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Mr. Frank Gilstrap
via email: fgilstrap@hillgilstrap.com

Dear Mr. Gilstrap,

I reviewed the new statutes again in Chapter 33 of the T.F.C. after we spoke. Although there are many questions about the new provisions and burden of proof, there appear to be two main areas of concern for practitioners. It also appears that most likely there is only one issue that the Supreme Court might address so I will discuss it first.

§33.003 (E) (3) states that the minor's application under this chapter must

> Be accompanied by the sworn statement of the minor's attorney under Subsection (r), if the minor has retained an attorney to assist the minor with filing the application under this section.

§33.003, Subsection (r) states:

> An attorney retained by the minor to assist her in filing an application under this section shall fully inform himself or herself of the minor's prior application history, including the representations made by the minor in the application regarding her address, proper venue in the county in which the application is filed, and whether a prior application has been filed and initiated. If any attorney assists the minor in the application process in any way, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement.

This sworn statement appears to require the attorney to somehow verify the information given by the applicant with regard to prior application history, address, proper venue and any prior applications filed and initiated or face a civil penalty. The biggest practical problem is how is the attorney supposed to do this?

With respect to application history and any currently-filed and initiated applications, there is no avenue for the attorney to verify that information. §33.0065 states that the clerk of the court shall retain the records for each case before the court under this chapter in accordance with rules for civil cases and grant access to the records to the minor who is the subject of the proceeding. It does not grant access to an attorney attempting to verify representations of the applicant under §33.003, Subsection (r).

In Tarrant County, for example, the files are not accessible on the local system nor are they e-filed. They are not kept in the same location as other civil or family law pending files. They are physically sealed with a laminating machine when the case is closed. How is an attorney going to verify that there is no other filed and initiated application, or a previously filed application that was denied, without being granted access to these files?

Another question is where should the attorney look for prior or pending applications? Venue is proper in multiple possible counties including the county in which the facility at which the minor intends to obtain the abortion is located. How many counties might be possibilities? What is a reasonable number of counties to check for the attorney? Given the desire to protect the identity of both the applicant and the Judge hearing the application, it can easily be presumed that there are local procedures in all counties which would prevent the attorney from accessing prior or pending applications. And yet, the attorney is required to sign a sworn statement about the truth of the assertions made by the applicant.

With respect to attesting to the applicant's address and the proper venue for the action, what exactly is expected of the attorney? Even if the attorney were to follow the applicant to the address she has given, it would merely allow the attorney to verify that the address exists, but not that the applicant actually resides there. What about the applicant who uses the parent's address for school enrollment, which would ostensibly be her residence, but actually resides with an extended family member? Also, this is a mobile society and if the applicant did reside at the address given which would be proper for venue, and then moves before the hearing, has the attorney left him or herself open to the civil penalty of §33.012? Individual attempts by the attorney representing the applicant to verify an address could quite possibly lead to the discovery of the applicant's pregnancy by the very family members whom the applicant seeks to avoid and then the attorney may be liable to his or her client for breach of confidential representation. It is a no-win situation for the attorney.

Overall, the requirement that the attorney "must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement" is a high bar for the attorney; especially given that there is almost no way for the attorney to independently verify either one. Typically in family law proceedings, it is the client, and not the attorney, who is attesting to the truth of the information or allegations. Tarrant County local rules require an attorney to verify the attorney's attempts to resolve the issue prior to requesting a hearing in a Certificate of Conference. Under the TFC, the attorney must verify a request for a continuance. But neither one requires the attorney to attest to the truth of his or her client's statements. But in no other section of the family code is the attorney required to verify the truth of his or her *client's claims*. The truth of those claims is determined by the trier of fact.

The civil penalty as it relates to the attorney's sworn statement, is problematic as well. Under §33.012, a significant civil penalty may be assessed against a person who is found to have intentionally, knowingly, recklessly, or with gross negligence, violated Chapter 33. The Attorney General is the agency with the ability to bring an action for the civil penalty and is charged with enforcing the chapter. The minor applicant and the Judges or Justices hearing the application are immune from the civil penalty. That only leaves the attorney and the physician open to suit. While the intent of this section may have been to subject the physician to additional fines, it also leaves the attorney vulnerable. If an attorney does not attempt independent verification, is he or she recklessly or intentionally violating the chapter provisions? Additionally, the wording of this section leads to concerns that malpractice insurance would not cover this type of suit. That type of personal, financial vulnerability based on representations made by a teen-aged applicant that the attorney has no way of verifying, is frightening for the practitioner. Possible personal exposure of this magnitude is already causing concern for practitioners who have been willing to assist these applicants in the past. The effect of practitioners withdrawing their assistance to these applicants will most certainly have a negative effect on those who are in need of legal representation for access to our courts.

Is it possible for the Supreme Court to clarify the expectations regarding the sworn statement? Perhaps some language that clarifies that the attorney attesting to the truth of the minor's information is in some way limited? Maybe language that says the attorney attestation of the minor's claims is "limited to the best of his or her ability, without undertaking any actions or independent investigation that may violate the confidentiality of the attorney-client relationship." Without any guidance as to what the duties are of the attorney for determining the truth of the minor's claims, it is an open door to finding out after the fact, and during the AG's civil case, what was expected of you.

The second are of concern is the removal of the deemed granted provision in the event the court fails to rule within the prescribed time frame. In this legislative session, Section (h) states, "the court shall rule on an application submitted under this section and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the fifth business day after the date the application is filed with the court." The concerns are two fold. First, subsection (g) states, "the court shall fix a time for a hearing on an application filed under Subsection (a) and shall keep a record of all testimony and other oral proceedings in the action." It does not prescribe a time frame in which to set the hearing. Ostensibly it should occur within five business days after the application is filed as that is when the court is to rule, but nothing specifically says so.

Second, and more problematic, is what is the practitioner to do if the court does not rule by 5 p.m. on the fifth business day after the day the application is filed? Appeal is not available as there has been no ruling. A writ of mandamus is a possibility but with what outcome? If the writ of mandamus is filed, the action would be based on the trial court's failure to issue a ruling within the prescribed time period. The nature of the relief sought would be a request for the Court of Appeals to order the trial court to issue a ruling. So, after the practitioner complies with all the requirement of the Texas Rules of Appellate Procedure for the writ of mandamus, which are not quick or easy for anyone not well-versed in appellate procedure, the Court of Appeals

could issue a ruling ordering the trial court to issue a ruling on the application. So what? There is no way the ruling could be within the prescribed time of Subsection (h) as that is the basis for the writ of mandamus. The time frame on the process of filing the writ of mandamus is anyone's guess but most likely somewhere between 3 and 5 working days. The time it will take for the appellate court to rule on the Mandamus is again up for debate. There is also no procedure for an expedited writ of mandamus for a Chapter 33 case like there is for an appeal in a Chapter 33 matter. So, if you add the time table up, it could very easily look like this: file petition and have hearing but receive no ruling (5days), file writ of mandamus(3-5 days), get appellate court ruling on Mandamus (3-5 days), then go back to waiting for a ruling from the trial court. Somewhere between 11 and 15 days after the petition was filed, the applicant is right back to square one waiting for the trial court to issue a ruling. This could be an endless loop with the Court of Appeals telling the trial court to issue a ruling and the trial court failing to do so.

In an appeal from the trial court's decision on a Chapter 33 matter, the Court of Appeals issues an actual ruling on the merits of the application and a ruling on the application has then been received. In a writ of mandamus situation, the consensus is that it would be inappropriate for the Court of Appeals to rule on the application itself at that point and that the response would be limited to whether or not the trial court abused its discretion by not issuing a timely ruling on the application for a judicial bypass and direction from the Court of Appeals for the trial court to issue a ruling. That is a lot of activity to still end up with no ruling from the trial court. Meanwhile, the days are adding up and the applicant may or may not have enough time to wait out a recalcitrant Judge. Also, the appeal in a Chapter 33 matter has specific protections for confidential and privileged pleadings while a mandamus action in a Chapter 33 case does not. How can the practitioner in good conscience file a writ of mandamus knowing both the applicant's name and the Judge's name must be clearly identified and the pleading is not confidential?

Is there a possibility that the Supreme Court Rules could expedite the process for a writ of mandamus in a Chapter 33 case? No requirement of record, for example. Since the granting of the writ requesting the trial court issue a ruling has no bearing on the merits of the underlying matter, why would a record be necessary for the Court of Appeals? It is the failure to rule that is being complained of; not the ruling itself. One would think a copy of the application showing the file-marked date and noting the date of the request for the writ would be sufficient to establish a prima facia case that the trial court failed to rule in accordance with the statute. Additionally, the Supreme Court Rules could extend to a writ for mandamus, the time tables and the confidentiality afforded to an appeal under §33.004. At least the attorney could file for the mandamus without making the client's name, or the Judge's name, public record.

If any of us considering the effects of the new statutes come up with any brainstorm thoughts between now and when the committee meets, I will send them your way. Thank you for taking the time to review these issues and working with the Rules Committee to attempt to get the Supreme Court of Texas to smooth out the rough spots.

Sincerely,

Barbara A. Armstrong