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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

THIS Survey period coincides with a session of the Texas legislature. Two useful summaries of the 1993 legislative changes have already appeared in print. The State Bar's section report printed an excellent summary of the changes, complete with a red-lined set of Family Code Revisions, arranged in numerical order and accompanied by good commentary.¹ The *Texas Bar Journal* also printed a less comprehensive but useful summary.²

I. STATUS

In last year's Survey, it was observed that "[p]aternity suits seem to be the 'hot' family law issue of the 1990s, at least so far as Texas Supreme Court action is concerned."³ Not only did the state supreme court live up to this billing in 1993, issuing no less than three decisions, but the Texas legislature also got in a few licks.

The most significant single decision in the Survey period is the Texas Supreme Court's ruling in *In the Interest of J.W.T.*,⁴ which sets out the due process rights of a biological father under the Texas Constitution. Mr. and Mrs. "T" separated, anticipating that they would get a divorce. Mrs. T. took up housekeeping with Larry Gibson⁵ for a few months, then reconciled with her husband. Some months later, J.W.T. was born. The timing of the birth, especially in combination with the fact that Mr. T. had a vasectomy about ten years earlier, pointed to Larry as the father. Blood tests confirmed this probability to a 99.41% certainty.

The trial court concluded that Family Code section 11.03's list of parties entitled to bring a suit affecting the parent-child relationship is exclusive,

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1. See *1993 Legislation Affecting Family Law Practice*, 93-2 STATE BAR SEC. REP.: FAM. L. (John J. Sampson ed. 1993) [hereinafter *1993 Legislation*].

2. See F. Lynne Wilkerson, *Family Code*, 56 TEX. B.J. 904 (1993).

3. James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 46 SMU L. REV. 1515, 1515 (1993).

4. 36 Tex. Sup. Ct. J. 1126 (June 30, 1993). The case was spotlighted at 62 U.S.L.W. 2099 (Aug. 17, 1993).

5. The Texas Supreme Court's opinion consistently refers to Larry Gibson as "Larry G." This protective move seems a bit belated, though, as he was referred to by his full name throughout the published court of appeals opinion, including the title. See *Gibson v. J.W.T.*, 815 S.W.2d 863 (Tex. App.—Beaumont 1991), *aff'd sub nom.* In the Interest of J.W.T. A Minor Child, 36 Tex. Sup. Ct. J. 1126 (June 30, 1993).

and that Larry therefore lacked standing to sue.⁶ The Beaumont Court of Appeals reversed, reasoning that Larry had been denied his due process rights under Article I, Section 19 of the Texas Constitution.⁷ A five-judge majority of the Texas Supreme Court agreed with the court of appeals and affirmed, placing its reliance specifically and exclusively on the Texas Constitution's principal⁸ due process guarantee.⁹

The Texas Supreme Court's ruling is interesting not only for its family law substance, but for its constitutional law and procedural implications. Substantively, *In the Interest of J.W.T.* resolves a clash between the rights of a biological father and the rights of the family. The majority opinion focuses on the rights of the biological father, pointing out that the state has established procedures for permitting, or forcing, a biological father to enjoy the benefits or shoulder the burdens of paternity. Contrary to the traditional restrictions stemming from Lord Mansfield's Rule,¹⁰ either husband or wife may now sue to deny the paternity of children born during their marriage.¹¹

6. This section, amended by the 1993 legislature in a manner not directly relevant to this issue, reads in part:

(a) An original suit affecting the parent-child relationship may be brought at any time by:

- (1) a parent of the child;
- (2) the child (through a representative authorized by the court);
- (3) a custodian or person having rights of visitation with or access to the child appointed by an order of a court of another state or country or by a court of this state before January 1, 1974;
- (4) a guardian of the person or of the estate of the child;
- (5) a governmental entity;
- (6) any authorized agency;
- (7) a man alleging himself to be the biological father of a child who has no presumed father filing in accordance with Chapter 13 of this code, but not otherwise;
- (8) a person who has had actual possession and control of the child for at least six months immediately preceding the filing of the petition;
- (9) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Section 15.03 of this code or to whom consent to adoption has been given in writing under Section 16.05 of this code; or
- (10) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months immediately preceding the filing of the petition and the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition.

TEX. FAM. CODE ANN. § 11.03(a) (Vernon Supp. 1994).

7. TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.")

8. Article I, section 13 of the Texas Constitution also contains a due process provision, stating 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." TEX. CONST. art. I, § 13 (emphasis added). The majority opinion, however, relied exclusively upon the due course of law provision of article I, section 19. See *supra* note 7.

9. The court could have chosen to write on "open courts" or "equal rights" grounds, TEX. CONST. art. I, § 13, since the application for writ of error also was granted on those grounds. See 35 Tex. Sup. Ct. J. 1007 (July 1, 1992).

10. As first set out in *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777), Lord Mansfield's rule prohibits either husband or wife from denying the paternity of a child born during marriage, thus requiring third-party testimony to establish non-access. The rule was repudiated in Texas in 1975. See *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975).

11. TEX. FAM. CODE ANN. § 12.06(a) (Vernon Supp. 1994).

Biological fathers also may sue or be sued to establish paternity if there is no marriage.¹² The mother or the state may even combine a suit to disestablish the presumed father's paternity with a suit to establish the biological father's paternity.¹³ The statutory exception in Texas provided that biological fathers could not sue to establish their paternity if the child was born to a marriage and the presumed parents (the husband and wife) did not deny paternity. This prohibition stemmed from the fact that the Family Code gives a biological father standing to sue only if the child has no presumed father,¹⁴ and that actions to establish paternity are also limited to situations in which there is no presumed father.¹⁵

The majority of the court, in an opinion written by Justice Lloyd Doggett, reasoned that the prohibition on suits by biological fathers may have "had merit in an earlier era when the true biological father could not be established with near certainty and when illegitimacy carried a significant legal and social stigma."¹⁶ Citing data documenting "[s]ignificant twentieth century changes"¹⁷ in this attitude, Justice Doggett concluded that "this is no longer the case."¹⁸ For this reason, and keeping in mind that the best interests of the child are always paramount,¹⁹ the court ruled that the biological father's due process rights had been violated.

The decision contains a very significant caveat. Since the interests of the child always are the primary concern, not every biological father would have the right to sue. Rather, "a father's interest in establishing a relationship with his biological child is constitutionally protected when accompanied by the father's early and unqualified acceptance of parental duties."²⁰ Elaborating on this "link between the rights and responsibilities of parenthood,"²¹ the court quoted with approval a Louisiana Supreme Court decision giving a biological father the right to establish paternity if the father "show[s] that he has taken concrete actions to grasp his opportunity to be a father and that

12. *Id.* § 13.01(a).

13. This result was approved in *Attorney General of Texas v. Lavan*, 833 S.W.2d 952 (Tex. 1992). See Paulsen, *1992 Annual Survey*, *supra* note 3, at 1515-17.

14. TEX. FAM. CODE ANN. § 11.03(a)(7) (Vernon Supp. 1994). The text is set out in note 6.

15. Before its 1993 amendment, Family Code section 13.01 provided that "[a] suit to establish the parent-child relationship between a child *who has no presumed father* and the child's biological father may be brought by the mother, by a man claiming to be or possibly to be the father, or by any other person or governmental entity having standing to sue under Section 11.03 . . ." TEX. FAM. CODE ANN. § 13.01 (amended 1993) (emphasis added). The section now simply provides a statute of limitation (two years after the child becomes an adult) without trying to specify the persons entitled to sue. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1994).

16. *In the Interest of J.W.T.*, 36 Tex. Sup. Ct. J. at 1133.

17. *Id.* at 1129. Justice Cornyn's dissent is particularly critical of the majority's analysis on this point, stating that "[u]pon examination, the history and demography of divorce, single parenting, and out-of-wedlock births are remarkably complicated, and are subject to considerable debate inside and outside academia." *Id.* at 1279-80 (Cornyn, J., dissenting) (footnotes omitted).

18. *Id.* at 1133.

19. *Id.* at 1130-31 (citing *Gunn v. Cavanaugh*, 391 S.W.2d 723 (Tex. 1965)).

20. *Id.* at 1131.

21. *Id.* at 1129.

there is a potential for him to make a valuable contribution to the child's development."²² In *J.W.T.*, Larry had arranged and paid for prenatal care and acknowledged responsibility for child support, thus evidently demonstrating parental interest and potential for contribution to the child's life sufficient to claim a constitutional right to sue.

In dissent, Justice Enoch emphasized "the significant countervailing constitutional interests of the family to be free from unwanted interference and attack by strangers."²³ He warned that "there are contradictory interests between the putative biological father and the family"²⁴ and that the majority's holding "would invite actions by persons whose only purpose is to break up the family to satisfy a jealous or revengeful feeling."²⁵ Justice Cornyn echoed this concern: "Unlike many children, J.W.T. has two parents who are willing and eager to provide stable [sic] home. Larry, his putative father has sued for the right to enter this circle, against the wishes of J.W.T.'s mother and presumed father. Conflict and discord are inevitable."²⁶

Family law issues aside, *In the Interest of J.W.T.* is also a major statement of the Texas Supreme Court's version of the "new federalism," the use of state constitutional provisions to guarantee rights greater than those set out in the United States Constitution. As the United States Supreme Court has executed a sharp right turn on civil rights issues in recent years, a number of state courts, with Texas "in the mainstream of this movement,"²⁷ have utilized state constitutional provisions to provide greater guarantees than afforded under federal law.²⁸

Historically, state constitutional provisions, including article I, section 19,²⁹ have been construed by Texas courts in conformity with their federal counterparts. While *In the Interest of J.W.T.* is far from being the first case

22. *In re Adoption of B.G.S.*, 556 So. 2d 545, 550 (La. 1990) (quoted in *In the Interest of J.W.T.*, 36 Tex. Sup. Ct. J. at 1131). The Louisiana court continues, explaining that "the mere existence of a biological link and fitness will not sustain the father's interest; it is defeasible if not preserved by dedicated, opportune fatherly action." *Id.*

23. *J.W.T.*, 36 Tex. Sup. Ct. J. at 1135 (Enoch, J., dissenting).

24. *Id.*

25. *Id.*

26. *In the Interest of J.W.T.*, 36 Tex. Sup. Ct. J. at 1280 n.10 (Cornyn, J., dissenting).

27. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. Crim. App. 1986). A 1985 symposium issue of the *Texas Law Review* contains a good blend of national and Texas-specific articles on this trend. See *Symposium: Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985). In some areas of criminal law, Texas possibly is the leader in developing innovative uses of state constitutional guarantees. See, e.g., Neil Colman McCabe, *State Constitutional Law: Separation of Powers in Criminal Cases*, THE CHAMPION, November 1993, at 38 (mentioning Texas as the only state high court to sustain a state separation-of-powers challenge to a speedy trial act).

28. This process of creating state constitutional rights independent of the federal "floor" is not without its pitfalls. See generally Neil Coleman McCabe and Catherine Greene Burnett, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. (forthcoming 1994).

29. See 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.").

in the more recent contrary trend, *J.W.T.* serves as a clear signal that the current Texas Supreme Court has decided to add due process guarantees to the list of civil rights on which it has now decided to chart its own course.³⁰ Under Fourteenth Amendment analysis, a deeply divided United States Supreme Court ruled in *Michael H. v. Gerald D.*³¹ that state laws cutting off the rights of a biological father do not violate due process guarantees. While the Beaumont Court of Appeals in *J.W.T.* admitted that *Michael H. v. Gerald D.* was "directly on point" (though declining to follow it),³² the Texas Supreme Court's majority opinion in *J.W.T.* engages in a detailed dissection of the United States Supreme Court's reasoning, to the point that Justice Cornyn's dissent suggests that the majority is "almost coy"³³ about the depth of disagreement. Nonetheless, it is clear that the opinion ultimately is reached "wholly under our Texas due course of law guarantee, which has independent vitality, separate and distinct from the due process clause of the Fourteenth Amendment to the U.S. Constitution."³⁴ The ruling in *J.W.T.* is critical, as it should effectively insulate the result from review by the United States Supreme Court.³⁵

The ruling in *In the Interest of J.W.T.* does raise some serious issues in state-federal relations, as well as in the proper role of the legislature and of the Texas Supreme Court. It is difficult to avoid the conclusion from the wording and interaction of the statutes at issue that the Texas legislature considered and deliberately subordinated the rights of biological fathers to the rights of the individuals constituting the family unit.³⁶ That conclusion is reinforced by the fact that the Texas legislature, in its most recent session, rewrote some of the statutory language at issue in *J.W.T.*, but in such a way as implicitly to disapprove of the result.³⁷ The accusations of Justice Enoch

30. Speaking for the majority, Justice Doggett correctly points out that the United States Supreme Court recognized as early as 1982 that "[t]he language of the Texas [due course] constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions." *In the Interest of J.W.T.*, 36 Tex. Sup. Ct. J. at 1132 n.22 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982)). In dissent, however, Justice Cornyn points out with equal accuracy that, only one year earlier, the majority opinion's author had reiterated the traditional rule that "we rely heavily on the literal text." *Id.*, 36 Tex. Sup. Ct. J. at 1279 (quoting *Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992)). In view of the textual similarity between the federal and state provisions, and the lack of definitive "legislative history" on the state provision, the dissent proceeds to make a reasonable case for a parallel reading.

31. 491 U.S. 110, 129 (1989).

32. *Gibson*, 815 S.W.2d at 867.

33. *In the Interest of J.W.T.*, 36 Tex. Sup. Ct. J. at 1281 (Cornyn, J., dissenting).

34. *Id.* at 1132.

35. *Id.* at 1283 (Cornyn, J., dissenting) ("This is precisely what has happened here: aware that its interpretation of the Texas Constitution is final, the court has elected to ignore the holding in a controlling case under the United States Constitution and make Justice Brennan's dissenting opinion the law of Texas.").

36. See *supra* notes 11 through 15 and accompanying text.

37. The majority opinion in *J.W.T.* points out the fact that some of the policies favoring rights of non-parents are given statutory protection, quoting the provision that "a grandparent or other person deemed by the court to have had substantial past contact with the child sufficient to warrant standing" may intervene in a suit affecting the parent-child relationship. *J.W.T.*, 36 Tex. Sup. Ct. J. at 1130 n.16 (quoting Texas Family Code section 11.03(c)) (emphasis added). While the italicized language is unaffected by 1993 statutory revision, identical language in

that "[u]nder the guise of denial of procedural due course of law, the Court is in fact creating a substantive due course of law interest,"³⁸ and of Justice Cornyn that "the court substitutes its own unfounded notions of what is good for Texans for the judgment of our elected representatives in the legislature"³⁹ may be overstated. Justice Cornyn's use of the *Dred Scott* decision as a prime example of the dangerous road down which substantive due process may lead even borders on the inflammatory.⁴⁰ Few would argue, however, with the proposition that complex questions of changing social mores, or of balancing the rights of family members against those of "outsiders" are more commonly seen as legislative, rather than judicial matters.

In *J.W.T.*, Texas followed the lead of the Louisiana Supreme Court in finding broader due process rights for biological fathers than those afforded under the Fourteenth Amendment of the U.S. Constitution. Whether this is the beginning of some sort of a trend remains to be seen, although arguably similar decisions have been issued by California⁴¹ and Minnesota⁴² courts. Indeed, even in the short time since the opinion's issuance, *J.W.T.* has caught the attention of another state supreme court, though how closely it was read is not certain. In *B.H. v. K.D.*,⁴³ the North Dakota Supreme Court applied that state's version of the Uniform Parentage Act⁴⁴ and declined to find that a biological father had due process rights in a situation similar to that present in *J.W.T.* The majority opinion cited a Texas court of appeals decision specifically disapproved of in *J.W.T.*,⁴⁵ the dissent, without bothering to mention that the decision was grounded on state constitutional grounds, cites *J.W.T.* with approval.⁴⁶ Thus, to put it mildly, the issue is not yet fully settled.

Questions of paternity and federalism aside, the Texas Supreme Court's

section 11.03(b), regarding original suits seeking managing conservatorship, was deleted. See TEX. FAM. CODE ANN. § 11.03(b) (Vernon Supp. 1994).

The 1993 legislature also rewrote portions of Family Code section 12.06(a), one of the provisions at issue in *J.W.T.*, in such a way as to indicate that it was aware of developing case law. The revision does not, however, directly address *J.W.T.* concerns. Compare TEX. FAM. CODE ANN. § 12.06(a) (Vernon Supp. 1994) (now providing that "a governmental entity" is entitled to deny a presumed father's paternity, and omitting restrictive language) with Attorney General of Texas v. Lavan, 833 S.W.2d 952 (Tex. 1992) (reaching much the same result as a matter of judicial interpretation); see also Charles G. Childress, 1993 Legislation, *supra* note 1, at 19 (stating that the 1993 revision of § 12.06(a) "more or less codifies" the *Lavan* decision).

38. *J.W.T.*, 36 Tex. Sup. Ct. J. at 1134 (Enoch, J., dissenting).

39. *Id.* at 1288 (Cornyn, J., dissenting).

40. *Id.* at 1281-82 (citing *Dred Scott v. Sandford*, 60 U.S. 393 (1856)). The opinion adds the stifling of labor law reform and other progressive legislation to the protection of slave "property" as examples of the dangers of judicial application of substantive due process. *Id.* at 1282.

41. See *Michael M. v. Giovanna F.*, 7 Cal. Rptr. 2d 460 (Cal. App. 1992).

42. *Kelly v. Cataldo*, 488 N.W.2d 822 (Minn. Ct. App. 1992).

43. 506 N.W.2d 368 (N.D. 1993).

44. N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1991 and Michie Supp. 1993).

45. The North Dakota Supreme Court cited *Jack v. Jack*, 796 S.W.2d 543, 550 (Tex. App.—Dallas 1990, no writ) for the proposition that standing determinations are not gender-based, but presumption-based. See *B.H. v. K.D.*, 506 N.W.2d 368 at 376. However, *Jack* was disapproved on the standing question by the *J.W.T.* majority. See *J.W.T.*, 36 Tex. Sup. Ct. J. at 1133 n.26.

46. *B.H. v. K.D.*, 506 N.W.2d at 383 (Meschke, J., dissenting).

opinion in *J.W.T.* also puts a more mundane, but still serious, issue of procedure into high relief. The majority opinion and Justice Enoch's dissenting opinion in this case were released on June 30, 1993.⁴⁷ Justice Cornyn's dissenting opinion followed some two-and-one-half months later, on September 15.⁴⁸ As this Survey article was completed, in mid-November, 1993, the bar still awaited promised separate concurrences by Chief Justice Phillips and Justice Hecht.

The practice of issuing opinions piecemeal is not completely unprecedented in the Texas Supreme Court⁴⁹ or other Texas courts.⁵⁰ It does seem to be a comparatively new practice, however,⁵¹ and it is one with which this author strongly disagrees. The sole apparent advantage of issuing a majority opinion in a case with the notation that concurring or dissenting opinions "will follow" is that the majority decision issues in a more timely manner. Indeed, *J.W.T.*'s author has been vociferous in his criticism of court delay,⁵² and *J.W.T.* had taken nearly a year from granting of an application for writ of error to decision.⁵³

Promptness, however, is not always a virtue. The disadvantages of the piecemeal approach, at least for the outside legal community, are legion. A principal problem is that, because court rules require that a motion for rehearing be filed "within fifteen days after the date of rendition of the judgment or decision of the court,"⁵⁴ the losing party may be forced to file before knowing the positions of all members of the court on the issue. In *J.W.T.*, for example, even after filing a motion for extension of time, the losing lawyers were forced to file before knowing the positions of one-third of the court.

47. See *J.W.T.*, 36 Tex. Sup. Ct. J. at 1126, 1133, 1136.

48. See *id.* at 1277, 1288.

49. See, e.g., *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993); *Diamond Shamrock Ref. & Mktg Co. v. Mendez*, 844 S.W.2d 198 (Tex. 1992); *Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439 (Tex. 1992); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911 (Tex. 1992); *Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990); *Orange County v. Ware*, 34 Tex. Sup. Ct. J. 252 (Dec. 31, 1990), *withdrawn*, 819 S.W.2d 472 (Tex. 1991); *Ruiz v. Conoco, Inc.*, 36 Tex. Sup. Ct. J. 412 (Dec. 31, 1992), *withdrawn*, 36 Tex. Sup. Ct. J. 1304 (Sept. 29, 1993); *Bandy v. First State Bank*, 35 Tex. Sup. Ct. J. 643 (Apr. 22, 1992), *withdrawn*, 35 Tex. Sup. Ct. J. 843 (June 10, 1992); *Brady v. Fourteenth Court of Appeals*, 33 Tex. Sup. Ct. J. 358 (Mar. 28, 1990), *withdrawn*, 33 Tex. Sup. Ct. J. 609 (June 20, 1990). In another opinion issued the same day as *J.W.T.*, the court also indicated that a dissenting opinion would follow. See *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438 (Tex. 1993).

50. See, e.g., *Eason v. Eason*, 860 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

51. So far as the author has been able to determine through a LEXIS survey, with the exception of an isolated 1886 case, the recent spate of piecemeal decisions dates from mid-1989. See *Mitchell v. M-K-T RR Co.*, 32 Tex. Sup. Ct. J. 526 (July 5, 1989), *withdrawn*, 33 Tex. Sup. Ct. J. 245 (Feb. 21, 1990); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986). The Texas Supreme Court also engaged in the practice to a limited extent in the 19-'teens and early '20s, with some bad results. See *infra* note 57.

52. See, e.g., *Delaney v. University of Houston*, 835 S.W.2d 56, 61 (Tex. 1992) (Doggett, J., concurring); *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799 (Tex. 1992) (Doggett, J., dissenting and concurring).

53. The application for writ of error was granted July 1, 1992. See 35 Tex. Sup. Ct. J. at 1007 (July 1, 1992).

54. TEX. R. APP. P. 190(a).

A further problem then occurs. The court could, as apparently will be the case in *J.W.T.*, decline to decide the motion for rehearing until all opinions issue in the case. This makes some sense, as the dissenting or concurring opinions conceivably could bring forth some new argument which should be addressed in the majority opinion. On the other hand, so long as the motion for rehearing is not overruled, the decision is not final and precedential.⁵⁵ The court's haste in issuing the majority opinion therefore does neither the litigants nor the general public any ultimate good. In addition, should the majority decide to rewrite its opinion to accommodate arguments raised in the further opinions that follow, a likely result in this case,⁵⁶ the original opinion might be withdrawn or modified, with further delay and a possible further rehearing.

One option, of course, is for the court to deny the rehearing before receiving the "opinions to follow." If this course were followed, however, the court would lose its jurisdiction over the case, and at least arguably would lose its ability to modify the language of the majority opinion. Legal publishers might also be confused. For example, Texas's unofficial official publisher, West Publishing Company, follows the practice of placing opinions in the advance sheets after all rehearing motions are denied. If this should occur before all opinions are issued, West either would need to keep a tally sheet to determine when all dissenting and concurring judges have "reported in," or it might (most likely by accident) print the opinions as a continuing saga in successive volumes of the *Southwestern Reporter*,⁵⁷ as the *Texas Supreme Court Journal* has already been forced to do.⁵⁸ This might well result in all sorts of difficulties in legal research, among the least of which is the likelihood that *J.W.T.* does not clearly fit within any single one-year Survey period for SMU's *Annual Survey* issue.⁵⁹

55. See TEX. R. APP. P. 186(a) (providing that "[a]t the expiration of fifteen days from the rendition of judgment if no motion for rehearing has been filed, or at the expiration of fifteen days after overruling the motion for rehearing, the clerk shall issue and deliver the court's mandate in the cause . . .").

56. See *infra* text accompanying notes 60-61. As this Survey went to press, the author's prediction of a withdrawn and reissued majority opinion was confirmed. See *In the Interest of J.W.T., A Minor Child*, 37 Tex. Sup. Ct. J. 496 (Feb. 2, 1994).

57. This problem apparently occurred in the early years of the twentieth century. In at least two cases, separate opinions issued after the majority opinion appear in the *Texas Reports* version of the case, but not in the *Southwestern Reporter*. Compare *Stamford Compress Co. v. Farmer's & Merchants' Nat'l Bank*, 105 Tex. 44 (1912) and *Westerman v. Mims*, 111 Tex. 29 (1921) with *Stamford Compress Co. v. Farmer's & Merchants' Nat'l Bank*, 143 S.W. 1142 (Tex. 1912) and *Westerman v. Mims*, 227 S.W. 178 (Tex. 1921).

The problem was not solely the court's, however. At this time, West Publishing sometimes appeared to "jump the gun," publishing opinions before rehearings were denied, as evidenced by the fact that supplemental opinions on denial of rehearing sometimes appear at different places in the *Southwestern Reporter* than do the majority opinions. See, e.g., *Koy v. Schneider*, 218 S.W. 479 (Tex.), *reh'g denied*, 221 S.W. 880 (Tex. 1920); *Tyler Bldg. & Loan Ass'n v. Biard & Scales*, 171 S.W. 1122 (Tex. 1914), *reh'g denied*, 171 S.W. 1200 (Tex. 1915).

58. The majority opinion and Justice Enoch's dissent appear in issue no. 32a. See *J.W.T.*, 36 Tex. Sup. Ct. J. at 1126, 1133. Justice Cornyn's dissenting opinion is the only matter of substance in issue no. 36. See *J.W.T.*, 36 Tex. Sup. Ct. J. at 1277.

59. A similar problem was encountered by the *Texas Tech Law Review*, which printed a student Note keyed to the now-withdrawn opinion. See Chester A. Caldwell, Note, *Texas Expands Biological Fathers' Rights to Rebut the Marital Presumption and Establish Parental*

Perhaps the worst problem, however, is that the practice of issuing opinions as continuing serials unnecessarily exposes the Texas Supreme Court's internal decision-making processes to public scrutiny. A popular political maxim holds that, just as one who loves sausage should never watch it being made, so should one who believes in the political process never watch the legislature in action. A reasonable corollary to that rule might be that public respect for the judiciary seldom is increased by the chance to watch controversial court opinions in the process of formation. The Texas Supreme Court in recent years has shown a marked tendency to withdraw and reissue decisions with comparatively minor changes in wording. This tendency will only be accentuated by issuing dissenting and concurring opinions after the majority opinion is in print. The authors of court opinions typically refer to and refute arguments raised in concurrences and dissents, and *J.W.T.* is no exception. The majority opinion repeatedly refers to Justice Enoch's dissent⁶⁰ and even slips up on at least one occasion and foreshadows the argument in Justice Cornyn's then-unissued dissent.⁶¹ In all likelihood, once the concurring justices weigh in, the majority, and perhaps the dissenting, opinions will be withdrawn, edited, and reissued.⁶² This will lead to inevitable speculation about the meaning of the changes, no matter what the court intended when the original opinions were withdrawn.⁶³

A second paternity decision issued by the Texas Supreme Court during the past year, *Dreyer v. Greene*,⁶⁴ skirts the constitutional issues that *J.W.T.* addressed directly. The primary question in *Dreyer* was whether a paternity suit brought by the children is barred by a divorce decree finding the husband and wife to be the parents of the children. The Family Code provides that a paternity suit "is barred if final judgment has been rendered by a court of competent jurisdiction: (1) adjudicating a named individual to be the biological father of the child."⁶⁵ The Texas Supreme Court, joining the trial

Rights to Children with Presumed Fathers: In the Interest of J.W.T., 36 Tex. Sup. Ct. J. 1126 (June 30, 1993), 25 TEX. TECH L. REV. 193 (1993).

60. See, e.g., *J.W.T.*, 36 Tex. Sup. Ct. J. at 1131 n.18.

61. In one footnote, Justice Doggett refers to "[t]he dissenting justices" and correctly anticipates the substance of Justice Cornyn's dissent although only Justice Enoch's dissent had issued at that point. *Id.* (emphasis added). A less clear example is Justice Doggett's footnote refutation of the argument that the majority's decision would jeopardize the adoption process, which appeared to come out of the clear blue sky until Justice Cornyn's dissenting opinion made that claim some two-and-one-half months later. Compare *J.W.T.*, 36 Tex. Sup. Ct. J. at 1133 n.25 with *J.W.T.*, 36 Tex. Sup. Ct. J. at 1287 (Cornyn, J., dissenting).

62. The percentage of opinions later withdrawn, when originally issued with concurring or dissenting opinions "to follow," is quite high. See *supra* notes 49 and 51.

63. As a general matter of interpretation, a withdrawn opinion "should, in deference to the court's wishes, be treated as if never rendered." *Mixon v. Wallis*, 161 S.W. 907, 911 (Tex. Civ. App.—San Antonio 1913, writ ref'd). The temptation to enter into such speculation, however, is almost irresistible. See, e.g., James W. Paulsen, *Jensen III and Beyond: Exploring the Community Property Aspects of Closely Held Corporate Stock in Texas*, 37 BAYLOR L. REV. 653, 656 n.8 (1985) (containing an extensive bibliography of articles written about one, two or all three versions of the Texas Supreme Court's decision in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984)).

64. 37 Tex. Sup. Ct. J. 57 (Oct. 27, 1993).

65. TEX. FAM. CODE ANN. § 13.44(a)(1) (Vernon Supp. 1994).

court and court of appeals,⁶⁶ found that the divorce decree barred such a subsequent suit.

The facts were not appealing, so far as the children's right to sue were concerned. In her divorce petition, Kathleen Gresham Dreyer swore under oath that she and her then-husband were the parents of three children, including twin boys, of the marriage. When she had some initial problems collecting child support, Kathleen reiterated the claim in a support order. A deal was then struck in which her ex-husband conveyed some land, which turned out to be virtually valueless because of an undisclosed tax lien, in settlement of support obligations.⁶⁷ Kathleen, as the next friend of the twins, sued to establish that Philip Greene was the biological father. The circumstances suggest a calculating maneuver on Kathleen's part to get child support from whomever was available to pay, and the Texas Supreme Court seems to have thought as much, commenting that "only after Thorne [the ex-husband] had difficulty meeting his obligation did Kathleen sue Philip to establish his paternity of two of her three children."⁶⁸

The decision of the Texas Supreme Court is very limited. Citing three prior court of appeals rulings,⁶⁹ the majority simply reasoned that "parents" and children "of the marriage" were affirmative statements of the biological relationship.⁷⁰ The Court sidestepped the most serious question: since the children were not represented independently in the divorce, their constitutional rights might be implicated. The court held that constitutional complaints were waived because they were not raised at trial.⁷¹ Moreover, in a concluding footnote, the court "express[ed] no opinion" on the question of whether the children could challenge the paternity finding by bill of review.⁷²

The decision drew a dissent by an odd assortment of judges: Justice Gammage, Chief Justice Phillips, and Justice Doggett. Chief Justice Phillips dissented solely on the question of whether a boilerplate recital in a default decree could be considered an adjudication of biological paternity.⁷³ Justices Gammage and Doggett agreed; however, drawing an explicit parallel with the concern for the constitutional rights of the biological father expressed in

66. The lower court opinions are discussed in last year's Survey. See Paulsen, *1992 Annual Survey*, *supra* note 3, at 1517-18.

67. These facts do not appear either in the court of appeals or Texas Supreme Court opinion. They are, however, apparently true. See Paulsen, *1992 Annual Survey*, *supra* note 3, at 1517 n.26.

68. *Dreyer*, 37 Tex. Sup. Ct. J. at 58 n.1.

69. *Espree v. Guillory*, 753 S.W.2d 722 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Thompson v. Thompson*, 572 S.W.2d 761 (Tex. Civ. App.—Tyler 1978, no writ); *Walters v. Walters*, 565 S.W.2d 586 (Tex. Civ. App.—Austin 1978, no writ).

70. *Dreyer*, 37 Tex. Sup. Ct. J. at 57.

71. *Id.* at 58.

72. *Id.* n.2.

73. Phillips's dissent is limited to Part I of Justice Gammage's opinion, which analyzed the legislative history of the Family Code section barring paternity actions in cases with prior final judgments "adjudicating a named individual to be the biological father of the child." *Id.* at 59 (citing TEX. FAM. CODE ANN. § 13.44(a)(1) (Vernon Supp. 1994)).

J.W.T.,⁷⁴ they concluded that the majority opinion rides "roughshod over the rights of the minor children for whose protection the legislature enacted the paternity provisions in question."⁷⁵

The Texas Supreme Court's third paternity decision of the Survey period, *County of Alameda v. Smith*,⁷⁶ involves the effect of refusal to submit to paternity testing. Rod Smith refused to comply with two court orders to submit to blood, body fluid or tissue testing in a suit brought by the Texas Attorney General's office, on behalf of California authorities, under the Revised Uniform Reciprocal Enforcement of Support Act.⁷⁷ The trial court, relying on Family Code section 13.06(d)'s language that such refusal shifts the burden of proof,⁷⁸ entered judgment that Smith was the child's biological father and should pay child support. The court of appeals reversed, reasoning that, under section 13.02(b),⁷⁹ the state still had the burden of introducing evidence sufficient to support a default judgment.⁸⁰ The Texas Supreme Court resolved the apparent discrepancy in the statutes by ruling, in a per curiam opinion without argument, that the legislature intended the burden to be on the person refusing to submit to paternity testing.⁸¹ The court was careful to point out that no constitutional issues were raised by the parties.⁸²

While not directly relevant to the issues raised in *County of Alameda*, it is worth noting that the 1993 legislature made several changes in the law governing paternity suits. Blood or other scientific tests now must exclude 99 percent (rather than the old 95 percent) of the male population as potential fathers in order for the results to be admitted in evidence⁸³ or shift the burden of proof.⁸⁴ In a strange twist on normal procedure, the party seeking to establish paternity still retains the right to open and close, even if the burden of proof has been shifted because of a positive paternity test.⁸⁵

The statute of limitations for a paternity now clearly runs two years after the second anniversary of the date the child becomes an adult, although suits are permitted before birth.⁸⁶ A new section encourages early suits by providing that the Attorney General's office be notified whenever items relating

74. *Dreyer*, 37 Tex. Sup. Ct. J. at 59 (Gammage, J., dissenting).

75. *Id.* at 58.

76. 36 Tex. Sup. Ct. J. 1325 (Sep. 29, 1993).

77. TEX. FAM. CODE ANN. § 21.18 (Vernon Supp. 1994).

78. *Id.* § 13.06(d) ("A party who refuses to submit to paternity testing has the burden of proving that the alleged father is not the father of the child.").

79. *Id.* § 13.02(b)(2) ("[I]f any party refuses to submit to court-ordered paternity testing, upon proof sufficient to render a default judgment the court may resolve the question of paternity against that party.").

80. *Smith v. Drake*, 852 S.W.2d 82, 85-86 (Tex. App.—Waco), *rev'd sub nom.* *County of Alameda v. Smith*, 36 Tex. Sup. Ct. J. 1325 (Sept. 29, 1993). The petition did contain a sworn statement by the child's mother attesting to Smith's paternity. The statement was not introduced into evidence, however, possibly because it was made on "best information and belief." *Id.* at 84.

81. *County of Alameda*, 36 Tex. Sup. Ct. J. at 1325.

82. *Id.* n.1.

83. TEX. FAM. CODE ANN. §§ 13.02(a), 13.04(g) (Vernon Supp. 1994).

84. *Id.* § 13.05(c).

85. *Id.* § 13.06(g).

86. *Id.* § 13.01(a).

to a child's father are not completed on a birth certificate.⁸⁷ Child support can now be collected, retroactive to birth, regardless of when the paternity suit is filed.⁸⁸ Negotiation of child support obligations in such instances is now encouraged by statute.⁸⁹

II. SUPPORT

The Survey period contains a good deal of activity, both judicial and legislative, on the subject of child support. Support at the high end of the economic spectrum commanded the most attention. The Texas Supreme Court's opinions in *Rodriguez v. Rodriguez*⁹⁰ and a companion case⁹¹ dealt with a question of statutory construction arising from 1989 revisions to support guidelines. The question, to what extent "lifestyle" factors as opposed to the child's demonstrated needs can be taken into account when the obligor's net monthly resources exceed \$4000, would not have arisen before 1989, since the 1987 guidelines specifically included lifestyle as a factor to be considered under these circumstances.⁹² In the 1989 revision, however, this reference was deleted.⁹³

At the court of appeals level in *Rodriguez*, the principal question was whether the legislature meant to eliminate lifestyle factors from the child support calculus at the upper end of the income scale. One might reasonably conclude that the elimination of the lifestyle language in the 1989 revision was a clear signal of the legislature's intent, as the court of appeals so held.⁹⁴ Things are not quite that simple, however. The Texas child support statutes set out a number of relevant "evidentiary factors,"⁹⁵ including the generic phrase, "any other reason or reasons consistent with the best interest of the child, taking into consideration the circumstances of the parents."⁹⁶ This language might well leave room for consideration of "lifestyle" factors.

The Texas Supreme Court had no difficulty disposing of the lifestyle question, so far as the 1989 amendments were concerned, concluding that "[w]e agree with the court of appeals that above \$4000 of net monthly resources, additional child support may only be awarded based on the needs of the

87. *Id.* § 13.015.

88. TEX. FAM. CODE ANN. § 13.44(a) (Vernon Supp. 1994).

89. *Id.* § 14.808.

90. 860 S.W.2d 414 (Tex. 1993).

91. *Berger v. Berger*, 36 Tex. Sup. Ct. J. 924 (May 19, 1993), *withdrawn*, 37 Tex. Sup. Ct. J. 2 (Oct. 6, 1993).

92. Act of Nov. 1, 1987, 70th Leg., 2d C.S., ch. 73, § 4, 1987 Tex. Gen. Laws 226-27, amended by Act of Sept. 1, 1989, 71st Leg., R.S., ch. 617, § 5, 1989 Tex. Gen. Laws 2035.

93. The relevant section now provides in part that, for net monthly resources above \$6000 (a 1993 revision from the previous \$4000), "[w]ithout further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child." TEX. FAM. CODE ANN. § 14.055(c) (Vernon Supp. 1994).

94. *Rodriguez v. Rodriguez*, 834 S.W.2d 369 (Tex. App.—San Antonio 1992), *rev'd on other grounds*, 860 S.W.2d 414 (Tex. 1993).

95. TEX. FAM. CODE ANN. § 14.054 (Vernon Supp. 1994).

96. *Id.* § 14.054(15).

child."⁹⁷ The decision went further, though, in a process of reasoning that "shocked the child support community."⁹⁸

Unfortunately, one needs to do a little math to understand the cause for shock. Once the court of appeals in *Rodriguez* concluded that lifestyle factors could not be included in "high end" child support, it subtracted the \$800 "presumptive" award authorized by the Family Code (20 percent of net resources, to \$4000) from the \$1,742.17 actual proven needs of the child.⁹⁹ The remaining amount, \$942.17, was all that could be awarded in addition to the \$800 presumptive award.¹⁰⁰

The Texas Supreme Court, however, took a different approach. The high court began by observing that the trial court is not required to make specific findings regarding factors considered in the presumptive award, and that such items as ability to pay and amount of access to the child might be considered.¹⁰¹ Therefore, to the Texas Supreme Court, "the presumptive award necessarily encompasses a number of factors that are not limited just to the needs of the child."¹⁰² To the Texas Supreme Court, "the \$800 presumptive award is just that—a presumptive award."¹⁰³ Thus, there is no reason to assume it is based on need and no reason to deduct it from the child's total proven need in determining the propriety of the remainder of the child support award. The court therefore "delinked needs of the child and the child support calculated under the guidelines,"¹⁰⁴ at least for the presumptive award.

This new method of calculation led directly to a different result in the case. To reiterate a bit, the total child support award was \$2500. If the \$800 presumptive child support is not necessarily related to the child's needs, only \$1700 must be justified by proven need. Since this amount is less than the \$1742.17 in actual need found by the trial court, the original award was justified.

The result, while not prohibited by the language of the child support statutes, surely is counterintuitive. One would think that the child's needs ought much more to be the touchstone at lower levels of available resources than at the high end. At any rate, the ink hardly had a chance to dry on the *Rodriguez* slip opinion before the legislature acted. The Family Code now provides that "the entire amount of the presumptive award be subtracted from the proven total needs of the child."¹⁰⁵ Should there be any lingering doubt, the amendment also adds that "in no event may the obligor be required to pay more than an amount equal to 100 percent of the proven needs of the child as child support."¹⁰⁶

97. *Rodriguez*, 860 S.W.2d at 417.

98. Harry L. Tindall, 1993 *Legislation*, *supra* note 1, at 32.

99. *Rodriguez*, 834 S.W.2d at 372.

100. *Id.* at 374.

101. *Rodriguez*, 860 S.W.2d at 418.

102. *Id.*

103. *Id.*

104. Tindall, 1993 *Legislation*, *supra* note 1, at 32.

105. TEX. FAM. CODE ANN. § 14.055(c) (Vernon Supp. 1994).

106. *Id.*

Two caveats should be added. First, the 1993 legislative change, while limiting all support to the child's proven needs, also increases the presumptive amount from \$4000 to \$6000 per month,¹⁰⁷ a change which should "now cover 97% of all obligors."¹⁰⁸ Second, while the principal holding of *Rodriguez* is already history in that one now can consider only the "needs of the child," one should not forget the *Rodriguez* court's footnote observation that "needs" is an imprecise term that "is not limited to bare necessities of life."¹⁰⁹ Thus, says the high court, "'needs of the child' includes more than the bare necessities of life, but is not determined by the parents' ability to pay or the lifestyle of the family. In determining the needs of the child, we direct courts to continue to follow the paramount guiding principle: *the best interest of the child.*"¹¹⁰

While *Rodriguez* and associated developments surely are the most prominent developments in the support area over the past year, a number of other cases and statutory changes also deserve brief mention. Contractual agreements for child support continue to generate a respectable amount of litigation. In *Giangrosso v. Crosley*,¹¹¹ Pamela Giangrosso argued that a prior order containing no requirement that she pay child support barred a request by her former husband to modify the order to seek support. The First District Court of Appeals in Houston began by noting that a court ordinarily cannot modify the terms of a contractual child support agreement, absent contract-based grounds such as fraud, accident, or mistake.¹¹² Nonetheless, if the agreement is incorporated into a court order, the court has authority to modify, because "[p]arties cannot by contract deprive the court of its power to guard the best interest of the child."¹¹³ Since this agreement was incorporated into a court order, entered after divorce, contract questions did not enter in.¹¹⁴ Conversely, in *Hollander v. Capon*,¹¹⁵ the same court held that a suit for breach of a child support contract not incorporated in a court order is governed by the four-year statute of limitations applicable to written contracts¹¹⁶ rather than the special ten year statute for support orders.¹¹⁷

While court-ordered child support terminates on the death of the obligor, contractual support can follow the payor to the grave.¹¹⁸ *Lake v. Lake*¹¹⁹ illustrates the point in a somewhat unusual fact setting. A contractual child

107. *Id.* § 14.055(a).

108. Tindall, 1993 *Legislation*, *supra* note 1, at 32.

109. *Rodriguez*, 860 S.W.2d at 417 n.3 (citing *Courville v. Courville*, 568 S.W.2d 719, 720 (Tex. Civ. App.—Beaumont 1978, no writ).

110. *Id.*

111. 840 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1992, no writ).

112. *Id.* at 768 (citing *Hoffman v. Hoffman*, 805 S.W.2d 848, 850 (Tex. App.—Corpus Christi 1991, writ denied).

113. *Leonard v. Lane*, 821 S.W.2d 275, 278 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

114. *Id.*

115. 853 S.W.2d 723 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

116. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986).

117. See TEX. FAM. CODE ANN. § 14.41 (Vernon 1986); see also *infra* note 131.

118. See *Hutchings v. Bates*, 406 S.W.2d 419, 420 (Tex. 1966).

119. No. 05-92-02111-CV, 1993 WL 342588 (Tex. App.—Dallas, Aug. 23, 1993, n.w.h.).

support agreement provided that if the payor died before the support obligations terminated, the contract obligation would be satisfied by conveyance of an equity interest in a piece of real estate. Before death, however, the agreement was modified by an addendum transferring the real estate interest by quitclaim, together with the deletion of the provision just mentioned with an explanation that the parties "are relieved of their respective obligations and responsibilities as set forth in those paragraphs."¹²⁰ Another provision, however, making the contractual obligation of support binding on "heirs at law, next of kin, executors, administrators, and other personal representatives,"¹²¹ was not struck.

The Dallas Court of Appeals acknowledged the statutory mandate, which provided that, "[u]nless otherwise agreed to in writing or expressly provided for in the decree, provisions for the support of a child are terminated by . . . the death of a parent obligated to support the child."¹²² It is at least arguable that the intent of the transaction, when viewed as a whole, was to release the payor from obligations after death in exchange for transfer of the agreed-upon property during life. The Dallas court, however, construed the agreement strictly as written. The undeleted proviso that the agreement was binding on heirs, taken in conjunction with the statement in the addendum that "[a]ll other portions of the . . . [a]greement are hereby affirmed and ratified by the parties,"¹²³ combined for a summary judgment against the estate.

Lewis v. Lewis,¹²⁴ a case involving the proper application of offsets to a claim for child support arrearages, merits a brief note. In *Lewis*, the obligor conceded nonpayment of child support, but claimed an offset for support paid while a child was living with him. The Family Code provides for such offsets or counterclaims during a period when the custodial parent voluntarily relinquishes control of a child to the obligor.¹²⁵ The obligor claimed an offset for one child for thirty-five months, while the claim was only for a twenty-five month period. The evidence indicated that the father was keeping track of voluntary oversupport and subtracting it from later support payments. Nonetheless, citing Chief Justice Phillips's dissent in *Williams v. Patton*,¹²⁶ to the effect that the trial court "acts as a mere scrivener"¹²⁷ in tallying up arrearages and credits, the Houston Court of Appeals (14th District) ruled that each month of unpaid support was a separate claim, and that only financial contributions made by the obligor during that month would be considered as offsets.¹²⁸ Although the decision is not altogether clear, the amounts exceeding support obligations on a month-by-month basis apparently should not be considered, because they are voluntary payments

120. *Id.* at *4 n.1.

121. *Id.* at *2.

122. TEX. FAM. CODE ANN. § 14.05(d) (Vernon 1986).

123. *Id.* at *4.

124. 853 S.W.2d 850 (Tex. App.—Houston [14th Dist.] 1993, no writ).

125. TEX. FAM. CODE ANN. § 14.41(c) (1986 and Vernon Supp. 1993).

126. 821 S.W.2d 141 (Tex. 1991).

127. *Id.* at 153 (Phillips, C.J., dissenting).

128. *Lewis*, 853 S.W.2d at 854.

pursuant to a common law obligation of support, and thus "not necessarily to be offset against the statutory obligation enforced by a court order."¹²⁹ Since the trial court had for some reason not permitted evidence on offsets, the Houston Court of Appeals (14th District) remanded for further scrivening.

The 1993 legislature made a number of statutory changes of relevance to the general issue of child support. In addition to the changes in the support guidelines already mentioned, lawmakers made it easier to calculate and collect arrearages. Not only is it now permitted to cumulate judgments for child support arrearages,¹³⁰ but the former statutory provision limiting judgments to arrearages owing for less than ten years has been replaced by a four-year window for filing motions to confirm after emancipation or the date the obligation terminates.¹³¹ Arrearages may be collected by wage withholding, even if reduced to judgment,¹³² as can health insurance payments,¹³³ even if the obligor employee works outside the state.¹³⁴ Employer fines for noncompliance have been increased, from \$50 to \$200 per violation.¹³⁵ A voluntary program will also encourage employers to report the names of all new hires.¹³⁶ In other action, delinquent child support obligors can no longer receive state grants or loans, or bid on state contracts.¹³⁷ A new statute permits delinquent support obligations to be set off against debts owed by the state, with a limited exception for workers' compensation awards,¹³⁸ and delinquent child support payments may also be collected from insurance awards.¹³⁹

While most statutory changes reflect the state's continuing "get tough" attitude toward delinquent child support obligors, some changes are designed to streamline the process. A new child support review process, based on principles of negotiation and mediation, is being implemented.¹⁴⁰ Personal checks must now be accepted unless the obligor has a history of writing bad checks.¹⁴¹ Child support is also moving into the computer age, with a new provision for payment by electronic funds transfer.¹⁴²

Last, but assuredly not least, so far as legislation is concerned, Texas became the first of the major industrial states to adopt the Uniform Interstate Family Support Act.¹⁴³ This is particularly appropriate, because University

129. *Id.* (quoting *In re McLemore*, 515 S.W.2d 356, 358 (Tex. Civ. App.—Dallas 1974, no writ)).

130. TEX. FAM. CODE ANN. § 14.41(a) (Vernon Supp. 1994).

131. *Id.* § 14.41(b).

132. *Id.* § 14.43(a)(4).

133. *Id.* § 14.43(l).

134. *Id.* § 14.43(h).

135. *Id.* § 14.43(n).

136. TEX. HUM. RES. CODE ANN. § 76.011 (Vernon Supp. 1994).

137. TEX. FAM. CODE ANN. § 14.52 (Vernon Supp. 1994).

138. TEX. HUM. RES. CODE ANN. § 76.0041 (Vernon Supp. 1994).

139. TEX. FAM. CODE ANN. § 14.972 (Vernon Supp. 1994).

140. *Id.* §§ 14.801-.809.

141. *Id.* § 14.0501(d).

142. *Id.* § 14.0502.

143. *Id.* §§ 21.01-.43.

of Texas law professor John J. Sampson was co-reporter for the uniform act and Harry Tindall of Houston was an active participant in the drafting process.¹⁴⁴ For the same reason, it should not come as a surprise that much of the act already will be familiar to Texas practitioners. The long-arm provisions are modeled on Texas law, as are the provisions for continuing exclusive jurisdiction.¹⁴⁵ Out-of-state support orders can now be enforced directly against Texas employers or through state enforcement agencies.¹⁴⁶

Finally, the Survey period contains a healthy crop of quasi-criminal decisions on contempt orders. *Ex parte Hall*,¹⁴⁷ a decision issued by the Texas Supreme Court in April 1993, is a primer on settled law, albeit in a somewhat unusual context. By prenuptial agreement, Craig Hall agreed to pay MaryAnna's living expenses of \$23,982.75 per month, as well as \$675 per month for her two adult children. When the marriage went sour, the court set temporary spousal and child support at the agreed figures, together with arrearages and credits apparently calculated on the same basis, despite Craig's argument that the amounts were "exorbitant."¹⁴⁸ Craig did not pay and, after the usual formalities, the judge ordered him jailed for contempt.

The Dallas Court of Appeals upheld the order on habeas challenge, except for the portion of the order awarding MaryAnna attorney fees for any habeas corpus proceeding.¹⁴⁹ The Texas Supreme Court disagreed, striking down the order in its entirety. The reasons were simple. Under the Texas Constitution, imprisonment for debt is unconstitutional.¹⁵⁰ This does not affect an ordinary contempt order in a family law case, however, because such orders arise from legal duties owed as a result of the parties' *status*, not their private contracts.¹⁵¹ An order for temporary spousal support¹⁵² or child support¹⁵³ therefore is enforceable by contempt. A contract for support, however, is different. It is still enforceable. However, to the extent that it exceeds a spouse's legal duties, such an agreement is enforceable only as a debt through ordinary legal processes, and not by use of the court's contempt power.¹⁵⁴

In *Ex parte Hall* the record made it clear that the court did not exercise any independent judgment; in fact, the court "expressly stated that it was simply enforcing the parties' agreement."¹⁵⁵ The order contained none of the required findings, and arrearages were calculated without any eviden-

144. See Sampson, *1993 Legislation*, *supra* note 1, at 66.

145. *Id.*

146. Wilkerson, *supra* note 2, at 906.

147. 854 S.W.2d 656 (Tex. 1993).

148. *Id.* at 657.

149. *Id.* at 657-58.

150. See TEX. CONST. art. I, § 18 ("No person shall ever be imprisoned for debt.").

151. See, e.g., TEX. FAM. CODE ANN. § 4.02 (Vernon 1986) (providing, in part, that "[e]ach spouse has a duty to support the other spouse" and that "[e]ach parent has the duty to support his or her child"); *Cunningham v. Cunningham*, 40 S.W.2d 46, 49-50 (Tex. 1931).

152. TEX. FAM. CODE ANN. §§ 3.58(c)(2), (f) (Vernon 1986).

153. TEX. FAM. CODE ANN. §§ 11.11(a)(2), (h) (Vernon Supp. 1994).

154. See, e.g., *Ex parte Hatch*, 410 S.W.2d 773, 776 (Tex. 1967).

155. *Hall*, 854 S.W.2d at 658.

tiary basis.¹⁵⁶ Accordingly, use of the contempt power was inappropriate, and Mr. Hall was ordered discharged.¹⁵⁷

Ex parte Garrison,¹⁵⁸ a habeas corpus case from the Houston Court of Appeals (1st District), points out a problem that deserves the Texas Supreme Court's (and perhaps the legislature's) prompt attention. The obligor was confined for failure to pay child support, though he had already served the criminal portion of his jail time. He sought habeas corpus relief based on an affidavit claiming that he had no money or job, no employment prospects, no possibility of a loan from family and friends, and so forth.¹⁵⁹ Under 1987 amendments to the Family Code, the defense of inability to pay is rigidly controlled by law. The statute specifies that inability to pay is an affirmative defense to a contempt motion.¹⁶⁰ The defense is not available unless some evidence is introduced,¹⁶¹ and the obligor is required to prove inability to pay by a preponderance of the evidence.¹⁶²

Although a plain reading of these statutes would lead to the conclusion that the legislature intended obligors to shoulder some very substantial burdens in proving inability to pay, the Houston Court of Appeals (1st District) simply sidestepped the issue.¹⁶³ These rules, Justice Bass reasoned, do not apply at all in original habeas proceedings.¹⁶⁴ Thus, as stated in the second paragraph of the opinion:

The issue is not whether relator was able to pay child support as it came due, or at the time of the hearing on contempt. The issue is whether this Court will grant habeas corpus relief when its original habeas corpus jurisdiction is invoked and the relator, by uncontroverted affidavit, testifies he is presently unable to pay child support arrearage because he has no money or property that can be sold or mortgaged; he is unemployed and has no prospects of obtaining employment; friends, relatives, and financial institutions have refused to loan him money; and he knows of no other source from which he can obtain money to pay the arrearage, and such testimony is corroborated by a period of incarceration.¹⁶⁵

Viewed in this way, all objections to the obligor's release from confinement could be disposed of in short order. The first apparent obstacle was the fact that the obligor provided no statement of facts from the trial court hearings. Justice Bass reasoned that evidence of inability to pay some months earlier might be relevant, but was hardly necessary, to show the obligor's "present, uncontested inability to pay" at the time of the habeas corpus pro-

156. *Id.*

157. *Id.* at 659.

158. 853 S.W.2d 784 (Tex. App.—Houston [1st Dist.], orig. proceeding).

159. The facts stated in the affidavit, as summarized by the court, are set out *infra* in the text accompanying note 165.

160. TEX. FAM. CODE ANN. § 14.40(g) (Vernon Supp. 1994).

161. *Id.* § 14.40(h).

162. *Id.*

163. *Garrison*, 853 S.W.2d at 785.

164. *Id.*

165. *Id.*

ceeding.¹⁶⁶ The court distinguished a prior opinion requiring a statement of facts in order to consider a habeas corpus petition, also from the Houston Court of Appeals (1st District),¹⁶⁷ because the prior case dealt with waiver of counsel, not inability to pay.

The other problem was that the court of appeals appeared to be determining fact issues, something the court acknowledged was beyond its authority.¹⁶⁸ Initially, the answer seems quite simple. Justice Bass noted that the Houston Court of Appeals (1st District) decided, in two previous opinions,¹⁶⁹ that an uncontradicted habeas corpus affidavit coupled with a period of incarceration conclusively establishes the facts necessary to justify release.¹⁷⁰ He further observed that even the affidavit of an interested party can be given conclusive effect "when a party has the means and opportunity of disproving the testimony, if it were not true, and fails to do so."¹⁷¹

The majority's reasoning quickly begins to unravel, however, when one considers the points raised in Justice Camille Dunn's dissent. Justice Dunn pointed out that the record presented to the court included a list of property awarded to the obligor in the divorce: cash, retirement plan benefits, a car, and a bass boat, and that the affidavit did not explain what had happened to those assets.¹⁷² Justice Dunn further noted that the obligor brought forth no statement of facts from the original contempt hearing, and that there was no way of knowing that the trial court had not already considered the same arguments.¹⁷³ Justice Dunn also intimated that the majority decision contradicted prior decisions from the Houston Court of Appeals (1st District) holding that it is the child support obligor's burden in a habeas corpus proceeding to bring forth a statement of facts,¹⁷⁴ and that in the absence of a statement of facts, it would be presumed that there was evidence to support the trial court's judgment that the obligor had the ability to pay.¹⁷⁵ The overall effect, she concluded, was to "impermissibly shift the burden of bringing forth the statement of facts to the real party in interest"¹⁷⁶ and that "[i]t is unconscionable to require the real party in interest to controvert the relator's general affidavit regarding inability to pay when the real party in interest does not have the burden of proving the relator's ability to pay."¹⁷⁷

166. *Id.* at 787.

167. *Ex parte Occhipenti*, 796 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

168. *Garrison*, 853 S.W.2d at 787 n.3 (quoting *Ex parte Ramzy*, 424 S.W.2d 220, 227 (Tex. 1968, orig. proceeding) (Norvell, J., concurring)).

169. *Ex parte Mabry*, 792 S.W.2d 588 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding); *Ex parte Peters*, 770 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding)

170. *Garrison*, 853 S.W.2d at 787.

171. *Id.*

172. *Id.* at 788-89 (Dunn., J., dissenting).

173. *Id.*

174. *See Occhipenti*, *supra* note 167.

175. *See Ex parte Nivens*, 592 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1979, orig. proceeding).

176. *Garrison*, 853 S.W.2d at 789.

177. *Id.*

In this author's opinion, Justice Dunn has the better argument. Issues of *present* inability to pay are best handled by the trial court, which has fact-finding capabilities not available to a court of appeals. In this case, one hardly could expect Garrison's ex-wife to address, by affidavit, the question of whether Garrison still had the property he was awarded in the divorce. Such questions are the gist of evidentiary hearings. In consequence, to say that the affidavit is uncontradicted, when the proceeding offers no opportunity to test the truth of the obligor's conclusory statements, seems disingenuous. And if real parties in interest respond to conclusory affidavits with equally conclusory counter-affidavits, based on what little they know about the obligor's financial status after six months in jail and without the opportunity to ask the obvious questions, one wonders what the Houston Court of Appeals (1st District) will do to determine whether the counter-affidavits raise a fact question.

The merits of the case aside, *Ex parte Garrison* points out two major weaknesses in the Texas appellate system. First, our appeals courts are far too reluctant to reduce inconsistency within their own decisions. It is difficult to argue with Justice Dunn's observations that, while the decision is consonant with some prior Houston Court of Appeals (1st District) rulings,¹⁷⁸ it is arguably in conflict with others.¹⁷⁹ The decision of the Houston Court of Appeals (1st District) not to grant en banc rehearing, on a five-to-four vote in which all members of the *Garrison* panel voted for rehearing except for the author,¹⁸⁰ is disappointing.

Even worse, the decision highlights a continuing conflict between two appellate courts with concurrent jurisdiction over the most populous urban area in the state. In announcing its decision, the *Garrison* court announced that "we decline to follow"¹⁸¹ *Ex Parte King*,¹⁸² a 1991 decision on highly similar facts from the Houston Court of Appeals (14th District). Conversely, in *Ex Parte King*, the Houston Court of Appeals (14th District) similarly announced that "[w]e decline to follow the First Court of Appeals,"¹⁸³ citing the two decisions relied upon in *Garrison*. Such intercourt conflicts are regrettable in all cases. They become intolerable when, as in this case, the conflict exists between two appellate courts with overlapping jurisdiction.

The fact that this blatant and unresolved conflict between Houston's two courts of appeals involves an original proceeding adds some peculiar twists. Since the question is one of procedure in original mandamus proceedings, trial courts will not be forced to engage in a guessing game as to which court of appeals, by random draw, will hear an appeal from their decision. Nor, unfortunately, can the Texas Supreme Court act to correct the problem by granting an application writ of error on "conflict" grounds.

178. *See supra* note 169.

179. *See supra* notes 174-75.

180. *Garrison*, 853 S.W.2d at 788.

181. *Id.*

182. 819 S.W.2d 944 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

183. *Id.* at 946.

This habeas corpus face-off between Houston's two appellate courts does create a different problem — a blatant invitation to forum-shop. By joint court order, original proceedings currently are divided between Houston's two appellate courts in strict numerical rotation, odd-numbered cases to the Houston Court of Appeals (1st District) and even-numbered cases to the Houston Court of Appeals (14th District).¹⁸⁴ In view of the current unresolved conflict, and the high probability that any child support habeas corpus relator will be released if the case is filed in the Houston Court of Appeals (1st District), one might well begin to see attorneys loitering in the hallway outside the clerk's office, waiting for the next odd number to roll around.

All in all, *Ex parte Garrison* signifies a sad situation. Recalcitrant child support obligors are released, contrary to the probable intent of the statutes, without a fair evidentiary hearing. Conflicts within the Houston Court of Appeals (1st District) are unresolved because of the court's reluctance to take cases for en banc review.¹⁸⁵ And conflicts between Houston's two courts of appeals will continue to bedevil the bench and bar, though the last problem ultimately is attributable to the legislature's unthinking decision to give two independent courts of appeals overlapping trial court jurisdiction, a situation not contemplated in any rational theory of precedent.

Although not as significant as *Garrison*, in *Ex parte Howell*¹⁸⁶ the Houston Court of Appeals (1st District) denied relief to an obligor who claimed the child support enforcement order was defective and that he was denied a jury trial. The "defect" was a supposed failure to comply with the statutory requirement that the order set out "the time, date, and place" of each violation.¹⁸⁷ Since the order gave the total amount in arrears and a four page exhibit gave a list of dates, amounts owed, and zeros in the "amount paid" column, and that payments were to have been "THRU Harris County Child Support," the court concluded that substantial compliance with the statute had been achieved.¹⁸⁸ So far as a jury trial was concerned, the Houston appeals court felt bound by the Texas Supreme Court's recent decision in *Ex parte Sproull*.¹⁸⁹ Since the confinement requested did not exceed six months, the charge was not "serious," and a jury trial was not required.¹⁹⁰

III. TERMINATION AND ADOPTION

Termination and adoption have not been particularly active areas of the case law during the last Survey period, although the 1993 legislative session

184. See Order Implementing Docket Equalization Practices for Original Proceedings (First and Fourteenth Courts of Appeals, Feb. 8, 1990) (copy on file with the author).

185. Cf. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94 (Tex. 1992) (confirming the right of a justice of the First Court of Appeals, not a member of the issuing panel, to issue a written dissent from the denial of en banc rehearing).

186. 843 S.W.2d 241 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

187. TEX. FAM. CODE ANN. § 14.33(a) (Vernon 1986).

188. *Howell*, 843 S.W.2d at 243.

189. 815 S.W.2d 250 (Tex. 1991) (per curiam); see also Paulsen, 1992 Annual Survey, *supra* note 3, at 1535.

190. *Howell*, 843 S.W.2d at 244.

did make some noteworthy changes in the statutes. Parental rights can be terminated when a parent has "failed to support a child in accordance with his ability during a period of one year"¹⁹¹ and termination is in the child's best interests. Two cases issued during the Survey period discuss this provision, with moderately differing results. *In the Interest of Z.W.C.*¹⁹² involved a support order of \$200 per month; *In the Interest of R.R.F.*¹⁹³ involved a support order of \$100 per month. No payments were ever made by either obligor. The principal question in each case was who had the burden of proving the obligor's ability to pay during the period in question.

In *Z.W.C.* the obligor had been in and out of jail on several occasions since the issuance of the support order. In a 1989 decision, *Yepma v. Stephens*,¹⁹⁴ the Austin Court of Appeals ruled that proof that an obligor was in prison for some portion of the twelve-month period, and therefore could not pay, together with no contrary evidence, constituted a fact issue sufficient to avoid termination.¹⁹⁵ Relying on this ruling, the mother in *Z.W.C.* argued that the obligor should be presumed able to meet his support obligations for a twelve-month period during which he was able to spend all or part of each month out of jail. The Fort Worth Court of Appeals did not agree. Rather, the Fort Worth court reasoned that, since the party seeking termination bears the burden of proof¹⁹⁶ and must produce clear and convincing evidence¹⁹⁷ that termination is justified, that party must show that the obligor had the ability to pay, but did not pay, for twelve successive months. Absent affirmative evidence of ability to pay, termination was not proper.

In *R.R.F.* the Corpus Christi court arrived at the opposite conclusion in a situation where neither party put on evidence of ability to pay child support. First, the court suggested that the original child support order contained an implicit finding of ability to pay.¹⁹⁸ Second, the court turned to the law governing contempt proceedings as an applicable analogy.¹⁹⁹ As discussed earlier in this Article,²⁰⁰ inability to pay is an affirmative defense to a contempt motion. The defense is not available unless some evidence is introduced, and the obligor must prove inability by a preponderance of the evidence.²⁰¹ Since "[i]n either situation, the rights of the non-paying parent are in jeopardy, either by incarceration or by loss of parental rights," the Corpus Christi court ruled that inability to pay should be considered an affirmative defense.²⁰²

191. TEX. FAM. CODE ANN. § 15.02(1)(F) (Vernon Supp. 1994).

192. 856 S.W.2d 281 (Tex. App.—Fort Worth 1993, n.w.h.).

193. 846 S.W.2d 65 (Tex. App.—Corpus Christi 1992, writ denied).

194. 779 S.W.2d 511 (Tex. App.—Austin 1989, no writ).

195. *Id.* at 512.

196. *See, e.g.,* State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

197. TEX. FAM. CODE ANN. § 11.15(b) (Vernon 1986).

198. *R.R.F.*, 846 S.W.2d at 68.

199. *Id.*

200. Relevant portions of the statutes are set out earlier in this Article, in connection with discussion of recent habeas corpus decisions. *See supra* notes 160-64 and accompanying text.

201. *Id.*

202. *R.R.F.*, 846 S.W.2d at 68.

The issue is not altogether clear. In the author's opinion, however, the Fort Worth court has the better of the argument. The Texas Supreme Court has ruled that "involuntary termination statutes are strictly construed in favor of the parent."²⁰³ The Code requires that "each finding required for termination of the parent-child relationship must be based on *clear and convincing evidence*."²⁰⁴ This is a specific and solitary statutory exception to the Family Code's general rule that court findings may be based on a preponderance of the evidence.²⁰⁵ Ability to pay surely is "a finding" required to support termination. The Corpus Christi court thus seems to have imported by analogy what has been prohibited by the explicit terms of the Family Code.

The Corpus Christi court's claim that the original support order contains an implied finding that the obligor was able to pay the support is undoubtedly true,²⁰⁶ but it is irrelevant to the issue in a termination proceeding. The support order only contains an implied finding as of the time the order is entered; it cannot predict the future. The termination statute is extremely clear as to the time period involved: "a period of one year ending within six months of the date of the filing of the petition."²⁰⁷ This directs the court's attention to the period of time for which support was not paid, not the time the support order first was entered. All in all, the author agrees with the Austin court's observation in *Yepma* that the statute "requires evidence establishing that the parent had the ability to pay child support *during the relevant period*."²⁰⁸ Since that opinion was written by Justice Gammage before he took his current job as a justice of the Texas Supreme Court, the opinion deserves a little more consideration than it was given by the Corpus Christi panel.

A voluntary termination issue deserves brief mention. In *Kawazoe v. Davila*,²⁰⁹ the mother secured the father's consent to termination of parental rights, and for thirteen years she led him to believe that his rights had in fact been terminated. When the mother sued to collect past due child support, the San Antonio appeals court held that the father's signing of the voluntary termination papers, combined with the mother's misrepresentations, estopped her from collecting arrearages.²¹⁰ In so doing, the San Antonio court explicitly followed²¹¹ the lead set by the Tyler Court of Appeals in *LaRue v. LaRue*,²¹² a case reported in last year's Survey.²¹³

Two matters of termination procedure also should be noted. The Family

203. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

204. TEX. FAM. CODE ANN. § 11.15(b) (Vernon 1987) (emphasis added).

205. *Id.* § 11.15(a) ("Except as provided by Subsection (b) of this section, the court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.") (emphasis added).

206. Under the Family Code, the court is required to consider a parent's ability to contribute in setting child support. TEX. FAM. CODE ANN. § 14.052(b)(2) (Vernon Supp. 1994).

207. *Id.* § 15.02(1)(F).

208. 779 S.W.2d at 512 (emphasis added).

209. 849 S.W.2d 906 (Tex. App.—San Antonio 1993, n.w.h.).

210. *Id.*

211. *Id.* at 910.

212. 832 S.W.2d 387 (Tex. App.—Tyler 1992, no writ).

213. See Paulsen, 1992 Annual Survey, *supra* note 3, at 1538.

Code requires the appointment of a guardian ad litem in cases in which termination of the parent-child relationship is sought unless the court finds, among other possibilities, that the interests of the child are adequately represented.²¹⁴ In *Chapman v. Chapman*²¹⁵ the Waco Court of Appeals held that "[i]t would be a rare situation" in which such a finding could be made, if the adverse parties were the child's parents, and that *Chapman* was not such a case.²¹⁶

In *Azbill v. Dallas County Child Protective Service*,²¹⁷ the Dallas Court of Appeals tried, with very limited success, to unravel a legal tangle caused by the trial court's failure to issue an order for separate trials. The Dallas County Child Protective Services (CPS) started termination proceedings against the Azbills, who then cross-filed for divorce in the same action. The court held separate trials, terminating parental rights after a jury trial, and then, at a later date, granting the divorce. Two judgments, each apparently final, were issued. The Dallas court observed that the record reflected the trial court's undoubted intent to have separate trials on the two issues. Unfortunately, under Texas Supreme Court authority in the *Aldridge* case,²¹⁸ failure to enter a separate trial order²¹⁹ results in a presumption that the judgment disposes of all issues.

The Dallas court's decision is a primer on the final judgment rule in its Texas incarnation. The court worked through each possibility, rejecting the possibility that either judgment was interlocutory or that one case could have more than one final judgment. The court's ultimate conclusion was that the first judgment, terminating parental rights, was the only final judgment. Under *Aldridge*, all relief not granted in a final judgment is presumed to be denied.²²⁰ The Azbills thus can claim a certain amount of notoriety as being one of the few couples denied a divorce in an era of no-fault divorce, and in a case in which there was more than enough fault to go around, to boot. The opinion concludes with the observation that "[t]he Court expresses no opinion on how or whether [the couple] may correct the error regarding the divorce decree."²²¹ One would imagine, however, that filing a new divorce petition ultimately would be easier for the Azbills than taking the trouble of finding out.

Several statutory changes are worth mentioning. First, the Family Code now provides that when an agency interviews a child during an investigation regarding the possibility of taking possession of the child, the agency must make a reasonable effort within twenty-four hours to notify the child's parents and legal guardians.²²² Second, termination of parental rights after de-

214. TEX. FAM. CODE ANN. § 11.10(a) (Vernon 1986).

215. 852 S.W.2d 101 (Tex. App.—Waco 1993, n.w.h.).

216. *Id.* at 102.

217. 860 S.W.2d 133 (Tex. App.—Dallas 1993, n.w.h.).

218. *See* North East Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 898 (Tex. 1966).

219. *See* TEX. R. CIV. P. 174.

220. *Aldridge*, 400 S.W.2d at 898.

221. *Azbill*, 860 S.W.2d at 142.

222. TEX. FAM. CODE ANN. § 17.031 (Vernon Supp. 1994).

nial of a prior petition is now expressly permitted when the circumstances of the child, parent, managing conservator or possessory conservator have materially and substantially changed.²²³ Curiously, evidence from the former hearing may be considered at the new hearing.²²⁴ Finally, Texas now has taken a clear position on the transracial adoption issue, with legislative amendments designed to assure that race and ethnicity are not factors to be considered in adoption,²²⁵ placement for adoption,²²⁶ or placement in or removal from a foster home.²²⁷ The clarification is welcome.

Texas adopted the Uniform Child Custody Jurisdiction Act (UCCJA)²²⁸ in an effort to minimize interstate custody disputes. Although the act has been in effect for more than a decade, Texas courts are still working through some of its jurisdictional ramifications. Several such cases came before Texas appellate courts during this Survey period.

In *Little v. Daggett*²²⁹ the Texas Supreme Court ruled per curiam that a paternity action dismissed for want of prosecution did not justify an end run around the UCCJA where the mother and child had moved out of state. In 1990, Sherry Little filed a paternity action in Texas. She moved to Tennessee in 1992, and the court dismissed the paternity action for want of prosecution. In 1993, a little more than six months after Little left Texas, the putative father brought a paternity action in Texas, seeking temporary visitation. On mandamus, the Texas Supreme Court recognized that a court rendering visitation orders retains authority to modify those orders,²³⁰ but held that the dismissal removed this possible basis for jurisdiction.²³¹

*Abderholden v. Morizot*²³² involves a somewhat more complicated situation. After a divorce in Travis County, Texas, the mother and child moved to Arkansas. During a Christmas visit to Arkansas, the father became concerned about the child's behavior. He took the child to Texas, placed him in a mental hospital, and filed a motion for a temporary restraining order in Travis County district court. At the hearing, the parties agreed to partici-

223. *Id.* § 15.025(c)(1).

224. *Id.* § 15.025(d). Speaking of this provision, Professor Sampson states: "I wonder what specific case generated this amendment." John J. Sampson, *1993 Legislation, supra* note 1, at 57.

225. See TEX. FAM. CODE ANN. § 16.081 (Vernon Supp. 1994) (providing that, "[i]n determining the best interest of the child under Section 16.08 of this code, the court may not deny or delay the adoption or otherwise discriminate on the basis of race or ethnicity of the child or the prospective adoptive parents").

226. See TEX. HUM. RES. CODE ANN. § 47.041 (Vernon Supp. 1994) (providing that "[t]he department, a county child-care or welfare unit, or a licensed adoption agency may not deny or delay placement of a child for adoption or otherwise discriminate on the basis of the race or ethnicity of the child or adoptive parents").

227. See TEX. HUM. RES. CODE ANN. § 41.028 (Vernon Supp. 1994) (providing that "[t]he department may not prohibit or delay the placement of a child in foster care or remove a child from foster care or otherwise discriminate on the basis of race or ethnicity of the child or the foster family").

228. TEX. FAM. CODE ANN. §§ 11.51-75 (Vernon 1986).

229. 858 S.W.2d 368 (Tex. 1993, orig. proceeding).

230. See, e.g., *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Hemingway v. Robertson*, 778 S.W.2d 199 (Tex. App.—Houston [1st Dist.] 1989, no writ).

231. *Little*, 858 S.W.2d at 369.

232. 856 S.W.2d 829 (Tex. App.—Austin 1993, no writ).

pate in treatment in Texas. The father then filed a motion to modify child custody, also in Travis County. The court ultimately granted the motion and named the father as managing conservator.

The mother appealed, challenging the district court's jurisdiction to modify custody. Since Arkansas was the child's new "home state" under the UCCJA, the father relied on several arguments to defeat application of the general rule. First, he argued that the mother's participation in the trial constituted consent to jurisdiction. The Austin Court of Appeals pointed out, however, that questions of subject matter jurisdiction cannot be settled by consent.²³³ The court further noted that participation in the initial proceeding did not constitute a "written agreement of all the parties"²³⁴ sufficient to confer jurisdiction.²³⁵ In addition, the father argued that the UCCJA provides for "emergency jurisdiction" if the child is present in the state and there is a "serious and immediate question" regarding the child's welfare.²³⁶ The Austin court ruled, however, that this jurisdiction would not extend to permanent custody modifications.²³⁷

Finally, the father argued that the Arkansas courts had declined to exercise jurisdiction,²³⁸ thus leaving a clear field for the Travis County district court. The Austin Court of Appeals disagreed. The Texas trial judge apparently had telephone conversations with his Arkansas counterpart, but this ground of jurisdiction was not pled.²³⁹ Nor was a hearing held by the Arkansas judge or any communication from the Arkansas court "filed" in the Texas proceeding.²⁴⁰ Accordingly, the Austin Court of Appeals disapproved the trial court's exercise of jurisdiction.

Some similar questions arose in *White v. Blake*.²⁴¹ The procedural and factual background of the case was described by the Tyler appeals court as "complex,"²⁴² a marvel of understatement. What follows is a simplified version of the critical facts. The parties divorced in Alabama. The mother, in

233. *Id.* at 832.

234. The Texas UCCJA provides, in part: "*Except on written agreement of all the parties, a court may not exercise its continuing jurisdiction to modify custody if the child and the party with custody have established another home state unless the action to modify was filed before the new home state was acquired.*" TEX. FAM. CODE ANN. § 11.53(d) (Vernon 1986) (emphasis added).

235. *Abderholden*, 856 S.W.2d at 832.

236. Under the Texas UCCJA, a court has jurisdiction to modify child custody if "it is necessary in an emergency to protect the child because he has been subject to or threatened with mistreatment or abuse or is otherwise neglected or there is a serious and immediate question concerning the welfare of the child." TEX. FAM. CODE ANN. § 11.53(a)(3)(B) (Vernon 1986).

237. *Abderholden*, 856 S.W.2d at 833. In making this ruling, the court relied upon an earlier decision to the same effect by the Amarillo Court of Appeals. See *Garza v. Harney*, 726 S.W.2d 198 (Tex. App.—Amarillo 1987, orig. proceeding).

238. A Texas trial court is permitted to exercise jurisdiction if it is in the best interest of the child and "another state has declined to exercise jurisdiction on the ground that this state [Texas] is the more appropriate forum to determine the custody of the child." TEX. FAM. CODE ANN. § 11.53(a)(4)(B) (Vernon 1986).

239. *Abderholden*, 856 S.W.2d at 835.

240. See TEX. FAM. CODE ANN. § 11.57(i) (Vernon 1986) (requiring "filing").

241. 859 S.W.2d 551 (Tex. App.—Tyler 1993, orig. proceeding).

242. *Id.* at 553.

the process of losing a bitterly disputed case in which she claimed the father was sexually abusing their child, moved with the child to Texas. After waiting approximately eight months, she applied for a protective order in a Texas court, claiming child abuse. The father appeared specially, but he walked out of the hearing after the special appearance was denied. The court proceeded to make findings of sexual abuse, arguably contrary to findings already made in Alabama, and enjoined the father from having any contact with the child.

The father later filed a habeas corpus petition seeking to enforce his Alabama visitation rights; this petition was denied. The mother then filed a motion to terminate parental rights. The father again filed a motion to dismiss on jurisdictional grounds, which was denied. The father then filed three mandamus actions, challenging each of the trial court's rulings.

Although the mother and child had resided in Texas for more than six months, this fact alone would not be dispositive since an action was pending in Alabama at the time they moved. Nonetheless, under the UCCJA²⁴³ and the federal Parental Kidnapping Prevention Act,²⁴⁴ the Texas court had "emergency jurisdiction" to address the allegations of sexual abuse. Since the father chose not to participate once his special appearance was overruled, he forfeited his chance to argue the merits of the charge. The habeas corpus proceeding to enforce Alabama visitation rights was likewise unavailing since Texas provides an exception for situations in which "there is a serious immediate question concerning the welfare of the child."²⁴⁵

The jurisdictional challenge to the Texas action to terminate parental rights was another matter. The initial question was whether a termination proceeding is a "custody proceeding" within the ambit of the UCCJA.²⁴⁶ The Tyler court disposed of arguably contrary authority from the Texas Supreme Court²⁴⁷ and the Austin Court of Appeals²⁴⁸ to the effect that a proceeding to terminate parental rights is not a "child custody" proceeding under Texas law, suggesting that the Texas Supreme Court's ruling should be limited only to jurisdictional questions under a now-repealed bar on "child custody" questions, and that the Austin opinion simply was wrong. The court noted that the Austin ruling had been questioned by the courts of several other states²⁴⁹ and that termination of parental rights necessarily involves a reduction of custody—to zero.

The remaining question, as in *Abderholden*, was whether the Alabama

243. See *supra* note 236.

244. See 28 U.S.C. § 1738A(c)(2)(C)(ii) (1988) (providing that a court may assume jurisdiction for child custody purposes if the child is present in the state and "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse").

245. TEX. FAM. CODE ANN. § 14.10(d) (Vernon 1994).

246. TEX. FAM. CODE ANN. § 11.52(3) (Vernon 1986).

247. See *Richardson v. Green*, 677 S.W.2d 497 (Tex. 1984).

248. See *Williams v. Knott*, 690 S.W.2d 605 (Tex. App.—Austin 1985, no writ).

249. See, e.g., *Souza v. Superior Court*, 238 Cal. Rptr. 892, 895 (Cal. Ct. App. 1987); *Gainey v. Olivo*, 373 S.E.2d 4, 5-6 (Ga. 1988); *Foster v. Stein*, 454 N.W.2d 244, 246 (Mich. App. 1990). The cases are cited in *White*, 859 S.W.2d at 562.

court had conceded jurisdiction to Texas. Again, the Texas trial court relied on telephone conversations with the Alabama judge, to the effect that the case was a "hot potato" that was generating a lot of publicity and that the Alabama judge would "like to see the matter resolved in any way it could be resolved, and if that meant doing it here [in Texas], fine."²⁵⁰ The Tyler Court of Appeals ruled, however, that these statements did not satisfy the requirements set out in the Texas UCCJA. As further illustration of the danger of relying on judge-to-judge phone conversations, the court noted the filing of a supplemental record containing a written order from the Alabama court to the effect that an action was pending in Alabama, that the Texas court's assumption of jurisdiction violated federal law, and that any order entered by the Texas court would be regarded as null and void in Alabama.²⁵¹ Accordingly, the Tyler Court of Appeals instructed the trial court to dismiss the termination proceeding.

Custody-related sanctions also received some attention during the Survey period.²⁵² In *Eason v. Eason*²⁵³ the Houston Court of Appeals (14th District) affirmed the trial court's decision to strike pleadings and prohibit testimony in a support-custody battle because the appellant had failed to pay discovery-related ad litem's fees. In an unusually strong dissent filed nearly a month after the majority opinion, Justice Draughn bemoaned the tendency of courts to strike pleadings for discovery abuse without considering less drastic alternatives, terming such actions "equivalent to a civil death penalty."²⁵⁴ He noted that an assessment of sanctions against the attorney would have been appropriate, since by the attorney's own admission, the problem was caused in part because "he had been fishing the bay" instead of responding to discovery requests.²⁵⁵

Finally, the dissent noted a disturbing circularity to the proceedings as a whole. The mother filed for increased child support and past due payments. The father responded with a motion to change custody. The mother could not pay her share of ad litem fees for discovery on the expanded case and was therefore prevented from seeking past due child support in an amount more than three times the unpaid ad litem fees: "Appellant thus found herself out of court because of lack of funds, and back in court facing a custody battle which required more funds. All because she filed suit for money legally due her."²⁵⁶

250. *White*, 859 S.W.2d at 564-65 (quoting the trial judge's summary of the conversation as set out in the statement of facts).

251. *Id.* at 565.

252. In addition to the case discussed in text, the Beaumont Court of Appeals also ruled in *Warchol v. Warchol*, 853 S.W.2d 165, 169 (Tex. App.—Beaumont 1993, no writ), that the trial court's power to assess attorney's fees as a sanction for filing a frivolous motion to modify is reviewed on the same abuse of discretion standard. This otherwise unremarkable opinion is, however, spiced up by an extended (and strained) analogy of a trial judge's job to that of a symphony conductor. *See id.* at 169.

253. 860 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

254. *Id.* at 191 (Draughn, J., dissenting).

255. *Id.* at 193.

256. *Id.* at 192.

Finally, the Texas Supreme Court recently granted a writ of error on a very interesting conservatorship-related issue. *W.C.W. v. Bird*,²⁵⁷ treated extensively in last year's Survey,²⁵⁸ is a "negligent diagnosis" suit brought against a testifying psychologist by a parent accused of child abuse. The mother filed abuse charges when the managing conservator father was about to move to Florida. The mother took the child to psychologist Bird, who diagnosed abuse. According to summary judgment evidence, this was the psychologist's first such case.²⁵⁹ Nonetheless, the psychologist spent only ten minutes with the child. While the diagnosis was based on the child's supposed abuse by "Daddy," Bird did not consider that the child was staying on a temporary basis with the mother and her new common-law husband.²⁶⁰ Despite this shaky basis for an opinion, the psychologist filed an affidavit accusing the father of sexual abuse and helped to convince a police officer to file criminal charges.²⁶¹

After the father successfully defended himself against the abuse charges, he sued Bird. Under chapter 34 of the Family Code, those who report child abuse enjoy a general immunity from liability, including liability for testimony in judicial proceedings.²⁶² Bird did not make such a report; in fact, chapter 34 was not mentioned until oral argument in the Houston Court of Appeals (1st District).²⁶³ The court of appeals also rejected a common law immunity argument in holding that the privilege for participants in judicial proceedings "does not preclude a suit for negligence."²⁶⁴

The Houston Court of Appeals (1st District) recognized the difficulty of applying the Texas Supreme Court's "balancing" analysis in *Otis Eng'g Corp. v. Clark*,²⁶⁵ but the court ultimately concluded that psychologist Bird and her employer owed a duty to the father.²⁶⁶ The Texas Supreme Court's decision in the case may well emerge as a major restatement of the law of professional liability to third parties.²⁶⁷ It is probably no accident that the high court granted an application for writ of error in *Bird* on the same

257. 840 S.W.2d 50 (Tex. App.—Houston [1st Dist.] 1992), *rev'd*, 868 S.W.2d 767 (Tex. 1994).

258. See Paulsen, 1993 *Annual Survey*, *supra* note 3, at 1527-28.

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

260. *Id.*

261. *Id.*

262. TEX. FAM. CODE ANN. § 34.03 (Vernon Supp. 1994).

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

264. This somewhat questionable ruling was discussed in more detail in last year's Survey. See Paulsen, 1993 *Annual Survey*, *supra* note 3, at 1528 n.148.

265. 668 S.W.2d 307, 309 (Tex. 1983).

266. *Bird*, 840 S.W.2d at 56.

267. As this Survey was going to press, the Texas Supreme Court issued a near-unanimous opinion in this case. *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994). The court unequivocally denied the possibility of recovery from a psychiatrist under these facts:

We hold that a mental health professional owes no professional duty of care to a third party to not negligently misdiagnose a condition of a patient. We also hold that a privilege exists for communication of an alleged child abuser's identity in the course of a judicial proceeding whether the accusation was negligently made.

Id. at 772.

day²⁶⁸ that an application was granted in *Thomas v. Pryor*,²⁶⁹ a malpractice claim by a disappointed beneficiary against an attorney who drafted a will (on a pro bono basis).

268. See 36 Tex. Sup. Ct. J. at 1248-49 (Sept. 13, 1993).

269. 847 S.W.2d 303 (Tex. App.—Dallas 1992, writ granted, dism'd by agr.).