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Family Law: Parent and Child

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FAMILY LAW: PARENT AND CHILD

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THE past year has been a relatively quiet one in family law, so far as Texas judicial developments go. Practitioners doubtless welcome this period of calm, as it frees a little time to memorize the new location of statutes that were shuffled and renumbered in wholesale lots during the 1995 biennial legislative session. This is not to say that the Texas Supreme Court or courts of appeal have been silent on family law topics; to the contrary, a half dozen supreme court opinions of interest issued during the Survey period. However, the single most interesting family law opinion, and the one with which this Survey begins, issued from a federal district court.

I. FEDERAL COURT DEVELOPMENTS: THE CONSTITUTIONALITY OF THE CHILD SUPPORT RECOVERY ACT OF 1992

The Child Support Recovery Act of 1992 (CSRA)¹ makes it a federal offense to “willfully fail[] to pay a past due support obligation with respect to a child who resides in another State.”² A past due support obligation, for purposes of the act, is any unpaid amount greater than \$5000 or owing for more than one year.³ The statute, passed with some fanfare by the Bush administration, also is a favorite of the Clinton administration. It is, nonetheless, somewhat controversial. In what is probably the

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1. 18 U.S.C. § 228 (1994).

2. *Id.* § 228(a).

3. *Id.* § 228(d)(1).

most dramatic challenge to the act's legality,⁴ a Texas doctor and self-styled "freeman" holed up at his mother's Coushatta, Louisiana, home to contest a CSRA indictment. The confrontation ended peacefully, but only after the family dog was shot while assaulting a police officer and members of "patriot" groups from several states, including the "Texas Constitutional Militia," rallied to the doctor's cause.

Oddly enough, militia members and "freemen" who claim the Child Support Recovery Act is unconstitutional can point to some mainstream support for their position. In 1995, an Arizona federal district court declared the CSRA invalid on Commerce Clause⁵ and comity grounds.⁶ In *United States v. Bailey*,⁷ United States District Judge Fred Biery of San Antonio followed suit.⁸ A few days after the Texas ruling, a Pennsylvania federal court also declared the CSRA unconstitutional.⁹ The Arizona, Texas and Pennsylvania courts based their conclusions primarily on the United States Supreme Court's recent five-to-four decision in *United States v. Lopez*,¹⁰ In *Lopez*, a case which also originated in San Antonio, Texas,¹¹ the Supreme Court invalidated on Commerce Clause grounds a part of the Gun-Free School Zones Act of 1990,¹² which made it a federal offense to knowingly possess a firearm in a school zone.¹³

In past cases, the Supreme Court has utilized a two-pronged test to determine whether the Congress has acted within its Commerce Clause authority: (1) whether there is a rational basis for the conclusion that the regulated activity sufficiently affects interstate commerce, and (2) whether the specific regulation is reasonably adapted to the constitutionally permitted goals.¹⁴ In *Lopez*, the first decision in more than fifty years in which the Court invalidated an act of Congress on Commerce Clause grounds,¹⁵ Chief Justice Rehnquist detailed three areas legiti-

4. The story was reported extensively. For useful summaries, see Kim Cobb, *Armed or Not, Militia Response Raises New Fears*, HOUS. CHRON., Mar. 3, 1996, at A1; Richard Leiby, *Potential Flash Point Defused in Louisiana; Standoff Reflects Lessons of Ruby Ridge, Waco*, WASH. POST, Mar. 2, 1996, at A3. The doctor eventually was convicted and ordered to pay more than \$90,000 past due child support. Tim Bryant, *Doctor's Verdict Demonstrates Child Support Push*, DOWD SAYS, ST. LOUIS POST-DISPATCH, June 6, 1996, at 14A.

5. U.S. CONST. art. I, § 8, cl. 3 (stating that "the Congress shall have power to regulate Commerce . . . among the several States . . .").

6. See *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995), *rev'd sub nom.*, *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996); see also *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996).

7. 902 F. Supp. 727 (W.D. Tex. 1995).

8. District Judge Biery quoted approvingly from the Arizona *Mussari* opinion. *Id.* at 729 (citing *Mussari*, 894 F. Supp. at 1367).

9. *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995).

10. 115 S. Ct. 1624 (1995).

11. *Lopez* involved a senior at San Antonio's Edison High School who was arrested for carrying a .38 caliber handgun on the school grounds. See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

12. 18 U.S.C. § 922(q) (1994).

13. *Id.* § 922(q)(2)(A) (1994).

14. See, e.g., *Hodel v. Virginia Surface Mining & Reconstruction Ass'n*, 452 U.S. 264, 265 (1981).

15. *United States v. Lewis*, 936 F. Supp. 1093, 1096 (D.R.I. 1996)

mately subject to congressional regulation: (1) the channels of interstate commerce; (2) instrumentalities, persons or things in interstate commerce; or (3) activities having a substantial relation to interstate commerce.¹⁶ The *Lopez* Court reasoned that the Gun-Free School Zones Act did not regulate an economic activity, contained no jurisdictional requirement of an interstate nexus, and had no legislative history detailing a connection to interstate commerce.¹⁷

Dicta in the *Lopez* majority opinion seemed to make federal regulations affecting the family particularly vulnerable to invalidation on Commerce Clause grounds. Chief Justice Rehnquist stated that if the Court were to recognize Congressional regulatory power any time national productivity was affected, then Congress could regulate even such "family law" activities as "marriage, divorce and child custody."¹⁸ The principal dissenting opinion did not argue the point, but stated that "[t]o hold this statute constitutional is not to . . . hold that the Commerce Clause permits the Federal Government to . . . regulate marriage, divorce, and child custody."¹⁹ Thus, it is not surprising that one scholarly writer has provided a list of federal enactments affecting family law—statutes such as the Parental Kidnapping Prevention Act of 1980,²⁰ the Child Support Enforcement Act²¹ and the Child Abuse Prevention and Treatment Act²²—that are vulnerable to constitutional challenge in the post-*Lopez* world.²³ And it is not surprising that Judge Biery concluded: "[G]iven the language and guidance of the *Lopez* majority, a reasonable inference can be made that the Supreme Court would also find constitutionally infirm Congress' attempt to regulate the family law relationship of Mr. and Ms. Bailey."²⁴

Judge Biery bolstered his analysis with two less substantial subsidiary arguments: comity and the domestic relations exception to federal jurisdiction. While the court's reasoning is not altogether clear, *Bailey* does mention the *Younger*²⁵ abstention doctrine as a reason to refrain from "interference" with state court custody determinations.²⁶ It is difficult to

16. 115 S. Ct. at 1629-30.

17. *Id.* at 1631-32.

18. *Id.* at 1632.

19. *Id.* at 1661 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.).

20. 28 U.S.C. § 1738A (1994).

21. 42 U.S.C. §§ 651-669 (1994).

22. 42 U.S.C. §§ 5101-5106h (1994).

23. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1788 n.1 (1995).

24. *Bailey*, 902 F. Supp. at 728.

25. *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the United States Supreme Court disapproved issuance of a federal injunction to prevent state prosecution under the California Criminal Syndication Act. Speaking for the Court, Justice Black stated that the injunction "must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* at 41. The decision also was grounded in principles of comity or "Our Federalism," defined by Justice Black as a belief that "the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

26. *Bailey*, 902 F. Supp. at 729.

see what "interference" would be present if a federal court lent its weight to enforcement of state child support laws.²⁷ Moreover, as one critical commentator on *Bailey* has pointed out that "notions of federalism and comity . . . alone have never been used to declare an act of Congress to be unconstitutional."²⁸ District Judge Biery's reliance on the domestic relations exception to federal jurisdiction also is questionable. The domestic relations exception to general "federal question" jurisdiction is grounded more in tradition and statutory construction than in the Constitution,²⁹ does not exclude all family law cases,³⁰ and surely could be "trumped" by a specific jurisdictional statute.³¹

Indeed, a substantial part of Judge Biery's rationale appears to be based more on public policy grounds than on strictly constitutional considerations. The *Bailey* opinion notes that states have several effective

27. *Accord* United States v. Ganaposki, 930 F. Supp. 1076 (M.D. Pa. 1996). The *Ganaposki* court stated:

The CSRA does not violate the principles of comity and federalism because it does not displace any approach taken by the states. In fact, it furthers the approach taken by the states in furthering the enforcement of state court decrees. In addition, the CSRA goes no further than the enforcement of state court decrees and is not an attempt by Congress to legislate with respect to the amount of child support payments in any particular case; any ruling that support must be paid and the amount to be paid is left to the states.

Id. at 1083.

28. Amy E. Watkins, Comment, *The Child Support Recovery Act of 1992: Squeezing Blood From a Stone*, 6 SETON HALL CONST. L.J. 845, 873 & 873 n.186 (1996); *see also* United States v. Hopper, 899 F. Supp. 389, 393 (S.D. Ind. 1995) (stating that "this Court can find no case where those 'principles' [of federalism and comity] were held to be grounds to declare an act of Congress unconstitutional").

29. The doctrine was first stated, though without any citation to authority, in *Barber v. Barber*, 62 U.S. 582 (1858). The most recent detailed exposition of the doctrine is found in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). *Ankenbrandt* held that claims of intra-familial tort triable in federal diversity courts, but nonetheless reaffirmed the domestic relations exception, in large part because Congress had not acted to amend the diversity statute after *Barber*. Justice White justified the doctrine in part because issuance of divorce, alimony or child custody decrees "not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance." *Ankenbrandt*, 504 U.S. at 703-04.

30. Many statutes touch on family law without regulating marriage, divorce and child custody laws. *E.g.*, Judith Resnick, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1721-29 (1991) (describing the impact of federal welfare, tax, bankruptcy and pension law on families). A useful distinction therefore can be drawn between "core" and "peripheral" domestic relations cases. *See* Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 603 (1984).

31. *See, e.g.*, United States v. Hampshire, 892 F. Supp. 1327, 1330 (D. Kan. 1995) (stating that "because the domestic relations exception is rooted in a narrow construction of the diversity jurisdiction statute, . . . the rule has no application where there exists an independent basis for federal jurisdiction beyond diversity of citizenship"), *aff'd*, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997); Rebecca A. Wistner, Comment, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935, 948 (1996) (stating that "[t]he domestic relations exception is an exception to diversity jurisdiction . . ., not federal question jurisdiction" and concluding that "where Congress regulates a matter of domestic relations through the Commerce Clause, the exception does not apply").

remedies for collecting support from absent parents,³² and speculates that strict enforcement of the statute would only result in a large number of suspended sentences because child support obligors cannot earn the money to pay past due support while in jail.³³ Judge Biery also expressed some doubt about using "limited federal law enforcement and judicial resources as a debt collection agency," doubtlessly reinforcing the perception of those who believe some federal judges "sense that this work is insignificant docket-clutter beneath [their] dignity."³⁴ One commentator, in fact, has taken Judge Biery to task for this language, stating that "the *Bailey* court had no authority to act as a superlegislature and declare [the CSRA] to be invalid simply because it does not think it was a wise policy choice."³⁵ While the comment may be a bit strong, Judge Biery did invite criticism by using a somewhat flippant tone in several parts of the opinion.³⁶

At the time that *Bailey* issued from the Western District of Texas, there were only three district court decisions on the CSRA—all negative. A circuit split at the district court level soon developed, with four other circuits ruling in favor of the Act's constitutionality.³⁷ In February 1996, at a law review symposium on post-*Lopez* developments, one speaker predicted that the *Bailey* appeal—like the San Antonio decision in *Lopez*—would result in the Fifth Circuit issuing the first circuit ruling on a major Commerce Clause issue.³⁸ Whether because the Fifth Circuit is a little bashful after its successful prediction in *Lopez* or otherwise, this prediction has not borne out. At the time this Survey went to press, no appellate ruling on *Bailey* was forthcoming.

In the interim, the appellate box score has shifted markedly in favor of the constitutionality of the CSRA and against the *Bailey* court's reason-

32. A list of Texas statutes is set out in the opinion. See *Bailey*, 902 F. Supp. at 729-30.

33. *Id.* at 728.

34. Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1210 (1994).

35. Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA. L. REV. 1469, 1514 (1996).

36. The opinion begins with the sentence: "Once upon a time, Keith and Lisa Bailey were, or at least thought they were, in love." *Bailey*, 902 F. Supp. at 727. It ends with a vague comment that "there may be other bases by which to challenge the constitutionality" of the statute and states the court's "humble opinion" that the CSRA is invalid. *Id.* at 730.

37. See Malcolm Stewart, *University of Idaho College of Law Federalism Symposium: IV. United States v. Lopez: A Governmental Perspective*, 32 IDAHO L. REV. 519, 522 (1996)(summarizing the state of case law on the CSRA in February 1996 and concluding, "it seems fairly likely that this could be the first post-*Lopez* statute to generate a circuit conflict" regarding the scope of Congress' power under the Commerce Clause).

District court opinions upholding the constitutionality of the CSRA initially issued from courts in the Second, Fourth, Seventh, and Tenth Circuits. See *Hopper*, 899 F. Supp. at 393. *United States v. Murphy*, 893 F. Supp. 614 (W.D. Va. 1995), *vacated on other grounds*, 934 F. Supp. 736 (W.D. Va. 1996) (finding improper venue); *Hampshire*, 892 F. Supp. at 1328-29. *United States v. Sage*, 906 F. Supp. 84 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997).

38. See Adam Hirsh, *University of Idaho College of Law Federalism Symposium: III. United States v. Lopez: A Commerce Clause Challenge*, 32 IDAHO L. REV. 505, 516 (1996)(stating that "[t]he Fifth Circuit . . . may again be the first court of appeals to rule on the constitutionality of a major Commerce Clause challenge").

ing. The Second and Tenth Circuits have ruled in favor of the Act's constitutionality³⁹ and the Ninth Circuit has joined them—reversing the Arizona decision on which *Bailey* relied so heavily.⁴⁰ Moreover, in the Third Circuit, the only remaining circuit in which a district court has declared the CSRA unconstitutional, another district court has declined to follow the first court's lead.⁴¹ Further, district court decisions in at least two more circuits have affirmed the constitutionality of the CSRA.⁴² Thus, while the *Bailey* ruling may have represented majority judicial opinion for at least a few months, it is now possible to say with some confidence that "most courts agree the legislation is constitutional."⁴³ Finally, while scholarly commentary is somewhat divided on the wisdom of the CSRA,⁴⁴ the published work to date seems unanimous in favoring its constitutionality under *Lopez* standards.⁴⁵

39. See *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996); *cert. denied*, 117 S. Ct. 753 (1997); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784, (1997).

40. *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

41. See *Ganaposki*, 930 F. Supp. at 1078 (expressly noting that its "conclusion is in conflict with the only other opinion to date in this circuit"). The *Ganaposki* court based its conclusion in large part on post-*Lopez* Third Circuit authority suggesting that Congress' Commerce Clause powers still would be viewed broadly. *Id.* at 1079-80 (discussing *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995) (construing a federal "carjacking" statute), *cert. denied*, 116 S. Ct. 681 (1995)).

42. These are the First and Eleventh Circuits. See, e.g., *United States v. Lewis*, 936 F. Supp. 1093, 1097 (D.R.I. 1996) (stating, inter alia, that "[t]he CSRA can be upheld as constitutional because the regulation of child support payments is, in itself, the regulation of the channels of interstate commerce"); *United States v. Kegel*, 916 F. Supp. 1233, 1238 (M.D. Fla. 1996) (stating that "Congress' authority under the Commerce Clause may extend to non-commercial activity by a private actor if it is of the sort capable of repetition to a degree which substantially affects interstate commerce").

43. Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1908 n.144 (1996).

44. See, e.g., Eric Grossman, Comment, *Where Do We Go From Here? The Aftermath and Application of United States v. Lopez*, 33 Hous. L. Rev. 795 (1996):

One wonders how much consultation with the states actually took place [before passage of the CSRA] because forty-eight states have already passed the Uniform Reciprocal Enforcement of Support Act . . . Perhaps the states merely needed access to federal funds in order to vigorously pursue these individuals, as opposed to the federal criminalization of failure to pay child support.

Id. at 855; see also Wistner, *supra* note 31 at 937 (characterizing the CSRA as "an unwise exercise of federal criminal lawmaking power" and "a prime example of what is wrong with the recent federalization of criminal law").

45. See, e.g., Deborah Jones Merritt, *Reflections on United States v. Lopez: Commerce!*, 94 MICH. L. REV. 674, 724 (1995) (stating that "[t]he economic nature of a parent's failure to pay child support" together with other factors "sustain[s] the constitutionality of the Child Support Recovery Act after *Lopez*"); Burdette, *supra* note 35 at 1475 (stating that "the criminal provisions of the CSRA should be found to be constitutional, both as a matter of law and as a matter of social policy"); Ronald S. Kornreich, Note, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After United States v. Lopez*, 64 FORDHAM L. REV. 1089, 1120 (1995) (concluding that "the CSRA is a valid exercise of Congress's commerce power"); Watkins, *supra* note 28 at 848 (stating that the act "is not only a legitimate exercise of Congress's power under the Commerce Clause, but also under the Spending Clause"); Wistner, *supra* note 31 at 937 (stating that "the CSRA is constitutional").

One may well question, as Judge Biery has questioned, the wisdom of adding a level of federal sanctions to a relatively well-developed system of interstate cooperation.⁴⁶ Nonetheless, at some level, that decision must be left to the United States Congress. Congress found that child support was a national problem, and that states were hampered in collecting child support obligations from out-of-state obligor parents.⁴⁷ In the aggregate, unpaid child support amounts to more than five billion dollars per year.⁴⁸

Because the CRSA requires an interstate nexus,⁴⁹ and because of the specificity of the Congressional findings,⁵⁰ it is difficult to imagine a Fifth Circuit ruling that will sustain *Bailey*. But, then again, the Fifth Circuit surprised a lot of people in *Lopez*. Until that day, if it ever comes, indictments and rulings against Texas deadbeat dads continue to issue from the many jurisdictions that have sustained the constitutionality of the CSRA.⁵¹

II. STATUS

One interesting paternity decision issued from the Texas Supreme Court during the Survey period, and one issued shortly after the period ended. *Interest of B.I.V.*⁵² is the second, and one hopes the last, Texas Supreme Court decision for a high-profile South Texas paternity suit featuring a prominent judge, Raul Longoria, as defendant.⁵³ The case

46. Texas, like all other states, the District of Columbia and Puerto Rico, has adopted the Uniform Interstate Family Support Act. *Bailey*, 902 F. Supp. at 730; see TEX. FAM. CODE ANN. §§ 159.001-902 (Vernon 1996).

47. H.R. REP. NO. 102-771, 102d Cong., 2d Sess. (1992).

48. *Hampshire*, 892 F. Supp. at 1330.

49. See, e.g., *Murphy*, 893 F. Supp. at 616 (analogizing to federal statute punishing felons who flee a state to avoid prosecution "taking advantage of our federal system of government through flight to another state").

50. One commentator has noted that "[p]erhaps the most important factor" distinguishing the CSRA from the legislation invalidated in *Lopez* was that the CSRA "was passed in response to evidence showing that existing state mechanisms had proven to be inadequate precisely because of the interstate nature of the conduct being regulated." Stewart, *supra* note 37, at 523.

51. See, e.g., Philip P. Pan, *Ex-Md. Dad a Deadbeat, Court Rules*, WASH. POST, Nov. 14, 1996, at D5 (reporting conviction against Corpus Christi man, since remarried to a King Ranch heir, and redivorced, owing about \$35,000 under Maryland court order); Joy Powell, *Child-Support Crackdown Is Welcomed Child Support*, OMAHA WORLD-HERALD, Oct. 18, 1996, at 19SF (reporting prosecution against Wimberly man owing about \$9,000 under Oklahoma court order); Peter Shinkle, *Prosecutors Target "Deadbeat Parents"*, BATON ROUGE ADVOC., Jan. 23, 1997, at 1A (reporting prosecution against Abilene man owing about \$21,000 under Louisiana court order); Bruce Vielmetti, *Federal Action Taken Against Deadbeat Parents*, ST. PETERSBURG TIMES, Mar. 10, 1996, at 1B (reporting prosecution against Texas truck driver owing nearly \$40,000 under Florida court order).

52. 923 S.W.2d 573 (Tex. 1996).

53. The first decision was *B.I.V.*, 870 S.W.2d 12 (Tex. 1994). That case was discussed in an earlier Survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 48 SMU L. REV. 1275, 1277-79 (1995) [hereinafter Paulsen, 1995 Annual Survey]. The court of appeals decision has also been discussed. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 49 SMU L. REV. 1063, 1068 (1996) [hereinafter Paulsen, 1996 Annual Survey].

involves a simple standing issue: whether the mother may intervene in a paternity and support suit brought by the Attorney General's office. The Supreme Court of Texas concluded, in a per curiam opinion reversing the judgments of both lower courts, that the mother indeed does have sufficient "personal stake in the controversy"⁵⁴ to participate. The court noted that the mother's possessory rights in the child were affected by court-ordered visitation, and that the mother's statutory right to receive and disburse support payments⁵⁵ was affected by the court's order that support payments be paid into a trust for the child.

B.I.V. is not particularly noteworthy in its own right, but it does provide another piece for the puzzle created by recent Texas Supreme Court jurisprudence on parties and judgments in the paternity area. In *Lavan*,⁵⁶ the court intimated that a suit by the Attorney General to establish paternity is not affected by declarations regarding paternity in a prior divorce decree.⁵⁷ In *J.W.T.*,⁵⁸ the court held that constitutional considerations require some opportunity for an alleged biological father to prove paternity, a holding since written into the statutes.⁵⁹ In *Dreyer v. Greene*,⁶⁰ however, the Texas Supreme Court intimated that a paternity suit brought by the children is barred by a prior divorce decree declaring the husband to be "father" of the children.

In *Dreyer*, a majority of the court relied on waiver to sidestep the issue of whether the interests of the children were sufficiently identical with or protected by the mother to warrant using the divorce action to preclude a later suit by the children.⁶¹ Therefore, the Texas Supreme Court in *Dreyer* did not engage in any close analysis of potentially conflicting interests between mother and child. Though *B.I.V.* and *Dreyer* might be distinguished on the facts, one would hope that the Texas Supreme Court will eventually see a future *Dreyer* scenario as posing a question very much like that addressed in *B.I.V.* If a parent has interests that could potentially conflict with the aims of the Attorney General's office, which

54. *B.I.V.*, 923 S.W.2d at 574 (citing *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984)).

55. The Court quoted the Family Code's provision that a parent has "the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child." *Id.* at 575 (quoting TEX. FAM. CODE ANN. § 151.003(a)(8) (Vernon 1996)).

56. *Attorney General of Texas v. Lavan*, 833 S.W.2d 952 (Tex. 1992). The case has been discussed in an earlier Survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, 46 SMU L. REV. 1515, 1515-17 (1993) [hereinafter Paulsen, 1993 Annual Survey].

57. *Id.* at 955.

58. 872 S.W.2d 189 (Tex. 1994). The case was treated extensively in an earlier Survey. See James W. Paulsen, *Family Law: Parent and Child, Annual Survey of Texas Law*, SMU L. REV., 1197, 1197-1205 (1994) [hereinafter Paulsen, 1994 Annual Survey].

59. See TEX. FAM. CODE ANN. § 160.101(a)(3) (Vernon 1996) (providing statutory authority for an action by a supposed biological father) and TEX. FAM. CODE ANN. § 160.110(f) (Vernon 1996) (establishing a two-year limitation period for such actions).

60. 871 S.W.2d 697 (Tex. 1993). The case was discussed extensively in an earlier Survey. See Paulsen, 1994 Annual Survey, *supra* note 58, at 1205-07.

61. The Court noted that the issue had not been raised at trial and "express[ed] no opinion" on the question of whether the children could raise the issue by later bill of review. *Dreyer*, 871 S.W.2d at 698 n.2.

presumably is operating in the best interest of the child,⁶² then a parent likewise might have interests that could conflict with those of a child who does not have independent representation in a divorce.

*Interest of A.L.J.*⁶³ demonstrates some of the harsh results of extending *Dreyer*. In *A.L.J.*, the mother sued to establish paternity of an alleged biological father. The man defended by pointing to the woman's prior divorce decree. The trial court granted summary judgment for the man and the court of appeals affirmed. The Tyler Court of Appeals relied on the fact that in her prior divorce case, the mother swore in her pleadings that her husband was the child's "father," and the original trial court ordered termination of the "parent-child relationship" with that "parent."⁶⁴

The mother pointed out that, so far as *res judicata* effect of the first decision was concerned, "parent" can mean something other than "biological father."⁶⁵ Moreover, argued the mother, under *Lavan*, the prior decree should not be binding. The Tyler Court of Appeals did not agree. In *Lavan*, the court pointed out, the child was not mentioned in the divorce decree.⁶⁶ Instead, the Tyler court chose to rely on the statement in *Dreyer* that "it is implausible that the court would have chosen this single word (parents) to refer, without qualification or explanation, to both the biological relationship between [the wife] and the children and some other relationship involving [the husband]."⁶⁷

Of course, one can argue with the Texas Supreme Court's assumption in *Dreyer*. The most that can be said about the husband of a child born during marriage is that he is the *presumed* biological father of that child.⁶⁸ This presumption usually will not be contested in a divorce, sometimes for the simple reason that the presumed biological father is not in the possession of facts that otherwise might lead to reasonable doubt on the point. In *Dreyer*, for example, the mother may have had a selfish reason not to disclose the existence of another possible biological father: She apparently thought her soon-to-be ex-husband was a better source of

62. Suit in *B.I.V.* was instituted under Chapter 76 of the Human Resources Code, which provides for parent locator, child support, or paternity determination services *for the benefit of a child*. *B.I.V.*, 923 S.W.2d at 574 (emphasis added); see TEX. HUM. RES. CODE ANN. § 76.004(a) (Vernon 1990), *repealed and reenacted as* TEX. FAM. CODE ANN. § 231.101(a) (Vernon 1996). For this reason, the suit is styled "In the interest of" *B.I.V.*

63. 929 S.W.2d 467 (Tex. App.—Tyler 1996, no writ).

64. *Id.* at 470.

65. "Parent" is a term used by the Family Code to mean something different from simple biological fatherhood. As but one example, the Family Code provides that a parent-child relationship is created by adoption. See TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon 1996).

66. *A.L.J.*, 929 S.W.2d at 471.

67. *Id.* at 470 (quoting *Dreyer*, 871 S.W.2d at 698).

68. See TEX. FAM. CODE ANN. § 151.002(a)(1) (Vernon 1996) (stating that "[a] man is presumed to be the biological father of a child if he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after . . .").

child support.⁶⁹ The mother in *A.L.J.* also argued that the divorce judgment was rendered by default. The Tyler Court of Appeals rejected this argument as well, pointing to recitals in the judgment that the court "had heard evidence and found that these allegations were true."⁷⁰ Moreover, as the court pointed out, *Dreyer* also involved a default judgment.⁷¹

A.L.J. is remarkable not so much for its result, which is a reasonably logical extension of *Dreyer*'s harsh holding, but for the vigorous dissent by Justice Holcomb. He pointed out, as a principal point of dissimilarity between the two cases, that constitutional arguments were waived in *Dreyer*.⁷² By contrast, in *A.L.J.*, a Texas due process claim⁷³ was "adequately and properly preserved."⁷⁴ Justice Holcomb noted that the Texas Supreme Court permitted a biological father to raise a paternity challenge and concluded that "[i]t seems to me that the children themselves would necessarily have the same right, under due course of law, to assert their claims of paternity against their actual biological father, even if their mother, in a default divorce decree, has claimed otherwise."⁷⁵

A somewhat similar paternity issue, but with a substantial interstate twist, recently has commanded the attention of the Texas Supreme Court. In *Purcell v. Bellinger*,⁷⁶ a divorced mother brought a paternity claim, individually and on behalf of her son. An earlier New York suit against the claimed biological father had been dismissed with prejudice after a finding that the mother's proof was not "clear, convincing and entirely satisfactory."⁷⁷ The child was not represented by an attorney ad litem in the New York action. In addition, most of the mother's evidence was excluded, including a blood test that would have excluded 99.4 percent of the male population.⁷⁸

The San Antonio Court of Appeals ruled that the suit was not barred. On the question of choice of law, the court simply stated without explanation or supporting authority that it was "bound by Texas law, not that of

69. See *Dreyer*, 871 S.W.2d at 700 (Gammage, J., dissenting)(noting that "[t]he twins' mother apparently was not protecting their interests when she sought child support for them from her ex-husband").

70. *A.L.J.*, 929 S.W.2d at 471.

71. *Id.* at 470.

72. Justice Holcomb also pointed out that the controlling facts were markedly different from the facts in *Dreyer*, in that *A.L.J.*'s mother was six months pregnant when she married the presumed father, and the claimed biological father did not deny sexual relations during the relevant period. *A.L.J.*, 929 S.W.2d at 474 (Holcomb, J., dissenting).

73. See TEX. CONST. art. I, § 19 (stating that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land"). Apparently no claim was made under the United States Constitution or the Texas "open courts" clause. See U.S. CONST. amend. XIV; TEX. CONST. art. I, § 13.

74. 929 S.W.2d at 473(Holcomb, J., dissenting).

75. *Id.* at 474.

76. 40 Tex. Sup. Ct. J. 295 (Jan. 31, 1997).

77. *Id.*

78. *Bellinger v. Purcell*, 914 S.W.2d 630, 632 (Tex. App.—San Antonio 1995), *rev'd*, 40 Tex. Sup. Ct. J. 295 (Jan. 31, 1997).

New York.”⁷⁹ The court’s explanation of why it did not feel bound by *Dreyer* was fleshed out in somewhat greater detail. The court relied on earlier cases to the effect that a child is not barred by the effect of a prior paternity action, unless “the record clearly demonstrates that the [previous] suit was based solely on the child’s rights . . . and that the relief was solely for the use and benefit of the child.”⁸⁰ The San Antonio court noted the intermediate appellate decision in *B.I.V.* for its analogous reasoning and concluded: “We do not find the circumstances and the holding in *Dreyer* applicable to this case because [this child] has no presumed father and has never been legitimated.”⁸¹

At first blush, the San Antonio court’s distinctions seem rather thin. But for *B.I.V.*, all the court’s authority predated *Dreyer*. Moreover, whether the mother was given a fair shake or not, the precise issue was contested and adjudicated in favor of the claimed biological father. Thus, the situation might be seen as somewhat fairer than *Dreyer*, so far as the rights of the child are concerned.

While the fact that the Texas Supreme Court reversed the San Antonio Court of Appeals in *Purcell* is not surprising, the opinion contains some very interesting language. The Texas Supreme Court applied settled law to rule that New York law, not Texas law, governed.⁸² The court noted that, at that time, New York did not permit a minor to bring a paternity proceeding, that there was no proof the child was inadequately represented or that there was any conflict of interest, and that any evidentiary problems should have been addressed in a direct appeal of the first proceeding.⁸³

The court continued, however, with some observations that might give hope to those who look for a retreat from *Dreyer* if a constitutional claim is presented squarely. The Texas Supreme Court stated that, even if New York’s law had been challenged on constitutional grounds, “[a] state has the right to impose reasonable parameters on suits to establish paternity.”⁸⁴ The court explained that under Texas law:

[T]he Family Code provides a *rebuttable presumption* that “in a trial on the merits before a judge or jury . . . the interests of the child will be adequately represented by the party bringing suit to establish parentage of the child.” . . . *Unless the child rebuts this presumption*, a judgment in a prior paternity action by the mother bars any subsequent suit.⁸⁵

79. *Id.*

80. *Id.* (quoting *Stroud v. Stroud*, 733 S.W.2d 619, 621 (Tex. App.—Dallas 1987, no writ)); *see also* *Attorney General v. Ridge*, 773 S.W.2d 645 (Tex. App.—San Antonio 1989, writ denied).

81. *Id.*

82. *See, e.g.*, *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990) (applying federal res judicata law in Texas court to determine preclusive effect of earlier federal judgment).

83. *Purcell*, 40 Tex. Sup. Ct. J. at 296-97.

84. *Id.* at 297.

85. *Id.* (emphasis added) (quoting TEX. FAM. CODE ANN. § 160.003 (Vernon 1996)).

The court added: "Our holding does not prevent a child from establishing paternity; it only prevents relitigation of paternity when the child's interests were adequately pursued in a previous paternity action that resulted in a final judgment."⁸⁶

The possible significance of the Texas Supreme Court's language may be seen by comparison to the Tyler Court of Appeals' treatment of the same statutory provision in *A.L.J.* By its language, the "rebuttable presumption" language of the Family Code seems to apply only "in a trial on the merits before a judge or jury,"⁸⁷ that is, in the first trial in which paternity is adjudged. The Tyler court proceeded from this presumption to use the language of the Family Code to argue against a later suit by the child. If, in the first trial, the court found that the interests of the child were not adequately represented by the parent bringing the suit, then—reasoned the Tyler court—the statute would have required the appointment of an attorney ad litem. Since no ad litem was appointed and the first judgment was not attacked directly, a later court must presume that the first court found the child's interests were adequately represented.⁸⁸

Of course, in the typical case, such assumptions and presumptions are sheerest nonsense.⁸⁹ If a court has no special reason to assume a conflict of interest, no attorney ad litem will be appointed. If no attorney ad litem is appointed, no one is likely to attack the judgment on the ground of inadequate representation. And if these assumptions form a total bar to a later suit by a child, then it would seem that constitutional concerns are implicated. The Tyler Court of Appeals' reasoning in *A.L.J.* therefore seems to form a "Catch 22": If an attorney ad litem is appointed, a later suit is barred because the child was represented by the ad litem; if none is appointed, a later suit is barred by the implied finding that the child was adequately represented by the parent. Either way, the child cannot sue.

In contrast, the language of the Texas Supreme Court's opinion in *Purcell* may signal an attempt by the court to use the statute's language to create an opportunity for the initiation of paternity suits by children who were in fact represented poorly by a parent in a prior action. The fact that the San Antonio Court of Appeals in *Purcell* went to some pains to distinguish *Dreyer*,⁹⁰ while the Texas Supreme Court did not mention *Dreyer* at all, surely is suggestive. One therefore might hope that if a fact situation similar to *Dreyer* should arise in a future case, and constitutional

86. *Id.*

87. TEX. FAM. CODE ANN. § 160.003 (Vernon 1996).

88. *A.L.J.*, 929 S.W.2d at 471.

89. Moreover, even if the judgment were to recite boilerplate language to the contrary, as the Tyler Court of Appeals opinion seems to intimate, the likelihood that the language reflects any "real" determination by the court would seem small. *See id.* (stating that the prior divorce court "found" that the mother would adequately represent the child's interests, that the interests were not adverse, and that there was no need for the appointment of an attorney ad litem, but not specifying whether this conclusion was based on recitals in the judgment, or conclusions based on the presumption that the court would have fulfilled all statutory duties).

90. *See supra* note 78 and accompanying text.

arguments are preserved and presented properly, the *Purcell* dicta will provide a blueprint for a different result.

One footnote on the general subject of standing and prior paternity suits should be added. In *B.M.L. ex rel. Jones v. Cooper*,⁹¹ the Austin Court of Appeals held that a suit by a child was not barred by a prior adjudication of nonpaternity in a support action brought by the Attorney General's office. In essence, the child claimed the first judgment had been obtained by fraud, and that the blood used for the initial testing was not the defendant's, but that of a "ringer."⁹² The court noted and attempted to distinguish *Dreyer*⁹³ but preferred to follow the court of appeals ruling in *Purcell*. No matter how one views the scope of *Dreyer*, or what one chooses to read into the Texas Supreme Court reversal of the intermediate decision in *Purcell*, however, the presence of a serious fraud issue affecting the central evidence presented in *B.M.L.* surely argued for limited application of the collateral estoppel doctrine.⁹⁴

In the Interest of A.S.L.,⁹⁵ a decision from the Amarillo Court of Appeals, once again raised an issue that periodically has troubled courts: whether a paternity action can be brought after the death of the alleged father. The Amarillo court noted a division of opinion between the two courts of appeals that had previously addressed the issue;⁹⁶ the Amarillo court chose to permit the child a right of action. The Amarillo court reasoned (correctly, in the writers' opinion) that the Texas Supreme Court has demonstrated some sensitivity to the rights of children born out of wedlock,⁹⁷ that the relevant statutes do not positively prohibit a suit after

91. 919 S.W.2d 855 (Tex. App.—Austin 1996, no writ).

92. A Turkish doctor stated that, on the same day the serviceman defendant supposedly had appeared to have blood drawn for testing, the doctor had seen the man whose blood was tested walking around the U.S. Air Force base wearing a different name badge. The issue was complicated by the fact that, while a letter to that effect from the doctor was submitted, a signed affidavit had not been procured. *Id.* at 857-58.

93. The Austin court believed *Dreyer* to be consistent with the proposition that "children may bring their own actions after a failure to find paternity in a divorce decree, but not after an adjudication of paternity." *Id.* at 859. Curiously, the Austin court in *B.M.L.* omitted any mention of *Lavan*, though the facts of that case arguably would be closest in point. Compare *Lavan*, 833 S.W.2d 952 (ruling that a suit by the Attorney General's office is not barred by declarations in a prior divorce decree, to which the Attorney General's office was not a party) with *B.M.L.*, 919 S.W.2d 855 (ruling that a suit by a child is not barred by declarations in a suit brought by the Attorney General's office, to which the child was not a party).

94. See *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994) (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) for the proposition that collateral estoppel requires that the issue in question have been "fully and fairly litigated" in the first case); see also RESTATEMENT (SECOND) OF JUDGMENTS § 70(1)(b) (1982) (stating that "a judgment in a contested action may be avoided if the judgment . . . [w]as based on a claim that the party obtaining the judgment knew to be fraudulent") and *id.* comment a (explaining that "[t]o immunize such a judgment from attack is to compound the injustice of its result on the merits with the injustice of the means by which it was reached").

95. 923 S.W.2d 814 (Tex. App.—Amarillo 1996, no writ).

96. Compare *In the Interest of George*, 794 S.W.2d 875 (Tex. App.—Tyler 1990, no writ) (refusing to permit an action) with *Manuel v. Spector*, 712 S.W.2d 219 (Tex. App.—San Antonio 1986, no writ) (permitting an action to proceed).

97. See, e.g., *Dickson v. Simpson*, 807 S.W.2d 726 (Tex. 1991) (stating, in the probate context, that a rule requiring a child to bring suit to establish paternity before its first

the alleged father's death,⁹⁸ and that the common law rule that paternity actions did not survive the death of the alleged father had been overruled by implication through state statute.⁹⁹

The *A.S.L.* court also addressed an evidentiary concern in post-death paternity actions. Like those in most states, Texas paternity statutes now depend heavily on blood tests.¹⁰⁰ In determining that the child was not entitled to bring a post-death paternity action, an earlier court reasoned that these statutes are "indications" that the Family Code contemplates that the suit take place during the alleged father's life.¹⁰¹ The Amarillo court in *A.S.L.*, however, noted that if the alleged father "fails to appear"¹⁰² (something that seems highly likely in the average post-mortem paternity case), then parentage testing may be waived.¹⁰³

III. CONSERVATORSHIP

Two recent decisions address the question of third party liability for conservatorship decisions. In *Mattix-Hill v. Reck*,¹⁰⁴ the Texas Supreme Court let stand a decision that, under the particular facts, a DHS caseworker was not liable in tort to a child or mother for urging that the child should be permanently removed from the home. In *Delcourt v. Silverman*,¹⁰⁵ the Fourteenth Court of Appeals likewise ruled in favor of a psychiatrist and guardian ad litem, though on immunity grounds.

Fifteen-year-old Amy Reck accused her stepfather of sexual abuse.¹⁰⁶ Amy's mother believed that no molestation had occurred and refused to ask the stepfather to leave. Amy therefore was removed from her home

birthday violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

98. The Texas Probate Code provides, among other options, that a biological child to be entitled to inherit if the child "is adjudicated to be the child of the father by court order or as provided by Chapter 13, Family Code." TEX. PROB. CODE ANN. § 42(b)(1) (Vernon Supp. 1997). That part of the Family Code, now Chapter 160, provides in part that a child may bring an action to determine paternity up to two years after becoming an adult. TEX. FAM. CODE ANN. § 160.002(b) (West 1996).

99. See *A.S.L.*, 923 S.W.2d at 816-17.

100. See, e.g., TEX. FAM. CODE ANN. § 160.102 (Vernon 1996) (stating that the court "shall" order all parties to submit to "the taking of blood, body fluid, or tissue samples"); § 160.106(c) (putting the burden of proof on one whose paternity is not excluded by a test that would exclude more than 99 percent of the male population).

101. *George*, 794 S.W.2d at 878.

102. TEX. FAM. CODE ANN. § 160.102(b) (Vernon 1996).

103. The statute actually states that parentage testing can be waived only in cases in which the respondent "fails to appear and wholly defaults." TEX. FAM. CODE ANN. § 160.002(b) (Vernon 1996). Depending on the procedural posture of the case, it would be difficult to say that the alleged father "wholly defaults" in failing to appear, or even "fails to appear," if a personal representative defends the suit. The Amarillo court in *A.S.L.* did not try to push the statutory language too far, but observed only that the statute "indicat[es] that the legislature did not consider such samples essential to deciding the paternity issue." 923 S.W.2d at 814.

104. 923 S.W.2d 596 (Tex. 1996)(per curiam).

105. 919 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

106. The summary of the facts that follows is taken largely from the Texas Supreme Court's per curiam opinion, which is somewhat better organized than the opinion of the court of appeals. See *Reck*, 923 S.W.2d at 596-97.

and placed in foster care. The stepfather eventually confessed to the abuse, whereupon Amy's mother commenced divorce proceedings. Meanwhile, Amy ran away from her foster home. She returned three days later, claiming she was raped by one or more unknown men. When Amy disappeared, caseworker Mattix-Hill contacted Mrs. Reck to notify her of Amy's disappearance. In the same conversation, Mattix-Hill also urged Mrs. Reck to permanently place Amy in foster care.

Instead, Amy's mother sued the DHS, Mattix-Hill and four other DPS employees under the Texas Tort Claims Act¹⁰⁷ for intentional infliction of emotional distress and similar torts.¹⁰⁸ The jury found in favor of two co-workers but awarded \$3.5 million against the remaining defendants on intentional infliction of emotional distress grounds; the trial court granted an across-the-board judgment notwithstanding the verdict.¹⁰⁹ Mrs. Reck appealed the judgment against Mattix-Hill and two other employees.

The Beaumont Court of Appeals went through an unusually detailed description of the acts of which Amy Reck and her mother complained,¹¹⁰ matching them against the elements of the tort of intentional infliction of emotional distress set out in *Twyman*.¹¹¹ The trial court's judgment in favor of one defendant, who supposedly ratified the wrongful acts of the others, was dismissed for lack of record support, together with a lack of legal authority for the proposition that liability for intentional infliction of emotional distress can be imposed simply for approving another's acts.¹¹² The judgment in favor of a second defendant, who supposedly yelled at Mrs. Reck over the phone and "threw" pamphlets at her while interviewing her about her husband's molestation of Amy, was affirmed on the ground that the actions, even if true, did not constitute "intentional outrageous or extreme conduct."¹¹³

On most claims, the Beaumont Court of Appeals also found in favor of caseworker Mattix-Hill, principally because there was no properly briefed record support. Nonetheless, the court of appeals found some evidence to support the claim that Mattix-Hill had acted outrageously in trying to get Mrs. Reck to consent to a permanent placement plan for Amy during the same conversation in which she told Mrs. Reck that Amy had disappeared. The Beaumont court noted that "[o]ur Supreme Court has not defined 'all reasonable bounds of decency'" and added that the question "may be a fact issue."¹¹⁴ The court conceded that Mattix-Hill's inquiries,

107. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-109 (Vernon 1986 & Supp. 1996).

108. These included bad faith, malice, gross negligence and civil conspiracy. *Reck v. Londow*, 926 S.W.2d 592, 592 (Tex. App.—Beaumont 1995), *rev'd in part sub nom.* *Mattix-Hill v. Reck*, 923 S.W.2d 596 (Tex. 1996).

109. *Reck*, 923 S.W.2d at 597.

110. *See Reck*, 926 S.W.2d at 593-97.

111. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

112. *Reck*, 926 S.W.2d at 594. The court of appeals also found that some other acts either were never communicated directly to the plaintiffs or that they did not, as a matter of law, rise above the level of mere negligence. *Id.*

113. *Id.*

114. *Id.* at 596.

under the circumstances, might be viewed as an attempt to take unfair advantage of Mrs. Reck. As a consequence, the Beaumont panel concluded that “[w]e cannot say, as a matter of law, this does not constitute outrageous or extreme conduct.”¹¹⁵

The Texas Supreme Court disagreed. Both the telephone call about Amy’s disappearance and the questions about the placement plan were part of Mattix-Hill’s job. The Court reminded the parties that “DHS caseworkers are often involved in emotionally charged situations, and . . . they may be confronted with conflicting interests and duties.”¹¹⁶ After stating that it was appropriate for Mattix-Hill to contact Mrs. Reck about Amy’s disappearance, the Texas Supreme Court added: “Nor was a request that Reck sign the placement papers or the timing of that request ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.’”¹¹⁷

While the finer nuances of *Reck* are perhaps of more interest to tort lawyers than family law practitioners, three points are of more general interest. First, the Beaumont court’s observation that the Texas Supreme Court has not given much guidance on what constitutes “extreme and outrageous” conduct remains valid after the supreme court’s uninformative ruling in *Reck*.¹¹⁸ Perhaps the outrageous conduct that gives rise to a tort claim will prove incapable of any definition more precise than Justice Potter Stewart’s famed “I know it when I see it” definition of obscenity.¹¹⁹ Nonetheless, while the writers do agree with the result, it is unsettling to have the outcome of a case depend on something no more substantial than the unamplified opinion of nine judges based on “eyeballing” the evidence.

A second point of interest about *Reck* is that both the litigants and the courts appeared to ignore a critical point of legal difference between the principles announced in *Twyman* and the actual charge that was submitted in *Reck*. In *Twyman*, the Texas Supreme Court adopted the tort of intentional infliction of emotional distress “as set out in Section 46(1) of the *Restatement (Second) of Torts*.”¹²⁰ As the Texas Supreme Court correctly pointed out in *Reck*, the “extreme and outrageous” conduct targeted by the Restatement must “go beyond all possible bounds of decency.”¹²¹ Nonetheless, while the Beaumont court characterized the

115. *Id.*

116. *Reck*, 923 S.W.2d at 598.

117. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

118. The Texas Supreme Court stated that the caseworker was simply doing her job, that DHS workers “are often involved in emotionally charged situations” and that they “strive to protect the child, to treat the parents fairly, and to further the goals of society.” *Reck*, 923 S.W.2d at 598. All this may well be true. It says nothing, however, about the question of whether it is appropriate to discuss a permanent placement plan in the same conversation in which a mother is informed that her daughter is missing from the foster home. To that question, the court simply stated that caseworker Mattix-Hill’s conduct was “appropriate in the circumstances.” *Id.*

119. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring).

120. 855 S.W.2d at 621-22.

121. *See supra* note 117 (emphasis added).

Reck jury charge as “correctly submitted under *Twyman*,” the jury instruction of “extreme and outrageous” conduct actually stated only that the conduct must exceed “all reasonable grounds of decency,” rather than following *Twyman*’s “all possible grounds of decency” language.¹²² This language discrepancy might be crucial. One might well agree with the Beaumont court that whether the caseworker’s conduct exceeded all “reasonable” bounds of decency might be one for the jury, yet also agree with the supreme court that the evidence does not raise a fact issue as to whether all “possible” bounds of decency have been exceeded. The failure of either the Beaumont Court of Appeals or the Texas Supreme Court in *Reck* to address the substantial discrepancy between the language of the charge, and that of *Twyman* and the Restatement is unfortunate, because other courts appear to be using the erroneous “all reasonable bounds” language.¹²³

In *Reck*, the Texas Supreme Court stated that in view of the disposition of the case, it was not necessary to reach the question of whether the caseworker was protected by judicial immunity or statutory protection for individual defendants under the Texas Tort Claims Act.¹²⁴ An immunity question was addressed more directly by the Houston Court of Appeals (Fourteenth District) in *Delcourt v. Silverman*.¹²⁵ The losing parent in a custody dispute sued the court-appointed psychiatrist and attorney ad litem on several tort grounds.¹²⁶ The trial court granted summary judgment for the professionals; the court of appeals affirmed. Because the trial court’s grant of summary judgment did not specify the grounds, the court of appeals had the option to affirm the decision for any reason warranted by the evidence.¹²⁷ The Houston court chose, in an elaborately reasoned opinion, to affirm on the ground of absolute immunity.

122. *Twyman*, 855 S.W.2d at 621 (quoting the *Restatement*).

123. See *Villasenor v. Villasenor*, 911 S.W.2d 411, 421 (Tex. App.—San Antonio 1995, no writ) (quoting *Massey v. Massey*, 807 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1991, writ denied) and concluding that defendant’s actions exceeded “all reasonable bounds of decency”); *Massey*, 807 S.W.2d at 400 (stating that “[o]utrageous conduct is that conduct which exceeds all reasonable bounds of decency”).

124. *Reck*, 923 S.W.2d at 598. The Texas Tort Claims Act provides that a judgment against a governmental entity bars an action against an individual employee based on the same subject matter. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 1986) (stating that “[a] judgment in an action or a settlement of a claim under [the Texas Tort Claims Act] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim”). The Act, however, does not apply when the claim “aris[es] out of assault, battery, false imprisonment, or any other intentional tort.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (Vernon 1986). The court of appeals held that the latter section permitted the action against the individual caseworkers to proceed, despite the fact that the Recks did not appeal the J.N.O.V. in favor of the DHS. *Reck*, 926 S.W.2d at 592.

125. 919 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

126. There was some dispute as to exactly which pleading was the “live” one, and how many torts were alleged. The court of appeals eventually boiled the list down to four: negligence, fraud, civil conspiracy and intentional infliction of severe emotional distress. *Id.* at 780-81.

127. See *id.* at 780 (citing *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)).

The *Delcourt* opinion begins with an extended primer on the doctrine of judicial immunity. Judges generally are immune from liability for actions undertaken while in the performance of their office, "no matter how erroneous the act or how evil the motive."¹²⁸ When a judge delegates or appoints another to perform services for the court, immunity may follow the delegation, under the doctrine of "derived judicial immunity."¹²⁹ Courts commonly follow a "functional" approach to determination of immunity, asking whether the party claiming immunity is "acting as an integral part of the judicial system or an 'arm of the court.'"¹³⁰ The relevant question is then whether the psychiatrist and ad litem were acting on behalf of the judge.

As to the psychiatrist, appointed under Rule 167a to evaluate the parents and child,¹³¹ the court noted that "the psychiatrist or mental health professional perform[s] a special task closely related to the judicial process pursuant to a court directive."¹³² If immunity were not offered, the Houston court reasoned, "such professionals would be, at the very least, reluctant to accept these appointments," which would "inhibit judges from performing their duties."¹³³

The ad litem appointment was a somewhat trickier matter. Under the Family Code,¹³⁴ a court is empowered, and sometimes required, to appoint an attorney ad litem for a child. Nonetheless, until the *Delcourt* decision, there apparently had never been a decision on the liability of an ad litem appointed under the Family Code.¹³⁵ Recent commentators, including the associate judge who appointed the psychiatrist and attorney ad litem in the *Delcourt* matter, have expressed concern over the lack of clear liability standards.¹³⁶ The court of appeals therefore undertook to provide this certainty by extending judicial immunity to attorneys ad litem.

128. *Id.* at 781 (citing, inter alia, *Turner v. Pruitt*, 342 S.W.2d 422, 423 (Tex. 1961)). The court qualified this general statement with the sole requirement that the judicial action not be taken "in the clear absence of all jurisdiction." *Id.*

129. *Id.* at 782 (citing *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992)).

130. *Id.* (citing and quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)).

131. The rule states that in Title II family law cases, the court may appoint "one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties." TEX. R. CIV. P. 167a(d)(1).

132. *Delcourt*, 919 S.W.2d at 782.

133. *Id.* at 783.

134. The provision relied upon at trial in *Delcourt* was revised and recodified during the 1995 rewrite of the Family Code. The Code now provides that an attorney ad litem must be appointed in any suit in which termination of parental rights is requested, with certain exceptions. TEX. FAM. CODE ANN. § 107.001(a) (Vernon 1996). The Code also provides that an attorney ad litem may be appointed, at the discretion of the court or associate judge, in any other matter. § 107.001(b). Appointment is required in cases in which "the court deems representation necessary to protect the interests of the child who is the subject matter of the suit." § 107.011(b).

135. *Delcourt*, 919 S.W.2d at 783.

136. See Jim Gulberteau & Linda Motheral, *The Changing Role of Guardian and Attorney Ad Litem*, 55 TEX. B.J. 955, 957 (1995) (stating that "it may be anticipated that there will be the potential for increasing shortages of available and qualified attorneys over the next few years who will be willing to risk the uncertainty and exposure. . .").

The *Delcourt* panel took considerable trouble to distinguish its decision from a recent Dallas opinion, *Byrd v. Woodruff*,¹³⁷ in which judicial immunity was denied to an attorney ad litem. In *Byrd*, the ad litem was appointed under Rule 173¹³⁸ to represent the child's interests in determining the apportionment of settlement proceeds. Because the ad litem's duties in such a case "place the ad litem in the capacity of the minor's personal representative, displacing the next friend," the *Byrd* ad litem was "acting as an advocate and not a representative of the court."¹³⁹

Although the *Delcourt* court is not particularly clear on the issue, it evidently felt an ad litem appointment under the Family Code should be treated differently, not because the ad litem has a different responsibility under the Family Code compared to a personal injury settlement, but because the judge has a different role. In both a personal injury settlement and a custody case, the ad litem must represent the best interests of the child. In a custody case, however, the judge is not a neutral arbiter between the competing parties. Rather, the court, like the ad litem, is under a statutory mandate to act in "[t]he best interest of the child."¹⁴⁰ For this reason, most¹⁴¹, but not all,¹⁴² courts extend a form of judicial immunity to guardians ad litem in child custody matters.

The decision in *Delcourt*, however, is not altogether immune from criticism. For one thing, the interests of the ad litem and the court in a child custody are not always completely in harmony. While the best interest of the child is the "primary consideration" for the court in a child custody matter,¹⁴³ other considerations, such as the public policy favoring the appointment of parents as conservators, also must be considered. The attorney ad litem, appointed simply "to protect the interests of the child," has no such constraints.

Another ground on which *Delcourt* can be criticized is the court's inadequate attention to assuring the child some redress for inadequate representation by an attorney ad litem. Absolute quasi-judicial immunity would not only block suits by disgruntled non-custodial parents, it would prohibit suits by children wronged by the negligent conduct of ad litem

137. 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ denied).

138. The rule provides in relevant part that when a minor "is a party to a suit . . . and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor . . . , the court shall appoint a guardian ad litem for such person." TEX. R. CIV. P. 173.

139. *Delcourt*, 919 S.W.2d at 784.

140. See TEX. FAM. CODE ANN. § 153.004 (Vernon 1996) (stating that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child").

141. See generally Susan L. Thomas, Annotation, *Liability of Guardian Ad Litem for Infant Party to Civil Suit for Negligence in Connection With Suit*, 14 A.L.R. 5th 929 (1996).

142. A notable exception is the recent decision in *Fleming v. Asbill*, 42 F.3d 886 (4th Cir. 1994) (holding, under South Carolina law, that a guardian ad litem could be liable in a negligence suit by a child claiming poor representation in suit in which grandparents obtained custody).

143. See *supra* note 140.

supposedly acting on their behalf.¹⁴⁴ The Texas Legislature has recently evidenced concern for the competence of attorneys ad litem, spelling out the minimum duties of those attorneys¹⁴⁵ and requiring a training course and continuing legal education.¹⁴⁶ Sampson and Tindall correctly state that "it is a sad commentary on the practice of law when the legislature must intervene to mandate elementary activities of an attorney."¹⁴⁷

Delcourt may well be right, as a matter of public policy. One wonders, however, why the court felt it necessary to blaze a new public policy trail by declaring a policy of quasi-judicial immunity for attorneys at litem when a similar result might have been accomplished, at less expense to children, by expansion of existing rulings on the scope of the general duty owed by attorneys and other professionals to third parties. The Texas Supreme Court recently ruled that psychologists in family law cases have no duty to third party litigants,¹⁴⁸ even more recently, the court has ruled that attorneys who draft wills are under no duties to the beneficiaries.¹⁴⁹ A ruling that an attorney ad litem has no duty to either parent would seem to accomplish the principal purpose of a broad-based immunity, while not excusing an attorney for shoddy representation of her client, the child. Nonetheless, despite the fact that a "no duty" theory evidently was the primary ground for summary judgment at the trial level,¹⁵⁰ the *Delcourt* panel chose to ground its decision on immunity.¹⁵¹

In addition to decisions on third party liability and immunity, the Survey period also contains the usual run of cases illustrating particular examples of the setting of terms and conditions of conservatorship, and the circumstances under which conservatorship will be modified. *Wolfe v. Wolfe*¹⁵² is one of the more factually interesting, and undoubtedly the most salacious, case of the Survey period, starring a doting (or mentally unstable) mother who breast-fed her son until age four, then absconded with him to New Zealand, and a father who after four years of forced

144. The *Delcourt* court apparently realized that its decision would cut off suits by children wronged by negligent actions of attorneys ad litem, distinguishing the typical *Byrd*-type lawsuit on that basis that "[i]n that particular situation it would be unfair to deny a minor the ability to seek recourse for inadequate representation." 919 S.W.2d at 784.

145. TEX. FAM. CODE ANN. § 107.014(b) (Vernon 1996) (stating that, at a minimum, an attorney ad litem must interview the child and individuals with significant knowledge about the child).

146. *Id.* § 107.006.

147. SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 320, § 107.104 commentary (Aug. 1996 ed.).

148. *See Bird v. W.C.W.*, 868 S.W.2d 767, 768 (Tex. 1994) (stating that there is "no professional duty running from a psychologist to a third party to not negligently misdiagnose a condition of a patient").

149. *See Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996) (stating that "[b]ecause the attorney did not represent the beneficiaries, we . . . conclude that he owed no professional duty to them").

150. *See Delcourt*, 919 S.W.2d at 780 (stating that the defendants moved for summary judgment, first, because "they owed no duty to *Delcourt*").

151. The last substantive paragraph of the decision states that "[b]ecause we find Silverman and Trusch were entitled to summary judgment based on immunity, we do not reach the issue of no duty." *Id.* at 788.

152. 918 S.W.2d 533 (Tex. App.—El Paso 1996, writ denied).

celibacy developed a fondness for kinky sex with a paramour. The latter relationship led to an evidentiary question discussed by the El Paso Court of Appeals for about two printed pages under the heading "Exclusion of Sexual Apparatus."¹⁵³

More mundane entries in this year's crop of conservatorship decisions include a case confirming a court's discretion to restrict the "competent adults"¹⁵⁴ a possessory conservator can designate in his stead to pick up a child for visitation¹⁵⁵ and a decision denying a trial judge's attempt to override federal tax law¹⁵⁶ by denying a custodial parent the right to claim tax exemptions for two of three children.¹⁵⁷ In an Amarillo appeal from a divided custody case,¹⁵⁸ the court found justification for deviation from the standard summer possession order¹⁵⁹ in a trial court's finding that the two children would benefit from spending more time together.¹⁶⁰ The Houston Court of Appeals (Fourteenth District) also ruled that a party who backs out of a mediated agreement to modify custody can be forced to abide by that agreement, but only through proceedings to enforce a contract.¹⁶¹

153. See *id.* at 538-40. The court concluded that "[s]ome of the items are downright nasty; all are in poor taste," and that their probative value therefore was probably outweighed by the potential for prejudice. *Id.* at 540. Moreover, since testimony had been elicited as to the general nature of the material, any error in excluding the paraphernalia was harmless. *Id.*

154. See TEX. FAM. CODE ANN. § 153.316(b) (Vernon 1996) (stating that "either parent may designate a competent adult to pick up and return the child").

155. See *Capello v. Capello*, 922 S.W.2d 218 (Tex. App.—San Antonio 1996, no writ)(refusing to permit a girlfriend or her family to pick up a child for visitation, despite a claim of hardship).

156. Federal law provides as a general matter that the parent in whose custody a child is for more than half the calendar year has the right to claim the tax exemption. See 26 U.S.C. § 152(e)(1)(1994).

157. See *Lystad v. Lystad*, 916 S.W.2d 617, 618 (Tex. App.—Fort Worth 1996, no writ)(stating that "[w]e must narrowly construe deductions and exemptions provided in the tax statutes").

158. *Interest of Doe*, 917 S.W.2d 139 (Tex. App.—Amarillo 1996, writ denied).

159. See TEX. FAM. CODE ANN. § 153.313(3) (Vernon 1996) (providing, in a standard possession order for parents who reside more than 100 miles apart, for 42 days summer visitation); § 153.252(2) (setting out a rebuttable presumption that the standard possession order is in the best interest of the child).

160. While the Family Code provides that the standard possession order is rebuttably presumed to be in the child's best interest, see *supra* note 159, the Code also provides that "[i]t is preferable for all children in a family to be together during periods of possession." TEX. FAM. CODE ANN. § 153.251(c) (Vernon 1996).

161. *Davis v. Wickham*, 917 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1996, no writ). The court noted the general rule that if consent is withdrawn before judgment, a consent judgement cannot be rendered. *Burnaman v. Heaton*, 240 S.W.2d 288, 291 (Tex. 1951). A mediated settlement is enforceable "in the same manner as any other written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 1996). The court could, "after proper notice and hearing," have proceeded to render judgment, "not [as] an agreed judgment, but [as] a judgment enforcing a binding contract." *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). Because the trial court rendered judgment at a hearing called "solely for the purpose of determining the merits of the motion . . . to enter the agreed settlement," the case was remanded for further proceedings. *Davis*, 917 S.W.2d at 416.

The Family Code requires that modification of sole managing conservatorship take place only if a party's circumstances have "materially and substantially changed" and a new sole conservator would be a "positive improvement."¹⁶² The Code does not, however, define these terms, but leaves their amplification to trial judges. In *Marriage of Chandler*,¹⁶³ the Amarillo Court of Appeals held that a mother's repeated moves (four in three years), remarriage to a man with two children in need of care, a new baby, and a generally uncooperative and hostile attitude toward her ex-husband and his visitation rights combined to demonstrate grounds for modification.¹⁶⁴ In *Graves v. Graves*,¹⁶⁵ on the other hand, the Houston Court of Appeals (First District) reversed an order modifying custody on the ground that the non-custodial parent's affidavit did not meet the special heightened standard required of modification orders during the first year after issuance. The statute usually requires a showing that the "present environment may endanger the child's physical health or significantly impair the child's emotional development."¹⁶⁶ The affidavit, however, simply stated that because the father had been unable to communicate with his child, he was "concerned that she may be in danger."¹⁶⁷

Two decisions address problems peculiar to conservatorship by grandparents. The Family Code expresses a strong preference for parents in custody decisions and imposes a heavy burden on nonparents.¹⁶⁸ A parent is to be appointed as managing conservator "[u]nless the court finds that appointment . . . would significantly impair the child's physical health or emotional development."¹⁶⁹ In *Kirby v. Chapman*,¹⁷⁰ a case marred by allegations of political bias on the part of the presiding judge,¹⁷¹ the Fort Worth Court of Appeals found the standard to be met. The child's grandparents and the deceased father's second wife obtained managing conser-

162. TEX. FAM. CODE ANN. § 156.101(a)(1), (2) (Vernon 1996).

163. 914 S.W.2d 252 (Tex. App.—Amarillo 1996, no writ).

164. The Waco Court of Appeals has disagreed with *Marriage of Chandler* because the *Chandler* court applied a normal sufficiency of the evidence standard of review instead of reviewing the trial court's decision solely for abuse of discretion. See *Wilemon v. Wilemon*, 930 S.W.2d 290, 294 (Tex. App.—Waco 1996, no writ). Nonetheless, since the Amarillo court in *Chandler* affirmed the trial court in any event, no harm was caused. The *Chandler* court commented, in a footnote, that "[l]eft for another day is the issue of whether those appealing questions controlled by the abuse of discretion standard actually present basis to secure reversal when they fail to argue, through point of error, that the discretion was indeed abused." 914 S.W.2d at 253 n.1.

165. 916 S.W.2d 65 (Tex. App.—Houston [1st] 1996, no writ).

166. TEX. FAM. CODE ANN. § 156.102(b)(1) (Vernon 1996).

167. *Graves*, 916 S.W.2d at 69.

168. See, e.g., *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990).

169. TEX. FAM. CODE ANN. § 153.131(a) (Vernon 1996).

170. 917 S.W.2d 902 (Tex. App.—Fort Worth 1996, no writ).

171. The judge, Randy Catterton, had been appointed to the bench in part through the good offices of State Senator Chris Harris, the mother's ex-brother-in-law. The Fort Worth Court of Appeals noted that Judge Catterton also had substantial support in the Tarrant County family bar (some 40 or more attorneys took a bus to Austin to support his nomination), and that political appointment—like partisan elections—is simply one of the "facts of life" in Texas law, not an independent ground for recusal. *Id.* at 908 (quoting *Rogers v. Bradley*, 909 S.W.2d 872, 882 (Tex. 1995), quoting in turn from *Aguilar v. Anderson*, 855 S.W.2d 799, 805 (Tex. Ap.—El Paso 1993, writ denied) (Osborn, C.J., concurring)).

vatorship on a dual showing: First, the child was emotionally disturbed and exhibited inappropriate sexual behavior. Second, the mother, a forty-two-year-old doctor, demonstrated "poor dating choices."¹⁷² She had married and divorced once since the divorce in question, to a psychotic fast food worker with sexual problems. She also had six intimate relationships in the three years preceding the modification hearing, including one with a married psychiatric patient and another with a man she met through a personals ad in *The Dallas Observer*.¹⁷³ These factors combined, in the court's opinion, to demonstrate that the child's need for "as consistent and as unstimulating . . . an environment as he can get" was unlikely to be met by continuing to live with the mother.¹⁷⁴

*Interest of Ferguson*¹⁷⁵ demonstrates some intentional asymmetry in the Family Code. The mother conceded managing conservatorship to the paternal grandparents, who had been caring for the children while the mother attended school. After the mother landed a steady job and married, she sought to be named managing conservator of the children. The trial court explicitly acknowledged that if the question were being decided for the first time, it would have appointed the mother managing conservator pursuant to the statutory presumption.¹⁷⁶ However, since the grandparents were managing conservators, the court believed the initial presumption had been replaced by the Family Code's requirement that the mother show her appointment would be a "positive improvement."¹⁷⁷ This she did not do. The mother conceded long-standing case law to the effect that the parental presumption does not control in a suit to modify conservatorship, but argued that 1987 amendments strengthening the parental presumption now demand a different result. The Texarkana Court of Appeals concluded, however, that the amendments only strengthened the initial presumption in favor of parents, and did not alter the burdens in a motion to modify.¹⁷⁸

IV. SUPPORT

Under the uniform and federal acts for child support and custody cases,¹⁷⁹ the preferred basis for initial jurisdiction is the child's "home state."¹⁸⁰ The "home state" is the state in which the child resided for the

172. *Kirby*, 917 S.W.2d at 913.

173. *Id.* at 912-13.

174. *Id.* at 914.

175. 927 S.W.2d 766 (Tex. App.—Texarkana 1996, no writ).

176. See *supra* note 68 and accompanying text.

177. See TEX. FAM. CODE ANN. § 156.203(2) (Vernon 1996).

178. *In re Ferguson*, 927 S.W.2d at 768.

179. See 28 U.S.C. § 1738A (1994) (Parental Kidnapping Prevention Act, hereinafter PKPA); 28 U.S.C. § 1738B (1994) (Full Faith and Credit for Child Support Orders Act); TEX. FAM. CODE ANN. §§ 152.001-025 (Vernon 1996) (Uniform Child Custody and Jurisdiction Act, hereinafter UCCJA); TEX. FAM. CODE ANN. §§ 159.001-902 (Vernon 1996) (Uniform Interstate Family Support Act, hereinafter UIFSA).

180. See 28 U.S.C. § 1738A; TEX. FAM. CODE ANN. §§ 152.003, 159.204 (Vernon 1996). However, under the recently enacted Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, a court that had "subject matter jurisdiction" and "personal jurisdiction

six months immediately preceding the initiation of the action.¹⁸¹ If a child support or custody decree is entered in accordance with the jurisdictional rules of these laws, the decree enjoys a sort of statutory full faith and credit,¹⁸² and the rendering court enjoys exclusive jurisdiction to modify the subject rights and obligations between the parties. This system works reasonably well among the states of the United States, all of which are bound by federal law, and all or most of which have embraced the obligations and benefits of the uniform acts.¹⁸³ Texas even takes the system a step further, by adopting the pertinent jurisdictional provisions of the UCCJA as a basis for all suits affecting the parent child relationship.¹⁸⁴

Not all child custody or support cases, however, involve contests between U.S. citizens, residents or courts. In Texas custody and support cases, an out-of-state decree might well be Mexican, or at least the contestants are more likely to hail from Mexico than from Montana. Two recent Texas cases illustrate the application of the uniform laws in the "international" context. While neither breaks important new ground in international family law, each serves as a useful lesson and occasion to consider Texas family law in the transnational context.

*Flores v. Melo-Palacios*¹⁸⁵ involved a mother's effort to modify and enforce a Mexican child support decree or establish a new Texas decree.¹⁸⁶ All three parties were citizens of Mexico,¹⁸⁷ but the mother and child were clearly residents of Texas and the obligor father was at least arguably a resident of Texas.¹⁸⁸ The trial court apparently believed, erroneously, that it could not exercise personal jurisdiction over the father for child support purposes because of his Mexican citizenship. It also may have believed, equally erroneously, that it could not exercise subject-matter jurisdiction to enforce a Mexican decree, or that it lacked subject mat-

over the contestants" when it issued an order acquires exclusive and continuing jurisdiction if that state is the *child's* residence or the residence of *either* of the contestants. *Id.* § 1738B(c), (d).

181. TEX. FAM. CODE ANN. §§ 152.002, 159.101 (Vernon 1996). *But see infra* note 190.

182. For a discussion of the otherwise uncertain availability of Constitutional full faith and credit for child support decrees, see HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 750-54 (2d ed. 1988).

183. *See* Uniform Child Custody Jurisdiction Act Annot., Table of Jurisdictions Wherein Act Has Been Adopted (1968)(listing all states); Uniform Interstate Family Support Act Annot., Table of Jurisdictions Wherein Act Has Been Adopted (1992)(listing 26 states).

184. TEX. FAM. CODE ANN. § 102.011 (Vernon 1996). However, a suit under the UIFSA is not a "suit affecting the parent child relationship" for this purpose. *Id.* The UIFSA carries its own terms of jurisdiction. *See* TEX. FAM. CODE ANN. §§ 159.201, 159.205.

185. 921 S.W.2d 399 (Tex. App.—Corpus Christi 1996, writ denied).

186. The Attorney General intervened in the action for the purpose of establishing a Texas support order. In addition to joining in the successful appeal of the trial court's dismissal on grounds of lack of jurisdiction, the Attorney General also successfully appealed from the trial court's striking of the Attorney General's plea in intervention. *Id.* at 404.

187. *Id.* at 401.

188. *Id.* at 401, 403.

ter jurisdiction over a child support dispute between two Mexican citizens.¹⁸⁹

It is useful to note at the outset that there might have been subject-matter jurisdiction under UIFSA to register or enforce the Mexican decree under that Act. UIFSA was written to apply to and provide enforcement of a foreign decree in *some* instances, much as it does in the case of a decree of a sister state. The Act defines "State" (and thereby also defines such key terms as "home state," "initiating state," "issuing state," and "responding state"), to include "a foreign jurisdiction that has established procedures for issuance and enforcement of support orders that are *substantially similar* to the procedures under this chapter."¹⁹⁰ Thus, Mexico might qualify as a "state" wherever that term is used in UIFSA, provided it has rules "substantially similar" to those of UIFSA.¹⁹¹

Unfortunately, the *Flores* case never reached the issue of whether the Mexican decree qualified for recognition under UIFSA. Instead, the Corpus Christi court appears to have treated the case as a simple non-UIFSA action for an initial support decree, ignoring the alternative request for registration and enforcement of the existing Mexican decree.¹⁹²

As a suit for an initial child support decree, the action was subject to the usual rules of jurisdiction for a suit affecting the parent-child relationship. Under the Texas Family Code, a court may exercise either *status* jurisdiction over the matter under the rules of the UCCJA (for example, "home state" jurisdiction), or it may exercise *personal* jurisdiction over the nonresident respondent on any of the usual bases for personal jurisdiction, including personal service with citation in Texas.¹⁹³

Since the father in *Flores* was in fact served in Texas, the court had at least one clear-cut statutory basis for exercising personal jurisdiction against him. The father, however, argued that exposing him to the power of the Texas courts, for the mere reason of his transitory presence in the state at the time he was served with process, was a denial of due process. The court of appeals found this argument foreclosed by the U.S. Supreme Court's decision in *Burnham v. Superior Court of California*.¹⁹⁴ There, the Court rejected the due process argument and upheld the rule allowing personal service of process on a nonresident during the nonresident's

189. *Id.* at 403. For a discussion of an old and long-since abandoned rule that jurisdiction to make a custody determination was limited to the state that was the child's domicile, see Clark, *supra* note 182, at 456-62. However, this rule does not appear to have been applied to child support adjudications. See *supra* note 182.

190. TEX. FAM. CODE ANN. § 159.101(19) (Vernon 1996) (emphasis added).

191. The Commissioners used Mexico and Canada as particular examples of nations whose child support decrees might be registered and enforced under UIFSA. TEX. FAM. CODE ANN. § 159.101 commissioners' commentary (Vernon 1996).

192. Were the father to invoke the exclusive and continuing jurisdiction of the Mexican court as a defense against the prayer for a Texas child support decree, the court might be forced to reconsider the applicability of the UIFSA. TEX. FAM. CODE ANN. § 205(d); § 159.205(d) (Vernon 1996).

193. See TEX. FAM. CODE ANN. § 102.011 (Vernon 1996).

194. 495 U.S. 604 (1990). See *Flores*, 921 S.W.2d at 402-03 (containing the Corpus Christi court's discussion of this issue and the *Burnham* case).

transitory presence.¹⁹⁵

In any event, the court found that the father in *Flores* was in fact a resident of Texas, because he rented a Dallas apartment and lived there with his current wife for one year, held a Texas driver's license showing that apartment as his address, enrolled his other child in a Dallas school, and attended a Dallas church. Thus, he was subject to service of process as a Texas resident wholly apart from his physical presence in Texas at the time he was served with process.¹⁹⁶

The defendant appears also to have argued that personal jurisdiction alone was insufficient under Texas Family Code section 102.011, which he interpreted to require *both* personal jurisdiction and status jurisdiction in a suit affecting the parent-child relationship. This argument has some support in a theory that certain status adjudications (such the dissolution of a marriage) require that a party whose status is to be determined or adjusted (or at least one of the parties whose relationship is to be adjudicated) must be a *domiciliary* of the forum state.¹⁹⁷ However, whether or not domicile was ever required for status jurisdiction in any suit affecting the parent child relationship, current uniform state and federal law very clearly focuses on a child's residence or "home state" (where the child has resided for six months) in custody and support actions.¹⁹⁸

Moreover, the Corpus Christi court interpreted the Family Code to allow a court to proceed based *either* on status jurisdiction consistent with the UCCJA *or* personal jurisdiction consistent with the limits of due process.¹⁹⁹ The court reasoned that this interpretation is particularly appropriate in the case of child support actions, arguing that child support is better viewed as a matter of personal indebtedness, governed by the usual rules for personal jurisdiction, than as a status adjudication.²⁰⁰ In this regard, the court appears to be correct, at least where the obligor's status as a parent has already been determined.²⁰¹ Thus, in most cases it is enough to assert personal jurisdiction, even on the basis of mere transitory presence, in order to adjudicate an obligor's child support obligation. Of course, the existence of other decrees or the pendency of litigation in other jurisdictions may limit a court's power under either UIFSA²⁰² or the Full Faith and Credit for Child Support Orders Act.²⁰³

The other recent case with an international flavor is *Arteaga v. Texas*

195. *Burnham*, 495 U.S. 604.

196. 921 S.W.2d at 401-02.

197. See Clark, *supra* notes 182 and 189.

198. The latest of these laws, the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, gives priority to the jurisdiction where the child happens to reside, regardless of how long the child has resided there, and regardless of the child's domicile.

199. 921 S.W.2d at 404. See also *Creavin v. Moloney*, 773 S.W.2d 698, 703 (Tex. App.—Corpus Christi 1989, writ denied).

200. 921 S.W.2d at 404.

201. Clark, *supra* note 182, at 750-54; see also generally *In re S.A.V.*, 837 S.W.2d 80 (Tex. 1992).

202. TEX. FAM. CODE ANN. § 159.001-.902 (Vernon 1996).

203. 28 U.S.C. § 1738B (1994).

Department of Protective and Regulatory Services,²⁰⁴ an international custody dispute. In *Arteaga*, the Texas Department of Protective and Regulatory Services petitioned to terminate the parental rights of two Mexican nationals. The mother fled and disappeared with the child before the filing of the petition. The father, who remained to defend against the petition, argued that the district court lacked jurisdiction over the matter because he and the child were Mexican nationals.

Under the UCCJA, as previously stated, jurisdiction is based on a child's "home state," which is where the child resided for the six month period preceding the initiation of the action.²⁰⁵ Mr. Arteaga argued that this rule should apply only to U.S. nationals, but the court disagreed. The "home state" basis for jurisdiction, the court held, applies even in the case of foreign nationals, at least where the parent and the child are in fact residents of the United States. Perhaps anticipating a due process challenge to the assertion of custody jurisdiction over foreign nationals, the court also emphasized that Arteaga and his daughter had substantial contacts with Texas, that in addition to their residency they had enjoyed local social services, and that Arteaga had worked for fourteen years in the United States. The court's decision does leave a large area of uncertainty for other foreign nationals whose connection with Texas is less substantial, and whose domiciles or residences remain firmly anchored in their home countries. This is because a custody decree, unlike the support decree in *Flores*, is more likely to involve a status adjudication.²⁰⁶

The court's decision also left the missing daughter's situation far from completely resolved. If the child has returned to Mexico, and if she is located there, a Mexican court might well deny recognition of the Texas court's decision. However, Mexico has acceded to The Hague Convention on the Civil Aspects of International Child Abduction, with respect to custody issues involving the United States,²⁰⁷ and any future conflict between American and Mexican authorities would be resolved under that law.

On a more mundane note, some recent cases address the proper calculation of child support. The Texas Family Code provides a two step system for the determination of child support. The first step involves the application of a simple formula with respect to the first \$6,000 of an obligor's "net monthly resources." Since most obligors have net resources below \$6,000, the inquiry usually ends here, and the simple statutory formula (20% of net resources for one child, 25% for two children, etc.)

204. 924 S.W.2d 756 (Tex. App.—Austin 1996, writ denied).

205. TEX. FAM. CODE ANN. § 152.003(a)(1)(A) (Vernon 1996). When a party acting as a parent removes the child from his home state during the six months preceding the initiation of the action, the state retains its status as the home state. *Id.* § 152.003(a)(1)(B).

206. *See supra* notes 182-83. Moreover, treaty and international law may govern a state court's jurisdiction over foreigners in a custody dispute. *See, e.g.*, Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 116 [hereinafter *The Hague Convention*].

207. *The Hague Convention, supra* note 206.

supplies the presumptive answer even with little or no evidence about the child's actual needs. The resulting figure is only a presumptive amount, and a court may consider other factors in increasing or decreasing that amount.²⁰⁸

If either party makes such a request, the Family Code requires the court to make specific findings regarding its calculation of the presumptive amount, and if the court orders an amount at variance with the presumptive amount the court must also describe the specific factors it considered.²⁰⁹ For years the intermediate courts have held that the district courts' failure to make such findings constitutes reversible error,²¹⁰ and in *Tenery v. Tenery*,²¹¹ the Texas Supreme Court confirmed this rule.

For an affluent obligor whose net resources exceed \$6,000 per month, the task of determining child support can be much more difficult and unpredictable. Having employed the guidelines to calculate the amount of support due against the first \$6,000 of net resources, the court must then ask whether the resulting figure is sufficient to satisfy the child's "proven needs." If not, the court must then determine the funds that would be necessary to satisfy the child's additional needs, and it must allocate some portion of these additional needs to the obligor in the form of additional child support, after comparing the relative financial condition of the obligor and obligee parent.²¹² The Code, however, is conspicuously unhelpful in defining what constitutes the "proven needs" of the child. For example, on what basis should a court determine the appropriate lifestyle for a child? Is a child entitled to an affluent lifestyle merely because the obligor is affluent?

*Scott v. Younts*²¹³ addresses the question of what qualifies as proof of a child's "needs." In *Scott*, the obligor (who was never married to the mother and apparently had never lived with the child) earned \$436,400, while the mother earned a comparatively minuscule \$11,000 per year. The father had been paying a mere \$700 per month in child support when the mother filed this action for additional child support far and above the statutory formula amount (\$1,200, or 20% of the obligor's first \$6,000 in monthly net resources). The district court awarded child support of \$2,500 per month, and the father appealed.

The "needs" of the child, the court of appeals began, are not limited to "bare necessities of life."²¹⁴ In this case, the obligee mother presented two types of "needs." First, she described current monthly expenses of \$2067.29 per month. Second, she described additional items she desired

208. See TEX. FAM. CODE ANN. § 154.130 (Vernon 1996).

209. *Id.*

210. See *Haney v. Haney*, 834 S.W.2d 490 (Tex. App.—Houston 14th Dist.] 1992, writ denied); *Chamberlain v. Chamberlain*, 788 S.W.2d 455 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

211. 932 S.W.2d 29 (Tex. 1996).

212. See TEX. FAM. CODE ANN. § 154.130 (Vernon 1996).

213. 926 S.W.2d 415 (Tex. App.—Corpus Christi 1996, writ filed).

214. *Id.* at 420 (quoting *Thomas v. Thomas*, 895 S.W.2d 895, 896 (Tex. App.—Waco 1995, writ denied)).

but could not presently provide at her current income and with the existing level of child support.

The Corpus Christi Court of Appeals focused on three particular desired but currently unaffordable items in support of the award. The first was counseling for the daughter's emotional problems which, the mother testified, were the result of daughter's sense of estrangement from her father. In addition, the mother sought funds for extracurricular activities the mother believed would help to build the daughter's self-esteem. Finally, the mother testified that the daughter performed well in school, and for this reason the mother believed that private school and a college savings fund were important for fulfilling the daughter's potential.²¹⁵

The court found the mother's testimony sufficient to uphold the trial court's award of \$2500. It agreed that the request for money for a college savings fund did not qualify as a need, because the law does not require a parent to support a child beyond the age of 18 or graduation from high school, whichever occurs later.²¹⁶ However, the court agreed that the evidence supported the need for counseling, extracurricular activities and summer camp. It rejected the father's argument that expert testimony was required to prove that private schooling or extracurricular activities were needs. The mother, as managing conservator, was competent to testify about these needs and her testimony standing alone was sufficient even as to the need for professional counseling.

Children whose parents die, retire, or become disabled may be entitled to their own social security benefits as survivors or dependents.²¹⁷ If a child support obligor lives apart from his child, the custodial parent can arrange to have the child's benefits paid directly to child's household. Does this public support for the benefit of a child satisfy any part of the obligor parent's duty of support? The answer, even after decades of experience under this social security scheme, is surprisingly muddled.²¹⁸

For example, the Texas Family Code provides that an obligor's net resources are "all . . . income actually being received, including . . . social security benefits,"²¹⁹ but does not answer the question of whether this includes benefits paid on the obligor's account but delivered to the child's household. *Interest of Allsup*²²⁰ represents a Texas court's first direct confrontation with the issue.²²¹ The court's solution, which is to grant a

215. The court agreed that some items the mother asserted as needs were insupportable. These included a horse. *Id.* at 421-22 & n.9.

216. *Id.* at 422 n.10.

217. See 42 U.S.C. § 402 (1994).

218. Michael A. DiSabatino, Annotation, *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child*, 34 A.L.R.5th 447 (1995). For an early case addressing the problem, see *Fuller v. Fuller*, 360 N.E.2d 357 (Ohio App. 1976) (social security payments to mother for benefit of the child may not be used by mother to discharge support obligation).

219. TEX. FAM. CODE ANN. § 154.062 (Vernon 1996).

220. 926 S.W.2d 323 (Tex. App.—Texarkana 1996, no writ).

221. The issue was at least introduced if not resolved in *Lake v. Lake*, 899 S.W.2d 737 (Tex. App.—Dallas 1995, no writ) (social security survivor benefits did not offset a contractual duty of child support owed by the obligor's estate); see also *Block v. Waters*, 564

mandatory credit for social security retirement benefits received by a child in the absence of a court order or agreement to the contrary, is an unfortunately simple solution to a problem that, in the authors' opinion, calls for a more tailored approach.

The specific facts in *Allsup* certainly beg for the resulting credit. The father, retired and drawing social security benefits, claimed (though with much dispute from the mother) that they had agreed to set his child support obligation at \$360 per month *because* his social security benefits for the benefit of the child were \$360. After the divorce, the father continued to receive social security dependent benefits for the child and used these benefits to fulfill his obligation to the child. Three years later, however, the mother exercised her right to redirect the payment of these benefits directly to her. She then sued the father for an additional \$360 per month in "unpaid" child support.²²²

Unfortunately for the father's position, the prior "understanding" was not in writing, either included in the order or made as a statement in open court, and the mother denied the understanding. Thus, whether the father was entitled to credit depended on the effect of the social security retirement benefits in the absence of any agreement or provision in the order.

The district court granted the father a credit for the amount of the benefits received by the child, effectively fulfilling the father's obligation, and the mother appealed. Finding little relevant authority from the Texas courts, the court of appeals surveyed the decisions of other states and found a variegated stew. In several states, courts have granted the obligor a credit;²²³ in one, no credit;²²⁴ and in two more, courts have granted the trial judge some sort of discretion to count such benefits or not count them at all.²²⁵

The underlying reasoning of the first approach, granting a credit, is that the child's entitlement to benefits derives from the parent, and the benefits represent earnings previously contributed by the parent by means of payroll deductions.²²⁶ The second approach, rejecting any credit, rests on the argument that the entitlement to social security benefits is not a property right of the wage earner, and that the child's receipt of its own entitlement does not diminish the obligor's own benefits. Some proponents

S.W.2d 113 (Tex. Civ. App.—Beaumont 1978, no writ)(court of appeals, without explanation, ordered trial judge to calculate amount of support arrearages with credit for social security benefits already received by children).

222. *Allsup*, 926 S.W.2d at 323.

223. *Id.* at 327 (citing cases from Alaska, Illinois, Indiana, New York, and Ohio). A number of other states follow the same rule for the analogous situation of dependent disability benefits. *See id.* at 327 n.4.

224. *See id.* at 327-28 (citing *In re Marriage of Haynes*, 343 N.W.2d 679 (Minn. App. 1984)).

225. *See id.* at 328 (citing *Children & Youth Servs. v. Chorgo*, 491 A.2d 1374 (Pa. Super. 1985); *In re Marriage of Hughes*, 850 P.2d 555 (Wash. App. 1993)).

226. *See Allsup*, 926 S.W.2d at 327. *See, e.g., Miller v. Miller*, 890 P.2d 574 (Alaska 1995); *see also DiSabatino*, *supra* note 218.

of this approach also find some significance in the fact that the child or custodian receiving the benefits would be responsible for any overpayment.²²⁷ A third group holds that allowance of a credit is discretionary with the trial court.

The Texarkana court of appeals found the first approach most persuasive, and held that "a parent has a right to receive credit for Social Security payments made for the child by reason of the parent's retirement."²²⁸ The court further ordered that Mr. Allsup was entitled to a credit retroactively and prospectively.²²⁹

The court's holding undoubtedly did equity for the parties in *Allsup*. But the key in *Allsup*, and the justification for the result, seems to lie less in the political or economic philosophy of the social security system than in the specific circumstances of the case. After all, the father was receiving those benefits on behalf of the child at the time of divorce, and it is clear in retrospect that the court and the parties must have considered the child's benefits as the *father's* resource for purposes of determining the amount of the father's obligation. It was very likely not mere coincidence that the amount of his support obligation equaled exactly the amount of the benefits attributable to the child. The mother permitted the father to receive the child's benefits for three years, in effect allowing the father to use the child's benefits to fulfill the obligation. One could easily conclude that the parties assumed the father's receipt of the benefits and delivery of the same amount to the child, over a three year period, was the fulfillment of his obligation. The event that forced the parties back to court was the mother's unilateral action redirecting the delivery of the child's benefits from the father's household to her own. Her action to seek additional money was, under the circumstances, an effort to gain a windfall doubling of the amount of child support for no reason other than a change of address on a government check.

Yet the Texarkana court's stated general rule, "that a parent has a right to receive credit for Social Security payments made for the child by reason of the parent's retirement,"²³⁰ may lead to less satisfying results in other situations in which a credit will tend to undermine the underlying intent of the parties' agreement or the court's order. For example, if an obligor's eligibility (and the child's dependent eligibility) occurs after the amount of the child support obligation is established, allowing a simple credit to the obligor might result in a windfall. Depending on the circumstances, the total resources available to the obligor and his child may have increased, but all or most of the increase may be enjoyed by the obligor.²³¹

227. See also *In re Marriage of Haynes*, 343 N.W.2d 679 (Minn. App. 1984).

228. *Allsup*, 926 S.W.2d at 328.

229. *Id.*

230. *Id.* at 328.

231. Suppose, for example, that under the child support guidelines the obligor was earning net resources of \$1,000 a month and was paying \$200 a month in child support. TEX. FAM. CODE ANN. § 154.125 (Vernon 1996). Suppose further that the obligor retired,

Although the Texarkana court's approach may be right for the precise situation in which it was applied, it is questionable whether this approach should serve as precedent for a variety of related scenarios. Should the Texarkana rule be followed in the first instance in the calculation of an initial support order? What if the initial order truly was issued without any contemplation of dependent social security benefits and the availability of such benefits is an unexpected event? Should the court be permitted to modify the support obligation on grounds of a material and substantial change of circumstances under Section 125.401? And, if so, should the court routinely allow an entire credit or only a partial credit? Or should the court merely consider the availability of such benefits as a circumstance justifying adjustment of the support obligation under section 125.123? Should the courts take the same approach irrespective of whether the social security benefits in question are for retirement or disability? It would be ambitious indeed to believe that *Allsup* provides the answer for all these questions.

A somewhat related question was posed in *Kirby v. Chapman*.²³² The child's father was dead. The obligor mother was receiving social security survivorship benefits on her son's behalf, and was ordered to turn them over to the grandparent managing conservators. She argued that payment of these benefits should be viewed as child support payments, which when calculated with her court-ordered direct child support payments would have pushed her total payments over the statutory guidelines. The Fort Worth Court of Appeals resolved the question by considering the payments as "income for [the child] and not for his guardian recipient."²³³ Accordingly, the payments would neither be added to the mother's income nor credited against her support payments. The *Kirby* court added, "We know of no authority, and have been cited to none, that would authorize [the obligor mother] to ascribe [the son's] earnings as child support payments on her behalf."²³⁴ But, of course, *Kirby* issued a few months before *Allsup*, so the Fort Worth court did not have the benefit of Texarkana's ruling. Moreover, because the payments in *Kirby* would be attributed to the dead father's earnings, rather than the obligor

and the child began to receive \$200 per month in benefits. If the obligor's own social security benefits, private retirement and other resources still yielded \$1,000, he would be wholly discharged from his support obligation and be effectively \$200 richer, but the child would enjoy no gain whatsoever.

To avoid this result one must include the amount of the child's benefits in the amount of the obligor's net resources. Under this approach the obligor's net resources after retirement would be \$1,200, and if he paid 20 percent to the child his total obligation would be \$240, of which \$200 would be satisfied by the child's benefits. Arguably this result is still not fair because the obligor, who before retirement had \$800 after paying child support, would have \$960 to keep for himself (a gain of \$160) after retirement, and the child would have \$240, with a gain of only \$40. In other words, the obligor still will have gained four times as much as the child as a result of the *child's* benefits. This disparity results from the fact that amounts included in the obligor's net resources yield only 20 percent to the child under section 154.125.

232. 917 S.W.2d 902 (Tex. App.—Fort Worth 1996, no writ).

233. *Id.* at 914.

234. *Id.*

mother's efforts, it is not at all certain that the result would have been any different.

Until the 1995 amendments to the Family Code, the parties to a divorce could make a private agreement regarding matters of child support, conservatorship and access, and if the court adopted the agreement, the parties could enforce it either as part of a judgment or as a contract.²³⁵ In 1995, the Texas Legislature amended the law to eliminate the contract remedy option, leaving as the exclusive remedy the enforcement of the judgment.²³⁶ Still, agreements made before the effective date (September 1, 1995) remain enforceable as contracts, and thus the requirements for contract enforcement have a lingering importance.

One frequent issue has been the manner in which the parties create or preserve their option to sue for breach of contract as opposed to seeking enforcement of the order that resulted from the contract. In *Bruni v. Bruni*,²³⁷ the parties reached an agreement regarding post-majority support, and the mother sought to enforce the father's obligation as a contractual matter. The district court and court of appeals both declined to enforce the contract on the ground that the *child support order* did not provide for enforcement of the terms of the agreement as a contract. The lower courts relied on the Supreme Court's decision in *Elfelt v. Elfelt*,²³⁸ which they viewed as denying the contract remedy for an underlying agreement without an express provision in the order adopting or incorporating the agreement.

But in *Bruni* the Court distinguished *Elfelt*, and held that a contract remedy is preserved where the agreement merely states that it will survive the entry of judgment until it has been fully performed.²³⁹ The difference between the cases, the court observed, was that in *Elfelt* there was no separately drafted agreement, and thus any basis for contract enforcement was either in the order or it did not exist. In *Bruni*, on the other hand, the parties had reached, written and signed an agreement, and the court approved the agreement by entering a separate order that incorporated the key terms of the agreement. The agreement's express provision for survival beyond the entry of judgment was all the language that was needed to leave the parties their option of contract enforcement.

V. ADOPTION AND TERMINATION

Adoption law was once a practice that seemed pedestrian, but regrettably is now frequently sensational. Owing perhaps to the national publicity generated in a few recent contested adoption cases, biological parents and relatives are challenging adoption petitions and decrees as never before.

235. See *Bruni v. Bruni*, 924 S.W.2d 366, 367-68 (Tex. 1996).

236. See TEX. FAM. CODE ANN. § 153.007(c) (Vernon 1996).

237. 924 S.W.2d 366, 367-68 (Tex. 1996).

238. 730 S.W.2d 657 (Tex. 1987).

239. 924 S.W.2d at 367-38.

One example from the past year is *Woosley v. Smith*,²⁴⁰ in which the putative birth father, having admittedly signed an affidavit of waiver of interest in child, changed his mind and sought custody of his biological offspring. A year after having disclaimed his interest in the child, he filed an action to invalidate both the decree terminating his parental rights and another decree granting the child's adoption by his new parents.

The *Woosley* case is most important for its powerful statement of policy in favor of preserving the adoption process against belated challenges by fickle birth parents. The birth father asserted a number of technical defects in the waiver process and termination proceeding, but all were rejected by the district court. On appeal his arguments were reduced to one: whether the court that terminated his parental rights inadvertently "voided" its "final" decree against him by entering a second "final" decree that also terminated the rights of a previously overlooked possible father. The highly technical arguments surrounding this issue are better treated in a survey of civil procedure than in a survey of family law.²⁴¹ However, the end result was affirmation of the judgment upholding the termination and adoption decrees and a strongly worded statement of policy in favor of preserving the finality of adoption:

[W]hen a parent voluntarily terminates this parent-child bond, the best interests of the child become paramount. Once that child has been surrendered . . . for adoption, the safety, education, care and protection of the child, not the contentment or welfare of the parent, is of utmost importance Children voluntarily given up in compliance with the Family Code cannot be snapped back at the whim of the parent.²⁴²

This laudable policy, however, was not strong enough to prevent the same court of appeals, including two of the same judges,²⁴³ from holding

240. 925 S.W.2d 84 (Tex. App.—San Antonio 1996, no writ).

241. In brief, in the original termination proceeding court (or rather the adoption agency that petitioned for termination and provided the order) overlooked that the birth mother was married to another man, who was the marital (and therefore "presumed") father. The original decree would have terminated *Woosley's* rights, but it would have left intact the rights of the marital "presumed" father, the existence of which barred the child's adoption by other parents. Thus, the adoption agency obtained the court's entry of a second order terminating the marital father's rights.

Citing *City of West Lake Hills v. State*, 466 S.W.2d 722 (Tex. 1971), *Woosley* argued that the second decree had the effect of voiding the first decree, and that since the second decree did not terminate *his* rights, his parental rights were revived by omission. The court of appeals found a more pertinent line of authority stemming from *Mullins v. Thomas*, 136 Tex. 215, 150 S.W.2d 83 (1941) and *Azbill v. Dallas County Child Protective Services*, 860 S.W.2d 133 (Tex. App.—Dallas 1993, no writ), both ruling that the first decree prevails over the second.

242. 925 S.W.2d at 88 (quoting *Brown v. McLennan County Children's Protective Serv.*, 627 S.W.2d 390 (Tex. 1982)). The San Antonio court added, in a reprimand of its own, that "we find it inconceivable that appellant would now attempt, when the child is three years old, to take him from the only family he has known." *Id.*

243. Judges Chapa and Green participated in both *Woosley* and *Sims*. Judge Stone was the third judge in *Woosley*, and Judge Hardberger was the third judge in *Sims*.

void the underlying adoption decree in *Sims v. Adoption Alliance*.²⁴⁴ In *Sims* the alleged defect related more directly to the integrity of the adoption process. At the time the birth mother voluntarily relinquished the child, Texas law lacked any prescribed minimum waiting period between the birth of a child and the mother's execution of a relinquishment. In this case, the mother executed her relinquishment 26 hours after birth, strictly in accordance with the law then in effect. During the same year, however, the Legislature had enacted an amendment to require a waiting period of 48 hours,²⁴⁵ and the new law took effect on September 1, 1995. This effective date was *after* the execution of the relinquishment in *Sims*, but it was *during* the pendency of the termination proceeding and *before* the entry of a termination decree. Because the Legislature provided that the new law would apply to pending suits on September 1, the requirement applied to the relinquishment in *Sims* with destructive force.

The Adoption Alliance argued that retroactive application of the new waiting period unconstitutionally affected the agency's rights with respect to the child.²⁴⁶ The constitutional ban on retroactive laws protects only "vested" rights against such laws, and the court agreed with the Adoption Alliance that a right need not rise to the level of a "property" right in order to deserve such protection.²⁴⁷ But only rights based on a "reasonable expectation" or involving "substantial reliance" are possibly "vested" rights; in this case the court found the Adoption Alliance did not reasonably rely on prior law in its decision to proceed with the termination and adoption that was based on a relinquishment taken in fewer than the new statutory requirement of 48 hours. Although the law was not strictly "in effect" at the time of the relinquishment, it had been enacted two months earlier, and its pending effective date left the agency only two weeks after the relinquishment to gain a final order and avoid application of the law. In passing, the court assumed that "an organization in the adoption business would have been aware of these legislative changes including the 'pending' case requirement How can it be said that a statute which the parties know will change in less than two weeks is a 'likely basis for substantial reliance?'"²⁴⁸

The ultimate premise of the court's ruling, however, is that the new statute must be read to render the premature relinquishment untimely, and that the law reasonably notified the public of its effect. The San Antonio court believed that the statute was "unambiguous" in this regard, and allowed no room for any reasonable alternative interpreta-

244. 922 S.W.2d 213 (Tex. App.—San Antonio 1996, writ denied). By yet another coincidence, the Adoption Alliance was the licensed agency that processed the adoptions in both *Woosley* and *Sims*.

245. Act of June 16, 1995 74th Leg., R.S. ch. 751, 1995 Tex. Sess. Law Serv. 214 (codified at TEX. FAM. CODE ANN. § 161.103 (Vernon 1996)).

246. The Texas Constitution prohibits "ex post facto" and "retroactive" laws. TEX. CONST. art. I, § 16.

247. See *Deacon v. City of Euless*, 405 S.W.2d 59, 62 (Tex. 1966).

248. *Sims*, 213 S.W.2d at 217.

tion.²⁴⁹ At the very least, however, the statute is quite vague regarding the application of its effective date. The amendment that included the effective date provision was a wide ranging reform that covered quite a bit of ground, and its application to cases pending on the effective date would not necessarily require reopening and repeating every otherwise completed aspect of a proceeding. The relinquishment, for example, was not only completed before the law's effective date, it was *irrevocable* before the law's effective date. It is at least reason for pause that the court's reading of this "unambiguous" law results in the revocation of an irrevocable document.

The court's determination to ignore even the possibility of an alternative interpretation may have been motivated more by special circumstances of the case than by close reading of the law. Within a few days of the execution of the relinquishment, the birth mother in *Sims* made her intention to oppose the agency's termination and adoption petition absolutely clear. In response, the agency could have sought a new relinquishment (unlikely) or it could have accepted the fact that there was too much risk to proceed. In retrospect, the agency's risky and futile race to judgment, despite the birth mother's reasonably prompt objection, may only have contributed to the San Antonio court's sympathy for the birth mother.

On the whole, the Survey period was a relatively quiet one, so far as cases involving termination of parental rights are concerned. The Texas Supreme Court did issue one per curiam decision,²⁵⁰ reversing a decision in which the Eastland Court of Appeals held evidence of extremely unsanitary conditions insufficient to justify termination of parental rights. While both the Eastland and supreme court opinions leave much to be desired, so far as a clear statement of the facts is concerned,²⁵¹ it seems clear that the children habitually lived in very unsanitary conditions and that the mother was incapable of doing much about it—being, as the court of appeals put it, "a young mother who was only a child herself."²⁵² The court of appeals found the evidence sufficient to place the children in state care, but not to terminate parental rights, on the theory that "proof of inadequate care" did not equate with "endangerment."²⁵³ The supreme court, however, stated that "neglect can be just as dangerous to the well-being of a child as direct physical abuse."²⁵⁴

Several court of appeals decisions involving termination of parental rights did issue. The results, however, are not very noteworthy. In

249. *Id.* at 215.

250. *In re M.C.*, 917 S.W.2d 268 (Tex. 1996).

251. The court of appeals, for example, states in a footnote that the mother "did not have the children with her when she was shot." *In re M.C.*, 932 S.W.2d 35, 38 n.4 (Tex. App.—Eastland 1995), *rev'd*, 917 S.W.2d 268 (Tex. 1996). Neither opinion, however, says another word about the shooting.

252. *In re M.C.*, 932 S.W.2d at 38.

253. *Id.*

254. *In re M.C.*, 917 S.W.2d at 270.

one,²⁵⁵ termination of parental rights was sustained on evidence that both parents used crack cocaine, that the father beat the mother in the presence of the children, and that the mother occasionally worked for the father as a prostitute. Moreover, the mother violated an earlier agreement with the Child Protective Services that she remain sober and refrain from letting the father live with the family. In another case,²⁵⁶ however, a mediation agreement in which the father agreed that if he did not remain sober, get a job, and get a residence, then "he does not need to have his children returned to him" was not held to justify termination of parental rights. Because the touchstone in a termination proceeding is the "best interest of the children," the court felt it "irrelevant whether [the father] needs or deserves to have the children physically returned to him."²⁵⁷ Finally, in a decision that seems intuitively obvious, the San Antonio Court of Appeals ruled that parental rights could not be terminated on the ground that the father had failed to support his child for the preceding twelve months, when he had only been adjudged the father four months before the termination proceeding was initiated.²⁵⁸

255. *In the Interest of J.J.*, 911 S.W.2d 437 (Tex. App.—Texarkana 1995, writ denied).

256. *Glover v. Brazoria County C.P.S.*, 916 S.W.2d 19 (Tex. App.—Houston [1st Dist.] 1995, no writ).

257. *Id.* at 20.

258. *Djeto v. Texas Dep't of Prot. & Reg. Servs.*, 928 S.W.2d 96 (Tex. App.—San Antonio 1996, no writ).

