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# FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender\*

## I. LEGISLATIVE CHANGES

SINCE 1973, when Title 2, Parent and Child, of the Family Code was first adopted,<sup>1</sup> each session of the Texas Legislature has enacted numerous changes in the code's provisions. Thus, in the area of family law, practitioners and judges must constantly check statutes for substantive changes, and effective dates. Most of the changes made during the regular seventieth session of the Texas Legislature took effect September 1, 1987,<sup>2</sup> except some that took effect June 19, 1987.<sup>3</sup> Those enacted during the second called special session took effect November 1, 1987.<sup>4</sup>

While the legislature made a number of minor, housekeeping changes,<sup>5</sup> it also made two major changes based on policy decisions, and further revised the means of enforcement of child support. The policy changes relate to acceptance of the concept of joint custody and to the courts' acknowledgment of the equal rights of fathers of illegitimate children established by the decision in *In re McLean*.<sup>6</sup>

Divorced fathers have been battling for a larger role in their children's lives and have viewed joint managing conservatorship as one solution.<sup>7</sup> In the past, Texas law provided for joint managing conservatorship only upon agreement of the parties,<sup>8</sup> but now the legislature has enacted a statute that enables a court to appoint joint managing conservators without such an agreement.<sup>9</sup> This change necessitated numerous other changes such as the

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1. Title 2, Parent and Child, ch. 543, 1973 Tex. Gen. Laws 1411.

2. *E.g.*, TEX. FAM. CODE ANN. § 14.021 (Vernon Supp. 1988) (appointment of joint managing conservators).

3. *E.g.*, *id.* § 12.06(a) (denial of paternity); *see* *Davis v. Houston*, 734 S.W.2d 210, 211 (Tex. App.—Fort Worth 1987, no writ) (court denied husband's petition for writ of mandamus because legislature had already amended statute to allow wife to deny husband's paternity).

4. *E.g.*, TEX. FAM. CODE ANN. §§ 14.05(a), (g), (h) (Vernon Supp. 1988) (child support).

5. *E.g.*, *id.* §§ 11.171 (b), (c) (corrected name of Department of Human Resources to Department of Human Services); *Id.* § 14.44(d) (words such as petition changed to motion).

6. 725 S.W.2d 696 (Tex. 1987); for a discussion of the case, see *infra* notes 71-76 and accompanying text.

7. *See generally* M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* (1978).

8. TEX. FAM. CODE ANN. § 14.06(a) (Vernon 1986).

9. *Id.* § 14.01 (Vernon 1986 & Supp. 1988). It is interesting to note that this section in subsection (a) validates what courts have been doing for some time: appointing grandparents

need to define joint managing conservatorship,<sup>10</sup> the need to spell out the rights and duties of each of the joint managing conservators,<sup>11</sup> and the need to define what must be included in the decree.<sup>12</sup> In addition, it is necessary to define the basis for a finding that a court-ordered joint managing conservatorship is in the best interest of the child<sup>13</sup> or when an agreed joint managing conservatorship is not in the best interest of the child.<sup>14</sup> The legislature also included provisions establishing the proper allocation of child support.<sup>15</sup>

The policy in favor of providing stability in children's lives<sup>16</sup> has led to the creation of a presumption that conservatorship decrees should not be relitigated more often than annually.<sup>17</sup> Joint conservatorships are likely to be more difficult to maintain. Either internal or external circumstances may quickly arise that could necessitate modification of the original decree. The legislature recognized this possibility and provided that courts may modify joint conservatorships at any time if certain specified conditions are met.<sup>18</sup> If, however, a party tries to take advantage of these modification provisions in order to harass the other party, a court may require the offending party to pay attorney's fees.<sup>19</sup>

In order to equalize the treatment of mothers and fathers of children born out of wedlock<sup>20</sup> and to recognize the scientific advances in blood tests used to determine paternity, the legislature made a number of changes in Chapter 13, Determination of Paternity. If a father whose paternity is not in dispute wishes to obtain an adjudication of his status as the legitimate parent of his child, he must execute a statement of paternity.<sup>21</sup> Then he, as the biological father, may file a petition with the court for an adjudication that he is the legitimate father of the child, and the court must enter the order.<sup>22</sup>

A biological father's right to legitimate is not subject to a statute of limitations.<sup>23</sup> In addition, the legislature has amended the Probate Code again so that a person claiming to be an illegitimate child or claiming inheritance through an illegitimate child may, based on clear and convincing evidence,

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as joint managing conservators. See *Harrison v. Harrison*, 734 S.W.2d 737, 740 (Tex. App.—Eastland 1987, no writ); *Garner v. Garner*, 673 S.W.2d 413, 416-17 (Tex. App.—Fort Worth 1984, writ dismissed); *Yancey v. Koonce*, 645 S.W.2d 861, 864 (Tex. App.—El Paso 1983, writ refused n.r.e.).

10. TEX. FAM. CODE ANN. § 14.021(b) (Vernon Supp. 1988).

11. *Id.* § 14.02(e).

12. *Id.* § 14.021(f).

13. *Id.* §§ 14.021(e), (h).

14. *Id.* §§ 14.021(c), (h).

15. *Id.* § 14.021(g).

16. See, e.g., *Knowles v. Grimes*, 437 S.W.2d 816, 817 (Tex. 1969) (court denied mother's attempted relitigation of custody because material change of circumstances that would warrant relitigation had not occurred).

17. TEX. FAM. CODE ANN. § 14.08(d) (Vernon Supp. 1988) (modification of order).

18. *Id.* § 14.081(c)(1)(B). This section provides that the court may modify a decree if "the decree has become unworkable or inappropriate under existing circumstances." *Id.*

19. *Id.* § 14.082 (addresses frivolous filing of Motion to Modify Conservatorship).

20. See *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987).

21. TEX. FAM. CODE ANN. § 13.22 (Vernon 1986 & Supp. 1988).

22. *Id.* § 13.21(b) (Vernon Supp. 1988).

23. *Id.* § 13.21(e).

inherit from and through the purported father.<sup>24</sup> If the alleged father remains in the pool of possible fathers after 95% of the male population has been excluded by blood testing, a prima facie case of paternity has been established.<sup>25</sup>

The legislature, in the second called session, enacted a number of changes in the method of enforcing child support orders. The most significant change provides that an indigent respondent facing possible incarceration is entitled to a court-appointed attorney,<sup>26</sup> and the attorney's fee is to be paid out of county funds.<sup>27</sup> The legislature clearly intends all of these procedures to benefit the children whose support is at issue. This is spelled out in the provision requiring bond forfeitures to be paid to the obligee rather than the state.<sup>28</sup> The legislature underscored this policy of support for children regardless of their status by requiring courts to determine support amounts without regard to the legitimacy of the child.<sup>29</sup>

The above represents merely a sampling of the many changes enacted by the seventieth legislative session. The State Bar Family Law Section Reports discuss all of the statutory changes along with some legislative history.<sup>30</sup>

## II. UNITED STATES SUPREME COURT DECISIONS

During the 1986-87 term the United States Supreme Court decided cases in three important areas of parent and child law: paternity, custody, and support. In *Rivera v. Minnich*<sup>31</sup> the Court held that the standard for a finding of paternity requires merely a preponderance of the evidence.<sup>32</sup> The Court reasoned that a paternity action involves a dispute between equals, the mother and the alleged father, and each would suffer similarly as a result of an adverse decision.<sup>33</sup> Thus each should share the risk of an inaccurate finding.<sup>34</sup> The Court did not agree with the father's contention that a finding of paternity in which the only result adverse to the father is financial liability for support of a child is the equivalent of a termination of the parent-child relationship.<sup>35</sup> Accordingly, the standard of proof for each action may differ.<sup>36</sup> The Court distinguished *Santosky v. Kramer*<sup>37</sup> on the basis that when

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24. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1988).

25. TEX. FAM. CODE ANN. § 13.06(c) (Vernon Supp. 1988) (regarding evidence at legitimacy trial).

26. *Id.* § 14.32(f).

27. *Id.* § 14.33(b).

28. *Id.* § 14.32(e).

29. *Id.* § 14.05(g).

30. Vol. 87-4 Legislation Edition, and Vol. 87-5 Legislation Edition, Part II.

31. 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987).

32. *Id.* at 3006, 97 L. Ed. 2d at 481. This resembles Texas law, which permits a finding of paternity by the preponderance of the evidence after a court finds the alleged father not excluded by clear and convincing evidence. TEX. FAM. CODE ANN. § 13.05 (Vernon 1986); See *In re J.A.K.*, 624 S.W.2d 355, 357 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.).

33. 107 S. Ct. at 3005, 97 L. Ed. 2d at 481.

34. *Id.*

35. *Id.* at 3004, 97 L. Ed. 2d at 480.

36. *Id.*

37. 455 U.S. 745 (1982) (in actions to terminate parental rights, state must support its claim by clear and convincing standard).

the state attempts to destroy an on-going relationship, as New York attempted to do in *Santosky*, it should be held to a more demanding standard of proof,<sup>38</sup> while in paternity litigation the reverse holds true since such an action attempts to establish a relationship.<sup>39</sup> The Court found that a majority of the states agree with these differing standards of proof.<sup>40</sup>

In *California v. Superior Court*<sup>41</sup> the Court addressed the problem of child-snatching when courts in different states have entered various custody orders, some of which might be valid. The mother in this case had, at the time of divorce, obtained a California court decree giving her sole custody of the children with visitation for the father. The mother remarried and moved from California without notifying the father. The mother prevented the father from visiting the children and while she resided in Texas obtained a decree from a Texas court giving full faith and credit to the California decree. In the meantime the father obtained a California decree that modified the original decree and provided for joint custody. The California court issued the decree prior to the Texas decree, but the mother did not notify the Texas court of this fact. Because she also did not comply with the modified California decree, the father applied again to the California court, which this time awarded the father sole custody. In each instance all parties received proper service and notice.

The mother continued to ignore the California court's orders and moved to Louisiana, where the father found the children and, with the aid of his father, took them back to California. The mother then instituted a criminal kidnapping action against the father and grandfather by swearing out an affidavit charging that they had acted without authority to remove the children from her custody. With the affidavit as proof, Louisiana filed an information charging the father and grandfather with violating Louisiana's kidnapping statute.<sup>42</sup> The Governor of Louisiana formally notified the Governor of California that the State of Louisiana wanted the father and grandfather for simple kidnapping and demanded that California deliver the men for trial.<sup>43</sup>

The father and grandfather then petitioned the California Superior Court for a writ of habeas corpus to circumvent the extradition warrants. The court issued the writ based on a finding that the affidavits alone did not establish the mother's right to her children. California authorities, acting on behalf of Louisiana, then applied for a writ of mandate from the California Court of Appeal, contending that the lower court had abused its discretion. The appellate court reluctantly granted the writ. On appeal, the California Supreme Court reversed the appellate court and this appeal to the United States Supreme Court followed.

The Court reversed on the basis that the extradition clause of the United

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38. 107 S. Ct. at 3004, 97 L. Ed. 2d at 480.

39. *Id.* at 3003, 97 L. Ed. 2d at 478.

40. *Id.*

41. 107 S. Ct. 2433, 96 L. Ed. 2d 332 (1987).

42. *Id.* at 2436, 96 L. Ed. 2d at 338 (citing LA. REV. STAT. ANN. § 14:45.1 (West 1986)).

43. 107 S. Ct. at 2436, 96 L. Ed. 2d at 338.

States Constitution<sup>44</sup> and the Extradition Act<sup>45</sup> require that extradition be a summary procedure.<sup>46</sup> The Court held that an extradition proceeding is not the place to determine the underlying merits of the claims of the parties.<sup>47</sup> The Court apparently believed that the father had lawful custody of the children according to the decrees of the California courts and that Louisiana would probably so find<sup>48</sup> under the Parental Kidnapping Prevention Act of 1980 (PKPA).<sup>49</sup> The Court nevertheless held that Louisiana provided the proper forum for justice under the Extradition Act.<sup>50</sup>

Justices Stevens and Brennan dissented based on their belief that the Court's reading of the scope of review of an asylum state's judicial inquiry was unnecessarily narrow.<sup>51</sup> Furthermore they believed that this reading of the Extradition Act undermined the goals and purposes of the PKPA.<sup>52</sup> Both sources of law embody "constitutional command[s]," and courts should read them consistently with each other.<sup>53</sup> Finally, and perhaps most importantly, the Justices were concerned that the Court's holding would provide estranged parents with an inappropriate weapon to use against each other in custody battles.<sup>54</sup>

*Rose v. Rose*<sup>55</sup> is a most important case in that it stands for the proposition that state child support orders based on veterans' benefits are not necessarily preempted by federal law.<sup>56</sup> In this case a Tennessee court ordered Mr. Rose, a totally disabled veteran, to pay child support notwithstanding the fact that he derived most of his income from federal veterans' benefits. When he failed to pay he was held in contempt. He appealed, claiming that the Veterans' Administration had exclusive jurisdiction over his benefits and it had not apportioned them. The Court found this irrelevant since the Veterans' Administration had not been involved in the state court child support decision and since Congress had not spoken on this particular issue.<sup>57</sup> These factors reduced the potential for interference with federal interests.<sup>58</sup> The Court also found that veterans' benefits are not paid to the veteran for his support alone, but include support for his family, since the benefits consti-

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44. U.S. CONST. art. IV, § 2, cl. 2.

45. 18 U.S.C. § 3182 (1982).

46. 107 S. Ct. at 2438, 96 L. Ed. 2d at 340. *But see Ex parte Holden*, 719 S.W.2d 678, 679-80 (Tex. App.—Dallas 1986, no pet.) (court held that extradition presented question of gubernatorial discretion). *Holden* is distinguishable because the alleged criminal acts occurred in Texas, not in the demanding state. The applicant, therefore, was entitled to gubernatorial discretion on the question of extradition.

47. 107 S. Ct. at 2440, 96 L. Ed. 2d at 343.

48. *Id.*

49. 28 U.S.C. § 1738A (1982).

50. 107 S. Ct. at 2441, 96 L. Ed. 2d at 343.

51. *Id.* at 2441, 96 L. Ed. 2d at 344.

52. *Id.* at 2445, 96 L. Ed. 2d at 348-49.

53. *Id.* at 2445, 96 L. Ed. 2d at 349.

54. *Id.* at 2446, 96 L. Ed. 2d at 350.

55. 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).

56. *Id.*

57. *Id.* at 2035, 95 L. Ed. 2d at 609.

58. *Id.* at 2036, 95 L. Ed. 2d at 610.

tute compensation for impaired earning capacity.<sup>59</sup> The funds are exempt from garnishment or attachment while they are in the hands of the Veterans' Administration, but following delivery to the veteran himself a state court may require the veteran either to pay child support or be found in contempt.<sup>60</sup>

Last year's decision of the Texas Supreme Court in *Veterans Administration v. Kee*,<sup>61</sup> in which the court held that a state court may not garnish a father's disability benefits,<sup>62</sup> appears correct in light of *Rose*. It is, of course, more certain as well as convenient to be able to order a federal agency to pay child support monies directly to the obligee. Since this is not possible in the case of veterans' benefits, the obligees should, on the basis of the holding in *Rose*, be able to collect their child support arrearages through contempt proceedings.

### III. STATUS

In *Howell v. State*<sup>63</sup> the appellate court upheld the parents' conviction for violating the compulsory school attendance law.<sup>64</sup> The parents had appeared pro se and contended that it was their religious conviction that their children should be educated at home. At trial, however, they failed to show the nature of their religious beliefs and practices. The appellate court held that they had failed to show that the attendance law imposed a substantial burden on the exercise of their religious beliefs and, therefore, did not reach the question of the state's interest in educating minors.<sup>65</sup>

Another parent appearing pro se also ran into difficulties in *Susan R.M. v. Northeast Independent School District*.<sup>66</sup> The court held that the father had no standing since he had relinquished managing conservatorship to the Texas Department of Human Services.<sup>67</sup> The case arose under the Education of All Handicapped Children Act.<sup>68</sup> The court pointed out that the father might receive an appointment as next friend if the legal representative's interests conflicted with those of the infant, but the father must ask for and obtain court approval to do so.<sup>69</sup>

Fathers in Texas have had difficulty in establishing their right to parenthood when their children have been born illegitimate and the mother has objected to paternal involvement.<sup>70</sup> In *In re McLean*<sup>71</sup> the Texas

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59. *Id.*

60. *Id.* at 2039, 95 L. Ed. 2d at 614.

61. 706 S.W.2d 101 (Tex. 1986).

62. *Id.* at 103.

63. 723 S.W.2d 755 (Tex. App.—Texarkana 1986, no pet.).

64. *Id.* at 756 (parents held to have violated TEX. EDUC. CODE ANN. § 4.25 (Vernon 1972 & Supp. 1988)).

65. 723 S.W.2d at 757-58.

66. 818 F.2d 455 (5th Cir. 1987).

67. *Id.* at 458.

68. 20 U.S.C. §§ 1411-1420 (1982 & Supp. III 1985).

69. 818 F.2d at 458.

70. See *In re T.E.T.*, 603 S.W.2d 793, 797-98 (Tex. 1980).

71. 725 S.W.2d 696 (Tex. 1987).

Supreme Court recognized that the Texas equal rights amendment<sup>72</sup> requires courts to use strict scrutiny when examining gender-based discrimination.<sup>73</sup> The court held that procedures for voluntary legitimation as originally enacted violated the Texas Constitution.<sup>74</sup> A man who sought recognition as the parent of his illegitimate child, over the mother's objection, had to prove that it was in his child's best interest that the court recognize him as the child's parent.<sup>75</sup> A mother, on the other hand is recognized as the child's parent from birth.<sup>76</sup> As a result of *In re McLean* the legislature changed the statute.<sup>77</sup> Of course, a court may terminate for cause the parent-child relationship of either the biological father or the mother.<sup>78</sup> If a father has not been found to be the biological father, but is merely the probable or alleged father, the court may terminate his rights if he fails to respond to citation in a suit affecting the parent-child relationship.<sup>79</sup>

Married fathers have been able to deny paternity,<sup>80</sup> but until the recent change in the statute<sup>81</sup> wives could not unilaterally challenge their husband's parental status. Courts, in addition, have been reluctant to bastardize children born during marriage.<sup>82</sup> *In re S.C.V.*<sup>83</sup> demonstrates the confusion created by presumptions and the exclusion of scientific evidence.<sup>84</sup> The court refused to admit the serologic evidence of the husband's nonpaternity and instead ruled that since it could find no evidence of nonaccess by the husband, the mother had not rebutted the presumption of legitimacy of a child born during marriage.<sup>85</sup> The court, therefore, held that the alleged father, who was not the husband, was also not the father of the child, even though the jury had found to the contrary.<sup>86</sup> The husband was not a party to the suit and, as the dissent pointed out, he could file a nonpaternity suit proving his nonpaternity; the child would then have no legal father at all.<sup>87</sup>

Once a court has ruled in a divorce case that the former husband fathered the children born during the marriage, setting aside that finding without the consent of the mother is almost impossible. In *Spears v. Haas*,<sup>88</sup> for example, the court denied a writ of mandamus that would have compelled the

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72. TEX. CONST. art. I, § 3a.

73. 725 S.W.2d at 698.

74. *Id.*

75. See Parent-Child Relationship Act, ch. 476, § 13.21, 1975 Tex. Gen. Laws 1263, amended by Act of June 18, 1987, ch. 689, § 8, 1987 Tex. Gen. Laws 5100.

76. TEX. FAM. CODE ANN. § 12.01 (Vernon 1986).

77. See *supra* notes 20-25 and accompanying text.

78. TEX. FAM. CODE ANN. §§ 15.02, 15.024 (Vernon 1986 & Supp. 1988).

79. *Id.* § 15.023.

80. See Parent-Child Relationship Act, ch. 424, § 7, 1983 Tex. Gen. Laws § 2355, amended by Act of June 18, 1987, ch. 689, § 5, 1987 Tex. Gen. Laws 5099 (current version at TEX. FAM. CODE ANN. § 12.06 (Vernon Supp. 1988)).

81. TEX. FAM. CODE ANN. § 12.06 (Vernon Supp. 1988).

82. *Joplin v. Meadows*, 623 S.W.2d 442, 463 (Tex. App.—Texarkana 1981, no writ) (court recognized presumption of legitimacy accorded to births during wedlock).

83. 735 S.W.2d 874 (Tex. App.—Dallas 1987, writ granted).

84. *Id.* at 876.

85. *Id.* at 878-79.

86. *Id.* at 875, 877.

87. *Id.* at 880.

88. 718 S.W.2d 756 (Tex. App.—Corpus Christi 1986, no writ).



former wife-mother to submit to serologic testing to determine paternity.<sup>89</sup> The husband attempted to overturn the original paternity finding by way of a bill of review, and the court held that he had to establish a prima facie case before he could ask that the wife undergo serology testing.<sup>90</sup> He had had a vasectomy two years prior to the birth of his twins. He must, therefore, have known at the time of his divorce of the basis for contesting paternity.<sup>91</sup> Had the husband contested paternity at the time of divorce, then the serologic evidence would have been admitted. If the evidence was clear and convincing that the husband was excluded from paternity, then the court would have had to have found that he was not the father.<sup>92</sup>

*Collier v. Wichita County Child Welfare Unit*<sup>93</sup> involved an alleged father's attempted legitimation of two children born prior to marriage, and one during another marriage; the court dismissed the claim. Problems arose as a result of a suit brought by the Wichita County Child Welfare Unit to terminate the parent-child relationship. The biological father counter-claimed in that suit to legitimate his two children. The court held that the child born between marriages was the legitimate child of the father despite the fact that a court later annulled the marriage and the father had declared under oath that there were no children born during the marriage.<sup>94</sup> The court in *Collier* went on to hold that the older child who was born during an earlier marriage of the mother was a legitimate child of that earlier marriage and, therefore, the biological father could not voluntarily legitimate that child.<sup>95</sup> The dissent claimed that the court had engaged in too technical a reading of the father's petition and would have reversed and remanded the case.<sup>96</sup>

After a paternity suit brought by the state has been dismissed with prejudice because of the noncooperation of the mother, the child cannot appeal the judgment since the child was not a party to the original suit.<sup>97</sup> If a court entered summary judgment in a paternity suit under the old one-year statute of limitations,<sup>98</sup> based on a limitations defense, a second suit will be barred based on the doctrine of res judicata.<sup>99</sup> The Dallas appeals court that found a subsequent suit barred noted that the child had not been a party to either suit.<sup>100</sup> This result is unfortunate because the United States Supreme Court

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89. *Id.* at 758.

90. *Id.*

91. *Id.*

92. See *W.K. v. M.H.K.*, 719 S.W.2d 232, 234, 236 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (when father establishes absence of biological fatherhood by clear and convincing evidence, court must proceed to find absence of paternity).

93. 722 S.W.2d 198 (Tex. App.—Fort Worth 1986, no writ).

94. *Id.* at 200 (court relied on statutory presumption of legitimation in TEX. FAM. CODE ANN. § 12.02(a) (Vernon 1986 & Supp. 1988)).

95. 722 S.W.2d at 201.

96. *Id.* at 202.

97. See *Stroud v. Stroud*, 733 S.W.2d 619, 621, 622 (Tex. App.—Dallas 1987, no writ).

98. Parent-Child Relationship Act, ch. 476, § 13.01, 1975 Tex. Gen. Laws 1261, 1261-62, amended by, Act of June 19, 1983, ch. 744, § 13.01, 1983 Tex. Gen. Laws 4531; see TEX. FAM. CODE ANN. § 13.01 (Vernon 1986).

99. *Fite v. King*, 718 S.W.2d 345, 347 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

100. *Id.* at 346 n.1.

found the original limitations statute unconstitutional<sup>101</sup> and the legislature changed the statute by lengthening the limitations period to twenty years from the date of birth.<sup>102</sup> The *Fite* case addressed by the Dallas court presented an especially good fact situation for applying the Restatement (Second) of Judgments, which permits exceptions to the rule of res judicata when the judgment in the first action was plainly inconsistent with the implementation of a later statutory scheme or constitutional holding.<sup>103</sup>

A child must establish paternity in order to collect worker's compensation,<sup>104</sup> bring a wrongful death action,<sup>105</sup> or obtain social security benefits.<sup>106</sup> In order to contest a will it is not necessary to establish paternity; a justiciable interest is sufficient.<sup>107</sup> In *Seyffert v. Briggs*,<sup>108</sup> however, the plaintiff contended that she was the illegitimate child of the decedent and therefore entitled to act as the administratrix of the estate. She based her claim on the statute permitting the use of written statements made by her alleged father before 1974.<sup>109</sup> The court held that these statements could be used in a paternity action, but not in a probate action, since the Probate Code<sup>110</sup> in effect at the time only recognized legitimate children or illegitimate children whose fathers had executed statements of paternity in accordance with the Family Code.<sup>111</sup> Accordingly, the appellate court dismissed the cause without prejudice.<sup>112</sup> If, however, the heirs can demonstrate that their ancestor was a natural child of the decedent, they may still inherit from the decedent, if they can show that they have been disinherited because of an old, unconstitutional statute.<sup>113</sup>

The attorney general has ruled that a child receiving death benefits, because of the death of a parent, under the state statute for children of fire and

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101. *Mills v. Habluetzel*, 456 U.S. 91, 97, 100 (1982) (statute violated equal protection).

102. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1988).

103. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d) (1982); *see id.* § 26(1)(d) comment e, illustration 6.

104. *Leal v. Moreno*, 733 S.W.2d 322, 324 (Tex. App.—Corpus Christi 1987, no writ) (paternity could be conclusively disproved by use of properly administered blood tests).

105. *See Cook v. Winters*, 645 F. Supp. 158, 159-60 (S.D. Tex. 1986) (court abstained based on federal domestic relations exception as well as holding that child was not decedent's natural or legal child based on finding in prior Texas divorce decree).

106. *See Morris v. Bowen*, 646 F. Supp. 363, 365-66 (W.D. Tex. 1986). The court found that the child was not the decedent's natural or legal child and that under Texas law there was no clear or convincing evidence of an agreement to adopt; the child, therefore, was not the decedent's equitably adopted child. *Id.* at 366.

107. TEX. PROB. CODE ANN. § 10 (Vernon 1980).

108. 727 S.W.2d 624 (Tex. App.—Texarkana 1987, writ ref'd n.r.e.).

109. *Id.* at 627 (citing TEX. FAM. CODE ANN. § 13.24 (Vernon 1986)).

110. *See* Probate Revision Act, ch. 713, § 5, 1979 Tex. Gen. Laws 1743, amended by Act of June 17, 1987, ch. 464, § 1, 1987 Tex. Gen. Laws 4085, 4085-86 (current version at TEX. PROB. CODE ANN. § 12(b) (Vernon Supp. 1988)); *see also supra* note 24 and accompanying text (discusses amended Probate Code).

111. 727 S.W.2d at 628. The court required that the statement meet the requirements of TEX. FAM. CODE ANN. § 13.22 (Vernon 1986).

112. 727 S.W.2d at 628.

113. *Stafford v. Little*, 730 S.W.2d 162, 163 (Tex. App.—Tyler 1987, no writ). The court rested its decision on the holding in *Reed v. Campbell*, 106 S. Ct. 2234, 2238, 90 L. Ed. 2d 858, 864 (1986) (Court ordered reversal of judgment based on unconstitutional disinheritance statute). *Stafford*, 730 S.W.2d at 163.

law enforcement officers who had suffered violent deaths in the course of duty,<sup>114</sup> may continue to do so even after adoption.<sup>115</sup> If, however, the child was adopted by another before the death of the natural parent, the child may not receive benefits under the statute.<sup>116</sup>

#### IV. CONSERVATORSHIP

In order to determine custody of a child the court must have jurisdiction, and if the court enters an order without proper notice to the parent of the child, that order is void.<sup>117</sup> A court may not enter a default judgment without the ten-day notice required for contested cases when the defendant has entered an appearance.<sup>118</sup> If a party has filed a petition for custody in another state prior to the petition in the Texas court, and the petition in the other state conforms with the Uniform Child Custody Jurisdiction Act (UCCJA),<sup>119</sup> then the Texas court has no subject matter jurisdiction and must not act.<sup>120</sup> After a nonsuit has been entered in a divorce case, a court may issue temporary orders with regard to the custody of the children, but these orders are interlocutory in nature and are eliminated when another court takes jurisdiction of the divorce.<sup>121</sup>

In *Gay v. Gay*<sup>122</sup> the court by some very specious reasoning held that the trial court did not commit reversible error by deciding custody on the basis of the sex of the child.<sup>123</sup> The trial court had stated "that a three-year old girl is a different matter from a three-year old boy" and, therefore, to appoint the mother the managing conservator promoted the best interest of the child.<sup>124</sup> The appellate court recognized that the Family Code prohibits the use of gender as a basis for determining the qualifications of parents<sup>125</sup> and that prior case law has held that such reasoning constitutes reversible error.<sup>126</sup> The court, however, distinguished these authorities by finding that in this case the trial judge focused on the sex of the child and its best interest

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114. TEX. REV. CIV. STAT. ANN. art. 6228f, § 3 (Vernon Supp. 1988).

115. Op. Tex. Att'y Gen. No. JM-731 (1987).

116. *Id.*

117. *Rider v. Farris*, 718 S.W.2d 883, 884 (Tex. App.—Beaumont 1986, writ dismissed). The conservators provided notice by publication and the court entered the judgment after only 16 days' notice to the mother, instead of the proper 20 days required by statute. See TEX. FAM. CODE ANN. § 11.09(e) (Vernon 1986).

118. *Schulz v. Schulz*, 726 S.W.2d 256, 258 (Tex. App.—Austin 1987, no writ) (court reversed trial court's default order because wife had not received proper notice in divorce and conservatorship contest).

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

120. *Cunningham v. Cunningham*, 719 S.W.2d 224, 227, 229 (Tex. App.—Dallas 1986, writ dismissed).

121. *Ault v. Mulanax*, 724 S.W.2d 824, 831-32 (Tex. App.—Texarkana 1986, no writ) (new divorce court must include conservatorship issues in its hearings and judgment).

122. 737 S.W.2d 94 (Tex. App.—El Paso 1987, writ denied).

123. *Id.* at 95.

124. *Id.*

125. *Id.*; see TEX. FAM. CODE ANN. § 14.01(b)(1) (Vernon Supp. 1988) (prohibits consideration of parents' sex).

126. 737 S.W.2d at 95 (citing *Glud v. Glud*, 641 S.W.2d 688, 690-91 (Tex. App.—Waco 1982, no writ) (court reversed child custody order based on consideration of parent's sex)).

rather than the sex of the parents.<sup>127</sup>

The court has discretion to appoint a guardian ad litem in custody suits.<sup>128</sup> Even if the court appoints a guardian, the guardian need not appear at trial when the judge has determined that the guardian can add nothing further to the background of the case.<sup>129</sup> When grandparents intervene in a divorce and custody suit, the grandparents, in order to be appointed managing conservators of the child, must prove that their appointment would be in the best interest of the child.<sup>130</sup> They need not prove that the parents would endanger or emotionally harm the child.<sup>131</sup>

When both parents meet the necessary qualifications for managing conservatorship, the court does not abuse its discretion by entering judgment for the father on the jury verdict, since it would not contradict the weight of the evidence.<sup>132</sup> In *Parker v. Parker*<sup>133</sup> the father stated unequivocally that the child was his, and the mother offered no evidence controverting that statement. As a result, the court held that the trial court had not abused its discretion by appointing the father the managing conservator even though the child was born after only three weeks of marriage.<sup>134</sup> The mother also complained that the lower court had incorrectly overruled her motions to disqualify the father's initial attorney at trial. The court found that this did not constitute error because although the attorney had previously represented the mother in a different custody dispute, the attorney voluntarily withdrew after the mother filed disqualification motions.<sup>135</sup> In addition, the mother failed to show that she suffered prejudice during the trial.<sup>136</sup> The court held that based on the evidence adduced at trial it was in the best interest of the child to appoint the father the managing conservator.<sup>137</sup> The court in *In re Yarbrough*<sup>138</sup> also appointed the father managing conservator despite the mother's claims of jury misconduct and perjury on the part of the father.<sup>139</sup> The appellate court held that the trial court did not abuse its discretion by refusing to order a new trial on the basis of newly discovered

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127. 737 S.W.2d at 96.

128. TEX. FAM. CODE ANN. § 11.10(a) (Vernon 1986).

129. *Lopez v. Lopez*, 723 S.W.2d 772, 773 (Tex. App.—El Paso 1987, no writ) (court awarded managing conservatorship of children to mother).

130. *Harrison v. Harrison*, 734 S.W.2d 737, 740-41 (Tex. App.—Eastland 1987, no writ) (court distinguished between proof required of intervenors in suit that has already been brought under TEX. FAM. CODE ANN. § 11.03(a) (Vernon 1986 & Supp. 1988) and burden of proof required of filers of original suit under *id.* § 11.03(b)).

131. *Id.*

132. *Kotrla v. Kotrla*, 718 S.W.2d 853, 856 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (conservatorship awarded to father although mother was granted "broad" visitation rights, but this did not mean that she was best suited to be managing conservator); *Garza v. Garza*, 718 S.W.2d 825, 827 (Tex. App.—Corpus Christi 1986, no writ) (conservatorship awarded to father since it was not shown that admission of evidence of rumors that mother was having an illicit affair resulted in improper jury verdict).

133. 720 S.W.2d 114 (Tex. App.—Houston [1st Dist.] 1986, no writ).

134. *Id.* at 115.

135. *Id.* at 116.

136. *Id.*

137. *Id.*

138. 719 S.W.2d 412 (Tex. App.—Amarillo 1986, no writ).

139. *Id.* at 413.

evidence when that evidence did not show that the custody order would severely harm the children.<sup>140</sup>

*In re Knighton*<sup>141</sup> is a particularly egregious case since the question of managing conservatorship has been in continuous litigation since 1982. The mother belongs to the Worldwide Church of God and during both trials the father's primary attack on her capacity to be managing conservator of the children focused on her religious beliefs. The court of appeals remanded the case originally in 1984 because of improper comments in the jury charge with respect to the mother's religious beliefs.<sup>142</sup> On remand, a large portion of the interrogation of the parties centered on religion.<sup>143</sup> The court reversed and remanded, again finding that instead of a trial on the issue of the best interest of the child, the proceedings were actually a trial of the mother's religious beliefs.<sup>144</sup> The court held that the error rose to fundamental, constitutional dimension and that the mother did not waive the error by failing to object or by withdrawing a motion for a mistrial.<sup>145</sup> The court did not, however, change the temporary managing conservatorship of the father, which had been in effect since 1982.<sup>146</sup>

In *In re Rutland* the court overruled a similar plea.<sup>147</sup> The court removed the mother, a Jehovah's Witness, as the managing conservator and appointed the father in her stead.<sup>148</sup> The court specifically refused to follow *Knighton* and held that the mother's failure to object to the introduction of her religious beliefs waived any error.<sup>149</sup> The court found sufficient evidence to support a finding that retention of the mother as managing conservator would injure the children and that appointment of the father as managing conservator would be a positive improvement.<sup>150</sup>

In all civil cases, even modification suits, a record should be made unless it has been waived by the parties.<sup>151</sup> A temporary order entered prior to a hearing on the merits of a motion to modify is interlocutory and not appealable.<sup>152</sup> If a child has lived for six months in a county other than the one in which the court entered the original conservatorship order, the court should transfer the cause to the county where the child lives, even if an intervenor

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140. *Id.* at 415, 417.

141. 723 S.W.2d 274 (Tex. App.—Amarillo 1987, no writ).

142. *In re Knighton*, 685 S.W.2d 719, 722 (Tex. App.—Amarillo 1984, no writ).

143. 723 S.W.2d at 278-79.

144. *Id.* at 285.

145. *Id.* at 283, 284.

146. *Id.* at 285.

147. 729 S.W.2d 923 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

148. *Id.* at 932.

149. *Id.* at 931, 932.

150. *Id.* at 935, 936. In *McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986), the Fifth Circuit sustained the trial court's dismissal of the case under the doctrine of claim preclusion. The court found that this was a child custody case brought because of an alleged violation of the mother's first amendment religious rights. *Id.* at 1402. The court held that the issue had not been raised in the Texas court, there had been no appeal from the original judgment, and therefore, the judgment was final. *Id.* at 1403.

151. *Patterson v. Permenter*, 721 S.W.2d 479, 480 (Tex. App.—Beaumont 1986, no writ).

152. *Cobb v. Musslewhite*, 728 S.W.2d 118, 120 (Tex. App.—Tyler 1987, no writ).

has made the motion.<sup>153</sup> A court may reverse a default judgment if it cannot find evidence to support the allegations.<sup>154</sup> In any event, “[c]ourts should exercise liberality”<sup>155</sup> in favor of permitting a defaulting party access to the courts, especially in suits affecting the parent-child relationship.<sup>156</sup> Failure to grant a new trial when a meritorious defense exists is an abuse of discretion.<sup>157</sup>

In order to obtain a modification of a conservatorship order, the petitioner must demonstrate a material change in circumstances and that “retention of the present sole managing conservator would be injurious [and] . . . appointment of a new managing conservator would be a positive improvement . . . .”<sup>158</sup> In *Parsons v. Parsons*<sup>159</sup> the court upheld an order, supported by a jury verdict, changing the managing conservatorship from the mother to the father.<sup>160</sup> The trial court did not abuse its discretion by refusing to admit videotaped testimony of the minor child into evidence.<sup>161</sup> *Magers v. Durham*<sup>162</sup> also involved allegations of sexual abuse, but the court sustained the jury verdict permitting the mother to remain as managing conservator, holding that the court could not substitute its conclusions for those of the jury.<sup>163</sup>

Parties should exercise caution before attempting to change a joint managing conservatorship to a sole managing conservatorship. In *Roach v. Roach*<sup>164</sup> the father filed a motion asking to change the order from joint managing conservatorship to one appointing him as sole managing conservator. He alleged in his pleadings that the joint managing conservatorship injured the children. The jury found that retaining the mother as joint managing conservator was injurious, but that appointment of her as sole managing conservative would provide a positive improvement.<sup>165</sup> The court found that the jury findings did not conflict, since the jury understood that the parties had acted as joint managing conservators.<sup>166</sup> The court also found that the mother did not have to introduce evidence on the injuriousness of the joint managing conservatorship since the father had already done

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153. *Walker v. Miller*, 729 S.W.2d 120, 122-23 (Tex. App.—Dallas 1987, no writ). In this case the child had been living for more than a year with its grandparents with the consent of the managing conservator. The grandparents did not live in Dallas County, and when the father moved to modify they intervened and petitioned the court to transfer the proceeding to the county where the child lived. The grandparents sought appointment as joint managing conservators or possessory conservators. *Id.* at 122.

154. *Considine v. Considine*, 726 S.W.2d 253, 254 (Tex. App.—Austin 1987, no writ).

155. *Sexton v. Sexton*, 737 S.W.2d 131, 133 (Tex. App.—San Antonio 1987, no writ).

156. *Id.*

157. *Id.* at 133, 134.

158. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Supp. 1988).

159. 722 S.W.2d 751 (Tex. App.—Houston [14th Dist.] 1986, no writ).

160. *Id.* at 755.

161. *Id.* at 754.

162. 720 S.W.2d 871 (Tex. App.—Fort Worth 1986, writ *dism'd*).

163. *Id.* at 873.

164. 735 S.W.2d 479 (Tex. App.—Houston [1st Dist.] 1987, no writ).

165. *Id.* at 484.

166. *Id.* at 482.

so.<sup>167</sup>

To litigate the enforcement or modification of custody orders in Texas a party must effectively show that the Texas courts have jurisdiction. For example, in *Clague v. Clague*<sup>168</sup> the court held that Texas did not have jurisdiction to modify a Texas decree because of the children's absence from the state for four years.<sup>169</sup> When the child has a home state other than Texas the courts cannot take jurisdiction based only on a spurious finding of an emergency that allegedly raises serious questions concerning the child's welfare.<sup>170</sup> Texas courts will also recognize a valid Mexican court order and limit permissible relief to a temporary short-term protective order pending final determination by the Mexican court.<sup>171</sup>

The court in *Hutchings v. Biery*<sup>172</sup> apparently believed that the jurisdiction rules concerning interstate custody do not include visitation and so applied the Texas continuing jurisdiction rules<sup>173</sup> instead of the UCCJA.<sup>174</sup> The definition of custody determination in the UCCJA specifically includes visitation.<sup>175</sup> The definitions also refer to Texas terminology as to "custody" meaning managing conservatorship<sup>176</sup> and "visitation" meaning possession,<sup>177</sup> but this does not mean that the jurisdictional rules exclude visitation since it is the custody determination that is at issue.<sup>178</sup> The court in *Hutchings* did hold that the Maryland resident had sufficient contacts with Texas so that the exercise of jurisdiction over him to modify visitation did not offend due process,<sup>179</sup> but that is irrelevant since the court had no jurisdiction under the UCCJA.<sup>180</sup>

Frustration with the inability of one party to persuade the other party to obey custody orders has given rise to an increasing amount of penalizing litigation, but before a person may be confined for failing to comply with a

167. *Id.* The court pointed out that the decision was difficult because the jury had to choose between two good parents who loved the children and had made sacrifices in order to give them a good life. *Id.* at 484.

168. 723 S.W.2d 808 (Tex. App.—Tyler 1987, no writ).

169. *Id.* at 810; see TEX. FAM. CODE ANN. § 11.53(d) (Vernon 1986).

170. *Ex parte McDonald*, 737 S.W.2d 102, 104 (Tex. App.—Corpus Christi 1987, no writ) (father was granted habeas corpus after being found in contempt for violating a court order that court had no jurisdiction to enter); *Milner v. Kilgore*, 718 S.W.2d 759, 762 (Tex. App.—Corpus Christi 1986, no writ) (mother attempted to recover her child from father based on a valid prior court order; writ of habeas corpus should have issued as automatic ministerial act); *Grimes v. Flores*, 717 S.W.2d 949, 952 (Tex. App.—San Antonio 1986, no writ) (court granted mother's writ of mandamus in habeas corpus action to obtain return of her children; mother had already shown that court had no jurisdiction over children for purposes of determining custody, *Grimes v. Grimes*, 706 S.W.2d 340, 343 (Tex. App.—San Antonio 1986, writ dismissed)).

171. *Garza v. Harney*, 726 S.W.2d 198, 203 (Tex. App.—Amarillo 1987, no writ).

172. 723 S.W.2d 347 (Tex. App.—San Antonio 1987, no writ).

173. TEX. FAM. CODE ANN. § 11.05 (Vernon 1986).

174. *Id.* §§ 11.51-.75.

175. *Id.* § 11.52(2).

176. *Id.* § 11.52(10).

177. *Id.* § 11.52(11).

178. *Id.* § 11.53.

179. 723 S.W.2d at 349.

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

visitation order there must be notice and a hearing.<sup>181</sup> The Texas Supreme Court in *Silcott v. Oglesby*<sup>182</sup> ruled that at common law and now by statute<sup>183</sup> a person has the right to obtain damages for the retention of a child in violation of a court order.<sup>184</sup> Accordingly, upon remand by the supreme court the lower court found that the facts sufficiently showed that the maternal grandfather had taken or retained possession of the child in violation of a valid court order, thereby entitling the managing conservator to recover actual and exemplary damages.<sup>185</sup>

In *Smith v. Smith*<sup>186</sup> the court sustained a jury award of \$53 million against a number of related defendants for violating the child custody interference statute.<sup>187</sup> If the thought of a \$53 million judgment does not deter persons from violating court orders, then perhaps criminal penalties will. In *Perry v. State*<sup>188</sup> a mother was convicted of interference with child custody and sentenced to a two-year prison term, which the court probated.<sup>189</sup> In *Davis v. State*<sup>190</sup> a father was convicted of enticing a child, assessed a \$1000 fine, and sentenced to 180 days in jail.<sup>191</sup> He broke into the mother's house and took the child at a time when he was not entitled to possession.<sup>192</sup>

## V. SUPPORT

The child support guidelines that became effective February 4, 1987, and the court order form promulgated by the attorney general for orders withholding from earnings for child support have been published in the Family Code.<sup>193</sup> In *Rafidi v. Rafidi*,<sup>194</sup> decided before the guidelines became effective, the court upheld an award of \$800 a month in child support.<sup>195</sup> In *Jackson v. Crawford*,<sup>196</sup> another pre-guideline case, the court upheld an award of \$500 a month in child support and ordered withholding of earnings to pay the award.<sup>197</sup> The court found that this was not a modification situation, but an original decree since although the petition had been styled as a

181. *Ex parte Mackie*, 727 S.W.2d 129, 131 (Tex. App.—San Antonio 1987, no writ).

182. 721 S.W.2d 290 (Tex. 1986).

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

184. 721 S.W.2d at 293-94.

185. *Oglesby v. Silcott*, 728 S.W.2d 141, 144 (Tex. App.—Tyler 1987, no writ).

186. 720 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1986, no writ).

187. *Id.* at 596, 600 (defendants violated TEX. FAM. CODE ANN. § 36.02 (Vernon 1986)).

188. 727 S.W.2d 781 (Tex. App.—Austin 1987, no pet.).

189. 727 S.W.2d at 781 (mother violated TEX. PENAL CODE ANN. § 25.03(a)(1) (Vernon Supp. 1988)).

190. 736 S.W.2d 217 (Tex. App.—Corpus Christi 1987, no pet.).

191. *Id.* at 218.

192. *Id.* *Winthrop v. State*, 735 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd), is another case in which a defendant was convicted of violating § 25.04 of the Texas Penal Code. TEX. PENAL CODE ANN. § 25.04 (Vernon 1974).

193. See TEX. FAM. CODE ANN. § 14.05 (Vernon Supp. 1988) (child support guidelines); *Id.* § 14.42 (form of order).

194. 718 S.W.2d 43 (Tex. App.—Dallas 1986, no pet.).

195. *Id.* at 46.

196. 727 S.W.2d 628 (Tex. App.—Dallas 1987, no writ).

197. *Id.* at 631, 633.



motion to modify, no court had entered prior support orders.<sup>198</sup>

When a court faces a number of issues, but the court has only dealt with one of them, any order entered regarding that issue is not a final appealable order, and an appellate court has no jurisdiction.<sup>199</sup> The court, however, should grant a motion to transfer as it is the court's "mandatory ministerial duty" when the child has resided in the transferee county for more than six months.<sup>200</sup> Because remedy by appeal frequently fails to protect the rights of parents and children, appellate courts will grant mandamus to compel transfer in the proper case.<sup>201</sup> A Texas court may increase an out-of-state child support order in a default judgment if the other state's judgment has been properly authenticated and the payor has not objected to the evidence in the writ of error petition.<sup>202</sup> If there is no prior order fixing payment, a court cannot order a father to pay arrearages, since there are none, but the court may order him to pay increased future child support.<sup>203</sup> An ambiguous, indefinite child support order will not support a judgment for back child support.<sup>204</sup> A definite order can be reduced to judgment, but only for payments due and owing for ten years or less.<sup>205</sup>

A court may increase,<sup>206</sup> decrease,<sup>207</sup> or refrain from changing the amount of a child support order even though either an increase<sup>208</sup> or a de-

198. *Id.* at 633.

199. *Zellers v. Barthel*, 727 S.W.2d 364, 366 (Tex. App.—Fort Worth 1987, no writ) (order appealed from was for increase in child support).

200. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (recognizing TEX. FAM. CODE ANN. § 11.06(b), (i) (Vernon 1986)).

201. *See Proffer*, 734 S.W.2d at 673 (granted conditional writ of mandamus after court of appeals, *Proffer v. Yates*, 723 S.W.2d 345, 347 (Tex. App.—San Antonio 1987), had refused to grant one).

202. *Farley v. Farley*, 731 S.W.2d 733, 736-37 (Tex. App.—Dallas 1987, no writ). A former wife sought to modify a California decree that was nonmodifiable unless the husband's net annual income exceeded \$15,000. The former wife introduced Internal Revenue Service 1099 forms and employer's earnings reports as evidence of the husband's income. Although the evidence constituted hearsay, the husband failed to complain that the trial court erred in admitting the documents. *Id.*

203. *McLeod v. McLeod*, 723 S.W.2d 777, 779, 780 (Tex. App.—Dallas 1987, no writ).

204. *Templet v. Templet*, 728 S.W.2d 844, 847-48 (Tex. App.—Beaumont 1987, no writ). Such a decree is also unenforceable by contempt. *See Ex parte Slavina*, 412 S.W.2d 43, 44-45 (Tex. 1967).

205. *See Sandford v. Sandford*, 732 S.W.2d 449, 450-51 (Tex. App.—Dallas 1987, no writ) (court modified trial judgment for child support based on TEX. FAM. CODE ANN. § 14.41(b) (Vernon Supp. 1988)).

206. *See Sohocki v. Sohocki*, 730 S.W.2d 30, 32 (Tex. App.—Corpus Christi 1987, no writ) (court awarded requested increase in support to \$4000 a month for both children and \$3000 for younger child after elder's emancipation; father had net monthly income of \$40,000, while mother earned \$500 per month); *Power v. Power*, 720 S.W.2d 683, 685 (Tex. App.—Houston [1st Dist.] 1986, writ dismissed) (court increased support from \$375 per month to \$900). In *Power* the father tried to enter a plea in abatement under the Soldier's and Sailor's Relief Act, 50 U.S.C. § 521 (1982), but the court found no evidence that his defense was adversely affected by his military service. 720 S.W.2d at 685.

207. *Trahan v. Trahan*, 732 S.W.2d 113, 114-15 (Tex. App.—Beaumont 1987, no writ) (court reduced support payments by \$60 a month after father's income had declined \$46).

208. *Baker v. Baker*, 719 S.W.2d 672, 675-76 (Tex. App.—Fort Worth 1986, no writ). The mother asked for more support, but did not prove that her income had decreased or that the father's income had increased. The court specifically did not rely on the father's increased expenses caused by his remarriage and his two additional children. *Id.* at 675. The court also

crease<sup>209</sup> has been requested. A court cannot order child support after the child reaches eighteen since the court loses jurisdiction at that time.<sup>210</sup> An agreed order, even one entered early on, to support the children through college, is not a contract unless the agreement expressly provides that the terms are enforceable as a contract.<sup>211</sup> Income from a spendthrift trust may be attached to satisfy a judgment for arrearages in child support even after the child attains eighteen years.<sup>212</sup> When a child marries, the parents' duty of support generally terminates.<sup>213</sup> If, however, the marriage of the minor is annulled, the support duty may revive based on the idea that an annulment voids a marriage *ab initio*.<sup>214</sup> The result may differ when the minor child marries and then divorces since a marriage did in fact exist and the minor child remains emancipated.<sup>215</sup>

Enforcement of child support orders may be achieved by any of three methods: contempt,<sup>216</sup> judgment for arrearages,<sup>217</sup> and withholding from earnings.<sup>218</sup> When withholding from the obligee's wages becomes a standard practice, use of the first two remedies may decline. For example, in *Taylor v. Taylor*<sup>219</sup> the appellate court reversed the trial court's decision not to order withholding from the obligor's wages.<sup>220</sup> The trial court declined to order withholding because he was classified as a temporary employee.<sup>221</sup> The appellate court pointed out that the Family Code provides for penalties against an employer who uses an income withholding order to terminate an employee and the Code does not distinguish between temporary and perma-

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reversed the order on income withholding, since the father was not in arrears and there had been no motion requesting it. *Id.* at 677.

209. *Powell v. Powell*, 721 S.W.2d 394, 396 (Tex. App.—Corpus Christi 1986, no writ) (father asked for reduction in light of changed circumstances; court denied it based on his aggregate resources and earning potential).

210. *Couser v. Stanton*, 722 S.W.2d 250, 251 (Tex. App.—San Antonio 1986, no writ); *Fullerton v. Holliman*, 721 S.W.2d 478, 479 (Tex. App.—Eastland 1986, writ *dism'd*). Later, in *Fullerton v. Holliman*, 730 S.W.2d 168 (Tex. App.—Eastland 1987, writ *ref'd n.r.e.*), however, the court reversed and rendered the earlier denial of the order because it found the support was based on a contract between the parents. *Id.* at 170. These cases arise because the legislature changed the duty of support to include children who, although they are past 18, are fully enrolled in a program leading to a high school diploma. See TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1988).

211. *Elfeldt v. Elfeldt*, 730 S.W.2d 657-58 (Tex. 1987), *rev'g* 725 S.W.2d 305 (Tex. App.—Houston [1st Dist.] 1986) (based on TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1986)).

212. *First City Nat'l Bank v. Phelan*, 718 S.W.2d 402, 406 (Tex. App.—Beaumont 1986, writ *ref'd n.r.e.*).

213. TEX. FAM. CODE ANN. § 14.05(d) (Vernon 1986).

214. *Fernandez v. Fernandez*, 717 S.W.2d 781, 783 (Tex. App.—El Paso 1986, writ *dism'd*).

215. *Laird v. Swor*, 737 S.W.2d 601, 603 (Tex. App.—Beaumont 1987, no writ) (duty of support ordered for daughter). The court, however, did hold that a child who goes to live with an aged relative is not emancipated and therefore the duty of support for that child continues. *Id.*

216. TEX. FAM. CODE ANN. § 14.40 (Vernon 1986 & Supp. 1988).

217. *Id.* § 14.42.

218. *Id.* § 14.43.

219. 721 S.W.2d 457 (Tex. App.—Corpus Christi 1986, no writ).

220. *Id.* at 458.

221. *Id.*

nent employees.<sup>222</sup>

In *Ex parte McIntyre*<sup>223</sup> the San Antonio appellate court wrestled with the problem of what process is due to a contemnor in a child support hearing. The court held that a court should advise all contemnors who appear pro se of their right to counsel so that the record will establish that the contemnor knew of his right to representation and waived it.<sup>224</sup> The court then specifically overruled *Ex parte Lopez*<sup>225</sup> as to the respondent's burden when he or she replies to a motion for contempt for failure to pay child support.<sup>226</sup> The court held that the respondent has the burden to establish, by a preponderance of the evidence, the defense of involuntary inability to pay.<sup>227</sup> The majority did not discuss *Lowry v. State*,<sup>228</sup> but the dissent saw no distinction between a civil contempt hearing and a criminal nonsupport proceeding and argued that the burden of persuasion should not shift on the basis of convenience.<sup>229</sup> The majority held that the movant had made out a prima facie case of contempt for failure to make child support payments and denied the writ of habeas corpus.<sup>230</sup> Courts, however, granted the writs in other cases in which the relator showed that he had not been informed of his right to counsel,<sup>231</sup> or that he could not afford an attorney and had not been provided one.<sup>232</sup>

Writs of habeas corpus based on findings of contempt for failure to pay child support were denied in a number of cases despite allegations: (1) that an appeal was pending,<sup>233</sup> (2) that it was really an imprisonment for debt because the amount owing had been reduced to judgment,<sup>234</sup> (3) that the order was not sufficiently specific to be enforceable by contempt,<sup>235</sup> or (4) that the contemnor was unable to pay.<sup>236</sup> Habeas corpus will issue if an

222. *Id.* at 458 (discussing TEX. FAM. CODE ANN. § 14.43(m), (n) (Vernon Supp. 1988)).

223. 730 S.W.2d 411 (Tex. App.—San Antonio 1987, no writ).

224. *Id.* at 415.

225. 710 S.W.2d 948, 956 (Tex. App.—San Antonio 1986, no writ).

226. 730 S.W.2d at 417.

227. *Id.*

228. 692 S.W.2d 86, 87-88 (Tex. Crim. App. 1985) (portion of criminal nonsupport sections of criminal code unconstitutional).

229. 730 S.W.2d at 422, 425.

230. *Id.* at 419.

231. *Ex parte Simpson*, 736 S.W.2d 939, 940 (Tex. App.—Beaumont 1987, no writ); *Ex parte Young*, 724 S.W.2d 423, 425 (Tex. App.—Beaumont 1987, no writ).

232. *Ex parte Strickland*, 724 S.W.2d 132, 135 (Tex. App.—Eastland 1987, no writ); *Ex parte Hamill*, 718 S.W.2d 78, 79 (Tex. App.—Fort Worth 1986, no writ). The legislature has resolved these problems. See *supra* notes 26-27 and accompanying text.

233. See *Sullivan v. Sullivan*, 719 S.W.2d 239, 240 (Tex. App.—Dallas 1986, no writ) (trial court has continuing jurisdiction to enforce its child support order even during pendency of appeal from that order).

234. *Ex parte Wilbanks*, 722 S.W.2d 221, 224 (Tex. App.—Amarillo 1986, no writ) (father was in contempt for failing to pay child support, not for failing to pay judgment; child support is not a debt, but a duty).

235. *Ex parte Jimenez*, 737 S.W.2d 358, 361 (Tex. App.—San Antonio 1987, no writ); *Ex parte Conoly*, 732 S.W.2d 695, 697 (Tex. App.—Dallas 1987, no writ); *Ex parte Parrott*, 723 S.W.2d 342, 343-44 (Tex. App.—Fort Worth 1987, no writ).

236. *Ex parte Dabau*, 732 S.W.2d 773, 777 (Tex. App.—Amarillo 1987, no writ); *Ex parte Carruth*, 731 S.W.2d 753, 755 (Tex. App.—Fort Worth 1987, no writ); *Ex parte Sustrik*, 721 S.W.2d 592, 594 (Tex. App.—Fort Worth 1986, no writ).

order of commitment is not in writing,<sup>237</sup> or was entered by a court that lacked jurisdiction because the case had been transferred to another county.<sup>238</sup> A contempt order must be specific,<sup>239</sup> must be based on the allegations in the pleadings,<sup>240</sup> and must give notice of which judgment the contemnor has violated<sup>241</sup> before it will support a commitment. Of course, if the father really can prove that he lacks the ability to pay because of indigency the court will order his discharge from custody.<sup>242</sup>

The Revised Uniform Reciprocal Enforcement of Support Act (RURESA)<sup>243</sup> has replaced the Uniform Reciprocal Enforcement of Support Act (URESA).<sup>244</sup> Because it became effective on November 1, 1987, the courts have not yet tested the provisions. An appellate court, applying the former Act, recognized that venue lies in the county of the residence of the obligee.<sup>245</sup> Additionally, in *Whitehead v. Whitehead*<sup>246</sup> an appellate court also applying the old Act held that the receiving court may upwardly modify a prior support order.<sup>247</sup>

## VI. TERMINATION AND ADOPTION

The Texas Supreme Court in *Texas Department of Human Services v. Boyd*<sup>248</sup> defined the word endanger as used in the Texas Family Code<sup>249</sup> in connection with the involuntary termination of parental rights. The court held that endanger does not mean the same thing as danger, which a court defined as "actual and concrete threat of *injury* to the child's emotional or physical well-being."<sup>250</sup> Endanger means to "expose to loss or injury; to jeopardize" and in this context the court does not need to find that the "conduct be directed at the child or that the child actually suffers injury."<sup>251</sup> The court held that imprisonment standing alone would not constitute endangerment, but that if the evidence, including evidence of imprisonment, demonstrates a pattern of conduct that endangers a child, then a decree terminating

237. *Ex parte* Strickland, 723 S.W.2d 668, 669 (Tex. 1987).

238. *Ex parte* Serenil, 734 S.W.2d 71, 73-74 (Tex. App.—San Antonio 1987, no writ).

239. *Ex parte* Hernandez, 726 S.W.2d 651, 652 (Tex. App.—Eastland 1987, no writ).

240. *Ex parte* Stephens, 734 S.W.2d 761, 763-64 (Tex. App.—Fort Worth 1987, no writ) (court held that failure to "timely" pay is not same as failure to pay child support).

241. *Ex parte* Rosborough, 723 S.W.2d 273, 274 (Tex. App.—Houston [1st Dist.] 1987, no writ) (order that lacked notice of charge and judgment was void).

242. *Ex parte* Barnes, 730 S.W.2d 46, 47 (Tex. App.—San Antonio 1987, writ *dism'd*).

243. TEX. FAM. CODE ANN. §§ 21.01-.34 (Vernon Supp. 1988).

244. Uniform Reciprocal Enforcement of Support Act, ch. 543, § 3, 1973 Tex. Gen. Laws 1458, 1463, *repealed by* Act of Aug. 3, 1987, ch. 49, § 1, 1987 Tex. Gen. Laws 291, 291-319.

245. *Gaston v. Chaney*, 734 S.W.2d 735, 737 (Tex. App.—Eastland 1987, no writ).

246. 735 S.W.2d 534 (Tex. App.—Tyler 1987, no writ).

247. *Id.* at 536.

248. 727 S.W.2d 531 (Tex. 1987), *rev'g and remanding* 715 S.W.2d 711 (Tex. App.—Austin 1986).

249. TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon 1986).

250. 727 S.W.2d at 533 (emphasis in original).

251. *Id.* This definition is a less specific ground for termination of parental rights than that suggested by some noted authorities. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 72 (1979).

the parent-child relationship is supportable.<sup>252</sup>

In *In re S.H.A.*<sup>253</sup> the Dallas court of civil appeals concluded, similarly to *Boyd*, that the Family Code does not require a court to find that aggressive or abusive behavior was directed at the child before a court may terminate the parent-child relationship.<sup>254</sup> The court then went on to specifically overrule *Higgins v. Dallas County Child Welfare Unit*<sup>255</sup> to the extent that it conflicted with *S.H.A.*<sup>256</sup> *S.H.A.* was a very difficult case involving the termination of parental rights in respect to only one child of a family with six children, based on conflicting evidence and witnesses.<sup>257</sup> The dissenters believed that the trial court based the termination on the parents' poverty and ignorance<sup>258</sup> and that the majority created the opportunity for courts to terminate parental rights based solely on the parents' unknowing, ignorant, and passive neglect of the child.<sup>259</sup>

To support the termination of the parent-child relationship the claimant must provide clear and convincing evidence.<sup>260</sup> In *E.L.B. v. Texas Department of Human Services*<sup>261</sup> the court agreed that the claimant had satisfied this burden and found that while the mother had a mental capacity of an eight-year old child, the court could not assume that she was incapable of realizing that she was neglecting her children.<sup>262</sup> In *Juan A. v. Dallas County Child Welfare*<sup>263</sup> the court also held that clear and convincing evidence supported the termination of parental rights because of the mother's failure to take the child for treatment after he had been severely burned while under the care of his father.<sup>264</sup> The Corpus Christi appeals court upheld another parent-child relationship termination despite a claim that the trial court had lost jurisdiction after failing to timely hold a hearing to review the placement of the child.<sup>265</sup> The court held that loss of jurisdiction would constitute an excessive remedy for failing to meet the statutory

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252. 727 S.W.2d at 534. The court in *In re A.K.S.*, 736 S.W.2d 145 (Tex. App.—Beaumont 1987, no writ), followed *Boyd* in affirming the termination of a father's parental rights based on his conviction for rape of a stranger and a compulsion to expose his genitals to women. *Id.* at 146.

253. 728 S.W.2d 73 (Tex. App.—Dallas 1987, no writ).

254. *Id.* at 83 (discussing TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon 1986)).

255. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

256. 728 S.W.2d at 83.

257. *Id.* at 75-81.

258. *Id.* at 94.

259. *Id.* at 102.

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

261. 732 S.W.2d 785 (Tex. App.—Corpus Christi 1987, no writ).

262. *Id.* at 787.

263. 726 S.W.2d 241 (Tex. App.—Dallas 1987, no writ) (case appealed after abatement of initial appeal, *Juan A. v. Dallas County Child Welfare*, 733 S.W.2d 559 (Tex. App.—Dallas 1986, no writ), to permit specific findings, because the findings had originally been written in alternative).

264. 726 S.W.2d at 244.

265. *Garcia v. Tex. Dep't of Human Servs.*, 721 S.W.2d 528, 529 (Tex. App.—Corpus Christi 1986, no writ). The court applied TEX. FAM. CODE ANN. § 18.01(c) (Vernon Supp. 1988), which requires that hearings be held no earlier than five and one-half months and no later than seven months from the date of the last hearing. *Id.*

deadlines.<sup>266</sup>

The Texas Department of Human Services has tried to base the termination of the parent-child relationship on the fact that allowing a child to remain in its foster care negatively affects the child and, therefore, endangers the child. The court of appeals in *G.M. v. Texas Department of Human Resources*<sup>267</sup> found this position untenable and without merit.<sup>268</sup> In *Rodriguez v. Texas Department of Human Services*<sup>269</sup> the court also held that there was insufficient evidence to support termination of parental rights and that the provision for allowing judges to interview minor children in chambers cannot be used in proceedings to terminate the parent-child relationship.<sup>270</sup> The provision for interviewing minors is found in and relates to Family Code sections regarding proceedings for conservatorship.<sup>271</sup>

In *Perez v. Williamson*<sup>272</sup> the court reversed and remanded a private termination and adoption decree because the parties seeking to adopt the child (appellees) lacked standing.<sup>273</sup> The court came to this conclusion based on a strict reading of the statute that required the appellees to have maintained possession and control of the child for at least six months immediately prior to the filing of the suit.<sup>274</sup> The child had been removed from the appellees' home and placed with the Harris County Court Services shortly before the appellees filed this suit. Additionally, the appellees had retained control of the child in defiance of court orders. A concurrence pointed out that the better way to have resolved the issue would have been to have given full faith and credit to a Mississippi decree that had upheld the natural mother's right to custody of the child.<sup>275</sup> Even a suit to terminate the parent-child relationship is subject to the mandatory transfer provisions regarding consolidation.<sup>276</sup> A court must transfer a suit affecting the parent-child relationship so that it may be consolidated with a suit for divorce.<sup>277</sup> Mandamus will issue if the trial court fails to transfer.<sup>278</sup>

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266. 721 S.W.2d at 530.

267. 717 S.W.2d 185 (Tex. App.—Austin 1986, no writ).

268. *Id.* at 188. There being no clear and convincing evidence to support the jury verdict, the court reversed and remanded. *Id.* at 189; *see also* *Naquin v. Tex. Dep't of Human Servs.*, 722 S.W.2d 448 (Tex. App.—El Paso 1986, no writ) (court agreed with Austin court as to endangerment from foster care and also found insufficient evidence to support trial court's findings and reversed and rendered as to mother).

269. 737 S.W.2d 25 (Tex. App.—El Paso 1987, no writ).

270. *Id.* at 28.

271. *Id.* (relying on TEX. FAM. CODE ANN. § 14.07(c) (Vernon 1986)).

272. 726 S.W.2d 634 (Tex. App.—Houston [14th Dist.] 1987, no writ) (construing TEX. FAM. CODE ANN. § 11.03(a)(8) (Vernon 1986)).

273. *Id.* at 636.

274. *Id.*

275. *Id.*

276. *See* *Yates v. Gaither*, 725 S.W.2d 529, 531-32 (Tex. App.—Dallas 1987, no writ) (relying on TEX. FAM. CODE ANN. §§ 3.55(c), 11.06(c), (f) (Vernon 1986)).

277. 725 S.W.2d at 531-32.

278. *Id.*

