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# FAMILY LAW: PARENT AND CHILD

*Ellen K. Solender\**

## I. LEGISLATIVE CHANGES

FOR the past several sessions the emphasis of the Texas legislature has been on increasing the effectiveness of the collection of child support. The special session of the 72nd Legislature made a number of changes in the law. The most significant is subchapter F, Child Support Lien.<sup>1</sup> It is now possible to perfect child support liens on all personal and real property that is not exempt under the Texas Constitution, so that, for example, if an obligor is collecting workers' compensation, the payments may be attached.<sup>2</sup> In the regular session the legislature added prejudgment interest that may have accrued on payments not made prior to a judgment<sup>3</sup> to the amount of back child support owed. When setting the amount of child support if there is no information concerning the earnings of the obligor or obligee, a minimum wage is presumed.<sup>4</sup> Also, any variation from the percentage support guidelines must be explained by the court.<sup>5</sup>

The legislature lowered the age at which a child should be consulted about custody from fourteen to twelve years.<sup>6</sup> It also made possible a modification of a sole managing conservatorship decree when the child has been voluntarily placed with another for more than six months.<sup>7</sup> Previously the period of time was more than one year.

The above text represents merely an overview of recent legislative changes. A more complete and detailed listing of changes to the Family Code is contained in the State Bar Family Law Section Reports.<sup>8</sup> The best way, however, to be certain you are using the current version of the law is to check the most recent editions of the statutes.

## II. UNITED STATES SUPREME COURT DECISIONS

There were no decisions by the United States Supreme Court affecting the ordinary practice of family law during the last term. The Court, however, recently turned down an opportunity to interpret the Parental Kidnapping

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1. TEX. FAM. CODE ANN. §§ 14.971-.983 (Vernon Supp. 1992).

2. *Id.* § 14.972(b)-(c).

3. *Id.* § 14.34 (West 1991).

4. *Id.* § 14.053(k).

5. *Id.* § 14.057(b).

6. *Id.* §§ 14.021(e)(6), 14.07(a), 14.08(g)(1).

7. *Id.* § 14.08(c)(4).

8. Vol. 91-2 Summer Legislation Edition and Vol. 91-3 Fall Legislation Edition, Part II.

Jurisdiction Act.<sup>9</sup> The review would have involved resolving a conflict in jurisdiction between California and Wisconsin.<sup>10</sup> The Court in *Thompson v. Thompson*<sup>11</sup> held that it is the only forum for resolution of jurisdictional conflicts of this sort, so the parties were left deadlocked, without a remedy.<sup>12</sup>

### III. STATUS

Schools and courts continue to be troubled about how to implement the Education of Handicapped Act.<sup>13</sup> In a case involving an emotionally disturbed child, the district court granted an injunction to prevent the child from attending regular classes as had been provided in his individual education program.<sup>14</sup> The court based the decision on evidence concerning the student's threat of imminent danger to himself and others.<sup>15</sup> The court retained jurisdiction so that it could order further relief, should it be needed. In *Lindsey v. State*<sup>16</sup> a case concerning a deaf child, the parents alleged that the state had harmed the child by failing to provide a structured education as mandated by the Texas Education Code.<sup>17</sup> Although the parents had received permission to sue the state,<sup>18</sup> the court of appeals held that the state was immune from liability, since there was no pre-existing law on which to base the parents' claim.<sup>19</sup>

Two recent cases were brought against Texas school districts. In the first, the attorney general held that a car telephone is not a paging device as defined by the Texas Education Code,<sup>20</sup> but that, if the phones are disruptive, the school district has the authority to regulate the phones.<sup>21</sup> In the second case, a student who was suspended for violating a school's drug policy sued the district for disciplining him.<sup>22</sup> The district court found that the school district had complied with procedural due process and that the district had met its duty by providing a full range of hearings before taking action.<sup>23</sup>

A trial court found that a fourteen year-old boy had maliciously assaulted the defendant, but denied the jury's award of exemplary damages. The appellate court held that a fourteen year-old is capable of acting with malice and reinstated the jury's award.<sup>24</sup> The appeals court based its decision on the fact that the Family Code provides that a parent may be liable for the

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9. 28 U.S.C.A. § 1738A (West Supp. 1991).

10. *In re A.E.H.*, 468 N.W.2d 190 (Wis. 1991) *cert. denied sub nom. C.C. v. P.C.*, 112 S. Ct. 338 (1991).

11. 484 U.S. 174 (1988).

12. *Id.* at 187.

13. 20 U.S.C.A. § 1400 (West 1991).

14. *Texas City I.S.D. v. Jorstad*, 752 F. Supp. 231 (S.D. Tex. 1990).

15. *Id.* at 238.

16. 811 S.W.2d 731 (Tex. App.—Austin 1991, writ denied).

17. TEX. EDUC. CODE ANN. § 11.03(i)(1) (West 1991).

18. Tex. S. Con. Res. 69, 67th Leg., 1981 Tex. Gen. Laws 3911.

19. 811 S.W.2d at 734.

20. TEX. EDUC. CODE ANN. § 21.309 (West 1991).

21. Op. Tex. Att'y Gen. No. JM-1225 (1990).

22. *Salazar v. Luty*, 761 F. Supp. 45 (S.D. Tex. 1991).

23. *Id.* at 47.

24. *Williams v. Lavender*, 797 S.W.2d 410 (Tex. App.—Fort Worth 1990, writ denied).

malicious actions of a child who is at least twelve years old<sup>25</sup> and therefore it follows that a fourteen year-old can act maliciously and should be liable for exemplary damages.<sup>26</sup> In another tort case the Texas supreme court held that a child may recover for loss of consortium when a third party causes serious, permanent, and disabling injury to the child's parent.<sup>27</sup>

When an underage child marries without parental permission, the proper remedy is to promptly obtain an annulment.<sup>28</sup> In *Husband v. Pierce*<sup>29</sup> the parents tried to obtain possession of their married minor child through a writ of habeas corpus. After the writ was granted, the husband petitioned for mandamus relief, which was granted. The court of appeals held that the daughter had been emancipated by her marriage and therefore, the parents had no right to obtain her forcible return.<sup>30</sup> While a father may have a protectable interest in his child's last name,<sup>31</sup> the court of appeals in *Concha v. Concha*<sup>32</sup> held that he does not have a constitutional right to have his child's surname changed from the mother's to his.<sup>33</sup>

In order to collect child support from a father, the child's paternity must be established. In *Daniels v. Allen*<sup>34</sup> after a finding of paternity, the father appealed the award of attorney's fees. The court ruled that attorney's fees were necessary for the child since the services of an attorney were required to protect the child's interests.<sup>35</sup> In *Ussery v. Gray*<sup>36</sup> the alleged father attempted to have the attorney general's (AG) office disqualified from representing the mother on the grounds that the AG's office was representing him in a different support suit. The trial court denied the motion and the appellate court affirmed, reasoning that the AG's office, as the state agency that administers child support collections, is a public service agency that does not represent clients in the same manner as private attorneys.<sup>37</sup> If the father had shown actual prejudice he might have won.<sup>38</sup>

After a divorce decree, a party thereto may not later attack the decree. In *Dreyer v. Greene*<sup>39</sup> the court of appeals would not permit the mother to attack her children's paternity (after she had twice participated in actions finding that her former husband is the father of her children).<sup>40</sup> However, in *Murdock v. Murdock*,<sup>41</sup> a divorce proceeding, the Texas supreme court held

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25. TEX. FAM. CODE ANN. § 33.01 (West 1991).

26. 797 S.W.2d at 411.

27. *Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1991).

28. TEX. FAM. CODE ANN. § 2.41 (West 1991).

29. 800 S.W.2d 661 (Tex. App.—Tyler 1990, no writ).

30. *Id.* at 664.

31. *In re Baird*, 610 S.W.2d 252, 254 (Tex. Civ. App.—Fort Worth 1980, no writ).

32. 808 S.W.2d 230 (Tex. App.—El Paso 1991, no writ).

33. *Id.* at 232.

34. 811 S.W.2d 278 (Tex. App.—Tyler 1991, no writ).

35. *Id.* at 280.

36. 804 S.W.2d 232 (Tex. App.—Fort Worth 1991, no writ).

37. *Id.* at 236.

38. *Id.* at 236-237.

39. 809 S.W.2d 262, 263-64 (Tex. App.—Houston [1st Dist.] 1991, no writ).

40. *Id.* at 264.

41. 811 S.W.2d 557, 560 (Tex. 1991).

that the husband, who had denied paternity, was entitled to a judgment in his favor after blood test evidence established a zero probability that he was the father.<sup>42</sup> The court held that failure to conduct a pre-trial hearing has no effect on the substantive rights of the parties.<sup>43</sup> In *K.B. v. N.B.*<sup>44</sup> the court of appeals found that the father, by his actions subsequent to his wife's impregnation, had ratified the parent-child relationship and would be liable for child support.<sup>45</sup> A child born as a result of artificial insemination may be considered the child of the husband by ratification, even though the husband had not signed a consent as required by statute.<sup>46</sup>

Sometimes a man wishes to assert his paternity, but is frustrated by presumptions that children born into a marriage are the husband's and not his.<sup>47</sup> In *Jack v. Jack*<sup>48</sup> the court of appeals held that although the plaintiff was a stranger to the divorce decree and therefore it was not *res judicata* as to him, the state's interest in presuming that a husband is the father of his wife's children was sufficient to overcome any interest the plaintiff might have.<sup>49</sup> The question of presumptions may be clarified by *State v. Lavan*.<sup>50</sup> In that case the child in question had not been mentioned in the divorce decree and the mother was seeking to hold a man, not her former husband, liable for child support. The trial court granted summary judgment to the alleged father and the appellate court affirmed. The court held that a paternity action could not be brought because the child was born during a marriage and so has a presumed father.<sup>51</sup> Let us hope that the Texas supreme court will decide that a man who can be proven to be the biological father of a child is the child's legal father, with all the rights and responsibilities that a person of such status should have.

In *Tipps v. Metropolitan Life Insurance Co.*<sup>52</sup> the district court found on the basis of DNA fingerprinting that the plaintiff was not the daughter of the decedent.<sup>53</sup> The court pointed out that the other evidence neither confirmed nor denied the biological relationship, and the scientific evidence against the relationship was clear and convincing.<sup>54</sup> The court ordered that the plaintiff take nothing under the insurance policy. In *Dickson v. Simpson*<sup>55</sup> the Texas supreme court held that an adult child allegedly born out of wedlock has a

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42. *Id.* at 560.

43. *Id.* at 559.

44. 811 S.W.2d 634, 639 (Tex. App.—San Antonio 1991, no writ).

45. *Id.* at 639.

46. TEX. FAM. CODE ANN. § 12.03 (West 1991).

47. *In re M.R.M.*, 807 S.W.2d 779, 782 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

48. 796 S.W.2d 543 (Tex. App.—Dallas 1990, no writ). If you are interested in writing a sequel to the television show "Dallas", you might want to look at the facts in this case before starting to write.

49. *Id.* at 549.

50. 802 S.W.2d 73 (Tex. App.—Austin 1990, writ granted).

51. TEX. FAM. CODE ANN. § 13.01 (West 1991).

52. 768 F. Supp. 577 (S.D. Tex. 1991).

53. *Id.* at 580.

54. *Id.* at 579.

55. 807 S.W.2d 726 (Tex. 1991).

right to establish her paternity so that she may inherit.<sup>56</sup> The court based its decision on the fact that the plaintiff never had the opportunity to establish her paternity because the statutes in effect during her alleged father's lifetime provided for time limitations that barred her from asserting her rights. The court, finding that this bar denied her equal protection, reversed and remanded.<sup>57</sup>

#### IV. CONSERVATORSHIP

In two cases the grant of managing conservatorship to the father was sustained despite the exclusion of some evidence that might have been favorable to the mother.<sup>58</sup> In *DMB*<sup>59</sup> an eight year-old child's testimony as to custodial preference was not received because she was not found to be sufficiently mature.<sup>60</sup> In *Davis*<sup>61</sup> the failure to admit a social worker's testimony was held to be harmless error, since the basic facts that she would have supplied were already before the jury.<sup>62</sup>

A joint custody order was sustained in *Halamka v. Halamka*.<sup>63</sup> The order was based on evidence that the father's housing is adequate for himself and the children, and on the testimony of a child protective specialist that the father is a nurturing parent.<sup>64</sup> In *Johnson v. Johnson*<sup>65</sup> however, the court of appeals approved only supervised visitation for the father on the basis of evidence of alcohol abuse.<sup>66</sup>

The court of appeals sustained a default judgment against a non-resident father on the questions of divorce, custody and visitation.<sup>67</sup> However, since there was no in personam jurisdiction, the questions of child support and property division could not be addressed.<sup>68</sup> The father, by attacking the judgment, had entered his appearance, and so the court reversed and remanded the support and property questions.<sup>69</sup>

In *Connors v. Connors*<sup>70</sup> the court of appeals held that it was not required to find that it would not be in the best interest of the child to award manag-

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56. *Id.* at 727.

57. *Id.* at 728.

58. *In re Marriage of DMB and RLB*, 798 S.W.2d 399 (Tex. App.—Amarillo 1990, no writ); *Davis v. Davis*, 801 S.W.2d 22 (Tex. App.—Corpus Christi 1990, no writ).

59. 798 S.W.2d at 399.

60. 798 S.W.2d at 403. In *Decker v. Hatfield*, 798 S.W.2d 637 (Tex. App.—Eastland 1990, writ dism'd w.o.j.), a six year old child's preference was admitted for the purpose of explaining the expert's own testimony.

61. 801 S.W.2d at 22.

62. 801 S.W.2d at 23.

63. 799 S.W.2d 351 (Tex. App.—Texarkana 1990, no writ).

64. *Id.* at 355. The court also affirmed the trial court's disposable income finding.

65. 804 S.W.2d 296 (Tex. App.—Houston [1st Dist.] 1991, no writ).

66. *Id.* at 301. In addition the court affirmed an order of \$800 per month in child support based on evidence that the appellant, father, was capable of earning at least \$3000 per month.

67. *Calvert v. Calvert*, 801 S.W.2d 217 (Tex. App.—Fort Worth 1990, no writ).

68. *Id.* at 220.

69. *Id.* If the father had not wanted to litigate the support question in Texas, he should have relied on his special appearance to question the court's jurisdiction under Tex. R. Civ. P. 120a and waited for the mother to come to Indiana to obtain child support.

70. 796 S.W.2d 233 (Tex. App.—Fort Worth 1990, writ denied).

ing conservatorship to the father before the court could award a joint managing conservatorship to the mother and the maternal grandparents.<sup>71</sup> In *Von Behren v. Von Behren*<sup>72</sup> a grandmother was denied standing to bring a suit for managing conservatorship because she could not prove that there existed a serious and immediate question concerning the welfare of the children in question.<sup>73</sup> The grandmother had alleged that her son, the father of the children in question, had sexually abused the children. In another case that also failed in its allegations of sexual abuse, the mother was awarded attorneys fees and costs, but the appellate court reversed, holding that there had not been a finding that the Department of Human Services' action to obtain custody of children believed to have been exposed to sexual abuse was unreasonable or without foundation.<sup>74</sup>

The trial court's appointment of a nonparent as managing conservator was reversed and remanded in *In re W.G.W.*,<sup>75</sup> because of a poor jury instruction. The trial court had refused to give a definition of the term "significantly impair." This term is crucial in a case requesting that the natural parent be denied managing conservatorship so that a nonparent may be appointed, and failure to provide guidance to the jury is reversible error.<sup>76</sup>

*Bingham v. Bingham*<sup>77</sup> is an illustration of the fallacy of the idea that ordering joint managing conservatorships will minimize the need for court intervention. The mother with whom the child was domiciled had to change her domicile in order to be employed. She filed a motion to modify and was opposed by the child's father, who wanted to be named sole managing conservator. The trial court rejected this claim and modified the original order, finding that the change in domicile was in the best interest of the child. The father appealed, claiming that the court had not found that the change would be a positive improvement. The appellate court held that while the trial court had not used the specific legislative "magic words" in its decree, it had acted within the spirit of the legislative enactment.<sup>78</sup> There was a similar result in *Talley v. Leach*,<sup>79</sup> where the trial court modified an Illinois divorce decree. The parents had been named joint managing conservators and both had subsequently moved to Texas. The court, after a jury trial and hearing, had changed the domicile of the children and made some adjustments to the visitation schedule. These were not considered such de facto changes as to require a finding of a material and substantial change in circumstances.<sup>80</sup>

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71. *Id.* at 239. The mother had suffered a stroke and had severe disabilities.

72. 800 S.W.2d 919 (Tex. App.—San Antonio 1990, writ denied).

73. *Id.* at 923, based on TEX. FAM. CODE ANN. § 11.03(b)(1) (Vernon Supp. 1990).

74. Dallas County Child Welfare Unit of the Tex. Dep't. of Human Serv. v. Black, 812 S.W.2d 620, 624 (Tex. App.—Dallas 1991, no writ).

75. 812 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1991, no writ).

76. *Id.* at 417, 421.

77. 811 S.W.2d 678 (Tex. App.—Fort Worth 1991, no writ).

78. *Id.* at 681; TEX. FAM. CODE ANN. § 14.081(c)(2) (Vernon Supp. 1991).

79. 802 S.W.2d 21 (Tex. App.—Beaumont 1990, writ denied).

80. *Id.* at 24.

In *MacCallum v. MacCallum*<sup>81</sup> a father's motion to change visitation and child support was denied by the district court, which changed some of the times of visitation and placed restrictions on the activities of the father during visitation. The district court restricted the children, aged eight and nine, from operating farm equipment, such as tractors and plows, and from being in any way involved in the mixing or application of herbicides or pesticides or other farm chemicals. These restrictions would be applicable during any visitation until the children are fourteen years old. The appellate court affirmed all the changes and restrictions, but reversed and rendered as to the wife's attorneys fees on appeal.<sup>82</sup> The couple then got into a dispute about the exact meaning of the visitation schedule and the father was found in contempt for violating it. The Texas supreme court granted the father a writ of habeas corpus on the basis that the modified order was not specific enough to be enforced by a contempt ruling.<sup>83</sup>

In *Zemanek v. Boren*<sup>84</sup> both parties moved to modify joint conservatorship to a sole conservatorship. The mother moved for a jury trial, but over her objections the action was removed from the jury docket. After a bench trial the father was named sole managing conservator. The mother appealed and the appellate court reversed and remanded, holding that the trial court had abused its discretion.<sup>85</sup> In *Hibler v. Hibler*<sup>86</sup> the appellate court held that the trial court retained jurisdiction to modify a child custody agreement some two months after it was entered because of changed circumstances.<sup>87</sup> In *Greene v. Barker*<sup>88</sup> mandamus was conditionally granted because a motion to transfer is timely when it is made on or before the Monday after the expiration of citation or notice of the action or before the commencement of the hearing, whichever is sooner.<sup>89</sup>

Enforcing the right to custody of a child can be difficult, especially when the other party raises the specter of child abuse. In two cases the allegation of imminent danger was not proved to the satisfaction of the appellate court and the children were returned to their managing conservators.<sup>90</sup> In *Ex parte Brister*<sup>91</sup> a mother was held in contempt for failing to deliver the child to the father in accordance with the divorce decree and she petitioned for a writ of habeas corpus.<sup>92</sup> The decree was intended to be flexible so that it could accommodate the father's fluctuating work schedule. A divided Texas

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81. 801 S.W.2d 579 (Tex. App.—Corpus Christi 1990, writ denied).

82. *Id.* at 587.

83. *Ex parte MacCallum*, 807 S.W.2d 729 (Tex. 1991).

84. 810 S.W.2d 10 (Tex. App.—Houston [14th Dist.] 1991, no writ).

85. *Id.* at 12-13.

86. 813 S.W.2d 524 (Tex. App.—San Antonio 1991, no writ).

87. *Id.* at 525.

88. 806 S.W.2d 274 (Tex. Civ. App.—Fort Worth 1991, orig. proceeding [leave denied]).

89. *Id.* at 275; TEX. FAM. CODE ANN. § 11.06(f) (Vernon 1986).

90. *Rocha v. Schuble*, 809 S.W.2d 681 (Tex. App.—Houston [14th Dist.] 1991, no writ) (habeas corpus granted); *Rosendorf v. Blackmon*, 800 S.W.2d 377 (Tex. App.—Corpus Christi 1990, no writ) (mandamus granted so that child can be returned to father in accordance with Wisconsin decree).

91. 801 S.W.2d 833 (Tex. 1990).

92. *Id.* at 834.



supreme court granted the writ on the basis that the terms of the divorce decree were not sufficiently clear and unambiguous.<sup>93</sup> There was a dissent based on the opinion that the decree was sufficiently certain.<sup>94</sup>

In *Weirich v. Weirich*<sup>95</sup> the jury granted the mother almost \$6,000,000 in damages from the father and paternal grandmother for the abduction and concealment of the children for approximately seven years. The father settled before appeal and the appellate court reversed as to the paternal grandmother, holding that she did not have actual notice of the decree that awarded the managing conservatorship to the mother and that there was no evidence that she assisted in the retaining or concealing of the children.<sup>96</sup> The court also held that there is no cause of action for negligent interference with a family relationship independent of the Family Code.<sup>97</sup>

In *Briggs v. State*<sup>98</sup> a jury found a parent and step-parent guilty of interference with child custody. The defendants were found to have knowingly violated a court order that had placed the child in the temporary custody of Harris County Protective Services.<sup>99</sup> The stepfather received a two-year sentence and the mother's two-year sentence was probated.<sup>100</sup>

In *In re Wilson*<sup>101</sup> the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>102</sup> was dispositive of the jurisdiction to hear a motion to modify an Oklahoma child custody decree. The divorce had been in Oklahoma and custody was awarded to the father who stayed with the children in Oklahoma. The mother filed for a motion to modify in Texas. The judges of the two courts conferred by telephone and the Oklahoma judge relinquished jurisdiction. The appellate court reversed the trial court's finding of jurisdiction on the basis that the children's home state was and is Oklahoma, leaving the Texas court without jurisdiction.<sup>103</sup>

In *In re SAV*<sup>104</sup> the appellate court held that Minnesota had continuing jurisdiction.<sup>105</sup> The parties were divorced in Minnesota and the mother moved to Texas with the children. The court correctly held that, although under the UCCJA both states would have concurrent jurisdiction, under the Parental Kidnapping Prevention Act,<sup>106</sup> which is a federal statute and preempts state law, only Minnesota has continuing jurisdiction and therefore its decrees are entitled to full faith and credit.<sup>107</sup> The court also held that

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93. 801 S.W.2d at 834-35.

94. *Id.* at 836.

95. 796 S.W.2d 513 (Tex. App.—San Antonio 1990, writ granted).

96. *Id.* at 519. There was, however, evidence that the children visited the grandmother on at least two occasions during their concealment.

97. *Id.* at 515, citing to TEX. FAM. CODE ANN. § 36.02 (Vernon 1986).

98. 807 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).

99. *Id.* at 651.

100. *Id.* at 649.

101. 799 S.W.2d 773 (Tex. App.—Tyler 1990, no writ).

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

103. 799 S.W.2d at 774.

104. 798 S.W.2d 293 (Tex. App.—Amarillo 1990, writ granted).

105. *Id.* at 296.

106. 28 U.S.C.A. § 1738A (West Supp. 1990).

107. 798 S.W.2d at 296.

child support requires in personam jurisdiction and since the father had appeared in the Texas court, that portion of the Texas decree would be affirmed.<sup>108</sup>

## V. SUPPORT

The child support guidelines<sup>109</sup> seem to be effective, since there have been few appeals from the amount of support originally ordered. In *Kahn v. Kahn*<sup>110</sup> a husband's threat to file bankruptcy was not considered "good cause" for awarding a lump sum as child support.<sup>111</sup> The court of appeals stated that a finding of "good cause" for a lump sum award must be related to the needs of the child.<sup>112</sup> *Lahar v. Lahar*<sup>113</sup> presages a problem that will continue to plague the courts if they do not coordinate among themselves support orders for different children of the same obligor. In *Lahar* the court of appeals held that a trial court need only consider the number of children actually before the court when setting child support.<sup>114</sup> The court held that before the trial court must consider another child, there needs to be a financial obligation to that child under a court order.<sup>115</sup> Since the support award is set at a relatively high amount,<sup>116</sup> when the father is ordered to pay child support for his second child in another court, that court will either have to set a low support amount or ignore the other court's order and cause the father to have difficulty paying the two support orders.<sup>117</sup> The money consumed in appealing different courts' orders would be better spent on the children.

*Cole v. Joliet*<sup>118</sup> illustrates the proposition that a trial court's decrees will not be reversed absent an abuse of discretion.<sup>119</sup> The same finding was made in *Stocker v. Magera*,<sup>120</sup> where the award was only half the amount of child support required by the guidelines, and in *Belcher v. Belcher*,<sup>121</sup> where the award was increased above the guidelines. This was also the case in two

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108. *Id.* at 300.

109. TEX. FAM. CODE ANN. § 14.052 (West 1991).

110. 813 S.W.2d 708 (Tex. App.—Austin 1991, no writ).

111. *Id.* at 709-10.

112. *Id.* at 709.

113. 803 S.W.2d 468 (Tex. App.—Beaumont 1991, no writ).

114. *Id.* at 469.

115. *Id.*

116. *Id.* The order was for \$350 per month for one child based on net resources of \$1,768.70. In *Martin v. Martin*, 797 S.W.2d 347 (Tex. App.—Texarkana 1990, no writ) the father was required to pay only \$300 per month on net resources of \$1,000 per month for three children.

117. See *Escue v. Escue*, 810 S.W.2d 845 (Tex. App.—Texarkana 1991, no writ), reversing a child support modification for failing to take into consideration the appellant's prior child support obligation to another child by ruling of another court. The other court's award had also been reversed and remanded for failing to consider the number of children appellant had in determining appropriate amount of child support obligation. *Escue v. Reed*, 790 S.W.2d 717 (Tex. App.—El Paso 1990, no writ).

118. 804 S.W.2d 199 (Tex. App.—Houston [14th Dist.] 1991, writ dismissed w.o.j.).

119. *Id.* at 201.

120. 807 S.W.2d 753 (Tex. App.—Texarkana 1990, writ denied).

121. 808 S.W.2d 202 (Tex. App.—El Paso 1991, no writ).

other cases,<sup>122</sup> which affirmed an increase in child support and held that this increase was not prevented by a contract relating to the amount of child support. In *Worford v. Stamper*<sup>123</sup> the Texas supreme court reversed the appellate court, holding that the trial court had not abused its discretion in increasing child support and extending it beyond the child's eighteenth birthday in view of the child's special needs.<sup>124</sup>

A trial court may also refuse to either raise<sup>125</sup> or lower<sup>126</sup> a child support order. It is reversible error, however, for a court to fail to state its findings with regard to child support.<sup>127</sup> Courts may not approve parents' self-help arrangements to reduce child support arrearages through contractual agreements.<sup>128</sup> The court reasoned that permitting parents to agree to the reduction of arrearage amounts would result in the encouragement of the non-payment of child support.<sup>129</sup> There were two concurrences and a dissent.

Enforcement of child support decrees can be very difficult, but failure to notify the obligor of the date of the trial when the obligor has a meritorious defense will not result in a collection of support, but rather in a bill of review.<sup>130</sup> In *Jones v. Ignal*<sup>131</sup> the husband contended that the trial court did not have jurisdiction over him because, although he filed a general appearance to the original contempt motion, he was not served with a citation regarding a later motion to have the past due child support reduced to judgment. The appellate court held that under the statutory provisions in effect at that time, the trial court retained jurisdiction to award relief.<sup>132</sup> The appellate court also held that the husband's support obligation was not automatically reduced upon an older child's attaining majority and affirmed the trial court's judgment.<sup>133</sup> In *Gross v. Gross*<sup>134</sup> the court of appeals also held that the burden for reducing child support when a child is emancipated

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122. *Hoffman v. Hoffman*, 805 S.W.2d 848 (Tex. App.—Corpus Christi 1991, writ denied); *In re Marriage of Edwards*, 804 S.W.2d 653 (Tex. App.—Amarillo 1991, no writ).

123. 801 S.W.2d 108 (Tex. 1990).

124. *Id.* at 109-10.

125. *Woodley v. Bruton*, 796 S.W.2d 304 (Tex. App.—Eastland 1990, writ denied).

126. *State v. Hernandez*, 802 S.W.2d 894 (Tex. App.—San Antonio 1991, no writ). The case was reversed and remanded in part because there was no provision for specific payment of arrearages or medical insurance.

127. *Hanna v. Hanna*, 813 S.W.2d 626, 628 (Tex. App.—Houston [1st Dist.] 1991, no writ).

128. *Williams v. Patton*, 35 Tex. Sup. Ct. J. 65 (Nov. 2, 1991), *affirming* 796 S.W.2d 526 (Tex. App.—Houston [1st Dist.] 1990). In *Coke v. Coke*, 802 S.W.2d 270 (Tex. Civ. App.—Dallas 1990, writ denied) the court held that an oral agreement between the parties that each parent would support the child residing in the parent's respective home is void as against public policy, since it would permit the reduction of child support without court approval. *Id.* at 276.

129. 35 Tex. Sup. Ct. J. at 67.

130. *State v. Buentello*, 800 S.W.2d 320, 326 (Tex. App.—Corpus Christi 1990, no writ). The trial court's grant of a bill of review was reversed on the issue of attorney's fees, since the state was really not a party to the underlying cause of action, which is the existence of marriage and a need for a divorce. The state intervened only because its interest in the child support issue was at risk.

131. 798 S.W.2d 898 (Tex. App.—Austin 1990, writ denied).

132. *Id.* at 900.

133. *Id.* at 902-03.

134. 808 S.W.2d 215 (Tex. App.—Houston [14th Dist.] 1991, no writ).

rests on the obligor,<sup>135</sup> and that the court could order wage withholding to clear up the arrearages.<sup>136</sup>

Unless money given to an obligee is for the purpose of providing actual support of the child, it cannot be used as an offset to arrearages for child support.<sup>137</sup> In *Medrano v. Medrano* the money was given to the obligee for payments relating to the use and purchase of a car. The court of appeals held that these payments did not constitute actual support of the child.

When a support order is entered in a Revised Uniform Reciprocal Enforcement of Support (RURESAs) action, it does not modify the original order unless the second order specifically so provides.<sup>138</sup> Thus the original order may later be enforced.<sup>139</sup> In a RURESAs suit for ongoing support and arrearages a court should order, in its assignment of the obligor's earnings a sum sufficient to liquidate the payments in arrears, and should also provide continuing support.<sup>140</sup> In another RURESAs case the court ordered child support, but held that it did not have jurisdiction to order visitation and the appellate court affirmed since Texas is not the child's home state.<sup>141</sup> In *Omick v. Hoerchler*<sup>142</sup> the court of appeals enforced a foreign child support judgment applying the Missouri statute of limitations because judgment would not be time barred in Missouri, although it would be barred in Texas.

In *Schnitzius v. Koons*<sup>143</sup> an obligee had to go to rather extreme lengths to collect child support that was owed to her. The obligor had filed an appearance bond in connection with a contempt motion and was released. When the obligor did not appear for the hearing, the obligee filed a motion seeking forfeiture, which was granted, and the surety failed to appeal. More than six months later, the surety moved to vacate the order and after a hearing this was granted. The obligee then filed for mandamus to compel the court to reinstate its judgment of forfeiture, which was conditionally granted because the surety's time for filing for a new trial had expired.<sup>144</sup>

In *Ex parte Boetscher*<sup>145</sup> the court of criminal appeals held that it was a denial of equal protection to enhance the crime of non-support of a child from a misdemeanor to a felony for non-residents only.<sup>146</sup> The statute covers not only residents who flee the state to avoid support, but also those who are residents of another state and remain there after the child in need of support happens to move to Texas.<sup>147</sup> For Texas residents the crime is

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135. *Id.* at 219.

136. *Id.* at 221.

137. 810 S.W.2d 426, 427 (Tex. App.—San Antonio 1991, no writ).

138. TEX. FAM. CODE ANN. § 21.31 (West 1991).

139. *State v. Borchers*, 805 S.W.2d 880, 882 (Tex. App.—San Antonio 1991, writ denied).

140. *Clanton v. Clanton*, 807 S.W.2d 844, 846 (Tex. Civ. App.—Houston [14th Dist.] 1991, no writ.)

141. *Brown v. Jarvis*, 808 S.W.2d 628, 631 (Tex. App.—Austin 1991, writ denied).

142. 809 S.W.2d 758, 759-60 (Tex. App.—San Antonio 1991, writ denied).

143. 813 S.W.2d 213 (Tex. App.—Dallas 1991, no writ). The amount of money involved in this complicated case is \$2000.

144. *Id.* at 218.

145. 812 S.W.2d 600 (Tex. Crim. App. 1991).

146. *Id.* at 603.

147. TEX. PENAL CODE ANN. § 25.05 (West 1991).

merely a misdemeanor.<sup>148</sup> The court held that this distinction is unconstitutional and therefore Texas lacks jurisdiction.<sup>149</sup> In what might be considered a companion case, *State v. Paiz*,<sup>150</sup> the court of criminal appeals, on facts similar to *Boetscher*, in an en banc opinion held that the sixth amendment vicinage provision<sup>151</sup> is irrelevant in child support cases since the crime is committed in the state where the child resides, rather than where the obligor resides. The court then held that based on this appeal Texas has jurisdiction. The court further stated that it was expressing no opinion as to other constitutional limitations on jurisdiction citing *Boetscher*.<sup>152</sup>

Orders for support must be clear and specific both as to their terms and the underlying basis for them, or a contempt order will fail.<sup>153</sup> A written order of commitment is required to sustain imprisonment for contempt<sup>154</sup> and a person, after being found in contempt by a master, is entitled to be heard on any contested issues by a trial judge before being found in noncompliance.<sup>155</sup> A visiting judge who has been appointed for a specific time period cannot issue a contempt order after the time has expired, and any order thus issued is considered void.<sup>156</sup> A contempt order will be reformed if it increases the punishment after there has been a delay in the imposition of the order, to permit the relator to purge himself although he previously failed to do so.<sup>157</sup>

If the support provisions are sufficiently specific, then contempt is available and a writ of habeas corpus will not be granted.<sup>158</sup> Even though the obligor cannot pay the full arrearages, if he can make the partial payments as ordered or has the ability to pay by borrowing, and fails to do so, he can be confined.<sup>159</sup> Criminal contempt is proper when a relator fails to comply with a court order to produce documents in court, and the relator may be jailed immediately.<sup>160</sup>

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148. *Id.*

149. 812 S.W.2d at 603-04.

150. 817 S.W.2d 84 (Tex. Crim. App. 1991).

151. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *state and district wherein the crime shall have been committed* . . ." U. S. CONST. amend. VI (emphasis added).

152. 812 S.W.2d 600 (Tex. Crim. App. 1991).

153. *Ex parte* Clark, 813 S.W.2d 696, 697 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Ex parte* Thompson, 803 S.W.2d 876 (Tex. App.—Corpus Christi 1991, no writ).

154. *Ex parte* Cadena, 811 S.W.2d 725, 726 (Tex. App.—Corpus Christi 1991, no writ).

155. *Ex parte* Haskin, 801 S.W.2d 12, 13 (Tex. App.—Corpus Christi 1990, no writ).

156. *Ex parte* Holland, 807 S.W.2d 827, 829-30 (Tex. App.—Dallas 1991, no writ).

157. *Ex parte* Balderas, 804 S.W.2d 261 (Tex. App.—Houston [1st Dist.] 1991, no writ).

158. *Ex parte* Wessell, 807 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1991, no writ); *ex parte* Johns, 807 S.W.2d 768 (Tex. App.—Dallas 1991, no writ); *ex parte* Tamez, 801 S.W.2d 18 (Tex. App.—Corpus Christi 1990, no writ).

159. *Ex parte* Duncan, 796 S.W.2d 562 (Tex. App.—Houston [1st Dist.] 1990, no writ) (probation is a proper remedy where obligor cannot pay the full arrearage, but can keep current and pay something extra towards reducing the arrearage); *ex parte* Bregenzer, 802 S.W.2d 884 (Tex. App.—Houston [1st Dist.] 1991, no writ) (obligor had not proved inability to pay when he had not asked his wife, a legal secretary, to lend him the money to pay the support).

160. *Ex parte* Friedman, 808 S.W.2d 166 (Tex. App.—El Paso 1991, no writ).

## VI. TERMINATION AND ADOPTION

The attorney general, in response to a query concerning the Open Records Act's effect on the disclosure of the original birth certificate of an adopted person, concluded that it did not affect the confidentiality provisions relating to adoption records.<sup>161</sup> Thus the information in the original birth certificate may not be disclosed by the Bureau of Vital Statistics without a court order, even though, as in the instant case, fifty years have passed since the filing of the original birth certificate.<sup>162</sup>

In *Prokopuk v. Offenhauser*<sup>163</sup> the court of appeals held that the failure of a father to support his child before he is sure that he is the father of the child cannot be grounds for the termination of his parental rights.<sup>164</sup> The father had sought to legitimate his child and the mother had cross-claimed to terminate his rights. In *Nichols v. Nichols*<sup>165</sup> the default judgment terminating a father's parental rights was reversed for failure to appoint a guardian ad litem to represent the child.<sup>166</sup> The father had filed for termination alleging that he was not the biological father of the child. The mother neither answered nor appeared. The appellate court ruled that in this circumstance there was no one present to represent the child, and so the appointment of a guardian ad litem was mandatory.<sup>167</sup>

In *Smith v. Sims*,<sup>168</sup> a maternal grandmother was successful in terminating the parental rights of the father and adopting her grandchildren.<sup>169</sup> The court of appeals held that the father's murder of the mother and the holding hostage of the children for three days thereafter was a course of conduct that endangered the children and met the statutory requirements for termination.<sup>170</sup> In *Coleman v. Smallwood*<sup>171</sup> a natural mother's change of mind came too late for her to prevent an adoption. She had signed a voluntary relinquishment that was irrevocable for sixty days,<sup>172</sup> and although she changed her mind the day after signing, the termination proceeding took place within the allotted time and the court held that it was valid.<sup>173</sup> The natural mother contested the finding on two other grounds, but neither was successful. The first was that she was a minor and the second, that the attorney ad litem was appointed on the day of the trial and so could not have adequately represented the child. The appellate court held that the statute permitting a minor to contract away her parental rights is constitutional<sup>174</sup>

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161. Tex. Att'y Gen. ORD-596 (1991).

162. *Id.*

163. *Prokopuk v. Offenhauser*, 801 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

164. *Id.* at 539-40.

165. 803 S.W.2d 484 (Tex. App.—El Paso 1991, no writ).

166. *Id.* at 485-86.

167. *Id.*

168. 801 S.W.2d 247 (Tex. App.—Houston [14th Dist.] 1990, no writ).

169. *Id.* at 250-51.

170. TEX. FAM. CODE ANN. § 15.02 (West 1991).

171. 800 S.W.2d 353 (Tex. App.—El Paso 1990, no writ).

172. TEX. FAM. CODE ANN. § 15.03 (Vernon Supp. 1991).

173. 800 S.W.2d at 359.

174. *Id.* at 357.

and that the appointed attorney ad litem was so experienced that he was able to properly represent the child.<sup>175</sup> In *Rodriguez v. Lutheran Social Services of Texas, Inc.*<sup>176</sup> the natural parents were successful in having the question of termination of their parental rights reversed and remanded.<sup>177</sup> The agency, when it applied to be appointed managing conservator, had failed to include a statement about compliance or lack of compliance with the Interstate Compact for the Placement of Children<sup>178</sup> and the appellate court held that the testimony to explain the noncompliance was not sufficient.<sup>179</sup>

A court may terminate the parent-child relationship based on an affidavit of relinquishment or for cause. In *In re R.L.C.*<sup>180</sup> the court of appeals held that both methods were available to the trial court.<sup>181</sup> The mother claimed that the court should have inquired into her mental capacity before accepting her relinquishment since she suffered from a schizophrenic disorder, although there was no evidence of this at the time of the signing of the affidavit. In any event, there were sufficient grounds that the court could have ordered an involuntary termination of her parental rights. In *Slatton v. Brazoria County Protective Services Unit*<sup>182</sup> the court of appeals held that an earlier denial of a termination of the parent-child relationship was not res judicata as to a later cause of action, as long as the termination was based on actions of the parents that occurred after the earlier denial.<sup>183</sup>

In *Texas Department of Human Services v. White*<sup>184</sup> the Texas supreme court, in a per curiam opinion, held that the inclusion of a picture of the child with his foster family was not such a denial of the mother's rights as to require a reversal.<sup>185</sup> The case was remanded to the appellate court for consideration of the factual sufficiency points. Relying on a rule of civil procedure,<sup>186</sup> the Dallas court of civil appeals held that it could not consider a statement of facts that had been filed too late and so had to presume that there was sufficient evidence to support the jury's findings that termination of the parent-child relationship was proper.<sup>187</sup>

In *Texas Department of Human Services v. E.B.*<sup>188</sup> the Texas supreme court in its zeal to use broad-form jury questions, nullified the due process provisions of the carefully crafted section on involuntary termination of parental rights.<sup>189</sup> That section when carefully read states that a court must

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175. *Id.* at 359.

176. 814 S.W.2d 153 (Tex. App.—San Antonio 1991, writ denied).

177. *Id.* at 156.

178. TEX. FAM. CODE ANN. § 11.08(d) (Vernon Supp. 1991).

179. 814 S.W.2d at 156.

180. 800 S.W.2d 655 (Tex. App.—Corpus Christi 1990, writ dismissed w.o.j.).

181. *Id.* at 656.

182. 804 S.W.2d 550 (Tex. App.—Texarkana 1991, no writ).

183. *Id.* at 555.

184. 817 S.W.2d 62 (Tex. 1991).

185. *Id.* at 53.

186. TEX. R. APP. P. 54(c) (West 1991).

187. *Krasniqi v. Dallas County Child Protective Servs. Unit of Texas Dept. of Human Servs.*, 809 S.W.2d 927 (Tex. App.—Dallas 1991, writ denied).

188. 802 S.W.2d 647 (Tex. 1990).

189. TEX. FAM. CODE ANN. § 15.02 (West 1991).

find enough evidence on one of the listed grounds to terminate, as well as find that termination is in the best interest of the child. When there are two possible grounds for termination, as was pointed out by the court of appeals, using a broad-form question makes it impossible to know if a majority of the jury made a finding concerning either ground, and so it could be that there were not sufficient facts to support the termination of the parent-child relationship. The Texas supreme court, however, overlooked this problem and ruled that a broad-form submission asking if the parent-child relationship should be terminated is proper.<sup>190</sup>

In *Kellogg v. Martin*<sup>191</sup> the grandparents of a child, who were the subjects of a termination of parental rights proceeding, were able to have all the orders vacated because they had made a timely objection to the assignment of a visiting judge.<sup>192</sup> The grandparents had standing because the child had been in their possession for more than six months.<sup>193</sup> In *Neal v. Texas Department of Human Services*<sup>194</sup> the appellate court reversed a termination of the mother's parental rights on the grounds that she was subjected to undue influence when she signed a voluntary relinquishment of parental rights.<sup>195</sup> The court held that the caseworker did not act improperly, but from the testimony of the caseworker it appeared that the mother's husband may have coerced her into signing, and so the evidence was not clear and convincing that there was a voluntary relinquishment.<sup>196</sup>

## VII. CONCLUSION

Looking back over the fifteen years or so that these Survey articles have been written, it appears that while some of the law has changed, the underlying problems remain the same. Some family problems may have been created by the law, but most have merely been somewhat exacerbated or minimized by legal intervention.

The length and detail of the Family Code has been increased over the years, as the legislature has added all sorts of provisions for the determination of the amount and then the collection of child support payments. The legislature has also tried to restrict the discretion of the trial courts by establishing guidelines for such things as visitation<sup>197</sup> and support.<sup>198</sup> There has been a diminution of fights over venue since the rules on transfers were enacted,<sup>199</sup> thanks to strict enforcement by the courts.<sup>200</sup>

The United States Supreme Court has done more than its share to undermine the stability of the family, while mouthing all sorts of platitudes about

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190. 802 S.W.2d at 648-49.

191. 810 S.W.2d 302 (Tex. App.—Texarkana 1991, no writ).

192. *Id.* at 305.

193. TEX. FAM. CODE ANN. § 11.03(a)(8) (Vernon Supp. 1991).

194. 814 S.W.2d 216 (Tex. App.—San Antonio 1991, writ denied).

195. *Id.* at 218-19.

196. *Id.* at 222.

197. TEX. FAM. CODE ANN. §§ 14.032, .033 (West 1991).

198. *Id.* § 14.055.

199. *Id.* § 11.06.

200. *See, e.g., Walker v. Miller*, 729 S.W.2d 120 (Tex. App.—Dallas 1987, no writ).



traditional family values.<sup>201</sup> Its greatest negative achievement, however, has been in the area of interstate child custody battles, where it has claimed exclusive jurisdiction to settle disputes,<sup>202</sup> and has then refused to do so.<sup>203</sup>

The most affirmative change that has taken place in our society is the increasing desire of fathers of children born out of wedlock to assert their rights.<sup>204</sup> In addition the courts, through their interpretation of the constitution and the statutes, have made it possible for these children to enforce their inheritance rights.<sup>205</sup>

The number of custody fights has not decreased. The concept of joint custody is not only flawed, but judging by the number of requests for modification that joint custody decrees generate, it would appear to be a failure.<sup>206</sup> A return to sole managing conservatorship with legislatively imposed restrictions on modification seems to be the better solution.<sup>207</sup>

Support is an area in which there is an appearance of progress, since numerous obligors have been held in contempt, while others have had their wages garnished as provided by the statute.<sup>208</sup> Since the motivation for these rulings is an attempt to shift the burden of child support from the taxpayer to the father, it is not at all certain that the children have benefited.

Finally, the area of termination and adoption is one that can best be described as a tale of unmitigated woe. Successful adoptions never get to court and the unsuccessful ones are harrowing. The facts in involuntary termination of parental rights cases are quite disturbing, to say the least, but since this matter is serious, it is perhaps a good thing that these judgments are not rendered lightly. All in all, however, these cases tend to reinforce the belief that the law can neither protect children nor put dysfunctional families back together again.

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201. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

202. *Thompson v. Thompson*, 484 U.S. 174 (1988).

203. *In re A.E.H.*, 468 N.W.2d 190 (Wis. 1991), cert. denied sub nom. *C.C. v. P.C.*, 112 S. Ct. 338 (1991).

204. See e.g., *In re M.R.M. & E.E.M.*, 807 S.W.2d 779 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

205. See e.g., *Dickson v. Simpson*, 807 S.W.2d 726 (Tex. 1991).

206. See *supra* notes 59-62 and accompanying text.

207. TEX. FAM. CODE ANN. § 14.08(c) (West 1991).

208. *Id.* § 14.43.