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Family Law: Parent and Child

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FAMILY LAW: PARENT AND CHILD

by

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THIS past year the bench and bar seem, at last, to have accepted the fact that the Family Code is no longer new and is here to stay. The area of the parent-child relationship, however, continues to be troublesome. As will be discussed, problems concerning custody may arise long after the divorce has become final, and while the Family Code provides a method for litigating the disputes it cannot resolve the underlying conflicts of the parties. Whenever the state finds it necessary to intervene between parent and child, the inability of the law to solve family problems becomes even more apparent, and the courts must struggle to achieve a balance between the rights of the parents and the needs of their children. It appears that this will be the major area of concern and litigation for at least the next decade.

Before dealing with special problems in the parent-child relationship, some aspects of family status are briefly treated in order to provide continuity with previous articles on this subject. Further attention is directed to the "Family Law: Husband and Wife" article in this *Survey*.

I. MARRIAGE AND DIVORCE

Common Law Marriage. The courts decided in favor of the validity of common law marriages in four different cases during the past year. Two involved the wife's right to be appointed administratrix of the husband's estate as well as the right to inherit. *Reilly v. Jacobs*[1] held that a common law marriage could be inferred, as the legislature has directed by statute,[2] despite the fact that the wife did not change her former name on a driver's license or social security card and that her husband had opened bank accounts without her joinder. The marriage had lasted from 1968 to 1974. A somewhat difficult fact situation arose in connection with a common law marriage which lasted only three days after a prior marriage was discovered to have been dissolved.[3] The couple started to live together in 1972 and agreed to be man and wife in 1974, but the husband's first wife did not obtain a divorce from him until 1975. The husband was in Nevada at the time he was informed of the divorce from his first wife and the second wife joined him there for a three-day visit. The husband was then killed in an airplane crash while on his way to New Orleans. The court held the shortness of time was not an issue because section 2.22 of the Family Code controlled.[4] This section validates a marriage as soon as the prior marriage is dissolved, and does not, the court found, require that the actions which validate a marriage be performed within Texas.

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1. 536 S.W.2d 406 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).
2. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975).
3. Durr v. Newman, 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).
4. TEX. FAM. CODE ANN. § 2.22 (Vernon 1975) states that a "marriage is void if either party was previously married and the prior marriage is not dissolved."

In *Till v. Till*[5] a divorce was contested on the basis that there was in fact no marriage. The court found, however, that all the elements necessary to prove the common law marriage had been shown[6] and affirmed the trial court's order granting a divorce and child support. The court held that it was unnecessary for an express agreement between husband and wife to be proved by direct evidence. Such an agreement could be inferred from proof of the remaining two elements of common law marriage: living together as husband and wife, and holding each other out to the public as husband and wife. Thus, the court apparently rejected the husband's argument that the law does not favor, but merely tolerates, common law marriage. In accord with this decision is a recent federal court of appeals ruling[7] that statutory discrimination between ceremonial and common law marriage does not violate the equal protection clause of the fourteenth amendment since the legislature could have had a rational basis for the distinction.[8]

Procedure. Now that most divorce cases are based on the grounds of insupportability,[9] the major issues raised in divorce proceedings are in the area of property division, which is covered by a separate article in this *Survey*, child support, and conservatorship, which are discussed in this Article under the heading of "Parent and Child." There were in the past year, however, a number of divorce decisions involving procedural matters which are of interest to Texas lawyers. A number of the issues, while important, seem rather obvious and will, therefore, be given only cursory coverage. One case held that a divorce decree is not final, and thus is not appealable, if it leaves out the amount of child support.[10] Another case held that notice of a contempt hearing must be properly served before a defendant can be found in contempt;[11] once a judgment has become final its terms cannot be modified, and, therefore, a subsequent modification cannot be used as a basis for a contempt order.[12] The courts also held that an oral judgment is a valid judgment so long as it is not set aside,[13] and that unless there is an objection at the hearing to the absence of a court reporter, the absence cannot be raised on appeal.[14] Furthermore, when a statement of facts is not properly entered into the record it will not be considered by the appeals court.[15] Another appellate court found that when the appellant exercised due diligence and yet failed to

5. 539 S.W.2d 381 (Tex. Civ. App.—Tyler 1976, no writ).
6. TEX. FAM. CODE ANN. § 1.91 (Vernon 1975).
7. Conway v. Chem. Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976).
8. The court stated:
> The Texas Legislature could rationally conclude that the moral or religious feelings aroused by admission of the sort of evidence required to establish a common-law marriage would be so injurious to the surviving spouse that the risk to his or her marriage exceeds the procedural benefits from the evidence.

Id. at 931.
9. TEX. FAM. CODE ANN. § 3.01 (Vernon 1975) provides: "On the petition of either party to a marriage, a divorce may be decreed without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation."
10. Stone v. Stone, 531 S.W.2d 850 (Tex. Civ. App.—Dallas 1976, no writ).
11. *Ex parte* Harwell, 538 S.W.2d 667 (Tex. Civ. App.—Waco 1976, no writ).
12. *Ex parte* Wagley, 530 S.W.2d 609 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).
13. Louwein v. Dowell, 534 S.W.2d 421 (Tex. Civ. App.—Dallas 1976, no writ).
14. Phillips v. Phillips, 532 S.W.2d 161 (Tex. Civ. App.—Austin 1976, no writ).
15. Scoggins v. Scoggins, 531 S.W.2d 245 (Tex. Civ. App.—Tyler 1975, no writ).

obtain a statement of facts on appeal, he was entitled to a new trial.[16] The Texas Supreme Court, in reversing *Smith v. Smith*,[17] expanded this right by holding that the mere inability to obtain a statement of facts entitles the appellant to a new trial. Attorneys are, therefore, on notice that when an opposing party has answered, but has failed to appear for trial on the merits, a record should be made of the proceedings or the absence of a record will be grounds for a new trial. Attorneys, of course, are aware that a trial court may refuse to grant a continuance without abusing its discretion,[18] and that motions for new trial can be overruled by operation of law.[19]

Out-of-State Judgments. In two cases the courts upheld the validity of out-of-state judgments on the basis of full faith and credit. In *Hatfield v. Christoph*[20] a nunc pro tunc order of an Oregon court was given the same presumption of validity as would have been given a Texas court's order. *Hendricks v. Hendricks*[21] was interesting because the husband contended that the original Kentucky award of alimony was unconstitutional since at the time of the award the statute provided for a grant of alimony only to a woman and thus was a violation of equal protection under the fourteenth amendment to the United States Constitution. The husband reasoned that if the original order was unconstitutional then the Kentucky court lacked jurisdiction and the order was void. The Texas court, relying on a Georgia decision which had held that the Georgia alimony statutes were constitutional,[22] did not agree with these arguments. Rather, the court found the Georgia and Kentucky statutes similar and affirmed the trial court's decision on the basis that the original decree had become absolute and vested.

Venue. Section 3.21 of the Family Code was interpreted as replacing the general venue statute[23] for divorce actions in two separate cases, both styled *Lutes v. Lutes*,[24] which arose out of the same cause of action. The wife filed a suit for divorce in Henderson County and more than a month later the husband filed his suit for divorce in Harris County. The wife filed a plea of privilege instead of a plea in abatement in answer to the husband's suit. The plea of privilege was granted and the husband appealed. The appeals court, after first granting a writ of prohibition preventing the Henderson court from acting, considered the matter and found that the plea of privilege must be dismissed and, further, that since there had been no hearing on the matter, the plea of privilege could not be construed as a plea in abatement. In *Guillory v.*

16. Stronck v. Stronck, 538 S.W.2d 854 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

17. 544 S.W.2d 121 (Tex. 1976), *rev'g* 535 S.W.2d 380 (Tex. Civ. App.—Beaumont 1976). In this divorce case the appellant (the husband and defendant) failed to appear either personally or by counsel at the trial on the merits. At issue, in addition to the divorce, were child custody, division of community property, and allocation of attorney's fees.

18. Chandler v. Chandler, 536 S.W.2d 260 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd); Oates v. Oates, 533 S.W.2d 107 (Tex. Civ. App.—Tyler 1976, no writ).

19. Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976).

20. 539 S.W.2d 396 (Tex. Civ. App.—Waco 1976, no writ).

21. 535 S.W.2d 668 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

22. Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).

23. TEX. REV. CIV. STAT. ANN. art. 1995(16) (Vernon Supp. 1976-77).

24. 536 S.W.2d 418 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (wife's action); 538 S.W.2d 256 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (husband's action).

Davis,[25] however, the wife fared better since the trial court construed her plea of privilege as a motion to transfer[26] and granted it on that basis. The husband appealed, but the appellate court ruled that a motion to transfer is an interlocutory order, and therefore not appealable.

Cross-Actions. The courts considered two cases involving the problem of cross-actions alleging adultery in original divorce actions based on grounds of insupportability.[27] In *Bell v. Bell*[28] the appeals court interpreted section 3.03 of the Family Code[29] to include acts of adultery *after* separation. It further held that the husband should have been permitted to amend his pleadings to include the grounds of adultery despite the fact that the acts allegedly occurred after the filing of the original suit. The court found, however, that while the trial court should not have struck the cross-action based on adultery, such action, along with the exclusion of evidence of adultery, was harmless error in that it did not appear that there would have been a different division of property because of the alleged adultery. In *Hopkins v. Hopkins*[30] the wife originally filed suit for divorce on grounds of insupportability. When the husband filed his answer and a cross-action on the same grounds the wife moved for a nonsuit which was overruled, and the court proceeded to trial and judgment based on the husband's cross-action. The wife contended on appeal that section 3.08 of the Texas Family Code[31] is unconstitutional because she has a vested right to offer the defenses of recrimination and adultery. The appeals court did not agree and held that Texas does not regard the marital relationship as a contract vesting rights in the parties. Therefore, there is nothing to preclude the retroactive application of amendments to the laws which govern the marital relationship.

II. PARENT AND CHILD

A. *Status*

Equal Protection. The Texas equal rights amendment[32] was thoroughly discussed in *Mercer v. Board of Trustees*[33] which involved a school suspension for a male student's violation of a hair-length regulation. The court agreed that classifications based on sex are suspect and require strict scrutiny, but rejected the view espoused by the Washington Supreme Court[34] that the equal rights amendment requires a prohibition of all classifications based on sex. The court stated that legislating that women are men would be both futile and absurd[35] and that where the rights under the amendment come

25. 530 S.W.2d 870 (Tex. Civ. App.—Beaumont 1975, writ dism'd).
26. *See* TEX. FAM. CODE ANN. § 11.06(c) (Vernon 1975); Rogers v. Rogers, 536 S.W.2d 442 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).
27. TEX. FAM. CODE ANN. § 3.01 (Vernon 1975); *see* note 9 *supra*.
28. 540 S.W.2d 432 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).
29. "A divorce may be decreed in favor of one spouse if the other spouse has committed adultery." TEX. FAM. CODE ANN. § 3.03 (Vernon 1975).
30. 540 S.W.2d 783 (Tex. Civ. App.—Corpus Christi 1976, no writ).
31. "(a) The defense of recrimination is abolished. . . . (c) The defense of adultery is abolished." TEX. FAM. CODE ANN. § 3.08 (Vernon 1975).
32. TEX. CONST. art. I, § 3a.
33. 538 S.W.2d 201 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).
34. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975), concerning the right of girls to play high school interscholastic football.
35. 538 S.W.2d at 206.

into conflict with other fundamental constitutional rights, one set of rights would have to give way to the other. The court then decided that since schools stand somewhat in loco parentis, they should be permitted to establish and enforce their own rules without impractical court intervention. In *Ex parte Tullos*[36] a statute which discriminated between seventeen-year-old males and females in connection with driving while intoxicated[37] was found to be unconstitutional in part. The decision stated that the statute could be corrected easily by striking the words which would have permitted seventeen-year-old females to avoid the possibility of confinement in jail while males were allowed to be confined, thereby equalizing the penalties. The court held, however, that the seventeen-year-old male petitioner had been lawfully confined and therefore denied relief.

Inheritance. The inheritance status of the same adopted child was considered by two separate courts.[38] One case involved a workman's compensation award; the other involved a life insurance policy. The adopted child sought to inherit from his natural father, but both courts ruled that the terms "child" or "children" do not include a child who has been adopted by another. In considering the workman's compensation award, the court found that the new Family Code had not changed the effect of the precedent case *Patton v. Shamburger*.[39] The court which adjudicated the insurance claim followed the same precedent and indicated that the result could be changed only by the inclusion of specific language in the policy itself.

Legitimacy. In *Wickware v. Session*[40] the court found that a California court had determined that the children of the deceased landowner were "duly acknowledged" by him and were, therefore, entitled to inherit. California law was held to be controlling as to the status of the children because both parents were residents of California and the children were born there. The court further held that the fact that the children were born during the marriage of their mother to a man other than their father was not an irrebutable presumption of legitimacy since under Texas case law[41] a spouse can competently testify to facts which tend to bastardize her children. In *Wedgeman v. Wedgeman*,[42] however, the court would not permit the introduction of evidence which might have bastardized the child when there was no allegation of impotency or non-access. In requiring the husband to pay child support, the trial court in *Wedgeman* refused to permit introduction of the wife's diary which contained statements concerning an alleged natural father of the child. The exclusion was upheld by the appeals court which agreed that this material was merely evidence of adultery and not admissible. In *Raulston v. Raul-*

36. 541 S.W.2d 167 (Tex. Crim. App. 1976).
37. TEX. REV. CIV. STAT. ANN. art. 6701*l*-4 (Vernon Pamphlet Supp. 1975).
38. Banegas v. Holmquist, 535 S.W.2d 410 (Tex. Civ. App.—El Paso 1976, no writ) (concerning workmen's compensation death benefits), and Holmquist v. Occidental Life Ins. Co., 536 S.W.2d 434 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (concerning interpretation of an insurance policy).
39. 431 S.W.2d 506 (Tex. 1968).
40. 538 S.W.2d 466 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
41. Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).
42. 541 S.W.2d 522 (Tex. Civ. App.—Waco 1976, no writ).

ston[43] the husband was more fortunate. The child in question was born prior to the marriage and, despite the fact that the husband had signed a statement of paternity, the trial court found that he was not the child's actual biological father. The court held that under the Family Code the proper method for legitimating the child of another man is adoption and, therefore, a mere statement of paternity without proof of actual biological paternity does not create the parent-child relationship.

B. *Conservatorship*

The most significant development in the area of child custody litigation was the Texas Supreme Court's enforcement of the method and intent of the habeas corpus section of the Texas Family Code.[44] The court in *Standley v. Stewart*[45] ruled that the trial court must consider a petition for habeas corpus at once, and only thereafter, following proper procedure,[46] hold the hearing on the question of modification. The *Standley* case involved a fifteen-year-old boy who had voluntarily moved to the home of his father, the noncustodial parent. When the father filed a petition to modify the original custody order the mother filed an application for a writ of habeas corpus. In this particular case there may be a finding in the later section 14.08 modification hearing, after the granting of the writ, that a change in conservatorship is in the best interest of the boy. The rationale of the statute, however, is illustrated by the fact that no-one would have been harmed by following proper procedure. Earlier in the year an appeals court, also relying on section 14.10, reversed the trial court's denial of a habeas corpus writ,[47] holding that in a case involving

43. 531 S.W.2d 683 (Tex. Civ. App.—Texarkana 1975, no writ).

44. (a) If the right to possession of a child is presently governed by a court order, the court in a habeas corpus proceeding involving the right to possession of the child shall compel return of the child to the relator if and only if it finds that the relator is presently entitled to possession by virtue of the court order. (b) The court shall disregard any cross action or motion pending for modification of the decree determining managing conservatorship, possession, or support of or access to the child unless it finds that the previous order was granted by a court of another state or nation and that: (1) the court did not have jurisdiction of the parties; or (2) the child has been within the state for at least 12 months immediately preceding the filing of the petition for the writ.

TEX. FAM. CODE ANN. §§ 14.10(a), (b) (Vernon 1975).

45. 539 S.W.2d 882 (Tex. 1976). The court has continued to enforce § 14.10(b) of the Family Code by mandamus; *see* Morgan v. Smith, 19 Tex. Sup. Ct. J. 458 (Oct. 2, 1976), and Morgan v. Stewart, 19 Tex. Sup. Ct. J. 459 (Oct. 2, 1976).

46. TEX. FAM. CODE ANN. § 14.08(b) (Vernon Supp. 1976-77). The relationship of § 14.08(b) to § 14.10 is important because § 14.08(b) entitles the party affected by modification to at least 30 days' notice, while § 14.10, a habeas corpus statute, has no such provision. *See* Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159, 224 (1976); Comment, *Child Custody Modification and the Family Code*, 27 BAYLOR L. REV. 725 (1975); Comment, *The Jurisdiction of Texas Courts in Child Custody Disputes: A Functional Approach*, 54 TEXAS L. REV. 1008 (1976).

47. Lugo v. Wade, 534 S.W.2d 726 (Tex. Civ. App.—Waco 1976, no writ). This case arose after a divorce in which the mother was awarded exclusive custody of her child. She then began living with a man who stated to the trial court that he "believed" he was the father of the child. The putative grandparents were the parties in the suit opposing the mother. *See also* Priest v. Priest, 536 S.W.2d 954 (Tex. Civ. App.—Waco 1976, no writ), a custody modification suit in which the Waco court pointed out, citing *Lugo v. Wade*, *supra*, that if the father had timely appealed the habeas corpus verdict, he would have won, but since he failed to appeal, a verdict based on a jury finding granting custody to the mother was affirmed; and Carpenter v. Ross, 534 S.W.2d 447 (Tex. Civ. App.—Beaumont 1976, no writ), in which a writ of habeas corpus was denied after a hearing concerning the immediate welfare of the children, and a temporary custody order was entered which was not appealable since it was a purely interlocutory order pending custody modification proceedings. *See* TEX. FAM. CODE ANN. § 14.10(c) (Vernon 1975).

strangers to the original custody decree the fact that petitioners were not parties to the original suit was irrelevant to the question of the right of a lawful custodian to have possession of a child. It was stated that the original decree gave the mother the clear right to custody and that issues of paternity and changes of conservatorship should be litigated in a separate lawsuit since they have no bearing upon the habeas corpus proceedings.[48]

The courts are also applying section 14.10 to cases involving out-of-state court orders. One case involved a Florida decree which, had it not been for the new habeas corpus statute and its strict application, appeared to be capable of relitigation on an annual basis.[49] Originally the mother, who lived in Texas, was granted custody by a Florida court; thereafter, the father took the child back to Florida, and the Florida court changed permanent custody from the mother to the father, granting visitation rights to the mother. When the mother, during a summer visit of the child in Texas, attempted to get a Texas court to change permanent custody back to her, the Texas court put an end to the matter after a habeas corpus hearing by giving full faith and credit to the Florida decree and returning the child to the custody of the Florida father. The court dismissed the suit without resolution on the merits when it was shown that the child was within the State of Texas for less than twelve months and that the other parent was entitled to possession. In another habeas corpus case full faith and credit was given to a Minnesota custody decree after the Texas court found that the Minnesota court had continuing jurisdiction.[50] *McCarty v. Walker*[51] concerned a once modified Oklahoma decree. The modification had transferred custody back to the Oklahoma mother from the Texas grandfather. The Texas grandfather, refused, however, to return the child. When the mother came into a Texas court to obtain relief, that court found that Oklahoma had jurisdiction and, therefore, that the decree was entitled to full faith and credit, and granted the writ. While three cases do not necessarily establish a pattern, the combined effect of these cases with the Texas Supreme Court's use of its mandamus power to require courts to follow the procedures established by the Family Code,[52] would seem to be that Texas is not the best haven for parents who are attempting to disregard their own state's custody orders.

Some jurisdictional problems cannot be resolved by the habeas corpus provisions of the Family Code because either the children have been in Texas longer than twelve months[53] or the new long-arm statute[54] cannot be applied to both parents. Such a situation was before the trial court in *Hilt v. Kirkpat-*

48. 534 S.W.2d at 728.
49. *In re* Kamont, 537 S.W.2d 86 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).
50. Lehman v. Lehman, 537 S.W.2d 131 (Tex. Civ. App.—Fort Worth 1976, no writ). This case involved a decree which gave custody to the mother on condition she stay in Minnesota; when she took the children to Texas the father petitioned the Minnesota court for modification. In that hearing the Minnesota court found that it had jurisdiction and gave the mother time to appear personally and appeal. Instead the mother tried to use the Texas courts and failed.
51. 538 S.W.2d 861 (Tex. Civ. App.—Texarkana 1976, no writ).
52. *See* notes 44-46 *supra* and accompanying text.
53. TEX. FAM. CODE ANN. § 14.10(b)(2) (Vernon 1975), which provides that the court shall disregard any cross action unless it finds, among other things, that the child has been within the state for at least 12 months.
54. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1976-77).

rick.[55] The children had been in Texas since 1969, and the father, a resident of Colorado, had not been served in Texas. The trial court decided it had jurisdiction and appointed the mother as managing conservator and limited the father's visitation rights. The appeals court agreed with the father's challenge of the lower court's jurisdiction over him, but stated that the judgment was not void since the mother and children had been before the Texas court and, therefore, the decree would be recognized in Texas. The court further stated that what Colorado might decide to do was not the Texas court's problem. The case might be characterized as a typical *May v. Anderson*[56] situation and the type of case which, if the Family Code provisions[57] work as planned, should not occur in the future.

Trial court decisions concerning conservatorship were generally sustained. Appointing a father as managing conservator does not necessarily imply that a mother is unfit.[58] Even in child custody cases the findings of the trial court will be upheld unless they are so contrary to the great weight of the evidence as to show a clear abuse of discretion.[59] While ordinarily inexperience or mistake of one's own attorney is not grounds for a new trial, protection of children is so important that if there is strong new evidence concerning the best interests of the children, failure to grant a new trial may be an abuse of discretion. In *C—— v. C——*[60] the Dallas court of civil appeals declined to follow the reasoning of the Corpus Christi court in *In re* Y.[61] The Dallas court held that the children, not the parents, are the real parties in interest, and lack of diligence on the part of one of the litigating parents should not control the children's future. The court held that it has the primary responsibility to protect the children and it must make its decisions in their best interests unrestrained by technical rules. Another court ruled that if no jury issue is submitted on visitation rights the court may appoint the non-managing conservator to the possessory conservator position; failure to submit the visitation issue to the jury is construed as an election to have the court determine the question.[62]

Most appointments of managing conservators occur when the parents of the children are divorced, but when one parent dies it is possible that a question may arise as to who should have the care and control of the decedent's and surviving parent's child. In *In re Barrera*[63] the court found that

55. 538 S.W.2d 849 (Tex. Civ. App.—Waco 1976, no writ).

56. 345 U.S. 528 (1953), in which the United States Supreme Court held that, since the right to custody of one's children is a personal right, a court must have personal jurisdiction to determine a parent's custody right.

57. TEX. FAM. CODE ANN. §§ 14.10(a), (b) (habeas corpus), 11.051 (long-arm) (Vernon 1975); *see* note 44 *supra*.

58. Johnson v. Johnson, 536 S.W.2d 620 (Tex. Civ. App.—Tyler 1976, no writ).

59. Tye v. Tye, 532 S.W.2d 124 (Tex. Civ. App.—Corpus Christi 1975, no writ).

60. 534 S.W.2d 359 (Tex. Civ. App.—Dallas 1976, no writ). The problem here arose because some affiants who supported the mother's motion for a new trial had been called as witnesses at trial but the testimony in question had not been elicited from them at that time.

61. 516 S.W.2d 199 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). When the wife moved for a new trial on the grounds that her attorney was inexperienced and had made numerous trial errors, the court held that "[i]nexperience with the courts or negligence or mistake of one's own attorney is not a ground for new trial." *Id.* at 206.

62. Davis v. Davis, 531 S.W.2d 426 (Tex. Civ. App.—Texarkana 1975, no writ). This finding was based on TEX. FAM. CODE ANN. §§ 11.13, 14.03 (Vernon 1975).

63. 531 S.W.2d 908 (Tex. Civ. App.—Amarillo 1975, no writ).

despite the Probate Code's seeming presumption in favor of the surviving parent,[64] this presumption can be overcome by proper evidence. The court applied the provisions of the Family Code in deciding to appoint the grandparents as managing conservators and the mother as possessory conservator.[65]

In two cases where there was a jury trial the party requesting modification of conservatorship succeeded. In one case[66] the father sought to be named managing conservator based on a change of circumstances caused by his former wife's neglect and mistreatment of the children subsequent to her remarriage. The appellate court, while not finding any direct evidence that the new stepfather was an abusive person, did hold that the jury was entitled to find that some neglectful conduct on the part of the stepfather had caused the burn-like lesions on the child. In the other case[67] the appellate court found support for findings that there had been a change of the original circumstances and that a different managing conservator would be a positive improvement for the child. The facts showed that the father, who was the original managing conservator, moved from his mother's home and married a woman who not only had worked in bars but approved of taking children to bars. On the other hand, the mother showed that her circumstances had improved since she had had treatment for nervous disorders and was newly married to a man who loved the child. There was evidence that this second husband did drink, but since his drinking was alleged not to be excessive, the appellate court felt that all the facts taken together supported the jury finding and the judgment. In *Davis v. Duke*[68] the court, sitting without a jury, found that there had been no material change in circumstance despite the allegation that the mother, the present managing conservator had, on occasion, smoked marijuana in the presence of the children. Its reasoning was that since it was also found that when the children were living with both parents the father had smoked marijuana, there had been no change in the situation of the children. The appeals court affirmed the trial court's decision. A mere change in age, however, was held to be sufficient to permit modification of a right of access to the child. The appellate court in *Horne v. Harwell*[69] agreed that the difference between the ages of seventeen months and of three years and four months was significant and affirmed the appointment of the father as possessory conservator. The action of a trial judge who spoke with a ten-year-old boy in chambers to determine the child's wishes on conservatorship was approved by the appeals court in *Kimery v. Blackstock*[70] as being in compliance with the Family Code.[71]

64. "If one parent is dead, the survivor is the natural guardian of the person of the minor children, and is entitled to be appointed guardian of their estates." TEX. PROB. CODE ANN. § 109(a) (Vernon Supp. 1976-77).
65. TEX. FAM. CODE ANN. § 14.07(b) (Vernon 1975).
66. Wallace v. Fitch, 533 S.W.2d 164 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).
67. Thompson v. Uzzell, 541 S.W.2d 499 (Tex. Civ. App.—Tyler 1976, no writ).
68. 537 S.W.2d 519 (Tex. Civ. App.—Austin 1976, no writ).
69. 533 S.W.2d 450 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).
70. 538 S.W.2d 503 (Tex. Civ. App.—Waco 1976, no writ).
71. "[I]n a nonjury trial the court may interview the child in chambers to ascertain the child's wishes as to his conservator. The court may permit counsel to be present at the interview." TEX. FAM. CODE ANN. § 14.07(c) (Vernon Supp. 1976-77). The interview in the instant case was held with only the child's court-appointed counsel present.

C. *Support*

Support for children comes from either the private or the public sector, and in either case the necessity for or amount of support may be sufficiently uncertain that litigation results. For the private sector the litigation generally involves three problems: initial determination of support, subsequent modification of the original decree, and, frequently, enforcement of the payment of support. Thus, in all three areas it is the amount of support which is at issue rather than the right to support. On the other hand, questions relating to governmental support generally are concerned with the right to receive any support at all.

Public Support. The Supreme Court of the United States, in *Mathews v. Lucas*[72] upheld the statutory classifications arising out of portions of the Social Security Act[73] which conditioned the eligibility of certain illegitimate children for a surviving child's insurance benefits on a showing that the deceased wage earner was actually contributing to the child's support. The majority of the Court chose to follow the reasoning of *Labine v. Vincent*,[74] rather than that of the *Levy v. Louisiana*[75] line of cases, and held that "discrimination between individuals on the basis of their legitimaoy does not command extraordinary protection from the majoritarian political process . . .";[76] therefore, distinctions can be made to serve administrative convenience. The Court found that the presumption of dependence of legitimate children and various types of acknowledged illegitimate children is overinclusive, but that it is permissible because the presumption is "reasonably related to the likelihood of dependence at death."[77] The dissent viewed the decision as indicating that the majority of the Court believes that illegitimates are less deserving than legitimates. This decision would appear to perpetuate some of the historical distinctions between legitimates and illegitimates; perhaps the best that can be said of it is that it further confuses an already confused area. In another opinion[78] the Court vacated and remanded a district court's summary judgment which had upheld a statutory scheme of higher payments to foster parents who were not related to their foster children than to related foster parents. The Court noted that the lower court had not had the opportunity to rule on the issue of conflict between the state and federal law and should be allowed to do so.

In two cases the courts held that a father's duty of support had not been preempted by a welfare program and, therefore, instead of owing back child support to the child, he owed it to the state, which had been providing child

72. 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976).
73. 42 U.S.C. §§ 402(d), 416(e), 416(h)(2)(A) (Supp. 1975).
74. 401 U.S. 532 (1971), which upheld a Louisiana Probate Code intestacy provision which denies illegitimates the right to inherit from their fathers if their fathers had not properly recognized them. The fact of paternal identity was not an issue in any of these cases.
75. 391 U.S. 68 (1968); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); all of these cases held that the illegitimate child had a right to receive support if a similarly situated legitimate child would be accorded a support right.
76. Mathews v. Lucas, 96 S. Ct. 2755, 2762, 49 L. Ed. 2d 651, 661 (1976).
77. *Id.* at 2764, 49 L. Ed. 2d at 663.
78. Youakim v. Miller, 96 S. Ct. 1399, 46 L. Ed. 2d 32 (1976).

support in his stead. In the first the Ninth Circuit Court of Appeals held that bankruptcy does not discharge the debtor from the obligation to reimburse the state agency which had to provide support for the bankrupt's children.[79] The court reasoned that it is the underlying character rather than the form of the obligation which controls and, therefore, the debt falls within the provisions of the bankruptcy act concerning maintenance of support.[80] In the second case a Texas appeals court upheld the direct payment of the husband's child support to the State Department of Public Welfare rather than to his ex-wife since the family was receiving AFDC benefits which were greater than his support payments.[81]

Private Support. Trial courts usually have wide latitude in establishing the amount of child support a parent must pay, but an abuse of discretion was found when a father had been ordered to pay $60 per week child support out of a weekly net income of $87.[82] An order requiring a father to pay approximately half his income as child support was upheld even though the amount was less than the minimum needs of his children.[83] Neither was it held to be an abuse of discretion when the mother was ordered to pay child support commensurate with her ability when the father was appointed managing conservator of the minor children.[84]

A court which modified the original child support order by almost doubling the payments after eight years did not abuse its discretion.[85] The appellate court noted that even without detailed testimony there was evidence of a change of condition and mentioned, inter alia, the fact of spiraling inflation. A downward modification was upheld in another case when the trial court had changed the managing conservatorship of two of the three children from the mother to the father and, therefore, had reduced the amount of child support to be paid for the one remaining in the mother's care.[86] An appellate court reversed and remanded another downward modification attempt because it was not clear whether or not the original agreement, which was contractual, allowed for modification upon a change of conditions.[87] The trial court had

79. Williams v. Department of Social & Health Servs., 529 F.2d 1264 (9th Cir. 1976).

80. Bankruptcy Act, 11 U.S.C. § 35(a)(7) (1970).

81. Carreon v. Texas State Dep't of Pub. Welfare, 537 S.W.2d 345 (Tex. Civ. App.—San Antonio 1976, no writ). The wife had authorized her husband's child support payments to be delivered to the State Department of Public Welfare, and the State Department of Public Welfare had instituted suit seeking reasonable support payments from the husband to the extent the agency had supplied the needs of his children. The district court ruled that not only should the husband be required to pay child support to the welfare department, but the wife should be required to make up any resulting deficiencies in child support. The court of civil appeals reformed the lower court order as it concerned the wife because the State Department of Welfare had not sought an order to require the wife to pay child support, and, therefore, the district court had improperly invoked its jurisdiction over her. Also, since there had been no notice to the mother prior to the hearing that such payments might be required, her procedural due process rights were held to have been violated.

82. Gunter v. Gunter, 538 S.W.2d 428 (Tex. Civ. App.—Eastland 1976, no writ). The court held that support payments should be made to correspond with financial ability.

83. Nixon v. Nixon, 540 S.W.2d 740 (Tex. Civ. App.—Texarkana 1976, no writ).

84. Boriack v. Boriack, 541 S.W.2d 237 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd).

85. Jackman v. Jackman, 533 S.W.2d 361 (Tex. Civ. App.—San Antonio 1976, no writ).

86. Boyd v. Boyd, 534 S.W.2d 362 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

87. Griffin v. Griffin, 535 S.W.2d 42 (Tex. Civ. App.—Austin 1976, no writ). The court refused to reach the issue of whether the district court is empowered to modify contractual child support payments upon a finding of changed conditions, but cited Duke v. Duke, 448 S.W.2d 200 (Tex. Civ. App.—Amarillo 1969, no writ), in which such a modification was permitted.

declared the original property settlement agreement, which was incorporated by reference into the divorce decree and which included child support provisions, null and void because the payments required under the agreement constituted alimony. Relying on *Francis v. Francis*[88] an appellate court reversed on the basis that a contract between a husband and wife for the payment of support to the wife after a divorce decree becomes final is not alimony, but left the question of the possibility of modification of child support to the determination of the trial court. *Red v. Red*[89] presents a more complex and far-reaching problem. At issue in the *Red* case was the question of continued support for a disabled child. The original 1963 divorce decree required support only until the child, then age fourteen, reached eighteen, but the father voluntarily continued support payments past age eighteen, stopping his payments shortly after the Family Code became effective. The special statutory[90] support provision for disabled children in effect at the time of the divorce had not been invoked at the time of the 1963 decree. In this suit the appellant sought in a motion to modify support to rely upon the provisions of section 14.05 of the Family Code.[91] The trial court dismissed the case for lack of jurisdiction. The appellate court affirmed, reasoning that since the modification was sought after the enactment of the Family Code,[92] the suit would be governed by the provisions of section 14.05(b). That section provides that support payments may be *continued* after a child reaches eighteen, and the court interpreted this to mean that the eligibility of a child for support must be invoked *before* the child reaches eighteen. Therefore, since this suit was not timely, there was no remedy. The dissent pointed out that this would mean that a disabled child who is over eighteen at the time of the parent's divorce would not be entitled to support, and the legislature could not have intended a result so contrary to the meaning of the prior statute.[93]

Venue in cases concerning enforcement of child support is still causing numerous problems for courts and attorneys. For example, an action to enforce a consent judgment concerning child support arrearages is one in contract rather than a suit affecting the parent-child relationship, and should be brought where the contract is to be performed.[94] A suit for damages for

88. 412 S.W.2d 29 (Tex. 1967).

89. 536 S.W.2d 431 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ granted).

90. 1961 Tex. Sess. Law Serv. ch. 31, § 1, at 135 (TEX. REV. CIV. STAT. ANN. art. 4639a-1 (repealed 1973)). Under this repealed statute a court could require and enforce support payments for a physically or mentally unsound child, whether a minor or not.

91. If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

TEX. FAM. CODE ANN. § 14.05(b) (Vernon 1975).

92. The enactment clause of title 2 of the Texas Family Code provides:
(b) Any action or suit commenced after January 1, 1974, that has as its object the modification of an order, judgment, or decree entered prior to January 1, 1974, but which under this Act would be a suit affecting the parent-child relationship, is governed by the provisions of this Act, and shall be treated as the commencement of a suit affecting the parent-child relationship in which no court has continuing exclusive jurisdiction.

93. *See* note 90 *supra*.

94. *See* Tips v. Green, 533 S.W.2d 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ

failure to comply with contractual child support payments as provided in a divorce property settlement agreement is also a suit to enforce a contract and may be brought in district court.[95] But, when the original divorce, custody, and support decree contained no reference to a child support agreement, a suit to enforce child support is a suit affecting the parent-child relationship, not a suit on a contract.[96] Therefore, the original court retains continuing jurisdiction. A court which has acquired jurisdiction may hear a child support action brought under the Uniform Reciprocal Enforcement of Support Act[97] even though an action for divorce between the same parties is pending in another court.[98] The court was of the opinion that to hold otherwise would frustrate the purposes of the Act.

Enforcement of support is difficult because in addition to the problem of finding assets which can be attached to satisfy a judgment there is also the problem of finding the individual who owes the duty of support in order to obtain a judgment. An important new aid is the Parent Locater Service which is under the management of the State Department of Public Welfare.[99] Since this is a new method for finding missing parents it is not well known throughout the state and has not been used by private attorneys to any significant extent. The act establishing the service provided for the garnishment of wages due from the federal government to any individual,[100] and it may be that Texans can use these provisions against individuals who owe support and who are working for the federal government outside Texas.[101]

When the father falls behind in child support payments, the custodian, who is usually the former wife as well as the children's mother, may seek enforcement through incarceration of the father by means of a contempt order. In this situation the father's remedy is a writ of habeas corpus which may not be granted if the court finds that he has sufficient funds to pay what is owing,[102] but which the court must grant if there is sufficient evidence to the

dism'd). Because the custody, control, access, and support of the child were not in issue, venue was held not to be governed by the Family Code, but by the provisions of TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1976-77).

95. Adwan v. Adwan, 538 S.W.2d 192 (Tex. Civ. App.—Dallas 1976, no writ). The court distinguished plaintiff's action as one for damages for failure to make payments as provided by the contract rather than an action to hold defendant in contempt for failure to comply with the support order in the divorce decree; thus, the district court was not barred from assuming jurisdiction by the provisions of TEX. FAM. CODE ANN. § 11.05 (Vernon 1975 & Supp. 1976-77) which provides that the court which acquires jurisdiction over a parent-child relationship has continuing jurisdiction.

96. Stehling v. Wilkinson, 533 S.W.2d 427 (Tex. Civ. App.—Tyler 1976, no writ), relying on TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1976-77).

97. TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975 & Supp. 1976-77).

98. Raney v. Raney, 536 S.W.2d 617 (Tex. Civ. App.—Tyler 1976, no writ).

99. This service is based on title IV-D of the Social Security Act, 42 U.S.C. § 653 (Supp. 1975). Two recent articles discussing this Act as well as other enforcement methods are: Behling, *New Developments in Texas Child Support Enforcement*, 11 TEX. TRIAL LAW. F., Oct.-Dec. 1976, at 9; Comment, *Enforcement of Child Support Obligations of Absent Parents—Social Services Amendments of 1974*, 30 SW. L.J. 625 (1976).

100. Administrative rules must be followed rather carefully for this procedure. *See* Bolling v. Howland, 398 F. Supp. 1313 (M.D. Tenn. 1975) (dismissal was based on failure to obtain a "certificate of necessity" from the Secretary of HEW).

101. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 106 (1976).

102. *E.g.*, *Ex parte* McCrary, 538 S.W.2d 2 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). The relator must bear the burden of establishing as a matter of law that he is unable to comply with the trial court's order, including a showing that there is no source from which he might reasonably be expected to obtain the arrearage.

contrary.[103] Recourse through a habeas corpus proceeding may be necessary in other situations. For example, an order in a divorce decree directing a husband to pay his wife's attorney's fees out of a trust fund which had been established for the couple's son was held to be void and the contempt order was discharged.[104]

The husband who works overseas, but whose salary comes from a local company, can be a particularly frustrating target in the child support area. One wife was able to obtain direct relief by temporarily enjoining her husband's employer to withhold from her husband's pay certain amounts as alimony pendente lite and child support pending the couple's divorce. The company complied by preserving the amount withheld as a fund, and when the divorce was granted the money was ordered paid to the wife even though she had failed to supply bond as required by law. Such failure by the wife was found by the appeals court to render the trial court's order to the employer to withhold the husband's wages void, and the appeals court would not permit this arrangement to continue after the divorce was granted.[105] The appeals court held that although the original order was void, the money accumulated up to the time of the divorce was the community property of the husband and wife and could, therefore, be paid over to the wife without constituting an abuse of discretion,[106] but that the portion of the trial court's order which had the employer act as the agent of the husband to make child support payments must be stricken. Future collections by the wife will undoubtedly be more difficult since the husband is employed in Iran.

Full faith and credit was used to enforce a judgment rendered by a Maryland court despite the fact that the Maryland decree was entered after a Texas divorce decree had become final.[107] The Maryland court, while not entering a divorce decree as such, recited that it had acquired in personam jurisdiction over the husband and did grant a "Decree of Permanent Alimony and Other Relief," which included child support. The Texas court commented that Maryland had failed to give full faith and credit to the Texas decree, but held that since the Maryland court had obtained in personam jurisdiction over the parties and since there had been no appeal from the judgment of the Maryland court, it was a final judgment, and an error of the Maryland court in refusing to give full faith and credit to the Texas judgment does not justify a similar error on the part of a Texas court.[108]

In *Reid v. Reid*[109] the mother brought a suit for child support for the first time when the child was nearly fourteen years of age although the child had been born four-and-one-half months after the divorce decree. Judgment was for her, and the father appealed. Appellant claimed that he had had no knowledge at the time of divorce that his wife was pregnant and that he was

103. *E.g.*, *Ex parte* Dustman, 538 S.W.2d 409 (Tex. 1976). Under uncontradicted and corroborated evidence that the defendant is unable to meet child support payments it is an abuse of discretion for the trial court to hold defendant in contempt and order him imprisoned.
104. *Ex parte* Fleming, 532 S.W.2d 122 (Tex. Civ. App.—Dallas 1975, no writ).
105. Hopkins v. Hopkins, 539 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1976, no writ).
106. *Id.* at 247.
107. Layton v. Layton, 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).
108. *Id.* at 646.
109. 538 S.W.2d 833 (Tex. Civ. App.—Waco 1976, no writ).

not even aware of the existence of the child until the suit at bar was filed. Since the appellant and his attorney had, however, been present in court when the original decree, which acknowledged the pregnancy and made provisions for custody and visitation to be effective at the time of the child's birth, was rendered, and because the appellant had never denied paternity of the child, the judgment of the trial court was upheld.

The patience and forebearance of the Houston (First District) court of civil appeals must be commended for its attempts to resolve the problems of the Blackmons. The court had to decide six separate appeals between October 1975 and February 1976, all relating to the support and conservatorship of one child.[110] No new or unusual principles of law are involved in these causes, but it is interesting to note that while everything was handled by the one court which had jurisdiction, confusion was created by filing each cause under a separate docket number. Because the docket numbers were never related to one another, even though essentially the same parties were involved in each cause, a number of conflicting results arose from the holding of separate hearings. While the Texas Family Code does attempt to resolve jurisdictional conflicts between courts,[111] it does not address problems within the same court. The overcrowded dockets in some domestic relations and juvenile courts are likely to cause situations such as this to occur more frequently. It is easy to suggest that better management may be the answer, but since the individual courts do not control their own budgets, better adjunct services may not be available to them.

D. *Termination and Adoption*

The frequency of and the motives for state intervention on behalf of children has been the subject of much research and study over the past several years.[112] Terminating the parent-child relationship cannot be lightly undertaken, and there is concern that constitutional requirements for specificity of the standards used to determine whether or not intervention is needed are not being met. Last year portions of the Iowa parental termination statute were found unconstitutional by a federal court[113] because of the vagueness of the statutory language.[114] This resulted in an impermissible

110. *Ex parte* Blackmon, 529 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); Blackmon v. Blackmon, 529 S.W.2d 574 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); Blackmon v. Blackmon, 531 S.W.2d 916 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); Blackmon v. Blackmon, 531 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); Blackmon v. Blackmon, 531 S.W.2d 921 (Tex. Civ. App.—Houston [1st Dist.], no writ); *Ex parte* Blackmon, 534 S.W.2d 379 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

111. *See* TEX. FAM. CODE ANN. §§ 11.04, .05 (Vernon 1975).

112. *See, e.g.*, Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976). These articles discuss the problem of long-term foster care and suggest statutory reforms which might force state agencies to act with greater speed in either returning the child to his parents or severing the relationship and arranging for permanent placement of the child.

113. Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975).

114. The statute permitted the court, upon petition, to terminate the parent-child relationship if it found that the parents had "refused to give the child necessary parental care and protection,"

delegation of authority by the legislators to the administrators who determine the standards for termination. The court held that termination should occur only when there exists a likelihood that more harm will occur to the child by staying with his parents than by being permanently separated from them. In the absence of that likelihood there can be no compelling state interest in terminating parental rights and such termination would result in a violation of due process rights.[115] The wording of the Texas statute[116] has been unsuccessfully challenged,[117] and Texas courts, as will be discussed in the following paragraphs, have been requiring substantial and specific evidence to support allegations of parental misconduct before a judgment terminating the parent-child relationship will be affirmed.

The Texas Supreme Court was confronted with a problem in *In re K*[118] which, while somewhat ameliorated by the 1975 amendments to the Family Code, has not yet been completely resolved.[119] The problem is that under Texas law a child cannot be permanently placed with someone not his parent unless his parents are dead or have actively engaged in conduct detrimental to him.[120] The court in this case avoided the problem of grounds[121] for termina-

or were "unfit by reason of . . . conduct . . . detrimental to the physical and mental health or morals of the child." IOWA CODE ANN. §§ 232.41(2)(b), (d) (West 1969).

115. 406 F. Supp. at 24.

116. TEX. FAM. CODE ANN. §§ 15.01-.07 (Vernon 1975 & Supp. 1976-77).

117. In *D. F. v. State* the Texas Family Code provisions for termination of parental rights was found not unconstitutionally vague or overbroad because of the requirements of finding both specific conduct and that termination is in the best interest of the child. 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

118. 535 S.W.2d 168 (Tex. 1976). In this case the alleged father, who was confined in a penitentiary, wanted to legitimate the child and be made the child's managing conservator without the unwed mother's consent and despite the fact that he had not assisted the mother during her pregnancy.

119. TEX. FAM. CODE ANN. § 15.02(1)(H) (Vernon Supp. 1976-77) was added after the hearing in *In re K*. It provides that a father's parental rights may be terminated for failure to be supportive of the mother during her pregnancy and after the child's birth and would have covered the fact situation in *In re K*. *See* note 121 *infra*; Smith, *Title 2. Parent and Child, Texas Family Code Symposium*, 8 TEX. TECH L. REV. 19, 92-94 (1976).

120. Predicted conduct or the status of the parent are not statutory grounds. *Cf.* Patton v. Welch, 538 S.W.2d 7 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (father's parental rights terminated on the grounds that his felonious conduct which resulted in numerous prison terms prevented the development of a father-son relationship); Carter v. Dallas County Child Welfare Unit, 532 S.W.2d 140 (Tex. Civ. App.—Dallas 1976, no writ) (grounds for termination of parental rights was not the fact of mental incompetency but the acts arising out of the condition of mental incompetency).

121. The statutory basis for termination of the parent-child relationship was amended in 1975 by inserting two new subsections in subsection (1) of TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1976-77). These new subsections are (C) and (H), which means that the letter identification of subsection (1) has been substantially altered; the text of the statute is as follows:

> A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:
>
> (1) the parent has:
>
> (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or
>
> (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or
>
> (C) voluntarily left the child alone or in the possession of another not the parent and, although expressing an intent to return, failed to do so without providing adequate support of the child and remained away for a period of at least six months; or
>
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

tion of parental rights by deciding that the fact that a person is a biological father does not necessarily mean that he is a fit person to be a parent[122] and, therefore, it denied the petition for legitimation and thus prevented the biological father from entering into a parent-child relationship.[123] The dissent was based on two equal protection grounds: first, that women are being treated differently from men since an unwed mother is a parent based on mere biology whereas an unwed father, in order to become a parent, must prove fitness in addition to the biological relationship; secondly, that while both wed and unwed biological fathers are constitutionally required to support their children,[124] unwed fathers are not necessarily parents as are wed fathers because, unlike wed fathers, unwed fathers must prove their fitness to be parents. The majority, however, held that there is a rational basis for these distinctions and found that providing for notice and a hearing on the question of legitimation was sufficient to meet constitutional standards.[125]

The termination of parental rights was denied in *Hall v. Harris County Child Welfare Unit*[126] because the presumption that a child's best interest is served by being with its natural parents had not been rebutted by clear and convincing evidence. The state's case was based on allegations that the parents were unable to provide adequate care for the children, but evidence regarding medical facts was unsupported by expert testimony or medical records; thus, the appellate court held that hearsay or unsubstantiated

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(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

122. A biological father is not a "parent" unless the child is legitimate as to him. TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975). The father may become a parent by marrying the mother, *id.* § 12.02(a) (Vernon Supp. 1976-77), by voluntary legitimation, *id.* § 13.21, or through a paternity suit, *id.* § 13.01.

123. 535 S.W.2d 168, 171 (Tex. 1976).

124. Gomez v. Perez, 409 U.S. 535 (1973).

125. The possible effect of the Texas Equal Rights Amendment was not discussed. *See* notes 32-35 *supra* and accompanying text.

126. 533 S.W.2d 121 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

opinions of lay witnesses not qualified as medical experts are not proof of inadequate care.[127] Another court[128] also found that the evidence adduced at trial was not sufficient to support termination on the basis of violations of various sections of the Family Code relating to abandonment.[129] In *Moreland v. State*[130] evidence supporting termination of parental rights as to young children, while leaving the relationship with older children in the family intact was held not to be inconsistent. In *Fletcher v. Travis County Child Welfare Department*[131] another involuntary termination proceeding, it was held that a social work report may be properly admitted into evidence when the caseworker who prepared the report is present and testifies that the report is based on personal knowledge. In *Pattison v. Spratlan*[132] a judgment terminating parental rights based on an irrevocable affidavit of relinquishment to the State Department of Public Welfare as the managing conservator was affirmed per curiam by the Texas Supreme Court with the modification that the appeals court erred when it assessed appeals costs against the appellant since an uncontroverted affidavit of inability to pay had been filed in the trial court by the appellant.

In *Wiley v. Spratlan*[133] the Texas Supreme Court reversed a lower court judgment for the state in a procedure terminating the parent-child relationship based on non-support. The court held that provisions regarding involuntary termination of parental rights must be strictly construed and that unless an element of section 15.02(1) of the Family Code is found, a termination cannot be based on section 15.02(2).[134] Subsection (2) requires that termination be in the best interest of the child and subsection (1) describes specific types of conduct on the part of the parent. In the instant case the court found that the lower court's broad interpretation of the Family Code[135] was wrong and held that one year means all twelve months, just as two years had meant all twenty-four months under the prior statute.[136] In *Scheisser v. State* the court again emphasized the need for specificity and clear and convincing proof before reversing a lower court judgment.[137] This involved a particularly unfortunate fact situation because while the termination was still being appealed and, therefore, not final, the children were put up for adoption and

127. *Id.* at 123.

128. Ervin v. Wichita County Family Court Serv., 533 S.W.2d 947 (Tex. Civ. App.—Fort Worth 1976, no writ). The decision was further buttressed by the fact that the state admitted error and asked for a reversal of the judgment.

129. TEX. FAM. CODE ANN. §§ 15.02(1)(A), (C) (Vernon Supp. 1976-77), *supra* note 121.

130. 531 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). The court noted that the two older children, aged 15 and 13, had passed their major development stages.

131. 539 S.W.2d 184 (Tex. Civ. App.—Austin 1976, no writ). The court distinguished this case on its facts from Magallon v. State, 523 S.W.2d 477 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), which held that a social study is not evidence upon which the court's findings may be based unless the report is properly admitted into evidence.

132. 535 S.W.2d 48 (Tex. Civ. App.—Tyler), *modified and aff'd per curiam*, 539 S.W.2d 60 (Tex. 1976).

133. 543 S.W.2d 349 (Tex. 1976).

134. *See* text of statute, note 121 *supra*. The State Department of Public Welfare had based its petition on an alleged violation of TEX. FAM. CODE ANN. §§ 15.02(1)(F), (2) (Vernon Supp. 1976-77).

135. *See* McKnight, *supra* note 101, at 98.

136. 1931 Tex. Sess. Law Serv. ch. 177, at 300 (formerly the adoption statute art. 46a, § 6(a)).

137. 544 S.W.2d 373 (Tex. 1976).

an adoption decree granted. As the court points out, before an adoption petition can be considered there must be a final termination decree; therefore, the juvenile court exceeded its authority and the adoption decree was void.[138] It is worth noting that in dictum the court indicated that when there is a variance between the allegations in the pleadings and the actual findings of fact by the trial court grounds for reversal might exist. Thus, a termination based on a section 15.02(1)(D) (conduct which endangers the children) allegation, but which actually relies on section 15.02(1)(B) (voluntarily left the children without expressing an intent to return), is not likely to withstand appellate court scrutiny.[139]

Rogers v. Searle[140] concerned a private adoption which involved a supposedly voluntary relinquishment of parental rights in order to effect the termination prior to adoption. The mother petitioned for a bill of review to set aside the termination on the basis that her relinquishment was not voluntary since there had been extrinsic fraud. She also attacked as unconstitutional the provisions of the Family Code[141] which provide for voluntary waiver of service prior to the filing of a termination suit. The Texas Supreme Court granted a writ of error[142] in this case on the basis that there was extrinsic fraud and that the waiver provisions of the Texas Family Code were unconstitutional, but the court reversed solely because it found there had been sufficient evidence to raise a question of extrinsic fraud at the trial court level. The court therefore refused to confront the constitutional issues. The court is, however, undoubtedly aware that thousands of Texas children have been placed in adoption in reliance on the validity of the waiver provisions of section 15.03 of the Family Code[143] and if it had seen any question of the constitutionality of this provision the court in all likelihood would have siezed this opportunity to settle the question. Securing stable homes and supportive families for children is a primary concern of the courts and the legislature,[144] and anything which unnecessarily undermines the validity of the adoption procedure should be considered detrimental to the best interests of children.

After a valid judgment terminating the parent-child relationship, a biological parent has no justiciable interest in further proceedings relating to the

138. *See Prerequisites to Petition*, TEX. FAM. CODE ANN. § 16.03 (Vernon 1975 & Supp. 1976-77).

139. *See* text of statute, note 121 *supra*.

140. 533 S.W.2d 433 (Tex. Civ. App.—Corpus Christi), *rev'd*, 544 S.W.2d 114 (Tex. 1976).

141. TEX. FAM. CODE ANN. § 15.03 (Vernon Supp. 1976-77). This section was attacked as unconstitutional under the fifth and fourteenth amendments of the United States Constitution and under TEX. CONST. art. I, § 19.

142. 19 Tex. Sup. Ct. J. 333 (May 29, 1976).

143. The affidavit of relinquishment of parental rights provided for in TEX. FAM. CODE ANN. § 15.03 (Vernon Supp. 1976-77) provides the basis for many terminations of the parent-child relationship when the mother and the biological father wish to place the child with an authorized agency for adoption. Most parents in this situation do not wish to be involved in court proceedings and therefore waive the right to process. If the waiver were found unconstitutional such adoptions would be in jeopardy since TEX. FAM. CODE ANN. § 16.03(b) (Vernon Supp. 1976-77) provides that "no petition for adoption of a child may be considered unless there has been a decree terminating the parent-child relationship," so that in order to be valid, an adoption must be based on a valid final decree of termination. *See also* Smith, *Title 2. Parent and Child, Texas Family Code Symposium*, 5 TEX. TECH L. REV. 390, 451 (1974); Smith *supra* note 119, at 103.

144. *See In re* K, 535 S.W.2d 168, 171 (Tex. 1976).

child[145] and cannot rely on the habeas corpus provisions of the Family Code because such a parent has no present right to possession and, therefore, lacks standing.[146] Lack of jurisdiction prevented courts in two cases from intervening on behalf of persons who may have had an interest[147] in the disposition of the children in question. In one case a person who had physical custody of the child for seven-and-one-half years and was denied the right to intervene in a district court proceeding to terminate the parent-child relationship sought a writ of mandamus from the court of civil appeals. The appellate court denied the writ, holding that only the Texas Supreme Court has the power in mandamus proceedings to require a district court to set aside an illegal order.[148] In the other case a judgment terminating the parent-child relationship could not be modified since there had been no motion for a new trial filed within thirty days, thus allowing the judgment to become final despite the fact that the juvenile court had issued oral instructions, not embodied in the written judgment, directing the Harris County Child Welfare Unit to hold the children for nine months in order to give the parents an opportunity for rehabilitation.[149] In *Tobola v. State*[150] the appellate court reversed the trial court's rendition of judgment against the parents following *their* motion for judgment at the close of the state's testimony. The court found that the parents had been prevented from presenting evidence in the hearing for termination of their parent-child relationship. The court held that this circumstance obviated the necessity for an immediate objection, and, thus, the parents had not waived their right to appeal. Attorneys who bring termination suits should remember that while there is no statutory requirement of confidentiality for court records concerning termination of the parent-child relationship, paternity, or legitimation, the court may order the sealing of the files if so requested.[151]

The problem of the duty of support without a court order was addressed in *Holley v. Adams*[152] where a mother's parental rights were terminated on petition of her former husband, the father of the child. The father was awarded custody of the child in the divorce decree of 1969 and there was no order to the mother to pay child support. The civil appeals court found, however, that because of section 4.02 of the Family Code[153] each spouse does have a continuing duty of support and that the mother had not contributed in accordance with her ability. The Texas Supreme Court reversed, not because of no duty of support but on the basis that if there is an excuse for the failure to support this must be considered in connection with ascertaining the best

145. Glover v. Moore, 536 S.W.2d 78 (Tex. Civ. App.—Eastland 1976, no writ).
146. Ainsworth v. Homes of St. Mark, 530 S.W.2d 877 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See* discussion of TEX. FAM. CODE ANN. § 14.10 (Vernon 1975 & Supp. 1976-77), note 44 *supra* and accompanying text.
147. *See* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) as to who may bring suit under the Family Code.
148. Chapa v. Betts, 534 S.W.2d 446 (Tex. Civ. App.—Austin 1976, no writ).
149. Baggett v. State, 541 S.W.2d 226 (Tex. Civ. App.—Tyler 1976, no writ).
150. 538 S.W.2d 868 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).
151. TEX. ATT'Y GEN. OP. NO. H-826 (1976).
152. 532 S.W.2d 694 (Tex. Civ. App.—Austin), *rev'd*, 544 S.W.2d 367 (Tex. 1976).
153. "Each spouse has a duty to support his or her minor children." TEX. FAM. CODE ANN. § 4.02 (Vernon 1975).

interest of the child.[154] The court noted that there was an emotional relationship between mother and child and maternal grandmother and child, as well as between father and child and stepmother and child. It then found that there was no evidence that termination of the parent-child relationship was in the best interest of the child.[155] One of the reasons the father gave for desiring termination in *Holley* was that he was fearful of what would happen to his child if he should die.[156] This fear may be a factor in many stepparent adoptions and perhaps the legislature should address this problem by giving consideration to establishing some conservatorship rights to the surviving spouse of a managing conservator.

The rights of grandparents continue to be a problem for the courts.[157] In one case a trial court found that it was in the best interest of the child both to remove him from and then place him back in his maternal grandparents' home.[158] The appellate court found this order so contradictory that it remanded the case to the trial court where it is still pending at the time of this writing. The problem in this case is that the father is deceased and the mother has executed a voluntary relinquishment in favor of the maternal grandparents who have instituted adoption proceedings. The paternal grandparents oppose the adoption. The concern of the paternal grandparents is that if the maternal grandparents are permitted to adopt the children, under section 16.09 of the Family Code[159] the maternal grandparents will become parents while the paternal grandparents are left with no legal relationship to the child.

154. 544 S.W.2d at 371.

155. Since both subsections of the statute must be satisfied, a failure to prove either subsection will prevent termination. *See* note 121 *supra*.

156. 544 S.W.2d at 372.

157. *See* McKnight, *supra* note 101, at 98.

158. *In re* Herd, 537 S.W.2d 950 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

159. "On entry of a decree of adoption, the parent-child relationship exists between the adopted child and the adoptive parents as if the child were born to the adoptive parents during marriage." TEX. FAM. CODE ANN. § 16.09(a) (Vernon 1975).