



# Children's Commission

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



## Texas Child Protection Law

# Bench Book

November 2018

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# ACKNOWLEDGMENTS

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This revised edition of the Texas Child Protection Law Bench Book (Bench Book) includes additions of and revisions to important topics such as Community Based Foster Care, Caregiver Assistance Agreements, new Bureau of Indian Affairs Guidelines regarding implementation of the Indian Child Welfare Act, and new federal laws affecting educational outcomes of children in the child welfare system.

This project is supported by the Court Improvement Program grants, awarded by the United States Department of Health and Human Services Administration for Children and Families. The information in this publication has been developed by the Bench Book Advisory Committee and the staff of the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (Children's Commission). Any resource materials or other written contributions provided by the Children's Commission should not be read as an advisory issued by the Supreme Court of Texas or any other court. Contributions to this Bench Book are not rulings on specific cases or legal issues, but are solely intended to address the improvement of the law, the legal system, and the administration of justice related to child protection cases.

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# INVESTIGATIONS

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## Legal Overview of Investigations

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 Child Protective Services (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

### B. Making a Report

### C. Fourth Amendment Requirements in an Investigation

### D. Orders in Aid of Investigation

## A. Initiation of Investigations

Initiation of an investigation requires:

### 1. Abuse, Neglect, Exploitation 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;

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- 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 compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or [Tex. Penal Code § 20A.02\(a\)\(8\)](#), prostitution under [Tex. Penal Code § 43.02\(b\)](#), 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 & 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 & 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.
  - Forcing or coercing a child to enter into a marriage. [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 § 261.001\(1\)\(E\), \(F\), \(G\), \(H\), 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.
  - A negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy. [Tex. Fam. Code § 261.001\(4\)](#).

Neglect does not include the refusal by a person responsible for a child's care, custody, or welfare to permit the child to remain in or return to the child's home resulting in the placement of the child in the conservatorship of the Department of Family and Protective Services (DFPS or Department) if:

- The child has a severe emotional disturbance;
- The person's refusal is based solely on the person's inability to obtain mental health services necessary to protect the safety and well-being of the child; and

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- The person has exhausted all reasonable means available to the person to obtain the mental health services described by [Tex. Fam. Code § 261.001\(4\)\(B\)\(ii\)](#). [Tex. Fam. Code § 261.001\(4\)](#).

The DFPS Commissioner shall adopt rules to prohibit DFPS from making a finding of abuse or neglect against a person in a case in which DFPS is named managing conservator of a child who has a severe emotional disturbance only because the child's family is unable to obtain mental health services for the child. [Tex. Fam. Code § 261.002\(b\)\(1\)](#).

The refusal of a parent, guardian, or managing or possessory conservator of a child to administer or consent to the administration of a psychotropic medication to the child, or to consent to any other psychiatric or psychological treatment of the child, does not by itself constitute neglect of the child unless the refusal to consent:

- Presents a substantial risk of death, disfigurement, or bodily injury to the child; or
- Has resulted in an observable and material impairment to the growth, development, or functioning of the child. [Tex. Fam. Code § 261.111\(b\)](#).

“Exploitation” includes:

- The illegal or improper use of a child or the child's resources for monetary or personal benefit or profit by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy. [Tex. Fam. Code § 261.001\(3\)](#).

## **2. 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\(5\)](#).
- An employee, volunteer, or other person working under the supervision of a licensed or unlicensed child-care facility, including a family home, residential child-care facility, employer-based day-care facility, or shelter day-care facility, as those terms are defined in Chapter 42, Human Resources Code.

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## B. Making a Report

DFPS sets out the mandatory requirements for an investigation in [CPS Handbook § 2200](#).<sup>1</sup>

### 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\(b\)](#) 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\(b-1\)](#).

The requirement to report under [Tex. Fam. Code § 261.101](#) applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services. [Tex. Fam. Code § 261.101\(c\)](#).

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#### 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 & 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 [Tex. Fam. Code § 261.107\(e\)](#).

### 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

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If a caseworker cannot gain consent, they may seek a court order to allow entrance for an interview, examination, or investigation. [Tex. Fam. Code § 261.303\(b\)](#).

### **3. Exigent Circumstances**

If there is not time to obtain 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**

If the Department receives an anonymous report of child abuse or neglect, the Department shall conduct an investigation to determine whether there is any evidence to corroborate the report. [Tex. Fam. Code § 261.304](#). 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 of the child's clothing. An investigation can include a visit to the child's home unless the alleged abuse or neglect can be confirmed or clearly ruled out without a home visit, an interview with and examination of the child, and an interview with the child's parents. [Tex. Fam. Code § 261.304\(b\)](#).

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 [[Terry v. Ohio, 392 U.S. 1, 21-22 \(1968\)](#)], all that is required [to take a child into a separate room for an interview] 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 upon his return home at the end of the school day. [Gates, 537 F.3d at 439](#).

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**Special Issue:** Unless otherwise authorized by this chapter (Chapter 262) or other law, such as Chapter 105 or Chapter 82, a hearing held by a court in a suit under this chapter may not be ex parte. [Tex. Fam. Code § 262.206](#).

## D. Orders in Aid of Investigation

### 1. Interference

A person may not interfere with a DFPS 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\(b\)](#).

Contumacious 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\(b\)\(1\)\(I\)](#).

### 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 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\(c\)](#).

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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 consider requiring 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 has 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.

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# ALTERNATIVES TO REMOVAL

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## Texas Family Code

### Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship Chapter 261. Alternative Response

In assigning priorities and prescribing investigative procedures based on the severity and immediacy of the alleged harm to a child, DFPS may use an alternative response system to make the most effective use of resources to investigate and respond to cases. [Tex. Fam. Code § 261.3015](#). In addition, CPS may seek the following remedies and interventions as an alternative to removing a child.

- A. Order Seeking Removal of Alleged Perpetrator of Physical or Sexual Abuse**
- B. Order for Required Participation**
- C. Protective Orders**
- D. Relinquishing Custody of Child to Obtain Certain Services**
- E. Child Safety Check Alert List**

### **A. 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\(a\)](#).

DFPS can also:

- File for a protective order on behalf of the child instead of or in addition to obtaining a temporary restraining order; or
- Assist a parent or other adult with whom a child resides in obtaining a protective order. [Tex. Fam. Code § 262.1015\(a-1\)](#).
- DFPS can also file for a protective order in certain cases under new Section 261.501, which provides for a protective order on its own or jointly with a parent or relative caregiver when DFPS is not otherwise authorized to seek a protective order under [Tex. Fam. Code § 82.002](#). [Tex. Fam. Code § 261.501](#).
- DFPS is also required to include in its petition for removal a statement as to whether there is a protective order in effect or an application pending under Title 4, Family Code,

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Chapter 7A, Code of Criminal Procedure, or an order for emergency protection under Article 17.292, Code of Criminal Procedure. The Department must also attach a copy of each order in effect, if a party to the suit or a child of a party was the applicant or victim and the other party was the respondent. If a copy of an order in effect is not available at the time of filing of the petition, the petition must state that a copy of the order will be filed with the court before any hearing. [Tex. Fam. Code § 102.008](#).

### **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 remains in effect for up to 14 days, unless the court grants an extension under [Tex. Fam. Code § 262.201\(a-5\)](#), [\(e\)](#), or [\(e-1\)](#). [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 a parent has been 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](#).

## **B. 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. [Tex. Fam. Code § 263.203](#).

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## 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\(d\)](#).

# C. 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. If the court chooses to recess

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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 § 83.006\(c\)](#).

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](#); and [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:

- The county in which the applicant resides;
- The county in which the respondent resides; or
- 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:

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- 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\(b\)](#).

There is a presumption that family violence has occurred and is likely to occur in the future if:

- The respondent has been convicted of or placed on deferred adjudication community supervision for any of the following offenses against the child for whom the petition is filed:
  - an offense under [Tex. Penal Code Title 5](#), for which the court has made an affirmative finding that the offense involved family violence under [Tex. Crim. Proc. Code Art. 42.013](#); or
  - an offense under [Tex. Penal Code Title 6](#).
- The respondent's parental rights with respect to the child have been terminated; and
- The respondent is seeking or attempting to seek contact with the child. [Tex. Fam. Code § 81.0015](#).

A protective order issued pursuant [Tex. Fam. Code, Title 4, Subtitle B](#) is effective for a period stated in the order, not to exceed two years; or if a period is not stated in the order,

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until the second anniversary of the date the order was issued. [Tex. Fam. Code § 85.025\(a\)](#). A court may render a protective order sufficient to protect the applicant and members of the applicant's family or household that is effective for a period that exceeds two years if the court makes specific findings pursuant to [Tex. Fam. Code § 85.025\(a-1\)](#).

If a person who is subject of a protective order is confined or imprisoned on the date the protective order would expire under [Tex. Fam. Code § 85.025\(a\)](#) or [Tex. Fam. Code § 85.025\(a-1\)](#), or if the protective order would expire not later than the first anniversary of the date the person is released from confinement or imprisonment, the period for which the order is effective is extended, and the order expires on:

- The first anniversary of the date the person is released from confinement or imprisonment, if the person was sentenced to confinement or imprisonment for more than five years; or
- The second anniversary of the date the person is released from confinement or imprisonment, if the person was sentenced to confinement or imprisonment for five years or less. [Tex. Fam. Code § 85.025\(c\)](#).

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."**

**"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 PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS."**

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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\(c\)](#).

A protective order rendered by a court may be transferred 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](#).

DFPS is also required to include in its petition for removal a statement as to whether there is a protective order in effect or an application pending under Title 4, Family Code, Chapter 7A, Code of Criminal Procedure, or an order for emergency protection under Article 17.292, Code of Criminal Procedure. The Department must also attach a copy of each order in effect, if a party to the suit or a child of a party was the applicant or victim and the other party was the respondent. If a copy of an order in effect is not available at the time of filing

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of the petition, the petition must state that a copy of the order will be filed with the court before any hearing. [Tex. Fam. Code § 102.008](#).

### **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.

### **4. Texas Family Violence Bench Book**

The Texas Office of Court Administration produced a reference manual in 2011, [the Texas Family Violence Bench Book](#), devoted entirely to the law on family violence in Texas<sup>2</sup> and updated [Texas Family Violence Bench Book chapters](#) in 2013.<sup>3</sup>

## **D. Relinquishing Custody of Child to Obtain Certain Services**

The Texas Family Code requires DFPS to make rules that prohibit the agency from making a finding of abuse or neglect against a parent in a case in which DFPS is named managing conservator of a child who has a severe emotional disturbance only because the child's family is unable to obtain mental health services for the child. [Tex. Fam. Code § 261.002\(b\)](#).

### **1. Severe Emotional Disturbance Defined**

[Tex. Fam. Code § 261.001](#) defines "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 DFPS files a suit affecting the parent-child relationship requesting managing conservatorship of a child who suffers from a severe emotional disturbance to obtain mental health services for the child, DFPS must, unless it is not in the best interest of the child, discuss with the child's parent or legal guardian the option of seeking a court order for joint managing conservatorship of the child with DFPS. [Tex. Fam. Code § 262.352](#).

## **E. Child Safety Check Alert List**

If at any time during an investigation of a report of child abuse or neglect to which DFPS has assigned the highest priority DFPS is unable to locate the child who is the subject of the report of abuse or neglect or the child's family, DFPS shall notify the Department of Public Safety (DPS) that the location of the child and the child's family is unknown. If DPS locates the child and the child's family, DPS shall notify DFPS of the location of the child and the child's family. [Tex. Fam. Code § 261.301\(i\)](#).

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DPS shall maintain a child safety check alert list as part of the Texas Crime Information Center (TCIC) to help locate a child or the child's family for purposes of:

- Investigating a report of child abuse or neglect;
- Providing protective services to a family receiving family-based support services; or
- Providing protective services to the family of a child in the managing conservatorship of DFPS. [Tex. Fam. Code § 261.3022\(a\)](#).

If DFPS is unable to locate a child or the child's family for a purpose described in [Tex. Fam. Code § 261.3022\(a\)](#) after DFPS has attempted to locate the child for not more than 20 days, DFPS shall notify DPS that DFPS is unable to locate the child or the child's family. The notice must include the information required by [Tex. Fam. Code § 261.3022\(c\)\(1\)-\(10\)](#). [Tex. Fam. Code § 261.3022\(b\)](#).

On receipt of notice from DFPS, DPS shall notify TCIC to place the child and the child's family on a child safety check alert list. The alert list must include the following information if known or readily available:

- The name, sex, race, date of birth, any known identifying numbers, including social security number and driver's license number, and personal descriptions of the family member alleged to have abused or neglected a child according to the report DFPS is attempting to investigate;
- The name, sex, race, date of birth, any known identifying numbers, including social security number and driver's license number, and personal descriptions of any parent, managing conservator, or guardian of the child who cannot be located for the purposes described by [Tex. Fam. Code § 261.3022\(a\)](#);
- The name, sex, race, date of birth, any known identifying numbers, including social security number and driver's license number, and personal descriptions of the child who is the subject of the report or is receiving services described by [Tex. Fam. Code § 261.3022\(a\)\(2\)](#) or [Tex. Fam. Code § 261.3022\(a\)\(3\)](#);
- If applicable, a code identifying the type of child abuse or neglect alleged or determined to have been committed against the child;
- The family's last known address;
- Any known description of the motor vehicle, including the vehicle's make, color, style of body, model year, and vehicle identification number, in which the child is suspected to be transported;
- The case number assigned by DFPS;
- The DFPS dedicated law-enforcement telephone number for statewide intake;

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- The date and time when and the location where the child was last seen; and
  - Any other information required for entry as established by TCIC. [Tex. Fam. Code § 261.3022\(c\)](#).

On receipt of notice that a child has been located, TCIC shall remove the child and the child's family from the child safety check alert list. [Tex. Fam. Code § 261.3024\(c\)](#).

If law enforcement encounters a child or other person listed on the TCIC child safety check alert list, the law enforcement officer shall follow the procedures described by the [Tex. Crim. Proc. Code Art. 2.272](#). [Tex. Fam. Code § 261.3023](#).

If a peace officer locates a child or other person listed on the TCIC child safety alert list established under [Tex. Fam. Code § 261.3022](#), the officer shall:

- Immediately contact DFPS on the dedicated law enforcement telephone number for statewide intake;
- Request information from DFPS regarding the circumstances of the case involving the child or other person; and
- Request information from the child and the other person regarding the child's safety, well-being, and current residence. [Tex. Crim. Proc. Code Art. 2.272\(a\)](#).

The peace officer may temporarily detain the child or other person to ensure the safety and well-being of the child. [Tex. Crim. Proc. Code Art. 2.272\(b\)](#).

If the peace officer determines that the circumstances described by [Tex. Fam. Code § 261.204](#) exist, the officer may take temporary possession of the child without a court order as provided by [Tex. Fam. Code § 261.204](#). If the peace officer does not take possession of the child, the officer shall obtain the child's current address and any other relevant information and report that information to DFPS. [Tex. Crim. Proc. Code Art. 2.272\(c\)](#).

A peace officer who locates a child or other person listed on the TCIC child safety check alert list and who reports the child's or other person's current address and other relevant information to DFPS shall report to TCIC that the child or other person has been located and to whom the child was released, as applicable. [Tex. Crim. Proc. Code Art. 2.272\(d\)](#).

If law enforcement encounters a person, including a child, listed on the TCIC child safety check alert list, the officer shall request information from the person or the child regarding the child's well-being and current residence. [Tex. Fam. Code § 261.3023\(a\)](#).

A law enforcement officer who locates a child listed on the TCIC child safety check alert list shall report that the child has been located in the manner prescribed by [Tex. Crim. Proc. Code Art. 2.272](#). [Tex. Fam. Code § 261.3024\(a\)](#).

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A law enforcement officer who locates a child listed on the TCIC child safety check alert list and who reports the child's current address and other relevant information to DFPS under [Tex. Fam. Code § 261.3023](#) shall report to TCIC that the child has been located. [Tex. Fam. Code § 261.3024\(a\)](#).

If DPS locates a child who has been placed on the child safety check alert list established under [Tex. Fam. Code § 261.3022](#) through a means other than information reported to DPS by a law enforcement officer under [Tex. Crim. Proc. Code Art. 2.272](#), DPS shall report to TCIC that the child has been located. [Tex. Fam. Code § 261.3024\(b\)](#).

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# BEST INTEREST

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Best Interest of the child is always the **primary consideration** in determining conservatorship, possession, and access. [Tex. Fam. Code § 153.002](#).

## A. Factors in Determining Best Interest of Children

**Factors in Determining Best Interest of Children**, including, but not limited to:

- Child's age and physical and mental vulnerabilities;
- Frequency and nature of out-of-home placements;
- History of abusive or assaultive conduct by the child's family or others with access to home;
- History of substance abuse by child's family or others with access to home;
- Whether the perpetrator of the harm to child has been identified; and
- Special considerations for children 16 years of age or older. [Tex. Fam. Code § 263.307](#).

## B. Hearings Requiring a Best Interest Determination

### The Adversary Hearing

*When considering placement with relative or non-custodial parent:*

- The court shall place a child with the child's noncustodial parent or with a relative unless placement is not in the best interest of the child. [Tex. Fam. Code § 262.201\(n\)](#).

### Permanency Hearings before a Final Order

*When making a finding that the child can't be returned:*

- At each permanency hearing before a final order, the court shall make a finding on whether returning the child to the child's home is safe and appropriate, whether the return is in the best interest of the child, and whether it is contrary to the welfare of the child for the child to return home. [Tex. Fam. Code § 263.002\(c\)](#); See also [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#).

*When determining whether to meet a child:*

- The court shall consult with the child if the child is four years of age or older and if the court determines it is in the child's best interest. [Tex. Fam. Code § 263.302](#).

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## C. Court Decisions Requiring a Best Interest Determination

*Transferring a case to the court of continuing exclusive jurisdiction (CCEJ):*

- The court shall order transfer to the CCEJ if the court finds the transfer is necessary for the convenience of the parties and is the best interest of the child. [Tex. Fam. Code § 262.203](#).

*Denying a parent visitation:*

- 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: o states the reasons for finding that visitation is not in the child's best interest; and
- Outlines specific steps the parent must take to be allowed to have visitation with the child. [Tex. Fam. Code § 263.209\(b\)](#).

*When considering unsupervised visitation in the context of family violence:*

- It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with a child if credible evidence is presented of a history or pattern of past or present child neglect or abuse or family violence by that parent or any person the parent permitted to have unsupervised access to the child. [Tex. Fam. Code § 153.004\(e\)](#).

*Extending the dismissal date:*

- The court finds that extraordinary circumstances necessitate the child remaining in the Temporary Managing Conservatorship (TMC) of the department and that continuing TMC is in the best interest of the child. [Tex. Fam. Code § 263.401\(b\)](#).

*Ordering a monitored return:*

- The court finds that retaining jurisdiction under this section is in the best interest of the child. [Tex. Fam. Code § 263.403\(1\)](#).

## D. DFPS Decisions That Must Consider Best Interest

*When considering placement:*

- In selecting a placement for a child, the Department shall consider whether the placement is in the child's best interest. In determining whether a placement is in a child's best interest, the Department shall consider whether the placement: o is the least restrictive setting for the child;
  - o is the closest in geographic proximity to the child's home;
  - o is the most able to meet the identified needs of the child; and

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- satisfies any expressed interests of the child relating to placement, when developmentally appropriate. [Tex. Fam. Code § 264.107\(c\)](#).

*When assessing a relative or designated placement:*

- Before placing a child with a proposed relative or other designated caregiver, the Department must conduct an assessment to determine whether the proposed placement is in the child’s best interest. [Tex. Fam. Code § 264.754\(b\)](#).

## **E. Case Law on Best Interest When Seeking Termination of Parental Rights**

The *Holley* factors (*Holley v. Adams*, [544 S. W. 2d 367](#) (Tex. 1976)) are a non-exclusive list of factors to consider, including:

### **DESIRES OF CHILD;**

**The desires of the child can be inferred by evidence other than the child’s testimony.** A factfinder may infer the preferred placement of a child too young to articulate her own desire by assessing the quality and extent of the relationships between the child and the prospective placements. *L.Z. v. Tex. Dep’t of Family and Protective Serv.*, [No. 03-12-00113-CV, 2012 WL 3629435, at \\*10](#) (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.)

### **EMOTIONAL & PHYSICAL DANGER TO CHILD NOW & IN FUTURE;**

**Past conduct can be used to measure future conduct.** “Evidence of past misconduct or neglect can be used to measure a parent’s future conduct.” *Ray v. Burns*, [832 S.W.2d 431, 435](#) (Tex. App.—Waco 1992, no writ)

### **PARENTAL ABILITIES;**

**Past conduct can be used to measure future conduct.** In reviewing the parental abilities of a parent, a factfinder can consider the parent’s past neglect or past inability to meet the physical and emotional needs of their children. *D.O. v. Tex. Dep’t of Human Servs.*, [851 S.W.2d 351, 356](#) (Tex. App.—Austin 1993, no writ.)

### **PROGRAMS AVAILABLE TO ASSIST PARENTS;**

**Parent’s initiative to pursue programs is relevant.** A factfinder can infer from a parent’s failure to take the initiative to avail herself of the programs offered to her by the Department that the parent “did not have the ability to motivate herself to seek out available resources needed...now or in the future.” *In re W.E.C.*, [110 S.W.3d 231, 245](#) (Tex. App.—Fort Worth 2003, no pet.)

### **PLANS FOR THE CHILD BY INDIVIDUALS SEEKING CUSTODY OR AGENCY;**

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**The feasibility of competing plans may be compared.** A factfinder may compare the parent's and the Department's plans for the child and consider whether the plans and expectations of each party are realistic or weak and ill-defined. *D.O. v. Tex. Dep't of Human Servs.*, [851 S.W.2d 351, 356](#) (Tex. App.—Austin 1993, no writ.)

#### **STABILITY OF HOME OR PROPOSED PLACEMENT;**

**Stability is paramount for the child.** Stability and permanence are paramount in the upbringing of children. *In re T.D.C.*, [91 S.W.3d 865, 873](#) (Tex. App.—Fort Worth 2002, pet. denied)

**Stability is a compelling government interest.** The goal of establishing a stable, permanent home for a child is a compelling interest of the government. *Hann v. Tex. Dep't of Protective and Regulatory Servs.*, [969 S.W.2d 77, 83](#) (Tex. App.—El Paso 1998, pet. denied)

**Past conduct can be used to measure future stability.** Parent's failure to show that he is stable enough to parent a child for any prolonged period entitles the factfinder "to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption."). *D.O. v. Tex. Dep't of Human Servs.*, [851 S.W.2d 351, 358](#) (Tex. App.—Austin 1993, no writ.)

**Consequence of not terminating may be considered.** A factfinder may also consider the consequences of its failure to terminate parental rights, and that the best interest of the child may be served by termination so that adoption may occur rather than the impermanent foster care arrangement that would result if termination were not obtained. *In re B.S.W.*, [No. 14-04-00496-CV, 2004 WL 2964015, at \\*9](#) (Tex. App.—Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem. op.)

**AND ANY ACTS OR OMISSIONS OF A PARENT INDICATING THE RELATIONSHIP IS NOT PROPER; AND ANY EXCUSE FOR THE ACTS OR OMISSIONS OF A PARENT.**

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# REMOVAL

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## Legal Overview of Removal of Children

### 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

[Tex. Fam. Code Chapter 262](#) governs the circumstances in which DFPS may seek managing conservatorship of a child if there is an immediate need for the child's removal from the home due to child abuse or neglect. [Tex. Fam. Code Chapter 262, Subchapter B](#). 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 § 262.113](#).

- A. Removal or Conservatorship of a Child**
- B. Jurisdiction, Venue, and Transfer**
- C. Emergency Removal With a Court Order**
- D. Emergency Removal Without a Court Order**
- E. Expedited Hearing and Appeal**
- F. After Ex Parte Order Authorizing Removal**
- G. Filing Suit Prior to Taking Possession of Child**
- H. Service of Citation**
- I. Evaluation of Identified Relatives and Other Designated Individuals**
- J. Placement**
- K. Visitation Schedule**
- L. Placement When Child Victim of Human Trafficking**

### **A. Removal or Conservatorship of a Child**

- 1. Authorized Actions by Governmental Entity**

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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. Child’s Health and Safety is 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\(b\)](#). However, new [Tex. Fam. Code § 262.116](#) prohibits DFPS from taking possession of a child based on evidence that the parent homeschooled, is economically disadvantaged, has been charged with a nonviolent misdemeanor (other than one listed in Title 5 or 6 of the Penal Code, or involves family violence as defined by [Tex. Fam. Code § 71.004](#), the parent provided or administered low-THC cannabis if the low-THC cannabis was prescribed for the child, or if a parent declined immunization for a child for reasons of conscience, including religious belief. This new section does not prohibit DFPS from gathering or offering evidence of these actions as part of an effort to take possession of a child.

## **B. Jurisdiction, Venue, and Transfer**

### **1. Jurisdiction**

A suit brought by DFPS requesting an order under [Tex. Fam. Code Chapter 262](#) may be filed in a court with jurisdiction to hear the suit in the county in which the child is found. [Tex. Fam. Code § 262.002](#).

New [Tex. Fam. Code § 262.013](#) establishes a new filing requirement for petitions relating to more than one child. DFPS must now file suit in the same court a petition based on allegations arising from the same incident or occurrence and involving children living in the same home.

If a court of this state has acquired continuing, exclusive jurisdiction, no other court of this state has jurisdiction of a suit with regard to that child except as provided by [Tex. Fam. Code Chapter 155](#) or [Tex. Fam. Code Chapter 262](#). [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, unless:

- Another court has continuing exclusive jurisdiction under [Tex. Fam. Code Chapter 155](#); or
- Venue is fixed in a suit for dissolution of marriage under [Tex. Fam. Code Subchapter D, Chapter 6](#). [Tex. Fam. Code § 103.001\(a\)](#).

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### 3. Transfer

Effective September 1, 2017, [Tex. Fam. Code § 155.201](#) requires that upon receiving notice that a court exercising emergency jurisdiction under Chapter 262 has ordered the transfer of a suit affecting the parent-child relationship under [Tex. Fam. Code § 262.203\(a\)\(2\)](#), a court of continuing jurisdiction (CCJ) must transfer the proceedings to the court exercising jurisdiction under Chapter 262. The court exercising emergency jurisdiction under Chapter 262 may also transfer the suit affecting the parent-child relationship to the CCJ for the convenience of the parties and if transfer is in the child's best interest. However, a court hearing the case under Tex. Fam. Code Chapter 262 must transfer any suit affecting the parent child relationship to the court in which the suit for dissolution of marriage is pending once the Chapter 262 court has rendered a final order. [Tex. Fam. Code Chapter 263, Subchapter E. Tex. Fam. Code § 262.203\(a\)\(3\)](#); [Tex, Fam. Code Chapter 6, Subchapter E. Tex. Fam. Code § 6.407\(a\), \(b\) and \(c\)](#); [Tex, Fam. Code Chapter 103, Tex. Fam. Code § 103.002](#); [Tex, Fam. Code Chapter 155, Subchapter C. Tex. Fam. Code § 155.201\(a\)](#).

DFPS is required to file a transfer order issued under [Tex. Fam. Code § 262.203\(a\)\(2\)](#) with the clerk of the CCJ so that the clerk of the CCJ can, within the time required by [Tex. Fam. Code § 155.207\(a\)](#), transfer the case to the court exercising jurisdiction under Chapter 262. [Tex. Fam. Code § 155.204](#). Pursuant to [Tex. Fam. Code § 262.203](#), an order of transfer must include:

- The date of any future hearings in the case that have been scheduled by the transferring court;
- Any date scheduled by the transferring court for the dismissal of the suit under [Tex. Fam. Code § 263.401](#); and
- The name and contact information of each attorney ad litem or guardian ad litem appointed in the suit. [Tex. Fam. Code § 262.203\(d\)](#).

The court to which a suit affecting the parent-child relationship is transferred may retain an attorney ad litem or guardian ad litem appointed by the transferring court. If the court finds that the appointment of a new attorney ad litem or guardian ad litem is appropriate, the court shall appoint that attorney ad litem or guardian ad litem before the earlier of:

- The 10<sup>th</sup> day after the date of receiving the order of transfer; or
- The date of the first scheduled hearing after the transfer. [Tex. Fam. Code § 262.203\(e\)](#).

[Tex. Fam. Code § 155.207\(a\)](#) and [Tex. Fam. Code § 155.207\(c\)](#) address the transfer of court files from one jurisdiction to another. Not later than the 10<sup>th</sup> working day after the date an order of transfer is signed, the clerk of the court transferring a proceeding shall send to the proper court in the county to which transfer is being made:

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- The pleadings in the pending proceeding and any other document specifically requested by a party;
  - Certified copies of all entries in the minutes;
  - A certified copy of each final order; and
  - A certified copy of the order of transfer signed by the transferring court. [Tex. Fam. Code § 155.207\(a\)](#).

On receipt of the pleadings, documents, and orders from the transferring court, the clerk of the transferee court shall docket the suit and shall notify the judge of the transferee court, all parties, the clerk of the transferring court, and, if appropriate, the transferring court's local registry that the suit has been docketed. [Tex. Fam. Code § 155.207\(c\)](#).

## **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 of 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](#).

### **2. Emergency Order Authorizing Possession of a Child Prior to Removal**

Before a court may, without prior notice and a hearing, issue a temporary order for the conservatorship of a child under [Tex. Fam. Code § 105.001\(a\)\(1\)](#) or a temporary restraining order or attachment of a child authorizing a governmental entity to take possession of a child, 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;

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- 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 Title 4](#) for the protection of the child if the court finds that, based on the recommendation of or request by DFPS:

- 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\(c\)](#).

### **3. 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;

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- 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\(a-5\), \(e\), or \(e-1\)](#). [Tex. Fam. Code § 262.1015\(d\)](#).
- 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 Supreme Court of Texas 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, 615](#) (Tex. 2008, orig. proceeding).

#### **4. 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

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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\(g\)](#).

### **5. 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 order, temporary restraining order or attachment under [Tex. Fam. Code § 262.102\(a\)](#) 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;
- 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;
- On personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#);
- 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 child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#);
- 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 Chapter 481](#) and the use constitutes an immediate danger to the physical health or safety of the child. [Tex. Fam. Code § 262.104\(a\)](#); or

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- On personal knowledge or information 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\(b\)](#).

A petition filed after taking possession of a child in an emergency must be supported by an affidavit that comports with the grounds stated above. The affidavit must also state that based on the affiant's personal knowledge, there was no time, consistent with the child's health and safety, for a full adversary hearing under Subchapter C, that continuation in the home would be contrary to the child's welfare, and reasonable efforts were made to prevent or eliminate the need for removal of the child. [Tex. Fam. Code § 262.105](#).

## **2. 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 business day after the date the child is taken into possession. [Tex. Fam. Code § 262.106](#). The court shall render orders that are necessary to protect the physical health and safety of the child. [Tex. Fam. Code § 262.106\(a\)](#).

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

For the purpose of determining the first business 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\(c\)](#).

## **3. 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

- The evidence shows that one of the following circumstances exists:

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- 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;
  - the child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#) on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse or of trafficking in the future;
  - the parent or person who has possession of the child is currently using a controlled substance as defined by Chapter 481, Health & Safety Code, and the use constitutes an immediate danger to the physical health or safety of the child; or
  - the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine;
- Continuation of the child in the home would be contrary to the child’s welfare; 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 § 262.107\(a\)](#).

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\(b\)](#).

#### **4. 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 five days. On the expiration of the fifth 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](#)

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Chapter 262 as if DFPS took possession under [Tex. Fam. Code § 262.104](#). [Tex. Fam. Code § 262.110\(b\)](#).

## **E. 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, a 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 [Tex. Fam. Code § 262.112](#) 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\(c\)](#).

## **F. After Ex Parte Order Authorizing Removal**

### **1. Duration of Temporary Order, Temporary Restraining Order, and Attachment**

A temporary order, temporary restraining order, or attachment of the child issued under [Tex. Fam. Code § 262.102\(a\)](#) 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\(a-5\)](#), (e), or (e-1). [Tex. Fam. Code § 262.103](#).

### **2. Temporary Managing Conservatorship**

The court 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](#).

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The managing conservator must be a parent, a competent adult, DFPS, or a licensed child-placing agency. [Tex. Fam. Code § 153.005\(b\)](#).

A voluntary agreement to temporary managing conservatorship cannot be used as an admission by the parent that the parent engaged in conduct that endangered the child. [Tex. Fam. Code § 262.013](#).

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**

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, unless the court grants an extension under Subsection (a-3) or (a-5) or (e-1). [Tex. Fam. Code § 262.201\(a\)](#).

## **4. Attorney ad Litem and Guardian Ad Litem Appointments**

### **4.1 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](#).

### **4.2 Discretionary Appointment of Parent Attorney**

[Tex. Fam. Code § 107.0141](#) states that the court may appoint an attorney ad litem to represent the interests of a parent for a limited period beginning at the time the court issues a temporary restraining order or attachment of the parent's child under [Tex. Fam.](#)

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[Code Chapter 262](#) and ending on the court's determination of whether the parent is indigent before commencement of the full Adversary Hearing. [Tex. Fam. Code § 107.0141\(a\)](#).

An attorney ad litem appointed for a parent under this section:

- Has the powers and duties of an attorney ad litem appointed under [Tex. Fam. Code § 107.0131](#); and
- If applicable, shall:
  - conduct an investigation regarding the petitioner's due diligence in locating and serving citation on the parent; and
  - interview any parent or other person who may have information relating to the identity or location of the parent. [Tex. Fam. Code § 107.0141\(b\)](#).

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

- Inform the parent of the parent's right to be represented by an attorney ad litem appointed by the court, if the parent is indigent and appears in opposition to the suit;
- If the parent claims indigence and requests an attorney ad litem beyond the period of time the temporary appointment under [Tex. Fam. Code § 107.0141](#), assist the parent in making a claim of indigence for the appointment of an attorney ad litem; and
- Assist the parent in preparing for the full Adversary Hearing under [Tex. Fam. Code Chapter 262, Subchapter C](#). [Tex. Fam. Code § 107.0141\(c\)](#).

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 § 107.0141\(d\)](#).

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 § 107.0141\(e\)](#), the court shall discharge the attorney ad litem from the appointment. [Tex. Fam. Code § 107.0141\(e\)](#).

If the attorney ad litem identifies or locates the parent, and the court determines that the parent is not indigent, the court shall discharge the attorney ad litem from the appointment. [Tex. Fam. Code § 107.0141\(f\)](#).

### **4.3 Court-Maintained Appointment Lists**

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Each court in this state shall establish and maintain a list of all attorneys who are qualified to serve as an attorney or guardian ad litem or mediator and are registered with the court. [Tex. Gov't Code § 37.003\(a\)](#). Guardians ad litem or other persons appointed under a program authorized by [Tex. Fam. Code § 107.031](#) are exempt from this list. [Tex. Gov't Code § 37.002](#). A court annually shall post each list at the courthouse of the county in which the court is located and on any Internet website of the court. [Tex. Gov't Code § 37.005](#). Courts will also be required to use a rotation system to appoint attorneys unless certain exceptions apply. [Tex. Gov't Code § 37.004](#).

Additionally, the clerk of each court shall prepare a report on court appointments for an attorney ad litem, guardian ad litem, guardian, or mediator for a case before the court in the preceding month or note that no appointments were made for the preceding month. [Tex. Gov't Code § 36.004\(a\)](#). The report on court appointments must include:

- The name of each person appointed by the court as an attorney ad litem, guardian ad litem, guardian or mediator for a case in that month;
- The name of the judge and the date of the order approving compensation to be paid to a person appointed as an attorney ad litem, guardian ad litem, guardian or mediator for a case in that month;
- The number and style of each case in which an a person was appointed as an attorney ad litem, guardian ad litem, guardian or mediator for a case in that month;
- The number of cases each person was appointed by the court to serve as an attorney ad litem, guardian ad litem, guardian or mediator for a case in that month;
- The total amount of compensation paid to a person appointed to serve as an attorney ad litem, guardian ad litem, guardian or mediator appointed by the court in that month and the source of the compensation; and
- If the total amount of compensation paid to a person appointed to serve as an attorney ad litem, guardian ad litem, guardian or mediator for one appointed case in that month exceeds \$1,000, any information related to the case that is available to the court on the number of hours billed to the court for the work performed by the person or the person's employees, including paralegals, and the billed expenses. [Tex. Gov't Code § 36.004\(a\)\(1\)-\(6\)](#).

Not later than the 15<sup>th</sup> day of each month, the clerk of the court shall:

- Submit a copy of the report to the Office of Court Administration; and
- Post the report at the courthouse of the county in which the court is located and on any Internet website of the court. [Tex. Gov't Code § 36.004\(b\)](#).

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If a court fails to provide to the clerk of the court information required for the report submitted under [Tex. Gov't Code § 36.004](#), the court is ineligible for any grant money awarded by this state or a state agency for the next state fiscal biennium. [Tex. Gov't Code § 36.005](#).

#### **4.4 Office of Child Representation and Office of Parent Representation and Managed Assigned Counsel Program**

##### **a. Office of Child Representation and Office of Parent Representation**

The Texas Family Code authorizes governmental entities, including a county or group of counties, to create offices of child representation or parent representation. [Tex. Fam. Code Chapter 107, Subchapter E](#); [Tex. Fam. Code § 107.251](#); [Tex. Fam. Code § 107.252](#); [Tex. Fam. Code § 107.253](#); [Tex. Fam. Code § 107.256](#); [Tex. Fam. Code § 107.258](#); [Tex. Fam. Code § 107.259](#); [Tex. Fam. Code § 107.260](#); [Tex. Fam. Code § 107.261](#); and [Tex. Fam. Code § 107.262](#).

An office of child representation is an entity that used public money to provide legal representation and services for a child in a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for the child in which the appointment is mandatory for a child under [Tex. Fam. Code § 107.012](#). [Tex. Fam. Code § 107.254](#).

An office of parent representation is an entity that uses public money to provide legal representation and services for a parent in a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for the child in which the appointment is mandatory for a parent under [Tex. Fam. Code § 107.013](#). [Tex. Fam. Code § 107.255](#).

##### **b. Managed Assigned Counsel Program for the Representation of Certain Children and Parents**

The Texas Family Code also includes provisions authorizing the creation of managed assigned counsel programs. [Tex. Fam. Code Chapter 107, Subchapter F](#); [Tex. Fam. Code § 107.101](#); [Tex. Fam. Code § 107.102](#); [Tex. Fam. Code § 107.103](#); [Tex. Fam. Code § 107.104](#); [Tex. Fam. Code § 107.105](#); [Tex. Fam. Code § 107.106](#); [Tex. Fam. Code § 107.107](#); and [Tex. Fam. Code § 107.108](#).

A managed assigned counsel program may be operated with public money for the purpose of appointing counsel to provide legal representation and services for a child or parent in a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for the child in which appointment is mandatory for a child under [Tex. Fam. Code § 107.012](#) and for a parent under [Tex. Fam. Code § 107.013](#). [Tex. Fam. Code § 107.102\(a\)](#).

#### **4.5 Duties and Required Training of Child's Attorney Ad Litem**

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The duties and responsibilities of attorneys ad litem are found in [Tex. Fam. Code § 107.003](#) and [Tex. Fam. Code § 107.004](#). A few specific duties of the attorney ad litem include the following:

[Tex. Fam. Code § 107.004](#) requires that the attorney for the child file a written statement with the court indicating that the attorney ad litem complied with [Tex. Fam. Code § 107.004\(d\)\(1\)](#), 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](#).

[Tex. Fam. Code § 107.004](#) states that the required meeting under [Tex. Fam. Code § 107.004\(d\)](#) must take place:

- 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
- 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. [Tex. Fam. Code § 107.004\(d-1\)](#).

**Special Issue:** The meeting between the AAL and child client should 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. This might be a subject of judicial inquiry during the hearing.

[Tex. Fam. Code § 107.004\(d-2\)](#) also requires that an attorney ad litem appointed to represent a child in the managing conservatorship of 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\(d-2\)](#).

New [Tex. Fam. Code § 107.004\(d-3\)](#) requires that an attorney ad litem review the child's safety and well-being, including any effects of trauma to the child, and take appropriate action, including requesting a review hearing when necessary to address an issue of concern.

#### **4.6 Duties of Parent Attorney**

[Tex. Fam. Code § 107.0131](#) requires an attorney appointed to represent a parent to abide by the parent's objectives for representation. [Tex. Fam. Code § 107.0131\(a\)\(1\)\(H\)](#).

##### **a. Duration of Appointment of Parent Attorney**

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[Tex. Fam. Code § 107.016](#) provides for continuity of representation for parents who appeal a termination or managing conservatorship order, stating:

- 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 as long as the child is in the Department's managing conservatorship; and
- An attorney appointed under [Tex. Fam. Code Chapter 107, Subchapter B](#) to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of:
  - the date the suit affecting the parent-child relationship is dismissed;
  - the date all appeals in relation to any final order terminating parental rights are exhausted or waived; or
  - 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](#).

#### **4.7 Duties of Parent Appointed to Represent Alleged Father**

Except as otherwise provided by [Tex. Fam. Code § 107.0132\(b\)](#) and [Tex. Fam. Code § 107.0132\(d\)](#), an attorney ad litem appointed under [Tex. Fam. Code § 107.013](#) to represent the interests of an alleged father is 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 who 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

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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](#). 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\(d\)](#).

#### **4.8 Duties of Attorneys Appointed to Represent Parents Whose Identity or Location is Unknown or Who Has Been Cited by Publication**

[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\(e\)](#), 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:

- Provide to each party and the court the parent's name and address and any other available locating information unless the court finds that:
  - disclosure of a parent's address is likely to cause that parent harassment, serious harm, or injury; or
  - the parent has been a victim of family violence; and

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- 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 [Tex. Fam. Code § 107.014\(b\)\(1\)\(B\)](#), the court may:

- Order that the information not be disclosed; or
- 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\(e\)](#).

### **4.9 Required Attorney Training**

[Tex. Fam. Code § 107.004](#) requires 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 three 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 per [Tex. Fam. Code § 107.004\(b\)](#). An attorney ad litem is not required to comply with [Tex. Fam. Code § 107.004\(d\)](#) 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 three 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\(c\)\(2\)](#).

[Tex. Fam. Code § 107.0131](#) provides enumerated duties for parents' attorneys, including three hours of CLE training and meeting with the client before each hearing.

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[Tex. Fam. Code § 107.0131](#) also requires that the continuing legal education relate to representing parents in child protection cases 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 three 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\(c\)](#).

## **5. Notice Requirement to Parent Regarding Legal Representation**

The temporary order, 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 business 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\(c\)](#).

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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\(d\)](#).

## **6. Information Provided to Relatives and Certain Individuals; 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;
- An adult relative of the alleged father if DFPS has a reasonable basis to believe the alleged father is the child's biological father; or
- 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](#), 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; and
  - 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 Suit Affecting the Parent-Child Relationship (SAPCR). [Tex. Fam. Code § 262.1095\(d\)](#). 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\(e\)](#).

## **G. Filing Suit Prior to Taking Possession of Child**

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## 1. 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:

- There is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child and that allowing the child to remain in the home would be contrary to the child's welfare; and
- Reasonable efforts, consistent with the circumstances and providing for the safety of the child, have been made to prevent or eliminate the need to remove the child from the child's home. [Tex. Fam. Code § 262.113](#).

New [Tex. Fam. Code § 262.1131](#) authorizes the court to render a Temporary Restraining Order as provided by [Tex. Fam. Code § 105.001](#), when DFPS files suit under [Tex. Fam. Code § 262.113](#).

Section 262.201 was amended to impose a deadline of 30 days for a court to hear a non-emergency petition filed pursuant to [Tex. Fam. Code § 262.113](#). [Tex. Fam. Code § 262.205](#), which governed the Show Cause Hearing conducted on petitions filed pursuant to Section 262.113, was repealed. All hearings held subsequent to emergency and non-emergency removal petitions are combined under Section 262.201 of the Texas Family Code. [Tex. Fam. Code § 262.201](#).

## H. 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](#)

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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 other than one appointed pursuant to [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. [Tex. Fam. Code § 102.009\(a\)\(8\)](#).

#### **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\(c\)](#).

#### **Waiver of Citation**

[Tex. Fam. Code § 102.0091](#) allows for waiver of citation. A party to a suit under [Tex. Fam. Code Title 5](#) may waive the issuance or service of citation after the suit is filed by filing with the clerk of the court in which the suit is filed the waiver of the party acknowledging receipt of a copy of the filed petition. [Tex. Fam. Code § 102.0091\(a\)](#).

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The party executing the waiver may not sign the waiver using a digitalized signature. [Tex. Fam. Code § 102.0091\(b\)](#). The waiver must contain the mailing address of the party executing the waiver. [Tex. Fam. Code § 102.0091\(c\)](#).

Notwithstanding [Tex. Civ. Prac. & Rem. Code § 132.001](#), the waiver must be sworn before a notary public who is not an attorney in the suit, unless the party executing the waiver is incarcerated. [Tex. Fam. Code § 102.0091\(d\)](#). The Texas Rules of Civil Procedure do not apply to a waiver executed under [Tex. Fam. Code § 102.0091](#). [Tex. Fam. Code § 102.0091\(e\)](#).

## I. 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. [Tex. Fam. Code § 262.114\(a\)](#).

**Special Issue:** Courts are required at each permanency hearing held under Chapter 263 to review the placement of each child who is not placed with a relative caregiver or designated caregiver as defined by [Tex. Fam. Code § 264.751](#), and make a finding as to whether DFPS is able to place the child with a relative or designated caregiver and to state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#).

For more on out of state placements, see generally the Interstate Compact on Placement of Children<sup>4</sup> and [the Bench Book chapter on \*The Interstate Compact on the Placement of Children \(ICPC\)\*](#).

### 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

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- 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\(a-2\)](#).

## J. Placement

### 1. Child Placement Resources Form

DFPS may place a child with a relative or other designated caregiver identified on the proposed Child Placement Resources Form.

DFPS:

- Must determine that the placement is in the best interest of the child;
- Must complete the background and criminal history check and conduct a preliminary evaluation of the relative or other designated caregiver's home before the child is placed with the relative or other designated caregiver;
- May place the child before conducting the background and criminal history check or home study required by [Tex. Fam. Code § 262.114\(a\)](#). Not later than 48 hours after the time that the child is placed with the relative or other designated caregiver, DFPS shall begin the home study of the relative or other designated caregiver. DFPS shall complete the home study as soon as possible unless otherwise ordered by a court; and
- 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\(c\)](#).

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**Special Issue:** Courts are required at each permanency hearing held under Chapter 263 to review the placement of each child who is not placed with a relative caregiver or designated caregiver as defined by [Tex. Fam. Code § 264.751](#), and make a finding as to whether DFPS is able to place the child with a relative or designated caregiver and to state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#).

## 2. Caregiver Visit With Child; Information

Before placing a child with a proposed relative or other designated caregiver, DFPS must:

- Arrange a visit between the child and the proposed caregiver; and
- 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:
  - the child’s school information and educational needs;
  - the child’s medical, dental, and mental health care information;
  - the child’s social and family information; and
  - any other information about the child DFPS determines will assist the proposed caregiver in meeting the child’s needs. [Tex. Fam. Code § 264.7541\(a\)](#).

DFPS may waive the requirements if 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\(b\)](#).

## 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](#).

## K. Visitation Schedule

### 1. Visitation With Certain Children

Applicable only to a child:

- Who is in the temporary managing conservatorship of DFPS; and

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- 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 fifth day after the date DFPS is named temporary managing conservator of the child unless:

- DFPS determines that visitation is not in the child's best interest; or
- 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\(e\)](#).

## L. Placement When Child Victim of Human Trafficking

A court in an emergency, initial, or full Adversary Hearing conducted under [Tex. Fam. Code Chapter 262](#) may order that the child who is the subject of the hearing be placed in a secure agency foster home verified in accordance with [Tex. Hum. Res. Code § 42.0531](#), if the court finds that:

- The placement is in the best interest of the child; and
- The child's physical health or safety is in danger because the child has been recruited, harbored, transported, provided, or obtained for forced labor or commercial sexual activity, including any child subjected to an act specified in [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#). [Tex. Fam. Code § 262.011](#).

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# BURDEN OF PROOF

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## A. Sufficient Evidence to Satisfy a Person of Ordinary Prudence and Caution

Ordinary Prudence and Caution requires a minimal showing, less than a preponderance but enough to persuade a reasonable person, similar to the “probable cause” required for a search warrant. Applies to:

- Ex Parte Removal Hearing. [Tex. Fam. Code § 262.101](#);
- Taking Possession of a Child in Emergency Without a Court Order. [Tex. Fam. Code § 262.104](#);
- Full Adversary Hearing (both emergency and non-emergency removal). [Tex. Fam. Code § 262.201](#).

## B. Preponderance of the Evidence

Preponderance is evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it. Picture the scales of justice tipping slightly lower on one side and that is enough to meet the preponderance of the evidence. It is the standard of proof generally used in civil cases. Applies to:

- 60 Day Status Review. [Tex. Fam. Code § 105.005](#);
- Permanency Hearing before Final Order. [Tex. Fam. Code § 105.005](#);
- Final Order Awarding Permanent Managing Conservatorship (without termination). [Tex. Fam. Code § 105.005](#);
- Permanency Hearing after Final Order. [Tex. Fam. Code § 105.005](#);
- Adoption Hearing. [Tex. Fam. Code § 105.005](#).

## C. Clear and Convincing

Clear and Convincing is the measure or degree of proof that will produce in the mind of the trier of fact (either a judge or a jury) a firm belief or conviction as to the truth of the allegations sought to be established. More than just a “Preponderance of the Evidence” but not as much as “Beyond a Reasonable Doubt.” Applies to:

- Termination of Parental Rights. [Tex. Fam. Code § 161.001](#);

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- An Order placing a child in foster care under the Indian Child Welfare Act, [25 U.S.C. § 1912\(e\)](#).

## **D. Beyond a Reasonable Doubt**

Beyond a Reasonable Doubt is met when the trier of fact is fully satisfied, or entirely convinced that something occurred. Applies to:

- Termination cases subject to the Indian Child Welfare Act. [25 U.S.C. §1912\(f\)](#).

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# ADVERSARY HEARING

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## 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

***Please see the At a Glance and Adversary Hearing Checklists in the Checklist Section of the Bench Book.***

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; this hearing is to be held within 14 days of the date the child was taken into the possession of DFPS. [Tex. Fam. Code § 262.201](#). 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. When DFPS files a petition pursuant to Section 262.113, the court must set a full adversary no later than the 30<sup>th</sup> day after the date the suit is filed. [Tex. Fam. Code § 262.201\(b\)](#). 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 why a child should be in substitute care, should be approved by the court.

- A. Service of Citation**
- B. Notice**
- C. Hearing After Emergency Removal With or Without a Court Order**
- D. Hearing When Child Not in Possession of DFPS**
- E. If Court Does Not Remove or Continue DFPS Conservatorship**
- F. Mandatory Appointment of Attorney for Parent**
- G. Transfer**
- H. Placement With Relatives or Designated Caregiver**
- I. Placement When Child Victim of Human Trafficking**
- J. Aggravated Circumstances**

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## K. Decisions Regarding Education Required at Adversary 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. The court may proceed with temporary orders prior to any required service by publication. [Tex. Fam. Code § 262.201\(o\)](#).

#### 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, 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 locator 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 the known parent who cannot be located, before granting any judgment on such service.

### B. Notice

#### 1. The Right to Notice

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The Petitioner, which is usually DFPS, must ensure that notice of the lawsuit is provided to those who are sued.

## 2. Methods of Providing Notice of Hearing

The requirements for citation are different from 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 given by some form of substituted service, including citation by publication, as authorized by the Texas Rules of Civil Procedure.

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, **electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager or in person, by mail, by commercial delivery service, by fax, by email, 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. [Tex. R. Civ. P. 21a](#).

## 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 if DFPS has a reasonable basis to believe the alleged father is the child’s biological father; and
- Anyone who is identified as a potential relative or designated caregiver on the proposed Child Placement Resources Form. [Tex. Fam. Code § 262.1095\(a\)\(1\)](#).

DFPS **may** provide information to adults DFPS determines have a long-standing and significant relationship with the child. [Tex. Fam. Code § 262.1095\(a\)\(2\)](#).

The written notice must include, among other things:

- A statement that the child is in the state’s custody;

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- 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; and
  - 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\(d\)](#) and [Tex. Fam. Code § 262.1095\(e\)](#).

#### **4. Report Regarding Notification of Relatives**

[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' diligent efforts. [Tex. Fam. Code § 263.007](#).

#### **5. Notice to Parents of Right to Counsel**

Before commencement of the full Adversary Hearing, if an attorney has not already been appointed under [Tex. Fam. Code § 107.013](#), 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\(c\)](#).

[Tex. Fam. Code § 107.0141](#) allows the court to appoint an attorney for a parent whenever the SAPCR is filed, but if a parent's first appearance is at the Adversary Hearing and the parent requests the appointment of an attorney, then the court shall require the parent to complete and file with the court an affidavit of indigence. The court may consider additional evidence to determine whether the parent is indigent, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the appointment of an attorney for the parent is requested, the court shall make a determination of indigence before commencement of the full Adversary Hearing. If the court determines the parent is indigent, the court shall appoint an attorney to represent the parent. [Tex. Fam. Code § 262.201\(c\)](#).

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## C. Hearing After Emergency Removal With or Without a Court Order

### 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\(a-5\)](#), (e) or (e-1). [Tex. Fam. Code § 262.201\(a\)](#).

### 2. Extension

Although [Tex. Fam. Code § 262.103](#) allows for the temporary order, 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 that the failure to conduct the Adversary Hearing does not deprive the court of its jurisdiction. *In re J.M.C.*, [109 S.W.3d 591, 595](#) (Tex. App. – Fort Worth 2003, no pet.).

For indigent parents, the court may, for good cause shown, postpone the full Adversary Hearing for up to 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. [Tex. Fam. Code § 262.201\(e\)](#). For parents who are not indigent, but who appear in opposition, the court may, for good cause shown, postpone the full Adversary Hearing for up to seven days from the date of the parent's appearance to allow the parent to hire an attorney or to provide the parent's attorney time to respond to the petition and prepare for the hearing. [Tex. Fam. Code § 262.201\(a-5\)](#) or [§ 262.201\(e-1\)](#). Under an extension granted pursuant to Section 262.201(e), the court may shorten or lengthen the extension granted, if the parent and the appointed attorney agree in writing. If the court postpones the full Adversary Hearing, the court shall extend a temporary order, temporary restraining order, or attachment issued by the court under [Tex. Fam. Code § 262.102\(a\)](#) or [Tex. Fam. Code § 262.1131](#) for the protection of the child until the date of the rescheduled full Adversary Hearing. [Tex. Fam. Code § 262.201\(a-5\)](#) or (e).

### 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\(g\)](#).

### 4. Duty on DFPS Prior to Adversary Hearing

New [Tex. Fam. Code § 262.014](#) now requires DFPS, at the request of the attorney for a parent who is a party in the suit or the attorney ad litem for the parent's child, before the adversary hearing, to provide the name of any person the Department intends to call as a witness to the allegations (except the name of a Department employee), a copy of any offense report relating to the allegations contained in the petition that will be used to refresh

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a witness's memory, and a copy of any photo, video or recording that will be presented as evidence.

## **5. Required Findings if Child to Remain in Care**

### **a. Danger to Physical Health and Safety**

There was a danger to the physical health or safety of the child, including a danger that the child would be a victim of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#), 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\(g\)\(1\)](#).

### **b. 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\(g\)\(2\)](#).

In determining whether there is a continuing danger to the physical health or safety of the child under subsection (g), 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 § 262.201\(i\)\(1\) and \(2\)](#).

### **c. 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\(g\)\(3\)](#).

## **6. Court Actions/Orders if Child to Remain in Care**

### **a. 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 [Tex. Fam. Code Chapter 262](#). [Tex. Fam. Code § 262.204](#).

### **b. Admonish and Notify Parents**

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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\(m\)](#).

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\(c\)](#).

**c. 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\(n\)](#).

**d. Render Protective Order, If Necessary**

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 § 262.201\(k\)](#).

**e. Inquire About Native American Heritage**

The court shall ask all parties present at the full Adversary Hearing whether the child or the child’s family has a Native American heritage and identify any Native American tribe with which the child may be associated. [Tex. Fam. Code § 262.201\(f\)](#). For more information regarding requirements when a child has a Native American heritage, please see the Bench Book Chapter on the [Indian Child Welfare Act](#).

**f. 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 should consider setting the dates for Status, Initial Permanency, and Final Hearings at the start of the case as it helps provide all parties and interested persons with notice of future hearings.

## D. Hearing When Child Not in Possession of DFPS

1. Filed Under [Tex. Fam. Code § 262.113](#)

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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](#).

## **2. When Must Hearing Be Held**

In a suit requesting possession of a child after notice and hearing, a full Adversary Hearing must be held not later than the 30<sup>th</sup> day after the date the suit is filed. [Tex. Fam. Code § 262.201\(b\)](#).

## **3. Conduct Hearing Under [Tex. Fam. Code § 262.201](#)**

After the hearing, the court may grant the request to remove the child from the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession of the child if the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

- There is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child and continuation of the child in the home would be contrary to the child's welfare; 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 § 262.201\(j\)](#)

If the court orders removal of the child from the child's home, the court shall:

- Issue an appropriate temporary order under [Tex. Fam. Code Chapter 105](#); and
- 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\(m\)](#).

## **4. Court Actions/Orders if Child is Placed in Care**

### **a. 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 [Tex. Fam. Code Chapter 262](#). [Tex. Fam. Code § 262.204](#).

### **b. Order Placement With Non-Custodial Parent or Relative**

Unless it is not in the best interest of the child, the court shall place a child who has been removed with:

- The child's noncustodial parent; or

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- Another relative of the child if placement with the noncustodial parent is inappropriate. [Tex. Fam. Code § 262.201\(n\)](#).

**c. Render Protective Order, If Necessary**

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 § 262.201\(k\)](#).

**d. 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.

**e. 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 the Child or Continue DFPS Conservatorship**

Both statute and case law encourage the use of alternatives to removal as long as the child is protected. See the 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**

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\(a\)\(4\)](#).

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In a suit described by [Tex. Fam. Code § 107.013\(a\)](#), if a parent is not represented by an attorney at the parent's first appearance in court, the court shall inform the parent 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 an attorney ad litem appointed by the court. [Tex. Fam. Code § 107.013\(a-1\)](#).

The court may appoint one attorney for both parents if they are both entitled and their interests are not in conflict and there is no history or pattern of past or present family violence by one parent directed against the other parent, a spouse, or a child of the parties. [Tex. Fam. Code § 107.013\(b\)](#).

The court shall require a parent who claims indigence under [Tex. Fam. Code § 107.013\(a\)](#) to file an affidavit of indigence pursuant to [Tex. R. Civ. P. 145\(b\)](#) before the court may conduct a hearing to determine the parent's indigence under [Tex. Fam. Code § 107.013](#). [Tex. Fam. Code § 107.013\(d\)](#).

The court may consider additional evidence at that hearing, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent. [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.

### **1. Temporary Appointment of Attorney ad Litem for Parents**

[Tex. Fam. Code § 107.0141](#) authorizes the court to appoint an attorney ad litem to represent the interests of a parent for a limited period beginning at the time the court issues a temporary restraining order or attachment of the parent's child under [Tex. Fam. Code Chapter 262](#) and ending on the court's determination of whether the parent is indigent before commencement of the full Adversary Hearing. [Tex. Fam. Code § 107.0141\(a\)](#).

An attorney ad litem appointed for a parent under this section:

- Has the powers and duties of an attorney ad litem appointed under [Tex. Fam. Code § 107.0131](#); and
- If applicable, shall:
  - conduct an investigation regarding the petitioner's due diligence in locating and serving citation on the parent; and

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- interview any parent or other person who may have information relating to the identity or location of the parent. [Tex. Fam. Code § 107.0141\(b\)](#).

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

- Inform the parent of the parent's right to be represented by an attorney ad litem appointed by the court, if the parent is indigent and appears in opposition to the suit;
- If the parent claims indigence and requests an attorney ad litem beyond the period of time the temporary appointment under [Tex. Fam. Code § 107.0141](#), assist the parent in making a claim of indigence for the appointment of an attorney ad litem; and
- Assist the parent in preparing for the full Adversary Hearing under [Tex. Fam. Code Chapter 262, Subchapter C. Tex. Fam. Code § 107.0141\(c\)](#).

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 § 107.0141\(d\)](#).

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 § 107.0141\(e\)](#), the court shall discharge the attorney ad litem from the appointment. [Tex. Fam. Code § 107.0141\(e\)](#).

If the attorney ad litem identifies or locates the parent, and the court determines that the parent is not indigent, the court shall discharge the attorney ad litem from the appointment. [Tex. Fam. Code § 107.0141\(f\)](#).

## G. Transfer

Effective September 1, 2017, [Tex. Fam. Code § 155.201](#) requires that upon receiving notice that a court exercising emergency jurisdiction under Chapter 262 has ordered the transfer of a suit affecting the parent-child relationship under [Tex. Fam. Code § 262.203\(a\)\(2\)](#), a court of continuing jurisdiction (CCJ) must transfer the proceedings to the court exercising jurisdiction under Chapter 262. The court exercising emergency jurisdiction under Chapter 262 may also transfer the suit affecting the parent-child relationship to the CCJ for the convenience of the parties and if transfer is in the child's best interest. However, a court hearing the case under [Tex. Fam. Code Chapter 262](#) must transfer any suit affecting the parent child relationship to the court in which the suit for dissolution of marriage is pending once the Chapter 262 court has rendered a final order. [Tex. Fam. Code Chapter 263, Subchapter E. Tex. Fam. Code § 262.203\(a\)\(3\)](#); [Tex, Fam. Code Chapter 6, Subchapter E. Tex. Fam. Code § 6.407\(a\), \(b\) and \(c\)](#); [Tex, Fam. Code Chapter 103, Tex. Fam. Code § 103.002](#); [Tex, Fam. Code Chapter 155, Subchapter C. Tex. Fam. Code § 155.201\(a\)](#).

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- The date of any future hearings in the case that have been scheduled by the transferring court;
  - Any date scheduled by the transferring court for the dismissal of the suit under [Tex. Fam. Code § 263.401](#); and
  - The name and contact information of each attorney ad litem or guardian ad litem appointed in the suit. [Tex. Fam. Code § 262.203\(d\)](#).

The court to which a suit affecting the parent-child relationship is transferred may retain an attorney ad litem or guardian ad litem appointed by the transferring court. If the court finds that the appointment of a new attorney ad litem or guardian ad litem is appropriate, the court shall appoint that attorney ad litem or guardian ad litem before the earlier of:

- The 10<sup>th</sup> day after the date of receiving the order of transfer; or
- The date of the first scheduled hearing after the transfer. [Tex. Fam. Code § 262.203\(e\)](#).

[Tex. Fam. Code § 155.207\(a\)](#) and [Tex. Fam. Code § 155.207\(c\)](#) address the transfer of court files from one jurisdiction to another. Not later than the 10<sup>th</sup> working day after the date an order of transfer is signed, the clerk of the court transferring a proceeding shall send to the proper court in the county to which transfer is being made:

- The pleadings in the pending proceeding and any other document specifically requested by a party;
- Certified copies of all entries in the minutes;
- A certified copy of each final order; and
- A certified copy of the order of transfer signed by the transferring court. [Tex. Fam. Code § 155.207\(a\)](#).

On receipt of the pleadings, documents, and orders from the transferring court, the clerk of the transferee court shall docket the suit and shall notify the judge of the transferee court, all parties, the clerk of the transferring court, and, if appropriate, the transferring court's local registry that the suit has been docketed. [Tex. Fam. Code § 155.207\(c\)](#).

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\(b\)](#).

## **1. Order of Transfer**

An order of transfer must include:

- 
- The date of any future hearings in the case that have been scheduled by the transferring court;
  - Any date scheduled by the transferring court for the dismissal of the suit under [Tex. Fam. Code § 263.401](#); and
  - The name and contact information of each attorney ad litem or guardian ad litem appointed in the suit. [Tex. Fam. Code § 263.203\(d\)](#).

The court to which a suit is transferred may retain an attorney ad litem or guardian ad litem appointed by the transferring court. If the court finds that the appointment of a new attorney ad litem or guardian ad litem is appropriate, the court shall appoint that attorney ad litem or guardian ad litem before the earlier of:

- The 10<sup>th</sup> day after the date of receiving the order of transfer; or
- The date of the first scheduled hearing after the transfer. [Tex. Fam. Code § 262.203\(e\)](#).

## 2. Transfer of Court Files

[Tex. Fam. Code § 155.207\(a\)](#) and [Tex. Fam. Code § 155.207\(c\)](#) address the transfer of court files from one jurisdiction to another. Not later than the 10<sup>th</sup> working day after the date an order of transfer is signed, the clerk of the court transferring a proceeding shall send to the proper court in the county to which transfer is being made:

- The pleadings in the pending proceeding and any other document specifically requested by a party;
- Certified copies of all entries in the minutes;
- A certified copy of each final order; and
- A certified copy of the order of transfer signed by the transferring court. [Tex. Fam. Code § 155.207\(a\)](#).

On receipt of the pleadings, documents, and orders from the transferring court, the clerk of the transferee court shall docket the suit and shall notify the judge of the transferee court, all parties, the clerk of the transferring court, and, if appropriate, the transferring court's local registry that the suit has been docketed. [Tex. Fam. Code § 155.207\(c\)](#).

## 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. Please see the [CPS Handbook § 4523](#).<sup>5</sup>

DFPS may place the child with the relative or designated caregiver identified on the proposed placement form if DFPS determines that the placement is in the best interest of the child. DFPS must complete the background and criminal history check and conduct a preliminary evaluation of the relative or other designated caregiver's home before the child is placed with the relative or other designated caregiver. [Tex. Fam. Code § 262.114\(b\)](#).

Not later than 48 hours after the time that the child is placed with the relative or other designated caregiver, DFPS shall begin the home study of the relative or other designated caregiver. [Tex. Fam. Code § 262.114\(b\)](#). DFPS shall complete the home study as soon as possible unless otherwise ordered by a court. [Tex. Fam. Code § 262.114\(b\)](#).

DFPS must provide an informational manual required by [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\(b\)](#).

## **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\(a-2\)](#).

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**Special Issue:** Courts must make a finding at the Adversary Hearing as to whether DFPS is able to place the child with a relative or other designated caregiver and state the evidence that supports its finding either way. [Tex. Fam. Code § 262.0022](#).

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 of Former Foster Parent**

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. Placement When Child Victim of Human Trafficking**

A court in an emergency, initial, or full Adversary Hearing conducted under [Tex. Fam. Code Chapter 262](#) may order that the child who is the subject of the hearing be placed in a secure agency foster home verified in accordance with [Tex. Hum. Res. Code § 42.0531](#), if the court finds that:

- The placement is in the best interest of the child; and
- The child's physical health or safety is in danger because the child has been recruited, harbored, transported, provided, or obtained for forced labor or commercial sexual activity, including any child subjected to an act specified in [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#). [Tex. Fam. Code § 262.011](#).

## **J. 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](#).

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**Special Issue:** One of the offenses that constitutes aggravated circumstances is knowingly subjecting a child to sex trafficking, receiving a benefit from a venture that involves sex trafficking, or engaging in sexual conduct with a trafficked child.

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 set pursuant to [Tex. Fam. Code § 263.401.](#)) [Tex. Fam. Code § 262.2015\(c\)](#) and [Tex. Fam. Code § 262.2015\(d\)](#).

## **K. Decisions Regarding Education Required at Adversary Hearing**

### **1. Designation of Education Decision-Maker**

[Tex. Fam. Code § 263.004](#) requires DFPS to provide 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 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 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 fifth day after the date of an Adversary Hearing held under [Tex. Fam. Code § 262.201](#) is concluded, DFPS must file the information required by [Tex. Fam. Code § 263.004\(a\)](#) with the court and provide a copy to the school the child attends. [Tex. Fam. Code § 263.004\(b\)](#).

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**Special Issue:** The notice required by [Tex. Fam. Code § 263.004](#) will be provided by DFPS via Form 2085E, Designation of Education Decision-Maker. For more information regarding this form, please see the Bench Book Chapter entitled [Education](#).

If a person other than a person identified under [Tex. Fam. Code § 263.004\(a\)](#) is designated to make educational decisions or assigned to serve as a surrogate parent, DFPS shall file the updated information in a permanency progress report filed under [Tex. Fam. Code § 263.303](#) or [Tex. Fam. Code § 263.502](#). The updated information must be provided to the school the child attends 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 third 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\(b\)](#).

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# STATUS HEARING

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## 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 the legal custody of DFPS.

***Please see the Checklist Section for Status Hearing Checklist.***

- A. Status Hearing**
- B. Mandatory Findings**
- C. Court Shall Advise/Warn Parents**
- D. Court Shall Review Service Plan**
- E. Court Shall Review Visitation Plan**
- F. Child Placement Resources Form Required**
- G. Permanency Planning Meetings**
- H. Assessments**
- I. Inquiry About Child's Native American Heritage**

### **A. Status Hearing**

#### **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\(b\)](#).

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## 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 conservator of a child, the court shall hold a Status Hearing to review the child's status and service plan. [Tex. Fam. Code § 263.201\(a\)](#).

## 3. Notice Must Be Given Pursuant to [Tex. Fam. Code § 263.0021](#)

Notice of a hearing under [Tex. Fam. Code Chapter 263](#) shall be given to all persons entitled to notice of the hearing. [Tex. Fam. Code § 263.0021\(a\)](#). Notice of a hearing under Chapter 263 must now state that the individual receiving notice pursuant to Section 263.0021(b) may, but is not required to, attend the hearing and may request to be heard at the hearing. [Tex. Fam. Code § 263.0021\(e\)](#). Courts must now determine whether the child's caregiver is present at the hearing and allow the caregiver to testify if the caregiver wishes to provide information about the child. [Tex. Fam. Code § 263.0021\(f\)](#).

The following persons are entitled to at least 10 days' notice and are entitled to present evidence and be heard at a hearing under [Tex. Fam. Code Chapter 263](#):

- DFPS;
- The foster parent, pre-adoptive parent, relative providing care, or the director or director's designee of the group home or general residential operation 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, if the appointment was not dismissed in the final order;
- A guardian ad litem appointed for the child, if the appointment was not dismissed in the final order;
- A volunteer advocate appointed for the child, if the appointment was 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; and
- Any other person or agency named by the court to have an interest. [Tex. Fam. Code § 263.0021\(b\)](#).

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Notice of a hearing under [Tex. Fam. Code Chapter 263](#) may be given:

- As provided by [Tex. R. Civ. P. 21a](#);
- In a temporary order following a full Adversary Hearing;
- In an order following a hearing under [Tex. Fam. Code Chapter 263](#);
- In open court; or
- In any manner that would provide actual notice to a person entitled to notice. [Tex. Fam. Code § 263.0021\(c\)](#).

## B. Mandatory Findings

During a Status Hearing, the court shall make findings as to whether:

- DFPS 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](#). 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 review the report and order DFPS to make further efforts, if warranted. [Tex. Fam. Code § 262.202\(a\)\(1\)](#); [Tex. Fam. Code § 263.202\(f\)](#); [Tex. Fam. Code § 262.1095\(a\)](#); and [Tex. Fam. Code § 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\(a\)\(2\)](#).
- 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. [Tex. Fam. Code § 263.202\(b\)\(1\)](#). The court shall give the 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, and the child's parents and the representative of DFPS has signed the plan. [Tex. Fam. Code § 263.202\(b\)\(2\), \(3\) and \(4\)](#).
- The court has identified the individual who has the right to consent to medical treatment for the child under [Tex. Fam. Code § 266.004](#). [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

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relative of the child. It is left to the court to decide what action, if any, should be taken in response to a negative answer. [Tex. Fam. Code § 263.202\(a\)\(2\)](#).

- 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:** DFPS is required to involve the parents in developing the Service Plan. [Tex. Fam. Code § 263.102\(a\)\(3\)](#). Parent attorneys are entitled to attend any case staffing in which the parent is invited to participate, including to develop a family service plan. [Tex. Fam. Code § 107.0131\(a\)\(2\)\(F\)](#). Courts might consider whether DFPS has involved counsel for the child and whether the parent has substantial input as to what services are appropriate to help the family reunify and ensure the child's well-being.

## 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 § 263.203\(b\)](#).

### 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 demonstrate 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\(a\)](#) requires that the court advise the parties of the provisions regarding the mandatory appointment of an attorney ad litem under [Tex. Fam. Code Chapter 107, Subchapter A](#) and 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\(a\)](#).

[Tex. Fam. Code § 263.0061](#) requires 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 required by [Tex. Fam. Code Chapter 263, Subchapter D](#), the court shall 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\(a\)](#).

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\(a\)](#). See Section E of this chapter.

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**

Except as provided by [Tex. Fam. Code § 262.2015](#), 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](#) requires 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 request that 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](#) clarifies 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;
- Be in writing and in a language that the parents understand, or made otherwise available;

- 
- Be prepared by DFPS in conference with the child’s parents;
  - State appropriate deadlines;
  - Specify the primary permanency goal and at least one alternative goal;
  - 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 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 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 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 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 Two 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 service plans, as appropriate. [Tex. Fam. Code § 263.102\(f\)](#).

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#### 4. Effective Date

The service plan takes effect when:

- The child's parents and the appropriate representative of DFPS 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 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\(e\)](#) and [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

After reviewing the original or any amended service plan, and making any changes or modifications deemed necessary, the court must incorporate the original or amended service plan into the orders of the court. The court may also render additional appropriate orders to implement or require compliance with an original or amended service plan. [Tex. Fam. Code § 263.106](#).

### E. Court Shall Review Visitation Plan

For more information regarding visitation and relevant forms, please see the Bench Book Chapter entitled [Family Visitation](#).

#### 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:

- The safety and best interest of the child;
- The age of the child;
- The desires of each parent regarding visitation with the child;
- The location of each parent and the child; and
- The resources available to DFPS, including the resources to:

- 
- 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
  - 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:

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

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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\(c\)](#).

The court must also make a finding as to whether DFPS is able to place the child with a relative or other designated caregiver and state the evidence that supports its finding either way. [Tex. Fam. Code § 262.0022](#).

## **G. Permanency Planning Meetings**

### **1. Timing of Permanency Planning Meetings**

DFPS shall hold a permanency planning meeting for each child for whom DFPS is appointed temporary managing conservator in accordance with department rule that is designed to allow the child to exit the managing conservatorship of DFPS safely and as soon as possible and be placed with an appropriate adult caregiver who will permanently assume legal responsibility for the child. [Tex. Fam. Code § 263.009\(a\)](#).

### **2. Permanency Planning Meeting Requirements**

At each permanency planning meeting, DFPS shall:

- Identify any barriers to achieving a timely permanent placement for the child;
- Develop strategies and determine actions that will increase the probability of achieving a timely permanent placement for the child; and
- Use the family group decision-making model whenever possible. [Tex. Fam. Code § 263.009\(b\)](#).

## **H. Assessments**

Although there are certain assessments required for children removed under particular circumstances (Texas Health Steps and Required Medical Exams detailed in the Healthcare for Texas Children chapter) all children must receive a developmentally appropriate comprehensive assessment not later than the 45<sup>th</sup> day after the date a child enters the conservatorship of DFPS. . [Tex. Fam. Code § 266.012\(a\)](#).

The assessment must include:

- A screening for trauma; and

- 
- Interviews with individuals who have knowledge of the child's needs. [Tex. Fam. Code § 266.012\(a\)](#).

For more information, please see the Bench Book Chapter entitled [Health Care for Texas Children](#).

## **I. Inquiry Regarding Child's Native American Heritage**

The court shall ask all parties present at the Status Hearing whether the child or the child's family has a Native American heritage and identify any Native American tribe with which the child may be associated. [Tex. Fam. Code § 263.202\(f-1\)](#). For more information regarding requirements when a child has a Native American heritage, please see the Bench Book Chapter entitled [Indian Child Welfare Act](#).

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# PERMANENCY HEARING BEFORE FINAL ORDER

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## Legal Overview of Permanency Hearing Before Final Order

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

***Please see the Checklist Section for the Permanency Hearing  
Before Final Order Checklist.***

Permanency 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 Before Final Order**
- B. Hearing Notice is Mandatory**
- C. Permanency Plan for Child is Required**
- D. Permanency Progress Report is Required; Contents**
- E. Procedural and Due Process Issues**
- F. Mandatory Actions, Findings, and Considerations**
- G. Mandatory Child-Specific Considerations**
- H. Best Interest**
- I. Medical Consent**
- J. Children Who are Missing or Victims of Sex Trafficking**
- K. Notice of Significant Events**

## **A. Permanency Hearing Before Final Order**

### **1. Initial Permanency Hearing**

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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 and the court shall review the status of, and permanency plan for, the child to ensure that a final order consistent with that permanency plan is rendered before the date of dismissal of the suit under [Tex. Fam. Code Chapter 263](#). [Tex. Fam. Code § 263.304\(a\)](#).

## 2. Subsequent Permanency Hearing

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. For good cause shown or on the court's own motion, the court may order more frequent hearings. [Tex. Fam. Code § 263.305](#).

**Special Issue:** Some judges use the 2<sup>nd</sup> Permanency Hearing Before Final Order as a pretrial conference to discuss discovery, the pleadings upon which DFPS will be seeking relief, and other trial related issues.

## B. Hearing Notice is Mandatory

Notice of a hearing under [Tex. Fam. Code Chapter 263](#) shall be given to all persons entitled to notice of the hearing. [Tex. Fam. Code § 263.0021\(a\)](#). Notice of a hearing under Chapter 263 must now state that the individual receiving notice pursuant to Section 263.0021(b) may, but is not required to, attend the hearing and may request to be heard at the hearing. [Tex. Fam. Code § 263.0021\(e\)](#). Courts must now determine whether the child's caregiver is present at the hearing and allow the caregiver to testify if the caregiver wishes to provide information about the child. [Tex. Fam. Code § 263.0021\(f\)](#).

The following persons are entitled to at least 10 days' notice and are entitled to present evidence and be heard at a hearing under [Tex. Fam. Code Chapter 263](#):

- DFPS;
- The foster parent, pre-adoptive parent, relative providing care, or the director or director's designee of the group home or general residential operation 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, if the appointment was not dismissed in the final order;
- A guardian ad litem appointed for the child, if the appointment was not dismissed in the final order;

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- A volunteer advocate appointed for the child, if the appointment was 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; and
  - Any other person or agency named by the court to have an interest. [Tex. Fam. Code § 263.0021\(b\)](#).

Notice of a hearing under [Tex. Fam. Code Chapter 263](#) may be given:

- As provided by [Tex. R. Civ. P. 21a](#);
- In a temporary order following a full Adversary Hearing;
- In an order following a hearing under [Tex. Fam. Code Chapter 263](#);
- In open court; or
- In any manner that would provide actual notice to a person entitled to notice. [Tex. Fam. Code § 263.0021\(c\)](#).

## 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 § 263.0021\(b\)](#) not later than 10 days before the date of the 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;
- Termination of parental rights and adoption of the child by a relative or other suitable individual;

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- 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\(a\)](#).

With passage of the Preventing Sex Trafficking and Strengthening Families Act (“SFA”) into law in 2014, there are NO permissible uses of APPLA for any child under 16 years of age, and use of APPLA is limited for youth age 16 and older. Courts must ask each youth with a permanency plan of APPLA about their desired permanency outcome, and determine at each permanency review hearing that APPLA is the *best* permanency plan for the child. Texas law also requires courts to document the agency’s unsuccessful efforts to achieve a more preferred outcome. With passage of SFA, courts *must find* that APPLA is the best permanency plan. [Tex. Fam. Code § 263.3026\(b\)](#).

## **D. Permanency Progress Report is Required; Contents**

### **1. Filing the Permanency Progress Report**

Not later than the 10<sup>th</sup> day before the date set for each Permanency Hearing Before a Final Order is rendered, DFPS shall file with the court a permanency progress report and provide a copy at least 10 days prior to the hearing, unless the court orders a different period for providing the report, 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 contain:

- Information necessary for the court to conduct the Permanency Hearing and make its findings and determinations under [Tex. Fam. Code § 263.306](#);
- Information on significant events, as defined by [Tex. Fam. Code § 264.018](#); and
- Any additional information DFPS determines is appropriate or that is requested by the court and relevant to the court’s findings and determinations under [Tex. Fam. Code § 263.306](#). [Tex. Fam. Code § 263.303\(b\)](#).

### **3. Filing a Response**

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A parent whose parental rights are the subject of a suit affecting the parent-child relationship, the attorney for that parent, or the child's attorney ad litem or guardian ad litem may file a response to the DFPS report filed under [Tex. Fam. Code § 263.303](#). A response to the report may be filed up to three days prior to hearing. [Tex. Fam. Code § 263.303\(c\)](#).

## E. Procedural and Due Process Issues

At each Permanency Hearing Before Final Order, 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\(a-1\)\(1\)](#).
- Review the efforts of DFPS or other agency in:
  - locating and requesting service of citation on all persons entitled to service of citation under [Tex. Fam. Code § 102.009](#); 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\(a-1\)\(2\)](#).
- 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](#).

## F. Mandatory Actions, Findings, and Considerations

### 1. Place/Return Child

The court must make a finding as to whether DFPS is able to place the child with a relative or other designated caregiver and state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#).

Also, the court must make a finding as to whether returning the child to the child's home is safe and appropriate, in the best interest of the child, and whether return home is contrary to the welfare of the child. [Tex. Fam. Code § 263.002\(c\)](#).

The court must also determine whether to return the child to the child's parents if the child's 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\(a-1\)\(6\)](#).

OR

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Estimate 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\(a-1\)\(7\)](#).

## **2. Review Extent of Parent's Compliance With Temporary Orders and the Service Plan**

Review the extent of the parent's compliance with temporary orders and the service plan and the extent to which progress has been made toward alleviating or mitigating the causes necessitating the placement of the child in foster care. [Tex. Fam. Code § 263.306\(a-1\)\(4\)](#).

## **3. Review Permanency Progress Report**

Review the permanency progress report to determine:

- The safety and well-being of the child and whether the child's needs, including any medical or special needs, are being adequately addressed;
- The continuing necessity and appropriateness of the placement of the child, including with respect to a child who has been placed outside of this state, whether the placement continues to be in the best interest of the child;

**Special Issue:** Courts are required at each permanency review hearing held under Chapter 263 to review the placement of each child who is not placed with a relative caregiver or designated caregiver as defined by [Tex. Fam. Code § 264.751](#), and make a finding as to whether DFPS is able to place the child with a relative or designated caregiver and to state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#).

- The appropriateness of the primary and alternative permanency goals for the child developed in accordance with department rule and whether DFPS has made reasonable efforts to finalize the permanency plan, including the concurrent permanency goals, in effect for the child;
- Whether the child has been provided the opportunity, in a developmentally appropriate manner, to express the child's opinion on any medical care provided;
- For a child receiving psychotropic medication, whether the child:
  - has been provided appropriate non-pharmacological interventions, psychosocial therapies, or behavior strategies to meet the child's needs; or
  - has been seen by the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days;
- Whether an education decision-maker for the child has been identified, the child's education needs and goals have been identified and addressed, and there have

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been major changes in the child's school performance or there have been serious disciplinary events;

- For a child 14 years of age or older, whether services that are needed to assist the child in transitioning from substitute care to independent living are available in the child's community; and
- For a child whose permanency goal is APPLA:
  - the desired permanency outcome for the child, by asking the child; and
  - whether, as of the date of the hearing, another planning permanent living arrangement is the best permanency plan for the child and, if so, provide compelling reasons why it continues to not be in the best interest of the child to:
    - return home;
    - be placed for adoption;
    - be placed with a legal guardian; or
    - be placed with a fit and willing relative.
  - whether DFPS has:
    - conducted an independent living skills assessment under [Tex. Fam. Code §264.121\(a-3\)](#);
    - addressed the goals identified in the child's permanency plan, including the child's housing plan, and the results of the ILS assessment;
    - provided a youth 16 years and older with the documents and information listed in [Tex. Fam. Code §264.121\(e\)](#); and
    - provided a youth who is 18 years or has had the disabilities of minority removed, the documents and information listed in Section 264.121(e-1). [Tex. Fam. Code § 263.306\(a-1\)\(5\)](#).

#### **4. Inquire About Child and Family's Native American Heritage**

The court shall ask all parties present whether the child or the child's family has a Native American heritage and identify any Native American tribe with which the child may be associated. [Tex. Fam. Code § 263.306\(a-1\)\(3\)](#). For more information regarding requirements when a child has a Native American heritage, please see the Bench Book Chapter entitled [Indian Child Welfare Act](#).

#### **5. Determine Date of Dismissal**

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Announce in open court the dismissal date and the date of any upcoming hearings. [Tex. Fam. Code § 263.306\(a-1\)\(8\)](#).

## 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

### 1. Child-Attendance is Mandatory

The child must attend each Permanency Hearing, unless specifically excused by the court. If the child is four 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](#).

Despite the many improvements Texas has made over the past several years, involving youth in the court process and ensuring their voice is heard and considered continues to be a challenge. The Texas Family Code has been amended many times to make it clear that children and youth must attend hearings, and to place additional duties on attorneys ad litem, judges, and the Department to meet with children in advance of court hearings. Yet, children and youth are routinely excluded from meaningful participation, resulting in the feeling that their voices are not heard and their opinions are not important. There have also been many studies by the American Bar Association (ABA) as well as Court Improvement Programs around the country on this singular issue, and there is simply no question that foster youth repeatedly express the desire to be involved in decisions about their lives. Being involved gives the youth a sense of control, helps them understand the process, and direct contact with the court benefits the judge and the youth.

**Special Issue:** In 2008, the ABA National Child Welfare Resource Center on Legal and Judicial Issues produced five judicial bench cards to assist judges in preparing, accommodating, and interviewing children who attend court. The judicial bench cards are broken down by age: Ages 0-12 months, 3-5 years, 5-11 years, 12-15 years, and 16 years and over. These bench cards are included in the Checklist section of this Bench Book.

### 2. Age-Appropriate Normalcy Activity

[Tex. Fam. Code § 264.001](#) requires court consideration of age-appropriate normalcy activities, defined as an activity or experience:

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- That is generally accepted as suitable for a child’s age or level of maturity or that is determined to be developmentally appropriate for a child based on the development of cognitive, emotional, physical, and behavioral capacities that are typical for the age or age group; and
  - In which a child who is not in the conservatorship of DFPS is generally allowed to participate, including extracurricular activities, cultural and enrichment activities, and employment opportunities. [Tex. Fam. Code § 264.001\(1\)](#).

In addition to the requirements of [Tex. Fam. Code § 263.306\(a-1\)](#), at each Permanency Hearing before a final order is rendered, the court shall review DFPS efforts to ensure that the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities, including activities not listed in the child’s service plan. [Tex. Fam. Code § 263.306\(c\)](#).

DFPS shall use its best efforts to normalize the lives of children in the managing conservatorship of DFPS by allowing substitute caregivers, without the prior approval of DFPS, to make decisions similar to those a parent would be entitled to make regarding a child’s participation in age-appropriate normalcy activities. [Tex. Fam. Code § 264.125\(a\)](#).

In determining whether to allow a child in the managing conservatorship of DFPS to participate in an activity, a substitute caregiver must exercise the standard of care of a reasonable and prudent parent. [Tex. Fam. Code § 264.125\(b\)](#).

The standard of care of a reasonable and prudent parent means the standard of care that a parent of reasonable judgment, skill, and caution would exercise in addressing the health, safety, and welfare of a child while encouraging the emotional and developmental growth of the child, taking into consideration:

- The overall health and safety of the child;
- The child’s age, maturity, and development level;
- The best interest of the child based on the caregiver’s knowledge of the child;
- The appropriateness of a proposed activity and any potential risk factors;
- The behavioral history of the child and the child’s ability to safely participate in a proposed activity;
- The importance of encouraging the child’s social, emotional, and developmental growth; and
- The importance of providing the child with the most family-like experience possible. [Tex. Fam. Code §264.001\(5\)](#).

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A foster parent, other substitute caregiver, family relative or other designated caregiver, or licensed child placing agency caring for a child in the managing conservatorship of DFPS is not liable for harm caused to the child resulting from the child's participation in an age-appropriate normalcy activity approved by the caregiver if, in approving the child's participation in the activity, the caregiver exercised the standard of care of a reasonable and prudent parent. [Tex. Fam. Code § 264.114\(c\)](#).

### 3. Placement Decisions

[Tex. Fam. Code § 264.107](#) requires 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\(e\)](#). The guardian ad litem is entitled to be consulted and provide comments regarding the child's placement, and must be granted access to a child in the child's placement. [Tex. Fam. Code § 107.002\(b\)](#).

**Special Issue:** Courts are required at each permanency hearing held under Chapter 263 to review the placement of each child who is not placed with a relative caregiver or designated caregiver as defined by [Tex. Fam. Code § 264.751](#), and make a finding as to whether DFPS is able to place the child with a relative or designated caregiver and to state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#).

### 4. Child Age 14 or Older

The court must ensure that if the child is 14 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\(a-1\)\(4\)\(G\)](#).

### 5. Texas Juvenile Justice Department (TJJD)

A child committed to the TJJD may attend a Permanency Hearing in person, by telephone, or by videoconference. [Tex. Fam. Code § 263.302](#).

### 6. Summary of Medical Care

At each hearing under [Tex. Fam. Code Chapter 263](#), the court shall review a summary of medical care provided to the foster child since the last hearing. [Tex. Fam. Code § 266.007\(a\) and \(b\)](#). The summary must include information regarding:

- 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 treatment;

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- 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;
  - For a child receiving psychotropic medication:
    - any psychosocial therapies, behavior strategies, or other non-pharmacological interventions that have been provided to the child; and
    - 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](#);
  - 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;
  - 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
  - Other information required by DFPS rule or by the court. [Tex. Fam. Code § 266.007\(a\)](#).

## 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 and DFPS 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;

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- 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 for a child 16 and older:

- 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

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- This transition is in the best interest of the child. [Tex. Fam. Code § 263.307\(c\)](#).

## I. Medical Consent

### 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\(h\)](#).

[Tex. Fam. Code § 266.004\(h\)](#) addresses 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:
  - has received the training described by [Tex. Fam. Code § 266.004\(h-1\)](#);
  - understands the principles of informed consent for the administration of psychotropic medication; and
  - 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\(h-2\)](#).

DFPS may consent to health care services ordered or prescribed by a health care provider authorized to order or prescribe health care services regardless of whether services are provided under the medical assistance program under [Tex. Hum. Res. Code Chapter 32](#), if

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DFPS otherwise has the authority under [Tex. Fam. Code § 266.004](#) to consent to health care services. [Tex. Fam. Code § 266.004\(k\)](#).

### **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\(b\)\(3\)](#).

## **J. Children who are Missing or Victims of Sex Trafficking**

If a child in DFPS managing conservatorship is missing from the child's substitute care provider, including a child who is abducted or is a runaway, DFPS shall notify the following persons that the child is missing:

- The appropriate law enforcement agencies;
- The court with jurisdiction over the department's managing conservatorship of the child;
- The child's attorney ad litem;
- The child's guardian ad litem; and
- The child's parent unless the parent:
  - cannot be located or contacted;
  - has had the parent's parental rights terminated; or
  - has executed an affidavit of relinquishment of parental rights. [Tex. Fam. Code § 264.123\(a\)](#).

DFPS must provide the notice required by [Tex. Fam. Code § 264.123\(a\)](#) not later than 24 hours after the time DFPS learns that the child is missing or as soon as possible if a person entitled to notice under [Tex. Fam. Code § 264.123\(a\)](#) cannot be notified within 24 hours. [Tex. Fam. Code § 264.123\(b\)](#).

If a child has been reported as a missing child under [Tex. Fam. Code § 264.123\(a\)](#), DFPS must notify the persons described by [Tex. Fam. Code § 264.123\(a\)](#) when the child returns to the child's substitute care provider not later than 24 hours after the time the department learns that the child has returned or as soon as possible if a person entitled to notice cannot be notified within 24 hours. [Tex. Fam. Code § 264.123\(c\)](#).

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DFPS must make continuing efforts to determine the location of a missing child until the child returns to substitute care, including:

- Contacting the appropriate law enforcement agencies, the child's relatives, the child's former caregivers; and any state or local social service agency that may be providing services to the child on a monthly basis; and
- Conducting a supervisory-level review of the case on a quarterly basis if the child is 15 years of age or younger to determine whether sufficient efforts have been made to locate the child and whether other action is needed. [Tex. Fam. Code § 264.123\(d\)](#).

DFPS must document in the missing child's case record:

- The actions taken by the department to determine the location of the child; and persuade the child to return to substitute care;
- Any discussion during, and determination resulting from, the supervisory-level review under [Tex. Fam. Code § 264.123\(d\)\(2\)](#);
- Any discussion with law enforcement officials following the return of the child regarding the child's absence; and
- Any discussion with the child described by [Tex. Fam. Code § 264.123\(f\)](#). [Tex. Fam. Code § 264.123\(e\)](#).

After a missing child returns to the child's substitute care provider, DFPS must interview the child to determine the reasons why the child was missing, where the child stayed during the time the child was missing, and whether, while missing, the child was a victim of conduct that constitutes an offense under [Tex. Penal Code § 20A.02\(a\)\(7\)](#). DFPS must report to an appropriate law enforcement agency any disclosure made by a child that indicates that the child was the victim of a crime during the time the child was missing. DFPS shall make a report under this subsection not later than 24 hours after the time the disclosure is made. DFPS is not required to interview a missing child under this subsection if, at the time the child returns, DFPS knows that the child was abducted and another agency is investigating the abduction. [Tex. Fam. Code § 264.123\(f\)](#).

For more information, please see the Bench Book Chapter entitled [Human Trafficking](#).

**Special Issue:** Children in foster care and children who run away are at a higher risk of becoming victims of human trafficking. The first hours after a child or youth runs away can be critical to maintaining safety and preventing victimization. Consider holding hearings to determine what efforts have been made to locate missing children.

## K. Notice of Significant Events

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The notice sections of [Tex. Fam. Code § 264.018](#) are in addition to other notice requirements provided by law, including [Tex. Fam. Code § 264.107\(g\)](#), which deals with placement of children, and [Tex. Fam. Code § 264.123](#), governing the reporting duties of DFPS when a child in custody becomes missing. [Tex. Fam. Code § 264.018\(b\)](#).

DFPS must provide notice under [Tex. Fam. Code § 264.018](#) in a manner that would provide actual notice to a person entitled to the notice, including the use of electronic notice whenever possible. [Tex. Fam. Code § 264.018\(c\)](#).

Not later than 24 hours after an event described by [Tex. Fam. Code § 264.018\(d\)](#), DFPS shall make a reasonable effort to notify a parent of a child in the managing conservatorship of the DFPS of:

- A significant change in medical condition of the child [as defined by [Tex. Fam. Code § 264.018\(a\)\(4\)](#)];
- The enrollment or participation of the child in a drug research program under [Tex. Fam. Code § 266.0041](#); and
- An initial prescription of a psychotropic medication [as defined by [Tex. Fam. Code § 266.001](#)]. [Tex. Fam. Code § 264.018\(d\)](#).

Not later than 48 hours before DFPS changes the residential child-care facility of a child in the managing conservatorship of DFPS, DFPS shall provide notice of the change to:

- The child's parent;
- An attorney ad litem appointed for the child under [Tex. Fam. Code Chapter 107](#);
- A guardian ad litem appointed for the child under [Tex. Fam. Code Chapter 107](#);
- A volunteer advocate appointed for the child under [Tex. Fam. Code Chapter 107](#); and
- The licensed administrator of the child-placing agency responsible for placing the child or the licensed administrator's designee. [Tex. Fam. Code § 264.018\(e\)](#).

As soon as possible but not later than the 10<sup>th</sup> day after the date DFPS becomes aware of a significant event [as defined by [Tex. Fam. Code § 264.018\(a\)\(5\)](#)] affecting a child in the conservatorship of DFPS, DFPS shall provide notice of the significant event to:

- The child's parent;
- An attorney ad litem appointed for the child under [Tex. Fam. Code Chapter 107](#);
- A guardian ad litem appointed for the child under [Tex. Fam. Code Chapter 107](#);
- A volunteer advocate appointed for the child under [Tex. Fam. Code Chapter 107](#);

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- The licensed administrator of the child-placing agency responsible for placing the child or the licensed administrator's designee;
  - A foster parent, prospective adoptive parent, relative of the child providing care to the child, or director of the group home or general residential operation where the child is residing; and
  - Any other person determined by the court to have an interest in the child's welfare. [Tex. Fam. Code § 264.018\(f\)](#).

A significant event means:

- A placement change, including failure by DFPS to locate an appropriate placement for at least one night;
- A significant change in medical condition [as defined by [Tex. Fam. Code § 264.018\(a\)\(4\)](#)];
- An initial prescription of a psychotropic medication or a change in dosage of a psychotropic medication [as defined by [Tex. Fam. Code § 266.001](#)];
- A major change in school performance or a serious disciplinary event at school; or
- Any event determined to be significant under DFPS rule. [Tex. Fam. Code § 264.018\(a\)\(5\)](#).

For purposes of [Tex. Fam. Code § 264.018\(f\)](#), if a hearing for the child is conducted during the 10-day notice period described by [Tex. Fam. Code § 264.018\(f\)](#), DFPS shall provide notice of the significant event at the hearing. [Tex. Fam. Code § 264.018\(g\)](#).

DFPS is not required to provide notice under [Tex. Fam. Code § 264.018](#) to a parent of a child in the managing conservatorship of DFPS if:

- DFPS cannot locate the parent;
- A court has restricted the parent's access to the information;
- The child is in the permanent managing conservatorship of DFPS and the parent has not participated in the child's case for at least six months despite DFPS efforts to involve the parent;
- The parent's rights have been terminated; or
- DFPS has documented in the child's case file that it is not in the best interest of the child to involve the parent in case planning. [Tex. Fam. Code § 264.018\(h\)](#).

A person entitled to notice from DFPS under [Tex. Fam. Code § 264.018](#) shall provide current contact information pursuant to [Tex. Fam. Code § 264.018\(j\)](#).

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# FINAL HEARING

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## 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

***Please see the Checklist Section for the  
Final Order and Grounds for Termination Checklists.***

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. Case Must Be Dismissed Within One Year**
- B. Court May Extend Dismissal Date if Extraordinary Circumstances**
- C. Monitored Return**
- D. Final Hearing**

### **A. Case Must Be Dismissed Within One Year**

Unlike a Family Based Safety Services (FBSS) or “court ordered services” case, once DFPS has temporary managing conservatorship of a child, the case must be resolved within one year. Unless the court has commenced the trial on the merits or granted an extension under [Tex. Fam. Code § 263.401\(b\)](#) or [Tex. Fam. Code § 263.401\(b-1\)](#), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing DFPS as temporary managing conservator, the case will be automatically dismissed without a court order. [Tex. Fam. Code § 263.401\(a\)](#).

### **B. Court May Extend Dismissal Date if Extraordinary Circumstances**

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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 automatically 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\(b\)](#).

If, after commencement of the initial trial on the merits within the time required by [Tex. Fam. Code § 263.401\(a\)](#) or [Tex. Fam. Code § 263.401\(b\)](#), the court grants a motion for a new trial or mistrial, or the case is remanded to the court by an appellate court following an appeal of the court's final order, the court shall retain the suit on the court's docket and render an order in which the court schedules a new date on which the suit will be automatically dismissed, makes further temporary orders, and sets a new trial date pursuant to [Tex. Fam. Code § 263.401\(b-1\)](#).

If the court grants an extension under [Tex. Fam. Code § 263.401\(b\)](#) or [Tex. Fam. Code § 263.401\(b-1\)](#) but does not commence the trial on the merits before the dismissal date, the court's jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under [Tex. Fam. Code § 263.401\(b\)](#) or [Tex. Fam. Code § 263.401\(b-1\)](#), as applicable. [Tex. Fam. Code § 263.401\(c\)](#).

### **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 addition to the limitation imposed by [Tex. Fam. Code § 263.401\(c\)](#), the following cases address limits on extension of time. *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) (mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal).

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## 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's jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order. [Tex. Fam. Code § 263.401\(c\)](#).

## 3. Failure to Make a Timely Motion to Dismiss

Section 263.402(b) is repealed. There is no duty to file a motion to dismiss. The court automatically loses jurisdiction of the case without a court order unless the trial court has commenced the trial on the merits or granted an extension under [Tex. Fam. Code § 263.401\(b\)](#) or [\(b-1\)](#).

## 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. [Tex. Fam. Code § 102.003\(a\)\(9\)](#).

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. An attorney ad litem appointed to represent the child is entitled to request a hearing or a trial on the merits. [Tex. Fam. Code § 107.003\(a\)\(3\)\(B\)](#). *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).

## C. 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.

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## 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; or
- Transition the child, according to a schedule determined by DFPS or the court from substitute care to the parent while the parent completes the remaining requirements imposed under a service plan and specified in the temporary order that are necessary for the child's return;
- 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\(a\)](#).

Unless the court has already granted an extension under [Tex. Fam. Code § 263.401\(b\)](#), DFPS or the parent may request an additional six months to complete the remaining requirements in a service plan and specified in the temporary order that are mandatory for the child's return. [Tex. Fam. Code § 263.403\(a-1\)](#). If the court has already granted a six-month extension based on extraordinary circumstances under Section 263.401(b), the extension offered under Section 263.403(a-1) is not available.

If the court renders an order under [Tex. Fam. Code § 263.403](#), 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 before the dismissal of the suit or the commencement of the trial on the merits a child placed with a parent under Section 263.403 must be moved from that home or the court renders a temporary order terminating the transition order issued under [Tex. Fam. Code §263.403\(a\)\(2\)\(B\)](#), the court shall, at the time of the move or order, schedule a new date for dismissal of the suit. 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 moved or the order is rendered under [Tex. Fam. Code § 263.403\(c\)](#), whichever date is later. [Tex. Fam. Code § 263.403\(c\)](#).

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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).

## D. Final Hearing

At the final hearing, the court may either:

- Enter a final decree of conservatorship that returns the child to the parent or caregiver and dismisses DFPS;
- Enter a final decree of conservatorship that gives a relative permanent managing conservatorship, with or without termination of parental rights, and dismisses DFPS; or
- Enter a final decree of conservatorship that names DFPS as the permanent managing conservator, with or without termination of parental rights.

### 1. Parties

Confirm that all parties have been served pursuant to [Tex. Fam. Code § 102.009](#).

**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 Texas Legislature has also recognized the countervailing interest of the child's family. Newly enacted [Tex. Fam. Code § 162.0086](#) (Information Regarding Sibling Access) requires the Department to provide to each person seeking to adopt a child information regarding the right of a child's sibling to file suit for access to that child under [Tex. Fam. Code § 102.0045](#) and [Tex. Fam. Code § 153.551](#).

### 2. Required Notice of Trial

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than 45 days to the parties of the first setting for trial, or by agreement of the parties. [Tex. R. Civ. P. 245](#).

### 3. 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.

#### a. 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

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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).

Effective September 1, 2017, [Tex. Fam. Code § 161.001\(c\)](#) prohibits courts from making findings and ordering termination under [Tex. Fam. Code § 161.001\(b\)](#) based on evidence that the parent homeschooled the child, is economically disadvantaged, has been charged with a nonviolent misdemeanor (other than one listed in Title 5 or 6 of the Penal Code, or involves family violence as defined by [Tex. Fam. Code § 71.004](#)), administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed, or for declining immunization for a child for reasons of conscience, including religious belief. However, [Tex. Fam. Code § 161.001\(e\)](#) allows the Department to offer evidence of the actions described in [Tex. Fam. Code § 161.001\(c\)](#) as part of an action to terminate the parent-child relationship.

Also, new [Tex. Fam. Code § 161.206\(a-1\)](#) now restricts courts from terminating the parental rights of a parent unless the court finds by clear and convincing evidence grounds for termination for that parent.

#### **b. 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. [Tex. Fam. Code § 105.005](#).

#### **c. Indian Child Welfare Act (ICWA)**

If ICWA applies, the burden of proof and standards for a final order seeking permanent managing conservatorship or termination of parental rights are different than under the Texas Family Code. In summary, if ICWA applies the evidence required to terminate parental rights is beyond a reasonable doubt, supported by 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\(f\)](#).

### **4. Grounds for Termination of Parental Rights**

#### **a. Personal Service Required unless Prongs Met Under [Tex. Fam. Code § 161.208](#)**

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If a parent of the child has not been personally served in a suit in which DFPS seeks termination, the court that terminates a parent-child relationship may not appoint DFPS as permanent managing conservator of the child unless the court determines that:

- DFPS has made a diligent effort to locate a missing person who has not been personally served and a relative of that parent; and
- A relative located by DFPS has had a reasonable opportunity to request appointment as a managing conservator of the child or DFPS has not been able to locate the missing parent or a relative of the missing parent. [Tex. Fam. Code § 161.208](#).

#### **b. Involuntary Termination of Parent-Child Relationship**

Pursuant to [Tex. Fam. Code § 161.001\(a\)](#), “born addicted to alcohol or a controlled substance” means a child:

- Who is born to a mother who during the pregnancy used a controlled substance, as defined by [Tex. Health & Safety Code Chapter 481](#), other than a controlled substance legally obtained by prescription, or alcohol; and
- Who, after birth as a result of the mother’s use of the controlled substance or alcohol:
  - experiences observable withdrawal from the alcohol or controlled substance;
  - exhibits observable or harmful effects in the child’s physical appearance or functioning; or
  - exhibits the demonstrable presence of alcohol or a controlled substance in the child’s bodily fluids. [Tex. Fam. Code § 161.001\(a\)](#).

[Tex. Fam. Code § 161.001\(b\)](#) provides the list of grounds for involuntary termination of parental rights. The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

- The parent has:
  - voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
  - voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
  - voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

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- knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
  - engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
  - failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
  - abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
  - voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
  - contumaciously refused to submit to a reasonable and lawful order of a court under [Tex. Fam. Code Chapter 261, Subchapter D](#);
  - been the major cause of:
    - the failure of the child to be enrolled in school as required by the Education Code; or
    - the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
  - executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by [Tex. Fam. Code § 161.103](#);
  - been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under [Tex. Fam. Code Title 3](#) for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
    - [Tex. Penal Code § 19.02](#) (murder);

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- [Tex. Penal Code § 19.03](#) (capital murder);
  - [Tex. Penal Code § 19.04](#) (manslaughter);
  - [Tex. Penal Code § 21.11](#) (indecenty with a child);
  - [Tex. Penal Code § 22.01](#) (assault);
  - [Tex. Penal Code § 22.011](#) (sexual assault);
  - [Tex. Penal Code § 22.02](#) (aggravated assault);
  - [Tex. Penal Code § 22.021](#) (aggravated sexual assault);
  - [Tex. Penal Code § 22.04](#) (injury to a child, elderly individual, or disabled individual);
  - [Tex. Penal Code § 22.041](#) (abandoning or endangering child);
  - [Tex. Penal Code § 25.02](#) (prohibited sexual conduct);
  - [Tex. Penal Code § 43.25](#) (sexual performance by a child);
  - [Tex. Penal Code § 43.26](#) (possession or promotion of child pornography);
  - [Tex. Penal Code § 21.02](#) (continuous sexual abuse of young child or children);
  - [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or [\(8\)](#) (trafficking of persons); and
  - [Tex. Penal Code § 43.05\(a\)\(2\)](#) (compelling prostitution);
  - had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of [Tex. Fam. Code § 161.001\(b\)\(1\)\(D\)](#) or [\(E\)](#) or substantially equivalent provisions of the law of another state;
  - constructively abandoned the child who has been in the permanent or temporary managing conservatorship of DFPS for not less than six months, and:
    - DFPS has made reasonable efforts to return the child to the parent;
    - the parent has not regularly visited or maintained significant contact with the child; and
    - the parent has demonstrated an inability to provide the child with a safe environment;

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- failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of DFPS for not less than nine months as a result of the child's removal from the parent under [Tex. Fam. Code Chapter 262](#) for the abuse or neglect of the child;

**Special Issue:** Courts are prohibited from ordering termination on “O” grounds if a parent proves by a preponderance of the evidence that the parent was unable to comply with specific provisions of the court order, that the parent made a good faith effort to comply with the order, and that failure to comply is not attributable to any fault of the parent.

- used a controlled substance, as defined by [Tex. Health & Safety Code Chapter 481](#), in a manner that endangered the health or safety of the child, and:
  - failed to complete a court-ordered substance abuse treatment program; or
  - after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
- knowingly engaged in criminal conduct that has resulted in the parent's:
  - conviction of an offense; and
  - confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;
- been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;
- voluntarily delivered the child to a designated emergency infant care provider under [Tex. Fam. Code § 262.302](#) without expressing an intent to return for the child; or
- been convicted of:
  - the murder of the other parent of the child under [Tex. Penal Code § 19.02](#) or [Tex. Penal Code § 19.03](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 19.02](#) or [Tex. Penal Code § 19.03](#);
  - criminal attempt under [Tex. Penal Code § 15.01](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the

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elements of an offense under [Tex. Penal Code § 15.01](#), to commit the offense described by [Tex. Fam. Code § 161.001\(b\)\(1\)\(T\)\(i\)](#); or

- criminal solicitation under [Tex. Penal Code § 15.03](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 15.03](#), of the offense described by [Tex. Fam. Code § 161.001\(b\)\(1\)\(T\)\(i\)](#); and
- That termination is in the best interest of the child. [Tex. Fam. Code § 161.001\(b\)](#).

Although DFPS is allowed to offer evidence on the matters listed below, a court may not make a finding under [Tex. Fam. Code § 161.001\(b\)](#) and order termination of the parent-child relationship based on evidence that the parent:

- Homeschooled the child;
- Is economically disadvantaged;
- Has been charged with a nonviolent misdemeanor offense other than:
  - an offense under Title 5, Penal Code;
  - an offense under Title 6, Penal Code; or
  - an offense that involves family violence, as defined by [Tex. Fam. Code § 71.004](#) of this code;
- Provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or
- Declined immunization for the child for reasons of conscience, including a religious belief. [Tex. Fam. Code § 161.001\(c\)](#).

For more information regarding case law related to termination of parental rights, see the DFPS Texas Practice Guide for Child Protective Services Attorneys, Section 8: Termination at [https://www.dfps.state.tx.us/Child\\_Protection/Attorneys\\_Guide/documents/Section\\_8\\_Termination/Termination.pdf](https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_8_Termination/Termination.pdf), and the DFPS 2017 Termination Case Law Update at [https://www.dfps.state.tx.us/Child\\_Protection/Attorneys\\_Guide/documents/Section\\_8\\_Termination/August\\_2017\\_Case\\_Law\\_Addendum.pdf](https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_8_Termination/August_2017_Case_Law_Addendum.pdf).

### **c. Involuntary Termination: Inability to Care for Child**

The Texas Family Code authorizes the termination of the parental rights of a parent who is unable to meet the child's needs due to a mental disability. The court may order termination of the parent-child relationship in a suit filed by DFPS if the court finds that:

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- The parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child;
  - The illness or deficiency, in all reasonable probability, provided by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18<sup>th</sup> birthday of the child;
  - DFPS has been the temporary or sole managing conservator of the child of the parent for at least 6 months preceding the date of the hearing on termination held in accordance with [Tex. Fam. Code § 161.003\(c\)](#);
  - DFPS made reasonable efforts to return the child to the parent; and
  - Termination is in the best interest of the child. [Tex. Fam. Code § 161.003\(a\)](#).

Immediately after filing a suit under [Tex. Fam. Code § 161.003](#), the court shall appoint an attorney ad litem to represent the interests of the parent against whom the suit is brought. [Tex. Fam. Code § 161.003\(b\)](#). An attorney appointed under [Tex. Fam. Code § 161.003\(b\)](#) shall represent the parent for the duration of the suit unless the parent, with the permission of the court, retains another attorney. [Tex. Fam. Code § 161.003\(d\)](#).

A hearing on the termination may not be held earlier than 180 days after the date on which the suit is filed. [Tex. Fam. Code § 161.003\(c\)](#).

#### **d. Termination of the Rights of an Alleged Biological Father**

Except as otherwise provided by [Tex. Fam. Code § 161.002](#), the procedural and substantive standards for termination of parental rights apply to the termination of the rights of an alleged father. [Tex. Fam. Code § 161.002\(a\)](#).

The rights of an alleged biological father may be terminated if:

- After being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under [Tex. Fam. Code Chapter 160](#);
- The child is over one year of age at the time the petition for termination of the parent-child relationship or for adoption is filed, he has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#), and after the exercise of due diligence by the petitioner:
  - his identity and location are unknown; or
  - his identity is known but he cannot be located;
- The child is under one year of age at the time the petition for termination of the parent-child relationship or for adoption is filed and he has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#); or

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- He has registered with the paternity registry under [Tex. Fam. Code Chapter 160](#), but the petitioner’s attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful, despite the due diligence of the petitioner. [Tex. Fam. Code § 161.002\(b\)](#).

The termination of the rights of an alleged father under [Tex. Fam. Code § 161.002\(b\)\(2\)](#) or [Tex. Fam. Code § 161.002\(b\)\(3\)](#) does not require personal service of citation or citation by publication on the alleged father, and there is no requirement to identify or locate an alleged father who has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#). [Tex. Fam. Code § 161.002\(c-1\)](#).

The termination of rights of an alleged father under [Tex. Fam. Code § 161.002\(b\)\(4\)](#) does not require service of citation by publication on the alleged father. [Tex. Fam. Code § 161.002\(d\)](#).

The court shall not render an order terminating parental rights under [Tex. Fam. Code § 161.002\(b\)\(2\)](#) or [Tex. Fam. Code § 161.002\(b\)\(3\)](#) unless the court receives evidence of a certificate of the results of a search of the paternity registry under [Tex. Fam. Code Chapter 160](#) from the vital statistics unit indicating that no man has registered the intent to claim paternity. [Tex. Fam. Code § 161.002\(e\)](#).

The court shall not render an ordering terminating parental rights under [Tex. Fam. Code § 161.002\(b\)\(4\)](#) unless the court, after reviewing the petitioner’s sworn affidavit describing the petitioner’s effort to obtain personal service of citation on the alleged father and considering any evidence submitted by the attorney ad litem for the alleged father, has found that the petitioner exercised due diligence in attempting to obtain service on the alleged father. The order shall contain specific findings regarding the exercise of due diligence of the petitioner. [Tex. Fam. Code § 161.002\(f\)](#).

## 5. 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;

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- 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).

## 6. Presumptions Involved in Conservatorship

### a. 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\(b\)](#).

### b. 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\(a\)](#).

Effective September 1, 2017, [Tex. Fam. Code § 153.004\(e\)](#) states that it is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or

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present neglect, abuse or family violence by that parent, or any person who resides in that parent's household or who is permitted by that parent to have unsupervised access to the child during that parent's periods of possession of or access to the child. [Tex. Fam. Code § 153.004\(e\)](#). The statute further provides that courts may consider evidence of a history or pattern of past or present child neglect, abuse or family violence by a parent or other person, as applicable. [Tex. Fam. Code § 153.004\(f\)](#).

### **c. 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:

- 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
- 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](#), or [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\(d-1\)](#), but see new [Tex. Fam. Code § 153.004\(e\)](#) and (f) regarding visitation and access to a child by any person who will have unsupervised access to a child who also has a history or pattern of past or present child neglect, abuse or family violence.

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\(a\)](#).

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**Special Issue:** Although not law, judges should enter final orders regarding conservatorship of the child, child support, and access to the child. If DFPS requests dismissal of its lawsuit after reunification with a parent, the court may want to consider whether:

- The dismissal or nonsuit is in the best interest of each child affected by the suit; and
- 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.

## 7. 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 has continuously expressed a strong desire against being adopted; and
- The needs and desires of the child. [Tex. Fam. Code § 263.404\(b\)](#).

**Special Issue:** As a best practice, courts should continue the appointment of the child's attorney ad litem (AAL) and guardian ad litem (GAL) until the child reaches permanency, meaning the child is adopted or leaves care permanently by transfer of conservatorship to a suitable adult prior to the age of 18.

## 8. 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\(a-1\)](#).

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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\(c\)](#).

## **9. Requirements for Appointment of Nonparent as Managing Conservator**

[Tex. Fam. Code § 263.408](#) imposes additional duties on DFPS when a nonparent is appointed as managing conservator of a child in the legal custody of DFPS.

In a suit in which the court appoints a nonparent as managing conservator of a child, DFPS must provide the nonparent with an explanation of the difference between appointment as a managing conservator of a child and adoption of a child, including specific statements informing the nonparent that:

- The nonparent's appointment conveys only the rights specified by the court order or applicable laws instead of the complete rights of a parent conveyed by adoption;
- A parent may be entitled to request visitation with the child or petition the court to appoint the parent as the child's managing conservator, notwithstanding the nonparent's appointment as managing conservator; and
- The nonparent's appointment as the child's managing conservator will not result in the eligibility of the nonparent and child for post-adoption benefits. [Tex. Fam. Code § 263.408\(a\)\(1\)](#).

In addition to the rights and duties provided under [Tex. Fam. Code § 153.371](#), the court order appointing the nonparent as managing conservator must include provisions that address the authority of the nonparent to:

- Authorize immunization of the child or any other medical treatment that requires parental consent;

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- Obtain and maintain health insurance coverage for the child and automobile insurance for the child, if appropriate;
  - Enroll the child in a day-care program or school, including kindergarten;
  - Authorize the child to participate in school-related or extracurricular or social activities, including athletic activities;
  - Authorize the child to obtain a learner's permit, driver's license, or state-issued identification card;
  - Authorize employment of the child;
  - Apply for and receive public benefits for or on behalf of the child; and
  - Obtain legal services for the child and execute contracts or other legal documents for the child. [Tex. Fam. Code § 263.408\(a\)\(2\)](#).

The court must require evidence that the nonparent was informed of the rights and duties of a nonparent appointed as managing conservator of a child before the court renders an order appointing the nonparent as managing conservator of a child. [Tex. Fam. Code § 263.408\(b\)](#).

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# PERMANENCY HEARING AFTER FINAL ORDER

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## Legal Overview of Permanency Hearing After Final Order

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. Permanency Hearings After Final Order

***Please see the Checklist Section for the  
Permanency Hearing After Final Order Checklist.***

When a child is in the permanent managing conservatorship of DFPS, the court must periodically review the case to ensure that the child's needs are being met and that efforts have not ceased to find the child a permanent placement. As long as 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. This includes changing the terminology regarding this hearing to emphasize the need to seek permanency for a youth until the youth leaves care, even if DFPS has permanent managing conservatorship.

- A. When Permanency Hearing After Final Order is Conducted**
- B. Notice of the Permanency Hearing After Final Order**
- C. The Child Shall Attend the Permanency Hearing After Final Order**
- D. Permanency Progress Report After Final Order**
- E. Conducting a Permanency Hearing After Final Order**
- F. Court Orders Related to Permanent Managing Conservatorship**

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## G. Foster Youth Bill of Rights and Ombudsman's Office

### H. Transitional Services

### I. Extended Jurisdiction for Youth Aging Out of Foster Care

## A. When Permanency Hearing After Final Order is 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 Permanency Hearing After Final Order must be held within six months. If the parental rights are terminated, the first Permanency Hearing After Final Order must be held within 90 days after the court renders the final order. [Tex. Fam. Code § 263.501\(a\) and \(b\)](#). Thereafter, a Permanency Hearing After Final Order must be held every six months until the date the child leaves the permanent managing conservatorship of DFPS. [Tex. Fam. Code § 263.501\(a\)](#).

## B. Notice of the Permanency Hearing After Final Order

Notice of a hearing under [Tex. Fam. Code Chapter 263](#) shall be given to all persons entitled to notice of the hearing. [Tex. Fam. Code § 263.0021\(a\)](#). Notice of a hearing under Chapter 263 must now state that the individual receiving notice pursuant to [Tex. Fam. Code § 263.0021\(b\)](#) may, but is not required to, attend the hearing and may request to be heard at the hearing. [Tex. Fam. Code § 263.0021\(e\)](#). Courts must now determine whether the child's caregiver is present at the hearing and allow the caregiver to testify if they caregiver wishes to provide information about the child. [Tex. Fam. Code § 263.0021\(f\)](#).

The following persons are entitled to at least 10 days' notice and are entitled to present evidence and be heard at a hearing under [Tex. Fam. Code Chapter 263](#):

- DFPS;
- The foster parent, pre-adoptive parent, relative providing care, or the director or director's designee of the group home or general residential operation 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, if the appointment was not dismissed in the final order;
- A guardian ad litem appointed for the child, if the appointment was not dismissed in the final order;

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- A volunteer advocate appointed for the child, if the appointment was 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; and
  - Any other person or agency named by the court to have an interest. [Tex. Fam. Code § 263.0021\(b\)](#).

Notice of a hearing under [Tex. Fam. Code Chapter 263](#) may be given:

- As provided by [Tex. R. Civ. P. 21a](#);
- In a temporary order following a full Adversary Hearing;
- In an order following a hearing under [Tex. Fam. Code Chapter 263](#);
- In open court; or
- In any manner that would provide actual notice to a person entitled to notice. [Tex. Fam. Code § 263.0021\(c\)](#).

The licensed administrator of the child-placing agency responsible for placing the child or the licensed administrator's designee is entitled to at least 10 days' notice of a Permanency Hearing After Final Order. [Tex. Fam. Code § 263.0021\(d\)](#).

## **C. The Child Shall Attend the Permanency Hearing After Final Order**

The child shall attend each Permanency Hearing After Final Order in accordance with [Tex. Fam. Code § 263.302](#). [Tex. Fam. Code § 263.501\(f\)](#).

## **D. Permanency Progress Report After Final Order**

### **1. Filing the Permanency Progress Report After Final Order**

Not later than the 10th day before the date set for a Permanency Hearing After Final Order, DFPS shall file a permanency progress report with the court. [Tex. Fam. Code § 263.502\(a\)](#). For good cause shown, the court may order a different time for filing the report or that a report is not required for a specific hearing. [Tex. Fam. Code § 263.502\(a-2\)](#).

### **2. Copies of Report Provided**

DFPS shall provide a copy to each person entitled to notice of the hearing under [Tex. Fam. Code § 263.0021](#). [Tex. Fam. Code § 263.502\(a\)](#).

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### 3. Permanency Progress Report Contents

The permanency progress report must contain:

- Information necessary for the court to conduct the Permanency Hearing and make its findings and determinations under [Tex. Fam. Code § 263.5031](#);
- Information on significant events, as defined by [Tex. Fam. Code § 264.018](#); and
- Any additional information DFPS determines is appropriate or that is requested by the court and relevant to the court's findings and determinations under [Tex. Fam. Code § 263.5031](#). [Tex. Fam. Code § 263.502\(a-1\)](#).

## E. Conducting a Permanency Hearing After Final Order

At each Permanency Hearing After Final Order, the court shall:

- Identify all persons and parties present at the hearing;
- Review the efforts of DFPS or other agency in notifying persons entitled to notice under [Tex. Fam. Code § 263.0021](#);
- Make a finding as to whether DFPS is able to place the child with a relative or other designated caregiver and state the evidence that supports its finding either way. [Tex. Fam. Code § 262.0022](#), [Tex. Fam. Code § 263.002](#), and [Tex. Fam. Code § 263.5031\(3\)\(B\)](#); and
- Review the permanency progress report to determine:
  - the safety and well-being of the child and whether the child's needs, including any medical or special needs, are being adequately addressed;
  - whether DFPS placed the child with a relative or other designated caregiver and the continuing necessity and appropriateness of the placement of the child, including with respect to a child who has been placed outside of this state, whether the placement continues to be in the best interest of the child;
  - if the child is placed in institutional care, whether efforts have been made to ensure that the child is placed in the least restrictive environment consistent with the child's best interest and special needs;

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Special Issue: “Least Restrictive Setting” means a placement that, in comparison to all other available placements, is the most family-like setting. For children older than six, placing the child in a cottage home, even though part of a general residential operation and considered congregate care under federal law, is permissible and considered under Texas law to be a “least restrictive setting.” For children younger than six, the only acceptable “least restrictive setting” is a foster home. A cottage home may be considered the least restrictive setting for a child younger than six only if DFPS determines it is in the best interest of the child to be placed in the cottage home. [Tex. Fam. Code § 263.001\(3-a\), \(c\), and \(d\)](#).

- the appropriateness of the primary and alternative permanency goals for the child, whether DFPS has made reasonable efforts to finalize the permanency plan, including the concurrent permanency goals, in effect for the child, and whether:
  - DFPS has exercised due diligence in attempting to place the child for adoption if parental rights to the child have been terminated and the child is eligible for adoption; or
  - another permanent placement, including appointing a relative as permanent managing conservator or returning the child to a parent, is appropriate for the child;
- for a child whose permanency goal is another planned permanent living arrangement:
  - the desired permanency outcome for the child, by asking the child;
  - whether, as of the date of the hearing, another planned permanent living arrangement is the best permanency plan for the child, and, if so, provide compelling reasons why it continues to not be in the best interest of the child to:
    - return home;
    - be placed for adoption;
    - be placed with a legal guardian; or
    - be placed with a fit and willing relative;
  - whether DFPS has:
    - conducted an independent living skills assessment under [Tex. Fam. Code § 264.121\(a-3\)](#);
    - addressed the goals identified in the child’s permanency plan, including the child’s housing plan, and the results of the ILS assessment;

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- provided a youth 16 years and older with the documents and information listed in [Tex. Fam. Code § 264.121\(e\)](#); and
  - provided a youth who is 18 years or has had the disabilities of minority removed, the documents and information listed in [Tex. Fam. Code § 264.121\(e-1\)](#). [Tex. Fam. Code § 263.306\(a-1\)\(5\)](#);
  - if the child is 14 years of age or older, whether services that are needed to assist the child in transitioning from substitute care to independent living are available in the child's community;
  - whether the child is receiving appropriate medical care and has been provided the opportunity, in a developmentally appropriate manner, to express the child's opinion on any medical care provided;
  - for a child receiving psychotropic medication, whether the child:
    - has been provided appropriate non-pharmacological interventions, therapies, or strategies to meet the child's needs; or
    - has been seen by the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days;
  - whether an education decision-maker for the child has been identified, the child's education needs and goals have been identified and addressed, and there are major changes in the child's school performance or there have been serious disciplinary events;
  - for a child for whom DFPS has been named managing conservator in a final order that does not include termination of parental rights, whether to order DFPS to provide services to a parent for not more than six months after the date of the Permanency 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; and
  - whether DFPS has identified a family or other caring adult who made a permanent commitment to the child. [Tex. Fam. Code § 263.5031](#).

Additionally, [Tex. Fam. Code § 263.503\(c\)](#) requires that, in addition to the requirements of [Tex. Fam. Code § 263.5031](#), at each Permanency Hearing After a Final Order the court shall review DFPS efforts to ensure that the child has regular, ongoing opportunities to engage in age-

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appropriate normalcy activities as defined by [Tex. Fam. Code § 264.001](#); this may include activities not listed in the child’s service plan. [Tex. Fam. Code § 263.503](#).

## **F. Court Orders Related to Permanent Managing Conservatorship**

### **1. Court Ordered Services for Parents**

When a parent is still involved or over time becomes re-involved in the case, a court may order DFPS to provide services to a parent for not more than six months after the date of the Permanency 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 § 263.5031\(3\)\(J\)](#).

### **2. Termination of Parental Rights After Denial of Prior Petition to Terminate**

The court may terminate the parent-child relationship after rendition of an order that previously denied termination of the parent-child relationship if:

- The petition under [Tex. Fam. Code § 161.004](#) is filed after the date the order denying termination was rendered;
- The circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered;
- The parent committed an act listed under [Tex. Fam. Code § 161.001](#) before the date the order denying termination was rendered; and
- Termination is in the best interest of the child. [Tex. Fam. Code § 161.004\(a\)](#).

At a hearing under [Tex. Fam. Code § 161.004](#), the court may consider evidence presented at a previous hearing in a suit for termination of the parent-child relationship of the parent with respect to the same child. [Tex. Fam. Code § 161.004\(b\)](#).

### **3. Child Committed to Texas Juvenile Justice Department (TJJD)**

A court is required to conduct a Permanency Hearing After Final Order for a child while the child is committed to or released under the supervision of TJJD, unless the child is adopted

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or permanent managing conservatorship of the child is awarded to an individual other than DFPS. [Tex. Fam. Code § 263.501\(g\)](#).

## **G. Foster Youth Bill of Rights and Ombudsman’s Office**

Each child in foster care shall be informed of the child’s rights provided by state or federal law or policy that relate to:

- Abuse, neglect, exploitation, discrimination, and harassment;
- Food, clothing, shelter, and education;
- Medical, dental, vision, and mental health services, including the right of the child to consent to treatment;
- Emergency behavioral intervention, including what methods are permitted, the conditions under which it may be used, and the precautions that must be taken when administering it;
- Placement with the child’s siblings and contact with members of the child’s family;
- Privacy and searches, including the use of storage space, mail, and the telephone;
- Participation in school-related extracurricular or community activities;
- Interaction with persons outside the foster care system, including teachers, church members, mentors, and friends;
- Contact and communication with caseworkers, attorneys ad litem, guardians ad litem, and court-appointed special advocates;
- Religious services and activities;
- Confidentiality of the child’s records;
- Job skills, personal finances, and preparation for adulthood;
- Participation in a court hearing that involves the child;
- Participation in the development of service and treatment plans;
- If the child has a disability, the advocacy and protection of the rights of a person with that disability; and
- Any other matter affecting the child’s ability to receive care and treatment in the least restrictive environment that is most like a family setting. [Tex. Fam. Code § 263.008\(b\)](#).

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DFPS shall provide a written copy of the foster children’s bill of rights to each child placed in foster care in the child’s primary language, if possible, and shall inform the child of the rights described by the foster children’s bill of rights:

- Orally in the child’s primary language, if possible, and in simple, non-technical terms; or
- For a child who has a disability, including an impairment of vision or hearing, through any means that can reasonably be expected to result in successful communication with the child. [Tex. Fam. Code § 263.008\(c\)](#).

The HHSC Commissioner must appoint an ombudsman for children and youth in foster care. [Tex. Gov’t Code § 531.992\(a\)](#). The ombudsman serves as a neutral party in assisting children and youth in the conservatorship of DFPS with complaints regarding issues with the authority of DFPS or another health and human services agency. [Tex. Gov’t Code § 531.993](#).

Starting in May 2016, youth may contact FCO through the following methods:

- Toll-free phone: 1-844-286-0769 (8am to 5pm, Monday through Friday)
- Toll-free fax: 1-888-780-8099
- Mail: Texas Health and Human Services Commission  
Foster Care Ombudsman, MC H-700  
P O Box 13247  
Austin, Texas 78711-3247
- Online: <https://hhs.texas.gov/about-hhs/your-rights/office-ombudsman>

**Special Issue:** Judges, Parents, Attorneys, CASA and other individuals with inquiries and complaints about a youth's case may continue to contact the DFPS [Office of Consumer Relations](#) at 1-800-720-7777 or [OCR@dfps.state.tx.us](mailto:OCR@dfps.state.tx.us).

## H. Transitional Services

DFPS shall address unique challenges facing youth in conservatorship transitioning to independence pursuant to [Tex. Fam. Code § 264.121](#), including efforts to improve transition planning and providing experiential life skills-training. [Tex. Fam. Code § 264.121\(a\)\(1\)](#) and [Tex. Fam. Code § 264.121\(a-1\)](#) and (a-2).

DFPS must conduct an independent living skills (ILS) assessment for all youth 16 and older in DFPS Temporary or Permanent Managing Conservatorship and must conduct an ILS assessment for all youth 14 and older in DFPS Permanent Managing Conservatorship. [Tex. Fam. Code § 264.121\(a-3\)](#) and (a-4). DFPS must annually update the youth’s ILS assessment to determine the skills acquired by the youth during the preceding year. DFPS also must coordinate with child welfare stakeholders to develop a plan to standardize the Preparation for Adult Living (PAL) curriculum used around the state by providers. [Tex. Fam. Code § 264.121\(a-5\)](#) and (a-6).

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[Tex. Fam. Code § 264.121\(i\)](#) relates to transition planning. DFPS shall ensure that the transition plan for each youth 16 years of age or older includes provisions to assist the youth in managing the youth's housing needs after the youth leaves foster care, including provisions that:

- Identify the cost of housing in relation to the youth's sources of income, including any benefits or rental assistance available to the youth;
- If the youth's housing goals include residing with family or friends, state that DFPS has addressed the following with the youth:
  - the length of time the youth expects to stay in the housing arrangement;
  - expectations for the youth regarding paying rent and meeting other household obligations;
  - the youth's psychological and emotional needs, as applicable; and
  - any potential conflicts with other household members, or any difficulties connected to the type of housing the youth is seeking, that may arise based on the youth's psychological and emotional needs;
- Inform the youth about emergency shelters and housing resources, including supervised independent living and housing at colleges and universities, such as dormitories;
- Require DFPS to review a common rental application with the youth and ensure that the youth possesses all of the documentation required to obtain rental housing; and
- Identify any individuals who are able to serve as cosigners or references on the youth's application for housing. [Tex. Fam. Code § 264.121\(i\)](#).

### **Provision of Copies of Certain Records**

DFPS shall ensure that each youth acquires a copy and a certified copy of the youth's birth certificate, a social security card or replacement social security card, as appropriate, and a personal identification certificate under [Tex. Transp. Code Chapter 521](#), on or before the date the on which the youth turns 16. [Tex. Fam. Code § 264.121\(e\)](#). Attorneys and Guardians Ad Litem are now responsible for ascertaining whether youth in care have received a copy of the documents referenced in [Tex. Fam. Code §§ 264.121\(e\) and 264.121\(e-1\)](#). Courts are also required to determine whether the Department has provided the youth with documents required by Section 264.121(e), and for youth 18 years or older, or who has had the disabilities of minority removed, whether the Department has provided the youth with the documents and information listed in Section 264.121(e-1).

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When providing a youth with a document required by [Tex. Fam. Code § 264.121\(e-1\)](#), DFPS shall provide the youth with a copy and a certified copy of the document or with the original document, as applicable. [Tex. Fam. Code § 264.121\(e-2\)](#).

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

- The youth’s birth certificate;
- The youth’s immunization records;
- The information contained in the youth’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 § 264.121\(e-1\)](#).

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](#).<sup>6</sup>

## **I. Extended Jurisdiction for Youth Aging Out of Foster Care**

### **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 18<sup>th</sup> 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, Residential Treatment Center (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:

- The date of the young adult’s 18<sup>th</sup> birthday; or
- The date the young adult exits extended foster care. [Tex. Fam. Code § 263.6015\(b\)](#).

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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](#).

While a youth is in extended foster care, the Family Code requires the court to conduct review 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\(b\)](#).

The extended jurisdiction statute states 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:

- The last day of the month in which trial independence ends; or
- 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\(g\)](#).

For more information, see an Extended Court Jurisdiction Flowchart developed by DFPS.<sup>7</sup>

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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:

- The young adult's 21st birthday; or
- 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\(b\)](#).

For more information, see a Brief Overview of Transitional Living Services developed by DFPS.<sup>8</sup>

## 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:

- DADS 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](#) or [Tex. Fam. Code § 263.6021](#). [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

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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](#).

For more information, see the [Extended Jurisdiction Matrix](#) created by DFPS.<sup>9</sup>

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# APPEALS

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## 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\(a\)](#). 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**
- I. Case Law Update**

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## **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\(3\)](#), 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\(3\)](#).

## **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).

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## 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\(g\)](#).

## I. Case Law Update

Each year, DFPS produces a case law update of select child protection cases. The 2018 Termination Case Law Update was prepared by the DFPS Appellate Unit: Michael Becker, Leslie Capace, Brenda Kinsler, Jerry Reyes, Rebecca Safavi, Eric Tai, and Mark Zuniga.

The 2018 update includes the following cases:

### JURISDICTION

*In re L.S., S.V., and C.W.*, [No. 06-17-00113-CV](#), (Tex. App.—Texarkana Mar. 9, 2018, no pet.).

### JURY ISSUES

Striking Jury Demand: *In re L.G.T.*, [No. 04-17-00526-CV](#) (Tex. App.—San Antonio Jan. 10, 2018, no pet.) (mem. op.).

Allocation of Jury Strikes: *S.B. v. Texas Dep't of Family and Protective Servs.*, [No. 03-17-00431-CV](#) (Tex. App.—Austin Dec. 22, 2017, pet. denied) (mem. op.).

Batson Challenge: *D. G. v. Texas Dep't of Family and Protective Services*, [No. 03-17-00366-CV](#) (Tex. App.—Austin Oct. 26, 2017, no pet.) (mem. op.).

### CONDUCT OF PROCEEDINGS

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*In re K.R., A.R., and G.L.C.*, [No. 13-17-00281-CV](#) (Tex. App.—Corpus Christi Oct. 26, 2017, pet. denied) (mem. op.).

## JUDICIAL BIAS

*In re L.S.*, [No. 02-17-00132-CV](#) (Tex. App.—Fort Worth Sept. 21, 2017, no pet.) (mem. op.).

## PRE-TRIAL MATTERS

Immunizations Over Objection of Parents: *In re Womack*, [No. 10-17-00336-CV](#), (Tex. App. — Waco 2017, orig. proceeding [mand. pending]).

Right to Appointed Counsel: *N.T. v. Texas Dep't of Family and Protective Services*, [No. 03-17-00573-CV](#) (Tex. App.—Austin Nov. 29, 2017, no pet.) (mem. op.).

## TERMINATION GROUNDS

### [TFC § 161.001\(b\)\(1\)\(C\)](#)

*R.M. v. D.R. and B.R.*, [No. 03-17-00605-CV](#) (Tex. App.—Austin Mar. 6, 2018, no pet.) (mem. op.) (father's parental rights terminated in private case which alleged father voluntarily left child alone without providing adequate support and remained away for at least six months. COA stated that the six-month minimum is a period of six months consecutively).

### [TFC § 161.001\(b\)\(1\)\(D\)](#)

*In re K.A.R.*, [No. 04-17-00723-CV](#) (Tex. App.—San Antonio Apr. 11, 2018, no pet.) (mem. op.) (Parent knowingly placed or allowed the child in conditions or surroundings which endangered the child's physical or emotional well-being). Also, *In re A.M.*, [No. 07-17-00094-CV](#) (Tex. App.—Amarillo Sept. 21, 2017, pet. denied) (mem. op.); *In re A.M.*, [No. 07-17-00094-CV](#) (Tex. App.—Amarillo Sept. 21, 2017, pet. denied) (mem. op.) (mother's ingesting drugs that affected her ability to stay awake and care for child had potential for endangering the child).

### [TFC § 161.001\(b\)\(1\)\(E\)](#)

*In re W.R.C.*, [No. 10-17-00250-CV](#) (Tex. App.—Waco Dec. 20, 2017, no pet.) (mem. op.) (threats, comments and actions show course of conduct that endangers child's emotional well-being). Also, *In re A.R.M.*, [No. 05-17-00539-CV](#) (Tex. App.—Dallas Mar. 30, 2018, pet. pending) (mem. op.) (evidence suggesting that Mother coached Daughter to make false sex abuse outcries, otherwise attempted to undermine relationship between Father and Daughter, and violated both court orders and supervised visitation rules supports the endangerment finding); *In re Z.O.*, [No. 02-17-00166-CV](#) (Tex. App.—Fort Worth Sept. 7, 2017, no pet.) (mem. op.) (emotional abuse alone supports endangerment finding); *In re B.F., P.M.F. a/k/a P.F.*, [No. 14-17-00421-CV](#) (Tex. App.—Houston [14th Dist.] Nov. 16, 2017, no pet.) (mem. op.)

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(presence of drugs in child's system harmed child); *In re G.H.*, [No. 02-17-00193-CV](#) (Tex. App.—Fort Worth Oct. 19, 2017, no pet.) (mem. op.) (lack of income not excuse for neglect); *In re K.K.D.B.*, [No. 14-17-00302-CV](#) (Tex. App.—Houston [14th Dist.] Oct. 5, 2017, pet. denied) (mem. op.) (court not required to ignore old criminal history).

### [TFC § 161.001\(b\)\(1\)\(N\)](#)

*In re R.I.D. and L.J.M.*, [543 S.W.3d 422](#) (Tex. App.—Houston [14th Dist.] 2018, no pet.) (inability provide safe environment); Also, *In re J.G.S.*, [No. 08-17-00192-CV](#) (Tex. App.—El Paso Feb. 14, 2018, no pet.) (Reasonable Efforts shown in absence of service plan); *In re F.E.N.*, [542 S.W.3d 752](#) (Tex. App.—Houston [14th Dist.] 2018, no pet.) (reasonable efforts not shown in absence of service plan).

## **DIRECT OR COLLATERAL ATTACK ON TERMINATION ORDER**

[TFC § 161.211\(c\)](#) *In re K.S.L.*, [538 S.W.3d 107](#) (Tex. 2017) (Regardless of what a trial court must find under TFC § 161.001, TFC § 161.211(c) limits appellate review to fraud, duress, and coercion); Also, *In re R.P.R., Jr.*, [No. 14-17-00760-CV](#) (Tex. App.—Houston [14th Dist.] March 1, 2018, pet. filed) (mem. op.) (complaint that the affidavit of relinquishment does not comply with TFC § 161.013 barred by TFC § 161.211(c)); *In re D.S. and In the Matter of the Marriage of G.S. and A.G.*, [Nos. 05-17-01066-CV and 05-17-01068-CV](#), (Tex. App.—Dallas Apr. 18, 2018, no pet. h.) (collateral attack on the termination order based on a lack of subject matter jurisdiction is not barred by TFC § 161.211(c)).

## **BEST INTEREST – HOLLEY FACTORS**

### **A. Desires of the Child**

*Behavioral Issues* - *In re J.C.C., Jr., L.H.M.C., and J.Z.M.*, [No. 04-17-00120-CV](#) (Tex. App.—San Antonio Aug. 30, 2017, no pet.) (mem. op.); *see also In re A.F. and A.F.*, [No. 14-17-00394-CV](#) (Tex. App.—Houston [14th Dist.] Oct. 19, 2017, no pet.) (mem. op.) (trial court can properly consider the continued damaging consequences the children suffered from time spent with their parents under the desires factor).

*Negative Impact of Failing to Visit* - *In re E.J.M.*, [No. 04-17-00569-CV](#) (Tex. App.—San Antonio Jan. 3, 2018, no pet.) (mem. op.).

### **B. Emotional and Physical Needs and Emotional and Physical Danger**

*Misdemeanor Criminal Convictions* - *In re C.M., Jr.*, [No. 14-17-00507-CV](#) (Tex. App.—Houston [14th Dist.] Nov. 30, 2017, pet. denied) (mem. op.)

*Failure to Protect from Drug Use Due to Incarceration* - *In re L.J.T.*, [No. 04-17-00567-CV](#) (Tex. App.—San Antonio Feb. 28, 2018, no pet.) (mem. op.).

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*Evidence of Termination Improving Children’s Situation Not Sufficient - In re J.E.M.M. and L.A.M.M.*, [532 S.W.3d 874](#) (Tex. App.—Houston [14th Dist.] 2017, no pet.).

*Allowing Lapse of Medicaid Supports Inability to Provide for Emotional and Physical Needs - C.S. v. Texas Department of Family and Protective Services*, [No. 03-17-00229-CV](#) (Tex. App.—Austin Aug. 9, 2017, no pet.) (mem. op.)

### **C. Parent Abilities**

*Children Running Away at Parent’s Request - In re H.L.H.*, [No. 10-16-00254-CV](#) (Tex. App.—Waco Mar. 14, 2018, no pet.) (mem. op.).

*Parent Unable to Learn from Classes - In re S.J.R.-Z, J.C.Z., A.R.Z., I.L.L., K.K.H., and J.G.H. III*, [537 S.W.3d 677](#) (Tex. App.—San Antonio 2017, no pet.).

### **D. Stability of Proposed Placement**

*Providing Name of Possible Kinship Placement Not Sufficient - In re D.D.P., C.L.C., E.L.C., and J.M.J.*, [No. 04-17-00444-CV](#) (Tex. App.—San Antonio April 4, 2018, no pet.) (mem. op.).

## **CONSERVATORSHIP**

### **A. TFC § 153.131 - Conservatorship**

*In re R.F., Jr.*, [No. 04-17-00582-CV](#) (Tex. App.—San Antonio Mar. 14, 2018, no pet.) (mem. op.) (trial court did not abuse discretion in refusing to appoint father as managing conservator instead of possessory because father knew of mother’s behavior and activities which significantly impaired the child’s physical health or emotional development).

### **B. Specificity in Visitation Order**

*In re A.N. and I.R.N.*, [No. 10-16-00394-CV](#) (Tex. App.—Waco Sept. 13, 2017, no pet.) (mem. op.).

### **C. Jury Question**

*In re J.W.G.*, [No. 14-17-00389-CV](#) (Tex. App.—Houston [14th Dist.] Nov. 9, 2017, pet. denied) (mem. op.).

## **POST-TRIAL MATTERS**

### **A. De Novo Mandatory**

*In re R.R.*, [537 S.W.3d 621](#) (Tex. App.—Austin 2017, orig. proceeding).

### **B. Parent Lacks Standing to Challenge Attorney Ad Litem Representation**

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*In re B.M., J.M., D.M., and L.M.*, No. 13-17-00467-CV (Tex. App.—Corpus Christi Nov. 30, 2017, pet. denied) (mem. op.); see also *In re J.E.G., A.R.G., P.N., Jr., and R.I.N.*, No. 06-17-00064-CV (Tex. App.—Texarkana Oct. 6, 2017, pet. denied) (mem. op.) (concluding Mother lacked standing under doctrine of virtual representation to proceed with ineffective assistance claim against children’s attorney *ad litem* because her interests were not aligned with those of children).

**C. TFC § 161.211(a) – Bill of Review**

*In re M.E.*, No. 07-16-00039-CV (Tex. App.—Amarillo Jan. 8, 2018, no pet.) (mem. op.).

**INDIAN CHILD WELFARE ACT**

**A. Intervention by Tribe**

*In re J.J.T.*, 544 S.W.3d 874 (Tex. App.—El Paso 2017, no pet.).

**B. Necessity of Expert Witness**

*S.P. v. Texas Dep’t of Family and Protective Services*, No. 03-17-00698-CV (Tex. App.—Austin Mar. 9, 2018, no pet.) (mem. op.).

You can link to the 2018 DFPS case law update here:

<http://texaschildrenscommission.gov/media/83944/2018-termination-case-law-update-bench-book-et.pdf>

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# ADOPTION

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## 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 adopted child and adoptive 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

### B. Documentation Required

### C. Hearing

## A. Petition for Adoption

### 1. Where Petition Must Be Filed

The Texas Family Code authorizes a suit in which adoption is requested may be filed in the county in which the child resides or in the county where the petitioners reside, regardless of whether another court has continuing exclusive jurisdiction under [Tex. Fam. Code Chapter 155](#). A court that has continuing exclusive jurisdiction is not required to transfer the suit affecting the parent-child relationship to the court in which the adoption suit is filed. [Tex. Fam. Code § 155.001\(c\)](#) allows an exception to continuing, exclusive jurisdiction for suits for adoption. [Tex. Fam. Code § 103.001\(b\)](#).

### 2. Spouses Must Join in Petition

If a petitioner is married, both spouses must join in the petition for adoption. [Tex. Fam. Code § 162.002\(a\)](#). 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

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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 six 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](#).
- **Health, Social, Educational, and Genetic History (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\(c\)](#). New [Tex. Fam. Code § 162.005\(c\)](#) requires any Child Placing Agency, Single Source Continuum Contractor, or other person placing a child for adoption to receive a copy of the HSEGH in preparation for the adoption. Also, new [Tex. Fam. Code § 162.007\(a\)](#) requires that the child's health history include information, to the extent known by the Department, whether the child's birth mother consumed alcohol during pregnancy and whether the child has been diagnosed with Fetal Alcohol Spectrum Disorder (FASD).
- **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.

## Adoption Order from a Foreign Country

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- 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; and
- Legal advocate for the child and/or guardian ad litem/CASA.

### 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.

**Special Issue:** 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.

### 3. Adoption Hearing Takes Precedent Over Other Settings

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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](#) and [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.

#### 5. Rehoming

Effective September 1, 2017, [Tex. Fam. Code § 162.026](#), entitled the Regulated Custody Transfer of Adopted Child, prohibits and criminalizes the practice of "rehoming" a child. A parent, managing conservator, or guardian of an adopted child may not transfer permanent physical custody of the child to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child unless: (1) the parent, managing conservator, or guardian files a petition with a court of competent jurisdiction requesting a transfer of custody; and (2) the court approves the petition. Transfer to the Department for a short term is allowed.

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# COMMUNITY BASED FOSTER CARE

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## A. What is Community Based Foster Care?

In 2017, the Texas Legislature passed Senate Bill 11, which amended the Family Code, Government Code, and Human Resources Code relating to the provisions of child protective services and other health and human services, including foster care, relative and kinship care, and adoption services. Effective September 1, 2017, DFPS started implementing Community Based Foster Care, referred to as CBC, in certain geographic areas in the state, known as “catchment” areas. CBC is intended to delegate or outsource certain decisions about foster care delivery and case management, and that it be implemented with measurable goals related to these decisions. DFPS has developed an implementation plan for implementing CBC throughout the state, as well as a readiness review and process, multiple evaluation processes, and in the process of designing and executing performance-based contracts for the services.

## B. The Single Source Continuum Contractor or SSCC

A Single Source Continuum Contractor or SSCC generally will be a non-profit with focus on child welfare and by law must be formed as a charitable organization. A local governmental entity can also serve as an SSCC and an example of a local governmental entity in a position to do so is Harris County Child Protective Services. Part of the readiness process, explained below, requires DFPS to consider whether an SSCC has demonstrated experience in providing services to children and families in the catchment area. As part of an application to secure a contract for CBC, each SSCC must develop a Community Engagement Plan that includes details about how the SSCC will involve faith-based entities, the judiciary, CASA, Child Advocacy Centers (CAC), service providers, foster families, biological parents, foster youth and former foster youth, relatives, child welfare boards, attorneys for both children and parents, and any other stakeholder the SSCC wants to include. Formation as a charitable organization provides limited protection to the SSCC under Chapter 84 of the Civil Practice and Remedies Code (CPRC). The CPRC protections are limited to acts or omissions that occur while the entity or person is acting within the course and scope of the entity’s contract with the Department and the person’s duties for the entity and only if insurance coverage in the minimum amounts required by Chapter 84 are in force and effect at the time of the cause of action for personal injury, death, or property damage accrues.

## C. The Effect of CBC on Courts and Court Process

Senate Bill 11 mandates the transfer of placement and case management services from DFPS to the SSCC, although as of September 1, 2018, no case management services have been transferred. Case management is defined to include court-related duties. Court-related

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duties include service of process, notice of hearings and significant events, preparation of court reports, appearing in court and offering testimony, engaging in discovery, preparing for trial, appearing at trial and mediation, complying with all of DFPS current statutory duties, and complying with all court orders that would ordinarily bind DFPS, will be the responsibility of the SSCC and its subcontractors. DFPS will be the party to the lawsuit, and the SSCC will act as its agent. SSCC employees will confer with and operate under an attorney-client relationship with the DFPS legal counsel, whether DFPS is represented by a regional attorney or a county or a district attorney. Records that are related to the provision of CBC in a catchment area are subject to the Public Information Act in the same manner as DFPS records.

## **D. Monitoring of the SSCC by DFPS**

Senate Bill 11 directs DFPS to establish a quality oversight and assurance division to oversee contract compliance, conduct assessments of fiscal and qualitative performance of the SSCC and vendors and create and administer a dispute resolution process. DFPS must also monitor the transfer of case management services through this division, which will have the authority to review, approve, or disapprove a contractor's recommendation with respect to a child's permanency goal. Senate Bill 11, under [Tex. Fam. Code § 264.168](#), allows DFPS to include in the contract with the SSCC any necessary oversight measures and review processes to maintain compliance with federal and state requirements. It also requires DFPS to develop an internal dispute resolution process to decide disagreements between the SSCC and DFPS.

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# CONTEMPT<sup>1</sup>

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## A. Introduction

Texas law recognizes two kinds of contempt and two different types of remedies:

- Direct contempt occurs in the presence of the court during court proceedings and is immediately punishable by the court
- Indirect or constructive contempt occurs outside the court's presence, and dictates stricter procedural standards

The remedies for contempt are similarly divided into two categories:

- Civil or coercive and
- Criminal or punitive

The remedy used by the court, not the conduct of the contemnor, defines the contempt remedies as civil or criminal. Although the term "contempt of court" conjures images of unchecked authority, in reality the power is limited. A high percentage of contempt judgments are set aside by appellate courts. Exacting standards apply.

## B. Direct Contempt

The essence of direct contempt is that the offending conduct obstructs or tends to obstruct the proper administration of justice.<sup>10</sup> Direct contempt is characterized by an unwarranted interruption of orderly court proceedings and for the most part is unrelated to the issues on trial. The interruption diverts attention from the trial and delays the proceedings until the interruption is addressed by the court. Direct contempt can be addressed by the court immediately unless the contempt involves an officer of the court.<sup>11</sup> However, the power to punish immediately for direct contempt flows from observing the conduct and the exigency of the situation. Once the immediate need to maintain decorum or address the interruption has passed, the power to punish summarily also ends.<sup>12</sup> Examples of Direct Contempt:

- Refusal to obey a specific court order during trial proceedings;
- Expressing improper remarks or indifference to the court's actions

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<sup>1</sup> Information in this chapter is taken from the Texas Center for the Judiciary Bench Book chapter on Contempt. This version does not include information on a judges' actions in court when witnessing contempt, drafting orders, enforcing orders, and appellate remedies. Please contact the Texas Center for the Judiciary at [www.yourhonor.com](http://www.yourhonor.com) for access to its bench book, additional and detailed guidance, and associated forms.

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- Disobeying the judge's instruction to cease a disturbance in court

## C. Indirect Contempt

Indirect or constructive contempt occurs outside the court's presence and does not involve a disruption of orderly court proceedings. Unlike direct contempt, in constructive contempt the issue generally does relate to the case on trial and is most often characterized by a dispute between the parties to the litigation regarding enforcement of a court order. Constructive contempt does not interfere with or interrupt court proceedings since it is the very focus of court proceedings scheduled to address it. Although time is important, it does not have the urgency of direct contempt and consequently the law imposes much more stringent procedural standards on constructive contempt hearings. Examples of Indirect or Constructive Contempt:

- Having a conversation with a juror after trial begins
- Secreting assets from a court appointed receiver
- Failure to obey a court order

## D. Remedies for Contempt

[Texas Gov't Code § 21.001\(a\)](#) gives courts the inherent power to maintain control of court proceedings and enforce lawful orders through the power of contempt. Although all contempt proceedings are quasi-criminal, it is the character of the relief the proceeding will afford that defines the proceeding as civil or criminal.<sup>13</sup> On a finding of contempt, the court may respond to the contempt by applying the civil/coercive remedy sanction, or the criminal/punitive sanction, or a combination of both.

## E. Civil / Coercive

Civil contempt, more accurately known as coercive contempt, has the purpose of securing compliance with a court order. To be enforceable by coercive contempt the order must be clear and unambiguous.<sup>14</sup> Due process standards apply in indirect contempt proceedings to assure that the contemnor is offered adequate safeguards. Due process for civil or coercive contempt requires:

- Full and complete notice of the conduct with which the contemnor is charged;<sup>15</sup>
- Adequate notice of the court order alleged to have been violated;<sup>16</sup>
- Ample time to prepare and respond to the allegation;<sup>17</sup>
- Reasonable notice of the time and date of the contempt hearing.<sup>18</sup>

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- The right to appointed counsel if the alleged contemnor is indigent; <sup>19</sup>
  - The right to a jury trial if the potential punishment exceeds 6 months in jail; <sup>20</sup>
  - The right to be advised by the court of the right to a jury if punishment could exceed 6 months in jail; <sup>21</sup> and
  - The ability to comply with the court order. <sup>22</sup>

## F. Criminal / Punitive

The nature of criminal contempt is punitive, to punish past errant behavior, and is most commonly assessed in direct contempt cases. It is an unconditional sentence for punishment or deterrence.<sup>23</sup> Criminal contempt proceedings for contumacious and disruptive conduct during court proceedings may be dealt with immediately by the judge, unless committed by a court officer.

## G. Burden of Proof

The Burden of Proof for a punitive contempt order must be based on proof beyond a reasonable doubt.<sup>24</sup> There is a division of authority on the burden of proof required in cases addressing civil or coercive contempt. [Tex. Fam. Code § 105.005](#) provides for a preponderance of the evidence, but one Court of Appeals has held that in contempt proceedings to enforce child support, the obligor parent must prove the inability to pay by a preponderance of the evidence.<sup>25</sup> However, the 5<sup>th</sup> Circuit has said in a civil contempt proceeding, the movant bears the burden of establishing the elements of contempt by clear and convincing evidence.<sup>26</sup> Another court has held the standard to be clear and convincing for civil contempt, and at least one court has held that contempt for a violation of a written court order requires proof beyond a reasonable doubt. <sup>27</sup>

## H. Jury

Case law has held that there is no general right to a jury trial in cases of contempt.<sup>28</sup> However, offenses considered ‘serious’ entitle the one charged to the 6th Amendment right to a jury.<sup>29</sup> Under Texas law, punishment of six months incarceration or less and a fine of \$500 or less is considered a petty offense, insufficient to trigger the right to trial by jury.<sup>30</sup> Punishment exceeding six months’ incarceration entitles the contemnor to a jury, and the judge must advise the contemnor of the right to jury.<sup>31</sup> At what point in the contempt proceeding the case is determined to be serious or petty is subject to conflicting authority. One Court of Appeals has held that “if confinement may exceed six months,” then the contempt offense is serious and constitutional safe- guards (i.e., the right to a jury) should be given.<sup>32</sup> However, another Court of Appeals has held that the actual punishment imposed determines whether the character of the contempt is serious or petty.<sup>33</sup>

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## I. Authority

References to contempt in the Texas Family Code

- [Tex. Fam. Code § 157.001](#) – Motion for Enforcement
- [Tex. Fam. Code § 157.424](#) – Relation to Motion for Contempt
- [Tex. Fam. Code § 105.001](#) – Temporary Orders Before Final Order
- [Tex. Fam. Code § 81.004](#) – Contempt for Nonpayment of Fee

**Statutory limitations on Contempt** – [Texas Gov't Code 21.002](#)

- Punishment is limited to six months in county jail and/or fine of \$500.00
- Cumulative punishment cannot exceed 18 months; and
- Court officers held in contempt are entitled to a personal recognizance bond and another judge to determine the validity of the contempt.

**Court Officers** – [Texas Gov't Code 21.002\(d\)](#) requires that an officer of the court held in contempt by a trial court shall, upon request, be released on personal recognizance until a *de novo* determination of guilt or innocence by another judge assigned by the regional administrative judge. Court officers include:

- Attorneys
- Court Reporters
- Attorneys Ad Litem
- Receivers

## J. Orders of Contempt

Orders of contempt must:

- Be in writing, definite, and certain<sup>34</sup>
- Clearly state in what respect the court's earlier order was violated<sup>35</sup>
- Notify the contemnor of how he violated the previous order<sup>36</sup>
- Be signed by the judge within a short, reasonable time after finding of contempt<sup>37</sup>
- If it is punitive, it must specify the exact punishment imposed<sup>38</sup>
- If it is coercive it must clearly state what the contemnor must do to purge himself of

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contempt<sup>39</sup>

If the contemnor is to be incarcerated, the orders of contempt must be accompanied by an order of commitment, and no person may be held for contempt without a written order of commitment. Orders of commitment must provide the precise punishment assessed or, in the case of coercive contempt, the things contemnor must do to be purged of contempt.<sup>40</sup>

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# DISPROPORTIONALITY

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## Introduction

Disproportionality is the over or underrepresentation of a racial or ethnic group within a social system at a rate or percentage that is not proportionate to their representation in the general population. 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.

This phenomenon has most significantly affected African American children, with national data indicating that African American children represent 33% of children in foster care, although they represent only 15% of children in the general population.<sup>41</sup> This overrepresentation of African American children has been observed in the child welfare system for more than thirty years,<sup>42</sup> yet persists as a national concern.<sup>43</sup>

Special Issue: Numerous studies indicate that African American children are disproportionately represented in the Texas child welfare system. 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.

## A. In Texas

In Texas, as compared to children of other races:

- African American children are more likely to be removed;
- African American children are least likely to return home;
- African American children are less likely to exit to reunification and more likely to exit to emancipation;
- African American child have the longest wait to exiting foster care; and
- For Native American children in the care of CPS, the trends and patterns are unstable due to the low numbers.

DFPS data from FY2017 shows African American children were much more likely than Anglo or Hispanic children to be reported as victims of child abuse or neglect and are removed from their families at almost twice the rate of the general population. African American children comprised 11.2% of the general child population of Texas but accounted for 23.2% of all children awaiting adoption. Even when other factors are considered, African American

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children spend more time in foster care, or other substitute care, are less likely to go home to their parents, and wait longer for adoption.

While African American and American Indian children are overrepresented in foster care, White children are proportionately represented, and Hispanic children are underrepresented. However, most Hispanic children wait longer than White children to be adopted.<sup>44</sup>

## **B. The Elimination of Disproportionality and Disparities**

Texas Health and Human Services Commission (HHSC) and DFPS have been addressing disproportionality at the statewide level since 2005. In 2010, HHSC created the Center for Elimination of Disproportionality and Disparities to partner with health and human services agencies, external stakeholders, other systems, and communities to identify and eliminate disproportionality and disparities affecting children, families, and disparately impacted individuals. In 2017, the official name was changed to the Office of Minority Health Statistics and Engagement (OMHSE), which was charged with identifying the systemic factors and practice improvements needed to address the disproportionate representation and disparate outcomes for children, families, and disparately impacted individuals in the state's health and human services programs. The Texas Legislature defunded the OMHSE effective September 1, 2018.

## **C. What You Can Do About Disproportionality?**

Many Texas judges want to know what they can do to combat disproportionality from the bench.

Texas' two highest courts, the Supreme Court of Texas and the Texas Court of Criminal Appeals, spearheaded the Beyond the Bench: Law, Justice, and Communities Summit on December 14, 2016 in Dallas. The Summit brought together Texas judges, law-enforcement officers, and national, state, and community leaders with the objective of strengthening trust and confidence in our justice system.

Public trust is the justice system's principal asset but a recent study by the National Center for State Courts found there is widespread public perception that our courts do not provide justice for all. At the Summit, participants explored diverse viewpoints and engaged in candid conversations to listen and learn from one another.

The Beyond the Bench Toolkit was created to assist in planning similar convenings and to inspire continued conversation about this important issue. The Toolkit includes video and details from the event and is now available for print on the pages that follow and at the links below.

- Download the [Complete Toolkit](#)

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- Download the [Complete Toolkit for Print](#)
  - Visit the [YouTube Playlist](#)

In 2010, the Supreme Court Children’s Commission formed the Judicial Workgroup Addressing Disproportionality (JWD).

- The JWD mission is to educate the judiciary & legal stakeholders on how to address cultural & institutional racism that contributes to the over-representation of African American, Native American and Hispanic youth and families in the child protection system.
- Since 2011, there have been 16 different judicial trainings where judges learned how unconscious bias could be affecting their decision-making.
- In 2016, the JWD hosted 70 participants in a Poverty Simulation Seminar. Six judges brought court teams to participate in a simulation where they assumed the roles of families facing poverty and experienced and how difficult it is to survive day-to-day and navigate the court system in a child welfare case, when you have limited means. **Contact the Children’s Commission if you are interested in hosting a Poverty Simulation in your region.**

There are also many opportunities to partner with your community to contribute to this effort. Leaders in the African American community who speak out in support of these efforts are making powerful statements to children and families in the child welfare system and to their communities. Partnerships with the Alabama-Coushatta, Ysleta del Sur Pueblo, and Kickapoo Traditional Tribe of Texas are ongoing.

The National Council of Juvenile and Family Court Judges (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 best practices for one of the most critical stages in a child abuse and neglect case.<sup>45</sup>

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. While this is not an isolated issue in child welfare, child welfare leaders in Texas are committed to ongoing conversations and solutions that will contribute to the reduction of disproportionality and disparities and improve outcomes. Texas CPS is working in partnership with communities and stakeholders to ensure our children, youth and families remain at the heart of our work.

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# EDUCATION

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*Please see the Checklist Section for the Education checklist.*

## A. Education Data

National studies show that youth in foster care have poor educational outcomes when compared to their peers in the general population. Youth in foster care are more likely to be suspended or expelled, score lower on statewide standardized tests, repeat a grade, and to drop out, and are less likely to graduate. For more information on these studies, please see: [National Working Group on Foster Care and Education \(2018, April\), “Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care”](#).<sup>46</sup>

According to data collected by the Texas Education Agency (TEA) Public Education Information Management System (PEIMS) during the 2012-2013 school year, which captured the “leaver” status, the reason why a student left school, only 38.8 percent of Texas youth in foster care left because they graduated, compared to 72.4 percent of the general student population. During the same school year, the leaver status of students in foster care who left school because they dropped out was 28.6 percent, compared to 8.3 percent of the general student population. Youth in foster care in Texas also had lower high school achievement, were more likely to be served in special education programs, and were less likely to be in gifted and talented programs. For further detail, please see [Data on Foster Children Attending Texas Public Schools](#).<sup>47</sup>

Although many children experience educational challenges, students in foster care face additional hurdles, including multiple residential and school changes, missed school days for visits with parents and siblings, court appearances, or therapeutic or other case-related appointments that are only available during school hours, as well as an often chaotic educational, social, emotional, and family 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 often inadequate ongoing and effective communication. If Texas judicial, child welfare, and education stakeholders coordinate efforts, especially during school transitions, students in foster care are less likely to experience a damaging loss of records, credits, services, and support systems, which can hinder academic success.

## B. School Stability

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**Special Issue:** School is often a source of stability as well as a place for academic and social development of children and youth in foster care. If a child must be removed from his or her home or change placements, consider the potential impact on the child's education and what efforts were made to keep the child in the same school, if possible.

## 1. Fostering Connections

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 Act).<sup>48</sup> [42 U.S.C. § 675](#). 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 any time the child's placement changes, unless it is not in the child's best interest. If the child cannot remain in the same school, 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 (LEAs)<sup>49</sup> to ensure educational stability. Provisions in the Fostering Connections Act highlight the importance of improving educational outcomes of children and youth in foster care across the nation.

### a. Education Stability Provisions of the Fostering Connections Act

- *Proximity to school* – Each placement decision for a child in foster care 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\(1\)\(G\)\(i\)](#).
- *Coordinate with local education agencies* – The child welfare agency must coordinate with LEAs to ensure that the child can remain in the school where the child is enrolled at the time of each placement. [42 U.S.C. § 675\(1\)\(G\)\(ii\)\(I\)](#). For further detail, please see U.S. Departments of Education and Health & Human Serv., Admin. for Children & Families (2014) joint letter.<sup>50</sup>
- *Immediate enrollment and timely transfer of records* – Alternatively, if remaining in that school is not in the child's best interests, the agencies must ensure that the child is immediately enrolled and that all educational records are provided to the new school. [42 U.S.C. § 675\(1\)\(G\)\(ii\)\(II\)](#).
- *Transportation* – Foster care maintenance payments may cover reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. [42 U.S.C. § 675\(4\)\(A\)](#).

## 2. Educational Stability Plan

To meet the requirements of the Fostering Connections Act regarding education stability,

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DFPS must develop, in accordance with [42 U.S.C. § 675](#), a plan to ensure the educational stability for children in foster care. [Tex. Fam. Code § 264.1072](#).

In recognition of the need for agency coordination, DFPS must collaborate with the Texas Education Agency (TEA) to develop policies and procedures to ensure that the needs of foster children are met in every school district. [Tex. Fam. Code § 266.008\(d\)](#).

### **3. Every Student Succeeds Act**

In December 2015, the most recent reauthorization of the Elementary and Secondary Education Act, known as the Every Student Succeeds Act (ESSA), became law.<sup>51</sup> [20 U.S.C. § 6301 et seq.](#) ESSA makes substantial changes to the education system, including giving more flexibility to states to determine student performance measures. ESSA also mirrors in the education law many of the provisions affecting students in foster care from the Fostering Connections Act.

#### **a. Education Stability Provisions of the Every Student Succeeds Act**

- *Best interest determination* – A child in foster care is entitled to enroll or remain in the school of origin unless a determination is made that it is not in the child’s best interest to attend the school of origin. The decision must be based on all factors relating to the child’s best interest, including consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement. [20 U.S.C. § 6311\(g\)\(1\)\(E\)\(i\)](#).
- *Streamlined transitions* – When a determination is made that it is not in the child’s best interest to remain in the school of origin, the child is immediately enrolled in a new school, even if the child is unable to produce records normally required for enrollment. [20 U.S.C. § 6311\(g\)\(1\)\(E\)\(ii\)](#). The enrolling school must immediately contact the school last attended by the child to obtain relevant academic and other records. [20 U.S.C. § 6311\(g\)\(1\)\(E\)\(iii\)](#).
- *Liaisons at the state and local education agencies* – ESSA requires designation of a state point of contact to coordinate with child welfare agencies. [20 U.S.C. § 6311\(g\)\(1\)\(E\)\(iv\)](#). LEAs must also designate a point of contact upon written request. [20 U.S.C. § 6312\(c\)\(5\)\(A\)](#).
- *Transportation* – LEAs must ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with [42 U.S.C. 675\(4\)\(A\)](#) and ensure that, if there are additional costs incurred in providing transportation to maintain children in foster care in their schools of origin, the local educational agency will provide transportation to the school of origin if:

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- the local child welfare agency agrees to reimburse the local educational agency for the cost of such transportation;
  - the LEA agrees to pay for the cost of such transportation; or
  - the LEA and the local child welfare agency agree to share the cost of such transportation. [20 U.S.C. § 6312\(c\)\(5\)\(B\)](#).

#### **4. School Placement**

A student who was enrolled in a primary or secondary public school before the student entered the conservatorship of DFPS and who is placed 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. The student is entitled to continue to attend the school regardless of whether the student remains in the conservatorship of DFPS for the duration of the student's enrollment in the school. [Tex. Educ. Code § 25.001\(g\)](#).

If a student who is in the conservatorship of DFPS is enrolled in a primary or secondary public school, other than the school in which the student was enrolled at the time the student was placed in the conservatorship of DFPS, the student is entitled to continue to attend that school without payment of tuition until the student successfully completes the highest grade level offered by the school at the time of enrollment in the school, even if the child's placement is changed to a residence outside of the attendance area for that school or outside the school district. The student is entitled to continue to attend the school regardless of whether the student remains in the conservatorship of DFPS for the duration of the student's enrollment in the school. [Tex. Educ. Code § 25.001\(g-1\)](#).

**Special Issue:** Although [Tex. Educ. Code § 25.001\(g\)](#) and [Tex. Educ. Code § 25.001\(g-1\)](#) allow a 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. The presumption is that the child's caregiver will be responsible for any costs related to the transportation, although transportation plans required under ESSA may create more opportunities for some school districts in the 2017-2018 school year to work with the caregiver to find a solution to the transportation challenge.

#### **5. McKinney-Vento Homeless Assistance Act**

Previously, a child who is "awaiting foster care placement" met the federal McKinney-Vento Homeless Assistance Act (McKinney-Vento Act) definition of homeless and the child was entitled to attend the school that the child attended when permanently housed or the school in which the child was last enrolled, with transportation and other services

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provided by the district. [42 U.S.C. § 11431 et seq.](#)<sup>52</sup> ESSA amends the McKinney-Vento Act and effective December 10, 2016, the “awaiting foster care placement” was removed from the definition of homelessness. [Pub. L. No. 114–95](#). For more information on this change, please see guidance from the Department of Education, [Education for Homeless Children and Youths Program Non-Regulatory Guidance](#).<sup>53</sup>

## C. Roles and Responsibilities Related to Education

### 1. Designation of Education Decision-Maker

[Tex. Fam. Code § 263.004](#) requires DFPS to provide notice to the court and others of the entity or person holding education decision-making authority for a child or youth in foster care. 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 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 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 parent 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 fifth day after the date of an Adversary Hearing held under [Tex. Fam. Code § 262.201](#) is concluded, DFPS must file the information required by [Tex. Fam. Code § 263.004\(a\)](#) with the court and provide a copy to the school the child attends. [Tex. Fam. Code § 263.004\(b\)](#).

If a person other than a person identified under [Tex. Fam. Code § 263.004\(a\)](#) is designated to make educational decisions or assigned to serve as a surrogate parent, DFPS shall file the updated information in a permanency progress report filed under [Tex. Fam. Code § 263.303](#) or [Tex. Fam. Code § 263.502](#). The updated information must be provided to the school the child attends not later than the fifth day after the date of the designation or assignment. [Tex. Fam. Code § 263.004\(c\)](#).

In order to comply with this mandate, DFPS created [Form 2085-E Designation of Education Decision-Maker](#),<sup>54</sup> to be filled out by the caseworker and provided to the school by the child’s caregiver.

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**Special Issue:** Every student in foster care will have an education decision-maker. Only certain students in foster care who are eligible to receive special education services will have a surrogate parent appointed, as outlined below.

## 2. Court Hearings

During the Permanency Hearing Before Final Order, the Court must review the permanency progress report determine whether an education decision-maker for the child has been identified, the child's education needs and goals have been identified and addressed, and there have been major changes in the child's school performance or there have been serious disciplinary issues. [Tex. Fam. Code § 263.306\(a-1\)\(5\)\(F\)](#).

At the Permanency Hearing After Final Order, the court must determine whether an education decision-maker for the child has been identified, the child's education needs and goals have been identified and addressed, and there are major changes in the child's school performance or there have been serious disciplinary events. [Tex. Fam. Code § 263.5031\(3\)\(I\)](#).

**Special Issue:** In light of the DFPS duty to notify the court of the name and contact information of the education decision-maker within five days of the designation, if DFPS does not provide Form 2085-E in the permanency progress report, the court might inquire on the record during the Permanency Hearings Before or After Final Order about the identity of the education decision-maker for the child.

Upon request of a person providing substitute care for a child who is in the managing conservatorship of DFPS, DFPS shall allow the person to provide the child with an education in the home setting unless:

- The right of DFPS to allow the education of the child in a home setting has been specifically limited by court order;
- A court at a hearing conducted under [Tex. Fam. Code Chapter 263](#) finds, on good cause shown through evidence presented by DFPS in accordance with the applicable provisions in the DFPS CPS Handbook, that education in the home setting is not in the best interest of the child; or
- DFPS determines that federal law requires another school setting. [Tex. Fam. Code § 263.0045](#).

## 3. Notice of Significant Events

School districts, campuses, and open-enrollment charter schools must provide notice to the child's educational decision-maker and caseworker regarding events that may significantly impact the education of a child, including:

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- Requests or referrals for an evaluation under Section 504, Rehabilitation Act of 1973, [29 U.S.C. § 794](#), or special education under [Tex. Educ. Code § 29.003](#);
  - Admission, review, and dismissal (ARD) 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\(b\)\(10\)\(A\)-\(G\)](#).

**Special Issue:** State law requires schools to notify caseworkers of the enumerated major events, including the issuance of a Class C misdemeanor citation at school. Please note, however, that since 2013, ticketing is no longer permitted for school-related misbehavior constituting a Class C misdemeanor.

DFPS must provide notice of significant events, including a major change in school performance or a serious disciplinary event at school not later than the 10<sup>th</sup> day after the date DFPS becomes aware of a significant event affecting a child in the conservatorship of DFPS to:

- The child's parent;
- An attorney ad litem appointed under [Tex. Fam. Code Chapter 107](#);
- A guardian ad litem appointed under [Tex. Fam. Code Chapter 107](#);
- A volunteer advocate appointed for the child under [Tex. Fam. Code Chapter 107](#);
- The licensed administrator of the child-placing agency responsible for placing the child or the licensed administrator's designee;
- A foster parent, prospective adoptive parent, relative of the child providing care to the child, or director of the group home or general residential operation where the child is residing; and
- Any other person determined by the court to have an interest in the child's welfare. [Tex. Fam. Code § 264.018\(a\)\(5\)\(D\)](#) and [Tex. Fam. Code § 264.018\(f\)](#).

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#### 4. Education-Related Requirements for AALs and GALs

An attorney ad litem appointed to represent a child in the managing conservatorship of DFPS must, 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\(i\)](#). Guardians ad litem are now required by law to interview the child’s educators. [Tex. Fam. Code § 107.002\(b\)](#).

**Special Issue:** Consider whether to continue the appointment of the attorney and guardian ad litem, especially CASA, on the case to address education issues until the youth permanently leaves care. If the attorney ad litem is dismissed before the youth leaves care, consider whether to identify an education advocate by court order.

#### 5. Decisions Related to Special Education

A foster parent for a child may act as a parent for the child, as authorized under [20 U.S.C. § 1415\(b\)](#), if:

- The rights and duties of the department to make decisions regarding the child’s education under [Tex. Fam. Code § 153.371](#) have not been limited by court order; and
- The foster parent agrees to participate in making special education decisions on the child’s behalf and complete a training program that complies with TEA minimum standards before the next ARD meeting but no later than 90 days after assuming the role. [Tex. Fam. Code § 263.0025\(a-1\)](#), [Tex. Educ. Code § 29.015\(a\)\(3\)](#), and [Tex. Educ. Code § 29.015\(b\)](#).

If the foster parent completes a training provided by DFPS, a school district, an Education Service Center, or any other entity that receives federal funds to provide special education training to parents, the foster parent need not retake the training. [Tex. Educ. Code § 29.015\(b-1\)](#).

**Special Issue:** In the 85<sup>th</sup> Legislative Session, the requirement that a child live in a foster home for 60 days before the foster parent could act as parent, for the purposes of making special education-related decisions, was removed. As a default, the foster parent will now serve as parent from Day 1 and there will be no surrogate parent appointed.

Under the Individuals with Disabilities Education Act (IDEA), if a “parent” cannot be

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identified or located the school district must assign an individual to act as a surrogate for the parents for a child with a disability in foster care who is eligible to receive special education services. [20 U.S.C. § 1415\(b\)\(2\)\(A\)](#). The school district has 30 days to appoint a surrogate parent upon realizing the need. [20 U.S.C. § 1415\(b\)\(2\)\(B\)](#).

To ensure the educational rights of a child are protected in the special education process, the court may appoint a surrogate parent for the child if:

- The child's school district is unable to identify or locate a parent for the child; or
- The foster parent of the child is unwilling or unable to serve as a parent for the purposes of [Tex. Fam. Code Chapter 263, Subchapter A. Tex. Fam. Code § 263.0025\(b\)](#).

**Special Issue:** School districts have a mandatory duty to appoint a surrogate parent if a parent cannot be identified or located. Courts have permissive authority to appoint a surrogate parent.

Except as provided by [Tex. Fam. Code § 263.0025\(d\)](#), the court may appoint a person to serve as a child's surrogate parent if the person is willing to serve in that capacity and meets the requirements of [20 U.S.C. § 1415\(b\)](#). [Tex. Fam. Code § 263.0025\(c\)](#). Employees of DFPS, TEA, a school or school district, or any other agency involved in the education or care of the child cannot serve as surrogate parents. [Tex. Fam. Code § 263.0025\(d\)](#).

The court may appoint a child's guardian ad litem or court-certified volunteer advocate, as provided by [Tex. Fam. Code § 107.031\(c\)](#), as the child's surrogate parent. [Tex. Fam. Code § 263.0025\(e\)](#). To act as a surrogate parent for the child, the volunteer advocate must complete a training program for surrogate parents that complies with minimum standards established by TEA rule within the time specified by [Tex. Educ. Code § 29.015\(b\)](#). [Tex. Fam. Code §107.031\(c\)\(4\)](#).

In appointing a person to serve as the surrogate parent for a child, the court may consider the person's ability to meet the following qualifications:

- Be willing to serve in that capacity;
- Exercise independent judgment in pursuing the child's interests;
- Ensure that the child's due process rights under applicable state and federal laws are not violated;
- Complete a training program that complies with minimum standards established by TEA rule within the time specified in [Tex. Educ. Code § 29.015\(b\)](#);
- Visit the child and the school where the child is enrolled;

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- Review the child's educational records;
  - Consult with any person involved in the child's education, including the child's teachers, caseworkers, court-appointed volunteers, guardian ad litem, attorney ad litem, foster parent and caregiver; and
  - Attend meetings of the child's ARD committee. [Tex. Educ. Code § 29.0151\(d\)\(2\)-\(8\)](#) and [Tex. Fam. Code § 263.0025\(f\)](#).

**Special Issue:** Consider appointment of a surrogate parent for youth in Residential Treatment Centers who are receiving special education services.

Pursuant to [Tex. Educ. Code § 29.001\(10\)\(A\)](#), an individual assigned to act as a surrogate parent must complete a training program in which the individual is provided with an explanation of the provisions of federal and state laws, rules, and regulations relating to:

- The identification of a student with a disability;
- The collection of evaluation and re-evaluation data relating to a student with a disability;
- The ARD committee process;
- The development of an individualized education program (IEP), including the consideration of transition services for a student who is at least 14 years of age;
- The determination of least restrictive environment;
- The implementation of an IEP;
- The procedural rights and safeguards available under [34 C.F.R. § 300.148](#), [34 C.F.R. § 300.151-300.153](#), [34 C.F.R. § 300.229](#), [34 C.F.R. § 300.300](#), [34 C.F.R. § 300.500-300.520](#), [34 C.F.R. § 300.530-300.537](#), and [34 C.F.R. § 300.610-300.627](#), relating to the issues described in [34 C.F.R. § 300.504\(c\)](#); and
- Where to obtain assistance in understanding the provisions of federal and state laws, rules, and regulations relating to students with disabilities; and
- The duties and responsibilities of surrogate parents as required under [Tex. Educ. Code § 29.0151\(d\)](#). [19 Tex. Admin. Code § 89.1047\(c\)\(1\)](#).

If a court appoints a surrogate parent for a child with a disability under [Tex. Fam. Code § 263.0025](#) and the school district determines that the surrogate parent is failing to perform or is not properly performing the duties listed under [Tex. Educ. Code § 29.0151\(d\)](#), the district shall consult with DFPS and appoint another person to serve as the surrogate parent for the child. [Tex. Educ. Code § 29.0151\(f\)](#).

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On receiving notice from a school district under [Tex. Educ. Code § 29.0151\(f\)](#), DFPS must promptly notify the court of the failure of the appointed surrogate parent to properly perform the duties required under [Tex. Educ. Code § 29.0151](#). [Tex. Educ. Code § 29.0151\(g\)](#).

For more information on special education, see *Section F of this chapter, Special Education and Section 504*.

## D. School Transitions

### 1. Foster Care Liaison in Each Texas School District and at the Texas Education Agency

Each school district and open enrollment charter school must 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\(a\)\(1\)](#). Each school district and open-enrollment charter school must also report the liaison's name and contact information to TEA. [Tex. Educ. Code § 33.904\(a\)\(2\)](#).

In recognition of the challenges faced by students in substitute care, TEA shall assist the transition of substitute care students from one school to another by designating at least one agency employee to act as a liaison officer regarding educational issues related to students in the conservatorship of DFPS. [Tex. Educ. Code § 25.007\(b\)\(14\)](#).

Special Issue: TEA developed several resources regarding foster care liaisons:

- Updated contact information for the district and open enrollment charter school foster care liaisons is now located in the Ask Texas Education Directory (AskTED), available online at:

[http://mansfield.tea.state.tx.us/TEA\\_AskTED\\_Web/Forms/Home.aspx](http://mansfield.tea.state.tx.us/TEA_AskTED_Web/Forms/Home.aspx).

- If the court cannot locate the school district liaison on the AskTED system, please reference TEA AskTED guidance, located online at:

<http://tea.texas.gov/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=25769817937&libID=25769818040>.

- Other resources for liaisons, including contact information for Education Service Center Foster Care Champions, can be found at :

<http://tea.texas.gov/FosterCareStudentSuccess/liaisons/>.

### 2. Enrollment

If DFPS takes possession of a child under [Tex. Fam. Code Chapter 262](#) during the school

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year, DFPS shall ensure that the child returns to school not later than the third 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\(a\)](#).

**Special Issue:** CPS has revised the policy handbook to require enrollment within two days of the initial removal or placement change. More information is available at: [https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x15000.asp#CPS\\_15300](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x15000.asp#CPS_15300).

A child may be enrolled by any person showing evidence of legal responsibility of the child. [Tex. Educ. Code § 25.001\(j\)](#). A child in foster care may attend a school free of charge in the district where the foster parent resides. [Tex. Educ. Code § 25.001\(f\)](#). A school district shall accept a child for enrollment in a public school without the documentation required by [Tex. Educ. Code § 25.002\(a\)](#) if DFPS has taken possession of the child under [Tex. Fam. Code Chapter 262](#). DFPS must furnish that documentation to the school district not later than the 30th day after the date the child is enrolled in the school. [Tex. Educ. Code § 25.002\(g\)](#).

A child may be provisionally admitted to an elementary or secondary school if the child has begun the required immunizations and if the child continues to receive the necessary immunizations as rapidly as is medically feasible. [Tex. Educ. Code § 38.001\(e\)](#).

**Special Issue:** In general, DFPS delegates day to day decision-making to the child's caregiver, including responsibility for school enrollment. Upon enrollment in school, a caregiver should present DFPS Forms 2085 and 2085E to ensure the school recognizes the caregiver's legal authority to enroll the child. These documents also serve to notify the school that the child is in foster care and provide the name of the education decision-maker and the surrogate parent, if applicable. For more information on acceptable forms for school enrollment, please see TEA PEIMS supplemental guidance at: <http://tea.texas.gov/FosterCareGuidance.pdf>.

### 3. Records Transfer

TEA shall assist the transition of students in substitute care from one school to another by ensuring 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\(b\)\(1\)](#).

**Special Issue:** Districts failing to provide the required information within 10 calendar days of a written request by the receiving school district may be reported to the Texas Records Exchange Help Desk: (512) 463-7246 or [TREx@tea.texas.gov](mailto:TREx@tea.texas.gov).

### 4. Education Passport

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Each child in DFPS conservatorship must have an education passport. The education passport contains educational records of the child, including the names and addresses of educational providers, the child's grade-level performance, and any other important educational information. [Tex. Fam. Code § 266.008\(a\)](#). DFPS shall maintain the passport as part of DFPS records for the child as long as the child remains in foster care. [Tex. Fam. Code § 266.008\(b\)](#). DFPS has a duty to make the education passport available to any person authorized by law to make educational decisions for the child in foster care. [Tex. Fam. Code § 266.008\(c\)\(1\)](#).

**Special Issue:** For more information about the education passport, referred to as the Education Portfolio or "green binder," please see:

- CPS Policy Handbook Section 15400, located online at:

[https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x15000.asp#CPS\\_15410](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x15000.asp#CPS_15410).

- Education for Children Resource Guide, available at:

[http://www.dfps.state.tx.us/handbooks/CPS/Resource\\_Guides/Education\\_Resource\\_Guide.pdf](http://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Education_Resource_Guide.pdf).

## 5. Confidentiality of Education Records

The federal Family Educational Rights and Privacy Act of 1974 (FERPA) allows for release of student records between school districts without parental consent in compliance with a court order upon enrollment in the receiving school. [20 U.S.C. § 1232g](#).<sup>55</sup>

The Uninterrupted Scholars Act of 2013 amended FERPA to permit caseworkers and other child welfare or tribal organization representatives to access personally identifiable student information without parental consent and allows for disclosure of student records pursuant to a judicial order related to a child welfare proceeding without further notice to the parent. [20 U.S.C. § 1232g \(b\)\(2\)\(B\)](#).<sup>56</sup>

The Uninterrupted Scholars Act provisions also apply to special education-related records for children ages birth to 21 with disabilities under IDEA Parts B and C. [20 U.S.C. § 1400 et seq.](#)<sup>57</sup>

## 6. Collection of State-Level Education Data

TEA collects data through PEIMS regarding the foster care status of students. [Tex. Educ. Code § 7.029\(b-1\)](#). In addition, DFPS provides child-level data on a yearly basis to TEA and TEA performs a data match to ascertain, on an aggregate level, how students in foster care are faring educationally. [Tex. Educ. Code § 7.029\(a\)](#).

## 7. Credit Transfer and Recovery

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In recognition of the challenges facing students in foster care, TEA is now required to develop policies and procedures to address:

- 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\(b\)\(3\)](#);
- Placing a student in comparable courses or educational programs to those offered at a previous school to the extent comparable courses and programs are available, [Tex. Educ. Code § 25.007\(b\)\(4\)](#);
- 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\(b\)\(11\)](#); and
- Ensuring 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\(b\)\(12\)](#).

School districts must make credit by examination available, at any point during the school year, to students in foster care. [19 Tex. Admin. Code § 74.24\(a\)\(2\)](#). Credits earned towards state graduation requirements in an accredited school district are transferable and must be accepted by another school district in the state. [19 Tex. Admin. Code § 74.26\(a\)\(1\)](#). A school district shall award credit proportionately to a student in substitute care who successfully completes only one semester of a two-semester course. [19 Tex. Admin. Code § 74.26\(e\)](#).

## **E. Attendance and School Experience**

### **1. School Year**

A child who is required to attend school under [Tex. Educ. Code § 25.085](#) shall attend school each school day for the entire period the program of instruction is provided. [Tex. Educ. Code § 25.085\(a\)](#). Unless specifically exempted by [Tex. Educ. Code § 25.086](#), a child who is at least six years of age, or who is younger than six years of age and has previously been enrolled in first grade, and who has not yet reached the child's 19<sup>th</sup> birthday shall attend school. [Tex. Educ. Code § 25.085\(b\)](#). On enrollment in prekindergarten or kindergarten, attendance is also compulsory. [Tex. Educ. Code § 25.085\(c\)](#).

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**Special Issue:** When considering the timing of a school move, courts, DFPS, and school staff should be aware of both the sending and receiving local school district calendars, including the administration schedule for the State of Texas Assessment of Academic Readiness (STAAR), which can be found on the TEA Website and on local school district websites.

## 2. Minimum Attendance for a Class Credit or a Final Grade

A student in any grade level from kindergarten through grade 12 may not be given credit or a final grade for a class unless the student is in attendance for at least 90 percent of the days the class is offered. [Tex. Educ. Code § 25.092\(a\)](#). A student who is in attendance for at least 75 percent but less than 90 percent of the days a class is offered may be given credit or a final grade for the class if the student completes a plan approved by the school's principal that provides for the student to meet the instructional requirements of the class. [Tex. Educ. Code § 25.092\(a-1\)](#). [Tex. Educ. Code § 25.092\(a\)](#) does not apply to a student who receives credit by examination for a class as provided by [Tex. Educ. Code § 28.023](#). [Tex. Educ. Code § 25.092\(a-2\)](#).

## 3. Excused Absences for Court-Ordered Activities

A school district shall excuse a student from attending school, including travel, if the student is in the conservatorship of DFPS, participating, as determined and documented by DFPS, in an activity:

- Ordered by a 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; or
- Required under a service plan under [Tex. Fam. Code Chapter 263, Subchapter B](#). [Tex. Educ. Code § 25.087\(b\)\(1\)\(F\)](#).

A student whose absence is excused under [Tex. Educ. Code § 25.087\(b\)](#) may not be penalized for that absence, shall be counted as if the student attended school for purposes of calculating the average daily attendance of students in the school district, and must be allowed a reasonable time to make up school work missed on those days. [Tex. Educ. Code § 25.087\(d\)](#).

**Special Issue:** If feasible, judges may consider scheduling court hearings for school-aged children outside of school hours. Additionally, to ensure a child does not incur unnecessary unexcused absences, it is helpful to clarify in the court order which appointments and activities require the child's presence or involvement.

## 4. Truancy

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With certain exceptions, if a student fails to attend school without excuse on 10 or more days or parts of days within a six-month period in the same school year, a school district shall within 10 school days of the student's 10th absence refer the student to a truancy court for truant conduct under [Tex. Fam. Code § 65.003\(a\)](#). [Tex. Educ. Code § 25.0951\(a\)](#). Truant conduct may be prosecuted only as a civil case in a truancy court. [Tex. Fam. Code § 65.003 \(b\)](#). However, if a student fails to attend school without excuse as specified by [Tex. Educ. Code § 25.0951\(a\)](#), a school district may file a complaint against the student's parent in a county, justice, or municipal court for an offense under [Tex. Educ. Code § 25.093](#), if the school district provides evidence of the parent's criminal negligence. [Tex. Educ. Code § 25.0951\(b\)](#).

A school district shall adopt truancy prevention measures designed to address student conduct related to truancy in the school setting before the student engages in conduct described by [Tex. Fam. Code § 65.003\(a\)](#) and minimize the need for referrals to truancy court for conduct described by [Tex. Fam. Code § 65.003\(a\)](#). [Tex. Educ. Code § 25.0915\(a\)](#). A school district shall offer additional counseling to a student and may not refer the student to truancy court if the school determines that the student's truancy is the result of being in the state foster program. [Tex. Educ. Code § 25.0915 \(a-3\)](#).

For more information, please see the [Texas Judicial Branch website truancy resources](#).<sup>58</sup>

## **5. Extracurricular Activities**

A child in foster care may attend a school in the district where the foster parent resides free of charge and a durational residence requirement may not be used to prohibit that child from fully participating in any activity sponsored by the school district. [Tex. Educ. Code § 25.001\(f\)](#). The Office of the Attorney General of Texas interpreted this language to mean that the University Interscholastic League cannot apply any durational residency requirement to children placed in foster care, regardless of whether the placement is the child's first placement or a move from one placement to another.<sup>59</sup>

## **6. Discipline**

If a school district permits the use of corporal punishment as a method of student discipline, the person having lawful control of a student must provide a signed, written statement each school year to prohibit corporal punishment for that student. [Tex. Educ. Code § 37.0011\(c\)](#). It is CPS policy to prohibit the use of corporal punishment for all children in foster care and caregivers are directed to "opt out" of school policy on corporal punishment in writing on an annual basis.<sup>60</sup>

In 2015, the [Tex. Educ. Code Chapter 37](#) was amended to require the designation of a person to serve as the campus behavior coordinator. [Tex. Educ. Code § 37.0012](#). In addition to other duties, the campus behavior coordinator must promptly notify the student's parent or guardian if the student is placed into in-school or out-of-school suspension, placed in a disciplinary alternative education program, expelled, or placed in

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a juvenile justice alternative education program or is taken into custody by a law enforcement officer. [Tex. Educ. Code § 37.0012\(d\)](#). A campus behavior coordinator must:

- Promptly contact the parent or guardian by telephone or in person; and
- Make a good faith effort to provide written notice of the disciplinary action to the student, on the day the action is taken, for delivery to the student’s parent or guardian. [Tex. Educ. Code § 37.0012\(d\)](#).

[Tex. Educ. Code § 37.0012](#) also allows for written notice to be mailed or given by the principal or other designee if the parent or guardian is not reached on the first business day. [Tex. Educ. Code § 37.0012\(e\)](#) and [Tex. Educ. Code § 37.0012\(f\)](#).

With limited exceptions for serious offenses, a student who is enrolled in a grade level below grade three may not be placed in out-of-school suspension. [Tex. Educ. Code § 37.005](#).

## 7. High School Graduation

Beginning with the 2014-2015 school year, the minimum, recommended, and advanced high school programs were replaced with the foundation program. [Tex. Educ. Code § 28.025\(h\)](#). Graduation planning now includes review of a personal graduation plan (PGP) for some junior high or middle school students and all high school students. [Tex. Educ. Code § 28.0212](#) and [Tex. Educ. Code § 28.02121](#). For further information on the graduation programs, please see the [TEA Graduation Toolkit](#).<sup>61</sup>

**Special Issue:** A PGP provides each student with a roadmap for academic progress, graduation, and college and career readiness. A PGP is a helpful tool to keep students in foster care on track for graduation, especially when their progress is disrupted by school changes.

Until September 2019, if a student in the 11th or 12th grade has failed to comply with the end-of-course assessment instrument performance requirements under [Tex. Educ. Code § 39.025](#) for not more than two courses, the school district that the student attends shall establish an individual graduation committee at the end of or after the student’s 11th grade year to determine whether the student may qualify to graduate. [Tex. Educ. Code § 28.0258](#).<sup>62</sup>

If an 11<sup>th</sup> or 12<sup>th</sup> grade student in the conservatorship of DFPS 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\(i\)](#).

## F. Special Education and Section 504

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## 1. The Individuals with Disabilities Education Act (IDEA)

Under IDEA, all children with disabilities between the ages of 3 and 21 are entitled to a free, appropriate public education (FAPE). [20 U.S.C. § 1412\(a\)\(1\)\(A\)](#). A child qualifies for special education if he or she has an identified disability and that disability adversely affects the child's performance in school. [20 U.S.C. § 1400 et seq.](#) and [Tex. Educ. Code § 29.003](#).

## 2. Section 504

Section 504 of the Rehabilitation Act of 1973 (Section 504) is a federal law aimed at protecting individuals from discrimination on the basis of a physical or mental disability that substantially impairs a major life activity.<sup>63</sup> [29 U.S.C. § 794](#).

**Special Issue:** Some children may qualify for Section 504 accommodations to “level the playing field” without changing what the child is expected to master. For example, a child with dyslexia may not be eligible for special education services, but might qualify for Section 504 accommodations, such as additional time to complete an exam or preferred seating in the classroom.

## 3. Referral and Consent

School districts have a "Child Find" duty to identify, locate, and evaluate children with disabilities to determine which children are currently receiving needed special education and related services. [20 U.S.C. § 1412\(a\)\(3\)\(A\)](#).

If a parent or legal guardian makes a written request to a school district's director of special education services or to a district administrative employee for a full individual and initial evaluation of a student, the district shall, not later than the 15th school day after the date the district receives the request:

- Provide an opportunity for the parent or legal guardian to give written consent for the evaluation; or
- Refuse to provide the evaluation and provide the parent or legal guardian with notice of procedural safeguards under [20 U.S.C. § 1415\(b\)](#). [Tex. Educ. Code § 29.004\(c\)](#).

If the rights of a parent have been terminated or subrogated by court order or the school has made reasonable efforts and cannot locate the parent, an initial evaluation may be initiated without parental consent. [20 U.S.C. § 1414\(a\)\(1\)\(D\)\(iii\)](#).

The school has 45 days to complete a full individual and initial evaluation of the student for special education services. [Tex. Educ. Code § 29.004\(a\)\(1\)](#).

## 4. Individualized Education Program (IEP)

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Children who receive special education services will have an IEP. [20 U.S.C. § 1414\(d\)](#). Members of the child’s IEP team, known in Texas as the ARD committee, participate in the formulation and approval of the IEP.<sup>64</sup> [Tex. Educ. Code § 29.005](#).

It is the responsibility of the school district to ensure the ARD Committee includes:

- The parents of a child with a disability;
- Not less than one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- Not less than one special education teacher, or where appropriate, not less than one special education provider of such child;
- A representative of the local educational agency who:
  - is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - is knowledgeable about the general education curriculum; and
  - is knowledgeable about the availability of resources of the local educational agency;
- An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in [20 U.S.C. § 1414\(d\)\(1\)\(B\)\(ii\) – \(vi\)](#);
- At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- Whenever appropriate, the child with a disability. [20 U.S.C. § 1414\(d\)\(1\)\(B\)](#).

## 5. Special Education Transitions

A receiving school must accept a referral for special education services made for a student in substitute care by a school previously attended by the student. [Tex. Educ. Code § 25.007\(b\)\(9\)](#). If there is an existing IEP for the child, the receiving school must provide services comparable to those described in the previous IEP, until it either adopts the previous IEP or develops a new IEP. [20 U.S.C. § 1414\(d\)\(2\)\(C\)\(i\)\(I\)](#) and [Tex. Educ. Code § 25.007\(b\)\(9\)](#).

## 6. Manifestation Determination Review

The right to FAPE includes students who have been suspended or expelled from school. [20 U.S.C. § 1412\(a\)\(1\)\(A\)](#). If a student with a disability is removed for more than 10 school

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days, members of the ARD committee must conduct a manifestation determination review to determine if:

- The conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
- The conduct in question was the direct result of the local educational agency’s failure to implement the IEP. [20 U.S.C. § 1415\(k\)\(1\)\(E\)](#).

## 7. Graduation

A child who successfully completes their IEP under [Tex. Educ. Code § 29.005](#) is eligible for a high school diploma. [Tex. Educ. Code § 28.025\(c\)](#).

# G. Eligibility for Special Programs

## 1. Prekindergarten

A school district must offer free prekindergarten if it identifies at least 15 eligible children who are at least four years old. [Tex. Educ. Code § 29.153\(a-1\)](#). A child is eligible for prekindergarten, without paying tuition, if the child is or ever has been in the conservatorship of DFPS following an Adversary Hearing held as provided by [Tex. Fam. Code § 262.201](#). [Tex. Educ. Code § 29.153\(b\)\(6\)](#).

**Special Issue:** The school district will require a prekindergarten verification letter from DFPS to verify eligibility for children currently or formerly in DFPS conservatorship.

## 2. Compensatory, Intensive, or Accelerated Instruction

Students in foster care are considered to be at risk of dropping out of school and are eligible for supplemental education services. [Tex. Educ. Code § 29.081\(d\)\(11\)](#). A school district shall offer an intensive program of instruction to any student who does not perform satisfactorily on an assessment instrument administered under [Tex. Educ. Code Chapter 39, Subchapter B](#), or is not likely to receive a high school diploma before the fifth school year following the student’s enrollment in the 9<sup>th</sup> grade, as determined by the district. [Tex. Educ. Code § 28.0213\(a\)](#).

## 3. Nutrition

Students in foster care are categorically eligible for all U.S. Department of Agriculture child nutrition programs including: the National School Lunch Program /School Breakfast Program, Special Milk Program, Fresh Fruit and Vegetable Program, Summer Food Service Program, and the Child and Adult Care Food Program. [42 U.S.C. § 1758](#).

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**Special Issue:** Schools use DFPS Form 2085 to verify that a child is in foster care and thus eligible for free school meals. If it is not otherwise addressed in the court reports, a court might ask the caseworker about whether the child's nutritional needs are being met in both the school and home settings.

#### **4. Texas Virtual School Network (TxVSN)**

Each school district must have a written policy about opportunities to enroll in electronic courses provided by TxVSN. [Tex. Educ. Code § 30A.007](#). Children in foster care are eligible for part or full time enrollment in the TxVSN, regardless of whether the student was enrolled in a public school in this state in the preceding school year. [Tex. Educ. Code § 30A.002](#).

**Special Issue:** The TxVSN is an online resource offered by state certified teachers that can assist students in foster care with obtaining course credit. On a case by case basis, DFPS will determine whether enrollment in virtual instruction is appropriate for a child in foster care. If the child receives special education services, that determination will be made in consultation with the child's ARD committee.

#### **5. Early College**

An at risk student, as defined by [Tex. Educ. Code § 29.081](#), can participate in an early college education program that:

- Enables a participating student to combine high school courses and college-level courses during grade levels 9 through 12;
- Allows a participating student to complete high school and, on or before the fifth anniversary of the date of the student's first day of high school, receive a high school diploma and either an associate degree; or at least 60 semester credit hours toward a baccalaureate degree;
- Includes articulation agreements with colleges, universities, and technical schools in this state to provide a participating student access to postsecondary educational and training opportunities at a college, university, or technical school; and
- Provides a participating student flexibility in class scheduling and academic mentoring. [Tex. Educ. Code § 29.908](#).

#### **6. Dual Credit**

Each school district shall implement a program under which students may earn the equivalent of at least 12 semester credit hours of college credit in high school. [Tex. Educ. Code § 28.009\(a\)](#).

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A program implemented under [Tex. Educ. Code § 28.009](#) must provide a student the opportunity to earn credit for a course or activity, including an apprenticeship or training hours:

- That satisfies a requirement necessary to obtain an industry-recognized credential or certificate or an associate degree and is approved by the Texas Higher Education Coordinating Board (THECB); and
- For which a student may earn credit concurrently toward both the student's high school diploma and postsecondary academic requirements. [Tex. Educ. Code § 28.009\(a-1\)](#).

A school district is not required to pay a student's tuition or other associated costs for taking a course under this section. [Tex. Educ. Code § 28.009\(a-2\)](#).

## H. Post-Secondary Opportunities

**Special Issue:** During hearings involving middle and high school students in foster care, courts may inquire about the youth's post-secondary education goals. If the youth or caregiver is present at the hearing, a court may encourage options, including vocational and technical training, certificate programs, and two and four-year higher education opportunities.

### 1. Tuition and Fee Waiver

A student is exempt from the payment of tuition and fees, including tuition and fees charged by an institution of higher education for a dual credit course or other course for which a high school student may earn joint high school and college credit, if the student:

- Was in the conservatorship of DFPS:
  - on the day preceding the student's on his or her 18th birthday; or
  - on or after the student's 14<sup>th</sup> birthday, if the student was also eligible for adoption on or after that day; or
  - on the day the student graduated from high school or received the equivalent of a high school diploma; or
  - on the day preceding the date the student is adopted or PMC is awarded to a person other than a parent, if that date is on or after September 1, 2009; or
  - during an academic term in which the student was enrolled in a dual credit course or other course for which a high school student may earn joint high school and college credit; and
- Enrolls in an institution of higher education as an undergraduate student or in a

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dual credit course or other course for which a high school student may earn joint high school and college credit not later than the student's 25th birthday. [Tex. Educ. Code § 54.366\(a\)](#).

Notwithstanding [Tex. Educ. Code Ann § 54.366\(a\)\(1\)](#), a child who exits the conservatorship of DFPS and is returned to the child's parent, including a parent whose parental rights were previously terminated, may be exempt from the payment of tuition and fees if DFPS determines that the child is eligible under department rule. [Tex. Educ. Code § 54.366\(c\)](#). Youth age 14 or older in PMC or youth age 16 or older in TMC who subsequently exit conservatorship to the legal responsibility of a parent are eligible for the tuition and fee waiver. [40 Tex. Admin. Code § 700.1630\(a\)](#). If after exiting the foster care system the youth returns to DFPS conservatorship, the youth's eligibility will be based on their current foster care circumstances. [40 Tex. Admin. Code § 700.1630\(b\)](#).

A student is also exempt from the payment of tuition and fees if the student was adopted and was the subject of an adoption assistance agreement under [Tex. Fam. Code Chapter 162, Subchapter D](#), that:

- Provided monthly payments and medical assistance benefits; and
- Was not limited to providing only for the reimbursement of nonrecurring expenses, including reasonable and necessary adoption fees, court costs, attorney's fees, and other expenses directly related to the legal adoption of the child. [Tex. Educ. Code § 54.367\(a\)](#).

Note, [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](#) or [Tex. Educ. Code § 54.367](#). [Tex. Educ. Code § 54.2001\(g\)\(3\)](#).

## **2. Information about Higher Education**

TEA and the THECB must develop outreach programs to ensure that students in the conservatorship of DFPS or adopted students in grades 9-12 are aware of the availability of the exemptions from the payment of tuition and fees. [Tex. Educ. Code § 54.366\(b\)](#) and [Tex. Educ. Code § 54.367\(b\)](#).

TEA must also develop procedures to 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\(b\)\(13\)](#).

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**Special Issue:** Regional Preparation for Adult Living staff or the adoption eligibility specialists determine eligibility for the tuition and fee waiver. For more information about informing youth and young adults about the waiver, please see CPS Policy Handbook Section 10300, located online at:

[https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x10300.asp#CPS\\_10311](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10300.asp#CPS_10311).

In coordination with DFPS, each school district must facilitate the transition of each child enrolled in the district who is eligible for a tuition and fee waiver under [Tex. Educ. Code § 54.366](#), and who is likely to be in the conservatorship of the department on the day preceding the child's 18th birthday to an institution of higher education by:

- Assisting the child with the completion of any applications for admission or for financial aid;
- Arranging and accompanying the child on campus visits;
- Assisting the child in researching and applying for private or institution-sponsored scholarships;
- Identifying whether the child is a candidate for appointment to a military academy;
- Assisting the child in registering and preparing for college entrance examinations, including, subject to the availability of funds, arranging for the payment of any examination fees by the department; and
- Coordinating contact between the child and a liaison officer designated under [Tex. Educ. Code § 61.0908](#) for students formerly in DFPS conservatorship. [Tex. Fam. Code § 264.1211\(c\)](#).

**Special Issue:** To encourage postsecondary success, it is important for the court, attorneys ad litem, schools, caseworkers, and others to explain the tuition and fee waiver and other benefits to assist youth with the transition out of foster care. A great resource for youth in care is the DFPS Texas Youth Connection, available online at:

<https://www.dfps.state.tx.us/txyouth/>.

### **3. Education Training Voucher (ETV) and Other Programs**

Under the *John H. Chaffee Foster Care Independence Program*, eligible youth are entitled to up to \$5,000 a year to cover education-related expenses from the federal ETV program.<sup>65</sup> [42 U.S.C. § 677](#). For more details about the DFPS Preparation for Adult Living services and other higher education resources, please see [DFPS Transitional Living Services](#).<sup>66</sup>

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#### 4. Liaisons at the THECB and Institutions of Higher Education

Each institution of higher education, as defined by [Tex. Educ. Code § 61.003](#), must designate at least one employee of the institution to act as a liaison officer for current and incoming students at the institution who were formerly in the conservatorship of DFPS. The liaison officer shall provide to those students information regarding support services and other resources available to the students at the institution and any other relevant information to assist the students. [Tex. Educ. Code § 51.9356\(b\)](#).

The THECB shall designate at least one employee of the board to act as a liaison officer for current and incoming students at institutions of higher education who were formerly in the conservatorship of DFPS. The liaison officer shall assist in coordinating college readiness and student success efforts relating to those students. [Tex. Educ. Code § 61.0908](#).

**Special Issue:** Contact information for designated liaisons at Texas institutions of higher education is available online at:

<http://www.collegeforalltexas.com/apps/financialaid/tofa2.cfm?ID=429>.

### I. Resources

#### **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 (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:

- Judicial practices;
- Data and information sharing;
- Multi-disciplinary training;

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- School readiness;
  - School stability and transitions;
  - School experience, supports, and advocacy;
  - Post-secondary education; and
  - 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\*](#), found at:

<http://texaschildrenscommission.gov/media/1119/thetexasblueprint.pdf>

### **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, DFPS, and local school districts.

Texas's second Foster Care and Education Summit took brought together over 200 judges, attorneys, advocates, educators, child welfare professionals, and young adults formerly in care from every region in Texas. The Summit highlighted the need for state, regional, and local collaboration, the importance of school stability, postsecondary opportunities, special education, school discipline, and early education.

### **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 February 2015, the Task Force assessed progress and presented recommendations for future collaboration in the [\*Texas Blueprint Implementation Task Force Final Report\*](#).<sup>67</sup> The Children's Commission created a standing Foster Care and Education Committee in 2015 to systematically address the intermediate and long term goals of the *Texas Blueprint*.

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## Resource Guide for Foster Care Liaisons in School Districts

TEA, DFPS, and the Children’s Commission collaborated on a resource guide for education professionals 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](#),<sup>68</sup> In addition, TEA has additional resources that may be found on the Foster Care and Student Success webpage, listed below.

### Texas Court Appointed Special Advocates (CASA) Educational Advocacy Toolkit

Initially a deliverable of the Implementation Task Force Training Workgroup, Texas CASA developed the [Educational Advocacy Guidebook](#) to provide guidance on a variety of education-related issues. The guidebook includes tips and resources for CASA volunteers.<sup>69</sup>

### Foster Care and Education Data Workgroup Infographic

In November 2015, the Data Workgroup released an infographic prepared by the University of Texas at Austin entitled, [Texas Commits to Transform Education Outcomes of Students in Foster Care: Findings from the Texas Blueprint Implementation Data Workgroup](#).<sup>70</sup> The infographic highlights the education outcomes of students in foster care in Texas and emphasizes the importance of collaboration and using data to drive decision-making.

### Confidentiality Guide

In April 2017, DFPS, TEA, and the Children’s Commission developed guidance around [Information Sharing between Child Welfare and Schools: Maintaining Privacy and Promoting Educational Success](#).<sup>71</sup> The document provides information about when and how to share child welfare and education information while respecting confidentiality.

### Transition Planning

DFPS, TEA, and the Children’s Commission created a [Transition Planning Guide for Students in Foster Care Receiving Special Education Services](#).<sup>72</sup> The Guide includes a side by side comparison of the transition planning processes in the special education and child welfare systems, revealing best practices to encourage improved collaboration and outcomes.

### Higher Education Information and Resource Guide

In June 2017, DFPS, THECB, Education Reach for Texans, and the Children’s Commission collaborated on the [Texas Higher Education Information and Resource Guide for Foster Care Liaisons](#).<sup>73</sup> Although the guide is designed with the higher education foster care liaison in mind, it is also available as a resource for the legal community to encourage improved postsecondary outcomes for foster care alumni.

## Judicial Checklists

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*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 on education, found at:

<http://benchbook.texaschildrenscommission.gov/>.

## **Websites**

American Bar Association Legal Center on Foster Care and Education website:  
<http://www.fostercareandeducation.org/Home.aspx>.

Child Protective Services Policy Handbook on Education:  
<https://www.dfps.state.tx.us/handbooks/CPS/Menu/MenuCPSa15000.asp>.

Texas Education Agency (TEA) Foster Care and Student Success website:  
<http://tea.texas.gov/FosterCareStudentSuccess/>.

Children's Commission Foster Care and Education website:  
<http://texaschildrenscommission.gov/our-work/foster-care-education/>

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# EVIDENCE IN CPS CASES

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CPS cases present evidentiary situations and procedures unique to this area of the law. This chapter will provide an overview of statutory provisions related to CPS cases.

## A. Applicability of Rules of Evidence

Unless otherwise provided, the Texas Rules of Evidence apply as in other civil cases. [Tex. Fam. Code § 104.001](#).

## B. Facilitating Child Testimony at Trial

### 1. Prerecorded Statement of Child

If a child 12 years of age or younger is alleged in a suit under [Tex. Fam. Code Title 5](#) to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:

- No attorney for a party was present when the statement was made;
- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- The statement was not made in response to questioning calculated to lead the child to make a particular statement;
- Each voice on the recording is identified;
- The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
- Each party is afforded the opportunity to view the recording before it is offered into evidence. [Tex. Fam. Code § 104.002](#).

### 2. Prerecorded Videotaped Testimony of the Child

The court may, on the motion of a party to the proceeding, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding. [Tex. Fam. Code § 104.003\(a\)](#).

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Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony. [Tex. Fam. Code § 104.003\(b\)](#).

Only the attorneys for the parties may question the child. [Tex. Fam. Code § 104.003\(c\)](#).

The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them. [Tex. Fam. Code § 104.003\(d\)](#).

The court shall ensure that:

- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and not altered;
- Each voice on the recording is identified; and
- Each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom. [Tex. Fam. Code § 104.003\(e\)](#).

### **3. Remote Televised Broadcast of Testimony of Child**

If in a suit a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties. [Tex. Fam. Code § 104.004\(a\)](#).

The procedures that apply to prerecorded videotaped testimony of a child [see [Tex. Fam. Code § 104.003](#)] apply to the remote broadcast testimony of a child. [Tex. Fam. Code § 104.004\(b\)](#).

### **4. Substitution for In-Court Testimony of Child**

If the testimony of a child is taken as provided by [Tex. Fam. Code Chapter 104](#), the child may not be compelled to testify in court during the proceeding. [Tex. Fam. Code § 104.005\(a\)](#).

The court may allow the testimony of a child of any age to be taken in any manner provided by [Tex. Fam. Code Chapter 104](#) if the child, because of a medical condition, is incapable of testifying in open court. [Tex. Fam. Code § 104.005\(b\)](#).

### **5. Hearsay Statement of Child Abuse Victim**

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In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

- The child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
- The court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child. [Tex. Fam. Code § 104.006](#).

### C. Video Testimony of Certain Professionals

In a proceeding brought forth by DFPS concerning a child who is alleged in a suit to have been abused or neglected, the court may order that the testimony of a professional be taken outside the courtroom by videoconference:

- On the agreement of the department's counsel and the respondent's counsel; or
- If good cause exists, on the court's own motion. [Tex. Fam. Code § 104.007\(b\)](#).

In ordering testimony to be taken as provided by [Tex. Fam. Code § 104.007\(b\)](#), the court shall ensure that the videoconference testimony allows:

- The parties and attorneys involved in the proceeding to be able to see and hear the professional as the professional testifies; and
- The professional is able to see and hear the parties and attorneys examining the professional while the professional is testifying. [Tex. Fam. Code § 104.007\(c\)](#).

Professional means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. [Tex. Fam. Code § 104.007\(a\)](#); [Tex. Fam. Code § 261.101\(b\)](#).

If the court permits the testimony of a professional by videoconference as provided by [Tex. Fam. Code § 104.007](#) to be admitted during the proceeding, the professional may not be compelled to be physically present in the court during the same proceeding to provide the same testimony unless ordered by the court. [Tex. Fam. Code § 104.007\(d\)](#).

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## D. Allegations of Abuse and Neglect and Attorney-Client Privilege

### 1. Requirement to Report

The requirement to report child abuse and neglect under [Tex. Fam. Code § 261.101](#) applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services. [Tex. Fam. Code § 261.101\(c\)](#).

### 2. Privileged Communication

In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of a privileged communication except in the case of communications between an attorney and client. [Tex. Fam. Code § 261.202](#).

## E. Testimony of Children’s Ad Litem

### 1. Attorney ad Litem

An attorney ad litem or an attorney serving in the dual role may not:

- Be compelled to produce attorney work product developed during the appointment as an attorney;
- Be required to disclose the source of any information;
- Submit a report into evidence; or
- Testify in court except as authorized by Tex. Disciplinary Rules Prof’l Conduct R. 3.08. [Tex. Fam. Code § 107.007\(a\)](#).

[Tex. Fam. Code § 107.007\(a\)](#) does not apply to the duty of an attorney to report child abuse or neglect under [Tex. Fam. Code § 261.101](#). [Tex. Fam. Code § 107.007\(b\)](#).

### 2. Guardian ad Litem

Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem’s recommendations relating to:

- The best interests of the child; and

- 
- The bases for the guardian ad litem's recommendations. [Tex. Fam. Code § 107.002\(e\)](#).

In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative. [Tex. Fam. Code § 107.002\(f\)](#).

In a contested case, the guardian ad litem shall provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

- The date required by the scheduling order; or
- The 10<sup>th</sup> day before the date of the commencement of the trial. [Tex. Fam. Code § 107.002\(g\)](#).

Disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to the Texas Rules of Evidence. [Tex. Fam. Code § 107.002\(h\)](#).

## **F. Prohibition of Certain Testimony Not Applicable in DFPS Cases**

[Tex. Fam. Code § 104.008](#) requiring an expert to conduct a child custody evaluation prior to testifying about conservatorship or possession of or access to a child does not apply to a suit in which DFPS is a party. [Tex. Fam. Code § 104.008\(c\)](#).

## **G. Resources**

Evidence – Update and Current Issues, Heather L. King and Jessica Hall Janicek, State Bar of Texas 40<sup>th</sup> Annual Advanced Family Law Course, August 4-7, 2014.

Evidence Jeopardy – It's All about the Hearsay, Heather L. King and Jessica Hall Janicek, State Bar of Texas Judges and Associate Judges Program, August 5, 2015.

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# EXTENDING FOSTER CARE FOR TRANSITIONING YOUTH

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## A. Extended Jurisdiction

Federal law (Fostering Connections Act) allows a youth to voluntarily remain in foster care after their 18th birthday – referred to as "Extended Foster Care", if they meet certain requirements such as staying in school, working, or participating in a job training program. Extended Foster Care is eligible for Title IV-E funding from the federal government until the youth's 21st 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 the 18th birthday for at least six months. Per [Tex. Fam. Code § 263.601 et seq.](#), the court must conduct periodic hearings every six months, and must make specific findings. The court must also maintain jurisdiction over the youth age 18 or older who temporarily leaves foster care for a "trial independence" period so that if/when the youth returns to foster care, the youth (and the State) will not lose eligibility for federal funding. This statutory structure assists the child welfare agency in ensuring federal funding to assist with extended foster care services. Without it, DFPS would not be able to serve many of the youth who leave foster care after turning 18 and later find they need to return to care for additional supports and services while they transition to independence.

## B. Trial Independence

Trial Independence, found in [Tex. Fam. Code § 263.6015](#), allows youth to voluntarily exit foster care after their 18th birthday, and then decide to voluntarily return to foster care within six months (or within a 12 month period if authorized by a court order) for additional support. The court retaining jurisdiction allows DFPS to draw down federal dollars to help provide services to youth who exit and later return to care. If a Trial Independence period is ending, and the youth does not wish to return to Extended Foster Care, the Court can still keep the case open, and the Court can maintain jurisdiction up to age 21, upon request by the youth. [Tex. Fam. Code § 263.6015](#).

## C. Supervised Independent Living

The Supervised Independent Living (SIL) program allows a youth to live in residential foster care in a more independent setting, including apartments, dorms and shared housing. Young adults receive casework and support services to help them become independent and self-sufficient.

If a youth is placed in a SIL program, CPS does not supervise the youth's living situation or maintain contact unless the youth is receiving transitional living services such as the

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Transitional Living Allowance and Aftercare Room and Board, Education and Training Voucher, and Aftercare case management.

For more information, please see the [Extended Court Jurisdiction Flowchart](#), [Extended Jurisdiction Matrix](#), and the [Transitional Living Services Handout](#) developed by DFPS.<sup>74</sup>

Through SIL a young adult has:

- **Increased responsibilities**
  - Manage their own finances
  - Buying groceries/personal items
  - Working with a Landlord
- **Help transitioning to independent living**
  - Achieving identified education and employment goals
  - Accessing community resources
  - Engaging in needed life skills training
  - Establishing important relationships

## D. Eligibility Requirements for SIL?

SIL is available for a young adult who is able to:

- Demonstrate a reasonable level of maturity and ability to manage the expectations required in a SIL setting with minimal supervision and case management; and able to
- Meet [eligibility requirements](#) for Extended Foster Care.
- The young adult in a SIL placement must meet the Extended Foster Care eligibility requirements within 30 days of placement.
- A 17-year-old youth in DFPS conservatorship may apply for a SIL placement but is not eligible for placement until the 18th birthday.

## E. SIL Settings

SIL settings can include:

- Apartments
- Non-College Dorms

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- College Dorms
  - Shared Housing
  - Host Homes

[Read more about SIL setting types.](#)

## F. Requesting a SIL Placement

**Step 1:** The young adult discusses SIL with the caseworker. The young adult completes the DFPS a SIL Application and gives to the DFPS caseworker.

**Step 2:** The DFPS caseworker sends the completed and approved SIL Application to the SIL Coordinator through a mailbox established by DFPS. The SIL Coordinator in the DFPS State Office send the referral to the SIL Contractor(s) that have available openings.

**Step 3:** The DFPS caseworker discuss the available SIL placement options with the young adult. The young adult has the option to accept a SIL placement in any DFPS Region where a SIL setting has been established.

**Step 4:** At the young adult's direction, the DFPS caseworker sends the required forms and the SIL application to contracted SIL provider(s).

**Step 5:** Upon initial acceptance by a SIL provider, the young adult and DFPS caseworker hold discussions with the SIL provider. If the young adult, DFPS caseworker and SIL provider agree on the placement, a placement date is identified, and the placement is completed.

For more information, refer to the SIL policy on [Requesting a SIL Placement](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10400.asp#CPS_10484) at [https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x10400.asp#CPS\\_10484](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10400.asp#CPS_10484) .

## G. Resources

DFPS website:

- Extended Court Jurisdiction Flowchart:  
[http://www.dfps.state.tx.us/Child\\_Protection/Youth\\_and\\_Young\\_Adults/Transitional\\_Living/Extended\\_Foster\\_Care/documents/Extended\\_Court\\_Jurisdiction\\_Flow\\_Chart.pdf](http://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/documents/Extended_Court_Jurisdiction_Flow_Chart.pdf)
- Extended Foster Care webpage:  
[https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x10400.asp](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10400.asp)
- Extended Foster Care Resource Guide:  
[https://www.dfps.state.tx.us/handbooks/CPS/Resource\\_Guides/Extended\\_Foster\\_Care\\_Resource\\_Guide.pdf](https://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Extended_Foster_Care_Resource_Guide.pdf)

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- Supervised Independent Living:  
[https://www.dfps.state.tx.us/Child\\_Protection/Youth\\_and\\_Young\\_Adults/Transitional\\_Living/Extended\\_Foster\\_Care/supervised\\_independent\\_living.asp](https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/supervised_independent_living.asp)
  - Transitional Living Services Handout:  
[https://www.dfps.state.tx.us/Child\\_Protection/Youth\\_and\\_Young\\_Adults/Transitional\\_Living/documents/Transitional\\_Living\\_Services\\_Handout.pdf](https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/documents/Transitional_Living_Services_Handout.pdf)

Texas Rio Grande website:

- Legal Aid Foster Youth Justice Project Extended Jurisdiction Matrix:  
<http://www.texasfosteryouth.org/downloads/ExtendedJurisdictionMatrixFinal.pdf>

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# FAMILY VISITATION

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## A. Court Duties

Per [Tex. Fam. Code § 263.107](#), not later than the 30th day after the date DFPS is named TMC of a child for whom the goal of DFPS is reunification with the parent, it must develop a visitation plan in collaboration with each parent. In determining the frequency and circumstances of visitation, DFPS is to consider the safety and best interest of the child, the child's age, the desires of each parent regarding visitation with the child, the location of each parent and the child, and the resources available to DFPS, including resources to ensure visitation is properly supervised and provide transportation to the visit. Please see the [DFPS Visitation Plan template](#) for more information.<sup>75</sup>

DFPS must file the visitation plan with the court 10 days before the Status Hearing, and the court must review the plan, taking into consideration those factors specified in [Tex. Fam. Code § 263.107](#).

Per [Tex. Fam. Code § 263.108](#), after reviewing an original or amended visitation plan, the court must render an order regarding the parent's visitation with a child that the court determines is appropriate. Parents may petition the court to request review and modification of an original or amended plan. [Tex. Fam. Code § 263.108\(c\)](#).

[Tex. Fam. Code § 263.109](#) states that 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 states the reasons that visitation is not in the best interest of the child, and that outlines specific steps the parent must take to have visitation. DFPS has developed a "No Contact Visitation Plan" that requires documentation of why visitation is not in the child's best interest and what needs to occur in order for contact or visitation to begin. [Tex. Fam. Code § 263.109\(b\)](#). Please see the [DFPS No Contact Visitation Plan template](#) for more information.<sup>76</sup>

Also, if the order requires supervised visitation, it must outline specific steps the parent must take to have the level of supervision reduced. [Tex. Fam. Code § 263.109\(c\)](#).

## B. DFPS Best Practice Guide

DFPS issued a [Visitation Best Practice Guide](#) for the field in October 2014.<sup>77</sup> This guide provides Department employees with policy, guidance, and tools to assess the appropriateness of visitation, how to develop the visitation plan, how to engage fathers and other family members in the visitation process, the role of the foster parents, and how to move from one level of supervision to another.

### 1. Basic Principles Promoted by the Best Practice Guide

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### **a. Visitation is essential for a child's well-being**

The primary purpose of visitation is to maintain the parent-child attachment, reduce a child's sense of abandonment, and preserve their sense of belonging as part of a family and community. A child needs to see and have regular contact with their parent(s) and siblings, as these relationships are the foundation of child development.

### **b. Visitation is fundamental to permanency**

Visitation facilitates permanency planning, promotes timely reunification, and helps in the decision-making process to establish alternative permanency plans. Visitation maintains and supports the parent-child relationship necessary for successful reunification.

### **c. Visitation is vital to a child maintaining family relationships and cultural connections**

Maintaining family connections has life-long significance for a child. Regular visitation maintains their relationships with siblings and others who have a significant role in a child's life. When a child loses family connections, they also lose family history, medical history and cultural information. Visitation is considered the heart of reunification, but even when reunification is not likely, parents, siblings and extended family continue to be important in a child's life.

### **d. Visitation and family contact should never be used as a reward or punishment but should always be considered a right of families and children**

*The absence of regular and frequent parent-child visitation or contact may have serious consequences for both a child and parent(s). Without visitation, the relationship can deteriorate, and both can become emotionally detached. When parent-child attachment suffers, reunification becomes more difficult.*

## **2. Benefits of Parent-Child Visitation**

- Supports parent-child attachment
- Eases the pain of separation for all
- Maintains and strengthens family relationships
- Reassures a child that their parents/primary caregiver are alright and helps the child to not blame themselves for placement
- Supports the family in dealing with changing relationships
- Motivates parent to make positive changes in their life by providing reassurance that the parent-child relationship is important for a child's well-being

- Provides opportunities for parent(s) to learn and try new skills
- Supports a child’s adjustment to the foster home
- Enables the parent(s) to be active and stay current with their child’s development, educational and medical needs, church and community activities
- Provides opportunities for parent(s) to assess how their child is doing, and share information about how to meet their child’s needs
- Assists in the assessment and decision-making process regarding parenting capacities and permanency goals
- Reduces the time in out-of-home care
- Increases the likelihood of reunification

### 3. Supervision

If DFPS recommends to the court that visits be supervised, the visitation plan should include a summary statement of the assessed safety reasons supervision is necessary. In addition, parent(s) should clearly understand the specific safety factors preventing less restrictive contact with their child and what demonstrated changes will assist the caseworker in being able to make recommendations lifting supervision requirements.

## C. Stages of Supervision

	<b>Unsupervised</b>	<b>Low</b>	<b>Medium</b>	<b>High</b>
	Parent(s) can be alone with child.  No monitor is present during the visit.	Visitation where the monitor may be present for a portion of the visit. Parent(s) would have some time alone with their child.	Visitation where the monitor is close enough to observe the visit but is not required to hear everything that is said in the visit between the parent(s) and child. Parent(s) may have some time alone with their child if the monitor ensures certain conditions are satisfied.	Child may not be removed from the presence of the monitor. Parent(s) cannot be alone with their child.

	<b>Unsupervised</b>	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>Stage of Supervision</b>	<i>Example: Day and Overnight visits; visits at the kinship placement.</i>	<i>Example: Visits at the park or the parents' home where the caseworker or monitor may supervise the visit for 15 minutes then leave the child with the parent(s) for 30 minutes and then return to observe the last 15 minutes.</i>	<i>Example: Parent(s) can take the child to the bathroom alone. Parent(s) can play with the child at the playground while the monitor observes from a distance.</i>	<i>Example: Parent(s) must be within hearing distance and intervention distance of the monitor and cannot be alone with the child under any circumstance.</i>
<b>Safety Assessment</b>	Unsupervised visitation would be used when the caseworker determines no safety concerns exist that prohibit the parent(s) and child from being alone during the visit. This stage may be used while the child is in care and immediately prior to reunification.	Low supervision would primarily be used when the caseworker determines that there is a low level of concern for the child's safety but still a need for parental education, coaching, and skill-building.	Medium supervision would be used when the caseworker determines there is a moderate level of concern for the child's safety and coaching, education, and skill-building are necessary. Visitation assessment determines safety factors that must be addressed in visitation plan.	Highly structured visitation would most likely be used if there is a high level of concern assessed for a child's physical or emotional safety during a visit.

	<b>Unsupervised</b>	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>Visitation Location</b>	Parent(s) and Caseworker determine visitation location.	Visitation location is a community based or "home-like" setting and offers parent(s) the opportunity to develop parenting skills or improve parent-child interactions. Visits may occur in more than one place, including appointments with therapists or other professionals, and continue at the parents' home, relative's home, or other community setting.	Visitation location is a home-like setting to offer parent(s) the opportunity to develop parenting skills and improve parent-child interactions, as well as manage safety concerns. Locations may include parents' home, relative's home, professional's office, park or other community setting.	Visitation location would ensure a highly structured visit. Locations may include the CPS visiting room, professional's office or other secure location.

	<b>Unsupervised</b>	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>Monitor's Role</b>	No monitor. Parent(s) provides feedback about the visit.	Monitor's role is primarily to aid the parent(s) in problem solving if issues arise. The monitor may also offer the parent(s) education, coaching, skills building and support to achieve permanency goals. Monitor may drop in the visit to ensure that the visit is going well and that the parent(s) or child does not have any concerns.	Monitor's role is to observe interactions between the parent(s) and child; ensure that the child is safe; and offer the parent(s) education, coaching, and skill-building. Monitor and parent(s) would know the conditions required to maintain safe visits and under what conditions the monitor may intervene.	Monitor's role is to listen to and closely observe all interactions between the parent(s) and child and intervene if needed. Parental coaching could be offered, but the primary concern would be child's safety. Monitor and parent(s) would know the conditions required to maintain safe visits.

## D. Parent Information and Observation Form<sup>78</sup>

**This information is provided to parents to assist with pleasant and meaningful visits with their child. It was developed in partnership with parents and parent advocates**

- It is very important for you to attend every visit on time. If you do not do this, your child will be disappointed when they are at the visit and you are not. If you have a problem getting to the visit or know that you are likely to be late, contact your caseworker as soon as you can to inform the caseworker you will be late or are having a problem getting to the visit.
- It is best not to make promises to your child during visitation, but if you do make a promise, such as “next time I see you I will bring your favorite book from home,” make sure you fulfill that promise.
- You can bring toys, clothes and pictures from home to the visit. If you have questions about the appropriateness of an item, contact your caseworker prior to the visit.

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- Show your child affection (i.e. hugs and handholding) during the visit unless you have specifically been ordered not to by the court or your caseworker.
  - The visit will be observed and there are two reasons for this: to ensure the safety and well-being of your child, and to gather information that will help improve future visits.
  - Your child may ask difficult questions such as “when can I come home?” You should not respond with a specific date because that can change along the way and you don’t want to disappoint your child. A good response could be “I hope it is soon, but I’m so glad I get to see you now.” Your child will probably ask this several times and possibly every time they talk to you.
  - Your child may also not behave in a way you expect. If your child is fussy or upset, it may be because so much change is happening in your child's life or your child is tired or had a bad day. Take this opportunity to positively comfort, support and talk to your child about what is going on in their life.
  - If your child talks to you about their foster parent or family, you should listen and respond in a positive way. Although it may be difficult that your child cannot be with you right now, you should be as supportive as possible of the foster parent or family because they are taking care of your child and it is important that your child not feel bad about that. If you do have a concern about the foster parent or family, do not discuss it with your child or in front of your child. Inform the caseworker of your concerns after the visit, and if you have a lawyer, you may want to discuss with him/her as well.
  - If you have questions about the visit or what was observed during the visit, you should feel free to ask the person observing you. If the person observing your visit uses a visitation observation form to document what happens at the visit, you should be given a copy of that form.
  - If you have questions about your case or future visits, ask your caseworker after the visit.
  - Don’t talk to your child about your CPS case or caseworker during the visit. Use this opportunity to spend time with your child and enjoy your child's company. If your child asks questions about your case, suggest that the child ask the caseworker. If your child has an attorney ad litem or a CASA volunteer, you might also suggest that your child ask them any case related questions.
  - You may have a difficult time after and between visits. Talk to people in your life about how you are feeling. It might even be a good idea to tell them about the visit ahead of time, so you can have support ready for you. At the end of your visit, goodbyes can be difficult for you and your child. During the last 5 minutes, plan what you will do on your next visit together. Try putting it on paper and letting the child take it home with

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them. During the visit you can give your child something from home or draw a picture with them, so they have something to hold onto in between visits. Do not prolong the goodbye as it will make it harder for you and your child.

- If the visit didn't go as you had hoped or planned, don't be hard on yourself! Learn about what you need to improve and remember that there are no perfect parents. You just need to keep trying to be the best parent you can be for your child!

## **1. Observation**

DFPS has also implemented a visitation observation form that is intended to document what occurs at supervised visits. The observer is asked to fill out responses to certain questions.

After the visitation session, the observer is required to provide the parent or adult with the form, and the parent/adult is asked to sign it. Parents can make notes on the observation form regarding how the visit went, whether the parent has any questions or concerns about the recorded information, and if the parent has anything he/she would like to add about the visit. Please see the [DFPS Parent/Supportive Adult Visitation and Observation Form](#) for more information.<sup>79</sup>

## **2. DFPS Review and Revision of Visitation Plan**

Per DFPS, the visitation plan should be reviewed by DFPS monthly to determine progress, update goals, and determine if it appropriate to consider changes in supervision, location, and setting. If there has been little or no progress towards developing protective actions and meeting case goals found during two consecutive monthly reviews, the caseworker is directed to initiate a formal or informal family meeting to determine how to modify the visitation plan to include a more intensive level of parent coaching/guidance around visitation.

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# HEALTH CARE FOR TEXAS CHILDREN IN FOSTER CARE: STAR HEALTH

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*Please see Checklist Section for Medical and Mental Health Care Checklist.*

STAR Health is 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 through voluntary foster care agreements (ages 18 to 22)
- Youth who aged out of foster care at age 18 and are eligible for Medicaid services (ages 18-21)
- 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.

There are a few populations of children who are not eligible for the STAR Health program. Unless otherwise indicated, these children receive Medicaid through the Traditional Fee-for-Service program. STAR Health does not cover children who are:

- Placed outside of Texas;
- From other states but placed in Texas;
- Residents in nursing homes, state schools, state supported living centers, and ICF-IID facilities;
- Dually eligible for Medicaid and Medicare;
- Adopted and the adoption is finalized;
- In hospice; or
- In DFPS conservatorship but adjudicated in a Texas Juvenile Justice Department (TJJD) facility and do not receive Medicaid but receive health care services through TJJD.

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## A. Unique Features of STAR Health

STAR Health provides a full-range of Medicaid covered medical, dental, vision, prescription and behavioral health services, including:

- A Medical Home for each child, meaning a doctor, or other Primary Care Provider (PCP), or PCP Team to oversee care
- Immediate enrollment for immediate health care benefits
- Licensed and degreed managed care organization (MCO) staff who coordinate physical and behavioral healthcare and access to other non-Medicaid benefits and resources
- Access to healthcare through a network of providers (doctors, nurses, hospitals, clinics, psychiatrists, therapists, etc.) specifically recruited for their history and expertise in treating children who have been abused or neglected and who are offered ongoing trainings on such issues
- The Health Passport electronic health record, which makes available a history of healthcare visits, immunizations, lab results, prescriptions, and service plans to medical consenters, caseworkers, and healthcare providers
- Psychotropic Medication Utilization Reviews to determine if the prescribed medication regimen meets the required guidelines and is within the standard of care
- Service management and service coordination teams led by licensed and degreed MCO staff who coordinate physical and behavioral health care and access to other non-Medicaid benefits and resources for complex cases
- Nursing and Behavioral Health 24/7 help-lines for caregivers and caseworkers
- Medical advisory committees to monitor healthcare provider performance

## B. Physical Healthcare Benefits Provided by STAR Health

The following is not an exhaustive list of Medicaid-covered physical health care benefits:

- Ambulance services
- Birthing services provided by a physician and certified nurse midwife (CNM) in a licensed birthing center
- Cancer screening, diagnostic, and treatment services
- Chiropractic services

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- Community First Choice services, including personal assistance services, habilitation, emergency response services, and support consultation
  - Dental services
  - Durable medical equipment and medical supplies
  - Early Childhood Intervention (ECI) services
  - Family planning
  - Hearing exams/hearing aids
  - Home health care services, such as private duty nursing, skilled nursing, and personal care services
  - Hospital care, including emergency and inpatient services
  - Lab tests/x-rays
  - Physical, occupational, and speech therapies
  - Podiatry
  - Prenatal care
  - Prescription drugs and biological
  - Preventive care through Texas Health Steps
  - Specialty physician services
  - Transplantation of organs and tissues
  - Vision services

### **C. Behavioral Health Benefits Provided by STAR Health**

The following is not an exhaustive list of Medicaid-covered behavioral health benefits:

- Substance abuse services
- Inpatient and outpatient mental health services
- Partial hospitalization
- Intensive outpatient
- Day treatment

- Observation
- Rehabilitative services
- Outpatient therapy
- Telemedicine
- Disease management (Intellectual Developmental Disabilities)
- Complex case management

STAR HEALTH ENHANCEMENTS		
	<b>CARE GRANTS</b>	\$100 per member, per year for non-Medicaid covered items that benefit the child's well-being (school supplies, art therapy kit)
	<b>EXPANDED VISION</b>	\$100 above the existing Medicaid benefit for features or frames not covered by Medicaid
	<b>OTC MEDICATIONS</b>	\$30 per member, per quarter toward over the counter medication delivery through a mail order program
	<b>CENTACCOUNT</b>	Walmart gift card account for young adults age 18-21 who complete wellness visits, dental checkups, flu shots, & other health screenings
	<b>BOYS &amp; GIRLS CLUB</b>	Annual membership fee for members ages 6-18
	<b>SPORTS / CAMP PHYSICALS</b>	Pays for physicals for members ages 4-18
	<b>7-DAY FOLLOW UP INCENTIVES</b>	Gift card or teddy bear incentive (as age appropriate) once per year for attending the recommended 7-day follow up visit after an inpatient stay
	<b>ONLINE MENTAL HEALTH RESOURCES</b>	Access to mystrength.com, an interactive web and mobile application platform that helps improve mental health and overall wellbeing

## D. Transitioning Youth

The Patient Protection and Affordable Care Act (PPACA), commonly called the Affordable Care Act (ACA), requires states to provide Medicaid coverage to youth and young adults under age 26 who were in foster care and were receiving Medicaid when they aged out of foster care.

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The **Former Foster Care Children (FFCC) program** provides healthcare coverage to youth who age out of foster care at age 18, were receiving Medicaid coverage at the time they aged out, are a U.S. citizen or have qualified alien status such as a green card. This coverage is available through age 25 under two separate programs, based on age:

- Young adults aged 18 through 20 are automatically enrolled in the [STAR Health](#) program, but can switch to the STAR program, if they prefer; and
- Young adults aged 21 through 25 must choose a [STAR](#) program health plan.

For foster youth who are under the age of 21, but who are not eligible for the FFCC program because the youth did not receive Medicaid at the time he/she aged out of care, coverage is provided by STAR Health for youth who:

- Were in Texas foster care on his/her 18th birthday or older;
- Do not have other health coverage;
- Meet program rules for income; and
- Are a US citizen or have a qualified alien status, such as a green card.

It is not necessary for a court to extend jurisdiction beyond age 18 for this coverage to apply. See the Bench Book Chapter entitled [Extending Foster Care for Transitioning Youth](#) for more information.

## E. Child and Family Assessments

**Texas Health Steps:** All children entering DFPS conservatorship must receive a comprehensive, preventive health care checkup within 30 days of entering DFPS conservatorship known as the Texas Health Steps medical checkup, which includes preventive care components. The checkup helps identify the child's unique healthcare needs and helps DFPS make placement decisions that are in the child's best interest.

**Medical Exam within Three Business Days:** As of December 31, 2018, all children removed to conservatorship must receive an initial medical examination from a physician or other health care provider authorized by state law to conduct a medical examination by the end of the third business day after the child is removed from the child's home. [Tex. Fam. Code § 264.1076](#).

- **Vaccinations Prohibited During Exam:** A physician or health care provider cannot administer a vaccination without parental consent except for a tetanus vaccination, and only if the physician or other health care provider determines that an emergency requires a vaccination. The prohibition of vaccinations does not apply once DFPS is named the child's managing conservator. The restriction on vaccinations applies only to vaccinations (except for tetanus) administered under the medical exam required by

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new subsection 264.1076. Thus the prohibition is limited only to the population receiving the exam, and only restricts what can be done during the exam. Likewise, the lifting of the restriction on vaccinations once DFPS receives managing conservatorship. Outside these circumstances, the law neither expands nor restricts a parent's right to withhold consent for immunization either under [Tex. Fam. Code § 32.101](#) or [Health & Safety Code § 161.004](#). However, see [Tex. Fam. Code §§ 266.002](#) and [266.004](#) regarding a court's authorization to issue orders related to medical care for children in foster care. See *In re Womack*, [549 S.W.3d 760](#) (Tex. App.—Waco 2017) holding to the extent [Tex. Fam. Code §§ 266.004](#), and [32.101\(c\)](#) were in conflict, [§ 32.101\(c\)](#) was more specific and controlled.

**Child and Adolescent Needs and Strengths (CANS):** DFPS also uses the CANS to evaluate each child's needs and strengths to assist in service planning, inform placement decisions, and reduce the number of assessments administered to children in DFPS conservatorship.

**Family Strength and Needs Assessment (FSNA)** is also in use by DFPS to assess and utilize family strengths to hone in on necessary services customized to address the Department's specific concerns. Although the FSNA and CANS will not be attached to court reports, judges may hear DFPS staff providing testimony or information regarding findings or recommendations that come from these assessments.

Children and youth, ages 3 to 17, will receive a CANS Assessment, completed by a STAR Health clinician, within 30 days of removal. During the same time period, the CPS caseworker will conduct the FSNA of the family, identify targeted interventions, and work with the family to prioritize goals and tasks. In the state's Foster Care Redesign area, near Fort Worth, the Single Source Continuum Contractor (SSCC), Our Community Our Kids, is utilizing a combination of STAR Health providers and CANS certified staff, employed by residential providers within the SSCC network, to administer the CANS.

Special Issue: Many courts like to schedule a Status Hearing within a few days of the Adversary Hearing to jump start services to families. To maximize the effectiveness of the new assessment tools, it is recommended that courts conduct Status Hearings at around 60 days into the case. The law requires that the CANS be administered within 45 days of removal, and DFPS policy sets the completion date at 30 days. The FSNA is conducted with the family within the first three weeks of removal and is used to inform the CANS. Both the STAR Health clinician and the CPS caseworker need time to utilize the CANS and FSNA tools with fidelity. Allowing time for a thorough assessment and coordination of efforts should produce child and family service plans that set a path toward achieving permanency as quickly as possible for the child and family.

**Developmental Disability Assessment:** During the 85<sup>th</sup> Legislative Session, the Legislature also added a requirement that DFPS assess whether a child has a developmental

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disability as soon as possible after the child is placed in DFPS conservatorship, and if the assessment indicates an intellectual disability, to ensure that a referral for a determination of such is made as soon as possible. [Tex. Fam. Code § 264.1075](#).

## **F. Medical Consent**

Before a child may receive medical treatment, consent is required. In 2005, Texas passed a law that requires each child in DFPS conservatorship to have a medical consentor. The responsibility of this medical consentor is to provide medical consent. Medical consent means making a decision on whether to agree or not agree to a medical test, treatment, procedure, or a prescription medication.

### **1. Informed Consent**

Informed consent means the medical consentor gets complete information about the proposed medical care before making a decision. The goal is to make sure that the medical consentor makes an informed decision about the child's health care.

When permission is given for health-care, the Medical Consentor must make sure he or she understands:

- The child's symptoms and medical diagnosis.
- How the treatment will help the condition.
- What happens without the treatment?
- The side effects and risks associated with the treatment.

### **2. Choosing a Medical Consentor**

The court will name (authorize) either an individual or DFPS as the medical consentor.

The individual may be a relative or someone involved in the child's life. When the court names an individual as medical consentor, that person is ultimately responsible for the medical decisions for that child and reports directly to the court. When a judge gives DFPS the power to consent to medical care for a child, the agency chooses up to four primary and backup medical consentors. The two primary medical consentors are usually the child's caregivers or a caseworker and another CPS staff.

DFPS may choose medical consentors and backup medical consentors who are:

- Professional employees of emergency shelters
- Foster parents
- Relatives

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- CPS caseworkers, supervisors or other CPS staff
  - Parent whose rights have not been terminated, if in child's best interest

DFPS may not choose medical consenters and backup medical consenters who are employees of staffed facilities such as residential treatment centers or intermediate care facilities for individuals with developmental disabilities. CPS caseworkers are usually designated in these cases.

In some cases, the court allows a youth 16 or 17 years old to be his or her own medical conserter, if other requirements are met. [Tex. Fam. Code § 266.010](#).

Attorneys ad litem and DFPS staff are required to inform 16 and 17 year olds in foster care of their right to ask the court whether they can consent to their own medical care. [Tex. Fam. Code § 107.003\(b\)\(3\)](#).

There are two types of medical consent training for youth:

- DFPS Medical Consent Training for Caregiver - All youth must complete this training before they become 18 years old.
- DFPS Psychotropic Medication Training – Youth who are taking psychotropic medications must complete this training before they are 18 years old.

Documentation that a youth has completed the required training should be filed in the youth's file by the caseworker.

### **3. Informed Consent for Psychotropic Medications**

The medical conserter must always have a complete discussion with the child's health-care provider. According to Texas law, consent to giving a psychotropic medication is valid only if:

- It is given voluntarily and without undue influence, and
- The conserter receives information (given verbally or in writing) describing:
  - the specific condition to be treated;
  - the beneficial effects on that condition expected from the medication;
  - the probable health and mental health consequences of not consenting to the medication;
  - the probable clinically significant side effects and risks associated with the medication;

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- 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](#).

#### **4. Guidance for Youth Who are Their Own Medical Consenter**

[Tex. Fam. Code § 264.121](#) requires, 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:

- The use of the medication;
- The resources that are available to assist the youth in managing the use of the medication; and
- Informed consent and the provision of medical care in accordance with [Tex. Fam. Code § 266.010\(i\)](#). [Tex. Fam. Code § 264.121\(g\)](#).

The youth's caseworker and caregivers should help the youth get information about any medical condition(s), tests, treatment, and medications, and to support them in making informed decisions.

If a youth's healthcare decision puts the youth at risk for harm, the court can overrule a youth's decision to refuse medical care even after authorizing the youth to make medical decisions. To do that the court must find by clear and convincing evidence that the medical care is in the best interest of the youth and one of the following:

- The youth lacks the capacity to make the decision.
- Not getting the care will result in observable and material impairment of growth, development, or functioning of the youth.
- The youth is at risk of causing substantial bodily harm to self or others. [Tex. Fam. Code § 266.010\(g\)\(1\)-\(3\)](#).

In these situations, DFPS may file a motion asking the court to order a specific medical treatment or allow DFPS to consent to medical care for the youth. The motion must include the youth's reasons for refusing medical care and a statement signed by the physician explaining why medical care is necessary. [Tex. Fam. Code § 266.010\(d\)-\(e\)](#).

## **G. Admission of a Child in DFPS Custody to an Inpatient Mental Health Facility**

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DFPS may no longer admit a child in DFPS conservatorship to an inpatient mental health facility based on the child's consent to be admitted. The Department may request admission only if a physician states that the child has a mental illness or demonstrates symptoms of a serious emotional disorder and presents a serious risk of harm to themselves or others. [Tex. Health & Safety Code 572.001](#).

The admission is considered a significant event for the purpose of [Tex. Fam. Code § 264.018](#), and requires notice to all parties entitled to notice and to the court of continuing jurisdiction within three days of admission. DFPS must continue to review the need for continued placement and if DFPS determines there is no longer a need for inpatient treatment, notify the facility administrator that the child may no longer be detained without an application for court ordered mental health services.

## **H. Monitoring Psychotropic Medications**

In February 2005, DFPS, the Department of State Health Services (DSHS), and the Health and Human Services Commission (HHSC) released a "best practices" guide to ensure the proper use of psychotropic medications for the children in foster care.

The March 2016 Psychotropic Medication Utilization Parameters for Children and Youth in Foster care<sup>80</sup> is the most recent version of these guidelines. It serves as a resource for physicians and clinicians who care for children diagnosed with mental health disorders. The guide provides recommendations for the appropriate use of psychotropic medications for children in foster care and includes nine criteria indicating the need for review of the child's clinical status.

Since April 2008, STAR Health has conducted Psychotropic Medication Utilization Reviews (PMURs) on the children whose medication regimens fall outside of the expectations of the Parameters.

[The STAR Health PMUR Process for STAR Health Members FAQ and Stakeholder Manual](#) explains this process and how to request a review.<sup>81</sup>

## **I. End of Life Medical Decisions**

If a child in DFPS conservatorship has been diagnosed with an "irreversible condition" or a "terminal condition" and medical professionals suggest withholding or withdrawing life-sustaining treatment, the regular process for medical consent does not apply and the caseworker and supervisor must follow the procedures outlined below. However, any party may seek court intervention at any time if all parties do not agree on a course of action or if any party is concerned about the child's rights.

If parental rights have not been terminated and the child's attending physician recommends end-of-life care, the parents have the authority to make the end-of-life decisions even if DFPS

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has Temporary Managing Conservatorship or Permanent Managing Conservatorship. DFPS staff or other Medical Consenters do not have the legal authority to consent in these circumstances.

If parental rights have been terminated as to both parents, or the parents are deceased and the attending physician recommends end-of-life care, the caseworker and supervisor must:

- Obtain a written statement from the attending physician certifying that the child has a terminal or irreversible condition and that the physician recommends withholding or withdrawing life-sustaining treatment;
- Request a second opinion or a review by a hospital medical or ethics review board if there are any concerns regarding the recommendation of the attending physician;
- Confirm that there is no relative, fictive kin, or other individual with possessory or custodial rights. If one is available, that person must be consulted for end-of-life decisions if possible;
- Notify and discuss the recommendation with the program director, regional director, regional attorney, attorney representing DFPS, the child's attorney ad litem, guardian ad litem, CASA (if applicable), and any other legal party to the case; and
- Notify and consult with the local court.

## **J. Health Passport**

The Health Passport is a web-based system that contains a record of healthcare history for every child, youth, or young adult enrolled in the STAR Health program. The Health Passport is not a full medical record. It contains the following information:

- A complete record of healthcare visits and services with any network provider
- Immunizations, lab results, and prescriptions received
- Healthcare forms such as psychotropic reviews, service plans, Texas Health Steps forms, and CANS
- Allergies, vital signs, height, weight, and record of future scheduled appointments if entered by network providers
- A two year history from prior to entering foster care, if the child received Medicaid or CHIP coverage in the past

Medical consenters, caseworkers, network providers, some CASA staff, and some residential provider staff are able to view Health Passport records. Network providers are able to enter data into Health Passport.

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Only a DFPS staff member may give a printed copy of the Health Passport or sections of the Health Passport to other persons or entities, including judges.

## K. Court Orders for Medical Services

If a health care professional has been consulted regarding a health care service, procedure, or treatment for a child in DFPS conservatorship, a court must make findings in the record supporting its decision if the court declines to follow the recommendation of the health care professional. [Tex. Fam. Code § 266.005](#).

**Special Issue:** If the child needs a service not covered by Medicaid, the judge may order that a physician assess the need for the service, if that has not already been done. Also, 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. Also, a copy of the signed order should be sent via fax to Superior at 1-866-702-4837.

## L. References

### Key STAR Health Phone Numbers

<u>Organization</u>	<u>Phone Number</u>
Superior HealthPlan Network Member Services Hotline	1-866-912-6283
Cenpatico (Behavioral Health)	1-866-218-8263
DentaQuest (Dental Services)	1-888-308-4766
Total Vision Health Plan (Vision Services)	1-866-642-8959
NurseWise	1-866-912-6283

### HHSC Medical Transportation Program

If you live in the counties of Dallas, Denton, Ellis, Erath, Hood, Hunt, Johnson, Kaufman, Navarro, Palo Pinto, Parker, Rockwall, Somervell, and Tarrant:

- **Call LogistiCare:**
  - Phone Reservations: 1-855-687-3255
  - Where's My Ride: 1-877-564-9834

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If you live in the counties of Austin, Brazoria, Chambers, Fort Bend, Galveston, Hardin, Harris, Jasper, Jefferson, Liberty, Matagorda, Montgomery, Newton, Orange, Polk, San Jacinto, Tyler, Walker, Waller and Wharton:

- **Call MTM:**
  - Phone Reservations: 1-855-687-4786
  - Where's My Ride: 1-888-513-0706

If you live in any other county:

- **Call MTP:**
  - Phone Reservations: 1-877-633-8742 and press Option 1 to schedule a ride or Option 2 to file a complaint.

## **M. Who to Contact with Health Care Questions**

DFPS developed a STAR Health mailbox which is staffed by the DFPS medical services team and checked on each business day: [dfpsstarhealth@dfps.state.tx.us](mailto:dfpsstarhealth@dfps.state.tx.us)

## **N. Additional Links / Resources**

Texas DFPS website at

[https://www.dfps.state.tx.us/Child\\_Protection/Medical\\_Services/default.asp](https://www.dfps.state.tx.us/Child_Protection/Medical_Services/default.asp)

See the STAR Health website at [www.fostercaretx.com](http://www.fostercaretx.com)

[Center for Public Policy Priorities Policy Paper on STAR Health](#), November 2008

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# HUMAN TRAFFICKING

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*Please see the Checklist Section for the Human Trafficking checklist.*

## A. Definition of Human Trafficking

Human trafficking is a term that refers to labor and sex trafficking of minors and adults. While all forms of trafficking are dangerous and exploitative, children and youth in foster care are especially vulnerable to child sex trafficking.

### 1. Federal Law

Under the federal Trafficking Victims Protection Act,<sup>82</sup> severe forms of trafficking in persons is defined as:

- Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. [22 U.S.C. § 7102\(9\)](#).

The term “sex trafficking” means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act. [22 U.S.C. § 7102\(10\)](#). A “commercial sex act” is defined as any sex act on account of which anything of value is given to or received by any person. [22 U.S.C. § 7102\(4\)](#).

**Special Issue:** Force, fraud, or coercion are not required elements of sex trafficking when the victim is a child. In addition, movement of the child is not required and money need not be exchanged to prove a child was trafficked. Traffickers often manipulate children with promises of food, clothing, shelter, and love.

### 2. Trafficking of Children Defined

In Texas, “trafficking” is defined as transporting, enticing, recruiting, harboring, providing, or otherwise obtaining a person by any means. [Tex. Penal Code § 20A.01\(4\)](#).

For sex and labor trafficking offenses, a “child” is defined as a person younger than 18 years of age. [Tex. Penal Code § 20A.01\(1\)](#). Both child sex and labor trafficking are offenses in Texas regardless of whether the actor knew the age of the child at the time of the offense. [Tex. Penal Code § 20A.02\(b\)\(1\)](#).

### 3. Child Sex Trafficking

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Texas law defines child sex trafficking as knowingly trafficking a child and by any means causing the trafficked child to engage in, or become the victim of, conduct prohibited by:

- Continuous Sexual Abuse of Young Child or Children, [Tex. Penal Code § 21.02](#);
- Indecency with a Child, [Tex. Penal Code § 21.11](#);
- Sexual Assault, [Tex. Penal Code § 22.011](#);
- Aggravated Sexual Assault, [Tex. Penal Code § 22.021](#);
- Prostitution, [Tex. Penal Code § 43.02](#);
- Promotion of Prostitution, [Tex. Penal Code § 43.03](#);
- Aggravated Promotion of Prostitution, [Tex. Penal Code § 43.04](#);
- Compelling Prostitution, [Tex. Penal Code § 43.05](#);
- Sexual Performance by a Child, [Tex. Penal Code § 43.25](#);
- Employment Harmful to Children, [Tex. Penal Code § 43.251](#); or
- Possession or Promotion of Child Pornography, [Tex. Penal Code § 43.26](#). [Tex. Penal Code § 20A.02\(a\)\(7\)](#).

Alternatively, a person commits the crime of child sex trafficking if that person knowingly receives a benefit from participating in a venture that involves an activity described by [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or engages in sexual conduct with a child trafficked in the manner described in [Tex. Penal Code § 20A.02\(a\)\(7\)](#). [Tex. Penal Code § 20A.02\(a\)\(8\)](#).

The landmark case of *In re B.W.* addressed the issue of whether a thirteen year old child can be adjudicated a juvenile delinquent for committing the offense of prostitution. The Supreme Court of Texas held that a child under the age of 14 lacks capacity to consent to sex and thus cannot be charged with the offense of prostitution. The court found that, “[c]hildren are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters.” *In re B.W.*, [313 S.W.3d 818, 826](#) (Tex. 2010).

**Special Issue:** Other terms referring to child sex trafficking include Commercial Sexual Exploitation of Children, Domestic Child Sex Trafficking, and Domestic Minor Sex Trafficking.

#### 4. Child Labor Trafficking

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In Texas, a person commits child labor trafficking by knowingly trafficking a child with the intent that the trafficked child engage in forced labor or services. [Tex. Penal Code § 20A.02\(a\)\(5\)](#). In addition, knowingly receiving a benefit from participating in a venture that involves an activity described by [Tex. Penal Code § 20A.02\(a\)\(5\)](#), including by receiving labor or services the person knows are forced labor or services, constitutes labor trafficking. [Tex. Penal Code § 20A.02\(a\)\(6\)](#).

“Forced labor or services” is defined as labor or services, other than labor or services that constitute sexual conduct, that are performed or provided by another person and obtained through an actor's use of force, fraud, or coercion. [Tex. Penal Code § 20A.01\(2\)](#).

**Special Issue:** Force, fraud, or coercion are required elements of child labor trafficking or adult labor or sex trafficking. Under Texas law, child sex trafficking can be accomplished by any means. Force, fraud, or coercion are not required.

## 5. Continuous Trafficking of Persons

A person commits the offense of continuous trafficking of persons if, during a period that is 30 or more days in duration, the person engages two or more times in conduct that constitutes an offense under [Tex. Penal Code § 20A.02](#) against one or more victims. [Tex. Penal Code § 20A.03\(a\)](#).

## B. Trafficking and Child Welfare

### 1. CPS Investigations Involving Trafficking

The definition of child abuse includes compelling or encouraging a child to engage in sexual conduct as defined by [Tex. Penal Code § 43.01](#) including compelling or encouraging a child in a manner 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\(b\)](#), or compelling prostitution under [Tex. Penal Code § 43.05\(a\)\(2\)](#). [Tex. Fam. Code § 261.001\(1\)\(G\)](#).

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 also constitutes child abuse. [Tex. Fam. Code § 261.001\(1\)\(L\)](#).

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Special Issue: CPS Policy outlines the circumstances when a person traditionally responsible for a child's care, custody, or welfare can be investigated by CPS as an alleged perpetrator of sex or labor trafficking. For more information, see Section 2380 Child Trafficking (Sex and Labor Trafficking) available online at:

[https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_2200.asp#CPS\\_2380](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2380).

## **2. Trafficking May be Considered as Basis for Removal of Child**

If there is no time to obtain a temporary order, temporary restraining order, or attachment under [Tex. Fam. Code § 262.102\(a\)](#) before taking possession of a child consistent with the health and safety of that child, an authorized DFPS representative, a law enforcement officer, or a juvenile probation officer may take possession of a child without a court order under the following conditions related to trafficking:

- On personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#); 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 child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#). [Tex. Fam. Code § 262.104\(a\)\(3\)-\(4\)](#).

## **3. Standard for Decision at Initial Hearing After Taking Possession Includes Consideration of Trafficking**

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

- The evidence shows that one of the following circumstances exists:
  - 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;
  - the child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#) on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse or of trafficking in the future;
  - the parent or person who has possession of the child is currently using a controlled substance as defined by Chapter 481, Health & Safety Code, and

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the use constitutes an immediate danger to the physical health or safety of the child; or

- the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine;
- Continuation of the child in the home would be contrary to the child's welfare; 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 § 262.107\(a\)](#).

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\(b\)](#).

#### **4. Required Findings at Adversary Hearing if Child Victim of Trafficking to Remain in Care**

In a suit filed under [Tex. Fam. Code § 262.101](#) or [Tex. Fam. Code § 262.105](#), at the conclusion of the full adversary hearing, the court shall order the return of the child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

- There was a danger to the physical health or safety of the child, including a danger that the child would be a victim of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#), 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;
- 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; and
- 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\(g\)](#).

#### **5. Aggravated Circumstances**

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The court may find under [Tex. Fam. Code § 262.2015\(a\)](#) that a parent has subjected the child to aggravated circumstances if the parent has engaged in conduct against the child or another child of the parent that would constitute an offense of trafficking of persons under [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or [\(8\)](#). [Tex. Fam. Code § 262.2015\(b\)\(3\)\(O\)](#).

## C. Risk Factors and Indicators

Children and youth who run away or experience foster care are at a higher risk of commercial sexual exploitation.<sup>83</sup> According to the Office of the Texas Attorney General, potential indicators, or red flags, that a child may be a trafficking victim include:

- Changes in school attendance habits, appearance, socio-economics, friend groups, interests, school activities, vocabulary, demeanor, attitude, and sexual behavior;
- Luxury items (e.g. manicures, designer clothing, purses, etc.) without an explainable source of income;
- Truancy;
- Getting into trouble in the company of older teens or adults;
- Sexually provocative clothing;
- Tattoos, especially of another person's name;
- Hotel key cards;
- Refillable gift cards;
- Multiple phone or social media accounts;
- Lying about the existence of social media accounts or refusing caregiver access to those accounts;
- Sexually provocative pictures on the phone or online accounts;
- Unexplained injuries: bruising, swelling, redness, cigarette burns;
- Claim of an older boyfriend/girlfriend;
- Lack of identification; and
- Multiple runaways from home in a short period of time.<sup>84</sup>

**Special Issue:** The availability of the internet means trafficking can happen anywhere. Traffickers often use the web to recruit and exploit child victims. Teaching youth in foster care about internet safety is a critical part of any effort to prevent and address human trafficking.

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## D. CPS Reporting Requirements Regarding Child Sex Trafficking

### 1. Preventing Sex Trafficking and Strengthening Families Act

Under the Preventing Sex Trafficking and Strengthening Families Act (SFA), as of September 29, 2016, DFPS must report immediately, and in no case later than 24 hours after receiving information on children or youth who have been identified as being a sex trafficking victim, to the law enforcement authorities.<sup>85</sup> [42 U.S.C. § 671\(a\)\(34\)\(A\)](#).

Under SFA, DFPS is also required to develop and implement specific protocols for:

- Expediently locating any child missing from foster care;
- Determining the primary factors that contributed to the child's running away or otherwise being absent from care, and to the extent possible and appropriate, responding to those factors in current and subsequent placements;
- Determining the child's experiences while absent from care, including screening the child to determine if the child is a possible sex trafficking victim (as defined in [42 U.S.C. § 675\(9\)\(A\)](#)); and
- Reporting such related information as required by the Secretary of the Department of Health and Human Services; and
- DFPS must report immediately, and in no case later than 24 hours after receiving, information on missing or abducted children or youth to the law enforcement authorities for entry into the National Crime Information Center (NCIC) database of the Federal Bureau of Investigation and to the National Center for Missing and Exploited Children. [42 U.S.C. § 671\(a\)\(35\)](#).

**Special Issue:** The National Human Trafficking Hotline receives tips about human trafficking and makes referrals for services.

For more information, please visit <https://humantraffickinghotline.org/> or call 1-888-373-7888.

## E. Children Who are Missing or Victims of Sex Trafficking

If a child in DFPS managing conservatorship is missing from the child's substitute care provider, including a child who is abducted or is a runaway, DFPS shall notify the following persons that the child is missing:

- The appropriate law enforcement agencies;
- The court with jurisdiction over the department's managing conservatorship of the child;

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- The child's attorney ad litem;
  - The child's guardian ad litem; and
  - The child's parent unless the parent:
    - cannot be located or contacted;
    - has had the parent's parental rights terminated; or
    - has executed an affidavit of relinquishment of parental rights. [Tex. Fam. Code § 264.123\(a\)](#).

DFPS must provide the notice required by [Tex. Fam. Code § 264.123\(a\)](#) not later than 24 hours after the time DFPS learns that the child is missing or as soon as possible if a person entitled to notice under [Tex. Fam. Code § 264.123\(a\)](#) cannot be notified within 24 hours. [Tex. Fam. Code § 264.123\(b\)](#).

If a child has been reported as a missing child under [Tex. Fam. Code § 264.123\(a\)](#), DFPS must notify the persons described by [Tex. Fam. Code § 264.123\(a\)](#) when the child returns to the child's substitute care provider not later than 24 hours after the time the department learns that the child has returned or as soon as possible if a person entitled to notice cannot be notified within 24 hours. [Tex. Fam. Code § 264.123\(c\)](#).

DFPS must make continuing efforts to determine the location of a missing child until the child returns to substitute care, including:

- Contacting the appropriate law enforcement agencies, the child's relatives, the child's former caregivers; and any state or local social service agency that may be providing services to the child on a monthly basis; and
- Conducting a supervisory-level review of the case on a quarterly basis if the child is 15 years of age or younger to determine whether sufficient efforts have been made to locate the child and whether other action is needed. [Tex. Fam. Code § 264.123\(d\)](#).

DFPS must document in the missing child's case record:

- The actions taken by the department to determine the location of the child; and persuade the child to return to substitute care;
- Any discussion during, and determination resulting from, the supervisory-level review under [Tex. Fam. Code § 264.123\(d\)\(2\)](#);
- Any discussion with law enforcement officials following the return of the child regarding the child's absence; and

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- Any discussion with the child described by [Tex. Fam. Code § 264.123\(f\)](#). [Tex. Fam. Code § 264.123\(e\)](#).

After a missing child returns to the child's substitute care provider, DFPS must interview the child to determine the reasons why the child was missing, where the child stayed during the time the child was missing, and whether, while missing, the child was a victim of conduct that constitutes an offense under [Tex. Penal Code § 20A.02\(a\)\(7\)](#). DFPS must report to an appropriate law enforcement agency any disclosure made by a child that indicates that the child was the victim of a crime during the time the child was missing. DFPS shall make a report under this subsection not later than 24 hours after the time the disclosure is made. DFPS is not required to interview a missing child under this subsection if, at the time the child returns, DFPS knows that the child was abducted and another agency is investigating the abduction. [Tex. Fam. Code § 264.123\(f\)](#).

## F. Secure Agency Foster Home

A court in an emergency, initial, or full adversary hearing conducted under [Tex. Fam. Code Chapter 262](#) may order that the child who is the subject of the hearing be placed in a secure agency foster home verified in accordance with [Tex. Hum. Res. Code § 42.0531](#), if the court finds that:

- The placement is in the best interest of the child; and
- The child's physical health or safety is in danger because the child has been recruited, harbored, transported, provided, or obtained for forced labor or commercial sexual activity, including any child subjected to an act specified in [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#). [Tex. Fam. Code § 262.011](#).

A secure agency foster home verified under [Tex. Hum. Res. Code § 42.0531](#) must provide:

- Mental health and other services specifically designed to assist children who are victims of trafficking under [Tex. Penal Code § 20A.02](#) or [Tex. Penal Code § 20A.03](#), including:
  - victim and family counseling;
  - behavioral health care;
  - treatment and intervention for sexual assault;
  - education tailored to the child's needs;
  - life skills training;
  - mentoring; and
  - substance abuse screening and treatment as needed;

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- Individualized services based on the trauma endured by a child, as determined through comprehensive assessments of the service needs of the child;
  - 24-hour services; and
  - Appropriate security through facility design, hardware, technology, and staffing. [Tex. Hum. Res. Code § 42.0531\(c\)](#).

**Special Issue:** Very few placements exist to address the physical, mental, and emotional needs of child sex trafficking victims. Judges can play a critical role in working with community stakeholders to develop local strategies to prevent trafficking and support survivors.

## G. Resources

Children’s Commission Jurist in Residence letters on human trafficking:

- The Texas Response to Human Trafficking (Jan 2018):  
<http://texaschildrenscommission.gov/media/83730/jarl-jan-2018-ht-prevention-month.pdf>
- Foster Care and Human Trafficking (Jan 2015):  
<http://texaschildrenscommission.gov/media/1348/foster-care-and-human-trafficking.pdf>

Department of Family and Protective Services

- Texas Youth Connection information by region:  
[https://www.dfps.state.tx.us/txyouth/safety/physical\\_safety.asp](https://www.dfps.state.tx.us/txyouth/safety/physical_safety.asp)
- Understanding Human Trafficking:  
[https://www.dfps.state.tx.us/Investigations/Human\\_Trafficking/default.asp](https://www.dfps.state.tx.us/Investigations/Human_Trafficking/default.asp)

National Center for Missing and Exploited Children child sexual exploitation resources:  
<http://www.missingkids.org/Exploitation>

National Human Trafficking Hotline (888) 373-7888 or <https://humantraffickinghotline.org/>

National Judicial Institute on Domestic Child Sex Trafficking online resources:  
<http://www.ncjfcj.org/DCST-Materials>

Office of the Texas Attorney General information on human trafficking, including Be the One online training video: <https://www.texasattorneygeneral.gov/cj/human-trafficking>

Office of the Texas Governor Child Sex Trafficking Team:  
[https://gov.texas.gov/organization/cjd/topic\\_trafficking](https://gov.texas.gov/organization/cjd/topic_trafficking)

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Polaris human trafficking resources: <https://polarisproject.org/human-trafficking>

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# INDIAN CHILD WELFARE ACT (ICWA)

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***Please see Checklist Section for ICWA Checklist.***

***This chapter is excerpted from the DFPS Attorney Manual with permission of DFPS.***

The Indian Child Welfare Act of 1978 (ICWA), [25 U.S.C. §§ 1901 – 63](#); [25 C.F.R. Part 23](#), 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 [25 U.S.C. § 1903\(4\)](#). The law was enacted to protect not only Indian children, but their families and tribes. [25 U.S.C. § 1902](#).

In 2013, the United States Supreme Court interpreted ICWA narrowly, restricting the rights of a parent who has never had custody of an Indian child and limiting the circumstances when the placement preferences apply in *Adoptive Couple v. Baby Girl*, [133 S.Ct. 2552 \(2013\)](#).

In response, the Department of the Interior, Bureau of Indian Affairs (BIA) issued updated guidelines in February 2015 and a binding final rule to the regulations implementing ICWA (Final Rule or Regulations). [81 FR 38864](#) (June 14, 2016) and codified at [25 CFR part 23](#). The final rule reflects public comment and carries forward the “gold standard” in child welfare best practices. Effective in December 2016, the final rule:

- Clarifies terms used in the statute such as what actions are necessary to prevent the breakup of an Indian family using the rule's definition of "active efforts";
- Provides definitive signposts for ICWA compliance;
- Allows for notice of involuntary proceedings by certified mail, return receipt requested, as a less costly alternative to registered mail, return receipt requested;
- Provides flexibility to allow local procedures for emergency removal and placement, as long as ICWA's statutory standard for emergency removal and placement is met, is as short as possible;
- Continues to allow for consideration of each child's unique circumstances, but establishes some parameters to ensure that ICWA's purposes are not frustrated;
- Ensures states have the flexibility to determine the best way to maintain their records and no longer requires the proposal for maintaining all Indian child custody records in a single location;
- Leaves intact a parent's prerogative to choose an adoptive family for their child in voluntary proceedings; the rule requires that the parents review families who meet the placement preferences before making a final decision; and

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- Protects confidentiality of the parties in all child custody proceedings, requiring the BIA, states, and tribes to keep information confidential.

In December 2016, the BIA issued another edition of updated Guidelines for Implementing the Indian Child Welfare Act (Guidelines)<sup>86</sup>. The Guidelines are not legislative and are thus not binding, but Texas courts have relied on the Guidelines in interpreting ICWA. *In re V.L.R.*, [507 S.W.3d 788](#) (Tex. App. — El Paso, Nov. 18, 2015). The Guidelines state that “these guidelines explain the statute and regulations and also provide example of best practices.”

## A. When Does ICWA Apply?

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.” [25 U.S.C. § 1912\(a\)](#).

### 1. Child Custody Proceedings

A suit seeking foster care placement, termination of parental rights, pre-adoptive or an adoptive placement is 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).

The Regulations clarify ICWA applies to a voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child...“ [25 C.F.R. § 23.103\(a\)\(1\)\(ii\) and \(4\)](#). This does not include voluntary placement made without threat of removal by a state agency, if a parent or Indian custodian may regain custody on demand. If a parent or Indian custodian consents to voluntary foster care placement, that consent can be withdrawn at any time by filing a written document or testifying in court. [25 C.F.R. § 23.127](#).

### 2. 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. [25 U.S.C. § 1903\(4\)](#). An Indian tribe includes any of the more than 500 federally recognized tribes in the U.S. If DFPS becomes involved with an Indian child associated with any of these tribes, ICWA may apply.

There are also three federally recognized tribes with reservations in Texas:

- Ysleta del Sur Pueblo, also known as the Tigua, in El Paso;
- Kickapoo Tribe of Texas, in Eagle Pass; and
- Alabama Coushatta Tribe of Texas near Livingston.

DFPS enjoys a good working relationship with each of these tribes. Children who reside on one of these reservations have specific legal protections (see Tribal and State

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Jurisdiction section below) and, in some cases, DFPS and the Tribe have agreed to a written protocol for handling these cases.

### 3. Reason to Know

A court has reason to know a child is an Indian child:

- If any party, tribe, or agency informs the agency or court that the child is an Indian child;
- Any participant, officer of the court, or agency involved in the proceedings informs the court it has discovered such information;
- The child gives the court reason to know he or she is an Indian child;
- The domicile or residence of the child, parent, or Indian custodian is on a reservation;
- The court is informed the child is or has been a ward of a Tribal court; or
- The court is informed either parent or the child has a Tribal membership card. [25 C.F.R. § 23.107\(c\)](#).

### 4. How Are Possible Indian Children Identified?

A common reason for failure to comply with ICWA is the failure to identify children subject to the ICWA. Two important changes are designed to remedy this problem:

At the Adversary, Status, and each Permanency Hearing, Texas courts are required to ask the parties whether the child or child's family has Native American heritage and identity any Native American tribe with which the child may be associated. [Tex. Fam. Code § 262.201\(f\)](#), [Tex. Fam. Code § 263.202\(f-1\)](#), and [Tex. Fam. Code § 263.306 \(a-1\)\(3\)](#).

The Regulations require that the state court judge ask each participant at the commencement of the proceedings whether the person knows or has reason to know the child is an Indian child and to instruct the parties to inform the court of any such information that arises later. [25 C.F.R. § 23.107\(a\)](#).

By far the most significant impact of failing to identify an ICWA case is if key ICWA provisions are violated, *a final order can be invalidated*. The remedy for violation of key ICWA provisions is a petition to invalidate. [25 U.S.C. § 1914](#). Similarly, if there is not sufficient information in the record to assess whether ICWA applies, an appeal can be abated. Either way, permanency is delayed.

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**Special Issue:** If any parent or family member's response suggests an Indian child may be involved in a DFPS case, document as much information as possible about the family history, because this information is often vital to a tribe's ability to verify a child or parent's membership status. If all family members deny any tribal family history, this should be documented. If there is any information to suggest a tribal association, by giving the tribe notice and following up as necessary to verify a child's status you can eliminate a potentially devastating delay that can undermine permanency.

## B. Tribal and State 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 ICWA, whether or not the tribe intervenes or the case is transferred to a tribal court.

### 1. 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. [25 U.S.C. § 1911\(a\)](#).

### 2. 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 the tribal court otherwise has exclusive jurisdiction. [25 U.S.C. § 1922](#). 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.

### 3. 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. [25 U.S.C. § 1911\(b\)](#). Even in this circumstance, however, there is a presumption of tribal jurisdiction in cases involving an Indian child. *Mississippi*, [490 U.S. 30 \(1989\)](#).

## C. Required Notice

ICWA imposes many specific requirements governing the timing, the type of notice, and the persons and entities entitled to notice. *In re R.R.*, [249 S.W.3d 213](#) (Tex. App. — Fort Worth,

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March 19, 2009, no pet.). One overarching issue is that without notice, a Tribe cannot confirm or deny Indian child status. Even if a child turns out not to be subject to ICWA, if there is evidence of possible Indian child status, proof of compliance with notice requirements can be essential to counter a challenge based on violation of ICWA.

### 1. When is Notice Required?

Notice is required for each "child-custody proceeding." Defined as any action *except an emergency hearing* that may result in a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement, this means any Suit Affecting the Parent Child Relationship filed by CPS requires notice. [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.2](#).

### 2. 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). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.112 \(a\)](#).<sup>87</sup>

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

### 3. When Identity of Parent / Indian Custodian is Known

Notice of a pending custody proceeding involving an Indian child must be sent to:

- Every known parent;
- Indian custodian;
- Each identified tribe; and
- Regional Director, Bureau of Indian Affairs (BIA) (a representative of the Secretary of Interior). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.11\(a\)](#).

### 4. When Identity is Not Known

If the identity or location of a parent or Indian custodian is not known or the identity of the tribe cannot be determined, **Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined** must be sent to:

- Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.11\(b\)](#).

### 5. How to Send Notice

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DFPS has notices with the required advisements which can be tailored with specific child and family information. A copy of the petition should be attached as well as any additional family history, including family trees or copies of membership cards. Family history information can be critical to a tribe's ability to determine membership status.

If a parent has requested anonymity, the agency and the court should maintain confidentiality and relevant court documents should be under seal. [25 C.F.R. § 23.107\(d\)](#).<sup>88</sup>

The Regulations will allow giving notice by registered or certified mail, with return receipt requested in either case. [25 C.F.R. § 23.11\(a\)](#); [25 C.F.R. § 23.111\(c\)](#). As a practical matter, certified mail is preferred because this allows delivery to someone other than the addressee. If the intended recipient of registered mail is not available, registered mail must be returned to sender, making it necessary to resend notice. Notice may be sent by personal service or electronically *in addition*, but this does not satisfy the service requirement. [25 C.F.R. § 23.111\(c\)](#). Particularly where an e-mail contact is provided, sending a duplicate notice this way is best practice to expedite the process of determining a child's status.

A copy of each notice sent, with the return receipt or other proof of service must be filed with the court and should be admitted into evidence at trial. [25 C.F.R. § 23.111\(a\)\(2\)](#).

## 6. Parent/Indian Custodian

A parent includes the biological or adoptive parent of an Indian child, including a non-Indian parent. [25 U.S.C. § 1903\(9\)](#); [25 C.F.R. § 23.2](#). An alleged father must acknowledge paternity or be legally determined to be the father before being recognized as a parent. *In re V.L.R.* [507 S.W.3d 788](#) (Tex. App. —El Paso, Nov. 18, 2105, no pet.) (unidentified tribe of a child's unwed father who fails to establish paternity is not the child's tribe).

A primary impact of the U.S. Supreme Court's *Baby Girl* opinion was to limit the rights of a father who was a registered tribal member but had never had custody of his child. The Court found that an action for termination of parental rights against such a father could proceed without meeting the higher burden of proof or standards in [25 U.S.C. § 1912\(d\)](#) and (f). *Adoptive Couple v. Baby Girl*, [133 S.Ct. 2552 \(2013\)](#). The impact of this decision is limited by the following:

The *Baby Girl* decision does not impact other substantive rights under ICWA, including the right to notice and appointment of counsel for indigent parents;

A Texas court declined to extend the *Baby Girl* rationale to a parent who had prior custody of an Indian child, albeit not for the preceding twelve years; *In re V.L.R.* [507 S.W.3d 788](#) (Tex. App. —El Paso, Nov. 18, 2105, no pet.).

[Tex. Fam. Code § 263.202\(a\)\(1\)](#) and DFPS policy require that a diligent search be conducted and notice provided to a parent, including an alleged father;

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The Regulations now define "continued custody" to include physical and/or legal custody (including under tribal law or custom) that a parent "already has or had at any point in the past," and specify that a biological mother has had custody of a child. [25 C.F.R. § 23.2](#).<sup>89</sup>

"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." [25 U.S.C. § 1903\(6\)](#).

## **7. More Than One Tribe**

If a child has ties to more than one tribe, notice to each tribe is essential so that each tribe can make a determination of membership or eligibility. If more than one tribe responds affirmatively, the Regulations direct the Tribes to designate the child's Tribe and if the Tribes do not agree, the State court must do so, based on specified criteria. [25 C.F.R. § 23.109\(c\)](#).<sup>90</sup>

## **8. Contact Information**

The best resource for contact information for individual tribes is the ICWA notice published in the Federal Register. For tribes without a listing, the Regulations mandate contacting the tribe directly to find out the proper contact person. If the Tribe fails to respond to written communication, seek assistance from the Bureau of Indian Affairs.

For notice to the Regional Director:

For child custody proceedings In Texas, *except for notice to the Ysleta del Sur Pueblo of El Paso County*:

Anadarko Regional Director  
BIA  
P.O. Box 368  
Anadarko, Oklahoma 73005

For child custody proceedings in *El Paso and Hudspeth counties in Texas*:

Albuquerque Regional Director  
BIA  
615 First St.  
P.O. Box 26567  
Albuquerque, New Mexico 87125.

## **9. After Initial ICWA Notice**

Once the initial Notice of Pending Custody Proceeding Involving Indian Child is sent as required, send notice to the same listed persons and Tribes as follows:

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- Unless or until a tribe confirms a child is not a member or eligible for tribal membership, DFPS will send notice of interim hearings, permanency planning meetings, family group conferencing or similar meetings to all persons and tribes entitled to notice by *regular first-class mail*; and
  - If the pleadings are amended, or a final hearing is set, DFPS will send a new Notice of Pending Custody Proceeding Involving Indian Child, with the petition and any additional child and family history information attached, by certified or registered mail, return receipt requested. [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.111](#).

## D. Indian Child Determination

A tribe's determination regarding the child's status is conclusive and a "State court may not substitute its own determination regarding a child's membership or eligibility for membership in a Tribe or a parent's membership in a Tribe." [25 C.F.R. § 23.108\(b\)](#).<sup>91</sup> Certain factors relied upon by courts in the past in determining whether a case is subject to ICWA are expressly excluded from this determination, including: a family's involvement with the tribe and cultural, social, religious or political activities; the child's blood quantum, or whether the parent ever had custody. [25 C.F.R. § 23.103\(c\)](#).<sup>92</sup> If the only identified tribe confirms that a child is neither a member nor eligible for membership, this evidence can support a request that the court find that the ICWA does not apply.

If a Tribe fails to respond after being properly noticed, counsel should first verify that the agency has exercised due diligence to communicate with the Tribe by phone, fax, or e-mail. A state court may rely on facts or documentation indicating a Tribal determination or membership or eligibility, such as an enrollment document, to make a determination regarding Indian child status. [25 C.F.R. § 23.108\(c\)](#).<sup>93</sup>

In the more common scenario, when documents showing a tribal determination are not available, a tribe's failure to respond to notice may present a distinct difficulty. Once the court confirms by way of report, declaration or testimony on the record that due diligence was used to identify and work with all potential tribes, the Regulations direct the court to "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of 'Indian child'..." [25 C.F.R. § 23. 107\(b\)](#).<sup>94</sup>

Depending on the nature of the evidence that gave the court reason to know that the child is an Indian child and prompted notice, imposing ICWA's requirements without confirmation from a tribe or independent evidence may not be legally supportable. Until there is further case law interpreting the Regulations, the determination of a child's Indian status in the absence of tribal input may depend on the court's assessment of the nature and quality of the initial report of possible Indian child status and the evidence available after proper notice is provided.

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The Regulations state that there is no exception to ICWA based on the premise that if the child's parent does not have a social, cultural, or political connection with an Indian tribe that ICWA should not apply. This judicially-created doctrine, called the existing Indian family doctrine, had not been addressed in Texas courts but is now specifically denounced in the Regulations.

## **E. Emergency Removal**

If an emergency removal is necessary "to prevent imminent physical damage or harm to [an Indian] child," the petition or supporting documents must contain specific information including the child or family's tribal affiliation, the specific imminent physical damage or harm, and the active efforts made to prevent the removal and to return the child to the home. [25 C.F.R. § 23.113\(d\)](#). DFPS has an ICWA removal affidavit which conforms to these requirements.

An emergency removal must be terminated as soon as it is not necessary to prevent the imminent physical harm. An emergency removal will terminate on the:

- Filing of a child-custody proceeding,
- Transfer of the case to the Tribe's jurisdiction, or
- Return of the child to the parent or Indian custodian.

If a child is not returned home or the case transferred to the tribe, all proceedings must comply with ICWA. If a party asserts or the court has reason to believe an Indian child may have been improperly removed or retained, the court must terminate the proceedings unless returning the child would subject the child to "substantial and immediate danger or threat of such danger." [25 C.F.R. §§ 23.113\(a\) and 23.113\(c\)](#).<sup>95</sup>

## **F. Special Setting Following Emergency Hearing**

An emergency proceeding should not be continued for more than 30 days unless the court finds:

- Returning the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- The court has been unable to transfer the proceeding to the appropriate Tribe; and
- It has not been possible to initiate a "child-custody proceeding."

When an Indian child is subject to removal, the best strategy is to set another hearing at the earliest possible date that accommodates the 30 day notice requirement applicable when a foster care placement is requested under ICWA. [25 U.S.C. § 1912](#). At that time, an ICWA compliant hearing can be conducted.

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## G. 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 ICWA.

It is recommended that courts with the capacity permit family members and tribes to participate by telephone, video conference, and other means. [25 C.F.R. § 23.133](#).<sup>96</sup> If there is reason to know a parent or Indian custodian has limited English proficiency, the court must provide interpreter services. [25 C.F.R. § 23.111\(f\)](#).<sup>97</sup>

### 1. Mandatory Transfer to Tribal Court

A parent, an Indian custodian, or the child's tribe may petition the state court to transfer a suit involving an Indian child to the tribal court. A transfer request may be made orally on the record or in writing, at any stage of the proceedings. [25 C.F.R. § 23.115](#).<sup>98</sup> On receipt of a transfer request, the state court should immediately ensure the tribal court is notified. Notice may include a request for timely response regarding whether the tribe will decline the transfer. [25 C.F.R. § 23.116](#).

Transfer to the tribal court is mandatory, unless the court makes a finding of good cause not to transfer, the tribe declines transfer or either parent object. [25 U.S.C. § 1911\(b\)](#); [25 C.F.R. § 23.117](#).<sup>99</sup> The court cannot consider the following factors in assessing good cause:

- The advanced stage of the proceedings, if notice to the tribe did not occur until an advanced stage;
- Whether there was no petition to transfer in a prior proceeding involving the child;
- Whether transfer would affect the child's placement;
- The child's cultural connections with the Tribe or its reservation; or
- The socio-economic conditions of the Tribe, BIA social services, or the judicial systems. [25 C.F.R. § 23.118\(c\)](#).

The basis for any decision denying transfer must be a written order or in a statement on the record. [25 C.F.R. § 23.118\(d\)](#). If transfer is ordered, the state court must promptly forward the court records and work with the Tribal court to accomplish a smooth transfer with minimal disruption in services to the family. [25 C.F.R. § 23.119](#).

### 2. Appointment of Counsel

Appointment of counsel for indigent parents or Indian custodians is mandatory under ICWA, whether the action is for removal and placement in foster care or for termination of parental rights. [25 U.S.C. § 1912\(b\)](#). If a parent or Indian custodian appears without an

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attorney, the court must give an advisement of specific rights provided under ICWA. 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. [Tex. Fam. Code § 107.012](#).

### **3. Right to Review Records**

In a proceeding for emergency removal, foster care placement 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. [25 U.S.C. § 1912\(c\)](#); [25 C.F.R. § 23.134](#).<sup>100</sup> 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 information promotes collaboration with a tribe, in terms of locating resources, experts, or vital family history information.

### **4. Right to Intervene**

The tribe and the Indian custodian have the right to intervene in the state court action *at any time* in the proceedings. [25 U.S.C. § 1911\(c\)](#). Intervention may be accomplished informally, by oral statement, or formally. Most important, if an Indian child is involved, ICWA applies whether or not the child's tribe intervenes.

### **5. 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 custody proceedings. [25 U.S.C. § 1911\(d\)](#).

## **H. Placement Preferences**

ICWA mandates that placements for foster care and adoption be made according to statutory preferences, unless good cause is shown to deviate from the preferences. [25 U.S.C. § 1915](#); [25 C.F.R. § 23.129-131](#). The court must consider the preference of the Indian child or child's parent, where appropriate. [25 C.F.R. § 23.131\(d\)](#); [25 C.F.R. 23.132\(b\)](#). In a voluntary proceeding, if a parent requests anonymity, the court must give weight to that request in applying the preferences. [25 C.F.R. § 23.129\(b\)](#).

All placements must be in the least restrictive setting that:

- Most approximates a family, taking sibling attachment into consideration;
- Allows any special needs to be met; and
- Is in reasonable proximity to the child's home, extended family, and siblings. [25 C.F.R. § 23.131](#).

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The statutory preferences give priority as follows:

### **1. 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. [25 U.S.C. § 1915\(b\)](#); [25 C.F.R. § 23.131\(b\)](#).<sup>101</sup>

### **2. For an Adoptive Placement**

- A member of the child's extended family;
- Other members of the child's tribe; or
- Other Indian families. [25 U.S.C. § 1915\(a\)](#); [25 C.F.R. § 23.130](#).

### **3. Departing from ICWA Preferences**

The tribe can by resolution alter the order of preferences. [25 U.S.C. § 1915\(c\)](#). 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.

Good cause to depart from the placement preferences must be shown by clear and convincing evidence, on the record or in writing, and be based on one or more of the following factors:

- The request of the Indian child's parent;
- Request of the child of sufficient age and capacity;
- Ability of placement to maintain sibling attachment;
- The "extraordinary physical, mental, or emotional needs" of the child; and
- The unavailability of a suitable placement (despite a diligent search and active efforts to locate one). [25 C.F.R. § 23.132\(b\), \(c\)](#).

Neither the relative socioeconomic status of a placement nor ordinary bonding flowing from time spent in a non-preferred placement made in violation of ICWA will support deviation from preferences. [25 C.F.R. § 23.132\(d\), \(e\)](#).

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This creates yet another incentive to identify a child subject to ICWA quickly, to avoid a child bonding with a caretaker before a placement consistent with these preferences can be made.

In the *Baby Girl* case, the Supreme Court held that if no party eligible for preference formally seeks placement, the placement preferences do not apply. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552. This shifts the burden to a potential placement to seek placement, which is at odds with the best placement practices for child protection. Regardless of a child's ethnicity, DFPS does not wait for placements to come forward but seeks out extended family, fictive kin, and other placement resources. When an Indian child is identified, the tribe is notified and may also identify potential placements. Any appropriate potential placement is assessed and a placement selected consistent with the statutory preferences and good casework practice. As a result, a potential placement's failure to make a formal request would not impact the selection process in a DFPS child protection suit.

## **I. Conservatorship or Termination of Parental Rights of Indian Child**

### **1. Burden of Proof**

If ICWA applies, the burden of proof and standards for an order placing a child in foster care (in effect a removal) or a final order seeking permanent managing conservatorship or termination of parental rights are different than under the Texas Family Code. In summary, if ICWA applies the requirements are:

- 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 by proved unsuccessful. [25 U.S.C. § 1912\(e\)](#)

- 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 1912\(f\)](#).

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## 2. Causal Relationship

Whether a foster care placement or termination of parental rights is at issue, there must be evidence of “a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child.” 25 C.F.R. § 23.121(c).<sup>102</sup> Without a causal relationship, evidence of “community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.” 25 C.F.R. § 23.121(d).

## 3. 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. 25 U.S.C. § 1912(d). 25 C.F.R. §23.120.<sup>103</sup> Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts. **“Active efforts” is generally construed to require more than the “reasonable efforts” otherwise required for children in foster care. The Regulations offer detailed examples of what constitutes active efforts:**

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
- (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe;
- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

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(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; and

(11) Providing post-reunification services and monitoring. [25 C.F.R. § 23.2.](#)

**Strategies that promote diligent identification of tribes, incorporate culturally appropriate tribal services, help families overcome barriers, promote involvement of the Tribe, and maintain sibling relationships and family visits are all encouraged.**

The Guidelines recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.<sup>104</sup> **To the extent possible, DFPS staff should work with a child's tribe, extended family, tribal social services, and individual Indian caregivers to tailor appropriate services for individual families.**

The Regulations specify that active efforts must be documented in detail in the record. [25 C.F.R. § 23.120\(b\).](#)

## J. Who is a Qualified Expert Witness?

The statute does not define what constitutes a qualified expert under ICWA. The Regulations *require* that an expert be qualified to testify as to whether the child's continued custody by the parent or custodian is "likely to result in serious emotional or physical damage," and direct that an expert *should be* qualified to testify as to the "prevailing social and cultural standards" of the child's tribe. [25 C.F.R. § 23.122.](#) The social worker assigned to the child's case may not serve as an expert (although a caseworker may testify otherwise, as to the parent's compliance with the service plan, visitation and other issues).

Without question, the child's tribe is the best source for an expert. If the tribe is in agreement with the agency's legal strategy, and has an expert willing and able to testify, this is ideal. However, if a tribe has a policy against termination of parental rights, or is not in agreement with DFPS on a specific case, finding an ICWA expert can be challenging. Understandably, many tribal members do not want to take a position in a court proceeding adverse to a fellow tribal member and with very small tribes, the pool of potential experts is limited to begin with. The DFPS Office of General Counsel may be able to assist in identifying expert witnesses. Courts with capability should allow participation by phone, video conferencing, or other methods. [25 C.F.R. § 23.133.](#)

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## K. Voluntary Relinquishment of Parental Rights

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. [25 U.S.C. § 1913\(a\)](#). 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. The Guidelines also state that notice of voluntary proceedings to the Indian tribe is a recommended practice, while the statutory notice provision is limited to involuntary proceedings. [25 U.S.C. § 1912\(a\)](#).<sup>105</sup>

In addition, ICWA requires the judge to 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. [25 U.S.C. § 1913\(a\)](#). 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). [25 U.S.C. § 1913\(c\), \(d\)](#).

## L. Case Notes

### 1. U.S. Supreme Court

*Adoptive Couple v. Baby Girl*, [133 S. Ct. 2552](#) (2013) (Court held: (1) the higher burden of proof and standard for termination of parental rights under ICWA do not apply to Indian parent who never had custody and cannot resume or continue to have custody of an Indian child; (2) requirement that “active efforts” be made to prevent the breakup of an Indian family does not apply to a parent who abandons a child before birth and never had custody; and (3) placement preferences do not bar a non-Indian family from adopting when no other eligible candidate (relative, tribal member, or other Indian person) seeks to adopt an Indian child)

*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

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that requires the state court to transfer jurisdiction unless good cause is shown or tribe declines)

## 2. Texas Courts

### *INDIAN CHILD STATUS*

*In re E.A.H.*, [2018 WL 2451824](#) (Tex. App.—Austin June 1, 2018, no pet. h.) (mem.op.) (where Department gave notice with relevant family history to three Cherokee tribes and BIA and none confirmed Indian child status ICWA does not apply and notice to other tribes on the Dawe’s Roll not required)

*In re C.C. and Z.C.*, [2018 WL 718987](#) (Tex. App. — Tyler February 6, 2018, no pet.) (mem.op.) (ICWA does not apply where parent’s asserted affiliation is with Azteca, which is not a federally recognized tribe for purposes of ICWA); original case, *In re C.C. and Z.C.*, [2018 WL 3184319](#) (Tex. App. — Tyler, 2017, no pet.)(remand necessary where despite father’s report of “Indian blood”, status report indicating each child’s Native American status yet to be determined and permanency reports showing both parents denied Native American status, without explanation, trial court failed to make determination of Indian child status)

*In re A.E.*, [2017 WL 4707488](#) (Tex. App. —Dallas 2017, no pet.) (mem.op.) (where mother denied Indian heritage until trial was underway, appellate court abated case for further investigation; after caseworker testified that twenty recognized tribes all responded that the child was neither enrolled nor eligible for enrollment, trial court did not know or have reason to know of Indian child status)

*In re C.D.G.D.M., v. DFPS*, [2017 WL 4348237](#) (Tex. App. —Austin 2017, no pet.) (mem.op.) (ICWA does not apply where Department gave notice to all Cherokee tribes, and all concluded child did not meet Indian child definition)

*In re T.R.*, [491 S.W.3d 847](#) (Tex. App. — San Antonio 2016, no pet.) (termination affirmed where mother repeatedly denied Native American ancestry and great-grandmother reported no family member was registered with the Choctaw Nation and her own membership was in a Cherokee tribe not recognized by Congress)

*In re Z.C.*, [No. 12-15-00279-CV](#), 2016 Tex. App. LEXIS 4546 (Tex. App. — Tyler April 29, 2016, no pet.) (mem.op) (termination abated and remanded for trial court to make findings as to Indian child status; three permanency reports referencing Indian child status and report from CASA volunteer that father refused hair follicle drug test on grounds that he was Indian and could not cut hair sufficient to trigger duty to give notice to the tribe; ) (*In the Interest of Z.C.*, [No. 12-15-00279-CV](#), [2017 Tex. App. LEXIS 3896](#) (App.—Tyler Apr. 28, 2017) On remand, proceeding reinstated and proper notice was sent. The court found child’s possible tribe was not an ICWA recognized tribe. Trial court judgement was then affirmed.)

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*In re D.D.*, [No.12-15-00192-CV](#), [2016 WL 7401925](#) (Tex. App. — Tyler 2016, no pet. h.) (mem.op.) (in separate opinions involving two parents, appeal of termination case abated and remanded, for failure to address issue of child's tribal heritage and give proper notice despite references in the record to family tribal history)

*In re N.A.*, [No. 02-13-00345-CV](#), [2014 LEXIS 2377](#) (Tex. App. — Fort Worth, February 28, 2014, no pet.) (information in progress reports that mother reported her great-great-grandfather was a registered Cherokee sufficient to trigger notice to tribe requirement)

*In re C.T.*, [No. 13-12-00006-CV](#), [2012 LEXIS 10746](#) (Tex. App. — Corpus Christi-Edinburg, Dec. 27, 2013, no pet.) (where child's grandmother testified child was half-Indian because she is half Black Foot and the mother is half Cheyenne, but failed to indicate whether parents or children were members or children were eligible for membership, failure to apply ICWA not error)

*In re J.J.C.*, [302 S.W. 3d 896](#) (Tex. App. — Waco 2009, no pet.) (allegation that maternal grandmother is member of Chippewa Indian Nation sufficient to give court "reason to believe" Indian child involved)

*In re R.R.*, [294 S.W. 3d 213](#) (Tex. App. — Fort Worth, March 19, 2009, no pet.) (where grandmother is enrolled tribal member and tribe requested more information, notice to tribes and Bureau of Indian Affairs required before trial court can determine child's status as Indian child)

*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 insufficient to put court on notice of Indian child; court distinguishes *Doty-Jabbaar*, noting 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) (termination reversed for failure to adhere to ICWA requirements where caseworker notified the tribe in a prior proceeding for termination of parental rights and again in this case, court concluded "it is apparent [the agency] acknowledged the child's status as an Indian child ... .")

## NOTICE

*In re T.R.*, [491 S.W.3d 847](#) (Tex. App. — San Antonio, April 4, 2016, no pet.) (ICWA notice not required where mother repeatedly denied Native American ancestry and great-grandmother reported no family member was registered with the Choctaw Nation and her own membership was in a Cherokee tribe not recognized by Congress)

*In re K.S.*, [448 S.W. 3d 521](#) (Tex. App. -- Tyler 2014, pet. denied) (failure to strictly comply with formal notice not basis for invalidation where tribe had actual notice, intervened, and participated in case)

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*In re R.R.*, [294 S.W. 3d 213](#) (Tex. App. — Fort Worth, March 19, 2009, no pet.) (strict compliance with specific ICWA notice requirements necessary to avoid exposing a termination decree to a petition to invalidate at some future date)

#### *ICWA APPLICATION*

*In re J.J.T.*, [544 S.W. 3d 874](#) (Tex. App. — El Paso, no pet.) (termination judgment reversed where tribal intervention denied because untimely and not in writing)

*Villarreal v. Villarreal*, [No. 04-15-00551-CV, 2016 Tex. App. LEXIS 8272](#) (Tex. App — San Antonio Aug. 3, 2016, no pet. h.) (mem. op.) (a divorce is not a "child custody proceeding" subject to ICWA)

*In re E.G.L.*, [378 S.W. 3d 542](#) (Tex. App.— Dallas 2012, pet. denied) (ICWA does not apply to suit by stepfather seeking adjudication of father's paternity and appointment as conservator)

*In re B.O.*, [No. 03-12-00676-CV, 2013 LEXIS 4712](#) (Tex. App.—Austin, April 12, 2013, no pet.) (mem. op.) (argument that ICWA should apply because father is a tribal member even though children are not members or eligible for membership in a tribe rejected)

*Comanche Nation v. Fox*, [128 S.W.3d 745](#) (Tex. App. —Austin 2004, no pet.) (ICWA does not apply to proceeding to modify child conservatorship where no public or private agency is attempting to remove a child from an Indian family)

*Doty-Jabbaar v. Dallas County Child Protective Services*, [19 S.W.3d 870](#) (Tex. App. — Dallas 2000, pet. denied) (even if tribe does not intervene, court must apply ICWA if Indian child involved and "[w]hen, as here, an ICWA proceeding takes place in state court, rather than a tribal forum, the trial court should take great precaution to ensure the prerequisites of ICWA have been satisfied.")

#### *BURDEN OF PROOF*

*In re G.C.*, [No. 10–15–00128–CV, 2015 Tex. App. LEXIS 8527](#) (Tex. App.—Waco, August 13, 2015, no pet.) (mem. op) (section 1912(f)'s requirement of a finding beyond a reasonable doubt is limited to the finding expressly stated in section 1912(f) and does not apply to the termination findings under the Texas Family Code)

*In re K.S.*, [448 S.W.3d 521](#) (Tex. App.— Tyler 2014, pet. denied) (there must be proof beyond a reasonable doubt that active efforts to prevent the breakup of the Indian family were made and proved unsuccessful)

#### *PLEADINGS AND JURY CHARGE*

*In re G.C.*, [No. 10–15–00128–CV, 2015 Tex. App. LEXIS 8527](#) (Tex. App.—Waco, August 13, 2015, no pet) (mem. op.) (concurrent application of the ICWA and the Texas Family Code to proceedings involving Indian children provides additional protection to

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parents of Indian children because it requires the party seeking termination to prove state and federal grounds before the parent-child relationship may be terminated.)

*In re K.S.*, [448 S.W. 3d 521](#) (Tex. App. —Tyler 2014, pet. denied) (when ICWA applies, both ICWA and the Texas Family Code must be satisfied; not error to submit broad form jury charge where charge included instruction on statutory language and burden of proof under both ICWA and the Family Code; and, there must be proof beyond a reasonable doubt that "active efforts" were made and were unsuccessful to prevent the breakup of the Indian family under [25 U.S.C. § 1912\(d\)](#))

*In re W.D.H.*, [43 S.W.3d 30](#) (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, pet. denied) (termination order reversed, citing failure to make requisite ICWA findings and error in making findings on best interests (“an Anglo standard”) and on statutory grounds for termination under the Texas Family Code. Father’s whereabouts and status as a member of the Cheyenne-Arapaho tribe of Oklahoma were unknown when child was removed at birth and only after reunification was in progress and father was convicted of burglary did he advise the agency he was one-fourth Indian)

#### ACTIVE EFFORTS

*In re K.S.*, [448 S.W.3d 521](#) (Tex. App. — Tyler 2014, pet. denied) (in *dicta* the court observes, "[b]ut when aggravated circumstances exist and reasonable efforts for reunification are not required by the family code, the ICWA requirements must still be satisfied because they provide a higher degree of protection than state law," an approach consistent with the generally strict interpretation of ICWA by Texas courts)

#### EXPERT WITNESS

*In re S.P.*, [2018 WL 1220895](#) (Tex. App. — Austin, March 9, 2018, no pet. h.) (mem.op.) (testimony of foster parent and Department caseworker fails to satisfy requirement for evidence, including qualified expert testimony, that “the continued custody of the child by the parent is likely to result in the serious emotional or physical damage to the child,” and necessitates remand)

*In re V.L.R.*, [507 S.W.3d 788](#), (Tex. App. — El Paso, Nov. 18, 2015, no pet. h.) (caseworker without tribal membership, recognition by tribe of her substantial experience in the delivery of child and family services to Indians, or knowledge of the prevailing social and cultural standards and childrearing practices within the tribe, not a qualified expert)

*Doty-Jabbaar v. Dallas County Child Protective Services*, [19 S.W. 3d 870](#) (Tex. App. — Dallas, 2000, pet. denied) (without reference to the particular grounds for removal (cocaine exposed infant), court found social worker’s nine and a half years of experience insufficient qualification as ICWA expert, citing the lack of evidence of social worker’s education and familiarity with Indian culture and childrearing practices)

#### JURISDICTION/TRANSFER

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*Yavapai-Apache Tribe v. Mejia*, [906 S.W.2d 152](#) (Tex. App.—Houston [14<sup>th</sup> Dist.] 1995) at 169 (error to use "best interests of the child" and the children's lack of contact with the tribe to determine good cause to deny transfer to tribal court; court approves use of a modified forum non conveniens doctrine, citing location of evidence and witnesses, to assess good cause and affirm denial of transfer, observing that "when a state court keeps a case in a concurrent setting, it is still required to apply the relevant sections of ICWA. In other words, avoiding tribal court jurisdiction does not render ICWA inapplicable.")

#### REMEDY FOR ICWA VIOLATION

*In re V.L.R.*, [507 S.W.3d 788](#) (Tex. App. — El Paso, Nov. 18, 2015, no pet. h.) (violation of ICWA requires reversal of termination judgment)

*In re G.D.P.*, No. [09-14-00066-CV](#), [2014 Tex. App. LEXIS 7477](#) (Tex. App. — Beaumont, 2014, no pet.) (parties agreed to reverse termination judgment based on violation of ICWA)

*In the Interest of P.J.B.*, No. [10-12-00286-CV](#), [2013 LEXIS 4076](#) (Tex. App. — Waco, March 28, 2013, no pet.) (no violation where appeal abated and trial court found ICWA did not apply)

*In re J.J.C.*, [302 S.W. 3d 896](#) (Tex. App. — Waco 2009, no pet.) (trial court's failure to follow ICWA can be raised for the first time on appeal; appeal abated pending trial court determination of Indian child status; *disp. on merits*, 2010 Tex. App. LEXIS 2513 (Tex. App.—Waco, April 7, 2010, no pet.) (mem. op.) (termination reversed and remanded based on determination that children were Indian children)

*Doty-Jabbaar v. Dallas County Child Protective Services*, [19 S.W. 3d 870](#) (Tex. App. — Dallas, 2000, pet. denied) (termination judgment reversed for failure to adhere to ICWA requirements)

#### STANDARD OF REVIEW

*In re V.L.R.*, [507 S.W.3d 788](#), (Tex. App. — El Paso, Nov. 18, 2015, no pet.) (where burden of proof is beyond a reasonable doubt in ICWA termination case, the Jackson v. Virginia standard requires review of evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found [25 U.S.C. § 1912\(d\)](#) and [25 U.S.C. § 1912\(f\)](#) were satisfied beyond a reasonable doubt)

### 3. Other State Courts

#### INDIAN CHILD STATUS

*In the interest of N.S.*, [837 N.W. 2d 680](#) (Iowa Ct. App. 2013) (where all three Ute tribes notified, two confirmed child was not a member and the third provided sufficient evidence

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for the court to conclude child was not a member, trial court properly concluded that ICWA did not apply)

*In re Jack*, [122 Cal. Rptr.3d 6](#) (Cal. Ct. App. 2011) (father and children's lack of tribal enrollment does not determine Indian child status; differences in tribal membership criteria and enrollment procedures mean that whether a child is an Indian child depends on "the singular facts of each case")

*In re B.R.*, [97 Cal. Rptr. 3d 890](#) (Ca. Ct. App. 2009) (where children's biological father had been adopted by Apache parent, error to allow tribe to determine Indian child status)

*In re E.H.*, [46 Cal. Rptr.3d 787](#) (Cal. Ct. App. 2006) (mother's failure to respond to trial court's repeated exhortations that she disclose Indian heritage or to challenge social worker's report stating ICWA did not apply prompts court to observe "this is the most cynical and specious ICWA claim we have encountered." It is also worth noting that even on appeal, the mother did not assert that the children were subject to ICWA, but merely that the case should be reversed because the state agency and the court had made insufficient inquiries about whether ICWA applied to these children)

*In re Gerardo A.*, [14 Cal. Rptr. 3d 798](#) (Cal. Ct. App. 2004) (error to find ICWA did not apply where child welfare department failed to share additional Indian heritage information with all proper tribes. Without available Indian family history information, neither the tribe nor the Bureau of Indian Affairs can investigate and determine if child is an "Indian child")

*In re O.K.*, [130 Cal. Rptr. 2d 276](#) (Cal. Ct. App. 2003) (no reason to believe child is an Indian child where the only evidence is paternal grandmother's vague and speculative statement that child's father "may have Indian in him.")

#### **EXPERT WITNESS QUALIFICATIONS**

*Matter of I.W.*, [419 P.3d 362](#) (Okla. Civ. App. 2017) (tribal social services director who is an elder in the tribe and licensed as a social worker witness is not disqualified as expert witness under ICWA because he was not the primary caseworker on the case; however, an expert's equivocal testimony that fails to support the required finding does not satisfy the burden)

*Bob. S. v. State*, [400 P.3d 99](#) (Alaska 2017) (proof that parent's continued custody likely to result in serious damage to the child may be established with the testimony of one or more experts or by aggregating testimony of lay and expert witnesses)

*In re L.M.B.*, [54 Kan. App.2d 285](#) (Kan. Ct. App. 2017) (despite lack of experience in the direct delivery of child and family services, tribal doctor who is a member of the same tribe as the children, with a PhD in Native American history, who is professor of indigenous American Indian studies and has taught the Indian Child Welfare Act is a qualified expert)

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*Caitlyn E. v. State*, [399 P.3d 646](#) (Alaska 2017) (tribal woman with tribal social work experience who testified that members of Yupik tribes “don't raise our children being verbally abusive” is a qualified expert)

*In re K.S.D.*, [904 N.W. 2d 479](#) (North Dakota 2017) (despite testimony from agency experts qualified in child deprivation and welfare, termination reversed and case remanded in the absence of testimony from qualified expert that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child)

*In re D.B.*, [414 P. 3d 46](#) (Colo. Ct. App. 2017) (ICWA expert not required to specifically state that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child; rather, expert's testimony must be a part of the evidence that support the court's finding to this effect)

*In re Diana P.*, [355 P.3d 541](#) (Alaska, Sept. 1, 2015) (where the basis for termination of parental rights is "culturally neutral," expert testimony combined with lay testimony can be sufficient to establish "serious emotional or physical damage.")

*In re Shane*, [842 N.W.2d 140](#) (Neb. Ct. App. 2013) (licensed mental health practitioner and certified professional counselor whose practice serving abused or neglected children and those with behavioral problems, includes Indian children, who has experience working with Indian youth at a youth shelter and at a high school program, qualifies as expert witness)

*Brenda O. v. Arizona Dep't of Economic Security*, [244 P.3d 574](#) (Ariz. Ct. App. 2010) (mental health professional qualified as expert witness, without extensive knowledge of prevailing social and cultural standards and childrearing practices of the Navajo where "there was no evidence at trial that Navajo culture or mores are relevant to the effect Brenda's demonstrated alcohol problem has on her children.")

*Marcia V. v. Alaska, Office of Children's Services*, [201 P.3d 496](#) (Alaska 2009) (legislative history suggests "expertise beyond the normal social worker qualifications" or "substantial education in the area of his or her specialty" are necessary but "[w]hen the basis for termination is unrelated to Native culture and society and when any lack of familiarity with cultural mores will not influence the termination decision or implicate cultural bias in the termination proceeding, the qualifications of an expert testifying under [25 U.S.C. § 1912\(f\)](#) need not include familiarity with Native culture.")

## *JURISDICTION/TRANSFER*

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*In re Tavian B.*, [874 N.W.2d 456](#) (Nebraska 2016) (advanced stage of the proceedings not a valid basis for finding good cause to deny motion to transfer jurisdiction to a tribal court, based on Guidelines. Notably, the later enacted [25 C.F.R. § 23.118\(c\)\(1\)](#) only prohibits consideration of this factor if the ICWA notice was given at an advanced state of the proceedings)

*In re Jayden D.*, [842 N.W. 2d 199](#) (Neb. Ct. App. 2014) (no good cause to deny transfer to tribal court where no evidence introduced regarding the current location of parent and children, the identity and location of witnesses, location of the tribal court, or the ease with which evidence might be presented in the tribal court)

*Navajo Nation v. Norris*, [331 F.3d 1041](#) (9<sup>th</sup> Cir. 2003) (denial of tribe's challenge to adoption of Indian child based on state court's lack of jurisdiction affirmed, because Indian parents were not domiciliaries of the reservation at the time of the child's birth and as such, state court had concurrent jurisdiction)

#### *PLACEMENT PREFERENCES*

*In re R.H.*, [228 Cal.Rptr.3d 747](#) (Cal. Ct. App 2018) (good cause to deviate from the placement preferences established where mother obstructed efforts to place with maternal family, tribe failed to respond to repeated messages from the agency, child never had any contact with the Tribe, and was bonded to prospective adoptive parents)

*In re D.L.*, [298 P.3d 1203](#) (Ok. Civ. App. 2013) (tribal family failed to show good cause to deviate from the mandatory placement preferences, which give first **preference** to extended family, whether or not family is associated with a tribe)

*In re Enrique P.*, [709 N.W.2d 676](#) (Neb. Ct. App. 2012) (in the absence of evidence showing good cause to deviate from placement preferences, court order to cease search for relative placements reversed)

*Navajo Nation v. Arizona Dep't of Economic Security, Z.*, [284 P.3d 29](#) (Ariz. Ct. App. 2012) (good cause to deviate from placement preferences where infant placed in foster home at one month of age, removal would create severe distress, and family agreed to expose child to tribal culture; original placement was with extended family of alleged father later excluded as father)

#### *ACTIVE EFFORTS*

*Damon W.*, [2018 WL 1357357, No. S-16739](#) (Alaska 2018) (agency's efforts over the entire case, showing efforts beyond developing case plan and leaving parent to complete it on his own, satisfy "active efforts")

#### *ACTIVE EFFORTS TO REUNIFY*

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*In re L.M.B.*, [54 Kan. App.2d 285](#) (Kan. Ct. App. 2017) (“active efforts” does not require “absolutely every effort;” a narrow focus on what the caseworker failed to do ignores the other ways that the provider engaged in active efforts)

*State ex rel. Children, Youth & Families Dep’t v. Yodell B.*, [367 P.3d 881](#) (N.M. Ct. App., December 21, 2015) (no active efforts found where the Department created a service plan and referred the father to a parenting class but otherwise took a passive role and shouldered father with burden of locating and obtaining services and ensuring providers communicated with Department)

*In re D.A.*, [305 P.3d 824](#) (Mont. 2013) (attempting to work around parent's incarceration, supervision, and chemical dependency problems, “[t]he Department's active efforts matched the Department's words in its desire to facilitate reunification.”)

*In re D.S.*, [806 N.W.2d 458](#) (Iowa Ct. App. 2011) (responding to tribe's statement that parents should be allowed up to five years additional time to reunify, court found active efforts to reunify were made, explaining “[w]hile ICWA focuses on preserving Indian culture, it does not do so at the expense of a child's right to security and stability.”)

*In re J.S.B.*, [691 N.W.2d 611](#) (S.D. 2005) (“we do not think Congress intended that ASFA's “aggravated circumstances” should undo the State's burden of providing ‘active efforts’ under ICWA.”)

*N.A. v. State*, [19 P.3d 597](#) (Alaska 2001) (citing long list of efforts by child welfare agency as well as Dept. of Corrections to address parent’s substance abuse and reunify family, court concludes state’s effort were not only active, but exemplary)

*In re Leticia V.*, [97 Cal. Rptr.2d 303](#) (Cal. Ct. App. 2000) (active efforts does not require duplicative reunification services or the performance of idle acts; where parent failed to respond to substantial but unsuccessful efforts to address drug problem in one child’s case, repeating those efforts for the same parent in another child’s case is not required)

#### *REMEDY FOR ICWA VIOLATION*

*In re S.E.*, [158 Cal. Rptr. 3d 497](#) (Cal. Ct. App. 2013) (failure to investigate child's Indian heritage and provide information to the tribe requires reversal of guardianship order and remand)

*In re Adoption of Erin G*, [140 P.3d 886](#) (Alaska 2006), [127 S.Ct. 591](#) (2006, cert. denied) (although ICWA contains no statute of limitations for a petition to invalidate, state law limiting challenge of adoption decree not based on fraud or duress to one year applied in the absence of explicit congressional intent to impose no time limit on such actions)

## **M. Resources**

Quick Reference Sheet for State Court Personnel,

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<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041404.pdf>

*Indian Child Welfare Act Judicial Benchbook*, National Council of Juvenile and Family Court Judges,

[http://www.ncjfcj.org/sites/default/files/NCJFCJ\\_ICWA\\_Judicial\\_Benchbook\\_Final\\_Web.pdf](http://www.ncjfcj.org/sites/default/files/NCJFCJ_ICWA_Judicial_Benchbook_Final_Web.pdf)

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# THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

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This chapter is an overview of the Interstate Compact on the Placement of Children (ICPC).

The ICPC is a model contract that was drafted in 1960, and is legally binding on all states that adopt it. Texas adopted the ICPC in 1995 and it is codified at [Tex. Fam. Code § 162.102](#). The purpose of the ICPC is to ensure that children placed out of their home state receive the same protections and services that would be provided, if they remained in their home state.

To see any specific ICPC regulations mentioned throughout this chapter, please link to the ICPC regulations here:

[https://aphsa.org/OE/AICPC/ICPC\\_Regulations.aspx](https://aphsa.org/OE/AICPC/ICPC_Regulations.aspx)

CPS ICPC policy can be found here:

<https://www.dfps.state.tx.us/handbooks/CPS/Menu/MenuCPS9000.asp>.

Some recent efforts to improve the Texas ICPC process include:

- The overall processing of expedited home study requests
- Regional ICPC coordinators have been tasked to assist Texas caseworkers with the ICPC process
- Texas ICPC/State office and Regional ICPC coordinators are promoting on-line easily accessible ICPC training
- Texas ICPC/State Office created a spreadsheet to use jointly with the ICPC regional coordinators to routinely track and check for the status of outgoing home study requests

DFPS is tracking the timeliness of outgoing requests.

## A. Purpose of the ICPC

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;

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- 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. ICPC Applicability**

Generally, it applies to any interstate placement of a child over whom the court has jurisdiction. ICPC applies to the following:

- Placements that are preliminary to an adoption whether public or private adoption
- Placements in a licensed or approved foster home, including related and unrelated caregivers
- Placements with relatives when a parent or relative is not making the placement (i.e., the parent does not have legal custody / right to make the placement)
- Placements in group homes or residential placement, including accused or adjudicated delinquents placed in institutions in other states

### **1. The ICPC Does Not Apply to the Following:**

- Birth parents placing with a non-custodial birth parent, or a relative as long as no court has assumed jurisdiction of the child to be placed
- Relatives placing with birth parents or another relative as long as no court has assumed jurisdiction of the child to be placed
- A Court with jurisdiction that transfers the child to an out of state parent.
  - note that the receiving state has no responsibility for supervision or monitoring a placement made under these circumstances
- Placements into schools where the primary purpose for the placement is educational
- Placements into medical and mental facilities
- Tribal Placements (See the Indian Child Welfare Act section below)
- Visits, as long as the visit meets the definition under the ICPC Section I.D.3 (See also Visit vs. Placement section below).

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### Special Issue: Placement of a Child with an Out of State Parent

State Courts throughout the nation have reached different conclusions on whether ICPC procedures apply when courts place a child with an out of state biological parent. Until 2017 Texas Courts had followed the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations that state ICPC procedures do apply to placement with parents in certain circumstances, but no Texas court had addressed the issue directly.

In March 2016, DFPS updated its policy related to placing children with an out-of-state parent. DFPS will not initiate an ICPC home study request on a non-offending, non-custodial parent residing in another state, unless it is ordered to do so by the court with jurisdiction over the SAPCR. The new policy related to out of state placements with non-offending parents is found at Section 9300.<sup>1</sup>

In May of 2017 the San Antonio Appeals Court ruled that despite Texas's adoption of Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations, the plain unambiguous wording of ICPC Article III excluded biological parents as placements subject to ICPC procedures. The court ruled the compact does not apply to interstate placement of children with their natural parent and therefore the determination whether to place the child with the out of state parent is left to the court's discretion.

## **C. Jurisdiction vs. Process**

When a case comes before a juvenile or family court, the issue of jurisdiction will always precede the question of whether the ICPC applies. Thus, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA), and the Parental Kidnapping Prevention Act (PKPA) must be considered to determine whether the court and child welfare agency have continuing jurisdiction over child custody, which is precedent to the question of authority to place a child out-of-state. Case law in *J.D.S. v. Franks* differentiates between the jurisdictional components of the UCCJA and the purview of the ICPC. *J.D.S. v. Franks*, [893 P.2d 732](#) (Ariz. 1995). In *Franks*, the Supreme Court of Arizona explained that the compliance with the ICPC is not a prerequisite for exercising jurisdiction because the ICPC merely establishes a procedure to follow when a placement is made. Thus, the validity of a court's exercise of jurisdiction depends on the UCCJA (or UCCJEA) and PKPA. *Franks* spells out that the ICPC governs procedure, whereas the UCCJA (or UCCJEA) and PKPA govern jurisdiction. Likewise, in *White v. Adoption of Baby Boy D.*, the Supreme Court of Oklahoma held that the ICPC does not negate subject matter jurisdiction. *White v. Adoption of Baby Boy D.*, [2000 OK 44, 10 P.3d 212](#) (Okla. 2000).

## **D. Court Leadership**

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The National Council of Juvenile and Family Court Judges recommends close judicial monitoring to ensure the case is moving according to the ICPC timeframes. Special hearings may be required to ensure that certain activities are completed in a timely manner. Lack of understanding of the ICPC and its requirements is often cited as a problem that causes delays in an ICPC placement. Other delays are built into the ICPC process itself.

**Special Issue:** Many receiving states routinely deny home studies, especially on non-custodial parents, and there is no appeal process – a highly criticized flaw in the ICPC. Judges should consider directly contacting the judge in the receiving jurisdiction to ask for assistance in completing the ICPC process in the receiving state and with home studies that are stalled or denied without sufficient explanation and no recourse for reconsideration.

## E. Expedited Placement Request

Under certain conditions, a court may request an expedited placement review. Cases involving a child who is under the jurisdiction of a court are eligible, if at least one of the following criteria is met:

- There is unexpected dependency due to a sudden or recent incarceration, incapacitation or death of a parent or guardian. Incapacitation means a parent or guardian is unable to care for a child due to a medical, mental or physical condition of a parent or guardian;
- The child sought to be placed is four years of age or younger, and can include older siblings sought to be placed with the same proposed placement resource;
- The court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource. Substantial relationship means the proposed placement has a familial or mentoring role with the child, has spent more than cursory time with the child, and has established more than a minimal bond with the child; or
- The child is currently in an emergency placement.

Expedited placement option is not available where:

- The child has already been placed in the receiving state in violation of the ICPC, unless a visit has been approved in writing by the receiving state Compact Administrator and a subsequent order entered by the sending state court authorizing the visit with a fixed return date in accordance with Reg. No. 9; or
- The intention of the sending state is to place the child for licensed or approved foster care or adoption.

Expedited placement, like the ICPC, does not apply at all when:

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- The court places the child with a parent.

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. Please visit the American Public Human Services Association (APHSA) at [https://aphsa.org/OE/AAICPC/ICPC\\_Regulations.aspx](https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx) for more information.<sup>106</sup>

## **F. Visits vs. Placement**

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. For example, if the purpose of a visit is to provide the child with a social or cultural experience of short duration, such as a camp stay or visit with a friend or relative, and is less than 30 days, it will be presumed to be a visit. A stay of more than 30 days, but not longer than the duration of a school vacation period, can also be considered a visit. A stay that does not have a terminal date will be considered a proposed placement. Once a home study or supervision request has been made by the sending agency, there is a rebuttable presumption that the intent of any stay in the receiving state that exceeds 30 days is for placement and not simply a visit.

## **G. ICPC and Victims of Domestic Sex Trafficking**

According to a Juvenile Law Advisory Committee Brief on the ICPC and Domestic Child Sex Trafficking issued by the National Council of Juvenile and Family Court Judges in 2014, and in the context of child sex trafficking victims, the ICPC is often implicated in trying to place victims in the few facilities that can provide the extensive services needed for trafficking survivors. As the needs of this population are complex and expensive, only a limited number of residential institutions can provide this high level of care. Services for victims often require multi-systemic and long-term care, and the cost of housing a child in a residential facility can be expensive. Additionally, the operation of residential facilities is legally and practically complicated, and unfeasible for many poor, small or rural counties. Thus child sex trafficking victims may not have a variety of placements which fit their needs, forcing placing agencies to look outside the home state. There are various organizations that also recommend victims be removed from the original geographic area of exploitation during restorative services. There are only a handful of facilities throughout the country that specifically provide placement and services for trafficking victims.

## **H. The Indian Child Welfare Act and the ICPC**

Because the ICPC is a compact adopted by states as state law, the federal Indian Child Welfare Act (ICWA) preempts conflicting state law. Thus, the ICPC does not apply to interstate

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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. See [Bench Book chapter on the Indian Child Welfare Act](#) for information about placement preferences and requirements when ICWA is involved.

## I. Additional Resources

[ICPC: A Manual and Instructional Guide for Juvenile and Family Court Judges, NCJFCJ](#) located at [http://www.ncjfcj.org/sites/default/files/ICPCManualandGuideFullDoc\\_0.pdf](http://www.ncjfcj.org/sites/default/files/ICPCManualandGuideFullDoc_0.pdf).

Vivek Sankaran, [Foster Kids in Limbo: The Effects of the Interstate Compact on the Placement of Children on the Permanency of Children in Foster Care](#) (2014) located at [https://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Annie\\_E\\_Casey\\_Report.pdf](https://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Annie_E_Casey_Report.pdf).

Child Welfare Information Gateway, Legal and Court Issues Regarding Inter-jurisdictional Placements located at <https://www.childwelfare.gov/topics/permanency/interjurisdictional/legal/>

### Leading Cases:

*In the Interest of C.R.-A.A.*, 521 S.W.3d 893 (Tex. App.--San Antonio 2017) established that the ICPC does not apply to an interstate child placement with that child's natural parent. The court held that the ICPC does not apply to placement with a child's non-offending parent in another state. Article III of the ICPC prohibits a state from sending to another state "any child for placement in foster care or as a preliminary to adoption." The court held that a biological parent is excluded from Article III, by both the plain, ordinary, unambiguous meaning of the term and an analysis of the ICPS's legislative history that indicates the drafters did not intend for it to apply to natural parents. Furthermore, the court reasoned that even Texas's adoption of the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations that state ICPC procedures do apply to placement with parents in certain circumstances cannot override the plain meaning of Article III. The court concluded that it is inappropriate to resort to rules of construction or extrinsic aids when there is no ambiguity in the language and that when Texas adopted the AAICPC, it did so within the limits of state law which specify that rules or regulations that contravene statutory language or impose additional, excessive, or contrary burdens on the statutory provision are invalid.

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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, a Texas Court of Appeals in *Unger v. Baker*, 01-89-00803-CV (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 child was subject to the jurisdiction of the Texas trial court in which the managing conservator had filed a motion to 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.

**ICPC Regulations:**

[https://aphsa.org/OE/AAICPC/ICPC\\_Regulations.aspx](https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx)

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# INTERVENTIONS IN CPS CASES

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In CPS cases, legal interventions raise a number of issues. This chapter addresses:

- Standing requirements for non-parties to intervene in CPS legal cases and in cases with other stages of CPS involvement
- Considerations in responding to interventions filed
- Special issues when addressing an intervention in a CPS case

## A. Standing

There are two avenues for a non-parent party to establish standing in a SAPCR:

- Standing to file an original suit
- Standing to intervene in a pending suit

### 1. Standing to File Original Suit

[Tex. Fam. Code Section 102.003](#) provides that an original suit may be filed at any time by:

- A parent of the child;
- The child through a representative authorized by the court;
- A custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
- A guardian of the person or of the estate of the child;
- The Department of Family and Protective Services;
- A licensed child placing agency;
- A man alleging himself to be the father of a child filing in accordance with [Tex. Fam. Code Chapter 160](#), subject to the limitations of that chapter, but not otherwise;
- A person other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- 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](#);

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- A person with whom the child and the child’s guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child’s guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
  - A person who is the foster parent of a child placed by the Department of Family and Protective Services in the person’s home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
  - A person who is a relative of the child within the 3<sup>rd</sup> degree of consanguinity, as determined by [Tex. Gov’t Code Chapter 573](#), if the child’s parents are deceased at the time of the filing of the petition; or
  - A person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under [Tex. Fam. Code § 102.0035](#), regardless of whether the child has been born. [Tex. Fam. Code § 102.003\(a\)](#).

In computing the time necessary for standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#), [Tex. Fam. Code § 102.003\(a\)\(11\)](#), and [Tex. Fam. Code § 102.003\(a\)\(12\)](#), the court may not require that the time be continuous and uninterrupted but shall consider the child’s principal residence during the relevant time preceding the date of commencement of the suit. [Tex. Fam. Code § 102.003\(b\)](#).

Notwithstanding the time requirements of [Tex. Fam. Code § 102.003\(a\)\(12\)](#), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under [Tex. Fam. Code § 102.003\(a\)\(12\)](#) applies only to the adoption of a child who is eligible to be adopted. [Tex. Fam. Code § 102.003\(c\)](#).

## **Common Avenues for Original Standing in CPS Cases**

### **2. Actual Care, Control and Possession**

[Tex. Fam. Code § 102.003\(a\)\(9\)](#) provides standing to a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.

#### **a. Time-Specific in Applicability**

- No standing when child in home for only five and a half months at time of filing (*In the Interest of E.C.*, [No. 02-13-00413-CV](#) Tex. App. LEXIS 10199 (Tex. App. – Fort Worth [2<sup>nd</sup> District] September 11, 2014)).
- No standing when child in home for only three months at time of filing (*In re C.M.J.*, [No. 02-12-0036-CV](#) (Tex. App. – Fort Worth, December 2012, no pet.)).

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- b. Elements of “Actual Care, Control, and Possession.” Under *Jasek v. Texas Department of Family and Protective Services*, the court looked to the composite elements of the care, control, and possession in reaching its decision, considering:
- The individual asserting standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#) will have:
    1. Lived in a home where the child consistently and frequently stayed overnight;
    2. Financially supported the child;
    3. Participated in the child’s education; and
    4. Fed, clothed, and provided health care to the child.
  - “Actual control” does not require the authority to make legal decisions for the child (*Jasek v. Texas Department of Family and Protective Services*, [348 S.W.3d 523](#) (Tex. App. – Austin 2011, no pet.)).
- c. A non-parent's "actual care, control, and possession" of a child does not need to be exclusive to have standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#). *In the Interest of H.S.*, [550 S.W.3d 151](#) (Tex. 2018).

### **3. Standing to Request Termination and Adoption**

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

- A stepparent of the child;
- An adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
- An adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
- An adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- Another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. [Tex. Fam. Code § 102.005](#).

### **4. Standing for a Grandparent or Other Person**

In addition to the general standing to file suit provided by [Tex. Fam. Code § 102.003](#), a grandparent, or other relative of the child related within the third degree of consanguinity,

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may file an original suit requesting managing conservatorship if there is satisfactory proof that:

- The order requested is necessary because the child’s present circumstances would significantly impair the child’s physical health or emotional development; or
- Both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. [Tex. Fam. Code § 102.004\(a\)](#).
  - a. Relatives and degrees of consanguinity:
    - a parent or child (relatives of the first degree)
    - a brother, sister, grandparent, or grandchild (relatives of the second degree)
    - a great-grandparent, great-grandchild, aunt who is a sister of a parent of the child, an uncle who is the brother of a parent of the child, a nephew who is the child of a brother or sister of the child, or a niece who is a child of a brother or sister of the child (relatives of the third degree). [Tex. Gov’t Code § 573.023\(c\)](#).
  - b. Limits on [Tex. Fam. Code § 102.004\(a\)](#) Standing
    - step-grandfather excluded (*In the Interest of E.C.*, [No. 02-13-00413-CV](#) Tex. App. LEXIS 10199 (Tex. App. – Fort Worth [2<sup>nd</sup> District] September 11, 2014))
    - step-uncle excluded (*In re A.M.S.*, [277 S.W.3d 92](#) (Tex. App. – Texarkana 2009, no pet.))
    - great-aunt or great-uncle excluded (*In re N.L.D.*, [412 S.W.3d 810](#) (Tex. App. – Texarkana 2013, no pet.))
  - c. Proving Significant Impairment pursuant to [Tex. Fam. Code § 102.004\(a\)](#)
    - significant impairment of child’s physical health and emotional development found with evidence of parental drug use and criminal convictions and incarceration. (*In re K.D.H.*, [426 S.W.3d 879](#) (Tex. App. – Houston [14<sup>th</sup> Dist.] April 3, 2014, no pet.))
    - significant impairment of child’s physical health and emotional well-being found with evidence of physical and emotional abuse of the child even if the last alleged incident occurred months before the filing of the petition when the parent’s ideas regarding discipline had not changed during the period and the parent had not received any counseling or other services during that time to mitigate the risk of continued abuse. *In re McDaniel*, [408 S.W.3d 389](#) (Tex App. – Houston [1<sup>st</sup> Dist.] 2011)
    - significant impairment of emotional development found where a parent fails to send their child to school on a regular basis and fails to provide necessary

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therapeutic interventions for a child with poor school performance and behavioral issues. *Maudlin v. Clements*, 428 S.W.3d 247 (Tex. App. – Houston 2014)

- d. Applicability and Implications of [Tex. Fam. Code § 102.004\(a\)](#) in CPS Cases
- avenue for grandparents and other relatives within the requisite degree of consanguinity to file for custody of a child in an investigation or Family Based Safety Services stage of a CPS case
  - an original action for conservatorship under [Tex. Fam. Code § 102.004\(a\)](#) does not have the rehabilitative and service requirements of a CPS case or the same strict timelines

## **B. Standing to Intervene in a Pending Suit**

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that the appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child’s physical health or emotional development. [Tex. Fam. Code § 102.004\(b\)](#).

### **1. Applicable to Pending SACPRs**

- A grandparent or other person can only utilize [Tex. Fam. Code § 102.004\(b\)](#) in SACPRs that have not yet resulted in a final order.
- In the context of CPS cases, the SACPR is no longer pending once DFPS is appointed PMC of the child.

### **2. Pleading Requirements**

- The grandparent or other person must establish that they have had substantial past contact with the child; and
- The grandparent or other person must present satisfactory proof to the court that the appointment of the parent or parents as sole or joint managing conservators would significantly impair the child’s physical health and emotional development. [Tex. Fam. Code § 102.004\(b\)](#).

### **3. Case Law related to Substantial Past Contact**

Courts have applied the standard definition of “substantial” from the Random House Dictionary as “of ample or considerable amount, quantity, size, etc.” and have evaluated

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the amount of actual contact and not the difficulties of the intervening party maintaining contact. (*In re C.M.C.*, [192 S.W.3d 866](#) (Tex. App. – Texarkana 2006, no pet.))

“Substantial past contact” has been found to involve more than seeing a child regularly during his or her life. Substantial past contact has been shown by parties who have “frequently cared for the children, lived nearby, and spent a great deal of time with the family. (*Blackwell v. Humble*, [241 S.W.3d 707](#) (Tex. App. – Austin 2007, no pet.))

Relatives who have cared for a child for as few as 7 weeks have been found to have substantial past contact. The Court’s analysis focused on the caretaker’s daily supervision of the child during that time and found the intervening party to have established substantial past contact in undertaking the daily functions of legal custody during that time. (*In re A.L.W.*, [No. 02-11-00480-CV](#) (Tex. App. – Fort Worth Nov. 8, 2012, pet. denied)(mem. op.))

**Special Issue:** The determination of whether substantial past contact exists is a fact-intensive inquiry. The determination is not statutorily defined and case law does not establish a clear factual framework for judges to make the determination. Deference is usually given to the trial court’s assessment.

#### **4. Evidence that Appointment of Parent(s) as Managing Conservator would Significantly Impair the Child’s Physical Health and Emotional Development**

A person with substantial past contact with a child will be unable to show evidence that the appointment of a parent as the managing conservator when facts show only speculation of potential harm if the parent is appointed conservator. (*In re S.M.D.*, [329 S.W.3d 8](#) (Tex. App. – San Antonio, 2010, pet. dismissed))

#### **5. “Significant Impairment” during Reunification Phase of a CPS Case**

Alleged father who had independently raised the child for 2 and a half years submitted to paternity testing and was dismissed as a party to the case after genetic testing ruled him out as the father. He intervened alleging substantial past contact. He was denied leave to intervene because he failed to show that the appointment of the mother as sole managing conservator would significantly impair the child’s physical health and emotional development. Testimony offered by the Department at multiple hearings had shown that she had complied with all court orders and service plan requirements, that the child had already been placed with her and that the Department was recommending dismissal of the case. The Court of Appeals found no abuse of discretion in the trial court’s refusal to grant leave to intervene. (*L.J. v. Texas Department of Family & Protective Services*, [No. 03-11-00435-CV](#) (Tex. App. – Austin, August 1, 2012, pet. denied) (mem. op.))

### **C. Foster Parent Interventions**

#### **1. General Standing Provision, [Tex. Fam. Code § 102.003 \(a\)\(12\)](#)**

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An original suit may be filed at any time by a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition. [Tex. Fam. Code § 102.003\(A\)\(12\)](#).

## 2. Foster Parent Intervention Limited

- a. Previously, foster parents could intervene under [Tex. Fam. Code § 102.004\(b\)](#) with a showing of substantial past contact with the child, and satisfactory proof to the court that the appointment of a parent as Sole Managing Conservator or both parents as Joint Managing Conservators would significantly impair the child's physical health or emotional development. [Tex. Fam. Code § 102.004\(b\)](#).
- b. Effective September 1, 2017, [Tex. Fam. Code § 102.004\(b-1\)](#) clarifies that a foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12). [Tex. Fam. Code § 102.004\(b-1\)](#).

## D. Limitations on Standing

### 1. Limitations on Standing

Except as provided by [Tex. Fam. Code § 102.006\(b\)](#) and [Tex. Fam. Code § 102.006\(c\)](#), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:

- A former parent whose parent-child relationship has been terminated by court order;
- The father of the child; or
- A family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or the father of the child. [Tex. Fam. Code § 102.006\(a\)](#).

The limitations on filing suit imposed by [Tex. Fam. Code § 102.006](#) do not apply to a person who:

- Has a continuing right to possession of or access to the child under an existing court order; or
- Has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit. [Tex. Fam. Code § 102.006\(b\)](#).

The limitations on filing suit imposed by [Tex. Fam. Code § 102.006](#) do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is the sister of a parent of the child, or an uncle who is the brother of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing

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conservatorship of the child not later than the 90<sup>th</sup> day after the date the parent-child relationship between the child and the parent is terminated. [Tex. Fam. Code § 102.006\(c\)](#).

Courts have affirmed that [Tex. Fam. Code § 102.006\(c\)](#) serves to limit the standing of particular individuals when the parent-child relationship has been terminated; it does not confer standing. (*In re N.A.D.*, [397 S.W.3d 747](#) (Tex. App. – San Antonio 2013, no pet.)) and (*L.H. v. Texas Dep’t of Family and Protective Services*, [No. 03-13-00348-CV](#) (Tex. App. – Austin Mar. 6, 2014, no pet.)).

Special Issue: [Tex. Fam. Code § 102.006\(c\)](#) may have practical effects for judges:

- Narrows the class of individuals who would otherwise have standing to file an original proceeding for modification or adoption.
- Restricts time period for filing.
- Note that the legal avenues for adoption and modification may impose obstacles even to those who have standing and who file within 90 days.

## 2. Consequences of Missing 90-Day Deadline

Even parties who would otherwise have standing will lose that standing if they fail to file their petition for custody or adoption within 90 days.

Petition to adopt children by aunt with substantial past contact filed 7 months after parental rights were terminated was barred by Section 102.006(c) because it had not been filed within 90 days of the termination order. (*In re A.M.*, [312 S.W.3d 76](#) (Tex. App. – San Antonio 2010, pet. denied)).

## E. Petitions to Modify the Parent-Child Relationship

### 1. Procedural Requirements

If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit shall execute and attach an affidavit as provided by [Tex. Fam. Code § 156.102\(b\)](#). [Tex. Fam. Code § 156.102\(a\)](#).

The affidavit must contain, along with supporting facts, at least one of the following allegations that:

- The child’s present environment may endanger the child’s physical health or significantly impair the child’s emotional development;

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- The person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
  - The person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child. [Tex. Fam. Code § 156.102\(b\)](#).

The court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in [Tex. Fam. Code § 156.102\(b\)](#) are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing. [Tex. Fam. Code § 156.102\(c\)](#).

## 2. Modifications of Termination Orders in CPS Proceedings

Modifications must include a sworn affidavit that shows that the child's present environment may endanger the child's physical health or emotional development.

Grandparents filed Petition to Modify the Parent-Child Relationship immediately following the termination of parent-child relationship proceeding to which they were not parties and cited [Tex. Fam. Code § 102.006\(c\)](#) as basis for standing. No affidavit was attached. DFPS filed a Motion to Dismiss based on failure to attach the required affidavit under [Tex. Fam. Code § 156.102](#). Trial court dismissed suit and 4<sup>th</sup> Court of Appeals upheld dismissal finding [Tex. Fam. Code § 102.006](#) did not confer standing and the procedural requirements of [Tex. Fam. Code § 156.102](#) applied in cases where a modification of the Department's conservatorship of a child is sought. (*In re N.A.D.*, [397 S.W.3d 747](#) (Tex. App. – San Antonio 2013, no pet.)).

Special Issue: *In re N.A.D.* may present practical implications for the court:

- Modification of an order entered only 90 days earlier may require facts that establish that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development.
- Modification facts may be difficult to establish if, as part of Trial Court findings at termination of parent rights proceedings, that the child's current placement is meeting the child's needs and continuation is in the best interest of the child.

## F. Practical Considerations

### 1. Timing

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**a. Some courts have successfully struck interventions as untimely if filed too close to the dismissal deadline.**

Grandmother filed petition in intervention 2 months before dismissal date when permanency plan changed from reunification to termination although she had been aware of the case for over a year. Motion to Strike granted and affirmed by Appellate Court as within the discretion of the Court. (*In the Interest of C.A.L.*, No. 02-05-308-CV, 2007, Tex App LEXIS 1196 (App.—Fort Worth Feb. 15 2007 orig. proceeding) (mem. op.)).

Grandfather who lived in Kentucky filed an intervention 2 months before trial. (Waiting to file an intervention when out of state and ICPC study required problematic). (*Anderson v. Texas Dep't of Family and Protective Services*, No. 03-06-00327-CV (Tex. App. – Austin May 9, 2007, pet. denied (mem. op.)).

**b. Court should balance the complication of the issues in the case and the rights of the intervening party.**

A trial court abuses its discretion if it strikes a petition in which (1) the intervener could bring the same action, or any part thereof, in their own names, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the interveners' interest. In applying that analysis, the court found that even though the intervention was filed only 2 weeks before trial that the intervening party had standing and should have been allowed to participate in the trial. (*Seale v. Texas Dept. of Family & Protective Services*, No. 01-10-00440-CV (Tex. App. – Houston [1<sup>st</sup> Dist.] Mar. 3 2011, no pet.) (mem. op.)).

**2. Procedural Issues**

**a. Effect of Intervention**

Rule 60 of the Texas Rules of Civil Procedure provides that “any party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party.” Thus, intervening parties, absent a Motion to Strike, are immediately granted the status of a party and can participate in discovery, participate in hearings and mediations, and receive court reports, and other filings with the court. [Tex. Rule Civ. P. 60.](#)

**b. Leave of Court**

The court may grant a grandparent or another person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under [Tex. Fam. Code Chapter 102](#) if there is satisfactory proof to the court that appointment of a parent would significantly impair the child's physical health or emotional development. [Tex. Fam. Code § 102.004\(b\).](#)

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Following the plain language of the statute, the court finds a request for leave to intervene is necessary under [Tex. Fam. Code § 102.004\(b\)](#) and that the Intervener’s Amended Petition for Intervention which requested that the court “grant the relief requested in this intervention” be read as a request for leave to intervene. (*In the Interest of A.T.*, [No 14-14-00071-CV](#), (Tex. App. – Houston, July 15, 2014, (no pet.) (mem. op.)).

Court found that [Tex. Rule Civ. P. 60](#) does not apply to interventions filed under [Tex. Fam. Code § 102.004\(b\)](#). Court noted that the legislature developed a separate provision governing intervention in family law cases and gave the trial court discretion to determine whether to allow an intervention even when the statutory requirements are met. Court then found that no written motion to strike was required. (*L.J. v. Texas Department of Family & Protective Services*, [No. 03-11-00435-CV](#) (Tex. App. – Austin Aug. 1, 2012, pet. denied) (mem. op.)).

### **c. Imperfect Pleadings Can Establish Standing**

Appellate courts review standing issues by construing the pleadings in favor of the petitioner and by looking to the pleader’s intent.

Question is whether a party provides other parties and the Court fair notice of his or her claim. (*Jasek v. TDFPS*, [348 S.W.3d 523](#) (Tex App. – Austin 2011, no pet.)); *In the Interest of D.A.*, [No. 02-14-00265-CV](#) (Tex. App. – Fort Worth, February 5, 2015) (mem. op.); *In the Interest of N.I.V.S.*, [No. 04-14-00108-CV](#) (Tex. App. – San Antonio, March 11, 2015) (mem. op.).

## **G. Resources**

[Interventions: Tips for Properly Filing and Responding to Interventions in CPS Cases, 2015 Child Welfare Judges Conference.](#)

Interventions in Suits Affecting the Parent-Child relationship – Mary Evelyn McNamara and Karen J. Langsley, State Bar of Texas 40th Annual Advanced Family Law Course, August 4-7, 2014.

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# PATERNITY

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## A. The Mother-Child and Father-Child Relationship

The mother-child relationship is established between a woman and a child by:

- The woman giving birth to the child;
- An adjudication of the woman's maternity; or
- The adoption of the child by a woman.

The father-child relationship is established between a man and a child by:

- An un rebutted presumption of a man's paternity of the child. [Tex. Fam. Code § 160.204](#);
- An effective acknowledgment of paternity under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
- An adjudication of the man's paternity;
- The adoption of a child by the man; or
- The man's consenting to assisted reproduction by his wife

## B. Types of Fathers

- Presumed
- Alleged (or putative)
- Acknowledged
- Adjudicated
- Unknown

## C. Presumed Father

A man is a Presumed Father if:

- He is married to the mother of the child and the child is born during the marriage;
- He is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;

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- He is married to the mother of the child before the birth of the child in apparent compliance with the law, even if the attempted marriage is or could be declared invalid and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity or divorce;
  - He married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child; and
    - the assertion is in a record filed with the bureau of vital statistics,
    - he is voluntarily named as the child's father on the child's birth certificate, or
    - he promised in a record to support the child as his own;

During the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own. [Tex. Fam. Code § 160.204](#).

## D. Alleged Father

A man is an Alleged Father (sometimes called putative father) if:

- He alleges himself to be, or is alleged to be, the genetic father or possible genetic father of a child, but his paternity has not been determined.

An alleged father cannot establish paternity or create a presumption of paternity by registering with the Paternity Registry, but timely registration entitles him to notice of an action for termination of parental rights or adoption of a child he may have fathered.

There are several ways an alleged father may establish paternity:

- The mother of a child and the man claiming to be the biological father may sign an acknowledgment of paternity with the intent to establish the man's paternity. [Tex. Fam. Code § 160.301](#). A valid acknowledgment of paternity filed with the vital statistics unit is the equivalent of an adjudication of the paternity of a child and confers all rights and duties. [Tex. Fam. Code § 160.305](#).
- Both the mother and father can testify in open court and ask the court to establish paternity.
- Genetic testing. DFPS may obtain genetic testing through the Office of the Attorney General.

As soon as a legal father is established, any other potential candidates can be dismissed.

## E. Acknowledged Father

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A man is an Acknowledged Father if:

- He has executed an Acknowledgement of Paternity (AOP). A valid AOP filed with the VSU is the equivalent of an adjudication of paternity.

## **F. Adjudicated Father**

A man is an Adjudicated Father if:

- He has been adjudicated by a court to be the father of a child. Adjudication can be accomplished by an admission of paternity under penalty of perjury during a hearing. Also, a signed Acknowledgment of Paternity that has been filed

## **G. Paternity Registry**

The Vital Statistics Unit (VSU) maintains a paternity registry. A man who wants to be notified of a proceeding for the adoption or the termination of parental rights regarding a child he may have fathered must register before the birth of the child or not later than the 31st day after the child's birth. The registrant has the responsibility of keeping his information current with the bureau. A man who has filed with the paternity registry within the requisite time frame is entitled to be served with notice of a suit involving the child. Registering with the paternity registry also establishes a basis for personal jurisdiction of a person who is not a Texas Resident.

If no father-child relationship can be established, a petitioner (DFPS) seeking termination of parental rights or adoption must obtain a certificate of the results of a search of the paternity registry. If the petitioner (DFPS) has reason to believe that conception or birth of the child have may occurred in another state, the petitioner must obtain a certificate from paternity or putative father registry of that state.

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# PERMANENCY CARE ASSISTANCE (PCA)

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## A. What Is Permanency Care Assistance?

The Permanency Care Assistance (PCA) Program provides certain benefits and supports to qualifying kinship families who take permanent managing conservatorship (PMC) of a child. PCA families are eligible for:

- Monthly cash assistance similar to adoption assistance;
- Medicaid health coverage; and
- 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 \$1,200.

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\(a\)](#). Caregivers who apply must be:

- Related to, or has a longstanding relationship with, the child / children before the child is placed; and
- Verified by a child placing agency, and provide verified foster care for the child for at least six months AFTER verification and BEFORE the court awards PMC and dismisses the case.

DFPS may enter into a PCA 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\(b\)](#). A court may not order DFPS to enter into a PCA 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\(c\)](#).

## B. What Should Courts Do?

Before awarding permanent managing conservatorship to a kinship caregiver under this program and dismissing DFPS from a case, the court should ensure that:

- DFPS has determined that reunification and adoption are not appropriate permanency options for the child;
- The caregiver is verified (verified is not the same thing as licensed. DFPS licenses child placing agencies, and in turn, child placing agencies verify foster homes);

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- The child has been placed with the verified kin for at least six months following the date of the verification; and
  - DFPS and the kinship caregiver have signed a PCA Agreement and it is on file PRIOR to the award of PMC to the caregiver – the child must be in the temporary or permanent managing conservatorship of DFPS on the day before PMC is transferred to the relative.

The one-year deadline to dismiss a case still applies. For example, if the 12-month deadline is approaching, and a child has not lived with his or her verified caregiver for at least six months after the verification, the case must be extended under [Tex. Fam. Code § 263.401](#) or permanent managing conservatorship must be awarded to DFPS in order to allow sufficient time to satisfy the 6-month verified foster care requirement prior to the relative being awarded PMC.

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. If the caregiver and DFPS agree on the appropriateness of the arrangement; and if DFPS has temporary or permanent managing conservatorship of the joining sibling at the time the agreement is signed, the family must enter into a PCA agreement for the sibling BEFORE the court awards PMC of the sibling to the kin/caregiver and dismisses DFPS from the case.

A caregiver receiving PCA is not eligible for the Relative and Other Designated Caregiver Program. 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 PCA agreement may not exceed the amount of the monthly 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](#).

## **C. How Does PCA Affect Older Youth?**

Extended PCA benefits are available to eligible youth to permit them to remain eligible for PCA through the month in which they turn 21. Youth in this category can also apply for educational training vouchers (ETVs) for vocational or college pursuits, by contacting regional PAL staff.

If DFPS first entered into a PCA agreement with a youth's kinship provider after the child's 16th birthday, DFPS may continue to provide PCA payments until the last day of the month of the youth's 21st birthday under [Tex. Fam. Code § 264.855](#), provided the youth or permanent managing conservator submits documentation sufficient to establish that the youth:

- Regularly attends high school (or a program leading toward a high school diploma or high school equivalency certificate);
- Regularly attends an institution of higher education (or a postsecondary vocational or technical program);

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- Works at least 80 hours a month;
  - Participates in a program or activity that promotes employment or removes barriers to it; or
  - Is incapable of performing the activities described above because of a documented medical condition.

The PCA program was set to expire on August 31, 2017, according to the terms of [Tex. Fam. Code § 264.857](#) unless the Texas Legislature extended the program. The 85<sup>th</sup> Texas Legislature did extend the program by passing Senate Bill 203 which repealed [Tex. Fam. Code § 264.857](#). The bill passed by over two thirds vote in each house and was signed by the Governor on May, 29, 2017 making it effective immediately upon that date.

The Preventing Sex Trafficking and Strengthening Families Act, federal legislation passed by U.S. Congress on September 29, 2014, allows for the preservation of a child's eligibility for PCA payments in the event the caregiver dies or becomes incapacitated if a PCA-Successor (a person appointed to permanently care for your child in the event that the caregiver is no longer able) replaces the caregiver as the child's legal guardian.

PCA payments may continue to a PCA-Successor if all of the following conditions are met:

- The kinship caregiver completes an amendment to the Permanency Care Assistance Agreement to name a potential PCA-Successor to receive PCA benefits on the child's behalf in the event of their death or incapacitation.
- The PCA-Successor submits to DFPS the required background check information and that information meets DFPS standards.
- The PCA-Successor signs a Permanency Care Assistance Agreement with DFPS.
- The PCA-Successor submits to DFPS proof demonstrating that he or she has been given legal custody of the child by the court.

The PCA-Successor cannot begin receiving PCA payments from DFPS until he or she has signed a Permanency Care Assistance Agreement and has assumed legal custody of the child. If the PCA-Successor signs the Permanency Care Assistance Agreement after being given legal custody of the child by the court, DFPS may grant retroactive benefits back to the date legal custody was granted, for a period not to exceed 12 months.

The terms and conditions of the PCA Agreement originally signed by the kinship caregiver will also apply to the PCA-Successor.

## **D. What About Social Security Administration Benefits and Child Support?**

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While kinship families serve as foster parents, they receive a monthly foster care payment from DFPS. If the child in the kinship family's care receives Social Security Administration (SSA) benefits also or if child support monies have been court ordered, DFPS receives and uses these funds to offset the cost of the child's foster care payments. The kinship family will receive the foster care payments in lieu of the child's SSA benefits or child support they may have previously received from DFPS. When the court gives legal custody (PMC) to the kinship family and PCA benefits begin, the kinship family must apply with the SSA to become the representative payee of the child's SSA benefits and arrangements must also be made for the kinship family to receive any child support payments that have been court ordered.

## **E. Resources**

Jurist in Residence Letters regarding PCA:

<http://texaschildrenscommission.gov/media/1365/jirfirstpca.pdf>

<http://texaschildrenscommission.gov/media/1366/pcajir.pdf>

<http://texaschildrenscommission.gov/media/1367/18-permanency-care-assistance-program-follow-up-3rd-letter.pdf>

Fostering Connections to Success and Increasing Adoptions Act: What it Means for Texas, Center for Public Policy Priorities located at: <http://library.cppp.org/files/4/newfostercare.pdf>

See Also: Chart of financial, education, and medical benefits available to children who exit DFPS conservatorship located at: <http://texaschildrenscommission.gov/media/83634/benefits-chart-2017.pdf>

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# PSYCHOTROPIC MEDICATION

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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 been 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, studies have shown that psychotropic medications can have serious side effects on adults using them, and little yet is known about the effects of long-term use in children.

In 2013, 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\(7\)](#):

- Psychomotor stimulants;
- Antidepressants;
- Antipsychotics or neuroleptics;
- Agents for control of mania or depression;
- Anti-anxiety agents; and
- 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

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[Psychotropic Medication Utilization Parameters](#) (Parameters), most recently updated in 2016.<sup>107</sup> 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

[Tex. Fam. Code § 266.004\(h\)](#) requires medical consenter training, which 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:

- Has received the training described by [Tex. Fam. Code § 266.004\(h-1\)](#);
- Understands the principles of informed consent for the administration of psychotropic medication; and
- 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\(h-2\)](#).

The Medical Consent Training for Caregivers is about two and half hours long and can be found at: [https://www.dfps.state.tx.us/Training/Medical\\_Consent/page01.asp](https://www.dfps.state.tx.us/Training/Medical_Consent/page01.asp). DFPS also has a two-hour online training on psychotropic medications for DFPS staff, foster parents and residential providers, relative caregivers, and youth medical consenters. Please see: [https://www.dfps.state.tx.us/Training/Psychotropic\\_Medication/](https://www.dfps.state.tx.us/Training/Psychotropic_Medication/)

### 1. Informed Consent

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 Texas Legislature has defined consent for psychotropic medication. Consent to the administration of a psychotropic medication is valid only if:

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- The consent is given voluntarily and without undue influence;
  - The person authorized by law to consent for the foster child receives verbally or in writing information that provides:
    - the specific condition to be treated;
    - the beneficial effects on that condition expected from the medication;
    - the probable health and mental health consequences of not consenting to the medication;
    - the probable clinically significant side effects and risks associated with the medication; and
    - 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.

Included in the idea of informed consent is the consideration of alternative treatments and trauma-informed care. The concept of trauma-informed care is a huge paradigm shift for

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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. In 2015, the 84<sup>th</sup> Texas Legislature added [Tex. Fam. Code § 266.012](#) regarding comprehensive assessments. Not later than the 45<sup>th</sup> day after the date a child enters the conservatorship of DFPS, the child shall receive a developmentally appropriate comprehensive assessment. The assessment must include:

- A screening for trauma; and
- Interviews with individuals who have knowledge of the child’s needs. [Tex. Fam. Code § 266.012\(a\)](#).

Beginning September 1, 2016, all youth placed in substitute care receive a Child Assessment of Needs and Strengths (CANS) completed as part of their assessment and service planning process within 30 days of removal. The CANS is used to gather information about the strengths and needs of the child and family and used in Service Planning to assist the child and family in reaching their goals.<sup>108</sup>DFPS may consent to health care services ordered or prescribed by a health care provider authorized to order or prescribe health care services regardless of whether services are provided under the medical assistance program under [Tex. Hum. Res. Code Chapter 32](#), if DFPS otherwise has the authority under [Tex. Fam. Code § 266.004](#) to consent to health care services. [Tex. Fam. Code § 266.004\(k\)](#).

## **2. Texas Foster Children are More Likely to Have Been Traumatized**

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.

## **3. Limited Mental Health / Substance Abuse Services**

Texas struggles to provide 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 most 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

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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.

#### **4. 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:

- Appropriately monitor the side effects of the medication; and
- Determine whether:
  - the medication is helping the child achieve the treatment goals; and
  - 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. Medication Review**

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?

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## 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; or
- Medication regimen is outside Parameters, and there is risk for or evidence of significant side effects.

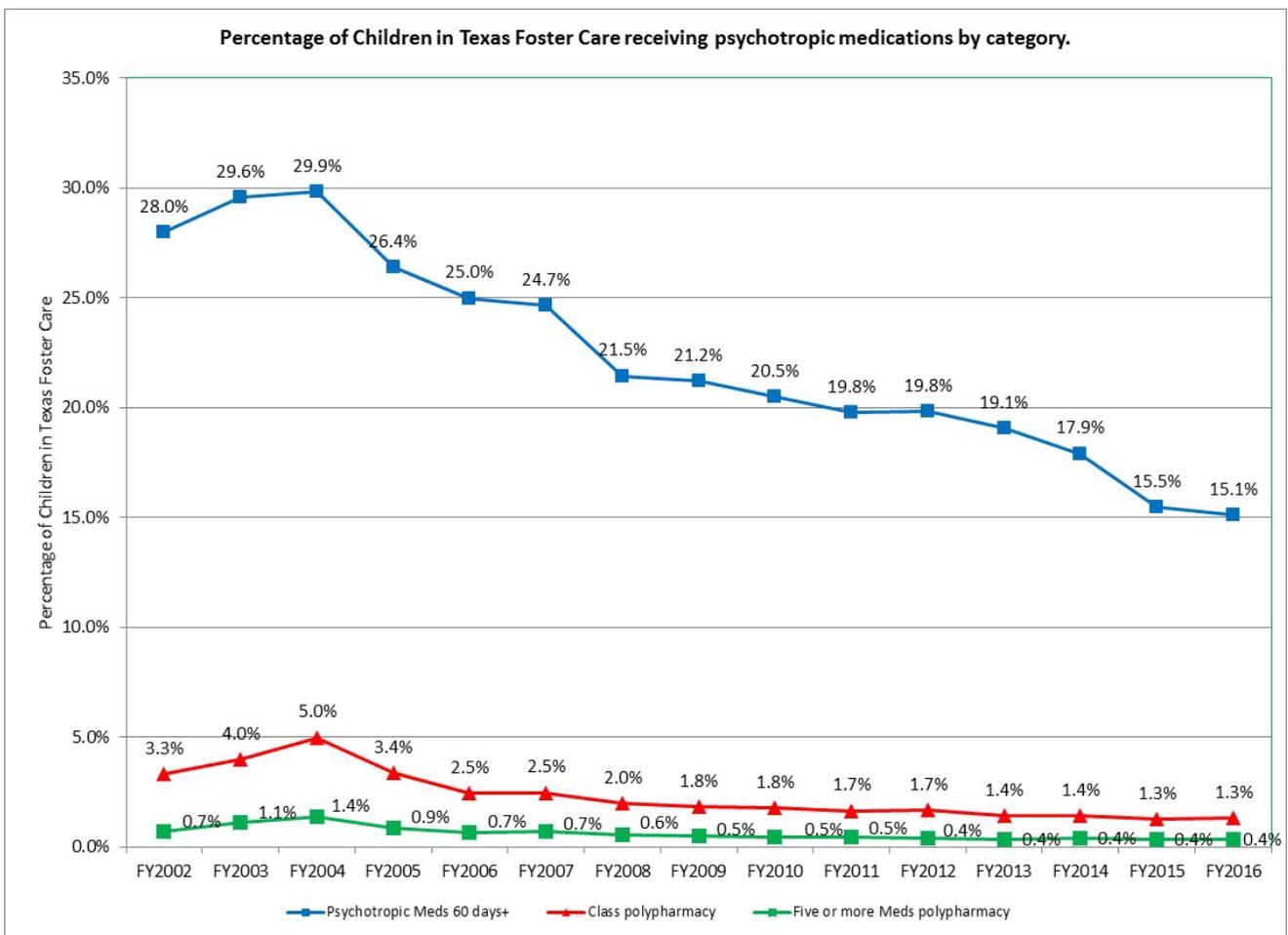
STAR Health is in a good position to intervene and educate the prescribing physician because all providers are clinically privileged by STAR Health. Physicians who appear to consistently prescribe outside the Parameters despite risk for or evidence of significant side effects, or when there is an opportunity to reduce polypharmacy, 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 of contract, 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 and has decreased from approximately 25% in 2002 to 15% in 2016 for children prescribed psychotropic medications for 60 days or more.



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## C. Parental Notification of Certain Medical Conditions

DFPS must provide notice of significant events regarding a child in foster care to the child's biological parents and others under [Tex. Fam. Code § 264.018](#) in a manner that would provide actual notice to a person entitled to the notice, including the use of electronic notice whenever possible. [Tex. Fam. Code § 264.018\(c\)](#).

Not later than 24 hours after an event described by [Tex. Fam. Code § 264.018\(d\)](#), DFPS shall make a reasonable effort to notify a parent of a child in the managing conservatorship of the DFPS of:

- A significant change in medical condition of the child [as defined by [Tex. Fam. Code § 264.018\(a\)\(4\)](#)];
- The enrollment or participation of the child in a drug research program under [Tex. Fam. Code § 266.0041](#); and
- An initial prescription of a psychotropic medication [as defined by [Tex. Fam. Code § 266.001](#)]. [Tex. Fam. Code § 264.018\(d\)](#).

As soon as possible but not later than the 10<sup>th</sup> day after the date DFPS becomes aware of a significant event affecting a child in the conservatorship of DFPS, DFPS shall provide notice of the significant event to the child's parent. [Tex. Fam. Code § 264.018\(f\)](#).

A significant event includes:

- A significant change in medical condition [as defined by [Tex. Fam. Code § 264.018\(a\)\(4\)](#)]; and
- An initial prescription of a psychotropic medication or a change in dosage of a psychotropic medication [as defined by [Tex. Fam. Code § 266.001](#)].

For purposes of [Tex. Fam. Code § 264.018\(f\)](#), if a hearing for the child is conducted during the 10-day notice period described by [Tex. Fam. Code § 264.018\(f\)](#), DFPS shall provide notice of the significant event at the hearing. [Tex. Fam. Code § 264.018\(g\)](#).

DFPS is not required to provide notice under [Tex. Fam. Code § 264.018](#) to a parent of a child in the managing conservatorship of DFPS if:

- DFPS cannot locate the parent;
- A court has restricted the parent's access to the information;
- The child is in the permanent managing conservatorship of DFPS and the parent has not participated in the child's case for at least six months despite DFPS efforts to involve the parent;

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- The parent's rights have been terminated; or
  - DFPS has documented in the child's case file that it is not in the best interest of the child to involve the parent in case planning. [Tex. Fam. Code § 264.018\(h\)](#).

A person entitled to notice from DFPS under [Tex. Fam. Code § 264.018](#) shall provide current contact information pursuant to [Tex. Fam. Code § 264.018\(j\)](#).

## D. 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 Hearings Before and After Final Order.

### 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. [Tex. Fam. Code § 266.007](#).

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](#).

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The court must determine whether the child has been provided the opportunity, in a developmentally appropriate manner, to express opinion about medical care. [Tex. Fam. Code § 263.306\(a-1\)\(5\)\(D\)](#). For a child receiving psychotropic medication, the court must determine whether the child has:

- Been provided psychosocial therapies, behavior strategies, and non-pharmacological interventions.
- Seen prescribing physician every 90 days for review. [Tex. Fam. Code § 263.306\(a-1\)\(5\)\(E\)](#).

## **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. [Tex. Fam. Code § 266.010](#). 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 § 263.302](#) requires that the youth attend Permanency Hearings before and after final order, 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 ([MedQuestions@Cenpatico.com](mailto:MedQuestions@Cenpatico.com)) 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. The hotline can be reached at 1-866-218-8263.

## **4. Some Courts Use Standardized Court Report**

A standardized court report may help provide a summary of medical information that directly follows [Tex. Fam. Code § 266.007](#). A standardized report may include 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.

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## **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).

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# **RELATIVE and OTHER DESIGNATED CAREGIVER PROGRAM**

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## **A. What is the Relative and Other Designated Caregiver (RODC) Program?**

In 2017, the Texas Legislature passed the Relative and Other Designated Caregiver Program (RODC) which allows DFPS to enter into Caregiver Assistance Agreements (CAA) with a relative or other designated caregiver to provide monetary assistance for caring for children in its Temporary Managing Conservatorship.

## **B. Who Qualifies?**

Caregivers are eligible for the RODC Payment if:

- The child they are caring for is currently in CPS Temporary Managing Conservatorship;
- They have an approved home assessment;
- They are NOT already verified as foster parents;
- They sign and abide by a Caregiver Assistance Agreement; and
- The total household income does not exceed 300% of federal poverty limit.

## **C. How Much is the Monthly Payment?**

The RODC Payment is currently set at \$11.55 per day, per child; this is approximately \$345.00 per month, per child.

## **D. How Long Can the Caregiver Receive Payments?**

The monthly reimbursement payments are available for up to 12 months after placement of the child in the caregiver's home with a one-time, six-month extension for good cause.

## **E. Examples of Circumstances that Justify Good Cause for Payments to Go Beyond 12 Months.**

- Finding a previously absent parent of the child;
- Awaiting the expiration of the timeline for an appeal of an order in a suit affecting the parent-child relationship;

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- Allowing additional time for a kin caregiver to complete the approval process for verification or adoption of the child;
  - Waiting for approval of a child's placement from another state;
  - A delayed determination of the child's Indian Child status, or awaiting the approval of the Indian Child's Tribe; or
  - Any other circumstance involving the child or caregiver that DFPS deems as justification for an extension.

## **F. What if the Child Moves?**

The payments follow the child but the duration of the payment stays the same. For example, if a child lives with an eligible grandmother for 4 months and then moves to an eligible aunt's home for 8 months, the 12-month payment period does not restart.

## **G. How is the RODC Payment Dispersed?**

The payment is paid monthly similar to foster care payments, but because it is considered a reimbursement, it is paid in arrears. In other words, the payments are determined by the number of days the child was with the kinship caregiver the previous month. Payments are processed for care days in the prior month on or about the 15th of each month and disbursed at the end of that month for care days in the prior month.

## **H. Should Relatives Still Apply for TANF before Receiving the RODC Payment?**

Grandparents are no longer required to apply for and be denied the TANF Grandparent Grant (a one-time payment of \$1,000 per sibling group) before qualifying for the RODC Payment. However, a grandparent may still apply for the Grandparent Grant and receive it in addition to the RODC Payment.

## **I. What if a Caregiver Receives PMC of the Child?**

If a caregiver receives PMC of a child, the caregiver can request the \$500 annual reimbursement per child for child-related costs. DFPS can reimburse caregivers in this amount for up to three years or until the child turns 18, whichever comes first.

## **J. What Can Judges Do to Support RODC Payments?**

- Be familiar with the eligibility criteria;
- Know that DFPS can only make the payment based on a reimbursement process; and

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- Understand that if courts make orders regarding different dates of payments, this may delay the payment process for other relative caregivers, since every region is processing a large number of relative caregiver payments every month according to a set schedule.

## **K. DFPS Must Keep Track**

DFPS is required to publish an annual report on the funds disbursed, permanency outcomes for the children who are placed with relatives, and the length of time between the beginning of RODC and the award of PMC to the caregiver.

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# TRAUMA-INFORMED CARE

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**Note:** The field of trauma and trauma-informed care, and trauma-informed practice is constantly evolving and expanding. This information in this chapter is intended to give judges a basic understanding of the topic to help manage child protection cases in a trauma-informed manner. The Texas child welfare system is moving to adopt a formal trauma-informed approach and definitions and this chapter will be updated in 2019 to reflect this progress and new findings in the field.

**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

## **A. Trauma Impacts a Child’s Development and Health**

### **1. Altered Biological Stress Systems and Neural Circuitry/Structure**

- Difficulties with 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

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- 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; or
- Delinquency and adult offending

## **B. Current Challenges**

- Alarming 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.

## **C. 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)

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);

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- 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 because:
    - 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”; and
    - the fear, guilt or shame of perceived mental illness is lessened once child is able to connect the trauma and its effects.
  - More positive neurological effects on the foster youth’s immune function and overall physical health through disclosure of and confrontation of trauma

## **2. Create an 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 the child resources such as social support, self-esteem and resilience, self-

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comforting, sense of meaning and purpose – to help them 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 planning. If crisis occurs again, caregivers in foster homes and residential treatment centers 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 that prevent youth from engaging in positive afterschool activities such as sports, clubs, and tutoring.

## **D. Trauma-Informed Organizations**<sup>109</sup>

An organization, program, or system that is trauma-informed:

- **Realizes the impact of trauma**, including how it can emotionally, behaviorally, and physically affect children, families, staff, volunteers as well as the organizations that work with them.
  - understands a person’s behavior in the context of coping strategies that are designed to survive adversity, including responses to primary and secondary trauma. For instance, what presents as anger may be fear, and what presents as disruptive behavior may be self-preservation.

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- understands that the need for a trauma-informed response is not limited to mental and behavioral health specialty services, but is integral to all organizations and systems involved in children’s lives. It may prevent healing and wellness if not addressed across the entire web of these systems.
  - understands that a pharmacological response and/or reducing the risk of repeat trauma alone cannot meet the needs of vulnerable children. Building relationships, community, and the feeling of safety are necessary for neuro-development and healing from early trauma.
  - **Recognizes the signs of trauma** and consistently incorporates trauma screening and assessment into all aspects of work, including interactions with children, families, staff, and volunteers.
  - **Responds by applying the principles of a trauma-informed approach** to all areas of functioning. This includes:
    - staff and volunteer training on trauma and trauma-informed practices.
    - leadership that realizes the role of trauma in their staff and the children/families they serve.
    - policies and practices that ensure three core pillars of trauma-informed care are addressed:
      - **connection:** focusing on the relational needs of children, with special attention towards building and strengthening secure attachments between caregivers and children.
      - **safety:** creating an environment of physical, social, and psychological safety and meeting the child’s physiological needs; this includes good nutrition, adequate sleep, attention to sensory needs, and regular physical activity.
      - **regulation:** providing structured experiences to enhance emotional and behavioral self-regulation in children; enhancing caregivers’ mindful awareness and their ability to use proactive strategies for behavioral change.
  - **Avoids re-traumatizing** children, caregivers, and staff by recognizing how organizational and system practices such as placement disruptions, seclusion, restraints, and abrupt transitions can cause additional harm and interfere with healing. Relationships and nutrition are not used as part of a system of awards/consequences.

### Examples of What Trauma-Informed Care Looks Like In Different Scenarios

<b>Court Rooms</b>	<ul style="list-style-type: none"> <li>• Judges and attorneys are informed of research-based, trauma-informed responses.</li> <li>• Where possible, court orders allow adequate time for children and families to prepare for a transition to a new placement.</li> <li>• Placement decisions are based on ensuring connection, safety, and regulation.</li> </ul>
<b>Caseworker Environment</b>	<ul style="list-style-type: none"> <li>• Caseworkers are connected emotionally with the children they serve.</li> <li>• Caseworkers have sensory items available for children to use if desired.</li> <li>• Nutritious snacks and water are available.</li> <li>• Caseworkers have skill-sets that are informed by research-based trauma-informed response and practices.</li> </ul>
<b>Medical Provider Offices</b>	<ul style="list-style-type: none"> <li>• Medical providers are aware of how trauma can emotionally, behaviorally, and physically affect children.</li> <li>• Medical providers understand that a pharmacological response alone cannot meet the needs of vulnerable children.</li> </ul>
<b>Residential Treatment Centers</b>	<ul style="list-style-type: none"> <li>• Nutritious snacks are available on request, not locked or used as rewards for good behavior.</li> <li>• Sensory rooms are available for children to use when they request or choose to.</li> <li>• All staff and volunteers are trained on research-based, trauma-informed responses and practices.</li> <li>• Behavioral correction strategies are trauma-informed; caregivers and staff understand the role of fear in behavior.</li> <li>• Children may use sensory techniques/items during instructional time; they may move and use other strategies to help them feel in control physically.</li> </ul>
<b>Homes</b>	<ul style="list-style-type: none"> <li>• Caregivers focus on the relational needs of children, with special attention towards building and strengthening secure attachments.</li> <li>• Behavioral correction strategies are trauma-informed; caregivers understand the role of fear in behavior.</li> <li>• Caregivers create an environment of physical, psychological, and social safety.</li> <li>• Children have nutritious food and water available at regular intervals throughout the day to maintain stamina and focus.</li> <li>• Children are given the opportunity for a break and “re-do” after disruptive behavior.</li> </ul>

	<ul style="list-style-type: none"> <li>Caregivers are self-aware and are able to use proactive strategies for behavioral change.</li> </ul>
<b>Houses of Worship</b>	<ul style="list-style-type: none"> <li>Wrap around support is available for children and families who have experienced trauma.</li> <li>Learning and worship settings are conducive to physical, psychological, and social safety.</li> </ul>
<b>Classrooms</b>	<ul style="list-style-type: none"> <li>Students may use sensory techniques/items during instructional time; they may move and use other strategies to help them feel in control physically.</li> <li>Students have nutritious food and water available at regular intervals throughout the day to maintain stamina and focus.</li> <li>Students are given the opportunity for a break and “re-do” after disruptive behavior rather than having a mark moved or other penalty imposed.</li> </ul>

## E. 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\(a\)](#); and [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\(a\)](#); and [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\(5\)](#); and [40 Tex. Admin. Code § 749.2001\(5\)](#)

(Definition of emergency situation)

- Where immediately necessary

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40 Tex. Admin. Code § 748.43(17); 40 Tex. Admin. Code § 749.43(18) (Definition of EBI) 40 Tex. Admin. Code § 748.2401(5); and 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 Emergency Behavioral Intervention (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); and 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 and 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); and 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); and 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); and 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); and 40 Tex. Admin. Code § 749.2051(b)

## **3. Restraint/Seclusion May Only Be Administered by:**

- Qualified caregiver

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40 Tex. Admin. Code § 748.2453 and 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; and 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) and 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; and 40 Tex. Admin. Code § 749.2203

- IMMEDIATELY once the danger is over

40 Tex. Admin. Code § 748.2553(2)(C) and 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); and 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:

Type of Emergency Behavior Intervention	The caregiver must release the child:
(5) Mechanical restraint	<p>(A) Immediately when an emergency health situation occurs during the restraint. The caregiver must obtain treatment immediately;</p> <p>(B) As soon as the child's behavior is no longer a danger to himself or others;</p> <p>(C) No later than five minutes after the child begins exhibiting the required behaviors;</p> <p>(D) When the maximum time allowed for mechanical restraint is reached; or</p> <p>(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.</p>

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\(3\)](#) and [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\(3\)](#); and [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); and 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); and 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	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	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.
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**A review is triggered when:**

- Restrained four times in a seven day period  
40 Tex. Admin. Code § 748.2901(2)(A) and 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) and 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 and 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); and 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); and 40 Tex. Admin. Code § 749.2281(2)(C)

Also see other relevant provisions:

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- [40 Tex. Admin. Code § 748.1119](#) and [40 Tex. Admin. Code § 749.2021](#) (techniques prohibited)
  - [Tex. Admin. Code § 748.2303](#) and [40 Tex. Admin. Code § 749.1953](#) (may not use or threaten corporal punishment)
  - [40 Tex. Admin. Code § 748.2307](#) and [40 Tex. Admin. Code § 749.1957](#) (methods of punishment prohibited)
  - [40 Tex. Admin. Code § 748.2605](#) and [40 Tex. Admin. Code § 749.2205](#) (prohibited physical restraint techniques)
  - [40 Tex. Admin. Code § 748.2705](#) (types of mechanical & other restraint devices prohibited)

## F. Trauma Work in Texas

### 1. Reports

[Trauma-Informed Care Final Report, The Meadows Mental Health Policy Institute for Texas](#)

[Meeting the Needs of High Needs Children in the Texas Child Welfare System, November 2015](#)<sup>110</sup>

[Understanding Trauma-Informed Care in the Texas Child Welfare System, Data and Recommendations from the Field, October 2015](#)<sup>111</sup>

[Respecting the Needs of Children and Youth in Texas Foster Care: Acknowledging Trauma and Promoting Positive Mental Health throughout the System, December 2014](#)<sup>112</sup>

### 2. Legislation

In 2011, the Texas Family Code was amended to require DFPS to include training in trauma-informed programs and services in any training the department provides to foster parents, adoptive parents, kinship caregivers, department caseworkers, and department supervisors. [Tex. Fam. Code § 264.015](#).

DFPS Trauma-Informed Practice Workgroup was formed to look at:

- Training;
- Assessment and screening;
- Kinship caregiver support; and
- Secondary traumatic stress for direct care staff.

DFPS caseworkers are required to complete:

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- An initial, in-person training on trauma-informed care during their basic skills development training; and
  - An annual refresher course online.

#### Residential Child Care Contract (RCCC) Requirements

- As of September 1, 2015, DFPS required all caregivers and employees who are subject to RCCC for direct care to complete:
  - at least eight hours of trauma-informed care training prior to being the only caregiver responsible for children.
  - at least two hours of trauma-informed care annually, and contractors may select their own curriculum/model for the annual refresher training.

Changes to the Family Code in 2013 required trauma-informed care training for certain staff of county and state juvenile facilities, including probation officers, supervision officers, correctional officers, parole officers and court-supervised community-based program personnel. [Tex. Hum. Res. Code § 221.002\(c-1\)](#).

Since 2015, DFPS is required to institute a comprehensive psychosocial assessment tool to assess all children who enter the foster care system within 45 days. The tool must include a trauma assessment and an interview with at least one individual who knows the child. [Tex. Fam. Code § 266.012](#).

The Children's Commission, in partnership with Texas CASA and the Shield Ayers Foundation, created a one-hour training to help introduce trauma-informed care to Attorneys ad Litem, Guardians ad Litem and CASA volunteers. The presentation includes strategies for advocating for children in courtrooms, schools, and placements to meet each child's unique needs. Other topics include how trauma influences a child's ability to communicate about the case and how to appropriately respond to a child's trauma-related behaviors. [Video: Trauma-Informed Advocacy for Children and Youth in Foster](#).

### **3. Statewide Initiatives**

#### **The Statewide Collaborative on Trauma-Informed Care**

In July 2017, the Children's Commission launched the Statewide Collaborative on Trauma Informed Care (SCTIC), which aims to elevate trauma-informed policy in the Texas child welfare system by creating a statewide strategy to support system reform, organizational leadership, cross-systems collaboration, and community-led efforts with data-informed initiatives to develop champions, consensus, and funding. SCTIC began with a planning group with the Children's Commission, Meadows Mental Health Policy Institute (MMHPI), Texas CASA, and the Department of Family and Protective Services and has created workgroups to carry out its mission.

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## **Children’s Advocacy Centers’ (CACs) Practice Model**

In 2013, the Texas Legislature raised the standard for mental health services in CACs, requiring that all mental health services be trauma-focused and evidence-based. Additionally, mental health services must be provided by professionals who have a master’s degree and are licensed, or who are students in an accredited graduate program and supervised by a licensed mental health professional.

## **Texas Children Recovering from Trauma (TCRFT)**

In 2012, the Department of State Health Services (DSHS) was awarded a 4-year cooperative grant from the National Child Traumatic Stress Initiative of SAMHSA. This initiative focused on transforming the existing children’s mental health services in Texas into trauma-informed care services. The target population of this grant was children and youth ages 3 to 17 that have been exposed to or witnessed trauma or are children of military families. . A final report on the grant was issued in December 2016; [Texas Children Recovering From Trauma Final Project Report: A trauma-informed care transformation pilot under the Texas Department of State Health Services](#).<sup>113</sup>

## **Trauma-Informed Care Specialty Network**

Created by STAR Health, it allows its providers to list the training on trauma that they have pursued and helps identify providers who have been trained in trauma-informed care in the STAR Health network for caseworkers, caregivers, and others in the child welfare community. STAR Health also offers TIC trainings to CPA, kinship families, RTC staff, and Emergency Shelter staff.

**The National Quality Improvement Center’s Adoption and Guardianship Support and Preservation (QIC-AG)** awarded grant funds to Texas to study TIC practice. Pathways to Permanence, training for active caregivers, was selected and will be randomly given to groups of caregivers for children whose parents’ had their parental rights terminated; or children who have been in care for at least two years with no or partial rights terminated.

## **4. Community-Level Initiatives**

### **The Travis County Collaborative for Children (TCCC)**

Led by Texas Christian University’s (TCU) Institute of Child Development (ICD), the TCCC intended to bring system-wide changes to the way foster children in Travis County are cared for during and after their time in state custody. TCCC’s ultimate goal is to accelerate healing and speed to permanency for children in foster care utilizing ICD’s evidence-based Trust-Based Relational Intervention (TBRI®) principles and practices.

### **Mental Health Connection Trauma Implementation Team**

In Tarrant County, originally formed in 2011 to bring Trauma-Focused Cognitive Behavioral Therapy to the community. The Mental Health Connection launched a public awareness

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campaign in May 2013 called "Recognize Trauma." The campaign included movie ads, bus ads and billboards, in addition to brochures, posters and wallet cards.

### **The Trauma-Informed Care Consortium of Central Texas (TICC)**

Established in 2013 by St. David's Foundation and Austin Child Guidance Center, the TICC brings together professional organizations quarterly to network, share information, and coordinate trainings for mental health clinicians, school personnel, medical /nursing professionals, law enforcement, and juvenile justice professionals.

## **G. National Resources**

Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency at: [http://www.ncjfcj.org/sites/default/files/trauma%20bulletin\\_0.pdf](http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.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>

[The National Child Traumatic Stress Network \(NCTSN\) Bench Card for the Trauma Informed Judge](#), at: [http://www.nctsn.org/sites/default/files/assets/pdfs/judge\\_bench\\_cards\\_final.pdf](http://www.nctsn.org/sites/default/files/assets/pdfs/judge_bench_cards_final.pdf)

The National Child Traumatic Stress Network, LGBTQ Issues and Child Trauma, at: [http://www.nctsn.org/sites/default/files/assets/pdfs/safe\\_spaces\\_safe\\_places\\_flyer\\_2015.pdf](http://www.nctsn.org/sites/default/files/assets/pdfs/safe_spaces_safe_places_flyer_2015.pdf)

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# YOUTH IN COURT AND YOUTH VOICE

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Despite the many improvements Texas has made over the past several years, involving youth in the court process and ensuring their voice is heard and considered continues to be a challenge. The Texas Family Code has been amended many times to make it clear that children and youth must attend hearings, and to place additional duties on attorneys ad litem, judges, and the Department of Family and Protective Services (DFPS or “the Department”) to meet with children in advance of court hearings and provide children and caregivers with notice of court proceedings and with copies of reports filed in advance of each hearing. Yet, children and youth are routinely excluded from meaningful participation, resulting in the feeling that their voices are not heard, and their opinions are not important.

## A. The Law

Chapter 263 of the Texas Family Code mandates that all children who are in the conservatorship of DFPS attend all permanency hearings.<sup>114</sup> Specifically, Section 263.302 states that the child shall attend each permanency hearing, unless the court specifically excuses the child’s attendance, and that the court shall consult with the child in a developmentally appropriate manner regarding the child’s permanency plan, if the child is four years of age or older and the court determines it is in the best interest of the child.<sup>115</sup> Failure by the child to attend a hearing does not affect the validity of an order rendered at the hearing.<sup>116</sup>

The law does not require or appear to contemplate that the child or youth will attend an Ex Parte, Adversary or Status Hearing. Although there are different interpretations, many read the law to say that the child must attend each permanency hearing, unless the judge makes an individual determination that excused that child from attending a specific hearing. Issuing a blanket order excusing a child from attending permanency hearings or even more generally, for all children to be excused from all permanency hearings, is not considered a best practice. Additionally, and of note, youth who are committed to the Texas Juvenile Justice Department (TJJD) may (and should) attend permanency hearings by video, telephone, or in person.<sup>117</sup>

## B. Pros of Involving Children and Youth in Court Proceedings

There have been many studies by the ABA as well as Court Improvement Programs around the country on this singular issue, and there is simply no question that foster youth repeatedly express the desire to be involved in decisions about their lives.<sup>118</sup> Being involved gives the youth a sense of control, helps them understand the process, and direct contact with the court benefits the judge and the youth. Children are often told that “the judge makes the decisions.” Other reasons: attorneys are not always reliable and informed advocates; hearing quality is better, hearings can present an opportunity for visitation, foster parents and relatives caring for the child often attend because they bring the child to the hearing.

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## **C. Cons of Involving Children and Youth in Court Proceedings**

There are also cons of involving or requiring the presence of children in child protection hearings. A few examples include: a Perception that it's a waste of time; children miss school and important events; court is emotionally damaging for children and youth; and children and youth at times don't want to attend. Other obstacles include lack of transportation; court dockets are not accommodating; notice is inadequate; and judges are sometimes uncomfortable speaking with and interviewing children.

## **D. Engaging the Child at the Hearing**

There are ways to help make the experience for everyone feel more beneficial. Ensure attorneys and caseworkers do their job by helping prepare the child for the hearing. Learn child-specific interviewing techniques so that engaging the child in conversation is easier. Even young children have the competence to tell adults what they want and need when questioned in an age-appropriate manner. Making court a good experience is critical. Restructure dockets, and schedule hearings involving children and youth in the afternoon, after school. Try using video conferencing or invite youth to submit personal written court reports.

Generally every child should appear at every permanency hearing before and after final orders. The statute presumes that all children will attend their permanency hearings, but also accommodates the occasion when children should be excused from attending by the judge. The expectation is that the court will excuse a child on a case-by-case basis and not operate under a blanket order or rule.

For a more complete report on the benefits of youth in court and practical tips for accommodating their presence, please read the Children's Commission's July 2016 report on Youth Presence in Court Proceedings on the Children's Commission's website.<sup>119</sup>

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# JURIST IN RESIDENCE LETTERS

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The Jurist in Residence (JIR) position was created to foster judicial leadership and promote greater expertise among child protection judges. The Jurist in Residence acts as a consultant, trainer, and speaker to provide expert and seasoned judicial advice on matters affecting courts and legal system handling of child welfare cases and issues. District Judge Dean Rucker serves as the Children's Commission's Jurist in Residence and has done so since 2014.

Appointed in 1998, Judge Rucker serves as the Presiding Judge for the Seventh Administrative Judicial Region of Texas. In 2014, Judge Rucker retired as judge of the 318th Judicial District in Midland County, a bench he held 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.

Acting as JIR, Judge Dean Rucker is instrumental in advancing judicial education and community collaboration across the state through training events and written communications, particularly by authoring regular topical and timely Jurist in Residence letters. The JIR Letter was created to routinely update judges on special matters.

## **Jurist in Residence Letters**

(Listed alphabetically and available at <http://texaschildrenscommission.gov/for-judges/jurist-in-residence-and-jir-letters/jir-letters/>)

- [83rd Legislative Session Proposal on Appointment and Compensation of Counsel in Child Protective Services \(CPS\) Cases](#)
- [84<sup>th</sup> Legislative Session Update](#)
- [85th Legislative Session Update](#)
- [Attorney and Judicial Scholarships Extended](#)
- [Back to School - Legislation and Resources to Help Improve Education Outcomes of Students in Foster Care](#)
- [Bench Book for CPS Judges](#)
- [Best Practices for Residential Interventions for Youth and their Families: A Resource Guide for Judges and Legal Partners with Involvement in the Children's Dependency Court System](#)

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- [Beyond the Bench: Law, Justice, and Communities Summit](#)
  - [Capacity & Community Engagement](#)
  - [Child and Adolescent Needs and Strengths \(CANS\) Assessment for Foster Children \(2015\)](#)
  - [Child Adolescent Needs and Strengths Assessment and Family Strength and Needs Assessment \(2016\)](#)
  - [Child and Adolescent Needs and Strengths \(CANS\) Assessment for Foster Children Meetings \(2016\)](#)
  - [Children's Commission Mediator Survey](#)
  - [Court Hearing Practices and Court Costs](#)
  - [CPS realigns staff in response to state budget cuts](#)
  - [Definition of Home for Purposes of Removal to Foster Care](#)
  - [DFPS "3 in 30" Program Information and Implementation Schedule](#)
  - [DFPS Case Management System](#)
  - [DFPS Foster Care Redesign](#)
  - [DFPS Transformation Report and Suggested Statutory Changes](#)
  - [Drug Court Grant Opportunity](#)
  - [Education Considerations for the 2017-2018 School Year](#)
  - [Education Decision-Making in CPS Cases and the New Form 2085-E](#)
  - [Education Guides: Transition Planning in CPS and Special Education, Information Sharing Between Child Welfare and Schools](#)
  - [Engagement Efforts to Achieve Permanency](#)
  - [Every Student Succeeds Act \(ESSA\) \(2015\)](#)
  - [Every Student Succeeds Act \(ESSA\) Update 2017](#)
  - [Extended Health Care Benefits for Former Foster Youth](#)
  - [Extending Foster Care Beyond 18](#)
  - [Family Helpline and Spanish Version of the Parent Resource Guide](#)

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- [Family Visitation in CPS Cases](#)
  - [Federal Requirements Regarding Specificity in Court Orders](#)
  - [Foster Care and Human Trafficking](#)
  - [Free Online Attorney Training on Representing Parents in CPS Cases Offered by State Bar of Texas](#)
  - [Free Spanish-Language Interpretation Available By Telephone For Some Courts](#)
  - [Guide for Fathers in CPS Cases](#)
  - [The Hague Convention on the Civil Aspects of International Abduction in Cases Involving Battered Respondents: A Texas Bench Guide for State and Federal Court Judges](#)
  - [Homeless Youth Handbook](#)
  - Hurricane Harvey Announcement: [Message from the Department of Family Protective Services](#)
  - [ICWA Quick Reference Tools for State Courts](#)
  - [Impact of Budget Deficits on CPS](#)
  - [Implicit Bias in Judicial Decision-Making](#)
  - [Information about Youth Sex Offenders](#)
  - [Judicial Commission on Mental Health](#)
  - [Judicial Guide to Advocate for and Ensure Adequate Funding for Legal Representation in Child Protective Services Cases](#)
  - [Judicial Scholarship Opportunities: NCJFCJ and NACC](#)
  - [Legal Representation Survey](#)
  - [Legislative Changes Regarding Medical Care for Foster Youth](#)
  - [Legislative Proposal on Appointment and Compensation of Counsel in Child Protective Services \(CPS\) Cases](#)
  - [Medical Care for Foster Youth](#)
  - [Medical Consenter Training](#)

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- [NACC Conference Scholarships, New Child Protection Law Section, Job Opening at the Children's Commission](#)
  - [New Appellate Rules Applicable to Termination of Parental Rights or State as Managing Conservator](#)
  - [New Data Available on Education Outcomes for Texas Foster Youth](#)
  - [New ICWA Quick Reference Tools for State Courts](#)
  - [New Laws Effective 9/1; Scholarships for 2017 Texas CASA Conference; 2017 Legislative Update Now Available Online](#)
  - [New Required Domestic Violence Training for Child Protection Mediators](#)
  - [New Texas Case Law on Indian Child Welfare Act](#)
  - [Notice and Engagement Email Notification System Announcement](#)
  - [Notification to Courts of New CASA Screening Procedure](#)
  - [Ombudsman for Children and Youth in Foster Care](#)
  - [Opiate and Opioid Dependency of Pregnant and Nursing Women](#)
  - [Parental Child Safety Placements, or PCSPs](#)
  - [Permanency Care Assistance Program, Part I - Basics](#)
  - [Permanency Care Assistance Program, Part II - Follow-Up](#)
  - [Permanency Care Assistance Program, Part III](#)
  - [Permanency Summit Follow-up](#)
  - [Psychoactive Medications](#)
  - [Relative and Other Designated Caregiver Program](#)
  - [Resources Related to Cultural Competency and Reducing Disproportionality and Disparities](#)
  - [Save the Date: 2018 Child Welfare Judges Conference](#)
  - [Scholarship Deadlines; TBLS Child Welfare Application Extension; TBLS Exam Fee Reimbursement; and DFPS Region 1 Community Meeting](#)
  - [Star Health Enhancements](#)
  - [Star Health & Psychotropic Medications](#)

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- [Subpoena Policy at DFPS](#)
  - [Summer Scholarship Opportunities for Child Welfare Attorneys](#)
  - [Supreme Court Emergency Order and Applicability of Family Code Section 263.401](#)
  - [Supreme Court of Texas Emergency Order Affecting Child Protection Cases](#)
  - [TBLS Applications for Specialization in Child Welfare Law Certification Exam](#)
  - [TBLS 2018 Specialization Exam in Child Welfare; Scholarship Opportunity for Inaugural CLE hosted by new Child Protection Law Section of the State Bar of Texas](#)
  - [Texas Child Protection Law Bench Book](#)
  - [Texas Child Protection Specialty Courts](#)
  - [Texas Health Steps Medical Checkup](#)
  - [Texas Higher Education Information and Resource Guide for Foster Care Liaisons](#)
  - [Texas Mounts Effort to Improve Educational Outcomes of Children and Youth in Foster Care](#)
  - [The Texas Response to Human Trafficking](#)
  - [Trial Skills Training Opportunity: July 2018](#)
  - [Trial Skills Training Deadline Extended; Legal Representation Surveys](#)
  - [Trial Skills MCLE Now Available in the TexasBar CLE Online Classroom](#)
  - [Unaccompanied Alien Children](#)
  - [Undocumented Caregivers in Texas](#)
  - [Video Conferencing to Increase Family and Youth Engagement](#)
  - [Webinar: Kinship Care and Race Equity in Child Welfare](#)
  - [Why It's Important to Consider the Indian Child Welfare Act](#)
  - [Youth Voice in Court Proceedings](#)

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# CHARTS

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[Post Foster Care Benefits](#)

[Uniform Child Custody Jurisdiction and Enforcement Act \(UCCJEA\)](#)

[Continuing Court of Jurisdiction \(CCJ\) and Venue](#)

[Extended Court Jurisdiction](#)

[Extended Jurisdiction Matrix](#)

[Transitional Living Services College Resources Chart](#)

[Transitional Living Services Overview Handout](#)

# COMMON 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.
ARD	Admission, Review, and Dismissal	Process by which a student's parents and school staff meet at least annually to: 1) decide whether a student has an eligible disability; 2) determine what special education and related services will be provided; and 3) develop an individual education program.
BIA	Bureau of Indian Affairs	Bureau of the U.S. Department of the Interior, which currently provides services (directly or through contracts, grants or compacts) to approximately 1.9 million Native Americans and Alaska Natives.
CANS	Child and Adolescent Needs and Strengths	A tool developed for children's services to support decision making, including level of care and service planning, to facilitate quality improvement initiatives, and to allow for the monitoring of outcomes.

CAPTA	Child Abuse Prevention and Treatment Act	Federal legislation addressing child abuse and neglect.
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. <a href="http://www.casaforchildren.org">http://www.casaforchildren.org</a>
CCEJ	Court of Exclusive, Continuing Jurisdiction	Upon rendition of a final order in a SAPCR, a court acquires continuing, exclusive jurisdiction over all subsequent matters regarding the child, unless otherwise provided by <a href="#">Tex. Fam. Code Chapter 155</a> .
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. <a href="http://www.dshs.state.tx.us/mch/Child_Fatality_Review.shtm">http://www.dshs.state.tx.us/mch/Child_Fatality_Review.shtm</a>
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.
CIP	Court Improvement Program	Strengthening Texas courts to achieve safety, permanency, and well-being for abused and neglected children is the work of the Court Improvement Program. <a href="http://www.texaschildrenscommission.gov">http://www.texaschildrenscommission.gov</a>
COS	Circle of Support	Held soon after a youth who has been removed from the home reaches age 16. Primary purpose is to develop a transition plan for the youth and to connect youth to supportive and caring adults who can help the youth when the youth leaves foster care.
COS	Court Ordered Services	Type of CPS case during which services are ordered by the court for the family, but DFPS does not have temporary managing conservatorship of the child.
CPA	Child Placing Agency	Licensed by DFPS and required to conform to minimum standards, verify and oversee non-agency foster placements.
CPC	Child Protection Court	Courts that specialize in child protection cases.
CPS	Child Protective Services	A division of Texas DFPS 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. <a href="https://www.dfps.state.tx.us/child_protection/">https://www.dfps.state.tx.us/child_protection/</a>

CPU	Centralized Placement Unit	Reviews child's information, tracks placement vacancies, and determines least restrictive placement option that best meets needs of child.
CRCG	Community Resource Coordination Group	Collaboration of local public and private agencies, organizations, and families to work together to meet the needs of individuals which no one agency can meet.
CSCAL	Child Safety Check Alert List	Automated program operated by the Texas Department of Public Safety as part of the Texas Crime Information Center to assist DFPS in locating families that move before CPS begins or finishes an investigation or that move during the provision of services by CPS.
CVS	Conservatorship	Legal care, custody and control of a child given by court order.
CWB	Child Welfare Board	Board developed and funded in some Texas counties to help meet needs of children and youth in foster care.
DFPS/ TDFPS	Texas Department 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. <a href="http://www.dfps.state.tx.us">http://www.dfps.state.tx.us</a>
DPS	Texas Department 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. <a href="http://www.txdps.state.tx.us">http://www.txdps.state.tx.us</a>
DSHS	Texas Department of State Health Services	The Texas Department of State Health Services promotes optimal health for individuals and communities while providing effective health, mental health and substance abuse services to Texans. <a href="http://www.dshs.state.tx.us">http://www.dshs.state.tx.us</a>
ESSA	Every Child Succeeds Act	Federal education law passed in December 2015 replacing No Child Left Behind. ESSA contains several educational stability provisions related to the education of children and youth in foster care that mirror the Fostering Connections to Success and Increasing Adoptions Act of 2008. ESSA also requires designated points of contact in education and child welfare systems, assurances that schools will coordinate with child welfare to develop transportation plans, and in December 2018, disaggregated data on children and youth in foster care will be included in the reporting requirements.
FBSS	Family Based Safety Services	A type of service provided to some families who were the subject of an investigation of child abuse and neglect allegations. Also known as Family Preservation. Includes services to families to prevent removal of the child from the home.

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.
FGC	Family Group Conference	A type of Family Group Decision Making. During a family group conference, the child's family joins with relatives, friends, and community members to develop a plan for the child and family. Generally held after a child is removed, but may also be used before removal when the family receives FBSS.
FGDM	Family Group Decision Making	A collaborative approach to service planning and decision making, which involves the child or youth and his or her family to join CPS staff in developing a service plan.
FTM	Family Team Meeting	A type of Family Group Decision Making that is generally held before a child is removed from the home, but also may be held during other states of services, such as when a family receives FBSS or when a child is in DFPS conservatorship.
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.
GRO	General Residential Operation	A residential child-care operation that provides child care for 13 or more children or young adults.
HHSC	Health and Human Services Commission	State agency which oversees operations of the health and human services system, including DFPS.
HSEGH	Health, Social, Educational and Genetic History	Child's information provided in report to prospective adoptive families.
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 ICWA represent a dramatic departure from the procedural and substantive laws that most states have enacted to govern child custody proceedings.
IEP	Individualized Education Program	A plan for each child with a disability that is developed, reviewed, and revised by a committee, of which parents are active members. Includes the student's present levels of academic achievement and functional performance, participation in State and district-wide assessments, transition services, annual goals, special factors, special education, related services, supplementary aids and services, extended school year services, and least restrictive environment.
IMPACT	Information Management Protecting Adults & Children in Texas	A statewide automated child welfare information system (SACWIS) system used by the Texas DFPS to aid in the investigation and assessment of alleged child and adult abuse or neglect cases.
IV-E	Title IV-E	Title IV-E of the Social Security Act which provides federal funding stream to states for costs related to the provision of foster care.
JMC	Joint Managing Conservatorship	The sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party. <a href="#">Tex. Fam. Code § 101.016</a> .
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. <a href="https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/lgbtq_book.authcheckdam.pdf">https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/lgbtq_book.authcheckdam.pdf</a>
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.
NCJFCJ	National Council of Juvenile and Family Court Judges	The mission of the National Council of Juvenile and Family Court Judges is to provide all judges, courts, and related agencies involved with juvenile, family, and domestic violence cases with the knowledge and skills to improve the lives of the families and children who seek justice.

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. <a href="http://www.ncsc.org/">http://www.ncsc.org/</a>
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. <a href="http://www.oag.state.tx.us">http://www.oag.state.tx.us</a>
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. <a href="http://www.txcourts.gov/oca.aspx">http://www.txcourts.gov/oca.aspx</a>
OMHSE	Office of Minority Health Statistics and Engagement	In 2010, the Texas Health and Human Services created the Center for Elimination of Disproportionality and Disparities to partner with health and human services agencies, external stakeholders, other systems, and communities to identify and eliminate disproportionality and disparities affecting children, families, and disparately impacted individuals. In 2017, the Center's name was officially changed to the Office of Minority Health Statistics and Engagement (OMHSE). The OMHSE works to identify the systemic factors and promote improvements that address the disproportionate representation and disparate outcomes for children, families, and disparately impacted individuals in the state's health and human services programs.
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.
PC	Permanency Conference	Held when it is not possible or appropriate to hold a Family Group Conference. Used to develop a youth's permanency plan and the family's service plan.
PJMC	Permanent Joint Managing Conservatorship	The long-term sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party; granted by final decree. <a href="#">Tex. Fam. Code § 101.016.</a>
PMC	Permanent Managing Conservatorship	Placement of a child in the permanent conservatorship of an entity or person, by court order, (e.g. Texas DFPS, relative) with no intention of returning the child to the parent's custody.
RO	Ruled Out	One of the possible dispositions given in a DFPS investigation of child abuse and neglect. The information gathered during the investigation supports a reasonable conclusion that: 1) the alleged abuse did not occur; 2) the alleged perpetrator is 9 years old or younger; 3) the alleged abuse or neglect did occur but there is sufficient evidence to reasonably conclude that the named alleged perpetrator is not responsible.

RTB	Reason to Believe	One of the possible dispositions given in a DFPS investigation of child abuse and neglect. Based on the preponderance of information gathered during the investigation, the caseworker concludes that the alleged abuse or neglect did occur and the alleged perpetrator is responsible for it.
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.
SIJS	Special Immigrant Juvenile Status	SIJS is an immigration classification that may allow for a child who is present in the U.S. without legal immigration status and who has been abused, abandoned, or neglected by a parent.
SPA	Regional Support Program Administrator	Persons assigned to a region for the support of Texas DFPS programs.
SSCC	Single Source Continuum Contractor	Non-profit or governmental entity with child welfare as primary mission that contracts with DFPS to oversee delivery of services through the state's community-based care foster care program.
TBRI®	Trust-Based Relational Intervention	Developed by Texas Christian University's Institute of Child Development, evidence-based principles and practices to accelerate healing and speed to permanency for children in foster care.
TCIC	Texas Crime Identification Center	TCIC provides immediate access 24/7 to law enforcement agencies throughout Texas to data regarding the stolen status of property and the wanted, missing, sex offender, or protective order status of persons.
TFC	Texas Family Code	The laws and statutes that govern Texas family law including child protection.
THECB	Texas Higher Education Coordinating Board	The Texas Higher Education Coordinating Board's mission is to promote access, affordability, quality, success, and cost efficiency in the state's institutions of higher education, through Closing the Gaps and its successor plan 60x30, resulting in a globally competent workforce that positions Texas as an international leader in an increasingly complex world economy.

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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.
TPM	Transition Plan Meeting	Held soon after a youth who has been removed from the home reaches age 16.
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. <a href="http://www.txcourts.gov/media/1435952/trcp-all-updated-with-amendments-effective-january-1-2018.pdf">http://www.txcourts.gov/media/1435952/trcp-all-updated-with-amendments-effective-january-1-2018.pdf</a>
UTC	Unable to Complete	One of the possible dispositions given in a DFPS investigation of child abuse and neglect. The caseworker could not gather enough information because the caseworker could not locate a principal or a principal was uncooperative.
UTD	Unable to Determine	One of the possible dispositions given in a DFPS investigation of child abuse and neglect. The allegation does not meet the criteria for unable to complete, but: 1) the information gathered is not enough to determine whether the abuse or neglect occurred; or 2) there is enough information to determine that abuse or neglect occurred, but there is not enough information to determine if the alleged perpetrator is responsible.

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

<sup>1</sup> CPS Handbook § 2200, located at [http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_2200.asp](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp). Last visited October 24, 2018.

<sup>2</sup> The Texas Family Violence Bench Book, located at <http://www.txcourts.gov/media/478288/domesticviolencebenchbook.pdf>. Last visited October 24, 2018.

<sup>3</sup> Updates to chapters of the Texas Family Violence Bench Book, located at: <http://www.txcourts.gov/publications-training/judicial-ethics-bench-books/judicial-bench-books.aspx> Last visited October 24, 2018.

<sup>4</sup> Interstate Compact on Placement of Children, located at: <https://aphsa.org/AAICPC/default.aspx>. Last visited October 24, 2018.

<sup>5</sup> CPS Handbook § 4523, located at: [https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_4500.asp#CPS\\_4523](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_4500.asp#CPS_4523). Last visited October 24, 2018.

<sup>6</sup> A Guide for Those “Aging Out” of Foster Care in Texas, located at: <http://texaschildrenscommission.gov/media/83915/aging-out-of-foster-care-tx-2018-final.pdf>. Last visited October 24, 2018

<sup>7</sup> Extended Court Jurisdiction Flowchart, located at: [http://www.dfps.state.tx.us/Child\\_Protection/Youth\\_and\\_Young\\_Adults/Transitional\\_Living/Extended\\_Foster\\_Care/documents/Extended\\_Court\\_Jurisdiction\\_Flow\\_Chart.pdf](http://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/Extended_Foster_Care/documents/Extended_Court_Jurisdiction_Flow_Chart.pdf). Last visited October 25, 2018.

<sup>8</sup> DFPS Transitional Living Services Handout, located at: [https://www.dfps.state.tx.us/Child\\_Protection/Youth\\_and\\_Young\\_Adults/Transitional\\_Living/documents/Transitional\\_Living\\_Services\\_Handout.pdf](https://www.dfps.state.tx.us/Child_Protection/Youth_and_Young_Adults/Transitional_Living/documents/Transitional_Living_Services_Handout.pdf) Last visited October 24, 2018.

<sup>9</sup> DFPS Extended Jurisdiction Matrix, located at: <http://www.texasfosteryouth.org/downloads/ExtendedJurisdictionMatrixFinal.pdf> Last visited October 24, 2018.

<sup>10</sup> Ex parte Daniels, 722 S.W.2d 707, 708 (Tex. Crim. App. 1987)

<sup>11</sup> Ex parte Duncan, 182 S.W. 313, 314 (Tex. Crim. App. 1916); Cooke v. United States, 45 Sup. Ct. 390, 394 (1925); Ex parte Flournoy, 312 S.W.2d 488, 492 (Tex. 1958); Tex. Gov’t Code § 21.002(d).

<sup>12</sup> Ex parte Knable, 818 S.W.2d 811 (Tex. Crim. App. 1991)

<sup>13</sup> Ex parte Cardwell, 416 S.W.2d 382, 384 (Tex. 1967); Hicks on Behalf of Feiock v. Feiock, 108 Sup. Ct. 1423, 1429 (1998).

<sup>14</sup> Ex parte Chambers, 898 S.W.2d 257, 260 (Tex. 1995) rehearing overruled

<sup>15</sup> In re Rowe, 113 S.W.3d 749, 752 (Tex. App.—Austin, 2003, no writ); In re R.E.D., 278 S.W.3d 850, 856 (Tex. App.—Houston [1st Dist] 2009, no writ)

<sup>16</sup> Ex parte Conway, 419 S.W.2d 827, 828 (Tex. 1967)

<sup>17</sup> In re Oliver, 68 Sup. Ct. 499, 507 (1948); Ex parte Martin, 656 S.W.2d 443, 445 (Tex. Crim. App. 1982)

<sup>18</sup> Ex parte Vetterick, 744 S.W.2d 598,599 (Tex.1988); Tex. Fam. Code § 157.062

<sup>19</sup> Ex parte Gunther, 758 S.W.2d 226, 227 (Tex. 1988); Tex. Fam. Code § 157.163(b)

<sup>20</sup> Muniz v. Hoffman, 422 U.S. 454, 95 S. Ct. 2178, 2190 (1975); Ex Parte Werblud, 536 S.W.2d 542, 546 (Tex. 1976).

<sup>21</sup> Ex parte Griffin, 682 S.W.2d 261, 262 (Tex. 1984)

<sup>22</sup> Chambers, 898 S.W.2d at 261; In re Lausch, 177 S.W.3d 144, 155 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

<sup>23</sup> Ex parte Johns, 807 S.W.2d 768, 771, (Tex. App.—Dallas, 1991, no pet.).

<sup>24</sup> Ex parte Landry, 144 S.W. 962, 963 (Tex. Crim. App. 1912); Hicks, 108 Sup. Ct. at 1430; Chambers, 898 S.W.2d at 259; R.E.D., 278 S.W.3d at 860.

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- <sup>25</sup> In Interest of R.R.F., 846 S.W.2d 65, 68 (Tex. App. – Corpus Christi 1992)
- <sup>26</sup> Travelhost v. Blandford, 68 F.3d 958, 961 (5<sup>th</sup> Cir. 1995)
- <sup>27</sup> Alberti v. Klevenhagen, 610 F. Supp. 138, 141 (S.D. Texas 1985); Ruiz v. McCotter, 661 F. Supp. 112, 116 (S.D. Texas 1986)
- <sup>28</sup> Green v. U.S., 78 S. Ct. 632, 644
- <sup>29</sup> Muniz, 95 S. Ct. at 2190
- <sup>30</sup> Werblud, 536 S.W.2d at 546
- <sup>31</sup> Griffin, 682 S.W.2d at 262
- <sup>32</sup> Ex parte York, 899 S.W.2d 47, 49 (Tex. App.—Waco 1995, no writ)
- <sup>33</sup> In re Brown, 114 S.W.3d 7, 11 (Tex. App.—Amarillo 2003, no writ) (citing Werblud, 536 S.W.2d at 546)
- <sup>34</sup> In re Alexander, 243 S.W.3d 822, 825 (Tex. App. – San Antonio 2007, no writ)
- <sup>35</sup> Ex parte Shacklee, 939 S.W. 2d 144, 145 (Tex. 1997)
- <sup>36</sup> In re Nesevitch, 93 S.W. 3d 510, 513 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2002, no writ)
- <sup>37</sup> Ex parte Calvillo Amaya, 748 S.W.2d 224, 225 (Tex. 1988); Ex parte Whitehead, 908 S.W.2d 68, 70 (Tex. App – Houston [1<sup>st</sup> Dist] 1995, no writ)
- <sup>38</sup> Ex parte Mitchell, 738 S.W.2d 703, 706 (Tex. App. – El Paso 1989, no writ)
- <sup>39</sup> Ex parte Proctor, 398 S.W.2d 917, 918 (Tex. 1966)
- <sup>40</sup> Ex parte Whitehead 908 S.W. 2d at 70; Ex parte Supercinski, 561 S.W.2d 482 (Tex. Crim. App. 1977)
- <sup>41</sup> National Conference of State Legislatures, <http://www.ncsl.org/research/human-services/disproportionality-and-disparity-in-child-welfare.aspx>. Last visited October 24, 2018.
- U.S. Department of Health and Human Services (2010). Administration for Children and Families, Administration on Children, Youth, and Families. The AFCARS report: Preliminary FY 2009 estimates as of July 2010. Washington, DC: U.S. Government Printing Office.
- <sup>42</sup> Billingsley, A., & Giovannoni, J. M. (1972). Children of the storm. New York: Harcourt Brace Jovanivich.
- <sup>43</sup> Hill, R. B. (2008). An analysis of racial/ethnic disproportionality and disparity at the national, state, and county levels. Seattle, WA: Casey Family Programs.
- <sup>44</sup> Texas Department of Family and Protective Services, [http://www.dfps.state.tx.us/Child\\_Protection/Disproportionality/default.asp](http://www.dfps.state.tx.us/Child_Protection/Disproportionality/default.asp). Last visited October 24, 2018.
- <sup>45</sup> Courts Catalyzing Change Preliminary Protective Hearing Benchcard, located at <http://www.ncjfcj.org/sites/default/files/CCC%20Bench%20Card%20Insertsfinal.pdf>. Last visited October 24, 2018.
- <sup>46</sup> National Factsheet on the Educational Outcomes of Children in Foster Care. Available online at [http://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2100&Command=Core\\_Download](http://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2100&Command=Core_Download). Last visited June 30, 2018.
- <sup>47</sup> Data on Foster Children Attending Texas Public Schools 2012-2013. Available online at [http://texaschildrenscommission.gov/media/1192/2012-13-updated-foster-care-data-handout\\_v2.pptx](http://texaschildrenscommission.gov/media/1192/2012-13-updated-foster-care-data-handout_v2.pptx). Last visited June 30, 2018.
- <sup>48</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351. Available online at <http://www.gpo.gov/fdsys/pkg/PLAW-110publ351/pdf/PLAW-110publ351.pdf>. Last visited June 30, 2018.
- <sup>49</sup> Federal law references the local education agency (LEA). This term is synonymous with the school district or open-enrollment charter school. In Texas, the state education agency (SEA) is the Texas Education Agency.
- <sup>50</sup> U.S. Departments of Education and Health & Human Serv., Admin. for Children & Families (2014) joint letter regarding coordination between local education and child welfare agencies. Available online at: <http://www2.ed.gov/about/inits/ed/foster-care/fostering-connections-letter.doc>. Last visited June 30, 2018.
- <sup>51</sup> Every Student Succeeds Act, Pub. L. No. 114–95. Available online at: <https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf>. Last visited June 30, 2018.
- <sup>52</sup> McKinney-Vento Homeless Assistance Act of 1987, Pub. L. No. 100-77. Available online at <http://www.gpo.gov/fdsys/pkg/STATUTE-101/pdf/STATUTE-101-Pg482.pdf>. Last visited June 30, 2018.
- <sup>53</sup> U.S. Department of Education, Education for Homeless Children and Youths Program Non-Regulatory Guidance. Available online at <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>. Last Visited June 30, 2018.
- <sup>54</sup> DFPS Education Decision-Maker Form 2085-E. Available online at [https://www.dfps.state.tx.us/site\\_map/forms.asp](https://www.dfps.state.tx.us/site_map/forms.asp). Last visited June 30, 2018.

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