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How Does The Texas Declaration of a Public Health Disaster and the Courts' Order of March 13, 2020, Affect Personal Control Measures Under The Health & Safety Code?

HLPI Disclosure Statement

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This document is prepared by the Health Law & Policy Institute of the University of Houston Law Center¹ for use during the public health disaster declared by State Health Services Commissioner John Hellerstedt on March 19, 2020 ("March 19 Disaster Declaration").² It also addresses changes to matters arising under the Health & Safety Code resulting from the joint order issued on March 13, 2020, by the Texas Supreme Court and Texas Court of Criminal Appeals ("March 13 Order").³ This document is intended as a special supplement to the Bench Book⁴ and should be read in conjunction with that document. As set forth first in the Executive

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² The declaration lasts for 30 days, which is calculated as ending April 18, 2020. It may be extended for another 30 days, which would mean that under current law, the disaster and the special procedures it authorizes cannot be in place after May 18, 2020. Further extensions of the state of public disaster would likely require legislative action. The governor can also terminate a declaration of a public health disaster at any time. The disaster declaration is available online at https://gov.texas.gov/uploads/files/press/DECLARATION_of_public_health_disaster_Dr_Hellerstedt_03-19-2020.pdf.

³ The March 13 Order, by its terms, expires on May 8, 2020, but reserves the right to be further extended. <https://www.txcourts.gov/media/1446056/209042.pdf>.

⁴ The 2020 edition of the Bench Book is freely available at <https://www.law.uh.edu/healthlaw/HLPIBenchBook.pdf>. The entire document is available in PDF format, and the Forms section of the Bench Book is available as an editable Microsoft Word document. For paper copies, please contact healthlaw@uh.edu.

Summary below and then in the discussion that follows, the declaration of a public health disaster, coupled with the Texas Supreme Court order, materially changes the powers of the Texas courts and executive officials with respect to personal control measures and Chapter 81 of the Texas Health & Safety Code.

Executive Summary

The declaration of a public health disaster:⁵

1. Permits courts that have issued a temporary protective custody order to wait until the end of the public health disaster before holding a hearing as to whether that custody should be further extended via a regular protective custody order. Tex. Health & Safety Code Ann. § 81.165(b).

2. Permits courts to issue temporary or regular protective custody orders without the prior issuance of a written order (or any service thereof) by Department of State Health Services ("DSHS") or a health authority, provided that (a) the individual is infected or is reasonably suspected of being infected with a communicable disease that presents an immediate threat to the public health and (b) the individual has indicated that the individual will not voluntarily comply with control measures. § 81.083(e).⁶

3. Enlarges the power of DSHS or a health authority to impose on property any control measures necessary and most appropriate to arrest, control, and eradicate the threat to public health. Peace officers are empowered to enforce these measures using reasonable force.

4. Disallows exemptions normally permitted under Chapter 81 from compelled medical treatments. These exemptions do not exist during emergencies, an area quarantine, or after the issuance by the governor of an executive order or a proclamation under Chapter 418. § 81.009(b).

The March 13 Order lets courts treat the statutory or rule-imposed deadlines on proceedings under the Health & Safety Code as guidelines rather than requirements. Permissible procedures are still constrained, however, by due process and other guarantees under the federal and Texas constitutions.

⁵ The declaration of public health disaster requires both (1) a declaration by the governor of a state of disaster; and (2) a determination by the commissioner of the department of health and human services that there exists an immediate threat from a communicable disease that poses a high risk of death or serious long-term disability to a large number of people and creates a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted. Tex. Health & Safety Code § 81.003(7).

⁶ There is an alternative reading of this provision under which the health authority would have to show only that the individual is infected or is reasonably suspected of being infected with a communicable disease that presents an immediate threat to the public health; it would not need to show an intent not to comply. Such a reading would require the word "regardless" in section 81.083(e)(2) to "distribute" over both phrases on either side of the "and" in section 81.083(e)(2). This alternative reading, however, would render the second phrase surplusage. There are no Texas cases resolving the ambiguity, but in general interpretations of statutes that render language surplusage are disfavored. *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998) ("Of course, we will give effect to all the words of a statute and not treat any statutory language as surplusage if possible.").

Discussion

Temporary Protective Custody Orders

Courts and public health authorities can, if feasible, follow the conventional timeline set forth by Chapter 81 for imposition of personal control measures⁷ even during a public health disaster. Because this timeline may not properly balance individual liberties against a heightened public interest during the time of a public health disaster, Chapter 81 permits a different timeline to then be used. The disaster timeline accelerates court proceedings and permits temporary protective custody to last considerably longer than when no public health disaster occurs. With a public health disaster in effect, there is no longer a need for a two-step process in which the health authority issues an order, gets it served, waits to see if the individual complies, and only then if the individual does not comply, seeks a court proceeding in which a medical affidavit will be required. Tex. Health & Safety Code Ann. § 81.083(e).

In a public health disaster, section 81.083(e) permits the public health authority to go directly to court to get both an order for implementation of control measures and, potentially, the placement of the individual in protective custody. There is no need for the public health authority to issue or serve a written order before going to court. Nor does the public health authority need to show that the person has already violated any law. Rather, under sections 81.151 and 81.161, the public health authority may directly seek an order from a judge or magistrate for temporary protective custody. The public health authority will ask the court (no jury) to determine based on evidence it provides that there is "probable cause to believe that the person presents a substantial risk of serious harm to himself or others to the extent that the person cannot be at liberty pending the filing of the application. . . ." § 81.162(f)(2). To have the temporary protective custody order issued, the health authority must also promise to file two documents by the next business day: (1) an application to impose control measures and (2) an application for (non-temporary) protective custody. § 81.162(g). If the court finds that this promise has been made and that probable cause has been shown, it directs a peace officer to place the individual in custody and transport them to an appropriate facility generally selected by the health authority. § 81.163(a).

The clock is now running on the public health authority. Absent the March 13 Order, if the health authority fails to file the two documents mentioned above by 4 p.m. the next business day (the non-disaster deadline), the

⁷ For some diseases, a personal control measure could include detention but might leave the person at liberty with directives to be vaccinated, take required medication, or receive education on a disease. § 81.082(f). Protective custody, by contrast, involves only the taking of the person into custody and placing them in an in-patient facility, a facility deemed suitable by the health commissioner, including, in certain circumstances, a non-medical facility. In the case of COVID-19, personal control measures and protective custody somewhat blend together because there are presently few control measures other than some form of detention or custody likely to stop the spread of the disease. Because Chapter 81 does not explicitly authorize a *temporary* control measure pending a hearing, however, detention of a person at a medical facility or perhaps at their home is likely best accomplished through use of a temporary protective custody order. See § 81.163.

temporary protective order expires and any individual taken into custody pursuant to that order goes free. It is likely that the March 13 Order permits the court to extend that non-disaster deadline, though the need for fairness to the person who may be subjected to custody pending the filing suggests that any such extension may not be longer than necessary. Regardless of whether the deadline is the non-disaster one or an extended one issued by a court pursuant to the March 13 Order, if the documents are timely filed, the temporary protective custody continues until the motion relating to personal control measures and/or non-temporary protective custody can be heard. Again, if the documents are not timely filed, protective custody ends.

It is here with a timely filing of these two documents that the existence of a public health disaster markedly changes the law. If a public health disaster exists, the hearing on control measures and non-temporary protective custody need not occur until after the period of disaster is ended. § 81.165(b). This could be up to 60 days. § 81.082(d). Moreover, even absent the March 13 Order, the March 19 Disaster Declaration gives courts some leeway in the time allowed to hold a hearing.

The combination of the March 13 Order and March 19 Disaster Declaration should spare the court in many cases from the difficulty of empaneling a jury on short notice during a time when bringing people together is potentially risky. If the person is in custody and believes they have been wronged, they may well prefer a bench trial to resolve the matter more swiftly. The person in custody, however, retains their rights under the Texas Constitution to demand that, whenever a hearing is held, matters within the province of a jury be decided by a jury.⁸ Tex. Const. art. I, § 15. What all of this means is that the original determination on whether to impose temporary protective custody becomes crucially important during the period when the March 13 Order and March 19 Disaster Declaration are in effect. It is there that the court must balance the costs of two potential errors: (1) wrongfully removing the liberty of a person who does not pose a significant risk of spreading a communicable disease; and (2) wrongfully leaving at liberty a person who does pose a significant risk of spreading a communicable disease and who has indicated no intention of behaving responsibly.

Control Measures Directed At Property

The March 19 Disaster Declaration likewise streamlines procedures for quarantining of property. Such provisions might be applicable where a business has had an influx of persons shedding the SARS-CoV-2 virus that causes COVID-19 and that may remain active on surfaces for days.⁹ No longer does the health authority need to accompany restrictions on use of the property with notice of its action by registered or certified mail

⁸ It may well be, though, that if there is an extensive delay between the imposition of temporary protective custody and any hearing, the issue will be rendered moot: the person will likely have recovered and no longer be infectious or the person will have died.

⁹ A recent study found that SARS-CoV-2 was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. Neeltje van Doremalen et al., Aerosol and Surface Stability of HCoV-19 (SARS-CoV-2) Compared to SARS-CoV-1, *The New England Journal of Medicine* (March 17, 2020), <https://www.nejm.org/doi/10.1056/NEJMc2004973>.

or by personal delivery to the person who owns or controls the property. Rather, the health authority can simply order the property owner to take appropriate control measures such as sealing off the property in question. § 81.084(d-1)(3). Moreover, during a public health disaster, the health authority can also impose additional control measures it believes most appropriate to stop the threat to public health. § 81.084(k). Presumably, such measures might include limitations on the time the business may be open or the number of persons that may occupy the property at any time. If the property owner fails or refuses to comply with the orders of the department or health authority and the department or health authority has reason to believe that the property is or may be infected or contaminated with a communicable disease that presents an immediate threat to the public health, the department or health authority may petition the county or district court of the county in which the property is located for an injunction requiring its orders to be carried out.¹⁰ The property owner may also be warned that violations of a property control measure is a Class B misdemeanor. § 81.087

Disallowance of Exemptions for Medical Treatment

Although it never permits an exemption from an otherwise lawful requirement that an individual be isolated or quarantined, Chapter 81 generally has recognized an exemption from medical treatment¹¹ that might otherwise be ordered under that law. Section 81.009 generally allows for exemption from medical treatment in circumstances in which an individual chooses treatment by prayer or spiritual means as part of the tenets and practices of a recognized church of which the individual is an adherent or member. But even this exemption for medical treatment does not apply during an emergency or an area quarantine or after the issuance by the governor of an executive order or a proclamation under Chapter 418. § 81.009(b).¹²

Constitutional Considerations

Substance

As set forth below, both federal and Texas law are clear that there is no per se bar against state imposition of personal control measures that restrict a person's liberty or that restrict use of property. On the federal side, numerous cases support a state's issuance of a rational and non-discriminatory quarantine. See *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) (upholding against preemption,

¹⁰ Although not explicitly authorized by Chapter 81, there would seem to be no special barrier to issuance of a preliminary injunction or temporary restraining order.

¹¹ Chapter 81 does not define “medical treatment,” and there is no Texas case law providing guidance on the meaning and limits of medical treatment during an emergency, area quarantine, or order by the governor. § 81.082(f). The statute does provide a definition of “control measures,” which includes immunization, detention, restriction, disinfection, decontamination, isolation, quarantine, disinfestation, chemoprophylaxis, preventive therapy, prevention, and education. § 81.082(f). However, the statute does not use “treatment” and “control measures” interchangeably.

¹² The term “emergency” is not defined in Chapter 81. It is also not clear how specific the governor's executive order or proclamation must be in eliminating the otherwise-existing exemption contained in § 81.009(a) for compelled medical treatment. Neither the State of Disaster Order on March 13 nor the Executive Order issued on March 19, 2020 by Governor Abbott specifically eliminates the exemption.

treaty, and dormant commerce clause challenges area quarantine imposed by Louisiana during yellow fever outbreak); *Morgan's Louisiana & T.R.R. & S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886) (upholding, against dormant commerce clause and other constitutional challenges, a Louisiana law charging an inspection fee of incoming vessels); see generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding against Fourteenth Amendment liberty challenges public health measures such as forced vaccination so long as not unreasonable or arbitrary); but cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding unconstitutional a public health measure related to limitation on laundries that is administered by public authority "with an evil eye and an unequal hand" so as to unjustly discriminate on the basis of race).

Texas law likewise supports imposition of control measures. The lead case is *Ex parte James*, 181 S.W.2d 83, 84 (Tex. Crim. App. 1944). In *James*, the Beaumont health authorities ordered that the sheriff detain a person who had an unspecified communicable disease.¹³ *Id.* The detainee sought a writ of habeas corpus in part on constitutional grounds. *Id.* In examining the claim, the Texas Supreme Court wrote that the matter was "definitely settled" as follows:

The right of the Government to quarantine against contagious and communicable diseases is as vital to human existence as is the law of self-defense. The right has been upheld and the legislation construed to meet the emergencies of the diseases named in the legislation. This court cannot agree that other provisions of our Constitution may destroy this power.

Id. Moreover, at least for animal quarantines, Texas has upheld delegation of quarantine power to administrative agencies. *Mulkey v. State*, 201 S.W. 991 (Tex. Crim. App. 1918) (animal quarantine); *Smith v. State*, 168 S.W. 522 (Tex. Crim. App. 1914) (animal quarantine).

Procedure

In determining whether procedures now permitted by the March 13 Order are constitutional, Texas courts should generally¹⁴ be guided by the United States Supreme Court decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) regarding the Due Process Clause of the Fourteenth Amendment and its adoption by Texas in cases such

¹³ At the time, the cited statute read: "Local health officers are authorized and directed to quarantine persons who have, or are reasonably suspected of having syphilis, gonorrhoea, or chancroid, whenever, in the opinion of said local officer, or the State Board of Health, or its executive officer, quarantine is necessary for the protection of the public health." Vernon's Ann. Texas Civ. St. art. 4445 (repealed 1983).

¹⁴ One exception is where questions of notice are involved. Constitutional notice issues are generally decided under the framework established in *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950), in which the goal is for notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." See *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

as *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).¹⁵ In general, Texas courts interpret the due process provisions of Article I, Section 19 of the Texas Constitution and the due process provision of the Fourteenth Amendment of the U.S. Constitution in the same manner. See *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887) ("[I]t must be held that the people intended, by that clause of the constitution, in so far as it is identical with the fourteenth amendment, to place thereby just such restrictions on the powers of the legislature as the highest court in the nation has declared is the true construction of like language made a part of the constitution of the United States for the purpose of placing a limitation on the power of the legislatures of the several states.").

Essentially, *Eldridge* demands that the court, examining a procedure and a proposed alternative, consider three types of costs: (1) the cost of a "false positive," here imposing a control order or protective custody on a person who in fact did not pose a serious risk of passing a communicable disease; (2) the cost of a "false negative," here failing to impose a control order or protective custody on a person who in fact does pose a serious risk of passing on a communicable disease; and (3) the cost of the procedures themselves.¹⁶

In the current environment, the costs of the two types of errors may be considerable. It is unquestionably unpleasant to confine someone to their home or to an institution, particularly when doing so imposes either additional health risks to the individual or creates an economic burden. Letting someone go free, however, who turns out to be a "super spreader" creates enormous costs, due to the apparent communicability of COVID-19. The individual infects two others who are sick within five days; they infect four others who are sick after another five days; and so forth, with potentially exponential growth. The costs of an enhanced procedure should consider both the direct costs and the additional harms that may be caused by delay: letting a person probably infected with COVID-19 continue to work in a nursing home, for example, while the court awaits a full evidentiary hearing requested by counsel may create an enormous "false negative" cost even though the

¹⁵ "In conducting an *Eldridge* due process analysis, we weigh three factors—the private interests at stake, the government's interest in the proceeding, and the risk of erroneous deprivation of parental rights—and balance the net result against the presumption that our procedural rule comports with constitutional due process requirements."

¹⁶ See *Sutton v. City of Milwaukee*, 672 F.2d 644, 645–46 (7th Cir. 1982) ("The starting point for our analysis is *Mathews v. Eldridge*, ... where the Supreme Court announced a simple cost-benefit test of general applicability for deciding whether due process requires notice and hearing before government may deprive a person of property. See Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U.Chi.L.Rev. 28, 46-48 (1976). See also *Frost v. Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975), where Judge Friendly proposed a similar test, anticipating *Mathews*. The *Frost* and *Mathews* tests require comparing the benefit of the procedural safeguard sought, which is a function of the value of the property interest at stake and the probability of erroneous deprivations if the safeguard is not provided, with the cost of the safeguard. The benefit of the safeguard can be thought of as the product of multiplying the value of the property interest by the probability that that value will be destroyed by a government error if the safeguard is not provided. Quantification will rarely be possible but expressing mathematically the relationship between the value of the interest and the probability of its erroneous destruction may assist in thinking about the tests—which, being general, are as applicable to the towing of automobiles as to the termination or reduction of social security benefits as in *Mathews* and *Frost*.").

direct costs of that more prolonged hearing are themselves modest. In short, as the Fifth Circuit has noted: "A state should not be required to provide the procedural safeguards of a criminal trial when imposing a quarantine to protect the public against a highly communicable disease." *Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977).

It should be noted that, at least historically, there have been post-deprivation remedies available to an individual who, rightly or wrongly, is quarantined and then suffers harm as a result of negligence (or worse) in the implementation of the quarantine. In *Aaron v. Broiles*, 64 Tex. 316, 319 (1885), the court examined the liability of Fort Worth health officials who removed a boy infected with smallpox and his mother to inadequate shelter in the face of sleet and cold, which resulted in their deaths from exposure. While upholding a right of quarantine, the court wrote: "If the defendants caused the removal of the plaintiff's wife and child without the care and precaution which the circumstances required, and if the deaths resulted therefrom, then, in our opinion, they are responsible; and the fact that they were city officers, and acting under a city ordinance, does not shield them." *Id.* Often, the existence of an effective post-deprivation remedy may act as a basis for denying individuals additional pre-deprivation process. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).