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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

I. LEGISLATIVE CHANGES

Perhaps the most significant statutory change during the survey period in family law relating to child custody was enacted by the Congress of the United States. Popularly known as the Parental Kidnapping Prevention Act (PKPA), the Act provides very little in the way of kidnapping prevention; it does attempt, however, to provide for a uniform system of child custody jurisdiction.¹ The PKPA does not directly enact the Uniform Child Custody Jurisdiction Act (UCCJA),² but instead defers to state sovereignty by expanding the concept of full faith and credit. A new section, entitled Full Faith and Credit Given to Child Custody Determinations,³ is added to the full faith and credit statute by the PKPA.⁴ Apparently, the PKPA was intended to further uniformity in the interpretation of continuing jurisdiction throughout the United States by creating an incentive for all states to enact the UCCJA.⁵ Unfortunately, the interpretation of the UCCJA has not been uniform, so that in any particular case each state's law will have to be examined before any determination can be made as to which state has jurisdiction.⁶ Texas lawyers should be aware that Texas

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1. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-73 (1980) (to be codified in scattered sections of titles 18, 28, and 42 U.S.C.). Section 7 describes the purpose of the Act. 94 Stat. at 3568. Section 8 provides that a state must give full faith and credit to another state's child custody determinations when criteria set out in the section are met. 94 Stat. at 3569. Section 9 provides for the use of the Federal Parent Locator Service to help find any absent parent or child in connection with the settling of a child custody dispute. 94 Stat. at 3571. Section 10 attempts to clarify congressional intent that the Fugitive Felon Act, 18 U.S.C. § 1073 (1976), apply to parental kidnapping. 94 Stat. at 3573.

2. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28. For the various state amendments to each section, see *id.*, reprinted in 9 U.L.A. 116 (1979 & Supp. 1981).

3. Pub. L. No. 96-911, § 8, 94 Stat. 3569 (to be codified at 28 U.S.C. § 1738A).

4. 28 U.S.C. § 1738 (1976).

5. This may not have been necessary, since only Massachusetts, Mississippi, South Carolina, Texas, the District of Columbia, Puerto Rico, and the Virgin Islands have not enacted the UCCJA. In *Murphy v. Murphy*, 404 N.E.2d 69 (Mass. 1980), Massachusetts judicially adopted rules similar to the UCCJA, and Texas has had rules similar to the UCCJA through its Family Code. See TEX. FAM. CODE ANN. §§ 11.01-.06 (Vernon 1975).

6. Uniformity of interpretation is important because the PKPA appears to rely on a state's own definition of its jurisdiction instead of external objective criteria. While this survey cannot discuss the various interpretations of UCCJA jurisdiction, some of the following articles might be helpful: Bodenheimer, *Interstate Custody: Initial and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981); Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOCATE 28 (1981). In addition, two decisions by Oregon's Supreme

law alone may not answer the question of which state has jurisdiction over a particular child custody case.⁷ Because the PKPA became effective on July 1, 1981, no court decisions to date have interpreted it.

In its 67th session, the Texas Legislature made a number of routine changes in the wording of various sections of the Family Code, as well as some significant substantive changes. One of the changes was the increase in the length of the statute of limitations in paternity suits from one year to four years.⁸ This change may or may not be final because both the United States Supreme Court⁹ and the Texas Supreme Court¹⁰ have pending before them constitutional challenges to the original one year statute of limitations. If either court should rule that minority must toll any statute relating to a minor's paternity, the statute will have to be altered.

In the interest of clarity and in response to the experiences of persons using the Family Code, the legislature revised chapter 11, the procedural chapter of the parent and child section of the Code. Section 11.06 on transfers of proceedings, has been clarified.¹¹ Section 11.10, which concerns guardians ad litem, now provides for the payment of the guardian ad litem by the county when the state seeks to terminate the parent-child relationship.¹² In addition to being revised and clarified, section 11.11,¹³ on temporary orders, now provides for the awarding of attorney's fees in connection with temporary orders.¹⁴ Section 11.13 was revised to clarify further the role of the court and the jury,¹⁵ and section 11.18, on costs, now clearly permits the awarding of attorney's fees with respect to all parent-child proceedings.¹⁶

Chapter 12,¹⁷ on the parent-child relationship, was not amended, and chapter 13,¹⁸ on paternity, was left substantially unchanged, with the ex-

Court that indicate a changing view of the UCCJA are worth comparing: *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981); *Settle v. Settle*, 276 Or. 759, 556 P.2d 962 (1975).

7. Not only must original jurisdiction be in conformity with the PKPA, but continuing jurisdiction depends on the original state's view of its continuing jurisdiction. Pub. L. No. 96-611, § 8(a), 94 Stat. 3570 (1980) (to be codified at 28 U.S.C. § 1738A(d)). Thus, the provisions of § 14.10 of the Texas Family Code may need to be interpreted in light of the other states' jurisdictional viewpoints. If a state's law holds that it has continuing jurisdiction so long as one of the parties to the original decree remains within that state, then, despite the so-called six-month rule of § 14.10(b)(2), a Texas court might not have jurisdiction. See TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1982).

8. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982).

9. *Texas ex rel. A.B.D. v. Habluetzel*, No. 1547 (Tex. Civ. App.—Corpus Christi Jan. 31, 1980, writ ref'd), *prob. juris. noted*, 451 U.S. 936 (1981). The Supreme Court recently heard arguments on *Mills v. Habluetzel*. 8 FAM. L. REP. (BNA) 2162 (Jan. 12, 1982).

10. *In re Miller*, 605 S.W.2d 332 (Tex. Civ. App.—Fort Worth 1980), *writ granted sub nom. In re J.A.M.*, 24 Tex. Sup. Ct. J. 202 (Jan. 31, 1981).

11. All the subsections of this section have been revised, and the number of subsections has been increased. TEX. FAM. CODE ANN. § 11.06 (Vernon Supp. 1982).

12. *Id.* § 11.10(e).

13. All the subsections of this section have been revised. *Id.* § 11.11.

14. *Id.* § 11.11(a)(5).

15. All the subsections of this section have been revised. *Id.* § 11.13.

16. *Id.* § 11.18(a).

17. *Id.* §§ 12.01-.05 (Vernon 1975 & Supp. 1982).

18. *Id.* §§ 13.01-.09, 13.21-.24, 13.41-.43.

ception of the change in the statute of limitations mentioned above.¹⁹ Section 14.04 was also reorganized, clarifying that a possessory conservator can be granted as many decisional rights as a managing conservator, even though the child may be living with the managing conservator.²⁰ A new section that addresses the problem of probation for persons found in contempt for arrearages in child support payments was added to chapter 14.²¹ The new section allows the courts greater flexibility in fashioning remedies for nonsupport.

Two essential procedural amendments were made to chapter 15. One of these provides a statutory basis for terminating the legal rights of a man who has executed an affidavit of a waiver of interest in a child.²² Heretofore the status of such a man has been anomalous. Because he is neither a parent nor a father, he seemingly has no rights that can be terminated. He is, or might be, connected with the child, however, or he would not have been involved in litigation. The addition to the Family Code attempts to dispose of any rights or any potential rights such a man might have. The other amendment to chapter 15 changes the procedure for dismissal of a termination petition. No longer are all parties required to agree to dismissal; instead, only the court has to approve.²³ The court is required to consider the best interests of the child in all matters brought to its attention pertaining to the child²⁴ and this should be a sufficient safeguard against improper dismissals.

The legislature extensively changed chapter 21, the Uniform Reciprocal Enforcement of Support Act (URESA).²⁵ The confusion caused by integrating the Texas rules of continuing jurisdiction²⁶ into URESA had been evident for some time, and the many amendments to this chapter attempt to make URESA a freestanding remedy. One change in URESA is that the definition of duty of support has been expanded to include explicitly all varieties of court recognized fathers.²⁷ Additionally, changes were made in the rules concerning the admissibility of evidence in URESA litigation.²⁸

The limit on parental liability for damage caused by the wilful and malicious conduct of their children was tripled, raising the ceiling to \$15,000.²⁹ In addition, all references in the Family Code to the State Department of Public Welfare now reflect the department's new name, the Texas Department of Human Resources. This summary does not attempt to include all

19. See note 8 *supra* and accompanying text.

20. TEX. FAM. CODE ANN. § 14.04 (Vernon Supp. 1982).

21. *Id.* § 14.12.

22. *Id.* § 15.041(e).

23. *Id.* § 15.06.

24. *Id.* § 14.07 (Vernon 1975 & Supp. 1982).

25. *Id.* §§ 21.03(6), .04, .08, .24, .25, .26, .28, .31, .32(a), .35, .36, .45 (Vernon Supp. 1982).

26. *Id.* §§ 11.05, .052, .071.

27. *Id.* § 21.03(6).

28. *Id.* § 21.36.

29. *Id.* § 33.02.

the child related statutory changes made by the 67th Texas Legislature. The Probate Code, the Education Code, and the Human Resources Code, among others, also reflect changes that relate to children.

II. UNITED STATES SUPREME COURT DECISIONS

During the past year, the United States Supreme Court was again active in making decisions concerning the parent-child relationship. In *Little v. Streater* the Court held that when the state is a party in a suit to establish paternity, and the alleged indigent father has the burden of denying paternity, it is a denial of due process for the state not to provide for the cost of blood grouping tests.³⁰ The Texas Legislature seems to have reached a similar conclusion; when the legislature enacted the Texas paternity statute in 1975, it provided that the courts could require that costs of blood grouping tests be borne by the Texas Department of Human Resources.³¹ *Little*, however, does not appear to be useful in forecasting the Court's attitude on statutes of limitations for paternity suits.³² The Court's holding turned on the injustice of saddling a man with paternal responsibility when it was in fact not his responsibility, rather than on the need or perhaps the right of a child to know accurately the identity of his father.

*Webb v. Webb*³³ involved the interpretation of the UCCJA. The Supreme Court avoided the issue of the application of the constitutional requirement of full faith and credit³⁴ to child custody judgments on the basis that this case concerned state statutory law and not the federal Constitution. There being no federal question, therefore, the Court declined to intervene. Furthermore, the Court found that the federal full faith and credit issue had not been raised properly below, and so held there was no basis for deciding the issue.³⁵ This result is probably a good one, because the PKPA³⁶ had not yet been passed when *Webb* was decided. The Court now will have an opportunity to decide the entire question of full faith and credit in relation to child custody under the PKPA. This question is highly complicated, and the states need an opportunity to clarify the issues before the United States Supreme Court settles the matter.

In *Jones v. Helms*,³⁷ a habeas corpus case, the father had wilfully abandoned his child and left the state. Under Georgia law such action was a felony; had he not left the state, however, it would have been merely a misdemeanor.³⁸ The father claimed that the statutory classification vio-

30. 101 S. Ct. 2202, 2211, 68 L. Ed. 2d 627, 639 (1981).

31. TEX. FAM. CODE ANN. § 13.03(b) (Vernon Supp. 1982).

32. See note 9 *supra* and accompanying text.

33. 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

34. U.S. CONST. art. IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

35. 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

36. For a discussion of the provision of the PKPA, see notes 1-4 *supra* and accompanying text.

37. 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

38. GA. CODE ANN. § 74-9902 (1981).

lated his equal protection rights under the United States Constitution.³⁹ He also claimed that the classification violated the privileges and immunities clause⁴⁰ by denying him the right to travel. The Court found no merit in either argument,⁴¹ and held that a person's own misconduct can qualify his right to travel.⁴² Furthermore, the Court held that enforcing the parental support obligation is so important that the difficulty of extraterritorial enforcement justifies enhancing the crime of abandonment from a misdemeanor to a felony.⁴³ Having found no impermissible infringement of the right to travel, the Court could find no equal protection violation. The case is particularly interesting because the Court found a legitimate state interest in having parents support their children.

The state's interest in the obligation of parents to support their children, however, was not considered sufficient to allow state law to prevail over federal law in *Ridgway v. Ridgway*.⁴⁴ A serviceman, insured under the Serviceman's Group Life Insurance Act (SGLIA),⁴⁵ was the divorced father of three children. The divorce judgment contained a negotiated property settlement that ordered him to keep his life insurance policies in force for the benefit of his three children. Four months after the divorce he remarried, and six days later he changed the beneficiary designation of his SGLIA policy, directing that the proceeds be paid according to law. Under the provisions of the SGLIA, such a designation meant that the proceeds would go to his widow, his second wife. After his death, his first wife under the terms of the divorce decree claimed the proceeds on behalf of the children, while the second wife claimed the proceeds as the designated beneficiary. The Supreme Judicial Court of Maine imposed a constructive trust in favor of the children on the proceeds of the policy, and ordered payment accordingly.⁴⁶

The United States Supreme Court reversed, holding that such an action was in contravention of the supremacy clause,⁴⁷ because Congress intended that SGLIA proceeds go only to the beneficiaries designated in writing by the serviceman.⁴⁸ The Court further found that imposition of a constructive trust on the proceeds was inconsistent with the antiattachment provisions of the SGLIA.⁴⁹ *Yiatchos v. Yiatchos*,⁵⁰ which involved a

39. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction equal protection of the laws."

40. *Id.* art. IV, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

41. 101 S. Ct. at 2442, 69 L. Ed. 2d at 128.

42. *Id.* at 2440-41, 69 L. Ed. 2d at 125-26.

43. *Id.* at 2441-42, 69 L. Ed. 2d at 127-28.

44. 102 S. Ct. 49, 59, 70 L. Ed. 2d 39, 53 (1981).

45. 38 U.S.C. §§ 765-770 (1980).

46. *Ridgway v. Prudential Ins. Co. of Am.*, 419 A.2d 1030, 1035 (Me. 1980).

47. U.S. CONST. art. VI, cl. 2 provides: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

48. 102 S. Ct. at 55, 70 L. Ed. 2d at 47-48.

49. *Id.* at 57-58, 70 L. Ed. 2d at 51.

50. 376 U.S. 306 (1964).

fraudulent attempt to divest a wife of any interest in her property, was distinguished from *Ridgway*. The Court noted that in *Ridgway* the first wife had not alleged fraud in the lower courts, and she did not have a vested right in the proceeds, because only her former husband had the power to create or change beneficiaries.⁵¹ *Ridgway's* actions were found to be "nothing more than a breach of contract."⁵²

Justice Powell, joined by Justice Rehnquist, dissented vigorously, disputing the finding of a lack of fraudulent intent.⁵³ Justice Stevens, in a separate dissenting opinion, argued that the imposition of a constructive trust in this case would not damage any substantial federal interest.⁵⁴ Notably lacking in the discussion by all members of the Court is the question of *res judicata*. If *Ridgway* was dissatisfied with the restrictions imposed by the divorce court he could have appealed its decree, and seemingly, he alone should have had standing to raise the question of federal preemption. Possibly a negotiated settlement of child support was not considered a final judgment, but it is odd that the question of *res judicata* was never addressed by the Court.⁵⁵

The right of indigent parents to counsel when the state is attempting to terminate their parental rights has been of concern for some time.⁵⁶ Texas does not provide counsel for parents in such circumstances, although it does provide for the appointment and payment of a guardian ad litem for their children.⁵⁷ The question of the parent's right to counsel was before the Court in *Lassiter v. Department of Social Services*,⁵⁸ and a divided Court held that no absolute right to counsel existed because a loss of liberty was not involved.⁵⁹ The Court stated that a case by case balancing of interests was required.⁶⁰ In *Lassiter* no expert witnesses testified, no troublesome points of law arose, no allegations of criminal conduct were made, and the weight of the evidence was such that the presence of an attorney would not have made a dispositive difference. The Court therefore found no denial of due process.⁶¹ The Court added that its opinion did not imply that the statutory standards of thirty-three states and the District of Columbia requiring the appointment of counsel "are other than enlightened and wise."⁶²

51. 102 S. Ct. at 56-57, 70 L. Ed. 2d at 50.

52. *Id.* at 57, 70 L. Ed. 2d at 50.

53. *Id.* at 59-63, 70 L. Ed. 2d at 53-58.

54. *Id.* at 63-68, 70 L. Ed. 2d at 58-64.

55. In similar cases involving private insurance, Texas courts have used the constructive trust device in order to protect the rights of the decedent's children. *Tomlinson v. Lackey*, 555 S.W.2d 810 (Tex. Civ. App.—El Paso 1977, no writ); *Wunsche v. Equitable Life Assurance Soc'y*, 551 S.W.2d 84 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.); see Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 32 Sw. L.J. 141, 156 (1978).

56. See *Lassiter v. Dep't of Social Servs.*, 101 S. Ct. 2153, 2166 n.6, 68 L. Ed. 2d 640, 652 n.6 (1981).

57. TEX. FAM. CODE ANN. § 11.10 (Vernon Supp. 1982).

58. 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

59. *Id.* at 2159, 68 L. Ed. 2d at 649.

60. *Id.*

61. *Id.* at 2162-63, 68 L. Ed. 2d at 653.

62. *Id.* at 2163, 68 L. Ed. 2d at 654.

The four dissenters believed that a parent's interest in the care and custody of his or her child was of such unique importance that a court should not attempt to judicially extinguish the right without providing the parents the benefit of counsel.⁶³ *Lassiter*, however, does not close the door on a requirement of representation by counsel in some, and perhaps most, termination cases. The Court was closely divided, and Justice Stewart, who authored the majority opinion has resigned. This case should be a signal to Texas to become "enlightened and wise" by providing for representation by counsel in all state initiated parental termination cases.

Two other cases of interest to family lawyers practicing in the parent-child area were decided during the survey period. In *H.L. v. Matheson* the Court, in further considering the abortion rights of minors, held that when an unemancipated minor girl, who was living at home and dependent upon her parents, sought an abortion, the state could require that notice be given to her parents before the abortion was performed.⁶⁴ The Court pointed out, however, that the parents are not given veto power, but merely the opportunity to be consulted, and to give guidance and counsel to the minor.⁶⁵

A statutory rape law was attacked as gender-based discrimination in *Michael M. v. Superior Court*⁶⁶ because only men could be found criminally liable under the statute. A rather fragmented Court⁶⁷ held that when a legitimate state interest exists, discrimination based on gender differences is not unconstitutional.⁶⁸ The Court found that the statute "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male."⁶⁹

III. STATUS

The right of undocumented alien children to a free public education has not yet been decided. The United States Supreme Court has heard oral argument in the case, and a decision is expected by late spring.⁷⁰ The children currently are attending school in compliance with various court orders.⁷¹

The eligibility rules of the University Interscholastic League (UIL) con-

63. *Id.* at 2164, 2176, 68 L. Ed. 2d 655, 670.

64. 450 U.S. 398, 409 (1981).

65. *Id.* at 409-10.

66. 450 U.S. 464 (1981).

67. Only two members of the Court joined in the opinion written by Justice Rehnquist on behalf of the Court. Two Justices wrote separate concurring opinions and four Justices dissented.

68. 450 U.S. at 468-69.

69. *Id.* at 476. For a Texas view of sex distinctions, particularly relating to that of a father from a mother of a child born out of wedlock, see *In re T.E.T.*, 603 S.W.2d 793 (Tex. 1980), *cert. denied*, 450 U.S. 1025 (1981); *In re K.*, 535 S.W.2d 168 (Tex.), *cert. denied*, 429 U.S. 907 (1976).

70. The Court heard oral arguments on Dec. 1, 1981. *Plyler v. Doe*, 50 U.S.L.W. 3462 (1981). For an editorial summary of the arguments, see *id.* at 3457.

71. See *Boe v. Wright*, 648 F.2d 432, 433 (5th Cir. 1981); *Doe v. Plyler*, 628 F.2d 448, 461 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044, 68 L. Ed. 2d 347 (1981); *In re Alien*

tinue to be questioned. The Texas Supreme Court overturned the UIL's one victory of last year and held that the rule preventing a high school student from representing a different school district for one calendar year after moving into the new district was a denial of equal protection and therefore unconstitutional.⁷² In connection with two other rules, however, Texas courts denied preliminary injunctions. The first case concerned the nineteen-year age limit on high school participants; the injunction was denied because the court found it unlikely that the proponents would win on the merits.⁷³ The denial of the injunction in the other case, concerning the number of years a participant could remain eligible for UIL competition, was on technical grounds.⁷⁴

*Jones v. Latexo Independent School District*⁷⁵ involved the suspension of several students because of a violation of school rules regarding the possession of drug paraphernalia. The court granted a preliminary injunction so that one of the student plaintiffs could graduate from high school.⁷⁶ During the challenged search, the entire student body had been subjected to an inspection by a "sniffer" dog.⁷⁷ The court found that this search violated the students' fourth amendment rights.⁷⁸ The school district argued that the doctrine of in loco parentis should permit them greater latitude in carrying out measures necessary for the maintenance of discipline and order.⁷⁹ While agreeing that the school board's concern over drug abuse was appropriate, the court held that even though school employees are at times placed in the role of parents, the doctrine of in loco parentis cannot transcend constitutional rights.⁸⁰ The court therefore enjoined the school board from further use of the "sniffer" dogs.⁸¹

A child's name is important not only in relation to his status but also in relation to his school records. Some divorced parents attempt to use self-help to change their child's name by enrolling him in school with a surname different from the one that was given the child at birth, and ordered retained by the court at the time of the divorce. In *In re Baird*⁸² the court

Children Educ. Litigation, 501 F. Supp. 544, 597 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078, 69 L. Ed. 2d 950 (1981).

72. *Sullivan v. University Interscholastic League*, 599 S.W.2d 860 (Tex. Civ. App.—Austin 1980), *rev'd*, 616 S.W.2d 170, 173 (Tex. 1981).

73. *Blue v. University Interscholastic League*, 503 F. Supp. 1030, 1036 (N.D. Tex. 1980).

74. *University Interscholastic League v. Torres*, 616 S.W.2d 355, 358 (Tex. Civ. App.—San Antonio 1981, no writ).

75. 499 F. Supp. 223 (E.D. Tex. 1980).

76. *Id.* at 240.

77. A "sniffer" dog is a dog trained to detect a wide variety of illicit odors. The students remained seated in their classrooms, and the dog walked up and down the aisles sniffing each student. If the dog detected a target odor, he signaled his handler. *Id.* at 228.

78. *Id.* at 237. U.S. CONST. amend. IV provides: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ."

79. The doctrine of in loco parentis provides that school teachers and administrators have the authority to discipline during school hours, because they are responsible for the health, safety, and conduct of the students. 499 F. Supp. at 236.

80. *Id.*

81. *Id.* at 241.

82. 610 S.W.2d 252 (Tex. Civ. App.—Fort Worth 1980, no writ).

was confronted with a selfhelp situation. Relying on *Newman v. King*,⁸³ the appeals court affirmed the decree ordering the natural mother and her husband not to permit the child to use any other name than Baird while the child attended school.⁸⁴ The court pointed out that it was protecting the father's interest in having his child bear his surname.⁸⁵

For inheritance purposes the proper establishment of paternity is most important. In *Lalli v. Lalli*⁸⁶ and *Trimble v. Gordon*⁸⁷ the United States Supreme Court attempted to establish what a state can do to provide for the orderly disposition of estates when a claim is asserted by a possible illegitimate child. The Texas Legislature responded to these decisions by modifying the Probate Code,⁸⁸ but the modification has not resolved questions concerning the effect of the Supreme Court's decisions on the inheritance rights of possible heirs born prior to the change. The cases in Texas are in total confusion as to the retroactive effect of the *Lalli* and *Trimble* decisions. In *Lovejoy v. Little*,⁸⁹ decided in 1978, one Texas appellate court declared the unamended section 42 unconstitutional to the extent it violated the holding in *Trimble*.⁹⁰ Another court, in *Winn v. Lackey*,⁹¹ refused to apply the decisions retroactively.⁹² The decedent died intestate in 1973, before *Trimble*, but the suit was brought in 1978 after both *Trimble* and *Lovejoy* had been decided. Instead of merely refusing to follow *Lovejoy*, the court attempted to distinguish *Winn* from *Lovejoy* on the ground that the suit in *Lovejoy* had been filed prior to *Trimble* while the suit in *Winn* was filed after *Trimble*.⁹³ Since the hearings in both cases were held after *Trimble*, the filing distinction seems meaningless.⁹⁴ Nevertheless the *Winn* court sustained the unconstitutional version of section 42 of the Probate Code in cases where the decedent died prior to *Trimble*.⁹⁵ *Bell v. Hinkle*⁹⁶ is an even more poorly reasoned decision. The court never mentioned *Trimble*, and although the decedent died intestate in 1969, the

83. 433 S.W.2d 420 (Tex. 1968).

84. 610 S.W.2d at 253.

85. *Id.* at 254.

86. 439 U.S. 259 (1978) (statute upheld requiring judicial declaration of paternity before father's death); see Solender, *supra* note 55, at 144-45.

87. 430 U.S. 762 (1977) (statute allowing illegitimate children to inherit by intestate succession only from their mothers held unconstitutional); see Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 33 Sw. L.J. 155, 156 (1979).

88. TEX. PROB. CODE ANN. § 42 (Vernon 1980) was enacted in 1979. The 1979 version improves a 1977 amendment to § 42, which in turn had been enacted in response to *Trimble*.

89. 569 S.W.2d 501 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

90. The Tyler court held that the three illegitimate children were entitled to inherit from their father to the same extent that they could from their mother. *Id.* at 504.

91. 618 S.W.2d 910, 912 (Tex. Civ. App.—Eastland 1981, no writ).

92. *Id.*

93. *Id.*

94. The decedent in *Lovejoy* died in 1971, the suit for determination of heirship was filed in 1974, and the hearing was held in 1977, right after the decision in *Trimble*. 569 S.W.2d at 502-03.

95. 618 S.W.2d at 912.

96. 607 S.W.2d 936 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ), *cert. denied*, 102 S. Ct. 115, 70 L. Ed. 2d 100 (1981).

court applied the 1979 version of the Probate Code.⁹⁷ The 1979 version of the Probate Code provides that an illegitimate child may inherit from his father if the father has complied with the provisions of chapter 13 of the Family Code.⁹⁸ In 1969 the Family Code had not yet been enacted,⁹⁹ so unless the putative father had had unusual foresight he could not have complied with its provisions.

Still another inheritance case, *Jones v. Davis*,¹⁰⁰ concerned the issue whether an illegitimate daughter and an illegitimate grandson could inherit from their father and grandfather, respectively. Both men died intestate, neither having taken any steps to legitimate their children. On motion for summary judgment, the trial court held that the children could not inherit; the appellate court reversed and remanded.¹⁰¹ The decedent in the case had died intestate in 1978, after *Trimble*, but before the 1979 change in the Probate Code. The appeals court, in reversing, merely stated that the old probate statute must be held unconstitutional, and followed *Trimble* and *Lovejoy*.¹⁰²

The Texas Supreme Court reversed the appeals court and reinstated the trial court's decision.¹⁰³ The court discussed the history and reasoning of the United States Supreme Court in illegitimacy cases and concluded that the 1979 version of Probate Code section 42, in effect at decedent's death in 1978, was constitutional.¹⁰⁴ The court also pointed out that the United States Supreme Court had dealt only with first generation illegitimates.

Johnson v. Mariscal,¹⁰⁵ unlike the cases previously discussed, concerned the inheritance rights of an illegitimate child whose alleged father died testate. The will, which was executed in 1971, made no provision for the illegitimate child, who was born in 1977. The mother of the child contested the will on his behalf, asking that the will be set aside on the basis that the child was a pretermitted heir. The court engaged in some rather complex reasoning and decided that the Probate Code definition of child,¹⁰⁶ while excluding unrecognized illegitimate children, specifically did not exclude recognized illegitimate children.¹⁰⁷ Thus the court found irrelevant any discussion of legitimation in other portions of the Code, be-

97. 607 S.W.2d at 937.

98. TEX. PROB. CODE ANN. § 42(b) (Vernon 1980).

99. Chapter 13 was enacted in 1975. See TEX. FAM. CODE ANN. § 13 (Vernon 1975 & Supp. 1982).

100. 616 S.W.2d 276 (Tex. Civ. App.—Houston [1st Dist.] 1981), *rev'd*, 25 Tex. Sup. Ct. J. 122 (Jan. 9, 1982).

101. 616 S.W.2d at 278.

102. *Id.*

103. 25 Tex. Sup. Ct. J. 122 (Jan. 9, 1982).

104. *Id.* at 126. The court stated that the pre-1977 version of § 42 probably would have been held unconstitutional under *Trimble*, but did not decide if the Supreme Court intended *Trimble* to have retroactive effect. *Id.* at 123 n.1.

105. 620 S.W.2d 905 (Tex. Civ. App.—Corpus Christi 1981), *writ ref'd n.r.e. per curiam*, 25 Tex. Sup. Ct. J. 128 (Jan. 9, 1982).

106. "'Child' includes an adopted child . . . but, unless expressly so stated herein, does not include an *unrecognized*, illegitimate child of the father." TEX. PROB. CODE ANN. § 3(b) (Vernon 1980) (emphasis added).

107. 620 S.W.2d at 908.

cause the definition of a pretermitted child in connection with a will included recognized illegitimate children.¹⁰⁸ The jury had found that the child in question was the natural child of the decedent but had made no finding with respect to the issue of recognition. The court therefore reversed and remanded the case for a finding on the recognition question.¹⁰⁹ If *Johnson* endures, the inheritance rights of some illegitimates in Texas will be different from the rights of other illegitimates, and all illegitimates will continue to be treated differently from legitimates.¹¹⁰

Establishing paternity when the father wishes to contest the allegation is difficult at best, and the Texas courts and legislature seem to delight in creating additional procedural difficulties.¹¹¹ Thus, in *Decuire v. Sinegal*¹¹² although the father had signed a statement of paternity, he argued that the statement had not been executed in strict compliance with the statute. The appeals court, apparently bought the argument, and reversed the trial court's order legitimating the child and remanded.¹¹³ Focusing on the absence of a trial court finding that the statement had been properly executed, and the lack of any blood test evidence, the appellate court held that the facts were insufficient to establish paternity.¹¹⁴ The court noted, however, that the father had never denied paternity.¹¹⁵

Jurisdictional grounds were the basis for the denial of access to the Texas courts for an out-of-state mother and child in *Albers v. Ames*.¹¹⁶ The alleged father was a Texas resident, but the court stated that no jurisdiction existed over the mother and child.¹¹⁷ The denial of jurisdiction is most disheartening because the court not only applied the UCCJA jurisdiction provisions to a paternity action, but also noted that the Colorado court had denied relief because it had no jurisdiction over the Texas resident defendant father.¹¹⁸ Seemingly, if the father is a Texas resident, no court other

108. *Id.*

109. *Id.* at 909.

110. The distinction between children whose fathers have complied with statutory formalities, such as marrying their mothers or legitimating, and those whose fathers have not complied will continue, but there now will be a distinction among those illegitimate children whose fathers have not complied with any of the statutory formalities. Children whose fathers have not executed wills will be distinguished from those whose fathers have executed wills, but did not mention them. So a twice-overlooked child is in a better position.

111. The Texas Legislature created the difficulties when it originally enacted a one-year statute of limitations. The Texas courts aggravated the problem by sustaining the one-year statute of limitations. See *Texas Dep't of Human Resources v. Chapman*, 570 S.W.2d 46 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). But see *In re Miller*, 605 S.W.2d 332 (Tex. Civ. App.—Fort Worth 1980), writ granted sub nom. *In re J.A.M.*, 24 Tex. Sup. Ct. J. 202 (Jan. 31, 1981); note 10 *supra* and accompanying text.

112. 617 S.W.2d 725 (Tex. Civ. App.—Beaumont 1981, no writ).

113. *Id.* at 727.

114. *Id.* The Texas Department of Human Resources seemingly fares better in paternity actions. In two recent cases its allegations were sustained. See *Martinez v. Texas Dep't of Human Resources*, 620 S.W.2d 805 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Williams v. Texas Dep't of Human Resources*, 619 S.W.2d 450 (Tex. Civ. App.—Waco 1981, no writ).

115. 617 S.W.2d at 727.

116. 616 S.W.2d 653 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

117. *Id.* at 654.

118. *Id.* at 654-55.

than a Texas court would have jurisdiction to determine his rights. In *Albers* the mother, by bringing the action in a Texas court, availed herself of its jurisdiction and the Texas court arguably should have acted.¹¹⁹

The problem of proving paternity is not necessarily confined to illegitimate children. When successive marriages have occurred, the question of which marriage or which husband produced a particular child can become quite involved. *G- v. G-*¹²⁰ was such a case in which the trial court found that the child was a product of the first marriage. The appeals court, however, held that this finding was against the weight of the evidence and therefore reversed and remanded.¹²¹ Noting the trial court's finding that the mother did not prove her case by a preponderance of the evidence, the dissent argued that the appellate court should not have substituted its view of the credibility of the evidence for that of the trial court.¹²²

IV. CONSERVATORSHIP

When, at the time of divorce, the parties are unable to agree as to who shall be named managing conservator, the courts face a most difficult decision. At the outset, the parents are on an equal plane,¹²³ and the amount of evidence necessary to tip the scales one way or the other is merely a preponderance of the evidence as in any other civil suit.¹²⁴ The court's primary consideration is the best interests of the children,¹²⁵ and in making this determination the court considers the circumstances of the parents.¹²⁶ If the children are twelve years of age or older the court must confer with the children,¹²⁷ and in the absence of contradictory evidence is likely to accord great weight to their preferences. *Fettig v. Fettig*¹²⁸ is an instance in which the trial court awarded managing conservatorship of all the children to the father after the three older children had indicated they wished to live with him. The fourth child was included in the order because the court found that it was in the best interest of the children that they remain as a familial unit. When the children are younger than twelve, unrefuted evidence that one party is competent and willing to be appointed managing conservator can be sufficient.¹²⁹ If a nonparent contests the appointment of a parent as managing conservator, when no permanent managing conservator has been appointed, however, the burden is

119. For problems in connection with interpretation of UCCJA, see note 6 *supra* and accompanying text.

120. 604 S.W.2d 521 (Tex. Civ. App.—Dallas 1980, no writ).

121. *Id.* at 522.

122. *Id.* at 524.

123. TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975) provides that "in determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent."

124. *Id.* § 11.14(a).

125. *Id.* § 14.07(a).

126. *Id.* § 14.07(b) (Vernon Supp. 1982).

127. *Id.* § 14.07(c).

128. 619 S.W.2d 262 (Tex. Civ. App.—Tyler 1981, no writ).

129. *Lott v. Lott*, 605 S.W.2d 665, 669 (Tex. Civ. App.—Dallas 1980, writ *dism'd*).

on the contestant to show that it would not be in the best interests of the child to permit the parent to become the managing conservator. This is a much heavier burden than in the normal contested conservatorship situation and is in conformity with the legislature's intent that parents be given preference in custody matters.¹³⁰

The importance of checking final judgments for clerical errors cannot be overstated. In *Bockemehl v. Bockemehl*¹³¹ a divorce was granted on the basis of an agreement between the parties; the formal decree was signed later, however, and it reversed the parties as to managing conservatorship. The mother discovered the error several years later when the father refused to return the child after a visitation period. When the court denied her application for a writ of habeas corpus because the decree did not indicate that she had the right of possession, the mother brought an action to correct the original decree nunc pro tunc. The request for correction of the decree was granted, and the appellate court affirmed, stating that sufficient evidence existed to show that the confusion was caused entirely by a clerical error. Seeking correction of an original decree is important for two reasons. First, it will enable the true managing conservator to obtain a writ of habeas corpus if necessary. Additionally, as the appellate court in *Bockemehl* pointed out, in the event of a custody modification suit, the party seeking the change will have the burden of proving change of circumstances; thus the correct managing conservator would have a lighter burden.¹³² Following through on causes of action is important not only in connection with checking the accuracy of a decree, but also in pursuing the decree in the first place. Dismissing a divorce action for want of prosecution relieves the court of continuing jurisdiction, and eliminates any possibility of enforcement of temporary orders entered in connection with the dismissed cause of action.¹³³

The facts concerning the children's residence can be determinative in establishing jurisdiction to decide custody. In *Felch v. Felch*¹³⁴ the trial court found that the children were domiciled in Texas with their mother at time of trial. Although the children were actually in the State of Washington with their father, the court defined their stay as a temporary visit that had no effect on the jurisdiction of the Texas court. The court seemed to base its decision on the fact that the mother had filed her suit for divorce in Texas a week prior to the father's filing in Washington, thus giving her the prize for winning the race to the courthouse. This case actually raises more questions than it answers since domicile is not considered a basis for jurisdiction under the Family Code.¹³⁵ Specific dates of residence of the

130. See *Hamlet v. Silliman*, 605 S.W.2d 663 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (court stated natural mother's sister would have to show that it would not be in best interests of child to permit mother to become managing conservator).

131. 604 S.W.2d 466 (Tex. Civ. App.—Dallas 1980, no writ).

132. See *id.* at 470.

133. See *Rosser v. Rosser*, 620 S.W.2d 802 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

134. 605 S.W.2d 399 (Tex. Civ. App.—Waco 1980, writ dismissed).

135. See TEX. FAM. CODE ANN. § 11.045 (Vernon Supp. 1982).

children, therefore, should have been alleged instead of the determination being made on what the court itself characterized as "somewhat vague" evidence.¹³⁶ The summary disposition of *Felch* might make it possible for Washington to deny full faith and credit to the decree, with the result being the lack of a final settlement of custody.

An out-of-state divorce decree determining custody of a child was held not entitled to full faith and credit when a Texas court had assumed jurisdiction in the matter prior to the entry of the decree.¹³⁷ The court further found that the Texas managing conservator had not been named a party to the out-of-state suit, and thus the decree could not bind her.¹³⁸ The Texas court while purporting to settle the question of custody, has in reality laid the groundwork for further litigation and controversy. The managing conservator was not even a parent, she was a paternal aunt, and it is unlikely that Kansas, the other state, will recognize the Texas decree. If the child is ever found outside of Texas, Kansas could assert that its decree is the enforceable one and would probably succeed.

The Texas Legislature created an additional source of litigation and turmoil in the child custody area by providing access rights to grandparents.¹³⁹ *Minns v. Minns*¹⁴⁰ is interesting because the court granted each set of grandparents and each parent specific access rights. The decree named the mother managing conservator and named all the others possessory conservators with various access rights. The appellate court affirmed all of the visitation provisions.¹⁴¹

Even if a grandparent is not named in the original divorce decree, he can petition to be named possessory or managing conservator at a later date. *Oglesby v. Silcott*¹⁴² was a suit for modification of the original decree in which the Court granted a grandfather possessory conservator status. His actual possession of his grandchild was conditioned upon his posting a \$10,000 bond. The appeals court affirmed this condition, finding it necessary in light of the fact that the grandfather already had participated in the kidnapping of the child by the child's mother.¹⁴³ In another modification action the trial court named the paternal grandparents managing conservators. The appellate court reversed this decision, however, pointing out that

136. 605 S.W.2d at 400.

137. *Gunter v. Glasgow*, 608 S.W.2d 273 (Tex. Civ. App.—Eastland 1980, no writ).

138. *Id.* at 276.

139. TEX. FAM. CODE ANN. § 14.03(d) (Vernon Supp. 1982) provides:

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 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.

140. 615 S.W.2d 893 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dismissed).

141. *Id.* at 898.

142. 620 S.W.2d 820 (Tex. Civ. App.—Tyler 1981, no writ).

143. *Id.* at 825.

the appellees had not sustained their burden of proof as to a substantial change in circumstances.¹⁴⁴ The courts have limited the opportunity for grandparents to seek access rights to situations where litigation already has occurred concerning the parent-child relationship. Therefore, when the change in circumstances has occurred because of the death of a parent, the grandparents cannot obtain a possessory conservatorship because no managing conservator has ever been appointed.¹⁴⁵

Once the question of conservatorship has been settled, the Family Code requires that a year elapse before a motion to modify may be filed unless emergency situations exist or consensual modifications are involved.¹⁴⁶ The statute requires that the movant attach an affidavit to the early modification that details the circumstances.¹⁴⁷ Whether these provisions are jurisdictional or waivable is unclear. In *Jilek v. Chatman*¹⁴⁸ the court successfully straddled the issue by finding that, while the modification motion had been filed twelve days early without an affidavit attached, the trial court took no immediate action on it, and the appellant father did not complain of the lack of an affidavit until four months later. Alternatively, the court held that the appellant father had timely filed his motion, and because the two motions to modify were consolidated by agreement of the parties and heard together, the court had power to decide all matters relating to the custody of the child.¹⁴⁹ The untimely motion was, therefore, made timely by piggybacking on the timely motion. The apparent failure of a joint custody decree to meet the needs of the child was the substantive basis of the modification request. The custody decree provided that the

144. *Neal v. Neal*, 606 S.W.2d 729 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

145. *See In re KLM*, 609 S.W.2d 314 (Tex. Civ. App.—Eastland 1980, no writ) (no independent cause of action for right of access by grandparents when no managing conservator appointed).

146. TEX. FAM. CODE ANN. § 14.08(d) (Vernon Supp. 1982). The Family Code allows consensual modifications. *See id.* § 14.06(a), which provides:

To promote the amicable settlement of disputes between the parties to a suit under this chapter, the parties may enter into a written agreement containing provisions for conservatorship and support of the child, modifications of agreement or orders providing for conservatorship and support of the child, and appointment of joint managing conservators.

147. *Id.* § 14.08(d) provides:

If the motion is filed for the purpose of changing the designation of the managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

- (1) that the child's present environment may endanger his physical health or significantly impair his emotional development; or
- (2) that the managing conservator is the person seeking the modification or consents to the modification, and the modification is in the best interest of the child.

148. 613 S.W.2d 558 (Tex. Civ. App.—Beaumont 1981, no writ).

149. *Id.* at 560. In *Kirby v. Langley*, 612 S.W.2d 718 (Tex. Civ. App.—Dallas 1981, no writ), the appellate court relied on TEX. FAM. CODE ANN. § 14.06 (Vernon Supp. 1982) in sustaining the premature filing of a motion to modify. Both parents had joined in that motion; the court reasoned the motion was a type of agreement concerning conservatorship, and therefore did not have to comply with the strict requirements of § 14.08(d).

mother be managing conservator during January, November, and December, and that the father be managing conservator for the remaining months of the year. The court found that the custody arrangement would interfere with school attendance, and that sufficient evidence existed to support the change in conservatorship that named the mother managing conservator and the father possessory conservator with the right of possession of the child on weekends and during summer vacation.¹⁵⁰

Joint managing conservatorship decrees may be becoming more common. In *Terrett v. Wagenor* the court modified such a joint decree.¹⁵¹ Although the mother had requested the change, the trial court ruled in favor of the father, naming him managing conservator. In addition to naming the father managing conservator, the trial court ordered the mother to pay \$150 per month in child support. The father had responded to the pleadings prepared by the mother with a general denial. Although the father had filed no pleadings for affirmative relief, the appellate court, relying on the Family Code test of the best interest of the child,¹⁵² sustained the trial court's modification.¹⁵³ The appellate court pointed out that the Texas Supreme Court in *Leithold v. Plass*¹⁵⁴ had held that once the jurisdiction of a court was invoked in a child custody matter, "it becomes the duty of the court in the exercise of its equitable powers to make proper disposition of all matters comprehended thereby in a manner supported by the evidence."¹⁵⁵

The basis for modifying managing conservatorship also is being questioned. When the only question put to a jury is whether the present managing conservator should be retained, the standard is that such retention must be injurious to the child before a change may be granted.¹⁵⁶ If, however, the court additionally asks whether a different managing conservator would be a positive improvement, the jury's answer might differ, because it is not necessary that present conditions be injurious for a change to be an improvement. If both questions are asked of the jury and weighed against one another, a change in circumstances on the part of the current managing conservator no longer would be a necessary condition for change; all that would need to be shown is that a change in the circumstances of the person applying for the change has occurred such that it would be a positive improvement for the child. The problem of what standard is to be used in changing managing conservator is not answered clearly by the statute. Although the standards are written in the conjunctive, the persons whose conditions must be found to have changed are the child or the *parent*, not the managing conservator. In most cases the person seeking a change is a parent as well as a possessory conservator. In *Jones v. Jones*

150. 613 S.W.2d at 560.

151. 613 S.W.2d 308 (Tex. Civ. App.—Fort Worth 1981, no writ).

152. TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1975).

153. 613 S.W.2d at 311.

154. 413 S.W.2d 698 (Tex. 1967).

155. *Id.* at 701.

156. *See* TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Supp. 1982).

the court held that the circumstances of both the managing and possessory conservator parents should be weighed by the jury in determining who should prevail.¹⁵⁷ Other courts have held to the contrary.¹⁵⁸ The Texas Supreme Court has solved the conflict by reversing *Jones* and holding that the term "parent" in the statute does not include the possessory conservator.¹⁵⁹ The court stated that "it is irrelevant whether or not there has been a change in the circumstances of the possessory conservator,"¹⁶⁰ and that only if there was a finding of a change in the circumstances of the child or managing conservator could the factfinder look at the circumstances of the possessory conservator.¹⁶¹ The Supreme Court decision in *Jones* did not affect a number of custody modification decisions made during the survey period since they were based on the conclusion that the continuation of the same managing conservator would be injurious to the child.¹⁶²

When a potential managing conservator is not a parent or a relative, the courts are likely to treat him as an interloper, even though he may have had custody of the children. In *Pratt v. Texas Department of Human Resources* the court went so far as to deny standing to a potential adoptive father who had had custody of the children for more than a year.¹⁶³ The parental rights of the biological parents had been terminated in Moore County, and the Texas Department of Human Resources (TDHR) appointed managing conservator. The TDHR placed the children with the appellant and his wife in Potter County, and considered the couple as potential adoptive parents. Before the finalization of the adoption, the couple separated and indicated an intent to divorce. The TDHR therefore removed the children from the couple's home, and placed them in foster homes outside of Potter County. The appellant filed a motion in Moore County to modify conservatorship and to transfer the hearing to Potter County, asserting that the transfer was mandatory because the children's

157. 614 S.W.2d 190, 193 (Tex. Civ. App.—Houston [14th Dist.] 1981), *rev'd*, 25 Tex. Sup. Ct. J. 120 (Jan. 9, 1982).

158. See *Ogrydziak v. Ogrydziak*, 614 S.W.2d 474 (Tex. Civ. App.—El Paso 1981, no writ); *Wright v. Wright*, 610 S.W.2d 553 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

159. 25 Tex. Sup. Ct. J. 119, 120 (Jan. 9, 1982).

160. *Id.* at 121.

161. *Id.* at 120-21. The court specifically disapproved the language in *Watts v. Watts*, 563 S.W.2d 314, 316 (Tex. Civ. App.—Dallas 1978, writ *ref'd n.r.e.*), which had stated that the term "Parent," as used in TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Supp. 1982), included both custodial and noncustodial parents. 25 Tex. Sup. Ct. J. at 121.

162. See, e.g., *Lopez v. Soliz*, 619 S.W.2d 12 (Tex. Civ. App.—Corpus Christi 1981, no writ) (deposition of child's physician sufficient evidence to show that retention of managing conservator would be injurious to welfare of child); *Jeffers v. Wallace*, 615 S.W.2d 252 (Tex. Civ. App.—Dallas 1981, no writ) (remarriage of managing conservator and turbulent relationship with older brother was such material and injurious change of circumstances as to warrant change of custody); *In re F.J.K.*, 608 S.W.2d 301 (Tex. Civ. App.—Fort Worth 1980, no writ) (arrest of managing conservator's new husband for felony possession of marijuana and evidence of physical neglect of children found sufficient for change of managing conservators); *Roe v. Doe*, 607 S.W.2d 602 (Tex. Civ. App.—Eastland 1980, no writ) (evidence that managing conservator had been living with a man and that they used marijuana in child's presence, as well as possessory conservator's care of child during her sickness, held sufficient to find material change in circumstances).

163. 614 S.W.2d 490 (Tex. Civ. App.—Amarillo 1981, writ *ref'd n.r.e.*).

residence was in Potter County since they had been in appellant's home for more than a year.¹⁶⁴ The trial court denied the motion to transfer, and dismissed the modification motion on the basis that the former foster parent had no standing to bring a modification suit. The appellate court affirmed the rulings of the trial court, rigidly reading the venue provisions of the statute relevant to the motion to transfer.¹⁶⁵ For venue to be placed with a nonparent and nonmanaging conservator, the court held that the child must be under that person's care and control at the time of hearing on the motion to transfer.¹⁶⁶ The children had been removed from appellant's care a little over a month prior to the filing of the motion to transfer. The court therefore stated that the standing requirements had not been met.¹⁶⁷ The court took judicial notice of the fact that the counties were adjacent, and that the courthouses were 45 miles apart, which distance was not so inconvenient for appellant as to amount to an abuse of discretion.¹⁶⁸

The purpose of the venue provisions of the statute is to make it possible for hearings to be held where the evidence concerning the child's welfare is most readily available. The rigid reading of the statute in *Pratt* subverts that purpose. The real issue, however, is the matter of standing. In considering who may bring a modification suit, the court limited the phrase "any person with an interest in the child"¹⁶⁹ to mean those persons entitled to service of citation in a suit affecting the parent-child relationship.¹⁷⁰ The list of such persons is limited to those with a legal interest in the child, and does not include unrelated persons who may have had physical custody of the child. Relying on this limited list, the court held that the appellant could not bring a motion to modify conservatorship.¹⁷¹ The court, however, apparently misreads the intent of the legislature in framing the Family Code. The phrase "any person with an interest in the child" was intended for the protection of the child as well as the court. A court should hear all parties who might have an interest in the child; then, armed with full knowledge of the circumstances, the court could make an informed decision as to the best interest of the child. To limit unnecessarily the persons the court can hear works to the detriment of both the child and the court. Denying standing to truly interested persons substitutes a procedural device for a hearing on the merits; when the welfare of children is concerned, such is not the law.¹⁷²

*Drexel v. McCutcheon*¹⁷³ addressed an issue important to lawyers. A

164. *Id.* at 492. TEX. FAM. CODE ANN. § 11.06(b) (Vernon 1975) sets venue in the county where a child has lived for more than six months.

165. 614 S.W.2d at 496; see TEX. FAM. CODE ANN. § 11.04(c)(4) (Vernon 1975).

166. 614 S.W.2d at 493.

167. *Id.* at 495-96.

168. *Id.* at 494.

169. TEX. FAM. CODE ANN. § 11.03 (Vernon 1975).

170. 614 S.W.2d at 495; see TEX. FAM. CODE ANN. § 11.09(b) (Vernon Supp. 1982).

171. 614 S.W.2d at 494-95.

172. *Holley v. Adam*, 544 S.W.2d 367, 370 (Tex. 1976) (procedural irregularities and pleading defects will be overlooked when best interests of child clearly at stake).

173. 604 S.W.2d 430 (Tex. Civ. App.—Waco 1980, no writ).

lawyer is entitled to legal fees for successfully defending the custodial parent's right to continue as managing conservator if this service was necessary and for the benefit of the child. Obviously, if the court finds that the status quo is in the best interest of the child, then defending it is necessary for the child. The question in *Drexel*, however, was whether *unsuccessfully* defending the custodial parent's right could be a necessary service to the child. The court held that legal fees could be necessary even when the custodial parent failed to prevail, if the record established that the legal services were performed for the benefit of the child.¹⁷⁴ The jury's answer on the question of legal fees, however, was nonresponsive; hence, the court reversed and remanded on that issue.

Modification of custody decrees can present problems when both parents are present within the state. The problems are compounded, however, when one of the parents has left the state or has never been in Texas. In *Campbell v. Campbell*¹⁷⁵ the managing conservator mother and the child had been in Louisiana for at least twenty-seven months before the Texas father filed a motion to modify. The Texas court, applying the recently revised statute on exceptions to jurisdiction,¹⁷⁶ held that since the managing conservator and the child had maintained their residence in Louisiana for over six months, the trial court was correct in dismissing the motion, because it no longer had jurisdiction over the managing conservator and the child.¹⁷⁷

*Kelly v. Novak*¹⁷⁸ was another case involving out of state considerations. The couple divorced in Texas, and the court named the mother managing conservator and the father possessory conservator, giving him liberal visitation privileges. About six months after the divorce decree, the mother remarried and left Texas to reside in the State of Washington. Less than six months later, the father filed a motion to modify the custody decree. The mother was properly served, but, on the advice of her attorney, did not appear at the hearing. The trial court made extensive changes in the visitation provisions, but retained the mother as managing conservator. The mother then filed a motion to set aside the judgment, contending that the court had no jurisdiction to modify the original order because she, the managing conservator, and the child were residents of Washington. The trial court denied the motion. On appeal the court decided jurisdiction existed because all the provisions for modification of an order had been

174. *Id.* at 435. *But see* Reames v. Reames, 604 S.W.2d 335 (Tex. Civ. App.—Dallas 1980, no writ). The court found that it was an abuse of discretion to award attorney's fees to the losing party in connection with a change in visitation. The court indicated that generally a child's best interest can be served best by appointing a guardian ad litem for that purpose. *See also* Klement v. Munder, 619 S.W.2d 31 (Tex. Civ. App.—El Paso 1981, no writ) (per curiam) (abuse of discretion to tax parties other than parents attorney ad litem fees when parents not indigent).

175. 617 S.W.2d 795 (Tex. Civ. App.—Austin 1981, writ *dism'd w.o.j.*).

176. *See* TEX. FAM. CODE ANN. § 11.052(a)(1) (Vernon Supp. 1982).

177. 617 S.W.2d at 797.

178. 606 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

satisfied.¹⁷⁹ The mother had been absent from the state for less than six months, and no exception to continuing jurisdiction therefore applied.¹⁸⁰ Having established the question of jurisdiction, the appellate court found that a material change in circumstances had occurred, thereby necessitating a change in the visitation schedule. The child was no longer in Texas, but resided in Washington, and such a great distance would require modification of the order that had contemplated a visitation schedule of every other weekend. The appellate court also found the new schedule authorized by the trial court to be unworkable. Under the new schedule, the child was required to be flown to Texas for nine days of each month. The appellate court held that no evidence indicated that the new schedule was in the best interest of the child, and therefore reversed and remanded.¹⁸¹ Although the court misread the exception to jurisdiction, it reached the right result. The exception applies only if the managing conservator's status is in question and makes no reference to the possessory conservator;¹⁸² therefore, the court would have had jurisdiction in any event.

Perry v. Ponder,¹⁸³ a very carefully and thoughtfully written opinion, attempted to solve the problem of jurisdiction to modify custody when one parent and the child are residents of Texas and the other parent has never had any meaningful contact with Texas. The opinion was written before the enactment of the Parental Kidnapping Prevention Act (PKPA),¹⁸⁴ so the statute's effect on the reasoning of the opinion is problematic. In *Perry* the couple originally lived in Alabama and were divorced there. The mother, who had been awarded custody, moved to Texas with the child. The father then obtained a decree from the Alabama court modifying the divorce decree so as to give him custody. The mother filed suit in Texas for modification of conservatorship and child support payments. She alleged that the Alabama modification decree was void because she and the child were Texas residents, and because she had received no notice and had had no opportunity to appear at the Alabama hearing. The father was duly served,¹⁸⁵ and he responded by means of a special appearance¹⁸⁶ asking that the suit be dismissed for lack of personal jurisdiction over him. The trial court dismissed the suit because it found that the father had insufficient minimum contacts with Texas to constitutionally support an assertion of personal jurisdiction.¹⁸⁷

The appellate court separated the issue of jurisdiction to render a support decree from the issue of jurisdiction over a custody decree, and found

179. *Id.* at 28; see TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1982).

180. See TEX. FAM. CODE ANN. § 11.052 (Vernon Supp. 1982).

181. 606 S.W.2d at 30; cf. *In re C.E.B.*, 604 S.W.2d 436, 439 (Tex. Civ. App.—Amarillo 1980, no writ) (description of acceptable visitation schedule).

182. TEX. FAM. CODE ANN. § 11.052(a)(1) (Vernon Supp. 1982).

183. 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ).

184. For a discussion of the PKPA, see notes 1-7 *supra* and accompanying text.

185. TEX. R. CIV. P. 108.

186. *Id.* 120a.

187. 604 S.W.2d at 312.

that, on the basis of the holding in *Kulko v. Superior Court*,¹⁸⁸ deciding the support issue would be a violation of due process.¹⁸⁹ The court, however, determined that custody was more a matter of status than an obligation, so factors other than minimum contacts might be considered in order to comply with due process.¹⁹⁰ After looking to the principles of the *Restatement (Second) of Conflict of Laws* and the Uniform Child Custody Jurisdiction Act and distinguishing *May v. Anderson*,¹⁹¹ the court decided it might be possible to assert personal jurisdiction over the father under section 4 of the Texas parent-child long-arm statute.¹⁹² The court remanded the case for a trial court determination of whether the mother and child had lived in Texas long enough to give Texas a sovereign interest, and access to enough evidence concerning the child's welfare so that a determination of the child's best interest could be made.¹⁹³

Enforcement of child custody decrees has become an increasingly difficult problem. When the child is in the possession of a managing conservator who refuses to release the child to the possessory conservator for court ordered visitation, one remedy is a contempt judgment.¹⁹⁴ Sometimes such a judgment is effective, and if violated, it can result in the imprisonment of the managing conservator. The original order should express clearly the means by which the managing conservator can comply with the order or purge himself should he happen to fail to comply, because if this is not done the whole exercise may have to be repeated.¹⁹⁵

The more prevalent problem, however, has been the unlawful taking or keeping of a child from the possession of its lawful custodian. The courts have been active in this area, and the Congress of the United States has also responded by passing legislation.¹⁹⁶ On a number of occasions, the Texas Supreme Court has issued writs of mandamus ordering trial courts to grant writs of habeas corpus releasing children to the lawful possession of their custodians.¹⁹⁷ The courts also have begun enforcing the Penal Code provisions that make it an offense to retain a child outside of Texas with knowledge that such action violates a valid court order.¹⁹⁸ Addition-

188. 436 U.S. 84 (1978).

189. 604 S.W.2d at 312.

190. *Id.* at 321.

191. 345 U.S. 528 (1953).

192. 604 S.W.2d at 312. TEX. FAM. CODE ANN. § 11.051(4) (Vernon Supp. 1982) states that the court may exercise personal jurisdiction if "there is any basis consistent with the constitutions of the state or the United States for the exercise of personal jurisdiction."

193. 604 S.W.2d at 322-23.

194. *See* TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975) (explicitly authorizing contempt of court as penalty for refusal to conform with order of the court).

195. *See, e.g., Ex parte Brooks*, 604 S.W.2d 463 (Tex. Civ. App.—Tyler 1980, no writ) (court has no power to impose coercive imprisonment for contempt when order did not specify reasonable extent of duty to surrender possession).

196. 28 U.S.C. § 1738A (1976); *see* notes 1-6 *supra* and accompanying text.

197. *See, e.g., Perry v. Scoggins*, 25 Tex. Sup. Ct. J. 19 (Oct. 24, 1981); *Marshall v. Wilson*, 616 S.W.2d 932 (Tex. 1981).

198. TEX. PENAL CODE ANN. § 25.03(a) (Vernon Supp. 1982) provides:

A person commits an offense if he takes or retains a child younger than 18 years out of this state when he:

ally, courts have been using the law of torts to obtain civil damages for the wronged parties in child snatching cases.¹⁹⁹ In *Fenslage v. Dawkins* a federal court held that Texas law would favor a tort remedy and awarded \$65,000 in damages and \$65,000 in exemplary damages.²⁰⁰

The controversy in *Arrington v. Arrington*²⁰¹ involved the possession of a dog, and poignantly illustrates the sadness of the human condition in connection with conservatorship. The husband appealed from a decree that had made the wife managing conservator of the dog, Bonnie Lou. The court pointed out that, while "Bonnie Lou is a very fortunate little dog with two humans to shower upon her attentions and genuine love frequently not received by human children from their divorced parents. . . . A dog . . . is not a human being and not treated in the law as such. A dog is personal property."²⁰² "The office of 'managing conservator,' " according to the court, "was created for the benefit of human children, not canine."²⁰³ The court found that Bonnie Lou had been a gift to the wife and therefore was her property. The husband agreed to his wife having custody as long as he could have the privilege of reasonable visitation. The court upheld the guidelines established by the trial court, and summed up by saying, "We are sure there is enough love in that little canine heart to 'go around'. Love is not a commodity that can be bought and sold—or decreed. It should be shared and not argued about."²⁰⁴

V. SUPPORT

Trial courts have wide discretion in establishing the amount required for the support of a child.²⁰⁵ Appellate courts rarely question the decision,

-
- (1) knows that his taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody; or
 - (2) has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit for divorce, or a civil suit or application for habeas corpus to dispose of the child's custody, has been filed.

See Roberts v. State, 619 S.W.2d 161 (Tex. Crim. App. 1981) (discussion of jurisdiction of Texas courts in these matters).

199. RESTATEMENT (SECOND) OF TORTS § 700 (1977). *See Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Schuppin v. Unification Church*, 435 F. Supp. 603 (D. Vt.), *aff'd*, 573 F.2d 1295 (1st Cir. 1977).

200. 629 F.2d 1107, 1109 (5th Cir. 1980).

201. 613 S.W.2d 565 (Tex. Civ. App.—Fort Worth 1981, no writ).

202. *Id.* at 569.

203. *Id.*

204. *Id.* and *amen.*

205. *See, e.g., Woods v. Woods*, 619 S.W.2d 590 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (affirming decree awarding \$200 per month for one child); *Huls v. Huls*, 616 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (affirming decree awarding \$400 per month for one child); *Zamora v. Zamora*, 611 S.W.2d 660 (Tex. Civ. App.—Corpus Christi 1980, no writ) (affirming decree awarding \$200 per month for two children); *Saums v. Saums*, 610 S.W.2d 242 (Tex. Civ. App.—El Paso 1980, writ *dism'd*) (affirming decree awarding \$200 per month for one child, despite court's knowledge that appellant was behind in another child support obligation; *see Saums v. Synoground*, 605 S.W.2d 373 (Tex. Civ. App.—El Paso 1980, no writ)); *Lott v. Lott*, 605 S.W.2d 665 (Tex. Civ. App.—Dallas 1980, writ *dism'd*) (affirming decree awarding \$240 per month for one child, although appellant had only \$800 per month income).

and at least one has affirmed even the inclusion of a requirement for the payment of medical expenses in a support decree.²⁰⁶ The appellate court, nevertheless reversed and remanded the trial court's decree in *Price v. Price*,²⁰⁷ holding that use of a percentage of a father's net bonus as the basis of child support was error.²⁰⁸ The court noted that past Texas cases have disapproved of formulas in the calculation of child support.²⁰⁹ In addition, the court pointed out that the father already had other child support obligations and speculated as to the result if the other children also wanted "a piece of the action."²¹⁰ The appellate court sent the case back for further findings since the original order for a basic \$300 per month child support included the bonus percentage.²¹¹

Some confusion exists concerning the evidence needed to support a modification of a child support decree. It seems clear that when the circumstances of the obligor have changed materially and substantially for the worse, a decrease in the support obligation is merited.²¹² The child's diminished needs are not the basis for the decrease in support for, in reality, his needs probably have increased; rather the decrease is based on the futility of attempting to maintain a support order that can not be enforced. When the obligor's circumstances have improved, however, it has been argued that an obligee cannot demand an increase in support based on that fact alone. *Holt v. Holt*²¹³ correctly interpreted the Family Code by holding that "a material and substantial change in the circumstances of a party affected by the order providing for support,"²¹⁴ was sufficient to sustain an order for an upward modification of the support order.²¹⁵

Other cases that have permitted the upward modification of support decrees have generally used reasoning similar to that in *Holt*, although usually not stating it as forcefully. In *Strauss v. Strauss*²¹⁶ the court fortified its decision to allow upward modification by mentioning that the child was aging and soon would be attending school. The true basis for the modification, however, was the discharge of the obligor's debts as a result of a bankruptcy action, and a substantial increase in his income. The court stated that the modification was justified "because of the needs of the child

206. *Minns v. Minns*, 615 S.W.2d 893 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dismissed).

207. 606 S.W.2d 51 (Tex. Civ. App.—Fort Worth 1980, no writ).

208. *Id.* at 53.

209. *Id.* at 52; see *In re J.M. & G.M.*, 585 S.W.2d 854 (Tex. Civ. App.—San Antonio 1979, no writ); *Doss v. Doss*, 521 S.W.2d 709 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *Barlow v. Barlow*, 282 S.W.2d 429 (Tex. Civ. App.—El Paso 1955, no writ).

210. 606 S.W.2d at 53.

211. *Id.*

212. See, e.g., *Watkins v. Austin*, 590 S.W.2d 830 (Tex. Civ. App.—Dallas 1979, no writ); *MacAyeal v. MacAyeal*, 575 S.W.2d 626 (Tex. Civ. App.—Waco 1978, no writ).

213. 620 S.W.2d 650 (Tex. Civ. App.—Dallas 1981, no writ).

214. *Id.* at 652. TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Supp. 1982) states that "the court may modify an order . . . if the circumstances of the child or a person affected by the order . . . to be modified have materially and substantially changed since the entry of the order." (Emphasis added.)

215. 620 S.W.2d at 651.

216. 619 S.W.2d 18 (Tex. Civ. App.—Corpus Christi 1981, no writ).

and the increased ability of the appellant to provide his child with a life style commensurate with his earnings."²¹⁷ *McCartor v. Parr*²¹⁸ adds further support for the proposition that courts base their decisions primarily on the obligor's ability to pay. In this case the appellate court held that to order payments in excess of the obligor's ability to pay was an abuse of discretion, despite evidence concerning the increased needs of the child.²¹⁹ The father, a student, was supported by his father, and had no immediate job prospects.

Sometimes modifications in support orders are more apparent than real as when the number of children being supported decreases but the amount per child increases.²²⁰ Other calculations may be hidden within support orders, for example, the date on which the new order takes effect. The effective date can be either the date of the filing of the motion for modification or the date of the decree;²²¹ the determination of the date is within the trial court's discretion.²²²

For many litigants, the enforcement of support decrees is the most difficult part of the entire divorce procedure. One method of enforcement is a contempt proceeding.²²³ When all the correct procedures are followed, a court may place an obligor in jail until he has complied with the provisions of the contempt order.²²⁴ If, however, the obligor is able to show that the contempt order (1) violated due process because of a lack of notice,²²⁵ (2) that he is unable to pay,²²⁶ (3) that the order lacks specificity or clarity,²²⁷ or (4) that the order was phrased in the disjunctive and the obligor

217. *Id.* at 20 (emphasis added).

218. 612 S.W.2d 268 (Tex. Civ. App.—Amarillo 1981, no writ).

219. *Id.*

220. *See, e.g.,* *Craig v. Jess*, 620 S.W.2d 221 (Tex. Civ. App.—Waco 1981, no writ) (affirming order increasing a 1978 order of \$80 per month per child for five children to \$135 per month per child for three children; overall change only increase of \$5 per month).

221. TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Supp. 1982) provides that "[a]n order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify."

222. *See, e.g.,* *Black v. Bassett*, 619 S.W.2d 193 (Tex. Civ. App.—Texarkana 1981, no writ); *Cox v. Cox*, 609 S.W.2d 888 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

223. TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975); *see* Mnookin, Book Review, *Using Jail for Child Support Enforcement*, 48 U. CHI. L. REV. 338 (1981) (reviewing D. CHAMBERS, *MAKING FATHERS PAY* (1979)).

224. *See Ex parte* Englutt, 619 S.W.2d 279 (Tex. Civ. App.—Texarkana 1981, no writ); *Ex parte* Wilson, 616 S.W.2d 327 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); *Ex parte* Hodge, 611 S.W.2d 468 (Tex. Civ. App.—Dallas 1980, no writ); *Ex parte* Hall, 611 S.W.2d 459 (Tex. Civ. App.—Dallas 1980, no writ); *Ex parte* Cummings, 610 S.W.2d 238 (Tex. Civ. App.—Amarillo 1980, no writ); *Ex parte* Chacon, 607 S.W.2d 317 (Tex. Civ. App.—El Paso 1980, no writ); *Ex parte* Miller, 604 S.W.2d 324 (Tex. Civ. App.—Dallas 1980, no writ).

225. *See Ex parte* Bush, 619 S.W.2d 298 (Tex. Civ. App.—Tyler 1981, no writ); *Ex parte* Eureste, 614 S.W.2d 647 (Tex. Civ. App.—Austin 1981, no writ); *Ex parte* Crocker, 609 S.W.2d 833 (Tex. Civ. App.—Tyler 1980, no writ); *Ex parte* Gonzales, 606 S.W.2d 5 (Tex. Civ. App.—Amarillo 1980, no writ); *Ex parte* McNemee, 605 S.W.2d 353 (Tex. Civ. App.—El Paso 1980, no writ).

226. *See Ex parte* Sanders, 608 S.W.2d 343 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *In re* Anderson, 604 S.W.2d 338 (Tex. Civ. App.—Tyler 1980, no writ).

227. *See Ex parte* White, 616 S.W.2d 340 (Tex. Civ. App.—San Antonio 1981, no writ); *Ex parte* Quevedo, 611 S.W.2d 711 (Tex. Civ. App.—Corpus Christi 1981, no writ); *Ex parte*

has complied with one of the orders,²²⁸ then habeas corpus will lie and the obligor cannot be incarcerated. After a child has reached eighteen years of age, child support orders no longer can be enforced by contempt.²²⁹ In addition, an obligation to support or pay money to a child, who at the time of divorce is over eighteen, must be based on a contract²³⁰ since no legal duty to support exists.²³¹ In such situations the regular venue statutes apply rather than the provisions of the Family Code.²³²

Sometimes the best way to collect past due child support payments is to reduce them to judgment.²³³ Garnishment is also a possible method for obtaining payment if Air Force retirement benefits are owing to the obligor. Attorney's fees can be included in the amount garnished, if they were incurred in the effort to obtain the past due support.²³⁴ *Nagle v. Nagle*²³⁵ represents a unique method for obtaining redress. In this case the husband promised to deed to his wife his ownership interest in their house provided she did not press the contempt proceeding then pending. She complied with the agreement, but he did not. The court found that the wife proved all the elements of fraud and awarded her the value of her husband's interest in the house, plus the cost of prosecuting the suit.²³⁶

VI. TERMINATION AND ADOPTION

When the parent-child relationship is terminated and the child is legally adopted by another, that child is legally the child of the new parent.²³⁷ The adopted child has no connection with his natural parent, except in some instances, the right to inherit from that parent.²³⁸ The court in *Figueroa v. Santos*²³⁹ therefore ruled that for purposes of the Texas guest statute²⁴⁰ a child who has been adopted is no longer related to his natural cousin and can bring an action for negligence if he is injured while riding

Mikeska, 608 S.W.2d 290 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *Ex parte Owens*, 605 S.W.2d 709 (Tex. Civ. App.—Dallas 1980, no writ).

228. See *Ex parte Englutt*, 608 S.W.2d 610 (Tex. 1980).

229. See *Ex parte Thomas*, 609 S.W.2d 829 (Tex. Civ. App.—Tyler 1980, no writ).

230. *Robertson v. Robertson*, 608 S.W.2d 245 (Tex. Civ. App.—Eastland 1980, no writ).

231. TEX. FAM. CODE ANN. § 14.05 (Vernon 1975) provides only that "[t]he court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age"

232. *Busbey v. Busbey*, 619 S.W.2d 472 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (when marriage settlement agreement provided remedy available as contract, venue must be established under usual venue rules since action a general contract suit, not based on Texas Family Code).

233. *Rush v. Hagler*, 611 S.W.2d 718 (Tex. Civ. App.—Fort Worth 1981, no writ) (husband, failing to pay child support, could be held liable in general civil action, thereby rendering wife judgment creditor).

234. *Etzel v. United States Dep't of Air Force*, 620 S.W.2d 853 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

235. 617 S.W.2d 811 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ granted).

236. *Id.* at 813.

237. TEX. FAM. CODE ANN. § 16.09 (Vernon 1975 & Supp. 1982).

238. *Id.* § 15.07 (Vernon Supp. 1982).

239. 606 S.W.2d 350 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

240. TEX. REV. CIV. STAT. ANN. art. 6701b, § 1(a) (Vernon 1975).

as a guest in an automobile driven by that cousin.²⁴¹ Although the court in *Figueroa* ruled on a question of first impression,²⁴² its holding is in conformity with holdings in other areas. Children legally adopted by another have been denied the benefits of worker's compensation²⁴³ and recovery for wrongful death²⁴⁴ following the death of a natural parent.

After a parent has been granted custody in a divorce action the parent often remarries, and the new stepparent may wish to adopt the child of the custodian. Adoption in Texas requires that the parent-child relationship of the natural parent be terminated before a valid adoption proceeding can take place.²⁴⁵ While the termination and adoption proceedings can be combined,²⁴⁶ if the termination is reversed on appeal, the adoption also will be invalid.²⁴⁷ Such was the case in *Mayfield v. Smith*, in which the appellate court found the mere fact that the father was imprisoned insufficient grounds for termination.²⁴⁸ The court also found the evidence legally insufficient to establish that the father had failed to support his minor children in accordance with his ability.²⁴⁹ Accordingly, the court reversed the trial court judgment that had terminated the rights of the natural father, and decreed the stepfather's adoption of the children invalid.²⁵⁰

Jurisdiction to terminate the parent-child relationship can be problematic in situations when one parent has never been in Texas and when a state other than Texas decreed the original custody and support order. *Brewington v. Wertin*²⁵¹ might have been such a case, but the father voluntarily submitted to the jurisdiction of the court, and the court found by clear and convincing evidence²⁵² that he had failed to support the children in accordance with his ability.²⁵³ As a result the court terminated his parent-child relationship.²⁵⁴ *In re M.S.B.*²⁵⁵ presented a different termination situation. The father, by special appearance,²⁵⁶ challenged the court's ju-

241. 606 S.W.2d at 352.

242. *Id.* at 351.

243. *Patton v. Shamburger*, 431 S.W.2d 506, 508 (Tex. 1968).

244. *Go Int'l, Inc. v. Lewis*, 601 S.W.2d 495, 499 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

245. TEX. FAM. CODE ANN. § 16.03 (Vernon Supp. 1982).

246. *Id.* § 16.03(b).

247. *See Schiesser v. State*, 544 S.W.2d 373, 377 (Tex. 1976) (adoption decree entered prior to final judgment terminating parent-child relationship ruled void).

248. 608 S.W.2d 767, 771 (Tex. Civ. App.—Tyler 1980, no writ).

249. *Id.* at 770. *But see Belitz v. Seekatz*, 570 S.W.2d 218 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (evidence insufficient to support finding that father did not provide support in accordance with his ability).

250. 608 S.W.2d at 771.

251. 609 S.W.2d 305 (Tex. Civ. App.—Waco 1980, no writ).

252. *In re G.M.*, 596 S.W.2d 846 (Tex. 1980) (use of clear and convincing evidence standard required in involuntary proceedings for termination of parent-child relationship); *see In re J.J.*, 617 S.W.2d 188 (Tex. 1981) (per curiam). The Texas Supreme Court in a per curiam opinion refusing writ of error held that, while the decision in *G.M.* was prospective in nature, cases pending at the time of the decision because of an appeal come within the rule of that decision. *Id.* at 188.

253. TEX. FAM. CODE ANN. § 15.02(1)(F) (Vernon Supp. 1982).

254. 609 S.W.2d at 306.

255. 611 S.W.2d 704 (Tex. Civ. App.—San Antonio 1980, no writ).

256. TEX. R. CIV. P. 120a.

risdiction, and the trial court found that it had no jurisdiction and dismissed. Upon the mother's appeal, the appellate court in a wrongly reasoned opinion decided that the trial court did have jurisdiction over the nonresident father, and reversed and remanded.²⁵⁷ The decision is wrong in failing to differentiate between the process due in a termination proceeding and in a custody proceeding. The Family Code itself is misleading, since it would apply the same jurisdictional requirements to all suits affecting the parent-child relationship, and makes no distinctions between the various types of actions.²⁵⁸ The United States Supreme Court has held that in support matters the person whose rights are being adjudicated must have had minimum contacts with the forum state in order for a decision concerning that person to be constitutional.²⁵⁹ In *M.S.B.* the father had never been in Texas. Some years earlier a Texas court had increased the father's child support payments after a hearing in which he did not appear. This earlier order was not constitutionally valid, and if the grounds for termination were based on the prior order, the termination should have failed. In addition, the reasoning of *Perry v. Ponder*,²⁶⁰ on which the court relied,²⁶¹ was based on the philosophy of the Uniform Child Custody Jurisdiction Act. Because the UCCJA is concerned only with matters of custody and not the permanent severing of parental rights, *Perry* was irrelevant to this decision.

Sometimes adoptions take place in which the parties to the proceedings are distantly related.²⁶² The evidence necessary for termination²⁶³ is the same as in actions between strangers²⁶⁴ or between the parents and the state.²⁶⁵ When no natural parents with a connection to the child remain,

257. 611 S.W.2d at 706.

258. TEX. FAM. CODE ANN. § 11.045 (Vernon Supp. 1982).

259. See *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

260. 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ). For a discussion of *Perry v. Ponder*, see notes 183-93 *supra* and accompanying text.

261. 611 S.W.2d at 706.

262. See, e.g., *In re Guillory*, 618 S.W.2d 948 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). The court found that the mother knowingly allowed the child to remain in conditions or surroundings that endangered the child's physical and emotional well-being (see TEX. FAM. CODE ANN. § 15.02(1)(D) (Vernon Supp. 1982)) by sharing living quarters with persons sniffing glue. 618 S.W.2d at 950. the court granted the termination and gave custody to an aunt of the child. *Id.* at 951.

263. TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1982).

264. See, e.g., *Diaz v. Beyer*, 611 S.W.2d 726 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). In this case the father failed to provide adequate support or medical care at time of birth (see TEX. FAM. CODE ANN. § 15.02(1)(H) (Vernon Supp. 1982)) and the mother voluntarily left the child and expressed an intent not to return (see *id.* § 15.02(1)(A)). Accordingly, the court found sufficient grounds to terminate the parent-child relationship and permit the appellee's adoption to be sustained, even though the natural parents had married each other and wished to have their child back. 611 S.W.2d at 732.

265. See, e.g., *In re R.L.*, 620 S.W.2d 249 (Tex. Civ. App.—Amarillo 1981, no writ) (order of termination reversed and remanded because evidence not clear and convincing); *In re L.F.*, 617 S.W.2d 335 (Tex. Civ. App.—Amarillo 1981, no writ) (order of termination sustained as factually sufficient in showing moderately retarded, emotionally disturbed mother capable of knowingly allowing children to remain in conditions that endangered them); *Allred v. Harris County Child Welfare Unit*, 615 S.W.2d 803 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (order of termination sustained on finding that father's wilful

the standard for who should adopt becomes one of the best interest of the child.²⁶⁶ After a decision has been made as to which party should be permitted to adopt, the losing party, if not related to the child in any way, may lose all rights to the child, including the visitation rights of a possessory conservator. This was the decision of the court in *Hopper v. Brittain*²⁶⁷ in which the former wife and her new husband brought an adoption proceeding in connection with a child of whom she and her former husband had been given custody. After the divorce, the adoption not having been finalized, the wife was designated as managing conservator. While the former husband had an opportunity to contest the adoption as possessory conservator,²⁶⁸ the court found that once the adoption was finalized his possessory conservatorship vanished.²⁶⁹ Furthermore, the court held that a parent-child proceeding need not be brought to terminate his rights, because he was not a "parent" within the contemplation of the Family Code.²⁷⁰

*Mendez v. Brewer*²⁷¹ raised the question of a foster parent's right to intervene in a suit to terminate the parent-child relationship. The foster parents had the child in their custody as a result of a contract with the Texas Department of Human Resources. They became attached to the child and wished to adopt him. The trial court struck their intervention petition and the appeals court reversed,²⁷² but the Texas Supreme Court sustained the action of the trial court.²⁷³ The supreme court reasoned that persons have a right to intervene in a pending suit when they have an interest in the subject matter of the litigation that is not merely contingent or remote.²⁷⁴ The court found that the only interest the foster parents had was in an adoption and that that interest was contingent on the termination of parental rights.²⁷⁵ Accordingly, the court stated that the Texas Department of Human Resources, the parents, and the child were the real parties in interest.²⁷⁶ The court held that the foster parents were at most witnesses.²⁷⁷

criminal activity with knowledge of wife's pregnancy and his subsequent imprisonment amounted to voluntary abandonment); *In re H.W.E.*, 613 S.W.2d 71 (Tex. Civ. App.—Fort Worth 1981, no writ) (order of termination sustained based on clear and convincing evidence of sexual abuse).

266. TEX. FAM. CODE ANN. § 16.08 (Vernon Supp. 1982); see *Remling v. Green*, 610 S.W.2d 817 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). This case marked the end of a bitter controversy wherein the Texas Supreme Court had reversed and remanded the original decision of the appellate court. See *Remling v. Green*, 601 S.W.2d 84 (Tex. Civ. App.—Houston [1st Dist.]), *rev'd and remanded*, 608 S.W.2d 905 (1980).

267. 612 S.W.2d 636 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

268. If he had not been designated possessory conservator he might be denied standing, as was the foster parent in *Pratt v. Texas Dep't of Human Resources*, 614 S.W.2d 490 (Tex. Civ. App.—Amarillo 1981, writ *ref'd n.r.e.*). See notes 163-72 *supra* and accompanying text.

269. 612 S.W.2d at 639.

270. *Id.*; see TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975).

271. 25 Tex. Sup. Ct. J. 126 (Jan. 9, 1982).

272. *Id.* at 127.

273. *Id.* at 128.

274. *Id.* at 127 (quoting *Rogers v. Searle*, 533 S.W.2d 440 (Tex. Civ. App.—Corpus Christi 1976, no writ)).

275. 25 Tex. Sup. Ct. J. at 128.

276. *Id.*

Whenever parents attempt to contest the termination of their parental rights by the Texas Department of Human Resources, they may experience difficulties in raising the necessary funds.²⁷⁸ When a proper appeal is taken despite this difficulty, it is most unfortunate to have a court reporter refuse to prepare the statement of facts unless she is paid. In *Loffin v. Weiss* the court of civil appeals held that mandamus would issue despite the fact that the reporter had resigned her official reporter position.²⁷⁹ The reporter contended that her property was being taken for public use without compensation, but the court found that she already had been compensated through the salary she received as an official court reporter.²⁸⁰

The Texas Supreme Court never has had the opportunity to rule on the validity of the sections of the Family Code that permit a parent to relinquish all rights to his child and to waive his right to any notice or service of process prior to the actual filing of a termination suit.²⁸¹ *Brown v. McLennan County Children's Protective Services*²⁸² may offer the court such an opportunity. In this case the mother executed an irrevocable affidavit relinquishing all parental rights to her two children and waiving future service of process. In a subsequent proceeding the trial court terminated her parental rights. The mother then filed for a writ of error and for a statement of facts. The appellate court affirmed the trial court's judgment, finding that she ceased to be an interested party after she had executed the affidavit.²⁸³ Because numerous adoptions have been granted based on terminations involving irrevocable affidavits of relinquishment and waivers of process prior to the actual filing of the petition to terminate the parent-child relationship,²⁸⁴ it is hoped that the Texas Supreme Court will seize this opportunity to determine the correct procedures. Termination of the parent-child relationship is not something that should be done lightly; the procedures should be followed carefully and meticulously in spirit as well as form. The legislature established the current method some years ago, and if the agencies have been following it correctly their actions should be sustained.²⁸⁵

277. *Id.*

278. *See, e.g.,* *Shriver v. McLennan County Children's Protective Servs.*, 610 S.W.2d 229 (Tex. Civ. App.—Waco 1980, no writ). The court in *Shriver* denied a motion to extend time for filing of transcript. *Id.* at 230. The court did not accept the attorney's explanation that the transcript was being held pending the receipt from plaintiff of money to cover appeals costs. *Id.* Instead, the court found that the plaintiff's actions amounted to indifference or negligence. *Id.*

279. 605 S.W.2d 377, 380 (Tex. Civ. App.—Amarillo 1980, no writ).

280. *Id.* at 380-81.

281. TEX. FAM. CODE ANN. §§ 15.01-.03 (Vernon 1975 & Supp. 1982).

282. 616 S.W.2d 699 (Tex. Civ. App.—Waco 1981, writ granted).

283. *Id.* at 701.

284. *See, e.g.,* *S.A.S. v. Catholic Family Servs.*, 613 S.W.2d 540 (Tex. Civ. App.—Amarillo 1981, no writ).

285. *See In re B.B.F.*, 595 S.W.2d 873 (Tex. Civ. App.—San Antonio 1980, no writ); *Rogers v. Searle*, 533 S.W.2d 433 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976). *See also* Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 31 Sw. L.J. 133, 151 (1977).

