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FAMILY LAW

by

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FAMILY law cases during the past year exhibited their usual bewildering diversity. Cases, particularly in the field of divorce, reflected the inevitable tensions resulting from the attempt to use laws strict and absolute on their face in situations that call for remedies flexible and responsive to human needs. In all areas the cases mirror the chaos that results from the efforts to adapt a nineteenth century body of law to the needs of a highly mobile twentieth century society.

Not surprisingly, these strains and tensions have generated a considerable pressure for reform. In response to this pressure the Family Law Council of the State Bar of Texas has proposed revisions of the law governing marriage, divorce, annulment, custody, support, and adoption. These proposals will be presented to the 1969 session of the legislature. A revision of the juvenile laws is under way and scheduled for completion in time for presentation to the 1971 legislature. The goal of the revisions is a complete, new Family Code for Texas.

I. JUVENILES

> The child involved can then be permitted to tell his side of the story. If he is frightened or reluctant to talk, it is not out of order for the judge to put him at his ease or get him to talk by discussing other things the child may be interested in. A little praise may be helpful. The child should understand that the proceeding is not a criminal court and the purpose is to help him. Patience and friendliness are essential . . . .[1]

This advice for the juvenile judge is typical of the tenor of a handbook for juvenile court personnel. The juvenile court, according to the philosophy upon which these special courts were founded, is to meet the child in the stance of a kindly, understanding father.[2]

But to what extent is this approach still possible? How far can the patient, friendly juvenile judge go in persuading the juvenile to unburden his conscience to the court?

In *In re Gault*[3] the United States Supreme Court said:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. . . . If counsel is not present for some permissible reason when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not

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[1] STATE YOUTH DEVELOPMENT COUNCIL, THE COMMUNITY, THE STATE AND THE DELINQUENT CHILD 17 (2d rev. ed. 1955).

[2] *See* CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 83 (1954).

[3] 387 U.S. 1 (1966).

the product of ignorance of rights or of adolescent fantasy, fright or despair.[4]

Clearly, the paternalistic philosophy underlying the juvenile courts is to some extent in conflict with the constitutional protection now required. The question presented to those concerned with this field is: To what extent can the juvenile court preserve its traditional informality and benevolent concern for the individual child and still conform to the greater formality demanded by *Gault*?[5]

The *Gault* case was set in motion when Mrs. Cook complained to police that a neighbor, Gerald Gault, 15, had made obscene remarks to her on the telephone. A week later an Arizona juvenile court found Gerald to be delinquent and committed him to the State Industrial School for Boys "for the period of his minority (that is, until he reached the age of 21 years) unless sooner discharged by due process of law." An adult convicted of the same act would have faced, at the maximum, a $50 fine or two months' imprisonment. Plainly this fact bothered the Supreme Court when it eventually decided the case. The Court, however, was primarily concerned that Gerald was not granted certain procedural rights that must be allowed an adult as a matter of course. Neither Gerald nor his parents received advance notice of the charges against him. He was not informed that he had the right to counsel and the right to have counsel appointed for him if he was financially unable to obtain it for himself. He was not informed that he had the right to remain silent. The evidence against Gerald was entirely hearsay: Mrs. Cook did not appear at the hearing to give direct testimony that Gerald had made obscene remarks to her. No record was made of the hearing, and Gerald had no right to a transcript and no right to appeal.

The Supreme Court, in reviewing Gerald's case, held that he was entitled to the first four procedural rights—right to notice of the charges, right to counsel, right to remain silent, and right to confront the witnesses against him. The Court did not rule on the right to a transcript and the right to appeal.

The impact of *Gault* on juvenile law was that of a boulder dropping into a still pool. Most of the Texas juvenile cases decided during the survey period were ripples from the boulder.

That *Gault* is, indeed, a "juvenile *Miranda*" is reflected by *Choate v. State*[6] in which a court of civil appeals applied *Miranda v. Arizona*[7] and *Gault* in tandem. In *Choate* the record did not clearly show that the juvenile had been given warning sufficient to indicate that he knowingly and intelligently waived his privilege to remain silent. The court observed that in *Gault*, "the United States Supreme Court . . . made applicable to juveniles the privilege against self-incrimination as it was applied to adults in *Miranda v. Arizona*."[8]

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[4] *Id.* at 55.
[5] *See* PUBLIC AFFAIRS COMM., INC., THE JUVENILE COURT COMES OF AGE (1968).
[6] 425 S.W.2d 706 (Tex. Civ. App. 1968).
[7] 384 U.S. 436 (1966).
[8] 425 S.W.2d at 706.

In *Collins v. State*[9] a court of civil appeals expanded *Gault* by applying the right not to be twice placed in jeopardy for the same act to a juvenile proceeding. The problem arose when the state mistakenly alleged that the juvenile committed a theft of automobile tires from one person when the tires actually belonged to another. At the beginning of the first proceeding the state made an oral motion to amend its petition to show a theft from the proper party. The defendant did not object and the court granted the motion. The state, however, did not file a new petition or correct the original petition at this time. Instead, the state took a non-suit in the proceeding. Eventually a new petition was filed in the same cause correctly alleging that the juvenile had stolen the automobile tires from the true owner, and the juvenile was found to have committed the offense. On appeal, the juvenile contended that the oral motion for a trial amendment, although the amended petition was not actually filed until later, had placed him in jeopardy for the same offense he was charged with in the new petition. Since the state had taken a non-suit in the first proceeding, he argued, it could not again bring suit for the theft of the same tires from the same complainant. The Houston court of civil appeals agreed, holding that, though a juvenile proceeding is nominally civil, *Gault* guarantees to the defendant "all of the privileges and immunities which he would have if it were a criminal proceeding."[10] The non-suit, normally not prejudicial in a civil case, was determinative in the juvenile trial because of the criminal trial protections now required.

The case illustrates the confusion that results from the current move to superimpose criminal protections on a civil action. If the full scope of criminal rules were applied, it would seem that neither an oral nor a written trial amendment would be allowed.[11] The court here applied the Texas Rules of Civil Procedure[12] in allowing the oral amendment to be effective to change the petition, but applied criminal procedure standards to decide whether the defendant had been previously held in jeopardy.

Two cases decided during the year cast doubt on the future efficacy of charging a juvenile under Texas' "habitually deporting" statute.[13] The statute defines a delinquent child as one who "habitually so deports himself as to injure or endanger the morals or health of himself or others." Neither decision held the much-used statute unconstitutional, but each raises questions about its future.

In the first case the petition simply alleged in the statutory language that "said boys habitually deported himself [sic] so as to injure and endanger the morals of himself [sic]."[14] The court of civil appeals held the petitions insufficient in that they merely alleged conclusions and did not set out specific facts as required by the statute.

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[9] 429 S.W.2d 650 (Tex. Civ. App. 1968).

[10] *Id.* at 652.

[11] TEX. CODE CRIM. PROC. ANN. art. 28.10 (1966); Jackson v. State, 419 S.W.2d 370 (Tex. Crim. App. 1967).

[12] TEX. R. CIV. P. 66, 67.

[13] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (1964).

[14] Viall v. State, 423 S.W.2d 186, 187 (Tex. Civ. App. 1967).

In the second,[15] law enforcement officials were more careful. The petition not only alleged that the defendant was habitually deporting herself so "as to injure or endanger the morals or health of herself and others"[16] but set forth four specific occasions on which the defendant had run away from home. The trial court found the defendant guilty. The court of civil appeals reversed, finding that the procedural requirements set forth in *Gault* had not been observed.

The concurring judge, however, made a strong plea for reversal on the "more fundamental basis" that the habitually deporting statute should be declared unconstitutional. Such words as "injure," "endanger," and "morals," he argued, are too vague to give adequate warning "as to what the State commends or forbids."[17] Further, he urged that, since the delinquency statute may result in a deprivation of liberty, it is penal in its effect and must be construed as a penal statute. Under this standard the statute should be held invalid because it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[18]

The Texas courts also faced one of the issues specifically not decided in *Gault*, *i.e.*, whether a minor is entitled to a transcript of the hearing. In *Hernandez v. Hardy*[19] the court of civil appeals held that the parents of the delinquent, after filing as next friends an affidavit of inability to pay costs, were entitled, as a matter of law, to perfect their appeal and to be furnished with a transcript and statement of facts without paying the costs. The decision was based on two earlier Texas decisions pertaining to right to appeal without an appeal bond.[20]

Some doubt as to whether *Gault* requires the exclusion of confessions made without a warning results from the fact that the juvenile does not have the right to a jury trial. In *Yzaguirre v. State*[21] a court of civil appeals held that error in admitting a minor's statement to a policeman did not require reversal since the judge expressly stated in his decision that the finding of delinquency was not predicated on that statement. In *Leach*, however, the court reversed because of admissions made by the defendant before she had counsel or had been warned of her constitutional right to remain silent. The difference in the two cases, apparently, is the judge's express statement in *Yzaguirre* that the defendant's statement did not enter into his decision.

Another case[22] presented the perennial problem posed by the efforts of law enforcement officials to "save" a charge against a juvenile until the juvenile becomes an adult, then try him as an adult. Here, the 15-year-old defendant shot the decedent. Murder with malice charges were filed in

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[15] Leach v. State, 428 S.W.2d 817 (Tex. Civ. App. 1968).
[16] *Id.* at 818.
[17] *Id.* at 822.
[18] *Id.* at 821-22, quoting Conally v. General Constr. Co., 269 U.S. 385 (1926).
[19] 426 S.W.2d 258 (Tex. Civ. App. 1968).
[20] Lee v. McKay, 414 S.W.2d 956 (Tex. Civ. App. 1967), *error dismissed*; *In re* Brown, 201 S.W.2d 844 (Tex. Civ. App. 1947), *error ref. n.r.e.*
[21] 427 S.W.2d 687 (Tex. Civ. App. 1968).
[22] Solis v. State, 418 S.W.2d 265 (Tex. Civ. App. 1967).

justice court, but on transfer to the juvenile court, the charges were changed to assault with intent to murder. The purpose for doing this, according to defendant, was so that at a later date when he became amenable to criminal prosecution, the state could have him indicted and tried for murder with malice. The court of civil appeals held the defendant had no vested right to be tried in juvenile court on the same charges as those lodged in justice court and that the state could allege other offenses. On a "hope-for-the-best" note, the court commented, "This Court cannot assume that the State will attempt to have appellant indicted and tried for murder when he becomes 17 years old, but if and when it does so, appellant can present his plea of previous conviction, former jeopardy, violation of due process of law, fundamental fairness . . . ."[23] In the light of previous Texas criminal cases and the state's "carving doctrine,"[24] it would seem that, if the state should attempt to re-try defendant, his plea of former conviction would be good.[25]

Of procedural interest is the Supreme Court of Texas' holding in *Ex parte Hofmayer* that it has no jurisdiction of a petition for writ of habeas corpus filed on behalf of a juvenile restrained of his liberty as the result of an order entered by a juvenile court.[26] The court observed that it does "not have general original jurisdiction to grant the writ of habeas corpus as does the Court of Criminal Appeals."[27] Presumably such petitions should be brought to the criminal court.

II. ADOPTION

Since the United States Supreme Court decision holding state anti-miscegenation laws unconstitutional,[28] attention has focused on the Texas statute which forbids interracial adoption.[29] In *In re Gomez*[30] a Negro member of the United States Army sought, with the permission of the mother whom he had married, to adopt two white daughters born to her out of wedlock. Adoption would legitimate the children and enable them to receive benefits as dependents of a member of the armed forces. The district court denied the adoption on the basis of the Texas statute.

On appeal, the El Paso court of civil appeals upheld the petitioner's contention that the statute was unconstitutional in violation of the equal protection clause of the fourteenth amendment to the United States Consti-

[23] *Id.* at 268.

[24] Simco v. State, 9 Tex. Ct. App. R. 338 (1880). "[A] rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once." *Id.* at 349. *See also* Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 Sw. L.J. 567, 572 (1968).

[25] *See* discussion, 418 S.W.2d at 268. *See also* TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(i) (Supp. 1968) which states that "If the juvenile court retains jurisdiction, the child is not subject to prosecution at any time for any offense alleged in the petition or for any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the proceeding."

[26] 420 S.W.2d 137 (Tex. 1967).

[27] *Id.* at 138.

[28] Loving v. Virginia, 388 U.S. 1 (1967).

[29] TEX. REV. CIV. STAT. ANN. art. 46a, § 8 (1959): "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person."

[30] 424 S.W.2d 656 (Tex. Civ. App. 1967).

tution and Section 3 of Article 1 of the Texas Constitution.[31] With respect to federal law, the court quoted from *Loving v. Virginia*:

> Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' . . . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . and if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[32]

Three cases reflect the courts' reluctance to allow adoption over the objection of a natural parent or to give a literal interpretation to the statute allowing adoption without parental consent if the parent has either abandoned or failed to support a child for two years.

Two of the cases[33] dealt with situations in which the natural mother contested the adoption of children whose custody had been awarded to the father at the time of divorce. In neither case was the mother ordered to pay child support. In both cases the court held the mother could not be charged with abandonment or non-support of the children when she had no duty under the divorce decree either to care for or support them.

The third case[34] presented the familiar situation in which a father was trying to pay child support which was disdained by the mother. The stepfather was trying to adopt the child. The court of civil appeals held that a finding that the father had failed to support the child was against the overwhelming weight of the evidence. As in previous cases, the court seemed to require a showing of intent not to support in order to justify a finding of failure to support. Return by the mother of the father's proffered payments negated that intent.

Cases within the survey period reflected the continuing problems caused by the adoption based on termination of parental rights without notice to the parent. In one,[35] the mother, who was awarded custody of her two sons on divorce, took a protracted trip to India, leaving the boys with the paternal grandparents. While she was away in 1963 the grandparents filed a petition resulting in a declaration that the children were dependent and neglected and an award of custody to the grandparents. When she returned in 1964, the mother filed a petition for writ of habeas corpus, contending the grandparents promoted and financed the trip in order to defraud her of the children. The writ was denied, and the mother did not appeal. A year later the grandparents were allowed to adopt the children

[31] The pertinent section provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive public emoluments, or privileges, but in consideration of public services." The "Interpretive Commentary" for the section describes it as setting "forth two meanings of equality, that of equal protection of the laws, and that of political equality."

[32] 388 U.S. at 11.

[33] Thompson v. Meaux, 429 S.W.2d 668 (Tex. Civ. App. 1968); Smith v. Waller, 422 S.W.2d 189 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[34] Khafaji v. Meitzen, 429 S.W.2d 174 (Tex. Civ. App. 1968), *error dismissed.*

[35] Harrell v. Harrell, 428 S.W.2d 370 (Tex. Civ. App. 1968), *error ref. n.r.e.*

without consent of the mother since her rights had been terminated. In 1967 the mother filed a motion in the original 1963 dependency proceeding asking that the judgment be set aside. The court of civil appeals held that the 1964 habeas corpus decision was res judicata as to the validity of the dependency judgment inasmuch as the pleadings in that cause and the instant case raised the same issues. By deciding on this basis, the court avoided the problems raised by the lack of notice to the mother and the decision in *Hendricks v. Curry*[36] that a child must be without care before it can be adjudicated dependent and neglected.

In another case[37] to set aside a dependency judgment, it was held that the new suit is, in effect, a trial de novo on this issue and the fact of dependency must be proved anew, rather than by reference to the evidence presented at the original trial. The burden of proof is on the person asserting dependency.

The courts, not surprisingly, refused to disturb on appeal one trial court's decision to deny adoption[38] and another's refusal to allow a parent to revoke a consent to adoption given to a child-placing agency.[39] In other decisions it was held that failure to appoint a guardian *ad litem* for a child when the mother and stepfather seek to change its name is not fundamental error requiring reversal[40] and that proof of a statutory adoption requires a showing that a document of adoption was executed.[41]

III. Marriage and Children

Two United States Supreme Court cases decided during the survey period significantly advanced the dignity and legal status of the child born out of wedlock. In *Levy v. Louisiana*[42] the Court held that state denial of an illegitimate child's right to sue for the wrongful death of its mother constitutes invidious discrimination in violation of the fourteenth amendment if legitimate children are allowed such a suit. The illegitimate, said the Court, is not a "nonperson." In a companion case, *Glona v. American Guaranty & Liability Insurance Co.*,[43] it was held that a mother could sue for the wrongful death of her illegitimate child.

Implicit in both opinions is the assumption that the children were the biological offspring of the mother. But, while motherhood is an observable act, fatherhood is more difficult to prove. Texas provides no legal machinery for establishing paternity. The problem, therefore, is to predict what will happen in Texas if an illegitimate sues for the death of his father or if a father is sued for the support of an illegitimate child. These are rights which legitimate children have in this state. Since *Levy* holds that state law may not deny to the illegitimate the rights accorded to legitimates, it fol-

[36] 401 S.W.2d 796 (Tex. 1966).
[37] Aechternacht v. Page, 429 S.W.2d 597 (Tex. Civ. App. 1968).
[38] Conder v. Helvey, 430 S.W.2d 374 (Tex. Civ. App. 1968).
[39] Carrell v. Hope Cottage Children's Bureau, Inc., 425 S.W.2d 898 (Tex. Civ. App. 1958), *error ref. n.r.e.*
[40] Newman v. King, 433 S.W.2d 420 (Tex. 1968).
[41] Petty v. Dunn, 419 S.W.2d 417 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[42] 88 S. Ct. 1509 (1968).
[43] 88 S. Ct. 1515 (1968).

lows logically that the *absence* of state machinery to establish paternity should not be allowed to deny the illegitimate child a constitutional right. Followed to its extreme, this reasoning would require Texas to provide a paternity-proving procedure. On the other hand, the language of *Levy* is carefully restricted to the rights of the illegitimate with respect to the mother. Additional cases will be needed to determine whether the *Levy* rationale does indeed apply to fathers.

It is easy in theory to say that constitutional doctrine should apply alike to mothers and fathers. But it is not easy to evade the fact that it is not presently possible to prove fatherhood with the same certainty as motherhood. As long as this difference exists, the paternity action will be open to the criticism that it is sometimes an invitation to extortion.

The continuing viability of common law marriage in Texas was reflected in two civil appeals cases during the survey period. In one[44] a living, undivorced common-law wife was given preference in the appointment of an administrator over a subsequent wife married ceremonially to the decedent. The court did not apply or discuss the usual presumption in favor of the validity of a subsequent marriage. In another case[45] a son was able to establish heirship rights by the showing of a common-law marriage between his mother and the decedent.

A slight nibbling away at the long-honored concept of intrafamily immunity was evidenced by *Littleton v. Jordan*.[46] Here the administrator of a child's estate was allowed to recover damages from the employer of the child's father who had negligently run over the child with a truck in the course of his employment even though the father would have been immune from suit because of the interfamily immunity doctrine. The court relied almost entirely on a statement by Prosser[47] that this was the present "overwhelming" weight of authority. It distinguished on its facts an early Texas case[48] in which the owner of a cottonseed mill was held not liable for injuries to a child brought on the mill premises by the employee parent but without the owner's permission. The difference between the two cases was the situs of the accident; in the *Littleton* case the child was injured while playing in the patio of his own residence, a house furnished by the employer. The court allowed recovery even though it recognized that the practical effect of its holding would be that the father would share in any recovery awarded to his child's estate under the descent and distribution statutes,[49] and thus would benefit from his own negligent conduct. No effort was made by the employer in this case to seek indemnity from the negligent employee-father.

One spouse is not necessarily the agent of the other for purposes of giving consent to an operation. In *Gravis v. Physicians & Surgeons Hospital of Alice*[50] Mrs. Gravis sued for assault and battery, contending that the

[44] Fox v. Jordan, 421 S.W.2d 481 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[45] Windom v. Windom, 422 S.W.2d 611 (Tex. Civ. App. 1967).
[46] 428 S.W.2d 472 (Tex. Civ. App. 1968), *error ref.*
[47] W. PROSSER, LAW OF TORTS § 116 (3d ed. 1964).
[48] Blossom Oil & Cotton Co. v. Poteet, 104 Tex. 230, 136 S.W. 432 (1911).
[49] TEX. PROB. CODE ANN. § 38 (1956).
[50] 427 S.W.2d 310 (Tex. 1968).

defendants had administered a spinal anesthetic and operated without her consent. Mr. Gravis had given written permission for the operation and administering of whatever anesthetic the physician deemed necessary. The supreme court reversed the court of civil appeal's finding that Mrs. Gravis' consent was unnecessary because there was an emergency. The court recognized the rule that consent would be implied "where the patient is unconscious or otherwise unable to give express consent and an immediate operation is necessary to preserve life or health."[51] Here no such emergency existed and the defendants had ample time to secure from Mrs. Gravis oral if not written permission to perform the operation. On the effect of Mr. Gravis' permission, the court commented: "There is no contention . . . that Mr. Gravis was authorized by his wife to consent in her behalf, and the relationship of husband and wife does not in itself make one spouse the agent of the other."[52]

IV. Divorce and Annulment

Controversy respecting the full faith and credit holding in *Burleson v. Burleson*[53] has tended to obscure another important issue in the case, *i.e.*, the extent of the jurisdiction of the special domestic relations court created by statute for the metropolitan counties in the state. The wife obtained a Nevada divorce, and the husband afterward sued for divorce and a division of the community property in a domestic relations court in Harris County. When the wife's Nevada divorce was upheld on appeal, the question remained whether the Harris County court then had jurisdiction to divide the property since no divorce action remained before it. The court of civil appeals held that the domestic relations court did have such jurisdiction. Its holding rested both on the language of the statute creating the court and the principle that "once jurisdiction is lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat the jurisdiction." Since the decision was made before the law broadening the jurisdiction of the family courts took effect,[54] it seems clear that the effect would be the same under the new law.

The hoary and oft-denounced doctrine of recrimination is still with us. In *Woods v. Woods*[55] the jury found in answer to special issues that (1) the defendant was guilty of excesses, cruel treatment and outrages (2) such as to render further living together insupportable (3) but that defendant's conduct was brought on and provoked by acts of plaintiff. The trial court disregarded the answer to (3) and granted the plaintiff a divorce. On appeal it was held that disregarding the jury's answer to the third issue was error. The court of civil appeals said that inasmuch as the plaintiff had spent two hours in a motel room with a male friend and confessed love for this friend after reconciliation with her husband, some

[51] *Id.* at 311.
[52] *Id.*
[53] 419 S.W.2d 412 (Tex. Civ. App. 1967).
[54] Tex. Rev. Civ. Stat. Ann. art. 2338-11 (Supp. 1968).
[55] 419 S.W.2d 921 (Tex. Civ. App. 1967).

evidence existed that her conduct had provoked her husband's subsequent cruelties.

The courts continue to take a relatively liberal view of the kinds of disagreeable conduct which will render further living together insupportable. Found to be sufficient were (1) a husband's nagging his wife to give him her property,[56] (2) a wife's expressing happiness at the death of her husband's mother and gossiping about her husband's stockholders,[57] and (3) a wife's overdrawing of her husband's checking account and then calling his superiors at work to tell them her husband would not pay his debts.[58]

A court of civil appeals upheld the trial court's discretion in striking a plea of intervention by an alleged putative wife in a divorce proceeding involving protracted litigation between the husband and his first wife over the division of a large community estate.[59] The case also demonstrates the inadvisability of relying on a Mexican divorce in Texas. The husband had obtained a divorce across the border and remarried. His first wife obtained a declaratory judgment that the Mexican divorce was void and she was still the wife. After the passage of some time during which the husband lived with the second wife, the first wife brought the instant suit for divorce and property division.

Another case[60] held the doctrine of res judicata blocked a second suit for divorce on the grounds of cruelty where the second suit alleged no different acts of cruelty but merely a continuation of the same acts of cruelty on which a previous divorce had been denied. The case is a warning to counsel that in a second suit for divorce on a ground previously used, new marital wrongs should be pleaded.

V. Custody and Support

"Just as it is practically impossible to draw an exact line marking the change from one color to another in a rainbow, so it is practically impossible to draw an exact line marking the change from visitation to a modification of custody in cases involving children. Yet the time comes when the difference is apparent and must be recognized."[61]

During the survey period the courts continued to wrestle with the problem of how much of a change in the time a child is allowed with one of his parents amounts to a change of custody rather than a modification of visitation. As pointed out in the last Family Law *Survey* Article,[62] serious consequences attach to this dichotomy. It is generally accepted that the divorcing court has continuing jurisdiction for modification of visitation while a change of custody requires a new and independent suit in which the defendant can file a plea of privilege to be sued in the county of his residence.[63]

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[56] Caldwell v. Caldwell, 423 S.W.2d 140 (Tex. Civ. App. 1967).
[57] Griggs v. Griggs, 428 S.W.2d 165 (Tex. Civ. App. 1968).
[58] McGlathery v. McGlathery, 429 S.W.2d 187 (Tex. Civ. App. 1968).
[59] Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[60] Pavlas v. Pavlas, 428 S.W.2d 880 (Tex. Civ. App. 1968).
[61] Leaverton v. Leaverton, 417 S.W.2d 82, 85 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[62] Smith, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 118 (1968).
[63] *Id.*

The critical point at which a modification of visitation becomes a change of custody may be the point at which the change in time involved is more than two weeks. In *Leithold v. Plass*[64] the trial court changed the original order to allow the father two weeks with the child. The Supreme Court of Texas held that this was a change of visitation only. On the other hand, a court of civil appeals held that a change to allow the father to have the child on Saturday and Sunday for two weekends each month was a change of custody, not a clarification of visitation rights.[65] The court relied on *Leithold* and *Leaverton v. Leaverton*,[66] a civil appeals case which interpreted *Leithold* to mean that a change involving four weeks a year, as opposed to the two weeks involved in *Leithold*, would be a change in custody, not visitation.

That the light from *Leithold* is dim, at best, is shown by yet another case[67] which purports to follow it. The father was given the right to visit the children in their home each weekend and to have them with him at his home for two weeks each summer. This was held to change visitation rights only. The key may be the fact that on the weekend visits, the father was required to visit them in the home of the mother. He was given the complete care and control of the children[68] in his own home for two weeks only—the supposed magic figure.

Today's high mobility brought the usual crop of interstate cases. One[69] reiterated the proposition laid down in *Williams v. North Carolina*[70] and *May v. Anderson*[71] that when full faith and credit is sought for a divorce or custody decision in forum one, the opposing party is entitled to an independent determination in forum two of whether forum one had jurisdiction. In this case the mother contended that she had established a Texas domicile before citation was served in a New York action in which custody of the children was awarded to the father. The mother had actual notice of the New York action and had an attorney present as an observer, but she was not served in New York and did not enter an appearance in the New York action. The Texas court held that Texas could not give full faith and credit to the New York judgment without first making an independent finding of whether the New York court had in personam jurisdiction over the mother.

As is usual in custody cases, the decisions showed a strong tendency by the appellate courts to uphold the decisions of the trial courts, even if the lower court decision had the effect of depriving a natural parent of

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[64] 413 S.W.2d 698 (Tex. 1967).

[65] Eddins v. Tarvin, 429 S.W.2d 689 (Tex. Civ. App. 1968). *See* discussion of case in Smith, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 123 (1968).

[66] 417 S.W.2d 82 (Tex. Civ. App. 1967).

[67] Staples v. Staples, 423 S.W.2d 166 (Tex. Civ. App. 1967).

[68] *Leithold* held that the period of time the 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." 413 S.W.2d at 700.

[69] Spitzmiller v. Spitzmiller, 429 S.W.2d 557 (Tex. Civ. App. 1968), *error ref. n.r.e.*

[70] 325 U.S. 226 (1945).

[71] 345 U.S. 528 (1953).

the child's custody.[72] Another indication that the rights of a natural parent are not beyond question was the decision that the issue of whether a child whose father had died should live with her mother or stepmother was a question for the jury.[73] The trial court had decided in favor of the natural mother.

In *Ex Parte Hooks*[74] the supreme court held that a father may be adjudged in contempt for non-support of his children after the children have reached eighteen if the unpaid support accrued and the court's order was entered before the children reached eighteen. *Hooks* is not authority, however, for the proposition that a court may order a father to support a child after its eighteenth birthday. In *Ex Parte Williams*[75] the trial court had held the father in contempt for failure to obey an order to support children until they were twenty-one. The Supreme Court of Texas reversed, holding that the statute gives the court no authority to order support for children past eighteen.

Two other supreme court habeas corpus cases reiterated the familiar principle that a father may not be held in contempt and imprisoned for failure to perform acts or make payments he is unable to make.[76]

In the always vexatious problem of setting child support which is adequate for the children and not unduly burdensome for the father the appellate courts tended to uphold the lower courts, whether the order increased[77] or reduced[78] the sum awarded.

The quantum of evidence needed to establish a right to support was considered in a case[79] begun in Iowa under the Uniform Support of Dependents Law of that state and heard in a Harris County court of domestic relations. Plaintiff appeared only through the state's attorney who presented no testimony, witnesses, exhibits or stipulations. It was held that in the absence of evidence, the judgment that the plaintiff receive $30 per month support money was without support.

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[72] London v. London, 427 S.W.2d 319 (Tex. Civ. App. 1968), *error ref. n.r.e.* (natural father wins over natural mother); Ayala v. Waldner, 426 S.W.2d 628 (Tex. Civ. App. 1968) (foster parents win over natural parents); Tiller v. Vaillasenor, 426 S.W.2d 257 (Tex. Civ. App. 1968) (uncle wins over mother); Calhoun v. Rugger, 425 S.W.2d 50 (Tex. Civ. App. 1968) (uncle wins over natural mother).

[73] Huff v. Stafford, 429 S.W.2d 620 (Tex. Civ. App. 1968), *error dismissed.*

[74] 415 S.W.2d 166 (Tex. 1967).

[75] 420 S.W.2d 135 (Tex. 1967).

[76] *Ex parte* Ramzy, 424 S.W.2d 220 (Tex. 1968); *Ex parte* Rohleder, 424 S.W.2d 891 (Tex. 1967).

[77] Willis v. Willis, 425 S.W.2d 696 (Tex. Civ. App. 1968).

[78] Ramey v. Ramey, 425 S.W.2d 900 (Tex. Civ. App. 1968), *error dismissed*; Menzies v. Menzies, 419 S.W.2d 398 (Tex. Civ. App. 1967).

[79] Way v. Fisher, 425 S.W.2d 704 (Tex. Civ. App. 1968).