Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody

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I. Introduction

In 1982, Professor (later Dean, and still later Judge) Guido Calabresi, published a book entitled *A Common Law for the Age of Statutes.*[1] The book deservedly achieved wide recognition in the academic world, netting 1,253 citations in a recent Westlaw search.[2] Surprisingly, acceptance by the intended audience, *i.e.*, the judiciary, was significantly more muted—only nineteen citations of the book could be found in a similar Westlaw search of state appellate decisions, and another search found twenty-four federal court citations.[3] The theme of the book is that the common law had been largely supplanted by "statutorification," for which a remedy is needed, especially because statutes often become obsolete over time. Judge Calabresi's goals for the 319 pages of closely reasoned argument are captured in the first paragraphs of the first chapter, engagingly titled "Choking on Statutes."

> The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have

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1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (Harv. U. Press 1982). Judge Calabresi served as professor and then as dean of Yale Law School from 1959 to 1994. In 1994, he was nominated to the U.S. Court of Appeals for the Second Circuit, on which he served until taking senior status on July 21, 2009.

2. Westlaw search on February 1, 2011, for "Calabresi/3 Common" using "TP-all" (Text and Periodicals).

3. *Id.*, same Westlaw text search on Feb. 1, 2011, using "allstates," (state appellate decisions) and "ALLFEDS" (federal decisions).

> become the primary source of law. The consequences of this "orgy of statute making," in Grant Gilmore's felicitous phrase, are just beginning to be recognized. The change itself and its effect on our whole legal-political system have not been systematically treated.
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> In this book I will argue that many disparate current legal-political phenomena are reactions to this fundamental change and to the problems it has created. . . .
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> The "statutorification" of American law . . . cannot be adequately explained except as a series of *ad hoc* reactions to the deeper change in American law. More specifically, they are reactions to the feeling that, because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and that *some* of the laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape.
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> The combination of lack of fit and lack of current legislative support I will call the problem of legal obsolescence.[4]

My appropriation of Judge Calabresi's felicitous chapter title almost thirty years after he formulated his thesis validates not only his perception at the time, but also his implicit perceptivity that the future would hold an even greater degree of replacement of the common law with statutory law. On the other hand, the "Calabresi outcome" of statutory obsolescence is not inevitable. Assuming that a continuing orgy of legislation is subject to continued scrutiny by interested parties and tended and monitored by those legislators who live to pass statutes, "statutorification" may continue unabated while the statutory regime, changing with the times, avoids the fate of obsolescence. The process described in this essay could well be described as choking on statutes; but critics must acknowledge that regular, timely, and wise amendments are at least theoretically possible. Judge Calabresi's criticisms of nearly thirty years ago compelled me to review my own forty years of experience in drafting statutes and shepherding them (or trying to) through the legislative process.[5] In short, this essay is written by a biased, pro-legislation drafter and commentator.[6] Yet I do not endorse unnecessary "fiddling" (either for individual political recognition, client or constituent satisfaction, or compulsion).

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4. CALABRESI, *supra* note 1, 1–2.

5. *See* John J. Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269 (1973) (the phrase coined in 1971 was subsequently widely used thereafter).

6. When I was a boy, Sunday evenings were reserved for the Ed Sullivan Show. One of his recurring presentations was the introduction of an old guy at the piano (or sometimes two old guys) who would do his/their shtick of "and then I wrote." It is tempting to try my hand at my own "and then I wrote" segment here. Instead, I hope you will take my word for my representation that I was intimately involved throughout most all of the processes described in this essay. I hasten to add that my legislative drafting experience goes beyond parochial Texas law and encompasses service as a reporter for two uniform acts as well: UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) (1992, 1996, 2001, and 2008), and UNIFORM PARENTAGE ACT

This article describes in truncated form one portion of the massive expansion and extensive legislative specification of family law policies in Texas throughout the last four decades. It is a story of ever-increasing infatuation with highly detailed statutory regulation. Most of the changes, large and small, in the allocation of "parental custody and visitation,"[7] in the *Texas Family Code* are tracked from 1973 through 1995.[8] Most of the legislative detail was the product of interest group lobbying, especially volunteer fathers' rights groups and the Family Law Section of the State Bar of Texas. Some was due simply to legislative tinkering to obtain authorship credit for political purposes. Whatever the underlying reasons for continuing, detailed legislative focus on these issues, the consequence has been intermittent tension between legislators and the judiciary, on the one hand, as well as continuing pressure on legislators from constituents, lawyers, sometimes judges, and divorcing or divorced parents determined "to improve" the Code, and often to revisit old battle grounds and to relitigate the political and policy issues.

Policy issues arise whenever any interested person or group pursue a change in the complex relationship between divorced parents concerning their ongoing care of their children. These relationships can be wary, often hostile, and subject to the possibility of expensive and punishing litigation. Because motivations, more than occasionally, involve the opportunity for emotional revenge, proposals may be efforts to obtain justification from legislation. On the one hand, clarity is important: a lawyer should be able to tell the client with some degree of certainty what a judge will order regarding the future postdivorce relationship with the ex-spouse and children. Similarly, judges should know the extent of their authority to regulate the divorcing parents' future control of and relationship with their children. The same clarity should be present when a judge is called to decide a future conflict about the children, which is so common among divorced parents. But, judges also need a measure of discretion to deal with the continuing issues of a divorced family.

(2000), as amended 2002.

7. The advocates for much of the legislation discussed in this essay, *i.e.*, noncustodial parents (read fathers) and their volunteer lobby groups have a strong dislike for the term "visitation," based on the oft-repeated assertion that "I am NOT a visitor in my child's life." In the TEXAS FAMILY CODE, the process is known as "possession of and access to the child." This essay employs commonplace terminology, especially because much of Texas language is unfamiliar to innocent, non-Texan eyes and ears.

8. In reported cases, the courts cite TEX. FAM. CODE ANN. (Vernon *date*), a Thomson-West multi-volume publication, in which the Family Code is contained in six hardbound volumes. Personally the author would prefer citations to the one volume, soft cover SAMPSON & TINDALL'S FAMILY CODE ANN. (2010) (Thomson West 20th ed.). To be fair, there are several other commercial versions of the Code as well.

The process grows more complicated in Texas by the vastness of the state. The largest metropolitan areas, Dallas-Fort Worth-Arlington, San Antonio, and Houston, designate trial judges who generally specialize in family law. In much of the rest of Texas, such specialization is not common practice. Thus, experience with the typical issues varies greatly from court to court. Arguably, judges with the most contact with the subject matter would be best suited to make the choices for public policy. How that proposition works out in practice is at the heart of this essay.

II. 1969 and 1973 Sessions of the Texas Legislature: *Texas Family Code* Created

For purposes of this essay, the modern era of Texas family law began with the 1969 enactment of the first installment of the *Texas Family Code*. Title 1 dealt with marriage, divorce, and community property.[9] In 1973, two legislative sessions later,[10] the Texas Legislature enacted Title 2, Parent and Child, which became effective January 1, 1974.[11] The new Family Code organized the law of custody and visitation as it had developed in the post-World War II era. Remarkably, this formulation of Texas law remained basically unchanged for a decade. The original four key provisions are set forth below in a somewhat bowdlerized form for a national audience.[12]

Key to reading initial Texas statutes in this article:

Italics = Clarifying terminology for non-Texans, a.k.a., translation into normal English.

9. Acts 1969, 61st Leg., ch. 888, Family Code p. 2707, eff. Jan. 1, 1970. TEX. FAM. CODE Title 1, Husband and Wife, (1969), was most notable for containing the first strictly no-fault ground for divorce enacted in the United States. *Id.* at p. 2721, § 3.01, Insupportability. Shortly thereafter, however, the California legislature enacted its own no-fault provision. The latter received virtually all of the national publicity, both positive and negative. The Texas version enacted one ground endorsing the no-fault principle by explicitly stating "a divorce may be granted without regard to fault." But, the new code conservatively also retained six standard fault grounds as well, at least one of which has a no-fault aspect, *i.e.*, § 3.07, Confinement in a Mental Hospital. On the other hand, the California legislature bit the bullet and announced that one no-fault ground was sufficient to settle all of the issues. The story of all of these dramatic events is detailed in Texas Family Code Symposium, 5 TEXAS TECH L. REV. 267–68, 320–24 (1974).

10. Note that the Texas Legislature meets in regular session only in odd-numbered years (for 140 days). During the time period covered by this article, only in 1996 was a special session held in an even-numbered year to deal with the subject at hand.

11. Acts 1973, 63rd Leg., ch. 543, Family Code-Title 2, p. 1411, §§ 14.01-.04, eff. Jan. 1, 1974.

12. The text of the statutes includes the actual Texas terminology shown in brackets struck-through, and inserts most commonly used terms for the ease of understanding by non-Texas family law attorneys.

Strike-through = Unique Texas terminology.[13]

Section 14.01. Court Appointment of *Custodian* [~~Managing Conservator~~].[14]

(a) In any suit affecting the parent-child relationship, the court may appoint a *custodian* who must be a suitable, competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint a *custodian.*

(b) A parent shall be appointed the *custodian* of the child unless the court finds that appointment of the parent would not be in the best interest of the child. In determining which parent to appoint as *custodian*, the court shall consider the qualifications of the respective parents without regard to the sex of the parent.

[Note: Subsections (c) and (d) of this section did not relate to parental rights.]

Section 14.02. Rights, Privileges, Duties, and Powers of *Custodial Parent* [~~Managing Conservator~~].

(a) . . . [A] parent appointed *custodian* of the child retains all the rights, privileges, duties, and powers of a parent to the exclusion of the other parent, subject to the rights, privileges, duties, and powers of a *noncustodial parent* [~~possessory conservator~~] as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child.

[Note: Subsections (b), (c), and (d) did not relate to parental rights.]

Section 14.03. Possession of and Access to Child.

(a) If a *custodial parent* is appointed, the court may appoint . . . a *noncustodial parent* and set the time and conditions for possession of or access to the child by the *noncustodial parent* and others.

(b) On the appointment of a *noncustodial parent*, the court shall pre-

13. Judging by reactions expressed to the author by non-Texans over the years, perhaps "bizarre" would be a more apt term for the actual Texas terminology. The custodial parent, CP everywhere else, is described as a "sole managing conservator;" parents with joint custody are "joint managing conservators;" and the noncustodial parent with visitation, NCP, is the "possessory conservator." That's right, originally under the TEXAS FAMILY CODE, a parent who lost a custody battle was awarded "possession of and access to the child" as the PC. This stems from the original, somewhat esoteric, view that the possessory conservator is awarded those rights when the child is in the actual possession of the NCP. Later, *infra*, the NCP was statutorily awarded certain increased parental rights at all times. Finally, the term "possessory conservator" virtually disappeared in usage when "joint custody" became the standard for all typical decrees.

14. In 1973, the author was the sole voice testifying in the legislative hearings against adoption of the terms "managing and possessory conservator."

scribe the rights, privileges, duties, and powers of the *noncustodial parent.*

(c) The court may not deny possession of or access to a child to either or both parents unless it finds that parental possession or access is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

[Note: Subsection (d) did not relate to parental rights.]

Section 14.04. Rights, Privileges, Duties, and Powers of *Noncustodial Parent.*

A *noncustodial parent* has the following rights, privileges, duties, and powers during the period of possession, subject to any limitations expressed in the decree:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter;

(3) the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

(4) any other right, privilege, duty, or power of a *custodial parent* expressly granted in the decree awarding possession of the child.

[Note: Although the appointment of a noncustodial person theoretically could include persons not the "other parent;" in fact, such appointments were relatively rare, as obviously was the intent of the legislature.]

On close reading, these four statutory provisions could hardly have been simpler. To be fair to the drafters, contemporaneous explanations of the process demonstrated the intent to create marginally more even-handed regard for the rights of both parents. The statement in section 14.01(b) above, *supra*, for equal treatment of the parents "without regard to the sex of a parent" is proof, albeit somewhat slender, of such intent.[15] As a practical operating method, however, the statutes were written with the clear understanding that cases would be decided by courts according to existing social mores (provided neither the mother nor the father were unfit to parent their children). In other words, the existing common law at the time of drafting the new Family Code was incorporated into the statutory text. The crucial provisions are found in sections 14.02(a), 14.03(a), and 14.04, which establish a "winner and loser" structure. The most important phrase is found in section 14.02(a) above, stating the custodial parent "retains all

15. Eugene L. Smith, *Texas Family Code Symposium: Title 2. Parent and Child*, 5 TEX. TECH L. REV. 424–32 (1974).

the rights, privileges, duties, and powers of a parent to the exclusion of the other parent." This winner position is restricted only by the narrow rights provided to the noncustodial parent set forth in section 14.04. When that parent has visitation with the child, there is a list of obvious duties, *i.e.* feed the child and provide a roof over its head. There is also a vague promise that the trial court may also award specific rights to a noncustodial parent. In point of fact, the view that the custodial parent is more than just the primary parent was reflected by the actual text of virtually every custody order at the time. The standard decree in virtually every divorce case stated: "The Petitioner (read mother) is awarded custody of the child and the Respondent (read father), is awarded reasonable visitation with the child."[16]

In shorthand, these orders boiled down to the fact that the father did not have a single minute in a year during which he was actually legally entitled to have possession of or access to his child. Rather, the mother was empowered to decide when, where and if visitation was reasonable, or if it would take place at all. This result should be labeled "the common law rule" of custody and visitation in Texas, which initially was engrained statutorily in the *Family Code*, effective January 1, 1974. Admittedly, the Texas approach may not have reflected typical practice in other states. What follows will demonstrate that the legislature found this expression of common law to be wholly inadequate.

Interestingly, the one-sided view of winner-loser for parents of divorce received a significant boost by the contemporaneous publication of the most talked about book of the decade, *Beyond the Best Interest of the Child.*[17] The book argued strongly that winner and loser framework did not go far enough, and that visitation should indeed be solely at the discretion of the custodial parent.[18]

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16. Although either the father or the mother could be the "petitioner," the customary "gentlemanly way" of settling a "no fault" divorce was for the mother/wife to take the lead. Incidentally, the new Family Code forbade "a detailed statement of evidentiary facts," which "shall be stricken from the pleadings on the motion of any party "to the suit or by the court on its own motion." TEXAS FAM. CODE § 3.52 (4th ed.) (1981).

17. JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNET, BEYOND THE BEST INTEREST OF THE CHILD (1973). I must admit the book is still being used to teach at my place of employment—but certainly not by the author.

18. *Id.* at 38, which states custody in divorce and separation shall be subject to the following rule:

> Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is designed to protect the security of an ongoing relationship—that between the child and the custodial parent.

III. 1975 to 1981 Legislative Sessions: Distant Drums and Trumpets Sound[19]

Needless to say, dissatisfied fathers immediately began objecting to the legislature that "reasonable visitation" was meaningless as a practical matter. These efforts did yield limited legislative response; amendments were made to the four sections quoted above in three of the next four legislative sessions, often with cooperation from the Family Law Section of the State Bar of Texas.

Beginning in the 1977 legislative session, self-motivated volunteer groups (collectively known by the name of the most prominent, the Texas Fathers for Equal Rights, hereafter TFER) began systematic lobbying to seek redress for paternal grievances. One of their chief goals was to foster a new theory of dealing with postdivorce relationships between parents, a principle that came to be widely and controversially, known as joint custody. In the 1979 legislative session, TFER successfully promoted an amendment allowing a court to award joint custody to parents, albeit only in conjunction with the relatively onerous condition that the parties agreed to the arrangement as follows:[20]

Section 14.06. Agreements Concerning *Custody and Visitation*

(a) To promote the amicable settlement of disputes between the parties to a suit under this chapter, the parties may enter into a written agreement containing provisions for conservatorship and support of the child, modifications of agreements or orders providing for conservatorship and support of the child, *and appointment of joint custodians.*

[*Note: Subsections (b)-(d), which provide for the court to reject or accept and enforce the agreement of the parties on best interest grounds were not amended. This meant that a judge could reject the parents' agreement to joint custody—reportedly not an uncommon occurrence.*]

Parenthetically, this was only the beginning for the fathers' lobby groups to receive sympathetic recognition from the male-dominated legislature (so long as the fathers did not try to bully legislators—as sometimes happened in that "boys-will-be-boys" world).

IV. 1983 Legislative Session: A Boulder Begins Rolling Downhill

For at least a decade, fathers' rights groups had complained long and loudly that custodial parents were free to interfere with "reasonable" vis-

19. Sections 14.01-.04: amended by Acts 1975, 64th Leg., p. 1265, ch. 476, § 27, eff. Sept. 1, 1975; amended by Acts 1977, 65th Leg., p. 335, ch. 164, § 1, eff. Aug. 29, 1977; amended by Acts 1981, 67th Leg., p. 944, ch. 355, § 4, eff. Sept. 1, 1981.

20. Amended by Acts 1979, 66th Leg., p. 717, ch. 313, § 1, eff. Aug. 27, 1979.

itation rights, or even block them entirely, without any realistic threat of punishment. This consequence was totally unsatisfactory to noncustodial parents. A few appellate judges decried the custom, but that attitude had not succeeded in changing the ways of most lower courts.

To be fair, not all the credit for the reform visitation orders is due to fathers lobbying. Other forces, primarily the Family Law Section, weighed in for more equal treatment of both parents. Moreover, a latent but powerful, hostility towards the trial judiciary by both legislators and lawyers was a factor. Rather than exercising their supposedly great discretion to achieve a reasonable balance, trial judges typically left the parties without guidance, other than the custodial mother's generosity for allowing the father's contact, or lack thereof, with his child. This was widely regarded by fathers as a default of responsibility by the trial judiciary; a position male legislators agreed with.

In retrospect, the meaningful evolution of the *Texas Family Code* began in 1982 when a committee of lawyers and other interested parties appointed by a senator took up the issue.[21] Remember, Judge Calabresi's book was published in 1982.[22] The development of parental custody grew from the simplest possible formulation to an extraordinary "statutorification"—a complex set of rules to be imposed in a "standard possession order" that governs the relationship of separated parents for virtually every minute of a year. Conversely, the court order also contains an alternative of the simplest possible authorization for post-decree parental custody and visitation, *i.e.*, the parents may do anything they both agree to do without regard to the order. Whether the legislature has produced the right balance of detailed regulation with judicial (and even lawyerly) discretion to guide litigating, and often hostile, divorcing and divorced parents is a continuing conundrum.

In 1983, the legislature dealt itself another hand in the controversy, coming down relatively gently on the side of noncustodial parents. In large part, the response was based on an equal-treatment argument (the amendment was actually included in the major child-support enforcement bill calling for wage assignment). Trial courts "were encouraged" to publish schedules and formulas to be used in determining visitation (as well as for child support),[23] thereby lending predictability to decrees. To this

21. Senator Betty Andujar, Tarrant County (Fort Worth), served in the Texas Senate from 1972 to 1982, as its first female senator and first Republican since Reconstruction. The committee's recommendations may have been her crowning achievement.

22. Ironically the "orgy of statutes" in Texas as described here began in 1982—surely there was no cause and effect.

23. Guidelines for child support (not discussed in this article) and for custody and visitation were tied together in Texas law throughout the time period described. The former were greatly

end, without much notice and little discussion or controversy, two simple sentences were added to the primary provision controlling visitation, to wit:[24]

Section 14.03. Possession of and Access to Child.

(a) If a *custodial parent* is appointed, the court may appoint one or more *noncustodial persons* and set the time and conditions for possession of or access to the child by the *noncustodial parent* and others. *If ordered, the times and conditions for possession of or access to the child must be specific and expressly stated in the order, unless either party shows good cause why specific orders would not be in the best interest of the child.*

(b) The court by local rule may establish and publish schedules, guidelines, and formulas for use in determining the times and conditions for possession of and access to a child.

[*Note: New text was inserted as subsection (b).*]

Thus, after September 1, 1983, visitation orders supposedly were required to be specific, absent good cause to be otherwise (whatever that might mean). Publication of local advisory guidelines were drafted and promulgated by local trial judges, composed of schedules and formulas to be used in determining custody and visitation (and child support) and projected to provide predictability to decrees. Although not recognized at the time, the legislative suggestion to eliminate "reasonable visitation" as the basic order had the effect of dislodging a boulder from the top of a mountain. More, much more, was yet to come in the next dozen years.

V. 1987 Legislative Session: Runaway Boulder Triggers an Avalanche

The 1985 legislative session passed without notice of the boulder rolling down the mountain from 1983, *i.e.*, the courts had largely ignored the legislature's request for guidelines on custody and visitation (and child support as well, not discussed in this article). By the time the 1987 session ended, the resulting avalanche was recognized by all. Pressure for reform of the basic structure of a child custody order had been building ever since the Family Code was enacted in 1973. The explosion in 1987 was virtually volcanic in its sweep (note the mixed metaphors have a mountain connection).

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assisted by federal legislation, *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

24. Acts 1983, 68th Leg., p. 1608, ch. 304, § 1, eff. Aug. 29, 1983; Acts 1983, 68th Leg., p. 1728, ch. 338, §, eff. Sept. 1, 1983.

The language added to the primary statute outlining the parameters of custody and visitation was deceptively straightforward, but extraordinarily complex and comprehensive in its application.

Section 14.01. Court Appointment of Sole Custodian or Joint Custodians.

(a) In any suit affecting the parent-child relationship, the court may appoint a *sole custodian or may appoint joint custodians, and shall order reasonable terms and conditions for the implementation of the custody and visitation. A custodian* must be a suitable competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint at *least one joint or sole custodian.*

(b) A parent shall be appointed *sole custodian or both parents shall be appointed as joint custodians* of the child unless the court finds that appointment of the parent *or parents* would not be in the best interest of the child *because the appointment would significantly impair the child's health or emotional development.* In determining which parent to appoint as *sole custodian*, the court shall consider:

(1) the qualifications of the respective parents without regard to the sex of parent; and

(2) evidence of the intentional use of abusive physical force by a parent against his or her spouse or against any person younger than 18 years of age committed within a two-year period preceding the filing of the petition for divorce or annulment or during the pendency of the suit.[25]

A. Parental Presumption Redefined (1987)

The presumption that a parent should be named parental custodian was significantly reworded. While it is undoubtedly true that the right of a parent to have and raise children is one of constitutional dimension,[26] the statutory parental presumption had been phrased in extraordinarily weak language. The statute only said that "the best interest of the child shall always be the primary consideration of the court." This was coupled with the former exception, which stated, without further elaboration, a parent should be named as custodian unless it "would not be in the best interests of the child." That was a classic example of an incomprehensible circular definition.

While the parental presumption was supposedly "very strong," in fact

25. TEX. FAM. CODE ANN. §§ 14.01, Acts 1987, 70th Leg., ch. 744, § 4, eff. Sept. 1, 1987.
26. *See* Troxel v. Granville, 530 U.S. 57 (2000), and cases cited therein.

not all reported cases fully supported that proposition.[27] This parental presumption without teeth was particularly peculiar given the further statutory statement that a parent could not be denied visitation, *i.e.*, possession of or access to a child "unless the parental possession is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child." In short, the visitation presumption for a parent had been worded in stronger terms than the custody presumption.

After September 1, 1987, a parent could be denied custody only if such a result "would significantly impair the child's physical health or emotional development." Even a parent less adequate as a custodian than another person, absent facts meeting the statutory exception, would prevail.

The provision to "consider" domestic violence was somewhat watered down during the legislative process when amendments argued that "minimal violence" or "very old war stories" should not be allowed into evidence to clog the docket with stale mud-slinging. Current mud-slinging was not prohibited, however, as a two-year period was allowed for consideration of the viability of past domestic violence. This timeframe corresponded with the statute of limitations for prosecution of criminal assault.

B. Joint Custody by Court Order, Not Just by Agreement (1987)

If ever there was an issue in Texas that just would not go away, joint custody is that issue. It was battled over in the legislative halls from 1979 until 1995 and beyond. It seems to many observers that avoiding controversy if at all possible is a central principle of the Texas Legislature. Thus, it was somewhat surprising in 1987 for a bill to pass that generated as much opposition as support. For example, the competing camps of pro and con mustered over forty witnesses each when the legislation proposing court-ordered joint custody was heard by the Senate committee. Proponents promised that with passage paradise would soon arrive in Texas, and postdivorce hostility between parents would vanish as the morning dew. Opponents, on the other hand, predicted Armageddon should such an Old Testament-style plague be foisted upon the unsuspecting citizens of Texas.

At the time, it was predictable that the actual experience would fall somewhere between these two views. After all, the system being sup-

27. In the 1970s, some cases held that a parent may be deprived of custody even though that parent is a fit and proper person. De La Hoya v. Saldavar, 513 S.W.2d 259 (Tex. Civ. App.–El Paso 1974); Gibson v. Hines, 511 S.W.2d 546 (Tex. Civ. App.–Waco 1974). By the 1980s, however, the courts placed more emphasis on the constitutional dimension of the subject. Neely v. Neely, 698 S.W.2d 758 (Tex. App.–Austin 1985); Cooper v. Texas Dep't Human Servs., 691 S.W.2d 807 (Tex. App.–Austin 1985).

planted—sole custody with an occasional agreed joint custody—was hardly a model of unblemished perfection. State legislators almost always rely on hunch and guesswork. Not for them (or for us) to rely on statistical studies, which, to be fair, would be impossible in this context. But, if we lived in a world in which such facts could be efficiently, economically, and accurately gathered, it would almost certainly demonstrate that an unknown percentage of the following conclusions would follow: (1) in X% of postdivorce custody cases, anything works; (2) in Y% of cases, sole custody works, but joint custody does not; (3) in Z% of cases, joint custody works, but sole custody doesn't; and finally, (4) in ZZ% of cases, *nothing works*. Further, almost all of the war stories used to illustrate any point will be heartfelt and reflect the speaker's personal experience.

The core of the controversy revolved around whether a trial court should be given the authority to order joint custody over the opposition of at least one, or even both, parents. Proponents argued that the inability of the court to enter such an order completely distorted the bargaining process and greatly inhibited settlement of cases because the likely winner of the contest, *i.e.,* the mother, would not agree to joint custody, which offered no benefit to her. Only if she is "bought off with an excessive price" would joint custody be attractive.

Opponents argued that if the parties could not agree, joint custody would never work. The hypothetical situations propounded always involved extreme hostility between the parties—close to, but not quite, including the use of firearms if the other parent were to come within range. While rather obviously joint custody would not work in such situations, the hope was that at least a majority of district judges would have the good sense not to impose the form on unwilling parties if their overt, extreme hostility was clear. Notwithstanding the lack of evidence on the subject, the general principle for the 1987 legislation was that shared parenting after separation or divorce was to be encouraged—up to endorsing trial judge fiat.

Not one, but both of the primary goals of the fathers' lobbying groups were addressed and achieved: joint custody was given real substance, and specific terms were mandated for visitation by the noncustodial parent, who would have the somewhat ambiguous title of joint custodian.[28]

Section 14.021. Appointment of Joint *Custodians*.

(a) It is the policy of this state to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child and to encourage parents to share

28. TEX. FAM. CODE ANN. § 14.021. Acts 1987, 70th Leg., ch. 744, § 6, eff. Sept. 1, 1987.

in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage.

(b) In this section, "joint *custody*" means the sharing of the rights, privileges, duties, and powers of a parent by two parties, ordinarily the parents, even if the exclusive power to make certain decisions may be awarded to one party. Joint *custody* does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint *custodians*; ordinarily the best interest of the child will require the court to designate a primary physical residence for the child.

In sum, the legislature directed that henceforth two varieties of custody orders would be available from your friendly local court: sole and joint.

For the first time, joint custody was defined, to wit, the sharing of the parental powers by two parties, ordinarily the parents. It was also made clear that nonparents can be named joint custodians, and that one parent and one nonparent could share parenting duties. Such an order would likely involve a marginally competent parent and a grandparent from that side of the family. Two nonparents could also be named as joint custodians, *i.e.*, uncle and aunt, grandparents, etc.

The exclusive power to make certain decisions explicitly may be awarded to just one of the two joint custodians. In what is probably the single most important policy in the statute, to wit: "Joint custody: does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint *custodians*." In most cases (if not all), the statute made clear that best interest of the child generally requires that the residence of one of the parents be designated as the child's "primary physical residence." In short, trial courts were compelled to recognize that stability in a child's life is more important than equalizing time of possession.

Parties who agree to, or a court that orders, joint custody must settle certain issues, particularly those that are likely to cause future controversy. Most importantly, there must be a mechanism for determining the primary residence of the child. For example, either the mother or the father could be awarded the right to choose the child's principal residence, or the court could do so. Further, the county of the child's residence might be agreed on or decided by the judge. For example, initially in Austin it was not uncommon to see the child's residence established "within 30 miles of the capitol dome." Alternative dispute resolution procedure, however, was strongly encouraged, in contrast to relitigating the issues.

Most importantly from the perspective of proponents of joint custody,

trial courts were authorized to exercise discretion and to award joint custody, even in the absence of agreement by the parties. The key words were "shall appoint . . . only if . . . the appointment is in the best interest." If the court orders joint custody, its decree must contain the requisite detail so that a plan for the life of the order is provided. The statute provides the mandatory requirements to be contained in the decree. In 1987, many judges were very leery of the very idea of joint custody. Therefore, the victory of the principle was conditioned as discretionary with the court, if not Pyrrhic and somewhat on the hollow side. Again, more about this later.

VI. 1989 Legislative Session: Pushing the Courts Aside

If the 1987 session triggered an avalanche of legislation, the 1989 session more closely resembled heavy bombardment of the judiciary by the legislature thanks to well-earned frustration with the courts' unresponsiveness to its requests for action. Legislators came to believe that the common law approach was flawed due to judicial restraint and caution, and even covert opposition to the legislature's right to decide issues of public policy. After all, legislators in Texas meet for only 140 days every other year, while judges are on duty year-round. Thus, legislators expected better work product from judges because they believed consistent attention to the issue was required. Disappointed in the judicial nonresponse from years past, legislators took the bit between their collective teeth and ran away—a phenomenon well-known in Texas.

A. Revisiting the Parental Presumption (1989)

One aspect of strengthening the parental presumption in 1987 did not sit well with many family law practitioners, who then convinced the Family Law Section to advocate a modification. The amendment took account of a child's shifting best interest when care and control have been surrendered by the parent or parents for an extended period. The argument was that sooner or later a child will look to a third party as the primary caretaker and relate to that third party in a manner reasonably equivalent to the parent-child relationship. Almost everyone agreed there would come a time when a long-term actual custodian and the parent or parents should play on a level field. The legislature was called upon to establish a statutory timeframe, especially because judicial discretion was held in such low repute. Ultimately the bar-sponsored recommendation to erode the parental preference after an absence of one year was accepted.[29]

29. This timeframe continues to date, TEX. FAM. CODE § 153.373. Voluntary Surrender of Possession Rebuts Parental Presumption.

B. Statewide Statutory Visitation Guidelines (1989)

By 1989, the legislative request made in 1983 for local courts to establish and publish advisory schedules, guidelines, and formulas for possession of and access to the child (and child support) had gone substantially unheeded for two sessions. Some courts did follow directions, but most did not. Although an exact count was not available, it was commonly believed that noncompliance was the rule rather than the exception. For example, the Harris County (Houston) courts, the largest and most important population center in the state, appeared to be the major offender by doing nothing. Similarly, the Dallas courts ignored the mandate for visitation guidelines.[30] Not coincidentally, during this same session the legislature had also become a bit frustrated with the handling of child support guidelines by the Texas Supreme Court.[31]

It should be noted that not all courts had failed to comply with the requests. Comprehensive custody and visitation guidelines were formulated by the trial court judges of Travis County (Austin) in 1984.[32] But, the 1987 session had also set the stage to prove conclusively to the legislature that any court might feel empowered to ignore legislative directives. The Texas Supreme Court had been requested to appoint a committee to study whether advisory guidelines should be promulgated to assist local courts, and whether statewide guidelines would be appropriate. The Supreme Court allowed nearly two years to elapse before getting around to the task. In March 1989, an advisory committee was named, but because the legislature had already reconvened in January 1989, the court's action was viewed as something of an insult.

All this irritated the legislature no end. Key legislators determined that if local trial courts could not, or would not, put into place the public policy the legislature had determined to be appropriate, the legislature would assume the task. Thus, the legislature scrapped its request for local court control and replaced it with enactment of a new statutory standard for orders of "possession of and access to a child," a.k.a. visitation.[33] As a

30. The Dallas local courts had promulgated child support guidelines, but these were replaced in 1986 by statewide guidelines promulgated by the Texas Supreme Court at the insistence of federal authorities.

31. The Texas Supreme Court had assumed the burden for promulgating child support guidelines. They had a serious false start in which the court published guidelines and withdrew them after a few months in response to overwhelming criticism. The court more or less succeeded in its task by Order of the Supreme Court of Texas, Child Support Guidelines, effective February 4, 1987. The author had the unforgettable fun of chairing the 100-plus person committee that recommended the guidelines to the court (which had a short life until the statutory takeover, which could generate another article—but won't).

32. Hold your applause; the Travis County judges did not publish child support guidelines.

33. Acts 1989, 71st Leg., ch. 617, § 4, eff. Sept. 1, 1989.

result, effective September 1, 1989, Texas became the proud owner of statutory guidelines regarding child custody and visitation (and child support).[34] Finally, another provision further demonstrated how disaffected the legislature had become with the common law approach by explicitly stating that neither local court rules nor Supreme Court Rules could interfere with the standard possession order.[35]

Given this history, unsurprisingly the legislature treated the supreme court as a junior partner, directing it to appoint another advisory committee of at least twenty-five persons to advise the legislature (not the court) on visitation guidelines.[36] The efforts of this advisory committee were not entirely in vain, however. Ultimately, it met for several years and many of its recommendations to the legislature formed the basis for amendments to the Family Code.

C. The Guidelines Themselves (1989)

Based primarily, but not exclusively, on the 1984 guidelines published by Travis County (Austin) trial judges, the legislature created a standard possession order intended for anyone named as a noncustodian,[37] or as a joint custodian without the right to designate the child's principal residence. The Travis County guidelines had made no distinction based on the age of the child, but the new legislative guidelines exempt their application to children under three. The court may enter a standard possession order or handcraft an order to account for special circumstances—for example, those of a nursing infant. The standard possession order directs that at age three the standard possession order automatically applies unless the order was made applicable to a toddler in the first instance (over time this has often happened).

The standard possession order intends a result directly contrary to the common law "reasonable visitation" order it replaced. The latter provided no time in a year during which the noncustodial parent had a right to have possession of and access to the child. The standard possession order

34. Acts 1989, 71st Leg., ch. 617, § 6, eff. Sept. 1, 1989. The legislature found the guidelines published by the supreme court to be fundamentally sound, but needed an amendment to eliminate one overly complex and divisive aspect of the assessment of the child support order, which incidentally the author had opposed.

35. TEX. FAM. CODE § 14.032(e)–(f). Acts 1989, 71st Leg., ch. 617, § 4, eff. Sept. 1, 1989

36. TEX. FAM. CODE § 14.03(j). Acts 1989, 71st Leg., ch. 617, § 4, eff. Sept. 1, 1989. *Repealed by* Acts 1995, 74th Leg., ch. 20, § 2, eff. April 20, 1995.

37. The statutes presume one parent will be awarded the right to determine the child's primary place of residence, which is true whether one parent is named sole custodian or both parents are named joint custodians. As noted above, from 1987 forward, the statute has explicitly stated "joint custody does not require the award of equal or nearly equal periods of physical possession of and access to the child. . . ."

allocates virtually every minute of the year to one parent or the other.

The terms of the basic, standard possession order were almost identical to those orders that had been routinely rendered in Travis County for almost five years—*i.e.,* the first, third and fifth weekends, which are defined as beginning on Friday at 6:00 P.M. and ending on Sunday at 6:00 P.M. An additional midweek visitation period is provided, *i.e.*, Wednesday evenings from 6:00 to 8:00 P.M., but only during the school year. Further, the regularly ordered weekend possession of and access to a child is extended by Monday or Friday when those days are recognized holidays.

Specifically recognized vacation and designated holiday times trump (supersede) any conflicting weekend or Wednesday period. Ten specific time periods are singled out for special treatment, *e.g.,* the "Christmas school vacation"[38] is to be divided approximately fifty-fifty, in alternating first and second halves. Specificity was key. The time for the mid-Christmas vacation transfer of the child was set at "noon on December 26." This particular change of possession was the subject of extensive debate and controversy—to the point of ultimately being modified by floor amendment during debate. This demonstrates the depth of feeling involved in these matters, and the seriousness with which the legislators considered their decisions. The same example perhaps can be advanced to prove choking the parties with detail.

Nothing was left to chance. Beginning with New Year's Day through the end of the Christmas school vacation, the standard possession order is designed to have a provision to cover any issue that might arise between the parents for the entire year—and for all the years of childhood thereafter (doubtless an impossible goal to achieve in practice). Each phase of the life of the parties had its own rules. Sadly, there were no built-in schedules to account for changes in the life of a child who ages from toddler to teenager. Unless the parties can agree to modify the order accordingly, an expensive trip back to court might be required.

The standard possession order applies to parents who live close to one another (defined as 100 miles or less), and to those who live far apart (over 100 miles). This geographical aspect of the standard possession order springs into effect when one parent changes residence. While parents who live in Waco and Austin (101 miles from courthouse to courthouse) are in quite a different situation from those who live in Austin and Anchorage,

38. Political correctness is not a hallmark of the Texas Legislature, not to mention "separation of church and state" niceties. When the suggestion was made in a committee hearing that "Christmas vacation" might better be named "Winter school vacation," the chairman replied it was his understanding that "Christmas vacation" was the secular name for those December days when children were excused from attending school.

there is one set of rules for both (further details are omitted here).

Of particular interest are the "general terms and conditions," which attempt to settle future disputes of a predictable nature.[39] The most important of these are the basic rules on exchange of the child. Historically, "pick-up and return" was almost always ordered—that is, the noncustodial parent (the father) picks up the child at the custodial parent's (mother's) residence and returns the child there.

Initially the first version of the standard possession order (1989) began with an attempt to establish certain civilized behavior rules for parents. The judge is authorized at the final hearing to choose the method for transferring the child between parents. The traditional method not only burdens the noncustodian with transportation costs, but can be a source of contention. The 1989 alternative allowed the judge to require each parent to pick up the child from the other's home, *i.e.*, a "pick-up and pick-up" exchange. This policy arguably forces the parents to accommodate each other, especially if they live some distance apart.

Most of the subsequent amendments and subsequent litigation about the standard possession order has been about this exchange. Perhaps surprisingly the guidelines and the standard possession order have generated extraordinarily little appellate litigation.[40] The complete history of the process is yet to be written. Suffice it to say that issues involving relocation have yet to be finally settled in Texas, which hardly makes the state unique.

The second most important statutory guideline is that the standard possession order is rebuttably presumed to be in the best interest of the child. To deviate, a court must determine that the standard possession order will be "unworkable or inappropriate." And, the deviating order must explain the specific reasons for the deviation. Obviously all this was intended to constrain the discretion of trial judges within the narrow confines of the standard possession order.

D. Parties May Agree to Ignore the Standard Possession Order (1989)

The Texas standard possession order is both rigidly fixed and extraordinarily flexible. It is almost unconscionably inflexible, given that it allo-

39. TEX. FAM. CODE § 153.316. General Terms and Conditions.

40. A Westlaw search was made of the relevant TEX. FAM. CODE sections relating to guidelines and the standard possession order. The first set is §§ 14.023-.033, effective Sept. 1, 1989 to April 19, 1995, which produced twenty citations of the two statutory provisions; and, §§ 153.251-258; 153.311-.317, effective April 20, 1995 to date, which produced 129 citations of the fifteen separate statutory provisions. In the twenty-one years the guidelines and standard possession order have been in force, Texas has witnessed well over two-million divorces, the majority of which have involved children.

cates every minute of the year to one party or the other, insofar as their mutual relationship is concerned. It might be fair to say that only crazy people would adhere to its terms without deviation. On the other hand, it is infinitely flexible. *The very first substantive provision in the standard possession order is short, direct, and to the point, and expresses the most important principle in the order:*

Section 153.311. Mutual Agreement or Specified Terms for Possession

> The court shall specify in a standard possession order that the parties may have possession of the child at times mutually agreed to in advance by the parties and, in the absence of mutual agreement, shall have possession of the child under the specified terms set out in the standard possession order.[41]

This crucial section provides that the parties may agree to vary the possession of a child at any time, in any mutually acceptable manner, and that the specific terms set out in the standard possession order take effect only in the absence of mutual agreement. Arguably, rigid, slavish observance of the standard possession order almost constitutes evidence of bad parenting on the part of one or both parties. Such behavior subverts the basic purpose of the pattern order, which is to answer questions and settle possible disputes when necessary. But, the standard possession order is designed to provide a framework for future decision making, not as a continuing punishment for the failure of the personal relationship of the parents. In short, the standard possession order should be regarded as the default resolution of all potential conflict on which the joint custodians cannot reach agreement until modified by their mutual consent.

It is fair to say that the 1989 version of the standard possession order granted liberal visitation and favored noncustodians (fathers) to a degree much more than had been the standard practice in most, if not all, Texas counties. Nonetheless, most of the major women's lobby groups, *i.e.,* Texas NOW, Texas Women's Political Caucus, and the Texas Council on Domestic Violence, signed on to this bill as "acceptable." One other word of importance: the guidelines implicitly are based on the idea that the noncustodial parent (read father) desires the maximum amount of possession of and access to the child. In other words, the father is a caring, nurturing, loving dad; and not an indifferent, glad-to-be-rid-of-the-kid parent. There is virtually no contemplation in the standard possession order for the latter sort of noncustodian, although everyone knows there is a regular per-

41. Acts 1989, 71st Leg., ch. 617, § 4, eff. Sept. 1, 1989; Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 2009, 81st Leg., ch. 1113, § 5, eff. Sept. 1, 2009.

centage of paternal noncustodial parents that act in just that way—and some maternal noncustodians, too.

The only relief given to a custodial parent is somewhat hollow. First, despite repeated suggestions to the contrary, liberal visitation is granted but it is not ordered to be performed. The noncustodian is extended a wide range of rights, but there is no mandate to exercise them. Repeated failure of a parent to give notice of the inability to exercise scheduled possessory rights can be considered as a factor in modification of those possessory rights. But it will be discretionary with the court whether a modification is to be entered merely because notice was regularly not given when the noncustodian did not show up as scheduled. Further, the offense is the failure to give notice and not one of failure to exercise the right of visitation. Thus, a noncustodian who shows up rarely, but always gives notice of whether the visitation will be or will not be exercised, is not in violation of the standard order. In other words, visitation with your child is a right, but not a duty.

VII. 1995 Legislative Session: Culmination—Joint Custody Presumes Best Interest

All of the threads of movement toward joint custody came together in the Texas Senate in 1995 when Senator Chris Harris, co-chair of an interim legislative study committee, brought the House Bill by the other co-chair, Chairman Toby Goodman, to the floor. Senator Harris presented the following amendment:

Section 153.131. Presumption That Parent to Be Appointed Joint Custodian.[42]

(a) Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint custodians is in the best interest of the child.[43]

Senator Harris explained that the time when custody battles wound up with a "winner" and a "loser" was eliminated in the 1993 session, and that

42. The relevant title of the code was reorganized, recodified, and renumbered early in the 1995 session without substantive change. This permitted amendments of substance throughout the remainder of the session.

43. Acts 1995, 74th Leg., ch. 751, § 32, eff. Sept. 1, 1995.

it was time to move on to a new attitude about the custody of children after divorce. He argued joint custody was clearly part of a nationwide trend; approximately thirty-eight states had statutes regarding joint custody, and seventeen states had presumptions that joint custody is in the best interest of the child. Rumor had it that in the early evening, as Chairman Goodman was accepting the Senate amendment in the House, a delegation of Houston family law judges was caravanning toward the Capitol in Austin to oppose the presumption of joint custody. Alas, apparently they arrived too late.

Irresponsible reporting in the *Houston Chronicle* triggered an avalanche of anguish when the newspaper erroneously stated that the new formulation mandated a fifty-fifty split of time between mothers and fathers. In fact, the substantive provisions regulating the appointment of joint custodians were not affected in any way by this particular amendment. The rule regarding the appointment of one of the parents to furnish the primary residence was continued, and the statutory statement that joint custody does not require "equal or nearly equal periods of physical possession" was unchanged.

VIII. 1997 to the Current 2011 Legislative Sessions: Weeding the Vegetable Garden, Pruning the Fruit Trees

Without exception, the statutory provisions regulating custody and visitation have been amended every year since the *Texas Family Code* was enacted in 1973. After the watershed amendment in 1995 to create a presumption that joint custody is to be the lodestar of custody decisions, the magnitude of the amendments tailed off dramatically. In retrospect, after this event the standard possession order underwent only one significant change for the remainder of the twentieth century, and so far in the twenty-first as well.[44] Attention given to the provisions has evolved from passion to quiet affection and tender loving care. Each legislative session since 1995 has seen a stitch here, a touch-up of paint there, but definitely no remodeling.

Some argue the standard possession order in the *Texas Family Code* is a classic example of creation of a regulatory system choking on specificity. Yet, virtually all Texas family law attorneys and family court judges seem to have endorsed the program, perhaps with varying degrees of enthusiasm. Beyond doubt, however, it has brought both clarity and predictability to child custody and visitation orders and, to the extent possible, compliance to those orders.

44. A change of the midweek visit from Wednesday to Thursday evening might seem minor on first glance. But when the visit can be extended overnight, the child might be in the possession of the noncustodial parent from Thursday evening to Monday morning or longer.

A major Houston divorce attorney recently characterized the standard possession order as analogous to the distribution of 401(k) funds. That is, the standard possession order is the required minimum distribution (RMD) of the rights of the noncustodial parent. Perhaps the standard possession order may better be described as akin to "holy writ." That is, the vast majority of custody decrees contain the order as the basic model for the post-litigation behavior of divorcing parents. Only in some default paternity suits is the standard possession order likely to have no impact or effect on post-decree conduct. Thereafter, the situation may be akin to aspects of some of the Protestant tradition, *i.e.*, the parties are left to interpret the order according to their own understanding.

As a final aside, the Family Law Section of the State Bar of Texas, aided by its doppelganger, the Family Law Foundation,[45] arranged for a proposed amendment to the standard possession order to be introduced in the 2011 session.[46]

45. The Foundation is a private organization funded primarily by family law attorneys to lobby for and against pending legislation.

46. Companion bills were introduced by Rep. Senfronia Thompson (D. Houston) and Senator Chris Harris (R. Arlington) to add extensive provisions to the standard possession order to apply to a child under three years old. At press time, SB 820 has passed the Senate, is through the committees in the House, and is scheduled for the Local and Consent Calendar, which means it is certain to pass. Note the bipartisan nature of the *Family Code* legislation in Texas.