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FAMILY LAW

by

Eugene L. Smith*

THE survey period produced few startling cases, but did reveal a steady increase in the number of decisions arising out of family disputes. Noteworthy legislation was passed dealing with adoption and divorce. Most important were judicial developments in the law regulating the custody and support of children. The appellate courts were heavily involved in working out rather basic problems of the judicial power to deal with this extremely significant area.

I. ADOPTION

In contrast to the last survey period, adoption developments were few. The adoption statute was amended to conform with constitutional requirements, bringing Texas legislation into agreement with common practice. Two supreme court cases and one civil appeals case presented issues of some importance.

*Lout v. Whitehead*¹ disposed of a relatively important problem of construction. Section 6 of article 46a² permits an adoption without the parent's consent if the parent has failed to contribute to the child's support "substantially" and "commensurate with his financial ability" for "a period of two years."³ Some question previously existed as to whether the statutory two-year period of non-support had to be immediately prior to the adoption decree or whether any two-year period of non-support would be a sufficient basis for dispensing with a parent's consent.⁴ The supreme court held that any two-year period of non-support satisfies the statute.⁵

*Smith v. Painter*⁶ was the first Texas case to deal squarely with the non-inheritance rights of blood relatives of an adopted child. Smith, the child's maternal grandfather, sued the child's father (his former son-in-law) and the adoptive mother, seeking an injunction ordering them to permit visitation and communication with the child.⁷ In its per curiam opinion affirming the lower court's refusal of the injunction, the supreme court relied upon section 9 of article 46a⁸ which terminates all rights of consanguineous

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¹ 415 S.W.2d 403 (Tex. 1967).

² TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (Supp. 1967).

³ *Id.*

⁴ The point is not wholly esoteric because a non-supporting parent must be given notice of the pending adoption. TEX. REV. CIV. STAT. ANN. art. 46a, §§ 1(d), 1(e), 6 (Supp. 1967); *Armstrong v. Manzo*, 380 U.S. 545 (1965); Smith, *Family Law, Annual Survey of Texas Law*, 21 Sw. L.J. 50-52 (1967); and when informed of the basis for dispensing with his consent, the parent could defeat the adoption by bringing his support payments up to date.

⁵ Two previous cases in the courts of civil appeals had so held. *Pearson v. Newton*, 371 S.W.2d 126 (Tex. Civ. App. 1963); *Jones v. Bailey*, 284 S.W.2d 787 (Tex. Civ. App. 1955) *error ref. n.r.e.*

⁶ 408 S.W.2d 785 (Tex. Civ. App.), *error ref. n.r.e.*, 412 S.W.2d 28 (1967).

⁷ His daughter, the child's mother, had died; the child was subsequently adopted by its stepmother with the husband-father's consent.

⁸ TEX. REV. CIV. STAT. ANN. arts. 462, 89 (1964).

relatives of adopted children.⁹ Denying a grandparent all contact with his grandchild is poignant, but the court's construction of the adoption statute and its "new-parent" philosophy is undoubtedly correct.

The only other case of note involved the esoteric question of adoption by estoppel.¹⁰ Despite ambiguous evidence, a jury found that the "parents" agreed to adopt the child, that the child relied upon the agreement by assuming the relationship of a child to its parents, and that the "parents" reciprocated. This verdict was allowed to stand by the court of civil appeals. The elements which establish an adoption by estoppel, were therefore established and the foster child was permitted to inherit as an heir.

At the last session of the legislature article 46a was amended to provide a statutory basis for giving notice of a pending adoption to the parents of the child.¹¹ Attorneys and judges must now be certain that the process is issued to the parents of children to be adopted, even if their consent to the adoption is not required.¹² The statute was also amended to make it clear that unmarried persons may adopt children.¹³

II. MARRIAGE AND DIVORCE

The courts did little of significance in the area of marriage and divorce during the survey period. Two opinions dealt with the quantum of proof required to establish marriage. The first of these¹⁴ held routinely that the evidence established the elements of a common-law marriage, *viz.*, that the parties agreed to be husband and wife, cohabited, and held themselves out to the public as husband and wife.¹⁵ In the second case¹⁶ the question was whether the evidence established a valid marriage in the place of the parties' domicile, Mexico. Eloise Henley and Eliot Chess lived together for a year after exchanging informal vows to be husband and wife in Mexico. No license was issued nor was the "marriage" registered, as required by Mexican law. A child was born after the parties separated. Since the proof did not establish a valid Mexican marriage, the court of civil appeals held that no marriage existed and hence that the child was not the heir of Chess.

Divorce cases reaching the court of civil appeals were unremarkable, presenting mostly questions of whether the evidence established cruelty. In this regard it was a vintage year for interspousal cursing and vituperation, invariably held to justify divorce.¹⁷

⁹ Section 9 provides, *inter alia*, "all legal relationship and all rights and duties between such child and its natural parents shall cease and determine, and such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption." Paradoxically the child is still an heir of its natural parents.

¹⁰ *Malone v. Dixon*, 410 S.W.2d 278 (Tex. Civ. App. 1967) *error ref. n.r.e.*

¹¹ TEX. REV. CIV. STAT. ANN. art. 46a, § 1(d) (Supp. 1967). For a discussion of the notice problem, see Smith, *Family Law, Annual Survey of Texas Law*, 21 Sw. L.J. 50, 50-52 (1967).

¹² The parents' consent to the adoption may be dispensed with in cases of two-year abandonment or non-support, TEX. REV. CIV. STAT. ANN. art. 46a, § 6(a) (Supp. 1967), or judicial termination of parental rights, *id.* § 6(c).

¹³ *Id.* § 1.

¹⁴ *O'Benar v. O'Benar*, 410 S.W.2d 214 (Tex. Civ. App. 1966) *error dismissed*.

¹⁵ For a complete, excellent discussion of the Texas law governing informal (or common-law) marriage, see Comment, *Common-Law Marriage in Texas*, 21 Sw. L.J. 647 (1967).

¹⁶ *Bunting v. Chess*, 416 S.W.2d 492 (Tex. Civ. App. 1967) *error dismissed*.

¹⁷ *Angerstein v. Angerstein*, 417 S.W.2d 916 (Tex. Civ. App. 1967); *Hester v. Hester*, 413 S.W.2d 448 (Tex. Civ. App. 1967); *O'Benar v. O'Benar*, 410 S.W.2d 214 (Tex. Civ. App. 1966) *error dismissed*; *Emerson v. Emerson*, 409 S.W.2d 897 (Tex. Civ. App. 1966).

The legislature made one important change in the grounds for divorce. Living apart without cohabitation for a period of three years will justify granting a divorce on the petition of either spouse.¹⁸ Because the statute was not otherwise amended we now have the somewhat anomalous situation that either three-year abandonment¹⁹ or three-year separation will constitute a basis for divorce. Probably the abandonment ground will fall into disuse as it is based on proof of fault, while separation is a non-fault ground against which there are no defenses.²⁰ Provision was also made for central registration of divorces and annulments, a much-needed addition.²¹

III. CUSTODY AND SUPPORT

This seems to have been the year in which the family-law problems were concentrated in the areas of custody and support, and the Texas courts reaped the whirlwind caused by archaic, uncoordinated statutes, a skyrocketing divorce rate, and the high mobility of divorced parents. The principal cases dealt with questions of judicial power. The overwhelming majority of cases involving custody and support questions are, of course, divorce cases. By article 4639 the court decreeing a divorce is given the "power . . . to give the custody and education of the children to either father or mother, as the court shall deem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the children."²² Article 4639a is more extensive and explicit, providing that if there are minor children of divorcing parents:

[I]t shall be the duty of such trial court to inquire into the surroundings and circumstances of each such child or children, and such court shall have full power and authority to inquire into and ascertain the financial circumstances of the parents of such child or children, and of their ability to contribute to the support of same, and such court shall make such orders regarding the custody and support of each such child or children, as is for the best interest of same The court may by judgment order either parent to make periodical payments for the benefit of such child or children, until same have reached the age of eighteen (18) years, or, said court may enter a judgment in a fixed amount for the support of such child or children, and such court shall have full power and authority to enforce said judgments by civil contempt proceedings. . . . Said court shall have power and authority to alter or change such judgments, or suspend the same, as the facts and circumstances and justice may require.²³

A recent enactment, supplementing the latter statute, authorizes the divorce court to order and enforce payments for the support of children requiring custodial care, whether the children are minors or not.²⁴

When a court grants a divorce to parties with minor children, it faces two immediate problems: the awarding of custody and the setting of child support payments. Both acts are obligatory on the court under article

¹⁸ TEX. REV. CIV. STAT. ANN. art. 4629(4) (Supp. 1967). Formerly the law required a seven-year period of living apart.

¹⁹ *Id.* art. 4629(2).

²⁰ *Fields v. Fields*, 399 S.W.2d 958 (Tex. Civ. App. 1966).

²¹ TEX. REV. CIV. STAT. ANN. art. 4477, § 50(c) (Supp. 1967).

²² *Id.* art. 4639 (1960).

²³ *Id.* art. 4639a, § 1 (Supp. 1967).

²⁴ *Id.* art. 4639a-1 (Supp. 1967).

4639a.²⁵ The court, obviously, has broad discretion in both areas, but it cannot be doubted that custody is harder to handle satisfactorily than support. Adjusting the relative rights of parents, children, and third parties is painful and difficult for a court. Custody must ordinarily be given in these cases to only one of the parties, leaving the other with only visitation rights.²⁶

The court's task is not made easier by the custody-visitation dichotomy in the law. Considerable litigation has arisen as a result of disputes between parents over the propriety of court-granted visitation rights, and a considerable body of law has arisen around the distinction between custody and visitation. The problem is this: if "visitation" is restricted in meaning to periodic contact with a child in the home of the custodian, the parent without custody cannot participate in decisions concerning the child's welfare such as education, religious and moral training, discipline, and care and control.²⁷ Even these ordinary incidents of the parent-child relationship do not embrace what is usually of greater importance, the right to associate with one's child. On the other hand, a broad definition of "visitation" that includes extended, continuous visits with the non-custodial parent verges on divided, or split, custody, depriving the child of the real or supposed benefits of stability associated with single-person custody.²⁸

Awarding custody at the time of the divorce is only the first part of a continuing problem. If the children are much below the age of eighteen, changes in condition are likely to occur before the need for custody expires. Controversies between parents are common, and remarriage or change of residence of a spouse creates new stresses and difficulties even for those parents who bear no animosity toward their ex-spouse. Whatever the precipitant, it is safe to predict that suits which have as their object an alteration or modification of custody arrangements will be numerous. Texas

²⁵ See text accompanying note 23 *supra*.

²⁶ The cases indicate that a divorce court has four alternatives available in determining visitation rights of the parent not given custody. It may deny visitation altogether, *Hill v. Hill*, 404 S.W.2d 641 (Tex. Civ. App. 1966) (dictum); limit visitation to specified times and places, see, e.g., *Schwartz v. Jacob*, 394 S.W.2d 15 (Tex. Civ. App. 1965) *error ref. n.r.e.*; provide for visitation at "reasonable times and places," *Wallace v. Scrogum*, 369 S.W.2d 531 (Tex. Civ. App.), *aff'd*, 372 S.W.2d 941 (1963); or leave the decree silent on visitation. Because the rule is long-established that the parents' right to visitation at reasonable times and places exists even without decretal provision, *Felker v. Felker*, 216 S.W.2d 669 (Tex. Civ. App. 1948) *error ref. n.r.e.*, the third alternative is legally superfluous but is nevertheless a common provision in decrees.

²⁷ See particularly *Leithold v. Plass*, 413 S.W.2d 698, 702 n.1 (Tex. 1967) (dissenting opinion).

²⁸ A turgid description of the dangers of divided custody is that of Judge Alexander in *Martin v. Martin*, 132 S.W.2d 426, 428 (Tex. Civ. App. 1939):

Certainly, no child could grow up normally when it is hawked about from one parent to the other with the embarrassing scene of changing homes at least twice each year. Such decrees are usually prompted by a laudable desire to avoid injuring the feelings of the parents, but the net result is a permanent injury to the child without any substantial benefit to the parents. In addition to the lack of stability in his surroundings, the child is constantly reminded that he is the center of a parental quarrel. It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child and are not conducive to good citizenship. Moreover, the parents are continuously pitted against each other in the unenviable contest of undermining the child's love for the other parent. Each parent is afraid to exercise any sort of discipline for fear of losing out in the contest. As a result, the child is reared without parental control.

Unhappily, this passage and the case in which it appears have been uncritically relied upon by Texas courts as reason and authority for refusing divided, or split, custody.

courts have long held that such suits between the parents (or between the parents and a third party) are new and independent suits in which the right to relief depends on proof that a material change in circumstances has occurred since the last custody adjudication, and that the criterion for changing custody or leaving it unchanged is the "best interest" of the children.²⁹ In a custody action, the defendant is entitled to venue in the county of his residence.³⁰ However, should the suit be denominated one seeking a modification or alteration of visitation, the divorce court, which set visitation rights, has continuing exclusive jurisdiction regardless of the domicile of the parties (usually parents) who will be affected by a change in visitation.³¹

Complicating the problem further are two additional rules of continuing, exclusive jurisdiction in the divorce court. The first is that the only court with power to enforce visitation rights, support orders, or original custody orders by civil contempt is the court which made the order—the divorce court.³² The second is that the divorce court has exclusive jurisdiction to order support payments, and that the power to change or modify support provisions in light of changed conditions at a later date is exclusive with that court.³³ There is no independent action for support in Texas other than those limited ones provided in articles 4639b³⁴ and 4639c.³⁵ To

²⁹ TEX. REV. CIV. STAT. ANN. art. 4639 (1964); *Mumma v. Aguirre*, 364 S.W.2d 220 (Tex. 1963). *Lakey v. McCarroll*, 134 Tex. 191, 134 S.W.2d 1016 (1940), a jurisdiction venue case, determined that the divorce court did not have continuing exclusive jurisdiction over a subsequent custody suit if there were allegations of changed conditions. As the divorce decree is res judicata without proof of changed conditions, *Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787 (1955), custody actions are always independent except in divorce suits. For criteria of changed conditions justifying a change of custody see *Leonard v. Leonard*, 218 S.W.2d 296 (Tex. Civ. App. 1949).

³⁰ *Lakey v. McCarroll*, 134 Tex. 191, 134 S.W.2d 1016 (1940).

³¹ This proposition has never been tested directly but is assumed correct in opinions of both the supreme court and courts of civil appeals. See *Leithold v. Plass*, 413 S.W.2d 698 (Tex. 1967) (dissenting opinion); *Leonard v. Leonard*, 358 S.W.2d 721 (Tex. Civ. App. 1962); *Glasgow v. Hurley*, 333 S.W.2d 658 (Tex. Civ. App. 1960). Whether this assumption of continuing jurisdiction and venue is wholly correct is arguable despite the language of TEX. REV. CIV. STAT. ANN. art. 4639a (Supp. 1967) that the divorce court "shall have power and authority to alter or change such judgments, or suspend the same, as the facts and circumstances and justice may require." *Lakey v. McCarroll*, 134 Tex. 191, 200, 134 S.W.2d 1016, 1021 (1940), held that this provision "[m]anifestly . . . only has reference to that part of the divorce decree dealing with orders requiring either or both parents to make contributions for the support of their children." Continuing jurisdiction should exist only if the decree specifies the terms of visitation. If the decree is silent a parent has a right of reasonable visitation enforceable upon application to any district court having jurisdiction of the parties. *Felker v. Felker*, 216 S.W.2d 669 (Tex. Civ. App. 1948) *error ref. n.r.e.* Courts have generally held that proof of materially changed conditions is not required to justify a change in visitation.

³² *Ex parte Goldsmith*, 155 Tex. 605, 290 S.W.2d 502 (1956); *Carlson v. Johnson*, 327 S.W.2d 704 (Tex. Civ. App. 1959). Further, civil contempt is the only means to enforce a support order. *Burger v. Burger*, 156 Tex. 584, 298 S.W.2d 119 (1957); *Ex parte Birkhead*, 127 Tex. 556, 95 S.W.2d 953 (1936).

³³ *Ex parte Mullins*, 414 S.W.2d 455, 456 (Tex. 1967): "Subsequent motions to change or modify child support orders constitute a continuation of the original cause of action for divorce and must be filed in the original divorce suit." See also *Ex parte Taylor*, 137 Tex. 505, 155 S.W.2d 358 (1941); *Lakey v. McCarroll*, 134 Tex. 191, 134 S.W.2d 1016 (1940).

³⁴ TEX. REV. CIV. STAT. ANN. art. 4639b (1964). This statute permits a parent or custodian of a child to institute an action against a non-supporting parent for custody, support and maintenance *during* marriage, without the necessity of instituting a divorce proceeding. Since by its terms the support action lies only against a parent who is still married, a divorced parent must still institute an action to change support in the original divorce suit. See note 33 *supra*.

³⁵ TEX. REV. CIV. STAT. ANN. art. 4639c (1960) authorizes an independent suit for custody and support against a parent when the marriage has been terminated by a foreign divorce decree

be valid a support order must be ancillary relief in an independent action for either divorce or custody.³⁰

How does this set of statutory and judicial rules work in practice? Not very well. Let us suppose that *H* and *W* are residents of Dallas and decide to get a divorce. They are the parents of one child, *C*, who is five years old. *H* is employed in the aerospace industry; *W* has no formal job training and has never worked. The suit for divorce is filed in the Domestic Relations Court Number One, in Dallas. A divorce is routinely granted and *W* is given custody of *C*. *H* is ordered to pay \$150 per month child support and is given the right to visit with *C* one weekend a month.

As long as *H* and *W* remain residents of Dallas no particular legal difficulties ensue. The divorce court is convenient and can resolve controversies about either custody, visitation or support; its exclusive jurisdiction over enforcement of its decree and adjustment of visitation or support is sensible and causes no inconvenience to the parties.

The odds favor the remarriage of both *H* and *W*, and with the high mobility of our society it is quite possible that they will move elsewhere. Assuming that they remarry and that *H* moves to Houston and *W* to Midland, practical problems of considerable magnitude are created. Should *H* cease child support payments, only the Dallas court that rendered the divorce can take steps to enforce the obligation, and if conditions change, only that court has power to change the amount of support payments. If one or both parties are dissatisfied with the visitation arrangement, only that court can change the terms of *H*'s visitation rights. Both *H* and *W* are forced to use a forum convenient to neither. Yet that court does not have exclusive jurisdiction to change custody—that is an independent action and *W* would be entitled to venue in the county of her residence, now Midland.

The hypothetical example does not present an unusual set of facts, and the courts have been hard put to work out solutions to this kind of problem. Their troubles are even more dramatic when multi-state situations come up. Either party's move to another state would increase the difficulties, as would the move to Texas of a person who was divorced in another state. In addition, lawyers generally attempt to work out details of custody, support and visitation by agreement of the parties. This practice has given

that is silent on custody and support. The court's orders under this statute are enforceable by civil contempt and subject to its continuing jurisdiction.

³⁰ *Ex parte Roberts*, 139 Tex. 644, 165 S.W.2d 83 (1942); *Bowyer v. Bowyer*, 130 Tex. 257, 109 S.W.2d 741 (1937). The *Bowyer* case, *supra*, and *Cunningham v. Cunningham*, 120 Tex. 491, 40 S.W.2d 46 (1931), held that maintenance of a minor child by its parent could be ordered either as incident to a divorce action (*Cunningham*) or to an independent custody suit (*Bowyer*). One important difference in the practice prior to the enactment of article 4639a (in 1935) should be borne in mind. The court's power to order support was considered in rem in the sense that the parent's obligation of support before 1935 could be satisfied only from their property, which could be subjected to a trust to insure that the duty of support was discharged. *Bowyer v. Bowyer*, *supra*; *Cunningham v. Cunningham*, *supra*; *Fitts v. Fitts*, 14 Tex. 443 (1855). Even in divorce actions the courts were without power to impose personal liability on a parent for periodic support payments in money. *Ex parte Gerrish*, 42 Tex. Crim. 114, 57 S.W. 1123 (1900). Because of the limited relief available under this rule (support could be obtained only if the parent had property) article 4639a was enacted.

rise to an emerging body of law based on contract principles that superimposes a new set of variables on the traditional rules.

*Leithold v. Plass*³⁷ epitomizes the courts' dilemmas in custody cases. Louis Leithold and Thyra Plass were divorced in Arizona in 1962. She was given custody of their three-year-old adopted child, Marc, and he was given limited rights of visitation. Mrs. Leithold married Gilbert Plass and moved to Dallas in 1963, and Leithold moved to California. After the divorce the parties' animosity resulted in a series of suits. Mrs. Plass first attempted unsuccessfully to have the child's name changed to Plass shortly after the move to Dallas.³⁸ After the disposition of that case Leithold instituted a suit denominated an "Application for Modification of Visitation and Change of Custody" in the juvenile court of Dallas County. He asked the court to give him Marc's custody and control for a two and one-half month period each summer. After a hearing the trial court awarded Leithold "visitation" rights of two weeks a year, with permission to take the child outside Texas. Mrs. Plass appealed to the court of civil appeals, which reversed.³⁹

The supreme court had before it the relatively narrow procedural question of whether the prayer for a change of custody empowered the trial court to enter an order changing only visitation rights. However, because the court of civil appeals had held that the evidence offered in the trial court was sufficient to justify a change of visitation but not a change of custody,⁴⁰ the supreme court was forced to examine the question of whether the order actually granted a change of visitation rather than a change of custody. Affirming the trial court order, the supreme court distinguished custody and visitation, holding that the right to have the child for a two-week period did not constitute an award of custody. The majority opinion is not altogether clear, but it appears to hold that the period of time during which a child is in the company of a parent is not as important as the right to establish domicile and provide the "elements of immediate and direct care and control of the child, together with provision for its needs."⁴¹ Since these rights remained in Mrs. Plass, the trial judge's decree was only a change in visitation rights for which no material change in conditions need be proved.

Of equal or greater importance was the court's holding that "a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child."⁴² The decision could do much to resolve some of the difficulties caused by the previously exclusive jurisdiction and venue of the divorce court in visitation matters. If the hypothetical *W* described above lives in Midland, *H* may give a court other than the divorce court power to alter

³⁷ 413 S.W.2d 698 (Tex. 1967).

³⁸ *Plass v. Leithold*, 381 S.W.2d 580 (Tex. Civ. App. 1964).

³⁹ *Plass v. Leithold*, No. 7708 (Tex. Civ. App. 6th Dist., Mar. 29, 1966).

⁴⁰ *Id.* at 8-9.

⁴¹ 413 S.W.2d at 700.

⁴² *Id.* at 701.

or modify his rights of visitation simply by bringing an independent custody suit against W. If he is unable to change custody the court will still have the power to change visitation rights. Ingenious lawyers should not take long to realize that they can circumvent the continuing jurisdiction problem of visitation merely by bringing an independent, fictional suit for custody. Venue will lie in the county of the custodian's residence and the parties will not be forced back to the divorce court.

Justice Norvell's dissenting opinion and two cases in the courts of civil appeals point out the law's remaining deficiencies. A parent who moves for a change of visitation in the original court may still become entangled in the custody-visitiation distinction. By asking for too much in the way of visitation the motion becomes a request for change of custody. The defendant may test this question in either of two ways. He may file a plea of privilege to be sued in the county of his residence if he lives elsewhere, alleging that the action is an independent custody suit.⁴³ Or he may contend that the suit is in fact one for a change of custody and that the evidence adduced at the hearing is insufficient to justify a change in custody.⁴⁴ If either tactic is adopted the trial court must decide whether the suit is for change of custody or visitation.

Justice Norvell asserted that the propriety of the trial court's decree should not be based on an "elusive"⁴⁵ distinction between custody and visitation, but upon whether the suit was to enforce the original decree's provisions or to alter them; a person seeking a change would be forced to prove that a change in conditions required a modification of the original order for the best interests of the child. Using this standard, Leithold's right to have his child for two weeks of the year was regarded by Justice Norvell as a change of custody beyond the trial court's power since there was no change in conditions.

Abstractly the dissenting opinion is appealing; no court has been able to articulate a workable distinction between custody and visitation⁴⁶ and it would be much simpler to treat them the same as far as the proof required to justify a change in the conditions established by the divorce court. However, Justice Norvell did not indicate clearly that he would obliterate the dichotomy for venue purposes.⁴⁷ Thus, if the custodian of the child did move out of the county where the divorce was rendered, venue would still be proper in the divorce court for a change of visitation but not for a

⁴³ *Huffman v. Huffman*, 408 S.W.2d 248 (Tex. Civ. App. 1966), presented such a question. Involving a prayer for custody essentially the same as that in *Leithold v. Plass*, 413 S.W.2d 698 (Tex. 1967), the suit was characterized as a custody suit and the plea of privilege granted.

⁴⁴ *Leaverton v. Leaverton*, 417 S.W.2d 82 (Tex. Civ. App. 1967) *error ref. n.r.e.* illustrates this aspect.

⁴⁵ 413 S.W.2d at 702 (dissenting opinion).

⁴⁶ *Leithold* held that two weeks with the child was an award of visitation, while *Leaverton v. Leaverton*, 417 S.W.2d 82 (Tex. Civ. App. 1967) *error ref. n.r.e.* (see note 44 *supra*) held that four weeks was an award of custody. In *Leaverton* the court acknowledged that "it is practically impossible to draw an exact line marking the change from visitation to a modification of custody," but then said "the time comes when the difference is apparent . . ." *Id.* at 85. Presumably the difference is somewhere between two and four weeks.

⁴⁷ The venue cases were cited and quoted from with no apparent disapproval. 413 S.W.2d at 702-03.

change of custody and the same problem of distinguishing the two would exist if improper venue was alleged.

Leithold was only one of several supreme court cases that decided questions of judicial power. In *Ex parte Mullins*⁴⁸ the supreme court pointed out once again the exclusiveness of the continuing jurisdiction of the divorce court in the enforcement of child support orders. Mullins obtained a divorce in the Domestic Relations Court Number Three, of Harris County in 1961. That court's decree awarded him custody of his three children but was silent on the matter of child support. In a subsequent independent custody action in the Domestic Relations Court of Galveston County, the mother was given custody. She later moved for an award of child support in that court and her motion was granted. Upon Mullins' refusal to make payments under the decree, the Galveston court held him in contempt. On habeas corpus the supreme court held that the divorce court had exclusive jurisdiction to make orders concerning child support, and ordered Mullins discharged. To secure child support the mother would have to bring her action in the original court.⁴⁹

Other habeas corpus cases gave the supreme court opportunities to work out limits on the power of courts to order and enforce child support payments under article 4639a. *Ex parte Hooks*,⁵⁰ decided by a sharply divided court, involved the enforcement of a lump sum payment after the youngest child reached eighteen. Earl Hooks, the relator, had defaulted in his support payments in 1961. At that time the trial court ordered him to make fixed payments until his youngest child reached eighteen "and then . . . to be held in continuing contempt until the arrears . . . [of \$4,070] has been paid in full . . ." ⁵¹ After his youngest child reached eighteen in 1963, Hooks refused to make the payment despite his conceded ability to do so, contending that the court lost enforcement powers since there were no children under eighteen. The majority opinion concluded that the enforcement powers of article 4639a authorized the trial court to carry its orders into effect by forcing a delinquent contemnor to pay arrearages after all children reached eighteen. This was true even though the court's command required payments to be made after children reached the specified age.

The distinction made by the majority between the court's power to order support payments and its power to enforce its order is emphasized by *Ex parte Hatch*,⁵² the first supreme court case dealing with article 4639a-1,⁵³ enacted in 1961. This statute authorizes a divorce court to order and enforce support payments for children above the age of eighteen years who require custodial care. In *Hatch* the court entered an order requiring the relator to support such a child in 1962. The divorce had been granted in

⁴⁸ 414 S.W.2d 455 (Tex. 1967). For further discussion, see VanDercreek, *Texas Civil Procedure*, this *Survey*, at footnote 24.

⁴⁹ See cases cited note 33 *supra*, and accompanying text.

⁵⁰ 415 S.W.2d 166 (Tex. 1967).

⁵¹ *Id.* at 167.

⁵² 410 S.W.2d 773 (Tex. 1967). For further discussion, see VanDercreek, *Texas Civil Procedure*, this *Survey*, at footnote 23.

⁵³ TEX. REV. CIV. STAT. ANN. art. 4639a-1 (Supp. 1967).

1958, and the court purported to make the support order under its continuing jurisdiction even though at the time of the order the child was nineteen. The court held that the divorce court lost jurisdiction over the child when she reached eighteen and was thus without authority to enter the new support order.⁵⁴ Original jurisdiction of children over eighteen was not conferred by the new statute, only continuing jurisdiction. The result of this holding is that support payments under article 4639a-1 must be ordered while the child is under eighteen if the court is to have continuing jurisdiction later. Lawyers and judges should be careful to provide in the decree that support payments are pursuant to the new statute.

Texas courts were not wholly occupied with questions of jurisdiction and power during the past year. In *Dannelley v. Dannelley*⁵⁵ the supreme court held on first impression that the temporary commitment for treatment of mental illness of a mother who had been awarded custody of children did not as a matter of law vest custody in the children's father. The original custody award remained in effect until changed either by an independent custody action or the death of the custodian.⁵⁶ The court reserved decision on the question of whether custody would be affected by a judgment that the custodian was of unsound mind or otherwise incapable of managing his affairs.

Relying on the constitutional grant to district courts of "original jurisdiction and general control"⁵⁷ over minors, the supreme court held in *Page v. Sherrill*⁵⁸ that in situations of emergency a child can be taken temporarily from its custodian without notice or hearing. The court emphasized that such action was extraordinary and was to be used only when *immediate*⁵⁹ action was indicated and when the interruption of custody was promptly followed by a full hearing of the right to custody.

During the survey period the most interesting and probably the most significant development in the law of support has been the development of rules defining the legal consequences of agreed settlements of support obligations, both legal and moral.⁶⁰ Lawyers in divorce cases have long made it

⁵⁴ *Cuellar v. Cuellar*, 406 S.W.2d 510 (Tex. Civ. App. 1966), which had reached a contrary result, was expressly disapproved.

⁵⁵ 417 S.W.2d 55 (Tex. 1967). A record of mental illness does not per se make a parent unfit to have custody. *Ponce v. Ponce*, 412 S.W.2d 777 (Tex. Civ. App. 1967) *error dismissed*.

⁵⁶ TEX. PROB. CODE ANN. § 109 (1964) provides that the father is the natural guardian of the children if the parents are married and that, "If one parent is dead, the survivor is the natural guardian of the person of the minor children." The predecessor of this provision, Tex. Rev. Civ. Stat. Ann. art. 4118 (1925), has been construed by the supreme court as causing a change of custody by operation of law if a custodial parent dies. *Peacock v. Bradshaw*, 145 Tex. 68, 194 S.W.2d 551 (1946). See also *Harrelson v. Davis*, 415 S.W.2d 293 (Tex. Civ. App. 1967).

⁵⁷ TEX. CONST. art. 5, § 8.

⁵⁸ 415 S.W.2d 642 (Tex. 1967).

⁵⁹ *Id.* at 645. The emphasis was the court's. The father in *Page v. Sherrill* requested the summary action on the ground that leaving the children with the custodial mother endangered their health. *Id.* at 644.

⁶⁰ Agreements defining post-divorce obligations are particularly important under tax law because of the considerable implications to the parties. Periodic payments to a divorced wife are included in her gross income (and hence are deductible from the husband's gross income) "in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband . . . under a written instrument incident to such divorce." INT. REV. CODE of 1954, § 71(a)(1). The benefits of this provision are available to Texas husbands under properly drawn

a practice to work out a division of property with the parties rather than to have the courts make the division under the authority given them by article 4638.⁶¹ As divorces have become more common this practice has been extended to child support, and it is now nearer the rule than the exception that child support payments are the product of agreement rather than judicial action under article 4639a.⁶² Further, the absence of authorization for alimony (or support payments) to spouses even in hardship cases,⁶³ combined with the unavailability of property to be set aside to a spouse for his or her support,⁶⁴ has resulted in widespread attempts to provide periodic support payments to a spouse in the guise of a property settlement.

When the basis of the agreement is a division of property, courts usually recite in the divorce decree that the property settlement agreement is "fair, just and reasonable," is "approved" by the court and is "ordered filed in the papers of the case." In contrast, the parties' agreement to pay child support is ordinarily not mentioned in the decree, which usually includes the court's "finding" of reasonable child support payments and an order to make the payments. But child support is still often the subject of a provision in the parties' agreement and is filed in the papers of the case. Whether the obligation to make any sort of periodic payments is contractual or decretal in origin is of considerable moment because of the difference in means of enforcement, because of the court's continuing powers, and because of the lack of judicial power to order support payments to spouses except as incident to a division of property. Characterization of the support provisions of an agreed judgment as contractual increases the remedies available to a spouse and thus enhances the possibility that the obligation of support will actually be met. Of equal importance in a number of cases is that the courts' lack of power to order alimony can be circumvented by a "property settlement" agreement.

*Hutchings v. Bates*⁶⁵ was the first supreme court case to deal with these questions directly. Naturally enough, it dealt with a suit based upon a property settlement agreement providing for periodic child support payments. The husband, Warren Bates, agreed to pay \$150 per month child support until the older of his two children reached eighteen years of age, and then to pay \$100 per month until the younger child reached eighteen. He further agreed to pay reasonable medical expenses of the children until

"property settlement" agreements even though under Texas law the husband has no obligation to support his divorced wife. *Taylor v. Campbell*, 335 F.2d 841 (5th Cir. 1964). Further, under recent legislation the person making periodic child support payments is entitled to a dependency deduction if he contributes at least \$600 to the child's support and the divorce decree or support agreement provides he is to receive the deduction. 1 CCH 1968 STAND. FED. TAX REP. ¶ 1242.005.

⁶¹ TEX. REV. CIV. STAT. ANN. art. 4638 (1964).

⁶² TEX. REV. CIV. STAT. ANN. art. 4639a (Supp. 1967). See text accompanying note 23 *supra* for statute.

⁶³ *Francis v. Francis*, 412 S.W.2d 29 (Tex. 1967).

⁶⁴ In its equitable division of property under article 4638 the divorce court may set aside property for a spouse's support without running afoul of the alimony limitation. *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21 (1923); *Keton v. Clark*, 67 S.W.2d 437 (Tex. Civ. App. 1934) *error ref.*

⁶⁵ 406 S.W.2d 419 (Tex. 1966). For further discussion, see Hemingway, *Wills and Trusts*, this *Survey*, at footnote 60.

the younger child reached eighteen. This agreement was "approved by the court and incorporated in the divorce decree" and the husband was "directed" by the judgment to make the payments.⁶⁶ Bates died before the youngest child reached eighteen and Mrs. Hutchings (his ex-wife) claimed that his estate was obligated for the balance of the support payments and for medical expenses which had accrued after his death. Her claim was based upon contract principles rather than on a judicially-imposed obligation because the obligation to pay child support created by judicial decree terminates at the death of the obligor.

The supreme court held that the husband's estate was liable for unpaid support payments. "[W]here the duty to make support payments arises from an agreement of the parties, their rights and obligations in that respect are governed largely by the rules relating to contracts."⁶⁷ Justice Walker's opinion carefully pointed out that the agreement executed by the parties gave the husband several parcels of real estate as his separate property. Moreover, the agreement did not indicate that the support payments were to be paid only from his earnings. From all the "provisions of the contract and the circumstances surrounding its execution,"⁶⁸ the court concluded that the figure was not simply one that the parties agreed upon to be fixed by the court as periodic support payments. The husband's estate was therefore bound.

Left unanswered in the Hutchings case is the question of whether child support payments agreed to by the parties and incorporated into the decree by reference or made the subject of specific court order are contracts, or court-ordered support payments, or both. If only contractual, the divorce court would not only lose the power to enforce the payment by contempt but would also lose the power to modify their amount under changed conditions. If entered by virtue of the courts' power to order such support payments, they are enforceable solely by contempt but are subject to modification in light of changed circumstances. If both, the party entitled to receive the payments might have the best of both worlds, with the agreement treated as a severable obligation from that imposed by the decree.

Two decisions of courts of civil appeals also leave this issue in doubt. In one,⁶⁹ the husband applied to the divorce court for a modification of the child-support provisions of the divorce decree. The parties had entered into a property settlement agreement that fixed child support at \$250 per month and the divorce court approved the settlement and ordered the husband to pay that amount.⁷⁰ The court held that modification could only be

⁶⁶ *Id.* at 420.

⁶⁷ *Id.* More specifically the court held that:

[W]here the contract and judgment provide for periodic support payments to be made until the occurrence of a specified event the obligor's estate is responsible for installments accruing after his death unless it fairly appears from other stipulations or the surrounding circumstances that it was intended for the obligation to terminate upon death.

Id. at 421.

⁶⁸ *Id.* at 422.

⁶⁹ *Morris v. Morris*, 406 S.W.2d 550 (Tex. Civ. App. 1966).

⁷⁰ *Id.* The exact language of the decree was not given but it probably was standard, judging by the court's paraphrase.

by consent of the parties and not by judicial modification as the obligation was imposed by contract, not judicial action. In the other case,⁷¹ suit was brought by the wife for delinquent child support payments due under an agreement that was approved by the court and incorporated into its decree. Defendant attempted to avoid liability on the ground of failure of consideration, alleging that the ex-wife's suit was grounded in contract. The appellate court held that the decree constituted a consent judgment and that the defendant's only remedy would be by direct attack on the decree itself.⁷² We thus have decisions of two courts of civil appeals reaching results contradictory in principle—one treating the obligation as essentially contractual and the other as decretal.

The courts, therefore, are operating in a shadowy area when agreements to pay child support are in question. A divorce court has power to order periodic payments for this purpose. Their judgments are often unclear as to whether the obligation to pay support is by virtue of judicial action or agreement of the parties (or both) and some shaking down is inevitable because of the mixed elements of private and judicial action.

When an agreement provides for periodic support payments to a spouse, however, the courts' lack of power is clear. What effect will be given to a purported property settlement agreement that obligates a husband to make installment payments to a wife for a period of years? Does a divorce court's approval of such an agreement and its incorporation into a divorce decree constitute an award of alimony prohibited by Texas law?

These questions were answered in the negative by the supreme court in *Francis v. Francis*.⁷³ There the parties had entered into a property settlement agreement under which the wife relinquished her interest in the parties' property in exchange for the husband's promise to pay her \$15,000. This sum was to be paid in installments of \$50 per month for eight months following the divorce, after which they were to increase to \$100. If the wife remarried only \$7,500 was to be paid; otherwise the entire amount would be paid. This agreement was found by the divorce court to be fair and reasonable and was approved and filed in the papers of the case. The husband paid the first \$7,500 and then instituted a declaratory judgment action to have the balance of the obligation nullified as an attempt to order alimony payments to the wife.

The supreme court held that the obligation of the husband was not an obligation to pay alimony as "to be alimony the allowance to or provision for the wife's support, whether during pendency of the suit, during a divorce from bed and board . . . or after an absolute divorce . . . must have been made by a judgment or decree of a court."⁷⁴ Alimony does not include a "mere contractual obligation of a husband to make future periodic

⁷¹ *Akin v. Akin*, 417 S.W.2d 882 (Tex. Civ. App. 1967).

⁷² If the obligation to pay child support derived from the decree and not from the agreement, the suit for damages should have been disallowed as contempt proceedings were the exclusive remedy available to the wife. See note 32 *supra*.

⁷³ 412 S.W.2d 29 (Tex. 1967). For further discussion, see McKnight, *Matrimonial Property*, this *Survey*, at footnote 44.

⁷⁴ *Id.* at 31.

or lump sum payments for the support and maintenance of his wife."⁷⁵ Since the courts have long had the power to order a husband to make post-divorce periodic payments to a wife for her support from his property, the court reasoned that the Texas bar to alimony included only support payments "imposed by a court order or decree . . . as a personal obligation."⁷⁶

After thus disposing of the argument that the agreement itself was for the payment of alimony and hence violative of public policy, the court faced the important question of the effect of the court's approval of the agreement. Pointing out that the decree did no more than approve the parties' agreement, the court held that this act alone did not invalidate the contract. The vice would be in the court's ordering such payments.

These developments leave the law in something of a quandary.⁷⁷ Permitting the enforcement of contractual alimony under contract principles is, on balance, laudable. The same is true with respect to contractual child support. But if the usual language in the divorce decree is not considered to be an indication of judicial action there are serious problems for lawyers representing a party in a divorce proceeding since it creates a possibility that contempt is not available to enforce any of the provisions of the agreement and that subsequent modification of the orders is impossible. Caution in this area is indicated. In the case of child support payments if the lawyers wish the court to have continuing jurisdiction and power, they should be absolutely certain that the decree is phrased in terms of the requirements of article 4639a and does not simply incorporate the agreement into the judgment. Should the parties agree that periodic payments in the nature of "tax" alimony are to be made to a spouse, the attorney for that spouse must be equally careful that the court does not in any way order compliance with the agreement under its article 4638 powers.

⁷⁵ *Id.* at 32.

⁷⁶ *Id.* at 33.

⁷⁷ The court did not cite or allude to *Hutchings v. Bates* in the *Francis* case, or even indicate that the problems of the cases are in any way related.