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NOTES

BINDING JURY VERDICT IN CHILD CUSTODY PROCEEDINGS: ARTICLE 4639a AMENDED

The issue of child custody in Texas can now be determined by a jury whose verdict is no longer advisory but is binding on the trial judge. Articles 4639,¹ 4639a,² 4639b,³ and 4639c⁴ are the Texas provisions concerning custody and support of the children of a divorce. Article 4639a⁵ in its original 1935 version provided in part:

Upon the trial of any . . . [divorce], and in the event a divorce is granted by the court, if there are . . . minor children, it 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 make such orders regarding the custody and support of each such child or children, as is for the best interest of same. . . .

House Bill 436 of the 57th Legislature, effective June 14, 1961, amended article 4639a by adding to the above language the following:

provided, however, that the judgment of the court in a jury trial of a divorce cause may not contravene the jury's determination of child custody. In any hearing held in this State concerning the custody of a child, whether pursuant to a divorce cause or not, any party to the hearing may, upon assumption of jury costs, demand a jury to determine custody of the child, and the judgment of the court must conform to that determination.⁶

This amendment reverses the general principle that the trial judge, sitting as a chancellor, determines the custody of a minor. Prior to this time whenever a jury was used its verdict was merely advisory, and the judge in his discretion could disregard it.⁷ Under the new amendment, not only is this power denied the judge, but a jury trial is allowed in child custody cases as a matter of right.

Historically, the determination of the custody of minor children

¹ Tex. Rev. Civ. Stat. Ann. (1960).

² *Ibid* (providing that in a divorce action the court shall enter an order for the custody and support of all children under 18 years of age born of the marriage).

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ Tex. Rev. Civ. Stat. Ann. (Supp. 1961).

⁷ "In determining the custody of a child, a court exercises a sound discretion, and its determination will not be disturbed unless abuse of discretion is clearly shown." 1 Speer, *Marital Rights in Texas* 169 (4th ed. 1961), citing *In re Belcher*, 155 Tex. 560, 289 S.W.2d 915 (1956); *Clark v. Spradlin*, 301 S.W.2d 216 (Tex. Civ. App. 1957—Texarkana) *no writ hist.*, and others.

was a well-recognized branch of equity.⁸ The origin of that practice may be traced to the delegation to the chancery by the English crown of its duty to protect the helpless as *parens patriae*.⁹ Generally, in all equitable proceedings there has never been a right to a jury trial unless that right has been expressly provided by constitution or statute.¹⁰ The chancellor has the authority to exercise a broad discretion, and this principle is followed in each American state irrespective of whether there is a merger of law and equity in that jurisdiction.¹¹ The general rule that has evolved is that

in child custody cases, the proceeding is an equitable one in which the trial judge sits as a chancellor, and in which technical rules of practice, procedure, and evidence are of little importance and may be disregarded. Jury findings are advisory only, and not binding on the trial judge. Great latitude in the admission of evidence is permissible; the children should be permitted to testify, and where the parties agree to *ex parte* interviews and conferences between the court and the children, they may not complain because the court gave weight to relevant information acquired therefrom.¹²

Every American jurisdiction has some legislation relating to the general issue of custody, and without exception the statutes make the court's power over such proceedings a discretionary one.¹³ No state other than Texas allows a jury trial as a matter of right.¹⁴ Even though the Texas Constitution takes a very liberal view of the right to trial by jury,¹⁵ the extension of the right to all child custody actions is unique.

⁸ While the English courts of equity had from the start the exclusive power to appoint guardians of minor children, the issue of custody pursuant to a divorce was within the jurisdiction of the ecclesiastical courts until 1857 when Parliament created the Probate and Divorce Division of the High Court of Justice. 17 Am. Jur. *Divorce and Separation* § 275 (1939).

⁹ Simkins, *Equity* 24 (2d ed. 1911); 19 Am. Jur. *Equity* § 179 (1939).

¹⁰ *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N.Y. 365 (1879); Note, 7 Texas L. Rev. 663 (1929).

¹¹ "A court of chancery undoubtedly has, by reason of its nature and constitution, ample power to decide every question of law or fact that comes before it. . . ." 19 Am. Jur. *Equity* § 398, at 272 (1939). See also 27B C.J.S. *Divorce* §§ 303, 310 (1959).

¹² 3 Speer, *Marital Rights in Texas* 211-12 (4th ed. 1961).

¹³ "No doubt the court would have a general discretionary power in the matter, either by virtue of its common-law or equity powers, or under the . . . statutes." 2 Vernier, *American Family Laws* 192 (1936).

¹⁴ See 27B C.J.S. *Divorce* § 303 (1959).

¹⁵ Tex. Const. art. I, § 15 provides that: "the right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Article V, § 8 provides that the district court shall have original jurisdiction and general control over guardians and minors under such regulations as may be prescribed by law. Section 10 of art. V confers the right of jury trial in all causes in the district court.

The first case testing article 4639a as amended is *Carter v. Carter*, ___ S.W.2d ___ (Tex. Civ. App. 1962—Waco) *writ pending*. The majority upheld the constitutionality of H.B. 436, but Associate Justice Jake Tirey, who wrote the court's opinion, disagreed.

In the following comparatively unrelated proceedings, the issue of child custody may now be determined in Texas by the verdict of a jury:¹⁶ (a) divorce, (b) habeas corpus, (c) declaring a child "dependent or neglected," (d) guardianship, and possibly (e) adoption.

a. *Divorce Actions*.—In a divorce action the determination of the custody of children is in the nature of an ancillary proceeding,¹⁷ and it has even been held¹⁸ that such determination may be made when a divorce has been denied. Although article 4632¹⁹ provides that either party to a divorce action may demand a jury trial, the cases have held that to a certain extent the jury findings are not binding on the trial judge.²⁰ Moreover, the courts have unqualifiedly held

Basing his argument on art. V, § 8 of the Texas Constitution, Justice Tiley stated that art. 4639a as amended is unconstitutional because ". . . the framers of our Constitution did not intend that our Legislature would have the power to take the care, custody and control of children away from a trained judiciary. . . ." The construction and interpretation which has been uniformly given to § 8 is that it clothes the district court with the old common law chancery jurisdiction of general control over guardians and minors. Therefore, the clause in § 8 which gives the district court "original jurisdiction and general control over . . . minors under such regulations as may be prescribed by law . . ." can only be construed as enabling the legislature

to enact such laws relating to procedural matters so that the court would have all necessary process, as will enable the court to effectively exercise its general control and jurisdiction. Any other construction would be too broad, and would authorize the Legislature to enact the amendment under consideration, the effect of which is to be in open and irreconcilable conflict with the general control of minors provided for by the section under consideration. . . .

One cannot invoke the jurisdiction of the court to deal with the personal status or the person of a child and at the same time deny the power of the court . . . to do with the child's person . . . whatever appears to the court to be for the best interest of the child. . . . Yet the legislature by the amendment, places the well-being and future status of the child solely in the hands of the jury, and makes the district court impotent to do what it believes to be for the best welfare of the child. . . .

¹⁶ Even though the amendment directly affects only a statute regarding custody in a divorce proceeding, it clearly appears that the legislature did not intend to limit the rule of a binding jury verdict to a divorce proceeding. The statute provides for a jury ". . . in any hearing . . . pursuant to a divorce cause or not. . . ." Tex. Rev. Civ. Stat. Ann. art. 4639a (Supp. 1961). Before the amendment was enacted, the courts consistently reached the same results, *i.e.*, the verdict of a jury was merely advisory in child custody hearings regardless of the type of proceeding. *Kesler v. McGuire*, 109 S.W.2d 1115 (Tex. Civ. App. 1937—Eastland) *no writ hist.*; *Northcutt v. Northcutt*, 287 S.W. 515 (Tex. Civ. App. 1926—Eastland) *error dismissed*; see Note, 16 Texas L. Rev. 581 (1938).

¹⁷ *Speer, op. cit. supra* note 7, at 210, citing *McClendon v. McClendon*, 289 S.W.2d 640 (Tex. Civ. App. 1956—Ft. Worth) *no writ hist.*

¹⁸ *Speer, op. cit. supra* note 7, at 210, citing *Boggs v. Boggs*, 306 S.W.2d 237 (Tex. Civ. App. 1957—Amarillo) *no writ hist.*; see Annot., 113 A.L.R. 901 (1938); 151 A.L.R. 1380 (1944).

¹⁹ Tex. Rev. Civ. Stat. Ann. (1960).

²⁰ "While findings of a jury in a divorce case are advisory only, it is the duty of the court, where evidence warrants, to submit such issues to the jury and secure jury findings on such facts and the failure to do so is reversible error." *Zuniga v. Zuniga*, 244 S.W.2d 270 (Tex. Civ. App. 1951—San Antonio) *no writ hist.*, see generally Feild, Texas Divorce (1940).

that where the custody of the children was in issue, the jury's verdict was advisory, and only a showing of a flagrant abuse of discretion by the trial judge, whether he followed the advice of the jury or not, would effect a reversal.²¹ In fact, the use of a jury had been discouraged since the trial court was specifically given power to determine which parent got custody under articles 4639²² and 4639a.²³ But in *Wright v. Wright*²⁴ the court relaxed this objection because

the statute itself does not seem to expressly forbid the submission of the issue as to the custody . . . to a jury, and the word "court" . . . could . . . be held to include a trial by jury. . . . We see no impropriety, if the court desires the assistance of a jury in aiding him in the determination of any matter of fact in issue, in submitting the same for the finding of a jury. . . . [However], the verdict is not conclusive upon the court. . . .²⁵ (Emphasis added.)

Later, in *Lawler v. Lawler*²⁶ it was made clear that even if a jury was employed to assist the trial judge, the latter must also act as an independent fact-finder. The court in *Lawler* noted that

the court recited in his judgment that he considered *all the evidence* in connection with the answer returned by the jury to said issue, and [the court] *found as a fact* that appellee was a fit and proper person and that the interests and welfare of said children would be best subserved in her care, custody and control.²⁷ (Emphasis added.)

b. *Writs of Habeas Corpus*.—In cases not involving divorce, the use of a writ of habeas corpus has become the customary procedure for determining the rights of contending parties claiming custody of a child.²⁸ Although this remedy is theoretically based on the improper restraint of the child, the court upon obtaining jurisdiction

²¹ *Winzer v. Winzer*, 317 S.W.2d 810 (Tex. Civ. App. 1958—Beaumont) *no writ hist.*; *Boggs v. Boggs*, 306 S.W.2d 237 (Tex. Civ. App. 1957—Amarillo) *no writ hist.*; *Neal v. Medcalf*, 244 S.W.2d 666 (Tex. Civ. App. 1951—El Paso) *no writ hist.*; *Northcutt v. Northcutt*, 287 S.W. 515 (Tex. Civ. App. 1926—Eastland) *error dism'd*; *Kentz v. Kentz*, 209 S.W. 200 (Tex. Civ. App. 1919—Amarillo) *no writ hist.*; see Note, 16 Texas L. Rev. 581 (1938).

²² Tex. Rev. Civ. Stat. Ann. (1960). This article states, in part, that
The court shall have power, in all divorce suits, to give the custody and education of the children to either father or mother, as the court shall deem right and proper . . . and . . . to issue any injunction or make any order that the safety and well-being of any such children may require.

²³ Tex. Rev. Civ. Stat. Ann. (1960), as applied before H.B. 436.

²⁴ 110 S.W. 158 (Tex. Civ. App. 1908) *no writ hist.*

²⁵ *Id.* at 160.

²⁶ 15 S.W.2d 684 (Tex. Civ. App. 1929—Waco) *no writ hist.*

²⁷ *Id.* at 685.

²⁸ *Legate v. Legate*, 87 Tex. 248, 28 S.W. 281 (1894); *Tunnell v. Reeves*, 35 S.W.2d 707 (Tex. Comm. App. 1931); *Long v. Smith*, 162 S.W. 25 (Tex. Civ. App. 1914—Amarillo) *no writ hist.*

of the matter will go much further; it will determine all questions which arise concerning the right to custody.²⁹ There had never been a right to a jury trial in a habeas corpus proceeding because there was no such right at common law at the time of adoption of the constitution.³⁰ Such a proceeding is not a "cause" within the meaning of article V, section 10 of the Texas Constitution,³¹ and it was felt that a demand for a jury would so delay the hearing that its effectiveness would be greatly impaired.³² However, it was within the authority of the court to impanel a jury and to require it to make a finding which might be used in an advisory way.³³

c. *Proceedings to Declare a Child "Dependent or Neglected."*—Article 2330³⁴ establishes a proceeding in which a child may be declared (under specified circumstances) "dependent or neglected," but regardless of the finding, the question of the child's future custody will be determined. Article 2334³⁵ provides for a jury trial in such a proceeding. The cases have construed the right to a jury strictly by holding that a finding of a jury with respect to whether or not a minor is a dependent or neglected child as defined in the act, if supported by the evidence, is binding on the court. However, the trial court was *not* bound to award custody to persons whom the jury determine are fit to have the care and custody of the children, and some cases held that the court could even refuse to permit a jury trial.³⁶

d. *Guardianship Proceedings.*—A guardian is a statutory officer appointed by the probate court to protect the interests of a minor and provide for the ward's education and maintenance.³⁷ The Texas Probate Code³⁸ provides a procedure in the nature of a civil action whereby a guardian can be appointed for a minor. The Probate Code

²⁹ Legate v. Legate, *supra* note 28; Tunnell v. Reeves, *supra* note 28.

³⁰ Ex parte Eller, 71 Tex. Crim. Rep. 285, 158 S.W. 1145 (1913); Burckhalter v. Conyer, 9 S.W.2d 1029 (Tex. Comm. App. 1928), noted in 7 Texas L. Rev. 663 (1929); Joseph v. Puryear, 273 S.W. 974 (Tex. Civ. App. 1925—Austin) *no writ hist.*; Foster v. Foster, 230 S.W. 1064 (Tex. Civ. App. 1921—Galveston) *error dism'd*; Pittman v. Byers, 112 S.W. 102 (Tex. Civ. App. 1908) *no writ hist.*; Note, 16 Texas L. Rev. 581 (1938).

³¹ Tex. Const. art. V, § 10 confers the right of jury trial in all causes in the district courts. "Habeas corpus is a writ of right. . . ." Burckhalter v. Conyer, *supra* note 30.

³² Burckhalter v. Conyer, 9 S.W.2d 1029 (Tex. Comm. App. 1928).

³³ Duckworth v. Thompson, 37 S.W.2d 731 (Tex. Comm. App. 1931); see Harris, *Jury Trial in Civil Cases—A Problem in Constitutional Interpretation*, 7 Sw. L.J. 1 (1953).

³⁴ Tex. Rev. Civ. Stat. Ann. (1950).

³⁵ *Ibid.*

³⁶ Booker v. Cameron County Child Welfare Unit, 320 S.W.2d 150 (Tex. Civ. App. 1959—San Antonio) *no writ hist.*; Bee v. Robbins, 303 S.W.2d 827 (Tex. Civ. App. 1957—Dallas) *no writ hist.*

³⁷ 21 Tex. Jur. *Guardian and Ward* § 2 (1939).

³⁸ Tex. Prob. Code § 7 (1956).

further provides that "the rights, powers and duties of . . . guardians shall be governed by the principles of the common law, when the same do not conflict with the provisions of the statutes of this State."³⁹ The Texas Constitution⁴⁰ gives the county court original jurisdiction over probate proceedings, including appointment of guardians, with appellate jurisdiction in the district court.⁴¹ But since the constitution also gives the district court the *exclusive* power to determine controversies over the custody of minors,⁴² the rule is that *the right to custody* of a minor cannot be finally determined in a proceeding for the appointment of a guardian in the county court.⁴³ Now, in the event an appeal of such appointment is taken to the district court, or the proceeding for appointment arises originally in the district court, the litigants should be entitled to a trial by jury as granted by House Bill 436.⁴⁴

e. *Adoption Proceedings*.—Adoption proceedings are governed rather strictly⁴⁵ in Texas by articles 46a,⁴⁶ 46b,⁴⁷ and 46b-1.⁴⁸ The

³⁹ Tex. Prob. Code § 32 (1956).

⁴⁰ Tex. Const. art. V, § 16.

⁴¹ Tex. Const. art. V, § 8 provides that "the District Court shall have appellate jurisdiction and general control in probate matters over the County Court . . . for appointing guardians, . . . and original jurisdiction and general control over . . . guardians and minors under such regulations as may be prescribed by law. . . ."

Section 21 of the Texas Probate Code provides that:

There shall be no trial by jury in probate matters in the county court except in proceedings involving persons of unsound mind and habitual drunkards. In proceedings in the District Court, by appeal or otherwise, the parties shall be entitled to trial by jury as in other civil actions in the District Court.

⁴² Tex. Const. art. V, § 8.

⁴³ In *Thomason v. McGeorge*, 285 S.W. 285 (Tex. Comm. App. 1926) it was said that the district court may interfere by wresting a minor from a guardian and may award its custody elsewhere. In *Whittenberg v. Craven*, 258 S.W. 152 (Tex. Comm. App. 1924) it was stated that no provision of the constitution provides for concurrent jurisdiction in the district court and the county court over the custody and control of minors, and that the statutes are void insofar as they attempt to confer upon the county court authority to determine the custody and control of minors. In *Anderson v. Cossey*, 214 S.W. 624 (Tex. Civ. App. 1919—Ft. Worth) *no writ hist.*, it was held that the right to the custody of the minor is a question over which a court of equity has jurisdiction, and an order and judgment of the county court awarding the care and custody to a designated person does not preclude the district court from entertaining jurisdiction, where it is made to appear that the best interests of the minor—the paramount consideration—demand that custody should be changed. Finally, in *Worden v. Worden*, 148 Tex. 356, 224 S.W.2d 187 (1949), the supreme court held that the powers of the district court to award custody and to appoint and supervise guardians of the persons of minors are independent of and superior to the powers of county courts.

⁴⁴ Acts 1961, ch. 305.

⁴⁵ "While adoption statutes are to be liberally construed in favor of minors in order to effectuate their beneficial purpose . . . the rule of strict construction applies in favor of a non-consenting parent." *Stinson v. Rasco*, 316 S.W.2d 900, 905 (Tex. Civ. App. 1958—Dallas) *no writ hist.*

⁴⁶ Tex. Rev. Civ. Stat. Ann. (Supp. 1961).

⁴⁷ Tex. Rev. Civ. Stat. Ann. (1959).

⁴⁸ *Ibid.*

only method of adoption is that prescribed by the statutes⁴⁹ since it was unknown at common law,⁵⁰ and there must be compliance with all the conditions imposed by the legislature. Therefore, the right to a jury trial in a contested adoption proceeding has been denied since (a) adoption was unknown to the common law, and (b) the present adoption statutes have no provisions for a jury trial.⁵¹ However, a distinction may be drawn between obtaining custody of a child and adopting a child.⁵² In the latter instance, the rights, duties, and obligations of the natural parents are finally assumed by the adopting parents;⁵³ whereas, a custody decree is subject to alteration with changing circumstances. Since the state has an interest in the well-being of children within its jurisdiction, it may prescribe by statute any reasonable test and standard which will best serve a child's interests and welfare.⁵⁴ Whether the right to a jury trial which is granted by House Bill 436⁵⁵ will be read into the adoption statutes depends upon the somewhat unpredictable process of judicial interpretation.

In considering the above items (except adoption), it should be noted that in accordance with equity practices a prior custody decree is subject to modification at any time upon proper showing.⁵⁶ Just as in the initial proceeding, any finding of a jury in the rehearing was formerly advisory.⁵⁷ However, now it appears that House Bill 436⁵⁸ will entitle litigants to a jury trial in a rehearing when that right is granted in the initial proceeding.

The policy behind the consistent denial of a jury trial as a matter of right in these actions seems to be based upon the responsibility which the state has for the well-being of minor children. The courts,

⁴⁹ Tex. Rev. Civ. Stat. Ann. arts. 46a (Supp. 1961), 46b, 46b-1 (1959).

⁵⁰ 1 Speer, *Marital Rights in Texas* 215 (4th ed. 1961); *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App. 1951—Austin) *error ref.*

⁵¹ *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App. 1951—Austin) *error ref.*, in which the court also stated, at 839, that "article 46a . . . validly and plainly makes it the duty of the trial court or judge, as distinguished from a jury, to grant or deny a petition for adoption as in his discretion the facts and welfare of the child require," and cited *Oldfield v. Campbell*, 191 S.W.2d 897 (Tex. Civ. App. 1946—Waco) *no writ hist.*

⁵² In *Stinson v. Rasco*, 316 S.W.2d 900 (Tex. Civ. App. 1958—Dallas) *no writ hist.* it was held that an adoption proceeding may not be used to determine the right to custody. See also 1 Speer, *op. cit. supra* note 50, at 212.

⁵³ *Sims v. Sims*, 62 S.W.2d 495 (Tex. Civ. App. 1933—Galveston) *error disp'd.*

⁵⁴ *Brooks v. DeWitt*, 143 Tex. 122, 182 S.W.2d 687 (1944).

⁵⁵ Acts 1961, ch. 305.

⁵⁶ There must be an allegation that the circumstances surrounding the child have changed in such a manner that his best interests are no longer served. This amounts to a new action; without a showing of changed circumstances the issue is *res judicata*. 1 Speer, *op. cit. supra* note 50, at 212.

⁵⁷ *Oldfield v. Campbell*, 191 S.W.2d 897 (Tex. Civ. App. 1946—Waco) *no writ hist.*

⁵⁸ Acts 1961, ch. 305.

rather than juries, perform the function historically assumed by the chancellor. Since it is everywhere accepted that "the interest and future of the child is paramount to all other considerations,"⁵⁹ it can be argued that this interest lies exclusively within the jurisdiction of the courts to protect. In this sense, a child custody case is not a "cause" within the meaning of the constitution.⁶⁰

There were three purposes⁶¹ espoused by the legislature for the enactment of the new amendment:⁶² (1) The issue of who is best suited to take custody of a child is a question of fact, hence clearly within the realm of a jury. Since the law regards both parents as equally entitled to custody of the child,⁶³ the jury should be allowed to determine from the facts which parent, or third person, can best perform that function. (2) A jury is more "equitable." Since both parents are equally entitled to custody, one may argue that each should have the burden of proving that the other is less able to provide for the child's welfare. However, prior to the new amendment⁶⁴ the practice arose among trial judges of awarding a child to the mother, unless she was shown to be unfit to assume such responsibilities.⁶⁵ (3) Statistics of the Texas Youth Council⁶⁶ show that of those children adjudged delinquent who lived with one parent only, nineteen per cent of the total lived with the mother; whereas, only four per cent of the total lived with the father.⁶⁷ Thus, the primary intent of the legislature appears to be the elimination of the presumption favoring the mother.

House Bill 436 amending article 4639a⁶⁸ has provoked much controversy among the bench and the bar. Many practicing attorneys,

⁵⁹ *Northcutt v. Northcutt*, 287 S.W. 515, 516 (Tex. Civ. App. 1926—Eastland) *error dismissed*.

⁶⁰ Tex. Const. art. V, § 10 confers the right of jury trial in all *causes* in the district courts. See *Harris, op. cit. supra* note 33, at 9-12.

⁶¹ The reasons given here were orally stated in an interview with Rep. Ben E. Lewis, Dallas, who drafted and introduced the bill into the Texas House of Representatives. The original bill limited the binding verdict of the jury to the custody issue in divorce proceedings. Representative Fairchild suggested from the House floor that the bill be broadened to include "any custody proceeding, whether pursuant to a divorce or not," and in this revised form it passed the House by a vote of 146-1. The Senate voted 24-5 for the provision as amended. See Senate Journal of May 24, 1961, and House Journal of May 18, 1961.

⁶² H.B. 436, Acts 1961, ch. 305.

⁶³ Tex. Rev. Civ. Stat. Ann. art. 4639 (1960) provides: "The court shall have power, in all divorce suits, to give custody . . . of the children to either father or mother, as the court shall deem right and proper. . . ."

⁶⁴ H.B. 436, Acts 1961, ch. 305.

⁶⁵ *Murphey v. Walker*, 209 S.W.2d 371 (Tex. Civ. App. 1948—Amarillo) *no writ hist.*; *Redwine v. Redwine*, 198 S.W.2d 472 (Tex. Civ. App. 1947—Amarillo) *no writ hist.*

⁶⁶ Texas Youth Council Ann. Rep. to the Governor 43 (1961).

⁶⁷ Since admittedly the great majority of children of divorced parents live with the mother, these statistics do not appear too reliable.

⁶⁸ Tex. Rev. Civ. Stat. Ann. (Supp. 1961).

along with most legislators, generally favor it, agreeing that the issue of custody, being one of fact, is properly for a jury. "There is, seemingly, security in the sometimes-prejudiced, sometimes-confused, sometimes-inaccurate verdict of jurors. They have a way of reaching a just result, even if they fail now and then to make a right decision."⁶⁹ Critics of the new law include judges who object to the vulnerability of juries to trial strategies and their tendency to be subjective and emotional. Federal District Judge Sarah T. Hughes stated:

This requirement that the judgment cannot contravene the jury's determination of child custody . . . is a backward step in the handling of children, a judge being better qualified through experience gained from many hearings to determine such matters in the best interest of the child.⁷⁰

The members of the Family Law Section of the State Bar of Texas have unanimously approved a proposed new act to amend article 4639a⁷¹ by eliminating the provisions making the judgment conform to a jury's verdict and by eliminating the provision permitting demand for a jury trial in child custody cases. At this writing the proposed act is under consideration by the Board of Directors of the State Bar of Texas as to possible endorsement to the next legislature.

It appears that the 57th Legislature intended to establish a basic policy in the handling of child custody cases. Nullifying a long line of unqualified decisions, the legislature revoked the trial judge's traditional discretionary power along with his presumption favoring the mother as the parent best qualified to protect a child's interests. Before a jury the contending sides will now get equal consideration. However, it is purely conjectural that juries will not harbor similar prejudices in favor of the mother. It is submitted that even if the new amendment is held constitutional, it is nevertheless undesirable to allow mandatory and binding jury verdicts in child custody cases merely on the speculation that fathers will obtain more impartial treatment at the hands of a jury.

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⁶⁹ Harris, *supra* note 33, at 19.

⁷⁰ Hughes, *Problems Concerning Children Arising From Conflict in Marriage*, 24 Tex. B.J. 925, 1001 (1961).

⁷¹ Tex. Rev. Civ. Stat. Ann. (Supp. 1961).