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Family Law: Parent and Child

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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

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THIS Survey period has been relatively uneventful, for once, so far as judicial events of earthshaking importance are concerned. While the Texas Supreme Court continued to decide a respectable number of family law-related cases, recent cases tend more to fine-tune existing doctrine than to establish any remarkable new law. One exception, though only tangentially related to this Survey, is *National County Mutual Fire Insurance Company v. Johnson*,¹ in which a bare majority of the Court invalidated the family member exclusion in auto insurance policies on the ground that it conflicts with the Texas Motor Vehicle Safety-Responsibility Act.² Moreover, since the Texas Legislature was not in session during the Survey period, practitioners have been given a much-needed opportunity to familiarize themselves with some of the statutory rewrites of the 1993 session.

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1. 879 S.W.2d 1 (Tex. 1993).

2. Section 21(b) of the act requires liability insurance which will pay "all sums which the insured shall become legally obligated to pay as damages arising out of the ownership, maintenance or use of such motor vehicle." TEX. REV. CIV. STAT. ANN. art. 6701h § 21(b)(Vernon 1986 & Supp. 1995). Five members of the Court joined in an opinion written by Justice Hightower, holding that any exclusion of family members is against the broad public policy for inclusion set out in the above-quoted statutory language. *National County Mutual*, 879 S.W.2d at 3. A separate concurring opinion by Justice Cornyn expressly limited the invalidity of the exclusion only to the minimum statutory limits of liability. *Id.* at 5 (Cornyn, J., concurring). Since Justice Cornyn's vote was essential to the majority ruling, this limitation is "the law," at least for the time being. *See id.* at 5 n.1.

I. UNITED STATES SUPREME COURT DECISIONS: EXTENDING *BATSON* TO EXCLUSION OF WOMEN

What is arguably the most important family law-related decision in this Survey period came, not from the Texas Supreme Court, but from the United States Supreme Court. In *J.E.B. v. Alabama ex rel. T.B.*,³ a paternity case, the Court held that the Equal Protection Clause⁴ prohibits gender-based discrimination in jury selection. In *J.E.B.*, an Alabama paternity suit, the state used nine of its ten peremptory jury strikes to remove male jurors, with the result that the alleged father was tried by an all-female jury.

In *Batson v. Kentucky*,⁵ the United States Supreme Court earlier outlawed the race-based use of peremptory challenges, stating that a "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."⁶ The *J.E.B.* Court extended this rationale to sex-based use of peremptory challenges. Speaking for the majority, and relying in some small part on evidence from Texas,⁷ Justice Harry Blackmun stated that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."⁸ He added:

Since *Reed v. Reed*,⁹ . . . this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender . . . or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"¹⁰

This extension of *Batson* to gender discrimination was predictable;¹¹ the Court even observed that "short of overruling a decade of cases interpreting the Equal Protection Clause, the result we reach today is doctrinally compelled."¹²

Of course, *Batson*-style challenges already have made their way into the Texas family law arena. In the current Survey period, for example, at least one decision rebuffed a claim that all African-Americans had been

3. 114 S. Ct. 1419 (1994).

4. U.S. CONST. amend. XIV.

5. 476 U.S. 79 (1986).

6. *Id.* at 85-86.

7. The majority opinion quotes the observation, from an old Dallas prosecutor's manual: "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts." *J.E.B.*, 114 S. Ct. at 1426 n.10.

8. *Id.* at 1421.

9. 404 U.S. 71 (1971).

10. *J.E.B.*, 114 S. Ct. at 1424-25 (citations omitted).

11. See, e.g., Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992); but see *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993) (refusing to extend *Batson* to gender).

12. *J.E.B.*, 114 S. Ct. at 1428 n.12.

struck for discriminatory reasons.¹³ Nonetheless, considering the much greater number of family law issues in which sexual, rather than racial, stereotypes may come into play, *J.E.B.* surely will have a much more widespread effect on the process than did *Batson*.

Any extended speculation on the likely impact of *J.E.B.* is well beyond the scope of this Survey. In all likelihood, however, voir dire will become an even more substantial element of the trial. Justice O'Connor's concurring opinion notes that by "further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event."¹⁴ A Texas commentator already has picked up on this aspect of the decision, commenting that "trial lawyers should consider *J.E.B.* useful authority against a trial court's restriction of time in voir dire."¹⁵

Moreover, the dramatic expansion of *Batson*-style challenges occasioned by *J.E.B.* may bring increased pressure for the elimination of peremptory challenges altogether. In *Batson*, Justice Marshall suggested that the potential for abuse inherent in peremptory challenges "should ideally lead the Court to ban them entirely from the criminal justice system."¹⁶ More pragmatically, a Florida court has observed that complete elimination of peremptory challenges would be preferable to "a prolonged case-by-case strangulation . . . over a period of many years which in the end will effectively eviscerate the peremptory challenge or, at best, result in a convoluted and unpredictable system of jury selection enormously difficult to administer."¹⁷ A respected Texas proceduralist, responding to *J.E.B.*, already has taken up this refrain, calling for the elimination of the peremptory challenge, accompanied by expanded availability of challenges for cause.¹⁸

II. STATUS

The current Survey period contains a fair number of decisions on paternity issues, most centering on procedural defenses. *In the Interest of B.I.V.*,¹⁹ the sole Texas Supreme Court decision of consequence during the Survey period,²⁰ is arguably the most interesting and certainly the

13. *In the Interest of A.D.E.*, 880 S.W.2d 241, 243-45 (Tex. App.—Corpus Christi 1994, no writ)(holding, in a termination proceeding, that the decision to strike two prospective African-American jurors on the ground that one lived in the same apartment complex as the mother and the other was a "grandmotherly type" was not a pretext for racial discrimination).

14. *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring).

15. Michael J. Mazzone, *Keeping Up With . . . Jury Selection*, HOUS. LAW., July/Aug. 1994, at 24.

16. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

17. *Alen v. Florida*, 596 So.2d 1083, 1088 (Fla. Ct. App. 1992).

18. Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1003-04 (1994).

19. 870 S.W.2d 12 (Tex. 1994).

20. Two other status-related decisions were issued by the Texas Supreme Court during the Survey period. One, *Dreyer v. Greene*, 871 S.W.2d 697 (Tex. 1993), was covered

highest news profile paternity case in the year's crop of decisions, primarily because Raul Longoria, a sitting state district judge, was the claimed father.²¹ The mother brought an action to establish Judge Longoria as the father of B.I.V. At the time of the action, the Texas Family Code required that the child have no presumed father.²² Judge Longoria defended on the theory that, since the mother was married at the time of birth, B.I.V. already had a presumed father.²³

The trial court granted summary judgment for Judge Longoria. The mother appealed, claiming that termination of the presumed father's parental rights is not required before suit could be brought against another man. The Corpus Christi Court of Appeals affirmed,²⁴ basing its ruling on an Austin appeals court decision, *State v. Lavan*.²⁵ The Austin court's decision was reversed by the Texas Supreme Court, which held that the Attorney General's office could sue to disestablish paternity in one man and establish paternity in another in a single suit.²⁶ The *B.I.V.* court issued a supplemental opinion on rehearing, to the effect that, while the Texas Supreme Court's *Lavan* ruling permitted the two actions to be brought in a single suit, summary judgment was justified in *B.I.V.* because no action against the presumed father was joined with the action against Judge Longoria.²⁷

The Texas Supreme Court reversed, stating that Judge Longoria's objection to the mother's failure to join the presumed father was "in substance merely a motion to abate . . . the granting of which would merely give [the mother] a reasonable opportunity to amend her suit to remove the obstacle to its prosecution."²⁸ The high court, therefore, remanded to permit the mother to amend her pleadings, adding the presumed father as a necessary party.²⁹ The court also noted in passing that a September

preemptively in last year's survey. James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 47 SMU L. REV. 1197, 1205-07 (1994). The second, In the Interest of J.W.T., 872 S.W.2d 189 (Tex. 1994), is a minor rewrite of an earlier version of the opinion issued and covered extensively by this *Annual Survey* during the last Survey period. Paulsen, *supra*, at 1197-1205.

21. The case has generated continuing coverage in the media. See, e.g., Gordon Hunter, *Ex-Judge Wins Another Round in Paternity Case*, TEX. LAW., Feb. 13, 1995, at 13 (reporting that "TEXAS LAWYER has covered the case extensively").

22. In the Interest of B.I.V., 870 S.W.2d 12, 13 (Tex. 1994). The relevant section has since been amended. See TEX. FAM. CODE ANN. § 13.01(a)(Vernon 1986 & Supp. 1995)(deleting an earlier sentence requiring that a suit to establish paternity be brought by "a child who has no presumed father").

23. See TEX. FAM. CODE ANN. § 12.02(a)(1)(Vernon 1986 & Supp. 1995)(stating, inter alia, that "a man is presumed to be the biological father of a child if . . . the child is born during the marriage").

24. In the Interest of B.I.V., 843 S.W.2d 58 (Tex. App.—Corpus Christi 1992), *rev'd*, 870 S.W.2d 12 (Tex. 1994).

25. 802 S.W.2d 73 (Tex. App.—Austin 1990), *rev'd*, 833 S.W.2d 952 (Tex. 1992).

26. Attorney General of Texas v. Lavan, 833 S.W.2d 952 (Tex. 1992). The decision is discussed in some detail in James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 46 SMU L. REV. 1515, 1515-17 (1993).

27. *B.I.V.*, 843 S.W.2d at 66.

28. *B.I.V.*, 870 S.W.2d at 13.

29. *Id.* at 14.

1993 amendment to the Texas Family Code would require the mother to include an express statement in her pleadings denying the presumed father's paternity.³⁰

Amanda v. Montgomery,³¹ a decision from the First Court of Appeals, provides some valuable guidance on procedure and proof requirements when the paternity issue is raised by the presumed father after a divorce. In *Amanda*, the mother brought a motion to increase child support; her ex-husband counterclaimed with a bill of review action challenging paternity. The court of appeals ruled that the bill of review had to be brought as a separate action, not as a counterclaim.³² The discussion of the merits of the husband's claim, however, is even more interesting.

To succeed in setting aside an earlier judgment, a bill of review must demonstrate that the first decision was "the result of fraud, accident or wrongful act of the opposite party, or official mistake—unmixed with [the complaining party's] own negligence."³³ Justice Michol O'Connor's opinion gave two grounds for concluding that the husband failed to support a bill of review.³⁴ First, since the divorce predated the amendment of the Family Code that now permits denial of paternity in a divorce,³⁵ the ex-husband had no right that was denied, by fraud or otherwise.³⁶ Second, since the husband claimed adultery in the divorce, he was presumably on notice of the possibility that the child was not his; thus, the mistake was not unmixed with his own negligence.³⁷ In a separate concurrence, Justice Adele Hedges added a third reason: Any lies told by the mother in divorce proceedings would be *intrinsic* fraud, not *extrinsic* fraud, since the extrinsic fraud that would warrant a bill of review must be collateral to a matter that actually was tried.³⁸ In sum, as another writer already has pointed out, "[w]ith this case, these paternity cases are going to be very difficult to win"³⁹

One interesting inheritance decision deserves mention. In *York v. Flowers*,⁴⁰ a recognized child born out of wedlock's claim withstood a summary judgment challenge, permitting the possible recovery of an interest in land nearly fifty years after the relevant events. Betty York is the biological daughter of Coburn Barlow. Betty was adopted by Catherine Flowers, who married Coburn Barlow shortly after the adoption. Barlow died intestate in 1944; in 1955 his widow conveyed a 41.5 acre

30. *Id.* n.1 (citing TEX. FAM. CODE ANN. § 12.06(a)(Vernon 1986 & Supp. 1993)).

31. 877 S.W.2d 482 (Tex. App.—Houston [1st Dist.] 1994, no writ).

32. *Id.* at 485.

33. *See, e.g., Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).

34. *Amanda*, 877 S.W.2d at 485-87.

35. *See* TEX. FAM. CODE ANN. § 12.06 (Vernon 1986)(new section, added 1983); *see also* Ellen K. Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 38 Sw. L.J. 173, 175 (1984).

36. *Amanda*, 877 S.W.2d at 486.

37. *Id.* at 487.

38. *Id.* at 488 (Hedges, J., concurring).

39. David N. Gray, *SAPCR—Illegitimacy and Paternity*, 1994-2 STATE BAR SEC. REP. 41, 42-43.

40. 872 S.W.2d 13 (Tex. App.—San Antonio 1994, writ denied).

tract of land acquired during the marriage to a third party. In 1992, Betty sued to establish her rights in the land. The trial court granted summary judgment in favor of Flowers' successor, based on the three, five, ten and twenty-five year statutes of limitations, as well as the four-year residual statute.

The San Antonio Court of Appeals reversed the summary judgment, ruling in Betty's favor.⁴¹ Initially, the court ruled that Betty was entitled to present proof that Mr. Barlow was her biological father,⁴² in particular, that she was received into his home and held out to be his biological child.⁴³ On the limitations issue, while the opinion leaves many of the details to the imagination, it appears that the adoptive mother's conveyance was to a family member, and that the occupancy was not sufficiently adverse to cause any one of the possible statutes of limitation to begin running. The court concluded that "only in rare instances is a court justified in holding that adverse possession has been established as a matter of law" and that "[w]e believe this not to be one of those rare instances."⁴⁴

*Ramirez v. Sanchez*⁴⁵ reiterates the general requirement that a written record be made in a paternity proceeding,⁴⁶ even when the putative father has waived any right to paternity testing through failure to appear for the hearing.⁴⁷

Several paternity cases dealt with time-bar issues in some fashion. In *Matter of Marriage of Collins*,⁴⁸ a divorce suit included establishment of an informal marriage. Because the defendant failed to complain of the fact that the claim was not brought within one year of the end of the relationship,⁴⁹ he was presumed by statute to be the child's father.⁵⁰ In *Blake v. Blake*,⁵¹ the state brought suit in 1992 to establish paternity of a fourteen-year-old child. The father's first argument, that the case should be governed by the one-year absolute limitations statute in effect at the

41. *Id.* at 16.

42. *Id.* at 15 (citing TEX. PROB. CODE ANN. § 42(b) (Vernon 1993)(setting out circumstances under which a biological child can claim a paternal inheritance).

43. *Id.* (citing TEX. FAM. CODE ANN. § 12.02 (Vernon 1986 & Supp. 1995)(establishing a presumption of paternity if a child is received into the home and openly held out as a biological child)).

44. *Id.*

45. 871 S.W.2d 534 (Tex. App.—San Antonio 1994, no writ).

46. *Id.* (citing TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1986)(providing that, in a suit affecting the parent-child relationship, "[a] record shall be made as in civil cases generally unless waived by the parties with the consent of the court").

47. *Id.* (citing TEX. FAM. CODE ANN. § 13.02(d) (Vernon 1986)(stating that "[i]f the respondent fails to appear and wholly default . . . paternity testing shall be waived").

48. 870 S.W.2d 682 (Tex. App.—Amarillo 1994, writ denied).

49. *Id.* (citing TEX. FAM. CODE ANN. § 1.91(b)(Vernon 1993)(providing that such a proceeding "must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later"). The court rejected the father's argument that this constituted a jurisdictional bar, construing it instead to be a waivable limitations statute. *Collins*, 870 S.W.2d at 684-85.

50. *Id.* at 685; see *supra* note 23.

51. 878 S.W.2d 209 (Tex. App.—Corpus Christi, writ denied), *cert. denied*, 115 S. Ct. 648 (1994).

time of the child's birth,⁵² was rejected because the statute had since been declared unconstitutional⁵³ and thus was "a nullity."⁵⁴ The suit thus was governed by the residual four-year limitation period,⁵⁵ subject to tolling by disability.⁵⁶ Since the child was fourteen when suit was brought, suit was filed "well within the residual limitations period"⁵⁷ or, put differently, before limitations even had begun to run.⁵⁸

In *Reyna v. Attorney General*,⁵⁹ the putative father was notified of his alleged paternity in 1975, though the state did not bring suit until 1992. The court ruled that laches is not available against a state agency performing a governmental function, "unless some extraordinary circumstances exist."⁶⁰ Those circumstances, to the court, did not include a mere seventeen-year delay. In *Attorney General v. Allred*,⁶¹ an action by the state was not barred, despite the fact that a suit brought by the Tarrant County District Attorney's Office had been dismissed with prejudice for failure to prosecute some fourteen years earlier. Because the state did not have independent standing to pursue such an action before 1989,⁶² and thus was not in privity with a party to the earlier action, the court concluded that *res judicata* did not apply.

III. CONSERVATORSHIP

Several conservatorship-related cases issued from the Texas Supreme Court during the Survey period. In *Brook v. Brook*,⁶³ the Court clarified an issue regarding the burden of proof when a nonparent is awarded custody. The parents had a somewhat unconventional marriage, the tabloid highlights of which included drug use, mate swapping, inflatable dolls and ménage à trois.⁶⁴ The couple separated, the mother abandoned her erstwhile career as a topless dancer, moved in with her parents, and started to attend church and counseling. The trial court appointed the mother and

52. *Id.* at 210 (citing Act of June 19, 1975, 64th Leg., R.S., ch. 476, § 24, 1975 Tex. Gen. Laws 1261, 1261-62).

53. *Id.* (citing *Mills v. Habluetzel*, 456 U.S. 91 (1982)).

54. *Id.* at 210.

55. *Blake*, 878 S.W.2d at 210 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986)).

56. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(a)(1)(Vernon 1986 & Supp. 1995)(providing that "[a] person is under a legal disability if the person is younger than 18 years of age").

57. *Id.* at 211.

58. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 160.001(b)(Vernon 1986 & Supp. 1995)(providing that "the time of the disability is not included in a limitations period").

59. 863 S.W.2d 558 (Tex. App.—Fort Worth 1993, no writ).

60. *Id.* at 559 (citing *Attorney General v. Daurbigny*, 702 S.W.2d 298, 300 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

61. 871 S.W.2d 298 (Tex. App.—Fort Worth 1994, no writ).

62. See TEX. FAM. CODE ANN. § 11.03(i)(Vernon 1986 & Supp. 1995)(granting the attorney general's office authority to bring "any child support action authorized under Title 2 of this code").

63. 881 S.W.2d 297 (Tex. 1994).

64. *Brook v. Brook*, 865 S.W.2d 166, 169 (Tex. App.—Corpus Christi 1993), *aff'd*, 881 S.W.2d 297 (Tex. 1994).

her parents joint managing conservators, to the exclusion of the husband.⁶⁵

The husband appealed, arguing that the evidence did not establish, in the words of the Family Code, that his appointment as sole or joint managing conservator "would significantly impair the child's physical health or emotional development."⁶⁶ The Texas Supreme Court acknowledged that the statutory requirement that the "appointment of parent or parents"⁶⁷ as managing conservator be proved to harm the child before custody could be awarded to nonparents, restates the general presumption that the child's best interest is best served by awarding custody to a natural parent.⁶⁸ Nonetheless, though admitting that "the [Family] Code is somewhat ambiguous"⁶⁹ on the point, a unanimous court held that the fact that one parent (the mother) was appointed a joint managing conservator satisfied the statute's demands, and that the failure also to appoint the father as a joint managing conservator did not trigger any heightened standard of proof.⁷⁰ In the court's words, "[t]he fact that a nonparent shares custody does not detract from the fact that one of the child's parents does have custody."⁷¹

Two less salacious custody matters also came before the Texas Supreme Court during the Survey period. In *Tippy v. Walker*,⁷² a mandamus proceeding, the Texas Supreme Court held in a per curiam opinion that the six-month residency period stated in the Family Code for mandatory transfer of venue in child custody modification motions⁷³ runs from the date the child actually begins to reside in the new county, not from the date the original custody decree is signed. The court relied on its prior decision in *Arias v. Spector*,⁷⁴ a 1981 mandamus action involving now-Justice Rose Spector, as containing an implicit holding that the residency period runs from the earlier date.⁷⁵

The other mandamus action was *Vaughan v. Walther*,⁷⁶ a custody-related disqualification controversy. An attorney was hired by the grandmother on two occasions: first, to represent the mother in a custody matter; and second, to represent the grandmother against the mother in an attempt to secure conservatorship. The attorney argued that the first action was no ground for disqualification because it was dismissed within two weeks after filing, during which time he never met or spoke with the

65. *Id.* at 169-70.

66. *Id.* at 172 (citing TEX. FAM. CODE ANN. § 14.01(b)(1)(Vernon 1986 & Supp. 1995)).

67. *Brook*, 881 S.W.2d at 298.

68. *Id.* (citing *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990)).

69. *Id.* at 299.

70. *Id.* at 230.

71. *Id.*

72. 865 S.W.2d 928 (Tex. 1993).

73. *Id.* at 929 (citing TEX. FAM. CODE ANN. § 11.06(b)(Vernon 1986)).

74. *Id.* (citing *Arias v. Spector*, 623 S.W.2d 312 (Tex. 1981)).

75. *Tippy*, 865 S.W.2d at 929.

76. 875 S.W.2d 690 (Tex. 1994).

daughter. The court's per curiam opinion avoided the disqualification issue per se, concluding that the daughter waived her rights by waiting until the day of the custody hearing to file a disqualification motion, despite the fact that she had some six week notice of the problem.⁷⁷ Reiterating an earlier ruling, the high court stated that "[c]ourts must adhere to an exacting standard when considering motions to disqualify counsel so as to discourage their use as a dilatory trial tactic."⁷⁸

A final conservatorship-related decision from the Texas Supreme Court, *Bird v. W.C.W.*,⁷⁹ has been tracked through two previous Surveys.⁸⁰ A father cleared of child abuse charges brought suit against the psychologist who had misdiagnosed the child. A unanimous Supreme Court, at least if one counts the concurring opinions, ruled that a mental health professional does not owe a duty to a third party in this situation, thus barring a negligence action.⁸¹

The psychologist also repeated the claim of abuse in a court affidavit, however, something the court felt was outside the scope of her professional relationship. The Texas Supreme Court observed that two possible privileges applied to this communication: the common law privilege for statements made in the course of judicial proceedings⁸² and the more recent statutory privilege for those reporting child abuse.⁸³ The psychologist, however, raised only the claim of common law privilege at trial. Nonetheless, the general public policy reasons underlying that privilege, as well as the state's "strong interest in protecting children, especially protecting them against physical and sexual abuse,"⁸⁴ justified prohibition of the father's claim.

A decision on a similar issue issued by the El Paso Court of Appeals during the Survey period also has attracted the Texas Supreme Court's attention. *Gonzalez v. Avalos*⁸⁵ is a tort suit rising from a DHS supervisor's failure to investigate a case of suspected child abuse reported by the non-custodial parent. The supervisor closed the case without assigning it for investigation; within a month, the child was admitted to the hospital with injuries that ultimately proved fatal. Avalos, the father, sued the supervisor individually and in her official capacity. The El Paso court ruled that sovereign immunity was waived by the state through the Texas Tort Claims Act,⁸⁶ and that the mishandling of the intake report was "the

77. *Id.* at 690-91.

78. *Id.* at 691 (citing *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990)).

79. 868 S.W.2d 767 (Tex. 1994).

80. See Paulsen, *supra* note 20, at 1225-26; Paulsen, *supra* note 26, at 1527-28.

81. *Bird*, 868 S.W.2d at 772-73.

82. *Id.* at 771 (citing *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912-13 (Tex. 1942)).

83. *Id.* at 772 (citing TEX. FAM. CODE ANN. § 34.03 (Vernon 1986 & Supp. 1995)).

84. *Id.*

85. 866 S.W.2d 346 (Tex. App.—El Paso 1993, writ dismissed w.o.j.).

86. *Id.* at 352 (citing TEX. CIV. PRAC. & REM. CODE §§ 101.001 - .021. (Vernon 1986 & Supp. 1995)).

use, misuse, or failure to use tangible . . . property"⁸⁷ While individuals are immune for quasi-judicial acts within the scope of their discretion, the El Paso court reasoned that the supervisor had a ministerial statutory duty, at a minimum, to "make a thorough investigation" of every report.⁸⁸

The supervisor's final argument was based on the statutory immunity for child abuse reporting not raised in *Bird*, extending to "a person reporting or assisting in the investigation of a report" of child abuse.⁸⁹ The appeals court gave short shrift to this argument, observing that the problem was that no investigation whatever was made. Since the statute refers to "the investigation," rather than "investigations" in general, the El Paso court concluded that the decision not to investigate at all was not encompassed by the immunity. The Texas Supreme Court has granted the supervisor's application for writ of error on points indicating particular concern with the official immunity issue.⁹⁰

Two very similar appeals court decisions illustrate application of the presumption favoring parents over nonparents in awards of managing conservatorship in more straightforward settings than the Texas Supreme Court's *Brook* decision just discussed.⁹¹ In *Brigham v. Brigham*,⁹² the Dallas Court of Appeals reversed an award of managing conservatorship to the grandmother, instead of the parents. Acting in reliance on the Texas Supreme Court's statement that an award of custody to a nonparent must be based on "evidence of specific actions or omissions . . . that demonstrate that appointing the parent would result in physical or emotional harm to the child,"⁹³ the Dallas appeals court sustained a "no evidence" challenge to the judgment. The court observed that the only reason relied upon by the trial court for its custody decision was unsupported speculation that an award of custody to either parent might result in removal of the children from the state.⁹⁴

In *Whitwell v. Whitwell*,⁹⁵ the grandparents also intervened, seeking to prevent the mother from obtaining sole managing conservatorship of the child on the ground that she would return to her native Australia if granted custody. The situation was complicated by the fact that the child had some severe medical problems. The trial court applied the basic pre-

87. *Gonzalez*, 866 S.W.2d at 352; see TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986)(imposing liability for injury caused by "a condition or use of tangible personal or real property").

88. *Gonzalez*, 866 S.W.2d at 350 (quoting TEX. FAM. CODE ANN. § 34.05(a)(Vernon 1986 & Supp. 1995) (emphasis in original)).

89. *Id.* at 351 (citing TEX. FAM. CODE ANN. § 34.03(Vernon 1986 & Supp. 1995)).

90. 37 Tex. Sup. Ct. J. 881 (June 8, 1994).

91. See *supra* text accompanying notes 63-71.

92. 863 S.W.2d 761 (Tex. App.—Dallas 1993, writ denied).

93. *Id.* at 762 (citing *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990)).

94. *Id.* at 764. One commentator has observed that the trial court's decision in *Brigham* also could have been based on the fact that the father had a long-term affair and child by another woman, while the mother was carrying on with her minister. See Cathy Medina, *SAPCR—Conservatorship*, 1994-1 STATE BAR SEC. REP. FAM. L. 33.

95. 878 S.W.2d 221 (Tex. App.—El Paso 1994, no writ).

sumption in favor of parents over nonparents, taking into account the fact that the mother had made appropriate medical inquiries. The El Paso Court of Appeals affirmed, commenting that "the parents in absence of positive disqualification, have the first right to the care and custody of their children, even against others, who might conceivably be in better financial condition"96

In *R.S. v. B.J.J.*,⁹⁷ another nonparent case with somewhat different facts, the Dallas Court of Appeals affirmed the award of managing conservatorship to nonparents, who had cared for two of a couple's four children for several years, on proof that the parents voluntarily had no contact with the children in over a year. The court rejected an argument that it was against public policy to separate siblings.⁹⁸ First, the Dallas court observed that Texas case law permits the separation of siblings on a showing of "clear and compelling reasons."⁹⁹ Second, since the overriding consideration in every case is the "best interest of the child,"¹⁰⁰ and since the parents' voluntary separation of the two children from their siblings created a situation in which the children formed familial relations with the nonparents, the parents had created a clear and compelling reason for separation.¹⁰¹

*Green v. McCoy*¹⁰² presents an interstate custody dispute in a somewhat unusual context. Mother and child moved from California to Texas in 1991 and have resided there continuously since. In 1992, the father filed suit for divorce, and the mother acknowledged notice. The mother did not show up for trial, evidently because she was under the impression that the father would concede primary custody to her. Instead, the father obtained a divorce and sole custody by default in 1993. The father conceded that he did not notify the mother of his intent to seek full custody.

Following the divorce, the father filed an application for a writ of habeas corpus in Texas. The trial court refused to grant custody to the father. Instead, the court temporarily granted custody to the Department of Human Resources. The father filed for mandamus. The Amarillo Court of Appeals conditionally granted the writ in part, though giving little ultimate satisfaction to the father. While conceding that on a showing of a valid prior child custody order, the granting of a writ of habeas corpus ordinarily should be "automatic, immediate, and ministerial,"¹⁰³ the court noted three exceptions: Habeas corpus relief is not proper if

96. *Id.* at 223 (citing *Valentine v. Valentine*, 203 S.W.2d 693 (Tex. Civ. App.—Amarillo 1947, no writ)).

97. 883 S.W.2d 711 (Tex. App.—Dallas 1994, no writ).

98. *Id.* at 720.

99. *Id.* at 720 (citing *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. App.—Houston [1st Dist.] 1988, no writ) (emphasis omitted)). This requirement is not found in the Family Code. *MacDonald v. MacDonald*, 821 S.W.2d 458, 463 (Tex. App.—Houston [14th Dist.] 1992, no writ).

100. *Id.* (citing TEX. FAM. CODE ANN. § 14.07(a)(Vernon 1986)).

101. *R.S.*, 883 S.W.2d at 720.

102. 870 S.W.2d 616 (Tex. App.—El Paso 1994, orig. proceeding).

103. *Id.* at 618 (citing TEX. FAM. CODE ANN. § 14.10(a)(Vernon 1986 & Supp. 1995)).

the prior order was issued without prior notice and opportunity for hearing, if the party seeking relief consented to the changed situation for six months preceding, or if there is serious and immediate concern for the child's welfare.¹⁰⁴ The latter two situations did not fit the facts, and the Family Code does not grant authority to modify authority under the first. Thus, mandamus relief vacating the temporary custody order was appropriate.

The Amarillo appeals court, however, stopped short of ordering that the father be given custody of the child. Instead, the court suggested a more appropriate way for the trial court to proceed. Since the child had resided in Texas for more than six months, Texas was the child's new home state.¹⁰⁵ The mother, the court suggested, should file a new suit in Texas to modify child custody. The El Paso court seemed to express some doubt about the Texas court's ability to sidestep the federal Parental Kidnapping Prevention Act, suggesting that the mother should "if possible, file an action collaterally attacking the California court's jurisdiction."¹⁰⁶ The court's concern may not be necessary, however. Discussing this case, Professor John Sampson has correctly noted that the California judgment "is not entitled to full faith and credit under the PKPA because the child had Texas as a home state when the California order was rendered."¹⁰⁷

Another rather technical interstate custody dispute question was addressed by the Waco Court of Appeals in *Hughes v. Black*.¹⁰⁸ A custody suit was filed in Limestone County, Texas, despite the fact that Indiana was the child's "home state."¹⁰⁹ The trial court nonetheless found "that it ha[d] jurisdiction to decide child custody in this matter"¹¹⁰ and proceeded to enter an agreed temporary visitation order. The Waco appeals court conceded that jurisdiction was not proper, except to issue temporary orders under appropriate circumstances, but it declined to grant mandamus relief because the complaining party had a remedy by way of appeal.¹¹¹ The court conceded that a 1993 decision from the Texas Supreme Court permitted mandamus relief from temporary orders under roughly similar circumstances,¹¹² but noted that the temporary orders were not challenged. In dissent, Justice Cummings argued that the relief should be granted because, in accordance with the purposes of the Uniform Child

104. *Id.* (citing TEX. FAM. CODE ANN. § 14.10(b)-(d)(Vernon 1986 & Supp. 1995)).

105. *Id.* at 619 (citing TEX. FAM. CODE ANN. § 11.52(5)(Vernon 1986)).

106. *Green*, 870 S.W.2d at 620.

107. John J. Sampson, *SAPCP—Conservatorship*, 1994-2 STATE BAR SEC. REP. & FAM. L. 27.

108. 863 S.W.2d 559 (Tex. App.—Waco 1993, orig. proceeding).

109. The appellate record indicated that the child had resided with a parent in Indiana for at least six consecutive months preceding the filing of the suit. *Id.* at 560; see TEX. FAM. CODE ANN. § 11.52(5)(Vernon 1986).

110. *Hughes*, 863 S.W.2d at 560 (quoting the trial court's order).

111. *Id.* at 561.

112. *Id.* at 560 (citing *Little v. Daggett*, 858 S.W.2d 368 (Tex. 1993)).

Custody Jurisdiction Act,¹¹³ “we should expedite the process of getting this matter to the ‘home state’ of the child without requiring the parties and the *child* to endure shifting the *child* back and forth during the appellate process.”¹¹⁴ The mandamus, in Justice Cummings’ view, could have been issued because “the court’s assumption of jurisdiction underlies its approval of the agreed temporary order. . . .”¹¹⁵

One appellate point bears mention. The Amarillo appeals court recently dismissed an appeal of a child custody matter on the ground that the appellant filed a notice of appeal, but no cost bond.¹¹⁶ The appellant argued that no cost bond was required by law, and that a notice was sufficient under the rules.¹¹⁷ The Amarillo court, however, concluded that the general Family Code statement that family law appeals “‘shall be as in civil cases generally’”¹¹⁸ should be read to require a cost bond.

Two tort cases with implications for conservatorship deserve some brief consideration. In *Wofford v. Blomquist*,¹¹⁹ the Corpus Christi Court of Appeals ruled that no special relationship akin to that of parent and child exists between grandparent and grandchild, at least for purposes of the negligent entrustment doctrine. Thus, grandparents who provided money for the purchase of their granddaughter’s auto were not liable to those injured by the granddaughter, despite the fact that she had been involved in four prior collisions (one fatal) before her twentieth birthday. In *Hoffmeyer v. Hoffmeyer*,¹²⁰ a suit between divorced parents arising from the accidental death of their child, the Eastland Court of Appeals ruled that teaching one’s son to use a gun is an act protected by the parental immunity doctrine.¹²¹

Finally, on a related matter, *Cole v. Cole*¹²² should be mentioned as a handy case to cite for the proposition that, even in Texas, the husband’s chances of securing sole or joint managing conservatorship are not improved by teaching the children to drink beer or shoot high-powered rifles.¹²³ And on that note, this Survey passes to the subject of child support.

113. *Id.* at 561 (citing TEX. FAM. CODE ANN. § 11.51 (a)(1) (Vernon 1986 & Supp. 1995)(stating that one purpose of the act is to “avoid jurisdictional competition and conflict”)).

114. *Hughes*, 863 S.W.2d at 561 (Cummings, J., dissenting).

115. *Id.* at 561-62.

116. *In the Interest of Hall*, 871 S.W.2d 251 (Tex. App.—Amarillo 1994, no writ).

117. *Id.* at 251 (citing TEX. R. APP. P. 40(a)(2)).

118. *Id.* at 252 (citing TEX. FAM. CODE ANN. § 11.19(a)(Vernon 1986)).

119. 865 S.W.2d 612 (Tex. App.—Corpus Christi 1993, writ denied).

120. 869 S.W.2d 667 (Tex. App.—Eastland 1994, writ denied).

121. *Id.* at 668 (citing *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933 (Tex. 1992)).

122. 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ).

123. The presence of two naked strippers probably did not help matters. *See id.* at 480.

IV. SUPPORT

The Survey period contains the usual slew of decisions on the setting and modification of child support. In *Kish v. Kole*,¹²⁴ an out-of-state support decree was modified upward, due largely to the ex-husband's voluntary underemployment—he was now working in a managerial capacity for a family-owned company, receiving a salary far below that of paid managers in similar businesses. By contrast, in *Starck v. Nelson*,¹²⁵ a Corpus Christi decision, the court determined that an "erratic employment history"¹²⁶ standing alone does not exceed a scintilla of evidence of voluntary underemployment, particularly when most of the job changes were involuntary.

Starck is more interesting for its discussion of some of the issues raised when a child support obligor remarries. Texas child support statutes express the relatively clear intent to create "a neutral scheme [for determining appropriate child support] that would be unaffected by the remarriage of the child support obligor."¹²⁷ The Family Code provides that a court may not add the resources or subtract the needs of a new spouse from the child support calculus;¹²⁸ the calculation of "net resources" available for child support pointedly allows only a single person's tax deduction.¹²⁹ Nonetheless, the *Starck* court stated, "[n]o reported cases interpret the boundaries of this statutory prohibition"¹³⁰ on considering the income or needs of the new spouse.¹³¹

The question is not altogether simple. While the statutes do not permit consideration of the new spouse's impact on the obligor's financial situation, it is equally clear that there is sometimes a very clear relationship. Even though the adage, "Two can live as cheaply as one" is sometimes accompanied by the corollary, "Only if one doesn't eat," remarriage surely can involve some reduction in expense. For example, one new spouse or the other usually will experience a reduction in living expenses by moving into the other's home, or through pooling resources for a new home. Conversely, remarriage often entails added responsibilities for the debts of the new spouse, including the statutory imposition of liability for "necessaries."¹³² The Family Code contains language broad enough to permit consideration of such factors, in particular, the statement in section 14.053(e) that in setting or modifying support obligations "[t]he court may consider any additional factors that increase or decrease the ability

124. 874 S.W.2d 835 (Tex. App.—Beaumont 1994, no writ).

125. 878 S.W.2d 302 (Tex. App.—Corpus Christi 1994, no writ).

126. *Id.* at 307.

127. *Id.* at 306.

128. *Id.* at 306 n.5 (citing TEX. FAM. CODE ANN. § 14.056(c)(Vernon 1986 & Supp. 1995)).

129. *Id.* at 306 n.4 (citing TEX. FAM. CODE ANN. § 14.053(b)(Vernon 1986 & Supp. 1995)).

130. *Starck*, 878 S.W.2d at 306.

131. This statement by the *Starck* court is not entirely accurate. See *State v. Hernandez*, 802 S.W.2d 894, 896 (Tex. App.—San Antonio 1991, no writ).

132. TEX. FAM. CODE ANN. § 4.02 (Vernon 1993).

of the obligor to make child support payments."¹³³ Moreover, the Family Code does permit consideration of "gifts" and "spousal maintenance" in the determination of net resources,¹³⁴ although the latter requirement would make more sense if Texas were a jurisdiction that permitted permanent court-ordered alimony.¹³⁵

In *Starck*, the trial court did not add the new spouse's contribution into the calculus in determining the obligor's net resources. It did, however, take those resources into account as a reason for deviating from the support guidelines.¹³⁶ The Corpus Christi Court of Appeals reversed, concluding that the lower court's approach "allows the court to do indirectly what the statute directly prohibits."¹³⁷ This probably is no worse than any other approach, but it surely does not resolve the issue. In *Starck*, the trial judge evidently stated quite clearly that the reason for deviating from the support guidelines was that the obligor had remarried and that the new spouse's resources were available to pay living expenses.¹³⁸ A less clear situation would be presented if the court simply found living expenses had decreased, but did not attribute a cause. Similar contributions by relatives can be taken into account in one way or another, as the *Kish* case demonstrates.¹³⁹ It takes little power of prognostication to observe that, while *Starck* may be one of the first cases to address this issue directly, it surely will not be the last.

One somewhat interesting decision, *Clark v. Jamison*,¹⁴⁰ addresses a "high end" support question. The couple originally agreed to \$4000 per month in child support; the ex-husband later tried to modify support, arguing among other things that the amount presumptively should be modified because it was not in line with the support guidelines. The Fourteenth Court of Appeals ruled that the rebuttable presumption in favor of the support guidelines¹⁴¹ does not apply to a case in which a reduction in support is sought. Since the ex-husband had agreed to the original amount, as specifically permitted by the Family Code,¹⁴² he had the burden to show a material change in circumstances.¹⁴³ This he did

133. TEX. FAM. CODE ANN. § 14.053(e)(Vernon 1986 & Supp. 1995).

134. *Id.* § 14.053(b).

135. See generally James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7 (1993).

136. See TEX. FAM. CODE ANN. § 14.057(b) (Vernon 1986 & Supp. 1995)(permitting deviation from the support guidelines, but requiring specific fact findings in support of the deviation).

137. *Starck*, 878 S.W.2d at 306.

138. *Id.* at 308 (stating that "[t]he trial court found that Starck's wife's contribution to their joint living expenses enabled Starck to pay more child support than if he were solely responsible for his living expenses").

139. See *supra* note 124 and accompanying text.

140. 874 S.W.2d 312 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.).

141. See TEX. FAM. CODE ANN. § 14.055 (Vernon 1986).

142. *Id.* § 14.06(a).

143. TEX. FAM. CODE ANN. § 14.08(c)(2)(Vernon 1986 & Supp. 1995).

not do.¹⁴⁴ A somewhat similar argument—that a prior support order not in compliance with the support guidelines by itself established a “material change in circumstances”—likewise failed in *Cole v. Cole*,¹⁴⁵ although the Fourteenth Court of Appeals remanded because other evidence established a change in circumstances.¹⁴⁶

*In the Interest of Pecht*¹⁴⁷ squarely addresses a “high end” support question. The Texas Supreme Court’s *Rodriguez*¹⁴⁸ decision, discussed in last year’s Survey,¹⁴⁹ sets out the general scheme. Up to the first \$4000 of income, the statutory percentage presumptively applies without regard to need. After that point, the child or children’s “needs,” rather than any preferred “lifestyle,” are the touchstone.¹⁵⁰ The *Clark v. Jamison* court avoided the need to determine whether any portion of the children’s \$25,000-plus per month “needs” really were the chosen lifestyle of the custodial parent by reasoning that an amount at least equal to the \$4000 per month support obligation represented actual need, and that the inquiry would only take on immediate relevance if there was an attempt to increase support obligations.¹⁵¹ Since the *Pecht* court was reviewing a support increase, to a total of \$3500 per month, the detailed analysis avoided by the *Clark* court was essential.

Using *Rodriguez* analysis, the Texarkana Court of Appeals in *Pecht* held that the first \$1000 in monthly support obligation presumptively was justified without regard to need.¹⁵² The remaining \$2500 per month had

144. In another case issued during the Survey period, the Tyler Court of Appeals held that an agreed order modifying child support waives any error “except such as might go to the jurisdiction of the court.” *Minnick v. Rogers*, 873 S.W.2d 420, 422 (Tex. App.—Tyler 1994, n.w.h.) (quoting *Urbanczyk v. Urbanczyk*, 634 S.W.2d 34, 36 (Tex. App.—Tyler 1982, no writ)). The argument that the agreement was signed under the threat of sanctions for late-filed discovery did not, the appeals court found, rise to the level of “duress.” *Id.* Similarly, in *Wright v. Wright*, 867 S.W.2d 807 (Tex. App.—El Paso 1993, writ denied), the litigants originally had agreed to split medical expenses not covered by insurance on a 50-50 basis. In a modification hearing, apparently without giving any thought to this aspect of the original order, the parties represented to the court that they were willing to accept a support and visitation order following the Family Code standard guidelines. While no provision was made for uncovered medical expenses as was made in the original order, this was a matter within the trial court’s discretion. *See* TEX. FAM. CODE ANN. § 14.061(o) (Vernon 1986 & Supp. 1995).

145. 882 S.W.2d 90 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

146. The Family Code provides that “[t]he court *may* consider the guidelines for the support of a child . . . to determine whether there has been a material and substantial change in circumstances” and that “[i]f the amount of support . . . is not in substantial compliance with the guidelines, this *may* warrant a modification of a prior order.” TEX. FAM. CODE ANN. § 14.056(a) (Vernon 1986 & Supp. 1995) (emphasis added). The fault with the movant’s argument apparently was in reading the statute to mean that proof of an order not in compliance with the guidelines *must* result in modification.

147. 874 S.W.2d 797 (Tex. App.—Texarkana 1994, n.w.h.).

148. *Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993).

149. *See* Paulsen, *supra* note 20 at 1208-10.

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

151. *Clark*, 874 S.W.2d at 319.

152. *Pecht*, 874 S.W.2d at 801. Under the statutory guidelines, for two children, twenty-five percent of the obligor’s net monthly resources, to a maximum of \$4000, is presumptively proper. TEX. FAM. CODE ANN. § 14.055(b) (Vernon 1986 & Supp. 1995).

to be justified on the basis of need.¹⁵³ The evidence reflected that both children suffered from attention deficit disorder and required psychotherapy. For similar reasons, the trial court reasoned that private school, a special summer camp and special health care were warranted.¹⁵⁴ The support obligor argued that his ex-wife's new home, with payments of \$2500 per month, and the \$1000-plus a month full-time housekeeper were lifestyle choices not justified by the children's needs. The trial court, however, evidently felt the expenditures were for the needs of the children because the new home was on the bus route to the children's private school, the new neighborhood had more children, and the housekeeper helped to care for the children after school. The Texarkana appeals court ruled that this decision was within the trial court's discretion, and that the extra \$1500 per month in support did not represent an abuse of that discretion.¹⁵⁵

The Survey period contains several interesting decisions relating to the enforcement of support orders. In *Buzbee v. Buzbee*,¹⁵⁶ the Waco Court of Appeals addressed the burdens of proof involved in proving and defending against a claim of arrearages. The father was behind in his support obligations, at least according to the records. The question was the appropriate amount of reductions for direct payments to the mother, and of credits for expenses during times of possession in excess of court orders. The trial court made extensive fact findings, one of which justified a finding of arrearages by "splitting the difference" between the amount claimed by the Attorney General's office and that claimed by the father-obligor.¹⁵⁷

The Waco Court of Appeals reversed and rendered, finding that a proper application of the basic proof presumptions resulted in a clear determination of arrearages. The Waco court read the statutes as placing the burden of proving the amount in arrears on the plaintiff.¹⁵⁸ The defendant then has to prove offsets for actual support paid during excess periods of possession.¹⁵⁹ The amount of support not paid through the court registry was undisputed; nonetheless, the court was not limited to the record in determining amounts actually paid.¹⁶⁰ While the evidence was conflicting, the court was entitled to make a fact finding that substantial additional sums had been paid directly to the managing conservator.¹⁶¹ The record contained no evidence, however, detailing the amounts spent by the obligor during periods of extended possession.

153. *Pecht*, 874 S.W.2d at 801.

154. *Id.*

155. *Id.* at 803.

156. 870 S.W.2d 335 (Tex. App.—Waco 1994, n.w.h.).

157. *Id.* at 338.

158. TEX. FAM. CODE ANN. § 14.41(a)(Vernon 1986 & Supp. 1995).

159. *Id.* § 14.41(c).

160. *Buzbee*, 870 S.W.2d at 339 (citing *Niles v. Rothwell*, 793 S.W.2d 77, 79 (Tex. App.—Eastland 1990, no writ)).

161. *Id.* at 339-40.

Thus, since the arrearages could not be reduced on this ground, the Waco court determined total arrearages and rendered judgment.

Habeas corpus proceedings challenging contempt orders continue to be a substantial portion of Texas appellate courts' support-related docket. While most cases deal with the mechanics of the process, several decisions issued during the Survey period are notable for reining in creative attempts to use contempt orders to collect collateral costs. The contours of the dispute are easily sketched out. The Texas Constitution prohibits imprisonment for debt.¹⁶² Thus, contempt powers generally are not available to assure the payment of attorney's fees or court costs in family law litigation.¹⁶³ Attorney's fees and costs assessed in connection with the collection of child support, however, are not considered to be "debts."¹⁶⁴ Several cases issued during the Survey period explored the line between these rules.

In *Roosth v. Daggett*,¹⁶⁵ Roosth obtained mandamus relief, blocking Judge Daggett from holding him in contempt for failing to honor a turnover order through which his ex-wife was trying to collect her attorney's fees for the divorce. The Fourteenth Court of Appeals acknowledged the statutory mandate that "[r]easonable attorney's fees may be taxed as costs"¹⁶⁶ in contempt proceedings, and that attorney's fees may be considered "necessaries" for the children in appropriate cases.¹⁶⁷ However, since these attorney's fees were for the divorce per se, not incurred in the course of a child support proceeding, the trial court was not able to fold them into a child support contempt order.¹⁶⁸

*Ex Parte Hightower*¹⁶⁹ is similar in some respects. Several years after the divorce, the father moved for a change in visitation rights. The court appointed a guardian ad litem. To assure collection of fees, the ad litem secured a court order requiring the mother to "pay the Attorney/Guardian Ad Litem Fees and Costs as *child support and as costs*."¹⁷⁰ The Dallas Court of Appeals rejected this creative writing effort, holding that "although the ad litem drafted the order to provide that the fees were child support, they are clearly nothing more than attorney's fees."¹⁷¹

A final variation on the theme of costs and attorney's fees was presented in *Ex parte Williams*,¹⁷² in which the First Court of Appeals

162. TEX. CONST. art. I, § 18.

163. See, e.g., *Wallace v. Briggs*, 162 Tex. 485, 488, 348 S.W.2d 523, 525-26 (1961)(orig. proceeding).

164. See, e.g., *Ex parte Hightower*, 877 S.W.2d 17, 20 (Tex. App.—Dallas 1994, orig. proceeding, [writ dismissed w.o.j.]); *Ex parte Rogers*, 633 S.W.2d 666, 670-01 (Tex. App.—Amarillo 1982, orig. proceeding).

165. 869 S.W.2d 634 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding).

166. TEX. FAM. CODE ANN. § 11.18(a)(Vernon 1986).

167. *Roosth*, 869 S.W.2d at 636. See, e.g., *Wolters v. White*, 659 S.W.2d 885, 887 (Tex. App.—San Antonio 1983, writ dismissed).

168. *Id.* at 637.

169. 877 S.W.2d 17 (Tex. App.—Dallas 1994, orig. proceeding, [writ dismissed w.o.j.]).

170. *Id.* at 19 (emphasis added by the court).

171. *Id.* at 21.

172. 866 S.W.2d 751 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

disapproved an attempt to base a contempt order in part on failure to pay \$1246 in private investigator's fees. Even though those fees were incurred in trying to locate and serve the support obligor, the court held that they were not within the statutory definition of recoverable "costs."¹⁷³

The Texas Supreme Court also handled one child support contempt case during the Survey period. In *Ex parte Roosth*,¹⁷⁴ a litigant already discussed¹⁷⁵ obtained modification of a court order sentencing him to incarceration for sixty days on each of three counts of failure to pay child support, with no time off for good behavior. The Texas Supreme Court ruled that "[a] trial court has no authority to limit the operation of the good behavior credit,"¹⁷⁶ and thus held that the order was void to that limited extent.¹⁷⁷

*Ex Parte Brown*¹⁷⁸ illustrates the line between an erroneous order and a void order in a family law-related context. A family court master found Brown in contempt for making obscene telephone calls to his ex-wife, a violation of a permanent injunction contained in the divorce decree.¹⁷⁹ Brown appealed the order. For various reasons, including an apparent request that the matter be continued until Brown could find a new lawyer, the hearing on the appeal was not held within the thirty-day period provided by the Government Code.¹⁸⁰ Brown argued that since the law provides that a hearing "shall" be held within thirty days, failure to comply rendered the order void.

The Fort Worth Court of Appeals conceded that this language was mandatory, and acknowledged that the issue appeared to be one of first impression.¹⁸¹ The reviewing court noted that the trial judge apparently was trying to assure Brown's right to counsel.¹⁸² While failure to hold the hearing within the required time was error, it was not such error as would deprive the court of jurisdiction.¹⁸³ Brown's remedy, if any there were in this case, would have been to seek mandamus relief to force the trial court to hold a timely hearing.¹⁸⁴

173. *Williams*, 866 S.W.2d at 753. See TEX. FAM. CODE ANN. § 11.18(a)(Vernon 1986)(stating in part that "the court may award costs").

174. 881 S.W.2d 300 (Tex. 1994)(orig. proceeding)(per curiam).

175. See *supra* notes 165 through 167 and accompanying text.

176. *Roosth*, 881 S.W.2d at 301.

177. *Id.*

178. 875 S.W.2d 756 (Tex. App.—Fort Worth 1994, orig. proceeding).

179. *Brown*, 875 S.W.2d at 758.

180. See TEX. GOV'T CODE ANN. § 54.012(h)(Vernon 1988)(stating in part that "[t]he referring court . . . shall hold a hearing on all appeals not later than the 30th day after the date on which the initial appeal was filed with the referring court").

181. *Brown*, 875 S.W.2d at 759.

182. *Id.* See *Ex parte Skero*, 875 S.W.2d 44, 46 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding)(discussing right to counsel in contempt proceedings and need for informing indigent litigants of this right).

183. *Id.* at 760.

184. *Id.*

Several other cases during the Survey period address the technical requirements for a contempt order. The Family Code requires that any enforcement order imposing imprisonment or a fine set out specifically the provisions of the order not complied with and the date of each occasion of noncompliance.¹⁸⁵ The details of compliance must be set out in clear, specific and unambiguous terms.¹⁸⁶ In *Ex parte Coleman*,¹⁸⁷ the Tyler Court of Appeals voided a contempt order for lack of specificity because it incorporated an earlier order not specifying the particular payments in arrears. In addition, though the parties had stipulated to a payment schedule, the stipulations were not spelled out in the order.

Similarly, in *Ex parte Russell*,¹⁸⁸ the order was held void because it did not set all support violations with specificity, with the result that the detailed numbers did not add up to the total arrearages. In addition, several failed payments occurred at a time when the earlier order had not yet been written down. Since a written order is required,¹⁸⁹ the support obligor could not be jailed because of violations of an order not yet written. A good part of the problem with the *Russell* order, as with the *Coleman* order, was simply a matter of drafting. The *Russell* order set out multiple violations, most of which would have passed muster, but assessed a single penalty.¹⁹⁰ When a single punishment is assessed for multiple acts of contempt, a problem with a single predicate act voids the order.¹⁹¹ The solution would have been to tie the punishment to each act of contempt, rendering the order only partially void and assuring that the contemnor would remain in custody.¹⁹²

*Ex parte Christensen*¹⁹³ may be an example of a decision that sacrifices the purposes of child support enforcement statutes on the altar of technical accuracy. The original order of contempt placed the obligor on probation and required payments on the first and fifteenth of each month. Probation was revoked when the terms of the order were not met, despite the fact that the obligor's employer apparently withheld the required amounts from his pay on August 17 and August 28, and the support order

185. TEX. FAM. CODE ANN. § 14.33(a)(Vernon 1986 & Supp. 1995).

186. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967)(orig. proceeding).

187. 864 S.W.2d 573 (Tex. App.—Tyler 1993, orig. proceeding).

188. 875 S.W.2d 467 (Tex. App.—Austin 1994, orig. proceeding).

189. *Ex parte Padron*, 565 S.W.2d 9212, 924 (Tex. 1978)(orig. proceeding)(stating that “[o]ne who is committed to jail for contempt should be able to find somewhere in the record the written order”).

190. *Russell*, 875 S.W.2d at 469 n.6.

191. *Ex parte Davila*, 718 S.W.2d 281, 282 (Tex. 1986).

192. A similar problem, though involving violation of visitation provisions, rather than support obligations, arose during the Survey period in *Ex parte Sealy*, 870 S.W.2d 663 (Tex. App.—Houston [1st Dist.] 1994). Sealy was held in contempt for violating two provisions of a custody order: denying her ex-husband telephone access and refusing visitation rights on a specific date. A single 24-day jail term, probated on conditions, was assessed for the violations. Since the provisions of the custody order did not take effect until September 1, 1995, violation of the provisions was a temporal impossibility on October 19, 1993, the date of the contempt motion. Since a single punishment encompassed both offenses, the order was void. *Id.* at 667.

193. 868 S.W.2d 376 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

was made subject to the provisions of the wage withholding order. The problem, in essence, was that the general support order contemplated bi-monthly paychecks while the employee actually was paid every two weeks.

The Houston Court of Appeals (First District) was spared the trouble of determining whether the trial court's order for employer payments superseded the dates in the contempt order because the record did not indicate whether the employer actually was served with a withholding order before the critical August dates.¹⁹⁴ In an able dissenting opinion, Chief Justice Oliver-Parrott discussed ambiguous language in the wage withholding order that seemed to authorize the August payments as actually made. In an unusually acerbic but (to this writer) accurate observation, the editor of the State Bar's Family Law Section newsletter also commented that "the real purpose of ordering child support is not to jail obligors who are paying, but to keep them working."¹⁹⁵

Two cases issued during the Survey period address the time limits for bringing actions to collect child support arrearages. Under section 14.41(b) of the Family Code, the trial court retains jurisdiction to entertain a motion to collect arrearages for four years after the child becomes an adult or the support obligation ceases.¹⁹⁶ In *In the Interest of M.J.Z.*,¹⁹⁷ the Houston Court of Appeals (First District) addressed a claim that the Attorney General's office should be held to the ordinary standard of "due diligence"¹⁹⁸ in securing service when trying to collect past due child support. In *M.J.Z.*, the Attorney General's office filed a motion to collect past due child support forty-nine days before the child's twenty-second birthday; service was not effected, however, for some three-and-one-half months. The Houston court rejected ordinary due diligence analysis.¹⁹⁹ Since a family court has continuing jurisdiction over such matters, the court reasoned that section 14.41(b) should be treated as a jurisdictional statute, not a statute of limitations.²⁰⁰ This conclusion is reinforced by the Family Code's language requiring that a motion "be filed" within four years of majority,²⁰¹ not that the plaintiff "bring suit" within that time, the language used in typical statutes of limitation.²⁰²

*Allen v. Blackwell*²⁰³ raised a different interpretive question relating to section 14.41(b). The Blackwells divorced in 1982; the mother was given

194. *Id.* at 379.

195. John J. Sampson, *SAPCR—Child Support*, 1994-2 STATE BAR SEC. REP. FAM. L. 37.

196. TEX. FAM. CODE ANN. § 14.41(b)(Vernon 1986 & Supp. 1995).

197. 874 S.W.2d 724 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).

198. *See, e.g.*, *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990)(setting out a due diligence standard for service in ordinary civil litigation).

199. *M.J.Z.*, 874 S.W.2d at 726.

200. *Id.*

201. TEX. FAM. CODE ANN. § 14.41(b)(Vernon Supp. 1995).

202. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.002-.004 (Vernon 1986); *M.J.Z.*, 874 S.W.2d at 726.

203. 866 S.W.2d 108 (Tex. App.—Waco 1993, writ denied).

custody of the couple's two children and the father paid support. In 1986, the father became managing conservator of the older child, and his support obligation was halved. In 1988, he became managing conservator of the younger child as well, and his support obligations ceased. In 1992, more than four years after support obligations ceased, the mother sought managing conservatorship of the younger child, as well as back support payments totalling \$16,400, for the period from 1982 through 1988.

The trial court, focusing on section 14.41(b)(2),²⁰⁴ decided it lacked jurisdiction to award back support payments because it was more than four years since the support obligation ceased;²⁰⁵ the mother argued, in reliance on section 14.41(b)(1),²⁰⁶ that the four-year period had not begun to run because the younger child was still below the age of majority. The Waco Court of Appeals sided with the trial court and the father, ruling that the disjunctive "or" in the statute meant that suit must be brought within the lesser of the two periods. Among the reasons cited by the Waco court for its decision is the fact that the ruling dovetails with a similar result under the contempt statute.²⁰⁷

In recent years, litigants who defend successfully against custody and support enforcement actions have become increasingly aggressive in seeking sanctions. The 1993 Survey²⁰⁸ reported on *Black v. Dallas County Child Welfare Unit*,²⁰⁹ a case of first impression from the Texas Supreme Court establishing the right of a litigant to recover sanctions from the Attorney General's office for frivolous litigation. *Black* involved the assessment of sanctions under Chapter 105 of the Texas Civil Practice & Remedies Code, which provides for the recovery from a state agency²¹⁰ of "fees, expenses, and reasonable attorney's fees" if the court finds an action is "frivolous, unreasonable, or without foundation."²¹¹ In this Survey period, in *Attorney General v. Cartwright*,²¹² the Houston Court of Appeals (Fourteenth District) arguably expanded the boundaries of *Black*.

In *Cartwright*, the Attorney General's office pursued Sheila Cartwright through a succession of support actions, claiming she was delinquent in her obligations under a Louisiana order. Ms. Cartwright repeatedly de-

204. This portion of the statute provides that jurisdiction to entertain a motion to collect past-due child support ceases four years after "the date on which the child support obligation terminates pursuant to the decree or order or by obligation of law." TEX. FAM. CODE ANN. § 41.41(b)(2)(Vernon 1986 & Supp. 1995).

205. *Allen*, 866 S.W.2d at 109.

206. This portion of the statute, already discussed, provides that actions for past due child support must be brought within four years of the time "the child becomes an adult." TEX. FAM. CODE ANN. § 14.41(b)(1)(Vernon 1986 & Supp. 1995).

207. *Allen*, 866 S.W.2d at 109. See also TEX. FAM. CODE ANN. § 14.40(b)(Vernon 1986); *Ex parte Walker*, 739 S.W.2d 415, 417 (Tex. App.—Amarillo 1987, no writ).

208. See Paulsen, *supra* note 26, at 1525-27.

209. 835 S.W.2d 626 (Tex. 1992).

210. For purposes of Chapter 105, the Attorney General's office is defined as a state agency. TEX. CIV. PRAC. & REM. CODE ANN. § 105.001(3)(Vernon 1986).

211. TEX. CIV. PRAC. & REM. CODE ANN. § 105.002 (Vernon 1986).

212. 874 S.W.2d 210 (Tex. App.—Houston[14th Dist.] 1994, writ denied).

nied that any such order existed. A January 1991 suit was dismissed after the Attorney General's office failed to produce the supposed order. A July 1991 suit ultimately was dismissed with prejudice after the Attorney General's office failed to show for a de novo appeal from a master's finding (favorable to the Attorney General). An appeal from this ruling was voluntarily dismissed. Nonetheless, the Attorney General's office filed a notice of delinquency. The Attorney General's office dismissed this notice with prejudice, with the *agreed dismissal order* reciting that the action was "frivolous, groundless, and without legal authority."²¹³ Amazingly enough, the state then filed a motion for new trial, to which Ms. Cartwright finally responded with a successful Rule 13 sanction motion,²¹⁴ securing \$2000. Months later, though the dismissal indisputably was final, the Attorney General's office filed a motion to vacate the dismissal; Ms. Cartwright responded with another successful sanctions motion, securing an additional \$3000.

The Attorney General's principal argument, that sovereign immunity bars the collection of such sanctions, is relatively uninteresting. The Houston appeals court held, in proper reliance on *Black*, that the "plain language" of Chapter 105 "is a statutory waiver of sovereign immunity and a statutory remedy for costs, expenses and attorney's fees."²¹⁵

The more interesting argument advanced by the Attorney General is that Ms. Cartwright's sole available relief was under Chapter 105, and that Cartwright did not meet Chapter 105's procedural requirements. The Houston appeals court stated that, since Rule 13 permits the imposition of sanctions against "any attorney"²¹⁶ who files a groundless pleading in bad faith or for the purpose of harassment, that the Attorney General opens itself to sanctions. One commentator has noted that *Cartwright* "can be (and should be) interpreted to say that even if you don't comply with [Chapter 105], you can still obtain Rule 13 sanctions."²¹⁷ If true, this would be a significant legal development, since the Texas Supreme Court in *Black* disclaimed any intended effect of the decision beyond Chapter 105 actions. On the other hand, the Houston Court of Appeals (Fourteenth District) also found that the sanctions motion did substantially comply with Chapter 105 requirements,²¹⁸ and the Texas Supreme Court's "writ denied" designation is extremely ambiguous.²¹⁹ In a note of irony, the Attorney General's office apparently collected and forwarded a \$5000 IRS refund check under the invalid notice of delin-

213. *Id.* at 213.

214. *See* TEX. R. CIV. P. 13.

215. *Cartwright*, 874 S.W.2d at 217; *see Black*, 835 S.W.2d at 629.

216. *Id.* at 219; *see also* TEX. R. CIV. P. 13.

217. David N. Gray, *SAPCR—Child Support*, 1994-2 STATE BAR SEC. REP. FAM. L. 36.

218. *Cartwright*, 874 S.W.2d at 218-19.

219. *See, e.g., Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, (5th Cir. 1989)(stating that "the implications of the [Texas] state supreme court's 'denial' of writs . . . are not clear").

quency;²²⁰ Ms. Cartwright therefore may have ended up well behind on the exchange.

V. TERMINATION AND ADOPTION

The Survey period contains no particularly startling cases on termination and adoption. Several cases, however, are worth mention. The lone decision from the Texas Supreme Court, *Matter of Thacker*,²²¹ involved disbarment of an attorney with a private adoption practice who was convicted of the felony of violating Texas' "baby-selling" statute.²²² Thacker's ten-year sentence was probated. The Texas Supreme Court rejected the argument that, in determining whether violation of the statute was a "felony involving moral turpitude," Thacker's mental state or motives should be considered. Instead, the seven-judge majority opinion concluded that "[e]ven though it is difficult to sketch a clear boundary for the precise limits of a lawyer's continued moral fitness to practice, the lawyer convicted of purchase of a child has crossed that line and forfeited her privilege to continue the practice of law."²²³

Two recent decisions from the same court illustrate the proof requirements on appeal for challenging decisions terminating parental rights, and provide an interesting juxtaposition of judicial rhetoric. The Corpus Christi Court of Appeals sustained the termination of parental rights in *In the Interest of A.D.E.*²²⁴ on the ground that the father had failed to support his child for a twelve-month period and that termination was in the child's best interest.²²⁵ The court noted that grounds for termination must be proved by clear and convincing evidence,²²⁶ and that this standard is stricter than the typical civil standard, falling somewhere between the typical civil "preponderance" standard and the criminal "beyond a reasonable doubt" standard. However, echoing earlier decisions, the court ruled that, no matter what the trial burden, the appropriate appellate standard still is sufficiency of the evidence.²²⁷ Thus, since the father appealed only on "no evidence" grounds, evidence that he worked at least sporadically during the year, coupled with his admission that he could have sent some money for support, was considered sufficient to sustain termination.

The tone and result in *Ybarra v. Tex. Dep't of Human Services*²²⁸ is far different. Elida Ybarra, a mildly retarded mother of five who earned approximately \$1000 per month working in a tavern, had on an earlier occa-

220. See Gray, *supra* note 217, at 35.

221. 881 S.W.2d 307 (Tex. 1994).

222. TEX. PENAL CODE ANN. § 25.11 (Vernon 1989).

223. *Thacker*, 881 S.W.2d at 310.

224. 880 S.W.2d 241 (Tex. App.—Corpus Christi 1994, n.w.h.).

225. See TEX. FAM. CODE ANN. § 15.02(a)(F)(b) (Vernon 1986 & Supp. 1995).

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

227. *A.D.E.*, 880 S.W.2d at 245 (citing *D.O. v. Texas Dep't of Human Services*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ)).

228. 869 S.W.2d 574 (Tex. App.—Corpus Christi 1993, no writ).

sion been reported to the DHS for leaving her children alone in "a squalid house."²²⁹ She was moved into public housing and advised not to leave the children alone. When a caseworker visited a year later and found the children alone again at 7:30 p.m., the children were placed in foster care and Ybarra's rights terminated eighteen months later.

The question was whether the state had introduced sufficient evidence of conditions endangering the physical or emotional well-being of the children.²³⁰ The court began by describing the parent-child relationship as "perhaps the strongest bond between people in nature and the keystone of society,"²³¹ a right of constitutional dimensions²³² requiring that "any effort by the State to terminate it be strictly scrutinized."²³³ Nonetheless, a considerable amount of evidence supported the DHS determination. The first time authorities intervened, the roof of the family's house was open to the sky. On the second visit, there were not enough beds for all the children, there was little food in the house, the children were hungry and dirty, only one child was wearing shoes, and the younger children were dressed only in underwear. Further testimony revealed that Mrs. Ybarra had failed to apply for day care services or to attend parenting classes, that she could not provide proof of attendance at Alcoholics Anonymous meetings, and that she smelled of alcohol when she was found at work.

The Corpus Christi Court of Appeals, however, emphasized contrary evidence to the effect that Ybarra had not been able to get attendance slips from her A.A. meetings, as well as her testimony that she had not been drinking for several years, and concluded that the evidence did not sustain a "clear and convincing" finding of endangerment.²³⁴ In further discussion, the court emphasized that matters were not entirely within the mother's control, since "poverty played a role" in the children's condition.²³⁵

The writer does not quarrel with the result in either *A.D.E.* or *Ybarra*. What is clear and convincing evidence is, in any case, to some extent found in the eye of the beholder. Moreover, Mrs. Ybarra had the advantage that one of the three DPS witnesses thought that termination would not be in the best interest of the children. Nonetheless, the court's use of poverty to excuse Mrs. Ybarra's neglect, while studiously ignoring the same factor in the *A.D.E.* father's background, at least drives home the fact that in appeals from termination of parental rights, the difference between "no evidence" and "factually insufficient evidence" review may

229. *Id.* at 577.

230. TEX. FAM. CODE ANN. § 15.02(a)(1)(D)(Vernon 1986 & Supp. 1995).

231. *Ybarra*, 869 S.W.2d at 576.

232. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 747 (1982)).

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

234. *Id.* at 578.

235. *Id.* at 579.

take on even greater significance than it does in an ordinary civil appeal.²³⁶

One case issued during the Survey period illustrates the successful termination of parental rights in favor of caregivers with whom the children had been voluntarily placed for a long period of time. In *Fite v. Nelson*,²³⁷ the Fourteenth Court of Appeals affirmed the termination of a father's parental rights under relatively clear facts. The mother left the child with the grandparents two days after birth; six months later, the father deposited the couple's other two children. The father, who initially denied paternity for the youngest child, visited the child twice a year and contributed less than \$10 per month of a \$100 per month child support obligation over a seventy-seven month period. Termination was sought on the ground of failure to support.

The father did not try to prove financial inability to make support payments. Instead, he argued that the \$100 per month support obligation was for all three children, and that when he voluntarily reclaimed the two older children, his support obligation ceased.²³⁸ The court conceded that this fact would be a defense to a contempt motion for nonsupport, but concluded that it had no effect in a proceeding to terminate parental rights. Moreover, since the \$100 per month was for the support of all three children, and the child in question remained with the grandparents, the court reasoned that the father's only option was to seek a modification in the support order. This he did not do.

As in any such case, however, termination also must be proved to be in the best interest of the child.²³⁹ The trial court relied on the father's infrequent visits and initial doubts regarding paternity, together with evidence that the child viewed the grandparents as his "mom" and "dad" and feared being taken away from them, as sufficient basis for terminating parental rights.²⁴⁰ The result has been criticized as "particularly iffy," in view of the fact that the youngest child now is legally cut off from his older brothers and sisters, and that any fears could have been allayed by denying the father's motion to modify custody.²⁴¹

Two criminal case raising double jeopardy questions deserves brief mention because of some unusual procedural aspects relevant to termina-

236. See generally Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L. REV. 361 (1960); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515 (1991). R.S. v. B.J.J., 883 S.W.2d 711 (Tex. App.—Dallas 1994, n.w.h.) forms an interesting contrast with *A.D.E.*, in that the court elected to consider the parents' complaint as raising a factual sufficiency challenge, despite the fact that the appellate brief seemed to raise only a legal sufficiency challenge. *Id.* at 714-15.

237. 869 S.W.2d 603 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.).

238. See TEX. FAM. CODE ANN. § 14.40(c)(Vernon 1986)(providing that if the managing conservator has voluntarily turned over the child to the support obligor, "the obligor may affirmatively plead and prove the fact that actual support was supplied to the child as a defense in whole or in part to a motion for contempt").

239. TEX. FAM. CODE ANN. § 15.02(a)(2)(Vernon 1986 & Supp. 1995).

240. *Fite*, 869 S.W.2d at 607.

241. John J. Sampson, *SAPCR-Termination*, 1994-2 STATE BAR SEC. REP. FAM. L. 40.

tion proceedings. In *Manning v. State*,²⁴² Jeffrey Manning testified in a preliminary termination hearing that serious injuries to his child resulted from horseplay. The court disagreed and ordered the Department of Human Services to serve as the child's temporary conservator. This termination proceeding was later consolidated with a suit for divorce. During the hearing on the consolidated cases, Mr. Manning admitted that his earlier testimony was false. This decision to "come clean" no doubt was influenced by the fact that, during the interim between the two hearings, Manning had been convicted by another court of injury to a child and placed on probation.

The state initially moved to have Manning's probation revoked on the ground that he had committed perjury in the termination action. When the court refused to revoke probation, the state sought and obtained a conviction for perjury. Manning argued that he did not commit perjury because he retracted his false statement and, alternatively, that the perjury conviction after the state's unsuccessful attempt to revoke probation constituted double jeopardy. He lost on both grounds. The Eastland Court of Appeals reasoned that the consolidated divorce/termination case was not the same "official proceeding"²⁴³ in which Manning made the false statement, and that the retraction defense to perjury thus did not apply.²⁴⁴ Manning's double jeopardy challenge failed on the ground that a failure to revoke probation is not a ruling on the underlying charge, and that the decision not to revoke probation could have been grounded in the belief that Manning's perjury occurred before his probation, rather than that no perjury had taken place.²⁴⁵

Malone v. State,²⁴⁶ an appeal from a ninety-nine year sentence for aggravated sexual assault of a child, also involved a double jeopardy question and the juxtaposition of civil and criminal proceedings. Robert Malone argued that the failure of a civil jury to find that he had "engaged in conduct . . . which endangered the physical or emotional well-being of the child,"²⁴⁷ and the jury's concomitant failure to terminate his parental rights, should operate to bar a later conviction for sexual assault of a child, since the sole evidence at the civil trial of his "conduct" was the same alleged sexual assault of a child on which his criminal conviction rested.

242. 870 S.W.2d 200 (Tex. App.—Eastland 1994, writ ref'd).

243. Both the statutory definition of perjury and the retraction defense to perjury use the language "official proceeding," not "case," to define the crime and defense. See TEX. PENAL CODE ANN. §§ 37.02, 37.05 (Vernon 1989).

244. *Manning*, 870 S.W.2d at 202. While the question was not discussed by the court, it seems as if Manning would have had trouble with another requirement of the retraction defense, that the retraction take place "before it became manifest that the falsity of the statement would be exposed." TEX. PENAL CODE ANN. § 37.05(2)(Vernon 1989). Manning's conviction for injury to a child undoubtedly cast considerable doubt on the veracity of his earlier explanation for the child's injuries.

245. *Manning*, 870 S.W.2d at 203.

246. 864 S.W.2d 156 (Tex. App.—Fort Worth 1993, no writ).

247. *Id.* at 158.

The Fort Worth Court of Appeals rejected Malone's appeal on both grounds. Ordinarily, only successive criminal prosecutions constitute double jeopardy.²⁴⁸ While recognizing that on rare occasions an ostensibly civil remedy may be so punitive in purpose or effect that it equates with a criminal prosecution,²⁴⁹ the *Malone* court reasoned that a termination proceeding is "remedial in nature and relates to the State's interest in protecting abused and neglected children, not punishment of the parent."²⁵⁰ While the court felt Malone's collateral estoppel argument—that the first judgment necessarily included a finding that he did not sexually abuse his child—was better grounded, there was no trial court record to permit the court to determine whether the issue of sexual abuse was specifically litigated.²⁵¹

The writer's impression is that *Manning* and *Malone* represent the mainstream view that criminal proceedings after civil actions should not be barred. It is worth noting, however, that a federal circuit conflict on an analogous question seems to be heating up. Several circuits, including the Fifth,²⁵² have held that successful civil forfeiture actions (usually in the drug context) do not raise a bar to subsequent criminal proceedings. The Ninth Circuit, however, recently has ruled that such civil forfeiture actions must be brought in the same proceeding as the criminal charges, or have the later action struck on double jeopardy grounds.²⁵³

248. *Id.* at 158 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

249. *Id.* at 159 (citing *Ex parte Rogers*, 804 S.W.2d 945, 949 (Tex. App.—Dallas 1990, no pet.).

250. *Id.*

251. *Id.* at 160.

252. See, e.g., *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), cert. denied sub nom., *Anderson v. United States*, 115 S. Ct. 573 (1994).

253. See, e.g., *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (5th Cir. 1994); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994).