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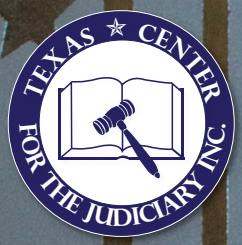

The Official Publication of the Texas Center for the Judiciary

In Chambers

Inside:

Same-Sex Marriage and Gender Identity

New Grand Jury Procedures

Awards and Honors

Ethics

Upcoming Events

and more!

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On the cover: *State Capitol, photo by Debra Malkiewicz*

This is the the official publication of Texas Center for the Judiciary. The magazine is published three times a year and funded in part by a grant from the Texas Court of Criminal Appeals. In Chambers strives to provide the most current information about national and local judicial educational issues and course opportunities available for Texas judges. We keep the Texas Center's mission of "Judicial Excellence Through Education" as our guiding premise.
Readers are encouraged to write letters and submit questions, comments, or story ideas for In Chambers. To do so, please contact Courtney Gabriele, Curriculum Director, at 512.482.8986 or toll free at 888.785.8986, or via email at courtneyg@yourhonor.com. Articles subject to editing for clarity or space availability.
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In Chambers

The official publication of the Texas Center for the Judiciary

Fall 2015

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feature

New Court Appointment Procedures and Reporting Requirements Enacted by the 84th Legislature – Senate Bill 1876 and Senate Bill 1369

By Mena Ramon

The 84th Texas Legislature passed two bills providing new procedures and reporting requirements for court appointments. Senate Bill 1876[1] enacted new procedures for courts to follow when appointing attorneys ad litem, guardians ad litem, guardians and mediators. Senate Bill 1369[2] added new reporting requirements regarding the appointment and payment of persons covered under Senate Bill 1876 and competency evaluators.

On September 21, 2015, Representative Harold V. Dutton, Jr., filed a request for an attorney general opinion (RQ-0060-KP)[3] regarding the constitutionality of SB 1876. Chairman Dutton asks whether the requirements of the Act violate the doctrine of separation of powers because it deprives judges of their discretion in making court appointments and "improperly interferes with how a court manages its docket" and whether it is unconstitutionally vague because it requires judges to add persons to their appointment lists who are "qualified" but does not provide the standards a judge should use to determine whether a person is qualified. This article is intended to provide general information about the law and suggestions for how to comply. It does not address the merits of the arguments posed in Chairman Dutton's attorney general opinion request.

> "The new law provides no guidance on how to determine if a person is "qualified to serve."

Senate Bill 1876 - Court Appointment Procedures

SB 1876 added Chapter 37 to the Government Code effective September 1, 2015. Chapter 37 provides new procedures for the appointment of attorneys ad litem, guardians ad litem, mediators and guardians in counties with a population of 25,000 or more. It applies to any court created by the Texas Constitution or by statute or that is authorized by statute.[4]

The most significant change to practices in effect before September 1, 2015, is the requirement that a court, when required to appoint an attorney ad litem, guardian ad litem or guardian, appoint the person whose name appears first on a list to be maintained by the court pursuant to Government Code Sec. 37.003.[5] Courts are also required to follow this appointment process when appointing mediators in cases when the parties cannot agree on one.[6] Once a person from one of the lists is appointed,

their name is moved to the end of the applicable list.[7]

New Government Code Sec. 37.003 requires courts to establish and maintain lists of: 1) "all attorneys who are qualified to serve as an attorney ad litem and are registered with the court," 2) "all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court," 3) "all persons who are registered with the court to serve as a mediator," and 4) "all attorneys and private professional guardians who are qualified to serve as a guardian as defined by Sec. 1002.012, Estates Code, and are registered with the court." A court may establish and maintain more than one list that is categorized by the type of case and a person's qualifications.[8]

"Qualified to Serve"

To be placed on the list to serve as an attorney ad litem, guardian ad litem and guardian, Sec. 37.003 requires that the person be "qualified to serve" in that capacity and register with the court.[9] The new law provides no guidance on how to determine if a person is "qualified to serve." At a minimum, persons placed on lists for positions that have statutory requirements to serve in that capacity should meet those minimum requirements before being "registered" with the court and placed on the list. The following is a list of court appointed positions that have specific statutory requirements and a description of the requirements.

Attorney ad litem for child or parent in a child protection case - must complete three hours of continuing legal education relating to representing children or parents in child protection cases, depending on the type of appointment, as soon as practicable after the appointment. However, the attorney is not required to comply with this requirement if the court finds that the attorney ad litem has experience equivalent to the education. If a person is required to complete the CLE, the attorney must receive an additional three hours of CLE annually by the anniversary of the day the person was added to the court's list in order to remain on the list of attorneys who are eligible to represent children and parents in child protection cases.[10]

Attorneys who serve as guardians or attorneys ad litem in guardianship proceedings – to be appointed in a guardianship established before September 1, 2015, must be certified by the State Bar as having successfully completed a three-hour course of study in guardianship law and procedure sponsored by the State Bar or its designee.[11] This provision was amended by the 84th Legislature in House Bill 39.[12] For guardianships established after September 1, 2015, the attorney must have completed a four-hour course of study that includes an hour on alternatives to guardianships and the support and services available to proposed wards. The certification issued by the State Bar expires two years from the date it is issued.

Professional guardians - persons who are in the business of providing guardianship services are required to be certified by the Judicial Branch Certification Commission and would need this certification in order to be "qualified to serve" as a private professional guardian and be registered with the court and placed on the list.[13]

Other than the few court appointed positions that have specific statutory requirements, there is no guidance for a judge to determine whether a person is qualified for purposes of being placed on the list. Arguably, the judge or judges in a county could adopt additional objective standards, but this exercise could be subject to challenge if the standards are not truly objective. If judges are interested in setting up additional standards, they may find it helpful to review the standards established by the judges for the qualifications needed to be placed on the public appointment list to represent indigent defendants and by local selection committees for the qualification of attorneys who can represent indigent defendants in capital cases in which the death penalty is sought.[14]

Establishing and Maintaining the Lists

A court may request that the court's local administrative judge (LAJ) establish and maintain the required lists for the court. An LAJ is required to maintain these lists for any court that requests the LAJ to do so, even if it is just one court. The LAJ may establish and maintain one list for all of the requesting courts and may maintain separate lists categorized by the type of case and the person's qualifications.[15, 16]

A court is not required to make an appointment from the required list for: 1) "a mediation conducted by an alternative dispute resolution system established under Ch. 152, Civil Practices and Remedies Code," 2) the appointment of "a guardian ad litem or other person appointed under a program authorized by Sec. 107.031 of the Family Code (CASA appointment), 3) the appointment of 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 Sec. 1002.012, Estates Code.[17]

Courts are permitted to appoint persons who are not next on the list or who are not on the list but meet the statutory or other requirements necessary for the appointment in two instances. The first is when the parties have agreed on the person and the court approves of the appointment.[18] The other is on a finding of good cause, if the appointment is required on a complex matter, because the person has "relevant specialized education, training, certification, skill, language proficiency or knowledge of the subject matter," "has relevant prior involvement with the parties," or "is in a relevant geographic location."[19]

Senate Bill 1876 also requires an LAJ to ensure that appointments made by the courts in the county are made from the lists as required by Sec. 37.003.[20] It also requires the presiding judge of the probate courts to require that the LAJs for statutory probate courts in a county ensure that the statutory probate courts in the county comply with Chapter 37.[21]

Posting the Lists

The lists maintained by the courts are required to be posted annually "at the courthouse of the county in which the court is located and on any Internet website of the court."[22] Under the plain reading of the statute, a court does not appear to have a duty to update its lists as names are added; however, it is probably a best practice to do so. If a court is known to post general information for the attorneys who practice regularly before them, the lists should be posted there. Another possible location is the place where the district clerk posts the lists of attorneys who are qualified for appointment to represent indigent defendants in capital cases in which the death penalty is sought.

SB 1876 also requires that the lists be posted on "any Internet website of the court." If courts do not maintain their own websites, they should coordinate with the person in the county who maintains the sites for the courts and request that the lists be posted there. If there is no Internet website for the courts in the county, SB 1876 does not require that one be created solely for the purpose of posting the required lists.

Reconciling HB 3003 (new offices of child and parent representation and managed assigned counsel programs for certain children and parents) and SB 1876

The 84th Legislature also passed House Bill 3003[23] that provides a process for local governments to establish offices for the representation of children and indigent parents involved in suits seeking conservatorship of the child or the termination of parental rights by the Department of Family and Protective Services.[24] The bill

> "...it is not surprising that the appointment provisions... are in conflict. So how does one comply with both laws?"

permits several counties to establish an office that serves more than one county. Attorneys employed by the office are not permitted to engage in the private practice of child welfare law.[25] If the county in which the court sits has such a program, the court is required to appoint an attorney from the office unless there is a conflict of interest or other reason to appoint a different attorney.[26]

HB 3003 also authorizes counties to create a managed assigned counsel program to provide legal representation for parents and children in cases in which an appointment is required under Sec. 107.012 and 107.013 of the Family Code.[27] A judge in a county served by a managed assigned counsel program must make appointments required under Sec. 107.012 and 107.013 of the Family Code from the program's public appointment list unless there is a conflict of interest or other reason to appoint a different attorney from the list maintained by the court of attorneys qualified for appointment under Sec. 107.012 or 107.013.[28] In order to be placed on the program's list, attorneys must apply with the program, meet all education and training requirements under Sec. 107.004 and 107.031, and be approved by the program director or review committee, as applicable. [29]

Having been passed during the same legislative session and covering the same subject matter, it is not surprising that the appointment provisions of SB 1876 and HB 3003 are in conflict. So how does one comply with both laws? The answer lies in the conflict provision of SB 1876.[30] It provides that Chapter 37 controls when there is a conflict between the provisions of Chapter 37 "and a specific provision relating to a court." It is unlikely that the programs established under HB 3003 would be considered "specific provisions relating to a court" because the attorneys would not be selected for the programs by a court. They would either be hired by the office of parent/child representation or be on a list prepared by the managed assigned counsel program. Therefore, SB 1876 should not trump the appointment procedures provided by HB 3003 and a judge in a county with one of these programs should follow the appointment procedures required under HB 3003 and not be required to resort to the lists maintained under Chapter 37 unless there is a conflict of interest or other reason required to appoint a different attorney from the list maintained by the court. [31]

Senate Bill 1369 – New Reporting Requirements Effective September 1, 2016

Most judges are familiar with the Supreme Court of Texas order (Misc. Docket No. 07-9188)[32] that mandates reporting of fees paid during a month in the amount $500 or more for each appointment made by a judge of any district, county or probate court, court master, or court referee of a position for which any type of fee may be paid in a civil, probate, or family law case under Titles 1, 2 and 4 of the Family Code. All reports required under the order are prepared by the district and county clerks for the courts they serve.[33]

Differences Between Supreme Court Order and SB 1369 Reporting Requirements

Effective September 1, 2016, Senate Bill 1369 requires more comprehensive reporting than what is currently required under the Supreme Court's order. SB 1369 requires reporting from appellate, justice and

municipal courts as well as those courts already covered under the Supreme Court's order. The bill also requires that the monthly reports include all appointments made during a month in addition to payments made during the month. If the amount paid to a person in a month on one case exceeds $1,000, the report must also include any information related to the case that is available to the court on the number of hours billed and billed expenses.[34]

Additionally, the Supreme Court's order only applies to family law cases under Titles 1, 2 and 4 of the Family Code. SB 1369 requires reporting on appointments to all family law cases, including child protection cases. SB 1369 also expands the reporting requirement to any relevant activity in criminal and juvenile cases.

Unlike the Supreme Court's order which requires that any fee payment over $500 be reported, SB 1369 only requires reporting of payments made to attorneys ad litem, guardians ad litem, guardians, mediators and competency evaluators.[35] The new reporting requirements do not apply to: "1) a mediation conducted by an alternative dispute resolution system established under Chapter 152, Civil Practices and Remedies Code, 2) information made confidential under state or federal law, including applicable rules, 3) a guardian ad litem or other person appointed under a program authorized by Sec. 107.031, Family Code, or 4) an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code."[36]

SB 1369 requires that the monthly reports be submitted no later than the 15th day of each month to the Office of Court Administration; this is a shorter time period than the Supreme Court's requirement that the reports be submitted no later than the 20th day following the end of the month.[37] SB 1369 also makes a court ineligible for state grant funds in the following biennium if it fails to provide the clerk of the court the information required to be submitted in the reports.[38]

Report Content

The report must include:[39]

- The name of each person appointed by the court in the month;
- The name of the judge and the date of the order approving compensation to be paid to a person appointed
- The number and style of the case
- The number of cases each person was appointed to in the month
- The total amount of compensation paid to each person and the source of compensation
- If the total amount paid to a person in one case in the month exceeds $1,000, the number of hours billed for the work performed and the billed expenses.
- If no appointment was made during the reporting period, the clerk must submit a report indicating so.

Clerks are already reporting most of this information in most types of cases. The exceptions are that they must submit a report even if there are no appointments made in the month and they must provide more detailed information that is available to the court in cases where a person is paid more than $1,000 in a case in one month.

Judges should be especially aware of the report content requirements so that all court appointment orders and orders approving payment include the information the clerk requires to prepare and submit the monthly reports. Ensuring that orders making appointments and approving payment contain this information is not only a best practice, it is currently required by the Supreme Court's order for the cases that must be reported under the Court's order. Additionally, as mentioned above, failure to do so may make the court ineligible for state grant funding in the following state biennium.

Posting the Report

SB 1369 also requires the clerk to post the report at the courthouse of the county in which the court is located and on any Internet website of the court.[40] Under the Supreme Court's order, a clerk is only required to make a copy available for public inspection in the clerk's office.

The provisions regarding the places that the report must be posted are identical to those specifying where the Government Code Sec. 37.003 lists of attorneys ad litem, guardians ad litem, guardians, and mediators must be posted. If possible, court clerks should coordinate with the courts in the county to identify a common place where this information can be posted in order to avoid confusion regarding the location of the various lists and reports required to be posted under SB 1876 and SB 1369.

The Office of Court Administration is updating the reporting forms and system to reflect the changes made by SB 1369 and to ensure that any reporting requirements mandated by the Supreme Court but not included in SB 1369 continue to be addressed. OCA anticipates the Supreme Court's order will be amended to reflect the changes required by SB 1369 and that the reporting of court appointees other than those listed in SB 1369 will continue in effect under the Supreme Court's order. A "Frequently Asked Questions" [41] page has been added to OCA's website to assist clerks in determining how the changes mandated by SB 1369 will change the way they currently report to OCA. ♦

(Endnotes)

1 *Act of May 31, 2015, 84th Leg., R.S., ch. 1223, 2015 Tex. Sess. Law Serv. 4071 (Vernon).*

2 *Act of June 1, 2015, 84th Leg., R.S., ch. 1199, 2015 Tex. Sess. Law Serv. 4024 (Vernon).*

3 https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2015/pdf/RQ0060KP.pdf

4 *To be codified at Tex. Gov't Code Ann. §37.001(a) (Vernon Supp. 2015).*

5 *Id. §37.004(a) (Vernon Supp. 2015).*

6 *Id. §37.004(b) (Vernon Supp. 2015).*

7 *Id. §37.004(f) (Vernon Supp. 2015).*

8 *Id. §37.003(b) (Vernon Supp. 2015).*

9 *New Tex. Gov't Code §37.003(a)(3) regarding establishing lists of mediators who can be appointed does not include the "qualified to serve language" found in the provisions for the other lists; however, §154.052, Tex. Civ. Prac. & Rem. Code, provides qualifications for impartial third parties appointed under Ch. 154 of that Code.*

10 *Texas Family Code Ann. §§107.004 and 107.0131 (Vernon 2014).*

11 *Tex. Estates Code Ann. §1054.201 (Vernon 2014).*

12 *Act of May 20, 2015, 84th Leg., R.S., ch. 214, 2015 Tex. Sess. Law Serv. 1290 (Vernon).*

13 *Tex. Gov't Code §155.102 (Vernon Supp. 2014).*

14 *See Code Crim. Proc. Ann. arts. 26.04 and 26.052(d)(1) (Vernon Supp. 2014).*

15 *Senate Bill 1876 repealed the provisions of Tex. Gov't Code §§74.092(a)(11) and (b) that required the LAJ to maintain a list of all attorneys who were qualified to serve as an attorney ad litem.*

16 *To be codified at Tex. Gov't Code Ann. §37.003(c) (Vernon Supp. 2015).*

17 *Id. §37.002 (Vernon Supp. 2015).*

18 *Id. §37.004(c) (Vernon Supp. 2015).*

19 *Id. §37.004(d) (Vernon Supp. 2015).*

20 *Id. §74.092(11) (Vernon Supp. 2015).*

21 *Id. §25.0022(d)(10) (Vernon Supp. 2015).*

22 *Id. §37.005 (Vernon Supp. 2015).*

23 *Act of May 25, 2015, 84th Leg., R.S., ch. 571, 2015 Tex. Sess. Law Serv. 1969 (Vernon).*

24 *To be codified at Tex. Family Code Ann. §107.064 (Vernon Supp. 2015).*

25 *Id. §107.069(d) (Vernon Supp. 2015).*

26 *Id. §107.070 (Vernon Supp. 2015).*

27 *Id. §§107.102, 107.103 (Vernon Supp. 2015).*

28 *Id. §107.107(a) (Vernon Supp. 2015).*

29 *Id. §107.107(b) (Vernon Supp. 2015).*

30 *To be codified at Tex. Gov't Code Ann. §37.001(b) (Vernon Supp. 2015).*

31 *To be codified at Tex. Family Code Ann. §§107.070(a) and 107.107(a) (Vernon Supp. 2015).*

32 http://www.txcourts.gov/media/7527/SC-Order-07-9188.pdf

33 *Information regarding reporting requirements under the Supreme Court's order is available at:* http://www.txcourts.gov/statistics/appointments-fees-in-civil-cases.aspx

34 *To be codified at Tex. Gov't Code Ann. §36.004(a) (Vernon Supp. 2015).*

35 *Id.*

36 *Id. §36.003 (Vernon Supp. 2015).*

37 Id. §36.004(b)(1) (Vernon Supp. 2015).

38 Id. §36.005 (Vernon Supp. 2015).

39 Id. §36.004(a) (Vernon Supp. 2015).

40 Id. §36.004(b)(2) (Vernon Supp. 2015).

41 http://www.txcourts.gov/reporting-to-oca/news/sb-1369-appointments-fees-reporting.aspx