

# ***Family Law Changes by the 78<sup>th</sup> Legislature***

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**Family Law Changes by the 78<sup>th</sup> Legislature**  
**By A. Michelle May**

As happens every two years, the Texas Legislature made some substantial changes to the Family Code during this Legislative session – some good, some bad, and some are just ugly! All of the bills proposed by the State Bar of Texas Family Law Section were passed, plus a few extras. This article is not intended to be a comprehensive statement on every change affecting family law, but is an overview of the most important changes.

Unless noted otherwise, all changes take effect on September 1, 2003.

**I. Title 1**

1. Income from partitioned property

Section 4.102 clarifies that any partition or exchange of property includes the future earnings and income arising from the property unless there is an agreement to the contrary.

2. Austin Form

The Austin form (a.k.a. the “white” form) must now be filed *with the petition for divorce*, not with the divorce decree. Tex. Fam. Code §6.401. Obviously, there will be information that is unknown at the time of filing of the divorce, so an amended form will likely need to be filed at the end of the case.

3. No more ADR statements

The Legislature repealed the requirement of filing an ADR statement. Tex. Fam. Code §§6.404, 102.0085.

4. Agreement to partition income

Section 7.002 has been amended to allow the parties to agree to partition their income back to the beginning of the year of

the divorce. This is beneficial so that the parties do not have to split up community income for the year of divorce and argue over deductions. Note, however, that if the parties agree to partition their income under the section and the temporary orders require payment of temporary spousal support, the parties should address the nature of the support payments either in the partition agreement or the temporary orders, and specify whether the temporary support payments are in the nature of alimony. As a practical matter, if this type of agreement is incorporated into a divorce decree, both parties must sign off on the decree.

This statute also, for the first time, references quasi-separate property being treated as if it is separate property under Texas law.

(See Appendix A for language of this statute.)

5. Definition of resources for maintenance

Gross income for the purpose of determining the amount of maintenance is now defined by referring to the definition of resources in the child support statutes, without taking deductions or excluding payment of benefits. Tex. Fam. Code §8.055.

**II. Title 2**

1. Change of name of child

In any suit to change the name of a child, the pleadings must include whether the child is subject to sex offender registration. Tex. Fam. Code §45.002.

2. Change of name of adult

In any suit to change the name of an adult, the pleadings must include whether the petitioner is subject to sex offender registration and a completed finger print card. This section does not apply to a name change in conjunction with a divorce proceeding.

**III. Title 4**

An application for protective order is now confidential until after service of process on the respondent or hearing on the protective order, whichever is sooner. Tex. Fam. Code §82.010. This change was also made with regard to divorce pleadings and SAPCR pleadings. Tex. Fam. Code §§6.410, 102.0086.

In addition, the Legislature made a change to the Texas Code of Criminal Procedure, defining how to handle conflicts between magistrate’s protective orders and protective orders issued under the authority of Title 4.

**IV. Title 5**

1. Standing

A prospective adoptive parent, named in a verified statement by the pregnant mother or parent of the child, now has standing to file a SAPCR. Tex. Fam. Code §102.003(a)(14). The requirements for a statement to confer standing on a prospective adoptive parent are set forth in the new §102.0035.

A foster parent will also have standing to file suit for adoption, regardless of the amount of time the child has resided in the foster parent’s home, once the foster parent has been approved to adopt the child. Note, however, that the term “approved” is not defined. Tex Fam. Code §102.003(c).

2. Citation by publication

It is now mandatory that a statement of evidence of service, approved and signed by the court, must be filed and made a part of the record in any case where there is service of citation by publication. Tex. Fam. Code §102.010. This applies to any suit filed on or after September 1, 2003.

3. Video Testimony

In DPRS cases, certain professionals may be allowed, at the court’s discretion, to testify by video conferencing, as long as the parties and attorneys are able to see and hear the testimony and the professional is able to see and hear the parties and attorneys during the examination. Tex. Fam. Code §104.007. If videoconference testimony is permitted, the professional may not be compelled to be physically present in court, unless ordered by the court.

4. Molesting language

The language in temporary restraining orders and injunctions which used to read “restraining a party from molesting or disturbing the peace of the child or another party” has been changed to delete the phrase “molesting or”. Tex. Fam. Code §105.001. So, the new language should read “restraining a party from disturbing the peace of the child or another party.”

5. Jury trials

The Legislature has now given a definitive statement of what issues go to a jury and what does not.

A party is entitled to a jury verdict on the following issues, and the trial court *cannot contravene* the jury’s verdict:

- appointment of sole managing conservator;
- appointment of joint managing

- conservator;
- appointment of a possessory conservator;
- determination of which JMC has the exclusive right to designate the primary residence of the child;
- determination of whether to impose a restriction on the geographic area in which a JMC may designate the child's primary residence; and,
- if a restriction is imposed, the determination of the geographic area within which the JMC must designate the child's primary residence.

Tex. Fam. Code §105.002(c)(1). The court may not submit a jury question on the following issues:

- support under Chapter 154 or 159 (UIFSA);
- a specific term or condition of possession of or access to the child; or,
- any right or duty of a conservator, other than the determination of primary residence.

Tex. Fam. Code §105.002(c)(2).

Thus, there is no provision for advisory jury opinions, and the trial court cannot grant a jnov! The trial court will still have the discretion to refuse to submit a jury question on the basis of no evidence (directed verdict), but the only remedy if the trial judge disagrees with the jury's verdict is to grant a new trial.

This new law applies only to SAPCRs filed on or after September 1, 2003.

(See Appendix B for language of this statute.)

#### 6. New disclaimer in decrees

All order which address possession of or access to a child must now contain a new

disclaimer giving notice that peace officers may now use reasonable efforts to enforce the terms of a "custody order". Tex. Fam. Code §105.006. The officers are granted immunity regarding good faith acts performed in the scope of the officer's duties in enforcing a custody order. Any person who presents an invalid order commits an offense punishable by up to 2 years in jail and fine up to \$10,000.

Note, the term "custody order" is not defined under this disclaimer and may be interpreted by some departments very broadly.

(See Appendix C for language of this statute.)

#### 7. Attorney's Fees

A court may now only render a *judgment* for attorneys fees and expenses, not an *order*. The statute also changed the term "costs" to "expenses", although it is undefined as to the difference in meaning. Tex. Fam. Code §106.002.

#### 8. Ad Litem

The Legislature has now created a new type of ad litem, in an attempt to clear up some of the confusion that has existed in determining an attorney's role in representing children or incompetents. Tex Fam. Code Chapter 107.

The Legislature has now created a new "Amicus Attorney", but only in private cases not filed by a governmental entity. Tex Fam. Code §107.017. An Amicus Attorney is appointed to represent the *best interest of a child*, not advocate for them. Tex Fam. Code §107.001(1). An Amicus Attorney does not "represent" the child, and the child is not the "client" of the Amicus Attorney.

An Attorney Ad Litem is now defined as an attorney who provides legal services to a

person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation. Tex. Fam. Code §107.001(2). The attorney ad litem actually has a traditional attorney-client relationship with the person.

A Guardian Ad Litem is a person appointed to represent the best interest of a child, and includes volunteer advocates, a professional (not an attorney) who holds a relevant professional license and whose training relates to the determination of a child's best interests, an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or, an attorney ad litem appointed in the dual role. Tex. Fam. Code §107.001(5). An attorney can be appointed as a guardian ad litem, but cannot render any legal services as such; he or she can only act as a fact witness and cannot make arguments, file pleadings, etc.

The "dual role" means the role of an attorney who is appointed as both guardian ad litem and attorney ad litem for a child in a suit by a governmental entity (e.g. DPRS). Tex. Fam. Code §107.001(4).

The powers and duties of each role are set out in the statute. Tex. Fam. Code §§107.002, 107.003, 107.004, 107.005.

Any appointment under this Chapter must include an order authorizing the attorney ad litem, guardian ad litem, or amicus attorney to have immediate access to the child and any otherwise privileged or confidential information relating to the child. Tex. Fam. Code §107.006. Without requiring any further release or order, the custodian of any relevant records shall be released to the attorney ad litem, guardian ad litem, or amicus attorney. However, a mental health record of a child 12 or older that is privileged or confidential under other law may only be released in accordance with the other law.

An attorney ad litem, amicus attorney, or attorney serving in the dual role may not:

1. be compelled to produce attorney work product developed during the appointment as an attorney,
2. be required to disclose the source of any information; or
3. testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct.

Tex. Fam. Code §107.007. Note, however, that this does not negate the duty to report child abuse or neglect.

An attorney ad litem or dual role attorney may determine that the child cannot meaningfully formulate objectives of the representation; as such, the attorney ad litem or dual role attorney may present to the court a position that the attorney determines will serve the best interest of the child. Tex. Fam. Code §107.008. If a guardian ad litem is appointed for the child, the attorney shall consult with the guardian ad litem and present the child's objectives according to the guardian ad litem's opinion regarding the best interest of the child.

Anyone appointed under this Chapter has immunity from civil damages arising from a recommendation made or an opinion given in conjunction with the appointment. Tex. Fam. Code §107.009.

In DPRS suits, the court shall appoint a guardian ad litem to represent the best interest of the child, and shall appoint an attorney ad litem to represent the interests of the child, immediately after the filing of the petition but before a full adversarial hearing. Tex. Fam. Code §§107.011, 107.012. The court may appoint an attorney in the dual role to satisfy these requirements, but the court may, at any time during the case or upon the request of the attorney ad litem, appoint another person to serve as the guardian ad litem. Tex. Fam. Code §107.0125.

An attorney appointed as attorney ad litem or attorney in dual role is entitled to reasonable fees and expenses in an amount determined by the court, to be paid by the parents of the child unless they are indigent. If indigency is shown, an attorney ad litem in a DPRS suit for termination shall be paid from the county general funds. Tex. Fam. Code §107.015.

In a suit other than a suit by a governmental entity, the court has the discretion to make an appointment of an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code §107.021. The factors the court should consider in making such appointment are set forth in the statute. However, the court may not appoint an attorney in the dual role or a volunteer advocate, unless the volunteer advocate's training is specifically designed for participation in suits other than suits filed by the governmental entity. Tex. Fam. Code §107.022.

In suits that do not involve a governmental entity, attorney's fees may be awarded in accordance with Chapter 106, or the court may order one or more of the parties to pay reasonable fees and expenses to an amicus attorney, attorney ad litem for the child, or professional, other than volunteer advocate, appointed as guardian ad litem. Tex. Fam. Code §107.023. The court shall require a cost deposit to be made at the time of the appointment and order additional amounts be paid into trust for the attorney before the final hearing.

(See Appendix D for language of this statute.)

#### 9. UCCJEA affidavits

UCCJEA affidavits are no longer required in every case. Now, they are only required to be filed in cases where each party does not reside in this state. Tex. Fam. Code §152.209.

#### 10. Geographic restrictions

A court is no longer required to designate the county of the geographic restriction, but may establish any geographic area as the primary residence of the child. Tex. Fam. Code §153.134.

#### 11. Standard possession order

The midweek possession has now been changed in all parts of the standard possession order from Wednesday to Thursday. Tex. Fam. Code §§153.312, 153.314, 153.317.

#### 12. Prevention of international abduction

This statute adds provisions to the Family Code related to the prevention of international parental child abduction. It advocates the best interests of the child by providing a statutory basis to ensure courts determine the risk of abduction in certain cases, and order preventative measures based on that risk if the court deems it necessary.

This statute was adapted from a study published by the American Bar Association Center on Children and the Law, as well as numerous reports from various other sources.

Note, this statute applies to any SAPCR pending in a trial court on June 20, 2003.

If credible evidence is presented showing a risk of international abduction of a child by a parent of the child, the court shall, on its own motion or at the request of a party, determine whether preventative measures should be taken. Tex. Fam. Code §153.501. There are many factors for the court to consider in making such a determination, as set forth in the statute. Tex. Fam. Code §§153.501, 153.502.

If the court finds it is necessary to take measures to protect a child from international

abduction by a parent of the child, the court may take any of the following actions:

1. appoint the parent not at risk for international abduction as the SMC of the child;
2. require supervised visitation of the parent by a visitation center or independent organization (not a family member, friend or acquaintance);
3. enjoin a parent or anyone acting on the parent's behalf from taking certain actions;
4. order passport and travel controls
5. require the parent to provide written notice of the court-ordered passport and travel restrictions to the United States Department of State's Office of Children's Issues with a copy of the court order;
6. order the parent to execute a bond or deposit security to cover the cost of recovering the child if abducted to a foreign country;
7. authorize law enforcement agencies to take measures to prevent the abduction; or,
8. make certain findings in the court's order.

Tex. Fam. Code §153.503.

(See Appendix E for language of this statute.)

### 13. Child support

The term "enrolled" is now defined for the purposes of determining termination of child support.

Child support may be ordered paid after the child's 18<sup>th</sup> birthday only if the child is "enrolled" in a program leading toward a high school diploma (under Chapter 25 of the Education Code, section 130.008 of the Education Code, or on a full-time basis in a private secondary school program), and

complying with the minimum attendance requirements of the school or Subchapter C, Chapter 25 of the Education Code. Tex. Fam. Code §154.002.

Child support agreements are enforceable as judgments, but not as contracts, even if the parties agree otherwise. Tex. Fam. Code §154.124.

There is now a federally-mandated national medical support form, which must be used in Title IV-D cases and may be used in private cases. This form complies with ERISA. The form may be downloaded from the Federal Office of Child Support Enforcement at:

[www.acf.dhhs.gov/programs/cse/forms/](http://www.acf.dhhs.gov/programs/cse/forms/)

(See Appendix F for a copy of the form.)

### 14. Transfer of venue

Where one party moves out of state, a child custody proceeding or child support proceeding shall transfer to the county of residence of the remaining party. Tex. Fam. Code §155.301.

### 15. Modification

The material and substantial change standard for modification in a SAPCR now begins with the *earlier* of the date of rendition of the order, *or the date of signing of the mediated or collaborative law settlement agreement*. Tex. Fam. Code §156.101. This timing also applies to the one-year requirement for modification of primary conservatorship and child support. Tex. Fam. Code §§156.102, 156.401.

### 16. Enforcement

In an enforcement of possession suit, the court is required to order the party violating the court order to pay the attorney's fees and costs of the party seeking enforcement in addition to any other remedy. Tex. Fam.

Code §157.167. The court may waive the requirement of payment of attorney's fees based on good cause. However, this waiver does not apply to situations where the respondent is found to owe more than \$20,000 in child support arrearages unless the court also finds that the respondent is involuntarily unemployed, disabled, or lacks financial resources to pay the attorney's fees and costs.

#### 17. UIFSA

All states now subscribe to UIFSA. The statute as a whole stands for the proposition that issues pertaining to child support require personal jurisdiction, whereas issues regarding custody require *in rem* jurisdiction.

Where a Texas court issues the initial child support order, that Texas court shall have continuing, exclusive jurisdiction to modify its order if this state remains the state of residence of either the obligor, obligee or child, or the parties consent in the record or in open court to the continuing jurisdiction. Tex. Fam. Code §159.205(a). A Texas court that has issued an initial child support order may not exercise continuing, exclusive jurisdiction if each party consents in a record that a court of another state that has jurisdiction over one of the parties or the child may modify the order and assume jurisdiction, or the order is not the controlling order in effect. Tex. Fam. Code §159.205(b).

A Texas court that issues a spousal support order *consistent with the law of this state* has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation. Tex. Fam. Code §159.211(a). A Texas court may not modify a spousal support order issued by a court of another state having continuing, exclusive jurisdiction over that order under the law of that state. Tex. Fam. Code §159.211(b).

The physical presence of a nonresident

party in a Texas court is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage. Tex. Fam. Code §159.316(a). A party or witness residing in another state shall be permitted to testify by telephone, audiovisual means, or other electronic means at a designated court or other location. Tex. Fam. Code §159.316(f).

#### 18. Parentage

A man is presumed to be the father of a child if, during the first 2 years of the child's life, he continuously resided in the household in which the child resided and represented to others that the child was his own. Tex. Fam. Code 160.204(a)(5).

A presumption of paternity may be rebutted only by an adjudication that he is not the father or the filing of a valid denial of paternity, together with the filing by another person of an acknowledgment of paternity. Tex. Fam. Code §160.204(b).

#### 19. Gestational agreements

The Legislature provided a new subchapter for gestational agreements. Tex. Fam. Code §§160.751 et.seq.

The mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law, regardless of the fact that the gestational mother gave birth to the child. Tex. Fam. Code §160.753. The father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law.

A gestational agreement is authorized between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child, with certain stipulations:

- the intended parents must be married to each other;
- each intended parent must be a party to the gestational agreement;
- the gestational agreement must require that the eggs used in the assisted reproduction procedure be retrieved from an intended parent or a donor;
- the gestational mother's eggs are prohibited from being used in the assisted reproduction procedure;
- the gestational agreement must state that the physician who will perform the assisted reproduction procedure as provided by the agreement has informed the parties to the agreement of certain facts
- the parties to a gestational agreement must enter into the agreement before the 14th day preceding the date the transfer of eggs, sperm, or embryos to the gestational mother occurs for the purpose of conception or implantation;

Tex. Fam. Code §160.754. A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse, and it cannot limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.

The intended parents and prospective gestational mother may commence a proceeding to validate the gestational agreement, but either the gestational mother or the intended parents must have resided in Texas for 90 days prior to the date the proceeding is commenced and the

prospective gestational mother's husband, if any, must be joined in the suit. A copy of the agreement must be attached to the petition. Tex. Fam. Code §160.755.

A gestational agreement must be validated by hearing. A court may validate such agreement only if the court finds that:

- the parties have submitted to the jurisdiction of the court;
- the medical evidence shows the intended mother is unable to carry a pregnancy to term and give birth at all or without unreasonable risk to her physical or mental health or the health of the unborn child;
- home study determines that the intended parents meet the standards of fitness for adoptive parents, unless waived by the court;
- each party voluntarily entered into the agreement and understands its terms;
- the prospective gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth to another child will not pose an unreasonable risk to the child's health or the physical or mental health of the prospective gestational mother;
- the parties have adequately provided for which party is responsible for all reasonable health care expenses associated with the pregnancy, including a provision for who is responsible if the agreement is terminated.

Tex. Fam. Code §160.756.

The prospective gestational mother, her husband if she is married, or either intended parent, before a prospective gestational mother becomes pregnant by means of assisted reproduction, is authorized to terminate a gestational agreement validated under Section 160.756 by giving written notice of the termination to each other party

to the agreement. A person who terminates a gestational agreement shall file notice of the termination with the court. The court, on receipt of the notice of termination, shall vacate the order validating the gestational agreement. A prospective gestational mother and her husband, if she is married, are not liable to an intended parent for terminating a gestational agreement if the termination is in accordance with this section. Tex. Fam. Code §160.759.

amendments may prove to have a definite affect on family law practice.

(See Appendix G for language of this statute.)

#### 20. Post-termination contact

Section 161.2061 authorizes a court, upon a best interest finding, to provide in a termination order that the biological parent may have limited post-termination contact with the child upon agreement of the biological parent and DPRS. This does not limit the finality of the termination order, and it does not authorize the terminated parent to file any motion other than a motion seeking enforcement.

#### 21. Associate Judges

An associate judge now has the authority to render and sign a final order agreed to in writing as to both form and substance by all parties or a final default order. Tex. Fam. Code §201.007. An order signed by the associate judge constitutes an order of the referring court.

The controlling date for calculating appellate deadlines is the date an agreed or default order was signed by an associate judge.

### **V. Conclusion**

This Legislative session, there were over 80 bills passed affecting family law. Although not on the same level of the sweeping changes of a few years ago, several of the

## **APPENDIX A**

## **APPENDIX B**

## **APPENDIX C**

## **APPENDIX D**

## **APPENDIX E**

## **APPENDIX F**

## **APPENDIX G**

## **APPENDIX H**