

TEMPORARY ORDERS IN A DIVORCE AND SAPCR: PREPARING PLEADINGS AND ASSISTING WITH MOTION PRACTICE

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I. INTRODUCTION

The outcome of a temporary orders hearing often decides the outcome of the ultimate issues in a case. It can be the most important hearing if the case never goes to trial. It is a trial in itself and sets the tone for the rest of the case.

Temporary relief can be requested during a divorce, SAPCR, or on appeal. This paper will focus on the process during a divorce or SAPCR. Temporary orders seek to maintain the status quo, preserve property, and protect the parties and safety and welfare of the children while a case is pending. They decide issues regarding primary custody, possession and access, child and medical support, and temporary allocation of assets and debts. While available at any stage of a case, it is best to request relief and get temporary orders as soon as possible, especially if children are involved or if there is a concern that property may “disappear” in the interim. Another benefit of having temporary orders early on is that it allows you to assess the strengths and weaknesses of your client’s case at the beginning. If prepared for correctly, you can gather much of the information and documentation you will need for the case on the front end.

The Texas Family Code (TFC), Texas Rules of Civil Procedure (TRCP) and the local rules of the county and court where the case is pending dictate the process for requesting and receiving temporary orders. It is important to understand the process, and particularly the local rules, so your client will know what to expect and you may utilize the limited time you have to prepare efficiently and effectively.

I. PREPARING THE INITIAL PLEADINGS

Preparing for the temporary orders hearing begins with the petition. By the time the initial client interview is complete, you should have enough information to begin drafting the petition. Make sure that you understand the facts of the case and your client’s goals. Anticipate the opposing party’s goals. At the interview, considerable time needs to be spent

discussing and clarifying with your client the issues in the case and why your client believes the court

should decide those issues in favor of your client over the opposing party. Managing expectations is also critical; the client needs to know the various options and probable outcomes, as well as what to expect from your office, the other side, and the court. Explain how the case is expected to progress given the county and court where it will be heard.

A. Where to File

Separate papers can be (and have been) written entirely on issues of jurisdiction and venue, and those issues will not be delved into much detail here, but it is important to note that the court is authorized only to decide issues when it has jurisdiction. TEX. FAM. CODE §§6.308, 102.012.

For a divorce, one of the parties must be domiciled in Texas for 6 months prior to the filing of the petition and a resident of the county for the preceding 90 days. TEX. FAM. CODE §6.301. To file a SAPCR, A party must satisfy one of the standing requirements identified in the TFC. TEX. FAM. CODE §§102.003-102.007. To make a child custody determination or decide issues related to legal and physical custody and visitation, Texas must be the home state of the child or satisfy one of the other provisions under the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA). TEX. FAM. CODE §§152.102(3), 152.201. If a party lives outside of Texas, an affidavit that complies with the UCCJEA must be attached to the petition. TEX. FAM. CODE §152.209(a). Personal jurisdiction is required if your client is seeking to impose upon the opposing party a personal obligation, such as paying money. *In re S.A.V.*, 837 S.W.2d 80, 83(Tex.1992). The TFC identifies ways to acquire personal jurisdiction over a nonresident respondent in a divorce or SAPCR. TEX. FAM. CODE §§6.305, 102.011.

A suit for divorce involving children must include a SAPCR. TEX. FAM. CODE §6.406. If a SAPCR is filed before the divorce, the SAPCR must be transferred to the divorce court. TEX. FAM. CODE

§6.407(a). An original SAPCR must be filed in the county where the child resides unless another court has continuing exclusive jurisdiction (CEJ) or the venue is fixed in a suit for divorce. TEX. FAM. CODE §103.001. The TFC provides for how to determine where a child resides. TEX. FAM. CODE §103.001(c).

A modification suit needs to be filed in the court of CEJ; however, a change of facts since the last order could cause the court to lose jurisdiction. A common example is when the child has resided in another county for 6 months. TEX. FAM. CODE §155.201(b). If a child has resided in another county for 6 months, transferring venue is mandatory and a motion to transfer venue should be filed at the same time as the petition. TEX. FAM. CODE §155.204(b). A court may transfer venue if the child has lived in another county for less than 6 months or for the convenience of the parties. TEX. FAM. CODE §155.202. The transferring court retains jurisdiction to enter temporary orders pending transfer and until the receiving court enters the case on its docket. TEX. FAM. CODE §155.005.

B. Drafting the Petition

Before drafting the petition, check the local rules for pleading requirements. For example, Dallas County requires each page of all documents filed with the court be numbered and descriptively titled, and that orders be separate from the motion. DALLAS CTY. FAM. LOC. R. 11.01. The petition should accurately and completely reflect the relief your client is requesting at both the temporary orders hearing and on final trial. If you don't plead it, your client risks not having that issue heard. The petition should be specific enough to give the other side and the court fair notice of the claims and relief sought. *See* TEX. R. CIV. P. 45.

Review the petition with your client before filing to ensure they fully understand the claims and relief requested. Some of the substantive issues that should be discussed with your client include:

1. Existence of other court orders affecting the parties or children;
2. Date of marriage and separation;

3. Grounds for divorce;
4. Existence and type of community property and separate property;
5. Whether the child owns property;
6. Types of conservatorship and allocation of legal rights and duties;
7. Geographic restrictions;
8. Possession and access schedules;
9. Child and spousal support;
10. Availability of medical support;
11. Existence of a protective order;
12. Name changes;
13. Attorney's fees;
14. Existence of standing orders;
15. Temporary relief; and
16. Special issues (existence of common law marriage or marital agreements, tort claims, claims for reimbursement, etc.).

Distinguish the issues a court must hear from what may be heard by a jury. Your client may want to have a jury trial on issues such as conservatorship or who should have the right to designate the child's primary residence. If it's decided there should be a jury trial, request a jury in the petition and pay the fee at the time of filing so the case can be set on the court's jury docket.

1. Grounds for Divorce

It is sufficient to track the language of the referencing statute when stating the grounds for divorce in the petition. TEX. FAM. CODE §6.402(a). Texas is a no fault state and typically insupportability is used as the ground for divorce; however, plead other grounds if supported by the evidence as it could be helpful for developing the theme of your case and presenting evidence during the temporary orders hearing and on final trial.

2. Children

The TFC identifies what items and statements are required in a SAPCR petition. TEX. FAM. CODE §102.008. Make sure your client understands the presumptions and corresponding

burdens under the TFC related to joint managing conservatorship (JMC), the standard possession order (SPO), and child support. The more your client's requested relief deviates from these presumptions, the more detailed and specific you should be in your pleadings. It is best to plead alternative positions so any position your client takes is supported by the pleadings.

a. Conservatorship

Plead whether your client is seeking a JMC or sole managing conservatorship (SMC). Texas law presumes JMC unless the court finds it would not be in the child's best interest because it would significantly impair the child's physical health or emotional development. TEX. FAM. CODE §153.131. Credible evidence of instances such as child neglect, physical or sexual abuse, or family violence before or during the suit will likely result in having to plead for SMC. Include a statement that the appointment of both parents as JMCs would significantly impair the child's physical health or emotional development. *See* TEX. FAM. CODE §§153.004(b)–(d), 153.005, 153.131(b).

Discuss with your client the rights and duties identified in the TFC and how they should be allocated. *See* TEX. FAM. CODE §§153.073, 153.074, 153.076, 153.132. If both parents are appointed conservators, the court is required to specify whether the rights and duties, specifically those identified in §153.132, should be exercised by each parent individually, by joint agreement, or exclusively by one parent. TEX. FAM. CODE §153.071. You should specifically plead if your client is seeking the right to designate the primary residence. Plead whether the residence should be determined without regard to a geographic restriction or identify the parameters of the restriction. You should also plead the rights your client wants to hold exclusively or by joint agreement.

b. Possession/Access and Support Provisions

In many cases, an SPO is a sufficient schedule for the party not named primary conservator. *See* TEX. FAM. CODE §§153.311–

153.317. An SPO is presumed to be in the best interest of a child over the age of three. TEX. FAM. CODE §§153.251–153.252. For children under the age of three, the TFC identifies factors for the court to consider when devising a schedule. TEX. FAM. CODE §153.254. An SPO may also not be workable if, for example, a party works on the weekends or the parties have been exercising a different schedule for a period of time prior to filing. If your client is the party seeking a visitation schedule, identify the schedule you want the court to order along with an alternative schedule.

If your client is seeking SMC, identify whether the other parent should be appointed a possessory conservator. If not, plead that such an appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child. TEX. FAM. CODE §153.191. Identify whether your client wants the other party to have supervised visits and who should supervise them. You may also plead for electronic access. TEX. FAM. CODE §153.015.

Your client's request for child support will be depend on the substance of your client's request regarding conservatorship, possession, and access. Plead who should be ordered to pay child support and identify if your client is seeking support that deviates from the guidelines. Plead who should be ordered to provide medical support, and how uninsured medical expenses should be allocated. A statement of health insurance availability should be attached to the petition as it is required to be disclosed prior to the temporary orders hearing. TEX. FAM. CODE §154.181.

3. Requesting Temporary Relief

Unlike temporary relief in other civil cases, a temporary restraining order (TRO) or temporary injunction in a divorce or SAPCR is not required to define the injury or state why it is irreparable, unless a party is requesting extraordinary relief. TEX. FAM. CODE §§6.503(a), 105.001(b). However, if you are also seeking injunctive relief against a third party, your petition will need to meet the requirements for obtaining injunctive relief in civil cases. *See* TEX. R.

CIV. P. 680-685. The court can waive the requirement of a bond in a temporary order in a divorce or made on behalf of a child. TEX. FAM. CODE §§6.503(b), 105.001(d).

A violation of a TRO, temporary injunction, or other temporary order is enforceable by contempt. TEX. FAM. CODE §§6.506, 105.001(f). The relief identified should be specific enough to be enforceable. Be careful about copying verbatim from the TFC; one court has found that relief tracking the language of what is now TEX. FAM. CODE §6.501(a)(6) was not specific enough to be enforceable by contempt. *Ex Parte Higginbotham*, 768 S.W.2d 4, 5 (Tex.App—Fort Worth 1989, orig. proceeding). Temporary orders are generally not subject to interlocutory appeal and can be reviewed by mandamus. See TEX. FAM. CODE §§6.507, 105.001(e).

a. Temporary Restraining Orders

The request for a TRO and the relief requested as part thereof should be identified in the petition, and a separate TRO containing notice and a hearing date should be filed and served at the same time as the petition. A TRO is valid for the earlier of 14 days or the date the court enters temporary orders. TEX. R. CIV. P. 680. The time can be extended either by agreement or by motion of a party. If your county has a standing order, attach the order to the petition and serve it at the same time as the petition.

The TFC provides a list of relief that can be requested in a TRO during a divorce and SAPCR. Check with the court beforehand if it requires that the TRO be mutual. Regardless, it is generally a good idea for your client to refrain from engaging in those same activities. Not every request that can be included necessarily *should* be included. It may be necessary to request relief that is specifically tailored to the facts of the case, although depending on the court, it may not be granted ex parte. Examples of case specific relief in a TRO include refraining from the use of alcohol around children or prohibiting overnight guests.

The TFC provides that a party may be enjoined from engaging in the following acts without notice and a hearing:

1. Intentionally communicating in person or in any other manner, including by telephone or another electronic voice transmission, video chat, in writing, or electronic messaging, with the other party by use of vulgar, profane, obscene, or indecent language or in a coarse or offensive manner, with intent to annoy or alarm the other party;
2. Threatening the other party in person or in any other manner, including by telephone or another electronic voice transmission, video chat, in writing, or electronic messaging, to take unlawful action against any person, intending by this action to annoy or alarm the other party;
3. Placing a telephone call, anonymously, at any unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication with the intent to annoy or alarm the other party;
4. Intentionally, knowingly or recklessly causing bodily injury to the other party or to a child of either party;
5. Threatening the other party or a child of either party with imminent bodily injury;
6. Intentionally, knowingly, or recklessly destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of one or both of the parties with intent to obstruct the authority of the court to order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children in the marriage;
7. Intentionally falsifying any writing or record, including an electronic record, relating to the property of either party;
8. Intentionally misrepresenting or refusing to disclose to the other party or to the court, on proper request, the existence, amount, or location of any tangible or intellectual property of one or both of the parties, including electronically stored or recorded information;
9. Intentionally or knowingly damaging or destroying the tangible or intellectual property of

the parties or either party, including electronically stored or recorded information;

10. Intentionally or knowingly tampering with the tangible or intellectual property of one or both of the parties, including electronically stored or recorded information, and causing pecuniary loss or substantial inconvenience to the other party;

11. Selling, transferring, assigning, mortgaging, encumbering, or in any other manner alienating any of the property of Petitioner or Respondent, regardless of whether the property is personalty, realty, or intellectual property, and whether separate or community, except as specifically authorized by order of the court;

12. Incurring any indebtedness, other than legal expenses in connection with this suit, except as specifically authorized by order of the court;

13. Making withdrawals from any checking or savings account in any financial institution for any purpose, except as specifically authorized by order of the court;

14. Spending any money in either party's possession or subject to either party's control for any purpose, except as specifically authorized by order of the court;

15. Withdrawing or borrowing in any manner for any purpose from any retirement, profit-sharing, pension, death, or other employee benefit plan or employee savings plan or from any individual retirement account or Keogh account, except as specifically authorized by order of the court;

16. Entering any safe-deposit box in the name of or subject to the control of either party, whether individually or jointly with others;

17. Withdrawing or borrowing in any manner all or any part of the cash surrender value of a life insurance policy on the life of either party or a child of the parties, except as specifically authorized by order of the court;

18. Changing or in any manner altering the beneficiary designation on any life insurance on the life of either party or a child of the party;

19. Canceling, altering, failing to renew or pay premiums, or in any manner affecting the level of coverage that existed at the time the suit was filed of any life, casualty, automobile, or health

insurance policy insuring the parties' property or persons, including a child of the parties;

20. Opening or diverting mail or e-mail or any other electronic communication addressed to the other party;

21. Signing or endorsing the other party's name on any negotiable instrument, check, or draft, including tax refunds, insurance payments, and dividends, or attempting to negotiate any negotiable instrument payable to the other party without the personal signature of the other party;

22. Taking any action to terminate or limit credit or charge cards in the name of the other party;

23. Discontinuing or reducing the withholding for federal income taxes on from either party's wages or salary;

24. Destroying, disposing of, or altering any financial records of the parties, including but not limited to records from financial institutions (including canceled checks and deposit slips), all records of credit purchases or cash advances, tax returns, and financial statements;

25. Destroying, disposing of, or altering any e-mail, text message, video message, or chat message or other electronic data or electronically stored information relevant to the subject matters of this case, regardless of whether the information is stored on a hard drive, in a removable storage device, in cloud storage or in another electronic storage medium;

26. Modifying, changing, or altering the native format or metadata of any electronic data or electronically stored information relevant to the subject matters of the case, regardless of whether the information is stored on a hard drive, in a removable storage device, in cloud storage, or in another electronic storage medium;

27. Deleting any data or content from any social network profile used or created by either party or a child of the parties;

28. Using any password or personal identification number to gain access to the other party's e-mail account, bank account, social media account, or any other electronic account;

29. Terminating or in any manner affecting the service of water, electricity, gas, telephone, cable television, or other contractual services, such as security, pest control, landscaping,

or yard maintenance, at the residence of either party, or in any manner attempting to withdraw any deposits for service in connection with those services;

30. Excluding the other party from the use and enjoyment of a specified property;

31. Entering, operating, or exercising control over a specified motor vehicle in the possession of the other party;

32. Disturbing the peace of the child or of another party; and

33. Removing the child beyond a specifically identified geographical area. TEX. FAM. CODE §§6.501(a), 105.001(a)(3,5).

b. Relief that Cannot be Requested in a TRO

Any relief that requires notice and a hearing cannot be granted in an ex parte TRO. Additionally, a TRO cannot:

1. Include a provision that is the subject of a requirement, appointment, award or other order identified in §64.104 of the Texas Civil Practice and Remedies Code entitled “Expenditures by Receiver”;
2. Exclude a spouse from occupancy of the residence where the spouse is living, except as provided in a protective order made pursuant to Title 4 of the TFC;
3. Prohibit a party from spending funds for reasonable and necessary living expenses;
4. Prohibit a party from engaging in acts reasonable and necessary to conduct that party’s usual business and occupation;
5. Provide for the temporary conservatorship of the child, unless requesting extraordinary relief;
6. Provide for the temporary support of the child; or
7. Order payment of reasonable attorney’s fees and expenses. TEX. FAM. CODE §6.501(b), 105.001(a)(1,2,5).

c. Requesting Extraordinary Relief

Extraordinary relief is relief seeking to:

1. Attach the body of the child;
2. Take the child into the possession of the court or a person designated by the court; or
3. Exclude a parent from possession of or access to the child. TEX. FAM. CODE §105.001(c).

If your client is requesting extraordinary relief, the pleadings must be verified or supported by affidavit alleging specific facts showing that immediate and irreparable injury, loss, or damage will result before notice can be served and a hearing can be held. §105.001(b).

d. Temporary Injunctions and Temporary Orders

After notice and a hearing, a court has the power to grant injunctive relief and make temporary orders. TEX. FAM. CODE §§6.502(a), 105.001(b). Plead for the court turn the temporary restraining order into a temporary injunction and make temporary orders for the preservation of the property and protection of the parties, and for the safety and welfare of the children. A court can make orders as to one or both parties with regard to any of the following:

1. Requiring a sworn inventory and appraisement of real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities;
2. Ordering payment of temporary spousal support;
3. Ordering production of documents and other tangible things;
4. Ordering payment of reasonable attorney’s fees and expenses;

5. Appointing a receiver;
 6. Awarding one spouse exclusive use of the residence during the case;
 7. Prohibiting one or both parties from spending funds beyond an amount determined by the court to be for reasonable and necessary living expenses;
 8. Awarding one spouse exclusive control of a party's usual business or occupation;
 9. Awarding control and management over specific property;
 10. Temporary conservatorship of the child;
 11. Temporary support of the child; or
 12. Determining geographic restrictions.
- See TEX. FAM. CODE §§6.502, 105.001(a).*

Plead for any additional ancillary relief your client will be requesting at the temporary orders hearing (appointment of an amicus attorney, mediation, child custody evaluation, drug testing, etc.).

4. Initial Pleadings in a Modification

SAPCR modifications require pleading beyond what is required for an original SAPCR.

a. Modification of Conservatorship and Possession/Access

If your client is seeking to modify conservatorship or possession and access, plead one of the following:

1. The circumstances of the child, conservator, or other party affected by the order have materially and substantially changed since the earlier of the date of the rendition of the order or the signing of a settlement agreement on which the order is based;
2. The child is at least 12 years

- old and has expressed to the court in chambers pursuant to §153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or
3. The conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months. TEX. FAM. CODE §156.101(a).

A conviction or order for deferred adjudication for child abuse or family violence is a sufficient ground to justify a modification or temporary order. TEX. FAM. CODE §§156.104, 156.1045.

If your client is seeking to modify the designation of the person having the exclusive right to designate the primary residence within one year of the earlier of the settlement agreement or the rendition of the prior order, you must attach a supporting affidavit to the petition alleging at least one of the following:

1. The child's present environment may endanger the child's physical health or significantly impair the child's emotional development;
2. The person with the present exclusive right to designate the primary residence is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
3. The person with the present exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least 6 months and the modification is in the best interest of the child. TEX. FAM. CODE §156.102(a)(b).

b. Temporary Orders in a Modification
Changing the Primary Conservator

If your client is seeking on temporary orders to change the designation of the person who has the exclusive right to designate the primary residence, there must be a showing that:

1. The order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
2. The person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than 6 months; or
3. The child is 12 years old or older and has expressed to the court in chambers pursuant to §153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child. TEX. FAM. CODE §156.006(b).

If pleading the impairment ground, there must be an affidavit attached to the request that is based on the affiant's personal knowledge or belief based on representations made to the affiant by a person with personal knowledge and contain facts supporting the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development. The court is not required to set a temporary orders hearing if it determines the affidavit is inadequate. §156.006(b-1).

c. Modification of Child Support

To modify child support, a party must plead that one of the following has occurred:

1. A material and substantial change in circumstances of the child or a person affected by the order since the earlier of the date the order was rendered or

the signing of a settlement agreement; or
2. 3 years have passed since the last order was rendered or modified and the monthly amount of child support differs by either 20% or \$100 from the amount that would be awarded under the current guidelines. TEX. FAM. CODE §156.401(a).

Plead that the child support award should retroactively apply to obligations accruing after the date of service of citation or an appearance in the suit, whichever occurs first. §156.401(b).

C. Notice, Filing, Setting Hearings, and Service

Local rules often have specific requirements that reiterate or expand upon the rules pertaining to notice and setting hearings. For example, Tarrant County requires that a party include language in a request for an ex parte TRO certifying that there is no attorney for the opposing party; or that there is an attorney for the opposing party and that attorney was notified of the request for ex parte relief, and; either no attorney wishes to be heard before presentment; the parties were unable to reach an agreement and the attorney was notified of the date and time of the hearing; or they were unable to reach the attorney. TARRANT CTY. FAM. LOC. R. 4.01 (13.2). Dallas County has a very similar rule. DALLAS CTY. FAM. LOC. R. 2.02.

Review the fee schedule so you can inform your client of the costs beforehand. Many counties have their fee schedules online. Contact the clerk's office and find out if any documents other than the civil case information sheet should be filed. Find out what the procedures are for getting a TRO signed and picked up for service. Depending on the county and court, the TRO may need to be electronically filed and signed, walked through the court, or a combination.

Once the petition and proposed TRO are filed, the court may set its own hearing date or you may need to contact the court to get a date. A party

must be given 3 days notice of the temporary orders hearing, and 6 days notice if serving by mail. TEX. R. CIV. P. 21(b), 21a(c). Tarrant County also requires 3 days notice of any hearing requesting temporary relief, but prohibits a temporary orders hearing in a modification suit before the deadline to answer unless an affidavit is attached to the petition setting forth special circumstances. TARRANT CTY. FAM. LOC. R. 4.01(5). Dallas County requires that a party use specific form language when notifying the other side of a hearing. DALLAS CTY. FAM. LOC. R. 3.03.

Service of the petition and TRO is conducted in the same manner as service generally in civil cases. TEX. FAM. CODE §102.009(c), *see* TEX. R. CIV. P.106. In addition to the parties, anyone affected by the petition or TRO needs to be served. Once served, the return of service must be filed with the court, and be on file for 10 days, exclusive of the day of filing and judgment, before a default judgment can be taken. TEX. R. CIV. P.107.

The opposing party may execute a waiver of service in lieu of being formally served. Waivers of service in a divorce and SAPCR are governed by the TFC, and must be sworn, completed after the petition has been filed, acknowledge receipt of a copy of the filed petition, and contain the mailing address of the waiving party. TEX. FAM. CODE §§6.4035, 102.0091.

D. Your Client is the Respondent

If your client is the Respondent, you will have even less time than the Petitioner to do all that is needed to prepare your pleadings and case for a temporary orders hearing. You need to play catch up, performing all of the same tasks required of the Petitioner and more.

First, obtain all pleadings and other documents on file with the court or that your client has received from the other side. Next, consider issues of jurisdiction and venue before filing any - pleadings. Procedural issues should be addressed first before substantive issues to save your client time and money, and in some instances to avoid waiver. A special appearance contesting personal jurisdiction as to the case or a particular claim follows the “due order of pleadings” requirement, and must be filed

first before any motion to transfer venue, answer, or other pleading. TEX. R. CIV. P. 120a. A motion to transfer venue based on mandatory grounds must be filed on or before the first Monday after the 20th day after the date of service of citation or notice of the suit or before the hearing starts, whichever is sooner. TEX. FAM. CODE §155.204(b). If contesting a motion to transfer, a controverting affidavit must be filed on or before the first Monday after notice of the motion is served. §155.204(d). Consider the necessity of filing a plea to the jurisdiction to challenge subject matter jurisdiction or a plea in abatement if the domicile or residency requirements have not been met. Consider filing a motion for continuance if there won’t be enough time to adequately prepare for the hearing. Call the other side, and find out if they will agree to a continuance and whether band aid orders can be put in place to allow the hearing to be reset or passed.

Answers must be filed by 10:00 a.m. on the Monday following the expiration of 20 days after service of citation. TEX. R. CIV. P. 99. The answer should contain any verified denials or affirmative defenses your client has to the claims being brought. Prepare a counterpetition in addition to an answer; don’t rely on the court to consider your client’s requests for relief simply because the other side has put them at issue. File and serve your answer and counterpetition before the temporary orders hearing to put the other side on notice and ensure the court will hear any properly plead requests. Set a temporary orders hearing for the same time as the Petitioner’s hearing.

III. PREPARING FOR THE TEMPORARY ORDERS HEARING

The local rules of the county and court will provide guidance when preparing for the hearing. These rules will dictate important matters such as time and presentation allotment, documents needed for the hearing, and whether the court requires the parties to attend mediation before having a hearing. If you anticipate needing a record, find out whether you should bring a court reporter or if the court will have someone available. A lot of this information can

be found online in the local rules or at the court's website. If you cannot find the information online, don't be afraid to call the court and ask!

A. Know Your Client's Story

At minimum, you will want to discuss the following with your client before the hearing:

1. Individual history of client, opposing party, and their family involvement;
2. History of client's relationship with opposing party;
3. Reason for the breakup or filing of the petition;
4. Parties' educational backgrounds;
5. Parties' employment history and work schedules;
6. Parties' pay history;
7. Details regarding children's education (name of schools and teachers, subjects, grades, etc.) and extracurricular activities (type of activity, name of coaches, practice and game schedule, etc.);
8. Daily schedule for parties and children;
9. Child care plans;
10. Division of responsibility for children and home;
11. Information regarding treating care providers for parties and children, and medications;
12. Temporary use of the marital residence and possession of other property;
13. Financial and credit card accounts;
14. Monthly income and expenses, how the bills are paid, and who should pay what bills;
15. "Bad facts" on either side (drugs, domestic violence, etc.);
16. Information regarding witnesses and their possible testimony;
17. What the other side will say about your client;

18. Who should have temporary custody of the children and why;
19. How rights and duties should be allocated; and
20. Proposed visitation schedules.

B. Develop a Theme

Develop a theme for your case and reinforce it through evidence, exhibits, and examination points. The most effective theme is that your client wishes to maintain the status quo. If your client is advocating to change the status quo, identify why it should change. Perhaps there are special circumstances which necessitate your client getting what they want. Perhaps your client is simply a better parent.

C. Frame the Issues

Be clear and concise when framing the issues. It is critical that you spend your time focusing on the issues; therefore, it is just as important to know what is not at issue. Use the evidence and exhibits to help frame and support the issues, and disregard irrelevant evidence.

D. Assign Homework

Let your client know early on that they will be assigned homework and will be expected to complete it timely and accurately. Go over with your client a list of all of the information and documents they need to provide before the hearing. The list should contain:

1. Any documents required by the local rules;
2. Financial information statement;
3. Bank and credit card statements;
4. W2s and tax returns for the last two years;
5. Last two paystubs showing year to date earnings;
6. Timeline of relevant events, usually beginning with the client's relationship with the opposing party;
7. A list of requested relief;

8. A list of real and personal property they want to keep while the case is pending;
9. Documents related to specific events, such as a police report or photographs;
10. A list of bills or debts each party should pay while the case is pending;
11. Calendar of missed time, if relevant;
12. Any journals they kept regarding their relationship or the children; and
13. A signed HIPAA release.

E. Prepare Exhibits

The homework completed by your client will aid in preparing the exhibits. Have any applicable exhibits available on a USB drive so that the court can modify them during the hearing, if desired. Premark the exhibits and have enough copies made for the court, the court reporter, opposing counsel, the opposing party, and your client. Prepare the following:

1. Summary of relief requested;
2. Financial information (financial information statement, tax returns, W2s, paystubs, bank and credit card statements, etc.);
3. All documents required under the local rules;
4. Child support calculation;
5. Calendar of missed time, if relevant;
6. If fees are being requested, affidavit, bills, and resume; and
7. Case specific documentation (medical records, photographs, police report, etc.).

F. Select Witnesses

Often the parties are the only witnesses, but consider using collateral witnesses when they have personal knowledge about a specific event or pattern of behavior that is relevant to the hearing. Don't use clearly biased witnesses who will only serve to bolster your client's testimony.

Interview the witness beforehand outside the presence of the client. Find out what the witness knows and their willingness to get involved. After, discuss with your client what the witness said, and whether to issue a subpoena or have the witness voluntarily testify. If you are planning to have a professional testify, such as a health care provider, get the records early so they can be reviewed before the hearing. Subpoena both the witness and the records to the hearing as you will probably not have enough time to have a business records affidavit served beforehand.

G. Know how to Prove Your Client's Requests

Use the relief requested exhibit, prevailing legal standards and presumptions, and public policy concerns to provide supporting grounds for your client's requests and help develop examination points for the hearing.

The public policy of Texas is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, provide them with a safe, stable, and nonviolent environment, and encourage parents to share in the rights and duties. TEX. FAM. CODE §153.001. Recall the reasons for temporary orders are to maintain the status quo, preserve property, and protect the parties and safety and welfare of the children. If your client has children under the age of 3, refer to the factors identified in §153.254.

The best interest of the children will be the court's primary consideration. Some of the factors to consider when determining best interest are:

1. The desires of the child;
2. The emotional and physical needs of the child now and in the future;
3. The emotional and physical danger to the child now and in the future;
4. The parental abilities of the individuals seeking custody;

5. The programs available to assist these individuals to promote the best interest of the child;
6. The plans for the child by these individuals or the agency seeking custody;
7. The stability of the home or proposed placement;
8. The acts or omissions of the parent which indicate the existing parent-child relationship is not a proper one; and
9. Any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-372 (Tex.1976).

The relief requested exhibit should serve as a roadmap of the issues and relief that will be raised at the hearing. The direct examination of your client should follow a logical (often chronological) format, followed by identifying the relief your client seeks and the grounds for obtaining such relief. Cross examinations should be framed around favorable facts and support your theme.

H. Prepare your Client for Court

It is important to thoroughly prepare your client for court. This is best done prior to the day of the hearing, but if that's not possible, it needs to be done at the courthouse well before the hearing. Before your client shows up to court, discuss appropriate dress and conduct. Many counties have local rules on courtroom decorum. *See DALLAS CTY. FAM. LOC. R. 14.01-14.06*. In addition, discuss with your client:

1. How to get to the courthouse and where to park;
2. What to expect procedurally while in court and order of proceedings;
3. What to expect while testifying; and
4. Anticipated questions and issues by any party or witness.

IV. PREPARING THE TEMPORARY ORDERS

You may want to prepare a draft temporary order to have ready at the hearing. If you have a draft and the other side doesn't, the court can use your draft to work off of during the hearing, if desired. It is best to bring a draft of language for an unusual issue your client wants addressed.

A. Get the Ruling

The court may issue an oral ruling immediately or a written ruling following the hearing. If the court issues an oral ruling, take extensive notes or get the transcript from the hearing. Several courts have blank temporary orders forms that can aid in documenting the ruling.

B. Drafting the Orders

The court will usually set the orders for entry. Generally, the prevailing party prepares a draft of the proposed order. The court or local rules will dictate the deadlines for submitting proposed orders to the opposing party for review.

1. Refer to the Local Rules

Check the local rules before drafting temporary orders because some counties have required language for the order. For example, Tarrant County requires that every temporary order containing provisions for child support must contain a paragraph ordering the parties to pay the appropriate fees that may be charged by the agency to whom child support is paid. TARRANT CTY. FAM. LOC. R. 4.01(7).

2. Be Specific

Include specific language stating why the temporary order is being issued. State that the order is being issued for the "preservation of the property and protection of the parties as deemed equitable" and "for the safety and welfare and best interest of the children". *See TEX. FAM. CODE §§6.502(a), 105.001(a)*.

The language of the order must be clear, specific, and unambiguous such that it can be enforceable by contempt. Identify the parties and children by name. Identify the rights and duties of each conservator as to the children and how the parties are able to exercise those rights. Ensure the terms and conditions of a possession and access schedule provide for the length of possession or access, dates, start and end times, who is to surrender and return the children, and where the surrender and return will occur.

An order for child or medical support, spousal support, or reimbursement of health insurance premiums should state the amount of support ordered, the dates for payments, where payments must be made, and the duration of the obligation. Any orders for payments enforceable as child support should contain wage withholding provisions and be submitted with a wage withholding order along with any other documents required by the court. Orders for temporary possession of property and payment of debts should also provide the appropriate unambiguous command language.

3. Contents of the Order

Temporary orders should identify and address:

1. Date of hearing;
2. Parties;
3. Appearances;
4. Record;
5. Jurisdiction;
6. Children;
7. Type of conservatorship;
8. The identification and allocation of rights and duties;
9. Possession and access schedule;
10. Temporary child support and wage withholding provisions;
11. Temporary medical support and health care provisions;
12. Temporary allocation of property and debts;

13. Temporary allocation of costs and attorney's fees;
14. Temporary injunctions;
15. Other provisions (deadlines to produce inventory and appraisement, parenting classes, mediation, etc.); and
16. Required statutory warnings.

C. Clarifying and Modifying Temporary Orders

File a Motion to Clarify if the temporary orders are not specific enough to be enforceable by contempt. You may also file a Motion for Additional Temporary Orders if the original temporary orders don't address a certain issue. File a Motion to Modify Temporary Orders if you wish to change a substantive matter. Recent case law indicates a showing of a material and substantial change in circumstances is not necessary to modify a temporary order; rather, it is sufficient to show that the modification is for the safety and welfare of the child. *In re Casanova*, No. 05-14-01166-CV, 2014 Tex. App. LEXIS 12638, at *10 (Tex.App.—Dallas, Nov. 20, 2014).

V. CONCLUSION

Adequate preparation is key to having an effective temporary orders hearing. While it is important to know what the other side will say and how your client will respond, don't be exclusively focused on responding to the allegations made against your client. Sticking to the theme and keeping in mind your client's story and goals will go a long way in conveying a clear and persuasive presentation.