St. Mary's Law Journal

Volume 22 | Number 4 Article 3

1-1-1991

Child Support for Adult Disabled Children: New Texas Legislation.

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The Texas Family Code was amended in 1989 during the Regular Session of the 71st Texas Legislature with respect to suport for adult disabled children.[1] The amendments included an amendment to subsection 14.05(b) and the addition of section 14.051.[2] Section 14.051 authorizes a court to order indefinite support for a disabled minor or adult child, whether suit is filed before or after the child turns eighteen, if the child's disability exists, or if the cause of the disability is known to exist, before the child turns eighteen.[3]

This article will explore the background and history of this legislation and provide a subsection-by-subsection analysis of the new Family Code section 14.051.[4]

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1. *See* Act of May 26, 1989, ch. 368, §§ 1-2, 1989 Tex. Sess. Law Serv. 1457 (Vernon).
2. *See* TEX. FAM. CODE ANN. §§ 14.05(b), 14.051 (Vernon Supp. 1991).
3. *See id.* at § 14.051.
4. Much of the background behind this legislation, as reported in this article, was researched for a prior article by the author. *See* Price, *Duty to Support Minor and Adult Children: Common Law, Statutory and Contractual*, in SOUTHERN METHODIST UNIV. SCHOOL OF LAW, TEXAS FAMILY LAW AND COMMUNITY PROPERTY ch. E (1988) [hereinafter Price]. *See generally* Cole, *Drafting and Enforcing Family Law Judgments: Problems of Educating and Supporting After Age Eighteen*, in STATE BAR OF TEXAS, ST. MARY'S SEVENTH ANNUAL PROCEDURAL INSTITUTE: PROCEDURAL ASPECTS OF FAMILY LAW ch. F (1985). Other commentary has briefly addressed this new legislation. Flores & Dubove, *State Bar Legislative Program: Final Disposition by 71st Legislature*, 52 TEX. B.J. 890, 891 (1989); Kazen, *Comment on Fam. C. § 14,051*, in 1989 TEXAS FAMILY CODE LEGISLATION, 7 TEX. FAM. L. RPTR. 17-18 (Aug. 1989); Sampson, *Amendments to Titles 1, 2 & 3 Texas Family Code*, in 1989, 1 STATE BAR [OF TEXAS] SEC. RPT., FAMILY LAW, 1989 LEGISLATION AFFECTING FAMILY LAW PRACTICE - THE 71ST LEGISLATURE, REGULAR SESSION 37-39 (Spec. Legis. Issue - Pt. One 1989) [hereinafter Sampson].

I. BACKGROUND: PARENT'S DUTY TO SUPPORT

A. *Generally*

1. General Rule: Duty Ends at Majority

A parent has a moral and legal duty to support a child.[5] The general rule regarding the duration of the legal duty to support is that the duty exists during an unemancipated child's minority and traditionally ends when the child reaches majority.[6] This general "duration

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5. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 6.2, 6.3 (2d ed. 1988) [hereinafter CLARK]; H. KRAUSE, CHILD SUPPORT IN AMERICA - THE LEGAL PERSPECTIVE (1981) [hereinafter KRAUSE]; J. LIEBERMAN, CHILD SUPPORT IN AMERICA 2 (1986) [hereinafter LIEBERMAN]; 67A C.J.S. *Parent and Child* § 49, at 322-26 (1978); Foster, *Relational Interests of the Family*, 1962 UNIV. ILL. L. FORUM 493, 512; Price, *supra* note 4, at E-2. Child support is a substantive right recognized at common-law. 67A C.J.S., *supra* § 49, at 324. As a facet of the parent-child relationship, a child's statutory right to financial support from or through its natural parent is protected under the equal protection clause. The United States Supreme Court has made its position clear in several cases in which it struck down state legislation which discriminated between legitimate and illegitimate children. *See* Gomez v. Perez, 409 U.S. 535, 537-38 (1973) (per curiam) (struck down Texas statute authorizing child support to legitimate children but denying it to illegitimate children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972) (struck down Louisiana statute denying workers compensation benefits equally to legitimate and illegitimate children); Levy v. Louisiana, 391 U.S. 68, 70-71 (1968) (struck down Louisiana statute which had been construed to deny illegitimate children wrongful death recoveries equal to those of legitimate children). Generally, in Texas, only a parent has a duty to support a child (natural or adopted). *See, e.g.*, Mata v. Moreno, 601 S.W.2d 58, 59 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *see* also TEX. FAM. CODE ANN. §§ 4.02, 12.04(3), 14.05(a),(b), 14.051 (b),(c),(g),(h) (Vernon Supp. 1991); Price, *supra* note 4, at E-2 to E-3. The duty to support means the duty to supply the child at least with necessaries. *See, e.g.*, Drexel v. McCutcheon, 604 S.W.2d 430, 433 (Tex. Civ. App.—Waco 1980, no writ) (attorney's fees as necessaries); Cordell v. Cordell, 592 S.W.2d 84, 86 (Tex. Civ. App.—Texarkana 1979, no writ) (both before and after divorce); *see also* TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1991). The support required includes providing the child with necessary food, shelter, clothing, medical care and education. *See, e.g.*, Gully v. Gully, 111 Tex. 233, 241, 231 S.W. 97, 100 (1921); Lawrence v. Cox, 464 S.W.2d 674, 675 (Tex. Civ. App.—Waco 1971, writ dism'd); Mitchell v. Davis, 205 S.W.2d 812, 813-14 (Tex. Civ. App.—Dallas 1947, writ ref'd); Maxwell v. Maxwell, 204 S.W.2d 32, 37 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e); Price v. Price, 197 S.W.2d 200, 202 (Tex. Civ. App.—El Paso 1946, writ ref'd); Chancellor v. Chancellor, 23 S.W.2d 761, 764 (Tex. Civ. App.—Fort Worth 1929, writ ref'd) (adopted and natural children treated the same with respect to support duty); *see also* TEX. FAM. CODE ANN. §§ 4.02, 12.04(3) (Vernon Supp. 1991). A minor or adult child has no legal duty to support a parent. *See, e.g.*, Missouri-Kansas-Texas R.R. Co. v. Pierce, 519 S.W.2d 157, 159 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

6. The duty to support begins at least at birth and continues until legally terminated. *See, e.g.*, Hustace v. Black, 191 S.W.2d 82, 85 (Tex. Civ. App.— El Paso 1945, writ ref'd); 67A C.J.S., *supra* note 5, § 55(b), at 342-43; *see also* CLARK, *supra* note 5, § 17.1; 67A C.J.S., *supra* note 5, §§ 55, 62. *See generally* Annotation, *Parent's Obligation to Support Adult Child*, 1 A.L.R.2d 910 (1948); Price, *supra* note 4. The age of majority at common law was 21, but

rule" is recognized at common law[7] and has been codified in Texas[8] as well as in other jurisdictions.[9]

2. Exceptions: Education and Disability

The general duration rule has two primary exceptions which may be referred to as the "education exception" and the "disability exception."[10] These exceptions impose a duty upon a parent to support an adult child. As may be expected, the exceptions are premised upon a societal perception that although a person may legally be classified as an adult, the person may still need some assistance to attain something society deems a necessity.[11]

The "education exception" requires a parent to support an adult child for a reasonable time until he has completed, or has had the opportunity to complete, some phase of formal education, such as graduation from high school or college.[12] Although this exception is

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today, by statute, it is eighteen in virtually all states. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (Vernon 1986) (age of majority in Texas is 18); *see also* KRAUSE, *supra* note 5, at 29. The general duty to support, as well as an order for child support, may end prematurely if the child becomes emancipated in the eyes of the law during minority. *See, e.g.*, CLARK, *supra* note 5, §§ 8.3, 17.1; Price, *supra* note 4, at E-16 to E-18. State statutes may require the termination during minority of a legal duty to support in some circumstances. *See, e.g.*, TEX. FAM. CODE ANN. § 14.05(d) (Vernon 1986).

7. *See infra* notes 22-23 and accompanying text.

8. *See, e.g.*, TEX. FAM. CODE ANN. §§ 4.02, 11.01(1), 12.04(3), 14.05(a) (Vernon Supp. 1991).

9. *See, e.g.*, CONN. GEN. STAT. ANN. § 466-84 (West 1990).

10. *See generally* CLARK, *supra* note 5, § 6.2; 67A C.J.S., *supra* note 5, §§ 62-63 (1978); Price, *supra* note 4, at E-8 to E-11, E-38 to E-57. The phrases "educational exception" and "disability exception" are those of the author's.

11. Traditionally, legal duties, which often derive from moral obligations, extend support to incompetent persons unable to provide for themselves, such as parental support for incompetent adult children. *See* KRAUSE, *supra* note 5, at 32. A child's individual parents or other relatives usually bear the cost of his support until the burden becomes so great that society must, or should in fairness, bear the cost in whole or in part.

12. *See, e.g.*, CLARK, *supra* note 5, § 6.2; Price, *supra* note 4, at E-8 to E-9. As noted, the duty to support includes the duty to provide the child with an education. *See supra* note 5. When majority was at age 21, this duty to educate a minor would have covered all or a substantial part of postsecondary education (e.g., college); however, with the age of majority now set at 18 in most states (e.g., Texas), see *supra* KRAUSE note 5, at 29, this generally precludes the duty to support the child through postsecondary educational endeavors. Absent a statutory requirement, even if an exceptionally bright child sought a postsecondary education before age eighteen, such education would generally have to be declared to be a "necessary" before a parent could be legally obligated for this support. At least one Texas case has treated postsecondary education not as a "necessary" for a minor but only as a "special advantage." Woodruff v. Woodruff, 487 S.W.2d 791, 793 (Tex. Civ. App.—Texarkana 1972, no writ). *But*

beyond the scope of this article,[13] Texas currently recognizes that a parent's general duty to support may continue into the child's adulthood to assist the child in graduating from high school.[14]

The "disability exception" obligates a parent to support a disabled adult child who is physically or mentally incapable of caring for or supporting himself.[15] Many jurisdictions recognize that a parent has a common-law duty to support an adult child who is disabled and incapable of taking care of himself.[16] Most of these jurisdictions condition this continuing duty upon the child already being disabled *before* reaching majority.[17] Once a healthy child becomes an adult, however, most jurisdictions hold that a postmajority disability does not re-impose a legal common-law duty to support a child.[18] Statu-

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cf. Ex parte Woodruff, 483 S.W.2d 951, 956 (Tex. Civ. App.—Texarkana 1972, original proceeding) (per curiam) (dicta, stating relator's "living expenses," including "college expenses" for his minor child by new marriage, were generally reasonable and necessary), *writ dism'd w.o.j. per curiam*, 487 S.W.2d 692 (Tex. 1972) (two *Woodruff* cases involved same man); *see also* Bohn v. Bohn, 455 S.W.2d 401, 415 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dism'd) (trial court could place father's separate property stock in trust to pay child's college education *during minority*). Texas will probably join the growing trend which recognizes postsecondary education as a necessary; see *infra* note 13 and accompanying text; however, it may unfortunately be some years before this is codified.

13. Other sources discuss the moral and, increasingly, legal duty of parents to support the postsecondary educational efforts of children for a reasonable time. *See generally* CLARK, *supra* note 5, at § 6.2; LIEBERMAN, *supra* note 5, at 13; Horan, *Postminority Support for College Education - A Legally Enforceable Obligation in Divorce Proceedings?*, 20 FAM. L.Q. 589 (1987); Price, *supra* note 4, at E-8 to E-9; Annotation, *Postsecondary Education as Within Nondivorced Parent's Child Support Obligation*, 42 A.L.R.4th 819 (1985); Annotation, *Responsibility of Noncustodial Divorced Parent to Pay For, or Contribute to, Cost of Child's College Education*, 99 A.L.R.3d 322 (1980); Annotation, *Parent's Obligation to Support Adult Child*, 1 A.L.R.2d 910 (1948).

14. TEX. FAM. CODE ANN. §§ 4.02, 14.05(a) (Vernon Supp. 1991).

15. *See, e.g.*, CLARK, *supra* note 5, § 6.2; KRAUSE, *supra* note 5, at 32; Price, *supra* note 4, at E-10 to E-11, E-39 to E-40. *See generally* Note, *Domestic Relations - Child Support - Parental Duty to Support a Subnormal Adult Child*, 48 MISS. L.J. 361 (1977); Note, *Child Support - Parental Obligation to Support Adult Children Held Strictly Limited to Circumstances Enumerated by Statute*, 9 SO. TEX. L.J. 101 (1967); Annotation, *Postmajority Disability as Reviving Parental Duty to Support Child*, 48 A.L.R.4th 919 (1986) [hereinafter *Postmajority Disability Support*]; *Parent's Obligation to Support Adult Child* 1 A.L.R.2d 910 (1948).

16. *See, e.g.*, Ex Parte Bayliss, 550 So. 2d 986, 988 (Ala. 1989); Towery v. Towery, 685 S.W.2d 155, 157 (Ark. 1985); *see also Postmajority Disability Support*, *supra* note 15, at 926.

17. *See supra* note 16. These courts reasoned that a minor's incompetency due to a continuing physical or mental disability prevents the child from becoming emancipated at the time of majority and, therefore, the child remains a "minor" in the eyes of the law. Further, most jurisdictions do not require that the child reside with the parents before the obligation to support the adult disabled child is imposed.

18. *See supra* note 16; *see also* Price, *supra* note 4, at E-11. If the child is not disabled

tory law has also been used to impose a parental duty to support a disabled adult child, either expressly[19] or constructively.[20]

3. Contractual Duties

Finally, absent law or policy to the contrary, a parent may obligate himself by agreement or contract to support a minor or an adult child for any period of time, whether the child is healthy or not and regardless of the purpose or intent behind the support.[21]

B. *The Texas Experience*

1. Generally

By case law and statute, Texas has followed the traditional common-law rule that imposes upon a parent the general duty to support an unemancipated minor child.[22] Numerous cases, and now statutes, also adopt the general common-law rule that the duty to support usu-

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upon reaching majority, then the child becomes emancipated and, therefore, an adult, and the parent-child relationship ends and cannot be reinstated at some future date based on an unforeseen disability. *See id.* There is, however, at least one court which has re-imposed the duty to support even when the disability came to fruition after majority. *See* Sininger v. Sininger, 479 A.2d 1354 (Md. 1984) (discussed *infra* notes 53, 133).

19. Only a few state statutes expressly address the availability of child support for adult disabled children. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-2451, 12-2453 (West 1982 & Supp. 1990); HAW. REV. STAT. § 580-47 (1985 & Supp. 1989); ILL. ANN. STAT. ch. 40, para. 513 (Smith-Hurd 1980 & Supp. 1990); TEX. FAM. CODE ANN. § 14.051 (Vernon Supp. 1991). The Illinois statute was upheld as constitutional. Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1391 (Ill. 1978).

20. The majority of state statutes authorize support for children without indicating whether support may be ordered past majority. *See* CLARK, *supra* note 5, § 17.1. The vast majority of these states have construed their statutes to require support for an adult disabled child. *See id.*; *see also* CLARK, *supra*, § 6.2. *See generally Postmajority Disability Support*, *supra* note 15.

21. *See, e.g.*, CLARK, *supra* note 5, § 17.1; *infra* text accompanying notes 26, 207-09, 222-24.

22. *See, e.g.*, Cunningham v. Cunningham, 120 Tex. 491, 497, 40 S.W.2d 46, 48 (1931); Gully v. Gully, 111 Tex. 233, 241, 231 S.W. 97, 100 (1921); Martinez v. State, 307 S.W.2d 259, 261-62 (Tex. Crim. App. 1957); Houtchens v. Matthews, 557 S.W.2d 581, 584 (Tex. Civ. App.—Fort Worth 1977, writ dism'd); *see also* TEX. FAM. CODE ANN. §§ 4.02, 12.04(6) (Vernon Supp. 1991). *See generally Parental Rights and Duties*, in 4 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 90.01[5] (Kazen ed. 1990). Parents have an equal duty to support, limited only by their respective abilities to do so. *See, e.g.*, Thompson v. Thompson, 572 S.W.2d 761, 765 (Tex. Civ. App.—Tyler 1978, no writ); Friedman v. Friedman, 521 S.W.2d 111, 114-15 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Bernard v. Bernard, 491 S.W.2d 222, 224 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ). *See generally* Price, *supra* note 4, at E-2, E-19.

ally ends when the child reaches majority.[23] No Texas case has expressly adopted either the "education exception" or the "disability exception" to the general common-law duration rule,[24] although both are now expressly recognized in certain respects by statute.[25] Texas courts do recognize and enforce a parent's contractual obligation to support an adult child.[26]

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23. *See, e.g.*, Ex parte Williams, 420 S.W.2d 135, 136-37 (Tex. 1967); Byrne v. Byrne, 398 S.W.2d 432, 434 (Tex. Civ. App.—Eastland 1965, no writ); McGowen v. McGowen, 273 S.W.2d 658, 659 (Tex. Civ. App.—Fort Worth 1954, writ dism'd); Du Pre v. Du Pre, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ); Price v. Price, 197 S.W.2d 200, 202 (Tex. Civ. App.—El Paso 1946, writ ref'd); Texas Employers Ins. Ass'n v. Birdwell, 39 S.W.2d 159, 160 (Tex. Civ. App.—Eastland 1931, writ ref'd); TEX. FAM. CODE ANN. §§ 4.02, 12.04, 14.05(a),(d) (Vernon Supp. 1991). *See generally* Kazen, *Support*, in 3 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 51.10[3] (Kazen ed. 1990); Note, *Child Support - Parental Obligation to Support Adult Children Held Strictly Limited to Circumstances Enumerated By Statute*, 9 S. TEX. L.J. 101 (1966-67); *supra* note 6 and text accompanying notes 6 - 9. Generally, when a child turns eighteen, a court's continuing jurisdiction over a child-related order terminates. *See generally* Dorsaneo, *Jurisdiction, Venue, and Transfers*, in 2 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 30.12 [5] (Kazen ed. 1989). Courts may order one amount of child support for several minor children to continue until the *youngest* child turns 18, *see, e.g.*, Klise v. Klise, 678 S.W.2d 545, 546 (Tex. App.—Houston [14th Dist.] 1984, no writ), thus, arguably, indirectly providing for the support of an adult child. *See generally* Price, *supra* note 4, at E-32 to E-37.

24. *See, e.g.*, Bohn v. Bohn, 455 S.W.2d 401, 415 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dism'd); *supra* notes 12-20 and accompanying text. *See generally* Price, *supra* note 4, at E-8, E-22, E-38 to E-39. Courts may consider the needs of adult children in dividing marital property. *See, e.g.*, Young v. Young, 609 S.W.2d 759, 760 (Tex. 1980) (involving a disabled child).

25. *See* TEX. FAM. CODE ANN. §§ 4.02, 14.05(a) (Vernon Supp. 1991). *See generally* Kazen, *Support*, in 3 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 51.10[3] (Kazen ed. 1989); *Determination of Support*, in 4 TEXAS FAMILY LAW SERVICE § 27.10 (Speer 6th ed. 1988); 40 TEX. JUR. 3RD § 849-50 (1985 & Supp. 1990). The "educational exception" in Texas authorizes support for adult children for purposes of facilitating graduation from high school. *See* TEX. FAM. CODE ANN. §§ 4.02 (general duty to support), 14.05(a) (periodic payment of child support) (Vernon Supp. 1991). As originally drafted, section 14.05(a) was interpreted, as was old section 14.05(b), as requiring the filing of a motion to seek adult support during high school before the child turned 18 years old. *See* Sheldon v. Marshall, 768 S.W.2d 852, 854-55 (Tex. App.—Dallas 1989, no writ); Klaver v. Klaver, 764 S.W.2d 401, 402-03 (Tex. App.—Fort Worth 1989, no writ); McLendon v. Allen, 752 S.W.2d 731, 733 (Tex. App.—Corpus Christi 1988, no writ); Couser v. Stanton, 722 S.W.2d 250, 251 (Tex. App.—San Antonio 1986, no writ); Fullerton v. Holliman, 721 S.W.2d 478, 479 (Tex. App.—Eastland 1986, writ dism'd); Ex parte Boemer, 711 S.W.2d 406, 407 (Tex. App.—Dallas 1986, original proceeding). *See generally* Sampson, *Commentary on Title 2, Texas Family Code Symposium Supplement*, 17 TEX. TECH L. REV. 1065, 1163 (1986); Price, *supra* note 4, at E-38 to E-39. For a general discussion of a parent's duty to educate a child, see *Children's Issues*, in 5 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 113.02 (Kazen ed. 1989). The "disability exception" is the subject of this article.

26. *See, e.g.*, Busbey v. Busbey, 619 S.W.2d 472, 475 (Tex. Civ. App.—Houston [14th

2. Statutory Child-Support Payments

While Texas common law recognizes a parent's general duty to support a child,[27] it does not recognize a court's authority to require a noncustodial parent to pay postdivorce child support to the custodial parent.[28] However, in 1935, the Texas Legislature enacted now-repealed Revised Civil Statute Article 4639a.[29] Under this statute, Texas courts gained the authority to order one parent to pay postdivorce child-support payments to the other parent. [30] This authority is currently in the Texas Family Code.[31]

3. Statutory Support for Adult Disabled Children

a. Article 4639a-1 (Repealed)

In 1961, the Texas Legislature enacted Revised Civil Statute Article 4639a-1 (now repealed), which authorized a court to order one

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Dist.] 1981, no writ) (medical and educational expenses); Richey v. Bolerjack, 594 S.W.2d 795, 799 (Tex. Civ. App.—Tyler 1980, no writ); Stegall v. Stegall, 571 S.W.2d 564, 566 (Tex. Civ. App.—Fort Worth 1978, no writ) (education expenses); Gray v. Bush, 430 S.W.2d 258, 263 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) (college education); Snipes v. Snipes, 174 S.W.2d 741, 742 (Tex. Civ. App.—Dallas 1943, no writ). *See generally* Price, *supra* note 4, at E-6 to E-10, E-33, E-64; Smith, *Agreements Incident to Divorce*, in 2 FAMILY LAW - TEXAS PRACTICE AND PROCEDURE § 44.02[5][c] (Kazen ed. 1989). A contract or agreement to support a child may be between the parents or a parent and a third party. Parents may agree or contract to support a minor or adult child either by a contractual (consensual) divorce decree, a contractual agreement incident to divorce which is incorporated into a divorce decree, or otherwise. *See, e.g.*, *Busbey*, 619 S.W.2d at 475; *Richey*, 594 S.W.2d at 799. Note, however, that the Family Code requires that the terms of an agreement "set forth in the decree" may be enforced by all remedies, "but are not enforceable as contract terms *unless the agreement so provides*." TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1986) (emphasis added). The Texas Supreme Court has strictly construed this statute. *See* Elfeldt v. Elfeldt, 730 S.W.2d 657, 658 (Tex. 1987) (per curiam) (mere fact that decree is contractual is not enough; it must expressly state that support provision is contractually enforceable); *see also* TEX. FAM. CODE ANN. § 14.051(j) (Vernon Supp. 1991); Price, *supra* note 4, at E-64; *supra* text accompanying note 21 and *infra* text accompanying notes 207-09, 222-24.

27. *See supra* note 22 and accompanying text.

28. *See, e.g.*, Cunningham v. Cunningham, 120 Tex. 491, 501, 40 S.W.2d 46, 50 (1931); Ex parte Gerrish, 42 Tex. Crim. 114, 57 S.W. 1123, 1124 (1900); *see also* Smith, *Commentary on Title 2, Texas Family Code Symposium*, 5 TEX. TECH L. REV. 389, 429 (1974).

29. Act of March 19, 1935, ch 39, § 1, 1935 Tex. Gen. Laws 111, *repealed by* Act of June 15, 1973, ch. 543, § 14.03, 1973 Tex. Gen. Laws 1411, 1424, 1458; Smith, *supra* note 28; *see also* Ex parte Birkhead, 127 Tex. 556, 559-60, 95 S.W.2d 953, 954 (1936) (quoting new article 4639a in full).

30. Both articles 4639a, see *supra* note 29, and 4639a-1, see *infra* note 32, were repealed by the adoption of Title Two of the Texas Family Code in 1973. *See* Act of June 15, 1973, ch. 543, § 14.03, 1973 Tex. Gen. Laws 1411, 1458.

31. TEX. FAM. CODE ANN. §§ 14.05(a), (b), 14.051 (Vernon Supp. 1990).

parent to pay postdivorce child support to the other parent for the support of a disabled child, whether the child was a minor or an adult.[32] The statute required that the child: (1) be unmarried; (2) be born of the marriage being dissolved; (3) require custodial care; (4) be unable to adequately take care of or provide for himself; and (5) have no personal estate or income sufficient to provide for his own care.[33] The purpose of the statute was "to provide for the continued support of children needing custodial care."[34] Article 4639a-1 was expressly applicable to any child, "whether a minor or not."[35] The article was permissive (discretionary) and not mandatory.[36]

b. Original Family Code Subsection 14.05(b)

The Texas Legislature, in 1973, enacted Title Two of the Family Code.[37] In doing so, it repealed article 4639a-1 but enacted an amended version of the article as subsection (b) of new Family Code section 14.05.[38] The one-sentence subsection read as follows:

> If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order the payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.[39]

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32. *See* Act of Aug. 18, 1961, ch. 31, § 1, 1961 Tex. Gen. Laws 135, *repealed by* Act of June 15, 1973, ch. 543, § 3, 1973 Tex. Gen. Laws 1411, 1424, 1458.

33. *See id.* Article 4639a-1 read in full as follows:

> In addition to all other requirements, each petition for divorce shall further set out, if such is a fact, that (1) an unmarried child, born of the marriage sought to be dissolved, is physically or mentally unsound and requires custodial care, and (2) that such child cannot adequately take care of or provide for himself, and (3) that such child has no personal estate or income sufficient to provide for his reasonable and necessary care. If the Court shall find all of such has been proven by full and satisfactory evidence the Court may require and enforce support payments for such child, whether a minor or not, subject to the power and authority of the Court to alter, change, suspend, or otherwise revise its judgments as the facts and circumstances may require and in the manner required by law.

Id.; *see also* Byrne v. Byrne, 398 S.W.2d 432, 433-34 (Tex. Civ. App.—Eastland 1965, no writ) (quoting article 4639a-1 in full).

34. Ex parte Hatch, 410 S.W.2d 773, 777 (Tex. 1967).

35. Act of Aug. 18, 1961, ch. 31, § 1, 1961 Tex. Gen. Laws 135 (repealed 1973).

36. *See id.* (court *may* require support payments); *see also infra* note 43.

37. *See* TEX. FAM. CODE ANN. tit. 2 (Vernon 1975), *enacted by* Act of June 15, 1973, ch. 543, § 1, 1973 Tex. Gen. Laws 1411 (effective January 1, 1974).

38. *See* Act of June 15, 1973, ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1424, *amended by* Act of May 26, 1989, ch. 368, 1989 Tex. Sess. Law Serv. 1457 (Vernon).

39. *See id.*

This new subsection replaced the old "custodial" requirement for postdivorce child support with a new standard requiring "*continuous* care and personal supervision," whether or not the child was institutionalized.[40] As one commentator noted, "[a]lthough the tests for support beyond age 18 were relaxed slightly by the 1973 Code, the burden of proof demanded before child support may be extended for an indefinite period past age 18 remains substantial."[41] Subsection 14.05(b) was described as a "two-pronged test" requiring a finding that the child (1) required continuous care and personal supervision because of a mental or physical disability and (2) was not able to support himself.[42] As with old article 4639a-1, even if the two-pronged test was met, subsection 14.05(b) was still permissive and not mandatory.[43]

In 1977, the Supreme Court of Texas, in *Red v. Red*,[44] held that relief sought under Family Code subsection 14.05(b) had to be "invoked" (e.g., a motion filed) before the child turned eighteen.[45] Sub-

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40. *Compare id. with* article 4639a-1, at *supra* note 32.

41. Sampson, *Commentary on Title 2, Ch. 14, Texas Family Code Symposium*, 13 TEX. TECH L. REV. 927, 940-41 (1982).

42. *See* Attaway v. Attaway, 704 S.W.2d 492, 494 (Tex. App.—Corpus Christi 1986, no writ) (discussed *infra* note 50).

43. *See* Valaque v. Valaque, 574 S.W.2d 608, 609 (Tex. Civ. App.—San Antonio 1978, no writ); *see also supra* note 36.

44. 552 S.W.2d 90 (Tex. 1977).

45. Red v. Red, 552 S.W.2d 90, 92 (Tex. 1977), *aff'g*, 536 S.W.2d 431 (Tex. Civ. App.—Houston [14th Dist.] 1976). In *Red*, a mother filed a motion to modify a prior support order to obtain postmajority support for her disabled child. The motion was filed well past the child's eighteenth birthday. The trial court dismissed the action for want of subject matter jurisdiction. *Red*, 552 S.W2d at 92. The appellate court affirmed, holding that once the child turned eighteen, the trial court lost jurisdiction over the child. *Red*, 536 S.W.2d at 434. The dissenting opinion would have allowed the trial court to consider the mother's motion. *Id.* The Supreme Court of Texas, in a 5-4 decision, affirmed, holding that once the child turned 18, the trial court lost jurisdiction to modify the prior order. *Red*, 552 S.W.2d at 92. The court cited *Ex parte Hatch*, 410 S.W.2d 773 (Tex. 1967), as an analogous case, but emphasized that, while old article 4639a-1 was available to a child "whether a minor or not," Family Code subsection 14.05(b) stated that a court may order that the payments for the support of a child shall "*be continued*" after the child's 18th birthday. *Id.* Because of the phrase "be continued," as well as the entire statutory scheme of the new Family Code, the Court held that subsection 14.05(b) could not be applied after a child turned 18. *Id.* The majority cited *Hatch*, which overturned the holding in *Cuellar v. Cuellar*, 406 S.W.2d 510 (Tex. Civ. App.—Corpus Christi 1966, no writ), which had allowed a modification order under then-new article 4639a-1 to require postmajority support, even though the child was an adult when the suit was filed. *Id.* at 93. The four-justice dissent in *Red* thought the majority had misconstrued *Hatch* and *Cueller*, noting that those cases involved situations where no statutory duty existed when the child reached 18 years of age. *Id.* at 95-99. The author of this article, after critiquing the statutes

section 14.05(b) was amended in 1985 by adding a second sentence that codified the *Red* decision and read as follows:

> The court may enter an order under this subsection only if a request for an order of extended support under this subsection has been made in the original suit, a petition requesting further action under Section 11.07 of this code, or a motion to modify under Section 14.08 of this code filed before the child's 18th birthday.[46]

Prior to the 1989 Texas Legislative Session, Family Code subsection 14.05(b) contained the two sentences quoted in the text above. The first sentence recognized a disabled child's substantive right to receive postmajority support and the concomitant substantive duty of a parent to provide the support.[47] The newer, second sentence was a remedial or procedural limitation on the availability of this substantive right.[48] In short, under old subsection 14.05(b), a court was authorized to enter an order requiring a parent to pay child support to the other parent for an indefinite period of time for the support of a disabled child during majority, but only if the petition or motion seeking the support was filed before the child turned eighteen.[49] Con-

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and cases before *Red*, as well as the *Red* decision itself, believes the majority opinion in *Red* was incorrect. *See* Price, *supra* note 4, at E-40 to E-44.

46. *See* Ch. 802, § 10, 1985 Tex. Gen. Laws 2841, 2844, *repealed by* Act of May 26, 1989, 71st Leg., R.S., ch. 368, § 1, 1989 Tex. Sess. Law Serv. 1457 (Vernon). While this amendment codified *Red*, it also had the effect of overturning a subsequently published opinion, tried before the 1985 amendment, which held that the modification order itself had to be actually *signed* before the child turned 18. *See* Attaway v. Attaway, 704 S.W.2d 492, 494-95 (Tex. App.—Corpus Christi 1986, no writ).

47. *See supra* quote in text accompanying note 39.

48. *See supra* quote in text accompanying note 46. The second sentence of old Family Code subsection 14.05(b) was merely a legal mechanism to, and limitation upon, the availability of the substantive right embodied in or conferred by the first sentence of the subsection. *See, e.g.*, Houtchens v. Matthews, 557 S.W.2d 581, 584 (Tex. Civ. App.—Fort Worth 1977, writ dism'd) (remedial law "is the legal machinery by which the substantive law is made effective," *quoting* Harrison v. Cox, 524 S.W.2d 387, 391 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.)); Du Pre v. Du Pre, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ).

49. Two appellate cases have upheld orders requiring postmajority support under old Family Code subsection 14.05(b). *See* Rogers v. Stephens, 697 S.W.2d 75, 79 (Tex. App.—Fort Worth 1985, writ dism'd); Rose v. Rubenstein, 693 S.W.2d 580, 582 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd). In neither of these cases was the timeliness of the filing of the motion in issue. In *Rowland v. Willy*, 751 S.W.2d 725 (Tex. App.—Houston [14th Dist.] 1988, original proceeding), the court held that where a mother's modification suit to provide adult support for a retarded child was pending in the district court of continuing jurisdiction, the mother's subsequent guardianship order issued by a probate court should be vacated. The court stated that where the statutes confer jurisdiction on more than one court, deference must be given to the court first acquiring jurisdiction.

versely, once a disabled child turned eighteen, absent an existing order or a pending suit under old subsection 14.05(b), a court lacked jurisdiction to order a parent to support the child.[50]

c. Problems and Criticisms

Severe criticism of old Family Code subsection 14.05(b) arose. Making the availability of postmajority support of a disabled child turn upon the technicality of when a motion was filed seemed arbitrary and inequitable. The disabled child's statutory right to support depended upon actions not only outside the child's control, but unrelated to the child's needs. If the parents of a disabled child divorced while the child was a minor, a court could order postmajority support for an indefinite period.[51] On the other hand, if the same parents of the same child waited to divorce until the child was eighteen years of age or older, a court had no jurisdiction to order any child support.[52]

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50. Including the court of appeals opinion in *Red*, seven published appellate cases have upheld orders denying, or have reversed or refused to enforce orders granting, postmajority support under old subsection 14.05(b) *See* Red v. Red, 536 S.W.2d 431 (Tex. Civ. App.—Houston [14th Dist.] 1976), *aff'd*, 552 S.W.2d 90, 92 (Tex. 1977); Harkins v. State, 773 S.W.2d 401, 404 (Tex App.—Houston [14th Dist.] 1989, no writ) (corrected opinion) (modification order entered after child turned 18, not enforceable, because court lacked jurisdiction to enter the order); In Matter of Marriage of Burrell, 747 S.W.2d 479, 482-83 (Tex. App—Amarillo 1988, no writ); Attaway v. Attaway, 704 S.W.2d 492, 494-95 (Tex. App.—Corpus Christi 1986, no writ); Valaque v. Valaque, 574 S.W.2d 608, 609-10 (Tex. Civ. App.—San Antonio 1978, no writ); Mial v. Mial, 543 S.W.2d 736, 738 (Tex. Civ. App.—El Paso 1976, no writ); *see also* Adkins v. Adkins, 743 S.W.2d 745, 746 (Tex. App.—El Paso 1987, writ denied) (prior unpublished opinion expressly held motion to modify under old Family Code subsection 14.05(b), filed after child reached eighteen, was properly dismissed for want of subject matter jurisdiction). All of these cases, except *Valaque* and *Mial*, turned on the fact that suit was not timely filed. The *Attaway* case held that even though the motion was filed and the hearing was held before the child turned eighteen, the order modifying was improperly *signed* after the child turned eighteen. *See Attaway*, 904 S.W.2d at 494-95. The same court later admitted that this holding went too far. *See* McLendon v. Allen, 752 S.W.2d 731, 732-33 (Tex. App.—Corpus Christi 1988, no writ). In any event, the 1985 amendment to old subsection 14.05(b) overturned *Attaway* (i.e., so long as motion *filed* before child turned 18, then court had jurisdiction to enter order under subsection). *See supra* note 46. A recent case, involving the enforceability of a decree ordering a father to maintain life insurance on his life for the benefit of the child until the child reached age 22, held that "[a] court of continuing jurisdiction has no authority *to order or to enforce support* for a non-disabled child over eighteen." Lambourn v. Lambourn, 787 S.W.2d 431, 432 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

51. *See supra* note 49.

52. *See supra* note 50. Associate Justice Pope, writing for the dissent in *Red*, stated the problem as follows:

> The majority holds that parents must hurry to the divorce court before a child reaches age 18 because, absent an order before that age, there is nothing to continue . . . . If a parent

Further, children diagnosed as having a mental or physical illness which was only gradually disabling, such as multiple sclerosis, were also subject to arbitiary and inequitable results. In such event, support under old subsection 14.05(b) was only available to the child upon reaching majority if the child was already so disabled as to qualify for support under the subsection's substantive standards by needing continuous care and personal supervision.[53] On the other hand, if, after adulthood, the child's disability finally met the substantive standards of subsection 14.05(b), relief would still be denied because of the procedural limitation requiring that a petition or motion be filed before the child turned eighteen.[54] For these reasons, the procedural limitation on the availability of the child's substantive right and the corresponding parental duty with respect to support of a disabled adult child was perceived as arbitrary, unreasonable, illogical, inequitable, and perhaps unconstitutional.[55] Legislative change was

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amicably agrees to support a child until the child reaches age eighteen, as Mr. Red did, and there is no prior support order which may be continued, the parent supplying the support may stop and the court is left powerless to require future payments.

Red v. Red, 552 S.W.2d 90, 98 (Tex. 1977)(Pope, J., dissenting).

53. In *Sininger v. Sininger*, 479 A.2d 1354 (Md. 1984), the court thoroughly addressed the dilemma caused by gradually disabling illnesses. The majority labeled as the "emancipation rationale" the appellant's (and the dissent's) contention that a duty of support is owed to a disabled adult child who is disabled at the time of majority, but that the duty is not owed to a child who becomes disabled after reaching majority. *See id.* at 1356. *See generally supra* notes 16-18 and *infra* note 133. The court then discussed the child's mental illness in this case:

Unlike physical injuries, mental disabilities often develop over time. The evidence in the instant case traced the roots of Janette's mental disability into her childhood. Yet, her mental difficulties, though present all along, did not become disabling . . . until after she passed the age of majority. Although she has suffered all along, her father is freed from any obligation to support her because . . . her sufferings did not disable her until after her twenty-first birthday.

Sininger, 479 A.2d at 1361.

54. As noted by Associate Justice Pope in the dissent in *Red*:

Children must develop their mental or physical disability before eighteen because if they unfortunately develop the handicap at age nineteen, they do not qualify for help.

Red v. Red, 552 S.W.2d 90, 98 (Tex. 1977)(Pope, J., dissenting).

55. *See, e.g.*, Kazen, *Over-18 Disabled Child Adkins v. Adkins*, 5 TEX. FAM. L. RPTR. No. 8 (March 1988) at 201. *See generally* Price, *supra* note 4, at E-45 to E-56 (raised question of whether old subsection 14.05(b) violated U.S. and Texas Constitutions' equal protection clauses and Texas Constitution's "open courts" provision). A challenge to old subsection 14.05(b) on equal protection grounds was raised in *Rose v. Rubenstein*, 693 S.W.2d 580, 583-84 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd). In *Rose*, only the father was ordered to pay postmajority support under old subsection 14.05(b) when his mildly retarded son was a minor. *Id.* at 583. His motion to decrease the amount of the support after his child passed majority was denied. On appeal he contended, among other things, that the subsection deprived him of equal protection as applied to the situation. He argued that although the subsec-

urged.[56]

II. LEGISLATIVE HISTORY

A. *1987: Proposed Bill to Amend Family Code Subsection 14.05(b)*

In 1987, legislation was introduced in the 70th Texas Legislature to amend old Family Code subsection 14.05(b) to authorize support for a disabled child regardless of when the disability arose.[57] This legislation failed to pass.[58] Some felt that after a healthy child became an adult, a postmajority disability should not re-impose upon an unexpecting and unprepared parent a new legal duty to support an adult handicapped child.[59] Others feared that if the legislation was not expressly limited to suits initiated by a parent, the new law might open a floodgate of litigation stemming from public entities or agencies seeking financial support or reimbursement from parents for the care which had been or was being provided to their disabled child.[60]

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tion obligated him to support his adult child, it could not now be used to impose the same obligation on the mother because: (1) the child was now an adult; and (2) no prior order existed requiring the mother to pay support for the child. *Id.* Therefore, the mother could escape her duty to support under old subsection 14.05(b). *Id.* at 583-84. Since the facts showed that the mother was indeed contributing to the child's support, the court held that old subsection 14.05(b) was not being applied against the father so as to currently deprive him of equal protection. *Id.* at 584. The court found that "[n]o unconstitutional discrimination existed under the facts of this case." *Id.*

56. *See* Adkins v. Adkins, 743 S.W.2d 745, 747 (Tex. App.—El Paso 1987, writ denied); HOUSE/SENATE JOINT INTERIM COMMITTEE ON CHILD SUPPORT, FINAL REPORT TO THE 71ST LEGISLATURE, THEIR FUTURE IS IN OUR HANDS (1988) at 19 and Exhibit 7 (discussed in detail *infra* note 63) [hereinafter 1988 INTERIM COMM. REPORT ON CHILD SUPPORT]; Kazen, *Comment on Adkins v. Adkins*, *supra* note 55, at 201. *See generally* Price, *supra* note 4.

57. *See* Tex. H.B. 1680, 70th Leg., R.S. (1987) (failed to pass).

58. *Id.* Representative Charlie Evans' H.B. 1680 was read for the first time and referred to the House Judicial Affairs Committee on March 19, 1987. *See* H.J. OF TEX., 70th Leg., R.S. 604 (1987). As introduced, the bill would have allowed postmajority support at any time if: (l) the child was older then 18; (2) the child required continuous care and personal supervision due to a mental disability; (3) the child was not able to support himself; (4) the child was not institutionalized; (5) the parent requesting the order provided or paid for the child's care; and (6) the order was in the child's best interest; however, only a parent could bring suit under the proposed section. *Id.* Following a public hearing, a substitute version of the bill was reported out favorably from the Committee. *See id.* at 1690, 3078. The new version did not expressly limit suit to being brought only by a parent, but it did require that, to be eligible for support under the bill, the child's disability must have been present when the child turned eighteen. *See* Tex. C.S.H.B. 1680, 70th Leg., R.S. (1987).

59. Conversation between author and various legislators (1987).

60. *See id.*

B. *1989: House Bill 695 and Senate Bill 298*

In 1988, the Council of the Family Law Section of the State Bar of Texas drafted a proposed bill to rewrite the Family Code with respect to the support of disabled children.[61] The State Bar Board of Directors approved this proposal without amendment as part of the State Bar's official legislative package.[62] A joint interim legislative committee on child support also adopted this identical proposed bill as recommended legislation.[63] This proposed legislation is attached to this article as Appendix A.

The Texas Legislative Council then redrafted the Family Law Council's proposed bill.[64] Representative Seidlits filed this redrafted

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61. The author of this article, as a member of the Council, was assigned the task of preparing an initial draft for the Family Law Council to consider. With only two technical corrections, the Council approved the draft at its April 23, 1988 meeting in El Paso, Texas. The Council made more extensive revisions to the amended draft at its June 18, 1988 meeting. This draft bill was attached verbatim to an interim joint legislative committee's report. *See infra* note 63, and app. A.

62. *See* Flores, *State Bar of Texas Board Approves 1989 Legislative Program*, 51 TEX. B.J. 1132, 1132 (1988). Prior to this, the State Bar's Committee on State Legislation in the Public Interest, of which the author was vice-chairman, had approved the Family Law Council's proposed bill at its meeting on August 27, 1988. *See infra* app. A. *See generally* STATE BAR OF TEXAS, PROPOSED LEGISLATION - 1989 LEGISLATIVE PROGRAM, STATE BAR OF TEXAS (Aug. 1, 1988) at tab 20.

63. *See* 1988 INTERIM COMM. REPORT ON CHILD SUPPORT, *supra* note 56, at Exh. 7; app. A. Regarding the need to amend the Family Code with respect to support for disabled adult children, the Report stated:

> Current Texas law allows the request for an extension of child support for children pursuing a high school diploma to be filed either before or after the child's 18th birthday. However, for handicapped children, the request must be filed *before* the 18th birthday. It would seem that the interests of the child and of the state would be better served if such an extension were allowed to be filed within a reasonable time beyond the 18th birthday of a handicapped child. This would allow the custodial parent and the court time to assess the ongoing needs of the child. Legislation is needed to allow a request for an extension of Child Support to be filed on behalf of mentally or physically handicapped children after the child reaches 18 years of age.

Id. at 19. The Report then recommended the following legislative change:

> Allow a request for an extension of child support to be filed on behalf of mentally or physically handicapped children after the child reaches 18. (Exhibit 7, Family Law Bill).

Id. at 32. The Committee's proposed legislation, attached to the Report as Exhibit 7, was identical to the State Bar's Family Law Council's originally proposed version. The State Bar Board subsequently adopted it as part of the Bar's official legislative package. *See supra* notes 61-62.

64. This redrafting was not intended to effect any substantive change in the proposed bill, although, as sometimes happens, some substantive changes did inadvertently occur. This Legislative Council's version was introduced as H.B. 695 and S.B. 298. *See supra* note 62; *infra*

bill as House Bill 695 on January 26, 1989[65] while Senator Caperton filed it as Senate Bill 298 on January 30, 1989.[66] A copy of S.B. 298 as originally filed (i.e., the Texas Legislative Council's draft) is attached to this article as Appendix B.[67]

At a hearing on S.B. 298 on March 21, Senator Caperton laid out a Senate Committee Substitute for S.B. 298 (referred to, in the Senate, as C.S.S.B. 298) which contained a number of amendments to original S.B. 298.[68] There was only very short public testimony, all in support of C.S.S.B. 298, at the March 21 hearing.[69] The Senate Jurisprudence Committee then voted the substitute bill out favorably without amendment or dissenting vote on March 22 and placed it on the Senate's local and consent calendar on March 30, 1989.[70] There was no Senate floor debate on C.S.S.B. 298 and it passed the Senate on March 30, 1989.[71]

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app. B (copy of S.B. 298 as originally introduced) and app. A (Family Law Council's proposed bill).

65. *See* Tex. H.B. 695, 71st Leg. (1989); *see also infra* app. B (copy of S.B. 298). House Bill 695 was read in the House for the first time and referred to the House Committee on Judicial Affairs on February 16, 1989. *See* H.J. OF TEX., 71st Leg., R.S. 305 (1989). It was considered in public hearing in the committee and referred to a subcommittee on March 8, 1989. There was only very brief public testimony, all in support of H.B. 695, at the March 8 hearing. A copy of the tape from this hearing is available from the Texas House Hearing Reporter. Also, a bill analysis of H.B. 695 is available from the Senate Jurisprudence Committee's office in Austin, Texas. Since S.B. 298 passed the Senate and was referred to the House Judicial Affairs Committee before H.B. 695 ever got out of that Committee, H.B. 695 was simply abandoned (left in subcommittee) and S.B. 298 became the vehicle for enacting the law. *See infra* notes 66-81 and accompanying text.

66. *See* Tex. S.B. 298, 71st Leg. (1989); *infra* app. B (copy of S.B. 298). S.B. 298 and H.B. 695 were companion (identical) bills filed virtually simultaneously in both the House and Senate. S.B. 298 was introduced and read in the Senate for the first time, and was referred to the Senate Committee on Jurisprudence, on January 31, 1989. *See* S.J. OF TEX., 71st Leg., R.S. 164 (1989).

67. Appendix B is the Texas Legislative Council's redraft of the Family Law Council's original draft (app. A) and was introduced as companion bills, H.B. 695 and S.B. 298. *See supra* notes 61-66 and accompanying text.

68. *See* Comm. Substitute Tex. S.B. 298, 71st Leg. (1989) (available from Senate Jurisprudence Comittee in Austin, Texas). This is the bill which finally passed, without amendment, and was signed into law. *See infra* notes 69-82 and accompanying text.

69. A copy of the tape from this hearing is available from the Texas Senate Staff Services Office. Also, a bill analysis of S.B. 298 as originally introduced, and a bill analysis of C.S.S.B. 298, are available from the Senate Jurisprudence Committee's office in Austin, Texas.

70. *See* S.J. OF TEX., 71st Leg., R.S. 549, 551 (1989). A bill analysis of C.S.S.B. 298 is available. *See supra* note 69.

71. *See* S.J. OF TEX., 71st Leg., R.S. 549, 551 (1989). Bills placed on (and not subsequently removed from) the Local and Consent Calendar of either house are not even brought up for formal consideration or vote on the floor of that house. The Senate Journal indicates a

Senate Bill 298 was then referred to the House.[72] A hearing before the House Judicial Affairs Committee was held on S.B. 298 on May 3, 1989.[73] Senate Bill 298 was reported out favorably, without amendment or dissenting vote, from the House committee on May 10, 1989.[74] On May 25, 1989, S.B. 298 was laid out for second reading on the House floor.[75] Besides Representative Seidlits' brief introductory remarks, there was no House floor debate on S.B. 298 and it passed without amendment to third reading by a nonrecord vote on May 25, 1989.[76] Finally, on May 26, 1989, S.B. 298 was laid out for third and final reading before the House.[77] Again, Representative Seidlits made some cursory remarks in laying out the bill, but there was no House floor debate. At 6:40 p.m. on May 26, 1989, S.B. 298 finally passed the House without amendment by a nonrecord vote.[78] Thus, Senate Committee Substitute S.B. 298[79] was the bill which finally passed both houses without one dissenting vote or amendment and was sent to the Governor.[80]

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final "vote" of 30 yeas and 0 nays on C.S.S.B. 298, as it did for virtually all bills on the Senate Local and Consent Calendar for that day, although no real vote was taken. *Id.*; Act of May 26, 1989, ch. 368, 1989 Tex. Sess. Law Serv. 1457, 1458 (Vernon) (codified as an amendment to TEX. FAM. CODE ANN. §§ 14.05(b) and 14.051).

72. *See* H.J. OF TEX., 71st Leg., R.S. 779, 833 (1989) (Senate received S.B. 298 from House on March 30, 1989 and referred to House Committee on Judicial Affairs on April 5, 1989). Representative Seidlits, author of companion H.B. 695, sponsored S.B. 298 in the House.

73. A copy of the tape from this hearing is available from the House Committee Coordinator's office in Austin, Texas. Also, a bill analysis of S.B. 298 is available from the House Judicial Affairs Committee's office in Austin, Texas.

74. *See* H.J. OF TEX., 71st Leg., R.S. 1648, 1649 (1989).

75. *See id.* at 2533. A bill analysis of S.B. 298, prepared for House members, is available from the Legislative Council's House Bill Distribution office in Austin, Texas. Also, the House Study Group, funded by various House members, prepared detailed analyses on all bills reaching the House floor and prepared an analysis on S.B. 298, which is available from the Group's office in Austin, Texas.

76. *See id.* A copy of the tape of the action on the House floor is available from the House Committee Coordinator's office in Austin, Texas.

77. *See id.* at 2714.

78. *See id.*; *see also* Act of May 26, 1989, ch. 368, 1989 Tex. Sess. Law Serv. 1457, 1458 (Vernon) (codified as an amendment to TEX. FAM. CODE ANN. §§ 14.05(b) and 14.051). The time was recorded by the author, who was present in the House gallery when the bill passed on third reading.

79. *See supra* note 68.

80. Tex. S.B. 298, after passing its third and final reading in the House on May 26, 1989, was reported to the Senate as passed on May 27, was signed in the Senate and the House on May 28, and was sent to the Governor on May 29, 1989. *See* H.J. OF TEX., 71st Leg., R.S. 3169 (1989); S.J. OF TEX., 71st Leg., R.S. 3608, 3661 (1989).

Governor Clements approved and signed S.B. 298 into law on June 14, 1989.[81] The new law went into effect on September 1, 1989.[82]

The short bill analyses, the very brief testimony in committee hearings, and the introductory remarks on the House floor all serve as legislative history.[83] However, a comparison of S.B. 298 as it was originally introduced with Senate Committee Substitute S.B. 298 as it was finally passed and signed into law, provides the clearest legislative history behind certain provisions of the law.[84]

III. ANALYSIS OF NEW LEGISLATION

A. *Overview of Major Changes*

Senate Bill 298 amended Texas Family Code subsection 14.05(b) by repealing the existing two-sentence subsection and adding a new sentence which merely references new subsection 14.051.[85] Senate Bill 298 also enacted new section 14.051, entitled "Support for a Minor or Adult Disabled Child."[86] Section 14.051 authorizes a court to order indefinite child support for a disabled minor or adult child, regardless of the age of the child when suit is brought, so long as the child's disability exists, or the cause of the disability is known to exist, before the child turns eighteen years old.[87]

There are at least six major elements to the legislation. First, the *substantive standards* under old Family Code subsection 14.05(b) are kept virtually intact in new section 14.051.[88] Second, and most importantly, the *availability* of postmajority support is no longer contingent upon when a parent seeks the relief but depends, instead, upon when the child's disability arises.[89] Thus, the relief of indefinite sup-

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81. *See* Act of May 26, 1989, ch. 368, 1989 Tex. Sess. Law Serv. 1457, 1458 (Vernon) (codified as an amendment to Tex. Fam. Code Ann. §§ 14.05(b) and 14.051).

82. *See id.* § 3, at 1458; *infra* text accompanying note 228.

83. *See supra* notes 64-78 and accompanying text.

84. *Compare infra* app. B *with* TEX FAM. CODE ANN. §§ 14.05(b) and 14.051 (Vernon Supp. 1991); *see also supra* notes 57-60 and accompanying text (proposed 1987 legislation), 61-63 and accompanying text and app. A (Family Law Council's draft bill), and 64-78 and accompanying text (legislative history of S.B. 298).

85. *See* Act of May 26, 1989, ch. 368, § 1, 1989 Tex. Sess. Law Serv. 1457 (Vernon) (codified as an amendment to Tex. Fam. Code Ann. § 14.05(b)).

86. *See id.* § 2.

87. *See* TEX. FAM. CODE ANN. § 14.051 (Vernon Supp. 1991).

88. *See id.* § 14.051(b)(1); *infra* notes 100-01 and accompanying text, 118-27 and accompanying text.

89. *See* TEX. FAM. CODE ANN. § 14.051(b)(2) (Vernon Supp. 1991); *infra* notes 100-07

port is available at any time, regardless of the age of the child, if the child is disabled, or if the cause of the disability is known to exist, before the child reaches majority. Third, with one exception, only a *parent* may sue under section 14.051, and public and private entities or agencies are expressly prohibited from bringing or maintaining suit under the section.[90] Fourth, the emphasis throughout section 14.051 lies on *both* parents sharing a disabled child's postmajority costs and expenses.[91] Fifth, an order for postmajority support may be requested and *entered* either while the child is still a minor or after the child is an adult.[92] Sixth, different Family Code provisions determine the *amount* of support depending upon the age of the child at the time when the support is to be paid.[93] The amount of support paid for the disabled child during minority is generally determined pursuant to the standard child-support guidelines applicable to all children, while the amount of support paid during adulthood is determined pursuant to subsection 14.051(g).

B. *Subsection-By-Subsection Analysis*

The following is a subsection-by-subsection analysis of the new legislation. Each subsection of the Texas Family Code that is analyzed is quoted verbatim in bold print below, followed by an analysis of the subsection.

1. Subsection 14.05(b)

The court may order either or both parents to provide for the support of a minor or adult disabled child for an indefinite period under Section 14.051 of this code.

The two sentences of old Family Code subsection 14.05(b) were repealed and replaced with one new sentence which merely references new section 14.051.[94] Importantly, this subsection, along with sub-

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and accompanying text, 128-37 and accompanying text; *see also* TEX. FAM. CODE ANN. § 14.051(d) (Vernon Supp. 1991); *infra* notes 147-49 and accompanying text.

90. *See* TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991); *infra* notes 108, 138-46 and accompanying text.

91. *See* TEX. FAM. CODE ANN. §§ 14.05(b), 14.051(b),(g),(h) (Vernon Supp. 1991).

92. *See id.* §§ 14.05(b), 14.051(a),(b),(d),(f).

93. *See id.* §§ 14.05(b), 14.051(a),(b),(g).

94. *Id.* § 14.05(b). Old subsection 14.05(b) was, of course, preceded by now-repealed article 4639a-1. *See supra* notes 32-33. The two sentences of old subsection 14.05(b), quoted in the text accompanying *supra* notes 39 and 46, were repealed by S.B. 298. *See* Act of May

section 14.051(b), expressly grants courts the authority to order support for disabled children of any age, and highlights that indefinite support may be awarded whether or not the child is still a minor.[95] In effect, old subsection 14.05(b) has been replaced with new subsection 14.051.

2. Subsection 14.051(a)

In this section: (1) "Adult child" means a child who is 18 years of age or older. (2) "Child" means a son or daughter of any age.

Family Code subsection 14.051(a) defines "adult child" and "child" as those terms are used in the section. Contrary to Family Code section 11.01(1), the term "child," as defined in subsection 14.051(a), is not limited to minors but refers to a son or daughter "of any age."[96] The term "adult child" is limited to a child who is eigh-

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26, 1989, ch. 368, § 1, 1989 Tex. Sess. Law Serv. 1457 (Vernon). The initial portion of the new sentence composing subsection 14.05(b) is based on the similar introduction language of subsection 14.05(a), and is similar to the initial language in new subsection 14.051(b). The sentence appeared virtually verbatim in all draft versions of the legislation. *See supra* notes 61-80 and accompanying text and *infra* apps. A and B. New subsection 14.05(b), like both its predecessor statute, and subsection 14.051(b), is permissive and not mandatory. *See supra* text accompanying notes 36, 43 and *infra* text accompanying notes 102-03. It also addresses the fact that "both" parents may be required to pay support, as do subsections 14.051(b),(g),(h). *See supra* text accompanying note 91 and *infra* notes 110, 163, and text accompanying notes 100, 163, 168, 173, 179, 181.

95. *See* TEX. FAM. CODE ANN. §§ 14.05(b), 14.051(b) (Vernon Supp. 1991).

96. *Compare id.* § 11.01(1) *with id.* § 14.051(a)(2). The age of majority was 21 years of age at common law, but is generally eighteen in Texas, with certain statutory exceptions regarding, *inter alia*, the duty to pay child support until the child graduates from high school. *See supra* notes 6, 12-14, 23 and accompanying text. Now-repealed article 4639a-1 did not expressly define child or adult, but authorized support for any disabled child, whether a minor or an adult. *See supra* note 33 and text accompanying notes 32-36. Likewise, old subsection 14.05(b) did not define child or adult child, but did authorize support for any minor disabled child to continue into adulthood if suit for such relief was invoked before age eighteen. *See supra* notes 45-46, 48-50 and text accompanying notes 39, 45-50. The 1987 proposed legislation originally addressed a child older than eighteen years, then was amended to reference an "adult son or daughter." *See supra* note 57-60 and accompanying text. All versions of the Family Law Council's draft of the new legislation contained merely the definition of "child," which was defined to mean a minor or an adult child of the parents. *See supra* notes 61-63 and accompanying text and *infra* app. A. The two definitions in the final bill were initially inserted by the Legislative Council's version, *see infra* app. B, and appeared unchanged in S.B. 298 as originally introduced and as substituted in committee and signed into law. *See supra* notes 64-80 and accompanying text. The definitions serve as the foundation for one of the key elements in the legislation, this being to make the remedy available despite the age of the child so long as the substantive standards are otherwise met. *See supra* text accompanying note 92.

teen years of age or older.[97] The only subsection of new section 14.051 in which the term "adult child" is used is subsection (g), which is used to determine the amount and terms of support to be paid during a disabled child's adulthood.[98] These specific definitions apparently supersede any conflicting definition of "child" contained elsewhere in the Code.[99]

3. Subsection 14.051(b)

The court may order either or both parents to provide for the support of the child for an indefinite period and determine the rights, privileges, duties, and powers of the child's parents for the support of the child if the court finds that: (1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be able to support himself; and (2) the disability exists, or the cause of the disability is known to exist, before or on the 18th birthday of the child.[100]

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97. TEX. FAM. CODE ANN. § 14.051(a)(1) (Vernon Supp. 1991).

98. *See id.* § 14.051(a)(1), (g).

99. *See, e.g., id.* § 11.01(1) (general definitions). Section 11.01 contains general definitions to be used throughout Subtitle A of Title Two of the Family Code, which would include section 14.051. The definitions under section 11.01 apply "unless the context requires a different definition: . . . ." *Id.* § 11.01. The terms "child" and "minor" are defined simultaneously under subdivision (1) of section 11.01 to mean "a person under eighteen years of age who is not and has not been married and who has not had his disabilities removed for general purposes," while "adult" is defined under subdivision (1) as "any other person." *Id.* § 11.01(1). The only portion of section 11.01(1) expressly in conflict with the definitions under subsection 14.051(a) is the phrase "under eighteen years of age." Thus, "unless the context" of the use of the term "child" under section 14.051 "requires a different definition," section 14.051 would not be available to a minor or adult disabled child who is or ever has been married or had his disabilities removed for general purposes. *Id.* Other provisions of the Code which do not contain definitions would apply equally to section 14.051 unless expressly superseded by a specific provision of section 14.051. In this respect, section 14.05(d) provides that, absent agreement or order to the contrary, support provisions terminate upon the marriage of the child, the removal of the child's disabilities, or the death of the obligor. *Id.* § 14.05(d) (Vernon 1986). Now repealed article 4639a-1 applied only to a child who was "unmarried." *See supra* note 33 and accompanying text. No case under article 4639a-1 addressed whether "unmarried" meant only *presently* unmarried at the time of the order or included a child who had been married but was now divorced. However, under the Family Code, if a child has been married and divorced during minority, the "child" has now become an adult, *see* TEX. FAM. CODE ANN. § 11.01(1) (Vernon Supp. 1991), and, absent agreement or decree to the contrary, this terminates any child-support order with respect to that child. *Id.* § 14.05(d). However, if the child's marriage is annulled, then the marriage was void *ab initio* and the child-support obligation continues. Fernandez v. Fernandez, 717 S.W.2d 781 (Tex. App.—El Paso 1986, writ dism'd). For a discussion of the definition of "parent," see *infra* note 109.

100. TEX. FAM. CODE ANN. § 14.051(b) (Vernon Supp. 1991). As noted, at common-law, a parent had a legal duty to support an adult disabled child, but only if the disability

Subsection 14.051(b) establishes the section's substantive standards and the court's authority to enter an order under Family Code section 14.051.[101] This is the heart of the new legislation.

The fact that the court "may" order support under the subsection indicates that new Family Code section 14.051 is, like its predecessors, permissive and not mandatory.[102] Thus, even if the substantive standards under subsection 14.051(b) are met, the court still has

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existed at the time of majority. *See supra* notes 17-18 and accompanying text. New subsection 14.051(b) is, in essence, an adoption of this rule.

101. TEX. FAM. CODE ANN. § 14.05(b) (Vernon Supp. 1991). As with new subsection 14.05(b), subsection 14.051(b) expressly grants a trial court the authority to order support under the section. The substantive standards are set out in subdivisions (1) and (2). Subdivision (1) is virtually identical to language in now-repealed article 4639a-1 and to the first sentence of old Family Code subsection 14.05(b). *See supra* note 33 and text accompanying note 39. Both drafts of the 1987 proposed legislation contained language similar to subdivision (1). *See supra* note 58 and text accompanying notes 57-60. Language similar to subdivision (2), which codifies a limitation recognized at common law, was first inserted in the second draft of the 1987 proposed bill. *See supra* notes 15-18 and accompanying text. The Family Law Council's drafts of subsection (b) contained language which was virtually identical to the present subsection 14.051(b) and, for emphasis, also re-stated in the negative what subdivision (2) states in the positive (i.e. "[a]n order may not be entered under this section if the disability first arose after the time the child attained eighteen years of age; . . . "). *See supra* notes 61-63 and accompanying text and *infra* app. A. The Legislative Council's version shortened the Family Law Council's draft, primarily by shortening the provision and setting out more succinctly the two distinct tests now contained in subdivisions (1) and (2). *See supra* notes 64-67 and accompanying text and *infra* app. B. The problem, however, was that the Legislative Council's version also inadvertently changed some important language contained in the Family Law Council's draft. First of all, the Legislative Council's draft merely began with the phrase, "[a] court may order the support of a child . . . ." *See infra* app. B. Unlike the Family Law Council's version, this did not conform with the present wording in Code subsection 14.05(a) or proposed new subsection 14.05(b) (i.e. "court may order either or both parents"), and did not expressly state that only a "parent" could be ordered to pay support under this subsection. *See infra* app. A. Second, the Family Law Council felt that sentence one of old subsection 14.05(b) should be used virtually verbatim in the new bill to reduce unnecessary litigation over the inadvertent use of different words and to take advantage of the relatively good case law developed under old subsection 14.05(b). Therefore, with one exception, the Family Law Council's draft adopted the first sentence of old subsection 14.05(b) into new subsection 14.051(b). *See supra* notes 61-62 and *infra* app. A. However, the Legislative Council's version totally rearranged the wording in its draft of subdivision (1) of subsection 14.051(b). *See supra* note 64 and *infra* app. B. The Committee Substitute for S.B. 298 redrafted subdivision (1) of subsection 14.051(b) to conform with the Family Law Council's draft and, therefore, with one exception, comported with prior law. *See supra* notes 39 & 68 and accompanying text. This subsection supports several of the key elements of the legislation, e.g., to maintain the substantive standard of old subsection 14.05(b), to make the availability of the section dependent on when the child's disability arose rather than when the motion was filed, and to highlight that both parents have a duty to support adult disabled children. *See supra* text accompanying notes 88-89, 91.

102. *See supra* notes 36, 43 and accompanying text.

broad discretion to enter an order under the section.[103]

Note that old Family Code subsection 14.05(b) authorized a court to order payments to "be continued" after the child's eighteenth birthday.[104] The Texas Supreme Court held that the phrase "be continued" implied the existence of a valid order and, therefore, a motion under old subsection 14.05(b) had to be filed before the child turned eighteen.[105] This phrase has been completely deleted. The new language under subsection 14.051(b), allowing a court to "order" parents to support a disabled child, is broader in scope.[106] A court now may enter any type of order under new section 14.051, including a new order or an order which continues or modifies an existing order.[107]

The court may also order either or both "parents" to provide support under Family Code section 14.051.[108] Under another Family Code section, the term "parent" means the mother, a man as to whom the child is legitimate or a man whom a court has adjudicated to be the biological father, or an adopted mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.[109] Subsection (b) is the first of several subsections of section 14.051 to reference the fact that "both" of the parents may be

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103. *See supra* notes 36, 43 and accompanying text. As usual, the best-interest-of-the-child standard applies to suits under section 14.051. *See* TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1986).

104. *See supra* note 38 and text accompanying note 39.

105. *See supra* notes 44-45 and accompanying text.

106. *See* TEX. FAM. CODE ANN. § 14.051(b) (Vernon Supp. 1991); *see also id.* § 14.05(a), (b).

107. *See id.* § 14.051(b); *see also id.* § 14.051(e),(f),(h),(i).

108. *See id.* § 14.051(b). The word "parent," included in the Family Law Council's draft, *see infra* app. A, but deleted from the Legislative Council's draft, *see infra* app. B, was inserted in the Committee Substitute for S.B. 298. *See supra* note 68. This conforms with the general rule that only a parent has a legal duty to support a child. *See supra* note 5 and accompanying text. It also comports with subsection 14.051(c), which states that only a parent may bring suit under section 14.051 (with one exception). *See* TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1991).

109. *See* TEX. FAM. CODE ANN. § 11.01(3) (Vernon Supp. 1991). The general definitions under section 11.01 apply throughout the Code unless the context of the use of a defined term elsewhere requires a different definition. *Id.* § 11.01. While now-repealed article 4639a-1 expressly applied only to natural children born of the marriage of the parents, *see supra* note 33, support obligations under the Family Code, including those under section 14.051, apply to any natural or adopted child. *See id.* § 11.01(3); *see also id.* § 16.09(a), (c). A parent whose parental rights are terminated owes no duty to support their biological or adopted child with respect to whom the relationship was terminated. *Id.* §§ 11.01 (3), 15.07. For a discussion of the definition of "child," see *supra* note 99.

ordered to provide support.[110]

As with old Family Code subsection 14.05(b), support under new section 14.051 may be for an "indefinite period."[111] Thus, postmajority support may continue for as long as a court determines the support is in the best interest of the child.[112]

A court also is given the authority under Family Code subsection 14.051(b) to "determine the rights, privileges, duties, and powers of the child's parents for the support of the child . . . ."[113] Thus, a court's authority is greater than merely requiring the noncustodial parent to make periodic monetary payments to the custodial parent. In *Rose v. Rubenstein,*[114] an argument was made that while a court had authority under old subsection 14.05(b) to require the noncustodial parent to pay periodic child support to the custodial parent, the court had no authority to enter any other orders regarding the child or the custodial parent once the child turned eighteen.[115] Subsection 14.051(b) clearly states that a court may enter orders with respect to all of the "rights, privileges, duties and powers" of "either or both" parents, but only with respect to the "support" of the child.[116] This provision does not open the door to postmajority custodial or possession orders except as they may directly bear upon the support neces-

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110. *See* TEX. FAM. CODE ANN. §§ 14.05(b), 14.051(b),(g),(h) (Vernon Supp. 1991) (all reference obligation of "both parents" to support a child); *see also id.* § 14.05(a). As noted, this shared obligation was one of the key elements of the new legislation. *See supra* text accompanying note 91. This conforms with the general rule that both parents have an equal duty to support a child, as limited only by their respective abilities to do so. *See supra* note 5.

111. *Compare* TEX. FAM. CODE ANN. § 14.051(b) (Vernon Supp. 1991) *with supra* text accompanying notes 33, 39, 94, 100.

112. *See, e.g.*, Rogers v. Stephens, 697 S.W.2d 75, 77, 79 (Tex. App.—Fort Worth 1985, writ dism'd) (support ordered for 3 years past child's eighteenth birthday); Rose v. Rubenstein, 693 S.W.2d 580, 583 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd) (apparently, indefinite support past age eighteen was ordered).

113. *See* TEX. FAM. CODE ANN. § 14.051(b),(g),(h) (Vernon Supp. 1991).

114. 693 S.W.2d 580, 583 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd).

115. *Id.* For a discussion of this point, see *supra* note 55 and accompanying text.

116. TEX. FAM. CODE ANN. § 14.05(b) (Vernon Supp. 1991). The phrase "rights, privileges, duties and powers" conforms with other Family Code sections, see *id.* § 12.04, and appears several times within section 14.051. *See id.* § 14.051(b),(g),(h). The phrase as used throughout section 14.051, however, is always modified by the phrase "for the *support* of the child" (emphasis added). The initial draft of the Family Law Council's proposed bill referred to orders for the "support, care and supervision" of the child. *See supra* note 61 and accompanying text and *infra* app. A. To defuse concerns by Council members that this wording might authorize courts to enter postmajority custody and possession orders, the words "care and supervision" were deleted from the Council's final draft. *See infra* app. A. Thus, the language "for the support" of the child limits courts to orders governing only the support of the child.

sary for the care and supervision of the child.[117]

Subdivisions (1) and (2) of Family Code subsection 14.051(b) provide, respectively, the substantive test for, and the limitations upon, the availability of support under Family Code section 14.051.[118] Subdivision (1), with one exception, incorporates verbatim the substantive test contained in old subsection 14.05(b).[119] Whereas old subsection 14.05(b) required a need for "continuous" care, new subsection 14.051(b)(1) requires a need for "substantial" care.[120] As noted, now-repealed article 4639a-1 required "custodial" care, but this requirement was strictly construed and arguably led to harsh results.[121] In enacting original subsection 14.05(b), the word "custodial" was deleted and substituted with the word "continuous."[122] However, the word "continuous" under old subsection 14.05(b) also was susceptible to strict construction.[123] Therefore, the word "continuous" has now

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117. A court is clearly not limited to merely ordering one parent to pay to the other parent periodic child support, as is standard under normal child-support circumstances. For example, a court might enter orders directing one parent to pay all or a portion of a certain monthly financial amount to the other parent and/or to a third party. *See infra* notes 145-46 and accompanying text. A parent may be required to turn over certain property or assets to the other parent or third parties. Each parent may be ordered to carry certain health insurance for the child or life insurance on their life for the benefit of the child or to reimburse each other for payments made directly to third parties for the support of the child. The court could monitor private or public assistance being provided for the child's benefit.

118. *See* TEX. FAM. CODE ANN. § 14.051(b)(1), (2) (Vernon Supp. 1991).

119. *See id.* § 14.051(b)(1); *cf. supra* text accompanying note 39.

120. *See* TEX. FAM. CODE ANN. § 14.05(b)(1) (Vernon Supp. 1991); *supra* text accompanying note 39.

121. *See supra* notes 40-41, 51-56 and accompanying text. In *Byrne v. Byrne*, 398 S.W.2d 432, 434 (Tex. Civ. App.—Eastland 1965, no writ), the court upheld the trial court's denial of a request for postmajority support under now-repealed article 4639a-1. The court stated that while the child had no personal estate or income sufficient to provide for his care, the child was not so physically or mentally unsound as to require custodial care or to be unable to provide or care for himself. *Id.* In *Aversa v. Aversa*, 405 S.W.2d 157, 160 (Tex. Civ. App.—San Antonio), *writ dism'd w.o.j. per curiam*, 407 S.W.2d 769 (Tex. 1966), the court reversed the trial court's order for postmajority support because the evidence did not show that the child required "custodial care." The court noted that the requirements under article 4639a-1 of "custodial care" and "no personal estate or income" referred to special care called for by the child's illness. *Id.* at 159. *See generally* Note, *Child Support - Parental Obligation to Support Adult Children Held Strictly Limited to Circumstances Enumerated by Statute*, 9 S. TEX. L.J. 101 (1966-67) (case note on *Aversa v. Aversa*).

122. *See supra* note 33 and text accompanying notes 39-40.

123. In *Mial v. Mial*, 543 S.W.2d 736, 738 (Tex. Civ. App.—El Paso 1976, no writ), the court upheld the trial court's order for support only during minority, noting that the trial court did not find the need for continuous care and personal supervision or the children's inability to support themselves. In *Rose v. Rubenstein*, 693 S.W.2d 580, 583 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd), the court defined "continuous care and supervision"

been replaced with the word "substantial" in new subsection 14.051(b).[124] While this somewhat relaxes the standard for postmajority support, the standard is still stringent, because before postmajority support is available, a child still must require "substantial care," "personal supervision," and "not be able to support himself."[125] To counterbalance the slight lessening of the substantive test, subsection 14.051(g) directs a court to determine the amount of postmajority support by focusing upon the degree of care and supervision directly related to the child's disabilities.[126] Thus, with but one amendment, the same two-prong test provided under old subsection 14.05(b) still exists under new subsection 14.051(b)(1): a court may only order postmajority child support if the child (1) requires substantial care and personal supervision because of his disability; and (2) is unable to support himself.[127]

Subdivision (2) of Family Code subsection 14.051(b) limits the applicability of section 14.051 to a child whose disability already exists, or the cause of that "disability is known to exist, before or on" the child's eighteenth birthday.[128] Thus, the limitation on the availability of postmajority support for a disabled child under section 14.051 depends upon when the disability arises and not, as under old subsection 14.05(b), upon when a petition or motion is filed.[129] This procedural change was the primary purpose for enacting S.B. 298.[130] Old subsection 14.05(b) was highly criticized because a disabled child's right to postmajority support was arbitrarily contingent upon when the petition or motion seeking the relief was filed.[131] Nevertheless, the Texas legislature seemingly was not amenable to imposing on a parent an

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as meaning an uninterrupted extension in time or sequence, a continuance without intermission, or a regular recurrence after minute interruption. *See* Attaway v. Attaway, 704 S.W.2d 492, 494 (Tex. App.—Corpus Christi 1986, no writ) (14.05(b) requirement not met merely because child failed to complete high school due solely to lack of his own application).

124. TEX. FAM. CODE ANN. § 14.051(b) (Vernon Supp. 1991). The word "substantial" appeared in the Family Law Council's draft of the legislation and in the original draft of S.B. 298. *See infra* apps. A and B. As originally drafted, Senate Committee Substitute for S.B. 298 contained the word "continuous," but this was substituted in committee hearing by handwritten insertion on the bill with the word "substantial." *See supra* note 68.

125. *See* TEX. FAM. CODE ANN. § 14.051(b)(1) (Vernon Supp. 1991).

126. *See id.* § 14.051(g).

127. *See id.* § 14.051(b)(1); *supra* text accompanying note 42.

128. TEX. FAM. CODE ANN. § 14.051(b)(2) (Vernon Supp. 1991).

129. *See supra* notes 46, 48-50, 89 and accompanying text.

130. *See supra* notes 51-56 and accompanying text.

131. *See supra* notes 51-56 and accompanying text.

unexpected duty of support for a child who first becomes disabled after reaching majority.[132] Thus, new subsection 14.051(b)(2) addresses both concerns by codifying the common-law rule that postmajority support may be ordered if the child's disability arises before reaching majority, but not if it arises thereafter.[133]

Under new subdivision (2) of subsection 14.051(b), a court has authority to enter an order only if (1) the *disability* in fact *exists* prior to age eighteen or (2) the *cause* of the disability is *known to exist* before the child turns eighteen.[134] The phrase "cause of the disability is known to exist" is intended to cover situations where a child's mental or physical illness, at the time the child reaches majority, is known but is not yet so disabling as to qualify under the substantive test set out in subdivision (1) of subsection 14.051(b).[135] For example, if a child has been diagnosed as having multiple sclerosis, the child, upon reaching majority, may not yet be so disabled as to require "substantial care and personal supervision" or as to "not be able to support

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132. *See supra* notes 57-59 and accompanying text.

133. *See* TEX. FAM. CODE ANN. § 14.051(b)(2) (Vernon Supp. 1991). The common-law rule that postmajority support is only available if the disability existed before majority, as discussed at *supra* notes 16-18, 53 and accompanying text, and as incorporated in new subsection 14.051(b)(2), is not without its critics. *See, e.g.*, Sininger v. Sininger., 479 A.2d 1354, 1360 (Md. 1984). Labeling the common-law rule the "emancipation rationale," the court stated:

> We could easily imagine a hypothetical that would have absurd results under an emancipation rationale approach. For instance, a man's two daughters, one age seventeen, the other age eighteen, are injured and paralyzed in the same car accident. The younger daughter can rely on her father's support indefinitely, yet the eighteen-year-old daughter has no right to support. We reject the inequitable results that could follow from the appellant's [emancipation rationale] approach.

Id. In support of the common-law rule, some feel that there should be some point in time in which a parent may determine with some degree of certainty his or her future financial obligations with respect to a child. *See generally supra* text accompanying note 59. Arguably, society as a whole should bear the financial support of disabled adult citizens and not the adult child's aging parent or parents. In few areas does society hold parents legally liable or responsible for their adult children.

134. *See* TEX. FAM. CODE ANN. § 14.051(b)(2) (Vernon Supp. 1991). A similar provision existed in the second draft of the 1987 legislation. *See supra* notes 57-58 and accompanying text. This language appeared in all drafts of S.B. 298. *See supra* notes 61-81 and accompanying text and *infra* apps. A and B. It generally incorporates the common-law rule. *See supra* notes 16-18, 53 and accompanying text. As used in subdivision (2) of subsection 14.051(b), "disability" refers to the child's incapacitating mental or physical state or condition, while "cause" refers to the underlying illness, injury or disease which is the basis of the disability.

135. *See supra* notes 53-54 and accompanying text. In such circumstances, parents will at least have some advance notice that they may be legally obligated to financially support a child indefinitely in the future.

himself;" however, the child might become so disabled after reaching majority. In such a case, if the cause of the disability was known to exist at the time the child reaches majority and, after reaching majority, the child finally becomes so disabled as to require substantial care and personal supervision, and is unable to support himself, then subsection 14.051 may be applied.[136] Thus, a court is authorized to enter a section 14.051 order after majority once the child's disability meets the substantive tests contained in subsection 14.051(b)(1). Note that the cause of the disability must be "known" to exist before the child reaches eighteen; therefore, the mere fact that the "cause" of the disability may have in fact existed undetected during minority may not be enough to trigger section 14.051 if that cause was not in fact "known" to exist before the child reached majority.[137]

4. Subsection 14.051(c)

An action under this section may be brought and maintained only by a parent of the child. The parent may not transfer or assign the right to bring or maintain an action under this section to any person, including a governmental or private entity or agency, except for an assignment made under Part D of Title IV of the federal Social Security Act, as amended (42 U.S.C. Section 651 et seq.).

With one exception, only a "parent" has standing to bring or maintain an action under Family Code section 14.051.[138] Further, a parent

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136. *See* TEX. FAM. CODE ANN. § 14.051(b)(2) (Vernon Supp. 1991); *see also supra* notes 53-54 and accompanying text.

137. Note that the underlying "cause" of the eventual disability, not the actual disability, must be known to exist before adulthood. *See supra* note 134. Undoubtedly, this "known to exist" requirement may arguably lead to inequitable results in given cases, for example, when a child's illness or disease clearly existed and could have been, but was not, detected prior to majority. *Cf. supra* note 133. However, requiring the "cause" to be "known" before majority comports with the legislature's general philosophy of fixing some point in time when a parent may predict, with some degree of certainty, his or her future financial obligations to an adult child. *See supra* notes 57-60, 133 and accompanying text. Had the legislature intended to make the availability of section 14.051 contingent merely upon the factual existence of the cause of the disability during minority, without a pre-majority knowledge thereof, it could have easily so stated.

138. TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991). This limitation of suits only by parents was first presented in the first draft of the 1987 legislation. *See supra* notes 57-60 and accompanying text. The first sentence of subsection 14.051(c) was contained verbatim in the Family Law Council's drafts. *See supra* notes 61-62 and accompanying text and *infra* app. A. Likewise, the second sentence of the subsection was contained virtually verbatim in the Family Law Council's draft. *See infra* app. A. The Legislative Council's version used only the term "bring;" *see supra* note 64 and accompanying text and *infra* app. B; however, the

is expressly prohibited from transferring or assigning this exclusive right to any other person, expressly including a governmental or private entity or agency.[139] As will be discussed, this does not preclude a nonparent's action for payment or reimbursement from a parent for the care of a child under other laws or by contract;[140] it merely precludes a nonparent from directly relying upon section 14.051 as the vehicle for obtaining those payments.

The only exception to a parent's inability to transfer or assign the right to bring or maintain an action under Family Code section 14.051 is that a parent may assign this right under Part D of Title IV of the federal Social Security Act.[141] Thus, in Title IV-D cases, a parent may assign his rights to the Attorney General of Texas to bring or maintain an action under section 14.051 on the parent's behalf.[142] The use of the phrase "brought and maintained" refers not only to initiating or commencing suit ("brought"), but also to intervening or joining in a pending cause of action ("maintaining").[143] While only a parent has standing to initiate or utilize a suit under section 14.051, and only a parent may be ordered to pay support for a

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Committee Substitute for S.B. 298 re-inserted the phrase "bring or maintain." *See supra* notes 68-69 and accompanying text. The exception in the second sentence of the subsection, related to IV-D suits, first appeared in the Committee Substitute for S.B. 298. *See id.* It was inserted at the request of the Texas Attorney General. This subsection incorporates one of the key elements of the legislation, which was to limit standing under section 14.051 to parents. *See supra* note 90 and accompanying text.

139. TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991). "[T]he State cannot recoup its costs for the care of an institutionalized adult child by virtue of this new statute." Sampson, *supra* note 4, at 38. Even if a parent does contractually transfer or assign his rights to seek child support under section 14.051 to an entity or agency, this transfer would seemingly be void and unenforceable.

140. *See infra* notes 207-09, 225-27 and accompanying text.

141. *See* TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991). Part D of Title IV of the federal Social Security Act authorizes a state-selected agency, such as the Attorney General in Texas, to establish and enforce child-support orders. *See* Social Security Act, 42 U.S.C. Pt. D, §§ 651 *et seq.* Because the Title IV-D child-support program requires a parent to assign his or her support rights to the State as a condition of receiving services from these programs, subsection 14.051(c) needed to have the exception for IV-D cases so as not to conflict with that program. *See* TEX. HUM. RES. CODE ANN. chs. 31 and 76 (Vernon 1980 and Pamphlet Supp. 1990); 42 U.S.C. §§ 601 *et seq.* and 651 *et seq.*

142. TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991). The Texas Attorney General is authorized to prosecute IV-D cases. *See* TEX. HUM. RES. CODE ANN. § 76.002 (Vernon 1991). The Texas Attorney General's Office requested this exception of IV-D cases from the anti-assignment provision in subsection 14.051(c).

143. *See* TEX. FAM. CODE ANN. § 14.051(c),(e) (Vernon Supp. 1991).

child,[144] nothing in section 14.051 or elsewhere prohibits a court from ordering child support to be paid to a nonparent.[145] Thus, a court may order either or both parents to pay support directly to a health-care provider or to the child himself or his guardian or representative.[146]

5. Subsection 14.051(d)

An action under this section may be brought regardless of the age of the child.[147]

As subsection 14.051(d) states, an action under Family Code section 14.051 may be commenced at any time regardless of the age of the child.[148] Thus, section 14.051 is available whether the disabled child is still a minor or is already an adult at the time the action is brought.[149]

6. Subsection 14.051(e)

An action under this section may be brought as an independent cause of action or as an action joined with any other action brought under this code.[150]

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144. *See supra* notes 22, 90, 109 and accompanying text.

145. *See, e.g.*, TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1991) (expressly authorizes support paid "to the persons specified by the court . . ."). This section merely prohibits nonparents from filing or intervening in suits founded on section 14.051, but it does not prohibit payments to nonparents under Section 14.05(a). *Id.*

146. *See, e.g.*, White v. Adcock, 666 S.W.2d 222, 226 (Tex. App.—Houston [14th Dist.] 1984, no writ) (portion of support ordered paid directly to children); TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1991).

147. TEX. FAM. CODE ANN. § 14.051(d) (Vernon Supp. 1991). Now-repealed article 4639a-1 expressly authorized support for a disabled child, whether a minor or an adult, but this provision was not carried forward in old subsection 14.05(b) of the Family Code. *See supra* notes 33-35, 39, 46 and accompanying text. Old subsection 14.05(b) was interpreted as requiring a filed petition or motion for postmajority support before the child turned eighteen, and this construction was later codified by an amendment to the section. *See supra* notes 44-50 and accompanying text. This new language in subsection 14.051(d) was contained verbatim in every draft of the new legislation. *See supra* notes 61-80 and accompanying text and *infra* apps. A and B. This subsection, along with the S.B. 298's applicability clause, should help eliminate litigation over the applicability of new section 14.051. *See infra* notes 228-31 and accompanying text. Subsection 14.051(d) conforms with several key elements of the new legislation. *See supra* notes 89, 92 and accompanying text.

148. TEX. FAM. CODE ANN. §§ 14.05(b), 14.051(a),(f) (Vernon Supp. 1991).

149. *Id.* §§ 14.05(b), 14.051(a),(f).

150. *Id.* § 14.051(e). Neither now-repealed article 4639a-1 nor old Family Code subsection 14.05(b) contained a similar provision. *See supra* notes 33, 39, 46 and accompanying text.

Subsection 14.051(e) expressly authorizes an action under Family Code section 14.051 to be brought either as an independent cause of action, such as a petition or a motion to modify solely seeking relief under section 14.051, or as an action joined with any other cause of action brought under the Family Code, such as a divorce suit.[151] This provision was intended to remove any question regarding whether relief sought under section 14.051 may be requested in conjunction with any other Family Code cause of action.[152]

7. Subsection 14.051(f)

If no court has continuing jurisdiction over the child, an action under this section may be brought as an original suit affecting the parent-child relationship. If there is a court of continuing jurisdiction over the child, an action under this section may be brought as a petition for further action under Section 11.07 of this code or a motion to modify under Section 14.08 of this code. If the child is under 18 years of age at the time an action to establish support is brought, the court may enter orders under Section 14.05 or this section, or both.

Family Code subsection 14.051(f) governs venue and jurisdiction, and specifically addresses support for minors. Section 14.051 confers jurisdiction upon a court to order support for a disabled child, regardless of the age of the child.[153] If there is no court of continuing jurisdiction over the child, an action must be brought as an original suit

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A similar provision was first contained in the 1987 legislation. *See supra* notes 57-60 and accompanying text. This provision was contained in all drafts of S.B. 298. *See supra* notes 61-80 and accompanying text and *infra* apps. A and B. The provision was modeled after similar provisions in the Code. *See infra* note 151. Subsection 14.051(e) comports with several key elements in the legislation. *See supra* notes 89, 92 and accompanying text.

151. TEX. FAM. CODE ANN. § 14.051(e) (Vernon Supp. 1991); *see also id.* §§ 3.55 (Vernon 1975), 11.02(b) (Vernon 1986), 11.07 (Vernon 1986 & Supp. 1991), 14.08(a), 14.30(d), 14.31(b)(2) (Vernon 1986), 14.051(f) (Vernon Supp. 1991).

152. *See id.* § 14.051(e); TEX. R. CIV. P. 51.

153. TEX. FAM. CODE ANN. § 14.051(f) (Vernon Supp. 1991). No similar provisions existed under now-repealed article 4639a-1 or old Code subsection 14.05(b). *See supra* notes 33, 39, 46 and accompanying text. Some provisions similar in concept to new sentences one and two of subsection 14.051(f) were attempted in the 1987 legislation. *See supra* notes 57-60 and accompanying text. Virtually identical versions of the three sentences of the subsection existed in all drafts of the Family Law Council's proposed bills. *See supra* notes 61-62; *infra* app. A. The Legislative Council's version of the last sentence began, "[i]f the child is a child for the purpose of Section 14.05 of this code . . . ," see *supra* note 64 and accompanying text and *infra* app. B, but the Committee Substitute for S.B. 298 amended this provision to read as it presently does. *See supra* notes 68-69 and accompanying text. In the Family Law Council's version, the first two sentences were in one section while the last sentence was in another; see

affecting the parent-child relationship.[154] An original suit would generally be appropriate in at least three situations: (1) where no prior order affecting the *minor or adult* child has ever been entered (i.e., no court has ever had jurisdiction over the child); (2) where a prior order affecting a *minor* child has ceased to be effective under its own terms or because the child has turned eighteen years of age or has otherwise become emancipated (i.e., the court has lost continuing jurisdiction over the child); or (3) where a prior order for support of an *adult* child has terminated pursuant to its own terms. Alternatively, if there is a court of continuing jurisdiction, the action must be brought in that court either as a petition for further action or a motion to modify.[155] This would apply where a prior order affecting a minor or an adult child still is in effect under its own terms. An order for postmajority support lodges in the court continuing jurisdiction over the child until the order terminates under its own terms or otherwise.[156] Thus, the first two sentences of subsection 14.051(f) should minimize litigation over where a section 14.051 suit should be filed.[157]

The last sentence of Family Code subsection 14.051(f) provides that, when the disabled child is still a minor, a support order may be entered under either sections 14.05 or 14.051, or both.[158] Thus, at one trial, while the child is still a minor, a court is authorized to enter an order to *establish* support for the disabled child to be paid indefinitely, both before and after the child reaches majority. The only difference is the court's determination of the terms and amount of support to be paid during the two different time periods.[159] Section 14.05 and the standard child-support guidelines under sections 14.052-.058 govern the amount and terms of support to be paid while

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supra notes 61-62 and *infra* app. A; however, all three sentences were combined in the Legislative Council's version. *See supra* note 64 and accompanying text; *infra* app. B.

154. *See* TEX. FAM. CODE ANN. § 11.04 (Vernon 1986). With respect to the availability of section 14.051 as affected by the Code's definitions and provisions regarding "child" and "parent" and the duration of the support provision, *see supra* notes 99 and 109 and accompanying text.

155. *See* TEX. FAM. CODE ANN. § 11.05 (Vernon 1986 & Supp. 1991). *See generally id.* §§ 11.07 (petition for further action), 14.08(c)(2) (motion to modify).

156. *See id.* §§ 11.01(5), 11.05(a) (Vernon 1986 & Supp. 1991).

157. For example, confusion might have arisen if the child is now an adult and a prior order for support of the child as a minor had already terminated. Now under subsection 14.051(f), in such a situation, since the court of continuing jurisdiction has lost jurisdiction, an original suit must be filed, not a motion to modify. *See supra* notes 154-56.

158. *See* TEX. FAM. CODE ANN. §§ 14.05(a),(b), 14.051(f) (Vernon Supp. 1991).

159. *See infra* notes 160-61.

a disabled child is a minor.[160] While the amount of support to be paid after a disabled child reaches majority may be determined and ordered while the child is still a minor, subsection 14.051(g) governs the amount of postmajority support.[161] Of course, evidence presented at the trial from which the support order results must support the amount of support ordered, regardless of when it is to be paid.[162]

8. Subsection 14.051(g)

In determining the amount of support to be paid after a child's 18 birthday, the specific terms and conditions of that support, and the rights, privileges, duties, and powers of both parents with respect to the support of the child, the court shall determine and give special consideration to: (1) any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability; (2) whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial

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160. *See* TEX. FAM. CODE ANN. §§ 14.05, 14.052-.058 (Vernon Supp. 1991) (new statutory child-support guidelines, effective September 1, 1989); *see also id.* § 14.051(g) (discussing post-majority support); *supra* note 92.

161. *See* TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991); *supra* note 92 and accompanying text.

162. An amount of child support may be determined in part by reference to a formula or schedule. *See* Walton v. Walton, 567 S.W.2d 66, 68 (Tex. Civ. App.—Amarillo 1978, no writ). Indeed, the new statutory child-support guidelines direct courts to determine the amount of support based upon the formulas, schedules and provisions set out in the guidelines. *See* TEX. FAM. CODE ANN. §§ 14.052-.58 (Vernon Supp. 1991) (e.g., a percentage of the obligor's "net resources," with the percentage based on the number of children). However, a child-support order cannot authorize the future modification in the amount of support based merely upon some arbitrary formula or schedule contained in the order. *See, e.g.*, Euston v. Euston, 759 S.W.2d 788, 790 (Tex. App.—El Paso 1988, no writ); Price v. Price, 606 S.W.2d 51, 52 (Tex. Civ. App.—Fort Worth 1980, no writ); In Interest of J.M. & G.M., 585 S.W.2d 854, 856-57 (Tex. Civ. App.—San Antonio 1979, no writ); Doss v. Doss, 521 S.W.2d 709, 713 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). Any court-ordered amount of support must be based upon *existing evidence then before the court. See, e.g.*, Tully v. Tully, 595 S.W.2d 887, 888 (Tex. Civ. App.—Austin 1980, no writ); *cf.* Cisneros v. Cisneros, 787 S.W.2d 550, 551-52 (Tex. App.—El Paso 1990, no writ). Of course, *existing evidence then before the court* could justify a present order mandating or authorizing an increase or decrease in the amount of support in the future. *See, e.g.*, Friedman v. Friedman, 521 S.W.2d 111, 114 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (amount of support decreased as each of several children turned eighteen). Indeed, the new statutory child-support guidelines provide that if the order governs support for more than one child, any order to decrease support as any of the children reach majority or are otherwise emancipated should be reduced to an amount which corresponds to the appropriate lower percentage under the guidelines. *See* TEX. FAM. CODE ANN. § 14.055 (Vernon Supp. 1991).

care or personal supervision of the adult child; (3) the financial resources available to both parents for the support, care, and supervision of the adult child; and (4) any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

Family Code subsection 14.051(g) addresses the amount of postmajority support and the terms of an order requiring support of a disabled child that is to be paid *after* the child becomes an adult.[163] Although an order to establish postmajority support may be entered while a disabled child is still a minor, subsection 14.051(g) must be used to determine the amount and terms of the adult child support.[164] Balancing the relaxed substantive standards under subsection 14.051(b)(1),[165] subsection (g) limits a court's discretion in determin-

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163. TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991). No similar provision existed in any predecessor statutes to section 14.051 or in the 1987 proposed legislation. *See supra* notes 33, 39, 46, 57-58 and accompanying text. The Legislative Council's version somewhat modified the Family Law Council's version; however, subsection (g) of the Committee Substitute for S.B. 298 was reworded to primarily conform with the Family Law Council's draft. *See supra* notes 61-64 and accompanying text; *infra* apps. A and B. The primary changes between the Legislative Council's version and the Committee Substitute for S.B. 298 were as follows. First, the first sentence of the Legislative Council's version of subsection (g) had read, "[i]n determining the amount of support *for an adult child* . . . ," but the italicized phrase was deleted and substituted with the present phrase, "to be paid after a child's 18th birthday . . . ." *Compare infra* app. B *with* TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991). As originally drafted, courts might have misinterpreted subsection 14.051(g) as being applicable only in suits in which the child was already over eighteen, whereas the new language is not so limiting. Under the new language, subsection 14.051(g) can still be applied in a suit in which the child is still a minor. However, it only determines the amount payable after the child reaches majority, and this amount must be supported by evidence at the present trial. *See supra* notes 92, 159-61 and accompanying text. Second, the Legislative Council's use of the term "a parent" was changed to "both parents" in the introductory sentence of subsection (g), to emphasize once again that adult child support is the responsibility of *both* parents according to their respective abilities. *See supra* notes 91, 110 and accompanying text and *infra* app. B. Third, and importantly, the Legislative Council's draft, in the introductory sentence, merely required a court to "consider" the following four categories of factors, whereas Committee Substitute for S.B. 298 required a court to "determine and give special consideration to" the four subdivisions. *See infra* app. B.; *supra* notes 64-69 and accompanying text; *infra* notes 169-71. Finally, the term "child" used throughout the four subdivisions in the Legislative Council's version was amended to read "adult child" in Committee Substitute for S.B. 298. *See infra* app. B; *supra* notes 68-69. This comports with one of the key elements of the legislation. *See supra* note 93 and accompanying text. Focusing the court's attention on certain factors in subsection 14.051(g) is intended to counter-balance the slight lessening of the substantive standard under subsection 14.051(b)(1). *See supra* notes 119-27 and accompanying text; *infra* notes 165-66.

164. TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991).

165. *See id.* § 14.051(b)(1); *supra* notes 119-27.

ing the amount and the terms of the support order, as well as the rights and duties of both parents with respect to the support, that are effective, or that will become effective, *after* the child turns eighteen.[166]

The phrase "specific terms and conditions of that support" refers to the provisions of an order addressing to whom and in what manner the support is to be paid and the duration of the support order.[167] The language referring to "the rights, privileges, duties, and powers of both parents" gives a court broad authority to enter orders regarding *both* parents with respect to a disabled child's postmajority support; however, the phrase "with respect to the *support* of the child" limits such an order to terms and conditions affecting the support of the child and does not open the door to postmajority conservatorship or possession orders.[168]

This subsection also states that the court "shall determine and give special consideration to" the categories of factors listed under the four subdivisions in subsection 14.051(g).[169] As originally introduced, S.B. 298 merely stated that the Court "shall *consider*" the four categories in determining the amount and terms of support; however, Senate Committee Substitute S.B. 298 substituted the phrase "determine and give special consideration to," thus requiring a court to concentrate on the four subdivisions of subsections 14.051(g)[170] as the basis for determining the amount of the adult child support. The phrase "shall determine" supports a requirement that, upon request, a court must enter findings of fact and conclusions of law with reference to the factors listed in subdivisions (1)-(4) of subsection (g).[171] Although a court is required to consider these factors, this subsection is not an exclusive list. Thus, while a court must consider subsection (g) factors, it may also consider other factors in determining the amount and terms of postmajority support. Subsection (g) was intended to preclude a court's rote application of a percentage of an obligor's net resources in determining postmajority support, and to direct a court to concentrate, instead, on requiring *both* parents to support an adult

166. *See* TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991) (governing support of adult child); *supra* notes 119-27.

167. *See supra* notes 113-17 and *infra* note 181 and accompanying text.

168. *See* TEX. FAM. CODE ANN. § 14.051(g),(h) (Vernon Supp. 1991).

169. *See id.* § 14.051(g).

170. *See id.*; *supra* notes 64-69 and accompanying text and *infra* apps. A and B.

171. *See* TEX. R. CIV. P. 296.

disabled child based upon those needs and resources *directly related* to the disability.[172] Thus, the total amount of support may, under subdivision (g), be less than, equal to, or greater than an amount of support calculated under the standard child-support guidelines applicable to minor children, but this support should be borne by *both* parents according to their relative abilities to provide the support.[173]

Subdivisions (1) through (4) of subsection 14.051(g) address the support of an "adult child," which term is defined in subsection 14.051(a) as a child eighteen years of age or older.[174] Under subdivision (1) of subsection (g) a court must determine and consider those costs and expenses *directly required by or related to* a child's disabilities.[175] Subdivision (2) requires a court to determine and give special consideration to whether either parent actually pays for or provides the substantial care or personal supervision for the adult child.[176] Subdivision (3) requires a court to determine and give special consideration to "financial resources available" to "both" parents for the support and supervision of the adult child.[177] Finally, subdivision (4) of subsection (g) is a catch-all provision requiring a court to deter-

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172. *See* TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991). A rote application of a percentage of an obligor's net resources is the general approach under the standard child-support guidelines applicable to healthy minor children. *See id.* §§ 14.052-.058. A court's child-support order will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion, the test for which is whether the court acted without reference to any guiding rules or principles, in other words, whether the act was arbitrary or unreasonable. Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (upholding trial court's amount of support for adult disabled child). The "guiding rules or principles" for determining the amount of postmajority support would be section 14.051(g).

173. Some expert testimony may be required to prove the needs and supervision directly related to the adult child's disabilities. *See, e.g.*, Waltz v. Waltz, 776 S.W.2d 320, 322 (Tex. App.—Houston [1st Dist.] 1989, no writ) (recovery under order requiring father to pay children's reasonable medical expenses required expert testimony that expenses incurred were "reasonable").

174. TEX. FAM. CODE ANN. § 14.051(a),(g)(1)-(4) (Vernon Supp. 1991).

175. *Id.* § 14.051(g)(1).

176. *Id.* § 14.051(g)(2).

177. *Id.* § 14.051(g)(3). Again, as throughout all of section 14.051, the emphasis is on "both" parents' responsibilities with respect to an adult child. The Legislative Council's draft, at subdivision (3), referenced "each parent," *see infra* app. B, but the Committee Substitute for S.B. 298 was changed to "both parents." *See supra* notes 68-69 and accompanying text. "Financial resources" would include any income from any public or private source, property or asset. The term "available" implies resources which are not necessarily in a parent's present possession and control but over which the parent has a present legal right to possession or present ability to obtain (e.g., unliquidated assets, future loans, deferred benefits or payments, etc.).

mine and give special consideration to "any other financial resources" or "other resources or programs" available from any source for the support and supervision of the adult child.[178]

9. Subsection 14.051(h)

An order under this section may contain provisions governing the rights, privileges, duties, and powers of both parents with respect to the support of the child and may be modified or enforced in the same manner as any other order under this title.[179]

Family Code subsection 14.051(h) addresses the contents, and the modification and enforcement, of orders entered under new section 14.051.[180] Like subsection 14.051(g), subsection (h) authorizes an order governing the rights and duties of "both" parents, but only "with respect to the *support* of the child."[181] It further clarifies that an existing order already entered pursuant to new section 14.051 may thereafter be modified or enforced to the same extent as any other

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178. TEX. FAM. CODE ANN. § 14.051(g)(4) (Vernon Supp. 1991). This last category refers to both financial and nonfinancial resources and programs available from sources other than the parents, whether public or private. Again, the term "available" implicitly includes resources and programs which are available but have not yet been utilized or obtained.

179. *Id.* § 14.051(h). No similar provision existed in now-repealed article 4639a-1, old subsection 14.05(b), or the 1987 legislation. *See supra* notes 33, 39, 46, 57-58 and accompanying text. The present language was contained virtually verbatim in the Family Law Council's draft, see *infra* app. A, but was substantially shortened in the Legislative Council's version. *See infra* app. B. That portion of present subsection 14.051(h) which begins with "contain" and ends with the second "may" was added to subsection (h) in the Committee Substitute for S.B. 298. *See supra* notes 68-69 and accompanying text.

180. TEX. FAM. CODE ANN. § 14.051(h) (Vernon Supp. 1991); *see also id.* § 14.05(i). For suggested form provisions for an order requiring postmajority support for a disabled child, see 2 STATE BAR OF TEXAS, TEXAS FAMILY LAW PRACTICE MANUAL 6.59 (1990) and Kazen, *Support*, in 3 FAMILY LAW — TEXAS PRACTICE AND PROCEDURE § 51.10A[2] (Kazen ed. 1989).

181. TEX. FAM. CODE ANN. § 14.051(h) (Vernon Supp. 1991). With respect to the phrase "rights, privileges, duties, and powers," the court has the discretion to determine whether one or both parents should be ordered to pay support, the amount of the support, the recipient of the support, the duration, suspension, and alteration of the support payments, whether the support should be paid through a support-collection agency, and the other terms and conditions relating to the adult support payment. *See, e.g.*, Tharp v. Tharp, 438 S.W.2d 391, 393 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ dism'd); TEX. FAM. CODE ANN. § 14.051(g) (Vernon Supp. 1991); *see also supra* notes 113-17, 168 and accompanying text. The court may determine if a withholding order, or an order for a bond or other security to secure the payments, should be entered. *See* TEX. FAM. CODE ANN. §§ 14.05(e), 14.42-.43 (Vernon 1986 & Supp. 1991). However, the factors set out in subsection 14.051(g) still affect the court's discretion regarding the amount of adult child support. *See supra* notes 163-78.

child-support order.[182]

A new order entered under section 14.051 may be subsequently modified pursuant to Family Code subsection 14.08(c)(2).[183] If a prior order for adult child support was never entered or, having been entered, is no longer in effect, there is no prior order to be modified; however, adult support may be established, or re-established, in an original suit pursuant to subsections 14.051(b), (d), (e) and (f) and the applicability clause of S.B. 298.[184] The affirmative defense of *res judicata* apparently would not bar a new suit under section 14.051 if a prior opportunity or attempt to obtain adult support was not available for trial on the merits or was denied on the *legal* basis of a lack of authority or jurisdiction for the entry of such an order at the time of the request.[185] On the other hand, if a prior attempt to obtain adult support was litigated on the merits and denied based on *factual* grounds, then *res judicata* may apply to bar the new cause of action unless the presently litigated factual circumstances are proven materially and substantially different from the factual circumstances existing at the time of the prior suit.[186]

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182. TEX. FAM. CODE ANN. § 14.051(h) (Vernon Supp. 1991); *see infra* notes 183-210.

183. *See* TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Supp. 1991).

184. *See id.* § 14.051(b), (d), (e), (f); *see also infra* note 228 and accompanying text.

185. Section 14.051 creates a new legal cause of action or, technically, a new legal availability of a pre-existing cause of action. In such cases, *res judicata* does not seem to be a bar. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1944); Muchard v. Berenson, 307 F.2d 368, 369-70 (5th Cir.), *cert. denied*, 371 U.S. 962 (1963); Marino v. State Farm Fire & Cas. Ins. Co., 787 S.W.2d 948, 949-50 (Tex. 1990) ("*res judicata* is not a defense in a subsequent action if there has been a change in the material facts, the applicable *statutory law*, or the *decisional law* between the first judgment and the second suit." (emphasis added)); State v. Standard, 414 S.W.2d 148, 151 (Tex. 1967); *see also* Scaling v. Williams, 284 S.W. 310, 312-13 (Tex. Civ. App.—Ft. Worth 1926, no writ). *See generally* 48 TEX. JUR.3d *Judgments* §§ 367, 382, 384 (1986). "[I]f there has been a material change in the basic factual or *legal situation* existing at the time [the prior judgment] was rendered, the judgment may lose its conclusive character." 48 TEX. JUR.3d *Judgments* § 367, at 431-32 (emphasis added); *accord State Farm Mut. Auto Ins. Co.*, 324 U.S. at 162; *Marino*, 787 S.W.2d at 949-50; *Standard*, 414 S.W.2d at 151; Powell v. Powell, 703 S.W.2d 434, 436 (Tex. App.—Waco 1985, writ ref'd n.r.e.); Ex parte Boyd, 157 S.W. 254, 255 (Tex. Civ. App.—Texarkana 1913, no writ); *cf.* Moreno v. Alejandro, 775 S.W.2d 735, 738-39 (Tex. App.—San Antonio 1989, no writ) (where asset could not in fact be divided pursuant to divorce decree, *res judicata* does not apply).

186. *See, e.g.*, Ogletree v. Crates, 363 S.W.2d 431, 434-36 (Tex. 1963); Wilson v. Elliott, 96 Tex. 472, 476-77, 73 S.W. 946, 946-47 (1903); Schumann v. Abernathy, 442 S.W.2d 455, 456-57 (Tex. Civ. App.—Waco 1969, no writ); Doherty v. Doherty, 279 S.W.2d 690, 695 (Tex. Civ. App.—Austin 1955, no writ); *see also* Villarreal v. Villarreal, 684 S.W.2d 214, 218 (Tex. App.—Corpus Christi 1984, no writ); TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Supp. 1991) ("material change" test to modify support order).

Enforcing an order entered under section 14.051 is somewhat complicated. Family Code subsection 14.051(h) provides that an order entered under new section 14.051 "may be . . . enforced in the same manner as any other order under this title."[187] Child-related orders entered under Family Code Title 2 may be enforced under Title 2, Subtitle A, Chapter 14, Subchapter B.[188] The express remedies set out in Subchapter B are not a limit on and do not preclude the "use of any other civil or criminal proceeding to enforce child support obligations . . . ."[189] The two primary Family Code enforcement remedies set out under Subchapter B to collect back-due support are an action for contempt under section 14.40 and an action for a money judgment under section 14.41.[190] The mere fact that a child is an adult does not *per se* preclude either of these remedies.[191]

A court has jurisdiction to enter a contempt judgment under section 14.40 only if the motion is filed "within six months after: (1) the child becomes an adult, or (2) the date on which the child support obligation generally terminates pursuant to the decree or order or by operation of law."[192] This is a jurisdictional (substantive), not a procedural (statute of), limitation.[193] Generally, when a "child becomes an adult" a parent's child-support obligation terminates "by operation of law;"[194] therefore, depending on how section 14.40 is interpreted, the Family Code contempt section may be a limited remedy to enforce back-due adult support payments ordered under new section 14.051.[195] However, since this Code's contempt provision is not an exclusive method for enforcing child-related orders, other laws may be utilized to enforce a section-14.051 order. As with any other civil

187. TEX. FAM. CODE ANN. § 14.051(h) (Vernon Supp. 1991).

188. *See id.* §§ 14.30-.51 (Vernon 1986 & Supp. 1991).

189. *Id.* § 14.30(d) (Vernon 1986).

190. *See id.* §§ 14.40-.41 (Vernon 1986 & Supp. 1991).

191. *See id. See generally* Huff v. Huff, 648 S.W.2d 286 (Tex. 1983) (judgment action); Ex parte Hooks, 415 S.W.2d 166 (Tex. 1967).

192. TEX. FAM. CODE ANN. § 14.40(b) (Vernon 1986).

193. *Id.* § 14.41(b); *see infra* note 202.

194. TEX. FAM. CODE ANN. § 14.40(b) (Vernon 1986).

195. Whether subdivisions (1) and (2) of Family Code Section 14.40(b) are mutually exclusive is uncertain, that is, whether subdivision (1) operates to terminate the support obligations independently of subdivision (2), and vice versa. If so, then when the child becomes "an adult" under subdivision (1), this alone would suffice to terminate a section-14.051 support order, notwithstanding subdivision (2). However, if each subdivision stands independently, then subdivision (2) would apply to enforce a section-14.051 support order, despite the age of the child, at least until six months after the order terminates under its own terms.

order entered under the Family Code or any other law, any court has inherent power and statutory authority to enforce its orders by contempt.[196] Contempt orders entered under section 14.051 may likewise be invoked to enforce this general power and authority.[197] Unlike money judgments, the Family Code provides no statute of limitations for contempt actions; however, case law has adopted the general four-year statute of limitations for child-support contempt actions.[198]

Distinct from a contempt action is a Family Code action for a money judgment for past-due support payments under section 14.41.[199] The Code provides that each "periodic" support payment "not timely made shall constitute a final judgment for the amount due and owing."[200] However, a court's jurisdiction to enter a money judgment is retained only if a motion for an arrearage judgment "is filed within four years after: (1) the child becomes an adult; or (2) the date on which the child support obligation terminates pursuant to the decree or order or by operation of law."[201] This is a jurisdictional limit on the availability of the section.[202] As with the contempt provision, depending on how section 14.41 is interpreted, the Family Code judgment remedy may be of limited value in enforcing adult support pay-

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196. *See, e.g.*, Ex parte Gorena, 595 S.W.2d 841, 845 (Tex. 1979); Ex parte Browne, 543 S.W.2d 82, 86 (Tex. 1976); Ex parte Ortega, 759 S.W.2d 191, 192 (Tex. App.—Houston [14th Dist.] 1988, original proceeding); TEX. GOV'T CODE ANN. §§ 21.001-.002 (Vernon 1988 & Supp. 1990).

197. *See supra* note 196.

198. *See* Ex parte McNemee, 605 S.W.2d 353, 357 (Tex. Civ. App.—El Paso 1980, orig. proceeding); Ex parte Payne, 598 S.W.2d 312, 318 (Tex. Civ. App.—Texarkana 1980, orig. proceeding) (relying on TEX. REV. CIV. STAT. ANN. art. 5529, which has now been repealed and recodified as TEX. CIV. PRAC. & REM. CODE § 16.051 (Vernon 1986)).

199. *See* TEX. FAM. CODE ANN. § 14.41 (Vernon 1986 & Supp. 1991).

200. *Id.* § 14.41(a) (Vernon Supp. 1991).

201. *Id.* § 14.41(b).

202. *See id.* Family Code subsections 14.40(b) and 14.41(b) contain virtually identical sentences referencing the court's retention of jurisdiction to enforce the order after the child becomes an adult. *See* TEX. FAM. CODE ANN. §§ 14.40(b), 14.41(b) (Vernon 1986 & Supp. 1991) (different time limits apply, i.e., 6 months for contempt, 4 years for money judgment). These are not statutes of limitations but are statutory grants of jurisdiction to the court. On the other hand, the first sentence of subsection 14.41(b), concerning money judgments, is a statute of limitations. *See infra* note 205. In view of the jurisdictional extensions provided in subsections 14.40(b) and 14.41(b), the mere fact that the child has become an adult does not alone render the order unenforceable. *See, e.g.*, In Interest of C.L.C., 760 S.W.2d 790, 792 (Tex. App.—Beaumont 1988, no writ); Ex parte Wilbanks, 722 S.W.2d 221, 223 (Tex. App.—Amarillo 1986, original proceeding); *see also* Ex parte Hooks, 415 S.W.2d 166, 168 (Tex. 1967). *See generally* Ruffin v. Ruffin, 753 S.W.2d 824 (Tex. App.—Houston [14th Dist.] 1988, no writ).

ments under a section-14.051 order.[203] There is no other statute authorizing courts to enter money judgments for past-due support.[204] Unlike an action for contempt, the Family Code does expressly set forth a ten-year statute of limitations for money judgments for past-due child support.[205] Suit may be brought against the defaulting parent or his estate.[206]

A child-support obligation imposed by contract, such as by a consensual (contractual) divorce decree or postdivorce order, or by an agreement incident to divorce incorporated into a divorce decree, may be enforced by an independent contract suit, but only if the agreement, consensual decree, or order expressly so provides.[207] The fact that the child is an adult does not *per se* prohibit such a suit.[208] The four-year statute of limitations applies to contract causes of action.[209]

Finally, the criminal nonsupport section of the Texas Penal Code is available to prosecute a parent if he "fails to provide support for his child . . . who is the subject of a court order requiring the individual to support the child."[210]

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203. *See supra* note 195.

204. *See* Comment, *Enforcement of Unpaid Child Support Payments Against a Decedent's Estate*, 32 BAYLOR L. REV. 269, 271 (1980). For contract actions on agreed support orders, see *infra* notes 207-09.

205. *See* TEX. FAM. CODE ANN. § 14.41(b) (Vernon Supp. 1991); *see also* Huff v. Huff, 648 S.W.2d 286, 289-90 (Tex. 1983); Shannon v. Fowler, 693 S.W.2d 54, 56 (Tex. App.—Fort Worth 1985, writ dism'd) (statute begins to run on each individual payment when it accrues); Houtchens v. Matthews, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977, writ dism'd). These cases were not based on Family Code section 14.41(b) or its predecessor, now-repealed Family Code 14.09, but relied on the general 10-year statute of limitations. The 10-year statute relied on was Revised Civil Statute Article 5532, which has now been repealed and recodified. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (Vernon 1986). Since subsection 14.41(b) is a substantive limitation on the court's power to act rather than a procedural statute of limitation, it need not be plead as an affirmative defense under Texas Rule of Civil Procedure 94. Jordan v. Middleton, 762 S.W.2d 339, 342 n.1 (Tex. Civ. App.—San Antonio 1988, no writ); Sandford v. Sandford, 732 S.W.2d 449, 451 (Tex. App.—Dallas 1987, no writ).

206. *See, e.g.*, Adair v. Martin, 595 S.W.2d 513, 514-15 (Tex. 1980) (can use Probate Code section 37 with Family Code section 14.09(c)(now-repealed and superseded by Family Code section 14.41) to sue estate for deceased's unpaid child support); TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1991) (obligation for debts of deceased is on his estate). *See generally* Comment, *Enforcement of Unpaid Child Support Payments Against a Decedent's Estate*, 32 BAYLOR L. REV. 269 (1980).

207. Elfeldt v. Elfeldt, 730 S.W.2d 657, 658 (Tex. 1987) (per curiam); TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1986); *supra* notes 21, 26 and *infra* notes 222-24.

208. *See infra* note 209.

209. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

210. TEX. PENAL CODE ANN. § 25.05(a) (Vernon 1989). The offense under subsection (a) is broken into two types: (1) the failure to "provide support for his child younger than

10. Subsection 14.051(i)

Except as otherwise provided by this section, proceedings under this section are the same as in a suit affecting the parent-child relationship. Except as otherwise provided by this section, all substantive and procedural rights and remedies under this code or otherwise which relate to the establishment, modification, or enforcement of child support orders shall apply to actions brought or orders entered under this section.[211]

Family Code subsection 14.051(i) addresses procedural matters generally. It broadly provides that all proceedings under new section 14.051 shall be treated as proceedings in any other suit affecting the parent-child relationship.[212] Any right or remedy available under any federal or Texas law (including the Texas Family Code) to either establish, modify or enforce a child-support order, applies to actions under new section 14.051.[213]

11. Subsection 14.051(j)

This section does not affect a parent's: (1) cause of action for the support of a disabled child under any other law; or (2) ability to contract for the support of a disabled child.[214]

Family Code subsection 14.051(j) is intended not only to mean

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eighteen years of age;" and (2) the failure to provide support "for his child . . . who is the subject of a court order requiring the individual to support the child." TEX. PENAL CODE ANN. § 25.05(a) (Vernon 1989). The latter provision does not reference age, as does the first. Therefore, this provision may be available to prosecute a parent for criminal nonsupport if the parent fails to comply with a court order under Family Code section 14.051.

211. TEX. FAM. CODE ANN. § 14.051(i) (Vernon Supp. 1991). No similar provisions existed under now-repealed article 4639a-1 or old Family Code subsection 14.05(b). *See supra* notes 33, 39, 46 and accompanying text. A few similar provisions existed under the 1987 proposed legislation. *See supra* notes 57-58 and accompanying text. Both sentences of the subsection existed virtually verbatim in the Family Law Council's drafts, *see infra* app. A, and while the second sentence was deleted from the Legislative Council's draft, *see infra* app. B, it was included in the Committee Substitute for S.B. 298. *See supra* notes 68-69.

212. TEX. FAM. CODE ANN. § 14.051(i) (Vernon Supp. 1991); *see also id.* § 11.14(a) (Vernon 1986) ("[e]xcept as otherwise provided in this subtitle, proceedings shall be as in civil cases generally.").

213. *Id.* § 14.051(i). The intent behind this "catch-all" subsection is to help alleviate any confusion in suits to establish, modify or enforce orders entered under new section 14.051.

214. TEX. FAM. CODE ANN. § 14.051(j) (Vernon Supp. 1991). No similar provision was contained in now-repealed article 4639a-1, old subsection 14.05(b), or the 1987 draft legislation. *See supra* notes 33, 39, 46, 57-58 and accompanying text. This provision was contained virtually verbatim in the Family Law Council's drafts, see *infra* app. A, and in all versions of S.B. 298. *See supra* notes 61-80 and accompanying text and *infra* app. B.

what it says, but to highlight other provisions of law which may provide some relief to parents for the care of their disabled children and which allow parents to contract between themselves and with others for such support.[215] Subsection 14.051(j)(1) serves as notification of other laws available to parents regarding support of disabled children.[216] For example, Texas Probate Code section 423 provides that able relatives shall maintain an incompetent person with no estate in the following priority: spouse, parent, child and grandchildren.[217] If no relative is able to do so, the county maintains the support.[218] While this may undoubtedly obligate parents to maintain an incompetent minor, Probate Code section 423 is generally considered to require repeated suits for past-due debts against a parent or other relative who refuses to reimburse the entity or person who has provided necessary support for the incompetent child.[219] A question exists as to whether Probate Code section 423 is available to require one parent to pay direct, periodic child-support payments to the other parent. One case has held that a parent, *as a guardian* of the child, could use Probate Code section 423 to require periodic child support from the other parent.[220] Another court has held that section 423 does not apply unless the State seeks reimbursement and that the section does not otherwise create a private cause of action by one parent against the other.[221]

Subdivision (2) of Family Code subsection 14.051(j) states that the section does not affect a parent's ability to contract for support for a disabled child.[222] Thus, parents may, by way of an agreement incident to divorce, agreed (consensual) decree or order, or an independent contract, enter into contractual agreements between themselves for the parental support of an adult child.[223] A parent may also con-

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215. *See* TEX. FAM. CODE ANN. § 14.051(j) (Vernon Supp. 1991).

216. *Id.* § 14.051(j)(1).

217. *See* TEX. PROB. CODE ANN. § 423 (Vernon Supp. 1980).

218. *Id.*

219. *See, e.g.*, Red v. Red, 552 S.W.2d 90, 91, 98 (Tex. 1977); *State v. Stone*, 290 S.W.2d 761, 762 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.).

220. *See* Adkins v. Adkins, 743 S.W.2d 745, 746-47 (Tex. App.—El Paso 1987, writ denied); Price, *supra* note 4, at E-12 to E-14.

221. *See* Runnells v. Firestone, 746 S.W.2d 845, 852 (Tex. App.—Houston [14th Dist.]), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988). In denying the petition for writ of error, the Supreme Court expressly declined to approve the Court of Appeal's interpretation of Section 423. *Runnels*, 760 S.W.2d at 240.

222. TEX. FAM. CODE ANN. § 14.051(j)(2) (Vernon Supp. 1991).

223. *See, e.g.*, Elfeldt v. Elfeldt, 730 S.W.2d 657, 658 (Tex. 1987) (per curiam); Busbey v.

tract with a third party for the care and supervision of a disabled child; however, as noted, a parent may not transfer or assign his rights under section 14.051 to a third party.[224]

12. Subsection 14.051(k)

This section does not affect the substantive or the procedural rights or remedies of a person other than a parent, including a governmental or private entity or agency, with respect to the support of the disabled child under any other law.[225]

Family Code subsection 14.051(k) is intended to mean what it says, and also to make entities and agencies, as well as parents, aware of the existence of other laws regarding support of children. Although only a "parent" may bring or maintain a cause of action under Family Code section 14.051, and entities and agencies are expressly prohibited from doing so,[226] there are other specific statutory causes of action available to nonparents allowing them to seek support payments or reimbursement from parents and other relatives for the care and supervision of a child.[227]

13. Effective Date and Applicability Clause

Section 3 of S.B. 298 provides an express effective date and an applicability clause for new Family Code section 14.051 as follows:

This Act takes effect September 1, 1989, and applies only to a suit pending or filed on or after that date to establish an order for support or to modify or enforce an order previously established, whether the dis-

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Busbey, 619 S.W.2d 472, 475 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Holder v. Holder, 528 S.W.2d 113, 115-16 (Tex. Civ. App.—Tyler 1975, no writ); TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1986); *supra* notes 21, 26, 207-09. *See generally* Price, *supra* note 4, at E-58, E-64 to E-65.

224. *See* TEX. FAM. CODE ANN. § 14.051(c) (Vernon Supp. 1991).

225. *Id.* § 14.051(k). No similar provision existed in now-repealed article 4639a-1, old Family Code subsection 14.05(b), or the 1987 draft legislation. *See supra* notes 33, 39, 46, 57-58 and accompanying text. This provision existed virtually verbatim in all versions of S.B. 298. *See supra* notes 61-80 and *infra* apps. A and B.

226. *See supra* notes 138-39, 144-45 and accompanying text.

227. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 35.001-.013 (chronically ill and disabled children); TEX. REV. CIV. STAT. ANN. arts. 3196a, § 2 (Vernon Supp. 1991) (state hospitals), 3198 (hydrophobia), 3202-a (Vernon 1986) (other institutions); *see also* TEX. HUM. RES. CODE ANN. §§ 32.001-.003, 111.059 (Vernon 1980 & Supp. 1991). *See generally* Price, *supra* note 4, at E-14 to E-16.

abled child is a minor or an adult.[228]

Thus, section 14.051 took effect on September 1, 1989 and expressly applies to any suit pending, or brought on or after, the effective date. The broad scope of the applicability clause was intended to eliminate litigation regarding the applicability of new section 14.051 under different fact situations involving, for example, the age of the child (1) when the suit is brought, (2) when the Code or this particular section went into effect, or (3) at the filing time of prior suits or orders, or the present suit. When article 4639a-1, a predecessor to Family Code section 14.051,[229] was enacted, there was a flurry of suits involving the application of the act.[230] Also, similar litigation arose involving the applicability of a 1953 amendment to old article 4639a (general statute authorizing child support) which raised the age limit of the child, for purposes of court-ordered child support, from sixteen to eighteen years of age.[231] These suits involved issues relating to whether the new legislation could be applied to cases where the child had already become an adult. The all-inclusive nature of the language of the applicability clause of S.B. 298 should make it clear, as should various provisions in section 14.051 itself, that new Family Code section 14.051 applies to any disabled child of any age, and may be utilized regardless of the age of the child when (1) the Family Code was enacted, (2) new section 14.051 went into effect, (3) a prior order was entered, or (4) the present suit was filed.[232]

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228. Act of May 26, 1989, ch. 368, § 2, 1989 Tex. Sess. Law Serv. 1457, 1458 (Vernon). The effective date was the same in all drafts of the legislation. *See supra* notes 61-80 and accompanying text; *infra* apps. A and B. The Family Law Council's draft bill's applicability clause was much more specific, detailed and all encompassing; *see infra* app. A; however, the Legislative Council's draft was much more limited and potentially confusing. *See infra* app. B. The version of the clause inserted in the Committee Substitute for S.B. 298 was much more akin to the Family Law Council's version. *See supra* notes 68-69 and accompanying text.

229. *See supra* notes 32-36 and accompanying text.

230. *See* Ex parte Hatch, 410 S.W.2d 773, 777 (Tex. 1967); Tharp v. Tharp, 438 S.W.2d 391, 394 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ dism'd); Cuellar v. Cuellar, 406 S.W.2d 510, 512 (Tex. Civ. App.—Corpus Christi 1966,. no writ), *disapproved in Ex parte Hatch*, 410 S.W.2d at 778; Price, *supra* note 4, at E-40 to E-43; *see also* Ex parte Hooks, 415 S.W.2d 166, 167-68 (Tex. 1967).

231. *See* McGowen v. McGowen, 273 S.W.2d 658, 659-60 (Tex. Civ. App.—Fort Worth 1954, writ dism'd); Du Pre v. Du Pre, 271 S.W.2d 829, 832 (Tex. Civ. App.—Dallas 1954, no writ); *supra* note 29 and accompanying text. *See generally* Price, *supra* note 4, at E-41.

232. *See* In Matter of Marriage of Roads, 773 S.W.2d 28 (Tex. App.—Amarillo 1989, writ denied) (amendment allowing court to appoint parents as joint managing conservators absent agreement applied to suits pending on its effective date).

IV. SUMMARY AND CONCLUSION

In summary, a disabled adult child now may receive court-ordered child support for an indefinite time if, whether institutionalized or not, the child (1) requires substantial care and personal supervision because of the physical or mental disability, (2) the child will not be able to support himself, and (3) the child's disability exists, or the cause of the disability is known to exist, before or on the child's eighteenth birthday. Prior law conditioned postmajority child support upon whether suit was filed before the child turned eighteen years old, while new Family Code section 14.051 conditions this support upon when the child's disability arose. The suit may be brought regardless of the age of the child. With only one exception, only a parent has standing to bring suit under section 14.051. The emphasis is on both parents sharing the cost of the child's postmajority disability. The amount of child support is set by focusing upon the financial needs directly related to the child's disability. Thus, while broadening an adult child's ability to receive support, the new law lessens each parent's individual burden in providing that support.

APPENDIX A—FAMILY LAW COUNCIL DRAFT
A BILL TO BE ENTITLED
AN ACT

relating to support for a minor or adult disabled child for an indefinite period.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 14.05(b), Family Code, is amended by deleting the present section and substituting therefor as follows:

(b) *The court may order either or both parents to provide for the support of a minor or adult disabled child for an indefinite period as provided under Section 14.051 of this code.*

SECTION 2. Chapter 14, Family Code, is amended by adding Section 14.051 to read as follows:

Sec. 14.051. SUPPORT OF A MINOR OR ADULT DISABLED CHILD FOR AN INDEFINITE PERIOD.

(a) *For purposes of this section only, "child" means a minor or an adult son or daughter of the parents.*

(b) *Notwithstanding any other law, if the court finds that the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may enter orders under this section for the support of the child for an indefinite period. An order may be entered under this section only if the disability exists, or the cause of the disability is known to exist, before or at the time that the child attains 18 years of age. An order may not be entered under this section if the disability first arose after the time that the child attained 18 years of age; provided, however, that this section does not affect a parent's cause of action with respect to the support of a disabled child under any other law or affect a parent's ability to contract with respect to support of a disabled child.*

(c) *Except as otherwise provided herein, proceedings under this section shall be as in suits affecting the parent-child relationship generally, and all substantive and procedural rights and remedies under this code relating to the establishment, modification and enforcement of child support orders shall apply to actions brought and orders entered under this section.*

(d) *An action under this section may be brought and maintained only by a parent of the child and may not be brought or maintained by a person who is not a parent of the child, including a governmental or private entity or agency, notwithstanding any assignment or transfer of rights by a parent to a person, entity or agency; provided, however, that this section does not affect the substantive or procedural rights or remedies of a person, entity or agency with respect to support of a disabled child under any other law. An action under this section may be brought whether the child is a minor or an adult, and may be brought as an independent cause of action or as an action joined with any other action brought under this code. If no court has continuing jurisdiction over the child, an action under this section may be brought as an original suit affecting the parent-child relationship. If a court has continuing jurisdiction over the child, an action under this section may be brought as a petition for further action under Section 11.07 of this code or a motion to modify under Section 14.08 of this code.*

(e) *With respect to a disabled child who is a minor at the time that a cause of*

action to establish support is brought, a court may enter orders under Section 14.05 of this code or this section, or both. With respect to orders entered under this section which provide for support after the child's 18th birthday, in determining the amount of support for the adult child, the specific terms and conditions of support for the adult child, and the rights, privileges, duties and powers of both parents with respect to the support of the adult child, the court shall determine and give special consideration to the following factors: any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to the adult child's actual mental or physical disability; whether the parent in fact pays for or will pay for the care or supervision of the adult child or in fact provides or will provide substantial care or personal supervision of the adult child; the financial resources available to both parents for the support, care and supervision of the adult child; and any other financial resources or other resources or programs available for the support, care and supervision of the adult child.

(f) *An order entered under this section may contain provisions governing the rights, privileges, duties and powers of both parents with respect to the support of the child, and may be modified and enforced as provided by this code.*

SECTION 3. This Act takes effect on September 1, 1989, and applies to any cause of action which is pending on that date or which is filed on or after that date. This Act applies to any cause of action brought under this Act whether: (1) the child is a minor or an adult; (2) the child was a minor or an adult on the date that this Act or this code became effective; (3) a prior order affecting the child was previously entered under this code or prior to the enactment of this code under a predecessor statute or otherwise; or (4) no order affecting the child was previously entered.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX B—ORIGINAL TEXAS LEGISLATIVE COUNCIL DRAFT

By Caperton S.B. No. 298

A BILL TO BE ENTITLED
AN ACT

relating to support for a minor or adult disabled child.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 14.05(b), Family Code, is amended to read as follows:

(b) *The court may order either or both parents to provide for the support of a minor or adult disabled child for an indefinite period under Section 14.051 of this code.* [~~If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period. The court may enter an order under this subsection only if a request for an order of extended support under this subsection has been made in the original suit, a petition requesting further action under Section 11.07 of this code, or a motion to modify under Section 14.08 of this code filed before the child's 18th birthday.~~]

SECTION 2. Subchapter A, Chapter 14, Family Code, is amended by adding Section 14.051 to read as follows:

Sec. 14.051. SUPPORT FOR A MINOR OR ADULT DISABLED CHILD.

(a) In this section:

(1) "Adult child" means a child that is 18 years of age or older.

(2) "Child" means a son or daughter of any age.

(b) A court may order the support of a child for an indefinite period and determine the rights, privileges, duties, and powers of the child's parents for the support of the child if the court finds that:

(1) because of a mental or physical disability, the child requires substantial care and personal supervision and is not able to be self-supporting, regardless of whether the child is institutionalized; and

(2) the disability exists, or the cause of the disability is known to exist, before or on the 18th birthday of the child.

(c) An action under this section may be brought and maintained only by a parent of the child. The parent may not transfer or assign the right to bring an action under this section to any person, including a governmental or private entity or agency.

(d) An action under this section may be brought regardless of the age of the child.

(e) An action under this section may be brought as an independent cause of action or as an action joined with any other action brought under this code.

(f) If no court has continuing jurisdiction over the child, an action under this section may be brought as an original suit affecting the parent-child relationship. If there is a court of continuing jurisdiction over the child, an action under this section may be brought as a petition for further action under Section 11.07 of this

code or a motion to modify under Section 14.08 of this code. If the child is a child for the purposes of Section 14.05 of this code at the time an action to establish support is brought, a court may enter orders under Section 14.05 or this section, or both.

(g) In determining the amount of support for an adult child, the specific terms and conditions of support for the adult child, and the rights, privileges, duties, and powers of a parent for the support of the adult child, the court shall consider:

(1) any existing or future needs of the child directly related to the child's mental or physical disability and the substantial care and personal supervision directly required by or related to the child's disability;

(2) whether the parent pays for or will pay for the care or supervision of the child or provides or will provide substantial care or personal supervision of the child;

(3) the financial resources available to each parent for the support, care, and supervision of the child; and

(4) any other financial resources or other resources or programs available for the support, care, and supervision of the child.

(h) An order under this section may be modified or enforced in the same manner as any other order under this title.

(i) Except as otherwise provided by this section, proceedings under this section are the same as in a suit affecting the parent-child relationship.

(j) This section does not affect a parent's:

(1) cause of action for the support of a disabled child under any other law; or

(2) ability to contract for the support of a disabled child.

(k) This section does not affect the substantive or procedural rights or remedies of a person other than a parent, including a governmental or private entity or agency, with respect to the support of a disabled child under any other law.

SECTION 3. This Act takes effect September 1, 1989, and applies only to a suit pending or filed on or after that date. A suit that was filed before the effective date of this Act and is not pending on or after that date is governed by the law in effect at the time the suit was filed, and that law is continued in effect for that purpose.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.