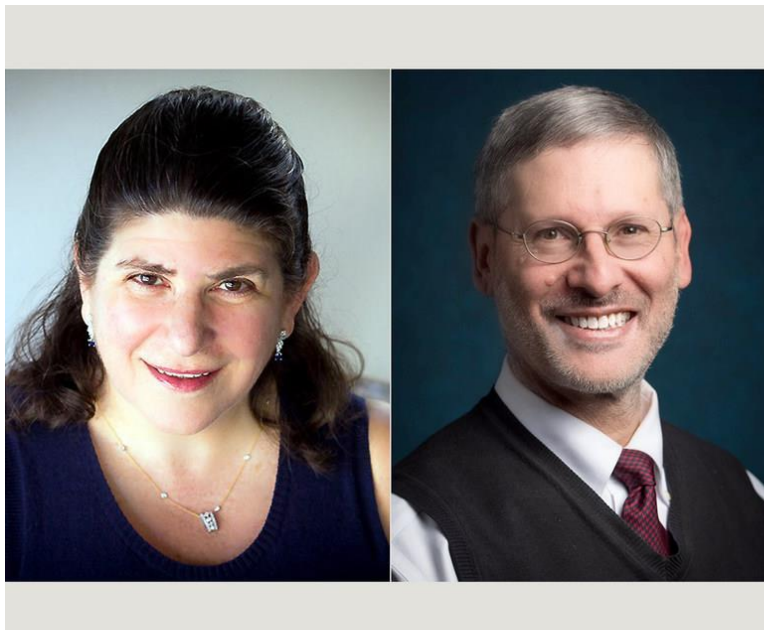
TEXAS LAWYER
EXPERT OPINION

New 2023 Texas Legislation That Every Family Lawyer Should Know

Elisa Reiter and Daniel Pollack | July 13, 2023



The Legislative Update on Family Law is a valuable resource to keep Texas lawyers in the know regarding changes to the Texas Family Code and other statutes. Why are these changes important? An attorney's competence as a litigator is measured in part by their ability to keep up with changes to the law. The 2023 Legislative Update was presented in Austin on June 30 by Gregory Beane, Warren Cole, Kristal C. Thomson and the Hon. Judy Warne.

Discovery Just for Family Lawyers. HB 2850

Initial Disclosures were embraced by some family lawyers, but disdained by many. The former group felt that we should get organized; gather and produce our documentation that could be used at hearings, mediation or trial; and promptly proffer our fact witnesses, legal theories of the case, and other documentation 30 days after an original answer was filed in a case. The latter group has long argued that initial disclosures were not merited in every family law matter and that they unduly burdened pro se litigants. The 88th Legislature provided an entirely new section, Title VI, “Civil Procedure,” pertaining to discovery in family law cases. There is an unexpected kicker. The statute includes language that, “Notwithstanding Section 22.004, Government Code, this chapter may not be modified or repealed by a rule adopted by the Texas Supreme Court,” effective Sept. 1, 2023. Will this statute be challenged as unduly infringing on the power of the judicial branch?

Protective Orders Are Impacted By Many Bills, Including HB1432, SB 48, HB3698, SB578, HB2715 and HB660

Two years ago, we brought the 87th Legislature’s new bills to your attention. At that time, an attempt was made to create standardized forms for use in every protective order case, including magistrate’s emergency ex parte orders. The 88th Legislature has now codified such terms. Perhaps the biggest change is the mandate for courts to issue protective orders when the court finds that a party engaged in an act of family violence in the past. Previously, the statute required courts to assess and find whether there was a reasonable expectation to anticipate future violent conduct by the respondent as a condition of issuing a

protective order. The need to look into the crystal ball and issue the protective order based on anticipated future conduct has been eliminated. The potential ramifications of eliminating that cross-check are manifold. Judge Warne noted that this change is likely to overburden our courts as litigants seek to prove "past family violence" to gain an advantage in property divisions and in custody matters. We must be able to prove that a litigant's behavior constitutes family violence or rose to the level of family violence. If there is a finding of family violence, entry of a protective order is mandatory. Moreover, the Office of Court Administration of the Texas Judicial System is charged with creating standardized forms that individuals must use in filing applications and in the protective orders that may result from those applications if they are granted. Why? Law enforcement has long fought for standardized forms to assist police officers, sheriffs and constables who are called upon to enforce such orders. Where should law enforcement look in a protective order for the relief granted in a given judgment? It is hoped that the standardized forms will help ease law enforcement officers' burdens in implementing such orders. Ex Parte Orders, including magistrate's orders, will be enforceable to the same extent as a final order. If there is a need for confidentiality, such as deleting information pertaining to an abused litigant's home or work address, or the name and address of their child's daycare, those provisions may be left blank. The effective date is Sept. 1, 2023. Might a prudent judge find cause to limit a protective order to less than one year in duration? Note that the forms are to be generated by the Office of Court Administration of the Texas Judicial System by year end, and those forms are to be in use by Sept. 1, 2024.

Trackers Beware: New Provision To Be Added to Standing Orders HB 2715

How many readers have apps on their cell phones allowing them to track their spouses or their children? Effective Sept. 1, 2023, new legislation prohibits the use of trackers or hiring individuals to do so, by prohibiting an individual from "tracking or monitoring personal property or a motor vehicle in the possession of a person protected by an order or of a member of the family or household of a person protected by an order, without the person's effective consent." How has Section 85.022(b) of the Texas Family Code been revised to assure compliance? By prohibiting a person who has committed family violence from "(A) using a tracking application on a personal electronic device in the possession of the person or the family or household member or using a tracking device; or (B) physically following the person or the family or household member or causing another to physically follow the person or member." The provision applies to protective or restraining orders rendered on or after Sept. 1, 2023. A protective order or restraining order rendered before the effective date of the act will be governed by the law in effect prior to this change. Upon filing of a dissolution case, it is presumed that effective consent to such tracking devices no longer exists. The practical impact: Warn your potential clients in the first consultation that for cases filed on or after Sept. 1, 2023, they should turn off all tracking apps and devices, including what may otherwise have been standard operating procedure within the family unit, prior to filing divorce.

Law Enforcement's Duty to Enter Information in Statewide Law Enforcement Information System HB 660

Effective Sept. 1, 2023, it will be mandatory for law enforcement to enter a protective order in the agency's records of outstanding warrants. What is the change? Previously, law enforcement had some discretion as to

updating its records regarding protective orders in effect. Think about the ramifications for those seeking employment, and how such individuals will explain away evidence of a predilection for committing family violence in their job applications. Think about how such documentation will impact divorce, modifications of custody and even cases regarding elder law matters such as guardianships.

Reporting Family Violence: Brochures for Victims SB1325

Already implemented as of May but effective as to treatment rendered on or after Jan. 1, 2024, the concept is that medical professionals who have reason to believe that a person they are treating for injuries resulting from an act of family violence must immediately provide their patient with a brochure as to the nearest family violence center, must document their patient's file as to concerns or findings of injuries indicative of family violence (as before), and in addition, must provide their patient with a brochure generated by the Health and Human Services Commission under Section 51A.003, Human Resources Code. Why? Studies reflect that if a person has been abused, their propensity to disregard ongoing threats is diminished by providing such a person with resources within the community. As with medical professionals, law enforcement will be charged with providing brochures on services available to victims of family violence in the area—i.e. campus security officers, police officers, constables and sheriffs. Our colleagues at Genesis, Family Compass and Suicide Crises and Prevention Center have known that sharing such information is valuable and that knowledge is not only power, it can sometimes help to break the cycle of abuse.

The Bane of Child Custody Evaluators: New Rules for Recording Evaluators' Interviews of Children HB4062

Court appointed child custody evaluators must create an audiovisual recording of their interviews with children in the context of their evaluations. The types of suits that are impacted are those affecting the parent-child relationship (cases involving conservatorship, possession of and access to a child where a child custody evaluator is appointed). A recording so created is to be considered confidential and is not to be released after the completion of the case in which the evaluator conducted the interview, "except by court order for good cause shown." Some family litigators strive to keep children out of court, but circumstances sometimes dictate sucking children into the vortex. Does this new statute mean that an interview with a child must be part of the evidence presented at trial, subject to review by a judge or jury? What will constitute good cause to waive the confidentiality provision associated with this revision? Will hiring an independent professional to review and comment on the methodology implemented by the court-appointed mental health professional constitute good cause? Some family lawyers may choose to exercise discretion. How? Include language in child custody evaluation orders whereby both parties waive the right to present good cause seeking to introduce the child custody evaluator's audiovisual recording(s) of their interview(s) of child(ren) at trial. Many mental health professionals lobbied against the passage of this statute. Will the statute be challenged as an undue infringement on the right to privacy? Greg Beane suggests including language along the following lines as a potential waiver should the parties and their respective attorneys agree to waive the mandate that the child custody evaluator

record their interview(s) with the child(ren) (to follow that portion of the order defining the child custody interview):

*By signing below, the parties to this lawsuit agree that the individual child interviews shall **not** be audio recorded **nor** video recorded by the child custody evaluator, and that the parties intend this agreement to constitute a waiver of the requirements otherwise imposed by Tx.Fam. Code Section 107.109. This provision shall be irrevocable, and shall be considered a sufficient explanation and good cause for the court appointed child custody evaluator's individual interviews of each child made the subject of this suit to **not** include audiovisual recordings, AND IT IS SO ORDERED.*

Would such language waiving the new mandate be sustained in the event of an appeal? Only time will tell. Effective Sept. 1, 2023.

Scheduling Temporary Hearings/Mediation Prior to Temporary Hearings HB2671

Many litigators are frustrated by their inability to have a temporary hearing in new cases, as many judges are ordering parties to mediate temporary issues prior to the court scheduling a temporary hearing. This change to Texas Family Code Section 105.001(a-1) mandates that if a court, on its own motion, mandates mediation in a case in which a temporary orders hearing has not yet occurred, the court may not postpone the temporary hearing more than 30 days after the initial date scheduled for the hearing. This applies to cases pending in a trial court as of Sept. 1, 2023, or that are filed on or after that date.

What About Freedom of Speech? Certain Testimony Prohibited? HB891

Applicable to cases filed on or after Sept. 1, 2023, individuals who are hired to offer an expert opinion as to the qualifications and reliability of the methodology used by child custody evaluators may testify about such matters, but cannot render an opinion as to where or with whom a child should reside.

Should Maintenance Granted on the Grounds of Mental or Physical Disability Be Modified? HB1547

Applicable to cases initiated on or after Sept. 1, 2023, continuation of maintenance is subject to the procedural requirements for modification cases set out in Tx.Fam. Code Section 8.057. It seems only fair to have procedural criteria, particularly if a case was made at trial that necessitated spousal maintenance due to one spouse suffering from physical or mental impairment.

Rehaul of Reimbursement Claims HB1547

If a litigant seeks reimbursement by one marital estate to another, the spouse claiming a right to reimbursement must prove:

1. That the spouse or both spouses used property of the marital estate to confer a benefit on the property of another marital estate.

2. That value of the benefit.

3. That unjust enrichment of the benefited estate will occur if the benefited estate is not required to reimburse the conferring estate.

The value of the benefit is calculated as of the day of trial (how to supplement production on a timely basis?). The calculation of value is determined based on three different standards:

1. The benefit resulted from the use of the conferring estate's property to pay a debt, liability or expense that in equity and good conscience should have been paid from the benefited estate's property, then the value of the benefit conferred is measured by the amount of the debt, liability or expense paid by the conferring estate;

2. If the benefit resulted from the use of the conferring estate's property to make improvements on the benefit estate's real property, then the value of the benefit conferred is measured by the enhancement in the value of the benefited estate's real property that resulted from the improvements; or

3. If the benefit resulted from the use of time, toil, talent or effort to enhance the value of property of a spouse's separate estate, then the value of the benefit conferred is measured by the value of the time, toil, talent or effort beyond that which was reasonably necessary to manage and preserve the spouse's separate property.

Legal scholars are invited to review Anderson v. Gilliland, Pennick v. Pennick and In Re Jensen for the genesis of these calculations. The new calculations are effective Sept. 1, 2023, and as to cases pending on Sept. 1, 2023.

Amicus Attorneys SB 869, HB4559

These two bills were sought, but not passed. Perhaps they will merit attention if the Legislature is called back for another emergency session.

There has long been a need to clarify the duties of an "*amicus* attorney," "guardian *ad litem*," "attorney *ad litem*" and "dual role attorney." The Texas Legislature has much to deal with. Perhaps if another special

session is called, the Legislature will provide clarifications to existing law, as well as to requirements for continuing legal education requirements and seeking diversity among those so appointed.

Get a Job! SB870

If a court finds an individual to be intentionally unemployed or intentionally underemployed in the context of court ordered child support, a court will have the authority to order that an obligor enroll in a program that provides assistance with skills training or job placement services, or, bluntly stated, to work! In an era of 3.7% unemployment rates, there are fewer excuses to not pay child support. Effective Sept. 1, 2023.

Make Up Time SB718

Well, it's about time. Unless otherwise prohibited by Chapter 157 (a-1), and unless good cause is shown, a court shall grant additional periods of access to and possession of a child to make up for denials of court-ordered possession or access resulting from a CPS investigation that failed to produce a finding of abuse or neglect. Effective Sept. 1, 2023.

Solicitation of a Minor as Grounds for Termination Parental Rights HB2658

Effective Sept. 1, 2023, a court may order termination of the parent-child relationship where a party has been convicted of criminal solicitation of a minor pursuant to Section 15.031 of the Tx.Penal Code. Termination suits filed prior to the effective date of the statute are governed by the law in effect at the time.

Adoption Changes HB461 and HB2969

This one is common sense in action. Evaluations will be mandatory in certain cases under Chapter 107, Tx.Fam. Code. Where will exceptions be made? Consider a step-parent adoption, where the parties and the child sought to be adopted have already lived together for years. The court may waive the requirement of an adoption evaluation. This applies to cases pending on Sept. 1, 2023, or filed thereafter. In addition, new legislation forces the Department of Family and Protective Services, and/or a contractor acting under the aegis of the Department, to neither implement nor enforce a maximum age for prospective adoptive parents, nor a maximum age differential between a child and any prospective adoptive parent. Previously, many adoption agencies considered 55 as the maximum age for a prospective adoptive parent. Effective Sept. 1, 2023.

Politically Sensitive Terminology HB446

Revises Tx.Civ.Prac.& Rem. Code to delete reference to "the mentally retarded" and to insert reference to "individuals with an intellectual disability." The statute now eliminates reference to "mental retardation," and instead implements reference to "intellectual disability". Effective Sept. 1, 2023. Why did this take so long? Such sensitivity could have and should have been displayed in the 20th century.

More work for AJs SB870

Unless a party files a written objection, IV-D proceedings may be conducted remotely by associate judges in those courts. If a final proceeding may result in a finding of contempt or revocation of community supervision, the respondent is entitled to appear in person unless the respondent waives that right. If the respondent does not

waive the right to appear in person, the AJ must appear in person as well. Effective Sept. 1, 2023, applies to proceedings on or after that date.

Disclosing Sanctions HB2384

Considering candidacy for the Texas Supreme Court, court of criminal appeals, district court (civil or criminal) or statutory county court? To be considered for inclusion on the ballot, one must provide in their application information pertaining to any sanction or censure they have been the subject of and, for the preceding five years, statements regarding the candidates' legal practice, legal specialization (if any) and the candidate's courtroom experience. If a candidate hasn't previously held a judicial office, they must additionally provide appellate court briefs they have filed in the preceding five years and oral arguments they have presented before an appellate court in the preceding five years. The application must contain a statement that the applicant is aware that providing false information on the application constitutes professional misconduct. Effective Sept. 1, 2023.

What's Mine is Yours—Sort Of SB869, SB870 and HB4765

Equitable adoption or adoption by estoppel is very much in play, thanks to these changes to the rules of intestate succession. Applicable to estates regarding decedents who died on or after Sept. 1, 2023. Tx.Estates Code has been revised such that one cannot assign the rights to or interest in property that could have otherwise been used to satisfy a child support obligation. Effective Sept. 1, 2023.

Judicial Education HB2384

Judges need to satisfy CLE requirements too—at least 16 hours of instruction after the first year of the judge's term, subject to certain exceptions. Should a judge fail to adhere to the requirements of the statute, the State Commission on Judicial Conduct must issue an order suspending an errant judge who fails to provide proof of completion of the continuing legal education requirement. If a judge remains noncompliant for a year or more, or engages in "wilful or persistent conduct that is clearly inconsistent with the proper performance of the judge's duties sufficient to subject the judge to removal from office," the Office of the Attorney General is required to file suit seeking to have such a judge removed from office pursuant to Tx.Civ.Prac. & Rem. Code, Section 66.02. Pertains to all judges who are elected, appointed or who hold office on or after Sept. 1, 2023.

Fail to Move the Docket, Get a Mentor HB2384

The Office of Court Administration must develop standards for monitoring courts to assure that judges are moving their dockets. Failure to meet the standards could mean that such judges are matched with mentor judges to assure that the standards are met. Effective Sept. 1, 2023.

Digital Signatures SB870

The requirement of an original signature as to release of a child support lien issued by a Title IV-D agency is waived. Such a release, bearing a digital signature, may be duly recorded in county deed records. Applies to a child support lien on or after Sept. 1, 2023.

As your authors did in 2021, we extend our heartfelt thanks to our legislators, to the Texas Family Law Foundation, to concerned lawyers

like those who are part of the Texas Association of Family Defense Attorneys and countless others who toil during the legislative session and beyond to assure revisions to laws that impact the denizens of Texas.

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