

SUBJECT: Establishing discovery procedures for Family Code

COMMITTEE: Juvenile Justice & Family Issues — committee substitute recommended

VOTE: 8 ayes — Dutton, Lujan, Cook, Leo-Wilson, Martinez Fischer, Smithee, Talarico, Wu

0 nays

1 absent — Lopez

WITNESSES: For — Keith Maples, Texas Family Law Foundation; Karl Hays
(*Registered, but did not testify*: Amy Bresnen, Texas Family Law Foundation)

Against — None

On — (*Registered, but did not testify*: Vicki Kozikoujekian, DDPS; Joel Rogers, Office of the Attorney General - Child Support Division)

BACKGROUND: Concerns have been raised that recent Texas Supreme Court changes to discovery procedures regarding requests for disclosures and discoveries for expert witnesses may be burdensome to some pro se litigants and attorneys, especially in rural areas.

DIGEST: CSHB 2850 would establish new discovery procedures for civil actions brought under the Family Code. The bill would prohibit the chapter from being modified or repealed by the supreme court.

Request for disclosure. The bill would allow a party to request disclosure from another party for information or material no later than 30 days before the last day of an applicable discovery period using the specified request. A party would be allowed to request the following:

- the correct names of the parties to the action;
- the name, address, and telephone number of any potential parties;

- the legal theories and, in general, the factual bases of the responding party's claims or defenses;
- the amount and any method of calculating economic damages;
- the name, address, and telephone number of any person having knowledge of relevant facts and a brief statement of each identified person's connection with the action;
- any discoverable settlement agreement described by the Texas Rules of Civil Procedure;
- any discoverable witness settlement described by the Texas Rules of Civil Procedure; and
- the name, address, and telephone number of any person who may be designated as a responsible third party.

When served with a request for legal theories and factual bases for claims or defenses, a responding party would not be required to compile all evidence that could be offered at trial.

For an action alleging physical or mental injury and damages, a party could request the following:

- all medical records and bills that would be reasonably related to the injuries or damages asserted or an authorization permitting the disclosure of the information; and
- all medical records and bills obtained by the responding party through an authorization provided by the requesting party.

Response. The responding party would be required to serve a written response to the requesting party within 30 days of the date the request was served. The bill provides for an exception, allowing a defendant that would be served with a request before the defendant's answer to have 50 days from that request to respond. This provision also would not apply to a response to a request regarding testifying experts.

Production of documents and tangible items. The responding party would be required to provide copies of documents and other tangible items with the response to a request, unless:

- the responsive documents were voluminous;
- the responding party stated a reasonable time and place for the production of the documents, and produced them at the established time and place, unless otherwise agreed by the parties or ordered by the court; and
- the responding party provided the requesting party a reasonable opportunity to inspect the documents.

Work product objections. A party could not assert or object on the basis of a work product privilege in response to requests made under the discovery procedures instituted by the bill.

Certain responses not admissible. A court could not admit or use for impeachment any amended or supplemental response to the following requests:

- the legal theories and, in general, the factual bases of the responding party's claims or defenses; or
- the amount and any method of calculating economic damages.

Discovery for expert witness. The bill would allow a party to make the following requests concerning testifying experts:

- the expert's name, address, and telephone number;
- the subject matter on which the expert would testify;
- the general substance of the expert's mental impressions and opinions and a brief summary of the basis for those impressions and opinions, or, if the expert is not retained, employed, or otherwise controlled by the responding party, documents reflecting that information; and
- if the expert is retained, employed, or otherwise controlled by the responding party, all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in the anticipation of the expert's testimony and the expert's current resume and biography.

The bill would require that the request use specific language or an authorized deposition or report. A party would be allowed to request another party to designate and disclose information concerning testifying expert witnesses.

A responding party would be required to provide the requested information no later than 30 days after the last day the request was served. The information would have to be provided 90 days before the end of the discovery period if the expert testified for a party seeking affirmative relief or 60 days for other applicable expert testimony.

Procedures for expert witnesses, depositions, and affirmative defenses. The bill would require a party seeking affirmative relief to make an expert retained, employed, or otherwise controlled by the party available for a deposition.

If the party provided a report produced by the expert, the party would not be required to make the expert available for a deposition until reasonably promptly after all other experts have been designated. If a party did not provide a report, the party would be required to make the expert available for a deposition reasonably promptly after the designation.

If the deposition could not be reasonably concluded more than 15 days from the deadline for designating other experts due to the actions of the party who designated the expert, the court would be required to extend the deadline for other experts testifying on the same subject.

A party not seeking affirmative relief would be required to make available an expert retained by, employed by, or otherwise controlled by the party for a deposition reasonably promptly after the designation of the expert and the deposition of the experts testifying for the party seeking affirmative relief.

Oral depositions for expert witnesses. CSHB 2850 also would allow a party to obtain discovery by oral deposition and a court-ordered report regarding:

- the subject matter on which a testifying expert would be expected to testify;
- the expert's mental impressions and opinions;
- the facts known to the expert, regardless of when the factual information would be acquired, that relate to or form the basis of the expert's mental impressions and opinions; and
- other discoverable items, including documents not produced in response to a disclosure request.

The court could order factual observations, tests, supporting data, calculations, photographs, or opinions of an expert in an oral deposition to be reduced to tangible form and produced in addition to the deposition. Following an oral deposition of an expert witness retained by an opposing party, the party taking the oral deposition would be required to pay all reasonable fees charged by the expert for the time spent on the deposition.

The party's duty to amend and supplement written discovery regarding a testifying expert would be governed by the Texas Rules of Civil Procedure.

Effect. The bill would take effect September 1, 2023 and the provisions of the bill would apply only to actions filed on or after the effective date.