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FAMILY LAW: PARENT AND CHILD

by

*Ellen K. Solender**

I. UNITED STATES SUPREME COURT DECISIONS

DURING the 1987-88 Term the United States Supreme Court decided three cases that affect the law of parent and child. In *Thompson v. Thompson*¹ the Court held that the Parental Kidnapping Prevention Act (PKPA)² does not create a private cause of action in federal court. The Court, in the absence of specific statutory language, found nothing in the legislative history of the PKPA to support the inference that Congress intended a private right of action.³ The Court found that Congress intended to extend the requirements of the full faith and credit clause of the United States Constitution⁴ to child custody decrees⁵ and that the "PKPA is a mandate directed to state courts to respect the custody decrees of sister States."⁶ The Court reasoned that since Congress did not intend that the federal courts play an enforcement role in child custody decisions, it also did not intend that the federal courts become entangled in situations where two state courts have issued conflicting custody orders based on conflicting jurisdictional determinations.⁷

The result of the *Thompson* decision is that interpretation of the PKPA will remain in the hands of the state courts and that conflicts such as the one giving rise to *Thompson* will remain unresolved. Ultimately, the United States Supreme Court will have to resolve the "truly intractable jurisdictional deadlocks,"⁸ but will not have a neutral, thoughtful body of law on which to rely. The PKPA is not clearly written. As such, a number of more neutral lower federal court decisions would aid the Court in the interpretation process.

*Hicks v. Feiock*⁹ concerned the problem of using a contempt order to imprison a delinquent obligor as a means of enforcing child support obligations. An obligor's failure to pay court ordered support is usually due either

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1. 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).
2. 28 U.S.C. § 1738A (1982).
3. 108 S. Ct. at 516, 98 L. Ed. 2d at 520.
4. U.S. CONST. art. IV, § 1.
5. 108 S. Ct. at 517-18, 98 L. Ed. 2d at 521-22.
6. *Id.* at 518, 98 L. Ed. 2d at 522.
7. *Id.* at 519-20, 98 L. Ed. 2d at 524.
8. *Id.* at 520, 98 L. Ed. 2d at 525.
9. 108 S. Ct. 1423, 98 L. Ed. 2d 72 (1988).

to poverty or lack of motivation. In the case of a lack of motivation, the threat of imprisonment may provide the incentive to pay. When, however, the obligor is actually impoverished and cannot pay, imprisonment becomes punishment for poverty. Distinguishing between the two reasons for failure to pay is quite difficult, and often only the obligor knows the reason. In *Hicks* Feiock failed to pay child support as required by a valid court order. Feiock argued that requiring him to show that he could not pay, so as to avoid contempt, was an unconstitutional shifting of the burden of proof. The California appellate court, interpreting California law, agreed that this was criminal contempt; therefore, incarceration on these facts was unconstitutional.¹⁰ The California Supreme Court denied review.¹¹

The United States Supreme Court, confronted with a rather confused situation, held that it could not reinterpret state law.¹² The Court instead distinguished between criminal and civil contempt by stating that civil contempt is remedial and for the benefit of the complainant, while criminal contempt is punitive and for the purpose of vindicating the authority of the court.¹³ The Court remanded the case for a determination of whether the contempt in this case was civil or criminal.

Hicks is important in that it permits obligees to continue to ask for coercive orders when the obligor has failed to pay court-ordered support, while at the same time protecting the obligor from punitive imprisonment. The courts must make clear that the purpose of the contempt order is to benefit the obligee. To avoid unnecessary imprisonment, the obligor must either pay what is owed to the obligee or demonstrate that payment is impossible. *Hicks* does not change Texas law and practice, as had been feared; it merely requires that the attorneys and judges be clear in their complaints and orders.

*Clark v. Jeter*¹⁴ is the third in a series of cases extending the statute of limitations for paternity actions.¹⁵ The Court in *Clark*, while finding a six-year statute of limitations unconstitutional on equal protection grounds, did not specify that six years was too short a time.¹⁶ The Court merely held that the six-year limitation did not relate substantially to Pennsylvania's interest in avoiding stale or fraudulent claims.¹⁷ One interpretation of this decision would allow a statute of limitations of less than six years for paternity actions. Alternatively, the case may suggest that as a result of scientific advances, an indefinite statute of limitations is required. The only certain

10. *In re Feiock*, 180 Cal. App. 3d 649, 653-56, 225 Cal. Rptr. 748, 750-51 (1986).

11. *Id.* at 648, 225 Cal. Rptr. at 748.

12. *Hicks*, 108 S. Ct. at 1428, 99 L. Ed. 2d at 730.

13. *Id.* at 1429, 99 L. Ed. 2d at 731 (quoting *Gompers v. Buck's Store & Range Co.*, 22 U.S. 418, 441 (1911)).

14. 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988).

15. *Mills v. Habluetzel*, 456 U.S. 91 (1982) (Court held one-year statute of limitations a denial of equal protection); *Pickett v. Brown*, 462 U.S. 1 (1983) (Court held two-year statute of limitations a denial of equal protection).

16. 108 S. Ct. at 1913-14, 100 L. Ed. 2d at 471.

17. *Id.* at 1915, 100 L. Ed. 2d at 473.

holding is that an argument based on avoiding stale or fraudulent litigation in paternity cases is not convincing.

II. STATUS

Grandparents and other persons who have minor children living with them often find it necessary to enroll the children in the local public school, although the custodians are not the children's legal guardians. Strict laws govern the residency requirements for enrollment for free public education in Texas.¹⁸ Texas school districts are concerned that children seeking to enroll in their schools are bona fide residents of the district and are not in the district for the primary purpose of attending a particular school. In *Byrd v. Livingston Independent School District*¹⁹ the court found that the children in question were undisputedly living in the district for reasons other than school attendance. The court analyzed the statute and found that the statutory test is in the disjunctive; it is not necessary that a child both reside with a legal guardian and be a bona fide resident in order to attend the local public school.²⁰ The court held that based on the particular facts the Livingston school district's interpretation of the statute violated the children's constitutional rights.²¹

In *Del A. v. Edwards*²² fifteen Louisiana foster children filed suit for damages,²³ alleging that the Louisiana Department of Health and Human Services had violated the Child Welfare Act of 1980.²⁴ The defendants moved for dismissal on the basis of qualified immunity. The court held that when officials violate understandable provisions of the Child Welfare Act they are not entitled to a qualified immunity and affirmed the district court's ruling in favor of the plaintiff children.²⁵ This ruling

is of interest to Texas attorneys since it is from the Fifth Circuit Court of Appeals and, therefore, applies to Texas as well as Louisiana.

In *Metropolitan Life Insurance Co. v. Carr*²⁶ the parties asked a federal court to decide if a biological father was entitled to proceeds of a group life insurance policy that designated no beneficiary. Because the decedent was a federal employee, the government had issued the policy pursuant to federal law.²⁷ Since the decedent died intestate, unmarried, and childless, the payment was to be made in accordance with federal law. The applicable provi-

18. TEX. EDUC. CODE ANN. § 23.01 (Vernon 1972).

19. 674 F. Supp. 225 (E.D. Tex. 1987).

20. *Id.* at 228.

21. *Id.* at 228-29. The court based its decision on both the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 2, and *Martinez v. Bynum*, 461 U.S. 321 (1983).

22. 855 F.2d 1148 (5th Cir. 1988).

23. The suit was for damages for the particular plaintiffs under 42 U.S.C. § 1983 (1982). The suit also asked for class-wide injunctive relief. 855 F.2d at 1150.

24. 42 U.S.C. §§ 620-628, 670-679 (1982 & Supp. III 1985).

25. 855 F.2d at 1153-54.

26. 690 F. Supp. 569 (N.D. Tex. 1988).

27. Federal Employees Group Life Insurance Act of 1954, 5 U.S.C. §§ 8701-8716 (1982 & Supp. IV 1986).

sion of the policy provided for payment "to the parents of the employee."²⁸ The mother and the biological father of the deceased had neither married nor attempted to marry. The mother contended that she was entitled to the entire proceeds of the policy because she was the only parent as defined by Texas law. The biological father claimed that the Texas Family Code did not apply to insurance policies of adults. The court held that Texas law controlled the interpretation of the term "parent" as used by federal law in this situation.²⁹ The court then looked at the applicable Texas Family Code provisions³⁰ and held that because the biological father had neither adopted his son nor established his paternity prior to the death of his son, he was not a "parent" under Texas law.³¹

In a wrongful death case, *Garza v. Maverick Market, Inc.*,³² the Corpus Christi court of appeals sustained the directed verdict granted by the trial court in favor of the defendant.³³ The court held that the mother of an illegitimate child born after the death of the alleged biological father had no standing to bring the suit as the next friend of the minor child.³⁴ The court found that the decedent had not recognized the child prior to the decedent's death.³⁵ To qualify as a recognized child of the decedent under the Wrongful Death Act,³⁶ the child's biological father must have taken some action with regard to the child under either the Family Code³⁷ or the Probate Code.³⁸ Since the child's alleged father had been killed before the birth of the child, such action was not possible. The child's mother and grandmother testified that the child was in fact the child of the decedent, but the court did not find this evidence probative.³⁹ Nevertheless, in *Brown v. Edwards Transfer Co.*⁴⁰ the Texas Supreme Court in a plurality opinion held that illegitimate children may recover under the Wrongful Death Act if they can establish their paternity by clear and convincing evidence.⁴¹ The court did not use the definition of child in effect in the Probate Code at the time of death;⁴² instead the court relied on the legislature's intent not to punish illegitimate children for circumstances beyond their control.⁴³ *Brown* involved adult illegitimate children, and the jury had found that the decedent was the biological father of the children. Since the court has granted a writ of error in the *Garza* case, it may reverse the holding in the case on the issue of the

28. *Id.* § 8705(a).

29. 690 F. Supp. at 571.

30. TEX. FAM. CODE ANN. §§ 11.01(3), 12.02 (Vernon 1986 & Supp. 1989).

31. 690 F. Supp. at 573.

32. 744 S.W.2d 286 (Tex. App.—Corpus Christi 1987, writ granted).

33. 744 S.W.2d at 289-90.

34. 744 S.W.2d at 289.

35. *Id.* at 288.

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

37. TEX. FAM. CODE ANN. §§ 13.21-.22 (Vernon 1986 & Supp. 1989).

38. TEX. PROB. CODE ANN. § 42(b) (Vernon 1980 & Supp. 1989).

39. 744 S.W.2d at 289.

40. 32 Tex. Sup. Ct. J. 108 (Dec. 10, 1988).

41. *Id.* at 109.

42. *Id.*

43. *Id.*

mother's standing and remand to permit the introduction of evidence that can meet the clear and convincing standard established in *Brown*.⁴⁴

The appellate courts reversed and remanded two paternity cases because the trial court had not followed the proper procedures. In *re S.P.H.*⁴⁵ the trial court erred in permitting an expert witness who had not been presented at the pretrial hearing to testify. This action by the trial court violated the statute, since no good cause was shown for his earlier failure to appear.⁴⁶ In *De LaRosa v. Garza*,⁴⁷ despite the fact that upon the joint motion of the parties a court dismissed with prejudice a prior proceeding, the trial court heard the refiled paternity action and found the appellant to be the biological father.⁴⁸ The appellate court found that the trial court lacked jurisdiction to hear the case because of the prior dismissal, but because the Family Code⁴⁹ allows persons other than the mother to bring paternity actions, the court remanded the case in the interests of justice.⁵⁰

The Texas Supreme Court in *In re S.C.V.*⁵¹ reversed a paternity decision that was based on the presumption that a child born during the marriage is the child of the husband. The alleged father, the husband, the mother, and the child had all submitted to blood tests. The results excluded the husband from the group of potential fathers, but included the alleged father. The jury found that the alleged father was the father of the child even though the court had excluded the blood test results of the husband.⁵² The supreme court affirmed the trial court's findings on the issue of paternity.⁵³ The court noted that its decision in *Davis v. Davis*⁵⁴ rejected Lord Mansfield's rule and replaced it with a rule that would allow evidence bearing directly on the truth being determined.⁵⁵ The court held that blood grouping tests are generally the best evidence for establishing nonpaternity and that courts should give the tests probative weight.⁵⁶

The court used the doctrine of *res judicata* rather than blood tests to decide paternity in *Esprey v. Guillory*.⁵⁷ *Esprey* involved a paternity suit that had been severed from and followed a divorce action. The trial judge found that a parent-child relationship existed between the alleged father, a third party, and the child, and ordered visitation privileges.⁵⁸ Unfortunately for

44. The court appears willing to accept evidence that bears directly on the truth being determined. See *infra* note 54 and accompanying text.

45. 739 S.W.2d 490 (Tex. App.—Beaumont 1987, no writ).

46. See TEX. FAM. CODE ANN. § 13.06(a) (Vernon 1986 & Supp. 1989) (allowing trial testimony only by witnesses who testified at the pretrial conference, absent a showing of good cause).

47. 748 S.W.2d 23 (Tex. App.—Amarillo 1988, no writ).

48. *Id.* at 25.

49. TEX. FAM. CODE ANN. § 13.01 (Vernon 1986 & Supp. 1989).

50. 748 S.W.2d at 26.

51. 750 S.W.2d 762 (Tex. 1988).

52. *Id.* at 763.

53. *Id.* at 766.

54. 521 S.W.2d 603, 607 (Tex. 1975).

55. *Id.* at 607-08.

56. 750 S.W.2d at 764-65.

57. 753 S.W.2d 722 (Tex. App.—Houston [1st Dist.] 1988, no writ).

58. *Id.* at 723.

the third party, the husband and wife had entered into a consent decree that found the child, born during the marriage, to be legitimate. The husband appealed the trial court's finding, and the appellate court held that the third party had no independent right to contest the child's legitimacy and that the consent decree was dispositive of the issue.⁵⁹ The dissenting judge claimed that the third party had standing to pursue his claim and that the language of the consent decree did not determine the biological father.⁶⁰

In *T.E.D. v. Emerson*⁶¹ the court conditionally granted a writ of mandamus.⁶² The husband filed a petition for divorce, and his wife cross-petitioned, claiming that the husband was not the father of the child that was born during the marriage. The alleged father, the mother, and the child all submitted to blood tests, and the alleged father intervened in the divorce action, claiming to be the biological father. The mother then asked the trial judge to order her husband to submit to blood tests. The judge, believing he did not have authority to make such an order, denied the request.⁶³ The court of appeals examined the Family Code provision that permits a husband or wife to contest paternity⁶⁴ and concluded that it includes the right of either spouse to obtain a blood test from the other spouse.⁶⁵

In *Jilani v. Jilani*⁶⁶ the Texas Supreme Court allowed an action by a minor against his father for injuries caused by the negligent operation of an automobile. The child was injured when his father lost control of the car in a one-car accident. The court, relying on *Felderhoff v. Felderhoff*,⁶⁷ found the type of negligence involved in this case to be outside the sphere of parental authority and discretion protected by the doctrine of parental immunity.⁶⁸

III. CONSERVATORSHIP

It is elementary law that in order for a court to have power to decide issues, it must first have jurisdiction. In deciding conservatorship questions the court must have jurisdiction over all the parties.⁶⁹ The purpose of the Uniform Child Custody Jurisdiction Act (UCCJA)⁷⁰ is to provide guidelines for proper exercise of jurisdiction in child custody cases. In *Swink v. Swink*⁷¹ the trial court held that it did not have jurisdiction and, therefore, could not make a determination as to managing conservatorship. Although

59. *Id.* at 724.

60. *Id.* at 726.

61. 746 S.W.2d 312 (Tex. App.—Amarillo 1988, no writ).

62. *Id.*

63. *Id.*

64. TEX. FAM. CODE ANN. § 12.06 (Vernon 1986).

65. 746 S.W.2d at 313.

66. 32 Tex. Sup. Ct. J. 123 (Dec. 17, 1988).

67. 473 S.W.2d 928, 933 (Tex. 1971) (retaining the rule of parental immunity in cases of ordinary negligence while discharging basic parental duties).

68. 32 Tex. Sup. Ct. J. at 124.

69. TEX. FAM. CODE ANN. § 11.53 (Vernon 1986).

70. TEX. FAM. CODE ANN. §§ 11.51-.75 (Vernon 1986 & Supp. 1989).

71. 745 S.W.2d 464 (Tex. App.—Tyler 1988, no writ).

the child was born in Texas, the parties had lived in Arizona for approximately eight months just prior to their separation. The husband moved to Texas, taking the child with him. A month later he filed for divorce and conservatorship in Texas. At approximately the same time, the wife filed similar suits in Arizona. The appellate court found that the trial court had correctly applied the pertinent provisions of the UCCJA⁷² and affirmed.⁷³

While jurisdiction is essential, the grounds for deciding custody are also important. In *Hodorowski v. Ray*⁷⁴ the Fifth Circuit held that child care workers have only a qualified immunity in child abuse cases.⁷⁵ The court found that the workers in this case had acted reasonably and violated no clearly established right.⁷⁶ The workers had removed the children from their home without a warrant because they feared further injury to the children. The children had bruises, which while not life-threatening were severe, and a report stated that the father had chased the children with a chain.

In *Leigh v. Parker*⁷⁷ the mother sued her psychologist for revealing confidential matters without her consent during a custody hearing. She relied on a now repealed statute⁷⁸ that created a privilege of confidentiality between psychologists and their patients. The mother alleged that she had lost custody of her child because of Parker's testimony. Parker responded that he had testified only after the judge had ruled that he should testify; therefore he was privileged and protected from any liability. The appellate court agreed and affirmed the trial court's take nothing judgment.⁷⁹

In *Wriston v. Kosel*⁸⁰ the court found that the rule stating that the custody of two or more children should not be divided absent compelling reasons did not apply to half-siblings.⁸¹ The court found that in such cases the best interest of the child whose custody is at issue⁸² is the only important or necessary factor.⁸³

Although the Family Code does not specifically address the duty to pro-

72. A Texas court has jurisdiction over a custody dispute if Texas is the child's home state or if no other state has jurisdiction. TEX. FAM. CODE ANN. § 11.53(a)(1), (2) (Vernon 1986); home state is defined as the state in which the child has lived with his parents for at least six months immediately preceding the filing of suit. *Id.* § 11.52(5).

73. 745 S.W.2d at 465-66.

74. 844 F.2d 1210 (5th Cir. 1988).

75. *Id.* at 1216. See *supra* notes 18-21 and accompanying text for discussion of court's determination in *Del A. v. Edwards* that officials had destroyed their qualified immunity.

76. *Id.* at 1217.

77. 740 S.W.2d 101 (Tex. App.—Austin 1987, writ denied).

78. TEX. REV. CIV. STAT. ANN. art. 5561(h) (Vernon 1958).

79. 740 S.W.2d at 104.

80. 742 S.W.2d 868 (Tex. App.—Eastland 1987, writ denied).

81. *Id.* at 870.

82. "The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship . . ." TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1986).

83. 742 S.W.2d at 870. In *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. App.—Houston [1st Dist.] 1988, no writ), the court specifically relied on this same reasoning.

vide medical treatment for a child in the managing conservator's custody,⁸⁴ the court in *Chapa v. Texas*⁸⁵ implied such a duty. The court found that any managing conservator, not only the child's parent, is responsible for providing medical treatment.⁸⁶ In this case the managing conservator was an aunt of the child. The child had died as a result of abuse by a third party, combined with the failure of the aunt to obtain medical treatment for the child. Based on these factors the trial court convicted the aunt of injury to the child.⁸⁷

A court must have jurisdiction of the matter and the parties to modify a prior custody decision, as well to establish custody.⁸⁸ In a habeas corpus case, *Hanson v. Leckey*,⁸⁹ the court held that the PKPA⁹⁰ does not require that a Texas court recognize the Kansas court's decree.⁹¹ Under Texas law, however, the court should do so if possible.⁹² The court examined both the Texas and Kansas version of the UCCJA and found the purposes of the two in substantial agreement.⁹³ The court then held that under the Texas statute,⁹⁴ and based on the facts of this case, it was required to enforce the Kansas order.⁹⁵ This reading of both the Texas statute and the PKPA is probably too broad, since the PKPA is a federal statute and the states are expected to follow it.⁹⁶ In this particular case, however, no problem arose since the Texas court deferred to the Kansas court, so that only one state had jurisdiction.

When a court acquires jurisdiction of a suit affecting the parent-child relationship, that court's jurisdiction continues until the child in question is no longer a minor or the court is legally required to transfer jurisdiction.⁹⁷ In *Lewis v. McCoy*⁹⁸ the managing conservator, the mother, died, and the father automatically became entitled to possession of the child.⁹⁹ The grandparents, to prevent the father from taking possession, attempted to become managing conservators by filing motions in their home county, rather than in the county where the original decree had been rendered. The parties filed many motions in the two counties. Ultimately the father prevailed by means of a writ of mandamus. The appellate court held that the original court had

84. For a statement of the rights, privileges, duties, and powers of a managing conservator, see TEX. FAM. CODE ANN. § 14.02 (Vernon 1986 & Supp. 1989).

85. 747 S.W.2d 561 (Tex. App.—Amarillo 1988, pet. ref'd).

86. *Id.* at 563.

87. *Id.* at 561. The court relied on TEX. PENAL CODE ANN. § 22.04 (Vernon 1974), which defines as a crime conduct that results in serious physical or mental harm to a child.

88. TEX. FAM. CODE ANN. §§ 11.53, 11.64 (Vernon 1986).

89. 754 S.W.2d 292 (Tex. App.—Tyler 1988, writ denied).

90. 28 U.S.C. § 1738A (1982); see *supra* notes 2-7 and accompanying text.

91. 754 S.W.2d at 294.

92. *Id.*

93. *Id.* at 294-95.

94. TEX. FAM. CODE ANN. § 11.63 (Vernon 1986).

95. 754 S.W.2d at 296.

96. See *supra* notes 2-7 and accompanying text.

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

98. 747 S.W.2d 48 (Tex. App.—El Paso 1988, no writ).

99. See TEX. FAM. CODE ANN. § 12.04(1) (Vernon 1986).

continuing jurisdiction.¹⁰⁰ The court reasoned that since the trial court's jurisdiction was over the child, and after the death of the managing conservator, a need for further orders and supervision may exist, jurisdiction would still lie in the trial court.¹⁰¹

The same principle applies in a case where a mentally retarded child becomes eighteen, and the court has retained jurisdiction in order to provide for support.¹⁰² The original divorce court is the court of dominant jurisdiction by virtue of having been the first to exercise jurisdiction. A probate court, even though it has concurrent jurisdiction in such matters, should defer to the divorce court.¹⁰³ If, however, during the pendency of a divorce, one of the parties dies or is killed, the action abates and should be dismissed.¹⁰⁴ Persons who wish to oust the surviving parent spouse from possession of the child should file an independent action.¹⁰⁵

After a modification based on the wife's signature prior to entry of the order, the wife brought a writ of error in *Kissinger v. Kissinger*.¹⁰⁶ The court granted the writ because the wife met the four requirements: (1) the suit was brought within six months; (2) the suit was brought by a party; (3) the party did not participate in the actual trial; and (4) some error was apparent on the face of the record.¹⁰⁷ Neither the wife nor her attorney had appeared at the hearing, and no record had been made of the hearing as required by the statute;¹⁰⁸ therefore error existed on the face of the record.¹⁰⁹

A motion to modify may be brought less than a year after the original decree by the managing conservator, or by the possessory conservator if the possessory conservator attaches an affidavit alleging the present environment injures the child's health.¹¹⁰ If the court believes the affidavit asserts enough facts to support the requirement, it may schedule a hearing on the motion.¹¹¹ The court need not make separate findings concerning the affidavit.¹¹² The court must simply hold the hearing and render its decision based on the facts presented.¹¹³ In *Bolden v. Clapp*¹¹⁴ the court held that when a managing conservator has voluntarily relinquished the care and possession of a child to a relative for more than twelve months, mandamus will not issue to reverse the temporary orders of the trial court changing the managing conservator-

100. 747 S.W.2d at 50.

101. *Id.*

102. *Rowland v. Willy*, 751 S.W.2d 725, 726-27 (Tex. App.—Houston [14th Dist.] 1988, no writ).

103. *Id.* at 727.

104. *Garcia v. Daggett*, 742 S.W.2d 808, 809 (Tex. App.—Houston [1st Dist.] 1987, no writ).

105. *Id.* at 809-10.

106. 748 S.W.2d 2 (Tex. App.—Houston [1st Dist.] 1987, no writ).

107. *Id.* at 4.

108. TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1986).

109. 748 S.W.2d at 5.

110. TEX. FAM. CODE ANN. § 14.08(d) (Vernon 1986 & Supp. 1989).

111. *Id.* § 14.08(e).

112. *In re J.K.B.*, 750 S.W.2d 367, 368 (Tex. App.—Beaumont 1988, no writ).

113. *Id.*

114. 751 S.W.2d 674 (Tex. App.—Tyler 1988, no writ).

ship to the relative who has had possession of the child.¹¹⁵ The court reasoned that a showing of voluntary relinquishment in the section of the Family Code concerning modification of conservatorship¹¹⁶ requires a lighter standard of proof than a showing of abandonment in the section providing for termination of parental rights.¹¹⁷ It found, therefore, that the trial court had not abused its discretion in changing the managing conservator.¹¹⁸ In *Tropoli v. Markentonis*¹¹⁹ an appellate court also found no abuse by a court that assessed attorney's fees following dismissal of a motion to modify conservatorship.¹²⁰ The trial court based dismissal on want of prosecution. The trial court then reinstated the case, found for the mother, and assessed attorney's fees against the father as costs. The appellate court denied the father's contention that assessment of fees is punitive, holding that under the Family Code¹²¹ the assessment is based on the best interest rationale.¹²²

*Wright v. Wentzel*¹²³ is a Texas case that the mother attempted to make an interstate case. In the original divorce decree the mother had been named managing conservator. Some years later she left the child with the father, who after several months filed a motion to modify, but did not serve the mother. Having moved to New Hampshire, she returned to Texas, took the child from her pre-school, and flew back to New Hampshire. The father filed for a temporary restraining order and hired a private investigator who found the child and her mother. At a New Hampshire police station the mother was served the motion to modify, the temporary restraining order, and notice of a show cause hearing to take place two days later. When she failed to appear for the hearing, the trial court, concerned that two days' notice was unrealistic, rescheduled the hearing. The father notified her of the resetting by both certified and regular mail. The certified letter was returned unclaimed, and the court then signed ex parte temporary orders.

The father went to New Hampshire and obtained possession of his daughter based on the orders. Some three months later the trial court heard the merits of the motion to modify and appointed the father managing conservator. The mother did not appear, nor did she file an answer. The court appointed her possessory conservator contingent on the father's consent. She then filed for a writ of error, claiming that she had received insufficient notice and that the trial court had lacked jurisdiction. The appellate court found that she was given notice and opportunity to be heard when she was

115. *Id.* at 677.

116. *Id.*; see TEX. FAM. CODE ANN. § 14.08(g)(2) (Vernon 1986) (restricting the issuance of modification orders to situations where the conservator relinquished care, control, and possession for more than twelve months and such order is in best interest of the child).

117. *Bolden*, 751 S.W.2d at 677; TEX. FAM. CODE ANN. § 15.02(1) (Vernon 1986) (restricting the issuance of termination orders to a list of very serious acts or omissions by the parent).

118. 751 S.W.2d at 677.

119. 740 S.W.2d 563 (Tex. App.—Houston [1st Dist.] 1987, no writ).

120. *Id.* at 565.

121. TEX. FAM. CODE ANN. § 11.18 (Vernon 1986).

122. 740 S.W.2d at 565.

123. 749 S.W.2d 228 (Tex. App.—Houston [1st Dist.] 1988, no writ).

served at the police station in New Hampshire.¹²⁴ The appellate court also ruled that the trial court had jurisdiction since all parties were living in Texas when the father filed the motion to modify and, furthermore, Texas was always the child's home state.¹²⁵ The court did find that while sufficient evidence to support modification existed, the trial court erred in making visitation contingent on the father's consent.¹²⁶ The court pointed out that the Family Code states that a court may not deny access to a parent unless there is a showing that it would endanger the child.¹²⁷

In *Scroggins v. Scroggins*¹²⁸ a father countered a motion to enforce child support orders with a motion to modify. He succeeded at the trial level, but the appellate court reversed, holding that he had presented insufficient evidence to show that retention of the present managing conservator would be injurious to the child.¹²⁹ Accordingly, the court reversed and rendered. Unfortunately the child support question seems to have been lost in the shuffle since the appellate court did not mention it.

An appellate court denied a petition for habeas corpus when the petitioner failed to file a statement of facts or brief with the petition.¹³⁰ A denial of a writ of habeas corpus is not appealable.¹³¹ Rather, the proper remedy is by mandamus.¹³² In *M.R.J. v. Vick*¹³³ the court denied habeas corpus although the father was able to demonstrate his entitlement to custody based on a prior court order, but the court refused to issue mandamus because of the peculiar facts of the case.¹³⁴ *Vick* involved a custody dispute between the paternal grandmother, who had physical custody, and the father. The trial court had not abused its discretion by holding an in camera interview with the child when it became concerned about the child's welfare.¹³⁵ Where the trial court did err was in failing to make a written finding as to the serious and immediate question of the welfare of the child.¹³⁶ The appellate court ordered the trial court to enter orders consistent with the appellate court's opinion.¹³⁷

IV. SUPPORT

Congress enacted the Family Support Act of 1988,¹³⁸ which modifies the earlier Child Enforcement Amendments of 1984.¹³⁹ One major change re-

124. *Id.* at 232.

125. *Id.* at 231-32.

126. *Id.* at 234.

127. *Id.*; see TEX. FAM. CODE ANN. § 14.03(d) (Vernon 1986).

128. 753 S.W.2d 830 (Tex. App.—Houston [1st Dist.] 1988, no writ).

129. *Id.* at 832-33.

130. *Ex parte Davis*, 753 S.W.2d 463, 464 (Tex. App.—Beaumont 1988, no writ).

131. *Nydegger v. Breig*, 740 S.W.2d 551, 552 (Tex. App.—San Antonio 1987, no writ).

132. *Id.*

133. 753 S.W.2d 526 (Tex. App.—Fort Worth 1988, no writ).

134. *Id.* at 528-29.

135. *Id.* at 528.

136. *Id.* at 529.

137. *Id.*

138. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

139. Child Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1986).

quires that after 1994 the states must provide for immediate wage withholding with respect to all new support orders.¹⁴⁰ Another section provides for a commission to study this provision, so perhaps the provision will not become effective. Since the commission is not required to report until late 1991, Texas may have to amend its support statutes during the coming legislative session.¹⁴¹ The Determination of Paternity section¹⁴² may require some changes as well since the Act addresses establishment of paternity issues.

The common law governed a case that was tried and went to final judgment during the period before the Texas Supreme Court had adopted final support guidelines.¹⁴³ The appellate court found no abuse of discretion in awarding \$3500 a month for child support since the obligor was earning approximately \$220,000 per year. Indeed, the appellate court stated that \$3500 a month would be considered a conservative amount were it not for the fact that the obligor was required to pay all medical expenses and keep and maintain various insurance policies.¹⁴⁴ The court held that the trial court had abused its discretion by providing for increases of \$1000 per month starting in September 1987 and again in 1988.¹⁴⁵ The court found insufficient evidence to support these increases.¹⁴⁶

In *Texas ex rel. Williams v. Green*¹⁴⁷ a parent attempted to have the Attorney General of Texas represent her in a motion to modify child support. The trial court dismissed, finding no statutory authority for such representation. The appellate court agreed. The court interpreted the Human Resources Code¹⁴⁸ very narrowly in holding that the power to represent a private person in a suit to establish custody is not a power to represent a private person in a suit to modify custody.¹⁴⁹ A dissent took the contrary position.¹⁵⁰

After a court has entered a default judgment on a motion to modify, the defaulting party may obtain a new trial by showing that his failure to appear was not the result of conscious indifference, that he has a meritorious defense, and that the granting of the new trial will not harm the other party.¹⁵¹ In *Ritter v. Wiggins*¹⁵² the husband failed to meet this burden because he did

140. Title I: Child Support and Establishment of Paternity: Subtitle A—Child Support Sec. 101 Immediate Income Withholding, 15 Fam. L. Rep. (BNA) 2001 (1988).

141. TEX. FAM. CODE ANN. §§ 14.30-.51 (Vernon 1986 & Supp. 1989).

142. *Id.* §§ 13.01-.09 (Vernon 1986 & Supp. 1989).

143. *Eikenhorst v. Eikenhorst*, 746 S.W.2d 882, 885 (Tex. App.—Houston [1st Dist.] 1988, no writ).

144. *Id.* at 886.

145. *Id.* at 886-87.

146. *Id.*

147. 746 S.W.2d 940 (Tex. App.—Austin 1988, writ denied).

148. TEX. HUM. RES. CODE ANN. § 76.007 (Vernon 1988). "Attorneys employed by the attorney general may represent the state or other parties in a suit to establish a child support obligation, collect child support, or determine paternity brought under the authority of federal law or this chapter."

149. 746 S.W.2d at 942.

150. *Id.* at 943-45 (Gammage, J., dissenting).

151. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted).

152. 756 S.W.2d 861 (Tex. App.—Austin 1988, no writ).

not show a meritorious defense. He claimed no change in circumstance had occurred since either a prior private agreement on child support or a prior court order. The prior court order related to access and thus was irrelevant. The court held that the Family Code does not empower courts to modify agreements between the parties, so no meritorious defense existed.¹⁵³ An appellant will not prevail when no record is filed with the appeal and the judgment is within the scope of the pleadings.¹⁵⁴

A motion to transfer, when combined with a motion to modify the parent-child relationship, is mandatory and automatic if the petitioner meets the six months residence requirement.¹⁵⁵ Even if the motion to transfer is made without an underlying modification motion, the transfer is not void if based on proper notice.¹⁵⁶ If a motion to modify child support is filed prior to the child's eighteenth birthday, the court has jurisdiction even though the hearing will occur after that birthday.¹⁵⁷

In *McLeod v. McLeod*¹⁵⁸ the Dallas court of appeals held that a judicial error cannot be corrected nunc pro tunc.¹⁵⁹ In a prior decision the same appellate court had held that when the trial court did not issue an underlying support order no arrearages can be owed and, therefore, an order to pay arrearages must be deleted.¹⁶⁰ Following this decision the mother asked the trial judge to rephrase his order from one to pay arrearages to one ordering the retroactive payment of increased child support. The appellate court held that this change was not a correction to effectuate a judgment, but the correction of a judicial error, and as such was not permissible.¹⁶¹ The court then reinstated the earlier court order as modified in the prior case.¹⁶²

In *Ruffin v. Ruffin*¹⁶³ an appellate court held that the trial court could enforce back child support orders by ordering withholding from veterans' disability benefits.¹⁶⁴ The court relied on *Rose v. Rose*¹⁶⁵ for its decision.¹⁶⁶ Since the Supreme Court in *Rose* simply held that state contempt orders directed at the obligor are not preempted by federal law, it will be interesting to see how the Veterans Administration responds to the withholding order.¹⁶⁷ A party may not appeal a court's denial of contempt.¹⁶⁸ If a court properly finds a petitioner in civil contempt and incarcerates him, he is not

153. *Id.* at 864. The court relied on TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon 1989), which deals only with modifications of court orders and decrees.

154. *Saenz v. Saenz*, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ).

155. *Sokolsky v. McFall*, 750 S.W.2d 35, 37 (Tex. App.—Amarillo 1988, no writ).

156. *Botello v. Salazar*, 745 S.W.2d 540, 541 (Tex. App.—Houston [14th Dist.] 1988, no writ).

157. *McLendon v. Allen*, 752 S.W.2d 731, 733 (Tex. App.—Corpus Christi 1988, no writ).

158. 752 S.W.2d 676 (Tex. App.—Dallas 1988, no writ).

159. *Id.* at 678 (citing *Mathes v. Kelton*, 569 S.W.2d 876, 877 (Tex. 1978)).

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

161. 752 S.W.2d at 678.

162. *Id.* at 679.

163. 753 S.W.2d 824 (Tex. App.—Houston [14th Dist.] 1988, no writ).

164. *Id.*

165. 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987).

166. 753 S.W.2d at 826-28.

167. 107 S. Ct. at 2036-37, 95 L. Ed. 2d at 610-11.

168. *Pruett v. Pruett*, 754 S.W.2d 802 (Tex. App.—Tyler 1988, no writ).

entitled to a good-conduct deduction from his court-ordered commitment.¹⁶⁹

Courts will grant habeas corpus writs in child support contempt cases when the contemnor has raised the issue of indigency and has not been advised of his right to appointed counsel.¹⁷⁰ The Houston appeals court granted the writ when the trial court did not clearly and unambiguously inform the contemnor of what he needed to do to avoid contempt.¹⁷¹ A contempt order must be supported by a record of the proceeding.¹⁷² If, however, the order is based on an agreement by the parties, then no record is necessary.¹⁷³

In *Ex parte Connor*¹⁷⁴ the Beaumont court of appeals held that probation was a sufficient restraint on liberty to permit filing a writ,¹⁷⁵ but remanded to the trial court to determine if a record had been made.¹⁷⁶ The court then granted a second petition for a writ based on the finding that no record existed and that any agreement that was made was between the attorneys and not the parties.¹⁷⁷ A vigorous dissent pointed out that the contemnor was represented by competent counsel, had authorized counsel to sign the agreement, and this court was simply delaying the payment of child support to children in need.¹⁷⁸

Three cases concerning support for dependent children over

eighteen may provide the answer to the question of how one spouse can obtain a support order for the other spouse.¹⁷⁹ In *In re Marriage of Burrell*¹⁸⁰ the parties obtained a divorce after the dependent child had reached eighteen. The child was in fact almost twenty-eight years old. The wife asked for child support. The trial court entered an order, but the appellate court reversed on the ground that the trial court lacked jurisdiction under

169. *Ex parte Harrison*, 741 S.W.2d 607 (Tex. App.—Austin 1987, no writ).

170. See, e.g., *Ex parte Berryhill*, 750 S.W.2d 368, 370 (Tex. App.—Beaumont 1988, no writ) (granting writ because contemnor was not advised of his right to compel after appellate court had previously ordered trial court to allow contemnor to develop facts as to his indigency), 741 S.W.2d 186, 190 (Tex. App.—Beaumont 1987, no writ); *Ex parte Walker*, 748 S.W.2d 21, 22 (Tex. App.—Dallas 1988, no writ) (holding that because the indigent was not so advised his rights were not waived); *Ex parte Goodman*, 742 S.W.2d 536, 541 (Tex. App.—Fort Worth 1987, no writ) (failure to advise father of his rights violated his fifth and sixth amendment rights and voided the order).

171. *Ex parte Bagwell*, 754 S.W.2d 490, 492-93 (Tex. App.—Houston [14th Dist.] 1988, no writ) (voiding an ambiguous court order); *Ex parte Sinclair*, 746 S.W.2d 956, 957 (Tex. App.—Houston [14th Dist.] 1987, no writ) (voiding an order because of lack of clarity).

172. E.g., *Ex parte Fain*, 750 S.W.2d 344, 345 (Tex. App.—Beaumont 1988, no writ).

173. See TEX. FAM. CODE ANN. § 14.32(b) (Vernon 1986).

174. 746 S.W.2d 527 (Tex. App.—Beaumont 1988, no writ).

175. *Id.*

176. *Id.* at 528.

177. *Ex parte Connor*, 749 S.W.2d 241, 242 (Tex. App.—Beaumont 1988, no writ).

178. *Id.* at 242-46.

179. 747 S.W.2d 479 (Tex. App.—Amarillo 1988, writ denied); *Adkins v. Adkins*, 743 S.W.2d 745 (Tex. App.—El Paso 1987, writ denied); *Runnells v. Firestone*, 746 S.W.2d 845 (Tex. App.—Houston [14th Dist.]), writ denied *per curiam*, 760 S.W.2d 240 (1988).

180. 747 S.W.2d 479 (Tex. App.—Amarillo 1988, writ denied).

the Family Code.¹⁸¹ In *Adkins v. Adkins*¹⁸² the court reached a different result.¹⁸³ Initially the mother asked for support under the Family Code. The court denied her request in an unreported opinion. The mother, as the guardian of her incompetent adult son, then asked the trial court for a support order under the Probate Code.¹⁸⁴ The trial court denied the order on the basis that the son had a small estate with some income and the mother was employed and capable of supporting him. The appellate court found first that the earlier judgment would not bar this action because the mother was suing in a different capacity.¹⁸⁵ She was not appointed guardian until after the divorce; therefore the doctrine of *res judicata* was not dispositive of her rights.¹⁸⁶ Then the court, relying on *Red v. Red*¹⁸⁷ and its reference to the Probate Code,¹⁸⁸ reversed and remanded.¹⁸⁹ The appellate court held that the trial court should determine whether the father was capable of contributing support and, if so, should order him to pay an amount commensurate with his ability.¹⁹⁰

Finally, in *Runnells v. Firestone*¹⁹¹ a mother sought the same type of relief as the mothers in *Burrell* and *Adkins* although her case was considerably more complicated. The divorce had been in Florida, the father had never lived in Texas, had moved to Canada, and had become a Canadian citizen. The mother attempted to invoke the Texas court's jurisdiction on the basis of a contract that the father allegedly entered into in connection with the adult child's support. The trial court found no contract and, therefore, no jurisdiction. The appellate court affirmed the trial court's finding as to jurisdiction,¹⁹² but also discussed the question of whether the Probate Code establishes a legal duty of support.¹⁹³ The appellate court agreed with the interpretation of the Probate Code by the dissent in *Red v. Red*¹⁹⁴ and held further that the trial court had not found that the incompetent lacked an estate of his own.¹⁹⁵ Finally, the appellate court determined that the statute applies to parents in the alternative and since the mother had not shown that she was incapable of providing for her son, she was not entitled to relief.¹⁹⁶

181. *Id.* at 484. The court relied on TEX. FAM. CODE ANN. § 14.05(b) (Vernon 1986) and *Red v. Red*, 552 S.W.2d 90 (Tex. 1977).

182. 743 S.W.2d 745 (Tex. App.—El Paso 1987, writ denied).

183. *Id.* at 746.

184. "Where an incompetent has no estate of his own, he shall be maintained: . . . (b) by the father or mother of such person, if able to do so; or, if not" TEX. PROB. CODE ANN. § 423 (Vernon 1980).

185. 743 S.W.2d at 746.

186. *Id.*

187. 552 S.W.2d 90 (Tex. 1977).

188. *Id.* at 91.

189. 743 S.W.2d at 747.

190. *Id.*

191. 746 S.W.2d 845 (Tex. App.—Houston [14th Dist.]), writ denied *per curiam*, 760 S.W.2d 240 (1988).

192. *Id.* at 853.

193. See *supra* note 184.

194. *Red v. Red*, 552 S.W.2d at 98.

195. 746 S.W.2d at 852.

196. *Id.*

The Texas Supreme Court, in a per curiam opinion, specifically declined to approve the appellate court's interpretation of the Probate Code or its analysis of *Red v. Red*.¹⁹⁷

When *Burrell*, *Adkins*, and *Runnell's* are construed together, it appears that a recognized right may now exist under the Probate Code for a parent guardian of an incompetent adult child to obtain help from the other parent in the support of that child. The method for obtaining the relief is rather clumsy since it requires the use of the Probate Code rather than the Family Code. Also, since in most cases the parent seeking support help will not, at the time of the divorce, be the appointed guardian of the incompetent, the court will have to try two different suits. If the original divorce court could determine the support needs and the property division at the same time, it would more efficiently reach a just decision since it has access to all the evidence and could more easily balance the equities.

V. TERMINATION AND ADOPTION

In *Kingsley v. Texas*¹⁹⁸ the court found an attorney guilty of the "purchase of a child" under the Texas Penal Code.¹⁹⁹ The attorney had arranged for the adoption of an unwed mother's child. During the mother's pregnancy, the attorney gave her checks for her rent, groceries, and miscellaneous items. The court held that these payments did not fall within the code exception for legal or medical expenses, especially the payments for cosmetics and cigarettes.²⁰⁰ The court held that the attorney had no standing to invoke the overbreadth doctrine, since his conduct fell within the core of what the statute was intended to prevent.²⁰¹ The court did find that the trial court had erred in permitting the state to present unadjudicated offenses during the punishment phase of the trial and so remanded for a new trial.²⁰²

A mother who signed an irrevocable relinquishment of her parental rights and a waiver of notice, changed her mind the following day, and attempted to intervene in the termination suit by asking the attorney representing the adoptive parents to notify her of the date of the hearing. The attorney failed to do so. The court terminated the mother's parental rights, and she appealed.²⁰³ The appellate court correctly denied relief, since an irrevocable relinquishment is irrevocable, at least for sixty days.²⁰⁴ The court failed to explain that a waiver of notice waives all notice of the particular hearing. To bring a writ of error the mother must show that the waiver was involuntary.²⁰⁵ When the court holds hearings in termination procedures, an indi-

197. 760 S.W.2d 240 (1988) (rejecting the interpretation in *Red v. Red*).

198. 744 S.W.2d 191 (Tex. App.—Dallas 1988, no pet.).

199. TEX. PENAL CODE ANN. § 25.06 (Vernon Supp. 1989).

200. 744 S.W.2d at 193.

201. *Id.*

202. *Id.* at 196. The remand is actually for a trial only on the punishment. *Id.* at 196-97; see TEX. CRIM. PROC. CODE ANN. § 44.29 (Vernon 1979 & Supp. 1989).

203. *In re C.T.*, 749 S.W.2d 214, 215 (Tex. App.—San Antonio 1988, no writ).

204. *Id.* at 217.

205. *Id.*

gent is entitled to a free statement of facts for use during an appeal.²⁰⁶ When foster parents might have information about the best interests of the child, the parents may take the foster parents' depositions.²⁰⁷ After a judgment in a termination suit becomes final, the psychologist's file created at the request of the court is not available for disclosure to a party with whom no doctor-patient relationship exists, unless the psychologist chooses to do so.²⁰⁸

In two cases the mothers' parental rights were terminated because of their failure to prevent the abuse of their children by their male friends rather than due to active abuse on the mothers' part.²⁰⁹ In *In re K.S.*²¹⁰ the court found clear and convincing evidence²¹¹ that the mother had knowingly placed the child in dangerous surroundings.²¹² The court determined that it was in the best interest of the child to terminate parental rights considering that the mother and child lacked emotional contact.²¹³ In *In re L.S.*²¹⁴ the evidence clearly established that the children had been sexually abused. One of the children, an eighteen-month-old child, had gonorrhea. The mother appealed on the basis that her male companion had prejudiced the jury when he testified by invoking his fifth amendment right to remain silent. The court overruled this point of error because no one had advance knowledge of the invocation of the privilege, no motion in limine was presented, and the witness had answered most of the questions.²¹⁵

A third case dealing with termination of a mother's rights differed somewhat from the others. In *In re M.H.*²¹⁶ the mother alleged that she needed clearer findings because the trial court made the findings in the alternative.²¹⁷ The appellate court found that the trial court had followed the wording of the statute as to involuntary termination and had specified sufficient facts to inform the mother of the reasons her rights were terminated.²¹⁸ The mother also complained that the evidence was not sufficient because she had not engaged in any direct abuse of her children. The court, relying on the Texas Supreme Court's definition of "endanger," affirmed the trial court.²¹⁹

206. *Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex. 1987) (court granted writ of mandamus).

207. *Caudillo v. Chiuminatto*, 741 S.W.2d 545, 546 (Tex. App.—Corpus Christi 1987, no writ), granted mandamus to prohibit the preventing of the taking of depositions).

208. *Baker v. Alexander*, 745 S.W.2d 112, 114 (Tex. App.—Fort Worth 1988, no writ).

209. *In re K.S.*, 752 S.W.2d 233 (Tex. App.—Fort Worth 1988, no writ); *In re L.S.*, 748 S.W.2d 571 (Tex. App.—Amarillo 1988, no writ).

210. 752 S.W.2d 233 (Tex. App.—Fort Worth 1988, no writ).

211. "In a suit in which termination of the parent-child relationship is sought, each finding required for termination of the parent-child relationship must be based on clear and convincing evidence." TEX. FAM. CODE ANN. § 11.15(b) (Vernon 1986).

212. 752 S.W.2d at 234.

213. *Id.* at 235.

214. 748 S.W.2d 571 (Tex. App.—Amarillo 1988, no writ).

215. *Id.* at 576.

216. 745 S.W.2d 424 (Tex. App.—Houston [14th Dist.] 1988, no writ).

217. *Id.* at 425.

218. *Id.* at 426; see TEX. FAM. CODE ANN. § 15.02 (Vernon 1986 & Supp. 1989).

219. 745 S.W.2d at 427; see also *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533-34 (Tex. 1987) (distinguishing the words "danger" and "endanger").

In *Subia v. Department of Human Services*,²²⁰ the El Paso court of appeals reversed and remanded because of numerous errors by the trial court.²²¹ Although the facts suggested that termination of the parent-child relationship would eventually take place, the court found that the parents' constitutional rights had not been protected, and thus the judgment could not stand.²²² Specifically the court found that the pleadings, which were in the alternative and merely tracked the statute, did not give fair notice of the facts.²²³ The trial court also erred in admitting not only hearsay testimony of a Department of Human Services caseworker, but also the testimony of a psychologist when the mother had not been informed that her communications with the psychologist would not be privileged.²²⁴ *Subia* underscores the need for proper procedures in termination of parental rights cases, since the risk of damage to the children increases with the time taken to resolve their custody.

The appellate courts reversed three other termination cases because the evidence adduced at trial was not clear and convincing.²²⁵ In *Clay v. Texas Department of Human Services*²²⁶ the court found that the mother posed no danger to the children.²²⁷ Only the father had abused them. Originally, the mother had asked for help because the father had beaten her, and she was afraid for her children's safety. The court held that termination is a harsh remedy and is not justified where a parent's failure to give the standard of care required by the Department of Human Services is due solely to lack of training or misfortune.²²⁸ Accordingly, the court reversed and rendered.²²⁹

In *Doria v. Texas Department of Human Services*²³⁰ the court reversed and remanded because the evidence was not clear and convincing.²³¹ The state presented some evidence of abuse, but the mother also presented evidence that she had tried to comply with the Department of Human Service's plan to regain her children, although she had not fully complied. Additionally, she offered evidence that indicated she loved her children. The evidence was mixed as to her relationship with her boyfriend, who had abused her in the past, although the court noted that he was no longer permitted to contact the children. The court did not find sufficient evidence to terminate,²³² but was sufficiently doubtful about the outcome of the case that it

220. 750 S.W.2d 827 (Tex. App.—El Paso 1988, no writ).

221. *Id.* at 831.

222. *Id.* at 829-30.

223. *Id.* at 829.

224. *Id.* at 830-31.

225. *Clay v. Texas Dep't of Human Servs.*, 748 S.W.2d 598 (Tex. App.—Waco 1988, no writ); *Doria v. Texas Dep't of Human Servs.*, 747 S.W.2d 953 (Tex. App.—Corpus Christi 1988, no writ); *N.S.M. v. Dallas County Welfare Unit*, 747 S.W.2d 814 (Tex. App.—Dallas 1987, no writ). See *supra* note 211.

226. 748 S.W.2d 598 (Tex. App.—Waco 1988, no writ).

227. *Id.* at 601.

228. *Id.*

229. *Id.*

230. 747 S.W.2d 953 (Tex. App.—Corpus Christi 1988, no writ).

231. *Id.* at 958-59.

232. *Id.* at 959.

reversed and remanded for a new trial.²³³

*N.S.M. v. Dallas County Welfare Unit*²³⁴ consisted essentially of a conflict between parents over custody, with the County Child Welfare Unit having been called in to act as referee. The father, who had custody, brought charges of child abuse against his daughter's maternal grandfather. These charges were substantiated to some extent. The appellate court found that abuse may have occurred while the child was in the mother's custody, but the evidence was too equivocal to be sufficient.²³⁵ The evidence as to the father was even more obscure. Because of his concern for his daughter, he conducted frequent vaginal examinations to check for penetration. The court found that the father's concern had become almost an unhealthy obsession.²³⁶ Yet at the same time, the father was a loving and concerned parent, so the court ruled that the trial court should explore less drastic remedies than termination.²³⁷

233. *Id.*

234. 747 S.W.2d 814 (Tex. App.—Dallas 1987, no writ).

235. *Id.* at 817.

236. *Id.*

237. *Id.* at 817-18.

