

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

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Re: Subcommittee Recommendation: Parental Continuance Rule

June 3, 2020

At the November 1, 2019 SCAC meeting, the full committee voted 20-5 in favor of proposing a rule addressing parental leave continuance. Based on discussion at that meeting and the February 28, 2020 meeting, the subcommittee recommends the following changes to the continuance rule for absence of counsel.

As a reminder, Florida and North Carolina have adopted rules providing for parental leave continuances. Copies of those rules are attached to this memo, along with the State Bar of Texas Court Rules Committee's proposed changes to T.R.C.P. 253 providing for parental leave continuances. Also attached is Harris County Local Rule 11 that entitles lead counsel to file a vacation letter that precludes a case from being set for trial and relieves counsel from engaging in any pretrial proceedings during that time frame. The Court has asked the subcommittee to consider broadening the proposed continuance rule to address not only the birth or adoption of a child, but also the grounds set forth in the Federal Family & Medical Leave Act (FMLA). 29 U.S.C. § 2612. A copy of that statute is also attached to this memo. As reflected in the proposal below, the subcommittee has addressed FMLA grounds in comments accompanying revised T.R.C.P. 253.

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.

Subcommittee Recommendation:**RULE 253. CONTINUANCE DUE TO ABSENCE OF COUNSEL**

(a) For purposes of this rule, “parental leave continuance”¹ means a continuance of a trial setting,² including the determination of a summary judgment motion, in connection with the birth or placement for adoption of a child by an attorney movant regardless of the movant’s gender. Twelve weeks is the presumptive maximum length of a parental leave continuance that may be taken within the twenty-four weeks after the birth or placement of a child for adoption. Upon a showing of good cause, the trial court may allow a longer time for the parental leave period. This rule does not apply to cases arising under Chapters 54,³ 83-85⁴, or 262⁵ of the Family Code, or involuntary civil commitment or guardianship proceedings. [Other exclusions?]⁶

(1) Any motion for a parental leave continuance must be filed at least ninety days before the date of commencement of the parental leave period as to existing trial settings and within seven days of notice of a trial setting made less than ninety days before commencement of the secured leave period. But because of potential medical complications and the uncertainty of a child’s birth or adoption date, the trial court must make reasonable exception to this requirement.

¹ Alternatively, this could be referred to as a “Secure Leave Period,” following the North Carolina model.

² Florida 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. Check whether these proceedings involve other Family Code chapters.

⁴ Protective Orders & Family Violence.

⁵ Involuntary Parental Termination Proceedings.

⁶ The subcommittee recommends presumptively mandatory parental leave apply to expedited trials but notes that TEX. R. CIV. P. 169(d)(2) will need amendment to reflect the application of this proposed rule.

(2) An attorney moving for a parental leave continuance must support the motion with an affidavit or an unsworn declaration compliant with Chapter 132 of the Texas Civil Practice & Remedies Code, confirming the following:

(A) the movant is the lead attorney, or setting forth facts demonstrating the movant has substantial responsibility for the preparation or presentation of the case;

(B) the movant was not retained or assigned to the case for the purpose of obtaining a continuance;

(C) the movant will be the lead attorney or have substantial responsibility for the preparation or presentation of the case for trial, including summary judgment, when reset;

(D) each of the movant's clients in the case has consented to the continuance; and

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

(3) The trial court must grant the continuance absent extraordinary circumstances stated in the trial court's order. The trial court shall enter a written order resetting the date of trial or determination of the summary judgment and adjust pending pretrial deadlines in the scheduling order for the case, if any, to correspond with the new trial date. Absent extraordinary circumstances, the trial court shall not set a case for trial, including summary judgment, during the designated leave period.

(b) Except as provided elsewhere in these rules, the trial court has the discretion, upon good cause shown or upon matters within the knowledge or information of the judge to be stated on the record, to grant a motion for continuance or postponement of the cause when called for trial.

Comment

When considering a motion for continuance under subsection (b) of this rule, the trial court should take into account the length and degree of the movant's work on the case, how long the movant has known about the reason for the request, the role the movant will play in the rescheduled trial or hearing, and the harm that delay would cause the opposing party balanced against the needs of the movant or the movant's family. Although discretionary, the trial court should give serious consideration to granting a requested continuance when the attorney seeking the continuance (1) must care for a spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; (2) has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or (3) is seeking the continuance due to an 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.⁷ When granting a continuance under subsection (b), the trial court should consider issuing interim orders to minimize the harm caused by delay. If a prompt reset date is difficult to fit into the trial court's schedule, the trial court should consider seeking the assistance of an assigned judge.

⁷ These grounds correspond to the grounds for leave under the Federal Family & Medical Leave Act 29 U.S.C. § 2612.