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## Waiver of Service of Process Executed Prior to Institution of Suit to Terminate Parental Rights Satisfies Due Process Notice Requirements.

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not place the parental rights above those of the child.<sup>84</sup> The custodial presumption provides sufficient protection for the parental rights<sup>85</sup> against state intrusion without the imposition of a more onerous burden of proof.<sup>86</sup>

The family has a right to remain inviolate from unwarranted intrusion by the state into family affairs.<sup>87</sup> This right to maintain the sanctity of the family unit, however, should not be used as a shield to protect the parents when a child has been abused, neglected, or abandoned.<sup>88</sup> The clear and convincing evidence standard creates such a shield by increasing the protection of the parent's right to custody of their children.<sup>89</sup> It is the right of the child to be free from abuse and neglect that needs protection, and preponderance of the evidence best serves that need.

*John William Wester*

**FAMILY LAW — Waiver of Service of Process — Waiver of Service of Process Executed Prior to Institution of Suit to Terminate Parental Rights Satisfies Due Process Notice Requirements.**

*In re B.B.F.*,

595 S.W.2d 873 (Tex. Civ. App.—San Antonio 1980, no writ).

The appellant, natural mother of a minor child, executed an affidavit of relinquishment of parental rights and waived service of process to any subsequent suit to terminate the parent-child relationship. Appellees filed

84. *Cf. id.* at 423 (preponderance of the evidence causes each litigant to share the risk of error).

85. *See Holley v. Adams*, 544 S.W.2d 367, 370-73 (Tex. 1976) (may not terminate parent-child relationship without first proving best interest of child is served by termination); *Brokenleg v. Butts*, 559 S.W.2d 853, 857-58 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (must rebut presumption that best interest of child served when left with parents; failure to rebut will cause child to remain with parents), *cert. denied*, 442 U.S. 946 (1979).

86. *See in re G.M.*, 596 S.W.2d 846, 846-47 (Tex. 1980) (clear and convincing evidence standard to be used in involuntary termination proceedings).

87. *See Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

88. *See Brooks v. DeWitt*, 178 S.W.2d 718, 723 (Tex. Civ. App.—San Antonio) (state has right to regulate parental conduct injuring child), *rev'd on other grounds*, 143 Tex. 122, 182 S.W.2d 687, *cert. denied*, 325 U.S. 862 (1944).

89. *Cf. In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (clear and convincing standard of proof to be used in *all* involuntary termination proceedings).

a suit to terminate the appellant's parental rights and to adopt the minor. Without notifying the appellant the trial court signed a decree terminating her parental rights.<sup>1</sup> The natural mother appealed to the San Antonio Court of Civil Appeals contending the waiver of service of process was void because it had been executed prior to the filing of the termination suit.<sup>2</sup> Held—*Affirmed*. Due process does not require a parent be given notice of a suit to terminate parental rights if the parent has previously relinquished such rights and waived service of process.<sup>3</sup>

The fifth and fourteenth amendments of the United States Constitution provide no person shall be deprived of "life, liberty, or property, without due process of law."<sup>4</sup> Similarly, the Texas Constitution prohibits such deprivations, "except by the due course of the law of the land."<sup>5</sup> Texas and federal decisions elaborating upon the full meaning of the due process clause establish the fundamental due process requirements to be the right to notice and an opportunity to be heard.<sup>6</sup> To be effective these rights must be offered in a meaningful manner prior to the deprivation.<sup>7</sup> Underlying the notice and hearing requirement is an interest in fairness

1. *In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no writ).

2. *Id.* at 874.

3. *Id.* at 874-75.

4. U. S. CONST. amends. V; XIV, § 1; see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (notice and opportunity to be heard must precede adjudication of life, liberty, or property); *Jacob v. Roberts*, 223 U.S. 261, 265 (1912) (opportunity to be heard essential to due process; notice a prerequisite of opportunity to be heard); *United States v. Fleming*, 565 S.W.2d 87, 89 (Tex. Civ. App.—El Paso 1978, no writ) (prejudgment garnishment of pay without notice violates due process).

5. TEX. CONST. art. I, § 19. Article I, section 19 provides: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id.*

6. See *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) (due process requires opportunity to be heard before property seized); *Armstrong v. Manzo*, 380 U.S. 545, 550-52 (1965) (failure to notify father of adoption proceeding violates due process); *Sgitovich v. Sgitovich*, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951) (forms of notice must correspond to due process), *cert. denied*, 342 U.S. 903 (1952).

7. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (rights must be offered before deprivation); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (rights must be meaningfully offered); *Huntley v. North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1020 (4th Cir. 1974) (due process requires notice appropriate to the occasion); *Halpern v. Austin*, 385 F. Supp. 1009, 1012 (N.D. Ga. 1974) (notice and opportunity to be heard must be offered at meaningful time); *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 310-11 (E.D. Pa. 1970) (controlling principle of due process is that hearing be meaningful); *F. v. P.*, 479 S.W.2d 124, 126 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.) (right to be heard must be meaningfully offered). In *Fuentes* the Supreme Court recognized only three "extraordinary situations" justifying postponement of notice and opportunity for a hearing. See *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972). Furthermore, the *Fuentes* decision recognized due process requirements may involve extra effort or expense, but maintained that protecting the interests of the parties affected is paramount to efficiency. *Id.* at 90-91 n.22.

and a desire to prevent unjust, one-sided decisions.<sup>8</sup> While state legislatures have discretion in prescribing forms of notice,<sup>9</sup> state and private interests must be balanced and notice procedures must meet all due process requirements.<sup>10</sup>

Traditionally, the notice requirement of the due process clause is achieved by service of process.<sup>11</sup> Through service of process the defendant is informed of the pending judicial proceeding and allowed an opportunity to present his defense.<sup>12</sup> Although constitutional rights are not easily waived,<sup>13</sup> an individual may waive service of process, thereby relinquishing the right to notice.<sup>14</sup>

8. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The United States Supreme Court has recognized notice and an opportunity to be heard provide the best opportunity for arriving at truth and obtaining a fair decision. See *id.* at 90-91 n.22.

9. See *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951) (as general rule, legislature has discretion in prescribing forms of notice), *cert. denied*, 342 U.S. 903 (1952); *cf.* *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (states have power to implement due process procedures).

10. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894-95 (1961) (procedures required by due process determined by state and private interests affected); *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951) (notice must afford fair opportunity to appear and defend interests), *cert. denied*, 342 U.S. 903 (1952); *T.E.C. v. Cady*, 563 S.W.2d 387, 388 (Tex. Civ. App.—Dallas 1978, no writ) (ten days notice to file protest constitutionally sufficient). See generally H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 18.2, at 610-15 (1968) (notice requirements for adoption proceedings).

11. See, e.g., *Louisville & N.R.R. v. Schmidt*, 177 U.S. 230, 236 (1900) (summons or equivalent notice affords opportunity to be heard); *Wagner v. Urban*, 170 S.W.2d 270, 272 (Tex. Civ. App.—Amarillo 1943, no writ) (citation notifies defendant suit filed); *Mosaic Templars of America v. Gaines*, 265 S.W. 721, 722 (Tex. Civ. App.—Texarkana 1924, no writ) (service of process intended to benefit defendant).

12. See *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 368-69 (1873); *Alvarez v. Alvarez*, 476 S.W.2d 353, 355 (Tex. Civ. App.—Corpus Christi 1972, no writ).

13. *Martinez v. State*, 437 S.W.2d 842, 847 (Tex. Crim. App. 1969); *cf.*, e.g., *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) (criminal law used to determine standard of waiver of constitutional rights); *Curry v. State*, 459 S.W.2d 644, 645 (Tex. Crim. App. 1970) (constitutional rights waived unless objections raised); *Evans v. State*, 444 S.W.2d 641, 644 (Tex. Crim. App. 1969) (constitutional rights may be waived by failure to make timely objection).

14. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). *Overmyer*, the leading decision on waiver of notice, upheld the validity of a cognovit note authorizing confession of judgment by an attorney who was not retained by the defendant. See *id.* at 187; *cf.* *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (due process hearing requirement subject to waiver); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (due process rights can be waived); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (parties can waive notice); *Myers v. Patton*, 543 S.W.2d 22, 25 (Tex. Civ. App.—Texarkana 1976, no writ) (statute permitting waiver of notice constitutional); *Rogers v. Searle*, 533 S.W.2d 433, 440 (Tex. Civ. App.—Corpus Christi) (Family Code provision permitting early waiver of notice upheld), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976). See generally Hughes,

Texas' statute governing service of process in civil cases permits waiver of service only if the waiver occurs after suit is brought.<sup>15</sup> Waiver of service has not been permitted in Texas prior to the filing of a suit on the premise that early waivers create unjust disadvantages against the parties executing waivers.<sup>16</sup> The United States Supreme Court, however, has recognized pre-suit waiver of service is not necessarily violative of procedural due process.<sup>17</sup> In *D. H. Overmyer Co. v. Frick Co.*,<sup>18</sup> a corporate property rights case, the Supreme Court upheld the validity of a contractual confession of judgment clause by which the debtor corporation relinquished its right to notice prior to the filing of suit.<sup>19</sup>

Texas Family Code provisions regarding termination proceedings permit waiver of service before a suit to terminate parental rights is filed.<sup>20</sup>

*Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701, 707-08, 711 (1974).

15. See TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971); cf. TEX. R. CIV. P. 119 (valid post-suit waiver must be in writing). Article 2224 provides: "No acceptance of service and waiver of process . . . shall be authorized . . . prior to the institution of suit, nor shall such acceptance or waiver be made until after suit brought." TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971). Rule 119 provides: "The defendant may accept service of process, or waive the issuance or service thereof by a written memorandum signed by him . . . after suit is brought . . ." TEX. R. CIV. P. 119.

16. See *Deen v. Kirk*, 508 S.W.2d 70, 72 (Tex. 1974) (waiver of process executed before divorce petition filed invalid); *McAnelly v. Ward Bros.*, 72 Tex. 342, 343, 12 S.W. 206, 207 (1888) (waiver of process ineffective if executed before petition to collect debt filed); *Northcutt v. Jarrett*, 585 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo) (waiver of process prior to filing divorce suit invalid), *writ ref'd n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979); *Gonzales v. Gonzales*, 494 S.W.2d 655, 656 (Tex. Civ. App.—El Paso 1973, no writ) (waiver of process executed prior to filing annulment suit void). *But see Myers v. Patton*, 543 S.W.2d 22, 25 (Tex. Civ. App.—Texarkana 1976, no writ) (Family Code provision permitting early waiver upheld); *Rogers v. Searle*, 533 S.W.2d 433, 440 (Tex. Civ. App.—Corpus Christi) (statute permitting waiver of notice before suit brought held constitutional), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976). The United States Supreme Court upheld a contractual waiver of notice executed before suit was brought in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). The Court recognized, however, the due process issue was not reached in the case because the defendant had actual notice of the hearing. See *id.* at 314-15 (agent's notice imputed to principal).

17. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (contractual waiver of prejudgment notice upheld). See generally Hughes, *Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701, 711 (1974).

18. 405 U.S. 174 (1972).

19. *Id.* at 187.

20. See *In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no writ) (affidavit executed before suit may contain waiver); TEX. FAM. CODE ANN. § 15.02(1)(k) (Vernon Supp. 1980) (parent may terminate parental rights in an affidavit of relinquishment); *id.* § 15.03 (affidavit may provide for a waiver of process). Statutes permitting waiver of process prior to the filing of a termination suit benefit parents who do not wish to be involved in court proceedings and who would not terminate their parental rights if appear-

These Family Code provisions exist despite the recognition that natural rights implicit in the parent-child relationship are of fundamental constitutional dimension.<sup>21</sup> Parental rights, therefore, are afforded great judicial respect,<sup>22</sup> and suits to terminate the parent-child relationship are subject to a strict standard of review.<sup>23</sup> Texas courts, however, have upheld the constitutionality of the Family Code sections permitting early waiver in termination suits.<sup>24</sup> In *Rogers v. Searle*<sup>25</sup> a mother unsuccessfully sought to set aside a decree terminating her parental rights, contending she had been fraudulently induced to execute an affidavit relinquishing her parental rights.<sup>26</sup> The mother also contested the validity of the pre-suit waiver provisions of the Texas Family Code.<sup>27</sup> The Corpus Christi Court of Civil Appeals, however, upheld the constitutionality of the contested statutory provisions.<sup>28</sup> Without mentioning the constitutional issue, the Texas Supreme Court reversed, finding sufficient evidence to raise a question of fraud.<sup>29</sup>

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ance in court were necessary. See Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning*, 13 FAM. L.Q. 257, 336-37 (1979). See generally Solender, *Family Law: Parent and Child*, 31 Sw. L.J. 133, 147-51 (1977).

21. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (integrity of family unit constitutionally protected); *Shappy v. Knight*, 475 S.W.2d 704, 706 (Ark. 1972) (parental rights involve "highest of natural rights"); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (involuntary termination of parent-child relationship involves fundamental rights); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (parental rights are of constitutional dimension). See generally Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 218-21 (1979) (discussing United States Supreme Court decisions relating to maintaining family unit). Parents have natural right to the care, custody, and management of their child. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

22. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (importance of family emphasized).

23. See *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (strict scrutiny applied to termination proceedings); *State v. Deaton*, 93 Tex. 243, 248, 54 S.W. 901, 903 (1900) (severing parent-child relationship requires "solid and substantial reasons"); *Sanchez v. Texas Dep't of Human Resources*, 581 S.W.2d 260, 262 (Tex. Civ. App.—Corpus Christi 1979, no writ) (strong presumption favoring parent retaining custody of child).

24. See *Myers v. Patton*, 543 S.W.2d 22, 25 (Tex. Civ. App.—Texarkana 1976, no writ); *Rogers v. Searle*, 533 S.W.2d 433, 440 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976).

25. 533 S.W.2d 433 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976).

26. See *id.* at 440.

27. See *id.* at 440. The mother claimed sections 15.02 and 15.03 of the Texas Family Code deprived her of due process rights under both the United States Constitution and the Texas Constitution. *Id.* at 440.

28. *Id.* at 440.

29. *Rogers v. Searle*, 544 S.W.2d 114, 115 (Tex. 1976).

*Myers v. Patton*<sup>30</sup> also involved a mother's attempt to set aside a termination decree.<sup>31</sup> Although the mother in *Myers* questioned the constitutionality of the Family Code pre-suit waiver provisions,<sup>32</sup> the record does not clearly indicate whether a pre-suit waiver of service was signed.<sup>33</sup> The *Myers* court upheld the termination, however, specifically noting the Family Code provisions permitting waiver of citation in an affidavit of relinquishment constitute the first time in Texas law that waiver of service can be executed prior to the filing of suit.<sup>34</sup>

The court in *In re B.B.F.*<sup>35</sup> found the Texas Family Code provisions dealing with termination of parental rights constitute an exception to the general rule requiring valid waiver of service of process to be executed only after suit is brought.<sup>36</sup> Reasoning that the Family Code permits an affidavit of relinquishment of parental rights to be executed before or after the filing of a termination suit<sup>37</sup> and that an affidavit may include a waiver of service of process,<sup>38</sup> the San Antonio Court of Civil Appeals held a person who signs an affidavit is not an interested party in a subsequent termination suit.<sup>39</sup> Notice of a termination suit, therefore, need not be given to a person who has previously relinquished parental rights and waived service of process.<sup>40</sup> Relying on the decisions of *Overmyer* and *Myers* the court also dismissed argument that Family Code provisions permitting waiver of process prior to the filing of suit violate the right to due process.<sup>41</sup>

The *B.B.F.* decision allowing a less stringent notice requirement to terminate parental rights is inconsistent with the recognized importance of the parent-child relationship,<sup>42</sup> the general rule in other Texas civil

30. 543 S.W.2d 22 (Tex. Civ. App.—Texarkana 1976, no writ).

31. *Id.* at 24.

32. *Id.* at 25.

33. *See id.* at 23-24.

34. *Id.* at 25 (first Texas case recognizing pre-filing waiver of service). Like Texas, other jurisdictions permit waiver of notice of termination suits. It is not clear, however, if such waivers may be executed prior to the filing of suit. *See* IDAHO CODE § 16-2001 (1979) (contractual relinquishment of parental rights forbidden); *id.* § 16-2007 (parent may waive notice of termination suit); MINN. STAT. ANN. § 260.231 (West Supp. 1980) (parent consenting to termination may waive notice); OKLA. STAT. ANN. tit. 10, § 1131 (West Supp. 1979) (parents must have notice of termination hearing); WIS. STAT. ANN. § 48.42 (West 1979) (notice may be waived by parent consenting to termination).

35. 595 S.W.2d 873 (Tex. Civ. App.—San Antonio 1980, no writ).

36. *Id.* at 874.

37. *See id.* at 874.

38. *See id.* at 874.

39. *Id.* at 874.

40. *Id.* at 874.

41. *Id.* at 874, 874 n.1.

42. *Compare In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no

cases,<sup>43</sup> and the basic requirements of due process.<sup>44</sup> Although the Texas Supreme Court has noted involuntary termination of parental rights involves fundamental constitutional rights,<sup>45</sup> the *B.B.F.* decision permits a natural mother's parental rights to be terminated without notification suit has been brought.<sup>46</sup> Permitting early waiver of process does not alleviate the one-sided decisions due process requirements are designed to prevent, since in absence of notice of the filing of a termination suit a mother is unable to defend her interests.<sup>47</sup> Furthermore, the *B.B.F.* decision facilitates termination of parental rights in spite of the Texas Supreme Court's holding in *In re G.M.*<sup>48</sup> requiring a stricter burden of proof for termination proceedings,<sup>49</sup> and the great judicial respect traditionally afforded family rights.<sup>50</sup> Perhaps in recognition of the strict scrutiny required in proceedings permanently depriving a parent of all the rights implied in parenthood,<sup>51</sup> other jurisdictions demand more rigorous notice

writ) (parent may waive service of process prior to filing of termination suit) *with In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (terminating parental rights involuntarily involves constitutional rights) *and Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (parental rights are of constitutional dimension) *and Sanchez v. Texas Dep't of Human Resources*, 581 S.W.2d 260, 262 (Tex. Civ. App.—Corpus Christi 1979, no writ) (strong presumption favoring natural parent maintaining custody of child).

43. *Cf.*, e.g., *Deen v. Kirk*, 508 S.W.2d 70, 71 (Tex. 1974) (waiver of process executed prior to filing of divorce suit void); *McAnelly v. Ward Bros.*, 72 Tex. 342, 343, 12 S.W. 206, 206-07 (1888) (invalidating waiver of process executed before suit to collect debt filed); *Faglie v. Williams*, 569 S.W.2d 557, 563 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (waiver of process executed before institution of divorce suit invalid).

44. *Cf.*, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) (procedural due process requires opportunity to be heard); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requirements must be offered in meaningful manner); *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (due process requires termination of parental rights be supported by proof more substantial than preponderance of the evidence).

45. *See In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980). The court noted termination of the parent-child relationship is a final and irrevocable divestment of all privileges, duties, legal rights, and powers between the parent and child except for the child's right to inherit. *Id.* at 846.

46. *See In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no writ).

47. *Cf.* *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (opportunity to be heard prevents mistaken deprivations of property); *McAnelly v. Ward Bros.*, 72 Tex. 342, 344, 12 S.W. 206, 207 (1888) (statute prohibiting early waiver designed to prevent undue advantages over debtors).

48. 569 S.W.2d 846 (Tex. 1980).

49. *Id.* at 847.

50. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (parental rights garner greater judicial respect than property rights).

51. *See In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (proceeding involuntarily terminating parent-child relationship strictly scrutinized); *State v. Deaton*, 93 Tex. 243, 248, 54 S.W. 901, 903 (1900) (proceedings terminating parental rights approached with caution and respect); *cf. Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (interest in parental rights demands



procedures for termination suits than the procedure upheld in *B.B.F.*<sup>52</sup>

In relying on *Overmyer* to support early waiver of notice in termination suits the San Antonio court failed to note the vast differences between property and family rights.<sup>53</sup> Although the right to freely retain property is granted constitutional protection,<sup>54</sup> the right of a parent to the care, custody, and enjoyment of his or her children has been deemed fundamental,<sup>55</sup> and, therefore, worthy of greater constitutional protection.<sup>56</sup> In effect, the court in *B.B.F.* has equated family rights with property rights by applying *Overmyer's* less stringent notice requirement to termination suits.<sup>57</sup>

The *B.B.F.* decision is in direct conflict with Texas' statute and decisions prohibiting waiver of process prior to the filing of suit.<sup>58</sup> The *Myers* decision relied upon by the *B.B.F.* court noted Family Code pre-suit waiver provisions are a departure from the general waiver of process procedures in Texas.<sup>59</sup> The *Myers* court, however, failed to offer any guidelines for how Family Code waiver provisions can be reconciled with contrary Texas authority on pre-suit waiver.<sup>60</sup> The applicability of *Overmyer*

greater judicial respect than economic considerations).

52. Compare IDAHO CODE § 16-2001 (1979) (contractual relinquishment of parental rights forbidden) and OKLA. STAT. ANN. tit. 10, § 1131 (West Supp. 1979) (parents must have notice of suit terminating parent-child relationship) with TEX. FAM. CODE ANN. §§ 15.02-.03 (Vernon Supp. 1980) (parent can waive notice prior to filing of termination suit).

53. Cf. *In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no writ) (pre-suit waiver valid in termination proceeding). In dismissing the due process argument raised by the appellant the San Antonio court did not elaborate on the family rights involved. *Id.* at 874 n.1; cf. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (family rights more precious than property rights).

54. See U.S. CONST. amends. V, XIV (individuals cannot be deprived of property without due process).

55. See, e.g., *Shappy v. Knight*, 475 S.W.2d 704, 706 (Ark. 1972) (parental rights involve highest natural rights); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (parent-child relationship involves fundamental rights); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (parental rights are of constitutional dimensions).

56. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (parental rights receive greater respect than property rights).

57. Cf. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (contractual pre-suit waiver of notice upheld in property rights case); *In re B.B.F.*, 595 S.W.2d 873, 874 n.1 (Tex. Civ. App.—San Antonio 1980, no writ) (pre-suit waiver of service valid in parent-child termination suit).

58. Compare *In re B.B.F.*, 595 S.W.2d 873, 874 (Tex. Civ. App.—San Antonio 1980, no writ) (pre-suit waiver of service of process valid in parental rights termination suit) and TEX. FAM. CODE ANN. §§ 15.02-.03 (Vernon Supp. 1980) (waiver of service permitted in affidavit executed prior to termination proceeding) with TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971) (waiver of service prior to filing of suit prohibited) and TEX. R. CIV. P. 119 (waiver of service permitted only after suit filed).

59. See *Myers v. Patton*, 543 S.W.2d 22, 25 (Tex. Civ. App.—Texarkana 1976, no writ).

60. See generally *id.* at 25. Due to uncertainty regarding the presence of a pre-suit

to the *B.B.F.* decision is also dubious, as Texas' statute governing waiver of process specifically prohibits the type of confession of judgment upheld in *Overmyer*.<sup>61</sup>

Whether the early waiver provisions of the Texas Family Code fully afford a parent due process rights is questionable.<sup>62</sup> The importance of the private interests at stake dictates the notice and hearing procedures required by due process.<sup>63</sup> When the private interest at stake is an individual's desire to retain property, the due process notice requirement permits pre-suit waiver of process.<sup>64</sup> If the private interest involves the fundamental rights of the parent-child relationship, however, rigorous notice procedures should be followed.<sup>65</sup> The suggestion that Texas decisions allowing early waiver of process in termination suits are designed to accommodate persons seeking to terminate parental rights without involvement in court proceedings is of limited value when weighed against the importance of the relationship terminated.<sup>66</sup> Permitting waiver of notice

waiver in *Myers*, the appellant in *B.B.F.* argued *Myers* should not apply. Brief for Appellant at 9-10, *In re B.B.F.*, 595 S.W.2d 873 (Tex. Civ. App.—San Antonio 1980, no writ).

61. See TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971). Article 2224 provides: "No acceptance of service and waiver of process . . . nor a confession of judgment shall be authorized . . . until after suit brought." *Id.*

62. Compare TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980) (parent may terminate parent-child relationship by executing affidavit of relinquishment) and *id.* § 15.03 (affidavit may contain waiver of service of process) with *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process rights must be offered in meaningful manner) and *F. v. P.*, 479 S.W.2d 124, 126 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.) (right to be heard must be meaningfully offered).

63. See *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951) (notice must afford fair opportunity to appear and defend interests), *cert. denied*, 342 U.S. 903 (1952); *cf. Stanley v. Illinois*, 405 U.S. 645, 650 (1972) (procedures required by due process determined by state and private interests affected).

64. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972). This may not be true in Texas where article 2224 of the civil statutes prohibits execution of a pre-suit waiver. See TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971). See generally Hughes, *Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701, 711 n.59 (1974).

65. *Cf. Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (parental rights deemed essential, more precious than property rights); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (parental rights are fundamental); IDAHO CODE § 16-2001 (1979) (contractual relinquishment of parental rights prohibited); OKLA. STAT. ANN. tit. 10, § 1131 (West Supp. 1979) (parents must have notice of suit terminating parental rights).

66. *Cf. Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (integrity of family unit constitutionally protected); *Shappy v. Knight*, 475 S.W.2d 704, 706 (Ark. 1972) (parental rights are respected natural rights); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (parental rights are of constitutional dimensions). See generally Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning*, 13 FAM. L.Q. 257, 309 n.222 (1979); Solender, *Family Law: Parent and Child*, 31 SW. L.J. 133, 147-51 (1977); Note, *The Right to Family Integrity: A Substantive Due Process Approach*

before a termination suit is filed may be more expedient than allowing waivers to be executed only after suit is brought.<sup>67</sup> Due process requirements, however, should not be sacrificed merely to eliminate additional effort or expense.<sup>68</sup>

Given the importance of the parent-child relationship<sup>69</sup> and the necessity of notice to satisfy procedural due process requirements,<sup>70</sup> the standard for waiver of process in a suit to terminate the parent-child relationship should be, at minimum, as rigorous as required in other Texas civil cases.<sup>71</sup> In light of these considerations the *B.B.F.* decision should be reexamined.

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to *State Removal and Termination Proceedings*, 68 *Geo. L.J.* 213, 218-21 (1979).

67. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (use of prompt, efficient procedures to achieve state ends is permitted). *See generally Solender, Family Law: Parent and Child*, 31 *Sw. L.J.* 133, 147-51 (1977). In discussing Texas decisions upholding the constitutionality of the pre-suit waiver provisions of the Family Code, Solender's article maintains the Texas Supreme Court recognizes many terminations and adoptions would be jeopardized if the Family Code provisions were declared unconstitutional. *Id.* at 151 n.143.

68. *See Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (procedural due process not designed to promote efficiency).

69. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (importance of family emphasized); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980) (fundamental rights involved in parent-child relationship); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (parental rights receive constitutional protection).

70. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice and opportunity to be heard minimal requirements of due process); *Jacob v. Roberts*, 223 U.S. 261, 265 (1912) (notice is necessary due process condition); *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951) (forms of notice must correspond to due process), *cert. denied*, 342 U.S. 903 (1952).

71. Waiver of process may not be executed before suit is filed in divorce and debt cases. *See, e.g., Deen v. Kirk*, 508 S.W.2d 70, 71 (Tex. 1974) (divorce case); *McAnelly v. Ward Bros.*, 72 Tex. 342, 343, 12 S.W. 206, 207 (1888) (debt case); *Faglie v. Williams*, 569 S.W.2d 557, 563 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (case of divorce); *cf. TEX. REV. CIV. STAT. ANN. art. 2224* (Vernon 1971) (post filing waiver of notice valid); *TEX. R. CIV. P. 119* (waiver of process may be executed after filing of suit).