



January 1978

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Recommended Citation

Ellen K. Solender, *Family Law: Parent and Child*, 32 Sw L.J. 141 (1978)
<https://scholar.smu.edu/smulr/vol32/iss1/5>

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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

THE period covered by this *Survey* Article has seen much activity in the courts, but little change in the substantive law.¹ The 65th Legislature made few alterations in the Family Code and the signals for future change seem to be coming from the federal courts, rather than the Texas courts. This is primarily because the trial courts in Texas have great discretion in the area of family law and the state appellate courts generally restrict themselves to supervising procedural rules such as venue, filing dates, court records, and notice. The federal courts, however, are more concerned with due process, not only as mandated by the Family Code, but also as to how the provisions of the Family Code are being implemented in practice.² Some interesting responses on the part of Texas lawmakers may therefore be necessary in the future.

I. LEGISLATIVE CHANGES

Although the Texas Family Code seems to be serving the needs of the citizens of the state as well as can be expected, grandparents have for some time felt that their rights have never been adequately recognized. The legislature apparently agreed, and added a number of provisions to the Code affecting the rights of grandparents.³ These new sections provide for the

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1. Four Texas Supreme Court cases decided during the survey period are omitted because they were discussed in last year's *Survey* article: *Schiesser v. State*, 544 S.W.2d 373 (Tex. 1976); *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976); *Rogers v. Searle*, 544 S.W.2d 114 (Tex. 1976); *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976); see Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 31 Sw. L.J. 133, 150-53 (1977).

2. A recent case indicative of this federal interest is *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977). This case is primarily concerned with "a suit for the protection of a child in an emergency." TEX. FAM. CODE ANN. § 17.01 (Vernon Supp. 1978). The court also discussed the standard of proof applicable in suits affecting the parent-child relationship, *id.* § 11.15 (Vernon 1975), and suggested that the current standard should be changed from a "preponderance of the evidence" to a "clear and convincing evidence" standard. But see *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976), in which the standard is defined not as "preponderance of the evidence," but as "solid and substantial." *Id.* at 352.

3. See TEX. FAM. CODE ANN. § 14.03 (Vernon Supp. 1978). Subsection (d) of § 14.03 was strengthened and clarified to read:

If the court finds that it is in the best interests of the child as provided in Section 14.07 of this code, the court may grant reasonable access rights to either the maternal or paternal grandparents of the child; and to either the natural maternal or paternal grandparents of a child whose parent-child relationship has been terminated or who has been adopted before or after the effective date of this code. Such relief shall not be granted unless one of the child's legal parents at the time the relief is requested is the child's natural parent. The court may issue any necessary orders to enforce said decree.

A reference to subsection (d) was added to § 16.09 to protect the grandparents' interest in the adoption context: "Nothing in this chapter shall preclude or affect the rights of a natural maternal or paternal grandparent to reasonable access under Section 14.03(d) of this code." *Id.* § 16.09.

possible preservation of visitation rights of grandparents even after the termination of a parent's right to a child. Although a father may have his parent-child relationship severed, his parents may be granted reasonable access to the child in their capacity as grandparents. Such visitation rights should give rise to children with three sets of grandparents: one set of maternal and two sets of paternal grandparents, or vice versa.

The type of case most directly affected by this change is exemplified by *Ex parte Pepper*,⁴ which involved the fact situation contemplated by the statute. The litigation in *Pepper* concerned a judgment for contempt which had been entered against the natural mother and adoptive father for failure to comply with a visitation order which had been entered prior to termination of the natural father's parental relationship. The natural mother and adoptive father applied for and were granted a writ of habeas corpus by the court of appeals on the ground that a person may not be imprisoned when there is no written order of contempt. The court, however, went further and explained that the order terminating the natural father's parental rights also terminated as a matter of law the paternal grandparents' legal relationship with the children. It is important to note that the grandparents were given notice of the adoption proceedings which resulted in a final decree terminating their relationship with their grandchildren. The amendments to the Family Code appear to remove this element of finality from an adoption decree and permit grandparents to assert their rights at any time.

Although legislative modification of section 14.07 of the Texas Family Code,⁵ relating to the best interest of the child, may clarify the rights of grandparents, this modification will probably not change those rights substantively; the courts have been, even without these changes, considering grandparents as possible managing conservators after the death of one or both parents.⁶

The other change in section 14.07⁷ regarding court interviews with children should have little effect on the practice of law in Texas. Greater status, however, is given to persons twelve to fourteen years old, as heretofore only persons fourteen years old or older could require consultation with the court. Because the new law does not change the fact that the court is not

4. 544 S.W.2d 836 (Tex. Civ. App.—Amarillo 1976), *writ diss'd*, 548 S.W.2d 884 (Tex. 1977). The amendments, however, will not change the problem raised by *In re Herd*, 537 S.W.2d 950 (Tex. Civ. App.—Amarillo 1976, *writ ref'd n.r.e.*): If the maternal grandparents adopt the child, the paternal grandparents have no standing to assert visitation rights because neither of the legal parents is a natural parent. See Solender, *supra* note 1, at 153.

5. TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1978). Subsection (b) now reads: "In determining the best interest of the child, the court shall consider the circumstances of the parents. In the event of the death of the parents, the grandparents may be considered but such consideration shall not alter or diminish the discretionary power of the court."

6. See *Ramirez v. Garcia de Bretado*, 547 S.W.2d 717 (Tex. Civ. App.—El Paso 1977, no writ) (court relied on Probate Code to appoint maternal grandmother as guardian of two children who were "for all practical purposes orphans"). See also *Goolsbee v. Heft*, 549 S.W.2d 34 (Tex. Civ. App.—Tyler 1977, no writ) (court granted visitation rights to maternal grandparents after the death of the child's mother); *In re Barrera*, 531 S.W.2d 908 (Tex. Civ. App.—Amarillo 1975, no writ) (court held maternal grandparents should be considered as managing conservators). *In re Barrera* is discussed in Solender, *supra* note 1, at 140.

7. TEX. FAM. CODE ANN. § 14.07(c) (Vernon Supp. 1978).

required to follow the wishes of the child, this amendment appears merely to be one of emphasis rather than substance.⁸

Amendments to section 14.10 of the Family Code clarify and modify some of the requirements and procedures for obtaining a writ of habeas corpus after an alleged child-snatching.⁹ The intent of the statute is to prevent any use of self-help by a parent who was not given lawful custody; there are, however, circumstances where a parent may properly have possession of a child, but without the benefit of a court order. It is these situations which subsection (b) attempts to address. As re-written, subsection (b)(1) will apply only if the prior court did not have jurisdiction of the parties; subsection (b)(2), however, has been substantially changed. The exception may now apply in any case where the child has not been in the relator's possession for at least six months prior to the filing of the writ. This exception is applicable to intrastate as well as interstate situations.

This change to section 14.10 may have been in response to the problems that were encountered by a number of trial courts during the past year which resulted in applications for and acceptances of numerous writs of mandamus to the Texas Supreme Court. Although a six-month rather than a twelve-month standard will be applied hereafter, the case of *Lamphere v. Chrisman*,¹⁰ decided under the old law, may still be important for purposes of determining when the relevant time period has expired. In *Lamphere* a motion to relitigate conservatorship was denied because the child had spent two months and six days during the previous twelve-month period outside of Texas. The Supreme Court of Texas affirmed this holding, but recognized that the child did not need to be continuously present within Texas during the twelve-month period in order to relitigate the custody issue. While explaining that insignificant visits outside Texas would not be considered in determining the twelve-month period, the court held that a period of two months and six days was significant and had to be considered in determining the twelve-month period. Although it is likely that similar principles will apply under the six-month rule, the distinction between significant and insignificant remains undefined.

8. See *In re Galliher*, 546 S.W.2d 665 (Tex. Civ. App.—Beaumont 1977, no writ), in which the court denied the petition for modification despite the written statement of the 14-year-old child involved.

9. TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1978). Section 14.10 now reads:

[Subsection (a) unaffected]

(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:

- (1) The previous order was granted by a court that did not have jurisdiction of the parties; or
- (2) the child has not been in the relator's possession and control for at least 6 months immediately preceding the filing of the petition for the writ.

[Subsections (c), (d), and (e) unaffected]

(f) The court shall disregard any motion for temporary or permanent adjudication relating to the possession of the child in a habeas corpus proceeding brought under Subsection (e) of this section unless at the time of the hearing an action is pending under this subtitle, in which case the court may proceed to issue any temporary order as provided by Section 11.11 of this code.

10. 554 S.W.2d 935 (Tex. 1977).

Although the change in subsection 14.10(b)(2) is substantive, it is not substantial, and a review of the cases decided under the old law indicates that the outcome would probably have been the same under either law. For example, the court in *Waltreus v. Braddock*¹¹ would have reached the same result under either standard since the child had resided in Texas for more than twelve months immediately preceding the time of filing the writ. Similarly, the outcome of *McElreath v. Stewart*¹² would probably have been the same under the new standard since the original custody order appears to have been valid, and the child was out of the possession of the relator for less than six months. The court in *Fountain v. Nelson*¹³ might have reached a different result under the amended statute if the child had been out of the relator's possession for six months immediately prior to the hearing. The facts as reported do not make the time periods clear, and it appears that unless proper time periods can be alleged and proved relief should be denied. When there is a serious question concerning the welfare of the child, then subsection 14.10(c) should be used.¹⁴

II. UNITED STATES SUPREME COURT DECISIONS

In the past year the United States Supreme Court has continued a case-by-case analysis of the status of illegitimates, but has yet to propound a fixed standard for the examination of the rights of illegitimates. This failure has caused inconsistent results.¹⁵ In *Fiallo v. Bell*,¹⁶ an immigration case, the Court, in a six-to-three decision, continued to follow a policy of limited judicial inquiry into immigration legislation. In *Fiallo* the Court held that Congress can withhold immigration preferences for natural fathers of illegitimate United States citizen children and illegitimate children of United States citizen natural fathers, while granting those preferences to natural mothers. Although this case is not of immediate importance to Texas lawmakers, it does serve to illustrate the proposition that it is better to be legitimate than illegitimate.

Trimble v. Gordon,¹⁷ however, may be of real concern in Texas. In that case the Court, in a five-to-four decision,¹⁸ held a portion of the Illinois

11. 551 S.W.2d 169 (Tex. Civ. App.—Eastland 1977, no writ).

12. 545 S.W.2d 955 (Tex. 1977).

13. 546 S.W.2d 102 (Tex. Civ. App.—Beaumont 1977, no writ).

14. See *Tooley v. Tooley*, 545 S.W.2d 524 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), where the granting of the writ was affirmed since there was no statement of facts concerning the allegations.

15. This lack of a fixed standard is illustrated by two lines of cases which the Court has followed alternately. Compare *Mathews v. Lucas*, 427 U.S. 495 (1976), and *Labine v. Vincent*, 401 U.S. 532 (1971), both of which follow a balancing standard, with *Gomez v. Perez*, 409 U.S. 535 (1973), *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), *Giona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), and *Levy v. Louisiana*, 391 U.S. 68 (1968), which apply a standard which might be defined as a non-strict scrutiny of suspect classification.

16. 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). *Fiallo* held constitutional 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2) (1970).

17. 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977).

18. Three of the Justices dissented on the grounds that this case is constitutionally indistinguishable from *Labine v. Vincent*, 401 U.S. 532 (1971). 97 S. Ct. at 1468, 52 L. Ed. 2d at 43 (Burger, C.J., Blackmun, & Stewart, JJ., dissenting). Justice Rehnquist's separate dissent is based on the conviction that the equal protection clause of the fourteenth amendment should be interpreted through historical analysis, and since it is a product of the Civil War it should not be applied to situations too far removed from race. *Id.* at 1468-70, 52 L. Ed. 2d at 43-46.

Probate Act¹⁹ unconstitutional as a denial of equal protection. The disputed section was similar to our former section 42 of the Probate Code²⁰ in that illegitimate children were permitted to take from and through their mothers, but not from their fathers. The defendant in *Trimble* had been adjudged the father of the child and had been ordered to pay child support, which he did until he died intestate. Thereafter, the mother filed for determination of heirship and the Illinois court entered an order identifying the father's parents and siblings as his only heirs.²¹ The Illinois Supreme Court found that the legislative purpose in changing from non-recognition to partial recognition of heirship rights for illegitimates was to ameliorate the previous harsh common law attitude towards illegitimates.²² The court held that the distinction between maternity and paternity, resting on the difficulty of establishing paternity, improved the status of illegitimates and promoted the orderly disposition of property at death.²³ Although the United States Supreme Court agreed that the primary purpose of the statute was to provide a more just system of state succession for illegitimate children, it held that the distinction between maternal and paternal intestate succession could not be "squared with the command of the Equal Protection Clause of the Fourteenth Amendment."²⁴ While recognizing that the intestate could have taken steps to assure inheritance for his illegitimate children, the Court ruled that the essential question is not what the individual can do, but rather "the constitutionality of discrimination against illegitimates in a state intestate succession law."²⁵

Under the old section 42 of the Texas Probate Code,²⁶ the illegitimate child took from and through his mother only. If, however, the child's father ever married the child's mother, then the child was legitimated and took from him as any other legitimate heir. Although the Texas Legislature changed the form of section 42, the only major substantive change concerns illegitimates who have been legitimated in voluntary legitimation proceedings.²⁷ These children can take from, but not through, their fathers and, therefore, will continue to have a lesser status than legitimate children. No mention is made in the new law regarding the effect of involuntary legitimation, although the Family Code provides that a decree designating the alleged father as the father of the child creates the same relationship accorded a legitimate child.²⁸

19. ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976-77).

20. TEX. PROB. CODE ANN. § 42 (Vernon 1956). This section is now amended in TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1978).

21. 97 S. Ct. at 1462, 52 L. Ed. 2d at 35-36.

22. *Id.* at 1464, 52 L. Ed. 2d at 38.

23. *Id.* at 1465, 52 L. Ed. 2d at 39.

24. *Id.* at 1468, 52 L. Ed. 2d at 43.

25. *Id.* at 1467, 52 L. Ed. 2d at 42.

26. TEX. PROB. CODE ANN. § 42 (Vernon 1956).

27. *Id.* § 42(c) (Vernon Supp. 1978). Subsection (c) states:

Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from his paternal kindred; and the father but not the father's kindred, shall inherit from such child and his issue.

28. TEX. FAM. CODE ANN. § 13.09 (Vernon 1975).

The revision of section 42 seems insufficient to bring the Probate Code into conformity with the United States Constitution if the rule of *Trimble v. Gordon*²⁹ is strictly applied. The provisions of the Family Code relating to involuntary legitimation might be read into the Probate Code by classifying these children as products of "marriages null in law,"³⁰ but this would still provide lesser rights for those children whose fathers had taken all possible steps to recognize them through voluntary legitimation. Legislative purpose for this discrepancy is difficult to find. Furthermore, if the Family Code provisions for involuntary legitimation cannot be read into the Probate Code, then the amendment to section 42 has an even greater chance of being found to deny equal protection to illegitimate children. There is this greater chance of unconstitutionality because the involuntarily legitimated child has been found by a court to be in fact the child of his alleged father and, therefore, deserving of his support.³¹

Questions concerning discipline in the public schools were settled in a five-to-four decision in *Ingraham v. Wright*.³² The majority found that the eighth amendment³³ concept of cruel and unusual punishment does not apply to corporal punishment as administered by public school teachers or administrators, and that in the event the punishment was excessive the usual common law and criminal remedies would be sufficient. The Court also found that there is no need for procedural safeguards such as notice and a hearing prior to the imposition of corporal punishment. The Court reasoned that to hold otherwise would "entail a significant intrusion into an area of primary educational responsibility."³⁴ The Court distinguished the earlier case of *Goss v. Lopez*,³⁵ the school suspension case, on the basis that it involved a state-created property interest, whereas paddling only involved a liberty interest that must be balanced against educational needs. *Ingraham*, while personally important to students, may be more important as an indicator of future abstention by the federal courts in situations involving school problems such as dress codes and hair lengths.³⁶

The Texas case of *Hogenson v. Williams*³⁷ involved a school punishment situation which arose, as the United States Supreme Court had indicated it should, in a tort action to recover damages for an assault allegedly committed on a seventh grade student football player by his coach. The primary question was whether physical contact is privileged when used for the

29. 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977).

30. TEX. PROB. CODE ANN. § 42(e) (Vernon Supp. 1978). Subsection (e) states: "The issue also of marriages deemed null at law shall nevertheless be legitimate."

31. This is exactly the same situation as in *Trimble v. Gordon*, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977).

32. 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

33. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

34. 97 S. Ct. at 1418, 51 L. Ed. 2d at 737.

35. 419 U.S. 565 (1975).

36. The importance of the *Ingraham* decision in Texas is indicated by the fact that an average of 2,000 incidents of physical punishment per month were reported in the 1971-72 school year in the Dallas Independent School District. The Houston Independent School District reported 8,279 paddlings during a two-month period in 1972. 6 CHILDREN TODAY 19 (1977).

37. 542 S.W.2d 456 (Tex. Civ. App.—Texarkana 1976, no writ).

purpose of "firing up" or "instilling spirit."³⁸ The defendant-appellee contended that this purpose was the equivalent of "instruction and encouragement" and, therefore, the contact was privileged.³⁹ The appeals court disagreed and held that the rule of privileged force only applies in situations where the teacher *reasonably* believes such action is necessary to enforce compliance with a *proper* command, either given for educational purposes or to punish prohibited conduct. Accordingly, the case was reversed and remanded since the verdict was rendered on improper instructions.

In *Smith v. Organization of Foster Families for Equality and Reform*,⁴⁰ a case based on New York law, the Supreme Court ruled that foster families, and, therefore, foster parents, are different from natural or adoptive families, thereby making it unnecessary to accord them the same procedural protections. The Court supported this distinction by reasoning that foster families, unlike natural families, derive their existence from state law and contractual arrangements.⁴¹ Accordingly, the Court held that foster parents are not entitled to full judicial review prior to the removal of their foster children; thus, ten days' notice and a right to a conference which results in an administrative determination prior to removal is sufficient to protect their liberty interest. On the other hand, natural parents, who derive their existence from a blood relationship, apparently have a property interest and, thus, may be entitled to complete due process rights. The Court did not mention an independent right of protection attaching to the foster children, who are the real parties in interest in any disposition dispute between foster parents, agencies, and natural parents. The similarities between New York and Texas law regarding the arrangement of temporary care for children through placement in foster homes should create the same constitutional rights for Texas foster parents as established in *Smith*. Accordingly, *Smith* should become an especially important decision for the Texas Department of Human Resources since that agency makes extensive use of foster parents to provide care for children of parents unable to do so.

Finally, in *Carey v. Population Services International*⁴² the Court, in a complex opinion characterized by many overlapping concurrences and dissents, appears to have held that minors have a right to privacy in connection with decisions affecting procreation. College clinics, public clinics, and private physicians, therefore, should all be able to dispense birth control information to minors without notifying the parents. Of course, if medical treatment is involved, parental consent should be obtained in accordance with the applicable provisions of the Texas Family Code.⁴³

III. STATUS

The Texas equal rights amendment⁴⁴ was considered in two cases last year. The first involved a young girl's desire to play football in the Orange

38. *Id.* at 459.

39. *Id.*

40. 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

41. *Id.* at 2110, 53 L. Ed. 2d at 35.

42. 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).

43. TEX. FAM. CODE ANN. §§ 35.01-.03 (Vernon 1975).

44. TEX. CONST. art. I, § 3a.

Junior Football Association.⁴⁵ The district court granted a temporary injunction in her favor, but the appeals court found insufficient state action and vacated the injunction despite the fact that practices were held on school grounds and games were played in public parks. The second case concerned the right of a married woman to have her name changed back to her maiden name.⁴⁶ The trial court denied the change, reasoning that such a change would result in " 'the appearance of an illicit cohabitation against the morals of society,' and be 'detrimental to the institution of the home and family life,' or that it will be against the best interest of the children."⁴⁷ The appellate court, apparently feeling that the denial was on sexist grounds, reversed, citing *Mercer v. Board of Trustees*⁴⁸ to support its view that the trial court's holding was a denial of equal protection. While the appellate court specifically commented that followers of traditional social propriety may not understand appellant's motives, the decision is significant for more than social propriety. The decision recognizes the change which has been occurring in some family units in which all family members do not have the same surname, either because the children are products of prior marriages⁴⁹ or because the wife retains her name at the time of marriage.⁵⁰

The problem of defining "reside," as used in the Texas Education Code,⁵¹ was considered in *De Leon v. Harlingen Consolidated Independent School District*.⁵² The question arose in connection with the school district's denial of the appellants' right to enroll in a tuition-free education program. While all of the appellants lived in the district, their parents resided elsewhere and the persons with whom the appellants lived were neither legally-appointed guardians nor lawfully in control of the appellants pursuant to orders of the juvenile court or child welfare agency. The appellants had admitted to the school admissions officer that they were living in Harlingen in order to attend the local school. The court found that mere physical presence in a school district will not satisfy the residency requirements of the statute. The court further noted that the attorney general of Texas has taken the position that sending a child to live in another school district for the sole purpose of obtaining an education in that district is not sufficient to require that a tuition-free education be provided.⁵³

The Texas Supreme Court continued to erode the tort doctrine of intra-

45. *Junior Football Ass'n v. Gaudet*, 546 S.W.2d 70 (Tex. Civ. App.—Beaumont 1976, no writ).

46. *In re Erickson*, 547 S.W.2d 357 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

47. *Id.* at 359.

48. 538 S.W.2d 201 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

49. *See, e.g., Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App.—Dallas 1976, no writ) (court found that it was not in child's best interest to change her last name to that of her mother and stepfather, thus sanctioning at least two different surnames in single family unit).

50. TEX. ATT'Y GEN. OP. NO. H-432 (1974). *See* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 68 (1975).

51. TEX. EDUC. CODE ANN. § 21.031(c) (Vernon Supp. 1978). This subsection states: "The board of trustees of any public free school district of this state shall admit into the public free schools of the district all persons . . . if such person or his parent, guardian or person having lawful control resides within the school district."

52. 552 S.W.2d 922 (Tex. Civ. App.—Corpus Christi 1977, no writ).

53. TEX. ATT'Y GEN. OP. NOS. H-63 (1973), O-586 (1939).

family immunity⁵⁴ when in *Bounds v. Caudle*⁵⁵ the court partially overruled the doctrine of complete inter-spousal immunity which had been recognized in Texas since 1886.⁵⁶ In *Bounds* the children of Mrs. Bounds brought a wrongful death action against their stepfather who, they claimed, had intentionally and willfully caused their mother's death. Relying on case precedent, the appellate court denied the children's wrongful death claim.⁵⁷ The high court, however, held that the doctrine of inter-spousal immunity would no longer apply to willful or intentional torts, reasoning that preservation of the family unit is not served by barring such causes of action. The court then held that since under this ruling the mother, had she lived, could have asserted a cause of action, her children's derivative cause of action should also be permitted. Accordingly, the case was remanded for a trial on the merits.

Parentage is probably the most important factor in establishing the status of a child, and while maternity is generally established easily, paternity poses many questions both of fact and law. In two cases considered by the Fort Worth court of civil appeals, the legal question of paternity was decided in favor of the alleged fathers, thereby obviating the factual question of paternity.⁵⁸ In both cases the Texas Department of Public Welfare had attempted to obtain personal jurisdiction over two alleged fathers through the use of the tort long-arm statute⁵⁹ because the Texas Family Code long-arm statute⁶⁰ had not become effective. The Fort Worth appeals court reversed and held that, since sexual intercourse between consenting adults is not a tort, the tort long-arm statute could not apply, thereby choosing to follow Colorado's⁶¹ reasoning rather than that of Illinois.⁶²

In *Alvarado v. Gonzales*,⁶³ however, the alleged father pled the one-year statute of limitations of the Family Code,⁶⁴ but the appellate court reversed and remanded on the ground that the paternity amendments to the Family Code should not be applied retroactively and, therefore, the one year limitation of the Code did not apply.

In *King v. King*⁶⁵ the facts apparently did not sustain a finding that the alleged father was the biological father. The court held that there had been

54. See *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971), in which an employee-son was allowed to sue his father's partnership for negligence. The court noted that in ordinary parent-child situations a suit would not be allowed for ordinary negligence and unintentional wrongs. Although the court's emphasis on unintentional wrongs may indicate that a child can sue a parent for an intentional wrong, there is no Texas case law so holding. *But see* *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App.—Fort Worth 1954, writ ref'd) (dictum indicates child may sue parent for an intentional wrong).

55. 21 Tex. Sup. Ct. J. 92 (Dec. 3, 1977).

56. *Nickerson & Matson v. Nickerson*, 65 Tex. 281 (1886).

57. *Bounds v. Caudle*, 549 S.W.2d 438 (Tex. Civ. App.—Corpus Christi 1977).

58. *Postell v. Texas Dep't of Pub. Welfare*, 549 S.W.2d 425 (Tex. Civ. App.—Fort Worth 1977, no writ); *Taylor v. Texas Dep't of Pub. Welfare*, 549 S.W.2d 422 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

59. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

60. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1978).

61. *A.R.B. v. G.L.P.*, 180 Colo. 439, 507 P.2d 468 (1973).

62. *Poindexter v. Willis*, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967).

63. 552 S.W.2d 539 (Tex. Civ. App.—Corpus Christi 1977, no writ).

64. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1978).

65. 544 S.W.2d 795 (Tex. Civ. App.—San Antonio 1976, no writ).

no common law marriage and, therefore, the alleged father was not the legal father; thus, the mother was the sole parent of the child. The court also refused to appoint the mother managing conservator since no one else was claiming adversely to her. Apparently, the entire claim for paternity was based on the controverted allegation of a common law marriage. A parent-child relationship in fact between the alleged father and child could not be determined since a paternity action was not brought.

In *Young v. Young*⁶⁶ the court held that although all three children were born during the marriage, that fact alone would not be the only criterion for ordering child support. The trial court found that the two younger children were conceived and born while the husband and alleged father was in prison. The court ruled that he could not be the biological father, and ordered him to pay support for only the older child. The wife had contended that a literal application of the Family Code⁶⁷ required the husband to be the father of all children born during the marriage, but the court disagreed, explaining that the common law presumption of legitimacy was overcome by proof of non-access. *Napier v. Napier*⁶⁸ quoted *Young* approvingly in stating that a later marriage, in this case five years, would not necessarily legitimate a child. Nevertheless, the court found that there was sufficient evidence submitted by the alleged father to support a finding that he was, in fact, the father. The evidence consisted of blood tests which although inconclusive did not rule out the probability of fatherhood, photographs showing resemblances, and testimony that there had been sexual relations nine months prior to the birth of the child.

Although the Texas Family Code has rather elaborate provisions for formal adoption,⁶⁹ status questions may arise after the death of an individual who allegedly stood in loco parentis to a claimant via the doctrine of equitable adoption. Texas courts have recognized this concept under two different theories. One theory is based on an actual agreement to adopt which was not carried out for some valid reason,⁷⁰ and the other is based on the traditional estoppel concept which includes performance by the child and reception of benefits from the child.⁷¹ In *Adler v. Moran*⁷² the trial court found an equitable adoption, but the appellate court, after discussing both possible theories for sustaining the result, reversed and remanded, holding that the evidence adduced at trial was too confused. The problem experienced is one which may occur with increasing frequency in all areas of the law since the witnesses were Spanish speaking and their testimony had to be

66. 545 S.W.2d 551 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dismissed).

67. TEX. FAM. CODE ANN. § 12.02(a) (Vernon 1975). This part of the Code said that "[a] child is the legitimate child of a man if the child is born or conceived before or during the marriage of his mother and the man." It should be noted that this subsection has been amended to read as follows: "A child is the legitimate child of his *father* if the child is born or conceived before or during the marriage of his *father* and mother." *Id.* (Vernon Supp. 1978) (emphasis added).

68. 555 S.W.2d 186 (Tex. Civ. App.—El Paso 1977, no writ).

69. TEX. FAM. CODE ANN. §§ 16.01-.12, 16.51-.55 (Vernon 1975).

70. *Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W.2d 972 (1951).

71. *Cubley v. Barbee*, 123 Tex. 411, 73 S.W.2d 72 (1934).

72. 549 S.W.2d 760 (Tex. Civ. App.—San Antonio 1977, writ granted).

given through interpreters. In two other cases the appellate courts affirmed jury findings that the appellants had not been equitably adopted.⁷³

IV. CONSERVATORSHIP

Controversy concerning managing conservatorship generally arises at the time of divorce or upon the death of the natural parents. If a permanent and acceptable settlement of conservatorship can be made at either of these times, later requests for modification can usually be avoided. Real changes in circumstances and the impossibility of settlement in some cases, however, result in a continuing stream of cases requesting modification.

In one case a father, as sole surviving parent, filed a writ of habeas corpus seeking to regain possession of his daughter who had been in the custody of the father's brother for the past five years.⁷⁴ At the time the answer to the writ was filed the father's brother and his wife filed a petition for adoption and termination of the father's parental rights. The trial court denied the father's writ until there could be a hearing on the uncle's petition for termination and adoption, and named the uncle as temporary managing conservator. The father claimed that the court did not have the power to deny the writ, because, at the time the writ was filed, no actions were pending affecting the parent-child relationship, and, therefore, he had a prima facie right to possession.⁷⁵ The court, however, found that an action affecting the parent-child relationship pending at the time of the hearing was sufficient and ruled that it was in the best interest of the child to maintain the status quo.⁷⁶

*In re Henson*⁷⁷ was a guardianship case arising after the almost simultaneous death of the children's parents. The father had named his brother guardian of the children in his will, but the mother's sister filed an application to be appointed permanent guardian of the person and/or managing conservator of the children. The trial court found that appointing the aunt as managing conservator would be in the best interest of the children. The appeals court agreed, stating that guardianship of the person under the Probate Code⁷⁸ is the same as managing conservator under the Family Code⁷⁹ and holding that there was jurisdiction to appoint a managing conservator for children without parents or guardian. The uncle contended that he was entitled to be named the guardian of the person of the children since he was named in the father's will.⁸⁰ The court, however, found, as a matter of law, that the uncle owned interests adverse to the children's interests and was thus disqualified. While the finding of disqualification related to property and not fitness for custody, the court indicated that the best interest of the

73. *Bowden v. Caldron*, 554 S.W.2d 25 (Tex. Civ. App.—Texarkana 1977, no writ); *In re Estate of Wood*, 543 S.W.2d 701 (Tex. Civ. App.—Beaumont 1976, no writ).

74. *In re Stuart*, 544 S.W.2d 821 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

75. See TEX. FAM. CODE ANN. § 14.10(e) (Vernon Supp. 1978).

76. The recent amendment of *id.* § 14.10(f) would only reinforce this decision.

77. 551 S.W.2d 136 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

78. TEX. PROB. CODE ANN. § 229 (Vernon 1956).

79. TEX. FAM. CODE ANN. § 14.02(b) (Vernon 1975).

80. TEX. PROB. CODE ANN. § 117 (Vernon 1956).

children is of primary concern and found that there was no abuse of discretion.

The court in *Benedict v. Benedict*⁸¹ found that there were "special conditions" at the time of divorce mandating the appointment of the wife and the wife's parents as joint managing conservators of the children. The appellate court affirmed this decision as well as the trial court's arrangements for visitation by the father. The appellate court pointed out that the trial court need not make specific findings as to the fitness of the parents in order to determine who should have physical custody of the children. In a later case⁸² the same appellate court found that appointing both grandparents as managing conservators was proper when such appointment is in the best interest of the children. The court pointed out that there is nothing in the Texas Family Code prohibiting a joint appointment.

In two cases the losing parties alleged misconduct or prejudice on the part of the trier of fact as grounds for reversal on appeal. In *Crapps v. Crapps*⁸³ the husband alleged that the court was biased in its decision appointing the wife managing conservator because the court had commented, after counsel had closed, that obviously the most important thing was the placement of the child in the custody of its mother. The appeals court, after reviewing the record, found that the court's comment was neither a finding of fact nor a conclusion of law and that the comment only served to indicate the court's conclusion upon the record that appellee should be named managing conservator. In *Tees v. Tees*⁸⁴ the husband, who was in the Army, was appointed managing conservator of the children. The wife's allegation of jury misconduct based upon a juror's statement that she had successfully reared her family in the military was rejected by the trial court and affirmed on appeal. In another decision dealing with conservatorship,⁸⁵ the trial court's appointment of a father as managing conservator of the minor child was affirmed, but the appellate court commented that the use of the phrase "reasonable visitation rights" to describe the times and the conditions upon which the possessory conservator can have access to the child was inappropriate under the current Family Code. Unless the parties agree, however, satisfactory visiting arrangements are difficult for trial courts to spell out. In *Musslewhite v. Musslewhite*⁸⁶ the trial court did not include Friday night as part of the possessory conservator's right of possession. The trial court's ruling was affirmed as not being an abuse of discretion. On the other hand, in *Corley v. Corley*,⁸⁷ where the trial court did not specify visitation times, the appellate court found an abuse of discretion. The appeals court indicated that arrangements for visitation should not be left to the discretion of the possessory conservator and the children without any right of interference from the managing conservator. The appellate court pointed out that placing

81. 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1976, no writ).

82. *Whitlow v. Mims*, 549 S.W.2d 45 (Tex. Civ. App.—Fort Worth 1977, no writ).

83. 546 S.W.2d 909 (Tex. Civ. App.—Austin 1977, no writ).

84. 546 S.W.2d 912 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

85. *Fergus v. Fergus*, 547 S.W.2d 51 (Tex. Civ. App.—Eastland 1977, no writ).

86. 555 S.W.2d 894 (Tex. Civ. App.—Tyler 1977, no writ).

87. 546 S.W.2d 884 (Tex. Civ. App.—Fort Worth 1977, no writ).

this kind of power in the hands of a child can be a burden rather than a privilege, especially where relations between the parents are hostile.

Normally appellate courts do not delve into the merits of a trial court's findings when the case involves a change of custody. *In re Anglin*⁸⁸ is an exception to this rule. In that case the father asserted that the trial court was wrong in changing custody back to the mother because a court should not consider a change in the non-custodial parent's situation as a "material and substantial" change in circumstances.⁸⁹ The trial court had ruled that while there had been only a change in degree in the father's situation, there had been such a change in the mother's circumstances that a change in managing conservatorship was warranted. This ruling was affirmed on the basis that a change in degree can be a material change. The appellate court also pointed out that while in this case the material change being considered actually involved both the custodial and non-custodial parents, ordinarily the "material change of conditions" would primarily concern an inquiry into the custodial parent's situation.

Absence of representation and timely notice of the hearing were the primary reasons for a reversal and remand in *Robinson v. Risinger*.⁹⁰ The court of civil appeals demonstrated, in a lengthy opinion, that lack of counsel caused the mother to be at such a disadvantage as to cast doubt on the validity of the evidence which had served as the basis for the trial court's findings, thereby necessitating a new trial in the "interest of justice."

In another case⁹¹ a change in managing conservatorship was reversed and the case dismissed due to lack of jurisdiction under section 17.05.⁹² In this case the mother had custody as the result of a Colorado divorce; a year later the father instituted suit in El Paso, Texas, seeking to modify the Colorado order and make him managing conservator. The father alleged in his petition that no other court had continuing jurisdiction, but then stated in his pleadings that the parties were divorced in Colorado. The court of civil appeals ruled that the statement in the pleadings put the question of continuing jurisdiction at issue, thereby requiring the trial court to obtain information from the Department of Public Welfare as to the identity of the court having continuing jurisdiction.⁹³ Without this information the question of jurisdiction could not be determined and the lower court judgment was dismissed without prejudice. *Slape v. Slape*⁹⁴ concerns another aspect of continuing jurisdiction, holding that the continuing jurisdiction of a divorce court can be destroyed by the subsequent remarriage, either ceremonial or, as alleged in this case, common law, of the divorcing parties.

When a jury is unable to reach a decision as to custody, the trial judge cannot enter custody orders on his own without violating the statutory right to trial by jury. If the parties reach a custody agreement on their own,

88. 542 S.W.2d 927 (Tex. Civ. App.—Dallas 1976, no writ).

89. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon 1975).

90. 548 S.W.2d 762 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

91. *Brown v. Brown*, 555 S.W.2d 784 (Tex. Civ. App.—El Paso 1977, no writ).

92. TEX. FAM. CODE ANN. § 17.05(a) (Vernon 1975).

93. Such inquiry was required pursuant to *id.* § 11.071 (Vernon Supp. 1978).

94. 553 S.W.2d 171 (Tex. Civ. App.—Amarillo 1977, no writ).

however, the court can approve the agreement, thereby obviating the need for a new jury trial.⁹⁵ Interlocutory orders are, of course, not appealable,⁹⁶ and unless the judgment awards attorney's fees, the fact that the jury found the amount to be reasonable does not require the court to award them.⁹⁷

V. SUPPORT

The courts, the legislature, and the public have all agreed that parents have a duty to support their children. Parents, however, do not always realize that the term "parents" includes mothers. Accordingly, when a father is appointed managing conservator and a mother is ordered to pay child support, there is likely to be an appeal. This situation occurred in *Glass v. O'Hearn*⁹⁸ where the trial court's judgment ordering the mother to pay support was affirmed. Although the duration of such support is generally limited to the child's minority, the Texas Family Code establishes special rules for handicapped children, making support obligations applicable for the entire life of the child.⁹⁹ This section is not viewed as having retroactive application, however, and, according to the Texas Supreme Court in *Red v. Red*,¹⁰⁰ a court does not have jurisdiction past the age of eighteen unless some provision for life-long support had been made at the time of divorce. The *Red* court went further than the particular facts required and indicated that a divorce court might not be able to order support payments, at the time of divorce, for a handicapped child who was already past the age of eighteen when the suit was instituted.¹⁰¹ If this interpretation is more than mere dictum, remedial legislation would seem to be necessary. The mere fact that a child is handicapped, however, is not sufficient to create a permanent duty of support under the Family Code. Rather, the duty is based on the child's inability to support himself after his eighteenth birthday. Absent such a showing, a court cannot order indefinite support.¹⁰² A trial court can, however, order relatively high support payments when there is an apparent special need of the minor children and the parent has the ability to pay.¹⁰³ Furthermore, a court must first order the beneficiary of a trust to make child support payments before the trustee can be ordered to make disbursements

95. *Taft v. Johnson*, 553 S.W.2d 408 (Tex. Civ. App.—El Paso 1977, no writ).

96. *Knipe v. Colpitts*, 551 S.W.2d 150 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Johnson v. Parish*, 547 S.W.2d 311 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

97. *Derbonne v. Derbonne*, 555 S.W.2d 507 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

98. 553 S.W.2d 15 (Tex. Civ. App.—Fort Worth 1977, no writ); *cf.* *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976) (affirms rule that mother has duty of support, but indicates that it must be spelled out to be effective). *See also* *Labowitz v. Labowitz*, 542 S.W.2d 922 (Tex. Civ. App.—Dallas 1976, no writ), where the mother was ordered to pay child support after a change in managing conservatorship.

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

100. 552 S.W.2d 90 (Tex. 1977).

101. *Id.* at 94.

102. In *Mial v. Mial*, 543 S.W.2d 736 (Tex. Civ. App.—El Paso 1976, no writ), support payments of \$200 per child per month were ordered for two hemophiliac children, and the settlement included a trust of \$2,750 for their benefit, but the court held that they were not entitled to support past the age of 18.

103. *Jackson v. Jackson*, 552 S.W.2d 630 (Tex. Civ. App.—Austin 1977, no writ).

for the child.¹⁰⁴ If the issue of child support has been reserved by the trial court for future determination, that judgment is interlocutory and not appealable.¹⁰⁵

Following the entry of a final child support order, the next problem which often arises is collection. One such case¹⁰⁶ concerning this problem involved a mother who brought two actions against the father for contempt for failure to pay court-ordered child support. On the first occasion the father was given only two days' notice of an order to appear and show cause why he should not be adjudged in contempt. Both section 14.09(c) of the Texas Family Code¹⁰⁷ and rule 308-A¹⁰⁸ of the Texas Rules of Civil Procedure indicate that an alleged defaulter in child support is allowed ten days' prior notice of such hearings. Accordingly, the appeals court discharged the contempt motion due to the lack of sufficient prior notice to the father. The court stated, however, that failure to give ten days' notice is not, in itself, a denial of due process. Rather, the court held that the facts and circumstances of each case determine whether such a denial occurred.¹⁰⁹ One month later the father was again ordered to appear. This time he was given only nine days' notice, but the appellate court affirmed the finding of contempt, reasoning that there was no evidence indicating that the lack of notice had an adverse effect upon his interest or his ability to assert it.¹¹⁰

In a related case the father asserted that the trial court did not have authority to enter a child support judgment during the pendency of an appeal. The court of civil appeals rejected this assertion because the decision which the father had appealed was an order of child support and was not appealable.¹¹¹ Accordingly, the court held that the trial court could enter its final order regarding child support.¹¹² A suspended contempt order conditioned upon failure to maintain payments is not self-executing, and a court may not place a father in jail, when he becomes delinquent, without a hearing.¹¹³

There are two facets of contempt proceedings, one coercive or civil and the other punitive or criminal. Therefore, when an individual in a contempt hearing invokes his constitutional right not to incriminate himself, a court may not base a penalty on the defendant's own testimony. *Ex parte Strin-*

104. *See In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1977, no writ) (interpreting TEX. FAM. CODE ANN. § 14.05(c) (Vernon 1975)).

105. *Campbell v. Campbell*, 550 S.W.2d 164 (Tex. Civ. App.—Austin 1977, no writ).

106. *Ex parte Sturdivant*, 544 S.W.2d 512 (Tex. Civ. App.—Texarkana 1976, no writ).

107. TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975).

108. TEX. R. CIV. P. 308-A.

109. 544 S.W.2d at 514.

110. *Ex parte Sturdivant*, 551 S.W.2d 144 (Tex. Civ. App.—Texarkana 1977, no writ). *See also Ex parte Trodler*, 554 S.W.2d 793 (Tex. Civ. App.—San Antonio 1977, no writ); *Ex parte Boyle*, 545 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). These appeals are based on the alleged violation of TEX. R. CIV. P. 308-A, but the courts' rulings are based on *Ex parte Cardwell*, 416 S.W.2d 382 (Tex. 1967), and *Ex parte Davis*, 161 Tex. 561, 344 S.W.2d 153 (1961).

111. *Sturdivant v. Sturdivant*, 551 S.W.2d 146 (Tex. Civ. App.—Texarkana 1977, writ dismissed).

112. *Id.* at 147.

113. *Ex parte Sauser*, 554 S.W.2d 239 (Tex. Civ. App.—Dallas 1977, no writ).

ger¹¹⁴ involved a situation in which the husband at the time of divorce was ordered to place \$11,000 into the wife's bank account in lieu of child support. The husband failed to deposit the money and was forced to testify at the contempt hearing that he did not have the money because he had spent it during one month "having a good time."¹¹⁵ The trial court then ordered Mr. Stringer confined for 150 days or until he purged himself by payment of the judgment. The appellate court pointed out that the contempt order would have been merely coercive if Mr. Stringer had been granted immunity from a punitive order, but since this was not done the contempt order was so prejudiced that it could not stand.¹¹⁶ Contempt, of course, is not the only remedy available to trial courts in attempting to enforce child support orders. Entering a money judgment¹¹⁷ and ordering a set-off against other property¹¹⁸ are alternatives available to enforce support orders.¹¹⁹

When a divorce decree requires that a child be named as beneficiary of an insurance policy, a failure by the insured to change the named beneficiary will not defeat the original decree. In *Wunsche v. Equitable Life Assurance Society*¹²⁰ the insured, pursuant to a divorce settlement, agreed to maintain life insurance, then in the name of his mother, for the benefit of his daughter. The name on the policy was never changed to comport with the agreement; however, the trial court's ruling that a constructive trust had been created for the benefit of the child was affirmed by the appellate court. In *Tomlinson v. Lackey*¹²¹ the El Paso court of civil appeals, relying on *Wunsche*, reached the same result in a similar factual situation.

The parent-child long-arm statute of the Texas Family Code¹²² was tested in *Zeisler v. Zeisler*.¹²³ In this case, pursuant to a 1971 Texas divorce decree, the mother, a resident of Georgia at the time of the suit, was receiving child support payments through the Dallas County support office from the husband who was then a resident of Florida. The mother was asking for an increase in support payments. The husband moved to dismiss on the basis of no personal jurisdiction. The trial court heard the merits before finding that it had no jurisdiction. The appellate court ruled that the due process test as stated in *International Shoe Co. v. Washington*¹²⁴ was satisfied since there were sufficient continuing contacts with Texas to establish personal jurisdiction. Accordingly, the decision was reversed and rendered in accordance with the trial court's findings.

The question of venue also continues to be contested even though the

114. 546 S.W.2d 837 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

115. *Id.* at 842.

116. For a different handling of an equally exasperating case see *Ex parte Preston*, 162 Tex. 379, 347 S.W.2d 938 (1961).

117. *Dabney v. Dabney*, 548 S.W.2d 98 (Tex. Civ. App.—Eastland 1977, no writ).

118. *Stephens v. Stephens*, 543 S.W.2d 686 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

119. *Id.*

120. 551 S.W.2d 84 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

121. 555 S.W.2d 810 (Tex. Civ. App.—El Paso 1977, no writ).

122. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1978).

123. 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd).

124. 326 U.S. 310 (1945). See also *O'Brien v. Lanpar*, 399 S.W.2d 340 (Tex. 1966).

Texas Family Code provides that venue lies in the county where the child resides in all suits affecting the parent-child relationship, unless there is a court with continuing jurisdiction. These principles were applied in *Adair v. Patterson*.¹²⁵

Trial courts are beginning to take into account the increased cost of living when modification of support payments is at issue. Upward modification was approved in both a private¹²⁶ and a foster care support case.¹²⁷ Upward modification is not automatic, however, because in situations where the former husband is unable to pay increased support the court is not likely to grant modification.¹²⁸ An interesting aspect of all three cases above is that the wife's earning capacity was considered as part of the evidence to determine ability to pay. Furthermore, the earning capacity of a second wife will be considered if the husband's inability to pay is in issue.

The dispute in *Boyd v. Boyd*¹²⁹ arose over the construction of a settlement agreement which gave the mother "sole and absolute" discretion in the use of the money for the support and maintenance of herself and the children. When the husband became managing conservator of two of the children, he withheld a portion of the monthly payment on the grounds that the money should be expended on the children. The trial court granted summary judgment on the amount of the arrearage, but failed to answer specifically the husband's request for a declaratory judgment concerning the children's right to a portion of the money. The court of civil appeals found that the trial court had not disposed of the declaratory judgment question, apparently holding that silence does not give consent, and dismissed the appeal pending a clear resolution of the question.

The difficulties of using the Uniform Reciprocal Enforcement of Support Act,¹³⁰ or URESA, another vehicle for obtaining enforcement of child support, are demonstrated by *Holmes v. Tibbs*.¹³¹ In *Holmes* the responding trial court attempted to raise the amount of support without a finding from the initiating state. The appellate court reversed, holding that the proof was insufficient because the only evidence presented to the court was the original court order for support payments of \$20 per week. The appellate court reasoned that the court-ordered support payments must be presumed sufficient without contrary evidence.

In *Solomon v. Solomon*¹³² jurisdiction rather than evidence was at issue. The court held that no court has continuing jurisdiction regarding pre-1974 support orders, and, therefore, the juvenile court had jurisdiction to enter the order. In another support case a cross action concerning alleged arrearages was denied on the ground of res judicata since the action had been

125. 551 S.W.2d 110 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

126. Lambert v. Lambert, 545 S.W.2d 542 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

127. Rodgers v. Texas Dep't of Pub. Welfare, 548 S.W.2d 798 (Tex. Civ. App.—Waco 1977, no writ).

128. Watley v. Watley, 542 S.W.2d 202 (Tex. Civ. App.—El Paso 1976, no writ).

129. 545 S.W.2d 520 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

130. TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975).

131. 542 S.W.2d 487 (Tex. Civ. App.—Corpus Christi 1976, no writ).

132. 546 S.W.2d 129 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

previously litigated under the URESA provisions.¹³³ The case may have been wrongly decided in 1974, but there was a final judgment and no appeal was taken therefrom, so that this action could only be construed as a collateral attack on the prior judgment; consequently, the trial court was without jurisdiction.

VI. TERMINATION AND ADOPTION

In matters concerning the welfare of children, the state has the power to intervene whenever necessary. This power, however, is not unlimited, and proceedings to terminate the parent-child relationship must comport with due process. The Texas Supreme Court in *Goffney v. Lowry*¹³⁴ ruled that an indigent mother did not have to exhaust all potential sources of charity in order to prove inability to pay the costs of an appeal; she was, therefore, granted a mandamus allowing her to appeal without securing costs. In the case of *In re R.E.W.*¹³⁵ a trial court's termination of the parent-child relationship was reversed and remanded despite extensive testimony; the evidence was not sufficiently convincing to show that the mother had knowingly placed or allowed her child to remain in an environment which endangered the child.¹³⁶ The court of civil appeals went on to state that an evidentiary standard of "beyond a reasonable doubt" would be too stringent on remand, since that standard might be detrimental to the child, the party most needing protection. The court in *Higgins v. Dallas County Child Welfare Unit*¹³⁷ agreed with the court in *R.E.W.* that the evidentiary standard of the Texas Family Code was not unconstitutional, and further held that circumstantial evidence may be sufficient to establish child abuse. The court cautioned, however, that each parent should be judged as an individual in a child abuse case; thus, the husband and wife should not be joined together in the special issues submitted to the jury. *In re S.H.*,¹³⁸ another termination proceeding, was reversed and remanded because the petition merely alleged that termination would be in the best interest of the child and did not specify any acts supporting the judgment of termination.¹³⁹

The state did prevail on appeal in a few termination cases. The trial court's termination in *H.W.J. v. State Department of Public Welfare*¹⁴⁰ was affirmed based on the ground that imprisonment resulting from a father's conscious act, and having the effect of placing or leaving his children in dangerous circumstances, is conduct justifying the termination of parental rights. The court underscored its holding that mere imprisonment was not the basis for the decision, since that cannot be construed as intentional

133. *Howard v. Brizendine*, 546 S.W.2d 136 (Tex. Civ. App.—Beaumont 1977, no writ).

134. 554 S.W.2d 157 (Tex. 1976).

135. 545 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

136. The state was relying on the provisions for involuntary termination of parental rights. See TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1978).

137. 544 S.W.2d 745 (Tex. Civ. App.—Dallas 1976, no writ).

138. 548 S.W.2d 804 (Tex. Civ. App.—Amarillo 1977, no writ).

139. On the other hand, *Whiteside v. Dresser*, 543 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.), was reversed and remanded because the jury was asked only to find on the father's actions and not also on the best interest of the child. Both elements must be found against the parent in order to terminate parental rights. See Solender, *supra* note 1, at 150.

140. 543 S.W.2d 9 (Tex. Civ. App.—Texarkana 1976, no writ).

abandonment. In another case the trial court, while not terminating the mother's parental rights, did deny the return of the children and chose to appoint Child Welfare as temporary managing conservator. The appeals court affirmed,¹⁴¹ holding that the ruling was not inconsistent since a trial court has wide discretion in child custody cases.

Two recent cases are important for their impact on the requirements of notice to fathers of illegitimate children. In the first case, *T.D.E. v Christian Child Help Foundation*,¹⁴² an especially interesting situation was presented in connection with the termination of a father's parental rights after the child's mother had voluntarily placed the child with an adoption agency. The agency, seeking to terminate the rights of both parents, was met with opposition from the father who had filed to legitimate the child. The agency opposed legitimation and alleged that the father had engaged in conduct which would endanger the child. The father contended that he did not know that the child's mother had become pregnant until he was notified of the suit to terminate. He did admit, however, that he had had relations with the child's mother, had left his wife, had lived with the child's mother, and had then abandoned her to return to his wife. A psychiatrist testified that a mother might feel anxious and rejected in these circumstances and that she might not take proper care of herself, which could result in harm to the fetus. The jury found against the father and the appellate court affirmed, stating that there was evidence which showed that a fetus may be endangered by the father's conduct when such conduct causes emotional stress to the mother during pregnancy. This holding is unusual since the conduct, in this case an act of abandonment, was knowingly engaged in only with regard to the mother. It would seem impossible to engage voluntarily in conduct with regard to some thing or person whose existence is unknown, that is, a fetus. If this reasoning stands, the right of a father to notice under *Stanley v. Illinois*¹⁴³ will be seriously eroded. The protections of *Stanley* will not be eroded by failure to serve process, but rather by a mother's unilateral decision not to disclose her pregnancy, thereby causing the father inadvertently to act contrary to his own child's interests.

The court in *Rogers v. Lowry*¹⁴⁴ presented a more conventional view of the *Stanley* notice requirements, holding that a biological father was entitled to notice even in the case of a stepfather's adoption of an illegitimate child. This view was adopted even though the biological father had not asserted any rights to the child. The court did not accept the mother's contention that no notice was needed, thereby rejecting her assertion that no relationship needed to be terminated since such a father was not a parent as defined by the Family Code.¹⁴⁵ Assuming, however, that the mother had concealed the

141. *Evans v. Tarrant County Child Welfare Unit*, 550 S.W.2d 144 (Tex. Civ. App.—Fort Worth 1977, no writ).

142. 550 S.W.2d 101 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

143. 405 U.S. 645 (1972). *Stanley* recognizes that all fathers, even those of illegitimate children, have an interest in their children which entitles them to notice before their rights can be severed.

144. 546 S.W.2d 881 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

145. TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975).

child's existence from the biological father, the notice protections would be of little use under the ruling in *T.D.E.* because the biological father could be held to have voluntarily abandoned the fetus. Notice to a biological father should do more than foreclose his rights automatically.

Although the two-step adoption process of the Texas Family Code,¹⁴⁶ as well as provisions of the Texas Penal Code,¹⁴⁷ have tended to discourage private placements, there is some litigation in the area. For example, litigation has arisen in the situation where the mother changes her mind while an attorney is serving as an intermediary. *Myers v. Patton*¹⁴⁸ is one such case where the mother after birth of the child, but while still in the hospital, voluntarily signed an affidavit of relinquishment of her child and then changed her mind. The trial court terminated parental rights on the basis of abandonment and further found that there was no undue influence on the part of the attorney, explaining that the only pressure came from the mother herself who felt she lacked the ability to care for and support the child. The mother also contested the constitutionality of the provisions in the Family Code which permit the waiving of process prior to the filing of suit.¹⁴⁹ The appellate court, however, dismissed this argument on the basis of rulings by the United States Supreme Court¹⁵⁰ and found that the mother had voluntarily, intelligently, and knowingly waived her rights with full awareness of the legal consequences.

Problems are generated when a mother desires to have her child returned to her after she had left him in a stable environment for an extended period of time because she was unable to care for him. Such a situation was presented to the court in *In re E.S.M.*;¹⁵¹ the couple who had cared for the child for over two years brought a suit to terminate the parent-child relationship so that they might adopt the child. The trial court ruled that the parental rights should be terminated, but apparently had difficulty writing a judgment which conformed to the requirements of the Family Code. After the clerical errors had been corrected, however, the appeals court affirmed on grounds that there was sufficient evidence to conclude that the mother had engaged in conduct which endangered the child and that termination was in the child's best interest. The court acknowledged the strong presumption that a child's best interest is served by keeping him in the custody of the natural parents, but found that the presumption had been overcome. A similar but more difficult problem arose in *Reed v. Wormley*¹⁵² where the paternal grandparents sought termination of the rights of the mother and the biological father, their son, and appointment of themselves as managing conservators. As in the preceding case, the court found sufficient evidence that the mother had allowed the child to remain in dangerous surroundings and that

146. *Id.* § 16.03 (Vernon Supp. 1978).

147. TEX. PEN. CODE ANN. § 25.06 (Vernon Supp. 1978).

148. 543 S.W.2d 22 (Tex. Civ. App.—Texarkana 1976, no writ).

149. TEX. FAM. CODE ANN. § 15.03 (Vernon 1975).

150. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

151. 550 S.W.2d 749 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

152. 554 S.W.2d 254 (Tex. Civ. App.—Eastland 1977, no writ).

the child's best interest would be served by terminating the parent-child relationship. It is interesting to note that the child's father was a friendly witness for his parents, although his own rights were also terminated.

Another case¹⁵³ involving grandparents was based on an entirely different fact situation. In this case the maternal grandparents sought to have the father's parental rights terminated after he had stabbed the children's mother to death. The court found that the contradictory evidence as to whether or not the stabbing occurred in the children's presence was immaterial since the children feared blood and knives, and held that the father had engaged in conduct which endangered the children's physical and emotional well-being. In view of the unusual facts in this case, the appeals court apparently did not scrutinize this proceeding as strictly as in the two cases just discussed; the appellate court accepted testimony of relatives and friends as to the psychological condition of the children, rather than requiring expert testimony. Furthermore, the court was willing to presume the existence of a lower court finding that termination was in the best interest of the children rather than requiring such a conclusion to be explicitly stated as did the court in *Whiteside v. Dresser*.¹⁵⁴

153. *In re B.J.B.*, 546 S.W.2d 674 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

154. 543 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); see note 139 *supra*.

