



In the Matter of the Marriage of Allison Gelbe-Pinkus and Mark Pinkus

2019 TAFLS Trial Institute
San Francisco, California

UCCJEA Analysis



Initial Child Custody Jurisdiction

NOT in an emergency, Texas can exercise jurisdiction in these scenarios: analyzed in order:

- (1) Texas is the “home state” of the child on the date suit is commenced; or was the home state of the child within six months before the commencement of this proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
- (2) another state court does not have jurisdiction OR the state having home state jurisdiction declines jurisdiction in favor of Texas as the more appropriate forum and the child and one or more of the parents has a significant connection with Texas;
- (3) all courts having jurisdiction under (1) or (2) have declined jurisdiction in favor of Texas being the more appropriate forum; or
- (4) no court of any other state would have jurisdiction under (1), (2), or (3). *See* TFC §152.201.

Home State

- “Home state” is defined by TFC § 152.102(7) as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.
- Child less than six months: the state in which the child lived from birth with a parent or a person acting as a parent.
- A period of temporary absence of a parent or a person acting as a parent is considered part of the period. Priority is given to home state jurisdiction under the UCCJEA.
- *Powell v. Stover*, 165 S.W.3d 322, 323 (Tex. 2005), by focusing on where the child “lived” with a parent and finding that the word “lived” strongly connotes physical presence as opposed to the subjective terms “residence” or “domicile.”

“Significant Connections”

- The significant connection tests are fact specific and a court looks at the nature and quality of the children's contacts with Texas. *In re. S.J.A.* 272 S.W.3d 678,685 (Tex.App.-Dallas 2008, no pet)
- Examples:
 - whether there are relatives of the child in Texas and what were the relationships of those relatives with the child.
 - It can include evidence regarding where the child lived at the time the suit was filed,
 - Who cared for the child,
 - Whether the parent's plans for the child's future care, education, protection and training were all available in Texas from the parent and other family members. *In re Forlenza*, 140 S.W. 3d 373,378 (Tex. 2004).

Is Texas a “Convenient Forum”?

- Texas may exercise initial custody jurisdiction if all courts that would meet the criteria of either home state or significant connection jurisdiction have declined jurisdiction in favor of Texas being the more appropriate forum.
- Only the court(s) that has the priority jurisdiction (i.e., either “home state” or “significant connection”) has the authority to determine if Texas is the more appropriate forum. Texas does not, and therefore cannot, make that determination.

PRACTICE TIP

- If you want to keep jurisdiction in Texas you need to obtain rulings/orders from the priority courts showing that they have formally declined jurisdiction, and the basis upon which they so declined. *See In re Presley*, 166 S.W.3d 866, 868 (Tex.App.— Beaumont 2005, orig. proceeding).
- If concurrent proceedings have been commenced, the court with the lesser priority or the court that is hearing the latter-filed case must stay its proceeding and communicate with the other court to determine whether that court has concluded the issue of jurisdiction.

Analysis for Convenient Forum

TFC Section 152.207(b)(1)-(8):

- Whether domestic violence has occurred and is likely to occur in the future and which state is best able to protect the parties;
- The length of time the child has resided inside/outside the state;
- The distance between the court attempting to exercise jurisdiction and the state that would assume jurisdiction;
- The relevant financial circumstances of the parties;
- Any agreement of the parties as to which state should assume jurisdiction;
- The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- The familiarity of the court of each state with the facts and issues in the pending litigation.

Texas Wins Jurisdiction by Default

- If the first three bases for jurisdiction are not present, home state, significant connections or more appropriate forum principles, then, Texas may exercise jurisdiction by default.
- The UCCJEA requires that some forum must be available to make a child custody determination. *Barabarawi v. Rayyan*, 406 S.W.3d 767,769-774 (Tex.App-Houston[1 4th Dist] 2013, no pet.).

Depositions



Deposition of Allison Gelbe-
Pinkus

Deposition Objections-TRCP 199.2

Objections to Questions:

“Objection, form” - an objection to the form of the question includes objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous.” Additionally can include: (1) assumes facts in dispute or not in evidence; (2) is argumentative; (3) misquotes a deponent; (4) is leading; (5) is unintelligible; (6) is compound; (7) is too general; and (8) has been asked and answered.”

“Objection, leading.”

Objections to Answers:

“Objection, non-responsive.”

Practice Tip:

If asked, must give clear and concise explanation for objection or it is waived.
TRCP 199.5

Instructing Witness Not to Answer

- (1) if necessary to preserve a privilege
- (2) to comply with a court order or the rules,
- (3) to protect a witness from an abusive question or one for which any answer would be misleading, or
- (4) to secure a ruling.

TRCP 199.5(f)

Securing a Ruling on Objections

- Call Court during deposition to secure ruling.
Con: Can backfire if court sees this as a ‘petty objection.’
- Motion for Ruling on Objections under Rule 199.6 – objecting party must submit all support for objection.

Using Deposition in Same Case

- TRCP 203.6(b): All or part of a deposition may be used for any purpose in the same proceeding in which it was taken.
- “Same proceeding” includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest.
- If the original is not filed, a certified copy may be used.
- TRE 801(e)(3), a deposition taken in the same proceeding is exempt from the hearsay rule irrespective of the witness’s availability.

Breaks During Deposition

- Breaks are not implicitly allowed during a deposition and may be taken if not agreed only to determine whether to assert a privilege.
- Termination of Deposition. A deposition may be terminated upon the expiration of time or for conduct prohibited by TRCP 199 or to obtain a ruling prior to an answer.

Party Admission

- You can use a deposition of a named party in another suit as a party admission.

Example: if the husband was named individually in a suit involving a community property business, meaning he was a party in the previous suit, the deposition of the husband is admissible as a party admission.

Nonparty Deposition

Nonparty's deposition from another proceeding is admissible only if:

it meets the requirements of the hearsay rule's former-testimony exception, TRE 804(b)(1):

(1) the declarant (i.e., the deponent) is unavailable as a witness, and

(2) the party against whom the deposition testimony is offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination

Deposition of Mark Pinkus

Impeachment

TRE 613(a)

- (1) Foundation Requirement. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness: (A) the contents of the statement; (B) the time and place of the statement; and (C) the person to whom the witness made the statement.
- (2) Next, counsel must give the witness the opportunity to explain or deny the prior inconsistent statement.
- (3) Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

NOTE: The requirements of TRE 613(a) do not apply to an opposing party's statement under TRE 801(e)(2)

Uses of Deposition at Trial

- Refreshing a witness's recollection,
- As testimony of a witness whose memory cannot be refreshed, and
- As a source of admissions of a party opponent

Improper Impeachment Example

Attorney: Did Mr. Smith purchase a car for you?

Paramour: No, he never bought anything for me.

Attorney: Let me show you your deposition testimony where you said he purchased all kinds of gifts for you, including a car.

Attorney 2: Objection, improper impeachment. Lacks foundation.

Court: Sustained.

Proper Impeachment Example

Attorney: Did Mr. Smith purchase a vehicle for you?

Paramour: No.

Attorney: Have you ever testified differently?

Paramour: No I haven't.

Attorney: Do you recall giving a sworn deposition in my office in May of last year where you swore under oath that Mr. Smith bought you lavish gifts?

Paramour: No.

INTRODUCE DEPOSITION

Electronic Discovery



How to Obtain the Information

- Requests for Production
- Interrogatories
- Admissions
- Deposition Testimony
- Requests to Gain Access to Electronic Devices

TRCP 192.3(b)

- Provides for discovery of documents, defined to include electronic information that is relevant to the subject matter of the action (cmt-1999)

TRCP 196.4

- To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced.
- Responding party must either produce the ESI that is “reasonably available in the ordinary course of business” or object on the grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested.

Warnings to Client

- Change passwords and get new Icloud account.
- Look at Standing Orders/injunctions for accessing passwords and access to accounts.
- Analyze what they provide in discovery as soon as you get it.
- Consult with a criminal attorney as soon as you find out about the potential violation.

How to Legally Gain Access to Electronic Devices

- *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009)
- *In re Pinnacle Eng'g*, 405 S.W.3d 835 (Tex.App.—Houston [1st Dist.] 2013, orig. proceeding)
- *In re VERP Inv., LLC*, 457 S.W.3d 255 (Tex.App.—Dallas 2015, orig. proceeding)
- *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6

STEP 1

- Request the information (i.e. Request for Production)
- Be specific, including specifying electronic media in any computer or cloud-based system

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6 STEP 2

- The responding party must then produce any electronic information that is “responsive to the request and...reasonably available to the responding party in its ordinary course of business.” “Reasonably available” information includes active data, near-line data, and offline data, but does **not** include backup tapes or erased/damaged data.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6

STEP 3

- If “the responding party cannot—through reasonable efforts— retrieve the data or information requested or produce it in the form requested”, the responding party **MUST OBJECT**.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6

STEP 4

- The parties should reasonably attempt to resolve the dispute without court intervention.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6 STEP 5

- If no resolution, either party can ask for a hearing. Further, the Responding party must prove that the requested information is not reasonably available because of undue burden or cost.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6 STEP 6

- If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, subject to the limitations of TEXAS RULES OF CIVIL PROCEDURE Rule 192.4.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6

STEP 7

- If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Weekley Homes:

8 Steps for Obtaining ESI under TRCP 194.6 STEP 8

- Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.

Analysis of Weekley Homes:

In re Pinnacle Eng'g, 405 S.W.3d 835

- Must specify what information is reasonably believed to be available on the computer hard drive or other electronic device
- Must show inadequate production or search of files before compel
- Must show that search will likely reveal documents
- Electronic device should ONLY be given to a qualified expert for analysis

Analysis of Weekley Homes:

In re VERP Inv., LLC, 457 S.W.3d 255

- Must show that less intrusive means has been implemented before compelling production
- Must show default in obligation to search and produce requested records
- Must show that search will likely reveal documents
- Electronic device should **ONLY** be given to a qualified expert for analysis

Analysis of Weekley Homes: *In re State Farm Lloyd's*, 520 S.W.3d 595

- “Proportionality is the polestar” – the guiding principle
- All discovery, including ESI, is subject to following proportionality considerations:
 - Likely benefit of requested discovery
 - Needs of the case
 - Amount in controversy
 - Parties’ resources
 - Importance of issues at stake in litigation
 - Importance of proposed discovery in resolving the litigation
 - Any other factor addressing jurisprudence
- Relevance of the ESI must be obvious or linked to a claim or defense

Spoliation & Duty to Preserve



What is Spoliation?

- The withholding, alteration, or destruction of evidence relevant to a legal proceeding.
- Determined by trial court as a matter of law
- If spoliation found, must assess appropriate remedy
- Several factors for the court to use to pick a remedy:
 - relevance of evidence.
 - harmful effect of evidence on spoliating party's case (or how helpful the evidence would have been to the other side).
 - whether the spoliated evidence was cumulative of other evidence that could be used instead

Duty to Preserve

- Duty arises ONLY when a party knows or reasonably should know that there is a substantial chance claim to be filed and that it has material evidence in its possession.

Practical Tips

- Create a spoliation letter.
- Send to your client and the opposing side.
- Make sure in your spoliation letter your client isn't accidentally deleting information from cloud based services during back up (such as iTunes)
- No deleting of social media accounts – only deactivation

Practical Tips

- Consider including spoliation warning in your Fee Agreement:
- *Spoliation – Client acknowledges by his/her signature below and initials on this paragraph that he/she has been advised by Firm that Client should not delete, erase, destroy, or permanently alter any information that could be relevant to the dispute for which Firm is being hired. This includes deleting text messages and/or e-mails, deleting data from hard drives, disposing of or destroying documents or other items, deleting information or profiles from social media (unless it can still be accessed by Client), and the like. Client is advised that these actions can result in serious financial or evidentiary sanctions that can jeopardize the outcome of Client's case and can possibly result in criminal liability.*

Interception of Communications



Interception of Wire, Aural & Electronic Communication

- Party commits offense and may be subject to criminal and civil penalties if party:
 - Intentionally intercepted, endeavored to intercept, or procured another person to intercept wire, oral or electronic communications
 - Intentionally disclosed or endeavored to disclose the contents and knew or should have known the information was wrongfully obtained
 - Intentionally used or endeavored to use contents when party knew or was reckless about whether information was wrongfully obtained
 - Knowingly or intentionally effected a covert entry for the purpose of intercepting such communications without court order or authorization
 - Intentionally used or endeavored to use, or procured another person to use, any electronic or other device to intercept when device
 - Is affixed to or otherwise transmits a signal through a wire, cable, or other connection used in wire communication; or
 - Transmits communication by radio or interferes with the transmission of communication radio
- 2nd Degree Felony
- Available Relief:
 - Statutory damages - \$10,000 for for each occurrence
 - Actual damages exceeding \$10,000
 - Punitive damages available
 - Injunctions
 - Attorney's fees and costs
- Tex. Civ. Prac. & Rem. Code 123.002; Texas Criminal Wiretap Act, Tex. Pen. Code 16.02; Tex. Code of Crim. Proc. 18.20; Federal Wiretap Act 18 USC 2510-2520

Intentional & Unauthorized Access to Stored Communications

- Party commits offense and may be subject to criminal and civil penalties if party:
 - Intentionally obtained access without authorization to a facility through which wire or electronic communication service is provided (i.e. gmail); or
 - Intentionally exceeded an authorization for access to a facility through which a wire or electronic communication service is provided
- Available Relief:
 - Statutory damages - \$1000 per incident; can exceed by proving actual damages (i.e. physical pain, suffering, mental anguish)
 - Punitive damages available, if willful and intentional
 - Injunctions
 - Attorney's Fees and Costs
- Class A Misdemeanor
- Tex. Civ. Prac. & Rem. Code 123.004(5); Tex. Code of Crim. Proc. 18.20, sec. 16(a)(2); Tex. Code of Crim. Proc. 18.21, sec. 12(a); 18 USC 2520(b)(2) & 2707(C)

Unauthorized Access of a Computer, Computer Network or Computer System

- Party commits offense and may be subject to criminal and civil penalties if party:
 - Intentionally obtained access without authorization to a computer, computer network or system
- Must be brought within 5 years after last act committed or 2 years from date of discovery or when claimant had reasonable opportunity to discover
- Actual damages and attorney's fees and costs
- Class B Misdemeanor, but increases to varying degrees of felonies if committed with intent to harm based on amount involved
- Tex. Civ. Prac. & Rem. Code 143.001-002; 18 USC 1030

Practical Tips

- Always request the source of the ESI before producing or using
- Warn and advise client about accessing personal electronic devices or of opposing party or others
- Consider including warning in Fee Agreement:
 - Use of Wiretapping or Other Related Device: Client represents and warrants that he/she or anyone on his/her behalf has not installed, utilized or otherwise operated a wiretapping device, including but not limited to a recording device on a telephone or software on a computer to monitor usage or communication, without the express consent of the Client's spouse and/or the opposing party ("wiretapping activity"). Client also represents and warrants that he/she or anyone on his/her behalf has not monitored, read, accessed or procured any electronic information, including e-mail and text messages, from the other party to the dispute or any related persons without that person's express or implied consent ("communication interception activity"). Client further represents and warrants that he/she has not and will not provide any information, data or other material to the Firm that is the product or result of any such wiretapping or communication interception activity. Client acknowledges that the Firm has fully explained that any such wiretapping activity may be illegal and may give rise to civil and criminal liability, and by entering into this Contract, Client represents and warrants that he/she has engaged in no such wiretapping activity or communication interception activity. Client is further advised to change all passwords to any online accounts to passwords that only Client knows.

HIPAA



HIPAA Tips for Attorneys

- TIP: Revoke HIPAA authorizations and POA's before filing. Communicate this information to medical providers.
- HIPAA Authorization-how to use throughout a case.
- What to do when you can't get a release?
- Protections for medical records/mental health/drug and alcohol treatment records
- Handling discovery from your client—what your obligation is before sending discovery responses to other party.
- What to do with records at the end of the case? (Destruction vs. maintaining records)



The End!

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