

TEXAS LAWYER

Revisions to the Texas Family Code that Every Attorney Should Know

There are many changes to the Texas Family Code and other laws impacting parents, grandparents, children and families beginning Sept. 1, 2021.

By Elisa Reiter and Daniel Pollack | July 14, 2021



What You Need to Know

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- This article reviews some of the changes that every lawyer should know about.
- Some of the changes are effective immediately or will be effective as of September 1, 2021.

The annual Legislative Update on Family Law is an invaluable resource to help attorneys stay informed regarding changes to the Texas Family Code and other changes in the law impacting parents, grandparents, children and families. This year's headliners were Warren Cole, the Hon. Judy L. Warne, Gregory Beane, and Lauren Melhart. They were concise and informative, and we all owe them a vote of gratitude. This article reviews some of the changes that every lawyer should know about. Some of the changes are effective immediately or will be effective as of September 1, 2021.

Title 1 Marriage Relationship

MARRIAGE LICENSE APPLICATIONS meet high technology. If certified through the Texas Judicial Council under Section 71.039, Tx Gov't Code, county clerks may issue a marriage license through remote technology). This is effective 9/1/2021. TFC 2.0091. HB 907.

DATE OF MARRIAGE must be in Divorce Decrees, effective September 1, 2021 TFC Section 6.712, HB 3774.

MAINTENANCE. Due to COVID layoffs, many sought modifications of statutory maintenance related to job losses and decreased earnings. Language has been added to assure that the Court may not increase statutory maintenance to an amount that exceeds the amount or duration of the original maintenance Order. Moreover, even if the Court finds a material and substantial change in circumstances regarding maintenance, such a finding cannot be the sole basis for arguing a material and substantial change regarding custody, access, or child support. This applies to motions filed on or after 9/1/2021. TFC Section 8.057(a), (b), (c) and (c)(1). HB 867 and HB 851.

ENFORCEMENT OF MAINTENANCE. A judgment of enforcement on default of maintenance payments may be enforced by any means available for any other judgment, but may now also be enforced by entry of an order or writ of withholding and a maintenance Qualified Domestic Relations Order (QDRO). TFC Section 8.059(b). This applies to orders entered before or after 9/1/2021. HB 867.

STATUTORY MAINTENANCE PAYMENTS. If statutory maintenance and child support payments per Chapter 154 are ordered, then maintenance payments shall be paid through the central registry in San Antonio. TFC 8.062 applies to maintenance orders entered on or after 9/1/2021. SB 286.

CJ/MAINTENANCE. The Court that rendered a maintenance order has continuing jurisdiction (CJ) to enter a QDRO in the event of a default and enforcement action, to require payment via retirement funds. Query: Is the person who owes money really agreeable with the taxes that will be occasioned if the payor is under 59½? Moreover, if a plan administrator deems an order as unworthy of QDRO status, the Court still retains CJ in order to enter a QDRO that will be worthy. TFC 8.354. In addition to having a CJ to correct a defective order, the court that renders a QDRO regarding statutory maintenance has the right to clarify or to add language to assure the collection of maintenance. TFC 8.355. Courts are obliged to give the statute liberal construction. TFC Section 8.356. Attorney's fees may be granted in maintenance enforcement, which can be recovered under any means allowed for a debt. TFC 8.357. Maintenance may be awarded by direct payments. TFC 8.358. Regarding built-in pre-emption, in the event of a conflict of law with the Government Code, the Government Code wins. In the event of a conflict with federal law, federal law trumps TFC Chapter 8. This applies to matters that were entered before or after 9/1/2021, the effective date of the act. HB 867.

ASK NICELY AND YOU SHALL BE REWARDED. A party to a maintenance order may request a QDRO in an original suit and/or in an enforcement suit. TFC 8.352(a)(b) can ask for a QDRO in an original suit or enforcement suit regarding maintenance. This applies to matters that were entered

before or after 9/1/2021, the effective date of the act. HB 867.

TEMPORARY ORDERS RE MAINTENANCE. During the pendency of a QDRO proceeding or similar order, or on appeal of an enforcement action, on the motion of a party or on the Court's own motion, the Court may render appropriate orders to preserve pensions, retirement accounts, or other employee benefits. Such an order is not subject to interlocutory appeal. TFC Section 8.353(a)(b). This applies to matters that were entered before or after 9/1/2021, the effective date of the act. HB 867.

CHANGE OF NAME. TFC 45. A petitioner is no longer required to provide an address if the petitioner can show that they are participating in an address confidentiality program (e.g., if domestic violence is an issue). TFC 45.102(c) Proof of participation in an address confidentiality program is to be provided per Article 58.059, Code of Criminal Procedure. This applies only to applications on or after 9/1/2021. HB 2301.

Title IV Protective Orders

PROTECTIVE ORDERS PER TITLE IV. To apply for a protective order, one must use the protective order application form created by the Office of Court Administration of the Texas Judicial System. This applies to private cases, cases through DA, and orders entered in

criminal cases by magistrates. TFC 82. This is effective immediately.

TEMPORARY EX PARTE ORDERS. Once, again, as to Protective orders, courts/applicants must use a standardized ex parte form created by the Office of Court Administration of the Texas Judicial System. TFC 83.007. This is effective immediately. SB 1458. It is possible to enter an agreed protective order, but, as previously mentioned, the new forms must be used. TFC 85.005(a). This is effective on or after 9/1/2021. HB 39.

PROOF OF SERVICE/DEFAULTS. There is no more last-minute waiving of certified mail receipts. To take a default judgment, proof of service must be filed with the Court prior to the hearing. With the status of the e-file system, this may be easier to say than to do. TFC 85.006(a).

SEPARATION OF WIRELESS SERVICE. While well intentioned, this may prove difficult to implement. If a petitioner on a protective order application is a primary user of a wireless telephone number associated with the respondent's telephone service account, the applicant/petitioner may ask the Court for a separation order allowing them to remove the phones used by the applicant or the applicant's children to a new account so that the respondent can no longer use the original phone account to track the applicant. Many protective order applicants have

limited financial resources. Is it unclear how, or if, cellular phone companies will be forced to cooperate.

STANDARDIZED FORM. Once again, the Legislature reminds us that we must use standardized forms created by the Office of Court Administration of the Texas Judicial System per Section 72.036, Gov't Code.

Title V Parent Child Relationships and SAPCRs

DEFINITION OF EARNINGS BROADENED. In addition to the old standbys of wages, salary, etc., wages now include compensation from a transportation network company or someone who uses a technology platform to make customer deliveries — for example, Uber and Amazon drivers. This is effective 9/1/2021. HB 458.

RIGHT TO JURY. Sole managing conservators are added to those who can request a jury trial on residency restrictions, and simply ties to “any right of a conservator other than a determination under Subdivision (1) (D) (E) or (F). This applies to suits filed on or after 9/1/2021. SB 285.

MORE RECORDS. Finally, Clerks will keep records not only of base monthly child support, but of medical support and dental support too. This aligns with the fact that cumulative judgments are now authorized for arrearages, i.e., base, health, dental). How will the data entry clerks handle this if parents are not specific, given the fact that if there is an

arrearage, payments are to be applied to the arrearage due first? TFC 105.008 SB 285.

AAL/GAL training. While there is some time built in to get in CLEs, court appointed counsel who wish to be on the judge's appointment list must supply each court with proof of training regarding trauma informed care and the effect of trauma on children in the custody of TDFPS. If the judge simply chooses someone due to their familiarity with the attorney, the attorney's acumen, etc., the training requirement is waived. TFC 107.004(b-1). Attorneys may want to see some excellent work on the State Bar of Texas website by Barbara Elias Perciful for such CLEs. This applies to suits filed before, during, or after 9/1/2021, but proof of such training is not due until 9/1/2022. HB 1315. If there has been termination of parental rights, the child remains in the department's custody, and all orders shall be entered for the AAL/GAL to continue to serve ("watchdog provision"). TFC 107.016. SB 904.

TRANSLATOR REGARDING CHILD CUSTODY EVALUATION WHERE PARENT DOES NOT SPEAK ENGLISH AS PRIMARY LANGUAGE. Child custody evaluators must speak the language of the people they are evaluating, or a translator/interpreter who can be an intermediary must be retained. This applies only to custody evaluations on or after the effective date of 9/1/2021. TFC 107.103 (c) (f) and (g). HB 3009.

ADDRESS WITHIN 50 MILES, BETWEEN 50 AND 100 MILES and OVER 100 MILES. Alternate beginning and ending possession times. In the past, the point of demarcation was reduced from 200 miles to 100 miles. It's been a long time, but this is another big change. It is presumed that if the parties live within 50 miles of one another, that the "visiting" parent will elect the expanded possession terms (pick up from school and return to school); this does not apply if the possessory conservator declines. So, likely there is a need for verbiage in the Decree to address visitation: 1. If the parties reside within 50 miles 2. If the parties reside between 51 and 100 miles apart, and 3. If the parties reside over 100 miles apart. How distance is measured is not specified. TFC 153.3171. Courts are given discretion to deny expanded terms if they find that it would not be in the child's best interests. This presumption does not apply if there is evidence of family violence, or if the conservator files a written document with the Court declining the expanded terms. Unclear is how that document might impact a future modification. The statute itself does not constitute a material and substantial change in circumstances. This is effective 9/1/2021. SB 1936.

Chapter 154 Child Support. If TDPFS is the recipient of child support as a result of a prior order, the court must provide notice to the OAG within 10 days after the modification order is entered. This applies to proceedings filed on or after 9/1/2021. HB 1227.

Manner of payment. As previously mentioned, this applies to the pension and retirement of obligors to assure payment. TFC 154.003. The effective date is 9/1/2021, but it applies regardless of whether the order was rendered before, during or after the effective date. HB 867.

Chapter 156 Modification

Resources. Courts are to consider all relevant background circumstances for the payor, including assets, residence, employment, earnings history, job skills, educational attainment, literacy, age, health, criminal history, barriers to employment and record of seeking work, jobs available in the community, prevailing wage in obligor's community, and whether there are employers willing to hire the payor. However, incarceration is not to be considered intentional unemployment or underemployment. TFC 156.066. Effective 9/1/2021, this applies to cases pending or filed on or after the effective date. SB 286.

Child Support Guidelines. Similar to adding the provision to address access under 50 miles, the child support guidelines get a new look, and are to include guidelines if the payor earns less than \$1,000 per month. Low income (under \$1,000/month) essentially drops each guideline sector by 5%, so one child is based on 15% of net, two on 20% of net, three on 25% of net, four on 35% of net, and five or more on 40% of net. TFC 154.125. Effective 9/1/2021, this applies to

cases filed after this date. Cases filed before are governed by the old guidelines.

Multiple Family Guidelines. This section has new provisions for those earning less than \$1,000/month/low-income families. TFC 154.129 SB 286.

Excluded Admissions. Certain filings are not considered judicial admissions. The mere filing of a motion to modify does not constitute a material and substantial change in circumstances. TFC 156.007. This applies only to modifications filed on or after the effective date of 9/1/2021. Existing modifications previously filed are governed by the old law. HB 851.

Modification based on Death of Conservator. Imagine there is a 'bad' parent with restricted access, e.g., findings of domestic violence, and a 'good' parent. If the 'good' parent dies the Court has the right to consider any term and condition that warranted restricted access. TFC 156.106. This may have been prompted by *In Re CJC*. This applies to pending cases and cases filed on or after 9/1/2021. HB 851.

Grounds for Modification of Support. The payor must have been incarcerated for 180 days before that can be considered a material and substantial change in circumstances. There is no mention of good time served, nor is there mention of how to count if the person is appealing

the criminal conviction. This applies to cases filed after 9/1/21. SB 286.

Chapter 157 Enforcement

Dental and Medical expenses. As mentioned above, dental and medical expenses can now be part of a cumulative judgment. TFC 157.005(b). This applies to suits filed on or after the effective date of 9/1/2021. Older cases are governed by the old law. This is effective 9/1/2021. SB 286.

Confirmation of arrearages. A cumulative money judgment can include unpaid medical expenses previously confirmed, medical support payments, interest on the same, and all of the above as to dental. TFC 157.263. This effective 9/1/2021. SB 286.

Child Support QDRO. A Court that rendered an order for support has continuing jurisdiction to enforce a child support order. TFC 157.501. This can include going after income from a pension or retirement to assure payment of child support. Effective 9/1/2021, this applies regardless of whether the order was rendered before or after the effective date. HB 867.

QDRO. As noted above, regarding asking for a QDRO initially, in a modification, at a temporary hearing, final hearing, or if the original QDRO was defective, liberal construction is encouraged. If there is a conflict of laws, federal law prevails. TFC 157.502-.503. Effective 9/1/2021,

this applies regardless of whether order rendered before or after the effective date. HB 867.

Registration of foreign order. A non-recording party is now entitled to 30 days notice rather than 20. A failure to contest timely still means that the order will be confirmed and arrearages/enforcement can be sought here. TFC 159.605(b). Effective date 9/1/2021, this applies only to support orders or income withholding orders issued by a court of another state that is registered in Texas on or after the effective date of the act. SB 286.

Chapter 161 Termination of Parent Child

Relationship. Instead of referencing termination based on a finding of continuous sexual abuse of children, there is now reference to “a young child or disabled individual.” This dovetails nicely with the Penal Code regarding the abuse of elderly or disabled individuals. TFC 161.001(b). Effective 9/1/2021, this applies only to offenses committed after the effective date of the act. HB 375.

Clarification regarding things as not necessarily being grounds for termination. These may include a parent homeschooling their child, a parent who is economically disadvantaged, or a parent charged with a nonviolent misdemeanor. TFC 161.001(c). This applies only to cases filed by the TDFPS on or after the effective date of 9/1/2021. HB 567.

Seeking Second Medical Opinion. Seeking a second medical opinion, or transferring to a new medical provider is not grounds to terminate. TFC 161.001 (c). This is effective immediately. HB 2536.

Termination of Parent Right. Where there has been a prior termination of parental rights, that prior termination cannot be the basis of another termination unless the department asks for a TPR within one year of the date that TDPFS was granted managing conservatorship. TFC 161.001 (d) (1). This applies to cases after the effective date, 9/1/21. HB 2924.

Who's your daddy? TDPFS must now give notice to the 4th degree of consanguinity. i.e., to the children of cousins of terminated parent(s) and to great grandparents, in addition to grandparents, aunts, uncles immediately after a termination order is entered. Again, what if there is an appeal? The persons notified have 90 days after the termination order is entered to try to set aside the involuntary termination. This does not apply if there is 'buyer's remorse' on a voluntary termination. This is effective 9/1/2021. HB 2926.

Reinstatement of Parental Rights after Involuntary Termination. It is possible for TDPFS, AAL, and a former parent whose rights were involuntarily terminated to seek reinstatement. This does not mean reinstatement will necessarily be granted. There are special rules as to a former

parent, in that they must give notice to the department at least 45 days prior to filing their petition (leaving a short window for the Court to act). This does not apply to voluntary termination cases. TFC 161.302. A hearing must be held within 60 days of filing, and there is a need to note whether or not a child aged 12 or older consents to having the errant parent back in their life. It is now possible for the Court to solicit the opinion of a child under 11, based on the child's maturity and ability to express preference. Following a hearing, the court may grant, deny, defer the decision for six months while the child remains the managing conservator and the former parent is a possessory conservator. A very nuanced case might exist whereby the parent was 'bad' enough to have their rights terminated but not so 'bad' they could still have contact with the child. TFC 161.302. If a petition is denied, the court must provide detailed reasons ("findings of fact") and a statement prohibiting filing of a subsequent petition before the first anniversary of the date of the order denying the petition. This is effective 9/1/2021. HB 2926.

Chapter 203 Domestic Relations Offices. A suit to modify or clarify can be filed. TFC 203.004. This is effective date 9/1/2021. SB 567.

Title IV-D

Chapter 231. Title IV-D Services. A form is to be created to allow an obligee or obligor to seek child support services

through a IV-D agency. TFC 231.0011(c) and (d) applies to suits pending on or after 9/1/2021. SB 285.

Paper trail. If there has been an assignment of rights to child support, proof must be attached to a pleading TFC 231.104 (c). This is effective 9/1/2021. SB 285.

Even IV-D Cases need to note the new possession orders 50/50-100/over 100. TFC 231.1211. Effective 9/1/2021, this applies to pending cases. HB 3203.

New contents of IV-D case. A waiver must be signed before a notary, or executed with an unsworn declaration. TFC 233.018 (C) cross references Section 132.001, Civil Practice and Remedies Code. This is effective 9/1/2021. SB 285.

State Case Registry. Obligors should be paying everything through the state disbursement unit. TFC 234.007(a). This is effective 9/1/2021 SB 286.

Chapter 254, Procedure in Suits by Governmental entities. See the notes above regarding the need for the Department to try to glean names and contact information for relatives to the 4th degree of consanguinity. TFC 262.1095 (a). This is effective 9/1/2021. HB 2926.

OTHER LEGISLATION

Separation of wireless telephone service accounts. Chapter 608 Bus. Comm. Code speaks to separation of cell phones after protective order issued. TBCC 608.001.

Judicial Branch/Government Code. A person can only bring a qualified facility/assistance dog to court, and they must have proof of insurance. This is effective 9/1/2021. HB 1071.

Cross check on remote marriage license applications. Tx Gov't Code Section 71.039. This is effective 9/1/2021, but the Texas Judicial Council has until 9/1/2022 to implement. SB 907.

Office of Court Administration, Gov't Code Chapter 72. The Office of Court Administration must develop and have on its website Protective Order forms. This is effective 9/1/2021, but the Texas Judicial Council has until 9/1/2022 to fully comply. SB 1458.

Second Amendment Rights. Persons between 18 and 21 can get a handgun if they are protected under a protective order. Department of Public Safety Chapter 411.1732. There will be special designation on their CHL noting that they have the right to carry per a protective order, provided the applicant passes muster on other fronts. This applies only to applications for handguns processed after 9/1/2021. Prior applications are governed by the old law. HB 918.

PROPERTY CODE

Actions and remedies, access to residence or former residence to retrieve personal property. If denied entry by a current occupant, the person who was denied entry can

seek a writ, authorizing them to go to the residence with a peace officer to get their possessions. There is a need to know if the property was listed in a Decree, and if so, relief can be sought in court granting such a Decree. Texas Property Code Chapter 24. This applies only to applications filed on or after 9/1/2021. HB 1012.

Many thanks are extended to the Texas Family Law Foundation, concerned lawyers, especially those at the Texas Association of Family Defense Attorneys, other lobbyists, and our dedicated Texas legislators for detailed and profound changes to the Texas Family Code.

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