



**Report to the Supreme Court of Texas
On Proposed Revisions to Texas Rule of Civil Procedure 145,
Affidavits of Indigency**

**Submitted by the Texas Access to Justice Commission
May 6, 2013**

Introduction

The Supreme Court of Texas established the Texas Access to Justice Commission ("Commission") in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system.¹ The Commission is comprised of ten appointees of the Court, seven appointees of the State Bar of Texas, and three ex-officio public appointees.

The Commission created a Self-Represented Litigants Committee² ("SRL Committee") in 2010 to address the access issues of pro se litigants. In January 2011, the SRL Committee established a Rules Subcommittee³ ("Subcommittee") to review legislation, policies and rules that impact pro se litigants. At its initial meeting in March 2011, the Subcommittee discussed various procedural challenges facing pro se litigants. Because many pro se litigants cannot afford filing fees, the conversation included a discussion of Texas Rule of Civil Procedure 145 ("TRCP 145")⁴, which governs affidavits of indigency.

At that time, legal aid organizations were reporting continued struggles with counties contesting affidavits of indigency accompanied by an IOLTA Certificate⁵, which have been uncontestable under TRCP 145 since 2005. As the Subcommittee proceeded with its review, members became concerned with the inconsistent manner in which affidavits of indigency are handled throughout the state and the high possibility of differing outcomes for affiants in similar financial circumstances, particularly for those

¹ Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001. See Exhibit A.

² Members of the SRL Committee are: Stewart Gagnon, chair, with Fulbright & Jaworski; Katie Bond with the Office of Court Administration; Randy Chapman with the Texas Legal Services Center; Bobbie Cochran with Houston Volunteer Lawyers; Cristy Arscot with Smith County Bar Association; Lewis Kinard with the American Heart Association; Hon. Lora Livingston, Travis County District Judge; Peggy Montgomery, retired from Exxon Mobile; Hon. Judy Parker, Lubbock County Court At Law Judge; Jay Patterson, retired Dallas judge; Lisa Rush with the Travis County Law Library; Jonathan Vickery with the Texas Access to Justice Foundation and Dianne Wilson, Ft. Bend County Clerk.

³ Members of the SRL Rules Subcommittee are: Lewis Kinard, chair, with the American Heart Association; Philip Friday at Friday, Friday and Kazen; Hon. Andrew Hathcock, Associate Judge at Travis County District Court; Laurel Holland, reference attorney at the Travis County Law Library and Self-Help Center; Kennon Peterson with Scott Douglass & McConnico; Jonathan Vickery with the Texas Access to Justice Foundation; and Marisa Secco as a resource member.

⁴ Tex. R. Civ. Pro 145. See Exhibit B.

⁵ In 2005, TCRP 145 was modified to include a provision that an affidavit of indigency accompanied by a certificate stating that a party represented by an attorney providing services through a legal aid program funded by the Interest on Lawyers Trust Accounts program may not be contested ("IOLTA certificate").

without representation. The Subcommittee has received numerous, and increasingly frequent, reports from legal aid attorneys, judges, clerks, court personnel, and law librarians of problems faced by parties who file an affidavit of indigency, including counties that:

- Automatically contest every affidavit of indigency filed, even when the party is receiving means-tested public benefits;
- Delay the filing of a case when it is accompanied by an affidavit of indigency;
- Contest affidavits of indigency accompanied by an IOLTA certificate;
- Assess costs after final orders are rendered and the case is concluded when there has been no successful contest to the affidavit of indigency;
- Determine indigence inconsistently within the same court, county, and across the state;
- Conduct contest hearings before a staff attorney rather than before a judge; and
- Adopt policies and practices that discourage parties from filing affidavits of indigency.

The Subcommittee discussed whether the situation could be handled through education, as is the Subcommittee's preference, rather than a rule revision. Ultimately, they felt that education would not suffice and that TRCP 145 could be improved in a way that made it fairer for litigants while giving more guidance to clerks and judges.

The guiding principles for the Subcommittee were that access to the court is a fundamental right under the Texas Constitution; that TRCP 145 is one way that the Texas Supreme Court has addressed this right; and any changes to TRCP 145 should help all affected parties apply the rule in a way that is consistent with Texas law.

Research and Methodology

During the course of its review, the Subcommittee researched other states' rules governing indigency, Texas case law, various definitions of indigency and eligibility requirements used by government entitlement programs and legal aid providers, and the relatively recent revision of Texas Rule of Appellate Procedure 20 ("TRAP 20"). The Subcommittee was also mindful of the balance between the revenue needs of counties and the consequences to litigants who cannot afford court costs.

Pauper's Rules in Other States

The Subcommittee began by researching rules governing indigency in other states.⁶ Some states had very cursory rules while others were more detailed. The majority of rules had the same basic elements as our current TRCP 145: a process for a party to proceed without incurring certain costs; a presumption that a party receiving public benefits was indigent; and a means of contesting a party's claim of indigence. However, other states had greater specificity in terms of the definition of indigence, the costs waived, and the means of contesting a claim of indigence. The Subcommittee did not rely on a rule from any particular state, although pros and cons of concepts from the rules of some states were discussed at various stages of drafting.

Case Law

The Subcommittee also researched Texas case law on both TRCP 145 and the appellate corollary, TRAP 20. The following cases are the most relevant and oft cited.

⁶ Research of other state's rules governing waivers of costs based on indigency set forth in Appendix A.

Pinchback v Hockless, 164 S.W.2d 19 (Tex. 1942) sets forth the purpose of the rule and basic test for determining if a party is unable to afford costs. “These rules...were adopted to protect the weak against the strong, and to make sure that no man should be denied a forum in which to adjudicate his rights merely because he is too poor to pay the court costs.... Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or give security therefor, if he really wanted to and made a good-faith effort to do so?”⁷

Cook v. Jones, 521 S.W. 2nd 335 (Tex. Civ. App. – Dallas 1975, writ ref’d n.r.e.) held that court costs included the fee for service of citation by publication.⁸

Equitable General Insurance Company of Texas v. Yates, 684 S.W.2d 669 (Tex. 1984) held that an uncontested affidavit of inability to pay costs is conclusive as a matter of law.⁹

Higgins v. Randall County Sheriff’s Office (Higgins II), 257 S.W.2d 684 (Tex. 2008) dealt with TRAP 20 and held that an appeal may not be dismissed for a formal procedural defect unless the party is provided a reasonable opportunity to correct the defect.¹⁰

In re Villanueva, 292 S.W.3d 236 (Tex. App. Texarkana 2009) held that “...without reference to the exact nature of the cost or fee at issue, Rule 145 of the Texas Rules of Civil Procedure removes any financial obstacles to the indigent litigant’s access to the courts.... We conclude that the trial court abused its discretion when it ordered Villanueva to pay the costs and fees associated with the attorney ad litem and the social study administrator when Villanueva is indigent as a matter of law [her affidavit of indigency was uncontested] and when such orders effectively deny her a forum in which to dissolve her marriage and resolve custody issues.”¹¹

Additional case law has been provided in Appendix B to this report.

Definitions of Indigence

One of the most vexing issues faced by the Subcommittee was how to determine if a party is unable to pay costs. No uniform definition of indigence exists throughout the 254 counties in Texas. A person may qualify as indigent in one county but not in another. In fact, there are multiple definitions of indigence operating within our state and nation.

To qualify for legal aid, a person must meet both income and asset eligibility requirements. At a Legal Service Corporation (“LSC”) funded provider, a person’s income may be up to 200% of the federal poverty guidelines. At a Texas Access to Justice Foundation (“TAJF”) funded organization, a person’s income must be at or below 125% of the federal poverty guidelines, or up to 187.5% of the federal poverty guidelines if the person is a victim of crime, or up to 200% of the federal poverty guidelines if the person is a veteran. TAJF and LSC funded providers use one of two asset limit tests.¹² Both have a limit on liquid and non-liquid assets and exempt certain non-liquid assets such as the person’s homestead, car, and household goods.

⁷ *Pinchback v Hockless*, 164 S.W.2d 19 (Tex. 1942), at 19, 20. See Exhibit C.

⁸ *Cook v. Jones*, 521 S.W. 2nd 335 (Tex. Civ. App. – Dallas 1975, writ ref’d n.r.e.) at 338. See Exhibit D.

⁹ *Equitable General Insurance Company of Texas v. Yates*, 684 S.W.2d 669 (Tex. 1984) at 671. See Exhibit E.

¹⁰ *Higgins v. Randall County Sheriff’s Office (Higgins II)*, 257 S.W.2d 684 (Tex. 2008) at 685. See Exhibit F.

¹¹ *In re Villanueva*, 292 S.W.3d 236 (Tex. App. Texarkana 2009) at 246. See Exhibit G.

¹² In Texas, all three LSC funded legal aid providers also receive TAJF funding. TAJF requires its grantees to use one of two asset limit tests as set forth on pages 4 and 5 of Exhibit H.

Eligibility requirements for various public benefits¹³ differ as well. The Supplemental Nutrition Assistance Program (“SNAP”, formerly food stamps) sets income eligibility at or below 130% of the federal poverty guidelines. Temporary Assistance to Needy Families (“TANF”) sets it at 187%. Both programs allow for income deductions, including medical expenses, child care, and child support payments, that can bring a household with income over 200% of the federal poverty guidelines to within eligibility range. Additionally, SNAP limits liquid assets to \$5,000, whereas the TANF limit is \$1,000. Both have asset exemptions, including a person’s homestead, car, and several other items.

To qualify for the Children’s Health Insurance Program (“CHIPs”), a family’s income may be up to 200% of the federal poverty guidelines and allows for multiple income deductions. CHIPs has no liquid asset test for households with income 150% or less of the federal poverty guidelines, but for households with income over 150%, CHIPs has a more liberal liquid asset limit of up to \$10,000. CHIPs has the usual non-liquid asset exemptions, including a homestead, car, and household items.

Finally, to qualify for public housing, the project-based Section 8 program, and the Section 8 voucher program, a person’s income may not exceed 80% of the median income for the area in which he lives.¹⁴ Statewide housing guidelines are approximately 300% of the federal poverty guidelines for smaller families and less than 200% of the federal poverty guidelines for larger families. A person must also meet asset eligibility requirements. Each county has specific guidelines that may be more or less than the statewide guidelines.

The following chart shows the 2013 federal poverty guidelines per household size:

Household Size	FPG	TAJF Guideline	SNAP* Guideline	TANF* Guideline	TAJF Crime Victim Guideline	LSC, TAJF Veterans & CHIPs* Guideline
		125% FPG	130% FPG	185% FPG	187.5% FPG	200% FPG
1	\$11,490	\$14,363	\$14,937	\$21,264	\$21,543	\$22,980
2	\$15,510	\$19,388	\$20,163	\$28,704	\$29,081	\$31,020
3	\$19,530	\$24,413	\$25,389	\$36,132	\$36,619	\$39,060
4	\$23,550	\$29,438	\$30,615	\$43,572	\$44,156	\$47,100
5	\$27,570	\$34,463	\$35,841	\$51,012	\$51,594	\$55,140
6	\$31,590	\$39,488	\$41,067	\$58,452	\$59,231	\$63,180
7	\$35,610	\$44,513	\$46,293	\$65,880	\$66,769	\$71,220
8	\$39,630	\$49,538	\$51,519	\$73,320	\$74,306	\$79,260

*Indicates entities that allow applicants to deduct certain expenses, such as child care or medical expenses from their income prior to applying the income eligibility test.

¹³ See Texas Works Handbook for information on SNAP, TANF, CHIPs and other medical benefit programs. Part C, Section 100 governs income limits: <http://www.dads.state.tx.us/handbooks/texasworks/C/index.htm>. Part A, Section 1400 governs income deductions: <http://www.dads.state.tx.us/handbooks/texasworks/A/1400/index.htm>. Part A, Section 1200 governs allowable assets: <http://www.dads.state.tx.us/handbooks/texasworks/A/1200/index.htm>.

¹⁴ Per the United States Department of Housing and Urban Development See 24 C.F.R §982.201 (2011) (Section 8 housing voucher program); 24 C.F.R. § 960.201 (2011) (public housing); 24 C.F.R. § 5.653 (2011) (project-based section 8)

Fortunately, some general conclusions can be drawn. All have an income test between 125-200% of the federal poverty guidelines and a non-liquid asset test that exempts the homestead, a car, and certain other assets, such as personal property. However, the liquid asset exemption varies widely from a low of \$1,000 per household to a high of \$10,000 for the individual plus an additional \$5,000 per family member.

Texas Rule of Appellate Procedure 20

The Subcommittee reviewed TRAP 20, the appellate corollary to TRCP 145, because it had been revised more recently than the last amendment to TRCP 145 and is more comprehensive than TRCP 145. The Subcommittee initially adopted the structure of TRAP 20, but over months of drafting, ended up discarding parts that clearly did not fit trial court level actions and changed the format to accommodate proposed changes.

Financial Need of Counties versus Ramifications to Party

Throughout the drafting process, the Subcommittee was conscious of the need for counties to secure filing fees and costs from parties who can afford to pay them to cover their expenses, while being mindful of possible ramifications to an indigent litigant's ability to secure a fair hearing by not having those costs covered. It was a difficult challenge, but the Subcommittee crafted a rule that it believes fairly balances those interests and is easy to understand by the court personnel who will most often be called upon to apply it.¹⁵

Recommendations and Rationale

Because the proposed revision is effectively a rewrite, this report addresses each section of the proposed rule.

Title, Affidavit of Inability to Pay Costs

Title Change: The Subcommittee proposes changing the title of TRCP 145 from Affidavit of Indigency to Affidavit of Inability to Pay Costs. In both the current rule and the proposed rule, the key definition is phrased as whether a party is "unable to afford costs" and is used throughout, so it seemed best to title the rule accordingly. Additionally, many legal aid providers already use this title on their affidavits.

Section (a), Establishing Inability to Pay Costs by Affidavit

Same basic rule. Under the current and proposed rule, Section (a) sets forth the basic rule that allows a party who is unable to pay costs to proceed without advance payment of costs, provided the party files an affidavit attesting to those facts. Most of Section (a) under the present TRCP is encompassed by this section.

¹⁵ The Subcommittee attempted to estimate a financial impact of the proposed revision by seeking information from the four largest counties on the number of cases filed on an affidavit of indigency and cost information. The information was not able to be obtained.

Section (b), Definition of Party Unable to Afford Costs

The Subcommittee believes that many of the problems arising under the current rule stem from a lack of clarity regarding who is unable to afford costs. In an effort to provide greater guidance, the Subcommittee dedicates an entire section to the definition.

Five Categories of Parties Defined as Unable to Afford Costs. In the proposed rule, five different categories of parties are included in the definition of a party who is unable to afford costs: those unable to afford costs under the current rule, a modification of those who are represented by a legal aid provider under the current rule, and two additional categories.

Keeps Public Benefit Recipients and Anyone with No Ability to Pay. The current rule defines a party who is unable to afford costs as those who are currently receiving public benefits and anyone else who has no ability to pay costs. Proposed Section (b)(1) regarding recipients of public benefits is essentially the same as the current rule, except it uses “means-tested government entitlement program” instead of “government entitlement” to underscore that the party has been screened for financial eligibility. Proposed Section (b)(5) has the same catchall category as the current rule.

Modifies Party Represented by IOLTA Funded Program. Under the current rule, a party represented by an attorney providing free legal services through an IOLTA-funded program that has screened the party as financial eligible, is allowed to proceed as a party who is unable to afford costs. Even though they are not technically defined as a party unable to afford costs under the current rule, the effect is the same. In fact, if an “IOLTA certificate” is filed with their affidavit, the affidavit cannot be contested.

Adds Party Represented by Legal Aid to Definition. The proposed rule simply adds this group to the definition of a party who is unable to afford costs. The fact that the party has been screened by a legal aid provider as financially eligible for services that are restricted to low-income individuals is what qualifies the party as unable to afford costs, not the certificate. The certificate is what makes their affidavit unable to be contested.

Changes reference from funding source (IOLTA) to funder or civil legal aid provider. The proposed rule eliminates the reference to IOLTA funds. The Subcommittee felt that it was better to connect the rule back to the entity that provides the funds and establishes the financial eligibility guidelines, such as TAJF or LSC, rather than a particular funding stream. As we have seen with IOLTA, funding streams are not necessarily stable. Additionally, because not all legal aid providers receive funding through TAJF or LSC, the Subcommittee included a provision for nonprofit civil legal aid providers serving people living at or below 200% of the federal poverty guidelines.

Adds Two Categories of Parties to Definition

Party Determined Financially Eligible but Not Represented by Legal Aid. The Subcommittee added a category to the definition for parties who have been determined to be financially eligible for free legal assistance by a legal aid provider but who were declined representation. The Subcommittee felt that those who meet the financial criteria for legal aid should not be penalized for being unable to get representation through legal aid, as

there are consistently far more applicants for legal aid than attorneys to meet that need. Adding this provision will help increase the uniform application of TRCP 145 across the state.

Party Living At or Below 200% of the Federal Poverty Guidelines. The Subcommittee also created a baseline definition of poor so that someone who has not been financially screened for legal aid or public benefits, but who would qualify for those services if they had, is defined as unable to afford costs. Each year, there are thousands of financially eligible people who apply for free legal services above the capacity of legal aid organizations to represent. This category recognizes similar eligibility criteria but does not require the affiant to go through a fruitless and potentially cumbersome application and rejection formality to establish financial eligibility for the fee waiver. It will also help those who do not live near a legal aid provider.

Similar to legal aid and public benefit programs, the baseline definition includes an income and an asset test. The proposed income test is that a party's household income must be at or below 200% of the federal poverty guidelines. It is the same income criteria used by LSC-funded legal aid programs and some public benefit programs. However, it does not allow income deductions for items like medical or child care expenses. Allowing for deductions adds several steps in calculating a party's income and makes the definition more cumbersome to apply. The Subcommittee favored having a rule that is easy to apply and requires little calculation over capturing these deductions.

The proposed asset test addresses both liquid and non-liquid assets. A party is limited to no more than \$2,000 in cash or easily convertible cash equivalents, such as certificates of deposit. This liquid asset cap is used by most means-tested government entitlement programs although legal aid programs allow a higher amount. The Subcommittee felt that the liquid asset test should be set fairly low because court costs are typically significantly less than the value of services provided by legal aid or an ongoing public benefit. The proposed non-liquid asset test exempts a party's homestead, car, and other items exempt under Chapter 42 of the Texas Property Code,¹⁶ similar to the non-liquid asset provisions for legal aid and means-tested government entitlement programs.

The Subcommittee spent a great deal of time discussing the benefits and challenges of creating a baseline definition. While a baseline definition creates a measurable, bright line floor to help ensure that people in similar financial situations are treated equally across the state, it may be cumbersome for clerks to apply. However, it also offers objective criteria for clerks to use when deciding if an affidavit should be contested, as opposed to the current situation where affidavits are often reviewed on a subjective basis.

Ultimately, the Subcommittee felt that it was better to create the baseline definition. The Subcommittee eliminated some of the steps used by public benefit and legal aid programs to determine eligibility, which makes the definition easier to apply. At a minimum, it provides more guidance to clerks and courts on who the Court views as unable to afford costs. The greater goal is to have a more uniform application of the rule.

¹⁶ See Chapter 42 of the Texas Property Code. Exhibit I.

Section (c), Contents of Affidavit

Keeps Current Rule and TRAP 20 Requirements and Adds Four New. Section (c)(1) lays out what is required in each affidavit. Enough guidance is needed so that parties can create their own affidavits and clerks can evaluate whether the criteria have been met. Because TRAP 20 does a much better job of stating what must be included in an affidavit, it mirrors TRAP 20 language more closely than the current rule.

The proposed rule incorporates all the requirements found in the current rule and in TRAP 20. However, it also requires affiants to provide contact information in the affidavit so that the court can communicate with them as needed. Finally, it requires affiants to state if they are currently receiving public benefits or free legal services through a legal aid provider, or if they financially qualified for legal aid but were declined representation. These statements provide a mechanism for parties to notify the court of these situations in the event that they fail to attach proof or confirmation of these facts.

Adds Privacy Provision. Section (c)(2) addresses privacy concerns by stating that a party cannot be required to provide personally identifying information about the party or the party's family members. It is by no means a comprehensive list, but the Subcommittee felt that although privacy issues would likely be addressed under another rule at some point in the near future, some guidance was needed now.

Section (d), Affidavits Not Contestable

The current rule provides that an affidavit may not be contested if a party attaches confirmation that he is represented by an IOLTA-funded legal aid provider and has been found financially eligible by that provider. The underlying principle is to exempt parties that have been determined indigent by an approved entity from having to be screened again if they attach proof of these facts to their affidavit.

Affidavits of Two Additional Categories of Parties Uncontestable. The proposed rule maintains the uncontestable provision in the current rule, although it drops the IOLTA language for reasons previously discussed. It also applies this principle to the affidavits of two additional categories of parties: current recipients of a means-tested government entitlement program and parties found eligible for free legal services by an approved legal aid provider but who were declined representation.

Section (e), Clerk to Provide Affidavit

Under the proposed rule, the clerk is required to provide an Affidavit of Inability to Pay Costs upon request. The Subcommittee added this provision after receiving reports, confirmed by emails, that clerks are removing the Affidavit of Indigency form from the Divorce Set One forms packet. Although clerks are willing to provide people with the divorce forms, they remove the affidavit form to discourage people from using it.

If the Court decides to adopt any or all of the proposed revisions, the Subcommittee recommends that the Affidavit of Indigency form in Divorce Set One be modified to reflect those changes. The Subcommittee further recommends that this form be made available for affiants to use in all contexts.

Section (f), Contests

Section (f) of the proposed rule and Section (d) of the current rule discuss what happens when affidavit is contested.

Effect of No Contest. Although the current rule is silent on what happens if no contest is filed, it is presumed that the party is allowed to proceed without payment of costs. TRAP 20 clarifies the issue by incorporating this presumption. It states that unless a contest is timely filed, no hearing will be held, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without payment of costs. Section (f)(1) of the proposed rule adopts TRAP 20 language except the language that no hearing will be held. The Subcommittee originally included that language until a judge pointed out that it was inconsistent with Section (g)(2) of the proposed rule, which allows a judge who believes a party's financial circumstance have changed to order that party to pay costs at the final hearing.

Filing a Contest. Section (f)(2) sets out who can file a contest, what the contest must include, and when a contest must be filed.

Who Can File. The current rule states that only the clerk or defendant can file a contest. TRAP 20 expands it to any party. The proposed rule follows TRAP 20 because the Subcommittee felt that any party with knowledge of the affiant's ability to pay should be allowed to file a contest. An opposing party will often have better knowledge of the financial circumstances of the affiant than a clerk or court.

Good Faith, Sworn Certificate, and Specificity in Filing Requirements. The proposed rule requires that every contest must be made in good faith, must state the grounds of the contest with specificity and must contain a sworn certification that the contestant has reason to believe that the affidavit is not sufficient. The certification is subject to the requirements of TRCP 13, even though the contestant may not be a party to the case.

The Subcommittee added these requirements because many clerks have a practice of contesting every affidavit filed, despite the clear intent of the current rule that each affidavit is to be reviewed for sufficiency on an individual basis. Clerks contest affidavits even when documentation is attached that the party is receiving public benefits. The practice is particularly burdensome on those who are unrepresented but otherwise meet the criteria under the current rule. These parties must arrange for time off of work, child care, or transportation to appear and simply confirm the contents of their affidavit. The unrepresented are also the most likely to miss the contest hearing and have their case dismissed when they should have been allowed to proceed without paying costs. Additionally, while the clerk has a vested interest in ensuring only those who are truly unable to afford costs proceed without paying costs, opposing parties do not share this interest and typically file contest hearings for harassment purposes. The Subcommittee believes that clear language stating attendant consequences is needed to stop these practices.

Time for Filing. The current rule is silent on when a contest hearing must be filed. TRAP 20 states that the contest must be filed within 10 days if the affidavit was filed in the trial court or by a date set by the clerk if the affidavit was filed in the appellate court. The proposed rule requires a contest by the clerk to be filed within 10 days of the date the affidavit was filed, and a

contest by an opposing party to be filed within 10 days of the date that the opposing party filed an answer or entered an appearance.

The Subcommittee felt that it was important to have the time frame on filing contests close to the date that the affidavit is filed. As the case progresses, the possibility that the affiant's circumstances may change increases and the court, rather than the clerk, is in a better position to determine if that has happened. If so, the court can order the affiant to pay costs in the final order.

Notice and Hearing. Section (f)(3) covers how much notice must be provided, when the contest hearing must be held, the effect of filing a contest on a hearing, and what happens if a contestant does not appear at the contest hearing.

Required Notice. The current rule and TRAP 20 are silent on how much notice must be given to a party. The presumption is three days under TRCP 21. The proposed rule provides that the affiant have at least 10 day notice of the contest hearing. Because most people who file an affidavit without an IOLTA certificate (or, under the proposed rule, free legal service provider certificate) are pro se and presumably indigent, the Subcommittee felt it was important to allow additional time for them to gather needed information, such as documentation from a government agency, and to make work, child care and transportation arrangements.

When Contest Hearing Held. The current rule suggests that the contest hearing will be held at the first hearing of the case but it is not clearly stated as such. Most courts follow this practice. The proposed rule clarifies that the contest hearing must be held at the first hearing in the case that occurs after the 10 day notice period. The Subcommittee debated whether to require the hearing to be held within 10 days after the notice period but that would have required affiants to come to court just for the contest hearing. The Subcommittee felt that it would be less burdensome on everyone to hold the contest hearing at the first hearing, and that it would also decrease the chances that the affiant would default for reasons unrelated to the issue of indigency.

Effect of Filing Contest on Other Hearings. The current rule states that temporary order hearings cannot be continued because a contest is pending. The proposed rule applies this concept to any hearing in the case, except that the court may continue a final hearing until after the 10 day notice period. This provision also reconciles the court's ability to continue a final hearing in Section (g)(1)(E).

No Appearance by Contestant. The current rule and TRAP 20 are silent on what happens if the contestant does not appear at the contest hearing. The proposed rule clarifies that the effect of the contestant's failure to appear results in the affidavit's allegations to be deemed true and the affiant is allowed to proceed without payment of costs.

Burden of Proof. Section (f)(4) maintains the provisions under the current rule, TRAP 20 and case law¹⁷ that the affiant has the burden of proving that the affidavit's allegations are true. The Subcommittee debated on whether to treat affidavits of inability to pay costs like sworn accounts and change the burden of proof from the affiant to the contestant. The Subcommittee was concerned with the practice adopted by many clerks of automatically contesting every affidavit and

¹⁷ *Supra* at note 6.

felt that shifting the burden of proof would curtail that practice. However, the Subcommittee recognized that the affiant is the only person in possession of the evidence needed to prove the affidavit true or false. The Subcommittee decided to address the issue by strengthening the requirements for filing a contest instead of shifting the burden of proof.

Incarcerated Parties. The proposed rule incorporates language from TRAP 20 on incarcerated parties. Because incarcerated parties are less likely to be present at a hearing, the provision clarifies that their affidavits must be considered as evidence sufficient to meet their burden of presenting evidence at the hearing.

Recipient of Government Entitlement Program. The proposed rule maintains the language under the current rule stating that if a party files an affidavit claiming receipt of a means-tested government entitlement program, the only issue that can be contested is whether the party is actually receiving the entitlement. The proposed rule adds that these affidavits can only be contested if proof of receipt is not attached. The proposed rule also adds that the party can provide other evidence of inability to pay costs if proof is unable to be provided because such proof can be difficult to obtain from a state or federal agency in a timely manner.

Decision. Section (f)(5) guides the court through the contest hearing and order. It incorporates current case law that the court must look at the record as a whole in determining if a party is able to pay costs¹⁸ and that a contest cannot be sustained due to a procedural defect unless the affiant has been given notice of the specific defect and an opportunity to cure it.¹⁹ As with the current rule, the proposed rule requires the court to state the reasons why a contest is sustained. Finally, the proposed rule requires the court to sign an order sustaining a contest within five days of the contest hearing. If not, the affidavit's allegations will be deemed true and the affiant will be allowed to proceed without paying costs.

Section (g), Costs

Section (g) lays out the court's options for payment of costs, including what to do when a party becomes able to pay costs during the course of the action. It also addresses when costs can be awarded in a final judgment and when a clerk can seek reimbursement of costs.

Payment of Costs.

Party Unable to Afford Costs. Section (g)(1)(A) states that a party who has been found unable to pay costs by the court, or by effect of the rule itself, has no costs to pay. The party cannot be ordered to pay costs during or after the case except as otherwise provided in the rule. The Subcommittee added this language to clarify that the costs are waived, not deferred, for a party who is found unable to pay costs. As such, a clerk or court cannot require costs to be paid at a later moment in time, as has recently happened in a few counties.

Parties Able to Afford Costs. Section (g)(1)(B) incorporates the TRAP 20 concept that a court may order partial payment of costs. Under the proposed rule, the court may allow a party who is technically able to afford costs to pay partial costs when special circumstances, such as medical expenses, exist that would make it burdensome for the party to pay full costs. Section

¹⁸ *Supra* at note 6.

¹⁹ *Supra* at note 9.

(g)(1)(C) simply states that if no special circumstances exist, the party must pay costs. Section (g)(1)(D) follows the current rule that allows the court to order another party in the suit to pay costs.

Installment Payments. Section (g)(1)(E) states that the court may allow a party to pay costs in installments but may not penalize a party who is current on his payment plan, including delaying the case until the costs are paid. However, the court may delay the final hearing until the costs are paid, provided no undue harm is caused.

The Subcommittee received reports of courts allowing a party to pay costs on an installment plan but delaying action in the case until the party had paid in full, regardless of whether the party was making payments according to schedule. The Subcommittee wished to clarify that parties who are current on their payment plan should not be penalized for paying according to court order or agreement. Many cases, such as family law cases, are time sensitive and delay can cause significant problems.

Later Ability to Pay Costs. Section (g)(2) borrows the TRAP 20 provision regarding parties who become able to pay costs during the course of the action. The court may order such a party to pay costs in the final order. The Subcommittee felt that it was best to have the issue addressed in the final order when the court would have knowledge of the total costs involved. Additionally, as under the current rule, the proposed rule allows the court to order a party to pay some or all of the costs if the case results in a monetary award believed by the court to be collectible and sufficient to cover the costs.

Reimbursement of Costs. Section (g)(3) makes clear that a clerk cannot attempt to collect costs from an affiant unless a contest was properly filed and sustained by written order. This provision clarifies that a clerk cannot attempt to collect costs from an affiant whose affidavit was not subject to a contest hearing or whose affidavit was deemed true as a matter of law.

Costs in Final Judgment. Section (g)(4) states that a final judgment cannot require a party to pay costs unless a contest was sustained or the party was later found able to pay by the court at the final hearing. This provision was added to counter the situation where the final orders contain boilerplate language that each party is responsible for paying their own costs, and clerks interpreting this language as a judgment that allows them to collect costs from indigent parties. The change should clarify any existing confusion regarding the matter, which is the subject of current litigation in some counties.

Attorney Fees and Costs. The proposed rule maintains the provision under the current rule that attorneys can still attempt to recover fees and expenses regardless of whether the party is unable to pay costs under the rule.

Section (h), Additional Definitions

Section (h) defines terms that are used throughout the rule. Most are self-explanatory. These comments are designed to highlight specific definitions and the reasons behind them.

Costs. The proposed list of costs includes those under the current rule, TRAP 20 and current case law as well as two additional categories.

Legal Process and Official Notices. The proposed rule specifies that income withholding orders, which notify employers to withhold child support, are covered as costs under the rule. Most courts and domestic relation offices do not charge for issuing these orders but some do, which often causes a delay in getting child support withholding started, despite strong public policy interests in promptly effecting such orders.

Service of Citation. The proposed rule confirms that service of process executed in another county is covered under the rule. This has always been the case, as it is covered in TRCP 126. Because problems continue to arise, the Subcommittee felt it should be stated directly in the rule itself. Additionally, the proposed rule incorporates service of citation by publication as allowed under *Cook v. Jones*.²⁰

Certified Copy of Final Order. The proposed rule includes the cost of one certified copy of a final order. Several counties provide a certified copy of the final order to parties who have filed under TRCP 145 but others do not. This provision was added because the expense associated with providing a certified copy of the final order is fairly minimal when weighed against the necessity of having one to obtain post-decree relief, especially in family law cases where the orders can be lengthy and certification expensive. It is also an important means of preventing indigence from being an obstacle to effecting the decrees and judgments of the court.

Court-Appointed Officers and Professionals. The proposed rule includes fees associated with court-appointed officers, such as a guardian ad litem, or other professionals. A party who is unable to pay costs simply cannot afford these expenses, yet the appointment or presence of these professionals may be critical to the outcome of that party's case. For example, in a family law case, the appointment of a guardian ad litem to help the court determine where the children will live, or whether supervised visitation should be ordered, is no less critical when a party cannot afford to pay costs. In some courts, the appointment of officers or experts has created de facto road blocks to resolving pending actions when the indigent party cannot pay the fees.

The Subcommittee recognizes the significance of these expenses but believes that courts do not appoint officers or professionals on a whim. They do so only when it is needed, and as such, should be covered for a party who is unable to pay costs by the county or another party to the case. To do otherwise, merely creates a barrier to the resolution of the case solely based on indigence, which is the antithesis of the purpose of TRCP 145. The inclusion is not without precedent. As previously discussed, fees for an attorney ad litem and a social study professional were deemed as costs to be covered under an affidavit of indigency in *In re Villanueva* in 2009.

Means-Tested Government Entitlement Program. At the recommendation of several judges, the definition of a means-tested government entitlement program includes a fairly comprehensive list of existing programs. The judges preferred an inclusive list to help them discern which public benefits are means-tested and which are not.

Current Recipient. The definition of a "current recipient" includes those that are receiving, or have been deemed eligible to receive but have not yet started receiving, a means-tested government entitlement.

²⁰ *Supra* at note 7.

Proof. This section discusses what counts as proof when someone is receiving a means-tested government benefit. It may be the first instance in which a Texas rule allows a screenshot of a website as acceptable proof.

Household. Household is defined as people who are related by blood or by law, rather than those who are living in the same abode, as is allowed under some means-tested entitlement programs. The Subcommittee felt that a party should only be required to count the income of those who are related to them by blood or by law rather than anyone else who may be living in the household, such as a tenant.

Income. The definition of income makes clear that “income” includes earned and unearned income.

Available. The proposed rule adopts the guidelines suggested by the Texas Access to Justice Foundation, which holds a party accountable only for income or assets to which they have access or control and which does not require the consent or cooperation of another person over whom they have no control. The proposed definition specifically states that a victim of domestic violence shall not be considered to have access to any income or asset that would require contact with the alleged abuser.

Conclusion

The Self-Represented Litigants Subcommittee of the Texas Access to Justice Commission believes the proposed revision to TRCP 145 will help resolve many of the issues that are seen under the current rule. It provides much greater guidance on the definition of a party who is unable to pay costs, which should result in a more uniform application of the rule across courts and counties. It specifies that a case cannot be delayed solely due to the filing of an affidavit or when a party has been allowed to pay costs in installments and is current on his account. It clarifies that affidavits must be individually reviewed and contested based on the contents of that particular affidavit, which should eliminate the practice of automatically contesting every affidavit filed. It reduces the burden on courts to review affidavits, and on affiants to confirm the contents of the affidavit, in situations where the affiant has already be found indigent by a means-tested government agency or legal aid provider. Finally, it gives direction to clerks and courts on when costs can be collected from a party determined to be unable to pay costs.