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# FAMILY LAW: PARENT AND CHILD

by  
Ellen K. Solender\*

## I. UNITED STATES SUPREME COURT DECISIONS

**B**URNHAM *v. Superior Court*<sup>1</sup> is a case that will cause much concern to proceduralists since it can be interpreted as either the signaling of a trend away from the “minimum contacts” analysis of *International Shoe v. Washington*,<sup>2</sup> or a simple decision about transient jurisdiction limited to the facts of *Burnham*.<sup>3</sup> The case concerned a husband and wife who had had a marital domicile in New Jersey. The husband remained in New Jersey and agreed that the wife could have custody of the children and move with them to California. The couple had agreed to obtain a divorce based on irreconcilable differences, but because the husband did not live up to the agreement, the wife brought suit for divorce in California. Shortly thereafter the husband visited Southern California on business and then went to Northern California to visit his children. He took the older child for the weekend to San Francisco.

As the father was returning the child, he was served with a California court summons and a copy of his wife’s divorce petition. He returned to New Jersey, but later made a special appearance in the California Superior Court in order to quash the service of process on the basis that the court lacked personal jurisdiction. The court denied the motion and the California Court of Appeal denied mandamus relief.<sup>4</sup> Although the United States Supreme Court unanimously affirmed the judgment, there was considerable disagreement among the Justices as to the basis for the decision.<sup>5</sup>

The husband claimed that California’s exercise of jurisdiction denied him due process because he lacked the requisite minimum contacts with the state and had merely been physically present in the state at the time of service. Justice Scalia wrote that a state could obtain jurisdiction over a physically present defendant even if the defendant’s presence was not related to the

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1. 110 S. Ct. 2105 (1990).

2. 326 U.S. 310 (1945).

3. *Burnham*, 110 S. Ct. at 2126 (Stevens, J., concurring).

4. *Id.* at 2109.

5. *Id.* at 2107-09.

cause of action.<sup>6</sup> He stated that his decision was based on "American tradition".<sup>7</sup> Justice Brennan concurred in the judgment, but argued that all rules of jurisdiction "must satisfy contemporary notions of due process."<sup>8</sup>

The *Burnham* decision is troubling because it arises in the family law context and Justice Scalia appears to denigrate the importance of contacts between parent and child.<sup>9</sup> In addition, he cites to *Kulko v. Superior Court of California*,<sup>10</sup> but does not seem to take seriously the concern expressed in that decision for reasonable visitation agreements.<sup>11</sup>

In *Baltimore City Department of Social Services v. Bouknight*<sup>12</sup> the Court held that a parent who refused to produce a child who had been adjudicated in need of assistance, could not invoke the fifth amendment<sup>13</sup> to protect herself from charges of contempt.<sup>14</sup> The Court reasoned that under these circumstances the child was in his parent's custody subject to the state's regulatory interests, and as such, the child was subject to inspection.<sup>15</sup> The Court did indicate that the fact that the child was subject to inspection and therefore must be produced might also limit the extent to which the state could use the testimonial fact of production in a criminal proceeding.<sup>16</sup>

The Court also rendered two decisions in connection with statutes requiring that parents be notified before a minor could legally undergo an abortion.<sup>17</sup> In each case, the Court upheld the constitutionality of the statutes.<sup>18</sup> Of interest to family law practitioners is the long discussion in *Hodgson* of the problems faced by single parent families.<sup>19</sup> If all the members of the Court continue to read and consider materials concerning the realities of family life in the United States today, one may hope that they will see the folly inherent in basing their family law decisions on historical tradition.<sup>20</sup>

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6. *Id.* at 2111.

7. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2110 (1990).

8. *Id.* at 2120.

9. *Id.* at 2118. In Justice Scalia's concurring opinion, he boldly states that fairness is lacking in Justice Brennan's due process and personal jurisdiction analysis. *Id.* Justice Scalia's sarcastic comment concerning the implications of being subject to personal jurisdiction while physically present in a state reflects his disapproval of Justice Brennan's analysis. Justice Scalia asked "What if, for example, Mr. Burnham were visiting a sick child? Or a dying child?" *Id.*

10. 436 U.S. 84, 93 (1978).

11. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2118 (1990).

12. 110 S. Ct. 900 (1990).

13. U.S. CONST. amend. V.

14. *Baltimore*, 110 S. Ct. at 908.

15. 110 S. Ct. at 907.

16. *Id.* at 908-09.

17. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2948-49 (1990); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2983-84 (1990).

18. *Hodgson*, 110 S. Ct. at 2948-49; *Akron*, 110 S. Ct. at 2983-84.

19. 110 S. Ct. at 2938-44, 2950. The court notes that the two-parent notification requirement for a minor's abortion is particularly burdensome and emotionally disturbing when the minor child has not maintained a close relationship with the absent parent. *Id.* at 2945, 2950.

20. See *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2343-45 (1989).

## II. STATUS

The Fifth Circuit Court of Appeals, in *Fee v. Herndon*,<sup>21</sup> a case involving allegedly excessive corporal punishment, continued to follow its holding in *Cunningham v. Beavers*<sup>22</sup> that no deprivation of substantive due process occurred when there was an adequate state and criminal law remedy.<sup>23</sup> Thus the court sustained the dismissal of the plaintiff's cause of action even though in this particular case the corporally punished student was a special education student who thereafter required six months of hospitalization in a psychiatric ward.<sup>24</sup> The Fifth Circuit held further that under Texas law, a teacher has no legal duty to intervene in corporal punishment administered by a fellow educator.<sup>25</sup> The court then stated that since there was a failure to state a federal claim, the residual tort claim against the school principal was properly remanded to state court.<sup>26</sup>

In *Brooks v. East Chambers Consolidated Independent School District*<sup>27</sup> the court permanently enjoined a urinalysis program for drugs in grades six through twelve as a condition for students' participation in extracurricular activities.<sup>28</sup> The court held that such a program was a search,<sup>29</sup> and relying on an earlier Fifth Circuit decision<sup>30</sup> in which dogs performed drug searches by sniffing students, held that the search must be objectively reasonable.<sup>31</sup> The court then held the program unconstitutional, finding no justification for the intrusion on the personal privacy of the school children.<sup>32</sup>

In *McNary v. Kahn*<sup>33</sup> the court reversed a probate court's summary judgment decision<sup>34</sup> and held that unresolved questions of fact concerning the paternity of decedent's putative child existed.<sup>35</sup> Relying on the 1987 amendments to the probate code, the court held that there might be clear and convincing evidence that the child in question was entitled to be treated as a child of the decedent for purposes of inheritance.<sup>36</sup>

In *In re George*<sup>37</sup> the Tyler appellate court held that a paternity action

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21. 900 F.2d 804, 811 (5th Cir. 1990).

22. 858 F.2d 269, 273 (5th Cir. 1988), cert. denied, 109 S. Ct. 1343 (1989).

23. *Fee*, 900 F.2d at 808.

24. *Id.* at 809-10. The court pointed out that the fact that causes of action brought under 42 U.S.C. § 1983 entitled prevailing parties to receive attorneys' fees was irrelevant to the question of adequate state relief. *Id.* at 809.

25. *Id.* at 811.

26. *Fee v. Herndon*, 900 F.2d 804, 811 (5th Cir. 1990).

27. 730 F. Supp. 759 (S.D. Tex. 1989).

28. *Id.* at 766.

29. *Id.* at 763; see also *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390-91 (1989) (drug screening by urinalysis is an infringement on reasonable privacy expectations and thus a search under fourth amendment).

30. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 479 (5th Cir. 1982).

31. *Brooks v. East Chamber Consol. Indep. School Dist.*, 730 F. Supp. 759, 764 (S.D. Tex. 1989).

32. *Id.* at 766.

33. 792 S.W.2d 126 (Tex. App.—Dallas 1990, no writ).

34. *Id.* at 128.

35. *Id.* at 127.

36. TEX. PROB. CODE ANN. § 42(b)(1) (Vernon Supp. 1991).

37. 794 S.W.2d 875 (Tex. App.—Tyler 1990, no writ).

could not be brought under Chapter 13 of the Texas Family Code after the alleged father's death.<sup>38</sup> The court expressly declined to follow a decision of the San Antonio court of appeals<sup>39</sup> and held that the Probate Code controlled intestate succession and provided sufficient remedies for possible illegitimate heirs.<sup>40</sup> In *Dickson v. Simpson*<sup>41</sup> the Austin court of appeals denied an adult illegitimate child the opportunity to contest the will of her alleged father because she had not established paternity before the running of the general four year statute of limitations.<sup>42</sup> The alleged father had died in 1985 and the court reasoned that the legislature, when providing new remedies for illegitimate children, also intended to permit adults to enjoy a similar remedy of legitimation by court order.<sup>43</sup> The legislature, while providing a specific statute of limitations for children, did not provide a specific statute of limitations for adults.

The court held that for adults the legislature's intent was that the four year general statute of limitations apply, which in this case commenced in 1979, the time of the legislative enactment.<sup>44</sup> The court dismissed equal protection claims despite the fact that children who have claims for paternal inheritance are treated differently from children with claims for maternal inheritance.<sup>45</sup> Based upon the 1987 amendment to the probate code section at issue and, if the court's reasoning in *Dickson* holds, known adult illegitimate children have a relatively short time remaining to assert their rights.<sup>46</sup>

In *Ortega v. First Republic Bank Fort Worth*<sup>47</sup> the Supreme Court of Texas held that the 1963 decision in *Martin v. Neel*<sup>48</sup> was dispositive of the rights of the adopted children to take as contingent remaindermen of a trust.<sup>49</sup> The *Martin* court had interpreted the words "including any other great-grandchildren who may be born after my death" to exclude adopted children.<sup>50</sup> Accordingly, the *Ortega* court held that the summary judgment against the adopted children was correct based on *res judicata*.<sup>51</sup>

In *Villalpando v. De La Garza*<sup>52</sup> a defective special appearance by the alleged father, a resident of Utah, gave the court personal jurisdiction<sup>53</sup> and enabled the court to hold on the basis of the evidence presented by the

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38. *Id.* at 879.

39. *Manuel v. Spector*, 712 S.W.2d 219, 222-23 (Tex. App.—San Antonio 1986, no writ) (paternity suit and blood testing under the Texas Family Code involve only the mother, alleged father, and child).

40. *In re George* at 878.

41. 781 S.W.2d 723, 727-28 (Tex. App.—Austin 1989, writ granted).

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

43. *Dickson*, 781 S.W.2d at 725.

44. *Id.*

45. *Id.* at 726-27.

46. *See supra* note 42.

47. 792 S.W.2d 452, 459 (Tex. 1990).

48. 379 S.W.2d 422, 429 (Tex. Civ. App.—Fort Worth 1964, writ ref'd).

49. *Ortega*, 792 S.W.2d at 454-55.

50. *Martin*, 379 S.W.2d at 424.

51. *Ortega*, 792 S.W.2d at 456.

52. 793 S.W.2d 274 (Tex. App.—Corpus Christi 1990, no writ).

53. *Id.* at 275-76.

mother that he was in fact the father of the twin girls at issue.<sup>54</sup> The father had refused to cooperate in blood testing. The finding of paternity permitted the court to order the father to pay child support and attorneys fees.<sup>55</sup>

In *Page v. Page*<sup>56</sup> the appellate court held that the trial court erred when it granted the petitioner's request for a nonsuit and dismissed the entire lawsuit despite the respondent's claims for affirmative relief.<sup>57</sup> The petitioner filed a petition for divorce on the basis of an alleged common law marriage and for child support. The respondent denied both allegations. Four years after the filing of the petition, the case went to trial. The court granted a nonsuit and dismissed the respondents claims for attorneys' fees and costs, and for reimbursement of child support payments. The appellate court reversed the trial court's judgment and remanded for trial on the respondent's claims.<sup>58</sup> The respondent had also asked the appellate court to find that there was no common law marriage or paternity, but since these issues had never been considered by the trial court, the appellate court held such findings were beyond its power.<sup>59</sup>

In *Goheen v. Koester*<sup>60</sup> the issue concerned the retroactivity of child support for an illegitimate child. The unwed father filed a suit for voluntary legitimation and possessory conservatorship. The mother then counter-claimed for termination of the unwed father's rights and adoption by her husband. The trial court established the father's paternity and granted him visitation rights.<sup>61</sup> The court ordered the father to pay child support back to the date of the filing of the petition and to pay of future support, as well as all the mother's attorneys' fees, and both sides appealed.<sup>62</sup> The father claimed that since he had obtained everything he wanted, (the mother had requested support from the child's birthdate) he was the successful party and should not have to pay the mother's attorneys fees. The court held that the trial court did not abuse its discretion in awarding attorneys' fees since it was difficult in a case that resulted in child support orders to determine just who was the successful party.<sup>63</sup>

The more difficult question was the date at which child support should start. The court held that it would follow the reasoning of *Adams v. Stotts*<sup>64</sup> that if a party was a parent at the time of judgment, that party was also a parent at the time of birth.<sup>65</sup> The court did not consider the changes made by the legislature to have overturned its prior holding.<sup>66</sup> The dissent dis-

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54. *Id.*

55. *Id.* at 278.

56. 780 S.W.2d 1 (Tex. App.—Fort Worth 1989, no writ).

57. *Id.* at 2-3.

58. *Id.* at 3.

59. *Id.*

60. 794 S.W.2d 830 (Tex. App.—Dallas 1990, no writ).

61. *Id.* at 831.

62. *Id.* at 832.

63. *Id.* at 836.

64. 667 S.W.2d 798, 800 (Tex. App.—Dallas 1983, no writ).

65. *Goheen*, 794 S.W.2d at 834.

66. See TEX. FAM. CODE ANN. § 13.42(a) (Vernon Supp. 1991).

agreed with the majority, finding that the legislature made the change to limit a father's liability in order to encourage fathers to voluntarily legitimize their children.<sup>67</sup>

One Texas court ordered a mother to stop using her new husband's name and to use the father's name when referring to their child's surname. The appellate court held that the trial court was correct in its order since a father had a protectible interest in having a child bear his surname.<sup>68</sup> The court further stated that the father had no burden to show harm; he merely had to prove that the mother was not using his surname.<sup>69</sup> The test under the Texas Family Code when requesting a name change for a minor is the best interest of the child, and the burden would be on the mother if she decided to follow this route.<sup>70</sup>

### III. CONSERVATORSHIP

In *Davis v. Davis*<sup>71</sup> the Dallas court of appeals held that a visitation schedule that markedly exceeded the Dallas County visitation guidelines was not a de facto grant of managing conservatorship to the possessory conservator in contravention of a jury verdict.<sup>72</sup> The court noted that the managing conservator had rights and powers that were not granted to the possessory conservator.<sup>73</sup> The mother, however, did offer a unique argument. She claimed that during much of the time accorded her, the child was either asleep or at day-care, and thus she did not have quality time with the child. Although she asserted that she had only three hours each weekday of available time, her attorney later conceded that there was no known case law using this distinction to determine visitation.<sup>74</sup> The court also distinguished this case, an original conservatorship determination, from all the cases cited by the mother which were modification cases.<sup>75</sup> The dissenting opinion complained that the right to a trial by jury had been undermined.<sup>76</sup>

The court in *O. G. v. Baum*<sup>77</sup> denied mandamus in a case involving the possibility of a blood transfusion for a child of sixteen who was a Jehovah's Witness. The court held that state and federal law were unsettled on the issue of a 16-year-old's constitutional and common law rights to refuse a blood transfusion.<sup>78</sup> The court held further that because the blood transfusion would be given only if absolutely necessary, the trial court had not

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67. 794 S.W.2d at 838.

68. *In re Griffiths*, 780 S.W.2d 899, 900 (Tex. App.—Amarillo 1989, no writ).

69. *Id.*

70. TEX. FAM. CODE ANN. § 32.04 (Vernon Supp. 1991).

71. 794 S.W.2d 930 (Tex. App.—Dallas 1990, no writ).

72. *Id.* at 935-36.

73. TEX. FAM. CODE ANN. § 14.02 (Vernon Supp. 1991).

74. *Davis*, 794 S.W.2d at 934.

75. *Id.* at 936.

76. *Id.* at 937. In *Rossen v. Rossen*, 792 S.W.2d 277, 278-79 (Tex. App.—Houston [1st Dist.] 1990, no writ), the court affirmed a jury's verdict granting managing conservatorship to the father.

77. 790 S.W.2d 839 (Tex. App.—Houston [1st Dist.] 1990, no writ).

78. *Id.* at 841-42.

abused its discretion.<sup>79</sup>

A divided Texas Supreme Court in *Lewelling v. Lewelling*<sup>80</sup> endeavored to establish guidelines for following the amended statute that provided for a strong parental preference in a conservatorship contest with a nonparent.<sup>81</sup> The court held that a nonparent, in order to prevail, would have to offer evidence of specific acts or omissions by the parent that would result in physical or emotional harm to the child.<sup>82</sup> The court also held that it would be contrary to the public policy of Texas to deny custody to a parent because that parent was a victim of spousal abuse.<sup>83</sup> The court reversed and remanded the case to the trial court for hearings on child support and visitation.<sup>84</sup> Justice Cook's concurrence pointed out that the legislature amended the statute to establish a bright line test for the parental presumption.<sup>85</sup>

Justice Gonzalez dissented, contending that the best interest of the child should still be the only test.<sup>86</sup> Justice Hecht, joined by Justice Spears, wrote a separate dissenting opinion agreeing with the reasoning of the court's opinion, but disagreeing with the judgment appointing the mother as managing conservator.<sup>87</sup> Both dissenting justices assumed, as did the majority, that the child had been living with its paternal grandparents for the last two years and a sudden change in households might not be in the child's best interest.<sup>88</sup>

In *Petru v. Bass*<sup>89</sup> the Houston court of appeals held that a temporary restraining order was not a prior court order under the Family Code.<sup>90</sup> The court granted a writ of habeas corpus to a father so that he could take possession of his child from its maternal grandparents although the child had been living with them for two years.<sup>91</sup>

In *Weimer v. Weimer*<sup>92</sup> a father lost a petition for a change in custody in a default judgment. The appellate court held that the trial court did not abuse its discretion by striking his pleadings as an abuse of discovery sanction and rendering judgment against him.<sup>93</sup> The court found that the mother was not a bad parent and that the father had not met the burden of proving that a change in custody would be in the children's best interest.<sup>94</sup> In another case where the father sought to become managing conservator based on allegations of sexual abuse, the court reversed and remanded for a new trial be-

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79. *Id.* at 842.

80. 796 S.W.2d 164, 167 (Tex. 1990).

81. TEX. FAM. CODE ANN. § 14.01(b) (Vernon Supp. 1991).

82. *Lewelling*, 796 S.W.2d at 167.

83. *Id.*

84. *Id.* at 168-69.

85. *Id.* at 169.

86. *Lewelling v. Lewelling*, 796 S.W.2d 164, 170, 173 (Tex. 1990).

87. *Id.* at 174-75.

88. *Id.*

89. 788 S.W.2d 945, 947 (Tex. App.—Houston [14th Dist.] 1990, no writ).

90. *Id.* at 947; TEX. FAM. CODE ANN. §§ 14.10(a),(e) (Vernon Supp. 1991).

91. *Petru*, 788 S.W.2d at 947.

92. 788 S.W.2d 647 (Tex. App.—Corpus Christi 1990, no writ).

93. *Id.* at 649-50.

94. *Id.* at 650.



cause of the admission of improper evidence.<sup>95</sup> The court held that questions asked of the child on the videotape shown to the jury were impermissibly leading,<sup>96</sup> that the experts' testimony as to their opinion that the child was truthful was inadmissible,<sup>97</sup> and that certain hearsay testimony of statements made by the child were also inadmissible.<sup>98</sup>

In *In Interest of A.B.B.*<sup>99</sup> the Texas Department of Human Services (TDHS) lost custody of A.B.B. and the trial court ordered the child returned to its mother.<sup>100</sup> The TDHS petitioned for a review of its placement of the child with its maternal grandparents in accordance with the Family Code.<sup>101</sup> TDHS had been granted temporary custody of the child following the child's second hospitalization for injuries he received in his home. TDHS placed the child with his maternal grandparents as foster parents and requested that its conservatorship appointment be terminated and that the maternal grandparents be made permanent managing conservators. After a hearing, the trial court ordered that the temporary conservatorship be terminated and that the child be returned to his mother.<sup>102</sup> When TDHS appealed this decision, the appellate court held that it had jurisdiction to hear this type of appeal.<sup>103</sup> The court also found that because the parents were not indigent, TDHS was not liable for the guardian ad litem fee even though it had initiated the suit.<sup>104</sup> The court then reviewed the evidence and held that while the evidence was conflicting, the trial court should be accorded discretion in determining the best interest of the child.<sup>105</sup> Thus, the court determined that there had been no abuse of discretion and that the child should be returned to his mother.<sup>106</sup>

In *Skidmore v. Glenn*<sup>107</sup> the court held that a father could not withdraw his consent to a visitation agreement after the trial court had orally rendered judgment.<sup>108</sup> The judgment was rendered on June 30, 1988 and signed on January 18, 1989, in response to a motion by the mother to enter an order. The father filed a response to that motion in which he attempted to revoke his agreement. The court denied this revocation.

In *Wittie v. Skees*<sup>109</sup> the Houston appellate court held that the father who timely requested a jury trial in his suit for a modification of custody would

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95. *Ochs v. Martinez*, 789 S.W.2d 949, 959-60 (Tex. App.—San Antonio 1990, writ denied).

96. *Id.* at 956.

97. *Id.* at 956-58.

98. *Id.* at 959.

99. 785 S.W.2d 828, 830 (Tex. App.—Amarillo 1990, no writ).

100. *Id.*

101. TEX. FAM. CODE ANN. § 18.01 (Vernon Supp. 1991).

102. *In re A.B.B.*, 785 S.W.2d at 830.

103. *Id.* at 831.

104. *Id.*

105. *Id.*

106. *In re A.B.B.*, 785 S.W.2d 828, 834 (Tex. App.—Amarillo 1990, no writ). It may be that this was the right decision, but medical witnesses testified that it was statistically "unlikely, but possible" that the injuries sustained by the child were the result of an accident. *Id.*

107. 781 S.W.2d 672 (Tex. App.—Dallas 1989, no writ).

108. *Id.* at 675.

109. 786 S.W.2d 464 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

be accorded his day in court since the trial court's denial of his request was reversed and remanded.<sup>110</sup> The court held that the father made the request within a reasonable time and that in this case, where less than six weeks had elapsed between the filing and the trial, the delay necessary for assembling a jury would not unduly burden the trial court.<sup>111</sup>

*In re Cassey D.*<sup>112</sup> concerned a profoundly handicapped five-year-old child and the right of visitation by her mother and an adult good friend. Because of all her medical problems, Galveston County Protective Services (GCPS) was named the child's temporary managing conservator. The mother and the adult friend lived in the Galveston area and while Cassey was hospitalized there, the adult friend came to know her and became her friend. When the court ordered that Cassey be placed in a health care facility in Dallas, it became difficult for the mother, as well as the friend, to visit during the limited and rigidly enforced visiting hours. The mother and the friend moved for entry of an order granting them reasonable visitation and access to the child.

The trial court, while denying the friend standing to be named a possessory conservator, also found that doing so would not be in the child's best interest.<sup>113</sup> The trial court also refused to grant the mother specific visitation, but instead made visitation rights subject to the discretion of the Managing Conservator (GCPS).<sup>114</sup> The appellate court declined to consider the standing issue and held that it was not an abuse of discretion to find that appointing the friend as possessory conservator was not in the child's best interest.<sup>115</sup>

The appellate court held that a parent had a right to visitation and that such right should not be denied except in the extreme case of an unfit parent.<sup>116</sup> This was not the case here, and the court held that an institution's visitation policies should not have a controlling effect over the requirements of the Family Code.<sup>117</sup> The court then, in order to expedite the resolution of the matter, ordered a mediation proceeding to determine the parties' rights of access.<sup>118</sup>

In *Fair v. Davis*<sup>119</sup> the court of appeals affirmed the trial court's modification of the father's visitation schedule.<sup>120</sup> The court held that it was not necessary to prove a positive improvement in connection with the change and that the mother had met the burden of proving change of circumstances as well as the children's best interest.<sup>121</sup> The court noted that the paternal

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110. *Id.* at 465-66.

111. *Id.* at 466.

112. 783 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1989, no writ).

113. *Id.* at 594.

114. *Id.*

115. *Id.* at 595-96.

116. *In re Cassey D.*, 783 S.W.2d 592, 596 (Tex. App.—Houston [1st Dist.] 1989, no writ).

117. *Id.* at 597.

118. *Id.* at 598.

119. 787 S.W.2d 422 (Tex. App.—Dallas 1990, no writ).

120. *Id.* at 431.

121. *Id.* at 428-29.

grandparents in the original order had been granted the right to exercise periods of visitation in lieu of the father as well as visitation periods of their own, and since the father might be leaving the state, it would be the grandparents' visitation that would be reduced.<sup>122</sup> The court, however, held that there was evidence to support the jury's finding and approved the reduction.<sup>123</sup>

In *Tope v. Kaminski*<sup>124</sup> the grandparents won access in the trial court, but the appellate court reversed and rendered.<sup>125</sup> The wife filed a divorce petition in 1983. The grandparents intervened and the court granted them access. In 1987, however, the parties, having reconciled, nonsuited the divorce. The grandparents then filed an original petition seeking access or managing conservatorship, asserting that one or more of the children had been abused.

The case went to trial and at its end the judge denied the grandparents managing conservatorship because he was not convinced that the children had been abused and stated he would conduct a hearing concerning the entry of judgment.<sup>126</sup> After considerable delay, the judge found that the grandparents had standing and granted them access.<sup>127</sup> The appellate court reversed, reasoning that in order for grandparents to have court ordered access to children of an ongoing marriage, there had to be a finding of abuse by the parents in addition to the best interest of the children test.<sup>128</sup>

The problem of who has jurisdiction over decisions concerning the custody of children in an interstate context has not been solved. The federal courts, even under the Parental Kidnapping Prevention Act (PKPA),<sup>129</sup> do not have jurisdiction to decide these issues.<sup>130</sup> In addition to the PKPA, the states have each enacted some version of the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>131</sup> The Texas Family Code provides that if the managing conservator and the children have lived in another state for six months, the Texas court may not exercise its continuing jurisdiction unless there has been a written agreement.<sup>132</sup>

In *Huffstutlar v. Koons*<sup>133</sup> this section was dispositive and the court granted the mother, an Oklahoma resident, a writ of mandamus compelling

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122. *Id.* at 430.

123. *Id.*

124. 793 S.W.2d 315 (Tex. App.—El Paso 1990, writ granted).

125. *Id.* at 317.

126. *Id.* at 316.

127. *Id.*

128. *Id.* at 316-17. In further support of its holding, the court pointed out that the Topes, as parents of their children, were fighting to retain control. *Id.* at 317.

129. 28 U.S.C.A. § 1738A (West Supp. 1990).

130. In *Thompson v. Thompson*, 484 U.S. 174, 178-79 (1988), the Court held that when Congress enacted the PKPA no new federal cause of action was created. *Id.* In *Thompson v. Sundholm*, 726 F. Supp. 147, 149 (S.D. Tex. 1989), the court held that in accordance with the Supreme Court's ruling, it did not have jurisdiction over a custody dispute.

131. See TEX. FAM. CODE ANN. §§ 11.51-75 (Vernon 1986). Each state may have a slightly different version of the Act, so if a dispute cannot be settled based on the Texas statute, for example, it is then necessary to look at the other state's statute.

132. TEX. FAM. CODE ANN. § 11.53(d) (Vernon 1986).

133. 789 S.W.2d 707 (Tex. App.—Dallas 1990, no writ).

the trial judge to grant her request for a writ of habeas corpus so that she might retrieve her child.<sup>134</sup> The appellate court held that the trial court lacked subject matter jurisdiction because the motion to modify had been filed after the child and the managing conservator had established a new home state.<sup>135</sup> In *Hemingway v. Robertson*<sup>136</sup> the court denied a writ of mandamus in a case involving visitation, child support, and attorneys' fees.<sup>137</sup> The court agreed that Indiana, the new home state, had jurisdiction over custody disputes, but then went on to hold that visitation was not the same as custody, and therefore the Texas court could continue to retain jurisdiction over questions of access.<sup>138</sup> The court did point out, however, that it might be better for one court to decide questions of custody and access and that the Texas court could defer to the Indiana court.<sup>139</sup> With regard to payment of support and attorneys' fees, these issues required personal jurisdiction and the Texas court retained jurisdiction over them.<sup>140</sup>

In *Viggiano v. Emerson*<sup>141</sup> the appellate court denied a petition for a writ of mandamus because the court had not yet determined which state had jurisdiction.<sup>142</sup> Accordingly, the court held that the trial court could issue an injunction prohibiting the removal of the children from certain Texas counties.<sup>143</sup>

Attorneys' fees in connection with custody and visitation can give rise to disputes. In *Miericke v. Lemoine*<sup>144</sup> the Dallas court of appeals held, over a dissenting opinion, that it could hear an appeal concerning attorneys' fees in connection with writ of habeas corpus that was not appealable.<sup>145</sup> In *Ex Parte Shields*<sup>146</sup> the appellate court held a wife in contempt for disobeying a

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134. *Id.* at 708.

135. *Id.* at 714. In *Caplan v. Daggett*, 784 S.W.2d 146, 147 (Tex. App.—Houston [14th Dist.] 1990, no writ), the court used the same reasoning to grant a mother living in California a writ of mandamus directing the district judge to vacate a judgment that modified a child custody order.

136. 778 S.W.2d 199 (Tex. App.—Houston [1st Dist.] 1989, no writ).

137. *Id.* at 201-02.

138. *Id.*

139. *Id.* The concept that visitation is not the same as custody is an interesting one since a custody determination includes decisions and instructions as to visitation as well as custody. See TEX. FAM. CODE ANN. § 11.52(2)(Vernon 1986). The courts appear to be relying on *Heartfield v. Heartfield*, 749 F.2d 1138, 1143 (5th Cir. 1985), a federal case that has since been overruled on nonsubstantive grounds by the United States Supreme Court. See *supra* note 130. It might be better in these interstate cases if the courts included the PKPA in their reasoning since the PKPA is controlling in many cases. See *supra* note 129.

An annotation in 78 A.L.R.4th 1028, 1032-42 (1990) purports to clarify issues in connection with conflicts between the PKPA and the UCCJA, but because it relies on various decisions from different states, the annotation fails to be a definitive source.

140. *Hemingway v. Robertson*, 778 S.W.2d 199, 203 (Tex. App.—Houston [1st Dist.] 1989, no writ). In *Henry v. Rivera*, 783 S.W.2d 766 (Tex. App.—San Antonio 1990, no writ), the court raised similar questions in connection with a dispute between Texas and Utah. *Id.* at 767-69. Utah had declined to exercise jurisdiction over visitation and support matters, but that was not held to be the same as declining jurisdiction over custody. *Id.* at 769.

141. 794 S.W.2d 564 (Tex. App.—Amarillo 1990, no writ).

142. *Id.* at 566-67.

143. *Id.* at 567.

144. 786 S.W.2d 810 (Tex. App.—Dallas 1990, no writ).

145. *Id.* at 811.

146. 779 S.W.2d 99 (Tex. App.—Houston [1st Dist.] 1989, no writ).

custody order as well as for not paying attorneys' fees.<sup>147</sup> The court correctly held such action was not imprisonment for debt, since enforcement of the contempt provisions would be suspended on payment of the fees.<sup>148</sup> In *Sullivan v. Deguerin, Dickson & Szekely*<sup>149</sup> the Houston appellate court held that the issue of attorneys' fees was severable from the issue of modification of visitation.<sup>150</sup> The attorneys' fees had not been appealed, and even though the court reversed visitation modification, such reversal did not affect the judgment as to attorneys' fees.<sup>151</sup>

#### IV. SUPPORT

In *LaPrade v. LaPrade*<sup>152</sup> the trial court included in its calculation of the obligor's net resources the depreciation amounts shown on the trucking company's income tax statements owned by the obligor.<sup>153</sup> The appellate court affirmed, pointing out that the trial court had broad discretion in determining the amount of child support and could assign a reasonable monetary value of income to assets that were not currently providing income.<sup>154</sup> In *Chamberlain v. Chamberlain*<sup>155</sup> a trial court failed to grant a request for findings with respect to the child support order as mandated by the Family Code.<sup>156</sup> The appellate court held that this was error and ordered the trial court to do so.<sup>157</sup> The legislature might be wise to require courts to make these written findings as a matter of routine without the need for a request from one of the parties.

Orders of a trial court cannot be set aside after such court has lost subject matter jurisdiction.<sup>158</sup> The proper remedy is by bill of review or a collateral attack at the time of attempted enforcement.<sup>159</sup>

In *Koether v. Morgan*<sup>160</sup> the appellate court held that in a situation where there were four children born of the marriage, but only one lived in the county of the court of original jurisdiction, while the other three lived in another county, the court of original jurisdiction was required to transfer jurisdiction to the court in the county where the other three children lived

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147. *Id.* at 100.

148. *Id.* at 101.

149. 786 S.W.2d 59 (Tex. App.—Houston [1st Dist] 1990, no writ).

150. *Id.* at 61.

151. *Id.*

152. 784 S.W.2d 490 (Tex. App.—Fort Worth 1990, writ denied).

153. *Id.* at 491.

154. *Id.* at 493. The court also pointed out that the managing conservator was virtually unemployable and that the obligor had a large amount of available accounts receivable which he was apparently not attempting to collect. *Id.*

155. 788 S.W.2d 455, 455 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

156. TEX. FAM. CODE ANN. § 14.057 (Vernon Supp. 1991).

157. *Chamberlain*, 788 S.W.2d at 455.

158. See *Davis v. Boone*, 786 S.W.2d 85, 87 (Tex. App.—San Antonio 1990, no writ).

159. *Id.* at 87. This case involved a clarification order based on an original divorce decree that had specified that the obligor's employer withhold child support, but did not specifically require the obligor herself to pay. The decree was later clarified to order the obligor to personally pay the support, but the obligor was not personally served nor did she appear at the clarification hearing. *Id.*

160. 787 S.W.2d 582 (Tex. App.—Waco 1990, no writ).

upon receiving a proper transfer motion.<sup>161</sup> The court held mandamus would lie since this was a mandatory ministerial duty based on legislative intent.<sup>162</sup> Transfers from one court to another cannot not be effected sua sponte, but only upon a motion of one of the parties.<sup>163</sup>

In *Escue v. Reed*<sup>164</sup> the court reversed and remanded, holding it was an abuse of discretion, when modifying the amount of support, to follow the child support guidelines for one child since the trial court knew that the obligor had to pay support for two children.<sup>165</sup> A trial court's failure to submit an instruction on net resources to the jury was harmless error because the charge was framed in terms of findings as to the best interest of the children along with a material and substantial change in circumstances.<sup>166</sup> Absent any change in circumstances, there can be no reduction in support.<sup>167</sup> Additionally, economic hardships from a remarriage can not be used as a basis for reducing support to children of a prior marriage.<sup>168</sup> The *Penick* court did state, however, that it would be proper to take into consideration the reduction in value of the obligor's non-income producing property because it might be necessary for the obligor to sell the property to meet his support obligations.<sup>169</sup> Accordingly, the court reversed and remanded the judgment.

In *Valencia v. Valencia*<sup>170</sup> the mother had been made managing conservator in the original decree and had been granted all right, title, and interest in the house that had been owned by the parties. The court found the husband had some \$15,000 in equity in the house, and this amount was to be repaid to him at \$100 a month to fulfill his child support obligation.<sup>171</sup> When the court modified the decree to grant managing conservatorship to the father, the court found that he was still owed \$13,100 for his equity in his former wife's homestead.<sup>172</sup>

Accordingly, the trial court imposed a lien on the homestead for that amount.<sup>173</sup> The appellate court held that the trial court's order was a nullity, since the mother had been granted clear title to the homestead.<sup>174</sup> The court did state, however, that while no lien could be imposed, there was nothing to prevent the court from ordering the mother to pay child

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161. *Id.* at 585.

162. *Id.*

163. See *Johnson v. Pettigrew*, 786 S.W.2d 45, 47-48 (Tex. App.—Dallas 1990, no writ).

164. 790 S.W.2d 717 (Tex. App.—El Paso 1990, no writ).

165. *Id.* at 720-21. The court did not hold it an abuse of discretion to not deduct from the obligor's net resources the monthly payments he was making to the IRS because he had in the past intentionally underpaid his tax obligations. *Id.*

166. See *Fair v. Davis*, 787 S.W.2d 422, 427 (Tex. App.—Dallas 1990, no writ); see *supra* note 119 and accompanying text for a discussion of the conservatorship aspects of this case.

167. *Penick v. Penick*, 780 S.W.2d 407 (Tex. App.—Texarkana 1990, writ denied).

168. 780 S.W.2d at 409.

169. *Id.* at 410.

170. 792 S.W.2d 565 (Tex. App.—El Paso 1990, no writ).

171. *Id.* at 566.

172. *Id.*

173. *Id.* at 566-67.

174. *Id.* at 567.

support.<sup>175</sup>

In *Lambourn v. Lambourn*<sup>176</sup> the ex-wife filed a motion for clarification and enforcement of an original divorce decree. The agreement incident to the divorce had contained provisions for life insurance for the benefit of the couple's minor child until the child reached age twenty-two. The decree failed to state how the proof of insurance was to be provided, so the trial court ordered both parties to provide proof of insurance annually and granted the ex-wife attorneys' fees.<sup>177</sup> The appellate court stated that a decree providing for support of a non-disabled child past eighteen was unenforceable, and therefore reversed and rendered the judgment of the trial court.<sup>178</sup>

A strong dissenting opinion noted that the decree did not enforce the order, but merely set an annual date for proof of insurance.<sup>179</sup> The dissent, relying on *Garcia v. Fleming*,<sup>180</sup> argued that an order for support past age eighteen was enforceable until the child reached the age of eighteen, and thereafter it was only voidable.<sup>181</sup>

In *Cisneros v. Cisneros*<sup>182</sup> the former wife sued for enforcement of arrearages in child support based on the ex-husband's failure to pay the automatic increases as they came due. Although the ex-husband defended his position on the basis that automatic increases were unenforceable, the cases he cited were based on court ordered increases and not on agreements as was the present case. Accordingly, the court affirmed the trial court's judgment and further held that while the judgment might not comply with the statute, the ex-husband's attorney had approved the judgment both as to substance and form, and therefore he had waived any error.<sup>183</sup>

In *Niles v. Rotherwell*<sup>184</sup> the appellate court credited the obligor with the full amount of support he had paid directly to the obligee even though the original order required him to make his payments through the district clerk.<sup>185</sup> The obligee appealed and the appellate court affirmed the trial court, holding that the trial court had the power to do what was in the best interest of the child and what was fair and equitable.<sup>186</sup> The court held that there was evidence that the direct payments were intended as child support, and thus by accepting those payments, the obligee waived her right to insist upon their payment through the registry of the court.<sup>187</sup> In another arrearage case, the trial court gave the obligor credit for the amount he paid to

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175. *Valencia v. Valencia*, 792 S.W.2d 565, 567 (Tex. App.—El Paso 1990, no writ).

176. 787 S.W.2d 431 (Tex. App.—Houston [14th Dist.] 1990, no writ).

177. *Id.* at 432.

178. *Id.* at 435.

179. *Id.* at 433.

180. 323 S.W.2d 152, 157 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

181. *Lambourn*, 787 S.W.2d at 435.

182. 787 S.W.2d 550 (Tex. App.—El Paso 1990, no writ).

183. *Id.* at 551-52.

184. 793 S.W.2d 77 (Tex. App.—Eastland 1990, no writ).

185. *Id.* at 79.

186. *Id.*

187. *Id.*

support one of two children after that child came to live with him.<sup>188</sup> The appellate court affirmed and also held that the agreement could not be enforced on a contractual basis since the agreement did not so provide.<sup>189</sup>

In *Litchfield v. Litchfield*<sup>190</sup> the appellate court reversed a denial of a motion for new trial in connection with a default judgment against a child support obligor.<sup>191</sup> The court held that the attorney's failure to appear was neither intentional nor a result of conscious indifference.<sup>192</sup> The dissent argued that the trial court did not have to accept the attorney's explanation.<sup>193</sup>

In *Harrell v. Hobbs*<sup>194</sup> the appellate court held that at the time of the judgment, the trial court did not have the power to order wage withholding for child support arrearages after the child had turned eighteen.<sup>195</sup> The court, however, did affirm the judgment for arrearages on the presumption that they had accrued within ten years of the filing of the motion to enforce.<sup>196</sup> In another request for wage withholding, the trial court reduced the amount of required child support and ordered wage withholding, but refused to include any amount for payment of arrearages in the withholding order.<sup>197</sup> The appellate court affirmed the trial court despite the Attorney General's contention that in suits brought by the Attorney General's office, the withholding for arrearages was mandatory. The appellate court disagreed with the Attorney General's argument, stating that current support payments were ordered withheld and that a judgment for arrearages had been granted.<sup>198</sup>

In *Rovner v. Rovner*<sup>199</sup> the trial court refused to hold the ex-husband in contempt for failure to pay adequate child support because the wording of the underlying judgment was too vague.<sup>200</sup> At the hearing, the trial court found that there were some definite amounts required by the order and that the total payable was less than the amount the ex-husband had paid.<sup>201</sup> The ex-wife appealed claiming that the trial court should have entered a judgment for arrearages. The appellate court disagreed, and held that amounts represented by the words "all medical, hospitalization and health care costs . . . not covered by insurance" and "all tuition, books, room and board related to the attendance at . . . Woodward Academy" were not sufficiently

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188. *Rinehold v. Rinehold*, 790 S.W.2d 404 (Tex. App.—Houston [14th Dist.] 1990, no writ).

189. *Id.* at 406.

190. 794 S.W.2d 105 (Tex. App.—Houston [1st Dist.] 1990, no writ).

191. *Id.* at 107-08.

192. *Id.* at 107.

193. *Id.* at 108-10.

194. 791 S.W.2d 310 (Tex. App.—Tyler 1990, no writ).

195. *Id.* at 312.

196. *Id.* at 313.

197. *See Texas ex rel. Nelson v. Nelson*, 783 S.W.2d 635 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

198. *Id.* at 638.

199. 778 S.W.2d 905 (Tex. App.—Dallas 1989, writ denied).

200. *Id.* at 906-07.

201. *Id.* at 907.



clear to be enforced by a judgment.<sup>202</sup>

The Texas Supreme Court held that in order to enforce child support orders by contempt, the contempt order must be specific,<sup>203</sup> it must specify the time, date, and place of each failure to pay.<sup>204</sup> In addition, the obligee must have the resources to pay,<sup>205</sup> and the contempt order must be clear as to whether it is civil or criminal and must specify the method by which it can be purged.<sup>206</sup> There can, of course, be no contempt order after the court has orally suspended the order upon which it is based.<sup>207</sup>

In *Ex parte Linder*<sup>208</sup> the Dallas court of appeals in a fragmented en banc decision denied the writ of habeas corpus, although the order on which it was based required the obligor to pay child support of \$250 a month in two monthly installments of \$112.50 each.<sup>209</sup> Relying on this order, the court held that the obligor should have paid at least \$112.50 twice a month, and he had paid nothing.<sup>210</sup> Additionally, the court did not find the contempt judgment void although it did not affirmatively state that there was a proper waiver of counsel.<sup>211</sup>

Habeas corpus will be denied when the obligor voluntarily appears at the contempt hearing, so that the trial court has jurisdiction despite a lack of ten days notice.<sup>212</sup> An order of commitment for violation of probation does not have to be as specific as an original contempt order<sup>213</sup> and contempt orders do not relieve an obligor of the continuing obligation to pay child support.<sup>214</sup>

In *Boetscher v. State*<sup>215</sup> a Michigan resident was indicted for the offense of criminal nonsupport and was extradited to Texas. He had never been in Texas prior to his extradition. He filed for a writ of habeas corpus which the

202. *Id.*

203. *Ex parte Garcia*, 795 S.W.2d 740, 741 (Tex. 1990).

204. *Ex parte Holland*, 790 S.W.2d 568, 568 (Tex. 1990) (enforcement orders must contain specific findings of time, date, and place of noncompliance); *Ex parte Duncan*, 795 S.W.2d 10, 10 (Tex. App.—El Paso 1990, no writ) (order invalid where time, date, and place of noncompliance not set out); *Ex parte Haynie*, 793 S.W.2d 317, 320 (Tex. App.—Houston [14th Dist.] 1990, no writ) (enforcement orders must contain specific time, date, and place of occurrence for which contempt is sought); *Ex parte Greene*, 788 S.W.2d 724, 725 (Tex. App.—Houston [14th Dist.] 1990, no writ) (contempt order void on due process grounds absent statutory requirement of specific time, date, and place of each instance of noncompliance); *Ex parte Johnson*, 778 S.W.2d 168, 169 (Tex. App.—Houston [1st Dist.] 1989, no writ) (commitment order void on its face which does not set out with particularity any dates of noncompliance with court order).

205. *Ex parte Mabry* 792 S.W.2d 588, 589 (Tex. App.—Houston [1st Dist.] 1990, no writ).

206. *Ex parte Mitchell*, 783 S.W.2d 703, 706 (Tex. App.—El Paso 1989, no writ).

207. *Ex parte Cole*, 778 S.W.2d 599, 600-01 (Tex. App.—Houston [14th Dist.] 1989, no writ).

208. 783 S.W.2d 754 (Tex. App.—Dallas 1990, no writ).

209. *Id.* at 756-57.

210. *Id.*

211. *Id.* at 759.

212. *Ex parte Waldrep*, 783 S.W.2d 332, 334 (Tex. App.—Houston [14th Dist.] 1990, no writ).

213. *Ex parte Cuellar*, 791 S.W.2d 324, 325 (Tex. App.—Houston [14th Dist.] 1990, no writ).

214. *Ex parte Malone*, 788 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1990, no writ).

215. 782 S.W.2d 954, 960 (Tex. App.—Amarillo 1990, pet. granted).

court denied.<sup>216</sup> The Court of Criminal Appeals has not yet ruled on *State v. Paiz*<sup>217</sup> which is a similar case that was also decided by an Amarillo court.

After reading most of the above cases, it should be clear that the courts are being harassed by obligors, mostly fathers, who are trying to use every loophole, real or imagined, to avoid paying their rightful child support obligation. On the other hand, it appears that there are also obligees, mostly mothers, who are trying to use the letter of the law, real or imagined, to obtain payments of support that have already been paid or are far in excess of that which is owed.

## V. TERMINATION AND ADOPTION

The Attorney General has ruled that state employees who adopt a child under three years of age are entitled to the same amount of sick leave that would be necessary to recover from pregnancy and childbirth.<sup>218</sup> The language is gender neutral so the leave can be used by either or both adoptive parents.

In *Works v. Arlington Memorial Hospital*<sup>219</sup> the adoptive parents lost a negligence suit in behalf of their adopted child against a hospital because there was no proximate cause. The court held that summary judgment for the hospital was proper when all the evidence showed that the hospital had discharged the baby with its natural mother.<sup>220</sup> After the discharge had been completed, the mother turned the baby over to an attorney's representative who then placed the baby with a couple who later abused it. The court held that the hospital could not have foreseen the danger to the baby.<sup>221</sup>

In *In re McAda*<sup>222</sup> the Amarillo appellate court held that the statutory scheme for privately placing a child for adoption was not unconstitutional.<sup>223</sup> The mother had signed an affidavit of relinquishment that was irrevocable for sixty days and during that time a court decree terminated her parent-child relationship. The court noted that constitutional rights may be waived if the waiver is voluntary and knowing as it was in this case.<sup>224</sup> The court dismissed the mother's other contentions as being misplaced since they related to the adoption process.<sup>225</sup> The court reasoned that after the parent-child relationship has been terminated, the natural mother is not a proper party in the adoption action.<sup>226</sup>

In *Broyles v. Ashworth*<sup>227</sup> the Fort Worth appellate court granted manda-

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216. *Id.* at 955.

217. 777 S.W.2d 575 (Tex. App.—Amarillo 1989, pet. granted).

218. Op. Tex. Att'y Gen. No. JM-1203 (1990).

219. 782 S.W.2d 309 (Tex. App.—Dallas 1989, writ denied).

220. *Id.* at 314.

221. *Id.*

222. 780 S.W.2d 307 (Tex. App.—Amarillo 1989, writ denied).

223. *Id.* at 311.

224. *Id.* at 310.

225. *Id.* at 311-12.

226. *Id.* at 312.

227. 782 S.W.2d 31 (Tex. App.—Fort Worth 1989, no writ).

mus in a case arising from a California natural mother's attempt to effect the return of her child after a parent-child relationship termination proceeding.<sup>228</sup> The mother asked for a new trial, which the trial court granted, and then for a writ of habeas corpus, which the court also granted.<sup>229</sup> The trial court granted the permanent managing conservatorship to the potential adoptive parents after the original parent-child relationship proceeding.<sup>230</sup> When the trial court granted a new trial, however, their status changed to temporary managing conservators.<sup>231</sup> At this point, the natural mother claimed she was a sending agency under the Interstate Compact for the Placement of Children<sup>232</sup> and had an absolute right to possession of the child.<sup>233</sup> The trial court agreed, but the appellate court pointed out that because there was no showing of California law, it was presumed that California law was the same as Texas law.<sup>234</sup> The court held therefore that the natural mother could not prevail because the potential adoptive parents had a right to possession under a valid court order.<sup>235</sup>

A distinction exists between parent-child relationship termination suits between private parties and suits between the state and a private party. The United States Supreme Court has not held that an attorney should be appointed to represent parents in private suits, but it has held that in state versus parent termination suits, the question of appointed representation should be decided on a case-by-case basis.<sup>236</sup> The interpretation of the Texas statute pertaining to appointed representation in parent-child relationship termination suits<sup>237</sup> is a matter for the Texas courts, and two courts during the past year came to opposite conclusions. In *Baird v. Harris*<sup>238</sup> the Dallas appellate court held that the statute applied only to suits between the state and an indigent parent,<sup>239</sup> while the court in *Odoms v. Batts*<sup>240</sup> held that the statute applied to all suits involving indigent parents.<sup>241</sup> If this latter interpretation stands, there may be pressure for the legislature to enact more statutes providing appointed counsel for indigent parties in suits other than just the parent-child relationship.

In *Yepma v. Stephens*<sup>242</sup> the appellate court reversed and rendered a judgment terminating the parent-child relationship of a father based on failure to support the child in accordance with his ability.<sup>243</sup> The court held that the

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228. *Id.* at 32.

229. *Id.* at 32-33.

230. *Id.* at 32.

231. *Id.*

232. HUMAN RES. CODE ANN. § 45.021 (Vernon Supp. 1991).

233. *Broyles v. Ashworth*, 782 S.W.2d 31, 32 (Tex. App.—Fort Worth 1989, no writ).

234. *Broyles*, 782 S.W.2d at 34.

235. *Id.*

236. *See Lassiter v. Department of Social Servs.*, 452 U.S. 18, 32 (1981).

237. TEX. FAM. CODE ANN. § 11.10(d) (Vernon 1986).

238. 778 S.W.2d 147 (Tex. App.—Dallas 1989, no writ).

239. *Id.* at 148-49.

240. 791 S.W.2d 677 (Tex. App.—San Antonio 1990, no writ).

241. *Id.* at 678-79.

242. 779 S.W.2d 511 (Tex. App.—Austin 1989, no writ).

243. *Id.* at 512.

period of nonsupport began no sooner than eighteen months prior to the filing of the suit and since, in this case, the father was incarcerated during most of the period, a finding that the father had the ability to pay was not supported by the evidence.<sup>244</sup> In *Little v. Garza*<sup>245</sup> a natural father was able to resist a non-relative adoption by a court determination that there was insufficient evidence to establish that he failed to support his daughter in accordance with his ability.<sup>246</sup> His victory, however, may not be permanent since the case was remanded for a new trial.<sup>247</sup>

In *Ivy v. Edna Gladney Home*<sup>248</sup> a putative father who had signed an Affidavit of A Waiver of Interest in Child<sup>249</sup> appealed the judgment terminating his parental rights. The appellate court affirmed the decision and after patiently negating each of the father's six points of error, sustained the procedure that had been used in this case and continues to be used to enable adoption agencies to place children quickly and efficiently.<sup>250</sup>

In *Williams v. Texas Department of Human Services*<sup>251</sup> the court reversed an order terminating the mother's parent-child relationship because there was no clear and convincing evidence to establish that she had engaged in conduct endangering the child.<sup>252</sup> The child had been in the custody of the mother's aunt and uncle since 1985. The mother did not challenge the custody arrangements but was now appealing to retain her parental rights. The mother had only had possession of the child for the first two months of its life and the state did not prove that the child had been endangered during that time.<sup>253</sup>

In *Howard v. Texas Department of Human Services*<sup>254</sup> the court reversed and remanded a decision terminating the parent-child relationship of a mother and her children because the attorney who was appointed ad litem for the children had previously represented the mother in a motion to modify conservatorship.<sup>255</sup> The appellate court held that although there might be enough evidence to support the court's decision, termination of parental rights was irrevocable and a trial adjudicating these rights must be able to withstand careful scrutiny.<sup>256</sup>

Texas courts affirmed termination of parental rights by the Texas Department of Human Resources in five different cases of child abuse. In two cases, the parent did not directly cause physical abuse but permitted it to happen.<sup>257</sup> In two other cases the children were sexually abused and the

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244. *Id.*

245. 787 S.W.2d 601 (Tex. App.—El Paso 1990, no writ).

246. *Id.* at 604.

247. *Id.*

248. 783 S.W.2d 829 (Tex. App.—Fort Worth 1990, no writ).

249. TEX. FAM. CODE ANN. § 15.041 (Vernon Supp. 1991).

250. *Ivy*, 783 S.W.2d at 831-34.

251. 788 S.W.2d 922 (Tex. App.—Houston [1st Dist.] 1990, no writ).

252. *Id.* at 927-28.

253. *Id.* at 927.

254. 791 S.W.2d 313 (Tex. App.—Corpus Christi 1990, no writ).

255. *Id.* at 315-16.

256. *Id.* at 316.

257. See *Mason v. Dallas County Child Welfare*, 794 S.W.2d 454, 456 (Tex. App.—Dallas

mothers did not prevent it,<sup>258</sup> and in the fifth case both parents' rights were terminated because the father had sexually abused the children and the mother had not prevented it.<sup>259</sup>

Most of these children whose relationships with their parents have been terminated will be placed for adoption. These children have been abused and will probably be classified as hard to place. The case of *Griffith v. Johnston*<sup>260</sup> is important in this connection, even though the court has denied that any constitutional rights of the parents were abridged by the state's failure to inform the adoptive parents of the children's prior treatment.<sup>261</sup> The publicity arising from the case has informed the public of the problem and has created considerable public concern. The legislature, perhaps as a result of the publicity, has by statute increased the state's duty to record information and make it available to potential adoptive parents.<sup>262</sup> One may expect that in the future the children involved in cases similar to those above will benefit from the information made available to their potential adoptive parents.

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1990, no writ) (danger to physical or emotional well being of child caused when "parent knowingly places child with persons who engage in endangering conduct"); see also *Garza v. Texas Dept. of Human Servs.*, 794 S.W.2d 521, 525 (Tex. App.—Corpus Christi 1990, no writ) (mother's parental rights properly terminated where she knowingly permitted children to be exposed to endangering conditions).

258. See *In re J.L.S.*, 793 S.W.2d 79, 81-82 (Tex. App.—Corpus Christi 1990, no writ) (mother's failure to come to sexually abused child's aid resulted in termination of her parental rights); see also *Lakes v. Texas Dept. of Human Servs.*, 791 S.W.2d 214, 216 (Tex. App.—Texarkana 1990, no writ) (mother who acknowledged her child had been sexually abused but failed to remove child from endangered conditions lost parental rights).

259. *Posner v. Dallas County Child Welfare*, 784 S.W.2d 585, 587 (Tex. App.—Eastland 1990, writ denied).

260. 899 F.2d 1427, 1437-41 (5th Cir. 1990), cert. denied, 112 L. Ed. 2d 701 (1991).

261. *Id.* at 1441.

262. See TEX. FAM. CODE ANN. § 16.032 (Vernon Supp. 1991).