

Texas Supreme Court Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee

From: Legislative Mandates Subcommittee

cc: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: September 28, 2022

Re: HB 2737; Final rule for Juvenile Proceedings re: shackling in court

HB 2737 (Ex. 1) passed by the 86th Texas Legislature in 2019, added Texas Government Code Section 22.0135, entitled “JUDICIAL GUIDANCE RELATED TO CHILD PROTECTIVE SERVICE CASES AND JUVENILE CASES.” The section requires the supreme court “in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families” to provide guidance to courts regarding various topics. In regard to juvenile cases, one of the issues enumerated is “(2) (D) a child’s appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding[.]”

By way of history, the subcommittee has been informed that after HB 2737’s enactment the Supreme Court’s Children’s Commission issued guidance in the form of “circulars” regarding the other topics in HB 2737, satisfying the guidance directive of the legislature for the other four (A-C, and E) items related to juvenile proceedings. The Children’s Commission also assembled a round table to discuss what rules may be necessary in response to the bill. Stakeholders only identified one topic that may need addressing by rule: juvenile restraints. The roundtable discussed what a rule might look like, and the Children’s Commission studied it further and proposed the rule that is in the memo.

Attached as Exhibit 2 is a three page memo dated August 23, 2022 from Jamie Bernstein, Executive Director of the Children’s Commission, a/k/a the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Family. Justice Lehrmann is Chair and Justice Huddle is Deputy Chair. The memo sets out the controlling law, short history of Texas legislative consideration, and the text of a proposed rule is at bottom of page 3 as follows:

Proposed Rule on the Use of Restraints in the Juvenile Court

- (a) Restraints, such as handcuffs, chains, irons, and other similar items, must not be used on a child during a juvenile court proceeding unless the court determines that:
 - (1) the use of restraints is necessary because the child presents a substantial risk of:
 - (A) inflicting physical harm on the child or another person; or
 - (B) flight from the courtroom; and
 - (2) there is no less restrictive alternative to restraints that will prevent physical harm or flight.
- (b) Any party may request a hearing on the necessity of restraints.
- (c) If the court determines that restraints are necessary, the court must:
 - (1) make that determination in a written order;
 - (2) when feasible, issue the order before the child enters the courtroom and appears before the court;
 - (3) make findings of fact in support of the order; and
 - (4) order the least restrictive type of restraint necessary to prevent physical harm or flight.
- (d) This rule does not apply to the use of restraints when transporting the child to or from the courtroom.

The memo with the Commission's proposed rule includes Attachment A, which is a 13-page report from an August 2020 meeting of 35 stakeholders holding a variety of positions directly involved with the parties and procedures of juvenile proceedings statewide. Exhibit B to the memo is a national survey with text of shackling rules in comparable proceedings from other states.

The subcommittee views the work as that of knowledgeable stakeholders and based on a national review of other states' practices¹. The principal policy question, then enacted by a rule, is an attempt to balance competing and valid interests. Shackling is widely viewed as traumatic to a youth and capable of doing lasting damage to the youth's life, so as a policy matter it should be done only when and to the extent necessary. Juvenile proceedings have different policies and procedures because Texas, like all other states, recognize the status, capacity, and interests of the minor defendant are different than criminal proceedings involving Defendants of majority age. Offsetting policy concerns are protecting the safety of other people in and around the proceeding as the youth is appearing in the courtroom, as well as preventing flight or other conflicts.

Most jurisdictions nationally have by statute or rule struck a balance setting a presumption against shackling. They provide criteria and processes for deciding when and to what extent safety considerations outweigh the policy. The proposed rule starts with the preferred presumption against shackling while still striking an appropriate balance which may be achieved by the judge on a case-by-case basis, recognizing facts may vary specific to the youth, proceeding, or circumstance related to the shackling necessity.

The subcommittee supports the Court enact a rule regarding shackling along the lines of what the Commission report recommends; **however**, the subcommittee was not able to convene with Ms. Bernstein, did not disassemble the proposed rule's language given the limited time, and some members did not want to report as favorable to this specific language. The subcommittee is generally in favor of a rule consistent with the policy balance but did not vote on this specific language.

¹ As a preemptive answer to a question a member of the whole committee often asks: Yes, a search for best practices was made

One consideration of specific language to the rule is an effort to clarify that the findings of fact referenced as necessary support for an order enforcing shackling, (c)(3), should be included in the Order itself, (c)(1). So, an alternative construction of Subsection (c) would state:

(c) If the court determines that restraints are necessary, the court must:

- (1) ~~make that determination in issue~~ a written order ~~which includes findings of fact in support of its determination~~;
- (2) when feasible, issue the order before the child enters the courtroom and appears before the court; ~~and~~
- (3) ~~make findings of fact in support of the order; and~~
- ~~(4)~~ order the least restrictive type of restraint necessary to prevent physical harm or flight.