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FAMILY LAW: PARENT AND CHILD

by
Ellen K. Solender*

I. LEGISLATIVE CHANGES

THE sixty-eighth session of the legislature enacted more changes in Title 2, Parent and Child, of the Family Code than has any other legislature since the enactment of title 2 in 1973.¹ The changes involve both substance and form. The two pieces of legislation that received the most publicity, although they may not be of the greatest practical significance, are the Uniform Child Custody Jurisdiction Act² and the new provision allowing garnishment of wages to pay child support.³

The enactment of the Texas version of the Uniform Child Custody Jurisdiction Act (UCCJA),⁴ while not actually changing Texas practice, should, because of its new name, provide needed credibility for Texas judgments in interstate custody decisions.⁵ Texas courts have customarily deferred to other jurisdictions' valid custody judgments,⁶ and the title of the UCCJA should make certain that other states will give due credit to our courts' decisions. Our continuing jurisdiction statute keeps its Texas flavor because it retains the provision that a court may not modify a custody decision without the agreement of the parties if the child and the managing conservator have established a residence in a state other than Texas and have been absent for over six months.⁷ The wording of the

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1. Title 2, Parent and Child, ch. 543, 1973 Tex. Gen. Laws 1411.

2. Ch. 160, 1983 Tex. Gen. Laws 691.

3. Act of June 17, 1983, ch. 402, 1983 Tex. Gen. Laws 2169 (amending Family Code to provide for garnishment of wages for child support); Tex. H.R.J. Res. 1, 68th Leg. (1983) (proposing state constitutional amendment permitting wage garnishment for child support).

4. TEX. FAM. CODE ANN. §§ 11.51-.75 (Vernon Pam. Supp. 1975-1983).

5. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 37 Sw. L.J. 111, 123 (1983).

6. See, e.g., *Wise v. Yates*, 639 S.W.2d 460 (Tex. 1982) (issuing writ of mandamus to uphold Virginia order of custody to wife); *Lamphere v. Chrisman*, 554 S.W.2d 935, 938 (Tex. 1977) (beyond distinctions in statutes, Texas recognizes no difference between valid Texas custody orders and those of other states); *Perry v. Ponder*, 604 S.W.2d 306, 318-19 (Tex. Civ. App.—Dallas 1980, no writ) (other state's custody decree entitled to full faith and credit regarding facts at time of decree); *Kellogg v. Kellogg*, 559 S.W.2d 126, 128 (Tex. Civ. App.—Texarkana 1977, no writ) (when asked to give full faith and credit to another state's proceedings Texas court cannot collaterally inquire into other state's jurisdiction over party if question of jurisdiction was litigated there).

7. TEX. FAM. CODE ANN. § 11.53(d) (Vernon Pam. Supp. 1975-1983). Section 11.53(d) incorporates the repealed § 11.052 exceptions to continuing jurisdiction. *Id.*

Texas UCCJA is not identical to the standard version of the UCCJA. The family practitioner dealing with another state's version of the UCCJA therefore should carefully compare it with the Texas version. The nature of the problem will then determine which law will apply.

One of the purposes of the UCCJA is to deter abductions of children.⁸ Although federal courts have begun to establish a common law tort cause of action for the wrongful taking of children from their lawful custodians,⁹ the legislature, uncertain of the sufficiency of the courts' solution, added Chapter 36, Civil Liability for Interference with Child Custody,¹⁰ to the Family Code. This chapter defines the tort¹¹ and sets out the damages available to a custodian whose custody has been wrongfully interrupted.¹² Continued expansion of the common law is permissible since the statute specifically does not preempt the possibility of other remedies, especially those that may be fashioned for the child who has been abducted.¹³

Enforcement of child support orders is a national problem, and Texas is not excepted.¹⁴ The legislature enacted an important new alternative to standard collection methods by adding a Family Code provision for the voluntary assignment of wages by the obligor.¹⁵ In addition, standby legislation allowed for the involuntary assignment of wages¹⁶ should the constitutional amendment permitting such assignment pass.¹⁷ Since the voters overwhelmingly endorsed the provision in the November 8, 1983, election, Texas can now enforce child support orders through wage assignments.¹⁸ These changes should reduce the number of persons found in contempt for failure to pay support, because automatic deductions from wages will pre-

8. *Id.* § 11.51(a)(5).

9. *See, e.g.,* *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (federal courts' diversity jurisdiction extends to tort suits over wrongful taking of child); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982) (tort claims arising from abduction of child are outside domestic relations exception to diversity jurisdiction); *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (mental suffering damages recoverable under Texas law against wrongful abductors of child).

10. TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon Pam. Supp. 1975-1983).

11. *Id.* § 36.02. One who takes or retains possession of or who conceals the whereabouts of a child in violation of a court order regarding possessory interest may be liable to the party deprived of that interest. *Id.*

12. *Id.* § 36.03. Damages include the actual expenses of locating and recovering the child and bringing suit as well as the value of mental suffering and exemplary damages for malice. *Id.*

13. *Id.* § 36.06.

14. Seventy-five percent of children in single-parent families in the United States receive no support from noncustodial parents, and the noncompliance rate for court-ordered child support payments to clients of the Texas Department of Human Resources is 70%. LEAGUE OF WOMEN VOTERS OF TEXAS EDUCATION FUND, FACTS AND ISSUES, CHILD SUPPORT ENFORCEMENT IN TEXAS (1983).

15. TEX. FAM. CODE ANN. § 14.091(a)-(o) (Vernon Pam. Supp. 1975-1983).

16. Act of June 17, 1983, ch. 402, § 2, 1983 Tex. Gen. Laws 2169, 2172-73.

17. "No current wages for personal service shall ever be subject to garnishment, *except for the enforcement of court-ordered child support payments.*" TEX. CONST. art. XVI, § 28 (italicized words added by passage of Proposition 6 in election of Nov. 8, 1983).

18. The legislature has also provided for the deduction of child support payments from unemployment benefits. Act of June 19, 1983, ch. 527, § 5, 1983 Tex. Gen. Laws 3064, 3072-74 (codified at TEX. REV. CIV. STAT. ANN. art. 5221b-13(c)-(d) (Vernon Supp. 1984).

vent obligors from falling behind in their payments. Additionally, in an attempt to promote uniformity in amounts payable for support, the legislature spelled out the factors to be considered in establishing the amount of support and recommended the use of formulas and guidelines.¹⁹ Courts may also publish local rules pertaining to schedules and formulas,²⁰ so that in a county having a number of district courts, various support orders based on similar facts will be approximately equal.

The legislature lengthened the statute of limitations for paternity actions to twenty years and made it uniform for all illegitimates.²¹ The United States Supreme Court undoubtedly would uphold the constitutionality of this statute.²² In addition the legislature made a significant change in the case law rule that had presumed that a child born of the marriage is legitimate.²³ A husband may now deny paternity and, despite the possibility of access, may use blood tests to prove his nonpaternity so that he will not be required to pay child support.²⁴

In addition to enacting the UCCJA the legislature made a number of substantive changes in the law pertaining to custody. When appointing managing and possessory conservators, a court must now specify in its order the times and conditions for possession of or access to the child.²⁵ Courts may also establish and publish local rules pertaining to schedules and guidelines for possession of or access to a child.²⁶ Additionally, the legislature significantly expanded the rights of grandparents.²⁷ The appointment of a managing conservator is no longer a prerequisite for a suit by a grandparent requesting access to a grandchild.

The Family Code now prohibits courts from issuing temporary orders changing conservatorship during the pendency of a hearing on a motion to permanently modify conservatorship unless the child is in danger.²⁸ This measure should promote stability and prevent a motion for modification from becoming a de facto change in conservatorship because of the delay

19. TEX. FAM. CODE ANN. § 14.05(a) (Vernon Pam. Supp. 1975-1983).

20. *Id.*

21. *Id.* § 13.01.

22. See *infra* notes 44-50 and accompanying text (discussion of *Pickett v. Brown*, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983)).

23. *Joplin v. Meadows*, 623 S.W.2d 442, 443-44 (Tex. App.—Texarkana 1981, no writ).

24. TEX. FAM. CODE ANN. § 12.06 (Vernon Pam. Supp. 1975-1983). The husband must raise the question of paternity by an express denial in his pleadings. *Id.* This statute is a legislative statement of disapproval of the results in *Clark v. Clark*, 643 S.W.2d 795, 797 (Tex. App.—Fort Worth 1982, no writ), and *Magana v. Magana*, 576 S.W.2d 131, 134 (Tex. Civ. App.—Corpus Christi 1978, no writ), in which the courts denied the husbands' motions for blood tests to establish their paternity or nonpaternity and ordered them to pay child support.

25. TEX. FAM. CODE ANN. § 14.03(a) (Vernon Pam. Supp. 1975-1983).

26. *Id.* § 14.03(b).

27. *Id.* § 14.03(e). This is a mislettered section, since § 14.03 now contains three subsections (e). It is the first subsection (e) that expands the rights of grandparents. This statute is, among other things, intended to repeal case law that has denied the parents of a deceased child a cause of action to obtain access to their grandchildren. See *In re K.L.M.*, 609 S.W.2d 314 (Tex. Civ. App.—Eastland 1980, no writ); *Barrientos v. Garza*, 559 S.W.2d 399, 399-400 (Tex. Civ. App.—Dallas 1977, no writ).

28. TEX. FAM. CODE ANN. § 14.08(g) (Vernon Pam. Supp. 1975-1983).

in hearing the motion. The statute, however, now recognizes a voluntary *de facto* modification.²⁹ The provision can be effective, for example, where the managing conservator has permitted the possessory conservator to keep the child on a more or less permanent basis, though without prior court approval of the arrangement. Recognition of a voluntary *de facto* modification is in accord with the policy of promoting agreements between the parties.

The legislature has apparently significantly changed its policy of secrecy concerning the identity of adoptees' natural parents. While continuing the confidentiality provisions of the Code,³⁰ the legislature has added requirements for the maintenance of detailed background records of the adoptee.³¹ It has also provided in the Human Resources Code³² for the establishment of a registry of adoptees and their natural parents. Under this plan, if either party is interested and the other party has consented, they may be able to make contact without too much difficulty. Since these provisions became effective January 1, 1984, those who were adopted prior to this date are not affected.

The numerous other changes in the Family Code include the requirement that an attorney *ad litem* be appointed for an indigent parent who opposes termination of his parental rights by a governmental entity.³³ Also, the legislature eased the requirements for obtaining temporary orders,³⁴ revised the evidence standards for termination to conform with court and constitutional requirements,³⁵ provided for inclusion of social security numbers in findings related to support orders,³⁶ and required that a conservator give written notice of changes of his address to all other parties.³⁷ As an indication of the growing concern for the sexually abused child, the legislators added a new section pertaining to the giving of testimony by the child.³⁸ It includes provisions for recording the testimony prior to trial, transmitting the testimony by closed-circuit television, limiting the persons who may be present, and other measures to protect the privacy and psychological well-being of the child.³⁹

The legislature also restricted the jurisdiction of the Texas Supreme Court in custody and support cases.⁴⁰ The provision is a logically consistent one since the court's jurisdiction is already restricted in divorce

29. *Id.* § 14.08(c)(1)(D).

30. *Id.* § 11.17(b), (d). Note that subsection (d) has been changed so that Travis County district courts no longer have concurrent jurisdiction with the decree court for purposes of providing information about the adoption decree.

31. *Id.* § 16.032 (Health, Social, Educational, and Genetic History Report).

32. TEX. HUM. RES. CODE ANN. §§ 49.001-.023 (Vernon Supp. 1984).

33. TEX. FAM. CODE ANN. § 11.10(d) (Vernon Pam. Supp. 1975-1983).

34. *Id.* § 11.11(b).

35. *Id.* § 11.15(b)-(c); see *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980).

36. TEX. FAM. CODE ANN. § 11.15(b) (Vernon Pam. Supp. 1975-1983).

37. *Id.* § 14.031.

38. *Id.* § 11.21.

39. *Id.*

40. TEX. REV. CIV. STAT. ANN. art. 1821(3) (Vernon Supp. 1984).

cases,⁴¹ where controversies in connection with custody and support usually arise. Of course the court will continue to have jurisdiction where decisions conflict on questions of law in the various courts of appeals or when an appeals court decision conflicts with a decision of the Texas Supreme Court.⁴²

II. UNITED STATES SUPREME COURT DECISIONS

As this author predicted last year,⁴³ the United States Supreme Court has decided the constitutionality of a two-year statute of limitations for paternity actions. The Court in *Pickett v. Brown*⁴⁴ unanimously held the Tennessee two-year statute unconstitutional.⁴⁵ The equal protection problem this statute raised was quite obvious; not only did it distinguish between legitimate and illegitimate children, but it also differentiated between illegitimate children who received public assistance and those who did not.⁴⁶ Justice Brennan's opinion quoted extensively from Justice O'Connor's concurring opinion in last term's *Mills v. Habluetzel*.⁴⁷ That concurrence had indicated that some statutes of limitations longer than one year might also be unconstitutional but had not specified how long a time would be necessary to make such a statute constitutional.⁴⁸ The opinion did note, however, the significance of the fact that paternity statutes seemed to be "one of the few Texas causes of action not tolled during the minority of the plaintiff,"⁴⁹ a situation also true of the Tennessee statute.⁵⁰ Even in this second decision on the subject, the Court did not explicitly state what the proper statute of limitations length might be. A strong indication as to the proper length of time may be found, however, in the Court's comments on tolling and its memorandum decision in *Astemborski v. Susmarski*,⁵¹ vacating and remanding a case for further consideration in light of *Pickett*. In *Astemborski* the Supreme Court of Pennsylvania had held the six-year state statute of limitations constitutional.⁵² The Texas Legislature was wise to take the hint from the *Mills* decision and revise its statute of limitations so that no question of its constitutionality could

41. *Id.*

42. *Id.* art. 1728(2) (Vernon 1962).

43. Solender, *supra* note 5, at 112.

44. 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983).

45. *Id.* at 2209, 76 L. Ed. 2d at 386 (discussing TENN. CODE ANN. § 36-224(2) (1977)).

46. 103 S. Ct. at 2202, 76 L. Ed. 2d at 377.

47. 456 U.S. 91 (1982) (declaring one-year statute of limitations for establishing paternity unconstitutional).

48. *Id.* at 102-03 (O'Connor, J., concurring).

49. *Id.* at 104 (O'Connor, J., concurring). Texas courts have held that for children born prior to the enactment of TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1984), increasing the statute of limitation to 20 years, the general four-year limitations rule of TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958) applies, and that it is tolled during the child's minority by TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon 1958). *Perry v. Merritte*, 643 S.W.2d 496, 498 (Tex. App.—Houston [14th Dist.] 1982, no writ); *Texas Dep't of Human Resources v. Delley*, 581 S.W.2d 519, 521 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

50. 103 S. Ct. at 2208-09, 76 L. Ed. 2d at 384-85 (O'Connor, J., concurring).

51. 103 S. Ct. 3105, 77 L. Ed. 2d 1360 (1983).

52. 451 A.2d 1012 (Pa. 1982).

exist.⁵³

In *Martinez v. Bynum*⁵⁴ the Court sustained the constitutionality of Texas's school attendance laws.⁵⁵ *Martinez* specifically addressed the statutory directive that only bona fide residents of a school district are entitled to free public school education.⁵⁶ If a child resides in a school district for the primary purpose of attending the public schools, the statute states that he is not entitled to a tuition-free education.⁵⁷ The Court found the residence requirement to be a bona fide one that "furtheres the substantial state interest in assuring that services provided for its residents are enjoyed only by residents."⁵⁸ The Texas Legislature has provided for stricter enforcement of the residence requirements through changes in the Education Code⁵⁹ and the Probate Code.⁶⁰

Another decision of interest to Texas attorneys is *Lehr v. Robertson*.⁶¹ The decision is significant because it upholds the constitutionality of a statute that distinguishes between mothers and putative fathers of illegitimate children.⁶² The Court stressed that the interest protected is "a substantial relationship between parent and child"⁶³ and that the father must accept a measure of responsibility for the child's future to be entitled to constitutional protection.⁶⁴ In this case the father delayed his attempt to establish a relationship for two years. The Court deemed this delay to be too long and therefore sustained the New York court's ruling permitting an adoption without the father's consent.⁶⁵

During the last term the Court had before it a similar appeal from a Texas court's decision denying a putative father the right to legitimate his child in order to prevent its adoption.⁶⁶ The petitioner contended that the Texas statute denies putative fathers equal protection because of its dis-

53. TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983). *Mills*, upon remand from the United States Supreme Court, was reversed and remanded for trial. 648 S.W.2d 18 (Tex. App.—Corpus Christi 1983, no writ).

54. 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1983).

55. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972 & Supp. 1984).

56. *Id.* § 21.031(c).

57. *Id.* § 21.031(d).

58. 103 S. Ct. at 1842, 75 L. Ed. 2d at 879.

59. Persons who knowingly falsify information on enrollment forms can be liable, for the period of time the ineligible student was enrolled, for either the maximum tuition charged by the district or the amount the district has budgeted for each student, whichever is greater. This liability is in addition to the penalty provisions of the Penal Code. TEX. EDUC. CODE ANN. § 21.031(g), (h) (Vernon Supp. 1984); see TEX. PENAL CODE ANN. § 37.10 (Vernon 1974).

60. A guardian may not be appointed for a minor for the primary purpose of enabling the minor to establish a residence for enrolling in a school or school district that he is otherwise ineligible to attend. TEX. PROB. CODE ANN. § 114(e) (Vernon Supp. 1984).

61. 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

62. *Id.* at 2996, 77 L. Ed. 2d at 630-31 (upholding TEX. FAM. CODE ANN. § 13.21 (Vernon Pam. Supp. 1975-1983)).

63. 103 S. Ct. at 2996, 77 L. Ed. 2d at 630.

64. *Id.* at 2993-94, 77 L. Ed. 2d at 627.

65. *Id.*

66. *In re Baby Girl S*, 628 S.W.2d 261 (Tex. App.—Eastland 1982), vacated and remanded sub nom. *Kirkpatrick v. Christian Homes*, 103 S. Ct. 1760, 76 L. Ed. 2d 337 (1983).

inction between putative fathers and mothers.⁶⁷ The Court, instead of deciding that question, vacated and remanded the case for further proceedings under Texas law.⁶⁸ The Texas Supreme Court has held the statutory distinction between mothers and putative fathers constitutional.⁶⁹ Unless some fact situation arises in which an established relationship is discriminatorily severed, the courts will likely continue to uphold the statute in its present form.

III. STATUS

The Texas Supreme Court's decision in *Sanchez v. Schindler*⁷⁰ produced an important new change in tort law relating to the wrongful death of children. The court overruled decisions dating back to 1877 that had held that the measure of damages for the wrongful death of a child was limited to pecuniary loss.⁷¹ In rejecting this rule the court agreed that it was "based on an antiquated concept of the child as an economic asset."⁷² Thus, the court extended a parent's right to recover to encompass damages for the mental anguish caused by the death of a child.⁷³ The court commented that if the pecuniary loss rule were literally applied, the average child would have a negative worth.⁷⁴ This ruling conforms Texas law to modern trends⁷⁵ and further confirms the importance of children in our society despite their lack of ability to produce income.

In *Sax v. Votteler*⁷⁶ the Texas Supreme Court held that a section of the Insurance Code⁷⁷ violated the Texas Constitution. The provision at issue removed the tolling provisions for minors after age six, thus preventing minors from bringing medical malpractice suits for injuries sustained during their minority. The court relied on the open courts provision of the

67. The statute is quite complex, since "parent" means the mother or a man as to whom the child is legitimate, TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975), and legitimation requires that the court issue a decree declaring the father a parent based on either the consent of the mother or a finding by the court that legitimation is in the best interests of the child, *id.* § 13.21 (Vernon Pam. Supp. 1975-1983). A petition for adoption may not be considered until after termination of the parent-child relationship, which requires both a statutory basis for termination and a finding that it is in the best interest of the child. *Id.* §§ 15.02, 16.03.

68. *Kirkpatrick v. Christian Homes*, 103 S. Ct. 1760, 76 L. Ed. 2d 337 (1983).

69. *In re T.E.T.*, 603 S.W.2d 793, 797 (Tex.), *cert. denied*, 450 U.S. 1025 (1980).

70. 651 S.W.2d 249 (Tex. 1983).

71. *Id.* at 251 n.2; *see General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 843 (Tex. App.—Waco 1982, writ *dism'd*); *Green v. Hale*, 590 S.W.2d 231, 235 (Tex. Civ. App.—Tyler 1979, no writ); *Jasper County Lumber Co. v. McMillan*, 188 S.W.2d 731, 732 (Tex. Civ. App.—Beaumont 1945, writ *ref'd*).

72. 651 S.W.2d at 251.

73. *Id.* at 253.

74. *Id.*

75. *Id.* at 252-53 nn.3-5.

76. 648 S.W.2d 661 (Tex. 1983).

77. TEX. INS. CODE ANN. § 5.82(4). This section was repealed by the Medical Liability and Insurance Improvement Act, ch. 817, § 41.01, 1977 Tex. Gen. Laws 2039, 2064, but replaced by a similar provision in TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1984).

Texas Constitution⁷⁸ and found that the statute denied the child any remedy unless the parents brought suit.⁷⁹ The court considered this reliance on the parents unrealistic.⁸⁰ The court found that the restriction on the child's access to the courts was not only unreasonable when balanced against the purpose of the statute but that it also abolished a minor's right to bring a common law cause of action without providing a reasonable alternative.⁸¹

Good day care facilities are important for children, and the Texas Department of Human Resources (DHR) is charged with supervising them. Accordingly, when the DHR found a particular facility in violation of its registration requirements, it obtained a permanent injunction to prevent that facility's operation. The court of appeals reversed on a pleading error.⁸² The Texas Supreme Court, however, reversed and remanded, finding that the appeals court elevated form over substance by basing its decision on the failure to find a licensing error when the Department had intended to complain of a lack of compliance with registration requirements.⁸³

The importance of sports in Texas high schools cannot be overestimated.⁸⁴ The University Interscholastic League (UIL) tries to regulate the fairness of competition through rules concerning matters such as training, financial awards to students, and eligibility. The UIL sanctioned the Hardin-Jefferson Independent School District for alleged violations of UIL rules, and the school district obtained a temporary injunction restraining the enforcement of the sanctions. The appeals court sustained the school district's position, finding that nothing in the record supported the sanctions and thus that the trial judge did not abuse his discretion in granting the injunction.⁸⁵ The court further held in accordance with prior decisions that the UIL is not a state agency and, therefore, must post appeal bonds.⁸⁶ The UIL was more successful in *Niles v. University Interscholastic League*,⁸⁷ a suit concerning eligibility. In *Niles* a student whose parents had been divorced moved with his mother from the district during the spring semester. He had played varsity football during the fall semester and, the following fall, returned to his former high school and rejoined the

78. "All courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law." TEX. CONST. art. I, § 13.

79. 648 S.W.2d at 667.

80. *Id.* The court noted that the parents themselves could be minors or could be ignorant or unconcerned. *Id.*

81. *Id.*

82. *Wininger v. Department of Human Resources*, 653 S.W.2d 376 (Tex. App.—Fort Worth 1983). The department's pleadings had alleged a licensing, rather than a registration violation.

83. *Department of Human Resources v. Wininger*, 657 S.W.2d 783, 784 (Tex. 1983).

84. See McCoy, *Perot Tackles a Local Favorite, and the Crowd Roars*, Wall St. J., Dec. 15, 1983, at 26, col. 3.

85. *University Interscholastic League v. Hardin-Jefferson Indep. School Dist.*, 648 S.W.2d 770, 772 (Tex. App.—Beaumont 1983, no writ).

86. *Id.* at 772-73.

87. 715 F.2d 1027 (5th Cir. 1983).

team. The UIL declared that Niles had violated a rule that requires students to be residents of the school district for a year prior to participating in interscholastic events. The student challenged the rule in federal court on constitutional grounds, claiming an infringement of his right to travel freely, an invidious discrimination between himself and children who reside with their parents, and a violation of his fundamental right to participate in interscholastic sports. Although the federal court held that it had subject matter jurisdiction since Niles's claims were not patently frivolous,⁸⁸ it found no violation of constitutional rights. The court held that the UIL rule only incidentally infringes upon the right to travel,⁸⁹ and promotes the state interest in equalizing competition without denying equal protection.⁹⁰ Additionally, the court found that a student's interest in interscholastic activities falls outside the protection of due process.⁹¹

In *In re E.G.M.*⁹² a court held that the accuracy of blood tests that failed to eliminate the possibility of paternity, when coupled with evidence of access during the critical period, is sufficient to compel a finding of paternity.⁹³ The trial court had found nonpaternity, but the appellate court held this finding to be so against the preponderance of the evidence as to be manifestly unjust or clearly wrong.⁹⁴ The blood tests, which indicated a 98.9% likelihood of paternity, strongly corroborated the mother's evidence on material issues.⁹⁵ The court specifically refused to follow the holding of *G—— v. G——*,⁹⁶ which had equated the percentage of likelihood of paternity demonstrated by medical testimony with the probability that the witness was telling the truth.⁹⁷

A finding of adoption by estoppel requires clear evidence of an agreement to adopt.⁹⁸ In *Brown v. Brown*⁹⁹ the court found no evidence of such an agreement, although the child in question had lived with the Browns for almost seventeen years. During that time the child's natural mother had always refused to give her consent to an adoption. Her brother, the alleged adoptive father, had also refused to consider terminating his sister's parental rights, although he would have liked to adopt the child. The appellate court denied Mrs. Brown's request for child support, affirming the trial court's finding that because the child had not been equitably adopted, no children were born of the marriage.¹⁰⁰

88. *Id.* at 1030.

89. *Id.* at 1030-31.

90. *Id.* at 1031.

91. *Id.*

92. 647 S.W.2d 74 (Tex. App.—San Antonio 1983, no writ).

93. *Id.* at 78-79.

94. *Id.* at 78.

95. *Id.*

96. 604 S.W.2d 521, 524 (Tex. Civ. App.—Dallas 1980, no writ).

97. 647 S.W.2d at 78.

98. *Cavanaugh v. Davis*, 149 Tex. 573, 577, 235 S.W.2d 972, 978 (1951).

99. 652 S.W.2d 828 (Tex. App.—Fort Worth 1983, writ dismissed).

100. *Id.* at 829.

Texas courts continue to limit the rights of adopted persons.¹⁰¹ In *Foster v. Foster*¹⁰² the court held that a person who was an adult when adopted does not succeed to the same rights as a person who was a minor when adopted. Citing no cases, the court held that "it is not the law of this State that one who was adult when adopted has entitlement under the laws of descent and distribution to recover as a child from anyone other than his adoptive parents."¹⁰³ This decision seems contrary to the language of the adoption statute, which states that "the adopted adult is the son or daughter of the adoptive parents for all purposes"¹⁰⁴

IV. CONSERVATORSHIP

When parents divorce or die, the custody of their minor children becomes subject to a court's jurisdiction. Courts should give careful consideration to the determination of managing conservatorship and should not modify an agreed settlement solely on the hearsay testimony of one of the parties, as the court did in *Edwards v. Edwards*.¹⁰⁵ There the appellate court found that the trial court had erred in not granting a new trial when the original judgment was obtained by extrinsic fraud perpetrated by the wife.¹⁰⁶ Neither may a court base its conservatorship decision on consideration of the sex of the parents,¹⁰⁷ as happened in *Glud v. Glud*.¹⁰⁸ The trial court in *Glud* abused its discretion by sealing the record of the court's interview with the children and denying the parties access to it.¹⁰⁹ This error was curable by the appeals court's making the record available to the parties.¹¹⁰ The trial court committed reversible error, however, by basing its custody award to the mother on the belief that "it would be very difficult for a man to raise two boys like a woman can. Therefore, I'm going to name her as managing conservator of the children."¹¹¹ The appellate court held that the comment showed that the trial court's determination of custody was based on the sex of the parents, thus depriving the father of his right to have his qualifications as custodian considered without regard to sex.¹¹² Clerical errors can be corrected nunc pro tunc, as in *Lane v. Hart*,¹¹³ where a dispute occurred about the interchangeability of the

101. *Pouncy v. Garner*, 626 S.W.2d 337 (Tex. App.—Tyler 1981, writ ref'd n.r.e.); Solender, *supra* note 5, at 117.

102. 641 S.W.2d 693 (Tex. App.—Fort Worth 1982, no writ).

103. *Id.* at 695.

104. TEX. FAM. CODE ANN. § 16.55 (Vernon Pam. Supp. 1975-1983).

105. 651 S.W.2d 940 (Tex. App.—Fort Worth 1983, no writ).

106. *Id.* at 943. The wife misled the husband as to the date of the divorce hearing so that she was the only party present.

107. TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975).

108. 641 S.W.2d 688 (Tex. App.—Waco 1982, no writ).

109. *Id.* at 689-90. "On the motion of a party . . . the court shall cause a record of the interview to be made . . . , which record of the interview shall be made part of the record in the case." TEX. FAM. CODE ANN. § 14.07(c) (Vernon Pam. Supp. 1975-1983).

110. 641 S.W.2d at 690.

111. *Id.*

112. *Id.* at 690-91.

113. 651 S.W.2d 419 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

words "residence" and "legal domicile."

When either of the parties to a divorce suit dies, the action abates and the court should dismiss the suit.¹¹⁴ In *Whatley v. Bacon*¹¹⁵ the Texas Supreme Court issued a conditional writ of mandamus to Judge Bacon asking that he vacate his temporary orders that had given conservatorship to the children's maternal grandparents after their mother died. Since the suit for divorce had abated, the orders could not have been issued pursuant to that suit.¹¹⁶ The father, as sole parent, was entitled to possession of the children.¹¹⁷ A similar result occurred in a clash between a mother and stepmother after the father, the managing conservator, died. In *Greene v. Schuble*¹¹⁸ the Texas Supreme Court used its mandamus powers again to order Judge Schuble to issue a writ of habeas corpus directing the stepmother to surrender the children to their natural mother. The court held that in the absence of specific provisions to the contrary, the death of the managing conservator ends the conservatorship order and, therefore, the surviving parent has a right to possession of the children.¹¹⁹ Three justices dissented from this interpretation, asserting that the conservatorship arrangement of the children should still be governed by the divorce court as the court of continuing jurisdiction.¹²⁰

Perhaps if the father in *Hernandez v. Valls*¹²¹ had availed himself of the habeas corpus remedy¹²² after his wife's death, he might have obtained and maintained custody. Instead, he attempted to modify the divorce decree in order to be declared managing conservator, and the maternal grandparents, who had retained physical custody of the child, moved for a transfer of venue to the county of their residence. The appellate court, focusing on the transfer provisions of the Code,¹²³ found that the children had been with the grandparents for more than six months and ordered the original divorce court, which had ruled for the father, to transfer the proceedings to the grandparents' county.¹²⁴

The surviving parent cannot prevail, however, if valid orders concerning

114. *Ex parte Cahill*, 286 S.W.2d 210, 215 (Tex. Civ. App.—Beaumont 1955, no writ).

115. 649 S.W.2d 297 (Tex. 1983).

116. *Id.* at 299.

117. TEX. FAM. CODE ANN. § 14.10(e) (Vernon Pam. Supp. 1975-1983). The grandparents may now sue for access to the children under the newly enacted § 14.03(d). *See supra* notes 26-27 and accompanying text.

118. 654 S.W.2d 436 (Tex. 1983).

119. *Id.* at 437-38 (construing TEX. FAM. CODE ANN. § 14.10(e) (Vernon Pam. Supp. 1975-1983)).

120. 654 S.W.2d at 439 (Ray, J., dissenting).

121. 656 S.W.2d 153 (Tex. App.—San Antonio 1983, no writ).

122. TEX. FAM. CODE ANN. § 14.10(e) (Vernon Pam. Supp. 1975-1983) provides:

If the right to possession of a child is not governed by a court order, the court in a habeas corpus proceeding . . . shall compel return of the child to the relator if, and only if, it finds that the relator has a superior right to possession of the child by virtue of the rights . . . of a parent as set forth in Section 12.04 of this code.

123. The Family Code provides for the transfer of a proceeding to the county in which the child has resided for six months or longer. *Id.* § 11.06(b).

124. 656 S.W.2d at 155.

custody of the child are in effect. In *Mergerson v. Daggett*¹²⁵ the Texas Supreme Court vacated a habeas corpus order giving custody to the child's natural mother because a valid temporary order had already been entered in response to an original petition by the child's aunt.¹²⁶ Thus, the child's custody was governed by a valid court order, and the natural parent did not have a superior right.¹²⁷ In fact, the Texas Supreme Court has continued to use its mandamus power to enforce the rights of managing conservators to possession of their children.¹²⁸ In addition, the court has when necessary enforced the mandatory transfer provision of the Code,¹²⁹ pointing out that while a transfer order is interlocutory, it is final as to the transferring judge.¹³⁰

While the new sections of the Code expanding grandparents' rights had not taken effect during the survey period,¹³¹ grandparents have nevertheless been increasingly active in asserting their rights to visit or have custody of their grandchildren. In *Ex parte Parker*¹³² the father, as possessory conservator, filed a writ of habeas corpus, which the trial court denied. His former wife, the managing conservator, was in jail, and her parents had possession of the children. Unfortunately, the father filed for a writ of mandamus in the court of civil appeals, which at the time did not have the power to compel the trial court to grant the writ.¹³³ Apparently the legislature has remedied this lack of power in the past session.¹³⁴ In three other cases the grandparents were able to assert their right to become managing conservators of their grandchildren as against the natural parents.¹³⁵

125. 644 S.W.2d 451 (Tex. 1982).

126. *Id.* at 452. TEX. FAM. CODE ANN. § 11.06(a) (Vernon 1975) provides:

If the right to possession of a child is presently governed by a court order, the court in a habeas corpus proceeding involving the right to possession of the child shall compel return of the child to the relator if and only if it finds that the relator is presently entitled to possession by virtue of the court order.

127. 644 S.W.2d at 452.

128. *See* Schoenfeld v. Onion, 647 S.W.2d 954, 955 (Tex. 1983) (court reiterated that order denying habeas corpus because of best interest of child may not be used as device to avoid mandate of Family Code § 14.10); *see also* Wise v. Yates, 639 S.W.2d 460, 461 (Tex. 1982) (court upheld Virginia custody order, holding that fact that mother might take children to Taiwan was not threat to children's welfare under § 14.10(c)).

129. TEX. FAM. CODE ANN. § 11.06 (Vernon Pam. Supp. 1975-1983).

130. *Seay v. Valderas*, 643 S.W.2d 395, 397 (Tex. 1982).

131. *See supra* notes 26-27 and accompanying text.

132. 643 S.W.2d 476 (Tex. App.—Tyler 1982, no writ).

133. Courts of appeals may issue writs of mandamus only to enforce their jurisdiction or to compel a trial judge to proceed to trial and judgment. *State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980); TEX. REV. CIV. STAT. ANN. arts. 1823-1824 (Vernon 1964).

134. The legislature recently extended the mandamus power of the courts of civil appeals under art. 1824 to "all writs of Mandamus agreeable to the principles of law regulating such writs." Act of June 19, 1983, ch. 839, § 3, 1983 Tex. Gen. Laws 4767, 4768-69.

135. *Herod v. Davidson*, 650 S.W.2d 501, 503 (Tex. App.—Houston [14th Dist.] 1983, no writ) (grandparents had standing to intervene to ask for managing conservatorship when they had had physical custody for two years); *Yancey v. Koonce*, 645 S.W.2d 861, 863-64 (Tex. App.—El Paso 1983, writ ref'd n.r.e.) (court found best interest of child would be served by appointing maternal grandparents managing conservators; mother and former managing conservator concurred, as against father and paternal grandparents); *In re J.W.*, 645 S.W.2d 340, 341-42 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (paternal grandparent had standing to intervene and be appointed managing conservator for child of divorced

The standard for modifying a divorce decree as to managing conservatorship requires that conditions have so materially changed that retention of the present managing conservator would be injurious to the child and that the appointment of a new managing conservator would be a positive improvement.¹³⁶ This standard is difficult to meet, and before a court can make such a modification the managing conservator is entitled to notice.¹³⁷ A drastic change in the visitation and support provisions of a decree, even without a change in the designation of the managing conservator, cannot stand absent a showing of a material change.¹³⁸ The courts have held that a mother's having a job that left her with less time to spend with her children was not a material change¹³⁹ and that a stepmother's prior misconduct was also not a basis for a change.¹⁴⁰ When the trial court finds, however, that a substantial change has occurred and that the change is detrimental to the child, the appeals court will affirm unless the finding is against the great weight of the evidence.¹⁴¹ Where an increase in visitation is sought, in the absence of a complete record the appeals courts will not substitute its judgment for that of the trial court.¹⁴² Additionally, courts have continuing jurisdiction to modify pre-1974 divorce decrees if the court's jurisdiction has been invoked subsequent to 1974.¹⁴³

In the only interstate decision of the survey period, the court in *McGee v. McGee*¹⁴⁴ held that although the trial court lacked personal jurisdiction over the father, the Parental Kidnapping Prevention Act of 1980¹⁴⁵ and the Texas jurisdictional statutes¹⁴⁶ nevertheless permitted the court to modify a visitation order entered in a Mississippi divorce decree. All parties had moved from Mississippi. Although the father was a resident of Oklahoma, the mother and children had lived in Texas since mid-1980, enabling

parents, since she had previously been appointed either temporary managing or possessory conservator).

136. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Pam. Supp. 1975-1983); see also *Jones v. Cable*, 626 S.W.2d 734, 736 (Tex. 1982) (interpreting § 14.08(c)(1)).

137. *Allen v. Allen*, 647 S.W.2d 356, 361 (Tex. App.—El Paso 1982, no writ).

138. *Werlein v. Werlein*, 652 S.W.2d 538, 539-40 (Tex. App.—Houston [1st Dist.] 1983, no writ).

139. *Vasquez v. Vasquez*, 645 S.W.2d 573, 575 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).

140. *Hollon v. Rethaber*, 643 S.W.2d 783, 785 (Tex. App.—San Antonio 1982, no writ).

141. *Gibbs v. Greenwood*, 651 S.W.2d 377, 381 (Tex. App.—Austin 1983, no writ).

142. *Maixner v. Maixner*, 641 S.W.2d 374, 376 (Tex. App.—Dallas 1982, no writ).

143. *Sawa v. Williams*, 656 S.W.2d 204 (Tex. App.—San Antonio 1983, no writ). An enactment provision of the 1973 amendment of § 3.55 of the Family Code indicated that an action commenced after January 1, 1974, involving the modification of an order, judgment, or decree affecting the parent-child relationship shall be treated as the commencement of a suit in which no court has continuing jurisdiction. Act of June 15, 1973, ch. 543, § 4(b), 1973 Tex. Gen. Laws 1451, 1459. The mother in *Sawa* claimed that the father's failure to file an original petition, rather than a motion to modify custody and support, denied the court jurisdiction since the divorce was granted in 1972. The court held that the entry of an agreed order in 1976 invoked the court's continuous jurisdiction. 656 S.W.2d at 205-06.

144. 651 S.W.2d 891 (Tex. App.—El Paso 1983, no writ).

145. 28 U.S.C. § 1738A (Supp. V 1981).

146. Act of June 13, 1979, ch. 584, § 1, 1979 Tex. Gen. Laws 1201, 1201-02, repealed by Uniform Child Custody Jurisdiction Act, ch. 160, § 10, 1983 Tex. Gen. Laws 691, 709 (substituting TEX. FAM. CODE ANN. §§ 11.05, .53 (Vernon Pam. Supp. 1975-1983)).

Texas courts to acquire jurisdiction over matters concerning the parent-child relationship.¹⁴⁷ The opinion is interesting because it contains citations to much of the literature on interstate jurisdiction in child custody matters.¹⁴⁸

V. SUPPORT

While both parents have a duty to support their children,¹⁴⁹ it is not necessarily an abuse of discretion for a trial court to refuse to award child support to the managing conservator husband. In *Ulrich v. Ulrich*¹⁵⁰ the parties' earnings were approximately equal, but the wife was contemplating a return to school. The trial court order gave the husband exclusive use of the homestead and the wife visitation rights with no support attached. The court of appeals affirmed this order because it appeared that the trial court had taken the entire circumstances of the parties into consideration in arriving at its decision not to require child support from the wife.¹⁵¹ The appellate court distinguished the case at hand from *Grandinetti v. Grandinetti*,¹⁵² where the wife had indicated both an ability and a willingness to pay child support.¹⁵³ In *Ulrich* no such willingness or ability was clearly evident.

A trial court has wide discretion in setting the amount of child support and is not required to order the maximum amount possible.¹⁵⁴ For example, even though the court has found that the husband has the ability to pay \$1300 per month in support, it may order only \$1100 per month after taking into consideration the standard of living that the family and the child have maintained.¹⁵⁵ Once a divorce decree is signed, temporary orders are no longer effective, and a trial court can either suspend or refuse to suspend its final support orders pending appeal.¹⁵⁶ A court cannot, however, reinstate its temporary orders.¹⁵⁷

Once an original order of support has been entered, the court may, upon proper motion, modify its orders if it finds a change of circumstances has occurred.¹⁵⁸ Trial courts also may award attorney's fees¹⁵⁹ and need not

147. 651 S.W.2d at 893.

148. *See id.*

149. TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1984).

150. 652 S.W.2d 503 (Tex. App.—Houston [1st Dist.] 1983, no writ).

151. *Id.* at 505-06.

152. 600 S.W.2d 371 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

153. *Id.* at 372, cited in *Ulrich*, 652 S.W.2d at 505-06.

154. *Woods v. Woods*, 619 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1981, no writ).

155. *Vautrain v. Vautrain*, 646 S.W.2d 309, 312-13 (Tex. App.—Fort Worth 1983, writ dismissed).

156. TEX. FAM. CODE ANN. § 11.19(c) (Vernon Pam. Supp. 1975-1983).

157. *Morris v. Morris*, 654 S.W.2d 789, 790-91 (Tex. App.—Tyler 1983, no writ).

158. *Cannon v. Cannon*, 646 S.W.2d 295, 297-98 (Tex. App.—Tyler 1983, no writ) (sufficient evidence of material change in circumstances to sustain increase in child support from \$100 to \$170 per month).

159. *Laviage v. Laviage*, 647 S.W.2d 758, 761 (Tex. App.—Tyler 1983, no writ).

follow the findings of a jury in setting the amount of child support,¹⁶⁰ since a jury verdict on child support is merely advisory.¹⁶¹ In *Smith v. Smith*,¹⁶² however, the appeals court held that the trial court had abused its discretion by ordering the mother to pay twenty-five dollars a month, or only one percent of her gross annual salary from her primary job, as child support for her teenage son. The court held this amount to be a token payment rather than support.¹⁶³ The court in *Orsak v. Orsak*¹⁶⁴ held that when each parent is named managing conservator of one of the parties' two children the court may order that each be solely responsible for the support of only the child who is in his or her custody. The appellate court stated that the trial court need not order cross support in order to maintain a statutory duty of support for both children by both parents, because the trial court may later modify its decree in the event of a change in circumstances.¹⁶⁵

*Carroll v. Jones*¹⁶⁶ illustrates the difficulty of finding a court with jurisdiction to modify a support decree when both of the parties move frequently. The parties were divorced in Florida and the mother and children moved to Texas, where the father submitted to the jurisdiction of the court for an order reducing his child support. The mother and children then moved to Colorado, and the father moved first to Georgia, where he was served, and then to Alaska. The Texas court held that it lacked subject matter jurisdiction because none of the parties still resided in Texas.¹⁶⁷ The mother sought to avoid this ruling by contending that because she was an air force wife, she could retain a Texas domicile. The court deemed this argument irrelevant since the jurisdiction statute then in effect used the words "principal residence" and not "domicile."¹⁶⁸

When the change in residence relates to an intrastate change, however, the outcome can be quite different. In that situation not only do the courts have jurisdiction, but venue also lies where the children reside. In *Leonard v. Paxson*¹⁶⁹ the Texas Supreme Court granted a conditional writ of mandamus to transfer the proceedings for a motion to modify from El Paso County to Galveston County, where the children were then residing and had resided for more than six months. The trial judge had held that a contractual venue agreement between the parties prevented the Family

160. *Havis v. Havis*, 651 S.W.2d 921 (Tex. App.—Corpus Christi 1983, no writ).

161. TEX. FAM. CODE ANN. § 11.13(b) (Vernon Pam.Supp. 1975-1983).

162. 651 S.W.2d 953 (Tex. App.—Fort Worth 1983, no writ).

163. *Id.* at 955.

164. 642 S.W.2d 566 (Tex. App.—Dallas 1982, no writ).

165. *Id.* at 568.

166. 654 S.W.2d 54 (Tex. App.—Fort Worth 1982, no writ).

167. *Id.* at 56.

168. Act of June 13, 1979, ch. 584, § 3, 1979 Tex. Gen. Laws 1201, 1202, *repealed by* Uniform Child Custody Jurisdiction Act, ch. 160, § 10, 1983 Tex. Gen. Laws 691, 709. The former statute provided that "a court may not exercise its continuing jurisdiction to modify . . . any part of a decree if all of the parties and the child have established and continue to maintain their *principal residence* outside this state." Act of June 13, 1979, ch. 584, § 3, 1979 Tex. Gen. Laws 1201, 1202 (emphasis added) (repealed 1983).

169. 654 S.W.2d 440 (Tex. 1983).

Code's mandatory transfer provisions¹⁷⁰ from taking effect. The supreme court pointed out that this suit was not on a contract but rather was a suit affecting the parent-child relationship and thus the transfer provisions of the Family Code controlled.¹⁷¹ To hold otherwise would have defeated the legislature's intent.¹⁷²

In *Huff v. Huff*¹⁷³ the Texas Supreme Court held that the ten-year statute of limitations¹⁷⁴ applies to the enforcement of judgments of child support. Thus, a motion to reduce arrearages to judgment may apply to the prior ten years, but to no earlier period. The court in *Huff* reasoned that the motion to reduce arrearages to judgment is but one of several means provided by the legislature to enforce judgments of child support,¹⁷⁵ and that such motions under the law of res judicata are not separate claims that would come under the general four-year statute.¹⁷⁶ Each claim as it comes due is not a final judgment, but rather is nonmodifiable because the trial court has no jurisdiction to modify support payments retroactively.¹⁷⁷ Parties have a right to be heard on the issue of arrearages not as a matter of relitigating the claim of support, but as a matter of due process in the presentation of defenses.¹⁷⁸

A motion to reduce child support to judgment is a remedy separate from a motion for contempt, and a court cannot enter such a judgment absent a pleading or a prayer to support it.¹⁷⁹ To be certain that a complete remedy is obtained, the attorney should file a motion for contempt and a motion to reduce the arrearages to judgment simultaneously.¹⁸⁰ A court cannot refuse to grant a money judgment for arrearages, because such refusal would constitute a prohibited retroactive modification.¹⁸¹ In addition to granting the judgment for arrearages, the court could also find the obligor in contempt, but it could not forgive the arrearage, since that had become a money judgment. It could, however, frame the contempt order to take in only *part* of the arrearage so that even if the relator claimed it was impossible for him to pay *all* the arrearages, he would not be released.¹⁸²

170. TEX. FAM. CODE ANN. § 11.06(b) (Vernon Pam. Supp. 1975-1983).

171. 654 S.W.2d at 441.

172. *Id.* at 441-42.

173. 648 S.W.2d 286 (Tex. 1983).

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

175. 648 S.W.2d at 289; *see* TEX. FAM. CODE ANN. § 14.09 (Vernon 1975 & Pam. Supp. 1975-1983).

176. 648 S.W.2d at 289; *see* TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

177. 648 S.W.2d at 289 n.8; *see* TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Pam. Supp. 1975-1983).

178. 648 S.W.2d at 289.

179. *Barnett v. Barnett*, 640 S.W.2d 776, 777 (Tex. App.—Houston [1st Dist.] 1982, no writ).

180. *See Holliday v. Holliday*, 642 S.W.2d 280 (Tex. App.—Houston [14th Dist.] 1982, no writ). The court in *Holliday* denied a motion to reduce arrearages of \$4000 to judgment because one month prior the obligor had been held in contempt and had purged himself by paying \$2000 of the \$6050 in arrears. The court incorrectly reasoned that by permitting the obligor to purge himself the slate was wiped clean of all arrearages. *Id.* at 282.

181. *Huff v. Huff*, 648 S.W.2d 286, 289 n.8 (Tex. 1983).

182. *Ex parte Raymer*, 644 S.W.2d 889, 891 (Tex. App.—Amarillo 1982, no writ).

Courts that do not meet prescribed formalities in their efforts to enforce support risk having their orders voided. Contempt citations should give notice of what act is required,¹⁸³ the show cause order should give adequate notice of the charges and should be properly served,¹⁸⁴ and the underlying decree must have ordered payment of support.¹⁸⁵ If, however, a husband, with his attorney present, testifies without objection that he is in arrears, after tendering the arrearage to the court, the court may still find him in criminal contempt.¹⁸⁶ The contemnor cannot then claim a privilege against self-incrimination, since the privilege is not self-executing.¹⁸⁷ In some circumstances it is possible to sever a portion of the order of contempt and sustain a portion of it. Such a severance occurred in *Ex parte Fernandez*,¹⁸⁸ where the support order was void because it included support for a child who was not a minor, as well as for one who was, but did not separate the amounts.¹⁸⁹ Because the portion of the order relating to the return of items of furniture was specific, however, the contempt order could be sustained and the habeas corpus writ denied.¹⁹⁰

*Autry v. Autry*¹⁹¹ is a case that the author hopes will be one of a kind. The obligor, the father, was in arrears for child support in the sum of \$3200. Apparently the mother had made a number of attempts to collect this sum, requiring the father to hire counsel to defend himself. He then filed a separate action for attorney's fees in the amount of \$4000. The court granted this petition even though the award was not connected with any other proceeding. The appellate court reversed, holding that section 11.18 of the Family Code¹⁹² supports no separate cause of action for attorney's fees.¹⁹³

When a divorce decree, like the one in *Hudspeth v. Stoker*,¹⁹⁴ provides that a group life insurance policy be maintained and its proceeds held in trust for the children, numerous changes in carriers under the same employer do not defeat the trust.¹⁹⁵ The changes in carrier in *Hudspeth* were totally at the option of the employer, and after one of the changes the owner-father attempted to thwart the child support agreement by designating his second wife as the beneficiary. The court held that such actions would not defeat the equitable rights of the children and imposed a con-

183. *Ex parte Martin*, 652 S.W.2d 826, 828 (Tex. App.—Fort Worth 1983, no writ).

184. *Ex parte Combs*, 638 S.W.2d 540, 541 (Tex. App.—Houston [1st Dist.] 1982, no writ).

185. *Ex parte Harris*, 649 S.W.2d 389 (Tex. App.—Corpus Christi 1983, no writ).

186. *Ex parte Tankersly*, 650 S.W.2d 550, 551 (Tex. App.—Fort Worth 1983, no writ).

187. *Id.*

188. 645 S.W.2d 636 (Tex. App.—El Paso 1983, no writ).

189. *Id.* at 639.

190. *Id.*

191. 646 S.W.2d 586 (Tex. App.—Tyler 1983, no writ).

192. TEX. FAM. CODE ANN. § 11.18(a) (Vernon Pam. Supp. 1975-1983) provides that in "any proceeding under this subtitle . . . the court may award costs. Reasonable attorney's fees may be taxed as costs . . ." (Emphasis added.)

193. 646 S.W.2d at 589.

194. 644 S.W.2d 92 (Tex. App.—San Antonio 1982, no writ).

195. *Id.* at 95.

structive trust for the original face amount of the decree.¹⁹⁶

In *Kennard v. McCray*¹⁹⁷ the court held that an agreement to release the father from his child support obligations in exchange for an assignment of certain royalty rights was void as against public policy since it had not been approved by the courts.¹⁹⁸ The father's second wife, however, could not avail herself of the court to recover the royalty rights because she stood in the shoes of the obligor in her attempt to void the agreement.¹⁹⁹ Courts will leave the parties to executed illegal contracts in the positions in which they have voluntarily placed themselves.²⁰⁰

In *Saunders v. Saunders*²⁰¹ a wife who had left her Texas husband to live in Pennsylvania used the Uniform Reciprocal Enforcement of Support Act (URESA)²⁰² to obtain support for her child. The husband attempted to deny paternity, but the court would not hear his testimony as to non-access.²⁰³ Unfortunately for the husband, he failed to preserve the point for appeal by omitting to make a bill of exceptions.²⁰⁴ The appeal did contend that his sixth amendment right²⁰⁵ to confront the witnesses against him had been denied, but the appeals court pointed out that this right applies only in criminal cases, whereas URESA is civil in nature.²⁰⁶ Sustaining the right to confront accusers would of course defeat the entire purpose of URESA, which is intended to allow parties in different parts of the country to establish their rights in relation to support without leaving home. The putative father in *Saunders* also complained that the trial court relied on hearsay evidence when it admitted the mother's petition. The court held that the petition merely served to establish a prima facie case and that the father had the burden to confirm or deny the facts alleged therein.²⁰⁷ Since the father testified to essentially the same facts as were contained in the petition, the trial court did not rely on the petition for its judgment, so the question of hearsay regarding the petition facts was irrelevant.²⁰⁸ This case serves to illustrate that URESA is a cumbersome mechanism at best and, until it is better understood, will be subject to many appeals that can only delay the implementation of valid support orders.

VI. TERMINATION AND ADOPTION

The Family Code requires that in any suit seeking termination of the

196. *Id.* at 96.

197. 648 S.W.2d 743 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

198. *Id.* at 745.

199. *Id.* at 746.

200. *Id.*

201. 650 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1983, no writ).

202. TEX. FAM. CODE ANN. §§ 21.01-.45 (Vernon 1975 & Pam. Supp. 1975-1983).

203. 650 S.W.2d at 537-38.

204. *Id.* at 538.

205. U.S. CONST. amend. VI.

206. 650 S.W.2d at 538.

207. *Id.* at 537.

208. *Id.*

parent-child relationship, the court must appoint a guardian ad litem for the child unless it is clear that the child can be adequately represented by a party to the suit.²⁰⁹ In *Barfield v. White*²¹⁰ a jury trial took place and the father strongly contested the termination of his parental rights. The jury found that the father had failed to support the child in accordance with his ability, and the trial court terminated his parental rights. The trial court, however, failed to appoint a guardian ad litem, and the court of appeals held such failure to be reversible error.²¹¹ The appellate court rejected the trial court's finding that the child's interests were adequately represented when each of the parties was vigorously advocating his or her own interests.²¹² In *Turner v. Lutz*²¹³ the court reached a similar conclusion, although the trial court had made no finding as to the adequacy of the child's representation.²¹⁴ The appellees in *Turner* asserted that the failure to appoint a guardian ad litem was harmless error, but the court pointed out that the requirement is mandatory and thus cannot be harmless.²¹⁵ The failure to appoint a guardian ad litem was not reversible error in *In re D.E.W.*,²¹⁶ however, since the termination of the father's rights was based on his voluntary relinquishment.²¹⁷ Thus the trial court's finding that the mother could adequately represent the child's interest was credible. The father also asserted that the lack of a trial record, in the absence of evidence that he waived his right to one, denied him due process.²¹⁸ The court found that the affidavit of relinquishment itself was a sufficient record, obviating the need for a record of the trial or a statement of facts.²¹⁹ The father also asserted that the execution of the affidavit of relinquishment was faulty. While not disputing that he had understood and signed the affidavit, the father claimed that no evidence showed that he had signed it in the presence of the witnesses and the notary. The court held that the physical presence of the witnesses and notary when the document is signed is not necessary. The affiant satisfied the essential requirements when he appeared personally before the notary and the notary verified the signatures.²²⁰

In *Rhoades v. Penfold*²²¹ a different kind of right to representation was questioned. In that case both parents' parental rights were terminated in

209. TEX. FAM. CODE ANN. § 11.10(a) (Vernon Pam. Supp. 1975-1983).

210. 647 S.W.2d 407 (Tex. App.—Austin 1983, no writ).

211. *Id.* at 409.

212. *Id.*

213. 654 S.W.2d 57 (Tex. App.—Austin 1983, no writ).

214. *Id.* at 58-59.

215. *Id.* at 59.

216. 654 S.W.2d 33 (Tex. App.—Fort Worth 1983, no writ).

217. *Id.* at 35 (citing TEX. FAM. CODE ANN. § 15.03 (Vernon 1975 & Pam. Supp. 1975-1983)).

218. 654 S.W.2d at 35.

219. *Id.* The court relied on *Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390, 394 (Tex. 1982), which found legislative intent that the affidavit of relinquishment be a sufficient basis for a termination finding.

220. 654 S.W.2d at 36.

221. 694 F.2d 1043 (5th Cir. 1983).

an action by the state. Although the court informed the parents that they had a right to counsel, it did not advise them that counsel would be appointed for them if they could not afford to pay. The mother then filed suit in federal court asking that the state's judgment be declared null and void, alleging that the failure to appoint counsel had deprived her of due process.²²² The district court certified a class action and rendered summary judgment for the mother. The Fifth Circuit Court of Appeals reversed and remanded, pointing out, first, that certification of a class was improper because the United States Supreme Court had held that the right to counsel in parent-child terminations exists on an individual basis, rather than being an across-the-board right.²²³ Second, because the district court had never litigated the question of indigency or even considered the evidence on this point, summary judgment could not be granted.²²⁴

The usual ground for termination of parental rights in intra-family adoptions is failure to support in accordance with ability.²²⁵ This was the ground for termination in both *Neiswander v. Bailey*²²⁶ and *In re S.K.S.*²²⁷ In the latter case the court also found that the appellant, who was in jail at the time of the termination trial and therefore could not appear personally, had no constitutional right to appear personally when he had been represented by counsel and had had adequate opportunity to appear by deposition.²²⁸ In two other cases courts terminated parental rights of fathers who were prisoners. The court in *Wray v. Lenderman*²²⁹ affirmed a jury verdict favoring termination, despite the fact that the appellees could not afford to contest the appeal. The court found that the evidence showed the father had engaged in a course of conduct that had the effect of endangering the well-being of the child.²³⁰ The father's criminal activities during the minor's lifetime could only result in the father's incarceration.²³¹ While the criminal conduct in itself evidenced a disregard for the minor's well-being, other evidence indicated that the father also had a violent temper and a drinking problem. *G.W.H. v. D.A.H.*²³² involved similar circumstances in that the father was in prison, but less additional evidence indicated the

222. The mother based her appeal on 42 U.S.C. § 1983 (Supp. V 1981) since the denial of counsel was done under color of state law.

223. 694 F.2d at 1049-50 (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981)).

224. 694 F.2d at 1048-49.

225. TEX. FAM. CODE ANN. § 15.02(1)(F) (Vernon Pam. Supp. 1975-1983).

226. 645 S.W.2d 835 (Tex. App.—Dallas 1982, no writ). The father in *Neiswander* had been ordered to pay \$20 per week in 1968, but he had failed to pay anything at all for over a decade. The court also discussed the standard of review for termination cases and held that the standard should be "whether the trier of fact could reasonably conclude that the existence of the fact is highly probable." *Id.* at 836. This standard is higher than the preponderance standard of ordinary civil proceedings. *Id.* at 835-36.

227. 648 S.W.2d 402 (Tex. App.—San Antonio 1983, no writ).

228. *Id.* at 405.

229. 640 S.W.2d 68 (Tex. App.—Tyler 1982, no writ).

230. *Id.* at 71-72; see TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon Pam. Supp. 1975-1983).

231. 640 S.W.2d at 71-72.

232. 650 S.W.2d 480 (Tex. App.—Houston [14th Dist.] 1983, no writ).

father had actually endangered the child. The father alleged that his termination of parental rights was based solely on his conviction for a single offense, the murder of a young woman. The court agreed that such a conviction would not be sufficient to sustain the allegations, but found other noncriminal conduct of the father sufficient to warrant termination.²³³ A vigorous dissent argued that the evidence against the father did not meet the clear and convincing standard of proof.²³⁴

When the state intervenes to take custody of a child, the standard for naming the state managing conservator is merely a preponderance of the evidence rather than the clear and convincing standard required in the termination of parental rights.²³⁵ The state must produce some evidence, however, to rebut the presumption that it is in the best interest of the child for the natural parents to retain custody.²³⁶ In *Bryant v. Hibber*²³⁷ the court found a sufficient basis in the evidence to terminate the mother's parental rights. Despite the mother's apparent true affection for her children, she had allowed them to remain in environments that endangered their well-being.²³⁸ Additionally, in *Bryant* the attorney ad litem contended that no evidence supported the \$250 amount of attorney's fees awarded by the court. The appellate court sustained the amount because the attorney, in her request for \$4025, had merely included the number of hours expended rather than the necessity for and nature and quality of the work.²³⁹

*In re S.D.S.*²⁴⁰ was another case in which the trial court found the mother had allowed the children to remain in a dangerous environment. The father was convicted of child abuse and in a plea bargain voluntarily relinquished his rights. The mother's rights were terminated, however, because although she had not herself endangered the children, her concern for them was untimely and by the time she took action to help, they had suffered too much.²⁴¹ The dissent pointed out that a factor in the mother's reticence was her great fear of her husband. She was not free to leave the house with both children, so one child was essentially held as a hostage.²⁴²

*Rodriguez v. Miles*²⁴³ involved two sets of foster parents who wished to adopt the same child. The appellees had filed for adoption first, but the Department of Human Resources (DHR) filed a consent to adoption for the appellants and intervened in opposition to the appellees. The trial

233. *Id.* at 481-82.

234. *Id.* at 482-84 (Murphy, J., dissenting).

235. *Choyce v. Dallas County Child Welfare Unit*, 642 S.W.2d 559, 560 (Tex. App.—Dallas 1982, no writ).

236. *Id.* at 561.

237. 639 S.W.2d 718 (Tex. App.—Austin 1982, no writ).

238. The court found the children's environment to include illicit drugs, overdoses, firearms, arrest, prostitution, and possible sexual abuse.

239. *Id.* at 720-21.

240. 648 S.W.2d 351 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

241. *Id.* at 353.

242. *Id.* at 353-54 (Jordan, J., dissenting).

243. 655 S.W.2d 245 (Tex. App.—Corpus Christi 1983, no writ).

court found for the appellees and ruled that the requirement of consent by the managing conservator,²⁴⁴ the DHR, should be waived.²⁴⁵ The appellants contended that appellees had no standing to petition for adoption, but the court found, in accordance with the Family Code,²⁴⁶ that after a termination of parental rights any adult has standing to adopt a child.²⁴⁷ The appellate court also affirmed the trial court's holding on waiver of consent, since it had found that the DHR did not have good cause for its refusal to consent.²⁴⁸ The appellants having shown no abuse of discretion, the decision of the trial court was affirmed.

244. TEX. FAM. CODE ANN. § 16.05 (Vernon 1975).

245. 655 S.W.2d at 219; *see* TEX. FAM. CODE ANN. § 16.05(d) (Vernon 1975).

246. *See* TEX. FAM. CODE ANN. § 16.02 (Vernon 1975).

247. 655 S.W.2d at 247-48.

248. *Id.* at 249.