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## Family Law: Parent and Child

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## Family Law: Parent and Child

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# FAMILY LAW: PARENT AND CHILD

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## TABLE OF CONTENTS

### I. RELOCATION ..... 1708

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II. CHILD SUPPORT .....	1714
III. TERMINATION AND ADOPTION .....	1718
IV. PARENTAGE .....	1725
V. CONSERVATORSHIP .....	1727
VI. JURISDICTION AND VENUE .....	1730

## I. RELOCATION

IN the area of family law, one of the most hotly discussed areas has been the right, or lack thereof, of a custodial parent to move a significant distance away from the noncustodial parent. Currently, across the United States, the trend is toward allowing the custodial parent to relocate. An example is the Supreme Court of Colorado's statement in *In re Francis*, that in a relocation case there is "a presumption that the custodial parent's choice to move with the children should generally be allowed."<sup>1</sup>

One of the more highly discussed appellate opinions in this area is the California Supreme Court's *Burgess* decision, which relied, to some extent, on social science research done by Professor Judith Wallerstein and was presented in her amica curiae brief.<sup>2</sup> However, her research has been highly criticized by at least one other professional in this area.<sup>3</sup>

In Texas, there are several statutory guidelines that should guide the courts, to some extent, in relocation cases. First is the state's legislatively codified public policy, which is to:

- (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;
- (2) provide a safe, stable, and nonviolent environment for the child; and
- (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.<sup>4</sup>

In addition, the Family Code states that if a parent is appointed as sole managing conservator, then that parent should have the exclusive right "to establish the primary residence of the child."<sup>5</sup> If the parties enter into an agreement for Joint Managing Conservatorship, then the court:

shall render an order appointing the parents as joint managing conservators *only if the agreement:*

- (1) designates the conservator who has the exclusive right to establish the primary residence of the child and:

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1. *In re Francis*, 919 P.2d 776, 784 (Colo. 1996).

2. *In re Burgess*, 913 P.2d 473 (Cal. 1996).

3. Richard A. Warshak, Ph.D., *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (Spring 2000).

4. TEX. FAM. CODE ANN. § 153.001(a) (Vernon 2002).

5. *Id.* § 153.132(1).

(A) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or

(B) specifies that the conservator may establish the child's primary residence without regard to geographic location.<sup>6</sup>

If the parents do not reach an agreement regarding conservatorship, and the court orders that the parties be Joint Managing Conservators, then the court *shall*:

(1) designate the conservator who has the exclusive right to determine the primary residence of the child and:

(A) establish, until modified by further order, a geographic area consisting of the county in which the child is to reside and any contiguous county thereto within which the conservator shall maintain the child's primary residence; or

(B) specify that the conservator may determine the child's primary residence without regard to geographic location.<sup>7</sup>

This background of competing policies, questionable social science, and sparse statutes is the background most family law attorneys have been dealing with in Texas. Texas family law attorneys thought they would finally get some guidance from the Texas Supreme Court when it granted writ in the case of *Lenz v. Lenz*.<sup>8</sup> However, after giving a good summary of the issues and history of relocation cases, the Texas Supreme Court did little. The minor contribution it did offer was to make a bright line determination that a jury verdict regarding whether a residence restriction should be lifted or imposed is binding on the trial court, and that the jury's decision cannot be contravened by the trial court.<sup>9</sup>

In *Lenz*, the mother and father were a German couple who were married and living in Germany. They had their first child in 1986 in Germany and then relocated to Phoenix, Arizona in 1991 because of Father's job.<sup>10</sup> While in Arizona the parties entered into a legal separation agreement, which was adopted by the Arizona courts. The agreement and consent decree stated that the parents had joint custody, that the mother was the primary residential parent, that the father had regularly scheduled visitation, and that the parents intended to move to San Antonio, Texas and restricted the children's residence to Texas.<sup>11</sup> The entire family did end up moving to Texas, and then in 1998, the mother initiated divorce proceedings, which resulted in the court adopting the Arizona consent decree.

Shortly after the divorce, the mother filed a modification action seeking to have the residency restriction lifted so that she could move back to

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6. *Id.* § 153.133(a)(1) (emphasis added).

7. *Id.* § 153.134(b)(1).

8. *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002).

9. *Id.* at 20.

10. *Id.* at 12.

11. *Id.*

Germany and remarry.<sup>12</sup> After a jury trial, the jury found that the mother should “have the exclusive right to determine the children’s primary residence.”<sup>13</sup> However, the trial court limited the jury’s finding, allowing the mother to pick the children’s primary residence as long as it was in Bexar County, Texas.<sup>14</sup>

The Texas Supreme Court did engage in a discussion regarding relocation cases, the history and evolution of relocation jurisprudence, and the competing approaches of other states. However, the actual ruling of the supreme court is limited to simply stating that since there was more than a scintilla of evidence to support the jury’s finding that the mother should have the exclusive right to determine the children’s primary residence, the trial court had no authority to contravene that verdict by restricting the children’s residence to Bexar County, Texas.<sup>15</sup>

The *Lenz* case was delivered on June 6, 2002, coincidentally also on June 6, 2002, the El Paso Court of Appeals decided the case of *Bates v. Tesar*,<sup>16</sup> and family law practitioners in Texas finally received some guidance on the substantive issues involved in relocation cases.

In *Bates*, the mother and father were divorced in 1996, with the Mother being designated as the sole managing conservator. The mother was also given the exclusive right to establish the children’s primary residence without regard to geographic limitation.<sup>17</sup> The mother exercised this right by moving with the children and her new husband from Dallas County to Port Lavaca, which is about 362 miles or a six and a half hour drive from Dallas.<sup>18</sup> She did not give notice as required by her decree, and the father did not find out that she was moving on June 14th until June 11th, just three days prior. The father obtained a restraining order that prohibited moving the children, but it was not served on the mother until she had already accomplished the move.<sup>19</sup> A temporary hearing was held before the associate judge on August 27, 1999 and an order was rendered requiring that the children be returned to Dallas and enrolled in school. On appeal to the trial court, the associate judge’s requirement that the children be moved back to Dallas was overturned, and the children stayed in Port Lavaca during the pendency of the case.

After the final hearing, the court appointed the parents as joint managing conservators, ordered that the children be returned to Dallas, and restricted the primary residence of the children to Dallas County.<sup>20</sup> The first issue of note in the case was deciding on the appropriate burden of proof. The court reviewed and summarized the differing approaches of

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12. *Id.*

13. *Id.* at 12-13.

14. *Id.*

15. *Id.* at 21.

16. *Bates v. Tesar*, 81 S.W.3d 411 (Tex. App.—El Paso 2002, no pet.).

17. *Id.* at 415.

18. *Id.* at 416.

19. *Id.*

20. *Id.* at 419-20.

the states across the nation regarding the burden of proof in relocation cases as the following:

Other states require the custodial parent to obtain judicial approval prior to relocation, thus placing the burden of proof on the custodial parent to prove that the move is in the best interest of the child. Still others have adopted a presumptive right of the custodial parent to change the residence of a child so long as removal would not be detrimental to the child and thus have placed the burden of persuasion on the non-custodial parent in a modification proceeding. Colorado has established a presumption in the custodial parent's favor which is triggered once the custodial parent presents a prima facie case demonstrating a sensible reason for the move; the burden then shifts to the non-custodial parent to establish that the move is not in the best interest of the child. The Minnesota Supreme Court has found an implicit statutory presumption that removal is permitted and requires the party opposing removal to present a prima facie case that relocation is not in the best interest of the child and would endanger the child's health and well-being. Washington places the burden on a non-residential parent who seeks a domicile restriction. Tennessee permits the custodial parent to remove the child from the jurisdiction unless the non-custodial parent can show that the motive for the relocation is intended to defeat visitation rights or the move evidences such bad judgment and is so potentially harmful to the child that custody should be changed.<sup>21</sup>

Rather than state a major policy decision regarding the proper burden of proof in Texas relocation cases, the court adopted a very simple method for determining the burden of proof. The burden of proof, as is almost always the case, is on the moving party.<sup>22</sup> In the *Bates* case, this resulted in the father having the burden of proof to show the required change in circumstances. However, if the original decree had contained a geographic limitation on the mother's exclusive right to determine the children's primary residence, then the burden of proof would have been on the mother to show a change of circumstances that necessitated the lifting of the restriction.

In *Bates*, the father was able to carry his burden of proof, mainly due to the distance from Dallas to Port Lavaca and the effect the distance would have on his relationship with his children. The court did not establish a bright line rule that a move is always a material and substantial change, but approved of language from a New Mexico Supreme Court case that stated "it is difficult to imagine an instance in which a proposed relocation will not render an existing parenting plan or custody-and-visitation arrangement unworkable."<sup>23</sup> The Texas court went on to give some guidance for future cases and stated that:

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21. *Id.* at 422-24.

22. *Id.* at 424.

23. *Id.* at 430 (citing *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991)).

[I]f the custodial parent moves a significant distance, a finding of changed circumstances may be appropriate. Such a decision is necessarily fact intensive but we can glean from the case law certain factors which the court should consider:

- the distance involved;
- the quality of the relationship between the non-custodial parent and the child;
- the nature and quantity of the child's contacts with the non-custodial parent, both de jure and de facto;
- whether the relocation would deprive the non-custodial parent of regular and meaningful access to the children;
- the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent;
- the motive for the move;
- the motive for opposing the move;
- the feasibility of preserving the relationship between the non-custodial parent and the child through suitable visitation arrangements; and
- the proximity, availability, and safety of travel arrangements.<sup>24</sup>

Also of note was the mother's claim that the trial court's ruling had infringed upon her Constitutional right to travel. In an otherwise long opinion, the court made short work of this argument and stated that "we find no merit to [the mother's] claim that the trial court's action infringes on her U.S. Constitutional right to travel."<sup>25</sup>

After both the *Lenz* and *Bates* decisions, the Austin Court of Appeals decided *Echols v. Olivarez*.<sup>26</sup> In *Echols*, the mother and father were never married but lived together for two years after their child was born. In 1997, an order was entered appointing the parents as joint managing conservators and giving the mother the right to establish the child's primary residence within Texas.<sup>27</sup>

In 2000, the mother had a second child, and after her maternity leave, she was offered a promotion with an eight percent pay increase and a ten percent salary bonus, but the job was in Tennessee.<sup>28</sup> The mother then filed a modification action seeking to have the residency restriction lifted so that she could move to Tennessee. The trial court granted the modification, and the father appealed.<sup>29</sup>

The Austin Court of Appeals noted that Texas Family Code section 153.001 provides that it is the public policy of the State of Texas to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child . . . and

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24. *Id.*

25. *Id.* at 437.

26. *Echols v. Olivarez*, 85 S.W.3d 475 (Tex. App.—Austin 2002, no pet.).

27. *Id.* at 476.

28. *Id.*

29. *Id.*



encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.”<sup>30</sup> However, even considering this clearly stated policy the court went on to say:

in the context of relocation cases, slavish adherence to such policy ignores the realities of a family that has been dissolved. After the dissolution of the family, each parent must establish a separate life. And in today’s society, it is unrealistic to expect that any family, whether intact or not, will remain in one geographic location for an extended period of time.<sup>31</sup>

In the end, the court of appeals affirmed the trial court, and the mother was allowed to move to Tennessee.

Lastly, in *Franco v. Franco*,<sup>32</sup> the parents of twin daughters were divorced in 1996, were designated joint managing conservators, and each parent was to have possession during alternating one-week periods. Neither parent was designated as the primary custodian, the children’s residence was restricted to El Paso county, and the shared custody arrangement (one-week-on-one-week-off) was followed by the parents after the divorce.<sup>33</sup>

In 1999, the mother filed a modification action seeking to be designated as the primary custodian with the father having standard possession and seeking to be allowed to move with the children from El Paso County to San Antonio. The father countered, asking that he be designated as the primary custodian and that the mother have standard possession.<sup>34</sup>

The trial court retained the joint managing conservatorship, gave the mother the exclusive right to establish the children’s primary residence, and gave the father received standard possession.<sup>35</sup> The court of appeals affirmed and conducted an extensive review of the facts of the case, including the fact that each parent had remarried, that the mother had been offered a job in San Antonio, and that the father had often expressed a desire to move to New Orleans. The court of appeals also compared the mother’s current home to her potential home in San Antonio. In the end, the trial court’s decision was affirmed, as the father did not show that that the modification order amounted to a clear abuse of discretion.<sup>36</sup>

It is interesting to note that the *Franco* decision goes into an extensive discussion regarding the facts of the case as they relate to the relocation issue and an extensive discussion of the law regarding relocation cases. However, the facts in *Franco* are that the father, prior to the modification, had possession of the children every other week, the same amount of time as the Mother. After the modification, he had a long-distance standard possession order. The court of appeals discussed the trial

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30. TEX. FAM. CODE ANN. § 153.001(a) (Vernon 2002).

31. *Echols*, 85 S.W.3d at 480.

32. *Franco v. Franco*, 81 S.W.3d 319 (Tex. App.—El Paso 2002, no pet.).

33. *Id.* at 321-22.

34. *Id.* at 322.

35. *Id.* at 327.

36. *Id.*

court's ruling that the Mother be allowed to relocate to San Antonio and the legal and factual basis for this. The court of appeals, however, did not discuss the basis, legal or factual, for the trial court's elimination of the shared custodial arrangement the parties had been living under for several years.

To summarize, in *Lenz*, there was a residency restriction, which was lifted by the jury so the mother was allowed to move from Texas to Germany. In *Bates*, the mother was the sole managing conservator with no residency restriction, but she was required to move back to Dallas from Port Lavaca. In *Echols*, there was a residency restriction limited to the state of Texas, which was lifted to allow the mother to move to Tennessee. Lastly, in *Franco*, there was a residency restriction and a shared custodial arrangement, both of which were eliminated to allow the mother to move with the children from El Paso County to San Antonio.

## II. CHILD SUPPORT

Most of the cases dealing with child support during the survey period dealt with the collection and payment of arrearages. In the case *In re A.M.*,<sup>37</sup> the Corpus Christi Court of Appeals clarified the amount and type of offsets and reimbursements available to an obligor against his or her arrearages. The court of appeals held that an obligor is entitled to an offset or credit against child support arrearages for actual support provided by the obligor while the children were residing with the obligor.<sup>38</sup> The offset is not limited to the date of service or appearance of the obligor.<sup>39</sup> The court of appeals also held that an obligor has a separate claim for reimbursement against an obligee for the amount of actual support paid to an obligee while the child resided with an obligor. Once an obligor establishes an offset claim, the obligor is entitled to offset the full amount of monthly child support accrued during the relevant time period.<sup>40</sup> Likewise, once an obligor establishes a reimbursement claim, the obligor is entitled to be reimbursed by the obligee the full amount of monthly child support paid during the relevant time period. The obligor is not required to show the exact amount of expenditures because the Family Code does not provide the court any discretion to reduce the offset or reimbursement amount.<sup>41</sup> An obligor, therefore, has two distinct coexisting remedies against an obligee seeking arrearages—an affirmative defense and a claim for reimbursement, both of which the trial court has no discretion to reduce once proven.

Although offsets and counterclaims for reimbursement are allowed against arrearages, courts are otherwise prohibited from reducing the

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37. *In re A.M.*, 101 S.W.3d 480 (Tex. App.—Corpus Christi 2002, pet. denied).

38. *Id.* at 489.

39. *Id.* at 485.

40. *Id.* at 489.

41. *Id.* at 485; see TEX. FAM. CODE ANN. § 157.008 (Vernon 2002).

amount of child support arrearages.<sup>42</sup> In *Attorney General of Texas v. Stevens*,<sup>43</sup> the issue before the court was whether social security disability benefits were a special type of credit that should reduce arrearages or at least provide an offset to child support arrearages. In this case, the obligor owed approximately \$11,000 in arrearages and was ordered to make weekly payments. A couple of months later, the obligor became disabled, so the son, who had just turned 18, received a check from the Social Security Administration for approximately \$7,000 in accordance with the benefit terms of the disability program.<sup>44</sup> The obligor argued that the \$7,000 paid to his son should be credited against his arrearages. The court of appeals held that disability payments made directly to a child are not a special credit against a judgment for child support arrearages.<sup>45</sup> Additionally, the court of appeals held that trial courts are bound by the offsets and counterclaims set forth in Texas Family Code Section 157.262(f), when rendering a money judgment for arrearages. The court of appeals went on to hold that equitable factors also preclude this type of special credit, as the payment of child support arrearages by an obligor fulfills a duty to the child and reimburses the custodial parent for extra resources expended to support the child.<sup>46</sup> Payments made directly to the child, as in this case, do not reimburse the custodial parent for extra resources. Trial courts, therefore, do not have discretion to allow other types of special credits outside of the code, equitable or otherwise.

In the case *In re L.C.H.*,<sup>47</sup> the Fort Worth Court of Appeals upheld a money judgment for arrearages in the amount of approximately \$140,000 and reaffirmed that child support obligations are not dischargeable in bankruptcy.

As for payment of arrearages, the San Antonio Court of Appeals in the case *In re A.M.E.*,<sup>48</sup> held that once the Attorney General provides Title IV-D services to a party, the Attorney General is entitled to an assignment of all arrearages in that case, and all child support and arrearages payments must go through the Office of the Attorney General. Trial courts may not ratify agreements between the parties for direct payments in such a case.

In the case *In re D.S.*,<sup>49</sup> the Houston Court of Appeals, Fourteenth District, held that a trial court has discretion whether to follow the child support guidelines in a modification action. In this case, a father appealed the trial court's denial of his requested modification to reduce child support. In 1996, the mother and father reached an agreement for

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42. *Id.* at 488; see TEX. FAM. CODE ANN. § 157.262 (Vernon 2002).

43. *Attorney Gen. of Tex. v. Stevens*, 84 S.W.3d 720 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

44. *Id.* at 721.

45. *Id.* at 724.

46. *Id.* at 726.

47. *In re L.C.H.*, 80 S.W.3d 689 (Tex. App.—Fort Worth 2002, no pet.).

48. *In re A.M.E.*, 71 S.W.3d 401 (Tex. App.—San Antonio 2001, no pet.).

49. *In re D.S.*, 76 S.W.3d 512 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

child support that allowed the father to pay \$500 per month while completing his orthopedic residency and then increase three years later to \$1,500 per month, assuming he would be in a lucrative private practice.<sup>50</sup> At the end of the three years, the father chose to accept another surgical residency instead of private practice. He filed a modification action pleading, among other grounds, that it had been three years since the child support order was rendered, and the support amount under that order differed by either twenty percent or \$100 from the amount he should pay according to the child support guidelines.<sup>51</sup> The court of appeals held that the father met the statutory grounds for a modification,<sup>52</sup> but that the trial court still had discretion whether to follow the child support guidelines in the modification action. It is a rebuttable presumption that a child support order based on guidelines is in a child's best interest. The court of appeals stated that in modification actions, the use of the presumption is not mandatory as in other cases but only discretionary.<sup>53</sup> This discretion applies to modifications of both agreed and non-agreed child support orders.

The El Paso Court of Appeals upheld a trial court's decision to award above-guideline child support in a modification suit based, at least in part, on the division of debt in the prior divorce proceeding.<sup>54</sup> The court of appeals also stated that a trial court has broad discretion to modify child support orders.<sup>55</sup> In supporting the trial court's equitable ruling, the court of appeals did note that the evidence showed that the award was reasonable and not arbitrary.<sup>56</sup>

In *Zorilla v. Wahid*,<sup>57</sup> the Corpus Christi Court of Appeals affirmed the trial court decision to apply the guidelines to potential earnings of an obligor. A mother argued that the father, a board-certified oncologist, should be ordered to pay above guidelines because he could make more than double what he was presently earning if he changed jobs.<sup>58</sup> The court of appeals stated that to support a finding of intentional underemployment or unemployment, there must be sufficient proof that the obligor caused his income to be reduced or eliminated for the purpose of decreasing the child support obligation.<sup>59</sup> The obligor's happiness in his present position is also a factor for the court to consider. Here, the evidence showed the father had never made more than what he was currently making, and he testified that he could not work the significantly longer hours required for a higher salary.

Often times when one party files a modification action, the other party

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50. *Id.* at 515.

51. *Id.* at 515-16; see TEX. FAM. CODE ANN. § 156.401 (Vernon 2002).

52. *In re D.S.*, 76 S.W.3d at 521-22.

53. *Id.* at 522.

54. *Hodson v. Keiser*, 81 S.W.3d 363 (Tex. App.—El Paso 2002, no pet.).

55. *Id.* at 368.

56. *Id.* at 368-69.

57. *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.—Corpus Christi 2002, no pet.).

58. *Id.* at 253.

59. *Id.*; see TEX. FAM. CODE ANN. § 154.066 (Vernon 2002).

promptly files a counter motion to modify. In *Hargrave v. Lefever*,<sup>60</sup> the father filed a motion to modify primary possession of the children. Prior to the entry of final orders in his modification action, the mother filed a motion to modify child support. The trial court signed a modification order in the father's case and subsequently granted summary judgment against the mother's modification citing her case was barred by res judicata.<sup>61</sup> The San Antonio Court of Appeals reversed and remanded the mother's case, holding that a parent is allowed to modify orders affecting the parent-child relationship as often as circumstances materially and substantially change,<sup>62</sup> that the mother's child support modification was a new ground for modification and not a claim that she was required to assert in the father's possession modification, and that the order entered in the father's modification action did not refer to the mother's pending motion.<sup>63</sup>

Texas Family Code section 153.001 states generally that possession may not be contingent on the payment of child support. In the case *In re A.N.H.*,<sup>64</sup> a father's child support obligation was suspended until such time as his daughter expressed a desire to have contact with him. The court of appeals held that although this contingent situation is not specifically addressed by the statute, the order violated the public policy behind the statute in that the payment of child support and possession were connected.

Some of the most interesting cases during the survey period determined the applicability of an administrative writ of withholding issued by the Attorney General to collect significantly past due child support. In the case *In re A.D.*,<sup>65</sup> the Texas Supreme Court held that Attorney General-issued writs are not in violation of the Texas Constitution's ban on retroactive laws.<sup>66</sup> The court held that the former four-year limitation<sup>67</sup> was not a statute of limitations on the collection of child support arrearages, but rather a limit on the trial court's jurisdiction to order withholding from an obligor's income for payment of child support.<sup>68</sup> The court stated that administrative writs do not place new liability on an obligor to pay child support and, therefore, do not violate the Texas Constitution.<sup>69</sup> The administrative writ is merely a procedural tool created to secure the payment of an existing, perpetual liability.<sup>70</sup> The court did not address the dormancy statutes in the Texas Civil Practice and Remedies Code.<sup>71</sup>

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60. *Hargrave v. Lefever*, 82 S.W.3d 524 (Tex. App.—San Antonio 2002, no pet.).

61. *Id.* at 526.

62. See TEX. FAM. CODE ANN. § 156.401 (Vernon 2002).

63. *Hargrave*, 82 S.W.3d at 527-28.

64. *In re A.N.H.*, 70 S.W.3d 918 (Tex. App.—Amarillo 2002, no pet.).

65. *In re A.D.*, 73 S.W.3d 244 (Tex. 2002).

66. See TEX. CONST. art. I, § 16.

67. TEX. FAM. CODE ANN. § 161.206 (Vernon 2002).

68. *In re A.D.*, 73 S.W.3d at 247-48.

69. *Id.* at 248.

70. See Attorney Gen. of Tex. v. Redding, 60 S.W.3d 891 (Tex. App.—Dallas 2001, no pet.).

71. TEX. CIV. PRAC. & REM. CODE ANN. §§ 31.006 & 34.001 (Vernon 2002).

The San Antonio Court of Appeals did visit the dormancy issue during the survey period. Texas Civil Practice and Remedies Code sections 31.006 and 34.001 state generally that if a writ of execution is not issued within ten years after a judgment, the judgment becomes dormant unless revived by *scire facias* or by an action of debt brought within two years of the date the judgment became dormant.<sup>72</sup> In the case *In re T.L.K.*,<sup>73</sup> the Attorney General attempted to enforce a father's child support obligation, including a child support judgment taken fifteen years prior to the filing of the enforcement action. The father argued that the dormancy provisions<sup>74</sup> preclude enforcement of the child support judgment. The court of appeals held that once unpaid child support is reduced to a judgment, the judgment confirming the child support arrearages is subject to the dormancy provisions.<sup>75</sup> The dormancy time period starts when the judgment is signed, not when the individual monthly child support payments came due, despite the fact that the code specifically states that each missed payment is a final judgment.<sup>76</sup> The court of appeals also held that even though the dormancy provisions apply to child support judgments, the Attorney General is exempt from the dormancy statutes because it brings cases on behalf of the state.<sup>77</sup>

*T.L.K.*<sup>78</sup> and, to a lesser extent the *Swate*<sup>79</sup> case discussed below, should significantly help the Office of the Attorney General collect the millions of dollars owed in past due child support.

### III. TERMINATION

Just as time does not dissolve court ordered child support, neither does termination of an obligor's parental rights. In the *Swate* case,<sup>80</sup> a father failed to pay child support as ordered in the parents' divorce decree. The mother filed suit to terminate his parental rights and confirm the child support arrearages. The trial court granted the mother's suit to terminate the father's parental rights and confirmed the child support arrearages through the date of termination.<sup>81</sup> On appeal, the father argued that he is not obligated to pay the child support arrearage, as the termination order absolves him from all duties between himself and the child.<sup>82</sup> The Waco Court of Appeals disagreed stating that an obligor is liable to a person providing necessities to persons to whom support is owed.<sup>83</sup> The court

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72. *Id.*

73. *In re T.L.K.*, 90 S.W.3d 833 (Tex. App.—San Antonio 2002, no pet.).

74. TEX. CIV. PRAC. & REM. CODE ANN. §§ 31.006 & 34.001.

75. *In re T.L.K.*, 90 S.W.3d at 837-40.

76. TEX. FAM. CODE ANN. § 157.261 (Vernon 2002).

77. TEX. CIV. PRAC. & REM. CODE ANN. § 16.061 (Vernon 2002); *In re T.L.K.*, 90 S.W.3d at 839-40.

78. *In re T.L.K.*, 90 S.W.3d at 833.

79. *Swate v. Swate*, 72 S.W.3d 763 (Tex. App.—Waco 2002, pet. denied).

80. *Id.*

81. *Id.* at 765.

82. See TEX. FAM. CODE ANN. § 161.206 (Vernon 2002).

83. See *id.* § 151.001.

held that since child support is an obligation to a person for the benefit of a child, the father's termination does not affect his obligation to satisfy a debt for child support through the date of termination.<sup>84</sup>

The "inability to pay" affirmative defense to a motion for enforcement of child support<sup>85</sup> also applies when termination of parental rights is sought based on the failure to pay court ordered child support.<sup>86</sup> In the case *In re J.M.M.*,<sup>87</sup> the Fort Worth Court of Appeals held that an obligor may plead and prove this affirmative defense to termination under Texas Family Code section 161.001(1)(F), but the failure to do so constituted a waiver of the defense.

The San Antonio Court of Appeals upheld a father's termination based on his failure to support the child for a period of one year ending within six months of when the petition was filed as long as it is in the best interest of the child.<sup>88</sup> In the *M.A.N.M.* case,<sup>89</sup> a couple married when the woman was eight months pregnant with another man's child. The child was born with drugs in her system. Eventually, the mother moved out of the husband's house, her rights were terminated, and the child was left in the care of the husband.<sup>90</sup> The biological father paid some support to the mother during her pregnancy, but did not provide any support to the husband other than offer him money in exchange for visitation with the child. The biological father began attempting to establish his parental rights in February 1999, prior to the mother's termination. Over the next year and half, he contacted Child Protective Services ("CPS"), who referred him to Legal Aid, who referred him the Attorney General's office, who told him they could not help him either. Finally, in May 2000, he was able to get a private attorney, who informed him that a petition to terminate his rights was already filed and, although he had left his information with CPS, they served him by publication.<sup>91</sup>

At the trial, the ad litem testified that termination was not in the child's best interest because the father had developed a bond with the child. The father's parents and the husband's mother testified that they all could help raise the child. Nevertheless, the trial court found termination to be in the child's best interest based, in part, on the testimony of the CPS administrator that it would be difficult for the child to form any significant attachment to the father because of the limited relationship they had the first two years of the child's life.<sup>92</sup> The court of appeals affirmed. The dissent stated that CPS, Legal Aid, and the Attorney General's office offered absolutely no help to the father, that the lapse of time argument

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84. *Swate*, 72 S.W.3d at 771.

85. *See* TEX. FAM. CODE ANN. § 157.008 (Vernon 2002).

86. *See id.* § 161.001.

87. *In re J.M.M.*, 80 S.W.3d 232 (Tex. App.—Fort Worth 2002, pet. denied).

88. *See* TEX. FAM. CODE ANN. § 161.001(1)(F) (Vernon 2002).

89. *In re M.A.N.M.*, 75 S.W.3d 73 (Tex. App.—San Antonio 2002, no pet.).

90. *Id.* at 75.

91. *Id.* at 76.

92. *Id.* at 76-77.

as grounds for termination in this case is unconscionable, and less drastic means should have been considered. The dissent also stated that the husband did not meet his burden to establish the father had the ability to pay support because there was no evidence of the father's educational level, employment history, earning potential or actual income.

In *Horvatich v. TDPRS*,<sup>93</sup> the Austin Court of Appeals reversed and remanded an order terminating a mother's parental rights. The court of appeals held that there was legally sufficient evidence but not factually sufficient evidence to find that the termination was in the best interest of the child. The mother's poor parenting skills, general neglect, and no plans to change in the future provided legally sufficient evidence to support termination. TDPRS failed to introduce evidence concerning the children's current situation in foster care and the likelihood for adoption, nor did TDPRS appear to have considered the mother's relatives as placement options prior to termination proceedings.

Many of the termination cases during the survey period revolve around the rights of imprisoned parents. The Corpus Christi Court of Appeals and the Beaumont Court of Appeals both decided cases regarding an incarcerated parent's right to appear at a termination trial. In the case *In re D.S.*,<sup>94</sup> the trial court denied the mother's request for a bench warrant without actually considering the request. The Corpus Christi Court of Appeals reversed the order of termination stating that it is abuse of discretion when a trial court denies a request for a bench warrant without first weighing all the relevant factors. The court listed certain factors the trial court must consider before denying an incarcerated parent's request to be present at the trial, including:

1. The cost and inconvenience of transporting the incarcerated parent to court.
2. The security risk and danger to the court and the public of allowing the incarcerated parent to attend court.
3. The substance of the matter.
4. The need of the fact finder to witness the incarcerated parent's demeanor.
5. Whether it is a bench trial or jury trial.
6. Whether it is possible to delay the trial until the incarcerated parent is released.<sup>95</sup>

The court of appeals stated that after considering all the relevant factors, if the trial court has a reason to not permit the incarcerated parent to personally appear, the court should permit that parent to appear by telephone or other reasonable means.

In the case *In re C.W.*,<sup>96</sup> an incarcerated mother's parental rights were

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93. *Horvatich v. Tex. Dep't of Protective & Regulatory Serv.*, 78 S.W.3d 594 (Tex. App.—Austin 2002, no pet. h.).

94. *In re D.S.*, 82 S.W.3d 743 (Tex. App.—Corpus Christi 2002, no pet.).

95. *Id.* at 745.

96. *In re C.W.*, 65 S.W.3d 353 (Tex. App.—Beaumont 2001, no pet.).



terminated and she appealed claiming her due process rights to access the courts were violated by only being able to appear by telephone. The Beaumont Court of Appeals affirmed the termination stating that her right to appear in court in civil cases is not absolute, and the trial court and her attorney sufficiently protected her interests. The court also held that the mother did "attend" the entire trial, albeit by telephone.<sup>97</sup>

Texas Family Code section 161.001(1)(Q) provides grounds for termination of parental rights if a parent "knowingly engaged in criminal conduct that has resulted in the parent's conviction (i) of an offense and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."<sup>98</sup> In the case *In re A.L.S.*,<sup>99</sup> a father received a ten-year probated sentence for burglary. His probation was later revoked and he received a ten-year prison sentence. The trial court terminated his parental rights based on section 161.001(1)(Q) of the Texas Family Code. The father argued on appeal that his conviction did not result in the prison sentence, but rather it was a technical violation of his parole.<sup>100</sup> The El Paso Court of Appeals disagreed with the father's technical argument, holding that there was sufficient evidence that his conduct ultimately led to his confinement and inability to care for his child.

There has been much discussion as to whether the language "... for not less than two years *from* the date of filing the petition,"<sup>101</sup> means the two years immediately prior to the termination petition being filed or for at least two years after it is filed. The El Paso Court of Appeals held in the *A.L.S.*<sup>102</sup> case that section 161.001(1)(Q) refers to the two years before the petition is filed.<sup>103</sup> The court of appeals noted that to hold otherwise would preclude the Texas Department of Protective and Regulatory Services from completing a termination suit because adhering to the time limitation<sup>104</sup> imposed on them<sup>105</sup> is a mandatory duty of the trial court.<sup>106</sup>

The Texarkana Court of Appeals in the case *In re B.S.W.*,<sup>107</sup> gave us its opinion on the ongoing question of whether the language in section 161.001(1)(Q) requires a parent's imprisonment and inability to care for the child to be for at least two years immediately *prior* to the termination petition being filed or for at least two years *after* it is filed. This court joined a growing majority of other appellate courts in holding that the

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97. *Id.* at 354.

98. TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon 2002).

99. *In re A.L.S.*, 74 S.W.3d 173 (Tex. App.—El Paso 2002, no pet.).

100. *Id.* at 177.

101. TEX. FAM. CODE ANN. § 161.001(1)(Q)(ii) (Vernon 2002).

102. *In re A.L.S.*, 74 S.W.3d at 177.

103. *Id.* at 183-84.

104. TEX. FAM. CODE ANN. § 263.401 (Vernon 2002).

105. *But see In re B.M.R.*, 84 S.W.3d 814 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (affirming an order terminating a father's parental rights based on his testimony that it would be more than 2 years since the filing of the petition before he would be released from prison and able to care for his child).

106. *In re L.L.*, 65 S.W.3d 194 (Tex. App.—Amarillo 2001, no pet.).

107. *In re B.S.W.*, 87 S.W.3d 766 (Tex. App.—Texarkana 2002, pet. filed).

statute requires confinement and inability to care for the child for at least two years before the petition is filed.<sup>108</sup> The Corpus Christi Court of Appeals, however, held that the statute refers to the two years *from* the filing of the petition, meaning afterward.<sup>109</sup>

In *D.R.L.M.*,<sup>110</sup> the Fort Worth Court of Appeals held that to satisfy the two-year requirement, the parent must be confined or imprisoned and not able to care for the child for at least two years from the filing date. Since the parent in this case would not be imprisoned for at least two years, the court of appeals found that the evidence supporting the termination based on this ground was legally insufficient.

Under Texas law, parental rights may be terminated if a parent knowingly places or allows a child to "remain in conditions or surroundings which endanger the physical or emotional well-being of a child,"<sup>111</sup> or if the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."<sup>112</sup> When reviewing terminations, the Texas Supreme Court held that the standard of review for appellate courts is whether the evidence is such that the fact finder could reasonably form a firm belief or conviction about the truth of the allegations.<sup>113</sup> The Amarillo Court of Appeals in the case *In re D.P.*,<sup>114</sup> defined "knowingly," as applied to the termination statutes, to mean a parent's actions or inactions were done "in a knowing manner; with awareness, deliberateness . . ." or "consciously, intelligently, willfully, or intentionally."<sup>115</sup> The court of appeals reversed the trial court's order terminating the mother's parental rights because there was not sufficient factual evidence that the mother acted "knowingly." The child's injuries were internal and not visible, and there was no evidence as to how the child sustained the injuries. An inference or suspicion is not enough to satisfy the "knowingly" requirement.

The termination statutes allow termination of parental rights of parents with mental illnesses, deficiencies, or retardation. Texas Family Code section 161.003 states generally that a court may order termination of parental rights if a parent has a mental illness or deficiency that renders the parent unable to provide for the physical and emotional needs of the child, and the parent's mental illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the child turn eighteen years old. In *Salas v. Texas Department of Protective and*

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108. *Id.* at 770.

109. *In re I.V.*, 61 S.W.3d 789 (Tex. App.—Corpus Christi 2001, no pet.).

110. *In re D.R.L.M.*, 84 S.W.3d 281 (Tex. App.—Fort Worth 2002, pet. denied).

111. TEX. FAM. CODE ANN. § 161.001(1)(D) (Vernon 2002).

112. *Id.* § 161.001(1)(E).

113. *In re C.H.*, 89 S.W.3d 17 (Tex. 2002).

114. *In re D.P.*, 96 S.W.3d 333 (Tex. App.—Amarillo 2001, no pet.).

115. *Id.* at 336 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1976) and BLACK'S LAW DICTIONARY 872 (6th ed. 1990)).

*Regulatory Services*,<sup>116</sup> the El Paso Court of Appeals held that there was reasonable probability that the mother's mental illness would continue until the youngest child turned eighteen years old, and there was factually and legally sufficient evidence that, because of her mental illness, she could not adequately care for the children.

It is worth mentioning that even if the court of appeals in *Salas* found that the mother's rights should not be terminated under section 161.003, the Fort Worth Court of Appeals noted in the *L.S.R.*<sup>117</sup> case that, as a matter of law, mental retardation does not preclude a fact finder from finding a parent "knowingly" neglected a child under section 161.001(D) and (E).

The appellate courts issued opinions dealing with procedural matters in a number of termination cases during the survey period. The Amarillo Court of Appeals held that submitting a broad-form jury charge is correct because the issue in termination cases is whether the parent-child relationship should be terminated, not the specific ground relied on for the termination.<sup>118</sup> The Fort Worth Court of Appeals also upheld a broad-form jury charge in the case *In re J.M.M.*<sup>119</sup> In the case *In re A.V.*,<sup>120</sup> the Waco Court of Appeals reversed and remanded a termination holding that the broad-form submission may have deprived the father of a jury verdict agreed to by at least ten jurors. The Texas Supreme Court has granted a petition for review in this case and hopefully will clarify the split of opinion.

Texas Rule of Evidence 605 states generally that the presiding judge in a trial may not testify as a witness in that trial. In the case *In re M.E.C.*,<sup>121</sup> the Waco Court of Appeals held that the admission of the mother's jury charge, which included the judge's signature, as evidence in the father's trial was not testimony by the judge in the trial, as prohibited by Texas Rule of Evidence 605. The Beaumont Court Appeals also held that temporary orders, permanency hearing orders, and memorandums of agreement that were entered into evidence during a termination trial do not violate Rule 605.<sup>122</sup>

The Fort Worth Court of Appeals held in *G.C.*,<sup>123</sup> that in counties where a statutory county court has concurrent jurisdiction with a district court in family law matters and a termination case is heard in the statutory county court, the parent is entitled to only a six-person jury.

In the *E.L.T.* case,<sup>124</sup> the mother's attorney requested a continuance and competency evaluation because she could not understand the pro-

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116. *Salas v. Tex. Dep't of Protective & Regulatory Servs.*, 71 S.W.3d 783 (Tex. App.—El Paso 2002, no pet.).

117. *In re L.S.R.*, 60 S.W.3d 376 (Tex. App.—Fort Worth 2001, pet. denied).

118. *In re K.S.*, 76 S.W.3d 36, 49 (Tex. App.—Amarillo 2002, no pet.).

119. *In re J.M.M.*, 80 S.W.3d 232, 245 (Tex. App.—Fort Worth 2002, pet. denied).

120. *In re A.V.*, 57 S.W.3d 51, 58 (Tex. App.—Waco 2001, pet. granted).

121. *In re M.E.C.*, 66 S.W.3d 449, 457-58 (Tex. App.—Waco 2001, no. pet.).

122. *In re M.S.*, 73 S.W.3d 537, 539-40 (Tex. App.—Beaumont 2002, pet. granted).

123. *In re G.C.*, 66 S.W.3d 517, 521-22 (Tex. App.—Fort Worth 2002, no pet.).

124. *In re E.L.T.*, 93 S.W.3d 372 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

ceedings. The Houston Court of Appeals for the 14th District held that the Family Code does not require a parent to have a certain level of competency in a termination suit. In fact, the very competency evaluation requested might be used as evidence for her termination based on her mental ability to care for the children.

In the *T.S.S.* case,<sup>125</sup> a man provided emotional and financial support for thirteen years following a divorce in which the parties to the divorce were named joint managing conservators of a child born during the marriage. After DNA evidence showed him not to be the biological father, the man filed a voluntary termination suit. The majority opinion of the San Antonio Court of Appeals held that the man was attempting to relitigate an issue essential to the prior divorce decree and was, therefore, barred by collateral estoppel. A dissent stated that nothing was being relitigated as one must first establish a parent-child relationship, or at least have the presumption of one, before it can be terminated.

The case *In re K.C.*,<sup>126</sup> the San Antonio Court of Appeals sitting en banc overruled its own decision from only a few months earlier in the case *In re R.H.*<sup>127</sup> In the *K.C.* case, a mother missed the first two days of the trial terminating her parental rights. Her attorney was present for the entire trial. The trial court overruled her motion for new trial, and the court of appeals affirmed. In the *R.H.* case, the court of appeals held that in a termination case, when the parent fails to attend his or her own trial but their attorney does attend, and the failure of the parent to attend prevents the attorney from presenting material evidence on the parent's behalf, then *Craddock*<sup>128</sup> should apply.<sup>129</sup> Overruling the prior opinion in *R.H.*, the court of appeals stated in *K.C.* that the attorney appeared and a trial on the merits was completed so there was no default, and hence, *Craddock* did not apply.<sup>130</sup>

In the case *In re E.L.Y.*,<sup>131</sup> the Waco Court of Appeals held that an indigent parent whose rights are terminated is entitled to be appointed appellate counsel.<sup>132</sup> The court of appeals held that appointed counsel may file an *Anders*<sup>133</sup> brief if counsel determines that there are no issues for appeal, but it must be in substantial compliance with Texas Rules of Appellate Procedure section 38.1.

In the case *In re H.R.*,<sup>134</sup> an indigent mother's trial attorney undertook steps to preserve her right to appeal following the entry of an order terminating her parental rights. The trial court found that the mother was indigent but ordered her to pay \$75 a month toward her appeal. Later,

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125. *In re T.S.S.*, 61 S.W.3d 481 (Tex. App.—San Antonio 2001, pet. denied).

126. *In re K.C.*, 88 S.W.3d 277 (Tex. App.—San Antonio 2002, pet. denied).

127. *In re R.H.*, 75 S.W.3d 126 (Tex. App.—San Antonio 2002, no pet.).

128. See *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

129. *In re R.H.*, 75 S.W.3d at 130.

130. *In re K.C.*, 88 S.W.3d at 279.

131. *In re E.L.Y.*, 69 S.W.3d 838 (Tex. App.—Waco 2002, no pet.).

132. TEX. FAM. CODE ANN. § 107.013 (Vernon 2002).

133. *Anders v. California*, 386 U.S. 738 (1967).

134. *In re H.R.*, 87 S.W.3d 691 (Tex. App.—San Antonio 2002, no pet.).

the district clerk's office denied the attorney's request for payment, stating that he was never officially appointed.<sup>135</sup> The San Antonio Court of Appeals held that the trial court had no discretion to order the mother to pay fees toward her appeal after finding her indigent, and because termination appeals are accelerated, the trial attorney for the indigent parent is usually in the best position to be appointed as appellate counsel and preserve the parent's right to appeal. In this case, the attorney had filed all of the necessary documents with the appellate court as the mother's appellate counsel, and there was no order entered allowing him to withdraw as counsel.<sup>136</sup>

As to affidavits of relinquishment, the Austin Court of Appeals held that a mother's affidavit was voluntary even though she signed it while she was emotionally unstable.<sup>137</sup> In the *D.R.L.M.*<sup>138</sup> case, a mother named a specific family to become managing conservators of her children in the affidavit for relinquishment. When the trial court named a different family, the mother argued that the affidavit was no longer voluntary. The Fort Worth Court of Appeals rejected her argument holding that the trial court is required to appoint the person designated in an affidavit unless it finds that the person named would not be in the child's best interest. Additionally, there was no language in the affidavit that conditioned her relinquishment upon the naming of the requested family as managing conservators.

#### IV. PATERNITY

There were only a few significant paternity cases during the survey period. In *In re M.C.*,<sup>139</sup> Randall and Mona were married in July 1999. They separated in December 1999, and less than a month later, Mona had twin boys. She filed for divorce from Randall on February 1, 2000. Randall's pleadings included a claim that he and Mona were the parents of the twins; whereas, Mona's pleadings contained an allegation that Randall was not their biological father, and she even attached DNA test results to her pleadings excluding Randall as the father.<sup>140</sup> However, in contradiction to the DNA test results, the trial court found that Mona and Randall were the parents of the twins and provided for their conservatorship, possession and support.

Mona appealed because the trial court had prevented her from presenting evidence to rebut the presumption, based upon their marriage, that he was the father of the children. She also complained of the trial court's refusal to hear evidence regarding in vitro fertilization and

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135. *Id.* at 702.

136. *Id.*

137. *Lumbis v. Tex. Dep't of Protective & Regulatory Servs.*, 65 S.W.3d 844, 851 (Tex. App.—Austin 2002, pet. denied).

138. *In re D.L.R.M.*, 84 S.W.3d 281 (Tex. App.—Fort Worth 2002, pet. denied).

139. *In re M.C.*, 65 S.W.3d 188 (Tex. App.—Amarillo 2001, no pet.).

140. *Id.* at 190.

whether Randall had properly consented to the procedure.<sup>141</sup>

The trial court refused to allow Mona to testify regarding the in vitro fertilization and instructed her and her counsel that “the court was not going to listen to testimony that she thought her children were not Randall’s.”<sup>142</sup> Mona was allowed to present a bill of exceptions to present evidence that “(1) would have rebutted the presumption of paternity set out by Section 151.002; (2) the children were conceived via in vitro fertilization and not artificial insemination; and (3) the facts and circumstances surrounding the conception were different from the circumstances supporting findings of ratification in cases under consideration by the trial court . . . .”<sup>143</sup>

The court of appeals reversed based upon the trial court’s refusal to allow Mona to present evidence to rebut the presumption of paternity. The court pointed out that the presumptions of paternity contained within the Texas Family Code are rebuttable and that Mona had the burden of proof. The trial court’s refusal to allow her to present any evidence to carry her burden was error and, as such, the case was reversed and remanded.

In *Ince v. Ince*,<sup>144</sup> Derek and Virginia were divorced in 1987, and the decree stated that they were parents of one child born during the marriage. There were three later modification actions involving support and possession. After eleven years, Derek petitioned the court for paternity testing for medical reasons. When the results came back excluding him as the biological father, Derek filed a bill of review.

The court of appeals stated the standard for a bill of review as requiring the “complainant [to] file a petition alleging factually and with particularity that, through no negligence of his own, he was prevented from asserting a meritorious defense to the original cause of action as a result of fraud, accident, wrongful act or official mistake.”<sup>145</sup> The court went on to explain the following:

Fraud, as it applies to attacks upon final judgment, may be either intrinsic or extrinsic. Intrinsic fraud relates to issues that were presented and resolved—or could have been resolved—in the former action. Fraudulent instruments and perjured testimony are considered intrinsic fraud because these are matters presented to and considered by the court in the original proceeding. Extrinsic fraud, on the other hand, is wrongful conduct practiced outside of the adversary trial—such as keeping a party away from court, making false promises of compromise, denying a party knowledge of the suit—that affects the manner in which the judgment is procured. Only extrinsic fraud supports a bill of review.<sup>146</sup>

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141. *Id.* at 190-91.

142. *Id.* at 192.

143. *Id.* at 193; see TEX. FAM. CODE ANN. § 151.002 (Vernon 2002).

144. *Ince v. Ince*, 58 S.W.3d 187 (Tex. App.—Waco 2001, no pet.).

145. *Id.* at 190.

146. *Id.*

The court of appeals found that Virginia's concealment of the true identity of the father of the child could only amount to intrinsic fraud and, therefore, could not support a bill of review. As such, the trial court's dismissal of the case was affirmed.

## V. CONSERVATORSHIP

There were several cases during the Survey period that tested the limits of the parental presumption. In *In re C.R.T.*,<sup>147</sup> the mother and father were divorced in 1995, at which time they were appointed joint managing conservators of their child. Then in 1998, they left their child to be raised by the child's aunt. The mother also left two other children with the aunt. The aunt took the children because the "parents were homeless drug addicts unable to feed them."<sup>148</sup>

In 1999, the mother decided to live with her parents in their three bedroom house and worked for them at their service station for room and board.<sup>149</sup> The aunt eventually filed to be the managing conservator. Temporary orders were entered requiring the mother and father to pay support for their children. The matter eventually was heard by the court for final trial, and the aunt was appointed as the managing conservator. The court of appeals stated the parental presumption as requiring:

the court to presume that the best interests of a child lay in appointing a biological parent. Yet, the presumption is rebuttable. For instance, proof that such an appointment would significantly impair the child's physical health or emotional development negates it, as does proof that the parent voluntarily relinquished actual care, custody or control of the child for one year and the best interests of the child would be served by appointing a nonparent as conservator.<sup>150</sup>

However, the court went on to state that the parental presumption has no application in a modification case, and the resulting burden on the movant is lower than it would be in an original action.<sup>151</sup> The effect of these rules in the *C.R.T.* case was that the aunt had to overcome the parental presumption as to two children because her action was an original action regarding them. As to the child of the mother and father, the parental presumption was not applicable, which reduced the burden.

However, in the final analysis, the court did not seem concerned with the differences in the burdens of proof and went to great lengths to examine the evidence so as to support the trial court's findings as to all three children. The court of appeals stated that:

[Mother] lacked ready means to personally support her offspring and expected others to care for them is testimony that she failed to investigate the medical condition of her children until told to do so by [the

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147. *In re C.R.T.*, 61 S.W.3d 62 (Tex. App.—Amarillo 2001, pet denied).

148. *Id.* at 64.

149. *Id.* at 64-65.

150. *Id.* at 65-66 (citations omitted).

151. *Id.* at 66.

aunt], that this 31 year old person could not legally drive her children anywhere (such as to school or to a doctor's office) since she had no driver's license, and that she had been dependent upon intoxicating substances for more than the majority of the lives of [the children.] Failing to support one's children has been considered indicia illustrating that appointment of the parent would significantly impair the child's physical health. So too has evidence of physical abuse, severe neglect, abandonment, drug and alcohol abuse, and very immoral behavior been deemed indicative impairment upon the child's health. [Mother]'s drug problem, her abandoning [the children] . . . her failure to provide support to [the children], her utter dependence upon her parents for her well-being, and her exhibition of a want of personal responsibility and emotional development are indicia of like ilk. They too evince potential impairment of health and emotional development sufficient to justify the appointment of a third-party as managing conservator instead of a parent. They also provide evidence rebutting the presumption that Darla should be the managing conservator . . . . And, when coupled with the evidence of stability, support, and nurturing offered by [the aunt], we cannot but find that the trial court's appointment of [the aunt] constituted a positive improvement, furthered the best interests of the children, and exemplified a legitimate exercise of discretion, the one for whom the parents had been appointment of [the aunt] constituted a positive improvement, furthered the best interests of the children, and exemplified a legitimate exercise of discretion.<sup>152</sup>

Based upon this analysis, the court of appeals affirmed the trial court's designation of the aunt as the managing conservator of the children.

In *In re S.W.H.*,<sup>153</sup> the mother had a daughter in July 1997, while on probation. Shortly after the birth, she tested positive for illegal substances during a routine urinalysis. The recommendation by her probation officer was incarceration. On April 7, 1998, the mother was incarcerated and left her child with friends, with the permission of her CPS worker. The mother was released to a halfway house on January 7, 1999, and on January 22, 1999, shortly before the mother was released from the halfway house, her friends filed suit to have themselves appointed sole managing conservators of the child.

The court of appeals stated that "a nonparent seeking custody may rebut the parental presumption and prevail over a parent by showing that appointing the parent as conservator would significantly impair the child's health or development or by showing that the parent voluntarily relinquished physical possession of the child for one year or more."<sup>154</sup>

The court of appeals found that the mother clearly did not relinquish her child for the requisite one year period, finding that the one year was up in March 1999, and the mother filed her answer to the suit in February 1999.

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152. *Id.* at 67-68.

153. *In re S.H.W.*, 72 S.W.3d 772 (Tex. App.—Fort Worth 2002, no pet.).

154. *Id.* at 775-776.



The trial court could still be upheld if the nonparent offered “evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child.”<sup>155</sup> Although there was evidence of the mother’s past behavior and drug history, the court of appeals noted that “evidence of past misconduct may not, by itself, be sufficient to show present parental unfitness as required to appoint a nonparent as conservator over a parent.”<sup>156</sup>

The court found that the mother’s improvement and recovery prevented the friends from overcoming the parental presumption. The court of appeals concluded that:

in the face of uncontroverted evidence that [Mother] has remained clean and sober since March 1998, has maintained steady employment, keeps a safe and stable home environment, and has bonded with [the child] during visitations since [Mother] was released from treatment in 1999, we do not find evidence in the record that [Mother]’s appointment as managing conservator would significantly impair [the child]’s physical health or emotional development.<sup>157</sup>

In *In re K.R.P.*,<sup>158</sup> the mother and father had a child in 1993. In 1996, the parents separated and the father moved in with his girlfriend. The father began serving a four-year criminal sentence only a few months after he began to live with the other woman. In 1999, the father was released and went to live with his wife (he had married his girlfriend by proxy while in prison), but that only lasted a few weeks, and the father moved out.<sup>159</sup> In 2000, his wife filed for divorce and sought managing conservatorship of her step-child. A temporary hearing was held and the mother testified that the child should stay with the step-mother. Father was appointed a temporary possessory conservator, and the mother and step-mother were appointed joint managing conservators.

In 2001, the court held a bench trial, after which the step-mother was appointed the sole managing conservator, and the mother and father were appointed possessory conservators. The mother and father appealed.<sup>160</sup>

The mother’s arguments were dismissed quickly because she never sought custody of the child. Since she was not seeking custody, the parental presumption was not applicable. However, the father had filed a motion seeking custody of the child.

The court of appeals found that appointment of the father as the managing conservator would significantly impair the child’s physical health and emotional development, even though the child, over twelve years of age, testified she wanted to live with her father. The court pointed out

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155. *Id.* at 777.

156. *Id.* at 778 (citing *In re M.W.*, 959 S.W.2d 661 (Tex. App.—Tyler 1997, writ denied)).

157. *Id.* at 779.

158. *In re K.R.P.*, 80 S.W.3d 669 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

159. *Id.* at 672.

160. *Id.* at 672-73.

that there was evidence that: 1) the father had abused alcohol in the past; 2) the mother had called the police six different times when she lived with the father due to his violent and assaultive behavior; 3) step-mother testified that the father was physically and emotionally abusive toward her; 4) "the child had been diagnosed with asthma and/or allergies," yet her father smoked in the house during his possession; 5) the father showed little or no interest in the child's school and activities; and 6) the father was behind \$10,000.00 in child support for another child he had fathered outside of marriage.<sup>161</sup>

In light of such facts, the court of appeals found that the evidence had rebutted the parental presumption.

The case of *Roby v. Adams*<sup>162</sup> is similar to the United States Supreme Court case of *Troxel v. Granville*<sup>163</sup> in that the mother had died leaving the father to raise two children. After the mother's death, the father reduced the maternal grandparent's access to the children, and after a while, he refused to allow them any contact with the children. After two social studies and a final trial, the Texas court granted the maternal grandparents court-ordered periods of possession.<sup>164</sup>

The court of appeals overruled the trial court based upon the parental presumption and the fact that there was no evidence that the father was not a fit parent. Absent such evidence, the decision of whether to allow or not allow intergenerational relationships must be left to the parent to make.

## VI. JURISDICTION/VENUE

Going hand-in-hand with the relocation issue are the jurisdictional issues raised by mobile parents. Before a court can even address the relocation issues, it must first determine if it has jurisdiction to do so. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as opposed to the Uniform Child Custody Jurisdiction Act (UCCJA), has now been in effect in Texas since 1999.<sup>165</sup> One difference in interpretation of the UCCJA among the states, that the UCCJEA was meant to remedy, was the effect of continuing exclusive jurisdiction, which is more and more important in an increasingly mobile society.

In *In re McCormick*,<sup>166</sup> the mother and father were divorced in Texas in 1995. The mother was appointed managing conservator, and the father was appointed possessory conservator. In September 2001, the child began living with the father in New Mexico. In a modification action in Texas court, the father was appointed the primary conservator, and in February 2001, the father moved with the child to Sylvia, Kansas. In

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161. *Id.* at 676.

162. *Roby v. Adams*, 68 S.W.3d 822 (Tex. App.—El Paso 2002, pet. denied).

163. *Troxel v. Granville*, 530 U.S. 57 (2000).

164. *Roby*, 68 S.W.3d at 823.

165. TEX. FAM. CODE ANN. § 152.001 (Vernon 2002).

166. *In re McCormick*, 87 S.W.3d 746 (Tex. App.—Amarillo 2002, no pet.).

March 2001, the mother apparently filed two petitions to modify, one was dismissed, and the father filed a plea to the jurisdiction as to the other.

After a hearing, the trial court found that Texas was not an inconvenient forum for the father and that Texas had continuing exclusive jurisdiction over the case.<sup>167</sup> The court relied upon Texas Family Code section 152.202, which provides that:

(1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.<sup>168</sup>

The court of appeals analyzed the facts of the case including the father's testimony that in Kansas, the child was living across the street from his grandparents, who watched the child when the father was not able to, the child had relatives in Kansas he played with, and the child attended school and church in Kansas. The child's doctor and counselor were in Kansas.<sup>169</sup>

The court pointed out that Clovis, New Mexico, was located only eight to ten miles from the Parmer County courthouse, where the initial custody proceeding was maintained, and Kansas was not the child's home state. The mother lived in Texas, previously had her possession in Texas, and she testified that the witnesses necessary for a hearing on custody would be herself, her current husband, Dr. Gaspar of Clovis, New Mexico, and her family in Texas, including her parents, brothers, and sister-in-law. Based upon these facts, the court of appeals stated it was a close one but that the trial court did not err in finding that the child still had a significant connection with Texas, and therefore, Texas still had exclusive continuing jurisdiction.<sup>170</sup>

In *In re Bellamy*,<sup>171</sup> the Texas Attorney General's office established paternity in 1996, and the parents were appointed joint managing conservators with the mother having the exclusive right to establish the child's primary residence. In March 2000, the Texas Attorney General's office filed a motion to modify child support, and the father responded with his own counter-petition seeking appointment as the child's primary conservator, which was granted. It was uncontested that the mother and child were residents of Louisiana, and Louisiana was the child's home state. However, the father lived in Texas.<sup>172</sup>

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167. *Id.* at 748.

168. *Id.* at 749 (citing TEX. FAM. CODE ANN. § 152.202 (Vernon 2002)).

169. *Id.*

170. *Id.*

171. *In re Bellamy*, 67 S.W.3d 482 (Tex. App.—Texarkana 2002, no pet.).

172. *Id.* at 483.

Under the UCCJEA, Texas retains exclusive continuing jurisdiction over a case if Texas made the initial custody determination, "until a court of [Texas] determines that neither the child nor one parent has a significant connection with [Texas] and that substantial evidence is no longer available in [Texas] concerning the child's care, protection, training, and personal relationships."<sup>173</sup>

The court of appeals reviewed the facts relating to the child's connection with the state of Texas, including the fact that she previously attended school in Texas and lived only a few miles from her grandparents in Texas. She was picked up for school at her maternal grandparents' home in Texas. Her father remained a resident of Texas since the original decree was entered in 1996. The father also paid his child support and was actively involved in the child's life. The home study conducted by agreement of the parties for this case was done by a group in Texas. Finally, the mother took the child to a psychologist in Texas.<sup>174</sup> The court of appeals found these facts were sufficient to support a finding that the child had a significant connection with Texas, and substantial evidence existed in Texas regarding her care, protection, training, and personal relationships.

In *In re Brilliant*,<sup>175</sup> the child was born in Massachusetts in 1999. Her parents never married, but lived together in Massachusetts until the father moved to Texas in April 2000. The move to Texas was planned, and the father took all of the family's belongings, except for some clothing for the mother and child. The mother and child stayed in Massachusetts with the child's maternal grandmother and would write to the father telling him how she was looking forward to her new life in Texas. The mother and child arrived in Texas in June of 2000.<sup>176</sup>

After arriving in Texas the mother and child spent a total of forty-five days there, after which they went back to Massachusetts in violation of a temporary restraining order the father had obtained when the mother started talking to him about going back to Massachusetts. After arriving back in Massachusetts, the mother filed a paternity action there and filed a plea to the jurisdiction regarding the case in Texas that Father had filed. Ultimately, the Texas court found it had jurisdiction and entered a default judgment appointing the father as sole managing conservator when the mother failed to appear or file an answer.<sup>177</sup>

The mother contended that her stay in Texas was merely a temporary absence, as that term is used in Texas Family Code section 152.102(7), and therefore did not affect Massachusetts' status as the child's home state. The court of appeals disagreed and found that the child had no home state since they had moved to Texas but had not stayed for six

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173. *Id.* at 485; see TEX. FAM. CODE ANN. § 152.202(a)(1) (Vernon 2002).

174. *In re Bellamy*, 67 S.W.3d at 487.

175. *In re Brilliant*, 86 S.W.3d 680 (Tex. App.—El Paso 2002, no pet.).

176. *Id.* at 682.

177. *Id.* at 683.

months. If a child has no home state, the next jurisdictional basis is “significant connection” jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.<sup>178</sup>

When the father filed his suit in Texas, the child had been alive for a little over thirteen months and had lived all but forty-five days of it in Massachusetts. The court of appeals, however, upheld the trial court’s exercise of jurisdiction based upon significant connections. The court of appeals stated that “. . . Texas was a repository of substantial evidence concerning [the] present or future care, training, and personal relationships”<sup>179</sup> of the child. However, the court of appeals found that the mother’s plea to the jurisdiction was an entry of appearance, and therefore, it was error to enter a default judgment. Therefore, the case was reversed and remanded on that basis.

Both the *McCormick* and the *Bellamy* cases stated that in jurisdictional issues involving different states, to the extent that the provisions of Texas Family Code section 155.201 regarding the mandatory transfer of cases conflicts with the UCCJEA, the UCCJEA controls. However, if the transfer is within the state, from county to county, you must still look to Chapter 155 to determine if the case must be transferred. In *In re S.G.S.*,<sup>180</sup> the Tarrant county trial court refused to transfer a case to Collin County, at the request of the father, even though the mother and child had resided in Collin County for fifteen months. The court of appeals reversed, finding that the transfer was mandatory upon the father’s timely motion to transfer.

Then in *In re Knotts*,<sup>181</sup> the child had lived with the mother in Rusk County for four years before moving back with his father. After living with his father for two months, the father filed a petition in Titus County, which was the original decree county. The trial court transferred the case to Rusk County and the court of appeals affirmed, stating that the transfer was mandatory.

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178. *Id.*; see TEX. FAM. CODE ANN. § 152.201(a)(2)(A) (Vernon 2002).

179. *Id.* at 692.

180. *In re S.G.S.*, 53 S.W.3d 848 (Tex. App.—Fort Worth 2001, no pet.).

181. *In re Knotts*, 62 S.W.3d 922 (Tex. App.—Texarkana 2001, no pet.).

