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# Judicial Guide to Advocating for and Ensuring Adequate Funding for Legal Representation in Child Protective Services Cases

PRESENTED BY: COURTS USER

DISTRICT / COUNTY COURT

COUNTY



## OVERVIEW OF CHILD PROTECTIVE SERVICES CASES

When the Texas Department of Family and Protective Services (DFPS) is called to investigate alleged abuse or neglect of a child, many times the investigation leads to the removal of the child from his home and family to ensure the child’s safety and well-being. In order for the State to gain legal custody of the child, DFPS must file a petition in a state court with jurisdiction over the subject matter and the child. Once a judge signs a court order granting DFPS conservatorship and places the child in state foster care, the State stands in the shoes of the parent until the child exits the foster care system. In fulfilling its parental duties, the State must ensure the child is safe while in foster care, develop a plan that details how the child will exit foster care, and provide services designed to ensure the child’s well-being while in care. ***The court that grants DFPS conservatorship of the child or children is also required to appoint legal counsel to all children and indigent parents.***

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### APPOINTMENT OF LEGAL COUNSEL IS MANDATORY

Section 107.012 of the Texas Family Code requires appointment of an attorney ad litem for a child involved in a Child Protective Services (CPS) case within 14 days after the child is removed from his or her home.<sup>1</sup> Family Code Sections 107.013, 107.0131, 107.0132, 107.014, and 107.0141 govern the various types of attorney appointments for parents involved in CPS cases.<sup>2</sup> The statute also places several other duties on the court, including informing the parent at every stage of his or her right to an attorney *and* to appoint an attorney for an indigent parent who is opposed to the State’s petition. Most counties use a rotation or wheel appointment system in appointing counsel. It is important to emphasize that the judge overseeing a CPS case has a duty to uphold the law, and the law requires the appointment of legal counsel to all children in the state’s conservatorship, to each indigent parent, and in limited circumstances, any alleged father.

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### WHY LEGAL REPRESENTATION IS IMPORTANT

Quality legal representation is essential in a CPS case given the importance of the interests involved. It is well established that a parent’s right to “the companionship, care, custody, and management of his or her children” is of constitutional magnitude.<sup>3</sup> While the U.S. Supreme Court has not held that parents have a constitutional right to court-appointed, publicly-funded counsel in every CPS case,<sup>4</sup> Texas law provides a statutory right to appointed counsel for children and indigent parents, and the Supreme Court of Texas has held that the statutory right to counsel necessarily includes the right to effective assistance of counsel.<sup>5</sup> Just as in cases where co-defendants in a criminal matter are not assigned one public defender or where two parents battling over custody of a child in a family law case would not hire the same lawyer, the parents of children in CPS custody should be appointed separate counsel. That said, providing legal representation to parents and children is expensive for the taxpayer. A lawsuit filed by CPS can take 12 to 18 months to reach a legal resolution. Some cases last much longer, even up to 18 years. Unlike the adjudication of most types of cases, a CPS case involves continuous reassessment through a series of statutorily mandated hearings. A recent study by the National Center for State Courts estimates that CPS cases in Texas require over 290 minutes of judicial handling – almost 100 minutes *more* than a first degree felony. Thus, adequately trained and fairly compensated legal counsel is critical as it can hasten family reunification or, where family reunification is not a viable option, assist with finding an alternative permanent home, all with

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<sup>1</sup> Tex. Fam. Code Ann. § 107.012

<sup>2</sup> Tex. Fam. Code. Ann. §§ 107.013, 107.0131, 107.0132, 107.014, 107.0141

<sup>3</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (citing *Stanley v. Illinois*, 405 U. S. 645, 651 (1971)); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”).

<sup>4</sup> See *Lassiter*, 452 U.S. at 31–32 (“... neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding.”)

<sup>5</sup> *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

the goal of shortening the time that a child must stay in foster care. A shorter length of time in foster care helps to protect family relationships, promote stability, and saves state and local taxpayers' money.

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## HOW LEGAL REPRESENTATION FOR CHILDREN AND PARENTS IS FUNDED

Each year, the State of Texas spends more than \$1.3 billion on child protective services.<sup>6</sup> In fiscal year 2015, Texas spent over \$402 million on foster care payments alone, averaging out to over \$13,000 per child in care.<sup>7</sup> But these dollars do not include the cost of legal representation of children and parents or the costs to the state and counties for the prosecution of CPS cases. Counties alone bear the costs associated with providing statutorily mandated legal representation for parents and children. Compensation and methods of appointment vary by jurisdiction across the 254 counties of Texas, and in most counties, the compensation for court-appointed attorneys in CPS cases is significantly lower than attorney's fees in private law matters. While there is not currently a state appropriation designated or available to counties to help offset the costs of providing legal representation in child protection cases, the Supreme Court Children's Commission published a resource paper that details how a state appropriation from the legislature might assist local counties bear these costs. Link to that paper here: [State Appropriation for Child Attorneys Ad Litem](#).

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## REPORTED COSTS ASSOCIATED WITH PROVIDING LEGAL REPRESENTATION

In 2014, the Texas Indigent Defense Commission (TIDC) surveyed 200 County Auditors about the total funds spent on legal representation of children in CPS cases in fiscal year 2013 and shared the information with the Supreme Court Children's Commission. While only a small number of counties responded, a few were able to report DFPS-related expenditures broken down between child and parent representation.

COUNTY	CHILD CASES	TOTAL PAID	AVERAGE PER CASE	PARENT CASES	TOTAL PAID	AVERAGE PER CASE
CALHOUN	8	\$18,007.00	\$2250.88	6	\$26,462.10	\$4410.35
COLLIN	327	\$544,980.00	\$1666.61	115	\$235,458.99	\$2047.47
DALLAS	465	\$239,586.00	\$515.24	471	\$173,937.00	\$369.29
EASTLAND	22	\$10,738.00	\$488.09	13	\$21,315.81	\$1639.61
EL PASO	378	\$513,357.00	\$1358.09	381	\$658,232.00	\$1727.64
FRANKLIN	22	\$2175.00	\$98.86	19	\$2100.00	\$110.52
HARRIS	1256	\$2,544,192.00	\$2025.63	2020	\$4,091,774.49	\$2025.63
KERR	159	\$119,446.00	\$751.23	87	\$54,419.62	\$625.50
PARKER	96	\$99,750.00	\$1039.06	No	Parent Totals	Reported
RANDALL	159	\$158,960.00	\$999.75	31	\$21,344.05	\$688.51
TRAVIS	958	\$1,064,332.40	\$1,110.99	738	\$1,527,158.09	\$2069.32
TRINITY	70	\$34,725.00	\$496.07	No	Parent Totals	Reported

Based on the limited survey data, the TIDC estimated that Texas counties spent approximately \$38 million on about 17,000 cases at an average of \$1264.00 per child per case and an average of \$1,597.00 per parent per case in fiscal

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<sup>6</sup> Tex. Dep't of Family & Prot. Servs., *Annual Report and Data Book 2015*, at 119.

<sup>7</sup> *Id.* at 52.

year 2013.<sup>8</sup> Texas is home to 7.3 million children. As laws evolve and people become more aware and concerned with child abuse and neglect, referrals to the foster care system increase. With that, removals to foster care surge, as do the legal expenses associated with each case. Also, in December 2015, a federal judge ruled in the Children’s Rights class action lawsuit, *M.D. v Abbott*, that all children in the Permanent Managing Conservatorship of the state (otherwise known as long-term foster care) must have a court appointed attorney ad litem for the duration of his or her time in foster care. For some children, this can be years.

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## HOW MUCH IS YOUR COUNTY SPENDING?

In order to understand how much your county is spending on legal representation in CPS cases, the county auditor should be able to provide the total expenditures for civil indigent representation associated with each case. Ideally, these expenditures would be tracked separately from juvenile cases and even further broken down between representation of children and parents involved in CPS cases. These expenditures should not include contempt of court or juvenile/public defender expenditures, but may include trial and mediation expenses associated with settling CPS cases.



A RECENT STUDY OF TRAVIS COUNTY MEDIATION EXPENDITURES FOUND THAT MEDIATION IS A COST EFFECTIVE STRATEGY FOR RESOLVING CPS CASES, SAVING BOTH TRAVIS COUNTY AND THE STATE OVER \$1.5 MILLION DOLLARS ANNUALLY FROM 2009 TO 2014

Child and Family Research Partnership: Cost Analysis of Mediation in Travis County Family Court

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## HOW TO REQUEST A BUDGET MEETING AND GATHERING DATA

First, be sure to include input from all judges in your jurisdiction who handle child protection cases. In many counties, CPS cases are handled by Associate Judges and these judges should be able to advice on funding needs going forward.

Local Government Code Chapter 111, places the responsibility of preparing a budget for the county on the County Budget Officer. Depending on the size of your county, the County Judge may be the budget officer. Your county may also have an appointed county auditor that acts as the budget officer. Each county is required to prepare a budget during the seventh or the tenth month of the fiscal year, as determined by the county’s commissioner’s court.<sup>9</sup> A typical budget planning process will start in January of each year. Link here to find out when your county budget process starts: <http://county.org/about-texas-counties/county-data/Documents/FiscalYears2016.pdf>

Request a meeting with the county budget and planning officer. Request from your budget officer or county auditor those expenditures related to CPS cases by year, broken down by payments to parent attorneys and child attorneys, as well as payments or expenditures associated with jury and bench trials and mediation. The clerk for the court may also have data on how many child protection cases are pending in the county or court. Also consider whether DFPS data would be useful. DFPS tracks various data on the Texas child population, how many child abuse

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<sup>8</sup> Texas Indigent Defense Commission, Issues in Indigent Defense, Presentation to Texas Association of Counties, August 28, 2014, <http://tidc.texas.gov/media/28225/140828TACCPS-RuckerDubose-.pdf>, at 5.

<sup>9</sup> Texas Local Gov’t Code § 111.003.

and neglect investigations are completed each year, and how many children are in foster care in each county at the end of each fiscal year.<sup>10</sup> Link to the 2015 DFPS Data Book here:

[https://www.dfps.state.tx.us/About\\_DFPS/Annual\\_Report/2015/default.asp](https://www.dfps.state.tx.us/About_DFPS/Annual_Report/2015/default.asp)

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## HOW TO PREPARE FOR A HEARING OR A MEETING

Keeping in mind that county government officials must abide by the state’s open meetings act and public information laws, seek permission to make a presentation to the county commissioner’s court at a regularly scheduled meeting or meet individually with county commissioners. Travis County District Court Judge Darlene Byrne developed a PowerPoint Presentation that may help with meeting or presentation preparation.

<http://texaschildrenscommission.gov/media/68415/Final-Powerpoint-for-Adequate-Funding-for-Legal-Representation.pptx>

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## CONCLUSION

The Texas Family Code mandates court-appointed representation to children and indigent parents involved in CPS suits, but adequate, fairly compensated representation is not always provided. At the root of the problem are structural deficiencies in the appointed legal representation system, including insufficient funding by counties struggling to fulfil the state’s mandate to provide legal counsel to children and indigent parents. The issue of how to adequately finance legal representation for indigent parents and children is also an issue that may be of interest to state representatives and senators. Judges are burdened with numerous responsibilities to ensure not only that the child is represented by counsel, safe while in foster care, attending school, visiting parents and siblings, and on a path to quickly exit the foster care system, but also must safeguard that the process is fair for all parents and family members invested and interested in the child’s future. An adequately funded legal representation system helps avoid poor outcomes for families because cases are not drawn-out due to incompetent and inadequate representation, family relationships remain intact, and children exit foster care quickly rather than lingering for years. Poor outcomes are emotionally traumatizing to the families involved, and they come at a substantial cost to the taxpayer. What is well established is that reports of abuse and neglect are on the rise, and more children are being removed from their families in response. Each time a child is placed in foster care, the legal duty to provide court-appointed counsel at the county’s expense is triggered. Adequately trained and fairly compensated legal representation serves an important purpose. It hastens resolution of cases, shortens the time that a child must stay in foster care, *and saves taxpayer dollars.*

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<sup>10</sup> Tex. Dep’t of Family & Prot. Servs., *Annual Report and Data Book 2015*, at 190-195.