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# FAMILY LAW: PARENT AND CHILD

by

*Ellen K. Solender\**

## I. LEGISLATIVE CHANGES

The Texas Family Code is integrated and complex and was enacted by comprehensive statutes. Title 2, Parent and Child, was enacted as a unit in 1973.<sup>1</sup> The overall plan of the Code appears to meet the general needs of parents and children, but in several cases provisions of the Code and the relationships between various subsections have been found to be unconstitutional, unclear, or unfair. The legislature has, in each session since 1973, modified portions of the Code that seemed most in need of improvement. The recent session was no exception. There were a number of minor changes, but two areas were deemed especially important: continuing jurisdiction and procedures for protecting a child in an emergency. The first change was in response to questions concerning continuing exclusive jurisdiction raised by various family law attorneys and resulted in three separate acts;<sup>2</sup> the second change was in response to a federal court's finding.<sup>3</sup>

The primary purpose of the various amendments to section 11.05, Continuing Jurisdiction,<sup>4</sup> is to carve out some exceptions to the inflexible rule of continuing jurisdiction in suits affecting the parent-child relationship. Unfortunately, the amendments were not introduced as a package, but instead were written and passed separately without any attempt at reconciliation of numbering or wording. Nevertheless, the amendments do not appear to conflict, so that all the amendments should be capable of being harmonized.<sup>5</sup> Two separate subsection (e)'s were enacted, one providing that no court has continuing exclusive jurisdiction over a child until it has entered a final order<sup>6</sup> and the other providing for the destruction of a

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1. 1973 Tex. Gen. Laws, ch. 543, § 1, at 1411.

2. S.B. 143, S.B. 768, and H.B. 1493, 66th Tex. Legis. Sess. (1979).

3. *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd and dismissed sub nom. Moore v. Sims*, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

4. TEX. FAM. CODE ANN. § 11.05 (Vernon Supp. 1980).

5. See the Code Construction Act, which provides that "if amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each." TEX. REV. CIV. STAT. ANN. art. 5429b—2, § 3.05(b) (Vernon Supp. 1980).

6. (e) A court does not acquire continuing, exclusive jurisdiction over the matters provided for under this subtitle in connection with the child before the entry of a final decree. A voluntary or involuntary dismissal of a suit affecting the parent-child relationship or the entry of a decree by another court having dominant jurisdiction of the suit terminates all jurisdiction of the court. Unless a final decree has been entered by a court of continuing, exclusive jurisdiction, a subsequent suit shall be commenced as an original proceeding.

court's continuing jurisdiction upon the remarriage of the parents of a child.<sup>7</sup> Since these two sections involve entirely different subject matter, it is obvious that there is no conflict, and the only difficulty that can arise from the duplication of the same subsection letter should be in citation. There is a similar problem in connection with subsection (a), because there are now two of these subdivisions as well. One subsection cross-references to portions of sections 11.05, 11.052 and 11.06,<sup>8</sup> while the other includes some of those references but adds cross-references to sections 17.05 and 17.06.<sup>9</sup> This confusion can be eliminated by the drafting of a master version of section 11.05(a) that incorporates all the cross-references into one section.<sup>10</sup>

The problem of continuing exclusive jurisdiction when the child and the managing conservator have left Texas and have lived in another state for more than six months is addressed in newly created subsection 11.052, which provides that unless there is a written agreement by the parties to continue to be supervised by the original court, that court loses the power to modify its original decree.<sup>11</sup> In emergencies it may be necessary for a

TEX. FAM. CODE ANN. § 11.05(e) (Vernon Supp. 1980).

7. (e) A court acquires jurisdiction of a suit affecting the parent-child relationship without a transfer under Section 11.06 of this code, even though another court has continuing jurisdiction over the child, if the parents of the child have remarried after the dissolution of a previous marriage between the parents and file in the court acquiring jurisdiction a suit for the dissolution of their subsequent marriage combined with a suit affecting the parent-child relationship concerning the child.

TEX. FAM. CODE ANN. § 11.05(e) (Vernon Supp. 1980).

8. "(a) Except as provided in Subsections (b), (c), (d), and (e) of this section and in Section 11.052 of this code, when a court acquires jurisdiction . . . [n]o other court . . . has jurisdiction . . . except on transfer as provided in Section 11.06 of this code." TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1980).

9. "(a) Except as provided in Subsections (b), (c), (d), and (e) of this section and Section 17.05 of this code, when a court acquires jurisdiction . . . no other court has jurisdiction . . . except on transfer as provided in Section 11.06 or 17.06 of this code." TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1980).

10. Sec. 11.05. CONTINUING JURISDICTION. (a) Except as provided in Subsections (b), (c), (d), and (e) . . . of this section and in Section 11.052 . . . and Section 17.05 of this Code, when a court acquires continuing jurisdiction of a suit affecting the parent-child relationship, that court retains continuing jurisdiction of all parties *and* . . . matters provided for under this subtitle in connection with the child. No other court of this state . . . has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in section 11.06 or 17.06 . . . of this code.

This version of § 11.05(a) was written by Professor Eugene Smith of the University of Houston Law School and reproduced in 79-3 STATE B. SEC. REP. FAM. L. 25 (1979).

11. (a) Except on the written agreement of all the parties, a court may not exercise its continuing jurisdiction to modify:

(1) the appointment of a managing conservator if the managing conservator and the child have established and continued to maintain their principal residence in another state for more than six months unless the action was filed and pending before the six-month period; or

(2) any part of a decree if all of the parties and the child have established and continue to maintain their principal residence outside this state.

(b) This section does not affect the power of the court to enforce and enter a judgment on its decree.

TEX. FAM. CODE ANN. § 11.052 (Vernon Supp. 1980).

court in the county where the child is present to issue temporary orders for the protection of the child. Section 17.05<sup>12</sup> was added to the Code for this purpose, and section 17.06<sup>13</sup> provides for the return of jurisdiction to the original court of exclusive jurisdiction after the crisis has passed. All of these exceptions are cross-referenced into section 11.05 as explained above.

*Sims v. State Department of Public Welfare*<sup>14</sup> was clearly in the minds of the legislators when they totally revised chapter 17, changing its name to "Emergency Procedures in Suit by Governmental Entity" from "Suit for Protection of Child in Emergency." The change responds to the criticisms of the *Sims* court and should, if followed in practice, prevent a repetition of the events that gave rise to that litigation.<sup>15</sup> The revised statute provides that unless certain specified conditions are met, a child should not be taken into custody without a court order.<sup>16</sup> The court order must be based on a sworn petition or affidavit and may not extend more than ten days.<sup>17</sup> The requirement of at least an ex parte hearing on the first working day that a court is available solves the problem of children lingering in the custody of the state for long periods of time without any hearing. If no court is avail-

12. (a) A suit affecting the parent-child relationship brought by a governmental entity seeking conservatorship or termination and a temporary restraining order or attachment of a child under this chapter may be filed in any court with jurisdiction to hear suits affecting the parent-child relationship in the county in which the child is found.

(b) Immediately after the issuance of such temporary orders as are necessary for the protection of the child pending a final hearing, a governmental entity shall determine the court of continuing jurisdiction and shall institute any transfers as are necessary under Section 17.06 or 11.06 of this code.

*Id.* § 17.05.

13. (a) Immediately after entry of temporary orders necessary for the protection of the child pending a final hearing, the court on the motion of a party shall transfer to the court of continuing jurisdiction, if there is a court of continuing jurisdiction, or if there is no court of continuing jurisdiction, to the court having venue of the suit affecting the parent-child relationship under Section 11.04 of this code. Transfers shall be made under the procedures provided by Section 11.06 of this code.

(b) Temporary orders issued under this chapter are valid and enforceable until properly superseded by a court with jurisdiction to do so.

(c) Any court to which the suit has been transferred may enforce by contempt or otherwise any temporary order properly issued under this chapter.

*Id.* § 17.06.

14. 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd and dismissed sub nom.* Moore v. Sims, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). The decision to reverse was 5-4 and was based on a finding that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), did apply, and that it was therefore unnecessary to reach the merits. See also Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 33 Sw. L.J. 155, 181 (1979).

15. In that case the children were held in custody without a hearing on the merits for 42 days. 438 F. Supp. at 1184. One concern of the *Sims* court, the preponderance of the evidence standard, 438 F. Supp. at 1194, was not addressed by the legislature, and the standard remains unchanged. "The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases." TEX. FAM. CODE ANN. § 11.15 (Vernon 1975). The recent holding in *Addington v. Texas*, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), that the standard of proof for involuntary commitment to state mental hospitals must be clear and convincing, might be extended to require such a standard for proceedings in which the state is attempting to take custody from parents.

16. TEX. FAM. CODE ANN. § 17.03 (Vernon Supp. 1980).

17. *Id.* § 17.02.

able after three working days, the child is to be returned to whoever is entitled to possession.<sup>18</sup> In any event, a full adversary hearing is required no later than ten days from the time the child has been taken into possession by an agency of the state.<sup>19</sup> In addition to all the revisions of chapter 17, chapter 11 was amended to provide for the appointment of an attorney ad litem for the child as soon as practicable whenever the state is seeking to terminate the parent-child relationship or to obtain custody of the child.<sup>20</sup> There is a provision for payment of this attorney by the parents when the parents are not indigent, but no payment is mandated when the parents are indigent.<sup>21</sup>

This concern for children "lost" in the system is evidenced by the addition this session of a new chapter to the Code.<sup>22</sup> This chapter, entitled Review of Placement of Children Under the Care of the Department of Human Resources, is intended to provide a check on the department. It applies to children committed to its care either voluntarily<sup>23</sup> or involuntarily.<sup>24</sup> The chapter provides, in essence, that hearings concerning the placement of the child must be held approximately every six months until there is some permanent disposition of the child.<sup>25</sup> If either the court or the particular division of the department involved is conscientious, there should be no problem with keeping track of the children under the department's jurisdiction. This section should be helpful in focusing on the need to place children permanently as soon as possible. In areas in which court supervision is lax and the department is understaffed, however, the children in custody will remain as "lost" as ever because there is no outside triggering mechanism for the periodic review.

The legislature made revisions or additions in three other areas of the Code that indicate that Texans are in tune with current trends in family law. A major addition was title 4, entitled Protection of the Family, which concerns the problem of violence in the family.<sup>26</sup> Secondly, provision was made for the child born alive as the result of an abortion to be placed in the custody of the Department of Human Resources and for parental rights to be terminated when appropriate.<sup>27</sup> Thirdly, the legislature in a

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18. *Id.* § 17.03(c).

19. *Id.* § 17.04.

20. *Id.* § 11.10(d).

21. *Id.* § 11.10(e).

22. *Id.* §§ 18.01-.06.

23. *Id.* § 18.02.

24. *Id.* § 18.01.

25. *Id.* §§ 18.01, .06.

26. *Id.* §§ 71.01-.19. Although this chapter has been in effect since Sept. 1, 1979, it has not been tested by the courts, nor is there a record of its implementation. There may be problems relating to due process if the protective orders are viewed as self-executing, because a hearing as to the fact of a violation of a protective order occurring outside the presence of the court would seem to be a minimal constitutional requirement. Section 71.16 provides for a warning that violation of an ex parte order may be punished as contempt of court by a fine and jail term and that a violation after a hearing is a criminal offense.

27. *Id.* §§ 12.05, 15.022, 17.011.

half-hearted way recognized the concept of joint custody.<sup>28</sup> This recognition applies only to agreed arrangements,<sup>29</sup> but since joint custody is not prohibited as to court appointed conservators,<sup>30</sup> it may be that in the proper case, a court will order a joint managing conservatorship for a Texas child.

## II. UNITED STATES SUPREME COURT DECISIONS

During the past year the United States Supreme Court has continued to try to resolve the question of the relative equality of the illegitimate child, the child's mother, and the child's father with respect to each other and to the rest of society. It appears to be constitutional to abolish the concept of illegitimacy altogether, but the problem of proof as to fatherhood would remain. More important, social policy still favors the regularization of relationships. The Supreme Court's decision in *Parham v. Hughes*<sup>31</sup> is based on both the problem of proof and the "condemnation of irresponsible liaisons beyond the bonds of marriage."<sup>32</sup> The decision upheld the Georgia wrongful death statute that allows the mother of an illegitimate child to sue for the child's negligent death, but bars the father's action unless he has taken appropriate steps to legitimate the child.<sup>33</sup> The Court said that when the sexes are not similarly situated, a statutory classification based on this dissimilarity may be valid. Stressing the importance of maintaining an orderly and fair system of property distribution after death, the Court distinguished this decision from *Weber v. Aetna Casualty & Surety Co.*,<sup>34</sup> on the basis that Parham could have changed his status as a father, whereas in *Weber*, the child could not legitimate himself.

Texas, which has recently reformed its Probate Code,<sup>35</sup> has a wrongful death statute<sup>36</sup> that would, at a minimum, conform to the requirements of the Georgia statute and should not be affected by this decision. In fact, the recent changes in the Probate Code appear to more than meet the mandate

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28. See M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT (1978); *Child Custody: A Symposium*, 53 CONN. B.J. 269 (1979).

29. TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1980).

30. *Id.* § 14.01 (Vernon 1975).

31. 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979). Justice Stewart wrote the opinion of the Court, Justice Powell concurred, and Justice White wrote for the four dissenters.

32. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

33. GA. CODE ANN. § 105-1307 (1968).

34. 406 U.S. 164 (1972). See also *Califano v. Boles*, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979), *rev'g* 464 F. Supp. 408 (W.D. Tex. 1978), which held that the denial of a mother's insurance benefits to the mother of an illegitimate child who never was married to the deceased wage earner while granting the benefits to the widow or divorced wife of the wage earner was not a denial of equal protection. The Court held that the classifications bore a rational relationship to the purposes of the Social Security Act and did not discriminate against illegitimate children. The Court pointed out that illegitimate children can receive children's insurance benefits even though their unmarried mothers cannot receive the mother's insurance benefits. The discrimination is therefore not focused on the child's needs.

35. TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1980).

36. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952).

of *Lalli v. Lalli*,<sup>37</sup> in which the Supreme Court held constitutional a New York statute that limited proof of paternity for inheritance purposes to court adjudication during the father's lifetime. The new provisions in the Texas Probate Code include as bases for determining heirship, both court adjudicated legitimation and voluntary legitimation executed in accordance with the Family Code.<sup>38</sup>

The Texas Family Code provisions concerning court recognition of a father's petition to legitimate his child<sup>39</sup> may be found unconstitutional as a denial of equal protection based on the reasoning of *Caban v. Mohammed*.<sup>40</sup> In that case the Court held unconstitutional a New York statute that permitted the natural mother to block the natural father's adoption of his illegitimate child. The Texas Supreme Court struggled with this problem in 1976 in *In re K*.<sup>41</sup> The facts of *Caban* could hardly be more different from those of *In re K*. In *Caban* the mother and father of the two children had lived together for approximately five years, and both parents contributed to the support of the family. The mother broke up the home by taking the children with her in order to live with another man, whom she subsequently married. The father's interest in his children continued, and, when he had the opportunity, he obtained their custody through self-help. This action triggered the legal proceedings that resulted in a court's granting the mother and her husband the right to adopt the children. The Texas case, on the other hand, concerned the classic circumstance of an illegitimate infant whose parents had evidenced no concern for each other and whose father, prior to his notification of an impending hearing on termination of parental rights, had indicated no interest in his child. The father in this particular case was in the penitentiary, so he could not have

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37. 439 U.S. 259 (1978); see Note, *Equal Protection and the Inheritance Rights of the Illegitimate Child: Lalli v. Lalli*, 33 Sw. L.J. 883 (1979). See also Solender, *supra* note 14, at 156-57.

38. Inheritance Rights of Legitimated Children

(a) Maternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(b) Paternal Inheritance. For the purpose of inheritance, 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 or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1980) (footnote omitted). The Family Code provisions referred to in the new Probate Code section are §§ 13.21-.24.

39. TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1980). See specifically § 13.21(b)(3), allowing the court to designate the father as a parent if "the mother or the managing conservator, if any, has consented to the decree."

40. 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

41. 535 S.W.2d 168 (Tex. 1976). A recent case, *In re T.E.T.*, 583 S.W.2d 484 (Tex. Civ. App.—Waco 1979, writ filed), involving a 14-year-old mother and an 18-year-old father, followed the reasoning of *In re K* and denied the father's petition for legitimation.

maintained physical custody even if he had been permitted to legitimate the child. The Texas case is especially interesting because it is the type of fact situation that the dissent in *Caban* envisioned and that caused Justice Stevens to express his concern that the holding should be viewed narrowly.<sup>42</sup>

The majority opinion in *Caban* is based on the concept that gender-based distinctions must serve governmental objectives and must be substantially related to those objectives unless there is a universal difference between the sexes that compels the distinction. The majority rejected the proposition that unwed fathers are invariably less qualified as parents than are unwed mothers and so found that there was a denial of equal protection. The Court indicated, however, that there may be some different problems relating to the adoption of newborns, and refrained from finding that statutes specifically designed to expedite the placement and adoption of newborns would constitute a denial of equal protection even if the statutes appear to distinguish between fathers and mothers.<sup>43</sup>

The Texas statutory scheme is based on a two-step procedure. The rights of the natural parent are terminated, and then the child may be considered for adoption.<sup>44</sup> Parents may voluntarily relinquish their child,<sup>45</sup> or their relationship may be involuntarily terminated for cause.<sup>46</sup> While a mother is always a parent, an unwed father is not a parent unless he has been adjudicated a parent,<sup>47</sup> and it is at this point that either the court's or the mother's consent is required.<sup>48</sup> If the mother or the court refuses to permit a father to legitimate his child and thus to become a parent, there would be no need to find grounds for termination of the parent-child relationship. Under the statute, a father-child relationship is of no legal consequence other than the constitutional support obligation<sup>49</sup> and, therefore, the nonparent father would have no special interest in his child.

It would be possible to amend the present Texas statute to be gender-neutral in relation to legitimation, by omitting from section 13.21, Voluntary Legitimation, the need for consent of the mother or of anyone else and by establishing the legitimation proceeding as one concerned with proof of paternity rather than fitness. Then, section 15.02 on termination of parental rights should be carefully examined to be sure it includes as grounds for termination everything necessary to protect the child from an unfit parent.

In two cases the United States Supreme Court attempted to minimize state intervention while recognizing a possible conflict of interests between parent and child. In *Parham v. J.R.*,<sup>50</sup> a case involving the mental health laws of Georgia that permit the parents or legal guardians of minors vol-

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42. 99 S. Ct. 1760, 1780-81, 60 L. Ed. 2d 297, 321-22 (1979).

43. *Id.* at 1768 n.11, 60 L. Ed. 2d at 307 n.11.

44. TEX. FAM. CODE ANN. § 16.03 (Vernon 1975 & Supp. 1980).

45. *Id.* § 15.01 (Vernon 1975).

46. *Id.* § 15.02 (Vernon Supp. 1980).

47. *Id.* § 11.01(3) (Vernon 1975).

48. See note 39 *supra* and accompanying text.

49. See *Gomez v. Perez*, 409 U.S. 535 (1973).

50. 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).



untarily to commit the minors to state mental hospitals, the Court balanced the parents' right to do what they believe is in the best interest of their child against the possibility of an error that would seriously interfere with a child's liberty interest. The Court found that there must be some neutral check on parents' rights to commit a child to a mental hospital and held that an admitting physician is capable of protecting the child from an unnecessary commitment.<sup>51</sup> The Court did not believe that requiring a court hearing would significantly reduce possible mistakes. The Court also assumed that when the state has custody of a child, the state acts in good faith and there is no greater need for judicial intervention than when a parent is asking for commitment.<sup>52</sup>

The Court in *Bellotti v. Baird*<sup>53</sup> found unconstitutional the Massachusetts statute regulating the abortions of minors. The Court tried to give some guidance as to what type of statute would be constitutional, but since the Court's policy is to refrain from interfering directly between parent and child, the opinion does not reflect a clear direction. The Court is concerned that the mature minor should not be prevented from making her own decisions, and while the Court does not provide a definition of mature minor, it is clear that age is not the sole factor.<sup>54</sup> The Court held that a minor found to be mature has a right to an abortion without notification of her parents.<sup>55</sup> The Court's position regarding ordinary minors is less clear, except that parents must be prevented from having an absolute veto. Since Texas does not yet have a statute with this type of requirement, the legislature may wait until there is further clarification before amending the section of the Family Code pertaining to medical consent.<sup>56</sup> There are no criminal penalties for violating this section; the remedy must be a civil suit.

### III. STATUS

The question of the free admission of illegal alien children to Texas public schools still has not been resolved. There are, as yet, few reported cases, and the two that have been reported are in opposition to each other. The most recent, *Doe v. Plyler*,<sup>57</sup> decided by federal district Judge William Wayne Justice, held that it was an unconstitutional denial of equal protection to require that undocumented children pay \$1,000 in tuition in order to attend school in the Tyler Independent School District. The court did not believe that the alleged legislative intent of saving money was served by denying free education to undocumented children, because in the long run a large segment of under-educated people will result in higher welfare

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51. *Id.* at 2506-07, 61 L. Ed. 2d at 121-22.

52. *Id.* at 2512, 61 L. Ed. 2d at 128.

53. 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

54. *Id.* at 3043-52, 61 L. Ed. 2d at 807-18.

55. *Id.* at 3051, 61 L. Ed. 2d at 816.

56. TEX. FAM. CODE ANN. § 35.03 (Vernon 1975); see particularly subsection (a)(4), which permits an unmarried pregnant minor to consent to any medical treatment related to her pregnancy except abortion.

57. 458 F. Supp. 569 (E.D. Tex. 1978).

costs and, therefore, greater expense to the state. In equal protection cases the treatment of aliens does not require the test of "strict scrutiny" in all situations;<sup>58</sup> there need be only a rational relationship between the treatment of the aliens and the legislation in question. The *Plyler* court did not find a rational relationship and held that undocumented children should not be subjected to different treatment from lawful aliens.<sup>59</sup>

The concern of the courts for the education and well-being of minors is further demonstrated by the case of *Doe v. Marshall*,<sup>60</sup> in which a federal court had to intervene to enable an emotionally troubled student to be eligible to play football over the objection of the state high school athletic regulatory body. The student brought an action under the federal statute relating to rights of the handicapped.<sup>61</sup> The court, in granting the injunction, noted that these were very particular circumstances and that it was necessary for the mental health of the student that he play on the team in question.<sup>62</sup> Football is not usually perceived as being a necessary activity, as was demonstrated by the case of *Lincoln v. Mid-Cities Pee Wee Football Association*.<sup>63</sup> That case involved an eight-year-old girl who wanted to play tackle football in the Mid-Cities Pee Wee league. The association decided to limit participation in the existing league to boys and to form a new league for girls. When only eight girls signed up to play, the new league was dropped. Plaintiff, relying on the Texas Constitution,<sup>64</sup> wanted both a temporary and a permanent injunction preventing the association from excluding her or, alternatively, enjoining the association from the free use of the public school facilities. The trial court, relying on precedent,<sup>65</sup> denied the temporary injunction, and the appeals court affirmed. The appeals court construed the Texas equal rights amendment<sup>66</sup> as not covering purely private conduct. Sufficient state involvement is required so as to make it unreasonable to conclude that the activity is purely private. This means that private conduct could be regulated if it is shown that it was "encouraged by, enabled by, or closely interrelated in function with state action."<sup>67</sup>

The difficulties of being a parent of a retarded child were poignantly illustrated by the case of *Little v. Little*.<sup>68</sup> In *Little* a normal brother who

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58. See e.g., *Ambach v. Norwick*, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978).

59. 458 F. Supp. at 586-93. But see *Hernandez v. Houston Independent School Dist.*, 558 S.W.2d 121, 125 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *Solender*, *supra* note 14, at 159.

60. 459 F. Supp. 1190 (S.D. Tex. 1978).

61. 29 U.S.C. § 794 (1976).

62. 459 F. Supp. at 1192.

63. 576 S.W.2d 922 (Tex. Civ. App.—Fort Worth 1979, no writ).

64. See TEX. CONST. art. I, § 3a (Texas equal rights amendment).

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

66. TEX. CONST. art. I, § 3a, which provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." (Emphasis added.)

67. 576 S.W.2d at 926.

68. 576 S.W.2d 493 (Tex. Civ. App.—San Antonio 1979, no writ).

was suffering from endstage renal disease needed a kidney transplant from the incompetent child. Such a transplant is not usually beneficial to the donor, although it is not necessarily harmful. The court found no statutory basis for authorizing the guardian to consent to such a transplant.<sup>69</sup> Texas does not recognize the substituted judgment doctrine, which would allow a guardian to make the decision on the assumption that the incompetent would have made the same decision as the guardian had the incompetent been normal. The court decided in this case that the transplant would be psychologically beneficial to the incompetent because she would have increased self-esteem and enhanced status that would probably lead to greater personal happiness as well as not losing a beloved brother.<sup>70</sup> In another case,<sup>71</sup> involving an injury to a mentally retarded child, the court found against the parents, relying on the Texas Education Code,<sup>72</sup> which provides that teachers are not personally liable for events that occur within the scope of their duties while exercising their discretion, unless the teacher used excessive force.

The Texas courts do recognize, however, that parents are concerned for their children and are permitting recovery for the parents' mental anguish resulting from injury to their children. In *Covington v. Estate of Foster*<sup>73</sup> the court reversed and remanded a personal injury case because the trial court excluded all evidence of the suffering of the parents as a result of their minor child's injuries. The child was in the car with her parents at the time of the accident. While all three were injured, the extensive injuries to the child caused the greater suffering of the parents. The court held that it is not unforeseeable as a matter of law: that driving the wrong way on a divided highway would cause a head-on collision with another vehicle; that injury to the occupants, including minor children, may occur; and that the children's parents would suffer mental anguish as a result.<sup>74</sup>

Not only is a parent's mental anguish questioned in a personal injury case, but that parent's character may sometimes be put in issue. In *Roth v. Law*<sup>75</sup> appellants had attempted to show that a child's eye injury might have been caused by child abuse instead of the automobile accident that was the subject of the suit. Their contention was based on a prior custody suit. The appellate court sustained the trial court in finding that rightful custody was irrelevant to the personal injury suit. The fact that such matters were sought to be introduced in a trial totally unrelated to child abuse illustrates the importance of establishing a mechanism for keeping the records of the Texas Department of Human Resources accurate and private.<sup>76</sup> This problem was further highlighted in *S.P. v. Dallas County Child*

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69. *Id.* at 496.

70. *Id.* at 499.

71. *Schumate v. Thompson*, 580 S.W.2d 47 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

72. TEX. EDUC. CODE ANN. § 21.912 (Vernon Supp. 1980).

73. 584 S.W.2d 726 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

74. *Id.* at 729.

75. 579 S.W.2d 949 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

76. See discussion of this issue in *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp.

*Welfare Unit*,<sup>77</sup> in which plaintiff sought to have all records and files concerning a criminal arrest for child abuse expunged. The court, relying on provisions of the Criminal Code,<sup>78</sup> agreed that all records relating to the criminal arrest could be expunged, including those in the files of the Department of Human Resources, but that any nonaccusatory reports made in accordance with the child abuse provisions of the Family Code<sup>79</sup> were not subject to expunction.<sup>80</sup>

Insurance companies lost in two cases based on interpretations of insurance policies relating to minors. In the first<sup>81</sup> the court found that a fourteen-year-old was a resident of his mother's household as defined by the policy. The minor's custody had been given to the mother by a court in connection with her divorce in 1964, but by informal agreement the minor lived with his father. The father had a larger house than the mother, and the father's address was used for school purposes; however, the minor kept extra clothes at the mother's apartment and spent time there. The court found that a child can have more than one residence, particularly a child of divorced parents, and therefore this minor came within the scope of the insurance policy. In the other case the insured attempted to collect from his major medical insurer for benefits based on his daughter's hospitalization.<sup>82</sup> The daughter had married during the time covered by the premium and had been hospitalized after her marriage, but during the premium period. The policy defined a dependent child as being unmarried, and the insurance company contended that on the day the daughter married its liability terminated. The Texas Supreme Court held otherwise, basing its holding on the Insurance Code, which provides that a limitation will not take effect during the period for which a premium is accepted.<sup>83</sup>

In *Sprague v. Memorial Baptist Hospital System*<sup>84</sup> the minor was precluded from recovery based on the old doctrine of charitable immunity. The minor suffered her injury at the time of her birth, prior to March 9, 1966. The Texas Supreme Court has held that the doctrine of charitable immunity was abrogated as to all causes of action arising from events after that date,<sup>85</sup> so the trial court's granting of summary judgment for the hospital was affirmed. In another case a special statute of limitations prevented a minor from recovering.<sup>86</sup> The minor was injured by an allegedly

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1179, 1191-92 (S.D. Tex. 1977), *rev'd and dismissed sub nom.* Moore v. Sims, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

77. 577 S.W.2d 385 (Tex. Civ. App.—Eastland 1979, writ *ref'd n.r.e.*).

78. TEX. CODE CRIM. PROC. ANN. art. 55.01 (Vernon 1979 & Supp. 1980).

79. TEX. FAM. CODE ANN. § 34.05 (Vernon Supp. 1980).

80. 577 S.W.2d at 388.

81. Hartford Cas. Ins. Co. v. Phillips, 575 S.W.2d 62 (Tex. Civ. App.—Texarkana 1978, no writ).

82. Bomar v. Trinity Nat'l Life & Accident Ins. Co., 579 S.W.2d 464 (Tex. 1979).

83. TEX. INS. CODE ANN. art. 3.70—7 (Vernon 1963).

84. 580 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ *ref'd n.r.e.*).

85. Howle v. Camp Amon Carter, 470 S.W.2d 629 (Tex. 1971) (interpreting *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530 (Tex. 1966)).

86. Mahathy v. George L. Ingram & Assoc., 584 S.W.2d 521 (Tex. Civ. App.—Beaumont 1979, no writ).

negligently designed door on a school building, but the court found that the ten-year statute of limitations relating to architects<sup>87</sup> had expired prior to the injury. It was not possible to apply the tolling statute<sup>88</sup> because the cause of action was barred prior to the time of the minor's injuries.

The importance of tolling in relation to statutes of limitations is especially pertinent in the area of establishing paternity. Infants cannot act on their own, and if Texas's one-year paternity time limitation<sup>89</sup> is sustained against the infant, the true party in interest, a fundamental right will be denied to that infant before it can even talk. Some hope that so harsh a rule may not be sustained was raised in *Texas Department of Human Resources v. Delley*,<sup>90</sup> which held that the general four-year statute of limitations<sup>91</sup> was applicable to suits brought in behalf of children born prior to the effective date of the Family Code's statute of limitations. The court went on to hold that the general statute was tolled<sup>92</sup> during the infant's minority, and since this child was born in 1968, the suit was timely.<sup>93</sup> In support of its decision the court discussed the importance of having parents support their children rather than placing the burden on the taxpayers.<sup>94</sup> The court further stated that the right for the child is too fundamental to permit its forfeiture by the inaction of others.<sup>95</sup>

The importance of legitimacy as a basis for obtaining child support is recognized by the courts. When a divorced father attempts to avoid paying court ordered child support by later denying paternity, the courts will invoke the doctrine of *res judicata* and deny him relief.<sup>96</sup> Courts will find children legitimate on the basis of judicial admissions in pleadings<sup>97</sup> and will not allow the blood test statutes<sup>98</sup> to be used to establish nonpaternity when a child has been conceived during the period of the marriage although born after the divorce.<sup>99</sup> In such a situation the court held that only the traditional defenses such as nonaccess or impotence apply. When, on the other hand, it is possible to prove nonaccess by a first husband, then a second husband may be found to be the father of a child born during the earlier marriage.<sup>100</sup> A child born prior to marriage may be legitimated by the father's marrying the mother, signing the birth certificate, and establishing proof of access.<sup>101</sup>

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87. TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1980).

88. *Id.* art. 5535 (Vernon 1958).

89. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980).

90. 581 S.W.2d 519 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

91. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

92. *Id.* art. 5535.

93. *See also* *Levescy v. Crocker*, 585 S.W.2d 337 (Tex. Civ. App.—Dallas 1979, no writ).

94. 581 S.W.2d at 522.

95. *Id.*

96. *Thompson v. Thompson*, 572 S.W.2d 761 (Tex. Civ. App.—Tyler 1978, no writ).

97. *Johnson v. Johnson*, 579 S.W.2d 30 (Tex. Civ. App.—Beaumont 1979, no writ).

98. TEX. FAM. CODE ANN. § 13.02 (Vernon Supp. 1980).

99. *Magana v. Magana*, 576 S.W.2d 131 (Tex. Civ. App.—Corpus Christi 1978, no writ).

100. *Blacksher v. Blacksher*, 575 S.W.2d 105 (Tex. Civ. App.—Waco 1978, no writ).

101. *Middaugh v. Merritt*, 576 S.W.2d 490 (Tex. Civ. App.—Fort Worth 1979, no writ);

Although the doctrine of adoption by estoppel has long been recognized by Texas courts,<sup>102</sup> such children are not necessarily of the same status as are legally adopted children. The court in *Amos v. Central Freight Lines*<sup>103</sup> held that the claimants could not bring a wrongful death action<sup>104</sup> since they were neither naturally born nor legally adopted children of the decedent. The court held that this is the definition of children required by the statute. Therefore, despite the fact that there was a pending adoption proceeding at the time of the death of the decedent, these children, although probably adopted by estoppel, are not covered by the statute.

#### IV. CONSERVATORSHIP

A trial court's findings as to conservatorship are usually sustained,<sup>105</sup> but if a jury finding is supported by the evidence, then a judgment non obstante veredicto will be reversed.<sup>106</sup> Since temporary conservatorship orders are not appealable,<sup>107</sup> frustrated parties may try self-help, and courts may attempt coercion through contempt, but contempt will not lie unless there has been compliance with due process.<sup>108</sup> Courts should be cautious about entering default judgments in matters concerning custody. In *Buckler v. Tate*<sup>109</sup> the mother obtained a hearing by means of an equitable bill of review. She was able to have a child custody decree in a default divorce set aside on a showing that she had a meritorious defense, that her failure to file an answer was not intentional, and that no injury would result to the opposite party.<sup>110</sup>

In personam jurisdiction is required for the settlement of conservatorship questions, but it is not required in order to give a court subject matter jurisdiction when the children are physically before the court.<sup>111</sup> Thus, Texas courts can decide custody matters when only one party and the children are present although another state may not have to give full faith and

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*cf.* *Raulston v. Raulston*, 531 S.W.2d 683 (Tex. Civ. App.—Texarkana 1975, no writ) (father's voluntary statement of paternity held not sufficient to overcome proof of nonpaternity).

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

103. 575 S.W.2d 636 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

104. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952).

105. *See* *Graham v. Graham*, 584 S.W.2d 938 (Tex. Civ. App.—Waco 1979, no writ) (supporting trial court's finding that best interest of children served by dividing custody of two children); *Gaspard v. Gaspard*, 582 S.W.2d 629 (Tex. Civ. App.—Beaumont 1979, no writ) (jury finding that mother should have custody; appellate court sustained without comment); *Swearingen v. Swearingen*, 578 S.W.2d 829 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dismissed) (while appeal was pending, father found in contempt for failure to pay child support; his application for writ of habeas corpus denied in *Ex parte Swearingen*, 574 S.W.2d 585 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ)).

106. *Kelley v. Kelley*, 583 S.W.2d 671 (Tex. Civ. App.—Austin 1979, writ dismissed).

107. *Craft v. Craft*, 580 S.W.2d 814 (Tex. 1979).

108. *Ex parte Mouille*, 572 S.W.2d 60 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

109. 572 S.W.2d 562 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

110. *Id.* at 564-65.

111. *May v. Anderson*, 345 U.S. 528 (1953).

credit to the decree.<sup>112</sup> When, however, the suit for divorce and custody is filed prior to the time when one of the parties leaves the state, the court should resolve the entire question of conservatorship since it has had jurisdiction from the beginning.<sup>113</sup>

Modification of divorce decrees by trial courts are given as much deference by appellate courts as are the original orders,<sup>114</sup> even as to the awarding of attorneys' fees.<sup>115</sup> Modifications must be based on a material change of circumstances of the original managing conservator and on a showing that appointment of a new managing conservator will be a positive improvement for the child; failure to so find is ground for reversal.<sup>116</sup>

In personam jurisdiction is as important for modification of a decree relating to conservatorship as it is for the initial decree. In *Miller v. Miller*<sup>117</sup> a mother who resided with her two children in Arizona successfully contested the jurisdiction of the Texas courts on the basis that she was an Arizona resident. No evidence was heard in the case, but at the time of the divorce decree in 1977 she was an Arizona resident, and, since she was served with notice of the modification hearing in Arizona in 1978, there was nothing to controvert the presumption that she had remained an Arizona resident. The father contended that the Texas long-arm statute<sup>118</sup> applied, but the court, relying on *Corliss v. Smith*,<sup>119</sup> held that since the mother had resided in a foreign jurisdiction for more than six months, it would be presumed that Texas courts are no longer a proper forum for the adjudication of these parent-child relationship claims. When, however, the parent and child contesting personal jurisdiction of the Texas courts have been absent from the state for only a short time prior to the filing of a motion to modify conservatorship, Texas courts should hear the case. This was the reasoning of the appellate court in reversing the trial court's dismissal of such a motion in *Oubre v. Oubre*.<sup>120</sup> The appellate court found that all the witnesses who could testify concerning the child were in Texas, and thus there would be no denial of due process to the mother in requiring her to appear in Texas.<sup>121</sup>

112. *Thornlow v. Thornlow*, 576 S.W.2d 697 (Tex. Civ. App.—Corpus Christi 1979, no writ).

113. *Pollock v. Dowell*, 583 S.W.2d 886 (Tex. Civ. App.—Dallas 1979, no writ).

114. *See Gehring v. Gehring*, 582 S.W.2d 901, 903 (Tex. Civ. App.—Waco 1979, no writ); *Mitchell v. Mitchell*, 582 S.W.2d 535, 536 (Tex. Civ. App.—Texarkana 1979, no writ); *Bagley v. Scott*, 582 S.W.2d 511, 512 (Tex. Civ. App.—Beaumont 1979, no writ); *Colbert v. Stokes*, 581 S.W.2d 770, 771-72 (Tex. Civ. App.—Austin 1979, no writ); *In re B—S—L—*, 579 S.W.2d 527, 528-30 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

115. *Reyna v. Reyna*, 584 S.W.2d 926 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

116. *See Sutter v. Hendricks*, 575 S.W.2d 308, 309-10 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *D.W.D. v. R.D.P.*, 571 S.W.2d 224, 225-26 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

117. 575 S.W.2d 594 (Tex. Civ. App.—El Paso 1978, no writ). *But see Webb v. Webb*, 582 S.W.2d 168 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

118. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1980).

119. 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ).

120. 575 S.W.2d 363, 364-65 (Tex. Civ. App.—San Antonio 1978, no writ).

121. *Id.* at 365.

When children have been in Texas more than six months, and all parties are present, Texas courts should take jurisdiction despite a valid out-of-state custody decree. This was the decision of the appeals court in *Rankin v. Gray*,<sup>122</sup> in which the appellate court overturned the trial court's granting of a writ of habeas corpus to the out-of-state father. The couple had been divorced in New Hampshire in 1978, and the mother was awarded custody of the children. She subsequently remarried, moved to Texas, and refused to send the children back to New Hampshire to visit their father, although she invited him to come to Texas. The father went into a New Hampshire court and obtained modification of the original decree to give him the right to custody; the mother neither answered nor appeared. The father then came to Texas to obtain a writ of habeas corpus for the return of the children, which the trial court granted based on the Texas Family Code habeas corpus statute.<sup>123</sup> The appellate court pointed out that this was an erroneous interpretation of the statute, since an exception to an immediate granting of a writ of habeas corpus arises whenever the children are found to have been out of the relator's, in this case the father's, possession for at least six months preceding the filing of the application for the writ.<sup>124</sup> The children in *Rankin* had been in Texas for over a year. The trial court should have denied the writ and granted a hearing on the mother's cross-action for custody.<sup>125</sup>

When a court has acquired jurisdiction over all parties, including the out-of-state resident, it cannot be taken away by the subsequent filing of a petition in a foreign court. The Texas court has the power to protect its jurisdiction by enjoining the prosecution of the out-of-state suit. This action was taken by the trial court in *Mayo v. Hall*,<sup>126</sup> which refused to allow the father to take the children out of Texas for visitation until his custody action in California had been dismissed with prejudice.

The courts have been rather strict in interpreting the language of various portions of the Family Code and have held that the Code will not permit the relitigation of custody within a year of the decree.<sup>127</sup> There is, however, disagreement as to who has standing to attack a custody decree. In *Watts v. Watts*<sup>128</sup> the Fort Worth court of civil appeals held that a grandfather was a "party affected" and had standing, despite the fact that he had not been a party in the original suit for divorce. In the original suit the mother had been named managing conservator. The court interpreted the section of the Code pertaining to modification as meaning that a "party affected" was the same as a "person affected" and decided that grandpar-

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122. 584 S.W.2d 539 (Tex. Civ. App.—Waco 1979, no writ).

123. TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1980).

124. 584 S.W.2d at 542 (citing TEX. FAM. CODE ANN. § 14.10(b)(2) (Vernon Supp. 1980)).

125. 584 S.W.2d at 541.

126. 571 S.W.2d 213 (Tex. Civ. App.—Waco 1978, no writ).

127. TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980); see *Figueroa v. Figueroa*, 580 S.W.2d 621, 622-23 (Tex. Civ. App.—El Paso 1979, no writ) (petition for modification based solely on change of physical custody should be dismissed).

128. 573 S.W.2d 864 (Tex. Civ. App.—Fort Worth 1978, no writ).



ents are in that category.<sup>129</sup> The court pointed out that even if the modification section was not found to be applicable, the general section pertaining to suits for the appointment of managing conservators would entitle the grandfather to standing, since that section uses the word "person" rather than "party."<sup>130</sup>

The problem of which county has jurisdiction to hear a habeas corpus petition continues to trouble the courts. The Texas Supreme Court in *Trader v. Dear*<sup>131</sup> held that such jurisdiction is not limited to the court with continuing jurisdiction but may also extend to the court in the county where the child is found. An appellate court in *Alvarado v. Alvarado*<sup>132</sup> held as a logical extension of this rule that such a suit may also be brought in the county where the relator resides, even though the child is not in that county. The court observed that this rule should help prevent child-snatching, because if the relator is the person with rightful custody, he can remain in the county of his residence, and the wrongful possessor would have to bring the child back to that county.<sup>133</sup> Another court of civil appeals pointed out that courts of civil appeals have very limited habeas corpus jurisdiction and can only issue a writ where there has been confinement based upon a violation of a court order in a divorce, child support, or child custody case.<sup>134</sup> It then dismissed a petition that was based not on a violation of an order but on the effect of an allegedly void order.<sup>135</sup> If the time for appeal had passed, the mother should have proceeded either by a bill of review or a motion to modify.

Visitation, or possessory conservatorship, can cause as many problems as custody or managing conservatorship. Courts can be called upon to interpret the visitation terms of a divorce decree,<sup>136</sup> or there may be an unsuccessful attempt to invoke a federal court's jurisdiction to prevent enforcement of a decree.<sup>137</sup> Parents should not agree to the entry of orders depriving them of access in exchange for relieving them of the duty of support, since the basis for a change in that order is a material change of circumstances on the part of the children, not on the part of the person

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129. "A court order or the portion of a decree that provides for . . . the appointment of a conservator . . . may be modified only . . . in the court having jurisdiction of the suit affecting the parent-child relationship. *Any party affected* by the order or the portion of the decree to be modified may file the motion." TEX. FAM. CODE ANN. § 14.08(a) (Vernon Supp. 1980) (emphasis added).

130. "A suit affecting the parent-child relationship may be brought by *any person* with an interest in the child . . ." TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (emphasis added). *But see* Barrientos v. Garza, 559 S.W.2d 399 (Tex. Civ. App.—Dallas 1977, no writ). *See also* Solender, *supra* note 14, at 167.

131. 565 S.W.2d 233 (Tex. 1978).

132. 583 S.W.2d 909 (Tex. Civ. App.—Corpus Christi 1979, no writ).

133. *Id.* at 912-13.

134. *Ex parte* Sarao, 583 S.W.2d 438 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

135. *Id.* at 439.

136. Strunck v. Peoples, 576 S.W.2d 487 (Tex. Civ. App.—Waco 1979, no writ).

137. Dirr v. Chancery Court, 585 F.2d 98, 99 (5th Cir. 1978) (affirming dismissal based on lack of jurisdiction, since Texas district court lacked power to serve process in Mississippi).

seeking the change. In *Files v. Thomasson*<sup>138</sup> the father agreed to such an order. Later, when he decided that he did want access to his children, the court held that his remarriage, the fact that his new wife was pregnant, and that he "subjectively wanted to see them" was not such a material or substantial change in circumstances as to warrant the granting of a modification.<sup>139</sup>

## V. SUPPORT

Most support orders are based on the agreement of the parties or are entered after the facts have been fully litigated; few appeals come from the original decree. Nevertheless, when an order in the guise of a consent judgment is entered that changes the provisions of the underlying written agreement without notice to one of the parties affected, some remedy should be afforded that party. In *Mikeska v. Mikeska*<sup>140</sup> an agreement to pay only the amount of child support the father saw fit was changed in the decree to require him to pay child support of \$400 per month. The new language was incorporated into the original decree. The appellate court found that the decree as modified was vague and ambiguous and ordered the trial court to clarify the conflict.<sup>141</sup> The dissent argued that the original agreement was against public policy and that the trial court had attempted to effect an amicable settlement while at the same time looking after the best interests of the child.<sup>142</sup> In two cases in which the mothers were found to have little, if any, earning capacity the trial courts were held not to have abused their discretion by awarding rather high child support payments.<sup>143</sup> No abuse in discretion was found in the refusal by the trial judge to order the mother of a handicapped child to contribute to his support after the child's eighteenth birthday.<sup>144</sup> The court based its decision on the statute providing that support of a handicapped child after eighteen *may* be ordered and, therefore, the order is discretionary.<sup>145</sup>

Enforcement of child support orders continues to be a problem. The statute provides that such orders may be enforced by contempt proceedings or that arrearages may be reduced to judgment and enforced as any other judgment for debt.<sup>146</sup> When a party is found in contempt and ordered confined, the remedy for the incarcerated party is a writ of habeas corpus.<sup>147</sup> Such writs will be granted if the orders on which the contempt

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138. 578 S.W.2d 883 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

139. 578 S.W.2d at 884-85.

140. 584 S.W.2d 565 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

141. *Id.* at 566.

142. *Id.* at 567.

143. *Paugh v. Paugh*, 579 S.W.2d 38 (Tex. Civ. App.—Waco 1979, no writ) (\$500 per month for three-month-old boy); *Maben v. Maben*, 574 S.W.2d 229 (Tex. Civ. App.—Fort Worth 1978, no writ) (\$600 per month for 15-year-old girl).

144. *Valaque v. Valaque*, 574 S.W.2d 608 (Tex. Civ. App.—San Antonio 1978, no writ).

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

146. *Id.* § 14.09.

147. *Anderson v. Burleson*, 583 S.W.2d 467 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

is based are conditional,<sup>148</sup> unclear,<sup>149</sup> or were not in writing at the time of the issuance of the order.<sup>150</sup> Additional grounds for dismissal include matters for which contempt will not lie, such as an ordinary debt,<sup>151</sup> and technicalities, such as the miswriting of a date.<sup>152</sup> A court of civil appeals will not grant the writ if the Texas Supreme Court has already refused to grant it, even though the lower court has no knowledge of the reason for denial.<sup>153</sup> In a situation where the contemnor had been called as an adverse witness, appeared without counsel, and testified without objection, the appellate court construed the proceedings as requiring the contemnor to testify against himself in violation of the fifth and fourteenth amendments, and found that he had to be released.<sup>154</sup> A coercive contempt order was found to be void and the contemnor ordered released after he had made the support payments.<sup>155</sup> Continuing his confinement could not enforce compliance with payment on the specified date since that date had already passed. In another case it was found to be double jeopardy to continue to confine the husband after he had made all ordered payments, because he had also violated a portion of the divorce decree that enjoined him from having any unreasonable physical contact with his wife.<sup>156</sup> He had, it appears, run his wife off the highway, broken into her home, and physically abused her. For these activities he had been tried, found guilty, fined, and spent thirty days in jail. Although he did violate the court order, he had already been criminally prosecuted for the same activities, and to order him confined for additional time for the same offense is unconstitutional.<sup>157</sup>

*Ex parte Chandler*<sup>158</sup> is a troublesome opinion and one that this author hopes will not be followed by other courts. A Dallas court entered a decree of divorce in 1975 ordering, among other things, that relator Chandler pay child support. In 1977 Chandler filed a motion to modify, and in 1978, pursuant to a motion by the respondent and in accordance with the Texas Family Code,<sup>159</sup> the Dallas court ordered the proceedings transferred to Harris County. Several months later the respondent filed a motion in the Harris County court, alleging that Chandler was in arrears in child support payments. Chandler filed a plea to the jurisdiction, contending that the Dallas court was the only court with continuing jurisdiction with respect to

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148. *Ex parte* Mason, 584 S.W.2d 936, 937 (Tex. Civ. App.—Dallas 1979, no writ).

149. *In re* Miller, 584 S.W.2d 907, 908 (Tex. Civ. App.—Dallas 1979, no writ); *Ex parte* Turner, 584 S.W.2d 585, 586 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Ex parte* McConnell, 580 S.W.2d 673, 674 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

150. *Ex parte* Pruske, 575 S.W.2d 417 (Tex. Civ. App.—Austin 1978, no writ).

151. *In re* Roberts, 584 S.W.2d 925, 926 (Tex. Civ. App.—Dallas 1979, no writ).

152. *Ex parte* Hemmitt, 580 S.W.2d 51 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

153. *Ex parte* Dillard, 577 S.W.2d 519, 522 (Tex. Civ. App.—Texarkana 1979, no writ).

154. *Ex parte* Harris, 581 S.W.2d 545, 547 (Tex. Civ. App.—Fort Worth 1979, no writ).

155. *Ex parte* Grothe, 581 S.W.2d 296, 296-98 (Tex. Civ. App.—Austin 1979, no writ).

156. *Ex parte* Brown, 574 S.W.2d 618, 620-21 (Tex. Civ. App.—Waco 1978, no writ).

157. U.S. CONST. amends. V & XIV; TEX. CONST. art. 1, § 14.

158. 580 S.W.2d 12 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

159. TEX. FAM. CODE ANN. § 11.06 (Vernon Supp. 1980).

the alleged contempt. The appeals court decided that despite the plain language of the statute,<sup>160</sup> the actions of Chandler prior to transfer could not be subject to contempt by the transferee court, destroying the entire concept of the statute regarding transfers.<sup>161</sup> The purpose of having one court of continuing jurisdiction is to provide for the orderly disposition of all matters relating to the children of a particular family. The purpose of the transfer provisions is to enable, in our mobile society, a single court to supervise the matters concerning the children and at the same time make the supervision convenient from the standpoint of both the court and the parties involved. This decision, if widely followed, would destroy that unity and make it necessary either to go back to the original court after transfer to enforce the child support arrearage by contempt, or to obtain a judgment against the nonpaying spouse prior to the transfer so that it could be transported as could any other judgment.<sup>162</sup>

Courts during the past survey year appeared to be reluctant to deny any applications for writs of habeas corpus in child support cases. If the order is clear enough, however, and the relator cannot show proof of indigency, then the writ will be denied.<sup>163</sup> Lack of certainty, on the other hand, has been found in a case in which the decree ordered the relator to pay for future medical expenses for the children.<sup>164</sup> The court in that case pointed out that such a provision raised more questions than it answered.<sup>165</sup> The court wondered, as an example, if "medical expenses" includes dental and orthodontic services.<sup>166</sup> When a court in response to a motion for contempt merely directs the husband to pay the arrearages in installments, the direction is not appealable; it is not a final judgment because the contempt motion was not disposed of.<sup>167</sup>

Contempt orders issued for violations of support orders that are based on the Uniform Reciprocal Enforcement of Support Act (URESA)<sup>168</sup> should be brought in the Texas court that originally issued the order. The court in *In re Miller*<sup>169</sup> held that URESA suits are subject to the same requirements of continuing jurisdiction as other suits affecting the parent-child relationship and ordered the relator discharged because the second court's order was void for lack of jurisdiction. In another URESA action

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160. "A court to which a transfer is made becomes the court of continuing jurisdiction, and all proceedings in the suit are continued as if it were brought there originally." TEX. FAM. CODE ANN. § 11.06(h) (Vernon 1975).

161. 580 S.W.2d at 13-14.

162. The appeals court based its holding on a 1922 supreme court decision that construed an entirely different statute. See *Ex parte Gonzalez*, 111 Tex. 399, 238 S.W. 635 (1922).

163. *Ex parte Roberts*, 582 S.W.2d 910, 911-12 (Tex. Civ. App.—Waco 1979, no writ).

164. *Ex parte Shelton*, 582 S.W.2d 637, 638 (Tex. Civ. App.—Dallas 1979, no writ).

165. *Id.*

166. *Id.*

167. *Richey v. Bolerjack*, 581 S.W.2d 780, 782-83 (Tex. Civ. App.—Tyler 1979), *rev'd and remanded*, 589 S.W.2d 957 (Tex. 1979), holding that absent the specific reservation of an issue the judgment is final.

168. TEX. FAM. CODE ANN. ch. 21 (Vernon Supp. 1980).

169. 583 S.W.2d 872 (Tex. Civ. App.—Dallas 1979, no writ).

the out-of-state wife filed suit to enforce her Georgia support order.<sup>170</sup> Her husband, who resided in Texas, answered and filed a counterclaim asking that the payments be reduced. The wife had properly applied to the Texas court, requesting that her Georgia decree be registered and confirmed. The trial court went behind the decree and agreed to the husband's request for reduction. The appeals court held that to permit such an action would "defeat URESA's goal of providing a simple and efficient proceeding for enforcing foreign support orders."<sup>171</sup>

Obtaining a judgment for the amount in arrears is an alternative method for enforcing child support. Sometimes a decree that might not be certain enough to support a contempt motion may be reduced to judgment by the use of parol evidence to explain the meaning of the original decree. This was the situation in *Johnson v. Johnson*,<sup>172</sup> when after two of three children reached the age of eighteen, the husband unilaterally reduced his child support payments. The former wife then filed an action for delinquent support payments. There was a provision for the reduction of payments after the first child became eighteen, but the decree was silent as to what would happen when the second child became eighteen. The appeals court agreed with the trial court that it was reasonable to interpret the decree as intending no reduction.<sup>173</sup> The statute of limitations for the enforcement of judgments is ten years.<sup>174</sup> A suit for back child support payments is timely, therefore, even, as here, after eight years.

The fact that there is some, but not sufficient, evidence of an agreement by the former wife to accept a reduction in payments will not serve as an estoppel so as to permit the doctrine of laches to apply.<sup>175</sup> After a former husband dies it is no longer possible to obtain a judgment against him, and since child support is not considered a debt, his estate may not be obligated to continue payments.<sup>176</sup> By the same token, a suit against an executor of an estate is not a suit affecting the parent-child relationship, so that the original divorce court no longer has continuing jurisdiction.<sup>177</sup>

A former wife and an adult son sued to enforce an agreement whereby the former husband had committed himself to pay for his children's col-

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170. *O'Halloran v. O'Halloran*, 580 S.W.2d 870, 871 (Tex. Civ. App.—Texarkana 1979, no writ).

171. *Id.* at 873.

172. 572 S.W.2d 364 (Tex. Civ. App.—Amarillo 1978, no writ).

173. *Id.* at 366.

174. TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958).

175. *Cunniff v. Johnson*, 584 S.W.2d 543, 544 (Tex. Civ. App.—Fort Worth 1979, writ dismissed); *Mitchell v. Mitchell*, 575 S.W.2d 311, 312 (Tex. Civ. App.—Dallas 1978, no writ).

176. *Martin v. Adair*, 582 S.W.2d 547 (Tex. Civ. App.—Beaumont 1979, writ granted); see *Smith v. Branhall*, 563 S.W.2d 238 (Tex. 1978). The problem posed by this case is caused by the fact that child support is not a debt, but rather an obligation, and so is enforceable by contempt as well as the usual debt remedies. Back child support is, moreover, based on a court decree and so is different from the usual debt; therefore, it is perhaps a type of judgment that should be enforceable against an estate. The Family Code, however, provides as follows: "Unless otherwise agreed to in writing or expressly provided in the decree, provisions for the support of a child are terminated by . . . the death of the parent obligated to support the child." TEX. FAM. CODE ANN. § 14.05(d) (Vernon 1975).

177. *Carson v. Korus*, 575 S.W.2d 326 (Tex. Civ. App.—San Antonio 1978, no writ).

lege education; if he failed to do so, he would have to pay reasonable legal fees for the enforcement of that commitment. The court found that the wife had a justiciable interest as the promisee of a third-party beneficiary contract and had a right to collect attorney's fees, since the victory was for her as well as for her son.<sup>178</sup>

Summary judgment has been held permissible when the defendant files his answer on the day of the hearing rather than seven days prior to the hearing as required by the Texas Rules of Civil Procedure.<sup>179</sup> In the same case the ex-husband attempted to raise the claim that the attorney's fees for the divorce of the ex-wife had been discharged in bankruptcy. The appellate court denied that contention, as well as ruling that it was proper for the trial court to add on post-judgment interest in accordance with Colorado law.<sup>180</sup>

If a former spouse is entitled to military retirement benefits, these benefits may be attached for purposes of payment of child support judgments.<sup>181</sup> Retirement benefits are not current wages, and the fact that the benefits are subject to garnishment has been settled law in Texas for more than a year.<sup>182</sup>

Failure to pay child support is a form of self-help that the managing conservator spouse can overcome by court action. The only escape from the obligation appears to be by hiding or perhaps by death, and even that is not certain.<sup>183</sup> A suit to modify in the court of continuing jurisdiction is the one lawful method for obtaining relief from excessive child support payments.<sup>184</sup> If, however, the amount of child support is based on a contractual as well as a court ordered obligation, it is not clear whether or not the court may abrogate the contract.<sup>185</sup> The court cannot enforce the contractual support obligation by contempt, but that obligation might continue to be enforceable through the judgment process as would any other contractual obligation. The court can, of course, enforce its modified orders by contempt. *In the Interest of J.M. & G.M.*<sup>186</sup> is another case that avoids directly answering the question of how to deal with a contractual child support obligation while permitting a drastic downward modification. The basis of the modification was that payments were to be escalated solely in relation to an automatic formula and not in relation to the actual

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178. *Stegall v. Stegall*, 571 S.W.2d 564, 565-67 (Tex. Civ. App.—Fort Worth 1978, no writ).

179. *Silcott v. Wilson*, 579 S.W.2d 291 (Tex. Civ. App.—Dallas 1979, no writ) (noting TEX. R. CIV. P. 166-A(c)).

180. 579 S.W.2d at 293-94.

181. *See Wager v. United States*, 582 S.W.2d 896, 897-98 (Tex. Civ. App.—San Antonio 1979, no writ); *United States v. Miranda*, 581 S.W.2d 711 (Tex. Civ. App.—San Antonio 1979, no writ); *United States v. Wakefield*, 572 S.W.2d 569, 571 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

182. *See Solender*, *supra* note 14, at 173.

183. *See* note 176 *supra*.

184. TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980).

185. *See e.g.*, *Griffin v. Griffin*, 535 S.W.2d 42, 44 (Tex. Civ. App.—Austin 1976, no writ).

186. 585 S.W.2d 854 (Tex. Civ. App.—San Antonio 1979, no writ).

circumstances of the parties. If the circumstances of both parties have changed, the courts may order an upward modification of support payments, taking into account not only the needs of the children but also the spouse's ability to pay.<sup>187</sup> *MacAyeal v. MacAyeal*<sup>188</sup> concerned a downward modification that was based solely on the changed circumstances of the payee-father. He became seriously ill immediately after the divorce and was forced to limit his law practice to part-time, resulting in a sharp drop in income. While the trial court permitted some reduction in his support payments, the appellate court ordered a further reduction. It pointed out that while the mother's living expenses exceeded her income, the father "must be permitted to retain enough of his earnings to pay the necessary expense of living and earning a living."<sup>189</sup>

The mother of twins was able to obtain a slight upward modification of the support order and relief from an improper entry of a decree in one action.<sup>190</sup> The original support order had been for "\$25 per week" instead of "\$25 per child per week" as had been shown on the docket sheet. The mother was also able to show that her costs for such items as utilities, medical insurance, and groceries had increased since 1975, the year of the divorce, so the trial court's order to increase support to \$27.50 per week per child was affirmed.

## VI. TERMINATION AND ADOPTION

In addition to the problems of support and custody at the time of divorce, there is also the possibility that a parent may lose all rights to his or her child because of a suit to terminate the parent-child relationship. *In re H.D.O.*<sup>191</sup> was a suit to terminate the parent-child relationship and to name a paternal aunt the managing conservator; the suit was heard on the same day as the divorce between the natural parents. The court granted the divorce, denied the termination, but made the aunt managing conservator. The mother appealed, claiming that the "best interest of the child standard" of the Texas Family Code<sup>192</sup> was unconstitutional in that it denied "her 'fundamental right to family integrity.'"<sup>193</sup> The appellate court found specifically that the "best interest of the child standard" is constitutional and sustained the trial court. In another case the parent-child relationship proceeding occurred some years after the divorce and was successfully brought by the mother against the father.<sup>194</sup> This was a situation involving divergent life-styles, and the court found that the father had not been able to sustain the presumption that the best interest of the child

187. *Poynter v. Haik*, 580 S.W.2d 114 (Tex. Civ. App.—Tyler 1979, no writ); *Hazelwood v. Jinkins*, 580 S.W.2d 33 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

188. 575 S.W.2d 626 (Tex. Civ. App.—Waco 1978, no writ).

189. *Id.* at 627.

190. *Moon v. Moon*, 573 S.W.2d 277 (Tex. Civ. App.—Waco 1978, no writ).

191. 580 S.W.2d 421 (Tex. Civ. App.—Eastland 1979, no writ).

192. TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1980).

193. 580 S.W.2d at 423.

194. *McGuire v. Brown*, 580 S.W.2d 425 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

would be served by the continuation of the parent-child relationship.<sup>195</sup> The court also found that despite the fact that there had been no specific order in the divorce decree on the subject of child support, the father had failed to support the child in accordance with his ability and, therefore, termination was justified.<sup>196</sup>

An application for a hearing on a writ of habeas corpus was granted to a natural mother who claimed that she was being denied access to her child.<sup>197</sup> The respondents, after producing the child as ordered, filed a plea of privilege to be sued in their own county, which was denied.<sup>198</sup> In another case suit was brought to terminate parental rights against a mother, probable father, and maternal grandmother.<sup>199</sup> The mother responded with a plea of privilege to be sued in her home county, the trial court sustained the plea, and plaintiffs appealed. The appellate court pointed out that while the pleading should not have been denoted a plea of privilege but rather a motion to transfer and was therefore not appealable, the appellants were not harmed by the change in terminology since they had relied on the venue rules of the Family Code and so were not misled.<sup>200</sup>

*Crahan v. N.R.*<sup>201</sup> started out as a habeas corpus proceeding, but was found by the appellate court to be a "simple suit for custody of a child." Whatever the name of the proceeding, there was a hearing as to who had a legal right to the child. It appeared that neither party had a legal right, so the court utilized the best interest of the child standard<sup>202</sup> and sustained custody in the parties in possession. The case demonstrates the problems that can arise when parties, in attempting to adopt a child, do not follow proper legal procedures. In this instance the natural mother delivered the child in an Ohio hospital under the name of the potential adoptive mother and gave the name of the potential adoptive father as her husband. These potential adoptive parents took the child at three days, shortly thereafter moved to Texas, and filed a petition in a Texas court to adopt the child.

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195. The record indicates that in this situation the mother had returned home with her child and had returned to her original middle class values, while her former husband continued in his artistic ways. In fact, he expressed concern that his child would, by living in his former wife's home, "develop materialistic points of view." 580 S.W.2d at 429. It was this clash of values that ultimately led the court to conclude that termination of parental rights was in the best interest of the child, since being subjected to two such different life-styles could be damaging to the child.

196. The court relied on the case of *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), for its interpretation of TEX. FAM. CODE ANN. § 15.02(1)(F) (Vernon Supp. 1980).

197. *Garza v. Shilling*, 576 S.W.2d 147 (Tex. Civ. App.—Corpus Christi 1979, no writ).

198. *Id.* at 151 (interpreting TEX. FAM. CODE ANN. § 14.10(e) (Vernon Supp. 1980)). The court by its interpretation of this section returned the writ of habeas corpus to the status of the *Great Writ*, establishing precedent for its later holding in *Alvarado v. Alvarado*, 583 S.W.2d 909 (Tex. Civ. App.—Corpus Christi 1979, no writ). See note 132 *supra* and accompanying text.

199. *Beyer v. Diaz*, 585 S.W.2d 359 (Tex. Civ. App.—Dallas 1979, no writ).

200. *Id.* at 360-61.

201. 581 S.W.2d 272 (Tex. Civ. App.—Fort Worth 1979, writ *dism'd*).

202. This standard was again attacked as unconstitutional, but the court saw no justification for such a finding. *Id.* at 275.



The attorney ad litem who had been appointed to represent the unknown parents found and notified the natural mother, and she answered in the adoption suit. The adoption suit had been abated pending determination of the custody suit appeal; presumably now the court in the adoption suit can obtain a full development of the facts and decide whether the parent-child relationship of the natural mother should be terminated in order to grant the adoption. There was some discussion of Ohio law, but since all the parties were in Texas and all the problems were Texas problems, the court held Ohio law to be irrelevant.<sup>203</sup>

The right of strangers to petition for the adoption of a child who is under the managing conservatorship of an adoption agency was sustained in two cases.<sup>204</sup> The courts interpreted the Family Code to mean that anyone can file a petition to adopt,<sup>205</sup> and, while the managing conservator may withhold consent, this may be done only for good cause.<sup>206</sup> The burden of proving lack of good cause, however, has been held to be on the persons requesting consent. Good cause on the part of the managing conservator is presumed.<sup>207</sup> In both cases the fact that petitioners were allegedly related to the child in question was not considered relevant, since the parent-child relationship, and thus all natural relationships, had been terminated prior to the petition for adoption.

*Barrow v. Durham*<sup>208</sup> is an unfortunate case that illustrates the need for courts to delay the termination of the parent-child relationship until it is clear that the family unit cannot remain intact. The case involved a Vietnamese mother who came to the United States with her American-born husband and their children. She was unable to speak any English and when, because of marital difficulties, her husband took their children and abandoned them at a Catholic children's center in Corpus Christi, she had great difficulty in comprehending what had happened to them. Ultimately she became dependent upon welfare, and the children were temporarily placed in the custody of the Nueces County Child Welfare Unit. The parent-child relationship of both the mother and her husband was terminated, but the court ordered the Child Welfare Unit to work with the mother to allow her an opportunity to provide a home for the children. This order included a six-month restriction as to placement for adoption.<sup>209</sup> Eventually, the six older children were legally restored to the

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203. *Id.*

204. *Goetz v. Lutheran Social Serv. of Texas, Inc.*, 579 S.W.2d 82 (Tex. Civ. App.—Austin 1979, no writ); *In the Interest of Unnamed Child*, 584 S.W.2d 476 (Tex. Civ. App.—Fort Worth 1979, writ filed).

205. 584 S.W.2d at 478; *see* TEX. FAM. CODE ANN. § 16.02 (Vernon Supp. 1980) (“Any adult is eligible to adopt a child who may be adopted.”).

206. 584 S.W.2d at 478; 579 S.W.2d at 84; *see* TEX. FAM. CODE ANN. § 16.05(d) (Vernon 1975).

207. *See Chapman v. Edna Gladney Home*, 561 S.W.2d 265, 267 (Tex. Civ. App.—Fort Worth 1978, no writ).

208. 574 S.W.2d 857 (Tex. Civ. App.—Corpus Christi 1978, writ granted).

209. This order is anomalous because a decree of termination of parental rights severs the parent-child relationship for all matters. TEX. FAM. CODE ANN. § 15.07 (Vernon Supp. 1980).

mother, and throughout this period the mother was reassured about the two youngest children and the possibility for their restoration. During the hearings on termination and restoration all of the children had been represented by the same guardian ad litem, and the case had been conducted under the same docket number. The youngest children had been placed from the beginning in the home of the appellees, and without notice to the mother or the attorney ad litem they had obtained a judgment for the adoption of the children. The attorney ad litem and the mother brought a bill of review to overturn the adoption. The trial court dismissed on the basis that since the mother and the attorney ad litem had not been parties to the adoption proceeding, they had no standing to contest the adoption. The appellate court sustained a bill of review, holding that while adoption and termination of parental rights proceedings are separate and distinct, so that an attorney ad litem for one proceeding is not a party in the other proceeding, still the mother or attorney ad litem could act as next friend to the minor children and would have standing to bring a bill of review.<sup>210</sup> The reasoning is strained, but the appellate court appears to have tried to do equity, at least for the mother. All these hearings and the attendant grief for both the natural mother and the purported adoptive parents could have been avoided if the court had not so hastily terminated the parent-child relationship. The termination of the parent-child relationship should be final, and if there appears to be a need for further consideration of the relationship, there should be no termination.<sup>211</sup> A child welfare unit can always be granted permanent managing conservatorship of the children, thus protecting the children while at the same time preventing a decree for adoption without notice to the natural parents because of the requirement of a hearing on the question of termination.<sup>212</sup>

The *Sims*<sup>213</sup> case cast its shadow over a number of child welfare cases. In one case<sup>214</sup> a federal court, following the *Younger*<sup>215</sup> doctrine, abstained from interfering in the pending state proceeding, but did enjoin the state from entering into its Child Abuse and Neglect Report and Inquiry System (CANRIS)<sup>216</sup> any report identifying the plaintiffs as child abusers until there had been a final judicial determination on the merits. In two other cases<sup>217</sup> a state appeals court specifically found contrary to the holding in

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210. 574 S.W.2d at 860.

211. See, e.g., *Johnson v. Jefferson County Child Welfare Unit*, 557 S.W.2d 569, 571 (Tex. Civ. App.—Beaumont 1977, no writ); *Baggett v. State*, 541 S.W.2d 226, 227 (Tex. Civ. App.—Tyler 1976, no writ).

212. TEX. FAM. CODE ANN. § 11.09(a) (Vernon Supp. 1980).

213. *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd and dismissed sub nom.* *Moore v. Sims*, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); see notes 14-15 *supra* and accompanying text.

214. *Brown v. Jones*, 473 F. Supp. 439 (N.D. Tex. 1979).

215. *Younger v. Harris*, 401 U.S. 37 (1971), held that federal courts should refrain from interfering in state court proceedings concerning state statutes when there is an adequate forum in the state courts for disposing of constitutional questions.

216. See TEX. FAM. CODE ANN. § 34.06 (Vernon 1975).

217. *In the Interest of G.M.*, 580 S.W.2d 65, 69 (Tex. Civ. App.—Amarillo 1979, writ granted); *Woodward v. Texas Dep't of Human Resources*, 573 S.W.2d 596, 598 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

*Sims* and held that the proper evidence standard is preponderance of the evidence. The court stated that prior rulings of the Texas Supreme Court require this standard.<sup>218</sup> It should be pointed out that the appeals court did not rely on precedent for termination of the parental-child relationship.

In three cases the trial court's termination of the parent-child relationship was sustained<sup>219</sup> on the statutory grounds that the parents had "knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the child"<sup>220</sup> despite the fact that in one case<sup>221</sup> the mother was of low mental ability. In *Compassano v. State*<sup>222</sup> the mother was able to obtain a reversal of the judgment terminating her parental rights because the state had not been able to prove that she had not supported the child in accordance with her ability for a full year. During part of the period of alleged nonsupport the mother had been unemployed and dependent on friends for her support.

*Shapley v. Texas Department of Human Resources*<sup>223</sup> reversed the termination of the mother's parent-child relationship but sustained the father's termination. This was a widely publicized case of child abuse, and the mother was the person who brought the matter to the attention of the authorities. The trial judge expressed inflammatory opinions to the media concerning the case, but his apparent bias was not a sufficient basis to obtain a reversal as to the father. It may be that had proper procedures been followed there could have been a reversal on the grounds that the judge should have followed the statutory procedures on motions for recusal.<sup>224</sup> The stated ground for reversal of the mother's termination was insufficient evidence in the face of recommendations by both the county attorney and the guardian ad litem against the termination of the mother's parental rights.<sup>225</sup>

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218. 580 S.W.2d at 69; 573 S.W.2d at 598-99. *But see* Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976).

219. B—J—M— v. Moore, 582 S.W.2d 619 (Tex. Civ. App.—Dallas 1979, no writ); Gonzalez v. Texas Dep't of Human Resources, 581 S.W.2d 522 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); Sanchez v. Texas Dep't of Human Resources, 581 S.W.2d 260 (Tex. Civ. App.—Corpus Christi 1979, no writ).

220. TEX. FAM. CODE ANN. § 15.02(1)(D) (Vernon Supp. 1980).

221. B—J—M— v. Moore, 582 S.W.2d 619 (Tex. Civ. App.—Dallas 1979, no writ).

222. 576 S.W.2d 100 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

223. 581 S.W.2d 250 (Tex. Civ. App.—El Paso 1979, no writ).

224. "A district judge shall request the Presiding Judge to assign a judge of the Administrative District to hear any motions to recuse such district judge from a case pending in his court." TEX. REV. CIV. STAT. ANN. art. 200a, § 6 (Vernon Supp. 1980).

225. 581 S.W.2d at 254.