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Texas Family Law Practice and Procedure

Publication 705 Release 64 November 2011

HIGHLIGHTS

Pub Update

- This release updates the set in light of amendments to the Family Code enacted by the 82nd Legislature as well as recent case law developments.

Authorization agreements. The statutes that created authorization agreements in 2009 have been amended to allow only one authorization agreement to be in effect for a child at a time. Other changes require that notice to a nonparty parent must be sent by certified mail, return receipt requested (rather than just regular mail). If the nonparty parent does not respond, a second notice must be sent. See Task B2, Determining Custody of Children, § B2.03[7].

Possession orders for child under three. Family Code Section 153.254 now contains a list of 13 factors the court must consider in rendering an order for possession of a child under the age of three. A party may request findings in support of the order, and if requested, the court must

make the findings within 15 days of the request. See Task B2, Determining Custody of Children, § B2.05[1][c].

Child support. Disapproving of holdings from twelve Texas courts of appeals, the Texas Supreme Court has held that when a child support obligor is intentionally unemployed or underemployed, the trial court may calculate child support based on the obligor’s earning potential, rather than actual earnings, even if there is no evidence that the obligor is unemployed or underemployed for the purpose of avoiding child support [Iloff v. Iliff, No. 09-0753 (Tex. 2011)]. See Task B3, Calculating Child Support, § B3.02[2][b][i].

Spousal maintenance. Family Code Chapter 8, which provides for spousal maintenance, has been extensively overhauled to clarify formerly vague provisions and make several substantive changes. The maximum duration of a spousal maintenance order now varies depending on the length of the marriage. The maximum amount of a maintenance order is now the lesser of \$5,000 (rather than \$2,500) or 20

percent of the obligor's monthly gross income. An obligee is now required to return any overpayments to the obligor. If the obligor successfully sues to recover overpaid maintenance, the obligee must pay the obligor's attorney's fees and costs. See Task B4, Determining Spousal Support and Maintenance, § B4.02.

Military retirement benefits. Combat-Related Special Compensation received in lieu of full retirement pay and Concurrent Retirement Disability Pay is excluded from the definition of "disposable retired pay" and as a result is not divisible on divorce. See Task B5, Characterizing Property of Parties, § B5.05[1][a], [2].

Fraud on the community. New Family Code Section 7.009 codifies the remedy for fraud on the community described in *Schlueter v. Schlueter* [975 S.W.2d 584 (Tex. 1998)]. When a spouse has committed actual or constructive fraud on the community, the court first calculates the value by which the community estate was depleted as a result of the fraud and calculates the amount of the reconstituted estate, that is, the total value of the community estate that would exist if the fraud had not occurred. Then the court divides the value of the reconstituted estate between the parties in a just and right manner. See Task B7, Dividing Community Property, § B7.03[13].

Collaborative family law participation agreements. New Title 1-A has been added to the Family Code to house the new Collaborative Family Law Act, recommended by the Texas Commission on Uniform State Laws. Title 1-A, containing Sections 15.001 et seq., replaces the existing statutes dealing with collaborative law in dissolutions and SAPCRs [former Tex. Fam. Code §§ 6.603, 153.0072]. The comprehensive new Act covers a range of

topics, including the requirements for a collaborative family law participation agreement; how the process begins and concludes; procedures to follow when a suit has already been filed; the requirements for a valid settlement agreement; lawyer disqualification; disclosure of information; confidentiality, and privilege. See Task E3, Using Alternative Dispute Resolution Methods, § E3.02A.

Income withholding. A writ of withholding is available to aid in the collection of child support arrearages regardless of when the arrearages accrued. The statute of limitation for obtaining a cumulative money judgment for child support arrearages does not apply to enforcement by means of a writ of withholding. Moreover, the dormancy and revival of judgments rules do not apply to a judgment for child support under the Family Code, regardless of when the judgment was rendered. See Task J4, Writ of Withholding, § J4.02[3].

Standing to apply for family violence protective order. A member of a dating relationship may apply for a protective order regardless of whether the member is a child or an adult, and an adult spouse or former spouse may apply for a protective order against a person to whom the applicant's spouse or former spouse is or has been married or is or has been dating. See Task P1, Determining Whether to Seek Protective Order, § P1.02[3].

Admissibility of child's hearsay statement in protective order proceeding. A statement made by a child 12 years of age or younger that describes family violence against the child is admissible as evidence if the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability, and either (1) the child testifies or is available to testify at the proceeding; or (2) the use of the state-

ment in lieu of the child's testimony is necessary to protect the child's welfare. See Task P2, Following Procedure to Obtain Protective Order, § P2.07[2].

Duration of protective order. If the subject of a protective order has caused serious bodily injury or has been the subject of two or more previous protective orders, courts may now render protective orders that are effective for longer than two years. See Task P2, Following Procedure to Obtain Protective Order, § P2.10.

Acknowledgment or denial of paternity. Rescission of an acknowledgment or denial of paternity no longer requires a judicial proceeding. Rescission may now be accomplished by filing a form with the bureau of vital statistics. See Task R1, Understanding Legal Relationship Between Father and Child, § R1.03[3].

Mistaken paternity. The 82nd Legislature enacted a new remedy never before available in Texas. Now, a man who has signed an acknowledgment of paternity or has been adjudicated to be a child's father without obtaining genetic testing may file a petition to terminate the parent-child relationship between himself and the child. If the man establishes a prima facie case that he signed the acknowledgment or was adjudicated as the child's father due to a mistaken belief that he was the child's genetic father based on misrepresentations that led him to that conclusion, the court will order genetic testing. If testing shows the man is not the child's father, the court must terminate the parent-child relationship, and this ends the man's duty to pay future child support. See Task S1, Initiating

Termination Suit, § S1.01[7].

Ad litem in DFPS termination suits. New Family Code provisions specify the powers and duties of attorneys ad litem appointed to represent parents in DFPS-initiated termination suits. Duties include interviewing, investigating the facts, reviewing court files, conducting discovery, encouraging settlement and ADR, and meeting with the parent. Attorneys ad litem for alleged fathers must conduct an investigation, interview persons with knowledge of the case, attempt to identify and locate the alleged father, and, if successful, provide that information to each party and the court. If the alleged father cannot be identified or found, the attorney ad litem must submit a report to the court. See Task S2, Conducting Termination Suit, § S2.03[4][e], [f].

Appeals in DFPS termination suits. The procedures for accelerated appeals in DFPS-initiated termination suits have been changed significantly. Under the new scheme, an attorney ad litem appointed to represent the parent at trial continues to represent the parent on appeal, and once a parent is found indigent, the parent is presumed to remain indigent for the duration of the suit and any subsequent appeal. The provisions in Family Code Section 263.405 concerning statements of appellate points and frivolousness hearings have been repealed, and the Texas Supreme Court has been directed to adopt procedural rules for these appeals by March 1, 2012. See Task S5, Obtaining Final Order in Termination Suit, § S5.04[6].

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November 2011

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