

Memorandum

To: Texas Supreme Court Advisory Committee

From: Subcommittee (TEX. R. CIV. P. 216-299a)

Professor Elaine Carlson, Chair

Tom Riney, Vice-Chair

Judge David Peeples

Alistair Dawson

Bobby Meadows

Kent Sullivan

Kennon Wooten

Re: Preliminary Discussion Draft

Feb. 17, 2020

At the November 1, 2019 SCAC meeting, the full committee voted 20-1 in favor of proposing a rule addressing parental leave continuance. The subcommittee has met several times and seeks further input from the full committee. A preliminary discussion draft follows. This is not a subcommittee recommendation as we are continuing to study the issues and the options.

Since we last met, Florida and North Carolina have finalized and adopted rules providing for parental leave. Copies of those rules are attached along with State Bar of Texas Committee on Court Rules proposed changes to T.R.C.P. 253 providing for parental leave continuances. The subcommittee was asked by the Court to consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to also include the grounds set forth in the Federal Family & Medical Leave Act, 29 U.S.C. § 2612. A copy of that statute is attached as well.

Exact wording of existing Rule 253:

RULE 253. ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

PRELIMINARY DISCUSSION DRAFT

RULE 253. PARENTAL LEAVE OR ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

(a) For purposes of this rule, “parental leave continuance”¹ means a continuance of a trial setting² or a hearing on a dispositive motion in connection with the birth or adoption of a child by an attorney applicant, regardless of the applicant’s gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to cases arising under Chapters 54³ or 262⁴ of the Family Code.⁵ [Other exclusions?]

(1) Any application made under this rule must be filed at least ninety days before the date of commencement of the parental leave period. But because of the uncertainty of a child’s birth or adoption date, the trial court must make reasonable exception to this requirement.

(2) An attorney seeking a parental leave continuance must support his or her application with an affidavit:

(A) affirming counsel is a lead attorney or has substantial responsibility for the preparation and/or presentation of the case [or is first or second chair and has substantial responsibility for the preparation and/or presentation of the case];

(B) that parental leave will be taken by the applicant as allowed by this rule;

¹ Alternatively refer to this as “Secure Leave Period” following the North Carolina model.

² Fla has other rules for parental leave in Criminal, Juvenile, and Involuntary Civil Commitment of Sexually Violent Predators Cases. North Carolina has separate provisions for Criminal, Special Proceedings and Estate Proceedings, and Juvenile Proceedings

³ Juvenile Proceedings

⁴ Involuntary Parental Termination Proceedings.

⁵ Richard Orsinger suggested family violence cases should be excluded from the rule.

(C) that the applicant will be the lead attorney or have substantial responsibility for the preparation and/or presentation of the case [or dispositive motion] when reset;

(D) that the client consents to the continuance; and,

(E) the continuance is not sought merely for delay but to care for the child.

(3) Absent extraordinary circumstances, the trial court must grant the continuance. The trial court must enter a written order resetting the trial date [or the dispositive motion setting] and adjust pending pretrial deadlines in its scheduling order, if any, to correspond with the new trial date.

(b) The trial court has discretion⁶ to grant a continuance of a trial [or a dispositive motion] setting for a maximum length of twelve weeks when an attorney supports its application [motion] for continuance with an affidavit [and supporting proof]⁷ affirming:

(1) counsel must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

(2) counsel has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or,

(3) counsel is seeking leave due to a qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the attorney is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

⁶ Justice Bland requests the subcommittee consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to include the grounds set forth in the Federal Family & Medical Leave Act. 29 U.S.C. § 2612.

⁷ The Federal Family & Medical Leave Act requires certification by the health care provider when leave is sought under the grounds in (b)1 or (b)2 above. 29 U.S.C. § 2613.

(c) Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

Corresponding Changes to TRAP Rules re Continuance of Oral Argument⁸

Existing Texas Rule of Appellate Procedure 10.5(c)

(c) *Motions to Postpone Arguments*. Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone oral argument of a case must be supported by sufficient cause.

Preliminary Discussion Draft of Texas Rule of Appellate Procedure 10.5(c):

(c) *Motions to Postpone Arguments*. Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone oral argument of a case must be supported by sufficient cause. Absent exceptional circumstances, the appellate court must find sufficient cause when appellate counsel properly moves for a parental leave continuance of the date and time for oral argument in compliance with this rule. The appellate court should exercise its discretion when the continuance is sought for absence of counsel under (5).

(1) For purposes of this rule, “parental leave continuance”⁹ means a continuance of the date and time for oral argument sought by counsel in connection with the birth or adoption of a child by an applicant, regardless of the applicant’s gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to appeals arising under Chapters 54 or 262 of the Family Code.¹⁰ [Other exclusions?]

(2) Any application sought under (c)(1) made under this rule must be filed at least ninety days before the date of commencement of the parental

⁸ Should the parental leave continuance also apply to motions to extend time to file Briefs? Notice of Appeal or Petition for Review?

⁹ Alternatively refer to this as “Secure Leave Period” as North Carolina does

¹⁰ Richard Orsinger suggested family violence cases should be excluded from the rule. Fla has distinctive rules for parental leave in Criminal, Juvenile, and Involuntary Civil Commitment of Sexually Violent Predators Cases.

leave period. But because of the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement.

(3) An attorney seeking a parental leave continuance must support his or her application with an affidavit:

(A) affirming counsel is a lead attorney or has substantial responsibility for the preparation and/or presentation of the oral argument [or is first or second chair and has substantial responsibility for the preparation and/or presentation of the oral argument];

(B) that parental leave will be taken by the applicant as allowed by this rule;

(C) that the applicant will be the lead attorney or have substantial responsibility for the preparation and/or presentation of the oral argument [or dispositive motion] when reset;

(D) [that the client consents to the continuance]; and,

(E) the continuance is not sought merely for delay.

(4) The court must enter a written order resetting the date and time for oral argument [or the dispositive motion setting].

(5) The appellate court has discretion¹¹ to grant a continuance of the date and time for oral argument [or a dispositive motion] setting [for up to twelve weeks] when the applicant attorney supports its application for continuance with an affidavit [and supporting proof] affirming:

(A) counsel must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

¹¹ Justice Bland requests the subcommittee consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to include the grounds set forth in the Federal Family & Medical Leave Act.

(B) counsel has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or,

(C) counsel is seeking leave due to a qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.