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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

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EVEN without a legislative session, the last Survey period has been an extraordinarily active one in family law, with important decisions from the United States Supreme Court and the Texas Supreme Court as well as the grant of petitions for review in three cases of considerable potential significance. In addition, a fair number of interesting court of appeals decisions also have been issued.

I. U.S. SUPREME COURT DECISION: GRANDPARENT RIGHTS

Possibly the most significant family law-related event during the Survey period occurred in Washington, D.C., with the United States Supreme Court's decision in *Troxel v. Granville*.¹ Most states, including Texas, have conservatorship statutes that give grandparents preferential status, sometimes even against an intact family unit.² There has been a considerable amount of speculation, the Texas statute not excepted, as to whether

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1. 530 U.S. 57 (2000).120 S. Ct. 2054 (2000).

2. See generally TEX. FAM. CODE ANN. §§ 153.431-.434 (Vernon 1996 & Supp. 2001).

such laws pass constitutional muster.³ *Troxel* answers these questions, and the answer is a resounding “maybe; maybe not.”

In *Troxel*, a case out of Washington state, the paternal grandparents wanted more visitation with their deceased son’s child than the mother was willing to allow. The trial court ruled for the grandparents; Washington’s Court of Appeals reversed.⁴ The Washington Supreme Court upheld that decision, ruling that Washington’s statute impermissibly infringed on the mother’s constitutional right to make major life decisions for her child.⁵

The United States Supreme Court also affirmed, with six different opinions, none of which represented a majority of the Court. The various opinions say quite a bit about how some members of the Court are leaning on parental rights these days, and are worth reading for that reason alone. The result is less than clear, though, as far as the constitutionality of other grandparent visitation statutes is concerned.

Speaking for a four-justice plurality, Justice Sandra Day O’Connor acknowledged the important role grandparents play in the upbringing of children, noting that 5.6 percent of all children under age 18 live with their grandparents.⁶ Nonetheless, while statutes giving grandparents preferential rights may reflect modern realities, such statutes also carry the potential to “place a substantial burden on the traditional parent-child relationship.”⁷ Citing a long list of decisions, Justice O’Connor observed that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁸

The chief fault in the Washington statute, in Justice O’Connor’s view, was that it is “breathhtakingly broad,”⁹ providing that “[a]ny person may petition the court for visitation rights at any time.”¹⁰ This, coupled with the fact that a fit parent was not given any formal deference in the decision as to whether visitation would be in the best interest of the child,¹¹ compelled the conclusion that the statute was unconstitutional as applied. This resolution of the issue permitted the plurality to avoid ruling on the principal constitutional question raised by the Washington Supreme Court: “whether the Due Process Clause requires all nonparental visita-

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4. *In re Troxel*, 940 P.2d 698 (Wash. App. 1997).

5. *In re Smith*, 969 P.2d 21 (Wash. 1998).

6. *Troxel*, 530 U.S. at 64.120 S. Ct. at 2059.

7. *Troxel v. Granville*, 530 U.S. 75, 64 (2000).

8. *Id.* at 66.2060.

9. *Id.* at 67.2061.

10. *Id.* (quoting Washington statute § 26.10.160(3); emphasis is Justice O’Connor’s).

11. Justice O’Connor linked “the traditional presumption that a fit parent will act in the best interest of his or her child” with this parent’s “fundamental constitutional right to make decisions concerning the rearing of her own daughters.” *Id.* at 69-70. Justice O’Connor also cited with approval several state statutes that did give preference, through presumption or evidentiary burden, to the parent in situations of parent-grandparent conflict. *Id.* at 70.

tion statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."¹²

In a separate concurrence, Justice Souter stated that he would have affirmed on one of the two grounds advanced by the Washington Supreme Court, that a statute which authorizes "any person at any time" to seek visitation with a child, subject only to a "best-interest" determination, "sweeps too broadly and is unconstitutional on its face."¹³ Like the plurality, though, Souter would avoid the issue of whether a showing of harm is required to justify visitation in opposition to parental wishes.

Justice Thomas also concurred separately, dropping a hint that he might be interested in overruling the Court's substantive due process cases on the ground that "the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."¹⁴ Until that case comes, though, Thomas would hold, in line with prior precedent, that parental rights are fundamental, that state infringement on those rights must withstand strict scrutiny, and that the Washington statute is not backed by "a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision."¹⁵ Justice Scalia, dissenting, indicated that he has already taken the plunge that Justice Thomas was merely contemplating and that while he might question the wisdom of the Washington Legislature, he would refuse to extend the substantive due process rights of parents to what he perceived to be a novel situation.¹⁶

Justices Stevens and Kennedy issued more lengthy dissents that were in some respects quite similar. Stevens would have preferred to avoid the case altogether by denying certiorari.¹⁷ Having granted it, he would not have been inclined to sustain the decision of the Washington Supreme Court because the statute was not *facially* invalid on either of the two grounds set out by that court (overbreadth and the lack of a harm standard).¹⁸ As to overbreadth, Justice Stevens did not approve of the Washington court's decision that the statute was unconstitutional on its face because, even though "any person" is a broad phrase, the statute "plainly sweeps in a great deal of the permissible,"¹⁹ that is, situations in which a non-parent should be permitted visitation.

Stevens also would have addressed and rejected the Washington Supreme Court's conclusion that harm to the child must always be shown for a non-parent to be granted visitation over the objections of a fit parent. After observing that sometimes "even a fit parent is capable of treat-

12. *Id.* at 73.2064.

13. *Troxel*, 530 U.S. at 76-77 (Souter, J., concurring).

14. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

15. *Id.* at 2068.

16. *Id.* at 91-93 (Scalia, J., dissenting).

17. *Id.* at 80 (Stevens, J., dissenting).

18. *Id.* at 85-86.

19. *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting).

ing a child like a mere possession,"²⁰ Stevens engaged in an extended discussion of the child's possible independent interest in creating or preserving a relationship with a non-parent, as well as a review of prior United States Supreme Court decisions recognizing that parental rights require something more than a simple biological relationship. Nonetheless, Stevens agreed with the plurality that the Court's jurisprudence "includes a strong presumption that a parent will act in the best interest of her child."²¹ In the context of a facial challenge to the constitutionality of a statute, however, Stevens would have thought it "safe to assume that trial judges usually give great deference to parents' wishes,"²² perhaps through application of Washington state's "best-interest-of-the-child" jurisprudence.

All in all, Stevens did not seem seriously concerned with the Washington statute. Taking into account the "almost infinite variety of family relationships that pervade our ever-changing society"²³ and the child's possible interest in maintaining such relationships even though a parent might prefer otherwise, "the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the state to act as arbiter, through the well-known best-interests standard."²⁴

Justice Kennedy, like Stevens, would have been content with a decision that the statute in question was not facially invalid. In particular, Kennedy rejected the Washington court's conclusion that a showing of harm would always be necessary and engaged in a lengthy discussion of the venerable pedigree and widespread use of the "best-interest-of-the-child" standard. Kennedy criticized "the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child."²⁵ In at least some cases, in Kennedy's view, the parent's connection with the child might be sufficiently tenuous and the third party's connection sufficiently strong that a "best-interests" test would be constitutionally appropriate.

In sum, it is a considerable challenge to glean anything from *Troxel* other than the fact that at least six members of the United States Supreme Court had sufficiently serious qualms about the Washington third-party visitation statute to sustain a decision holding it to be unconstitutional. Given the wide variation in details of such statutes across the nation, that does not help much. Moreover, the real question for readers of this Article is whether the current Texas statute would likely survive such a challenge.

20. *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting).

21. *Id.* at 89-90.

22. *Id.* at 96.

23. *Id.*

24. *Troxel*, 530 U.S. at 91.

25. *Id.* at 98 (Kennedy, J., dissenting).

A definitive answer to that question is beyond the scope of an annual Survey article and this author vigorously disclaims any intimation that he is writing his own last word on this subject. Nonetheless, a few preliminary observations might be in order. First, and in favor of the statute's constitutionality, the Texas "grandparent rights" statute is much more specific than Washington's. The law restricts standing to "grandparents," not "any person."²⁶ Moreover, a grandparent who seeks managing conservatorship in Texas would either have to show both parents' agreement or that the request is necessary "because the child's present environment presents a serious question concerning the child's physical health or welfare."²⁷

The "reasonable access" statute is somewhat more problematic. In favor of constitutionality, one might conclude that it limits grandparents' rights to seek visitation to a half-dozen specified situations, all but one of which clearly require some disruption of the nuclear family.²⁸ As to the two grounds for seeking visitation—when a child has been abused or neglected,²⁹ or has been judged to be in need of supervision,³⁰ one might reasonably argue that the statute has a common-sense basis (i.e., the more people who show an interest in such children, the better).

On the other hand, some of the situations in which grandparent access rights are triggered seem tailor-made to throw fuel on the flames of existing family disputes. Grandparents can seek access rights to their grandchildren against a current or former son or daughter-in-law, if their own child is in prison,³¹ divorced or living apart,³² or has had his or her parental rights terminated.³³ Without attempting to pre-judge any particular situation, in the case of a grandparent whose own child is in prison or has been judged to be an unfit parent, one would think that the parent who has raised such a child might be a worse than average risk as a grandparent.

The chief problem with the current statute, though, and the reason this author believes it may have some constitutional problems after *Troxel*, is that the Texas law is rather ambiguous on the point of who must prove

26. TEX. FAM. CODE ANN. § 153.432 (Vernon 1996 & Supp. 2001).

27. *Id.* § 102.004(a) (Vernon 1996 & Supp. 2001).

28. A *Baylor Law Review* student comment argues that the sixth exception, for situations in which "the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition," is unconstitutional because it permits grandparents to intrude on an intact family. See Nalle, *supra* note 3; see also TEX. FAM. CODE ANN. § 153.433(2)(F) (Vernon 1996 & Supp. 2001). This author is not so certain. While subsection (F) of the statute would by its terms permit visitation contrary to the wishes of both parents, that would seem to affect only the degree to which parental rights are affected. To countervail this greater infringement, the Legislature requires that the children have resided for at least six months with the grandparents. That would suggest an amount of family disruption equivalent to many divorces, as well as giving the grandparents some "sweat equity" in the matter.

29. See TEX. FAM. CODE ANN. § 153.433(2)(C) (Vernon 1996 & Supp. 2001).

30. See *id.* § 153.433(2)(D).

31. See *id.* § 153.433(2)(A).

32. See *id.* § 153.433(2)(B).

33. See *id.* § 153.433(2)(E).

that grandparent access is in the "best interest of the child." A clear majority of the United States Supreme Court believes the burden of proof in such cases is of constitutional dimensions.³⁴ The Texas statute could and, in this author's opinion, should be read to place the burden of showing "best interest" on the grandparent seeking access.³⁵ However, the 1997 amendment to the statute replaced the discretionary word "may" with the mandatory word "shall," resulting in a statute that now begins, "The court *shall* order reasonable access to a grandchild . . .",³⁶ thus injecting some uncertainty into the matter by making it look like the Legislature is strongly in favor of grandparent access. In any event, since a majority of the *Troxel* Court rejected the facial invalidity analysis in favor of a case-by-case approach, a Texas practitioner who does not wish her client to become this state's post-*Troxel* guinea pig would be well advised to draft pleadings and fact findings in such a way as to make it clear that grandparents seeking access against the wishes of a parent have assumed and met a rather substantial burden of proof.

II. THE TEXAS SUPREME COURT'S ABORTION BYPASS RULINGS

As of January 1, 2000, the new Chapter 33 of the Texas Family Code generally prohibits minors from securing an abortion unless a parent, managing conservator, or legal guardian has first been notified.³⁷ However, in compliance with United States Supreme Court rulings, the Texas parental notification statute also contains a judicial bypass provision, permitting a minor to have an abortion without parental notification.³⁸ To do so, the minor must satisfy a judge (1) that she is "mature and sufficiently well informed to make the decision" on her own, (2) that notification would not be in her "best interest," or (3) that notification "may lead to [her] physical, sexual, or emotional abuse."³⁹

Though the statute is reasonably specific in its terms, many procedural details were delegated to the Texas Supreme Court's rulemaking body. The Court promulgated rules and forms on December 22, 1999⁴⁰ and a

34. See *Troxel*, 530 U.S. at 69 (plurality opinion); *id.* at 89-90 (Stevens, J., concurring).

35. Following the normal presumption that the plaintiff in any civil suit has the burden of proof, the statutory requirement that the grandparent file suit under § 153.432, coupled with the affirmative wording of § 153.433, favors the conclusion that the grandparents would have the burden of proving the "best interests of the child." See TEX. FAM. CODE ANN. §§ 153.432, 153.433 (Vernon 1996 & Supp. 2001). But whether this alone would satisfy the constitutional concerns of the *Troxel* Court is another matter.

36. TEX. FAM. CODE ANN. § 153.433 (Vernon 1996 & Supp. 2001) (emphasis added).

37. *Id.* § 33.002(a)(1) (Vernon 1992).

38. See generally *Bellotti v. Baird*, 443 U.S. 622 (1979); see also generally *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

39. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 1996 & Supp. 2001).

40. An introduction to the statutes, rules and forms is available on the Texas Supreme Court's web site. See Bob Pemberton, An Overview of the Texas Parental Notification Statute and Rules, available at <http://www.supreme.courts.state.tx.us/rules/pnr/ch33.htm> (last visited Apr. 5, 2001). The rules themselves also can be found on-line. See Supreme

spate of litigation followed.⁴¹ A good bit of the Court's output during the first few months of calendar year 2000 was devoted to thrashing out the details of these cases on an expedited basis, sometimes at the expense of other litigation on the docket,⁴² and often accompanied by visible temper flares.⁴³

This author will not devote much space to these decisions, in part because they represent a very specialized area of practice, but also because they already have been discussed rather extensively in print.⁴⁴ In addition to a good general guide,⁴⁵ attorneys who represent the minor child in such cases have an on-line resource,⁴⁶ and attorneys representing the parents or public interest groups aligned with the parents also have available resources.⁴⁷

Before moving on to less thoroughly plowed ground, though, the unfortunate decision of the Texas Republican Party to add political fuel to the flames of what already was a bad situation for the state's high court should not pass without mention. The party's 2000 platform called for

Court of Texas, Texas Parental Notification Rules and Forms, available at <http://www.supreme.courts.state.tx.us/rules/pnr/33-rules.htm> (last visited Apr. 6, 2001).

41. All these decisions are styled "Jane Doe," which leads to a certain amount of confusion that even the practice of assigning numbers does not eliminate. See *In re Doe*, 19 S.W.3d 249 (Tex. 2000) (*Doe 1 (I)*); *In re Doe 2*, 19 S.W.3d 278 (Tex. 2000); *In re Doe 1*, 19 S.W.3d 300 (Hecht, dissenting from order) (*Doe 1 (II)*); *In re Doe 3*, 19 S.W.3d 300 (Tex. 2000) (per curiam); *In re Doe 4*, 19 S.W.3d 322 (Tex. 2000) (*Doe 4 (I)*); *In re Doe 4*, 19 S.W.3d 337 (Tex. 2000) (*Doe 4 (II)*); *In re Doe*, 19 S.W.3d 346 (Tex. 2000) (*Doe 1 (III)*).

42. In March 2000, Justice Hecht described the situation as follows:

For over three weeks the entire Court has worked on nothing but parental notification cases. Four cases have been decided, one with opinions to follow; another is pending, and no end is in sight, unless, that is, the trial courts and courts of appeals give up, which they cannot do and still exercise their own judgment.

Doe 3, 19 S.W.3d at 310 (Hecht, J., dissenting).

43. Accord Bruce Hight, *Abortion Cases Generate Friction on High Court: Notification Act Keeping Justices Busy*, AUSTIN AM.-STATESMAN, Mar. 19, 2000, at A1 (describing "bitter argument"); Mary Alice Robbins, *Funding Denied for Medically Necessary Abortions Violates ERA*, TEX. LAWYER, Dec. 18, 2000, at 6 (stating that "[d]isagreements over the parental notification cases led to sharply worded opinions in some instances").

44. This includes treatment in last year's Survey. See Thomas William Mayo, *Annual Survey of Texas Law, Health Care Law*, 53 SMU L. REV. 1101, 1102-07 (2000).

45. This author recommends Hon. Ann Crawford McClure, Richard Orsinger & Robert H. Pemberton, *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755 (2000). Justice McClure was chair of the Texas Supreme Court Advisory Committee's Special Subcommittee on the Implementation of Family Code Chapter 33; Messrs. Orsinger and Pemberton are also highly qualified.

46. See <http://www.janesdueprocess.org/> (last visited Apr. 6, 2001). The site came online on the twenty-eighth anniversary of *Roe v. Wade*, 410 U.S. 113 (1973). See *Group Offers Online Abortion Aid/Website Guides Underage Girls Who Want Legal Permission*, HOUS. CHRON., Jan 28, 2001, at 3E.

47. In particular, this author recommends Teresa Stanton Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 BAYLOR L. REV. 513 (2000). Professor Collett, a valued colleague on the South Texas faculty, served on the Texas Supreme Court Rules Advisory Special Subcommittee on Implementation of Family Code Chapter 33 and drafted amicus curiae briefs to the Texas Supreme Court in three of the *Doe* cases. *Id.* at 513 n. 91. The article contains a fourteen-page appendix of questions an attorney might ask a minor seeking judicial bypass; the questions are decidedly weighted against the minor's case. *Id.* at 588-601.

“electoral defeat of all judges who through raw judicial activism seek to nullify the parental notification law by wantonly granting bypasses to minor girls seeking abortions.”⁴⁸ This language mirrors accusations to the same effect by one of the dissenting justices in the bypass rulings.⁴⁹

One would hope that the members of the Texas Supreme Court, all of whom are Republicans, can ignore this deplorable attempt to directly influence judicial decision-making by threat of specific political repercussion. However, we may never know. Early predictions that abortion bypass rulings would completely overwhelm the Court’s civil docket have not been borne out. Since June 2000, only two other “Jane Doe” cases have come before the Texas Supreme Court. In each, the lower court’s decision was affirmed without a published opinion.⁵⁰

III. THE CONFIDENTIALITY OF CHILDREN’S MENTAL HEALTH RECORDS

On July 6, 2000, the Texas Supreme Court issued a ruling in *Abrams v. Jones*,⁵¹ a custody-related case that clarifies the extent to which a child’s mental health records are exempt from disclosure to parents.⁵² The Court held that a parent should not always be deemed to be acting on the child’s behalf. Moreover, even if the parent is acting on the child’s behalf, the mental health professional is entitled to withhold records if release would not be in the child’s best interests, and the opinion of the

48. Clay Robison, *Six Justices Defend Abortion Ruling; Say Legislators Made It Easy to Bypass Law*, HOUS. CHRON., June 23, 2000, at A29.

49. See, e.g., *Doe 3*, 19 S.W.3d at 309 (Hecht, J., dissenting) (stating that “[t]o substitute judicial intent for legislative intent, and Supreme Court findings for trial court findings, is judicial activism”); *Doe 4(I)*, 19 S.W.3d at 328 (Hecht, J., dissenting) (stating that “[t]hat [judicial] activism continues”). The Court’s majority even adopted this rhetoric in its own defense. See *Doe 1(II)*, 19 S.W.3d at 351 (stating that “[o]ur Legislature mandated a proof standard. For this Court to impose a standard different than that our Legislature chose would usurp the legislative function and amount to judicial activism”); see also *id.* at 366 (Gonzales, J., concurring) (stating that “to construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism”). Justice Enoch’s concurrence in *Doe 1(II)*, in which he was joined by Justice Baker, is particularly remarkable in that he addressed Justice Hecht by name throughout, commenting that though Hecht “excoriates the Court for its judicial activism,” he generally failed to cite authority for his conclusions. *Id.* at 362 (Enoch, J., concurring). The concurrence concludes: “When influenced by emotions, a judge loses the judicial perspective, often overstating the case, and at times, resorting to writing that is unbecoming. My colleague’s writings in these cases have been inappropriate. Deep convictions do not excuse a judge from respecting his colleagues, the litigants, or the law.” *Id.* at 364. The criticism did not deter Justice Hecht. See *Doe 1(III)*, 19 S.W.3d at 368 (Hecht, J., dissenting) (commenting, “We are not judicial activists, say the Justices in today’s majority. Surely they know that remonstrances like these do not allay doubts but only exacerbate them. ‘The lady doth protest too much, methinks.’”) (quoting WILLIAM SHAKESPEARE, *Hamlet*, act 3, sc. 2).

50. Interview with John T. Adams, Clerk of Court, Texas Supreme Court (Feb. 13, 2001). One case was filed August 2, 2000 and decided August 4, 2000. The other was filed November 30th and decided December 5, 2000. *Id.*

51. 35 S.W.3d 620 (Tex. 2000).

52. *Id.* at 625.

professional is powerful evidence of where the child's best interests lie.⁵³ Because Justices Baker and Hecht dissented, the latter with an extended and thoughtful (though somewhat vitriolic) opinion,⁵⁴ *Abrams* is worth a closer look.

Laurence Abrams, a Houston psychologist with a substantial practice in the family courts, had a half-dozen counseling sessions with an eleven-year-old girl.⁵⁵ The parents were joint managing conservators, but the girl resided principally with her mother. The problem arose when the girl's father sought to obtain Dr. Abrams' notes in preparation for trial on custody modification.

The father had good litigation-related reasons for requesting the notes. In an earlier meeting, Dr. Abrams had indicated to the father and the father's attorney that he thought the mother might initially have arranged the counseling sessions "to get a leg up on" the father in custody litigation.⁵⁶ While Abrams was unwilling to release his records, he did describe the general contours of the child's problems. The eleven-year-old girl had been told that when she turned twelve she would be permitted to designate with which parent she chose to live; she was in a "panic" at the thought of being at the center of a custody dispute.⁵⁷ The girl also supposedly indicated that she was leaning toward living with her father because her mother was gone from home too much.⁵⁸

When the father formally requested copies of Dr. Abrams' notes, Abrams responded, more or less in line with the Health & Safety Code's confidentiality provisions,⁵⁹ that he would not comply because disclosure was not in the child's best interests.⁶⁰ Abrams' explanation, fleshed out a bit by later trial testimony, was that he had promised a certain degree of confidentiality in order to gain the child's trust and so long as the child wished the conversations to remain confidential, disclosure would be harmful.⁶¹ However, Dr. Abrams offered (again, as provided by the Health & Safety Code⁶²) to turn over his notes to a new psychologist who might give the father a more favorable answer.⁶³

The father did not hire a new psychologist; rather, he sued to compel disclosure. The trial court ordered disclosure and the Houston Court of

53. *Id.* at 626.

54. Justice Baker's dissenting opinion simply adopts the reasoning of the court of appeals majority. *See id.* at 628 (Baker, J., dissenting).

55. *Id.* at 622.

56. *Id.* at 623.

57. *Abrams v. Jones*, 35 S.W.3d 620, 623 (Tex. 2000).

58. *Id.*

59. A mental health professional "may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health." TEX. HEALTH & SAFETY CODE § 611.0045(b) (Vernon 1992 & Supp. 2001).

60. *Abrams*, 35 S.W.3d at 623.

61. *Id.*

62. TEX. HEALTH & SAFETY CODE § 611.0045(e).

63. *Abrams v. Jones*, 35 S.W.3d 620, 623 (Tex. 2000).

Appeals affirmed despite one judge's dissent.⁶⁴ The Texas Supreme Court reversed and rendered judgment that Dr. Abrams' records not be disclosed.

The Court initially (and in this author's opinion, correctly) rejected the father's argument that the Family Code's provision that a conservator parent "has at all times the right . . . as specified by court order . . . of access to medical, dental, psychological, and educational records of the child"⁶⁵ trumps the Health and Safety Code's restrictions on disclosure.⁶⁶ The Texas Supreme Court turned to the Family Code provision's legislative history to determine that it was intended only to equalize informational rights between custodial and noncustodial parents, not to "give greater [informational] rights to divorced parents than to parents who are not divorced."⁶⁷ The Court could have, but did not, mention that specific statutes prevail over more general ones⁶⁸ and that later-enacted statutes trump earlier ones.⁶⁹

The Court then turned to the question of whether Dr. Abrams had met the requirements for withholding information. A psychologist may refuse to turn over records *even to the patient* if the psychologist determines that release "would be harmful to the patient's physical, mental, or emotional health."⁷⁰ The Health and Safety Code does provide that the "content of a confidential record shall be made available to a [parent] who is acting on the patient's behalf."⁷¹ However, the Court ruled that the parent simply steps into the child's shoes; that is, if Dr. Abrams could refuse to divulge information to the child on the ground that release would harm her, he could refuse to release that information to her parents as well.⁷²

The father argued, and the court of appeals agreed, that a parent is acting on the child's behalf when seeking access to that child's mental health records.⁷³ The Texas Supreme Court thought otherwise, stating that "unfortunately, parents cannot always be deemed to be acting on the child's behalf."⁷⁴ The Court illustrated its conclusion by pointing out that the father testified that he was "'partially' motivated by what he perceived to be his former wife's custody tactics."⁷⁵

64. *In re Marriage of Jones*, 983 S.W.2d 377 (Tex. App.—Houston [14th Dist.] 1999), *rev'd*, 35 S.W.3d 620 (Tex. 2000).

65. TEX. FAM. CODE ANN. § 153.073 (Vernon 1996 & Supp. 2001).

66. *Abrams*, 35 S.W.3d at 624.

67. *Id.*, 35 S.W.3d at 624.

68. See, e.g., TEX. GOV'T CODE ANN. § 311.026(a) (Vernon 1998 & Supp. 2001) (stating that "[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both"); see also *City of Dallas v. Mitchell*, 870 S.W.2d 21, 22 (Tex. 1994).

69. See, e.g., TEX. GOV'T CODE ANN. § 311.026(b) (Vernon 1998 & Supp. 2001) (preferring later enactments over earlier); see also *City of Dallas*, 870 S.W.2d at 22.

70. TEX. HEALTH & SAFETY CODE § 611.0045(b) (Vernon 1992 & Supp. 2001).

71. *Id.* § 611.0045(f).

72. *Abrams v. Jones*, 35 S.W.3d 620, 626 (Tex. 2000).

73. See *Marriage of Jones*, 983 S.W.2d at 381.

74. *Abrams*, 35 S.W.3d at 625.

75. *Id.* at 627.

If a mental health professional declines to turn over records, the father's remedies would be to get a "second opinion" from a new professional⁷⁶ (which the father declined to do) or seek a judicial ruling.⁷⁷ In a judicial proceeding such as this, the professional has the burden to prove⁷⁸ either: (1) that the parent was not in truth acting on the child's behalf, or (2) that disclosure of the information would harm the patient. Because of the Texas Supreme Court's limited jurisdiction, Abrams could prevail only if he could establish one of these contentions as a matter of law. The Court ruled that evidence as to whether the father was acting on his daughter's behalf was conflicting, but that Dr. Abrams' testimony that disclosure would harm the patient was credible and wholly uncontradicted.⁷⁹ Accordingly, the Court reversed and rendered judgment for the psychologist.

Justice Hecht's dissent criticizes both the majority's conclusion that a parent should not be assumed to be acting on the child's behalf in a custody dispute and that Dr. Abrams proved harm to the child as a matter of law. As to the first issue, Hecht questions the majority's implicit conclusion that "evidence that parents are hostile to one another is enough by itself to support an inference that they are selfishly motivated and therefore not acting on their child's behalf."⁸⁰ This author would agree. The Family Code's common theme, so far as statutory grounds for modification of conservatorship is concerned, is "the best interests of the child."⁸¹ The fact that the parents might disagree as to what the trial court should do would only mean, at worst, that one of the parents (i.e., the one ultimately adjudicated to be the loser) is not acting on the child's behalf. More often, whether right or wrong, both parents believe that their litigation position is in the child's best interest. Regardless, it seems strange that the majority would regard the husband's admission that he was trying to use the information to gain a litigation advantage over his ex-wife as "some evidence" that the father "was not acting on behalf of [the child] but . . . in his own interest."⁸² If this were a logical game of "connect-the-dots," there seems to be a line or two missing from the majority's analysis.

Justice Hecht's second complaint is more problematic. He suggests that the burden of proof on the mental health professional should be "substantial"⁸³ and that Dr. Abrams' testimony, even if uncontradicted, did not meet that burden. The reasoning is difficult to follow. The dissent says that "[n]othing in the statute suggests that this burden [of proof]

76. See *supra* text accompanying notes 62-63.54.

77. TEX. HEALTH & SAFETY CODE ANN. § 611.005(a) (Vernon 1992 & Supp. 2001).

78. *Id.* § 611.005(b).

79. *Abrams v. Jones*, 35 S.W.3d 620, 627 (Tex. 2000).

80. *Id.* at 631 (Hecht, J., dissenting).

81. See, e.g., TEX. FAM. CODE ANN. § 156.101(b) (Vernon 1996 & Supp. 2001) (stating that modification of conservatorship in response to a child's choice is subject to a judicial finding that the child's choice is "in the best interest of the child").

82. *Abrams*, 35 S.W.3d at 627.

83. *Id.* at 629 (Hecht, J., dissenting).

should be anything but substantial,”⁸⁴ and that the health care professional should present “solid, credible evidence that disclosure will cause [the patient] real, demonstrable harm.”⁸⁵ Denial of access, according to Hecht, “cannot be based on some general concern that the child may be displeased or discomfited, even severely, about the disclosure. Rather, denial must be grounded on evidence of actual impairment to the child’s health.”⁸⁶

However, it is hard to discern how Justice Hecht reads this heavy burden into the statute. The law simply says that the mental health professional has “the burden of proving that the denial was proper.”⁸⁷ Nothing about that language indicates that the Legislature was intending to impose any higher hurdle than the ordinary civil “preponderance of the evidence” standard.

Likewise, the statute authorizes the mental health professional to deny access to records “if the professional determines that release . . . would be harmful to the patient’s physical, mental, *or* emotional health.”⁸⁸ While Hecht says nondisclosure cannot be based on the professional’s conclusion that the child would be “displeased or discomfited, even severely”⁸⁹ by the disclosure, that might be just what the Legislature had in mind when it permitted nondisclosure of information “harmful to . . . emotional health.”

As to the specific evidence, Justice Hecht pointed out that Dr. Abrams’s concerns boiled down to the fact that the child would be harmed if her wish to keep the information private was not respected. Dr. Abrams testified that release of records would be “physically or emotionally harmful” to the child and that this still was his opinion on the date of trial, despite the fact he had not treated the child in six months.⁹⁰ Hecht argued either that the opinion was not entitled to weight because of the passage of time, or that the father had at least established a fact issue (thus precluding a “matter of law” conclusion by the Texas Supreme Court) by testifying that his daughter had recently changed her mind.⁹¹ The problem with this argument is that while Justice Hecht does a good job of tearing Dr. Abrams’ testimony apart in his opinion, trial counsel apparently did not do nearly as good a job (or any job at all, so far as Justice Hecht’s concerns go) during cross-examination of Dr. Abrams. Justice Hecht’s dissent at best proves that Dr. Abrams’ clear testimony that turning over the records would hurt the child could easily have been controverted. But even a summary judgment can be based on the testimony of an interested witness if that testimony is “clear, positive and di-

84. *Id.*

85. *Abrams v. Jones*, 35 S.W.3d 620, 629 (Tex. 2000) (Hecht, J., dissenting).

86. *Id.*

87. TEX. HEALTH & SAFETY CODE ANN. § 611.005(b) (Vernon 1992 & Supp. 2001).

88. *Id.* § 611.0045(b) (emphasis added).

89. *Abrams*, 35 S.W.3d at 629 (Hecht, J., dissenting).

90. *Id.* at 630.

91. *Abrams v. Jones*, 35 S.W.3d 620, 630 (Tex. 2000) (Hecht, J., dissenting).

rect, otherwise credible and free from contradictions or inconsistencies, and could have been readily controverted.”⁹² Likewise, a matter of law finding is no different.

But what is most disturbing about Justice Hecht’s dissent, and perhaps explains Justice Baker’s decision to dissent separately, is his attempt to link the decision to this year’s abortion bypass rulings. To Hecht, *Abrams* “continues in the vein” of the bypass cases, by “exhibit[ing] a disturbing lack of regard for the rights of parents to raise and care for their children.”⁹³ Both *Abrams* and the bypass cases, according to Hecht, show that the Court views statutes “through a prism of presumed diminution in parental authority.”⁹⁴ To this author, at least, he doesn’t prove his point.⁹⁵

IV. STATUS

With only a couple of exceptions, one of which might turn out to be a major decision by the Texas Supreme Court, parenthood questions lay thin on the ground during this review period. *In re M.W.T.*⁹⁶ is one exception, in that it presents a moderately interesting question of statutory construction in a support context. Shortly before the child’s eighteenth birthday, the mother filed a paternity action in order to collect retroactive support and to establish responsibility for continuing support payments. The father argued that because he was named on the child’s birth certificate, judicially admitted paternity, and had made voluntary support payments for nearly eighteen years, a paternity action was not appropriate. As the father put it, “no provision of the Texas Family Code authorizes a paternity action that essentially does nothing more than ratify a pre-existing presumption of paternity.”⁹⁷

The San Antonio Court of Appeals thought otherwise. While consent to placement of one’s name on a birth certificate makes one a presumed father,⁹⁸ that presumption may be rebutted.⁹⁹ Accordingly, the trial court had jurisdiction to entertain a paternity action. The fact that the father conceded paternity did not deprive the court of jurisdiction; it sim-

92. TEX. R. CIV. P. § 166a (c).

93. *Abrams*, 35 S.W.3d at 628 (Hecht, J., dissenting).

94. *Id.*

95. Indeed, Justice Owen, author of the majority opinion in *Abrams*, was a frequent dissenter, sometimes joining Justice Hecht, in the abortion bypass rulings.

96. 12 S.W.3d 598 (Tex. App.—San Antonio 2000, pet. denied).

97. *Id.* at 601 (internal quotations omitted). The father also raised estoppel and laches claims, as well as contesting post-majority support on the merits. Those issues are discussed later in this Article. See *infra* text accompanying notes 276-295.

98. See TEX. FAM. CODE ANN. § 151.002(a)(3)(B) (Vernon Supp. 2000).

99. See *id.* § 151.002(b). The court cautioned that the result would have been different if the father had executed a Voluntary Acknowledgment of Paternity. The opinion quotes with approval the statement in *Sampson & Tindall’s Texas Family Code Annotated* that such an acknowledgment would be “a legal finding of paternity equivalent to a judicial determination.” *In re M.W.T.*, 12 S.W.3d at 602 (quoting JOHN J. SAMPSON ET AL., TEXAS FAMILY CODE ANNOTATED 644 (1999) (internal quotations omitted); see also TEX. FAM. CODE ANN. §§ 160.201-216 (Vernon 1996 & Supp. 2001).

ply rendered further proof of that fact unnecessary. The San Antonio Court of Appeals drew further support from case law by stating that “[a] paternity action is *the* vehicle through which the child, or a party on behalf of the child, is able to establish responsibility for child support and thereby ultimately obtain it.”¹⁰⁰ The Court also noted that, under the Family Code, the effect of a parentage order is to “confirm or create” a parent-child relationship,¹⁰¹ which language suggests that an action may be appropriate even when there is no real doubt as to paternity.

Another recent case, *In re C.S.C.*,¹⁰² would have been an utterly unremarkable decision but for the fact that the Texas Supreme Court elected to grant a petition for review. However, because the high court may have selected this case in order to speak to the issue of constitutional rights of biological fathers, *C.S.C.* suddenly has been catapulted into a case that deserves some very close attention.¹⁰³

The facts are complex and are not reflected in the one-page court of appeals opinion, which originally was ordered not published.¹⁰⁴ Drawing on the briefs of the parties,¹⁰⁵ though, the situation appears to be pretty much as follows: *C.S.C.* was born in January 1992. Her mother was not married, but was simultaneously involved with two men, Charlie Cannon and Charles Sherry. While it is common practice to provide as little identifying information as possible in such suits,¹⁰⁶ the name behind the ini-

100. *In re M.W.T.*, 12 S.W.3d at 601 (quoting *Ex parte Wagner*, 905 S.W.2d 799, 803 (Tex. App.—Houston [14th Dist.] 1995, no pet.) (emphasis added) (internal quotations omitted)).

101. *Id.* at 602 (quoting TEX. FAM. CODE ANN. § 160.006(b) (Vernon 1996 & Supp. 2001)).

102. No. 09-98-324CV 2000 Tex. App. LEXIS 639 (Tex. App.—Beaumont 2000), *rev'd sub.nom.*, Tex. Dep't of Protective & Regulatory Servs. v. Sherry, No. 00-0386, 2001 Tex. Lexis 28 (Tex. 2001), pet. granted).

103. From conversations with counsel, this author understands that the Texas Supreme Court had some questions at oral argument regarding whether the constitutional issues were preserved at the trial level. That certainly is a valid concern; indeed, it may ultimately prevent the Court from reaching the issues discussed in the paragraphs that follow. *E.g.*, *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (declining to address issues regarding the preclusive effect of predecessor statute because, “[a]s a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal”). [Editor's note: while this article was in the final editing process, the Texas Supreme Court issued its decision. See Tex. Dep't of Protective & Regulatory Servs. v. Sherry, 44 Texas Sup. Ct. J. 672 (Apr. 26, 2001). The decision, which rejected Sherry's statutory arguments and held that constitutional objections were not presented, will be treated in more detail in next year's Survey.]

104. See 44 Tex. Sup. Ct. J. at 432 (Feb. 15, 2001) (ordering opinion published as part of grant process); see also TEX. R. APP. P. 47.3(d) (vesting discretion in the Texas Supreme Court to order that previously unpublished decision to be published).

105. The author is indebted to state Solicitor General Greg Coleman and attorney John Pettit of Conroe for their courtesy in providing copies of the briefs and for background conversations.

106. The Family Code provides that suits affecting the parent-child relationship “shall be entitled ‘In the interest of _____, a child.’” TEX. FAM. CODE ANN. § 102.008 (a) (Vernon 1996 & Supp. 2001). The court of appeals followed the common practice of using only the child's initials, styling the case, “In the Interest of *C.S.C.*, a child.” No. 09-98-324CV, 2000 Tex. App. LEXIS 639 (Tex. App.—Beaumont 1999). For some reason, however, the parties changed the style for Texas Supreme Court pleading, hence the petition

tials is a potentially salient fact here: The middle "S" in C.S.C. stands for "Sherry," and the final "C" is for "Cannon."¹⁰⁷

Mother and daughter lived with Charlie Cannon at the time of birth and for the first three years of the child's life. Charlie died in a fire in January 1995. Some months later, Charles Sherry moved in. He, the mother, and the child lived together for the next two years or so, with one exception. In January 1998, the mother, who had long-term drug problems, was placed in rehabilitation for four months. During that time, the child was removed from the home with the mother's consent. Both the mother and Charles saw the child for supervised visits during the mother's weekend furloughs. Mother, daughter and Charles Sherry were reunited after the mother's release in May, but the mother died of a drug overdose only a few weeks later.

Six days after the mother's death, Child Protective Services took custody of the child and filed suit to be declared sole managing conservator. Charles Sherry responded the next day with a suit to be declared C.S.C.'s biological father and managing conservator. Eventually, the two suits were consolidated and the trial court ruled against Sherry on standing grounds. One possible ground for standing, that Charles Sherry was "a person with whom the child and the child's . . . parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's . . . parent is deceased at the time of the filing of the petition,"¹⁰⁸ would have seemed tailor-made for this situation, but for the awkward four-month hiatus when the child was out of the home just before the mother's death.

Charles Sherry's bigger problem, and the likely reason this case eventually caught the Texas Supreme Court's attention, was that there already was a judgment declaring Charlie Cannon to be C.S.C.'s father. The mother had been receiving state aid since the child's birth. Shortly after the child's first birthday, the Attorney General's office filed suit against Charlie Cannon to establish paternity. The choice was logical: Charlie Cannon was listed on the birth certificate and lived with the mother, and no one seems to have told the Attorney General's office that Charles Sherry was even in the picture.

Charlie Cannon agreed to be declared C.S.C.'s biological father, signed a statement of paternity to that effect, and was declared to be C.S.C.'s biological father by agreed judgment. Because Cannon was living with and supporting both mother and child and because he agreed to reimburse the state for past expenses, the Attorney General's office waived its demand for a support order.

for review was granted in "Texas Department of Protective and Regulatory Services v. Sherry." *E.g.*, No. 00-0386, 2001 Tex. Lexis 28 (Tex. 2001); 44 Tex. Sup. Ct. J. at 431.

107. Of course, had the child been a boy, the temptation to speculate that the "C" in C.S.C. stands for "Charles" would be well-nigh irresistible. And though this author chooses not to be the first to reveal the name in print, the child's name is consistent with the theory that somebody named Charles was the father.

108. TEX. FAM. CODE ANN. § 102.003(a)(11) (Vernon Supp. 2000).

The Department of Protective and Regulatory Services's defense against Charles Sherry's later suit to establish himself as the biological father therefore was quite simple. The Family Code provides that a parentage suit generally is barred "if final judgment has been rendered by a court of competent jurisdiction . . . adjudicating a named individual [in this case, Charlie Cannon] to be the biological father of the child."¹⁰⁹ As if that were not enough, the Code also provides that an acknowledgment of paternity properly filed with the Bureau of Vital Statistics is "equivalent to a judicial determination"¹¹⁰ subject to attack only under very limited circumstances.¹¹¹ Moreover, the Family Code specifically provides that a suit contesting a presumption of paternity is barred after two years if the presumed father has lived in the same household as the child for that time and requests an order designating him as father.¹¹²

The basis of the Beaumont Court of Appeals' decision to reverse the trial court and grant Charles Sherry standing to sue is equally simple. The court relied on the Texas Supreme Court's *J.W.T.*¹¹³ opinion to conclude that Sherry "has a [constitutional] right . . . that cannot be denied."¹¹⁴

Unfortunately, the applicable law is not quite as simple as either the trial court or court of appeals seemed to think it was. *J.W.T.*, for example, is not factually on point, though it does say something about the Texas Supreme Court's attitude toward biological fathers. In *J.W.T.*, the Texas Supreme Court held that a biological father's rights under the Texas Constitution¹¹⁵ cannot be cut off by statute, even when assertion of those rights would intrude on an intact marriage, provided that the biological father demonstrated "early and unqualified acceptance of parental duties."¹¹⁶ In *J.W.T.*, there had been no prior formal adjudication of paternity so far as husband and wife were concerned, a rather telling difference that favors the State's position in *C.S.C.* On the other hand, in *C.S.C.*, there is no intact marriage (or even a living "parent") whose rights might be trammled by a decision to give Charles Sherry a chance to prove paternity. All in all, there is plenty of room for disagreement as to exactly whom the Texas Supreme Court's *J.W.T.* opinion supports.

J.W.T. aside, this author generally favors the biological father's side of the controversy in *C.S.C.*, at least if one focuses on the law instead of the facts. For that matter, the facts surrounding the original paternity suit and judgment in *C.S.C.* seem somewhat murky (hardly a surprise, in view

109. TEX. FAM. CODE ANN. § 160.007(a)(1) (Vernon 1996 & Supp. 2001).

110. *Id.* § 160.205(a) (Vernon Supp. 2000).

111. The Family Code provides a 60-day rescission period. *See id.* § 160.206. After that time, a challenge to the acknowledgement may be filed only on the basis of "fraud, duress, or material mistake of fact." *Id.* § 160.207(a). Even so, there also is a general four-year limitations period. *See id.* § 160.207(c), (e).

112. *Id.* § 160.110(f)(1)(2)(A), (B).

113. *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994).

114. *C.S.C.*, 2000 Tex. App. Lexis 639, 639, ___ S.W.3d at ___.

115. *See* TEX. CONST. art. I, § 19 (Vernon 1997).

116. *J.W.T.*, 872 S.W.2d at 198.

of the fact that both principals are dead). Charles Cannon may or may not have known about the possibility that Charles Sherry was C.S.C.'s father at the time he agreed to a judgment. Moreover, C.S.C.'s mother may have believed in good faith that Charlie Cannon was the biological father, she may have thought that he was the better provider (as in *J.W.T.*),¹¹⁷ she may have had a deal with one or both men to let paternity be established in such a way as to let the child benefit from Charlie Cannon's government benefits, or she may just have been so drug-dependent that she was not giving much thought at all to matters like these.

The danger in a case like this would be to let the particular facts, or speculation as to where the child's best interests might lie, drive the decision. This case may not be a particularly close fit with *J.W.T.* However, all biological fathers have at least *some* rights under the United States and Texas Constitutions.¹¹⁸ Those rights, whatever they might be in a particular case, do not appear to be taken into account *at all* by section 160.007. Under this provision of the Family Code, once final judgment has been rendered adjudicating a man to be the biological father, all future paternity suits are barred, period.¹¹⁹ Moreover, even assuming that proof of fraud or wrongdoing would leave a paternity adjudication open to attack by a bill of review,¹²⁰ a bill generally can be filed only by a party to the original suit¹²¹ and is difficult to win under the best of circumstances. Accordingly, though the Texas Supreme Court spoke in *J.W.T.* of protecting the rights of a biological father who has made "early and unqualified acceptance of parental duties" and though Charles Sherry's acceptance of those duties might be considered both late and qualified, there is nothing in the language of section 160.007 that would preclude its application against a far more diligent father than Charles Sherry.

Likewise, though there is some suggestion in the *C.S.C.* briefs that Charles Sherry may have known of the paternity litigation, this should

117. This was also the situation presented in *Dreyer v. Greene*, 871 S.W.2d 697 (Tex. 1993). See *infra* text accompanying note 126.

118. *E.g.*, *In re K*, 535 S.W.2d 168, 170 (Tex. 1976) (noting that biological fathers at least have some constitutional right to notice and hearing under the United States Constitution); *In re J.W.T.*, 872 S.W.2d 189, 190-91, 195-96 (Tex. 1994) (explicitly basing biological father's rights on art. I, § 19 of the Texas Constitution).

119. Section 160.007 permits only a limited exception for the filing of new suits "[d]uring the pendency of an appeal or direct attack on a judgment." TEX. FAM. CODE ANN. § 160.007(b) (Vernon 1996 & Supp. 2001).

120. Section 160.007 bars subsequent suits "under this chapter," that is, under the "Termination of Parentage" chapter of the Family Code. *Id.* § 160.007(a), (b). This language might or might not leave an opening for a bill of review proceeding. See *Dreyer*, 871 S.W.2d at 697, 698 n.2 (stating that "[w]e express no opinion on whether [children are barred by virtue of a former paternity adjudication] could have the finding of . . . paternity set aside by bill of review"); see also *Amanda v. Montgomery*, 877 S.W.3d 482, 485 (Tex. App.—Houston [1st Dist.] 1994, no writ) (holding that a bill of review challenging a paternity finding must be filed as a separate action, but not addressing whether such an action was proper); Attorney General *ex rel.* *Ridge v. Ridge*, 773 S.W.2d 645, 648 (Tex. App.—San Antonio 1989, writ denied) (holding divorce decree did not operate as a bar to the child's suit because the child was not a party to the divorce proceedings).

121. *E.g.*, *Durham v. Barrow*, 600 S.W.2d 756, 760 (Tex. 1980) (stating that "[a]s a general rule, a party to a prior judgment has standing to bring a bill of review").

not obscure the fact that the Family Code apparently does not require, nor did the state or the parties in fact accomplish, service of process on Charles Sherry. The United States Supreme Court has famously observed that while “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause[,] . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”¹²² The only provision of the Family Code that arguably provides for notice under the circumstances of *C.S.C.* is the general requirement that, in any original suit affecting the parent-child relationship, “an alleged father” is entitled to service.¹²³ The Attorney General’s office argued in *C.S.C.* that this provision only applies to someone claiming (or being claimed to be) a father *in a court proceeding*.¹²⁴ Assuming this reading of the Family Code is correct, and that the Legislature means section 160.007’s prohibition on successive suits to apply even to persons who were not parties to the original proceeding, the result would be a situation in which a biological father’s rights are effectively adjudicated in a proceeding to which he is not a party and of which he has no statutory right to notice, or even a decent stab at notice.

If this is what the statute means, it cannot be constitutional. As the Texas Supreme Court said in *In re K*,¹²⁵ a case involving far less savory facts than those of *C.S.C.*:¹²⁶

There is a rational basis for the state, which has an interest in securing stable homes and supportive families for children, to distinguish between the father who has accepted the legal and moral commitment to the family and the father who has not done so. The biological father may be a sperm donor or a rapist or someone as [in this case] who has simply engaged in a single hit and run sexual adventure. He may, on the other hand, be devoted to child and family even though the legal contract has not been sealed. Texas law offers the biological father of an illegitimate child the opportunity to prove which category in which he falls and to show that he should not be treated differently from fathers legally committed to the mothers of their children. Thus [the alleged biological father] sought and received a fair hearing. The evidence proved him to be an unfit person to act as parent of this child, and the denial of his petition for parental status was shown to be in the best interest of the child. His rights have been respected. The rights of society and baby girl K permit

122. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

123. TEX. FAM. CODE ANN. § 102.009(a)(8) (2000).

124. *E.g.*, Petitioner’s Brief on the Merits, Texas Department of Protective and Regulatory Services v. Sherry, No. 00-0386, Texas Supreme Court (brief on file with the author); *see also, e.g.*, WEBSTER’S NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE 68 (2d ed. 1949) (stating, as the first definition of “allege,” “to state under oath; to plead in court”).

125. 535 S.W.2d 168 (Tex. 1976).

126. Speaking for the majority, Justice Tom Reavley acknowledged that the man in question might be described as a “father,” but “only in the sense of that relationship which is the biological consequence of erotic ecstasy on a summer night”. *Id.* at 168.

him nothing more.¹²⁷

Because the State's suggested application of section 160.007 would deny Charles Sherry even the minimal opportunity for a court hearing that the Texas Supreme Court implies might be constitutionally available for a rapist or sperm donor,¹²⁸ it is hard to imagine how the statute could be sustained against constitutional challenge.

Constitutional questions aside, such a result undoubtedly was not what the Legislature had in mind when it drafted these provisions of the Family Code. Consider what would happen if, instead of bringing a paternity action against Charlie Cannon, the state or C.S.C.'s mother had deliberately set out to terminate any rights Charles Sherry might later try to claim as C.S.C.'s biological father. The Family Code requires that "[t]he procedural and substantive standards for termination of parental rights apply to the termination of the rights of an alleged biological father."¹²⁹ Accordingly, the alleged father is entitled to service of process if his identity and location are known,¹³⁰ and even if his identity is not known, providing he has signed up in the state's paternity registry.¹³¹ If the alleged father has not defaulted after service, the petitioner is required to submit a sworn affidavit detailing efforts to locate or identify the alleged father.¹³² Moreover, the absent or unknown alleged father is entitled to an attorney ad litem.¹³³ To top it all off, even if the mother were to follow all the rules, the alleged father still has a six-month period after judgment to set aside an order terminating his rights.¹³⁴

It is difficult to imagine a public policy that would require the state or child's mother to jump through so many procedural hoops if they had deliberately set out to terminate Charles Sherry's rights, yet would leave section 160.007 as a loophole through which they could accomplish exactly the same result, with no procedural or constitutional safeguards whatsoever, simply by suing and obtaining a judgment against another man.

It would be far more rational to consider section 160.007 as a statute that does cut off successive suits, but only as to those persons who were parties or privies to the initial suit. The result could be accomplished either by a constitutional ruling or, assuming the Court cannot or does not wish to ground its decision on constitutional grounds,¹³⁵ by interpre-

127. *Id.* at 171.

128. Of course, rapists and sperm donors would have some rather substantial legal hurdles to face under the Family Code. See, e.g., TEX. FAM. CODE ANN. § 151.101(b) (Vernon 1996 & Supp. 2001) (providing with respect to artificial insemination that "the resulting child is not the child of the donor unless he is the husband"); *id.* § 161.007 (Vernon Supp. 2000) (specifically providing for termination of parental rights when the child is born as the result of a sexual assault).

129. TEX. FAM. CODE ANN. § 161.002(a) (Vernon 1996 & Supp. 2001).

130. *Id.* §§ 102.009(a)(8), 161.002(b)(1) (Vernon Supp. 2000).

131. See *id.* § 161.002(b)(2).

132. See *id.* § 161.002(e).

133. See *id.* § 161.002 (f); see also *id.* § 107.013.

134. See *id.* § 161.211.

135. See *supra* note 103.

tation of the Family Code.¹³⁶ Such an interpretation would fit well with the Texas Supreme Court's issue and claim preclusion doctrine,¹³⁷ as well as being consistent with the only Texas Supreme Court ruling that directly addresses the scope of section 160.007, *Dreyer v. Green*.¹³⁸

In *Dreyer*, a default divorce decree stated, in boilerplate language, that the couple's children were "of the marriage." The children later brought suit, through their mother, to have another man declared the father. In a split and much-criticized decision, the Texas Supreme Court held that even though the children were not independently represented, this form language in a default judgment of divorce barred their later suit to establish another man as their father.¹³⁹

Dreyer is in some respects the "flip side" of *C.S.C.*, showing what *C.S.C.*, the child, would currently face if she tried to sue to establish Charles Sherry as her father, rather than vice versa. Under the Family Code, the child is not a necessary party to a paternity suit,¹⁴⁰ though there is a provision for separate representation if the court finds that the child's interests are not being adequately protected by someone who is a party¹⁴¹ (in both *Dreyer* and *C.S.C.*, the mother). In *Dreyer*, the mother may have designated her husband as father because she judged him a better source of child support during the children's minority, thus raising a potential conflict of interest.¹⁴² In his opinion for the majority, Justice Hecht implicitly acknowledged this conflict, hedging the Court's bets by stating in a footnote that the Court "express[es] no opinion" on the question of whether the children could bring a bill of review.¹⁴³ More generally, the Court declined to address the question whether using section 160.007 to bar the children's later suit "impermissibly infringes upon [the children's] rights to due process and equal protection of the law under the

136. One such approach would be to rule that Section 160.007 has no preclusive effect in this case because any suit requires notice to an "alleged father," and such notice was not given. See TEX. FAM. CODE ANN. § 102.009(a)(8) (Vernon Supp. 2000). This may not be the most common reading of the word "alleged." See, e.g., *supra* note 124. However, the Legislature has directed courts to assume that, in enacting statutes, it should be presumed that "compliance with the constitutions of this state and the United States" and "a just and reasonable result" are intended. TEX. GOV'T CODE ANN. § 311.021(1), (3) (Vernon 1998). Moreover, "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . consequences of a particular construction." *Id.* § 311.023(5). Even without this legislative directive, it is a canon of statutory construction that statutes should be read, if possible, so that they are constitutional. See, e.g., *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (stating that "[i]f possible, we interpret a statute in a manner that renders it constitutional").

137. See generally, e.g., *State & County Mut. Fire Ins. Co. v. Miller*, No. 99-0501, 2001 Tex. Lexis 2 (Tex. 2001), 44 Tex. Sup. Ct. J. 333 (2001).

138. 871 S.W.2d 697 (Tex. 1993).

139. *Id.* at 698.

140. TEX. FAM. CODE ANN. § 160.003(a) (Vernon 1996 & Supp. 2001).

141. *Id.* § 160.003(b).

142. The opinion notes that the paternity action was filed a short time after the mother experienced problems collecting child support from her ex-husband. *Dreyer*, 871 S.W.2d at 698 n.1.

143. *Dreyer v. Greene*, 871 S.W.2d 697, 698 n.2 (Tex. 1993).

United States Constitution” because that issue was not raised at trial.¹⁴⁴ If the *Dreyer* majority was sufficiently concerned with the rights of the children to leave some of these options open, despite the statutory presumption that the children’s interests were represented in the first suit, the Court should have at least had an equivalent interest in preserving the rights of the biological father, whose interests were most definitely not represented in the first action.

Moreover, though *J.W.T.* is not by its terms applicable to this case, the Texas Legislature’s response to *J.W.T.* does give some guidance as to what the Legislature thinks the public policy of the state should be in such cases. In *J.W.T.*, the Texas Supreme Court declared unconstitutional a statutory ban on standing for persons who claim to be a biological father, when a presumed father (like the husband in *J.W.T.*) is in the picture, at least when the biological father is “arbitrarily prevented from trying to establish any relationship with his natural child, after making early and unqualified acceptance of parental duties.”¹⁴⁵ The Texas Legislature responded at the next session by adding provisions which grant limited standing to “a man alleging himself to be the biological father of a child,”¹⁴⁶ but simultaneously placed some limits on such suits.

Section 160.110(f) now sets out a two-year limit for some suits filed by claimed biological fathers. The provision does not directly apply to the situation presented by *C.S.C.*, not only because it speaks only to *presumed*, but not adjudicated fathers,¹⁴⁷ but also because it assumes the presumed father is alive.¹⁴⁸ Nonetheless, the statute offers guidance. Most important, the legislature has set a general two-year time limit on when a biological father can sue to establish paternity, but only against a “real” father.¹⁴⁹ But, if the biological father is not intruding on an intact family, or something reasonably resembling an intact family, the Legislature sets no time limit for suit, other than the general requirement that it be within two years after the child’s eighteenth birthday.¹⁵⁰ In a case such as *C.S.C.*, in which one man previously has been adjudicated the father but both parents are dead, it seems reasonable to conclude that the Legislature would prefer not to cut off a biological father’s right to sue. *C.S.C.*’s real choice, at present, is between one parent and none.

144. *Id.* at 698.

145. 872 S.W.2d at 198.

146. TEX. FAM. CODE ANN. 160.110(f) (Vernon 1996 & Supp. 2001).

147. *Id.* § 160.110(f)(2) (speaking of “the presumed father”).

148. The statute requires that once an alleged biological father files suit, the presumed father must request an order designating him the father. *Id.* § 160.110(f)(2)(B).

149. The statute not only requires a “presumed father” in order to trigger the two-year limit, but a certain kind of presumed father: one who “has resided in the same household as the child in a father-child relationship or has established a father-child relationship with the child through his other actions” *Id.* § 160.110(f)(2)(A), but who takes the step, once suit is filed, of requesting an order designating him as the child’s father. *Id.* § 160.110(f)(2)(B).

150. *Id.* § 160.002(a) (Vernon 1996 & Supp. 2001).

Moreover, as a general matter, it would seem wise to construe standing rules liberally in family law cases. From what facts are known, the biological father's conduct in *C.S.C.* may not rise to the "early and unqualified acceptance"¹⁵¹ the Texas Supreme Court was looking for in *J.W.T.* On the other hand, he probably is the only "father" of whom *C.S.C.* has a conscious recollection, and he did take prompt legal action when *C.S.C.* was removed from the household. This would seem to be a good situation for the exercise of judicial discretion at the trial level. Assuming the Texas Supreme Court rules in favor of standing, Charles Sherry ultimately may find out that he is responsible for substantial child support, despite having insubstantial contact with *C.S.C.* However, from both a constitutional and prudential standpoint, it would seem best to give the trial court the opportunity to make that judgment call.

Other than *J.W.T.* and the pending appeal in *C.S.C.*, a pair of heirship proceedings from the Houston Court of Appeals constitute the only parenthood matters of note, and even these are not worth much of a note. In *Malone v. Thomas*,¹⁵² the appeals court upheld a determination that a child born out of wedlock was the decedent's son and sole heir. The Texas Probate Code provides that a child qualifies for inheritance upon a showing of (1) a presumption of paternity under section 151.002 of the Family Code; (2) a parentage suit under chapter 160; (3) proof of adoption; (4) a statement of paternity under section 160.202 of the Family Code; or (5) a probate court's determination by "clear and convincing evidence."¹⁵³ In what appears not to have been a well-coordinated effort,¹⁵⁴ one surviving sibling effectively appealed the trial court's determination, claiming that a court order of paternity did not meet the Probate Code's standards. One immediately fatal problem with this approach, however, was that the child had presented proof under three of the Probate Code's five methods, including presumption of paternity by virtue of voluntary designation on a birth certificate, a court decree and a statement of paternity in compliance with state law. Because the decedent's sister challenged only one of these three grounds, the court of appeals had no difficulty affirming the trial court's ruling.

In *Villery v. Solomon*,¹⁵⁵ the controversy centered on a DNA test. The decedent had a daughter by marriage and one or two children—the exact number was the crux of the dispute—by the proverbial "girl next door." The daughter eventually conceded paternity as to the elder of the two children in dispute, but claimed the trial court did not give appropriate weight to DNA test results as to the other. Under the right set of circumstances, the argument might have been interesting. The child in question

151. *J.W.T.*, 872 S.W.2d at 198.

152. 24 S.W.3d 412 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

153. TEX. PROB. CODE ANN. § 42(B) (Vernon Supp. 2000).

154. The opinion states that the decedent was survived by "several" brothers and sisters. *Malone*, 24 S.W.3d at 413. Two of these siblings managed to file notices of appeal; only one filed a brief. *Id.* n.1.

155. 16 S.W.3d 106 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

presented supporting evidence as to paternity from at least five witnesses and was even listed as a surviving child in the memorial service program. However, scientific tests do occupy a favored position under the Family Code's procedures for determining paternity.¹⁵⁶ Accordingly, if the issue had been framed, "Do five witnesses trump a DNA test under a "clear and convincing" standard?" the case might have been worth some extended discussion.

Unfortunately, the DNA results were not all that clear. No sample was taken from the decedent and no expert testified. The trial court admitted the report "for what it is,"¹⁵⁷ but it was not altogether clear what, in fact, the report was. It read in part, that "if the alleged father is the biological father of [the daughter born during marriage], he cannot also be the biological father of *both* [the son] and [the daughter]"¹⁵⁸ of the girl next door. The daughter born during marriage interpreted this report to mean that either the son or the daughter of the girl next door could be the decedent's biological children, but not both. However, in a rather gentlemanly statement by Justice Sam Nuchia, the court of appeals dismissed the language as "at best, ambiguous."¹⁵⁹

V. CONSERVATORSHIP

During the Survey period, the Texas Supreme Court issued one conservatorship decision of note. Under the Texas Family Code, one or both parents are to be named managing conservator unless the appointment would "significantly impair the child's physical health or emotional development."¹⁶⁰ *In re V.L.K.*¹⁶¹ addresses the question of whether the parental presumption still applies in a modification proceeding.¹⁶²

The facts of *V.L.K.* are somewhat complex and arise from a high-profile murder case.¹⁶³ When her husband was found dead, Leigh Ann Kil-

156. See, e.g., TEX. FAM. CODE ANN. § 160.106(c) (Vernon 1996 & Supp. 2001) (stating that "[i]f the court finds that at least 99 percent of the male population is excluded by the tests and that an alleged father is not excluded from the possibility of being the child's father, the burden of proof at trial is on the party opposing the establishment of the alleged father's parentage").

157. *Villery*, 16 S.W.3d at 109.

158. *Id.* (emphasis added).

159. *Id.* For the benefit of any nuance-impaired reader, the report's phrasing is equally consistent with a conclusion that the daughter born during marriage is the one who was not genetically related to her "father."

160. TEX. FAM. CODE ANN. § 153.131 (Vernon Supp. 2000).

161. 24 S.W.3d 338 (Tex. 2000).

162. See TEX. FAM. CODE ANN. § 156.101 (Vernon Supp. 2000).

163. The facts in the paragraphs that follow are drawn from the court of appeals and Texas Supreme Court opinions, as well as the following media accounts: Betsy Blaney & Domingo Ramirez Jr., *Court Decision Brings Closure to High-Profile Criminal Cases*, FORT WORTH STAR-TELEGRAM, Dec. 30, 1996, at 1; Betsy Blaney, *Wife Gets Probation in Killing; Community Service Hours Are Assessed*, FORT WORTH STAR-TELEGRAM, Aug. 15, 1996, at 1; Betsy Blaney, *Witness: Accused Wanted \$30,000; Testimony Starts in Murder Trial*, FORT WORTH STAR-TELEGRAM, Aug. 6, 1996, at 1; Betsy Blaney, *Woman Testifies She Shot Husband*, FORT WORTH STAR-TELEGRAM, Aug. 9, 1996, at 1; John Council, *In Session, Risky Strategy Works for Eulless Woman Who Killed Husband*, TEX. LAWYER, Sep. 2, 1996, at 2.

gore told police he had been shot by an armed intruder who also wounded her with a kitchen knife. The police became suspicious when it became clear that some of the physical evidence did not match Ms. Kilgore's story. The fact that she was showing a lot of interest in the life insurance proceeds didn't help either.

After being charged with murder, Ms. Kilgore was in and out of jail for approximately eighteen months, pending trial. Initially, her fourteen-month-old son stayed with his maternal aunt and uncle. When the aunt became ill, the child went to live with a paternal aunt and uncle. In an apparent attempt to stave off a custody battle, Ms. Kilgore filed an agreed decree in January 1996 appointing her mother managing conservator and designating herself possessory conservator. The child, however, remained with his paternal relatives because Ms. Kilgore's mother lived out of the country. Within a few months, the paternal aunt and uncle learned of the court decree and filed a motion to modify. Ms. Kilgore filed a cross-motion to be appointed sole managing conservator. Her mother asked that either Kilgore or Kilgore's sister be appointed sole managing conservator.

While neither the court of appeals or the Texas Supreme Court make it clear whether the modification hearing occurred before or after Ms. Kilgore's murder trial, the results of that trial probably strained inter-family relations even further, if such a thing were possible. In a dramatic on-the-stand reversal of her earlier testimony, Ms. Kilgore recanted her "armed intruder" story and confessed to the killing. She explained that she had confronted her husband, who had a prior conviction for aggravated assault, with evidence that he was planning a kidnapping. Her husband tied her up and tortured her in an attempt to silence her. When he freed her, Ms. Kilgore went to the bedroom, ostensibly to check on their infant son, and returned with a gun. When her husband advanced on her, she closed her eyes and shot, claiming that she was only trying to frighten her husband away. The jury evidently believed Ms. Kilgore's "battered woman" defense, as she was only convicted of aggravated assault, with a probated sentence and community service.¹⁶⁴

The paternal aunt and uncle convinced the trial judge that the parental presumption does not apply in a modification proceeding, at least when the parent in question has previously relinquished managing conservatorship. The trial judge agreed and submitted a "no presumption" jury instruction to that effect. The jury awarded conservatorship to the aunt and uncle. On appeal, the Fort Worth Court of Appeals disagreed, holding that the parental presumption applied.¹⁶⁵ The Supreme Court reversed, holding that the parental presumption does not apply in a modification

164. The Texas Supreme Court, on the other hand, may not have known or believed this story, as the opinion merely states that Ms. Kilgore "shot and killed V.L.K.'s father," and that she was awaiting trial while some of the other events unfolded. *V.L.K.*, 24 S.W.3d at 340.

165. *In re V.L.K.*, 993 S.W.2d 887, 892 (Tex. App.—Fort Worth 1999), *rev'd*, 24 S.W.3d 338 (Tex. 2000).

suit and that any error in submitting a “no presumption” jury charge had been waived.¹⁶⁶

In its decision, the Texas Supreme Court emphasized the difference between an original conservatorship determination and a modification proceeding, so far as public policy is concerned. Quoting a pre-Family Code decision, the Court explained that “[b]ecause a change of custody disrupts the child’s living arrangements and the channels of a child’s affection, a change should be ordered only when the trial court is convinced that the change will be a positive improvement for the child.”¹⁶⁷

In an original proceeding, the natural parent has the benefit of the parental presumption, and the non-parent seeking conservatorship must meet a higher burden.¹⁶⁸ More specifically, the Family Code provides that the initial presumption in favor of a parent can be overcome by showing that the appointment of the parent would significantly impair the child’s health or development.¹⁶⁹ However, the Court also pointed out that the presumption is rebutted “if the natural parent has ‘voluntarily relinquished actual care, control, and possession of the child to a nonparent’ for one year or more, and the appointment of a nonparent as managing conservator is in the best interest of the child.”¹⁷⁰ Moreover, in any conservatorship case, a court’s primary consideration “shall always be the best interest of the child.”¹⁷¹

Chapter 156, which governs modification of conservatorship, does not include a parental presumption. Hence, any person seeking to modify an original order of sole managing conservatorship must show that the circumstances of a party affected by the order have materially and substantially changed and that modification would be a positive improvement for the child.¹⁷² The Court noted the Legislature did not express any intent to apply the presumption in Chapter 156 modification suits and concluded, in accord with a pre-Family Code ruling,¹⁷³ that the parental presumption does not apply in modification suits.

The Texas Supreme Court’s decision in *V.L.K.* is a fair reading of the Family Code and, at least at first blush, appears to be a rational public policy. However, whether either the Court or the Legislature have given adequate thought to constitutional considerations is another matter altogether. Ms. Kilgore does not appear to have raised federal due process concerns. However, if the United States Supreme Court’s recent *Troxel v. Granville* decision stands for anything, it would be that the parental presumption counts in parent versus nonparent conservatorship

166. *V.L.K.*, 24 S.W.2d at 344.

167. *Id.* at 343 (quoting *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955)).

168. *See* TEX. FAM. CODE ANN. § 153.131 (Vernon Supp. 2000); *see also* *Brook v. Brook*, 881 S.W.2d 297, 298 (Tex. 1994).

169. TEX. FAM. CODE ANN. § 153.131 (Vernon Supp. 2000).

170. *V.L.K.*, 24 S.W.3d at 342 (quoting TEX. FAM. CODE § 153.373 (Vernon Supp. 2000)).

171. TEX. FAM. CODE ANN. § 153.002 (Vernon 1996 & Supp. 2001).

172. TEX. FAM. CODE ANN. § 156.101 (Vernon Supp. 2000).

173. *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955).

decisions.¹⁷⁴

In an ordinary case, the Family Code works so that one or both parents are appointed managing conservators.¹⁷⁵ Assuming a parent has been so appointed, the Family Code then works to preserve the parental presumption in a modification proceeding by favoring the managing conservator, usually a parent.¹⁷⁶ Here, for rather obvious reasons, Ms. Kilgore was not able to care for her infant son at the time of the initial conservatorship decision. While she did arrange to have her son boarded with relatives, as well as agreeing to have her mother named as managing conservator, it is not clear whether these actions met the statutory requirements cited by the Court for voluntary relinquishment of control.¹⁷⁷ Nor, when the managing conservator (Ms. Kilgore's mother) favors the mother, and the mother and paternal aunt and uncle occupy the same status as competing claimants for managing conservatorship, is there any special reason why public policy considerations based on the need for stability should apply. Put differently, a decision to award managing conservatorship either to the mother or to the paternal aunt and uncle could be viewed as a change in the legal status quo. There is no special public policy reason not to favor the mother.¹⁷⁸ In any event, the decision in *V.L.K.* would still appear to leave an opening for constitutional arguments in a case in which those arguments are properly raised.

In re De la Pena,¹⁷⁹ a case from the El Paso Court of Appeals, presents some interesting points of comparison and contrast with *V.L.K.* The child in question, a girl, was born while her father was serving a short prison term. After being bounced from one relative to another for a while, the baby girl and her older brother wound up in Texas with her paternal aunt and the aunt's lesbian companion. The father retrieved his son, but turnover of *V.L.K.* was delayed for one reason or another¹⁸⁰ until the aunt filed suit for sole managing conservatorship of the child.

The trial court appointed father and aunt joint managing conservators, with the father having the authority to determine his daughter's domicile. The El Paso Court of Appeals affirmed in a thoughtful, but lengthy, opinion by Justice Ann Crawford McClure. The court rejected the aunt's ar-

174. See *supra* text accompanying notes 1-36.

175. TEX. FAM. CODE ANN. § 153.131 (Vernon Supp. 2000).

176. See, e.g., *id.* §§ 156.101(a)(2) (requiring a showing of positive improvement to modify sole managing conservatorship); 156.104(a)(2) (requiring a showing that retention of the status quo would be detrimental to the welfare of the child, when seeking to modify from sole managing conservatorship to joint managing conservatorship).

177. See *supra* text accompanying note 170.

178. Of course, the situation is complicated by the fact that the child actually had been residing with paternal aunt and uncle for some months, even though the maternal grandmother was managing conservator. In this respect, the decision did preserve the status quo, though that hardly could be expected to be the result in all possible fact situations.

179. 999 S.W.2d 521 (Tex. App.—El Paso 1999, no pet.).

180. The facts of the case suggest that the aunt may have been stalling to accumulate sufficient time with *V.L.K.* to claim standing under the Family Code's "six months possession" provision. See TEX. FAM. CODE ANN. § 102.003 (Vernon Supp. 2000).

gument that the parental presumption¹⁸¹ should not apply because the father had voluntarily relinquished his daughter to the aunt's care and possession for a year,¹⁸² observing that the father had made some attempts to regain possession of the child. After an extended discussion of the relative merits of the contesting parties, the El Paso court confirmed the father's primary conservatorship. Though the aunt and her companion (whom the child referred to as "mommy" and "mama," respectively) provided "a caring and nurturing home"¹⁸³ for the child, the Family Code required that the aunt show more. "As a nonparent, she must demonstrate that returning [the child] to [her father] would result in serious physical or emotional harm to the child."¹⁸⁴

Since the aunt was granted managing conservatorship, she also argued that the trial court erred in deciding the father had the right to determine domicile. That was a major issue, because the aunt lives in Midland and the father lives in San Jose, California. The El Paso court decided that the parental presumption applies in deciding which joint managing conservator gets to determine the child's primary residence. In reaching this conclusion, the court relied on a recent Texas Supreme Court decision, *Phillips v. Beaber*,¹⁸⁵ that settled an interstate dispute.

Under the former Uniform Child Custody Jurisdiction Act ("UCCJA"),¹⁸⁶ a court of continuing jurisdiction cannot modify "custody" or "managing conservatorship" if a child has acquired a new home state, but it can modify "visitation."¹⁸⁷ The Texas Supreme Court held in *Beaber* that a motion seeking to change the child's domicile was more a "custody" than a "visitation" matter, since primary possession and domicile are "fundamentally 'rights inherent in a custody status.'"¹⁸⁸ More important, the Court also concluded that the rights of primary possession and domicile determination are "core rights of managing conservatorship."¹⁸⁹ Keeping these thoughts in mind, the El Paso court in *Pena* concluded that "[i]f the right of primary possession is at the very core of managing conservatorship, it appears to us that the parental presumption must apply here as well."¹⁹⁰ The El Paso court's conclusion is logical, but would appear to be philosophically at odds with the Texas Supreme Court's decision in *V.L.K.*, which itself might be somewhat inconsistent with *Phillips v. Beaber*. This undoubtedly is not the last we will be hearing of the parental presumption issue.

181. See *id.* § 153.131(A) (Vernon 1996 & Supp. 2001).

182. *Id.* § 153.373(1).

183. *De la Pena*, 999 S.W.2d at 529.

184. *Id.* at 529-30.

185. 995 S.W.2d 655 (Tex. 1999).

186. This statute, former Chapter 152 of the Texas Family Code, was repealed and replaced with the Uniform Child Custody Jurisdiction Enforcement Act of 1999. See TEX. FAM. CODE ANN. ch. 152 (Vernon Supp. 2000).

187. See *Beaber*, 995 S.W.2d at 656.

188. *Id.* at 658 (quoting *Leithold v. Plass*, 413 S.W.2d 698, 700 (Tex. 1967)).

189. *Id.* at 660.

190. *In re De la Pena*, 999 S.W.3d 521, 534 (Tex. App.—El Paso 1999, no pet).

In concluding the El Paso court's discussion in *In re De la Pena*, Justice McClure also reminded the parties that a major "best interest" concern appeared to have been pretty well ignored in the litigation. The little girl's older brother was living in California, and appointing the aunt as primary custodian would separate the children. This is contrary to a strong presumption in Texas law that "[s]iblings are not to be separated except upon a showing of clear and compelling reasons."¹⁹¹

Before leaving the subject of presumptions, a Waco Court of Appeals decision, *Robinson v. Robinson*,¹⁹² is worth mentioning briefly. The Family Code sets out a presumption in favor of joint managing conservatorship on divorce.¹⁹³ But that presumption is rebuttable, though, and the Family Code sets out some factors to consider when the parties cannot themselves agree.¹⁹⁴ Those factors include the physical and emotional effects of joint conservatorship; whether the parents will give first priority to the welfare of the child and make shared decisions in the best interest of the child; whether the parents can encourage and accept a positive relationship with the other parent; the shared participation of the parents in child rearing before the suit; and geographical constraints.¹⁹⁵

In *Robinson*, the court named the father sole managing conservator and the mother appealed. Since she had not raised evidentiary issues in a motion for rehearing, the mother was confined to a "no evidence" challenge on appeal. Judging from the evidence recited by the Waco court, an appeal under that restrictive standard hardly seemed worth the effort. Each party asked for sole managing conservatorship at trial, something that does not bode well for the ability to make shared decisions. The mother had a history of denying the father access to the child, and the parties could not even cooperate to the extent of getting the child enrolled in speech therapy. The parents also lived about 200 miles apart. As if this were not enough, one of the father's witnesses testified that every time the child returned after visiting with his mother, he was withdrawn and did not want to play. Life with the mother, in the witness's opinion, would be "worse than a funeral" and the equivalent of "condemning the child to the life of the homeless."¹⁹⁶ If any further reason for concluding that marriage was not a match made in heaven need be given, the court of appeals' observation that the father was "physically and emotionally abusive toward [the mother], and [the mother] was physically abusive" toward the father ought to suffice.¹⁹⁷ Though the court of appeals did not mention it, the last factor might have warranted the court in concluding that the presumption in favor of joint managing conserva-

191. *Id.* at 537.

192. 16 S.W.3d 451 (Tex. App.—Waco 2000, no pet.).

193. TEX. FAM. CODE ANN. § 153.131(b) (Vernon Supp. 2000).

194. TEX. FAM. CODE ANN. § 153.134(a) (Vernon Supp. 2000).

195. *Id.*

196. *Robinson*, 16 S.W.3d at 455.

197. *Id.* at 456.

torship should not have been applied in the first place.¹⁹⁸

In this regard, a Texas Supreme Court per curiam opinion on denial of petition for review deserves mention. In *Peña v. Peña*,¹⁹⁹ the Corpus Christi Court of Appeals affirmed a grant of joint managing conservatorship, despite what the woman claimed was a pattern of domestic violence. Under the Family Code, absent agreement, a court “may not appoint joint managing conservators if credible evidence is presented of a history or pattern of . . . physical . . . abuse by one parent directed against the other parent, a spouse, or a child.”²⁰⁰ The mother proved her husband hit her hard enough to cause a black eye on at least two occasions and that he dragged her and tore her jeans. The Corpus Christi court acknowledged that this un rebutted evidence constituted physical abuse but stated that whether it was enough to constitute a “history or pattern” of abuse was another matter. Drawing on federal racketeering law, the court suggested that the woman might need to show “more than merely repeated instances of the prohibited conduct, but [also] . . . some relationship among the separate instances that tends to connect them and to show a threat of continuing violations.”²⁰¹ The opinion concluded:

In the present case, the two hitting incidents left [the mother] with a black eye each time. However, [the mother’s] testimony only vaguely connects the two hitting incidents . . . We do not know who initiated the arguments, whether the hittings were provoked in any manner, or what other factors may have contributed to either or both incidents, or any other relevant details that may show a relationship, connection or predictable “pattern” of physical abuse.²⁰²

While denying the petition for review, the Texas Supreme Court went out of its way to quote the above language and comment: “These considerations are not relevant to determining whether there was physical abuse or a history or pattern of domestic violence under the statute.”²⁰³

In fairness to the Corpus Christi court, which might from these snippets be seen as making light of spousal abuse, that court *did* conclude that this evidence demonstrated physical abuse.²⁰⁴ The Corpus Christi court’s only concern, in light of the wide discretion typically accorded the trial court in custody matters, was whether the evidence established a “pattern” of abusive conduct so clearly that the reviewing court would have to

198. See, e.g., TEX. FAM. CODE ANN. § 153.131 (Vernon Supp. 2000) (stating that “[a] history of family violence involving the parents of a child removes the presumption” of joint managing conservatorship).

199. 986 S.W.2d 696 (Tex. App.—Corpus Christi 1998), *pet. denied per curiam*, 8 S.W.3d 639 (Tex. 1999).

200. TEX. FAM. CODE ANN. § 153.004(b) (Vernon 1996 & Supp. 2001).

201. *Peña*, 986 S.W.2d at 699.

202. *Id.*

203. *Peña*, 8 S.W.3d at 639.

204. *Id.*; *Peña* 986 S.W.2d at 698 (stating that the mother’s “uncontroverted testimony concerning two hitting incidents and one dragging incident amounts to evidence of physical abuse”).

conclude that the trial court had abused its discretion.²⁰⁵ That aside, the Texas Supreme Court has made it perfectly clear that any trial judge ordering joint managing conservatorship in the face of any credible evidence of physical abuse, pattern or not, runs a substantial risk of reversal.

In *Jenkins v. Jenkins*,²⁰⁶ another El Paso decision written by Justice McClure, the trial court modified custody when the mother violated the trial court's original decree by moving in with her boyfriend. This violated both an explicit prohibition on overnight male visitors and a restriction on changing the residence of the child. The El Paso court affirmed. The legal ruling was not difficult, as the mother had preserved only a "no evidence" challenge on her claims that she and her boyfriend were informally married and that her residence actually had not changed because her father was performing repairs on (and living in) her "uninhabitable" home. In the process of reciting evidence the trial court could reasonably have relied on to refute both claims, Justice McClure wryly noted that the mother's principal witnesses were herself and her father, and that the trial court was hearing evidence against both of them in separate "bad check" proceedings. This evidence, the El Paso court commented, "may well have prompted the trial court to discount the truth and veracity of their testimony."²⁰⁷

Several minor aspects of the case are worth mention. First, the burden in a proceeding to modify a joint conservatorship is on the movant, who must show both that the current situation has "materially and substantially changed" or is "unworkable" and that modification would be "a positive improvement for" the child.²⁰⁸ In sustaining the "no evidence" challenge, the El Paso court relied heavily on the fact that the trial court considered the best interest of the child when it originally ruled that having a male (and, judging from the evidence, possibly even *this* male) staying overnight was not in the child's best interests. While the court was not very specific in explaining how modification was shown to be a positive improvement for the child, it would seem by negative implication that if residing in the home of his mother was not in the child's best interest, then residing with his father might be a positive improvement.²⁰⁹ In

205. *Peña*, 986 S.W.2d at 698 (stating that the trial court "has wide discretion in determining what is in the best interest of the child and its judgment regarding conservatorship will not be disturbed on appeal unless it is shown from the record as a whole that the court abused its discretion").

206. 16 S.W.3d 473 (Tex. App.—El Paso 2000, no pet.).

207. *Id.* at 480 n.2.

208. TEX. FAM. CODE ANN. § 156.203 (Vernon 1996 & Supp. 2001).

209. In determining a "no evidence" point, the court is permitted to consider not only all of the evidence, but all implications that fairly may be drawn from that evidence. *See generally* *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). It would not, of course, be a necessary inference or true logical implication to say that if the mother's residence was bad, the father's necessarily would be an improvement. Perhaps he also had coed sleepovers. However, there also seems to have been at least a smidgen of evidence as to the father's living arrangements and disciplinary practices. *See Jenkins*, 16 S.W.3d at 481-82. In addition, the trial court's conclusion that the mother was deliberately violating the custody order and making up stories to justify or excuse the violations might

addressing the abuse of discretion argument, the appeals court ruled that the evidence of cohabitation coupled with the change of the child's primary residence was sufficient to support the trial court finding that the existing joint managing conservatorship was inappropriate.

A second point of interest is the El Paso court's pointed mention of the fact that the "wisdom or propriety" of the original non-cohabitation order was not before them.²¹⁰ If the mother had wanted to argue that it was unfair to require her to live the life of a nun after divorce, she should have raised that point in an appeal from the original order. Having opted not to do so, the mother had to live with "the court's determination of the lifestyle which fostered [the child's] best interest."²¹¹

Finally, in both *Jenkins* and *In re De La Pena*, Justice McClure included a page or so of pretty much identical boilerplate, discussing the difficulty of meshing "abuse of discretion" and traditional sufficiency review in the family law context.²¹² Justice McClure indicates a preference for a two-step approach set out in a dissenting opinion to a San Antonio Court of Appeals case, and more fully explained in another of her opinions.²¹³ While any analysis of this somewhat arcane dispute is beyond the scope of this year's Survey article, this author would note that the Texas Supreme Court recently has elected to hear a case involving a different dispute as to the correct standard of review (coincidentally, in another case out of El Paso). It therefore is not beyond the bounds of possibility that Justice McClure's "red-flagging" of the issue may also eventually bear fruit.

The most recent Survey period contains several interesting interstate custody dispute cases²¹⁴ including one, *Allison v. Allison*,²¹⁵ in which the Corpus Christi Court of Appeals was kind enough to cite a prior year's Survey article.²¹⁶ Unfortunately (or fortunately for the orderly development of the law), as already mentioned, the Uniform Child Custody Jurisdiction Act ("UCCJA") has been replaced by the Uniform Child Custody Jurisdiction Enforcement Act, which is still conveniently located in Chapter 152 of the Family Code. The new law applies to all suits filed after September 1, 1999.²¹⁷

This author tends to agree with Justice Ann Crawford McClure of El Paso, who in a recent case (which in her words "presents a classic exam-

warrant the trial court's decision that a change of primary residence to someone who did not have that track record might be a "positive improvement."

210. *Jenkins*, 16 S.W.3d at 479.

211. *Jenkins v. Jenkins*, 16 S.W.3d 473, 481 (Tex. App.—El Paso 2000, no pet.).

212. *Compare id.* at 477-78 with *In re de la Pena*, 999 S.W.2d 521, 526-27 (Tex. App.—El Paso 1999, no pet.).

213. *See Lindsey v. Lindsey*, 965 S.W.2d 589, 592 (Tex. App.—El Paso 1998, no pet.).

214. *See, e.g., In re E.K.N.*, 24 S.W.3d 586 (Tex. App.—Fort Worth 2000, no pet.).

215. 3 S.W.3d 211 (Tex. App.—Corpus Christi 1999, no pet.).

216. *Id.* at 214 n.4 (citing James W. Paulsen, *Family Law: Parent and Child*, 51 SMU L. REV. 1087, 1113 (1998)).

217. *See McGuire v. McGuire*, 18 S.W.3d 801, 806 (Tex. App.—El Paso 2000, no pet.).

ple of the deficiencies of the . . . UCCJA”²¹⁸ quotes with approval Sampson & Tindall’s warning that “case law under the former Texas version of the Uniform Child Custody Jurisdiction Act regarding continuing jurisdiction will have little, if any, precedent value under the new Act.”²¹⁹ Accordingly, this Survey article will skip these cases in favor of others that may not be quite as interesting, but that have more continuing legal vitality.

Two recent Waco Court of Appeals cases address the availability of mandamus relief for improperly denied transfer motions. The Family Code provides that a case “shall” be transferred if the child has moved and has resided in a new county for at least six months,²²⁰ and that the matter “may” be transferred even if the six-month period has not been satisfied.²²¹ Mandamus is the appropriate remedy when a mandatory transfer motion is improperly denied.²²² In *In re Sanchez*,²²³ the mother filed and served a transfer motion but did not serve the accompanying affidavit until six days before the hearing.²²⁴ She did file a letter explaining why the affidavit was not available.²²⁵ The father did not timely file a controverting affidavit, apparently because he felt he could not respond without knowing the substance of the mother’s allegations.²²⁶ The trial court denied the transfer motion, evidently as a sanction for this irregularity.²²⁷

But the Waco Court of Appeals conditionally granted mandamus.²²⁸ The court noted that a “motion to transfer does not have to be verified, nor” is an affidavit required.²²⁹ Hence, the presence or absence of a supporting affidavit was not dispositive. However, as stated in the Family Code, “a party desiring to contest the motion *must* file a controverting affidavit.”²³⁰ Absent such an affidavit, “the proceeding *shall* be transferred promptly without a hearing.”²³¹ Accordingly, the Waco court held that the mother was not required to file an affidavit, her error in failing to serve the same affidavit promptly was not significant, but the father’s failure to file a controverting affidavit left the trial court with no choice but to transfer.²³² The result is a correct reading of the rule, as is a similar

218. *Id.* at 803.

219. *Id.* (quoting SAMPSON & TINDALL’S TEX. FAM. CODE ANN. § 152.001, *Introductory Comment*, at 408 (2000)).

220. TEX. FAM. CODE ANN. § 155.201(b) (Vernon 1996 & Supp. 2001).

221. Actually, the statute states that “the court may deny the motion” to transfer if the six-month period is not satisfied, which works out to the same thing. *See id.* § 155.202(a).

222. *See, e.g.*, Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987).

223. 1 S.W.3d 912 (Tex. App.—Waco 1999, no pet. h.).

224. *Id.* at 913-14.

225. *Id.* at 915.

226. *Id.*

227. *Id.* at 914.

228. *Id.* at 915.

229. *In re Sanchez*, 1 S.W.3d 912, 915 (Tex. App.—Waco 1999, no pet. h.); TEX. FAM. CODE ANN. § 155.204(a) (Vernon 1996 & Supp. 2001).

230. *Id.* § 155.204(b) (emphasis added).

231. *Id.* § 155.204(a) (emphasis added).

232. *Sanchez*, 1 S.W.3d at 915.

ruling from San Antonio,²³³ but the father's mistake is understandable. It is rather odd for a statute to use the phrase "controverting affidavit" when nothing of equivalent weight exists to be "controverted."²³⁴

The Waco Court of Appeals faced an interesting twist on the transfer issue in *In re Simonek*.²³⁵ The mother had been found in contempt for a number of visitation-related violations, with enforcement suspended on condition of not committing further violations.²³⁶ After repeatedly failing to appear for hearings to address the possible "near-certain" revocation of the suspension of contempt enforcement, the mother filed a transfer motion.²³⁷ Because the father failed to respond by affidavit, the Waco Court of Appeals held that the entire case, including the pending motion to enforce the prior contempt order, must be transferred.²³⁸ In doing so, however, the court expressed the opinion that transfer of a contempt issue made little sense, not only because such a motion more directly concerns the powers of the court than the parent-child relationship, but also because the new judge might not, as the court delicately put it, "have the insight on this issue that the Respondent [judge] has."²³⁹

The court concluded by "urg[ing] the legislature to consider allowing a court with continuing, exclusive jurisdiction to retain jurisdiction over the contempt proceedings where the court has already determined that its orders have been violated."²⁴⁰ One member of the panel wrote separately to voice the opinion that "[t]he proper role of the judiciary does not include becoming an advocate to urge the legislature to make changes in the laws of this state."²⁴¹ The opinion added that "[s]upport of specific legislation is a right to be exercised by the parties and other members of our society."²⁴² This author respectfully disagrees. Judges do not cease to be "members of society" once they put on black robes. Indeed, the Texas Canons of Judicial Conduct explicitly permit a wide variety of "law reform" activity while on the bench.²⁴³ The Waco court appears to have done nothing more than address and highlight a couple of potential problems in the Family Code's transfer provisions, while faithfully applying the law as the court understands it. This hardly seems objectionable.

Several courts have grappled with the ramifications of a "one year final order or dismiss" rule adopted by the 1997 Legislature to ensure that children would not remain under the temporary care of the Department

233. See *In re Kramer*, 9 S.W.3d 449 (Tex. App.—San Antonio 1999, no pet. h.).

234. See TEX. FAM. CODE ANN. § 155.204(a), (b) (Vernon 1996 & Supp. 2001).

235. 3 S.W.3d 285 (Tex. App.—Waco 1999, no pet. h.).

236. *Id.* at 286.

237. *Id.* at 286-87.

238. *Id.* at 288.

239. *Id.* at 289.

240. *In re Simonek*, 3 S.W.3d 285, 289-90 (Tex. App.—San Antonio 1999, no. pet. h.) (Gray, J., concurring).

241. *Simonek*, 3 S.W.3d at 289-90 (Gray, J., concurring.).

242. *Id.* at 290.

243. TEX. CODE JUD. CONDUCT, Canon 4(B), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998 & Supp. 2001) ("Activities to Improve the Law").

of Protective and Regulatory Services (“DPRS”) for longer than one year, subject to an extension not to exceed 180 days.²⁴⁴ Chapter 263 requires either that a “final order” be entered concerning the child that has been placed under the temporary care of DPRS within one year or that the suit must be dismissed. A “final order,” by statute, is one that (1) requires a child to be returned to its parent; (2) names a managing conservator for the child; (3) appoints the DPRS as the managing conservator of the child without terminating the parent-child relationship; or (4) terminates the parent-child relationship and appoints a relative, another person, or the DPRS as managing conservator of the child.²⁴⁵

However, the statute provides two exceptions. First, the trial court may grant a one-time 180-day extension, but the extension order must schedule a new dismissal date.²⁴⁶ Second, the court may render a temporary order that states it is in the best interest of the child to retain jurisdiction, orders DPRS to return the child to the parents or a relative, and orders DPRS to continue to serve as temporary managing conservator of the child and to monitor the child’s placement to ensure that the child is in a safe environment.²⁴⁷ The temporary order must schedule a new dismissal date within 180 days from the date the order is rendered, and it must include specific findings regarding the court’s grounds for issuing the order.²⁴⁸

*In re Neal*²⁴⁹ addressed the issue of whether “constructive compliance” permits the trial court to retain jurisdiction. DPRS argued that court approval of plans which contemplated return of the children to their mother, coupled with return of the children in accordance with a different statutory provision,²⁵⁰ together constitute the equivalent of a temporary order which allowed extension of the dismissal date.²⁵¹ After a careful reading of the statute, the Houston Court of Appeals rejected this argument on the ground that it would require the court to read a third ground for exceptions into an unambiguous statute.²⁵²

The Waco Court of Appeals addressed a similar issue in *In re Bishop*.²⁵³ The trial court granted a continuance that pushed the hearing date over the one-year deadline.²⁵⁴ DPRS asserted that the rescheduling order constituted a statutory extension order.²⁵⁵ In a very thorough analysis of Chapter 263, the Waco Court concluded that the statutory require-

244. TEX. FAM. CODE ANN. § 263.401(a), (b) (Vernon 1996 & Supp. 2001).

245. *Id.* § 263.401(d).

246. *Id.* § 263.401(b)(1).

247. *Id.* § 263.402(a)(1)-(4).

248. *Id.* § 263.402(b)(1)-(2).

249. 4 S.W.3d 443 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

250. The provision permits DPRS to return a child to a parent for custody, care or control with notice to the trial court but without the necessity of a court order. *See* TEX. FAM. CODE ANN. § 263.004(a) (Vernon 1996) (repealed 1999).

251. *Neal*, 4 S.W.3d at 446.

252. *Id.* at 447.

253. 8 S.W.3d 412 (Tex. App.—Waco 1999, no pet.).

254. *Id.* at 415.

255. *Id.*

ments for an extension order were not met.²⁵⁶ A new dismissal date was not set, and in any event the rescheduled date exceeded the 180-day extension allowed under the statute.

In re Ruiz,²⁵⁷ another Waco case, also exemplifies strict judicial construction of the “one-year final order or dismissal rule.” “[A]n order appointing DPRS as temporary managing conservator of [the child was signed] on April 6, 1999.”²⁵⁸ On March 28, 2000, a week before the one-year deadline, “[a] jury returned a verdict recommending termination of the Ruizes’ parental rights.”²⁵⁹ On the same date, the judge made a handwritten docket notation indicating that the decree of termination was to be entered as to both parents per the jury’s verdict.²⁶⁰ Unfortunately, the final decree was not signed until May 2. The Waco court concluded that the docket notation was not a “final order.”²⁶¹ While dismissal of the suit left all parties (most particularly, the child) in a very awkward situation, the Waco court indicated that the termination suit was dismissed without prejudice.²⁶² Therefore, DPRS could re-file, asserting the same grounds for termination. However, the court concluded that “DPRS [could] not again remove [the child] from her home or keep her in foster care absent new facts which support removal.”²⁶³

In an area as broad as family law, space and time constraints dictate that some hard choices must be made as to which cases are covered in detail and which are not mentioned. This Survey period was a particularly difficult one in the area of conservatorship, with interesting cases or clusters of cases in a number of different areas. Before moving on to another area of the Survey, significant “also-rans” deserve brief mention such as: a Corpus Christi decision in which the court held that the Texas grandparent access statute permitted “access” to but not actual “possession” of a child;²⁶⁴ a Dallas opinion that explores some arcane aspects of proceedings under the Indian Child Welfare Act;²⁶⁵ a Beaumont case addressing the trial court’s ability to deviate from a standard possession order,²⁶⁶ accompanied by a lengthy and thoughtful dissent;²⁶⁷ and another Beaumont decision detailing the standards for determining indigency in a contempt proceeding.²⁶⁸

256. *Id.* at 420.

257. 16 S.W.3d 921 (Tex. App.—Waco 2000, no pet.).

258. *Id.* at 923.

259. *Id.*

260. *Id.*

261. *Id.* at 924.

262. *Id.* at 927.

263. *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.—Waco 2000, no pet.). The court concluded that “[t]o hold otherwise would [permit DPRS] to maintain custody of a child in its care indefinitely merely by annually re-filing suit.” *Id.*

264. *In re E.C.*, 28 S.W.3d 825 (Tex. App.—Corpus Christi 2000, no pet.).

265. *See Doty-Jabbaar v. Dallas County Child Protective Serv.*, 19 S.W.3d 870 (Tex. App.—Dallas 2000, no pet.).

266. *C.B.M.*, 14 S.W.3d 855 (Tex. App.—Beaumont 2000, no pet.).

267. *See id.* at 862 (Burgess, J., concurring and dissenting).

268. *See In re Pruitt*, 6 S.W.3d 363 (Tex. App.—Beaumont 1999, no pet. h.).

VI. SUPPORT

A fair number of support-related decisions were issued from Texas appellate courts during the Survey period, at least two of which involve support suits against prison inmates. In *In the Interest of Vega*,²⁶⁹ the Attorney General's office brought a suit to determine paternity, coupled with requests to establish conservatorship and support obligations. The inmate's answer claimed indigency and inability to contribute to support because of his incarceration.²⁷⁰ At trial, the judge ordered support in the amount of \$270 per month and retroactive support in the amount of \$9,759, both apparently based on the statutory presumption that he had wages at least equivalent to the federal minimum.²⁷¹

On appeal, the inmate was able to obtain a remand on the support ruling because no record of the trial proceedings had been made. The Amarillo Court of Appeals noted that the trial court has an affirmative duty to assure that a record is made,²⁷² unless a record is waived by the parties.²⁷³ While the judgment recited that a "record of the proceedings was waived,"²⁷⁴ the appellate court observed that this could not very well have been the case when the inmate was not even present at trial.

Another inmate was not so lucky. In *In the Interest of J.A.G.*,²⁷⁵ the San Antonio Court of Appeals affirmed a support judgment of \$200 per month and \$4,275 in arrearages. In *J.A.G.*, while an electronic record was made of the trial proceedings, it might as well have not been. The inmate filed an affidavit of indigency at trial,²⁷⁶ but neglected to file a new affidavit of indigency "with or before the notice of appeal."²⁷⁷ (While one might reasonably question the wisdom of the scheme that creates this appellate trap, the court of appeals's requirement of a new affidavit is a fair reading of an unfair rule.)²⁷⁸ After the inmate failed to respond to the court of appeals' request for proof that he had made arrangements for transcription of the record, the court of appeals decided the case without a record.²⁷⁹ Not surprisingly, the trial court's judgment was affirmed.

It is worth noting that, on April 5, 2001, the Texas Supreme Court ruled that a court of appeals should give appellants the chance to correct errors in affidavits before ordering that they pay costs for preparation of a record.²⁸⁰ Unfortunately, given the rather specific language of the Texas

269. 10 S.W.3d 720 (Tex. App.—Amarillo 1999, no pet.).

270. *Id.* at 721.

271. *Id.*

272. *Id.* at 722 (citing *Stubbs v. Stubbs*, 685 S.W.2d 643, 645-46 (Tex. 1985)).

273. *Id.*; TEX. FAM. CODE ANN. § 105.003(c) (Vernon 1996 & Supp. 2001) (providing that "[a] record shall be made as in civil cases generally unless waived by the parties with the consent of the court").

274. *Vega*, 10 S.W.3d at 722.

275. 18 S.W.3d 772 (Tex. App.—San Antonio 2000, no pet.).

276. See TEX. R. CIV. P. 145.

277. *J.A.G.*, 18 S.W.3d at 773; TEX. R. APP. P. 20.1(c)(1).

278. See generally *Holt v. F.F. Enter.*, 990 S.W.2d 756 (Tex. App.—Amarillo 1998, pet. denied).

279. *J.A.G.*, 18 S.W.3d at 773.

280. *In re J.W.*, 44 Tex. Sup. Ct. J. 581 (Apr. 5, 2001).

Rules of Appellate Procedure regarding the filing of an affidavit,²⁸¹ it is doubtful that this order for liberal treatment of defective affidavits could be extended to the outright failure to file.

In *J.A.G.*, the inmate also complained that he was denied the right to counsel, pointing to the Family Code provision that requires the trial court to appoint counsel whenever the inmate may be incarcerated as a result of the proceedings.²⁸² The inmate argued that a judgment for support that would just pile up arrearages while he remained in prison would leave him subject to a contempt action immediately upon release.²⁸³ No problem, replied the San Antonio Court of Appeals: "if [the inmate] fails to pay the child support ordered by the court, he will be entitled to counsel at a hearing to enforce the order and to hold him in contempt."²⁸⁴

This author has remarked before on the fundamental absurdity of attempts to secure support judgments against indigent prisoners.²⁸⁵ True, as the San Antonio Court of Appeals reasoned in an earlier opinion, some—or, as that court asserted without authority, "many"—inmates do have assets when they enter prison.²⁸⁶ Moreover, some inmates do earn money while in prison.²⁸⁷ These observations, however, have little force in a case such as *J.A.G.*, in which there is no indication that the inmate's affidavit of indigency submitted at trial was anything other than the simple truth.

To the court's credit, Justice Alma Lopez injected a welcome breath of reality in the form of a brief concurring opinion.

[H]ow can an incarcerated parent who is ordered to pay current and back child support while incarcerated expect anything other than an inability to pay when he is released from prison? Upon release, the parent will undoubtedly face a motion for contempt for failing to pay. This situation seems to place the individual on a legal ferris wheel which promises re-incarceration for failure to pay, leaving the individual hopeless that he or she will ever disembark from the never-ending ride. Has the child, the parent, the legal system, or society, gained anything from this vicious legal circle? I think not. Although I do not have the solution for this all-too-frequent social problem, the result here seems nonetheless unfair and nonsensical. Hopefully, [the inmate] will use his time in prison to rehabilitate himself and to obtain whatever training he can so that he can become a productive and wage-earning member of society.²⁸⁸

281. See TEX. R. APP. P. 20.1(c)(3) (providing for extension of time to file only if a request for such extension is made within 15 days after the deadline).

282. In the *Interest of J.A.G.*, 18 S.W.3d 772, 774 (Tex. App.—San Antonio, no pet.); TEX. FAM. CODE ANN. § 157.163 (Vernon 1996 & Supp. 2001).

283. *J.A.G.*, 18 S.W.3d at 774.

284. *Id.* 18 S.W.3d at 774.

285. See, e.g., James W. Paulsen, *Family Law: Parent and Child*, 51 SMU L. REV. 1087, 1120-21 (1998).

286. *In re M.M.*, 980 S.W.2d 699, 701 (Tex. App.—San Antonio 1998, no pet.).

287. *Id.*

288. In the *interest of J.A.G.*, 18 S.W.3d 772, 774 (Tex. App.—San Antonio, no pet.) (Lopez, J., concurring).

At the risk of overgeneralizing, the fault in cases such as this seems to lie with the Texas Attorney General's Office. Some inmates do have resources that could be used to pay child support and some do earn at least a little money while incarcerated. A per se rule that equates imprisonment with indigency would permit some parents who could pay support to avoid their duty to do so. Those cases, while they should not be ignored, are undoubtedly the exception and not the rule.

Ordinarily, legal "market forces" might be expected to winnow out inmates who can pay from those who cannot, even if generally worded statutes cannot. Most support obligees (or their lawyers) are smart enough to pursue only those turnips that are likely to have a little blood inside. The suits in question, though, are typically brought by the Texas Attorney General's Office, a state agency that—while much improved under General Cornyn—still ranks in the bottom twenty percent of the nation in child support enforcement efforts,²⁸⁹ with a collection rate of less than twenty percent of arrearages.²⁹⁰ In view of the gross mismatch between resources and need within the Attorney General's Office, one might reasonably question whether pursuit of cases such as *Vega* and *J.A.G.*, even if they are easy to win, represents the wisest possible allocation of scarce state resources.

One case issued during the Survey period raises some interesting questions about the application of support guidelines when a support order is modified. In *Friermood v. Friermood*,²⁹¹ the father obtained a reduction in child support on the basis of changed economic circumstances. He nonetheless appealed, unhappy that the trial court did not simply accept his income figures as the basis for an even greater reduction in accord with the support guidelines.²⁹² In affirming the trial court, the Houston Court of Appeals noted that even if the father's evidence of income was uncontradicted, it was not very convincing.²⁹³ The father, a fishing guide who lives with his parents, admitted to more than \$50,000 per year in gross income, though he claimed that various expenses and self-employed personal deductions whittled that down to about \$1,385 in net monthly resources.²⁹⁴ The father's credibility was hurt by prior false interrogatory answers and his admission that he underreported tip income to the IRS.²⁹⁵ The court of appeals also noted some \$5,000 in charitable contributions that could have been made available for child support, as well as intentional underemployment, in that the father made no effort to secure other work when guiding trips were not available.²⁹⁶

289. James Ridgeway, *Mondo Washington*, VILLAGE VOICE, Apr. 19-25, 2000, at 42.

290. Editorial, *Statistics Improve but Service Lacking. Given Its Abysmal Record, The Child Support Unit's Performance Had Nowhere to Go But Up*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2000, at 4B.

291. 25 S.W.3d 758 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

292. *Id.* at 760.

293. *Id.* at 760-761.

294. *Id.* at 759.

295. *Id.* at 760.

296. *Friermood*, 25 S.W.3d at 760-61.

So far, the case is unexceptional. What is unusual about *Frierwood* is that the court of appeals paid no attention to the support guidelines in deciding whether the trial court made the correct decision. Rather, the *Frierwood* court cited the Family Code's provision that the trial court "may consider the child support guidelines . . . to determine whether there has been a material or substantial change of circumstances . . . that warrants a modification of an existing child support order"297 For this reason, said the court of appeals, reference to support guidelines in a modification proceeding is "discretionary, not mandatory."²⁹⁸ In a somewhat schizophrenic twist on this conclusion, however, the appeals court also ruled that the trial court's failure to make requested fact findings justifying deviation from presumptive support figures was not an error because the father's evidence relating to income "was not well-supported or without contradiction";²⁹⁹ thus, it was "not . . . conclusively established that . . . the court materially varied from support guidelines."³⁰⁰ The court further stated, questioning one of its own prior decisions,³⁰¹ that "even if the court had been required to make findings, the trial court was within its discretionary bounds, and under the facts delineated, we hold any error in failing to do so was harmless."³⁰² One might reasonably ask why, if the Texas Court of Appeals is confident in the correctness of its conclusion that reference to support guidelines is only optional in a modification proceeding, any of this analysis was necessary.

The *Frierwood* court is correct in its observation that the Family Code says only that a court "may" consider the support guidelines in a modification proceeding.³⁰³ Other courts have on occasion engaged in similar reasoning.³⁰⁴ Nonetheless, the *Frierwood* court's conclusion seems at odds with the spirit, and perhaps even the letter, of the Family Code. Subchapter C of Chapter 154 of the Code begins with a *general* provision stating that "[t]he child support guidelines in this subchapter are intended to guide the court in determining an equitable amount of child support."³⁰⁵ That provision does *not* go on to say anything like "but only in an initial child support order, and not orders entered as a result of a later

297. *Frierwood v. Frierwood*, 25 S.W.3d 758, 760 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (quoting TEX. FAM. CODE ANN. § 156.402(a) (Vernon 1996 & Supp. 2001)) (emphasis is of the court of appeals).

298. *Id.*

299. *Id.* at 761.

300. *Id.*

301. *Id.* at 761 n.2 (citing *Morris v. Morris*, 757 S.W.2d 466, 467 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (stating that the requirement to make guideline findings, on proper request, is mandatory); 25 S.W.3d at 761 n.2).

302. *Frierwood*, 25 S.W.3d at 761 (footnote omitted).

303. TEX. FAM. CODE ANN. § 156.402(a) (Vernon 1996 & Supp. 2001).

304. See, e.g., *Escue v. Escue*, 810 S.W.2d 845, 848 (Tex. App.—Texarkana 1991, no writ) (stating that "[i]n modification of existing child support orders . . . the trial court's use of the percentage guidelines is discretionary, not mandatory"); *MacCallum v. MacCallum*, 801 S.W.2d 579, 584 (Tex. App.—Corpus Christi 1990, no writ) (stating that "[i]n modification of previous orders . . . the use of the rebuttable [guidelines] presumption is discretionary, not mandatory").

305. TEX. FAM. CODE ANN. § 154.121 (Vernon 1996 & Supp. 2001).

modification proceeding.” Likewise, the Family Code provision requiring the trial court to make findings of fact on proper request does not distinguish between initial and modification orders.³⁰⁶ In addition, neither the provisions stating that application of the guidelines is presumptively reasonable and in the best interest of the child,³⁰⁷ or that the guidelines are presumptively to be applied to obligors with monthly net resources less than \$6,000,³⁰⁸ make a distinction between the different orders, as would seem to have been shown in Mr. Frierwood’s case. Moreover, the support guidelines are to be used in calculating amounts presumptively due in proceedings to collect retroactive support.³⁰⁹ Given the central place of support guidelines in the setting of an initial and a retroactive support order, as well as the generality of the language employed, one might reasonably question whether the Legislature could have intended to simply throw the guidelines out the window whenever a modification request comes up.

To the contrary, even the Family Code’s modification provisions provide a central role for the support guidelines. In general, a support order may be modified on a showing that “the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order’s rendition.”³¹⁰ In 1997, however, the Legislature also provided that a modification motion could be filed if actual support is more than twenty percent off the guideline amount and more than three years have elapsed since the order was rendered or last modified.³¹¹ Moreover, if an existing support order does not substantially conform to the guidelines, whether or not the original deviation was justified, the Legislature has provided that “the court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child.”³¹² These provisions certainly suggest that trial courts are not expected to simply disregard the guidelines in a modification proceeding.

Indeed, even the language relied on by the *Frierwood* court does not support that court’s central conclusion. The court emphasized the permissive “may” in Section 156.402(a) as its basis for deciding that a trial court is free to disregard the guidelines in setting support.³¹³ What the

306. *Id.* § 154.130(a) (stating that “in rendering an order of child support, the court shall make the findings required”).

307. *Id.* § 154.122(a) (stating that “[t]he amount of a periodic child support payment established by the child support guidelines . . . is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child”).

308. *Id.* § 154.125(b) (stating that “[i]f the obligor’s monthly net resources are \$6,000 or less, the court shall presumptively apply the following schedule in rendering the child support order”).

309. *Id.* § 154.131.

310. *Id.* § 156.401(a)(1).

311. *Id.*

312. *Id.* § 156.402(b).

313. *Frierwood v. Frierwood*, 25 S.W.3d 758, 760 (Tex. App.—Houston [1st Dist.] 2000, no pet.); § 156.402(a).

court evidently forgot, however, is that a modification proceeding is a two-step process. First, the court generally must find that there has been a material and substantial change in circumstances since the prior order.³¹⁴ Second, the court must determine what amount of support would be appropriate. Section 156.402(a) says only that “[t]he court *may* consider the child support guidelines . . . to determine whether there has been a material or substantial change of circumstances,”³¹⁵ that is the first step in modification. The language does not say anything, permissive or otherwise, about whether or not a court should start with the guidelines in taking the second step, i.e., determining the actual amount of support.³¹⁶

Notably, the *Friermood* court makes no attempt to explain why the Legislature might have intended the guidelines to be purely optional in modifying support orders, even though they are central to the initial setting of support. This author can think of no sound public policy that would compel such a conclusion. Of course, a simple abuse of discretion standard, coupled with no legal need for the trial court to find the amount of the obligor’s monthly net resources or to justify deviation from the guideline percentage of that amount, would cut down on the number of successful appeals. At the same time, however, it would undoubtedly increase the number of modification proceedings as parties who are uncomfortable with guideline amounts would simply wait a few months and seek a modification of the initial order, without the guidelines.

It may be worth noting that this author is not the only person with a less than charitable view of the soundness of *Friermood*. In the Family Law Section’s squib on this case, David Gray has questioned whether “a trial court can just ignore the guideline percentages to pick a . . . figure from the air,”³¹⁷ adding that “[i]f the discretionary use of such [guidelines] becomes the vogue, the goal of the guidelines is destroyed.”³¹⁸ A supplemental note by Professor John J. Sampson adds, after analysis substantially similar to this author’s, that “the careless statement made by the 14th Court that application of guidelines are just discretionary, is dead wrong.”³¹⁹

314. As just explained in *supra* text accompanying note 284, the Family Code was amended in 1997 to make a twenty percent deviation from guidelines another basis for securing a modification hearing.

315. TEX. FAM. CODE ANN. § 156.402(a) (Vernon 1996 & Supp. 2001) (emphasis added).

316. It is not at all clear from the opinion whether the *Friermood* court understood the requirement that a material and substantial change of circumstances generally must be shown to justify modification of a support order. Although the case has, in the court’s words, a “confusing procedural history,” the modification motion was filed only three months after the order sought to be modified. *Friermood*, 25 S.W.3d at 759 n.1. Given the fact that the obligor “had been a self-employed fishing guide for many years,” one wonders what sort of changed circumstances were present. *Id.* The opinion offers no clue.

317. David N. Gray, *Contributing Editor’s Comment*, 2000-4 STATE BAR SEC. REP. FAM. L. 38.

318. *Id.*

319. John J. Sampson, *Editor’s Note*, 2000-4 STATE BAR SEC. REP. FAM. L. 38.

One might even reasonably question whether the trial court in *Friermood* saw its duty in the same light as did the court of appeals. It is difficult to imagine how a court that is just "ballparking" a case without reference to support guidelines or exact income figures would come up with the exceedingly precise amount of \$662.80 per month in support. Why not \$650, \$675, or even a nice round number like \$700?

M.W.T.,³²⁰ a case already mentioned for a parentage issue, also raises the question of when voluntary arrangements can estop a later legal claim for support. *M.W.T.*'s mother brought suit shortly before the child turned eighteen, seeking child support retroactive to birth as well as post-majority support on the ground of disability.³²¹ The father, who apparently had never contested paternity, already had paid some \$46,000 over the years.³²² In an effort to avoid what turned out to be a lump sum judgment for an additional \$43,000 or so, the father argued that the mother's eighteen-year pattern of conduct constituted laches or estoppel.³²³

The San Antonio Court of Appeals disposed of laches in short order,³²⁴ but considered the estoppel argument in more detail. In the child support context, estoppel consists of five elements:

- 1) a false representation or concealment of material facts; 2) made with knowledge, actual or constructive, of those facts; 3) to a party without knowledge, or the means of knowledge, of those facts; 4) with the intention that it should be acted on; and 5) the party to whom it was made must have relied or acted on it to his prejudice.³²⁵

The San Antonio court felt that the father had problems establishing either the first (false representation) or fifth (detrimental reliance) elements of the defense. The court acknowledged case authority to the effect that silence in the face of a duty to speak up could constitute a false representation.³²⁶ Nonetheless, after a confusing effort to distinguish the father's authority,³²⁷ the court suggested that the mother had no duty to

320. 12 S.W.3d 598 (Tex. App.—San Antonio 2000, pet. denied).

321. *Id.* at 600.

322. *Id.* at 601.

323. *Id.* at 602.

324. The court observed that laches is not available as a defense to a statutory cause of action. *See id.* at 604 (citing *In re Moragas*, 972 S.W.2d 86, 89-90 (Tex. App.—Texarkana 1998, no pet.). In addition, because laches and estoppel share the common element of detrimental reliance, the father's failure to demonstrate such reliance as to one defense was fatal to the other. *See id.*

325. *M.W.T.*, 12 S.W.3d 598, 603 (Tex. App.—San Antonio 2000, pet. denied) (quoting *Moragas*, 972 S.W.2d at 89-90).

326. *Id.* (citing *Smith v. Nat'l Resort Cmty., Inc.*, 585 S.W.2d 655, 658 (Tex. 1979) (stating that "where there is a duty to speak, silence may be as misleading as a positive misrepresentation of existing facts").

327. The opinion correctly notes that *Kawazoe v. Davila*, 849 S.W.2d 906 (Tex. App.—San Antonio 1993, no pet.) approved an estoppel defense when the mother had represented to the father for thirteen years that his parental rights had been terminated. *M.W.T.*, 12 S.W.3d at 603. *Kawazoe*, however, also has strong undertones of fraud, with allegations that the mother secured a divorce after citation by publication, despite evidence that the father's whereabouts were easily ascertainable at all times. *Kawazoe*, 849 S.W.2d 906.

inform the father that his payments were inadequate.³²⁸ Somewhat more convincingly, the court also cited evidence suggesting that the father had been aware that his voluntary contributions were not adequate for the child's needs.³²⁹

M.W.T. is also one of the few Texas cases interpreting the Family Code's provisions for support of an adult disabled child.³³⁰ The decision ought to raise a few eyebrows around the state, at least until one factors in the limitations imposed by the appropriate standards for appellate review. For a court to order continued support of a disabled child past the age of eighteen, the child or parent seeking support must prove that the child "requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support"³³¹ and that the disability existed before the child's eighteenth birthday.³³²

The "disability" at issue in *M.W.T.* was Oppositional Defiant Disorder, or ODD. This condition is fairly common; by one estimate, it affects some five to fifteen percent of all school-age children,³³³ and the incidence is undoubtedly higher among children who appear in family courts.³³⁴ An obvious problem when considering this psychological disorder to be a "disability" for Family Code purposes is that the individual symptoms of ODD, which commonly is found in association with Attention Deficit/Hyperactivity Disorder,³³⁵ read like a description of the less

M.W.T. distinguished the second decision, *Moragas*, on the ground that the mother in *Moragas* "knew of a child support order, but did not communicate its existence to the father for thirteen years." *M.W.T.*, 12 S.W.3d at 603. "Here," the *M.W.T.* court concluded, "there was no child support order, and [the mother] did not take steps to mislead [the father] as to his duty to provide for *M.W.T.*." *Id.* What the *M.W.T.* court inexplicably fails to state is that the *Moragas* court did not find any estoppel, even under what arguably were more extreme facts. See *Moragas*, 972 S.W.2d at 93 (rendering judgment for the mother in the amount of \$55,642.47).

328. The opinion states that the father "does not argue that [the mother] had a duty at a particular time to inform him of the amount he should have paid." *M.W.T.*, 12 S.W.3d at 603.

329. The opinion is not completely clear on this point. The court states only that the mother "testified that she had communicated her son's needs to [the father] in the past." *Id.* These needs presumably exceeded the sum of the voluntary payments.

330. See TEX. FAM. CODE ANN. §§ 154.301-309 (Vernon 1996 & Supp. 2001). Actually, *M.W.T.* is the *only* recent published decision of which this writer is aware that contains significant discussion of the "adult disabled child" statutes.

331. *Id.* § 154.302(a)(1).

332. *Id.* § 154.302(a)(2).

333. AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, CHILDREN WITH OPPOSITIONAL DEFIANT DISORDER (1999) (FACTS FOR FAMILIES No. 72), available at <http://www/aacap.org/publications/factsfam/72.htm> (last visited Jan. 30, 2001) (hereinafter FACTS FOR FAMILIES No. 72).

334. As one writer puts it, ODD is "substantially associated with disrupted parenting." Russell A. Barkley, *Commentary on the Multimodal Treatment Study of Children With ADHD*, 6 J. ABNORMAL CHILD PSYCH. 595 (2000).

335. A school psychologist in Austin, Texas, suggests that more than 60 percent of children with ADHD meet the diagnostic criteria for ODD. See *Seek Appropriate ADHD Assessment Amid OCR Investigation, Prescription Controversy*, SPECIAL EDUCATOR, Nov. 10, 2000.

desirable attributes of many “normal” adolescents:³³⁶ “excessive arguing with adults,” “deliberate attempts to annoy or upset people,” and “mean and hateful talking when upset.”³³⁷

One can reasonably question whether ODD was quite what the Legislature had in mind when it provided for the continuing support of adult disabled children. This author’s limited review of the literature uncovered nothing to suggest that ODD typically renders a person permanently incapable of self-support.³³⁸ Moreover, the statute contemplates a disability that requires “substantial care and personal supervision,” something that an adult with ODD would (almost by definition) actively resist.³³⁹

In all likelihood, though, *M.W.T.* does not presage a wave of ODD-based claims for lifetime child support. The father in this case evidently did not put forward a controverting expert, and his case was not helped by his reported advice to the mother that the child was retarded and “you need to get that child on SSI so he’ll have some care for him after he turns 18.”³⁴⁰ The San Antonio Court of Appeals seemed quite skeptical of the ultimate merits of the ODD claim, repeatedly emphasizing the deferential standard of review (“greater than that of a scintilla”)³⁴¹ and concluding—with italics for emphasis—that “[a]lthough another expert might disagree as to the *severity* of *M.W.T.*’s disability, we did not locate evidence that would *clearly* support a finding other than that reached by the trial court.”³⁴²

In more mundane applications of “child support past age eighteen” law, two recent decisions dealt with the Family Code’s provision for continuing support “[i]f the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma.”³⁴³

336. *M.W.T.*, 12 S.W.3d 603, 605 (Tex. App.—San Antonio 2000, pet. denied) (stating that “[a]lthough similar symptoms of anger might be seen in a ‘typical’ teenage male, [the wife’s expert] explained that the question is one of severity”).

337. The full list of symptoms, any four or more of which would indicate possible ODD, include:

- frequent temper tantrums
- excessive arguing with adults
- active defiance and refusal to comply with adult requests and rules
- deliberate attempts to annoy or upset people
- blaming others for his or her mistakes or misbehavior
- often being touchy or easily annoyed by others
- frequent anger and resentment
- mean and hateful talking when upset
- seeking revenge.

FACTS FOR FAMILIES No. 72, *supra* note 334.

338. This requirement would seem to be a fair reading of the statute. See *supra* text accompanying note 332.

339. To reiterate, one of the symptoms of ODD is “active defiance and refusal to comply with adult requests and rules.” FACTS FOR FAMILIES No. 72, *supra* note 334.

340. *M.W.T.*, 12 S.W.3d at 605.

341. *Id.*

342. *M.W.T.*, 12 S.W.3d 598, 605 (Tex. App.—San Antonio 2000, pet. denied) (emphasis added).

343. TEX. FAM. CODE ANN. § 154.002(a) (Vernon Supp. 2000).

In *Crocker v. Attorney Gen. of Texas*,³⁴⁴ the Attorney General's office sought an order requiring support payments through high school graduation. Relying on a 1991 Texas Supreme Court opinion, the obligor argued that the trial court ceased to have jurisdiction because the action was not brought before the child turned eighteen. The Austin Court of Appeals, however, noted that the statute had been amended in 1995 to provide that "the request for a support order through high school graduation may be filed before or after the child's 18th birthday."³⁴⁵ In answer to the obligor's argument that this language covered only a request for an original order, not modification of an existing order, the court pointed out that the preceding subsection referred specifically to the trial court's power to "render an original support order or modify and existing order."³⁴⁶

Crocker also argued that he should not be obliged to pay support past the child's eighteenth birthday because the child was not "fully enrolled" in courses leading to graduation. In general, courts have seemed unwilling to tie the definition of "fully enrolled" down too tightly. Courts have rejected the notion that any "arbitrary number of hours" counts as full enrollment;³⁴⁷ thus, one hour may suffice if that is all the student needs to graduate.³⁴⁸ No particular course schedule is required; a learning-disabled student taking a special curriculum outside the high school is fully enrolled if completion of the program results in a high school diploma.³⁴⁹ Nor is poor performance dispositive; in one recent case, a student who had been temporarily expelled and was receiving failing grades in four of six courses at the time of the hearing was nonetheless deemed fully enrolled.³⁵⁰

While the *Crocker* opinion is not altogether clear, the obligor apparently was suggesting that the child's schedule could have been rearranged for a prompter graduation and that his participation in the school's jobs program also led to an unnecessarily slow graduation schedule. The court stated that "[w]e analyze whether [the child] is fully enrolled, not on the basis of how many hours of class he is taking, but on how many hours he would be required to take if seeking to graduate."³⁵¹ The court concluded: "Although [the child] could theoretically have graduated in less than four years by not participating in the jobs program, a curriculum that is adapted to his particular educational needs does not disqualify him from being fully enrolled."³⁵²

A similar issue was addressed by the Fort Worth Court of Appeals in *In*

344. 3 S.W.3d 650 (Tex. App.—Austin 1999, no pet.).

345. TEX. FAM. CODE ANN. § 154.002(b) (Vernon Supp. 2000).

346. *Id.* § 154.002(a) (Vernon Supp. 2000).

347. *Ewing v. Holt*, 835 S.W.2d 274, 275 (Tex. App.—Fort Worth 1992, no writ).

348. *Id.*

349. *In re Frost*, 815 S.W.2d 890 (Tex. App.—Amarillo 1991, no writ).

350. *In re A.B.*, 994 S.W.2d 229 (Tex. App.—Eastland 1999, no pet.).

351. *Crocker v. Attorney Gen. of Tex.*, 3 S.W.3d 650, 653 (Tex. App.—Austin 1999, no pet.).

352. *Id.* at 653-54.

re *J.A.B.*,³⁵³ with a similar result. The fact that the child had accumulated enough unexcused absences to preclude credit in at least four of six courses was not dispositive. “‘Full enrollment’ does not require the child to make a good faith effort to attend school and pass, rather, it requires that a child’s name appear on the rolls of the school district, that the child be registered for the normal number of classes, and that he has not been withdrawn or expelled.”³⁵⁴

*Marriage of Cannaliato*³⁵⁵ represents an unsuccessful effort to escape a support obligation by a “creative” reading of an inartfully drafted phrase. The obligor was required to pay support “on the 15th day of September, 1979, and a like payment being due and payable on each 1st and 15th day of the month thereafter until the youngest child reaches the age of 18 years or is otherwise emancipated.”³⁵⁶ When a motion for arrearages was brought, the obligor explained that he had interpreted the order’s language as requiring only three payments, on September 15, 1979 and on the first and fifteenth day of “the month thereafter,” that is, on October 1 and 15, 1979. It is difficult to say what aspect of this opinion is the most surprising: the fact that the court of appeals engaged in a careful and lengthy explanation of exactly why the obligor was wrong when the statement is read in its entirety³⁵⁷ (as is proper)³⁵⁸, the fact that the court was able to find another case almost precisely on point,³⁵⁹ or the fact that the obligee apparently waited about twenty years before inquiring as to why no support checks were coming. In any event, it is important to remember that the result might not have been the same in a contempt proceeding.³⁶⁰

353. 13 S.W.3d 813 (Tex. App.—Fort Worth 2000, no pet.).

354. *Id.* at 816.

355. 28 S.W.3d 96 (Tex. App.—Texarkana 2000, no pet.).

356. *Id.* at 97.

357. The court’s exegesis of the language is worth quoting, if only because Justice Ben Z. Grant, one of the Texas judiciary’s genuine literary figures, obviously put some effort into it:

[W]e must examine the paragraph in its entirety to determine its meaning. The first portion of the paragraph states who is ordered to pay whom; the next portion of the paragraph states how much is to be paid per month; the next portion of the paragraph sets forth the amount of the installments and the first date an installment is due; the next portion of the paragraph sets forth the dates of the month thereafter when the payments will be due; and the last portion of the paragraph sets forth the length of time such payments will be made.

Id. at 98. For those who might not already know this literary tidbit, Justice Grant is a published playwright whose credits include *Kingfish* (with Larry L. King). See BEN Z. GRANT BIOGRAPHICAL INFORMATION, available at http://www/6thcoa.courts.state.tx.us/benz_.htm (last visited Feb. 10, 2001).

358. See, e.g., *Wilde v. Murchie*, 949 S.W.2d 331, 333 (Tex. 1997).

359. See *Ex parte Johns*, 807 S.W.2d 768 (Tex. App.—Dallas 1991, no writ) (contempt action with respect to an order that read in part, “a like installment due on each 15th and 1st day of the month thereafter”).

360. See, e.g., *Ex parte Acker*, 949 S.W.2d 314 (Tex. 1997) (stating that a divorce decree providing that payments should be made beginning “June 1” could not be enforced by contempt because the beginning year was not sufficiently certain); see also Paulsen, *supra*

Speaking of contempt, at least four recent cases involve the reversal of contempt orders for elementary defects in drafting or execution. In *Ex parte Ustick*,³⁶¹ the commitment order used passive language (“the Court . . . ORDERS him committed”)³⁶² rather than directing the sheriff or some like officer to take and detain the contemnor, as required by the Texas Supreme Court.³⁶³ In *In re Aarons*,³⁶⁴ the trial court forgot to inform the prospective contemnor of his right to counsel, as required by the Family Code.³⁶⁵ In *Ex parte Seligman*,³⁶⁶ the order was not signed until five days after the contemnor was committed to jail. While a reasonable delay to permit execution of the paperwork is permitted, else the contemnor could just meander out of the courtroom and disappear,³⁶⁷ the San Antonio Court of Appeals felt that jailing someone for three business days and a weekend without a written order was a bit much. In *In re Markowitz*,³⁶⁸ the trial court signed a commitment order but forgot to reduce the underlying contempt order to writing for seven days. The Houston Court of Appeals likewise held this delay entitled the contemnor to a “get out of jail free” card. *Markowitz* does have one point of interest, at least to those who appreciate irony: while the Court of Appeals properly criticized the trial court’s seven-day delay in getting the contempt order reduced to writing, it took *two years* to get the appellate opinion into the case reports.³⁶⁹

Two cases issued during the Survey period address questions relating to the calculation and collection of arrearages. In *Curtis v. Curtis*,³⁷⁰ the Attorney General’s office and mother brought a suit for arrearages stretching back some fourteen years. While the mother initially claimed that the father-obligor had paid no more than about \$1000 over the years, it developed during discovery and trial that the obligor had records establishing payments of more than \$18,000 as well as unsubstantiated claims for additional payments. Nonetheless, the mother appealed a \$7,600 ar-

note 263 at 1118 (summarizing *Acker*); but see *Ex parte Johns*, 807 S.W.2d 768 (permitting enforcement by contempt under these circumstances).

361. 9 S.W.3d 922 (Tex. App.—Waco 2000, no pet. h.).

362. *Id.* at 924.

363. *Ex parte Hernandez*, 827 S.W.2d 858, 858 (Tex. 1992) (per curiam) (criticizing a contempt order because it “contain[ed] no directive to the sheriff or other appropriate officer”).

364. 10 S.W.3d 833 (Tex. App.—Beaumont 2000, no pet.).

365. TEX. FAM. CODE ANN. § 157.163(b) (Vernon 1996 & Supp. 2001).

366. 9 S.W.3d 452 (Tex. App.—San Antonio 1999, no pet.).

367. See, e.g., *Ex parte Amaya*, 748 S.W.2d 224, 225 (Tex. 1988) (stating that a contemnor may “be detained by the sheriff or other officer for a short and reasonable time while the judgment of contempt and the order of commitment are being prepared for the judge’s signature”).

368. 25 S.W.3d 1 (Tex. App.—Houston [14th Dist.]1998, no pet.).

369. *Markowitz* issued September 4, 1998. See 25 S.W.3d at 1. The cases immediately preceding and following *Markowitz* in the *South Western Reporter* issued or were released for publication on August 29, 2000 and September 6, 2000, respectively. See *Dorsey v. State*, 24 S.W.3d 921 (Tex. App.—Beaumont 2000, no pet.); *Morgan v. Anthony*, 25 S.W.3d 5 (Tex. App.—Beaumont 1999, *rev’d*, 27 S.W.3d 928 (Tex. 2000)). West Publishing Company denies any responsibility for this two-year delay.

370. 11 S.W.3d 466 (Tex. App.—Tyler 2000, no pet.).

rearage judgment, claiming it should have been much larger. The Tyler Court of Appeals remanded, essentially concluding that neither party had done a very good job of establishing a case. Along the way, the Tyler court offered a useful refresher course on proof burdens in an arrearage proceeding.

Initially, the obligee-mother was required to prove the amount of arrearages.³⁷¹ Assuming an amount of arrearages could be established with certainty,³⁷² the obligor-father would then have the burden of establishing the amount of any lawful offsets.³⁷³ In this case, total support for the period in question should have been about \$40,000. The father-obligor testified, with records to support the great majority of his claim, that he had paid about \$20,000 over the years. The mother's testimony was far from credible, and she had the burden to establish arrearages as a matter of law, because she was appealing an issue on which she had the burden of proof at trial.³⁷⁴ Nonetheless, given this limitation in the obligor-father's own testimony, the court of appeals was able to conclude there was far more than \$7,600 in arrearages owing. The reduction therefore had to include some amount in offsets for support of one child who lived with the obligor-father for more than two years and on which the father had the burden of proof. The father, however, had not established the amount of support during this period with any degree of particularity. The entire case therefore was remanded for a new trial.

As a general matter, a judgment for arrearages is to be paid off at a rate of an additional twenty percent of monthly net resources or within two years, whichever results in a faster payoff.³⁷⁵ In *In re Chambers*,³⁷⁶ the obligee argued that the trial court erred in ordering arrearages in excess of \$20,000 to be paid off at a rate of only \$150 per month. This amount, she argued, would not even keep up with interest accumulating on the arrearages. In affirming the trial court's order, the Texarkana Court of Appeals pointed out that there are at least two statutory restrictions on the rate of arrearage payoff, the general prohibition on support payments in excess of fifty percent of monthly net resources³⁷⁷ and the proviso that arrearage payoff could be extended for "a reasonable length

371. See TEX. FAM. CODE ANN. § 157.263(a) (Vernon 1996 & Supp. 2001) (stating that "[i]f a motion for enforcement of child support requests a money judgment for arrearages, the court shall confirm the amount of arrearages and render one cumulative judgment"). This would fall within the general litigation rule that the moving party must establish facts justifying relief by a preponderance of the evidence.

372. The Tyler appeals court emphasized that the trial court "acts as a mere scrivener" in this regard. *Curtis*, 11 S.W.3d at 471 (quoting *Lewis v. Lewis*, 853 S.W.2d 850, 854 (Tex. App.—Houston [14th Dist.] 1993, no writ)).

373. See TEX. FAM. CODE ANN. § 157.008(a), (b) (Vernon 1996 & Supp. 2001) (providing that "[a]n obligor may plead as an affirmative defense . . . that the obligee voluntarily relinquished to the obligor actual possession and control of a child" and stating that "actual support must have been supplied").

374. See, e.g., *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

375. TEX. FAM. CODE ANN. § 158.003(b) (Vernon Supp. 2000).

376. 5 S.W.3d 341 (Tex. App.—Texarkana 1999, no pet.).

377. TEX. FAM. CODE ANN. § 158.009 (Vernon Supp. 2000).

of time" if the court were to find that the obligor or his family would "suffer unreasonable hardship" from another schedule.³⁷⁸ The court rejected obligee's argument that "reasonable length of time" must be interpreted to require a payment schedule that would at least keep pace with accumulating interest. Because no reporter's record was brought forward, the court was required to assume either that a more aggressive payoff schedule would have violated the fifty percent ceiling or that a showing of hardship had been made and that the payoff arrangements were reasonable.

*In re A.D.*³⁷⁹ is a fitting end to this section of the survey, as it involves the outer time limit on a suit for support. The Attorney General's office sought an administrative writ of withholding, relying on the statute's provision that such an order could be sought "at any time" to trump the Family Code's then-current provision that suits for arrearages were subject to a four-year limitations period. The Beaumont Court of Appeals ruled that because the suit would have been time-barred under the original statute some four years before the administrative proceeding was brought,³⁸⁰ issuance of a withholding order would violate the Texas Constitution's prohibition on retroactive laws.³⁸¹

The underlying issue is one that has elicited several different responses from the courts that have considered it to date. As summarized in the Family Law Section's newsletter,³⁸² other courts have previously ruled that Family Code provisions relating to the time to sue for support are only a jurisdictional limitation which impairs no vested rights,³⁸³ are a statute of limitations that impair no vested rights because only a money judgment is involved,³⁸⁴ or are both jurisdictional and a statute of limitations.³⁸⁵ The Family Law Section's summary of *A.D.* concludes with the observation that "there are six appellate opinions from six different courts which all say different things which sometimes conflict with each other,"³⁸⁶ and the wish that "[m]aybe *A.D.* will clarify the law if the Supremes will grant review and give us the 'true rule.'"³⁸⁷ It appears this wish may be granted, as the Texas Supreme Court granted the state's pe-

378. *Id.* § 158.007.

379. 8 S.W.3d 466 (Tex. App.—Beaumont 2000, pet. pending).

380. See Act of Sept. 22, 1986, 69th Leg., 2d C.S., Ch. 10, §§ 6, 7, 1986 Tex. Gen. Laws 17, repealed by Act. of Apr. 20, 1995, 74th Leg., R.S., Ch. 20, § 2(1), 1995 Tex. Gen. Laws 282 (former Family Code § 14.41).

381. See TEX. CONST. ANN. art. I, § 16 (stating that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made").

382. David N. Gray, *Contributing Editor's Comment*, 2000-2 STATE BAR SEC. REP. FAM. L. 41-42.

383. See *In re Digges*, 981 S.W.2d 445 (Tex. App.—San Antonio 1998, no pet.); *In re Kuykendall*, 957 S.W.2d 907 (Tex. App.—Texarkana 1997, no writ); *In re M.J.Z.*, 874 S.W.2d 724 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Sandford v. Sandford*, 732 S.W.2d 449 (Tex. App.—Dallas 1987, no writ).

384. See *ex parte Wilbanks*, 722 S.W.2d 221 (Tex. App.—Amarillo 1986, no writ).

385. See *In re M.J.Z.*, 874 S.W.2d at 726 (Wilson, J., concurring).

386. Gray, *supra* note 335 at 42.

387. *Id.*

tition for review February 8, 2001.³⁸⁸

VII. TERMINATION AND ADOPTION

On the subject of termination of parental rights, one case issued during the Survey period tops all others.

By granting a petition for review in *In re C.H.*,³⁸⁹ the Texas Supreme Court has signaled its willingness to resolve a controversy that has been brewing among the courts of appeals for more than twenty years. The question is simply stated: when U.S. Supreme Court decisions and the Family Code require that termination of parental rights be proved under a "clear and convincing" standard, are appellate courts required to do something more than apply the same standard of factual sufficiency review that they would use in a normal civil "preponderance of the evidence" case? The El Paso court thought so; but the Attorney General's office disagrees.

It would be both inappropriate and unnecessary for this author to indulge in much comment on the issues raised by *C.H.*; inappropriate because he has been engaged as counsel at the Texas Supreme Court level and unnecessary because he has previously expressed his opinions on the underlying questions in print.³⁹⁰ It is worth noting, however, that all—or all but one, depending on how one looks at it—of Texas' fourteen courts of appeal have weighed in on the issue, and a number have changed their positions over the years. The current box score, as this author sees it, is about eight to five in favor of some sort of different appellate treatment, with Eastland yet to formally weigh in. More precisely, five courts of appeal apply some sort of heightened standard of review,³⁹¹ five currently reject any differentiated approach,³⁹² and three nominally apply the

388. See 44 Tex. Sup. Ct. J. at 421-22 (Feb. 8, 2001).

389. 25 S.W.3d 38 (Tex. App.—El Paso 2000, pet. granted).

390. See, e.g., James W. Paulsen, *Family Law: Parent and Child*, 51 SMU L. REV. 1087, 1122-27 (1998).

391. The courts are Beaumont, Dallas, El Paso, San Antonio, and Waco. See, e.g., *In re A.P.*, 42 S.W.3d 248 (Tex. App.—Waco 2001, no pet. h.) (stating that "[t]his intermediate standard of review is necessary to protect the constitutionally protected interests involved in a termination of parental rights"); *In re K.C., Jr.*, 23 S.W.3d 604, 605 (Tex. App.—Beaumont 2000, pet. filed) (quoting *In re B.B.*, 971 S.W.2d 160, 164 (Tex. App.—Beaumont 1998, pet. denied)) (stating that "[t]o withstand a challenge of factual sufficiency, the evidence must permit a rational trier of fact to hold a firm belief or conviction as to the truth of the allegations sought to be established"); *In re B.R.*, 950 S.W.2d 113, 118 (Tex. App.—El Paso 1997, no writ) (stating that "where the burden of proof at trial is by clear and convincing evidence, we will apply the higher standard of factual sufficiency review first articulated in *Neiswander*"); *Neiswander v. Bailey*, 645 S.W.2d 835, 835 (Tex. App.—Dallas 1982, no writ) (stating that "[t]he standard of review should . . . be an intermediate one").

392. The courts are Corpus Christi, the two Houston courts, Texarkana, and possibly Tyler. See, e.g., *In re V.R.W.*, 41 S.W.3d 183, 191 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.) (stating that "we decline to apply a heightened standard of review to our legal sufficiency analysis"); *In re King*, 15 S.W.3d 272, 275 (Tex. App.—Texarkana 2000, pet. denied) (stating that "the clear and convincing standard of proof at the trial court level does not alter the fundamental standards of appellate review"); *In re J.N.R.*, 982 S.W.2d 137, 143 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (overruling a prior decision and stating that "we apply the traditional factual sufficiency standard of review"); *In re J.F.*, 888

traditional standard of review, though in such a way as to give some functional effect to the higher trial burden of proof.³⁹³

The Eastland Court of Appeals has spoken to the issue recently and apparently cast its lot with the “unaltered standard” courts, but it did so in an unpublished opinion.³⁹⁴ Three years ago, summarizing the split and noting that all but one court of appeals had expressed an opinion on the subject, this author concluded with the comment: “[a]ll eyes turn to Eastland.”³⁹⁵ It is somewhat strange that the Eastland court could address the issue, note the legal uncertainty, resolve that uncertainty for its own court of appeals district, but then decide that the decision did not deserve to be published. One wonders just what the Eastland court considers to be the minimum standard for publication.³⁹⁶

While *C.H.* surely is the most-watched case at present, it is not the only decision issued during the Survey period to address the appellate review controversy.

The Houston Court of Appeals discussed the appropriate standard of review for termination decisions in an en banc decision, *In re K.R.*,³⁹⁷ and in doing so managed to inject even more confusion and uncertainty into the subject than one might think possible. After discussing in some detail the varying approaches developed by other courts of appeal, the Court announced that it was not necessary to take a position on the issue because termination of rights could be sustained under *either* the standard factual sufficiency or a heightened standard of review.

As if this did not make things confusing enough, Justice Hudson’s opinion went to some trouble to explain that:

S.W.2d 140, 141 (Tex. App.—Tyler 1994, no writ) (setting out the traditional standard of review without comment); *In re A.D.E.*, 880 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1994, no writ) (stating that “[t]he clear and convincing standard of review required to terminate parental rights does not alter the appropriate sufficiency standard of appellate review”).

393. The courts are Amarillo, Austin, and Fort Worth. See, e.g., *In re Caballero*, No. 07-00-0278-CV, 2001 Tex. App. LEXIS 1688, at *5-6 (Tex. App.—Amarillo Mar. 14, 2001) (stating that “the standard of appellate review does not change” but adding that “we are to consider all the evidence to determine whether reaching a ‘firm belief or conviction’ that the allegation was true is contrary to the overwhelming weight of the evidence,” adding that “[t]o hold otherwise would nullify the heightened burden of proof required at trial”); *In re D.T.*, 34 S.W.3d 625, 631 (Tex. App.—Fort Worth 2000, no pet.) (stating that “the standard of review actually does not change, regardless of the terminology used to describe it,” but that “the higher burden of proof merely changes the weight of evidence necessary to support a finding or verdict”); *Leal v. Tex. Dep’t of Prot. & Reg. Servs.*, 25 S.W.3d 315, 320 (Tex. App.—Austin 2000, no pet.) (stating that though “[w]e have held that the heightened standard of proof required in the trial court does not alter the factual sufficiency standard of review in the appellate court,” the factual sufficiency standard “necessarily incorporates the burden of proof the proponent was required to meet at trial”).

394. See *In re S.Y.W.*, No. 11-99-00068-CV (Tex. App.—Eastland May 25, 2000, pet. denied) (designated unpublished under TEX. R. APP. P. 47).

395. Paulsen, *supra* note 1, at 1225.

396. See TEX. R. APP. P. 47.4 (stating generally that an opinion shall not be designated for publication unless it establishes or applies a new or modified rule of law, involves an issue of continuing public interest, criticizes existing law, or resolves a conflict of authority).

397. 22 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2000, pet. filed) (en banc).

The phrase “clear and convincing” has been used at various times (1) as a cautionary admonition to emphasize the seriousness of a cause of action; (2) to describe an intermediate burden of proof; and/or (3) to delineate a heightened standard of review. Because its meaning and significance vary with usage, the “clear and convincing” standard has been a source of confusion, and there is a split of authority regarding its effect upon our disposition.³⁹⁸

The court explained that in a number of situations in which courts might seem to require that a matter be proved by “clear and convincing” evidence or the equivalent, this does not actually signal a different standard of proof, *even at trial*. Rather, to the en banc majority, such language is “only an admonition to the trial judge to exercise great caution in weighing the evidence.”³⁹⁹ This author cheerfully confesses his mystification as to exactly how “great caution” differs from a “clear and convincing” standard of proof, unless the court is trying to say something like “it’s okay to be sloppy in deciding ‘preponderance of the evidence’ matters, but we want you to actually to listen to all the evidence when we say ‘clear and convincing.’” Moreover, though the court of appeals uses the requirement that separate property status must be established by clear and convincing evidence as one of its examples, it is difficult to imagine that the Texas Legislature was not thinking of a different standard of proof when that body provided in the Family Code that “[t]he degree of proof necessary to establish that property is separate property is clear and convincing evidence.”⁴⁰⁰

Justice Wittig wrote a separate concurrence to emphasize that, by testing the termination decision under both a “factual sufficiency” standard and a heightened standard, the en banc court was effectively backing away from its earlier decision that termination decisions should not enjoy a heightened standard of appellate review.⁴⁰¹ Moreover, in explaining his personal conclusion that a higher review standard is appropriate, Justice Wittig added:

[O]nly flawed logic could argue that both the constitutional and the legislative requirements apply only at the trial court level and not at the appellate level. If we review the legal and factual sufficiency of evidence applying the same standard as we review the preponderance of evidence, we too would sometime violate the due process of all Texas’s parents and children. But if we do not apply the higher constitutional and statutory standards, we too would fail our own constitutional responsibilities.⁴⁰²

In pleasant contrast to the Fourteenth Court’s muddled opinion in *K.R.*, the Austin Court of Appeals’ discussion of the appropriate standard

398. *Id.* at 88-89.

399. *Id.* at 89.

400. TEX. FAM. CODE ANN. § 3.003(b) (Vernon 1998). Justice Wittig’s thoughtful concurrence makes the same point. See *K.R.*, 22 S.W.3d at 96 n.5.

401. *Id.* at 96 (stating, somewhat more diplomatically than this author has done, that “[t]oday . . . the majority opinion does not embrace the precedent of this very court”).

402. *Id.*

of review in an otherwise unremarkable termination decision, *Leal v. Texas Dept. of Protective and Regulatory Servs.*,⁴⁰³ makes a very thoughtful contribution to the debate. Chief Justice Aboussie begins by stating that the Austin Court of Appeals has held that "the heightened standard of proof required in the trial court does not alter the factual sufficiency standard of review in the appellate court."⁴⁰⁴ However, Chief Justice Aboussie then added a critical qualifier:

But our holding to that effect does not mean that we review every trial court decision to see whether the fact in dispute has been shown by a mere preponderance of the evidence. Just as the factual sufficiency review of a trier of fact's verdict in a criminal case necessarily incorporates the State's burden to prove its case beyond a reasonable doubt, the factual sufficiency review of a civil appeal necessarily incorporates the burden of proof the proponent was required to meet at trial.⁴⁰⁵

If this is indeed the case, then the Austin Court of Appeals "unaltered" standard of review and the El Paso Court's "higher standard of factual sufficiency review"⁴⁰⁶ are in effect one and the same.⁴⁰⁷ The Austin court draws the same conclusion: "[w]e believe that our sister courts of appeal in fact employ this same exercise in reaching a decision, despite our corporate difficulty in articulating the standard and confusion of terminology in our opinions."⁴⁰⁸ One of the opinions cited by Chief Justice Aboussie to support her conclusion is the leading El Paso decision on the subject.⁴⁰⁹

An interesting side note to the standard of review question is presented in *Doty-Jabbaar v. Dallas Co. Child Protective Servs.*,⁴¹⁰ a termination case decided under the federal Indian Child Welfare Act.⁴¹¹ The provisions of that act, some of which have been discussed in a prior Survey,⁴¹² are in many ways quite inconsistent with Texas law. Special study by any attorney with a case involving an American Indian child is highly recommended.⁴¹³ What is particularly worth noting here, however, is that the

403. 25 S.W.3d 315 (Tex. App.—Austin 2000, no pet.).

404. *Id.* at 320 (citing *D.O. v. Tex. Dep't of Human Servs.*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ)).

405. *Id.*

406. *In re C.H.*, 25 S.W.3d 38, 47 (Tex. App.—El Paso, pet. granted).

407. The El Paso Court of Appeals in *C.H.* even formulates its "higher" standard at one point in the opinion, in a way that is functionally indistinguishable from the "unaltered" standard of the Austin court, to wit: "a challenge to the factual sufficiency of the evidence will only be sustained if the jury could not have reasonably found the facts to be established by clear and convincing evidence." *C.H.*, 25 S.W.3d at 48.

408. *Leal v. Tex. Dep't of Prot & Reg. Servs.*, 25 S.W.3d 315, 320 (Tex. App.—Austin 2000, no pet.).

409. *Id.* (citing *Edwards v. Tex. Dep't of Prot. & Reg. Servs.*, 946 S.W.2d 130 (Tex. App.—El Paso 1997, no writ)).

410. 19 S.W.3d 870 (Tex. App.—Dallas 2000, pet. denied).

411. 25 U.S.C. §§ 1901-1963.

412. See James W. Paulsen, *Family Law: Parent and Child*, 49 SMU L. REV. 1063, 1074-77 (1996).

413. A good starting point is Paul Shunatona & Tricia Tingle, *Indian Child Welfare Act in Texas—An Overview*, 58 Tex. B.J. 352 (1995).

standard of proof set out by federal law for termination proceedings involving Indian parents and children is not “preponderance of the evidence,” or even the constitutionally-mandated “clear and convincing” burden, but rather “evidence beyond a reasonable doubt,”⁴¹⁴ that is, the standard *criminal* burden of proof. Thus, in family law cases, it appears that Texas trial and appellate courts will occasionally find themselves called upon to apply just about every burden of proof and standard of review known to the Western world.

*In re A.M.C.*⁴¹⁵ demonstrates that even a heightened standard of review is not a silver bullet to defeat a close termination decision. In this Waco Court of Appeals case, a 24-year-old mildly retarded mother’s rights were terminated. The high points of the evidence against her were that her two children had elevated lead levels (caused by unwashed toys covered with paint flakes), that the two-year-old had been found wandering through heavy Waco traffic on one of several occasions when he left the unsecured house, and that the mother risked blindness for this child by not following a recommended regimen of special glasses and eye patches. To this might be added the mother’s repeated suicide attempts, and the children’s severe developmental delays.

But there was another side to the story. *A.M.C.* seems to have been a battle between two agencies and perhaps, two philosophies. While DPRS witnesses advocated termination, Mental Health and Mental Retardation (“MHMR”) representatives took a different view. *A.M.C.* was making progress in a variety of treatment programs and, at least with substantial support from various programs, might have been able to make a go of child-rearing. However, the jury, voting for termination, was extremely critical of DPRS. A note delivered to the judge read: “[w]e, the jury, unanimously agree that the outcome of this case would have been different had CPS given [the mother] the support that she was entitled to from the very beginning. We know that [the mother] loves her children and that she did the best that she could to her ability.”⁴¹⁶

The Waco Court of Appeals went to a great deal of effort to explain that it was employing a heightened standard of review that took account of the “clear and convincing” evidentiary standard at trial. Nonetheless, the Waco court affirmed the jury’s termination decision. In addition to the factors just outlined and the fact that the children were making a great deal of progress in foster care, the jury’s note probably ended up working against the mother. The court commented:

While the note from the jury illustrates that the jury felt emotional about their verdict, we note that the verdict was unanimous. That a jury does not enjoy severing the parent-child relationship is testament to the role of family ties for most of us in our culture. However, the note does not negate that the jury found the elements

414. 25 U.S.C. § 1912(f).

415. 2 S.W.3d 707 (Tex. App.—Waco 1999, no pet.).

416. *Id.* at 717-18.

needed to terminate the relationship. In fact, it shows that the jury served its assigned function of reviewing the evidence presented and not allowing sympathy to impact their resolution of the facts. Consequently, the verdict was based upon the evidence.⁴¹⁷

In re K.R.,⁴¹⁸ an en banc Houston Court of Appeals decision already noted for its discussion of the appropriate standard of review in termination proceedings,⁴¹⁹ addressed an interesting question that usually arises in criminal trials: whether making a party appear before the jury in shackles violates their right to a fair trial. The father, who was serving a ten-year prison sentence for killing his two-year-old stepson when he delivered an "adult strike" as punishment for soiling himself,⁴²⁰ had his parental rights terminated as to his infant daughter.

While the court agreed that the evidence seemed to fully warrant termination, it condemned the use of shackles. Drawing on a long line of state and federal criminal cases to the effect that shackles should only be used as a "last resort"⁴²¹ because such a display is "obnoxious to the spirit of our laws and all ideas of justice,"⁴²² the court rejected out of hand the state's argument that the reasons for the criminal rule do not apply because the father is not entitled to a presumption of innocence in a civil trial, stating that "in the same way the sight of shackles erodes a criminal defendant's constitutional presumption of innocence, the use of visible restraints can destroy the civil defendant's constitutional presumption that he is a fit parent and that it is in the best interest of his natural children that he retain his parental rights."⁴²³ Accordingly, absent some particularized reason why the defendant might be deemed dangerous without shackles, akin to application of the same standard in a criminal context, the Fourteenth Court of Appeals forbade the practice. The four dissenting justices believed the evidence was so strong that, under the circumstances, the presence of shackles was harmless error.⁴²⁴

A couple of other termination cases also raised procedural issues with constitutional implications. In *In re K.C.*,⁴²⁵ the Beaumont Court of Appeals rejected an inmate's claim that, while he did not request a jury trial as required by the Family Code,⁴²⁶ anything less than a requirement of express waiver would violate his constitutional rights. The court rejected this argument, explaining that the requirement of an express waiver of jury trial in criminal cases lies in the Code of Criminal Procedure,⁴²⁷ not

417. *Id.*

418. 22 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2000, pet. filed).

419. See *supra* text accompanying notes 398 through 403.

420. *K.R.*, 22 S.W.3d at 88.

421. *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

422. *Gray v. State*, 268 S.W. 941, 950 (Tex. Crim. App. 1924) (opinion on reh'g).

423. *In re K.R.*, 22 S.W.3d at 93.

424. See *id.* at 98 (Draughn, J., dissenting).

425. 23 S.W.3d 604 (Tex. App.—Beaumont 2000, no pet. h.).

426. TEX. FAM. CODE ANN. § 105.002 (Vernon Supp. 2000).

427. TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon Supp. 2000).

the United States Constitution.⁴²⁸ In *In re M.J.M.L.*,⁴²⁹ an indigent mother complained that she was not given appointed counsel until six months into the proceeding. In a somewhat questionable decision, the San Antonio court ruled that the statute did not require "immediate" appointment of counsel⁴³⁰ and affirmed termination.

Several other procedural issues of note have recently occupied the courts' attention. The El Paso Court of Appeals affirmed termination in a citation by publication case where due diligence was shown and the statutory procedures were followed.⁴³¹ The Austin Court of Appeals reversed a termination decision on the ground that an adoption placement service obtained an affidavit of voluntary relinquishment of rights by misrepresenting the enforceability of an "open adoption" agreement.⁴³² The Waco court struggled with a mandamus case presenting a conflict between a court-ordered psychological examination, as to which failure to comply could justify termination of parental rights, and the parents' privilege against self-incrimination in connection with possible murder charges stemming from the death of one of their twin children.⁴³³ The Court ultimately decided, by analogy to criminal cases, that a blanket refusal to comply was not warranted and that some sort of bar against later criminal use might be possible.

Finally, as is usual in any Survey period, there is the usual depressing litany of cases in which termination decisions are upheld with ease, considering the facts. *In re D.S.*⁴³⁴ is of some slight interest because the termination decision appears to have been predicated almost solely on one expert's opinion that a child's burn marks were more consistent with being pushed into a tub of very hot water than with accidental injury. One suspects, however, that one of the opening sentences of the opinion ("Appellant has a long history with CPS")⁴³⁵ had something to do with why the expert was given so much credence. In *Green v. Texas DPRS*,⁴³⁶ a mother's rights were terminated when she continued to let her daughter

428. See *K.C.*, 23 S.W.3d at 609.

429. 31 S.W.3d 347 (Tex. App.—San Antonio 2000, pet. denied).

430. See TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon Supp. 2000) (stating that "the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent of the child who responds in opposition to the termination"). The court contrasted this statute with that requiring appointment of an attorney ad litem for the child "immediately after the filing, but before the full adversary hearing," see *id.* § 107.012 (Vernon 1996 & Supp. 2001), and concluded there was no particular time pressure created by the statute. The author respectfully disagrees. The language "who responds in opposition to the termination" seems to set out a reasonably clear time for appointment. The court had two somewhat more plausible grounds for its opinion, by noting (1) that nothing critical happened during the time before appointment of counsel; and (2) that the mother did not initially request appointed counsel. Cf. *Ybarra v. Tex. Dep't of Hum. Servs.*, 869 S.W.2d 574, 580 (Tex. App.—Corpus Christi 1993, no writ) (stating that the father "did not request appointed counsel and was represented by retained counsel at trial").

431. *In re A.Y.*, 16 S.W.3d 387 (Tex. App.—El Paso 2000, no pet.).

432. *Vela v. Marywood*, 17 S.W.3d 750, 753 (Tex. App.—Austin 2000, pet. filed).

433. *In re Verbois*, 10 S.W.3d 825 (Tex. App.—Waco 2000, no pet. h.).

434. 19 S.W.3d 525 (Tex. App.—Fort Worth 2000, no pet.).

435. *Id.* at 527.

436. 25 S.W.3d 213 (Tex. App.—El Paso 2000, no pet.).

have contact with the husband, a convicted child sexual offender. And *In re King*⁴³⁷ affirms termination of a father's rights because of his conviction of sexual assault of another child in the home.

However, there is one recent adoption decision of note. The question of whether the doctrine of equitable adoption should be imported from probate law to matters governed by the Family Code, which was visited by the San Antonio Court of Appeals in 1992,⁴³⁸ surfaced again in *In re M.L.P.J.*⁴³⁹ The Eastland Court of Appeals concurred with the San Antonio panel that the doctrine could not be extended to Family Code cases but also agreed with the concerns previously expressed by the San Antonio court regarding inequities that could result if the doctrine was not applied.

Equitable adoption, according to the Texas Supreme Court, is not a "real" adoption. Rather, says the Court, the phrase is used "strictly as a shorthand method of saying that because of the promises, acts and conduct of the intestate deceased, those claiming under and through him are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child."⁴⁴⁰ Indeed, the Probate Code defines "child" as including a child adopted "by acts of estoppel."⁴⁴¹

Estoppel is, of course, a legal concept that is not limited simply to inheritance. It therefore is not surprising that attempts have been made to apply the doctrine to Family Code-related matters. In the mid-1980s, one such attempt failed when the Court of Criminal Appeals ruled that equitable adoption was not appropriately extended to juvenile court proceedings.⁴⁴² A juvenile was certified to stand trial for murder as an adult. The Family Code required that a guardian ad litem be appointed for the certification proceeding unless the child's "parent or legal guardian" was present.⁴⁴³ The State argued that the purpose of the statute was served because the defendant's aunt, with whom the child had lived almost his entire life, was present. The court of appeals agreed, relying on the concept of equitable adoption to conclude that the aunt was a "parent."⁴⁴⁴ Though affirming on other grounds,⁴⁴⁵ the Court of Criminal Appeals disapproved of the appeals court's reasoning. The high court noted that

437. 15 S.W.3d 272 (Tex. App.—Texarkana 2000, pet. denied).

438. *T.W.E. v. K.M.E.*, 828 S.W.2d 806 (Tex. App.—San Antonio 1992, no writ); see James W. Paulsen, *Family Law: Parent and Child*, 46 SMU L. REV. 1515, 1521-22 (1993) (summarizing *T.W.E. v. K.M.E.*).

439. 16 S.W.3d 45 (Tex. App.—Eastland 2000, pet. denied).

440. *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963).

441. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980).

442. *Flynn v. State*, 707 S.W.2d 87 (Tex. Crim. App. 1986).

443. The current version of this statute now is found at TEX. FAM. CODE ANN. § 51.11(a) (Vernon 1996 & Supp. 2001).

444. *Flynn v. State*, 667 S.W.2d 235 (Tex. App.—El Paso 1984), *aff'd on other grounds*, 707 S.W.2d 87 (Tex. Crim. App. 1986).

445. *Flynn v. State*, 707 S.W.2d 87 (Tex. Crim. App. 1986). The Court of Criminal Appeals determined that the purpose of the statute was met if a "friendly, competent adult" was present and that "the spirit, if not the letter of the statute was met." *Id.* at 89.

the Family Code defines "parent" as including an "adoptive" parent,⁴⁴⁶ but the aunt had never formally adopted the child. Therefore, under the "strict terms" of the certification statute, the aunt did not qualify.⁴⁴⁷ The Court of Criminal Appeals also relied on the Texas Supreme Court's admonition that equitable adoption or adoption by estoppel is not "the same as legal adoption" and that it does not have "all of the legal consequences of a statutory adoption."⁴⁴⁸

An earlier case, *T.W.E. v. K.M.E.*⁴⁴⁹ had presented the San Antonio Court of Appeals with an appealing case for expanding the doctrine of equitable adoption to a custody question. During the breakup of a ten-year marriage, the mother questioned the "father's" standing to seek custodial rights because another man was the biological father of the couple's six-year-old child. The husband, who apparently knew about the situation but nonetheless had raised the child as his own, tried to invoke the doctrine of equitable adoption. The San Antonio Court of Appeals ruled that the husband did have standing to seek custody, but only because he qualified as a person with actual possession for six months preceding the suit,⁴⁵⁰ not because he was a "parent." The Court conceded that the "father's" non-parent status would raise significant statutory impediments to equal treatment with the mother, adding, "when there are long-standing ties between the child and a putative father, one might well question the wisdom of a standing rule that credits biological ties exclusively and minimizes real human relationships by allowing either spouse to deny paternity after many years have passed."⁴⁵¹

The new case, *In re M.L.P.J.*,⁴⁵² is in some ways the "flip side" of *K.W.E.*. The ten-year-old child at issue was not biologically related to either husband or wife, but was left with them shortly after the child's birth. The evidence showed that the "father" treated the child as his own and might have formally adopted the child but for the couple's well-justified fear that the probated sentence for selling drugs might have created some awkwardness in the home study phase.⁴⁵³ Nonetheless, a few months after divorce papers were filed, the "father" ceased visitation. The trial court ordered that he pay child support and health insurance.

446. The current version of the Family Code's definition of "parent" is found at TEX. FAM. CODE ANN. § 101.024 (Vernon 1996 & Supp. 2001).

447. *Flynn*, 707 S.W.2d at 88.

448. *Id.* (quoting *Heien*, 369 S.W.2d at 30).

449. 828 S.W.2d 806 (Tex. App.—San Antonio 1992, no writ).

450. The current version of the provision, amended more than once in the recent past, grants standing to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 1996 & Supp. 2001).

451. *T.W.E.*, 828 S.W.2d at 809.

452. 16 S.W.3d 45 (Tex. App.—Eastland 2000, pet. filed).

453. See, e.g., TEX. FAM. CODE ANN. § 162.003 (Vernon 1996 & Supp. 2001) (mandating a social study, including a report on home conditions); *id.* § 162.0085 (requiring a criminal history report).

But the Eastland Court of Appeals reversed. Relying in large part on the case law developments just summarized, the court ruled that since only a "parent" can be required to pay child support, and the Family Code's inclusion of "adoptive mother or father" in the general definition of "parent" should not be extended to equitable adoption, the "father" was off the hook.

This author agrees with the result. Sometimes application of the equitable adoption doctrine would result in a better situation for the child and sometimes not. In either event, however, introduction of the doctrine of equitable adoption would permit a child to have more than two parents at one time. This result would run counter to numerous provisions of the Family Code.⁴⁵⁴ Moreover, the Legislature's expressed desire to exercise control over the adoption process would be defeated if "equitable adoption" were permitted to trump statutory requirements for a formal adoption, as the wife in fact tried to do in *M.L.P.J.*

454. Perhaps most clearly, the Family Code requires termination of at least one prior parental relationship before a child can be adopted, thus providing that even in formal adoptions, a child can have no more than two parents at one time. TEX. FAM. CODE ANN. § 162.001 (Vernon Supp. 2000). Likewise, the Family Code's conservatorship provisions repeatedly refer to "each parent" and "both parents," clearly contemplating that there should be no more than two parents at any one time. See, e.g., *id.* §§ 153.071 (Vernon 1996 & Supp. 2001) (referring to "both parents" and "each parent"); 153.073(a)(1)(A) (Vernon 1996 & Supp. 2001) (referring to the right of "a parent" to receive information from "the other parent"); see also generally §§ 160.101-110 (Vernon Supp. 2000) (setting up a "winner-take-all" system for determining biological fatherhood).

