



January 1983

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Recommended Citation

Ellen K. Solender, *Family Law: Parent and Child*, 37 Sw L.J. 111 (1983)
<https://scholar.smu.edu/smulr/vol37/iss1/5>

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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

I. UNITED STATES SUPREME COURT DECISIONS

DURING the 1981 Term the United States Supreme Court decided two cases that relate directly to Texas law in the parent and child area¹ and three others that have an indirect effect.² The *Mills v. Habluetzel*³ decision arose out of a direct attack on the constitutionality of the Texas statute of limitations for bringing a paternity suit. The suit attacked the original, one-year limitation period⁴ and not the current statute, which provides for a four-year period.⁵ A unanimous Court had no difficulty finding that one year is an "unrealistically short time limitation [and] is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims."⁶ The Court concluded that the Texas statute denied illegitimate children the equal protection of the law.⁷ At the time the Supreme Court decided *Mills* a similar case was pending before the Texas Supreme Court in which a court of civil appeals had found the same statute unconstitutional based on due process grounds.⁸ The Texas Supreme Court affirmed the appellate court's decision, but based its holding on equal protection in accordance with the *Mills* opinion.⁹

Neither the United States Supreme Court nor the Texas Supreme Court expressed an opinion as to the constitutionality of the new four-year stat-

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1. *Plyler v. Doe*, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *Mills v. Habluetzel*, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982).

2. *Lehman v. Lycoming County Children's Services Agency*, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982); *Board of Educ. v. Rowley*, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Santosky v. Kramer*, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

3. 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982).

4. 1975 Tex. Gen. Laws, ch. 13, § 13.01, at 1261-62.

5. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983).

6. 102 S. Ct. at 1555, 71 L. Ed. 2d at 779. The unanimous opinion was achieved by virtue of the concurrence of five Justices speaking through Justice O'Connor. *Id.* at 1556-58, 71 L. Ed. 2d at 779-82.

7. *Id.* at 1556, 71 L. Ed. 2d at 779; see U.S. CONST. amend. XIV, § 1, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

8. *In re Miller*, 605 S.W.2d 332 (Tex. Civ. App.—Fort Worth 1980), *aff'd sub nom. In re J.A.M.*, 631 S.W.2d 730 (Tex. 1982). U.S. CONST. amend. XIV, § 1 provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

9. 631 S.W.2d at 732.

ute of limitations, although both courts stated that they were aware of the change in Texas law.¹⁰ Justice Rehnquist, in his opinion for the Court, stated that the holding that "Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean . . . that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children."¹¹ Thus the Court left open the question of what is a constitutionally mandated length of time for illegitimate children to determine their paternity. Justice O'Connor, together with four other Justices, noted that the decision might be interpreted as approving the current Texas four-year statute of limitations.¹² In her concurrence, after discussing various fact situations that might require a longer period than one year for establishing paternity, Justice O'Connor stated that she did not read the Court's decision as prejudging the constitutionality of periods longer than the one-year limitation.¹³ Justice Powell went even further; he agreed with Justice O'Connor's interpretation of the decision, but emphasized the fact "that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff."¹⁴

Considering the complaints from the Justices concerning the overcrowding of their dockets, the *Mills* decision is most irresponsible.¹⁵ Since Texas is not the only state with a limitation period shorter than the age of minority in paternity suits,¹⁶ the Court will have the same question before it again very soon. In fact, the court has already noted probable jurisdiction in a case concerning a Tennessee statute.¹⁷ That case is just one of a number of contradictory state court decisions based on *Mills*.¹⁸ It would seem that the Texas Supreme Court should also have considered the new four-year statute since the amount of litigation on the subject in Texas indicates that it is an important issue. Furthermore, by not addressing the new statute the court may further delay certainty in this area. The common law now controls the limitation period for all children born prior to the enactment of the new statute.¹⁹ An even longer period of confusion

10. 102 S. Ct. at 1552 n.1, 71 L. Ed. 2d at 775 n.1; 631 S.W.2d at 732.

11. *Id.* at 1553, 71 L. Ed. 2d at 777.

12. *Id.* at 1556, 71 L. Ed. 2d at 780.

13. *Id.* at 1558, 71 L. Ed. 2d at 782.

14. *Id.*, 71 L. Ed. 2d at 782 (quoting Justice O'Connor's opinion, 102 S. Ct. at 1557, 71 L. Ed. 2d at 781).

15. See Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A.J. 1370, 1372 (1982).

16. See, e.g., IND. CODE ANN. § 31-6-6.1-6 (Burns 1980) (two-year limitation); N.Y. FAM. CT. ACT § 517(a) (McKinney Supp. 1976-1981) (two-year limitation, or two years after the mother becomes 18); UNIF. PARENTAGE ACT § 7, 9A U.L.A. 596 (1979) (suggests either a three-year limitation, or three years after child reaches the age of majority).

17. *Pickett v. Brown*, 638 S.W.2d 369 (Tenn. 1982) (upholding the Tennessee two-year statute of limitations, *prob. juris. noted*, 51 U.S.L.W. 3442 (U.S. Dec. 7, 1982)).

18. See, e.g., *Oregon v. Bradley*, 8 FAM. LAW REP. (BNA) 2696 (Ore. Aug. 25, 1982) (holding a six-year statute of limitations unconstitutional); *Astemborskii v. Susmarki*, 9 FAM. LAW REP. (BNA) 2104 (Pa. Nov. 4, 1982) (holding a six-year statute constitutional).

19. See *In re Renteria*, 624 S.W.2d 353 (Tex. Ct. App.—Corpus Christi 1981, no writ), relying on *Texas Dep't of Human Resources v. Delley*, 581 S.W.2d 519 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), in applying not only the general four-year statute of limitations, TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958), but also the statutory tolling

will occur if the new statute is found unconstitutional.²⁰ Let us hope that either the courts or the legislature will shortly resolve the question.

The second decision that directly concerned Texas law was *Plyler v. Doe*.²¹ A five Justice majority held that Texas could not treat undocumented aliens as nonpersons who are outside the jurisdiction or responsibility of Texas, and thus undeserving of equal protection.²² The Court found that the complete denial of a free public education to undocumented alien children would create a permanent subclass of illiterates, and such a denial must be justified by a substantial state interest.²³ The Court found no such interest. While not deviating from its view that public education is not a fundamental right,²⁴ the Court found that the cost to Texas of providing these children with a free education was not burdensome enough to form a reasonable basis for denying them an education.²⁵ Because of this decision the legislature should amend the Texas Education Code²⁶ to provide reimbursement from the Available School Fund to the school districts throughout the state for the cost of educating these children.

*Board of Education v. Rowley*²⁷ delineates the standard for providing personalized instruction to handicapped children. The Court interpreted the Education for All Handicapped Children Act of 1975²⁸ to mean that a state has provided a handicapped child with a "free appropriate public education" if its services allow the child to "benefit educationally."²⁹ The five-Justice majority found that it was not necessary to "maximize the potential of each handicapped child."³⁰ The Court also cautioned lower courts "to avoid imposing their view of preferable educational methods" when interpreting the Act.³¹

In *Lehman v. Locoming County Children's Services Agency*³² the Court

provision for persons under disability, TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon 1958 & Supp. 1982-1983).

20. One authority says: "It seems highly likely that any statute of limitation on paternity suits other than eighteen years will be found to be unconstitutional by some future, authoritative decision." Sampson, *Texas Family Code Symposium; Determination of Paternity*, 13 TEX. TECH. L. REV. 897, 903 (1982). *But see* Pickett v. Brown, 638 S.W.2d 369 (Tenn. 1982) (two-year statute constitutional), *prob. juris. noted*, 51 U.S.L.W. 3442 (U.S. Dec. 7, 1982).

21. 102 S. Ct. 2382, 72 L. Ed. 2d 787 (1982).

22. *Id.* at 2391, 72 L. Ed. 2d at 795.

23. *Id.* at 2402, 72 L. Ed. 2d at 803.

24. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

25. 102 S. Ct. at 2401-02, 72 L. Ed. 2d at 807-08.

26. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1952 & Supp. 1982-1983).

27. 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

28. 20 U.S.C. § 1401 (1976 & Supp. V 1981).

29. 102 S. Ct. at 3049, 73 L. Ed. 2d at 710.

30. *Id.* at 3048, 73 L. Ed. 2d at 708.

31. *Id.* at 3051, 73 L. Ed. 2d at 712. The most recent Texas case interpreting the Act involves damages for failing to provide appropriate services rather than standards. In *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982), the court held that, if a school district fails to provide appropriate education for a handicapped child, and unilateral arrangements are made to overcome the school district's failure, there might be a limited reimbursement remedy in exceptional circumstances. *Id.* at 468-69.

32. 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982).

refused to extend federal habeas corpus jurisdiction to child custody cases.³³ The Court held that it would not permit a collateral challenge to a state court's involuntary termination of parental rights by means of a writ of habeas corpus, even though the writ alleged that the underlying state statute is unconstitutional.³⁴ The Court based its decision on two important factors. First, the state has a strong interest in finality of child-custody disputes because of the child's need for certainty.³⁵ Secondly, although habeas corpus historically has been used to settle child custody suits, these cases have arisen within particular jurisdictional systems, not between them.³⁶ This type of federal interference with state judicial systems is not justified since the federal government has no substantive interest in child custody matters, and would unnecessarily undermine the principle of federalism.³⁷ The decision is significant in that it may prevent expansion of federal court involvement in domestic relations matter.³⁸

The last case concerning the parent-child relationship that the Supreme Court decided during its 1981 Term does not change Texas law. In *Santosky v. Kramer*³⁹ the Court held that when a state seeks to sever the parent-child relationship permanently, it can do so only if the evidence is clear and convincing.⁴⁰ In 1980 the Texas Supreme Court established the same rule in *In re G.M.*⁴¹ Although the holding of *Santosky* is not significant for Texans, its reasoning is important because it attempts to explain and evaluate the factors a court must consider to provide due process in cases where the state and the parents, or the child, are antagonists. The test in these cases is the one promulgated in *Mathews v. Eldridge*.⁴² The tribunal should balance the importance of the parent's or child's interest, the risk of error in depriving him of that interest, and the governmental interest in not raising the costs of its procedures in order to further minimize the possibility of error.⁴³

II. STATUS

Texas now must provide tuition-free education to undocumented illegal alien children,⁴⁴ but individual Texas school districts may still exercise some control over who receives a free education within their particular district. The Texas Education Code establishes the requirements for ad-

33. *Id.* at 3238, 73 L. Ed. 2d at 940. The writ was applied for under 28 U.S.C. § 2254 (1976 & Supp. IV 1980).

34. 102 S. Ct. at 3238, 73 L. Ed. 2d at 937.

35. *Id.* at 3238-39, 73 L. Ed. 2d at 938.

36. *Id.* at 3239, 73 L. Ed. 2d at 939.

37. *Id.* at 3239-40, 73 L. Ed. 2d at 939-40.

38. See *Sheres v. Englman*, 534 F. Supp. 286 (S.D. Tex. 1982) (discussed *infra* notes 202-08 and accompanying text).

39. 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

40. *Id.* at 1402-03, 71 L. Ed. 2d at 615-16.

41. 596 S.W.2d 846 (Tex. 1980).

42. 424 U.S. 319 (1976).

43. *Id.* at 335.

44. *Plyler v. Doe*, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); see *supra* notes 21-26 and accompanying text.

mission to schools in Texas, and the various boards of trustees have the power to implement these requirements in accordance with an overall policy that favors a tuition-free education for all Texas children.⁴⁵ The mere presence of a child in a particular district, however, does not necessarily entitle him to a tuition-free education in that district. For example, a district may require a child to reside with a parent or guardian in the district before that child may obtain a free education.⁴⁶ In *Jackson v. Waco Independent School District*⁴⁷ the court not only found sound policy reasons for this residence rule⁴⁸ but also reasoned that because a court desegregation order had previously established attendance zones, this rule was necessary.⁴⁹

Once the right of attendance has been established, problems may remain concerning eligibility to participate in interscholastic athletics. The University Interscholastic League's (UIL) summer camp rule⁵⁰ withstood a constitutional attack in *Kite v. Marshall*.⁵¹ The court held that a minimum rationality test applies to this type of classification and found no equal protection violation.⁵² In addition, the court found that the rule is not wholly arbitrary and, therefore, does not offend the due process clause.⁵³ This victory for the UIL in federal court may be a hollow one, however, since a Texas trial court granted a permanent injunction against enforcement of the rule, and the appellate court dismissed the case on the basis of nonjurisdiction.⁵⁴ The appellate court held in this and in another appeal from a UIL injunction that it could not have jurisdiction unless the UIL posted an appeal bond, which it failed to do.⁵⁵ The UIL is not a public entity and, therefore, is not excused from filing appeal bonds.⁵⁶

45. See TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1972) ("The trustees shall have the exclusive power to manage and govern the public free schools . . ."); *id.* § 21.031(c) (Vernon 1972 & Supp. 1982-1983) ("The board of trustees . . . shall admit into the public free schools of the district free of tuition all persons who are . . . over five and not over 21 years of age . . . if such person or his parent, guardian or person having lawful control resides within the school district.")

46. *Arredondo v. Brackette*, 648 F.2d 425 (5th Cir. 1981) (affirming the constitutionality of the statute in relation to native born American children whose Mexican parents are not in the United States), *cert. granted sub nom. Martinez v. Brackette*, 50 U.S.L.W. 3998.01 (U.S. June 22, 1982); *DeLeon v. Harlingen Consol. Indep. School Dist.*, 552 S.W.2d 922, 924-25 (Tex. Civ. app.—Corpus Christi 1977, no writ).

47. 629 S.W.2d 201 (Tex. Ct. App.—Waco 1982, writ ref'd n.r.e.).

48. *Id.* at 205.

49. *Id.*; see also *Arvizu v. Waco Indep. School Dist.*, 373 F. Supp. 1264 (W.D. Tex. 1973).

50. The summer camp rule prohibits a student from participating in interscholastic athletic competitions for a year following the student's attendance at a specialized athletic training camp. See *Marshall v. Brown*, 635 S.W.2d 578, 579 n.1 (Tex. Ct. App.—Amarillo 1982, writ ref'd n.r.e.).

51. 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2934, 73 L. Ed. 2d 1333 (1982).

52. 661 F.2d at 1030.

53. *Id.*

54. *Marshall v. Brown*, 635 S.W.2d 578, 581 (Tex. Ct. App.—Amarillo 1982, writ ref'd n.r.e.).

55. *Id.* at 580; see also *University Interscholastic League v. Payne*, 635 S.W.2d 754 (Tex. Ct. App.—Amarillo 1982, writ dism'd) (UIL must file bond).

56. 635 S.W.2d at 580.

In *Horton v. Goose Creek Independent School District*⁵⁷ the court per curiam withdrew a previous opinion⁵⁸ and held that the use of trained dogs in dragnet sniff-searches of children in school is unconstitutional,⁵⁹ but the use of these dogs to detect contraband in students' cars and lockers is not.⁶⁰ The court found that a dog's generalized exploratory sniffing of persons is an unreasonable search when no individualized suspicion exists and, thus, violates the fourth amendment.⁶¹ The court held, however, that using these dogs to detect contraband in students' cars and lockers is not an unreasonable, unconstitutional search if the dogs are reliable.⁶² This is a modification of the holding in *Jones v. Latexo Independent School District*⁶³ that enjoined all such searches.⁶⁴

A child's name is important in determining his status and normally the last name is the name in controversy between the parents. The courts have supported fathers when mothers have attempted to change the surnames of their children without using legal steps.⁶⁵ *In re M.L.P.*⁶⁶ did not involve the surname, but rather the first and middle names of the child. The child was born prior to the parents' divorce hearing, and the mother named the child without consulting the father. The father challenged the child's name at the time of the divorce, but the trial court refused to change it.⁶⁷ The appellate court also refused, holding that, while the court should make a name change at the father's request whenever there is evidence that a change is in the best interest of the child, there was no such evidence in this case.⁶⁸

The status of a child directly controls the right to intestate inheritance from parents.⁶⁹ Intestate succession is governed by the Probate Code,⁷⁰ but identity may be a factual issue. Such was the case in *Joplin v. Meadows*⁷¹ in which the cousins of the deceased attempted to establish themselves as the rightful heirs by showing that an alleged nephew was not, in fact, the nephew of the deceased. The nephew's father was the brother of the deceased and had predeceased her. The nephew was born during the second year of the brother's prior marriage. After eight years the marriage of the deceased's brother ended in divorce and the divorce petition alleged that the couple had separated on the day after the marriage. The cousins

57. 690 F.2d 470 (5th Cir. 1982).

58. 677 F.2d 471 (5th Cir. 1982).

59. 690 F.2d at 481-84.

60. *Id.* at 488.

61. *Id.* at 481-82.

62. *Id.* at 486 n.40.

63. 499 F. Supp. 223 (E.D. Tex. 1980).

64. *Id.* at 236-37.

65. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 36 Sw. L.J. 155, 162-63 (1982).

66. 621 S.W.2d 430 (Tex. Civ. App.—San Antonio 1981, writ dismissed).

67. *Id.* (mother named child Marcus Lee while father favored Shawn Christian).

68. *Id.* at 431.

69. TEX. PROB. CODE ANN. § 38 (Vernon 1980).

70. TEX. PROB. CODE ANN. §§ 37-43 (Vernon 1980 & Supp. 1982-1983).

71. 623 S.W.2d 442 (Tex. Ct. App.—Texarkana 1981, no writ).

argued that the petition, which raised questions of access, was evidence that the nephew was not the deceased brother's legitimate son. The court found, however, that the son was born during the term of the brother's first marriage and thus was presumed to be his legitimate child.⁷² This presumption is one of the strongest known in the law, and only clear and convincing evidence will rebut it.⁷³ The only evidence the court would accept to rebut the presumption was proof of nonaccess or impotence of the alleged father.⁷⁴ Affirming the trial court's finding that the nephew was the deceased's heir, the court held that the allegations of abandonment recited in the divorce petition and decree were merely hearsay and of no probative value.⁷⁵

In some situations the child's identity is established, but not his legitimacy. In *Batchelor v. Batchelor*⁷⁶ two alleged illegitimate sons of the intestate intervened in an application to declare heirship. The two alleged sons claimed a right to inherit because the decedent had recognized them as his children. The claimants agreed that their father had not followed the Probate Code procedures that would have made them legitimate heirs,⁷⁷ but they relied on *Johnson v. Mariscal*⁷⁸ to argue that this was not necessary. The Fort Worth appeals court distinguished *Johnson* in that it involved a will contest rather than intestate succession.⁷⁹ The court followed *Bell v. Hinkle*⁸⁰ instead, which held that an illegitimate child may inherit from his father only if the Probate Code requirements are met.⁸¹

Texas recognizes the concept of adoption by estoppel.⁸² Thus, with proper proof a person not formally adopted by the deceased may, nevertheless, inherit as the legitimate child of the deceased. *Pouncy v. Garner*⁸³ limited the right of equitably adopted children to a right to inherit only from their adoptive parents and their privies, excluding ancillary relatives. This distinction does not appear to comport with the Probate Code definition of child, which specifically includes those adopted by estoppel.⁸⁴ The Probate Code provides that an adopted child inherits from and through his

72. *Id.* at 443-44; see TEX. FAM. CODE ANN. § 12.02(a) (Vernon 1975 & Supp. 1982-1983).

73. 623 S.W.2d at 444.

74. *Id.*

75. *Id.*

76. 634 S.W.2d 71 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).

77. See TEX. PROB. CODE ANN. § 42 (Vernon 1980).

78. 620 S.W.2d 905 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e. per curiam, 626 S.W.2d 737 (Tex.), cert. denied, 102 S. Ct. 3496, 73 L. Ed. 2d 1375 (1982). In denying the writ of error the Texas Supreme Court stated: "The question of whether an illegitimate child may be recognized in any manner other than that provided in section 42 of the Texas Probate Code is not properly presented for our review. We therefore express no opinion on the writing of the court of appeals on this question." 626 S.W.2d at 738.

79. 634 S.W.2d at 73.

80. 607 S.W.2d 936 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), cert. denied, 454 U.S. 826 (1982).

81. 607 S.W.2d at 937.

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

83. 626 S.W.2d 337 (Tex. Ct. App.—Tyler 1981, writ ref'd n.r.e.).

84. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980).

adoptive parents and their kin as if the child was the natural, legitimate child of the adoptive parents.⁸⁵ For inheritance purposes, therefore, adoption by estoppel should place the child in the same position as all other legitimate children. Proof of an equitable adoption is at best difficult, and evidence of an agreement to adopt must exist. A mere intention is not sufficient.⁸⁶

*Conlon v. Schweiker*⁸⁷ is an interesting case because it held that the Secretary of Health and Human Services, when deciding who is entitled to survivor's benefits under social security, is not bound by a state court's decree if the court did not have personal jurisdiction over all the parties.⁸⁸ In *Conlon* a child claimed survivor's benefits under the Social Security Act through her alleged father. The child's mother had obtained an ex parte divorce based on an alleged common law marriage, and the Texas divorce court had found that the child was born of the marriage. In making his ruling the Secretary ignored this finding. The court sustained the Secretary and held he was not bound by the Texas decree and could determine, from all the facts, the child's right to benefits.⁸⁹ The court agreed that the facts were not sufficient to establish a common law marriage.⁹⁰ The child, therefore, was illegitimate and was not entitled to receive the social security benefits.⁹¹

Paternity suits in Texas are dismissed with prejudice if blood tests exclude the putative father from the possibility of actual fatherhood.⁹² The possibility exists that a man not excluded by the blood tests is not the father, and if he is able to convince the trier of fact, then the court will find that he is not the parent of the child, perhaps causing some other male to undergo the same procedure.⁹³ For example, in *In re J.T.H.*,⁹⁴ after the blood test but before the trial, the putative father agreed to admit fatherhood in exchange for a waiver of compensation or support of the child. The trial court did not admit this agreement into evidence since the court considered it an offer to compromise and not a completed compromise agreement. The jury found that the putative father was not the parent. The appellate court sustained the trial court and agreed with its interpretation of the law pertaining to admission of offers of settlement.⁹⁵ The court pointed out that the offer could not have ripened into a settlement because the child was not represented by a guardian ad litem, and, thus, the settle-

85. *Id.* § 40.

86. *Id.*; see *King v. Heirs and Beneficiaries of Watkins*, 624 S.W.2d 252, 255, 257 (Tex. Ct. App.—Tyler 1981, writ ref'd n.r.e.).

87. 537 F. Supp. 158 (N.D. Tex. 1982).

88. *Id.* at 163.

89. *Id.* at 164.

90. *Id.*

91. *Id.* at 165.

92. TEX. FAM. CODE ANN. § 13.05 (Vernon Supp. 1982-1983).

93. *Lopez v. Texas Dep't of Human Resources*, 631 S.W.2d 251 (Tex. Ct. App.—Corpus Christi 1982, no writ), is a more typical paternity case in which the jury despite some evidentiary flaws found the putative father to be the parent.

94. 630 S.W.2d 473 (Tex. Ct. App.—San Antonio 1982, no writ).

95. *Id.* at 477.

ment would have been in violation of the Family Code.⁹⁶

In *In re M.G.*⁹⁷ another putative father, who was found to be a parent after trial, appealed the decision on the grounds that he had been denied due process because the paternity proceedings would not have been initiated if the mother of the child had not applied for aid from the Department of Human Resources. He alleged that he should have been notified of her application so that he could contest her need for financial assistance. The court, while agreeing that the Department of Human Resources instituted a paternity proceeding as a direct result of providing financial assistance to the mother, nonetheless held that the application for assistance in itself was not the cause of the paternity proceeding.⁹⁸ Hearings by the Department of Human Resources are merely to determine the applicants' eligibility for benefits and relate to their own financial needs, not the activities of third parties.⁹⁹ It is true, of course, that the Department of Human Resources initiates paternity proceedings in order to be reimbursed for its expenditures in behalf of a child it has found to be in need, and this is what happened in this case.¹⁰⁰ In *In re J.A.K.*¹⁰¹ the mother appealed from a paternity suit, and the appellate court reversed and remanded because the trial court had used clear and convincing evidence as the standard of proof instead of a preponderance of the evidence standard.¹⁰² The court pointed out that in Texas a paternity proceeding is a civil action and involves no criminal sanctions.¹⁰³ The standard pertaining to the pretrial conference, which can result in dismissal, is clear and convincing,¹⁰⁴ but the court concluded that the pre-trial situation is different since its purpose is to dismiss frivolous claims.¹⁰⁵ Thus, the policy is that claims about which there is the slightest doubt should go to trial, so that the merits can be determined by a preponderance of the evidence.

III. CONSERVATORSHIP

Under Texas law a parent has the right to physical possession of his child unless there has been some judicial ruling to the contrary.¹⁰⁶ Accordingly, mere possession of a child for a period of time will not ripen into a right superior to that of the parents, and a court faced with such a fact situation should automatically issue a writ of habeas corpus in favor of

96. TEX. FAM. CODE ANN. § 13.07 (Vernon Supp. 1982-1983) provides that "[t]he child must be a party to a settlement agreement with the alleged father . . . [and] shall be represented in the settlement agreement by a guardian ad litem."

97. 625 S.W.2d 747 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

98. *Id.* at 749.

99. *Id.*

100. TEX. FAM. CODE ANN. § 13.42(a) (Vernon Supp. 1982-1983) provides that "no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established."

101. 624 S.W.2d 355 (Tex. Ct. App.—Corpus Christi 1981, writ ref'd n.r.e.).

102. *Id.* at 357.

103. *Id.*

104. *Id.*; see TEX. FAM. CODE ANN. § 13.05 (Vernon Supp. 1982-1983).

105. 624 S.W.2d at 357.

106. TEX. FAM. CODE ANN. § 12.04(1) (Vernon Supp. 1982-1983).

the parent.¹⁰⁷ A parent's right of possession prevails in spite of a guardianship order, since such orders cannot terminate the parent-child relationship.¹⁰⁸ This same rule applies to disputes between parents, one of whom has been given custody by a proper court order.¹⁰⁹ The court should not, however, relitigate custody orders in a habeas corpus hearing.¹¹⁰

Once a trial court establishes custody, third parties may not intervene by moving for a new trial.¹¹¹ While the best interests of the child are always paramount and should not be subverted by procedural rules,¹¹² a court will consider an intervenor's plea only if he produces evidence that had not been available to the court in its original hearing.¹¹³ In *Gillespie v. Gillespie*¹¹⁴ an appellate court reversed and remanded the trial court's decision to name the father managing conservator in a child custody case.¹¹⁵ The appeals court based its decision on the trial court's improper introduction of hospital records that showed the mother had received treatment for alcoholism.¹¹⁶ The Texas Supreme Court, however, reinstated the trial court's decision, holding that trial courts have wide latitude in custody cases and that sufficient evidence existed without the hospital records to support the trial court's finding.¹¹⁷ The court specifically did not reach the question of the introduction of hospital records. Trial courts must, however, follow proper procedure. The Tyler appeals court in *Hawkins v. Hawkins*¹¹⁸ granted a new trial in a divorce and custody suit because the divorce court failed to make a record of the trial.¹¹⁹ The Tyler court found that, although the father waived service and notice of the trial, he did not waive the record.¹²⁰ He was entitled to a statement of facts, the court reasoned, to preserve his right to an appellate review.¹²¹ Moreover, an appeals court will reverse a trial court's custody determination unless the trial court shows that it had jurisdiction over the parties. The mere recital of jurisdiction over a nonresident party will not provide jurisdiction to a

107. See *Trevino v. Garcia*, 627 S.W.2d 147, 149 (Tex. 1982). The court granted the parents a mandamus to overturn a writ of habeas corpus granted by the district court to the child's aunt and uncle. The aunt and uncle claimed a right of possession based on the doctrine of adoption by estoppel, having had physical possession of the child for over six years.

108. *Armstrong v. Reiter*, 628 S.W.2d 439, 440 (Tex. 1982): "[T]he county court lacks jurisdiction to enter any order which would affect the parent-child relationship."

109. *Perry v. Scoggins*, 626 S.W.2d 302 (Tex. 1981).

110. *Id.* at 303.

111. *Gaines v. Baldwin*, 629 S.W.2d 81 (Tex. Ct. App.—Dallas 1981, no writ).

112. *C — v. C —*, 534 S.W.2d 359, 361 (Tex. Civ. App.—Dallas 1976, writ dismissed).

113. *Gaines v. Baldwin*, 629 S.W.2d 81, 83 (Tex. Ct. App.—Dallas 1981, no writ).

114. 631 S.W.2d 592 (Tex. Ct. App.—Beaumont 1982), *rev'd*, 644 S.W.2d 449 (Tex. 1982).

115. 631 S.W.2d at 593.

116. *Id.* at 592-93.

117. 26 Tex. Sup. Ct. J. at 84. The supreme court specifically did not reach the question of admissibility of hospital records.

118. 626 S.W.2d 332 (Tex. Ct. App.—Tyler 1981, no writ).

119. *Id.* at 333.

120. *Id.*

121. *Id.*

court to decide custody.¹²² Some facts as to the nonresident's minimum contacts with Texas must be shown.¹²³

Enforcement of court orders can be a problem and courts often use contempt to force compliance.¹²⁴ Civil contempt is frequently used to enforce support orders when the individual has the money to pay but willfully refuses.¹²⁵ The attorneys' fees and costs that are engendered by the attempt to collect support are considered a part of the underlying obligation and may be collected through the same contempt procedure as is used to enforce the support obligation.¹²⁶ Attorneys' fees for enforcement of a conservatorship order, however, are debts for legal services, and thus are not enforceable by contempt.¹²⁷ In addition to holding that conservatorship orders cannot be enforced by contempt, one justice in *Ex parte Rogers* held that a sheriff could reduce a criminal contempt sentence by good time credit.¹²⁸ In that case a mother failed to return her minor children for four years after the end of the visitation period. In addition to a civil contempt order, the trial court sentenced her to thirty days in jail for criminal contempt.¹²⁹ The sheriff allowed her to complete her time in less than thirty days by applying a good time credit to her sentence.¹³⁰ The appellate court analogized criminal contempt to misdemeanor sentences and held that the credit could be used to reduce her sentence.¹³¹ The concurring justices modified this statement by holding that this credit could be used only if the court issuing the criminal contempt order had not prohibited it.¹³² The dissent would not allow the credit in any circumstances, reasoning that the power to modify a contempt sentence rests with the rendering court.¹³³

The doctrine of continuing jurisdiction obtains in child custody matters.¹³⁴ A court will modify a conservatorship order when there has been a change in the circumstances of the managing conservator that is injurious to the child so that a change in conservator would be a positive improve-

122. *Eby v. Leenerts*, 623 S.W.2d 502 (Tex. Ct. App.—Fort Worth 1981, no writ).

123. *Id.* at 502; see TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1982-1983).

124. The kidnapping, retention, and hiding of children is a continuing problem. The federal courts have begun allowing tort actions based on these activities. See *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982). Congress, in addition to enacting the Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566, 3568-69, (codified as amended in scattered sections at 28 U.S.C.; 42 U.S.C.), has recently passed the Missing Children Act, Pub. L. No. 97-292, 96 Stat. 1259 (1982), which is intended to help in the positive identification of missing children.

125. See *Ex parte Alderson*, 623 S.W.2d 751 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ).

126. *Ex parte Helms*, 152 Tex. 480, 259 S.W.2d 184 (1953).

127. *Ex parte Rogers*, 633 S.W.2d 666, 671 (Tex. Ct. App.—Amarillo 1982, no writ).

128. *Id.* at 668-69.

129. TEX. REV. CIV. STAT. ANN. art. 1911a (Vernon Pam. Supp. 1965-1982).

130. Texas law allows the sheriff to deduct time from convicts' prison terms for good conduct, industry, and obedience. *Id.* art. 5118a.

131. 633 S.W.2d at 669.

132. *Id.* at 672.

133. *Id.* at 674.

134. TEX. FAM. CODE ANN. § 11.05 (Vernon Supp. 1982-1983).

ment for the child.¹³⁵ A jury must base its decision on evidence substantiating this change of circumstance.¹³⁶ Regardless of any evidence, a court will order a new trial if the respondent was not properly notified of the modification hearing.¹³⁷ The court, at both the trial and appellate level, keeps the child's interest paramount. For example, when a trial court has found that no change should be ordered, the appellate court can rectify procedural errors by reversing and remanding without changing the child's situation unnecessarily.¹³⁸ Furthermore, if a trial court decides to change the managing conservator, it can suspend the judgment pending appeal.¹³⁹ Thus, if the appellate court reverses, the trial court's decision will not have changed the child's situation unnecessarily. This is a discretionary power, and an appellate court will not intervene unless there has been a clear abuse.¹⁴⁰

The exercise of continuing jurisdiction over a mobile population can become quite complicated. When the child's residence changes from one county to another within Texas the Family Code provides for a transfer of jurisdiction.¹⁴¹ If all the provisions of the statute have been satisfied, this transfer is mandatory.¹⁴² The process works smoothly within Texas, but problems arise when the moves are between Texas and another state.¹⁴³ In *Medellin v. Dillon*¹⁴⁴ a mother whom a Texas Court had named managing conservator moved with the child to Louisiana. When the child, two and a half years later, visited Texas the father filed a motion to modify asking that he be named managing conservator. The mother was personally served in Louisiana and filed a special appearance to protest the Texas court's jurisdiction on the grounds that she and the child had been permanently out of the state for more than six months.¹⁴⁵ Prior to the hearing on the special appearance motion, the father changed the basis of his lawsuit

135. *Jones v. Cable*, 626 S.W.2d 734 (Tex. 1981); *Gary v. Gary*, 631 S.W.2d 781 (Tex. Ct. App.—El Paso 1982, writ ref'd n.r.e.); *Hogge v. Kimbrow*, 631 S.W.2d 603 (Tex. Ct. App.—Beaumont 1982, no writ); *In re T.L.H.*, 630 S.W.2d 441 (Tex. Ct. App.—Corpus Christi 1982, writ dismissed); *Gaona v. Gaona*, 627 S.W.2d 821 (Tex. Ct. App.—San Antonio 1982, no writ); *Horton v. Horton*, 625 S.W.2d 78 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.); *Queton v. Queton*, 622 S.W.2d 648 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.).

136. *Fambro v. Fambro*, 635 S.W.2d 945 (Tex. Ct. App.—Fort Worth 1982, no writ).

137. *Weibusch v. Weibusch*, 636 S.W.2d 540 (Tex. Ct. App.—San Antonio 1982, no writ); *Vick v. Vick*, 626 S.W.2d 569 (Tex. Ct. App.—Tyler 1981, no writ).

138. *McPherson v. McPherson*, 626 S.W.2d 349 (Tex. Ct. App.—Fort Worth 1981, no writ) (trial court failed to make available to the parties social studies that court had considered); *In re Brazil*, 621 S.W.2d 811 (Tex. Civ. App.—Eastland 1981, no writ) (father, movant, failed to appear at hearing; trial court should have dismissed for want of prosecution).

139. *McGee v. McGee*, 634 S.W.2d 780, 781 (Tex. Ct. App.—Amarillo 1982, no writ).

140. *Id.* at 782.

141. TEX. FAM. CODE ANN. § 11.06(b) (Vernon Supp. 1982-1983).

142. *Arias v. Spector*, 623 S.W.2d 312 (Tex. 1981).

143. See *Dorsaneo, Due Process, Full Faith and Credit, and Family Law Litigation*, 36 Sw. L.J. 1085 (1983); *Weintraub, Affecting the Parent-Child Relationship Without Jurisdiction Over Both Parents*, 36 Sw. L.J. 1167 (1983).

144. 627 S.W.2d 737 (Tex. Ct. App.—Houston [1st Dist.] 1981), writ ref'd n.r.e., per curiam, 633 S.W.2d 786 (Tex. 1982).

145. TEX. FAM. CODE ANN. § 11.052(a)(1) (Vernon Supp. 1982-1983) provides that without written consent of both parties, a court cannot exercise continuing jurisdiction to modify the "appointment of a managing conservator if the managing conservator and the child have

from a motion to modify to a claim that it would be in the best interest of the child for the court to take jurisdiction because there was a serious question concerning the child's welfare. This plea changed the case from one asserting continuous jurisdiction to one asserting original jurisdiction.¹⁴⁶ The trial court denied the mother's challenge to the jurisdiction and named the father temporary managing conservator.

The mother, meanwhile, petitioned the Louisiana court to enforce the original 1977 Texas custody judgment. The court dismissed the case on the father's exception to the Louisiana court's jurisdiction. An intermediate Louisiana appellate court sustained this decision.¹⁴⁷ Shortly thereafter, the Texas appellate court reversed the Texas district court on the basis that, while it had proper subject matter jurisdiction, it did not have in personam jurisdiction. The appeals court held that the mother and child had been absent from the state for so long that it would be a violation of due process for the Texas court to exercise personal jurisdiction.¹⁴⁸ The Texas Supreme Court denied the writ and affirmed the appellate court, but noted that it did so on the basis that Louisiana was the more appropriate forum.¹⁴⁹ The court specifically did not express an opinion on the due process question.¹⁵⁰

The Texas Supreme Court also noted that, prior to its decision, the Louisiana Supreme Court had reversed and remanded the decisions of the lower Louisiana courts.¹⁵¹ The Louisiana Supreme Court held that Louisiana had jurisdiction based on the definition of home state found in the Uniform Child Custody Jurisdiction Act (UCCJA), which Louisiana had adopted.¹⁵² The Louisiana court also found it to be in the best interest of the child to assume jurisdiction because of the child's significant connections with Louisiana and the presence in the state of substantial evidence concerning the child's welfare.¹⁵³ Additionally, the Louisiana court pointed out that Texas has not enacted the UCCJA and while the Family Code's provisions are similar, they are not the same and, therefore, need not be given the same deference.¹⁵⁴ *Medellin* significantly illustrates the problems caused by Texas being the only state that has neither enacted nor judicially recognized the UCCJA.¹⁵⁵

established and continued to maintain their principal residence in another state for more than six months."

146. *Id.* § 11.045(a)(2).

147. 402 So. 2d 149 (La. App. 1981), *rev'd*, 409 So. 2d 570 (La. 1982).

148. 627 S.W.2d at 741.

149. 633 S.W.2d at 787.

150. *Id.*

151. *Id.*

152. 409 So. 2d at 574-75; *see* LA. REV. STAT. ANN. § 13:1705(A) (West Supp. 1983).

153. 409 So. 2d at 575; *see* LA. REV. STAT. ANN. § 13:1702(A)(2) (West Supp. 1983).

154. 409 So. 2d at 576.

155. The 68th Texas Legislature will probably rectify this by adopting the UCCJA and modifying the relevant Family Code Sections.

IV. SUPPORT

In *Ridgway v. Ridgway*¹⁵⁶ the United States Supreme Court limited a divorce court's jurisdiction over insurance policies issued under the Serviceman's Group Life Insurance Act.¹⁵⁷ Congress modified this decision by amending the survivor benefit plans through the Department of Defense Authorization Act of 1983.¹⁵⁸ In planning to use such an annuity to ensure support for a child, a parent must carefully follow the provisions of the Act, which can require the service person to get the former spouse's approval before changing the beneficiary.¹⁵⁹ Even if the obligor spouse is unwilling to agree to such a plan, the Act provides for notice to the former spouse should the obligor spouse attempt to make such a change.¹⁶⁰

Texas courts may order either lump sum or periodic child support payments.¹⁶¹ Both parents have a duty to support their children and the courts may order both to pay.¹⁶² Neither disparity of income¹⁶³ nor total disability¹⁶⁴ will necessarily relieve a spouse of this duty. The court, however, must base its decree on evidence, and the obligor's ability to pay is a necessary part of that evidence.¹⁶⁵

In order for a court to modify a support decree, it must, of course, have jurisdiction over the parties, and the presence of the children and one parent will not necessarily give the court jurisdiction over a nonresident party.¹⁶⁶ Valid jurisdiction, however, does not mean that a court can base a modification on no facts. In *Staff v. Staff*¹⁶⁷ a Texas court had entered the original decree and in a later suit modified the child support order. The father appealed the modification. The father entered a special appearance to contest the court's jurisdiction in the modification suit and provided no evidence as to his ability to pay child support. Although a statement of facts was not in the record, the appellate court presumed there

156. 454 U.S. 46, 102 S. Ct. 49 (1981); see also Solender, *supra* note 65, at 159.

157. 38 U.S.C. § 365-700 (1980).

158. See 10 U.S.C.A. § 1408 (1982).

159. See 10 U.S.C. §§ 1447-1450 (1976) (pre-amendment code provision allowing service person to designate beneficiaries).

160. *Id.* § 1450.

161. TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975).

162. *Id.* § 4. A duty of support exists only if there is a parent-child relationship. See also *Linan v. Linan*, 632 S.W.2d 155 (Tex. Ct. App.—Corpus Christi 1982, no writ) (motion to terminate own parent-child relationship denied).

163. *Hourigan v. Hourigan*, 635 S.W.2d 556, 558 (Tex. Ct. App.—El Paso 1981, no writ) (former wife ordered to pay lump sum from her share of community assets as child support).

164. *Mendoza v. Mendoza*, 621 S.W.2d 420, 421 (Tex. Civ. App.—San Antonio 1981, no writ). The original decree recited that the disabled spouse/father had no obligation to support. Before final judgment on the original decree, the mother filed a motion to modify, and after a hearing, the father was ordered to pay \$200 a month support. *Id.*

165. *In re E.L.P.*, 636 S.W.2d 579, 584 (Tex. Ct. App.—San Antonio 1982, no writ). In addition, the two concurring justices, who were the majority on this point, held that the grandparents' claim for reimbursement for necessities for the child may, on proper pleadings, be considered in the suit. *Id.* at 583.

166. *Ford v. Durham*, 624 S.W.2d 737 (Tex. Ct. App.—Fort Worth 1981, writ dismissed) (original divorce decree was in New Mexico, and appellee's visits to Texas to see child held not sufficient for jurisdiction).

167. 623 S.W.2d 152 (Tex. Ct. App.—Fort Worth 1981, writ dismissed).

were enough facts to support the trial court's jurisdiction, but the Fort Worth court reversed on the child support issue.¹⁶⁸ The modification judgment recited that there was no evidence on the father's financial situation except that he had a college education and had worked in the aerospace industry. The court found this to be insufficient evidence to support an upward modification of the child support payments.¹⁶⁹

Evidence of the obligor's change of circumstances is sufficient to increase or decrease support payments.¹⁷⁰ The amount of the modification is within the trial court's discretion, and an appeals court will not overturn it without evidence of abuse.¹⁷¹ The trial court may also condition suspending the order of downward modification on whether or not it is appealed.¹⁷² In many cases both the needs of the children and the earnings of the obligor have increased.¹⁷³ The obligor's increase in earnings need not be in the form of a cash salary. For example, although the former spouse did not receive a salary, the appeals court allowed a modification order based on the value of the work she performed because it contributed to her community estate.¹⁷⁴

A consent judgment does not bar an increase in support when the original judgment indicates that the parties intended the agreement to survive the decree as an enforceable contract as well as a judgment.¹⁷⁵ The law pertaining to modifications of contractual child support agreements has not been clearly established. Although the lower courts have addressed the issue,¹⁷⁶ the Texas Supreme Court has not.

*Edwards v. Edwards*¹⁷⁷ involved a tangle of collateral and direct attacks upon various child support modification judgments. In 1977, on a motion to modify, the trial court entered a default judgment relieving a father from support obligations that had accrued prior to the motion to modify. The judgment also decreased future support obligations for a period, after which the obligations increased for their duration. The mother did not

168. *Id.* at 153.

169. *Id.*

170. *Bible v. Bible*, 631 S.W.2d 177 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ) (payments decreased from \$640 to \$540 per month); *Williamson v. Williamson*, 624 S.W.2d 633 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ) (support increased from \$150 to \$500 per month).

171. *Bible v. Bible*, 631 S.W.2d 177 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ).

172. *Id.* at 179.

173. See *Brodway v. Burleson*, 632 S.W.2d 803, 805 (Tex. Ct. App.—Fort Worth 1982, no writ) (support increased from \$215 to \$375 per month); *Smallwood v. Smallwood*, 625 S.W.2d 75, 77 (Tex. Ct. App.—Fort Worth 1981, no writ) (support increased from \$300 to \$500 per month); *Carpenter v. White*, 624 S.W.2d 618 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ) (support increased from \$325 to \$475 per month).

174. *Phelan v. Taylor*, 627 S.W.2d 852, 853 (Tex. Ct. App.—Fort Worth 1982, no writ) (the former spouse performed secretarial duties for her lawyer/husband).

175. *Dorshaw v. Dorshaw*, 635 S.W.2d 783, 784-85 (Tex. Ct. App.—Corpus Christi 1982, no writ).

176. See *Dorshaw v. Dorshaw*, 635 S.W.2d 783 (Tex. Ct. App.—Corpus Christi 1982, no writ); *Duke v. Duke*, 448 S.W.2d 200 (Tex. Civ. App.—Amarillo 1969, no writ) (child support provisions incorporated into divorce decree subject to modification).

177. 624 S.W.2d 635 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

appeal from this judgment. The father/obligor failed to comply with the modified decree, and the mother filed a motion to reduce the unpaid child support to judgment. The trial court, in determining the amount of the judgment, omitted from its calculations the arrearage that the court on the previous motion had forgiven and, also, the later increases in support. The appeals court found that the original modification order that forgave the arrearages was void. The arrearages had accrued prior to the filing of the motion to modify and were, therefore, final. Thus, the court reasoned, the first modifying trial court did not have the power to forgive those payments.¹⁷⁸ Furthermore, the court held that the second modifying trial court, in reducing the father's obligation to judgment, had miscalculated the later payments.¹⁷⁹ The court distinguished modification proceedings from contempt proceedings, indicating that in the former courts may not modify retroactively, whereas in the latter they may.¹⁸⁰ It would seem that the better view is that courts cannot modify arrearages in any proceeding, but can suspend the payment of portions of the arrearages for a period of time in order to have the obligor avoid contempt.¹⁸¹

In *Nagle v. Nagle*¹⁸² a mother orally agreed to waive one of several past due child support payments. In exchange, the father agreed to pay the past due payments and convey his one-half interest in their home. The father paid the arrearages as well as the payment the mother had waived, but refused to convey his interest in their house. The mother sued for specific performance of the oral contract, or in the alternative, for damages based on fraud. The jury found fraud on the part of the father, and awarded the mother an amount equal to the father's interest in the house plus the court costs. The appeals court affirmed this decision.¹⁸³ The Texas Supreme Court reversed the intermediate court on the basis that the agreement violated the statute of frauds.¹⁸⁴ The supreme court also rejected the mother's argument that the court should uphold the agreement as an enforceable compromise and settlement, reasoning that, in order to apply this theory, a valid dispute must exist.¹⁸⁵ In this case the parties agreed that back child support was owing; therefore no evidence of a dispute existed.¹⁸⁶

*Huff v. Huff*¹⁸⁷ provides the Texas Supreme Court with an opportunity

178. *Id.* at 638-39; see also TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Supp. 1982-1983); *Casterline v. Burden*, 560 S.W.2d 499 (Tex. Civ. App.—Dallas 1977, no writ).

179. 624 S.W.2d at 638-39.

180. *Id.*; see *Whitley v. Whitley*, 566 S.W.2d 660 (Tex. Civ. App.—Beaumont 1978, no writ).

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

182. 633 S.W.2d 796 (Tex. 1982).

183. *Nagle v. Nagle*, 617 S.W.2d 811 (Tex. Civ. App.—Houston [14th Dist.] 1981), *rev'd in part*, 633 S.W.2d 796 (Tex. 1982).

184. 633 S.W.2d at 801.

185. *Id.* The court quoted from *Gilliam v. Alford*, 69 Tex. 267, 271, 6 S.W. 757, 759 (1887): "[I]f a doubt or dispute exists between parties with respect to their rights, . . . a compromise into which they have voluntarily entered must stand . . ." 633 S.W.2d at 801 (emphasis added by the *Nagle* court).

186. 633 S.W.2d at 801.

187. 634 S.W.2d 5 (Tex. Ct. App.—Beaumont 1982, writ granted).

to settle the question of which statute of limitations applies in suits to enforce child support. The Beaumont court of appeals in *Huff* held that the ten-year judgments statute should govern.¹⁸⁸ The court pointed out that a conflict exists among the intermediate courts, with some favoring the four-year limitation.¹⁸⁹ In *Texas Department of Human Resources v. Allred*¹⁹⁰ the trial court applied a four-year statute of limitations. The appeals court indicated that this was incorrect, but specifically did not address the issue because the parties did not properly plead it or raise it as an error.¹⁹¹

Contempt is the most common method for enforcing support payments. The appellate courts have no jurisdiction to hear appeals from contempt orders,¹⁹² but they can grant writs of habeas corpus. A court may issue a writ of habeas corpus when it finds the contempt order to be insufficiently clear in that it combines several charges.¹⁹³ A habeas corpus writ is also appropriate if the lower court issued the contempt order orally¹⁹⁴ or without notice.¹⁹⁵ The court will not grant the writ if the relator had the opportunity to defend himself at the contempt hearing and has not shown an inability to pay.¹⁹⁶ In *Ex parte Colley*¹⁹⁷ the relator complained that in the contempt hearing he had been called to be a witness against himself.¹⁹⁸ The appeals court found that he had merely been informed that he could call witnesses or testify in order to explain his failure to pay child support.¹⁹⁹

Texas has enacted the Uniform Reciprocal Enforcement of Support Act (URESA),²⁰⁰ which provides a method for persons from out of state to enforce support obligations. To enter a judgment under this Act proper evidence to support it must exist.²⁰¹ In *Sheres v. Engelman*²⁰² a federal court held that while an order under URESA does not supplant the original order, it may modify the original order.²⁰³ Although no Texas court

188. *Id.* at 6. The ten-year statute appears at TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958).

189. 634 S.W.2d at 5. The four-year statute appears at TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

190. 621 S.W.2d 661 (Tex. Civ. App.—Waco 1981, writ *dism'd*).

191. *Id.* at 663.

192. *See Texas Dep't of Human Resources v. Hebert*, 621 S.W.2d 466 (Tex. Civ. App.—Waco 1981, no writ).

193. *See Ex parte Oebel*, 635 S.W.2d 454, 456 (Tex. Ct. App.—San Antonio 1982, no writ); *Ex parte Sweeney*, 628 S.W.2d 855, 858 (Tex. Ct. App.—Fort Worth 1982, no writ); *Ex parte Almandarez*, 621 S.W.2d 664, 666-67 (Tex. Civ. App.—Fort Worth 1981, no writ).

194. *See Ex parte Jacobs*, 636 S.W.2d 20, 21 (Tex. Ct. App.—Austin 1982, no writ).

195. *See Ex parte Pena*, 636 S.W.2d 741, 744 (Tex. Ct. App.—Corpus Christi 1982, no writ).

196. *Ex parte Colley*, 621 S.W.2d 649, 651 (Tex. Civ. App.—Austin 1981, no writ).

197. *Id.*

198. *Id.*; *see Ex parte Werblud*, 536 S.W.2d 542, 547-48 (Tex. 1976); U.S. CONST. amend. V.

199. 621 S.W.2d at 652. *But see* TEX. FAM. CODE ANN. § 14.09(d) (Vernon 1975): "A parent may be compelled to testify fully in regard to his ability to support the child."

200. *See* TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975).

201. *Byrd v. Texas Dep't of Human Resources*, 625 S.W.2d 375, 376 (Tex. Ct. App.—San Antonio 1981, no writ).

202. 534 F. Supp. 286 (S.D. Tex. 1982).

203. *Id.* at 288-89.

has addressed the issue, the court relied on the language of the statute²⁰⁴ and decisions from other states,²⁰⁵ and concluded that a Texas court may modify a support order upward, but cannot decrease a support obligation under URESA because that would eliminate the original order.²⁰⁶ The court reasoned that URESA is a supplemental, not a supplanting, remedy. Thus, in this case the obligor remained liable for the full amount due under the original decision less the amount he had already paid, despite a Texas court's subsequent reduction in the amount of the original New York decree.²⁰⁷ The court also found nothing that would prevent a federal court from enforcing the original order if it has jurisdiction over the parties.²⁰⁸

V. TERMINATION AND ADOPTION

The Texas Supreme Court sustained the constitutionality of the voluntary presuit waiver of citation in cases terminating the parent-child relationship.²⁰⁹ Balancing the child's interest in security and stability against a parent's right to change his mind, the court held that a parent may waive citation if he has done so "voluntarily, intelligently and knowingly."²¹⁰ Furthermore, the court held that it is not error to fail to make a record of the trial, reasoning that the relinquishment to a licensed agency is irrevocable and therefore the agency's petition and the affidavit of relinquishment attached to it are sufficient to support a judgment.²¹¹ If the petition and affidavit are not sufficient, then it is up to the party alleging error to show that a statement of facts is necessary. Finally, the court held that it is not necessary to provide an attorney for the parent at the time he voluntarily signs the affidavit of relinquishment.²¹² The court distinguished voluntary relinquishment of rights from an involuntary termination procedure, but did not discuss the question of counsel in an involuntary proceeding.²¹³ This decision sustained the practice of adoption agencies and the Department of Human Resources that have been in effect since the enactment of title 2 of the Family Code.²¹⁴ The importance of finality in adoption decisions was recognized in Texas prior to the enactment of the Family Code, and the code provisions are merely a codification of that

204. See TEX. FAM. CODE ANN. § 21.04 (Vernon Supp. 1982-1983).

205. 534 F. Supp. at 293.

206. *Id.*

207. *Id.*

208. *Id.* at 294. *Sheres v. Engleman* and *Wasserman v. Wasserman*, 617 F.2d 832 (4th Cir. 1982), may signal a trend toward the federal courts' increased involvement in family law matters. *But see* *Lehman v. Lycoming County Children's Serv. Agency*, 102 S. Ct. 3231, 72 L. Ed. 2d 928 (1982) (discussed *supra* notes 32-37 and accompanying text).

209. *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 393-94 (Tex. 1982); see TEX. FAM. CODE ANN. § 15.03(c)(2) (Vernon Supp. 1982-1983).

210. *Id.* at 393.

211. *Id.* at 394.

212. *Id.*

213. *Id.*

214. See TEX. FAM. CODE ANN. §§ 11.01-.19 (Vernon 1975).

law.²¹⁵

If a person is not a parent, then his parent-child relationship cannot be terminated since he has no legally recognized relationship. A biological father is not a parent within the contemplation of the Family Code unless he has legitimated his child.²¹⁶ The child is, however, the legitimate child of his mother.²¹⁷ To legitimate his child a father must either marry the mother or obtain a decree of legitimation.²¹⁸ Legitimation requires the consent of either the mother or a court, which has found legitimation to be in the best interest of the child.²¹⁹ The trial court in *In re Baby Girl S*,²²⁰ terminated the parental rights of the mother and specifically found that it was not in the best interest of the child for the father to legitimate her.²²¹ The appellate court approved this decision following prior Texas law, which holds that distinguishing between biological mothers and biological fathers furthers the important state objective of protecting the interest of children born out of wedlock.²²² In *Najar v. Oman*²²³ the court, while not stating the best interest test specifically, pointed out that it was not necessary to follow all the standards of the provisions for involuntary termination of the parent-child relationship when the biological father was not a parent.²²⁴ The biological father was serving a fifty-year prison sentence and the mother's husband wanted to adopt the child. In *Standard v. Bledsoe*²²⁵ the biological father claimed the child was legitimate based on an alleged common law marriage to the mother. Because the father failed to prove this allegation, the court found that the biological father was not a parent, terminated the mother's parental rights, and permitted third parties to adopt the child.²²⁶

There is a presumption in favor of the validity of the most recent marriage and children born during this marriage are, of course, legitimate.²²⁷ A father in *In re R.L.*²²⁸ entered into a relationship with a woman whom he allegedly believed to be married to another man. He had two children by this woman, but he alleged they were legally another's. The trial court

215. See *Catholic Charities of Diocese of Galveston, Inc. v. Harper*, 161 Tex. 21, 24, 337 S.W.2d 111, 114 (1960).

216. TEX. FAM. CODE ANN. § 12.02 (Vernon 1975 & Supp. 1982-1983).

217. *Id.* § 12.01.

218. *Id.* §§ 12.02; 13.21. Legitimation requires the mother or the court to approve. *Id.*

219. *Id.* § 13.21(c).

220. 628 S.W.2d 261 (Tex. Ct. App.—Eastland 1982, writ ref'd n.r.e.), cert. granted *sub nom.*, *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983).

221. 628 S.W.2d at 262-63.

222. *In re T.E.T.*, 603 S.W.2d 793, 797 (Tex.) cert. denied, 450 U.S. 1025 (1980); *In re K.*, 535 S.W.2d 168, 169-71 (Tex.), cert. denied, 429 U.S. 907 (1976).

223. 624 S.W.2d 385 (Tex. Ct. App.—Austin, writ ref'd n.r.e.), cert. denied, 102 S. Ct. 2034, 72 L. Ed. 2d 483 (1982).

224. 624 S.W.2d at 387. The court also found that a biological father has no constitutional right to appear and testify personally at trial. *Id.*

225. 633 S.W.2d 566 (Tex. Ct. App.—Texarkana 1982, no writ).

226. *Id.* at 568.

227. TEX. FAM. CODE ANN. § 2.01 (Vernon 1975).

228. 622 S.W.2d 660 (Tex. Ct. App.—Fort Worth 1981, no writ).

notified the alleged legal father of the proceedings and terminated any interest he might have had in the children. The court then found that a binding marriage existed between the parties who had actually produced the children and held the father to be the legal parent.²²⁹ The court found, however, by clear and convincing evidence, that it was in the best interest of the children to terminate the parent-child relationship.²³⁰ Unless there is proof by clear and convincing evidence that a statutory basis exists for an involuntary termination of the parent-child relationship,²³¹ an appellate court will not sustain the trial court's decision.²³² A court may not apply this standard retroactively.²³³ The clear and convincing standard applies to both termination requirements: a finding of statutorily disapproved actions on the part of the parent, and also a finding that it is in the best interest of the child to sever the parent-child relationship.²³⁴

A suit for termination of the parent-child relationship is a suit affecting the parent-child relationship, and therefore the rules of continuing jurisdiction apply.²³⁵ If the original court in such a case has not transferred jurisdiction, a new court is without jurisdiction;²³⁶ the appellate court also lacks jurisdiction and may dismiss the case on its own finding.²³⁷ The Family Code mandates the appointment of a guardian ad litem to represent the child in a termination suit, unless the court finds that the child can be adequately represented by one of the parties.²³⁸

229. *Id.* at 662-63; see TEX. FAM. CODE ANN. § 12.02 (Vernon Supp. 1982-1983).

230. 622 S.W.2d at 663-64. The agency brought the termination suit because the father had killed the children's mother and left the children unattended when he fled. See TEX. FAM. CODE ANN. § 15.02(2) (Vernon Supp. 1982-1983).

231. 622 S.W.2d at 663; TEX. FAM. CODE ANN. § 15.02(1)(B), (C), (D) (Vernon Supp. 1982-1983).

232. *In re J.J.*, 617 S.W.2d 188 (Tex. 1981); *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *McAdoo v. Spurlock*, 632 S.W.2d 224, 226-27 (Tex. Ct. App.—Austin 1982, no writ); *In re T.L.H.*, 630 S.W.2d 441, 446 (Tex. Ct. App.—Corpus Christi 1982, writ dismissed); see *Smith v. McLin*, 632 S.W.2d 390, 392 (Tex. Ct. App.—Austin 1982, writ refused n.r.e.); *Flowers v. Texas Dep't of Human Resources*, 629 S.W.2d 891, 893 (Tex. Ct. App.—Fort Worth 1982, no writ) (trial court judgments affirmed, evidence clear and convincing).

233. *Ruff v. Christian Services*, 627 S.W.2d 799, 802 (Tex. Ct. App.—Tyler 1982, no writ).

234. *Hellman v. Kincy*, 632 S.W.2d 216, 218 (Tex. Ct. App.—Fort Worth 1982, no writ); see also *Chambers v. Terrell*, 630 S.W.2d 800, 802-03 (Tex. Ct. App.—Tyler), writ refused n.r.e. *per curiam*, 639 S.W.2d 451 (Tex. 1982). The court held that no evidence of the best interest test was dispositive, and the clear and convincing holding was unnecessary. 639 S.W.2d at 452. The court stated:

The trial court, sitting without a jury, did not use a lesser standard.

We are not to be understood as approving the holding of the Court of Appeals that the affidavit of relinquishment was void because the attorney who acted as the notary . . . had a "strong financial and beneficial interest." Among other things, no financial interest appears in the record. The point is reserved.

Id.

235. TEX. FAM. CODE ANN. § 11.05 (Vernon Supp. 1982-1983).

236. *Id.* § 11.06. But see *Arias v. Spector*, 633 S.W.2d 312 (Tex. 1981) *supra* note 142 and accompanying text.

237. *Carroll v. Couch*, 624 S.W.2d 398, 399 (Tex. Ct. App.—Fort Worth 1981, no writ).

238. TEX. FAM. CODE ANN. § 11.10(a) (Vernon Supp. 1982-1983); see *Arnold v. Callier*, 628 S.W.2d 468, 469 (Tex. Ct. App.—Beaumont 1981, no writ).

In *Arnold v. Callier*²³⁹ the court reversed and remanded the case because of the lower court's failure to appoint a guardian ad litem to represent the child at a hearing when there was no independent finding that the child was adequately represented. In *Linan v. Linan*,²⁴⁰ however, the record did reflect that the child was adequately represented, thus, the trial court's findings were sustained. The cases are also distinguishable in that the parent-child relationship in *Arnold* had been ordered terminated and in *Linan* it had not. Because "[t]ermination is a drastic remedy and is of such weight and gravity,"²⁴¹ it is not surprising that appellate courts are less likely to find that the child had adequate representation without a guardian ad litem in cases in which the trial court ordered termination than in those cases in which termination was denied.²⁴² Moreover, when a trial court orders termination, the court will approve an affidavit of inability to pay costs of appeal based on present poverty, although "past misconduct or improvidence" caused the inability to pay.²⁴³

Despite an array of procedural devices, courts sometimes err in either finalizing adoptions or terminating parent-child relationships. In *In re Baby Boy S*²⁴⁴ was apparently not such a case, although the Harris County Child Welfare Unit filed a bill of review in an adoption proceeding. The trial court denied review, and the appellate court sustained that denial because the agency did not allege or prove that the adoptive parents were unfit or that the natural parents' rights were improperly terminated.²⁴⁵ Apparently, and perhaps rightly, the Welfare Unit's concern was whether the actions of the managing conservator were proper. The appellate court pointed out that an adoption proceeding was not the proper forum for settling grievances concerning placement procedures, especially when the child has lived with his adoptive parents for more than four years.²⁴⁶

The appellate courts can reform improper judgments only if they are appealed. The number of cases cited above that appellate courts reversed and remanded merely on procedural grounds indicates the difficulties Texas lawyers and judges have in following the Family Code provisions. Few of the requirements of the Code are merely technical. An improper decision can destroy a child's life, especially when the decision is as final as in a termination procedure. *Joiner v. Vasquez*²⁴⁷ gives some indication of the magnitude of the problem. The court terminated the father's parental rights in a proceeding for which he was given notice by publication. Joiner, the father, was not present at the hearing. Although no evidence was presented, the court found that termination would be in the best inter-

239. 628 S.W.2d 468, 469 (Tex. Ct. App.—Beaumont 1981, no writ).

240. 632 S.W.2d 155, 157 (Tex. Ct. App.—Corpus Christi 1982, no writ).

241. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

242. 632 S.W.2d at 157.

243. *See Ranier v. Brown*, 623 S.W.2d 682, 686 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

244. 635 S.W.2d 147 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

245. *Id.* at 149-50.

246. *Id.* at 150.

247. 632 S.W.2d 755 (Tex. Ct. App.—Dallas 1982, no writ).

ests of the children.²⁴⁸ Unfortunately, when Joiner discovered what had happened he filed a motion for bill of review instead of a motion for a new trial.²⁴⁹ The court denied the bill of review because Joiner failed to establish a meritorious defense. Joiner did not appeal this denial, but filed a second bill of review that was denied on the basis of *res judicata*. Without appealing the second denial, Joiner filed a third bill of review and then appealed its denial. The appellate court sustained the trial court, holding that the failure to appeal the denial of the first bill of review was a bar to further litigation.²⁵⁰ The court mentioned the possibility that the minor children might have a right to attack the decree, but did not explain who might do so on their behalf.²⁵¹

A number of principles are in conflict in *Joiner v. Vasquez*. One is the importance of the finality of judgments²⁵² and another is the importance of stability to the child.²⁵³ In *Joiner*, however, these principles are in opposition to the principle that the courts should follow the law. The law mandates a genuine finding as to the best interests of the children in any suit affecting the parent-child relationship.²⁵⁴ In all this litigation the merits of the original decision were never reached. Moreover, the original trial court did not reach the merits because only one party was present and the other parties were represented in a pro forma manner. Thus, in *Joiner*, stability may not be in the best interests of the children. *Joiner v. Vasquez* should lead us to question whether the finality of judgment principle is so important that an illegally arrived at decision, vital to the children involved, cannot be reconsidered.²⁵⁵

248. 632 S.W.2d at 762 (Arian, J., dissenting).

249. TEX. R. CIV. P. 329 provides that when a defendant has not appeared and service of process was by publication the defendant may file a motion for new trial within two years after judgment. The motion must show good cause for a new trial and must be supported by affidavits. Joiner's petition was filed less than a year after the judgment based on citation by publication.

250. 632 S.W.2d at 759.

251. *Id.*; see *Durham v. Barrow*, 600 S.W.2d 756, 760-61 (Tex. 1980) (discussion of restrictions on powers of guardian ad litem).

252. 632 S.W.2d at 758.

253. *Id.* at 759.

254. TEX. FAM. CODE ANN. §§ 13.21(c), 14.07, 15.01, 15.02(2), 16.08(a) (Vernon 1975 & Supp. 1982-1983).

255. See *Edwards v. Edwards*, 624 S.W.2d 635 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ) (appellate court modified a final judgment, which had not been appealed, because trial court had exceeded its powers in the original decision). For a discussion of *Edwards* see *supra* notes 177-81 and accompanying text.