Children's Commission®

SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

TEXAS CHILD PROTECTION LAW

BENCH BOOK

September 2013

ACKNOWLEDGMENTS

This revised edition of the Texas Child Protection Law Bench Book includes statutory changes and additions of and revisions to important topics such as psychotropic medications, trauma-informed care, and education.

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Checklists found in previous versions of this Bench Book are in redevelopment to make them more succinct and of use to members of the judiciary, thus they have been removed from this iteration and will be available in future versions.

Because of the timeframe necessary for online links to new statutes to be developed after a legislative session, some links in the Bench Book may not be operational until December 31, 2013.

Bench Book Advisory Committee:

The Honorable Dean Rucker

The Honorable Robin Sage (ret.)

The Honorable Virginia Schnarr

Children's Commission Staff:

Tina Amberboy, *Executive Director*

Jessica Arguijo, *Administrative Assistant*

Mary Mitchell, *Executive Assistant*

Milbrey Raney, *Staff Attorney*

Tiffany Roper, *Assistant Director*

Kristi Taylor, *Program Attorney*

Rashonda Thomas, *Grants and Finance Specialist*

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ALTERNATIVES TO REMOVAL

Legal Overview of Alternatives to Removal

Texas Family Code

Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship

Chapter 261. Investigation of Report of Child Abuse or Neglect

The primary purpose of a CPS investigation is to protect the child. CPS investigations are civil in nature and include an evaluation of the child's immediate safety and an assessment of future risk of abuse or neglect.

A. Initiation of Investigations

- Requires abuse or neglect or the risk of abuse or neglect by a person responsible for a child's care, custody, or welfare

B. Making a Report

- Calls to the hotline
- Lay persons must report immediately
- Professionals must report within 48 hours
- Failure to report is a Class A misdemeanor but rises to State Jail Felony if the child was a person with an intellectual disability who resided in a state supported living center and the actor knew the child suffered serious bodily injury OR if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect
- Reporters are immune from liability
- False reports are punishable

C. Fourth Amendment Requirements in an Investigation

- Consent
- Court order
- Exigent circumstances

D. Orders in Aid of Investigation

- Admission to places where a child may be
- Child's examinations or medical records
- Parent's examinations or medical records

E. Order Seeking Removal of Alleged Perpetrator of Physical/Sexual Abuse

F. Order for Required Participation

G. Protective Orders

- Temporary ex parte protective order
- Protective order
- Temporary restraining order
- Additional Resources

H. Relinquishing Custody of Child to Obtain Certain Services

- Severe emotional disturbance defined
- Option of Joint Managing Conservatorship between Parent and DFPS

A. Initiation of Investigations

Initiation of an investigation requires:

Abuse or Neglect or the Risk of Abuse or Neglect

"Abuse" includes the following acts or omissions by a person:

- mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

- causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;

- physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable

discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

- failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

- sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of a young child or children under Tex. Penal Code § 21.02, indecency with a child under Tex. Penal Code § 21.11, sexual assault under Tex. Penal Code § 22.011, or aggravated sexual assault under Tex. Penal Code § 22.021;

- failure to make a reasonable effort to prevent sexual conduct harmful to a child;

- compelling or encouraging the child to engage in sexual conduct as defined by Tex. Penal Code § 43.01, including conduct that constitutes an offense of trafficking of persons under Tex. Penal Code § 20A.02(a)(7) or (8), prostitution under Tex. Penal Code § 43.02(a)(2), or compelling prostitution under Tex. Penal Code § 43.05(a)(2);

- causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Tex. Penal Code § 43.21 or pornographic;

- the current use by a person of a controlled substance as defined by Tex. Health and Safety Code Chapter 481, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;

- causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Tex. Health and Safety Code Chapter 481;

- causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Tex. Penal Code § 43.25; or

- knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under Tex. Penal Code § 20A.02(a)(5), (6), (7) or (8), or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections. Tex. Fam. Code § 261.001(1).

"Neglect" includes:

- the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;
- the following acts or omissions by a person:
  - placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;
  - failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;
  - the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services have been offered and refused;
  - placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or
  - placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under Tex. Fam. Code § 261.004 (1)(E), (F), (G), (H), or (K) committed against another child; or
- the failure by the person responsible for a child's care, custody, or welfare to permit the child to return to the child's home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away. Tex. Fam. Code § 261.001(4).

1. By a Person Responsible for a Child's Care, Custody, or Welfare

- a parent, guardian, managing or possessory conservator, or foster parent of the child;
- a member of the child's family or household as defined by Tex. Fam. Code Chapter 71;
- a person with whom the child's parent cohabits;
- school personnel or a volunteer at the child's school; or

- personnel or a volunteer at a public or private child-care facility that provides services for the child or at a public or private residential facility where the child resides. Tex. Fam. Code § 261.001(5).

B. Making a Report

The Texas Department of Family and Protective Services (DFPS) sets out the mandatory requirements for an investigation in the states in the Child Protective Services (CPS) Handbook. See CPS Handbook Section 2300.

1. Call to the Hotline

An investigation of child abuse or neglect usually starts with a call to the hotline. The reporter may identify himself or remain anonymous, but the identity of the reporter is confidential. Tex. Fam. Code §261.201(a)(1). However, a court may order disclosure of the identity of the reporter or the information obtained through the investigation. Tex. Fam. Code § 261.201(b).

2. Lay Person's Duty to Report

Any person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report. Tex. Fam. Code § 261.101(a).

In addition to the duty to report pursuant to Tex. Fam. Code § 261.101(a), a person must also report if the person has cause to believe that an adult was a victim of abuse or neglect as a child and the person determines in good faith that the disclosure of the information is necessary to protect the health and safety of another child. Tex. Fam. Code § 261.101(b-1).

3. Professional's Duty to Report

If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, the professional shall make a report no later than the 48th hour after the professional first suspects that the child has been abused or neglected. Tex. Fam. Code § 261.101(b).

A professional may not delegate to or rely on another person to make the report. Tex. Fam. Code § 261.101(b).

A professional who has the duty to report under Tex. Fam. Code § 261.101(a) or (b), must also report if the professional has cause to believe that an adult was a victim of abuse or neglect as a child and the professional determines in good faith that the disclosure of the

information is necessary to protect the health and safety of another child. Tex. Fam. Code § 261.101(b-1).

4. Failure to Report

A person commits an offense if the person is required to make a report under Tex. Fam. Code § 261.101(a) and knowingly fails to make a report. Tex. Fam. Code § 261.109(a).

Failure to report when required is punishable as a Class A misdemeanor, except that the offense is a state jail felony if the child was a person with an intellectual disability who resided in a state supported living center or a facility licensed under Tex. Health and Safety Code Chapter 252 and the actor knew the child suffered serious bodily injury. Tex. Fam. Code § 261.109(b).

A professional as defined by Tex. Fam. Code § 261.101(b) commits an offense if the person is required to make a report under Tex. Fam. Code §261.101(b) and knowingly fails to make a report. Tex. Fam. Code § 261.109(a-1).

An offense under Tex. Fam. Code §261.109(a-1) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect. Tex. Fam. Code § 261.109(c).

5. Immunities

A person acting in good faith who reports or assists in an investigation is immune from civil or criminal liability that might otherwise be imposed. Tex. Fam. Code § 261.106(a).

6. False Reports

Knowingly making a false report is punishable as a state jail felony, unless it is shown that the person has previously been convicted under this section, in which case the offense is a third-degree felony and carries a civil penalty of $1,000. Tex. Fam. Code § 261.107(a) and (e).

C. Fourth Amendment Requirements in an Investigation

For any investigative action that involves entering or remaining in a home, transporting a child for an interview, or removing a child from a parent's custody, DFPS must have consent, a court order, or exigent circumstances per *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008).

1. Consent

An evaluation of consent is based on the totality of the circumstances and under a standard of objective reasonableness. Silence or passivity cannot form the basis of

consent to enter. Also, mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent. Once consent is given, the consent may be limited, qualified, or withdrawn. *Gates*, 537 F.3d at 420.

2. Court Order

If a caseworker cannot gain consent, they may obtain a court order to enter a home.

3. Exigent Circumstances

If there is not time to gain a court order, however, DFPS can still enter or remain in a home even absent consent if there are exigent circumstances. Under this standard, there must be a reasonable cause to believe that the child is in immediate danger. Entering or remaining in the home for the sole purpose of interviewing the child does not suffice. *Gates*, 537 F.3d at 421-23.

4. Anonymous Tip

An anonymous tip, absent some showing that it is reliable, is not enough to justify removal for an interview. Instead, the tip must be corroborated through a preliminary investigation that can include an interview of the child's teachers or peers, an interview of the child at the school, or by looking for injuries on the child without removing any clothing. In determining whether to take the child to another location for the interview, the caseworker should take into account the child's wishes. *Gates*, 537 F.3d at 424. A person who is notified of and attempts to interfere with the transportation can be charged with a Class B misdemeanor. Tex. Fam. Code § 261.302(f).

5. Taking Child Into Separate Room for an Interview

Like a *Terry* stop, all which is required is a reasonable suspicion of abuse or neglect so long as the interview is no more intrusive than necessary. *Gates*, 537 F.3d at 434.

6. Transporting a Child from School to Another Location for an Interview

Before transporting a child for an interview, DFPS must first attempt to notify the parent or other person having custody of the child. *Gates*, 537 F.3d at 429. Absent consent to transport, DFPS may obtain a court order. Although there is currently no express statutory provision authorizing such an order, Tex. Fam. Code § 261.303 may be applicable. According to the holding in *Gates*, in order to transport a child from a public school for an interview absent a court order or consent, a caseworker must have a reasonable belief that the child has been abused and probably will be abused again if he goes home at the end of the school day. *Gates*, 537 F.3d at 433.

D. Orders in Aid of Investigation

1. Interference

A person may not interfere with an investigation of a report of child abuse or neglect. Tex. Fam. Code § 261.303(a).

The court may also prohibit the removal of the child from the state during an investigation if the court:

- Finds that DFPS has probable cause to conduct the investigation; and
- Has reason to believe that the person may remove the child from the state. Tex. Fam. Code § 261.306(b).

Refusal to submit to orders in aid of investigation may be grounds for termination of parental rights in a subsequently filed suit affecting the parent-child relationship. Tex. Fam. Code § 161.001(1)(I).

2. Court Orders

If DFPS requests the information below, but is not allowed access, then the court having family law jurisdiction and for good cause shall order:

- admission to the home, school or place where a child may be for the interview, examination, and investigation, Tex. Fam. Code § 261.303(b);
- a child's physical, psychological, or psychiatric examination or the release of related medical records, Tex. Fam. Code § 261.303(c); or
- a parent or caregiver's medical or mental examination of and/or access to related records, Tex. Fam. Code §261.305(b).

If the court determines that the parent or person is indigent, then the court shall appoint an attorney at the hearing relating to the examination or release of medical records under this section. Tex. Fam. Code § 261.305(c).

Special Issue: Although not required by statute, some courts require an affidavit to support a motion for an order in aid of investigation. Courts might also require the making of a record, if DFPS requests an order in aid of investigation without an affidavit or a motion for the order.

Courts might consider the following when requested to issue an order in aid of investigation:

- ☐ Jurisdiction is proper in the court because the child is located in the jurisdiction of the court or the court has continuing jurisdiction.
- ☐ DFPS has filed an application seeking an order in aid of investigation and shown good cause for a court order because:
  - DFPS cannot access the child;
  - DFPS cannot obtain medical, psychiatric, or psychological records of the child;
  - DFPS cannot obtain consent by the parent or caregiver of the child for a medical, psychological, or psychiatric examination; or
  - the parent or caregiver refuses to cooperate with the investigation and refusal poses a risk to the child's safety.

Access to Records: Without requiring a further order or release, the custodian of a medical, mental health, or drug or alcohol treatment record of a child that is privileged or confidential under other law shall release the record to a person authorized to access the record under Subsection (a), except that a child's drug or alcohol treatment record that is confidential under 42 U.S.C. § 290dd-2 may only be released as provided under applicable federal regulations. Subsection (d) is new and states that the disclosure of a confidential record under this section does not affect the confidentiality of the record, and the person provided access to the record may not disclose the record further except as provided by court order or other law. However, subsection (e) states, "Notwithstanding the provisions of this section, the requirements of Tex. Occ. Code § 159.008, apply.

E. Order Seeking Removal of Alleged Perpetrator of Physical or Sexual Abuse

Without asking for removal of the child, DFPS may file a petition for removal of the alleged perpetrator of child abuse from the household. Tex. Fam. Code § 262.1015. DFPS can also: 1) file for a protective order on behalf of the child instead of or in addition to obtaining a temporary restraining order; or 2) assist a parent or other adult with whom a child resides in obtaining a protective order. Tex. Fam. Code § 262.1015(a-1).

1. Court Orders

The court may order:

- Removal of the alleged perpetrator; and
- The remaining parent to make a reasonable effort to monitor the residence and report any attempt of the alleged perpetrator to return to the residence. Tex. Fam. Code § 262.1015(e).

2. Expiration of the Temporary Restraining Order

The order is good for up to 14 days, unless the court grants an extension under Tex. Fam. Code § 262.201(a-3). Tex. Fam. Code § 262.1015(d).

3. Violation of Temporary Restraining Order

It is a Class A misdemeanor if either parent violates the order; if previously convicted of the same offense, it is a third degree felony. Tex. Fam. Code § 262.1015(h).

4. Child with Sexually Transmitted Disease

DFPS must take additional steps if the investigation reveals that a child younger than 11 has a sexually transmitted disease. DFPS must appoint a special investigator to assist in the investigation of the case and that investigator must follow Tex. Fam. Code § 262.010, including coordinating with law enforcement. Tex. Fam. Code § 262.010.

F. Order for Required Participation

On request of DFPS, the court may require participation in services provided by DFPS.

1. Who May Be Ordered to Participate

- parent;
- guardian;
- managing conservator; or
- other member of child's household.

2. Court May Order

Participation in the services DFPS provides or purchases to:

- alleviate the effects of the abuse or neglect that has occurred;
- reduce the reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future; and

- permit the child and any siblings of the child to receive the services. Tex. Fam. Code § 264.203(a).

Such participation may be ordered whether the child resides in the home or has been removed from the home. Tex. Fam. Code § 264.203(b).

3. Failure to Comply

If the person ordered to participate in the services fails to follow the court's order, the court may impose appropriate sanctions in order to protect the health and safety of the child, including removal of the child. Tex. Fam. Code § 264.203(c).

4. If NOT Ordering Participation, Court Shall Specify Reasons in Writing

If the court does not order the person to participate, the court in writing shall specify the reasons for not ordering participation. Tex. Fam. Code § 264.203(d).

G. Protective Orders

DFPS is specifically authorized to file an application for a protective order. Tex. Fam. Code § 82.002(d)(2).

1. Temporary Ex Parte Protective Order

A temporary ex parte protective order can be used to:

- direct a respondent to do or refrain from doing certain acts. Tex. Fam. Code § 83.001(b).
- exclude a perpetrator from a residence under certain situations. Tex. Fam. Code § 83.006.

The order is effective for up to 20 days. Tex. Fam. Code § 83.002(a). On an applicant's request or on the court's own order, the 20-day period may be extended for additional 20-day periods. Tex. Fam. Code § 83.002(b).

A temporary ex parte protective order may be issued without notice or hearing, but the court has the option to recess the hearing to contact the respondent by phone and provide the respondent with an opportunity to be present for the hearing. Tex. Fam. Code § 83.007. If the court chooses to recess to allow the respondent an opportunity to be present, the hearing must resume that same day without regard to the respondent's availability. Tex. Fam. Code § 83.007.

A temporary ex parte protective order can be enforced through a civil contempt proceeding, and certain provisions can be criminally enforced. Tex. Fam. Code § 85.021; Tex. Fam. Code § 85.022; Tex. Penal Code § 25.07(a).

During the time a temporary ex parte protective order is in existence, it supersedes any other order under Tex. Fam. Code Title 5 to the extent there is a conflict. Tex. Fam. Code § 83.005.

2. Protective Order

Protective orders may be issued by a court if the court finds that family violence has occurred and is likely to occur in the future. Tex. Fam. Code § 85.001.

A prosecuting attorney may not be precluded from representing a party in a proceeding under Tex. Fam. Code Title 4, Subtitle B and DFPS in another action involving the party, regardless of whether the proceeding under Tex. Fam. Code Title 4, Subtitle B occurs before, concurrently with, or after the other action involving the party. Tex. Fam. Code § 81.0075.

An application for a protective order may be filed in:

1. The county in which the applicant resides;
2. The county in which the respondent resides; or
3. Any county in which the family violence is alleged to have occurred. Tex. Fam. Code § 82.003.

In a protective order, the court may, among other things:

- prohibit a party from removing a child who is a member of the family or household from the possession of a person named in the order, or the jurisdiction of the court, Tex. Fam. Code § 85.021(1)(A)(i-ii);
- order the person found to have committed family violence to perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence, including completion of a battering intervention and prevention program, Tex. Fam. Code § 85.022(a);
- prohibit the person found to have committed family violence from:
  - committing family violence;
  - communicating:
    - directly with a person protected by an order or a member of the family or household of a person protected by an order, in a threatening or harassing manner;

- a threat through any person to a person protected by an order or a member of the family or household of a person protected by an order; and
- if the court finds good cause, in any manner with a person protected by an order or a member of the family or household of a person protected by an order, except through the party's attorney or a person appointed by the court;

- going to or near the residence or place of employment or business of a person protected by an order or a member of the family or household of a person protected by an order;
- going to or near the residence, child-care facility, or school a child protected under the order normally attends or in which the child normally resides;
- engaging in conduct directed specifically toward a person who is a person protected by an order or a member of the family or household of a person protected by an order, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person; and
- possessing a firearm, unless the person is a peace officer, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision. Tex. Fam. Code § 85.022(b).

A protective order issued pursuant Tex. Fam. Code Chapter 85 is effective for a period stated in the order, not to exceed two years; or if a period is not stated in the order, until the second anniversary of the date the order was issued. Tex. Fam. Code § 85.025.

Each protective order issued under Tex. Fam. Code § 85.026(a), **including** a temporary ex parte order must contain the following:

"A PERSON WHO VIOLATES THIS ORDER MAY BE PUNISHED FOR CONTEMPT OF COURT BY A FINE OF AS MUCH AS $500 OR BY CONFINEMENT IN JAIL FOR AS LONG AS SIX MONTHS, OR BOTH."

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER."

"IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY TEX. PENAL CODE § 1.07, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE

AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION."

Each protective order issued under Tex. Fam. Code § 85.026(b), **except for** a temporary ex parte order must contain the following:

"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS $4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECTUED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS."

Each protective order issued under Tex. Fam. Code § 85.026(c), **including a** temporary ex parte order must contain the following:

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER."

Each protective order must be:

- served on the respondent, Tex. Fam. Code § 85.041; and
- delivered to law enforcement and the child's child care or school, as applicable, Tex. Fam. Code § 85.042.

If a final protective order is rendered by a court other than the court in which a suit affecting the parent-child relationship is pending, the clerk of the court that rendered the final protective order shall:

- inform the clerk of the court that a final order has been rendered; and
- forward a copy of the final protective order to the court in which the suit is pending. Tex. Fam. Code § 85.062.

A protective order rendered by a court may be transferred to the court having jurisdiction to the court having jurisdiction over the suit affecting the parent-child relationship or of continuing, exclusive jurisdiction. Tex. Fam. Code § 85.064.

If a suit affecting the parent-child relationship is pending, a party to the suit may apply for a protective order against another party to the suit by filing an application in the

court within which the suit is pending, or in the court within the county in which the applicant resides if the applicant resides outside the jurisdiction of the court in which the suit is pending. Tex. Fam. Code § 85.062(a).

An applicant for a protective order or an attorney representing an applicant may not be assessed any type of fee by a district or county clerk of the court or a sheriff, constable, or other public official or employee for the filing, serving, or entering of a protective order or for any other service. Tex. Fam. Code § 81.002.

3. Temporary Restraining Order

A temporary restraining order is not criminally enforceable like temporary ex parte protective orders and protective orders, both of which are designed to protect people and provide a greater level of protection than temporary restraining orders.

H. Relinquishing Custody of Child to Obtain Certain Services

During the 83rd Legislative Session, several changes were made to the Texas Family Code regarding circumstances in which a parent relinquishes custody of a child in order for the child to receive mental health services.

1. Severe Emotional Disturbance Defined

A subsection was added to Tex. Fam. Code § 261.001 to define "severe emotional disturbance" as a "mental, behavioral, or emotional disorder of sufficient duration to result in functional impairment that substantially interferes with or limits a person's role or ability to function in family, school, or community activities." Tex. Fam. Code § 261.001(9).

2. Option of Joint Managing Conservatorship between Parent and DFPS

Before a person relinquishes custody of a child who suffers from a severe emotional disturbance to obtain mental health services for the child, DFPS must, if it is in the best interest of the child, discuss with the person relinquishing custody of the child the option of seeking a court order for joint managing conservatorship of the child with DFPS. Tex. Fam. Code § 262.352.

REMOVAL

Legal Overview of Removal

Texas Family Code

Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship

Chapter 262. Procedures in Suit by Governmental Entity to Protect Health & Safety of Child

All suits by DFPS seeking managing conservatorship through emergency orders for the protection of a child are brought under Tex. Fam. Code Chapter 262. Suits under this chapter most often are prompted by an immediate need for removal. However, in some cases if, in the opinion of DFPS, a real and unacceptable risk of harm to the child exists, even in the absence of an actual emergency, DFPS may proceed under Tex. Fam. Code Chapter 262.

A. Removal or Conservatorship of a Child

B. Jurisdiction and Venue

C. Emergency Removal With a Court Order

- There is an immediate danger or continuation in the home is contrary to the child's welfare
- There is no time for a hearing
- Reasonable efforts were made

D. Emergency Removal Without a Court Order

- On personal knowledge or information furnished by another that there is an immediate danger or the child was sexually abused
- On corroborated information that the person who has possession of the child is currently using a controlled substance
- On personal knowledge or information furnished by another or on corroborated information that the person who has possession of the child allowed the child to remain on premises used to manufacture methamphetamine
- Hearing must be held on or before the 1st working day after child was removed

E. After Ex Parte Order Authorizing Removal

- Temporary order expires 14 days after issuance, unless extended according to the Texas Rules of Civil Procedure or Tex. Fam. Code § 262.201(a-3)
- Temporary order may include order for temporary conservatorship

- Full adversary hearing must occur no later than 14 days after the child was taken into possession
- An attorney ad litem and guardian ad litem must be appointed for the child no later than before the adversary hearing
- Notice is required

F. Service of Citation

G. Evaluation of Identified Relatives and Other Designated Individuals

- Background/criminal history checks must be performed on all potential caregivers
- The child placement resources form, home study, and name of the caregiver, if any, must be filed with the court

H. Placement

- The child may be placed with anyone identified on the child placement resources form
- The child may not be placed in isolation or a juvenile detention facility
- The child must be returned to school no later than 3 days after DFPS receives possession

I. Visitation Schedule

J. Expedited Hearing and Appeal

K. Filing Suit Without Taking Possession of Child

- A child does not need to be removed before the hearing if reasonable efforts have been made to eliminate the need

L. Decisions regarding Education

A. Removal or Conservatorship of a Child

1. Authorized Actions by Governmental Entity

A governmental entity with an interest in the child may file a suit affecting the parent-child relationship requesting an order or take possession of a child without a court order. Tex. Fam. Code § 262.001(a).

2. Paramount Concern

When determining if reasonable efforts have been made with respect to preventing or eliminating the need to remove a child from the child's home or to make it possible to

return a child to the child's home, the child's health and safety is the paramount concern. Tex. Fam. Code § 262.001(b).

B. Jurisdiction and Venue

1. Jurisdiction

A suit may be brought in a court with jurisdiction to hear the suit in the county in which the child is found. Tex. Fam. Code § 262.002.

The court has emergency jurisdiction even if there is another court with continuing, exclusive jurisdiction. Tex. Fam. Code § 155.001(c).

2. Venue

Venue lies in the county where the child resides, and generally speaking that county is where the child's parent lives, although different caretakers may sometimes establish the child's residence.

The court hearing the case under Chapter 262 is not required to transfer the suit until a final order is rendered in the CPS case. The court hearing the CPS case may, however, as a matter of discretion transfer the suit to the court hearing a divorce suit or to another court in which a suit affecting the parent child relationship is pending, even if there is not yet a final order in either court.

C. Emergency Removal with a Court Order

1. Filing a Petition before Taking Possession of a Child

An original suit filed by a governmental entity requesting permission to take possession of a child without prior notice and a hearing must be supported by a sworn affidavit by a person with personal knowledge stating facts sufficient to satisfy a person with ordinary prudence and caution that:

- there is an immediate danger to the child's physical health or safety or the child has been the victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare;
- there is no time, consistent with the physical health or safety of the child, for a full adversary hearing; and

- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child. Tex. Fam. Code § 262.101.

1. Emergency Order Authorizing Possession of a Child Prior to Removal

Before a court may, without prior notice and a hearing, issue a temporary restraining order or attachment of a child in a suit brought by a governmental entity, the court must find that:

- there is an immediate danger to the physical health or safety of the child or the child has been the victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare;
- there is no time, consistent with the physical health or safety of the child and the nature of the emergency, for a full adversary hearing; and
- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child. Tex. Fam. Code § 262.102(a).

In determining whether there is an immediate danger to the physical health or safety of a child, the court may consider whether the child's household includes a person who has:

- abused or neglected another child in a manner that causes serious injury to or the death of the other child; or
- sexually abused another child. Tex. Fam. Code § 262.102(b).

The court shall render a temporary order under Tex. Fam. Code Chapter 71 for the protection of the child if the court finds that:

- child abuse or neglect has occurred; and
- the child requires protection from family violence by a member of the child's family or household. Tex. Fam. Code § 262.102(c).

2. Removal of Alleged Perpetrator of Physical/Sexual Abuse

If DFPS determines after an investigation that child abuse has occurred and that the child would be protected in the child's home by the removal of the alleged perpetrator of the abuse, DFPS shall file a petition for the removal of the alleged perpetrator from the residence rather than attempt to remove the child from the residence. Tex. Fam. Code § 262.1015(a).

Notwithstanding Tex. Fam. Code § 262.1015(a), if DFPS determines that a protective order under Tex. Fam. Code Title 4 provides a reasonable alternative to obtaining an order under Tex. Fam. Code § 262.1015(a), DFPS may file an application for a protective order on behalf of the child instead of or in addition to obtaining a temporary restraining order or can assist the parent or other adult with whom the child resides in obtaining a protective order. Tex. Fam. Code § 262.1015(a-1).

A court has the authority to issue a temporary restraining order for the removal of an alleged perpetrator if the DFPS petition states facts sufficient to satisfy the court that:

- there is immediate danger to the physical health or safety of the child or the child has been the victim of sexual abuse;
- there is no time, consistent with the physical health or safety of the child, for an adversary hearing;
- the child is not in danger of abuse from a parent or other adult with whom the child will continue to reside in the residence of the child;
- the parent or other adult with whom the child will continue to reside in the child's home is likely to make reasonable efforts to monitor the residence and report to DFPS and appropriate law enforcement any attempt by the alleged perpetrator to return to the residence; and
- the issuance of the order is in the best interest of the child. Tex. Fam. Code § 262.1015(b).

The temporary restraining order:

- is to be served on the alleged perpetrator as well as the adult with whom the child will continue to reside, Tex. Fam. Code § 262.1015(c);
- expires not later than the 14th day after the order was rendered, unless the court grants an extension under Tex. Fam. Code § 262.201(a-3), Tex. Fam. Code § 262.1015(d); and
- requires that the other adult with whom the child will continue to reside make a reasonable effort to monitor the residence and report to DFPS and the appropriate law enforcement agency any attempt by the alleged perpetrator to return to the residence. Tex. Fam. Code § 262.1015(e).

The court shall order the removal of an alleged perpetrator if the court finds that the child is not in danger of abuse from a parent or other adult with whom the child will continue to reside in the child's residence and that:

- the presence of the alleged perpetrator in the child's residence constitutes a continuing danger to the physical health or safety of the child; or

- the child has been the victim of sexual abuse and there is a substantial risk that the child will be the victim of sexual abuse in the future if the alleged perpetrator remains in the residence. Tex. Fam. Code § 262.1015(f).

Removal of an alleged perpetrator from the child's home was cited by the Texas Supreme Court as a means of protecting a child short of separating the child from the parents and placing the child in foster care. See *In re Tex. Dep't of Family and Protective Servs.*, 255 S.W.3d 613, 614 (Tex. 2008, orig. proceeding).

3. Failure to Report Perpetrator's Return

A person commits an offense if the person is a parent or other person with whom a child resides, the person is served with an order, and the person fails to make a reasonable effort to monitor the residence of the child or to report to DFPS and the appropriate law enforcement agency an attempt by the alleged perpetrator to return to the residence. An offense under this section is a Class A misdemeanor. Tex. Fam. Code § 262.1015(g).

4. Criminal Offense for Returning to Child's Residence

A person commits an offense if, in violation of a court order under this section, the person returns to the residence of the child the person is alleged to have abused. An offense under this subsection is a Class A misdemeanor, except that the offense is a felony of the third degree if the person has previously been convicted under this subsection. Tex. Fam. Code § 262.1015(h).

D. Emergency Removal without a Court Order

1. Taking Possession without a Court Order

If there is no time to obtain a temporary restraining order or attachment before taking possession of the child consistent with the health and safety of that child, an authorized representative of DFPS, a law enforcement officer, or a juvenile probation officer may take possession of a child without a court order under the following conditions only:

- on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child or that the child has been the victim of sexual abuse; or
- on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe there is an immediate danger to the physical health or safety of a child or that the child has been the victim of sexual abuse; or

- on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child is currently using a controlled substance as defined by Tex. Health & Safety Code § 481.002(5); and,
- the use constitutes an immediate danger to the physical health or safety of the child. Tex. Fam. Code § 262.104(a).

Special Issue: The statute appears to discourage emergency removal if prior notice and hearing, at least a prior ex parte order, is feasible without endangering the child. The exact nature of the emergency is determined by the DFPS worker or officer at the scene. According to the CPS Handbook, a caseworker should consider emergency removal only if other options for protecting the child are ruled out. CPS Handbook § 5252.

2. Special Case for Methamphetamine

An authorized representative of DFPS, a law enforcement officer, or a juvenile probation officer may take possession of a child under Tex. Fam. Code § 262.104(a) on personal knowledge, or information that has been furnished by another, that has been corroborated by personal knowledge, that would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine. Tex. Fam. Code § 262.104(b).

3. Initial Hearing Requirement After Removal

If a child has been taken into possession without a court order by a governmental entity, the court in which a suit has been filed shall hold an initial hearing on or before the first working day after the date the child is taken into possession. The court shall render orders that are necessary to protect the physical health and safety of the child.

If the court is unavailable for a hearing on the first working day, then, and only in that event, the hearing shall be held no later than the first working day after the court becomes available, provided that the hearing is held no later than the third working day after the child is taken into possession. Tex. Fam. Code § 262.106(a).

For the purpose of determining the first working day after the date the child is taken into possession, the child is considered to have been taken into possession by DFPS on the expiration of the five-day period permitted pursuant to Tex. Fam. Code § 262.007(c) or Tex. Fam. Code § 262.110(b). Tex. Fam. Code § 262.106(d).

The initial hearing may be ex parte (without notice to the parents) and proof may be by sworn petition or affidavit if a full adversary hearing is not practicable. Tex. Fam. Code § 262.106(b).

If the initial hearing is not held within the time required, the child shall be returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child. Tex. Fam. Code § 262.106(c).

4. Standard for Decision at Initial Hearing after Taking Possession

The court shall order the return of the child at the initial hearing regarding a child taken in possession without a court order by a governmental entity, unless the court is satisfied that:

- there is a continuing danger to the physical health or safety of the child if the child is returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child, or the evidence shows that the child has been the victim of sexual abuse on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse in the future;
- continuation of the child in the home would be contrary to the child's welfare;
- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child. Tex. Fam. Code § 262.107(a).

In determining whether there is a continuing danger to the physical health or safety of a child, the court may consider whether the household to which the child would be returned includes a person who has:

- abused or neglected another child in a manner that caused serious injury to or the death of the other child; or
- sexually abused another child. Tex. Fam. Code § 262.107(b).

5. Taking Possession of Child in Emergency with Intent to Return Home

An authorized representative of DFPS, a law enforcement officer, or a juvenile probation officer may take temporary possession of a child without a court order on discovery of a child in a situation of danger to the child's physical health or safety when the sole purpose is to deliver the child without unnecessary delay to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child. Tex. Fam. Code § 262.110(a).

Until a parent or other person entitled to possession of the child takes possession of the child, DFPS may retain possession of the child without a court order for not more than 5 days. On the expiration of the 5th day, if a parent or other person entitled to possession does not take possession of the child, DFPS shall take action under Tex. Fam. Code Chapter 262 as if DFPS took possession under Tex. Fam. Code § 262.104 or Tex. Fam. Code § 262.110(b).

E. After Ex Parte Order Authorizing Removal

1. Duration of Temporary Restraining Order and Attachment

A temporary restraining order expires not later than 14 days after the date it is issued unless it is extended as provided by Tex. R. Civ. P. 680 or Tex. Fam. Code § 262.201(a-3). Tex. Fam. Code § 262.103.

2. Temporary Managing Conservatorship

The judge has the authority to issue a temporary order as described in Tex. Fam. Code § 105.001, including an order for temporary conservatorship of a child, which may be rendered without notice and an adversary hearing if the order is an emergency order sought by a governmental entity. Tex. Fam. Code § 105.001(h).

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. Tex. Fam. Code § 153.002.

The managing conservator must be a parent, a competent adult, an authorized agency, or a licensed child-placing agency. Tex. Fam. Code § 153.005(b).

The rights and duties of a non-parent appointed as managing conservator are listed in Tex. Fam. Code § 153.371.

A temporary order in a suit affecting a parent-child relationship rendered in accordance with Tex. Fam. Code § 105.001 is not required to include a temporary parenting plan. The court may not require the submission of a temporary parenting plan in any case by local rule or practice. Tex. Fam. Code § 153.602.

3. Setting Date for Full Adversary Hearing

Anytime there is a removal, at some point there must be a full adversary hearing to comport with due process. When there is a post-removal hearing, in the case of an

emergency removal without a court order, or an ex parte hearing for a removal with a court order, the judge must follow the procedures for scheduling a full adversary hearing.

Unless the child has already been returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession and the temporary order, if any, has been dissolved, a full adversary hearing shall be held not later than the 14th day after the date of the child was taken into possession by the governmental entity. Tex. Fam. Code § 262.201(a).

Special Issue: Many judges schedule the full adversary hearing when the ex parte order is signed to allow sufficient time for the parent to receive timely notice of the hearing and to allow sufficient time for the parent to request an attorney.

4. Mandatory Appointment of Attorney Ad Litem and Guardian Ad Litem

In a suit filed by a governmental entity requesting termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the interests of the child immediately after the filing, but before the full adversary hearing, to ensure adequate representation of the child. Tex. Fam. Code § 107.012. For more information regarding the role and responsibilities of an attorney ad litem, please see Tex. Fam. Code § 107.003 and Tex. Fam. Code § 107.004.

In a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child, the court shall appoint a guardian ad litem to represent the best interests of the child immediately after the filing of the petition but before the full adversary hearing. Tex. Fam. Code § 107.011(a). For more information regarding the role and responsibilities of a guardian ad litem, please see Tex. Fam. Code § 107.002.

4.1. New duties of Attorney Ad Litem

The duties and responsibilities of attorneys ad litem are found in Tex. Fam. Code § 107.003 and Tex. Fam. Code § 107.004. Several new duties were added during the 2013 legislative session.

In addition to the duties previously required (now under Tex. Fam. Code § 107.003 (a)), an attorney ad litem shall:

- Review the medical care provided to the child;
- In a developmentally appropriate manner, seek to elicit the child's opinion on the medical care provided; and

- For a child at least 16 years of age, advise the child of the child's right to request the court to authorize the child to consent to the child's own medical care under Tex. Fam. Code § 266.010. Tex. Fam. Code § 107.003(b).

Tex. Fam. Code § 107.004 was amended to add new subsection (d-2), which requires:

- An attorney ad litem appointed to represent a child in the managing conservatorship of the Department of Family and Protective Services shall, before each scheduled hearing under Chapter 263, determine whether the child's educational needs and goals have been identified and addressed. Tex. Fam. Code § 107.004(d-2).

During the 83rd Legislative Session, Tex. Fam. Code § 107.004 was amended regarding continuing legal education for attorneys appointed to represent children. An attorney ad litem appointed for a child in a proceeding under Tex. Fam. Code Subtitle E shall complete at least 3 hours of continuing legal education relating to representing children in child protection cases as described in Tex. Fam. Code § 107.004(c) as soon as practicable after the attorney ad litem is appointed. An attorney ad litem is not required to comply with this subsection if the court finds that the attorney ad litem has experience equivalent to the required education. Tex. Fam. Code § 107.004(b).

An attorney who is on the list maintained by the court as being qualified for appointment as an attorney ad litem for a child in a child protection case must complete at least 3 hours of continuing legal education relating to the representation of a child in a proceeding under Tex. Fam. Code Subtitle E each year before the anniversary date of the attorney's listing. Tex. Fam. Code § 107.004(b-1). The continuing legal education must focus on the duties of an attorney ad litem in, and the procedures of and best practices for, representing a child in a proceeding under Tex. Fam. Code Subtitle E. Tex. Fam. Code § 107.004(c)(2).

These changes building upon two significant legislative changes which occurred during the 2011 session of the Texas Legislature:

- Tex. Fam. Code § 107.004 was amended to add subsection (d) to require that the attorney for the child file a written statement with the court indicating that the attorney ad litem complied with subsection (d)(1), if the child or individual is not present at the court hearing. This requirement is not intended to require that the attorney state what the child said in the meeting. It only requires that the attorney file with the court a written statement of compliance with the meeting provision in Tex. Fam. Code § 107.004. The purpose of this amendment is to facilitate the court's oversight of attorneys and enforcement of the attorney's duty to meet with the client.

- Tex. Fam. Code § 107.004 was amended to add subsection (d-1) to clarify that the required meeting under subsection (d) must take place: (1) a sufficient time before the hearing to allow the attorney ad litem to prepare for the hearing in accordance with the child's expressed objectives of representation; and (2) in a private setting that allows for confidential communications between the attorney ad litem and the child or individual with whom the child ordinarily resides, as applicable. This amendment is intended to clarify that a brief meeting in the hallway before a hearing is not sufficient to comply with an attorney's obligation to meet with his or her client (or other individual). The meeting needs to occur sufficiently in advance of the hearing date to allow time to prepare for the hearing in light of the information obtained at the meeting.

Also of note, during the 83rd Legislative Session in 2013, Tex. Fam. Code § 107.006(c), which required an attorney to destroy records upon termination of the attorney's appointment, was repealed.

The State Bar of Texas currently offers several Continuing Legal Education (CLE) courses related to representation of children and youth in foster care, including:

- Representing Children in CPS Cases
  - MCLE Credit: 3 hrs; MCLE No: 901271524
- Advocating for Youth Aging Out of the Texas Foster Care System
  - MCLE Credit: 1 hr.; MCLE No: 901256884
- Resources and Procedures for Representing Crossover Youth with Disabilities
  - MCLE Credit: 1 hr.; MCLE No: 901254040
- Special Education Advocacy for Kids in the Foster Care System
  - MCLE Credit: 0.50 hrs.; MCLE No: 901261731

4.2. Duties of Parent Attorney

Effective September 1, 2013, Tex. Fam. Code § 107.0131 is amended to require an attorney appointed to represent a parent to abide by the parent's objectives for representation. Tex. Fam. Code § 107.0131(a)(1)(H).

Effective September 1, 2013, Tex. Fam. Code § 107.0131 is amended to require that the continuing legal education relate to representing parents in child protection cases (Tex. Fam. Code § 107.0131 (a)(1)(J)), and focus on the duties of an attorney ad litem in, and the procedures of and best practices for, representing a parent in a proceeding under Tex. Fam. Code Subtitle E. Tex. Fam. Code § 107.0131(b)(2). An attorney who is on the list maintained by the court as being qualified for appointment as an attorney ad litem for a parent in a child protection case must complete at least 3 hours of continuing legal education relating to the representation of a parent in a proceeding under Tex. Fam.

Code Subtitle E each year before the anniversary date of the attorney's listing. Tex. Fam. Code § 107.0131(c).

This new statute builds upon statutory changes which went into effect on September 1, 2011, which created then new Tex. Fam. Code Section 107.0131 to provide enumerated duties for parents' attorneys including 3 hours of CLE training and meeting with the client before each hearing. Tex. Fam. Code § 107.0131.

The Children's Commission, in conjunction with the State Bar of Texas, created a program entitled Representing Texas Parents in Abuse and Neglect Cases. It is a 3.25 hour course, available online at Texas Bar CLE, and free to attorneys who certify they take court appointments in CPS cases.

4.3. New Duties of Parent Appointed to Represent Alleged Father

During the 83rd Legislative Session, several changes were made to Tex. Fam. Code § 107.0132. Now, except as otherwise provided by Tex. Fam. Code § 107.0132(b) and Tex. Fam. Code § 107.0132(d), an attorney ad litem appoint under Tex. Fam. Code § 107.013 to represent the interests of an alleged father is only required to:

- Conduct an investigation regarding the petitioner's due diligence in locating the alleged father, including by verifying that the petitioner has obtained a certificate of the results of a search of the paternity registry under Tex. Fam. Code Chapter 160;
- Interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the alleged father; and
- Conduct an independent investigation to identify or locate the alleged father, if applicable. Tex. Fam. Code § 107.0132(a).

Tex. Fam. Code § 107.0132 provides duties for an attorney appointed to represent an alleged father that cannot be located. Specifically, those duties are limited to conducting an investigation regarding the petitioner's due diligence in locating the alleged father, and conducting an independent investigation to locate the father, including interviewing parties or persons with knowledge of the identity or location of the alleged father. If located, the attorney ad litem shall provide to each party and the court with the alleged father's name and locating information. If appropriate, the court may allow the attorney to assist the alleged father in establishing paternity. If the alleged father is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests as a parent under Tex. Fam. Code § 107.013(a)(1) or Tex. Fam. Code § 107.013(c). Tex. Fam. Code § 107.0132.

If the attorney ad litem is unable to identify or locate the alleged father, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to

identify or locate the alleged father with a statement that the attorney ad litem was unable to identify or locate the alleged father. Tex. Fam. Code § 107.0132. Effective September 1, 2013, on receipt of the summary required by Tex. Fam. Code § 107.0132(d), the court shall discharge the attorney from the appointment. Tex. Fam. Code § 107.0132(d).

The intent behind this provision is to limit the duties to tasks related to finding the father and bringing him into the case. Tex. Fam. Code § 107.0132.

4.4. New Duties of Attorneys Appointed to Represent Parents Whose Identity or Location is Unknown or Who Has Been Cited by Publication

Effective September 1, 2013, new Tex. Fam. Code § 107.014 addresses situations when an attorney is appointed to represent a parent whose identity or location is unknown or who has been cited by publication.

a. Duties

Except as provided by Tex. Fam. Code § 107.014(b) and Tex. Fam. Code § 107.014(d), an attorney ad litem appointed under Tex Fam. Code § 107.013 to represent the interests of a parent whose identity or location is unknown or who has been served by citation by publication is only required to:

- Conduct an investigation regarding the petitioner's due diligence in locating the parent;
- Interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the parent; and
- Conduct an independent investigation to identify or locate the parent, as applicable. Tex. Fam. Code § 107.014(a).

b. If Parent Identified and Located

If the attorney ad litem identifies and locates the parent, the attorney ad litem shall:

1. Provide to each party and the court the parent's name and address and any other available locating information unless the court finds that:

    a. Disclosure of a parent's address is likely to cause that parent harassment, serious harm, or injury; or

    b. The parent has been a victim of family violence; and

2. If appropriate, assist the parent in making a claim of indigence for the appointment of an attorney. Tex. Fam. Code § 107.014(b).

If the court makes a finding described by Tex. Fam. Code § 107.014(b)(1)(A) or (B), the court may:

1. Order that the information not be disclosed; or
2. Render any other order the court considers necessary. Tex. Fam. Code § 107.014(c).

If the court determines the parent is indigent, the court may appoint the attorney ad litem to continue to represent the parent under Tex. Fam. Code § 107.013(a)(1). Tex. Fam. Code § 107.014(d).

c. If Parent Not Located or Identified

If the attorney ad litem is unable to identify or locate the parent, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to identify or locate the parent with a statement that the attorney ad litem was unable to identify or locate the parent. On receipt of the summary required by Tex. Fam. Code § 107.014(e), the court shall discharge the attorney from the appointment. Tex. Fam. Code § 107.014(e).

4.5. Duration of Appointment of Parent Attorney

Tex. Fam. Code § 107.016 was added to provide for continuity of representation for parents who appeal a termination or managing conservatorship order. The new language provides that in a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested:

(1) an order appointing DFPS as the child's managing conservator may provide for the continuation of the appointment of the guardian ad litem or attorney ad litem for the child for any period set by the court; and

(2) an attorney appointed under this subchapter to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of:

A. the date the suit affecting the parent-child relationship is dismissed;
B. the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or
C. the date the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. Tex. Fam. Code § 107.016.

5. Notice Requirement to Parent

Effective September 1, 2013, the temporary restraining order or attachment of a child rendered by the court must contain the following statement prominently displayed in boldface type, capital letters, or underlined:

"YOU HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY. IF YOU ARE INDIGENT AND UNABLE TO AFFORD AN ATTORNEY, YOU HAVE THE RIGHT TO REQUEST THE APPOINTMENT OF AN ATTORNEY BY CONTACTING THE COURT AT [ADDRESS], [TELEPHONE NUMBER]. IF YOU APPEAR IN OPPOSITION TO THE SUIT, CLAIM INDIGENCE, AND REQUEST THE APPOINTMENT OF AN ATTORNEY, THE COURT WILL REQUIRE YOU TO SIGN AN AFFIDAVIT OF INDIGENCE AND THE COURT MAY HEAR EVIDENCE TO DETERMINE IF YOU ARE INDIGENT. IF THE COURT DETERMINES YOU ARE INDIGENT AND ELIGIBLE FOR APPOINTMENT OF AN ATTORNEY, THE COURT WILL APPOINT AN ATTORNEY TO REPRESENT YOU." Tex. Fam. Code § 262.102(d).

DFPS or other agency must give written notice to each parent of the child or to the child's conservator or legal guardian when a representative of DFPS or other agency takes possession of a child. Tex. Fam. Code § 262.109(a).

The written notice must be given as soon as practicable, but in any event not later than the first working day after the date the child is taken into possession. Tex. Fam. Code § 262.109(b).

The written notice requirements must include, among other things:

- the reasons why the child was removed;
- contact information for the caseworker;
- a summary of legal rights; and
- a statement that the parent has the right to hire an attorney. Tex. Fam. Code § 262.109(c).

The court may, but is not required to, waive the required notice under special circumstances, such as:

- the inability to locate the parent or caretaker;
- the child is an abandoned infant delivered to an emergency care provider; or
- for other good cause. Tex. Fam. Code § 262.109(d).

Special Issue: DFPS is responsible for providing service of citation and notice of several matters relating to agency activities relating to a lawsuit (investigations, removals, review hearings). While the same word "notice" is often used for both, it is important to distinguish between service and notice. The Texas Family Code requires that DFPS provide notice to parents of the investigation and removal of a child, as well as notice to relatives following the removal. These notice obligations, however, do not need to be executed in accordance with the rules governing service under the Texas Rules of Civil Procedure.

In lawsuits filed by DFPS, it is responsible for obtaining service of citation containing the original petition and notice of trial settings and other events during the pendency of the legal case. These notice requirements come not only from the Texas Rules of Civil Procedure, but also the Texas Family Code and federal law. With respect to service of citation, Tex. Fam. Code § 102.009(c) directs that service be made "as in other civil cases." Accordingly, DFPS is responsible for obtaining service of citation to all parties listed in Tex. Fam. Code § 102.009(a). Service must be accomplished via the method prescribed in Tex. R. Civ. P. 106 and by a person authorized pursuant to Tex. R. Civ. P. 103.

6. Information Provided to Relatives and Certain Individual; Investigation

When DFPS takes possession of a child under Tex. Fam. Code Chapter 262, DFPS shall provide information to each adult who DFPS is able to identify and locate and who:

- is related to the child within the third degree of consanguinity;
- is an adult relative of the alleged father who DFPS determines is most likely to be the child's biological father; and
- is identified as a potential relative or designated caregiver on the proposed child placement resources, and may provide information regarding an adult who DFPS determines has a long-standing and significant relationship with the child. Tex. Fam. Code § 262.1095(a). The written notice must include, among other things:
    - notice that the child is in the state's custody;
    - options available for participation in the care and placement and support of the family;
    - options that may be lost if the individual fails to timely respond; include the date, time and location of the Status hearing, if known. Tex. Fam. Code § 262.1095(b). DFPS is not required to provide information to a person who has criminal or family violence history. Tex. Fam. Code § 262.1095(c).

DFPS must use due diligence to identify and locate all individuals described by Tex. Fam. Code § 262.1095(a) within 30 days of the date DFPS files the SAPCR, and the failure of a parent or alleged father to complete the Child Placement Resources form does not relieve DFPS of its duty to seek information about persons under Tex. Fam. Code § 262.1095(d). Tex. Fam. Code § 262.1095(e).

F. Service of Citation

The following are entitled to service of citation on the filing of a petition in an original suit:

- a managing conservator;
- a possessory conservator:
- a person having possession of or access to the child under an order;
- a person required by law or by order to provide for the support of the child;
- a guardian of the person of the child;
- a guardian of the estate of the child;
- each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Tex. Fam. Code Chapter 161;
- an alleged father, unless there is attached to the petition an affidavit of waiver of interest in a child executed by the alleged father as provided by Tex. Fam. Code Chapter 161 or unless the petitioner has complied with the provisions of Tex. Fam. Code § 161.002(b)(2), (3), or (4);
- a man who has filed a notice of intent to claim paternity as provided by Tex. Fam. Code Chapter 160;
- DFPS, if the petition requests that DFPS be appointed as managing conservator of the child;
- the Title IV-D agency, if the petition requests the termination of the parent-child relationship and support rights have been assigned to the Title IV-D agency under Tex. Fam. Code Chapter 231;
- a prospective adoptive parent to whom standing has been conferred under Tex. Fam. Code § 102.0035; and
- a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Tex. Fam. Code Chapter 161 or to whom consent to adoption has been given in writing under Tex. Fam. Code Chapter 162. Tex. Fam. Code § 102.009(a).

Alleged fathers are not parents as defined in Tex. Fam. Code § 101.024 and do not have the right to a court appointed attorney except under Tex. Fam. Code § 107.013(a)(3) to monitor the due diligence of DFPS in checking the paternity registry under Tex. Fam. Code Chapter 160. However, alleged fathers have the right to service of citation unless that right is waived in an affidavit of waiver of interest in the child, or forfeited by failing to register with the paternity registry.

AND

Citation may be served on any other person who has or who may assert an interest in the child. Tex. Fam. Code § 102.009(b).

AND

Citation on the filing of an original petition in a suit shall be issued and served as in other civil cases. Tex. Fam. Code § 102.009(c).

Special Issue: Early determination of paternity issues may be important as it affects potential relative placement decisions. On the other hand, because paternity conveys rights to custody, reunification, and visitation, the court should carefully consider whether to rule on an alleged father's paternity status before sufficient information has been gathered and considered.

G. Evaluation of Identified Relatives and Other Designated Individuals

1. Background/Criminal History Checks

Before a full adversary hearing, DFPS must perform a background and criminal history check on the relatives or other designated individuals identified as a potential relative or designated caregiver, as defined by Tex. Fam. Code § 264.751, on the proposed child placement resources form provided under Tex. Fam. Code § 261.307.

DFPS shall determine which relative or other designated individual would be the most appropriate substitute caregiver, if any, before the full adversary hearing. Until DFPS identifies such caregiver, DFPS must continue to explore substitute caregiver options. The time frames do not apply to a relative or other designated individual located in another state. For more on out of state placements, see generally the Interstate Compact on Placement of Children, located at www.icpc.aphsa.org.

2. Home Study Filed with Court

At the full adversary hearing, DFPS shall, after redacting any social security numbers, file with the court:

- a copy of each proposed child placement resources form completed by the parent or other person having legal custody of the child;
- a copy of any completed home study performed; and
- the name of the relative or other designated caregiver, if any, with whom the child has been placed. Tex. Fam. Code § 262.114(a-1).

If the child has not been placed with a relative or other designated caregiver by the time of the full adversary hearing, DFPS shall file with the court a statement that explains:

- the reasons why DFPS has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and
- the actions DFPS is taking, if any, to place the child with a relative or other designated caregiver. Tex. Fam. Code § 262.114(a-1).

H. Placement

1. Child Placement Resources Form

DFPS may place a child with a relative or other designated individual identified on the proposed child placement resources form.

DFPS:

- must determine that the placement is in the best interest of the child.
- may place the child before conducting the background and criminal history check or home study required. Tex. Fam. Code § 262.114(b).
- shall provide a copy of an informational manual required under Tex. Fam. Code § 261.3071 to the relative or other designated caregiver at the time of the child's placement. Tex. Fam. Code § 262.114(b).

A foster parent with whom the child previously resided shall be considered for placement if:

- DFPS determines that placement of the child with a relative or designated caregiver is not in the child's best interest; and
- the placement is available and in the child's best interest. Tex. Fam. Code § 262.114(c).

2. Caregiver Visit with Child; Information

The 83rd Texas Legislature amended Tex. Fam. Code Chapter 264 to require DFPS to arrange visits and provide information to caregivers prior to placement.

Unless DFPS waives these requirements because the proposed relative or other designated caregiver has a long-standing or significant relationship with the child and has provided care for the child at any time during the 12 months preceding the date of the proposed placement (Tex. Fam. Code § 264.7541(b)), before placing a child with a proposed relative or other designated caregiver, DFPS must:

1. Arrange a visit between the child and the proposed caregiver; and
2. Provide the proposed caregiver with a form, which may be the same form DFPS provides to nonrelative caregivers, containing information, to the extent it is available, about the child that would enhance continuity of care for the child, including:
    a. The child's school information and educational needs;
    b. The child's medical, dental, and mental health care information;
    c. The child's social and family information; and
    d. Any other information about the child DFPS determines will assist the proposed caregiver in meeting the child's needs. Tex. Fam. Code § 264.7541(a).

3. Unacceptable Facilities for Housing Child

When a child is taken into possession and no allegations of delinquent conduct, conduct in need of supervision, or criminal conduct have been made, that child may not be held in isolation or in a jail, juvenile detention facility, or other secure detention facility. Tex. Fam. Code § 262.108.

I. Visitation Schedule

1. Visitation with Certain Children

Applicable only to a child:

1) Who is in the temporary managing conservatorship of DFPS; and

2) For whom the goal of DFPS is reunification of the child with the child's parent. Tex. Fam. Code § 262.115(b).

DFPS shall ensure that a parent who is otherwise entitled to possession of the child has an opportunity to visit the child not later than the 3rd day after the date DFPS is named temporary managing conservator of the child unless:

1) DFPS determines that visitation is not in the child's best interest; or
2) Visitation with the parent would conflict with a court order relating to possession of or access to the child. Tex. Fam. Code § 262.115(c).

2. Temporary Visitation Schedule

Before a hearing conducted under Tex. Fam. Code Chapter 262 Subchapter C, DFPS in collaboration with each parent of the child must develop a temporary visitation schedule for the child's visits with each parent. The visitation schedule may conform to the minimum visitation policies of DFPS. DFPS shall consider the factors listed in Tex. Fam. Code § 263.107(c) in developing the temporary visitation schedule. Unless modified by court order, the schedule remains in effect until a visitation plan is developed under Tex. Fam. Code § 263.107. Tex. Fam. Code § 262.115(d).

DFPS may include the temporary visitation schedule in any report DFPS submits to the court before or during a hearing under Tex. Fam. Code Chapter 262, Subchapter C. The court may render any necessary order regarding the temporary visitation schedule. Tex. Fam. Code § 262.115(e).

J. Expedited Hearing and Appeal

1. Expedited Hearing

DFPS is entitled to an expedited hearing under Tex. Fam. Code Chapter 262 in any proceeding in which a hearing is required if DFPS determines that a child should be removed from the child's home because of an immediate danger to the physical health or safety of the child. Tex. Fam. Code § 262.112(a).

2. Expedited Appeal

In any proceeding in which an expedited hearing is held under Tex. Fam. Code § 262.112(a), DFPS, parent, guardian, or other party to the proceeding is entitled to an expedited appeal on a ruling by the court that the child may not be removed from the child's home. Tex. Fam. Code § 262.112(b).

3. Subsequent Allegation

If a child is returned to the child's home after a removal in which DFPS was entitled to an expedited hearing under this section and the child is subject of a subsequent allegation of abuse or neglect, DFPS or any other interested party is entitled to an expedited hearing on the removal of the child from the child's home in the manner provided by Tex. Fam. Code § 262.112(a) and to an expedited appeal in the manner provided by Tex. Fam. Code § 262.112(b). Tex. Fam. Code § 262.112(c).

K. Filing Suit without Taking Possession of Child

A. When it is Not Necessary to Remove a Child PRIOR TO Notice and Hearing

An original suit filed by a governmental entity that requests to take possession of a child after notice and a hearing must be supported by an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence and caution that:

- reasonable efforts have been made to prevent or eliminate the need to remove the child from the child's home; and
- allowing the child to remain in the home would be contrary to the child's welfare. Tex. Fam. Code § 262.113.

L. Decisions Regarding Education

1. Designation of Education Decision-Maker

During the 83rd Legislative Session, the Texas Family Code was amended to add new Tex. Fam. Code § 263.004 to require the provision of notice to the court and others of the entity or person holding education decision-making authority. Generally, when appointed temporary or permanent managing conservator, DFPS is given the rights and duties of a non-parent managing conservator pursuant to Tex. Fam. Code § 153.371, which in includes the right to make decisions regarding the child's education. Tex. Fam. Code § 153.371(10).

Unless the court order limits the rights and duties of DFPS under Tex. Fam. Code § 153.371(10) to make decisions regarding the child's education, DFPS must file with the court a report identifying the name and contact information for each person who has been:

1) Designated by DFPS to make educational decisions on behalf of the child; and

2) Assigned to serve as the child's surrogate person in accordance with 20 U.S.C. 1415(b) and Tex. Educ. Code § 29.001(10), for purposes of decision-making regarding special education services, if applicable. Tex. Fam. Code § 263.004(a).

Not later than the 5th day after the date of an adversary hearing held under Tex. Fam. Code § 262.201 or Tex. Fam. Code § 262.205 is concluded, DFPS must file the report required by Tex. Fam. Code § 263.004(a) with the court and provide a copy to:

1) Each person entitled to notice of a permanency hearing under Tex. Fam. Code § 263.301; and
2) The school the child attends. Tex. Fam. Code § 263.004(b).

If a person other than a person identified in the report required by Tex. Fam. Code § 263.004(a) is designated to make educational decisions or assigned to serve as a surrogate parent, DFPS shall file with the court an updated report that includes the information required by Tex. Fam. Code § 263.004(a) for a designated or assigned person. The updated report must be filed not later than the 5th day after the date of the designation or assignment. Tex. Fam. Code § 263.004(c).

2. DFPS Must Ensure the Child Returns Child to School after Removal

If DFPS takes possession of a child during the school year, DFPS shall ensure that the child returns to school not later than the 3rd school day after the date an order is rendered providing for possession of the child by DFPS, unless the child has a physical or mental condition of a temporary and remediable nature that makes the child's attendance infeasible. Tex. Fam. Code § 264.115(a).

If the child has a physical or mental condition of a temporary and remediable nature, that makes the child's attendance infeasible, DFPS shall notify the school in writing that the child is unable to attend school. If the child's physical or mental condition improves so that the child's attendance is feasible, DFPS shall ensure that the child immediately returns to school. Tex. Fam. Code § 264.115(b).

ADVERSARY HEARING

Legal Overview of Adversary Hearing

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 262. Procedures in Suit by Governmental Entity to Protect Health & Safety of Child
Subchapter C. Adversary Hearing

There are two types of hearings considered to be adversary under Tex. Fam. Code Chapter 262, Subchapter C. The first and most well-known occurs after a court grants an ex parte order approving the removal of a child from a parent or caretaker and this hearing is to be held within 14 days of the date the child was taken into the possession of DFPS. The second type of adversary hearing occurs when the child is not in the possession of DFPS and DFPS is requesting to take possession of the child after notice and hearing. Although there is no time limit as to when this hearing is to occur, it should occur promptly. Courts across Texas differ in the way full adversary hearings are held, but in all cases DFPS has the burden to show why its recommendations, including keeping a child in substitute care, should be approved by the court.

A. Service of Citation

- DFPS must make a diligent effort to locate parent and relatives

B. Notice

- Right to Notice
- Methods of Providing Notice of Hearing
- Information Provide to Relatives and Certain Individuals; Investigation
- Report regarding Notification of Relatives

C. Hearing After Emergency Removal

- The hearing must be held no later than 14 days after the child was taken into possession
- Burden: Sufficient evidence to satisfy a person of ordinary prudence and caution
- Required findings that there was a danger to the physical health and safety, an urgent need to protect, and reasonable efforts were made
- If the child remains in care: issue an appropriate temporary order, admonish the parents, order placement with a non-custodial parent or relative, render a protective

order, set the status hearing, and ensure the child placement resources form is complete

D. Hearing When Child Not in Possession of DFPS

- Promptly set suit for hearing
- Burden: Sufficient evidence to satisfy a person of ordinary prudence and caution
- If the child is placed in care: issue an appropriate temporary order, admonish the parents, order placement with a non-custodial parent or relative, render a protective order, set the status hearing, and ensure the child placement resources form is complete

E. If Court Does Not Remove or Continue DFPS Conservatorship

F. Mandatory Appointment of Attorney for Parent

G. Transfer

- Transfer is discretionary when a suit for divorce has been filed before a final order in the child protection case has been rendered

H. Placement With Relatives or Designated Caregiver

- Before the adversary hearing DFPS must evaluate the persons listed on the child placement resources form, complete a home study, and conduct background/criminal history checks
- At the adversary hearing DFPS must file the child placement resources form, any home study, and the name of the caregiver, if any
- DFPS must consider placing the child with a foster parent the child has been previously placed with

I. Aggravated Circumstances

- The court may waive the service plan and accelerate the trial schedule
- Find that reasonable efforts to return the child are not required
- Conduct the initial permanency hearing within 30 days
- Set the final hearing

A. Service of Citation

Service is required in a suit filed by DFPS as in other original suits per Tex. Fam. Code § 102.009, but most courts do not require service on all those entitled to service before proceeding with the adversary hearing. Adversary hearings with service and adversary hearings without both specifically allow the court to proceed with temporary orders prior to any required service by publication.

1. DFPS Must Make a Diligent Effort to Locate Parent and Relatives

If a parent, as defined by Tex. Fam. Code § 160.102(11), of the child has not been personally served in a suit in which DFPS seeks termination, DFPS must make a diligent effort to locate that parent. Tex. Fam. Code § 161.107(b).

If a parent has not been personally served and cannot be located, DFPS shall make a diligent effort to locate a relative of the missing parent to give the relative an opportunity to request appointment as the child's managing conservator. Tex. Fam. Code § 161.107(c).

2. Relative Defined for Diligent Search Purposes

A relative means a parent, grandparent, or adult sibling or child. Tex. Fam. Code § 161.107(a)(2). If DFPS is not able to locate a missing parent or a relative of that parent and sufficient information is available concerning the physical whereabouts of the parent or relative, DFPS shall request the Office of the Attorney General to use the parental locater service to determine the location of the missing parent or relative. Tex. Fam. Code § 161.107(d).

DFPS shall be required to provide evidence to the court to show what actions were taken by DFPS in making a diligent effort to locate the missing parent and relative of the missing parent. Tex. Fam. Code § 161.107(e).

3. Citation by Publication and Diligent Search

Once DFPS has made the effort and has been unsuccessful, DFPS can file a Motion to Cite by Publication under Tex. R. Civ. P. 109.

Tex. R. Civ. P. 109 requires that before citation by publication can be issued by the clerk, the petitioner must file an affidavit of "due diligence". That rule also requires the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of, in these cases, the known but un-locatable parent, before granting any judgment on such service.

B. Notice

1. The Right to Notice

The Petitioner, which is usually DFPS, must ensure that notice of the lawsuit is provided to those who are sued. The right to notice is a federal due process right, and must be distinguished from the right to service of citation at the initiation of a suit, which is a

creature of state statutes and rules. For example, notice by first class mail may be sufficient for purposes of federal due process, and is used in some states.

2. Methods of Providing Notice of Hearing

The requirements for citation should not be confused with the requirements for notice of motions or of particular hearings. Citation generally must be by personal service on the respondent unless citation is waived by the respondent, forfeited under the "paternity registry" process, or some form of substituted service, including citation by publication, authorized by the Texas Rules of Civil Procedure is used. Once citation is complete and a return of service is on file, notice may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current fax number, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Notice may also be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

3. Information Provided to Relatives and Certain Individual; Investigation

When DFPS takes possession of a child under Tex. Fam. Code Chapter 262, DFPS **shall** provide information to each adult DFPS is able to identify and locate who:

- Is related to the child within the third degree of consanguinity (as defined by Tex. Gov't Code § 573.023(c));
- Is an adult relative of the alleged father DFPS determines is most likely to be the child's biological father; and
- Anyone who is identified as a potential relative or designated caregiver on the proposed child placement resources, and

DFPS **may** provide information to adults DFPS determines has a long-standing and significant relationship with the child. Tex. Fam. Code § 262.1095(a). The written notice must include, among other things:

- notice that the child is in the state's custody;
- options available for participation in the care and placement and support of the family;
- options that may be lost if the individual fails to timely respond;

- include the date, time and location of the of the Status hearing, if known. Tex. Fam. Code § 262.1095(b).

DFPS is not required to provide information to a person who has criminal or family violence history. Tex. Fam. Code § 262.1095(c).

DFPS must use due diligence to identify and locate all individuals described by Tex. Fam. Code § 262.1095(a) within 30 days of the date DFPS files the SAPCR, and the failure of a parent or alleged father to complete the Child Placement Resources form does not relieve DFPS of its duty to seek information about persons under Tex. Fam. Code § 262.1095 (d). Tex. Fam. Code § 262.1095(d) and (e).

Purpose: This notice is intended as an effort to engage and welcome relatives into the CPS case. It is well established that the involvement of relatives in a case greatly increases the likelihood for a positive outcome. Relatives can provide placement resources as well as emotional support.

Due Diligence: DFPS should use due diligence to locate all adult relatives. In exercising due diligence, caseworkers should interview each parent and the child in an age appropriate manner. The caseworker should also search available locator databases. Recently adopted federal law allows DFPS to have access to the Federal Parent Locator Service (a tool managed by the Attorney General's Child Support Division) to obtain state and federal child support data to help locate missing parents and relatives of children in child protection cases. DFPS should utilize this and other resources to search for and engage relatives and engage fathers at the beginning of the case.

What is provided in the Notice: DFPS will be providing relatives with a form letter stating the names of the children that have been removed and inviting the relative's participation. DFPS will provide relatives with a check box form to allow relatives to indicate their interest in providing support or maintaining a relationship with the child. Specifically, the relative will be able to indicate his or her interest in the following:

- ☐ I am interested in having this child(ren) placed with me in my home (for up to 12 – 18 months)
- ☐ I am interested in becoming a kinship caregiver and learning more about supportive services
- ☐ I am interested in becoming a foster parent for this child and learning more about supportive services
- ☐ If the parent's rights are terminated, I am interested in adopting this child
- ☐ I am interested in learning about Adoption Assistance Payments

- ☐ If the parent's rights are not termination, but the child is not reunified, I am interested in becoming this child's legal and permanent conservator
- ☐ I am interested in learning more about the Permanency Care Assistance Program
- ☐ I cannot serve as a placement for the child(ren) at this time, but am interested in supporting the child(ren) in one or more ways

4. Report Regarding Notification of Relatives

New Tex. Fam. Code § 263.007 requires DFPS to provide the court with a report regarding their compliance with Tex. Fam. Code § 262.1095. The court should review this report to assess DFPS's diligent efforts. Tex. Fam. Code § 263.007.

5. Notice to Parents of Right to Counsel

Before commencement of the full adversary hearing, the court must inform each parent not represented by an attorney of:

1) the right to be represented by an attorney; and
2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. Tex. Fam. Code § 262.201(a-1).

If a parent claims indigence and requests the appointment of an attorney before the full adversary hearing, the court shall require the parent to complete and file with the court an affidavit of indigence. The court may hear evidence to determine whether the parent is indigent. If the court determines the parent is indigent, the court shall appoint an attorney to represent the parent. Tex. Fam. Code § 262.201(a-2).

The court may, for good cause shown, postpone the full adversary hearing for not more than seven days from the date of the attorney's appointment to provide the attorney time to respond to the petition and prepare for the hearing. The court may shorten or lengthen the extension granted under Tex. Fam. Code § 263.201(a-3) if the parent and the appointed attorney agree in writing. If the court postpones the full adversary hearing, the court shall extend a temporary restraining order issued by the court for the protection of the child until the date of the rescheduled full adversary hearing. Tex. Fam. Code § 263.201(a-3).

C. Hearing after Emergency Removal

1. When Must Hearing be Held

A hearing must be held not later than the 14th day after the date the child was taken into possession unless the court grants an extension pursuant to Tex. Fam. Code § 262.201(a-3). Tex. Fam. Code § 262.201(a).

Special Issue: Temporary orders expire after 14 days. This does not impact the trial court's jurisdiction; however, courts should always renew and extend the temporary orders until the full adversary hearing is held. See *In re J.M.C.*, 109 S.W.3d 591, 595 (Tex. App.--Fort Worth 2003, no pet.) and Tex. Fam. Code § 262.201(a-3).

2. Extension

Although Tex. Fam. Code § 262.103 allows for the temporary restraining order and attachment of a child to be extended, there is no specific provision for the extension of the adversary hearing beyond the 14th day. If the hearing cannot be held within the 14 days, some courts convene and reset the hearing, while others rely on case law which indicates the requirement is not jurisdictional. *In re J.M.C.*, 109 S.W.3d 591, 595; *In re B.T.*, 154 S.W.3d 200, 207 (Tex .App.--Fort Worth 2004, no pet.).

But, effective September 1, 2013, the court may, for good cause shown, postpone the full adversary hearing for not more than seven days from the date of the attorney's appointment to provide the attorney time to respond to the petition and prepare for the hearing. The court may shorten or lengthen the extension granted under Tex. Fam. Code § 262.201(a-3) if the parent and the appointed attorney agree in writing. If the court postpones the full adversary hearing, the court shall extend a temporary restraining order issued by the court for the protection of the child until the date of the rescheduled full adversary hearing. Tex. Fam. Code § 262.201(a-3).

3. Burden/Standard of Proof

Findings must be based on sufficient evidence to satisfy a person of ordinary prudence and caution. Tex. Fam. Code § 262.201(b).

Special Issue: Numerous studies indicate that African American children make up about 12 percent of the child population in Texas, but account for almost 28 percent of the children removed from their homes due to allegations of abuse and neglect. Disproportionality can result from cultural, institutional and personal biases which influence decision-making processes from removal to reunification or termination. According to data collected by DFPS, African American children are more likely to be removed, are less likely to be reunified, and spend longer waiting to be adopted. For more information regarding disproportionality, please see the chapter later in this Bench Book.

4. Required Findings if Child to Remain in Care

Danger to Physical Health and Safety

There was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child. Tex. Fam. Code § 262.201(b)(1).

Urgent Need to Protect

The urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal. Tex. Fam. Code § 262.201(b)(2).

Special Issue: In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who:

- has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or
- has sexually abused another child. Tex. Fam. Code § 262.201(d).

Reasonable Efforts

Reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home. Tex. Fam. Code § 262.201(b)(3).

5. Court Actions/Orders if Child to Remain in Care

Issue an Appropriate Temporary Order

A temporary order rendered under Tex. Fam. Code Chapter 262 is valid and enforceable until properly superseded by a court with jurisdiction to do so. A court to which the suit has been transferred may enforce by contempt or otherwise a temporary order properly issued under this chapter. Tex. Fam. Code § 262.204.

Admonish and Notify Parents

Inform each parent in open court that parental and custodial rights and duties may be subject to restriction or termination unless the parent is willing and able to provide a safe environment for the child. Tex. Fam. Code § 262.201(c).

Before the commencement of the full adversary hearing, the court must inform each parent not represented by an attorney of:

1) the right to be represented by an attorney; and
2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. Tex. Fam. Code § 262.201(a-1).

Order Placement with Non-Custodial Parent or Relative

Unless it is not in the best interest of the child, place a child who has been removed from the child's custodial parent with the child's noncustodial parent or another relative of the child if placement with the noncustodial parent is not appropriate. Tex. Fam. Code § 262.201(e).

Render Protective Order

If the court finds that the child requires protection from family violence by a member of the child's family or household, the court shall render a protective order for the child under Tex. Fam. Code Chapter 105. Tex. Fam. Code § 262.205(c)(1).

Set Status Hearing

Although not statutorily required, the status hearing date is usually set at the adversary hearing and open-court notice to parties can be given.

Special Issue: Courts may consider setting the Status, Initial Permanency, and Final Hearings at the start of the case as it helps provide parents with notice of future hearings.

Also, courts may want to inquire whether the following forms are completed:

- Caregiver Resource Form 2625, which is designed to:
  - instruct the parents, or other person having legal custody of the child, to identify three individuals who could be relative caregivers or designated caregivers; and
  - inform the parent or other person how to submit the form to DFPS or other agency either in person or by fax or email. Tex. Fam. Code § 261.307(a)(2).
- Service Authorization Form 2054, which is required before services may be rendered.
- Family Information Form 2626, which is filled out by the parent or caregiver to provide information about the child and child's family. It includes questions about the child's medical history

D. Hearing When Child Not in Possession of DFPS

DFPS can file a suit requesting possession of a child after notice and a hearing. The suit must be supported by an affidavit sworn to by a person with personal knowledge and stating facts that satisfy the burden of proof. Tex. Fam. Code § 262.113.

1. When Must Hearing be Held

In a suit requesting possession of a child after notice and hearing, the suit shall be promptly set for hearing. See Tex. Fam. Code § 262.205(a).

The court may, for good cause shown, postpone the full adversary hearing for not more than seven days from the date of the parent attorney's appointment to provide the attorney

time to respond to the petition and prepare for the hearing. The court may shorten or lengthen the extension granted under Tex. Fam. Code § 263.201(a-3) if the parent and the appointed attorney agree in writing. If the court postpones the full adversary hearing, the court shall extend a temporary restraining order issued by the court for the protection of the child until the date of the rescheduled full adversary hearing. Tex. Fam. Code § 263.201(a-3).

2. Burden/Standard of Proof

Findings must be based on sufficient evidence to satisfy a person of ordinary prudence and caution that:

- reasonable efforts have been made to prevent or eliminate the need to remove the child from the child's home; and
- allowing the child to remain in the home would be contrary to the child's welfare. Tex. Fam. Code § 262.205(b).

3. Court Actions/Orders if Child is Placed in Care

Issue an Appropriate Temporary Order

A temporary order rendered under Tex. Fam. Code Chapter 262 is valid and enforceable until properly superseded by a court with jurisdiction to do so. A court to which the suit has been transferred may enforce by contempt or otherwise a temporary order properly issued under this chapter. Tex. Fam. Code § 262.204.

Admonish and Notify Parents

Inform each parent in open court that parental and custodial rights and duties may be subject to restriction or termination unless the parent is willing and able to provide a safe environment for the child. Tex. Fam. Code § 262.201(c).

Before the commencement of the full adversary hearing, the court must inform each parent not represented by an attorney of:

- the right to be represented by an attorney; and
- if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. Tex. Fam. Code § 262.201(a-1).

Order Placement with Non-Custodial Parent or Relative

Unless it is not in the best interest of the child, place a child who has been removed from the child's custodial parent with the child's noncustodial parent or another relative of the child if placement with the noncustodial parent is not appropriate. Tex. Fam. Code § 262.201(e).

Render Protective Order

If the court finds that the child requires protection from family violence by a member of the child's family or household, the court shall render a protective order for the child under Tex. Fam. Code Chapter 105. Tex. Fam. Code § 262.205(c)(1).

Set Status Hearing

Although not statutorily required, the status hearing date is usually set at the adversary hearing and open-court notice to parties can be given.

Special Issue: Some judges find it is good practice to set all hearing dates at the start of the case.

Ensure Child Placement Resources Form is Complete

The child placement resources form should:

- instruct the parents, or other person having legal custody of the child, to identify three individuals who could be relative caregivers or designated caregivers; and
- inform the parent or other person how to submit the form to DFPS or other agency either in person or by fax or email. Tex. Fam. Code § 261.307(a)(2).

E. If Court Does Not Remove or Continue DFPS Conservatorship

Both statute and case law encourage the use of alternatives to removal as long as the child is protected. See Bench Book chapter entitled Alternatives to Removal. If the court orders the return of the child to the parent or does not remove the child, the same alternatives are available to the court.

F. Mandatory Appointment of Attorney for Parent

During the 83rd Legislative Session, the Texas Legislature clarified the circumstances when an attorney shall be appointed for a parent. When DFPS files a petition requesting termination or seeking conservatorship of a child, the court must appoint an attorney for the following persons:

- an indigent parent who responds in opposition to either termination of parental rights or to the appointment of DFPS as managing conservator, Tex. Fam. Code § 107.013(a)(1);
- a parent served by publication, Tex. Fam. Code § 107.013(a)(2);
- an alleged father who failed to register with paternity registry and whose identity or location is unknown, Tex. Fam. Code § 107.013(a)(3); and
- an alleged father who registered with the paternity registry but cannot be personally served, Tex. Fam. Code § 107.013(a)(4).

The court may appoint one attorney for both parents if they are both entitled and their interests are not in conflict. Tex. Fam. Code § 107.013(b).

The parent must file an affidavit of indigence per Tex. R. Civ. P. 145(b) before appointment of an attorney pursuant to Tex. Fam. Code § 107.013(d), however, if DFPS has alleged grounds for termination of parental rights under Tex. Fam. Code § 161.003(b) based on inability to care for the child, the court must appoint an attorney when the petition is filed and without regard to opposition or indigence.

G. Transfer

On a motion of any party or the court's own motion, the court that rendered the temporary order shall:

- transfer the suit to the court of continuing, exclusive jurisdiction, if any;
- order transfer of the suit from the court of continuing, exclusive jurisdiction, if grounds exist for mandatory transfer; or
- order transfer of the suit to the court having venue, if grounds exist for transfer based on improper venue. Tex. Fam. Code § 262.203(a).

A motion to transfer relating to a suit filed under Tex. Fam. Code Chapter 262 may be filed separately from the petition and is timely filed while the case is pending. Tex. Fam. Code § 262.203(b).

When Transfer is Discretionary

A court exercising jurisdiction under Tex. Fam. Code Chapter 262 is not required to transfer the suit to a court in which a parent has filed a suit for dissolution of marriage before a final order for the protection of the child has been rendered under Tex. Fam. Code Chapter 263. Tex. Fam. Code § 262.203(c).

H. Placement with Relatives or Designated Caregiver

1. Before the Adversary Hearing

DFPS must:

- evaluate each person listed on the child placement resources form to determine who would be most the appropriate substitute caregiver;
- complete a home study of the most appropriate caregiver, Tex. Fam. Code § 262.114(a); and
- conduct background and criminal history checks of the relatives or other designated individuals identified as potential relatives or designated caregivers on the child placement resources form. CPS Handbook § 2544.

DFPS may place the child with the relative or designated individual before conducting the background and criminal history check or home study. DFPS must provide an informational manual to the relative or other designated caregiver at the time of the child's placement. Tex. Fam. Code § 261.3071 and Tex. Fam. Code § 262.114(b).

2. At the Adversary Hearing

DFPS must, after redacting any social security numbers, file with the court:

- a copy of each proposed child placement resources form;
- a copy of any completed home study; and
- the name of the relative or other designated caregiver, if any, with whom the child has been placed. Tex. Fam. Code § 262.114(a-1).

If the child has NOT been placed by the time of the full adversary hearing, DFPS shall file with the court:

- a statement that explains the reasons why DFPS has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and,
- the actions DFPS is taking, if any. Tex. Fam. Code § 262.114(a-2).

DFPS may file with the court the temporary visitation schedule developed pursuant to Tex. Fam. Code § 262.115(d). The court may render any necessary order regarding the temporary visitation schedule. Tex. Fam. Code § 262.115(e).

3. Further Consideration

DFPS must consider placing a child who has previously been in the managing conservatorship of DFPS with a foster parent with whom the child previously resided if DFPS determines that placement of the child with a relative or designated caregiver is not in the child's best interest and the placement is available and in the child's best interest. Tex. Fam. Code § 262.114(c).

I. Aggravated Circumstances

If the court finds aggravated circumstances, it may:

- waive the requirement:
  - of a service plan; and
  - to make reasonable efforts to return the child to a parent; and
- accelerate the trial schedule. Tex. Fam. Code § 262.2015(a).

To view the list of aggravated circumstances, see Tex. Fam. Code § 262.2015.

The court must also:

- find that reasonable efforts to make it possible for the child to safely return home are not required;
- set and conduct the initial permanency hearing within 30 days of making this finding; and
- set the final hearing. (No required time frame other than before dismissal date.) Tex. Fam. Code § 262.2015(c) and (d).

STATUS HEARING

Legal Overview of Status Hearing

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 263. Review of Placement of Children under Care of Department of Family and Protective Services
Subchapter C. Status Hearing

The status hearing focuses on the child's status and service plan. The status hearing is an opportunity for the judge and other parties to review the service plan, but it is generally not considered an opportunity to re-litigate whether the child should have been placed in DFPS's care.

A. Status Hearing is Mandatory

- The status review hearing must be held no later than 60 days after DFPS has been appointed temporary managing conservator

B. Mandatory Findings

- DFPS has used due diligence to locate all necessary persons
- Parties present have provided absent parent identification information
- Plan identifies goals and reasonable efforts to enable parents to achieve goals
- Parents have been consulted, reviewed, and understand service plan
- Medical consenter has been identified

C. Court Shall Advise/Warn Parents

- Advise the parties that service plan progress will be reviewed at subsequent hearings
- Warn parents that rights and duties may be restricted if they are unwilling and unable to provide for the child
- Warn each parent not represented by an attorney of the right to be represented by an attorney and, if the parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney

D. Court Shall Review Service Plan

- The service plan must be filed no later than 45 days after DFPS is appointed temporary managing conservator
- Contents of the service plan
- The service plan must provide additional information for parents when a child is under 2 years of age
- The service plan does not have to be approved by the court
- The court may order implementation of the service plan

E. Court Shall Review Visitation Plan

F. Child Placement Resources Form Required

G. Permanency Planning Meetings

A. Status Hearing is Mandatory

1. Hearing is Mandatory

The status hearing is mandatory unless the court holds an initial permanency hearing under Tex. Fam. Code § 262.2015 (aggravated circumstances) before the date a status hearing is required. Tex. Fam. Code § 263.201(b).

2. Must Be Held No Later Than 60th Day After Temporary Managing Conservatorship Order

Not later than the 60th day after the date the court renders a temporary order appointing DFPS as temporary managing conservatorship of a child, the court shall hold a status hearing to review the child's status and the service plan developed for the child. Tex. Fam. Code § 263.201(a).

B. Mandatory Findings

Tex. Fam. Code Chapter 263 does not list persons who must receive notice of the status hearing, only that if all parties entitled to citation and notice were not served, the court shall make findings as to whether:

- DFPS or other agency has exercised due diligence to locate all necessary persons, including an alleged father of the child, regardless of whether the alleged father is registered with the paternity registry under Tex. Fam. Code § 160.402. Note: Since 2011, DFPS is required to file a report under Tex. Fam. Code § 263.007 detailing its efforts to identify, locate, and provide information to each adult described by Tex. Fam. Code § 262.1095(a). Tex. Fam. Code § 263.202(f) requires that the court to review the report and order DFPS to make further efforts, if warranted. Tex. Fam. Code §§ 263.202(f), 262.1095(a), and 263.007.
- the child and each parent, alleged father, or relative of the child before the court have furnished to DFPS all available information necessary to locate another absent parent, alleged father, or relative of the child through the exercise of due diligence. Tex. Fam. Code § 263.202(a).
- a plan that has the goal of returning the child to the parent adequately ensures that reasonable efforts are made to enable the child's parents to provide a safe environment for the child, and under new Tex. Fam. Code § 263.202(g), the court shall give child's parents the opportunity to comment on the service plan. Tex. Fam. Code § 263.202(g).
- the parents have reviewed and understand the plan, the plan is reasonably tailored to address any specific issues identified by DFPS or other agency; and the child's parents and the representative of DFPS or other agency have signed the plan. Tex. Fam. Code § 263.202(b)(1) and (2).
- the court has identified the individual who has the right to consent to medical treatment for the child under Tex. Fam. Code § 266.003. Tex. Fam. Code § 263.202(e).
- The court is directed to inquire at the status hearing whether parents or other parties have provided information necessary to locate an alleged father, an absent parent, or a relative of the child. As usual, it is left to the court to decide what action, if any should be taken in response to a negative answer.

Since legislative changes made in 2011, the court is required, after reviewing and making any necessary modifications, to incorporate the service plan into the orders of the court and may render additional appropriate orders to implement or require compliance with the plan. Tex. Fam. Code § 263.202(b-1).

Special Issue: Courts should consider whether DFPS has involved counsel for the child and the parent has substantial input as to what services are appropriate to help the family reunify and ensure the child's well-being. Courts should also consider including language which takes into account the individualized needs and circumstances of the family and the reasons the child was removed rather than the use of boilerplate language.

C. Court Shall Advise/Warn Parents

1. Service Plan Progress Shall be Reviewed at All Subsequent Hearings

The court shall advise the parties that progress under the service plan will be reviewed at all subsequent hearings, including a review of whether the parties have acquired or learned any specific skills or knowledge stated in the service plan. Tex. Fam. Code § 263.202.

2. Court Shall Warn Parents

The court is required to inform each parent in open court that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents demonstrates a willingness and ability to provide the child with a safe environment. Tex. Fam. Code § 263.006 and Tex. Fam. Code § 263.202(b)(2).

3. Advise Parent of Appointment of Attorney

Tex. Fam. Code § 263.203(a) was added by the 82nd Legislature to require that the court advise the parties of the provisions regarding the mandatory appointment of an attorney ad litem under Tex. Fam. Code Subchapter A, Chapter 107, and shall appoint an attorney ad litem to represent the interests of any person eligible if the appointment is required by that subchapter. Tex. Fam. Code § 263.203(a).

During the 83rd Legislature, new Tex. Fam. Code § 263.0061 was added requiring notice to parents of right to counsel. At the status hearing required by Tex. Fam. Code Chapter 263 Subchapter C and at each permanency hearing by Tex. Fam. Code Chapter 263 Subchapter D held after the date the court renders a temporary order appointing DFPS as temporary managing conservator of a child, the court shall inform each parent not represented by an attorney of:

1) the right to be represented by an attorney; and

2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. Tex. Fam. Code § 263.0061(a).

If a parent claims indigence and requests the appointment of an attorney in a proceeding under Tex. Fam. Code Chapter 263 Subchapter C and Tex. Fam. Code Chapter 263 Subchapter D, the court shall require the parent to complete and file with the court an affidavit of indigence. The court may hear evidence to determine whether the parent is indigent. If the court determines the parent is indigent, the court shall appoint an attorney to represent the parent. Tex. Fam. Code § 263.0061(b).

4. Court Shall Review Visitation Plan

Court shall review the visitation plan, taking into consideration the factors specified in Tex. Fam. Code § 263.107(c). Tex. Fam. Code § 263.108(a).

The court may modify, or order DFPS to modify, an original or amended visitation plan at any time. Tex. Fam. Code § 263.108(b).

D. Court Shall Review Service Plan

1. Service Plan Shall be Filed

The service plan is the most important issue at the status hearing.

DFPS must file a service plan not later than the 45th day after the date the court renders a temporary order appointing DFPS as temporary managing conservator of a child. Tex. Fam. Code § 263.101.

Tex. Fam. Code § 263.103 was amended by the 82nd Legislature to clarify that the service plan shall be developed jointly with the parents. If the parents refuse to or are unable to participate, DFPS is required to file the service plan with the court and have the court order that it is effective. The service plan remains in effect until amended by the court. Tex. Fam. Code § 263.103.

Tex. Fam. Code § 263.104 was amended to clarify that any amendments to the service plan shall be developed jointly with the parents. If the parents refuse to or are unable to participate, DFPS is required to file the service plan with the court for it to become effective. The parent is allowed to file a motion with the court at any time to request review and modification of the amended service plan. Tex. Fam. Code § 263.104. A court can modify a service plan at any time. Tex. Fam. Code § 263.106.

2. Contents of the Service Plan

The service plan must:

- be specific;
- in writing and in a language that the parents understand, or made otherwise available;
- be prepared by DFPS or other agency in conference with the child's parents;
- state appropriate deadlines;
- state whether the goal of the plan is:
  - return of the child to the child's parents;
  - termination of parental rights and placement of the child for adoption; or
  - because of the child's special needs or exceptional circumstances, continuation of the child's care out of the child's home;
- state the steps necessary to:
  - return the child to the child's home if the placement is in foster care;
  - enable the child to remain in the child's home with the assistance of a service plan if placement is in the home under DFPS's or other agency's supervision; or
  - otherwise provide a permanent safe placement for the child;
- state the actions and responsibilities that are necessary for the child's parents to take to achieve the plan goal during the period of the service plan and the assistance to be provided to the parents by DFPS or other authorized agency toward meeting that goal;
- state any specific skills or knowledge that the child's parents must acquire or learn, as well as any behavioral changes the parents must exhibit, to achieve the plan goal;
- state the actions and responsibilities that are necessary for the child's parents to take to ensure that the child attends school and maintains or improves the child's academic compliance;
- state the name of the person with DFPS or other agency whom the child's parents may contact for information relating to the child if other than the person preparing the plan; and
- prescribe any other term or condition that DFPS or other agency determines to be necessary to the service plan's success. Tex. Fam. Code § 263.102(a).

The service plan shall include the following statement:

TO THE PARENT: THIS IS A VERY IMPORTANT DOCUMENT. ITS PURPOSE IS TO HELP YOU PROVIDE YOUR CHILD WITH A SAFE ENVIRONMENT WITHIN THE REASONABLE TIME PERIOD SPECIFIED IN THE PLAN. IF YOU ARE UNWILLING OR UNABLE TO PROVIDE YOUR CHILD WITH A SAFE ENVIRONMENT, YOUR PARENTAL AND CUSTODIAL RIGHTS MAY BE RESTRICTED OR TERMINATED OR YOUR CHILD MAY NOT BE RETURNED TO YOU. THERE WILL BE A COURT HEARING AT WHICH A JUDGE WILL REVIEW THIS SERVICE PLAN. Tex. Fam. Code § 263.102(b).

3. Service Plans for Children Under 2 Years of Age

DFPS shall consult with relevant professionals to determine the skills or knowledge that the parents of a child under two years of age should learn or acquire to provide a safe placement for the child. DFPS shall incorporate those skills and abilities into DFPS's service plans, as appropriate. Tex. Fam. Code § 263.102(f).

To the extent that funding is available, the service plan for a child under two years of age may require therapeutic visits between the child and the child's parents supervised by a licensed psychologist or another relevant professional to promote family reunification and to educate the parents about issues relating to the removal of the child. Tex. Fam. Code § 263.102(g).

4. Effective Date

The service plan takes effect when:

- the child's parents and the appropriate representative of DFPS or other authorized agency sign the plan; or
- the court issues an order giving effect to the plan without the parents' signatures. Tex. Fam. Code § 263.103(d).

The plan does not have to be formally approved by the court to become effective.

The plan is in effect until amended by the court or is superseded by a new plan negotiated between the parents and DFPS. Tex. Fam. Code § 263.103(e); Tex. Fam. Code § 263.104. A court can modify a service plan at any time. Tex. Fam. Code § 263.106.

5. Court Implementation of Service Plan

The court may render appropriate orders to implement or require compliance with an original or amended service plan. Tex. Fam. Code § 263.106.

Special Issue: It should be noted that although a service plan may be in effect, it is not a court order. The court is responsible for rendering appropriate orders to require such compliance as is necessary for the parents to successfully achieve the plan's goals.

E. Court Shall Review Visitation Plan

During the 83rd Legislative Session, substantial changes were made to the Texas Family Code regarding visitation between parents and children involved with DFPS.

1. Visitation Plan

Visitation plans apply only to a child in the temporary managing conservatorship of DFPS for whom the goal of DFPS is reunification of the child with the child's parent. Tex. Fam. Code § 263.107(a).

Not later than the 30th day after the date DFPS is named temporary managing conservator of a child, DFPS, in collaboration with each parent of the child, shall develop a visitation plan. Tex. Fam. Code § 263.107(b).

In determining the frequency and circumstances of visitation under Tex. Fam. Code § 263.107, DFPS must consider:

1) The safety and best interest of the child;
2) The age of the child;
3) The desires of each parent regarding visitation with the child;
4) The location of each parent and the child; and
5) The resources available to DFPS, including the resources to:
    a) ensure that visitation is properly supervised by a DFPS employee or an available and willing volunteer DFPS determines suitable after conducting a background and criminal history check; and
    b) provide transportation to and from visits. Tex. Fam. Code § 263.107(c).

Not later than the 10th day before the date of a status hearing under Tex. Fam. Code § 263.201, DFPS shall file with the court a copy of the visitation plan developed under Tex. Fam. Code § 263.107. Tex. Fam. Code § 263.107(d).

DFPS may amend the visitation plan on mutual agreement of the child's parents and DFPS or as DFPS considers necessary to ensure the safety of the child. An amendment to the visitation plan must be in the child's best interest. DFPS shall file a copy of any amended visitation plan with the court. Tex. Fam. Code § 263.107(e).

A visitation plan developed under Tex. Fam. Code § 263.107 may not conflict with a court order relating to possession of and access to the child. Tex. Fam. Code § 263.107(f).

2. Review of Visitation Plan; Modification

At the first hearing held under Tex. Fam. Code Chapter 263 after the date an original or amended visitation plan is filed with the court under Tex. Fam. Code § 263.107, the court shall review the visitation plan, taking into consideration the factors listed under Tex. Fam. Code § 263.107(c). Tex. Fam. Code § 263.108(a).

The court may modify, or order DFPS to modify, an original or amended visitation plan at any time. Tex. Fam. Code § 263.108(b).

A parent who is entitled to visitation under a visitation plan may at any time file a motion with the court to request review and modification of an original or amended visitation plan. Tex. Fam. Code § 263.108(c).

3. Court Implementation of Visitation Plan

After reviewing an original or amended visitation plan, the court shall render an order regarding a parent's visitation with a child that the court determines appropriate. Tex. Fam. Code § 263.109(a).

If the court finds that visitation between a child and a parent is not in the child's best interest, the court shall render an order that:

1. States the reasons for finding that visitation is not in the child's best interest; and
2. Outlines specific steps the parent must take to be allowed to have visitation with the child. Tex. Fam. Code § 263.109(b).

If the order regarding visitation between a child and a parent requires supervised visitation to protect the health and safety of the child, the order must outline specific steps the parent must take to have the level of supervision reduced. Tex. Fam. Code § 263.109(c).

F. Child Placement Resources Form

The court shall require all parties present at the status hearing to file a child placement resources form, if they have not already done so. Tex. Fam. Code § 263.201(c).

1. Notice, Service and Family Plan of Service Considerations at Status Hearing

Tex. Fam. Code § 263.202 was modified by the 82nd Legislature to clarify that the court shall review citation and notice on all persons entitled to notice of the suit or notice of the hearing. As per Tex. Fam. Code § 263.202(f), the court is required to review the report filed by DFPS under Tex. Fam. Code § 263.007 regarding its diligent efforts to locate all adult relatives and may order DFPS to take additional efforts if DFPS has not made sufficient efforts. If child placement resource forms have not been submitted by the persons in court, the court shall require those persons to submit forms. Additionally, the court should review the service plan and provide the parents with an opportunity to comment on the service plan. The court should make findings regarding whether it is reasonably tailored to address specific issues identified by DFPS and whether the child's parents and the representative of DFPS or other agency have signed the plan. The court is permitted to make appropriate modifications to the service plan. Accordingly, if the service plan is a standard fill-in-the-blank form, not tailored to address the specific problems/safety risks with the parents, the court can modify the plan to make it more tailored to the specific needs of the family. Tex. Fam. Code § 263.202.

G. Permanency Planning Meetings

During the 83rd Legislative Session, the Texas Legislature amended Tex. Fam. Code Chapter 263 to require DFPS to hold permanency planning meetings. These meetings are to occur 45 days and 5 months after DFPS is appointed TMC.

1. Timing of Permanency Planning Meetings – At Least One Required Prior to Status Hearing

DFPS shall hold a permanency planning meeting for each child for whom DFPS is appointed temporary managing conservator:

- Not later than the 45th day after the date DFPS is appointed TMC of the child; and
- Not later than five months after the date DFPS is named TMC of the child. Tex. Fam. Code § 263.009(a).

2. 5-Month Planning Meeting Requirements

At the five-month permanency planning meeting, DFPS shall:

- Identify any barriers to achieving a timely permanent placement for the child; and
- Develop strategies and determine actions that will increase the probability of achieving a timely permanent placement for the child. Tex. Fam. Code § 263.009(b).

3. Attendees at and Notice of Permanency Planning Meetings

The five-month permanency planning meeting and any subsequent permanency planning meeting may be conducted as a multidisciplinary permanency planning meeting if DFPS determines that a multidisciplinary permanency planning meeting will assist DFPS in placing the child with an adult caregiver who will permanently assume legal responsibility of the child and facilitate the child's exit from the conservatorship of DFPS. Tex. Fam. Code § 263.009(c).

Except as provided by Tex. Fam. Code § 263.009(e), DFPS shall make reasonable efforts to include the following persons in each multidisciplinary permanency planning meeting and notify those persons of the meeting:

1. The child, if the child is at least seven years of age;
2. The child's attorney ad litem;
3. The child's guardian ad litem;
4. Any court-appointed volunteer advocate for the child;
5. The child's substitute care provider and any child-placing agency involved with the child;
6. Each of the child's parents and the parents' attorney, unless:
    a. The parent cannot be located;
    b. The parent has executed an affidavit of relinquishment of parental rights; or
    c. The parent's parental rights have been terminated;
7. Each attorney ad litem appointed to represent the interests of a parent in the suit; and
8. Any other person DFPS determines should attend the permanency planning meeting. Tex. Fam. Code § 263.009(d).

DFPS is not required to include a person listed in Tex. Fam. Code § 263.009(d) in a multidisciplinary permanency planning meeting or to notify that person of a meeting if DFPS or its authorized designee determines that the person's presence at the meeting may have a detrimental effect on:

1. The safety or well-being of another participant in the meeting; or
2. The success of the meeting because a parent or the child has expressed an unwillingness to include that person in the meeting. Tex. Fam. Code § 263.009(e).

DFPS shall give the notice required by Tex. Fam. Code § 263.009(d) by email if possible. Tex. Fam. Code § 263.009(f).

PERMANENCY HEARING

Legal Overview of Permanency Hearing

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 263. Review of Placement of Children under Care of Department of Family and Protective Services
Subchapter D. Permanency Hearings

Permanency review hearings examine progress made by the parties since the last hearing and provide an opportunity for correction and revision of the permanency or case plan.

A. Permanency Hearing is Mandatory

- First Permanency hearing must be held no later than 180th day after DFPS is appointed as Temporary Managing Conservator
- A subsequent permanency hearing must be held no later than the 120th day after the last permanency hearing

B. Notice is Mandatory

Parties are entitled to at least 10 days notice and are entitled to present evidence and be heard at the hearing

C. Permanency Plan for Child is Required

- DFPS must prepare a permanency plan for each child in temporary managing conservatorship
- DFPS must give a copy to each person entitled to notice
- The permanency plan must contain required information
- The permanency plan must include concurrent permanency goals
- APPLA: Another Planned Permanent Living Arrangement

D. Permanency Progress Report is Required; Contents

- Must be filed with court at least 10 days prior to hearing
- Copy must be provided to parties at least 10 days prior to hearing

- Must contain DFPS recommendations regarding continuation or dismissal
- Response to report is allowed up to 3 days prior to hearing

E. Procedural and Due Process Issues

- Identify all persons or parties present or failing to appear
- Review DFPS attempts to locate parties
- Review the efforts of parties in providing locating information for absent parent(s)
- Evaluate DFPS efforts to identify relatives to care for the child
- Determine whether the summary of medical care was provided

F. Mandatory Actions, Findings and Considerations

- Return or place the child
- Evaluate parties' compliance with temporary orders and service plan
- Determine further plans, services, and temporary orders
- Review service plan, permanency report, and other submitted information
- Determine date of dismissal
- Set a final hearing

G. Mandatory Child-Specific Considerations

- Child's presence at hearing is mandatory
- Consult with child
- Determine whether the placement is appropriate and plans and services are being met
- If the child is committed to the Texas Juvenile Justice Department, consider whether the child's needs are being met
- If the child is 16 years or older, consider a transition plan

H. Best Interest

- Prompt and permanent placement is presumed to be in the child's best interest
- Statutory factors should be considered
- Additional factors should be considered if child is 16 years of age or older

I. Medical Care and Consent; Judicial Review Required

- Medical care may only be provided to a child if a person authorized by the court consents
- DFPS may be the medical consenter
- Review a summary of the medical care received since the last hearing.

A. Permanency Hearing is Mandatory

1. Initial Permanency Hearing

The first permanency hearing must be held no later than the 180th day after the date the court renders a temporary order appointing DFPS as temporary managing conservator of a child. Tex. Fam. Code § 263.304(a).

2. Subsequent Permanency Hearing

If the judge decides at the first permanency hearing that the child cannot be safely returned home, another permanency hearing will be held to allow parents to continue with services and determine the progress parents have made, or decide if child's plan should be changed to adoption, or some other permanent arrangement outside the home. Tex. Fam. Code § 263.306.

A subsequent permanency hearing before entry of a final order shall be held not later than the 120th day after the date of the last permanency hearing in the suit. Tex. Fam. Code § 263.305.

The required findings and orders are the same for subsequent permanency hearings as for the initial permanency hearing. Tex. Fam. Code § 263.306.

B. Notice is Mandatory

The following persons are entitled to at least 10 days' notice and are entitled to present evidence and be heard at the hearing:

- DFPS;
- the foster parent, pre-adoptive parent, relative providing care, or the director of the group home where the child resides;
- each parent of the child;
- the managing conservator or guardian of the child;
- an attorney ad litem appointed for the child;
- a volunteer advocate appointed for the child;
- The child if:

  (A) the child is 10 years of age or older; or

  (B) the court determines it is appropriate for the child to receive notice; and

- any other person or agency named by the court to have an interest. Tex. Fam. Code § 263.301(b).

C. Permanency Plan for Child is Required

1. Permanency Plan

DFPS must prepare a permanency plan for each child. DFPS must give a copy of the plan to each person entitled to notice pursuant to Tex. Fam. Code § 263.301(b) not later than 10 days before the date of first permanency hearing. Tex. Fam. Code § 263.3025(a).

The permanency plan must contain information required by Tex. Fam. Code § 263.303 and DFPS shall modify the permanency plan as required by the circumstances and the needs of the child. Tex. Fam. Code § 263.3025(b) and Tex. Fam. Code § 263.3025(c).

2. Permanency Goals

The permanency plan must include concurrent permanency goals consisting of a primary goal and at least one alternative permanency goal. Tex. Fam. Code § 263.3025(d). Appropriate and legally recognized permanency goals include (in order of preference):

- reunification of the child with a parent or other individual from whom the child was removed. (Safe reunification with the biological parents or a suitable member of the family of origin is the preference; this includes symbolic relatives, defined as persons who have a significant, long-standing relationship with the child or the child's family. Relatives are usually in a better position to meet a child's need for belonging, stability and continuity of care than unrelated caregivers.);
- termination of parental rights and adoption of the child by a relative or other suitable individual;
- award of permanent managing conservatorship of the child to a relative or other suitable individual; or
- another planned, permanent living arrangement for the child (APPLA). Tex. Fam. Code § 263.3026(a).

If the goal of DFPS's permanency plan for a child is to find APPLA for the child, DFPS must document a compelling reason why the other permanency goals are not in the child's best interest. Tex. Fam. Code § 263.3026(b).

Special Issue: Although an APPLA anticipates that the child will remain in state custody until age 18, it is not simply long-term foster care. Like the other options, it must involve an adult making a permanent commitment to the child, but in a slightly different context than when permanent managing conservatorship is granted to the adult. A permanent commitment in the APPLA context means the child will remain in state custody until age 18 and the adult will maintain an ongoing relationship with the child even after the child turns 18. Thus, even if a child's only permanency option is an APPLA, DFPS is still obligated to continue trying to identify a family or adult who will make a permanent commitment to the child, and at every placement review hearing, courts must evaluate DFPS efforts in this regard.

D. Permanency Progress Report is Required; Contents

1. Filing the Permanency Progress Report

Unless the court orders a different filing period, a permanency progress report must be filed with the court and a copy provided at least 10 days prior to the hearing to:

- each party;
- the child's attorney ad litem;
- the child's guardian ad litem; and
- the child's volunteer advocate. Tex. Fam. Code § 263.303(a).

2. Contents of the Permanency Progress Report

The report must:

- recommend that the suit be dismissed; or
- recommend that the suit continue, and:
  - identify the date for dismissal of the suit under Tex. Fam. Code Chapter 263;
  - provide:
    - the name of any person entitled to notice who has not been served;
    - a description of the efforts by DFPS or another agency to locate and request service of citation; and
    - a description of each parent's assistance in providing information necessary to locate an unserved party;
- evaluate the parties' compliance with temporary orders and with the service plan;

- evaluate whether the child's placement in substitute care meets the child's needs and recommend other plans or services to meet the child's special needs or circumstances;
- describe the permanency plan for the child and recommend actions necessary to ensure that a final order consistent with that permanency plan, including the concurrent permanency goals contained in that plan, is rendered before the date for dismissal of the suit;
- if the child is 16 or older, identify the services needed to assist the child in the transition to adult life; and,
- if the child is committed to the Texas Juvenile Justice Department or released under the supervision of the Texas Juvenile Justice Department:
    - evaluate whether the child's needs for treatment and education are being met;
    - describe, using information provided by the Texas Juvenile Justice Department, the child's progress in any rehabilitation program administered by the Texas Juvenile Justice Department; and
    - recommend other plans or services to meet the child's needs. Tex. Fam. Code § 263.303(b).

3. Filing a Response

A response to the report may be filed up to 3 days prior to hearing. Tex. Fam. Code § 263.303(c).

E. Procedural and Due Process Issues

At each permanency hearing, the court shall:

- Identify all persons or parties present at the hearing or those given notice but failing to appear. Tex. Fam. Code § 263.306(a)(1).

- Review the efforts of DFPS or another agency in:
    - attempting to locate all necessary persons;
    - requesting service of citation; and
    - obtaining the assistance of a parent in providing information necessary to locate an absent parent, alleged father, or relative of the child. Tex. Fam. Code § 263.306(a)(2).

- Inform each parent not represented by an attorney of:
  - The right to be represented by an attorney; and
  - If a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. Tex. Fam. Code § 263.0061.

- Review the efforts of each custodial parent, alleged father, or relative of the child before the court in providing information necessary to locate another absent parent, alleged father, or relative of the child. Tex. Fam. Code § 263.306(a)(3).

- Evaluate DFPS's efforts to identify relatives who could provide the child with a safe environment, if the child is not returned to a parent or another person or entity entitled to service. Tex. Fam. Code § 263.306(a)(6).

- Determine whether DFPS has provided the summary of medical care required by Tex. Fam. Code § 266.007(a) and (b). The summary must include information regarding:

  1) The nature of any emergency medical care provided to the child and the circumstances necessitating emergency medical care, including any injury or acute illness suffered by the child;
  2) all medical and mental health treatment that the child is receiving and the child's progress with the treatment;
  3) any medication prescribed for the child, the condition, diagnosis, and symptoms for which the medication was prescribed, and the child's progress with the medication;
  4) for a child receiving psychotropic medication:
     a) any psychosocial therapies, behavior strategies, or other non-pharmacological interventions that have been provided to the child; and
     b) the dates since the previous hearing of any office visits the child had with the prescribing physician, physician assistant, or advanced practice nurse as required by Tex. Fam. Code § 266.011;
  5) the degree to which the child or foster care provider has complied or failed to comply with any plan of medical treatment for the child;
  6) any adverse reaction to or side effects of any medical treatment provided to the child;
  7) any specific medical condition of the child that has been diagnosed or for which tests are being conducted to make a diagnosis;
  8) any activity that the child should avoid or should engage in that might affect the effectiveness of the treatment, including physical activities, other medications, and diet; and

9) other information required by DFPS rule or by the court. Tex. Fam. Code § 266.007(a).

F. Mandatory Actions, Findings and Considerations

1. Place/Return Child

The court shall return the child to the parent or parents if the child's parent or parents are willing and able to provide the child with a safe environment and the return of the child is in the child's best interest. Tex. Fam. Code § 263.306(a)(4).

OR

The court shall place the child with a person or entity, other than a parent, entitled to service under Tex. Fam. Code Chapter 102 if the person or entity is willing and able to provide the child with a safe environment and the placement of the child is in the child's best interest. Tex. Fam. Code § 263.306(a)(5).

2. Evaluate Temporary Orders

The court shall evaluate the parties' compliance with temporary orders and the service plan. Tex. Fam. Code § 263.306(a)(7).

The court shall determine plans, services, and further temporary orders necessary to ensure that a final order is rendered before the date for the dismissal of the suit. Tex. Fam. Code § 263.306(a)(14).

3. Review Service Plan

The court shall review the service plan, permanency report, and other information submitted at the hearing to:

- determine:
  - the safety of the child;
  - the continuing necessity and appropriateness of the placement;
  - the extent of compliance with the case plan;
  - the extent of progress that has been made toward alleviating or mitigating the causes necessitating the placement of the child in foster care; and

- whether DFPS has made reasonable efforts to finalize the permanency plan that is in effect for the child, including the concurrent permanency goals for the child; and

- project a likely date by which the child may be returned to and safely maintained in the child's home, placed for adoption, or placed in permanent managing conservatorship. Tex. Fam. Code § 263.306(b).

4. Review Visitation Plan

The court shall review any visitation plan or amended plan required under Tex. Fam. Code § 263.107 and render any orders for visitation the court determines necessary. Tex. Fam. Code § 263.306(a)(4).

5. Determine Date of Dismissal

The court shall determine the date for dismissal of the suit and give notice in open court to all parties of:

- the dismissal date;
- the date of the next permanency hearing; and
- the date the suit is set for trial. Tex. Fam. Code § 263.306(a)(13).

6. Set Final Hearing

The court shall set a final hearing on a date that allows the court to render a final order before the date for dismissal of the suit. Tex. Fam. Code § 263.304(b).

A party to the suit or an attorney ad litem for the child may seek a writ of mandamus to compel the court to comply with the duties imposed by this subsection. Tex. Fam. Code § 263.304(b).

G. Mandatory Child-Specific Considerations

During the permanency hearing, the court should determine whether the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living as well as the following considerations:

1. Child-Attendance is Mandatory

The child must attend each permanency hearing, unless specifically excused by the court. If the child is 4 years of age or older and if the court determines it is in the best interest of

the child, the court shall consult with the child in a developmentally appropriate manner regarding the child's permanency plan. Failure by the child to attend a hearing does not affect the validity of an order rendered at the hearing. Tex. Fam. Code § 263.302.

2. Court Actions/Orders

Determine whether the child continues to need substitute care. Tex. Fam. Code § 263.306(a)(11)(A).

Determine whether the child's current placement is appropriate for meeting the child's needs, including with respect to a child who has been placed outside of the state, whether that placement continues to be in the best interest of the child. Tex. Fam. Code § 263.306(a)(11)(B).

Determine whether other plans or services are needed to meet the child's special needs or circumstances. Tex. Fam. Code §263.306(a)(11)(C).

If child placed in institutional care, determine whether efforts have been made to ensure placement of the child in the least restrictive environment consistent with the best interest and special needs of the child. Tex. Fam. Code § 263.306(a)(12).

Identify an education decision-maker for the child if one has not been previously identified. Tex. Fam. Code § 263.306(a)(8).

Determine whether the child's education needs and goals have been identified and addressed. Tex. Fam. Code §263.306(b)(1)(D).

Review the medical care provided to the child as required by Tex. Fam. Code § 266.007. Tex. Fam. Code § 263.306(a)(8).

Ensure the child has been provided the opportunity, in a developmentally appropriate manner, to express the child's opinion on the medical care provided. Tex. Fam. Code § 263.306(a)(9).

For a child receiving psychotropic medication, determine whether the child has been:

- provided appropriate psychosocial therapies, behavior strategies, and other non-pharmacological interventions; and

- seen by the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days for purposes of the review required by Tex. Fam. Code § 266.011. Tex. Fam. Code § 263.306(10).

Review the child's medical care at each hearing and DFPS must provide a summary of the medical and mental health care provided to the child. Tex. Fam. Code § 266.007(a) and (b).

Special Issue: The court may make any orders it deems in the best interest of the child to move the child toward permanency. If DFPS is not moving appropriately toward permanency, the court should set timelines and tasks for DFPS to accomplish prior to the next hearing.

3. Placement Decisions

Tex. Fam. Code § 264.107 was amended in 2013 to require DFPS, when making placement decisions, to consult with the child's caseworker, attorney ad litem, and guardian ad litem and with any court-appointed volunteer advocate for the child, except when making an emergency placement that does not allow time for the required consultations. Tex. Fam. Code § 264.107(e).

4. Child Age 16 or Older

The court must ensure that if the child is 16 years or older, services are in place to assist the child in making the transition from substitute care to independent living if the services are available in the community. Tex. Fam. Code § 263.306(a)(13). In determining whether to adopt the permanency plan submitted by DFPS, the court should consider whether:

- the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living; and
- this transition is in the best interest of the child. Tex. Fam. Code § 263.306(c).

5. Texas Juvenile Justice Department (TDJJ)

A child committed to the TDJJ may attend a permanency hearing in person, by telephone, or by videoconference. Tex. Fam. Code § 263.302.

For a child committed to the TDJJ, the court shall determine whether the child's needs for treatment, rehabilitation, and education are being met. Tex. Fam. Code § 263.306(a)(15).

H. Best Interest

1. Presumption

The prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest. Tex. Fam. Code § 263.307(a).

2. Factors

The following factors should be considered by the court, DFPS, and other authorized agencies in determining whether the child's parents are willing and able to provide the child with a safe environment:

- the child's age and physical and mental vulnerabilities;
- the frequency and nature of out-of-home placements;
- the magnitude, frequency, and circumstances of the harm to the child;
- whether the child has been the victim of repeated harm after the initial report and intervention by DFPS or another agency;
- whether the child is fearful of living in or returning to the child's home;
- the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
- whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
- whether there is a history of substance abuse by the child's family or others who have access to the child's home;
- whether the perpetrator of the harm to the child is identified;
- the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;
- the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;
- whether the child's family demonstrates adequate parenting skills, including, providing the child and other children under the family's care with:
    - minimally adequate health and nutritional care;
    - care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;
    - guidance and supervision consistent with the child's safety;
    - a safe physical home environment;
    - protection from repeated exposure to violence even though the violence may not be directed at the child; and

- an understanding of the child's needs and capabilities; and
- whether an adequate social support system consisting of an extended family and friends is available to the child. Tex. Fam. Code § 263.307(b).

3. Child Age 16 or Older

The following guidelines should be considered by the court when determining whether to adopt the permanency plan submitted by DFPS:

- the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living; and
- this transition is in the best interest of the child. Tex. Fam. Code § 263.307(c).

I. Medical Care and Consent; Judicial Review Required

1. Medical Care and Treatment

Except in an emergency, medical care may not be provided to a child in foster care, unless the person authorized by court order consents to the medical care. Tex. Fam. Code § 266.004(a).

2. Medical Consenter

The court may designate DFPS as the medical consenter, but DFPS must within 5 business days file with the court and each party the name of an individual who will exercise the duty and responsibility of providing informed consent on behalf of DFPS. Tex. Fam. Code § 266.004(b)(2) and (c).

A person may not be authorized to consent to medical care provided to a foster child unless the person has completed a DFPS-approved training program related to informed consent and the provision of all areas of medical care as defined by Tex. Fam. Code § 266.001. Tex. Fam. Code § 266.004(h).

In 2013, the 83rd Texas Legislature amended Tex. Fam. Code § 266.004(h) regarding the required medical consenter training:

- The training required by Tex. Fam. Code § 266.004(h) must include training related to informed consent for the administration of psychotropic medication and the appropriate use of psychosocial therapies, behavior strategies, and other non-pharmacological interventions that should be considered before or concurrently

with the administration of psychotropic medications. Tex. Fam. Code § 266.004(h-1).

- Each person required to complete a training program under Tex. Fam. Code § 266.004(h) must acknowledge in writing that the person:
  1) Has received the training described by Tex. Fam. Code § 266.004(h-1);
  2) Understands the principles of informed consent for the administration of psychotropic medication; and
  3) Understands that non-pharmacological interventions should be considered and discussed with the prescribing physician, physician assistant, or advanced practice nurse before consent to the use of a psychotropic medication. Tex. Fam. Code § 266.004(h-2).

3. Consent by Child 16 Years of Age

A child who is at least 16 years of age may consent to the provision of medical care if the court determines that the child has the capacity to consent to medical care. Tex. Fam. Code § 266.010(a).

An attorney ad litem appointed for a child in a proceeding under Tex. Fam. Code Chapter 262 or Tex. Fam. Code Chapter 263 shall, for a child at least 16 years of age, advise the child of the child's right to consent to the child's own medical care under Tex. Fam. Code § 266.010. Tex. Fam. Code § 107.003(b)(3).

4. Judicial Review of Medical Care

The summary must include the following information:

- the nature of any emergency care provided and the circumstances that necessitated it;
- all treatment that the child has received and the progress of the treatment;
- any medication prescribed and for what it was prescribed and how it is working;
- extent to which the foster care provider has complied with treatment;
- any adverse reactions or side effects to treatment;
- any new diagnosis or tests being conducted for a diagnosis;
- any activity the child should avoid or engage in that affects treatment including physical activities, medications or diet; and
- any information required by the court or other rule. Tex. Fam. Code § 266.007(a).

FINAL HEARING

Legal Overview of Final Hearing

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 263. Review of Placement of Children under Care of Department of Family and Protective Services
Subchapter E. Final Order for Child under Department Care

Because of the need for permanency, the Family Code requires resolution of a case within one year, with a possible six-month extension if the court finds there are extraordinary circumstances and the extension is in the best interest of the child. The goal of the final hearing is the entry of a final order that identifies a permanency option or goal for the child and resolves the rights of all involved parties.

A. Time Limits Apply When Child is in Conservatorship

B. Case Must be Dismissed Within One Year

C. Court May Extend Dismissal Date if Extraordinary Circumstances

D. Monitored Return

- Monitored return cannot be longer than 180 days
- Must find that retaining jurisdiction is in the child's best interest
- Order DFPS to return the child
- Order DFPS to serve as the temporary managing conservator
- Order DFPS to monitor the placement

E. Final Hearing

- Burden in termination suit: Clear and convincing evidence
- Burden in conservatorship suit: Preponderance of the evidence
- Best interest determined by *Holley* factors
- It is a rebuttable presumption that a parent should be appointed as managing conservator
- It is a presumption that a parent should be appointed as possessory conservator

A. Time Limits Apply When Child is in Conservatorship

There is no time limit on the court's authority to maintain a case on the docket where DFPS is not appointed as temporary managing conservator. No time limits apply to the resolution of the "private" or "court ordered services" cases, because DFPS is not appointed the child's managing conservator.

Although the Family Code provisions regarding mandated hearings do not apply to these cases, courts may hold scheduled hearings on them in the same manner as the cases with a 12-month deadline. Theoretically, these cases might stay on a court's docket indefinitely.

B. Case Must be Dismissed Within One Year

Unless the court has commenced the trial on the merits or granted an extension under Tex. Fam. Code § 263.401(b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing DFPS as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by DFPS. Tex. Fam. Code § 263.401(a).

C. Court May Extend Dismissal Date if Extraordinary Circumstances

Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the 12-month period unless the court finds that extraordinary circumstances necessitate the child remaining in temporary managing conservatorship of DFPS and that continuing the appointment of DFPS as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the one-year period. Tex. Fam. Code § 263.401(b).

If the court retains the suit on the court's docket, the court shall render an order in which the court:

- schedules the new date on which the suit will be dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Tex. Fam. Code § 263.401(a);
- makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and

- sets the trial on the merits on a date not later than the new dismissal period. Tex. Fam. Code § 263.401(b).

Special Issue: Judges should consider if extensions are being granted because of a lack of community or judicial resources or to allow DFPS more time to establish reasonable efforts and evaluate whether this presents extraordinary circumstances that justify keeping a child in care. The lack of resources or reasonable efforts may indicate a systemic problem that could be addressed by the child welfare and judicial community so that children in foster care do not bear the burden of system inadequacies. Staying in care longer only to achieve the same result that would have been achieved at the original deadline may only serve to exacerbate problems that tend to develop with lengthy stays in foster care, all of which make achieving permanency more difficult.

1. Limits on the Extensions

The parties to a suit under this chapter may not extend the deadlines set by the court by agreement or otherwise. Tex. Fam. Code § 263.402(a).

In re J.L.C., 194 S.W.3d 667 (Tex. App.—Fort Worth 2006) (mother's request for extension of one year deadline binds her to 18 months maximum for decision); *In re J.H.G.*, 302 S.W.3d 304 (Tex. 2010).

2. Failure to Resolve Case Before Dismissal Date

If the court grants an extension but does not commence the trial on the merits before the required date for dismissal, the court shall dismiss the suit. The court may not grant an additional extension that extends the suit beyond the required date for dismissal. Tex. Fam. Code § 263.401(c).

3. Failure to Make a Timely Motion to Dismiss

A party to a suit who fails to make a timely motion to dismiss the suit waives the right to object to the court's failure to dismiss the suit. A motion to dismiss is timely if the motion is made before the trial on the merits commences. Tex. Fam. Code § 263.402(b).

Special Issue: A recent Texas Supreme Court opinion, *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637 (Tex. 2009), raises the question of whether counsel can waive a client's right to dismissal and what happens to the original dismissal date if a new trial is granted.

4. Effect of Dismissal

Typically, the dismissal of a suit affecting the parent-child relationship leaves the parties and the children in the status they had before the suit was filed. This is not always the case when DFPS files suit. For example, if a child is placed with a relative after DFPS files suit, the relative may gain standing to file an original suit seeking custody if the child remains with that relative for six months or more during the pendency of the DFPS lawsuit. The relative may not have had this standing at the time the DFPS lawsuit was filed, but now does with the passage of time.

Dismissal of the suit filed by DFPS also does not bar another party with standing from proceeding to trial on the suit against the parents. *In re Bishop*, 8 S.W.3d 412, 420 (Tex. App.—Waco 1999, orig. pet.) (dismissal is without prejudice and does not affect pleadings of intervenor relative and guardian ad litem); *In re J.C.*, 250 S.W.3d 486 (Tex. App.—Ft. Worth 2008, no pet. hist.) (foster parents sought and obtained termination of parent's rights after DFPS suit was dismissed).

DFPS may file a new petition after dismissal, but must look to the current situation in the home in order to find evidence sufficient to establish a continuing danger exists for the child if returned home. A parent must be appointed managing conservator of the child unless the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a); see also *In re Cochran*, 151 S.W.3d 275 (Tex. App.—Texarkana 2004, orig. proceeding) (past terminations alone not sufficient to deny placement with parents absent evidence of current danger to the health or safety of the child).

D. Monitored Return

At any stage of the case, the court may order a monitored return of the child to a parent with DFPS remaining as temporary managing conservator. The monitored return cannot be for more than 180 days, but may be ordered without regard to the other deadlines. If the court renders an order for a monitored return, it shall: 1) include in the order specific findings regarding the grounds for the order; and 2) schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced. Tex. Fam. Code § 263.403(b).

1. Findings and Orders Required for a Monitored Return

The court may retain jurisdiction and not dismiss the suit if the court renders a temporary order that:

- finds that retaining jurisdiction is in the best interest of the child;

- orders DFPS to return the child to the child's parent;
- orders DFPS to continue to serve as temporary managing conservator of the child; and
- orders DFPS to monitor the child's placement to ensure that the child is in a safe environment. Tex. Fam. Code § 263.403(a).

If the court renders an order, the court shall:

- include in the order specific findings regarding the grounds for the order; and
- schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced. Tex. Fam. Code § 263.403(b).

2. Failed Monitored Return

If a child placed with a parent must be moved from that home before dismissal of the suit or commencement of the trial on the merits, the court shall, at the time of the removal, schedule a new date for dismissal. The new dismissal date may not be later than the original dismissal date established under Tex. Fam. Code § 263.401 or the 180th day after the date the child is removed under Tex. Fam. Code § 263.403(c), whichever date is later. Tex. Fam. Code § 263.403(c).

If the court renders an order, the court must include in the order specific findings regarding the grounds for the order. Tex. Fam. Code § 263.403(d); *In re J.W.M.*, 153 S.W.3d 541, 545 (Tex. App.—Amarillo 2004, pet. denied); *In re Neal*, 4 S.W.3d 443 (Tex. App.—Houston [1 Dist.] 1999, orig. proceeding).

E. Final Hearing

At the final hearing, the court will either: (1) dismiss the case because the child has been returned to the parent or caregiver from whom the child was removed; or (2) place the child with a relative via a PMC agreement or enter an order that names DFPS as the PMC of the child, with or without termination of parental rights.

1. Parties

Tex. Fam. Code § 102.009 identifies a laundry list of persons entitled to notice and service of citation on the filing of a petition in an original suit.

Special Issue: Although the Family Code attempts to provide finality for children by limiting the time for appeals and restricting direct or collateral attacks on a judgment of termination of parental rights, the legislature has also recognized the countervailing interest of the child's family. For example, if an order terminating the parent-child relationship is entered without providing an opportunity for participation by an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child, that person may, within 90 days after termination of parental rights, file a motion to modify the order changing managing conservatorship from DFPS to the person. Tex. Fam. Code § 102.006(c). An adult sibling of a child who is separated from the child because of the action taken by DFPS may file a motion to modify or an original petition for access to the child without regard to whether the issue of managing conservatorship is an issue in the suit. Tex. Fam. Code § 102.0045; Tex. Fam. Code § 153.551.

2. Burden of Proof at Final Hearing

DFPS has the burden to show that parental rights should be terminated or that DFPS or another non-parent should be appointed the permanent managing conservator of the child.

Termination

In a termination suit, DFPS has the burden to present clear and convincing evidence of at least one ground for termination and that termination is in the best interest of the child pursuant to Tex. Fam. Code § 161.001. Clear and convincing evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Tex. Fam. Code § 101.007.

The Due Process Clause of the 14th Amendment requires the State to support the parental unfitness finding in a termination case by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980).

Conservatorship

When DFPS asks a court to grant conservatorship to DFPS or to an individual other than the parent, the burden of proof is a preponderance of the evidence, not clear and convincing. A parent may also seek to have conservatorship awarded to an individual of his or her choice, and the burden of proof for the parent would also be a preponderance of the evidence that conservatorship to that individual is in the best interest of the child.

3. Best Interest

Holley v. Adams, 544 S.W.2d 367, 373 (Tex. 1976) factors used to evaluate the evidence relating to best interest include but are not limited to:

- the desires of the child;
- the emotional and physical needs of the child now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parenting abilities of the parties seeking custody;
- the programs available to assist these persons;
- the plans for the child by the parties seeking custody;
- the acts or omissions of the parent and any excuse for the same; and
- the stability of the home or proposed placement.

"The absence of evidence about some of these *Holley* considerations would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child. Other cases, however, will present more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice to uphold the jury's finding that termination is required." *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

"Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a fact finder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's future home environment." *In re C.H.*, 89 S.W.3d 17, 32 (Tex. 2002).

4. Presumptions Involved in Conservatorship

- Parent Should be Appointed as Managing Conservator

Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child. It is a rebuttable presumption that the appointment of the parents as joint managing

conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption. Tex. Fam. Code § 153.131.

- Parent with History of Domestic Violence of Sexual Abuse

In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit. Tex. Fam. Code § 153.004(a).

- That a Parent Should be Appointed as Possessory Conservator

The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the child. Tex. Fam. Code § 153.191.

The court shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator. Tex. Fam. Code § 153.004(c).

The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that:

1) There is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit; or
2) The parent engaged in conduct that constitutes an offense under Tex. Penal Code § 21.02, Tex. Penal Code § 22.011, Tex. Penal Code § 22.021, Tex. Penal Code § 25.02, and that as a direct result of the conduct, the victim of the conduct became pregnant with the parent's child. Tex. Fam. Code § 153.004(d)(2).

Notwithstanding Tex. Fam. Code § 153.004(d), a court may allow a parent to have access to a child if the court makes one of several findings pursuant to Tex. Fam. Code § 153.004(d-1).

If the court enters an order appointing DFPS as the permanent managing conservator of the child without terminating the rights of the parent of the child, the court must find that:

- appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; and

- it would not be in the child's best interest to appoint a relative of the child or another person as the managing conservator. Tex. Fam. Code § 263.404(a).

Special Issue: Although not law, some judges do not simply dismiss or nonsuit the DFPS legal case outright, but rather enter final orders regarding conservatorship of, child support for, and access to the child. If DFPS requests dismissal of its lawsuit after reunification with a parent, the court may want to consider whether: 1) the dismissal or nonsuit is in the best interest of each child affected by the suit; and 2) any orders for the conservatorship, possession of or access to, or support of each child affected by the suit continue in effect after the dismissal or nonsuit.

5. Considerations in Naming DFPS as Permanent Managing Conservator

If the court determines that DFPS should be named as permanent managing conservator of the child without terminating the rights of a parent of the child, the court shall take the following factors into consideration:

- the child will reach 18 years of age in not less than three years;
- the child is 12 years or older and has expressed a strong desire against termination or being adopted;
- the child has special medical or behavioral needs that make adoption of the child unlikely; and
- the needs and desires of the child. Tex. Fam. Code § 263.404(b).

6. Final Order Appointing DFPS as Managing Conservator of Certain Abandoned Children (Baby Moses Law)

There is a rebuttable presumption that a parent who delivers a child to a designated emergency infant care provider in accordance with Tex. Fam. Code Subchapter D, Chapter 262:

- is the child's biological parent;
- intends to relinquish parental rights and consents to the termination of parental rights with regard to the child; and
- intends to waive the right to notice of the suit terminating the parent-child relationship. Tex. Fam. Code § 263.407(a).

A party that seeks to rebut a presumption in Tex. Fam. Code § 263.407(a) may do so at any time before the parent-child relationship is terminated with regard to the child. Tex. Fam. Code § 263.407(a-1).

If a person claims to be the parent of a child taken into possession under Tex. Fam. Code Chapter 262, Subchapter D [Emergency Possession of Certain Abandoned Children], before the court renders a final order terminating the parental rights of the child's parents, the court shall order genetic testing for parentage determination unless parentage has previously been established. The court shall hold the petition for termination of the parent-child relationship in abeyance for a period not to exceed 60 days pending the results of the genetic testing. Tex. Fam. Code § 263.407(b).

Before the court may render an order terminating parental rights with regard to a child taken into DFPS custody under Tex. Fam. Code § 262.303, DFPS must:

- verify with the National Crime Information Center and state and local law enforcement agencies that the child is not a missing child; and
- obtain a certificate of the search of the paternity registry under Tex. Fam. Code Chapter 160, Subchapter E not earlier than the date DFPS estimates to be the 30th day after the child's date of birth. Tex. Fam. Code § 263.407(c).

PLACEMENT REVIEW HEARING

Legal Overview of Placement Review Hearing

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 263. Review of Placement of Children under Care of Department of Family and Protective Services
Subchapter F. Placement Review Hearings

When a child is in the permanent managing conservatorship of DFPS, the court must periodically review his case to ensure that the child's needs are being adequately met and that efforts have not ceased to find the child a more suitable permanent placement. While the child remains in the permanent managing conservatorship of DFPS, whether parental rights have been terminated, the court must continue to review the status of the child until the child permanently leaves the managing conservatorship of DFPS through adoption, appointment of a person as managing conservator, or transitioning out of care upon the child's 18th birthday or graduation from high school, whichever occurs later.

Historically, once a child entered the long-term care of DFPS through the appointment of that agency as permanent managing conservator, if adoption was not the long-term goal of the child, few efforts were made to continue working with the parents or to locate a suitable relative or another individual in order to place the child outside of foster care. Recent changes to the Family Code envision continued efforts to achieve permanency for a child, even after the appointment of DFPS as permanent managing conservator.

A. When Placement Review Hearings are Conducted

- If parental rights are not terminated, the initial placement review hearing must be held within 6 months
- If parental rights are terminated, the initial placement review hearing must be held within 90 days after the final order is rendered
- After the initial placement review hearing, the next hearing must be held every 6 months until the child leaves the permanent managing conservatorship of DFPS

B. Notice of the Placement Review Hearing

- Notice must be given to all persons entitled to notice at least 10 days before the review hearing, including the child if the child is 10 years of age or older

C. The Child Shall Attend the Placement Review Hearing

D. Placement Review Report

- DFPS must file a placement review report and provide copies to all persons entitled to notice 10 days before the review hearing
- The placement review report must identify the permanency goal

E. Placement Review Hearings

- Determine whether the child's placement is safe and the child's needs are being met

F. Court Orders Beyond Permanent Managing Conservatorship

- If parental rights have not been terminated, the court may order DFPS to provide services to parents for up to 6 months
- Placement review hearings must be conducted while a child is committed to the Texas Juvenile Justice Department
- DFPS must provide copies of certain records to a child when the child is discharged or turns 18

G. Extended Jurisdiction

- A court's jurisdiction automatically extends beyond the young adult's 18th birthday
- Jurisdiction may also be extended if a child is incapacitated
- The appointment of the attorney ad litem, guardian ad litem, or volunteer advocate may continue
- The court may not appoint DFPS as managing conservator
- A young adult has the same rights as any adult of the same age
- Periodic review hearings may occur

A. When Placement Review Hearings are Conducted

After the entry of an order that appoints DFPS as permanent managing conservator of a child, if the parental rights are not terminated, a placement review hearing must be held within 6 months. If the parental rights are terminated, the first placement review hearing must be

held within 90 days after the court renders the final order. Tex. Fam. Code § 263.501(a) and (b). Thereafter, a placement review hearing must be held every 6 months until the date the child leaves the permanent managing conservatorship of DFPS. Tex. Fam. Code § 263.501.

B. Notice of the Placement Review Hearing

Notice of the placement review hearing:

- must be given at least 10 days prior to the hearing; and
- shall be given pursuant to Tex. R. Civ. P. 21(a); Tex. Fam. Code § 263.501(c) and (d).

Persons entitled to notice are:

- DFPS;
- the foster parents, pre-adoptive parent, relative of the child providing care or director of the group home or institution in which the child is residing;
- each parent of the child;
- each possessory conservator or guardian of the child;
- the child's attorney and volunteer advocate, if the appointments were not dismissed in the final order;
- The child if:
  - The child is 10 years of age or older; or
  - The court determines it is appropriate for the child to receive notice;
- the licensed administrator of the child placing agency responsible for placing the child; and
- any other person or agency named by the court as having an interest in the child's welfare. Tex. Fam. Code § 263.501(d) and (d).

Special Issue: Some courts reset Placement Review Hearings if the necessary persons entitled to notice, such as the child, did not receive notice of the hearing and are not in attendance.

C. The Child Shall Attend the Placement Review Hearing

The child shall attend each placement review hearing unless the court specifically excuses the child's attendance. Tex. Fam. Code § 263.501(f).

A child committed to the Texas Juvenile Justice Department may attend a placement review hearing in person, by telephone, or by videoconference. Tex. Fam. Code § 263.501(f).

The court shall consult with the child in a developmentally appropriate manner regarding the child's permanency or transition plan, if the child is 4 years of age or older. Tex. Fam. Code § 263.501(f).

Failure by the child to attend a hearing does not affect the validity of an order rendered at the hearing. Tex. Fam. Code § 263.501(f).

D. Placement Review Report

1. Filing the Placement Report

Not later than the 10th day before the date set for a placement review hearing, DFPS shall file a placement review report with the court. For good cause shown, the court may order a different time for filing the placement review report or may order that a report is not required for a specific hearing. Tex. Fam. Code § 263.502(a) and (b).

2. Copies of Report Provided

DFPS shall provide a copy to each person entitled to notice of the hearing. Tex. Fam. Code § 263.502(a).

Special Issue: If all necessary persons entitled to notice were properly notified and are before the court but did not receive the Placement Review Report, a court may give the persons the opportunity to review the report during a recess. If there is no report at the time of the hearing, the DFPS representative may give an oral report to which the parties do not object, or the hearing may have to be reset.

3. Placement Review Report Contents

The placement review report must identify the permanency goal for the child and must:

- evaluate whether the child's current placement is appropriate for meeting the child's needs;
- evaluate whether efforts have been made to ensure placement of the child in the least restrictive environment consistent with the best interest and special needs of the child if the child is placed in institutional care;
- contain a transition plan for a child who is at least 16 years of age that identifies the services and specific tasks that are needed to assist the child in making the

transition from substitute care to adult living and describes the services that are being provided through the Transitional Living Services Program operated by DFPS;

- evaluate whether the child's current educational placement is appropriate for meeting the child's academic needs;
- identify other plans or services that are needed to meet the child's special needs or circumstances;
- describe the efforts of DFPS to place the child for adoption if parental rights to the child have been terminated and the child is eligible for adoption, including efforts to provide adoption promotion and support services as defined by 42 U.S.C. § 629(a) and the federal Adoption and Safe Families Act of 1997 (Pub. L. No. 105-89); Tex. Fam. Code § 263.502(c)(1)(6); and
- identify any placement changes that have occurred since the most recent court hearing concerning the child and describe any barriers to sustaining the child's placement, including any reason for which a substitute care provider has requested a placement change. Tex. Fam. Code § 263.502(c)(9).

DFPS as Managing Conservator without Termination of Parental Rights

For a child whom DFPS has been named managing conservator in a final order that does not include termination of parental rights, the placement review report must describe the efforts of DFPS to find a permanent placement for the child, including efforts to:

- work with the caregiver to determine whether that caregiver is willing to become a permanent placement for the child;
- locate a relative or other suitable individual to serve as permanent managing conservator of the child; and
- evaluate any change in a parent's circumstance to determine whether:
  - the child can be returned to the parent; or
  - parental rights should be terminated. Tex. Fam. Code § 263.502(c)(7).

Texas Juvenile Justice Department

With respect to a child committed to the Texas Juvenile Justice Department or released under supervision by the Texas Juvenile Justice Department on or after May 23, 2009, the placement review report must:

- evaluate whether the child's needs for treatment and education are being met;

- describe, using information provided by the Texas Juvenile Justice Department, the child's progress in any rehabilitation program administered by the Texas Juvenile Justice Department; and
- recommend other plans or services to meet the child's needs. Tex. Fam. Code § 263.502(c)(7).

APPLA

If the goal of the DFPS permanency plan for a child is Another Planned Permanent Living Arrangement (APPLA), the placement review report must document a compelling reason why adoption, permanent managing conservatorship with a relative or other suitable individual, or returning the child to a parent are not in the child's best interest. Tex. Fam. Code § 263.502(d).

E. Placement Review Hearings

At each hearing, the court shall determine whether:

- the child's current placement remains safe, necessary, and appropriate for meeting the child's needs;
- efforts have been made to ensure placement of the child in the least restrictive environment consistent with the child's best interest and special needs;
- the services that are needed to assist a child who is at least 16 years of age in making the transition from substitute care to independent living are available in the community;
- the child is receiving appropriate medical care;
- the child has been provided the opportunity, in a developmentally appropriate manner, to express the child's opinion on the medical care provided;
- a child who is receiving psychotropic medication:
    - has been provided appropriate psychosocial therapies, behavior strategies, and other non-pharmacological interventions; and
    - has been seen by the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days for purposes of the review required by Tex. Fam. Code § 266.011;
- an education decision-maker for the child has been identified;
- the child's education needs and goals have been identified and addressed;
- other plans or services are needed;

- due diligence (or reasonable efforts) have been exercised in attempting to place a child for adoption;
- the permanent placement is appropriate for a child for whom DFPS has been named managing conservator in a final order that does not include termination of parental rights;
- for a child whose permanency goal is APPLA, DFPS has:
    - documented a compelling reason why adoption, permanent managing conservatorship with a relative or other suitable individual, or returning the child to a parent is not in the child's best interest;
    - identified a family or other caring adult who has made a permanent commitment to the child;
- if the child is committed to the Texas Juvenile Justice Department or released under the supervision by the Texas Juvenile Justice Department, the child's needs for treatment, rehabilitation, and education are being met; and
- DFPS has made reasonable efforts to finalize the permanency plan that is in effect for the child. Tex. Fam. Code § 263.503(a).

F. Court Orders Beyond Permanent Managing Conservatorship

1. Court Ordered Services for Parents Beyond Permanent Managing Conservatorship

For a child for whom DFPS has been named managing conservator in a final order that does not include termination of parental rights, the court may order DFPS to provide services to a parent for up to 6 months after the date of the placement hearing if:

- the child has not been placed with a relative or other individual, including a foster parent, who is seeking permanent managing conservatorship of the child; and
- the court determines that further efforts at reunification with a parent are:
    - in the best interest of the child; and
    - likely to result in the child's safe return to the child's parent. Tex. Fam. Code § 263.503(b).

7. Child Committed to Texas Juvenile Justice Department

A court is required to conduct placement review hearings for a child while the child is committed to the Texas Juvenile Justice Department or released under the supervision of the Texas Juvenile Justice Department, unless the child is adopted or permanent managing conservatorship of the child is awarded to an individual other than DFPS. Tex. Fam. Code § 263.501(g).

8. Provision of Copies of Certain Records

If, at the time a child is discharged from foster care, the child is at least 18 years of age or has had the disabilities of a minor removed, DFPS shall provide to the child, not later than the 30th day before the date the child is discharged from foster care, a copy of:

- the child's birth certificate;
- the child's immunization records;
- the information contained in the child's health passport;
- a personal identification certificate under Tex. Transp. Code § 521.032;
- a social security card or a replacement social security card, if appropriate; and
- proof of enrollment in Medicaid, if appropriate. Tex. Fam. Code § 264.014.

For more information about how to support youth who are transitioning from foster care, please see: A Guide for Those "Aging Out" of Foster Care in Texas.

G. Extended Jurisdiction

During the 83rd Texas Legislature, Tex. Fam. Code § 263.601 was amended to define "extended foster care," "trial independence," and "young adult" and to clarify Tex. Fam. Code Chapter 263, Subchapter G regarding extended jurisdiction.

1. Young Adult

"Young adult" is a person who was in the conservatorship of DFPS on the day before the person's 18th birthday. Tex. Fam. Code § 263.601(4).

2. Extended Foster Care

"Extended foster care" is foster care that extends beyond the young adult's 18th birthday. It requires the young adult to reside in a residential facility that is licensed or approved and paid for by DFPS, including a foster home, foster group home, RTC, and Supervised

Independent Living facility through a provider who has a contract with DFPS for extended foster care services. Tex. Fam. Code § 263.601(1).

3. Trial Independence

"Trial independence" means the status assigned to a young adult under Tex. Fam. Code § 263.6015, which is automatic and mandatory for a minimum of 6 months beginning on: 1) the date of the young adult's 18th birthday; or 2) the date the young adult exits extended foster care. Tex. Fam. Code § 263.6015(b). No court order is required for the mandatory 6-month trial independence. A longer period may be ordered by the court, but cannot exceed 12 months.

A court may order trial independence status extended for a period that exceeds the mandatory period under Tex. Fam. Code § 263.6015(b) but cannot exceed one year from the date the period under Tex. Fam. Code § 263.6015(b) commences. Tex. Fam. Code § 263.6015(c).

Each time a young adult exits foster care (originally at 18 or extended foster care), the youth adult will complete a new six-month period of trial independence. Tex. Fam. Code § 263.6015(d).

4. Extended Jurisdiction After Child's 18th Birthday

Any court with jurisdiction over a youth on the day before they turn 18 will automatically continue to have jurisdiction of the youth beyond their 18th birthday for at least six months. Youth age 18 or older are allowed to temporarily leave foster care, and as long as the court has jurisdiction, the state is eligible for federal funding to provide services for the young adult, including independent living supports such as housing. Tex. Fam. Code § 263.602.

The Family Code requires the court to conduct periodic hearings every six months, and make specific findings regarding the young adult's living arrangement, the permanency plan, whether the young adult participated in developing the plan, and whether it reflects independent living skills and appropriate services in order for the young adult to achieve independence, and whether additional services are needed to meet the young adult's needs. Tex. Fam. Code § 263.602(b).

In 2013, the extended jurisdiction statute was further amended to clarify that unless a court extends its jurisdiction over a young adult beyond the end of trial independence as provided by Tex. Fam. Code § 263.6021(a) or Tex. Fam. Code § 263.603(a), the court's extended jurisdiction over a young adult terminates on the earlier of:

1) The last day of the month in which trial independence ends; or

2) The young adult's 21st birthday. Tex. Fam. Code § 263.602(f).

A court with extended jurisdiction is not required to conduct periodic hearings as described in Tex. Fam. Code § 263.602 for a young adult who is not in extended foster care and who is only on trial independence and may not compel a young adult who has elected to not enter or has exited extended foster care to attend a court hearing. However, a court may, at the request of the young adult who is on trial independence, conduct a hearing described by Tex. Fam. Code § 263.602(b) or Tex. Fam. Code § 263.6021 to review any transitional living services the young adult is receiving during trial independence. Tex. Fam. Code § 263.602(g).

Unless a young adult receiving voluntary transitional living services while on trial independence reenters extended foster care before the end of the court's extended jurisdiction, the extended jurisdiction of the court ends on the earlier of:

1. The young adult's 21st birthday; or
2. The date the young adult withdraws consent to the extension of the court's jurisdiction in writing or in court. Tex. Fam. Code § 263.6021(b).

5. Extended Jurisdiction in Guardianship Situation

If a court believes that a young adult may be incapacitated as defined by Tex. Prob. Code § 601(14)(B), the court may extend its jurisdiction on its own motion without the young adult's consent to allow DFPS to refer the young adult to the Department of Aging and Disability Services (DADS) for guardianship services, as required by Tex. Hum. Res. Code § 48.209. Tex. Fam. Code § 263.603(a).

The extended jurisdiction to determine guardianship under Tex. Fam. Code § 263.603 terminates on the earliest of the date:

- The Department of Aging and Disability Services determines a guardianship is not appropriate under Tex. Hum. Res. Code Chapter 161;
- a court with probate jurisdiction denies the application to appoint a guardian; or
- a guardian is appointed and qualifies under the Texas Probate Code. Tex. Fam. Code § 263.603(b).

If DFPS or DADS determines a guardianship is not appropriate, or the court with probate jurisdiction denies the application to appoint a guardian, the court, under Tex. Fam. Code. § 263.603(a), may continue to extend its jurisdiction over the young adult only as provided by Tex. Fam. Code § 263.602. Tex. Fam. Code §263.603(c).

A young adult for whom a guardian is appointed and qualifies is not considered to be in extended foster care or trial independence and the court's jurisdiction ends on the date the guardian for the young adult is appointed and qualifies, unless the guardian requests the extended jurisdiction of the court under Tex. Fam. Code § 263.604. Tex. Fam. Code § 263.603(d).

By Guardian Request

A guardian appointed for a young adult may request that the court extend the court's jurisdiction over the young adult. A court that extends its jurisdiction over a young adult for whom a guardian is appointed may not issue an order that conflicts with an order entered by the probate court that has jurisdiction over the guardianship proceeding. Tex. Fam. Code § 263.604.

6. Role of Attorney ad Litem, Guardian ad Litem, or Volunteer Advocate

A court with extended jurisdiction may continue or renew the appointment of an attorney ad litem, guardian ad litem, or volunteer advocate for the young adult to assist in accessing services the young adult is entitled to receive. Tex. Fam. Code § 263.605.

An attorney ad litem or guardian ad litem appointed for a young adult who receives services in the young adult's own home from a service provider or resides in an institution (as defined by Tex. Fam. Code § 263.601(3)) that is licensed, certified, or verified by a state agency other than DFPS shall assist the young adult as necessary to ensure that the young adult receives appropriate services. Tex. Fam. Code § 263.606.

7. Prohibited Appointments and Orders

The court may not appoint DFPS or DADS as the managing conservator or guardian of the young adult. Tex. Fam. Code § 263.607(a). A court may not order DFPS to provide a service to a young adult unless DFPS:

- is authorized to provide the services under state law; and
- is appropriated money to provide the services in an amount sufficient to comply with the court order and DFPS obligations to other young adults for whom DFPS is required to provide similar services. Tex. Fam. Code § 263.607(b).

8. Rights of Young Adults

A young adult who consents to the continued jurisdiction of the court has the same rights as any other adult of the same age. Tex. Fam. Code § 263.608.

APPEALS

Legal Overview of Appeals

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 263. Review of Placement of Children under Care of Department of Family and Protective Services
Subchapter E. Final Order for Child under DFPS Care

An appeal of a final order rendered under Tex. Fam. Code Chapter 263, Subchapter E is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure and the appellate court must render its final order or judgment with the least possible delay. Tex. Fam. Code § 263.405. Also, the final order must contain the following prominently displayed statement in boldfaced type, in capital letters, or underline: "A PARTY AFFECTED BY THIS ORDER HAS THE RIGHT TO APPEAL. AN APPEAL IN A SUIT IN WHICH TERMINATION OF THE PARENT-CHILD RELATIONSHIP IS SOUGHT IS GOVERNED BY THE PROCEDURES FOR ACCELERATED APPEALS IN CIVIL CASES UNDER THE TEXAS RULES OF APPELLATE PROCEDURE. FAILURE TO FOLLOW THE TEXAS RULES OF APPELLATE PROCEDURE FOR ACCELERATED APPEALS MAY RESULT IN THE DISMISSAL OF THE APPEAL." Tex. Fam. Code § 263.405(b).

A. Specific Grounds Must be Stated in Trial Court Judgment

B. Parent Deemed Indigent on Appeal

C. Attorney Ad Litem Required to Remain on Case

D. Trial Court Clerk Has Specific Time-Sensitive Duties

E. Application of Tex. Civ. Prac. & Rem. Code § 13.003 Prohibited

F. Effective Assistance of Counsel

G. Order or Judgment Termination Parent-Child Relationship May Not be Suspended During Pendency of Appeal

H. Notice of Appeal / Appellant Duties

A. Specific Grounds Must Be Stated In Trial Court Judgment

The Texas Rules of Civil Procedure require the judge to state the specific grounds in the judgment supporting the termination or the appointment of the managing conservator. Tex. R. Civ. P. 306.

B. Parent Deemed Indigent on Appeal

Pursuant to Tex. Fam. Code § 107.013(e), parents deemed indigent in the trial court are presumed indigent on appeal, subject to challenges laid out in Tex. R. App. P. 20.1.

C. Attorney Ad Litem Required to Remain on Case

Pursuant to Tex. Fam. Code § 107.016(2), the attorney ad litem appointed to represent the parent at trial is required to remain on the case until the case is dismissed, the date all appeals in relation to any final order terminating parental rights are exhausted or waived, or until relieved of the duty or replaced by another attorney after a finding of good cause is rendered by the court on the record. Tex. Fam. Code § 107.016(2).

D. Trial Court Clerk Has Specific, Time-sensitive Duties

The Texas Rules of Appellate Procedure require the trial court clerk to immediately send a copy of the notice of appeal to the appellate court clerk and to the court reporter(s) responsible for preparing the record. Tex. R. App. P. 25.1(f).

The Texas Rules of Appellate Procedure require the trial court to direct the official or deputy reporter to commence the preparation of the reporter's record and arrange for a substitute reporter, if necessary. There are extensions of time available under certain circumstances. Tex. R. App. P. 28.4(b)(1).

E. Application of Tex. Civ. Prac. & Rem. Code § 13.003 Prohibited

The Texas Rules of Appellate Procedure prohibit the application of Tex. Civ. Prac. & Rem. Code § 13.003 (Free Transcript of Statement of Facts on Appeal) to an appeal from a parental termination or child protection case. Tex. R. App. P. 28.4(b)(3).

F. Effective Assistance of Counsel

Case law has established that if a parent is entitled to court-appointed counsel, the parent is entitled to effective assistance of counsel. *In re J.O.A., et. al.,* 283 S.W. 3d 336, 347 (Tex. 2009).

G. Order or Judgment Termination Parent-Child Relationship May Not be Suspended During Pendency of Appeal

Although a court may suspend other orders under the Family Code, the court may not suspend the operation of an order or judgment terminating the parent child relationship in a suit brought by the state or a political subdivision of the during the pendency of the appeal. Tex. Fam. Code § 109.001(d).

H. Notice of Appeal and Appellant Duties

The Texas Rules of Appellate Procedure require the notice of appeal to state whether it is a parental termination or child protection case subject to rules of acceleration under Tex. R. App. P. 28.4. Tex. R. App. P. 25.1(d)(6).

The Texas Rules of Appellate Procedure also require the appellant to file in the appellate court a docketing statement upon filing the notice of appeal and it must state whether the appeal is an appeal of a parental termination or child protection case as defined in Tex. R. App. P. 28.4. Tex. R. App. P. 32.1.

ADOPTION

Legal Overview of Adoption

Texas Family Code
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship
Chapter 162. Adoption

The purpose of the adoption is to create the parent-child relationship between the adoptive child and parents. Tex. Fam. Code § 162.017(a). The adoptive parents are assuming the permanent roles of parental care, custody, and control of the child. Through the adoption, the new parents are making a commitment to the court and the child that they will provide for all aspects of the child's well-being, so the adoption hearing concludes the decision-making and monitoring roles of the court.

A. Petition for Adoption

- Where petition must be filed
- Spouses must join in petition
- Proceed after termination is final and child has lived in adoptive home for 6 months

B. Documentation Required

C. Hearing

- Persons who should be present at an uncontested adoption hearing
- Persons who should be present at the contested adoption hearing
- Adoption hearing takes precedent over other settings
- Additional Information
    - Prohibited delays and denials
    - May seal the file

A. Petition for Adoption

1. Where Petition Must be Filed

The petition is filed in the county in which the child resides, the petitioners reside, or if the child is placed by an authorized agency, in the county where the agency is located. Tex. Fam. Code § 103.001.

2. Spouses Must Join in Petition

If a petitioner is married, both spouses must join in the petition for adoption. Tex. Fam. Code § 162.001(a). If after filing a joint petition for adoption, a married couple divorces, the court shall abate the adoption and dismiss the action unless one party thereafter amends the petition and seeks to adopt individually. Tex. Fam. Code § 162.013(c).

3. When to Proceed

The court has authority to proceed with adoption when all parental rights have been terminated in conjunction with the adoption. Tex. Fam. Code § 162.001(b)(1).

Unless waived by the court, the petition for adoption may be heard and the adoption ordered after the child has lived in the adoptive home for 6 months. Tex. Fam. Code § 162.009.

B. Documentation Required

The following is a list of documents required by the court before an adoption can be granted:

- **Criminal History Reports:** The court shall order each person seeking to adopt the child to obtain his or her own criminal history reports. The court shall accept a criminal history record for each person seeking to adopt the child provided by DFPS or by a licensed child-placing agency that received the information from DFPS, if the information was obtained not more than one year before the court ordered the record obtained. Tex. Fam. Code § 162.0085(a).

- **Pre-Adoptive Social Study and Post-Placement Social Study:** In a suit for adoption, pre-adoptive and post-placement social studies must be conducted as provided in Tex. Fam. Code Chapter 107. Tex. Fam. Code § 162.003; Tex. Fam. Code § 107.001.

- **Health, Social, Educational, and Genetic History Report (HSEGH Report):** Unless the adoptive parent is a grandparent, aunt or uncle, or stepparent, a HSEGH Report is required. Tex. Fam. Code § 162.005(a). If the child's biological parents cannot be located and there is insufficient information to complete the HSEGH report, the court may waive the HSEGH report. Tex. Fam. Code § 162.008(c).

- **Interstate Compact Compliance Statement:** per Tex. Fam. Code § 162.002(b)(2).

- **Written consent forms:** signed by the managing conservator, in most cases DFPS, and the child, if age 12 or over. Tex. Fam. Code § 162.010.

- **A report or response from the child's Indian tribe:** if applicable.

- **Order terminating parental rights:** if rights have previously been terminated.

Special Issue: It may be necessary to examine the circumstances of the termination, especially in an adoption from a foreign country, to determine if basic due process rights have been met.

Adoption Order from a Foreign Country

- An adoption order rendered to a resident of this state that is made by a foreign country shall be accorded full faith and credit by the courts of Texas and enforced as if the order were rendered by a court of Texas, unless the adoption law or process of the foreign country violates the fundamental principles of human rights or the laws or public policy of this state. Tex. Fam. Code § 162.023(a).

- A person who adopts a child in a foreign country may register the order in this state. A petition for registration of a foreign adoption order may be combined with a petition for a name change. If the court finds that the foreign adoption order does not violate the principles of human rights or the laws or public policy of this state, the court shall order the state registrar to register the order and file a certificate of birth for the child under Tex. Health & Safety Code § 192.006; Tex. Fam. Code § 162.023(b).

C. Hearing

1. Persons Who Should Always be Present at the Uncontested Adoption Hearing

- adoptive parents;
- assigned caseworker;
- legal advocate for the child and/or guardian ad litem/CASA; and
- the child, unless his/her presence is waived by the court.

Special Issue: An uncontested adoption often is completed in 10-20 minutes, if all documentation is properly filed. In a contested adoption, enough time must be set aside for the completion of a careful and complete hearing. Each court must determine the typical range in length of contested hearings and establish a calendar to accommodate such hearings without the need for postponements and delays.

2. Persons Who Should be Present at the Contested Adoption Hearing

- prospective adoptive parents;
- assigned caseworker;
- agency attorney;
- legal advocate for the child and/or guardian ad litem/CASA;
- parties contesting the adoption; and
- attorneys for all parties.

3. Adoption Hearing Takes Precedent Over Other Settings

If the social studies and criminal history records are filed, the adoption hearing is to be set and heard preferentially to any other civil case not given preference by other law. Tex. Fam. Code § 162.0045.

Special Issue: A number of judges have developed a special ceremony for consummating an adoption, including letting the child bang the gavel, the judge descending from the bench to join family in pronouncement, and including all extended family members and guests in the proceedings. Most families will want to take photos with the judge when the hearing is concluded.

4. Additional Information

The court may not delay or deny an adoption because a petitioner is a member of military or on the basis of race or ethnicity. Tex. Fam. Code § 162.0025; Tex. Fam. Code § 162.015.

Upon granting the adoption, the court may order the sealing of the court's file. Tex. Fam. Code § 162.021(a).

Special Issue: Some jurisdictions prefer utilizing the same court which handled the termination of parental rights case for the adoption proceedings involving the same child. If the proceeding is a combined termination and adoption, courts may want to set forth explicitly and thoroughly the conditions and circumstances under which parental termination and consent to adoption is obtained, including determining whether the consent was voluntary and informed and that all alternatives to adoption were explained. A thorough record protects the court and adoptive parents if there is a later attempt to set aside the termination and/or adoption.

DISPROPORTIONALITY

Disproportionality is the over representation of a race or cultural group in a particular program or system. By most measures of child well-being, African American, American Indian, Hawaiian and Alaska-Native children who are involved in the nation's child welfare system have worse experiences and outcomes than do white children. Although the situation varies significantly across states and local jurisdictions, African American and American Indian children served by child protective services and child welfare agencies generally enter care more often, stay longer in care, are reunified with their families less frequently and move into adoption only after longer periods of time than do white children.

This phenomenon has most significantly affected African American children, with the most recent national data indicating that African American children represent 30% of children in foster care, although they represent only 15% of children in the general population (U.S. Department of Health and Human Services). This overrepresentation of African American children has been observed in the child welfare system for more than thirty years (Billingsley & Giovannoni, 1972), yet persists as a national concern (Hill, 2008).

A. In Texas

The National Council of Juvenile and Family Court Judges (NCJFCJ) has published an updated *Disproportionality Rates for Children of Color in Foster Care Technical Assistance Bulletin,* utilizing the most current Adoption and Foster Care Reporting System (AFCARS) data and census data estimates to calculate current disproportionality indexes for every state. The Bulletin shows African-American children in Texas were almost twice as likely as Anglo or Hispanic children to be reported as victims of child abuse or neglect.

The NCJFCJ findings were consistent with earlier studies in Texas. In January 2006, DFPS released the results of a study of Disproportionality among children in Texas' foster care system, with findings similar to those shown nationally, including:

- Even when other factors are taken into account, Texas' African American children spend significantly more time in foster care or other substitute care, are less likely to be reunified with their families, and wait longer for adoption than Anglo or Hispanic children.
- African American families in Texas were less likely than white families to receive in-homes services in three out of eight regions (Texas Health and Human Services Commission, 2006). Likewise, Hispanic families were less likely than White families to receive services in four out of eight regions in Texas. (Texas Health and Human Services Commission, 2006).

B. Sources of Disproportionality

Disproportionality results from disparities that occur at multiple decision-making points along the child welfare pathway (Chapin Hall Center for Children, 2008; Wulczyn & Lery, 2007). Beginning with the initial report of alleged maltreatment, children who are subjects of those reports become involved in a process in which multiple decisions are made that affect the likelihood of their entry into and exit from foster care. These include decisions to accept a report for investigation, to substantiate allegations of maltreatment, to provide services, to place a child in out-of-home care, and to enable a child to exit from out-of-home care. These decisions are made not only by child welfare caseworkers, but also by casework supervisors, police, judges, agency administrators, legal professionals, and policy makers. At each decision-making point, there exists the potential for disparities to occur that may result in differential outcomes that negatively affect African American children and contribute to their overrepresentation in this system.

Understanding the source of disparities found at decision-making points along the child welfare pathway is essential to understanding and addressing the overrepresentation of African American children. Although research has documented the existence of disparities, it has been less successful in identifying the explanatory factors behind them. Critiques of research examining these disparities have suggested that poverty is likely a stronger explanatory factor than race, yet analyses that include measures of poverty using data from child welfare systems have largely not been conducted. In 2010, DFPS conducted a study of the Texas child welfare system to identify the factors contributing to disparities at the substantiation decision. Given the relationship between poverty and child maltreatment, the analyses controlled for the effect of family income, as well as other factors related to maltreatment, to better understand the effect of race on this decision-making point. Findings indicate that when family income is controlled, race is not a significant factor in the substantiation decision. However, when also controlling for caseworker perceptions of risk, race emerges as the stronger explanatory factor. This suggests not only an important relationship between race, income, and risk assessment, but also that disproportionality in the child welfare system is a complex phenomenon that cannot be explained by a single factor. These results further demonstrate that the effect of racial bias on decision-making remains an important consideration in understanding the overrepresentation of African American children. (Texas Department of Family and Protective Services, 2010).

C. The Elimination of Disproportionality and Disparities

As a result of these studies, Texas Health and Human Services created the Center for Elimination of Disproportionality and Disparities to eliminate the disproportionate number of African American children in Texas foster care, including:

- Developing and delivering cultural competency training to service delivery staff;
- Increasing targeted recruitment efforts of foster and adoptive families who can meet the needs of children who are waiting for permanent homes;
- Targeting recruitment efforts to ensure diversity among CPS staff; and

- Developing collaborative partnerships with community groups, agencies, faith-based organizations and other community organizations to provide culturally competent services to children and families of every race and ethnicity.

For judges, the NCJFCJ developed the Courts Catalyzing Change Preliminary Protective Hearing Benchcard, a practical and concrete judicial tool for use at the first hearing. This Benchcard reflects aspirational "best practices" for one of the most critical stages in a child abuse and neglect case (reprinted below and also available at: http://www.ncjfcj.org/sites/default/files/Right%20from%20the%20Start.pdf)

Health and human services agencies, the justice system, and other systems must partner with each other to make a difference in past patterns. The child welfare system plays a pivotal role in the solution, because it addresses the family as a whole and has the potential to decrease future disparate outcomes for African Americans. By working with local, regional, state, and national agencies in education, juvenile justice, health, and other stakeholders, the child welfare community seeks to identify common issues and barriers to equal access to community services for all Texans.

PRELIMINARY PROTECTIVE HEARING BENCHCARD©

Reflections on the Decision-Making Process to Protect Against Institutional Bias

Ask yourself, as a judge:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?

KEY INQUIRIES, ANALYSES AND DECISIONS THE COURT SHOULD MAKE AT THE PRELIMINARY PROTECTIVE HEARING

Persons who should be Present*

- ☐ Judge or judicial officer
- ☐ Parents of each child whose rights have not been terminated
- ☐ Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents –all possible parents
- ☐ Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- ☐ Relatives – relatives with legal standing or other custodial adults, including adult half- siblings
- ☐ Paternal and maternal relatives
- ☐ Non-related extended family, fictive kin (someone who is known and trusted by the families; godparents)

- ☐ Assigned caseworker
- ☐ Agency attorney
- ☐ Attorney for each parent (if conflict exists)
- ☐ Legal advocate for the child
- ☐ Guardian ad Litem (GAL)
- ☐ Court Appointed Special Advocate (CASA)
- ☐ ICWA expert (if ICWA applies)
- ☐ Tribal representative/tribal liaison
- ☐ Treatment and/or service providers
- ☐ All age-appropriate children
- ☐ Foster parents
- ☐ Cultural leaders, cultural liaisons, religious leaders
- ☐ Court-certified interpreters or court-certified language services
- ☐ Education liaison/school representative
- ☐ Court reporter
- ☐ Court security

* State and federal law determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, the NCJFCJ recommends that as many as possible be encouraged to attend the initial hearing.

PRELIMINARY PROTECTIVE HEARING BENCHCARD©

Courts can make sure that parties and key witnesses are present by:

• Ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom.
• Asking the youth/family if there is someone else who should be present.
• Requiring quick and diligent notification efforts by the agency.
• Requiring both oral and written notification in a language understandable to each party and witness.
• Requiring service/tribal notice to include the reason for removal, purpose of the hearing, availability of legal assistance in a language and form that is understandable to each party and witness.
• Requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin and other parties.
• Facilitating telephonic or video conferencing appearance at hearings.

Reviewing the Petition

• A sworn petition or complaint should be filed prior to the preliminary protective hearing and served/provided to the parents.
• The petition should be specific about the facts that bring the child before the court.
• The petition should not be conclusory without relevant facts to explain and support the conclusions.
• Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
• If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian unless it is determined that there is a safety threat to the child.
• Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

Indian Child Welfare Act (ICWA) Determination

The court should require that the applicability of the ICWA be determined before proceeding with the preliminary protective hearing. If the court has reason to believe ICWA applies, the court should proceed accordingly.
• If Yes – different standards apply, refer to the ICWA Checklist.
• If Yes – determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e).

COURTS CATALYZING CHANGE

PRELIMINARY PROTECTIVE HEARING BENCHCARD©

Engage Parents
• What language are you most comfortable speaking and reading?
• Do you understand what this hearing is about?
• What family members and/or other important people should be involved in this process with us?
• Do you understand the petition? (review petition with parties)

Due Process
• Who are the child's parents and/or guardians?
• How was paternity determined?
• What were the diligent search efforts for all parents?
• Have efforts to identify and locate fathers been sufficient? What has been done?
• How were the parents notified for this hearing?
  – Was the notice in a language and form understandable to parents and/or guardians?
• Do the parents understand the allegations?
• Are the parents entitled to representation? Are there language issues to consider when appointing attorneys?
• Are there issues in the case that are covered by the Americans with Disabilities Act?

Legal Threshold for Removal
• Has the agency made a prima facie case or probable cause showing that supports the removal of the child?
• Have the family's cultural background, customs and traditions been taken into account in evaluating the event and circumstances that led to the removal? Have the parent(s) cultural or tribal liaison/relevant other(s) been asked if there is a culturally-based explanation for the allegations in the petition?

Reasonable Efforts (to Prevent Removal)
• Were there any pre-hearing conferences or meetings that included the family?
  – Who was present?
  – What was the outcome?
• What services were considered and offered to allow the child to remain at home? Were these services culturally appropriate? How are these services rationally related to the safety threat?
• What was done to create a safety plan to allow the child to remain at home or in the home of another without court involvement?
  – Have non-custodial parents, paternal and maternal relatives been identified and explored? What is the plan to do so?
  • How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

What is Preventing the Child From Returning Home TODAY?

- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What is preventing the child from returning home today? What type of safety plan could be developed and implemented in order for the child to return home today?
  - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
  - Will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family and child, and are you satisfied that they understand these conditions?

Appropriateness of Placement

- If child is placed in foster care/shelter, have kinship care options been fully explored? If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- If child is placed in kinship care, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How is the placement culturally and linguistically appropriate?
  - From the family and child's perspective, is the current placement culturally and linguistically appropriate?
- How does the placement support the child's cultural identity? In what way does the placement support the child's connection to the family and community?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of meaningful family time with parents, siblings and extended family members?
  - Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?
  - Is the time and location of family time logistically possible for the family, and supportive of the child's needs?

Reasonable Efforts to Allow the Child to SAFELY Return Home

- What services can be arranged to allow the child to safely return home today?
- How are these services rationally related to the specific safety threat?
- How are the parents, extended family and children being engaged in the development and implementation of a plan for services, interventions, and supports?
- How will the agency assist the family to access the services?
  - Does the family believe that these services, interventions and supports will meet their current needs and build upon strengths?
  - Has the family been given the opportunity to ask for additional or alternate services?
- How are the services, interventions and supports specifically tailored to the culture and needs of this child and family?
  - How do they build on family strengths?
  - How is the agency determining that the services, interventions and supports are culturally appropriate?

- What evidence has been provided by the agency to demonstrate that the services/interventions for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?

Closing Questions to Ask Parents, Children, and Family Members

- **Do you understand what happened here today?**
- **Do you understand what are the next steps?**
- **Do you have any questions for the court?**

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Analysis of Disproportionality by Casey Family Programs examines trends on the national as well as local level at the investigation, substantiation, and placement stages within the child welfare system.

INDIAN CHILD WELFARE ACT (ICWA)

This section of the Bench Book is excerpted from the Texas DFPS Attorney Practice Manual with permission from the Department of Family and Protective Services.

The Indian Child Welfare Act of 1978 (ICWA)[1] is a federal law that imposes special standards and requirements when a child welfare agency seeks to intervene to protect an "Indian child," as defined by statute.[2] The law was enacted to protect not only Indian children, but their families and tribes.[3] To this end, the ICWA affords important rights to both families and tribes, including the right to petition a court with competent jurisdiction to invalidate any action for foster care placement or termination of parental rights if key provisions of the Act are violated.[4]

Authority

Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63, 25 C.F.R. Part 23. Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings.[5]

A summary of relevant case law follows this article.

Jurisdiction

Whether the family court or tribal court has jurisdiction over a case involving an Indian child depends on where the child resides, whether transfer to the tribal court is requested, and whether an exception to the mandatory transfer provision applies. If a case involves an Indian child, however, the state court proceedings must comply with the ICWA, whether or not the tribe intervenes or the case is transferred to a tribal court.

Exclusive Jurisdiction on the Reservation

If the child's residence or domicile is on the reservation, or if the child has been made a ward of the tribal court, the tribal court has exclusive jurisdiction, except when jurisdiction is otherwise vested in the state.[6]

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[1] 25 U.S.C. §1901 et seq. The ICWA applies to any child custody proceeding in which a non-Indian may obtain custody, but for purposes of this article, the focus is strictly on the impact of the law on child welfare decisions.
[2] 25 U.S.C. §1903(4).
[3] 25 U.S.C. §1902.
[4] 25 U.S.C. §1914.
[5] See Practice Guide, SECTION 11, TOOLS, Indian Child Welfare Act, for a copy of the Guidelines. The Guidelines are not legislative and are thus not binding, but they represent a significant interpretation of ICWA. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App. —Houston [14th Dist.] 1995, orig. proceeding [leave denied].
[6] 25 U.S.C. § 1911(a).

Emergency Exception

When an Indian child who resides on a reservation is temporarily off the reservation and emergency removal or placement is necessary "to prevent imminent physical damage or harm to the child," the state child welfare agency may act despite the fact that the tribal court otherwise has exclusive jurisdiction.[7] In such circumstances, the state child welfare agency must act promptly to: (1) end the removal or placement as soon as it is no longer necessary to prevent imminent physical damage or harm to the child; and (2) move to transfer the case to the jurisdiction of the tribe or return the child to the parents, as appropriate.

Concurrent Jurisdiction off the Reservation

If the child's residence or domicile is not on the reservation, the tribal and state court have concurrent jurisdiction.[8] Even in this circumstance, however, there is a presumption of tribal jurisdiction in cases involving an Indian child.[9]

Mandatory Transfer to Tribal Court

On motion by a child's parent, Indian custodian[10] or tribe, transfer of a state court child custody case involving an Indian child to the jurisdiction of the child's tribe is mandatory, unless either parent objects, good cause is shown or the tribe declines to accept the case.[11]

Parental Veto of Transfer

A parent's objection (including a non-Indian parent's veto) is an absolute bar to transfer.[12]

Good Cause

The Guidelines suggest that there may be good cause to deny transfer to the tribal court if: the request is untimely; an Indian child over age[12] objects; necessary evidence could not be presented in tribal court without undue hardship; the parents of a child over age five are not available and the child has had little or no contact with the tribe or tribal members. The tribal socio-economic conditions or perceived adequacy of the tribal social services or judicial systems may not be considered in determining whether there is good cause to deny transfer to a tribal court. The burden of proving good cause is on the party opposing transfer.[13] The case law is not consistent in construing how "good cause" should be analyzed. The only Texas case addressing what constitutes "good cause" rejects the use

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[7] 25 U.S.C. §1922.
[8] See 25 U.S.C. §1911(b).
[9] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
[10] "Indian custodian" is defined in the ICWA as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. §1903(6).
[11] 25 U.S.C. §1911(b).
[12] 25 U.S.C. §1911(b).
[13] See BIA Guidelines, Rule C.3., *Determination of Good Cause to the Contrary*; *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d at 163.

of a "best interest" analysis for this purpose because doing so defeats the purpose of ICWA by allowing Anglo cultural bias into the analysis and because best interest is relevant to placement, not to jurisdiction.[14]

When Does the ICWA Apply?

The ICWA applies to any "child custody proceeding" involving an "Indian child," if the court "knows or has reason to know that an Indian child is involved."[15]

Child Custody Proceedings

For foster care placement, termination of parental rights, pre-adoptive and adoptive placements are subject to ICWA. ICWA does not apply to most juvenile delinquency actions; nor does it apply to custody actions in divorce or separation proceedings (unless custody may be awarded to a non-parent).[16]

Indian Child

An Indian child is an unmarried person under age 18 who is either a member of an Indian tribe or eligible for membership and the biological child of a member.[17] There are more than 500 federally recognized tribes, but tribes from Mexico and Canada, as well as some U.S. tribes, are excluded.[18]

Reason to Know Indian child Involved

ICWA does not assign responsibility for discovering a child's Indian status to a specific party,[19] but a proactive approach to identifying these cases minimizes the risk of a final judgment being subject to attack for failure to adhere to ICWA requirements.[20]

How Are Possible Indian Children Identified?

In every case, the question should be asked: could this child be an Indian child? A number of CPS forms are designed to get information from family members about a child's possible Indian heritage.[21] To the extent that missing parents or other family

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[14] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d at 169.

[15] See 25 U.S.C. §1912(a).

[16] See 25 U.S.C. §1903(1); BIA Guidelines, Rule B.3. *Determination That Placement Is Covered by the Act, and* B.3. *Commentary*

[17] 25 U.S.C. §1903(4).

[18] [18] See 25 U.S.C. §1903(8*)* ["Indian tribe" defined]*; In re* A.J., 733 A.2d 36 (Vt. 1999). For a current list of federally recognized tribes, See Bureau of Indian Affairs website, http://www.doi.gov/bia/ (select tribal directory) or other resources listed in Practice Guide, SECTION 11, Child Welfare Contacts, Indian Child Welfare Act.

[19] BIA Guidelines, B.5. *Commentary*, states that "[t]his section [on Notice Requirements] recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian."

[20] The remedy for violation of key ICWA provisions is a petition to invalidate. 25 U.S.C. §1914.

[21] Child Placement Resources Form (Form 2625); Family Information Form (Form 2626); Indian Child and Family Questionnaire (Form 1705); Indian Child Welfare Act Checklist (Form 1706) (all of these forms are available on the CPS intranet site; See also Practice Guide, SECTION 11, TOOLS, ICWA, for copies of the Child and Family Questionnaire

members are found as a case progresses, the issue needs to be raised again, in order to avoid discovering that a case is subject to the ICWA too late in the proceedings.

If there is information that a child may be an Indian child, the best practice is to give the required ICWA notice, as detailed below, How to Give Notice. This satisfies the legal notice requirement if the child is an Indian child. The fact that a child has only a small amount of Indian blood, that a child's Indian relative is a distant one, or that a parent or grandparent was never enrolled as a tribal member does not resolve the question of whether an Indian child is involved. Only the tribe can make a membership determination.

When the ICWA notice is sent, you can also send a letter asking the tribe to confirm or deny the child's membership or eligibility for membership status.[22] This is not legally required, but may facilitate getting the necessary membership information more quickly. By giving a tribe as much information as possible about a child's family history and tribal connection and an opportunity to research the child's tribal status, CPS will have the best protection against any challenge based on failure to comply with ICWA.

The reliability of the information concerning a child's potential status as an Indian child, the tribe's response and the court's interpretation of the ICWA all play a role in determining whether the ICWA applies in a given case.[23]

Tribe Confirms Membership

Tribes have differing methods of establishing membership, and enrollment is not always required but a tribe's determination regarding the child's membership status is conclusive.[24]

Tribe Denies Indian Child Status

If the tribe responds that a child is neither a member nor eligible for membership, this evidence can be submitted to the court with a request that the court find that the ICWA does not apply.

No Tribal Response

Even if the tribe does not respond to an inquiry about a child's Indian status, or

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and the Indian Child Welfare Act Checklist.

[22] See Practice Guide, SECTION 11, TOOLS, ICWA, Sample Membership Query Letter to Tribe.

[23] Compare divergent approaches taken by Texas courts to some evidence of a tribal affiliation without confirmation from the tribe. *In re R.R.*, 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.) (evidence that grandmother was enrolled member and that tribe requested more information to determine children's status gave trial court reason to know child's Indian status and duty to ensure strict compliance with notice requirements before determining whether the ICWA applied); *In re R.M.W.*, 188 S.W.3d 831 (Tex. App.— Texarkana 2006) (no reason to know Indian children where DFPS gave notice to tribe but there was no evidence of children's tribal membership or eligibility); *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W. 3d 870, 874 (Tex. App.— Dallas 2000, pet. denied) (where caseworker previously notified tribe of proceedings to terminate appellant's parental rights, the agency acknowledged the child's status as an Indian child.)

[24] See BIA Guidelines, Rule B.1. *Determination That Child Is an Indian*. "The best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria." BIA Guidelines, B.1. *Commentary*.

responds without seeking to transfer the case or to intervene in the state court proceedings, the state court must follow ICWA if there is "reason to believe" that an Indian child is involved.

Scant, Unreliable Information

If information about a child's Indian heritage is scant or unreliable, it may be appropriate to ask that the trial court find that there is insufficient evidence to show that a child is an Indian child, and, thus ICWA does not apply. This strategy should only be used after verifying that the tribe has all available information about the family's possible tribal connection and has received the required ICWA notice. The decision to ask the court to find that ICWA does not apply should only be made after due consideration is given to the potential for an action to invalidate under 25 U.S.C. §1914 if an order is entered in violation of key ICWA provisions.

Existing Indian Family Doctrine

This is a judicially created exception to the ICWA based on the premise that if a child's parent does not have a social, cultural or political connection with an Indian tribe or the child has never lived in an Indian environment, ICWA should not apply. Although Texas courts have not addressed the issue, an increasing number of courts have rejected the existing Indian family doctrine[25] as contrary to the ICWA. Moreover, the tenor of ICWA decisions from Texas courts suggests this doctrine is not likely to be well-received in this state. "When, as here, an ICWA proceeding takes place in state court, rather than a tribal forum, the trial court should take great precautions to ensure the prerequisites of the ICWA have been satisfied."[26]

How to Give Notice

Giving notice under ICWA requires close attention to specific requirements governing the type of notice, the proper persons and entities who must be served, the type of service required and how compliance is demonstrated by filing proof of service with the court.[27]

The Notice of Pending Custody Proceeding Involving Indian Child must be sent to:[28]

- Every known parent(s);
- Indian custodian;
- Any identified tribe;
- The Secretary of the Interior; and

[25] The Kansas Supreme Court provides a thorough analysis of the positions of various state courts, the statutory scheme and U.S. Supreme Court precedent in this decision rejecting the Indian family law doctrine. *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).
[26] *Doty-Jabbaar v. Dallas County Child Protective Services,* 19 S.W. 3d 870, 877 (Tex. App. — Dallas 2000, pet. denied).
[27] *In re R.R.*, 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.).
[28] See Practice Guide, SECTION 11, TOOLS, Indian Child Welfare Act, Notice of Pending Custody Proceeding Involving Indian Child.

- The Bureau of Indian Affairs (BIA), Area Director.[29]

In addition, if the identity or location of a parent or Indian custodian is not known or the identity of the tribe cannot be determined, the Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined[30] must be sent to:

- The Secretary of Interior; and
- The Bureau of Indian Affairs, Area Director.[31]

Parent

A non-Indian parent of an Indian child has the same rights as an Indian parent. An alleged father, however, must acknowledge paternity or be legally determined to be the father before being recognized as a parent for purposes of ICWA.[32]

Indian Custodian

"Indian custodian" is broadly defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." [33]

More Than One Tribe

If the child has ties to more than one tribe, notice should be given to each tribe identified. Either the tribes or the court, but not CPS, can determine which tribe has the closer connection to the child.

Provide Family Information

With either ICWA Notice, attach a copy of the petition, the Indian Child and Family Questionnaire, or a family history or genogram with as much information as possible to aid the tribe in researching a child's status with a tribe. A child's family history is often key to a tribe's ability to confirm or deny a child's status as an Indian child.

Mailing

Notice must be sent either by registered or certified mail, and must include a request for a return receipt.[34]

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[29] 25 U.S.C. §1912(a); 25 C.F.R. § 23.11(a).

[30] See Practice Guide, SECTION 11, TOOLS, ICWA, Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot Be Located or Determined.

[31] 25 U.S.C. §1912(a); 25 C.F.R. §23.11(b).

[32] 25 C.F.R. §23.2, "Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established."

[33] 25 U.S.C. §1903(6).

[34] The statute requires notice by registered mail but the regulations permit certified mail. 25 U.S.C. §1912(a); 25 C.F.R. §23.11 (a) and (d). In either case, a return receipt must be requested. *In re T.M.*, 628 N.W. 2d 570 (Mich. App. 2001).

Proof of Service

File the proof of service with the court and, unless a tribe opts out of the proceedings in writing, add the tribe (as well as the BIA Area Director and the Secretary of Interior) to and other purposes for the remainder of the litigation.

Timing (10 + 20 days)

No "foster care placement or termination of parental rights" hearing can be held until at least ten (10) days after notice is received (subject to an additional 20 days if the parent/custodian/tribe requests additional time for preparation).[35] Notice of each subsequent hearing should be given, unless or until the tribe gives written notice that it no longer intends to be a party in the case.

To avoid a delay and potential challenge to the court's jurisdiction, experts recommend setting the initial hearing at least 30 days after notice is given (in effect, this assumes that a 20-day continuance is requested and granted).

Does the ICWA Notice Requirement Prevent an Emergency Removal?

No. The ICWA notice requirement does not prevent CPS an emergency removal if necessary "to prevent imminent physical damage or harm to [an Indian] child."[36]

Although the statutory emergency provision refers to children domiciled or residing on the reservation, the authority for emergency removals of an Indian child is implicit and buttressed by the legislative history.[37]

Special Removal Affidavit

If the child's Indian status is discovered at the time of removal, an ICWA compliant affidavit should be filed at the earliest possible time (either at the emergency removal or at the 14 day adversary hearing).[38]

Special Setting Following Emergency Hearing

As soon as possible after a removal hearing for an Indian child, the agency must request that another hearing be set that meets all ICWA requirements for notice, standards and burden of proof for a foster care placement.[39] While the Guidelines permit temporary

[35] 25 U.S.C. §1912(a).
[36] 25 U.S.C. § 1922.
[37] See 25 U.S.C. § 1922; *Oregon v. Multnomah County*, 688 P.2d 1354 (Ore. App. 1984).
[38] See Practice Guide, SECTION 11 TOOLS, Indian Child Welfare Act, Requirements for Emergency Removal of Indian Child; Sample Emergency Removal Affidavit
[39] 25 U.S.C. §1912.

emergency orders for a maximum of 90 days (unless there are extraordinary circumstances),[40] the best practice is to get the child's tribe involved and set a hearing at the earliest possible date that accommodates the required 20-30 day notice period. At that hearing, the court must make the necessary findings to warrant a "foster care placement.[41] See **Conservatorship or Termination of Parental Rights of an Indian Child**, below**.**

Rights of the Parents, Indian Custodian and Tribe

The parents or an Indian custodian of an Indian child and the child's tribe have specific rights under the ICWA.

Appointment of Counsel

Appointment of counsel for indigent parents or Indian custodians is mandatory under the ICWA, whether the action is for removal and placement in foster care or for termination of parental rights.[42] Appointment of counsel for a child is discretionary, but state law requires appointment of an attorney *ad litem* for a child if DFPS seeks conservatorship or termination.[43]

Right to Review Records

In a proceeding for foster care or termination of parental rights, each party (including the child's tribe and custodian) has the right to review all reports and records filed with the court.[44] Even before a tribe intervenes or in the event a tribe elects not to intervene, it is good practice to share these records with the child's tribe if requested. Unless prohibited by confidentiality rules, sharing this information is often key to getting the most effective assistance from a tribe in information, terms of locating resources, experts or vital family history

Right to Intervene

The tribe and the Indian custodian have an absolute right to intervene in the state court action *at any time* in the proceedings.[45] Either may intervene without the other. Intervention may be accomplished informally, by oral statement or formally.

Full Faith and Credit

The ICWA requires that all courts give full faith and credit to the "public acts, records, and judicial proceedings" of any federally recognized Indian tribe regarding Indian child

[40] BIA Guidelines, Rule B.7.(d).
[41] *In re S.M.H.*, 103 P.3d 976 (Kan. App. 2005) (following a temporary custody hearing on June 17, 2003, a hearing in compliance with ICWA should have been conducted by approximately September 17, 2003).
[42] 25 U.S.C. §1912(b).
[43] TEX. FAM. CODE §107.012.
[44] 25 U.S.C. §1912(c).
[45] 25 U.S.C. §1911(c).

custody proceedings.[46]

Statutory Placement Preferences for Indian Child

Unless the tribe modifies the order of preference as permitted by law or the good cause exception applies, the ICWA mandates the following placements in order of preference**:**

Foster care or pre-adoptive placement:

- A member of the child's extended family;
- A foster home licensed, approved, or specified by child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[47]

For an adoptive placement:

- A member of the child's extended family:
- Other members of the child's tribe: or
- Other Indian families.[48]

Tribe Can Modify

The tribe can by resolution alter the order of preferences for foster care, pre-adoptive, and adoptive placements.[49] The tribe's preference should then be followed as long as it is still the least restrictive setting appropriate to the needs of the child.[50]

Good Cause Exception

Good cause not to follow the statutory placement preferences may include the request of the biological parents or the child when the child is of sufficient age, the extraordinary physical or emotional needs of the child as established by expert testimony, or after diligent search, the unavailability of suitable families meeting the preference criteria.[51]

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[46] 25 U.S.C. §1911(d).
[47] 25 U.S.C. §1915(b); BIA Guidelines, Rule F.2
[48] 25 U.S.C. §1915(a); BIA Guidelines, Rule F.1. and F.1. Commentary
[49] 25 U.S.C. §1915(c) (tribe can alter placement preferences by resolution).
[50] 25 U.S.C. §1915(c).
[51] BIA Guidelines, Rule F.3. *Good Cause to Modify Preferences; In re Sara J.*, 123 P.3d 1017 (Alaska 2005).

Conservatorship or Termination of Parental Rights of Indian Child

The ICWA differs significantly from the Texas Family Code in the required findings and procedures for both placement in foster care and termination of parental rights. The ICWA requires that an order that permits a child to be placed in foster care (in essence, a conservatorship order) be based on clear and convincing evidence rather than the state standard of preponderance of the evidence. The ICWA requires that an order for termination of parental rights be based on the standard of beyond a reasonable doubt. Under the ICWA in both circumstances there must be "qualified expert testimony" to support a finding that continued custody by the parent or Indian custodian is "likely to result in serious emotional or physical damage to the child" and that "active efforts" were made to provide remedial services and rehabilitative programs but were unsuccessful in preventing the breakup of the family.

In summary if the ICWA applies, the requirements are:

For Foster Care Placement

Clear and convincing evidence

Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful.

For Termination of Parental Rights

Evidence beyond a reasonable doubt:

Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful. 25 U.S.C. §1912(d) and 25 U.S.C. §1912(f).

Serious Emotional or Physical Damage

Evidence of poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior alone is not sufficient to show serious emotional or physical damage. There must be evidence of particular conditions in the home that are likely to result in serious emotional or physical damage to a specific child. Evidence of "the causal relationship between the conditions that exist and the damage that is likely to result" is essential. [52]

[52] BIA Guidelines, Rule D.3.(c).

Active Efforts

There must be evidence of "active efforts" to alleviate the cause for removal, taking into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.[53] "Active efforts" is not defined by ICWA, but requires more than the "reasonable efforts" required in a non-Indian case. When this standard applies, CPS staff should attempt to work with the tribe, the extended family, Indian social services, and individual Indian caregivers to tailor appropriate services for individual families.[54]

Who is a Qualified Expert Witness?

The Guidelines suggest that a qualified expert will most likely be:

- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs relating to the family and childrearing practices;
- A lay expert with substantial experience in delivery of child and family services to Indians and extensive knowledge of the social, cultural, and childrearing standards within the child's tribe;
- A professional person with substantial education and experience in his or her specialty. [55]

Although the statute is silent as to the qualifications required of expert witnesses, in a majority of jurisdictions, courts do not interpret the law to require an expert with tribal cultural or child-rearing expertise where the grounds for removal or termination are not susceptible to cultural interpretation (fractured bones, sexual assault).[56] In Texas, the *Doty-Jabbaar* case found that a caseworker with nine and a half years' experience with the agency was not "any more qualified than any other social worker to testify in this proceeding," and did not qualify as an expert under ICWA.[57] Significantly, *Doty- Jabbaar* involved an infant removed due to parents' substance abuse issues. While the court did not make this distinction, it is at least arguable that expertise in tribal cultural and family traditions is more relevant in this type of case than, for example, in a case of shaken baby syndrome or sexual abuse. The best strategy is to offer an expert who is familiar with the tribe's culture and parenting practices whenever possible, but always in a case where the basis for removal or termination is susceptible to cultural bias.[58]

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[53] 25 U.S.C. §1912 (d); BIA Guidelines. Rule D. 2. *Efforts to Alleviate Need to Remove Child From Parents or Indian Custodians*

[54] BIA Guidelines, Rule D.2. and D.2. *Commentary*.

[55] BIA Guidelines, Rule D.4. *Qualified Expert Witnesses; See* Practice Guide, Section 11, Tools, Sample Questions to Qualify Expert Witness under ICWA.

[56] *In re L.G.*, 14 P.3d 946, 952-53 (Alaska 2000) (purpose of expert testimony is to avoid social workers with neither professional expertise nor familiarity with tribal culture sufficient to distinguish between different child-rearing practices and abuse or neglect; virtually all courts have concluded that if termination proceedings do not implicate cultural bias, expert need not have familiarity with cultural standards).

[57] *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W.3d 870, 877 (Tex. App. — Dallas 2000, pet. denied)

[58] See Practice Guide, SECTION 12 RESOURCES, Indian Child Welfare Act, for assistance in locating an expert witness, or contact the Office of General Counsel

Voluntary Relinquishment of Parental Rights

The ICWA imposes significantly different requirements for a valid voluntary relinquishment of parental rights, or "consent to termination of parental rights," as ICWA denotes the process, when an Indian child is involved than the Texas Family Code does.[59] The most significant difference is that a valid relinquishment to terminate parental rights must be in writing and be taken on the record before a judge.[60] In addition, the judge must attach a certificate that indicates that the terms and consequences of the consent were fully explained and that the parent or Indian custodian fully understood the explanation whether provided in English or by an interpreter. Consent to voluntary relinquishment of parental rights cannot be given until the eleventh day after birth of the child and must contain the child's name, birth date, the name of the child's tribe, any tribal affiliation and membership, name and address of the consenting parent or Indian custodian, and the name and address of the person or entity that arranged any adoptive or pre-adoptive placement. Unlike a relinquishment made to CPS under the Texas Family Code, a parent of an Indian child may withdraw consent for any reason at any time prior to entry of a final decree of termination or adoption. If consent is obtained by fraud or duress, a parent may withdraw consent and the court shall invalidate a decree of adoption up to two years after entry of the decree (or beyond the two years if otherwise permitted under state law).

Failure to Comply with the ICWA

Despite the best efforts of all parties, sometimes a child's Indian heritage and tribal status will not be discovered until long after a child is taken into CPS custody. When this happens, the only remedy is to give all parties proper notice immediately and conduct all future hearings and proceedings in conformance with the ICWA. Unless there was reason to know the child was an Indian child, orders entered prior to that time cannot be invalidated for noncompliance with the ICWA.[61]

If a child is not identified as an Indian child, it is virtually inevitable that key provisions of the ICWA will be violated. As a result, unless the evidence of a child's status was not accessible despite diligent efforts, any resulting judgment may be subject to an action to invalidate.[62] Consequently, it is essential that every effort be made to identify all cases subject to the ICWA at the earliest possible juncture.

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[59] 25 U.S.C. §1913(a).

[60] See Practice Guide, SECTION 11 TOOLS, Indian Child Welfare Act, Sample Consent to Relinquish Parental Rights.

[61] See *Oregon v. Tucker*, 710 P.2d 793 (Or. Ct. App. 1985).

[62] 25 U.S.C. §1914.

Case Notes

U.S. Supreme Court

→ JURISDICTION
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (Denial of tribe's motion to vacate adoption decree reversed on appeal, where both parents were members of the tribe and resided on the reservation, left the reservation prior to twins' birth and signed consent to adoption. Where children neither reside nor are domiciled on reservation, 25 U.S.C. § 1911(b) creates concurrent but presumptive tribal jurisdiction that requires the state court to transfer jurisdiction unless good cause is shown or tribe declines).

Texas Courts

→ *INDIAN CHILD STATUS*
In re R.R., 2209 Tex App LEXIS 2038 (Tex. App.— Fort Worth, March 19, 2009, no pet.) (Failure to give proper notice to tribes and Bureau of Indian Affairs precludes trial court from determining children's tribal status, where evidence that grandmother was enrolled member and tribe requested more information gave trial court reason to know of child's status).

In re R.M.W., 188 S.W. 3d 831 (Tex. App.— Texarkana 2006, no pet.) (Assertion of Indian heritage or blood without evidence of membership or eligibility for membership in an Indian tribe is insufficient to put court on notice of Indian child. Distinguishing Doty-Jabbaar, court notes DFPS did not admit child was Indian, and court made no finding that any children were tribal members).

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W.3d 870 (Tex. App.— Dallas 2000, pet. denied) ("Although the record indicates the tribe failed to intervene in this case, the trial court was nonetheless bound to apply the provisions of ICWA when faced with evidence the mother was a member of an Indian tribe.")

Additional resources:

Indian Child Welfare Act Checklists, National Council of Juvenile and Family Court Judges, www.ncjfcj.org

The Indian Child Welfare Handbook—A Legal Guide to the Custody and Adoption of Native American Children, B.J. Jones, et al. (2d Ed 2008).

Unger, Steven, ed., The Destruction of American Indian Families, New York: Association on American Indian Affairs, 1977, p.1

For more information, please see Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts at http://www.ncjfcj.org/sites/default/files/ICWA_brief.pdf. (NCJFCJ, 2012).

For more information, please see Indian Child Welfare Act Checklists for Juvenile and Family Court Judges at http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf (NCJFCJ, 2003).

The National Indian Child Welfare Association at http://www.nicwa.org/indian_child_welfare_act/.

THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

The Interstate Compact on the Placement of Children (ICPC) is the statutory mechanism to ensure protection and services to children who are placed across state lines for foster care or adoption. The law was established with the purpose of creating orderly procedures for the interstate placement of children and fixing financial responsibility for placing the children. However, the procedures required by the ICPC frequently lead to longer delays in placement.

Generally, the law requires that a juvenile or family court follow the ICPC any time the court sends or causes a child to be sent to another state. The ICPC was actually intended to extend jurisdictional reach into borders of the receiving state solely for the purpose of investigating a proposed placement and supervising a placement once made, but does not confer authority to adjudicate a custody case or otherwise modify orders. The ICPC is procedural and its governance extends to placements only. The ICPC was adopted by Texas and may be found in Tex. Fam. Code § 162.102.

A placement is the arrangement for the care of a child in a foster home or in a child-caring agency or institution, including placement with a relative, or into a pre-adoptive home, but not an educational institution, a hospital, or mental health facility or a placement made by a relative of the child.

A. Purpose

The purpose of the ICPC is to protect the child and the party states in the interstate placement of children so that:

- the child is placed in a suitable environment;
- the receiving state has the opportunity to assess that the proposed placement is not contrary to the interests of the child and that its applicable laws and policies have been followed before it approves the placement;
- the sending state obtains enough information to evaluate the proposed placement;
- the care of the child is promoted through appropriate jurisdictional arrangements; and
- the sending agency or individual guarantees the child legal and financial protection.

B. Placements Subject to ICPC

The ICPC applies to the following:

- placement preliminary to an adoption made by (adoptions include placements made by public agencies or birth parents);
- placement into foster care (foster care placements are those in licensed/approved foster family homes, including homes of relatives);
- placement with parents and relatives when a parent or relative is not making the placement; and
- placement into a residential facility (this form of foster care includes placements into residential treatment centers, group homes and child care institutions).

C. Placements Not Subject to the ICPC

The ICPC does not apply to the following:

- placements into schools where the primary purpose for the placement is educational;
- placements into medical and mental facilities; and
- placements made by a child's parent, stepparent, grandparent, adult sister or brother, adult aunt, or uncle, or non-agency guardian with any such relative or non-agency guardian.

D. Effect of the ICPC

Placement of a child across state lines shall not be made until the sending agency receives approval of the receiving state.

The ICPC procedure is to be carried out by the state ICPC administrators in the sending and receiving state. However, the process is known for causing great delays in achieving permanency. Frequently, the process is delayed by state agencies not following the time frames set out by law.

The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state.

E. Expedited Placement Request

Under certain conditions, a court may request an expedited placement review. To order such, the court must find:

- the proposed priority placement of a child from Texas into another state is necessary and the receiving state's Compact Administrator has had a properly submitted ICPC request pending for more than 30 business days with no decision;
- the proposed placement is with the child's close relative (parent, stepparent, adult brother or sister, adult uncle or aunt, grandparent); and:
    - unexpected dependency due to a sudden or recent incarceration, incapacitation (parent or guardian unable to care for child due to medical, mental or physical condition of parent or guardian), or death of a parent or guardian;
    - the child is four years of age or younger;
    - the child is in an emergency shelter; or
    - the child has spent a substantial amount of time in the home of the proposed placement in the past.

It is not within a judge's discretion to make all orders expedited. The situation must fit those criteria outlined in ICPC Regulation 7 for priority placement to be available; it is not a matter of discretion for judges.

Although some judges feel that it is within their discretion to grant "extended visits," these may actually be deemed an illegal placement with significant consequences. ICPC Regulation 9 defines a "visit," which is distinguished from a placement on the basis of purpose, duration, and the intention of the person or agency with responsibility for planning for the child as to the child's place of abode.

Special Issue: Lack of understanding of the ICPC and its requirements is often cited as a problem that causes delays in an ICPC placement. The ICPC involves a very complicated process, so familiarity with the provisions and additional resources is necessary. DFPS staff may be directed to call its ICPC Specialist and the court may consider setting the case for more frequent review hearings until the issue is resolved.

F. Penalty for Failure to Comply

Failure to comply with the ICPC, by placing a child without the approval of the receiving state, is a Class B misdemeanor. Upon conviction, the sending agency (which may be the

Court) shall be subject to having its license, permit, or other legal authorization for the placement of children suspended or revoked.

G. ICWA and the ICPC

Because the ICPC is a compact adopted by states as state law, the Indian Child Welfare Act (ICWA) is a federal law that preempts conflicting state law. Thus, the ICPC does not apply to interstate placements of an Indian child if the placement is being made within an Indian reservation unless:

- the tribal government requests ICPC services;
- the tribe has adopted the ICPC; or
- the tribe has an existing Title IV-E agreement with the state requiring ICPC compliance.

If an Indian child is being placed interstate but not within a reservation, the ICPC applies to that placement. However, the placement requirements of ICWA preempt any ICPC requirements that interfere with or impede the implementation of the placement required by ICWA.

Please refer to the DFPS Texas Interstate Compact Office for more information about the ICPC at this link: http://www.dfps.state.tx.us/adoption_and_foster_care/about_tare/adoption/icpc.asp

Additional Resources

ICPC: A Manual and Instructional Guide for Juvenile and Family Court Judges, NCJFCJ State ICPC Offices

Leading Cases

Rejecting the argument of prospective adoptive parents, residents of Colorado, with whom a child had been placed by the child's Texas managing conservator, that the Colorado court where the petition for adoption was pending had jurisdiction over the child, the Texas Court of Appeals in *Unger v. Baker*, 1989 (Tex. App. Houston 1st Dist. Aug. 18, 1989)(unpublished), held that under Article V(a) of the ICPC, the managing conservator, as the sending agency, retained jurisdiction over the child because the child had not yet been adopted. Therefore, the court concluded, the child was subject to the jurisdiction of the Texas trial court in which the managing conservator had filed a motion remove the child from the temporary placement with the prospective adoptive parents and overruled the prospective adoptive parents' motion for leave to file mandamus seeking rescission of the Texas trial court's order overruling their special appearance to contest the Texas court's jurisdiction.

Washington State ICPC case, State of Washington Court of Appeals - Division One - No. 63624-3-I (In the Matter of the Dependency of D.F.M) (August 2, 2010)

PERMANENCY CARE ASSISTANCE (PCA)

The Permanency Care Assistance (PCA) Program provides to qualifying kinship families who take permanent managing conservatorship of a child: 1) monthly cash assistance similar to adoption assistance; 2) Medicaid health coverage; and 3) a one-time reimbursement of nonrecurring expenses, including legal fees, incurred in the process of obtaining custody of the child, up to a maximum of $2,000. The maximum monthly payments are the same as those for adoption assistance and depend upon the child's authorized service level at the time the PCA is negotiated. Tex. Fam. Code § 264.852(a).

Qualifying caregivers are those who: 1) are related or who have longstanding relationships with the children being placed; and 2) are verified foster parents of the children being placed for at least 6 consecutive months; and 3) with whom the child has resided at least six months after verification and prior to award of permanent managing conservatorship. DFPS may enter into a permanency care assistance agreement with a kinship provider who is the prospective managing conservator of a foster child only if the kinship provider meets the eligibility criteria under federal and state law and DFPS rule. Tex. Fam. Code § 264.852(b).

Before awarding permanent managing conservatorship to a relative under this program, a court should ensure that:

- the caregiver is verified;
- the child has been placed with the verified kin for at least 6 months following the date of the verification;
- DFPS has determined that reunification and adoption are not appropriate permanency options for the child;
- DFPS and the kin have signed a PCA agreement and it is on file PRIOR to the award of permanent managing conservatorship to the caregiver.

Then, benefits begin once the court awards permanent managing conservatorship to the kin/caregiver.

A court may not order DFPS to enter into a permanency care assistance agreement with a kinship provider unless the kinship provider meets the eligibility criteria under federal and state law and DFPS rule, including the requirements relating to criminal history background check of a kinship provider. Tex. Fam. Code § 264.852(c).

The one-year deadline to dismiss a case still applies. For example, if a caregiver becomes verified prior to the 12-month dismissal date, but the child has not lived with the caregiver at

least 6 months, the case must be extended under Tex. Fam. Code § 263.401 to satisfy the 6 month residency requirement.

The kin/caregiver cannot qualify for PCA benefits if a parent is working toward reunification.

If a sibling is placed by CPS in the home of a child who is already the subject of a PCA agreement, the sibling is automatically eligible for PCA benefits and the six month residency requirement for the sibling is waived. However, the family must enter into a new PCA that includes the sibling BEFORE the court awards permanent managing conservatorship of the sibling to the kin/caregiver.

The PCA program does not replace the existing DFPS program that offers financial and other supports to relative and other designated caregivers. Relatives who do not meet the eligibility criteria under the PCA program can continue to take advantage of the Relative and Other Designated Caregiver Program.

The maximum monthly amount of assistance payments under a permanency care assistance agreement may not exceed the amount of the month foster care maintenance payment DFPS would pay to a foster care provider caring for the child for whom the kinship provider is caring. Tex. Fam. Code § 264.854.

If DFPS first entered into a permanency care assistance agreement with a foster child's kinship provider after the child's 16th birthday, DFPS may continue to provide permanency care assistance payments until the last day of the month of the child's 21st birthday, provided the child is:

- regularly attending high school or enrolled in a program leading toward a high school diploma or high school equivalency certificate;
- regularly attending an institution of higher education or a post secondary vocational or technical program;
- participating in a program or activity that promotes, or removes barriers to, employment;
- employed for at least 80 hours a month; or
- incapable of performing the activities described above due to a documented medical condition. Tex. Fam. Code § 264.855.

DFPS may not enter into a permanency care assistance agreement after August 31, 2017. DFPS shall continue to make payments after that date under a PCA agreement entered into on or before August 31, 2017, according to the terms of the agreement. Tex. Fam. Code § 264.857.

Resources

Q & A about PCA, Jurist in Residence Letter, Texas Office of Court Administration

Report on the Fostering Connections Act , New Federal Foster Care Legislation: What it Means for Texas the Center for Public Policy Priorities at http://library.cppp.org/files/4/newfostercare.pdf

HEALTH CARE FOR TEXAS CHILDREN IN FOSTER CARE: STAR HEALTH

In April 2008, all children under state conservatorship became eligible for STAR Health, a comprehensive, managed care program designed to better coordinate and improve access to health care for:

- Children in DFPS conservatorship (under age 18)
- Youth in CPS extended foster care (ages 18 to 22)
- Youth who were previously under DFPS conservatorship and have returned to foster care (ages 18 to 22) through voluntary foster care agreements
- Youth ages 18-21 who aged out of foster care at age 18 and are eligible for Medicaid services
- Former foster care youth (ages 21 to 23) enrolled in an institution of higher education located in Texas enrolled in the Former Foster Care in Higher Education (FFCHE) program.

Special Issue: STAR Health is a managed healthcare program for children in state care. Call 1-866-912-6283 for the Superior Health Plan Network.

A. Physical Health Benefits

By providing every child with a primary physician to coordinate care and a web-based Health Passport that travels with the child, STAR Health provides a medical home for foster children immediately upon entering DFPS conservatorship. Services include:

- Medical
- Dental
- Vision
- Prescriptions
- Hearing Exams/Hearing Aids
- Durable Medical Equipment
- Hospital Care
- Emergency Room
- Inpatient Services
- Physical Therapy

- Lab Tests/X-Rays
- Transplants
- Family Planning
- Disease Management (Asthma, Diabetes, etc.)
- Health Passport
- Help-lines for consumers and healthcare providers
- Physical, occupational, speech, and other health-related services

B. Behavioral Health Benefits

Mental Health and Substance Abuse Services are provided by Cenpatico, Superior's behavioral health partner. Services include:

- Inpatient Services
- Partial Hospitalization
- Intensive Outpatient
- Day Treatment
- Observation
- Rehabilitative Services
- Outpatient Therapy
- Telemedicine
- Disease Management (Intellectual Developmental Disabilities)
- Complex Case Management

STAR Health coverage does NOT include children who are:

- placed outside of Texas;
- from other states but placed in Texas;
- residents in Medicaid-paid facilities (nursing homes, state schools);
- dually eligible for Medicaid and Medicare;
- adopted and the adoption is finalized;
- in hospice; or
- in DFPS conservatorship, but placed in a TYC facility or on probation.

C. STAR Health and Transitioning Youth

- Youth who have aged out but have remained in paid foster care past their 18th birthday are eligible until the month of their 22nd birthday.
- Youth who leave foster care at age18 are eligible for coverage until their 21st birthday. Youth who are 21 and 22 are eligible for coverage if they are attending college or technical school. They must apply by calling 1-800-248-1078.
- It is not necessary for a court to extend jurisdiction beyond age 18 for this coverage to apply.
- The 83rd Texas Legislature amended Tex. Fam. Code § 264.121 in 2013 to require, for a youth taking prescription medication, DFPS to ensure that the youth's transition plan includes provisions to assist the youth in managing the use of the medication and in managing the child's long-term physical and mental health needs after leaving foster care, including provisions that inform the youth about:
    1) the use of the medication;
    2) the resources that are available to assist the youth in managing the use of the medication; and
    3) informed consent and the provision of medical care in accordance with Tex. Fam. Code § 266.010(1). Tex. Fam. Code § 264.121(g).

D. Court Orders

No court order is required as long as the service is medically necessary. However, if a judge orders a particular service or specific care that is covered by Medicaid, a signed copy of the order should be sent ASAP by DFPS via fax to Superior at 1-866-702-4837.

Special Issue: If the child needs a service not covered by Medicaid, the judge may order the service and DFPS will seek that service through a private pay contract. When entering orders for services that are not covered by Medicaid, a judge might consider drafting an order that provides DFPS the maximum flexibility in contracting because a particular provider may not be in the position to fulfill the contract as dictated by the court order.

References

Key STAR Health phone numbers

Organization	Phone Number
Superior HealthPlan Network	1-866-912-6283
Cenpatico (Behavioral Health)	1-866-218-8263
Delta Dental (Dental Services)	1-866-287-3419
TVHP (Vision Services)	1-866-642-8959
NurseWise	1-866-912-6283
Medical Transportation Program	1-877-633-8747
Vendor Drug Program (Prescriptions)	1-800-252-8263

Regional Well-being Specialists

Well-being specialists are DFPS liaisons to Superior HealthPlan, the company that operates the STAR Health provider network. Contact your regional well-being specialist for help with STAR Health.

Region	Name/Email
Amarillo and El Paso Regions (Regions 1 and 10)	Kathy Roberts
Midland and Abilene Regions (Regions 2 and 9)	John Clymer
Arlington Region (Region 3)	Pam Baker
Tyler and Beaumont Region (Regions 4 and 5)	Sheryl McCloney
Houston Region (Region 6)	Debbie Kumar-Misir
Austin Region (Region 7)	Magena Henderson
San Antonio and Edinburg Regions (Regions 8 and 11)	Jackie Lerche

Texas DFPS website *at* *http://www.dfps.state.tx.us/Child_Protection/Medical_Services/guide-star.asp*

See the STAR Health website *at* www.fostercaretx.com

STAR Health Bench Card, *The Judicial System and STAR Health at* http://www.superiorhealthplan.com/files/2011/11/ProviderTrainingSTARHealthJudiciarySystem.pdf

Center for Public Policy Priorities Policy Paper on STAR Health, November 2008

STAR Health Overview, February 2010 Presentation by James A. Rogers, MD, Medical Director, Texas DFPS of Family and Protective Services at: www.cwla.org/roundtables/2009/FC_TXhealth.ppt

E. Medical Consenter

Before a child may receive medical treatment, consent is required. Minors typically lack the legal capacity to consent, requiring a parent or guardian to serve as the consenter.

When a child is removed from his home, DFPS is named as Managing Conservator and steps into the role of parent. The role includes the responsibility to consent to medical procedures on behalf of the child. A parent would typically have the best historical information, current observations and intuition about their child. When a governmental agency steps into those shoes, it often results in information gaps and a lack of historical context, which further complicates an already difficult decision.

Medical Consenter Must be Designated

The Texas Family Code was amended in 2005 to require consent from a court authorized Medical Consenter before medical care could be provided to a child in DFPS conservatorship. Tex. Fam. Code § 266.004 and Tex. Fam. Code § 266.010 establish who may serve as the Medical Consenter for a child or youth in DFPS conservatorship as follows:

- foster parent;
- parent whose rights have not been terminated, if in child's best interest;
- DFPS or an agent of DFPS; or
- youth 16 years or older, if child has capacity to consent.

The judge may directly authorize an individual as Medical Consenter by court order or name DFPS as the Medical Consenter. When DFPS is authorized as the Medical Consenter, DFPS must designate an individual who will exercise consent and notify the court within five days of the authorization.

DFPS prefers to be named as the Medical Consenter because it provides more flexibility by allowing changes in the designated individual without seeking new court orders. For example, when placements change or the designated individual is no longer employed by DFPS, has a major illness, or fails to perform his or her duties, the individual may be replaced by filing a form, rather than setting a hearing, providing notice to parties, and requesting new orders. This process can be time-consuming for courts and DFPS staff, and more importantly, could delay medical treatment for a child.

Once DFPS is authorized in the order as the Medical Consenter, policy recommends designation of the most appropriate individual according to the type of placement. When a child is placed in an emergency shelter, DFPS may designate a professional staff member of a General Residential Operation (GRO) Offering Emergency Services (emergency shelter) as either the Medical Consenter or Backup Medical Consenter, provided that the staff person is knowledgeable about the child's medical condition and medical care needs.

In most cases in which a child has a live-in caregiver, such as a foster parent or kinship caregiver, DFPS designates the live-in caregiver as the Medical Consenter and typically designates a staff member of the Child Placing Agency (CPA) or CPS as backup medical consenter. Many times, foster parents are able to effectively advocate for the youth and children by attending the child's appointments and reporting first-hand knowledge of the child's progress and concerns. When a child is placed in a Residential Treatment Center or Group Home, the CPS caseworker is usually designated as the Medical Consenter, with the caseworker's supervisor as the Backup Medical Consenter. However, if a child is placed in a residential treatment center (RTC) that is out of the assigned caseworker's region, a caseworker in the region where the child is placed, known as an "I See You" (ISY) worker, becomes the primary Medical Consenter and the home region caseworker or the ISY Supervisor becomes the Backup Medical Consenter.

1. Medical Consenter Should Give Informed Consent

Tex. Fam. Code Chapter 266 requires consent for medical care by a Medical Consenter, but does not specifically define consent. DFPS Policy and training provides more detail about what is required of a Medical Consenter. The CPS Handbook states that prior to consenting, all Medical Consenters and Backup Medical Consenters must: (i) become knowledgeable about the child's medical condition, history, and needs; and (ii) have completed a DFPS-approved training on medical consent.

Tex. Fam. Code § 266.004(h) also requires a Medical Consenter to complete a DFPS-approved training program related to "informed consent" and the other mandates under Tex. Fam. Code Chapter 266. The only exception to this is for a parent whose rights have not been terminated, unless the Court orders the parent to complete the training.

2. Medical Consenter Must Participate

Tex. Fam. Code § 266.004(i) requires the Medical Consenter to participate in each medical care appointment of the child. The appropriate level of participation depends on the nature of the medical care the child is receiving and the requirements of the healthcare provider. (Certain healthcare providers may require greater participation, including that the individual consenting to medical care attend the appointment in person). According to the CPS Handbook Section 11122:

- Preventive care: Medical Consenter or Backup Consenter may provide written consent or may authorize another person to take the child to the appointment.
- Behavioral health therapy (e.g., counseling): Medical Consenter is required to approve the treatment plan and monitor the progress of the child, but is not required to attend therapy sessions unless required by the provider.
- Appointments that involve physical health treatment (such as when the child is sick, dental treatment, or review of the progress of children who have been prescribed psychotropic medications): Medical Consenter must attend or participate by phone.

PSYCHOTROPIC MEDICATION

Psychotropic medications are substances that affect the mind and alter mental processes such as perception, mood and behavior. Psychotropic drugs include stimulants, antidepressants, antipsychotics and mood stabilizers. Some children need to use psychotropic medications long-term to treat mental health disorders that they inherited or developed, such as attention deficit hyperactivity disorder, severe depression or psychosis. Other children need to use psychotropic medications temporarily to help relieve severe emotional stress and help them function in school, at home and in the community.

The use of psychotropic medication in children in foster care has become the subject of a heated national debate. Psychiatric medication may be life-saving and relieve disabling and sometimes deadly symptoms of mental health disorders. Children and youth in foster care may benefit from medication to ameliorate the effects of trauma brought on from exposure to abuse or neglect. However, although studies have shown that psychotropic medications can have serious side effects on adults using them, little yet is known about the effects of long-term use in children.

During the 83rd legislative session, the Texas Legislature amended Tex. Fam. Code § 266.001 to add a definition of a psychotropic medication. A "psychotropic medication" means a medication that is prescribed for the treatment of symptoms or psychosis or another mental, emotional, or behavioral disorder and that is used to exercise an effect on the central nervous system to influence or modify behavior, cognition, or affective state. The term includes the following categories when used as described by Tex. Fam. Code § 266.001(7):

(A) psychomotor stimulants;

(B) antidepressants;

(C) antipsychotics or neuroleptics;

(D) agents for control of mania or depression;

(E) anti-anxiety agents; and

(F) sedatives, hypnotics, or other sleep-promoting medications. Tex. Fam. Code § 266.001(7).

Texas led the nation in creating oversight protocols in 2005 when the 79th Texas Legislature enacted Senate Bill 6. This sweeping legislation proposed reforms for DFPS, including a plan to place all foster children under a single comprehensive managed care system. Texas was the first state to develop a "best practices" guide for oversight of psychotropic medications for children in foster care. Released in 2005 and recently updated, DFPS, the Department of State Health Services (DSHS), and the Health and Human Services Commission (HHSC) developed Psychotropic Medication Parameters for Foster Children (Parameters). The Parameters serve as

a resource for physicians and clinicians who care for children diagnosed with mental health disorders.

The Texas Legislature also enacted Tex. Fam. Code Chapter 266 which governs medical care and education services for children in foster care primarily through three processes:

- Medical Consenter;
- Agency Oversight; and
- Judicial Review.

A. Medical Consenter

In 2013, the 83rd Texas Legislature amended Tex. Fam. Code § 266.004(h) regarding the required medical consenter training. The training required by Tex. Fam. Code § 266.004(h) must include training related to informed consent for the administration of psychotropic medication and the appropriate use of psychosocial therapies, behavior strategies, and other non-pharmacological interventions that should be considered before or concurrently with the administration of psychotropic medications. Tex. Fam. Code § 266.004(h-1).

Each person required to complete a training program under Tex. Fam. Code § 266.004(h) must acknowledge in writing that the person:

1) Has received the training described by Tex. Fam. Code § 266.004(h-1);
2) Understands the principles of informed consent for the administration of psychotropic medication; and
3) Understands that non-pharmacological interventions should be considered and discussed with the prescribing physician, physician assistant, or advanced practice nurse before consent to the use of a psychotropic medication. Tex. Fam. Code § 266.004(h-2).

Although the term “informed consent” as it relates to medical care for a child in foster care is not defined in Tex. Fam. Code Chapter 266, the 83rd Texas Legislature recently defined consent for psychotropic medication. Consent to the administration of a psychotropic medication is valid only if:

1) The consent is given voluntarily and without undue influence;
2) The person authorized by law to consent for the foster child receives verbally or in writing information that provides:
    a. The specific condition to be treated;
    b. The beneficial effects on that condition expected from the medication;

c. The probable health and mental health consequences of not consenting to the medication;

d. The probable clinically significant side effects and risks associated with the medication; and

e. The generally accepted alternative medications and non-pharmacological interventions to the medication, if any, and the reasons for the proposed course of treatment. Tex. Fam. Code § 266.0042.

The Parameters describe what is meant by informed consent by stating that consent to medical treatment in non-emergency situations must be informed consent, which includes discussing the following with the prescribing doctor/psychiatrist before consenting:

- a DSM-IV (or current edition) psychiatric diagnosis for which the medication is being prescribed;
- target symptoms;
- treatment goals (expected benefits);
- risks of treatment, including common side effects, laboratory finding, and uncommon but potentially severe adverse events;
- risks of no treatment;
- overall potential benefit to risk of treatment;
- alternative treatments available and/or tried;
- the date the child was first placed in current placement;
- child's current weight in pounds; and
- child's date of birth, necessary to classify child as a child (age 1-12 years) or as an adolescent (age 13-18 years), because some medications are approved for children but not adolescents and vice versa.

The Texas Administrative Code sets out similar requirements for General Residence Operations (GRO) residential child-care operations that provide care for 13 or more children or young adults and which employ or contract with a health-care professional who prescribes psychotropic medications. 40 Tex. Admin. Code §748.2253 requires, for a GRO who employs or contracts with a health-care professional who prescribes psychotropic medications to a child in care, the prescribing health-care professional must give the following in writing or document a discussion with the Medical Consenter or a combination of both:

- The child's diagnosis;
- The nature of the child's mental illness or condition;

- An explanation of the purpose of the medication;
- A description of the benefits expected;
- A description of any accompanying discomforts and risks, including those which could result from long-term use of the medication, and possible side effects, including side effects that are known to frequently occur in persons, side effects to which the child may be predisposed, and the nature and possible occurrence of irreversible symptoms;
- A statement of whether the medication is habituating in nature;
- Alternative interventions to the use of psychotropic medication that have been attempted and that have been unsuccessful;
- Other alternative treatments or procedures to the use of the psychotropic medication;
- Risks and benefits of the alternative treatments or procedures;
- Risks and benefits of not receiving or undergoing a treatment or procedure;
- An explanation that the person legally authorized to give medical consent may ask questions about the child's response to the medication, and may review your daily records on request; and
- An explanation that the person legally authorized to give medical consent may withdraw consent and request the medication be discontinued at any time.

The health-care professional must offer to answer any questions the person legally authorized to give consent has about the medication.

The person must sign a consent form that acknowledges [all of the information set forth in subsection (a) has been provided]. A copy of this signed consent form must be filed in the child's record.

In December 2011, DFPS published an online training on psychotropic medications for DFPS staff, foster parents and residential providers which focuses on informed consent. The online Psychotropic Medication Training lists the following four expectations for Consenters:

- Understand that in most cases other interventions should be tried before psychotropic medications.
- Understand the need for a complete psychiatric evaluation prior to giving psychotropic medications.
- Understand the responsibility of the medical consenter to give informed consent for each psychotropic medication prescribed for a child.
- Understand how psychotropic medications are used.

Included in the idea of informed consent is the consideration of alternative treatments and trauma-informed care. The concept of trauma-informed care is relatively new and a huge paradigm shift

for the entire system that will take some time. The Introduction and General Principles Section of the Parameters promote a trauma-informed child and family-serving system where all parties involved recognize and respond to the varying impact of traumatic stress on those who have contact with the system, including youth, caregivers, and service providers. A robust trauma-informed system would not only screen for trauma exposure and related symptoms, but would also use culturally appropriate, evidence-based assessments and treatment. Medical Consenters must be trained in trauma-informed care and play their part in a system that promotes resilience in children and families impacted by and vulnerable to trauma.

In the general Texas population, about 10% of children are on psychotropic medications compared to 20% of foster kids. The different rates of use could be due to the serious mental health issues that are common with abuse and neglect or the lack of alternative treatments and specialized, trauma-informed services, or a combination of both.

Texas Foster Children are More Likely to Have Been Traumatized

The high rate of psychotropic medication use in Texas foster care may be attributable to the fact that children in foster care are often exposed to trauma related to abuse or neglect. Exposure to trauma, coupled with Texas' low removal rate, might indicate that children in Texas foster care have higher mental health needs than other states that have a lower threshold for removal. Texas serves over 75% of families in the home which means that the children who come into care have typically experienced more severe abuse and neglect and likely require more intervention for mental health and behavioral issues.

Limited Mental Health / Substance Abuse Services

Texas ranks 50th in providing adults access to mental health services. Medicaid in Texas is only available to children, the elderly, and the disabled. An able-bodied adult with severe depression or bipolar disorder, who does not have private health insurance, is not likely to access Medicaid. Substance abuse treatment is also unavailable for the majority of the uninsured population. When parents cannot access mental health and substance abuse services, their children often suffer.

Another concern is the lack of access to child psychiatrists by the children and youth in foster care. When child psychiatrists are not available, more primary care physicians are put in the position of prescribing psychotropic medications that may be outside their expertise. STAR Health has made significant strides in contracting with new psychiatrists and other mental health providers, but the large, diverse population and geographic regions in Texas make this challenging.

Monitoring Use of Psychotropic Drug

The Medical Consenter shall ensure that the child has been seen by the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days to allow the physician, physician assistant, or advanced practice nurse to:

1) Appropriately monitor the side effects of the medication; and
2) Determine whether:
    a. The medication is helping the child achieve the treatment goals; and
    b. Continued use of the medication is appropriate. Tex. Fam. Code § 266.011.

B. Agency Oversight

The Parameters provide recommendations for the appropriate use of psychotropic medications for foster children and include criteria indicating need for review of the child's clinical status. Medical Consenters, caregivers, judges, attorneys, and advocates also use the Parameters as they fulfill their duties of advocacy and oversight.

1. Screening Texas Foster Children on Psychotropic Medications

STAR Health oversees automated reviews of pharmacy claims data for all children in foster care receiving psychotropic medications to identify medication regimens which appear to be outside the Parameters. Additionally, STAR Health clinical staff routinely conducts telephonic health screenings when children newly enter DFPS conservatorship or change placements.

The telephonic health screening includes screening of the child's psychotropic medications regimen. The screening process includes criteria such as:

- Does the child have a documented mental health diagnosis?
- What is the child’s age? (Prescriptions might need further review if the child is under age 3 or 4, depending on the class of medication.)
- Is the child taking two or more medications from the same drug class? (Two mood stabilizers and long and short acting stimulants from the same family are allowed, but otherwise two or more medications from the same class call for further review.)
- Is the child prescribed five or more psychotropic medications regardless of the class?

2. Psychotropic Medication Utilization Review

The Psychotropic Medication Utilization Review (PMUR) is designed to determine whether a child's psychotropic medication regimen is outside of the Parameters and, if so, whether a consultation call from a STAR Health child psychiatrist to the prescribing physician is

indicated. A PMUR can be initiated by STAR Health if indicated by a health screening or pharmacy claim review. A PMUR may also be triggered by a request from any judge, attorney, caseworker, advocate, foster parent, Medical Consenter or other concerned person working with the child. The PMUR examines child-specific clinical information about a child's diagnoses, medication dosage, and whether the medication regimen is in compliance with the Parameters. STAR Health has committed to priority responses to inquiries from judges concerning children under their supervision. PMUR findings are usually sent to the child's caseworker or can be faxed or emailed directly to the court if requested.

All PMUR requests are reviewed by one of two STAR Health Licensed Behavior Health Clinicians who gather medical records and screen children's psychotropic medication regimens for compliance with the Parameters. If the regimen is outside the Parameters, the clinician refers the case to a STAR Health child psychiatrist to conduct a PMUR. The child psychiatrist outreaches to the treating physician, works with the treating physician to reduce polypharmacy if indicated and prepares a PMUR report. The PMUR report will contain a formal determination about the foster child's medication regimen. The possible determinations are as follows:

- Medication regimen within Parameters
- Medication regimen outside Parameters. Medication regimen reviewed and found to be within the standard of care
- Medication regimen outside Parameters, and there is opportunity to reduce polypharmacy
- Medication regimen is outside Parameters, and there is risk for or evidence of significant side effects.

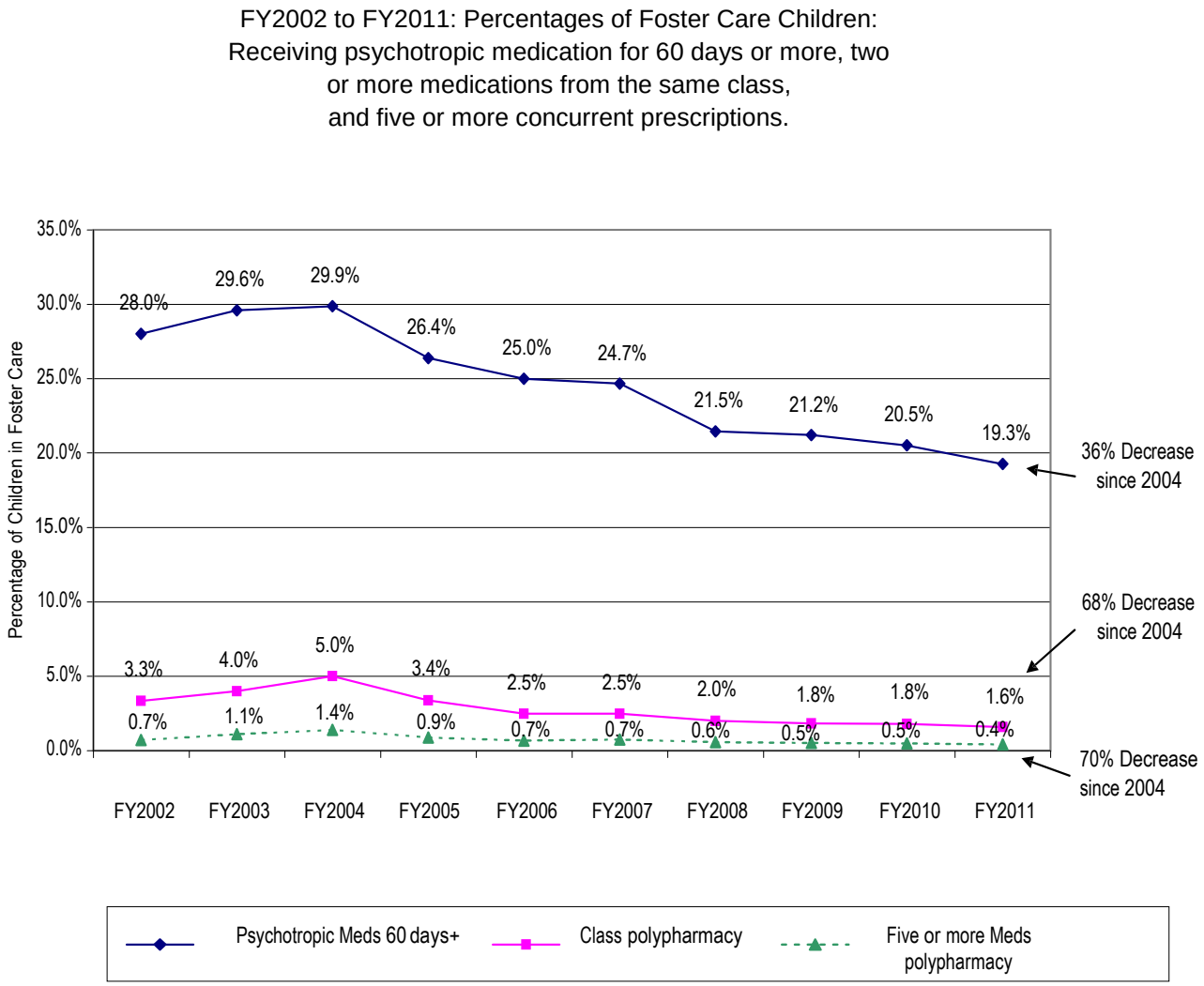
STAR Health is in a good position to intervene and educate the prescribing physician because all providers are clinically privileged by STAR Health. Physicians who appear to consistently prescribe outside the Parameters despite risk for or evidence of significant side effects, or when there is an opportunity to reduce poly-pharmacy, are referred to the Quality of Care (QOC) review process. Additional records are examined for pervasive patterns of over or dangerous prescribing. Qualifying cases are referred to the Credentialing Committee for further investigation and action. The results of Quality Improvement and Credentialing Committee investigations and actions are confidential and may not be released to or discussed with the public. All QOC issues are tracked and trended. Any practitioner showing a pattern or trend may be placed on corrective action and/or face disciplinary action up to and including termination, if warranted.

A PMUR cannot address whether other medications might be effective and this process is not the appropriate avenue to address immediate concerns about new medications or medication side effects; the informed consent process is considered the appropriate avenue to inquire

about new medications and side effects. In these situations, STAR Health recommends that the Medical Consenter contact the prescribing physician directly. DFPS also employs CPS Nurse Consultants in each administrative region to assist CPS staff with children's health issues, including questions about psychotropic medications.

3. Effect of Texas' Oversight Process

As a result of the various improvements to Texas' oversight process, including hiring a Medical Director at DFPS, implementing the Parameters as a statewide monitoring system, and launching managed care and clinical consultation by STAR Health, the prescription patterns of psychotropic medications for Texas foster children have improved significantly. Every year, the use of psychotropic medications in Texas foster care continues to decrease, from 29.9% in Texas State Fiscal Year (FY) 2004 to 19.3% in FY 2011, for children prescribed psychotropic medications for 60 days or more. This decrease represents a 36% reduction in usage.



Parental Notification of Certain Medical Conditions

DFPS shall notify the child's parents of the initial prescription of a psychotropic medication to a foster child and of any change in dosage of the psychotropic medication at the first scheduled meeting between the parents and the child's caseworker after the date the psychotropic medication is prescribed or the dosage is changed. Tex. Fam. Code § 266.005(b-1). DFPS is not required to provide notice to a parent who:

1. Has failed to give DFPS current contact information and cannot be located;
2. Has executed an affidavit of relinquishment of parental rights;
3. Has had the parent's parental rights terminated; or
4. Has had access to medical information otherwise restricted by the court. Tex. Fam. Code § 266.005(c).

C. Judicial Review

The judiciary is charged with oversight of the safety, permanency and well-being of the children in their courts. Tex. Fam. Code § 266.007 requires that the judge overseeing the case review a summary of the medical care being provided to the child at each hearing held pursuant to Tex. Fam. Code Chapter 263, specifically the permanency and placement review hearings.

1. Court Shall Review Medical Summary

Tex. Fam. Code Chapter 266 requires the summary of medical care to include:

- The nature of any emergency medical care provided to the child and the circumstances necessitating emergency medical care, including any injury or acute illness suffered by the child;
- All medical and mental health treatment that the child is receiving and the child's progress with the treatments;
- Any medication prescribed for the child and the condition, diagnosis, and symptoms for which the medication was prescribed and the child's progress with the medication;
- The degree to which the child or foster care provider has complied or failed to comply with any plan of medical treatment for the child;
- Any adverse reaction to or side effects of any medical treatment provided to the child;
- Any specific medical condition of the child that has been diagnosed or for which tests are being conducted to make a diagnosis; and

- Any activity that the child should avoid or should engage in that might affect the effectiveness of the treatment, including physical activities, other medications, and diet.

Additional information may be required to effectively oversee that informed consent has been given. Tex. Fam. Code Chapter 266 requires that judges review the medical care at each hearing conducted under Tex. Fam. Code Chapter 263.

2. Foster Youth Must be Heard at each Hearing Held Under Tex. Fam. Code Chapter 263

The Family Code provides that sixteen and seventeen-year-olds can serve as their own Medical Consenter with a judicial determination that the youth is capable of the role. If the youth is not the Medical Consenter, Tex. Fam. Code § 266.007(c) requires that he or she be provided the opportunity to express to the court their views on the medical care being provided. Further, Tex. Fam. Code Chapter 263 requires that the youth attend Permanency and Placement Review hearings, although some stakeholders have shared concerns about their experiences in child welfare courts where children and youth do not routinely attend their hearings. This is especially concerning with older youth, who are more likely than younger foster youth to be prescribed psychotropic medications.

3. Judicial Psychotropic Medication Information Line

Another tool implemented in 2012 to improve information-sharing is the Judicial Medication Information Email Box which allows judges to submit a request for general medication information. Emails are reviewed by a STAR Health Behavioral Health Service Manager, who has support from the STAR Health Behavioral Health Medical Director (child psychiatrist), the STAR Health Pharmacist and clinical managers. An example of an appropriate type of question for the email box is: What are the side effects of a particular medication or combination of medications on a 12-year-old girl who weighs 100 pounds? STAR Health also maintains a 24/7 Behavioral Health hotline with access to behavioral health professionals when urgent needs arise.

4. Some Courts Use Standardized Court Report

In 2012, DFPS adopted a uniform court report which serves as a helpful tool for communication between CPS, the courts, and other parties. The new standardized form provides a summary of medical information that directly follows Tex. Fam. Code § 266.007. The standardized report also includes the child's age and weight as well as information about medication and dosage, condition and diagnosis, symptom(s) being treated, last medication review, and the prescribing physician. What is not included is the name of the authorized designated Medical Consenter or any psychotropic medication

history, although this information may be provided verbally or located elsewhere in the court's file.

5. Some Courts Use Specific Informed Consent Forms and Practices

Some Texas child welfare judges have adopted a practice of ordering that in non-urgent situations, Medical Consenters must appear in court before giving consent to medication regimens that fall outside the Parameters. Also, to augment the information-sharing process, some judges are asking the Medical Consenters to complete a checklist of questions before appearing in court to ensure that the Consenter considered the many steps to informed consent (as defined by the Parameters). STAR Health is evaluating the form with the goal of developing a form acceptable and usable by all stakeholders.

TRAUMA INFORMED CARE

A traumatic experience is an event that threatens someone's life, safety, or well-being and overwhelms one's capacity to cope. Some examples include:

- Child maltreatment
- Witnessing violence
- Natural disasters
- Loss of loved ones
- Serious accidents
- Medical trauma

Trauma Impacts a Child's Development and Health:

1. **Altered Biological Stress Systems and Neural Circuitry/Structure**
   - Difficulties with poor emotional regulation, focus and self-control (when in fight or flight mode, the brain loses executive functions that do not serve fight or flight, like higher learning and problem-solving which contribute substantially to school success)
   - Anxious and avoidant behaviors
   - Potential impacts to self-efficacy

2. **Disruptions in Attachment Behavior**
   - Disruptions in relationships
   - Distrust of people in authority, seen as threats

3. **Changes in Social Development and Understanding of Social Stimuli**
   - Altered encoding and interpreting of social stimuli
   - Hostile attribution bias (child perceivers negative motives, facial expressions, body language)
   - Larger repertoire of aggressive responses
   - Aggression as an acceptable response
   - Difficulties belonging and playing well with others

4. **Behaviorally, trauma can look like Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and/or Conduct Disorder and can lead to**:
    - Substance use/abuse
    - Aggression
    - Numbness
    - Risk taking
    - Delinquency and adult offending

Current Challenges:

- Alarmingly high rates of childhood trauma exposure, Post Traumatic Stress Disorder (PTSD) and victimization among children in foster care
- Trauma concerns are frequently overlooked. Consistent observations suggest that denial of PTSD and blaming of its victims are not isolated omissions or distortions, but a pattern that spans over time, crosses national and cultural boundaries, and defies accumulated knowledge.

System Response:

In 2011 DFPS launched an initiative to transition the Texas child welfare system into a trauma-informed system. Part of this initiative includes coordinating with the Texas Health and Human Services Commission (HHSC) and STAR Health to identify evidence-based, trauma- informed treatment strategies and build a network of trained behavioral health providers to offer these services. This initiative includes four subgroups to develop recommendations and protocols in the following specific sectors of this work:

- Assessments/Tools: trauma-informed screening/assessment tools and processes;
- Training: trauma-informed training for staff and caregivers, including classroom and computer-based applications;
- Caregiver support: trauma-informed support for caregivers, including birth parents, adoptive parents, foster parents, providers and kin; and
- Staff Support: trauma-informed support for staff and other stakeholders affected by secondary traumatic stress, direct trauma, compassion fatigue, and burnout.

A. Trauma-Informed Practices

1. **Increase Accessible and Effective Trauma Services through Education and Collaboration among the many stakeholders** (mental health providers, caseworkers, foster parents, caregivers at kinship placements and residential treatment centers, judges, attorneys, CASAs, medical community, law enforcement) to promote:

   Collaboration leads to:

   - Better screening (brief, focused inquiry) at initial contact;
   - More detailed assessments (a more in-depth exploration by a trained mental health professional of the nature and severity of the traumatic events, and current trauma-related symptoms);
   - More specialized, evidenced-based treatments (with mental health professionals);
   - Less misdiagnosis of schizophrenia, psychosis NOS, borderline personality disorder, and conduct or oppositional-defiant disorder;
   - Fewer psychoactive medications, restraints and seclusions; and
   - More self-reporting of trauma by children and youth survivors.
     - Children and youth become educated about effects of trauma, e.g. violent physical abuse in childhood may not be disclosed because it is thought of as "discipline" or "normal"
     - The fear, guilt or shame of perceived mental illness is lessened once child is able to connect the trauma and its effects
     - Promote positive neurological effects on the foster youth's immune function and overall physical health through disclosure of and confrontation of trauma.

2. **Create Environment of Safety, Respect, Honesty, and Humility to Nurture Healing, Rehabilitation, and Resiliency**

   - Communicate to the children in foster care that their caregivers believe abuse and violence are significant events. Survivors' healing stories often begin with the experience of being believed, taken seriously and protected by an adult.
   - Develop a shared understanding of the role that trauma has played in shaping the survivor's life. Connect trauma concerns with the rest of the child's problems and goals, and understand that experiences of physical, sexual, and emotional abuse can shape fundamental patterns of perceiving the world, other people, and oneself.

- Identify current circumstances that may trigger trauma responses, e.g., unexpected touching, threats, loud arguments, violations of privacy or confidentiality, being in confined spaces with strangers, or sexual situations.
- Determine potential contraindications to use of restraint (and other coercive measures).
- Be watchful for other less obvious triggers that become evident as you know the child better and as he or she recognizes and can express her or his individual stress responses more accurately.
- Enable children to understand their strengths (adaptive capacities) as well as weaknesses that have grown out of their responses to horrific events, rather than seeing their "symptoms" and "disorders" as evidence of fundamental defects. Identify with child the resources such as social support, self-esteem and resilience, self-comforting, sense of meaning and purpose – to help them to recognize and draw on underused strengths.
- Help children and youth identify strategies helpful in the past in dealing with overwhelming emotions. Place priority on child's preferences regarding self-protection and self-soothing needs by using de-escalation preference surveys.

3. Increase Visitation

Minimize the trauma from removal and attachment disruption by increasing visitation with parents, siblings and other close family (especially in children ages zero to three) to provide meaningful and consistent connections with appropriate family members.

4. Promote Comforting and Calming Techniques

Encourage collaborative service plan. If crisis occurs again, caregivers in foster homes and residential can draw on the child's own knowledge of what has previously helped and hurt. Prepare for de-escalation in foster homes and residential treatment centers.

5. Provide ongoing support for caregivers

Responses of care giving adults to traumatic events are significant. Survivors often report the debilitating effects of being disbelieved, or having their accounts minimized or dismissed.

6. Encourage foster youth connection with healthy adults

Facilitate connections with "persons of character", e.g. CASAs.

7. **Help reduce barriers to youth participating in positive activities of interest**

Problem-solve transportation issues preventing youth from engaging in positive afterschool activities, tutoring, etc.

B. Restraint and Seclusion Guidelines

Many trauma-informed care trainings promote specific strategies including self-care approaches, peer-provided services, arts programs, and comfort rooms to enhance healing and as means to avoid the use of restraint and seclusion. In Texas, the Administrative Code offers the following guidelines on restraining and secluding children in General Residential Operations and Residential Treatment Centers:

1. **Restraint/Seclusion may only be used:**

   - as last resort

     40 Tex. Admin. Code § 748.2455(a)(1)(2); 40 Tex. Admin. Code § 749.2055(a)(1)(2); 40 Tex. Admin. Code § 748.2551(a); 40 Tex. Admin. Code § 749.2151

   - after less restrictive and more positive measures have been tried and failed

     40 Tex. Admin. Code § 748.2455(a)(1)(2); 40 Tex. Admin. Code § 749.2055(a)(1)(2); 40 Tex. Admin. Code § 748.2551(a); 40 Tex. Admin. Code § 749.2151(a)

   - only in an emergency situation

     40 Tex. Admin. Code § 748.2455(a)(1)(2); 40 Tex. Admin. Code § 749.2055(a)(1)(2); 40 Tex. Admin. Code § 748.2401(5); 40 Tex. Admin. Code § 749.2001(5)

     (Definition of emergency situation)

   - where immediately necessary

     40 Tex. Admin. Code § 748.43(17); 40 Tex. Admin. Code § 749.43(18) (Definition of EBI) 40 Tex. Admin. Code § 748.2401(5); 40 Tex. Admin. Code § 749.2001(5) (Definition of emergency situation)

   - to prevent imminent probable death or substantial bodily harm

     40 Tex. Admin. Code § 748.43(17); 40 Tex. Admin. Code § 749.43(18) (Definition of EBI); 40 Tex. Admin. Code § 748.2401(5); 40 Tex. Admin. Code § 749.2001(5)

(Definition of emergency situation); 40 Tex. Admin. Code § 748.43(47); 40 Tex. Admin. Code § 749.43(56) (Definition of substantial bodily harm)

- NEVER as punishment, retaliation, convenience, treatment, or means of compliance

  40 Tex. Admin. Code § 748.2463; 40 Tex. Admin. Code § 749.2063

2. Types of restraints that may be administered with restrictions:

- Physical restraint

  40 Tex. Admin. Code § 748.2451(a)(2); 40 Tex. Admin. Code § 749.2051(a)(2); 40 Tex. Admin. Code § 748.2401(7); 40 Tex. Admin. Code § 749.2001(7) (Definition)

- Emergency medication

  40 Tex. Admin. Code § 748.2451(a)(3); 40 Tex. Admin. Code § 749.2051(a)(3); 40 Tex. Admin. Code § 748.2753 (simultaneous use with another EBI); 40 Tex. Admin. Code § 749.2233 (simultaneous use with personal restraint); 40 Tex. Admin. Code § 748.2401(4); 40 Tex. Admin. Code § 749.2001(4) (Definition)

- Seclusion

  40 Tex. Admin. Code § 748.2451(a)(4); 40 Tex. Admin. Code § 748.2651; 40 Tex. Admin. Code § 748.2401(10); 40 Tex. Admin. Code § 749.2001(10) (Definition); 40 Tex. Admin. Code § 749.2051(b)

- Mechanical restraint

  40 Tex. Admin. Code § 748.2451(a)(5); 40 Tex. Admin. Code § 748.2701; 40 Tex. Admin. Code § 748.2703; 40 Tex. Admin. Code § 748.2755

  (simultaneous use with emergency medication); 40 Tex. Admin. Code § 748.2401(6); 40 Tex. Admin. Code § 749.2001(6) (Definition); 40 Tex. Admin. Code § 749.2051(b)

3. Restraint/Seclusion may only be administered by:

- Qualified caregiver
  40 Tex. Admin. Code § 748.2453; 40 Tex. Admin. Code § 749.2053

- Trained in emergency behavior interventions
  40 Tex. Admin. Code § 748.947; 40 Tex. Admin. Code § 749.947; 40 Tex. Admin. Code § 748.903; 40 Tex. Admin. Code § 749.903; 40 Tex. Admin. Code § 748.863(a); 40 Tex. Admin. Code § 749.863(a); 40 Tex. Admin. Code § 748.901; 40 Tex. Admin. Code § 749.901

- Whose duties include the direct care, supervision, guidance, and protection of child 40 Tex. Admin. Code § 748.43(5); 40 Tex. Admin. Code § 749.43(7)

4. **A child must be released from a restraint**:

- IMMEDIATELY if an emergency health situation arises
  40 Tex. Admin. Code § 748.2553(4)(A); 40 Tex. Admin. Code § 748.2553(5)(A); 40 Tex. Admin. Code § 748.2603; 40 Tex. Admin. Code § 749.2203
- IMMEDIATELY once the danger is over
  40 Tex. Admin. Code § 748.2553(2)(C); 40 Tex. Admin. Code § 749.2153(2)(C)
- Once maximum time allowed is reached
  40 Tex. Admin. Code § 748.2553(2)(E); 40 Tex. Admin. Code § 749.2153(2)(E); 40 Tex. Admin. Code § 748.2553(4)(D)

Type of Emergency Behavior Intervention	The caregiver must release the child:
(1) Short personal restraint	(A) Immediately when an emergency health situation occurs during the restraint. The caregiver must obtain treatment immediately; or (B) Within one minute, or sooner if the danger is over or the disruptive behavior is de-escalated.
(2) Personal restraint	(A) Immediately when an emergency health situation occurs during the restraint. The caregiver must obtain treatment immediately; (B) Within one minute of the implementation of a prone or supine hold; (C) As soon as the child's behavior is no longer a danger to himself or others; (D) As soon as the medication is administered; or (E) When the maximum time allowed for personal restraint is reached.
(3) Emergency medication	Not applicable.
(4) Seclusion	(A) Immediately when an emergency health situation occurs during the seclusion. The caregiver must obtain treatment immediately; (B) As soon as the child's behavior is no longer a danger to himself or others; (C) No later than five minutes after the child begins exhibiting the required behaviors; (D) When the maximum time allowed for seclusion is reached; (E) If the child falls asleep in seclusion. In this situation, the caregiver must: (i) Unlock the door; (ii) Continuously observe the child until he awakens; and (iii) Evaluate his overall well-being; or (F) If the child is receiving emergency care services: (i) As soon as the child is no longer a danger to himself or others; (ii) Upon the arrival of a medical professional; or (iii) Upon assistance from law enforcement or the fire DFPS.
(5) Mechanical restraint	(A) Immediately when an emergency health situation occurs during the restraint. The caregiver must obtain treatment immediately; (B) As soon as the child's behavior is no longer a danger to himself or others; (C) No later than five minutes after the child begins exhibiting the required behaviors; (D) When the maximum time allowed for mechanical restraint is reached; or (E) If the child falls asleep in the mechanical restraint. In this situation, the caregiver must release the child from the restraint and continuously observe the child until he awakens and evaluate him.

The maximum amount of time for a restraint/seclusion:

- Physical Restraint – under the age of 9, 30 minutes; 9 or over, 1 hour
- Seclusion -- <9, 1 hour; ≥9, 2 hours; < cumulative total of 2 hrs./12 hr. period
- Mechanical Restraint -- <9, 30 minutes; ≥9, 1 hour; <cumulative total of 1 hr./12 hr. period

Figure: 40 Tex. Admin. Code § 748.2801	
Types of Emergency Behavior Intervention	**The maximum length of time is:**
(1) Short personal restraint	One minute.
(2) Personal restraint	(A) For a child under nine years old, 30 minutes; (B) For a child nine years old or older, one hour; or (C) A prone or supine personal restraint hold may not exceed one minute.
(3) Emergency medication	Not applicable.
(4) Seclusion	(A) For a child under nine years old, one hour. (B) For a child nine years old or older, two hours.
(5) Mechanical restraint	(A) For a child under nine years old, 30 minutes. (B) For a child nine years old or older, one hour.

When restraining/secluding, a written order is required:

- By a licensed physician, when administering emergency medications

  40 Tex. Admin. Code § 748.2501(3); 40 Tex. Admin. Code § 749.2101(3)(A)

- By a licensed psychiatrist when administering mechanical restraints

  40 Tex. Admin. Code § 748.2501(5)

- By a licensed psychiatrist, physician, or psychologist when administering seclusion when using successive restraints

  40 Tex. Admin. Code § 748.2501(2); 40 Tex. Admin. Code § 749.2102(2)(A); 40 Tex. Admin. Code § 748.2751(3); 40 Tex. Admin. Code § 749.2231(a)

- When using restraints simultaneously

  40 Tex. Admin. Code § 748.2501(2); 40 Tex. Admin. Code § 749.2101(2)(A); 40 Tex. Admin. Code § 748.2753(a)(3) and (b); 40 Tex. Admin. Code § 749.2233(a) (Emergency medications with personal restraint); 40 Tex. Admin. Code § 748.2755(a)(3) and (b) (Mechanical restraints with emergency medications)

- When maximum length of time allowed is exceeded

  40 Tex. Admin. Code § 748.2805; 40 Tex. Admin. Code § 749.2283(2)

- Also see: 40 Tex. Admin. Code § 748.2505; 40 Tex. Admin. Code § 749.2105 (content of written orders); 40 Tex. Admin. Code § 748.2507; 40 Tex. Admin. Code § 749.2107 (PRN orders); 40 Tex. Admin. Code § 748.2807 (verbal orders to exceed maximum time allowed)

Type of Emergency Behavior Intervention	**Are written orders required to administer the intervention for a specific child?**	**Who can write orders for the use of the intervention for a specific child?**
(1) Short personal restraint	NO.	Not applicable.
(2) Personal restraint	NO. However, successive restraints, a restraint simultaneous with emergency medication, and/or a restraint that exceeds the maximum time limit all require orders as specified in this subchapter. PRN orders are also permitted under §748.2507 of this title (relating to Under what conditions are PRN orders permitted for a specific child?).	Not Applicable.
(3) Emergency medication	YES.	A licensed physician.
(4) Seclusion	YES, except written orders are not required when you provide emergency care services to the child placed in seclusion.	A licensed psychiatrist, psychologist, or physician.

(5) Mechanical restraint	YES.	A licensed psychiatrist.

A review is triggered when:

- Restrained four times in a seven day period
  40 Tex. Admin. Code § 748.2901(2)(A); 40 Tex. Admin. Code § 749.2331(2)(A)
- Emergency medications used three times in a thirty day period
  40 Tex. Admin. Code § 748.2901(3); 40 Tex. Admin. Code § 749.2331(3)
- Secluded >twelve hours or three times in a seven day period
  40 Tex. Admin. Code § 748.2901(4) **NOTE: Not applicable to foster care placements.
- Mechanically restrained > three hours or three times in a seven day period
  40 Tex. Admin. Code § 748.2901(5) **NOTE: Not applicable to foster care placements.

Restraint/Seclusion that is NOT allowed:

*Foster care placements --may never administer chemical restraints, mechanical restraints, or seclusion.

- Mechanical restraint may not be simultaneously used with seclusion or pursuant to PRN order
  40 Tex. Admin. Code § 748.2757; 40 Tex. Admin. Code § 748.2507(5)
- No chemical restraints
  40 Tex. Admin. Code § 748.1119(1); 40 Tex. Admin. Code § 749.1021(1); 40 Tex. Admin. Code § 748.2451(b); 40 Tex. Admin. Code § 749.2051(b); 40 Tex. Admin. Code § 748.2401(1); 40 Tex. Admin. Code § 749.2001(1) (Definition)
- Prone or supine restraints except for a personal restraint for 1 minute or less
  40 Tex. Admin. Code § 748.2605(b); 40 Tex. Admin. Code § 749.2205(b) & (c); 40 Tex. Admin. Code § 748.2461(b)(1); 40 Tex. Admin. Code § 749.2061(b)(1); 40 Tex. Admin. Code § 748.2553(2)(B); 40 Tex. Admin. Code § 749.2153(2)(B); 40 Tex. Admin. Code § 748.2801(2)(C); 40 Tex. Admin. Code § 749.2281(2)(C)

Also see other relevant provisions:

40 Tex. Admin. Code § 748.1119; 40 Tex. Admin. Code § 749.2021(techniques prohibited)
40 Tex. Admin. Code § 748.2303; 40 Tex. Admin. Code § 749.1953(may not use or threaten corporal punishment)
40 Tex. Admin. Code § 748.2307; 40 Tex. Admin. Code § 749.1957(methods of punishment prohibited)
40 Tex. Admin. Code § 748.2605; 40 Tex. Admin. Code § 749.2205(prohibited physical restraint techniques)
40 Tex. Admin. Code § 748.2705 (types of mechanical & other restraint devices prohibited)

Special Issue: Residential Treatment Centers (RTCs) self-report restraints and seclusions, which might not provide a complete picture of why, when, or how the restraint was executed. Also, because the information is reported in aggregate form, it might be difficult for the caseworker to discuss a specific event. DFPS is currently launching multi-level Trauma-Informed Care Training and this information should become more available as that paradigm shift occurs throughout DFPS and all child welfare professionals.

References

Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency *at http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.pdf.*

Roadmap to Seclusion and Restraint Free Mental Health Services, U.S. DFPS of Health And Human Services*, at http://store.samhsa.gov/shin/content//SMA06-4055/SMA06-4055-A.pdf*

Position Statement on Seclusion and Restraint, National Association of State Mental Health Program Directors (NASMHPD)*, at http://www.mentalhealthamerica.net/go/position-statements/24*

SAMHSA's Commitment to Eliminating the Use of Seclusion and Restraint, Psychiatric Services, September 2005

EDUCATION

A. Compared to Peers, Students in Foster Care Fare Poorly Educationally

According to national studies, youth in foster care have poor educational outcomes when compared to the general child population. The National Working Group on Foster Care and Education reviewed studies from around the country and found that, when compared to the general student population, foster youth were more likely to be suspended or expelled, scored lower on statewide standardized tests, were more likely to repeat a grade, were less likely to graduate and were more likely to drop out. For more information on these studies, please see: National Working Group on Foster Care and Education (2011, October), "Education is the Lifeline for Youth in Foster Care"

According to data collected by the Texas Education Agency (TEA) Public Education Information Management System (PEIMS) during the 2010-2011 school year, which looked at the "leaver" status or the reason why a student left school, 40.7 percent of Texas foster youth who left school had a leaver status of graduated, compared to the general student population rate of 70.7 percent. During the same school year, the leaver status of foster students who left school because they dropped out was 28.7 percent, compared to the general student population rate of 8.4 percent. Texas foster youth also had lower high school achievement, were more likely to be in special education, and were less likely to be in the gifted and talented program. Source: Data on Foster Children Attending Texas Public Schools

B. Students in Foster Care Face Unique Challenges

Although educational challenges are not unique to children and youth in foster care, this vulnerable population faces additional hurdles, including multiple residential and school changes, court appearances or therapeutic or other case-related appointments that must be attended during school hours, missed school days to visit with parents and siblings, as well as a typically chaotic educational history prior to entering foster care.

Children and youth who are of school-age and in foster care may also find themselves lost in-between child welfare and education – two systems with overlap, but inadequate ongoing and effective communication. Texas judicial, child welfare and education stakeholders informally report that school changes result in a damaging loss of records, credits, services, and support systems, which can hinder the academic success of school-age foster children and youth.

C. National Focus on Child Well-Being Requires States to Improve Educational Outcomes

Congress passed the most sweeping child welfare law in a decade with the *Fostering Connections to Success and Increasing Adoptions Act of 2008.* *Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351* The *Fostering Connections Act* includes important provisions regarding the educational stability of youth in foster care, calling on child welfare agencies to keep the child in the same school, if possible. When not possible, the child must be promptly enrolled in a new school. The legislation also increases the amount of federal funding that may be used to cover education-related transportation costs and requires child welfare agencies to work with local education agencies to ensure educational stability. Passage of the *Fostering Connections Act* highlights the importance of improving educational outcomes of children and youth in foster care across the nation.

Education Stability Provisions of the Fostering Connections Act of 2008

- Proximity to school - A child's foster care placement must take into account the appropriateness of the child's current educational setting and the proximity to the school in which the child is enrolled. 42 U.S.C. § 675(1)(G)(i) (2011)
- Coordinate with Local Education Agencies (LEA) - The agency also must assure that the agency will coordinate with LEAs to make certain that the child can remain in that school. 42 U.S.C. § 675(G)(ii) (2011)
- Immediate enrollment and timely transfer of records - If remaining in that school is not in the child's best interests, the agency must ensure that the child is immediately enrolled in a new school and that their educational records are provided to the school. 42 U.S.C. § 675(G)(ii) (2011)
- Transportation - Authorizes transportation costs, including expenses related to transport to extracurricular activities, to be allowable under foster care maintenance payments. U.S. Dep't Health & Human Serv., Admin on Children, Youth and Families, CWPM § 8.1B Q27 (2007), available online at www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36#1803

D. 2013 Legislative Changes related to Foster Care and Education

1. Foster Care Liaison in Each Texas School District

Legislation passed in 2013 built upon a key bill passed during the 82nd Legislative session in 2011. During that session, the Texas Legislature passed House Bill 826, which required each school district to appoint at least one employee to facilitate the enrollment in and transfer to a

public school of a child in the district who is in the conservatorship of the state. Tex. Educ. Code § 33.904.

During the most recent session, Tex. Educ. Code § 33.904 was amended to require open-enrollment charter schools to also appoint a foster care liaison. Tex. Educ. Code § 33.904(a)(1). The amended section also now requires each school district and open-enrollment charter school submit the liaison's name and contact information to TEA. Tex. Educ. Code § 33.904(a)(2).

TEA offers several resources about and for school district foster care liaisons:

- List of liaisons available at:
  - http://www.tea.state.tx.us/FosterCareStudentSuccess/liaisons/
- The Foster Care Education listserv for the liaisons:
  - Join at http://miller.tea.state.tx.us/list/ and select *Foster Care Education*
- Foster Care and Student Success website available at:
  - http://www.tea.state.tx.us/FosterCareStudentSuccess/

2. Designation of Education Decision-Maker

During the 83rd Legislative Session, the Texas Family Code was amended to add new Tex. Fam. Code § 263.004 to provide notice to the court and others of the entity or person holding education decision-making authority. Generally, when appointed TMC or PMC, DFPS is given the rights and duties of a non-parent managing conservator pursuant to Tex. Fam. Code § 153.371, which includes the right to make decisions regarding the child's education. Tex. Fam. Code § 153.371(10).

Unless the court limits the rights and duties of DFPS under Tex. Fam. Code § 153.371(10) to make decisions regarding the child's education, DFPS must file with the court a report identifying the name and contact information for each person who has been:

- Designated by DFPS to make educational decisions on behalf of the child; and
- Assigned to serve as the child's surrogate person in accordance with 20 U.S.C. 1415(b) and Tex. Educ. Code § 29.001(10), for purposes of decision-making regarding special education services, if applicable. Tex. Fam. Code § 263.004(a).

Not later than the 5th day after the date of an adversary hearing held under Tex. Fam. Code § 262.201 or Tex. Fam. Code § 262.205 is concluded, DFPS must file the report required by Tex. Fam. Code § 263.004(a) with the court and provide a copy to:

- Each person entitled to notice of a permanency hearing under Tex. Fam. Code § 263.301; and

- The school the child attends. Tex. Fam. Code § 263.004(b).

If a person other than a person identified in the report required by Tex. Fam. Code § 263.004(a) is designated to make educational decisions or assigned to serve as a surrogate parent, DFPS shall file with the court an updated report that includes the information required by Tex. Fam. Code § 263.004(a) for a designated or assigned person. The updated report must be filed not later than the 5th day after the date of the designation or assignment. Tex. Fam. Code § 263.004(c).

In order to comply with this mandate, DFPS adapted its medical consenter and placement authorization forms to create a special document to solely address education decision-making responsibilities. The form, called the *Form 2085-E Designation of Education Decision-Maker*, will be filled out by the caseworker, submitted to the court, and provided to the child's school and persons entitled to notice of permanency hearings.

3. Education Passport

Tex. Fam. Code § 266.008(c) amended during 83rd Legislative Session; DFPS also to make education passport available to any person authorized by law to make educational decisions for the foster child. Tex. Fam. Code § 266.008(c).

4. New Education-related Requirements for AALs and GALs

An attorney ad litem appointed to represent a child in the managing conservatorship of the DFPS shall, before each scheduled hearing under Tex. Fam. Code Chapter 263, determine whether the child's educational needs and goals have been identified and addressed. Tex. Fam. Code § 107.004(d-2).

A guardian ad litem appointed to represent a child in the managing conservatorship of the DFPS shall, before each scheduled hearing under Tex. Fam. Code Chapter 263, determine whether the child's educational needs and goals have been identified and addressed. Tex. Fam. Code § 107.002(i).

5. Special Education, new Tex. Fam. Code § 263.0025

Codifies in the Family Code federal and state law regarding the appointment of a surrogate parent in the situation in which a student in foster care is receiving special education services.

Subsection (a) allows a court to appoint a surrogate parent for a child in the temporary or permanent conservatorship of DFPS who is eligible under Tex. Educ. Code § 29.003 to participate in a school district's special education program to ensure the educational rights of the child are protected. Tex. Fam. Code § 263.0025(a). The surrogate parent must be willing to

serve in that capacity and must meet the requirements of 20 U.S.C. Section 1415(b) and Tex. Educ. Code § 29.001(10). Tex. Fam. Code § 263.0025.

6. Foster Students May Remain in School of Origin When Enter Foster Care

Prior to the 83rd legislative session, high school students who entered foster care were allowed to graduate from their school of origin, even if their foster placement was in a different school district. During the most recent legislative session, this was expanded for all foster students, including those in elementary and middle schools. Tex. Educ. Code § 25.001(g) was amended and now reads:

A student enrolled in a primary or secondary public school who is placed in the conservatorship of DFPS and at a residence outside the attendance area for the school or outside the school district is entitled to continue to attend the school in which the student was enrolled immediately before entering conservatorship until the student successfully completes the highest grade level offered by the school at the time of placement without payment of tuition. Tex. Educ. Code § 25.001(g).

Although the statute authorizes the child to remain in his or her school at the time of placement into foster care, it does not address related transportation issues, including costs of transportation and the person responsible for providing it.

7. Excused Absences for Court-Ordered Activities

During the 83rd Legislative Session, Tex. Educ. Code § 25.087(b)(1)(F) was amended by two separate bills to allow for additional excused absences related to CPS cases:

- A school district shall excuse a student from attending school, including travel, for a child in the conservatorship of DFPS, attending a mental health or therapy appointment or family visitation as ordered by a court under Tex. Fam. Code Chapters 262 or 263. Tex. Educ. Code § 25.087(b)(1)(F).

- A school district shall excuse a student from attending school, including travel, for a child in the conservatorship of DFPS, who is participating in an activity ordered by the court under Tex. Fam. Code Chapter 262 or Tex. Fam. Code Chapter 263, provided that it is not practicable to schedule the participation outside of school hours. Tex. Educ. Code § 25.087(b)(1)(F).

8. Educational Stability

The Texas Legislature amended Tex. Fam. Code Chapter 264 in 2013 to meet the requirements of the federal Fostering Connections Act regarding education stability. The new Family Code section requires DFPS to develop, in accordance with 42 U.S.C. § 675(1)(G) (2011), a plan to

ensure the educational stability of a foster child. Tex. Fam. Code § 264.1072.

9. Intensive Program of Instruction

The Texas Education Code was amended by the 83rd Texas Legislature regarding intensive programs of instruction, which is not only applicable to students in foster care, but to all students generally who do not pass a state-mandated assessment. A school district shall offer an intensive program of instruction to a student who is not likely to receive a high school diploma before the 5th school year following the student's enrollment in grade 9, as determined by the district. Tex. Educ. Code § 28.0213.

10. High School Graduation

Another change made by the 83rd Texas Legislature was designed to lead to more students in foster care graduating from high school. If an 11th or 12th grade student in the conservatorship of DFPS, who transfers to a different school district and is ineligible to graduate from the district to which the student transfers, the district from which the student transferred shall award a diploma at the student's request, if the student meets the graduation requirements of the district from which the student transferred. Tex. Educ. Code § 28.025(i).

11. Tuition and Fee Waiver Made Conditional for Some Youth Formerly in Foster Care

The 83rd Texas Legislature amended the Education Code regarding tuition and fee waivers in a way that will impact some students formerly in care.

New Tex. Educ. Code § 54.2001(g) specifically states the conditional receipt of the exemptions and waivers does not apply to students who receive the exemption in accordance with Tex. Educ. Code § 54.366, which includes a youth who:

- was in the conservatorship of DFPS on his or her 18th birthday, at the time of high school graduation or receipt of a GED, or while enrolled in a dual credit course for joint high school and college credit;
- was in the conservatorship of DFPS on his or her 14th birthday, if the student was also eligible for adoption on or after that day; and
- left the conservatorship of DFPS through adoption or the award of PMC to a person other than a parent, if it occurred on or after September 1, 2009.

But, there is no exception for students who are eligible for the tuition and fee waiver pursuant to Tex. Educ. Code § 54.367, which includes a youth who was adopted prior to the age of 14 and the subject of adoption assistance agreement on or before September 1, 2009. Tex. Educ. Code § 54.367. For these youth, new Tex. Educ. Code § 54.2001(a) makes continued receipt of exemptions or waivers conditional for a person who qualified for a mandatory or discretionary exemption or waiver from the payment of all or part of the tuition or other fees for enrollment

during a semester or term at an institution of higher education. The person may continue to receive the exemption or waiver for a subsequent semester or term only if the person:

- As a graduate or undergraduate student, maintains a grade point average that satisfies the institution's grade point average requirement for making satisfactory academic progress toward a degree or certificate in accordance with the institution's policy regarding eligibility for financial aid; and
- As an undergraduate student, has not completed as of the beginning of the semester or term a number of semester credit hours that is considered to be excessive under Tex. Educ. Code § 54.014, unless permitted to complete those hours by the institution on a showing of good cause. Tex. Educ. Code § 54.2001.

If on the completion of any semester or term a person fails to meet any requirement of Tex. Educ. Code § 54.2001(a), for the next semester or term in which the person enrolls, the person may not receive the exemption or waiver. A person may become eligible to receive an exemption or waiver in a subsequent semester or term if the person:

- Completes a semester or term during which the person is not eligible for an exemption or waiver; and
- Meets each requirement of Tex. Educ. Code § 54.2001(a), as applicable. Tex. Educ. Code § 54.2001(c).

Each institution of higher education shall adopt a policy to allow a student who fails to maintain a grade point average as required by Tex. Educ. Code § 54.2001(a)(1) to receive an exemption or waiver in any semester or term on a showing of hardship or other good cause, including such things as a severe illness, responsibility for caring for a sick, injured, or needy individual, military service, or another cause considered acceptable by the institution. Tex. Educ. Code § 54.2001(d).

12. New Directives for the Texas Education Agency (TEA)

Tex. Educ. Code § 25.007(b) was amended during the 2013 legislative session to broaden the responsibilities of TEA, including the following:

- Ensure that school records for a student in substitute care are transferred to the student's new school not later than the 10th working day after the date the student begins enrollment at the school; Tex. Educ. Code § 25.007(b)(1);
- Develop procedures for awarding credit, including partial credit if appropriate, for course work, including electives, completed by a student in substitute care while enrolled at another school; Tex. Educ. Code § 25.007(b)(3);
- Require school districts to provide notice to the child's educational decision-maker and caseworker regarding events that may significantly impact the

education of a child, including:

- requests or referrals for an evaluation under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), or special education under Tex. Educ. Code § 29.003;
- admission, review, and dismissal committee meetings;
- manifestation determination reviews required by Tex. Educ. Code § 37.004(b);
- any disciplinary actions under Tex. Educ. Code Chapter 37 for which parental notice is required;
- citations issued for Class C misdemeanor offenses on school property or at school-sponsored activities;
- reports of restraint and seclusion required by Tex. Educ. Code § 37.0021; and
- use of corporal punishment as provided by Tex. Educ. Code § 37.0011. Tex. Educ. Code § 25.007(b)(9)(A)-(G).

- Develop procedures for allowing a student in substitute care who was previously enrolled in a course required for graduation the opportunity, to the extent practicable, to complete the course, at no cost to the student, before the beginning of the next school year; Tex. Educ. Code § 25.007(b)(10);
- Ensure that a student in substitute care who is not likely to receive a high school diploma before the 5th school year following the student's enrollment in grade 9, as determined by the district, has the student's course credit accrual and personal graduation plan reviewed; Tex. Educ. Code § 25.007(b)(11);
- Ensure that a student in substitute care who is in grade 11 or 12 be provided information regarding tuition and fee exemptions under Tex. Educ. Code § 54.366 for dual-credit or other courses provided by a public institution of higher education for which a high school student may earn joint high school and college credit. Tex. Educ. Code § 25.007(b)(12).

Additionally, TEA shall collect data through the Public Education Information Management System (PEIMS) as to the foster care status of students. Tex. Educ. Code § 7.029(b-1).

E. Resources

Judicial Checklists

Asking the Right Questions II: Judicial Checklists to Meet the Educational Needs of Children and Youth in Foster Care. Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges (2008), found at: http://www.ncjfcj.org/sites/default/files/education%20checklist%202009.pdf

Foster Youth Education Judicial Checklist. Texas specific one page checklist regarding foster care and education, found at: http://education.texaschildrenscommission.gov/media/17265/Education%20Judicial%20Checklist.pdf

The *Texas Blueprint: Transforming Education Outcomes for Children and Youth in Foster Care*

In 2010, the Supreme Court of Texas issued an Order Establishing the Education Committee of the Permanent Judicial Commission for Children, Youth and Families (Children's Commission). The Order was the result of a Texas Action Plan drafted by a team of child welfare experts and designed to study the educational outcomes of Texas children and youth in foster care. The Education Committee - a high-level group of court, education and child welfare decision makers – created a collaborative initiative designed to improve educational outcomes of children and youth in the Texas foster care system. The order resulted in over 100 court, education and child welfare stakeholders coming together over an 18-month period to listen and learn from each other, discuss and debate the issues, and ultimately develop recommendations to improve educational outcomes of children and youth in foster care. Recommendations included changes in legislation, policy, and practice related to: 1) judicial practices; 2) data and information sharing; 3) multi-disciplinary training; 4) school readiness; 5) school stability and transitions; 6) school experience, supports, and advocacy; 7) post-secondary education; and 8) future collaboration. The recommendations and commentary may be found in the Education Committee's final report, *The Texas Blueprint: Transforming Education Outcomes for Children and Youth in Foster Care*.

Texas Foster Care and Education Summit, February 2013

In February 2013, over 200 court, child welfare, and education leaders met in Austin at Texas' first Foster Care and Education Summit and Texas took another step in its long-term initiative to improve how children and youth in its foster care system fare in schools. This step represented a new chapter in the initiative to improve education outcomes of students in foster care by bringing together a large group of multi-disciplinary stakeholders to raise awareness of the need to improve these outcomes and to begin establishing connections among the courts, the Texas Department of Family and Protective Services (DFPS), and local school districts. The summit was initially conceived as a recommendation in *The Texas Blueprint*. More information regarding the summit may be found in the report, *Foster Care and Education Summit: Texas Takes Next Step to Improve Education Outcomes of Children and Youth in Foster Care* and on the Transforming Education Outcomes for Children and Youth in Texas Foster Care website, found at: http://education.texaschildrenscommission.gov/

Joy Baskin, Director of Legal Services at the Texas Association of School Boards (TASB) has written a comprehensive paper on the connection between child welfare and education law in Texas, entitled *Education Issues for Students in Foster Care*. In addition, two Power Point presentations from the Foster Care and Education Summit provide additional information

regarding education of foster students:

- Education Unplugged
- Connecting Child Welfare and Education Law

The *Texas Blueprint* Implementation Task Force

As envisioned by the Supreme Court of Texas, the Education Committee was to be a short-term effort of less than two years. But, as part of its charge, the Court directed the Education Committee to develop a collaborative model to continue systemic improvement of educational outcomes after the submission of the *Texas Blueprint*. That collaborative model, the *Texas Blueprint* Implementation Task Force (Task Force), was created by order of the Supreme Court of Texas in December 2012 to ensure implementation of the *Texas Blueprint*'s recommendations and suggested strategies. In prioritizing the recommendations, three primary issue areas emerged: Data, Training and Resources, and School Stability. The Task Force formed three workgroups based on these issues, which have since identified chairs and will be meeting from July 2013 through the fall of 2014. Many of the workgroup members attended the summit and, hailing from diverse and multi-disciplinary backgrounds, bring a wealth of professional expertise to their respective workgroup's efforts at reform and collaboration. Following the summit, the Task Force also continues to meet and has developed a plan to guide how it monitors implementation of the *Texas Blueprint*, feedback from the summit, and the collaborative call to arms of the summit attendees.

Resource Guide for Foster Care Liaisons in School Districts

TEA, DFPS, and the Children's Commission collaborated on a resource guide for the school district foster care liaisons that has information of use to courts and others involved with CPS cases entitled *Foster Care & Student Success: Texas Systems Working Together to Transform Education Outcomes of Students in Foster Care*. Texas Education Agency, Texas Department of Family and Protective Services, Permanent Judicial Commission for Children, Youth & Families, 13 (2013). In addition, TEA has additional resources that may be found on this webpage: http://www.tea.state.tx.us/FosterCareStudentSuccess/

CPS Handbook Policy on Education

Texas CPS Handbook Policy on Education

Websites

Texas Education Agency (TEA) Foster Care and Student Success website:
http://www.tea.state.tx.us/FosterCareStudentSuccess/

Transforming Education Outcomes for Children and Youth in Texas Foster Care website: http://education.texaschildrenscommission.gov/

American Bar Association Legal Center on Foster Care and Education website: http://www.fostercareandeducation.org/Home.aspx

FAMILY VISITATION

Why visitation is important

- Helps maintain the bond between child and parent;
- Motivates parent to comply with services;
- Can improve parent's skills;
- Reduces separation trauma for children;
- Promotes well-being of the child and parents;
- Provides opportunity to assess the family;
- Promotes reunification;
- Provides evidence for termination trial;
- Improves relationships of everyone involved in the case; and
- Serves the child's best interest

Why visitation may not be appropriate

- Child safety concerns;
- Traumatizes the child;
- Emotionally difficult for child and parent;
- Children sometimes refuse to see parents;
- Lack of visitation motivates parents to earn visitation;
- Punishes parent for bad behavior;
- Causes behavior problems with child before and/or after; and
- Danger of recantation due to parental influence

On March 1, 2013, with the help of the Texas Department of Family and Protective Services (DFPS), the Center for Public Policy Priorities (CPPP), and Casey Family Programs, the Permanent Judicial Commission for Children, Youth and Families (Children's Commission) held a round table discussion on family visitation in Child Protective Services (CPS) cases. The round table brought together judges from across the state, representatives of DFPS and CPS, Court Appointed Special Advocates (CASA), prosecutors, attorneys, former foster youth, foster parents, biological parents, and parent advocates involved in CPS cases. The purpose of the round table was to help advise DFPS and its stakeholders on moving from the traditional one-size-fits-all approach to family visitation to one that serves the individualized needs of children and families. The discussion focused on the importance of visits between parents and the children who have been removed from their care; the motivation and punishment aspects of visitation; the frequency, supervision, and location of visits; and the development of a plan that both embodies the elements that guide families and advocates toward an outcome that serves the child's best interest and recognizes the parents' rights to information, access, and possession. Please see the final report from the Family Visitation Round Table for more information at Family Visitation in Child Protective Services Cases

Family Visitation Guide

	Highly Structured Strict Supervision	Moderate Structure Moderate Supervision	Relaxed and/or Intermittent Supervision	Unsupervised, including overnights
Safety Assessment	There is a high level of concern for the child's physical or emotional safety.	There is a moderate level of concern for the child's safety.	There is a low level of concern for the child's safety.	There are no safety concerns.
Supervision Level	Child may not be out of the presence of the monitor and parent(s) cannot be alone with their child.	Monitor is present for most of the visit. Parent may be alone with their child, if monitor ensures certain conditions are met or observed by the parent.	Monitor may be present for a portion of the visit. The parent(s) would have some time alone with their child.	No monitor is present for the majority of or during the visit. Parent(s) can be alone with the child. Use immediately prior to or within 14 days of reunification.
Location	CPS office to ensure structured and safe visits or home-like settings that are supervised, but can also help the parent develop parenting skills and protective capacities.	Home-like setting that offers parent opportunity to develop parenting skills, improve parent-child interactions, while allowing monitor to manage any safety concerns.	May include parent or relative's home, or other home-like setting that offers parent opportunity to develop parenting skills, improve parent-child interactions.	Parent determines visitation location, in collaboration with caseworker and child's caregiver to avoid schedule conflicts.
Visitation frequency	**Infants / Toddlers** – 2x per week for 2 hours **Young Child** – 1x per week for 2 hours **Youth** – 1x per week for 2 hours or more	**Infants / Toddlers** – 2x per week for 2 hours **Young Child** – 1x per week for 2 hours **Youth** – 1x per week for 2 hours or more	**Infants / Toddlers** –2x per week for 2 hours **Young Child** – 1x per week for 2 hours **Youth** – 1x per week for 2 hours or more	**Infants / Toddlers** – 2x per week for 2 hours **Young Child** – 1x per week for 2 hours **Youth** – 1x per week for 2 hours or more
Monitor's Role	To manage safety concerns, ensure safety of the child. May include parent coaching and education, but primary role is protection of the child.	To manage safety concerns and offer parent education, coaching and support, including a discussion about behavior observed during visit that may be unsafe or appropriate or involve behaviors that exhibit protective capacities and competence or lack of.	Primarily offer education, parenting skills, coaching and support in line with the permanency goals. Could also discuss behaviors observed during visit that are appropriate and exhibit protective capacities and competence.	No monitor. Parent(s) and caseworker would communicate and provide feedback / exchange information about the visit.

JURIST IN RESIDENCE LETTERS

The Commission has two Jurists in Residence:

District Judge Dean Rucker serves on the Children's Commission as one of the Jurist in Residence. Judge Rucker serves as the Presiding Judge for the Seventh Administrative Judicial Region of Texas since 1998 and as judge of the 318th Judicial District in Midland County since 1988. Judge Rucker was a longtime member of the Supreme Court Task Force on Foster Care, created in 1994 and was a founding member of the Children's Commission before becoming a Jurist in Residence. He is a member of the Texas Academy of Family Law Specialists and the National Council of Juvenile and Family Court Judges. He has served in numerous leadership capacities and also chairs the Children's Commission's Legislative Committee.

District Judge Robin Sage (ret), serves as one of the Children's Commission Jurist in Residence. Judge Sage retired in 2011 from the 307th Family District Court in Longview and also currently serves as the assigned judge for the Child Protection Court of Northeast Texas. Judge Sage has been active in Court Improvement Program activities since the mid-1990s serving on the Supreme Court Task Force on Foster Care, and was a founding member of the Children's Commission prior to serving as Jurist in Residence.

Each judge is instrumental in advancing judicial education and community collaboration across the state through training events and written communications, particularly topical Jurist in Residence letters.

Jurist in Residence Letters

(Listed alphabetically and available at http://texaschildrenscommission.gov/jir.aspx)

1. Back to School - New Legislation and Resources to Help Improve Education Outcomes of Students in Foster Care
2. Bench Book for CPS Judges
3. Children's Commission offers registration scholarships for Child Abuse & Neglect Workshop
4. Court Hearing Practices and Court Costs
5. CPS realigns staff in response to state budget cuts
6. DFPS Foster Care Redesign
7. Engagement Efforts to Achieve Permanency

8. Extending Foster Care Beyond 18
9. Free Spanish language interpretation available by telephone for some courts
10. Impact of Budget Deficits on CPS
11. Implicit Bias in Judicial Decision-Making
12. New Appellate Rules Applicable to Termination of Parental Rights or State as Managing Conservator
13. New DFPS Subpoena Policy
14. Permanency Care Assistance Program Basics
15. Permanency Care Assistance Program - 3rd JIR
16. Permanency Care Assistance Program Follow Up
17. FAQ: Permanency Care Assistance (PCA) Program
18. Permanency Summit Follow-up
19. Psychoactive Medications
20. Specificity in Court Orders
21. Star Health Contacts
22. Star Health & Psychotropic Medications

ACRONYMS AND ABBREVIATIONS

Acronym	Explanation	Comments
AAL	Attorney ad litem	An attorney who provides services for the purposes of the legal action only, including representation of a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.
ADR	Alternative Dispute Resolution	Settling conflict outside of litigation, (e.g., mediation)
AFCARS	Adoption and Foster Care Analysis and Reporting System	An application that collects case level information on all children in foster care for whom State child welfare agencies have responsibility for placement, care or supervision, and on children who are adopted under the auspices of the State's public child welfare agency.
AJR	Administrative Judicial Region	The state of Texas is divided into nine administrative judicial regions. Each region has a presiding judge that is appointed by the Governor to serve a four-year term.
APPLA	Another Planned Permanent Living Arrangement	A permanent legal arrangement for a child designed to promote stability and permanency in a child's life; refers to permanent placements other than a reunification with a parent, adoption or permanent managing conservatorship to a relative
ASFA	Adoption and Safe Families Act	The Adoption and Safe Families Act of 1997 (Public Law 105-89) was enacted by the United States Congress in an attempt to correct problems that were inherent in the foster care system that deterred the adoption of children with special needs. Many of these problems had stemmed from an earlier bill, the Adoption Assistance and Child Welfare Act of 1980, although they had not been anticipated when the law was passed. The biggest change to the law was how ASFA Amended Title IV-E of the Social Security Act regarding funding.
CAFA	Court Appointed Family Advocate	A group of attorneys unique to the Austin, Texas area specially trained and certified by the Austin Bar in the handling of child protection cases. They must obtain 30 hours per year training to remain certified. These attorneys are appointed to children and indigent parents. http://www.austinbar.org/sections/cafa
CASA	Court Appointed Special Advocate	A specially screened and trained volunteer, appointed by the court, which conducts an independent investigation of child abuse, neglect, or other dependency matters, and submits a formal report proffering advisory recommendations as to the best interests of a child. In some jurisdictions, volunteers without formal legal training, such as CASAs, are appointed to represent abused and neglected children, serving in the capacity of a Guardian ad litem. http://www.casaforchildren.org
CFRT	Texas Child Fatality Review Team	A multidisciplinary, multi-agency group, mandated by state law that oversees and assists the work of local review teams in Texas, and works to develop a statewide understanding of the scope and magnitude of childhood mortality.
CFSR	Child and Family Services Review	A Federal-State collaborative effort designed to help ensure that quality services are provided to children and families through State child welfare systems

Acronym	Explanation	Comments
CIP	Court Improvement Project	Strengthening Texas courts to achieve safety, permanency, and well-being for abused and neglected children is the work of the Court Improvement Project. http://www.texaschildrenscommission.gov
CPC	Child Protective Court	Courts that specialize in child protection cases.
CPS	Child Protective Services	A division of the Texas DFPS of Family and Protective Services that investigates reports of abuse and neglect of children. It also: provides services to children and families in their own homes; places children in foster care; provides services to help youth in foster care make the transition to adulthood; and places children in adoptive homes. http://www.dfps.state.tx.us/child_protection/about_child_protective_services
DFPS/ TDFPS	Texas DFPS of Family and Protective Services	A state agency that is charged with protecting children, adults who are elderly or have disabilities living at home or in state facilities, and licensing group day-care homes, day-care centers, and registered family homes; also referred to as 'DFPS'. http://www.dfps.state.tx.us
DPS	Texas DFPS of Public Safety	An agency of this state created to provide public safety services to those people in the state of Texas by enforcing laws, administering regulatory programs, managing records, educating the public and managing emergencies, both directly and through interaction with other agencies. http://www.txdps.state.tx.us
DSHS	Texas DFPS of State Health Services	The Texas DFPS of State Health Services promotes optimal health for individuals and communities while providing effective health, mental health and substance abuse services to Texans. http://www.dshs.state.tx.us
FCRB	Foster Care Review Board	A panel of screened and trained volunteers preferably appointed by juvenile or family courts to: regularly review cases of children in substitute placement such as foster care; examine efforts to identify a permanent placement for each child; and proffer advisory recommendations to the court.
GAL	Guardian ad litem	A person appointed by a judge to represent the best interests of an allegedly abused or neglected child; in many counties the GAL is the CASA

Acronym	Explanation	Comments
ICPC	Interstate Compact on the Placement of Children	Provides a solid legal framework for ensuring the timely placement of children across state lines, the suitability of prospective families, and the provision of needed support services. The proposed compact: (1) narrows the applicability of the compact to the interstate placement of children in the foster care system and children placed across state lines for adoption; (2) requires the development of time frames for completion of the approval process; (3) establishes clear rulemaking authority, (4) provides enforcement mechanisms; (5) clarifies state responsibility; and (6) ensures states' ability to purchase home studies from licensed agencies to expedite the process.
ICWA	Indian Child Welfare Act	The Indian Child Welfare Act (ICWA), which was adopted by Congress in 1978, applies to child custody proceedings in state courts involving "Indian" children--children of Native American ancestry. The provisions of the ICWA represent a dramatic departure from the procedural and substantive laws that most states have enacted to govern child custody proceedings.
IMPACT	Information Management Protecting Adults & Children in Texas	A statewide automated child welfare information system (SACWIS) system used by the Texas DFPS of Family and Protective Services (DFPS) to aid in the investigation and assessment of alleged child and adult abuse or neglect cases.
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Questioning Youth	The American Bar Association Opening Doors Project started 6 years ago to provide the legal and child welfare community tools, resources and support for improving outcomes for LGBTQ young people in foster care. http://www.americanbar.org/groups/child_law/what_we_do/projects/openingdoors.html p://www.americanbar.org/groups/child_law/what_we_do/projects/openingdoors.html
MOU	Memo of Understanding	An agreement between two parties in the form of a legal document. It is not fully binding in the way that a contract is, but it is stronger and more formal than a traditional gentleman's agreement. Sometimes, a memorandum of understanding is used as a synonym for a letter of intent, particularly in private law. A letter of intent expresses an interest in performing a service or taking part in an activity, but does not legally obligate either party.

Acronym	Explanation	Comments
NCSC	National Center for State Courts	The mission of NCSC is to improve the administration of justice through leadership and service to state courts, and courts around the world. http://www.ncsconline.org
OAG	Office of the Attorney General	A Texas state agency that serves as legal counsel to all boards and agencies of state government, issues legal opinions when requested by the Texas Governor, heads of state agencies and other officials and agencies as provided by Texas statutes, sits as an ex-officio member of state committees and commissions, and defends challenges to state laws and suits against both state agencies and individual employees of the State. http://www.oag.state.tx.us
OCA	Office of Court Administration	The mission of OCA is to provide Resources and Information for the Efficient Administration of the Judicial Branch of Texas. http://www.txcourts.gov/oca/
PAL	Preparation for Adult Living	A program within CPS to provide support and services to help youth prepare for independent adult living upon departure from DFPS care and support.
PJMC	Permanent Joint Managing Conservatorship	When permanent managing conservatorship is granted to DFPS and the parent(s) or other person.
PMC	Permanent Managing Conservatorship	Placement of a child in the permanent conservatorship of an entity or person, (e.g. Texas DFPS, relative) with no intention of returning the child to the parent's custody.
RTC	Residential Treatment Center	Placement of a child in treatment where the child lives at the facility providing the treatment services
SACWIS	Statewide Automated Child Welfare Information System (SACWIS)	A comprehensive automated case management tool that meets the needs of all staff (including social workers and their supervisors, whether employed by the State, county, or contracted private providers) involved in foster care and adoptions assistance case management.
SAPCR	Suit Affecting Parent-Child Relationship	A law suit, filed in child protective courts, that affects the parent-child relationship, such as conservatorship of a child that has allegedly been abused or neglected by a parent or guardian.

Acronym	Explanation	Comments
SPA	Regional Support Program Administrator	Persons assigned to a region for the support of Texas DFPS programs.
TFC	Texas Family Code	The laws and statutes that govern Texas family law including child protection
TJMC	Temporary Joint Managing Conservatorship	When temporary managing conservatorship is granted to DFPS and the parent(s) or other person.
TMC	Temporary Managing Conservatorship	The awarding of conservatorship of a child to Texas DFPS. This may include children remaining in their home with orders from the court for particular requirements to ensure the safety of the child or the removal of a child from the family for safety and well-being purposes.
TRCP	Texas Rules of Civil Procedure	Rules to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. http://www.supreme.courts.state.tx.us/Rules/TRCP/RCP_all.pdf
XML	Extensible Markup Language	The primary purpose is to facilitate the sharing of data across different information systems, particularly via the Internet

Abbreviation	Definitions
MDNG	A case reason for Medical Neglect
NSUP	A case reason for Non-Support
PHAB	A case reason for Physical Abuse
PHNG	A case reason for Physical Neglect
RAPR	A case reason for Refusal to Accept Parental Responsibility
SXAB	A case reason for Sexual Abuse
EMAB	A case reason for Mental or Emotional Injury
ABAN	A case reason for Abandonment
NSUP	A case reason for Neglectful Supervision