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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

DURING the past year, the Texas Supreme Court has issued opinions on, or accepted for argument, at least eight cases dealing with some aspect of the parent-child relationship. When one adds to this several other community property and family law related opinions issued by the state's high court during the last year, the total constitutes a hopeful sign that Texas family law may be emerging from nearly a century of "second-class citizenship,"¹ epitomized by the now-repealed ban on divorce, child custody and child support jurisdiction.² One well might hope, as Professor Sampson puts it, that this trend will continue "until the backlog of unsolved mysteries in our life's work is finally worked down."³

I. STATUS

Paternity suits seem to be the "hot" family law issue of the 1990s, at least so far as Texas Supreme Court action is concerned. Two paternity decisions were handed down during the 1991-92 session,⁴ and two more cases⁵ have been accepted for argument in the current session.⁶

Although *Attorney General of Texas v. Lavan*⁷ ultimately turned on pleading issues, the case raised a fascinating paternity question. Willie and Crystal Fleming divorced in 1986. While separated, but before the divorce, Crystal had a child. In 1988, the state brought a suit to establish paternity

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1. John J. Sampson, *A Brief Summary of the 1991-92 Texas Supreme Court Term: Family Law Cases*, 92-2 STATE BAR SEC. REP.—FAM. L. 8 (1992).

2. When the Texas legislature created intermediate appellate courts in 1891, it made their jurisdiction final, with certain exceptions, in divorce cases. See generally James P. Hart, *The Appellate Jurisdiction of the Supreme Court of Texas*, 29 TEX. L. REV. 285, 307-09 (1951). This prohibition was removed in 1987. See TEX. GOV'T CODE ANN. § 22.225 historical note (Vernon 1988).

3. Sampson, *supra* note 1, at 8.

4. *Attorney General of Texas v. Lavan*, 833 S.W.2d 952 (Tex. 1992); *Murdock v. Murdock*, 811 S.W.2d 752 (Tex. 1991). The *Murdock* decision was treated in last year's survey and will not be revisited here. See Ellen K. Solender, *Family Law: Parent and Child*, 45 SW. L.J. 1873, 1875-76 (1992).

5. *Gibson v. J.W.T.*, 815 S.W.2d 863 (Tex. App.—Beaumont 1991, writ granted); *Dreyer v. Greene*, 809 S.W.2d 262 (Tex. App.—Houston [1st Dist.] 1991, writ granted). Both *Gibson* and *Dreyer* are discussed in John D. Montgomery, *Parenting in the 90's: Who's My Legal Daddy? A Bedtime Story for the Future*, 56 TEX. B.J. 20 (1993).

6. Applications for writ of error were granted in both cases on July 1, 1992, with oral argument heard on December 1, 1992. 35 Tex. Sup. Ct. J. 1005, 1007 (July 1, 1992).

7. 833 S.W.2d 952.

under Chapter 13 of the Family Code, claiming that a third party, Willie Lavan, was the real father. While the suit against Lavan was pending, the Texas Legislature complicated the picture by amending the Family Code to provide that a suit to establish paternity can be maintained only if the child has no presumed father.⁸ Lavan moved for summary judgment, reasoning that since the husband is presumed to be the father of any child born during marriage,⁹ the suit could not be maintained.¹⁰ The situation was complicated still further by the fact that the child had not been mentioned in the divorce decree, giving rise to a claim by the putative father that the parties' failure to contest paternity in the divorce foreclosed later action by the state.

The trial court and the court of appeals agreed with the alleged father. The appeals court reasoned that the husband's paternity could be "disestablished" only in a suit under Family Code section 12.06,¹¹ which specifically excludes Chapter 13 proceedings as an appropriate vehicle for disestablishing paternity.¹² The Texas Supreme Court reversed, reasoning that a Chapter 12 suit could be combined in the same action with a Chapter 13 proceeding,¹³ and that, read liberally, the state's pleadings could be viewed as including a Chapter 12 suit to disestablish the husband's presumed paternity.¹⁴ This ruling undoubtedly came as a surprise to the Attorney General's office, whose representatives had argued in the Texas Supreme Court that they had not in fact intended to plead a Chapter 12 proceeding.¹⁵ Whether *Lavan* sets a new standard for the Texas rule requiring liberal construction of pleadings¹⁶ or not, the result is unobjectionable: Combining the

8. TEX. FAM. CODE ANN. § 13.01(a) (Vernon Supp. 1993).

9. See TEX. FAM. CODE ANN. § 12.02(a)(1) (Vernon Supp. 1993).

10. *Lavan*, 833 S.W.2d at 953.

11. *State of Texas v. Lavan*, 802 S.W.2d 73, 77 (Tex. App.—Austin 1990), *rev'd*, 833 S.W.2d 952 (1992).

12. In relevant part, section 12.06(a) reads as follows:

In any suit affecting the parent-child relationship, *other than a suit under Chapter 13 of this Code*, a husband or wife is entitled to deny the husband's paternity of the child. . . . The question of paternity under this section must be raised by an express statement denying paternity of the child in the spouse's pleadings in the suit

TEX. FAM. CODE ANN. § 12.06(a) (Vernon Supp. 1993) (emphasis added).

13. *Lavan*, 833 S.W.2d at 954.

14. *Id.* The Texas Supreme Court's emphasis on pleading has already been given effect by at least one court. See *In the Interest of B.I.V.*, 843 S.W.2d 58 (Tex. App.—Corpus Christi 1992), *on reh'g*, No. 13-91-080-CV, 1992 Tex. App. LEXIS 2939 (Tex. App.—Corpus Christi, Nov. 6, 1992 n.w.h.). In *B.I.V.*, the Corpus Christi court initially followed the court of appeals' ruling in *Lavan*. After the Texas Supreme Court's decision issued, the court denied a motion for rehearing with a further opinion noting that no Chapter 12 complaint was alleged.

15. In briefing, for example, the Attorney General's office stated specifically that "[t]he attorney general is not a 'husband or wife' and does not seek to rebut the presumed paternity of Willie Flemings pursuant to TEX. FAM. CODE ANN. § 12.06 (Vernon Supp. 1993), but to prove his non-paternity as an element in establishing the paternity of Willie Lavan." Petitioner's Application for Writ of Error at 15, *Attorney General of Texas v. Lavan*, 833 S.W.2d 952 (1992).

16. *Cf.* TEX. R. CIV. P. 45(d) ("All pleadings shall be construed so as to do substantial justice."). In the spirit of this rule, Texas courts typically do read pleadings liberally. See, e.g., *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ requested); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

two actions in one proceeding conserves judicial resources and, as the court put it, "advances the best interests of the child by eliminating any period of time a child would be left without the benefit of a legal father."¹⁷

In *Lavan*, the Supreme Court of Texas dealt in summary fashion with the claim that only the husband or wife had standing to challenge the husband's paternity. While section 12.06 does state that a "husband or wife" is entitled to challenge the husband's paternity, and refers to "the spouse's" pleadings,¹⁸ the court concluded that "[w]e . . . find nothing in the Code that expressly prohibits the State from bringing a claim under chapter 12,"¹⁹ at least in the absence of a proper objection on the point.²⁰ Once the court decided that the State of Texas could bring a claim to disestablish paternity, the question whether the prior divorce decree barred the State's action was answered easily. The court pointed to statutory authority authorizing "any governmental entity" to bring suit "at any time" in suits affecting the parent-child relationship.²¹ The Supreme Court concluded that this gives the State independent standing to challenge paternity, and that since it was not a party to the divorce decree, the decree had no binding effect on a later action.²²

Dreyer v. Greene,²³ currently pending decision in the Supreme Court of Texas, raises another standing issue in paternity suits. In *Dreyer*, the divorce decree adjudged the husband to be the father of three children, the youngest of whom were twins.²⁴ After some difficulties in collecting child support, in which the mother again affirmed that her ex-husband was the twins' father,²⁵ a deal was struck in which the ex-husband conveyed some land in settlement of the child support issue.²⁶ The land eventually proved to be virtually valueless because of an undisclosed tax lien.²⁷ The mother then sued Greene in her capacity as the children's next friend, claiming that Greene was the twins' "real" father. Greene defended, arguing that the suit was barred by the prior adjudication, and pointing to language in Family Code section 13.44 barring a paternity suit if a prior final judgment has been rendered "adjudicating a named individual to be the biological father of the

17. *Lavan*, 833 S.W.2d at 954.

18. See *supra* note 12 and accompanying text.

19. *Lavan*, 833 S.W.2d at 954.

20. The opinion is not altogether clear on the question of whether the issue was raised properly. The court noted that there were no special exceptions directed to the State's theory of recovery and that "the record does not show that *Lavan* complained of the breadth of, or any ambiguity in the State's pleadings." *Id.*

21. TEX. FAM. CODE ANN. § 11.03(a)(5) (Vernon Supp. 1993).

22. *Lavan*, 833 S.W.2d at 955.

23. 809 S.W.2d 262 (Tex. App.—Houston [1st Dist.] 1991, writ granted).

24. *Id.* at 263.

25. *Id.*

26. This fact does not appear in the court of appeals opinion. It is, however, found in the Family Law Section newsletter's report on the case. 91-5 STATE BAR SEC. REP.—FAM. L. 60-61 (John Sampson ed. 1991). Since Professor Sampson, the newsletter's editor, is Greene's counsel on appeal, the information can be presumed to be accurate. Possibly for the same reason, the newsletter's report of the case is unusually sedate.

27. *Id.*

child"²⁸ The trial court agreed with Greene and the court of appeals affirmed.²⁹

Dreyer contains some interesting similarities to *Lavan*, as well as some differences. One possible distinction between *Dreyer* and *Lavan* is the question of whether paternity actually was "adjudicated." In *Dreyer*, the court of appeals emphasized the fact that the twins were mentioned as children of the marriage in a sworn divorce pleading and in a subsequent proceeding to collect child support.³⁰ In contrast, the child in *Lavan* was for some reason not mentioned in the divorce proceeding. While not citing section 13.44 specifically, the Supreme Court of Texas noted in *Lavan* that "no order of the court purported to adjudicate the child's paternity."³¹ If this is a relevant distinction, it would be a thin one. The omission of the child's name from the *Lavan* pleadings is unexplained; the inclusion of the twins' names in the *Dreyer* pleadings resulted in adjudication only in the most technical sense, since judgment was rendered by default.³²

The Supreme Court of Texas' decision in *Dreyer* ought to be interesting, to put it mildly. While, as the court of appeals noted, the parents are presumed to represent the interests of the children in a divorce,³³ one might reasonably question whether a child's rights can be pretermitted by a garden-variety divorce action in which there is no separate representation of the child's interests³⁴ and in which the parties may well have interests that conflict with those of the child.³⁵ To cut off a child's rights in such a situation might conceivably give rise to a problem of constitutional dimensions, and Mrs. Dreyer so argued, although the court of appeals held that any such argument was waived by failure to raise the issue at trial.³⁶ Moreover, in *R.M.H. v. Messick*,³⁷ the Fort Worth court of appeals has suggested that a child's right to bring a paternity suit is not barred by a prior paternity suit filed and abandoned by her mother. The court expressly declined to follow the reasoning of the court of appeals in *Dreyer*, instead using a "virtual representation" theory to decide that the child's rights were not adequately represented, and a subsequent independent action not barred.³⁸

28. TEX. FAM. CODE ANN. § 13.44(a)(1) (Vernon Supp. 1993).

29. *Dreyer*, 809 S.W.2d at 263, 264.

30. *Id.*

31. *Lavan*, 833 S.W.2d at 953.

32. *Dreyer*, 809 S.W.2d at 263.

33. *Id.* at 264.

34. The court of appeals noted that an attorney ad litem "may" be appointed to represent the child's interests in a divorce, *id.* at 264 (citing TEX. FAM. CODE ANN. § 11.10(c) (Vernon 1986)), but that no attorney ad litem had been appointed in this case. Since this was a default judgment, however, one might reasonably wonder how the trial court could have been apprised of any possible problem or conflict of interest.

35. For example, if (as seems to be intimated) Kathleen Dreyer brought a paternity suit against Phillip Greene only because her ex-husband "dried up" as a source of child support, then it would seem equally reasonable to assume that she might have named her ex-husband as the father because of an initial mistaken impression that, "real" father or not, he would be a better source of child support. The child, however, might be interested in the truth.

36. *Dreyer*, 809 S.W.2d at 264.

37. 828 S.W.2d 226 (Tex. App.—Fort Worth 1992, no writ).

38. *Id.* at 225-26.

In *Gibson v. J.W.T.*,³⁹ however, a case in which the Supreme Court of Texas granted a writ of error the same day it decided *Lavan* and granted a writ in *Dreyer*, a constitutional challenge on behalf of a putative father is presented squarely. The facts in *Gibson* are only a minor variation on the *Lavan/Dreyer* theme. Mr. and Mrs. "T" separated, pending divorce. Mrs. T took up residence with Larry Gibson for several months, but then reconciled with her husband. Some months later, J.W.T. was born. Gibson filed suit to establish paternity. The trial court ordered blood tests, with subsequent testimony that, to a 99.41 percent certainty, Gibson was the biological father.⁴⁰ This result was not altogether surprising, as Mr. T had a vasectomy about ten years prior to J.W.T.'s birth.⁴¹ The apparent reason for the trial court's dismissal of Gibson's action, and the focus of the appeal, was Gibson's lack of standing.

Section 11.03 of the Family Code sets out the list of parties entitled to bring a suit affecting the parent-child relationship.⁴² In *Lavan*, the fact that governmental entities are mentioned in Section 11.03 was given some weight in the decision.⁴³ The fact that children are mentioned specifically in section 11.03 may also play some part in the ultimate resolution of *Dreyer*.⁴⁴ Section 11.03(a)(7), however, specifically excludes causes of action by a person claiming to be a biological father unless there is no presumed father.⁴⁵ Since Mr. T is the presumed father in this case,⁴⁶ Gibson's only hope was to argue that this provision is unconstitutional. Unfortunately for his position, the United States Supreme Court ruled in *Michael H. v. Gerald D.*,⁴⁷ a case the court of appeals felt to be "directly on point,"⁴⁸ that cutting off a biological father's rights raises no due process problems.⁴⁹ Gibson therefore relied upon the due process analogue in the Texas Constitution,⁵⁰ despite the fact that the clause is commonly construed with reference to its federal counterpart.⁵¹

The Beaumont court of appeals agreed with Gibson's contention, rejecting

39. 815 S.W.2d 863.

40. *Id.* at 864-65.

41. *Id.* at 865.

42. TEX. FAM. CODE ANN. § 11.03(a) (Vernon Supp. 1993).

43. See *supra* note 13 and accompanying text.

44. TEX. FAM. CODE ANN. § 11.03(a)(2) (Vernon Supp. 1993)(authorizing a suit to be brought "at any time" by "the child (through a representative authorized by the court)").

45. TEX. FAM. CODE ANN. § 11.03(a)(7) (Vernon Supp. 1993).

46. See *supra* note 9 and accompanying text.

47. 491 U.S. 110 (1989).

48. *Gibson*, 815 S.W.2d at 863.

49. 491 U.S. at 129.

50. TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."). However, the application for writ of error in *Gibson* was also granted on "open courts" and "equal rights" grounds, TEX. CONST. art I, §§ 13, 3a, indicating that these issues also were raised at the court of appeals stage. See Tex. Sup. Ct. J. 1008 (July 1, 1992).

51. Cf. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 102 (1987)("As a rule, . . . Texas courts have declined the opportunity to fully define the scope of state procedural due process because of their frequent reliance on the fourteenth amendment.").

the United States Supreme Court's approach in *Michael H. v. Gerald D.* The unanimous Beaumont court held that "the rights and privileges of parenthood are indeed fundamental"⁵² but rejected the United States Supreme Court plurality's countervailing consideration of protecting the "sanctity of the family" through measures designed to favor "historic" family units.⁵³ The language of the Beaumont court is unusually strong, criticizing the Supreme Court's "obviously strained analysis"⁵⁴ and concluding: "Thank God the Fourteenth Amendment gives the federal government no power to impose upon this state its view of what constitutes wise economic or social policy."⁵⁵

On October 30, 1992, the Waco court of appeals entered the fray with its decision in *Henderson v. Wietzikoski*.⁵⁶ On similar facts, the Waco court sided with Beaumont in holding Family Code section 11.03(a)(7) unconstitutional on state due process grounds.⁵⁷ The majority decision in *Henderson*, however, also addressed constitutional issues skirted by the Beaumont court in *Gibson*, whether the ban against paternity challenges by alleged natural fathers when a child has a presumed father violates the "open courts" provision of the Texas Constitution⁵⁸ or the Texas Equal Rights Amendment.⁵⁹ The Waco court found that no open courts problem is presented⁶⁰ but that the Family Code provision is a "gender-based distinction because only men such as Henderson . . . are denied the right to bring a suit to establish the parent-child relationship."⁶¹ Balancing the child and putative parent's "right to know" against the public policy favoring stable marriages, the majority struck the balance in favor of the right to know and against the statute's constitutionality.⁶² A vehement dissent by Chief Justice Thomas, however, criticized both the Waco and Beaumont courts' result, concluding that

[f]or the first time in the history of Texas jurisprudence, and in absolute derogation of the common law, a court recognizes the constitutional right of an outsider to attack the sanctity of the marital family by establishing the illegitimacy of its children. Surely that cannot be a right granted by the due-process clause of our state's constitution.⁶³

52. *Gibson*, 815 S.W.2d at 866.

53. *Id.* at 867 (citing *Michael H.*, 491 U.S. at 124).

54. *Id.*

55. *Id.*

56. 841 S.W.2d 101 (Tex. App.—Waco, 1992, n.w.h.).

57. *Id.* at 102.

58. TEX. CONST. art. I, § 13 provides, in relevant part, that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

59. The Texas ERA, adopted in 1972, provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin" and is self-operative. TEX. CONST. art. I, § 3a.

60. The court reasoned that the Texas open courts provision applies only to deprivations of established common law rights and that Henderson established no such right. *Henderson*, 841 S.W.2d at 105.

61. *Id.* at 104.

62. *Henderson*, 841 S.W.2d at 105.

63. *Id.* at 109 (Thomas, C.J., dissenting). Chief Justice Thomas also characterized the

There is surely something to be said for both sides of the issue, and the "point-counterpoint" discussion in the Family Law Section's newsletter spells out some of the policy issues succinctly. David Gray, criticizing the Beaumont court's ruling in *Gibson*, opines that "[k]eeping a family together is tough enough without allowing a stranger to intervene with or without paternal 'good cause.'"⁶⁴ In response, Professor Sampson comments that "the possibility also exists that the 'real husband' is but a convenience used by the mother to divest the 'real father' of his parental rights . . . In sum, in these cases the search for justice may be so fact-specific as to defy rulemaking."⁶⁵ In any event, the Supreme Court of Texas will have an opportunity in *Gibson* to give some constitutional guidance on a question that could have arisen in *Lavan*⁶⁶ and may or may not be faced in *Dreyer*.⁶⁷

Finally, two recent court of appeals cases, also dealing with paternity questions, deserve brief mention. In *Espiricueta v. Vargas*,⁶⁸ the Austin court of appeals held that a putative father could establish his paternity of a deceased child, for the purpose of sharing in a personal injury recovery, despite a recital in a divorce decree that the child was "born during the marriage" of the mother and another man.⁶⁹ The Austin court reasoned that this somewhat equivocal language did not constitute a "decree establishing paternity" so as to create res judicata problems.⁷⁰ Moreover, the fact that the putative father apparently signed a birth certificate as the child's father, permitted the court to presume that he was the child's father,⁷¹ even though this presumption could conflict with the presumption that the husband is the father of any child born during marriage.⁷² *Espiricueta* was cited with apparent approval by the Texas Supreme Court in *Lavan*.⁷³

In *T.W.E. v. K.M.E.*,⁷⁴ a divorce and custody proceeding bridging the gap between paternity and conservatorship issues, the mother claimed—and

Beaumont court's result as "bizarre," and commented: "Unfortunately, after thanking Providence that Texas can declare its own state policy, the *Gibson* court proceeds to ignore the policy set by the Texas legislature, which protects the marital family from outsiders attacking the legitimacy of children born to the marriage." *Id.* at 108.

64. 92-1 STATE BAR SEC. REP.—FAM. L. 36, 37 (John Sampson ed. 1992).

65. *Id.*

66. The Attorney General's briefing in *Lavan* suggested that a decision on statutory grounds, as did ultimately issue from the Supreme Court of Texas, would make "unnecessary an analysis of the child's due process rights under the Texas Constitution, which would seem at least as worthy of recognition as those of the biological father in *Gibson* . . ." Petitioner's Post-Submission Brief at 7, Attorney General of Texas v. *Lavan*, 833 S.W.2d 952 (Tex. 1992).

67. See *supra* notes 33-36 and accompanying text.

68. 820 S.W.2d 17 (Tex. App.—Austin 1991, writ denied).

69. *Id.* at 19.

70. *Id.*

71. *Id.* at 20. See TEX. FAM. CODE ANN. § 12.02(a)(4) (Vernon Supp. 1993).

72. In his comment on the case, David Gray points out some possible problems that could arise when different statutory presumptions conflict. Professor Sampson replies: "The 1989 legislature added four additional presumptions of paternity to the longstanding presumption applicable to the mother's husband . . . The legislature also chose not to provide a rank order for these presumptions, leaving trial courts the responsibility for resorting to logic if scientific parentage testing fails." 92-1 STATE BAR SEC. L. REP.—FAM. L. 38-39 (John J. Sampson ed. 1992).

73. See *Lavan*, 833 S.W.2d at 955.

74. 828 S.W.2d 806 (Tex. App.—San Antonio 1992, no writ).

proved through blood tests and other evidence—that a six-year-old child was not her husband's, but the result of an extramarital relationship. The San Antonio court of appeals rejected the husband's theories of estoppel and equitable adoption, but found that he nonetheless had standing to seek appointment as managing conservator as a "person who has had actual possession and control of the child for at least six months immediately preceding the filing of the petition."⁷⁵ The court also took the occasion to opine that the statutory scheme permitting a "psychological father" of long standing to be placed at a disadvantage by an adulterous spouse in divorce, due to the statutory preference for biological parents,⁷⁶ "puts a dangerous weapon in the legal arsenal of parents who are willing, during the stress of divorce litigation, to sacrifice a child's best interests for their own personal reasons."⁷⁷ The decision concludes with a broad hint to future litigants to consider a statute of limitations argument.⁷⁸

II. CONSERVATORSHIP

The Texas Supreme Court has been nearly as active in the area of child custody as it has in paternity matters recently, and has issued two decisions during the past year. In *Weirich v. Weirich*,⁷⁹ a jury awarded a mother almost \$6,000,000 in damages from the father and paternal grandmother for taking and hiding the children for almost seven years. The father did not appeal.⁸⁰ The court of appeals reversed,⁸¹ holding that Texas does not recognize a common law cause of action for negligent interference with a family relationship and that there was no evidence to support a verdict against the grandmother under the Family Code.⁸² The Texas Supreme Court reversed on the Family Code question, finding that there was some evidence that the grandmother knew the children were subject to a court order. The court thus did not reach the common law tort question.⁸³ The court remanded the issue to the court of appeals, however, to consider insufficiency of the evidence points of error. A separate concurrence by Justice Doggett advocated

75. TEX. FAM. CODE ANN. § 11.03(a)(8) (Vernon Supp. 1993).

76. See TEX. FAM. CODE ANN. § 14.01(b)(1) (Vernon Supp. 1993)(requiring that a parent be appointed managing conservator unless it would "not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development").

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

78. The court noted that "[a] statute of limitations for the denial of paternity would solve many of these problems," and that a four-year residual statute might apply, but that the issue was not raised in the trial court. *Id.* at 809-10.

79. 833 S.W.2d 942 (Tex. 1992).

80. The court of appeals noted that the father did not perfect an appeal because a tentative settlement had been reached. *Weirich v. Weirich*, 796 S.W.2d 513, 514 (Tex. App.—San Antonio 1990), *aff'd in part, rev'd in part*, 833 S.W.2d 942 (Tex. 1992).

81. The decision was summarized in last year's survey. See Solender, *supra* note 4, at 1880.

82. The Texas Family Code provides a cause of action for interference with child custody and provides joint and several liability for those who assist in this interference. TEX. FAM. CODE ANN. § 36.02(a), (c) (Vernon 1986).

83. *Weirich*, 833 S.W.2d at 943.

recognition of a common law cause of action.⁸⁴

Smith v. State,⁸⁵ a habeas corpus action arising out of a criminal prosecution for interference with child custody, deserves mention if for no reason other than its unusual facts. In 1985, Charles Smith allegedly fled Texas with his two young sons, in violation of a child custody order. During the seven years that followed, he apparently lived with his sons in Brazil, Scotland, Switzerland, Greece and Turkey, moving whenever his ex-wife picked up his trail, before finally settling down in Mexico.⁸⁶ In December of 1991, after the story aired on the television program *Unsolved Mysteries*, Smith was located in Mexico City and deported to the United States for trial.⁸⁷ At some time during this process, his ex-wife secured a \$53 million judgment on behalf of the children in a Harris County district court.⁸⁸

The record at Smith's bail proceeding was not clear. The trial judge, however, either set Smith's bail at \$53 million or conditioned \$20,000 in bail on payment of the \$53 million civil judgment.⁸⁹ On appeal, the Houston court of appeals [First District] held that, viewed either way, the bail determination was erroneous: If bail was set at \$53 million, the amount was so clearly excessive as to violate Texas law; if conditioned on payment of the civil judgment, the trial court's ruling bore no rational relationship to the purposes of bail, that is, insuring a defendant's attendance at trial.⁹⁰ Since Smith's prior record gave rise to some questions regarding the likelihood that he would appear at trial, the appeals court reduced bail, but only to \$125,000.⁹¹

In *the Interest of S.A.V.*,⁹² the Texas Supreme Court took up a complex and confusing jurisdictional question. A Minnesota couple divorced. The parents were awarded joint custody of the children, with the mother as physical custodian. Some time later, the mother moved to Texas. The mother moved to modify the Minnesota order in Texas; one day later, the father moved to modify in Minnesota.⁹³ The two state courts ultimately issued parallel orders on child support and visitation expenses. The Texas court, however, also modified the original Minnesota order to award the mother sole managing conservatorship and modified the father's visitation rights. A bare majority of the Texas Supreme Court decided that the father had sufficient "minimum contacts" with Texas—visiting his children and concurrently making employment inquiries—to warrant the exercise of jurisdiction by a Texas court over child support and visitation matters.⁹⁴ The majority

84. *Id.* at 946 (Doggett, J., concurring).

85. 829 S.W.2d 885 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

86. This testimony came from Smith's thirteen year-old son. *Id.* at 886.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 887.

91. *Id.* at 887. Since Smith testified that he could raise only \$400 to pay a bail bond premium, however, this "victory" apparently had no practical effect. *Id.*

92. 837 S.W.2d 80 (Tex. 1992).

93. *Id.* at 82.

94. *Id.* at 86. A dissenting opinion, authored by Justice Hecht and joined by Chief Justice Phillips and Justice Cornyn, argued that the majority's ruling might discourage parents from

also interpreted a Minnesota district court ruling, to the effect that "[t]his Court will decline to exercise its jurisdiction over child custody and visitation if Texas insists on exercising jurisdiction pursuant to an appellate court decision,"⁹⁵ as falling within the federal Parental Kidnapping Prevention Act's proviso that a court of one state can modify a custody determination from another state if the first state "has declined to exercise such jurisdiction."⁹⁶

In *Phillips v. Phillips*,⁹⁷ the Houston court of appeals (14th District), also concluded that a father, originally from Mississippi but residing in Kenya, had sufficient contacts with Texas to warrant the exercise of jurisdiction to enforce child support payments pending divorce. The mother, who was originally from Houston, took the children from Kenya to Houston for a three-week visit and never returned. The father's contacts with Texas consisted only of eight visits during courtship and marriage.⁹⁸ Nonetheless, since the father had no recent significant contacts with Mississippi or any other state, and it would be no more burdensome for him to defend the suit in Texas than elsewhere, the court sustained the exercise of jurisdiction.⁹⁹

In *the Interest of Carpenter*¹⁰⁰ presents an uncommon variation on the jurisdiction theme. After a Pennsylvania divorce, the husband absconded with the child, settling in Crowell, Texas. The authorities eventually tracked the father down and returned the child to his mother, who had since moved to Arizona. The father then filed suit in Texas to modify the Pennsylvania child custody order, arguing that Texas was the child's home state, since the child had at that time lived in Texas for the preceding six months. The trial court declined to exercise jurisdiction. The court of appeals affirmed, observing that under the Texas Uniform Child Custody Jurisdiction Act, Texas was the child's home state¹⁰¹ but that a court should decline jurisdiction if the petitioner has improperly removed the child from another's custody, unless the exercise of jurisdiction is in the child's best interests.¹⁰² The father argued that most evidence and witnesses to the child's welfare were in Texas and that these are important UCCJA considerations. The father also raised "open courts" and equal protection challenges. The court of appeals rejected these contentions, stating that the father "should not be allowed to use his deliberate secretion of himself and [the child] as a claim or right. . . . To do so would make a mockery of the purposes of the UCCJA."¹⁰³

visiting children. *Id.* at 89 (Hecht, J., dissenting). A separate dissent by Justice Gonzalez echoed these concerns. *Id.* at 93-94 (Gonzalez, J., dissenting).

95. *In the Interest of S.A.V.*, 837 S.W.2d at 88.

96. 28 U.S.C. § 1738A(f)(2)(1988).

97. 826 S.W.2d 746 (Tex. App.—Houston [14th Dist.] 1992, no writ).

98. *Id.* at 748.

99. *Id.* at 750.

100. 835 S.W.2d 760 (Tex. App.—Amarillo 1992, no writ).

101. TEX. FAM. CODE ANN. § 11.52(5) (Vernon 1986)(defining "home state" as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months").

102. TEX. FAM. CODE ANN. § 11.58(b) (Vernon 1986).

103. *Cunningham*, 835 S.W.2d at 761.

Under Texas law, as amended in 1987, nonparents may be granted custody only if the court finds that appointment of either parent "would significantly impair the child's physical health or emotional development."¹⁰⁴ In *Landry v. Nauls*¹⁰⁵ the Houston court of appeals [Fourteenth District], in a case of first impression,¹⁰⁶ reversed an award of custody to a grandparent, observing that this statutory language sets a higher burden of proof than did previous law¹⁰⁷ and that fact findings tracking the statutory language would be required.¹⁰⁸ In addition, the court opined, an award of custody to a grandparent is not proper when the grandparent is not a party to the action.¹⁰⁹ By contrast, in *May v. May*,¹¹⁰ an award of custody to the maternal grandfather was affirmed on appeal, when the evidence showed that the father had once sold drugs from his home.¹¹¹

Prause v. Wilder,¹¹² from the Texarkana court of appeals, addresses an interesting visitation question. The father moved to modify a restrictive visitation order to bring visitation up to the "standard" level presumed by the Family Code to be reasonable and in the child's best interests.¹¹³ The trial court declined to modify the order and the appeals court affirmed. The majority reasoned that, since the father "did not prove evidence [sic] that the current visitation order is unworkable or that a change would be in the best interest of the child,"¹¹⁴ the trial court did not abuse its discretion in declining to modify the order. A better-reasoned¹¹⁵ concurrence concluded that, since the father was requesting only that visitation be increased to the standard level, the statutory presumption that the standard order is reasonable and in the child's best interest worked in his favor until rebutted.¹¹⁶ However, record evidence that the father drank in the presence of the child, became violent when drinking, and kept a vicious pit bull dog, was sufficient to rebut the presumption and sustain the trial court's ruling.¹¹⁷

The past year has seen at least two cases involving some sort of successful recourse against state agencies or professionals by parents accused of child abuse, as well as at least one failed attempt. In *Black v. Dallas County Child Welfare Unit*,¹¹⁸ the Supreme Court of Texas ruled that a mother accused of child abuse could recover over \$53,000 in costs from a state agency that acted "frivolously, unreasonably and without foundation."¹¹⁹ This was a

104. TEX. FAM. CODE ANN. § 14.01(b) (Vernon Supp. 1993).

105. 831 S.W.2d 603 (Tex. App.—Houston [14th Dist.] 1992, no writ).

106. *Id.* at 604.

107. *Id.*

108. *Id.* at 606.

109. *Id.*

110. 829 S.W.2d 373 (Tex. App.—Corpus Christi 1992, writ denied).

111. *Id.* at 377-78.

112. 820 S.W.2d 386 (Tex. App.—Texarkana 1991, no writ).

113. TEX. FAM. CODE ANN. § 14.033(k) (Vernon Supp. 1993).

114. *Prause*, 820 S.W.2d at 387.

115. *Accord Editors Note*, 92-1 STATE BAR SEC. REP.—FAM. L. 22 (John J. Sampson ed. 1992).

116. *Prause*, 820 S.W.2d at 388 (Grant, J., concurring).

117. *Id.*

118. 835 S.W.2d 626 (Tex. 1992).

119. *Id.*

case of first impression¹²⁰ under chapter 105 of the Texas Civil Practice & Remedies Code,¹²¹ providing remedies for costs incurred in defending against frivolous claims by state agencies.

In *Black*, a teacher of a four-year-old handicapped girl reported signs of possible sexual abuse to the Dallas County Welfare Unit of the Texas Department of Human Services. A probationary caseworker interviewed the child and her brother, then made a decision to take both children into custody.¹²² The recital of facts in the majority and dissenting opinions of the Supreme Court of Texas vary substantially in flavor. Nonetheless, it appears that a judge refused to issue an ex parte temporary possession order, commenting that the evidence did not indicate any immediate danger.¹²³ The Department kept custody of the children over the weekend and obtained a hearing before a master on Monday, who granted the Department's request.¹²⁴ At an evidentiary hearing nine days later, however, the master found no evidence of abuse and ruled for Mrs. Black.¹²⁵ Nonetheless, the Department continued to keep the children for another day, requesting a trial de novo from the district judge.¹²⁶

Mrs. Black counterclaimed and, after a bench trial, obtained judgment for her expenses under Chapter 105. The court's ruling was that, while the Department did not act frivolously when it removed the children from their home, it did act frivolously from the day the judge first denied the ex parte order until the termination of the proceedings.¹²⁷ The Texas Supreme Court split five-to-four. The principal dispute involved the interpretation of language in Chapter 105 providing for assessment of costs when "the court finds that the *action* is frivolous, unreasonable, or without foundation."¹²⁸ While the dissenting opinion argued that this language required a finding that the Department's *lawsuit* be frivolous when filed,¹²⁹ the majority considered that the lawsuit *became* frivolous once the trial court denied the original ex parte request.¹³⁰

Put differently, state agencies apparently now have a duty to reevaluate suits as events develop, and to cease prosecution once further pursuit of a case might be viewed as "frivolous, unreasonable, or without foundation." Whether this reasoning ultimately will carry over into sanctions assessed under the Texas Deceptive Trade Practices Act¹³¹ or Rule 13¹³² is open to

120. *Id.* at 630.

121. TEX. CIV. PRAC. & REM. CODE ANN. §§ 105.001-04 (Vernon 1986).

122. *Black*, 835 S.W.2d at 627-28.

123. *Id.* at 628.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 630 n.9.

128. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(1) (Vernon 1986) (emphasis added).

129. *Id.* at 631 (Cornyn, J., dissenting).

130. *Black*, 835 S.W.2d at 630.

131. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon 1987).

132. TEX. R. CIV. P. 13. The ruling in *Black* is similar to the Fifth Circuit's ruling in *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987), that "the inquiry [into the factual and legal bases of pleadings] required by [federal] rule 11 is not a one time only

question; the dissent "suppose[s] the same rule would apply in other contexts"¹³³ while the majority disclaims any intended effect beyond Chapter 105 actions.¹³⁴

For Houston lawyers involved in suits against professionals who diagnose or report cases of child abuse, 1992 was an interesting—and somewhat confusing—year. In *W.C.W. v. Bird*¹³⁵ a parent accused of child abuse was given a green light from the Houston court of appeals (1st District) to use the common law remedy of a suit for "negligent misdiagnosis" against a psychologist who testified against him. However, in *Vineyard v. Kraft*,¹³⁶ under somewhat similar circumstances, the Houston court of appeals (14th District) denied recovery.

In *Bird*, the managing conservator father was about to move the child to Florida when the mother filed criminal charges alleging sexual abuse. The mother took the child to psychologist Bird for counseling. According to the summary judgment evidence, this was Bird's first sexual abuse case.¹³⁷ Nonetheless, she spent a total of only ten minutes with the child, during which time she asked no specific questions and conducted no tests. Since the child was staying temporarily with the mother's family at the time, the psychologist's suspicions of abuse by "Daddy" could have referred either to the father or to the mother's new common-law husband.¹³⁸ Nonetheless, the psychologist filed an affidavit in the custody action stating that the child was a victim of sexual abuse by his father and had a conversation with the investigating officer, resulting in the filing of criminal charges against the father.¹³⁹ After a successful termination of the proceedings, the father sued Bird. The trial court granted summary judgment.

In *Vineyard*, while the facts as stated by the court of appeals are perhaps less compelling, the story is much the same. Dr. Kraft initially was appointed by the court to evaluate the father and mother in connection with a divorce proceeding.¹⁴⁰ The mother took her young daughter to Dr. Kraft for psychiatric treatment; Dr. Kraft eventually recommended that Mr. Vineyard not be the primary caretaker.¹⁴¹ Some time after the divorce, convinced that Mr. Vineyard was abusing his daughter, his former wife violated court orders and went into hiding in Minnesota.¹⁴² Mr. Vineyard then sued Dr. Kraft. Again, the trial court granted summary judgment.

Under Family Code chapter 34, those who report child abuse generally

obligation. Counsel have a continuing obligation to review and reevaluate their position as the case develops." *Id.* at 1127.

133. *Black*, 835 S.W.2d at 634.

134. *Black*, 835 S.W.2d at 629 n.5 (citing the "distinct policy considerations" involved in Chapter 105).

135. 840 S.W.2d 50 (Tex. App.—Houston [1st Dist.] 1992, writ requested).

136. 828 S.W.2d 248 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

137. *Bird*, 840 S.W.2d at 52.

138. *Id.*

139. *Id.*

140. 828 S.W.2d at 249.

141. *Id.* at 251.

142. *Id.*

are immune from liability, including liability for testimony in judicial proceedings.¹⁴³ In *Vineyard*, Dr. Kraft made a report pursuant to chapter 34. Accordingly, the Houston court of appeals (14th District) held that this immunity extended to all statements made in connection with judicial proceedings.¹⁴⁴ In *Bird*, by contrast, chapter 34 was not mentioned until oral argument in the court of appeals, and thus could not support a summary judgment.¹⁴⁵

Ms. Bird did make an argument not raised in *Vineyard*, to the effect that she should benefit from the common law immunity accorded to participants in judicial proceedings.¹⁴⁶ Relying on *James v. Brown*,¹⁴⁷ the Houston court of appeals [First District] held that this privilege extends to suits for defamation, but "does not preclude a suit for negligence."¹⁴⁸

One aspect of *Bird*, however, does seem to present a clear conflict with *Vineyard*. In both decisions, the courts of appeals recognized that a tricky question of duty is presented when one parent brings a child to a health care professional and a negligent diagnosis results in harm to the other parent. Both courts turned to the Supreme Court of Texas' "balancing" analysis in *Otis Engineering Corp. v. Clark*.¹⁴⁹ In *Vineyard*, the court of appeals placed great weight upon public concern with sexual abuse, expressed in part through reporting statutes such as section 34.03, and upon the legislative remedies for improper reporting.¹⁵⁰ The court concluded that these factors outweighed the possible harm to family relationships caused by not providing a common law remedy.¹⁵¹ In *Bird*, by contrast, the court made no apparent attempt to factor in the social interest, possibly because no formal chapter 34 report was made.¹⁵²

143. TEX. FAM. CODE ANN. § 34.03 (Vernon Supp. 1993).

144. *Id.* at 254.

145. *Bird*, 840 S.W.2d at 53.

146. See, e.g., *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ); *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. Civ. App.—Dallas 1910, writ ref'd).

147. 637 S.W.2d 914 (Tex. 1982).

148. This aspect of the court of appeals' holding is perhaps not as clear as it might be. In *James v. Brown*, relied upon by the court, a mental patient initially hospitalized for observation was allowed to sue for negligent misdiagnosis and false imprisonment even though the psychiatrists' findings were later communicated to a court. 637 S.W.2d at 917-18. This ruling is not unreasonable, since the patient would have suffered confinement in a mental institution as a result of the alleged misdiagnosis, with resulting harm, even had the doctors never communicated their findings to a court in a commitment proceeding. In cases in which a pleading of "negligence" could be said to be a way of artfully avoiding the immunity defense, however, Texas courts have barred claims sounding in negligence. See, e.g., *Clark v. Grigson*, 579 S.W.2d 263, 265 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). In *Bird*, the psychologist apparently was contacted as part of a coordinated effort by the mother to stop the father from taking the child to Florida. See *Bird*, 840 S.W.2d at 51.

149. 668 S.W.2d 307, 309 (Tex. 1983) (discussing, in the context of determining whether a "duty" is owed, "the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer"); see *Bird*, 840 S.W.2d at 55 (discussing *Otis Engineering*); *Vineyard*, 828 S.W.2d at 253(same).

150. TEX. FAM. CODE ANN. § 34.031 (Vernon Supp. 1993).

151. *Vineyard*, 828 S.W.2d at 253-54.

152. *Bird*, 840 S.W.2d at 54-56.

Cheatham v. Rogers,¹⁵³ a discovery mandamus proceeding, deserves brief mention, if only as another recent example of applying the maxim "the best defense is a good offense," when dealing with an unfriendly mental health professional. Mr. Cheatham was faced with a court-appointed counselor's report recommending that his rights of access be terminated, and with his former wife's motion seeking to implement that recommendation. He responded by noticing the counselor's deposition, accompanying the notice with a subpoena duces tecum requesting all records relating to *the counselor's* mental health.¹⁵⁴ The counselor claimed a privilege under Rule 510(b).¹⁵⁵ The trial court agreed and quashed the deposition.

The Tyler court of appeals reversed. The court reasoned that the rule's exception for situations "[w]hen the disclosure is relevant in any suit affecting the parent-child relationship" applied¹⁵⁶ and that the information was relevant because, "if the information sought shows that [the counselor's] opinion comes from one who is impaired mentally or emotionally, she would be effectively impeached by such evidence."¹⁵⁷ The *Cheatham* court's reasoning was followed by the Houston court of appeals (1st District) in holding that mental health records of a "close friend" of the wife were likewise subject to an exception to the mental health privilege, though not relevant in the particular case.¹⁵⁸ And, in a letter opinion reciting facts suspiciously similar to those in the Houston case, the Attorney General's office declined to address the issue, stating that "[t]he Opinion Committee will not issue an opinion that effectively overrules a judicial decision."¹⁵⁹

Finally, in *McDonald v. McDonald*,¹⁶⁰ the Houston court of appeals (14th District) dealt with a split custody question. In a custody modification proceeding, in which both parents sought sole managing conservatorship, the jury decided that the mother should be the sole managing conservator of her nine-year-old daughter. The evidence, as characterized by the court of appeals, "presented the jury with a difficult choice between two loving parents."¹⁶¹ On appeal, the father argued that, since his sixteen-year-old son was living with him, the mother should be required to show "clear and compelling"¹⁶² reasons for split custody. Noting that this requirement is not found in the Family Code, however, the court of appeals opined that the advantages of keeping children together was only one factor going into the

153. *Cheatham v. Rogers*, 824 S.W.2d 231 (Tex. App.—Tyler 1992) (orig. proceeding).

154. *Id.* at 232-33.

155. Rule 510(b) provides in relevant parts that "[c]ommunication between a patient and a professional is confidential and shall not be disclosed" and that "[r]ecords . . . which are created by a professional are confidential and shall not be disclosed" TEX. R. EVID. 510(b)(1), (2).

156. *Cheatham*, 824 S.W.2d at 234 (citing TEX. R. EVID. 510(d)(6)).

157. *Id.* at 233.

158. *Smith v. Gayle*, 834 S.W.2d 105 (Tex. App.—Houston [1st Dist.] 1992, no writ).

159. Op. Tex. Att'y Gen. No. 92-39 (1992).

160. 821 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1992, no writ).

161. *Id.* at 463.

162. This standard is often used by Texas courts when considering the splitting of custody. See, e.g., *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. App.—Houston [1st Dist.] 1988, no writ).

calculus of the child's "best interests." The *MacDonald* court observed that, since the son had elected to live with his father,¹⁶³ application of a "clear and compelling" standard in this case would force parents to contest such elections or risk losing other children.¹⁶⁴

III. SUPPORT

If the legislatively-mandated child support guidelines were designed to eliminate courtroom wrangling, they have not yet succeeded fully in this goal. Two recent cases, *Ikard v. Ikard*¹⁶⁵ and *Rodriguez v. Rodriguez*,¹⁶⁶ have come to conflicting results on the determination of child support at the upper end of the income spectrum; the Texas Supreme Court has granted an application for writ of error in *Rodriguez*, the more recent of the two.¹⁶⁷

The principal issue facing the Texas Supreme Court in *Rodriguez* is whether "lifestyle" factors can be taken into account when the child support obligor's net monthly income exceeds \$4000, or whether additional support at this level is limited to a child's demonstrated needs. Before 1989, this question would not have arisen: The 1987 statutory guidelines specifically included lifestyle as a factor to be considered by a court when the obligor's income exceeded \$4000 per month.¹⁶⁸ In a 1989 legislative revision, however, the reference to lifestyle was deleted.¹⁶⁹ While this might seem to indicate the legislature's intent to eliminate lifestyle factors from child support at the upper end of the income scale, and the majority of the *Rodriguez* court of appeals panel so held,¹⁷⁰ the situation is not quite that simple. Even after the 1989 amendments, the Texas child support statutes still provide that the guidelines are only applied "presumptively"¹⁷¹ and that, whether following or deviating from the guidelines, courts may consider among other factors "the ability of the parents to contribute to the support of the child."¹⁷² In addition, the statutes set out a number of relevant "evidentiary factors,"¹⁷³

163. TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1993)

164. *MacDonald*, 821 S.W.2d at 463.

165. 819 S.W.2d 644 (Tex. App.—El Paso 1991, no writ).

166. 834 S.W.2d 369 (Tex. App.—San Antonio 1992, writ granted).

167. The application for writ of error was granted November 4, 1992. Oral argument is set for February 9, 1993. 36 Tex. Sup. Ct. J. 139 (Nov. 4, 1992).

168. The 1987 guidelines stated that "[i]n situations in which the obligor's net resources exceed \$4,000 per month, the court should apply the percentage guidelines . . . to the first \$4,000 of the obligor's net resources, and, without further reference to the percentage recommended by these guidelines, may order additional amounts of child support as are appropriate, depending on the lifestyle of the family, the income of the parties, and the needs of the parties." Act of Nov. 1, 1987, 70th Leg., 2d C.S., ch. 73, § 4, 1987 Tex. Gen. Laws 226-27, amended by Act of Sep. 1, 1989, 71st Leg., ch. 617, § 5, 1989 Tex. Gen. Laws 2035.

169. The current version of the relevant portion of section 14.055 states that the guidelines apply presumptively to the first \$4000 of monthly net resources, and that, "[w]ithout further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as proven, depending on the needs of the child at the time of the order." TEX. FAM. CODE ANN. § 14.055(c) (Vernon Supp. 1993).

170. 834 S.W.2d at 373.

171. *Id.*

172. TEX. FAM. CODE ANN. § 14.052(b)(2) (Vernon Supp. 1993).

173. TEX. FAM. CODE ANN. § 14.054 (Vernon Supp. 1993).

including the catch-all phrase, "any other reason or reasons consistent with the best interest of the child, taking into consideration the circumstances of the parents."¹⁷⁴ Either one of these more general provisions would seem to leave ample room for consideration of "lifestyle" factors.

Ikard and *Rodriguez* offer two conflicting answers to this statutory conundrum. In *Ikard*, the El Paso court of appeals approved an award of \$2,840 in child support for two children, based on net monthly resources of at least \$14,000 available to the father, a prominent Austin attorney.¹⁷⁵ The court noted the revised statutory language in section 14.055(c) addressing net monthly resources in excess of \$4,000, that is, the amendment eliminating "lifestyle," but placed more reliance on the general statutory provisions.¹⁷⁶ In *Rodriguez*, by contrast, the court of appeals disapproved an award of \$2500 per month, based on net monthly resources of \$8900, reducing the total to the \$1742.17 shown on the former wife's itemized list of the child's expenses.¹⁷⁷ The *Rodriguez* court relied upon rules of statutory construction, reasoning that the specific language of section 14.055(c) controlled more general provisions,¹⁷⁸ and that the Legislature's deletion of the "lifestyle" language from section 14.055(c) in 1989 should be presumed to be deliberate.¹⁷⁹ A dissenting opinion, however, mirrors the El Paso court's reasoning in *Ikard*.¹⁸⁰

The language of the El Paso court's decision in *Ikard* unmistakably approves consideration of lifestyle factors in determining child support obligations in the \$4000-plus statutory range.¹⁸¹ Apart from its statutory analysis, however, the court cited only cases decided before the statutory guidelines went into effect¹⁸² or under the pre-1989 version of the statute,¹⁸³ a fact the San Antonio court specifically pointed out in reasoning to its contrary conclusion in *Rodriguez*.¹⁸⁴ *Ikard* might also be distinguished factually from *Rodriguez*. The trial court in *Ikard* filed written findings of fact tracking the current statutory language, that is to say, that the child support award attributable to the obligor's net monthly resources in excess of \$4000 was "based upon the demonstrated needs of the children."¹⁸⁵

The reasoning of the *Rodriguez* majority, however, might also be ques-

174. TEX. FAM. CODE ANN. § 14.054(15) (Vernon Supp. 1993).

175. *Ikard*, 819 S.W.2d at 646. The El Paso court reached a similar result in *Belcher v. Belcher*, 808 S.W.2d 202 (Tex. App.—El Paso 1991, no writ), another case not appealed to the Texas Supreme Court.

176. *Ikard*, 819 S.W.2d at 647.

177. 834 S.W.2d at 372.

178. *Id.*

179. *Id.* at 373.

180. *Id.* at 373 (Garcia, J., dissenting).

181. *Ikard*, 819 S.W.2d at 650.

182. The *Ikard* court relied upon *Sohocki v. Sohocki*, 730 S.W.2d 30 (Tex. App.—Corpus Christi 1987, no writ), a case which predates the statutory guidelines. See *Ikard*, 819 S.W.2d at 650.

183. The *Ikard* court also relied upon *Anderson v. Anderson*, 770 S.W.2d 92 (Tex. App.—Dallas 1989, no writ), see *Ikard*, 819 S.W.2d at 650, a case decided under the 1987 version of the support guidelines. See *Anderson*, 770 S.W.2d at 94-95.

184. 834 S.W.2d at 373.

185. *Ikard*, 819 S.W.2d at 646.

tioned. The opinion, for example, never deals directly with the "presumptive" language of section 14.055(c), which might authorize a larger percentage of net monthly resources below \$4000 even if the statute's wording now precludes any "lifestyle" considerations beyond that point. Nor does the opinion offer any reason of sound public policy that might have prompted the Texas Legislature to permit lifestyle considerations, but only up to a \$4,000 net monthly resources "cap." To the contrary, it would seem that the richer the obligor, the more appropriate and less burdensome it would be for lifestyle considerations to play a part.

In fact, the only public policy consideration advanced by the San Antonio court in *Rodriguez* is the old alimony bugaboo: If amounts tied to the child's lifestyle, not needs, are considered, then—to the *Rodriguez* court—this "would amount to de facto alimony,"¹⁸⁶ something supposedly forbidden in this state since 1841.¹⁸⁷ It may well be true that it is impossible to maintain a child's former lifestyle without in some respects maintaining the former lifestyle of the custodial parent,¹⁸⁸ and the dissenting opinion in *Rodriguez* could be read as countenancing alimony-like uses of the increased child support.¹⁸⁹ Nonetheless, this would seem to be an equally valid objection to lifestyle considerations for determining child support for obligors in the lower income brackets, and it would be an odd legislative policy indeed which forbids "de facto alimony" only for the rich. In addition, since one of the evidentiary factors which a court may consider is "the amount of alimony or spousal maintenance actually and currently being paid or received by a part,"¹⁹⁰ then the lack of any alimony or spousal maintenance ought also to play some role in child support. Whatever one's view on these questions, some answer from the Texas Supreme Court would be welcome.¹⁹¹

Texas courts also have addressed a potpourri of other issues involving the setting or modification of support during the past year. In *Salazar v. Attor-*

186. 834 S.W.2d at 372.

187. In a forthcoming article, this author suggests that the supposed "public policy" prohibiting court-ordered permanent alimony in Texas since 1841, see *Rodriguez*, 834 S.W.2d at 372, is neither rooted in the early days of Texas history nor grounded in any deliberate "public policy." See James W. Paulsen, *The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. (forthcoming 1993).

188. In her comment on the *Ikard* opinion, Cheryl Wilson succinctly spells out the dilemma: "Setting child support for high income earners is a vexing problem. At what point does it become 'mother' support? On the other hand, why shouldn't the children enjoy the benefits of father's comfortable income?" 92-1 STATE BAR SEC. REP.—FAM. L. 33 (John Sampson ed. 1992) (comment by Cheryl Wilson).

189. Justice Garcia's opinion seems to intimate that some of the child support could appropriately be used for skills training for the custodial parent, or for relocation. *Rodriguez*, 834 S.W.2d at 378 (Garcia, J., dissenting).

190. TEX. FAM. CODE ANN. § 14.054(6) (Vernon Supp. 1993). This reference is presumably to contractual or temporary alimony, or to alimony or spousal maintenance ordered pursuant to a divorce decree rendered in another state, since Texas courts consider court-ordered permanent alimony to be contrary to the state's public policy.

191. Accord Norma L. Trusch, *Child Support—When the Guidelines Don't Fit*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, 3 ADVANCED FAMILY LAW COURSE GGG, GGG-8 (1992) ("Since the *Rodriguez* and *Ikard* cases are in direct conflict . . . , it would be hoped that the Supreme Court will resolve this issue. I am not aware of any legislation that will be proposed at the next session to clarify this apparent ambiguity in the code.").

ney General of Texas¹⁹² a paternity action, the Corpus Christi court of appeals ruled that a court need not consider a father's other children in setting support, when those children were not the subject of a support order. In *Payne v. Dial*¹⁹³ however, a motion for modification of support based on changed circumstances was denied although a second child—born before rendition of the first support order—became subject to a court support order by the time of the modification motion. And, in *State v. Johnican*¹⁹⁴ a paternity action, the Houston court of appeals (14th District) approved reimbursement of child support retroactive to the child's birth. While the Attorney General's office ordinarily is entitled to reimbursement for all support, without qualifications,¹⁹⁵ Family Code section 13.42(a) provides for support in paternity cases retroactive only "to the time of the filing of the suit."¹⁹⁶ The Houston court chose not to interpret the latter provision as restricting the State's rights, because to do so would create an unconstitutional discrimination between children born in and out of wedlock.¹⁹⁷

Contractual agreements for child support have also been the subject of considerable judicial discussion of late. These agreements generally are enforceable in Texas, even in the face of court-ordered reductions in support.¹⁹⁸ In *Hill v. Hill*¹⁹⁹ though, the Dallas court of appeals faced what is arguably the converse situation. The former wife sought an increase in child support beyond the amount specified in a contractual support agreement. The obligor objected, pointing to authority limiting reductions in child support to a contractual "floor" and arguing that if it's "good for the goose, it's good for the gander."²⁰⁰ The trial court agreed. The Dallas court of appeals, however, reversed, reminding the trial court that its primary concern should be "neither the goose nor the gander but . . . the goslings."²⁰¹ Since the court's primary concern is the best interest of the children, "the parties may agree to do more than the court would require to provide for the best interest of the children, but they cannot agree to do less."²⁰² Shortly after the Dallas court's decision in *Hill*, the Beaumont court of appeals in *Pettit v. Pettit*²⁰³ summarized conflicts in authority, but decided to follow the *Hill* reasoning. And in *Leonard v. Lane*,²⁰⁴ though not citing *Hill*, the Houston court of appeals (1st District) reached a similar result in a breach of contract case. While the former wife had agreed by contract not to seek an increase of child support, this provision was held void as against public policy, since "parties cannot by contract deprive the court of its power to guard the best

192. 827 S.W.2d 41 (Tex. App.—Corpus Christi 1992, writ denied).

193. 831 S.W.2d 457 (Tex. App.—Houston [14th Dist.] 1992, no writ).

194. 830 S.W.2d 215 (Tex. App.—Houston [14th Dist.] 1992, no writ).

195. See TEX. FAM. CODE ANN. § 14.062 (Vernon Supp. 1993).

196. TEX. FAM. CODE ANN. § 13.42(a) (Vernon Supp. 1993).

197. *Johnican*, 830 S.W.2d at 216-17.

198. See, e.g., *Ruhe v. Rowland*, 706 S.W.2d 709, 710 (Tex. App.—Dallas 1986, no writ).

199. 819 S.W.2d 570 (Tex. App.—Dallas 1991, writ denied).

200. *Id.* at 571.

201. *Id.* at 572.

202. *Id.*

203. 818 S.W.2d 561 (Tex. App.—Beaumont 1991, no writ).

204. 821 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

interest of the child.”²⁰⁵

The Texas Supreme Court has taken up a more complex version of the contractual child support question in *Williams v. Patton*.²⁰⁶ Williams, the obligor, was badly in arrears on child support. His former wife, Patton, filed a motion for contempt. The parties then arrived at an agreement whereby Williams would pay part of the amount in arrears and increased support payments in the future. The agreement also released Williams from his obligation for arrearages and provided that the contempt action would be dismissed with prejudice. The contempt motion was in fact dismissed, but without prejudice.²⁰⁷ A year and a half later, when Williams stopped making child support payments, Patton brought a new contempt motion, seeking all arrearages, including those encompassed by the agreement. Williams defended, claiming breach of contract.

All parties agreed that future child support payments could not be modified except by court order.²⁰⁸ The question was whether parents had the authority to modify payment of past due amounts, arrearages being considered to be amounts due to the custodial parent, who presumably already has spent the money for the child.²⁰⁹ The majority of the Texas Supreme Court, however, held that the trial court's authority to render judgments for past-due child support payments²¹⁰ could not be abrogated by private agreements between parties.²¹¹ The majority's principal concern was that if agreements for payment of arrearages could be upheld, then non-custodial parents could refuse to pay support and use the custodial parent's financial difficulties to "negotiate" an agreed reduction in arrearages.²¹² The majority, however, also held that the parents could agree to reduce arrearages paid by contract, but only after judgment.²¹³

The real holding of *Williams*, then, relates only to timing. The parties could have had a perfectly enforceable agreement to reduce arrearages owed, or to pay those arrearages over time, had they waited until after the trial court entered a judgment. The dissent criticizes this result as imposing an "unnecessary, time-consuming, and expensive procedure on parents reasonably desiring to compromise a debt for child support arrearages, with little or no corresponding benefit to themselves, their offspring or society."²¹⁴ While not responding to this argument in detail, the majority appeared to feel that retaining some involvement of the trial judge in the process would at least reduce the possibility that undue financial pressure would be exerted

205. *Id.* at 278.

206. 521 S.W.2d 141 (Tex. 1991).

207. *Id.* at 142 n.2.

208. See TEX. FAM. CODE ANN. § 14.08(a) (Vernon 1986)(modification of child support payments requires trial court approval); *Williams*, 821 S.W.2d at 143.

209. This is the position taken by the *Williams* dissent. See *Williams*, 821 S.W.2d at 153 (Phillips, C.J., dissenting).

210. See TEX. FAM. CODE ANN. § 14.41(a) (Vernon Supp. 1993).

211. *Williams*, 821 S.W.2d at 143.

212. *Id.* at 144.

213. *Id.* at 145.

214. *Id.* at 152 (Phillips, C.J., dissenting).

on the custodial parent.²¹⁵

Legal niceties aside, *Williams* stands as one of many recent illustrations of the deep professional divisions between some members of the court.²¹⁶ The decision generated a three-judge majority, three judges participating in two concurring opinions and a three-judge dissent. The dissent criticized the majority's holding as "but another example of judicially imposed make-work for the bench and bar"²¹⁷ and quoted a family law commentator's observation: "Isn't this case silly?"²¹⁸ The majority's acerbic response: "This court does not view any case involving the protection of a child's best interests as 'silly.'"²¹⁹

On a more mundane level, the past year, as usual, generated a respectable amount of litigation on the enforcement of child support obligations, emphasizing the necessity of complying strictly with all constitutional and statutory requisites. In *Ex Parte Sproull*²²⁰ the Texas Supreme Court reversed a sentence of more than twenty-two years' confinement for failure to pay child support because Sproull was not informed of his right to a jury trial.²²¹ In *Ex Parte Alford*²²² the Houston court of appeals (1st District) ruled that a commitment order which set out only the total amount of child support arrearages was void, reiterating the statutory requirement²²³ that such an order set out specifically the time, date and occasion of each failure to comply.²²⁴ In *Ex Parte Stanley*²²⁵ the Dallas court of appeals voided a contempt order that referred to the underlying divorce decree and support obligations by reference to wrong volume of the court minutes. In *Ex Parte Garcia*²²⁶ the El Paso court of appeals held that a "fill-in-the-blank" contempt order which did not specify the person to whom the obligor was to pay the arrearages was fatally defective. And in *the Interest of Dickinson*²²⁷ the Amarillo court of appeals held that the fact that a court order for arrearages extended the final payment date beyond the youngest child's eighteenth birthday did not extend the statute of limitations for bringing a contempt

215. See *Williams*, 821 S.W.2d at 144.

216. See, e.g., *Diamond Shamrock Refining & Mktg. v. Mendez*, 36 Tex. Sup. Ct. J. 450 (Jan. 5, 1993) (Cornyn, J., concurring on rehearing) (characterizing a dissenting opinion as representing "another example of an unfortunate tendency toward intolerance for honest differences of legal opinion on this court").

217. *Id.* at 152 (Phillips, C.J., dissenting).

218. *Id.* at 154 (quoting David N. Gray, 91-1 STATE BAR SEC. REP.—FAM. L. 27 (John Sampson ed. 1991)). The reference is to the court of appeals opinion, identical in relevant respects to the Texas Supreme Court's majority opinion.

219. *Williams*, 821 S.W.2d at 145. Justice Doggett's concurrence also criticizes the dissent for an "unnatural injection of natural law" and suggests that, "[t]aken to an extreme, this view would permit a free market in baby-selling." *Id.* at 147 n.4 (Doggett, J., concurring).

220. 815 S.W.2d 250 (Tex. 1991) (per curiam).

221. A possible sentence of more than six months' confinement has been held to be "serious" contempt, giving rise to a right to jury trial. See, e.g., *Ex Parte Werblud*, 536 S.W.2d 542, 546-47 (Tex. 1976).

222. 827 S.W.2d 72 (Tex. App.—Houston [1st Dist.] 1992, no writ).

223. See TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993).

224. 827 S.W.2d at 74.

225. 826 S.W.2d 772 (Tex. App.—Dallas 1992, orig. proceeding).

226. *Ex Parte Garcia*, 831 S.W.2d 1 (Tex. App.—El Paso 1992, orig. proceeding).

227. 829 S.W.2d 919 (Tex. App.—Amarillo 1992, no writ).

proceeding.²²⁸

The Texarkana court of appeals has issued an interesting opinion in a criminal case. In *Lyons v. State*²²⁹ a probated sentence for criminal nonsupport²³⁰ was challenged on the ground that the statute violates the Texas Constitution's prohibition on imprisonment for debt.²³¹ The court rejected the contention, concluding that "[i]mprisonment assessed as punishment for the violation of a statute or court order is not imprisonment for debt, even if the statute or court order has the effect of requiring a payment of money."²³² A concurring opinion noted that this case, while apparently the first addressing the constitutionality of the criminal statute, is in line with similar rulings in civil contempt cases.²³³

Since a 1983 amendment to the Texas Constitution, a potent weapon—garnishment—has been added to the court's arsenal of options to ensure payment of child support. That amendment specifically authorizes garnishment of current wages "for the enforcement of court-ordered child support payments."²³⁴ In *Tamez v. Tamez*,²³⁵ the obligor challenged court-ordered wage withholding because the amounts withheld went not only to pay child support, but attorneys' fees, repayment of funds spent on the children's needs by his ex-spouse before divorce, and compensation for the community's interest in retirement benefits. The Corpus Christi court of appeals disapproved withholding for retirement benefits or for pre-divorce spending for child support (these funds were not "court-ordered"²³⁶), but approved withholding for attorneys' fees as "incidental to" the court-ordered child support obligation.²³⁷ *Attorney General's Office v. Mitchell*²³⁸ raised a statutory question related to court-ordered wage withholding. A child support obligor challenged the withholding of support from paychecks, some ten months after withholding began, claiming that the amount of arrearages was incorrect and that the Attorney General's office failed to give proper notice. The trial court ordered the return of all funds paid under the withholding arrangement and further ordered the Attorney General's office to pay all costs and attorneys fees.²³⁹ The Dallas court of appeals ruled that Mitchell's

228. TEX. FAM. CODE ANN. § 14.40(b) (Vernon 1986) provides that the court's jurisdiction to enter contempt orders extends for six months after the child becomes an adult or six months after "the date on which the child support obligation terminates pursuant to the decree or order or by operation of law." The custodial spouse argued that the court order for payment of arrears fell within the latter provision; the court of appeals reasoned that, support orders extend beyond a child's eighteenth birthday only if the child was enrolled in high school or was disabled, see TEX. FAM. CODE ANN. § 14.0(a), (b) (Vernon 1986), and that the child did not fall in either of these two categories. *Dickinson*, 829 S.W.2d at 921.

229. 835 S.W.2d 715 (Tex. App.—Texarkana 1992, pet ref'd).

230. TEX. PENAL CODE ANN. § 25.05 (Vernon 1989).

231. TEX. CONST. art I, § 18.

232. *Id.* at 718.

233. *Id.* at 719 (Grant, J., concurring).

234. TEX. CONST. art. XVI, § 28 (1876, amended 1983).

235. 822 S.W.2d 688 (Tex. App.—Corpus Christi 1991, writ denied).

236. *Id.* at 690.

237. *Id.* at 691.

238. 819 S.W.2d 556 (Tex. App.—Dallas 1991, no writ).

239. *Id.* at 557-58.

failure to challenge any impropriety within ten days after notice,²⁴⁰ or within thirty days after the effective date of the writ,²⁴¹ barred his complaints.²⁴²

Finally, two recent decisions relating to the way in which payment of child support can be insured deserve mention. In *Kolpack v. Torres*²⁴³ the Corpus Christi court of appeals disapproved a trial court's decision to hold the trustee of a discretionary trust directly liable for payment of child support, absent an underlying judgment against the trust beneficiary. The trial court found, through separate sets of calculations, the amounts the beneficiary/obligor would receive from trust distributions and other income. The trustee was ordered to pay its "share" under the child support guidelines; the obligor spouse was separately ordered to pay his. The Corpus Christi court reasoned that, since Family Code section 14.05(c) empowers a court to order trustees to make distributions for child support only "to the extent the trustees are required to make payments to a beneficiary who is required to make support payments,"²⁴⁴ an underlying support judgment against the obligor is required.²⁴⁵

The second case, *Baucom v. Crews*,²⁴⁶ involved a motion to modify child support to capture part of a lump-sum severance payment. Beecher Baucom received a \$60,000-plus lump-sum payment from his railroad job when he decided to quit. By his own testimony, he tried to conceal this and other payments from his ex-spouse and the court.²⁴⁷ He was also \$1800 in arrears on support payments.²⁴⁸ In deciding to award lump-sum support, the Waco court of appeals addressed what it thought was a question of first impression²⁴⁹ under the post-1989 version of Family Code section 14.05(a).²⁵⁰ Since the 1989 legislative session, the Family Code requires lump-sum awards to be justified "for good cause shown."²⁵¹ Despite the fact that there was no specific fact finding on good cause, the Waco court of appeals found sufficient "good cause" in the fact of the lump-sum payments, the obligor's arrears, his voluntary underemployment and his concealment of payments.²⁵² The *Baucom* court's legal reasoning on this point has been criticized as "mumbo jumbo and a prime example of a court deciding what should happen and then . . . rationaliz[ing] its decision,"²⁵³ because the needs of the child did not appear to play a role. The same commentator

240. See TEX. FAM. CODE ANN. § 14.43(c) (Vernon Supp. 1993).

241. See TEX. FAM. CODE ANN. § 14.43(e) (Vernon 1993).

242. *Mitchell*, 819 S.W.2d at 559.

243. 829 S.W.2d 913 (Tex. App.—Corpus Christi 1992, writ denied).

244. TEX. FAM. CODE ANN. § 14.05(c) (Vernon 1986).

245. *Kolpack*, 829 S.W.2d at 916.

246. 819 S.W.2d 628 (Tex. App.—Waco 1991, no writ).

247. *Baucom*, 819 S.W.2d at 631.

248. *Id.* at 629.

249. In actuality, the Austin court of appeals had addressed the issue about two and one-half months earlier in *Kahn v. Kahn*, 813 S.W.2d 708 (Tex. App.—Austin 1991, no writ), arriving at an arguably contrary result. See 92-1 STATE BAR SEC. REP.—FAM. L. 29 (John Sampson ed. 1992).

250. TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1993).

251. *Id.*

252. *Baucom*, 819 S.W.2d at 630-31.

253. David N. Gray, 92-1 STATE BAR SEC. REP.—FAM. L. 29 (John Sampson ed. 1992).

adds, however: "In this case that isn't so bad."²⁵⁴

IV. TERMINATION AND ADOPTION

In 1987, the Texas Legislature gave specific authority for the termination of parental rights when the parent is found, by reason of mental illness, to be unable to care for the child.²⁵⁵ *In the Interest of Carroll*²⁵⁶ presented a constitutional challenge to this statute by a parent who became mentally ill before enactment of the statute. The Tyler court of appeals upheld the law's validity. The court observed that the state has a legitimate interest in singling out the class of mentally ill persons for special treatment, so far as the welfare of children is concerned.²⁵⁷ Since the statute requires "clear and convincing" evidence, in accord with United States Supreme Court standards,²⁵⁸ due process and due course rights are not violated. The court dismissed the mother's argument that the statute was unconstitutionally retroactive with the observation that the mother remained mentally ill for a year before the state filed suit.²⁵⁹

In *LaRue v. LaRue*²⁶⁰ the Tyler court of appeals ruled that one consequence of agreeing to voluntary termination of parental rights with no further notice of judicial proceedings is to estop the other parent from seeking child support arrearages at a later date, even if the termination of rights is never effectuated. In *Swinney v. Mosher*²⁶¹ however, an action by prospective adoptive parents against a birth mother who backed out of a deal, the Fort Worth court of appeals held that the mother's signature on an affidavit voluntarily relinquishing parental rights should not be construed as evidence of abandonment.

Standing questions have also played a role in termination proceedings. In *Rodarte v. Cox*²⁶² the Tyler court of appeals held that foster parents of two and one-half years' duration had standing to seek termination of parental rights, upholding the statute²⁶³ against a variety of constitutional challenges. And, in *Ray v. Burns*²⁶⁴ the Waco court of appeals held a mother's failure to object to the standing of non-parents in a termination proceeding was fatal to any complaint.

Several decisions regarding the inheritance rights of adopted children have issued recently, with courts holding that adopted children are entitled to

254. *Id.*

255. TEX. FAM. CODE ANN. § 15.024 (Vernon Supp. 1993).

256. 819 S.W.2d 591 (Tex. App.—Tyler 1991, no writ).

257. *Id.* at 592.

258. *Id.* at 593; see *Santosky v. Kramer*, 455 U.S. 745, 767 (1980); TEX. FAM. CODE ANN. § 15.024 (Vernon Supp. 1993).

259. 819 S.W.2d at 593.

260. 832 S.W.2d 387 (Tex. App.—Tyler 1992, no writ).

261. 830 S.W.2d 187 (Tex. App.—Fort Worth 1992, writ denied).

262. 828 S.W.2d 65 (Tex. App.—Tyler 1991, writ pending).

263. The Texas Family Code provides, inter alia, that a termination suit can be brought by an "adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so." TEX. FAM. CODE ANN. § 11.03(d)(4) (Vernon 1986).

264. 832 S.W.2d 431 (Tex. App.—Waco 1992, no writ).

inherit from birth parents²⁶⁵ or later born half-siblings.²⁶⁶ In *Curry v. Williman*,²⁶⁷ the Dallas court of appeals dealt with an interesting variation on the general rules, applying settled law to permit a child's natural mother to inherit, despite an appealing contrary claim of equitable adoption. Stacy Curry was born severely retarded, due to the hospital's negligence at birth. Stacy's parents divorced when she was two years old; her natural mother had no further contact for twenty years.²⁶⁸ Stacy's father remarried and had three children by the second marriage. The couple also tried to adopt Stacy, but abandoned the effort when Stacy's mother opposed it.

After Stacy died, her father and stepmother filed an application for determination of heirship, requesting that Stacy's estate (the remainder of a money award for the hospital's negligence) be divided among her half-brother and half-sisters.²⁶⁹ Relying on *Heien v. Crabtree*,²⁷⁰ the Dallas appeals court applied section 40 of the Probate Code²⁷¹ to divide Stacy's estate between her natural mother and father. The court reasoned that, even if this situation could be considered one of "equitable adoption," this is a species of estoppel operating only in favor of the child, not the parents.²⁷² Since Stacy broke no promise, her estate was not bound. The court might have added that, while *Heien* may not have been the most reasonable reading of section 40, that section has been amended since, with no change in the relevant language.²⁷³ Under long-standing Texas rules of statutory construction, this signals approval of prior judicial interpretations.²⁷⁴

265. *Northwestern Nat'l Cas. Co. v. Douchette*, 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).

266. *B.C.S. v. D.A.E.*, 818 S.W.2d 929 (Tex. App.—Beaumont 1991, writ denied).

267. 834 S.W.2d 443 (Tex. App.—Dallas 1992, n.w.h.).

268. *Id.* at 444.

269. *Id.*

270. 369 S.W.2d 28 (Tex. 1963).

271. TEX. PROB. CODE ANN. § 40 (Vernon Supp. 1993).

272. *Curry*, 834 S.W.2d at 444.

273. See Act of Sept. 1, 1989, 71st Leg., R.S., ch. 375, § 34, 1989 Tex. Gen. Laws 1485.

274. See, e.g., *Patton v. American Home Mut. Life Ins. Co.*, 185 S.W.2d 420, 422 (Tex. 1945) (reenactment of a statute after judicial construction implies approval); *Hilliard v. Wilkerson*, 492 S.W.2d 292, 295 (Tex. Civ. App.—Fort Worth 1973, writ granted, dism'd agr.) ("[W]here, after a statute has been construed by a state's highest court, the legislature reenacts the statute, whether by adoption of revised statutes or amendment, the act of the legislature carries with it the construction previously placed upon the law by the court."). This rule of construction would seem particularly appropriate in light of the spirited dissent by Justice Greenhill in *Heien*, to the effect that the majority was misconstruing the statute. See 369 S.W.2d at 32 (Greenhill, J., dissenting).

