Family Law: Parent and Child
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EACH year the volume of cases concerning parent and child increases. This year was no exception, but the increase does not indicate any change in the substantive law or any establishment of new rights or privileges for either parent or child. The increase in litigation in this area is a natural consequence of the higher divorce rate, since every divorce involving children contains the seeds for possible further litigation. The problems concerning children who are at risk still trouble the courts, and it is hoped that some resolution of the tensions between the rights of parents versus those of their children will be made in the forthcoming year by the United States Supreme Court, the Texas Supreme Court, or the Texas Legislature.

I. UNITED STATES SUPREME COURT DECISIONS

In *Quilloin v. Walcott* the Supreme Court continued its constitutional analysis of the rights of fathers of illegitimate children that it began in *Stanley v. Illinois*. In *Stanley* the Court held that a father of illegitimate children "was entitled to a hearing on his fitness as a parent before his children were taken from him." *Quilloin* addressed the right of a father to prevent the adoption of his illegitimate children even though he never had and did not desire to have custody. *Quilloin* arose in Georgia as a stepparent adoption proceeding in which the wife-mother had consented to her husband's adoption of her child. Under Georgia law only the consent of the mother is required for the adoption of an illegitimate child. The natural father was notified of the adoption petition and counter-petitioned for legitimation. The court held extensive hearings and found that adoption, rather than legitimation, was in the best interests of the child. Under Georgia law, therefore, the natural father could not block the adoption. The natural father contended on appeal that since no finding had been made that he was unfit as a father, he should have the same right to prevent the adoption as is provided a legal father. Appellant asserted that he was denied equal protection of the law because his interests were indistin-

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2. 405 U.S. 645 (1972).
3. *Id.* at 649.
guishable from those of a married father who is either separated or divorced from the mother and is no longer living with his child. The Court distinguished married and unmarried fathers on the facts of this case, noting that the unmarried father had never exercised actual or legal custody over his child and had never shouldered any significant responsibility with respect to daily supervision or care of the child. The Court appears to have established a presumption that during marriage a father "will have borne full responsibility for the rearing of his children." This presumption of responsibility is consistent with differences in dependency presumptions permitted between legitimate and illegitimate children in social security cases. Quilloin may be seen, however, as signaling the narrowing of the scope of protection afforded illegitimates and their parents from the apparent widening in Trimble v. Gordon.

The Court pointed out this term in Lalli v. Lalli that the standard for determining whether or not there has been a violation of equal protection for illegitimates has not been one of "strict scrutiny," but rather one of a rational relationship to a legitimate state purpose. On the surface the facts in Lalli appear to be the same as those in Trimble, except that Lalli concerns a New York statute and Trimble an Illinois statute. The facts of the cases are distinguishable, however, since the father in Trimble had gone through a court paternity proceeding prior to death, whereas the father in Lalli had not. Despite the paternity finding in Trimble, the Illinois intestate succession statute precluded any recovery for the illegitimate child because the parents had not married each other prior to the death of the father. New York, on the other hand, does not require marriage as a prerequisite to intestate succession; it requires only a court adjudication of paternity during the father's lifetime. New York's argument for a finding of a rational relationship between the requirement of a court proceeding during a father's lifetime and a determination of heirship was based primarily on administrative exigency, in that the method prescribed by its statute is intended to provide an orderly distribution of estates. In Trimble, on the other hand, Illinois related its law only to an interest in encouraging legitimate family relationships. The Court in Lalli found New York's argument persuasive, and held that, in equal protection decisions relating to illegitimates, the standard to be used is one in which a substan-

5. The question of support was not raised since the mother had not requested it and apparently the father had not offered it.
6. 434 U.S. at 256.
10. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2(a)(2) (McKinney 1967) provides:

An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

The statute of limitations issue, which is implicit in this statute, was not raised or discussed.
tial state interest is promoted by a procedure related to that interest in a manner not "so tenuous that it lacks the rationality contemplated by the fourteenth amendment."\(^{11}\)

The decision in *Lalli* was essentially a five-to-four decision, with Mr. Justice Powell, who wrote the Court opinion in both *Trimble* and *Lalli*, the swing Justice. Justice Blackmun, noting in his concurrence in *Lalli*\(^ {12}\) that the facts of *Lalli* and *Trimble* were indistinguishable, urged that *Trimble* be overruled. He concurred, nonetheless, because the Court was returning to the principles established in *Labine v. Vincent*.\(^ {13}\) *Labine* held, essentially, that so long as there is no total exclusion of illegitimates from the possibility of heirship, the several states are free to determine their own procedures for intestate succession.\(^ {14}\)

The Court's continued high regard for marriage is underscored by its decision in *Zablocki v. Redhail*,\(^ {15}\) which struck down as a denial of equal protection a Wisconsin statute that denied the right to marry to persons who owed child support payments.\(^ {16}\) The case was brought by a young man who had been found to be the natural father of an illegitimate child and ordered to pay child support by a Wisconsin court. Approximately two years after the order he applied for a marriage license, which was denied because he had not obtained a court order granting him permission to marry. The parties to the action stipulated that the father would not have been able to obtain the necessary court order because he was in arrears on his child support obligation and that the child had been a public charge since birth. The father's situation, however, was urgent in that he and the woman he intended to marry were expecting a child and they wanted to be lawfully married before the date of the expected birth. The Court found the statute unconstitutional, holding that the right to marry is a fundamental right, and a state may not interfere with the exercise of a fundamental right unless that interference will effectuate an important state interest. While realizing that the state's interest in the support of children is a legitimate and substantial interest, the Court questioned the means of effectuating that interest and found that limiting marriage was an underinclusive method for preventing the incurrence of new support obligations.

The fact that the support of children is a substantial state interest, but not a fundamental right, was further underscored in *Kulko v. Superior*...
in which the Court held that California offended traditional notions of fair play and substantial justice by asserting in personam jurisdiction over a father who had done no more than permit his children to reside in California with their mother. The couple established their marital domicile in New York, executed a separation agreement in New York, and procured a divorce in Haiti under a decree that incorporated the terms of the separation agreement. The mother then moved to California where she remarried.

Under the terms of the agreement the children were to reside with their father during the school year, and were to visit with their mother during Christmas, Easter, and summer vacations. The father was obligated to pay $3,000 per year in child support for the periods of time the children spent with their mother, but had no obligation to support the mother. Subsequently, the daughter told her father that she wanted to reside permanently with her mother and the father bought her a one-way ticket to California. The daughter reversed the agreed visitation agreement by spending the school year with her mother and vacations with her father. Three years later the son, unknown to his father, expressed to his mother the desire to live with her in California, and she sent him a plane ticket. Less than a month after the son arrived in California the mother commenced an action against the father in the California courts, seeking to establish the Haitian divorce decree as a California judgment and to modify the decree as to custody and support. The father appeared specially and moved to quash the service of process on the ground that he was not a resident of California and lacked sufficient “minimum contacts” with the state to warrant the state’s assertion of personal jurisdiction.

Justice Marshall, writing for the Court, found that the father, by merely buying his daughter a ticket to California, had not purposefully availed himself of the benefits and protections of California law so as to confer personal jurisdiction over him. The Court noted a distinction between family relations and commercial activity or tortious conduct, apparently requiring a lower standard of minimum contacts in commercial or tort cases than in domestic relations cases. The Court pointed out that be-
cause both California and New York have enacted some form of the Uniform Reciprocal Enforcement of Support Act.\textsuperscript{22} the mother had an avenue for redress, notwithstanding the unavailability of jurisdiction in the California courts.

The case is significant because it establishes some limit on the reach of the Texas Family Code long-arm provision.\textsuperscript{23} While California does not have a specific parent-child related long-arm statute, it does have a general statute that is intended to extend as far as the United States Constitution will permit.\textsuperscript{24} Although the Texas parent-child long-arm statute has a similar provision,\textsuperscript{25} it also contains specific language that appears to provide for jurisdiction based on facts similar to the facts on which the exercise of jurisdiction was found unconstitutional in \textit{Kulko}.\textsuperscript{26} Notably, the lack of a specific statutory basis for jurisdiction did not appear to be a factor in \textit{Kulko}.

\section*{II. Status}

Status as a tuition-free student in Texas public schools is granted to school age children who are citizens or legally admitted aliens.\textsuperscript{27} Illegal alien children, however, are not accorded this right, although many school districts permit them to attend school upon the payment of tuition. In \textit{Hernandez v. Houston Independent School District}\textsuperscript{28} the court addressed the constitutionality of denying a tuition-free education to illegal aliens. Relying on \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{29} the court held that the denial of a free education is not a denial of a fundamental right, and therefore, a system that distinguishes between legal and illegal residents need not be subjected to strict judicial scrutiny.\textsuperscript{30} The constitutional test, therefore, is whether a rational relationship exists between the state action in denying certain rights and furthering a legitimate state pur-

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\item \textsuperscript{24} "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." \textit{Cal. Code Civ. Proc.} § 410.10 (West 1973).
\item \textsuperscript{25} A Texas court may exercise in personam jurisdiction over a nonresident or nondomiciliary of Texas if "there is any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction." \textit{Tex. Fam. Code Ann.} § 11.051(4) (Vernon Supp. 1978-79).
\item \textsuperscript{26} A Texas court may exercise in personam jurisdiction over a nonresident or nondomiciliary of Texas if "the child resides in this state . . . as a result of the acts or directives or with the approval of the person on whom service is required." \textit{Id.} § 11.051(2) (emphasis added).
\item \textsuperscript{27} \textit{Tex. Educ. Code} § 21.031 (Vernon 1972).
\item \textsuperscript{28} 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
\item \textsuperscript{29} 411 U.S. 1 (1973).
\item \textsuperscript{30} Although classifications based on alienage are per se suspect and subject to strict judicial scrutiny, the court in \textit{Hernandez} found that \textit{Tex. Educ. Code} § 21.031 (Vernon 1972) does not concern alienage, "but instead [deals] with a class based upon residence within the United States in violation of the law." 558 S.W.2d at 124.
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pose. Noting that the revenue available for public education is limited, the court in *Hernandez* determined that the Texas statute denying free education to illegal aliens represented a rational means of funding public education.

The representation of a minor in a tort action was addressed in *Coleman v. Donaho*, in which the defendants objected to the appointment of a guardian ad litem and the subsequent assessment of his fees against the defendants. The court pointed out that since both the minor and his parents were parties to the lawsuit, a conflict of interest could have arisen. Consequently, appointing a guardian ad litem and assessing his fees to the defendants was proper. In *Rexroat v. Prescott* a different aspect of minor representation was addressed. A minor who was injured in an automobile accident brought an action against two defendants, alleging joint and several liability. Pursuant to rule 44 of the Texas Rules of Civil Procedure, the minor, represented by a "next friend," entered a settlement with one defendant. The nonsettling defendant claimed that the settlement acted as a bar to the present action. The nonsettling defendant relied upon the language of rule 44, which precludes settlement without court approval and mandates that the settlement "shall be forever binding and conclusive upon the party plaintiff." The court held, however, that a rule 44 settlement is governed by the holding in *McMillen v. Klingensmith*, which states that a contractual release or settlement discharges only the parties named in the settlement. To hold otherwise would prevent a minor from settling with any of the parties in a multiparty lawsuit for less than full satisfaction of his claim.

The family purpose doctrine was resurrected in *de Anda v. Blake*, in which a minor was involved in a collision while driving her mother's uninsured automobile. The mother-daughter relationship was found to be one of principal and agent, since the daughter was driving the car with her mother's consent for the purpose of buying shoes for another minor member of the family. Thus, the mother was found liable for her daughter's negligence. The mother filed a cross-action against her estranged husband, the minor's father, contending that he was jointly and severally liable, but

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31. In *Rodriguez* the Supreme Court upheld as constitutional Texas's method of school financing, which permits each school district to supplement state funding through an ad valorem tax on property within its jurisdiction. The Court found that the Texas financing scheme was a rational method of allocating economic resources. 411 U.S. 1 (1973).

32. The court noted that the cost of educating the 5,000 illegal aliens in Houston could be as much as $8,350,000 a year, and found that TEX. EDUC. CODE § 21.031 (VERNON 1972) insured that citizens and legally admitted aliens would receive a certain quality of education. 558 S.W.2d at 125. The court also noted that a federal district court had held otherwise, but since it was an unpublished opinion refused to give it any weight. *Id.* at 124.


34. 570 S.W.2d 457 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

35. TEX. R. CIV. P. 44.

36. *Id.*

37. 467 S.W.2d 193 (Tex. 1971).


the cross-action was not specifically addressed in the judgment. The appellate court, however, concluded that the cross-action was conclusively tried and disposed of by implied consent. Further, the court found that although the Family Code makes community property subject to tortious liability incurred by either spouse, a plaintiff need not seek recovery from both spouses, and a judgment need not be entered jointly and severally against a married couple, unless both spouses were actually involved and therefore both personally liable. Under the facts of this case, the husband was not in a principal-agent relationship to either his daughter or his wife and was not personally liable.

One of the most important aspects of establishing the identity as well as the status of a child is paternity. Once the paternity of a father is litigated and a final judgment is rendered, the issue is res judicata even though the issue was not specifically argued in the suit for divorce. Prior to the 1973 decision of *Gomez v. Perez* a paternity suit could not be brought in Texas, since the obligation of a father to support an illegitimate child was not recognized. In 1975 the Texas Family Code was amended to provide for paternity suits, but section 13.01 contains a provision barring any such suit brought after the child has reached the age of one year. In cases in which the limitation provision has been raised the Texas courts have held that this provision may not be applied retroactively.

The constitutionality of the paternity suit limitation provision was sustained in *Texas Department of Human Resources v. Chapman*. Chapman may be described as a pro forma decision in that the denial of equal protection contention was rejected because a rational relationship exists between the prevention of fraudulent claims and a time limitation. Noting that illegitimacy is not a suspect classification, the court in *Chapman* held there is no denial of equal protection as long as the statute does not absolutely foreclose the right of child support. In response to the contention by the Department of Human Resources that the statute denies illegitimate children due process of law, the court concluded that the legislature could reasonably have decided that the support right of a child is best protected by his mother, and on balance the protection of men from fraudulent and stale claims is more important than giving illegitimate children a method

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44. "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred." Tex. Fam. Code Ann. § 13.01 (Vernon Supp. 1978-79) (emphasis added).
46. 570 S.W.2d 46 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).
47. Mathews v. Lucas, 427 U.S. 495, 505-10 (1976), holding that illegitimacy is a classification calling for less than strict scrutiny.
for remedying their mother's inaction.48

The constitutionality of section 13.01 of the Family Code may not be settled, however, since the United States Supreme Court has not considered the effect of time limitations on establishing inheritance rights of illegitimates. The Court noted in Lalli v. Lalli49 that accuracy is enhanced by adjudicating paternity disputes during the lifetime of the alleged father; the statute of limitations question was not raised, however, and the Court did not address the issue.

The Texas paternity statute was subjected to further constitutional scrutiny in In re B.M.N.50 In that case the court, as provided by statute, ordered blood tests to establish the possibility of paternity,51 and found that the tests showed by clear and convincing evidence that the alleged father was excluded from the possibility of being the natural father of the child, and dismissed the suit with prejudice. The appellant claimed that the statutory requirement for dismissal based solely on blood tests52 is a violation of due process as required by the Texas Constitution.53 After a lengthy and careful discussion of the constitutional questions, the court concluded that the statutory reliance on blood tests to disprove paternity is neither arbitrary nor unreasonable. The court found that "the legislature has determined that blood tests are the most accurate methods yet devised . . . to determine the lack of paternity of an alleged father."54 Further, the court held that using blood tests as evidence for determining paternity was within the guidelines suggested by the United States Supreme Court in Trimble v. Gordon.55

Trimble was also relied on in Lovejoy v. Lillie,56 a suit to determine heirship in which the court found that the three illegitimate children of the male decedent were entitled to inherit despite section 42 of the Texas Probate Code, which grants only maternal inheritance rights to illegitimate children.57 Apparently, the decedent had not attempted legitimation, but the trial court found that the children were the biological children of the decedent. The appellate court held this finding sufficient to establish heirship. Although neither the sufficiency of the evidence nor the method of determining the biological relationship was discussed, the court neverthe-

48. 570 S.W.2d at 50.
50. 570 S.W.2d 493 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).
52. "At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice." TEX. FAM. CODE ANN. § 13.05(a) (Vernon Supp. 1978-79).
53. The appellant cited TEX. CONST. art. 1, § 13, but the court also discussed id. art. 1, §§ 3 & 19, as well as U.S. CONST. amend. XIV, § 1.
54. 570 S.W.2d at 501.
56. 569 S.W.2d 501 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).
less held that since the determination of paternity had been made, the children must be treated as the legitimate children of their father for intestate succession purposes, just as they would have been treated had their mother's estate been in question. The court thus struck down section 42 of the Texas Probate Code as unconstitutional.\footnote{58}

In \textit{Griffith v. Christian}\footnote{59} the right of children to receive workers' compensation benefits upon the death of their natural father when they have been adopted by another prior to the natural father's death was litigated again this year. The appellate court, following the rule of \textit{Patton v. Shamburger},\footnote{60} held that these children do not qualify for such benefits because they are not minor children of the deceased under the workers' compensation statute.\footnote{61} The court did not find any equal protection violation, since the children have the adoptive parent's benefits to rely on should the need arise. The confusion concerning workers' compensation benefits may lie in the old adoption statute, under which children were entitled to inherit from their natural parents even after their adoption.\footnote{62} This rule is still true under the new statute, unless specifically decreed otherwise.\footnote{63} Intestate succession, however, is not the same as workers' compensation benefits, and so the results are different.

In \textit{Moran v. Adler}\footnote{64} the Texas Supreme Court held that the standard of proof required to establish an equitable adoption is preponderance of the evidence, not the "clear, unequivocal and convincing" standard. The court further held that the reason an innocent purchaser is protected against the claims of an equitably adopted child is the policy protecting innocent purchasers against secret titles, not a rule that a legal title cuts off an equitable title. The court stated that "a purchaser from an apparent legal heir, in the absence of notice to the contrary, can rely upon the presumption that there are no equitably adopted children."\footnote{65} The rationale is obvious in that there are no records of equitable adoptions to put an innocent purchaser on notice of an outstanding claim.

The attorney general issued an opinion that should clear up some of the problems parents have in connection with names and status recorded by hospitals on their children's birth certificates.\footnote{66} The opinion stated that no claim concerning the status of legitimacy or illegitimacy should appear on

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58. 569 S.W.2d at 503. The court in Lovejoy was unable to distinguish § 42 of the Texas Probate Code from the provision in the Illinois Probate Act that was declared unconstitutional in Trimble v. Gordon, 430 U.S. 762 (1977). Both statutes permitted an illegitimate to inherit from his mother only. But see note 8-14 supra and accompanying text for a discussion of the possible limitations on Trimble.


62. 1931 TEX. GEN. LAWS ch. 177, § 11, at 300 (formerly TEX. REV. CIV. STAT. ANN. art. 46a, § 9).

63. TEX. FAM. CODE ANN. § 15.07 (Vernon 1975).

64. 570 S.W.2d 883 (Tex. 1978).

65. Id. at 887.

66. TEX. ATT'Y GEN. OP. NO. H-1078 (1977).}
the certificate. Further, since Texas does not regulate the naming of children, a child’s surname may be any name that the parents wish the child to have. In a situation in which paternity is disputed, a name should not be used that would tend to identify the alleged father. The opinion, without attempting to define "tend to identify," stated that in some situations use of the alleged father’s surname would be permissible. The hospital administrator must make a judgment in each case.

III. CONSERVATORSHIP

The courts generally become involved in the question of conservatorship in three different situations. Initially courts are required to intervene at the time of divorce either to settle disputed questions of managing and possessory conservatorship or to approve the agreements of the parties. After a divorce decree is granted, the parties often wish to change the arrangements made under the decree. The courts may then become involved when one party decides to change conservatorship without benefit of legal action. This situation usually comes before the court in the form of a writ of habeas corpus.\(^{67}\) The third situation giving rise to court intervention is when one party wishes to change a prior court order through legal channels by way of a suit for modification.\(^{68}\)

Although not within the foregoing categories, Texas courts were concerned in the last year with the constitutional validity of the Texas Child Care Licensing Act.\(^{69}\) The issue raised by this Act is essentially one of custody because parents who are managing conservators have a right to place their children in schools or camps when the parents believe it is beneficial for their children.\(^{70}\) In two cases decided during the survey period, an unlicensed religion-based home for juvenile delinquents challenged the constitutionality of the Texas Child Care Licensing Act. In Roloff Evangelistic Enterprises, Inc. \(v.\) State\(^{71}\) the court did not resolve the appellants' contention that the Act infringed upon their free exercise of religion because the facts before the court did not illustrate a conflict between the appellants' religious beliefs and the provisions of the Act. In Oxford \(v.\) Hill,\(^{72}\) however, the court upheld the constitutionality of the Act, finding that the Act is a reasonable regulation of conduct rather than an abridge-

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\(^{68}\) Id. § 14.08.


\(^{72}\) 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref’d).
ment of freedom of religious belief. Thus, conduct based on religious beliefs, rather than the beliefs themselves, are "'subject to regulation for the protection of society.'" 73

Appellate courts are reluctant to overturn trial court custody decisions, but trial court decisions must be based on proper jurisdiction. In Fox v. Fox, 74 a suit for divorce brought by the husband, the trial court did not have in personam jurisdiction over his wife and children. The husband was serving in the army at Fort Hood, Texas, but his wife and children were residents and domiciliaries of Ohio. The appeals court concluded that although the wife had been served personally, 75 she had insufficient contacts with Texas to permit in personam jurisdiction. The court, however, had jurisdiction to order the husband, who was before the court, to make child support payments, and because divorce is a question of status, 76 the court had jurisdiction to grant an ex parte divorce. Resolution of the custody question in this case must wait until some court has jurisdiction over all the parties.

Venue is an important issue for Texans who live in different counties, and has led to much litigation. 77 Divorce jurisdiction generally attaches to the trial court in which a divorce suit is first properly filed. If the parties are parents of minor children, a suit affecting the parent-child relationship must be included in the suit for divorce. 78 If another court has continuing jurisdiction of the minor children, then upon motion of one of the parties, that court must transfer the suit to the court with divorce jurisdiction. 79 In Brown v. Brown 80 the husband-father filed a suit for divorce and for determination of conservatorship in Matagorda County, Texas. His wife responded with a plea of privilege claiming that she and her daughter were residents of Harris County, and, therefore, venue should be in Harris County. She failed to allege and prove, as required, that she had filed for a divorce in Harris County prior to the filing of the Matagorda County action, so the appellate court dismissed the appeal. The court pointed out that the wife had followed the wrong transfer procedure. The proper procedure under the Family Code is to file a motion to transfer rather than a plea of privilege, but even if the court had treated the wife's plea of privilege as a motion to transfer, such a motion being nonappealable, she would still have lost. 81 The wife's only possible remedy might have been

73. Id. at 559 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
74. 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ).
75. The wife was served personally pursuant to TEX. R. Civ. P. 108, which may be construed as a long-arm statute by which in personam jurisdiction may be obtained. 559 S.W.2d at 409. Rule 108, like the Texas general long-arm statute, TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), permits assertion of personal jurisdiction to the limits of due process. See U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977).
78. TEX. FAM. CODE ANN. § 3.55(b) (Vernon 1975).
79. Id. § 11.06(b).
81. TEX. FAM. CODE ANN. § 11.06(f) (Vernon 1975).
by way of a petition for writ of mandamus.

When two states and two Texas courts become involved in a divorce and custody suit, the result is confusion, litigation, and little discussion of the merits. Such was the case in *Ex parte Jabara*,\(^8\) in which the husband-relator had been ordered jailed by a Texas juvenile court judge for failing to produce his two children in juvenile court in response to his wife's application for writ of habeas corpus. The wife's request for habeas corpus and custody was based upon a temporary order of a Virginia court giving her custody of the children. Although the father should have filed a plea in abatement, he filed a motion to quash the writ of habeas corpus and asked for custody of their children on grounds that a divorce suit was pending in a Texas domestic relations court and that court had issued a temporary order granting custody to the husband-relator. The appellate court held that the juvenile court had no jurisdiction to proceed because of the pending action in the domestic relations court. The court, however, did not settle the real issue in the case, which is whether the Virginia court is the court of dominant jurisdiction, in which case its orders would be entitled to full faith and credit. The appellate court referred this matter to the domestic relations court for its decision.

*Geesbreght v. Geesbreght*\(^8\) also posed jurisdictional questions, but the actions of the appellant-wife rendered those questions moot. The wife left her husband and took their children to Illinois where she immediately filed a suit for separate maintenance and custody of the children. About a month later, the husband filed a suit for divorce in Tarrant County. In August the Illinois court dismissed its suit for lack of prosecution, which suit was later reinstated, and the wife appeared in Tarrant County at a hearing in connection with her plea to be appointed temporary managing conservator of the children. The trial court sitting with a jury found that the husband should be appointed managing conservator. The wife appealed, contending that the court did not have jurisdiction to determine custody of the children because they were outside the state. The husband filed a motion to dismiss the appeal on the ground that the appellant had not complied with the trial court judgment since she had continued to keep the children in Illinois. Prior to the hearing on the motion to dismiss, the appellant delivered the children to her husband in Tarrant County. After ruling that the wife waived all challenges to jurisdiction by appearing generally to request temporary custody, the court in obiter dictum held that the trial court had jurisdiction in any event because the domicile of the children remained in Texas. The court based this conclusion on the father's lack of knowledge of or consent to any change in domicile, his continued support of the children at all times, and Family Code provisions giving a parent a right to decide domicile. The court, because the jurisdictional questions had become moot, did not have to decide which of the two

\(^8\) 556 S.W.2d 592 (Tex. Civ. App.—Dallas 1977, no writ).
\(^8\) 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, no writ).
parents with differing domiciles has the greater power to settle the domicile of their children.

The wide discretion of trial courts in adjudicating custody matters was sustained in a series of cases giving custody to grandparents,\textsuperscript{84} to the father,\textsuperscript{85} and to the mother.\textsuperscript{86} In \textit{In re Marriage of Stockett}\textsuperscript{87} the appellate court sustained the trial court's refusal to interview a five-year-old child concerning her choice of managing conservator. The judge did not want the child "thinking consciously or subconsciously that she had contributed to the decision of which parent was appointed her managing conservator."\textsuperscript{88} In \textit{Kates v. Smith},\textsuperscript{89} however, a rather complex legitimation and custody case was reversed and remanded because the trial court considered a supplemental report that was made to the court after the close of the custody hearing. The appellate court found that this procedure violated the Family Code, which mandates that the parties have an opportunity to examine anyone making an investigation or report that is considered by the court in making a decision on matters pertaining to the parent-child relationship.\textsuperscript{90}

In \textit{Walsh v. Walsh}\textsuperscript{91} the appointment of the mother as managing conservator was rendered moot by her death subsequent to the divorce decree. The surviving parent automatically became the managing conservator. Death does not, however, solve all problems. In \textit{Barrientos v. Garza},\textsuperscript{92} after the death of the mother, the father remarried and the maternal grandmother sought court ordered access and visitation rights. The trial court's decree granting these rights was reversed by the appellate court on grounds that the statutory provision for access rights for grandparents applies only when a managing conservator has been appointed.\textsuperscript{93} The court pointed out that this decision appeared to conflict with the holding in \textit{Goolsbee v. Heft},\textsuperscript{94} but noted that the \textit{Goolsbee} court was confronted with a different fact situation and had not considered the full implications of section 14.03 of the Family Code. The \textit{Barrientos} court appears to view the provisions on grandparents as limitations on the courts' power, rather than as expressions of legislative policy towards a broader recognition of grandparents' interests.\textsuperscript{95} This interpretation leads to an anomalous situation where a stepparent with little interest in the stepchildren has a greater right to ex-

\textsuperscript{84} Owen v. Owen, 558 S.W.2d 63 (Tex. Civ. App.—Waco 1977, writ dism'd).
\textsuperscript{86} \textit{In re Marriage of Stockett}, 570 S.W.2d 151 (Tex. Civ. App.—Amarillo 1978, no writ).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 153.
\textsuperscript{89} 556 S.W.2d 630 (Tex. Civ. App.—Texarkana 1977, no writ).
\textsuperscript{90} \textit{TEX. FAM. CODE ANN.} § 11.14 (Vernon 1975).
\textsuperscript{91} 562 S.W.2d 501 (Tex. Civ. App.—San Antonio 1978, no writ).
\textsuperscript{92} 559 S.W.2d 399 (Tex. Civ. App.—Dallas 1977, no writ).
\textsuperscript{93} See \textit{TEX. FAM. CODE ANN.} § 14.03 (Vernon 1975).
\textsuperscript{94} 549 S.W.2d 34 (Tex. Civ. App.—Tyler 1977, no writ).
\textsuperscript{95} See \textit{TEX. FAM. CODE ANN.} §§ 14.03(d), 16.09(d) (Vernon Supp. 1978-79) (amending the original Family Code). See also Solender, supra note 8, at 141-42.
clude the natural grandparents than a stepparent who has evidenced such concern that he has gone through an adoption proceeding. Adoption requires court intervention and would therefore create a forum for the grandparents to demand visitation rights.

Once the managing conservator has been appointed by the court, the losing party may attempt self-help methods of altering the decision by either retaining the child longer than the lawful visitation period or by removing the child from the possession of the managing conservator. The lawful managing conservator must then return to court to maintain his or her right to possession of the child. When the managing conservator applies to the court for a writ of habeas corpus in accordance with the provisions of the Family Code, the trial court too often permits the other party to amend the action to one for modification. To quash the modification action the managing conservator must then petition the Texas Supreme Court for a writ of mandamus ordering the trial judge to grant the writ of habeas corpus. Over the past several years the Texas Supreme Court has granted these writs almost routinely. While the trial judges are at fault for not following the law, the attorneys who help their clients file improper modification actions are also at fault and should perhaps be required to pay all costs of bringing the mandamus actions.

The status of parties pending appeal is that of the trial court's judgment unless the judgment has been specifically suspended. Apparently there can be confusion concerning which judgment is meant by a court and this was the excuse given by the offending parties in Ex parte Rutherford. The father had been made managing conservator of the children in the original suit; however, in a modification suit the mother was named managing conservator and the father appealed. The civil appeals court reversed and remanded, but restored the parties to their status under the trial court's decree. This had the effect of making the mother the managing conservator, but the father refused to give up custody of the children since he had appealed to the Texas Supreme Court. The trial court found the father and his attorney in contempt and they filed for a writ of habeas corpus in a different civil appeals court. That court granted the father's writ, but not the attorney's because the attorney had not violated a custody order and the court of criminal appeals is the only Texas appellate court with general jurisdiction of writs of habeas corpus. Meanwhile the wife had been granted a writ of attachment for the children by the original trial court, so the husband went back to the second court and filed for a writ of prohibition, whereupon the second court decided that really it did not have...

97. Strobel v. Thurman, 565 S.W.2d 238 (Tex. 1978); Trader v. Dear, 565 S.W.2d 233 (Tex. 1978); Saucier v. Pena, 559 S.W.2d 654 (Tex. 1978). See also Solender, supra note 8, at 143; Solender, supra note 60, at 138.
jurisdiction after all and refused to grant the writ.101

Trial courts do enforce custody orders and, in appropriate circumstances, foreign judgments by habeas corpus.102 At times courts may become autocratic about acts that they perceive to flaunt their authority and may unnecessarily hold in contempt parties who are attempting to act in good faith.103 The courts' attempts to enforce custody are sometimes defeated by parties who flee the jurisdiction, although these parties are then denied the right of appeal.104 Unless the situation falls within guidelines established by the legislature, habeas corpus will not lie. In Beverly v. Beverly105 the mother had originally been awarded custody of the child pursuant to an Alabama divorce. About a year later the father took possession of the child at the mother's request. The child remained in the custody of the father for a period of approximately two-and-one-half years, except for occasional short visits with the mother. The mother filed suit in Alabama alleging delinquent support payments and other matters relating to custody, whereupon the father filed suit in Texas seeking modification of the Alabama divorce judgment so as to make him the managing conservator. The Texas court named the father temporary managing conservator, and the mother then sought a writ of habeas corpus asserting her rights to possession of the child. The court denied the writ because the child had been in the father's possession for over six months prior to the filing of the application for the writ.106 The mother contended that this was error because during that period she had possession of the child for eight days during a Christmas holiday visit. The appeals court affirmed the trial court's denial of the writ, holding that the eight-day interruption of possession was "so brief as to be insignificant."107

Jurisdiction in suits for custody modification are subject to the same constitutional requirements of "fair play and substantial justice"108 as are original suits for custody.109 In Corliss v. Smith110 a husband sought a change in visitation rights that had been granted in a 1972 divorce decree; the wife, however, had moved to Nebraska with the children three years previously, and neither she nor the children were Texas domiciliaries. The

102. See Kellogg v. Kellogg, 559 S.W.2d 126 (Tex. Civ. App.—Texarkana 1977, no writ) (Connecticut custody order enforced by Texas court through habeas corpus provisions of Family Code; see note 96 supra).
103. See, e.g., Ex parte Minks, 563 S.W.2d 317 (Tex. Civ. App.—San Antonio 1978, no writ) (wife found in contempt for failure to produce children as ordered, although she could show she had no power to comply). It is important to note that contempt will lie only if based on a violation of a clear, specific, and unambiguous decree. Ex parte Dirr, 564 S.W.2d 422 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).
105. 567 S.W.2d at 621 (quoting Lamphere v. Chrisman, 554 S.W.2d 935, 938 (Tex. 1977)).
107. 567 S.W.2d at 621 (quoting Lamphere v. Chrisman, 554 S.W.2d 935, 938 (Tex. 1977)).
110. 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ).
wife appeared specially to contest the jurisdiction of the Texas court. The trial court agreed with the wife and dismissed the suit. The Tyler court of civil appeals affirmed, pointing out that although the literal requirements of the Texas Family Code long-arm statute appeared to be satisfied, other factors militated against assertion of jurisdiction. First, because the children had been domiciliaries of Nebraska for more than six months, most witnesses who could testify as to the welfare and best interest of the children were located in Nebraska. Thus, due process would not be served by insisting on a trial in Texas. Second, since Nebraska would not give full faith and credit to a Texas decree rendered in this case, the entire question could be relitigated in Nebraska.

Although the continuing jurisdiction provisions of the Family Code appear to be clearly written, difficulties occasionally arise when parties wish to modify decrees rendered prior to January 1, 1974. Any court obtaining jurisdiction after January 1, 1974, in a modification proceeding of a pre-1974 decree retains jurisdiction. Exclusive continuing jurisdiction attaches when a modification petition is filed if no other court has obtained jurisdiction after January 1, 1974, and actions filed later in another state will not oust the jurisdiction of the Texas court. A corrective statement by the State Department of Public Welfare can clear up confusion created by a report stating erroneously that no court has continuing jurisdiction. If a hearing has not been held, the court that has been misled should immediately transfer the cause to the court with continuing jurisdiction, since the court that mistakenly set the hearing originally no longer has jurisdiction. If a hearing is held and one of the parties protests, a transfer would still seem to be in order.

Trial court decisions in custody matters are given great weight and are generally sustained. In Watts v. Watts, however, the appellate court found that the trial court had abused its discretion in ordering a change in custody because no change of circumstance on the part of the managing conservator was shown as required by section 14.08 of the Texas Family Code. Additionally, the trial court was reprimanded because it had based visitation rights on a requirement that the children be taken to Sun-

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113. TEX. FAM. CODE ANN. § 11.05 (Vernon 1975).
118. 563 S.W.2d 314 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).
day school and church. The appellate court held that this violated the Texas Constitution.\textsuperscript{120}

In \textit{O. v. P.}\textsuperscript{121} the trial court modified custody so that the father would be managing conservator of the son and the mother would continue as managing conservator of the daughter. The mother appealed and the appellate court held that in the absence of clear and compelling reasons children should be raised with their brothers and sisters. The court found no such compelling reason and reversed that portion of the judgment pertaining to the change of managing conservatorship for the son. The court also based its reversal on the requirements of section 14.08(c)(1) of the Family Code, under which the person seeking to change the status quo to effect the appointment of a new managing conservator must show that “the retention of the present managing conservator would be injurious to the welfare of the child \textit{and} that the appointment of a new managing conservator would be a positive improvement for the child.”\textsuperscript{122} The appellate court concluded that the evidence presented was insufficient to meet this heavy burden.

\section*{IV. Support}

The amount established for child support in the original divorce decree provides the basis for later enforcement or modification. Generally, the appellate court will not find an abuse of discretion in the trial courts' determination of the amount of support.\textsuperscript{123} The appellate court, however, will reform decrees that appear ambiguous on such matters as the date of termination of support.\textsuperscript{124} Barring other circumstances, support terminates when the youngest child reaches the age of majority, now eighteen years.\textsuperscript{125} A divorce decree may provide for access on the part of grandparents, but the grandparents may not be ordered to make monthly support payments.\textsuperscript{126}

Insurance policies that have been designated by divorce decrees as being for the benefit of minor children may become payable to other beneficiaries by changing the designated beneficiary, but the new beneficiary will not be able to keep the benefits, since courts will impose constructive trusts

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\begin{enumerate}
\item 563 S.W.2d at 317. The Texas Constitution provides: “[N]o man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent.” TEX. CONST. art. I, § 6.
\item 560 S.W.2d 122 (Tex. Civ. App.—Fort Worth 1977, no writ).
\item \textit{Id.} at 126 (emphasis added).
\item See Poulter v. Poulter, 565 S.W.2d 107 (Tex. Civ. App.—Tyler 1978, no writ) ($300 per month child support affirmed).
\item \textit{Id.;} TEX. FAM. CODE ANN. § 14.05 (Vernon 1975).
\item Blalock v. Blalock, 559 S.W.2d 442 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).
\end{enumerate}
\end{footnotesize}
to effect the provisions of the original decree.\textsuperscript{127} A 1978 attorney general opinion stated that payments made by the Employees Retirement System of Texas to minor children beneficiaries may be made directly to the parent of the children without requiring the establishment of a guardianship.\textsuperscript{128} This ruling is designed to eliminate conflicts between the Probate Code and the Family Code and to make it easier for the surviving parent to care for the children. The Family Code provides that parents are guardians of the minor's estate and are authorized to receive payments for the support of the child.\textsuperscript{129} Of course, if a guardian of the minor's estate has already been appointed in connection with additional property in a probate proceeding, the guardian would receive the payments.\textsuperscript{130}

A valid child support order may not be modified retroactively with regard to delinquent support payments.\textsuperscript{131} The Family Code provides for enforcement of support orders through a court proceeding whereby the court renders a judgment for any unpaid amount, and this judgment may be enforced by any means available for the enforcement of judgments for debts.\textsuperscript{132} In \textit{Smith v. Bramhall},\textsuperscript{133} in which the collection of past due child support from a decedent's estate was sustained, the Texas Supreme Court noted that unpaid child support payments are not debts even though the enforcement proceedings available under the Family Code are the same as those for the enforcement of judgments for debts. In \textit{Houtchens v. Matthews},\textsuperscript{134} in which a mother was suing for arrearages accumulated over an eight-year period, the trial court erroneously applied the four-year statute of limitations for debt rather than the ten-year statute of limitations for judgments, and the appellate court held that the appellant was entitled to a judgment for the full eight-year period.\textsuperscript{135} Since child support is not a debt, but might be considered a judgment, this interpretation appears correct.

The importance of child support and the need for its prompt payment was emphasized in \textit{Waites v. Sondock},\textsuperscript{136} a case in which the mother was attempting to collect $4,600 in alleged child support arrearages. The father employed as his attorney a member of the Texas House of Representatives. Because the hearing was scheduled for January 1977, a time when the Texas Legislature would be in session, the father's attorney asked for a continuance until at least thirty days after May 31, 1977.\textsuperscript{137} The trial court granted a continuance and the mother petitioned the Texas Supreme

\textsuperscript{127} See \textit{e.g.}, Gutierrez \textit{v. Madero}, 564 S.W.2d 185 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Roberts \textit{v. Roberts}, 560 S.W.2d 438 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).


\textsuperscript{132} \textit{Id.} § 14.09(c).

\textsuperscript{133} 563 S.W.2d 238 (Tex. 1978).

\textsuperscript{134} 557 S.W.2d 581 (Tex. Civ. App.—Fort Worth 1977, writ dism'd).

\textsuperscript{135} \textit{Id.} at 585.

\textsuperscript{136} 561 S.W.2d 772 (Tex. 1977).

Court for a writ of mandamus on the grounds that she was in "dire need of support payments" since the father had made no payments for almost two years. The supreme court granted the writ, holding that when the party opposing the continuance faces irreparable harm by virtue of the mandatory legislative continuance, such a mandatory continuance violates the due process clause of the fourteenth amendment of the United States Constitution and article I, sections 13 and 19 of the Texas Constitution.

Although there are few defenses to a judgment for back child support, courts will prevent unjust enrichment through setoffs for payments actually made and for payments from other sources. In Block v. Waters the court pointed out that because the defendant was not before the court in a contempt proceeding and because there was no threat to defendant's liberty, his inability to pay was immaterial. To prevent unjust enrichment, however, the court ordered the judgment reduced by the amount of any payments actually made and of any benefits received by the children from social security.

Amounts of judgments for support arrearages are not necessarily automatic and prior court actions can be res judicata in a later suit, as occurred in Whitley v. Whitley. The couple divorced in 1970. In 1976 the wife moved for an increase in the child support and requested that the husband be found in contempt for failure to pay previously due support. The court modified the support payments and found the husband in contempt, but stayed the contempt conditioned on payment of increased support. The court further ordered that the husband need not pay the delinquent support. This latter order was found to be res judicata in a 1977 proceeding for a judgment for child support arrearages. The court noted that a motion for contempt and a petition to reduce child support to judgment are separate remedies and the wife should have objected to or appealed that portion of the prior judgment that ordered the husband not to pay the delinquent amounts.

Attempts to collect child support arrearages by garnishment of military retirement pay have been stymied by failure to notify the husband of the action. Apparently such garnishment will be possible if the husband is made a party and has the opportunity to enter any defenses. Under Texas law only retirement benefits are subject to garnishment. Further, fed-
eral legislation limits military benefit garnishment proceedings to actions for child support and alimony payments.\textsuperscript{144}

The Uniform Reciprocal Enforcement of Support Act (URESA) is a cumbersome device for enforcing child support orders.\textsuperscript{145} URESA is used when one of the parties is absent from Texas and the Texas court is without personal jurisdiction over the absent party or it is inconvenient for the absent party to come to Texas. The use of URESA may be even more difficult when there is no underlying basis for support, as was the case in Lewallen v. Hardin.\textsuperscript{146} The parties had been divorced in North Carolina and the support proceeding was initiated in North Carolina. The support request, which was forwarded to a Texas court from North Carolina, was based upon an affidavit stating that no support contribution had been made and that a reasonable amount was $200 a month. The trial court's support order was reversed and remanded on appeal on the ground that the affidavit was merely hearsay evidence and, therefore, there was insufficient evidence on which to base the trial court order.\textsuperscript{147} The appellate court suggested that the needed evidence might be obtained on remand by submitting interrogatories to the mother in North Carolina. In \textit{Ex parte McBride}\textsuperscript{148} the Dallas court of civil appeals considered the enforcement in Texas of a support decree entered in another state that has also enacted URESA. The court held that a Texas court is without jurisdiction to use contempt as a method of enforcement unless there has been full compliance with the foreign support order enforcement procedures of the Texas Family Code.\textsuperscript{149}

During the past year numerous applications for writs of habeas corpus were filed in connection with contempt detentions for failure to make child support payments. Those writs based on statements of inability to pay were usually denied because of lack of conclusive evidence.\textsuperscript{150} Nevertheless, a court cannot find a relator in contempt unless the court has jurisdic-

\begin{itemize}
\item \textsuperscript{144} 42 U.S.C.A. § 659(a) (1978) provides:
\begin{quote}
Notwithstanding any other provision of law, effective January 1, 1975, money... due from, or payable by, the United States... to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States... were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.
\end{quote}


\item \textsuperscript{146} 563 S.W.2d 356 (Tex. Civ. App.—Dallas 1978, no writ).

\item \textsuperscript{147} "In any [URESA] hearing... the court shall be bound by the same rules of evidence that bind the district court." \textbf{Tex. Fam. Code Ann.} § 21.36 (Vernon 1975). It would appear that this section needs some modification so that the requirements would be no greater than for a sworn account.

\item \textsuperscript{148} 567 S.W.2d 536 (Tex. Civ. App.—Dallas 1978, no writ).


\end{itemize}
tion by virtue of proper notice of a specific date for the hearing\(^{151}\) and a clear, definite order with which there has not been compliance.\(^{152}\) Since support orders must be clear and specific, they must be in writing,\(^{153}\) and since a contempt hearing is a special proceeding it is not appealable.\(^{154}\)

In 1977 the legislature replaced the domestic relations and special juvenile courts with district courts of general jurisdiction called family district courts.\(^{155}\) A question arose whether the new courts, which were really the same courts with new numbers or names, have the power to enforce by contempt any orders issued by the courts under their former name. The court in *Ex parte West*\(^{156}\) concluded that the intent of the legislature was to grant such power. Further, the new family courts must have this power of enforcement because there is no other court presently existing that could enforce their prior orders. A different jurisdictional issue is whether a court that entered support orders prior to passage of the Family Code is still the only court that can enforce its orders by contempt. An affirmative response is mandated because the principle of continuing jurisdiction existed prior to the enactment of the Family Code. The only exception would be the Family Code provision for modification of prior orders, not enforcement of prior orders.\(^{157}\)

An important constitutional question has still not been answered in connection with incarceration for criminal contempt. In *Ex parte Wilson*\(^{158}\) a writ of habeas corpus was requested on the basis that the relator had been deprived of his liberty without due process in a constructive criminal contempt proceeding in which he was not represented by counsel. The court noted that the United States Supreme Court cases cited by the relator were persuasive,\(^{159}\) but avoided the issue of lack of counsel on the basis that the record did not show that the relator was indigent.\(^{160}\) The court also noted that there was no controlling precedent on this particular issue from either the United States Supreme Court or the Texas Supreme Court. As a mere intermediate court, it therefore decided not to rule on the constitutional question and denied the writ. The Texas Supreme Court denied the petition from this ruling without opinion.\(^{161}\) In *Ex parte Hiester*\(^{162}\) a writ of habeas corpus was granted because the relator was able to show that his


\(^{153}\) *Ex parte Grothe*, 570 S.W.2d 183 (Tex. Civ. App.—Austin 1978, no writ).


\(^{156}\) 569 S.W.2d 674 (Tex. Civ. App.—Dallas 1977, no writ).


\(^{158}\) 559 S.W.2d 698 (Tex. Civ. App.—Austin 1977, no writ).


\(^{160}\) 559 S.W.2d at 700.


\(^{162}\) 572 S.W.2d 300 (Tex. 1978).
counsel’s failure to appear at the contempt hearing was not the relator’s fault. The court found that the relator was deprived of his right to counsel. Considering Wilson and Hiester together, a court might find that a relator has a constitutional right to be represented by court appointed counsel upon a proper showing of indigency. In Hiester the relator’s failure to be represented was caused by a failure of communication between the court and retained counsel; nevertheless, the relator was released on the basis of lack of representation, which was caused by no fault of his own. The question then is whether indigency is a fault of the relator. Since indigency is usually found not to be a fault, all indigent persons should be required to have court appointed counsel in criminal contempt hearings.

The court rendering an original divorce decree has continuing jurisdiction and can hear motions to modify that decree, unless a valid motion to transfer is filed in the original court. This interpretation of the venue transfer provisions of the Family Code was rendered by the Texas Supreme Court in Cassidy v. Fuller. The court held that venue in suits affecting the parent-child relationship is required in the county where the child has resided for more than six months. The court found that the provisions are intended to be mandatory to forestall forum shopping.

Modification orders increasing child support payments must be supported by evidence demonstrating that the defendant has the financial ability to pay the increase or that there has been a material and substantial change in circumstances. If a finding is made of a material change in circumstances, upward modifications are permitted even if the mother is the obligor. While courts should not use formulas or guidelines to determine proper support amounts, they may use outside schedules for calculation purposes. In Walsh v. Walsh an unusual change in circumstances gave rise to a lump sum child support order. Subsequent to the divorce and original order of child support the father was involved in an automobile accident. He was severely injured, was rendered non compos mentis, and was not expected to improve. As a result of the accident the father received a large damage judgment. The appellate court found that the modified lump sum payment of $20,000 for one child and $10,000 for the other child was not excessive in light of the large damage award.

Reduction of support payments can be difficult without conclusive evidence of inability to pay. In Casterline v. Burden, however, the plaintiff did manage to introduce sufficient evidence to demonstrate the need for reducing support payments. Plaintiff's job, at which he earned $680 per

164. 568 S.W.2d 845 (Tex. 1978).
month, was terminated and he obtained a position with the estate of his late father at only $100 per week. His motion to modify support had been filed prior to the change in jobs and the trial court granted the reduction retroactive to the date of the job change. On appeal, the wife argued that back child support cannot be modified. Although the appeals court agreed with the wife, the court noted that, as in this case, obligations that accrue subsequent to the motion to modify may be modified; therefore, there was no retroactive modification.172 Casterline is interesting because apparently more money was involved than appears in the record; however, since the court defined income to include only the “gain which proceeds from property, labor or business,”173 and not the ability to borrow, the downward modification was correct. The court has perhaps set a dangerous precedent in uniformly applying this definition of income to child support. Under this definition wealth represented by holdings of non-income-producing property such as diamonds or land would be excluded from consideration in determining the amount of child support due.

V. TERMINATION AND ADOPTION

Custody and support determinations usually settle family disputes, but they may also serve to set the stage for termination of the parental rights of the noncustodial parent. Under section 15.02 of the Texas Family Code, failure to support is one basis for the termination of a parent’s right to his child.174 Parents who are denied visitation rights sometimes retaliate by withholding support. As a result, a court may find in a termination hearing that lack of contact with the child combined with lack of support for the child are sufficient grounds for termination of parental rights. Courts are more willing to terminate parental rights when there is a plan for the child’s future, as would be the case where the custodial parent remarried and there is a stepparent willing to adopt the child. Dressler v. Aldridge175 was such a case. Pursuant to a West Virginia divorce decree, the mother was awarded custody of the two children and the father was ordered to make child support payments. About a year after the mother remarried she denied the father any visitation, whereupon he stopped making support payments and sought a judicial disposition of the situation by filing a contempt proceeding in West Virginia. The suit was dismissed for lack of jurisdiction because the mother and children were no longer living in the state. The mother, the children, and their stepfather moved to Texas in

172. “[A]n order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify.” Tex. Fam. Code Ann. § 14.08(c)(2) (Vernon 1978-79) (emphasis added). The wife, however, was awarded $2,200 as a contribution toward her attorney’s fees even though her attempt to prevent downward modification was unsuccessful.

173. 560 S.W.2d at 500.

174. Termination may be granted if the court finds that the parent “failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition.” Tex. Fam. Code Ann. § 15.02(1)(F) (Vernon Supp. 1978-79).

1972, and remained there. In 1977 the mother and the stepfather filed a suit for termination and adoption. The father testified in the hearing that he had difficulty locating the children after 1972, and when he phoned, he was told he could not talk to them. He did fly to Texas in 1976 and saw the children briefly. That meeting was his only contact with the children prior to the hearing. No adverse findings other than failure to support were made in relation to the father. No findings concerning the wishes of the children were made either by the appointed guardian ad litem or the court. In fact, the record appears devoid of any reason for termination other than the statutory ground of failure to support. The Family Code requirement of a showing that termination will be in the best interests of the children\(^ {176}\) was weakly supported. The appellate court admitted this was a close case and distinguished this case from \textit{Brokenleg v. Butts},\(^ {177}\) an earlier case in the same court, on the basis that here the stepfather planned to adopt the children, so that the children were assured of having legal parents. The court alluded to the important constitutional dimension of the parent-child relationship,\(^ {178}\) but nevertheless apparently grounded its decision on the second and separate cause of action involved in this case, adoption. It may be that for cases of this type the framers of the Texas Family Code were correct in separating the termination proceeding from the adoption proceeding.\(^ {179}\)

\textit{Brokenleg v. Butts}\(^ {180}\) involved a dispute between a South Dakota Sioux Indian mother and Texas Anglo grandparents. The child was born of the marriage between the son of the Anglo grandparents and the Sioux mother. The marriage was subsequently annulled and the child remained with the mother until the father and grandparents visited the mother on the Rosebud Sioux Indian Reservation, at which time the mother permitted the child to leave the reservation with the grandparents. The parties disputed whether the grandparents' custody of the child was intended to be indefinite. The natural grandparents brought an action to terminate the parental rights of the mother and the father. The father voluntarily relinquished his parental rights, and these rights were terminated by the trial court. The trial court also terminated the mother's parental rights, finding that she left the child in the possession of another without expressing an intent to return and without adequately supporting the child,\(^ {181}\) and finding that she failed to support the child in accordance with her ability for one year.\(^ {182}\) The trial court also made the requisite finding that termina

\(^{176}\) \textsc{Tex. Fam. Code Ann.} § 15.02(2) (Vernon Supp. 1978-79). With regard to the best interest test, financial rights do not seem to have been stressed. There appears to have been no consideration given to a claim for back child support. The amount must have been considerable and rightfully belongs to the child, not the mother.

\(^{177}\) 559 S.W.2d 853 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

\(^{178}\) 567 S.W.2d at 50.

\(^{179}\) \textit{See} \textsc{Tex. Fam. Code Ann.} § 16.03 (Vernon 1975), predecessor to \textsc{id.} § 16.03 (Vernon Supp. 1978-79).

\(^{180}\) 559 S.W.2d 853 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).


\(^{182}\) \textit{See id.} § 15.02(1)(F).
tion of the mother's parental rights would be in the best interest of the child.83 The grandparents had not petitioned for adoption, but they were awarded custody. Upon the mother’s appeal, the appellate court reversed in part, finding that while custody should be awarded to the grandparents, the factors did not compel a termination of the mother’s parental rights.84 There was no evidence that the mother was unfit, and according to the appellate court, the mother had supported the child in accordance with her ability. Since the child expressed a desire to live with the grandparents and the grandparents provided for the child, the court upheld the custody award to the grandparents. In addition to the lack of a suit for adoption, it would seem that Brokenleg is distinguishable from Dressier because the appellant in Brokenleg was unable to support, while the appellant in Dressier refused to support.

Saathoff v. Wilcox85 and In re Jones,86 two cases in which the fathers were able to retain their parental rights, provide an interesting contrast to the above cases. In Saathoff the father did not support the child in accordance with his ability to pay. Nevertheless, the appellate court affirmed the trial court’s finding that it was not in the best interest of the child to terminate the parent-child relationship, stating that the holding was not against the weight of the evidence. In Jones the appellate court reversed the trial court’s termination of the father’s parental rights because there was no evidence that during a period of twelve consecutive months the father failed to support his child in accordance with his ability. During the period in question the father had petitioned for bankruptcy and had sustained himself for approximately six months on a gross income of $700 to $900. The court took judicial notice that to pay both $100 per month child support and to survive would be impossible on this income.

During the survey period two fathers, now serving long prison terms, had their parental rights terminated on different grounds. The Texas Family Code provides that a termination petition will be granted if a parent endangers his child.87 In Crawford v. Crawford88 the father was found to be unfit because he engaged in conduct that endangered the physical and emotional well-being of his child. The appellate court affirmed, basing its decision not only on the conduct that resulted in the imprisonment of the father, but also on the father's violent actions during the marriage and his letters from prison that substantiated his hostile attitude. In Belitz v.

83. See id. § 15.02(2).
84. In reversing the trial court’s termination of the parent-child relationship, the appellate court relied on the eight factors listed in Holley v. Adams, 544 S.W.2d 367 (Tex. 1976), for determining the best interest of the child.
86. 566 S.W.2d 702 (Tex. Civ. App.—Tyler 1978, no writ).
87. Termination may be granted if the court finds that the parent “engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.” Tex. Fam. Code Ann. § 15.02(1)(E) (Vernon Supp. 1978-79).
Seekatz the court concluded that the father had not supported his child in accordance with his ability, despite the fact that he had been in prison since 1969. Although evidence demonstrated that prior to his imprisonment the father had engaged in violent conduct that might be construed as endangering the child, the pleadings had not given him sufficient notice of this issue. The father, however, did have sufficient notice of the issue of support, and the court found that the father’s failure to forward his excess income earned while in prison of $10 to $15 a month to his child was an adequate basis for termination.

In re V.M.B. illustrates that procedural difficulties and misapplications of law can prevent adjudication on the merits. An unwed father sought legitimation of his son, whom the father had never seen, even though he had been trying to obtain custody since before the boy’s birth. The child was conceived in Oklahoma and born in Texas in a maternity home in 1971 where the mother relinquished her parental rights. Since the relinquishment was prior to Stanley v. Illinois, no action was taken with regard to terminating the father’s parental rights. After the boy was placed in the home of his prospective adoptive parents, the father, a New York domiciliary, filed suit in Oklahoma seeking to legitimate the boy and to obtain custody. The Oklahoma court decided that New York law governed its decision, misapplied that law, did not discuss Stanley, which had been decided prior to the Oklahoma court hearing, and denied the father any relief. In a summary judgment ruling, the Texas court also ruled against the father on the basis that the Oklahoma court’s decision was res judicata. The appellate court affirmed, concluding that the errors committed by the Oklahoma court could have been raised by the father when he was seeking relief in Oklahoma.

In Nixon v. Humphrey a child found to be “dependent and neglected” was later adopted under the statutes that preceded the Family Code. The mother sought by means of a bill of review to have the adoption set aside. The mother had not been personally served in the dependency and neglect proceeding because the former statute did not require service. Nevertheless, the trial court found that this defect had been cured by personal service in the subsequent adoption proceeding. The appellate court affirmed the trial court and dismissed summarily the mother’s contention that she was entitled to have the judgment set aside because she had been too poor to employ counsel.

Both public and private adoption agencies occasionally use foster care.

189. 570 S.W.2d 218 (Tex. Civ. App.—Waco 1978, no writ).
190. 559 S.W.2d 901 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.).
191. 405 U.S. 645 (1972) (unwed father is entitled as a matter of law to notice and hearing on his fitness before his children can be taken from him).
192. 565 S.W.2d 365 (Tex. Civ. App.—San Antonio 1978, writ ref’d n.r.e.).
193. Any child found to be dependent and neglected could be adopted. 1969 [TEX. GEN. LAWS] ch. 488, § 1, at 1593.
194. No service of citation was required in a dependency proceeding if the parent was outside of the county where the proceeding was being heard. 1907 [TEX. GEN. LAWS] ch. 64, § 4, at 135.
Family Code provisions concerning adoption require adoptive parents to be scrutinized before adoption is permitted. In *Chapman v. Edna Gladney Home* foster parents challenged the power of the court appointed managing conservator to withhold consent to adoption. The Family Code provides that once a managing conservator has been appointed, he or she must consent in writing before any judgment of adoption may be entered. The court held that the potential adoptive parents had the burden to show that the home was without good cause to withhold consent. The potential adoptive parents in *Chapman* failed to sustain their burden and were not entitled to a decree of adoption. Potential adoptive or foster parents have little standing to attack placement decisions of managing conservators.

In matters pertaining to termination of parental rights the Texas Supreme Court has endeavored to enforce the spirit as well as the letter of the Family Code. The day-to-day activities of the district courts, however, are difficult to supervise since many of their decrees are interlocutory and not appealable. *Sims v. State Department of Public Welfare* indicates that sections of the Family Code were used routinely in the Harris County district courts to "stack" ten-day ex parte temporary custody orders. Because no relief was afforded in the Texas courts, the appellants turned to the federal district court which found that it was not required to abstain and took jurisdiction. The case represents a challenge to the procedures allegedly used in Harris County and to the wording of some portions of the statute. The procedure at issue deprived the parents of the custody of their children for more than a month without a hearing or notice of the specific charges.

The *Sims* court found several sections of the Family Code violative of the due process rights of parents. In particular, the court struck down the sections relating to taking possession of a child in an emergency. These sections make no specific provision for a full adversary hearing after the immediate emergency has passed, nor do they provide for an ex parte hearing to discover if there is an emergency in the first place. The court further noted that the normal procedures available in emergency suits af-

197. TEX. FAM. CODE ANN. § 16.05 (Vernon 1975).
200. See Kutzer v. Moore, 556 S.W.2d 865 (Tex. Civ. App.—San Antonio 1977, no writ) (pleadings sought to terminate the parental rights of both natural parents, but the trial court's judgment terminated only the rights of the mother, so that until the rights of the father had been determined, there had been no final disposition and the mother could not appeal).
fecting the parent-child relationship make possible the stacking of the provisions for ex parte orders so that the children can be in the state's custody for twenty days without a hearing. The court found these procedures unacceptable and indicated that the longest time permissible without a full hearing would be ten days from the date of seizure, not from the date recorded on the orders. Since there was no hearing, the standard of proof that would have been used by the Harris County district court is unknown. Presumably the "solid and substantial" evidence standard of the Texas Supreme Court would be appropriate, although the Family Code requires only proof by a preponderance of the evidence, and Sims held that the proof should be clear and convincing. The Sims court, in addressing the issue of counsel for the child, also held that an attorney should be appointed for every stage of the proceedings, including the emergency hearing. Additionally, and perhaps gratuitously since the issue was not before it, the court discussed the provisions for the reporting and filing of child abuse allegations, particularly those pertaining to the materials contained in the files and on the question of their confidentiality. Sims ruled that these provisions were unconstitutional. The United States Supreme Court may find that the district court's rulings are too broad, or were not relevant to the issues before it. At the least, the Court will probably uphold the district court's ruling on the notice and hearing requirements of the statute. The standard of proof that will be applied is uncertain. Perhaps the Court will agree with the Texas Supreme Court that a balancing of interests between the safety of the child and the desires of the parent is appropriate as to custody, but that clear and convincing evidence is the minimum constitutional standard for the termination of parental rights.

The procedural questions raised by Sims are especially important since the standards at the entry level should be strict enough to comply with due process, but not so strict that the children are endangered. The urgent need for proper procedures becomes more evident when one realizes that the Texas Department of Human Resources rarely appeals a decision adverse to it, and generally the Department is affirmed when it has been victorious. Nevertheless, in Travis County Child Welfare Unit v. Vance the state did appeal and won a reversal. In Vance the mother wished to have the child placed for adoption, and both the mother and the state opposed the father in his attempt to legitimate the child. The trial court

208. 438 F. Supp. at 1194.
209. Id. at 1195.
210. Id. at 1191-92.
213. Id.
found for the father on the basis of the best interest of the child, despite
evidence that he had never supported the child, had not seen the child nor
displayed any interest in him for more than two years after his birth, and
had no plans for creating a stable environment for the child were he to
obtain custody. The appeals court found the holding so contrary to the
weight of the evidence as to be clearly wrong, and reversed and remanded.

Johnson v. Jefferson County Child Welfare Unit\textsuperscript{215} is a disturbing case,
first because of the evidence of confusion of the legal meaning of a termina-
tion of parental rights in the mind of the court as well as in the minds of
social workers, and secondly because of the long delay in addressing an
alleged problem of child abuse. An involuntary termination decree must
be based on a finding of both an action prohibited by the statute and the
best interests of the child.\textsuperscript{216} The prohibited action that was used as a basis
for termination of the mother's rights had occurred some thirty-five
months prior to the trial. In the interval the child lived with his mother
and grandmother and there were no allegations of any additional child
abuse. The best interest allegations were confusing since despite the
sought for termination, requiring a complete severing of all ties between
parent and child, the social workers testified that it would not be in the
best interest of the child to terminate visitation rights. The trial court com-
plied with these confusing messages by terminating parental rights one day
and granting reasonable visitation rights the next. The appellate court
found these two rulings so inconsistent as to be "mutually destructive."\textsuperscript{217}
Thus, the court concluded there was no evidence that termination would
be in the best interest of the child, and reversed and remanded, pointing
out that it could have, on the basis of a no evidence point, reversed and
rendered.

In five cases during the survey period, parents appealed the termination
of their parental rights by the trial court based upon a proceeding initiated
by the state.\textsuperscript{218} In each case the decision was affirmed. In one case\textsuperscript{219} the
mother, who, if the evidence is correct, is not a "model" mother, argued
that the original petition to terminate and the hearing on appointment of a
temporary managing conservator were brought without time for her to
prepare or obtain counsel. Adequate notice was essential because the tem-
porary orders, which were interlocutory and therefore not appealable,\textsuperscript{220}

\textsuperscript{215} 557 S.W.2d 569 (Tex. Civ. App.—Beaumont 1977, no writ).
\textsuperscript{216} Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976); TEX. FAM. CODE ANN. § 15.02
\textsuperscript{217} 557 S.W.2d at 571.
\textsuperscript{218} Davis v. Travis County Child Welfare Unit, 564 S.W.2d 415 (Tex. Civ. App.—Austin
1978, no writ); Lane v. Jefferson County Child Welfare Unit, 564 S.W.2d 130 (Tex. Civ.
App.—Beaumont 1978, writ ref'd n.r.e.); Coleman v. Texas State Dep't of Pub. Welfare, 562
S.W.2d 554 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); In re Gilmore, 559 S.W.2d 879
Houston [14th Dist.] 1977, no writ).
\textsuperscript{219} Coleman v. Texas State Dep't of Pub. Welfare, 562 S.W.2d 554 (Tex. Civ. App.—
Tyler 1978, writ ref'd n.r.e.).
\textsuperscript{220} See, e.g., Knipe v. Colpitts, 551 S.W.2d 150 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).
continued for fifteen months without a final determination. The appeals court dismissed the problem as moot, pointing out that there had been a full and complete hearing at the time of the final determination. The court's holding may have rested on the overwhelming evidence against the fitness of the mother. Absent such evidence, and with a finding that termination would not be in the best interests of the child, this fifteen-month delay might have been a serious detriment to both mother and child. The federal court made virtually the same point in *Sims v. State Department of Public Welfare.* Nevertheless, any changes in procedure must await either modification of the Family Code by the legislature or a ruling of the United States Supreme Court.