

Summary of Proposed Revisions to TRCP 145

Proposed TRCP 145		Same New Modified			Proposed Rule	Rationale
Section						
Title, Affidavit of Inability to Pay Costs		X			•Affidavit of Inability to Pay Costs	•Current and proposed rule refer to a "party who is unable to afford costs" throughout. Seemed best to title the rule accordingly. •Used by many legal service providers already.
Section (a), Establishing Inability to Pay Costs					•Same basic rule as current rule. •Moves definition of who is unable to afford costs from section (a) in current rule to section (b) in proposed rule.	•Many of the problems arising under the current rule stem from a lack of clarity on who should be deemed as unable to afford costs. •Dedicates an entire section to clarifying this definition in proposed rule, section (b).
Section (b), Definition of Party Unable to Afford Costs						
Section (b)(1), Party Receiving Government Entitlement					•Same as the current rule, except uses "means-tested government entitlement program" instead of "government entitlement" to emphasize that party was screened for financial eligibility.	
					•Current rule allows a party represented by an attorney providing free legal services through an IOLTA-funded provider to proceed without paying costs because they've already been financially screened by legal aid. •Proposed rule is the same except eliminates IOLTA reference and instead references TAJF, LSC or nonprofit civil legal aid provider who serves people living at or below 200% of federal poverty guidelines.	•Proposed rule adds this group to definition of a party unable to afford costs. •Connects the rule back to the funding entity that establishes the financial eligibility guidelines for legal aid providers, such as TAJF or LSC, because they are likely more stable than a particular funding stream.
Section(b)(2), Party Receiving Free Legal Services		X		X		
Section(b)(3), Party Financially Eligible For Free Legal Services		X			•Adds parties screened as financially eligible by a legal service provider but who were declined representation.	•Those who meet the financial criteria for legal aid should not be penalized for being unable to get representation through legal aid. •Adding this provision will also help increase a more uniform application of TRCP 145 across the state.

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Section(b)(4), Party At or Below 200% of Federal Poverty Guidelines		X		<ul style="list-style-type: none"> • Creates a baseline definition 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. • Income must be at or below 200% of the federal poverty guidelines, similar to legal aid programs and some public benefit programs. • Unlike these programs, it does not allow for income deductions like medical or child care expenses. • Liquid assets may be no more than \$2,000 which is in keeping with public benefit programs but lower than legal aid programs. • Similar to legal aid and public benefit program non-liquid asset tests, a party's homestead, car, and other assets exempt under Chapter 42 of the Texas Property Code are exempt. 	<ul style="list-style-type: none"> • The Subcommittee grappled with the pros and cons of creating a baseline definition. While it creates a measurable 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 purely subjective basis. The Subcommittee eliminated some steps used by public benefit and legal aid programs to determine eligibility so that the definition would be easier to apply. At a minimum, it will provide more guidance to clerks and courts on who the Court views as unable to afford costs but the greater goal is to have a more uniform application of the rule. • The baseline definition is similar to those used by legal aid and public benefit programs. The main difference is that it does not allow for income deductions because the Subcommittee felt this would make the definition unwieldy. It also keeps a very low liquid asset test, similar to public benefit programs rather than the higher legal aid test. Because the typical court costs are much lower in value than a continuous benefit such as free legal services, the Subcommittee felt it was reasonable to go with the lower amount.
Section (b)(5), Other Parties	X			<ul style="list-style-type: none"> • Same catchall category as the current rule. 	

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Section											
Section (c), Contents of Affidavit											
Section (c)(1), contents						<ul style="list-style-type: none">•Incorporates requirements in the current rule and TRAP 20.•Adds party's contact information.•Requires party to state if 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.				<ul style="list-style-type: none">•Provide a mechanism for the court to be notified of these situations if a party fails to attach proof or confirmation of these facts.	
Section (c)(2), Privacy			X			<ul style="list-style-type: none">•Party cannot be require to provide personally identifying information about the party or the party's family members.				<ul style="list-style-type: none">•Not a comprehensive list. Subcommittee felt that these issues would likely be addressed under another rule in the near future.	
Section (d), Affidavits Not Contestable											
Section (d)(1)			X			<ul style="list-style-type: none">•Makes affidavit accompanied by proof that party is currently recieving public benefits uncontestable				<ul style="list-style-type: none">•Applies principle that a party already found financially eligible for services by a government entity or legal aid organization need not prove indigency again if they attach proof or confirmation of financial eligibility.	
Section (d)(2)				X		<ul style="list-style-type: none">•Makes affidavit accompanied by confirmation that the party is represented by a TAJF- or LSC-funded legal aid provider or a nonprofit civil legal aid provider serving people living at or below 200% of the federal poverty guidelines uncontestable.				<ul style="list-style-type: none">•Is same provision under current rule except eliminates reference to IOLTA funds in favor of referencing TAJF or LSC or nonprofit civil legal aid provider.	
Section (d)(3)		X				<ul style="list-style-type: none">•Makes affidavit accompanied by confirmation that the party was screened financially eligible by a legal aid provider but was declined representation uncontestable.				<ul style="list-style-type: none">•Applies principle that a party already found financially eligible for services by a government entity or legal aid organization need not prove indigency again if they attach proof or confirmation of financial eligibility.	

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Section (e), Clerk to Provide Affidavit		X		<ul style="list-style-type: none"> • Clerks must provide an affidavit upon request. 	<ul style="list-style-type: none"> • This provision was added after receiving reports that clerks are removing the Affidavit of Indigency form from the Divorce Set One forms packet before giving it to those who request it. • Although clerks are willing to provide people with the divorce forms, the affidavit form is removed to discourage people from using it.
Section (f), Contests					
Section (f)(1), Effect of No Contest		X		<ul style="list-style-type: none"> • Unless a contest is timely filed, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without payment of costs. 	<ul style="list-style-type: none"> • Current rule is silent on issue. TRAP 20 has similar language. • Incorporated to clarify that an uncontested affidavit is conclusive as a matter of law, as per case law.
Section (f)(2), Filing a Contest		X		<ul style="list-style-type: none"> • Contests must be filed in good faith. • Must have a sworn certification with specific language that is subject to TRCP 13. • Must state specific facts why affidavit is insufficient. • Must be filed within 10 days of the date the affidavit was filed if filed by clerk, or 10 days of the date the opposing party answered or entered an appearance if filed by opposing party. 	<ul style="list-style-type: none"> • Added these requirements because many clerks contest every affidavit filed, despite the clear intent of the current rule that each affidavit is to be individually reviewed for sufficiency. Clerks contest affidavits even when documentation is attached that the party is receiving public benefits. • Particularly burdensome on the unrepresented, who are most likely to miss the hearing and have case dismissed when should have proceeded without paying costs. • Opposing parties do not have a vested interest in whether costs are collected and typically file contest hearings for harassment purposes. • Clear language with consequences needed to stop these practices.

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Proposed TRCP 145 Section				Proposed Rule	Rationale
	Same	New	Modified		
				<ul style="list-style-type: none"> • 10 days notice of contest hearing • Contest hearing at first hearing of case after 10 day notice period. • Hearings can't be continued solely due to filing of a contest hearing, except final hearing can be continued until after 10 day notice period. Current rule only specifies that temporary order hearings cannot be continued. • If contestant fails to appear, affidavit's allegations deemed true as matter of law. 	<ul style="list-style-type: none"> • Because most people filing these affidavits are pro se and presumably indigent, the Subcommittee felt it was important to allow additional time to gather needed information, such as documentation from a government agency, and to make work, child care and transportation arrangements. • The Subcommittee debated whether to hold contest hearing within 10 days after the notice period, but affiants and courts would need to convene just for the contest hearing. Less burdensome on everyone to hold it at the first hearing, which is current practice of most courts. Would also decrease chances that affiant would default for reasons unrelated to issue of indigency. • Current rule only says temporary order hearings cannot be continued; simply applies to all hearings. Allowing final hearing to be continued also reconciles this section of proposed rule with section (g)(3)(E) that allows court to delay final hearing if a party hasn't fully paid costs on installment plan. • Current rule and TRAP 20 silent on what happens if contestant fails to appear. Has caused confusion. Simply clarifies issue.
Section (f)(3), Notice and Hearing		X		<ul style="list-style-type: none"> • Burden of proof on affiant to show affidavit's allegations are true. Same as current rule and TRAP 20. • Incorporates language from TRAP 20 on incarcerated parties stating their affidavits must be considered as evidence at hearing. • Same language as current rule on recipients of public benefits that only issue is whether affiant is actually receiving them but adds language allowing affiant to provide other evidence of inability to pay costs at hearing. 	<ul style="list-style-type: none"> • Added incarcerated parties language because they are less likely to be able to come to contest hearing. • Added ability of public benefit recipients to prove indigency by other evidence because may be difficult to obtain needed documents from gov't agency.
Section (f)(4), Burden of Proof	X		X		

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			<ul style="list-style-type: none">• Adds provision that court must look at record as a whole when determining indigence.• Adds contest cannot be sustained due to procedural defect unless affiant given notice and opportunity to cure.• Keeps current rule provision that court must state reason why contest is sustained in order.• Adds requirement that order sustaining contest be signed within 5 days of hearing. If not, affidavit's allegations deemed true as matter of law.	<ul style="list-style-type: none">• Incorporates current case law on reviewing record as a whole and prohibiting sustaining a contest on procedural grounds unless prior notice and time to correct has been given.	
Section (f)(5), Decision					
	X		X		
Section (g), Costs					
				<ul style="list-style-type: none">• Party found unable to pay costs by the court, or by effect of the rule itself, has no costs to pay.• Party cannot be ordered to pay costs during or after the case except as otherwise provided in the rule.	<ul style="list-style-type: none">• Language was added to clarify that the costs are waived, not deferred, for a party who is found unable to pay costs.• Party cannot be required costs to be paid at a later moment in time, as has recently happened in a few counties.
Section (g)(1)(A), Payment of Costs		X		<ul style="list-style-type: none">• Allows court discretion to order a party who can afford costs to pay partial costs when special circumstances exist, such as medical expenses, make it burdensome for the party to pay full costs.	<ul style="list-style-type: none">• Incorporates TRAP 20 concept that a court may order partial payment of costs.
Section (g)(1)(B), Payment of Costs		X			
Section (g)(1)(C), Payment of Costs			X	<ul style="list-style-type: none">• If able to pay and no special circumstances exist, party must pay costs.	<ul style="list-style-type: none">• Same as current rule except adds "special circumstance" language in keeping with (g)(1)(A) language
Section (g)(1)(D), Payment of Costs	X			<ul style="list-style-type: none">• Keeps current rule allowing court to order another party in the suit to pay costs.	

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Section (g)(1)(E), Payment of Costs		X		<ul style="list-style-type: none"> • Court may allow a party to pay costs in installments. • Court may not penalize a party who is current on payment plan, including delaying the case until the costs are paid. Exception: Court may delay the final hearing until the costs are paid, provided no undue harm is caused. 	<ul style="list-style-type: none"> • 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. • Clarifies that parties 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.
Section (g)(2)(A), Later Ability to Pay		X		<ul style="list-style-type: none"> • If a party who has proceeded without paying costs becomes able to pay some or all costs, the court may order the party to pay costs in the final order. 	<ul style="list-style-type: none"> • Incorporates TRAP 20 concept. • 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.
Section (g)(2)(B), Later Ability to Pay			X	<ul style="list-style-type: none"> • Keeps current rule provision that the court can order a party to pay some or all of the costs if the case results in a monetary award but adds clarification that the court must believe the award to be collectible and sufficient to cover the costs ordered to pay. 	
Section (g)(3), Reimbursement of Costs		X		<ul style="list-style-type: none"> • Clerk cannot try to collect costs unless a contest was properly filed and sustained by written order. 	<ul style="list-style-type: none"> • 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.
Section (g)(4), Award of Costs in Final Judgment	X			<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • 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.

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Section (g)(5), Attorney's Fees and Costs	X		<ul style="list-style-type: none">•Maintains 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)(1)(A), Costs - filing fees	X		<ul style="list-style-type: none">•Same as current rule.		
Section (h)(1)(B), Costs - legal process and notices		X	<ul style="list-style-type: none">•Specifies that income withholding orders, notifying employers to withhold child support, are covered as costs under the rule.	<ul style="list-style-type: none">•Most courts and domestic relation offices do not charge for issuing these orders but some do. Causes a delay in getting child support withholding started, despite strong public policy interests in promptly effecting such orders.	
Section (h)(1)(C), Costs - service of citation	X	X	<ul style="list-style-type: none">•Clarifies that service of process executed in another county is covered under the rule.•Incorporates service of citation by publication as allowed under <i>Cook v. Jones</i>.	<ul style="list-style-type: none">•Service of process executed in another county is currently covered under TRCP 126.•Because problems continue to arise, the Subcommittee felt it should be stated directly in the rule itself. Service of citation by publication allowed under <i>Cook v. Jones</i> , 521 S.W.2d 335 (Tex. Civ. App. Dallas, 1975)	
Section (h)(1)(D), Costs - certified copy of final order		X	<ul style="list-style-type: none">•Adds the cost of one certified copy of a final order.	<ul style="list-style-type: none">•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.	

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Section (h)(1)(E), Costs - Court-Appointed Officers & Professionals		X		<ul style="list-style-type: none">• Adds fees associated with court-appointed officers, such as a guardian ad litem, or other professionals.	<ul style="list-style-type: none">• This provision relates only to situations in which a court orders a party known to be indigent to pay the costs of officers or professionals appointed by the court.• These professionals may be critical to the outcome of a party's case. For example, in a family law case, the appointment of a guardian ad litem may be necessary for the court determine where the children will live or whether supervised visitation should be ordered. These matters are no less critical when a party cannot afford to pay costs.• 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. Fees for an attorney ad litem and a social study professional were deemed as costs that should be covered under an affidavit in <i>In re Villanueva</i> in 2009.
Section (h)(2), Means-Tested Government Entitlement Program		X		<ul style="list-style-type: none">• Any public benefit program that requires recipients to meet specific financial eligibility criteria.	<ul style="list-style-type: none">• At the recommendation of several judges, the definition 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.
Section (h)(3), Current Recipient	X			<ul style="list-style-type: none">• Clarifies that definition includes those that are receiving and those deemed eligible but have not yet started receiving.	<ul style="list-style-type: none">• Other than emergency relief, there is usually a time lag between qualifying as eligible and actual receipt of the benefit.
Section (h)(4), Proof	X			<ul style="list-style-type: none">• Lists examples of what counts as proof when someone is receiving a means-tested government benefit.	

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Section (h)(5), Household		X	<ul style="list-style-type: none">Household 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.	<ul style="list-style-type: none">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.	
Section (h)(6), Income		X	<ul style="list-style-type: none">Makes clear that "income" includes earned and unearned income.	<ul style="list-style-type: none">Courts and clerks are likely clear on this issue but some pro se litigants may not be.	
Section (h)(7), Available		X	<ul style="list-style-type: none">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.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.	<ul style="list-style-type: none">Adopts the eligibility guidelines suggested by the Texas Access to Justice Foundation.The provision regarding victims of domestic violence is matter of safety. Would not prevent victim from accessing joint account assets.	