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# FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender\*

## I. UNITED STATES SUPREME COURT DECISIONS

**D**URING the 1985-1986 Term the United States Supreme Court decided one family law case that directly affected Texas law, *Reed v. Campbell*.<sup>1</sup> The Court, reversing an appeal from a Texas decision,<sup>2</sup> held that because the administration of the estate in question was still in progress at the time of the Court's decision in *Trimble v. Gordon*,<sup>3</sup> properly resolving the illegitimate child's claim would not affect the state interest in the orderly disposition of decedents' estates.<sup>4</sup> *Reed* involved an illegitimate child who claimed a right to share in her father's estate despite the fact that her parents had never married. Her father died just prior to the decision in *Trimble*, and her claim was filed after that decision. Although the jury found that she was, in fact, her father's child, the trial court denied her claim, and the appellate court affirmed.<sup>5</sup> The Supreme Court refrained from basing its decision on retroactivity and instead held that the interest in avoiding unjustified discrimination against children born out of wedlock should be given controlling effect.<sup>6</sup> The Court reversed and remanded.<sup>7</sup>

Justice O'Connor this fall issued a stay in a child support case<sup>8</sup> that concerned the presumption of ability to comply with a court order. The stay was issued in connection with a California case wherein an appellate court held unconstitutional the requirement that the defendant has the burden to prove he is unable to comply with a child support order.<sup>9</sup> When the United

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1. 106 S. Ct. 2234, 90 L. Ed. 2d 858 (1986).

2. *Reed v. Campbell*, 682 S.W.2d 697 (Tex. App.—El Paso 1984, writ ref'd n.r.e.). For a discussion of this case, see Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 40 Sw. L.J. 53, 58 (1985).

3. 430 U.S. 762 (1977). In this case the Court held unconstitutional a total statutory disinheritance from the paternal estate of children born out of wedlock and not legitimated by the subsequent marriage of their parents. 106 S. Ct. at 2236, 90 L. Ed. 2d at 861-62.

4. 106 S. Ct. at 2337-38, 90 L. Ed. 2d at 861-64.

5. 682 S.W.2d at 701.

6. 106 S. Ct. at 2238, 90 L. Ed. 2d at 862-64. The Court based its reasoning on the equal protection clause of the fourteenth amendment to the U.S. Constitution. *Id.*

7. 106 S. Ct. at 2238, 90 L. Ed. 2d at 864. On remand, the El Paso court of appeals reversed and remanded the trial court's decision. *Reed v. Campbell*, 719 S.W.2d 655 (Tex. App.—El Paso 1986, no writ) (per curiam).

8. *Hicks ex rel. Feiock v. Feiock*, 107 S. Ct. 259, 93 L. Ed. 2d 237 (1986).

9. *In re Feiock*, 180 Cal. App. 3d 649, 653-55, 225 Cal. Rptr. 748, 750-51 (1986), cert. granted sub nom. *Hicks v. Feiock*, 55 U.S.L.W. 3607 (Mar. 10, 1987) (No. 86-787).

States Supreme Court decides this case next year, the holding may be an extremely important help or detriment to the speedy collection of child support payments.

## II. STATUS

The Texas Supreme Court found the Texas guest statute<sup>10</sup> unconstitutional in *Whitworth v. Bynum*.<sup>11</sup> This ruling is an important first step for family lawyers because it may cause a change in the current rule with regard to intrafamily immunity in negligence cases.<sup>12</sup> The court has addressed this issue with regard to intentional torts,<sup>13</sup> but not with regard to negligence. Removing the statutory barrier to suits between family members regarding automobile accidents should hasten the court's consideration of the issue of intrafamily negligence.

Complying with the mandate of the federal Education for All Handicapped Children Act (EAHCA)<sup>14</sup> may be expensive. In *Alamo Heights Independent School District v. State Board of Education*,<sup>15</sup> however, the Court held that if a handicapped child is likely to regress during a summer hiatus in educational opportunities, the school district must provide a suitable program.<sup>16</sup> Further, the court held that if out-of-district transportation is required, the district should provide that too.<sup>17</sup> In this case the school district was reluctant to bear the expense; however, the State Commissioner of Education ordered the school district to provide the child in question with full summer services as well as transportation. The court sustained this order,<sup>18</sup> but found that the mother was not entitled to attorney's fees because her child was not denied any due process rights<sup>19</sup> and because EAHCA contains no provision for attorney's fees.<sup>20</sup>

In *University Interscholastic League v. Jones*<sup>21</sup> a high school senior was allowed to play football although ineligible under University Interscholastic League (UIL) rules because he obtained an injunction that was not overturned in time to prevent his playing out the season. The appellate court then dismissed the case as moot.<sup>22</sup> In *Eanes Independent School District v. Logue*,<sup>23</sup> however, the UIL prevailed because the Texas Supreme Court is-

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10. TEX. REV. CIV. STAT. ANN. art. 6701b (Vernon 1977).

11. 699 S.W.2d 194, 197 (Tex. 1985).

12. See *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (allowing an employee to sue his father's partnership for negligence, but noting that in ordinary negligence situations a parent-child suit would not be allowed).

13. *Bounds v. Caudle*, 560 S.W.2d 925, 926-27 (Tex. 1977).

14. 20 U.S.C. §§ 1411-20 (1982).

15. 790 F.2d 1153 (5th Cir. 1986).

16. *Id.* at 1159.

17. *Id.*

18. *Id.* at 1160.

19. *Id.* at 1161-62. Had there been a denial of due process the mother might have been entitled to attorney's fees under the federal civil rights acts, 42 U.S.C. § 1983 (1982).

20. 790 F.2d at 161-63.

21. 715 S.W.2d 759 (Tex. App.—Dallas 1986, no writ).

22. *Id.* at 761.

23. 712 S.W.2d 741 (Tex. 1986).

sued a conditional writ of mandamus ordering the district judge to vacate his injunction.<sup>24</sup> *Logue* involved the declaration of a winner in Texas high school regional baseball play-offs after only one game in a best two-out-of-three series was played. The remaining two games were delayed because of rain and the UIL, following its rules, declared that the winner of the one game could advance in the playoffs. The Texas Supreme Court found that the district court had abused its discretion when it interfered with the UIL decision.<sup>25</sup> The court held that there is no fundamental right to participate in athletic events and therefore no constitutional rights were involved.<sup>26</sup>

In *Austin v. Hale*<sup>27</sup> the court held that employees of the Department of Human Resources are immune from suit for negligence if they act in good faith in investigating an allegation of child abuse.<sup>28</sup> The employees in *Austin* received a report of child abuse; while their investigation was in progress the child was killed. The court found that the gathering of information in order to take action based on that information was a quasi-judicial function and thus fell within the scope of official immunity.<sup>29</sup>

An adoption must be completely finalized before the about-to-adopt parent can file a wrongful death action. A federal court held in *Byrnes v. Ford Motor Co.*<sup>30</sup> that under Texas law the class of beneficiaries under the wrongful death statute<sup>31</sup> is very specific and would not include a surviving about-to-adopt parent.<sup>32</sup> The court did hold, however, that such a parent could bring a claim under the survival statute,<sup>33</sup> since the rights of the child's natural parents had been terminated and no one other than the about-to-adopt parent could claim any interest in the estate.<sup>34</sup> The claim, of course, turns on the establishing of an equitable adoption in the probate court.<sup>35</sup>

In many cases, paternity is the key to determining the status of a child. A San Antonio court held in dictum that nothing in the Texas statutes prevents a paternity action after the death of the putative father.<sup>36</sup> In addition, the court held that a putative paternal grandparent is not an individual who, under the Family Code,<sup>37</sup> can be ordered to submit to blood tests for the purposes of establishing paternity.<sup>38</sup> *Ex Parte Carey*<sup>39</sup> concerned a father who sought to avoid responsibility for his child by refusing to submit to blood tests. A jury found that he was the father, thus rendering the question

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24. *Id.* at 742.

25. *Id.*

26. *Id.*

27. 711 S.W.2d 64 (Tex. App.—Waco 1986, no writ).

28. *Id.* at 67, 68; TEX. FAM. CODE ANN. § 34.05 (Vernon 1986).

29. 711 S.W.2d at 68.

30. 642 F. Supp. 309 (E.D. Tex. 1986).

31. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004 (Vernon 1986).

32. 642 F. Supp. at 310-11.

33. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 1986).

34. 642 F. Supp. at 311-12.

35. *Id.* at 311.

36. *Manuel v. Spector*, 712 S.W.2d 219, 222 (Tex. App.—San Antonio 1986, no writ).

37. TEX. FAM. CODE ANN. § 13.01 (Vernon 1986).

38. 712 S.W.2d at 223.

39. 704 S.W.2d 13 (Tex. 1986).

of blood tests moot. Prior to the trial, the trial court found him in contempt and ordered him to pay fines of \$5,000 and \$25,000. The Texas Supreme Court held that these fines exceeded the statutory limit<sup>40</sup> by \$4,500 and \$24,500 respectively, and ordered him discharged upon payment of the proper statutory fines of \$500 each and costs.<sup>41</sup>

Even dismissal for want of prosecution will not prevent the refile of a paternity action, since the dismissal is not on the merits and, therefore, is not *res judicata*.<sup>42</sup> The court held further that laches would not bar the suit since it was to enforce the statutory duty of support<sup>43</sup> and also that the statutes of limitation would not bar the action because the child's status as a minor tolled the statute of limitations.<sup>44</sup>

### III. CONSERVATORSHIP

In *Oglesby v. Silcott*<sup>45</sup> the Texas Supreme Court recognized a common law cause of action for interference with child custody.<sup>46</sup> The court held that the appellate court had incorrectly interpreted an 1886<sup>47</sup> case in which the Texas Supreme Court had recognized a parental cause of action for child enticement, but had limited damages to the loss of the value of the child's services during the period of the abduction.<sup>48</sup> The court then went on to apply the more expansive common law right embodied in section 700 of the Restatement (Second) of Torts to the facts of the case.<sup>49</sup> The court stated that section 700 would apply to cases tried before September 1, 1983.<sup>50</sup> The legislature has enacted both a criminal penalty<sup>51</sup> and a civil remedy<sup>52</sup> for interference with child custody, effective September 1, 1983, but the additional possibility of a common law remedy might prove useful in the future should there be a fact situation that does not quite fit under the statutory causes of action. The court also discussed damages recoverable under this tort and pointed out that the possible financial benefit from a child is no longer the sole measure of damages.<sup>53</sup> Damages today include compensation for loss of companionship and the mental anguish experienced by the parents during the period of abduction.<sup>54</sup> If the abduction is willful, then there need

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40. TEX. GOV'T CODE ANN. § 21.002(b) (Vernon 1986).

41. 704 S.W.2d at 13, 14.

42. Texas Attorney Gen. *ex rel.* Ford v. Daurbigny, 702 S.W.2d 298, 299-300 (Tex. App.—Houston [1st Dist.] 1985, no writ).

43. TEX. FAM. CODE ANN. § 12.04(3) (Vernon 1986).

44. 702 S.W.2d at 301.

45. 721 S.W.2d 290 (Tex. 1986).

46. *Id.* at 293.

47. *Id.* at 292 (discussing *Gulf C. & S.F. Ry. v. Redeker*, 67 Tex. 190, 2 S.W. 527 (1886)).

48. 721 S.W.2d at 293.

49. *Id.* at 292. RESTATEMENT (SECOND) OF TORTS § 700 (1977) states: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."

50. 721 S.W.2d at 293.

51. TEX. PENAL CODE ANN. § 25.03 (Vernon 1974).

52. TEX. FAM. CODE ANN. §§ 36.01-08 (Vernon 1986).

53. 721 S.W.2d at 292 (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983)).

54. *Id.*

be no showing of actual physical injury to the parents for the parents to have a right of recovery.<sup>55</sup>

A federal court in *Shean v. White*<sup>56</sup> decided to abstain provisionally from deciding a possible civil rights claim pending resolution of the dispute by the state courts. The case involved allegations of wrongful conduct on the part of state officials, including some state judges, in the placement of certain children in foster care. The court found that the defendant judges were absolutely immune and dismissed any actions as to them.<sup>57</sup> The court, in abstaining, relied primarily on the domestic relations exception, but also cited the need to avoid disrupting state efforts to establish a coherent policy.<sup>58</sup>

In a divorce petition a husband filed for managing conservatorship of not only his own child, but of one that had been born to his former spouse just prior to the marriage. The trial court granted his request, but the appellate court reversed<sup>59</sup> as to his non-natural child. The court held that in order for a third party to prevail against a natural parent, as to managing conservatorship, the third party must rebut the presumption that it is in the best interest of the child to appoint the natural parent the managing conservator.<sup>60</sup> The court held that evidence concerning positive benefits will not rebut the presumption and that the third party must introduce evidence affirmatively showing a detrimental effect upon the child if the child is placed with the natural parent.<sup>61</sup> In *Sharp v. Sharp*<sup>62</sup> the court granted the mother managing conservatorship although a family therapist made allegations of sexual abuse.<sup>63</sup> The trial court on somewhat incomplete evidence found the allegations unsupported, and the appellate court affirmed.<sup>64</sup> In another contested conservatorship case the appellate court ordered the trial court to set aside its order to the husband that he furnish blood and urine samples for laboratory analysis.<sup>65</sup> The court held that the trial court's order was an abuse of discretion, since the wife had not made an affirmative showing that the husband's mental or physical condition was in controversy.<sup>66</sup> In *Beaupre v. Beaupre*<sup>67</sup> the father, possessory conservator, complained that the trial court

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55. *Id.*

56. 620 F. Supp. 1329 (N.D. Tex. 1985).

57. *Id.* at 1330.

58. *Id.* at 1331.

59. *Neely v. Neely*, 698 S.W.2d 758, 760 (Tex. App.—Austin 1985, no writ).

60. *Id.* "A parent shall be appointed managing conservator of the child unless the court finds that appointment of the parent would not be in the best interest of the child." TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1986). This same section was relied on in *Ex rel. T—*, 715 S.W.2d 416, 418 (Tex. App.—Dallas 1986, no writ), to affirm the granting of managing conservatorship to the child's mother as opposed to the grandmother. In *Yevak v. Yevak*, 713 S.W.2d 164 (Tex. App.—Texarkana 1986, no writ), the question of evidence had not yet arisen, since the grandparents had been denied the right to intervene. The case was reversed and remanded. *Id.* at 166.

61. 698 S.W.2d at 759-60.

62. 710 S.W.2d 696 (Tex. App.—Dallas 1986, no writ).

63. *Id.* at 698.

64. *Id.*

65. *Walsh v. Ferguson*, 712 S.W.2d 885, 885-87 (Tex. App.—Austin 1986, no writ).

66. *Id.* at 886, 887. Good cause must be shown before an order for a physical examination can issue. TEX. R. CIV. P. 167a(a).

67. 700 S.W.2d 353 (Tex. App.—Fort Worth 1985, writ *dism'd*).

denied him access to his children because the conservatorship decree provided for supervised visitation for three months and made no specific provisions for the period thereafter. The appellate court held that although the Family Code provides that the times and conditions for access must be specific,<sup>68</sup> if good cause is shown why such specificity would not be in the children's best interest, then the possessory conservator has the right of reasonable visitation.<sup>69</sup> In *Vellek v. Vellek*<sup>70</sup> a decree that contemplated visitation in Japan was not an abuse of discretion since no extreme grounds existed to support a denial.<sup>71</sup>

Once the terms of conservatorship have been established, they can be modified only upon a showing of a material and substantial change in circumstances, that retention of the present managing conservator would be injurious to the child, and either that the appointment of a new managing conservator would be a positive improvement or the managing conservator has voluntarily relinquished possession and control for more than twelve months and the modification is in the best interest of the child.<sup>72</sup> In recent years, a number of divorce decrees have included agreed joint conservatorships,<sup>73</sup> and after a time one or the other of the parents has attempted to modify them so as to be appointed the sole managing conservator.<sup>74</sup> Some of these motions have been successful<sup>75</sup> and some unsuccessful.<sup>76</sup> In *Brown v. Russell*,<sup>77</sup> the jury found that the conditions of the statute had been met, but the appellate court reversed and remanded because of the prejudicial comments of the trial judge.<sup>78</sup> *McClain v. Moore*<sup>79</sup> is especially notable because a stepfather was not only able to prevail on the question of modification, but also, in contrast to the stepfather in *Neely*,<sup>80</sup> he prevailed on the issue of the best interest of the child as against the natural mother.<sup>81</sup>

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68. TEX. FAM. CODE ANN. § 14.03(a) (Vernon 1986).

69. 700 S.W.2d at 355.

70. 709 S.W.2d 760 (Tex. App.—San Antonio 1986, no writ).

71. *Id.* at 762.

72. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon 1986).

73. See *infra* notes 74-76. TEX. FAM. CODE ANN. § 14.06(a) (Vernon 1986) provides that parties may enter into written agreements containing, among other things, provisions for the appointment of joint managing conservators.

74. For a recent negative review of joint custody arrangements see Baron, *Joint Managing Conservatorship: Why Texas Courts Should Not Permit It*, 28 S. TEX. L. REV. 379 (1986).

75. *Doyen v. Doyen*, 713 S.W.2d 370, 371-72 (Tex. App.—Beaumont 1986, no writ) (relationship with mother was found to be deteriorating); *Randle v. Randle*, 700 S.W.2d 314, 316 (Tex. App.—Houston [1st Dist.] 1985, no writ) (modification to avoid constant switching of child back and forth would be a positive improvement).

76. *Whitehead v. Whitehead*, 709 S.W.2d 388, 389 (Tex. App.—Beaumont 1986, writ dismissed) (per curiam) (no evidence to sustain change of condition, but reversed and remanded because of evidence that parents would be living in different localities and therefore a change in the access provisions may be needed); *Ramsey v. Ramsey*, 707 S.W.2d 724, 725-26 (Tex. App.—Beaumont 1986, no writ) (without a finding of a change of conditions a de facto change of managing conservator is erroneous).

77. 703 S.W.2d 843 (Tex. App.—Fort Worth 1986, no writ).

78. *Id.* at 847-48.

79. 701 S.W.2d 62 (Tex. App.—Tyler 1985, no writ).

80. *Neely v. Neely*, 698 S.W.2d 758 (Tex. App.—Austin 1985, no writ) (per curiam). For a discussion of this case see *supra* notes 59 and 60 and accompanying text.

81. 701 S.W.2d at 64.

Procedural errors can hamper modification attempts, especially if a party files a motion in the wrong court<sup>82</sup> or if the court fails to transfer as required by the statute.<sup>83</sup> When there is nothing in the record showing otherwise, the appellate court will presume that judgment was rendered in accord with a mutual agreement.<sup>84</sup> In *Stock v. Stock*<sup>85</sup> the court held that even if a father has fled the jurisdiction with his child following the rendering of a joint managing conservatorship decision, this decision cannot be modified after it has become final by denoting the modification a nunc pro tunc change.<sup>86</sup> In addition, the court held that a father was entitled to his day in court following notice by publication of a further modification of the original revised decision, since he had filed a motion for new trial within the two-year period permitted by the statute.<sup>87</sup> Finding the original revised order void, the appellate court ordered both the original revised order and the modification order set aside and remanded for a new trial.<sup>88</sup> Modification cannot be accomplished by appealing to the federal courts.<sup>89</sup>

The Texas courts continue to endeavor to comply with the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>90</sup> and have consistently held that if evidence shows that Texas is not the home state of the child and that another state has jurisdiction,<sup>91</sup> the decision of the trial court to refuse jurisdiction will not be overturned.<sup>92</sup> In *Grimes v. Grimes*<sup>93</sup> the court held that when the court of another state has jurisdiction over one of two siblings and the other sibling has no home state,<sup>94</sup> but substantial evidence is introduced concern-

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82. See *Ortiz v. Aranda*, 716 S.W.2d 692, 693 (Tex. App.—Corpus Christi 1986) (modification void, because no record of transfer of jurisdiction from the court of exclusive jurisdiction).

83. See *Reed v. Kenyon*, 713 S.W.2d 805, 806-08 (Tex. App.—Houston [1st Dist.] 1986, no writ) (mandamus will issue when a timely motion to transfer has been filed and there is no controverting affidavit). The transfer is a ministerial duty under TEX. FAM. CODE ANN. § 11.06 (Vernon 1986); see also *Lambert v. Baker*, 705 S.W.2d 735, 736 (Tex. App.—Houston [14th Dist.] 1986, no writ) (per curiam) (mandamus will not issue when the statement of facts contains conflicting evidence as to the length of time the child has lived in the county).

84. *Tevathan v. Akins*, 712 S.W.2d 559, 560 (Tex. App.—Houston [1st Dist.] 1986, no writ).

85. 702 S.W.2d 713 (Tex. App.—San Antonio 1985, no writ).

86. *Id.* at 716-17.

87. *Id.* at 714. TEX. R. CIV. P. 329 sets this two-year limitation.

88. 702 S.W.2d at 716-17.

89. See *Krempp v. Dobbs*, 775 F.2d 1319 (5th Cir. 1985) (affirming the federal district court refusal to review the result of a state custody proceeding).

90. TEX. FAM. CODE ANN. §§ 11.51-.75 (Vernon 1986 & Supp. 1987).

91. The criteria established to determine whether Texas has jurisdiction is found in *id.* § 11.53.

92. See *Harkness v. Harkness* 709 S.W.2d 376, 378 (Tex. App.—Beaumont 1986, writ dismissed) (upholding trial court's discretion in refusing to file additional facts and conclusions of law when Texas not home state of child); *Mason v. Barton*, 705 S.W.2d 284, 286 (Tex. App.—San Antonio 1986, no writ) (per curiam) (mandamus denied although trial court had granted Texas mother emergency temporary managing conservatorship, but had also refused jurisdiction because it found that Oregon was the proper forum to decide the custody issue); *Porter v. Johnson*, 712 S.W.2d 598, 599 (Tex. App.—Corpus Christi 1986, no writ) (trial court found that child had not lived in Texas for six months prior to the commencement of the modification proceeding and, in addition, a custody proceeding was pending in North Carolina).

93. 706 S.W.2d 340 (Tex. App.—San Antonio 1986, writ dismissed).

94. TEX. FAM. CODE ANN. § 11.52 (5) (Vernon 1986) defines the term "home state" as



ing the care and protection of that sibling in the other state, a Texas court should decline jurisdiction.<sup>95</sup> The child in *Grimes* had no home state because, although the Illinois mother had been appointed managing conservator, the child had lived in Texas with her maternal grandmother until the grandmother also moved to Illinois shortly before the suit was filed. In *Haley v. Haley*<sup>96</sup> a husband sued for divorce and managing conservatorship of his children. The children had lived with their mother in Alaska for less than six months at the time of the commencement of the suit. By the time of the trial, however, they had lived in Alaska for longer than a year and a half, and the trial court declined to exercise jurisdiction. The appellate court affirmed, finding that in custody litigation the interests of the children are paramount.<sup>97</sup>

A New Mexico decision deserves special mention. In *New Mexico ex rel. Dep't of Human Services v. Avinger*<sup>98</sup> the New Mexico Supreme Court held that the federal Parental Kidnapping Prevention Act (PKPA)<sup>99</sup> does not preempt New Mexico's child neglect proceedings<sup>100</sup> because the PKPA is silent on this subject and because the legislative history indicates that the PKPA was intended to prevent child-snatching across state lines and not to address child neglect issues.<sup>101</sup> The court then found that under the New Mexico UCCJA<sup>102</sup> the Texas court, which had rendered the original conservatorship decrees, had continuing exclusive jurisdiction and the New Mexico court should not have modified the Texas decrees.<sup>103</sup> This case is important because it clarifies the intent of Congress in child custody matters and points out that the PKPA was not intended to resolve all custody problems.

The major purpose of the PKPA was, as the New Mexico court correctly stated, to prevent child-snatching by providing a scheme that would empower only one state at a time to have jurisdiction to resolve child custody matters.<sup>104</sup> It is possible, however, for two states to mistakenly issue conflicting child custody orders. Recently, when this has happened, parents have turned to the federal courts to resolve the jurisdictional issue.<sup>105</sup> *Hickey v. Baxter*<sup>106</sup> is the most recent case in which a court has held that the domestic relations exception does not apply to PKPA disputes and therefore federal district courts do have the power to resolve the jurisdictional ques-

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the state in which the child immediately preceding the time involved lived with the parents, a parent, or a person acting as a parent, for at least six consecutive months. Special rules apply for children less than six months old and for temporary absences. *Id.*

95. *Id.* at 341-43.

96. 713 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1986, no writ).

97. *Id.* at 804.

98. 104 N.M. 255, 720 P.2d 290 (1986).

99. 28 U.S.C. § 1738A (1982 & Supp. III 1985).

100. N.M. STAT. ANN. § 32-1-9 (1986).

101. 720 P.2d at 292.

102. N.M. STAT. ANN. § 40-10-15(A) (1986).

103. 720 P.2d at 294-95.

104. *Id.* at 292.

105. *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984).

106. 800 F.2d 430 (4th Cir. 1986).

tions.<sup>107</sup> Four circuits have now agreed on this issue.<sup>108</sup> In *Thompson v. Thompson*,<sup>109</sup> however, the Ninth Circuit refused to follow the other circuits, declaring that since the PKPA does not expressly authorize a suit in federal court to enforce its provisions it does not create a cause of action in federal court.<sup>110</sup> The court based its opinion on both the language of the statute and its reading of the legislative history.<sup>111</sup> A dissenting opinion disputed the majority's interpretation of the legislative history,<sup>112</sup> claiming that the majority's application of the statute left it unenforceable.<sup>113</sup> The United States Supreme Court has decided to review *Thompson*<sup>114</sup> in order to resolve the conflict in the circuits as to a private right of action in federal court under the PKPA.

#### IV. SUPPORT

The most important non-event of the past year was the Texas Supreme Court's promulgating and then rescinding child support guidelines.<sup>115</sup> The guidelines were mandated by the legislature;<sup>116</sup> they are under study again and will be reissued by the court, presumably during 1987.

The legislature during the Second Called Session of the 69th Legislature enacted a number of amendments to the child support and wage assignment scheme, which had been enacted during the regular session in 1985.<sup>117</sup> These changes were mandated by the federal Child Support Enforcement Amendment of 1984,<sup>118</sup> because, despite the efforts of the legislature, the Texas scheme was not in compliance with the requirements of the federal act.<sup>119</sup> The changes consisted of various methods for expediting the enforcement and therefore the payment of support, and took effect January 1, 1987.<sup>120</sup>

Trial courts currently have wide discretion to establish the amount of support necessary in particular cases, and unless there has been an abuse of discretion the appellate courts will not overturn their orders.<sup>121</sup> In the case

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107. *Id.* at 431.

108. *See supra* notes 105 and 106.

109. 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3507 (U.S. Jan. 27, 1987) (No. 86-964).

110. 798 F.2d at 1552.

111. *Id.* at 1553-58.

112. *Id.* at 1560-62.

113. *Id.* at 1562. The dissent stated the majority's application of the statute turned it into "a toothless declaration of unenforceable platitudes." *Id.*

114. 55 U.S.L.W. 3507 (U.S. Jan. 27, 1987) (No. 86-964).

115. 23 TEX. LAW. CIV. DIG. # 26 (May 26, 1986) (rescinded July 16, 1986).

116. TEX. FAM. CODE ANN. § 14.05 (a) (Vernon 1986).

117. *See Solender, supra* note 2, at 53-56.

118. P.L. No. 98-378, 98 Stat. 1305.

119. Unless Texas was in compliance with the provisions of the Act it is possible that federal officials could impose monetary sanctions. 42 U.S.C. § 603(h) (Supp. III 1985).

120. TEX. FAM. CODE ANN. §§ 14.05(e)(f), 14.31, .32, .41-.45, .61(b), .80-.86 (Vernon Supp. 1987).

121. *See Abrams v. Abrams*, 713 S.W.2d 195, 196-97 (Tex. App.— Corpus Christi 1986, no writ) (support order of \$500 per child per month not an abuse of discretion, but periodic increases in support was not supported by the evidence); *Nelson v. Nelson*, 713 S.W.2d 146,

of *Aguilar v. Barker*,<sup>122</sup> involving an involuntary paternity action, the appellate court affirmed the trial court's discretion not only to establish child support of \$500 a month, but to award support retroactive to the date of birth.<sup>123</sup> In this case, the mother had not specifically requested retroactive support in her pleadings, but the appellate court affirmed the award, stating that detailed pleadings are not required in suits affecting the parent-child relationship.<sup>124</sup>

In *Huckeby v. Lawdermilk*<sup>125</sup> the court approved an upward modification of child support to \$250 per month although an existing settlement agreement provided for support of \$100 per month.<sup>126</sup> The payor spouse contended that the trial court erred in amending the contractual agreement because the parties entered into it in accordance with the Family Code.<sup>127</sup> The appellate court held that what the trial court had modified was a support order and that to hold a court could not modify a support order because of an existing support agreement would deny the court the power to act in the child's interest.<sup>128</sup> The amount of modification of an award is within the trial court's discretion,<sup>129</sup> but a court cannot allow a noncustodial parent to claim children as dependents for income tax purposes when this would be contrary to the Internal Revenue Code.<sup>130</sup> A court lacks jurisdiction to enter an extension of support order once the child has passed his eighteenth birthday.<sup>131</sup>

In *Stubbs v. Stubbs*<sup>132</sup> the father became delinquent in his support payments because, he contended, he no longer owed support since his daughter had left her mother's home. The mother denied this and requested an as-

147 (Tex. App.—Texarkana 1986, no writ) (per curiam) (support order of \$300 per month child support affirmed); *Pharo v. Trice*, 711 S.W.2d 282, 284 (Tex. App.—Dallas 1986, no writ) (requiring ex-wife to pay \$500 per month child support not an abuse of discretion); *Peery v. Peery*, 709 S.W.2d 392, 395 (Tex. App.—Fort Worth 1986, no writ) (support award of less than 25% of husband's income held reasonable); *Conroy v. Conroy*, 706 S.W.2d 745, 748 (Tex. App.—El Paso 1986, no writ) (\$445 per month child support not an abuse of discretion where father had income of \$3,000-plus a month and mother had no income and had never worked outside the home during the twenty-four years of marriage).

122. 699 S.W.2d 915 (Tex. App.—Houston [1st Dist.] 1985, no writ).

123. *Id.* at 917-18.

124. *Id.* at 917.

125. 709 S.W.2d 331 (Tex. App.—Eastland 1986, no writ).

126. *Id.* at 334.

127. TEX. FAM. CODE ANN. § 14.06 (Vernon 1986) provides for agreements concerning conservatorship.

128. 709 S.W.2d at 333.

129. See *Gawlik v. Gawlik*, 707 S.W.2d 256, 258-59 (Tex. App.—Corpus Christi 1986, no writ) (support raised from \$50 per month per child to \$75 per month per child, but trial court could not establish arrearage at \$3,000 when in actuality it should have been \$12,000).

130. See *Davis v. Fair*, 707 S.W.2d 711, 718 (Tex. App.—Eastland 1986, no writ) (the court did remand for a hearing on modification of support because of the hardship this ruling might have on the payor).

131. See *Attaway v. Attaway*, 704 S.W.2d 492, 494 (Tex. App.—Corpus Christi 1986, no writ) (child must require continuous care and personal supervision because of mental or physical disability in order for support to be extended beyond the age of 18 years); *Ex parte Boemer*, 711 S.W.2d 406, 407 (Tex. App.—Dallas 1986, no writ) (relator ordered released because trial court had no jurisdiction to extend support order when modification requested after children had turned 18).

132. 715 S.W.2d 373 (Tex. App.—Houston [1st Dist.] 1986, no writ).

signment of wages. The assignment was granted, although the daughter in question was living with her maternal grandmother while attending school in St. Louis, Missouri. The court pointed out that the temporary absence of a child from home does not conclusively establish that she is no longer living at home.<sup>133</sup> In *Veterans Administration v. Kee*<sup>134</sup> the children were not so fortunate. The Texas Supreme Court held that because of federal preemption, the father's disability benefits received in exchange for his waiving all his retirement benefits are not subject to garnishment for child support.<sup>135</sup> In *Madnick v. Doelling*<sup>136</sup> the appellate court found that the parties had entered into a contractual agreement of support that was enforceable as a contract although the support obligation had been modified downward over the years.<sup>137</sup> The support agreements were denominated as covenants, and the children were designated as third-party beneficiaries who could enforce the covenants. The appellate court found that this agreement was therefore contractual.<sup>138</sup> In *Ruhe v. Rowland*<sup>139</sup> the court found a contract to support, and despite a subsequent downward modification of the judgment of support, held that the court did not have the authority to modify the terms of the support contract.<sup>140</sup> The unpaid child support was therefore not discharged in bankruptcy.

When a settlement agreement incorporates a specific amount of insurance to remain in force and payable to the children of the insured, the insured cannot thwart the agreement by converting the policy to two smaller policies only one of which designates the children as the beneficiaries.<sup>141</sup> The children remain entitled to the full amount, which would include both policies.<sup>142</sup> In *Ayala v. Minniti*,<sup>143</sup> in connection with cross motions to modify both conservatorship arrangements and support payments, the court entered a temporary order to restrain the father or his attorneys from disposing of any funds received in settlement of a pending lawsuit. The father appealed the order, but since he had agreed to it, the court held that he was estopped from challenging it.<sup>144</sup> The statute of limitations does not begin to run until

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133. *Id.* at 375.

134. 706 S.W.2d 101 (Tex. 1986).

135. *Id.* at 102-03. The United States Supreme Court has noted probable jurisdiction of a case coming from Tennessee in which the state court held, contrary to Texas, that it could order the payment of child support from veteran's disability benefits. *Rose v. Rose*, 106 S. Ct. 3292, 92 L. Ed. 2d 708 (1986).

136. 713 S.W.2d 799 (Tex. App.—El Paso 1986, no writ).

137. *Id.* at 800.

138. *Id.*

139. 706 S.W.2d 709 (Tex. App.—Dallas 1986, no writ).

140. *Id.* at 710. It should be noted that these cases are distinguishable from *Huckeby*, *supra* note 125 and accompanying text, in that *Huckeby* concerned an upward modification of child support, thus the lesser contractual amount would not be affected by the court's judgment.

141. See *Alexander v. Alexander*, 701 S.W.2d 48, 50-51 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (children entitled to proceeds of converted policy).

142. *Id.* at 51.

143. 714 S.W.2d 452 (Tex. App.—Houston [1st Dist.] 1986, no writ).

144. *Id.* at 456-57.

the date each separate payment is due;<sup>145</sup> thus an order reducing back support to judgment is not barred as to most of the payments although the divorce decree was rendered more than ten years prior to the filing of the suit for back child support.<sup>146</sup> A court may not retroactively modify downwards the amount of accrued child support<sup>147</sup> and should automatically reduce the back child support payments to judgment. Further, the court can hold the respondent in contempt for only a portion of the amount in arrears.<sup>148</sup>

Sometimes when an obligor fails to pay child support, the obligee may ask for an order of contempt. This request should be made in the trial court, even though the case is on appeal.<sup>149</sup> If the order is not vague, the contemnor has not shown his inability to pay, and there is a specific writ, then habeas corpus will not be granted.<sup>150</sup> Good time credit should be granted to contemnors who are being punished for failure to pay child support if other county jail inmates receive such credit.<sup>151</sup> To do otherwise would be a denial of equal protection.<sup>152</sup>

Writs of habeas corpus will be granted when the order is void because it is without support in the evidence,<sup>153</sup> not specific enough,<sup>154</sup> or failure to comply is because of inability to pay.<sup>155</sup> A punitive order will be considered void if the time of commitment is increased without proper pleadings or notice to the relator.<sup>156</sup> Once an order has been modified by a transferee court, then the original court loses jurisdiction to enforce a support order.<sup>157</sup>

## V. TERMINATION AND ADOPTION

A decree that terminates the parent-child relationship divests the parent and child of all legal rights with respect to each other.<sup>158</sup> The statutes contain no provision for reversing a termination decree, so it must be rendered in strict compliance with the law.<sup>159</sup> In order for the decree to be valid, the

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145. See *Grasberger v. Grasberger*, 713 S.W.2d 429, 430-31 (Tex. App.—Houston [1st Dist.] 1986 no writ) (limitations period runs from date each individual payment due).

146. *Id.*

147. TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon 1986).

148. See *Castillo v. Castillo*, 714 S.W.2d 440, 442-43 (Tex. App.—San Antonio 1986, no writ) (reversing trial court's reduction of child support to an amount less than owed under child support order).

149. See *Bivins v. Bivins*, 709 S.W.2d 374, 376 (Tex. App.—Amarillo 1986, no writ) (trial court proper forum to seek enforcement of child support).

150. *Ex Parte Glossen*, 705 S.W.2d 711, 712-13 (Tex. App.—Houston [14th Dist.] 1985, no writ); *Ex Parte Williams*, 704 S.W.2d 465, 467-69 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Ex Parte Jones*, 700 S.W.2d 15, 18 (Tex. App.—Eastland 1985, no writ).

151. *Ex Parte Acly*, 711 S.W.2d 627, 628 (Tex. 1986).

152. *Id.*

153. *Ex Parte Davila*, 30 Sup. Ct. J. 28, 29 (Oct. 25, 1986).

154. *Ex Parte Griffin*, 712 S.W.2d 214, 215-16 (Tex. App.—San Antonio 1986, writ *dism'd*).

155. *Ex Parte Lopez*, 710 S.W.2d 948, 954 (Tex. App.—San Antonio 1986, no writ).

156. *Ex Parte Durham*, 708 S.W.2d 536, 537-38 (Tex. App.—Dallas 1986, no writ).

157. *Ex Parte Owen*, 701 S.W.2d 42, 44 (Tex. App.—Dallas 1986, no writ).

158. TEX. FAM. CODE ANN. § 15.07 (Vernon 1986).

159. See *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976) (termination of parent-child

court rendering it must have proper jurisdiction, and if there have been prior actions, it must be the court of continuing jurisdiction.<sup>160</sup> The standard of evidence for the termination of the parent-child relationship is clear and convincing, and a trial court's decree will be reversed if the evidence is insufficient to meet the standard.<sup>161</sup> In *Clark v. Dearen*<sup>162</sup> the court found that the evidence was not clear and convincing and held that the father's rights could not be terminated.<sup>163</sup> The mother had voluntarily relinquished her rights, but the father had not. The trial court terminated both natural parents' rights, the father's involuntarily, and granted a petition for adoption to appellees. The father appealed the decision, and the appellate court reversed.<sup>164</sup> While the decision appears correct on the law, the facts are most unfortunate since the child has lived with the appellees since he was twenty-two months old, is now seven, and has not seen his father since 1984.

*Stewart v. Reese*<sup>165</sup> addressed the problem of permitting a child's custody to revert back to its natural mother if after relinquishment and placement with adoptive parents, the mother changes her mind. This case concerned a private adoption, and after the court had issued a decree of termination, but before it became final, the mother revoked her relinquishment and filed a motion to vacate the decree. The trial court denied the motion, and the appellate court affirmed because the trial court had issued the decree on the basis of an affidavit of relinquishment and the best interest of the child.<sup>166</sup> The court held that permitting retroactive revocations of relinquishments would encourage the snatching back of children "at the whim of the parent."<sup>167</sup>

A termination of a father's parental rights will be sustained upon clear and convincing evidence that the father has engaged in conduct endangering the child.<sup>168</sup> In *Clark v. Clark*<sup>169</sup> the father had been convicted of murdering the mother's two-and-a-half year old child by a previous marriage. The mother thought the murder was an accident and married him. The father, who is serving a twenty-eight year prison term, contested the termination, claiming that since the murder had occurred prior to the birth of the child in question, he had not endangered her. The court disagreed, finding that it was not necessary for the violence to be committed in the presence of the

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relationship may not be based solely upon what the trial court determines to be in the best interest of child; one or more acts or omissions listed in statute must be proved).

160. *Alexander v. Russell*, 699 S.W.2d 209, 210 (Tex. 1985).

161. *Wetzel v. Wetzel*, 715 S.W.2d 387, 388-89 (Tex. App.—Dallas 1986, no writ) (divorced father sought to terminate the rights of the natural mother, his ex-spouse, when she brought an action for contempt to enforce her access rights).

162. 715 S.W.2d 364 (Tex. App.—Houston [1st Dist.] 1986, no writ).

163. *Id.* at 366-67.

164. *Id.* at 368.

165. 698 S.W.2d 236 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

166. *Id.* at 239-40.

167. *Id.* at 240 (citing *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 394 (Tex. 1982)).

168. TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon 1986) sets the requirement regarding endangering the child.

169. 705 S.W.2d 218 (Tex. App.—Dallas 1986, writ dismissed).

child in order for the court to terminate parental rights.<sup>170</sup> The court held that there was sufficient proof that the father's uncontrollable temper would endanger the child unless she was warned and that the warning itself would cause the child emotional harm.<sup>171</sup>

Imprisonment and an underlying criminal record will not of themselves constitute grounds for termination of parental rights,<sup>172</sup> and the bare assertion that the father has voluntarily left the child without more evidence, when the state has the ability to find evidence, pro or con on the point, will not support a termination of parental rights.<sup>173</sup> If there is clear and convincing evidence, parental rights will be terminated, and the court's explanation that termination prevents the authority to order visitation is not considered a comment on the weight of evidence.<sup>174</sup> A mother who appeals her termination is required to file a motion to extend the period for filing a statement of facts within seventy-five days of judgment even if she is indigent.<sup>175</sup> Requiring her to comply with the rules is not a denial of due process or equal protection.<sup>176</sup>

In *Byrne v. Catholic Charities, Diocese of San Angelo, Inc.*<sup>177</sup> the court sustained the rule that a relinquishment of parental rights to a licensed agency is irrevocable<sup>178</sup> unless there is fraud or overreaching and that the execution of the affidavit is proof that termination is in the best interest of the child.<sup>179</sup> The child who was the subject of this suit is now in a position to be adopted by strangers. In *Cowet v. Brine*<sup>180</sup> a child who had been adopted by strangers was the subject of a grandparent access suit. In this case the adoptive parents divorced and the mother remarried. Shortly thereafter the adoptive father was killed. The mother of the adoptive father asked for access rights, and the court denied them on the basis of the statute.<sup>181</sup> The problem is that the statute provides access only if a parent, at the time permission is requested, is a natural parent.<sup>182</sup> This result seems harsh in light of the fact that the adoption decree is to have the effect of creating a parent-child relationship as if the child had been born to the adoptive par-

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170. *Id.* at 219.

171. *Id.*

172. See *Boyd v. Texas Dep't Human Servs.*, 715 S.W.2d 711, 716 (Tex. App.—Austin 1986, no writ) (father's burglary conviction not enough to prove danger to child necessary to sever parent-child relationship).

173. *Texas Dep't of Human Res. v. J.T.H.*, 700 S.W.2d 718, 720-21 (Tex. App.—Corpus Christi 1985, no writ).

174. See *In re McElheney*, 705 S.W.2d 161, 164 (Tex. App.—Texarkana 1985, no writ) (words of trial court did not comment on the weight of the evidence).

175. *Howell v. Dallas County Child Welfare Unit*, 710 S.W.2d 729, 732 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

176. *Id.*

177. 710 S.W.2d 780 (Tex. App.—Austin 1986, no writ).

178. TEX. FAM. CODE ANN. § 15.03(d) (Vernon 1986) states that an affidavit of relinquishment to the Texas Department of Human Services (TDHS) or an agency authorized by the TDHS is irrevocable.

179. 710 S.W.2d at 783.

180. 704 S.W.2d 832 (Tex. App.—Texarkana 1985, writ dismissed).

181. *Id.* at 836.

182. TEX. FAM. CODE ANN. § 14.03(e) (Vernon 1986).

ents during marriage.<sup>183</sup> Furthermore, the child is entitled to inherit from his grandparents as if he were the natural child of his parents.<sup>184</sup> Thus in this case the child will have the legal right to inherit from his "grandmother" should she die intestate,<sup>185</sup> but she does not have the legal right to visit him.

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183. *Id.* § 16.09(a).

184. *Id.* § 16.09(b).

185. TEX. PROB. CODE ANN. § 40 (Vernon 1980).



