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Ellen K. Solender

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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

I. INTRODUCTION: CHANGES IN THE FAMILY CODE

THE 71st Texas Legislature enacted numerous changes in The Texas Family Code, Title 2, Parent and Child.¹ The Texas Legislature has enacted changes in every regular session as well as in many special sessions since the original passage of Title 2 in 1973. It is to be expected that this habit will continue, since the Family Code is quite complex and affects the lives of many legislators as well as their constituents.

A number of the changes were to conform the Code to a change in attitude towards children born out of wedlock.² From September 1, 1989, children will not be deemed legitimate or illegitimate, but will instead merely be children having unknown fathers, presumed biological fathers, fathers adjudicated as biological fathers, or adoptive fathers.³ Husbands are presumed biological fathers.⁴

While all chapters of Title 2 underwent some changes, two areas underwent major changes; the rules concerning the presumption of custody and the requirements for support and its enforcement. In the past, a parent has had the benefit of the presumption that it is in the best interest of the child that the parent be named managing conservator even though the parent had voluntarily relinquished the child to some other person for a period of time.⁵ The legislature has now specified that after a year that other person can file suit to be named managing conservator, and if it is found that it would be in the best interest of the child to maintain this relationship, that other person may be named managing conservator.⁶

The statute also creates the rebuttable presumption that it is in the best interest of the child for both parents to have a high degree of access to the child.⁷ A decree that names a parent as the possessory conservator⁸ must

* A.B., Oberlin College; J.D., Southern Methodist University. Professor of Law, Southern Methodist University.

1. TEX. FAM. CODE ANN. §§ 11.01 - 36.02 (Vernon Supp. 1990).

2. See, e.g., TEX. FAM. CODE ANN. §§ 11.03(a)(7), 13.01(a), 15.023 (Vernon Supp. 1990).

3. *Id.* § 11.01(3) (definition of "parent"). Unknown fathers cannot have parental rights or responsibilities and are only mentioned in connection with notice. *Id.* § 11.09(a)(8), (d).

4. *Id.* § 12.02(a)(1) (presumption of paternity).

5. cf. *Neely v. Neely*, 698 S.W.2d 758 (Tex. App.—Austin 1985, No Writ).

6. *Id.* § 14.01(b)(2).

7. *Id.* § 14.033(k).

8. *Id.* § 14.032.

contain and follow the detailed guidelines of the standard order as established by the legislature,⁹ unless the parties have entered into a written agreement that has been approved by the court.¹⁰ The parties may, however, vary the terms of a standard order at any time, provided there is mutual agreement. Failing mutual agreement, the terms revert to the standard order.¹¹

The guidelines have no enforcement provisions, but since they will be written specifically, they should be enforceable through contempt.¹² This, of course, will encourage the managing conservator to release the child to the possessory conservator when it is mandated by the standard order. If the possessory conservator, however, gives written notice to the managing conservator that it will not be possible to pick up the child as scheduled, there is nothing the managing conservator can do.¹³ If the possessory conservator without notice repeatedly fails to appear to pick up the child, this may be considered a factor for modification of the order.¹⁴ It would seem that there should be some affirmative requirement for the exercise of the right to possession and that the right would lapse if there had been a failure to exercise it for a certain number of times, with or without notice to the managing conservator.

A couple may have a disabled child and not decide to divorce until after the child has become eighteen. The previous interpretation of the statute held that a court under those circumstances was without jurisdiction to order child support.¹⁵ The Family Code has now been changed to permit courts to order either or both parents to support a disabled child even after the child becomes eighteen, providing it is a pre-existing disability.¹⁶ The right is for parents and their adult children only and cannot be brought by or assigned to any agency.¹⁷

The child support guidelines have been incorporated into the text of the Family Code.¹⁸ There are few substantive changes from the guidelines ordered by the Texas Supreme Court in 1987.¹⁹ The most important is that the guidelines are no longer intended to merely guide the courts in establishing child support amounts but are rebuttably presumed to be in the best

9. *Id.* § 14.033 (standard possession order).

10. *Id.* § 14.06 (agreements concerning conservatorship).

11. *Id.* § 14.033(b).

12. *Id.* §§ 14.312(b), 14.50.

13. *Id.* § 14.033(g)(5).

14. *Id.*

15. *Red v. Red*, 552 S.W.2d 90, 94-95 (Tex. 1977).

16. TEX. FAM. CODE ANN. § 14.051 (Vernon Supp. 1990). This will solve the problem for custodial parents of adult children in cases such as *In re Marriage of Burrell*, 747 S.W.2d 479 (Tex. App.—Amarillo 1988, writ denied) and *Adkins v. Adkins* 743 S.W.2d 745 (Tex. App.—El Paso 1987, writ denied). See Solender, *Parent and Child*, Annual Survey of Texas Law, 43 SW. L.J. 37, 46, 47 (1989).

17. TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1990).

18. *Id.* §§ 14.052-.057.

19. Order of the Supreme Court of Texas (eff. Feb. 4, 1987). 50 Tex. Bar J. 384 (April 1987) This order is now essentially incorporated in TEX. FAM. CODE ANN. § 14.055 (Vernon Supp. 1990) See *infra* notes 149-150.

interest of the child.²⁰ The amounts are no longer stated as a range, but are a definite percent of the obligor's net resources.²¹ It has been made clear that when modifying an existing support order, the court should not automatically lower it because of an obligor's support obligation to a later born child or increase it because the obligor has been voluntarily paying in excess of the required amount.²² Also, the net resources or needs of a second spouse of either the obligor or obligee are not to be included in the calculations of the net resources of the obligor or obligee.²³

A new section has been added to the Family Code pertaining to health insurance.²⁴ The court can order either the obligor or the obligee to maintain health insurance for the benefit of the child. Which party is required to maintain insurance will depend on who has access to the better insurance plan, and if no plans are available at a reasonable cost, the court may dispense with the obligation altogether.

To further facilitate determining the whereabouts of the parties, the driver's license numbers of the parties must be included in the decree.²⁵ The decree must also contain warnings as to what might happen should there be a failure to follow the orders contained in the decree.²⁶ *Williams v. Green*²⁷ has been overruled by the legislature and as a result the Child Support Enforcement Division of the Office of the Attorney General may now seek to modify as well as establish child support orders.²⁸ This was an odd decision and placed Texas out of compliance with the federal Family Support Act of 1988.²⁹

The parent-child relationship may be terminated if the parent has been found criminally responsible for the death or serious injury of another of the parent's children,³⁰ or has had a prior parent-child relationship terminated because of endangering the child.³¹ The termination must also be in the best interest of the child.³² This means that if a parent has injured only one of the parent's two children, the parent-child relationship with the uninjured child may also be terminated if it is found to be in that child's best interest.

The information that adoptive parents are entitled to receive before they adopt a child has been increased.³³ They are now entitled to receive a full report, not just a summary of the background of the child to be adopted,

20. TEX. FAM. CODE ANN. § 14.055(a) (Vernon Supp. 1990).

21. *Id.* § 14.055(b).

22. *Id.* § 14.056(b).

23. *Id.* § 14.056(c).

24. *Id.* § 14.061.

25. *Id.* § 11.155. In addition, this section requires the parties to inform the clerk of the court of their current addresses and telephone numbers as well as those of their current employers and if any of this information changes, to inform the clerk within ten days. *Id.*

26. *Id.* § 11.155(d).

27. 746 S.W.2d 940 (Tex. App.—Austin 1988, writ denied).

28. TEX. FAM. CODE ANN. § 11.03 (Vernon Supp. 1990).

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

30. TEX. FAM. CODE ANN. § 15.02(1)(L) (Vernon Supp. 1990).

31. *Id.* § 15.02(1)(M).

32. *Id.* § 15.02(2).

33. *Id.* § 16.032(a), (e)(1), (8-10).

and to receive it as soon as practicable.³⁴ This duty, which applies not only to the Texas Department of Human Services, but to all authorized agencies and persons placing children for adoption, includes informing the prospective adoptive parents of their right to examine the records and information relating to the history of the child.³⁵

The above represents a sampling of the many changes enacted by the seventy-first legislative sessions during 1989. The State Bar Family Law Section Reports sets out in detail the statutory changes along with some legislative history.³⁶

II. UNITED STATES SUPREME COURT DECISIONS

A. Child Abuse

If the Texas Department of Human Services receives reports of child abuse and fails to act to protect the child, and as a result, the child is permanently injured, the child may not bring an action alleging violation of rights under the Due Process Clause of the Fourteenth Amendment.³⁷ Furthermore, no statutory civil rights action may be filed.³⁸ The state has no constitutional duty to protect one citizen from the private actions of another citizen. This was the holding in *DeShaney v. Winnebago County Department of Social Services*.³⁹ The Court did go on to say that while there is no constitutional duty, it is possible for states to create other methods for holding state agencies accountable, including permitting actions in tort.⁴⁰

B. Statutes Affecting the Parent-Child Relationship

The Court in *Dellmuth v. Muth*⁴¹ held that unless the language of an Act evinces a clear intention to abrogate a State's immunity from suit under the Eleventh Amendment,⁴² there can be no action for damages against the State.⁴³ The Court held that the Assistance for Education of All Handicapped Children Act⁴⁴ did not contain such specific language and therefore, a father who had to pay for his child's private school education during the time the school system failed to follow the Act could not recover his tuition expenses.⁴⁵

34. *Id.* § 16.032(f).

35. *Id.* § 16.032(n).

36. Vol. 89-1 Special Legislation Issue - Part I and Vol. 89-2 Legislation Edition, Part II.

37. U.S. CONST. amend. XIV, § 1.

38. 42 U.S.C. § 1983 (1982).

39. 109 S. Ct. 998, 1003, 103 L. Ed. 2d 249, 258-59 (1989).

40. *Id.* at 1007. See *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988) (child welfare workers have only a qualified immunity when they err in removing a child from its home because of alleged child abuse). *But see* *Del A. v. Edwards*, 855 F.2d 1148, 1153-54 (5th Cir. 1988) (child welfare workers can lose their qualified immunity by failing to follow the clear mandate of a statute).

41. 109 S. Ct. 2397, 2401, 105 L. Ed. 2d 181, 189 (1989).

42. U.S. CONST. amend. XI.

43. 109 S. Ct. at 2402, 105 L. Ed. 2d at 190.

44. 20 U.S.C. §§ 1411-20 (1982).

45. 109 S. Ct. at 2402, 105 L. Ed. 2d at 190-91.

In *Mississippi Band of Choctaw Indians v. Holyfield*⁴⁶ the Court held that Indian Child Welfare Act⁴⁷ limits parents' right to determine the domicile of their child.⁴⁸ The Court found that Congress' concern over the placement of indian children in non-indian homes mandated a uniform federal definition of domicile.⁴⁹ The Court held that under the Act, the domicile of newborn indian children, regardless of their actual place of birth, is that of their parents when their parents are domiciled on a reservation.⁵⁰ In this situation the Act prevents a state court from having jurisdiction to enter a decree of adoption, despite the fact that the mother has left the reservation to give birth to her children and has also voluntarily surrendered them to a non-indian couple for adoption.⁵¹ Congress did not intend that by manipulating the definition of domicile, individual indian parents would be able to defeat the purposes of the Act.⁵²

C. Paternity

In *Michael H. v. Gerald D.*⁵³ the Court was asked to hold that in light of the ability to determine paternity, a conclusive presumption that a husband is the father of the child is a violation of the Due Process Clause.⁵⁴ A plurality of the Court, in an opinion authored by Justice Scalia, held that a state may allow a married couple to retain a child conceived within and born into their marriage by establishing an irrebuttable presumption that it is their child because this type of question is one of legislative policy and not constitutional law.⁵⁵ Scalia based his decision on historical tradition.⁵⁶ Although the wife knew that her husband was not the biological father, she would not join in a suit by the biological father to establish that fact. The biological father, the child, and the married mother had lived together for a period of time with the biological father conducting himself as the child's father.

Justices Brennan and White in their dissents emphasised that the result in this case was based on a plurality of the Court, not a majority.⁵⁷ They found, under the facts of this case, when the biological father seeking the right to visit his child had actual contact with the child for a significant period of time, he had a liberty interest in continuing that relationship; thus,

46. 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

47. 25 U.S.C. §§ 1901-1963 (1982).

48. 109 S. Ct. at 1609-10. This is also a limitation on the powers of Texas Indian parents, despite Section 12.04(1) of the Texas Family Code which states, among other things, that parents have the right, privilege, duty and power . . . "to establish the legal domicile of the child." TEX. FAM. CODE ANN. § 12.04(1) (Vernon Supp. 1990).

49. 109 S. Ct. at 1607, 104 L. Ed. 2d at 45.

50. 109 S. Ct. at 1608, 104 L. Ed. 2d at 46.

51. 109 S. Ct. at 1610-11, 104 L. Ed. 2d at 49.

52. 109 S. Ct. at 1609, 104 L. Ed. 2d at 47-48.

53. 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989).

54. U.S. CONST. amend. XIV, § 1.

55. 109 S. Ct. at 2345, 105 L. Ed. 2d at 110.

56. 109 S. Ct. at 2343-44, 105 L. Ed. 2d at 108.

57. 109 S. Ct. at 2349, 2360, 105 L. Ed. 2d at 114, 128, Justice Stevens concurred in the judgment because he believed California law did provide the father with an opportunity to be heard on his right to visit. 109 S. Ct. at 2347, 105 L. Ed. 2d at 112.

a refusal of a hearing on the matter was a denial of due process.⁵⁸

The Texas Family Code provides that a father is presumed to be the biological father if the child was born during his marriage to the child's mother.⁵⁹ This presumption may be rebutted by clear and convincing evidence.⁶⁰ Either party to the marriage may deny the paternity of a child born during the marriage;⁶¹ however, a suit to establish paternity by a non-marital partner may be brought only when a child has no presumed father.⁶² Thus, a fact pattern similar to *Michael H.* may occur in Texas. In that event the court could deny the biological father standing, since under the Texas statute the child would have a presumed father (the husband), and therefore, there could be no suit to establish the parent-child relationship.⁶³ The biological father despite the result in *Michael H.* may have a constitutional right to a hearing since that right appears to be favored by a majority of the current United States Supreme Court justices.

III. STATUS

A. Education for Handicapped Children

Congress passed the assistance for Education of All Handicapped Children Act⁶⁴ in order to assure that all children, including handicapped children, would receive an appropriate education.⁶⁵ In *Daniel R.R. v. State Board of Education*⁶⁶ the court held that the case was not moot, although it had been more than two years since the specific matter in controversy had arisen.⁶⁷ The parents of Daniel had filed this suit because the individualized educational treatment plan (IEP) had been changed from placing Daniel in a regular classroom to a special classroom. The court noted that because of the length of time it takes to review each year's IEP, a finding of mootness would preclude any real review of the controversy.⁶⁸ The court then went over the facts and the requirements of the Act in great detail and affirmed the trial court's finding in favor of the school district.⁶⁹ The court pointed out that the school officials hold each child equally deserving of a share of the school's limited resources, but that there are often a large variety of competing needs and in this case the balance tipped in favor of removing Daniel from the pre-kindergarten class.⁷⁰

58. 109 S. Ct. at 2349, 105 L. Ed. 2d at 114.

59. TEX. FAM. CODE ANN. § 12.02 (a)(1) (Vernon Supp. 1990).

60. *Id.* § 12.02(b).

61. *Id.* § 12.06.

62. *Id.* § 13.01.

63. *Cf. Espree v. Guillory*, 753 S.W. 2d 722, 724 (Tex. App.—Houston [1st Dist] 1988, no writ) (after the divorce the biological father was denied visitation).

64. 20 U.S.C. §§ 1411-20 (1982).

65. *See Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982) in which the Court held that "appropriate" means that the child will benefit educationally.

66. 874 F.2d 1036 (5th Cir. 1989).

67. *Id.* at 1041.

68. *Id.*

69. *Id.* at 1052.

70. In another case under the Act, the court reversed the summary judgment of the trial court holding that while attorney's fees were recoverable based on a settlement prior to a

B. Wrongful Death and Intestacy

In *Garza v. Maverick Market Inc.*⁷¹ the court held that an illegitimate child could recover under the Texas Wrongful Death Act⁷² for the death of his father if there is clear and convincing evidence that the deceased was his father.⁷³ The court held that it is not necessary to comply with other bodies of law in order to recover under the Wrongful Death Act.⁷⁴ The problem in the case at issue was that the father, who had not married the mother, died before the child was born so he could not have complied with the paternity provisions in the Texas Family Code⁷⁵ or the Probate Code.⁷⁶

*Henson v. Jarmon*⁷⁷ was a contest to determine intestate succession in which the jury found that the decedent had two illegitimate daughters. The father had died before the Probate Code had been amended to include the provision that a child could inherit from her father by showing she was his biological child.⁷⁸ The court, relying on *Reed v. Campbell*,⁷⁹ held that since the daughters had intervened before the estate had been distributed, it would be a denial of equal protection under the Fourteenth Amendment⁸⁰ to deny these daughters their claim.⁸¹

In *Smith ex rel. Sisk v. Bowen*⁸² the court came to a similar conclusion, although the problem was with the Family Code rather than the Probate Code. The Family Code at the time of the father's death had a one year statute of limitations for the determination of paternity.⁸³ The U.S. Supreme Court has held that provision unconstitutional,⁸⁴ and consequently the court in *Bowen* held that with the proper statute of limitations Texas would have found the child eligible to inherit under its intestacy laws.⁸⁵ The child, therefore, was entitled to receive social security survivor's benefits.⁸⁶

In another social security case, the court held that there was no legal basis for rejecting an illegitimate child's claim after a ruling by a Texas state court

hearing, there were genuine issues of fact as to the timing of the settlement and the amount of the fees. *Shelby C. ex. rel. Shelbie C. v. Venus Indep. School Dist.*, 878 F.2d 862 (5th Cir. 1989).

71. 768 S.W.2d 273 (Tex. 1989).

72. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.011 (Vernon 1986).

73. 768 S.W.2d at 276.

74. *Id.* at 275.

75. TEX. FAM. CODE ANN. §§ 13.01-13.09, 13.21-24 (Vernon Supp. 1990).

76. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1990).

77. 758 S.W. 2d 368 (Tex. App.—Tyler 1988, no writ).

78. TEX. PROB. CODE ANN. § 42(b)(1) (Vernon Supp. 1990).

79. 476 U.S. 852 (1986). In *Reed* the Supreme Court held that since the estate had not been probated at the time of the revision of the law, the interest in not discriminating against illegitimates should control. *Id.* at 86.

80. U.S. CONST. amend. XIV § 1.

81. 758 S.W.2d at 371.

82. 862 F.2d 1165, 1167-68 (5th Cir. 1989).

83. *Id.* at 1167.

84. *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982). The current limitation in Texas is "on or before the second anniversary of the day the child becomes an adult." TEX. FAM. CODE ANN. § 13.01(a) (Vernon Supp. 1990).

85. 862 F.2d at 1167-68.

86. 42 U.S.C. 416(h)(2)(A) (1988).

establishing the child's paternity.⁸⁷ However, in another social security case the court held that a birth certificate naming the deceased wage earner as the claimant's father is insufficient proof of paternity absent some proof that the deceased had authorized the use of his name.⁸⁸

C. Paternity

In *Attorney General of Texas v. Ridge*⁸⁹ the court held that a divorce decree is not res judicata as to a child's paternity when the child was not a party and not represented.⁹⁰ The decree had contained a finding the child was not the child of the husband, although the child had been born during the marriage. Subsequently the mother tried to establish that another man was the father, but his paternity was excluded by blood tests. She then filed a petition to establish paternity, but time passed and nothing happened, so she then filed for a bill of review based on the fraud of the respondent. He had alleged he was sterile. The court held that the bill of review was timely filed because it was based on her earlier petition to establish paternity.⁹¹

The Dallas Court of Appeals conditionally granted a writ of mandamus in *Baluch v. O'Donnell*.⁹² In *O'Donnell* the father had initiated a voluntary legitimation proceeding to obtain custody of his three-year-old son and the mother filed a divorce petition. For two years there had been numerous motions and hearings and the respondent ordered the father to pay interim attorneys' fees. The father failed to do so, and the respondent granted a motion for sanctions and issued an order striking all the father's pleadings. The father asked for relief both as to the attorney's fees and the pleadings. The court granted relief as to the pleadings by finding that striking them was an abuse of discretion, but went on to hold that the father had an adequate remedy as to attorney's fees on appeal.⁹³ The father's troubles were not over, however, since after the case was transferred to another district court, that judge as a condition of setting a trial date ordered him to pay the interim attorney's fees. He again asked for a writ of mandamus which was conditionally granted.⁹⁴ The appellate court held that the failure to set a trial date was a denial of due process under the Texas Constitution.⁹⁵ Moreover, since there is no specific authority for a trial judge to stay the proceedings under these circumstances, the judge had exceeded her authority.⁹⁶

87. *Garcia ex rel. Rodriguez v. Sullivan*, 883 F.2d 18, 20 (5th Cir. 1989).

88. *Garcia ex rel. Garcia v Sullivan*, 874 F.2d 1006, 1008 (5th Cir. 1989).

89. 773 S.W.2d 645 (Tex. App.—San Antonio 1989, writ denied).

90. *Id.* at 648.

91. *Id.*

92. 763 S.W.2d 8 (Tex. App.—Dallas 1988, no writ).

93. *Id.* at 11.

94. *Baluch v. Miller*, 774 S.W.2d 299, 302 (Tex. App.—Dallas 1989, no writ).

95. TEX. CONST. art. I §§ 13, 19.

96. 774 S.W.2d at 302.

D. Injuries to Children

In *Florio v. State*⁹⁷ the conviction of a live-in boyfriend for injury to a child by omission was reversed by the Texas Court of Criminal Appeals in light of *Billingslea v. State*.⁹⁸ *Billingslea* had held that a person could not be convicted of an injury by omission unless there is a statutory duty to act.⁹⁹ While *Billingslea* involved injury to an elderly person (by a son against his aged mother) and *Florio* involved an injury to a child, both convictions and reversals were based on the same statute.¹⁰⁰ The *Florio* court noted that while the facts in the case might have established a moral duty towards the child these did not establish a parent-child relationship which would have given rise to statutory duties.¹⁰¹ In a footnote the court indicated that in the future, under the amended statute, there might be authority for prosecution of persons who act similarly to *Billingslea* and *Florio*.¹⁰² This case is distinguishable from *Chapa v. State*.¹⁰³ In *Chapa* the Aunt who was convicted of failing to protect the child had a legal duty towards the child, since she had been named the managing conservator.¹⁰⁴

In another alleged abuse case, *K. F. by Faour v. Faour*,¹⁰⁵ the mother filed a tort action against her former husband after the divorce decree had become final, on behalf of her minor daughter seeking damages for the sexual abuse that had occurred prior to the divorce. The divorce had been based on a settlement agreement between the parties and did not mention the tort allegations. The trial court granted summary judgment based on *res judicata*. The appellate court reversed and remanded holding that the issue of sexual abuse was not *res judicata* because the allegation had not been litigated and was not essential to the divorce judgment.¹⁰⁶

E. Discipline in Education

In *Cunningham v. Beavers*¹⁰⁷ two children, one aged five and one aged six, were disciplined at school by two swats with a wooden paddle that resulted in bruises to both children. Their parents sued the superintendent of the school district in federal court alleging a violation of constitutional rights. The district court dismissed and the court of appeals affirmed.¹⁰⁸ The court, relying on *Ingraham v. Wright*¹⁰⁹ held that there were common law tort remedies available to the plaintiffs and, thus, they were not denied due pro-

97. 784 S.W.2d 415 (Tex. Cr. App. 1990, en banc.)

98. 780 S.W.2d 271 (Tex. Cr. App. 1989).

99. *Id.* at 276.

100. Amended by 71st legislature 22.04 (a)-(K) (Vernon supp. 1990).

101. 784 S.W.2d 415, 17.

102. *Id.* note 2.

103. 747 S.W.2d 561 (Tex. App.—Amarillo 1988, writ ref'd).

104. *Id.* at 563.

105. 762 S.W.2d 361 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

106. *Id.* at 363.

107. 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1343, 103 L. Ed. 2d 812 (1989).

108. *Id.* at 273.

109. 430 U.S. 651 (1977) (corporal punishment of school children was held not to be a violation of their right to be free from cruel and unusual punishment).

cess.¹¹⁰ The plaintiffs argued that research has shown that corporal punishment is not the best method for disciplining or educating a child. The court held, however, that because it was bound by precedent, this argument should be addressed to the Texas Legislature.¹¹¹ This case demonstrates that the presence of a tort remedy in a situation like this is a sham, since the money damages would be slight. The children were not hospitalized and merely missed a few days of school. The real damage may be that the children might now have a negative attitude toward school which will result in poor performance, and will limit their future career choices. This type of damage, however, would be considered too speculative.

IV. CONSERVATORSHIP

A. *Appointment of Conservatorship*

In *Beck v. Beck*¹¹² a former wife petitioned for a bill of review alleging that her absence from the trial was a significant factor in the appointing of her ex-husband as managing conservator of their children. At the pre-trial hearing it was conceded that she had a meritorious defense, but the trial court ignored this and denied her relief.¹¹³ The court of appeals then affirmed based on the allegations that the wife had been negligent in not pursuing remedies other than a bill of review.¹¹⁴ The Texas Supreme Court reversed, holding that the only proper inquiry at a pre-trial hearing in a bill of review should be on whether there is prima facie proof of a meritorious defense.¹¹⁵

In *Shirley v. Montgomery*¹¹⁶ a mother and father had been engaged in long and expensive litigation over the custody of their child. The trial court ordered the mother to pay \$15,000 into the trust fund of the attorney ad litem. She claimed she did not have the money. The trial court found that the failure to pay the money prevented the attorney ad litem from finishing his discovery as to the best interests of the child. The court ordered that it would sanction the mother by striking her pleadings and not permitting her to introduce evidence at trial unless she paid the \$15,000 into the trust account. The mother then filed for a writ of mandamus asking that the sanctions be set aside. The appellate court held that the mother did not have the money to pay into the ad litem trust fund and that although she could, after trial, appeal the judge's abuse of discretion, this was not an adequate remedy.¹¹⁷ The court pointed out that this was a child custody case and the best interest of the child was the main issue.¹¹⁸ Accordingly, it conditionally

110. 858 F.2d at 272.

111. *Id.* at 273.

112. 771 S.W.2d 141 (Tex. 1989).

113. *Id.* at 142.

114. *Id.* at 141.

115. *Id.*

116. 768 S.W.2d 430 (Tex. App.—Houston [14th Dist.] 1989, mand. overr.).

117. *Id.* at 434.

118. *Id.*

granted the writ.¹¹⁹ The trial judge, apparently not satisfied by the ruling, appealed the mandamus, but was overruled.¹²⁰ The case is disturbing because of the expectations by the trial court that the grandparents, having provided some funds to their daughter for her to pursue the case, have the obligation to continue to subsidize the suit. There appears to be no consideration of the fact that they are legal nonparties in this suit.¹²¹

In another mandamus case, *Jasso v. Robertson*,¹²² relief was denied because the father had standing and there was no violation of the mother's due process rights.¹²³ The mother claimed that the child, whose custody was at issue, was illegitimate, and therefore, the court did not have the power to grant temporary managing conservatorship to the father because he was not a parent.¹²⁴ She had in her initial pleadings, however, admitted, although she later denied it, that the parties were married and that the child was born during the marriage. Even if the marriage is not proved, the father is prima facie the father of the child if the mother admits that he is the biological father of the child, his name is on the birth certificate, and he has signed an affidavit swearing he is the father.¹²⁵ Thus, the father in *Jasso* had standing and the orders were not void.¹²⁶ The court also held that there was no violation of due process because there had been three hearings and the mother had ample opportunity to present any evidence she desired.¹²⁷

B. Jurisdiction

*Creavin v. Moloney*¹²⁸ was really a simple support case that was turned into a custody jurisdiction dispute by mistake. The parents had married and had a child in Ireland. They then moved to Pennsylvania and later the wife and child returned to Ireland. The husband who remained behind, obtained a divorce in Pennsylvania. The divorce decree made no mention of child custody or support. The father then moved to Texas in 1984 and remained there. The mother filed for a confirmation of her managing conservatorship and for child support in Texas court. The father claimed that Texas courts had no jurisdiction because of the Pennsylvania decree and the failure to comply with the Uniform Child Custody Jurisdiction Act (UCCJA).¹²⁹ The trial court dismissed the case claiming it had no jurisdiction. The appeals court reversed, holding that a custody determination is not a prerequisite to a suit for child support since both parents are obligated to support the child.¹³⁰ There is also no requirement that a party comply with the UCCJA

119. *Id.*

120. *Id.*

121. *Id.* at 433.

122. 771 S.W.2d 231 (Tex. App.—Houston [1st Dist.] 1989, no writ).

123. *Id.* at 234.

124. See TEX. FAM. CODE ANN. §§ 11.01(3), 11.03(1) (Vernon Supp. 1990).

125. 771 S.W.2d at 234.

126. *Id.* at 233.

127. *Id.* at 234.

128. 773 S.W.2d 698 (Tex. App.—Corpus Christi 1989, no writ).

129. *Id.* at 701. TEX. FAM. CODE ANN. §§ 11.51 -.74 (Vernon Supp. 1990).

130. 773 S.W.2d at 703.

when the court has personal jurisdiction by virtue of the fact that the foreign mother has come into the local court to ask for relief and the father defendant resides within the jurisdiction.¹³¹ The court held that the same reasoning applied as to custody jurisdiction and pointed out that there was no showing by either party that any other state or country would be a more appropriate forum.¹³²

C. Appellate Review

In three different cases appeals were denied because they were appeals from the granting of a new trial; as such, it was an interlocutory decision and not subject to appellate review.¹³³ In two of the cases, *Wenske v. Wenske* and *Scott v. Scott*, the father had apparently obtained custody in the first trial, with the retrial coming out differently. The fathers in neither case attacked the final judgment. Instead, they claimed an abuse of discretion for granting the new trial. Thus, in both cases the appellate court had to affirm the judgment.¹³⁴ In the third case, *Hurd v. Maxwell*, the trial court had granted a new trial only on the issue of possessory conservatorship and the mother appealed because she wanted a new trial on the entire issue of conservatorship. The court held that there was no final judgment and dismissed the appeal.¹³⁵

*Fabian v. Fabian*¹³⁶ was a case attacking the admission of evidence that resulted in the father being awarded managing conservatorship. The mother alleged that the evidence concerning her extra-marital affairs had been obtained by the use of illegal wiretaps. The court found, however, that the evidence was not obtained solely from wiretaps and admitted it. The appellate court reviewed the record as a whole and found that there was sufficient evidence to warrant naming the father as managing conservator and so affirmed the judgment.¹³⁷ In *Zetune v. Jafif-Zetune*¹³⁸ the court held that awarding the mother managing conservatorship and the father possessory conservatorship with frequent visitations did not deprive the father of his First Amendment religious rights,¹³⁹ since the trial court's decree did not prevent the father from practicing his religion or from sharing his beliefs with his children.¹⁴⁰

Two judgments providing for joint custody were attacked by appeal. In *In re Roach*¹⁴¹ the appeal was denied because the court ruled that the trial

131. *Id.* 702-703.

132. *Id.* 704-705.

133. *Wenske v. Wenske*, 776 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1989, no writ); *Scott v. Scott*, 774 S.W.2d 307, 308 (Tex. App.—Austin 1989, no writ); *Hurd v. Maxwell*, 762 S.W.2d 700, 701 (Tex. App.—Eastland 1988, no writ).

134. 776 S.W.2d at 781; 774 S.W.2d at 308.

135. 762 S.W.2d at 701.

136. 765 S.W.2d 516 (Tex. App.—Austin 1989, no writ).

137. *Id.* at 520.

138. 774 S.W.2d 387 (Tex. App.—Dallas 1989, writ denied).

139. U.S. CONST. amend. I.

140. 774 S.W.2d at 390.

141. 773 S.W.2d 28 (Tex. App.—Amarillo 1989, writ denied).

court had the power to appoint both parents as managing conservators without their prior written agreement.¹⁴² The court held that it was the legislature's intent to permit trial courts to do this in cases pending at the time the amendments to the Texas Family Code became effective.¹⁴³

In *Wharton v. Gonzales*¹⁴⁴ the court held that the date the judgment became final was the date the court, after a hearing and agreement by the parties, entered in its docket "Orders per the record and the decree."¹⁴⁵ The grandmother, who had agreed in court to being appointed joint managing conservator, could not change the final judgment on the following day because she had changed her mind.¹⁴⁶

D. Intervention

In two cases, *McCord v. Watts*¹⁴⁷ and *Lewelling v. Lewelling*,¹⁴⁸ grandparents intervened successfully in the original suit for divorce. In *McCord* the wife and the paternal grandparents were appointed joint managing conservators. The wife contended that the paternal grandparents did not have standing, but the court held that while they might not have been able to initiate a suit pertaining to conservatorship, they were entitled to intervene.¹⁴⁹ In *Lewelling* the paternal grandparents were awarded managing conservatorship and the mother appealed. She argued that awarding managing conservatorship to a non-parent was the same as a termination of parental rights and, therefore, required clear and convincing evidence. The appellate court disagreed, holding that the preponderance of the evidence standard was sufficient, since the mother's rights were not terminated, she was named possessory conservator, and could at a later date ask for a modification.¹⁵⁰

E. Transfer or Dismissal of a Case

A court, once it has acquired jurisdiction in a suit affecting the parent-child relationship, has continuing jurisdiction unless the children have been residing in a different county for six months.¹⁵¹ At that time the court upon a proper motion must transfer the case to the court in the other county.¹⁵² If there is no showing that the children have resided anywhere other than in the county of the court having continuing jurisdiction, then the transfer is

142. *Id.* at 33.

143. *Id.* TEX. FAM. CODE ANN. § 14.01(b) (Vernon Supp. 1990).

144. 761 S.W.2d 72 (Tex. App. — Houston [14th Dist.] 1988, no writ).

145. *Id.* at 74.

146. *Id.*

147. 777 S.W.2d 809 (Tex. App.—Austin 1989, no writ).

148. 774 S.W.2d 801 (Tex. App.—El Paso 1989, writ granted).

149. 777 S.W.2d at 811. In *Mitchell v. Balew*, 765 S.W.2d 532, 533 (Tex. App.—Beaumont 1989, no writ), the court held that an ex-stepfather has no standing to initiate a suit for managing or possessory conservatorship, absent exigent circumstances, but that he would have had standing to intervene in a pending action.

150. 774 S.W.2d at 804.

151. TEX. FAM. CODE ANN. § 11.06(b) (Vernon 1986).

152. *Id.*

not mandated.¹⁵³ A court is not mandated to transfer a suit unless it has jurisdiction, and when a special appearance is filed contesting jurisdiction, that should be dealt with first; only then is the motion to transfer germane.¹⁵⁴

A conservatorship modification application by a mother can be dismissed when she refuses to submit to drug testing, since drug usage would be a material issue in the case.¹⁵⁵ In a suit affecting the parent-child relationship an order requiring the parties to submit to psychological examinations by a psychologist rather than a psychiatrist is merely voidable and, thus, mandamus is not a proper remedy.¹⁵⁶ The court also held that the examination did not violate the provisions of the Medical Practice Act regarding confidential and privileged communications between doctor and patient.¹⁵⁷

F. Jury Trial

In *Martin v. Martin*¹⁵⁸ the Texas Supreme Court held that it is not reversible error for a court to deny a jury trial in a suit to modify conservatorship.¹⁵⁹ The mother was granted managing conservatorship, and was required to establish her residence with the children in one of three specified counties.¹⁶⁰ After her remarriage she filed a motion to modify to permit her to move with the children to a fourth county which was where her new husband resided. When she asked for a hearing on the nonjury docket, her former husband responded and moved for a jury trial. The trial court denied the request for the jury trial, heard the case on the merits, and granted the mother her motion for modification. The supreme court in affirming, reasoned that while a party is entitled to a jury trial, the findings of the jury on matters concerning terms and conditions of access to the child are merely advisory and may be contravened by the court.¹⁶¹ Since the court determines the conditions of access it is not error to deny a jury trial in a case in which that is the only issue.¹⁶²

153. *Green v. Hassell*, 764 S.W.2d 391, 393 (Tex. App.—Tyler 1989, no writ).

154. *Mouso v. Alworth*, 777 S.W.2d 795, 797 (Tex. App.—Beaumont 1989, no writ). Furthermore, the parent-child relationship may not be modified in a default judgment when there is evidence in the record that there was no default and the alleged defaulting party had not been given notice of the trial setting. *Barnes v. Barnes*, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ).

155. *Monaghan v. Crawford*, 763 S.W.2d 955, 959 (Tex. App.—San Antonio 1989, no writ).

156. *Mackey v. Vick*, 771 S.W.2d 738, 740 (Tex. App.—Fort Worth 1989, no writ).

157. 771 SW.2d at 740; TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1990).

158. 776 S.W.2d 572 (Tex. 1989).

159. *Id.* at 575.

160. *Id.* at 573.

161. *Id.* at 575.

162. *Id.* at 574. Since it is unlikely that a jury would have denied a mother the right to move from one county to another in Texas, the father's request was probably merely for purposes of delay or harassment.

G. Modification of Conservatorship

In *S.A.B.S. v. H.B.*¹⁶³ the mother filed a motion to modify conservatorship and the father counterclaimed asking for child support. The court reduced her access and the appellate court held that this should not have been done since there was no pleading to support this modification.¹⁶⁴ The trial court had also ordered the mother to pay child support, although there had been no original order to that effect, and there was no showing of a change of circumstance. The appellate court also reversed this part of the judgment.¹⁶⁵

In *Leighton v. Court*¹⁶⁶ the managing conservatorship was changed from the mother to the father after the child had been voluntarily relinquished by the mother to the father's custody for more than twelve months. The court held that the three weeks each summer that the original decree required visitation rights for the father could be included in figuring the twelve months.¹⁶⁷

In *Hawkins v. Haley*¹⁶⁸ it was not an abuse of discretion for a court to reduce the amount of visitation rights of the child's paternal grandparents after it was shown that the father had moved from his parents home.¹⁶⁹ This was a substantial and material change in circumstance.¹⁷⁰

In another case involving grandparents, their access rights were terminated.¹⁷¹ They had allowed the father to visit with the child despite a court order to the contrary. The appellate court held that although there must be extreme grounds for denying parents access, that is not the standard for grandparents and, thus, the trial court did not abuse its discretion.¹⁷²

In *Brown v. Dixon*¹⁷³ a father was granted immediate possession of his child after he brought a habeas corpus writ. The mother who had been the managing conservator died, and her parents sought to be named managing conservator. The court held that the sole surviving parent is entitled to immediate possession of the child where there are no existing orders governing the right to possession of the child and where there is no question as to the child's welfare.¹⁷⁴

Habeas corpus was also granted In *Ex parte Aguilera*,¹⁷⁵ a case in which the mother was found in contempt for violating court orders by making derogatory statements about the child's father in the child's presence. Fortu-

163. 767 S.W.2d 860 (Tex. App.—Corpus Christi 1989, no writ).

164. *Id.* at 861.

165. *Id.* at 862. The countersuit for support appears to have been a form of retaliation by the father. He was earning \$384 a week, while the mother was earning only \$500 to \$550 a month. The trial court may also have wanted to punish the mother for asking for a modification of custody since it ordered her to pay \$150 per month in child support. *Id.*

166. 773 S.W.2d 63 (Tex. App.—Houston [14th Dist.] 1989, no writ).

167. *Id.* at 65.

168. 765 S.W.2d 914, 915 (Tex. App.—Fort Worth 1989, no writ).

169. *Id.* at 914.

170. *Id.*

171. In re R.N.C., 768 S.W.2d 516 (Tex. App.—Fort Worth 1989, no writ).

172. *Id.* at 518.

173. 776 S.W.2d 599 (Tex. App.—Tyler 1989, no writ).

174. *Id.* at 603.

175. 768 S.W.2d 425 (Tex. App.—El Paso 1989, no writ).

nately for the mother, the appellate court found that the derogatory statements were made by a third party in the mother's presence, but not by the mother. This was reluctantly held not to be a violation of the court order.¹⁷⁶

H. Costs

A district court may order the county to pay the costs and expenses in a suit affecting the parent child-relationship when it is for the protection of a child and there is a finding of indigency on the part of the parents or other parties.¹⁷⁷ It is not necessary that the county child welfare unit be named managing conservator before such an order can issue.¹⁷⁸ This was the opinion of the Attorney General in response to a question from the Dallas County District Attorney.¹⁷⁹

V. SUPPORT

A. Guidelines

Child support guidelines became effective February 4, 1987 by order of the Supreme Court of Texas,¹⁸⁰ and the courts have just begun to grapple with the problems caused by a failure to understand or to follow them. In *Euston v. Euston*¹⁸¹ the trial court set the level of child support at twenty percent of the husband's net resources, but failed to set a fixed dollar amount. The twenty percent is within the supreme court's guidelines, but is not specific. The decree failed to take into account both parents' future ability to pay. The decree was held to be "vague, indefinite, and unenforceable."¹⁸² In *Archambault v. Archambault*¹⁸³ the trial court did not follow the guidelines in setting child support, nor did it make findings explaining why it failed to do so. The appellate court held this was not error because the trial judge has broad discretion and the appellant had not asked for findings.¹⁸⁴

In *Bazan v. Bazan*¹⁸⁵ the trial court deviated from the guidelines without making findings, although a request had been timely filed. The appellate court affirmed, leaning over backwards to support the trial judge, holding that the request for findings had not been filed correctly and there was some evidence to support the deviation.¹⁸⁶ On the other hand, in *Morris v. Morris*,¹⁸⁷ the appellate court reversed, holding that upon a timely request it is

176. *Id.* at 426.

177. Op. Tex. Att'y Gen. No. JM-1045 (1989).

178. *Id.*

179. *Id.*

180. See *supra* note 18. Essentially the same guidelines have been incorporated into the Family Code. See TEX. FAM. CODE ANN. § 14.055(b) (Vernon Sup. 1990).

181. 759 S.W.2d 788 (Tex. App.—El Paso 1988, no writ).

182. *Id.* at 790.

183. 763 S.W.2d 50 (Tex. App.—Beaumont 1988, no writ).

184. *Id.* at 52.

185. 762 S.W.2d 357 (Tex. App.—San Antonio 1988, no writ).

186. *Id.* at 359-60.

187. 757 S.W.2d 466 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

mandatory that the trial court state its findings and the reasons for deviating from the guidelines.¹⁸⁸ If the guidelines are to be of any use in making uniform the amount of child support paid for children throughout the state, it is essential that the appellate courts require the trial courts to follow the statute, as the court did in *Morris*.

B. Increase of Support

In two cases that were affirmed, *Carns v. Carns*¹⁸⁹ and *Crume v. Crume*¹⁹⁰ the trial courts increased the amount of support by ordering the obligors to pay the medical expenses of their children. In *Carns* the obligor was ordered to reimburse the obligee for the health insurance premiums she had paid for the children's benefit.¹⁹¹ In *Crume* the obligor was required to pay half the uninsured medical expenses of the child.¹⁹² In *Waltz v. Waltz*,¹⁹³ however, the court reversed and remanded a money judgment for the wife, holding that without an expert witness, it is not possible to determine if the medical expenses which were necessary were also reasonable.¹⁹⁴ In *Satterfield v. Hoff*¹⁹⁵ the court granted a motion for summary judgment and ordered increased child support and the reimbursement of certain dental expenses. The court did not order the full amount of the increase in child support requested, nor did it award attorney's fees. While all of these items had been the subject of deemed admissions, the appellate court held that the trial court was not bound to follow them in a child support case, since the matters were all within the court's discretion.¹⁹⁶

In *Rocha v. Villarreal*¹⁹⁷ the court held that it was not an abuse of discretion to substantially increase the amount of child support (the obligor not being responsible for the children's medical insurance or medical bills) and to make the increase retroactive to the date of the motion to modify.¹⁹⁸ It was, however, improper to reduce the retroactive amount to judgment without any notice to the obligor.¹⁹⁹ In another case, *Anderson v. Anderson*²⁰⁰ a former husband brought suit to lower his child support payments and his former wife counterclaimed for an increase, which was granted. The appellate court affirmed, finding that there had been a change of circumstances in

188. *Id.* at 467.

189. 776 S.W.2d 603 (Tex. App.—Tyler 1989, no writ).

190. 768 S.W.2d 14 (Tex. App.—Fort Worth 1989, no writ).

191. 776 S.W.2d at 604.

192. 768 S.W.2d at 15. However, the case was reformed on the issue of ordering wage withholding. Since the trial court had sua sponte ordered the wage withholding this was an abuse of discretion. *Id.* at 15.

193. 776 S.W.2d 320 (Tex. App.—Houston [1st Dist.] 1989, no writ).

194. *Id.* at 322.

195. 768 S.W.2d 839 (Tex. App.—Austin 1989, writ denied).

196. *Id.* at 841.

197. 766 S.W.2d 895, (Tex. App.—San Antonio 1989, no writ).

198. *Id.* at 898-99.

199. *Id.* at 899. The amount of increase of child support was from \$100 per month per child to \$350 per month per child. The obligee had to take personal bankruptcy, while the obligor had an annual income of approximately \$60,000.00. *Id.* at 898.

200. 770 S.W.2d 92 (Tex. App.—Dallas 1989, no writ).

that the child's needs had increased, while the former wife's income had decreased.²⁰¹ Although the former husband alleged that the increase in support payments would force him into bankruptcy, this was not relevant to the best interests of the child.²⁰²

C. Reduction in Support

In *Anderson v. Anderson*²⁰³ the ex-husband filed a motion to modify in order to reduce his child support obligations. The appellate court affirmed the trial court's denial, holding that the trial court was justified in including unvalued property in the ex-husband's net resources and in finding that he had transferred funds in order to reduce his net resources.²⁰⁴ In *Comeaux v. Comeaux*,²⁰⁵ however, the appellate court reversed the trial court, holding that, in the interests of justice, a change in managing conservatorship ended the support obligation under the agreement incident to the divorce.²⁰⁶ There was a dissent based on the contention that the agreement was a non-modifiable contract.²⁰⁷

In *Marichal v. Marichal*²⁰⁸ the court found that while the support amount was specified, there was no language in the original decree ordering the obligor to pay the child support award.²⁰⁹ Accordingly, the amount in arrears could not be reduced to judgment; however, the obligor's motion to modify downward the amount of support payments could be made retroactive to the date the motion to modify was filed.²¹⁰ In *Blanco v. Garcia*²¹¹ the court held that when there is sufficient evidence concerning a reduction in income, the court is acting within its discretion when it reduces the amount of the child support obligation.²¹²

D. Modification of Support

In *Klaver v. Klaver*²¹³ the appellate court affirmed that the trial court had jurisdiction to hear a modification request that had been filed prior to the child's eighteenth birthday.²¹⁴ The mother requested that child support be continued until the child graduated from high school.²¹⁵ The request was granted, the order was signed after the child became eighteen, and the support obligation was to continue until high school graduation. It was made

201. *Id.* at 95.

202. *Id.* at 96.

203. 767 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1988, no writ).

204. *Id.* at 165.

205. 767 S.W.2d 500 (Tex. App.—Beaumont 1989, no writ).

206. *Id.* at 503.

207. *Id.* at 504.

208. 768 S.W.2d 383 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

209. *Id.* at 384.

210. *Id.* at 386.

211. 767 S.W.2d 896 (Tex. App.—Corpus Christi 1989, no writ).

212. *Id.* at 898.

213. 764 S.W.2d 401 (Tex. App.—Fort Worth 1989, no writ).

214. *Id.* at 404.

215. See TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1990).

retroactive to the child's eighteenth birthday.²¹⁶ In another case the court was held to have jurisdiction to order the obligor to pay, by lump sum, half of the medical expenses incurred prior to the child's turning eighteen.²¹⁷ In this case the motion for modification had been filed before the child's eighteenth birthday, although the hearing had not been held until several years later.²¹⁸ In *Harkins v. State ex rel. Mason*,²¹⁹ however, an order for support was held to be void because even though the child was disabled before she was eighteen, the motion to modify support had been filed after the child had turned eighteen.²²⁰ It may now be possible for the mother, although not the state, to obtain some relief under the new legislation pertaining to support of adult disabled children.²²¹

Sanctions posed problems for the trial court in *Pinkley v. Vega*²²² in which the mother had moved to modify child support and conservatorship and her motion was heard by a master with the father not taking part in the hearing. The findings of the master were approved by the judge and an order was entered. Then the mother moved for a new trial, which was granted and a date was set for a hearing. At the hearing the father was ordered to have certain financial information prepared for the next hearing. At that hearing the father was the first witness, and upon discovering that the father was unprepared, the court terminated the hearing and as a sanction reinstated the original decree. The appellate court reversed, holding that since a new trial had been granted, thus wiping out the first trial, another judgment could not be entered without a trial.²²³ The question was whether or not the original findings of the master were facts which could be carried through from the first order, after it was vacated by the granting of a new trial, to the second order which was entered after the aborted trial. The court of appeals held that they could not.²²⁴

When a child is voluntarily relinquished by the managing conservator to the possessory conservator for periods in excess of the court ordered periods of possession, the money actually expended during that time may be used to offset a support arrearage, but the offset may not be used for obligations incurred but not paid.²²⁵ After proper notice, a child support arrearage may be reduced to judgment, but the judgment may not include amounts unpaid for more than ten years prior to the filing of the motion to reduce the arrearages to judgment.²²⁶ A court continues to have jurisdiction to enter judgments on motions for payment of child support arrearages for four years

216. 764 S.W.2d at 404-405.

217. *Sheldon v. Marshall*, 768 S.W.2d 852, 856 (Tex. App.—Dallas 1989, no writ).

218. *Id.* at 853.

219. 773 S.W.2d 401 (Tex. App.—Houston [14th Dist.] 1989, no writ).

220. *Id.* at 404.

221. TEX. FAM. CODE ANN. § 14.051 (Vernon Supp. 1990); see *supra* notes 270-16 and accompanying text.

222. 768 S.W.2d 473 (Tex. App.—El Paso 1989, writ granted). For a discussion of other cases involving excessive sanctions, see *supra* notes at 86-88, 104.

223. 768 S.W.2d at 475.

224. *Id.*

225. *Arnold v. Pitts*, 777 S.W.2d 773, 775 (Tex. App.—Beaumont 1989, no writ).

226. *Jordan v. Middleton*, 762 S.W.2d 339, 342 (Tex. App.—San Antonio 1988, no writ).

after the parent-child relationship has been terminated.²²⁷ The fact that the obligor has been absent from the state for part of those two years does not toll the statute, since this is not a statute of limitations, but one concerning continuing jurisdiction.²²⁸

E. Indigent Obligor and Criminal Non-Support

An indigent obligor who is unrepresented may not be incarcerated on contempt charges for failure to pay child support unless he has knowingly waived his right to counsel.²²⁹ The fact that an obligor may need a court ordered attorney does not prove that he is unable to discharge his support obligation.²³⁰ A committment order will be considered void and habeas corpus will lie unless the contempt order is specific as to the amount of arrearages, the method of calculation of the arrearages, or the number of failures to pay the support.²³¹ Ambiguity in other parts of an order will not, however, excuse a support obligation.²³² When the obligor proves that he is involuntarily incapable of paying the support obligation, he should not be found in contempt.²³³ If, however, the obligor fails to prove indigency, then committment is proper.²³⁴ A contempt order against the alleged husband obligor is proper to enforce a temporary support order after prima facie proof of a common-law marriage.²³⁵

In *Nunez v. Nunez*²³⁶ a foreign child support order was enforced against a Texas resident. The support order was based on an Illinois divorce decree in which the father was ordered to pay child support. He had fallen behind in his payments, and the children's mother asked the Texas court to enforce the judgment. The father argued that the matter was uncertain because one of the children was over eighteen, but the court held that Texas law permits confirmation of a foreign judgement despite the child's age.²³⁷ The court also pointed out that the judgment was entitled to full faith and credit since under Illinois' Uniform Reciprocal Enforcement of Support Act (URESAs)²³⁸

227. TEX. FAM. CODE ANN. § 14.41(b) (Vernon Supp. 1990).

228. *In re C.L.C.*, 760 S.W.2d 790, 792 (Tex. App.—Beaumont 1988, no writ).

229. *Ex parte Gunther*, 758 S.W.2d 226 (Tex. 1988); *Ex parte Martinez*, 775 S.W.2d 455, 456 (Tex. App.—Dallas 1989, no writ).

230. *Ex parte Chennault*, 776 S.W.2d 703, 704 (Tex. App.—Texarkana 1989, no writ).

231. *Ex parte Reynolds*, 776 S.W.2d 757, 758 (Tex. App.—Corpus Christi 1989, no writ); *Ex parte Higginbotham*, 768 S.W.2d 4, 5 (Tex. App.—Fort Worth 1989, no writ); *Ex parte Boykins*, 764 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Ex Parte Bahmani*, 760 S.W.2d 769, 770 (Tex. App.—Houston [14th Dist.] 1988, no writ).

232. *Mendez v. Attorney Gen. of Texas*, 761 S.W.2d 519, 521-22 (Tex. App.—Corpus Christi 1988, no writ).

233. *Ex parte Peters*, 770 S.W.2d 640, 641 (Tex. App.—Houston [1st Dist.] 1989, no writ).

234. *Ex parte Mulkey*, 776 S.W.2d 308, 311 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Ex parte Culver*, 760 S.W.2d 794, 795 (Tex. App.—Beaumont 1988, no writ).

235. *Ex parte Ortega*, 759 S.W.2d 191, 192 (Tex. App.—Houston [14th Dist.] 1988, no writ). An attorney appointed to represent an indigent in a contempt hearing for failure to pay child support is entitled to compensation not only for the original hearing, but also for pursuing habeas corpus relief for the indigent. *Cudd v. Bass*, 771 S.W.2d 3, 5 (Tex. App.—Houston [1st Dist.] 1989, no writ).

236. 771 S.W.2d 7 (Tex. App.—San Antonio 1989, no writ).

237. *Id.* at 9.

238. ILL. REV. STAT. ch. 40, para. 1209 (1979).

child support arrearages are a vested right and are specifically enforceable.²³⁹ In another URESA case,²⁴⁰ the father, who had been ordered by a Nebraska court to pay child support but who had not made any payments contended that there was no arrearage because the mother had agreed to accept the parties' business in lieu of child support. The trial court agreed and entered a take-nothing judgment. The mother, on appeal, contended that there was insufficient evidence to support the judgment. The appellate court reversed and rendered, not on the basis of the evidence, but as a matter of law.²⁴¹ The court held that the arrearage did exist because child support obligations cannot be modified in either Texas or Nebraska by private agreement of the parties.²⁴² The only method for modification is by filing a motion for modification in the proper court, and this had not been done.²⁴³

*State v. Paiz*²⁴⁴ was a case of first impression in that the father was charged with criminal nonsupport, although he had never been a resident of Texas and had never been the subject of a Texas court order. He was arrested in Colorado and extradited to Texas because his minor child, although born in Colorado, was a resident of Texas and the father had never contributed to her support. The father argued that since he had never been in Texas, until he was arrested and extradited, he had never committed a crime in Texas and, thus, the court had no jurisdiction. The court held that the more modern legal trend is to invoke jurisdiction not based on where the father resides, but where the child resides.²⁴⁵ The court reasoned that the harm occurs where the child resides and, thus, the crime is punishable in Texas.²⁴⁶ If this case is sustained it could pressage more draconian measures to enforce child support than has been the rule in the past.

VI. TERMINATION AND ADOPTION

When a father fails to support his children in accordance with his ability, his parent-child relationship may be terminated, but only if it is also in the best interest of the child that the relationship be terminated.²⁴⁷ The evidence favoring termination must be clear and convincing.²⁴⁸ In *Anthony v. Mays*²⁴⁹ the mother, who had remarried, sought to terminate the father's parent-child relationship because he had failed to pay child support. There was a jury trial, and the jury found that it was not in the child's best interest to terminate his relationship with his father. The judge entered a judgment non obstante verdicto terminating the relationship. An appeal was prosecuted by the guardian ad litem, and the appellate court reversed the trial

239. *Id.*

240. *Rogers v. Griffin*, 774 S.W.2d 706 (Tex. App. — Texarkana 1989, no writ).

241. *Id.* at 707.

242. *Id.*

243. *Id.*

244. 777 S.W.2d 575 (Tex. App.—Amarillo 1989 (writ granted)).

245. *Id.* at 576.

246. *Id.* at 577.

247. TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1990).

248. *Id.* §§ 11.15(b),(c).

249. 777 S.W.2d 200 (Tex. App.—San Antonio 1989, no writ).

court, holding that the trial judge could not ignore the jury's findings when they were supported by some evidence.²⁵⁰

The Department of Human Services most often acts to terminate the parent-child relationship based on the grounds that the parents knowingly placed the child in conditions that endangered the child, engaged in conduct that endangered the child, or both.²⁵¹ The Department must, of course, also prove that termination is in the best interest of the child.²⁵² In *In re D.E.*²⁵³ the court held that there is no right to a two stage process in termination trials.²⁵⁴ The first stage would be for the purpose of proving the alleged misconduct and the second would be to determine the best interest of the child.²⁵⁵ The court found this idea unworkable because the evidence for proving conduct and best interest is either overlapping or the same.²⁵⁶

In four other termination cases the courts affirmed the trial courts' findings of clear and convincing evidence.²⁵⁷ A mother's effort to delay a termination proceeding by filing a motion to transfer, after she had filed for a divorce in a different court, was prevented by the holding that her motion to transfer was untimely.²⁵⁸ Normally a motion to transfer is mandatory, but in this case the mother had, on the morning of the trial on the termination of her parental rights, filed a motion for a nonsuit for her divorce in the termination court and after that had been granted, had refiled for divorce in another district court in the same county. The appellate court found that allowing such a maneuver would be to "acquiesce in a gross abuse of the judicial system."²⁵⁹ In *Wheeler v. Baum*²⁶⁰ a mother was not able to appeal the termination of her parental rights because she had not given the court reporter notice of the filing of an affidavit of inability to pay costs.²⁶¹

In *In re P.S.*²⁶² the appellate court reversed a termination of parental rights, holding that there was not clear and convincing evidence to support the jury's decision.²⁶³ The court agreed that the parents had not met the

250. *Id.* at 204.

251. TEX. FAM. CODE ANN. §§ 15.02(1)(D), (E) (Vernon Supp. 1990).

252. *Id.* § 15.02(2).

253. 761 S.W.2d 596 (Tex. App.—Fort Worth 1988, no writ).

254. *Id.* at 601.

255. *Id.*

256. *Id.*

257. *Sylvia M. v. Dallas County Child Welfare Unit*, 771 S.W.2d 198 (Tex. App.—Dallas 1989, no writ) (the parent also alleged ineffective assistance of counsel because the same attorney had also represented the appellant, the father and the maternal grandparents, but the court found no actual conflict); *In re L.R.M.*, 763 S.W.2d 64 (Tex. App.—Fort Worth 1989, no writ); *Jones v. Dallas County Child Welfare Unit*, 761 S.W.2d 103, 109 (Tex. App.—Dallas 1988, writ denied) (it was also held that the failure of DHS to provide services to reunite families is not an issue in termination proceedings); *In re A.C.*, 758 S.W.2d 390, 394 (Tex. App.—Fort Worth 1988, no writ) (the court also found that financial hardship was not the sole cause of the parent's behavior).

258. *Garza v. Texas Dept. of Human Serv.* 757 S.W.2d 44, 47-48 (Tex. App.—San Antonio 1988, writ denied).

259. *Id.* at 48.

260. 764 S.W.2d 565 (Tex. App.—Houston [1st Dist.] 1988, no writ).

261. *Id.* at 566.

262. 766 S.W.2d 833, 837-38 (Tex. App.—Houston [1st Dist.] 1989, no writ).

263. *Id.* at 837-38.

level of conduct specified by the Child Protective Services holding the failure did not justify terminating their parental rights.²⁶⁴ In another case, the trial court's termination of a mother's parental rights was reversed and remanded because the jury instructions combined two independent grounds for termination into one, thereby making it possible for less than a majority of the jury to have found against her on both issues.²⁶⁵ A child's alleged biological father was able to contest the terminating of any interest he might have in his child by submitting an answer alleging that he was an indigent parent and asking for an indigency hearing and appointment of representation.²⁶⁶ The trial court had ruled that the father had failed to respond by timely filing an admission of paternity and terminated his interests in his child. The appellate court reversed and remanded, holding that the claim that the father's allegation that he was an indigent parent was an admission of paternity and, therefore, there should have been a hearing on his indigency, and he should have been permitted to oppose the termination of his parental rights.²⁶⁷

A mother who had voluntarily relinquished her parental rights had no vested right to bring a suit to adopt her child.²⁶⁸ The legislature by statute has specifically denied standing to a parent whose rights have been terminated to bring a suit for adoption unless the managing conservator has consented.²⁶⁹ The court found this does not violate equal protection because there is a rational basis for the legislation since the best interests of the child are paramount and in cases of termination of parental rights, permanency and stability are most important to the security of the child.²⁷⁰

264. *Id.* at 890.

265. *E.B. v. Texas Dept. of Human Services*, 766 S.W.2d 387, 390 (Tex. App.—Austin 1989, writ granted).

266. *Estes v. Dallas County Child Welfare Unit*, 773 S.W.2d 800 (Tex. App.—Dallas 1989, writ denied).

267. *Id.* at 802.

268. *In re Hughes*, 770 S.W.2d 635, 637 (Tex. App.—Houston [1st Dist.] 1989, no writ).

269. TEX. FAM. CODE ANN. §§ 11.03(g)(1), (h)(2) (Vernon 1986).

270. 770 S.W.2d at 637-38.

