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Family Law: Parent and Child

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FAMILY LAW: PARENT AND CHILD

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I. STATUS

THE Survey period has been comparatively quiet, so far as paternity questions are concerned. No decisions with implications on the scale of *In re J.W.T.*[1] have issued, though the original *J.W.T.* litigation remained active, as of the last Survey.[2]

In re Morales[3] may be the most interesting of the few status cases. In this 1993 paternity action, a Tarrant County district court relied on DNA testing to conclude that one of Eileen Morales' five children was not fathered by her husband Jose, but by Guadalupe Mares. The court issued temporary orders making Mares temporary managing conservator. In mid-1995, Jose filed for divorce in Willacy County, 500 miles or so due south of Fort Worth. In his petition, Jose claimed to be the father of all five children. Mares was not served or otherwise notified.

Six months later, the Morales jointly filed a motion to consolidate the Tarrant County action with the Willacy County suit. The Tarrant County court denied the motion and set trial in the paternity action for April 30, 1996. Because Mares had been made aware of the Willacy County action, he filed a special appearance, plea to the jurisdiction, plea in abatement, and motion to sever in that court on April 15. The Willacy County court orally denied all motions and set trial for April 26, 1996, that is, four days before the prior-scheduled Tarrant County hearing. The Willacy County district court found that Mares had failed to appear and that he lacked

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1. 872 S.W.2d 189 (Tex. 1994). The case is discussed in detail in an earlier survey. *See* James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 47 SMU L. REV. 1197, 1197-1205 (1994).

2. *See In re* J.W.T., 945 S.W.2d 911 (Tex. App.—Beaumont 1997, no writ). The case is discussed in last year's Survey. *See* James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 51 SMU L. REV. 1087, 1095-97 (1998) [hereinafter *1998 Annual Survey*].

3. 968 S.W.2d 508 (Tex. App.—Corpus Christi 1998, no writ).

standing to bring a paternity suit. The court therefore ordered that the husband and husband's mother be appointed joint managing conservators.

The Corpus Christi Court of Appeals quite properly reversed. The opinion says little about the Willacy County court's unseemly conduct in rushing to judgment ahead of the Tarrant County court or other questionable aspects of the case. However, the panel did quote the Fort Worth court's speculation that "the divorce action in Willacy County may be a sham for forum shopping since the cause here in Tarrant County contains a divorce between the same parties, Mr. & Mrs. Morales which was granted . . . on December 1, 1988, in Tarrant County."[4]

The Corpus Christi court did not rely on any explicit finding of bad faith in order to reverse the Willacy County judgment. Rather, the court ruled that the husband lacked standing to sue. Standing, the court explained, cannot be waived.[5] Moreover, the standing issue can be raised for the first time on appeal, and it can be raised by the court sua sponte.[6]

The Corpus Christi appeals court began by observing that a "parent" has standing to bring a suit affecting the parent-child relationship.[7] "Parent" is defined as including "the mother, a man presumed to be the biological father or who has been adjudicated to be the biological father by a court of competent jurisdiction, or an adoptive mother or father."[8] The court viewed this section of the Family Code as setting out a "one father, one mother" rule:

> A child can have only one legal father. Therefore, it follows that a person adjudicated to be the biological father becomes the parent of a child to the exclusion of a man previously presumed to be the biological father. In other words, the language in section 101.024 regarding the biological father contemplates the existence of either a presumed biological father *or* an adjudicated biological father; not both.[9]

In this writer's opinion, the court's explanation of the meaning of section 101.024 is inadequate, though the misstatement is not fatal to the reasoning. The definition of "parent," taken in context with other relevant sections of the Family Code, clearly does not limit standing only to one male and one female person. The Family Code grants a "parent" standing to bring a SAPCR.[10] The definition of "parent" in section 101.024 includes presumed fathers, and the Family Code explicitly con-

4. *Id.* at 512.

5. *See id.* at 511 (citing Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 445-46 (Tex. 1993)).

6. *See id.*

7. *See* TEX. FAM. CODE ANN. § 102.003(1) (Vernon Supp. 1998).

8. TEX. FAM. CODE ANN. § 101.024 (Vernon 1996).

9. *Morales*, 968 S.W.2d at 511-12.

10. *See* TEX. FAM. CODE ANN. § 102.003(1) (Vernon Supp. 1999). For the uninitiated, the acronym stands for "suit affecting the parent-child relationship." *See, e.g.*, TEX. FAM. CODE ANN. § 101.032(a) (Vernon 1996).

templates that there may be more than one presumed father at a time.[11]

The sounder rationale for the court's conclusion that Jose Morales lacked standing to sue is the fact that Jose already had been adjudicated not to be the biological father of the child at issue. The Family Code's presumption that a married man is the father of all children born during the marriage is rebutted by paternity test results like those relied upon by the Fort Worth court.[12] Upon introduction of such evidence, "the court shall enter an order finding that the man presumed to be the father is not the biological father."[13] The Corpus Christi appeals court observed that the statute does not explicitly require a final judgment, but only an "order." The Tarrant County district court's temporary order adjudicating Mares to be the father therefore eliminated the presumption that Morales was the father. The Corpus Christi panel did emphasize, in line with other authority,[14] that Morales might have been able to establish standing on some other ground, such as being "a person who has had actual care, control, and possession of the child for not less than six months preceding the filing of the petition."[15] The court noted, however, that Morales "based his standing solely on his status as a 'parent'."[16] One interesting factual aspect of the *Morales* case, not elaborated on by the court, is the 1988 divorce.[17] If indeed such a divorce decree existed, and if the decree contains a recital as to the paternity of the child at issue, then one might reasonably question whether either the Tarrant or Willacy district courts should have been involved.[18]

L.P.D. v. R.C.[19] also involves a predominantly procedural issue in an unusual setting. Five months after a young mother and her two-year-old child moved from Texas to Pennsylvania, R.C. brought a voluntary paternity action in Austin district court. The mother did not answer, and the court rendered a default judgment for the putative father. On writ of error (now, "restricted appeal"[20]), the Austin Court of Appeals reversed. To reverse on writ of error, a petitioner must show that: (1) he or she is a party; (2) who did not participate at trial; (3) filed the petition within six

11. As one simple example, assume that a pregnant woman secures a divorce and remarries before birth. Both husbands are presumed biological fathers, entitled to bring an original suit. *See* TEX. FAM. CODE ANN. § 151.002(a)(1) (Vernon 1996).

12. *See id.* § 160.110(a).

13. *Id.* § 160.110(h).

14. For example, in T.W.E. v. K.M.E., 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ), the court ruled that a husband whose paternity had been rebutted by blood tests nonetheless retained standing under the predecessor statute to § 160.110 (h). *See also* James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 46 SMU L. REV. 1515, 1521-22 (1993).

15. TEX. FAM. CODE ANN. § 102.003(9) (Vernon 1996).

16. *Morales*, 968 S.W.2d at 511 n.3.

17. *See supra* note 4 and accompanying text.

18. The thought is not original to this writer. *See* David N. Gray, Comment, 1995-3 ST. B. SEC. REP. FAM. L. 42-43.

19. 959 S.W.2d 728 (Tex. App.—Austin 1998, pet. denied).

20. Under the new Texas appellate rules, writ of error practice has been replaced by the term "restricted appeal." *See* TEX. R. APP. P. 30.

months of judgment; and (4) error is apparent on the face of the record.[21] The question in this case was whether the record demonstrated error.

The Austin Court of Appeals ruled that the trial court erred by not appointing an attorney ad litem for the child. As a general matter, appointment of an ad litem is a matter of the court's discretion, reversible only on a showing of abuse of discretion.[22] It is presumed that the child's interests will be represented adequately by a party to the suit.[23] An ad litem is required only on a positive finding that no party adequately represents the party, or that the interests of the parties are actually adverse to the child.[24] However, the presumption is reversed in the event of settlement, dismissal, or nonsuit. In such a case, appointment of an ad litem is required unless the court makes a positive finding that the child's interests are adequately represented or not adverse to the party, and the court also approves the settlement or dismissal.[25]

The problem in *L.P.D. v. R.C.* is that the case was not disposed of by settlement, dismissal, or nonsuit, but by default judgment. While in some respects a default judgment is even less likely to protect the interests of a child, it is not one of the instances specified by statute in which there is a presumption in favor of appointment of an ad litem. Nonetheless, the Austin Court of Appeals decided the trial court abused its discretion by not appointing an ad litem.

The court noted a number of facts, including the disparity in ages (plaintiff R.C. was fifty-three years of age and the child's mother twenty-one) the fact that R.C. had waited some five months after the mother moved to Pennsylvania to sue, and that the court order required a three-year-old to travel by air from Pennsylvania to Texas once a month. Most important, the nine-page record contained no evidence that R.C. ever had any contact with the child, nor any evidence other than a sworn affidavit to establish paternity. The court concluded, "When there is no person before the court who has had care and custody of the child, or understands the child's interests through another relationship, or even professes to have met the child, we hold the presumption that the party bringing suit will adequately represent the child's interest has been rebutted as a matter of law."[26] What the opinion does not recite, but the briefs reveal, is that at the time the couple met, the mother was a seventeen-year-old topless dancer and the putative father had a taste for voyeurism and group sex.[27] The mother also seems to have been impressed by the father's claim that he was a vampire and that the couple's child would also be a vampire, which certainly is one of the more unusual pick-up

21. *See, e.g.*, DSC Fin. Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991).
22. *See, e.g.*, McGough v. First Court of Appeals, 842 S.W.2d 637, 640 (Tex. 1992).
23. *See* TEX. FAM. CODE ANN. § 160.003(b) (Vernon 1996).
24. *See id.*
25. *See id.* § 160.003(c).
26. *L.P.D.*, 959 S.W.2d at 731.
27. *See* 1998-2 ST. B. SEC. REP. FAM. L. 32.

lines of which this writer has heard.[28]

Under the facts of the case, whether stated in the opinion or otherwise, it is easy to sympathize with the Austin court's dilemma. While the mother may be faulted for not appearing in some manner to contest the action, the child is the innocent victim of that failure. In this regard, though, the situation does not differ substantially from others in which the child is nominally represented by a parent, but in which the parent may have a conflict of interest that is not readily apparent.[29] In any event, even if the *L.P.D.* ruling should prove to be the law, it will not have any effect in the great majority of cases. Even if a trial court does not appoint an ad litem before a default judgment is entered, a restricted appeal is available only for a six-month period following judgment.[30]

Two decisions during the Survey period illustrate the amount of discretion accorded the trial court in setting retroactive child support following an adjudication of paternity. In one, the mother of a nine-year-old was awarded support retroactive only to the time the father filed his answer;[31] in the other, the mother of an eighteen-year-old was awarded support retroactive to birth.[32] In each case, the court of appeal interpreted the statutory language providing that "on a finding of parentage, the court *may* order support retroactive to the time of the birth of the child"[33] as a grant of discretion sufficient to sustain the trial court's decision.

II. CONSERVATORSHIP

One decision of note issued from the Texas Supreme Court during the Survey period. *Jones v. Fowler*[34] involves an interesting standing issue that was treated at great length in last year's Survey.[35] Before the 1995 nonsubstantive revision of the Family Code, standing in a SAPCR was granted to anyone who had "actual possession and control of the child for at least six months *immediately* preceding the filing of the petition."[36] The 1995 rewording removed the word "immediately," among other tink-

28. *See id.* Moreover, the writer is not aware of any credible evidence to support the claim that vampirism is an inherited trait, much less a dominant trait. *See* BERGEN EVANS, DICTIONARY OF MYTHOLOGY 290 (1970) (stating that vampirism spreads by bites); *see also Buffy the Vampire Slayer: Any Episode* (Warner television broadcast, various dates) (same). However, if both father and child are indeed vampires, this would explain two otherwise odd aspects of the opinion: the father's failure to submit a blood test and the court's requirement that "this three-year-old . . . fly back and forth to Texas once a month." *L.P.D.*, 959 S.W.2d at 731.

29. *See, e.g.*, Dreyer v. Greene, 871 S.W.2d 697 (Tex. 1993) (discussing, though not finally deciding, the question of whether children were barred from relitigating paternity when a divorce decree recited they were "of the marriage").

30. *See, e.g.*, TEX. R. APP. P. 30.

31. *In re* J.H., 961 S.W.2d 550 (Tex. App.—San Antonio 1997, no writ).

32. *In re* S.E.W., 960 S.W.2d 954 (Tex. App.—Texarkana 1998, no writ).

33. TEX. FAM. CODE ANN. § 160.005(b) (Vernon 1996) (emphasis added).

34. 969 S.W.2d 429 (Tex. 1998) (per curiam).

35. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1101-12.

36. Act of May 21, 1985, 69th Leg., R.S., ch. 802, § 1, 1985 Tex. Gen. Laws 2841, 2842 (codified at TEX. FAM. CODE ANN. § 11.03(a)(8) (Vernon 1986) (repealed 1995) (emphasis added)).

ering, with the result that standing is now afforded to one with whom the child has resided "for not less than six months preceding the filing."[37]

Fowler and Jones had been involved in a same-sex romantic relationship. Jones conceived a child through artificial insemination. Two years or so after the child was born, the couple broke up. Jones permitted Fowler to see the child regularly for about a year, then prohibited further visits. Fowler filed suit, claiming she was a person who had six months of actual care, control and possession. Jones countered that the period of care did not "immediately" precede the filing of suit. The Austin Court of Appeals held that the 1995 legislative rewording removed the requirement of immediacy;[38] the Texas Supreme Court reversed.

In general, the Texas Supreme Court's per curiam opinion followed the lines suggested in last year's Survey. The Texas Supreme Court relied on clear legislative history that no substantive change was intended. The court also noted that the legislature had removed the word "immediately" elsewhere in the Family Code, in particular, the definition of "home state" in the Texas version of the Uniform Child Custody Jurisdiction Act (UCCJA).[39]

Unfortunately, the per curiam opinion does not clearly explain how the Texas Supreme Court got to the conclusion that one could look through the language of the statute to consider the legislative history. At one point, the opinion seems to suggest that, since dictionary definitions differ on the meaning of the word "immediately," the reworded statute can be considered to be ambiguous, thus admitting legislative history.[40] This writer would disagree, for reasons set out at some length in last year's Survey.[41] However, the Texas Supreme Court's opinion also suggests that the bill could be considered part of the state's nonsubstantive statutory revision program, in which case any wording change is presumed not to affect the meaning of the statute.[42] To make matters worse, in the course of a single paragraph, the opinion manages to cite and use two different chapters of the Texas Government Code, one meant to apply to the state's old "civil statutes," and the other to the state's new "codes."[43]

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37. TEX. FAM. CODE ANN. § 102.003(9) (Vernon Supp. 1999).

38. *See* Fowler v. Jones, 949 S.W.2d 442 (Tex. App.—Austin 1997), *rev'd*, 969 S.W.2d 429 (Tex. 1998) (per curiam).

39. *See* TEX. FAM. CODE ANN. § 152.002(6) (Vernon 1996).

40. *See Fowler*, 969 S.W.2d at 431 (stating that while "we are to interpret words in a statute according to their ordinary meaning," dictionary definitions conflict on whether the definition of "preceding" includes the concept of immediacy, and therefore, "in this situation," legislative history can be considered).

41. In addition to observing that any method of reasoning that leads to the conclusion that the word "immediately" adds nothing to a phrase does not pass the "smell test," the writer engaged in a three-page dissection of the dictionary definitions relied upon by the Texas Legislative Council and the Austin Court of Appeals. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1104-07.

42. *See Fowler*, 969 S.W.2d at 432 (emphasizing the fact that H.B. 655 was tagged as a nonsubstantive recodification of the Family Code).

43. The Texas Supreme Court, citing section 312.005 of the Texas Government Code, stated that the "[c]ourt's primary goal in construing section 102.003(9) is to give effect to the intent of the Legislature." *Fowler*, 969 S.W.2d at 431. "[W]ords in a statute," the court

The Texas Supreme Court's explanation mixes apples and oranges. Chapter 312 of the Government Code, formerly Article 3268 of the old Revised Civil Statutes, by its terms "applies to the construction of all civil statutes."[44] Those statutes, however, are in the process of being replaced by twenty-six subject matter codes.[45] Chapter 311 of the Government Code applies to the construction of these new codes, or to the replacement of the old civil statutes by the new subject matter codes.[46] Moreover, contrary to the Texas Supreme Court's apparent assumption that legislative history is to be considered only if the statute is first found to be ambiguous, the section of the Code Construction Act cited by the court actually states that legislative history may always be considered, "whether or not the statute is considered ambiguous on its face."[47] In short, while the *Fowler* holding is clear, and probably legally correct, the court's rationale for considering legislative intent lacks something in lucidity.

In *Burkhart v. Burkhart*,[48] modification of custody was denied when the ex-husband moved for modification of the mother's sole managing conservatorship within a year after the divorce. The Family Code requires that a modification motion filed under these circumstances be accompanied by an affidavit showing endangerment, consent, or voluntary relinquishment.[49] The father's affidavit stated that the mother had moved to California depriving him of any significant contact with his son. The affidavit also stated that the mother was on welfare, that most of the child support payments were taken by California state authorities to offset welfare benefits, and that all adults in the child's new home smoked.

While the father's allegations were sufficient to convince the trial court that modification should be ordered, the Houston Court of Appeals (First District) reversed. The court noted the Legislature's policy not to disturb custody arrangements during the first year, observed that this policy was implemented through a heightened standard of pleading and proof, and concluded (in accord with a prior ruling[50]) that "an affiant must state concrete facts that clearly demonstrate that extraordinary relief is appropriate."[51] The court of appeals then picked apart the father's affidavit. Evidence that support payments were diverted to California welfare authorities did not prove the child was "hungry, unclothed or otherwise

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continued—again with a cite to Chapter 312 of the Government Code—are to be construed "according to their ordinary meaning." *Id.* However, because dictionary definitions conflict, the court concluded the paragraph by stating: "In this situation, the Code Construction Act directs us to consider, among other matters, the statute's legislative history." *Id.*

44. TEX. GOV'T CODE ANN. § 312.001 (Vernon 1988).

45. *See generally* TEXAS LAW REVIEW, TEXAS RULES OF FORM 36 (9th ed. 1997).

46. *See* TEX. GOV'T CODE ANN. § 311.002 (Vernon 1988).

47. *Id.* § 311.023.

48. 960 S.W.2d 321 (Tex.App.—Houston [1st Dist.] 1997, pet. denied).

49. *See* TEX. FAM. CODE ANN. § 156.102 (Vernon 1996).

50. *See* Graves v. Graves, 916 S.W.2d 65 (Tex. App.—Houston [1st Dist.] 1996, no writ); *see also* James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 50 SMU L. REV. 1237, 1258 (1997) (discussing *Graves*).

51. *Burkhart*, 960 S.W.2d at 324.

harmed as a result."[52] Evidence that the child and father had little contact did not prove the child was deprived of "significant contact important to the child's proper development."[53] Likewise, an "unadorned statement" that all adults in the child's new home smoked, without specific details, did not prove endangerment. As with other allegations, the court viewed the affidavit as "too nebulous to justify a modification hearing."[54] To use smoking as an example, in order to present an adequate affidavit, "[t]he father would have had to swear to facts that specifically pointed to endangerment of the child's health, such as frequent smoking in the presence of the child which aggravated a heightened sensitivity to respiratory distress."[55]

At first blush, it may not seem like the *Burkhart* appeals court took the best interests of the child sufficiently into account, nor dealt realistically with the practical problems that may be encountered in proving endangerment by affidavit before a hearing can even be scheduled. Nonetheless, the *Burkhart* result is in all likelihood correct. The Legislature has made it clear that an affidavit for modification within a year must be accompanied by an affidavit "along with supporting facts,"[56] and that no hearing may be scheduled "unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation . . . are stated in the affidavit."[57]

Gray v. Gray,[58] a decision from the Beaumont Court of Appeals, presents an interesting contrast to the careful scrutiny employed by the First Court of Appeals in *Burkhart*. In *Gray*, the father and joint conservator succeeded in modifying custody arrangements from a non-standard eleven days per month to an even more non-standard 50-50 division. The mother appealed, and the Beaumont court affirmed.

While the opinion is not neatly organized, the principal controversies revolved around questions of proof and appellate review. The first issue was what statutory burdens must be met to justify modification of the terms and conditions of joint conservatorship. The father pointed to the Family Code's general provision that terms and conditions of any conservatorship order may be changed on a showing of material and substantial change and unworkability.[59] The mother pointed to the more specific provision in section 156.202 that, in the case of modification of a joint conservatorship order, the movant must show that the current situation has materially and substantially changed or is unworkable *and* that modification "would be a positive improvement for *and* in the best interest of

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. TEX. FAM. CODE ANN. § 156.102(b) (Vernon 1996).
57. *Id.* § 156.102(c).
58. 971 S.W.2d 212 (Tex. App.—Beaumont 1998, no pet.).
59. *See* TEX. FAM. CODE ANN. § 156.301(1), (2) (Vernon 1996).

the child."[60]

The appeals court correctly ruled that section 156.202, requiring proof of positive improvement, was the applicable statute.[61] However, the Beaumont then proceeded to more or less read the additional "positive improvement" requirement out of existence. The court observed that under section 153.002 of the Family Code the best interest of the child must be considered in every case.[62] Therefore, announced the court, "[w]e see no substantive distinction, and the parties have not provided us with any, between the additional language contained in section 156.202, and the [best interest] language of section 153.002 which must guide any trial court regarding issues of conservatorship and possession of a child."[63] However, as if to forestall criticism on the ground that the legislature must have meant *something* when it provided in the Family Code that the movant in a joint custody modification must prove modification "would be a positive improvement for *and* in the best interest of the child,"[64] the Beaumont court added: "Nevertheless, we will, for the sake of this appeal, look to the language in section 156.202 in our review of the record for abuse of discretion."[65] Despite this promise, however, the phrase "positive improvement" is conspicuous by its virtual absence from the remaining four pages or so of the opinion.[66]

Another issue was the trial court's failure to include specific findings in its order modifying custody. The Family Code specifies that when a court deviates from the standard terms of conservatorship set out by statute, "the court shall state in the order the specific reasons for the variance from the standard order."[67] The trial court did not do so, although the opinion suggests–without elaboration or quotation–that other written findings were made.[68] Nonetheless, relying on an analogy to omitted

60. *Id.* § 156.202 (emphasis added).

61. Section 156.202 specifically applies to modifications of joint conservatorship orders; section 156.301 is more general in nature. Under the rule that "specific controls over general," section 156.202 would be considered the more specific of the two potentially applicable statutes. *Cf.* TEX. GOV'T CODE ANN. § 311.026(b) (Vernon 1988) (stating that "[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail").

62. *See* TEX. FAM. CODE ANN. § 153.002 (Vernon 1996) (stating that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child").

63. *Gray*, 971 S.W.2d at 214.

64. TEX. FAM. CODE ANN. § 156.202 (Vernon 1996) (emphasis added).

65. *Gray*, 971 S.W.2d at 214.

66. The sole exception is an offhand reference to the "best interest/positive improvement" issue. *See id.* at 317.

67. TEX. FAM. CODE ANN. § 153.258 (Vernon 1996).

68. The Beaumont Court of Appeals stated that the mother's appellate issues included challenges to "the evidentiary sufficiency of certain findings of fact by the trial court." *Gray*, 971 S.W.2d at 213. The court also specifically stated that "written findings of fact are indeed present in the record before us, albeit not in the order itself." *Id.* at 216. Finally, the court stated that "the written findings and the verbal explanation combined to eliminate any 'guessing game' on the part of either party with regard to reasons for deviating from the standard possession order." *Id.* at 217. Nonetheless, though the Beaumont court

findings of fact,[69] the Beaumont court concluded that the mistake did not in all likelihood confuse the appellant, and the record contained some evidence that all statutory requirements were met.[70]

If the *Gray* decision can be reduced to a single theme or lesson, it would be that the "abuse of discretion" standard of appellate review, applied with sufficient vigor, can reduce any qualitative statutory requirements to virtual meaninglessness on appeal. The Beaumont Court of Appeals castigated appellate counsel for arguing standard factual or legal sufficiency issues as alternative or duplicative points, stating–with emphasis–that "[u]nder an abuse of discretion standard, legal and factual insufficiency are *not* independent grounds for asserting error but are, on the other hand, relevant factors in assessing whether the trial court abused its discretion."[71] To secure reversal under an abuse of discretion standard, the appellant must demonstrate that the trial court "acted without reference to any guiding rules and principles," or acted in an "arbitrary and unreasonable" manner.[72]

In combination, the Beaumont court's overlay of an abuse of discretion standard on its decisions that the "positive improvement" language in the statute carried no independent meaning and that the entire record could substitute for a judgment recital of facts, led to an easy affirmance. However, reasonable minds might differ on whether the result in *Gray* was in line with the Legislature's intent. For one thing, the Legislature undoubtedly did mean something by inserting the "positive improvement" into the statute. Just as the First Court of Appeals in *Burkhart* recognized a public policy disfavoring frequent changes in conservatorship, so might the statutory language requiring proof of a "positive improvement" be read as a public policy disfavoring changes in the conditions of joint managing conservatorships without good reason. Sometimes the best interest of a child is best served by stability, even if the current situation is not ideal. Moreover, by requiring a somewhat higher standard for changes in the conditions of joint conservatorship, the Legislature might well have been providing an extra incentive for couples to work out minor problems without court intervention.[73] Finally, the requirement that the

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quoted extensively from the trial court's oral explanation for its ruling, the substance of the trial court's written findings is nowhere made evident.

69. *See id.* at 216 (quoting Martinez v. Molinar, 953 S.W.2d 399 (Tex. App.—El Paso 1997, no writ), for the conclusion that the presumption of harmful error that arises when findings of fact are omitted is rebutted when the face of the record affirmatively demonstrates that the complaining party was not harmed).

70. *See id.* at 218.

71. *Id.* at 213. This writer does not share the Beaumont court's evaluation of "no evidence" or "insufficient evidence" points as being advanced "in the wrong appellate context," as the court stated. *Id.* In view of the inherent murkiness of "abuse of discretion" review of matters for which fact findings are required, even seasoned appellate counsel could be forgiven a bit of caution, and a few duplicative "belt and suspenders" appellate issues.

72. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

73. In this regard, it is worth noting that the trial court in *Gray* urged the parties to "cooperate . . . with one another without all the bickering and the hollering and the screaming and the cussing and all of that." *Gray*, 971 S.W.2d at 216.

court state its reasons when an order deviates from the standard order seems incompatible with the pure abuse of discretion standard employed by the trial court.[74]

In *Gray*, the trial court's decision to change the father's periods of possession from eleven days, spread out through the month, to a sixteen-day block does not seem to have been motivated by any conviction that the change actually would be a "positive improvement" for the child. Rather, the custody change seems born of frustration, a reaction to bickering parents,[75] and a conviction that nothing could make matters much worse. After announcing the even split in times of possession, the trial court told the parties that they were free to come back in a few months or a year and "prove . . . to me that it is harmful to the child."[76] An exchange between mother and judge then ensued:

> Ms. [Gray]: . . . If it [the change] could be harmful to her, how could you do it?
> THE COURT: I don't think it will be harmful to her.
> . . .
> Ms. [Gray]: It is going to split her in half.
> THE COURT: Well, sure it will. Sure it will. But I don't think there will be any detrimental effect to that. But I don't have a crystal ball. If it does, it does; and y'all are welcome to petition the Court back to me and prove me wrong . . . .[77]

Even under an abuse of discretion standard, it is difficult to see how the Beaumont Court of Appeals was able to view "I don't think it will be harmful to her" as the equivalent of an express finding that the change in terms of conservatorship would be a "positive improvement," as the statute requires. Moreover, the court's "prove me wrong" statements do not sound much like the statutory language that places the burden on the movant in a modification proceeding.[78]

In *Doyle v. Doyle*,[79] statutory presumptions and fact findings were approached in a much more organized fashion. In 1995, the Legislature es-

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74. The Texas Supreme Court has stated that fact findings are "neither appropriate nor required" when a case is to be reviewed under the abuse of discretion standard. IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 445 (Tex. 1997). In a recent guardianship case, the Houston Court of Appeals (Fourteenth District) has noted the anomaly between a statutory requirement of fact findings at the trial court level and an abuse of discretion standard on appeal. *See* Trimble v. Texas Dep't of Prot. & Reg. Serv., 981 S.W.2d 211, 215 n.1 (Tex. App.—Houston [14th Dist.] 1998, no pet.). While the Houston and Beaumont courts both decided to apply the abuse of discretion standard, at the expense of any close examination of fact findings, it might reasonably be argued that a legislative requirement of fact findings at the trial court level suggests a somewhat more searching standard of review on appeal.

75. The appeals court decision describes a "very bitter and spiteful state of affairs" existing between mother and father. *Id.* at 215.

76. *Id.* at 216.

77. *Id.*

78. The burden of proof is not explicitly set out in the statute. However, the statute provides that the court "may" modify terms and conditions of a joint conservatorship order "if" circumstances have materially and substantially changed and modification "would be a positive improvement." TEX. FAM. CODE ANN. § 156.202 (Vernon 1996).

79. 955 S.W.2d 478 (Tex. App.—Austin 1997, no pet.).

tablished a rebuttable presumption in favor of joint managing conservatorship.[80] Another statutory provision sets out a list of factors to be considered in determining joint conservatorship.[81] The Austin Court of Appeals sustained the trial court's decision not to establish a joint managing conservatorship, in an opinion that set out each statutory factor, approximately in the statutory order. One prominent factor in the court's decision was a psychologist's testimony that there had been a "sharp deterioration" in the ability of the parents to cooperate in decisions regarding the child's welfare.[82]

Finally, in *In re M.R.*,[83] the San Antonio Court of Appeals addressed an interesting evidentiary question related to conservatorship. The Family Code provides in section 153.004(a) that, in making a decision regarding sole or joint managing conservatorship, the court "shall consider" evidence of violence committed against the party's "spouse" during a two-year period preceding the filing of suit.[84] The trial court excluded evidence of the father's violence on the ground that the father and mother were not married. The court of appeals reversed.

The San Antonio appeals court's rationale for reversal was that the father, though unmarried, fell within the intent of the statute. The court arrived at its rather novel conclusion that "spouse" means "non-spouse parent"[85] by looking to the next subsection of the Texas Family Code provision, quoting it as stating that a court may not appoint a joint managing conservatorship if credible evidence shows a past history of abuse "by one parent directed against the other parent."[86] The court concluded that "[i]t would obviously be impossible to apply subsection (b) if evidence of domestic violence committed by one unmarried parent against another unmarried parent were inadmissible."[87] Of course, one might respond that subsection (a) does not *exclude* evidence of non-spousal parent violence; it simply does not *require* admission of such evidence. The San Antonio court anticipated this argument, however, asking: "If a trial judge exercised her hypothetical discretion in excluding credible evidence, would she not commit error if she then appointed joint managing conservators?"[88]

A couple of observations about the court's reasoning might not be amiss. First, though the result seems reasonable, the court did engage in

80. *See* TEX. FAM. CODE ANN. § 153.131(b) (Vernon Supp. 1999).
81. *See id.* § 153.134(a).
82. *Doyle*, 955 S.W.2d at 480.
83. 975 S.W.2d 51 (Tex. App.—San Antonio 1998, writ denied).
84. TEX. FAM. CODE ANN. § 153.004(a) (Vernon 1996).
85. One could not, of course, argue the reverse of the San Antonio court's conclusion, that "parent" means "spouse." A stepmother spouse would not fit the definition of "parent," and even the husband of a woman who bears a child during an intact marriage enjoys only a rebuttable presumption of biological parenthood. *See* TEX. FAM. CODE ANN. § 101.024 (Vernon 1996) (defining "parent"); *see also supra* note 11 and accompanying text.
86. *Id.* § 153.004(b).
87. *In re M.R.*, 975 S.W.2d at 54.
88. *Id.*

a little bit of disingenuous quotation to get there. It is perfectly acceptable to interpret the language of the Family Code by reference to surrounding provisions; in fact, the Texas Supreme Court reached much further afield this Survey period when it opined on the meaning of the phrase "six months preceding."[89] Nonetheless, when the San Antonio court looked to subsection (b) of section 153.004 to shed light on the meaning of the word "spouse," it quoted selectively. Subsection (b) does not simply forbid a joint managing conservatorship on "credible evidence" of abuse "by one parent directed against the other parent;"[90] it forbids joint conservatorship on evidence of abuse directed "against the other parent, *a spouse,* or a child."[91] If "spouse" means "parent" for purposes of this statute, then one might wonder why the Legislature felt it necessary to include both "spouse" and "parent" in the section 153.004(b) list.

Another question might reasonably be asked about the court's rationale in *In re M.R.*, that being, whether a decision one way or another on this issue will actually accomplish much of anything. Section 153.004 is evidentiary in nature: A court "shall consider" evidence of violence committed against a spouse, "shall consider" such evidence in setting the terms of possessory conservatorship, and may not appoint joint managing conservators if "credible evidence" of violence "is presented."[92] Assume that, on remand, the trial court is forced to consider the excluded evidence of violence, yet nonetheless makes the same decision, which in this case was to grant sole managing conservatorship to the father. In general, under the statute, all the trial court has to do is "consider" the evidence. If a joint managing conservatorship is granted, despite evidence of violence, a reviewing court will simply assume–under the all-forgiving "abuse of discretion" standard–that the trial judge did not find the evidence of violence to be "credible."[93]

Finally, even if one assumes that it would be an abuse of discretion not to find the evidence credible, such as if the father already had been convicted under a criminal standard of proof for the same conduct,[94] the Family Code prohibits only the appointment of joint conservators, not the appointment of the father as sole managing conservator. Thus, the father might still be appointed sole managing conservator on remand.

This speculation is far from theoretical: In *In re M.R.*, the father apparently had been convicted on criminal charges,[95] and it is clear that the

89. *See supra* note 36 and accompanying text.
90. *In re M.R.*, 975 S.W.2d at 54.
91. TEX. FAM. CODE ANN. § 153.004(b) (Vernon 1996) (emphasis added).
92. *Id.* § (a), (c), (b).
93. For a brief discussion of the scope of the abuse of discretion standard, see supra note 22 and accompanying text.
94. The opinion contains a brief discussion of whether admitting proof of conviction of criminal conduct of this nature would be admissible under TEX. R. EVID. 609. *See In re* M.R., 975 S.W.2d at 55.
95. *See id.* at 53 (stating that "[o]n appeal, Karen notes that Joe has since been convicted of assaulting her," but adding that since the conviction was not in the record the

court was aware of the father's abuse, whether that evidence was formally admitted or not. There was also considerable evidence of abusive, obsessive or disturbed conduct on the mother's part.[96] While the reason the judge excluded evidence of the husband's violent behavior is not clear from the appellate opinion, that opinion also gives no reason for hope (and little reason for concern) that the trial court will render a substantially different decision on the second go-round.[97]

Several decisions during the Survey period address interstate custody conflicts. *Coots v. Leonard*,[98] a case that involved an interstate visitation dispute between the maternal grandparents and the natural father, revisits a complex jurisdictional question treated in last year's Survey. Chandice Leonard was born in Virginia in 1990. Her mother died in an auto accident when the child was about eighteen months old. The child's father lives in Virginia. So did the child, but for a year or so around the time of the mother's death. Nonetheless, a 1992 Texas court order set out the terms of custody, naming the father as sole managing conservator but granting the maternal grandparents joint possessory conservatorship with specific periods of visitation.

In 1994, the Virginia father and his new wife were granted a step-parent adoption by a Virginia court. In 1996, the father sought to modify the grandparents' visitation rights and to transfer jurisdiction to Virginia under the Texas version of the UCCJA.[99] The Midland, Texas court that had entered the original custody orders refused to accept the binding effect of the Virginia actions but ultimately ordered discretionary dismissal on forum non conveniens grounds.

The El Paso Court of Appeals opinion in *Coots*, written by a former chair of the State Bar's Family Law Section, offers a primer on interstate jurisdictional disputes, as well as a refreshing contrast to a less thoughtfully reasoned opinion discussed in last year's Survey.[100] Justice Ann Crawford McClure began by considering the jurisdictional issue, because jurisdiction is a prerequisite to forum non conveniens-style dismissal. Under the Texas version of the UCCJA, in conformity with the federal Parental Kidnapping Prevention Act of 1980 (PKPA),[101] the child's "home state" is given priority in a contest between two states with concurrent jurisdiction.[102] However, in another non-uniform modification of

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court would not consider it, "[n]or will we speculate on the effect the conviction might have on any future proceedings relating to the custody of the child").

96. The evidence included a high-speed police chase, at the conclusion of which the mother bit a police officer, phone harassment, dozens of arrests and at least one admission to a psychiatric hospital. *See id.* at 56.

97. The opinion recites several incidents during the presentation of testimony during which the judge was made aware of the pending assault charge. *See id.* at 55-56.

98. 959 S.W.2d 299 (Tex. App.—El Paso 1997, no pet.).

99. TEX. FAM. CODE ANN. ch. 152 (Vernon 1996 & Supp. 1999).

100. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1112-14 (discussing *Lemley v. Miller*, 932 S.W.2d 284 (Tex. App.—Austin 1996, no writ)).

101. 28 U.S.C. § 1738A.

102. *See, e.g.*, SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED § 152.003 Comment (1998).

the UCCJA that also dovetails with the PKPA, a Texas court that entered an original SAPCR order retains continuing jurisdiction over the *terms* of possessory conservatorship and child support, so long as one contesting party remains in Texas.[103] The legislative intent is to protect the "left behind" parent.[104]

Under the federal PKPA, a state court potentially retains jurisdiction so long as that court already has made a custody determination and "such State remains the residence of the child or of any contestant."[105] A second state's courts may modify prior determinations if the second state has jurisdiction (which Virginia clearly had in this case) and "the court of the other State no longer has jurisdiction or it has declined to exercise such jurisdiction to modify such determination."[106] Because the Texas version of the UCCJA provides that jurisdiction is retained over the terms of conservatorship, that jurisdictional choice is permitted under the federal PKPA. The father's argument that the Virginia adoption conferred exclusive jurisdiction on Virginia courts was dismissed in short order. Because the Texas maternal grandparents were not given "notice and an opportunity to be heard" in the Virginia proceeding, as provided by the Texas UCCJA,[107] the Virginia proceeding was not entitled to constitutional full faith and credit.[108]

Nonetheless, while the maternal grandparents won the jurisdictional battle, they lost the war. As already stated, the federal PKPA permits a new home state to modify a custody order if a prior state "has declined to exercise [its] jurisdiction."[109] The Texas UCCJA likewise permits a Texas court to decline jurisdiction on a finding that a Texas court "is an inconvenient forum and that a court of another state is a more appropriate forum."[110] Factors to be considered include the child's home state, connections with the child and family, availability of evidence, agreement, and compatibility with the purposes of the UCCJA.[111] The court of appeals reviewed the factors in order and concluded that the trial court did not abuse its discretion in ordering dismissal.[112]

Two cases from the Houston Court of Appeals (Fourteenth District), as well as an Amarillo decision, also touch on jurisdictional questions under

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103. *See id.*

104. *See, e.g.*, *Coots*, 959 S.W.2d at 303 (stating that "[n]umerous appellate decisions" express this policy and citing several).

105. 28 U.S.C. § 1738A(d).

106. *Id.* § 1738A(f).

107. TEX. FAM. CODE ANN. § 152.004 (Vernon 1996).

108. *See* U.S. CONST. art. IV, § 1 (stating that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

109. *See supra* note 101.

110. TEX. FAM. CODE ANN. § 152.007(e) (Vernon 1996).

111. *See id.* § 152.007(c).

112. Actually, the trial court ordered the case transferred to Virginia, which is not possible, because Virginia is not part of the state of Texas. *See id.* §§ 103.002-.003 (stating that transfer to another "county"). The court of appeals declined to invalidate the order for this defect and instead construed the order to require dismissal on condition that the suit be refiled in Virginia. *See id.* § 152.007(e).

the UCCJA. In *Beaber v. Beaber*,[113] the Fourteenth Court of Appeals sustained jurisdiction over a motion to modify seeking primary possession and the right to establish domicile, even though the child had been living in Colorado for two-and-one-half years. Because the divorce and joint conservatorship order originally had been granted in Texas, one of the parties still resided in Texas, and the motion did not seek to modify "custody." jurisdiction was sustained. The Amarillo Court of Appeals also approved retention of jurisdiction over a child who had moved to Colorado,[114] even though the motion sought to modify custody, ruling in accord with the Texas version of the UCCJA that when the parties had agreed to a judgment that contained explicit language retaining jurisdiction to determine custody matters, the agreement controlled.[115]

However, in *In re Powers*,[116] a panel of the Fourteenth Court of Appeals declined to exercise jurisdiction in order to establish visitation orders. In *Powers*, a Texan fathered a child on an Iowa resident. The child was born and resides in Iowa. In 1994, the father filed a Texas suit seeking to establish paternity and set out conservatorship and visitation rights. The mother objected to jurisdiction and counterclaimed for support. The Texas court issued an order establishing paternity and setting support obligations, but denied all other relief.

In December 1997, the father moved to modify the decree, seeking a voluntary increase in support and specific orders on visitation and custody. The mother answered, denying jurisdiction over custody and visitation. The Texas father dropped the request for a custody determination but sought and obtained orders on visitation.

The Houston Court of Appeals (Fourteenth District) conditionally granted mandamus. In line with the cases just discussed, the court acknowledged that the UCCJA does not preclude a Texas court from modifying the terms of conservatorship, providing that an order exists to be modified.[117] The Texas court had jurisdiction to establish paternity and set child support in the first action, because the court had personal jurisdiction over the father and prospective support obligor. Jurisdiction to determine custody matters, however, depends on the child's "home state" at the time of filing.[118] While the father argued–with—citing cases such as those just discussed—that visitation rulings do not implicate the UCCJA, the appellate panel disagreed. Because the Texas court never had jurisdiction to make a ruling, and never did make a ruling, on the custody and visitation issues, the Texas court lacked any continuing juris-

113. 971 S.W.2d 127 (Tex. App.-Houston [14th Dist.] 1998, pet. filed).

114. *See In re* Poole, 975 S.W.2d 342 (Tex. App.—Amarillo 1998, no pet.).

115. *See* TEX. FAM. CODE ANN. § 152.003(d) (Vernon 1996) (stating that "*[e]xcept on written agreement of all the parties*, a court may not exercise its continuing jurisdiction to modify custody if the child and the party with custody have established another home state unless the action to modify was filed before the new home state was acquired") (emphasis added).

116. 974 S.W.2d 867 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

117. *See id.* at 871.

118. *See id.* at 870.

diction over these matters.[119]

In a case of first impression for Texas, the San Antonio Court of Appeals considered a claim under the Hague Convention on the Civil Aspects of International Child Abduction[120] and its American implementing legislation, the International Child Abduction Remedies Act (ICARA).[121] The facts of *Flores v. Contreras*[122] are a bit unusual, even as family law cases go. Jose Flores, an American citizen and resident of San Antonio, went to Mexico "ostensibly seeking romance."[123] As a result of a series of radio spots he ran on a Mexico City-area station, Jose met and became rather friendly with Beatriz Contreras, a Mexican citizen. The couple did not marry, but a child was born and registered as a Mexican citizen. The birth certificate acknowledged Jose as the father. While stories differ, all agreed that Beatriz came to San Antonio on a two week visa; when she returned to Mexico, Jose kept their two-month-old son. Relying on the Hague Convention, Beatriz sued for return of her son in a San Antonio court; Jose counterclaimed with a SAPCR. The trial court ruled in Beatriz' favor and the San Antonio appeals court affirmed.

The Hague Convention aims to protect the rights of non-abducting parents in international custody disputes, whether custody has previously been the subject of court action or not.[124] Under ICARA, state and federal courts are granted concurrent jurisdiction to determine the merits of abduction claims, but not to decide any underlying custody disputes.[125] As a threshold matter, application of the law requires that a court determine that the petitioner originally had lawful custody, and that the child be removed from "the State in which the child was habitually resident immediately before the removal or retention."[126] Because the phrase "habitual residence" is not defined in ICARA, the court relied on a potpourri of out-of-jurisdiction authority[127] to conclude that a "child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."[128]

Jose argued that his son could not be said to be "habitually resident" in Mexico because he was only 50 days old at the time he came to San Antonio. Jose argued that under Mexican law, six months' residence

119. *See id.* at 871.

120. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

121. 42 U.S.C. §§ 11601-11610 (1988).

122. 981 S.W.2d 246 (Tex. App.—San Antonio 1998, pet. denied).

123. *Id.* at 248.

124. *See* 42 U.S.C. § 11601 (1989).

125. *See* 42 U.S.C. § 11603(a) (1988).

126. *Flores*, 981 S.W.2d at 248.

127. This included a leading English decision on the definition of "habitual residence." *See Flores*, 981 S.W.2d at 249 (quoting *In re* Bates (a Minor), No. CA 111.89, High Court of Justice, United Kingdom (1989)).

128. *Id.* (citing Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)). The San Antonio court wisely does not elaborate on the question of how one goes about determining the "settled purpose" of a two-month-old, so far as residence goes.

would be required to establish the child as "habitually resident" in Mexico. The trial court and court of appeals did not agree. Not only did a Mexican attorney's affidavit contradict Jose's reading of the law; such a result would be absurd, because it would leave all Mexican children under six month's age unprotected by the Hague Convention. This, said the San Antonio court, would be neither "logical or fair."[129] The child was ordered to be returned to Mexico, and the San Antonio court concluded with a personal aside to Jose: "Whatever his original intentions may have been, it is, of course commendable that Jose feels a compelling interest for his son. His energies must now be directed toward negotiating with the mother he chose for the child . . . ."[130]

Several other custody-related cases deserve brief mention. The Texas Court of Criminal Appeals has ruled[131] that double jeopardy[132] bars criminal prosecution for interference with child custody[133] when the ex-spouse previously had secured a contempt order from the family court based on the same conduct.[134] The case is notable for an in-depth, perhaps slightly tongue-in-cheek analysis of an extraordinarily splintered United States Supreme Court decision.[135]

The Houston Court of Appeals (Fourteenth District) granted conditional mandamus relief to a father who refused to return his children following summer vacation, based on the excessive size of cash bond set following the father's failure to appear at a contempt hearing.[136] The court observed that the Family Code establishes a presumption that a bond of $1000 is reasonable,[137] and the statute sets out an enumerated list of factors that would justify deviation from the statutory amount.[138] Because the trial court set a $25,000 bond for each of two children without evidence establishing one of the statutory factors, the appeals court granted relief.

Two alternative dispute resolution rulings are worth a moment's attention. In one, the Waco Court of Appeals initially declined to rule on a procedural mandamus petition, referring the matter first to an ADR pro-

129. *Id.* at 250.

130. *Id.*

131. *See Ex parte* Rhodes, 974 S.W.2d 735 (Tex. Crim. App. 1998, no pet. h.).

132. *See* U.S. CONST. amend. V (stating that no person is to be "subject for the same offence to be twice put in jeopardy of life or limb").

133. *See* TEX. PENAL CODE § 25.03 (Vernon 1994).

134. The order assessed a $100 fine and $2500 in legal fees, as well as requiring a $2500 bond to assure future compliance. *See* 974 S.W.2d at 737.

135. The decision, United States v. Dixon, 509 U.S. 688 (1993), was characterized by Presiding Judge McCormick in dissent as containing "five plurality opinions." *Ex parte* Rhodes, 974 S.W.2d at 744 (McCormick, J., dissenting).

136. *See In re* Clark, 977 S.W.2d 152 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding, no pet. h.).

137. *See* TEX. FAM. CODE ANN. § 157.001(b) (Vernon 1996).

138. *See id.* (stating that "[e]vidence that the respondent has attempted to evade service of process, has previously been found guilty of contempt, or has accrued arrearages over $1000 is sufficient to rebut the presumption").

ceeding.[139] In the other, the Houston Court of Appeals (First District) ruled that the trial court lacked authority to order mediation as a prerequisite to filing any future motions to modify.[140] The appeals court noted that the Family Code permits the court to "recommend" ADR in an order appointing joint managing conservators,[141] and grants authority to order a "suit" to mediation.[142] The court's pre-emptive mediation order, however, was neither a "recommendation" for future disputes nor an order in a pending "suit."

In other news, the San Antonio Court of Appeals held that the trial court erred in modifying a possession order at a contempt hearing where one of the parties did not have notice of what was at stake.[143] The Texarkana Court of Appeals held that denial of a modification request to permit the possessory conservator to deliver the child to school on the Monday morning following weekend visitation was not an abuse of discretion,[144] despite the fact that a 1997 amendment to the Family Code now mandates that such an election of re-delivery time be honored.[145] Finally, the Beaumont Court of Appeals has ruled that, at least in the absence of serious complaints against the ex-husband/possessory conservator, the ex-husband was entitled to possession of his children in preference to the mother's aunt and uncle, while the mother/managing conservator was in prison.[146]

III. SUPPORT

The Texas Supreme Court issued one support-related decision during the Survey period. In *In re Graham*,[147] the high court ruled that a divorce proceeding and associated child support issues could be transferred to the probate court in which the husband's guardianship proceeding was pending. After the husband attempted suicide, his wife was appointed guardian. A dispute arose over her handling of property and the probate court appointed a new guardian. The wife responded with a suit for divorce, seeking among other things a disproportional division of community

139. *See In re* Jensen, 966 S.W.2d 850, 850 (Tex. App.—Waco 1998, orig. proceeding, no pet. h.).

140. *See* Dennis v. Smith, 962 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

141. *See* TEX. FAM. CODE ANN. § 153.134(b)(5) (Vernon 1996) (providing that "in rendering an order appointing joint managing conservators, the court shall: . . . if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency").

142. *See id.* § 153.0071 (providing that "[o]n the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation").

143. *See In re* A.M., 974 S.W.2d 857, 862 (Tex. App.—San Antonio 1998, no pet. h.).

144. *See* Weldon v. Weldon, 968 S.W.2d 515, 518 (Tex. App.—Texarkana 1998, no pet.h.).

145. *See* TEX. FAM. CODE ANN. § 153.317 (Vernon Supp. 1999).

146. *See In re* Johnston, 957 S.W.2d 945 (Tex. App.—Beaumont 1997, orig. proceeding no pet.)

147. 971 S.W.2d 56 (Tex. 1998).

property and child support. A series of court orders and a mandamus action followed.

The Texas Supreme Court observed that the long-standing dispute between probate courts and district courts[148] has been legislatively resolved in favor of probate courts. Under current law, district courts have default jurisdiction over all actions, except when the constitution or statutes provide otherwise.[149] By statute, probate court jurisdiction extends to matters "incident to an estate."[150] In guardianship matters, this definition includes "all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate."[151]

In line with the statute, the Texas Supreme Court observed that a cause of action is "incident to an estate" if "the controlling issue in the suit is the settlement, partition, or distribution of the estate."[152] The Texas Supreme Court rejected the wife's attempted use of pre-1987 authority to the effect that divorce proceedings are not "incident to an estate," observing that the 1987 Legislature significantly narrowed the exclusive jurisdiction of district courts. After examining the divorce pleadings, the Texas Supreme Court concluded: "[T]he outcome of this divorce proceeding, which involves child support but not child custody or visitation, necessarily appertains to [the husband's] estate because it directly impacts the assimilation, distribution, and settlement of his estate."[153]

The court specifically stated: "That this case involves child support issues does not alter our conclusion."[154] The court referred to Probate Code provisions authorizing expenditure of funds for dependents of the ward[155] and providing for the monitoring of such payments,[156] and concluded: "Because [the husband's] child support obligations will be paid from his guardianship estate, the probate court can effectively and efficiently supervise the payments to ensure that the interests of both [the husband] and his child are protected."[157]

Two cases decided by the United States Fifth Circuit under the Child Support Recovery Act of 1992 (CSRA),[158] a statute that has received a

148. *See, e.g.*, Seay v. Hall, 677 S.W.2d 19 (1984) (restricting probate court jurisdiction over wrongful death matters); Palmer v. Coble Wall Trust Co., Inc., 851 S.W.2d 178, 181 (Tex. 1992) (discussing legislative response to *Seay*).

149. *See* TEX. CONST. art. V, § 8.

150. TEX. PROB. CODE ANN. § 606(e) (Vernon Supp. 1999).

151. *Id.* § 607(b).

152. *Graham*, 971 S.W.2d at 58 (citing *Palmer*, 851 S.W.2d at 182).

153. *Id.* at 59.

154. *Id.* at 60.

155. *See* TEX. PROB. CODE ANN. § 776A (Vernon Supp. 1999) (stating that "the court may order the guardian of the estate of a ward to expend funds from the ward's estte for the education and maintenance of the ward's spouse or dependent").

156. *See id.* § 743(a) (requiring the guardian to submit sworn written reports "of receipts and disbursements for the support and maintenance of the . . . ward's dependents").

157. *Graham*, 971 S.W.2d at 60.

158. 18 U.S.C. § 228.

good bit of ink in the last two Surveys,[159] deserve brief mention. In *United States v. Rose*,[160] the Fifth Circuit determined that a CSRA restitution order against a deadbeat dad does not violate the Constitution's ex post facto clause,[161] even though it included amounts due before the CSRA's effective date. Agreeing with two other circuits that had addressed the issue, the Fifth Circuit noted that the law gave "fair warning" that restitution of all past due amounts would be sought.[162] The court also ruled that the federal law does not change an obligation or the legal consequences of failure to pay. As the Fifth Circuit put it, "[t]he only possible 'disadvantage' confronting Rose is that he may actually find it more difficult to avoid his pre-existing legal obligations."[163] Rose, it might be noted, had gained some notoriety as one of South Carolina's "Ten Most Wanted" non-payers of child support.

In *United States v. Mathes*,[164] the Fifth Circuit addressed the precise meaning of "willfull" in the CSRA's provision that "[w]hoever willfully fails to pay a past due support obligation with respect to a child who resides in another State"[165] commits a criminal offense. In light of legislative history and authority from another circuit suggesting that "willfull" failure to pay child support should be given a meaning similar to that employed under federal tax evasion statutes, the Fifth Circuit panel concluded the evidence must establish beyond a reasonable doubt either that the support obligor "possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds . . . was created by . . . a voluntary and intentional act without justification in view of all of the financial circumstances . . . ."[166]

Mathes focused on the "sufficient funds to enable him to meet his obligation" language, claiming that it was not possible for him to pay a $20,000-plus support judgment. He admitted, however, that he could pay at least some amount toward arrearages. The Fifth Circuit observed that the CSRA's definition of "support obligation" as "*any amount*" owed under a court order for more than a year[167] rendered Mathes' failure to pay "willfull" because he was able to pay at least some amount. "Were we to do otherwise," the court explained, "child support obligors would be able to insulate themselves from criminal liability by simply failing to make child support payments until the total amount past due is an

159. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1088-90; James W. Paulsen & Richard R. Carlson, *Family Law: Parent and Child, Annual Survey of Texas Law*, 50 SMU L. REV. 1237, 1237-43 (1997).

160. 153 F.3d 208 (5th Cir. 1998).

161. *See* U.S. CONST. art. I, § 9, cl. 3.

162. *Rose*, 153 F.3d at 211 (citing United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996)).

163. *Rose*, 153 F.3d at 211.

164. 151 F.3d 251 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 628 (1998).

165. 18 U.S.C. § 228(a).

166. *Mathes*, 151 F.3d at 253 (quoting United States v. Poll, 521 F.2d 329, 333 (9th Cir. 1975)).

167. *Id.* at 254 (quoting 18 U.S.C. § 228).

amount that they are incapable of paying in one lump sum."[168]

Before leaving the subject of federal efforts to put "teeth" in interstate child support enforcement efforts, two recent developments should be mentioned. First, President Clinton has signed into law the "Deadbeat Parents Punishment Act of 1998,"[169] which amends the CSRA to provide felony penalties of up to two years in prison for failure to pay child support, providing the obligor has crossed state lines to evade a support obligation that is more than a year old or greater than $5,000.[170] Second, under new regulations, the U.S. State Department will revoke or deny a passport to a person certified by the Department of Health and Human Services to be in arrears on child support by more than $5,000.[171]

In *In re M.M.*,[172] the San Antonio Court of Appeals addressed an issue that troubled the Waco Court of Appeals, and this writer, during the last Survey period.[173] The question is the determination of child support when the prospective obligor is a guest of the state prison system. As was the case with two other courts,[174] the San Antonio court held that, in the absence of contrary proof, the prisoner is rebuttably presumed–like everyone else–to be capable of earning the minimum wage.[175] The judgment also tacked on $19,550 in past support, retroactive to the child's birth, on the same minimum wage assumption.

In rejecting the father's claim that the fact of his incarceration should be taken as proof that he has no income, the San Antonio court agreed with the Attorney General's office that "many people enter prison with assets from past employment."[176] Moreover, the court viewed the state statute requiring the withholding of support from prison trust accounts[177] as proof of the fact that money can be earned in prison. Finally, in an aspect of the opinion that is open to question, the court justified the award of past and current support on the ground that once the father was released from prison, he might eventually be in a position to pay arrearages.[178]

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168. *Id.* at 254.

169. P.L. 105-187, 112 Stat. 618 (1998).

170. *See generally Deadbeat Parents Punishment Law Signed; Makes Nonsupport Over State Lines a Felony*, 67 U.S.L.W. 2008 (1998).

171. *See Passport Procedures—Amendment to Restriction of Passport Regulation*, 62 Fed. Reg. 62,694 (1997) (to be codified at 22 C.F.R. pt. 51).

172. 980 S.W.2d 699 (Tex. App.—San Antonio 1998, no pet. h.).

173. *See* Reyes v. Reyes, 946 S.W.2d 627 (Tex. App.—Waco 1997, no writ); *see also* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1118-20.

174. *See Reyes*, 946 S.W.2d 627; *see also* Hollifield v. Hollifield, 925 S.W.2d 153 (Tex. App.—Austin 1996, no writ).

175. *See* TEX. FAM. CODE ANN. § 154.068 (Vernon 1996) (stating that "in the absence of evidence . . . the court shall presume that the party has wages or salary equal to the federal minimum wage for a 40-hour week").

176. *In re* M.M., 980 S.W.2d at 701.

177. *See* TEX. GOV'T CODE ANN. § 496.057 (Vernon 1990).

178. The San Antonio court cited the statute permitting the trial court to deviate from child support guidelines in the best interest of the child as support for this "he may be able to pay in the future" rationale. *See In re* M.M., 980 S.W.2d at 701 (citing TEX. FAM. CODE ANN. § 154.123(b)(17) (Vernon 1996)). Of course, precisely the same could be said of any

The solution to the problem, implicitly suggested by the San Antonio court, would have been for the inmate to show up at the support hearing and rebut the 40-hour minimum wage presumption. The court acknowledged that there is no absolute right for a prisoner to appear in civil proceedings,[179] but suggested that the prisoner had, and missed, an opportunity to secure a bench warrant. This answer, however, assumes that the father is sufficiently knowledgeable about the legal system to request a bench warrant or, more likely, to secure an attorney to do so. The court's rationale may technically be correct, but it is not very realistic.

In two cases brought under the Uniform Interstate Family Support Act (UIFSA),[180] Texas parents were successful in resisting payment. In one, the Houston Court of Appeals (Fourteenth District) held that the Georgia Attorney General's office could not collect support payments from the mother simply because the child's grandmother was receiving state benefits on the child's behalf.[181] The court reasoned that a grandparent is not a person who owes a duty of support to the child,[182] and that no support order had been entered. Therefore, the grandmother was not an "obligee" within the statute's terms,[183] and the Georgia state agency had no derivative standing under the statute.[184] In another case,[185] the Amarillo Court of Appeals ruled that registration of a Minnesota child support judgment could not be confirmed because it was not accompanied by a sworn or certified statement showing the amount of arrearages, as required by statute.[186] In yet another UIFSA case,[187] however, the Texas obligor was not so fortunate; the father filed his motion to dismiss one day after the statutory 20-day deadline.

In *Lueg v. Lueg*,[188] the Corpus Christi Court of Appeals relied on the

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other support award that varies upward from the guidelines. In any event, an order that increases support now on the theory that income may rise in the future is, at a minimum, contrary to the spirit of the support statutes. *See, e.g.*, Starck v. Nelson, 878 S.W.2d 302, 308 (Tex. App.—Corpus Christi 1994, no writ) (stating that "[c]ourts have generally rejected automatic increases in child support unless the increase was supported by evidence showing a certain future event to trigger the change").

179. *See In re* M.M., 980 S.W.2d at 701 (citing Nance v. Nance, 904 S.W.2d 890, 892 (Tex. App.—Corpus Christi 1995, no writ)).

180. TEX. FAM. CODE ANN. ch. 159 (Vernon 1996 & Supp. 1999).

181. Office of Attorney General v. Carter, 977 S.W.2d 159 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).

182. *See id.* at 162 n.3 (citing Blalock v. Blalock, 559 S.W.2d 442, 443 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ), for the proposition that a grandparent has no legal duty to support a grandchild).

183. *See* TEX. FAM. CODE ANN. § 159.101(12)(A) (Vernon 1996) (defining "obligee" as including someone "to whom a duty of support is . . . owed or in whose favor a support order has been issued").

184. *See id.* § 159.101(12)(C) (further defining "obligee" as a state agency "to which the rights under a duty of support or support order have been assigned or that has independent claims based on financial assistance provided to an individual obligor").

185. *In re* Chapman, 973 S.W.2d 346, 347 (Tex. App.—Amarillo 1998, no pet. h.).

186. *See* TEX. FAM. CODE ANN. § 159.602(3) (Vernon 1996).

187. *In re* Kuykendall, 957 S.W.2d 907, 908 (Tex. App.—Texarkana 1997, no pet.).

188. 976 S.W.2d 308, 313 (Tex. App.—Corpus Christi 1998, no pet. h.).

statutory description of the powers of a sole managing conservator[189] to hold it an abuse of discretion to require the sole managing conservator to pay child support to the possessory conservator. In *Dennis v. Smith*,[190] though, a divided panel of the Houston Court of Appeals (First District) found no abuse of discretion in a trial court's order that a joint managing conservator father, who earned more money than the mother and had possession of the child for less than forty percent of the time, had the right to determine the child's primary residence, but need pay no child support.

The *Dennis* majority found that the trial court had sufficient reason to deviate from the support guidelines.[191] The father had significant possession of the child and mortgage payments on a house that he was maintaining for his child. Moreover, because the parents already had shown themselves able to cooperate without formal support provisions, an order denying any support from father to mother was warranted.

This writer prefers the reasoning of Justice Michol O'Connor's dissent. Justice O'Connor began by examining the parties' relative financial situations and calculated that even taking into account the times of possession, the father should have been paying the mother at least $100 a month.[192] She then dissected the court ordered times of possession and demonstrated that they deviated very little from the standard possession order.[193] She further argued that the effect of the trial court's order was to permit the father to build equity in his home at the mother's expense, solely on the promise that he would keep it around for his son. To the majority's claim that any future sale of the house could be taken up in a motion to modify, Justice O'Connor had a simple retort: "That hardly responds to [the mother's] point–[The father] should not be able to get credit against child support payment for his mortgage payment for his house."[194]

Perhaps the oddest aspect of the *Dennis* opinion is the court of appeals' acceptance of the trial court's theory that the parties' ability to get along without support obligations under the court's temporary orders would be strengthened if those orders were made permanent.[195] The First Court of Appeals observed that the parties had cooperated in the past and that the mother "offered no evidence the contrary."[196] The mother, on the other hand, argued that "'any spirit of cooperation existing at the time the temporary orders were entered has to be considered a thing of the past in

189. *See* TEX. FAM. CODE ANN. § 153.132(3) (Vernon 1996) (stating that the sole managing conservator has the exclusive right "to receive and give receipt for periodic payment payments for the support of the child and to hold or disburse these funds for the benefit of the child").

190. 962 S.W.2d 67, 71 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

191. *See Dennis*, 962 S.W.2d at 73.

192. *See Dennis*, 962 S.W.2d at 75.

193. *See id.*

194. *Id.*

195. *See id.* at 73.

196. *Id.* at 73 (quoting Linda brief).

light of the parties' subsequent need to litigate the child related issues of access and support.'"[197] The majority simply dismissed this wholly indisputable contention, referring to the parties' "successful and agreed two-year experience without periodic payments."[198]

In reporting the *Dennis* opinion in the State Bar's Family Law Section newsletter, attorney Cathy Medina commented: "The mother has the day-to-day responsibilities of raising the child with no additional financial support, while the father has control over where the child lives and goes to school. What Fairy Land dose this trial judge live in to think the parents' cooperation will continue for the next 15 years?"[199] This writer would add that perhaps the only thing more unrealistic than the trial judge's prediction of continued cooperation after a hotly contested hearing on the issue, is for an appellate court to endorse that "Fairy Land" assumption after a hotly contested appeal. If three judges on the Houston Court of Appeals (First District) cannot agree on the wisdom and justice of the trial court's order, it is a safe bet that the parties will not.

In re M.M.O.[200] involved a very interesting but procedurally confused child support class action. Under the current version of the Family Code,[201] past due child support payments constitute a final judgment for the amount due, including interest.[202] Interest accrues from the date the payment is due until the date support is paid or reduced to judgment.[203] Under federal law[204] and state implementing legislation,[205] the Texas Attorney General's office has the responsibility to assist in the collection of child support. Nonetheless, until quite recently, the Attorney General's office did not include interest in the vast majority of its requests for arrearage orders.[206] According to a press report, the problem affects as many as 500,000 families and two million children, with accrued but uncollected interest in the area of five billion dollars.[207] The aim of the proposed class action is to rectify this situation; the problem appears to be that the plaintiffs are not completely clear on how this will be accomplished.

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197. *Id.*

198. *Id.*

199. Cathy Medina, *Associate Editor's Note*, 1998-3 STATE BAR SEC. REP. FAM. L. 37.

200. 981 S.W.2d 72 (Tex. App.—San Antonio 1998, no pet. h.).

201. *See* Castle v. Harris, 960 S.W.2d 140 (Tex. App.—Corpus Christi 1997, no pet.) (describing the history of "the effect of" common law and statutory interest provisions on child support arrearages).

202. *See* TEX. FAM. CODE ANN. § 157.261(a) (Vernon Supp. 1999).

203. *See id.* § 157.265(a).

204. *See* Title IV-D of the Social Security Act, 42 U.S.C. § 654(4) (1988).

205. *See* TEX. FAM. CODE ANN. § 231.001 (Vernon 1996).

206. The Attorney General's office explained that, although interest should have been included in all requests for arrearage orders since at least September 1991, the state did not have computer capability to figure the interest until 1996. *See In re M.M.O.*, 981 S.W.2d at 76 n.1.

207. *See Mediator Appointed in Child Support Suit*, AUSTIN AM. STATESMAN, Nov. 9, 1997, at B2.

The two named plaintiffs/class representatives both sought and obtained judgments nunc pro tunc or motions for new trial in the proceedings in which the Attorney General's office previously had reduced unpaid support obligations to judgment. They obtained class certification and the Attorney General's office–which initially supported certification–appealed.

The San Antonio Court of Appeals had several problems with the trial court's procedure. First and foremost was the question of proper defendants. The court observed that due process requires that defendants receive notice of and an opportunity to be heard at a class certification hearing. However, as the court wryly observed, "[o]ne of the more unusual aspects of this case is that the parties have expended considerable energy debating who the defendants to the class action are."[208] Possibilities include (at least) a class of all past child support obligors whose arrearage judgments obtained by the Attorney General's office do not contain interest, the Attorney General's office itself, or the Attorney General's "contracting agencies."[209] Plaintiffs attempted to work around the problem of uncertainty as to the identity of defendants by stating that they were only proceeding against the Attorney General's office "at this time"[210] and stated that they might certify a class of defendant support obligors at a later date. The problem with that approach, observed the court, with emphasis, is that "the time for providing notice to the obligors is *before* decisions purporting to affect their rights have been made."[211]

Nor was this the full extent of plaintiffs' problems. Because the two named representatives of the class already had obtained the relief they sought, the court ruled that they lacked standing.[212] In addition, several of the declaratory judgments sought by plaintiffs were held to be requests for advisory opinions. Nonetheless, enough of the case remained for it to be remanded to the state district court, though with a comment and warning from the San Antonio appeals court. "From our appellate shore," said the court, "it appears that this suit was commenced with a laudable goal" and "pursued disjointedly, but with great energy."[213] What the case deserves is "a thought-through and sound set of objectives and a coherent concept of how those objectives can be achieved in a class action."[214] However, because class actions are "extraordinary proceedings with extraordinary potential for abuse,"[215] the trial court was reminded of its "tremendous responsibility" when deciding to certify a class, as well as

208. *See In re* M.M.O., 981 S.W.2d at 80.

209. The San Antonio court noted that "[t]hese agencies are not named or further described in the petition and there is no indication that they have been served with the petition." *Id.* n.4.

210. *Id.* at 81.

211. *Id.*

212. *See id.* at 82.

213. *Id.* at 86.

214. *Id.*

215. *Id.* (citing General Motors Corp. v. Bloyed, 916 S.W.2d 949, 953 (Tex. 1996)).

the "management burdens that will be imposed on the court."[216]

The Attorney General's office, at least under Dan Morales, had a different take on the litigation. A spokesman explained that plaintiffs' lawyers would get forty percent of any sums collected and stated: "We want all that money going to the children who deserve this money. We're going to take care of this situation ourselves."[217] Whatever one may say of the objectives of the attorneys involved–and it would not be amiss to note that one is the current vice-chair of the State Bar's Family Law section–the suit at least has had the salutary effect of prodding the Attorney General's office into asking for interest when it sues to collect past due support.[218]

Lindsey v. Lindsey,[219] an otherwise unremarkable child support modification decision, contains a remarkable essay by El Paso appeals court Justice Anne Crawford McClure on the role of the "abuse of discretion" standard in family law cases. The opinion sets out the normal factual sufficiency standard, compares it with the abuse of discretion standard, then draws the two together in a section titled: "Which Standard Do We Apply?"[220] Justice McClure notes that the apparent majority of courts conclude that evidentiary sufficiency is subsumed into the general abuse of discretion review and is not an independent basis for reversal.[221] The *Lindsey* opinion disagrees with this approach and suggests–in line with a recent continuing legal education presentation by appellate specialist Roger Townsend[222]–that a more structured approach is appropriate:

> One commentator . . . recommends that once it has been determined that he abuse of discretion standard applies, an appellate court should engage in a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in the application of discretion? We agree with this approach. The traditional sufficiency review comes into play with regard to the first question; however, our inquiry cannot stop there. We must proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision. Stated inversely, we must conclude that the trial court's decision was neither arbitrary nor unreasonable.[223]

Applying the standard, Justice McClure summarized the evidence, concluding that the support obligee had shown a 50 percent decrease in resources from the time of the original order. This showing, combined with deviation from the support guidelines in the original order, was "both

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216. *Id.*

217. *Williamson Hits Morales on Child Support*, UPI, Aug. 12, 1997, *available in* LEXIS, News Library, CURNWS file.

218. *See id.*

219. 965 S.W.2d 589 (Tex. App.—El Paso 1998, no pet. h.).

220. *Id.* at 592.

221. *See id.*

222. *See* Roger Townsend, *State Standards of Review: Cornerstone of the Appeal, in* UNIV. TEX. 6TH ANNUAL CONF. ON STATE AND FEDERAL APPEALS (1996).

223. *Lindsey*, 965 S.W.2d at 592.

legally and factually sufficient to show a material and substantial change in Ms. Lindsey's ability to adequately provide for the child."[224] After this conclusion, the decision that the trial court did not abuse its discretion was a foregone conclusion.

Lindsey represents a reasoned attempt by a knowledgeable court to attempt to conduct meaningful review under an abuse of discretion standard. In the writer's view, it certainly represents a more rational approach than that exemplified by decisions such as the Beaumont court's *Gray* ruling, also discussed in this Survey.[225] However, whether *Lindsey*'s approach will catch on with other courts or withstand Texas Supreme Court review is another story altogether.

IV. TERMINATION AND ADOPTION

In the last Survey, the writer devoted considerable attention to a serious split that has developed among the courts of appeals regarding the proper standard of appellate review for termination cases.[226] Without rehashing the subject in detail, the problem stems from the fact that the United States Supreme Court has mandated a "clear and convincing" evidentiary burden at the trial court level, because of the fundamental rights implicated in a proceeding to terminate parental rights.[227] The Texas Supreme Court, on the other hand, has mandated only two general standards of review: "no evidence" or legal insufficiency and "against the great weight and preponderance" or factual insufficiency. The latter standard, however, implicitly assumes the normal civil "preponderance of the evidence" burden at trial.

The question that currently divides the courts of appeals is whether, given the constitutionally mandated higher standard of trial proof in a termination case, there is a need for a more rigorous standard of review on appeal. In the last Survey, the writer incorrectly pegged the split as 6-5 in favor of a heightened standard of appellate review, with three courts yet to weigh in; the real count at the time was a 6-6 tie,[228] with the two Houston courts split and Beaumont and Eastland's votes not yet in.

This Survey period produced more discussion, and a more complete vote total, but no more real enlightenment on the issue. A recent decision from the Waco Court of Appeals,[229] discussed preemptively in last

224. *Id.* at 593-94.

225. *See supra* notes 54, 59, 60 and accompanying text.

226. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1122-27.

227. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769-70 (1982).

228. The error consisted of not counting the Tyler Court of Appeals in the "same standard" camp. As the Waco Court of Appeals correctly pointed out in its tally in *In re* D.L.N., 958 S.W.2d 934, 940 (Tex. App.—Waco 1997, pet. denied), the Tyler court applied the traditional factual sufficiency standard to review of a termination proceeding in *In re* J.F., 888 S.W.2d 140, 141 (Tex. App.—Tyler 1994, no writ). The Tyler court, however, does not seem to have been aware of any controversy on the point.

229. *See* Spangler v. Texas Dep't of Prot. & Reg. Servs., 962 S.W.2d 253 (Tex. App.—Waco 1998, no pet.).

year's Survey,[230] cast that court's lot with the "intermediate standard" camp, reversing a contrary decision that was scarcely two months old.[231] A decision from Fort Worth[232] has reaffirmed that court's commitment to the "same standard" approach, though with no indication that the court is aware of any controversy. Finally, in *In re B.B.*,[233] the Beaumont Court of Appeals–one of the two remaining fence-sitters–skirted the edge of the fray with a cautious opinion, noting the conflict and applying the "intermediate standard" of El Paso, but with a footnote stating that "[w]e do not address the conflict in detail as both parties agree with this court on the standard of review to be applied."[234]

To duplicate a comment from last year's Survey, this writer respectfully suggests that the issue richly deserves the Texas Supreme Court's attention. Even though that court now operates as if its jurisdiction were purely discretionary, the Texas Supreme Court's "conflict" jurisdiction is mandatory in nature.[235] It is hard to imagine how the conflict could get any deeper, and the supreme court's apparent unwillingness to address this overripe issue does no one any good. Meanwhile, all eyes turn to Eastland, the last vote yet to be counted.

In other news, the Beaumont Court of Appeals[236] expressly overruled an earlier opinion,[237] and now holds that the statutory provision that parental rights could be terminated for "engag[ing] in conduct . . . which endangers the physical or emotional well-being of the child" applies even if the parent does nothing untoward in the presence of the child. The mother's younger child had been removed from her care at one week of age, and all visits were supervised. Nonetheless, in line with other courts, the Beaumont court read a Texas Supreme Court opinion[238] as permitting termination under the "endangerment by conduct" provision if the evidence "shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child."[239]

In *In re Shaw*,[240] the El Paso Court of Appeals followed the lead of an Eastland decision[241] and declared that application of the new "constructive abandonment"[242] ground for termination to conduct before its effec-

230. *See* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1123
231. *See In re* D.L.N., 958 S.W.2d 934 (Tex. App.—Waco 1997, pet. denied).
232. *See In re* C.D., 962 S.W.2d 145 (Tex. App.—Fort Worth 1998, no pet.).
233. 971 S.W.2d 160 (Tex. App.—Beaumont 1998, no pet. h.).
234. *Id.* at 164 n.3.
235. *See* TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 1988).
236. *See In re* B.B., 971 S.W.2d 160 (Tex. App.—Beaumont 1998, pet. denied).
237. *See* Lane v. Jefferson County Child Welfare Unit, 564 S.W.2d 130 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).
238. *See* Texas Dep't of Human Servs. v. Boyd, 727 S.W.2d 531 (Tex. 1987).
239. *Id.* at 534.
240. 966 S.W.2d 174 (Tex. App.—El Paso 1998, no pet. h.).
241. *See In re* R.A.T., 938 S.W.2d 783 (Tex. App.—Eastland 1997, writ denied); *see also* Paulsen, *1998 Annual Survey*, *supra* note 2, at 1128.
242. TEX. FAM. CODE ANN. § 161.001(N) (Vernon Supp. 1999). The statute was amended in 1997, after the date of the decision, to provide for a six-month period of constructive abandonment, rather than the original one-year provision. *See id.*

tive date violates the ex post facto clause of the Texas Constitution.[243] The statute currently provides for termination if the child has been placed in DPRS care for six months and the DPRS has :"made reasonable efforts to return the child to the parent," the parent has not regularly "visited or maintained significant contact with the child," and the parent has "demonstrated an inability to provide the child with a safe environment."[244] Because part of the time period relied upon by the DPRS had run before the effective date of the statute, the court ruled that an attempt to terminate would run afoul of the Texas Constitution. The court acknowledged that the enabling provisions of the law stated that the new ground "applies to a pending suit . . . without regard to whether the suit was commenced before, on, or after the effective date," the El Paso court agreed with Eastland that any attempt to give effect to the enabling language would be unconstitutional.[245]

Finally, cases issued during the Survey period contain the usual depressing litany of reasons for terminating parental rights. Some of the standouts in this year's crop include the man who threatened to kill two Department of Protective and Regulatory Services (DPRS) workers and blow up the DPRS building (never a good negotiating technique),[246] the woman who saw nothing wrong with her boyfriend's child pornography hobby,[247] and the woman who left her daughter as "collateral" for a cocaine buy.[248] Honorable mention goes to the woman whose rights were not terminated despite her explanation, in a phone call to the DPRS, that she could not visit her child because she was "hiding out from the law."[249]

While a few garden variety adoption decisions, as well as one case restating the elements of adoption by estoppel,[250] issued during the Survey period, the two most interesting cases (both from San Antonio) actually focus on complaints by birth mothers regarding the procedure by which their rights were terminated. In *In re J.(B.B.)M.*,[251] the San Antonio court relied on strict interpretation of procedural requirements to affirm a very questionable termination and adoption proceeding. The birth mother, who did not speak English, was persuaded by a child placing agency to give up her child. The mother signed an irrevocable affidavit of relinquishment, which was translated for her. The affidavit also included

243. *See* TEX. CONST. art. I, § 16. Unlike its federal counterpart, the Texas Constitution is not limited to criminal prosecutions. *See, e.g.*, Deacon v. City of Euless, 405 S.W.2d 59, 62 (Tex. 1966).

244. TEX. FAM. CODE ANN. § 161.001(N) (Vernon Supp. 1999).

245. *In re* Shaw, 966 S.W.2d at 180.

246. *See* Spangler v. Texas Dep't of Prot. & reg. Servs., 962 S.W.2d 253, 260 (also including evidence of violence, sexual assault, alcoholism and imprisonment).

247. *See In re* B.B., 971 S.W.2d at 168.

248. *See* Hann v. Texas Dep't of Prot. & Reg. Servs., 969 S.W.2d 77, 80 (Tex. App.—El Paso 1998, pet. denied).

249. *See In re* Shaw, 966 S.W.2d at 178 (apparently also providing the general location of the hideout). In fairness, the decision not to permit termination was based on grounds other than the mother's conduct. *See supra* note 223 and accompanying text.

250. Spiers v. Maples, 970 S.W.2d 166 (Tex. App.—Fort Worth 1998, no pet. h.).

251. 955 S.W.2d 405, 408 (Tex. App.—San Antonio 1997, no pet.).

a waiver of the mother's right to notice of further proceedings. Nonetheless, the mother was notified and showed up with counsel to challenge the voluntariness of the affidavit.

The mother's attorney argued that the trial court erred by proceeding to trial only six days after notice. The court of appeals agreed, but ruled that the attorney had waived error by proceeding to trial. The attorney also argued that the court erred by terminating the birth mother's rights without permitting her to put on evidence. He also offered as "newly discovered evidence" the testimony of two witnesses–a doctor and a social worker–to the effect that the adoption service had put an inappropriate amount of pressure on the mother.[252]

Again, the court of appeals relied on procedural defaults by the birth mother's lawyers. By referring to the proposed witnesses during his cross-examination of the movant's witnesses, the attorney demonstrated that the witnesses' testimony did not truly constitute "newly discovered" evidence.[253] Nor did the attorney make a clear objection and receive a clear ruling on the court's refusal to permit the admission of testimony. Accordingly, the judgment was affirmed, based in large part on perceived procedural defaults.

To this writer, at least, the result in *In re J.(B.B.)M.*, seems questionable on both legal and equitable grounds. At the conclusion of movant's testimony, the judge announced that "[t]he court is going to terminate the parental rights of both the father and the mother."[254] After some brief discussion about the form of order, and while everyone apparently still was in the courtroom, the mother's attorney asked if he could "make a quick statement."[255] After being given permission to do so, the attorney said: "I don't know how to address the issue that we were not permitted to put on our side."[256] The judge responded by stating that the mother could file a motion for new trial.

To the San Antonio Court of Appeals, this exchange demonstrates that the mother's counsel "did not lodge a proper objection regarding his desire to present [the mother's] case, and he did not obtain a ruling from the trial court."[257] As an example of what might constitute proper courtroom conduct, the court discussed a very similar situation described in a 1984 San Antonio termination decision, *Speed v. Guidry*.[258] As explained by the court in *In re J.(B.B.)M.*, in *Speed*, "the trial court had heard only one party's evidence before it announced its ruling. Counsel for the opposing party then indicated that he wanted to offer evidence regarding statutory grounds for termination. The trial court refused the request and stated

252. *Id.* at 408.
253. *Id.* at 411.
254. *Id.* at 409.
255. *Id.*
256. *Id.* at 411.
257. *Id.*
258. 668 S.W.2d 807 (Tex. App.—San Antonio 1984, no writ).

that the matter could be appealed."[259] To this point, *Speed* seems pretty much indistinguishable from *In re J.(B.B.)M.*. But the San Antonio court's narrative continues:

> Counsel [in *Speed*] replied: "[w]e want to make sure that this is clear. The Court is refusing to hear any evidence on the statutory grounds for termination of parental rights?" The court responded, "Right." Thus, there was a clear objection, on the record, as well as an indication that the party was ready to proceed and a refusal by the trial court to hear further evidence. The error in *Speed* was, therefore, properly preserved.[260]

This writer certainly does not endorse the conduct of mother's counsel in *In re J.(B.B.)M.* This case would have been far simpler if the lawyer had made an unmistakably clear objection and obtained an unmistakably clear ruling on that objection (or even filed a written motion for continuance). Nonetheless, that is not the standard by which trial court error is be judged. The question is not whether the conduct of mother's counsel meets the standards for civil trial board certification, but whether the attorney managed to do the minimum necessary to preserve error. Moreover, in the case of doubt, the fact that this proceeding involved the termination of parental rights might suggest a little charity in evaluating the situation.[261]

Under the rules, the test is not whether there is a "clear objection"[262] or a "proper objection."[263] Rather, the test is whether the objection "stated the grounds . . . with sufficient particularity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context."[264] The statement, "I don't know how to address the issue that we were not permitted to put on our side"[265] is surely not artful. But surely no one in the room had any trouble guessing what he meant. Moreover, the trial court's conduct in rendering judgment before hearing the other side of the story is so bizarre that even a blurted "But you can't do that!" would probably make the "specific grounds . . . apparent from the context."[266]

In like fashion, though the lawyer in *Speed* showed commendable fortitude in pinning the judge down to a specific ruling, the current version of the rules does not require such particularity. Rather, it is sufficient that the trial court rule on the objection "either expressly or implicitly."[267] No lawyer with any courtroom experience who asks to present his side of

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259. *In re* J.(B.B.)M., 955 S.W.2d at 410.
260. *Id.*
261. To its credit, the San Antonio Court of Appeals noted that a termination case presents a special situation, and the court evidently engaged in some independent legal research to identify cases specific to the subject of preservation of error in a termination setting. *See id.* at 410-11.
262. *Id.* at 410.
263. *Id.* at 411.
264. TEX. R. APP. P. 33.1(a)(1)(A).
265. *In re* J.(B.B.)M., 955 S.W.2d at 411.
266. TEX. R. APP. P. 33.1(a)(1)(A).
267. *Id.* 33.1(a)(2)(A).

the case and receives a reply on the order of "File a motion for new trial" is going to understand that statement as anything other than a "No." The San Antonio court excuses the judge's strange conduct by speculating that "it is possible that [the mother] was not prepared to go forward with proof at that time."[268] Maybe, maybe not. In any event, given the rights at issue, it would surely give observers a better feeling if the court had engaged in a similar degree of speculation in the mother's favor.[269]

In re Bruno[270] is also a San Antonio decision, and it also involves a complaint of overreaching against the same child placing agency whose conduct was questioned in *In re J.(B.B.)M.*. The similarities end here. A 19-year-old college student who lived with her parents checked into a San Antonio hospital to deliver a baby. She announced her wish to give the child up for adoption, because she wished to conceal the pregnancy from her friends and family.[271] Papers were signed and the termination proceeding took place. Some time later, the young woman's parents found out about the pregnancy when they received a bill for pediatric services. While one can only imagine the discussion that took place, the woman soon decided that she had been pressured into relinquishing her rights and/or that her parents would adopt the baby. The trial court considered a laundry list of nit-picking complaints against the affidavit of relinquishment (notary employed by the agency, no proof that witnesses were "credible" and so forth) and upheld the termination. The court of appeals affirmed.

The decision is notable primarily for a concurring opinion by Justice Rickhoff, in which he bemoaned a society that could let such things happen:

> An unemancipated, unwed teenager's signature is worthless in the commercial world, as this young mother discovered when the hospital sent home the bill, ending the secret just after it was made irrevocable. Yet if this same teenager decides to transfer a life to an adoption agency, that decision is irrevocable the moment the affidavit of relinquishment is signed.[272]

Justice Rickhoff concluded with his own suggestion for reform: "[W]e should . . . rethink our statutory waiting periods and make available some professional guidance to these very young mothers so that when we declare their relinquishments of parental rights irrevocable we are assured that mature reflection has preceded the choice."[273]

Justice Rickhoff's opinion surely can be criticized in the details: A 19-year-old college student is not "unemancipated," unless there is some ex-

268. *In re* J.(B.B.)M., 955 S.W.2d at 411 n.1.

269. Even if the missing witnesses were not present and willing to testify, one would assume that at least the mother was available to tell her side of the story.

270. 974 S.W.2d 401 (Tex. App.—San Antonio 1998, no pet. h.).

271. The opinion does not explain how the mother was able to conceal a nine-month pregnancy from her family while living at home.

272. *Id.* at 406 (Rickhoff, J., concurring).

273. *Id.* at 407.

tra factor the majority opinion does not reveal.[274] Nor, unfortunately, does a 19-year-old necessarily qualify as a "very young mother" by today's standards. And it is more likely that the bill went to the parents' house because the student was "living with her parents,"[275] rather than because the student's signature was considered "useless in the commercial world." Nonetheless, it is good to see that someone is devoting thought to improvements in the adoption process. Finally, one can only wonder, if Justice Rickhoff thought this situation was "shocking,"[276] what he might have said and done, had he been part of the *In re J.(B.B.)M.* panel.

274. *See* TEX. CIV. PRAC. & REM. CODE § 129.001 (Vernon 1986) (setting the age of majority at 18).

275. *In re* Bruno, 974 S.W.2d at 402.

276. *Id.* at 406 (Rickhoff, J., concurring).