

January 1985

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Recommended Citation

Ellen K. Solender, *Family Law: Parent and Child*, 39 Sw L.J. 43 (1985)
<https://scholar.smu.edu/smulr/vol39/iss1/3>

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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

I. LEGISLATIVE CHANGES

THE Texas Legislature has made no further changes in the law affecting parent and child since the massive reforms enacted during the sixty-eighth session in 1983.¹ Congress, however, has enacted substantial changes in the Social Security Act through the Child Support Enforcement Amendments of 1984,² which will have a significant effect on Texas family law.³ The cornerstone of the new law is simplification of methods for collecting past-due child support through mandatory wage withholding.⁴ Fortunately, in 1983 the voters of Texas amended the Texas Constitution to permit such withholding.⁵ Unfortunately, the enabling legislation that the Texas Legislature passed in 1983⁶ does not fully comply with the requirements of the federal law. The legislature, therefore, will have to make a number of changes to those sections of the Family Code dealing with enforcement and assignment of income for child support.⁷

The changes required will not be in policy, but in method of implementation, and are intended to benefit all children in single-parent homes, not

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1. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 38 Sw. L.J. 173-77 (1984).

2. Pub. L. No. 98-378, 98 Stat. 1305 (amending Social Security Act by placing procedural requirements on states to increase likelihood that children eligible for support will obtain it).

3. The American Bar Association considers the enforcement of child support so important that it has established a special child support project. Information concerning child support enforcement may be obtained by writing to:

Child Support Project, National Legal Resource Center for Child Advocacy and Protection

American Bar Association
1800 M. Street, N.W., Suite S-200
Washington, D.C. 20036

4. Child Support Enforcement Amendments of 1984, sec. 3(b), § 466(a)(1), 98 Stat. at 1306 (providing for wage withholding to collect delinquent child support).

5. TEX. CONST. art. XIV, § 28.

6. TEX. FAM. CODE ANN. §§ 14.09, .091 (Vernon 1975 & Pam. Supp. 1975-1983) (concerning enforcement of orders and assignment of income for child support, respectively).

7. See *id.* Having already lengthened the statute of limitations for paternity actions to 20 years, TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983), Texas is in conformity with the federal statute on this issue. See Child Support Enforcement Amendments of 1984, sec. 3(b), § 466(a)(5), 98 Stat. at 1307 (requiring procedures permitting paternity determination until child turns 18).

merely those receiving public assistance.⁸ To simplify collection of past-due support, Texas will have to require that all new decrees or modifications of prior decrees for child support contain a provision for the withholding of income, should the support fall into arrears.⁹ If an arrearage occurs, the machinery for wage garnishment can be activated without any loss of time.¹⁰ Additionally, whenever one of the parents works for a concern that provides medical insurance benefits for dependents of its employees, the support order will need to include this insurance coverage.¹¹ While the Texas Family Code mandates an involuntary wage assignment after the obligor has fallen two months in arrears,¹² the federal act will require that the period be shortened to one month.¹³

The Child Support Enforcement Amendments also enacted a number of changes affecting the employer who is required to withhold wages.¹⁴ These changes include requirements that the states establish methods to simplify the withholding process for employers and to penalize employers for amounts not withheld.¹⁵ In addition to these employer-related changes, the Child Support Enforcement Amendments provide further protection for the employee subject to a wage assignment order. The Amendments require that states provide for the imposition of a fine against any employer who discharges, refuses to employ, or takes disciplinary action against an employee simply because he is subject to a wage assignment order.¹⁶

The Child Support Enforcement Amendments require the governor of each state to appoint a State Commission on Child Support by December 1, 1984.¹⁷ The Amendments do not specify the number of members comprising the Commission, but the membership must represent all aspects of the child support system, including custodial and non-custodial parents, administrators, members of the judiciary, and others involved in child welfare programs.¹⁸ The Amendments require that the Commission study the effectiveness of the operation of the state's support system and report its findings to the governor no later than October 1, 1985.¹⁹

Finally, the Amendments require that each state establish statewide guide-

8. Child Support Enforcement Amendments of 1984, § 23(a)(b), 98 Stat. at 1329.

9. *Id.* sec. 3(b), § 466(a)(1), (b)(2), 98 Stat. at 1306-07, 1308.

10. The withholding provision requirement is primarily intended to benefit children who fall under the provisions of subchapter IV, Part A of the Social Security Statute, Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-605 (1982) (providing for federally funded state programs for aid and services to needy families with children). Since courts cannot know in advance which children might be affected, the withholding provision will have to apply to all decrees.

11. Child Support Enforcement Amendments of 1984, sec. 16, § 452(f), 98 Stat. at 1321.

12. TEX. FAM. CODE ANN. § 14.091(p)(2) (Vernon Pam. Supp. 1975-1983).

13. Child Support Enforcement Amendments of 1984, sec. 3(b), § 466(b)(3)(A), 98 Stat. at 1308.

14. *Id.* § 466(b)(6), 98 Stat. at 1309.

15. *Id.* § 466(b)(6)(B), (D).

16. *Id.* § 466(b)(6)(D).

17. *Id.* § 15, 98 Stat. at 1320-21.

18. *Id.* § 15(b), 98 Stat. at 1320.

19. *Id.* § 15(c), (d).

lines for child support awards by October 1, 1987.²⁰ These guidelines may be created legislatively, judicially, or administratively, but need not be binding. The Texas guidelines should supplement the recently enacted section in the Family Code pertaining to the factors courts are to consider for support and the recommendations for the use of formulas and guidelines.²¹ The federal requirement of statewide guidelines is consistent with the Texas Legislature's expressed interest in uniformity, as evidenced by its request that courts publish local rules pertaining to formulas and schedules.²²

II. UNITED STATES SUPREME COURT DECISIONS

During the 1983-1984 term the United States Supreme Court did not decide many cases in the family law area. In *Palmore v. Sidoti*²³ the Court reversed a Florida trial court's judgment as to the custody of a child, because the decision was based on race and not on the fitness of the parents.²⁴ The white mother was granted custody of the child in an earlier divorce proceeding. After the mother married a black man, the white father sought a change in custody. Although the trial court determined that both parents were fit and the new step-father was respectable, it found that, despite recent strides in improved race relations, a white child in a racially mixed home would suffer from social stigmatization.²⁵ The Supreme Court, relying on a number of earlier decisions,²⁶ found that this ruling denied constitutional rights based on the Equal Protection Clause.²⁷ While the decision serves as a reminder to Texas courts to eschew race as a basis for their decisions, Texas court opinions are not likely to exhibit the same candor as the Florida court. A Texas court of appeals reversed a recent trial court decision because the trial court had based its decision on the premise that women were better at raising children than men.²⁸

Another United States Supreme Court decision of interest to Texas is

20. *Id.* secs. 18(a), § 467(a), 18(b), 98 Stat. at 1321-22.

21. TEX. FAM. CODE ANN. § 14.05(a) (Vernon Pam. Supp. 1975-1983) provides that when determining the amount of child support the court must consider all appropriate factors, including the needs of the child, the ability of the parents to contribute to the child's support, the financial resources available, and any schedules, guidelines, and formulas the court has adopted.

22. *Id.*

23. 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984).

24. *Id.* at 1881, 80 L. Ed. 2d at 424. The appellate court affirmed per curiam without opinion, denying the Florida Supreme Court jurisdiction to review the case under the authority of Article V, § 3(b)(3) of the Florida Constitution. *Id.*; see *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (holding that Florida Supreme Court lacks jurisdiction to review per curiam decisions of state appellate courts rendered without opinion when basis for review is alleged conflict with decision of another court of appeals or supreme court).

25. 104 S. Ct. at 1881, 80 L. Ed. 2d at 424.

26. *Id.* at 1882-83, 80 L. Ed. 2d at 425-26 (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Strauder v. West Virginia*, 100 U.S. 303 (1800)).

27. 104 S. Ct. at 1882, 80 L. Ed. 2d at 426.

28. *Glud v. Glud*, 641 S.W.2d 688, 690 (Tex. App.—Waco 1982, no writ) (trial court violated mandate of TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975) that sex must not be basis of custody decision).

Irving Independent School District v. Tatro.²⁹ In this case the Court finally resolved the issue of whether clean intermittent catheterization (CIC),³⁰ necessary to the special education of a handicapped child, is a "related service" as defined in the Education of the Handicapped Act.³¹ The Court held CIC to be a related service and ordered the Irving School District to provide this procedure to the plaintiff's eight-year-old daughter during school hours. The Court based its finding on the fact that CIC is not a medical service, since a layperson can administer it with minimal training.³² The Court analogized this service to the requirement of modification of school buildings to make them accessible to handicapped children.³³ In a situation like the one in *Tatro* CIC permits the child to remain at school; thus, the procedure is as important to the educational process as the ability to enter the school in the first place.³⁴ The language of the opinion indicates that the Court intends a broad interpretation of the language of the Education of the Handicapped Act. This decision should forewarn school districts that the exclusion of handicapped children from the mainstream of education, based on the inconvenience of unusual procedures, will not be tolerated. The Court did find, however, that the school district was not liable for attorney's fees,³⁵ since relief was granted under the Education of the Handicapped Act³⁶ and not under the Rehabilitation Act.³⁷

III. STATUS

After their seventeen-year-old son made unauthorized withdrawals from their bank accounts that resulted in their son's conviction for forgery, the plaintiffs in *Amarillo National Bank v. Terry*³⁸ requested the bank to recredit their accounts in the amounts withdrawn. The bank complied, but relying on the Texas Family Code provisions concerning parental liability,³⁹ refused to repay the first \$5,000. The plaintiffs sued the bank to recover the full amount of their loss and the jury found for the plaintiffs. The appellate

29. 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984).

30. CIC is a procedure involving the insertion of a catheter into the urethra to drain the bladder. *Id.* at 3371, 82 L. Ed. 2d at 664.

31. 20 U.S.C. § 1401(17) (1982). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services (including . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . ." *Id.*

32. 104 S. Ct. at 3378, 82 L. Ed. 2d at 674.

33. *Id.* at 3377, 82 L. Ed. 2d at 672-73.

34. CIC was absolutely necessary for the education of the plaintiff's daughter because she needed catheterization every three or four hours to avoid injury to her kidneys.

35. See *Smith v. Robinson*, 104 S. Ct. 3457, 3474, 82 L. Ed. 2d 746, 770-71 (1984) (disallowing attorney's fees under Rehabilitation Act for claim ultimately allowed under Education of the Handicapped Act).

36. 20 U.S.C. § 1400 (1982).

37. 29 U.S.C. 794 (1982). The Education of the Handicapped Act has no provision for attorney's fees, while the Rehabilitation Act does.

38. 658 S.W.2d 702 (Tex. App.—Amarillo 1983, no writ).

39. TEX. FAM. CODE ANN. §§ 33.01, .02 (Vernon 1975). Effective June 10, 1981, § 33.02 allows increased recovery not to exceed \$15,000 per act. *Id.* § 33.02 (Vernon Pam. Supp. 1975-1983).

court affirmed, holding that the statute imposes liability for property damage, while the bank had suffered only an economic loss.⁴⁰ In addition, the court held that the bank failed to prove the necessary elements of its case.⁴¹

On remand from the Texas Supreme Court,⁴² the appellate court in *Winger v. Department of Human Resources*⁴³ affirmed the trial court's permanent injunction against the operation of a child-care facility. The Fort Worth court of appeals held that the statutes authorizing the injunction⁴⁴ were not unconstitutionally broad and also upheld the constitutionality of the legislature's delegation of authority to regulate child-care facilities to the Department of Human Resources.⁴⁵ The Department requested the injunction because the appellant failed to comply with the rules and regulations pertaining to registered family homes. In another case⁴⁶ the Department failed to close an unlicensed facility. Parents of a child who died while in the facility's care sued Department employees who had inspected the day-care center. The court held that state employees who gather facts and then act on them are immune from liability because their actions are quasi-judicial.⁴⁷

In *Rodriguez v. Ysleta Independent School District*⁴⁸ the court upheld the school district's requirement that a child, even though a bona-fide resident of the district, must reside with a parent, guardian, or other court-ordered relation to attend tuition-free public school.⁴⁹ The court held the requirements valid, noting that instances arise when a school district must contact a parent or guardian.⁵⁰ Persons residing in districts with this requirement who have unrelated children in their care should apply to the courts for a conservatorship order before the child enters school.

Maintaining discipline is an important problem for schools, but student safety is of primary concern. If a student is injured in the classroom while under the supervision of a teacher, that teacher is immune from liability if he is acting within the scope of his employment.⁵¹ A teacher may still be liable, however, for negligently injuring a student while disciplining him.⁵² The

40. 658 S.W.2d at 704.

41. *Id.* at 704-05. TEX. FAM. CODE ANN. § 33.01(2) (Vernon 1975) requires the child's conduct to have been willful and malicious. Although the Terrys admitted that their son's conduct was willful, they had not admitted that it was willful and malicious, and the bank had not proved that the conduct was willful and malicious.

42. *Department of Human Resources v. Winger*, 657 S.W.2d 783 (Tex. 1983) (reversing on pleading error).

43. 663 S.W.2d 913 (Tex. App.—Fort Worth 1984, no writ).

44. TEX. HUM. RES. CODE ANN. § 42.074 (Vernon 1980).

45. 663 S.W.2d at 914-15.

46. *Augustine v. Nusom*, 671 S.W.2d 112 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

47. *Id.* at 115. A state employee with quasi-judicial status enjoys immunity from personal liability as long as he is acting in good faith within the scope of his authority. *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

48. 663 S.W.2d 547 (Tex. App.—El Paso 1983, no writ).

49. *Id.* at 551.

50. *Id.*

51. TEX. EDUC. CODE ANN. § 21.912(b) (Vernon Supp. 1984); see *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978) (interpreting § 21.912(b) as immunizing professional school employees from liability except when negligently disciplining students).

52. *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978).

court in *Diggs v. Bales*⁵³ held that a teacher was not negligent in supervising the classroom.⁵⁴ In another case, administering three punitive spans for using abusive language to a bus driver was not a violation of due process, even though the parents had requested a three-day suspension as punishment for the student.⁵⁵ The Fifth Circuit held that even though the regulations of the district were not followed, such discipline did not violate the student's constitutional rights, since she requested the alternative of the spans.⁵⁶

Two high school seniors were also denied relief⁵⁷ after their grades were reduced as punishment for using alcohol on a school-sponsored trip. The students contended that the district violated their constitutional rights, since neither the policy manual nor the student handbook mentioned that the district could reduce their grades in addition to suspending the students.⁵⁸ The trial court agreed and granted a permanent injunction against any grade reduction. The appellate court ruled, however, that since school officials discussed these penalties at a number of high school assemblies, the students had notice and were not deprived of their constitutional rights.⁵⁹ The court held that school policy relating to discipline need not be in writing to be legally enforceable and dissolved the injunction.⁶⁰

Schools and parents are still struggling to comply with the provisions of the Education of the Handicapped Act.⁶¹ In *Scokin v. Texas*⁶² the parents requested reimbursement of expenditures for private schooling for their child after they unilaterally removed her from public school. The court denied relief, but determined that the appropriate state statute of limitations under the Act⁶³ is the two-year statute generally applicable to tort claims.⁶⁴

In *David H. v. Spring Branch Independent School District*,⁶⁵ which involved a petition for reimbursement of expenditures for private schooling for a learning-disabled child, the court granted partial relief.⁶⁶ Although they had learned of new laws granting legal rights to handicapped children, the parents delayed a whole year before contacting the school district for re-evaluation of the child. They alleged that uncertainty about how their child would function in a public school and about their legal rights caused the delay.⁶⁷ The court held that uncertainty was not good cause for delay and

53. 667 S.W.2d 916 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

54. *Id.* at 918. The court refused to read § 21.912(b) more broadly than *Barr v. Bernhard*.

55. *Woodard v. Los Fresnos Indep. School Dist.*, 732 F.2d 1243, 1244 (5th Cir. 1984).

56. *Id.* The court dismissed the action. *Id.*

57. *New Braunfels Indep. School Dist. v. Armke*, 658 S.W.2d 330 (Tex. App.—Waco 1983, writ ref'd n.r.e.).

58. *Id.* at 331.

59. *Id.* at 332. The rights allegedly violated were the students' rights to public education and a liberty interest in their good names. *Id.*

60. *Id.*

61. 20 U.S.C. §§ 1401-1461 (1982).

62. 723 F.2d 432 (5th Cir. 1984).

63. *Id.* at 438.

64. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1984).

65. 569 F. Supp. 1324 (S.D. Tex. 1983).

66. *Id.* at 1340.

67. *Id.*

did not allow reimbursement for the parents' expenditures for that year.⁶⁸ The court found, however, that the school district failed to provide the special treatment the Act required.⁶⁹ The school had recommended that the parents place the child in a class for the educable mentally retarded, rather than one for the learning disabled. The court held that such inappropriate placement was discriminatory under the Rehabilitation Act⁷⁰ and that the parents were entitled to partial recovery for their expenditures.⁷¹

In answer to the question of whether a private secondary institution may withhold a student's academic records because of unpaid tuition, the Attorney General of Texas stated that an institution that does not receive state funds is not a governmental body.⁷² A private school, therefore, need not comply with the Texas Open Records Act.⁷³ The Federal Family Education and Privacy Act⁷⁴ may cause the institution to lose federal funds, however, if the school does not permit the parents to inspect and review the records.⁷⁵

When the Texas Legislature passed the Education Reform Act⁷⁶ it included a provision requiring the University Interscholastic League to submit its rules and procedures to the State Board of Education.⁷⁷ The Board is empowered to approve, disapprove, or modify any rules submitted to it.⁷⁸ Perhaps this provision will result in less litigation concerning eligibility.

In *Smith v. Cornelius*⁷⁹ a court of civil appeals found the four-year paternity statute in effect from 1981 to 1983⁸⁰ unconstitutional.⁸¹ For a defendant who is ultimately determined to be the father, this finding may prove quite expensive if the court follows the reasoning of *Adams v. Stotts*.⁸² *Adams* held that when awarding child support after paternity has been established, the court should consider expenses of the child from the date of its birth.⁸³

Paternity is often difficult to establish. In *In re J.J.R.*⁸⁴ the alleged father specifically denied any sexual relationship with the mother. Despite testimony that blood tests, the results of which would exclude greater than ninety percent of the male population, had failed to exclude the defendant, the trial court found for the alleged father. The appellate court affirmed, holding that a blood test is merely another piece of evidence for the trier of

68. *Id.*

69. *Id.* at 1335; 20 U.S.C. §§ 1401-1461 (1982).

70. 29 U.S.C. § 794 (1982).

71. 569 F. Supp. at 1336, 1340.

72. Op. Tex. Att'y Gen. No. JM-154 (1984).

73. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 2(1)(F), 3(a) (Vernon Supp. 1984).

74. 20 U.S.C. § 1232g(a)(1)(A) (1982).

75. Op. Tex. Att'y Gen. No. JM-154 (1984).

76. Ch. 28, 1984 Tex. Sess. Law Serv. 269 (Vernon).

77. *Id.* pt. IV, sec. 2, § 21.921(b), at 402.

78. *Id.*

79. 665 S.W.2d 182 (Tex. App.—Dallas 1984, no writ).

80. *Id.* at 183 (citing TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983), amended by TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983)).

81. 665 S.W.2d at 184.

82. 667 S.W.2d 798 (Tex. App.—Dallas 1983, no writ).

83. *Id.* at 799.

84. 669 S.W.2d 840 (Tex. App.—Amarillo 1984, writ dism'd).

fact to consider.⁸⁵ In *C.G.W. v. B.F.W.*,⁸⁶ however, the appellate court found that properly conducted blood tests can be legally conclusive as to nonpaternity.⁸⁷ In this divorce case the tests were extensive and included the husband's parents as well as the husband, wife, and child. The trial court had admitted the blood test evidence, but at the conclusion of the trial without a jury did not mention such evidence in its findings of fact and conclusions of law. The trial court concluded that the child was the child of the marriage. The appellate court disagreed and held that properly conducted blood tests may be conclusive regarding biological impossibility.⁸⁸ The dissent based its conclusion on the long-held presumption that a child born or conceived in wedlock is legitimate.⁸⁹ This presumption was the law at the time of the divorce action, since the legislature had not yet enacted the provision for determining paternity of married fathers.⁹⁰

An ex parte divorce that terminates an alleged informal marriage does not necessarily establish the paternity of a child born during that marriage for social security purposes. In *Conlon v. Heckler*⁹¹ the court held that a Texas divorce decree is entitled to full faith and credit.⁹² Under the concept of divisible divorce,⁹³ however, a decree rendered without personal jurisdiction over one of the spouses is not conclusive as to all the accoutrements of marriage.⁹⁴ The child, a girl, was born in March 1969, approximately nine months after a two-week liaison between the putative father and the mother. In January 1970 the mother filed for divorce. The putative father was served notice in Vermont, but he neither answered nor appeared in the divorce proceedings. The mother made no assertion of personal jurisdiction under the Texas long-arm statute⁹⁵ at the time. The decree stated that one child was born of the marriage.⁹⁶ After the putative father died, the mother applied for survivor's benefits for the child. These benefits were denied because the court had not established the child's paternity. Even if the court had established paternity, the girl might have been considered illegitimate, requiring her to have been dependent on her father at the time of his death to qualify for benefits.⁹⁷ The reasoning of the court is most ingenious, since it asserts that it is giving full faith and credit⁹⁸ to the divorce while at the same time denying that a child born during the marriage is a legitimate child of the

85. *Id.* at 843.

86. 675 S.W.2d 323 (Tex. App.—San Antonio 1984, no writ).

87. *Id.* at 330.

88. *Id.* at 326.

89. *Id.* at 331 (Esquivel, J., dissenting).

90. TEX. FAM. CODE ANN. § 12.06 (Vernon Pam. Supp. 1975-1983).

91. 719 F.2d 788, 795 (5th Cir. 1983).

92. See U.S. CONST. art. IV, § 1; *Williams v. North Carolina*, 317 U.S. 287, 301 (1942).

93. *Estin v. Estin*, 334 U.S. 541, 549 (1948).

94. 719 F.2d at 796, 799. The *Conlon* court held that "a court's decree of divorce is separable from its declarations in that decree regarding the incidents of marriage, including alimony, support, custody, and paternity."

95. TEX. REV. CIV. STAT. ANN. art. 2031(b) (Vernon 1964 & Supp. 1984).

96. 719 F.2d at 791.

97. 42 U.S.C. § 402(d)(1), (d)(3) (1982).

98. U.S. CONST. art. IV, § 1.

marriage. The presumption that a child born during the marriage is a legitimate child of the marriage has been considered one of the strongest legal presumptions.⁹⁹ The real basis for the decision is found in a footnote:¹⁰⁰ the court did not believe that the Texas court's finding of an informal marriage was correct. The court could not, however, collaterally attack the Texas judgment, so while not disputing the putative father's paternity, it based its legal holding on the need for in personam jurisdiction to determine paternity.¹⁰¹ The unfortunate result was that the federal government became a co-conspirator with the child's irresponsible father in denying her support.

In *Hickey v. Johnson*¹⁰² the plaintiff established an equitable adoption through both oral and written evidence. The appellate court held that the defendant's requested instruction cautioning the jury to regard with suspicion oral agreements to adopt was properly refused as a comment on the weight of the evidence.¹⁰³ The testimony of step-children attempting to establish their status as equitable adoptees, based on the deceased's oral promises, however, is inadmissible absent some corroborative testimony.¹⁰⁴ Thus, even though evidence indicated a loving relationship between a deceased man and his step-children, the trial court correctly granted a directed verdict denying the claims of the step-children.¹⁰⁵ The court in *Flynn v. State*¹⁰⁶ held that actions of the parties can create a parent-child relationship despite the absence of formal adoption proceedings.¹⁰⁷ An aunt who claimed to have adopted a child was considered to have equitably adopted him, thus qualifying her to serve as a parent in a juvenile proceeding and obviating the need to appoint a guardian ad litem.¹⁰⁸

A "recognized" illegitimate child may not contest a will. The court held in *Mills v. Edwards*¹⁰⁹ that the only method for an illegitimate child to inherit from his father is contained in the Probate Code.¹¹⁰ Since the father had failed to comply with any of the legal methods for establishing legitimacy, the plaintiff had no interest in the estate.¹¹¹

The Texas appellate courts seem determined to limit the rights of adopted persons. In *Pope v. First National Bank*¹¹² the aunt of the claimant's alleged adoptive father had established a trust for the benefit of the alleged adoptive

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

100. 719 F.2d at 792 n.2.

101. The court required in personam jurisdiction since the suit affected the putative father's personal rights. *Id.* at 797.

102. 672 S.W.2d 33 (Tex. App.—Houston [14th Dist.] 1984, no writ).

103. *Id.* at 34.

104. *Defoeldvar v. Defoeldvar*, 666 S.W.2d 668, 671-72 (Tex. App.—Fort Worth 1984, no writ) (citing TEX. R. EVID. 601(b)).

105. *Defoeldvar v. Defoeldvar*, 666 S.W.2d 668, 671-72 (Tex. App.—Fort Worth 1984, no writ).

106. 667 S.W.2d 235 (Tex. App.—El Paso 1984, no writ).

107. *Id.* at 237-38.

108. *Id.* (citing TEX. FAM. CODE ANN. § 51.11 (Vernon 1975)).

109. 665 S.W.2d 153 (Tex. App.—Houston [1st Dist.] 1983, no writ).

110. *Id.* at 155; see TEX. PROB. CODE ANN. § 42(b) (Vernon 1980).

111. 665 S.W.2d at 155.

112. 658 S.W.2d 764 (Tex. App.—Dallas 1983, no writ).

father. Upon his death without descendants, the trust was to terminate and be distributed to two nieces of the settlor. The court, without attempting to determine whether adoption by estoppel had occurred, held that the claimant could not take under the trust because he was not in privity with the designees of the trust.¹¹³ A strong dissent complained that the courts were making second-class citizens of children adopted by estoppel, while the Texas Supreme Court had not yet ruled dispositively on the issue.¹¹⁴

In *Lehman v. Corpus Christi National Bank*¹¹⁵ the Texas Supreme Court reversed an appellate court decision that held that adopted adults do not have the same inheritance rights as adopted children.¹¹⁶ The supreme court held that a will defining descendants as children and issue and stating that "issue shall always include those who were adopted" includes adopted adults.¹¹⁷ When the will itself is clear, noted the court, no need exists to look to outside law.¹¹⁸

IV. CONSERVATORSHIP

In any suit concerning the parent-child relationship the making of a record is mandatory unless the court has approved an express waiver.¹¹⁹ A default judgment decreed without a record is, therefore, subject to a writ of error and will be reversed and remanded.¹²⁰ Even if the question of conservatorship is not raised on appeal, the lack of a record can taint the entire proceeding, necessitating a remand on the subjects of property division and child support.¹²¹ Even if a record is made, a court must have jurisdiction over the affected party before it can enter a binding order concerning property or custody rights. In *Kramer v. Kramer*¹²² neither the children nor the husband were before the court, and the wife failed to make any showing that any of them had ever been in Texas. Since the husband had entered a plea to stay the proceeding under the Soldiers' and Sailors' Civil Relief Act,¹²³ the appellate court reversed and remanded with instructions to abate the proceedings.

Absent a written agreement by the parties, trial courts cannot order joint managing conservatorships for the sole purpose of resolving a custody dis-

113. *Id.* at 766.

114. *Id.* at 768 (Stephens, J., dissenting).

115. 668 S.W.2d 687 (Tex. 1984).

116. *Lehman v. Corpus Christi Nat'l Bank*, 665 S.W.2d 799 (Tex. App.—Corpus Christi 1983), *rev'd*, 668 S.W.2d 687 (Tex. 1984). The appellate court relied on the wrongly decided *Foster v. Foster*, 641 S.W.2d 693 (Tex. App.—Fort Worth 1982, no writ).

117. 668 S.W.2d at 688.

118. *Id.* at 689.

119. See TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1975) ("A record shall be made as in civil cases generally unless waived by the parties with the consent of the court.").

120. *Hunter v. Hunter*, 666 S.W.2d 335, 336 (Tex. App.—Houston [14th Dist.] 1984, no writ). The *Hunter* court expressly held that the language of § 11.14(d) is mandatory. *Id.*

121. *Stubbs v. Stubbs*, 671 S.W.2d 70, 74 (Tex. App.—Dallas 1984, writ granted).

122. 668 S.W.2d 457 (Tex. App.—El Paso 1984, no writ).

123. 50 U.S.C. app. § 521 (1982) (providing for stay of judicial proceedings because of military service).

pute.¹²⁴ This rule appears to be based on both statutory construction¹²⁵ and common sense.¹²⁶ Third parties may not initiate custody proceedings unless they can fit the statutory definition of persons with "an interest in the child."¹²⁷ Thus, a great-grandmother was adjudged to have no standing,¹²⁸ as were an aunt and uncle.¹²⁹ The court did not dismiss the latter case, however, because the record indicated that the aunt and uncle might be able to establish standing by showing that they had possession of the child for six months prior to the suit.¹³⁰ The court reversed and remanded for a determination of the standing issue.¹³¹ The death of a parent appealing a custody decree will moot the action.¹³²

Absent compelling reasons, a court will not divide the custody of siblings, but if sufficient evidence to divide custody is introduced, an appellate court will not overturn the judgment of a trial court.¹³³ When grandparents intervene in a divorce proceeding to be appointed managing conservators, they need not show that the natural parent is unfit. The grandparents need only show that they will be superior custodians of the child¹³⁴ and that such a decree is in the best interest of the child.¹³⁵ In *Wimpey v. Wimpey*¹³⁶ the court did not find sufficient evidence adduced at trial to support the judgment, but determined that the trial court could consider a social study in its entirety when determining the best interest of the child.¹³⁷ A social study need not be formally entered into evidence, but is automatically made part of the record when one has been ordered.¹³⁸ *Garner v. Garner*¹³⁹ describes a particularly unfortunate situation. The father was severely injured in a motorcycle accident. The maternal grandparents, who had originally inter-

124. *Coles v. Coles*, 676 S.W.2d 226, 227 (Tex. App.—Fort Worth 1984, no writ); *Gonzales v. Gonzales*, 672 S.W.2d 887, 891 (Tex. App.—Corpus Christi 1984, no writ). Courts apparently may appoint married compatible couples as managing conservators without differentiating between them. See, e.g., *Wimpey v. Wimpey*, 662 S.W.2d 680, 682 (Tex. App.—Dallas 1983, no writ).

125. TEX. FAM. CODE ANN. §§ 14.01, .06 (Vernon 1975 & Pam. Supp. 1975-1983).

126. *Coles v. Coles*, 676 S.W.2d 226, 227 (Tex. App.—Fort Worth 1984, no writ); *Gonzales v. Gonzales*, 672 S.W.2d 887, 888 (Tex. App.—Corpus Christi 1984, no writ).

127. TEX. FAM. CODE ANN. §§ 11.03, .09(b) (Vernon 1975 & Pam. Supp. 1975-1983).

128. *Shaw v. Green*, 659 S.W.2d 150, 152 (Tex. App.—Houston [14th Dist.] 1983, no writ).

129. *In re Van Hersh*, 662 S.W.2d 141, 144 (Tex. App.—Amarillo 1983, no writ).

130. *In re Van Hersh*, 662 S.W.2d 141, 145 (Tex. App.—Amarillo 1983, no writ) (citing TEX. FAM. CODE ANN. § 11.03 (Vernon Pam. Supp. 1975-1983)). Section 11.03 gives standing to a person who has had possession and control of the child for six months prior to the filing of the petition.

131. 662 S.W.2d at 145.

132. *Black v. Black*, 673 S.W.2d 269, 270 (Tex. App.—Texarkana 1984, no writ).

133. *Zuniga v. Zuniga*, 664 S.W.2d 810, 812, 814 (Tex. App.—Corpus Christi 1984, no writ).

134. *Wimpey v. Wimpey*, 662 S.W.2d 680, 682 (Tex. App.—Dallas 1983, no writ).

135. TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975) (court will appoint parent managing conservator unless not in best interest of child).

136. 662 S.W.2d 680 (Tex. App.—Dallas 1983, no writ).

137. *Id.* at 682.

138. *Green v. Remling*, 608 S.W.2d 905, 909 (Tex. 1980). The *Wimpey* court held this result to be true in managing conservatorship adjudications as well as adoptions. 662 S.W.2d at 682.

139. 673 S.W.2d 413 (Tex. App.—Fort Worth 1984, writ dismissed).

vened, withdrew after extensive testimony attempting to establish their case, leaving the mother and the paternal grandparents to contend for custody. The mother was not able to offer a stable situation for the child, and the paternal grandparents, in addition to caring for the father, had a thirteen-year-old child with behavioral problems in their custody. Despite these difficulties, the attorney ad litem and the caseworker recommended that the court appoint the paternal grandparents managing conservators. The trial court agreed and so decreed. The appellate court found that the appointment was not an abuse of discretion.¹⁴⁰

Apparently, even an agreed joint managing conservatorship does not assure a good working arrangement. In *Dunker v. Dunker*¹⁴¹ the court appointed the parties co-managing conservators pursuant to an agreement, but within a year the conservators were back before the court requesting a modification. The father's affidavit swearing to the need for early relief¹⁴² alleged difficulty in continuing the co-managing conservator arrangement because the mother had moved to Indiana. The trial court found that circumstances had materially changed and that retention of the mother as co-managing conservator would be injurious to the welfare of the child. The court then appointed the father managing conservator and the mother possessory conservator. The appellate court affirmed, stating that the best interest of the child must always be of primary concern.¹⁴³ *Dalton v. Doherty*¹⁴⁴ represents a case of a de facto joint custody agreement. The father was appointed managing conservator and the mother possessory conservator, though each was to have the right to possession of the children one-half of the time. Approximately three years later, the arrangements broke down and the father filed a motion to modify, requesting the trial court to specify the terms and conditions for access to the children. The court heard evidence and considered a social study that was not entered into the record. The court decided to place the younger child with the mother at all times except even weekends of the month, but did not name her managing conservator. The father objected, stating that this change was so extreme that it constituted a de facto change in managing conservator. The appellate court agreed. Since the social study that the trial court had relied upon had not been made a part of the record, the appellate court had no evidence before it to support a finding that retention of the father as managing conservator would be injurious to the welfare of the younger child.¹⁴⁵ The court, therefore, reversed and remanded.¹⁴⁶ Still another type of joint custody arrangement is exemplified by *Guy v. Stub-*

140. *Id.* at 417.

141. 659 S.W.2d 106 (Tex. App.—Houston [14th Dist.] 1983, no writ).

142. See TEX. FAM. CODE ANN. § 14.08(d)(1) (Vernon Pam. Supp. 1975-1983). This section requires an affidavit containing allegations, along with supporting facts, that a child's environment may endanger his physical or emotional well-being to support a motion to modify a court order by changing the managing conservator.

143. 659 S.W.2d at 108.

144. 670 S.W.2d 422 (Tex. App.—Fort Worth 1984, no writ).

145. *Id.* at 424.

146. *Id.*

berfield.¹⁴⁷ The parties are not and have never been married, but immediately after the birth of their child the natural mother consented to the father's legitimating the child. The decree named the mother managing conservator. At the time of the decree an agreement between the parents that predated the child's birth specified that time with the child and expenses would be shared equally. All went well for two years until a dispute arose between the parents and the child was used as a pawn. The mother refused to give the father access to the child, thus denying the child a beneficial arrangement.¹⁴⁸ The appellate court found that the mother's actions raised some serious fact questions regarding her retention as managing conservator and reversed the trial court's granting of a motion to dismiss.¹⁴⁹

When a modification suit is tried before a jury and the evidence on conservatorship does not support the jury findings, the court should order a new trial, since it cannot contravene the verdict of the jury.¹⁵⁰ Entering a judgment notwithstanding the verdict on the issue of managing conservatorship, therefore, is improper.¹⁵¹ When any evidence supports a contention that the circumstances of the custodian and the children have materially changed, a court should hear all the evidence before ruling. If the court rules too quickly, the appellate court must reverse and remand, since a no evidence point will not be sustainable.¹⁵² A court can consider a remarriage as evidence of a material change in circumstances in ordering a modification in conservatorship.¹⁵³ The testimony of an older child who expresses emotional distress and a strong desire to live with her mother can also be evidence of the type of change of circumstances that establishes that a change in managing conservators would be a positive improvement.¹⁵⁴

The burden of proving a change of circumstances can be very great, but in *Blum v. Mott*¹⁵⁵ the court held that the mother could bring a bill of review¹⁵⁶ on the basis of fraud and avoid the burden posed by the Family Code.¹⁵⁷ The father allegedly tricked the mother into agreeing to a change in managing conservatorship of the couple's minor child. The appellate court held, however, that the mother's bill of review had failed to raise genu-

147. 666 S.W.2d 176 (Tex. App.—Dallas 1983, no writ).

148. *Id.* at 180.

149. *Id.*

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

151. *In re Soliz*, 671 S.W.2d 644, 648 (Tex. App.—Corpus Christi 1984, no writ).

152. *Kirkwood v. Kirkwood*, 663 S.W.2d 34, 36 (Tex. App.—El Paso 1983, no writ).

153. *Kimbrell v. Donnell*, 672 S.W.2d 307, 309 (Tex. App.—San Antonio 1984, no writ).

154. *L.P.W. v. S.O.*, 669 S.W.2d 182, 184-85 (Tex. App.—Fort Worth 1984, no writ).

155. 664 S.W.2d 741, 744 (Tex. App.—Houston [1st Dist.] 1984, no writ).

156. When the time for filing a motion for new trial has expired and a party cannot obtain relief by appeal, a proceeding in the nature of a bill of review is the exclusive direct attack for vacating a judgment rendered in a case in which the court had jurisdictional power to render it. *McEwen v. Harrison*, 345 S.W.2d 706, 710 (Tex. 1961). A party can successfully use a bill of review to set aside a final judgment by proving: (1) a meritorious defense that the party did not have the chance to present at the original trial; (2) an excuse justifying the failure to make the defense, based upon extrinsic fraud, accident, or wrongful act of the opposing party; and (3) the absence of fault or negligence. *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950).

157. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Pam. Supp. 1975-1983).

ine issues of fact on all the elements of fraud and affirmed the trial court's summary judgment.¹⁵⁸ When a managing conservator fails to appear at a modification hearing after receiving adequate notice and the party desiring modification of conservatorship offers adequate evidence on the best interest of the child, a writ of error will be denied.¹⁵⁹

Self-help may be successful when a change in conservatorship would do positive harm to the child. In *Hamann v. Morentin*¹⁶⁰ a court split the custody of the children between the parents, even though the father had snatched the children and concealed them for some three and one-half years from their mother, the lawful managing conservator. When the mother was finally able to reobtain custody, the older child was unable to readjust. The child became so upset that the court held the situation to be the type of extreme case that would compel the court to give one child to the father and the other child to the mother.¹⁶¹

Continued contact with both parents is important to the well-being of children, and the court should not permanently terminate a parent-child relationship without good cause.¹⁶² In the proper case, however, the court may punish by contempt the violation of a permanent injunction prohibiting such contact.¹⁶³ Failure to obey the terms of a child access order is also punishable by contempt,¹⁶⁴ but the court cannot modify prior orders at the contempt hearing absent proper notice and pleadings on that issue.¹⁶⁵ Retaining possession of children beyond the time permitted in the decree is also punishable by contempt, but if the contempt order contains ancillary inaccurate findings on child support arrearages, the whole judgment may become tainted and void.¹⁶⁶

When persons not entitled to lawful possession wrongfully detain children, habeas corpus is the remedy.¹⁶⁷ In *Rodriguez v. McFall*¹⁶⁸ the Texas Supreme Court issued a writ of mandamus, because the trial judge failed to order the paternal grandparents to return the child to the mother immediately after the death of the father. A divorce action was pending at the time of the father's death, but no custody orders had issued in connection with the action. Since the divorce abated on the father's death, the remaining natural parent was entitled to custody. As the Texas Supreme Court stated, "absent an immediate serious danger to the child, a parent is entitled to the immediate, automatic and ministerial grant of possession of the child as

158. 664 S.W.2d at 745.

159. *Barrera v. Barrera*, 668 S.W.2d 445, 448 (Tex. App.—Corpus Christi 1984, no writ).

160. 660 S.W.2d 645 (Tex. App.—Fort Worth 1983, no writ).

161. *Id.* at 647.

162. *Allison v. Allison*, 660 S.W.2d 134, 137 (Tex. App.—San Antonio 1983, no writ).

163. *Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983, no writ) (providing that due process standards must be met).

164. *Ex parte Karr*, 663 S.W.2d 534, 537 (Tex. App.—Amarillo 1983, no writ). The order is void if the relator was not served and was not present at the hearing. *Ex parte Dittmer*, 660 S.W.2d 144, 145 (Tex. App.—San Antonio 1983, no writ).

165. *Ex parte Karr*, 663 S.W.2d 534, 539 (Tex. App.—Amarillo 1983, no writ).

166. *Ex parte Wood*, 675 S.W.2d 346, 347 (Tex. App.—Waco 1984, no writ).

167. TEX. FAM. CODE ANN. § 14.10 (Vernon Pam. Supp. 1975-1983).

168. 658 S.W.2d 150 (Tex. 1983).

against a nonparent.”¹⁶⁹ The same standard applies to a valid subsisting court order. The court should grant the application for the writ of mandamus before holding any hearing on modification of the valid decree.¹⁷⁰ The courts of appeals are now empowered to issue writ of mandamus in such situations¹⁷¹ and are doing so when the facts warrant their intervention.¹⁷²

Interstate custody jurisdiction is not an easily resolved problem. While a Texas court can often decide the issue of jurisdiction,¹⁷³ a foreign court may not necessarily afford recognition to its decision.¹⁷⁴ In response to this dilemma parties seeking custody are beginning to invoke federal court jurisdiction. In *Flood v. Braaten*¹⁷⁵ a federal appeals court held that the domestic relations exception to federal jurisdiction is still viable, but that a federal court may intervene when a parent's right to the enforcement of a decree under the Parental Kidnapping Prevention Act (PKPA)¹⁷⁶ is violated. In *Flood* the mother brought an action in federal court seeking the enforcement of a New Jersey custody decree, in the face of inconsistent custody decrees by the state of North Dakota. The court looked at the legislative history of the PKPA before reaching a decision and found that Congress did not intend to render nugatory the right granted by the PKPA, to have one state at a time determine child custody.¹⁷⁷

A Texas federal district court came to a different conclusion in *Siler v. Storey*¹⁷⁸ when it denied a writ of prohibition against a Texas court of appeals. The federal court was unwilling to assume that the Texas courts would not protect the claimant's federal rights. Meanwhile, the Texas Supreme Court was considering the matter and, within days of the federal court ruling, it issued a writ of mandamus to the Texas appellate court reinstating the district court's habeas corpus order.¹⁷⁹

Much interstate activity provides the background for these proceedings. In 1981 a father took his two children from the marital home in Pennsylvania to California. The mother then obtained a temporary restraining order from a Pennsylvania court. When the father filed for divorce and

169. *Id.* at 151.

170. *Schoenfeld v. Onion*, 647 S.W.2d 954, 955 (Tex. 1983); *McElreath v. Stewart*, 545 S.W.2d 955, 958 (Tex. 1977).

171. TEX. REV. CIV. STAT. ANN. art. 1824 (Vernon Supp. 1984).

172. See *Klein v. Cain*, 676 S.W.2d 165, 172 (Tex. App.—Amarillo 1984, no writ) (granting conditional writ of mandamus); *Henderson v. Shackelford*, 671 S.W.2d 687, 690 (Tex. App.—Amarillo 1984, no writ) (denying writ due to serious immediate question concerning welfare of the child).

173. *Pettiette v. Morrow*, 661 S.W.2d 241, 243 (Tex. App.—Houston [1st Dist.] 1983, no writ).

174. *In re M.D.T.*, 663 S.W.2d 895, 897 (Tex. App.—San Antonio 1983, no writ) (Texas court judgment that California lacked jurisdiction to enter decree granting custody to mother may or may not be accorded full faith and credit by California court); see, e.g., *infra* notes 182-87 and accompanying text.

175. 727 F.2d 303, 307 (3d Cir. 1984).

176. 28 U.S.C. § 1738A (1982). This section relates to state full faith and credit recognition requirements for child custody decrees.

177. 727 F.2d at 310-12.

178. 587 F. Supp. 986 (N.D. Tex. 1984).

179. *Siler v. Storey*, 677 S.W.2d 504, 507 (Tex. 1984).

custody in California, the mother asked the court to dismiss the suit and enforce the Pennsylvania order. After a hearing the California court acceded to the mother's petition, but when she tried to enforce the order, she was able to obtain possession of only one child. The father fled with the other. The mother filed a divorce action in Pennsylvania and attempted to obtain service on the father, but he secreted himself to avoid service. The Pennsylvania court granted the divorce and awarded the mother custody of both children. The mother eventually found the child and the father in Texas and filed a petition for a writ of habeas corpus for the child.

The child was placed with Child Welfare pending resolution of the dispute. The father filed a cross-action seeking a divorce and alleging that the child had been with him over six months. The mother entered a special appearance; the court held a full hearing and granted the writ of habeas corpus. The father then turned to the court of civil appeals, which granted him a writ of mandamus, but the Texas Supreme Court granted the mother a writ of mandamus to the appeals court and ended the matter.¹⁸⁰ The supreme court's decision turned on the finding of a valid Pennsylvania court order issued by a court that had continuing jurisdiction; therefore, the child's presence in Texas for more than six months was irrelevant.¹⁸¹

Courts in other states have been confronted with petitions to recognize Texas decrees. In *Naputi v. Naputi*¹⁸² a North Carolina appellate court vacated a lower court modification because, under the Uniform Child Custody Jurisdiction Act (UCCJA), in effect in both states,¹⁸³ North Carolina lacked subject matter jurisdiction. The court found that Texas had continuing jurisdiction and that if the North Carolina party wanted the decree modified, the Texas courts must do it.¹⁸⁴ In *Kilgore v. Kilgore*¹⁸⁵ a Missouri court found sufficient fact questions as to the jurisdiction of a Texas court to preclude summary judgment. Thus, both parties were entitled to a hearing on the question of jurisdiction.¹⁸⁶ A Michigan court in *Dean v. Dean*¹⁸⁷ reversed a trial court's finding that Texas had jurisdiction and held that Michigan was the proper forum. The court based its decision on the fact that the children had lived a greater percentage of their lives in Michigan than in Texas.¹⁸⁸ Although the court found that the Texas divorce and custody proceedings antedated the Michigan proceedings, it determined that the Texas proceedings had not conformed with the UCCJA and, therefore, did not bar

180. *Id.*

181. *Id.*; see *Rush v. Stansbury*, 668 S.W.2d 690, 692 (Tex. 1984). The *Rush* court recognized the validity of a Tennessee custody decree based on the PKPA and TEX. FAM. CODE ANN. §§ 11.53, .64 (Vernon Pam. Supp. 1975-1983). 677 S.W.2d at 507.

182. 67 N.C. App. 351, 313 S.E.2d 179, 181 (N.C. Ct. App. 1984).

183. N.C. GEN. STAT. §§ 50A-1 to -25 (Supp. 1983); TEX. FAM. CODE ANN. §§ 11.51-75 (Vernon Pam. Supp. 1975-1983) (providing for uniform system among the states of jurisdictional and conflicts of laws rules applicable in child custody matters).

184. 313 S.E.2d at 181.

185. 666 S.W.2d 923 (Mo. Ct. App. 1984).

186. *Id.* at 932, 934.

187. 133 Mich. App. 20, 348 N.W.2d 725, 727 (1984).

188. 348 N.W.2d at 727.

Michigan's jurisdiction.¹⁸⁹

These three decisions should signal to Texas lawyers the need to make clear the facts on which the jurisdiction of the court is based in any custody decision. The decree should, if possible, recite the jurisdictional facts in full so that a court in another state will feel compelled to take notice of them. In some situations it may be necessary to attempt to invoke the help of the federal courts. While *Flood v. Braaten*¹⁹⁰ suggests that this route may be helpful, whether other circuits will follow the lead of the Third Circuit is not yet certain.

V. SUPPORT

The trial court hearing the suit for divorce generally establishes the amount of child support that the parents are to pay. To issue binding orders the court must have in personam as well as subject matter jurisdiction.¹⁹¹ In *Blenkle v. Blenkle*¹⁹² the trial court had rendered a default judgment in 1974 without having jurisdiction over the payor. Unfortunately, in 1983 the payor attempted to enter a special appearance to vacate the original order instead of filing a bill of review. He based his case on the Soldiers' and Sailors' Civil Relief Act¹⁹³ in addition to claiming lack of personal jurisdiction. The court held that the payor actually did enter an appearance, because the Act merely abates the action while the individual is in the service so that at a later time the claimant may appear and defend.¹⁹⁴

Evidence of the financial capacity of the parties at the time of the decree must justify the amount of support ordered.¹⁹⁵ Changes in financial condition subsequent to the trial cannot be considered on appeal; however, a court can refuse to find the payor in contempt for failure to pay the full amount because of adverse circumstances.¹⁹⁶ The appellate court can, if it finds an abuse of discretion, suggest a remittitur and affirm the decree at a lower rate of support.¹⁹⁷ *Adams v. Stotts*¹⁹⁸ is an important case in this area. The *Ad-*

189. *Id.*

190. 727 F.2d at 312; see *supra* note 175 and accompanying text.

191. *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).

192. 674 S.W.2d 501 (Tex. App.—El Paso 1984, no writ).

193. 50 U.S.C. app. § 520(4) (1982) (allowing defendant in judicial proceeding who was prejudiced by reason of military service and who has a meritorious defense to reopen case and defend).

194. 674 S.W.2d at 504.

195. See *Ruiz v. Ruiz*, 668 S.W.2d 866, 867 (Tex. App.—San Antonio 1984, no writ) (affirming order to pay \$400 per month for support of five children, based on payor's gross pay of \$887 per month and custodian's pay of \$800 per month); *Guy v. Stubberfield*, 666 S.W.2d 176, 181 (Tex. App.—Dallas 1984, no writ) (reversing and remanding support order because no evidence on subject was adduced at trial); *Cook v. Cook*, 665 S.W.2d 161, 167 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (affirming support order of \$1000 per month since amount did not exceed father's capacity to pay); *Zuniga v. Zuniga*, 664 S.W.2d 810, 814 (Tex. App.—Corpus Christi 1984, no writ) (affirming order that former wife should pay \$20 per week per child because of her greater education and earning capacity).

196. *Pierce v. Pierce*, 667 S.W.2d 921, 924 (Tex. App.—Fort Worth 1984, writ dismissed). The court affirmed a support order of \$900 per month although evidence showed that the payor's business might decline, which it did.

197. *Blazek v. Blazek*, 669 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1984, no writ).

ams court held that a trial court determining support for a child in a paternity action should consider expenses of childcare from the date of birth.¹⁹⁹ Furthermore, while determination of paternity is pending, the court cannot order temporary support,²⁰⁰ but once paternity is established the child has been legitimated from birth.²⁰¹ The father's responsibility, therefore, relates back to that date. The court based its decision on its interpretation of the paternity sections of the Texas Family Code.²⁰²

A court can modify child support orders on a showing of a material and substantial change in circumstances.²⁰³ The movant must give at least thirty days notice of the motion to modify²⁰⁴ and, as in all suits affecting the parent-child relationship, a record of the hearing is essential.²⁰⁵ In *White v. Adcock*²⁰⁶ the trial court did not order an increase in child support because of the father's history of voluntary support, but the court did order him to maintain hospitalization insurance for each child and to pay each child a specified allowance. The appellate court held that such an order was not an abuse of discretion and that payment directly to the children was within the ambit of the Family Code.²⁰⁷ In *Stofer v. Linville*²⁰⁸ the appellate court reversed and rendered, finding that the trial court had abused its discretion in increasing the support order.²⁰⁹ A problem not overcome in this case was the demonstration of change in circumstances of the payor since the evidence presented concerned only his present income and not his prior income.²¹⁰

The full impact of the Child Support Enforcement Amendments of 1984²¹¹ will not be felt until October 1985, since many of its provisions do not take effect until then. Nevertheless, the Attorney General's office is taking seriously the requirement that enforcement efforts be publicized.²¹² A number of crackdowns on delinquents have occurred, and these have been widely publicized.²¹³ The Attorney General has also issued opinions inter-

The court affirmed, conditioned upon the reduction of support payments from \$1,850 to \$1,200 per month. No remittitur was filed, so the cause was reversed and remanded.

198. 667 S.W.2d 798 (Tex. App.—Dallas 1983, no writ); see *supra* text accompanying notes 82, 83.

199. 667 S.W.2d at 800.

200. TEX. FAM. CODE ANN. § 13.42(a) (Vernon Pam. Supp. 1975-1983).

201. 667 S.W.2d at 800.

202. *Id.* (citing TEX. FAM. CODE ANN. §§ 13.01-.42 (Vernon Pam. Supp. 1975-1983)).

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

204. O'Connell v. O'Connell, 661 S.W.2d 261, 262 (Tex. App.—Houston [1st Dist.] 1983, no writ).

205. TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1975).

206. 666 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1984, no writ).

207. *Id.* at 225; see TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975).

208. 662 S.W.2d 783 (Tex. App.—Houston [14th Dist.] 1983, no writ).

209. *Id.* at 785.

210. *Id.*

211. See *supra* notes 2-22 and accompanying text (discussing potential impact of Child Support Enforcement Amendments).

212. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, sec. 14, § 454(a)(23), 98 Stat. 1320.

213. See Dallas Morning News, Dec. 12, 1984, at A25, col. 6; Dallas Times Herald, Dec. 31, 1984, at D1, col. 1.

preting some of the changes in the Family Code relating to support. In a ruling concerning the Family Code's mandate that decrees involving child support must contain the social security numbers of all parties,²¹⁴ the Attorney General took the common sense approach to social security numbers and stated that a number need not be obtained prior to the decree for a child who does not already have one.²¹⁵ The Family Code merely contemplates providing the court with social security numbers already obtained.²¹⁶

Since the courts may place on probation persons found in contempt for failure to pay child support,²¹⁷ they may also revoke the probation when those persons have not fulfilled the conditions for probation. The revocation hearing must comply with due process, and the District Attorney should represent the state.²¹⁸ If the contemner is indigent, the court should provide court-appointed counsel.²¹⁹ Failure to provide an indigent with counsel is a denial of due process, and the federal courts will grant relief if the state courts do not.²²⁰ Due process also requires that the contemner be present at the hearing unless he has made a knowing and intelligent waiver,²²¹ that a record be made of the hearing,²²² and that the decree on which the contempt order is based be unambiguous.²²³ A court has held the current criminal support statute²²⁴ unconstitutional on due process grounds, because the statute shifted the burden of disproving ability to pay, an element of the offense, to the defendant.²²⁵

The managing conservator and child often move around the state, so the original court may no longer be convenient for enforcement and supervisory purposes. Thus, transfer provisions are set out in the Family Code.²²⁶ The transferee court may enforce valid judgments of the transferor court through contempt or any other legal means.²²⁷ Decrees dating prior to 1974 are enforceable,²²⁸ as are decrees a court has issued to which the transfer was not timely, but which also was not properly challenged.²²⁹

A court may reduce child support arrearages to judgment and may enforce them as ordinary judgments.²³⁰ When a wife properly files the original

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

215. Op. Tex. Att'y Gen. No. JM-159 (1984).

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

217. *Id.* § 14.12.

218. Op. Tex. Att'y Gen. No. JM-176 (1984).

219. *Id.*

220. *Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983).

221. *Ex parte Trevino*, 665 S.W.2d 227, 230 (Tex. App.—San Antonio 1984, no writ); *Ex parte Gutierrez*, 661 S.W.2d 763, 764 (Tex. App.—San Antonio 1983, no writ).

222. *Ex parte Juarez*, 665 S.W.2d 200, 201 (Tex. App.—San Antonio 1984, no writ).

223. *Ex parte Longoria*, 671 S.W.2d 673, 675 (Tex. App.—San Antonio 1984, no writ).

224. TEX. PENAL CODE ANN. § 25.05 (Vernon 1974).

225. *Lowry v. State*, 671 S.W.2d 601, 604 (Tex. App.—Dallas 1984, no writ).

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

227. See *Fassy v. Kenyon*, 675 S.W.2d 217, 219 (Tex. App.—Houston [1st Dist.] 1984, no writ) (holding that transferee court can enforce judgment and also set it aside through bill of review).

228. *French v. Harris*, 658 S.W.2d 690, 691 (Tex. App.—Dallas 1983, no writ).

229. *Ex parte Bowers*, 671 S.W.2d 931, 935-36 (Tex. App.—Amarillo 1984, no writ).

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

child support agreement along with an affidavit attesting to the nonpayment, the response must contain more than a mere allegation that the amount of the obligation under the agreement has been modified.²³¹ If no specific facts regarding the modification are provided to contradict the fact of nonpayment, the court should grant the wife summary judgment.²³² In deciding the amount of the arrearages to use in calculating the size of the judgment, the court should eliminate sums, such as rental fees, that benefit the wife as a set-off, since child support is exclusively for the benefit of the child and not the wife.²³³ A court may respond to a wife's request for aid in satisfying a child support judgment by ordering the husband to deposit certain items in the registry of the court. Such an order is not an appealable final judgment because the court has not yet determined what the wife is entitled to and what items the court will return to the husband.²³⁴ A foreign support order may be registered in a Texas court²³⁵ even after the children have reached majority, thus enabling the collection of money that was unpaid in the past.²³⁶

VI. TERMINATION AND ADOPTION

Despite statements to the contrary,²³⁷ proper pleadings and correct procedure continue to be as important to the outcome of many family law matters as findings on the merits. *In re Baby Girl S.*²³⁸ is apparently such a case. The action concerned a biological father's attempt to obtain custody of an illegitimate child after the mother had relinquished her to a charitable adoption agency. The trial court terminated the parent-child relationship of the mother, foreclosed any rights the biological father might have in the child, and appointed the charitable agency managing conservator. The biological father appealed on constitutional grounds, claiming violations of due process and equal protection, and the Texas appellate court affirmed.²³⁹ The case went to the United States Supreme Court, which granted certiorari on the father's allegations that the voluntary legitimation statute violated his constitutional rights.²⁴⁰ The Supreme Court vacated the judgment of the appellate court and remanded for consideration of the alternative remedy of a paternity suit under the provisions of the Texas Family Code.²⁴¹ On remand the

231. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

232. *Id.*

233. *Smith v. Rabago*, 672 S.W.2d 38, 40 (Tex. App.—Houston [14th Dist.] 1984, no writ).

234. *In re Brecheisen*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

235. TEX. FAM. CODE ANN. §§ 21.61-.66 (Vernon 1975). These sections are known as the Uniform Reciprocal Enforcement of Support Act (URESA).

236. *Byrd v. Texas Dep't of Human Resources*, 673 S.W.2d 640, 642 (Tex. App.—San Antonio 1984, no writ).

237. *See C. v. C.*, 534 S.W.2d 359, 361 (Tex. Civ. App.—Dallas 1976, no writ).

238. 658 S.W.2d 794 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

239. *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

240. *Id.*, cert. granted mem. sub nom. *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 784, 74 L. Ed. 2d 991 (1983).

241. *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. App.—Eastland), vacated and remanded mem. sub nom. *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760, 75 L. Ed. 2d 785 (1983); TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon 1975 & Pam. Supp. 1975-1983).

appellate court held that since the trial court did not err in its decision on the original pleading based on voluntary legitimation²⁴² and because the alternative remedy had not been pled at the initial hearing,²⁴³ no remand was available under Texas law.²⁴⁴ Despite all this lawyering, the merits of the biological father's claims as a father have not been heard.

*Almaraz v. Williams*²⁴⁵ is a similar case, but with an opposite result. In this case the mother, a married woman,²⁴⁶ relinquished her child to a private couple who proceeded to attempt to terminate her parental rights and adopt the child. The mother had alleged that the child's father was unknown. When the father, her husband, discovered what had happened to his child, he filed for a writ of habeas corpus and a bill of review. The adoptive parents were served, but they failed to answer or appear, and the biological parents were granted a default judgment and a writ of attachment. The adoptive parents, however, refused to turn over the child and ultimately obtained another hearing. At this hearing the court held that the best interest of the child dictated that she remain with the adoptive parents. The biological parents then sought a writ of mandamus to enforce the writ of habeas corpus. The appellate court granted the writ, finding that the original writ of habeas corpus was a prior court order that must be honored.²⁴⁷ A strong dissent²⁴⁸ complained that the court had elevated form over substance.²⁴⁹ The child had been in the possession of the adoptive parents for over a year, so some real question as to the merits of the case existed.

In *Evans v. Woodward*²⁵⁰ the father was able to obtain a trial on the merits, overturning a judgment nihil dicit²⁵¹ terminating his parent-child relationship. He was able to show that his failure to answer was neither the result of intentional acts nor the result of conscious indifference, but, rather, the result of some confusion in his attorney's office. The father demonstrated that he had attended interviews with a social worker and had appeared with his attorney at hearings before a master. Accordingly, the

242. See TEX. FAM. CODE ANN. §§ 13.21-.24 (Vernon 1975 & Pam. Supp. 1975-1983).

243. The Attorney General first raised the possibility of a remedy through paternity suit in his brief to the United States Supreme Court. *In re Baby Girl S*, 658 S.W.2d at 795.

244. *Id.* at 796.

245. 673 S.W.2d 923 (Tex. App.—San Antonio 1984, no writ).

246. The mother and father became informally married around January 1, 1979. The child was born September 8, 1982.

247. *Id.* at 925.

248. *Id.* at 926-28 (Dial, J., dissenting). Justice Dial contended that if the trial judge had used the statutory language "a serious immediate question concerning the welfare of the child," TEX. FAM. CODE ANN. § 14.10(c) (Vernon Pam. Supp. 1975-1983), instead of "the best interest of the child," the majority would have denied the writ. 673 S.W.2d at 928.

249. 673 S.W.2d at 928. The dissent implied that competent counsel would have prevented the original default judgment and would have avoided the mandamus by urging the judge to track the language of the statute on habeas corpus before issuing any temporary orders. The statute states: "The court may issue any appropriate temporary order if there is a serious immediate question concerning the welfare of the child." TEX. FAM. CODE ANN. § 14.10(c) (Vernon Pam. Supp. 1975-1983).

250. 669 S.W.2d 154 (Tex. App.—Dallas 1984, no writ).

251. A nihil dicit judgment occurs when a defendant enters some plea, usually dilatory, but does not address the merits of the plaintiff's case. *Jack Adams Aircraft Sales, Inc. v. Hurley*, 569 S.W.2d 599, 600 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

appellate court held that the trial court's refusal to grant a new trial was an abuse of discretion.²⁵² In another case²⁵³ an appellate court reversed and remanded for a new trial on the questions of termination and adoption because the petitioners had not been heard in the trial court. The trial court had granted legitimation to the biological father and custody to the mother without affording the petitioners an opportunity to present their evidence.²⁵⁴ *In re Baby Girl T*²⁵⁵ is another procedural case. The court granted a new trial, holding that the judgment to terminate the parent-child relationship was void because it was entered four days, instead of five days, after the birth of the child.²⁵⁶ The case is admirable for its enforcement of the statute, but since the court based the termination on a relinquishment to an adoption agency, this may be a hollow remedy. Such relinquishments are irrevocable.²⁵⁷ In response to an indigent mother's request, an appellate court held that the mother was not entitled to a complete question-and-answer statement when her motion did not specifically allege errors or omissions in the reporter's narrative statement.²⁵⁸ Rather, the narrative statement should be supplemented in accordance with her objections.²⁵⁹

More cases of child abuse are being reported because of heightened public awareness, but some of these reports are unfounded. *In DeSpain v. Johnston*²⁶⁰ a federal district court issued an ex parte restraining order enjoining a state court order that required the alleged abusive parents to cooperate with an investigation. The district court delayed a hearing on the merits until the state courts dismissed the matter. The district court then proceeded to rule on various constitutional issues that the parents had raised. The court of appeals determined that the district court had acted in violation of the *Younger* abstention doctrine,²⁶¹ vacated the district court's judgment, and ordered the district court to dismiss the complaint.²⁶² The appellate court balanced the interests of the national and state governments and noted that family law is a traditional area of state concern.²⁶³ The courts did not decide the issue of whether the labeling system used in the state files on child abuse is constitutional.²⁶⁴

252. 699 S.W.2d at 155.

253. *Speed v. Guidry*, 668 S.W.2d 807, 810 (Tex. App.—San Antonio 1984, no writ).

254. *Id.* at 809-10.

255. 671 S.W.2d 654 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

256. *Id.* at 656; TEX. FAM. CODE ANN. § 15.021 (Vernon Pam. Supp. 1975-1983).

257. TEX. FAM. CODE ANN. § 15.03(d) (Vernon Pam. Supp. 1975-1983).

258. *Benson v. Grayson County Child Welfare*, 666 S.W.2d 166 (Tex. App.—Dallas 1983, no writ).

259. *Id.* at 169.

260. 731 F.2d 1171 (5th Cir. 1984).

261. *Id.* at 1175-78 (discussing *Younger v. Harris*, 401 U.S. 37 (1971)). The *Younger* doctrine dictates that a federal district court must presumptively abstain from granting injunctive or declaratory relief when state criminal proceedings or certain state civil proceedings are pending against the federal plaintiff once the action is commenced. 731 F.2d at 1175.

262. 731 F.2d at 1181.

263. *Id.* at 1179.

264. The system called Child Abuse and Neglect Reporting and Inquiry System (CANRIS) is a central computer registry maintained in accordance with TEX. FAM. CODE ANN. § 34.06 (Vernon 1975). The federal courts have already considered this system, and the

A finding that a parent has abused a child can result in termination of the parent-child relationship.²⁶⁵ In *Richardson v. Green*²⁶⁶ the Texas Supreme Court reversed a jury finding that the court should terminate the father's parental rights to his son because of alleged abuse. When inadmissible hearsay evidence was excluded, the court found that no more than a scintilla of evidence remained to support the judgment.²⁶⁷ Since the evidence in support of a finding terminating parental rights must be clear and convincing,²⁶⁸ the case required a reversal based upon the insufficiency of the evidence.

Richardson illustrates the problems connected with determining the existence of child abuse. The evidence was based primarily on hearsay accounts of conversations with the child that were not corroborated. A videotaped interview of the child with a caseworker of the Texas Department of Human Resources was introduced as evidence. The videotape could apparently serve as a lesson in how not to conduct such an interview, since it showed the child responding to leading questions.²⁶⁹ Furthermore, none of the clinical psychologists who were called as expert witnesses would testify to a firm belief that sexual abuse had occurred.

The Texas Supreme Court determined that it had jurisdiction over the appeal despite the recent passage of statutes further limiting the court's jurisdiction in divorce cases.²⁷⁰ The court pointed out that if the legislature had intended to remove termination appeals cases from its jurisdiction, the legislature would have said so specifically. This interpretation, of course, is correct because the termination of parental rights is not related to divorce, and normally non-relatives²⁷¹ bring termination cases in the context of adoption proceedings.²⁷² Also, the difference between a custody dispute and an action to terminate the parent-child relationship is substantial because the rights in question are so different.²⁷³ No statutory method provides for the undoing of a final judgment terminating parental rights. While a court can always effect a change of custody after a material and substantial change in circumstances,²⁷⁴ adoption is the only way to regain terminated parental rights. When clear and convincing evidence of either the failure to support in accordance with ability or of activities endangering the child is presented and is coupled with a finding that the best interests of the child dictate termination of parental rights,²⁷⁵ the trial court's judgment terminating the parent-child relationship will be sustained.²⁷⁶

Supreme Court held that Texas procedures could deal with any constitutional challenges. *Moore v. Sims*, 442 U.S. 415, 425-26 (1979).

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

266. 677 S.W.2d 497 (Tex. 1984).

267. *Id.* at 502.

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

269. 677 S.W.2d at 501.

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

271. See *infra* note 276 and accompanying text.

272. See *supra* cases cited in notes 238, 245, 250 & 253.

273. 677 S.W.2d at 500.

274. TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Pam. Supp. 1975-1983).

275. *Id.* § 15.02(1)(D), (E), (F).

276. See *Navarrette v. Texas Dep't of Human Resources*, 669 S.W.2d 849, 852 (Tex.

The practices of authorized public and private agencies in obtaining acknowledgements on affidavits of relinquishment²⁷⁷ were called into question in *Director, Dallas County Child Welfare v. Thompson*.²⁷⁸ The notary public before whom the mother executed the affidavit of relinquishment was an employee of the state agency interested in obtaining the signature. The trial court held that the notary was disqualified as a matter of law. The appellate court reversed, however, pointing out that while the notary was an employee of the agency in question, her duties were secretarial and she had no knowledge of the facts of the case nor any personal interest in the outcome.²⁷⁹ This case validates the common practice of both public and private agencies of paying the bond fees of an employee who will be asked to serve as a notary public for the agency whenever verification of a signature is needed. The agency must, of course, be able to show that the notary is a neutral party and has no interest in the transaction.

In *In re W.E.R.*²⁸⁰ the Texas Supreme Court upheld a trial court's finding denying an adoption after the appellate court had reversed. The appellate court had considered comments the trial judge had made after the bench trial. Because these comments were neither findings of fact nor conclusions of law, the appellate court should not have reviewed them.²⁸¹ An appellate court may not substitute its judgment for that of the trial court and, absent an abuse of discretion, may not reverse the trial court.²⁸² When the trial judge has made no findings of fact or conclusions of law, the judgment implies all necessary facts in support of the judgment.²⁸³

In *Walker v. Texas Department of Human Resources*²⁸⁴ the Austin court of appeals denied the prospective parents the right to adopt. The Department of Human Resources (DHR) was granted a petition to intervene and remove the prospective parents as managing conservators. The prospective

App.—El Paso 1984, no writ) (despite mother's mental and emotional impairment, sufficient evidence showed that she knowingly placed and knowingly allowed children to remain in conditions endangering their physical and emotional well-being); *In re T.M.Z.*, 665 S.W.2d 184, 187 (Tex. App.—San Antonio 1984, no writ) (father voluntarily abandoned pregnant wife, although she left because of his violence, since he knew where she went and he failed to tender support); *In re C.D.*, 664 S.W.2d 851, 853 (Tex. App.—Fort Worth 1984, no writ) (although mental illness or incompetence are not grounds for termination of parent-child relationship, sufficient evidence of conduct endangering child existed); *C.G.V. v. Texas Dep't of Human Resources*, 663 S.W.2d 871, 874 (Tex. App.—Beaumont 1984, no writ) (termination judgment citing to correct statutory grounds while erroneously reciting wrong statutory section held to provide sufficient notice to opposing party); *In re J.D.H.*, 661 S.W.2d 744, 746-47 (Tex. App.—Beaumont 1983, no writ) (father's course of criminal activity supported finding of engaging in conduct endangering the child); *Brantmeier v. Brazoria Protective Servs. Unit*, 661 S.W.2d 234, 236 (Tex. App.—Houston [1st Dist.] 1983, no writ) (mother's failure to remove daughter from household after learning of sexual molestation by father is sufficient evidence of allowing child to remain in endangering conditions).

277. TEX. FAM. CODE ANN. §§ 15.03(a), .04(a), (b) (Vernon Pam. Supp. 1975-1983).

278. 667 S.W.2d 282 (Tex. App.—Dallas 1984, no writ).

279. *Id.* at 283.

280. 669 S.W.2d 716, 717 (Tex. 1984) (per curiam).

281. *Id.*

282. *Id.* at 716-17.

283. *Id.* at 717.

284. 667 S.W.2d 919 (Tex. App.—Austin 1984, no writ).

parents had obtained the child directly from its mother through an affidavit of relinquishment. On the day following the child's birth the prospective parents obtained a decree in Tarrant County terminating the parent-child relationship and appointing them managing conservators of the child. The child continued to live with the prospective parents until they filed a petition to adopt. They then moved to Travis County, and the cause was transferred there. The DHR intervened and, without alleging any change in circumstances, petitioned for a denial of the adoption and for the appointment of itself as managing conservator. The DHR's petition was granted, based on the adoption portion of the Family Code.²⁸⁵ Claiming that the court should have based the change in conservatorship on the modification provisions of the Code,²⁸⁶ the prospective parents challenged the judgment. The appellate court, affirming the trial court, ruled that the modification statutes do not apply in adoption cases.²⁸⁷ The facts of this case demonstrate that before a court places a child with parties other than its natural parents, careful investigation is necessary. The termination proceedings apparently were done too hastily, since they occurred only one day after the birth of the child.²⁸⁸

285. TEX. FAM. CODE ANN. § 16.10 (Vernon 1975). Section 16.10 provides that the court may order the removal of the child from the proposed adoptive home if removal is in the child's best interest.

286. *Id.* § 14.08 (Vernon Pam. Supp. 1975-1983).

287. 667 S.W.2d at 921.

288. *See supra* notes 255-57 and accompanying text. If the prospective parents were able both to file and obtain a judgment of termination on the same day, however, some revision of the Code may be needed since the five-day-after-birth provision arguably applies only to termination petitions filed before the child's birth. TEX. FAM. CODE ANN. § 15.021 (Vernon Pam. Supp. 1975-1983).

