

# Persevering in the Pandemic

## TEXAS COURTS



By JUSTICE DEBRA H. LEHRMANN

This spring, courts across the nation found themselves presented with an unprecedented question. Not a new law or legal argument but something more practical: how to operate in the midst of the COVID-19 pandemic. With large gatherings banned, was a jury trial possible? If a party in a case was COVID-19 positive, could the party appear before a court? Were remote hearings using digital technology a valid substitute for in-person hearings? Could deadlines be extended? How were possession schedules affected by an extended spring break? Should a person be evicted when he/she was supposed to stay at home? With these questions vexing the country's courts, the court system in Texas took the lead. The Texas Supreme Court, under its emergency power and its power to regulate the legal profession, issued orders to guide the courts in Texas through these uncertain times. Texas's Office of Court Administration also worked diligently to facilitate the remote hearings allowed and encouraged by the Texas Supreme Court and to guide courts, attorneys, and parties in the use of digital technology. Here are some of the innovations and solutions used by the Texas courts.

### Staying Home

The Texas Supreme Court began by issuing an emergency order authorizing courts to modify or suspend deadlines and to conduct remote proceedings. The order also required courts to use those measures when the enforcement of a deadline or an in-person proceeding might spread the virus. The court later issued another order expanding upon the first by prohibiting courts from conducting nonessential proceedings that would violate state and local restrictions and clarifying that the orders applied to all child-protection cases and deadlines.

### Using Digital Technology

With in-person hearings on hold, remote hearings were the only option for parties with pressing matters. Texas's Office of Court Administration quickly learned the ins and outs of digital platforms and coached judges, attorneys, and parties on how to use those platforms to conduct hearings remotely. As of this writing, the Office of Court Administration had overseen about 50,000 remote hearings totaling almost 84,000 hours with over 174,000 participants. The Texas

Supreme Court held its last two rounds of oral arguments for the 2019–20 term remotely through a digital platform and livestreamed videos of the arguments on the Internet.

### Possession Schedules

The pandemic hit just before spring break. In response, schools across the country extended their spring breaks or announced a second week of spring break. Then schools closed for the rest of the semester. The Texas Supreme Court issued an order clarifying that child possession and access schedules would not be affected by these school closures and would be controlled by the original school schedule. The court later issued an order clarifying that stay-at-home orders likewise did not affect possession and access schedules.

### Eviction Proceedings

It can be difficult to stay at home when you've just been evicted, and many people were having trouble paying rent after losing their jobs in the pandemic. The court issued an order pausing residential eviction proceedings.

### Federal Aid

With Congress's passage of the CARES Act, the federal government began disbursing funds to families across the nation to help them weather the crisis. For some families though, this relief money was immediately targeted for debt collection. To ensure that the federal aid served its intended purpose, the Texas Supreme Court paused garnishments and default judgments in consumer debt collection cases. **FA**



JUSTICE DEBRA H. LEHRMANN has served on the Supreme Court of Texas since 2010, having been elected to the court twice following her gubernatorial appointment. She serves as the court's liaison to the State Bar of Texas, the State Bar Judicial Section's Judicial Ethics Committee, the Board of Disciplinary Appeals, the Texas

Association for Court Administration, the State Bar Family Law Section, the State Bar Family Law Council, and the Texas Attorney-Mediator Coalition. With a total of over 30 years' judicial experience, she was a trial judge in Tarrant County for 23 years prior to her appellate service and has served the Bar in leadership capacities on both state and national levels.

# COVID-19: Key Considerations in Divorce and Related Support Obligations

By GIA M. CONTI

**T**imes of crisis often correlate with economic uncertainty, giving way to particular considerations when contemplating divorce and/or support modifications to child or spousal support. Below is an overview of key considerations when facing divorce and support modification.

## Change in Circumstances? Consult with a Family Law Attorney Immediately

In the ongoing pandemic, you may find yourself going through significant life changes that ultimately impact your ability to pay spousal or child support. These changes could be a result of pay cuts, unemployment, injury or illness, or changes in child-related needs or any number of other circumstances. Thus, you may need to consider seeking modification to your existing support obligations.

## Time Is of the Essence

If you are even considering whether you need a modification of support, you should meet with a family law attorney right away. In some jurisdictions, modifications to support may take effect on the date of the filing of your court document(s) seeking modification—thus, it is important not to wait. Additionally, your existing settlement agreement or judgment may have explicit deadlines for filing motions related to continuation of spousal support, and failure to meet these deadlines could serve as a bar to the relief you are seeking.

In times of crisis, where courts are shut down or running at a significantly limited capacity, it is important to meet with an attorney that specializes in family law and is familiar with your jurisdiction. Many jurisdictions have moved towards electronic filing (e-filing) processes for filing court documents. However, in times of emergency, procedures for e-filing may vary greatly or may even be suspended entirely. A specialized family law attorney will be up to date on any changes to the local rules, procedures, and orders in your jurisdiction.

If your jurisdiction is not allowing e-filing because there is a state of emergency and/or the courts are closed, your attorney will likely be able to present alternative options to file and serve your documents on the opposing party. Providing your attorney with up-to-date contact information for the opposing party can help expedite the filing and service of your request for support modification.

## Future Actions Can Prejudice Your Case

After a significant life change, instinct often tells us to put one foot in front of the other and take the necessary next steps. However, the next steps you take can severely prejudice

or bolster your case for support modification. For example, if you have lost your job, you might be seeking unemployment and might be completing requisite forms. While you must fill out these forms truthfully, the timing and completion of unemployment forms may have implications on your case later. Another consideration is whether you are eligible for any hardship relief offered in the CARES Act (the Act). For example, are you planning to loan money against retirement or take out a Paycheck Protection Program loan for your business? If you are considering taking advantage of any of the relief afforded in the Act, you should also consider whether, for example, your business or retirement account(s) are marital assets or nonmarital assets, and how the relief requested may impact your case. Clients should meet with their attorneys and determine how, it at all, any hardship relief may impact the division of their assets in divorce and or determining support obligations. Your actions, while seemingly innocuous or well-intended, can significantly impact your modification claim and/or divorce case, and should be discussed with your attorney and tax professional (among other trusted advisors) *before* any actions are taken.

## Gather Your Documents

### Court Documents

Locate and review with your attorney any existing court documents such as your existing judgment, court orders, and settlement agreements. Often, settlement agreements and judgments are intimidatingly lengthy and do not exactly dredge up warm and fuzzy memories. Reviewing your divorce decree during an already-difficult time in your life may be understandably difficult and depressing. Avoid the temptation to bury your head in the sand. A well-drafted marital settlement agreement or parenting agreement may provide a procedure or road map for your next steps. Furthermore, a skilled family law attorney will be able to break down and explain your settlement agreement as it relates to the issues at hand. For example, your settlement agreement may require an annual exchange of tax returns and provide a true-up on your income each year, or it may require you to submit to mediation before commencing any litigation with a predetermined mediator.

### Supporting Documents

Gather and organize documents that support the relief you are requesting. Perhaps you lost your job or had your pay cut and are seeking a downward deviation in child or spousal support. Gather your supporting documents, such as your termination letter, paystubs, most recent tax returns, sever-

ance agreement, etc. In times of crisis, such as the ongoing pandemic, court systems can become easily overwhelmed, and you should try to make it easy for your attorney to show the court you need a modification.

Conversely, you may be seeking an increase in child support (or defending against a downward modification) because there has been a change in circumstances that adversely impacts your child-related expenses. In the ongoing pandemic, many parents find themselves juggling their employment obligations with obligations to transition their children to full-time home-schooling. As a result, your children may require additional educational support such as an Individualized Education Plan, tutoring, or other special accommodations. You may also need additional childcare services in order to maintain your employment obligations. Any number of changes with your children can create need-based arguments to increase your child support or defend against modification.

Gathering all your relevant documents will enable your attorney to prove the facts of your case and make it easy for the court to understand why your relief should be granted.

## Dividing Divorce Assets in a Crisis

### *Identify Assets*

Create a balance sheet listing the marital and nonmarital assets and liabilities. After doing so, group the assets and liabilities into helpful categories such as cash and cash equivalents, real estate, stocks, retirement, etc.

### *Compare Apples to Apples*

It is important to understand what categories of assets you are dealing with in any divorce, but it is especially important during times of economic uncertainty. Make sure you are always “comparing apples to apples.” A primary residence with a fair market value of \$500,000 and a savings account with \$500,000 should not be treated as one and the same because they have different liquidity and different tax implications. The savings account can be withdrawn at any time. Contrast that with the time it may take to sell the residential property in a recessed economy. Furthermore, the residential sale may be subject to capital gains tax, closing costs, and costs to maintain the property until it sells.

### *Tax Implications and Penalties*

Consider the net tax implications and any penalties for each spouse if either spouse withdraws funds from the asset. One spouse may have a lower income tax rate, allowing him/her to receive a greater net amount of money, after taxes and penalties. If one spouse is older than the other spouse, the older spouse may be able to access retirement assets sooner, and without penalty. If assets are being paid in lieu of spousal support, make sure to compare net dollars to net dollars. For example, if one spouse is receiving 401(k) funds in lieu of monthly maintenance or for a buy-out of a marital residence,

then it is important to remember that the 401(k) funds may be subject to taxes and early-withdrawal penalties. The federal government recently passed the CARES Act, which includes numerous tax changes to assist in relieving the financial impact of COVID-19. Now, more than ever, it is important to work with your family law attorney and tax professional when considering allocations of assets.

### *Impact of Asset Division and Allocation*

There may be a collateral effect on other issues when dividing assets. If one party is receiving an asset because he/she has a lower income tax rate, the asset allocation may have unintended collateral effect. For example, if you have a child going away to college, will allocation of the asset affect the child's financial aid? Will it affect a spouse's cost of out-of-pocket health insurance or the repayment of student loans that are tied to income? In addition to meeting with your attorney, it may also be important to meet with your tax preparer and financial planner when considering asset allocation to assess how increased assets and income may have collateral effects.

### *Date of Division and Market Gains/Losses*

It is also important to account for market gains and losses on certain assets in your settlement agreement. As we all saw in March 2020, the stock market dropped drastically along with the values of many assets. The division of certain retirement assets requires the entry of a qualified domestic relations orders (QDRO). Often, a QDRO will be drafted and entered after the entry of the judgment for dissolution of marriage—meaning there may be a lag in time between the divorce date and the division of the asset. If a QDRO is required to divide a retirement asset, then it is important to specify in the agreement who is going to draft the QDRO, allocate any fees or costs associated with drafting the QDRO, and provide a deadline for entry of the QDRO. Regardless of whether a QDRO is required to divide the asset, it is important to specify the date on which the asset is going to be valued (e.g., the date of entry of the divorce judgment or the date of entry of the QDRO). It is equally important to define whether the asset is subject to market gains and losses before its date of division. In a nutshell, when dividing assets, defining the basic terms, such as the “who, what, when, where, why, how, and for how much,” can protect the parties against market volatility in times of crisis. **FA**



**GIA M. CONTI** ([gia@fsfamlaw.com](mailto:gia@fsfamlaw.com)) is a partner at Feinberg Sharma, P.C. in Chicago, Illinois. A skilled litigator and certified mediator, she focuses on the complexities of high net-worth asset divisions, business valuations, and the intricacies of parental decision-making (custodial issues) and parenting time disputes. Gia prides herself on working closely with her clients, while utilizing creativity and ingenuity to achieve tailored, effective results.