

New Legislation Affecting the Judiciary

2015 Legislative Update

This article attempts to educate the judiciary on the major legislative changes from the 84th Legislative session in 2015 that impact the courts. All the new laws were effective September 1, 2015 unless indicated otherwise.

Family Law Bills

SB 314 by Sen. West: This act amends section 263.408 of the Family Code. The amended statute requires the Department of Family and Protective Services, when the court appoints a nonparent as the managing conservator, to provide to the nonparent an explanation of the differences between the appointment as managing conservator and adoption. The explanation should include the following statements:

- 1) appointment as conservator conveys the rights specified by the court or applicable law, rather than the complete rights of a parent that are conveyed via adoption;
- 2) a parent may still request visitation, or even appointment as managing conservator, from the court; and
- 3) appointment will not result in eligibility for postadoption benefits.

In addition, the court order appointing the nonparent as managing conservator shall include the following:

- 1) reference to the rights and duties conveyed under existing Section 153.371 (Rights and Duties of Nonparent Appointed as Sole Managing Conservator) of the Family Code (e.g., rights to direct religious training and consent to medical care and duties to feed and clothe); and
- 2) provisions addressing the authority of the nonparent to:
 - authorize immunizations;
 - obtain health and auto insurance;
 - enroll the child in day-care or preschool;
 - okay participation in extracurricular activities;
 - authorize getting a driver's license or ID;
 - authorize the child's employment; and
 - apply for benefits or obtain legal services for the child; and any other provisions the court deems necessary.

In issuing the order, the court must have evidence that the nonparent was advised of these rights and duties.

SB 814 by Sen. Rodriguez: This amends section 6.4035 of the Family Code. Under this new law, digital waivers on cases to remove disability of minor change name, or suits affecting parent child relationship are not allowed. Further, the waiver must contain the mailing address of the individual executing the waiver. This section does not apply to a person who is incarcerated.

SB 815 by Sen. Rodriguez: This bill amends section 6.501(a) of the Family Code and updates the standard divorce temporary restraining order language to include technology. Examples include that a party may not threaten or harass the other party by electronic messaging, electronic voice messaging or video chat. The bill further includes references to intellectual property and social media.

SB 822 by Sen. Rodriguez: This bill creates Chapter 47 of the Family Code and attempt to provided clarification of definitions of ad litem, amicus, and guardian ad litem in family law cases.

SB 1931 by Sen. Garcia: This bill amends sections 107.013 and 107.0141 of the Family Code. If a parent is not represented by an attorney at the parent's first appearance, the court shall inform the parent of the right to be represented by an attorney and if the parent is indigent and is in opposition to the suit, the right to appointed counsel. It allows for the parents to share the same appointed counsel if their interests are aligned and there is not history or pattern of family violence by one parent.

The court may appoint a temporary ad litem when the court issues the temporary restraining order or the attachment. In addition to the duties and powers under section 107.0131, the temporary ad litem shall conduct an investigation regarding the petitioner's due diligence in locating and serving citation on the parent. If the parent is located, the attorney shall inform the parent of the parent's right to be represented by an attorney and the right to an appointed attorney ad litem if indigent. If the parent claims indigence, the attorney shall:

- 1) Assist the parent in making a claim of indigence for the appointment of an attorney ad-litem.
- 2) Assist the parent in preparing for a full adversary hearing under Chapter 262.

If the attorney cannot locate the parent, the attorney shall issue a report to the court detailing the efforts made to locate the parent. Upon receipt of the report, the court shall discharge the attorney from the appointment.

If the court determines the parent is indigent, the court may appoint the attorney ad-litem to continue to represent the parent. This determination and appointment must be made prior to the commencement of the full adversary hearing. Sections 107.013 and 262.201 are amended to codify factors the court can consider in determining if the parent is indigent. Factors the court

may consider include the parent's income, the source of income, assets, property ownership, and benefits paid under federal, state, or local public assistance programs.

Practice tip: Make the appointment of the temporary attorney ad-litem when issuing the temporary restraining order or the attachment order.

SB 2065 by Sen. Estes: This bill creates sections 2.601 and 2.602 of the Family Code. It provides that a religious organization or a member of the clergy or a minister is not required to "solemnize any marriage or provide services" if that action would cause the organization or individual to violate sincerely held religious beliefs. This does not apply to the judiciary. This law was effective on June 11, 2015.

HB 825 by Rep. Giddings: This bill amends sections 262.201 and 263.306 of the Family Code. Under this new law, the court shall ask all parties present at each full adversary hearing, status hearing, or permanency hearing whether the child or the child's family has a Native American heritage and identify any Native American tribe with which the child may be associated.

HB 1449 by Rep. Giddings: This bill amends chapter 107 of the Family Code. The new legislation renames social studies as "child custody evaluations" and "adoptions evaluations". The bill establishes minimum requirements for evaluators. In addition, it adds requirements for determining if an evaluator has a conflict of interest. Further, a witness cannot offer expert opinion or recommendation relating to the conservatorship or access of a child unless that witness has conducted an evaluation in accordance with this section. **This is effective for suits filed on or after March 1, 2016.**

HB 3994 by Rep. Morrison: Notice and Consent to an abortion for a minor. This bill dramatically amends Chapter 33 of the Family Code. The suit for a court order authorizing an abortion of a pregnant minor without parental notification and consent must be filed in the county where the minor resides, a contiguous county, or the county where the procedure will be performed.

The petition must include a statement that the minor wishes to proceed to have an abortion without the notification and consent of a parent, managing conservator, or guardian. It must contain a statement about the minor's current physical address, mailing address, and telephone number. The court "shall" appoint a guardian ad litem to represent the best interest of the minor. The pregnant minor must appear before the court in person and cannot appear through video conferencing, telephone conferencing or any other electronic means.

The court must issue written findings of fact and conclusions of law no later than 5:00 p.m. on the fifth business day after the petition is filed. The new law deletes the provision that the petition is deemed granted if the court fails to issue findings in a timely manner. Further, the

burden of proof for the court to grant the application is changed from preponderance of the evidence to clear and convincing evidence that the abortion is in child's best interest. The court can inquire into the reasons why the minor wants the procedure and why the minor does not want to notify the parent, managing conservator, or guardian.

The clerk of the court is to file a report with the Office of Court Administration containing the following information:

- 1) the case number and style
- 2) the applicant's county of residence
- 3) the Court of Appeals District where the hearing occurred
- 4) the date of the filing of the application
- 5) the date of the disposition of the case
- 6) the disposition of the case.

The Office of Court Administration is required to publish a report annually with the figures from the court of appeals districts and the dispositions of the cases. The report from the clerks offices are not public record. **Effective January 1, 2016.**

Civil Law Bills

SB 455 by Sen. Creighton: This bill adds chapter 22A of the Government Code. Chapter 22A creates a special 3-Judge District Court to hear suits that:

- (1) challenge the finances or operations of this state's public school system; or
- (2) involve the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts.

The House version, HB 1091, had a provision to allow the attorney general to request the 3 judge district court in "any other case that could significantly impact the finances or affect a program of the state." This language was not included in the bill that passed.

The attorney general can petition the Chief Justice to appoint the 3 judge court in these type cases. All proceedings are stayed while the chief justice acts on the petition. The composition of the special three judge court will be the district judge of the judicial district to which the original case was assigned; one district judge of a judicial district other than a judicial district in the same county as the judicial district to which the original case was assigned; and one justice of a court of appeals other than:

(A) the court of appeals in the court of appeals district in which the original case was assigned; or

(B) a court of appeals district in which the district judge appointed under Subdivision (2) sits.

The Supreme Court may adopt rules for the operation of the three judge court. The law provides that with unanimous consent of the three judges, one judge can conduct hearings and issue temporary orders. But any rulings or orders issued by the one judge are subject to review by the entire panel. While the rules of procedure apply, there are still questions that remain as to how a trial would be conducted under this new chapter. An appeal from a decision of the three judge court is to the Supreme Court.

SB 735 by Sen. Fraser: This bill amends section 41.001 of the Civil Practice and Remedies Code by changing when evidence of a defendant's "**net worth**" is discoverable. The bill defines net worth as "the total assets of a person minus the total liabilities of the person on a date determined appropriate by the trial court."

The new law allows discovery of net worth only if: "**the court finds in a written order that the claimant has demonstrated a *substantial likelihood of success on the merits of a claim for exemplary damages.***" Earlier versions of the bill had provisions that net worth was not even relevant and therefore not discoverable.

The bill further states that if a party seeks discovery of net worth, the trial court should presume that the party seeking the discovery of net worth has had adequate time for discovery on the issue of exemplary damages and the responding party may seek summary judgment on that issue.

HB 1403 by Rep. Sheets: This bill amends section 74.001(a)(13) of the Civil Practice and Remedies Code and clarifies that cases brought under the Labor Code against a healthcare facility are not healthcare liability claims. However, the legislature did not address the issue with premises liability or slip and fall cases in a healthcare facility, as HB 956 failed to pass.

HB 1692 by Rep. Sheets: This new law amends section 71.051(e) and (h) of the Civil Practice and Remedies Code. If the trial court finds that the case would be more properly heard in another state, this bill allows the court to decline to exercise jurisdiction in a personal injury or wrongful death claims using the *doctrine of forum non conveniens*. The court must make the decision on whether to stay or dismiss a claim as to each individual plaintiff and "without regard to a plaintiff's country of citizenship or national origin."

HB 2536 by Rep. Harless: This bill amends section 25.1032 of the Government Code and applies only to Harris County. Under this new law, Harris County civil courts at law

have exclusive jurisdiction in eminent domain cases when the amount in controversy does not exceed \$200,000.00. If the amount in controversy exceeds \$200,000.00, then the party initiating the proceeding may file the case in a district court. The amendment also defines the term “amount in controversy” as “the amount of the bona fide offer made by the entity with eminent domain authority to acquire the property from the property owner voluntarily.”

Juvenile Law Bills

SB 1630 by Sen. Whitmire: This bill amends chapter 54 of the Family Code and Chapter 203 of the Human Resources Code. The new law relates to the commitment of juveniles in post-adjudication secure correctional facilities operated by the Texas Juvenile Justice Department and by local probation departments. The intent of the bill is to encourage counties to use local facilities and programs more. It limits the commitments to Texas Juvenile Justice Department to determinate sentenced youth unless the court determines that the juvenile has special needs that cannot be addressed in their home region. The bill actually authorizes more funding for local juvenile probation departments. The bill did not change the age of criminal responsibility.

SB 1707 by Sen. Fraser: This act amends section 58.003 of the Family Code and removes the requirement that the trial court hold a hearing before sealing the records of a juvenile who was adjudicated. The new law requires the court to give reasonable notice to the prosecuting attorney and allow the state to request a hearing before the court seals the records. **See also HB 263.**

HB 642 by Rep. Canales: This new statute amends section 106.071 of the Alcoholic Beverages Code and Chapter 42 of the Code of Criminal Procedure. It requires the court, as a condition of community supervision for offender younger than 18 years of age, to order the offender to attend alcohol or drug education classes if placed on probation for an alcohol or drug related offense. In addition, it requires offender or offender’s family to pay for the classes as a condition of probation.

HB 2398 by Rep. White: This bill decriminalizes the offense of Truancy. It amends the Code of Criminal Procedure, the Education Code, and the Family Code. The new law eliminates truancy as an act that constitutes conduct indicating a need for supervision. Further, the bill creates Truancy Courts. Truancy cases can only be prosecuted as a civil case in truancy courts. The designated truancy courts are the Constitutional County Courts (in jurisdictions with a population more than 1.75 million) the justice courts, and municipal courts. The bill does allow for charges to be filed against the parent or guardian, but not against the child. However, a child can still be fined in a civil proceeding.

Criminal Law Bills

SB 112 by Sen. Taylor: This bill amends article 17.292 of the Code of Criminal Procedure concerning Emergency Protective Orders. If the magistrate finds good cause, the order may authorize the accused's attorney or other court appointed person, to contact the alleged victim. **Effective immediately.**

SB 316 by Sen. Hinojosa: This bill amends article 26.04 of the Code of Criminal Procedure. It requires the court to give priority to appointing the public defender's office in court appointments over attorneys who are not in the public defender's office. However, the court does not have to appoint an attorney from the public defender's office if the court has reason to appoint another counsel or if the county has a managed assigned counsel program and the attorney will be appointed under that program.

SB 1517 by Sen. Seliger: This bill amends the Code of Criminal Procedure and could require a county to appointment of counsel for an indigent inmate arrested on a warrant from one county in another county. The bill sets out time frames based on population. If the accused requests an attorney, the magistrate in the county that arrested the suspect on the warrant shall notify the county that issued the warrant that the defendant has requested counsel, within 24 hours of the request. However, if the defendant has not been appointed an attorney in ten days and is still in custody in the arresting county, that county must appoint an attorney for the defendant. The county that issued the warrant shall reimburse the arresting county.

SB 1828 by Sen. Zaffirini: This new theft statute adds Section 31.18 of the Penal Code. It defines cargo as "goods, as defined by Section 7.102, Business & Commerce Code, that constitute, wholly or partly, a commercial shipment of freight moving in commerce." The value ladder for this statute is not consistent with new theft values or the old sections. For Cargo theft, the value ladder is:

- 1) \$1,500 to \$10,000: State Jail Felony
- 2) Over \$10,000 to \$100,000: Third Degree Felony
- 3) Over \$100,000 to \$200,000: Second Degree Felony
- 4) Over \$200,000: First Degree Felony

If the offense is less than \$1,500.00, it is not to be prosecuted under this section. However, that statute allows the state to add the value of any vehicle stolen or damaged in the commission of the offense into the value.

HB 326 by Rep. Wu: This bill amends Article 18.01 of the Code of Criminal Procedure. The bill attempts to regulate and modernize the practice of obtaining warrants when the applicant

and magistrate are in different physical locations. This law attempts to codify the procedures and use of electronic warrants. Under the new law, the magistrate may consider information communicated by telephone or other reliable electronic means in determining whether to issue a search warrant. The magistrate “may examine an applicant for a search warrant and any person on whose testimony the application is based. The applicant or other person must be placed under oath before the examination.” Reliable electronic means include fax, secure e-mail, and text messages.

The statute requires that the sworn affidavit and signed warrant must be kept in the court’s file.

HB 644 by Rep. Canales: This bill amends Article 18.04 of the Code of Criminal Procedure. The bill is an attempt to limit forged signatures on warrants. The statute now requires that the warrant be signed and dated by the magistrate and “the magistrates name appear in clearly legible handwriting or in typewritten form with the magistrate’s signature.

The bill further amends section 37.10(c)(2) of the Penal Code by adding search warrants to the offense of Tampering with a Governmental Record. This offense would be a third degree felony.

HB 1396 by Rep. Workman: This bill became the criminal law “Christmas Tree” bill. The bill amends sections in both the penal code and the code of criminal procedure.

This bill amends Code of Criminal Procedure Article 18.0215, dealing with cell phone search warrants. It clarifies that a peace officer cannot search phone without consent or warrant. The bill further sets out that only a judge in the same judicial district as the law enforcement agency seeking the warrant or where the phone is located can issue the warrant. The bill further sets out additional grounds to be met before the court can issue the warrant.

HB1396 also amends article 32A.01 of the Code of Criminal Procedure concerning trial priority. The new amendment states that cases with alleged victim under 14 years of age shall be given priority over other cases on the docket.

The bill further addresses statutory construction in criminal cases. The new law states that ambiguity in penalty or element of offense shall be construed in actor’s favor. Further, ambiguity is matter of law and shall be decided by the judge.

The bill also creates a commission to study all penal laws and procedures in Texas. The commission must be representative of the Criminal Justice System. The statute requires the commission to make its recommendations to the legislature by November 1, 2016. The Governor, Lieutenant Governor, Speaker of the House, and Chief Justice of the Supreme Court get to make 2 appointments each. The Presiding Judge of the Court of Criminal Appeals gets to make only 1 appointment to the commission.

Finally, the bill amends several sections of the Penal Code and increases the theft and criminal mischief value ladders: The new classifications are:

- 1) Under \$100: Class C Misdemeanor.
- 2) \$100 to \$750: Class B Misdemeanor
- 3) \$750 to \$2,500: Class A Misdemeanor
- 4) \$2,500 to \$30,000: State Jail Felony
- 5) \$30,000 to \$150,000: Third Degree Felony
- 6) \$150,000 to \$300,000: Second Degree Felony
- 7) Over \$300,000: First Degree Felony

HB 1546 by Rep Allen: This bill amends Chapter 42 of the Code of Criminal Procedure by adding Article 42.0199. It changes how the trial court grants State Jail Felony Diligent Participation credit. The new law basically gives the sentencing judge 2 options.

The first option is the judge can make a finding at sentencing that the defendant is presumptively entitled to the diligent participation credit. It would then be up to the Texas Department of Criminal Justice to determine how much of the 20% credit the defendant would be entitled to, if the defendant has not been subject to disciplinary action while in State Jail. This finding would have to be made on the judgment. Once that finding is made, the judge would not have any further input as to how much, if any, credit the defendant would receive unless the defendant has disciplinary issues.

The second option is for the judge not to make the presumptive finding on the record at the time of sentencing. If no finding is made, then the Texas Department of Criminal Justice would report to the sentencing judge at least 30 days prior to the inmate having completed 80% of his or her sentence. The sentencing judge would then have 30 days to determine how much, if any, credit to give. **Effective for crimes committed on or after September 1, 2015.**

HB 1690 by Rep. King: This bill amends chapter 411 of the Government Code. It creates a Public Integrity Unit in the Texas Rangers Division of the Texas Department of Public Safety. The bill orders the Texas Rangers to assist in the investigations. It sets the venue in the county in which the suspect resides instead of the county where the alleged offense occurred. Further the new law would require the elected prosecutor to file any appropriate charges and prosecute the case or recuse him or herself and have a neighboring prosecutor prosecute the case in the suspect's home county.

HB 2150 by Rep. Alvarado: This high profile bill amends chapter 19 of the Code of Criminal Procedure. This act establishes new requirements for Grand Jury and abolishes the use of the Grand Jury commissioner system. The new law requires that all grand juries be summoned and empaneled using the same system as petit juries. There are no exceptions to this new statute. The court must summon between 20 and 125 prospective jurors for the panel.

Further, the grand jury panel must be “fair cross section of the population area served by the court.” Court’s would be justified in selecting a panel from a central jury pool.

Article 19.23 establishes the questions to be asked of each prospective grand juror. It now adds a question concerning a conviction for misdemeanor theft, to bring this section in accord with the qualifications under section 19.08.

In addition, the bill amends Article 19.31 of the Code of Criminal Procedure and expands the grounds for challenging a potential grand juror. Such new grounds include, but are not limited to:

- 1) The grand juror is insane;
- 2) Medical conditions;
- 3) The grand juror is a witness or a target in the investigation (must be made ex parte and reviewed in camera by the court);
- 4) The grand juror served on the petit jury of the offense or conduct this grand jury is investigating;
- 5) That the grand juror has a bias against the defendant or the state.

Article 19.26 sets out how the grand jury is to be impaneled. Once the court has at least 16 qualified panel members and there is not a challenge to the array or a panel member, the court “shall select twelve fair and impartial persons to serve as grand jurors and four additional persons to serve as alternate grand jurors. The grand jurors and the alternate grand jurors shall be **randomly selected** from a **fair cross section of the population of the area served by the court.**”

There have been numerous disputes and suggestions by judges and stakeholders on how the court should impanel the grand jurors. Senator John Whitmire, the main Senate proponent for these changes, has recently written a letter in response to some questions concerning the application the new statute. An excerpt from that September 15, 2015 letter provides some legislative intent and guidance on selection of the grand jury.

“So long as the panel is randomly selected, the court can pick the first sixteen or not, it can question the entire panel or not, it can select the most qualified or not. It is within the court’s discretion to determine if those selected are ‘fair and impartial’ through direct questioning of the potential jurors by the court” Letter from Sen. John Whitmire.

Based on the wording of the statute and the legislative intent, there are basically four ways to pick a grand jury. The court could pick the first 16 jurors from the qualified panel. The court could “randomly select” 16 jurors from the qualified panel. The court could select the 16

most “qualified” or most representative jurors by using the entire panel. Finally, the court can select a grand jury that represents a fair cross section of the county, starting with the first juror and working up from that juror. Courts may want to consider placing on the record the method they choose to apply in selecting the grand jurors.

HB 2246 by Rep. King: This bill amends the Article 42.12 of the Code of Criminal Procedure and section 521 of the Transportation Code. This new statute makes it easier to obtain an occupational license after a conviction for an intoxication offense. It allows an individual whose driver’s license is suspended for a conviction for intoxication offense can operate a motor vehicle if the defendant:

- 1) obtains and uses an ignition interlock device for the entire period of the suspension;
and
- 2) applies for and receives an occupational driver's license with an ignition interlock designation under Section 521.2465, Transportation Code.

A person who is restricted to the operation of a motor vehicle equipped with an ignition interlock device may not be subject to any time of travel, reason for travel, or location of travel restrictions under the Transportation Code. The court can revoke the occupational license if the defendant fails to comply with the ignition interlock requirements.

General Law Bills

SB 1073 by Sen. Zaffirini: This bill started off as a simple bill addressing the requirements for an application to run for office. It passed out of the Senate in that manner. However, the House Elections Committee amended the bill on May 20, 2015, to repeal sections 172.21 (e) and (g) of the Elections Code. This amendment does away with the petitions requirement for judicial offices, including the Supreme Court, the Court of Criminal Appeals, the Courts of Appeals, and the courts in the 5 largest counties, Harris, Dallas, Bexar, Tarrant, and Travis.

SB 1139 by Sen. Huffman: This is the 2015 Court’s bill. It amends 201.101 of the Family Code by setting out guidelines for the regional presiding judges for the appointment and reappointment of associate judges. It further requires the Office of Court Administration to set out procedures and a written evaluation form to be used by the presiding judges.

The bill also amends the Government Code by creating several new District Courts and County Courts at Law. Some of the counties getting new courts include Cameron, Coryell, Collin, Ector, Fort Bend, Harris, and other counties.

SB 1369 by Sen. Zaffirini: This statute amends the Government Code by adding Chapter 36. This bill requires the court make reports of all appointments of attorney ad litem, guardian ad litem, amicus attorneys, competency evaluators, and mediators. It would exclude the appointments of CASA and ad litem in the minor abortion cases. Further, the court would have to report all payments to ad litem, amicus attorneys, and mediators.

SB 1876 by Sen. Zaffirini: This new law amends the Government Code by adding Chapter 37. This bill is closely related to SB 1369. It applies to counties over 25,000. In addition, the courts would have to create a rotating wheel, similar to those used for criminal defense appointments, for the appointment of attorney ad litem, amicus attorneys, guardian ad litem, and mediators. The court is required to have a list of all attorneys qualified and registered with the court to serve as attorney and guardian ad litem as well as all persons registered with the court to serve as mediators. The court would then be required to make appointments from those wheels. The bill does allow the judge discretion to vary from the wheel depending on the facts of the case and a finding of good cause by the court. The lists shall be posted at the courthouse.

The local administrative judge, at the request of one or more of the courts the judge serves, shall establish and maintain the lists required for those courts. The local administrative judge may establish and maintain one set of lists for all of the requesting courts. The bill does not apply to:

- 1) mediators appointed under Chapter 152 of the Civil Practice and Remedies Code;
- 2) a guardian ad litem or other person appointed under a program authorized by Section 107.031, Family Code;
- 3) an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code; or
- 4) a person other than an attorney or a private professional guardian appointed to serve as a guardian as defined by Section 1002.012, Estates Code.

This bill does raise some questions. The first is how should the courts go about compiling these lists of attorneys who want to be on the list? How often should the lists be updated? The statute requires that it be updated annually. But what if new attorneys request to be on the list in the middle of the year?

SB 1913 by Sen. Perry: This bill amends section 75.401 of the Government Code. It establishes that counties with more than one district court or statutory county court, to

establish, with the consent of the commissioners court, a court administrator system. It further allows the courts to designate local divisions by local rule.

HB 2747 by Rep. Landgraf: This new statute amends section 62.102 of the Government Code. It creates a new qualification to be a juror. It requires the juror to be a “citizen of the United States” and a “resident” of the State of Texas. The previous statute required the juror be a citizen of the State of Texas and made no mention of being a citizen of the United States.