Tool Kit *for* Attorneys Representing Parents *and* Children in Child Protection Cases

Disclaimer:
The creation and production of this Tool Kit for Attorneys Representing Parents and Children in Child Protection Cases is funded by the Children's Commission through the federal Court Improvement Program. The materials in this tool kit should not be construed as an advisory or ruling by or from the Supreme Court of Texas on specific cases or legal issues. These materials are solely intended to address the improvement of the law, the legal system, and the administration of justice. The information included in this tool kit was published in August 2020.

Children's Commission®
SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Justice Eva Guzman, *Chair*

Jamie Bernstein, *Executive Director*

August 1, 2020

Dear Practitioner,

The Supreme Court of Texas Permanent Judicial Commission on Children, Youth, and Families ("Children's Commission") is charged with strengthening courts for children, youth, and families in the child protection system and thereby improving the safety, permanency, and well-being of children. The Children's Commission provides training, tools, resources, and support to judges and attorneys who work on child protection cases across the state. One of the goals of the Children's Commission is to promote high-quality court proceedings that safeguard due process, encourage meaningful child and family involvement, and include effective legal representation of all parties.

As part of the ongoing commitment to elevate the practice of law in child protection cases, the Children's Commission is pleased to share this Tool Kit for Attorneys Representing Parents and Children in Child Protection Cases. This tool kit is designed to benefit attorneys of all levels of experience by providing concise compilations of relevant legal subjects, applicable state and federal statutes, hearing checklists, and practice tips for representing parents and children in child protection cases. The Commission hopes this tool kit will help promote best practices for attorneys in their advocacy both inside and outside the courtroom.

Please note that while this tool kit is designed for those representing parents and children, it is among the many resources which the Children's Commission has developed and provided to attorneys for parents, attorneys for children, prosecutors, and judges including the Texas Child Protection Law Bench Book; the hands-on Trial Skills Training; the Family Helpline; the Parent Resource Guide; and the Tool Kit for Attorneys Representing the Texas Department of Family & Protective Services in Child Protection Cases. Like all Children's Commission materials, this tool kit is available free of charge.

Thank you for your dedication and advocacy on behalf of the parents and children in Texas child protection cases.

Sincerely,

Jamie Bernstein
Executive Director
Children's Commission

Acknowledgments

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Acknowledgments

Honorable Eva Guzman, Chair, Children's Commission

Justice Eva Guzman has been a member of the Supreme Court of Texas since October 2009. Before serving on the Supreme Court, Justice Guzman served as an Associate Justice on the Houston-based Texas Fourteenth Court of Appeals, having been appointed in 2001 by Gov. Rick Perry. She also served as a trial court judge on the 309th Family District Court after her appointment by then-Gov. George W. Bush. Justice Guzman has been recognized by many law and community organizations for her service on and off the bench. She is the Chair of the Supreme Court Permanent Judicial Commission for Children, Youth and Families and has served in that capacity since June 2010.

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Judge Rucker serves as the Presiding Judge of the Seventh Administrative Judicial Region of Texas. He is also a retired Senior Judge, sitting by assignment, and serves as the Supreme Court Children's Commission Jurist in Residence and the Chair of the Legal Representation Committee. Judge Rucker is board certified in family law by the Texas Board of Legal Specialization (TBLS) and in 2018 TBLS presented him with the Tom Garner Award for his work creating the child welfare law specialty. He is a member of the Family Law Section and serves on the Family Law Council, the Formbook Committee, as Chair of the Judiciary Committee, and as Co-Chair of the Legislative Committee. He is a member of the Texas Family Law Foundation and has previously served as the Judicial Advisor on its Board of Directors. Judge Rucker is a Past Chair of the Judicial Section, State Bar of Texas; the Texas Center for the Judiciary; and the Texas Children's Justice Act Task Force; and has served as a Vice-Chair of the State Bar Pattern Jury Charge Oversight Committee.

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Overview: Child Protection Case Flow

Removal/Start of Case

Emergency

Ex Parte Hearing

- Before Removal
- After Removal

Within 14 Days

Within 14 days of Ex Parte Hearing, court adjudicates CPS petition for Temporary Managing Conservatorship (TMC) of the child.*

*Subject to extension for good cause.

Adversary Hearing

Status Hearing

No later than 60 days after CPS granted TMC, court must review efforts to locate and serve parents, contents of child's service plan, and related issues.

1st Permanency Hearing Before Final Order Within 180 Days

No later than 180 days after CPS granted TMC, court conducts comprehensive review of child's status and permanency plan.

Non-Emergency

Non-Emergency Hearing Within 30 Days

Must be held within 30 days after the petition is filed. Court adjudicates CPS petition for TMC of the child.

Subsequent Permanency Hearing Before Final Order Within 120 Days

Monitored Return

The dismissal date can be extended as part of a monitored return. Please see the expanded chart in the Dismissal Date section (page 78).

Extension of Time

Dismissal date extended 180 days if court finds that extraordinary circumstances & best interest necessitate child remaining in TMC.

Automatic Dismissal

No later than first Monday following one year anniversary of CPS appointment as TMC, a case is dismissed by operation of law, UNLESS the court commences trial, grants a single extension, OR orders monitored return. Court must give notice of dismissal 60 days before.

Final Order

Court adjudicates termination of parental rights and/or Appointment of Permanent Managing Conservatorship (PMC).

New Trial/Mistrial or Remand

Court must set dismissal date no later than 180 days after new trial/mistrial granted or remand ordered and set new trial date.

Permanency Hearing After Final Order

No later than 90 days after final order entered if CPS named PMC & parental rights terminated; otherwise, 6 months after final order. Court must review permanency efforts every 6 months until CPS no longer has conservatorship.

Appeals

Rules of Accelerated Appeals apply. Notice of appeal must be filed within 20 days after the order of judgment is signed.

Investigations & Alternatives to Removal of a Child

Federal law requires that the Department of Family and Protective Services (DFPS) make reasonable efforts consistent with child safety to prevent or eliminate the need for removing a child from a family's home. Not all investigations and interactions with families lead to removal of children. Below are examples of alternative interventions in lieu of removal. The best legal alternative will depend on the facts of each case.

THE INVESTIGATION OF THE FAMILY CANNOT BE COMPLETED

Court Order in Aid of Investigation

If a person interferes with an investigation of a family, or DFPS cannot access the child or the child's records, DFPS may petition a court to order the following on a showing of good cause:

- Access to a home, school, or any place where a child may be;
- A medical, psychological, or psychiatric exam (or to obtain the records of such an exam). Tex. Fam. Code §§ 261.303, 261.3031.

THE INVESTIGATION HAS REVEALED A NEED FOR SERVICES BUT THE FAMILY IS COMPLIANT

Safety Plans

A Safety Plan is defined by DFPS as a voluntary written agreement between DFPS and adult family members to address a specific threat to a child in the immediate or foreseeable future. The plan must be created with the family and be written in a practical, action-oriented manner and acknowledge a family's network of support. A petition for legal intervention is not filed with the court, and no court orders are entered in association with a Safety Plan, therefore the plan is not legal binding. However, a parent's failure or refusal to comply with a Safety Plan can be used as evidence in support of a request for removal to foster care.

In a Safety Plan, a parent may agree to:

- Place a child outside the home;
- Suspend or restrict visitation; and/or
- Submit to drug testing.

Alternative Response (AR)

The AR program was created to help families with low to moderate risk cases. In order to be considered for the program, all alleged child victims must be over the age of 6 and the intake must have received a designation of Priority 2 (P2). In an AR case, no final disposition, no alleged perpetrator, and no entry are made into the Central Registry. The goal is to provide a collaborative and non-judgmental environment to work with the family whose children are not in the managing conservatorship of DFPS to address concerns through protective services in order to prevent the need for further official intervention.

For more information, *see* the DFPS Alternative Response Resource Guide found at http://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Alternative_Response_Resource_Guide.pdf.

Family Based Safety Services (FBSS)

FBSS offers protective services to a family whose children are not in the managing conservatorship of DFPS in order to prevent the need to remove a child from the home. Participation in FBSS by a family is voluntary and is accompanied by a Safety Plan. Parents do not have to comply with the voluntary services, however, DFPS has the option of initiating further legal intervention if they determine the lack of compliance constitutes a danger to the child.

THE INVESTIGATION HAS REVEALED A NEED FOR SERVICES BUT THE FAMILY IS NOT COMPLIANT

Court Order for Participation in Services/Motion to Participate

If a family has refused services or is not voluntarily cooperating with DFPS's provided or funded services, DFPS can seek a court order to require a parent to participate in services designed to alleviate the effects of abuse or neglect or to reduce the reasonable likelihood of abuse or neglect in the immediate or foreseeable future. A parent's failure to comply with court-ordered services may lead to DFPS filing a petition to remove a child and may be offered as evidence.

THE INVESTIGATION HAS REVEALED A NEED FOR AN ALTERNATIVE PLACEMENT FOR THE CHILD

Parental Child Safety Placement (PCSP)

A Parental Child Safety Placement (PCSP) is an agreed temporary out-of-home placement approved by DFPS made by a parent with a caregiver who is either related to the child or has a long-standing and significant relationship with the child or family. With a proper authorization agreement, a parent can give an adult caregiver of a child placed under a PCSP the authority to take action, including but not limited to medical consent, school enrollment, consent for participation in school and sport events, applying for public benefits, and related authority. Tex. Fam. Code § 34.0021. The PCSP should expire in 60 days unless it is renewed by all parties.

THE INVESTIGATION HAS REVEALED THAT A PROTECTIVE PARENT IS THE VICTIM OF FAMILY VIOLENCE

Order for Removal of an Alleged Perpetrator ("Kick-Out Order")

It is well established that separating a child from their home and caregiver can be traumatizing. If an alleged perpetrator will not voluntarily leave the home and if the remaining parent or caretaker of the child will make a reasonable effort to monitor and report any attempt by the alleged perpetrator to return to the home, a temporary restraining order could be used to remove the alleged perpetrator. It is a Class A Misdemeanor to violate this temporary restraining order. This order lasts for 14 days. Tex. Fam. Code § 262.1015. This timing allows a protective parent time to initiate a custody suit or seek a protective order.

Practice Tip: If the protection of the child requires an order lasting longer than 14 days, a permanent protective order can be requested. (See section immediately below). This requires a separate application to be filed instead of, or in addition to, the Kick-Out Order.

Practice Tip: If a client is uncertain whether to seek a permanent protective order or a temporary order, consider filing both the temporary and the permanent orders at the same time in order to only have to complete service on the alleged perpetrator once. The permanent protective order hearing can always be passed if it is not necessary, and the temporary protective order expires in 14 days. Current law allows the temporary Ex Parte protective order to last up to 20 days with the ability to extend its duration for an additional 20 days. Tex. Fam. Code § 83.002.

Protective Orders

A victim of family violence may be issued a protective order upon a finding that family violence has occurred and is likely to occur again in the future. Tex. Fam. Code §§ 71.004; 81.001; 85.001; 261.501-261.505.

Additionally, upon a finding that there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, indecent assault, stalking, or trafficking, a court may issue a protective order. Tex. Code of Crim. Pro. Art. 7A.03.

- Obtaining such an order does not require proof of any visible marks or bruises and in a hearing for a permanent protective order a statement made by a child 12 years old or younger describing alleged family violence is admissible in the same manner as provided by Tex. Fam. Code §§ 104.006, 84.006. A statement made by a child victim younger than 14 years of age has been admissible in a protective order filed under the Tex. Code of Crim. Pro. Art. 7A.035, but Art. 7A.035 was repealed by the 86th Texas Legislature, effective January 1, 2021.
- While awaiting a protective order, temporary ex parte orders can keep a respondent from doing certain acts (such as causing emotional and physical abuse of the child) or going near the child or residence. DFPS can file such orders alone or jointly with another protective person.
- The temporary ex parte protective order is good for 14 days, and after notice and hearing, a court can order a protective order.
- Additionally, a protective order can be obtained for any victim of sexual abuse from their perpetrator.
- A protective order issued to a victim of family violence may be in effect for up to two years and is renewable upon a finding that the order for protection should be extended. Tex. Fam. Code § 85.025.
- A protective order issued to a victim of sexual assault or abuse, indecent assault, stalking, or trafficking may issue for any period of time, including for the duration of the lives of the perpetrator and victim. Tex. Code of Crim. Pro. Art. 7A.07.
- A violation of a protective order is a criminal offense. Tex. Fam. Code § 262.1015.

Parent's Attorney Practice Tip: An Ex Parte Order can be extended for an additional 20 days in order to accomplish service of process on the Respondent. The prosecuting attorney of the county (criminal district attorney or county attorney) will file the application for protective order at no cost on behalf of the applicant. If the prosecuting attorney is representing DFPS in a suit against the applicant, the prosecutor is not prohibited from filing the application, subject to the Texas Disciplinary Rules of Professional Conduct. However, the prosecutor's office is not required to file the Protective Order if they find it to be a conflict or it does not meet their qualifications for filing. Advise a client to exercise caution in sharing information in applying for a Protective Order that might be used against them in a Child Protective Services (CPS) case.

Duties of Parents' and Children's Attorneys

In addition to the duties that every attorney owes their client under the Texas Disciplinary Rules of Professional Conduct, there are specific statutory duties for attorneys appointed to represent parents and children in CPS cases.

DUTIES FOR PARENTS' AND CHILDREN'S ATTORNEYS

Interview the client after initial appointment within a reasonable amount of time unless the client's location is unknown *(for child client, applies to age four or older)*. Tex. Fam. Code §§ 107.0131(a)(1)A)(i), 107.003(a)(1)A)(i).

Interview each person who has significant knowledge of the case. Tex. Fam. Code §§ 107.0131(a)(1)(A)(ii), 107.003(a)(1)(A)(ii).

Interview the parties to the suit. Tex. Fam. Code §§ 107.0131(a)(1)(A)(iii), 107.003(a)(1)(A)(iii).

Conduct an independent investigation into the facts of the case. Tex. Fam. Code §§ 107.0131(a)(1)(B), 107.003(a)(1)(D).

Obtain and review copies of all court files in the suit during the attorney's course of representation. Tex. Fam. Code §§ 107.0131(a)(1)C)(i), 107.003(a)(1)(E).

Conduct formal discovery under the Texas Rules of Civil Procedure or a local discovery control plan. Tex. Fam. Code §§ 107.0131(a)(1) C)(ii), 107.003(a)(1)(F).

Take any action consistent with the client's interests that the attorney considers necessary to expedite the proceedings. Tex. Fam. Code §§ 107.0131(a)(1)(D), 107.003(a)(1)(G).

Encourage settlement and the use of alternative forms of dispute resolution. Tex. Fam. Code §§ 107.0131(a)(1)(E), 107.003(a)(1)(H).

Review and sign, or decline to sign, a proposed or agreed order affecting the client. Tex. Fam. Code § 107.0131(a)(1)(F), 107.003(a)(1)(I).

Meet before each court hearing with the client (*for child client, applies to age four or older*).Tex. Fam. Code §§ 107.0131(a)(1)(G), 107.004(d)(1).

Exceptions – If the court:

- Finds at that hearing that the attorney has shown good cause why the attorney's compliance is not feasible or not in the best interest of the child. Tex. Fam. Code §§ 107.0131(a)(1)(G), 107.004(e); or
- On a showing of good cause, authorizes the attorney to comply by conferring with the parent, as appropriate, by telephone or video conference. Tex. Fam. Code §§ 107.0131(a)(1)(G), 107.004(e).

Abide by the client's objectives for representation (*for child client, child must be competent to form an attorney-client relationship and form that relationship*). Tex. Fam. Code §§ 107.0131(a)(1)(H), 107.004(a)(2).

Become familiar with the American Bar Association's standards of practice for attorneys in abuse and neglect cases. Tex. Fam. Code §§ 107.0131(a)(1)(I), 107.004(a)(3).

Complete at least three hours of continuing legal education relating to representing parents and at least three hours of continuing legal education relating to representing children in child protection cases as soon as practicable after the attorney ad litem is appointed, unless the court finds that the attorney ad litem has experience equivalent to that education. Tex. Fam. Code §§ 107.0131(a)(1)(J), 107.004(b).

ADDITIONAL DUTIES FOR A CHILD'S ATTORNEY

In addition to the duties which every attorney owes their client under the Texas Disciplinary Rules of Professional Conduct, there are specific statutory duties for attorneys appointed to represent children in CPS cases.

Interview and interact with the child in a developmentally appropriate manner. Tex. Fam. Code §§ 107.003, 107.004.

Elicit in a developmentally appropriate manner the name of any adult, particularly an adult residing in the child's community, who could be a relative or designated caregiver. Tex. Fam. Code § 107.003(b)(4).

Advise the child. Tex. Fam. Code § 107.004(a)(1).

If the child is younger than four years of age, meet with the person who the child ordinarily resides with prior to each hearing. Tex. Fam. Code § 107.004(d)(1)(B).

Meet with the child or the child's caregiver prior to each hearing with sufficient time before the hearing to allow the attorney to prepare in accordance with the child's expressed objectives and meet in a private setting that allows for confidential communication. Tex. Fam. Code § 107.004 (d-1).

If the child is not present at the court hearing, file a written statement with the court that the attorney met with the child or the child's caregiver as required. Tex. Fam. Code § 107.004(d)(2).

Consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court. Tex. Fam. Code § 107.003(c).

Interview each person who has significant knowledge of the child's history and condition, including any foster parent. Tex. Fam. Code § 107.003(a)(1)(A)(ii).

Determine whether the child's educational needs and goals have been identified and addressed. Tex. Fam. Code § 107.004(d-2).

Review periodically 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 issues of concern. Tex. Fam. Code § 107.004(d-3).

Obtain and review copies of relevant records relating to the child. Tex. Fam. Code § 107.003(a)(1)(E).

Review the medical care provided to the child. Tex. Fam. Code § 107.003(b)(1).

Elicit, in a developmentally appropriate manner, the child's opinion on the medical care provided. Tex. Fam. Code § 107.003(b)(2).

Children at Least 16 Years of Age

- Advise the child of the child's right to request the court to authorize the child to consent to their own medical care. Tex. Fam. Code § 107.003(b)(3)(A).
- Ascertain whether the child has received a certified copy of their birth certificate, social security insurance (SSI) card or replacement SSI card, driver's license (DL) or state identification card, or any other document DFPS determines appropriate. Tex. Fam. Code § 107.003(b)(3)(B).

Substituted Judgment

If the child's attorney determines that the child cannot meaningfully formulate the child's objectives of representation because the child:

- Lacks sufficient maturity to understand and form the attorney-client relationship;
- Despite appropriate legal counseling continues to express objectives of representation that would be seriously injurious the child; or
- For any other reason is incapable of making reasonable judgments and engaging in meaningful communication,

Then the attorney must consult with the guardian ad litem for the child, if one has been appointed. Without being bound by the guardian ad litem's opinion or recommendation, the attorney for the child must ensure that the opinion and recommendation regarding the best interest of the child is presented to the court and may present to the court a position the attorney determines will serve the best interest of the child. Tex. Fam. Code § 107.008.

ADDITIONAL DUTIES OF A CHILD'S ATTORNEY APPOINTED IN THE DUAL ROLE OF ATTORNEY AND GUARDIAN AD LITEM

Conduct an investigation to determine the best interests of the child. Tex. Fam. Code § 107.002(a)(1).

Consider the child's expressed objectives without being bound by those objectives. Tex. Fam. Code § 107.002(b)(3).

Interview each person who has significant knowledge of the case including educators and child welfare service providers. Tex. Fam. Code § 107.002(b)(1)(B).

If substituting judgment, the attorney may present to the court a position the attorney determines will serve the best interest of the child. Tex. Fam. Code § 107.008.

Child's Attorney Practice Tip: In some Texas jurisdictions, long-standing practice has been to appoint an attorney serving in the dual role of attorney and guardian litem to every child in a CPS case. However, an attorney who serves in the dual role may face an ethical dilemma when representing a child who is capable of forming an attorney-client relationship and directing representation, if the child's objectives are incompatible with the attorney's assessment of the child's best interest, but the child's objectives do not meet the seriously injurious standard required to substitute judgment. The dilemma can be resolved by requesting appointment of another person to serve in the role of guardian ad litem for the child. Tex. Fam. Code § 107.0125.

DUTIES FOR A PARENT'S ATTORNEY APPOINTED TO REPRESENT AN ALLEGED FATHER

Conduct an investigation regarding the petitioner's due diligence in locating the alleged father, including verifying that the petitioner has obtained a certificate of the results of a search of the paternity registry.

Interview any party or other person with significant knowledge of the case who may have information relating to the identity or location of the alleged father.

Conduct an independent investigation to identify or locate the alleged father, as applicable.

If the alleged father is identified and located, the attorney ad litem shall:

- Provide to each party and the court the alleged father's name and address and any other locating information; and
- If appropriate, request the court's approval for the attorney ad litem to assist the alleged father in establishing paternity.

If the alleged father is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests.

If unable to identify or locate the alleged father, the attorney ad litem must 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.

DUTIES FOR A PARENT'S ATTORNEY APPOINTED TO REPRESENT AN UNKNOWN PARENT, UNLOCATED PARENT, OR PARENT WHO HAS BEEN SERVED BY CITATION BY PUBLICATION.

Conduct an investigation regarding the petitioner's due diligence in locating the parent.

Interview any party or other person with significant knowledge of the case who may have information relating to the identity or location of the parent.

Conduct an independent investigation to identify or locate the parent, as applicable.

If the attorney identifies and locates the parent, the attorney must:

- 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
- If appropriate, assist the parent in making a claim of indigence for the appointment of an attorney.

If unable to identify or locate the parent, the attorney ad litem must 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, the court must discharge the attorney from the appointment. Tex. Fam. Code § 107.014.

Burden of Proof

Sufficient Evidence to Satisfy a Person of Ordinary Prudence and Caution

"Ordinary Prudence and Caution" is similar to the "probable cause" required for a search warrant. Ordinary Prudence and Caution requires a minimal showing of evidence, less than a preponderance but enough to persuade a reasonable person. 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; and
- Full Adversary Hearing (both emergency and non-emergency removal). Tex. Fam. Code § 262.201.

Preponderance of the Evidence

"Preponderance" is evidence that is of greater weight or is more convincing than the evidence that is offered in opposition to it. A metaphor to illustrate the concept is the scales of justice tipping slightly higher on one side; that is enough to meet the standard of 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 (PMC) (without termination). Tex. Fam. Code § 105.005;
- Permanency Hearing after Final Order. Tex. Fam. Code § 105.005; and
- Adoption Hearing. Tex. Fam. Code § 105.005.

Clear and Convincing

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

- Termination of Parental Rights when Indian Child Welfare Act (ICWA) does not apply. Tex. Fam. Code § 161.001 and 25 U.S.C. §1912(f); and
- An Order placing a child in foster care under ICWA; 25 U.S.C.§ 1912(e).

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 ICWA. 25 U.S.C. §1912(f).

Required Burden of Proof

Sufficient to satisfy a person of ordinary prudence and caution « **Preponderance** « **Clear and convincing evidence** « **Beyond a reasonable doubt**

Best Interest of the Child

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002.

Best Interest Factors include, but are 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.

HEARINGS THAT CAN REQUIRE 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 non-custodial 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 cannot 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.

COURT DECISIONS THAT REQUIRE A DETERMINATION OF BEST INTEREST

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:
  - 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:

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002.

- 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 DFPS 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 is in the best interest of the child. Tex. Fam. Code § 263.403(a)(1).

DFPS DECISIONS THAT MUST CONSIDER BEST INTEREST

When considering placement:

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

- DFPS must conduct an assessment to determine whether the proposed placement is in the child's best interest. Tex. Fam. Code § 264.754(b).

FACTORS DETERMINING BEST INTEREST

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

- Desires of the Child
- Emotional and Physical Danger to Child Now and in Future
- Parental Abilities
- Programs Available to Assist Parents
- Plans for the Child by Individuals or Agency Seeking Custody
- Stability of Home or Proposed Placement
- Any Acts or Omissions of a Parent Indicating the Relationship is not Proper; and Any Excuse for the Acts or Omissions of a Parent.

See Tex. Fam. Code § 263.307 for additional factors in determining a child's best interest.

ELICITING EVIDENCE REGARDING BEST INTEREST

A parent or child's attorney should be comfortable eliciting information regarding a child's best interest regardless of the position being advocated. Below are sources and topics for soliciting evidence regarding best interest at a trial or contested hearing.

Parent/Conservator Testimony:

- Memories of the child's birth or the day the child came into their life;
- The child's unique role in the family;
- The bonds the child has with family members;
- The bonds the child has with the family's community;
- Training/classes the parent has attended; and/or
- Knowledge the parent or caregiver has gained about the child's needs and how they plan to meet those needs in the child's home.

Psychologist/Therapist Testimony:

- The number of and type of placements the child has experienced in CPS care;
- The progress or lack of progress the child has made in CPS care;
- Clinical research regarding the effects of removal or separation;
- Clinical research regarding life outcomes of children who experience foster care or family separation;
- The child's desires to remain/return home;
- What permanency means for this child;
- Behaviors of the child now and in the future; and/or
- Psychological effect of "closure" on the healing process.

Substitute Caregiver Testimony:

- Typical day with the child (meetings/appointments they attend with or for the child);
- Training/classes they have attended;
- Any special needs of the child and how those needs have been met;
- How the child was when they first entered substitute care and how they are now; and/or
- Future plans for child (e.g. Is the caregiver considering adoption?).

Pleading Practice

PLEADINGS

While DFPS may plead multiple grounds for termination, suits filed by a governmental entity are subject to Tex. R. Civ. P. 13, which prohibits groundless pleadings brought in bad faith or to harass, as well as Tex. Civ. Prac. & Rem. Code § 10, which requires that each allegation or other factual contention in the pleading has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Answer: Attorneys for parents and children should always file an Answer after their client has been served.

Special Appearance: If a parent client is unlocated, has not been served, and has not appeared before the court, do not file an Answer. An Answer or participation in the suit generally waives any defects in the previously issued service or notice. Instead, make a special appearance at the first hearing after appointment to ascertain information as to how the client can be located.

Affirmative Defenses: These should be filed with the Answer if they are applicable. All affirmative defenses that are applicable to any civil case apply; however, if the parent client has failed to complete one or more services ordered as part of the Court Ordered Service Plan, an attorney may file the specific defense under Tex. Fam. Code § 161.001(d) prior to the amended pleading deadline.

Counter-Petition: If a client is seeking relief from the court, it is important to file a Counter-Petition. This can be combined with the Answer. If a client has a preferred relative placement, consider including a request for the relative to be named managing conservator of the child, whether or not that relative has intervened.

Petition for Writ of Mandamus: If a client requests to contest the outcome of the Adversary Hearing order rendered by a District Court or County Court at Law, an attorney may file a Petition for Writ of Mandamus to the appropriate appellate court. The standard of review for a Writ of Mandamus is abuse of discretion.

Request for De Novo Hearing: If a client requests a de novo review of a ruling made by an associate judge, a written request for a De Novo Hearing must be filed within three working days, and the matter must be heard by the referring court within 30 days. Parties must specify the issues that will be presented to the referring court and may present witnesses on the specific issues raised on de novo.

Parent's Attorney Practice Tip: DFPS may plead in the alternative, but if DFPS has pleaded a "laundry list" of all termination grounds, or has included termination grounds that are not supported by affidavit, consider serving discovery or a Request for Admission to ascertain the evidence that DFPS has on each ground, and if no evidence is provided, consider filing a Motion for No Evidence Summary Judgment to eliminate the grounds for which there is no evidence.

PLEADING CONSIDERATIONS FOR THE CHILD'S ATTORNEY

A child's attorney shall participate in the conduct of the litigation to the same extent as an attorney for a party. Tex. Fam. Code § 107.003(1)(F). Accordingly, a child's attorney should file any necessary pleadings to further their representation of the child.

Child Client's Answer

A child's attorney should file an Answer and require the state (or other parties who cross-claimed) to meet the burden of proof. A general denial is an appropriate pleading. Tex. R. Civ. P. 83 and 85.

> **Child's Attorney Practice Tip**: An Answer of the child's attorney who is serving in the dual role should also include an assertion that the court should consider the best interest factors specified in *Holley v. Adams* in rendering judgment. 544 S.W. 2d 367 (Tex. 1976). This response may be considered a "special plea" under Tex. R. Civ. P. 85. Including the specific factors in a pleading puts these factors at issue in the case, supports discovery reasonably related to the discovery of admissible evidence, and establishes relevance for purposes of determining admissibility of evidence.

Responding to Nonsuit

The State cannot nonsuit a suit to terminate parental rights without court approval. Tex. Fam. Code § 161.203. If the State seeks to nonsuit, the child's attorney should consider the child's position. If appointed in the dual role, the attorney should also consider whether the nonsuit is in the child's best interest, and file a response contesting the nonsuit if appropriate. Given that the State may not be very enthusiastic about pursing a Petition it has been prevented from nonsuiting, the child's attorney should also consider filing a Cross-Petition on behalf of the child client.

Child's Cross-Petition

The child's attorney can file a Cross-Petition that can seek an outcome not pleaded by another party, but that meets the child's desires and/or best interest. Tex. R. Civ. P. 85 and 60.

- Even if the relief sought in the Cross-Petition seeks relief already sought by another party, the Cross-Petition preserves the client's right to pursue the claim if the other party abandons or does not vigorously pursue that claim.
- Cross-petition may allow the parties to pursue relief that the state is restricted from pursuing by DFPS policy or otherwise, e.g., if an out of state relative has surfaced too late in the proceeding to permit the state to seek an Interstate Compact on the Placement of Children (ICPC) placement. The child's attorney can use a cross-petition to continue to seek placement with that relative as being in the best interest of the child.

Cross-Petition for Name Change

A name change may be needed due to inconsistencies or issues with the child's legal name, such as a birth certificate listing the first name as "Infant," or a listing of a last name different than the surname used throughout child's life and in records.

Name changes are somewhat less complex before the child reaches the age of majority. If the child is 10 years of age or older, the child's written consent to the name change must be attached to the Petition. Tex. Fam. Code § 45.002(b).

Motion Practice

A motion is a pleading seeking some specific relief. There are certain motions that are specifically defined in the Texas Family Code or Texas Rules of Procedure that have precise elements to be included and demonstrated, but an attorney for a parent or a child is not limited to pursuing only those motions delineated in the Codes and Rules. A motion can be filed to pursue the relief a party needs and can merely state the grounds for the relief and set forth the relief or order requested. *See* Tex. R. Civ. P. 21.

COMMON MOTIONS FOR PARENTS' AND CHILDREN'S ATTORNEYS

Objection to Proposed Service Plan/Motion to Modify Service Plan: If the parent or child client needs additional services, or requests to eliminate services from the service plan, an attorney may file an Objection/Motion and seek relief from the court.

Motion to Increase Visitation: This motion can be filed by either parents' or children's attorneys when seeking to increase visitation or to obtain unsupervised visitation.

Motion to Change Placement or to Conduct a Home Study: Can be filed by either a parent's attorney or child's attorney but the child's attorney is specifically obligated to elicit "the name of any adult . . . who could be a relative or designated caregiver for the child. . . ." Tex. Fam. Code 107.003(b)(4). If after providing the name to DFPS, and DFPS does not pursue the potential placement, the attorney can bring the issue to the attention of the court by motion. Even if it is not a licensed or approved home, the judge may order a change of placement.

> **Practice Tip:** Evaluate if DFPS is excluding the proposed placement for reasons that are unrelated to safety. Look at the length of time since last criminal history, changed circumstances of the proposed placement, relationship to child, and whether home study denial is a good faith denial.

Motion for Expedited Home Study: DFPS needs an order to request an expedited home study. To resolve the issue of placement as quickly as possible, file this motion as soon as a home study is necessary.

Motion for a Monitored Return: If a parent has completed most of their services, but DFPS will not agree to return the child and dismiss the case, an attorney for a parent or a child may file a motion for the child to be returned home while the court retains jurisdiction, either through a standard monitored return or transitional monitored return. Tex. Fam. Code § 263.403(a)(2)(A)-(B).

Motion for Travel Costs: Might be necessary depending on the jurisdiction's policy toward travel reimbursement.

Motion for Paternity/DNA/Genetic Testing: May be necessary if the alleged father does not acknowledge paternity, or when there is more than one alleged father. Tex. Fam. Code § 160.608, 160.621.

Motion for Continuance: An attorney may file a written and sworn Motion for Continuance if good cause exits to delay the trial and there is still time for the court to grant the motion but still commence trial on the merits before the statutory deadline. If denied, error is preserved for appeal. Tex. R. Civ. P. 251.

Motion for Extension: If a parent has completed most services but will not complete the service plan prior to the statutory deadline, an attorney for a parent or a child may file a motion asserting that there are extraordinary circumstances sufficient to extend the case 180 days beyond the original statutory deadline. Tex. Fam. Code § 263.401(b).

COMMON MOTIONS FOR A PARENT'S ATTORNEY

Motion to Exclude Drug Test Results: DFPS may attempt to admit drug test results through a business records affidavit. Drug tests require expert testimony as outlined in the *Evidentiary Issues* section of this tool kit. "Because of the more stringent clear and convincing standard for a parental termination case as opposed to other civil cases, the Texarkana court has held that it is inappropriate to apply the more relaxed civil standard in determining the admissibility of business records." *See In re K.C.P.*, 142 S.W.3d 574, 580 (Tex. App.-Texarkana 2004, no pet.). *See also Philpot v. State*, 897 S.W.2d 848, 852 (Tex. App.-Dallas 1995, pet. ref'd).

Motion for Daubert Hearing: If a party attempts to elicit expert testimony from a witness who is not qualified to give an expert opinion, an attorney may move for a Daubert Hearing to challenge the witness's status as an expert. It will be necessary to voir dire the proposed expert on the qualifications, data relied on, and scientific procedure as outlined in the *Evidentiary Issues* section of this tool kit. Follow up with a motion to exclude expert witness if necessary.

Motion for No Evidence Summary Judgment: After an adequate time for discovery, this dispositive motion can be filed to strike any termination ground alleged in the Pleadings for which DFPS has provided no evidence.

Motion to Strike Intervention: If relatives or foster parents file an intervention over the objection of a client, the intervention may be struck if the intervening party lacks standing, or if placement with them is not in the best interest of the child. A motion to strike the intervention should be specific in the reasoning as to why the intervention should be struck.

Motion for Funds for an Expert Witness: This motion may be most relevant in medical abuse cases when there are differing opinions as to how certain injuries occurred, although it could be used for any expert, including those for drug testing and psychological/psychiatric issues.

Motion to Appoint Temporary Possessory Conservator: This can be filed when the Order granting TMC to DFPS does not specify that the parents are temporary possessory conservator with specific rights and duties.

Motion to Compel Discovery Responses: Consider filing if DFPS has not complied timely with discovery requests. However, it is important to weigh the costs and benefits of such a motion depending on evidence requested as evidence that is not produced in accordance with discovery is not admissible at trial.

Motion to Remove Guardian/Attorney Ad Litem: This motion should only be considered if there is serious misconduct that is prejudicial to a client. Talking to the ad litem first regarding concerns might alleviate the need to file the motion.

Request to Disclose Information: Must be served to DFPS, prior to the Adversary Hearing, requesting that they turn over the names of non-DFPS witnesses who will testify to the allegations, copies of offense reports that will be used, and any photo, video or recording that may be used at that Adversary Hearing. Tex. Fam. Code § 262.014.

Motion for Participation by Other Means: Parents have a constitutional right to attend not only their trial, but any ancillary hearings in the case. If a parent client is in jail, or otherwise indisposed and cannot attend trial, the attorney may file a motion requesting the parent to attend by telephone, television, Skype, etc., or even by deposition. If the motion is denied, then error is preserved for appeal.

COMMON MOTIONS FOR A CHILD'S ATTORNEY

Motion for Sibling Visitation/Access: If a client is not getting enough contact, whether face-to-face or otherwise with their siblings, the child's attorney can file a motion to seek such access. Sibling Access may also be pursued by a child, even if a child is under 18. Tex. Fam. Code § 153.551.

> **Child's Attorney Practice Tip:** Review the child's plan of service; it often recommends more frequent sibling access than is being provided. Consider filing a motion to request that the court order the amount of sibling access recommended by the child's plan of service.

Motion to Modify Parental Visitation: File if a client desires, and/or it is in the client's interest for the child to receive more or a different type of visitation with a parent, e.g., unsupervised visitation if appropriate. For example, if DFPS has set visitation for an inconvenient day/time for the parent or the child, and the child consistently misses class and would like to have visit days/or times vary, the child's attorney may file a motion to accommodate child and/or parent's needs.

Motion to Modify Services for the Child: If the child needs a special medical service (such as a cranial helmet) or if the child would benefit from therapy by a different provider or specialist. This motion can also be used to pursue normalcy issues such as allowing the child to participate in an extracurricular activity and/or if the child needs financial support for the same.

Motion for Child to Attend the Hearing/Confer with the Court: The Texas Family Code states that children shall attend each Permanency Hearing unless excused by the court, but a motion may be necessary if the child client wishes to attend a non-permanency hearing, or if local judicial practice excuses children from Permanency Hearings by default. Consider utilizing a Motion to Interview Child in Chambers. Tex. Fam. Code § 153.009.

Motion for Second Opinion on Psychotropic Medications: Tex. Fam. Code § 107.002(a)(2) provides for the attorney ad litem for a child to have access and review medical records and Tex. Fam. Code § 107.004(d-3) requires an attorney ad litem "to review the child's safety and well-being . . . and take appropriate action, including requesting a review hearing when necessary to address an issue of concern."

Termination Grounds

For a full list of the statutory grounds for Involuntary Termination of Parent-Child Relationship, *see* Tex. Fam. Code § 161.001(b)(1). The non-exhaustive list below contains grounds often pleaded in DFPS cases.

ABANDONMENT GROUNDS Tex. Fam. Code § 161.001(b)(1)(N)

Has the parent:

- Constructively abandoned the child who has been in the PMC or TMC of DFPS for not less than six months;
- Not regularly visited or maintained significant contact with the child;
- Demonstrated an inability to provide the child with a safe environment; and
- DFPS made reasonable efforts to return the child to the parent.

ENDANGERMENT: CONDITIONS OR SURROUNDINGS Tex. Fam. Code § 161.001(b)(1)(D)

Has the parent:

- Knowingly placed (the child) or knowingly allowed (the child);
- To remain in conditions or surroundings; and
- Endangers the physical or emotional well-being of the child.

ENDANGERMENT: COURSE OF CONDUCT Tex. Fam. Code § 161.001(b)(1)(E)

Has the parent:

- 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.

AFFIDAVIT OF RELINQUISHMENT OF PARENTAL RIGHTS Tex. Fam. Code § 161.001(b)(1)(K)

Has the parent:

- Executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights.

CRIMINAL CONVICTION-DEATH OR SERIOUS INJURY Tex. Fam. Code § 161.001(b)(1)(L)

Has the parent been convicted or been placed on community supervision, including deferred adjudication community supervision:

- For being criminally responsible for the death or serious injury of a child, under any of the following crimes: (murder; capital murder; manslaughter; indecency w/ child; assault; sexual assault; aggravated assault; aggravated sexual assault; injury to child; abandoning or endangering child; prohibited sexual conduct; sexual performance by child; possession or promotion of child pornography).

Practice Tip for Parent's Attorneys: If DFPS only offers judgments of convictions without charging instruments or any other evidence of the underlying facts that support the conviction, a parent's attorney may want to challenge the sufficiency of the evidence.

PRIOR TERMINATION ON ENDANGERMENT GROUNDS Tex. Fam. Code § 161.001(b)(1)(M)

Has the parent:

- Had their parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state.

COURT ORDERED SERVICES Tex. Fam. Code § 161.001(b)(1)(O)

Has the parent failed to comply with:

- Provisions of court order that specifically established the actions necessary for the parent to obtain the return of the child;
- Who has been in the PMC or TMC of DFPS for not less than nine months; and
- As a result of the child's removal for the abuse or neglect of the child.

Note: A court *may not* order termination under (O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of evidence that: the parent was unable to comply with specific provisions of the court order, and the parent made a good faith effort to comply with the order, and the failure to comply with the order is not attributable to any fault of the parent. Tex. Fam. Code § 161.001(d).

DRUG TREATMENT AND/OR RELAPSE Tex. Fam. Code § 161.001(b)(1)(P)

Has the parent:

- Used a controlled substance, as defined by Tex. Health & Safety Code Ch. 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.

INCARCERATION AND INABILITY TO CARE Tex. Fam. Code § 161.001(b)(1)(Q)

Has the parent:

- 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.

Note: The confinement or imprisonment for not less than two years is prospective from the date of the filing of the petition rather than retrospective. *In re A.V.*, 113 S.W.3d 355 (Tex. 2003).

TERMINATION OF RIGHTS OF ALLEGED BIOLOGICAL FATHER Tex. Fam. Code § 161.002

- Service of Citation or Due Diligence Finding Required:
  - after being served with citation, the alleged father does not timely file an admission of paternity or a counterclaim for paternity under Tex. Fam. Code Ch. 160.
  - he has registered with the Paternity Registry and DFPS has exercised due diligence to locate alleged father, but personal service of citation at the address provided to the registry and any other address known to DFPS has been unsuccessful.

Note: The court must enter specific findings regarding the exercise of due diligence by DFPS when rendering an order terminating parental rights under this section.

- Termination does not require personal service of citation or citation by publication, and there is not requirement to identify or locate an alleged father if:
  - child is over one year of age at the time the petition was filed, and he has failed to register with the Paternity Registry and his identity and location are unknown; or
  - his identity is known, but he cannot be located; or
  - child is under one year old at the time petition was filed, and he has not registered with the paternity registry.

Note: The court must receive evidence of a certificate of the results of the paternity registry from the Texas Department of State Health Services Vital Statistics Section indicating that no man has registered intent to claim paternity before the court can render an order terminating the rights of an alleged father.

Discovery

OVERVIEW

Discovery rules in DFPS cases are the same as in other civil cases and are governed by the Texas Rules of Civil Procedure. A Suit Affecting the Parent-Child Relationship (SAPCR) is usually subject to Level 2 Discovery. Please note that many courts who hear child protection cases have Level 3 Discovery Control Plans in place as part of their local rules and may modify the date by which Responses are due and require court approval to go outside of the parameters of the Discovery Control Plan.

It is important to respond to all discovery requests within 30 days after the discovery is served or in accordance with deadlines set forth in a court-ordered Discovery Control Plan. **Failure to timely answer discovery may limit the evidence and testimony which can be presented at trial.** Tex. R. Civ. P. 193.6(a).

TYPES OF DISCOVERY IN TEXAS RULES OF CIVIL PROCEDURE:

- Requests for Disclosure: Tex. R. Civ. P. 194
- Interrogatories: Tex. R. Civ. P. 197
- Requests for Production of Documents: Tex. R. Civ. P. 196
  - must be served at least 30 days before the end of the discovery period.
  - can include a request for entry upon property. Tex. R. Civ. P. 196.7
- Requests for Admission: Tex. R. Civ. P. 198
  - failure to respond timely will result in admissions being deemed admitted.
- Depositions: Tex. R. Civ. P. 199-200
  - any objection to the time and place of the deposition must be made by filing a Motion for Protective Order or a Motion to Quash.
- Requests for Physical and Mental Examinations: Tex. R. Civ. P. 204
  - in a DFPS suit (among others), on motion by a party or the court's own initiative, the court may appoint:
    - one or more psychologists or psychiatrists to examine a child or other party to the suit, and/or
    - a qualified expert to test and determine paternity.

Practice Tip: If an attorney for the party served with discovery responds with an objection which is vague or not applicable, file a Motion to Compel Discovery and request a hearing to address the validity of the objection. When there is a partial answer, if it is preceded by an objection, the objection should be addressed in this manner to ensure that a full answer is given.

Child's Attorney Practice Tip: Before agreeing to the return of a child to the parent, a child's attorney may want to see where the child will be living and ensure that the home is safe and suitable. If the child's attorney is unable to secure the agreement of the parent's attorney to allow inspection of the home, the child's attorney can serve a Tex. R. Civ. P. 196.7 request for inspection.

> **Practice Tip**: Some courts limit depositions or require that a motion be filed to request a court order for depositions to be taken. Court-appointed attorneys should learn in advance the court's procedures for depositions and for the payment of court reporters taking the deposition.

NOTABLE DISCOVERY ISSUES IN DFPS CASES

Discovery Prior to the Adversary Hearing

Prior to the Adversary Hearing, a party may send a written request to the attorney representing DFPS asking that they turn over the names of non-DFPS employee witnesses who will testify to the allegations, copies of offense reports that will be used, and any photo, video, or recording that may be used at that Adversary Hearing. Tex. Fam. Code § 262.014. Items produced prior to an Adversary Hearing may need to be redacted by the attorney representing DFPS.

Confidentiality with the CPS Case File

DFPS files contain information that is confidential by law and may only be disclosed for purposes consistent with the Texas Family Code and applicable federal and state law. Tex. Fam. Code § 261.201; *See also* 40 Tex. Admin. Code, §§ 745.8481 - 745.8493.

> **Practice Tip:** Redaction of the record in accordance with DFPS rules and guidelines takes time. When production of the record is needed urgently, consider asking the Court to order DFPS to produce the record with only the reporter's name and confidential identifiers redacted.

Discovery for the Child's Attorney

Children's attorneys are entitled to seek discovery even though their client is not a party to the litigation because the child's attorney is directed to ". . . participate in the conduct of the litigation to the same extent as an attorney for a party." Tex. Fam. Code § 107.003(a)(1)(F). Another party may also request discovery from the child's attorney; however, like any attorney, the child's attorney can object to producing specific materials on the basis of attorney-client privilege, attorney work product, or general confidentiality.

> **Parent's Attorney Practice Tip:** The "quasi-party" status of the child's attorney can cause some confusion regarding discovery and local practice may vary as to whether attorneys for children are served with discovery. Consider filing a motion to ask the court to order the attorney for the child to disclose all witnesses that they may seek to call, and to produce all exhibits that they may seek to admit. Otherwise the child's attorney may submit evidence that another party would not be allowed to present.

Experts

Special rules govern the exchange of information about expert witnesses in the discovery process. Note that the scope of discovery is different when cases involve testifying experts or consulting experts (those experts whose work has been reviewed by a testifying expert). Tex. R. Civ. P. 195.

Privileges

Commonly invoked privileges in child abuse litigation include those related to:

- Mental health records;
- Drug and alcohol abuse records;
- Attorney-client communication; and
- Work product.

Subpoenas

A person served with a subpoena can request a protective order if the subpoena seeks information that is privileged or otherwise objectionable. Tex. R. Civ. P. 176(e). DFPS has adopted detailed policy governing procedures for handling subpoenas served on individual staff or the agency. The DFPS subpoena policy is available on the DFPS website at https://www.dfps.state.tx.us/handbooks/Subpoena/default.asp.

> **Practice Tip:** In addition to serving a subpoena in accordance with DFPS policy, serve a copy on the attorney representing DFPS.

Business Records Tex. R. Evid. 902(10)

The Texas Rules of Evidence allow an exception to the hearsay rule for business records as long as they meet the requirements of Tex. R. Evid. 803(6) and they can be submitted without the testimony of the custodian of records or other qualified witness if accompanied by an affidavit that meets the requirements of Tex. R. Evid. 902(10).

> **Parent's Attorney Practice Tip:** When seeking documents by subpoena from a third party, such as a hospital or other medical provider, consider including a business records affidavit along with the subpoena so that the documents may be authenticated without live testimony. Be aware that the proponent of the documents must serve the documents and the accompanying affidavit pursuant to Tex. R. Civ. P. 21a on each party to the case at least 14 days before trial.

> **Parent's Attorney Practice Tip**: Some medical providers may file motions to quash subpoenas, so it may be necessary to have the court rule on the validity of the subpoena in order to obtain the records. If the requested records are those of a client or of the child of the client, consider having the client execute a release of information to obtain the records.

Motion for Enforcement and/or to Compel

Sanctions for abuse of the discovery process include orders denying discovery, imposing costs, finding facts established, limiting claims or defenses, striking pleadings, or dismissing an action and/or a contempt order for failure to comply with any order except orders to submit to a physical or mental examination.

Practice Tip: A remedy to the Motion for Enforcement or Contempt is usually the production of the discovery. The movant can wait until trial and then ask the Court to grant sanctions for failure to respond to discovery. If requested information is confidential, a hearing is necessary for such information to be released. Tex. Fam. Code § 269.201(b) sets out the procedural mechanism to request the disclosure of confidential material.

CASELAW ON SUCCESSFUL ARGUMENTS ON ADMITTING DISCOVERY EVEN IF IT WAS NOT PROPERLY PRODUCED IN DISCOVERY

- Requests for Admissions were intended to "eliminat[e] matters about which there is no real controversy" and were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense." *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam). Requests should be used as "a tool, not a trapdoor." *Marino v. King*, 355 S.W.3d 629, 632 (Tex. 2011) (quoting *U.S. Fid. and Guar. Co. v. Goudeau*, 272 S.W.3d 603, 610 (Tex. 2008)). When a party uses deemed admissions to try to preclude presentation of the merits of a case, due process concerns arise. *See TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917-18 (Tex. 1991). "Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults." *Marino*, 355 S.W.3d at 634. Absent flagrant bad faith or callous disregard for the rules, due process bars preclusive sanctions for discovery abuses. *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005).
- Parties can testify even if the parties were not disclosed as witnesses in discovery. *In re J.L.J.*, 352 S.W.3d 536 (Tex. App.—El Paso 2011, no pet.) (mother who signed affidavit of relinquishment prior to final judgment was still a party to the suit and allowed to testify at trial against father). Tex. R. Civ. P. 193.6(a) expressly exempts parties from exclusion if not disclosed as a potential witness in discovery. *In re M.J.M.*, 406 S.W.3d 292, 299 (Tex. App.—San Antonio 2013,no pet.) (holding the trial court erred in assessing death penalty sanctions, and noting, "Rule 193.6 expressly states that it does not apply to the testimony of named parties.").
- The failure to timely make, amend, or supplement the discovery response did not unfairly surprise or unfairly prejudice the other parties. Tex. R. Civ. P. 193.6(a)(2). *In re M.F.D.*, No. 01-16-00295-CV (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) (mem. op.) (The trial court did not abuse its discretion in finding that there was a lack of unfair surprise or unfair prejudice when DFPS's petition, a Status Hearing order, and service plan put the parent on notice that DFPS would seek termination if reunification could not be achieved.).
- Because the best interest of a child is of primary importance, the Third Court of Appeals has held that witnesses in a termination should be allowed to testify even if they were not disclosed in discovery. *Spurck v. Tex. Dep't of Family and Protective Servs.*, 396 S.W.3d 205, 215 (Tex. App.—Austin 2013, no pet.).

Practice Tip: If a parent's or child's attorney did not timely make, amend, or supplement a discovery response, this may result in evidence being excluded. However, the following arguments are available under Tex. R. Civ. P. 193.6 to advocate for admitting the evidence:

- Move for continuance and ask the court to allow more time to respond;
- Try to prove good cause for a failure to respond (clerical accident, mistake);
- Try to prove lack of unfair surprise and prejudice (no actual delay caused); and/or
- Argue that sanctions are not to be used as a tool to preclude presentation of the merits.

Evidentiary Issues

Predicates

OVERVIEW

Like procedural rules, evidentiary rules in DFPS cases also are the same as in other civil cases and are governed by the Texas Rules of Evidence. Tex. R. Evid. 901 provides, "to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what a proponent claims it is."

Parental Questions to Authenticate Evidence

Business/Medical Records

- Are you a custodian of the records or are you otherwise familiar with the manner in which the records contained in the Exhibit are maintained by virtue of your duties and responsibilities?
- Are the records originals or exact duplicates?
- It is the regular practice of the business to make the records?
- Are/is record by persons with personal knowledge (or from information transmitted by them)?
- Are/is record at or near the time of the occurrence? *See* Tex. R. Evid. 902(10)(B).

Diagrams/Charts/Drawings/Timelines

- Did you participate in the preparation of the Exhibit? (if applicable)
- Are you familiar with the information as it is presented in the Exhibit? How?
- Does it contain information generally used and relied upon by persons in your profession or occupation? (if applicable)
- Is this a fair and accurate representation of the underlying information?
- Will the Exhibit assist the Judge/Jury's comprehension of the evidence?

Photographs

- Are you familiar with the person/location/objects shown in the Exhibit? How?
- Is this a fair and accurate depiction?
- *Note*: the person admitting the photograph does not have to be the person who took it, as long as they can testify the photo was an accurate depiction at the time it was taken.

Videotapes/Audiotapes/Voicemail

- Are you familiar with what is shown/heard in the Exhibit? How?
- Was the recording device capable of making an accurate recording?
- Was the operator of the device competent?
- Have there been any changes, additions, or deletions made?
- Who is shown and/or speaking in the Exhibit?
- Is it a fair and accurate recording?

Physical Evidence/Tangible Objects

- Are you familiar with the Exhibit? How?
- Are there any identifying or distinguishing marks on it?

- Is the Exhibit in the same condition as it was when you previously observed it?
- Describe where the Exhibit has been since last in your custody?
- Who has had access to the Exhibit?

Signatures/Writings/Drawings

- Are you familiar with Jane Doe's handwriting/signature? How?
- Do you recognize the handwriting/signature contained in the Exhibit?
- Were you present when the Exhibit was made?
- Whose handwriting/signature is it?

X-Rays

- Are you familiar with this Exhibit or what is shown in the Exhibit? How?
- Was the Exhibit made by a qualified technician or physician? Who? When? Where?
- What proof is there that this Exhibit is Jane Doe's x-ray?
- Does this Exhibit fairly and accurately show the condition of Jane Doe's (insert name of body part in x-ray) at the time the x-ray was made?

Email or Text Message

- Do you recognize the sender's e-mail address? How?
- Do you recognize the name at the end of this email?
- Do you recognize the sender of the text message? How?
- Do the contents refer to any previous communication you had with this person?
- Are the contents of this email/text known to this person?

Facebook or Social Media

- Do you use Facebook/Twitter/Instagram/Snapchat/etc.?
- Do you have an account on Facebook, etc.?
- Did you create your own page on Facebook, etc.?
- Are you familiar with (defendant/opposing party)?
- How do you know them?
- Are you friends with the sender on any social media networks/do you follow the sender?
- Is that how you can see their page?
- Are you familiar with their Facebook page? Is it currently active?
- Would you recognize it if it were presented to you today in court?
- (Hand copy of social media page to witness) Do you recognize what I just handed you?
- Is this a screen shot of the sender's page/post/picture?
- Is this a fair and accurate depiction of the sender's page?
- Does it appear to be altered in any manner?
- How did you access this page?
- So since you and sender were friends on Facebook, you could see their page?
- And you could post things on each other's walls/pages?
- What was their username?

- Has anyone else ever sent you a message/posted on your wall from _____'s account?
- How did you know that it was sent from this sender and not someone pretending to be him/her?
- Do you have any reason to doubt that the person you were talking to on social media was this sender?

Practice Tip: Remember that "likes," "loves," or "dislikes" might fall into a hearsay exception, such as admission against interest.

Establishing a Child's Competence to Testify

PRESUMPTION OF COMPETENCE

The Texas Rules of Evidence provide that every person is competent to be a witness unless the rules provide otherwise. Generally, a child is presumed to be competent to testify. However, "persons lacking sufficient intellect" are incompetent to testify. A child may be one such witness, but a procedure must be followed to challenge the child's competence. Accordingly, **the burden is on the party challenging the child's competence**. Tex. R. Evid. 601(a).

The issue of the child's competence must be raised by a party opposing the child's testimony. At that point, the court must examine the child to assess whether the child "does not possess sufficient intellect to relate transactions about which he will testify." In doing so, the court considers:

- The competence of the child to observe intelligently the events in question at the time of the occurrence;
- The child's capacity to recollect the events;
- The child's capacity to narrate the facts; and
- Whether the child lacks the capacity to understand the obligation of the oath. *Pipkin v. Kroger Tex., L.P.,* 383 S.W.3d 655, 668 (Tex. App. – Houston [14th Dist.], pet denied). *See also In Re R.M.T.*, 352 WS.W.3d 12 (Tex. App. – Texarkana 2011, no pet.).

Practice Tip: To establish that a child has the capacity to understand the oath, the attorney needs to show that the child knows the difference between the truth and a lie (not that the child understands perjury). Rather than asking the child to define "truth" and "lie," it is most developmentally effective to provide the child with simple examples of truth and lies. For example, "Susie, if someone told you that the judge's robe is pink, would that be the truth or a lie?"

Objections

General Objections	Code
Authentication Insufficient	TRE 901
Best Evidence	TRE 1002, 1003
Bolstering	TRE 607-610
Cumulative	TRE 403
Confuses the Issue	TRE 403
Improper Predicate	TRE 602-3, 701, 701-2, 901-2
Inconsistent with Pleadings	TRE 66, 67
Irrelevant	TRE 401, 402
Misleading	TRE 403
Probative vs. Prejudice	TRE 403
Privileged	TRE 503

Hearsay
Statement made outside of Court, offered to prove the truth of the matter asserted.

Not Hearsay	Code
Prior Inconsistent Statements	TRE 801(e)(1)
Admission by Party Opponent	TRE 801(e)(2)
Deposition	TRE 801(3)

Objections to the Form of the Question	Code
Ambiguous/Vague	TRE 611(a)
Asked & Answered	TRE 403; 611
Argumentative	TRE 611(a)
Assumes Facts Not Evidence	TRE 403; 611
Calls for Narrative	TRE 403; 611(a)
Calls for Speculation	TRE 403; 611(a)
Compound	TRE 611(a)
Confusing	TRE 611(a)
Creates Undue Delay	TRE 403; 611(a)
Harassing Witness	TRE 403; 611(a)
Leading/Suggestive	TRE 403; 611(c)
Misleading	TRE 403; 611(a)
Misquoting Witness	TRE 403; 611(a)
Overbroad	TRE 403; 611(a)
Unfairly Prejudicial	TRE 403
Unintelligible	TRE 403; 611(a)

Objections to the Form of the Answer	Code
Narrative	TRE 611(a)
Nonresponsive	TRE 611
Lack of Personal Knowledge	TRE 602
Volunteered	TRE 403; 611(a)

Exceptions to Hearsay: Availability of Declarant Immaterial	Code
Present Sense Impression	TRE 803(1)
Existing Mental/Emotional/Physical Condition	TRE 803(3)
Recoded Recollection	TRE (5)
Absence of Entry of Record	TRE 803(7)
Records of Vital Statistics	TRE 803(9)
Records of Religious Organizations	TRE 803(11)
Family Records	TRE 803(13)
Statements of Property Documents	TRE 803(15)
Market Reports, Commercial Pubs	TRE 803(17)
Reputation - Family/Personal History	TRE 803(19)
Reputation as to Character	TRE 803(21)
Judgment re: Pers/Fam/Hist/Boundaries	TRE 803(23)
Excited Utterance	TRE 803(2)
Medical Diagnosis/Treatment	TRE 801(4)
Business/Medical Records	TRE 803(6)
Public Records/Reports	TRE 803(8)
Absence of Public Record/Entry	TRE 803(10)
Marriages/Baptisms & Similar	TRE 803(12)
Property Records	TRE 803(14)
Statements in Ancient Docs	TRE 803(16)
Learned Treatises	TRE 803(18)
Reputation - Boundaries/History	TRE 803(20)
Previous Conviction	TRE 803(22)
Statement Against Interest	TRE 803(24)

Exceptions to Hearsay: Declarant Unavailable	Code
Former Testimony	TRE 804(b)(1)
Personal Testimony	TRE 804(b)(3)
Dying Declaration	TRE 804(b)(2)

Exceptions to Hearsay for Children's Statements

The exceptions to the hearsay rule for children's statements are found in the Rules of Evidence and the Texas Family Code.

RULES OF EVIDENCE

Exceptions to the Rule Against Hearsay Regardless of Whether the Declarant is Available as a Witness. Tex. R. Evid. 803

- **Present Sense Impression**

  A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

- **Excited Utterance**

  A statement relating to a startling event or condition, made while or immediately after the declarant perceived it.

- **Then-Existing Mental, Emotional, or Physical Condition**

  A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

TEXAS FAMILY CODE

Pre-recorded Statement of a Child Tex. Fam. Code §104.002

If a child 12 years of age or younger is alleged in a suit under this title 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 an opportunity to view the recording before it is offered into evidence.

Pre-recorded Videotaped Testimony of Child Tex. Fam. Code §104.003

- 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.

- 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.
- Only the attorneys for the parties may question the child.
- The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them.
- 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 is 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.

Remote Televised Broadcast of Testimony of Child Tex. Fam. Code §104.004

- 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.
- The procedures that apply to prerecorded videotaped testimony of a child apply to the remote broadcast of testimony of a child.

Substitution for In-Court Testimony of Child Tex. Fam. Code §104.005

- If the testimony of a child is taken as provided by this chapter, the child may not be compelled to testify in court during the proceeding.
- The court may allow the testimony of a child of any age to be taken in any manner provided by this chapter if the child, because of a medical condition, is incapable of testifying in open court.

Hearsay Statement of Child Abuse Victim Tex. Fam. Code §104.006

- 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.

Child's Attorney Practice Tip: Note the age restrictions in some of the above rules.

Preservation of Error

AT TRIAL OR IN A HEARING

Timely Objections Tex. R. App. P. 33.1

To preserve error, the party objecting to the admission of evidence must make a timely objection, a motion to strike from the record, and obtain a ruling on the record. Similarly, the proponent of excluded evidence must make an offer of proof setting forth the substance of the evidence.

Objections must be timely:

- Improper question: must object before an answer is given.
- Improper answer: objection must be made as soon as that fact becomes apparent. Although it is proper to object to a completed answer (and necessary in order to protect the record) this is not the most desirable solution. If the objection is sustained, ask that the answer be struck and that the jury be instructed to disregard it.

Practice Tip: Always listen for possible leading, narrative, and relevance objections. After objecting, clearly but respectfully request to get a ruling on the record, especially if the Court does not respond directly to the request and instead says something like, "move along, Counsel," etc. Without a ruling on the objection, the error may not be preserved for appeal.

Offer of Proof Tex. R. Evid. 103(a)(2)

An offer of proof preserves an argument regarding evidence by informing the appellate court what evidence was excluded by the trial court.

Practice Tip: Request to make an offer of proof outside the presence of the jury. On the record, state what the evidence is, and why it should be admitted; ask the court to admit for the limited purpose of appeal. Evidence can be physical evidence or testimony that was objected to and excluded because the court sustained the objection.

Bill of Exception Tex. R. App. P. 33.2

Informs appellate court of evidence that was excluded at trial and therefore is not reflected in the record.

- Must file no later than 30 days after notice of appeal filed.
- Prepare document specific enough to make the trial judge aware of the rulings or actions which are the subject of the complaint, and which will be asserted on appeal.
- Must be presented to trial judge and opposing counsel.
- Can be agreed to by all parties or a hearing held to determine issues.

Practice Tip: A Bill of Exception is less common than an Offer of Proof but remains a method for obtaining review of a matter which is not reflected in the record.

Accelerated Appeals Tex. R. App. P. 28.1

Appeals in parental termination and child protection cases (SAPCR filed by DFPS requesting managing conservatorship) are governed by rules of appellate procedure for accelerated appeals except as otherwise provided by Tex. R. App. P. 28.4.

- In an accelerated appeal, the notice of appeal must be filed within 20 days after the order of judgment is signed. Tex. R. App. P. 26.1(b).
- To perfect an accelerated appeal, the notice of the appeal must be filed in compliance with Tex. R. App. P. 25.1 within the time allowed by Tex. R. App. P. 26.1(b). Tex. R. App. P. 28.1(b). Filing a motion for new trial, or other post-trial motion, or findings of fact will not extend the time to perfect an accelerated appeal.

Practice Tip: When arguing on the record, avoid using terms of art and acronyms (FBSS, OV, "dad was positive") without saying for what or when. Avoid terms like "ruled out," and "unable to determine," etc, unless an explanation for what those terms mean is provided. One should always strive to make the record very clear.

Expert Witnesses

Admissibility

For expert testimony to be admissible, the court must be satisfied that three conditions are met:

- The witness qualifies as an expert;
- The subject matter of the testimony is an appropriate one for the expert's testimony; and
- Admitting the expert testimony will assist the factfinder in deciding the case.

Even if the expert is qualified and the topic is a proper one for expert testimony, the proposed testimony must also be *reliable* and *relevant*. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Evidentiary Rules on Expert Witnesses

- Must be relevant. Tex. R. Evid. 401.
- Relevant evidence generally admissible; irrelevant evidence is not. Tex. R. Evid. 402.
- Testimony by experts is specialized knowledge that will assist the trier of fact to determine a fact at issue. Expert testimony can be based upon knowledge, skill, training, or education and expert can testify in the form of an opinion. Tex. R. Evid. 702.
- Basis of opinion by Expert - underlying data or facts that are basis of opinion given to other party at or before hearing. Data must be of a type reasonably relied upon by experts in that particular field. Tex. R. Evid. 703.
- Qualified experts can testify to their opinion as to the ultimate issue (i.e. should parental rights be terminated?). Tex. R. Evid. 704.
- Gatekeeper - Court determines if underlying facts or data are sufficiently reliable as the basis for the opinion testimony (must request a hearing). Tex. R. Evid. 705(c).

"Daubert Challenge"

Hearing to determine if expert's opinion is based upon reliable facts. Burden of proof is preponderance of the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993); *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

The court must determine that:

- The expert's field of expertise employs sound principles and methods;
- The expert's opinion is based on sufficient facts or data; and
- The expert has applied the principles and methods in a reliable manner.

***Robinson* Reliability Factors**

- The extent to which the theory has been or can be tested;
- The extent to which the technique relies upon the subjective interpretation of the expert;
- Whether the theory has been subjected to peer review and/or publication;
- The technique's potential rate of error;
- Whether the underlying theory or technique has been generally accepted as valid by
- The relevant scientific community; and
- The non-judicial uses which have been made of the theory or technique.

These factors are not exclusive factors and the trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Proper Forms of Expert Testimony

- Opinion.

Sample Questions on Expert Qualification

- What is your occupation/profession?
- What is your educational background?
- What degrees, certificates, or licenses do you have?
- Have you attended or conducted continuing education seminars, conferences and related training?
- Are you a member in any professional organizations/societies?
- Have you received any awards or other professional recognition?
- Have you published articles in your field?
- How many cases involving [subject matter] have you handled?
- How many years have you worked in this field?

Sample Questions on Need for Expert Opinion

- What it is about a brain injury/a burn injury/bite marks that requires an expert to explain?
- What is it about this case that a lay person with no background in this field might not understand?
- What are the key principles that a person without education or experience in this field would need to grasp in order to understand this case?
- Can you explain the research/theoretical basis/scientific principles involved in this field of study to a non-expert?
- Do you believe your testimony will aid the judge or jury in understanding the facts in this case? How?

Practice Tip: Review criminal court cases for new law and/or science, as they tend to be reviewed more often than family law cases – i.e. arson and bite mark science have seen significant changes in the last few years.

Sample Questions on Basis for Opinion

- Have you examined or interviewed the child/parent/other person?
- Have you administered any medical or psychological tests to the child/parent/other person?
- Have you reviewed medical records/documents/police reports?
- Have you made a diagnosis/made a conclusion/formed an opinion?
- Did you rely on any other source of information in forming your opinion other than the medical records/documents/police reports that we have discussed?
- If so, what other sources did you rely on?
- If the facts were [supply hypothetical] could you render an opinion regarding cause of injury; whether the injury was intentional; whether the injury is consistent with the parent's report of the incident?

Cross-Examination Questions of the Opposing Expert

- Has your theory been tested, or can it be tested?
- Does your technique rely on subjective interpretation?
- Has your theory been peer reviewed or publicized?
- What is the rate of error?
- Has your theory been generally accepted as valid by the relevant scientific community?
- Have there been any other non-judicial uses of your theory?

Drug Testing

Drug tests are commonly admitted into evidence through a parent (party) admission. Otherwise, for proper admission of drug test results, the source of the testing, the method used, and/or the circumstances or preparation of the test must indicate trustworthiness.

Error can be committed unless:

- The qualifications of the person conducting the test are admitted;
- There is testimony as to the type of test; and
- The expert shows that the test is standard and accepted for the substance tested.

Laying the proper foundation typically requires the testimony of three different people: a chain of custody witness, an expert to establish the reliability and proper techniques and testing protocol, and an expert to testify to the results.

Attempts to admit drug test results using a business records affidavit are subject to a hearsay objection. An expert witness must be present to prove up not only the testing protocol and chain of custody, but also the test results. *See In re K.C.P.*, 142 S.W.3d 574, 580 (Tex. App.-Texarkana 2004, no pet.). *See also Philpot v. State*, 897 S.W.2d 848, 852 (Tex. App.-Dallas 1995, pet. ref d).

Practice Tip: Consider filing a Motion to Exclude the drug test results if the proper foundation is not laid.

Practice Tip: Drug testing results admitted without proper foundation are not reversible error if the drug testing results come into evidence through other means (i.e., the parents testify to the use / admit to the probable results). DFPS may confront a parent with a positive test result, and if the parent admits to the use of the drugs confirmed in the test, then the fact of usage may not be an issue, but the specific drug and/or the amount used may still be at issue.

Practice Tip: In some circumstances, a client may fear being held criminally liable for admitting to drug use and may wish to assert their Fifth Amendment privilege against self-incrimination. However, there are important limitations on the privilege when it is asserted in a civil case and it is prudent to counsel the client regarding the benefits and drawbacks of asserting the Fifth Amendment prior to testimony. See the *Parents with an Open Criminal Case* section of this tool kit for more information.

Common Objections to Drug Testing Results

- Chain of custody;
- Hearsay; and
- Lack of proper foundation.

Hearings at a Glance

At A Glance

	Adversary	Status	Permanency Hearing Before Final Order	Permanency Hearing After Final Order
Hearing Set Timely	14 days or 30 days	60 days	1st at 180 days, thereafter, 120 days	180 days, except 1st at 90 days if TPR
Court of Exclusive, Continuing Jurisdiction	Yes	No	Yes	No
Child AAL and GAL Appointed	No later than 14-day Hearing	Required before 14-day Hearing	Yes	Yes
Parent Attorney	Yes	Yes	No	No
Notice of Hearing	Yes	Yes	Yes	Yes
Court Report Filed and Provided	Yes	Yes	Yes	Yes
Identify All Parties and Swear Witnesses	Not Required	Not Required	Yes	Yes
Inquire About Absent Parties	Yes	Yes	Yes	Yes
Inquire About Diligent Efforts	Yes	Yes	Yes	Yes
Address Service on Parties	Yes	Yes, if outstanding	Yes, if outstanding	No
Address Parentage Issues	Yes	Yes, if outstanding	Yes, if outstanding	No
Issue Orders Regarding Service	Yes	Yes, if outstanding	Yes, if outstanding	No
Admonish Parents of Right to Attorney	Yes	Yes	Yes	No
Admonish Parents of TPR	Yes	Yes	Yes	No
Aggravated Circumstances	Yes	No	No	No
Inquire About Indian Heritage and Document	Yes	Yes	Yes	No, unless new information
Indian Child Welfare Act, if applicable	Clear and convincing, expert testimony	Active efforts	Active efforts	No
Child Placement Resources Form	Yes	Yes, if outstanding	No	No
Child asked about potential placements	Yes	Yes	Yes	Yes
Initial Home Studies on File	Yes	Yes	No	No
Child Present	No	No	Yes	Yes
AAL met with client, form submitted if not	Yes	Yes	Yes	Yes

At A Glance

	Adversary	Status	Permanency Hearing Before Final Order	Permanency Hearing After Final Order
Review Current and Alternative Placement	Yes	Yes	Yes	Yes
Determine if able to place with relative, cite evidence	Yes	Yes	Yes	No
If with relative, inform about PCA	Yes	Yes	Yes	Yes
Temporary Visitation Plan on File	Yes	No	No	No
Review Visitation Plan	No	Yes	Yes	Yes
Service Plan Development	No	Yes	No	No
Review Service Plan	No	Yes	Review Compliance	Review Compliance
Review Permanency Goal	No	No	Yes	Yes
Review Education Goals, Progress, and Needs	No	If needed	Yes	Yes
Education Decision-Maker Identified	No	Yes	Yes	Yes
Review Medical Care	No	Yes	Yes	Yes
Medical Consenter Identified	Yes	Yes	Yes	Yes
Child's Opinion on Medical Care Known	No	No	Yes	Yes
Normalcy Activities	No	No	Yes	Yes
Reasonable Efforts Findings Required	Yes, to determine evidence sufficient for TMC to DFPS	Yes, as relates to Service Plan Requirements	Yes, as relates to execution of Permanency Plan	Yes, as relates to execution of Permanency Plan
Determine Dismissal Date	Yes	Yes	Yes	No
Transitional Living Plan on File if Child is 16 or Older	No	No	No	Yes
Dept. has conducted Independent Living Skills Assessment if required	No	No	Yes	Ye
Review Extended Jurisdiction	No	No	No	Yes
Set Next Hearing	Yes	Yes	Yes	Yes
Issue Order and Provide to Parties	Yes	Yes	Yes	Yes

Judicial Hearing Check Lists

As part of the Texas Child Protection Law Bench Book and Bench Cards, the Children's Commission includes check lists for judges presiding over DFPS cases to utilize at each statutorily required hearing to ensure the court is meeting statutory requirements and implementing best practices. It may be useful for attorneys representing parents and children to become familiar with the checklists to better understand the obligations and expectations of the court.

Adversary Hearing Checklist

15 Minutes; up to 25 suggested best practice

Statutory

Prior to Hearing

- ☐ Hearing within 14 days of removal unless temporary order extended
- ☐ Child's GAL/AAL appointed
- ☐ Parties served
- ☐ CCEJ identified
- ☐ Hearing within 30 days of petition filed if non-emergency under 262.113

At Hearing

- ☐ Identify parties present and served
- ☐ Inform parents of right to attorney
- ☐ Determine indigence
- ☐ DFPS provided notice to relatives
- ☐ Need for language interpretation
- ☐ Child Placement Resources Form/efforts to identify/locate parties not present
- ☐ Child provided opportunity to provide information about possible relative or other caregiver
- ☐ Determine if child can be placed with relative and note evidence
- ☐ CPS and criminal background checks conducted and home studies initiated
- ☐ If child with relative, inform about Permanency Care Assistance
- ☐ Indian/Native American Heritage
- ☐ Temporary Family Visitation Plan
- ☐ AAL form provided if client not seen

Court Findings

At End of Hearing

- ☐ Determine sufficient evidence to grant DFPS TMC of child; if not, return child
- ☐ Document danger to child to return to home or remain in home and remaining is home is contrary to welfare; reasonable efforts to prevent removal and to return child home
- ☐ If TMC to DFPS, inform parents that rights may be terminated or limited
- ☐ If cite by pub needed, may render temporary order anyway
- ☐ Determine aggravated circumstances alleged or exist
- ☐ If family violence, protective order necessary or available
- ☐ If child victim of human trafficking, placement in secure agency foster or group home
- ☐ Place child with noncustodial parent or relative unless not in best interest
- ☐ Determine whether DFPS is able to place child with relative or other designated caregiver; note evidence supporting finding either way
- ☐ ISSUE COURT ORDER
  - Service
  - Notice of removal
  - Parentage or DNA testing
  - Dismissal date
  - Transfer CCEJ, if applicable

Best Practices

- ☐ Engage parties with direct questions
- ☐ Review services with parents
- ☐ Set Status Hearing date
- ☐ Open court notice
- ☐ Ask the following questions:
  - *What is preventing this child from returning home today?*
  - *How is my decision specific to this child and this family?*
  - *Are there cultural issues we need to understand?*

Well-being Issues at Status Hearing

- ☐ School stability, education goals, progress, and issues, and education decision-maker
- ☐ Medical care and behavioral or psychiatric care
- ☐ Young adult presence at hearing or opinion about education or medical care

Status Hearing Checklist

15 Minutes; up to 25 suggested best practice

Statutory

Prior to Hearing

- ☐ Hearing 60 days after DFPS appointed TMC, unless aggravated circumstances
- ☐ Persons given 10 days' notice of hearing
- ☐ Visitation Plan filed least 10 days before
- ☐ Family Plan of Service filed no later than 45th day after DFPS appointed TMC
- ☐ Education decision-maker form filed
- ☐ Medical consent form filed
- ☐ Parent attorneys appointed
- ☐ Dismissal date set
- ☐ Child "3 in 30" exam trio performed no later than 30th day after child entered TMC of DFPS.

At Hearing

- ☐ Identify parties present and served
- ☐ DFPS due diligence to locate parties
- ☐ DFPS provided notice to relatives
- ☐ Need for language interpretation
- ☐ Inform parents of right to attorney
- ☐ If AAL hasn't seen client, form filed
- ☐ Child Placement Resources Form filed
- ☐ Child provided opportunity to provide information about possible relative or other caregiver
- ☐ If child with relative, inform about Permanency Care Assistance
- ☐ Paternity issues/Paternity Registry
- ☐ Home studies initiated
- ☐ Review current and alternative placements
- ☐ Review conservatorship and substitute care of the child
- ☐ Indian/Native American Heritage
- ☐ DFPS held or plans to hold Permanency Planning Meeting
- ☐ Address citizenship issues, consulate notified
- ☐ Review child's medical care

Family Plan of Service (SP)

- ☐ Determine if:
  - SP developed jointly with parents
  - Each term reviewed/discussed with parents; parents understand
  - Parents informed of rights with SP process
  - Noted if parent not able or willing to participate in development of SP
  - Plan has primary and concurrent goal
  - Plan is signed by parents and DFPS
- ☐ Parent has opportunity to comment on SP
- ☐ Court can modify SP at any time

Visitation Plan (VP)

- ☐ Review VP:
  - Age and safety of child at/during visitation
  - Desires of each parent regarding visitation
  - Location of each parent and child
  - Transportation to/from visits
  - DFPS/other resources available to support visitation
- ☐ Court may modify VP at any time
- ☐ If find visitation not in child's best interest, include in order reasons and specific steps parent must take to have visitation

Status Hearing Checklist
continued

Court Findings

At End of Hearing

- ☐ Determine whether SP reasonably tailored for specific issues identified by DFPS
- ☐ Determine whether any SP with goal of reunification adequately ensures that reasonable efforts made to enable parents to provide safe environment for child
- ☐ Advise/warn parents & parties:
  - Custodial rights and duties subject to restriction or termination or child not returned unless parent demonstrates willingness and ability to provide child with safe environment
  - Progress under SP reviewed at all hearings, including review of newly acquired knowledge or skills
- ☐ Incorporate SP into court order and render additional, appropriate orders to require compliance with or implement SP
- ☐ ISSUE COURT ORDER:
  - Dismissal date
  - May transfer to court of continuing, exclusive jurisdiction, if CCEJ exists

Best Practices

- ☐ Set first Permanency Hearing Before Final Order and announce in open court
- ☐ Engage parties with direct questions
  - *Do you understand the purpose of the Service Plan?*
- ☐ Ask direct and specific questions of the Department about reasonable efforts
  - *What about this plan is reasonably tailored to address specific issues present in Ms. Smith's case?*
- ☐ Ask the following questions:
  - *What is preventing this child from returning home today?*
  - *How is my decision specific to this child and this family?*
  - *Are there cultural issues we need to understand?*

Well-being Issues at Status Hearing

- ☐ School stability, education goals, progress, and issues, and education decision-maker
- ☐ Medical Consenter may need to be identified or updated
- ☐ Review psychiatric care, especially if child or youth prescribed psychotropic medication
- ☐ Young adult presence at hearing or opinion about education or medical care

Permanency Hearing Before Final Order Checklist

15 Minutes; up to 25 suggested best practice

Statutory

Prior to Permanency Hearing (PH)

- ☐ If first PH, scheduled within 180 days after DFPS named TMC
- ☐ If subsequent PH, scheduled within 120 days of last PH
- ☐ 10 days' notice provided
- ☐ DFPS Permanency Progress Report filed at least 10 days before PH and includes:
  - Child's Permanency Plan
  - Summary of Medical Care
- ☐ The court file includes:
  - Notification of consent for medical care
  - Education decision-maker Form 2085-E
  - Visitation Plan

At Hearing

- ☐ Identify those present
- ☐ Child in attendance
- ☐ DFPS due diligence to locate and serve parties not present
- ☐ Parent, alleged father or relative provided locating information for absent parents, alleged fathers, or relatives
- ☐ Child provided opportunity to provide information about possible relative or other caregiver
- ☐ If child with relative, inform about Permanency Care Assistance
- ☐ Paternity issues/Paternity Registry
- ☐ Need for language interpretation
- ☐ Advise parents of right to counsel
- ☐ Determine indigence
- ☐ Indian/Native American Heritage
- ☐ Citizenship issues, consulate notified
- ☐ Compliance with orders/Service Plan and progress made
- ☐ Parties and those present heard and provided opportunity to present evidence
- ☐ If caregiver is present, must be given opportunity to provide information about the child.
- ☐ If AAL has not seen child, form filed
- ☐ Review Permanency Progress Report:
  - Safety and well-being of child
  - Child's needs (medical/special)
  - Child's placement
  - Evidence as to whether DFPS is able to place with relative
  - Child's primary and alternative permanency goals
  - DFPS reasonable efforts to finalize permanency plan
  - Child provided opportunity to express opinion about medical care
  - For child receiving psychotropic medication, whether child has:
    - been provided non-pharmacological interventions.
    - seen prescribing physician every 90 days for review
  - Child's education decision-maker identified, education needs and goals identified and addressed, and major changes in school performance or disciplinary events
  - If 14 or older, transition services to assist from care to independent living
  - For child with goal of APPLA:
    - child's desired permanency outcome; and
    - whether APPLA best permanency plan; if so, provide compelling reasons why not in child's best interest to:
      - return home,
      - adoption,
      - placed with legal guardian, or
      - placed with a fit and willing relative
    - whether DFPS has conducted an Independent Living Skills (ILS) assessment for all youth 16 and older in TMC
    - whether DFPS has addressed the goals identified in the youth's permanency plan.
    - For youth 16 years of age or older, whether DFPS has provided documents required by Section 264.121(e)
    - For youth 18 years or older, or has had disabilities of minority removed, whether DFPS has provided youth with documents and information listed in Section 264.121(e-1)
- ☐ Child receiving appropriate medical care
- ☐ Child has regular, ongoing opportunities for age-appropriate normalcy activities, including those not in child's service plan

Permanency Hearing Before Final Order Checklist

continued

Court Findings

At End of Hearing

- ☐ Determine whether to return child if parents willing and able to provide safe environment and in child's best interest
- ☐ Advise/warn custodial rights and duties subject to restriction or termination
- ☐ Incorporate changes or modifications to Service Plan into order
- ☐ Likely date child returned home, placed for adoption, or placed in PMC
- ☐ Set next PH within 120 days or sooner
- ☐ Announce dismissal date and any upcoming hearings

Best Practices

- ☐ If lack of notice, consider resetting hearing to secure attendance
- ☐ Engage parties with direct questions
- ☐ Engage youth
- ☐ Ask DFPS direct, child-specific questions about primary and concurrent goal
- ☐ If not moving to positive permanency, set timelines and tasks to be completed prior to next hearing
- ☐ AAL knowledgeable about child's needs and legal objectives
- ☐ Set next PH 90 instead of 120 days
- ☐ For Older Youth:
  - Family group decision-making
  - Preparation for Adult Living (PAL)
  - If will turn 18 while in foster care:
    - discuss extended foster care and trial independence
    - ensure referrals to Texas Workforce Commission
    - ensure appropriate documents in possession before leave care
- ☐ Ask the following questions:
  - *What is preventing this child from returning home today?*
  - *How is my decision specific to this child and this family?*
  - *Are there cultural issues we need to understand?*

Well-being Issues

Medical Care and Mental Health

- ☐ Summary of medical care:
  - Nature of emergency medical care
  - All medical and mental health treatment receiving and progress
  - Any medication prescribed/progress
  - Caregiver compliance with treatment plan
  - Adverse reaction or side effects
  - Diagnosis or diagnostic tests
  - Activity to avoid that affect effectiveness of treatment
  - Other info required

Education and Educational Decisions

- ☐ Enrolled and in appropriate grade
- ☐ Remain in current school, even if placement changes
- ☐ If change placement, determine:
  - Where child wants to attend school
  - Whether transportation is available
  - Whether change coordinated with grading and testing periods
  - Whether records/credits transferred
- ☐ If 0-3, child assessed for developmental milestones through ECI
- ☐ If 0-5, enrolled in Early Head Start, Head Start, or Pre-Kindergarten
- ☐ Educational Decision-maker/Form 2085E on file
- ☐ School supports and disciplinary issues
- ☐ Extracurricular activities/normalcy
- ☐ Evaluated for/receiving special education
- ☐ If 14 or older, postsecondary education plan

Final Hearing Checklist for Non-Jury Trial

Statutory

Prior to Final Hearing

- ☐ Notice provided to parties within 45 days of trial
- ☐ All parties served
- ☐ Legal relief properly plead
- ☐ Compliance with Indian Child Welfare Act, if applicable

At Hearing

- ☐ Note appearances of all parties present
- ☐ Take announcements about readiness to proceed to trial
- ☐ Rule on any pending pretrial motions
- ☐ Opening Statements, unless waived
- ☐ Presentation of evidence
- ☐ Closing arguments, unless waived
- ☐ Evidence
  - Grounds for termination
  - *Holley v. Adams* Best Interest:
    - desires of the child
    - emotional and physical needs of child now and in future
    - emotional and physical danger to child now and in future
    - parental abilities of individuals seeking custody
    - programs available to assist those individuals to promote best interest of child
    - plans for child by these individuals or by agency seeking custody
    - stability of home or proposed placement
    - acts or omissions of parent which may indicate that existing parent-child relationship not a proper one
    - any excuse for acts or omissions of the parent

Court Findings

At End of Hearing

- ☐ Determine if met burden of proof:
  - Termination of Parental Rights: Clear and Convincing Evidence
  - If ICWA applies: Beyond a Reasonable Doubt
  - Conservatorship: Preponderance of the Evidence
- ☐ If termination, appoint DFPS or individual as managing conservator (MC)
- ☐ If no termination and DFPS awarded MC, find that:
  - Appointment of parent not in child's best interest because would significantly impair child's physical health or emotional development; and
  - Not in child's best interest to appoint relative of child or another person as managing conservator
- ☐ If no termination and DFPS awarded MC, consider whether:
  - The child will turn 18 in not less than 3 years;
  - The child is at least 12 years old or has continuously expressed a strong desire against being adopted; and
  - Needs and desires of child
- ☐ Advise parties of right to appeal
- ☐ Set Permanency Hearing After Final Order (PHAFO) within 90 days if MC granted to DFPS with termination
- ☐ Set PHAFO within 180 days if MC granted to DFPS without termination

Best Practices

- ☐ Remind Parent Attorney of appellate duties
- ☐ Set initial hearings sooner than statutorily required to ensure progress toward child's permanency goal
- ☐ Continue appointment of child's attorney ad litem (AAL) and guardian ad litem (GAL) until child reaches permanency/exits foster care.

Permanency Hearing After Final Order Checklist

15 Minutes; up to 25 suggested best practice

Statutory

Prior to Permanency Hearing (PH)

- ☐ If parental rights terminated, first PH within 90 days of final order
- ☐ If parent rights not terminated, first PH within 180 days of final order
- ☐ 10 days' notice of hearing

At Hearing

- ☐ Identify those present
- ☐ Child in attendance
- ☐ Review DFPS efforts to notify of hearing
- ☐ If AAL has not seen client, form filed
- ☐ Review Permanency Progress Report:
  - Child's safety and well-being
  - Child's needs (medical/special)
  - Child's placement, noting evidence as to whether DFPS can place child with relative
  - If in institutional care, efforts to ensure least restrictive environment
  - Primary/alternative permanency goals
  - DFPS reasonable efforts to finalize the permanency plan:
    - due diligence to place for adoption if rights terminated and child eligible; or
    - APPLA, including appointing relative as PMC or returning the child to parent, appropriate for child
  - For child with APPLA goal:
    - desired permanency outcome; and
    - whether APPLA best permanency plan; if so, compelling reasons why not in child's best interest to:
      - return home,
      - be placed for adoption,
      - be placed with legal guardian, or
  - Be placed with fit and willing relative
    - whether DFPS has conducted an Independent Living Skills (ILS) assessment for all youth 16 and older in TMC or PMC
    - whether DFPS has conducted an ILS for all youth 14 and older in PMC
    - whether DFPS has addressed the goals identified in the youth's permanency plan
    - for youth 16 years of age or older, whether DFPS has provided documents required by Section 264.121(e)
- ☐ DFPS Permanency Progress Report filed 10 days before hearing; includes
  - Summary of Medical Care
- ☐ The court file includes:
  - Notification of consent for medical care
  - Education Decision-Maker Form 2085E
    - for youth 18 years or older, or has had disabilities of minority removed, whether DFPS has provided youth with documents and information listed in Section 264.121(e-1)
  - If 14 or older, services to assist in transitioning from care to independent living in community
  - Receiving appropriate medical care and provided opportunity to express opinion on medical care
  - If receiving psychotropic medication:
    - provided appropriate non-pharmacological interventions, therapies, or strategies to meet needs; or
    - seen by prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days
  - Education decision-maker and education needs and goals identified, major changes in school performance or serious disciplinary events
  - For child in PMC without termination, whether DFPS to provide services to parent for up to 6 months after PH if:
    - child not placed with relative or other individual, including foster parent, seeking PMC; and
    - court determines further efforts at reunification with parent:
      - in best interest of child; and
      - likely to result in child's safe return to parent
  - DFPS identified family or other caring adult with permanent commitment to child
  - Child provided opportunity to provide information about possible relative or other caregiver
  - If child with relative, inform about Permanency Care Assistance

Permanency Hearing After Final Order Checklist

Continued

- ☐ Determine whether to return child if parents Address citizenship issues, consulate notified, SIJS
- ☐ Ensure those present given opportunity to be heard and if caregiver is present, must be allowed to provide information
- ☐ Confer with child about permanency plan
- ☐ Regular, ongoing opportunities to engage in age-appropriate normalcy activities

Court Findings

At End of Hearing

- ☐ Issue court order
- ☐ Set next PH within 180 days

Best Practices

- ☐ If inadequate notice, consider resetting hearing to secure attendance
- ☐ Engage parties with direct questions
- ☐ Engage youth
- ☐ Ask DFPS direct, child-specific questions about both primary and concurrent goal
- ☐ Next PH by 90 or 120 instead of 180 days
- ☐ For youth who will turn 18 while in care:
  - Discuss extended foster care and trial independence
  - Ensure referrals to Texas Workforce Commission
  - Ensure delivery of documents before leave care
- ☐ Youth advised of eligibility for Family Group Decision-Making or Circles of Support to discuss future plans
- ☐ Youth enrolled in PAL or provided transitional services after 14th birthday
- ☐ Ask the following questions:
  - *What is preventing this child from returning home today?*
  - *How is my decision specific to this child and this family?*
  - *Are there cultural issues we need to understand?*

Well-being Issues

Medical Care and Mental Health

- ☐ Summary of medical care:
  - Nature of emergency medical care
  - All medical and mental health treatment receiving and progress
  - Any medication prescribed/progress
  - Caregiver compliance with treatment plan
  - Adverse reaction or side effects
  - Diagnosis or diagnostic tests
  - Activity to avoid that affect effectiveness of treatment
  - Other info required

Education and Educational Decisions

- ☐ Enrolled in school/in appropriate grade
- ☐ Remains in current school, if placement change
- ☐ If placement change, determine:
  - Where child wants to attend school
  - Whether transportation available
  - Whether change coordinated with grading and testing periods
  - Whether records/credits transferred
- ☐ If 0-3, child assessed for developmental milestones through ECI
- ☐ If 0-5, child enrolled in Early Head Start, Head Start, or Pre-Kindergarten
- ☐ Educational Decision-maker Form 2085E on file
- ☐ School supports and disciplinary issues
- ☐ Extracurricular activities/normalcy
- ☐ Evaluated/receiving special ed services
- ☐ If 14 or older, postsecondary edu plan

Ex Parte Hearings

Ex Parte Order Before Removal Hearing

STATUTE Tex. Fam. Code. § 262.102

PURPOSE

To determine whether a court will authorize in advance the removal of a child and grant DFPS TMC of the child until an Adversary Hearing can be held.

BURDEN OF PROOF

Evidence sufficient to "satisfy a person of ordinary prudence and caution."

BEST INTEREST

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002.

INDIAN CHILD WELFARE ACT (ICWA)

A court can order emergency removal of an "Indian child" only if necessary "to prevent imminent physical damage or harm to the child." 25 C.F.R. § 23.113(d). This must be followed by a noticed hearing where DFPS must prove by clear and convincing evidence, including testimony from a Qualified Expert Witness (QEW). that a "foster care placement" is warranted. This hearing cannot be held until 10 days after notice of ICWA has been provided and is subject to a 20-day extension on request of a parent or tribe.

> **Practice Tip:** To avoid the need to continue the hearing, the best practice is for the hearing to be set at least 30 days out. Please see ICWA information in the *Federal Law Issues* section of this tool kit.

REQUIRED SHOWING FOR EX PARTE ORDER BEFORE REMOVAL HEARING

DFPS must submit sufficient evidence to prove:

- Either an immediate danger to the physical health or safety of the child, or that the child has been a victim of neglect or sexual abuse;
- That continuation in the home would be contrary to the child's welfare; and
- That there is not sufficient time, consistent with the child's physical health or safety and the nature of the emergency, to hold an Adversary Hearing; and
- That reasonable efforts were made to prevent or eliminate the need for removal.

NOTE ON THE DEFINITION OF "HOME"

The federal Administration of Children and Families defines "home" as the adult from whom the child is legally removed. In other words, home means parental custody, not physical location. The definition of "home" does not change regardless of where the child is living. Thus, when DFPS files a petition without taking possession of a child, the court must make the findings regarding reasonable efforts, contrary to the welfare, and continuing danger as they relate to the parent or adult who is entitled to legal custody of the child, not the person who has physical custody per Tex. Fam. Code § 262.113. Reasonable efforts to prevent removal from the parent's custody are not required if the parent has subjected the child to aggravated circumstances as defined by Tex. Fam. Code § 262.2015.

COURT ACTION

If the court finds that DFPS made the required showing the court must:

- Issue an ex parte order for protection of the child;
- Appoint an attorney ad litem, a guardian ad litem, and authorized medical consenter for the child; and
- Set the Adversary Hearing within 14 days, unless the court finds good cause to postpone the hearing pursuant to Tex. Fam. Code § 262.201.

Practice Tip: Attorneys for parents and children are not required to be appointed prior to the Ex Parte Hearing and their attendance is not required at the Ex Parte Hearing. However, in some circumstances an attorney may already be appointed when an Ex Parte Hearing occurs. This may occur if the attorney has been appointed as part of a Court Ordered Services case under Tex. Fam. Code § 264.203 and a new referral alleging abuse or neglect is the reason DFPS is seeking removal, or if DFPS is seeking to remove a child born during the pendency of an existing case filed under Chapter 262. If a parent's or a child's attorney is appointed or retained prior to the Ex Parte Hearing, they may prepare and file a response with controverting affidavits and participate in the Ex Parte Hearing. The attorney should conduct an independent evaluation of the basis for the removal, rather than relying solely upon DFPS for information.

Ex Parte Order After Removal Hearing

STATUTES Tex. Fam. Code §§ 262.106, 262.107

PURPOSE

When removal of a child without a prior court order is warranted, DFPS must petition the court no later than the next business day to request TMC of the child until an Adversary Hearing can be held.

BURDEN OF PROOF

Evidence sufficient to "satisfy a person of ordinary prudence and caution."

BEST INTEREST

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002.

ICWA

A court can order emergency removal of an "Indian child" only if necessary "to prevent imminent physical damage or harm to the child." 25 C.F.R. § 23.113 (d). This must be followed by a noticed hearing where DFPS must prove by clear and convincing evidence, including QEW testimony, that a "foster care placement" is warranted. This hearing cannot be held until 10 days after notice of ICWA has been provided and is subject to a 20-day extension on request of a parent or tribe.

Practice Tip: To avoid the need to continue the hearing, the best practice is for the hearing to be set at least 30 days out. Please see ICWA information in the *Federal Law Issues* section.

COURT ACTION:

If the court finds that DFPS made the required showing the court must:

- Issue an ex parte order for protection of the child;
- Appoint an attorney ad litem, and a guardian ad litem for the child;
- Appoint a person authorized to consent to medical care; and
- Set the Adversary Hearing within 14 days, unless the court finds good cause to postpone the hearing pursuant to Tex. Fam. Code § 262.201.

Practice Tip: Attorneys for parents and children are not required to be appointed prior to the Ex Parte Hearing and their attendance is not required at the Ex Parte Hearing. However, in some circumstances an attorney may already be appointed when an Ex Parte Hearing occurs. This may occur if the attorney has been appointed as part of a Court Ordered Services case under Tex. Fam. Code § 264.203 and a new referral alleging abuse or neglect is the reason DFPS is seeking removal, or if DFPS is seeking to remove a child born during the pendency of an existing case filed under Chapter 262. If a parent's or a child's attorney is appointed or retained prior to the Ex Parte Hearing, they may prepare and file a response with controverting affidavits and participate in the Ex Parte Hearing. The attorney should conduct an independent evaluation of the basis for the removal, rather than relying solely upon DFPS for information.

Adversary Hearings

STATUTE Tex. Fam. Code § 262.201

PURPOSE

To determine whether a court will grant DFPS TMC of a child or authorize DFPS's continued TMC of a child.

TIMING

- **After Emergency Removal**: Shall be held not later than the 14th day after the date the child was taken into possession unless the court grants an extension. Tex. Fam. Code § 262.201(a).
- **For Non-Emergency Removal Request**: Shall be held not later than the 30th day after the suit is filed Tex. Fam. Code § 262.201(b). However, best practice is to request that a hearing be set as soon as possible. If a setting cannot be obtained within 14 days, the prosecutor should discuss with DFPS whether waiting will pose a risk to the safety of the child.

BURDEN OF PROOF

Evidence sufficient to "satisfy a person of ordinary prudence and caution."

BEST INTEREST

The best interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002. At the Adversary Hearing, courts must 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).

ICWA:

The court must ask whether the child or family has Native American heritage and identify any tribe at the Adversary Hearing. Tex. Fam. Code § 262.201(f). DFPS must give notice to any identified tribe and request that the tribe confirm or deny the child's status as an Indian child.

If a tribe confirms (or a court finds) that a child is an "Indian child," please see the *Indian Child Welfare Act* section of this tool kit for information on how ICWA requirements will affect the case going forward.

CUSTODIAL PARENT ATTORNEY PREPARATION

- File any pleadings necessary to enable court to enter orders in accordance with the client's wishes, including placement with a relative.
- Determine whether there exists a court of continuing jurisdiction and whether ICWA applies to the child, even if the client is not the Indian parent.
- Determine if additional time is necessary to adequately prepare for the hearing and file any necessary motions for continuance.
- Determine whether appropriate relatives or fictive kin are able to care for the child and request home assessments be completed before the reset hearing.
- Determine if there is a probable or pending criminal case as a result of the facts surrounding the Child Protective Services (CPS) case and advise the client of their 5th Amendment Rights against self-incrimination in testifying at the hearing, discussing the case with other parties or in participating in court-ordered or recommended services.
- Review and assess evidence.

- Meet with the parent in a confidential setting to review and assess the evidence together.
- Advise the parent of his or her right to a full contested adversary/evidentiary hearing on DFPS's request for TMC.
- Determine if the client has any disabilities or special needs that must be accommodated in order to actively participate in the hearing.
- Determine if a language barrier exists.
- Determine whether domestic violence is an issue in the family, and whether it is known to DFPS.
- Make a request of the prosecutor pursuant to Tex. Fam. Code § 262.014 to provide names of witnesses DFPS intends to call (other than DFPS employees), a copy of any offense report to be used to refresh a witness's testimony, and a copy of any photo, video or recording to be presented as evidence; and subpoena any necessary witnesses and documents for the full adversary/evidentiary hearing.
- Determine what options may exist for services through non-DFPS providers – i.e. the client is participating in substance abuse treatment through probation, mental health services through county or private providers, domestic violence services through a non-profit agency, etc.
- Determine whether the parent has other children who are not subject of the suit, or who live with the parent (usually for a non-custodial parent who DFPS finds unsuitable, but other courts have found suitable).

Parent's Attorney Practice Tip: Remember that for most parents, this is a new process, they are scared, and they may be focused exclusively on the circumstances of removal and therefore may have difficulty understanding the long-term consequences of the decisions that they may be making at the initial hearing. The *Trauma Informed Lens for Interacting with Clients* section of this guide may be of assistance in helping discuss long-term implications of the Adversary Hearing.

Practice Tip: A contested Adversary Hearing may be appropriate if:

- There is not an immediate danger to the child – i.e. DFPS waited a substantial period of time between the incident that forms the basis of the referral and the removal and circumstances have changed in the meantime that reduce or eliminate the danger.
- DFPS did not make reasonable attempts to prevent or eliminate the need for removal – i.e. demand that the offending parent leave the home, place the child with a non-custodial parent, etc.
- The non-custodial parent is suitable and placement with that parent would not be against the best interest of the child.
- There is a suitable relative or fictive kin to care for the child but DFPS is opposed to the placement. Require that DFPS document their opposition.
- Conservatorship or placement are not contested issues, but the parent is opposed to one or more of the recommended services, or to the proposed visitation plan.

UNKNOWN OR ABSENT PARENT ATTORNEY PREPARATION

Determine whether the other parties know the identity and/or whereabouts of the parent. Note that when asked by DFPS for the address of the missing parent, the responding parent may say "I don't know." However, the responding parent may know where the family of the absent parent lives, or know how to get to their home, but not know the address. Additionally, the responding parent may not want the other parent involved, but the parent's attorney should explore why that is so, and explain that for purposes of temporary orders, it might be preferable for the child to be with the other parent or their family rather than in foster care.

- Use due diligence to locate the client, and submit a report to the court, stating either that the client has been located and provide the location information, or that after due diligence, the client could not be found. Make sure to report what efforts were made to locate the client.
- If the parent is an alleged father, determine whether he is an acknowledged or adjudicated father and, if not, whether he wants to be adjudicated, or is requesting paternity testing.

Practice Tip: Consider checking the Acknowledgment of Paternity (AOP) Registry to determine if any man has executed an AOP. There is a small fee associated with this task, for which a motion for costs could be filed. Some men will sign the AOP at the hospital when the child is born and will often say that they "signed the birth certificate" because the AOP will get them on the birth certificate as the legitimate father. However, some men have signed the AOP knowing that they are not the biological father. They may want to be the father or to help the mother, but the unintended consequence is added complication and additional parties to the lawsuit. The earlier this is addressed, the better.

Practice Tip: Attorneys representing a father whose location or identity are unknown should consider asking the child's mother whether she is receiving child support or benefits such as Medicaid or food stamps, as the receipt of benefits may trigger the filing of an Office of the Attorney General (OAG) paternity suit. The existence of a paternity suit may provide identity and contact information for a father whose location or identity are currently unknown.

Also consider asking the child's mother if she has ever been married and, if so, whether she has obtained a divorce or when she last resided with her husband. Additional issues may arise, and genetic testing may be necessary if a presumed father exists and the alleged father wishes to be adjudicated as the father.

CHILD'S ATTORNEY PREPARATION

Before the hearing, a child's attorney should:

- Visit the child in the child's placement. If there is no time to visit the child before the hearing, request a reset of the hearing in order to make the required visit;
- If possible, observe a parent-child visit;
- Interview the current caretakers, parents if allowed by their attorneys, witnesses and collaterals to be fully knowledgeable about the facts underlying the case;
- Review the rights and duties for a Guardian ad Litem and an Attorney ad Litem under the Family Code to ensure compliance;
- Consider all the recommendations that may apply to the parent's attorneys, if appropriate, especially regarding locating absent parents and their relatives. If a parent is not found until late in the case, it may be a lost opportunity to prevent the need for removal, identify family placement options, and can result in delays in permanency;
- Confer with the Court Appointed Special Advocate (CASA), if they are appointed to the case, as they often have valuable information that can assist in making recommendations to the court.

PARENT'S AND CHILD'S ATTORNEY PREPARATION

Review the *Concurrent Issues* section of this tool kit to be prepared to advocate a position on:

- Paternity
- Placement of the Child
- Child Support and Kinship Support
- Visitation
- Child Well-Being
- Reasonable Efforts to Prevent or Eliminate Removal

Child's Attorney Practice Tip: Upon meeting with and interviewing the child, the child may desire to attend court and meet with the judge at the Adversary Hearing, but the child's attendance is not required by statute. Consider filing a Motion to Interview Child in Chambers and request that the court schedule a time for the child to be brought to the courthouse and interviewed. This can permit the child to express their interests without having to testify in open court. Expect that not all parties will agree with this request and be prepared to present a convincing argument to support the request.

REQUIRED COURT FINDINGS AT AN ADVERSARY HEARING BASED ON AN EMERGENCY REMOVAL

The court must return the child home unless the court finds:

- There was a danger to the physical health or safety of the child. That danger could include that the child would be a victim of trafficking under Tex. Penal Code §§ 20A.02 or 20A.03 caused by an act or failure to act of the person entitled to possession;
- That continuation in the home would be contrary to the child's welfare;
- The urgent need for protection required immediate removal; and

- That despite reasonable efforts to prevent or eliminate the need for removal and to return the child home, there is a substantial risk of continuing danger to the child in the home. Tex. Fam. Code § 262.201(g).

REQUIRED COURT FINDINGS AT ADVERSARY HEARING BASED ON NON-EMERGENCY REMOVAL REQUEST

To order removal of the child, the court must find:

- 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;
- That continuation in the home would be contrary to the child's welfare; and
- Reasonable efforts consistent with the circumstances and safety of the child were made to prevent or eliminate the need for removal. Tex. Fam. Code §§ 262.113; 262.201(j).

ADDITIONAL COURT ACTION

The court must either return the child to the parent or other person entitled to possession or enter temporary orders for protection and:

- Order placement of child with a noncustodial parent, or relative unless that is not in the child's best interest;
- Ask all parties about Native American heritage and the identity of any tribe(s);
- Give parents warning about parental rights, require completion of the Child Placement Resources form, and require all relatives to provide information to locate any absent parent or relative;
- Set a Status Hearing within 60 days of the date TMC is granted;
- Inquire from all parties whether the child has had the opportunity to provide information regarding potential caregivers and whether individuals identified by the child are listed on the proposed child placement resources form; and
- Inform relatives serving as placement for a child of the ability to become a licensed foster parent and apply for Permanency Care Assistance (PCA).

Renewing and Extending the 14 Days

A Full Adversary Hearing after emergency removal must be held within 14 days because the temporary order authorizing emergency removal expires after 14 days in accordance with Tex. Fam. Code § 262.103. However, those orders can be extended before a Full Adversary Hearing is held. The temporary orders can be renewed and extended under the following circumstances:

- Upon a showing of good cause (defects in service, allowing time for the attorney for the child to visit with their client, court closure or docketing issues, etc.), an attorney can seek an order to extend the temporary order by up to 14 days and reschedule the hearing. Tex. R. Civ. P. 680;
- If an indigent parent appears in opposition to the suit and the court appoints an attorney, the temporary order can be extended by 7 days, and the court may shorten or lengthen the time of the extension *if the parent and the appointed attorney agree in writing*. Tex. Fam. Code § 262.201(e);
- If a non-indigent parent requests time to hire an attorney or to provide a retained attorney time to respond, the temporary order can be extended by 7 days, and the court may shorten or lengthen the time of the extension *if the parent and the attorney agree in writing*. Tex. Fam. Code § 262.201(e-1);

- No more than one extension of a temporary order may be granted unless subsequent extensions are unopposed. Tex. R. Civ. P. 680.

Practice Tip: Be mindful of the impact of separation on the child by delaying the Adversary Hearing. Request a reset only for the amount of time necessary to accomplish the required tasks instead defaulting to the maximum 14 days allowed under the Family Code and consider requesting additional visitation time, if appropriate, in the interim.

Practice Tip: Though a court will not lose jurisdiction if the Adversary Hearing is not held timely, a parent may seek mandamus to compel the court to hold the hearing. *In the Interest of J.M.C.*, 109 S.W.3d 591, 595 (Tex. App.—Fort Worth 2003).

Practice Tip: Consider addressing the following additional issues at the Adversary Hearing:

- Before the service plan can be fully developed and signed by a parent, there may be an identified need for psychological testing, drug assessment or testing, or physical examinations. Determine what orders might be appropriate and proceed accordingly.
- Determine whether there is a discovery control plan in place and/or whether there is a need for formal discovery.
- Consider requesting a scheduling order that sets out every future hearing.

Parent's Attorney Practice Tip: Meet with the client after the hearing to discuss the Family Strengths and Needs Assessment (FSNA) and to explain what to expect between the Adversary Hearing and the Status Hearing.

Status Hearing

STATUTES Tex. Fam. Code §§ 263.201, 263.202, 262.203

PURPOSE

To have a court review the contents of the service plan, rule on requested modifications to the service plan, and enter court orders necessary to implement the service plan. Additional goals are to review due diligence of efforts to serve parties; locate missing parents; notify relatives of a child's removal; identify potential family or fictive kin placements, if applicable; and review the child's medical care.

BURDEN OF PROOF

Preponderance of the evidence.

BEST INTEREST

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002.

ICWA

The court must ask whether the child or family has Native American heritage and identify any tribe at the Status Hearing. Tex. Fam. Code § 263.201(f-1). DFPS must give notice to any identified tribe and request that the tribe confirm or deny the child's status as an "Indian child."

If a tribe confirms (or a court finds) that a child is an "Indian child," please see the *Indian Child Welfare Act* section of this tool kit for information on how ICWA requirements will affect the case going forward.

PARENT'S ATTORNEY PREPARATION

- Review the service plan with the client in advance of the hearing.
- Prepare for any modifications that will be requested in court.

Parent's Attorney Practice Tip: Tex. Fam. Code § 161.001(d) provides a defense against the "O" termination ground if a parent can prove by a preponderance of the evidence that they were unable to comply with the service plan, made a good faith effort, and that failure to comply was not attributable to any fault of the parent. Consider filing an Answer with an affirmative defense if a parent was unable to comply with one or more services.

Parent's Attorney Practice Tip: If the service plan drafted by DFPS does not reflect the services that were court-ordered, consider filing a written objection to the plan. If the court adopts the service plan as an order of the court, the parent will have to complete these tasks as well as those that were initially court-ordered.

CHILD'S ATTORNEY PREPARATION

- Review the child's plan of service, and review with the client, if developmentally appropriate.
- Prepare any requested modifications to either the child's or parent's plan of service.

PARENT'S AND CHILD'S ATTORNEY PREPARATION

Review the *Concurrent Issues* section of this tool kit to be prepared to advocate a position on:

- Placement of the Child
- Child Support and Kinship Support
- Visitation
- Child Well-Being
- Normalcy

Practice Tip: If DFPS has failed to set up services, provide parent-child visits or initiate and/or complete home studies, consider filing a motion to enforce the court orders that were entered at the Adversary Hearing rather than waiting for the next statutorily- required hearing. Filing a motion creates a sense of urgency to timely address issues that can delay reunification or permanency.

COURT ACTION

At the Status Hearing the court must:

- Assess service and diligent search efforts for any missing parents (including alleged fathers);
- Appoint counsel as required and advise unrepresented parents;
- Ask all parties about Native American heritage and the identity of any tribe(s);
- Make specific findings and orders regarding visitation, service plan, medical consent (and psychotropic medications if prescribed);
- Set a Permanency Hearing no later than 180 days after TMC is granted;
- Allow the parents the opportunity to comment on the service plan;
- Inquire from all parties whether the child has had the opportunity to provide information regarding potential caregivers and whether individuals identified by the child are listed on the proposed child placement resources form; and
- Inform relatives serving as placement for a child of the ability to become a licensed foster parent and apply for PCA.

Practice Tip: If a client is seeking additional relief such as a contested placement change that will require a hearing separate from the Status Hearing, the most efficient way of obtaining a setting may be to file a motion for the requested relief and have it on file prior to the Status Hearing. Then request that hearing be set on this motion at the same time as the Status Hearing while everyone is present in court.

Permanency Hearing Before Final Order

STATUTES Tex. Fam. Code §§ 263.002, 263.302, 263.304, 263.305, 263.306

PURPOSE

Review status of the child and the permanency plan to ensure that the final hearing (trial on the merits) can be commenced before the dismissal date.

BURDEN OF PROOF

Preponderance of the evidence.

BEST INTEREST

Best Interest of the child is always the primary consideration in determining conservatorship, possession, and access. Tex. Fam. Code § 153.002. Also, best interest arises at the Permanency Hearings before a final order as follows:

- At each Permanency Hearing before a final hearing, 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).
- 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.

ICWA

Unless the court has made a finding that a child is not an "Indian child," the court must continue to ask whether the child or family has Native American heritage and identify any tribe, especially if new parties have appeared at this stage. Tex. Fam. Code § 263.306(a-1)(3).

If a tribe confirms (or a court finds) that a child is an "Indian child," please see the *Indian Child Welfare Act* section of this tool kit for information on how ICWA requirements will affect the case going forward.

PARENT'S ATTORNEY PREPARATION

- Assess parent's compliance and progress with temporary orders and the service plan.
- Assess whether there are services that need to be modified or eliminated.

Parent's Attorney Practice Tip: A client who has experienced trauma may be making progress and appear healthy but then relapse into old patterns and behaviors. Changing these behaviors takes time and may not be a straightforward or linear process. Targeted trauma-informed therapies and services can assist a client in healing. It may be appropriate to ask the court to include trauma-informed therapies or services in the service plan to improve the likelihood for success.

PARENT'S AND CHILD'S ATTORNEY PREPARATION

Review the *Concurrent Issues* section of this tool kit and be prepared to advocate a position on:

- Placement of the Child
- Visitation
- Child Well-Being
- Normalcy
- Reasonable Efforts to Return the Child Home

Additionally, Parents' and Children's attorneys should address:

- What are the diligent search efforts for any missing parties?
- What is the permanency plan for the child?
- What is the factual basis for the permanency plan?
- Is the client in agreement or opposition with the permanency plan?
- Is mediation appropriate at this stage of the case?

CHILD'S ATTORNEY PREPARATION FOR CHILDREN WHO MAY NOT ACHIEVE POSITIVE PERMANENCY

For a child whose permanency plan is another planned permanent living arrangement (APPLA), consider:

- What is the child's desired permanency outcome?
- Have the goals identified in the child's permanency plan been addressed?
- Has the child had an independent living skills assessment done and what were the results? Are any further services needed as a result?
- If the child is 16 or older, does the child have the original or certified copies of personal documents (not photocopies) which include Texas Identification card, birth certificate, SSI card, and if child is not born in the United States, the child's immigration or citizenship document which are required by law? Tex. Fam. Code §§ 264.121(e), 263.306(a-1)(5)(H)(v).
- If the child is 18 or older or has had the disabilities of minority removed, have original or certified copies (not photocopies) of personal documents been delivered to the client? Required documents include Texas Identification card, birth certificate, SSI card. Tex. Fam. Code §§264.121(e-1)-(e-2), 263.306(a-1)(5)(H)(vi).
- If child is not born in the United States, determine whether DFPS has possession of the child's immigration or citizenship documents and request they be turned over to the child.

Practice Tip: If mediation is appropriate and in the client's interest at this stage of the case consider a motion requesting mediation. If another party objects to mediation, request that the court order the mediation.

REQUIRED COURT ACTION

The court must:

- Identify persons and parties present, review the status of service of process and search efforts, ask about Native American heritage and any tribes the child is associated with, review compliance with temporary orders and service plan, as well as progress toward mitigating the need for foster care placement, and review DFPS efforts to provide the child with regular, ongoing opportunities to engage in normalcy activities;
- Review the permanency plan to assess each component - child safety and well-being, necessity for placement, appropriateness of permanency goals, whether the child has had opportunity to express opinion on any medical care, compliance with specific requirements if psychotropic medications that are prescribed, education issues, and transitional care issues;
- For a child with Another Planned Permanent Living Arrangement (APPLA):
  - a compelling reason why another plan is not in child's best interest;
  - whether DFPS has conducted an Independent Living Skills Assessment (ILSA);
  - whether DFPS has addressed the goals of the permanency plan, including a housing plan and the results of the ILSA;
  - for youth 16 or above, whether DFPS has provided required documents per Tex. Fam. Code §§ 264.121(e)(1),263.306(a-1)(5)(H)(v);
  - for youth 18 or above, or youth with disabilities of minority removed, whether DFPS has provided required documents; Tex. Fam. Code §§ 264.121(e-1), 263.306(a-1)(5)(H)(vi); and
  - for a child not placed with a relative or designated caregiver, review the placement and include in its findings a statement whether the child is placed with a relative or designated caregiver. Tex. Fam. Code § 263.002(b);
- Determine whether a return of the child to the parents if it is safe and appropriate, in the child's best interest, or whether return is contrary to the welfare of the child. Tex. Fam. Code § 263.002(c);
- Estimate a likely date for the child to be returned, adopted, or placed in PMC;
- Retain jurisdiction and permit the child to transition home under a transitional monitored return while the parents complete services or order a monitored return to parents if appropriate and in the child's best interest;
- Set a subsequent Permanency Hearing date no more than 120 days later until a final order is rendered;
- Announce in open court the automatic dismissal date and the date of any subsequent hearings. Tex. Fam. Code § 263.306(a-1);
- Inquire from all parties whether the child has had the opportunity to provide information regarding potential caregivers and whether individuals identified by the child are listed on the proposed child placement resources form; and
- Inform relatives serving as placement for a child of the ability to become a licensed foster parent and apply for PCA.

Practice Tip: If discovery has not already been served on opposing parties, it is appropriate to begin the process now to ensure it can be completed in advance of trial. See the *Discovery* section of this tool kit for more information.

Subsequent Permanency Hearings

A subsequent Permanency Hearing before entry of a final order must be held within 120 days of the previous Permanency Hearing in the suit (although it can be held sooner than 120 days). At such a hearing, the court reviews the progress of the parents, the status of the child, and the permanency goal.

Dismissal Date Strategies

Calculating the Automatic Dismissal Date

The dismissal clock begins to run on the date when the court first grants DFPS TMC. Unless the court has commenced the trial on the merits by that dismissal date, with few exceptions, a child protection suit filed by DFPS is automatically dismissed on the first Monday after the first anniversary of the date the court rendered an order appointing DFPS as TMC. Tex. Fam. Code § 263.401(a).

> **Practice Tip:** Pursuant to Tex. Fam. Code. § 263.401, the dismissal deadline is automatic, and the court loses jurisdiction by operation of law if a trial is not commenced before the deadline date. A timely motion to dismiss the suit is no longer required.

Know the Options

From the date DFPS is awarded TMC, the viability of obtaining a final order in the allotted time should be assessed on an ongoing basis. Exceptions to the one-year limit are extremely limited,but are important to keep in mind as the lawsuit evolves, in case requesting an extension might be needed.

Extraordinary Circumstances

If the court finds that extraordinary circumstances necessitate the child remaining in the TMC of DFPS and that continuing the appointment of DFPS as the TMC is in the child's best interest, the court may grant an extension of no more than 180 days. Tex. Fam. Code § 263.401(b).

- The court must consider a parent's good faith attempt to complete a drug rehab program when granting an extension of the deadline.

Monitored Return or Transition Monitored Return

Alternatively, the court may also retain jurisdiction with DFPS as the TMC and enter an order to:

- Return the child to the parent; or
- Transition the child to the home while the parent completes necessary services specified in the temporary order; and
- Order DFPS to remain as TMC and to monitor the child's placement.

In the case of a direct monitored return, the court shall schedule a new dismissal date 180 days after the monitored return is ordered, regardless of whether the deadline has been extended. Under the transition monitored return, the deadline is still extended by 180 days, and the court may retain jurisdiction for an additional six months for the parent to complete services specified in the temporary order, unless the court has already granted an extension under Tex. Fam. Code § 263.401(b).

If a child must be removed from the parent's home or the court terminates a transition order during this period, the court must set a new dismissal date no later than the original dismissal date or 180 days after the child is moved, whichever is later. Tex. Fam. Code § 263.403.

> **Practice Tip:** An agreement by the parties to seek an extension does not constitute a finding of extraordinary circumstances. Exercise caution about relying on such an agreement, as the judge may still deny the extension if they determine extraordinary circumstances are not present.

Transition/Monitored Return

If the court has not granted an extension of the 12 month deadline under Section 263.401(b):

The court can order a Regular Monitored Return under Section 263.403(a)(2)(A).

Extends 180 days per Section 263.403(b). The Family Code does not authorize any type of extension associated with a Monitored Return ordered pursuant to Section 263.403(a)(2)(A).

The court can order a Transition Monitored Return under Section 263.403(a)(2)(B).

Extends 180 days per Section 263.403(b).

Under Section 263.403(a-1), the Court can order an additional six months for the parent to complete the service requirements specified in the temporary order during a Transition Monitored Return granted pursuant to Section 263.403(a)(2)(B), but only if no extension under Section 263.401 was already granted.

After an extension period has been granted pursuant to 263.401(b):

The court can order a Regular Monitored Return under either Section 263.403(a)(2)(A).

OR

The court can order a Transitioned Monitored Return under Section 263.403(a)(2)(B).

But the additional six months of 263.403(a-1) are not available.

Practice Tip: Waiting until the last minute to request an extension can risk the ire of the court. If there is no active trial setting before the original deadline and no time to obtain a setting when the request for the extension is made, the court can only grant the extension or allow the case to be dismissed. The court may disagree that extraordinary circumstances are present but no longer has the discretion to order the case proceed to trial under the original deadline.

Practice Tip: An extension of the deadline under Tex. Fam. Code § 263.401 requires the court to find that extraordinary circumstances necessitate the child remaining in conservatorship of DFPS. Technical issues that prevent a trial from commencing such as lack of notice, lack of service, or lack of a trial setting may equate to extraordinary circumstances. If a client opposes the extension, consider challenging the sufficiency of the evidence for granting an extension based on extraordinary circumstances.

Final Hearing

IMPORTANT: A Final Hearing (Trial) must commence or an extension must be granted before the dismissal deadline or the court will lose jurisdiction over the case and the suit will be automatically dismissed without a court order. Tex. Fam. Code § 263.401.

PURPOSE

To obtain a final order prior to the dismissal date.

BURDEN OF PROOF

If termination of parental rights is requested, the burden of proof is "clear and convincing" evidence. If PMC is requested, the standard is "preponderance of the evidence," unless ICWA applies, in which case the burden shifts to "beyond a reasonable doubt" and a Qualified Expert Witness (QEW) is required.

BEST INTEREST

The focus at a termination trial is on best interest factors (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 other 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), as well as on the *Holley* factors. Tex. Fam. Code § 263.307; *Holley v. Adams,* 544 S. W. 2d 367 (Tex. 1976). DFPS must prove at least one ground for termination plus that it is in the child's best interest that parental rights be terminated. Please see the *Best Interest* section in this tool kit for more information.

ICWA

If ICWA applies, termination of parental rights requires proof beyond a reasonable doubt, including qualified testimony of a QEW, that the parent's continued custody "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). DFPS must demonstrate that "active efforts" were made to reunify, as well as other requirements. Please see the *Indian Child Welfare Act* section in the *Federal Law Issues* section in this tool kit for more information.

PREPARATION FOR A CONTESTED TRIAL

The preparation required for a contested trial varies greatly depending on the relief requested, the evidence, and whether a jury is requested. The practice tips below outline some general principles that attorneys for parents and children may consider when approaching a contested trial. Attorneys should seek additional materials, resources, and training to ensure adequate preparation.

Parent's Attorney Practice Tip: A parent's attorney should work with their client in the months leading up to trial to answer discovery so that all necessary witnesses may be called, and all necessary exhibits may be admitted. All service providers and any other witnesses the client wants to call to testify at trial should be interviewed. An attorney should discuss with their client the burden of proof required, the anticipated evidence from all parties, and any alternative relief requested. Attorneys should prepare their clients to testify on both direct and cross examination.

Child's Attorney Practice Tip: A child's attorney should not rely on the prosecutor and parents' attorneys to call witnesses and submit evidence relevant to their client's interests. A child's attorney should be prepared to call their own witnesses and introduce their own exhibits. If aligned with one party, the attorney should collaborate with that party on trial strategy and issue subpoenas for witnesses and exhibits that will advance the client's interests at trial. If the case is being tried to a jury, an attorney could request strikes separate from other parties, but be aware the court may require aligned parties to share strikes. During voir dire, it is essential that the panel understands the independent role of the child's attorney and develops trust in the attorney so that they are prepared to act on the ad litem attorney's recommendations. A child's attorney should have pleadings on file to seek relief requested on behalf of the child that is not sought by another party.

PREPARATION FOR AN AGREED OR DEFAULT FINAL ORDER

Termination of Parental Rights

Requires evidence of at least one ground for termination of parental rights against a parent and evidence that termination is in the best interest of the child. Tex. Fam. Code § 161.001(b).

Appointment of DFPS as PMC

The appointment of DFPS as a child's PMC without termination of parental rights is only appropriate if a more permanent option for a child is not possible. This requires evidence that:

- Appointment of a parent as managing conservator would not be in child's best interest because it would significantly impair the child's physical health or emotional development; and
- It would not be in child's best interest to appoint a relative or another person as managing conservator.

In making this determination, the court shall consider (1) that the child will be 18 years old in less than three years, (2) the child is 12 or older and has expressed a strong desire against termination and continuously expressed a strong desire against being adopted, and (3) the needs and desires of the child. Tex. Fam. Code § 263.404.

Transition Plan Requirements for Certain Youth

As part of the Final Hearing, the court must verify the following for any child who goes into PMC of DFPS and who has an APPLA:

- If the child is 14 or older: that DFPS has conducted an independent living skills assessment (ILSA) for the child as provided under Tex. Fam. Code § 264.121(a-3); that DFPS has addressed the goals identified in the child's permanency plan, including the child's housing plan, and the results of the ILSA;
- If the child is 16 or older: that there is evidence that DFPS has provided the youth with the documents and information listed in Tex. Fam. Code § 264.121(e); and
- If the child is 18 or older or has had the disabilities of minorities removed: that there is evidence that DFPS has provided the youth with the documents and information listed in Tex. Fam. Code § 264.121(e-1). Tex. Fam. Code § 263.4041.

Practice Tip: When making a record, it is helpful to avoid terms of art or acronyms and to remember the basics of examining a witness (e.g. identify all witnesses in the record and their relationship to the case). If examining the caseworker(s), it is important to establish their relationship to the case, and the basis of their knowledge about it (how long have they been working on the case, etc.).

Entering a Default Judgment

A default judgment must conform to the pleadings served on the Respondent. The record must show:

- Service of citation, no Answer and the Citation Return on file at least 10 days before trial;
- An order appointing an attorney ad litem for the absent parent, if appointment of counsel is mandatory;
- Evidence to support at least one of the termination grounds plead and that termination is in the child's best interest;
- A "statement of the evidence" approved and signed by the judge which should demonstrate the diligence used to locate the defendant if citation by publication was requested;
- Proof of compliance with the Servicemembers Civil Relief Act (SCRA) (please see *Federal Issues* section in this tool kit for more information); and
- For an alleged father, evidence that the alleged father has not registered his paternity or filed a paternity action or an admission of paternity.

Answer Defaults vs. No-Answer Defaults

Once an Answer has been filed, notice requirements are less onerous. An Answer or participation in the suit generally waives any defects in the previously issued service or notice. Every party filing a pleading is required to provide an address, telephone number, and fax number for themselves or for their attorney if they are represented by counsel. If the attorney withdraws, the attorney must provide the court with the last known address of their client. Subsequent pleadings or notices, including amended petitions or counter claims may then be served relatively easily.

Entering Agreed Orders

Agreed Final Orders can be entered by a court when all parties agree on their own, or when agreement has been reached during settlement conference or in mediation. The order must provide for the permanency of the children, whether this be to return home, to be placed permanently with a relative as managing conservator, or voluntary relinquishment of parental rights and awarding DFPS PMC. A subsequent order may be necessary to transfer PMC to relative who is not able or available to take PMC of the child when the final order is signed. In that case, the child may be placed in PMC of DFPS.

Practice Tip: Agreed orders should be dictated into the record and reflected in the final order. If there is a mediated settlement agreement, consider attaching a copy of it to the final order.

Practice Tip: Elicit testimony on best interest for both prove-ups and agreed orders. The testimony should be specific to the child and sufficient to meet the burden of proof, not merely a yes or no answer.

Practice Tip: Attorneys for parents and children should consider the following issues before entering a final order dismissing DFPS as conservator:

- Is there a court of continuing jurisdiction?
- Is there a prior order establishing a parent-child relationship?
- Are there multiple prior orders regarding different children that should be consolidated?
- Has child support for each child from each party been addressed?
- Has medical insurance and dental insurance been addressed for each child?
- Has visitation between each child and each conservator been established and is the language specific enough to be enforceable later, if needed?

COURT ACTION

The court may terminate parental rights on one or more grounds and/or name a permanent managing conservator for the child.

If PMC is awarded to DFPS, the court must set a date for the next hearing as follows:

- If DFPS was granted PMC and parental rights were terminated, the court must conduct the initial Permanency Hearing After Final Order within 90 days of the Final Order and hold subsequent hearings at least once every six months until the child is adopted or DFPS is no longer the conservator.
- If DFPS was granted PMC and parental rights were not terminated, the court must conduct a Permanency Hearing After Final Order at least once every six months until DFPS is no longer the conservator.

AFTER THE COURT RENDERS A FINAL ORDER

Be aware of strict time limits for any challenge:

- De Novo Hearing: A request for De Novo Hearing (if an associate judge heard the case) must be filed with the clerk of the referring court no later than the third working day after receiving notice of the substance of the associate judge's order; and
- Accelerated Appeal: An accelerated appeal must be filed within 20 days after the judgment or order is signed, subject to a possible 15-day extension. Parents' attorneys should notify their clients in writing before and after a trial of their right to appeal.

- Motion for New Trial: If the client wants to appeal a final judgment, a Motion for New Trial may be necessary to preserve error. A Motion for New Trial is required to preserve error regarding the factual sufficiency of the evidence, and to raise issues of ineffective assistance of counsel or newly discovered evidence. A Motion for New Trial may also be required to preserve error regarding the legal sufficiency of the evidence or incurable jury argument if those errors were not preserved at trial.

SEEKING APPOINTMENT OF APPELLATE COUNSEL

The appointment of a parent's attorney continues until the case is dismissed, the date all appeals are exhausted or waived, or the date on which the attorney is replaced by another attorney. Tex. Fam. Code § 107. 016(3). If a client wishes to appeal the trial court's decision, but the parent's attorney does not have experience in the appeal process for parental termination cases, the attorney can request new counsel be appointed but must continue to take active steps to preserve the client's right to appeal. The attorney should:

- Notify the client of right to appeal and provide the client with information regarding deadlines and time-sensitive nature of the case;
- File a Motion for Discharge of Trial Attorney and Motion for Appointment of Appellate Attorney, immediately upon being notified that the client wishes to appeal if notified within the time allowed for appeal;
- File Notice of Appeal with the District Clerk's office to perfect the appeal process;
- Notify the court coordinator that the Motion has been filed, due to the time-sensitive nature of the appeal;
- Obtain an Order of Appointment of Appellate Counsel from the court;
- Notify the appellate counsel of appointment by email and phone call, due to time sensitive nature of case;
- Provide appellate counsel with the name and contact information for the client; and
- Notify the client with the name and contact information for the appellate counsel.

Parent's Attorney Practice Tip: If the client requests an appeal, consider requesting visitation pending the appeal. If the case is reversed and rendered, and no visits have been occurring, a return to the parent may be very confusing or traumatic to the child who may not have seen the parent in many months.

Permanency Hearing After Final Order

STATUTES Tex. Fam. Code §§ 263.002, 263.501, 263.5031, 264.121

PURPOSE

To review the status of every child in PMC at least once every six months until DFPS is no longer the child's permanent managing conservator (unless parental rights are terminated, when the first Permanency Hearing must be no later than 90 days after the date of the order terminating parental rights).

BURDEN OF PROOF

Preponderance of the evidence.

CHILD'S ATTORNEY PREPARATION

- If parental rights have been terminated, and the child is in their intended adoptive home, ensure that all steps are being taken to consummate the adoption.
- Determine whether the child is eligible for adoption subsidy and ensure that the proper procedures are followed to obtain the subsidy, and if this is not occurring, ask the court to direct DFPS to assist the family in obtaining a subsidy.
- If parental rights have been terminated, but the child is not in a prospective adoptive home, advocate for recruitment efforts to identify such a home and request the court order DFPS to prioritize finding an adoptive home for the child. If there is a DFPS unit in the same county in which the case is currently filed which specializes in adoption preparation and recruitment, request that the child's case be transferred to that unit.
- Revisit the client's family members to inquire about placement and/or adoption. It may be that a relative was unable or unwilling to take the child in during the TMC phase, but circumstances may have changed to such a degree that placement is now viable. Adoption subsidy eligibility or PCA may make placement with family possible. With teenager clients, be knowledgeable about assistance to the family that may extend beyond age 18.
- For children who are likely to age out of foster care, attend all meetings related to planning for adulthood and be prepared to update the court and/or ask for additional services.
- Monitor the progress of DFPS in getting the child's documents, scheduling preparation for adult living classes, and helping the child in accessing their benefits.
- Be familiar with the benefits available to youth aging out of foster care. There are numerous resources available online including on the DFPS and Children's Commission's websites.
- If CASA is assigned to the case, maintain contact with the CASA and supervisor, as they may have more frequent contact with the child, and are often willing to research benefits, education-related assistance, and potential relatives.
- Review the *Concurrent Issues* section of this tool kit and be prepared to advocate a position on:
    - Placement of the Child
    - Child Well-Being
    - Normalcy

Child's Attorney Practice Tip: Children who are in long-term foster care may be at increased risk to experience the juvenile justice and adult criminal justice systems, as well as school discipline, mental health challenges, and immigration system. To represent a multi-system client effectively, a child's attorney must have a working knowledge of these systems. If necessary, an attorney may petition the court to appoint a co-ad litem for the specific purpose of addressing some of these issues. There are attorneys with specialized knowledge who can be very helpful to the youth. Additionally, DFPS has state and regional specialists who can assist in areas such as education, disabilities, juvenile justice, and immigration.

COURT ACTION:

The court must:

- Identify persons and parties present, review DFPS efforts to give required notice, and review DFPS efforts to provide the child with regular, ongoing opportunities to engage in normalcy activities;
- Inquire from all parties whether the child has had the opportunity to provide information regarding potential caregivers and whether individuals identified by the child are listed on the proposed child placement resources form;
- Inform relatives serving as placement for a child of the ability to become a licensed foster parent and apply for PCA;
- Review the permanency progress report to assess:
  - child safety and well-being (including whether any medical or special needs are being met);
  - whether the child is placed with a relative or designated caregiver, the continuing necessity for and appropriateness of the placement (including whether an out-of-state placement is in the child's best interest);
  - for a child who is placed in institutional care, is this the least restrictive environment consistent with the child's best interest;
  - the appropriateness of concurrent permanency goals, and whether DFPS made reasonable efforts to finalize the permanency plan, and exercised due diligence:
  - whether to place a child for adoption if parental rights are terminated, or
  - whether to find another permanency placement (including relative or return to parent) if appropriate;
  - for a child with Another Planned Permanent Living Arrangement (APPLA):
    - ask the child regarding their desired permanency outcome;
    - determine whether APPLA is the best plan and provide a compelling reason why another plan is not in the child's best interest;
    - determine whether DFPS has conducted an Independent Living Skills Assessment (ILSA);
    - determine whether DFPS has addressed the goals of the permanency plan, including a housing plan and the results of the ILSA;
    - for youth 16 or above, determine whether DFPS has provided the original or certified copies of personal documents (not photo copies) which include Texas Identification card, birth certificate, SSI card, and if child is not born in the United States, their immigration or citizenship document.

- for youth 18 or above, or with disabilities of minority removed, determine whether DFPS has provided the original or certified copies of personal documents (not photo copies) which include Texas Identification card, birth certificate, SSI card, and if child is not born in the United States, their immigration or citizenship document.

- determine whether transition services are needed for a child age 14 and older;
- review the appropriateness of medical care, whether the child has had an opportunity to express an opinion on any medical care, and compliance with specific requirements if psychotropic medications are prescribed;
- determine whether an education decision-maker has been appointed and whether school issues have been addressed;
- if the child is in PMC of DFPS and parental rights have not been terminated, determine whether to order up to 6 months of additional services for the parents if a relative or other person is not seeking PMC;
- determine whether DFPS has identified a family or other caring adult who has made a permanent commitment to the child; and
- set another hearing in 6 months or sooner.

Child's Attorney Practice Tip: At the first hearing after termination, be aware of whether a relative has filed an intervention, as allowed by the Tex. Fam. Code § 102.006(c). If so, explore whether the relative would be a suitable placement. If a client is opposed to the relative (or when serving as the child's attorney and guardian ad litem, the GAL determines that the intervention would not be in the child's best interest), determine whether they qualify by degree of consanguinity. If not, file a motion to strike the intervention.

Child's Attorney Practice Tip: If DFPS does not seem to be making progress toward an adoption, request a review hearing sooner than the next statutory permanency hearing, and consider filing a motion to ask the court to order DFPS to complete tasks within specific deadlines. If there is a permanency court in the county or region, consider asking the court to transfer the case to the permanency court.

Child Support and Kinship Support

CHILD SUPPORT

All parents have a duty to support their child. The court may order either or both parents to support a child as follows, per Tex. Fam. Code § 154.001:

Child support may be ordered:

- Until the child is 18 years of age or until graduation from high school, whichever occurs later;
- Until the child is emancipated through marriage, removal of disabilities of minority by a court order, or by other operation of law;
- Until the death of the child; or
- If the child is disabled as defined in Tex. Fam. Code § 154.302, for an indefinite period.

The court may order each parent who is financially able to pay support a child for whom DFPS has been appointed managing conservator.

- This support continues until the earliest of:
  - the child's adoption;
  - the child's 18th birthday or graduation from high school, whichever occurs later;
  - the removal of the child's disabilities of minority by court order, marriage or other operation of law;
  - the death of the child; or
  - if the child is disabled as defined in Tex. Fam. Code § 154.302, for an indefinite period.

Note that upon terminating a parent's rights, the court may order that parent to pay child support post-termination. Tex. Fam. Code § 154.001(a-1). In the absence of evidence of a party's resources, the court shall presume that the party has income equal to the federal minimum wage for a 40-hour week. Tex. Fam. Code §154.068.

Please refer to charts and tables in Tex. Fam. Code Ch. 154, Subchapter B for computing net resources available for payment of child support; child support tax charts; definition of net resources, additional factors for the court to consider; application of guidelines to net resources, computing support for children in more than one household, etc. This information will cover most child support matters as they arise in DFPS cases.

Practice Tip: When child support is ordered, the court shall order that child support be payable through the state disbursement unit (SDU). *See* Tex. Fam. Code § 154.004(a). The Office of the Attorney General (OAG) monitors payment of child support through the SDU and if a delinquency occurs, the OAG has a right to seek enforcement of child support and may at some point initiate proceedings to enforce the payment of child support. Texas law requires the court to order that income be withheld from the disposable earnings of the obligor for the payment of child support. *See* Tex. Fam. Code § 158.001. The OAG prescribes forms as authorized by federal law in a standard format entitled "Income Withholding for Support (IWO) Form, Instructions & Sample OMB 0970-0154" found at https://www.acf.hhs.gov/css/resource/income-withholding-for-support-form. *See* Tex. Fam. Code § 158.106(a). The form is published in the Texas Administrative Code, title 1, section 55.118.

RELATIVE AND KINSHIP PLACEMENT SUPPORT

Relative or Other Designated Caregiver Assistance Program (RODC) Without PMC of the child -- Monthly Reimbursement Payment and Medicaid

The child must be:

- In the managing conservatorship of DFPS; and
- Placed in the home by DFPS.

The caregiver must:

- Be related to the child or have a longstanding and significant relationship with the child;
- Be formally approved by DFPS as a caregiver (i.e., have an approved home assessment);
- Not be a licensed or verified foster home or group foster home; and
- Sign and abide by a written caregiver assistance agreement, which includes a commitment to:
  - be available as a continuing placement for the child for at least six months;
  - participate in specialized kinship training as recommended and provided by DFPS;
  - comply with DFPS requirements limiting or facilitating contact between the parents and the child;
  - apply for other forms of assistance, including financial and medical, for which the
  - child may be eligible; and
  - comply with any other child-specific requirements or limitations.

The caregiver's household income may not exceed:

- 300% of current poverty level, as determined annually by federal poverty guidelines. (Caregivers with a household income over 300% are not eligible.)

With PMC of the Child – Annual Reimbursement Payment (No Medicaid)

The child must have been:

- Previously in the managing conservatorship of DFPS; and
- Placed in the home by DFPS.

The caregiver must:

- Meet all of the requirements for caregivers without PMC (e.g., not be a licensed or verified foster caregiver);
- Have obtained PMC of the child after September 1, 2017; and
- Continue to comply with the signed caregiver assistance agreement.

The caregiver's household income does not exceed:

- 300% of current poverty level, as determined annually by federal poverty guidelines. (Caregivers with a household income over 300% are not eligible.)

Permanency Care Assistance Program (PCA)

Requires caregiver to become a licensed/verified foster parent and obtain PMC of the child.

Includes one-time reimbursement of nonrecurring expenses, monthly payment, and Medicaid.

The child must:

- Have been previously in the managing conservatorship of DFPS;
- Have been placed in the home by DFPS;
- Have demonstrated a strong attachment to the prospective permanent kinship conservator;
- Not have reunification or adoption as a permanency option (DFPS has already ruled these out for the child);
- If at least 14 years of age, have been consulted by DFPS about the prospective permanent kinship conservator's commitment to assume PMC of the child; and
- Have resided in the caregiver's home since it was licensed/verified for at least six consecutive months.

The caregiver must:

- Be a relative of the child or have had a longstanding and significant relationship with the child prior to DFPS placing the child in the home;
- Have a strong commitment to caring permanently for the child;
- Have been eligible for the receipt of foster care reimbursements on behalf of the child (i.e., caregiver must become a licensed or verified foster parent to the child) for at least six consecutive months prior to the effective date of the PCA agreement;
- Enter into a PCA agreement with DFPS on behalf of the child prior to becoming the child's permanent kinship conservator; and
- Obtain PMC of the child.

The court must NOT issue an order that includes any of the following:

- Naming either of the child's parents as Joint Managing Conservator (JMC) of the child;
- Naming DFPS as JMC of the child; or
- Awarding possessory conservatorship to any parent of the child under circumstances DFPS determines have the effect of reunifying the child with that parent.

Practice Tip: The earlier the relative/caregiver begins the process, the earlier they can become eligible to finalize a PCA agreement which can increase options for negotiation at the end of the case and avoid unnecessary extensions of the deadline. Courts are also required to inform relatives caring for children of the ability to apply for PCA at the Adversary Hearing, Status Hearing, and Permanency Hearings before and after a final order. Tex. Fam. Code §§ 262.201(n-1), 263.202(i), 263.306(c)(2), 263.5031(3).

MEDICAL & MENTAL HEALTH CHECKLISTS

Health Care Provider

Physical, dental, and eye care, along with immunization, and behavioral health for children in foster care are covered by two managed care programs, STAR Health, a division of Superior Health, and Cenpatico Behavioral Health, a division of the Centene Corporation.

Eligibility

- ☐ All children in DFPS conservatorship and young adults in extended foster care or those young adults who have returned to foster care, up to age 22. Tex. Fam. Code § 264.101(a-1)-(a-2).
- ☐ All youth who turned 18 in foster care and received healthcare through Medicaid (STAR Health or other), but who did not return to extended foster care, are covered under STAR Health or STAR Medicaid under the Affordable Care Act up to age 26. Affordable Care Act; Pub. L. No. 111-148.
  - *Note*: Former foster care children (FFCC) 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, receive coverage through the Medicaid for Transitioning Foster Care Youth (MTFCY) program if they do not have other healthcare coverage and meet program rules for income.

Medical Care Questions for the Child's Attorney

- ☐ Has the child received all health assessments, immunizations, hearing and vision screenings, dental checkups and services, prescriptions for medications, and medical equipment?
- ☐ Has there been any emergency medical care provided to child and circumstances necessitating care, include injury or acute illness of child?
- ☐ What medical and mental health treatment is the child receiving and what is child's progress with treatment (this includes any physical, dental, eye, immunization, and mental health issues)?
- ☐ Is there medication prescribed for the child, what is the condition, diagnosis, and symptoms for which medication was prescribed, and what is child's progress with medication?
- ☐ Has the child or foster care provider complied or failed to comply with any plan of medical treatment for child?
- ☐ Has the child suffered any adverse reaction to, or side effects of, any medical treatment provided to child?
- ☐ Is there a specific medical condition of child diagnosed or for which tests are being conducted to make diagnosis?
- ☐ Is there any activity the child should avoid or engage in that might impact effectiveness of treatment, including physical activities, other medications, and diet?
- ☐ Is there any other info required by DFPS or rule of court? Tex. Fam. Code § 266.007.

Mental Health Questions for the Child's Attorney

For a child receiving psychotropic medication:

- ☐ What psychosocial therapies, behavior strategies, or other non-pharmacological interventions were provided to child?
- ☐ Has the child seen or is the child seeing their prescribing physician, physician assistant or advanced practice nurse every 90 days?

Trauma Questions for the Child's Attorney

- ☐ Has trauma played a role in the child's behavior?
- ☐ Is a trauma assessment of the child by a trauma informed professional needed?
- ☐ What monitoring, treatment or other supports might be needed to help the child cope with traumatic stress reactions?

> **Child's Attorney Practice Tip:** A child's behavior may be related to their trauma history. Symptoms of mental disorders can overlap with the symptoms of trauma. If a child client is exhibiting behavioral issues, consider advocating for trauma-informed services for the client.

Additional Requirements for DFPS

- ☐ Has DFPS provided any parent who retains rights notice of initial prescriptions or changes in dosage? Tex. Fam. Code § 264.018.
- ☐ Did the child receive the comprehensive, preventive Texas Health Steps medical checkup within 30 days of entering conservatorship?
- ☐ Did the child receive the 3-Day medical examination by the end of the third business day after the child was removed from the child's home? Tex. Fam. Code § 264.1076.
- ☐ Did the child receive a Texas Child and Adolescent Needs and Strengths (CANS) 2.0 behavioral health assessment within 30 days of entering conservatorship if aged 3-17 years?

Additional Requirements for Child's Attorney

- ☐ Has the child been provided the opportunity to comment on the medical care being provided? Tex. Fam. Code § 266.007.
- ☐ Have you, as the child's attorney, reviewed the child's medical care? Tex. Fam. Code § 107.003(b)(1).
- ☐ Have you, as the child's attorney, elicited from your client their view on the medical care being provided? Tex. Fam. Code § 107.003(b)(2).
- ☐ Have you, as the child's attorney, advised youth 16 and older of the right to request medical consenter designation from the court? Tex. Fam. Code § 107.003(b)(3).

FOSTER CARE & EDUCATION CHECKLISTS

School Readiness

- ☐ If the child is age 0-3, have they been assessed for Early Childhood Intervention (ECI) services? 34 C.F.R. Part 303.
- ☐ If the child is age 0-5, have they been enrolled in Early Head Start, Head Start, or Pre-Kindergarten? 45 C.F.R. § 1305.2, Tex. Educ. Code § 29.153(b).

School Stability

- ☐ Is the child enrolled in and does the child have transportation to current school? Tex. Educ. Code § 25.001(a).
- ☐ Can the child remain in current school, regardless of additional placement changes? Tex. Educ. Code § 25.001(g)-(g-1).
- ☐ If school changes do occur, can they happen at the end of grading periods?
- ☐ If school changes do occur, can changes not conflict with standardized testing or final exams?

Education Decision-Making

- ☐ Has DFPS designated an Education Decision-Maker (EDM) for the child? Tex. Fam. Code § 153.371.
- ☐ Should the parent retain, or should any other person be given, specific education-related rights? Tex. Fam. Code § 153.371.
- ☐ Has DFPS provided EDM Form 2085-E to the child's school and has information regarding the EDM been provided to the parties? Tex. Fam. Code § 263.004.
- ☐ Should a surrogate parent be appointed to make decisions regarding special education, if the foster parent is unwilling or unable to fulfill that role? Tex. Fam. Code § 263.0025.

School Enrollment

- ☐ Can the child be enrolled immediately in a new school if a change is required? Tex. Fam. Code § 264.115.
- ☐ Has the child's education record or credit transfer issues been addressed by court as necessary? Tex. Educ. Code § 25.007(b).
- ☐ If the child was receiving special education services at their previous school, is the child's Individual Education Plan (IEP) being followed at the new school and has an Admission Review and Dismissal (ARD) committee meeting been scheduled? 19 Tex. Admin. Code § 89.1050(j).

School Placement and School Success Tex. Fam. Code §§ 263.306, 263.5031.

- ☐ What does the child say about school and which school the child wants to attend?
- ☐ Is the child in an appropriate school?
- ☐ Is the child progressing academically and on grade level?
- ☐ Are there identifiable areas where the child is excelling?
- ☐ Are there any additional school supports needed?
- ☐ Is the child involved in extracurricular activities? If not, does the child want to be involved?
- ☐ Is the child experiencing any discipline issues (truancy, suspension, expulsion, restraints)?
- ☐ Was the child's status in DFPS conservatorship considered when disciplinary decisions were made? Tex. Educ. Code §37.001.
- ☐ Has the caregiver signed annual form to prohibit corporal punishment at school? Tex. Educ. Code § 37.0011.

Post-Secondary Education Fam. Code §§ 263.306, 263.5031.

- ☐ If the youth is at least grade 9, has a personal graduation plan been created and graduation endorsement been chosen (this is in addition to the Foundation High School Program in STEM, Business & Industry, Public Services, Arts & Humanities, or Multi-Disciplinary Studies)? Tex. Educ. Code § 28.025.
- ☐ Does the child have a college or career plan?
- ☐ Does the child and their caregivers know about high school graduation requirements and how to prepare and apply for post-secondary education and available funding? 42 U.S.C. § 677; Tex. Educ. Code §§ 54.366, 54.367.

Special Education

- ☐ If needed, has the child been evaluated for special education services?
- ☐ If eligible, what is the date of child's last ARD committee meeting?

- ☐ Does the child have an IEP that is current, appropriate, and in effect?
- ☐ Has transition planning been coordinated, beginning no later than age 14?

HUMAN TRAFFICKING CHECKLIST

What is Child Sex Trafficking?

- ☐ A person knowingly transported, enticed, recruited, harbored, provided, or otherwise obtained the child by any means. Tex. Penal Code § 20A.01(4); and
- ☐ Caused the child to engage in, or become the victim of, an enumerated sex offense. Tex. Penal Code § 20A.02(a)(7); or
- ☐ Received a benefit from participating in a venture that involves an enumerated sex offense; or
- ☐ Engaged in sexual conduct with a trafficked child. Tex. Penal Code § 20A.02(a)(8).
- ☐ Child under 18 years of age, regardless of trafficker's knowledge. Tex. Penal Code §§ 20A.01(1), 20A.02(b)(1).

What is Child Labor Trafficking?

- ☐ A person knowingly trafficked child with intent that the child engage in forced labor or services. Tex. Penal Code § 20A.01(2), Tex. Penal Code § 20A.01(4), Tex. Penal Code § 20A.02(a)(5); or
- ☐ Received a benefit from participating in a venture that involves forced child labor or services including knowingly receiving forced child labor or services. Tex. Penal Code § 20A.02(a)(6).
- ☐ Child under 18 years of age, regardless of trafficker's knowledge. Tex. Penal Code §§ 20A.01(1), 20A.02(b)(1).

Under what Circumstances will DFPS Investigate Trafficking?

- ☐ A person traditionally responsible for child's care, custody, or welfare;
- ☐ Compelled or encouraged the child to engage in sexual conduct including child sex trafficking, prostitution, or compelling prostitution; Tex. Fam. Code § 261.001(1)(G);
- ☐ Knowingly caused, permitted, encouraged, engaged in, or allowed a child to be trafficked for sex or labor; or
- ☐ Failed to make a reasonable effort to prevent the child from being trafficked for sex or labor. Tex. Fam. Code § 261.001(1)(L).

If Child has been Missing from Foster Care, were the Following Steps Taken? Tex. Fam. Code § 264.123 **(*Note: These apply to any child missing from foster care, not exclusively victims of trafficking*)**

- ☐ DFPS made report to law enforcement and the National Center for Missing and Exploited Children (NCMEC) no later than 24 hours after learning a child is missing or abducted. 42 U.S.C. § 671(a)(35).
- ☐ Within 24 hours of learning child missing or returned to care after missing, DFPS notified law enforcement, court, child's Attorney ad Litem (AAL) and Guardian ad Litem (GAL), and parents (unless no known location, Termination of Parent Rights (TPR), or relinquishment).
- ☐ While a child is missing, DFPS makes continuing efforts to locate the child including monthly contacts with law enforcement and former caregivers and conducts supervisory-level review.

- After a missing child returns to care, DFPS interviewed the child about why the child was missing, where the child stayed while missing, and whether the child was a victim of sex trafficking while missing.

What are Some Red Flags to Help Identify Child Trafficking Victims?

- Multiple runaways from foster care placement in a short period of time.
- Changes in school attendance habits, appearance, socio-economic status and possessions, friend groups, interests, school activities, vocabulary, demeanor, attitude, and sexual behavior.
- Unexplained injuries such as bruising, swelling, redness, cigarette burns.
- Tattoos or branding.
- Hotel key cards or refillable gift cards.

Interviewing the Child Client

WHEN TO INTERVIEW THE CLIENT

- Within a reasonable time after the appointment. Tex. Fam. Code §107.003.
- Before each hearing, meet with the child if they are over four years of age. Tex. Fam. Code §107.004.

BACKGROUND PREPARATION

Before the first interview, become familiar as possible with the client and the client's background and history.

- Do not make assumptions about the child or the case.
- Read the pleadings, affidavits, and any other documents obtained.
- Talk with the DFPS caseworkers who have been involved with the case.
- Analyze the child's world from the child's perspective, rather than a personal or default lens of viewing the world.
- Educate yourself about the trauma that the child has experienced, how the child's past trauma affects the client now, and how might it affect the child in the future.

GOALS FOR FIRST/EARLY MEETING(S) WITH CHILD CLIENT

- Build rapport and trust.
- Explain the attorney-client privilege and confidentiality in a developmentally appropriate way and the roles and responsibilities of the professionals involved in the case.
- Learn the basic facts of the case from the child's perspective.
- Assess the child's needs.
- Illicit the child's preferences related to the case, including placement, visitation, education, and normalcy.
- Inquire, in developmentally appropriate manner, about potential family or fictive kin placement options.
- Be patient and listen to your client.

LOCATION AND TIMING OF INTERVIEW

- The interview can take place where the child lives, at their school, their daycare, a park, or another location where the child feels safe and comfortable.
- The interview must take place in a private space to ensure confidentiality but should not occur behind closed doors. Tex. Fam. Code §107.004 (d-1)(2).
- The interview must take place sufficiently in advance of the hearing to allow the attorney to prepare in accordance with the child's objectives. Tex. Fam. Code §107.004 (d-1)(1).

CHILD-CENTERED INTERVIEWING

Children's Common Concerns

- When will I go home?
- When will I see my mom/dad/siblings?
- Where will I live?
- Where will I go to school?

Make the Child Comfortable

- Ask where they would like to talk (outside/inside).
- Consider bringing an age-appropriate game to play, such as Candy Land, Chutes and Ladders, or Connect Four.
- Go for a walk if the child would be comfortable doing so – being active helps promote conversation.
- Get on the child's level physically. Sit on the floor, or together at a table or bench.
- Ask for permission when taking notes.

Interviewing Techniques

- Start with age-appropriate ice-breakers. Find out the client's interests, likes, and dislikes in connection with "safe" topic areas. (*What do you like to do for fun? Who is your favorite superhero?*)
- Use simple, open-ended questions (*"Tell me how to play that game?" Why is Batman your favorite?" "What do you like or dislike about___?"*)
- Follow the child's lead, not an outline of questions.
- It is especially important to use open questioning as you approach topic areas pertinent to the facts of the case. Children are highly suggestible, so extra caution should be taken not to ask them any leading questions.
- Use the funnel approach when they are telling the story of the case. Start by letting the child narrate the entire story as they choose. Eventually narrow down questions to get specifics, based on the child's telling of the story.
- Children often say that they understand something in order to please adults, when they really may not fully understand the conversation. When explaining something to your child client, have them explain it back to you in order to check their level of understanding.
- Use their words. For example, if they call their grandmother GiGi, call her GiGi when talking to the child.
- Use of demonstration: when appropriate, ask them to show how something happened, rather than requiring them to use words – or make demonstrations to help them (*"You said you liked visiting with your mother. How much did you like it?" Show your hands close together ["this much?"] then spread them out ["this much?"]*).
- If interviewing a sibling group, talk with the group about an overview of the case, but then interview each child individually to obtain each client's direction and preserve confidentiality.
- Focus on the judge's role in making decisions. Emphasize that the judge, rather than the child's parent or substitute caregiver, gets to make decisions about what happens in their case.
- Observe the child's body language. Non-verbal communication in reaction to questions can help guide you about which topics the client is ready to talk about.

Explaining the Legal System to a Child

- Avoid jargon: instead of using the words "Full Adversary Hearing" substitute "talking to the judge about what is going on with you and your family."
- Use simple language to explain the legal roles of other people in the child's case. For example:
    - a Judge makes decisions;

- a Caseworker makes sure children are safe;
- a CASA tells the judge what they think is best for the child;
- a Therapist helps people try to make better choices; and
- a Parents' Attorney tells the judge what their mom/dad wants.

Explaining the Role of the Child's Attorney

- Differentiate the attorney role from that of DFPS or CASA: Explain to the child *"you are my boss/you get to tell me what you want to have happen and I have to tell the judge what you want."*
- Explain the counselor part of the attorney's role and prepare the child that some information and advice may be hard for them to hear at times but that you want them to know what to expect. When possible, and without breaking confidentiality, arrange for the child to have some support after such conversations.
- Differentiate confidentiality from keeping secrets. Emphasize to the child "*I can't tell anyone what we talk about unless you tell me I can, but YOU can tell anyone.*"
- Explain the exceptions to confidentiality and your obligation to report abuse/neglect under Tex. Fam. Code § 261.101(c) if they disclose that:
  - they hurt someone;
  - someone hurts them; and/or
  - they are hurting themselves.
- Explain the procedural overview of the case in a way that is developmentally appropriate given the child's age and demonstrated understanding of legal concepts.

INFORMATION THAT SHOULD BE ACQUIRED DURING THE INTERVIEW

- Where does the client want to live?
  - have them rank their choice of placement (1, 2, 3), and document their choices.
- How does the child feel about their current placement?
- What are the child's educational needs?
- What are the child's health needs, including medical, mental, therapy?
- What is the child's preferences for visitation with parents and siblings?
- Can the child identify possible relatives or fictive kin?

SPEAKING TO THE JUDGE

- Explain that they might meet the judge in courtroom or in chambers.
- Ask both if the child would like to speak with the judge and where they would like to speak to the judge.

GAINING AND KEEPING THE CLIENT'S TRUST

- Do not ask questions about past abuse.
- Do not pretend to know them or their lives.
- Do not criticize their parents or other family members.
- Never make a promise that cannot be kept.
- Sustain a client's morale but be honest. Tex. R. Prof. Conduct 2.01.

- Inform the child about the case in a developmentally appropriate manner. If appropriate, tell them about their parent's progress, that their parents love them, etc.
- Answer their questions in developmentally appropriate ways.
- Be respectful of their views, comments, concerns, and situation.
- Practice empathy.
- Pay attention to what matters to the client.

DEALING WITH A NEW ABUSE DISCLOSURE/OUTCRY

- Assume the child is telling the truth.
- Remain calm, do not overreact.
- Ask a few open-ended questions that let the child tell their story in their own words.
- Reassure the child that they did the right thing by telling you, and that what happened was not their fault.
- Do not criticize the child or the alleged abuser.
- Do not make promises.
- Let the child know this information cannot be kept a secret since you have an obligation to report it to keep them safe.

Make the report to the DFPS Hotline: 1-800-252-5400 or online Texas Abuse Hotline Website at https://www.txabusehotline.org/Login/Default.aspx.

ADDITIONAL RESOURCE

Video: Interviewing the Child Client: Approaches and Techniques for a Successful Interview at https://www.youtube.com/watch?v=OYLWkVHvgOM; ABA Section of Litigation Children's Rights Committee.

Normalcy

NORMALCY DEFINED

Federal Law

Preventing Sex Trafficking and Strengthening Families Act of 2014

- Required states to implement a "reasonable and prudent parenting standard" giving foster parents the authority to make day-to-day decisions affecting children in their care regarding extracurricular, enrichment, cultural, social, or sporting activities.

Texas adopted a definition of "age-appropriate normalcy activity" as well as a definition of a "reasonable and prudent parent" effective September 1, 2015. See below for more specifics.

Age-Appropriate Normalcy Activity Defined Tex. Fam. Code § 264.001(1)

An activity or experience:

- 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 the state is generally allowed to participate, including extracurricular activities, in-school and out-of-school social activities, cultural and enrichment activities, and employment opportunities.

Reasonable & Prudent Parent Standard of Care Defined Tex. Fam. Code § 264.001(5)

What 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.

Factors to consider when deciding whether an activity is appropriate:

- Overall health and safety of the child;
- Child's age, maturity, and development level;
- Best interest of the child based on the caregiver's knowledge of the child;
- Appropriateness of a proposed activity and any potential risk factors;
- Behavioral history of the child and the child's ability to safely participate in a proposed activity;
- Importance of encouraging the child's social, emotional, and developmental growth; and
- Importance of providing the child with the most family-like living experience possible.

DFPS Best Efforts Tex. Fam. Code § 264.125

DFPS shall use its best efforts to normalize the lives of children in the managing conservatorship of DFPS by allowing substitute caregivers, without prior DFPS approval, to make decisions similar to those which a parent would be entitled to make regarding a child's participation in age appropriate normalcy activities.

Normalcy in Practice

For youth in foster care, normalcy means being able to act like their friends act and feel like part of a family. This includes:

- Being part of a caring family that supports them.
- Doing the normal daily and extracurricular activities they choose.
- Being a person, not a label.
- Making decisions, trying new things, and sometimes making mistakes.

Practice Tips:

- Ask early and often about a youth's interests and desired activities, including at school and in the community.
- Treat a young person as an individual. Take the time to get to know the client and what normalcy means to them.
- Rethink visitation. Allow relationship building time and activities, including with family, friends, and community members.
- Be creative in supporting youth's interests.
- Encourage the community to engage in the lives of the youth as skill trainers, transportation providers, or support families.
- Understand and respect normalcy decisions of the caregiver.
- If the parties cannot agree on normalcy activities, utilize motions for further orders so that the court can resolve disagreements and enforce compliance if the court has ordered access to the activity.

Paternity

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 unrebutted presumption of a man's paternity of the child. Tex. Fam. Code § 160.204.;
- An effective acknowledgment of paternity under Subchapter D of Tex. Fam. Code § 160.204, 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 consent to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child. Tex. Fam. Code § 160.201.

Types of Fathers as Defined in the Texas Family Code

- Presumed
- Alleged (or putative)
- Acknowledged
- Adjudicated
- Unknown

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;
- 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 it 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 Vital Statistics Unit;
    - 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; or
    - 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.

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. Any party, an attorney ad litem, or guardian ad litem for the child may request that genetic testing be ordered by the court to establish paternity.

As soon as a legal father is established, any other potential candidates can be dismissed.

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 no later than the 31st day after the child's birth. The registrant has the responsibility of keeping his information current with the VSU. 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 may have occurred in another state, the petitioner must obtain a certificate from the paternity or putative father registry of that state.

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.

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 with the Department of State Health Services is the equivalent of an adjudication of paternity.

Estoppel of Paternity

The Texas Legislature has recognized that in certain circumstances it may be in the best interest of the child not to have the child's understanding of their paternity disrupted. The value of maintaining the child's relationship with the man identified to the child as their father may prevent interested parties from litigating the issue, including denying a Motion for Genetic Testing. *See* Tex. Fam. Code §§ 160.607, 160.608, 160.609.

Child's Attorney Practice Tip: For a child without an Adjudicated or Presumed Father, asking for DNA testing on any alleged father who is present at the hearing can save time and prevent delays to permanency. If the petition does not include a request to terminate the rights of the unknown father, a child's attorney should consider including the request in their counter-petition.

Placement

Attorneys for parents and children should be prepared to address the following issues regarding a child's placement.

PLACEMENT APPROPRIATENESS

- Is the current placement the least restrictive and most family like setting for the child?
- Is the placement culturally and linguistically appropriate?
- Is the child or the parent requesting a placement change?

> **Practice Tip:** Prior to the hearing, determine if an agreement can be reached for a return to parent, placement with noncustodial parent, relative, or fictive kin. If so, draft a Rule 11 Agreement to present to the other parties. If not, consider filing a motion for such relief.

KINSHIP AND FICTIVE KIN OPTIONS

- If the child is in a foster care placement, what efforts were/are being made to explore kinship and fictive kin placement options?
- Have the parents and the child been asked to identify kinship and fictive kin placement options?
- Have home studies been started? If the home study will be outside of Texas, it will involve the Interstate Compact on the Placement of Children (ICPC) unless it involves a biological parent. Out of state home studies take significantly longer than in-state home studies and must be initiated as soon as possible in order not to delay permanency. Please see ICPC information in the *Federal Law Issues* section of this tool kit.
- If relatives were identified but deemed inappropriate by DFPS, what were the specific reasons? Was the placement assessed under Tex. Fam. Code § 264.754.?
- Are there services or supports available to mitigate any safety risks identified in the home study?
- If the child is in a kinship placement, has the placement been provided with appropriate training, services, and support to care for the child?

> **Practice Tip:** If DFPS is opposed to placement with a non-custodial parent, relative, or fictive kin due to their previous DFPS or criminal history, conduct an independent investigation into that history. While DFPS may not be able to agree to placement due to policy, a judge may find that certain criminal history that is in the distant past and/or unrelated to a safety issue may not be a current safety issue for purposes of placement. Child protection history that is remote, was ruled out or unable to determine, or where the party was not a perpetrator but rather the subject child or a collateral, also may not be a current safety issue.

THE CHILD'S NEEDS

- Does the placement meet the child's education needs and provide educational continuity?
- Is child's trauma being sufficiently considered in determining the child's placement?
- Is the placement knowledgeable about helping children with traumatic stress reactions and how to cope with those reactions? If not, what training or support is needed/available?
- Does the placement understand the reasonable and prudent parent standard and support normalcy for the child?

- Are the siblings placed together? If not, what efforts were made to attempt to place them together? Is there a safety issue that prevents the siblings from being placed together? How frequently are sibling visits occurring? Are the siblings able to regularly communicate with each other?

Reasonable Efforts

DFPS is required to make reasonable efforts to prevent the need for removal of the child. If removal is authorized, DFPS is required to make reasonable efforts to safely return the child home. Although there is no definitive list of what constitutes reasonable efforts, the questions below are modified from the National Council of Juvenile and Family Court Judges Enhanced Resource Guidelines and are designed to elicit suggested elements of what could be considered reasonable efforts.

QUESTIONS TO ASK REGARDING REASONABLE EFFORTS TO AVOID REMOVAL

- What were the specific safety risks leading to removal?
- What services were considered and offered to allow the child to remain in the home? Were those services culturally appropriate? Were they rationally related to the safety risk? Did they take into account the family's strengths and needs?
- What was done to create a safety plan to allow the child to remain at home or with another designated caregiver without requiring court involvement?
- Would the removal of a person from the home have allowed the child to safely remain home?
- Would the addition of a person to the home have allowed the child to safely remain home?
- Was the family offered the opportunity to participate in the Alternative Response Program or Family Based Safety Services? If so, why was AR or FBSS unsuccessful?
- Was the family ordered to participate in Court Ordered Services (COS)? If so, why was COS unsuccessful?
- Were non-custodial parents, paternal and maternal relatives identified and evaluated?
- Were there any pre-hearing conferences such as a Family Team Meeting or Family Group Conference? Who was there? What was the outcome?
- Does the family have a history with DFPS? Did the history influence DFPS's response to this situation?
- Are there orders that could be made under Tex. Fam. Code § 264.203 that would require the parents to participate in services but allow the child to remain safely in the home?

QUESTIONS TO ASK REGARDING REASONABLE EFFORTS TO ALLOW THE CHILD TO RETURN HOME

- What is preventing this child from safely going home today?
- What is the current immediate safety threat?
- What type of safety plan could be developed and implemented in order for the child to return home today?
- What specifically is preventing the parents from being able to provide the minimally adequate standard of protective care?
- Will the removal of a person from the home allow the child to safely return home?
- Will the addition of a person to the home allow the child to safely return home?
- Is a monitored return or a transitional monitored return appropriate? If not why not?
- If the safety threat is too high, do the parents understand what are the conditions required for the child to safely return?
- What services can be arranged to allow the child to safely go home today?
- How are the services rationally related to the specific safety threat?
- How is the family, including children and extended family, engaged in the development and implementation of the services?

- What efforts has DFPS made to assist the family with services?
- Does the family believe the services take into account the family's strengths and needs?
- Has the family asked for additional or alternative services?
- What evidence has DFPS provided that the services meet the needs of the family and have produced positive outcomes for families with similar issues?
- How are the services specifically tailored to the culture and needs of this child and this family?

Visitation

Temporary Visitation Schedule

A temporary visitation schedule is required at an early stage in a case for each child whose goal is reunification:

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 TMC 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.

The caseworker develops the schedule with the child's parents to the extent possible.

A schedule is not required for a child if:

- The court has made or will make a finding of aggravated circumstances; or
- The child has been abandoned without identification. Tex. Fam. Code § 262.115.

The temporary schedule remains in effect until the visitation plan is developed.

The caseworker must file the family's visitation plan no later than 10 days before the Status Hearing. Tex. Fam. Code § 263.107(d).

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.

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.

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.

> **Practice Tip**: Attorneys for parents and children can reorient contacts between parents and children from "visits" to "family time" by stressing the importance of both the length and the quality of time that children spend with their parents, separated siblings, and other important family members.

Attorneys can ask the court to consider these factors:

- Whether visitation can include normal parenting activities such as sharing meals, medical and therapeutic appointments, and school events;
- Whether there is a safety issue that necessitates supervised visitation (Are the children older? Was the reason for removal neglect?);

- Whether there are community organizations that can supervise visits when supervision is necessary;
- Whether there is a need for sibling visitation, independent from parent visitation;
- Whether the visitation schedule factors in the parent's resources for transportation and time away from work;
- Whether the child has an interest in expansive visitation that is independent from the parent's progress in services; and
- If a child is having a negative reaction at visitation, whether there is a way to provide trauma-informed support to the parent and child to assist them with safe, continued visits rather than reducing visitation.

Children with Disabilities

Attorney-Client Relationship

A child's intellectual or developmental disability does not necessarily mean that the child is not competent to form an attorney-client relationship. Neither does a child's IQ alone demonstrate incapacity. It is imperative for a child's attorney to become familiar with child development stages, interview the child, make an independent determination if that child can form an attorney-client relationship, and determine whether the attorney can or must follow the client's directives. If the child cannot meaningfully direct representation, the child's attorney must follow the procedures outlined in Tex. Fam. Code § 107.008 for substituted judgment.

Supplemental Security Income (SSI)

DFPS is required to assess and determine long-term care plans for youth who have qualifying disabilities. DFPS is responsible for applying for SSI on the youth's behalf. Written confirmation of benefits from the Social Security Administration is necessary to understand exactly what benefits the youth is entitled to when they exit foster care. DFPS has Regional Specialists for SSI and they can be an effective resource for ensuring the client obtains appropriate resources.

Effects of SSI on a Child's Placement

- If a child receives SSI and they are in DFPS-contracted substitute care, the SSI payment goes to the state to defray the cost of the child's care.
- If a child receives SSI and is placed with a kinship caregiver, the kinship caregiver can receive the SSI payment either directly or once it has passed through DFPS.
- If the child is adopted, the SSI payment is taken into consideration when negotiating the adoption subsidy.

Taking Action if Services are Denied

All children in foster care are automatically enrolled in the STAR Health Medicaid plan regardless of any prior Medicaid eligibility or enrollment in other Medicaid Plans. At this time, SuperiorHealth is the insurance provider for STAR Health, so children in DFPS conservatorship can only go to providers who accept SuperiorHealth. If a client is denied a service by SuperiorHealth, the denial can be appealed. Typically, there is a lengthy process for administratively appealing Medicaid service denials. Rather than appealing the SuperiorHealth decision, it may be more efficient to petition the court to order the service under Tex. Fam. Code 266.004(e). However, it is important to note that SuperiorHealth can only be ordered to provide services that are both "medically necessary" and part of the Texas Medicaid Plan. Any other healthcare service ordered by the court must be paid for by different means.

Intellectual Disabilities

Children with Intellectual and Developmental Disabilities (IDD) can be supported long-term after aging out of DFPS care through the Home and Community-Based Services (HCS) program that provides housing, therapeutic interventions, and other in-home supports for the life of a child with IDD. Though the most common way to qualify for an HCS program slot is to be put on a waiting list, most individuals wait over 10 years for an HCS slot. There are special slots in the HCS program for children aging out of DFPS custody. To qualify for one of these special slots the child must have a Determination of Intellectual Disability (DID) from the Local Mental Health Authority (LMHA).

> **Child's Attorney Practice Tip:** Make sure the DFPS Developmental Disability Specialist (DDS) has registered an eligible youth for HCS, if needed.

Child's Attorney Practice Tip: The process to apply for and receive disability-related benefits can be a lengthy one. If the child has a disability and may be entitled to services, it is critical to have conversations with the caseworker and/or DFPS Disability Specialists as soon as practicable and on a regular basis.

Guardianship

Competency is generally determined based on whether the individual can continue to make decisions for themselves with supports in place rather than losing their rights through a guardianship proceeding where a guardian is appointed to make decisions on their behalf. However, a child with an intellectual disability or other disability does not automatically qualify for adult guardianship once they turn eighteen. A probate court still must appoint Texas Department of Aging and Disability Services (DADS) or another guardian through a probate proceeding and a certificate of medical exam (CME) must be completed by a physician and presented to the court documenting the person's incapacity. DADS, through the Texas Health and Human Services Commission (HHSC), is the state agency that is appointed as the guardian for a qualifying child if there is not another adult to take guardianship, and they can accept or reject a guardianship application.

Child's Attorney Practice Tip: If a child client will require a guardian once they become an adult, it is important to begin the application process well before the client turns 18 as qualification for guardianship is not automatic.

Steps to Guardianship

By the time a youth with disabilities turns 16, the caseworker must consider whether the youth will have the ability to provide for their own food, clothing, shelter, oversee their own healthcare, and manage their own finances.

The CPS caseworker should begin searching for an interested and appropriate potential guardian when a youth in care with disabilities turns 16 and should consult with the CPS Developmental Disability Specialist (DDS) and CPS supervisor regarding whether alternatives to guardianship or possible alternate guardians. If there is not an appropriate alternate potential guardian or least restrictive alternative available, the CPS caseworker should begin collecting information and necessary documentation for the referral to HHSC to request a guardian.

While CPS may refer a youth to HHSC at age16, it is preferable for CPS to wait until the youth is at least 17 since a guardianship application cannot be filed more than 6 months prior to the youth's 18th birthday. Prior to making a referral to HHSC, the CPS caseworker should contact the CPS SSI coordinator to ensure the youth is receiving active SSI benefits, and if benefits are not active, the CPS caseworker must work with the SSI coordinator to apply or have benefits reinstated.

Once the SSI benefits for the youth with disabilities have been established and confirmed and all supporting documentation required has been gathered, the CPS supervisor launches the Aging Out of Care (AOC) stage in IMPACT, the DFPS case management system. The CPS caseworker completes the referral form and submits it to the DDS. The DDS submits the guardianship referral via IMPACT and emails a copy of the referral form and all supporting documentation to the Guardianship Supervisor in the region where the youth is currently residing.

Alternatives to Guardianship

A guardianship restricts the legal rights of an individual with a disability and may not always be appropriate. Courts must ensure that the least restrictive arrangement is made for a youth with disabilities, so the youth has their needs met and their rights intact. Sometimes a youth may only need a limited guardianship that is tailored to the specific needs they have. For instance, the right to vote, the right to drive, and the right to marry might all remain intact. Restoring a right after it has been removed via guardianship can be challenging and it is preferable to leave as many rights as possible available for the individual.

Some youth do not need a guardianship at all and can be better served with a Supported Decision-Making Agreement (SDMA), which is a less-restrictive option that allows the youth to retain all decision-making rights while having a supporter who helps them to understand and process the decisions they make.

Child's Attorney Practice Tip: Make sure that the proper department at DFPS is notified when a youth who receives SSI is aging out of foster care so that DFPS can resign as the youth's designated payee. Once DFPS resigns as the payee, the youth can go to the Social Security Administration office to become their own payee or designate a new payee. If the youth cannot manage their own finances but does not need a guardian, local resources may help find a designated payee to help the youth manage their finances.

Transition Planning

The Section 811 Project Rental Assistance Program provides project-based rental assistance for extremely low-income persons with disabilities linked with long term services and allows persons with disabilities to live as independently as possible through the coordination of voluntary services and providing a choice of subsidized, integrated rental housing options. Referrals to Section 811 must be made by the DFPS primary case worker in coordination with the DFPS Developmental Disability Specialist. There is also a waiting list for this program, though it is much shorter than the waitlist for HCS.

Dual Status Youth

A dual status youth is a youth who has or had concurrent involvement in both the child welfare and juvenile justice systems. When representing a dual status youth there are important issues to consider.

INFORMATION GATHERING

Questions to ask when a client has been detained (arrested) for an offense:

- When and where were they detained (arrested)?
- What are the pending allegations/What is the alleged offense?
- Has a petition been filed? Is the child eligible for a diversion program?
- Is the youth currently in detention? How long have they been there? When is the youth's next detention hearing scheduled? Is juvenile probation recommending release?
- Has the child been appointed a juvenile defense attorney on the delinquency case? If so, make contact with the attorney as soon as possible to introduce yourself, learn about the offense, and provide any information about the child that can assist the juvenile defense attorney in their representation.

It is important to research these questions with the child, the caseworker, the juvenile defense attorney, and the juvenile probation officer, depending on the timeline of the case.

CONFIDENTIALITY

Because the objectives of the juvenile defense attorney (handling the delinquency case) and the attorney ad litem (as well as others working on behalf of the youth on the CPS case) may not necessarily align, it is important for the two attorneys or legal teams to enter a Memorandum of Understanding (MOU) at the very outset of representation to identify what information, if any, may be shared between attorneys and legal teams.

It is critically important to advise a client not to discuss their delinquency case with anyone besides their juvenile defense attorney (unless MOUs have been signed allowing for information sharing). Information about the allegations is confidential and protected by the Fifth Amendment and the juvenile defense attorney should advise the clients of their Fifth Amendment right to remain silent as to any details regarding a current criminal investigation or ongoing case. That may include information that the juvenile defense attorney will not want to disclose to the child's attorney, or have their client disclose to the child's attorney, without an MOU.

In the absence of an MOU governing information sharing, the Rules of Professional Conduct dictate that confidentiality is imperative. Under these rules, the juvenile defense attorney should advise the client not to speak or discuss the delinquency case or any of its details with anyone (other than their juvenile defense attorney).

In the absence of an MOU, an issue that may arise is that the CPS caseworker or investigator may ask the client about their delinquency charges, and the client may respond without understanding the implications for their delinquency case.

COMMUNICATION WITH JUVENILE DEFENSE COUNSEL

Notwithstanding the existence of an MOU, it is crucial to establish open lines of communication with a child client's juvenile defense attorney. A child's CPS attorney may know the client and their family history and circumstances better than the juvenile defense attorney. A child's CPS attorney can provide information that assists in a better and more expedient resolution on the delinquency case, including:

- Mitigating circumstances due to child's CPS case and placement;

- Services the child needs;
- Services the child is already receiving;
- Best ways to communicate with the child;
- Possible resources of support known in CPS case but not in juvenile case; or
- Attendance at detention hearings (if child is in detention) to advise court of placements available to the child, in order to allow for expedited release from detention.

Court-appointed juvenile defense attorneys often have heavy caseloads, which can slow their response time when contacted, but it is important to initiate a conversation as soon as possible to discuss the common client's case.

Important things to discuss include:

- Upcoming court dates for both the CPS and Juvenile Case;
- Progress of the case;
- The general strategy of the juvenile defense attorney;
- The status of plea negotiations with prosecution (i.e., what is the current offer, what are the possibilities in the case for pre-petition diversion programs, deferred adjudication, or services as part of a plea negotiation); and
- Disposition options in the juvenile case, including placement options if the child is not going to be released on probation.

Child's Attorney Practice Tip: Make it a priority to check in with the juvenile defense attorney for updates regularly, at least before each CPS statutory hearing, and more often if child is in detention.

UNDERSTAND HOW THE JUVENILE CASE AFFECTS THE CPS CASE

Services Overlap

It is important for the juvenile court to determine what services are being provided through the CPS case. Must they be duplicated or substituted by juvenile probation services, or are the services being provided in the CPS sufficient? Ask the court to allow consolidation of services as much as possible. This is especially important if transportation and/or time management is necessary for a caregiver to provide so that the child is able to receive services.

Consequences of Dispositions – Sealing Juvenile Records

Once a juvenile case is concluded or nearing its end, whether it was disposed through a pretrial diversion program or through formal adjudication and disposition, it is imperative to take steps to ensure that the child's juvenile records will be sealed. Even if the case was resolved through a pretrial diversion program without a charge being filed, the child will still have a juvenile record that can have numerous negative collateral consequences, such as:

- Barriers to obtaining housing;
- Difficulty with successful applications to colleges or trade schools;
- Obstacles in obtaining employment;
- Problems applying for military service; and/or
- Interference with immigration cases.

Most juvenile records, including many felony records, can be sealed automatically or via application when a youth turns 17. Youth transitioning out of foster care are especially in need of having their records sealed once they become eligible to ensure a better transition into adulthood. There are both non-profit agencies and juvenile attorneys that will seal juvenile records via Application for Sealing of Files and Records. Please see the *Additional Resources* section of this tool kit for more information.

Child's Attorney Practice Tip: Constructing a timeline with the delinquency case dates and the statutory deadlines for the CPS case can increase understanding of how the two cases may overlap.

Inability to Care & Parents with Disabilities

INABILITY TO CARE

In certain circumstances, DFPS may file for termination of a parent's rights based on the parent's mental illness or deficiency without alleging one of the termination grounds in Tex. Fam. Code 161.001. However, a mental illness or disability alone is not sufficient for termination of parental rights.

INVOLUNTARY TERMINATION: INABILITY TO CARE FOR CHILD Tex. Fam. Code § 161.003

The court must find:

- That the parent has a mental or emotional illness, or mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child;
- That the illness or deficiency will probably continue to render the parent unable to provide for the child's needs until the child's 18th birthday;
- That DFPS has been TMC or Sole Managing Conservator for at least six months prior to the termination hearing;
- That DFPS made reasonable efforts to return the child to the parent; and
- That termination is in the child's best interest.

When representing a parent who has a mental or emotional deficiency, an attorney still owes their client a duty of zealous advocacy to ensure their client's rights are protected and that DFPS makes reasonable efforts to return the child to the parent.

Federal law prohibits governmental entities including DFPS and the courts, from discriminating against people with disabilities in their programs, services, and activities. Once it is determined that a parent or caregiver has an intellectual or developmental disability and/or a mental illness, DFPS is obligated to work with the family to identify possible services and supports that can assist the caregiver in meeting the needs of their child. If a caseworker suspects that a parent has an intellectual or mental disability, they must contact the Developmental Disability specialist at DFPS so that a member of that team can work with the parent on whatever services are required. This policy is based on Section 504 of the Rehabilitation Act of 1973, as well as the Americans with Disabilities Act, which requires governmental entities to make accommodations to people with disabilities.

PARENTS WITH DISABILITIES

Parents with mental or intellectual disabilities are equally entitled to accommodations as those with physical disabilities. An attorney may need to advocate for transportation assistance for a parent, relocation of a service or visit to an accessible facility, or referral to agencies that can help with various supports.

DFPS is legally mandated to make reasonable accommodations and modifications for disabled parents and caregivers so that they have equal access to services, and so that they can complete the services according to their abilities.

> **Parent's Attorney Practice Tip:** Accommodations, modifications, and supports must be individualized, and there is no one size that fits all. Therefore, it is important to understand the clients' strengths and limitations to effectively advocate for them and the accommodations needed.

Incarcerated Parents

Generally, an incarcerated parent has the same rights and duties as a parent who is not incarcerated, and an attorney owes their client the same duties of zealous advocacy to protect their client's rights and ensure reasonable efforts are made to return the child to the parent.

The Texas Department of Criminal Justice (TDCJ) is the agency which manages the overall operation of the state's prison system, parole, and state jail systems. The agency also provides funding, training, and certain oversight of community supervision.

TYPES OF CORRECTIONAL FACILITIES

Correctional Centers (Private)

These are privately operated correctional centers that house Correctional Institutions Division (CID) offenders.

County Jails

County jails are managed by the county sheriff or designee. The county jail facility's primary role is to hold defendants awaiting trial or those who have been convicted and sentenced to county jail.

Federal Prisons

Federal prisons are managed and run by the U.S. government and houses inmates who have been convicted of a federal crime. The Federal Bureau of Prisons is responsible for the centralized administration of federal prisons.

State Jail Facilities

State jails house individuals who have committed felony crimes (primarily property crimes and low-level controlled substance offenses) that have a maximum sentence of two years and a mandatory term of community supervision. Some state jails are privately operated and house state felons as well as CID transfer offenders.

HOW TO LOCATE AN INCARCERATED PARENT

To locate a parent in a TDCJ Facility (a Texas prison or State Jail) contact the Office of Classification and Records in Huntsville, Texas at:

- 1-936-437-6564 or 1-800-535-0283;
- Visit the TDCJ website at https://www.tdcj.texas.gov/; or
- Look for the Quick (Link) box and use the list just as the TDCJ website has it.

Parents Not Under TDCJ Supervision

The parent is confined in a facility other than TDCJ, the following links may be useful:

- Federal Bureau of Prisons (BOP) (contains online inmate locator). The BOP Office of Public Affairs phone: (202) 307-3198; Email: webmaster@bop.gov.
- Victim Information and Notification Everyday (Vine Link) to locate a parent who may be incarcerated in another State.
- Corrections Department by State to locate a parent in another state.

The following are some additional links not supported or endorsed by TDCJ:

- Prison Search Ancestor Hunt
- Corrections.com

Parents in County Jails

If a parent is incarcerated in a county jail, conduct a search of the county's website in order to locate the parent or contact the county jail directly.

ATTENDANCE AT HEARINGS AND TRIAL

Even if a client is incarcerated, they still have a right to be present at the statutory hearings.

> **Parent's Attorney Practice Tip:** If a client wants to attend a hearing or trial via phone, contact the correctional facility well before the scheduled hearing to determine what is required to make the client available at the scheduled time. If the client wants to attend in person, a bench warrant will be required and the best practice is to work with the court and the attorney representing DFPS to facilitate the bench warrant.

SERVICE PLAN

A client's incarceration does not mean they cannot participate in services. To find out what services are available to the incarcerated parent, contact the facility or go online to https://www.tdcj.texas.gov/divisions/rpd/index.html to view Rehabilitation Programs Services, where the TDCJ inmate services are located. Some county facilities also have classes available for their inmates. Attorneys should contact the jail to obtain a list of services available for their parent client and inquire into programming available both on-site and through distance learning. There may be programs that parents can participate in via mail correspondence even if classes are not being offered on-site.

> **Parent's Attorney Practice Tip:** Contact the correctional facility about the facility's visitation policy, including procedures and restrictions (such as whether all visitors must be on the offender's visiting list before being approved to visit) and determine if there is a social worker or chaplain who can help with arranging visits at the facility.

VISITATION

A client's incarceration does not mean that visitation with their child is impossible or inappropriate.

If the court is reluctant to order visitation with an incarcerated parent, there are studies which indicate that allowing contact between children and parents who are incarcerated can mitigate the harms of separation for the child. Please see the *Additional Resources* section of this tool kit for more information.

If visitation is ordered by the court, it is important for the parent's attorney to explain to the parent that they need to notify their attorney if the parent is not permitted visits by the facility as a result of disciplinary sanction, because of facility security, transfer to another facility, or release from a facility or program.

An incarcerated parent may send written correspondence to their child. However, it is prudent to advise the client that the content of written correspondence is not confidential and discuss what information is and is not appropriate to include in written letters.

PLACEMENT

A client's incarceration does not mean that they are unable to assist in providing information about or facilitating a placement for their child. Relatives and fictive kin of an incarcerated parent may be placement options or other sources of support for the family. A client should be given the opportunity to provide that information as soon as possible after appointment. Please see the *Current Issues* section of this tool kit for more information when considering placement issues.

Older Youth in Foster Care

An attorney representing teenage youth in foster care must be aware of several specific duties the attorney, DFPS, and the courts have regarding older youth, as well as best practices that can help prevent negative outcomes for youth who age out of DFPS care.

LEGAL REQUIREMENTS BEFORE A YOUTH'S 18TH BIRTHDAY

MEDICAL CONSENT

Child's Attorney Duties Tex. Fam. Code § 107.003(b)(3)(A)

Once a child turns 16, the child's attorney must advise the child of their right to request the court authorize the child to consent to the child's own medical care and file a motion if the youth wants to request that authority.

IDENTIFICATION ISSUES

DFPS Duties Tex. Fam. Code § 264.121(e), (e-1)

By age 16, DFPS must provide youth with original or certified copies of the following:

- Birth certificate
- SSI card
- Texas Driver's License or identification card

By age 18, DFPS must also provide youth with the following:

- Immunization records
- Health passport
- Proof of Medicaid enrollment

Child's Attorney Duties Tex. Fam. Code § 107.003(b)(3)(B)

Once a child turns 16, the child's attorney must ascertain whether the child has received:

- Certified Copy of their Birth certificate
- SSI card
- Texas Driver's License or Texas identification card
- Any other documents DFPS determines appropriate

Child's Attorney Practice Tip: A child's attorney should also ensure the youth has original copies of all immigration documents. It is essential that the youth knows and understands their immigration status and has all their original immigration documents. Assumptions about citizenship can have disastrous consequences for the youth later in life. Do not rely on third-hand explanations and seek outside immigration expertise if necessary. If the youth appears to not have immigration status or immigration documents, attorneys should verify that DFPS staff is working on obtaining legal immigration status or documentation of their status and regular progress is being made. See the *Special Immigrant Juvenile Status* section of this tool kit for more information.

Child's Attorney Practice Tip: A child's attorney should also ensure youth have access to their credit report and receive a copy of it before exiting care.

Child's Attorney Practice Tip: Verify that each identification document has the youth's correct name and that the name is spelled correctly. If there is a problem with the youth's name or if the youth wants to change their name, it is much easier to correct the mistake or change the name before the youth turns 18.

PREPARING FOR TRANSITION TO ADULTHOOD

Preparation for Adult Living

The Preparation for Adult Living (PAL) program involves an independent living skills assessment, life skills classes, transition planning, conferences, and training events. Services may start as early as age 14 but must absolutely begin by age 16. Tex. Fam. Code § 264.121. PAL services are usually offered by local service providers who will also provide voluntary aftercare case management for the youth between age 18 and age 21. DFPS has dedicated PAL coordinators to help youth access benefits when they leave care.

Circle of Support (COS) meetings will be scheduled for youth who are on track to age out of foster care. A COS is centered on the youth and is the preferred method of transition planning. The youth is permitted to invite foster care providers, teachers, parents, siblings, relatives, mentors, attorneys, CASAs, and friends. If an initial COS does not adequately address the youth's transition needs, a child's attorney can request an additional COS and help the youth plan ahead for the meeting.

Extended Foster Care

Youth who wish to remain in extended foster care after their 18th birthday must meet one of the following eligibility criteria:

- Attend high school or a program leading to a high school diploma or a high school equivalency certificate (GED); or
- Attend college or higher learning institution, or post-secondary vocational program or technical program (6 credit hour minimum); or
- Participate in an employment program or activity that promotes or removes barriers to employment; or
- Work at a job at least 80 hours per month; or
- Have a documented medical condition that limits other activities.

Supervised Independent Living (SIL) is a program available only to youth in extended foster care that allows them to live independently in a supervised living arrangement while their expenses are paid by DFPS. SIL placement locations can be apartments, college dorms, or shared housing.

If a youth chooses not to remain in extended foster care, they can return any time before they turn 21, as long as there are placements available. This is an available option regardless of whether the Trial Independence period has ended or if the court still has Extended Jurisdiction.

TRANSITIONAL SERVICES AND BENEFITS

Healthcare

- Former Foster Care Children's Medicaid (FFCC): Young adults are eligible only if they received federally-funded Medicaid on their 18th birthday; this benefit is not means-tested; youth are eligible for this benefit until age 26.

- Medicaid for Transitioning Foster Care Youth (MTFCY): Young adults are eligible for this benefit if they were not receiving federally-funded Medicaid, but were in DFPS conservatorship, on their 18th birthday. Youth are eligible for this benefit until age 21 and must be under 400% of the Federal Poverty Guideline.
- Maintaining Medicaid Eligibility: All Medicaid recipients, including youth formerly in foster care, must renew their Medicaid eligibility once every 12 months. To ensure continuous coverage, youth must provide their current mailing address to HHSC. If the youth changes their address without noticing HHSC, and HHSC receives returned mail and cannot locate the youth, the youth's Medicaid benefits will be denied. A youth can report an address change online through YourTexasBenefits.com at https://www.yourtexasbenefits.com/Learn/Home, the Your Texas Benefits mobile app, calling 211, in person at a local Medicaid eligibility office or by in writing by mail or by fax. Youth must also respond to requests for information from HHSC and may need to verify that they are a Texas resident and/or their immigration status.

Transitional Expenses

- Transitional Living Allowance (TLA): This cash benefit of $1,000 is available in two separate payments of $500 each, and is available to young adults who were in foster care on their 18th birthday, who completed the PAL life skills class, and who are transitioning to independent or supervised living. Recipients must meet the same eligibility criteria as extended foster care and must receive the benefit before their 21st birthday. CPS Handbook § 10241.
- Aftercare Room and Board (ARB): This is an emergency benefit of up to a maximum of $3,000 paid, in increments of no more than $500 per month, directly to landlords or utility companies or as a grocery store gift card. It is available to young adults who were in foster care on their 18th birthday and demonstrate emergency financial need. They must meet the same eligibility criteria as extended foster care and must receive the benefit before their 21st birthday. CPS Handbook § 10251.

Education

- Tuition/Fee Waiver: This benefit waives tuition and fees for all Texas public institutions of higher education (including 2-year colleges, 4-year universities, and technical schools). Eligible youth or young adults, including some youth who are reunified with parents, must enroll in a dual credit or college credit course before their 25th birthday to lock in the benefit. Tex. Educ. Code § 54.366. Adopted youth may also be eligible for the waiver. Tex. Educ. Code § 54.367.

> **Child's Attorney Practice Tip**: The eligibility criteria for the tuition and fee waiver, as well as assessing which programs qualify for the waiver, is complex. Contact the regional Preparation or Adult Living specialist to verify eligibility.

- Education and Training Voucher (ETV): This is a federal cash benefit of up to $5,000 per year for expenses related to college or training programs (e.g., housing, food, books, childcare, computer equipment, other expenses). Eligible young adults can receive the benefit until age 21 and can continue using the benefit until age 23 if using at age 21 and maintaining satisfactory academic progress (available to more than only aged out foster youth). CPS Handbook § 10320.

Child's Attorney Practice Tip: Some aftercare benefits are contingent based on how the child exits care. It is important to advise the client on the benefits which might be available under each exit type, including an adult adoption after the client turns 18.

EXTENDED JURISDICTION

Extended jurisdiction allows the court to retain a youth's case on the court's docket after the youth turns 18, hold review hearings to determine whether the youth is receiving appropriate services, and order DFPS to provide certain services to the youth. The court may not compel a youth to attend a hearing and the youth still maintains all the rights of any adult of the same age. Tex. Fam. Code §§ 263.601-263.608. When a young adult turns 18, DFPS conservatorship is dismissed. The young adult can choose to either remain in Extended Foster Care (EFC) or can exit DFPS' care to live independently, also known as Trial Independence (TI). When a young adult makes a decision to remain in EFC or to begin TI, the young adult is considered to be in Extended Court Jurisdiction.

Path 1 – Extended Foster Care

For a young adult in EFC, a review hearing is held every 6 months. A young adult can exit EFC for TI at any time prior to age 21. For those remaining in EFC, the court's extended jurisdiction ends at age 21.

A young adult who stays in EFC may or may not be receiving Transitional Living Services (TLS). TLS are multipurpose and available to youth ages 14 up to 23 and include circles of support, preparation for adult living classes, education and training vouchers, college tuition and fee waivers, and other related services and support of young people 16 to 21 or up to 22 years of age who are currently or formerly in foster care, or who are transitioning out of care.

Path 2 – Trial Independence

If at age 18 the young adult decides to not stay in EFC, he or she exits to Trial Independence (TI) which automatically extends up to 6 months. A court order is required to extend the TI up to 12 months. The young adult can choose to return to EFC during the TI period or at any time before age 21. A young adult may or may not use TLS while in TI but receiving TLS effects the court's extended jurisdiction over the youth's case.

No hearings are required by the court during TI, but the young adult may request a hearing, or the court may set hearings on its own motion. At a hearing, a court may review and make orders regarding the services being provided to youth, identification documents the youth may need, and sibling contact if the youth has siblings in DFPS conservatorship.

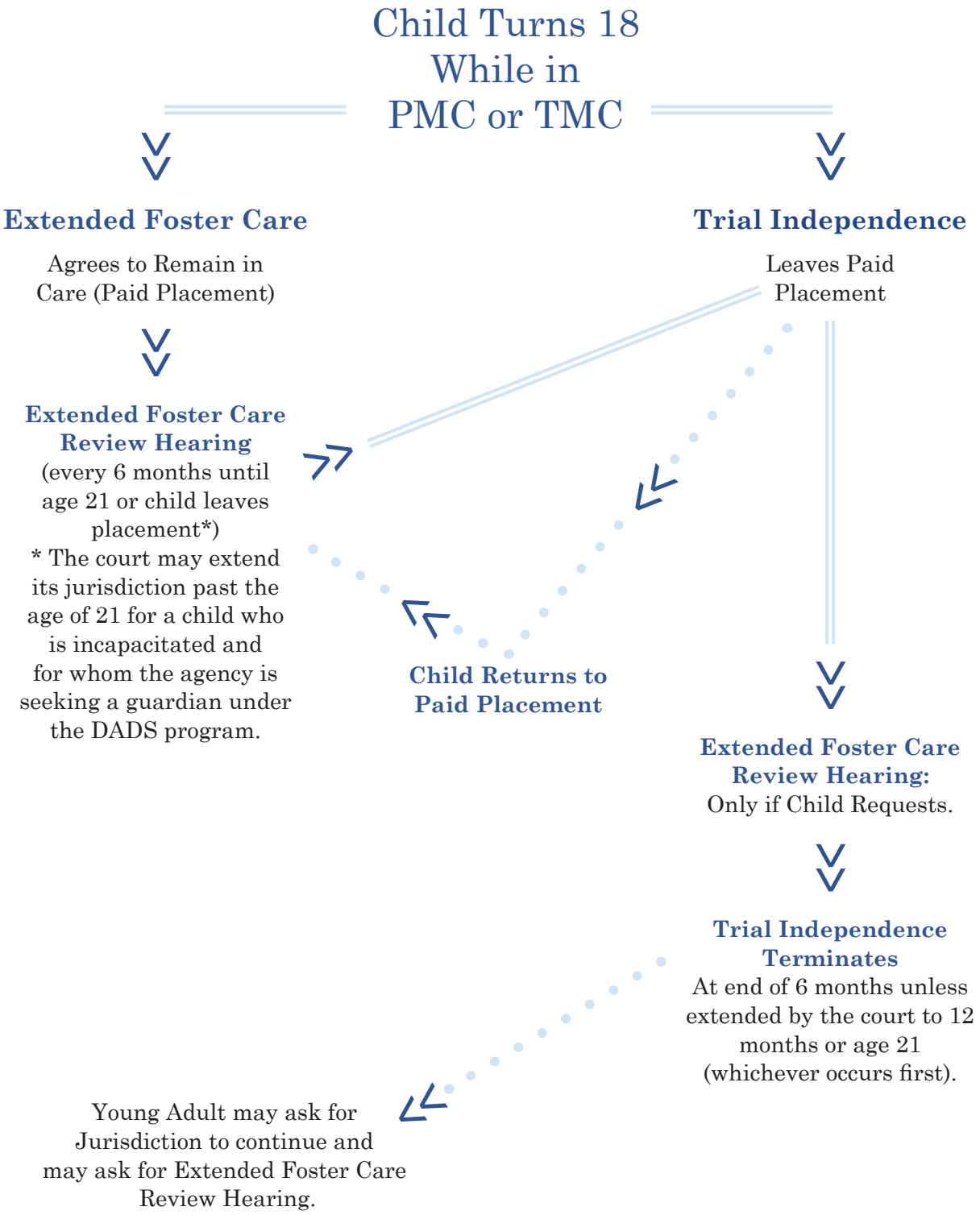
A youth may or may not use TLS while in TI but receiving TLS effects the court's extended jurisdiction over the youth's case (see below).

Path 2A – Trial Independence without Transitional Living Services

If the young adult does not receive TLS, the court's jurisdiction ends when the young adult's TI period ends or upon the young adult's 21st birthday, whichever is earlier.

Path 2B – Trial Independence with Transitional Living Services

When the young adult's TI ends, the young adult can request a voluntary extension of the court's jurisdiction beyond the TI period if the young adult is currently receiving TLS. The court's jurisdiction ends when the young adult turns 21, or before, if the young adult withdraws consent to the court's extended jurisdiction.


Child Turns 18 While in PMC or TMC
Extended Foster Care
Agrees to Remain in Care (Paid Placement)
Extended Foster Care Review Hearing
(every 6 months until age 21 or child leaves placement*)
* The court may extend its jurisdiction past the age of 21 for a child who is incapacitated and for whom the agency is seeking a guardian under the DADS program.
Trial Independence
Leaves Paid Placement
Child Returns to Paid Placement
Extended Foster Care Review Hearing:
Only if Child Requests.
Trial Independence Terminates
At end of 6 months unless extended by the court to 12 months or age 21 (whichever occurs first).
Young Adult may ask for Jurisdiction to continue and may ask for Extended Foster Care Review Hearing.

Parents with an Open Criminal Case

A parent client may have an additional criminal component to a case filed by DFPS. This can be difficult to navigate as actions taken in the CPS case can directly affect the criminal case and there are important aspects to consider from the outset for both cases.

INFORMATION GATHERING

Questions to ask the client:

- When and where were they arrested? What state and county?
- What are the pending charges? Have they been filed?
- Is there an alleged victim? Does the client know the alleged victim? If so, how?
- Does the client have any previous convictions?
- Do they have a criminal attorney? (If they do not have an attorney, it is important they understand their right to an attorney, including a court-appointed attorney.)

If the client does not know the above information, then research the answers as part of an independent investigation into the client's case. Contact the criminal prosecutor or criminal defense attorney if possible, to make inquiries, and if those professionals cannot be identified, run an independent criminal record search. Even though the information above pertains to the criminal case, understanding the criminal case is necessary to better represent a client in the CPS case.

If the parent client does not have a criminal attorney, consider assisting them in the process to apply for one. There may be applications and affidavits required, depending on where the criminal case is located. Call the court directly for its specific process for appointing a criminal attorney.

CONFIDENTIALITY

It is crucial to establish with the client the importance of confidentiality and advise the client not to speak or discuss the criminal case and any of its details with anyone besides their parent's attorney and their criminal attorney. The client has a Fifth Amendment right to remain silent as to any details regarding a current criminal investigation or ongoing case but the investigator or caseworker may ask the client about their criminal charges and the client may respond without understanding the implications for their criminal case.

> **Parent's Attorney Practice Tip:** The confidentiality discussion should take place during the initial contact with the client as a part of the attorney-client privilege explanation.

COMMUNICATION WITH DEFENSE COUNSEL

It is crucial to establish open lines of communication with a client's criminal attorney. Court-appointed criminal attorneys often have heavy caseloads, which can slow their response time when contacting them, but it is important to initiate a conversation as soon as possible to discuss the client's criminal case.

A parent's CPS attorney can provide information that assists the criminal defense attorney in preparing a dense and resolving the criminal case including:

- Mitigating circumstances due to the parent's history and circumstances;
- Services the parent has completed in their CPS case or is in the process of completing; and
- Effective ways to communicate with the parent.

Important things to consult with the client's criminal attorney about include:

- Upcoming court dates for both the CPS and criminal case;
- The evidence being used (video, audio, police reports, etc.);
- The progress of the case;
- The general strategy of the defense attorney; and
- The status of plea negotiations with prosecution (what is the current offer).

Parent's Attorney Practice Tip: Make it a priority to check in with the criminal attorney for updates prior to each CPS statutory hearing, if not more frequently.

HOW THE CRIMINAL CASE AFFECTS THE CPS CASE

Services Overlap

It may be important for the criminal court to determine what services are being provided to the parent through the CPS case. Must they be duplicated or substituted by probation services, or are the services being provided in the CPS case sufficient? Ask the court to allow consolidation of services as much as possible. This is especially important if the transportation and/or time management necessary to comply with a wide array of services are challenges for the client.

Parent's Attorney Practice Tip: Criminal cases involving domestic violence often have bond or probation conditions that require batterer intervention classes or components, which can be used to fulfill requirements of a DFPS service plan. Attorneys should also look into whether the conditions have a stay away provision or if there is an emergency protective order or full protective order in place as it may cause additional issues in the CPS case if the victim is the other parent.

Most bond or probation conditions will also require drug testing; however, the criminal case and civil CPS will likely require independent testing. Caseworkers and probation officers will often communicate after failed tests but will want their own tests due to their own specific requirements.

Pattern of Dangerous Conduct

DFPS may use previous criminal convictions and pending charges against the client to show a pattern of dangerous behavior. It is important to view any offense reports that the prosecuting attorney may have on the client. Any altercation or incident with law enforcement, even if no arrest or charge was made, can be used to establish a pattern of conduct that may endanger a child.

Consequences of Dispositions

If a criminal case is concluded or nearing its end, it is imperative to speak with the criminal attorney about the possible implications of different types of pleas. This is an extremely strategic point for the case, especially if a criminal charge is directly related to the CPS case being opened. Research and speak with a criminal attorney to better understand criminal case dispositions and collateral consequences.

Parent's Attorney Practice Tip: Construct a timeline with the criminal case dates and the statutory deadlines for the CPS case to better understand how the two cases may overlap or exist independently from each other.

FIFTH AMENDMENT CONSIDERATIONS

Fifth Amendment Does Apply to Civil Cases

The right against self-incrimination applies to both civil and criminal cases. *McCarthy v. Anderson*, 266 U.S. 34 (1924). The application is not dependent on the type of proceeding, but on whether the answers to the questions could subject the person who answers to criminal liability in the future. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

Testifying in a Civil Case

In a civil case, the state has the right to call the opposing party as a witness, but the individual retains their right against self-incrimination if they reasonably fear that the answer sought may be incriminating. *Texas Dept. of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995)

No Blanket Assertion of Privilege

However, the party may not make a blanket assertion against self-incrimination in a civil case. They must assert the privilege in response to each question and the judge rules on whether the witness can assert his Fifth Amendment right to a given question. *In re Verbois*, 10 S.W. 3d 825, 828 (Tex. App. – Waco 2000).

Negative Inference Allowed

Unlike in a criminal case, the application of the Fifth Amendment in civil cases is not automatic and if the witness fails to testify, or fails to answer a question, it may be held against them. The factfinder is "free to draw negative inferences from [a witness's] repeated invocations of the Fifth Amendment." *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007).

Parent's Attorney Practice Tip: Because of the significant differences in the application of the Fifth Amendment to criminal and civil cases, consult with the client's criminal attorney before the client testifies in a DFPS court proceeding.

Psychotropic Medication Parameters for Children

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.

> **Child's Attorney Practice Tip:** Symptoms of mental disorders can overlap with the symptoms of trauma. A child's behavior may be related to their trauma history. If a child client is exhibiting behavioral issues, consider advocating for trauma-informed services for the client.

In 2013, the 83rd 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:

- 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).

In February 2005, DFPS, the Department of State Health Services (DSHS), and HHSC released a "best practices" guide to ensure the proper use of psychotropic medications for the children in foster care.

The June 2019 *Psychotropic Medication Utilization Parameters for Children and Youth in Foster Care in Texas Public Behavioral Health* (6th Version) 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 treatment falls outside of the expectations of the Parameters. 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 treatment is in compliance with the Parameters. STAR Health has committed to prioritize 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 treatment for compliance with the Parameters. If the treatment 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 treatment. The possible determinations are as follows:

- Medication treatment within Parameters;
- Medication treatment outside Parameters. Medication treatment reviewed and found to be within the standard of care;
- Medication treatment is outside Parameters and there is opportunity to reduce polypharmacy; or
- Medication treatment is outside Parameters and there is risk for or evidence of significant side effects.

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 may be referred to the Peer Review Committee for further investigation and action. The Peer Review Committee is established by the Managing Care Organization, Superior Health, and consists of network providers who review PMUR concerns for STAR Health Members who exceed the Quality of Care thresholds. Superior Health also utilizes consultant physicians as needed to review specific specialist issues, if a need is identified. The results of Quality Improvement and Peer Review 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 their 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.

The Parameters and PMUR can be accessed on DFPS's website at https://www.dfps.state.tx.us/Child_Protection/Medical_Services/Psychotropic_Medications.asp.

Using a Trauma-Informed Lens for Interacting with Clients

Interactions with the child welfare system can be traumatizing for children and parents. Both children's and parent's attorneys may want to be familiar with techniques for interacting with clients who have experienced trauma. The following information is modified content from the Trauma-Informed Legal Advocacy Project. Please see the *Additional Resources* section in this tool kit for more information.

LEGAL INTERVIEWING & TRAUMATIC TRIGGERS

What is Happening from the Perspective of Parents and Children Involved with the Child Welfare System?

A person may be feeling distracted, anxious, and agitated and thus unable to meaningfully participate in an interview or conversation. Trauma triggers are one factor that may explain why a child or parent client is having trouble connecting with others including their own attorney. A trigger is something that evokes a memory of past traumatizing events, including the feelings and sensations associated with those experiences. Encountering triggers may cause someone to feel uneasy or afraid, even without them being consciously aware of these reactions. A trigger can make someone feel as if they are reliving a traumatic experience and can elicit a fight, flight, or freeze response. Many things can be a possible trigger for someone. A person might be triggered by a particular color of clothing, by the smell of a certain food, by certain phrases or behaviors, or the time of year. Internal sensations, such as rapid heartbeat, nausea, or tightened muscles, can be triggers as well or the person may feel nauseous or have other physical reactions.

A trigger may be associated with the traumatic experience without their conscious awareness and the client may not know why they are feeling or reacting a certain way. Children or adults who are triggered by traumatic memories may also appear bored or uninterested, talk about things in a flat or unemotional way, have a blank stare and spacey look, or appear to be shut down or checked out. Their answers to questions may be slow and incomplete. Additionally, many families and communities involved with DFPS have been deeply affected by negative experiences with legal and administrative systems, such as criminal justice, immigration, and education systems. For these reasons, a client may distrust the child welfare system.

WAYS TO PREVENT A CLIENT FROM FEELING TRIGGERED

Offer Options in the Physical Space.

Offer choices of where to meet; which chair they can use; and whether a door is closed, open, or slightly ajar. Consider whether slight adjustments can be made to accommodate multiple seating options. For example:

> "*Which chair would be most comfortable for you*?"
>
> "*Would you prefer the door closed or slightly open?*"

At the same time, be aware that sometimes options can be overwhelming to someone who is not accustomed to being given many choices.

Encourage Self-Regulation.

Experiencing trauma can disrupt a person's ability to manage emotions and calm themselves when they are starting to feel upset. Self-regulation may include listening to music, going for a walk, or playing with a dog or cat. In the context of a legal meeting, options are more limited, but some strategies that may help a client self-regulate include doodling or coloring, fidgeting with toys or other objects, offering food or snacks, looking at calming pictures, and drinking water.

Explain Things in Advance.

For people who have experienced trauma, it can be helpful to know in advance what is going to happen. This includes telling someone how much time their attorney has available to meet with them, which can also help build trust. It can also be helpful to tell someone the types of matters that will be discussed during the meeting. For example:

> *"We have about an hour to talk today. I'd like to hear you talk about what happened when DFPS came to your home. I'm going to ask you some questions as we go, and you can ask me questions at any time. Then we'll go over some of the paperwork DFPS gave you and I'll explain what it means."*

Offer Breaks.

Taking breaks throughout a meeting can help the client stay present and engaged.

Be Thoughtful About Note Taking.

Ask permission to take notes and summarize the notes for your client at the end of the meeting. This can help keep build trust and rapport with your client. Also, do not allow note taking to detract from being present with someone.

What can help if a client appears triggered?

Notice and Validate their Feelings.

Noticing and validating a client's feelings can help them to become aware of what is happening with them, if they are not already aware. It also lets the client know their attorney cares about their emotional safety. This matters in part because these actions contradict what happens in many traumatic incidents, where a person's feelings of anxiety and fear are often ignored and dismissed, or where showing these feelings may be met with increased violence. Noticing and validating the client's feelings includes allowing the client to move through their feelings at their own pace. For example:

> *"That sounds really scary/hurtful." "It really means a lot that you are sharing this with me, even though it makes you sad to talk about it."*

Ask What Would Help.

When making suggestions, offer several options whenever possible, rather than just asking "yes or no" questions. Asking someone how to help them when they seem triggered also reflects the relationship as a partnership of equal respect. For example:

> *"Let me know if I can get you a glass of water, or we can just sit together for a moment." "Would it help to have a moment to yourself or visit with your friend in the waiting room, or maybe something else?"*

Use Open Body Language.

If the client is very upset and agitated, it can be helpful for the attorney to use open body language so that the client knows that their attorney does not pose a threat. This includes keeping shoulders relaxed, keeping body posture and hands open and relaxed, and avoiding blocking the client from being able to exit or walk away.

Help the Client to Get Grounded in the Present.

If a client seems anxious or uncomfortable, it may be because they feel they are unsafe in the

current environment. There are tools to help a client feel safe and grounded in the present. Some examples include helping the client notice their breath, their physical presence, or physical things in the environment. For example:

> *"You know we can sit here on this bench for as long as we need to. We are okay right now, you and me. We can just take our time, no one is going to bother us here."*
>
> *"Is it hard for you to focus on these questions? When that happens, some people say it helps them to just take a minute to notice yourself breathing in and out."*

BUILDING TRUST AND UNDERSTANDING THE IMPACT OF TRAUMA

What is Happening from the Perspective of Parents and Children Involved with the Child Welfare System?

There are many reasons why someone might not share information, some of which may be related to experiencing trauma. Experiencing abuse, especially by a trusted person, can make it difficult to trust people in the future. Of course, someone's hesitations about sharing information may also reflect an awareness of real danger that the information shared will be held against them in court. Another reason that someone may not share information right away is that they do not remember the information, or they can't recall it in the way that its being asked for.

Survivors of trauma do not always remember their experiences in chronological order. On the other hand, survivors of trauma may remember events, but they may ascribe different meaning to the events than reflected in legal definitions of abuse. Often, when someone experiences a traumatic event, the person may seem distant or they might dissociate, which means there is a change in their consciousness which disturbs the normally connected functions of identity, memory, thoughts, feelings, and experiences. Their understanding of what is happening and their experience of what is happening become disconnected. This is a protective coping mechanism that can keep someone emotionally safe during traumatic events, but it can affect the person's ability to recall those events, or other events that occur when the person experiences a traumatic trigger.

For a person who is agitated or disconnected because of a traumatic trigger, traumatic memory, or simply by being in an environment that does not feel safe to them, building a connection and developing trust are key to helping the person regulate their emotions and responses.

What Might Help Create Trust with the Client?

- Sharing your mission statement explaining your personal reasons for choosing to represent parents and children in DFPS cases.
- Being transparent with the client. For example,
  - being transparent about limitations on time and resources.

    "I'm really glad you called. I have about five minutes to talk right now. If we need more time, we can schedule another call."
  - being transparent about the need for and use of information.

    "Is there any reason why DFPS might say you were neglectful? The reason I'm asking is so that we can prepare together for every possible thing that DFPS might say, not because I don't believe you."
- Understanding fluctuations in the client's level of trust in their attorney over time.

Keep in mind that sharing personal information, such as details about experiences of abuse, can make someone feel vulnerable, especially if they have not shared that information before.

Thus, in some cases, someone might share a lot about themselves in a meeting and then become more guarded, withdraw from the relationship, or even stop responding to calls altogether. As the relationship develops, the client may want to share more information, or they may even change parts of their story.

What Might Help a Client with Memory Recall?

Use open-ended questions if necessary, to gently facilitate more detail. Lay out topics in broad terms. If the client is a parent, the best approach is to start by letting the client tell their story from start to finish. If the client is a child, do not elicit details of abuse or neglect from the child, since discussions about abuse or neglect should occur with a trauma-informed mental health professional.

PREPARING A CLIENT FOR COURT

Being involuntarily separated from a parent or child can be a traumatic experience. As the client approaches the hearing date, they may be experiencing anxiety, sleep deprivation, and exhaustion. At court, parents may see the caseworker who made the decision to remove their children, which may be a triggering event for them. Parents and children may be seeing each other for the first time since removal. Encountering such reminders of trauma may cause the client to feel uneasy, afraid, or terrified, and they may re-experience what they felt when they were initially traumatized.

How Can Parents' and Children's Attorneys Emotionally Prepare Clients for Court?

- **Offer a Tour of the Court Building Ahead of Time**. Describe the logistical and spatial details of attending court, including where parties will wait before court opens, where they will take breaks, who will be in the courtroom, and the location of restrooms. There is a balance to giving someone enough information to help them know what to expect and giving them too much information, which could potentially overwhelm them. Let your client be the guide. If possible, take a tour of the courtroom itself.
- **Identify Your Client's Supporters.** Encourage the client to bring someone appropriate to court with them and explain local rules for court room decorum. If there is no family member or friend who can attend, suggest they ask someone they know through a support group, social activity, or church group. If no one is available to attend in person, friends or family can show that they are there in spirit by sending notes and messages of support or trinkets that can be kept close. If a client has very limited support, they may want to find a peer support group such as the DFPS Parent Collaborative. If the client is seeing a therapist, it may help to have an appointment scheduled with the therapist as soon as possible after the hearing.
- **Suggest Making a "Night Before" Plan.** Not sleeping and not eating can have an impact on our ability to manage our emotions, but when a client is anxious, they may have a hard time doing both. Acknowledging to someone that this is often the case can help them to decide how they want to prepare. If unable to address these issues the night before, check in with the client prior to the hearing to see if they have had a meal and help them locate food options in the courthouse.
- **Offer to Help Make a "What If" Plan.** Consider asking the client whether they think anything about the court proceedings might be particularly difficult or triggering for them and making a plan for how to respond. Encourage the client to practice self-calming techniques prior to the day of court so that these become automatic and easier to access when stress makes it hard to think. Always follow the lead of the client to see how much they want to plan.

- **Make a Plan for Dealing with Stress at Court.** It can help to ask the court for a recess when the client feels they need one or when observing them experiencing a trauma response. While on break, validate their feelings. Acknowledge that what's happening may be very upsetting and that they are doing a great job. Sometimes just silently being with someone for a few minutes can help them to calm themselves and prepare to continue.

AVOIDING BURNOUT AND PRACTICING SELF-CARE

An attorney's office may be the first place where a client can safely show frustration and anger. This may cause attorneys to feel unappreciated or perceive the client as "demanding" and "difficult." Over time, attorneys may feel that working with challenging clients in this complex area of law might be too difficult. Challenges of doing empathic work include:

Burnout, including exhaustion, cynicism, and ineffectiveness.

Secondary Trauma (sometimes called vicarious trauma), which refers to the effects of working empathically with and feeling responsibility toward people who have survived the trauma of abuse, violation, and discrimination.

Consider whether working on these cases made it harder as an attorney to:

- Feel positive about the work.
- Feel competent.
- Get things done, feel productive.
- Stay positive.
- Stay calm and manage emotions.
- Feel safe.
- Trust the client, or trust others.

WHAT MIGHT HELP?

Utilize Self-Care Strategies.

- Keep in mind that this may be the first time the client felt safe enough to show emotion.
- Set boundaries with clients.
- Plan out specific times to work on challenging cases.
- Keep positive thoughts in mind about the attorney's role in the case.
- Ask a co-worker or colleague to remind you about positive aspects of the work.
- Take time to reflect on personal feelings and responses, both in the context of individual interactions and after big successes or losses.
- Use calming or grounding techniques for yourself during phone calls (e.g., coloring, fidget tools).
- Use a checklist to remember when interacting with clients, such as not to take things personally, etc.
- Utilize additional support to help the client (e.g., connect them with a therapist or the DFPS Parent Collaboration Groups).

Utilize Available Assistance such as the Texas Lawyers Assistance Program.

- The program provides confidential help for law students, lawyers, and judges who have problems with substance use and mental health issues online at https://www.tlaphelps.org/ or call 1-800-343-TLAP or text TLAP to 555888.

Indian Child Welfare Act (ICWA)

Federal 25 U.S.C. §§1901-1963; 25 C.F.R. Part 23 Guidelines for Implementing the Indian Child Welfare Act (Bureau of Indian Affairs, 2016).

Tex. Fam. Code §§ 262.201(f), 263.201(f-1), 263.306(a-1)(3).

How are ICWA cases identified?

Texas courts are required to ask the parties whether the child or child's family has Native American heritage and to identify any Native American tribe the child may be associated with at the Adversary, Status, and Permanency Hearings. Tex. Fam. Code §§ 262.201(f), 262.201(f-1), 263.306(a-1)(3).

If the court knows or has "reason to know" that an "Indian child" is the subject of a child protection suit, DFPS must give each parent and identified tribe and any Indian custodian (caretaker) notice of ICWA rights. 25 U.S.C. § 1912(a). 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).

When Does ICWA Apply?

If there is any indication of tribal affiliation, DFPS must give notice to each tribe identified in order to confirm or deny a child's status as an "Indian child" under ICWA.

An "Indian child" is a child who is either:

- 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).

There are more than 500 federally recognized tribes and children from any of these tribes can be found in Texas. 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. A child residing on a reservation has specific legal protections 25 U.S.C. § 1911(a), and, in some cases, DFPS and the Tribe have a written protocol for handling these cases.

In every case, counsel should confirm that DFPS has asked every parent, extended family member, and any child old enough, whether there is any Native American family history. The Court must also instruct the parties to inform the court of any such information that arises later. 25 C.F.R. § 23.107(a).

If there is any indication of possible tribal family history, counsel should confirm that DFPS has:

- Completed an Indian Child & Family Questionnaire if there is any Native American family history; and
- Sent a formal ICWA notice of rights to each potential tribe, parent and any Indian custodian (caretaker).

Notices and instructions as well as contact information for all federally registered tribes, regulations guidelines, and case law summaries are available in the Texas Practice Guide for DFPS Attorneys at https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp, Sections 4 and 13.

When a Child is Identified as an Indian Child?

A hearing must be held where DFPS must show by clear and convincing evidence, including testimony of a qualified expert witness, that the parent's continued custody "is likely to result in serious emotional or physical damage to the child," to warrant a foster care placement. 25 U.S.C.§ 1912(e). This finding cannot be made until 10 days after notice of ICWA has been provided and is subject to a 20-day extension on request of a parent or tribe. To avoid the need to continue the hearing, the best practice is to set this hearing at least 30 days out. ICWA also requires that DFPS make "active efforts" to reunify among other legal requirements. Please see the *Indian Child Welfare Act* section information in the *Federal Law Issues* section of this tool kit.

Note: The hearing must occur no matter how far along in the case the confirmation that the child is an "Indian child" is made.

PLEADINGS, BURDEN OF PROOF & REQUIRED FINDINGS

If ICWA applies, generally the best practice is to plead concurrently under the Family Code and ICWA. In the jurisdiction of the Houston 14th District Court of Appeals, however, pleadings should be limited to the ICWA findings, without parallel Family Code pleadings. *In re W.D.H.*, 43 S.W.3d 30 (Tex. App.—Houston 2001, pet. denied).

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 PMC or termination of parental rights are different than under the Texas Family Code.

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 DFPS and proved unsuccessful. 25 U.S.C. § 1912(d).

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(f).

In addition, when ICWA applies, special requirements apply regarding:

- Notice
- Pleadings

- Expert witnesses (please see section below)
- Placement
- Transfer to a tribal court
- Intervention/participation by a child's tribe

Who is a Qualified Expert Witness (QEW)?

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. However, if a tribe has a policy against termination of parental rights, or is not in agreement with seeking termination 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. Courts with capability should allow participation by phone, video conferencing or other methods. 25 C.F.R. § 23.133.

ICWA Finding is Essential

The best practice is to request that the trial court make a finding on the record as to whether ICWA applies in every child protection case. If the record is silent, a party may raise the issue on appeal, and an appellate court may remand the case for purpose of making this finding. By far the most significant impact of failing to identify an ICWA case is that 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.

Interstate Placements (ICPC)

What is the ICPC?

If a child may be placed in another state, the Interstate Compact on the Placement of Children (ICPC) may require approval from that state. (*See* Tex. Fam. Code Ch. 162). When the ICPC applies, child protective services in their receiving state provides an assessment before a placement and monitoring after a placement. This is a multi-step administrative process between the sending and receiving states and can take some time to complete.

When does the ICPC Apply?

Generally, ICPC applies to placements for adoption or foster care, and in group homes or residential placement.

When does the ICPC not Apply?

- If a parent or specified relative is placing a child with a parent (subject to non-custodial parent policy below) or specified relative (stepparent, grandparent, adult uncle or aunt, adult sibling, or legal guardian), the ICPC does not apply as long as no court has assumed jurisdiction of the child; or
- If a child is being placed in a hospital or school.

> **Practice Tip:** The ICPC is not a fast process. Any attorney can request a court order for an expedited ICPC in certain circumstances. Note that this expedites the process on the Texas DFPS end, but it does not expedite the ICPC process in the receiving state.

Visits Outside Texas

If a prospective caregiver, who resides outside Texas, requests that a child in DFPS conservatorship visit that caregiver in the caregiver's state, the caseworker must notify Texas Interstate Compact Office (TICO) in writing.

- Before approving the visit, TICO:
  - verifies that the request meets the criteria for an ICPC visit;
  - verifies that the child will return to the sending state at the end of the visit; and
  - notifies the receiving state's interstate compact office prior to the visit.

A visit is excluded from the ICPC under Regulation nine of the ICPC Regulations if it is for brief social or cultural experience; and

- The visit has a definite end date; and
- The visit is no longer than 30 days, or begins and ends within a school vacation; and
- There has been no request for a home study or supervision.

Placement with a Relative-Expedited Requests (Regulation 7)

An expedited order requires an approval or denial within 20 business days. A judge can sign an order for an expedited placement under Regulation 7 of the ICPC Regulations if:

- The proposed placement is with a parent (subject to non-custodial parent policy below), stepparent, grandparent, adult uncle or aunt, adult sibling, or legal guardian, and one of the following criteria apply:

- the child was unexpectedly placed in foster care because the parent/guardian was recently incarcerated; is unable to care for the child due to a medical, mental, or physical condition; or is recently deceased;
- the child or sibling being placed with the child is four years of age or younger;
- the court finds that the child or sibling has a substantial relationship with the proposed placement; or
- the child is currently in an emergency placement.

Placement with a Non-Custodial Parent

Generally, due process prevents delaying placement with an out-of-state parent long enough to complete an ICPC request. For counties within the jurisdiction of the Fourth Court of Appeals, that Court has rejected outright application of the ICPC to an out-of-state parent. *In the Interest Of C.R.-A.A.*, 521 S.W.3d 893 (Tex. App. — San Antonio, no pet.).

To address child safety in this circumstance, DFPS policy requires the caseworker to assess an out-of-state parent without using the ICPC. CPS Handbook 4513.1. If the assessment reveals no concerns, the court can place the child and *dismiss the case as to that child* without further monitoring.

If the assessment reveals concerns, DFPS must request a noticed hearing and prove the parent's unfitness in order to invoke the ICPC. CPS Handbook 4513.13.

Special Immigrant Juvenile Status (SIJS)

8 U.S.C. § 1101(a)(27)(J)

8 C.F.R. § 204.11

United States Customs and Immigration Service (USCIS) Policy Manual (https://www.uscis.gov/policy-manual)

What is Special Immigrant Juvenile Status (SIJS)?

Federal law permits eligible foster children to "self-petition" for a Special Immigrant Juvenile visa, which is the first of a two-step process required to obtain permanent resident status (a "green card"). 8 U.S.C. § 1101(a)(27)(J).

What Does a State Court Have to Do with a Foster Child's Immigration Status?

Federal law requires a predicate order from a family court (or other court with jurisdiction over the custody and care of juveniles such as a DFPS proceeding) before a child can apply for SIJS. The family court or DFPS court order must include three findings:

- That the child has been "declared a dependent of the court or has been placed by the court under the custody of a state agency or an individual or entity appointed by the court;"
- That reunification of the child with one or both parents "is not viable as a result of abuse, neglect or abandonment or a similar basis found under state law;" and
- That it is "not in the child's best interest to be returned to the parent or child's country of origin or last habitual residence."

USCIS policy now requires evidence of the factual basis for these statutory findings, in order to demonstrate that the order is bona fide, and not requested primarily for the purpose of immigration relief. For this reason, all SIJ orders should reference the facts underlying each finding.

In addition, USCIS construes "lack of viable reunification" to mean "that the court intends its finding that the child cannot reunify with their parent (or parents) remains in effect until the child ages out of the juvenile court's jurisdiction." *USCIS Policy Manual*, Vol. 6, Part J., Ch. 2. D.2.

If a child or youth has a SIJS order obtained before these policy changes, it may be necessary to request an amended SIJS order.

Practice Tip: If a child or youth in foster care was not born in the U.S., the attorney for the child or the child's parent should check with the caseworker to find out if:

- Notice been sent to the foreign consulate;
- Repatriation or placement in the home country is viable; or
- The child may need assistance to obtain immigration status or U.S. citizenship. It is important to start the process as soon as possible due to the lengthy timeline and the serious risks and limitations that impact an undocumented youth or young adult.

For more information, consult the DFPS Regional Attorney assigned to citizenship and immigration issues. *See Texas Practice Guide for CPS Attorneys, Section 13, Citizenship & Immigration Issues,* DFPS Staff List at https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Citizenship_and_Immigration/DFPS-Citizenship-Immigration-Contacts-2020.pdf.

School Stability Under Federal & State Law

Fostering Connections to Success and Increasing Adoptions Act, 43 U.S.C. § 675 et seq. Every Student Succeeds Act (ESSA) 20 U.S.C. § 6301 et seq.

The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300 Texas Education Code, Texas Family Code

What is Required for School Stability When a Child is Taken into DFPS Care or Changes Placement?

- A child's initial placement into care, and any subsequent placement changes, must take into account the appropriateness of the child's educational setting and the proximity to the school the child is enrolled in at the time of the placement or placement change. 42 U.S.C. § 675(1)(G)(i).
- DFPS must coordinate with school districts to ensure that the child remains in the same school the child was attending at the time of the initial placement or any subsequent move, unless it is not in the child's best interests to remain in that school. 42 U.S.C. § 675(1)(G)(ii)(I), 20 U.S.C. § 6311(g)(1)(E)(i).
- DFPS and the school district must collaborate to ensure that the child is transported to the previous school, if necessary. 20 U.S.C. § 6312(c)(5)(B).
- If remaining in the prior school is not in the child's best interest, the child must be immediately enrolled in a new school, even without records normally required for enrollment. 42 U.S.C. § 675(1)(G)(ii)(II), 20 U.S.C. § 6311 (g)(1)(E)(ii).
- DFPS must ensure the child's education records are provided to the new school within 30 days. State law requires that the child's school records are transferred to the new school not later than the 10th working day after the date the student begins enrollment at the school. Tex. Educ. Code §§ 25.002(g), 25.007(b)(1).
- The child is entitled to attend public school in the district in which the foster parents reside free of any charge to the foster parents or the agency. A durational residence requirement may not be used to prohibit a child from fully participating in any activity sponsored by the school district, including extracurricular activities. Tex. Educ. Code § 25.001(f).
- The child is also entitled to continue to attend the school he or she was enrolled in before entering conservatorship, or at the time of a placement change, without payment of tuition, until he or she completes the highest grade offered at the school at the time of placement. The child is entitled to continue to attend the school even if the child leaves conservatorship. Tex. Educ. Code § 25.001(g)-(g-1).

What is Required If the Child Receives Special Education Services?

- If a child with a disability who is eligible to receive special education services transfers to a new school district during the school year, the new district must schedule an Admission, Review, and Dismissal (ARD) meeting within 30 days and provide the child services comparable to those described in the child's Individual Educational Program (IEP) from the previous district until the new district either adopts the child's previous IEP or develops a new IEP, or, if the transfer is from another state, until the new district conducts an evaluation (if it determines it is necessary) and develops a new IEP. 20 U.S.C. § 1414(d)(2)(C)(i), Tex. Educ. Code § 25.007(9), 19 Tex. Admin. Code § 89.1050(j).
- If the child does not receive special education but a disability is suspected, the child must be referred for a special education evaluation. An evaluation may be initiated by any person involved in the education or care of the student. 20 U.S.C. § 1414(a)(1).

- Children eligible to receive special education services must have a parent identified to make related decisions. If a parent does not retain education decision-making rights, the child is placed in a foster home, and the foster parent is willing and able, the foster parent will serve as parent for special education decision-making purposes. Otherwise, a surrogate parent must be appointed by the school, and can be appointed by the court, to make special education decisions on behalf of the child. Tex. Educ. Code §§ 29.015; 29.0151; Tex. Fam. Code 263.0025.

How are the Court and Other Parties Involved in Education Stability?

- DFPS must designate an individual to make the day-to-day educational decisions for a child in conservatorship, and must provide that individual's name (as well as the name of any surrogate parent appointed for the child for special education decision-making purposes, if applicable) to the court and the child's school within five days after the initial Adversary Hearing, and must update the court in the next permanency progress report if there are any changes to the education decision-maker or surrogate parent. Tex. Fam. Code § 263.004.
- DFPS must notify the child's attorney ad litem, CASA volunteer, caregiver, and education decision-maker of any notification from the school regarding a significant school event such as disciplinary action, referral to special education, or other event. Tex. Fam. Code § 264.018(a)(5)(D), Tex. Educ. Code § 25.007(b)(10).
- The court is required at each Permanency Hearing to determine whether an education decision-maker for the child has been identified, whether the child's education needs and goals have been identified and addressed, and whether there have been major changes in the child's school performance or any serious disciplinary events. Tex. Fam. Code §§ 263.306(a-1)(5)(F), 263.5031(3)(I).
- A child's guardian ad litem and attorney ad litem are required to determine whether the child's educational needs and goals have been identified and addressed before each scheduled Permanency Hearing. Tex. Fam. Code §§ 107.002(i), 107.004(d-2).
- If a caregiver desires to educate the child in a home setting, DFPS may ask the court to make a finding that home-schooling is not in the best interests of a child in conservatorship because it does not meet the child's academic and social needs and goals. Tex. Fam. Code § 263.0045.

Servicemembers Civil Relief Act (SCRA)

50 U.S.C. §3901 et seq.

How does the Servicemembers Civil Relief Act (SCRA) impact child protection litigation?

The SCRA provides certain protections for servicemembers involved in a civil action, including a child custody proceeding, while the member is in the military or within 90 days after release from the military.

Missing Parent

If a parent has not appeared in a child custody suit, whether or not this is due to military service, DFPS must file An Affidavit of Military Service (available in the *Practice Guide for CPS Attorneys*, Section 13, Military at https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/Section-13.asp). 50 U.S.C. § 3931(b)(1). The best practice is to request a search of the military database before the Status Hearing, if any parent has not been located.

The DFPS diligent search unit includes a search of the US Military Database and the certificate of military service or non-service in the FINDRS Report provided to a requestor. Alternatively, a search can be performed on the U.S. military website at https://scra.dmdc.osd.mil/scra/#/home. *Note* that a search requires a parent's date of birth, last name and first name or initial, and ideally, social security number.

A search of the military database will generally result in either a Certificate of Non-Service, or a Certificate of Service. The Certificate should be attached to an Affidavit of Military Service, provided to parties and counsel of record, and filed with the court.

Default Judgment

If a parent has not appeared in a child protection suit, no default judgment can be taken unless:

- DFPS has filed an Affidavit of Military Service with a Certificate of Service or Non-Service; and
- An attorney has been appointed for the parent. 50 U.S.C. § 3931(b)(2).

If the court determines there may be a defense which cannot be presented without the parent's presence or the attorney has been unable to contact the parent after exercising due diligence, the court shall grant a stay for at least 90 days. 50 U.S.C. § 3931(d).

After Notice

If a parent in the military has notice of a child custody suit, the court on its own motion may stay the suit, or on request of the servicemember, shall stay the action for at least 90 days, if there is proof that the military duty materially affects the servicemember's ability to appear and a date when the servicemember will be available; or, if the commanding officer confirms that military duty prevents the servicemember's appearance and leave is not authorized. 50 U.S.C. § 3932(b).

Child Custody Protection

If a court renders a temporary custody order solely based on the deployment or anticipated deployment of a servicemember parent, the court shall limit the order to the time justified by the deployment. 50 U.S.C. § 3938(a). Moreover, a parent's absence as a result of a deployment may not be the sole factor in determining the best interest of child for purposes of a request for a permanent custody. 50 U.S.C. § 3938(b). Similar protections are provided in state law. Tex. Fam. Code § 156.006(c).

Abbreviations and Acronyms

Acronym	Description
AAL	Attorney Ad Litem
ACYF	Administration of Children, Youth and Families – Division of US Health and Human Services
ACA/ADA	Assistant County Attorney/Assistant District Attorney
ADHD	Attention Deficit/Hyperactivity Disorder
ADO	Adoption Worker
AG	Attorney General
AHT	Abusive Head Trauma, including Shaken Baby Syndrome
AOP	Acknowledgment of Paternity
APS	Adult Protection Services
AR	Alternative Response Worker/Unit
ARD	Admission Review and Dismissal
BIA	Bureau of Indian Affairs
BVS/VSU	Bureau of Vital Statistics/Vital Statistics Unit
CAC	Child Advocacy Center
CANS	Child and Adolescent Needs and Strengths Assessment
CAPTA	Child Abuse Prevention and Treatment Act
CAS	Child Advocacy Specialist
CASA	Court-Appointed Special Advocate
CBC	Community-Based Care
CCEJ	Court of Continuing and Exclusive Jurisdiction
CDIB	Certificate of Degree of Indian Blood
CFRC	Child Fatality Review Committee
COS	Circle of Support or Court Ordered Services
CPA	Child Placing Agency
CPC	Child Protection Court

Acronym	Description
CPS	Child Protective Services
CPSHB	Child Protective Services Handbook
CPU	Child Placement Unit
CRCG	Community Resource Coordination Group
CRP	Community Reintegration Project
CVS	Conservatorship Worker/Unit
CWB	Child Welfare Board
DADS	Texas Department of Aging and Disability Services
DEIC	Designated Emergency Infant Care (Baby Moses Locations)
DFPS	Department of Family and Protective Services
DIF	Desarollo Integral de Ia Familia (Mexico's Child Welfare Agency)
DNR	Do Not Resuscitate Order
DSHS	Texas Department of State Health Services
DSM	Diagnostic and Statistical Manual of Mental Disorders
ED	Emotional Disturbance
EPO	Emergency Protective Order
ETV	Education and Training Voucher
FA	Father
FAS/ FASD	Fetal Alcohol Syndrome or Fetal Alcohol Stress Disorder
FBSS	Family Based Safety Services
FGC/ FGDM	Family Group Conference or Family Group Decision Making
FP	Foster Parents
FTM	Family Team Meeting
FSNA	Family Strengths and Needs Assessment
FTT	Failure to Thrive

Acronym	Description
GAL	Guardian ad Litem
HHS	Health and Human Services
HHSC	Texas Health and Human Services Commission
HSEGH	Health, Social, Educational and Genetic History
ICAMA	Interstate Compact on Adoption & Medical Assistance
ICARA	International Child Abduction Remedies Act
ICPC	Interstate Compact for the Placement of Children
ICWA	Indian Child Welfare Act
IDEA	Individuals with Disabilities Education Act
IDD	Intellectual and Developmental Disability
IEP	Individualized Education Plan
INV	Investigation Worker/Unit
ISP	Individualized Service Plan
JMC	Joint Managing Conservatorship
JPO	Juvenile Probation Officer
LD	Learning Disabled
LOC	Level of Care
lOP	Intensive Outpatient
MEPA	Multi-Ethnic Placement Act
MGF	Maternal Grandfather
MGM	Maternal Grandmother
MO	Mother
MSO	Mediated Settlement Agreement
MSP	Munchausen Syndrome by Proxy
NCIC	National Crime Identification Center
NOS	Not Otherwise Specified

Acronym	Description
NSUP	Neglectful Supervision
OAG	Office of Attorney General
PAL	Preparation For Adult Living
PC	Permanency Conference
PGF	Paternal Grandfather
PGM	Paternal Grandmother
PHAB	Physical Abuse
PKPA	Parental Kidnapping Prevention Act
PMC	Permanent Managing Conservatorship
PO	Parole Officer or Protective Order
R/O	Ruled Out
RAD	Reactive Attachment Disorder
RAPR	Refusal to Accept Parental Responsibility
RSDI	Retirement, Survivor and Disability Insurance
RTB	Reason To Believe
RTC	Residential Treatment Center
SANE	Sexual Assault Nurse Examiner
SAPCR	Suit Affecting the Parent/Child Relationship
SBS	Shaken Baby Syndrome
SIDS	Sudden Infant Death Syndrome
SIJS	Special Immigrant Juvenile Status
SSI/SSDI	Social Security Income/Supplemental Security Disability Income
SWI	Statewide Intake
SXAB	Sexual Abuse
TAC	Texas Administrative Code
TANF	Temporary Aid for Needy Families

Acronym	Description
Title IV-E	Title IV-E of the Social Security Act
TMC	Temporary Managing Conservatorship
TPR	Treatment Plan Review
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction Enforcement Act
UTC	Unable To Complete
UTD	Unable To Determine
YFT	Youth For Tomorrow

Additional Resources

All websites in this section were last visited in July 2020.

Child Welfare Legal Advocacy

- American Bar Association Center on Children and the Law: https://www.americanbar.org/groups/public_interest/child_law/
- American Bar Association Child Law Practice Today: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/
- National Association of Counsel for Children: https://www.naccchildlaw.org/default.aspx
- State Bar of Texas Committee on Child Abuse and Neglect: https://www.texasbar.com/
- Texas District and County Attorneys Association: https://www.tdcaa.com/
- Texas Lawyers for Children: https://www.texaslawyersforchildren.org/

Children's Commission

- Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (Children's Commission): Website: http://texaschildrenscommission.gov/; Email: children@txcourts.gov
- The Texas Child Protection Law Bench Book is available on the Children's Commission Bench Book webpage (http://texaschildrenscommission.gov/for-judges/bench-book/) in the following formats:
  - Printable Version
  - Online and Interactive
  - Available by downloading the mobile application, LawBox:
    - Open the LawBox app
    - Select "The Texas Children's Commission"
    - Enter "children" for both username and password; additional instructions are available.

Department of Family and Protective Services

- Texas DFPS: http://www.dfps.state.tx.us/
- Texas Practice Guide for DFPS Attorneys: https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp. For assistance in the following subject matters, *see* the DFPS Attorneys' expertise list found in Section 14, page 7:
  - Adoption Assistance (AA) and Permanency Care Assistance (PCA) agreed orders and administrative appeals
  - Adult Protective Services (APS) Issues Alternative Response
  - CASA (Including IMPACT "Case Connection" access issues, MOU) Child-care licensing issues and standards
  - Children's money issues: SSI benefits including SAPCR court order re: use of children's money);
  - Confidentiality - APS
  - Confidentiality - DFPS
  - Criminal and abuse/neglect background checks
  - Education (including special education / IDEA, ECI, FERPA, Fostering Connections, provisions, McKinney –Vento Act regarding homeless)

- Extended Foster Care
- ICPC (Interstate Compact on the Placement of Children) ICWA (Indian Child Welfare Act)
- Immigration (children and in general) International issues Juvenile Justice Issues
- Kinship/relative designated caregiver and associated programs or benefits, including
- Permanency Care Assistance Agreements
- Lawsuits and settlements for personal injury and wrongful death for children in conservatorship
- Liaison with District and County Attorneys, Judiciary
- Medicaid, including eligibility and services for children and adults
- Medical issues, including Medicaid STAR Health, Health Passport, psychotropic meds, medical consent, substance abuse
- Mental health (including involuntary commitment) and services for people with Intellectual and Developmental Disabilities
- Prevention and Early Intervention (PEI) Permanency Care Assistance
- Records release Subpoena-related issues Trafficking
- Trial and Appellate Practice and Procedure
- Uniform Child Custody Jurisdiction and Enforcement Act

Appeals

- Texas Courts of Appeal: http://www.txcourts.gov/cca
- The Supreme Court of Texas: http://www.txcourts.gov/supreme/

Adoption

- Texas Adoption Resource Exchange (TARE): https://www.dfps.state.tx.us/Application/TARE/Home.aspx/Default

Child Abuse Prevention & Advocacy

- American Professional Society on the Abuse of Children: https://www.apsac.org/
- Children's Defense Fund: https://www.childrensdefense.org/
- Crimes Against Children Research Center: http://www.unh.edu/ccrc/
- National Center for Missing and Exploited Children: https://www.missingkids.org/
- National Data Archive on Child Abuse and Neglect website: https://www.ndacan.acf.hhs.gov/
- National Sexual Violence Resource Center: https://www.nsvrc.org/
- TexProtects: Champions for Safe Children: https://www.texprotects.org/
- Texas Council of Child Welfare Boards: http://www.tccwb.org/

Child Support

- Office of Attorney General: https://www.texasattorneygeneral.gov/

Clinical Research on Separation and Removal

- American Bar Association: https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/talking-points-for-trial-and-appellate-lawyers.pdf

Court-appointed Special Advocates

- National CASA: https://nationalcasagal.org/
- Texas CASA: https://texascasa.org/

Disability - Advocates & Information

- Disability Rights Texas: https://www.disabilityrightstx.org/en/home/

Domestic Violence

- Texas Council on Family Violence: https://tcfv.org/

Education

- Texas Education Agency: https://tea.texas.gov/
- Texas Education for Homeless Children and Youth: https://tea.texas.gov/texas-schools/support-for-at-risk-schools-and-students/texas-education-for-homeless-children-and-youth-tehcy-program

Hotlines

- National Domestic Violence Hotline: https://www.thehotline.org/
- Texas Dept. of Family & Protective Services Abuse & Neglect: https://www.txabusehotline.org/Login/Default.aspx
- Texas Youth Helpline: Website: http://www.dfps.state.tx.us/Youth_Helpline/default.asp; Hotline: (800) 989-6884

Human Trafficking

- Office of the Attorney General: https://www.texasattorneygeneral.gov/initiatives/human-trafficking
- Office of the Governor: https://gov.texas.gov/organization/cjd/childsextrafficking

Immigration & Citizenship

Department of Homeland Security - All immigration and border related issues formerly the responsibility of the INS are now under the authority of the Department of Homeland Security (DHS). The following divisions now handle:

- U.S. Citizenship & Immigration Services (CIS) - immigrant services and benefits: https://www.uscis.gov/
- U.S. Immigration and Custom Enforcement (ICE) - domestic investigative and enforcement: https://www.ice.gov/
- U.S. Customs and Border Protection (CBP) - border enforcement: https://www.cbp.gov/
- Human Rights Initiative: https://hrionline.org/
- Immigrant Legal Resource Center - Special Immigrant Juvenile Status and general immigration resources: https://www.ilrc.org/

Incarcerated Parent Visitation

- U.S. Department of Health and Human Services: https://aspe.hhs.gov/pdf-report/effects-parental-incarceration-young-children

Indian Child Welfare Act

- Bureau of Indian Affairs: https://www.bia.gov/
- National Congress of American Indians: http://www.ncai.org/
- National Indian Child Welfare Association (NICWA): https://www.nicwa.org/
- Texas Child Protection Law Bench Book: Indian Child Welfare Act (ICWA): http://benchbook.texaschildrenscommission.gov/library_item/gov.texaschildrenscommission.benchbook/144

International

- Hague Convention on Civil Aspects of International Child Abduction: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction
- Hague Conference on Private International Law: https://www.hcch.net/en/home
- Hague Adoption Convention: https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention.html
- Desarrollo Integral de la Familia ("DIF") - Social services counter part to DFPS in Mexico: https://www.dif.cdmx.gob.mx/
- International Social Service - Resource for international home studies: https://iss-usa.org/
- U.S. Department of State International Judicial Assistance - Country specific information regarding service of process and related issues; select Law & Policy, then Information for Americans Abroad, then Judicial Assistance, then choose country specific information: https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst.html
- Consular Notification and Access - Guidance and contact information for foreign consuls (*See* International Travel; select A-Z Index, select Consular Notification & Access: https://travel.state.gov/content/travel/en/consularnotification.html

Interstate Compact on Placement of Children (ICPC)

- Association of Administrators of the ICPC: Website: https://www.aphsa.org/AAICPC/default.aspx; Phone: (202) 682-0100
- Texas DFPS: Webpage: https://www.dfps.state.tx.us/adoption_and_foster_care/about_tare/adoption/icpc.asp; Phone: (512) 929-6819

Judicial

- National Association of Drug Court Professionals: https://www.nadcp.org/
- National CASA Judge's Page: https://nationalcasagal.org/advocate-for-children/resources-for-judges/
- National Center for State Courts: https://www.ncsc.org/
- National Council of Juvenile & Family Court Judges: https://www.ncjfcj.org/
- Texas Center for the Judiciary: https://www.yourhonor.com/web

Legal Research

- National Conference of State Legislatures' Child Welfare Research: https://www.ncsl.org/
- Texas Legislature Online: https://www.legis.state.tx.us/

Medical Research:

- American Academy of Pediatrics: https://www.aap.org/en-us/Pages/Default.aspx
- PubMed Central - A free digital archive provided by the U.S. National Institute of Health: https://www.ncbi.nlm.nih.gov/pmc/

Mental Health

- Nation Alliance on Mental Illness (NAMI): https://www.nami.org/Home

Older Youth

- Texas Foster Youth Justice Project: http://texasfosteryouth.org/
- Texas Youth Connection: https://www.dfps.state.tx.us/txyouth/

Parent Support

- DFPS Parent Collaboration Groups: https://www.dfps.state.tx.us/Child_Protection/Family_Support/PCG/PCG.asp

Paternity

- Texas Dept. of State Health Services Vital Statistics Unit - FAQ's about paternity and parentage: https://www.dshs.texas.gov/vs/%20
- Office of Attorney General of Texas - FAQ's on establishing paternity: https://www.texasattorneygeneral.gov/child-support/paternity

Sealing Juvenile Records

- Juvenile and Children's Advocacy Project (JCAP) - At the University of Houston Law Center: Website: https://www.jcaptexas.org/; Phone: (713) 743-1132; Email: info@jcaptexas.org.

Shaken Baby Syndrome

- National Institute of Neurological Disorders & Strokes - Abusive Head Trauma Shaken Baby Syndrome: https://www.ninds.nih.gov/

State and Federal Child Welfare Policy

- Administration for Children and Families Children's Bureau: https://www.acf.hhs.gov/cb

Substance Abuse

- National Alliance for Drug Endangered Children: https://www.nationaldec.org/
- National Center for Substance Abuse and Child Welfare: https://ncsacw.samhsa.gov/
- Substance Abuse and Mental Health Services Administration (SAMHSA): https://www.samhsa.gov/

Trauma Informed Advocacy

- Trauma Informed Legal Advocacy Project: http://www.nationalcenterdvtraumamh.org/trainingta/trauma-informed-legal-advocacy-tila-%20project/

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