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FAMILY LAW: PARENT AND CHILD

James W. Paulsen*

TABLE OF CONTENTS

I. STATUS	1065
II. CONSERVATORSHIP	1070
III. SUPPORT	1078
IV. TERMINATION AND ADOPTION	1084

ANY review of recent developments in Texas family law must begin with the remarkable 1995 legislative session. According to knowledgeable commentators, "the 74th Legislature saw more change to the parent-child section of the Family Code than at any time since the original enactment of Title 2 in 1973."¹ While a large part of this legislative hubbub was little more than wholesale renumbering and reorganization,² the Legislature also engaged in a fair amount of substantive (and occasionally questionable³) tinkering.

While some of the more notable specific changes are treated in the appropriate subject-matter sections that follow,⁴ a fair number are of broader application. For example, in an attempt to guarantee some minimum level of competent representation for children,⁵ ad litem rules have

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1. John J. Sampson & Howard G. Baldwin, Jr., *Family Law: Top 10 Things That Happened This Legislative Session*, 58 TEX. B.J. 950, 950 (1995).

2. Most notably, the Legislature created a new Title 5, containing statutes relating to suits affecting the parent-child relationship (SAPCR).

For purposes of simplicity, all statutory references in this paper have been amended at great cost and personal sacrifice to conform to the new numbering scheme, rather than the old version reflected in the text of the opinions, unless some substantive change is involved.

3. At least a couple of the legislative changes may face constitutional challenges. See *infra* text accompanying notes 161-73 (prohibiting persons in default on support obligations from obtaining marriage licenses) and 176-78 (retroactively rendering support and conservatorship agreements unenforceable as contracts).

4. A useful short summary also was published by the Family Law Section of the State Bar. See *1995 Legislation Affecting Family Law Practice*, 1995-3 STATE BAR SEC. REP. FAM. L. 3-59.

5. Sampson and Baldwin comment, appropriately, that "[i]t is a sad commentary on the practice of law when the legislature must intervene to mandate the most elementary activities of an attorney." Sampson & Baldwin, *supra* note 1, at 951.

been extensively rewritten.⁶ It is also worth noting, though of only tangential interest to this survey, that the Texas Supreme Court issued two ad litem decisions during this survey period.⁷ The statutes also have been revised to accommodate binding arbitration⁸ and to assure that clients know of the availability of alternative dispute resolution.⁹ Finally, the Legislature has made it clear that all professionals—even attorneys—are legally obligated to report child abuse.¹⁰

One case of potential general significance also bears watching. The Texas Supreme Court has granted an application for writ of error in *Welsh v. Welsh*,¹¹ a case raising a jurisdictional challenge to Fort Bend County's impact court. The impact court, staffed by a visiting judge and taking cases "transferred" from other courts, was created to handle the overflow from Fort Bend County's three district courts.¹² The losing party in a divorce and custody battle challenged the impact court's jurisdiction, arguing that the Family Code strictly regulates the transfer of a case from one court to another.¹³

The appeals court reasoned that the impact court derived its power from the Texas Constitution's provision authorizing district judges to hold court for one another when they deem it expedient¹⁴ and observed that impact courts have routinely been held legitimate in criminal cases.¹⁵ The court of appeals also reasoned that the case was not really transferred to another court since the caption on the pleadings continued to read "328th District Court."¹⁶ The court of appeals did not mention the fact that the "continuing, exclusive jurisdiction" and transfer statutes relied upon by the appellant to demonstrate the impact court's lack of jurisdiction apply only after a "final order" is entered.¹⁷ In any event, the case bears watching, particularly in light of the Texas Supreme Court's

6. Changes include the creation of ad litem "pools" in larger counties with continuing legal education and competency requirements, TEX. FAM. CODE ANN. § 107.006 (Vernon Supp. 1996), and an outline of some of the ad litem's powers and duties. *Id.* § 107.014.

7. See *Frank A. Smith Sales, Inc. v. Flores*, 907 S.W.2d 487, 488 (Tex. 1995) (per curiam) (holding that ad litem fees cannot be awarded for representation after resolution of the conflict that led to the appointment); *Brownsville-Valley Regional Medical Ctr. v. Gamez*, 894 S.W.2d 753, 757 (Tex. 1995) (same).

8. TEX. FAM. CODE ANN. § 153.0071 (Vernon Supp. 1996).

9. This is accomplished by requiring that a specific statement acknowledging the availability of alternative dispute resolution be included in a party's first pleading and that the statement be signed by the party. *Id.* § 102.0085.

10. *Id.* § 261.101(c). The duty is non-delegable. *Id.* § 261.101(b). The attorney-client privilege still exists, but is limited to the exclusion of testimony, not exemption from reporting. See *id.* § 261.202.

11. 905 S.W.2d 615 (Tex. App.—Houston [14th Dist.] 1995, writ granted).

12. See Patti Muck, *Judge is Taken Off Impact Court Duties*, HOUS. CHRON., Apr. 8, 1994, at A-30.

13. See, e.g., TEX. FAM. CODE ANN. § 155.001 (Vernon Supp. 1996) (acquiring continuing, exclusive jurisdiction); *id.* §§ 155.201-202 (setting out requirements for mandatory and discretionary transfer).

14. See TEX. CONST. art. V, § 11.

15. See generally *Ex parte Holmes*, 754 S.W.2d 676, 682 n.5 (Tex. Crim. App. 1988) (presenting historical summary of the use of impact courts).

16. *Welsh*, 905 S.W.2d at 617.

17. See, e.g., TEX. FAM. CODE ANN. § 155.001(a) (Vernon Supp. 1996).

recent interest in sorting out family law jurisdictional problems.¹⁸ It is worth noting (though in this world of Elizabeth Taylors, it is by no means a record) that the impact court judge who tried the *Welsh* matter has stepped down in preparation for his own seventh divorce.¹⁹

I. STATUS

In *In the Interest of J.W.T.*,²⁰ a highly controversial decision, the Texas Supreme Court ruled that a person claiming to be the "real" father had the constitutional right to bring an action, even if the child in question had a presumed father,²¹ at least if that person makes "early and unqualified acceptance of parental duties."²² The 1995 Legislature accommodated the *J.W.T.* ruling by providing statutory authority for an action by a supposed biological father²³ and by setting out a two-year limitation period for such actions.²⁴ The Legislature also addressed some of the possible conflicting presumptions in paternity actions, emphasizing its preference for scientific testing methods.²⁵

In a refreshing switch from recent survey periods, the Texas Supreme Court heard no major paternity cases. The closest the high court came was *State ex rel. Latty v. Owens*,²⁶ a procedure and sanctions dispute arising in a paternity context. The Texas Attorney General's office brought a paternity suit against Owens at the request of its Louisiana counterpart. After the blood testing mandated by statute,²⁷ a family law master determined that Owens was the father and ordered him to pay child support. The court initially signed an order adopting the master's finding, then conducted a *de novo* trial on the paternity issue. When the state attempted to introduce the blood test results into evidence, Owens objected on the basis that Latty's interrogatory answers did not name the expert who conducted the tests. The court continued the hearing to allow supplementation of responses. When the hearing reconvened a little more than a month later, however, the interrogatory answers were still defective: the author of the paternity report was listed incorrectly; the mother did not list herself as a person with knowledge of relevant facts; and the mother's interrogatory answers were verified by her attorney, not herself.

18. See *infra* text accompanying notes 90-109.

19. See Muck, *supra* note 12.

20. 872 S.W.2d 189 (Tex. 1994).

21. The case was treated extensively in the 1994 survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 47 SMU L. REV. 1197, 1197-1205 (1994).

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

23. TEX. FAM. CODE ANN. § 160.101(a)(3) (Vernon Supp. 1996).

24. *Id.* § 160.110(f).

25. In the case of conflicting presumptions of paternity, "the presumption that is founded on the weightier considerations of policy and logic controls." *Id.* § 160.110(e). The legislation also provides that the weightier considerations should be found to favor a presumed father who is not excluded by a paternity test that would exclude 99% of the male population. *Id.*

26. 907 S.W.2d 484 (Tex. 1995) (per curiam).

27. TEX. FAM. CODE ANN. § 160.102 (Vernon Supp. 1996).

The trial court excluded the paternity test results, pleadings, exhibits, and affidavits.

The court of appeals reversed on the ground that these "death penalty" sanctions were excessive.²⁸ Failure to name the mother did not work as a surprise on Owens, because "it was clear to all parties that the mother in a paternity suit is a person with knowledge of relevant facts."²⁹ The court of appeals also believed that the paternity test was improperly excluded. The trial court had based its holding on three reasons: (1) hearsay; (2) failure to verify interrogatory answers; and (3) failure to identify the paternity expert. The Family Code, however, creates a specific hearsay exception for paternity reports,³⁰ and the expert in question was appointed by the court, not retained by the parties.³¹ Moreover, evidence that otherwise would be excluded for failure to respond to discovery can be admitted on a showing of good cause.³² The expert's name was on the test results, and the same evidence had already been presented to the master. This, to the court of appeals, constituted good cause.³³ Finally, "death penalty" sanctions must be just,³⁴ which at a minimum means that the sanctions must have some direct relationship to the offensive conduct.³⁵ In this case, to quote the court, "[t]he offensive conduct was committed by an attorney with the Texas Attorney General's office, while the party suffering the punishment was an indigent child in Louisiana."³⁶

The Texas Supreme Court reversed, though without comment on the court of appeals' reasoning on the sanctions issue. Rather, the Texas Supreme Court held that the trial court's order approving the master's findings, signed before the putative father exercised his right of de novo review,³⁷ was a final and appealable judgment. The court of appeals had viewed the order approving the master's findings as a nullity since the court's authority to do so is conditioned on the parties' failure to file a written notice of appeal.³⁸ The Texas Supreme Court agreed that although the trial court "should have held a hearing on Owens' appeal before signing an order adopting the master's report,"³⁹ failure to do so did not render the order void. Since Owens did not appeal the first order, and the trial court had lost plenary jurisdiction by the time the second

28. *State ex rel. Latty v. Owens*, 893 S.W.2d 728, 732-33 (Tex. App.—Texarkana), *rev'd per curiam*, 907 S.W.2d 484, 485 (Tex. 1995).

29. *State ex rel. Latty*, 893 S.W.2d at 731.

30. TEX. FAM. CODE ANN. § 160.109(b) (Vernon Supp. 1996) (stating that "[a] verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matters it contains").

31. *See id.* § 160.104(a) (requiring the court to appoint and determine the qualifications of a paternity testing expert).

32. *See* TEX. R. CIV. P. 215(5).

33. *State ex rel. Latty*, 893 S.W.2d at 732.

34. *See* TEX. R. CIV. P. 215(2)(b).

35. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

36. *State ex rel. Latty*, 893 S.W.2d at 732.

37. *See* TEX. GOV'T CODE ANN. § 54.012 (1988) (repealed 1995).

38. *See id.* § 54.011 (repealed 1995).

39. *State ex rel. Latty*, 907 S.W.2d at 485.

order issued, the master's paternity ruling, mistakenly adopted by the trial court, stood.

Like *State ex rel. Latty, In the Interest of S.R.M.*⁴⁰ almost managed to present an interesting post-O.J. issue on the use of blood test results. The putative father complained of the admission of unverified blood test results. Unfortunately, the father raised only a "no evidence" challenge, compounding the problem with an incomplete statement of facts prepared from a tape recording.⁴¹ Since the mother could be heard on the tape, clearly stating that appellant was the father, the record contained "some evidence" of paternity, no matter how one looks at it.

Before leaving the subject of audio-recorded trials, it is worth noting that the San Antonio Court of Appeals reversed a default paternity determination because the entire tape-recorded record was gone.⁴² The court noted its distress about the fact that the trial court, on a very tight budget, had bought only three months' worth of tapes, then re-recorded new trials over the oldest tapes. The San Antonio court admonished the trial court that its legal duty to maintain records for three years "is not diminished by use of an alternative form of recordation. Neither can it be eviscerated by budget considerations."⁴³

Two cases issued during this survey period reiterated the limit of a parent's liability for a child's torts when that liability is based solely on parental status. The more interesting of the two, *Rodriguez v. Spencer*,⁴⁴ rose from the death of Paul Broussard in a Houston "gay-bashing" incident. Broussard's mother (Rodriguez) sued the mother of a seventeen-year-old who was implicated in Broussard's death. The mother was granted summary judgment on the ground that her son's actions were unforeseeable.

Rodriguez first asked the court to acknowledge a duty to third parties arising from the Family Code's statement that a parent has "the duty of care, control, protection, and reasonable discipline of the child."⁴⁵ Reasoning from the Legislature's specific provision elsewhere in the Family Code for parental liability to third parties for property damage,⁴⁶ and from the fact that the provision relied upon by Rodriguez is usually cited in criminal actions against parents for harming their children, the court of appeals held that the statute "does not establish a parent's duty to control or discipline children for the benefit of third parties."⁴⁷

Alternatively, Rodriguez asked the court to extend a common law duty. At present, the parent-child relationship alone is not enough to

40. 888 S.W.2d 267 (Tex. App.—Houston [1st Dist.] 1994, no writ).

41. Absent a complete statement of facts, the missing material is presumed to support the judgment. An incomplete record therefore is fatal to a "no evidence" challenge. See, e.g., *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990).

42. *Walker v. Stefanic*, 898 S.W.2d 347, 349 (Tex. App.—San Antonio 1995, no writ).

43. *Id.*

44. 902 S.W.2d 37 (Tex. App.—Houston [1st Dist.] 1995, no writ).

45. TEX. FAM. CODE ANN. § 151.003(a)(2) (Vernon Supp. 1996).

46. See *id.* §§ 41.001-.003.

47. *Rodriguez*, 902 S.W.2d at 41.

render a parent liable for the child's torts;⁴⁸ there must be some independent relationship⁴⁹ or negligence.⁵⁰ Rodriguez suggested that the court adopt the Restatement position that a parent is liable for failing to exercise reasonable control of a child when that parent "knows or should know of the necessity and opportunity for exercising such control."⁵¹ Although Rodriguez argued that the Restatement does not mention foreseeability the court declined to adopt the Restatement and observed further (correctly, in this writer's opinion) that the phrase "*should know*" implies foreseeability in any event.⁵² The *Rodriguez* reasoning was underscored in *Childers v. A.S.*,⁵³ a factually complex case, involving "sex games" played by children and accusations of parental failure to control. Making a long story short, the Fort Worth Court of Appeals endorsed the *Rodriguez* analysis in detail and likewise refused to adopt the Restatement position.⁵⁴

In a followup to a high profile case of the last survey period,⁵⁵ the child of District Judge Raul Longoria and the child's mother were denied standing to appeal the agreed settlement of a suit brought by the Attorney General's office.⁵⁶ The child, who was not a party to the suit, was denied standing on the doctrine of "virtual representation" because his interests were not identical with those of the state.⁵⁷ The mother evidently had no independent complaint.

*Ex parte Wagner*⁵⁸ offers a minor twist on a long-settled constitutional question. Wagner, adjudged the father in a paternity action, was held in contempt for refusing to pay attorney's fees permitted by statute.⁵⁹ The father argued that incarceration for failing to pay these fees was unlawful imprisonment for debt, in violation of the Texas Constitution.⁶⁰ It has long been held that imprisonment for failure to pay child support is not

48. See, e.g., *Moody v. Clark*, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

49. This could, for example, include liability on traditional theories of respondeat superior or joint enterprise. See, e.g., *De Anda v. Blake*, 562 S.W.2d 497, 499 (Tex. Civ. App.—San Antonio 1978, no writ).

50. *Moody*, 266 S.W.2d at 912.

51. RESTATEMENT (SECOND) OF TORTS § 316(b) (1965).

52. *Rodriguez*, 902 S.W.2d at 43.

53. 909 S.W.2d 282 (Tex. App.—Fort Worth 1995, no writ).

54. *Id.* at 287.

55. *In the Interest of B.I.V.*, 870 S.W.2d 12 (Tex. 1994). The case is discussed briefly in the 1995 survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 48 SMU L. REV. 1275, 1277-79 (1995).

56. *B.I.V. v. Longoria*, 897 S.W.2d 395, 398-99 (Tex. App.—Corpus Christi 1995, writ requested).

57. *Id.* at 398. The Corpus Christi court quoted a Dallas decision for the proposition that "[t]he child's interests . . . in establishing the parent-child relationship with his father, extend far beyond support, they include the right to a relationship with his father, the avoidance of the social stigma imposed on those burdened by the status of illegitimacy, and the right to inherit." *Id.* (quoting *Stroud v. Stroud*, 733 S.W.2d 619, 621 (Tex. App.—Dallas 1987, no writ)).

58. 905 S.W.2d 799 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding).

59. See TEX. FAM. CODE ANN. § 106.002 (Vernon Supp. 1996).

60. TEX. CONST. art. I, § 18.

imprisonment "for debt," but rather for violation of a legal duty.⁶¹ The reasoning extends to unpaid attorney's fees as incidental to the child support obligation.⁶² In *Wagner* the court of appeals simply took the reasoning one step further, reasoning that "a paternity action must be filed before a mother can obtain, much less enforce, a child support obligation," and that a paternity action therefore "is by its very nature an enforcement proceeding."⁶³

*Roberson v. Pickett*⁶⁴ was a case of first (and, one might hope, last) impression on a strange question of service in a paternity case. The mother of a child born out of wedlock was murdered. The maternal grandmother filed suit on her own and the child's behalf and recovered a judgment. She then filed an application for guardianship in probate court. The child's biological father, who had been denied standing in the personal injury suit, was notified and filed a contest of guardianship. He then filed a separate suit in family court, without notifying the grandmother, established his paternity, and was awarded conservatorship of the child.

In a bill of review proceeding, the question was whether the grandmother was entitled by statute to notice of the family court action. The Family Code provides that citation "may" be served on "any . . . person who has or who may assert an interest in the child."⁶⁵ Under the facts, this certainly included the grandmother. The mandatory portion of the statute, however, requires service only on, inter alia, "a guardian" of the person or estate of the child.⁶⁶ At the time the family court suit was filed, the grandmother had filed to be named guardian, but was not yet "the guardian." Nonetheless, in this "unique situation" presenting a "case of first impression,"⁶⁷ the court of appeals held that the grandmother was a person who was entitled to notice.

The court gave little credence to the father's argument that the ruling would encourage potential litigants to rush out and file guardianship proceedings in order to be entitled to service of paternity actions. To the court, "any concerns about an abuse of this process are trumped by an interest in judicial comity."⁶⁸ The underlying problem, of course, was that the father's attorney's action in failing to notify the grandmother of the family court case was, at a minimum, "disingenuous" and smacked of "deception."⁶⁹ To the court, the overarching "best interest of the child" mandated some implied extension of the "guardian" portion of the mandatory service statute: "Secretly filing suit involving some of the

61. See, e.g., *Ex parte Birkhead*, 95 S.W.2d 953, 954 (Tex. 1936).

62. *Ex parte Helms*, 259 S.W.2d 184, 188 (Tex. 1953).

63. *Wagner*, 905 S.W.2d at 803.

64. 900 S.W.2d 112 (Tex. App.—Houston [14th Dist.] 1995, no writ).

65. TEX. FAM. CODE ANN. § 102.009(b) (Vernon Supp. 1996).

66. *Id.* §§ 102.009(a)(5)-(6).

67. *Roberson*, 900 S.W.2d at 115.

68. *Id.* at 116.

69. *Id.*

same issues affecting a child serves neither the law nor the litigants."⁷⁰

In the "no great surprise" category, *In the Interest of Sicko*⁷¹ ranks very high. Sicko, an unfortunately named 57-year-old man, sued to establish paternity but the court held that the suit was barred by limitations. The suit was so thoroughly barred by limitations that neither the current⁷² nor any former paternity-specific statute of limitations applied.⁷³ Suit therefore was barred by the residual four-year statute.⁷⁴ Even if a "discovery rule" were applied to paternity actions—a question on which the court of appeals court expressed grave doubts—Sicko had waited more than six years after "discovering" his possible biological father to file suit. Sicko's constitutional challenge was dismissed, in part, because he did not seek a determination of parentage as a step toward securing some right of inheritance, or the like, but only to satisfy his curiosity. The court observed that "appellant does not argue and we can find no support for a common law right to bring a paternity action merely to determine the identity of one's biological father."⁷⁵

II. CONSERVATORSHIP

Two major statutory changes in conservatorship law were effected by the Texas Legislature at its most recent session. First, Texas now has a statutory presumption that joint managing conservatorship is in the best interest of the child.⁷⁶ While irresponsible media coverage led some Texans to assume that this change required Texas divorce courts to divide possession time equally between the two parents,⁷⁷ the statute did no such thing. The requirement that the court determine the child's primary physical residence remains in effect,⁷⁸ as does the explicit statutory statement that joint managing conservatorship does not require "equal or nearly equal periods of physical possession."⁷⁹

The second statutory change may be more significant. Before the 1995 legislative session, a person seeking a change of sole managing conservator was required to meet a "well known, sometimes criticized"⁸⁰ three-pronged test: (1) the circumstances of a party have materially and substantially changed; (2) retention of the current managing conservator

70. *Id.*

71. 900 S.W.2d 863 (Tex. App.—Corpus Christi 1995, no writ).

72. TEX. FAM. CODE ANN. § 160.002(a) (Vernon Supp. 1996).

73. As late as 1973, Texas did not recognize a cause of action for paternity. See JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 550 (1995). Even under the current statute, Sicko's action would have been barred in 1961. *Sicko*, 900 S.W.2d at 865.

74. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986).

75. *Sicko*, 900 S.W.2d at 866 n.2.

76. TEX. FAM. CODE ANN. § 153.131(b) (Vernon Supp. 1996).

77. Some of the mistakes in reporting are described by Sampson and Baldwin. Sampson & Baldwin, *supra* note 1, at 954 n.15.

78. TEX. FAM. CODE ANN. § 153.136 (Vernon Supp. 1996).

79. *Id.* § 153.135.

80. John J. Sampson, *Commentary to Chapter 14, Texas Family Code Symposium*, 21 TEX. TECH L. REV. 1323, 1403 (1990).

would be injurious to the child's welfare; and (3) appointment of a new sole managing conservator would be a positive improvement for the child.⁸¹ The second prong—retention of the current sole managing conservator would be injurious to the child's welfare—now has been dropped.⁸² This change may not be of great importance, however, since joint managing conservatorship is now a statutory option⁸³ and even a possessory conservator now has many rights during periods of possession.⁸⁴ Thus, since the "all or nothing" attitude that dominated the early Family Code provisions has been modified in these very significant respects, eliminating one prong of the old test is unlikely to have much cumulative impact.⁸⁵

Other, less sweeping changes are worth a brief mention. Legislation now specifically provides for possession of and access to an adult, disabled child.⁸⁶ New legislation also provides, as if it were necessary, that conviction of child abuse is a "material and substantial change of circumstances" sufficient to justify modification of a conservatorship order.⁸⁷ Conversely, parties who knowingly make a false report of child abuse in a SAPCR proceeding may have that fact used against them in the determination of conservatorship.⁸⁸ A court may order compensatory periods of possession or access to a child when the party has wrongly been denied prior court-ordered periods of possession or access.⁸⁹

In *Bigham v. Dempster*,⁹⁰ a divided Texas Supreme Court addressed a question of dominant jurisdiction conflict in a child custody case. The court was aided in its efforts by an all-star cast of counsel that included four former justices or chief justices of the court, as well as two former state senators,⁹¹ a fact that was noted pointedly in the dissenting opinion.⁹²

The majority opinion begins its analysis with the optimistic statement that "[t]he procedural facts are complicated, but the legal problem is simple."⁹³ Simplifying the facts somewhat,⁹⁴ the Bighams divorced in Harris County. Mr. Bigham later obtained a temporary order permitting him to

81. See TEX. FAM. CODE ANN. § 156.101(a) (Vernon Supp. 1996).

82. *Id.*

83. *Id.* § 153.005.

84. *Id.* §§ 153.073-.074.

85. See SAMPSON ET AL., *supra* note 73, § 156.101 cmt.

86. TEX. FAM. CODE ANN. § 154.309 (Vernon Supp. 1996).

87. *Id.* § 156.304(a).

88. *Id.* § 153.013.

89. *Id.* § 157.168.

90. 901 S.W.2d 424 (Tex. 1995).

91. Respondents, Judges Georgia Dempster and Bill Henderson of Houston, were represented by former Chief Justice Joe R. Greenhill, and former Justices Oscar Mauzy, C.L. Ray, and Eugene A. Cook, as well as several other appellate practitioners. See *id.* at 424, 425.

92. *Id.* at 434 n.1 (Gonzalez, J., dissenting).

93. *Id.* at 425.

94. For example, while this case is summarized as involving two courts, there was a further subplot involving a transfer from one district court to another in Harris County, eliminated here in the interest of simplicity. See *id.* at 427-28.

take the children to Fayette County. Four months later, he filed a motion to transfer the suit, which included a motion to modify custody, to Fayette County. Over Ms. Bigham's objections, the Harris County judge did so. Mr. Bigham filed a certified copy of the transfer order with the Fayette County District Clerk, who made an "official" notation that the case was "docketed" on January 4, 1995.⁹⁵ In addition, on the same day, the Fayette County district judge issued a temporary restraining order prohibiting Ms. Bigham from removing the children from Fayette County. Meanwhile, back in Harris County, a new judge assumed office on January 1, 1995. The case files still had not been packed and shipped. On January 5, 1995, one day after the Fayette County "docketing," a new Harris County judge set aside the transfer order. Further orders from both courts followed in quick succession, as the "turf war" escalated.

In general, only one court has "continuing, exclusive jurisdiction" over children at any one time.⁹⁶ In the case of a transfer, the transferring court "retains jurisdiction to render temporary orders,"⁹⁷ but "jurisdiction of the transferring court terminates on the docketing of the case in the transferee court."⁹⁸ Ms. Bigham argued that the transferring court rescinded its order within its 30-day period of plenary jurisdiction, and that the case could not be considered "docketed" in the new court until originals or certified copies of the records had been transmitted by the clerk of the transferring court. In support of her contention, Ms. Bingham pointed to statutory language providing that "[o]n receipt of the files . . . from the transferring court, the clerk of the transferee court shall docket the suit."⁹⁹

A majority of the Texas Supreme Court did not agree with this reasoning: "We cannot agree that the jurisdiction of the court turns on whether, or with what diligence, a clerk performs a ministerial duty to forward court documents."¹⁰⁰ The court found the purpose of the statutory provisions to be to expedite transfers. The rapid forwarding of the transfer order by counsel, and the equally rapid "docketing" of the case by the clerk, in legal terminology¹⁰¹ sufficed to terminate the transferring court's jurisdiction even though the case file remained in Harris County.¹⁰² Thus, "[t]he rule is that the case is docketed when the court to which it is transferred has received a certified copy of the transfer order and asserts jurisdiction, or when all files have been transferred, whichever occurs first."¹⁰³ The court relied on the traditional legal meaning of "docketed"

95. *Bigham*, 901 S.W.2d at 426-27.

96. TEX. FAM. CODE ANN. § 155.001 (Vernon Supp. 1996).

97. *Id.* § 155.005(a).

98. *Id.* § 155.005(b).

99. *Id.* § 155.207(c).

100. *Bigham*, 901 S.W.2d at 430.

101. *Id.*

102. *Id.* at 431.

103. *Id.*

in reaching this holding.¹⁰⁴

In dissent, Justices Gonzalez, Spector and Owen stated that the decision "creates uncertainty in an area that demands certainty, and allows venue shopping in child custody proceedings,"¹⁰⁵ and that it permits "one of the litigants, rather than the court clerk, [to] execute the order transferring venue."¹⁰⁶ There surely is some force to the dissent's arguments. In fact, it is not even certain from the court's decision what event triggered the Fayette County court's jurisdiction: the court clerk "docketing" the case, or the judge issuing a temporary restraining order on the same day. If the latter triggered jurisdiction, which is one fair reading of the opinion,¹⁰⁷ then the court's opinion may have virtually erased the statute's "docketing" language. All in all, it is difficult not to sympathize with the dissenters' concluding observation: "While many of life's rewards go to the swift, a race to the courthouse is not a sensible method of establishing venue in child custody cases."¹⁰⁸ Perhaps the best one can hope from *Bigham* is that, due to its very unusual facts, it is "probably a case that will never arise again."¹⁰⁹

In *Grigsby v. Coker*,¹¹⁰ the Texas Supreme Court addressed another highly unusual conservatorship-related issue. In a case characterized by "intense acrimony,"¹¹¹ the father obtained a "gag order" prohibiting the mother from referring to him as a pedophile or in otherwise derogatory ways while the motion to modify custody was pending. The mother, claiming that she was trying to secure evidence that the father had abused other children in the neighborhood, distributed papers referring to the husband as a child molester and to their child as a victim of sexual abuse. She challenged the gag order as violative of her free speech rights.

The Texas Supreme Court granted mandamus, refusing the husband's invitation to carve out any exception to the general rules for family law cases.¹¹² In general, a judicial gag order is warranted only when some

104. The court noted that "[t]he term 'docketed' in our jurisprudence has the connotation not only of the clerk's formally placing the case on the list of cases pending in the court, but also of notice that the court is ready to act on the matter, to take jurisdiction over it." *Id.*

105. *Bigham*, 901 S.W.2d at 431 (Gonzalez, J., dissenting).

106. *Id.* at 432 (Gonzalez, J., dissenting).

107. The dissenting opinion interprets the majority opinion as ruling that "the Fayette County court had wrested jurisdiction from Harris County by *entertaining a motion for temporary orders*," not simply by the clerk's action in docketing the case. *Id.* at 432 (emphasis added). The majority opinion discusses both the docketing and the court's action on temporary orders, stating that transfer occurs when the transferee court first "asserts jurisdiction." *Id.* at 431. To this reader, at least, the language sounds more active than the mere act of docketing a case. The statute, however, speaks simply of "docketing." See *supra* text accompanying note 98.

108. *Bigham*, 901 S.W.2d at 434 (Gonzalez, J., dissenting).

109. David N. Gray, Comment, 1995-4 STATE BAR SEC. REP. FAM. L. 24.

110. 904 S.W.2d 619 (Tex. 1995).

111. *Id.* at 620.

112. The husband had argued for a broader authority to issue a gag order under the Family Code's general power to issue temporary orders during the pendency of a SAPCR. The court rejected this argument, stating that while the statute does grant trial courts broad

immediate and irreparable harm to the judicial process would deprive the litigants of a fair trial and, even then, only if the gag order is the least restrictive means of preventing harm.¹¹³ The court stated that the gag order issued in this case failed because it was overly broad.¹¹⁴ It prohibited the parties from referring to each other "in a derogatory manner."¹¹⁵ The court noted, tongue firmly in cheek, that "[a]s the parties have little to say about one another that is not derogatory, the order essentially prohibits them from speaking about one another at all."¹¹⁶ *Grigsby* does not stand for the proposition that a gag order of this sort could never issue in a family law case; it simply holds that the order must meet constitutional drafting standards.¹¹⁷

*Yavapai-Apache Tribe v. Mejia*¹¹⁸ deserves mention as an interesting decision in a jurisdictional "turf war" between state and tribal courts under the Indian Child Welfare Act (ICWA).¹¹⁹ Yvette Rita Johnson, a full-blood member of the Yavapai-Apache Tribe, lives in Arizona. Her three sons live in Houston. The father of the oldest child is unknown; Monterey Clayton White, IV claimed to be the father of the two younger children. In two suits (one of which originally was brought by the Harris County Children's Protective Service), White's aunt and uncle sought to be appointed as managing conservators of the children. The tribe was properly notified of the suit¹²⁰ and intervened.

The decision hinged on the preliminary question of jurisdiction. Under the ICWA, federally recognized Indian tribes¹²¹ have exclusive jurisdiction of children on the reservation¹²² and concurrent jurisdiction over children domiciled off the reservation.¹²³ In cases of concurrent jurisdiction, as in the one before the Houston court, the presumption is in favor of the tribal court. More specifically, the statute provides that "in the absence of good cause to the contrary, [a state court] shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent,"¹²⁴ provided that the tribe does not decline jurisdiction.

In one respect, the answer to the jurisdictional question was relatively simple. White, claiming to be the biological father, objected to the transfer. The ICWA's definition of "parent" excludes "the unwed father

statutory powers in family cases, "it does not authorize them to invade constitutional guarantees." *Id.* at 621.

113. *Id.* at 620 (citing *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992)).

114. *Id.*

115. *Grigsby*, 904 S.W.2d at 620-21.

116. *Id.* at 621.

117. *See id.* (noting that the court cannot "invade constitutional guarantees").

118. 906 S.W.2d 152 (Tex. App.—Houston [14th Dist.] 1995, no writ).

119. 25 U.S.C. §§ 1901-1963 (1994). For a recent Texas treatment of the statute, see Paul Shunatona & Tricia Tingle, *Indian Child Welfare Act in Texas—An Overview*, 58 TEX. B.J. 352 (1995).

120. *See* 25 U.S.C. § 1912(a) (1994).

121. *See id.* § 1903(8).

122. *Id.* § 1911(a).

123. *Id.* § 1911(b).

124. *Id.*

where paternity has not been acknowledged or established.”¹²⁵ After the Tribe filed its motion to transfer, White filed a claim for voluntary paternity¹²⁶ and a statement of paternity as to the two younger boys.¹²⁷ The statement of paternity constitutes prima facie evidence of paternity and liability for child support.¹²⁸ The Tribe argued that White’s actions should be ignored because the federal statute is worded in the past tense and White’s statement of paternity was executed after the Tribe’s motion to transfer was filed. This argument received short shrift, with the court noting that a motion to transfer typically is “the opening volley in any custody proceeding involving an Indian child”;¹²⁹ to ignore statements of paternity filed after this date would be to discourage attempts by biological fathers to take responsibility for their children, a result surely not intended by the United States Congress. Alternatively, since White had lived with the younger children since their birth and held himself out as their biological father, there was a statutory presumption of paternity.¹³⁰ So far as the oldest child was concerned, the mother “implicitly” objected to transfer by indicating that she did not want the case involving the oldest child transferred if the case involving the two younger children was not transferred.¹³¹

Because an objection by either parent is enough to warrant a state court in refusing to transfer jurisdiction to a tribal court, the Fourteenth Court of Appeals could have rested its decision on that ground alone. It did not. Instead, in a section of the opinion spanning some eleven pages and nine footnotes,¹³² the court wrote an extended treatise on the history and intent of the ICWA.¹³³ The discussion highlighted the sorts of “good cause” that would justify a state court refusing to transfer jurisdiction to a tribal court,¹³⁴ and noted the difference between the “best interests” test under Texas law and the ICWA.¹³⁵

Boiled down just a bit, the sort of “good cause” that would warrant a state court in declining to transfer a case to a tribal court is not defined by statute.¹³⁶ According to non-binding Bureau of Indian Affairs guidelines, “good cause” could include, inter alia, the hardship that could result for parties and witnesses forced to pursue the case in a tribal court.¹³⁷ Rec-

125. 25 U.S.C. § 1903(9) (1994).

126. See TEX. FAM. CODE ANN. § 160.201 (Vernon Supp. 1996).

127. See *id.* § 160.202.

128. See *id.* § 160.203(a).

129. *Yavapai-Apache Tribe*, 906 S.W.2d at 173.

130. TEX. FAM. CODE ANN. § 151.002(a)(5) (Vernon Supp. 1996).

131. *Yavapai-Apache Tribe*, 906 S.W.2d at 175.

132. See *id.* at 161-71.

133. The opinion contains copious references to all the law review articles one could possibly hope to ever read on the ICWA. On the other hand, the reader may prefer a short and recent survey of the ICWA that comes free with the price of State Bar of Texas membership. See Shunatona & Tingle, *supra* note 119.

134. *Yavapai-Apache Tribe*, 906 S.W.2d at 163-71.

135. *Id.* at 168-71.

136. *Id.* at 163-64.

137. *Id.* at 164 (citing Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979)).

ognizing the difficulty that might be occasioned by moving the Houston proceeding to Camp Verde, Arizona, the Tribal Court offered to come to Houston to determine the matter.¹³⁸ The Fourteenth Court of Appeals rejected this option, citing the hoary case of *Pennoyer v. Neff*¹³⁹ for the proposition that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”¹⁴⁰ Since the Tribal Court would have no jurisdiction outside the reservation’s boundaries, its well-meant offer was useless.

In dicta, the Fourteenth Court of Appeals also opined on the question of whether the trial court abused its discretion in declining to transfer the case to the Tribal Court based on the “best interests” of the children. To a Texas practitioner, the resolution of such an issue might seem a foregone conclusion, considering that the best interests of the child are paramount in any custody determination, both by statute¹⁴¹ and long-standing court practice.¹⁴² Nonetheless, the Fourteenth Court of Appeals stated that it was improper to consider the children’s best interests as dispositive in a ICWA case.¹⁴³ In one respect, the court’s reasoning is unexceptional: as the court put it, “[q]uestions of ‘best interest’ are appropriate to issues of placement, not jurisdiction.”¹⁴⁴

In another respect, however, the court viewed the “best interest” test as a form of cultural bias, since “[w]hen state courts use this test, they obviously consider the factors from their own perspective, that is, an Anglo-American point of view.”¹⁴⁵ The ICWA was passed in part to combat the racial and cultural prejudices that in past years had resulted in a disproportionate number of Indian children being removed from their homes.¹⁴⁶ As the court put it, “Congress sought to ensure the continued viability of Indian tribes by protecting Indian children from cultural genocide.”¹⁴⁷

The stated policy of the ICWA is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and

138. This offer may, so far as the Houston-based author knows, establish some sort of a record. The Fifth Circuit occasionally drops in from New Orleans to sit for a week or two, and the Amarillo Court of Appeals has been known to come to town to help out Houston’s two state courts of appeals with their overloaded dockets. Even Amarillo, however, is not so far away as Arizona is from Houston. See, e.g., *STATE FARM ROAD ATLAS 3-4* (Rand McNally 1994).

139. 95 U.S. 714 (1877). The author, who teaches this case once a year to a group of thoroughly bored Civil Procedure students, is grateful for the Fourteenth Court of Appeal’s attempt to give *Pennoyer* some current relevance.

140. *Id.* at 720.

141. TEX. FAM. CODE ANN. § 153.002 (Vernon Supp. 1996) (stating that “[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child”).

142. See, e.g., *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (setting out some of the factors to be considered by a court in determining a child’s best interests).

143. *Yavapai-Apache Tribe*, 906 S.W.2d at 169-70.

144. *Id.* at 169.

145. *Id.* at 168.

146. See *id.* at 161-62.

147. *Id.* at 162 (citing *Shunatona & Tingle*, *supra* note 119, at 352).

families.”¹⁴⁸ State courts are split as to whether the “best interest” of Indian children is equivalent to the traditional state law “best interest” test. Citing a dissenting opinion from an Oregon Supreme Court justice with approval,¹⁴⁹ the court of appeals joined an apparent minority of jurisdictions¹⁵⁰ in declining to consider the standard “best interest” test as appropriate in transfer determinations. Instead, in the panel’s view, “[u]nder the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family.”¹⁵¹ To view the situation otherwise, the court concluded, would be to “engage in the type of analysis that created the need for the Act in the first place.”¹⁵² Justice Edelman, it should be noted, concurred solely in the result.¹⁵³

Two custody-related contempt cases issued during the most recent Survey period, one from Houston and one from Amarillo, address a very similar issue—whether passive conduct (or what was once, in military parlance, the offence of “dumb insolence”) can be a ground for contempt. In *Ex parte Morgan*,¹⁵⁴ the Amarillo court granted a writ of habeas corpus when a mother was found in contempt because she “did nothing to insist” that the children be ready to leave for a summer visitation with their father.¹⁵⁵ While deciding the case on other grounds, the Amarillo court opined that “passive conduct” of this nature was not punishable by contempt.¹⁵⁶

In *Ex parte Rosser*,¹⁵⁷ the Houston Court of Appeals dealt with a very similar situation. The father was held in contempt for failing to deliver his daughter for summer visitation with the mother. The daughter testified that the father “said that he would drag me into the car and I said that I would go run away to a friend’s if he forced me to go visit” the mother.¹⁵⁸ Citing recent Texas Supreme Court authority,¹⁵⁹ the Houston

148. 25 U.S.C. § 1902 (1994).

149. *Yavapai-Apache Tribe*, 906 S.W.2d at 169 (citing *Quinn v. Walters*, 881 P.2d 795, 810 (Ore. 1994) (Unis, J., dissenting)).

150. By the court’s count, eight jurisdictions (Arizona, California, Indiana, Montana, Nebraska, Oklahoma, Oregon and South Dakota) apparently follow the standard “best interest” test; five jurisdictions (Colorado, Illinois, Minnesota, Missouri and New Mexico) decline to do so. *Id.*

151. *Id.*

152. *Id.* This is one of several places in which the opinion’s language might be considered by some to be poorly chosen, as it could lead to the conclusion that the panel believes Judge Mejia was engaging in “cultural genocide,” rather than just doing her best to apply the appropriate law. *See supra* text accompanying note 147. It is not completely far-fetched to believe that the best interest of a particular Indian child may entail factors other than ensuring the long-term viability of the tribe. In fact, the stated congressional policy seems to treat the “best interest” of the child and the “stability and security of Indian tribes and families” as two different, though surely related, goals. *See supra* text accompanying note 141.

153. *Yavapai-Arapaho Tribe*, 906 S.W.2d at 175.

154. 886 S.W.2d 829 (Tex. App.—Amarillo 1994, orig. proceeding).

155. *Id.* at 831, 832.

156. *Id.* at 832.

157. 899 S.W.2d 382 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding).

158. *Id.* at 384.

159. *Ex parte Chambers*, 898 S.W.2d 257, 261 (Tex. 1995) (orig. proceeding).

court defined the issue as one of "involuntary inability to comply,"¹⁶⁰ that is, that the contempt order was improper only if the relator established conclusively that he could not comply. While granting the writ on other grounds, the Houston court stated that the trial court was free to disbelieve the evidence of father and daughter, as they were interested parties.

The split between Houston and Amarillo courts is quite clear. The Houston court identified three levels of contumacious conduct in visitation matters: "(1) a parent actively discourages or impedes visitation; (2) a parent passively fails to insist that a child comply with visitation; or (3) a parent is legitimately unable to compel a child to comply with visitation."¹⁶¹ To the Houston court, only the third category would qualify as a defense to contempt.¹⁶² The Amarillo court, however, seems inclined to accept the second, passive category of conduct as a defense to contempt, as the Houston court noted with disapproval.¹⁶³ In this writer's opinion, the Houston court probably has the better of the argument. Nonetheless, it is difficult to argue with the Amarillo court's expression of frustration at such counterproductive visitation games, leading to the admonition: "It is imperative that both parents recognize that their personal feelings must be submerged in carrying out their responsibility to obey the law and, by doing so, demonstrate to their children that they should do so as well."¹⁶⁴

III. SUPPORT

During the most recent session, the Texas Legislature raised the stakes for "deadbeat" parents. New Chapter 232, aptly summarized by one set of commentators as "Pay Up, Bubba, or lose the hunting license and park the pick-up,"¹⁶⁵ provides for the suspension of a wide variety of licenses on a showing that the obligor is more than ninety days behind in support payments and has failed to follow a court-ordered repayment schedule.¹⁶⁶ The new legislation extends to licenses issued by more than fifty agencies, including hunting and fishing permits, motor vehicle licenses and a variety of professional licenses¹⁶⁷ (yes, even those licenses issued by the State Bar of Texas¹⁶⁸).

The Texas Legislature, however, may have gone just a little bit too far in its zeal to encourage parents to stay current on support payments through the regulation of licenses. The new section 1.045 of the Family Code requires that the persons applying for a marriage license submit a sworn statement verifying that they are not delinquent in the payment of

160. *Ex parte* Rosser, 899 S.W.2d at 385.

161. *Id.* at 386.

162. *Id.*

163. *Id.* n.8 (noting that "we differ" with Amarillo "as to the second alternative").

164. *Ex parte* Morgan, 886 S.W.2d at 831.

165. Sampson & Baldwin, *supra* note 1, at 952.

166. TEX. FAM. CODE ANN. § 232.003 (Vernon Supp. 1996).

167. *Id.* § 232.001.

168. *Id.* § 232.002(42).

court-ordered child support.¹⁶⁹ Failure to submit this affidavit disqualifies one from receiving a marriage license;¹⁷⁰ a false statement in an affidavit constitutes a felony.¹⁷¹

The Legislature's motives in enacting Section 1.045 seem obvious: There may well be a state interest in preventing a person from starting a new family when that person cannot support current children from the old marriage. On the other hand, however, the new Texas statute is very similar to a Wisconsin statute invalidated in 1978 by the United States Supreme Court in *Zablocki v. Redhail*.¹⁷² In *Zablocki*, the Supreme Court noted that "the right to marry is of fundamental importance" and that the statute "significantly interfere[d] with the exercise of that right."¹⁷³ The Supreme Court observed further that Wisconsin's interest in keeping children off the public dole was not furthered by the statute: The statute "merely prevent[ed] the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children."¹⁷⁴ Moreover, the statute would at best only stop deadbeat parents from incurring additional support obligations. It was thus "grossly underinclusive" in not "limit[ing] in any way new financial commitments by the applicant other than those arising out of the marriage."¹⁷⁵

The Texas statute, of course, does not stand on precisely the same footing as the Wisconsin statute invalidated in *Zablocki*. Perhaps most significant,¹⁷⁶ Wisconsin is one of the majority of American jurisdictions that do not recognize the doctrine of common law (or, in Texas, "informal") marriages.¹⁷⁷ Thus, while the United States Supreme Court in *Zablocki* could state that applicants who could not meet the licensing requirement "are absolutely prevented from getting married,"¹⁷⁸ a person prohibited from obtaining a marriage license under the new Texas statute would not be so prevented: He or she could simply take up housekeeping and establish a valid informal marriage.¹⁷⁹ This distinction does not, however, necessarily favor the Texas statute, since it would weaken the rationality of the relationship between the statute's language and its goal. Moreover, the Legislature's failure to treat formal and informal marriages

169. TEX. FAM. CODE ANN. § 1.045 (Vernon 1993 & Supp. 1996).

170. *Id.* § 1.07(a)(1).

171. *Id.* § 1.045(d).

172. 434 U.S. 374 (1978).

173. *Id.* at 383.

174. *Id.* at 389.

175. *Id.* at 390.

176. Another distinction, probably less important than that discussed in the text, is that the Wisconsin statute required proof that the child or children for whom support was not paid were "not then and [were] not likely thereafter to become public charges." *Id.* at 402. While the Texas statute has no such specific proof requirement, the state interest in enforcing valid support obligations nonetheless seems significant.

177. See WIS. STAT. ANN. § 765.16 (West 1993 & Supp. 1995).

178. *Zablocki*, 434 U.S. at 387.

179. See TEX. FAM. CODE ANN. § 1.91 (Vernon 1993 & Supp. 1995).

equally might well give rise to an equal protection¹⁸⁰ or free exercise¹⁸¹ challenge.

In a curious but more clearly constitutional counterpoint to its restriction on remarriage of deadbeat parents, the Texas Legislature specifically prohibited a court from conditioning access to a child on the payment of support.¹⁸² Conversely, a court cannot condition the payment of support on whether the managing conservator is cooperating with the possessory conservator's attempts to exercise rights of possession or access to the child.¹⁸³

Another enactment of the 1995 Legislature also is worth mentioning for its possible constitutional infirmities. Before the most recent session, the question of whether agreements regarding custody or child support incorporated into a judgment could be enforced as a contract or as a judgment caused occasional problems. A 1995 amendment makes it clear that the legislature intends such contracts to be enforceable only as judgments,¹⁸⁴ and that this change in available remedies applies even to contracts drafted before the amendment's effective date.¹⁸⁵ This attempt to "erase" contract remedies, however, is at least contrary to the spirit of the United States Constitution's prohibition on the impairment of contracts.¹⁸⁶ The Legislature compounded this potential problem by failing to make a corresponding change to the support statutes,¹⁸⁷ creating an internal contradiction in the Family Code.¹⁸⁸

Another, more minor, change includes a specific statutory provision for

180. A United States District Court in Texas, for example, recently invalidated a portion of the pre-1995 Texas informal marriage statute on the ground that it unlawfully discriminated between formal and informal marriage partners. *See White v. State Farm Mut. Life Ins. Co.*, 907 F. Supp. 1012 (E.D. Tex. 1995) (holding that Section 1.91's former requirement that a suit to prove the existence of an informal marriage must be brought within one year of the time the relationship ended violates the Equal Protection Clause of the United States Constitution).

181. A minister, rabbi or other religious official who conducts a marriage ceremony for a couple who does not have a valid marriage license arguably commits a criminal violation. *See, e.g., TEX. FAM. CODE ANN.* §§ 1.81-.83 (Vernon 1993 & Supp. 1995). Thus, a statute that places an undue burden on an applicant for a license, but places no equivalent burden on one who seeks to enter into an informal marriage, may be denying fundamental religious rights—the right to celebrate the sacrament of marriage—while not effectively furthering any state purpose.

182. *TEX. FAM. CODE ANN.* § 153.001(b) (Vernon Supp. 1996).

183. *Id.* § 154.011.

184. *Id.* § 153.007(c).

185. Act of June 16, 1995, 74th Leg., R.S., ch. 751, §§ 26, 129 1995 Tex. Gen. Laws 3888, 3933 (stating that the law "applies to a pending suit affecting the parent-child relationship without regard to whether the suit was commenced before, on, or after the effective date of this Act").

186. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *accord* SAMPSON & TINDALL'S, *supra* note 73, § 153.007 cmt. (stating that "[t]he founding fathers took a dim view of retroactive impairment of contracts").

187. *See TEX. FAM. CODE ANN.* § 154.124(c) (Vernon Supp. 1996) (stating that the terms of an agreed support order "are not enforceable as contract terms unless provided by the agreement").

188. *Accord* SAMPSON ET AL., *supra* note 73, § 154.124 cmt. (referring to the problem as "an irreconcilable conflict").

voluntary wage withholding for the payment of child support¹⁸⁹ as well as the modification of such withholding to reflect the agreements of the parties.¹⁹⁰

In *Thompson v. Davis*,¹⁹¹ the Texas Supreme Court corrected a trial court's attempt to extend sanctions for support-related problems to the question of conservatorship. The father had previously been judged in contempt for failing to pay attorney's fees rising from the mother's successful attempt to increase support payments. When the father later tried to secure a modification of custody, the court prohibited him from conducting any discovery regarding events occurring before the date he purged himself of contempt. As a matter of general law, sanctions assessed in litigation must be "just," that is, the sanction "must be directed against the abuse and toward remedying the prejudice caused the innocent party."¹⁹² Since the problem for which the husband had been sanctioned arose in the context of the support dispute, the court reasoned, "[i]t was excessive to extend this sanction to matters regarding custody, which was not at issue in the prior proceeding."¹⁹³

The Texas Supreme Court has dealt with at least two issues of contempt procedure during the Survey period. One case, *Ex parte McKenzie*,¹⁹⁴ deserves mention only as an example of the massive waste of time (including Texas Supreme Court time) that can be occasioned by inattention to detail in drafting. Blake McKenzie had been sued for failure to pay child support by his wife, his child's ad litem and the Attorney General's office. The Attorney General's office secured a contempt order which wrongly named the ad litem as movant, despite the fact that the ad litem's motions had previously been dismissed. The Texas Supreme Court ordered McKenzie released on bond while considering his habeas corpus petition, then dismissed the action as moot when the trial court belatedly vacated its order.

Gerald Anderson was ordered to jail for child support arrearages on the basis of a "fill in the blank" contempt order. He sought habeas corpus relief from the El Paso Court of Appeals,¹⁹⁵ which granted the writ on the ground that the commitment order did not adequately explain how Anderson could purge himself of contempt.¹⁹⁶ The court, however, went to some lengths to emphasize that, since the defect was solely technical, "[t]he trial court need not . . . conduct another trial, hearing, or any further proceedings whatsoever before entering a contempt order,"¹⁹⁷ provided that the order was sufficiently specific.

189. TEX. FAM. CODE ANN. § 158.011 (Vernon Supp. 1996).

190. *Id.* § 158.403.

191. 901 S.W.2d 939 (Tex. 1995).

192. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

193. *Thompson*, 901 S.W.2d at 940.

194. 909 S.W.2d 502 (Tex. 1995).

195. *Ex parte Anderson*, 893 S.W.2d 195 (Tex. App.—El Paso 1995, orig. proceeding).

196. The court found that the order did not properly specify the amount of arrearages or the person to whom the arrearages should be paid. *Id.* at 196.

197. *Id.* at 197 n.4.

In June 1994, in *Ex parte Delcourt*,¹⁹⁸ the Texas Supreme Court had ruled that a second contempt order, issued without an additional hearing, violates due process rights¹⁹⁹ if not issued "sufficiently close to the time the judge pronounced the contempt."²⁰⁰ Anderson petitioned the Texas Supreme Court on this ground, pointing to a four-month delay between the original and the second contempt order.²⁰¹ The Texas Supreme Court agreed and granted the writ, emphasizing the fact that the second contempt order issued almost two months after the court of appeals decision.²⁰²

While a four-month delay between the two contempt orders may seem like a long time, much of that time was taken up with the filing and decision on the original habeas action.²⁰³ To this observer, at least, there does not seem to have been much slack time in the process. Nor did the Texas Supreme Court offer any guidance as to how long a delay is reasonable. As a practical matter, then, *Anderson* and *Delcourt* may make it necessary to hold a new fact hearing after a contempt order is voided on even the most technical grounds.

In *Hammond v. Hammond*,²⁰⁴ a panel of the Fort Worth Court of Appeals split on a basic question of proof in a child support modification proceeding. Jeff and Rhonda Hammond divorced in 1987, with an agreed decree covering child support. In 1993, Jeff moved to modify. The trial court granted his motion, reducing child support for his two minor children from \$400 per month to \$202.58. Jeff presented evidence that he suffered a herniated disk in 1992 which greatly reduced his ability to work. Net resources at the time of the modification hearing were about \$800 per month, so the trial court reduced payments in accordance with the child support guidelines.²⁰⁵ Jeff did not, however, testify as to his resources at the time of the 1987 divorce, other than to say that he had a "high paying job."²⁰⁶

Under the Family Code, modification of child support requires a showing that the circumstances of the child or parent have "materially and substantially changed since the date of the order's rendition."²⁰⁷ The majority of the Fort Worth court applied the typical "double-snapshot" test, that is, comparing the father's circumstances at the time of divorce with the circumstances at the time of the modification hearing. Without credible evidence of the amount Hammond was making at the time of divorce, his evidence of subsequent financial reverses could not "be placed in

198. 888 S.W.2d 811 (Tex. 1994).

199. See U.S. CONST. amends. V, XIV.

200. *Ex parte Delcourt*, 888 S.W.2d at 812.

201. *Ex parte Anderson*, 900 S.W.2d 333 (Tex. 1995, orig. proceeding).

202. *Id.* at 335.

203. The original contempt order was entered November 10, 1994. *Ex parte Anderson*, 893 S.W.2d at 196. The court of appeals issued its opinion January 26, 1995. *Id.* at 195.

204. 898 S.W.2d 406 (Tex. App.—Fort Worth 1995, no writ).

205. See TEX. FAM. CODE ANN. § 154.124 (Vernon Supp. 1996).

206. *Hammond*, 898 S.W.2d at 408.

207. TEX. FAM. CODE ANN. § 156.401(a) (Vernon Supp. 1996).

proper context."²⁰⁸

In a dissent that runs about triple the length of the majority opinion, Justice Lattimore criticized the court for adopting "a strict standard that is unreasonable and contrary to common sense."²⁰⁹ In his view, the statutory requirement of a material change in circumstances "since the date" of the earlier order²¹⁰ does not logically require proof of resources *on the date* of the earlier order. Lattimore viewed the statute as preventing a litigant from dredging up issues that existed before the earlier order, but stated that the statute's language "provides the reader little guidance on the quality, quantity, or character of evidence that is allowed or mandated to prove the requisite change in circumstances since that time."²¹¹

In the absence of any direct statutory guidance, Justice Lattimore turned to the Code Construction Act²¹² for guidance. When a word is not defined in a statute, that word should be "construed according to the rules of grammar and common usage."²¹³ In addition, courts should assume that the legislature intended a just and reasonable result.²¹⁴ The dictionary defines "since" as "after a time in the past,"²¹⁵ and Jeff Hammond did show a change in circumstances after the time of the order. Moreover, in applying child support standards to Hammond's undisputed income level, the majority's reasoning left Hammond committed to spending more than half his net resources on child support, a result the Legislature hardly could have intended, and one that "subjects [the] parent to almost certain contempt proceedings."²¹⁶ Justice Lattimore concluded by discussing several opinions from other courts of appeal which, in his view, show signs of moving to "a more common sense approach that considers all the circumstances underlying a trial court's decision to modify."²¹⁷

Ultimately, the proof problem at issue in *Hammond* should not be dispositive in many cases. Careful presentation of evidence, combined with an income tax return from the year of the divorce or most recent modification, should avoid the evidentiary difficulty. Moreover, had the *Hammond* divorce taken place after the Texas child support guidelines took effect, and had the agreement been in accord with those guidelines,²¹⁸ the *Hammond* majority would have accepted a "reasoning backward" approach, deriving the obligor's net resources at the time of the divorce

208. *Hammond*, 898 S.W.2d at 408.

209. *Id.* at 410 (Lattimore, J., dissenting).

210. TEX. FAM. CODE ANN. § 156.401(a) (Vernon Supp. 1996).

211. *Hammond*, 898 S.W.2d at 412 (Lattimore, J., dissenting).

212. TEX. GOV'T CODE ANN. §§ 311.001-.032 (Vernon 1988).

213. *Id.* § 311.011(a).

214. *Id.* § 311.021(3).

215. See, e.g., WEBSTER'S THIRD NEW INT'L DICTIONARY 2122 (1981) (cited in *Hammond*, 898 S.W.2d at 412 n.5 (Lattimore, J., dissenting)).

216. *Hammond*, 898 S.W.2d at 412 n.5 (Lattimore, J., dissenting).

217. *Id.* at 413.

218. An agreement is not required to be in accord with the child support guidelines. TEX. FAM. CODE ANN. § 154.124 (Vernon Supp. 1996).

from the amount of the support payments ordered.²¹⁹ Nonetheless, under the circumstances of *Hammond*, the court's approach seems to give the trial court far less latitude in fact-finding than normal.

IV. TERMINATION AND ADOPTION

The 1995 legislative session made no major changes in the law of termination and adoption. One amendment clarifies the fact that involuntary termination of parental rights must be proved under the "clear and convincing" evidentiary standard;²²⁰ another adds a new ground for termination when a parent whose children have been removed from the home fails to demonstrate any continuing interest in the child.²²¹ In the area of adoption, the 1995 amendments strengthened public policy—the race of prospective adoptive parents should not to be a factor in court proceedings²²²—by extending the policy to state agencies and licensed child-placing agencies.²²³ A 1995 amendment also harmonizes state law with the federally-required preference for in-tribe adoptions,²²⁴ setting this out as an exception to Texas policy.²²⁵

Most termination of parental rights issued during this Survey period reflect the same dreary litany of neglect and abuse that trial courts face on a daily basis, but offer little legal "meat" worth noting. In the "no great surprise" category, first place goes to the Austin Court of Appeal's ruling that the father's conviction for serious bodily injury to a child (read that as "death"), even though the child was not his own, still was more relevant than prejudicial in termination proceedings.²²⁶ Second place goes to the Fort Worth Court of Appeals for an opinion terminating the parental rights of a man who admitted repeated sexual abuse of his eight-year-old daughter,²²⁷ but who objected to any sexual offender treatment that involved use of plethysmography.²²⁸ A strong honorable mention goes to the Tyler Court of Appeals, which held that termination was justified²²⁹ when officers checking on the welfare of children whose mother had threatened to kill them in the past, and who had left the children in the company of a convicted child sexual abuser, found the two-year-old child "asleep on the floor lying face down in a bowl of spaghetti," supervised only by a four-year-old.²³⁰

219. *Hammond*, 898 S.W.2d at 408 n.1.

220. TEX. FAM. CODE ANN. §§ 161.001, 161.206(a) (Vernon Supp. 1996).

221. *Id.* § 161.001(1)(N).

222. *Id.* § 162.015(a).

223. *Id.* § 162.308.

224. See 25 U.S.C. 1915(a) (1994).

225. TEX. FAM. CODE ANN. § 162.015(b) (Vernon Supp. 1996).

226. *Trevino v. Texas Dep't of Protective & Regulatory Servs.*, 893 S.W.2d 243, 251-52 (Tex. App.—Austin 1995, no writ).

227. *In the Interest of W.S.*, 899 S.W.2d 772, 774 (Tex. App.—Fort Worth 1995, no writ).

228. *Id.* The mother's rights were also terminated, in part because she observed at least one act of sexual abuse, yet took no action to protect the child. *Id.* at 774-75.

229. *In the Interest of J.F.*, 888 S.W.2d 140 (Tex. App.—Tyler 1994, no writ).

230. *Id.* at 142.

The decisions are not completely without legal interest. The Tyler decision, for example, reiterates the position of other courts that, while termination proceedings do involve fundamental rights, criminal "effective assistance of counsel" standards do not apply.²³¹ The Fort Worth decision is worth noting for the court's commendable candor in publicly retreating from its own prior position—now in the minority of Texas courts²³²—that the Family Code's provision for termination of rights on a showing that "conditions or surroundings" endangered the child's well-being²³³ referred only to physical living conditions.²³⁴ In the future, the Fort Worth court will join other courts in "look[ing] at the evidence regarding the physical environment as well as the environment produced by the conduct of [the parents]."²³⁵

*Dupree v. Texas Department of Protective & Regulatory Services*²³⁶ serves as a useful reminder of the fact that the sort of parental conduct that could justify termination can occur even before birth. The child, a "crack baby," was removed from parental care immediately on release from the hospital, and parental rights were terminated shortly thereafter. The mother admitted cocaine use through the pregnancy, including the day she gave birth, and she was incarcerated for parole violation when the termination trial took place. She had a prior stillborn child due to syphilis, dropped out of a program of treatment for syphilis before her second pregnancy, and did not secure regular prenatal care. The father knew about these problems and did nothing. In addition, he used cocaine himself, failed to attend parenting classes or pay child support, showed up for only four of ten scheduled visitations with the child, and admitted that the child would grow up in the company of drug users. The court recognized that it could consider conduct both before and after the child's birth and concluded that there was more than sufficient evidence to justify termination.²³⁷

The most interesting termination case in this year's rather thin crop may well have been *In the Interest of R.D.S.*,²³⁸ a decision from the Amarillo Court of Appeals. A teenage mother executed an affidavit of relinquishment of parental rights²³⁹ one day after birth,²⁴⁰ an unrelated couple were named temporary conservators of the child, with a view to-

231. *Id.* at 143.

232. *See, e.g.,* *D.O. v. Texas Dep't of Human Serv.*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ); *Smith v. Sims*, 801 S.W.2d 247, 251 (Tex. App.—Houston [14th Dist.] 1990, no writ).

233. TEX. FAM. CODE ANN. § 161.001(1)(D) (Vernon Supp. 1996).

234. *See* *Stuart v. Tarrant County Child Welfare Unit*, 677 S.W.2d 273, 280 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

235. *In the Interest of W.S.*, 899 S.W.2d at 776.

236. 907 S.W.2d 81 (Tex. App.—Dallas 1995, no writ).

237. *Id.* at 87; *see, e.g.,* *Clark v. Clark*, 705 S.W.2d 218, 219 (Tex. App.—Dallas 1985, writ dism'd).

238. 902 S.W.2d 714 (Tex. App.—Amarillo 1995, no writ).

239. *See* TEX. FAM. CODE ANN. § 161.103 (Vernon Supp. 1996).

240. A 1995 amendment to the statute provides that such affidavits can no longer be secured until after a 48-hour post-birth "cooling off" period. *See id.* § 161.103(a)(1).

ward adoption. The affidavit provided, as permitted by law, that the decision was revocable only for the first sixty days,²⁴¹ though the mother claimed she was told she had only three days to change her mind.

In any event, before the sixty-day period had passed, the mother informed the conservators that she intended to block the proposed adoption. She then initiated an on-again, off-again proceeding to recover the child, but maintained very little contact with the child. When the matter came to trial, the principal question was whether the mother's action in signing the affidavit, even if later repudiated, was evidence that she "voluntarily left the child alone or in the possession of another not the parent and *expressed an intent not to return*."²⁴² The Fort Worth Court of Appeals, relying on a 1966 Texas Supreme Court opinion,²⁴³ held in 1992 that it "could not possibly find that [a birth mother's] actions, which were in accordance with her earlier decision to give [the child] up for adoption, constitute evidence [to support termination] under the abandonment statute of the Family Code."²⁴⁴

The Dallas court in *R.D.S.*, however, disagreed. The 1966 decision, it felt, dealt with different statutory language. The current Family Code does not use the word "abandonment," with all its connotations of indifference to the child's welfare; instead, it just describes a set of objective facts. The court continued: "The legislature having so clearly spoken we are chary, unlike the *Swinney* court [Fort Worth], to supplement the statute with elements judicially created and applicable to a repealed law."²⁴⁵ Revocation of the relinquishment does not eliminate the fact that the affidavit was once signed. As the Dallas court put it, "the fact that the parent *had* that intent is frozen, and rescinding the document simply evinces a changed mind."²⁴⁶ Accordingly, because the trial court felt that the bulk of the evidence—including the affidavit—supported the statutory ground for termination, the Dallas court affirmed.²⁴⁷

Finally, the Fort Worth Court of Appeals also dealt with a procedural question worth noting in *In the Interest of Baby Girl T.*²⁴⁸ An Indiana mother signed a set of papers relinquishing parental rights, clearing the road for a Texas adoption. An Indiana attorney and notary public acknowledged the mother's signature. Some weeks after the termination proceeding, in which the Gladney Center was named as managing conservator, the Indiana woman filed a motion for new trial, arguing that the attorney's acknowledgement was invalid because he had a financial inter-

241. *See id.* § 161.103(d).

242. *Id.* § 161.001(1)(A) (emphasis added).

243. *See Hendricks v. Curry*, 401 S.W.2d 796, 800 (Tex. 1966).

244. *Swinney v. Mosher*, 830 S.W.2d 187, 192 (Tex. App.—Fort Worth 1992, writ denied).

245. *In the Interest of R.D.S.*, 902 S.W.2d at 720-21.

246. *Id.* at 721.

247. *Id.*

248. 904 S.W.2d 206 (Tex. App.—Fort Worth 1995, no writ).

est in the suit.²⁴⁹ The Fort Worth court rejected the argument on evidentiary grounds.²⁵⁰ While the precise extent of the Indiana attorney's involvement was difficult to judge on the record, he apparently did nothing more beyond "acknowledging the documents supporting termination and serving as the guardian of T."²⁵¹ Moreover, there was no evidence that the attorney was retained to assist in the Texas adoption. No matter what the Fort Worth court's holding, though, it surely remains good policy for an attorney to secure a notary public who is not an attorney involved in the case, no matter how tangential that involvement may be.

249. See *Terrell v. Chambers*, 630 S.W.2d 800, 802 (Tex. App.—Tyler) (holding that affidavit of relinquishment is invalid when acknowledged by an attorney with a strong financial interest in the proceeding), *writ ref'd n.r.e. per curiam*, 639 S.W.2d 451 (Tex. 1982) (expressing doubts as to the reasoning).

250. *In the Interest of Baby Girl T.*, 904 S.W.2d at 208.

251. *Id.*

