St. Mary's Law Journal

Volume 11 | Number 4 Article 12

12-1-1980

A Temporary Child Custody Order Issued Pursuant to Section 11.11 of the Texas Family Code Constitutes a Non-Appealable Interlocutory Order.

Anthony J. Blazi

and practical solution lies in allowing the interests of all three parties to be adjudicated simultaneously,[66] with the remedies of constructive trust and subrogation serving as tools by which the relative equities of the parties may be balanced.[67]

Mark B. Taylor

TEXAS FAMILY LAW—Interlocutory Orders—A Temporary Child Custody Order Issued Pursuant to Section 11.11 of the Texas Family Code Constitutes a Non-Appealable Interlocutory Order

Craft v. Craft,
579 S.W.2d 506 (Tex. Civ. App.—Dallas), *writ ref'd per curiam,* 580 S.W.2d 814 (Tex. 1979).

On July 21, 1975, the Crafts were divorced, and the wife was appointed managing conservator of their three children. Shortly thereafter the father moved to modify the divorce decree, and on August 8, 1977 the court, with the mother's consent, appointed the father managing conservator of their eldest child. Several months later the father filed an emer-

---

Property and Liability Insurance, 60 COLUM. L. REV. 1063, 1071 (1960) (discord among courts and commentators as to proper solution to the problem).

66. *See* 4 G. PALMER, THE LAW OF RESTITUTION 387-90 (1978); *cf.* Cheatwood v. De Los Santos, 561 S.W.2d 273, 279 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Kost v. Resolute Underwriters of R.I. Ins. Co., 211 S.W.2d 758, 760 (Tex. Civ. App.—Galveston 1948, writ dism'd). Rule 39 of the Texas Rules of Civil Procedure allows a court to order joinder of all persons who have or claim an interest in the subject matter of the suit and whose interest will necessarily be affected by any judgment rendered in the action. TEX. R. CIV. P. 39; *see* Thoreson v. Thompson, 431 S.W.2d 341, 347 (Tex. 1968) (plaintiff's insurer which had paid part of loss held to be necessary party to insured's negligence suit against third party who caused the loss).

67. *See* Cheatwood v. De Los Santos, 561 S.W.2d 273, 279 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (insurance proceeds impressed with constructive trust for benefit of third party); Kost v. Resolute Underwriters of R.I. Ins. Co., 211 S.W.2d 758, 760 (Tex. Civ. App.—Galveston 1948, writ dism'd) (third party subrogated to insured's rights against insurer).

gency motion[1] to obtain custody of the two youngest children on the grounds the mother was mentally ill and had threatened to kill the father in the children's presence. The court granted the motion, appointed the father temporary conservator pending trial of the cause, and ordered the mother not to visit the children during this period. Complying with rule 385 of the Texas Rules of Civil Procedure, the mother perfected an appeal from the interlocutory order. Opposing the motion the father moved to dismiss arguing that the court lacked jurisdiction to hear the appeal. Held—*Motion to Dismiss Granted.* A temporary child custody order issued pursuant to section 11.11 of the Texas Family Code constitutes a non-appealable interlocutory order.[2]

As a general rule the jurisdiction of appellate courts is limited to appeals from final judgments.[3] A judgment is not considered final until it resolves all the issues between the parties concerning the subject matter of the litigation.[4] Originating with the concept of the case as an indivisible unit,[5] the final judgment rule arose from the common law requirement that an appeal entail a review of the entire case record.[6] Since the record was not complete until a final judgment was entered, the rule became a necessary prerequisite to the initiation of the appellate process.[7] Although

---

1. An "emergency motion" is a motion made by a party seeking to have a child placed in the custody of the court on grounds that the child's present environment is dangerous to its physical or emotional well being. *See* TEX. FAM. CODE. ANN. § 17.02 (Vernon Supp. 1980).

2. *See* Craft v. Craft, 579 S.W.2d 506, 508 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

3. *See, e.g.*, North E. Independent School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966); Marulanda v. Mendez, 489 S.W.2d 128, 129 (Tex. Civ. App.—San Antonio 1972, no writ); Archer v. Archer, 407 S.W.2d 529, 530 (Tex. Civ. App.—San Antonio 1966, no writ). *See generally* TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

4. *See, e.g.*, Collins v. Miller, 252 U.S. 364, 370 (1919) (for appeal judgment must be final for all parties, entire subject matter, and all causes of action); Henderson v. Shell Oil Co., 143 Tex. 142, 143-44, 182 S.W.2d 994, 995 (1944) (to be final judgment must determine controversies subject of litigation); Hargrove v. Insurance Inv. Corp., 142 Tex. 111, 116, 176 S.W.2d 744, 746 (1944) (for purposes of appeal, judgment must make final disposition of all matters in controversy). *See generally*, RESTATEMENT OF JUDGMENTS § 41 (1942).

5. This concept arose from the supposition that the record could not be in two courts at once. *See* Metcalfe's Case, 77 Eng. Rep. 1193, 1198 (K.B. 1615). *See generally* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 542 (1932).

6. *See* Fitzwilliams v. Copley, 73 Eng. Rep. 651, 654 (K.B. 1670). *See generally* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 542 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 292 (1966).

7. *See* Elkin v. Wastell, 81 Eng. Rep. 194, 196 (K.B. 1617). To remove the record while the case was pending in the lower court would disturb the proceedings. The reviewing court could not hear the appeal until the record was complete so it could be fully informed of what happened in the court below. *See* Spittlehouse v. Farmery, 82 Eng. Rep. 718, 718-19 (K.B. 1651). *See generally* Bishop of Glouchester v. Veale, 74 Eng. Rep. 1034, 1034 (K.B. 1598); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 543-44 (1932).

the concept of the case as an indivisible unit has been modified,[8] the final judgment rule is still applied because it reduces appellate litigation,[9] prevents disruption of the trial process,[10] and alleviates needless litigation expense.[11] Therefore, in the absence of an express jurisdictional grant, appellate courts entertain only those appeals that follow a final judgment.[12]

Since an interlocutory order is by definition only temporary,[13] appeal from such an order is ordinarily not allowed.[14] The long standing rule has been that no appeal will lie from an interlocutory order unless expressly

---

8. *See* Pierce v. Reynolds, 160 Tex. 198, 199, 329 S.W.2d 76, 77 (1959). When a formal severance is entered and the judgment is granted in the severed cause, it is final and appealable. *Id.* at 199, 329 S.W.2d at 77; Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 159 Tex. 550, 552, 324 S.W.2d 200, 202 (1959). *But see* Allison v. Gulf Liquid Fertilizer Co., 353 S.W.2d 512, 514 (Tex. Civ. App.—Fort Worth 1962, no writ). Under federal rule 54b, in an action involving multiple claims, when one or more but not all of the claims have been adjudicated, those that have been fully adjudicated may be appealed, even though the entire controversy has not been resolved. *See* FED. R. CIV. P. 54b; 6 MOORE'S FEDERAL PRACTICE 54.19, at 231 (2d ed. 1976).

9. *See* Cohen v. Beneficial Indus. Loan Co., 337 U.S. 541, 546 (1949); Republican Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948). *See generally* Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 293-94 (1966).

10. *See* Gillespsie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Republican Natural Gas Corp. v. Oklahoma, 334 U.S. 62, 69 (1948). *See generally* Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 293-94 (1966).

11. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964). *See generally*, Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 540 (1932).

12. *See, e.g.*, Office Employers Int'l v. Southwestern Drug Corp., 391 S.W.2d 404, 407 (Tex. 1965) (interlocutory order that depositions be taken not appealable); Henderson v. Shell Oil Co., 143 Tex. 142, 144, 182 S.W.2d 994, 995 (1944) (order disallowing "next friend" for non compos mentis, interlocutory and therefore not appealable); Pioneer Am. Ins. Co. v. Knox, 199 S.W.2d 711, 712 (Tex. Civ. App.—Austin 1947, writ ref'd) (order dismissing plea of intervention; interlocutory order not appealable unless provided for by statute). *Compare* Edmondson v. Bourland, 18 S.W.2d 1020, 1021 (Ark. 1929) (writ of mandamus may provide relief from adverse interlocutory order) *and* Dixie Serv. Co. v. Leaverton, 76 S.W.2d 530, 531 (Tex. Civ. App.—Texarkana 1934, no writ) (mandamus may be used for appeal in an otherwise non-appealable situation) *with* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771-78 (1957) (writ of mandamus not to be used as a substitute for appeal; as extraordinary remedy it must be used for extraordinary causes). *See generally* TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971); 4 R. MCDONALD TEXAS CIVIL PRACTICE § 17.04 (rev. 1971).

13. *See* Linn v. Arambould, 55 Tex. 611, 615 (1881) (order not adjudicating all issues is interlocutory); Cleghorn v. Chicago, 228 S.W.2d 967, 970 (Tex. Civ. App.—Amarillo 1959, no writ) (order that is not determinative on every issue is interlocutory). *See generally* 1 FREEMAN ON JUDGMENTS § 38 (5th ed. 1925).

14. *See* Henderson v. Shell Oil Co., 143 Tex. 142, 144, 182 S.W.2d 994, 995 (1944); Witt v. Witt, 205 S.W.2d 612, 614 (Tex. Civ. App.—Fort Worth 1947, no writ); Hicks v. Southwest Dev. Co., 181 S.W.2d 982, 983 (Tex. Civ. App.—Eastland 1944, no writ). *See generally* TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

provided by statute.[15] In Texas, when enacting statutory exceptions allowing such appeals, the legislature has used clear and unambiguous language.[16] Accordingly, legislative intent was easily discernable, and statutory construction unnecessary.[17] With the enactment of section 11.11(b) of the Texas Family Code,[18] the question arose whether the legislature had created another means by which interlocutory orders could be appealed.[19]

Construction of a provision of the Family Code requires an understanding of the Code's underlying purpose concerning the parent-child relationship: to promote the best interests of the child.[20] This policy is best exemplified in the determination of child custody, when the best interests of the child are the foremost consideration.[21] The first step in the custody process, an award of temporary custody, is governed by section 11.11,[22] which empowers the court to appoint a temporary managing conservator of the child pending determination of permanent custody at trial on the

---

15. *See* Henderson v. Shell Oil Co., 143 Tex. 142, 143-44, 182 S.W.2d 994, 995 (1944); Cleghorn v. Chicago, 228 S.W.2d 967, 970 (Tex. Civ. App.—Amarillo 1959, no writ); Hicks v. Southwest Dev. Co., 181 S.W.2d 983, 983 (Tex. Civ. App.—Eastland 1944, no writ). *See generally* TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

16. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964) ("either party may appeal from the judgment sustaining or overruling a plea of privilege"); *id.* art. 2250 (Vernon 1971) ("an appeal shall lie from an interlocutory order . . . appointing a receiver or trustee in any cause"); *id.* art. 2251 (Vernon 1971) ("appeals from orders granting or dissolving temporary injunctions shall lie").

17. *See* Gately v. Humphrey, 151 Tex. 588, 589, 254 S.W.2d 98, 100 (1952). The intent of the legislature obvious, courts had no choice but to apply the law as clearly written. *Id.* at 590, 254 S.W.2d at 100; *see* Bennet v. Langoau, 348 S.W.2d 179, 181 (Tex. Civ. App. —Dallas), *writ dism'd w.o.j.*, 362 S.W.2d 952, 955 (Tex. 1961); Van Alstyne v. State, 246 S.W.2d 671, 672 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.).

18. *See* TEX. FAM. CODE ANN. § 11.11(b) (Vernon 1975).

19. *Compare* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (temporary custody orders are interlocutory and therefore not appealable) *and* Johnson v. Parish, 547 S.W.2d 311, 313 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (temporary custody orders are not appealable) *with In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (temporary custody orders, like temporary injunctions, are appealable).

20. *See* TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1980).

21. *See, e.g.*, Davis v. Davis, 499 S.W.2d 992, 994 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (principal concern in custody determination is child's best interests); Ponder v. Rice, 479 S.W.2d 90, 91 (Tex. Civ. App.—Dallas 1972, no writ) (in determining custody principal concern is child's best interests); Smith v. Clements, 424 S.W.2d 326, 328 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.) (foremost concern in custody decision is child's best interests); *cf.* Miller v. Watters, 466 S.W.2d 94, 96 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.) (parent's right to custody must yield to child's best interests); Huff v. Stafford, 429 S.W.2d 620, 621 (Tex. Civ. App.—Dallas 1968, writ dism'd) (best interests of child paramount to parent's right to custody).

22. TEX. FAM. CODE ANN. § 11.11 (Vernon 1975 & Supp. 1980).

merits.[23] Temporary custody orders are governed by the rules generally controlling temporary restraining orders and temporary injunctions in civil cases.[24] From the language of section 11.11, it is unclear whether temporary custody orders may be appealed.[25] Although temporary injunctions are expressly appealable,[26] temporary restraining orders are not.[27] Thus, it is unsettled whether the reference to rules governing temporary injunctions implies legislative intent that temporary custody orders be appealable, or merely that these orders be governed by the same procedural rules with regard to notice and hearings.[28] As a result of the ambiguous language, the courts of civil appeals have construed the statute differently.[29]

The issue of whether temporary custody orders are appealable was first raised by the Tyler Court of Civil Appeals in *In re Stuart*.[30] By adopting a broad construction of section 11.11(b) the *Stuart* court held the statute authorized appeals from temporary child custody orders.[31] Shortly there-

---

23. *Id.*

24. *Id.*

25. *Compare* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (temporary custody awards are interlocutory and thus not appealable) *and* Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (section 11.11(b) does not provide for appeals from interlocutory orders) *with In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (temporary custody orders may be appealed under section 11.11(b)).

26. *See* Aloe Vera of America, Inc. v. CIC Cosmetics Corp., 517 S.W.2d 433, 436 (Tex. Civ. App.—Dallas 1974, no writ); City of Farmer's Branch v. Hawnco, Inc., 435 S.W.2d 288, 292 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.). *See generally* TEX. REV. CIV. STAT. ANN. art. 2251 (Vernon 1971) & art. 4662 (Vernon 1952).

27. *See* Jackson v. Lubben, 502 S.W.2d 860, 862 (Tex. Civ. App.—Dallas 1973, no writ); Swift v. Callaghan Land & Pastoral Co., 120 S.W.2d 459, 459 (Tex. Civ. App.—San Antonio 1938, no writ); Johnson v. Sunset Stores, 27 S.W.2d 644, 646 (Tex. Civ. App.—El Paso 1930, no writ). *See generally* 15 TEXAS L. REV. 502, 503 (1937).

28. *See* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). *But see In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). For the procedural rules with regard to notice and hearings, see TEX. R. CIV. P. 680-693.

29. *Compare* Knipe v. Collpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (these orders are interlocutory and not appealable) *and* Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (no statutory authorization for appeals from this type of order) *with In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (the effect of section 11.11(b) is to authorize appeals from these orders).

30. 544 S.W.2d 821 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). In *Stuart* the father filed a writ of habeas corpus to obtain custody of his daughter from the custodian. Following a denial of the writ and an appointment of the custodian as temporary managing conservator, the father brought an appeal. *See id.* at 822.

31. *Id.* at 822. In arriving at this decision, the court noted that appeal from an interloc-

after, the Houston Court of Civil Appeals for the First District decided *Johnson v. Parish*,[32] determining the word "rules" contained in section 11.11(b) referred directly to rule 385 of the Texas Rules of Civil Procedure,[33] which allows for appeals only when expressly granted by statute.[34] In *Johnson* the court held the rules governing appeals from temporary injunctions inapplicable since there is no provision in the Texas Family Code expressly authorizing such appeals.[35] Recently in *Knipe v. Collpitts*,[36] the court relied heavily on *Johnson* and unequivocally stated that temporary orders affecting visitation and conservatorship of a child are interlocutory only and therefore not appealable.[37]

Faced with this conflict of authority, the Dallas Court of Civil Appeals in *Craft v. Craft*[38] followed *Johnson* and *Knipe*, holding temporary orders issued under section 11.11 could not be appealed.[39] Noting the marked absence of section 11.11 in the provision for appeals within the Code,[40]

---

utory order is allowed when authorized by statute. *Id.* at 822. Since temporary injunctions are appealable, the language of section 11.11(b) was deemed sufficient to authorize the appeal of an interlocutory order in the child custody context. *Id.* at 822.

32. 547 S.W.2d 311 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). In *Johnson*, the father was removed as managing conservator of the children on grounds that the circumstances had materially changed to the detriment of the children. The mother was appointed temporary managing conservator pending trial, and the father appealed from the temporary order. *See id.* at 312.

33. *Id.* at 313; *see* TEX. R. CIV. P. 385.

34. TEX. R. CIV. P. 385 states: "Appeals from interlocutory orders (when allowed by law) may be taken . . . . (d) When the appeal is from an order granting or refusing a temporary injunction . . . the cause may be heard in the Court of Civil Appeals . . . ." *Id.*

35. *See* Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). Noting that temporary orders issued under section 11.11 were to be governed by the rules governing temporary restraining orders and temporary injunctions, the *Johnson* court decided that by "rules" the legislature meant rule 385 of the Texas Rules of Civil Procedure. Since prior to the Family Code temporary custody orders were not appealable, the court concluded there remained no statutory authorization for such an appeal, and thus held it lacked jurisdiction to hear the appeal. *Id.* at 312.

36. 551 S.W.2d 150 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ). The *Knipe* case involved an appeal from an order establishing child visitation rights. The father filed a motion for contempt claiming he was being denied his visitation privileges, and the court granted a temporary order allowing him visitation rights over the Christmas and New Year's holidays. The mother was enjoined from interference with these privileges, and she appealed from the temporary order. *See id.* at 151.

37. *See id.* at 151.

38. 579 S.W.2d 506 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

39. *Id.* at 508; *see* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App. —Houston [1st Dist.] 1977, no writ).

40. *See* Craft v. Craft, 579 S.W.2d 814 (Tex. 1979). Section 11.19(b) of the Texas Family Code provides:

the court concluded the legislature intended to codify existing laws governing the appealability of temporary custody orders.[41] Since the legislature is charged with knowledge that prior to the Family Code temporary custody orders were not appealable,[42] the *Craft* court assumed that had the legislature intended such a drastic change from existing law it would not have done so by implication.[43] Section 11.11(b) was interpreted to relate primarily to the rules pertaining to notice, hearings, and other procedural matters[44] governing the execution of a temporary order.[45] Policy

---

An appeal may be taken by any party to a suit affecting the parent-child relationship from an order, decree, or judgment:

(1) entered under Chapter 13 of this code;

(2) entered under Chapter 14 of this code appointing or refusing to appoint a managing conservator; appointing or refusing to appoint a possessory conservator; ordering or refusing to order payments for support of a child; or modifying any such order previously entered;

(3) entered under Chapter 15 of this Code terminating or refusing to terminate the parent-child relationship; or appointing a managing conservator;

(4) entered under Chapter 16 of this code granting or refusing an adoption.

TEX. FAM. CODE ANN. § 11.19(b) (Vernon 1975).

Interpreting section 11.19(b), the court applied the maxim *expressio uniun est exclusio alterius* (the expression of one thing is exclusive of another) and determined the legislature intended to exclude orders entered under chapter 11 from the provision for appeals in suits affecting the parent-child relationship. *See* Craft v. Craft, 579 S.W.2d 506, 509 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

41. *See id.* at 509. Prior to the enactment of the Texas Family Code, temporary custody orders were not appealable. *See* Frost v. Frost, 467 S.W.2d 683, 684 (Tex. Civ. App. — Texarkana 1971, no writ); Archer v. Archer, 407 S.W.2d 529, 530 (Tex. Civ. App. — San Antonio 1966, no writ); Mendoza v. Baker, 319 S.W.2d 147, 149, 151 (Tex. Civ. App. — Houston 1958, no writ). *See generally* TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

42. *See* City of Ingleside v. Johnson, 537 S.W.2d 145, 153 (Tex. Civ. App.—Corpus Christi 1976, no writ); Garner v. Lumberton Independent School Dist., 430 S.W.2d 418, 423 (Tex. Civ. App.—Austin 1958, no writ); Hurt v. Oak Downs, 85 S.W.2d 294, 299 (Tex. Civ. App.—Dallas 1935, writ ref'd).

43. *See* Craft v. Craft, 579 S.W.2d 506, 509-10 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). Provisions for appeal from a temporary order have in the past been very explicit. *See* TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964) ("either party may appeal from the judgment sustaining or overruling the plea of privilege"); *id.* art. 2250 (Vernon 1971) ("An appeal shall lie from an interlocutory order . . . appointing a receiver or trustee in any cause . . . ."); *id.* art. 2251 (Vernon 1971) ("Appeals from orders . . . granting or dissolving temporary injunctions shall lie . . . ."). The provision for appeals within the Code, section 11.19, makes no mention of chapter 11, although providing for orders given under chapters 13, 14, 15, and 16. *See* TEX. FAM. CODE ANN. § 11.19 (Vernon 1975). As a result, the court found the facts weighted heavily in favor of a strict construction of section 11.11(b). *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

44. *Id.* at 511; *see, e.g., Ex parte* Brown, 543 S.W.2d 82, 86 (Tex. 1976) (violation of injunction may be punished by contempt); Charter Medical Corp. v. Miller, 547 S.W.2d 77, 78 (Tex. Civ. App.—Dallas 1977, no writ) (injunction must clearly state reason for issuance);

considerations also weighed heavily in favor of a strict construction of section 11.11(b) to avoid its use as a tool for vexation and harrassment by parents.[46] Consequently, the Dallas Court of Civil Appeals concluded the legislature did not intend to impose the additional burden on parents, children, and appellate courts that a broad construction of section 11.11(b) would entail.[47]

The dissent, interpreting section 11.11(b) more liberally, argued all the rules governing temporary injunctions, whether procedural, substantive, or statutory, were applicable to temporary orders issued under section 11.11(b) of the Texas Family Code.[48] Since temporary injunctions may be appealed, the dissent reasoned the legislature intended to afford the same right to any party adversely affected by a temporary custody order.[49] Upholding what it determined to be a construction promoting the child's best interests, the dissent concluded the legislature intended to change preexisting law and make temporary custody orders appealable.[50]

Following the court of civil appeal's decision, the mother filed an application for writ of error with the Texas Supreme Court.[51] The supreme

---

Long v. State, 423 S.W.2d 604, 605 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (formal citation not necessary on hearing for temporary injunction). *See generally* Keith, *Reach of the Texas Injunction*, 32 TEX. B.J. 675, 675-80 (1969); Webber, *So You Need a Temporary Restraining Order?*, 41 TEX. B.J. 728, 728-31 (1978).

45. *See* Craft v. Craft, 579 S.W.2d 506, 510 (Tex. Civ. App. — Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

46. *Id.* at 511; *accord*, Statham v. Statham, 211 So. 2d 456, 459 (Ala. 1968); Sparkman v. Sparkman, 114 So. 580, 581 (Ala. 1927).

47. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). Other states addressing the question whether temporary custody orders are appealable have held they are not. *See* Angel v. Widle, 525 P.2d 369, 370 (N.M. 1974); Morrisson v. Morrisson, 344 N.E.2d 144, 145 (Ohio Ct. App. 1973); *cf.* Seidlitz v. Seidlitz, 327 A.2d 779, 782-84 (Md. Ct. App. 1974) (statute allowing appeals from temporary custody orders was repealed by legislature shortly after its enactment).

48. *See* Craft v. Craft, 579 S.W.2d 506, 514 (Tex. Civ. App. —Dallas) (Akin, J., dissenting), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). Appeals are allowed under section 11.19. *See* TEX. FAM. CODE ANN. § 11.19 (Vernon 1975). Judge Akin found this section was not intended to be exclusive. *See* Craft v. Craft, 579 S.W.2d 506, 513 (Tex. Civ. App.—Dallas) (Akin, J., dissenting), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

49. *Id.* at 514 (Akin, J., dissenting). *See generally* TEX. REV. CIV. STAT. ANN. art. 4662 (Vernon 1971).

50. *See* Craft v. Craft, 579 S.W.2d 506, 514 (Tex. Civ. App.—Dallas) (Akin, J., dissenting), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). Judge Akin determined the better policy was to allow appeals in this situation since a child's life and welfare could be adversely affected even though the order is temporary. *See id.* at 514 (Akin, J., dissenting). He stated these orders may remain in effect for a long period of time as a result of overcrowded dockets and procedural maneuvers, and the child may incur permanent damage even though the order itself is only temporary. *Id.* at 514 (Akin, J., dissenting).

51. *See* Craft v. Craft, 580 S.W.2d 814, 815 (Tex. 1979).

court refused the writ, stating no provision in section 11.11, or elsewhere in the Texas Family Code, provided for an appeal from a temporary custody order.[52]

When a controversy arises about the meaning and effect of a statute, it becomes the duty and province of the court to construe the statutory language.[53] Generally, a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein.[54] Since the legislature is charged with knowledge of preexisting law,[55] a determination of the proper construction of section 11.11(b) devolves into two issues: whether the legislature meant to make such an extensive change in existing law as would result from a broad construction of section 11.11(b), and if so, whether such a change would be in the best interests of the child.[56]

Section 11.11(b) was promulgated by the legislature with full knowledge that temporary custody orders had previously not been appealable.[57] If the provision was enacted to provide for appeals from temporary custody awards, it is doubtful legislators would have used equivocal language to effect such a radical change from settled law.[58] When a

---

52. *See id.* at 815. The court distinguished its refusal of application for writ of error in *In re Stuart* because the appealable nature of a temporary custody order was not assigned as error in that case. *See id.* at 815.

53. *See, e.g.*, A. M. Servicing Corp. v. State, 380 S.W.2d 747, 748 (Tex. Civ. App. —Dallas 1964, no writ); Newsom v. State, 372 S.W.2d 681, 683 (Tex. Crim. App. 1963); Texas State Bd. of Dental Examiners v. Fenlaw, 357 S.W.2d 185, 189 (Tex. Civ. App. —Dallas 1962, no writ).

54. *See, e.g.*, Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 769 (Tex. 1977); Minton v. Frank, 545 S.W.2d 442, 445 (Tex. 1976); Jessen Assoc., Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex. 1975).

55. *See, e.g.*, City of Ingleside v. Johnson, 537 S.W.2d 145, 153 (Tex. Civ. App.—Corpus Christi 1976, no writ); Garner v. Lumberton Independent School Dist., 430 S.W.2d 418, 423 (Tex. Civ. App.—Austin 1968, no writ); Hurt v. Oak Downs, 85 S.W.2d 294, 299 (Tex. Civ. App.—Dallas 1935, writ ref'd).

56. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). *See generally* TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 3.01-.03 (Vernon Supp. 1980).

57. *See* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ); Affolter v. Affolter, 389 S.W.2d 742, 744 (Tex. Civ. App.—Corpus Christi 1966, no writ). *See generally* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.03(4) (Vernon Supp. 1980).

58. *See, e.g.*, Jefferson County v. Board of County & Dist. Road Indebtedness, 143 Tex. 99, 111, 182 S.W.2d 908, 915 (1944) (intent to repeal conflicting provision must be clearly evidenced); Red River Nat'l Bank v. Ferguson, 109 Tex. 287, 291, 206 S.W. 923, 925 (1918) (it is assumed that when proposing radical change in settled law statutory language will be made so plain and clear as to eliminate need for construction); Adams v. Rockwell County, 280 S.W. 759, 761 (Tex. Comm'n App. 1926, opinion adopted) (radical departure from established policy will not be decreed unless clearly compelled by words or implication of a statute).

law is expressed in plain and unambiguous language, no need exists for statutory construction.[59] If the language of a statute is clear, the courts must apply the law as written, regardless of its policy, purposes, or justice of its effect.[60] Had the legislature intended to provide for interlocutory appeals, it is unlikely they would have allowed legislative intent to be controverted by an adverse judicial construction.[61] The ease with which the legislature could have expressly stated its intent, coupled with its failure to do so, implies that a broad construction of section 11.11(b) is incorrect.[62]

A closer look at the language of section 11.11(b) provides further support for the proposition that temporary custody orders issued thereunder are not appealable. Temporary custody orders are to be governed by the "rules governing temporary restraining orders and temporary injunctions in civil cases generally."[63] To comply with the rules of statutory construction,[64] the court must presume all parts of the statute are intended to be effective.[65] There are a variety of rules[66] governing temporary restraining orders and temporary injunctions, some alike[67] and some different.[68] In

---

59. *See* Fox v. Burgess, 157 Tex. 292, 297, 302 S.W.2d 405, 409 (1957); Calvert v. Phillips Chem. Co. 268 S.W.2d 478, 481 (Tex. Civ. App.—Austin 1954, no writ); Wall v. Wall, 172 S.W.2d 181, 185 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.).

60. *See, e.g., Ex parte* Roloff, 510 S.W.2d 913, 915 (Tex. 1974) (if statute is plain and unambiguous no need for statutory construction); Ringo v. Gulf States Utils. Co., 569 S.W.2d 31, 34 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (clear statute will be enforced according to its terms); Anguiano v. Jim Walters Homes, Inc., 561 S.W.2d 249, 254 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (where statute is clear and unambiguous use of rules of construction is improper).

61. *See* Red River Nat'l Bank v. Ferguson, 109 Tex. 287, 291, 206 S.W. 923, 925 (1918); Adams v. Rockwell County, 280 S.W. 759, 761 (Tex. Comm'n App. 1926, opinion adopted). *See generally* Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

62. *See* Jefferson County v. Board of County & Dist. Road Indebtedness, 143 Tex. 99, 111, 182 S.W.2d 908, 915 (1944); Red River Nat'l Bank v. Ferguson, 109 Tex. 287, 291, 206 S.W. 923, 925 (1918). *See generally* Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); TEX. REV. CIV. STAT. ANN. art. 5429b-2 § 3.03(4) (Vernon Supp. 1980); McKnight, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 407 (1974).

63. TEX. FAM. CODE ANN. § 11.11(b) (Vernon 1975).

64. *See* TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 1.01-3.12 (Vernon Supp. 1980).

65. *See, e.g.*, Morter v. State, 551 S.W.2d 715, 718 (Tex. Crim. App. 1977) (presumed entire statute meant to be effective); Walcher Butane Co. v. Calvert, 156 Tex. 587, 591, 298 S.W.2d 93, 96 (1957) (each clause of statute should be given effect under rules of statutory construction); Moore v. Sabine Nat'l Bank, 527 S.W.2d 209, 212 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). *See generally* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.01(2) (Vernon Supp. 1980).

66. *See* TEX. R. CIV. P. 680-693.

67. *See, e.g.*, TEX. R. CIV. P. 683 (temporary restraining order and temporary injunction must both set forth reasons for issuance); TEX. R. CIV. P. 684 (both require bond to be

order to give effect to section 11.11(b) as a whole, its parts must be construed in a fashion that makes them harmonious.[69] This can be done only by construing its language as referring purely to procedural matters, such as requirements governing the execution of a temporary order.[70] Any other construction would be contrary to the principles employed when interpreting an ambiguous statute,[71] and violative of the court's statutory construction powers.[72]

To determine the proper construction of section 11.11(b), one must also ascertain whether the child's interests would be adversely affected if appeals from temporary custody orders were allowed.[73] Since the trial judge has great discretion in granting temporary orders for the conservatorship of a child,[74] the potential for abuse of discretion must be balanced

---

posted); TEX. R. CIV. P. 688 (both require issuance by court clerk and delivery to sheriff).

68. *See* TEX. R. CIV. P. 680. A temporary restraining order may be issued without a hearing; a temporary injunction may not. *Id. Compare* TEX. R. CIV. P. 680 (temporary restraining order may be issued without notice to adverse party) *with* TEX. R. CIV. P. 681 (no temporary injunction may be issued without notice to other party). *See generally* Daniel v. Kittrell, 188 S.W.2d 871, 873 (Tex. Civ. App.—Waco 1944, no writ). A temporary restraining order is granted to maintain the status quo pending a hearing for temporary injunction, whereas a temporary injunction maintains the status quo pending final disposition on the merits. Daniel v. Kittrell, 188 S.W.2d 871, 873 (Tex. Civ. App.—Waco 1944, no writ).

69. *See* Lane v. Ross, 151 Tex. 268, 272, 249 S.W.2d 591, 594 (1952) (parts of a statute should be harmonized to resolve apparent conflicts); Martin v. Sheppard, 129 Tex. 110, 116, 102 S.W.2d 1036, 1039 (1937) (all parts of a statute should be reconciled to be given effect); *cf.* Black v. American Bankers Ins. Corp., 478 S.W.2d 434, 437 (Tex. 1972) (all parts of an act construed together). *See generally* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.01(2) (Vernon Supp. 1980).

70. *See* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). *But see In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). For the procedural rules with regard to notice and hearings, see TEX. R. CIV. P. 680-693.

71. *See* TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Vernon Supp. 1980).

72. *See* Trimmier v. Carlton, 116 Tex. 572, 581, 296 S.W. 1070, 1074 (1927); Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 406, 138 S.W. 575, 581 (1911).

73. *Compare* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas) (to promote child's best interests temporary custody orders should not be appealable), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979) *with In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (such appeals should be allowed to promote child's best interests). *See generally* McKnight, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 407 (1974).

74. *See, e.g.*, Roy v. Sherman, 299 S.W.2d 329, 332 (Tex. Civ. App.—Austin 1957, writ ref'd) (in deciding where child's best interests lie trial judge vested with broad discretionary power); Perdue v. Walden, 282 S.W.2d 744, 745 (Tex. Civ. App.—Dallas 1955, no writ) (trial judge given broad discretion in determining child's best interests); Norris v. Norris, 194 S.W.2d 813, 813 (Tex. Civ. App.—Waco 1946, no writ) (trial judge has broad discretion in deciding what is best for child).

against the possibility of harmful effects upon the child as the result of a prolonged delay of trial on the merits.[75] Of all the parties involved in custody disputes, the child is often the most adversely affected.[76] Although the child's interests are supposedly paramount, children often are used for harassment by one parent against the other pending final custody determination.[77] Delaying final disposition with a series of appeals from temporary custody orders could aggravate existing problems while providing no means for final relief.[78] Such a policy would further expose the child to adversities during temporary custody, and therefore would not be in accordance with the Family Code's fundamental purpose of promoting the best interests of the child.[79]

The child's best interests can only be fully ascertained by a trial on the merits.[80] Only then does a court have the opportunity to obtain a full

---

75. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). The potential for adverse effects to the child during temporary custody is twofold. First, should the judge make an improper award of temporary custody, the child may be placed in an undesirable home environment. *See id.* at 511. *See generally* Magallon v. State, 523 S.W.2d 477, 479 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647 (1977); Annot., 4 A.L.R.3d 1396 (1965). More importantly, the child's temporary custody may be used as a tool for harrassment between the parties through the adversary system, during which time the child would be forced to forego the benefits of a final disposition of his case at a trial on the merits. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App. —Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979). *See generally* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

76. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979); O'Shea v. Brennan, 387 N.Y.S.2d 212, 214-15 (Sup. Ct. 1976). *See generally* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); 12 CREIGHTON L. REV. 234 (1978).

77. *See* O'Shea v. Brennan, 387 N.Y.S.2d 212, 214-15 (Sup. Ct. 1976). *Compare* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ) (to protect children custody should be promptly determined) *with* 12 CREIGHTON L. REV. 235, 242 (1978) (children often become pawns in custody proceedings). *See generally* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

78. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *cf.* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ) (permanent custody should be determined quickly for child's sake). *See generally* 12 CREIGHTON L. REV. 234 (1978).

79. *See* C_ v. C_, 534 S.W.2d 359, 361 (Tex. Civ. App.—Dallas 1976, no writ); Tye v. Tye, 532 S.W.2d 124, 127 (Tex. Civ. App.—Corpus Christi 1975, no writ). *See generally* TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1980).

80. *See* Tye v. Tye, 532 S.W.2d 124, 127 (Tex. Civ. App.—Corpus Christi 1975, no writ) (trial court in better position than appellate court to determine best interests of child); Wallace v. Scrogum, 369 S.W.2d 531, 533 (Tex. Civ. App.—Austin) (trial court in best position to determine custody solution), *aff'd*, 372 S.W.2d 941 (Tex. 1963). *See generally* TEX.

understanding of the child's situation, a requisite in determining final custody.[81] At trial on the merits, the court has the chance to interview the child[82] and may require a social study of the child's environment.[83] In addition, the judge can weigh the testimony, assess the parties involved, and determine the needs and desires of the child in light of his surroundings.[84] Since the risk of harm to the child during temporary custody is lessened by a speedy trial,[85] the construction of section 11.11(b) providing the shortest path to trial on the merits seems consistent with both legislative intent and the best interests of the child.[86]A broad construction of section 11.11(b) may not only circumvent legislative intent,[87] but may also force the courts to deal with several practical problems inherent in that construction.[88] A broad construction of the language of section 11.11(b) would further aggravate presently overcrowded dockets.[89] Since

---

FAM. CODE ANN. §§ 11.12, 14.07 (Vernon 1975 & Supp. 1980).

81. *See* Mumma v. Aguirre, 364 S.W.2d 220, 223 (Tex. 1963); Gibson v. Hines, 511 S.W.2d 546, 548-49 (Tex. Civ. App.—Waco 1974, no writ).

82. *See In re* Marriage of Stocket, 570 S.W.2d 151, 153 (Tex. Civ. App.—Amarillo 1978, no writ); Kimery v. Blackstock, 538 S.W.2d 503, 504 (Tex. Civ. App.—Waco 1976, no writ); *cf.* O. v. P., 560 S.W.2d 122, 125 (Tex. Civ. App.—Fort Worth 1977, no writ) (interview not mandatory but at court's discretion). *See generally* TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1980); 32 SW. L.J. 142 (1978).

83. *See* Swearingen v. Swearingen, 578 S.W.2d 829, 831 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd); Brown v. Brown, 521 S.W.2d 730, 734 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *cf.* Magallon v. State, 523 S.W.2d 477, 480 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (social study discretionary with trial judge). *See generally* TEX. FAM. CODE ANN. § 11.12 (Vernon 1975 & Supp. 1980).

84. *See* Mumma v. Aguirre, 374 S.W.2d 220, 223 (Tex. 1963); Gibson v. Hines, 511 S.W.2d 546, 548-49 (Tex. Civ. App.—Waco 1974, no writ). *See generally* TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1980).

85. *See* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ) (justice demands an expeditious determination of permanent custody); *cf.* Statham v. Statham, 211 So. 2d. 456, 459 (Ala. 1968) (courts look with disfavor on harrassing litigation over child custody). *But see In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (in child's best interest to allow for appeals from temporary custody awards).

86. *See* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). *But see In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

87. *See* Knipe v. Colpitts, 551 S.W.2d 150, 151 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Johnson v. Parish, 547 S.W.2d 311, 312 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). *But see In re* Stuart, 544 S.W.2d 821, 822 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

88. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam,* 580 S.W.2d 814 (Tex. 1979); *cf.* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ) (justice demands quick custody determination). *See generally* 12 CREIGHTON L. REV. 234 (1978).

89. *See* FIFTIETH ANNUAL REPORT, TEXAS JUDICIAL COUNCIL 132 (1978). Cases filed in

domestic relations cases currently comprise one-half of the docket of district courts,[90] appeals from temporary custody orders would inevitably place an additional burden on the courts of civil appeals.[91] Should appeals from temporary custody orders be allowed, reversal would be available only upon finding the trial judge clearly abused his discretion.[92] The appellate court is expressly prohibited from making a review on the merits, and may address only the propriety of the trial court order in light of the facts.[93] As a result, the trial court decision would usually remain unchanged, while an award of final custody would be delayed pending appeal.[94] This delay, both unnecessary and undesirable,[95] is avoided by the court's strict construction of section 11.11(b).

Although section 11.11(b) will be strictly construed following the *Craft* decision, it is obvious that more should be done to protect the child from potential harm during temporary custody. At present, the only remedy to a parent, believing his child's physical or emotional well-being to be in jeopardy, is modification of the temporary custody order.[96] This requires a material change in circumstances,[97] and may be difficult to prove in

---

the courts of civil appeals during 1978 increased ten percent over 1977. Sixty-one percent of these cases were disposed of during the year; cases remaining on the docket for subsequent disposition increased by 21 percent over 1977. *Id.*

90. *Id.*

91. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

92. *See* Southwest Weather Research Corp. v. Jones, 160 Tex. 104, 110, 327 S.W.2d 417, 421 (1959) (trial court decision on temporary injunction must be affirmed unless clear abuse of discretion is shown); Stroud v. Town of Pecos City, 391 S.W.2d 805, 806 (Tex. Civ. App.—El Paso 1965, writ ref'd n.r.e.) (appellate court cannot reverse trial court decision on temporary injunction unless clear abuse of discretion is shown). Since temporary custody appeals would be governed in a similar fashion, a clear abuse of discretion would be necessary to obtain a reversal of a temporary custody order. *See generally* TEX. FAM. CODE. ANN. § 11.11(b) (Vernon 1975).

93. *See* TEX. REV. CIV. STAT. ANN. art. 4662 (Vernon 1971). *See generally* Southwest Weather Research Corp. v. Jones, 160 Tex. 104, 110, 327 S.W.2d 417, 421 (1959); Brooks Gas Co. v. Sinclair Oil & Gas Co., 408 S.W.2d 747, 752 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

94. *See* Craft v. Craft, 579 S.W.2d 506, 511 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 580 S.W.2d 814 (Tex. 1979).

95. *Id.* at 511; *accord*, Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ). *See generally* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); 12 CREIGHTON L. REV. 234 (1978).

96. *See* TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980).

97. *See, e.g.*, Matter of Marriage of Stocket, 570 S.W.2d 151, 154 (Tex. Civ. App. — Amarillo 1978, no writ) (change of managing conservator may be had upon a material change in circumstances); *In re* Anglin, 542 S.W.2d 927, 932 (Tex. Civ. App.—Dallas 1976, no writ) (must be material change in conditions to authorize a change of custody); Wallace v. Fitch, 533 S.W.2d 164, 167 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (change of custody may only follow material change in circumstances). *See generally* TEX. FAM. CODE

certain cases. Protection of the child may best be accomplished by limiting the duration of the temporary custody order to three or six months.[98] Such a limit would assure rapid disposition by trial on the merits and guarantee that a final custody determination be made within a short period of time. The chance of harm to the child before trial would be minimized, thereby solving one of the problems foreseen by those favoring appeal. As a result, the child will receive permanent custody determination within a reasonable time, and will avoid being subject to harrassment prior to trial on the merits.

It is clear following the *Craft* decision that appeals from temporary custody orders are not allowed. It is up to the legislature to remedy the problems inherent in awards of temporary custody. By limiting the duration of temporary custody orders, the legislature can guarantee the child's interests are fully protected, thus further promoting the best interests of the child in suits dealing with the parent-child relationship.

Anthony J. Blazi

ANN. § 14.08 (Vernon Supp. 1980).

98. *See* Frost v. Frost, 467 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1971, no writ) (recommending a designation of expiration dates for temporary custody orders). Handling the problem in a slightly different fashion, Michigan allows appeals from temporary custody awards, but places all such appeals at the top of the docket. *See* MICH. STAT. ANN. § 25.312(b) (1974). In Texas this would occur automatically should appeals from temporary orders be allowed. *See* TEX. REV. CIV. STAT. ANN. art. 4662 (Vernon 1971); *cf.* TEX. FAM. CODE ANN. § 17.02(c) (Vernon Supp. 1980) (temporary order that child be taken into custody of government official pursuant to emergency motion may not extend beyond 10 day period).