

Family Law

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I. MARRIAGE AND DIVORCE

A. CEREMONIAL MARRIAGE

1. Reggie (age 20) and Muffy (age 18), both of whom are from Oklahoma but came to Texas to attend college, are second cousins and had dated twice when Reggie invited Muffy to Dallas for the Cotton Bowl game. After the game, they attended a party at the Reunion Hotel, where each consumed many Orange Blossoms. They hit it off famously – more famously as the party went on. Near the end of the party (7am Sunday morning), Reggie got up enough nerve to say, “I’ve wanted to ask you this after our first date, and now I ask: Will you marry me?” Muffy, who had similar feelings about Reggie, replied, “Daddy and Mumsie will probably kill me, but...let’s go!” It being a Sunday, all of the ministers were tied up, but Reggie knew that his uncle Hobie Gates, the mayor of nearby Weston, would marry them. Reggie called Hobie, and they agreed to meet at the Weston City Hall. When they got there, Reggie introduced Muffy to “my uncle Hobie, the mayor of Weston,” and to the two witnesses: The Weston Chief of Police and a Texas Ranger (in uniform). Despite her groggy condition, Muffy was impressed.

Hobie was anxious to get back home to watch the NFL game, so the ceremony was brief. After reading three verses from the Bible, Hobie asked the two of them, “do you really want to get married?” When both answered yes, “Well, by virtue of the authority vested in me, I pronounce you man and wife.” After the Texas Ranger sang the Lord’s Prayer, the ceremony was over.

After a two-day honeymoon at a Motel 6, Reggie and Muffy returned to campus and took up residence in Reggie’s nearby condominium. Two weeks later, Muffy (having second thoughts) got up enough nerve to tell Daddy and Mumsie, who were outraged. Daddy started to cry, and Mumsie bellowed, “You had no authority to marry without my consent. Besides, your uncle Hobie is a nerd.” Muffy has consulted you. How can she get out of this relationship?

Yes Valid ceremonial marriage?

No Does it matter that Reg and Muffy did not get a marriage license?

Key words: Even though no marriage license was obtained, ceremonial marriage can be valid.

(However, since no “valid ceremonial marriage with license,” **marriage must be established by proof** (*i.e.*, that elements of ceremonial marriage were satisfied).

No Does it matter that **Mayor** Hobie Gates conducted the ceremony? (Not a minister, rabbi, judge, JP, retired judge or JP, federal judge, Quaker ceremony.)

#1: Reasonable appearance of authority

#2 At least one party acted in good faith

No [1999 statute] Were Reggie and Muffy **required** to attend a premarital education course offered by a mental health professional or religious counselor?

No Does it matter that Reggie and Muffy are arguably residents of Oklahoma, not Texas, and that neither resides in Weston County?

No residency requirement. Non residents can marry while driving through Texas.

NO Does it matter that the “ceremony” was disgustingly informal, and that the Texas Ranger sang the Lord’s Prayer off-key?

No particular form of ceremony is required

B. VOID AND VOIDABLE MARRIAGES

Mumsie has informed you that “I *know* this marriage is VOID under Texas law.”

Is she right? No. A marriage is void if:

- #1. Bigamy. *But* [Feb. 1996] marriage becomes valid if impediment removed (*e.g.*, present spouse dies).
- #2. Consanguinity (includes relationships by adoption).
 - a. Ascendent’s decedents
 - b. First line collaterals
 - c. Uncles, aunts

BUT First cousins are OK

(Not our facts, but...) If it were a void marriage, it would be terminated by a ***Suit to Declare Marriage Void***. For a Texas court to have jurisdiction:

- (1) Marriage took place in Texas, **OR** (2) one party domiciled in Texas.

Can the Reggie-Muffy marriage be annulled?

- | | |
|-----------|--|
| <u>No</u> | #1. Underage? Needs parental consent or approval. |
| <u>No</u> | #2. [Feb.1992] Concealed divorce within 30 days of marriage? [action to annul must be brought within one year] |
| <u>No</u> | #3. Impotency? |
| <u>No</u> | #4. Incompetency? |
| <u>No</u> | #5. Fraud, duress, force? |

No #6. Marriage under the influence of alcohol or narcotics?

Under grounds 2 thru 6 there must have been no cohabitation after facts discovered, fraud or force removed, or effects of alcohol or drugs wear off.

No #7. Marriage during 72-hour waiting period after license issued, not permitted unless () one of parties is in Armed Forces or (ii) 72-hour cooling off period waived by court.

To annul marriage under ground #7 (marriage during 72-hour “cooling off” period), suit must be brought ***within 30 days after the marriage***.

Does Muffy have grounds for divorce?

Yes On the six “other” grounds? (Cruel treatment, adultery, felony conviction, abandonment for more than a year, living apart for 3 years, mental hospital for over 3 years.)

Before no fault, cruel treatment was used a lot.

Yes ***No-fault divorce*** on the ground of ***insupportability***? “Marriage has become unsupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relation and prevents any reasonable expectation of reconciliation.”

Reggie, who has taken the position that “I ***know*** we can make this marriage work,” has decided to contest the no-fault divorce. What defense can he raise, and what procedural tactic might he pursue?

#1: Reasonable expectation of reconciliation (only defense)

#2: Six month Texas domicile; and 90 days co-residence (procedural tactic)

2. [Feb. 1985] 17-year-old Jane told her dad that she was spending the night with a friend. Actually, Jane drive to Matamores with her boyfriend Hobie Gates and went through a marriage ceremony. This all took place 60 days ago; dad has just found out about it. What can he do?

Yes Can a suit for annulment of the marriage (under age 18) be filed, given that 60 days have elapsed since the marriage?

90 days SOL if it is a parent - 90 days from when he knew or should have known

No Upon proof of the underage marriage, ***must*** the court order an annulment?

In court’s discretion. Facts considered, pregnancy.

If a child marries under age 18 with written parental consent, application for license must be made ***within 30 days*** after parental consent.

C. INFORMAL MARRIAGE

3. [Feb.1997] What does it take to establish a common-law (“informal”) marriage? There must be no impediment to the marriage (bigamy, consanguinity, age 18 or older). Also:

- * #1. **Agreed to be married** only subjective element
- #2. **“Holding out”** (held themselves out to others that they were married)
- #3. **Cohabitation** no minimum time required; weekend won’t do it

* Former law: Agreement could be inferred from cohabitation plus holding out. 1989 statute: “Agreed to be married” *must be affirmatively proven*. **BUT** [*Russell v. Russell* (Tex.1993) proof of agreement to be married can be by direct *or circumstantial* evidence.

Circumstantial evidence = cohabitation and holding out

If action to prove common law marriage is not brought within 2 years after parties ceased living together, *presumption* (not a statute of limitation, but a presumption) is that the parties *had not agreed to be married*. Purpose: A dies intestate; B claims to be his widow: “We lived together as husband and wife for ten years back in the 1980s, and never divorced.”

Declaration of informal marriage: Means of establishing proof of common law marriage. [E.g., wants to establish eligibility for Social Security, Veterans Administration, or other governmental benefit.] Declaration contains: #1. **Same information as license application:** () age 18 or older, (ii) neither is already married, (iii) not related within prohibited degree of consanguinity. #2. **Elements of common law marriage:** cohabitation; held themselves out to others they were married; they agreed to be married.

D. DIVORCE

4. [Feb.2000] W comes to your office in Texas and tells you that she and her husband H have lived in New Orleans for the past two years. Last week H got drunk and beat her severely. She returned home to her mother’s and wants to file for divorce. Can you file suit for divorce for W in your county?

Not Yet. #1: Six month Texas domicile.
AND #2: [Feb.1999] 90 days as a county resident.

[Feb. 1994: Temporary absence over holidays does not affect meeting domicile-residence requirement.]

5. Some procedural aspects of divorce action.

- a. Pleadings: Keep it short and no evidentiary facts. allegation of grounds must be in language of statute without a detailed statement of evidentiary facts. Allegations of evidentiary facts to be stricken on motion of either party or on court's own motion.
- b. Petition must state whether protective order for family violence is in effect.
- c. **Party must sign pleading:** s/he is aware of alternate dispute resolution methods including mediation.
- d. If minor children of the marriage, Suit Affecting Parent-Child Relationship (SAPCR) **must** be joined in divorce proceeding.
- e. **Counseling** [Feb. 1999]: The court "may" (optional) order the parties to submit to counseling, to determine whether there is a **reasonable expectation of reconciliation**, and can order **further counseling for an additional 60 days** if the court continues to believe that there is a reasonable expectation of reconciliation. The counseling can include consideration of the effect of a divorce on minor children of the marriage.
- f. **Mediation** [Feb. 1999] The court "may" order that the parties enter into mediation. A mediated settlement is binding on the parties if (i) it provides in a separate paragraph that **the agreement is not subject to revocation**, and (ii) it is **signed by both parties**, and (iii) it is **signed by the party's attorney(s), if any, who were present** at the time the parties signed the agreement. If a mediated settlement agreement meets these requirements, **either party is entitled to judgment on the agreement**.
- g. **Parent education and family stabilization course** [1999 statute] The court "may" order that the parties attend a parent education and family stabilization course taught by a mental health professional or religious counselor.
- *h. **Collaborative law procedures** [2001 statute] The parties **and their attorneys** can agree in writing to use their best efforts and make a good faith attempt to resolve their dispute (child custody, child support, etc.) **without judicial intervention** except to have the court approve the parties' settlement agreement. The attorneys must agree that if the parties do not settle, **the attorneys will withdraw from the case** and will not serve as litigation counsel. A status report must be filed with the court no later than 180 days after the agreement was entered into; and another report must be filed after one year. If the parties haven't settled within two years after the suit was filed, the court may either set the case for trial or dismiss the suit without prejudice.

Can the divorce court grant a tort recovery for:

No negligent infliction of emotional distress? *Boyles v. Kerr* (Tex. 1993)

Yes intentional infliction of emotional distress? *Twyman v. Twyman* (Tex. 1993)

No If a judgment for intentional infliction of emotional distress is granted, can the same conduct be considered in making a just and right division of the community estate, using “fault” as a factor?

No Is there a separate tort cause of action (with actual and exemplary damages) for actual or constructive fraud on the community, as by allegedly depleting community estate by selling assets for less than full value? [*Schleuter*, Tex. 1998]

6. [July 1986] W has retained you to file suit for divorce. However, she has no knowledge of the nature or extent of the community estate. She is concerned that H may dispose of property during pendency of the divorce. Also, W has no source of support and cannot pay her living expenses. What should you do?

a. When petition for divorce is filed, petition for TRO.

On what grounds can TRO be granted *ex parte* (no notice or hearing)?

[General test:] Unreasonable acts of the sort that no reasonable person could think he or she could commit: vulgar phone calls with intent to annoy and alarm, threats of bodily injury, falsifying records, removing, concealing, transferring property, etc.

b. Also, when petition for divorce is filed, petition for a temporary injunction.

After notice and hearing, a temporary injunction can be granted for the above unreasonable acts, and also reasonable acts which a person ordinarily could do or refrain from doing unless ordered by the court: awarding one spouse exclusive occupancy of residence, **ordering payment of temporary support**, attorney’s fees or other expenses, requiring a sworn inventory, requiring the production of books and records, etc. (Injunction also can cover the “unreasonable acts” for which TRO was previously granted; but [Feb. 1999] *ex parte* TRO **cannot** be obtained for “reasonable acts.”)

7. [July 1986] Two weeks after W filed for divorce, H beat her severely. Two days later, H showed up at W’s workplace, accused W of dishonesty, and threatened to “teach you another lesson” unless W returned home with him immediately. What steps should you take on W’s behalf to **protect** her?

#1 File for a protective order on showing that other party has committed family violence (or dating violence), which consists of: (1) intentional abuse **or** (2) threat of bodily harm

Protective order [issued by divorce court judge if divorce pending; an independent cause of action if outside the divorce context] can prohibit party from committing

family violence, from communicating with family members, from stalking the other party, from going near residence or place of employment, removing a child, etc. or carrying a concealed firearm unless he/she is a peace officer.

Venue: [July 1998] county where applicant resides **OR** county in which respondent resides.

Maximum duration of protective order: **two years.** *But* one year after order entered, subject can request determination whether there is a continuing need for the order.

[July 1998] Court also may order respondent to complete a **battering intervention and prevention program**, counsel with a social worker, or perform acts that court determines are appropriate to prevent or reduce the likelihood of family violence in the future.

YES Is notice and hearing required?

Hearing is expedited: No sooner than 48 hours, no later than 20 days after service. (What should we do in the meantime?)

#2 **TPO (Temporary Protective Order – ex parte)** if court finds a **clear and present danger** that H is likely to commit family violence again. [July 1998] A TPO is valid for up to 20 days. Upon motion, TPO may be extended for an additional 20 days.

Yes * Can the TPO evict H from the family home?

* *IF* (1) W files sworn affidavit giving description of facts supporting the TPO, and (2) W appears in person to testify.

8. [July 1986] H and W live in Dallas. After H is served with divorce petition, he sells a ranch (community property) in North Texas to B; title was in H's name alone. H alone signed the deed and received \$75,000 as sale proceeds. Can W set the sale aside?

NO **UNLESS buyer knew transfer was made with intent to defeat W's rights**

No Was W's joinder required on the deed conveying the property?

9. [Feb 1985] Six months after her divorce, W comes to your office and tells you that she would like to resume the use of her maiden name. The divorce decree did not change her name. What should you do?

Petition for change of name in District court. Petition must contain current name; proposed name; reasons for change. Court must find good cause.

II. PATERNITY

10. [Feb. 1984, Feb. 1987] Hobie Gates comes to your office and shows you petition just

served on him seeking to establish that he is the father of an 18 month old child. Hobie tells you that he has just returned from Saudi Arabia where he has worked for an oil company for the past three years and that he has never even heard of the petitioner (Martha). He tells you that a public trial of the paternity suit will jeopardize his career with the oil company. Explain to Hobie what will be involved in a paternity suit, and what are his rights and risks.

Generic tests must be taken by the allege father and the child.

[Typically, the mother also submits genetic testing specimens, but this is not required.]

If for some reason a genetic testing specimen is not available from the allege father, for good cause and under circumstances the court considers just, the court can order that genetic testing specimens be submitted by: relatives of alleged father for good cause.

If the alleged father refuses to submit to paternity testing, court has option:

- (1) contempt
- (2) default judgment - adjudicating paternity

If the genetic testing results establish at least a 99% probability that the man is the father, based on a paternity index of at least 100 to 1 the court shall enter an order that the man is the father.

If the genetic testing results establish that the man is not the father, or that another man is the father, the court shall enter an order that the man is not the father.

The **only** evidence that can rebut a genetic test finding that the man is or is not the father : is other genetic test results that reach a contrary conclusion.

Statute of limitations for paternity suit: two years...after child becomes an adult = 20 years old.

While the court can order the payment of child support retroactive to the child's birth, there is a statutory presumption that retroactive support not exceeding what would have been due under the child support guidelines for the preceding four years is reasonable and in the child's best interest. [Presumption can be rebutted on a showing that the man knew or should have known he as the father and sought to avoid establishment of support obligation.]

10a. At the time she files the paternity suit, Martha petitions that Hobie be ordered to pay temporary child support pending the outcome of the case. Can Hobie be ordered to pay temporary child support...

No at the time Martha files the paternity suit?

Yes if the genetic test results show at least a 99 percent probability that Hobie is the father, based on a paternity index of at least 100 to 1?

[Feb. 1997] *Venue for paternity suit*: Same as for SAPCR not connected with divorce: *County where child resides*. In a paternity suit, *neither party can demand a jury trial*.

11. [Feb 1994] Filbert files suit to divorce Hazel, and in the accompanying SAPCR seeks appointment as managing conservator of their 8-month-old child (Almond). In her answer, Hazel contends that Filbert is not Almond's father.

Yes Can Hazel seek to show Filbert's non-paternity, given that the child was born during their marriage?

Presumptions as to paternity: A man is presumed to be father of a child if:

- a. ***Born during (or within 300 days after) marriage*** or attempted (but void or voidable) marriage; ***or***
- b. He ***married*** (or attempted to marry) ***the mother after the child's birth AND*** () ***acknowledged paternity*** in a record filed with the Bureau of Vital Statistics, ***OR*** (ii) ***promised*** in a record ***to support the child, OR*** (iii) was ***voluntarily named the father child's birth certificate***.

The ***only*** evidence that can rebut the presumption of paternity: generic test results.

a. In a question involving either spouse challenging the presumption of paternity, you should also discuss paternity by estoppel: Because of either party's conduct, the court may deny genetic testing and issue an order adjudicating the presumed father to be the father, if the court finds that (1) conduct of the mother or presumed father ***estops*** the party from denying parentage, and (2) it would be against child's best interest to disprove the father-child relationship. *E.g.*, husband knew he was not or might not be the father, but accepted the role of father, and the mother relied on that acceptance; *or* husband relied on the mother's acceptance of him as the father, in which case mother is estopped to challenge parentage.

The court considers such factors as: () length of time between date paternity action is filed and the date presumed father was put on notice that he might not be the father; (ii) length of time presumed father had assumed the role of father; (iii) facts surrounding presumed father's discovery of his possible nonpaternity; (iv) child's age, and nature of relationship between the child and the presumed father; and (v) harm that may result to the child if presumed paternity is disproved.

In the proceeding, a minor or incapacitated child must be represented by guardian ad litem.

No [Feb. 1997] Does "the paternity by estoppel" doctrine apply to a man in a nonmarital relationship who cohabited with the mother for many years?

Applies only to married persons where a presumption of paternity has been

raised.

12. [Feb. 1994, Feb. 1995] Frank and Millie live together even though Millie is married to Harold. (Millie has filed for divorce.) Millie gets pregnant; Frank and Millie arrange for prenatal care under a contract that acknowledges Frank's paternity, and Frank makes several payments for obstetrical services. Shortly before the child is born, Frank and Millie split. Millie and Harold reconcile, and Millie drops the divorce action. After the child is born, Frank brings an action seeking to establish that he is the child's father.

Yes [Feb. 1997] Does Frank have standing to rebut the presumption of Harold's paternity, given that the child was born during the Millie-Harold marriage?

But if man who is presumed father [Harold] was cohabiting with Millie during the probable time of conception, Frank must file the action: within four (4) years. Generic testing then done.

III. ADOPTION

[July 1998] A child may be adopted if (i) both parents have died, (ii) the parent-child relationship as to each living parent has been terminated, (iii) second marriage situation: a stepparent (spouse of parent whose P/C relationship has not been terminated) wants to adopt the child, or (iv) child is at least two years old, the P/C relationship has been terminated with respect to one parent, and a former stepparent who had been a managing conservator or had possession of the child for a specified period wants to adopt a child.

13. Bitsy, 17 years old and unmarried, tells you that she is four months pregnant. She tells you that her boyfriend Joe is probably the child's father, but she isn't interested in bringing a paternity suit. Bitsy has not yet decided whether she will give the child up for adoption or, instead, will raise the child as a single parent. She wants to know: If she decides to give the child up for adoption, what procedures must be followed, and when does she have to decide?

Prerequisite to an infant adoption: termination of P/C relationship.

#1. PETITION FOR SUIT TO TERMINATE PARENT-CHILD RELATIONSHIP:

Can be filed: after first trimester of pregnancy

Hearing cannot be held until: five (5) days after child's birth

#2 AFFIDAVIT OF STATUS OF CHILD signed by *mother* after first trimester, as to identity of father

Purposes: (1) shows mom is unmarried

(2) provide information as to father to meet due process concerns

#3. AFFIDAVIT OF RELINQUISHMENT OF PARENTAL RIGHTS: signed by *mother*

Lays predicate for: consent decree terminating P/C relationship

Key points: (1) minor can sign

(2) Cannot be signed until 48 hours after child's birth, gives opportunity to change mind

#4. AFFIDAVIT OF WAIVER OF INTEREST IN THE CHILD: signed by father. In effect a quit claim deed.

If the man brings a paternity suit seeking to establish that he is the child's father and seeking custody, upon his filing the petition the court can order him to pay temporary child support.

Alleged father's rights [until terminated – see below]: Has right to bring paternity suit (but no other SAPCR).

Since biological father has rights, there must be a mechanism by which those rights can be terminated, so the adoption can proceed. SO: If the alleged or probable father does not sign an affidavit of waiver of interest in the child, rights can be involuntarily terminated: (1) if, after being served, he does not respond by either admitting paternity or filing a counterclaim for paternity or voluntary legitimation, (2) by failing to file with the *paternity registry* within 30 days after the child's birth, or (3) by proof of culpable acts that are grounds for termination of parent-child relationship – e.g., abandonment of mother during pregnancy.

13a Five months later, Bitsy gives birth to the child and decides to place the child for adoption through the Texas Department of Protective and Regulatory Services (TDPRS), which has identified a couple (Joe and Jane Smith) who want to adopt the child. What procedures must be followed before the adoption can take place?

[July 1998] What reports must be completed before an adoption can be finalized?

#1: Pre adoption home screening - a report by social worker into circumstances and conditions of *home environment*;

#2: Post placement adoption report - another report by social worker into circumstances of child in home environment;

#3: Report showing the adopting parties' *criminal history record*; and

#4: Social, Health, Education and Genetic History [SHEG] Report.

Report also must include any history of abuse suffered by the child.

Yes [July 1998] Do both spouses have to join in the petition for adoption?

Yes Does the adoption proceeding abate if Joe and Jane *divorce*?

No Does adoption proceeding abate if *one of them dies* before adoption is final?

Yes [July 1998] Must child reside with the Smiths before the final decree of adoption can be entered?

Six months minimum unless court finds waiver in BIC

No Must the child give written consent to the adoption? Only if age 12 or older.

[July 1998] What Family Code provisions insure confidentiality of adoption procedures?

No When the adopted child becomes an adult, is he entitled to receive a copy of the entire Social, Health, Educational and Genetic History report? Report summary only.

Edited to protect: confidentiality of birth parents and family.

When can entire report (and not just a report summary) be released? (If both sides are looking)

Yes Does Texas recognize adoption of one adult by another? No best interest test.

14. After termination of parent-child relationship as to Bitsy, does the child have inheritance rights from and through Bitsy?

Yes *unless* decree terminating P-C relationship expressly terminates inheritance rights.

15. [July 1995] 8-year-old C has lived with M and F as foster parents for the past three years. The parental rights of the natural parents were terminated due to abuse and neglect, and in the termination decree the TDHS was named C's managing conservator. M and F now want to adopt C. The TDHS refuses to consent to the adoption based on the report of a caseworker (an ardent Democrat) that M and F are Republicans and, thus, would not make suitable parents.

Yes Do M and F have standing to file petition to adopt C, given that they are not related to C and are not managing conservators? 12 month test is met.

Yes * Is the managing conservator's (here, the TDHS) consent to the adoption required?

But Court can waive if consent withheld for good cause.

15a. [Feb. 1990] M and F adopt C. Three years later, the natural mother files a petition to set aside the adoption, pointing out that she was not personally served and did not appear in the proceeding terminating her parental rights – which, if true, raises serious due process concerns.

No Can the natural mother set aside the adoption?

[July 1998] Validity of an adoption is not subject to direct or collateral attack more than six months after the adoption decree is entered.

16. [July] 1985, July 1988] Betty and Bill were divorced a year ago; Betty was named sole managing conservator of the couple's 14-year-old daughter Diane. Betty has since remarried Harry, who wants to adopt Diane. What advice would you give Betty about the adoption proceedings by her new husband?

The first thing that must occur before an adoption can take place: as to Bill, terminate parent/child relationship.

If Bill is willing to cooperate: bring voluntary termination proceeding.

And what could Bill sign? Affidavit of relinquishment of parental rights.

If Bill if **not** willing to cooperate: involuntary termination proceeding.

Grounds [July 1994, Feb. 1997]: Abandonment, abuse, neglect, imprisonment for over 2 years, culpable acts toward the child or another child, *failure to support child for one year*, use of controlled substance.

Statutory test: best interest of the child.

[Feb. 1995] Evidentiary standard in involuntary termination proceeding, as to both rounds *and* best interest test: clear and convincing evidence and BIC

[July 1985] Bill is 11 months in arrears on child support. So, what should you do?

Wait one month-then file for failure to support for one year.

[Feb. 1990, July 1998] What of the fact that Diane is 14 years old? Age 12 or over must give written consent to the adoption.

IV. CUSTODY: MANAGING CONSERVATOR

A. APPOINTMENT OF MANAGING CONSERVATOR

17. Herb (an accountant) and Wendy (a bouncer at the Kikker Ballroom), married 15 years, have an 13-year-old child (Carter). Wendy and Herb have agreed to a property division, but both seek custody of Carter. Each thinks the other is an unfit parent. Herb contends that Wendy is unfit because of her occupation and her hours. Wendy's position is that Herb is unfit because...well, he is an accountant and knows absolutely nothing about anything that is relevant. Wendy has asked you a number of questions about her case; advise her.

a. If Wendy is awarded custody of the child and Herb is awarded visitation, Wendy will be called a *managing conservator* (MIC), and Herb will be called a *possessory conservator* (PC).

b. [July 1984] In deciding whether to grant Wendy or Herb custody as managing conservator, what factors will the court take into account?

The statutory test: BIC

Other statutory requirements: (1) no discrimination based on gender or marital status; (2) evidence of past domestic violence is considered; (3) evidence of false report of child abuse is considered.

Court-developed factors: desires of child; child's physical and emotional needs; parental ability; stability of home environment; parent's plans and opportunities for the child. Negative factor: acts and omissions showing one parent less fit than other parent.

Yes Can Wendy get a jury trial on the "managing conservator" issue?

On custody issue: yes, binding on the court (no judgment NOV)

c. Wendy has told you that Carter says he wanted to live with her, not Herb. However, Herb's lawyer tells you that Carter told *his* client that he wanted to live with Herb. What is the role of Carter's preferences in selection of a managing conservator?

[Feb. 1995] Since Carter is *age 12 or older*: can choose m/c with writing filed with the court (unless court vetoes b/c not BIC)

d. [July 1987] Herb seeks appointment as sole managing conservator, and also seeks to deny Wendy visitation rights as possessory conservator, pointing out that, in addition to working at the Kikker Ballroom, Wendy is an alcoholic.

No On proof of the above facts, is Herb likely to be successful in persuading the court to deny Wendy visitation rights? Unless showing of danger to child's physical or emotional health.

18. [July 1994, Feb. 1998] H and W were divorced three years ago. W was named managing conservator of the couple's two children (age 6 and 4), and H was ordered to pay child support. H has experimented with cocaine for a number of years, and has recently developed a serious addiction. During his summer visitation, H left some drugs lying on a table. The younger child swallowed them and became critically ill. Because of H's stupor from his own drug use, he was not aware that the child was ill for several hours; the delay in medical treatment caused complications. W has consulted you; what are her options?

YES Does W have grounds for involuntary termination of H's parental rights?

There is clear and convincing evidence of abuse: H has engaged in conduct that has endangered the child's physical and emotional well-being.

Probably Not Would it be advisable for W to pursue an involuntary termination?

Why: His support obligation would cease.

What, then should W do?

File motion to terminate or restrict visitation - based on danger to physical or mental health

19. [July 1985] You are W's attorney in divorce action. H and W have three children: A (15 years old), B (13), and C (7). The two older children want to live with their father, but W wants custody of all three children. Advise W as to the probable decision on the custody issue.

A and B: **W loses.** Child age 12 or over can choose MC in writing filed with court (unless court vetoes).

Problem as to C: split custody frowned on by courts. Court will try to keep kids together. AB will tip C to H.

BUT

- (1) Paramount test is: BIC
- (2) Desires of the child are important.
- (3) Ask for jury trial.

B. **JOINT MANAGING CONSERVATORS:** [July 1990] Court can *order* joint managing conservators (JMCs) if it finds that JMCs are in child's best interest [there is a *rebuttable presumption* that JMC *is* in the child's best interest], *and*

- Child's physical, psychological, or emotional needs will benefit;
- Parents have shown the ability to reach shared decisions;
- Both parents participated in child rearing before the suit was filed;
- Geographical proximity of homes of the parties not a problem.

Key points: (1) Appointment of JMCs does not require equal or nearly equal periods of physical possession of child. Typically, home of one of them designated as child's primary residence.

- (2) Exclusive power to make certain decisions can be given to one JMC ("primary JMC").
- (3) Court order (or parties' agreement to be JMCs) *must*:

Establish child's residence, or designate which JMC shall have right to determine residence;

Include provisions designed to minimize disruption of child's schooling, daily routine, and association with friends;

Set out rights and duties to be exercised solely by one JMC, and those to be exercised jointly;

(4) One party can be ordered to pay child support.

20. [Feb and July 1995] A parent **must** be appointed sole MC (or both parents must be appointed JMCs) unless [Feb. 2000] court finds that appointment of a parent would not be in child's best interest because it would **substantially impair** child's **physical health** or **emotional development**.

When this issue arises: Grandma [as in Feb. 2000] or an aunt seeks to be appointed.

V. CHILD SUPPORT

A. SCOPE OF CHILD SUPPORT OBLIGATION

21. In the divorce action, Wendy is appointed sole MC of Carter. Herb is awarded "reasonable visitation," and is ordered by the court to pay \$500/month child support until Carter attains age 23 or graduates from college, whichever period is later. The order provides for mandatory withholding from Herb's wages. Are there grounds for challenging this order on appeal? Yes

#1: Visitation order must be a **STANDARD POSSESSION ORDER**: If parents live **within 100 miles** of each other, noncustodial parent gets possession **6:00pm to 8:00pm every Wednesday**, and from **6:00pm Friday to 6:00pm Sunday the first, third and fifth weekends** each month, plus **30 days in the summer** (unless parties agree to different provisions, or court determines that standard possession order would be unworkable). More flexible rules apply if the child is under age three; different rules apply if parents live more than 100 miles apart. [July 1997] PC must pay for travel expenses related to visitation if he has adequate resources to do so.

#2: [July 1984] Court-ordered support must terminate: at 18 years or high school graduation, whichever is later.

...unless [July 1997, July 1999] **child is physically or mentally disabled BEFORE attaining age 18**, An action to enforce the support obligation can be brought after child has attained age 18, as long as child was disabled before her 18th birthday.

Support obligation also terminates on obligor parent's death, child's marriage. (But claim for arrearages can be brought against obligor parent's estate.)

#3: Court **must** order obligor to provide: health insurance.

#4: Payment of child support cannot be conditioned on granting visitation rights (and visitation cannot be conditioned on payment of child support).

22. [Feb 1990] At the divorce trial with a jury, the jury finds (1) that H should be appointed MC of the couple's 5-year-old child, and (2) that W should pay child support of \$800/month. Although there is evidence to support the jury's findings, the trial judge enters a judgment notwithstanding the verdict (1) appointing W as MC, and (2) ordering

H to pay \$800/month child support. H appeals. How should the Court of Appeals rule...

Yes [Feb. 1996] Was it error for the trial court to disregard the jury finding as to custody? Jury is binding on custody issues.

Yes Could the trial court have granted a motion for new trial on the custody issue? If verdict against the weight of evidence

No Was it error for the trial court to disregard the jury finding as to support? Jury verdict is advisory only on all other issues than custody JMC or primary residence under a JMC.

B. AMOUNT OF CHILD SUPPORT

Statutory child support guidelines [July 1999] apply unless parties agree on (and the court approves) some other amount of support.

| | |
|------------------|---------------------------------------|
| 1 child: | 20% of obligor's NET RESOURCES |
| 2 children: | 25% of “ ” “ |
| 3 children: | 30% of “ ” “ |
| 4 children: | 35% of “ ” “ |
| 5 children: | 40% of “ ” “ |
| Over 5 children: | Not less than amount for 5 children |

The guidelines provide a \$ amount as a starting point, which can be increased or reduced taking into account the following statutory factors [July 1999]: Needs of the child; ability of the parents to contribute to support; any financial resources available for support of the child; amount of possession and access to child. ***But court order must contain written explanation justifying departure from statutory guidelines.***

[July 1992] In determining needs of the child, such items as food, school lunches, entertainment, allowance, haircuts, electric and heating bills, etc. do **not** justify an award in excess of the statutory guidelines; the amount determined under the guidelines as assumed to cover these items. However, severe asthma and allergies which require regular allergy shots and medications would establish ***special needs***. [Three times since 1996:] Learning disability and required educational services established special need.

Guidelines apply to ***first \$6,000/month of net resources*** (\$72,000/year). [July 1996, July 1997:] If obligor parent's net resources exceed \$6,000/month, the court may order additional support ***only*** if it shown that ***needs of the child*** warrant a greater award. Obligor parent's income (even great wealth) and family lifestyle are ***NOT*** to be considered. In no event may the obligor be required to pay child support that exceeds the ***proven needs of the child.***

Net resources: CASH FLOW REVENUE FROM ALL SOURCES: Earned income, investment income (dividends, interest, royalty, net rental income), all other income (social security, unemployment and workman's comp benefits, pensions, annuities, trusts, capital gains)

Less **deductions** for FICA (social security taxes), union dues, health insurance for obligor's children, and income tax withholding for **single person claiming one personal exemption and a standard deduction**.

Unless the parties agree otherwise, child support payments must be made to **local child support registry** or **attorney general**.

23. [July 1997] Ollie resigned from law firm "rat race," entered seminary; sought to reduce child support because he had no income. Should Ollie's child support obligation be reduced?

No If the obligor's actual income is significantly lower because of **unemployment or under-employment**, guidelines apply to obligor's **earning potential**.

C. ENFORCEMENT OF CHILD SUPPORT

[July 1999: list remedies available]

- #1 **Mandatory withholding from wages**. All **final** orders for periodic child support **must** provide for mandatory withholding. [Doesn't apply to temporary support orders.]

The maximum amount subject to mandatory withholding is 50% of **DISPOSABLE EARNINGS** (take-home pay): **Salary and wages minus "the usual" deductions**: income tax withholding, FICA (social security), retirement contributions, etc.

Step 1: Determine amount of child support (based on net resources) pursuant to guidelines.

Step 2: Determine amount of mandatory withholding based on disposable income (take-home pay).

Where (as is typical) most if not all of the obligor's net resources are from salary and wages, mandatory withholding from wages doesn't even come close to the 50% maximum—unless arrearages are involved.

Yes [Feb. 1991] Is mandatory withholding available for arrearages as well as current support obligations?

No Does mandatory withholding apply to investment income?

If obligor spouse is **self-employed** (meaning that mandatory withholding from an employer is not possible), he can be order to **post bond** or other security, which is forfeited if he falls in arrears.

- #2 **Suspension of License**. A court can issue an **Order Suspending License** if obligor () is 90 days in arrears and (ii) has been given an opportunity but has failed to make payment under an agreed repayment schedule. This procedure is available with respect to an

obligor's *driver's license, hunting or fishing license, and license to engage in a profession, occupation or business*. The statute lists 56 agencies that grant licenses, including attorneys, CPAs, doctors, liquor store owners, plumbers, etc.

Obligor must be served with notice advising that license will be suspended in 60 days after service of notice unless he pays all arrearages or enters into a reasonable repayment schedule. (Purpose: catch his attention.) Licenses that are suspended may be restored when the obligor pays off the arrearages. Also, a delinquent obligor ***cannot obtain state grants, loans, or contracts***.

Bottom line: On motion, court issues ***Order Suspending License*** is obligor ***90 days in arrears, gets 60 days notice***.

- #3. ***Child support lien for arrearages*** can be asserted and enforced against obligor's real property (other than homestead) and non-exempt personal property. Lien also attaches to claims for negligence, personal injury or workman's compensation held by the obligor on ***or after*** date on which lien attaches. Even if arrearages have not been reduced to judgment, claimant may secure lien by filing ***child support lien notice*** with clerk of court in country in which obligor is believed to own nonexempt property or in which obligor resides.

"Second spouse" rule: If obligor remarries, spouse can petition determine the spouse's interest in property subjected to child support lien, and to release from the lien any property (1) solely owned by the spouse, or (2) community property of spouse and obligor, if sale of obligor's interest would result in unreasonable hardship upon the spouse or obligor's family.

- #4 [2001 statute] ***Levy and Execution on Obligor's Financial Assets***: If a judgment for arrearages has been rendered, claimant can deliver a ***notice of levy to financial institutions*** holding assets owned by obligor (bank accounts, mutual funds, liability insurance claims, etc.). Delivery of the notice of levy freezes the assets; obligor has ***10 days*** to either pay arrearages in full, enter into a satisfactory payment schedule, or file suit to contest. The ***financial institution must pay the amount identified in the notice*** no sooner than 15 days and no later than 21 days after delivery of the notice, unless obligor contests the levy.

- #5 ***Contempt*** [Up to 6 months in jail, or \$500 fine, or both]

Important adjunct of contempt proceeding: probation up to five years.

No [July 1997] Is an agreement to pay support contained in parties' settlement agreement, but *not* incorporated into the divorce decree, enforceable by contempt? Not violation of a court order.

- #5. ***Money Judgment***: Periodic child support payment not timely made ***automatically becomes money judgment for amount due***. In action to reduce arrearages to judgment, ***plus interest at 6%***, court's only function is to confirm amount of unpaid support, subject only to defense of actual payment. Judgment is enforced by means generally available

for enforcement of judgments for debts.

Statute of limitations for money judgment for arrearages: there is none.

D. INTERSTATE ENFORCEMENT OF SUPPORT ORDER

24. [July 1989] H and W were divorced in Nebraska in 1990. W was awarded custody of the couple's child C, and H was ordered to pay child support, and an income-withholding order was served on H's employer in Omaha. H moved to Texas in 1995, and has paid no child support since the move. What procedure must W follow in Texas to enforce the Nebraska child support obligation by *contempt*?

No Will a Texas court cite H for contempt of a *Nebraska* order? Only a Texas order, no power to cite for another state's order.

What, then, should W do if she wants to enforce the order in Texas by contempt?

Make it a Texas order under the Uniform Interstate Family Support Act. [July 2000] To register an order under UIFSA, W should send two copies of the Nebraska support order (one of which is a certified copy) to a Texas court, together with a sworn statement by W showing the name and address of H (and, if known, the name and address of his employer). Upon registration under ***UIFSA***, THE ORDER BECOMES A Texas order, and then will be enforceable in Texas by contempt.

Any ***future violations*** of the now-Texas child support order can be enforced by contempt by a Texas court. Contempt is ***not*** available for arrearages (offenses committed prior to order's registration), as these offenses were in violation of a ***Nebraska*** order. Post-hoc citation for contempt would be a denial of due process.

- 24a. What other avenues might W pursue in enforcing the Nebraska support order?

- (1) [July 2000] Reduce the arrearages to a money judgment in the Nebraska courts. The money judgment then would be entitled to Full Faith and Credit in Texas.
- (2) [July 2000] Best bet: W should mail a copy of the income-withholding order to H's Texas employer. Under UIFSA, this automatically triggers income withholding unless H contests the validity of the order. Alternatively, W can mail the support order, or income-withholding order, or both, to the Texas Attorney General's Child Support Enforcement division, which would seek administrative enforcement of the order.

25. [Reverse the states – essentially the same answer.] H and W were divorced in Texas in 1990. W was awarded custody of the couple's child C, and H was ordered to pay child support. H moved to Nebraska in 1995, and has paid no child support since the move. ON W's behalf, what procedure would you follow in enforcing the Texas child support obligation in Nebraska?

“On W's behalf, I would mail a copy of the income-withholding order to H's Nebraska

employer. Under Uniform Interstate Family Support Act, this will automatically trigger income withholding unless H contests the validity of the order. I would also request that withholding be made for arrearages, since UIFSA permits income withholding for arrearages as well as for current support. Withheld income would be transmitted to the Texas attorney general, and then to my client.

“If W does not know the name and address of H’s employer, I would mail a copy of the support order and income-withholding order to the Nebraska child support enforcement agency, which will seek administrative enforcement of the order.”

[Time permitting, discuss money judgment for arrearages, enforceable via Full Faith and Credit, and contempt.]

VI. ENFORCEMENT OF CUSTODY ORDERS

A. HABEAS CORPUS

26. [Feb. 1995; tested frequently] W and H were divorced in New Mexico two years ago. W awarded custody of the couple’s two children, still lives in New Mexico. Three weeks ago, H brought the children to Texas for a vacation trip. Two days later, H called W and told her he had decided to keep the children in Texas and that he and his mother would raise them. Your client is poor; H and his mother are wealthy. W fears that if she brings any action in Texas, H will cross-file to seek custody of the children. What advice would you give W, and what steps would you take *to return the children to her?*

If question involves parent withholding possession of a child in violation of a custody (“managing conservator”) order [as in Feb. 1994–list the remedies available] you **must** discuss:

- #1 File writ of habeas corpus - one issue only.

Sole issue: ***IS THERE A VALID COURT ORDER AWARDING CUSTODY?***

(Unlike contempt, fact that it is a New Mexico order doesn’t matter.)

- No Can the respondent cross-file and relitigate custody issue in a habeas proceeding?
Only one issue is there a valid court order.

Exceptions: [listed **only** for sake of completeness]

- a. Court can consider whether custody order **is** a valid court order; *i.e.* whether it was issued by court without due process (reasonable notice and opportunity to be heard).
- b. Temporary order can be issued if court **finds** that there is a serious immediate question concerning child’s welfare.
- c. If child has not been in relator’s possession at any time within past 6 months,

court may consider motion or cross-action to modify custody. [In a habeas, “plaintiff” is called *relator*; “defendant” is called *respondent*.]

[Feb. 1986] Venue of habeas corpus proceeding:

(1) *County in which child is found.* (2) *court of continuing jurisdiction under SAPCR.*

There is one situation where habeas corpus may be brought even though there is no court order: Parent, relying on entitlement to possession as parent, can bring habeas against non-parent (*e.g.*, aunt) who withholds custody.

A question involving parent withholding possession of a child in violation of a custody (“managing conservator”) order, also may call for discussion of:

#2. **STATUTORY TORT LIABILITY – INTERFERENCE WITH CHILD CUSTODY**

[Feb. 1994] Is available if a person takes or retains possession of a child or conceals child’s whereabouts in violation of a *court order*. Available against noncustodial parent who “kidnaps” child; also against custodial parent who withholds child in violation of visitation rights.

Is also available against third party who aids and abets (even attorney who gives advice).

Key procedural point: Must give notice by registered or certified mail of intent to file tort suit in 30 days unless custody order is complied with. Purpose: get his attention.

If the question is in an INTRASTATE or all-Texas setting (MC and children live in Houston; father wrongfully takes children to Lubbock), you should also discuss:

#3. **CONTEMPT.** Important adjunct of proceeding: Probation (for up to 5 years).

Since a finding of contempt involves jail time, it is *quasi-criminal* in nature. Accordingly, **ALL** criminal due process rules apply to contempt proceeding: Right to be present at trial; right to appointed counsel if indigent; evidentiary standard is “beyond a reasonable doubt.”

If (as in #26) the question is an INTERSTATE setting (New Mexico court order; H takes the children to Texas), you must also discuss:

#4. **UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)**, whose purpose is to avoid jurisdictional disputes and facilitate interstate enforcement of custody and visitation orders. Jurisdiction over custody mater lies in the state with (in descending order):

**** (1) HOME STATE JURISDICTIONS:** Is *child’s home state* – where child has lived for **last six months**. Thus in #26 the Texas courts must cede jurisdiction to New Mexico.

(2) *Temporary emergency jurisdiction:* child has been **abandoned or abused**.

(3) *No other state has jurisdiction* AND () the child and one parent has a *significant connection* with the state, and (ii) *substantial evidence* is available in this state.

(4) *Inconvenient forum*: Although one of above tests is met, court may decline jurisdiction If it is an inconvenient forum, taking into account whether domestic violence is involved, length of time child resided outside of state, relative financial circumstances of the parties, nature and location of relevant evidence.

REMEDIES UNDER UCCJEA:

1. **Registration of order**: Register two copies of order (one certified); Texas court can then grant any relief available for enforcement of registered order, including contempt.

2. **Expedited enforcement** in habeas-type proceeding: UCCJEA establishes a procedure similar to (but not called) habeas corpus. Court issues order directing respondent to appear in person at hearing held *the next judicial day after service of the order* or (if that date is impossible) the first judicial day possible. Possession of child is awarded to petitioner unless the custody or visitation order has been stayed or vacated.

3. **Warrant to take immediate possession of child**. On filing petition seeking to enforce custody or visitation order, petitioner may file for a warrant to take possession of the child on a finding that the child is imminently likely to suffer *serious physical harm* or be *removed from the state*.

#5. MODIFICATION OF CHILD SUPPORT OR CUSTODY ORDER

27. [July 1996; four times since 1990] In a divorce action in Dallas County, W was named MC of the couple's child. The decree incorporated by reference a settlement agreement under which H agreed to pay child support of \$500/month. The agreement further provided that "exclusive venue for all suits concerning the subject of this agreement and matters relating to the parties' divorce shall be in Dallas County, Texas." The agreement also provided that neither party would seek a modification of the level of child support. Eight months ago W and the children moved to seek a modification of the level of child support. Eight months ago W and the children moved to Harris County where W got a job as a waitress. H has had three promotions since the divorce. W retains you to increase child support. What steps would you take, *and where*?

#1. **Motion to Modify Support Order** [Feb. 1998] – filed in SAPCR court. Court of continuing jurisdiction - Dallas County

#2. Simultaneous with Motion to Modify, file Motion to Transfer to Harris County.

[July 1997] Transfer is mandatory if child has resided in new county for at least six months.

Yes Is mandatory transfer possible, when the parties agreed that proper venue is Dallas

County?

Family code venue rules are mandatory and can't be changed by agreement.

Yes [July 1996] Can W seek modification of child support in view of the parties' agreement that it was not subject to modification:

Against public policy.

BUT [July 1997] if H agreed to pay support until child (now 19) attains 21, () guidelines *do not apply*, and (ii) support cannot be modified unless agreement provides for modification.

Test [July 1999]: (1) circumstances of child or an affected party have: materially or substantially changed.

or (2) 3 years have elapsed, and support deviates from guidelines by greater of 20% or \$100.

28. Suppose that H adopts a child, or has twins by his second wife. Is this a changed circumstance that warrants a decrease in the amount of an existing child support order?

Yes because **all** children to whom obligor owes a duty to support are taken into account.

29. Suppose that the trial judge improperly denies a motion to transfer SAPCR to a new county even though the child has lived there for more than 6 months. Or [Feb. 1995] suppose the judge improperly enters an order granting a motion to transfer although the 6-month test has *not* been met. Can the losing party appeal the trial judge's order?

No because judge's order on a motion to transfer is interlocutory.

What, then, should the losing party do? Mandamus.

30. [Every third bar exam!] In divorce action six months ago, H and W agreed that W was to be sole MC for the couple's two children. Since the divorce, W has been seen at every club in town, the kids have been left with a babysitter for weeks at a time, and have missed half of their school time for the last three months. H wants custody of the children. What steps, if any, can you take to have H named sole MC?

a. Motion for modification of managing conservator (or possessory conservator) order must be filed where? SAPCR court, original court that issued custody order.

[Feb. 1995]...but if child has moved to new county and has resided there for **at least 6 months**, upon motion transfer to new county is mandatory.

To prevent frustration of visitation by a surprise move, each conservator must give the

other party notice of intent to move at least 60 days before the move.

b. To modify sole managing conservatorship [*or* a possessory conservatorship, *or* (in a JMC) designation of person who has right to designate child's primary residence], two-pronged test:

#1: Modification is in the ***best interest of the child***,
AND #2: changed circumstances (means child's circumstances have materially and substantially changed).

c. [Frequently tested] Since the motion to modify designation of the person who has the right to determine the child's primary residence has been filed with one year from the order to be modified, unless the MC consents to the modification H must also show:

#3: Danger to child's physical or emotional health.

Purpose of this rule: to discourage repeated litigation of custody.

d. Exception: Two-prong test to modify custody order does not apply (and only test is ***best interest of child***) if MC voluntarily relinquishes possession and control of the child for at least 6 months.

I. MULTISTATE PROBLEMS

31. [July 1995] H and W were divorced two years ago in Texas. W was named MC of the couple's child, and H was ordered to pay \$1,000/month child support. Eight months ago, W and C moved permanently to Florida and are living there with W's boyfriend. H has retained you to bring an action to be appointed managing conservator of the child, and to reduce child support. Which state is the proper forum?

(1) Proceeding to modify custody (managing conservator) The relevant law is: UCCJEA and the relevant test is: home state jurisdiction (6 month test). Now Florida is his home state, file there.

If H also wanted to modify ***visitation*** (possessory conservatorship), since the ***UCCJHEA*** applies to visitation as well as custody orders, apply ***six-month "home state"*** test.

(2) Proceeding to modify child support? The relevant law is UIFSA which says that the motion must be filed in Texas SAPCR court because: one party still resides in Texas.

As with the UCCJEA and custody matters, one of the purpose of UIFSA is to resolve jurisdictional disputes and to establish clear guidelines as to which court has jurisdiction over support issues. The court issuing the support order has continuing, exclusive jurisdiction as long as ***one party*** (obligor, obligee *or* child) continues to reside in that state.

[July 2000] If all parties have moved from state where support order was issued, motion to modify support must be filed in *state where obligor resides* (to get personal jurisdiction over obligor), after registering support order in that state under UIFSA procedures.

32. [July 1991] H and W were divorced in Nebraska a year ago. W was awarded custody of the couple's child C, and H was ordered to pay child support. H moved to Texas; W and C still live in Nebraska. H wants to file suit to modify the custody and child support orders in a *Texas* court; can he do so?

No [Feb. 1995] Can H modify the Nebraska child custody order in a Texas court?

The relevant law is: UCCJEA and the relevant test is: home state jurisdiction.

No Can H modify the Nebraska child support order in a Texas court?

The relevant law is: UIFSA.

VII. OTHER FAMILY LAW PRINCIPLES

A. GRANDPARENTS' PETITION FOR REASONABLE ACCESS

33. [Feb. 2000] Granny tells you that her son, Hubie Gates, was divorced three years ago. HOBIE (the scoundrel) voluntarily agreed to termination of parental rights to his daughter. The daughter now lives with her natural mother who is bitter towards the entire family. The mother refuses to allow the granddaughter to visit Granny. Can you help Granny gain visitation rights, and if so what proceeding would you file?

Answer: *Petition for reasonable access for grandparent*

To be granted reasonable access, the parental rights of at least one parent must *not* have been terminated, *and* Granny must meet *one* of the following tests:

- (1) The child's parents are *divorced* or have *lived apart* for at least *three months*;
- (2) The child lived with Granny for at least six months during the past two years;
- (3) The parent who is grandmother's child is deceased had his parental rights terminated, is in prison or is incapacitated; or
- (4) The child has been abused or neglected.

But if the child has been adopted by a new family, no reasonable access for Granny.

B. REMOVAL OF DISABILITY OF MINORITY

34. For a 16-year-old, disability of minority may be removed if child is (1) *financially independent* and (2) *living apart from parents*.

For 17-year-old, these requirements **DO NOT APPLY**. The only test: **best interest of child**. Thus [July 1984] after a 17-year-old child's disability is removed, child could sell property without the necessity of appointing a guardian in probate court.

C. CHILD ABUSE; SEXUAL ABUSE

35. [Feb. 1989] The Texas Dept. of Protective and Regulatory Services [TDPRS] can take possession of a child **without a court order** upon information that would lead a **person of ordinary prudence and caution** to believe that child was victim of child abuse or sexual abuse, and there is **no time to obtain a TRO**.

TDPRS must file a SAPCR (with appointment of attorney ad litem for the child) and obtain an **ex parte hearing within three working days** after child was taken into possession. Parents must be given written notice prior to ex parte hearing: (1) Reasons why they took possession of the child, (2) a summary of the parents' legal rights.

A **full adversary hearing** must be held **within 14 days**. If either the ex parte hearing or the full adversary hearing is not held within specified time, child must be returned to parents.

To retain the child, the TDPRS must present sufficient evidence to satisfy a person of ordinary prudence and caution that (1) there is a **continuing danger to the child's physical health or safety** caused by the parents' act or failure to act, and (2) there is a reasonable likelihood that the child will be a victim of abuse in the future.

36. [Feb. 2000] Under a 1995 statute, **professional must report suspected child abuse**. An attorney, minister, doctor, psychologist, social worker, etc., having reason to believe that a child is being subjected to abuse or neglect must report the information **within 48 hours**. The duty to make a report **cannot be delegated**. Failure to make such a report is a **misdemeanor**. The identity of the reporting individual is confidential, and can be disclosed only on court order or to a law enforcement officer for purposes of criminal investigation. A person who is in good faith reports alleged child abuse or neglect, or who testifies in a judicial proceeding, is immune from civil or criminal liability. A person who acts in bad faith or with malicious purpose is not immune from civil or criminal liability.

D. PARENTAL NOTIFICATION OF ABORTION

1999 statute: Before abortion can be performed on minor, () **48 hours' notice** must be given **to parent**, guardian, or managing conservator, **or** (ii) **court approval** obtained where the minor does not want parental notification, **or** (iii) doctor determines that because of minor's physical condition, abortion is necessary to **avoid serious risk of substantial and irreversible impairment of a major bodily function**.

E. PARENTAL LIABILITY FOR CHILD'S TORTIOUS CONDUCT

37. [July 1984] Bart, a 14-year-old who lives next door, comes to Phil's house and asks to borrow \$100. When Phil refuses to lend Bart the money, Bart strangles Phil's prize bulldog

valued at \$6,500. Bart's parents were away from home when this occurred; when they return home and Phil tells them what happened, they just laugh. What are Phil's rights?

NEGLIGENCE: [Feb. 2000] Parent is liable for *property damage* caused by child's *negligent conduct* (regardless of child's age) if conduct is attributable to *parent's negligent failure to exercise duty of control and reasonable discipline* of child. (No dollar limit on liability.) Note that two acts of negligence are required: Child *and* parent.

INTENTIONAL TORT: Parental liability for property damage caused by *wilful and malicious conduct* of child age 12 to 18:

Maximum of \$25,000/act (plus court costs, attorney's fees). No need to show parental neglect.