



2022 Tool Kit for Attorneys  
Representing the Texas Department  
of Family & Protective Services in  
Child Welfare Cases



**Disclaimer:**

The creation and production of this Tool Kit for Attorneys Representing the Department of Family and Protective Services in Child Welfare 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 or any other court 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 originally released in April 2018 and updated in September 2022.

## Letter from the Executive Director

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September 1, 2022

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 welfare 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 welfare 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 welfare cases, the Children’s Commission is pleased to share this Tool Kit for Attorneys Representing the Department of Family and Protective Services in Child Welfare 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 welfare 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 the Department of Family and Protective Services (DFPS), it is among the many resources which the Children’s Commission has developed, supported, and provided to attorneys representing parents, children, and the Department of Family and Protective Services as well as judges including: the Texas Child Protection Law Bench Book; Trial Skills Training; the Family Helpline; the Parent Resource Guide; and the Tool Kit for Attorneys Representing Parents and Children in Child Welfare 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 involved in Texas child welfare cases.

Sincerely,

A handwritten signature in black ink that reads "Jamie Bernstein".

Jamie Bernstein  
Executive Director  
Children’s Commission

## *Letter from the Texas District and County Attorneys Association*

September 1, 2022

Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families

Members of the Commission,

Protecting the children of this state is one of the most important missions of those in government service. On behalf of the Texas District and County Attorneys Association, I want to thank the members of the Commission and the Children's Commission's DFPS Representation Subcommittee who contributed to the original and updated versions of the Tool Kit for Attorneys Representing DFPS in Child Welfare Cases. Prosecutors in Texas have been honored to partner with the Texas Department of Family & Protective Services ("DFPS") in working on child welfare cases, and TDCAA is grateful for the work the Commission has done in providing this resource for Texas prosecutors and others representing children in these important cases.

The *Tool Kit* represents many hours of hard work by prosecutors, DFPS staff, Commission staff, and members of the judiciary. Many thanks for their dedication to this important project.



Robert Kepple  
TDCAA Executive Director



**Texas Department of Family and Protective Services**

**Office of General Counsel**

**Commissioner**  
*Jaime Masters, MS, MFT*

July 5, 2022

Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families Members of the Commission,

On behalf of the Texas Department of Family and Protective Services (“DFPS”), I am grateful for the opportunity to recommend the Tool Kit for Attorneys Representing DFPS in Child Protection Cases. The work we do in the area of child protection law can be as complex as it is urgent. Practitioners must master not only the laws specific to child welfare, but also the wider Texas Family Code, rules of evidence and procedure, administrative rules and DFPS policy. The result of joint efforts by the Commission, the Texas District and County Attorney’s Association, and DFPS, this updated Tool Kit manages to be both a thorough and convenient resource certain to be of great value to attorneys at any experience level. The Tool Kit demonstrates the power of collaboration in improving the lives of children, youth, and families in Texas.

*Vicki Kozikoujikian*

Vicki Kozikoujikian  
DFPS General Counsel

## Acknowledgements

The Children’s Commission would like to thank the authors and editors who contributed to the original and updated versions of the Tool Kit for Attorneys Representing the Department of Family and Protective Services in Child Welfare Cases.

Tina Amberboy	Aimee Corbin	Amber Martinez
Katherine N. Argabright	Jessica Devaney	Dylan Moench
Jessica Arguijo	Judge Denise Fortenberry	Karin Qualls
Jamie Bernstein	Quyona Gregg	Milbrey Raney
Denise Brady	Clint Harbour	Yvonne Rosa
Laurel Brenneise-Parke	Deborah Hinds	Anna Saldaña Ford
Audrey Carmical	Sophia Karimjee	Michele Surratt
Renée Castillo-De La Cruz	Pamela Kemp	Lucinda Valdez
Ernesto E. Cavazos Jr.	Brenda Kinsler	Andrea Vicencio
M. Lynn Chamberlin	Doug Lowe	Judge Elizabeth Watkins
Judge Gary Coley	Monica Mahoney	Will Watson
Latoya T. Colley	Jackie Sparks Martin	Mark Zuniga

The Children’s Commission would also like to express its gratitude to Rob Kepple and Brian Klas of the Texas District and County Attorneys’ Association for their continued support of this resource and for the opportunity to collaborate on training entitled “[\*The Fundamentals of Child Welfare Law\*](#).” Additionally, the Children’s Commission would like to express its gratitude to the members of the Children’s Commission’s Legal Representation Committee.

Judge Gary Banks (ret.)	Jessica Guy	Judy Powell
Alison Brock	Julia Hatcher	Judge April Propst
Andrew Brown	Judge Derbha Jones	Judge Jamie Rawlinson
Sarah Bryant	Becky Lange	Judge Susan Redford
Chief Justice Darlene Byrne	Michelle Latray	Mary Christine Reed
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Barbara J. Elias-Perciful	Judge Cheryll Mabray	Kenneth D. Thompson
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Judge Charles Griffin	Karen Miller	Judge Elizabeth Watkins*
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\* Indicates membership both on the DFPS Representation Sub-Committee which created this tool kit and on the Legal Representation Committee of the Children’s Commission.

## Acknowledgements, continued

The Children's Commission staff would like to recognize the leadership and vision of Justice Debra Lehrmann, Chair of the Children's Commission; Justice Rebeca Huddle, Deputy Chair of the Children's Commission; and Judge Gary Coley, Chair of the Children's Commission's Legal Representation Committee. We are grateful for their support.



### **Honorable Debra Lehrmann, Chair, Children's Commission**

Justice Debra H. Lehrmann has served on the Supreme Court of Texas since 2010, having been elected to the Court twice following her gubernatorial appointment. Before serving on the Supreme Court, she was a trial judge in Tarrant County for 23 years. Justice Lehrmann has been recognized by many law and community organizations for her service on and off the bench. In 2020, she received the Child Protection Law Section Founder's Award in recognition of her significant contribution to the establishment of the section. She serves as the Court's liaison to the State Bar of Texas, the State Bar Family Law Section, and the Family Law Council. Since September 2021, she has served as the Chair of the Children's Commission.



### **Honorable Rebeca Aizpuru Huddle, Deputy Chair, Children's Commission**

Justice Rebeca Aizpuru Huddle was appointed to the Supreme Court of Texas by Governor Greg Abbott in October 2020. She is a native of El Paso and she earned her undergraduate degree in political science at Stanford University and her law degree at the University of Texas School of Law, where she was the recipient of three endowed presidential scholarships and graduated with honors. She previously served as a justice on the First Court of Appeals. She has served as a member of the board of directors of the Greater Houston Partnership and the Houston Area Women's Center. She is a Fellow of the Texas Bar Foundation and the Houston Bar Foundation. She has served as the Deputy Chair of the Children's Commission since September 2021.



### **Honorable Gary Coley, Legal Representation Committee Chair**

The Honorable Gary Coley was elected as Judge of the 74th District Court in 2008. He has served on numerous committees for the Children's Commission, Texas Center for the Judiciary, and Texas College for Judicial Studies. Among other civic and professional activities, he is a member of Rotary Club, American Board of Trial Advocates (ABOTA) and the Judge Abner McCall Inn of Court. Judge Coley obtained his BBA from Texas A&M University and his JD from Baylor University School of Law.

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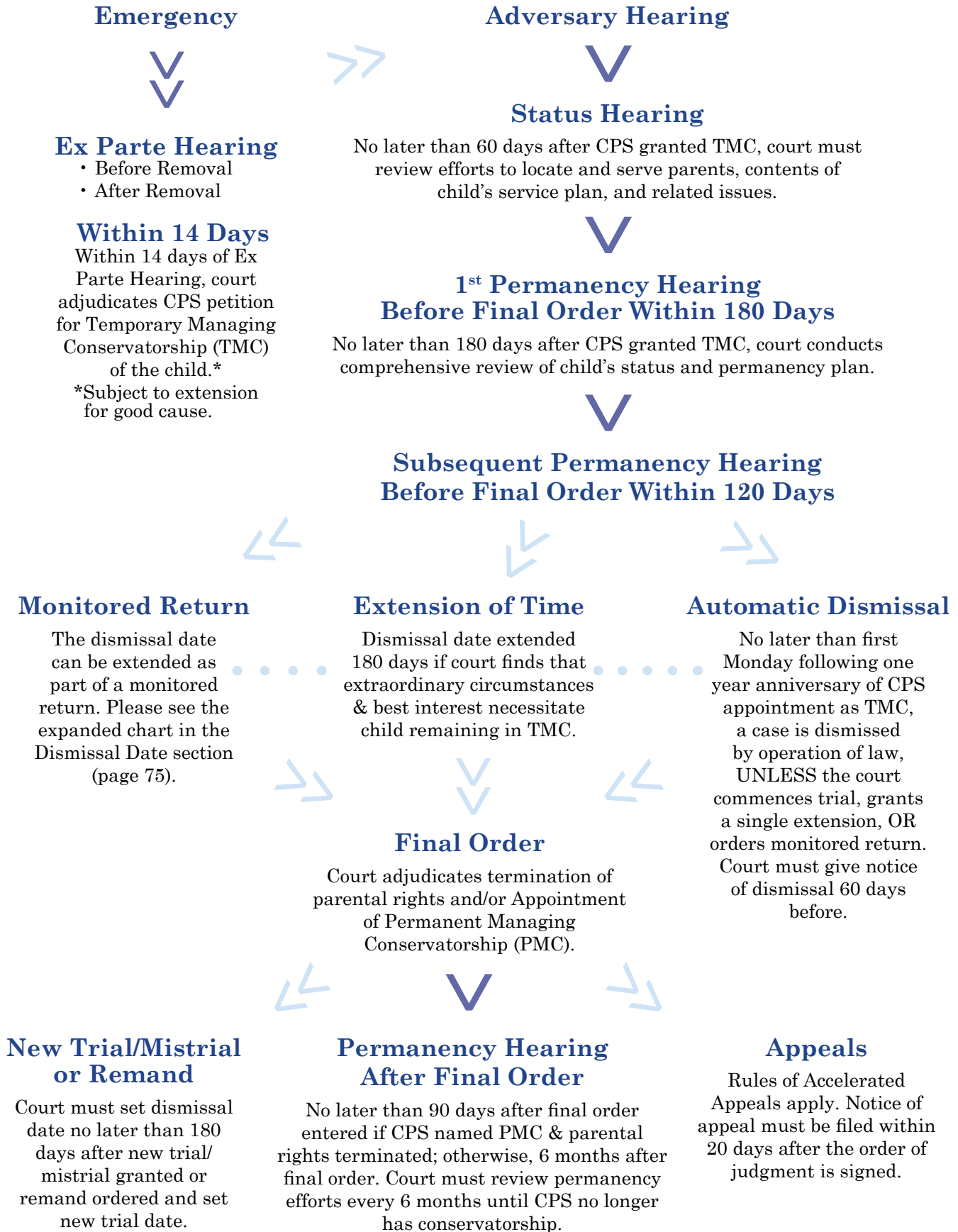


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# Overview: Child Welfare Case Flow Chart

*Removal/Start of Case*      *Tex. Fam. Code Title 5, Ch. 161; 261-266*



## Burden of Proof

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

Ordinary Prudence and Caution is similar to the Probable Cause standard 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:

- Initial Hearing of a petition for COS/MTP. [Tex. Fam. Code § 264.203\(m\)](#);
- 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
- Adversary Hearing. [Tex. Fam. Code § 262.201](#).

### *Preponderance of the Evidence*

Preponderance of the Evidence is evidence that is of greater weight or 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](#);
- Adoption Hearing. [Tex. Fam. Code § 105.005](#);
- Hearing on Reinstatement of Parental Rights. [Tex. Fam. Code § 161.303](#).

### *Clear and Convincing*

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

- Termination of Parental Rights 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*

The Beyond a Reasonable Doubt standard 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](#).

### *Court Hearings that Can Require a Best Interest Determination*

#### THE ADVERSARY HEARING

##### *When considering placement with relative.*

If the court does not order possession of the child by a parent, the court shall place a child with a relative of the child unless placement is not in the best interest of the child. [Tex. Fam. Code § 262.201\(n\)](#).

#### PERMANENCY HEARINGS BEFORE A FINAL ORDER

##### *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](#).

##### *When determining whether to return the child to the child's home.*

At each permanency hearing before a final order, the court shall determine whether to return the child to the child's parents if the child's parents are willing and able to provide the child with a safe environment and the return of the child is in the child's best interest. [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#). *But see also* [Tex. Fam. Code § 263.002\(c\)](#).

### *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 § 263.109\(b\)](#).

#### WHEN CONSIDERING UNSUPERVISED VISITATION IN THE CONTEXT OF FAMILY VIOLENCE

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

## EXTENDING THE DISMISSAL DATE

The court finds that extraordinary circumstances necessitate the child remaining in the Temporary Managing Conservatorship (TMC) of 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 under this section is in the best interest of the child. [Tex. Fam. Code § 263.403\(1\)](#).

## *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, the Department 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

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

## *Factors in Determining Best Interest*

The "Holley factors" below are a non-exclusive list of factors to consider:

- Desires of the child;
- Emotional and physical danger to the child now and in the 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. *Holley v. Adams*, 544 S.W. 2d 367 (Tex. 1976).

Additional factors to consider in determining a child's best interest are outlined in [Tex. Fam. Code § 263.307](#) and 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.

## Relevant Case Law

### DESIRES OF CHILD

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

### EMOTIONAL & PHYSICAL DANGER TO CHILD NOW & IN THE FUTURE

- **Past conduct can be used to measure future conduct.** “Evidence of past misconduct or neglect can be used to measure a parent’s future conduct.” *Ray v. Burns*, 832 S.W.2d 431, 435 (Tex. App.—Waco 1992, no writ).
- **Prior termination orders can be relevant in determining future danger.** “The trial court was permitted to take as true the conduct-specific findings in these judgments as showing Mother had a history of abandoning and endangering her children.” “The court can consider evidence of prior termination as to two children in analyzing evidence relating to another child’s best interest.” *ITIO J.M.G.*, 608 S.W.3d 51, 55 (Tex. App, San Antonio, July 1, 2020).

### PARENTAL ABILITIES

- **Past conduct can be used to measure future conduct.** In reviewing the parental abilities of a parent, a factfinder can consider the parent’s past neglect or past inability to meet the physical and emotional needs of their children. *D.O. v. Tex. Dep’t of Human Servs.*, 851 S.W.2d 351, 356 (Tex. App.—Austin 1993, no writ.).
- **Conclusory testimony regarding parental abilities is insufficient.** Although caseworker “opined that termination was in child’s best interest because he needed a permanent home and aunt in California was willing to adopt him, nothing is known about the aunt or her home in California. Therefore, there is no evidence about the aunt’s parental abilities...” *ITIO R.S.D.*, 446 S.W.3d 816, 821 (Tex. App. - San Antonio, Sept. 3, 2014).

### PROGRAMS AVAILABLE TO ASSIST PARENTS

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

## PLANS FOR CHILD BY INDIVIDUALS SEEKING CUSTODY OR AGENCY

- **The feasibility of competing plans may be compared.** A factfinder may compare the parent's and the Department's plans for the child and consider whether the plans and expectations of each party are realistic or weak and ill-defined. *D.O. v. Tex. Dep't of Human Servs.*, [851 S.W.2d 351, 356](#) (Tex. App.—Austin 1993, no writ.).
- **Adoption subsidies should not be the basis for a best interest finding.** Terminating a parent's rights to his children so that someone can obtain financial subsidies upon adoption is not an appropriate basis on which to base a best interest finding. *ITIO of E.D., E.D., I.D., and J.D.*, [419 S.W.3d 615, 619](#) (Tex. App. - San Antonio Nov. 22, 2013).

## STABILITY OF HOME OR PROPOSED PLACEMENT

- **Stability is paramount for the child.** Stability and permanence are paramount in the upbringing of children. *In re T.D.C.*, [91 S.W.3d 865, 873](#) (Tex. App.—Fort Worth 2002, pet. denied).
- **Stability is a compelling government interest.** The goal of establishing a stable, permanent home for a child is a compelling interest of the government. *Hann v. Tex. Dep't of Protective and Regulatory Servs.*, [969 S.W.2d 77, 83](#) (Tex. App.—El Paso 1998, pet. denied).
- **Past conduct can be used to measure future stability.** Parent's failure to show that he is stable enough to parent a child for any prolonged period entitles the factfinder "to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption." *D.O. v. Tex. Dep't of Human Servs.*, [851 S.W.2d 351, 358](#) (Tex. App.—Austin 1993, no writ).
- **Consequence of not terminating may be considered.** A factfinder may also consider the consequences of its failure to terminate parental rights, and that the best interest of the child may be served by termination so that adoption may occur rather than the impermanent foster care arrangement that would result if termination were not obtained. *In re B.S.W.*, [No. 14-04- 00496-CV, 2004 WL 2964015, at \\*9](#) (Tex. App.—Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem. op.).

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

- **Parent's acts or omissions in the not-too-distant past can show the relationship with the child is not a proper one.** A factfinder can consider a parent's drug use, frequent incarcerations, continued involvement in an abusive relationship, and extremely poor judgment in leaving child in dangerous and deplorable conditions in determining whether the parent-child relationship is a proper one. *ITIO D.M.*, [452 S.W.3d 462, 472-473](#) (Tex. App. - San Antonio, Nov. 24, 2014).
- **Incarceration alone does not support finding that parent-child relationship is improper.** Other than the fact the appellant was incarcerated at the time of trial, "no other evidence was offered on whether appellant's relationship with her child was not a proper one." *ITIO R.S.D.*, [446 S.W.3d 816, 821](#) (Tex. App. - San Antonio, Sept. 3, 2014).
- **Past criminal conviction may not be sufficient to support a finding that the parent-child relationship is not a proper one.** The fact that a parent has been convicted of having an improper relationship with a minor before his children were born without any evidence presented concerning the offense does not support a finding that there "is a risk of his having an inappropriate relationship with his own children." *ITIO E.N.C., J.A.C., S.A.L., N.A.G., and C.G.L.*, [384 SW3d 796, 808](#) (Tex. 2012).



## *Eliciting Evidence Regarding Best Interest*

The following 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;
- The bonds the child has with the proposed long-term caregiver;
- The level of interest the parent has shown in the well-being of their child;
- The frequency and nature of the parent’s visits;
- The recent, relevant criminal history of the parent;
- Training/classes the parent has attended;
- Parent’s demonstration (or lack thereof) of changes in behavior;
- Parent’s demonstration that they have or have not addressed the issues that brought the child into DFPS care;
- Details regarding the parent’s level of cooperation with the Department and services; 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.

### **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 child and how those needs have been met;
- How child was when they first entered substitute care and how they are now; and/or
- Future plans for child (e.g., Does the caregiver plan to stay involved with the child and if so, how? Is the caregiver considering adoption?).

### **PSYCHOLOGIST/THERAPIST TESTIMONY**

- The number of and type of placements the child has experienced in DFPS care;
- The progress or lack of progress the child has made in DFPS 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

# Jurisdiction, Venue, and Transfer

## *Original Jurisdiction*

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

DFPS must file a petition based on allegations of abuse or neglect arising from the same incident or occurrence and involving children living in the same home in the same court. [Tex. Fam. Code § 262.015](#).

## *Court of Continuing, Exclusive Jurisdiction (CCEJ)*

Except for voluntary or involuntary dismissal of a suit affecting the parent-child relationship (SACPR), a parentage suit where the final order finds that an alleged or presumed father is not the father, or a final order of adoption, a court acquires continuing, exclusive jurisdiction over the matters provided for by [Tex. Fam. Code Title 5](#) in connection with a child on the rendition of a final order. [Tex. Fam. Code § 155.001](#).

If a court of this state has acquired continuing, exclusive jurisdiction, no other court of this state has jurisdiction of a suit with regard to that child except as provided by [Tex. Fam. Code Chapter 155](#), [Tex. Fam. Code § 103.001\(b\)](#), or [Tex. Fam. Code Chapter 262](#). [Tex. Fam. Code § 155.001\(c\)](#).

## *Emergency Jurisdiction*

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

- “[A]s to emergency and temporary orders, the Chapter 262 court shares jurisdiction with the Chapter 155 court of continuing, exclusive jurisdiction, but not as to final orders.” *In re L.S.*, [557 S.W.3d 736, 739](#) (Tex. App.—Texarkana 2018, no pet.).

If at the conclusion of the full adversary hearing the court renders a temporary order, DFPS shall request identification of a court of continuing, exclusive jurisdiction as provided by [Tex. Fam. Code Chapter 155](#). [Tex. Fam. Code § 262.202](#).

- “[O]nce the Chapter 262 court issues a temporary order after a full adversary hearing, then the Department ‘shall request identification of a court of continuing, exclusive jurisdiction as provided by Chapter 155.’” *In re D.W.*, [533 S.W.3d 460, 465](#) (Tex. App.—Texarkana 2017, pet. denied) (quoting [Tex. Fam. Code § 262.202](#) (emphasis added)).

For information related to jurisdiction when ICWA applies, please see the *ICWA* section of this tool kit.

## *Venue*

Venue lies in the county where the child resides; generally speaking, that county is where the child’s parent resides, unless:

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

A child resides in the county where the child’s parents reside or the child’s parent resides, if only one parent is living, except that:

- If a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;
- If the parents of the child do not reside in the same county and if a managing conservator, custodian, or guardian of the person has not been appointed, the child resides in the county where the parent having actual care, control, and possession of the child resides;
- If the child is in the care and control of an adult other than a parent and a managing conservator, custodian, or guardian of the person has not been appointed, the child resides where the adult having actual care, control, and possession of the child resides;
- If the child is in the actual care, control, and possession of an adult other than a parent and the whereabouts of the parent and the guardian of the person is unknown, the child resides where the adult having actual possession, care, and control of the child resides;
- If the person whose residence would otherwise determine venue has left the child in the care and control of the adult, the child resides where that adult resides;
- If a guardian or custodian of the child has been appointed by order of a court of another state or country, the child resides in the county where the guardian or custodian resides if that person resides in this state; or
- If it appears that the child is not under the actual care, control, and possession of an adult, the child resides where the child is found. [Tex. Fam. Code § 103.001\(c\)](#).

### *Relevant Case Law*

- [Tex. Fam. Code § 103.001](#) is not jurisdictional but is a venue statute that determines the proper county to bring a suit affecting the parent-child relationship. See [Tex. Fam. Code § 103.001](#); *Gutierrez v. Gutierrez*, No. 05-14-00803-CV, 2016 WL 1242193, at \*1 (Tex. App.—Dallas Mar. 30, 2016, no pet.); *Kshatrya v. Texas Workforce Com’n*, 97 S.W.3d 825, 832 (Tex.App.—Dallas 2003, no pet.) (venue is not jurisdictional); see also [Tex. Fam. Code § 103.002](#) (if suit brought in improper county, suit shall be transferred on timely motion).
- The law in Texas has long been that any party to a lawsuit may expressly or impliedly waive rights conferred upon him by a venue statute. *Grozier v. L–B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309 (Tex.App.—Fort Worth 1988, writ denied).
- The matter of venue is a personal privilege which may be waived. See *id.*; *Mooney Aircraft, Inc. v. Adams*, 377 S.W.2d 123, 125 (Tex.Civ.App.—Dallas 1964, no writ).

### *Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)*

The UCCJEA governs jurisdiction over child custody issues between Texas and other states. *In re Isquierdo*, 426 S.W.3d 128, 131 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). [Tex. Fam. Code Chapter 152](#) codifies the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) into state law.

Except as provided in [Tex. Fam. Code § 152.204](#), a Texas court may not modify a child custody determination made by a court of another state unless:

- The Texas court has jurisdiction to make an initial determination under [Tex. Fam. Code §152.201\(a\)\(1\)-\(2\)](#); and
- The court of the other state determines it no longer has exclusive continuing jurisdiction, or that the Texas court would be a more convenient forum, or either court determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state. [Tex. Fam. Code § 152.203](#).

## INITIAL CHILD CUSTODY JURISDICTION

Except as otherwise provided in [Tex. Fam. Code § 152.204](#), a Texas court has jurisdiction to make an initial child-custody determination if:

- This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
- A court of another state does not have jurisdiction, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [Tex. Fam. Code §§ 152.207](#) or [152.208](#), and:
  - the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
  - substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships;
- All courts having jurisdiction have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under [Tex. Fam. Code §§ 152.207](#) or [152.208](#); or
- No court of any other state would have jurisdiction under the criteria specified in [Tex. Fam. Code § 152.201](#).

## HOME STATE

Home state is defined as the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case where a child is less than six months of age, the home state is the one in which the child lived from birth with a parent or person acting as a parent. [Tex. Fam. Code §152.102\(7\)](#).

## EMERGENCY JURISDICTION UNDER THE UCCJEA

A Texas court may assume temporary jurisdiction over a custody dispute if the child is present in this state and it is necessary to protect a child subjected to or threatened with mistreatment or abuse. [Tex. Fam. Code § 152.204](#).

Any order issued under emergency circumstances must be temporary in nature; the order must specify a period that the court considers adequate to obtain an order from the state with jurisdiction. The temporary order shall remain in effect only until proper steps are taken in the original forum state to adequately protect the child or until the specified period expires. [Tex. Fam. Code § 152.204\(c\)](#).

Notice is required for the exercise of jurisdiction on a person who resides out-of-state and may be

given in any manner reasonably calculated to give actual notice. See [Tex. Fam. Code § 152.108](#).

## DUTY TO COMMUNICATE

A court of this state may communicate with the court in another state concerning a proceeding arising under [Tex. Fam. Code Chapter 152](#). The court may allow the parties to participate in the communication. If the parties are unable to participate, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. If proceedings involving the same parties are pending simultaneously in a Texas court and the court of another state, the Texas court shall inform the other court of the simultaneous proceedings and shall request that the other court hold the proceeding in that court in abeyance until the Texas court conducts a hearing to determine whether it has jurisdiction over the proceeding. Except for communications between courts on schedules, calendars, court records, and similar matters, a record must be made of any communication under [Tex. Fam. Code Section 152](#), and the parties must be informed promptly of the communication and granted access to the record. [Tex. Fam. Code § 152.110\(f\)](#).

**Practice Tip:** To ensure compliance with [Tex. Fam. Code § 152.110\(f\)](#) requirement that a record of communication between courts is made, attorneys representing DFPS may request of the judge that they announce in open court and put on the record that they communicated with the judge of the out-of-state court of continuing jurisdiction and their joint decision as to which court would retain jurisdiction.

A Texas court which has been asked to make a custody determination under [Tex. Fam. Code § 152.204](#) (temporary emergency jurisdiction), upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of another state having jurisdiction, shall immediately communicate with the other court. If a Texas court is exercising emergency jurisdiction, it shall immediately communicate with a court of another state that has commenced a child custody proceeding or has made a child custody determination under a statute similar to this section to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. [Tex. Fam. Code § 152.204\(d\)](#).

## INCONVENIENT FORUM

A Texas court which has jurisdiction under [Tex. Fam. Code Chapter 152](#) to make a child custody determination may decline to exercise its jurisdiction if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. [Tex. Fam. Code § 152.207\(a\)](#).

## *Transfer of Suit*

On the motion of a party or the court's own motion, if applicable, the court that rendered the temporary order shall in accordance with procedures provided by [Tex. Fam. Code Chapter 155](#):

- Transfer the suit to the court of continuing, exclusive jurisdiction, if the court finds that the transfer is necessary for the convenience of the parties and in the best interest of the child;
- Order transfer of the suit from the court of continuing, exclusive jurisdiction; or
- If grounds exist for transfer based on improper venue, order transfer of the suit to the court having venue of the suit under [Tex. Fam. Code Chapter 103](#). [Tex. Fam. Code § 262.203\(a\)](#).

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

*Note: Upon receiving notice that a court exercising emergency jurisdiction under [Tex. Fam. Code Chapter 262](#) has ordered the transfer of a SAPCR under [Tex. Fam. Code § 262.203\(a\)\(2\)](#), a CCEJ must transfer the proceedings to the court exercising jurisdiction under Chapter 262. [Tex. Fam. Code § 155.201](#).*

If the court exercising jurisdiction under Chapter 262 orders the transfer of the suit to the CCEJ the order of transfer must include:

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

A temporary order rendered under Chapter 262 is valid and enforceable until properly superseded by a court with jurisdiction to do so. [Tex. Fam. Code §262.204](#).

*Note: A suit in which adoption is requested may be filed in the county where the child resides or in the county where the petitioners reside, regardless of whether another court has continuing exclusive jurisdiction under [Tex. Fam. Code Chapter 155](#). Except as provided by [Tex. Fam. Code § 155.201](#), a court that has continuing exclusive jurisdiction is not required to transfer the SAPCR to the court in which the adoption suit is filed. [Tex. Fam. Code § 103.001\(b\)](#).*

## Relevant Case Law

- *In re C.G.*, [495 S.W.3d 40, 44–45](#) (Tex. App.—Corpus Christi 2016, pet. denied) (statute is “truly jurisdictional”—that is, when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void.”).
- *In re S.H.*, [No. 13-18-00240-CV, 2018 WL 4624720, at \\*1, \\*5](#) (Tex. App.—Corpus Christi—Edinburg Sept. 27, 2018, no pet.) (mem. op.) (declaring void the 343rd District Court of Bee County’s 2017 order terminating father’s parental rights under chapter 262 when the 36th District Court of Bee County had continuing, exclusive jurisdiction based on a 2004 SAPCR under chapter 155, there was no transfer order, and the exchange-of-benches doctrine did not apply).
- *In re L.S.*, [557 S.W.3d 736, 739–40](#) (Tex. App.—Texarkana 2018, no pet.) (holding, after abatement for an evidentiary hearing, that an order terminating father’s parental rights to L.S. by a Harrison County Court was void when a Gregg County Court still had continuing, exclusive jurisdiction in matters connected with L.S.).

**Practice Tip:** Unless the petition alleges that no court has CCEJ or that the court in which the suit or petition to modify has been filed has acquired and retains CCEJ, DFPS shall request the identification of the court of continuing, exclusive jurisdiction from vital statistics as soon as practicable prior to the Status Hearing. If a court of continuing, exclusive jurisdiction is identified, attorneys representing DFPS should act quickly and file a motion and order to transfer either to the CCEJ or from the CCEJ to the 262 Court. The trial court cannot issue a final order in a child welfare case if another court has continuing, exclusive jurisdiction.

# Pleading Practice

## *Pleadings*

DFPS may plead multiple grounds for termination in their Petition for Protection, for Conservatorship, and for Termination in a Suit Affecting the Parent Child Relationship. However, suits filed by DFPS 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. [Tex. Fam. Code §161.101\(b\)](#).

**Practice Tip:** Avoid pleading a “laundry list” of all termination grounds, and instead focus on pleading termination grounds which are applicable to the facts of your case and/or which can be proved at trial.

**Practice Tip:** Termination grounds such as constructive abandonment or failure to complete the family plan of service include timing and reasonable efforts components that are not likely to have been met at the time of the filing of the original petition; however, these grounds may still be included in the petition if the grounds are likely to be proved at trial. Depending on your jurisdiction, you may also consider including contingent phrasing in your original pleadings such as:

“The Department will seek court orders to compel Respondent to participate in services in order to continue to make reasonable efforts to return the child home to reunify the family. Respondent is hereby notified, should they not comply with those orders, that, after the requisite time period has elapsed, the Department will seek to terminate parental rights for failure to comply with the provisions of a court order that specifically established the actions necessary for Respondent to obtain the return of the child who will have been in the permanent or temporary managing conservatorship of the Texas Department of Family and Protective Services for not less than nine months as a result of the child removal from the parent under chapter 262 for the abuse or neglect of a child.”

**Practice Tip:** Depending on the jurisdiction, attorneys representing DFPS might consider requesting Court Ordered Services strictly in the alternative in the petition for removal. Some courts may consider entering a finding that, while a request for temporary managing conservatorship of a child should be denied, the evidence presented at the adversary hearing supports a finding for court ordered services; however, other courts may not consider making such a finding unless a request for it is specifically pleaded.

## *Termination Grounds Included in SAPCR*

A complete list of the statutory grounds for Involuntary Termination of Parent-Child Relationship is found in [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 permanent or temporary managing conservatorship of the Department for not less than six months, and
- Not regularly visited or maintained significant contact with the child; and
- Demonstrated an inability to provide the child with a safe environment; and
- DFPS made reasonable efforts to return the child to the parent.

**Practice Tip:** Before proceeding with a request for termination based on the “N” ground at a termination trial, attorneys representing DFPS might consider calculating timelines to ensure that the child has been in the managing conservatorship of DFPS at least 6 months. If it is pleaded and the requisite time has not elapsed by the time of the final hearing on the merits, amending pleadings is a best practice.

**Practice Tip:** Attorneys representing DFPS might consider taking a close look at the parents’ opportunities to spend time with their child. In that case, it is helpful to determine the frequency with which the parent could visit or have contact with the child and how many times the parent exercised this right. For example, if the temporary court orders allow a parent to visit the child twice per month for two hours per visit, that parent will have the opportunity to complete 48 hours of visitation over 24 visits with the child over a 6-month period. If the parent only attends 2 visits in that time and had no other contact with the child, then the contact was likely not significant. However, if there is an order in place denying the parent visitation, the abandonment ground may not apply.

**Practice Tip:** Remember that contact with a child may include visits, phone calls, communication through video chat such as FaceTime, Zoom, or Skype, letters, or other mediums approved by the court. Contact may also be allowed through communication with a relative caregiver if the child is too young to participate in visits. If there are barriers preventing a parent from visiting or contacting their child as scheduled, such as transportation or internet issues, caseworkers should make reasonable efforts to assist the parent with maintaining contact with their child.

## ENDANGERMENT GROUNDS: 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 which endangers the physical or emotional well-being of the child.

**ENDANGERMENT GROUNDS: 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.

*Note: When a parent executes an affidavit of voluntary relinquishment, Tex. Fam. Code § 161.1031 also requires the parent to complete a medical history report. If an “Indian child” is involved, the standard relinquishment form is not valid. Please see additional information in the ICWA section in this tool kit.*

**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, an elderly individual, or disabled individual; abandoning or endangering child; prohibited sexual conduct; sexual performance by child; possession or promotion of child pornography.

*Note: the ground also applies to out of state convictions for crimes with elements similar to those listed above.*

**Practice Tip:** The most straightforward way to prove conviction of a crime is to use a certified copy of the judgment. It is also helpful to get a certified copy of the indictment. Request the certified copies of the documents early in the case to ensure the documents are available in time for your use at trial and to comply with discovery orders in the case.

**PRIOR TERMINATION ON ENDANGERMENT GROUNDS**

Tex. Fam. Code § 161.001(b)(1)(M).

Has the parent:

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

*Note: The court may not order termination under this ground unless the petition was filed within one year of DFPS being named managing conservator of a child in a prior case against the parent which resulted in the termination of that parent's rights. [Tex. Fam. Code § 161.001\(d-1\)](#).*

**Practice Tip:** When requesting a termination of parental rights based on a prior termination on endangerment grounds, the most straightforward way to prove the prior termination is to use a certified copy of the final order terminating parental rights pursuant to [Tex. Fam. Code § 161.001\(b\)\(1\)\(D\)](#) or [\(E\)](#) or equivalent grounds in another state. Request the certified copy of the document early in the case, especially if the termination occurred in another jurisdiction, to ensure the document is available in time for use at trial and to comply with any discovery orders in the case.

## FAILURE TO COMPLETE 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 Permanent Managing Conservatorship (PMC) or Temporary Managing Conservatorship (TMC) of DFPS for not less than nine months,
- 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\(d\)](#).*

**Practice Tip:** Attorneys representing DFPS might consider calculating timelines to ensure the child has been in the managing conservatorship of DFPS at least nine months before proceeding on a request for termination of parental rights based on the "O" ground. If it is pled and the requisite time has not elapsed by the final hearing on the merits, it is best practice for attorneys representing DFPS to amend their pleadings.

**Practice Tip:** At final trial, attorneys representing DFPS must prove by clear and convincing evidence that the child’s initial removal was due to abuse and/or neglect. A finding that abuse and/or neglect occurred is a fact-intensive issue. Merely offering the order granting TMC to the Department into evidence may not be sufficient to prove those findings because the Temporary Orders issued at end of the Adversary Hearing were rendered under a preponderance of the evidence standard. Additionally, a parent’s agreement to grant TMC to DFPS at the Adversary Hearing may not be used as an admission of abuse and/or neglect of a child by the parent. Instead, consider eliciting testimony from the CPI caseworker, law enforcement, and any other witness that may support a finding by clear and convincing evidence that the child’s removal from their home was due to the abuse and/or neglect of the child.

**Practice Tip:** [Tex. Fam. Code § 161.001\(b\)\(1\)\(O\)](#) refers to the Family Plan of Service that became an order of the Court. Attorneys representing DFPS seeking termination should elicit testimony about the specific services ordered as to each parent, how the service plan was narrowly tailored to meet the dangers that brought the child into care, that it was made an order of the court, and that it was designed to provide the parents with knowledge and tools that, if used and demonstrated, would allow for reunification. Additional supportive testimony could bring forward any changes to the service plan throughout the life of the case, changes of service providers, and any assistance offered by the caseworker to each parent such as transportation or provision of provider services through electronic means such as Zoom to meet the needs of each parent.

## 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).*

## BORN ADDICTED

Tex. Fam. Code § 161.001(b)(1)(R).

Has the parent:

- Been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription.

See definition of “born addicted,” Tex. Fam. Code § 161.001(a).

### *Relevant Case Law*

- *In re L.G.R.*, 498 S.W.3d 195, 202–03 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (holding that observable signs of withdrawal were not required to support termination of rights where mother admitted marijuana use during pregnancy and the child’s meconium tested positive).
- *In re D.D.G.*, 423 S.W.3d 468, 474–75 (Tex. App.—Fort Worth 2014, no pet.) (holding that mother’s admission of methamphetamine use during pregnancy and child testing positive at birth was sufficient to support termination of rights and that no expert testimony was required to establish the level of drugs in the child’s system).
- *In re M.N.O.*, No. 09–02–070 CV, 2002 WL 31835026, at \*2 (Tex. App.—Beaumont Dec. 19, 2002, no pet.) (not designated for publication) (upholding termination of mother’s parental rights to all three of her children on ground that she was the cause of her youngest child being born addicted to cocaine and stating that medical records indicating youngest child tested positive for cocaine at birth were legally and factually sufficient evidence to support the trial court’s finding under section 161.001(1)(R)).
- *In re R.S.O.C.*, No. 02–11–00337–CV, 2012 WL 2923289, at \*5 (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.) (upholding termination of mother’s parental rights to her three children after mother testified to using cocaine prior to youngest child’s birth and youngest child’s medical records indicated child tested positive for cocaine at birth).

## TERMINATION OF RIGHTS OF ALLEGED BIOLOGICAL FATHER

Tex. Fam. Code § 161.002.

If an alleged father has been served with citation, his rights can be terminated if he does not timely file an admission of paternity or a counterclaim for paternity under Tex. Fam. Code Chapter 160. Tex. Fam. Code § 161.002 (b)(1).

An alleged father’s rights can be terminated without personal service of citation or citation by publication if:

- The child is over one year of age at the time the petition was filed, and the alleged father has failed to register with the paternity registry, and after the exercise of due diligence by the petitioner:
  - his identity and location are unknown, or
  - his identity is known, but he cannot be located; Tex. Fam. Code § 161.002 (b)(2).
- The child is under one year of age at the time the petition was filed, and the alleged father has not registered with the paternity registry. Tex. Fam. Code § 161.002 (b)(3).

Petitioner's due diligence to locate and identify the alleged father is required for the above sections including obtaining a certificate of the results of the paternity registry search from the Texas Department of State Health Services Vital Statistics Unit indicating that no man has registered intent to claim paternity. [Tex. Fam. Code § 161.002\(e\)](#).

If an alleged father has registered with the paternity registry, citation by publication is not required, but DFPS must still exercise due diligence to locate the alleged father, including a sworn affidavit describing their efforts to obtain personal service of citation at the address provided to the registry and any other address known to DFPS. [Tex. Fam. Code § 161.002\(b\)\(4\)](#). The court must enter specific findings regarding the exercise of due diligence by DFPS when rendering an order terminating parental rights under this section. [Tex. Fam. Code § 161.002\(f\)](#).

**Practice Tip:** Before the court can render an order terminating parental rights of an alleged father who has failed to register with the paternity registry, the court must receive evidence of a certificate of the results from the Texas Department of State Health Services Vital Statistics Unit indicating that no man has registered intent to claim paternity. [Tex. Fam. Code § 161.002 \(e\)](#).

*Note: An alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown or who registered with the paternity registry but who DFPS has been unable to personally serve at the address provided to the registry and at any other address known by DFPS is entitled to a mandatory appointment of an attorney. [Tex. Fam. Code § 107.013\(a\)\(3\) & \(4\)](#).*

## Special Issues

### “BABY MOSES”

[Tex. Fam. Code § 161.001\(b\)\(1\)\(S\)](#).

The Safe Haven law, also known as the Baby Moses law, gives parents who are unable to care for their child a safe and legal choice to leave their infant with an employee at a designated safe place: a hospital, fire station, free-standing emergency center, or emergency medical services (EMS) station.

Has the parent:

- Voluntarily delivered the child to a designated emergency infant care provider under [Tex. Fam. Code § 262.302](#) without expressing an intent to return for the child.

### 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 parent unable to provide for physical, emotional, and mental needs of the child;
- The illness or deficiency will probably continue to render parent unable to provide for child's needs until child's 18th birthday;
- DFPS has been temporary managing conservator or sole managing conservator of the child for at least six months prior to the termination hearing;

- DFPS made reasonable efforts to return the child to the parent; and
- Termination is in the best interest of the child.

*Note: If the petition alleges that parental rights should be terminated due to a parent's inability to care for the child, the court must appoint an attorney ad litem to represent the interests of the parent against whom the suit is brought, and a hearing on the termination of parental rights may not be held earlier than 180 days after the date on which the suit was filed. [Tex. Fam. Code § 161.003\(b\)-\(c\)](#).*

**Practice Tip:** While a parent is entitled to the appointment of an attorney ad litem to represent their interests under [Tex. Fam. Code § 161.003](#), the appointment of a guardian ad litem for the parent can only be ordered by a probate court. DFPS should not request the appointment of a guardian ad litem for a parent, even if there are concerns about the parent's capacity. The referral of the proceeding to the proper court for guardianship proceedings must come from the attorney ad litem for the parent, at the direction of their client's expressed objectives of representation and if appropriate. [Tex. Fam. Code § 107.010](#).

## ICWA

If a child is identified as an "Indian child," specific pleadings, notices, burdens of proof, and findings are required. Please see the *ICWA* section in this tool kit.

## FILING A REQUEST TO NONSUIT

DFPS cannot nonsuit a suit to terminate parental rights without court approval. [Tex. Fam. Code § 161.203](#).

# Service of Citation and Notice

## *Service of Citation*

“Service” is the process of documenting that a party has been provided notice of an event or documents. Service of citation gives legal notice to parties that a suit has been filed. In lawsuits filed by DFPS, the agency is responsible for obtaining service of citation containing the original petition and providing notice of trial settings and other events during the pendency of the legal case. Citation on the filing of an original petition in a Suit Affecting the Parent-Child Relationship (SAPCR) must be issued and served as in other civil cases. [Tex. Fam. Code § 102.009\(c\)](#). However, in a suit filed under [Tex. Fam. Code § 262.101](#) (Filing Petition Before Taking Possession of Child) or [Tex. Fam. Code § 262.105](#) (Filing Petition After Taking Possession of Child in Emergency), a court may proceed with temporary orders prior to any required service by publication. [Tex. Fam. Code § 262.201\(o\)](#).

### **PARTIES TO BE SERVED**

DFPS is responsible for obtaining service of citation on the following parties:

- Each parent (including an alleged father), unless the parent’s rights are terminated, or a parent signs a waiver of service;
- A managing or possessory conservator, guardian, or other person with court ordered access to the child;
- A prospective adoptive parent with standing or a conservator designated in an affidavit of relinquishment; and
- The Texas Attorney General’s Office or any other child-support agency (if child support payments may be affected). [Tex. Fam. Code § 102.009\(a\)](#); [CPS Policy Handbook § 5230](#).

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

Service must be accomplished via the method prescribed in [Tex. R. Civ. P. 106](#) and by a person authorized pursuant to [Tex. R. Civ. P. 103](#).

## *Waiver of Citation*

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

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



## Appearance

A party may enter an appearance in open court:

- In person,
- By attorney, or
- By a duly authorized agent.

This appearance must be noted on the court's docket and entered on record and has the same force and effect as if the party had been served with citation. [Tex. R. Civ. P. 120](#). The filing of an answer also constitutes an appearance of a party and dispenses with the necessity for the issuance or service of citation on the party. [Tex. R. Civ. P. 121](#).

A party wishing to object to the jurisdiction of the court over their person may make a special appearance either in person or by attorney for the limited purpose of contesting jurisdiction. [Tex. R. Civ. P. 120a](#).

## Alternative Service under *Tex. R. Civ. P. 106(b)*

When DFPS has attempted to personally serve citation on a parent or other party under [Tex. R. Civ. P. 106\(a\)](#) and that service has been unsuccessful, DFPS can seek authorization from the court for an alternative method of service as detailed in [Tex. R. Civ. P. 106\(b\)](#). This requires the submission of a motion supported by a sworn affidavit listing any location where the party can probably be found and stating that service has been unsuccessfully attempted at that location.

Upon presentation of this motion, the court may authorize service by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement or in any other manner, including electronically by social media, email or other technology, that the statement shows will be reasonably effective to give the party notice of the suit.

## Service of Process in a Foreign Country

The method of service to be used when a parent is found to be living in a foreign country is detailed in [Tex. R. Civ. P. Rule 108a](#). There are several alternative methods listed including as provided by [Tex. R. Civ. P. 106\(a\)](#), and pursuant to the terms and provisions of any applicable international agreement.

If a parent is located in country that is a party to the Hague Service Convention, the only methods of service permitted are those specified by the Convention. Mexico and Canada are signatories to the Hague Service Convention. For a complete list of countries that are parties to the Hague Service Convention, visit the [Hague Conference on Private International Law website](#).

**Practice Tip:** Service by mail is not prohibited under the Hague Service Convention, but members to the Hauge Service Convention may register an objection to service by mail, and the country of Mexico has done so. As a result, a person in Mexico must be served through the Mexican Central Authority. For a list of Hague members, please visit the [Hague Conference on Private International Law Authorities Member List](#). For more information, please see the *Foreign Consul* section of this tool kit.

DFPS will initiate international service of process for a parent living in a country which is a

party to the Hague Service Convention whose identity and location are known. The following steps should be taken prior to requesting international service:

- Obtain an apostille (even though not specifically required), through the office of the Texas Secretary of State. An apostille certifies the authenticity of the signature, the capacity in which the person signing the document has acted and identifies the seal/ stamp which the document bears.
- Request translation of the citation, petition, affidavit, and apostille that will be served on the parent.
- The DFPS worker must submit a request for Health and Human Services Commission (HHSC) translation services through Form F-501-401.
- Once all documentation has been secured, DFPS will send it to their contracted international service provider to initiate the service process.

**Practice Tip:** International service of process can take several months and should be initiated as soon as an address is located for the parent. For more information about legal service requirements in a specific foreign country, please visit the [U.S. Department of State Bureau of Consular Affairs Service of Process webpage](#).

For parents located in a country not subject to the Hague Service Convention, service should be as specified:

- By the law of the country where service is to occur;
- As directed by the foreign authority;
- As provided by [Tex. R. Civ. Pro.106](#);
- Pursuant to a treaty;
- By consular officials when authorized by U.S. Department of state or by any other means not prohibited by the country in question.

**Practice Tip:** As with all service, the method used must be reasonably calculated to give actual notice in time for the respondent to answer and respond. [Tex. R. Civ. P. 108a](#).

**Practice Tip:** A parent in a foreign country can execute a waiver of service if the parent is willing to sign one. The waiver of service must be translated to the parent's native language, and unless the parent is incarcerated in a foreign country, the waiver must be signed by a notary public. Please note that the fee for a notary public in a foreign country can be costly and, therefore, not an option for some parents. It is worth asking the consulate or the U.S. embassy if they provide notary services for a minimal fee and informing the parent and/or their attorney of this option.

## *Diligent Efforts to Locate Missing Parties and Relatives*

### **DFPS MUST MAKE A DILIGENT EFFORT TO LOCATE PARENT AND RELATIVES**

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

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

If a missing parent is believed to be living in a foreign country, DFPS must ask family members in the United States for contact information, contact the consulate of that country, and request assistance in locating the parent. If a missing parent is believed to be living in Mexico, DFPS must follow policies outlined in the [CPS Policy Handbook § 5233.33](#).

### **“RELATIVE” DEFINED FOR DILIGENT SEARCH PURPOSES**

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

DFPS is also required to provide evidence to the court to show what actions were taken in making a diligent effort to locate the missing parent and relative of the missing parent. [Tex. Fam. Code § 161.107\(e\)](#).

### **CITATION BY PUBLICATION AND DILIGENT SEARCH**

If DFPS has made the effort but has been unsuccessful in obtaining personal service on a known parent, DFPS may file a motion and accompanying sworn affidavit of due diligence in support of their request for citation by publication under [Tex. R. Civ. P. 109](#). Before granting any judgment on a request for such service, the court must inquire into the sufficiency of the diligence exercised in attempting locate the parent.

[Tex. R. Civ. P. 109a](#) can be used whenever citation by publication is authorized. In these circumstances, the court may, on a motion, prescribe a different method of substituted service if the court finds, and so recites in its order, that the alternative method is as likely as publication to give the respondent actual notice. These rules do not limit the methods available to the court. Examples of appropriate methods under this section include citation by posting at the courthouse door, posting the citation at the home of a relative with whom the parent has contact, citation by electronic methods such as social media, email or other technology, or by using the newly developed Office of Court Administration's Citation by Publication and Court Notices Website.

Authorization by the court of substituted service under [Tex. R. Civ. P. 109](#) or [109a](#) does not relieve DFPS of its duty to continue to make diligent efforts to locate the parent.

**Practice Tip:** As of July 1, 2020, the Office of Court Administration’s Public Information website is available for posting citations and other public or legal notice required to be posted on the website or requested to be posted by a court or court clerk. For more information, visit the [Citation by Publication and Court Notices website](#).

## Notice

“Notice” is the process of providing informing relevant parties and individuals that an event has occurred or will occur in a matter. DFPS is responsible for providing service of citation and notice of several matters relating to agency activities relating to a lawsuit (investigations, removals, review hearings, etc.). While the same word “notice” is often used for both, it is important to distinguish between service and notice. The Texas Family Code requires that DFPS provide notice to parents of the investigation and removal of a child, as well as notice of all review hearings to relatives of the removal, and notice to parties, relatives, caregivers, and to the child if the child is age 10 or older. However, these notice obligations do not need to be executed solely in accordance with the rules governing service under the Texas Rules of Civil Procedure. [Tex. Fam. Code § 263.0021](#) provides several methods of notice available to DFPS.

**Practice Tip:** Service of citation is required upon the filing of an original petition to give named parties notice of the suit. DFPS should consider including notice of any upcoming scheduled hearings (such as the court ordered services hearing or adversary hearing) with the citation to ensure compliance with the requirement that all persons entitled be given 10 days’ notice of a hearing. [Tex. Fam. Code § 263.0021\(b\)](#).

*Note: Notice of a hearing may also be given in a temporary order following a full adversary hearing, in an order following a hearing under [Tex. Fam. Code Ch. 263](#), in open court, or in any manner that would provide actual notice to a person entitled to notice. [Tex. Fam. Code § 263.0021\(c\)](#). It is best practice for DFPS to notify those entitled to notice of each upcoming hearing and keep a record of the methods in which notification was made.*

## THE RIGHT TO NOTICE

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

## METHODS OF PROVIDING NOTICE OF HEARING

The requirements for citation are different from requirements for notice of motions or of particular hearings. Citation generally must be by personal service on the Respondent unless citation is waived by the Respondent, forfeited under the “paternity registry” process, or given by some form of substituted service, including citation by publication, as authorized by the Texas Rules of Civil Procedure.

Once citation is complete and a return of service is on file, notice may be served by:

- Delivering a copy to the party to be served, or the party’s duly authorized agent or attorney of record;
- Electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager; or

- In person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Notice may also be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. [Tex. R. Civ. P. 21a](#).

## INFORMATION PROVIDED TO RELATIVES AND CERTAIN INDIVIDUALS

When DFPS takes possession of a child under [Tex. Fam. Code Chapter 262](#), DFPS must provide information to each adult DFPS is able to identify and locate who:

- Is related to the child within the fourth degree of consanguinity, as defined by [Tex. Gov't Code § 573.023\(c\)](#);
- Is an adult relative of the alleged father if DFPS has a reasonable basis to believe the alleged father is the child's biological father; and
- Is identified as a potential relative or designated caregiver on the proposed Child Placement Resources Form. [Tex. Fam. Code § 262.1095\(a\)\(1\)](#).

DFPS may provide information to each adult who DFPS is able to identify and locate who has a long-standing and significant relationship with the child. [Tex. Fam. Code § 262.1095\(a\)\(2\)](#).

[Tex. Fam. Code § 262.1095\(b\)](#) requires the written notice to include:

- A statement that the child is in the state's custody;
- Options available for participation in the care and placement and support of the family;
- Options that may be lost if the individual fails to timely respond; and
- The date, time, and location of the status hearing, if applicable;
- Information regarding the procedures and timeline for a suit affecting the parent-child relationship.

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

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

## REPORT REGARDING NOTIFICATION OF RELATIVES

DFPS is required to provide the court with a report regarding their compliance with [Tex. Fam. Code § 262.1095](#). The court should review this report to assess DFPS' diligent efforts. [Tex. Fam. Code § 263.007](#).

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

Before commencement of the full adversary hearing, if an attorney has not already been appointed under [Tex. Fam. Code § 107.013](#), the court must inform each parent not represented

by an attorney of:

- The right to be represented by an attorney; and
- If a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney. [Tex. Fam. Code § 262.201\(c\)](#).

[Tex. Fam. Code § 107.0141](#) allows the court to appoint an attorney for a parent whenever the SAPCR is filed. However, if no appointment has been made prior to the Adversary Hearing and a parent claims indigence and requests the appointment of an attorney, the court must make a determination of indigence before commencement of the full adversary hearing, and, if the court determines the parent is indigent, it must appoint an attorney to represent the parent. [Tex. Fam. Code § 262.201\(d\)](#).

For good cause shown, the court may postpone the full adversary hearing and extend any temporary orders in place for up to seven days from the date of the appointment to provide the attorney time to respond to the petition and prepare for the hearing or up to seven days from the date of the appearance of a parent who is not indigent to hire an attorney or to provide the parent's attorney time to respond to the petition and prepare for the hearing. [Tex. Fam. Code §262.201\(e\)-\(e-1\)](#).

**Practice Tip:** Consider requesting the temporary appointment of an attorney ad litem for each respondent parent when filing your original SAPCR petition under [Tex. Fam. Code § 262.101](#) and [Tex. Fam. Code § 262.105](#). The appointment of an attorney at the onset of the case allows time for the attorneys to prepare with their clients prior to the initial adversary hearing and could facilitate an agreement or limit the number of contested issues before the court at the adversary hearing. In addition, the appointment of an attorney for a parent prior to the adversary hearing will reduce the number of hearing resets and, when possible, will avoid any undue delays in reunifying families.

## FOREIGN CONSUL

When DFPS takes possession of a child who was born in another country who is not a U.S. citizen, DFPS must notice the foreign consul of the country of which the child is a citizen.

To notify a foreign consulate that DFPS has removed a child, the caseworker must:

- Complete [Form 2650](#), Letter to Foreign Consulates;
- Send the completed form to the designated consulate by mail, return receipt requested, or by fax and include the confirmation notice when filing it with the court; and
- Send a copy of the notice to the attorney representing DFPS.

Caseworkers should contact the DFPS Immigration Specialist in their DFPS region for consular office contact information. For more information about working with a Foreign Consulate and providing a Foreign Consulate with notice, see [CPS Policy Handbook § 6715](#).

# Interventions

Intervenors in a child welfare cases tend to be either a family member or foster parent seeking to be named the managing conservator of the child. In order for a non-parent to intervene in a child welfare case, the person must have standing.

There are two avenues for a non-parent to establish standing in a Suit Affecting the Parent-Child Relationship (SAPCR):

- Standing to file an original suit. [Tex. Fam. Code § 102.003](#).
- Standing to intervene in a pending suit. [Tex. Fam. Code § 102.004\(b\)](#).

**Practice Tip:** Intervening parties, absent a Motion to Strike, are immediately granted the status of a party and can participate in discovery, in hearings and mediations, and receive court reports and other filings with the court. [Tex. R. Civ. P. 60](#). When a Petition in Intervention is filed, it is important to check whether the intervenor has proper standing to file. If the intervenor lacks standing, consider filing a Motion to Strike the Petition in Intervention.

## *Standing to File an Original Suit*

[Tex. Fam. Code § 102.003](#) provides a list of individuals who may file an original suit at any time.

In computing the time necessary for standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#), [\(a\)\(11\)](#) and [\(a\)\(12\)](#), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit. [Tex. Fam. Code § 102.003\(b\)](#).

Notwithstanding the time requirements of [Tex. Fam. Code § 102.003\(a\)\(12\)](#), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under [Tex. Fam. Code § 102.003\(a\)\(12\)](#) applies only to the adoption of a child who is eligible to be adopted. [Tex. Fam. Code § 102.003\(c\)](#).

## ACTUAL CARE, CONTROL, AND POSSESSION

[Tex. Fam. Code § 102.003\(a\)\(9\)](#) provides standing to a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.

## *Relevant Case Law*

### TIME-SPECIFIC APPLICABILITY

- Standing not found when child in home for only five and a half months at time of filing. (*In the Interest of E.C.*, No. 02-13-00413-CV, [Tex. App. LEXIS 10199](#) (Tex. App. – Fort Worth [2nd District] September 11, 2014)).
- Standing not found when child in home for only three months at time of filing. (*In the Interest of C.M.J.*, No. 02-12-00036-CV (Tex. App. – Fort Worth, December 2012, no pet.)).

### ELEMENTS OF “ACTUAL CARE, CONTROL, AND POSSESSION”

- An individual asserting standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#) must have:

- lived in a home where the child consistently and frequently stayed overnight;
  - financially supported the child;
  - participated in the child’s education; and
  - fed, clothed, and provided health care to the child.
- “Actual control” does not require the authority to make legal decisions for the child. See *Jasek v. Tex. Dep’t of Family and Protective Servs.*, 348 S.W.3d 523 (Tex.App.—Austin August 17, 2011, no pet.).

*Note: A non-parent’s “actual care, control, and possession” of a child does not need to be exclusive to have standing under Tex. Fam. Code § 102.003(a)(9). In the Interest of H.S., 550 S.W.3d 151 (Tex. 2018).*

## STANDING TO REQUEST TERMINATION AND ADOPTION

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

- A stepparent of the child;
- An adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
- An adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
- An adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- Another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. [Tex. Fam. Code § 102.005](#).

## *Grandparent Interventions*

In addition to the general standing to file suit provided by [Tex. Fam. Code § 102.003](#), a grandparent or other relative of the child related within the third degree of consanguinity may file an original suit requesting managing conservatorship if there is satisfactory proof that:

- The order requested is necessary because the child’s present circumstances would significantly impair the child’s physical health or emotional development; or
- Both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. [Tex. Fam. Code § 102.004\(a\)](#).

## RELATIVES AND DEGREES OF CONSANGUINITY

- A parent or child (relatives of the first degree);
- A brother, sister, grandparent, or grandchild (relatives of the second degree); or
- A great-grandparent, great-grandchild, aunt who is a sister of a parent of the child, an uncle who is the brother of a parent of the child, a nephew who is the child of a brother or sister of the child, or a niece who is a child of a brother or sister of the child (relatives of the third degree). [Tex. Gov’t Code § 573.023\(c\)](#).



*Note: Tex. Fam. Code §§ 102.003(13) and 102.004 confer standing to file suit on relatives of a child within the third degree of consanguinity. This disparity does not relieve DFPS of their duty under Tex. Fam. Code §§ 262.1095 and 161.2081 to provide notice to relatives of a child within the fourth degree of consanguinity when DFPS takes possession of the child or if an order of termination of parental rights has been rendered.*

## Relevant Case Law

### LIMITS TO STANDING CONFERRED BY TEX. FAM. CODE § 102.004(a)

- Step-grandfather excluded (*In the Interest of E.C.*, No. 02-13-00413-CV. Tex. App. LEXIS 10199 (Tex. App. – Fort Worth [2nd District] September 11, 2014)).
- Step-uncle excluded (*In re A.M.S.*, 277 S.W.3d 92 (Tex. App. – Texarkana 2009, no pet.)).
- Great-aunt or great-uncle excluded (*In re N.L.D.*, 412 S.W.3d 810 (Tex. App. – Texarkana 2013, no pet.)).

### PROVING SIGNIFICANT IMPAIRMENT OF CHILD PURSUANT TO TEX. FAM. CODE § 102.004(a)

- Significant impairment of child’s physical health and emotional development found with evidence of parental drug use and criminal convictions and incarceration. (*In re K.D.H.*, 426 S.W.3d 879 (Tex. App. – Houston [14th Dist.] April 3, 2014, no pet.)).
- Significant impairment of child’s physical health and emotional well-being found with evidence of physical and emotional abuse of the child even if the last alleged incident occurred months before the filing of the petition when the parent’s ideas regarding discipline had not changed during the period and the parent had not received any counseling or other services during that time to mitigate the risk of continued abuse. *In re McDaniel*, 408 S.W.3d 389 (Tex. App. – Houston [1st Dist.] 2011).
- Significant impairment of emotional development found where a parent fails to send their child to school on a regular basis and fails to provide necessary therapeutic interventions for a child with poor school performance and behavioral issues. *Maudlin v. Clements*, 428 S.W.3d 247 (Tex. App. – Houston 2014).

*Note: Tex. Fam. Code § 102.004(a) provides an avenue for grandparents and other relatives within the requisite degree of consanguinity to file for custody of a child in an investigation or Family Based Safety Services stage of a child welfare case which does not require the rehabilitative and service requirements of a TMC case or the same restrictions.*

## Standing to Intervene in a Pending Suit

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under [Tex. Fam. Code Chapter 102](#) if there is satisfactory proof to the court that the appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child’s physical health or emotional development. [Tex. Fam. Code § 102.004\(b\)](#).

## APPLICABLE TO PENDING SAPCRS

- A grandparent or other person can only utilize [Tex. Fam. Code § 102.004\(b\)](#) in SAPCRs that have not yet resulted in a final order.
- In the context of child welfare cases, the SAPCR is no longer pending once DFPS is appointed PMC of the child.

## PLEADING REQUIREMENTS

- The grandparent or other person must establish that they have had substantial past contact with the child; and
- The grandparent or other person must present satisfactory proof to the court that the appointment of the parent or parents as sole or joint managing conservators would significantly impair the child’s physical health and emotional development. [Tex. Fam. Code § 102.004\(b\)](#).

## *Relevant Case Law*

### SUBSTANTIAL PAST CONTACT

- Courts have applied the standard definition of “substantial” from the Random House Dictionary as “of ample or considerable amount, quantity, size, etc.” and have evaluated the amount of actual contact and not the difficulties of the intervening party maintaining contact. (*In re C.M.C.*, [192 S.W.3d 866](#) (Tex. App. – Texarkana 2006, no pet.)).
- “Substantial past contact” has been found to involve more than seeing a child regularly during his or her life. Substantial past contact has been shown by parties who have “frequently cared for the children, lived nearby, and spent a great deal of time with the family.” (*Blackwell v. Humble*, [241 S.W.3d 707](#) (Tex. App. – Austin 2007, no pet.)).
- Relatives who have cared for a child for as few as 7 weeks have been found to have substantial past contact. The Court’s analysis focused on the caretaker’s daily supervision of the child during that time and found the intervening party to have established substantial past contact in undertaking the daily functions of legal custody during that time. (*In re A.L.W.*, [No. 02-11-00480-CV](#) (Tex. App. – Fort Worth Nov. 8, 2012, pet. denied)(mem. op.)).
- In a case of first impression, the Dallas Court of Appeals has held that grandparents, as opposed “other persons,” are not required to establish substantial past contact under [Tex. Fam. Code § 102.004\(b\)](#). See *In re Nelke*, [537 S.W. 3d 917, 922-23](#) (Tex. App – Dallas 2019, no pet h.).

**Practice Tip:** The determination of whether substantial past contact exists is a fact-intensive inquiry. The determination is not statutorily defined and case law does not establish a clear factual framework for judges to make the determination. Deference is usually given to the trial court’s assessment.

### EVIDENCE THAT APPOINTMENT OF PARENT(S) AS MANAGING CONSERVATOR WOULD SIGNIFICANTLY IMPAIR THE CHILD’S PHYSICAL HEALTH AND EMOTIONAL DEVELOPMENT

- A person with substantial past contact with a child will be unable to show evidence that the appointment of a parent as the managing conservator would cause significant

impairment when facts show only speculation of potential harm if the parent is appointed conservator. (*In re S.M.D.*, 329 S.W.3d 8 (Tex. App. – San Antonio, 2010, pet. dismissed)).

## “SIGNIFICANT IMPAIRMENT” DURING REUNIFICATION PHASE OF A CHILD WELFARE CASE

- Alleged father who had independently raised the child for two and a half years submitted to paternity testing and was dismissed as a party to the case after genetic testing ruled him out as the father. He intervened alleging substantial past contact. He was denied leave to intervene because he failed to show that the appointment of the mother as sole managing conservator would significantly impair the child’s physical health and emotional development. Testimony offered by the Department at multiple hearings had shown that she had complied with all court orders and service plan requirements, that the child had already been placed with her and that the Department was recommending dismissal of the case. The Court of Appeals found no abuse of discretion in the trial court’s refusal to grant leave to intervene. (*L.J. v. Texas Department of Family & Protective Services*, No. 03-11-00435-CV (Tex. App. – Austin, August 1, 2012, pet. denied) (mem. op.)).

## *Foster Parent Interventions*

### GENERAL STANDING PROVISION

An original suit may be filed at any time by a person who is the foster parent of a child placed by the DFPS in the person’s home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition. [Tex. Fam. Code § 102.003\(a\)\(12\)](#).

### FOSTER PARENT INTERVENTION LIMITED

[Tex. Fam. Code § 102.004\(b\)](#) allows persons with substantial past contact with a child leave to intervene in a pending suit if they can provide satisfactory proof to the court that the appointment of a parent as Sole Managing Conservator or both parents as Joint Managing Conservators would significantly impair the child’s physical health or emotional development. However, a foster parent may only be granted leave to intervene under [Tex. Fam. Code § 102.004\(b\)](#) if the foster parent would have standing to file an original suit as provided by [Tex. Fam. Code § 102.003\(a\)\(12\)](#). [Tex. Fam. Code § 102.004\(b-1\)](#).

## *Limitations on Standing*

Except as provided by [Tex. Fam. Code § 102.006\(b\)](#) and (c), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:

- A former parent whose parent-child relationship has been terminated by court order;
- The father of the child; or
- A family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or the father of the child. [Tex. Fam. Code § 102.006\(a\)](#).

The limitations on filing suit imposed by [Tex. Fam. Code § 102.006](#) do not apply to:

- A person who has a continuing right to possession of or access to the child under

an existing court order or who has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit. [Tex. Fam. Code § 102.006\(b\)](#);

- An adult sibling of the child, a grandparent of the child, an aunt who is the sister of a parent of the child, or an uncle who is the brother of a parent of the child if:
  - the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated. [Tex. Fam. Code § 102.006\(c\)](#).

Courts have affirmed that [Tex. Fam. Code § 102.006\(c\)](#) serves to limit the standing of particular individuals when the parent-child relationship has been terminated; it does not confer standing. (*In re N.A.D.*, [397 S.W.3d 747](#) (Tex. App. – San Antonio 2013, no pet.)) and (*L.H. v. Texas Dep't of Family and Protective Services*, [No. 03-13-00348-CV](#) (Tex. App. – Austin Mar. 6, 2014, no pet.)).

**Practice Tip:** A relative seeking to file an original suit once termination of parental rights has occurred must have standing to file suit and must not be subject to the limitations to standing under [Tex. Fam. Code § 102.006](#). If a limitation on standing applies to the relative seeking to file suit, consider filing a Motion to Strike.

## CONSEQUENCES OF MISSING THE 90-DAY DEADLINE

Even parties who would otherwise have standing will lose that standing if they fail to file their petition for custody or adoption within 90 days.

- Petition to adopt children by aunt with substantial past contact filed 7 months after parental rights were terminated was barred by [Tex. Fam. Code § 102.006\(c\)](#) because it had not been filed within 90 days of the termination order. (*In re A.M.*, [312 S.W.3d 76](#) (Tex. App. – San Antonio 2010, pet. denied)).

**Practice Tip:** DFPS must notify relatives who have been identified under [Tex. Fam. Code § 262.1095](#) immediately after a court renders an order terminating the parent-child relationship that the parent-child relationship has been terminated, and they have 90 days after the date the order is rendered to file an original suit or a suit for modification requesting managing conservatorship of the child in accordance with [Tex. Fam. Code § 102.006\(c\)](#). [Tex. Fam. Code § 161.2801](#).

## Relevant Case Law

### TIMING ISSUES

*Some courts have struck interventions as untimely if filed too close to the dismissal deadline.*

- Grandmother filed petition in intervention two months before dismissal date when permanency plan changed from reunification to termination although she had been aware of the case for over a year. Motion to Strike granted and affirmed by Appellate Court as within the discretion of the Court. (*In the Interest of C.A.L.*, [No. 2-05-308-CV, 2007](#), [Tex. App LEXIS 1196](#) (App.—Fort Worth Feb. 15, 2007 orig. proceeding) (mem. op.)).

- Grandfather who lived in Kentucky filed an intervention two months before trial. (Waiting to file an intervention when out of state and ICPC study required was problematic). (*Anderson v. Texas Dep't of Family and Protective Services*, No. 03-06-00327-CV (Tex. App. – Austin May 9, 2007, pet. denied (mem. op))).

***Court should balance the complication of the issues in the case and the rights of the intervening party.***

- A trial court abuses its discretion if it strikes a petition in which (1) the intervener could bring the same action, or any part thereof, in their own names, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the interveners' interest. In applying that analysis, the court found that even though the intervention was filed only two weeks before trial that the intervening party had standing and should have been allowed to participate in the trial. (*Seale v. Texas Dept. of Family & Protective Services*, No. 01-10-00440-CV (Tex. App. – Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.)).

## PROCEDURAL ISSUES

### ***Leave of court.***

- Following the plain language of the statute, the court finds a request for leave to intervene is necessary under [Tex. Fam. Code § 102.004\(b\)](#) and that the Intervener's Amended Petition for Intervention which requested that the court "grant the relief requested in this intervention" be read as a request for leave to intervene. (*In the Interest of A.T.*, No. 14-14-00071-CV, (Tex. App. – Houston, July 15, 2014, (no pet.) (mem. op.)).
- Court found that [Tex. R. Civ. P. 60](#) does not apply to interventions filed under [Tex. Fam. Code § 102.004\(b\)](#). Court noted that the legislature developed a separate provision governing intervention in family law cases and gave the trial court discretion to determine whether to allow an intervention even when the statutory requirements are met. Court then found that no written motion to strike was required. (*L.J. v. Texas Department of Family & Protective Services*, No. 03-11-00435-CV (Tex. App. – Austin Aug. 1, 2012, pet. denied) (mem. op.)).

### ***Imperfect pleadings can establish standing.***

- Appellate courts review standing issues by construing the pleadings in favor of the petitioner and by looking to the pleader's intent. Question is whether a party provides other parties and the Court fair notice of his or her claim. (*Jasek v. TDFPS*, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)); *In the Interest of D.A.*, No. 02-14-00265-CV (Tex. App. – Fort Worth, February 5, 2015) (mem. op.); *In the Interest of N.I.V.S.*, No. 04-14-00108-CV (Tex. App. – San Antonio, March 11, 2015) (mem. op.).

# 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 certain jurisdictions have Level 3 Discovery Control Plans and orders 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. For more information, see [Texas Law Help Discovery in Texas: Investigate and Prepare for Trial](#).

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 or local 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*

### ***Responding to Written Discovery***

[Tex. R. Civ. P. 193](#)

- If an objection is not timely asserted then the objection is waived unless the court excuses the waiver for good cause shown. [Tex. R. Civ. P. 193.2\(e\)](#).
- A party is required to amend or supplement their response reasonably promptly after the party discovers the necessity for the amended response. It is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. [Tex. R. Civ. P. 193.5\(b\)](#).
- A party who fails to make, amend, or supplement a discovery response, including a required disclosure, in a timely manner may not introduce in evidence the material or information or offer the testimony of a witness (other than a named party) unless the court finds that there was good cause for the failure or that the failure of the party to do so will not unfairly surprise or unfairly prejudice the other parties. [Tex. R. Civ. P. 193.6\(a\)](#).

### ***Required Disclosures***

[Tex. R. Civ. P. 194](#)

- Child welfare actions filed under Texas Family Code Title 5, Subtitle E are exempt from required initial disclosures, but are still subject to court orders for particular disclosures and disclosure timelines set by the court. [Tex. R. Civ. P. 194.2\(d\)\(5\)](#).
- Unless otherwise ordered by the court, pretrial disclosures must be made at least 30 days before trial. [Tex. R. Civ. P. 194.4\(b\)](#).

### ***Discovery Regarding Testifying Expert Witnesses***

[Tex. R. Civ. P. 195](#)

- Unless otherwise ordered by the court, a party seeking affirmative relief must designate experts 90 days before the end of the discovery period. [Tex. R. Civ. P. 195.2\(a\)](#).

### ***Requests for Production of Documents***

[Tex. R. Civ. P. 196](#)

- Must be served at least 30 days before the end of the discovery period. [Tex. R. Civ. P. 196.1\(a\)](#).
- Can include a request for entry upon property. [Tex. R. Civ. P. 196.7](#).

**Practice Tip:** Consider requesting a copy of both the redacted and the unredacted de-identified (“De-ID”) file from DFPS no less than 60 days prior to the end of the discovery period, even if the other parties to the suit have not requested it, to avoid unnecessary delays related to production closer to trial.

### *Interrogatories*

[Tex. R. Civ. P. 197](#)

- Must be served on another party no later than 30 days before the end of the discovery period. [Tex. R. Civ. P. 197.1](#).
- Responding party must serve their written response on the requesting party within 30 days after service of the interrogatories. [Tex. R. Civ. P. 197.2\(a\)](#).

### *Requests for Admission*

[Tex. R. Civ. P. 198](#)

- Must be served on another party no later than 30 days before the end of the discovery period. [Tex. R. Civ. P. 198.1](#).
- Responding party must serve their written response on the requesting party within 30 days after service of the request. [Tex. R. Civ. P. 198.2\(a\)](#).
- Failure to respond timely will result in admissions being deemed admitted. [Tex. R. Civ. P. 198.2\(c\)](#).

### *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. [Tex. R. Civ. P. 199.4](#).
- Notice of intent to take written deposition must be served on witnesses and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside of the discovery period only by agreement of the parties or with leave of the court. [Tex. R. Civ. P. 200.1](#).
- Objections to the form of a question are waived unless asserted in accordance with [Tex. R. Civ. P. 200.3\(b\)](#). [Tex. R. Civ. P. 200.3\(c\)](#).

**Practice Tip:** Some courts limit depositions or require that a motion be filed to request a court order for depositions to be taken.

### *Requests for Physical and Mental Examinations*

[Tex. R. Civ. P. 204](#)

- In a DFPS suit, 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 another other party to the suit; and/or
- a qualified expert to test and determine paternity. [Tex. R. Civ. P.204.4](#).

## COMMON OBJECTIONS TO DISCOVERY

The following is a non-exclusive list of objections that may be raised to requests for discovery.

- Discovery not timely requested.
- Vague, ambiguous, argumentative, overbroad, and unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.
- Broad, uncertain, and unintelligible so that the responding party cannot determine the nature of the information sought.
- Repetitive (if the information requested or produced has already been requested in the discovery).
- Privileged (if the information calls for privileged information such as attorney-client communication or is otherwise privileged). [Tex. Civ. P. 193.3](#).

If an asserted privilege or objection only pertains in part as to the request for production or response, a party is required to comply with any part of the request for production or response that is not objected to.

**Practice Tip:** If an attorney for the party served with discovery responds with an objection that the request is vague or not applicable, the proponent of the discovery request can consider filing 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.

## *Notable Discovery Issues in CPS Cases*

### DISCLOSURE OF CERTAIN EVIDENCE PRIOR TO THE ADVERSARY HEARING

At the request of the attorney for a parent who is a party in a SAPCR filed under [Tex. Fam. Code Ch. 262](#), or of the attorney ad litem for the child, DFPS must provide the names of witnesses (excluding an employee of DFPS) who will testify to allegations, copies of offense reports that will be used, and any photo, video or recording that may be used at that adversary hearing before the start of such hearing. [Tex. Fam. Code § 262.014](#). Items produced prior to an adversary hearing may need to be redacted by the attorney representing DFPS due to the short time frame available to comply with the request.

**Practice Tip:** Be prepared to manage the time and effort involved in the redaction of confidential information in any documents produced under a request for certain disclosures prior to the adversary hearing in order to timely comply with those disclosure requests.



## CONFIDENTIALITY AND DISCLOSURE OF EVIDENCE

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](#). Confidentiality provisions require the redaction of DFPS documents in response to a discovery request that is not subject to release, such as the identity of the reporter of abuse or neglect. [Tex. Fam. Code § 261.201](#).

**Practice Tip:** Citing confidentiality, an attorney representing DFPS should object to any questions pertaining to the identity of the reporter unless the court has had a hearing based upon a motion to release that information.

**Practice Tip:** Redaction of the record by DFPS' record management department can take up to 20 days, but may take longer. While the record management department will usually have redactions completed within the time frame for discovery deadlines, attorneys representing DFPS might be prepared to file any motions for extension prior to the discovery deadline or seek a Rule 11 agreement to extend the discovery deadline in case of any delays.

**Practice Tip:** The DFPS record management department should send the attorney representing DFPS copies of both the redacted and unredacted case file, also referred to as the de-identified ("De-ID") file. Only the prosecutor and child advocates are entitled to an unredacted copy of the file. Attorneys representing DFPS should review the redacted copy against the unredacted file for any possible oversights regarding redactions before serving opposing counsel with the De-ID file; examples are the blacking out of multiple pages of information instead of just the portions containing confidential information, or conversely, overlooking critical redactions such as emails containing an attorney-client communication. Case files produced by DFPS in discovery can be thousands of pages long, and redaction mistakes might be made. If so, immediately contact the records management department to correct the issue.

## 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 rather than those 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 privilege; 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. Additionally, attorneys representing DFPS may contact their local Regional Attorney's Office for more information regarding the "subpoena mailbox," and its uses.

**Practice Tip:** The subpoena range in a civil proceeding is limited: a person cannot be compelled to appear or produce documents more than 150 miles away from where they reside or were served. If a potential witness is located outside of the subpoena range, an attorney representing DFPS might reach out to see if the witness would be willing to attend court to testify. Most courts now have the ability to allow for testimony via video conferencing such as Zoom. It is advisable to check with the court early in the case to determine if this may be an option for necessary witnesses outside of the subpoena range. Some courts may also allow this option for witnesses who may be otherwise unavailable to attend court in person.

**Practice Tip:** DFPS will submit a request for payment, commonly referred to as a 2054, for any contracted service providers who are expected to testify at a hearing. It is a best practice for DFPS to submit this payment request for contracted providers even when the provider has been subpoenaed to testify on behalf of opposing counsel.

## BUSINESS RECORDS

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\(10\)](#).

**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. Pursuant to [Tex. R. Civ. P. 21a](#), the proponent of the documents must serve the documents and the accompanying affidavit on each party to the case at least 14 days before trial.

**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 records requested are for the child, include a copy of the order naming DFPS the Temporary Managing Conservator of the child along with the subpoena for the child's records. If a parent has executed a release of medical information to DFPS, include a copy of the release with the request to increase the likelihood of release of the information sought.

## REQUESTS FOR ADMISSION

If Requests for Admission are not timely answered, they may be deemed admitted without a court order. [Tex. R. Civ. P. 198.2\(c\)](#).

If you have unanswered Requests for Admission, consider presenting the following points to the court:

- 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 for Admissions 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 merits preclusive sanctions for discovery abuses. *Wheeler v. Green*, [157 S.W.3d 439, 443](#) (Tex. 2005).

## 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. The movant can wait until trial and then ask the court to grant sanctions for failure to answer.

**Practice Tip:** A remedy to the Motion for Enforcement or Contempt is usually the production of the discovery. To avoid any hearings on the motions, the attorney representing DFPS can simply turn over the requested materials, if they are not protected. If material is protected, i.e., the reporter’s name, a hearing may be necessary for a court order on the release of such material. [Tex. Fam. Code 261.201](#).

## *Case Law on Admitting Discovery Even if it was Not Properly Produced*

- **Parties are allowed to testify even if they 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’ 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 trial 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.)
  - *But Note:* In finding that DFPS’ witnesses should not have been allowed to testify due to a failure to timely disclose, the Sixth Court of Appeals disagreed with the Third Court’s reasoning in *Spurck*, stating “while we do not disagree with the Austin court regarding the importance of the best interest issue in custody cases, *Spurck* and *R.H.* were parental-rights termination cases brought by the Department, whereas the cases cited by the court in deciding *Spurck* and *R.H.* involved motions to modify conservatorship between the biological parents of the child. Due to the significant differences between custody cases between biological parents and suits brought by the Department to terminate a parent’s parental rights, we do not agree that the rule elevating the best-interest issue over “technical rules of pleading and practice” governs parental-rights termination cases.” *In re D.W.G.K.* [558 S.W.3d 671, 686-691](#) (Tex. App.—Texarkana 2018, no pet.) (citing *Spurck*, [396 S.W.3d at 215](#)). *See also R.H. v. Tex. Dep’t of Family and Protective Servs.*, No. 03-00-00018-CV, [2001 WL 491119](#) (Tex.App.—Austin May 1, 2001, pet. denied).

**Practice Tip:** Upon receipt of discovery, the attorney representing DFPS should review, forward production to the records management department for records, forward interrogatories and disclosures to the caseworker for answers, and calendar the due date. Setting a reminder about a week before the due date will prompt the attorney representing DFPS to gather the answers from caseworker and ensure the records department has gathered and sent all the records. Although others at the department may answer the questions, it is the responsibility of the attorney representing DFPS to gather and ensure proper answers are turned over on time.

**Practice Tip:** If discovery responses are not timely made, amended, or supplemented, and evidence is excluded as a result, attorneys representing DFPS might try the following under [Tex. R. Civ. P. 193.6](#) to advocate for admitting the evidence:

- Move for a continuance and ask the court to allow more time to respond to the discovery requests;
- 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 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.”

### AUTHENTICATION QUESTIONS

#### ***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?
- Is it the regular practice of the business to make the records?
- Are/is the record(s) made by persons with personal knowledge (or from information transmitted by them)?
- Are/is the record(s) made 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?
- Is there information in these contents known to this person?

### ***Social Media***

- Do you use Facebook/Twitter/Instagram/TikTok/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 his/her 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 his/her 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 a “like,” “love,” “dislike,” etc. on posts to social media may fall into a hearsay exception, such as admission against interest.

## *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).

**Practice Tip:** A respondent parent may be called as a witness in a child welfare hearing and may assert their Fifth Amendment privilege in response to any question asked if they reasonably fear that the answer sought may incriminate them. The judge will then rule on whether the privilege may be asserted as to each question for which the privilege is asserted. Unlike in criminal cases, the factfinder in a child welfare case is allowed to draw a negative inference from the witness’ refusal to answer and/or invocation of the Fifth Amendment.

## *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 S.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, “Sam, if someone told you that the judge’s robe is pink, would that be the truth or a lie?”



## Objections

<b>General Objections</b>	<b>Code</b>
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

<b>Not Hearsay</b>	<b>Code</b>
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

<b>Objections to the Form of the Question</b>	<b>Code</b>
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)

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

<b>Exceptions to Hearsay: Availability of Declarant Immaterial</b>	<b>Code</b>
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)

<b>Exceptions to Hearsay: Declarant Unavailable</b>	<b>Code</b>
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**

[Tex. R. Evid. 803](#)

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

#### ***Present Sense Impression***

[Tex. R. Evid. 803\(1\)](#)

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

#### ***Excited Utterance***

[Tex. R. Evid. 803\(2\)](#)

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***

[Tex. R. Evid. 803\(3\)](#)

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.

#### ***Statement Made for Medical Diagnosis or Treatment***

[Tex. R. Evid. 803\(4\)](#)

A statement that is made for and is reasonably pertinent to medical diagnosis or treatment; and describes medical history; past or present symptoms or sensations; their inception; or their general cause.

### **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 (“Outcry” Statements)***

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 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.
- *See, e.g., In the Interest of E.M.*, 494 S.W.3d 209 (Tex.App.—Waco 2015, pet. denied) (focus is on the outcry statement itself, not the abuse; therapist testified outcry statements regarding domestic violence between the parents were credible because they were expressed in a manner consistent with what the therapist would expect, were made in age-appropriate language, were consistent through different placements, and were not of the type this aged child would make up).

**Practice Tip:** Note that age restrictions apply to some of the above exemptions, and some require that a motion be filed.

## ***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 request, objection, or 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 your objection is sustained, ask that the answer be struck and that the jury be instructed to disregard it.

**Practice Tip:** Listen for possible leading questions on direct examination, questions that call for a narrative, or questions that solicit irrelevant information. 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. [Tex. R. App. P. 33.1\(a\)\(2\)\(B\)](#).

### ***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. Through an offer of proof, counsel can memorialize testimony excluded by the trial court. Exhibits not admitted into evidence should be marked and handed to the court’s reporter for inclusion in the record.

**Practice Tip:** When physical evidence or testimony is excluded by an opponent’s sustained objection, 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; then ask the court to admit the evidence for the limited purpose of making a record for appeal. In a jury trial, this must be done before the court reads its charge to the jury. In a bench trial, this must be done before the closing of evidence.

### ***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 obtain the trial court’s signature and must be filed with the trial court no later than 30 days after notice of appeal is filed.
- The document must be 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:** Although a Bill of Exception is less common than an Offer of Proof, it is 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 welfare 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 [Rule 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:** It is critical to ensure the trial court record is very clear in case of appeal. When arguing on the record, avoid using terms of art and acronyms (OV, FBSS, “dad was positive,” etc.). Also, avoid terms like “ruled out,” “unable to determine,” etc. unless an explanation for what those terms mean is provided.

## *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 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 is 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](#).
- Bases of opinion by expert must be underlying data or facts that are the basis of opinion given to other party at or before the 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](#).
- The court acts as gatekeeper to determine 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. The 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).

#### ***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 is it 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 these cases may be appealed more often than family law cases. For example, arson and bite mark science has changed significantly over time and caselaw through appellate review of criminal cases is more prevalent.

### ***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; and/or whether the injury is consistent with the parent's report of the incident?

### ***Sample Cross-Examination Questions of the Opposing Expert***

- Has your theory been tested, or can it be tested?
- Does your technique rely on the 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 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.

The only way to prove that a test is trustworthy is to use the test administrators as witnesses to lay the proper foundation; this typically requires testimony from three different people. Error can be committed unless you admit the qualifications of the person conducting the test, testimony as to the type of test, and show that the test is standard and accepted for the substance tested.

For admission of a drug test, you typically need 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. However, if you have the supervisor/director of the lab, you may only need two witnesses as they can testify to the conduct and substance of the test using a properly laid business records foundation (contact a Department Regional Attorney for a litigation packet; this is different from the de-identified case file provided in discovery). The person who administered the test is not enough to prove it up without the expert.

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. *But see In re E.B.*, No. 11-19-00001-CV, 2019 WL 3955974 (Tex.App.—Eastland August 22, 2019), finding that live testimony was not required to admit a drug screen and a proper affidavit executed by the custodian of records that set out the chain of custody, testing procedures, and qualifications of the analysts satisfied Rules 803(6) and 902(10) of the Texas Rules of Evidence. *See also In re A.T.*, No. 02-04-00355-CV, 2006 WL 563565 (Tex.App.—Ft. Worth Mar. 9, 2006), holding that a drug screen completed by a hospital was admissible through business record because all pertinent information related to the test was laid out within the records; however, results from another lab included in the hospital records were not admissible.

**Practice Tip:** Drug test results admitted without proper foundation are not reversible error if the drug test results come into evidence through other means (i.e., the parents testify to the use and/or admit to the probable results). *See In re K.C.P.*, 142 S.W.3d 574 (Tex. App.—Texarkana, 2004, no pet.).

### ***Common Objections to Drug Testing Results***

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

## **TESTIMONY OF FORENSIC ASSESSMENT CENTER NETWORK (FACN) DOCTOR**

Allegations of abuse and neglect in medically complex cases are typically generated by an intake report received from hospital personnel or medical providers, such as a child’s pediatrician.

DFPS utilizes the Forensic Assessment Center Network (FACN) in most medical abuse and/or medical neglect cases. The FACN was established by DFPS in 2006 to make specialized pediatricians available for consultation to DFPS and Child Care Licensing in cases of suspected child abuse and neglect. The FACN is managed by the University of Texas Health Science Center (UTHealth)-Houston McGovern Medical School, in coordination with UT Health Science Center at San Antonio, UT Medical Branch at Galveston, UT Southwestern Medical Center at Dallas, Dell Children’s Medical Center at Austin, and Texas Tech University Health Sciences Center at Lubbock.

The FACN requires consultations with physicians who are board certified in a relevant field or specialty, including radiologists, geneticists, orthopedists, and endocrinologists. Physicians must also have experience in certain specific conditions such as rickets, Ehlers-Danlos Syndrome, and other medical conditions that mimic child maltreatment or increase the risk of misdiagnosis of child maltreatment. [Tex. Fam. Code § 261.3017\(b\)](#). More information about referrals to the FACN is available in [CPS Policy Handbook § 2232](#) and the [DFPS Forensic Assessment Center Network \(FACN\) Resource Guide](#).

### ***Mitigation of Provider Conflicts***

A health care provider who makes a report of suspected abuse or neglect of a child may not provide forensic assessment services in connection with an investigation from the report. This applies regardless of whether the health practitioner is a member of the FACN. [Tex. Fam. Code § 261.30175\(b\)](#).

**Practice Tip:** In cases where a FACN physician physically evaluated a child, the FACN physician may testify as a medical witness. In cases where FACN only reviews records, the FACN physician may testify as an expert witness.

**Practice Tip:** The exigent removal of a child may not be based solely on the opinion of a medical professional under contract with DFPS who did not conduct a physical examination of the child. However, if the physician who conducted the physical examination and the FACN physician both agree that abuse or neglect occurred, both opinions may be used for an emergency removal. [CPS Policy Handbook § 2232.5](#). Both physicians should be called to testify as witnesses in a subsequent Adversary Hearing where the removal was based on these opinions.



# Investigations

The primary purpose of a DFPS investigation into allegations of child abuse or neglect is to protect the child. DFPS investigations are civil in nature and include an evaluation of the child's immediate safety and an assessment of future risk of abuse or neglect. DFPS sets out the mandatory requirements for an investigation in [CPS Policy Handbook § 2200](#).

DFPS investigations are conducted by a Child Protective Investigations (CPI) caseworker. At the conclusion of an investigation, the caseworker, with input from their supervisor, will assign a disposition to each allegation received based on the information gathered and may assign the case for closure, refer the family to services, or request that further legal action be taken.

**Practice Tip:** During the course of an investigation, the CPI caseworker or their supervisor may seek a legal case staffing. Attorneys representing DFPS should familiarize themselves with DFPS policy as well as the applicable law in order to best advise DFPS.

**Practice Tip:** When staffing a case with DFPS, be sure to discuss the nature of the allegations received, the investigative actions taken by the caseworker, and the reasonable efforts, consistent with child safety, to prevent or eliminate the need for removing a child from their home, that have been made in order to provide the most informed advice to DFPS. Discuss whether any additional information would be helpful in making a decision about which legal remedies are available such as: are all parents accounted for, what are collaterals reporting, what alternatives to removal are available, and are there any services that can be offered to the family that will eliminate the need for removal.

## *Initiation of an Investigation*

Initiation of an investigation requires abuse, neglect, exploitation, or the risk of abuse or neglect by a person responsible for a child's care, custody, or welfare.

### DEFINITION OF ABUSE

[Tex. Fam. Code § 261.001\(1\)](#)

“Abuse” includes the following acts or omissions by a person:

- Mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- Causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- Physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;
- Failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;
- Sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of a young child or

children under [Tex. Penal Code § 21.02](#), indecency with a child under [Tex. Penal Code § 21.11](#), sexual assault under [Tex. Penal Code § 22.011](#), or aggravated sexual assault under [Tex. Penal Code § 22.021](#);

- Failure to make a reasonable effort to prevent sexual conduct harmful to a child;
- Compelling or encouraging the child to engage in sexual conduct as defined by [Tex. Penal Code § 43.01](#), including compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or [\(a\)\(8\)](#), solicitation of prostitution under [Tex. Penal Code § 43.021](#), or compelling prostitution under [Tex. Penal Code § 43.05\(a\)\(2\)](#);
- Causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by [Tex. Penal Code § 43.21](#) or pornographic;
- The current use by a person of a controlled substance as defined by [Tex. Health & Safety Code Chapter 481](#), in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;
- Causing, expressly permitting, or encouraging a child to use a controlled substance as defined by [Tex. Health & Safety Code Chapter 481](#);
- Causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by [Tex. Penal Code § 43.25](#);
- Knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under [Tex. Penal Code § 20A.02\(a\)\(5\)](#), [\(a\)\(6\)](#), [\(a\)\(7\)](#) or [\(a\)\(8\)](#), or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections; or
- Forcing or coercing a child to enter into a marriage.

### DEFINITION OF NEGLECT

[Tex. Fam. Code § 261.001\(4\)](#)

“Neglect” means an act or failure to act by a person responsible for a child’s care, custody, or welfare evidencing the person’s blatant disregard for the consequences of the act or failure to act that results in harm to the child or that creates an immediate danger to the child’s physical health or safety.

“Neglect” includes:

- The leaving of a child in a situation where the child would be exposed to an immediate danger of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;
- The following acts or omissions by a person:
  - placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child’s level of maturity, physical condition, or mental abilities and that results in bodily injury or an immediate danger of immediate harm to the child;
  - failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting an immediate danger of death, disfigurement, or

bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;

- the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services have been offered and refused;
- placing a child in or failing to remove the child from a situation in which the child would be exposed to an immediate danger of sexual conduct harmful to the child; or
- placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under [Tex. Fam. Code § 261.001\(1\)\(E\), \(1\)\(F\), \(1\)\(G\), \(1\)\(H\), or \(1\)\(K\)](#) committed against another child;
- The failure by the person responsible for a child’s care, custody, or welfare to permit the child to return to the child’s home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away; or
- A negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy.

Neglect does not include:

- The refusal by a person responsible for a child’s care, custody, or welfare to permit the child to remain in or return to the child’s home resulting in the placement of the child in the conservatorship of DFPS if:
  - the child has a severe emotional disturbance;
  - the person’s refusal is based solely on the person’s inability to obtain mental health services necessary to protect the safety and well-being of the child; and
  - the person has exhausted all reasonable means available to the person to obtain the mental health services described by [Tex. Fam. Code § 261.001\(4\)\(B\)\(i\)\(b\)](#). [Tex. Fam. Code § 261.001\(4\)\(B\)\(i\)](#);
- Allowing the child to engage in independent activities that are appropriate and typical for the child’s level of maturity, physical condition, developmental abilities, or culture. [Tex. Fam. Code § 261.001\(4\)\(B\)\(ii\)](#).
- Seeking a second opinion for a child’s medical care or transferring a child’s medical care to a new provider or facility. [Tex. Fam. Code § 261.001\(4\)\(B\)\(ii\)](#).

The DFPS Commissioner shall adopt rules to prohibit DFPS from making a finding of abuse or neglect against a person in a case in which DFPS is named managing conservator of a child who has a severe emotional disturbance only because the child’s family is unable to obtain mental health services for the child. [Tex. Fam. Code § 261.002\(b\)\(1\)](#); [CPS Handbook §2391](#).

*Note: While often misidentified, a case in which a parent or guardian relinquishes custody to DFPS for the purpose of obtaining mental health services for their child is not a refusal to assume parental responsibility (RAPR) case. A RAPR is characterized as the failure by the person responsible for a child’s care, custody, or welfare to permit the child to return to the child’s home without arranging for the necessary care for the child after the child has been absent from the home for any reason. When a parent or*

*guardian has exhausted all other options, DFPS will discuss the option of temporarily relinquishing custody of their child to DFPS in order to obtain certain mental health services to address the child’s severe emotional disturbance. The parent or guardian is named a temporary joint managing conservator (TJMC) along with DFPS for the purpose of obtaining the mental health services the parent was unable to obtain for a child on their own with the intent to have the child return home. DFPS may enter a disposition on the allegation of neglect with regard to a RAPR but may not enter a disposition with regard to neglect on case involving a relinquishment to obtain mental health services.*

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

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

## DEFINITION OF EXPLOITATION

[Tex. Fam. Code § 261.001\(3\)](#)

“Exploitation” includes:

- The illegal or improper use of a child or the child’s resources for monetary or personal benefit or profit by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy.

## PERSON RESPONSIBLE FOR A CHILD’S CARE, CUSTODY, OR WELFARE

- A parent, guardian, managing or possessory conservator, or foster parent of the child;
- A member of the child’s family or household as defined by [Tex. Fam. Code Chapter 71](#);
- A person with whom the child’s parent cohabits;
- School personnel or a volunteer at the child’s school; or
- Personnel or a volunteer at a public or private child-care facility that provides services for the child or at a public or private residential facility where the child resides; or
- An employee, volunteer, or other person working under the supervision of a licensed or unlicensed child-care facility, including a family home, residential child-care facility, employer-based day-care facility, or shelter day-care facility, as those terms are defined in [Tex. Hum. Res. Code Chapter 42](#). [Tex. Fam. Code § 261.001\(5\)](#).

## *Fourth Amendment Requirements in an Investigation*

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

## CONSENT

An evaluation of consent is based on the totality of the circumstances and under a standard of



objective reasonableness. Silence or passivity cannot form the basis of consent to enter. Also, mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent. Once consent is given, the consent may be limited, qualified, or withdrawn. *Gates*, 537 F.3d at 420.

## COURT ORDER

If a caseworker cannot gain consent, they may seek a court order to allow entrance for an interview, examination, or investigation. *Tex. Fam. Code § 261.303(b)*. For more information, see the *Court Order in Aid of Investigation* section of the tool kit.

## EXIGENT CIRCUMSTANCES

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

**Practice Tip:** Before acting under exigent circumstances (without a court order), DFPS must assess the nature of the abuse, whether there is time to obtain a court order, the strength of the evidence to support the allegations of abuse, the risk that a parent will flee with the child, alternative reasonable efforts available to prevent removal, and weigh the harm to the child that might result from removal versus the child remaining in their home. If there is time to obtain a court order granting the removal of a child, DFPS should not enter a home or take possession of the child without first seeking a court order. Additionally, if there are alternatives available that will allow the child to safely remain in their home, the decision for an exigent removal would not be supported.

For example: if a child made an outcry near the end of the school day about sexual abuse that was occurring regularly upon their return home from school, exigent circumstances might exist depending on the circumstances. If the alleged perpetrator was the only adult expected to be at the home that afternoon, the argument for exigent circumstances would exist since there would not be adequate time to obtain a court order before the child would be made to return home where the likelihood of abuse occurring would be imminent. Alternatively, if the alleged perpetrator was out of town, there would be time to conduct an investigation into the protective capacity of the other adults in the home and determine if other alternatives, such as requesting a “Kick-Out” order or obtaining a court order granting the removal of the child were available.

*Note: Tex. Fam. Code §§ 262.113, 262.1131, 262.201(b), and 262.201(j), which referred to non-emergency removals, were repealed from statute effective September 1, 2021.*

## ANONYMOUS TIP

If the Department receives an anonymous report of child abuse or neglect, the Department shall conduct an investigation to determine whether there is any evidence to corroborate the report. *Tex. Fam. Code § 261.304*. The tip must be corroborated through a preliminary investigation that can include an interview of the child’s teachers or peers, an interview of the child at the school, or by looking for injuries on the child without removing any of the child’s clothing. An investigation can include a visit to the child’s home unless the alleged abuse or neglect can be

confirmed or clearly ruled out without a home visit, an interview with and examination of the child, and an interview with the child's parents. [Tex. Fam. Code § 261.304\(b\)](#).

In determining whether to transport the child to another location for the interview, the caseworker should take into account the child's wishes. [Gates, 537 F.3d at 424](#). A person who is notified of and attempts to interfere with the transportation can be charged with a Class B misdemeanor. [Tex. Fam. Code § 261.302\(f\)](#).

**Practice Tip:** Like a *Terry* stop [*Terry v. Ohio*, [392 U.S. 1, 21-22](#) (1968)], all that is required [to take a child into a separate room for an interview] is a reasonable suspicion of abuse or neglect so long as the interview is no more intrusive than necessary. [Gates, 537 F.3d at 434](#). Additionally, before transporting a child for an interview, DFPS must first attempt to notify the parent or other person having custody of the child. [Gates, 537 F.3d at 429](#). Absent consent to transport, DFPS may obtain a court order. In order to transport a child from a public school for an interview absent a court order or consent, a caseworker must have a reasonable belief that the child has been abused and probably will be abused again upon his return home at the end of the school day. [Gates, 537 F.3d at 439](#).

## IMMEDIATE REMOVAL

If, before an investigation is completed, the investigating agency believes that the immediate removal of a child from their home is necessary to protect the child from further abuse, or neglect, the investigating agency must file a petition or take other action under [Tex. Fam. Code Chapter 262](#) to provide for the temporary care and protection of the child. [Tex. Fam. Code § 261.302\(d\)](#). For more information about removals, see the *Removal of a Child* section of this tool kit.

*Note: A DFPS investigator must notify of the parent of the right to make an audio recording of the interview, that the recording is subject to subpoena, and that the parent may request a copy of DFPS recording policy. [Tex. Fam. Code § 261.3027](#). The investigator must also inform the parent in writing before conducting the interview that the parent may request an administrative review of DFPS findings, and the parent shall sign an acknowledgement of receipt. [Tex. Fam. Code § 261.3091](#).*

# Alternatives to Removal of a Child

Separating a child from their home and caregiver can be very traumatic for the child. Considerations such as child safety and other factors related to the well-being of the child remain at the forefront of every potential removal decision, and the best response will be dependent upon the individual facts and available options associated with each case.

Federal law requires that DFPS make reasonable efforts consistent with child safety to prevent or eliminate the need for removing a child from their home. Not all investigations and DFPS interactions with families lead to removal. By exploring alternative interventions, consistent with the circumstances and providing for the safety of the child, the opportunity exists to avoid the need for removal to foster care without jeopardizing child safety.

Below are examples of alternative interventions in lieu of removal. The best alternative to removal will depend on the facts of each case and appropriate options available.

## 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.](#)

**Practice Tip:** If there is reason to believe that a parent or other caregiver may remove a child from the state (or another geographic limit) or may hide a child, the court can render a temporary restraining order if it finds DFPS has probable cause to conduct the investigation and there is reason to believe that the person may remove or hide the child. Motion and Affidavit are typically required. [Tex. Fam. Code § 261.306.](#)

## THERE IS A SAFETY ISSUE, BUT THE FAMILY IS WILLING TO ENGAGE IN SERVICES

### *Safety Plans*

A Safety Plan is a voluntary, short-term, written agreement between DFPS and adult family members to address a specific threat to a child in the immediate or foreseeable future. The Safety Plan is meant to allow the child to remain safely in the home while the family works to address the identified concerns. 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, and as a result the plan is not legally binding. Safety plans are voluntary agreements, and a parent can revoke their agreement at any time. However, DFPS policy states if the family is unwilling to participate in a safety plan to address dangers to the child, the caseworker must determine if it is necessary to remove the child from the home. [CPS Policy Handbook § 12651.](#)

In a Safety Plan, a parent may agree to:

- Relocate to a safe environment, such as a shelter, with the child;
- Have their contact with the child supervised by a relative or fictive kin; or

- Place a child in a short-term placement outside the home (sometimes referred to as a Parent-Child Safety Agreement [PCSP]) if the *family* determines a PCSP is more workable than having a relative or fictive kin supervise parent-child contact.

### ***Alternative Response (AR)***

The AR program was created by DFPS 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 services in order to prevent the need for further official intervention.

For more information, see the [DFPS Alternative Response Resource Guide](#).

### ***Family-Based Safety Services (FBSS)***

Family-Based Safety Services (FBSS) are designed to maintain children safely in their homes, or make it possible for children to return home, by strengthening the ability of families to protect their children and reducing threats to their safety. Children of families who are offered protective services are not in the managing conservatorship of DFPS. Family participation in FBSS is voluntary and may include a written, signed Safety Plan that ensures the parent's contact with the child is supervised until the danger indicators have been sufficiently addressed. Parents do not have to engage in or comply with the voluntary services; however, DFPS may initiate further legal intervention if it determines the lack of participation or compliance constitutes a danger to the child.

## **THERE IS A SAFETY ISSUE, BUT THE FAMILY IS UNWILLING TO PARTICIPATE IN SERVICES**

### ***Court Order for Participation in Services/Motion to Participate (COS/MTP)***

If a family has refused services or is not voluntarily cooperating with services provided or funded by DFPS, DFPS may 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. Those services ordered by the court are provided by FBSS. 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. See [CPS Handbook § 2400](#) for more information on the relationship between FBSS and COS/MTP. For more information, see the *Court Ordered Services* section of this tool kit.

## **THE FAMILY DETERMINES THAT AN ALTERNATIVE PLACEMENT IS MORE WORKABLE THAN A SUPERVISION PLAN**

### ***Parental Child Safety Placement (PCSP)***

A Parental Child Safety Placement (PCSP) is a family-initiated, temporary, out-of-home placement 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 that may occur when the family determines that a PCSP is more workable than having a supervision agreement for parent-child contact. 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 §§ 34.002, 34.0021, 264.902.](#)

**Practice Tip:** Attorneys representing DFPS may consider [subscribing](#) to receive DFPS policy updates on PCSPs and all other CPS related policies.

## 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. See the *Protective Orders* section in this tool kit.

A court may issue a temporary restraining order (also called a “kick-out order”) if the Department’s petition states fact sufficient to satisfy the court that:

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

The order can be extended pursuant to [Tex. Fam. Code § 262.201\(e\).](#) [Tex. Fam. Code § 262.1015\(d\).](#)

**Practice Tip:** If the protection of the child requires an order lasting longer than 14 days, DFPS may file an application for a protective order on behalf of the child instead of or in addition to obtaining a temporary restraining order or may assist a parent or other adult with whom the child resides in obtaining a protective order. [Tex. Fam. Code § 262.1015\(a-1\).](#)

**Practice Tip:** If uncertain about whether to seek a protective order in addition to or in lieu of a Temporary Restraining Order, consider filing both petitions at the same time in order to only have to complete service on the alleged perpetrator once. The protective order hearing can always be passed if it is not necessary, and the temporary restraining order expires within 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 at a time. [Tex. Fam. Code § 83.002](#).

### ***Protective Orders***

Domestic violence is often a presenting issue in child welfare cases. If a parent is a victim of domestic violence, parents' attorneys may want to consider filing for a protective order on behalf of their client to help demonstrate their protective capacity. Children's attorneys may also consider filing for a protective order if the child is a victim.

### ***Filing***

Any adult, including a parent or guardian, who is acting on behalf of a victim of an offense under [Texas Penal Code §§ 20A.02, 20A.03, 21.02, 21.11, 22.011, 22.012, 42.072, or 43.05](#) may file an application for a protective order if the victim is younger than 18 years of age. [Tex. Code of Crim. Pro. Art. 7B.001](#). A prosecuting attorney acting on behalf of the victim or adult who is acting on behalf of the victim may also file an application.

DFPS is specifically authorized to file an application for a protective order of any person alleged to be the victim of family violence. [Tex. Fam. Code § 82.002\(d\)\(2\)](#).

Additionally, if not otherwise authorized to apply for a protective order under [Tex. Fam. Code Chapter 82](#), DFPS may, on its own initiative or jointly with a parent, relative, or caregiver of the child, file an application for protective order for the protection of a child in their temporary managing conservatorship in certain cases of abuse or neglect. *See* [Tex. Fam. Code § 261.501](#).

### ***Ex Parte Protective Orders***

While awaiting a protective order hearing, temporary ex parte orders issued prohibit 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.

**Practice Tip:** If the court finds from the information contained in an application for a protective order that there is a clear and present danger of family violence, it may, without further notice or hearing, enter a temporary ex parte order for the protection of the applicant or any other member of the applicant's family or household. [Tex. Fam. Code § 83.001](#). The temporary ex parte order is valid for no more than 20 days and may be extended by additional 20-day periods. [Tex. Fam. Code § 83.002](#).

### ***Required Findings for Issuance of Protective Order***

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 § 85.001](#). Except as otherwise provided by statute, a protective order is effective for the period stated in the order,

not to exceed two years or, if not stated in the order, until the second anniversary of the date the order was issued. [Tex. Fam. Code § 85.025](#).

Obtaining a protective order does not require proof of any visible marks or bruises and, in a hearing for a 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](#). [Tex. Fam. Code § 84.006](#).

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 shall issue a protective order that includes a statement of the required findings. [Tex. Code of Crim. Pro. Art. 7B.003](#). An offender's conviction of or placement on deferred adjudication community supervision for any of the above offenses constitutes reasonable grounds. [Tex. Code of Crim. Pro. Art. 7B.003](#).

In a hearing on application for a protective order under the [Tex. Code of Crim. Pro. Ch. 7B](#), a statement that is made by a child younger than 14 years of age who is the victim of an offense under [Tex. Penal Code §§ 21.02, 21.11, 22.011, 22.012, or 22.021](#), and that describes the offense committed against the child is admissible as evidence in the same manner that a child's statement regarding the abuse against the child is admissible under [Tex. Fam. Code § 104.006](#). [Tex. Code of Crim. Pro. Art. 7B.004](#).

### ***Duration***

The temporary ex parte protective order may be issued for up to 20 days and may be extended for additional 20-day periods. [Tex. Fam. Code § 83.002](#). After notice and hearing, a court may issue a protective order. A court may render a protective order sufficient to protect the applicant and members of the applicant's family or household that is effective for more than two years if the court makes certain findings about the person who is the subject of the protective order. See [Tex. Fam. Code § 85.025\(a-1\)](#). Additionally, an application for protective order may be renewed. [Tex. Fam. Code §§ 82.008, 82.0085](#).

A protective order issued under [Tex. Code of Crim. Pro. Art. 7B.003](#), may be effective for the duration of the lives of the offender and victim or for any shorter period stated in the order. A parent or guardian may not file an application to rescind the protective order if the parent or guardian is the alleged offender subject to the protective order. [Tex. Code of Crim. Pro. Art. 7B.007](#).

The court shall issue a lifetime protective order if the offender is:

- Convicted of or placed on deferred adjudication community supervision for an offense listed in [Tex. Code of Crim. Pro. Art 7B.001\(a\)\(1\)](#); and
- Required to register for life as a sex offender under [Tex. Code of Crim. Pro. Art. 62](#). [Tex. Code of Crim. Pro. Art. 7B.007\(a-1\)](#).

### ***Enforcement***

A violation of a protective order is a criminal offense. [Tex. Fam. Code § 85.026](#); [Tex. Code Crim. Pro. Art. 7B.006](#).

**Practice Tip:** An attorney from a County or District Attorney’s Office assigned to represent DFPS is not prohibited from filing an application for a protective order on behalf of an individual who has been served in a child welfare suit. However, a prosecutor’s office is not required to file a protective order application on behalf of an individual if they find doing so to be a conflict or if the request for a protective order does not meet the prosecuting office’s qualifications for filing. Applicants should be advised that they are mandated to report information shared related to abuse or neglect of a child.

**Practice Tip:** If there is a concurrent criminal case filed based on the facts that led to a request for the removal of a child from their home, it is likely that the attorney representing DFPS in the child welfare matter will not be the same attorney responsible for the criminal case. Additionally, the judge presiding over the criminal matter may be different from the judge presiding over the child welfare case. It is important to know about any protective orders or bond conditions that may be issued in the criminal case to avoid conflicting orders in the civil CPS case.

**THE INVESTIGATION OR CIRCUMSTANCES HAVE REVEALED A NEED TO HOLD A CHILD WITH THE INTENT TO RETURN THE CHILD TO A FIT PARENT OR GUARDIAN**

***Taking Possession of Child in an Emergency with Intent to Return Home***

An authorized representative of DFPS, law enforcement, or a juvenile probation officer may take temporary possession of a child for up to five days without a court order when there is a danger to the child’s physical health or safety when the sole purpose is to deliver the child without unnecessary delay to a parent, managing conservator, or other person who is presently entitled to possession of the child. [Tex. Fam. Code § 262.110](#).

If the parent or other person entitled to possession does not take possession by the end of the fifth day, DFPS shall take action as if it took possession of the child in an emergency without a court order pursuant to [Tex. Fam. Code § 262.104](#). [Tex. Fam. Code § 262.110\(b\)](#).

**Practice Tip:** Encourage investigative caseworkers to begin writing their affidavit in support of a removal pursuant to [Tex. Fam. Code § 262.104](#) while the facts of the investigation are still fresh in their mind. Then, if after taking possession of a child in an emergency with intent to return the child home, it appears that a parent or other person entitled to possession of a child will not be able to take possession by the end of the fifth day that the child is in the possession of DFPS, the caseworker should be able to quickly add the new facts in support of the petition for removal and submit it for filing.



## Removal of a Child

If during the course of the investigation it is deemed necessary take possession of a child to ensure their safety, DFPS has two options:

- Seek a court order authorizing the removal of the child prior to taking possession of the child; or
- Take possession of the child in an emergency without a court order.

### FILING A PETITION BEFORE TAKING POSSESSION OF A CHILD

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

- There is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse;
- Continuation in the home would be contrary to the child's welfare;
- There is no time, consistent with the physical health or safety of the child, for a full adversary hearing; and
- Reasonable efforts, providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child. [Tex. Fam. Code § 262.101](#).

### FILING A PETITION AFTER TAKING POSSESSION OF A CHILD IN AN EMERGENCY

When a child is taken into possession without a court order, the person taking the child into possession, without unnecessary delay, shall:

- File a suit affecting the parent-child relationship;
- Request the court to appoint an attorney ad litem for the child; and
- Request an initial hearing to be held by no later than the first business day after the date the child is taken into possession. [Tex. Fam. Code § 262.105\(a\)](#).

An original suit filed by a governmental entity after taking possession of a child under [Tex. Fam. Code § 262.104](#) must be supported by an affidavit stating facts sufficient to satisfy a person of ordinary prudence and caution that, based on the affiant's personal knowledge or on information furnished by another person corroborated by the affiant's personal knowledge, one of the following circumstances existed at the time the child was taken into possession:

- There was an immediate danger to the physical health or safety of the child;
- The child was the victim of sexual abuse or of trafficking under [Section 20A.02 or 20A.03, Penal Code](#);
- The parent or person who had possession of the child was using a controlled substance as defined by [Chapter 481, Health and Safety Code](#), and the use constituted an immediate danger to the physical health or safety of the child; or
- The parent or person who had possession of the child permitted the child to remain on premises used for the manufacture of methamphetamine; and
- Based on the affiant's personal knowledge:
  - continuation of the child in the home would have been contrary to the child's welfare;
  - there was no time, consistent with the physical health or safety of the child, for a full

adversary hearing under Subchapter C; and

- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child. [Tex. Fam. Code § 262.105\(b\)](#).

**Practice Tip:** In reviewing affidavits in support of removal, ensure that the caseworker includes all non-removal options that were considered and offered to the family and the reason why those alternatives were not sufficient to ensure the safety of the child. The caseworker should be able to testify as to these efforts in support of a finding on the record that reasonable efforts were made to avoid the removal. Additionally, the caseworker should testify as to reasonable efforts made after the removal of a child from their home to eliminate the need for the continued removal of the child from the home. For more information, see the *Reasonable Efforts* section of this tool kit.

### NOTICE REQUIREMENT

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

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

The written notice requirements must include, among other things:

- The reasons why the child was removed;
- Contact information for the caseworker;
- A summary of legal rights; and
- A statement that the parent has the right to hire an attorney. [Tex. Fam. Code § 262.109\(c\)](#).

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

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

### INFORMATION PROVIDED TO RELATIVES AND CERTAIN INDIVIDUALS

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

- Related to the child within the fourth degree of consanguinity;
- An adult relative of the alleged father if DFPS has a reasonable basis to believe the alleged father is the child’s biological father; or
- Identified as a potential relative or designated caregiver as defined by [Tex. Fam. Code § 264.751](#) on the proposed Child Placement Resources form provided under [Tex. Fam. Code § 261.307](#) and may provide information regarding an adult who DFPS determines has a long-standing and significant relationship with the child. [Tex. Fam. Code § 262.1095\(a\)](#).

- The written notice must include, among other things:
  - notice that the child is in the state’s custody;
  - options available for participation in the care and placement and support of the family, the methods by which the individual may exercise those options, and any requirements the individual must satisfy to exercise those options, including the requirement that the individual be evaluated by the DFPS under [Tex. Fam. Code § 262.114](#) before the individual may serve as a substitute caregiver; and the deadlines before which the individual must respond to exercise those options;
  - options that may be lost if the individual fails to timely respond;
  - the date, time, and location of the Status Hearing, if applicable; and
  - information regarding the procedures and timeline for a suit affecting the parent-child relationship. [Tex. Fam. Code § 262.1095\(b\)](#).

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

DFPS must provide the information immediately after the person has been identified and located. [Tex. Fam. Code § 262.1095\(d-1\)](#).

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



# Hearings at a Glance

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

Updated March 2022

	Adversary	Status	Permanency Hearing Before Final Order	Permanency Hearing After Final Order
If AAL hasn't seen client, determine good cause	Yes	Yes	Yes	Yes
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	Yes
Review Extended Jurisdiction	No	No	No	Yes
Set Next Hearing	Yes	Yes	Yes	Yes
Issue Order and Provide to Parties	Yes	Yes	Yes	Yes

## Court Ordered Services

Court Ordered Services (COS) is also referred to as Required Participation or a Motion to Participate (MTP).

### STATUTE

Tex. Fam. Code § 264.203

### PURPOSE

To determine whether the family is in need of services to address allegations of abuse and neglect and alleviate a continuing danger to the child.

### BURDEN OF PROOF

Evidence sufficient to satisfy a person of ordinary prudence and caution. [Tex. Fam. Code § 264.203\(m\)](#).

### REQUIREMENTS FOR FILING A PETITION

DFPS may file a suit in the county in which the child is located requesting the court to render a temporary order requiring the parent, managing conservator, guardian, or other member of the child's household to participate in services for:

- Alleviating the effects of the abuse or neglect that has occurred;
- Reducing a continuing danger to the physical health or safety of the child or reducing a substantial risk of abuse or neglect caused by an act or failure to act of the parent, managing conservator, guardian, or other member of the child's household; and
- Permitting the child and any siblings of the child to receive services. [Tex. Fam. Code § 264.203\(a\)](#).

The petition must be supported by a sworn affidavit by a person based on personal knowledge and stating facts sufficient to support a finding that:

- The child has been a victim of abuse or neglect or is at substantial risk of abuse or neglect; and
- There is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the parent, managing conservator, guardian, or other member of the child's household unless that person participates in services requested by DFPS. [Tex. Fam. Code § 264.203\(d\)](#).

### APPOINTMENT OF COUNSEL

- Immediately after the filing of a petition for court ordered services but before the 14-day hearing, the court must appoint counsel for the child(ren) and counsel for a parent for whom participation in services is requested. [Tex. Fam. Code § 264.203\(g\) and \(h\)](#).
- A parent who is indigent and appears in opposition to the motion has a right to a court-appointed attorney. [Tex. Fam. Code § 264.203\(i\)\(2\)](#). The court is not required to appoint an attorney for a parent who is not asked to participate in services or any non-parent who is asked to participate in services. [Tex. Fam. Code § 264.203\(h\)](#).
- In court ordered services cases, court-appointed attorneys for children have the powers and duties under [Tex. Fam. Code §§ 107.003 and 107.004](#) and court-appointed attorneys for parents have the powers and duties under [Tex. Fam. Code § 107.0131](#).
- If a parent is found indigent, the court-appointed attorney may continue to represent the

parent. If the court determines that a parent is not indigent the court must discharge the attorney ad litem after the hearing and must order the parent to pay the cost of the attorney ad litem’s representation. [Tex. Fam. Code § 264.203\(j\)](#). The court may postpone any subsequent proceeding for up to seven days after discharge to allow the parent time to hire counsel. [Tex. Fam. Code § 264.203\(k\)](#).

**EX PARTE ORDERS PROHIBITED**

- An order for required participation can be entered only after notice and a hearing. [Tex. Fam. Code § 264.203\(l\)](#).

**14-DAY HEARING**

- The court must set a hearing no later than 14 days after the date the petition was filed unless the court finds good cause to extend that date for not more than 14 days. [Tex. Fam. Code § 264.203\(f\)](#).

**PROSECUTOR PREPARATION**

Attorneys representing DFPS should be familiar with the burden of proof applicable at each hearing. Please see the *Burden of Proof* section of this tool kit for more information.

Before Filing the Petition:

- Ensure that the affidavit contains sufficient facts to support a finding that the child has been a victim of abuse or neglect or is at substantial risk of abuse or neglect, and there is a continuing danger.

Prior to the Hearing:

- Ensure that attorney ad litem have been appointed for the child/ren and the parent(s) for whom participation is being requested.
- Ensure that service has been requested on all parties.
- Meet with DFPS caseworker and prepare for the hearing.

At the Hearing:

- Present sufficient evidence to satisfy the court that rendering an order for court ordered services as to each of the requested parties is necessary.
- Ensure that the services being requested are specific and narrowly tailored.

**REQUIRED SHOWING**

At the conclusion of the hearing, the court must deny the petition unless the court finds:

- An act or failure to act of the parent, managing conservator, guardian, or other member of the child’s household resulted in:
  - abuse or neglect of the child; or
  - a substantial risk of abuse or neglect to the child; or
  - continuing danger to the physical health or safety of the child; and
- Services are necessary to ensure the physical health or safety of the child. [Tex. Fam. Code § 264.203\(m\)](#).



## COURT ACTION

Before the hearing begins, the court must inform each parent of their right to an attorney and to a court-appointed attorney, if indigent. [Tex. Fam. Code § 264.203\(i\)](#).

If DFPS meets their required showing, the court must:

- State its findings in the order;
- Make appropriate temporary orders under Chapter 105 necessary to ensure the safety of the child; and
- Order the participation in specific services narrowly tailored to address the findings made by the court. [Tex. Fam. Code § 264.203\(n\)](#).

The court may not require a parent to participate in services if that parent/party did not cause the alleged abuse or neglect, the substantial risk of abuse or neglect, or the continuing danger to the child.

Once services are ordered, a parent may obtain services from a qualified service provider of their own selection. After obtaining verification of completion of the service from the provider selected by the parent, DFPS must accept the verification as proof of successful completion of the service. However, if the parent selects their own provider, the parent is responsible for the cost of the services. [Tex. Fam. Code § 264.2031](#).

**Practice Tip:** An order to participate can only be entered after notice and hearing. This means that the parent(s) must be served with notice of the hearing. Keep in mind that the court cannot order a parent/party to participate in services who did not cause the continuing danger, substantial risk of abuse or neglect, or who was not the perpetrator of abuse or neglect alleged.

## SAFETY PLANS

A family in a court ordered services case may already have a Safety Plan with DFPS as part of the investigation or ongoing FBSS case and the status of the Safety Plan may become an issue in the court ordered services case. For more information, see the *Alternatives to Removal of a Child* section of this tool kit for more information on DFPS Safety Plans.

The court is not authorized to incorporate compliance with a safety plan in its orders, but the court may make its own orders regarding the child’s safety. [Tex. Fam. Code § 264.203\(n\)](#) provides that if a court renders an order granting the Department’s petition the court shall “make appropriate temporary orders under Chapter 105 necessary to ensure the safety of the child....”

[Texas Family Code §105.001](#) provides that a court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child, including an order:

- For the temporary conservatorship of the child;
- For the temporary support of the child;
- Restraining a party from disturbing the peace of the child or another party;
- Prohibiting a person from removing the child beyond a geographical area identified by the Court; or

- For payment of reasonable attorney’s fees and expenses.

**Practice Tip:** With proper notice and pleadings, courts may temporarily place a child with another party and/or make other appropriate orders pursuant to Chapter 105, provided the Court’s orders are necessary to ensure the safety of the child. These orders would be limited to 180 days pursuant to [Tex. Fam. Code § 264.203\(q\)](#) unless extended pursuant to [Tex. Fam. Code § 264.203\(r\)](#) or (s).

### REVIEW HEARINGS

The court must review the status of each person required to participate in services within 90 days after the date the court renders the order. The court shall set subsequent review hearings every 90 days to review the continued need for the order. [Tex. Fam. Code § 264.203\(p\)](#).

An order for required participation expires on the 180th day after the date the order is signed unless extended as provided by [Tex. Fam. Code § 264.203\(r\)](#) or (s). Any party can request termination of the order at any time. The court shall terminate the order on a finding the order is no longer needed. [Tex. Fam. Code § 264.203\(t\)](#).

### EXTENSION

A court ordered services case may be extended up to an additional 180 days from the original expiration date upon a showing by DFPS of a continuing need for the order, after notice and hearing. [Tex. Fam. Code § 264.203\(r\)](#).

The Court may extend an order up to an additional 180 days only if the extension is requested by the person required to participate in services or that person’s attorney and the Court finds:

- The extension is necessary to allow the person time to complete ordered services; and
- The Department made a good faith effort to timely provide the services to the person; and
- The person made a good faith effort to complete the services; and
- The completion of the services is necessary to ensure the physical health and safety of the child; and
- The extension is requested by the person or the person’s attorney. [Tex. Fam. Code § 264.203\(s\)](#).

# Ex Parte Hearings

## *Ex Parte Order Prior to Removal of Child*

### STATUTE

Tex. Fam. Code § 262.102

### PURPOSE

To determine whether a court will authorize in advance the removal of a child and grant DFPS temporary managing conservatorship (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](#).

### REQUIRED SHOWING FOR EX PARTE ORDER BEFORE REMOVAL HEARING

DFPS must submit sufficient evidence to prove:

- Either that there is 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 no 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 consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal. 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](#). [Tex. Fam. Code § 262.102](#).

\* This determination may not be based solely on the opinion of a medical professional under contract with DFPS who did not conduct a physical examination of the child. [Tex. Fam. Code § 262.102\(b-1\)](#).

### 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.

**Practice Tip:** When DFPS files a petition seeking 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.

## 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 consentor 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:** Prepare the caseworker ahead of time to be able to testify from their personal knowledge about the reasonable efforts which DFPS made before requesting removal of the child. Be prepared to rebut any objections to hearsay within the Affidavit of Removal.

**Practice Tip:** Any medical expert contracted by DFPS must have examined the child for the court to rely upon their medical opinion to issue an emergency order. [Tex. Fam. § 262.102 \(b-1\)](#).

**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, it is best practice to notify the attorney of the new filing and the ex parte hearing. It is not required that the ex parte hearing be rescheduled if the attorney is not available to attend, but, in some jurisdictions, the court may choose to do so.

## 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:** When seeking an order for the emergency removal of an “Indian child,” DFPS must submit an ICWA removal affidavit which conforms to the heightened removal requirements. An ex parte removal must be terminated as soon as it is no longer necessary to prevent the imminent physical harm to the “Indian child.”

### ***Continuing an Ex Parte Hearing to Comply with ICWA Notice Requirement***

An ex parte proceeding should not be continued for more than 30 days unless the court finds:

- Returning the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- The court has been unable to transfer the proceeding to the appropriate Tribe; and
- It has not been possible to initiate a “child-custody proceeding.”

**Practice Tip:** To avoid the need to continue the hearing, the best practice is to set this hearing out with at least 30 days’ notice. For more information, see the *ICWA* section of this tool kit.

### ***Termination of Ex Parte Removal Under ICWA***

An ex parte removal will terminate on the following conditions:

- Filing of a child-custody proceeding,
- Transfer of the case to the Tribe’s jurisdiction, or
- Return of the child to the parent or Indian custodian.

If a child is not returned home or the case is transferred to the Tribe, all proceedings must comply with ICWA.

If a party asserts or the court has reason to believe an “Indian child” may have been improperly removed or retained, the court must terminate the proceedings unless returning the child would subject the child to “substantial and immediate danger or threat of such danger.” [25 C.F.R. § 23.113\(a\) and \(c\)](#).

**Practice Tip:** Due to the pending U.S. Supreme Court case on ICWA (*Brackeen v. Haaland*, [994 F.3d 249](#) (5th Cir. 2021)), continued application of ICWA provisions may prevent DFPS cases from being reversed in the event that the law is upheld.

## **PROSECUTOR PREPARATION**

Before the ex parte hearing, the prosecutor must:

- Review caseworker’s affidavit to assess the sufficiency of the evidence;
- Prepare and file the appropriate petition with affidavit;
- If parties have attorneys, notify the attorneys of the ex parte hearing;
- If an ex parte order is granted, request that the clerk issue citation and notice of the adversary hearing; and
- If ICWA applies, send notification to the parent, Indian custodian and the child’s tribe by registered mail of the pending proceedings and the right to intervene. If no tribe or parent can be found or is unknown notice must be given to Secretary of the Interior. [25 USCA §21 1912 \(a\)](#).

**Practice Tip:** If, at any point after filing a petition for removal of a child, DFPS learns that a child may be an “Indian child,” notice to the Tribe must be sent. The determination as to whether a child qualifies as a member of the Tribe is at the sole discretion of the Tribe. If not previously filed, an amended petition and affidavit containing the necessary ICWA language must be filed upon learning that a child is an “Indian child” and the heightened burden of proof should be applied to all past hearings, as feasible, and must be applied to hearings going forward.

## *Ex Parte Order After Emergency Removal of Child Without a Court Order*

### STATUTES

Tex. Fam. Code §§ 262.104, 262.105, 262.106, 262.107

### PURPOSE

There are limited circumstances when a DFPS caseworker, law enforcement officer, or juvenile probation officer may take possession of a child without a court order. [Tex. Fam. Code § 262.104](#).

When removal of a child without a prior court order is warranted, DFPS must then file a petition and affidavit with the court no later than the first business day after the date the child is taken into possession to request an initial hearing for the court to render orders necessary to protect the physical health and safety of the child. [Tex. Fam. Code §§ 262.105, 262.106](#).

### 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](#).

### EX PARTE HEARING

Under [Tex. Fam. Code § 262.106 \(b\)](#) if a full adversary hearing is not practicable, the initial hearing may be ex parte and proof may be by sworn petition and affidavit.

### RETURN OF THE CHILD

The child must be returned to the parent or guardian if the initial hearing is not timely held. [Tex. Fam. Code § 262.106 \(c\)](#). For the purposes of determining the first business day after the child is taken into possession, the child is considered to have been taken into possession by DFPS on the expiration of the five-day period permitted under [Tex. Fam. Code § 262.007 \(c\)](#) or [262.110 \(b\)](#). [Tex. Fam. Code §262.106\(d\)](#).

### REQUIRED SHOWING

DFPS must submit sufficient evidence to prove:

- One of the following circumstances exist:
  - there is a continuing danger to the physical health or safety of the child; or

- that the child has been a victim of neglect or sexual abuse and is a substantial risk of future sexual abuse or trafficking; or
- the parent’s use of a controlled substance constitutes an immediate danger to the physical health and safety of the child; or
- the child has been permitted to remain on the premises used for the manufacture of methamphetamine; and
- That continuation in the home would be contrary to the child’s welfare; and
- That reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal. [Tex. Fam. Code § 262.107](#).

## 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:** Prepare your caseworker ahead of time to be able to testify from their personal knowledge about the reasonable efforts which DFPS made before requesting removal of the child.

**Practice Tip:** If an attorney was appointed or retained by a party to the suit or to represent the interests of a child prior to the removal, it is best to notify them as soon as possible of the intent to file a removal petition.

## 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:** When seeking an order for the emergency removal of an “Indian child,” DFPS must submit an ICWA removal affidavit which conforms to the heightened removal requirements. An ex parte removal must be terminated as soon as it is no longer necessary to prevent the imminent physical harm to the “Indian child.”

### *Continuing an Ex Parte Hearing to Comply with ICWA Notice Requirement*

An ex parte proceeding should not be continued for more than 30 days unless the court finds:

- Returning the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- The court has been unable to transfer the proceeding to the appropriate Tribe; and
- It has not been possible to initiate a “child-custody proceeding.”

**Practice Tip:** To avoid the need to continue the hearing, the best practice is to set this hearing out with at least 30 days’ notice. Please see the *ICWA* section of this tool kit for more information.

### ***Termination of Ex Parte Removal under ICWA***

An ex parte removal will terminate on the following conditions:

- Filing of a child-custody proceeding,
- Transfer of the case to the Tribe’s jurisdiction, or
- Return of the child to the parent or Indian custodian. If a child is not returned home or the case transferred to the Tribe, all proceedings must comply with ICWA.

If a party asserts or the court has reason to believe an “Indian child” may have been improperly removed or retained, the court must terminate the proceedings unless returning the child would subject the child to “substantial and immediate danger or threat of such danger.” [25 C.F.R. § 23.113\(a\) and \(c\)](#).

**Practice Tip:** Due to the pending U.S. Supreme Court case on ICWA (*Brackeen v. Haaland*, [994 F.3d 249](#) (5th Cir. 2021)), continued application ICWA provisions may prevent DFPS cases from being reversed in the event that the law is upheld.

### **PROSECUTOR PREPARATION**

- Review caseworker’s affidavit to assess the sufficiency of the evidence;
- Prepare and file the appropriate petition with affidavit;
- If parties have attorneys, notify the attorneys of the ex parte hearing;
- If an ex parte order is granted, request that the clerk issue citation and notice of the adversary hearing; and
- If ICWA applies, send notification to the parent, Indian custodian and the child’s tribe by registered mail of the pending proceedings and the right to intervene. If no tribe or parent can be found or is unknown notice must be given to Secretary of the Interior. [25 USCA §21 1912 \(a\)](#).

**Practice Tip:** If, at any point after filing a petition for removal of a child, DFPS learns that a child may be an “Indian child,” notice to the Tribe must be sent. The determination as to whether a child qualifies as a member of the Tribe is at the sole discretion of the Tribe. If not previously filed, an amended petition and affidavit containing the necessary ICWA language must be filed upon learning that a child is an “Indian child” and the heightened burden of proof should be applied to all past hearings, as feasible, and must be applied to hearings going forward.



# Adversary Hearing

## STATUTE

Tex. Fam. Code § 262.201

## PURPOSE

To determine whether a court will authorize DFPS' continued Temporary Managing Conservatorship of a child.

## TIMING

The hearing must be held not later than the 14th day after the date the child was taken into possession unless the court grants an extension. [Tex. Fam. Code § 262.201\(a\)](#).

## 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](#). At the Adversary Hearing, courts must place a child who is removed 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 *ICWA* section of this tool kit for information on how ICWA requirements will affect the case going forward.

## PROSECUTOR PREPARATION

Before the hearing, the prosecutor must:

- Review and assess evidence;
- On request from a parent or child's attorney, 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; [Tex. Fam. Code § 262.014](#).
- Check status of service of citation (if citation by publication is necessary, the court may render a temporary order without waiting for publication [Tex. Fam. Code § 262.201 \(o\)](#)), check subpoenas for witnesses and records;
- Verify status of placement with a person named on the Child Placement Resource Form; [Tex. Fam. Code § 262.114](#).
- Confirm DFPS has asked about possible Native American heritage and the identity of any tribe; and
- Verify DFPS' recommendation regarding visitation, medical consent, or any other issue that may warrant court intervention.

**Practice Tip:** If possible at this stage, check the status of the Court of Continuing, Exclusive Jurisdiction (CCEJ) inquiry and determine if transfer is required, and request that the caseworker complete an Affidavit Regarding Military Service for any missing parent.

**Practice Tip:** Talk with the Child Protective Investigations (CPI) caseworker on the day of the hearing as well, to assess if any new information or witnesses are needed (a seven-day extension can be requested if more time is needed for a witness to appear voluntarily or through subpoena).

### REQUIRED FINDINGS AT AN ADVERSARY HEARING

#### *Findings Regarding the Parent from whom the Child was Removed.*

Tex. Fam. Code § 262.201(g).

The court must return the child to the parent/conservator/guardian/custodian from whom the child was removed unless the court finds:

- There was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession (that danger could include that the child would be a victim of trafficking under [Tex. Penal Code §§ 20A.02 or 20A.03](#));
- That continuation in the home would be contrary to the child’s welfare;
- The urgent need for protection required immediate removal and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child’s removal; and
- That reasonable efforts have been made to enable the child to return home, but there is a substantial risk of continuing danger to the child if the child is returned home.

#### *Findings Regarding the Parent Not Involved in the Circumstances Leading to Removal.*

Tex. Fam. Code §262.201 (g-1).

If the court finds it is not safe to return the child to the parent from whom the child was removed, the court shall consider any other parent, managing conservator, possessory conservator, guardian, caretaker, or custodian as a possible placement.

If the court finds this person did not cause the immediate danger to the physical health or safety of the child or was not the perpetrator of the neglect or abuse alleged in the suit, the court shall order possession of the child by that person unless the court makes specific findings as to each person entitled to possession:

- The person cannot be located after exercise of due diligence or the person is unable or unwilling to take possession of the child; or
- Reasonable efforts have been made to enable the person’s possession of the child, but possession by that person presents a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person, including a danger that the child would be a victim of trafficking under [Tex. Penal Code §§ 20A.02 or 20A.03](#).

## COURT ACTION

Upon making the necessary findings above, the court must enter temporary orders for protection and:

- Order placement of child with a 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 and responsibility for 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-DAY PERIOD

An Adversary Hearing 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 an 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.), the prosecutor can seek an order to extend the Temporary Injunction 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 orders 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 [emphasis added]. [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 orders 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 [emphasis added]. [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 wary of repeated renewals and extensions. [Tex. R. Civ. P. 680](#) states that no more than one extension of a temporary order may be granted unless subsequent extensions are unopposed. 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:** With only 7 and 14-day extensions available, be sure to have all subpoenas out promptly and to question the caseworker immediately for any other possible witnesses you may want to subpoena.

***Sample Questions for the Caseworker (non-exclusive list):***

- How did DFPS become involved with this child?
- What allegations were made that prompted DFPS' involvement?
- Did DFPS investigate the allegations?
- What did the investigation reveal about the child and parents?
- What was the condition of the child when the CPI caseworker investigated?
- Was there a danger to the physical health or safety of the child that was caused by an act or failure to act of the person entitled to possession of the child?
- Can you explain how the act or failure to act endangers the physical health or safety of the child?
- Is it contrary to the child's welfare to remain in the home?
- Why is contrary to the child's welfare for the child to remain in the home?
- Did the urgent need for protection of the child require the child's immediate removal?
- What efforts were made to eliminate or prevent the removal of the child from their home?
- What efforts were made to enable the child to return home?
- Is there a substantial risk of *continuing danger* to the child if he or she is allowed to return home?
- What is the risk and why is it substantial?
- What actions has DFPS taken to locate a placement for the child, other than placing the child in DFPS substitute care?
- Are there any relative or fictive kin caregivers who are willing and able to take the child in?
- Has the child been asked in a developmentally and age-appropriate manner about possible placement options?
- Are there any concerns about placing the child with those relatives or fictive kin caregivers?
- What supports do the relative or fictive kin caregivers need to ensure that placement remains stable?
- Is it in the best interest of the child to name DFPS as the temporary managing conservator of the child?
- How is it in the child's best interest for DFPS to be named temporary managing conservator?
- Does the family have any previous history with DFPS?
- Are there any criminal charges pending for the parent in light of the investigation? (At times law enforcement may be involved and charges may be filed)
- Have the parents and /or any family members with knowledge been asked to complete an ICWA questionnaire? Is there reason to believe the child is or may qualify for membership of an Indian/Native American tribe? If so, has notice been sent?

**Practice Tip:** Make sure to cover the following topics at this hearing:

- Determine whether ICWA applies;
- Determine what visitation orders are appropriate;
- Determine whether a child support order is in place;
- Determine whether paternity testing is needed;
- Determine what orders might be appropriate to assist in the development of the service plan, such as psychological testing, a drug assessment or testing, or other examination, and proceed accordingly;
- Determine whether there is a discovery control plan in place and/or whether there is a need for formal discovery;
- Determine what placement options are available and whether home studies have been initiated;
- If the court does not already do so, consider requesting a scheduling order that sets out every future hearing. *Note* that this allows for parents to get notice of a final hearing at this early stage of the case.

# Status Hearing

## STATUTES

Tex. Fam. Code §§ 263.201, 263.202, 263.203

## PURPOSE

To have a court review the status of the child and 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, 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 the court finds) that a child is an "Indian child," see the *ICWA* section of this tool kit for information on how ICWA requirements will affect the case going forward.

## PROSECUTOR PREPARATION

Before the hearing, the prosecutor must ensure or confirm the following, especially if new parties have joined the suit or if absentee parties have been located:

- Confirm DFPS filed notice of the designation of the child's education decision-maker with the court and the child's school within five days of the conclusion of the adversary hearing; [Tex. Fam. Code § 263.004](#).
- Check status of the inquiry on any courts of continuing, exclusive jurisdiction (CCEJ) and determine if transfer is required; [Tex. Fam. Code §§ 155.101, 262.203](#).
- Request that the caseworker complete an Affidavit Regarding Military Service and an Affidavit of Diligent Efforts for any missing parent;
- Confirm DFPS has collaborated with each parent for whom the goal is reunification to develop a visitation plan. [Tex. Fam. Code § 263.107](#).
- Confirm whether DFPS was able to jointly develop the original service plan with the child's parents, discuss each term and condition of the service plan with the child's parents, and obtain the signatures of the child's parents on the service plan. [Tex. Fam. Code § 263.103](#).
- Review proposed service plan for compliance with [Tex. Fam. Code § 263.102](#);
- Confirm DFPS filed service plans not later than the 45th day after the rendering of the temporary order appointing DFPS as temporary managing conservator (TMC). [Tex. Fam. Code § 263.101](#);
- Confirm DFPS has asked all persons about possible Native American heritage and the

- identity of any tribe;
- Calculate automatic dismissal date;
- File any necessary motions, including a motion for substituted service, with enough time to provide adequate notice to all parties of the request for consideration at the upcoming hearing;
- Confirm that 10 days before the hearing, DFPS has filed:
  - a court report and has provided copies to everyone entitled to same;
  - information on DFPS efforts to identify, locate, or provide information to relatives and others regarding the removal; [Tex. Fam. Code § 263.007](#);
  - information on the child’s medical care;
  - copy of visitation plan; [Tex. Fam. Code § 263.107\(d\)](#); and
  - Child Placement Resources Form and any placement related documents that have not been filed with the court. [Tex. Fam. Code § 263.003](#).

**Practice Tip:** Regarding the “O” Ground for Termination of Parental Rights: If failure to comply with service plan under [Tex. Fam. Code § 161.001\(1\)\(O\)](#) is plead as a termination ground, all essential components of the plan must be specified and incorporated in the court order.

**Practice Tip:** Verification of a CCEJ is only directly mentioned as a duty to complete immediately after the Adversary Hearing; however, it is a matter that should continue to be reviewed by the prosecutor. The consequences of not having verification of the CCEJ are severe and ongoing efforts should be made to ensure that the issue of CCEJ is resolved before attempting to render a final judgment.

## REQUIRED SHOWING

The prosecutor must prove:

- Due diligence was exercised to locate and serve necessary persons, including an alleged father (whether or not he has registered with the paternity registry);
- Compliance with notice to relative requirements ([Tex. Fam. Code § 262.1095](#)); and
- The appropriateness of the service plan ([Tex. Fam. Code § 263.202](#)).

## 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;

- Determine whether the service plan is narrowly tailored to address specific issues identified by DFPS;
- 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:** Depending on your jurisdiction, a party may be able to set a motion seeking additional relief, such as a contested placement change, at the same time as the Status Hearing. If this occurs, prepare your caseworker for additional questioning related to the current placement, the proposed placement, and the reasons DFPS is not in support of the placement change.

***Sample questions for the Caseworker (non-exclusive list):***

- Are you the current caseworker? Have you determined whether there are any prior court actions involving the child(ren) such as a prior removal?
- Have all the parties been served? What efforts are you making to locate all the parties? What is the status of diligent search efforts for any missing parents? If there is a motion on file with accompanying affidavit of diligent efforts, is DFPS requesting an order to grant substituted service?
- Have the parents and /or any family members with knowledge been asked to complete an ICWA questionnaire? Is there reason to believe the child is or may qualify for membership of an Indian/Native American tribe? If so, has notice been sent?
- Has a service plan been created? Was the service plan created in collaboration with the parents? Did DFPS review the service plan with the parents and did the parents sign the service plan? Why or why not? Has it been filed with the court? What are the identifiable services in the plan? Are the services narrowly tailored to address the needs of the family? Is DFPS asking that the service plan be made an order of the court?
- Where are the children placed and how are they doing?
- If the child is in a foster home or residential setting, what actions has DFPS taken to locate a relative or fictive placement for the child?
- Are there any relative or fictive kin caregivers who are willing and able to take the child in?
- Has the child been asked in a developmentally and age-appropriate manner about possible placement options?
- Are there any concerns about placing the child with those relatives or fictive kin caregivers?
- What supports do the relative or fictive kin caregivers need to ensure that placement remains stable?
- Are the children receiving any psychotropic medications? If so, what are the medications meant to treat and what is the dosage for each medication? When was the last medication review for the child?



- How is the child doing in school? What activities are they involved in?
- What reasonable efforts have been made to either return the children home or to a relative/kinship placement?
- Should DFPS be maintained as TMC?
- Are these plans in the best interest of the child/ren in this case?

***Before the hearing, research the following:***

- Have family members been identified for placement?
- If a family member was identified as a proposed placement, but the child was not placed there, what were the reasons for declining placement? Was the placement assessed pursuant to [Tex. Fam. Code § 264.754](#)?
- Have home studies been initiated? If the home study will be outside of Texas, it will involve the Interstate Compact on the Placement of Children (ICPC) unless placement will be with a biological parent. Out of state home studies take significantly longer and must be started as soon as possible. Please see the *ICPC* section of this tool kit for more information.
- Is an incarcerated or long-distance parent involved? These parents have the right to be present at hearing, and the prosecutor will need to get contact information and potentially ask court about presence via phone or other means. Prisons require at least a 24-hour notice and a signed letter/order from the judge to appear.

***At the Hearing:***

- Ensure that the service plan is detailed with contact numbers and exact services to be completed with a timeframe to complete them.
- Make sure the service plan has been filed with the court and inquire whether the parents collaborated in the creation of the plan. Also discuss whether the parents reviewed the plan and signed it. Elicit testimony about why or why not.
- Ask the court to adopt the service plan and make it an order of the court. At a termination proceeding where it is alleged that parents did not complete services, the court ordered plan can be introduced as evidence.

# Permanency Hearing Before Final Order

## STATUTES

Tex. Fam. Code §§ 263.002, 263.302, 263.304, 236.305, 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 the child’s parents are willing and able to provide the child with a safe environment and whether the return of the child is in the child’s best interest. [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#). *But see also* [Tex. Fam. Code § 263.002\(c\)](#).
- 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\(a-1\)\(3\)](#).

Please see the *ICWA* section of this tool kit for information on how ICWA requirements will affect the case going forward.

## PROSECUTOR PREPARATION

Before the hearing, the prosecutor must ensure or confirm the following, especially if new parties have joined the suit or if absentee parties have been located:

- Check status of the inquiry on any courts of continuing, exclusive jurisdiction (CCEJ) and determine if transfer is required; [Tex. Fam. Code §§ 155.101, 262.203](#).
- Request that the caseworker complete an Affidavit Regarding Military Service and an Affidavit of Diligent Efforts, if not already completed, for any missing parent;
- Confirm DFPS has filed information on DFPS efforts to identify, locate, or provide information to relatives and others regarding the removal (this most frequently is included in the court report); [Tex. Fam. Code § 263.007](#);
- Confirm DFPS has asked all persons about possible Native American heritage and the identity of any tribe;
- File any necessary motions for consideration at the hearing with adequate time to provide notice to all parties;
- Confirm DFPS has filed any amended service plan that has been created; [Tex. Fam. Code § 263.104](#);

- Confirm that 10 days before the hearing, DFPS has filed:
  - a permanency plan for the child and has provided copies to each person entitled to notice under [Tex. Fam. Code § 263.0021\(b\)](#); [Tex. Fam. Code § 263.3025](#);
  - a court report and has provided copies to everyone entitled to same; [Tex. Fam. Code § 263.303](#);
  - any updates regarding the child’s education decision-maker; [Tex. Fam. Code § 263.004\(c\)](#);
  - any updates regarding the child’s medical consentor;
  - Child Placement Resources Form and any placement related documents that have not been filed with the court; [Tex. Fam. Code § 263.003](#).
- Verify notice of hearing sent and the status of search efforts for any missing absent parent or relatives;
- Verify child will attend unless specifically excused by court (child in TJJD custody may appear by telephone or video); [Tex. Fam. Code § 263.302](#); and
- Review the report and permanency plan for compliance with [Tex. Fam. Code §§ 263.3025; 263.303](#) and be prepared to address the issues the court must assess (below).

**Practice Tip:** While certain issues, such as placement, will be discussed at the permanency hearing, some courts may require a filed motion if a party intends to request a change of placement at the hearing. In some jurisdictions, these motions may require a separate hearing.

## REQUIRED SHOWING

This will vary depending on the circumstances, but will always focus on:

- If return of the child to the parent is not recommended, what evidence of safety and best interest warrants continued out of home placement;
- The factual basis for the permanency plan, including placement, progress toward reunification, reasonable efforts, services, visitation, and diligent search efforts for any missing parties and information about every aspect of the child’s care (medical, educational, social, normalcy activities); and
- The specific issues the court must review under [Tex. Fam. Code § 263.306](#) (see below).

## COURT ACTION

The court must:

- Order the return of the child to a parent unless the court finds that returning the child to that parent presents a continuing danger to the child and the return would be contrary to the welfare of the child. [Tex. Fam. Code § 263.002\(c\)](#); The order returning the child may be a monitored return under [Tex. Fam. Code § 263.403](#). *But see also* [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#).
- 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 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 (ILS) assessment;
    - whether DFPS has addressed the goals of the permanency plan, including a housing plan and the results of the ILS assessment;
    - for youth 16 or older, 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 older, 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\(b\)](#);
  - 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 transition 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.

***Sample questions for the Caseworker: (non-exclusive list)***

- What efforts have been made to locate and request service of citation on all persons entitled to service?
- Have all issues of paternity been resolved?
- Can the child safely return to the home?
- Is there a continuing necessity for placement, and is it appropriate and in the child’s best interest?
- Is the child placed with a relative or designated caregiver?
- If not, has the child been asked in a developmentally and age-appropriate manner about possible placement options? Have the parents or other family members identified any

new potential placements if the child cannot be returned home?

- Are there any concerns about placing the child with those relatives or fictive kin caregivers?
- What supports do the relative or fictive kin caregivers need to ensure that placement remains stable?
- Are the children receiving any psychotropic medications? If so, what are the medications meant to treat and what is the dosage for each medication? When was the last medication review for the child?
- Are there any other plans or services needed to meet the child's special needs or circumstances?
- Are the parents' compliant with temporary orders and the service plan and what is the extent of their progress?
- How are the child/ren doing? What activities are the child/ren engaging in (age-appropriate, normalcy activities)? Have the child's education-related needs and goals have been identified and addressed? What about medical, emotional, special needs?
- What are the articulated wants of the child/ren?
- Is there a need for additional services for the parents? Is DFPS requesting that these be made orders of the court?
- Is there a likely date by which the child may be returned home, adopted, or placed in permanent managing conservatorship (when do we expect completion of case, what is the permanency plan)?
- If the child is 14 or older, what services are needed for the transition to independent living?
- If the child is 16 or older, have you delivered the original or certified copies of personal documents (not photocopies) which include Texas Identification card, birth certificate, Social Security 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 you delivered the original or certified copies of personal documents (not photocopies) which include Texas Identification card, birth certificate, Social Security 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\(e-1\), 263.306\(a-1\)\(5\)\(H\)\(vi\)](#).
- Has DFPS has made reasonable efforts to finalize the permanency plan, including the concurrent permanency goals (has the parent been offered rides, bus passes, assistance with setting up appointments, etc.)?
- If asking for monitored return to the child's parents, are the child's parents willing and able to provide a safe environment? Is the return in the child's best interest? Is the continuation of DFPS as the TMC in the best interest of the child?
- If asking for an extension based on extraordinary circumstances, what are the circumstances that necessitate an extension?

### 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.

*Note: At the end of each permanency hearing before final order, the court must order DFPS to return the child to the child's parent(s) unless it finds, with respect to each parent, that there is a continuing danger to the physical health or safety of the child and returning the child to the child's parent(s) is contrary to the welfare of the child. [Tex. Fam. Code § 263.002 \(c\)](#). However, this does not prohibit the court from rendering an order for a monitored return. [Tex. Fam. Code § 263.002\(d\)](#).*

**Practice Tip:** If the case can benefit from mediation, consider requesting that mediation by the parties prior to trial be ordered by the court. In addition, if helpful to obtaining a final agreement, ask that any non-parties that may be subject to a final order be authorized to attend mediation. For example, if a grandmother may be named PMC of the children, it is best to have her sign off on the mediated settlement agreement (MSA) to indicate her willingness to do so.

## Dismissal Date Issues

### CALCULATING THE AUTOMATIC DISMISSAL DATE

The dismissal clock begins to run on the date when the court first grants DFPS temporary managing conservatorship (TMC). Unless the court has commenced the trial on the merits on that dismissal date, with few exceptions a child welfare 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:** To avoid any possible appeal issue and any delay in permanency for the child or children the subject of the suit, schedule and be sure to commence the trial on the merits several weeks before the automatic dismissal date.

### EXTRAORDINARY CIRCUMSTANCES

If the court finds that extraordinary circumstances necessitate the child remaining in DFPS temporary managing conservatorship and that continuing to appoint DFPS as temporary managing conservator 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.
- The court shall find that extraordinary circumstances exist if:
  - a parent has made a good faith effort to successfully complete the service plan but needs additional time, and
  - on completion of the service plan the court intends to order the child returned to the parent. [Tex. Fam. Code § 263.401\(b-3\)](#).

**Practice Tip:** An agreement by the parties to seek an extension does not constitute a finding of extraordinary circumstances. Attorneys might exercise caution about relying on such an agreement, as the judge may still deny the extension if the court determines that extraordinary circumstances are not present.

**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 to 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.

### MONITORED RETURN OR TRANSITION MONITORED RETURN

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

- Return the child to the parent (a “monitored return”); 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 (a “transition monitored return”).

In the case of a 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 after the 180 days, 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](#).

## Transition /Monitored Return

If the court has not granted an extension of the 12 month deadline under [263.401\(b\)](#):

The court can order a Regular Monitored Return under [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\(b\)](#).

The Family Code does not authorize any type of extension associated with a Monitored Return ordered pursuant to [Section 263.403\(a\)\(2\)\(A\)](#).

Per [Section 263.403\(b\)](#), the court must schedule a new dismissal date not later than the 180th day after the court enters the order unless the court commences a trial on the merits.

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.*



## A COURT ORDER IS REQUIRED TO EXTEND THE DISMISSAL DATE

Even if all the parties agree to extend the dismissal date, the deadlines cannot be extended except by Court Order. [Tex. Fam. Code § 263.402\(a\)](#). The Supreme Court recently ruled that “Trial Courts should make the [§263.401\(b\)](#) findings in a written order as a matter of course, but we hold that the failure to do so is not error, provided the findings are made orally on the record or in some other writing.” *In re G.X.H.*, [627 S.W.3d 288, 299](#) (Tex. April 30, 2021).

**Practice Tip:** Even if the parties agree, a judge can still overturn either of the above requests.

**Practice Tip:** Request your extension before passing on your last trial settings before the case deadline. If an extension is requested after the last trial setting has been passed, the judge has only the choice of granting the extension or allowing the case to be dismissed, denying the court its discretion to decline the extension request and have the case proceed to trial. Remember to have the judge sign a new scheduling order that reflects the new dismissal date and distribute to all parties.



# Final Hearing/Trial on the Merits

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](#).

## STATUTES

[Tex. Fam. Code §§161.001, 263.401, 263.404](#)

## PURPOSE

To obtain a final order consistent with the child’s permanency plan prior to the dismissal date.

**Practice Tip:** Trial must commence or an extension must be granted before the one-year anniversary of the date that DFPS was named as the temporary managing conservator or the court will lose jurisdiction over the case, the suit will be automatically dismissed without a court order, and the child must be returned to their home. [Tex. Fam. Code § 263.401](#).

## BURDEN OF PROOF

If termination of parental rights is requested, the standard of proof is clear and convincing evidence. If PMC is requested, the standard is preponderance of the evidence, unless ICWA applies. If ICWA applies, termination of parental rights requires proof beyond a reasonable doubt.

## 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 termination of parental rights is in the child’s best interest. 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 Qualified Expert Witness (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. For more information, see *ICWA* section of the tool kit.

## HEARING BEFORE ASSOCIATE JUDGE

The Family Code authorizes judges in civil proceedings to refer cases to associate judges appointed both under Texas Family Code Chapter 201, Subchapters A and C to handle the disposition of a variety of case-related matters, including trials on the merits in termination of parental rights. [Tex. Fam. Code § 201.005\(a\)](#).

Referral to an associate judge is not binding on the parties, so if any party timely objects, the

referring court must hear the trial on the merits or preside at a jury trial. [Tex. Fam. Code § 201.005\(b\)-\(c\)](#). Barring an objection, however, a [Texas Family Code Chapter 201, Subchapters A or C](#) associate judge may determine the merits in either a bench or a jury trial, subject to the parties' post-trial right to request a "de novo hearing" before the referring court, which must be heard within thirty days of a timely de novo request. [Tex. Fam. Code § 201.015](#).

A party desiring a trial before the referring court rather than the associate judge must file an objection not later than the 10th day after the date the party receives notice that the associate will hear the trial. If an objection is filed, the referring court shall hear the trial on the merits or preside at a jury trial, if a jury demand has been timely made. [Tex. Fam. Code § 201.005\(c\)](#).

### PROSECUTOR PREPARATION

The preparation required for a contested trial varies greatly depending on the relief requested, the evidence, and whether a jury is requested. In every case, preparing a trial notebook will focus pretrial preparation, reveal issues that require additional research, and ensure easy access to information during trial.

The practice tips below outline some general principles that attorneys representing DFPS may consider when approaching a contested trial. Attorneys should seek additional materials, resources, and training to ensure adequate preparation.

**Practice Tip:** Attorneys should work with the DFPS caseworker in the months leading up to trial to answer discovery so that all necessary witnesses may be identified and called and all necessary exhibits may be admitted. All service providers and any other witnesses that the attorney intends to call to testify should be interviewed ahead of time. Review the facts that led up to the removal, all court orders, the service plan, service provider notes and caseworker reports to the court, and discuss the burden of proof, anticipated evidence from all parties, and any alternative relief requested with your client. Prepare witnesses for direct and cross-examination.

**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.)

### REQUIRED SHOWING

#### *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\(b\)](#). Evidence for each prong must be presented against each parent for whom termination is being sought. To avoid a child being returned home if a termination order is denied or reversed on appeal, the best practice is to plead in the alternative for permanent managing conservatorship to be awarded to DFPS.

#### *Appointment of DFPS as Permanent Managing Conservator*

The appointment of DFPS as a child's Permanent Managing Conservator (PMC) without termination of parental rights is only appropriate if there isn't a more permanent option for a child. 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:

- That the child will be 18 years old in less than three years;
- The child is 12 or older and has expressed a strong desire against termination and continuously expressed a strong desire against being adopted; and
- 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 and who has an Alternative Planned Permanent Living Arrangement (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 seeking to admit the affidavit as evidence over hearsay objection, argue that the affidavit is not being used to prove the truth of the assertions included, but rather to show what the court relied on when it made the determination to remove for abuse or neglect under Chapter 262. See *In the Interest of E.C.R.*, 402 S.W.3d 239, 248 (Tex. 2013). This is especially helpful when the worker who wrote the affidavit is unable to testify.

### ENTERING A DEFAULT JUDGMENT

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

- Service of citation, no answer and the return on file at least 10 days;
- An order appointing an attorney ad litem for the absent parent, if appointment of counsel is mandatory;
- If the judgement seeks termination against one or both parents, 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 the *Servicemembers Civil Relief Act* 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 admission of paternity.

**Practice Tip:** Before filing an amended petition, requesting an interlocutory default as to a missing parent may avoid notice or service problems.

### 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 their attorney, if 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.

**Practice Tip:** It is important to still make a clear record in case of an appeal. When making a record, it is helpful 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 on the case, etc.).

**Practice Tip:** If a parent appears to contest a default prior to the final hearing, and there is any question about compliance with the procedural requirements, the best strategy may be to agree to a new trial, in order to avoid exposing an otherwise solid termination case to reversal.

**Practice Tip:** Unlike with a default judgment, an “empty chair” trial may occur after a parent has appeared or filed a response in a case and has received proper notice but does not appear at the final hearing. If a parent timely requests a jury trial but does not appear and has not waived the request, attorneys representing DFPS might consider proceeding with the trial to avoid appellate issues.

### ENTERING AGREED ORDERS

Agreed Final Orders can be entered by a court when all parties have reached agreement, typically achieved during a 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 PMC to DFPS.

**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 clear and convincing evidence standard, not merely a yes or no answer. Agreed orders should be dictated into the record and reflected by a final order. If there is a mediated settlement agreement (MSA), consider attaching a copy of it to the final order.

**Practice Tip:** 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.

**Practice Tip:** For Child Protection Court (CPC) associate judges, the proposed order or judgment of the associate judge becomes the order of the referring court by operation of law without ratification by the referring court. [Tex. Fam. Code § 201.2041\(a\)](#). Regardless of whether a de novo hearing is requested before the referring court, a proposed order or judgment rendered by an associate judge that meets the requirements of [Tex. Fam. Code § 263.401\(d\)](#) is considered a final order for purposes of [Tex. Fam. Code § 263.401](#). [Tex. Fam. Code § 201.014\(b\)](#) and [Tex. Fam. Code § 201.2041\(b\)](#).

### ***90-Day Deadline to Render Final Order; Extension***

The Court must render a final order not later than the 90th day after trial commences. [Tex. Fam. Code § 263.4011\(a\)](#). The remedy for failing to render a final order within the specified time period is to file a mandamus requesting that the court render a final order.

*Note: The 90-day period **IS NOT** tolled for any recess during the trial.*

The court may extend the 90-day period for the period the court determines necessary if, after a hearing, the court finds good cause for the extension.

*Note: An extension of the 90-day period requires (1) a hearing, and (2) a written order specifying the grounds on which the extension is granted and the length of the extension.*

### AFTER THE COURT RENDERS A FINAL ORDER

The prosecutor must:

- Prepare the judgment making sure:
  - to track the statutory language for the applicable termination grounds, which should be listed in the conjunctive;
  - to include the parental presumption language of [Tex. Fam. Code § 153.131](#), if applicable; and
  - that the statutory warning to parents is prominently displayed (boldface type, underlined or capital letters).
- File a Motion to Enter Judgment if a party fails or refuses to sign the judgment; and
- Schedule a Permanency Hearing After Final Order.

Be aware of strict time limits for any challenge:

- **A request for de novo hearing** must be filed with the clerk of the referring court no later than the 3rd working day after receiving notice of the substance of the associate judge’s order; [Tex. Fam. Code § 201.015](#). For more information, see the *De Novo Hearing* section of the tool kit;
- **An accelerated appeal** must be filed within 20 days after the judgment or order is signed, subject to a possible 15-day extension. [Tex. R. App. P. 26.1\(b\)](#) and [Tex. R. App. P. 26.3](#). For more information, see the *Appeals* section below; and
- **A motion for new trial** must be filed within 30 days after the final judgement is signed. [Tex. R. Civ. P. 329B](#).

### NOTICE OF TERMINATION FOR CERTAIN RELATIVES

Immediately after a court renders an order terminating the parent-child relationship in a suit filed by DFPS, DFPS is required to notify each individual described by [Tex. Fam. Code § 102.006\(c\)](#) who has been identified under [Tex. Fam. Code § 262.1095](#) that:

- The parent-child relationship has been terminated; and
- The individual has 90 days after the date the order is rendered to file an original suit or a suit for modification requesting managing conservatorship of the child in accordance with [Tex. Fam. Code § 102.006\(c\)](#). [Tex. Fam. Code § 161.2081](#).

### APPEALS

#### *Accelerated Appeal*

An appeal of a final order rendered under [Tex. Fam. Code Chapter 263, Subchapter E](#) is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure and the appellate court must render its final order or judgment with the least possible delay. [Tex. Fam. Code § 263.405\(a\)](#). An accelerated appeal must be filed within 20



days after the judgment or order is signed, subject to a possible 15-day extension. [Tex. R. App. P. 26.1\(b\)](#) and [Tex. R. App. P. 26.3](#).

The final order must contain the following prominently displayed statement in boldfaced type, in capital letters, or underline:

“A PARTY AFFECTED BY THIS ORDER HAS THE RIGHT TO APPEAL. AN APPEAL IN A SUIT IN WHICH TERMINATION OF THE PARENT-CHILD RELATIONSHIP IS SOUGHT IS GOVERNED BY THE PROCEDURES FOR ACCELERATED APPEALS IN CIVIL CASES UNDER THE TEXAS RULES OF APPELLATE PROCEDURE. FAILURE TO FOLLOW THE TEXAS RULES OF APPELLATE PROCEDURE FOR ACCELERATED APPEALS MAY RESULT IN THE DISMISSAL OF THE APPEAL.” [Tex. Fam. Code § 263.405\(b\)](#).

### ***Appointment of Appellate Attorney for Parent***

A parent who has been determined indigent by the court is presumed to remain indigent for the duration of the suit and any appeal unless the court finds a material and substantial change for the parent’s financial circumstances. [Tex. Fam. Code § 107.013\(e\)](#).

Otherwise, 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\(2\)](#).

### ***Findings of Fact and Conclusions of Law***

In the context of accelerated appeals, which an appeal of a termination decree is, whether the trial court files findings and conclusions is discretionary. See [Tex. R. App. P. 28.1\(c\)](#); *In re M.P.*, No. 02-14-00032-CV, 2014 WL 3882179 at \*2 (Tex.App.—Ft. Worth Aug. 7, 2014, no pet.) (mem. op.). *In re A.S.*, No. 02-16-00076-CV, 2016 WL 3364838, at \*6 (Tex.App.—Ft. Worth June 16, 2016, no pet.) (mem. op.).

In an accelerated appeal, “[t]he trial court need not file findings of fact and conclusions of law but *may* do so within 30 days after the order is signed. [Tex. R. App. P. 28.1\(c\)](#) (emphasis added).” *In re M.P.*, No. 02-14-00032-CV, 2014 WL 3882179, at \*2 (Tex.App.—Ft. Worth Aug. 7, 2014, no pet.) (mem. op.).

**Practice Tip:** Some appellate courts may require that Findings of Fact and Conclusions of Law be submitted prior to reviewing an appeal. Be prepared to timely submit a proposal of the findings and conclusions related to a case on appeal upon request to the trial court to consider for adoption if such a request is made.

### ***Representation of DFPS on Appeal***

The DFPS Appellate Unit handles termination appeals across the entire state, and any attorney representing DFPS may refer an appeal to the DFPS Appellate Unit. However, some County and District Attorney Offices handle their own civil appeals, including child welfare law cases. Please check with your office to determine if appeals are handled in-house or need to be referred out in a timely manner.

A County or District Attorney’s Office may refer an appeal to the DFPS Appellate Unit by contacting Virginia Weldon at [virginia.weldon@dfps.texas.gov](mailto:virginia.weldon@dfps.texas.gov) or by calling (512) 929-6819 to obtain a referral form. The referral form and any post-trial documents should be e-mailed to

Eric Tai, DFPS Managing Attorney for the Appellate Unit, at [eric.tai@dfps.texas.gov](mailto:eric.tai@dfps.texas.gov) as soon as possible after receiving notice of appeal. A prolonged delay in referring the case to the DFPS Appellate Unit may result in the case not being accepted.

# Permanency Hearing After Final Order

## STATUTES

Tex. Fam. Code §§263.002, 263.501, 236.5031, 264.121

## PURPOSE

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

## BURDEN OF PROOF

Preponderance of the evidence.

## PROSECUTOR PREPARATION

Before the hearing, the prosecutor must:

- 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 an adoption subsidy and ensure that the proper procedures are followed to obtain the subsidy.
- If parental rights have been terminated, but the child is not in a prospective adoptive home, advise DFPS to initiate recruitment efforts to identify such a home.
  - 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 teenage 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, 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.
- Verify that 10 days before the hearing (unless the court orders a different deadline or waives the reporting requirement for good cause shown):
  - proper notice was provided to all parties;
  - court report was filed and provided to all parties; [Tex. Fam. Code § 263.502](#);
  - any updates regarding the child's medical consentor;
- Verify DFPS arranged for child to attend the hearing unless specifically excused by the court or, for a child in Texas Juvenile Justice Department (TJJD) custody, appearance in person, telephonic, or by video; [Tex. Fam. Code § 263.302](#);
- Verify current information regarding educational decision-maker and any surrogate parent has been filed with the court; [Tex. Fam. Code § 263.004\(c\)](#); and
- Review the permanency progress report in preparation for the Court's review pursuant to [Tex. Fam. Code § 263.5031\(3\)](#).

**Practice Tip:** Review permanency report thoroughly prior to the hearing. Meet with the assigned caseworker and supervisor to identify any potential concerns that may arise in the hearing.

## 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 Permanency Care Assistance;
- 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 child's best interest);
  - for a child who is placed in institutional care, whether it is the least restrictive environment consistent with the child's best interests;
  - 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 the 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;
    - whether DFPS has conducted an Independent Living Skills Assessment (ILSA); and
    - 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; these are the original or certified copies of personal documents (not photocopies) which include Texas Identification card, birth certificate, Social Security card, and if child is not born in the United States, their immigration or citizenship document. [Tex. Fam. Code §§ 264.121\(e\); 263.5031\(3\)\(E\)\(v\)](#);
    - for youth 18 or above, or with disabilities of minority removed, whether DFPS has provided required documents; these are the original or certified copies of personal documents (not photocopies) which include Texas Identification card, birth certificate, Social Security card, and if child is not born in the United States, their immigration or citizenship document. [Tex. Fam. Code § 264.121\(e-1\); 263.5031\(3\)\(E\)\(v\)](#);
  - determine whether transition services are needed for children age 14 or 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 DFPS has PMC of child and rights are not terminated, whether to order up to 6 months of additional services for the parents if a relative or other person is not seeking PMC;
- whether DFPS has identified a family or other caring adult who has made a permanent commitment to the child;
- whether DFPS has made efforts to ensure the child have regular, ongoing opportunities to engage in age-appropriate normalcy activities; and Set another hearing in 6 months or sooner.

***Sample questions for the Caseworker (non-exclusive list)***

- Are you the current caseworker? How long have you been the caseworker?
- Who are the children involved in this suit?
- How old is each child? What efforts has DFPS made to ensure the child is involved in age-appropriate activities?
- If the child is age 14 or older, what transition services has DFPS provided and are any additional services needed?
- If the child is age 16 or older, has DFPS provided the child with the required personal documents?
- Where is he/she placed? Is this the least restrictive placement? How the child doing in this placement?
- If child not placed with relative or fictive kin, what efforts have been made to place the child with a relative or fictive kin? Has the child been asked, in a developmentally appropriate manner, about any adults in his/her life that might be appropriate for placement or continued contact?
- Is the child in school? If so, what grade? How is the child doing in school?
- Is the child on any psychotropic medications? If yes, are these medications regularly reviewed by a doctor?
- What is the permanency plan for the child?
- If parental rights have not been terminated, would additional services for the parent be beneficial?

**Practice Tip:** The following documents and information are needed for all youth aging out of care per [Tex. Fam. Code § 264.121\(e-1\)](#):

- Birth certificate;
- SS card or replacement;
- Texas Identification card;
- Immunization records;
- Information in Health passport;
- Proof of Medicaid Enrollment; and
- Proof the young adult has been in foster care, unless they have been in care less than 6 months (Family First Act).

## Other Statutory Hearings

### *De Novo Hearing*

#### STATUTES

Tex. Fam. Code §§ 201.015, 201.2042(b)

#### PURPOSE

When a case is referred to an associate judge for any authorized purpose, a party may request a de novo hearing before the referring court by filing a written request with the clerk of the referring court not later than the third working day after the date the party receives notice of the substance of the associate judge's ruling or order. [Tex. Fam. Code § 201.015\(a\)](#). De novo hearings are limited to the specific issues stated in the de novo hearing request. [Tex. Fam. Code § 201.015\(b\)](#). See *In re L.R.*, 324 S.W.3d 885, 890 n.5 (Tex. App.—Austin 2010, no pet.) (“[T]he de novo hearing before the referring court is limited to those issues raised in the hearing request.”).

*Note: For de novo hearings requested in matters handled by associate judges appointed under [Tex. Fam. Code Chapter 201, Subchapter C](#), the party requesting the de novo hearing must file notice with the clerk of the referring court as well as the court to ensure that the referring court judge is timely notified along with the clerk of the court. Notice of a request for a de novo hearing before the referring court must be given to opposing parties under [Tex. R. Civ. P. 21\(a\)](#). [Tex. Fam. Code § 201.015\(d\)](#).*

**Practice Tip:** If a request for de novo hearing is filed by a party, any other party may file a request for a de novo hearing before the referring court not later than the third working day after the date the initial request was filed. [Tex. Fam. Code § 201.015\(e\)](#).

#### BURDEN OF PROOF

##### *De Novo of Temporary Orders*

For a de novo of a temporary orders hearing, the standard is preponderance of the evidence.

##### *De Novo of Final Hearing*

If termination of parental rights is requested, the burden of proof is clear and convincing evidence. If permanent managing conservatorship is requested, the standard is preponderance of the evidence.

#### PROSECUTOR PREPARATION

This varies greatly depending on the whether any new testimony and/or evidence will be presented on behalf of DFPS at the de novo hearing. A de novo hearing may be requested for any hearing in which the associate judge rendered orders. At a minimum, an attorney representing DFPS should be prepared to cross-examine witnesses presented by the party requesting the de novo. If the de novo hearing request is related to a lengthy contested matter, such as the final trial, discuss with DFPS the pros and cons of obtaining the trial transcript for the referring court's review.

- Parties may present witnesses at the de novo hearing, and the referring court may consider the record from the hearing before the associate judge, including any charge to the jury and any verdict returned, if the matter was tried before a jury. [Tex. Fam. Code § 201.015\(c\)](#).

- Although a party may request a de novo hearing before the referring court, a party is not entitled to demand a second jury if the order or proposed judgment reviewed by the referring court was the result of a jury trial presided over by the associate judge in the first instance. [Tex. Fam. Code § 201.015\(i\)](#).

## *Relevant Case Law*

- Neither [Tex. Fam. Code § 201.015](#) nor any other provision of the Texas Family Code expressly confers a right to a jury trial in a de novo hearing. *In the Interest of A.L.M.-F., A.M., J.A.-F., N.A.-F., and E.A.-F.*, No.593 S.W.3d 271, 276-277. (Tex. 2019).
- A de novo hearing under [Tex. Fam. Code Chapter 201](#) is not equivalent to a new trial as review by the referring court under [Tex. Fam. Code § 201.015](#) is not entirely independent of the proceedings before the associate judge. Accordingly, the term “de novo hearing,” as used in [Tex. Fam. Code Chapter 201](#), does not equate to a “trial de novo.” Rather, the term “de novo hearing” has meaning that is unique to the associate judge referral statutes and governed by the procedures specified in the authorizing statutes. *In the Interest of A.L.M.-F.*, 593 S.W.3d 271, 279.

## FORGOING RIGHT TO DE NOVO HEARING

Parties can forego their right to have their case decided by the referring court in two ways:

- a party can waive the right to a de novo hearing by executing a waiver prior to the hearing or trial before the associate judge; or
- post-hearing, the party can fail to or forego filing a request for a de novo hearing within the time required by statute.

Thus, if a request for a de novo hearing before the referring court is not timely filed or the right to de novo hearing before the referring court is waived.

## COURT ACTION

The referring court must conduct the de novo hearing within thirty days of the request. [Tex. Fam. Code § 201.015\(f\)](#).

The findings and orders that the referring court must render will be subject to the type of hearing on de novo and will specifically address the issues raised on de novo.

## *Adoption Hearing*

### STATUTES

[Tex. Fam. Code Chapter 162](#), [Tex. Fam. Code §§ 102.008\(b\), 103.001\(b\), 155.001\(c\), 155.201\(a-1\)](#)

### PURPOSE

Adoption creates the legal parent-child relationship between the adopted child and adoptive parents for all purposes. [Tex. Fam. Code § 162.017\(a\)](#). The adoptive parents assume the permanent roles of parental care, custody, and control of the child as though the child were the biological child of the parents. [Tex. Fam. Code § 162.017\(b\)](#). Through adoption, the new parents make a commitment to the court and to the child that they will provide for all aspects of the child’s well-being, thereby concluding the decision-making and monitoring roles of the court.

## PROSECUTOR PREPARATION

Adoption filings are handled by an attorney representing the adoptive family. Additionally, the attorney representing the adoptive family will have the burden of proving up the adoption. Depending on the jurisdiction, attorneys representing DFPS may assist with obtaining a court date for the hearing or with transportation of court files to and from an off-site Adoption Day Docket.

## PERSONS WHO SHOULD ALWAYS BE PRESENT AT AN ADOPTION HEARING

- Adoptive parents
  - if joint petitioners are spouses, and it would be unduly difficult for one of the petitioners to appear, the court may waive the attendance of that petitioner if the other spouse is present. [Tex. Fam. Code § 162.014\(a\)](#);
- A child to be adopted who is 12 years old or older unless appearance is waived by the court upon a finding that it is in the best interest of the child. [Tex. Fam. Code § 162.014\(b\)](#);
- Assigned caseworker;
- AAL and/or GAL/Court Appointed Special Advocate (CASA) for the child.

## COURT ACTION

If a petition requesting termination has been joined with a petition requesting adoption, the court shall also terminate the parent-child relationship at the same time the adoption order is rendered. The court must make separate findings that the termination is in the best interest of the child and that the adoption is in the best interest of the child. [Tex. Fam. Code § 162.016\(a\)](#).

The court shall grant the adoption if it finds that:

- The requirements for adoption have been met; and
- The adoption is in the best interest of the child. [Tex. Fam. Code § 162.016\(b\)](#).
- The name of the child may be changed in the order if requested. [Tex. Fam. Code § 162.016\(c\)](#).

## *Reinstatement of Parental Rights Hearing*

### STATUTES

[Tex. Fam. Code §§ 161.301-161.304](#)

### PARTIES THAT MAY FILE FOR REINSTATEMENT

- DFPS or a Single Source Continuum Contractor (SSCC)
- The attorney ad litem for the child
- A parent whose rights have been involuntarily terminated. [Tex. Fam. Code § 161.302\(a\)](#).



**Practice Tip:** Since the statute requires that a parent’s rights must have been involuntarily terminated, this may be interpreted to exclude parents who signed affidavits of relinquishment or signed and mediated settlement agreement not to oppose termination based on [Tex. Fam. Code § 161.001\(b\)\(O\)](#) or other ground under [§ 161.001](#). However, all grounds under [Tex. Fam. Code § 161.001](#) are listed under “Involuntary Termination of the Parent-Child Relationship” including [Tex. Fam. Code § 161.001 \(b\) \(K\)](#) (execution of an affidavit of relinquishment) so those parents may not be excluded from filing for reinstatement.

## PETITION REQUIREMENTS

### *Circumstances When a Petition Cannot Be Filed*

A petition for reinstatement cannot be filed if:

- The termination of parental rights did not result from a suit filed by DFPS;
- It has been less the two years since the parent’s rights were terminated;
- The child has been adopted, or is the subject of an adoption placement agreement;
- There is a pending appeal; or
- It has been less than one year since a court denied a previous petition for reinstatement.

### *Required Contents of the Petition*

The contents of the petition must be sworn to by the petitioner and must include:

- The name of the petitioner;
- The name and address of the former parent seeking reinstatement;
- The name, date and place of birth, and current residence of the child, if known;
- The name, current residence address and contact information for any party that participated in the termination hearing and has information relevant to the petition;
- A summary of grounds upon which the former parent’s rights were terminated;
- A statement of facts and evidence that shows the former parent is rehabilitated and has the capacity and willingness to carry out the responsibilities and duties of a parent under [Tex. Fam. Code § 151.001](#). Examples of such evidence include:
  - mental health treatment,
  - substance abuse treatment,
  - employment history, or
  - other personal history demonstrating rehabilitation.
- A summary of prior requests or motions for reinstatement;
- A statement by the former parent seeking reinstatement;
- If the child is older than 12, a statement of the child’s intent or willingness to consent to reinstatement. [Tex. Fam. Code § 161.302\(c\)](#).

## NOTICE

Notice of the petition must be served on:

- The child or child’s representative;
- The county attorney;
- The child’s attorney ad litem;
- DFPS or SSCC, if applicable
- The former parent whose parental rights are sought to be reinstated, if they are not the petitioner; and
- The Tribal representative, if ICWA applies. [Tex. Fam. Code § 161.302\(e\)](#).

**Practice Tip:** If the petitioner is the former parent, they must provide 45 days’ notice to DFPS of their intent to file using the Notice of Intent of Former Parent to Petition Court to Reinstate Parental Rights Form 3800 created by the DFPS Commissioner. Please visit [DFPS’ Forms webpage](#) to download the form.

### HEARING

A hearing must be held no later than 60 days after the date the petition is filed. [Tex. Fam. Code § 161.303\(a\)](#).

#### *Standard of Proof*

The petitioner has the burden of proof. [Tex. Fam. Code § 161.303\(b\)](#). The standard of proof required for reinstatement of parental rights is preponderance of the evidence. [Tex. Fam. Code § 105.005](#).

#### *Purpose*

For the court to determine whether the former parent’s rights should be reinstated.

#### *Required Findings*

For the court to reinstate the parent’s rights, the court must find that:

- Reinstatement of parental rights is in the child’s best interests;
- At least two years have passed since the issuance of the order terminating parental rights and an appeal of the order is not pending;
- The child has not been adopted and is not the subject of an adoption placement agreement;
- If the child is over 12 years old, that the child consents and desires to reside with the parent;
- The former parent has remedied the conditions that were grounds for rendering the order terminating parental rights; and
- The former parent is willing and able to perform parental duties as provided by [Tex. Fam. Code § 151.001](#) including maintaining the health, safety, and welfare of the child.

If the child is less than 12 when the petition for reinstatement is filed, the court must consider the child’s age, maturity, and ability to express a preference and may consider the child’s preference regarding the reinstatement as one factor in the court’s determination.

## COURT ACTION

### *Grant the petition*

If the court grants the petition after a hearing, the court must issue a written order stating that all legal rights, powers, privileges, immunities, duties, and obligations of the former parent with respect to the custody, care, control, and support of the child are reinstated.

### *Deny the petition*

If the court denies the petition, it must make findings and detail reasons for the denial and must issue a statement prohibiting the filing of a subsequent petition for a year from the order of denial.

### *Defer taking action*

The court may defer the decision on the petition and render a temporary order expiring after a period of six months during which DFPS remains the managing conservator and the former parent is the possessory conservator.

During the six-month time period, DFPS must monitor the possessory conservatorship of the former parent and when the temporary order expires, the court shall hold a hearing to determine whether to grant or deny the petition for reinstatement. [Tex. Fam. Code § 161.304](#).

## *Benefits for Child After Reinstatement*

Youth in DFPS conservatorship are eligible for certain benefits, such as a tuition and fee waiver for attending state higher education institutions, an Education and Training Voucher (ETV) to provide financial assistance while attending school, Medicaid eligibility, and waiver of fees for state government identification.

Eligibility for the youth depends on a variety of factors including the youth's age, legal conservatorship, and how the youth exits DFPS conservatorship. If the parent's rights are reinstated, it may affect the availability of certain benefits for the youth.

## TUITION AND FEE WAIVER

If the parent's rights are reinstated, the child may still be eligible for the tuition and fee waiver under the following circumstances:

- The child was in DFPS conservatorship on the day of the child's 14th birthday, if they were also eligible for adoption on or after that day; or
- The child is 14 years or older on or after June 1, 2016 and left PMC of DFPS to return to the legal responsibility of a parent; or
- The child is 16 years or older on or after June 1, 2016 and left TMC of DFPS to return to the legal responsibility of a parent; or
- The child enrolled in a dual credit course or other course in which a high-school student may earn joint high school and college credit and was in DFPS conservatorship on the day of enrollment; and
- The child enrolls in a public higher education institution or in a dual credit course before their 25th birthday. [Tex. Educ. Code § 54.366](#); [40 Tex. Admin. Code §700.1630](#).

**Practice Tip:** DFPS Preparation for Adult Living (PAL) staff verify eligibility for the tuition and fee waiver, even if the child did not participate in PAL services.

### **EDUCATION AND TRAINING VOUCHER**

The youth may still be eligible for ETV if the child was at least 16 and was likely to remain in DFPS foster care until turning 18 before the reinstatement was filed.

### **OTHER BENEFITS**

- After reinstatement, youth are unlikely to retain qualification for Medicaid for former and transitioning foster youth.
- After reinstatement, youth will no longer be eligible for the waiver of driver's license or state identification fees.

## Reasonable Efforts

DFPS is required to make reasonable efforts to prevent the need for removal of the child. Additionally, 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 throughout the case.

### QUESTIONS FOR 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 Alternative Response or Family Based Safety Services 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' 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 FOR 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 transition monitored return appropriate? If not, why not?
- If the safety threat is too high, do the parents understand what conditions are 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?

**Practice Tip:** Remember that reasonable efforts to prevent or eliminate the need for removal of the child are dependent on the individual circumstances of the case and should provide for the safety of the child. Reasonable efforts to allow the child to return home can include DFPS efforts to assess and address any immediate safety issues and to assist the family with services. Efforts to prevent removal may be limited, for example, in a situation where a child has made an outcry during school hours about continual sexual abuse by a parent who will be the sole caregiver for the child when they return home at the end of the school day.

Unless the court finds that aggravated circumstances exist and grants a request to waive the requirement that DFPS make reasonable efforts to return a child to their parent under [Tex. Fam. Code § 262.2015](#), DFPS must make continued reasonable efforts throughout the life of the case to enable the parents to provide a safe environment for child and return the child to their home. DFPS must also make reasonable efforts to finalize the permanency plan for the child.

*Note: Certain termination grounds require that DFPS prove the reasonable efforts it made to return the child to the parent.*

**Practice Tip:** Generally, the implementation of a family service plan by DFPS is considered a reasonable effort to return a child to the parent.

#### QUESTIONS FOR REASONABLE EFFORTS TO ARRANGE AND STABILIZE A PERMANENT PLACEMENT FOR THE CHILD WHEN REUNIFICATION IS NOT POSSIBLE

*Modified from the National Council of Juvenile and Family Court Judges Enhanced Resource Guidelines*

- What efforts were made to reunify the family?
- Why is this plan preferable to reunification?
- Are there relatives who are willing to adopt the child if termination is granted? Is the child living with this relative? If not, why, and what can DFPS do to eliminate barriers to placement?

- If the child is not placed with relatives, what efforts have been made to identify a willing and able relative to adopt the child?
- If there are no relatives willing and able to adopt, has DFPS identified any fictive kin willing and able to adopt the child?
- If relative adoption is not the plan, is adoption by the foster parent(s) the plan? Why or why not?
- If an adoptive home must be recruited, what efforts are being made to identify potential adoptive homes both locally and in other jurisdictions? Are there adults with whom the child has or has had a positive relationship with who may be potential adoptive families?
- Are there relatives interested in permanent managing conservatorship but who are not willing or able to adopt? If so, why is non-relative adoption preferable to PMC with a relative?
- Were the relatives fully informed about the benefits of adoption and/or permanent managing conservatorship?
- Have the relatives been offered assistance in answering questions they may have about adoption or PMC?
- If relatives have been ruled out as placement resources due to prior criminal records, have non-safety licensing waivers been pursued? If not, why?
- What is the child's desires regarding adoption or PMC?
- Is the prospective adoptive placement open to maintaining positive family contacts?
- If there is a sibling group, will the siblings be able to remain together? If not, what efforts have been made to keep the siblings together? Is sibling contact and visitation occurring, and are the placements committed to continuing contact and visitation after final orders are entered?
- If a change in school will occur, what will be done to prepare for the transition?
- Is the adult proposed to serve as permanent managing conservator or as the adoptive parent willing to fill the parental role for the child beyond the age of majority and through adulthood?
- Is the adult proposed to serve as the permanent managing conservator or adoptive parent financially able to care for the child through the age of majority? If not, has DFPS explored opportunities for relative caregiver payments, if a relative, and or entitlements?
- Has there been full disclosure to the family of the child circumstances and special needs?
- What are the plans to continue any necessary services for the child? How will these services be funded after the final order is signed?
- Does the proposed managing conservator or adoptive parent have the necessary skills and knowledge to apply a "reasonable and prudent parent standard" while at the same time allowing the child to participate in normal and beneficial activities?
- Is counseling needed and will it be provided to assist a child to understand and participate in reaching the new goal?
- If the goal is APPLA, what are the compelling reasons for determining that it is not in the child's best interest to return home, to pursue either termination or reinstatement of parental rights, or pursue placement with a guardian or fit and willing relative? What

is the identified, specific, and long-term placement for the child? How will this plan provide stability and permanency for the child? What is the child position regarding this plan?

### *The Impact of Reasonable Efforts on Federal Funding*

If the court fails to make a reasonable efforts finding or finds that reasonable efforts were not made, it could impact the total amount of federal Title IV-E reimbursement received by DFPS; however, it does not affect funding for the individual child, the subject of the suit.

#### **REASONABLE EFFORTS TO PREVENT REMOVAL**

##### ***Timing***

Finding must be made within 60 days of the child's removal. [45 C.F.R. § 1356.21\(b\)\(1\)\(i\)](#).

##### ***Impact***

If the court does not make the finding, the agency will not receive IV-E dollars for the duration of the child's stay in foster care. [45 C.F.R. § 1356.21 \(b\)\(1\)\(ii\)](#).

#### **REASONABLE EFFORTS TO FINALIZE PERMANENCY**

##### ***Timing***

Finding must be made within 12 months of foster care entry and at least once every 12 months thereafter. [45 C.F.R. § 1356.21\(b\)\(2\)\(i\)](#).

##### ***Impact***

If the court does not make the finding, the agency will not receive IV-E funding until such a determination is made. [45 C.F.R. § 1356.21\(b\)\(2\)\(ii\)](#).



## Establishing 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 un rebutted presumption of a man's paternity of the child. [Tex. Fam. Code § 160.204](#);
- An effective acknowledgment of paternity under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
- An adjudication of the man's paternity;
- The adoption of a child by the man; or
- The man's consenting to assisted reproduction by his wife under Subchapter H, which has resulted in the birth of the child. [Tex. Fam. Code § 160.201](#).

### TYPES OF FATHERS:

- 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 bureau of vital statistics,
  - he is voluntarily named as the child's father on the child's birth certificate, or
  - he promised in a record to support the child as his own;
- During the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own. [Tex. Fam. Code § 160.204](#).

***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 Texas Office of the Attorney General.

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

***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 DFPS of State Health Services is the equivalent of an adjudication of paternity.

**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.

## PATERNITY REGISTRY

The Vital Statistics Unit (VSU) maintains a paternity registry. A man who wants to be notified of a proceeding for the adoption or the termination of parental rights regarding a child he may have fathered must register before the birth of the child or not later than the 31st day after the child's birth. The registrant has the responsibility of keeping his information current with the bureau. A man who has filed with the paternity registry within the requisite time frame is entitled to be served with notice of a suit involving the child. Registering with the paternity registry also establishes a basis for personal jurisdiction of a person who is not a Texas Resident.

If no father-child relationship can be established, a petitioner (DFPS) seeking termination of parental rights or adoption must obtain a certificate of the results of a search of the paternity registry. If the petitioner (DFPS) has reason to believe that conception or birth of the child have may occurred in another state, the petitioner must obtain a certificate from paternity or putative father registry of that state.

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## 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](#).

## Placement

Attorneys 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?

### *Placement Preferences*

When ICWA does not apply and when placement with a parent or other person entitled to possession of the child is not possible, DFPS must give preference to persons in the following order when making a placement decision for a child:

- A person related to the child by blood, marriage, or adoption;
- A person which whom the child has a long-standing and significant relationship;
- A foster home;
- A general residential operation. [Tex. Fam. Code § 262.114\(d\)](#).

If the child has previously been in a foster home under DFPS conservatorship, DFPS shall consider placing a child in that home if the foster home is available, the placement would be in the child's best interest, and placement with a relative or fictive kin is not in the child's best interest. [Tex. Fam. Code § 262.114\(c\)](#).

If a child is not placed with a relative, the court must at each hearing under [Tex. Fam. Code Chapter 262](#) include in its findings a statement on whether DFPS has elicited information regarding potential caregivers from the child. [Tex. Fam. Code § 262.0022\(1\)](#).

Please see the *ICWA* section in this tool kit for a list of placement preferences for an "Indian child."

**Practice Tip:** Courts are required at each permanency hearing held under [Chapter 263](#) to review the placement of each child who is not placed with a relative caregiver or designated caregiver as defined by [Tex. Fam. Code § 264.751](#) and make a finding as to whether DFPS is able to place a child with a relative or designated caregiver and to state the evidence that supports its finding either way. [Tex. Fam. Code § 263.002\(b\)](#). If a relative caregiver or designated caregiver identified lives in another state, a home study will have to be completed on the out of state placement under the Interstate Compact for the Placement of Children (ICPC). For more information, see the *ICPC* section of the tool kit.

### *Non-Offending Parent*

At the conclusion of a full adversary hearing, if the court does not order the return of the child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession from whom the child is removed, the court must order that possession of the child be awarded to a parent who did not cause the immediate danger or who is not the perpetrator of the neglect or abuse unless the court finds:

- The person cannot be located after exercise of due diligence or the person is unable or unwilling to take possession of the child; or
- Reasonable efforts have been made to enable the person's possession, but possession presents a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person, including a danger that the child would be a victim of trafficking under [Tex. Fam. Code § § 20A.02 or 20A.03](#), [Penal Code. Tex. Fam. Code § 262.201\(g-1\)](#).

## *Kinship and Fictive Kin Options*

### **CHILD PLACEMENT RESOURCES FORM**

If DFPS determines that removal of the child may be warranted, a proposed Child Placement Resources Form must be provided to the parent. [Tex. Fam. Code § 261.307\(a\)\(2\)](#). DFPS may place a child with a relative or other designated caregiver identified in the proposed Child Placement Resources Form if:

- DFPS determines that the placement is in the best interest of the child; and
- DFPS completes a background and criminal history check and conducts a preliminary evaluation of the relative or other designated caregiver's home before the child is placed with the relative or other designated caregiver. [Tex. Fam. Code § 262.114 \(b\)](#).

DFPS may place a child before conducting the home study required by [Tex. Fam. Code § 262.114\(a\)](#), but not later than 48 hours after the time that the child is placed with a relative or other designated caregiver, DFPS must begin the home study of the relative or other designated caregiver. [Tex. Fam. Code § 262.114\(b\)](#).

Until DFPS identifies an appropriate substitute caregiver, it must continue to explore placement options, including asking the child in a developmentally appropriate manner to identify any adult, particularly one residing in the child's community, who may be a relative caregiver or a designated caregiver.

### **CAREGIVER VISIT WITH CHILD; INFORMATION PROVIDED BY DFPS**

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

- arrange a visit between the child and the proposed caregiver; and
- provide the proposed caregiver with a form (which may be the same form DFPS provides to a non-relative caregiver) containing information, to the extent it is available, about the child that would enhance continuity of care for the child, including:
  - the child's school information and educational needs;
  - the child's medical, dental, and mental health care information;
  - the child's social and family information; and
  - any other information about the child DFPS determines will assist the proposed caregiver in meeting the child's needs. [Tex. Fam. Code §264.7541\(a\)](#).

DFPS may waive the requirements if the proposed relative or other designated caregiver has a long-standing or significant relationship with a child and has provided care for the child at any time during the 12 months preceding the date of the proposed placement. [Tex. Fam. Code § 264.7541\(b\)](#).

## QUESTIONS TO ASK RELATED TO POTENTIAL KINSHIP AND FICTIVE KIN PLACEMENT 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 additional information in the *ICPC* 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?

### *The Child's Needs*

- Does the placement meet the child's educational needs and provide educational continuity?
- Is the 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?
- Has the AAL regularly contacted the child to inform them of the next steps? Has the AAL checked on the child's thoughts and feelings about the current placement options?

### *Children Without Placement (CWOP)*

If DFPS or an SSCC is unable to secure a licensed placement for a child in DFPS conservatorship, the child must receive temporary emergency care provided directly by DFPS or an SSCC until a licensed appropriate placement can be found. DFPS or the SSCC must provide notice to the court no later than the next business day after the date the child is placed in temporary care. [Tex. Fam. Code §264.107\(g\)](#).

Children are forbidden by statute to stay overnight in a DFPS office, so the child must stay in another location (i.e., hotel, apartment) while being supervised by DFPS staff. [Tex. Fam. Code §264.1071](#). While this situation should be avoided whenever possible, the number of children without placement are very low compared to the overall population of children in care across Texas.

## CAUSES AND RISK FACTORS

There is no single reason why some children in the conservatorship of DFPS might experience a lapse in licensed placement. However, the combination of the effects of the COVID-19 pandemic, increased federal and state oversight, and placement capacity gaps are some factors that may have contributed to an increasing number of children in Texas entering CWOP.

Children who are at higher risk of CWOP include:

- Older children
- Children with behavior issues
- Children released from psychiatric hospitals
- Children released from juvenile detention
- Children moving to or from a residential treatment center (RTC)
- Children with special needs (i.e., Autism)

## IMPACTS OF CWOP ON CHILDREN

### *Instability*

- Overnight stays in DFPS offices are forbidden by statute, but children without placement may stay in hotels or apartments overnight and may stay in DFPS offices during daytime hours. Such unlicensed placements are intended as a short-term solution, but some children may experience this for longer periods of time.
- The child's formal education may be interrupted and there may be limited access to informal education resources such as tutors or study sessions.
- Therapy for the children can be inconsistent during temporary placements.
- Not having a stable, licensed placement can be a traumatic experience for children.

**Practice Tip:** Children in CWOP who are staying in hotels, offices, or dorms on a temporary basis meet the federal McKinney-Vento Homeless Assistance Act (“McKinney-Vento”) definition of homeless, and therefore the child is entitled to attend the school that the child attended when permanently housed or the school in which the child was last enrolled, with transportation and other services provided by the district. [42 U.S.C. § 11431 et seq.](#)

### *Supervision*

- The children are supervised and provided for by caseworkers and other DFPS staff. These duties are in addition to existing work responsibilities.
- Caseworkers and staff must ensure that an adult is always present, but there is no consistent caregiver or supervisor.
- DFPS caseworkers and staff are not trained as childcare providers.

### *Safety*

- Children without placement may be at increased risk of running away or becoming a victim of child sex trafficking.

- Unsupervised access to medication can lead to improper dosage or the proper medication regime not being followed.
- Children with serious mental health or behavioral needs may interact with other children without adequate supervision.
- Without training and options for discipline, conflicts between children or between children and staff can escalate and increase the risk of injury or arrest.

### ***Basic Needs***

- Older youth do not have the support or living space available to build healthy life skills such as hygiene, cleaning/chores, getting regular physical activity outdoors, cooking a healthy meal, etc.
- Making visitation arrangements with parents is more complicated when the child does not have a stable placement.

### ***Identifying Alternatives to CWOP***

- DFPS can assist in moving a child out of CWOP by thoroughly investigating alternative placements. For example, DFPS might:
- Identify whether there are relatives or fictive kin who may not meet DFPS approval but could be a safe place for this child.
- Contact potential relatives or fictive kin placement and consider meeting with them in their homes, if appropriate.
- Review and reconsider prior placement options that were not previously approved or that broke down. Determine whether anything can be done to help support placement in these homes.
- Consider contacting treatment centers that do not contract with DFPS about availability.
- Request the child's common app, review for accuracy, and edit, if appropriate.



# 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 in any of the following ways 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 or disabilities or 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 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; or
  - the death of the child; or
  - if the child is disabled as defined in [Tex. Fam. Code § 154.302](#), for an indefinite period.

If a court presiding over a SAPCR involving DFPS orders child support payments or modifies child support payments that requires the payments be made to DFPS, the court must notify the Texas Office of the Attorney General within 10 days.

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](#). Note also that incarceration of a parent cannot be considered intentional unemployment or underemployment when establishing or modifying child support.

When computing net resources available for payment of child support, refer to charts and tables in [Texas Family Code Chapter 154, Subchapter B](#). There you will find child support tax charts, definitions of net resources, additional factors for court to consider; application of guidelines to net resources, and computing a support for children in more than one household, etc.

Basic Guideline Child Support					
Number of children	1	2	3	4	5
% Net monthly	20%	25%	30%	35%	40%

		Number of children before the court				
		1	2	3	4	5
Number of other children for whom the obligor has a duty of support	0	20%	25.00	30.00	35.00	40.00
	1	17.50	22.50	27.38	32.20	37.33
	2	16.00	20.63	25.20	30.33	35.43
	3	14.75	19.00	24.00	29.00	34.00
	4	13.60	18.33	23.14	28.00	32.89
	5	13.33	17.86	22.50	27.22	32.00
	6	13.14	17.50	22.00	26.60	31.27
	7	13.00	17.22	21.60	26.09	30.67

Minimum Wage Chart						
Minimum Wage	Gross Monthly Income	Net Monthly Income	1 child (20%)	2 children (25%)	3 children (30%)	4 children (35%)
7.25	1256.67	1121.54	224.31	280.39	336.46	392.54

**Practice Tip:** The Texas Office of the Attorney General (OAG) website has a [Monthly Child Support Calculator](#) available online.

**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 Texas 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.](#)” *See Tex. Fam. Code § 158.106(a)*. The form is published in the [Texas Administrative Code, Title 1, Section 55.118](#) and is available online.

## Relative and Kinship Placement Support

### RELATIVE OR OTHER DESIGNATED CAREGIVER ASSISTANCE PROGRAM (RODC)

The relative and other designated caregiver program (RODC) supports continuity and stability for children in the conservatorships of DFPS by providing financial assistance to eligible kinship caregivers. Under the RODC, DFPS may enter into Caregiver Assistance Agreements (CAA) with a relative or other designated caregiver who has not been verified as a foster parent or

otherwise licensed to provide 24-hour residential childcare to provide monetary assistance for caring for children in the Temporary Managing Conservatorship of DFPS.

Caregivers without PMC of the child are eligible for the monthly RODC reimbursement payment and Medicaid coverage for the child if:

- The child they are caring for is currently in the managing conservatorship of DFPS;
- They have been they have an approved home assessment;
- They are not already verified as a foster parent or as a group home and receiving foster care maintenance payments;
- They sign and abide by a Caregiver Assistance Agreement including a commitment to:
  - be available as a continuing placement for the child for at least six months;
  - participate in specialized kinship training as recommended 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;
  - comply with any other child-specific requirements or limitations; and
- The total household income does not exceed 300% of the federal poverty limit.

The monthly RODC reimbursement payments are available for up to 12 months after placement of the child in the caregiver's home with a one-time, six-month extension for good cause.

Examples of circumstances that justify good cause for payments to go beyond 12 months include:

- Attempting to find a previously absent parent of the child;
- Awaiting the expiration of the timeline for an appeal of an order in a suit affecting the parent child relationship;
- Allowing additional time fork in caregiver to complete the approval process for verification or adoption of a child;
- Waiting for approval of the child placement from another state;
- A delayed determination of the child's "Indian child" status, or when awaiting the approval of the Indian child's Tribe; or
- Any other circumstance involving the child or caregiver that DFPS deems as justification for an extension.

If the child moves, the payment will follow the child, but the duration of the payment stays the same. For example, if a child lives with an eligible grandmother for four months and then moves to an eligible aunt home for eight months, the 12-month payment does not restart for the aunt.

If a caregiver receives PMC of a child, the caregiver can request a \$500 annual reimbursement per child for child related costs (no Medicaid) if:

- The child they are caring for was previously in the managing conservatorship of DFPS;
- The child was placed in the home by DFPS;
- The caregiver meets all of the requirements for caregivers without PMC (e.g., not be a licensed or verified foster caregiver);

- They have obtained PMC of the child after September 1, 2017;
- They continue to comply with the signed caregiver assistance agreement; and
- The total household income does not exceed 300% of the federal poverty limit.

If the caregiver with PMC qualifies for the yearly RODC reimbursement payment, DFPS can reimburse caregivers on this amount for up to three years or until the child turns 18, whichever comes first.

### **PERMANENCY CARE ASSISTANCE PROGRAM (PCA)**

The goal of the Permanency Care Assistance (PCA) program is to provide financial support to kinship caregivers who want to provide a permanent home to children who can't be reunited with their parents.

Kinship Caregivers are often relatives and other people who have played significant roles in rearing children when parents are having a difficult time. These individuals play a vital role in providing children with stability when they can't live with their birth parents.

DFPS may enter into a PCA agreement with the kinship provider who is the perspective managing conservator of a foster child only if the kinship provider meets the eligibility criteria under federal and state law and DFPS rule. [Tex. Fam. Code § 264.852\(b\)](#).

#### ***In order to qualify for PCA, 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 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 permanent managing conservatorship of the child; and
- Have resided in the caregiver's home while licensed/verified for at least six consecutive months.

*Note: PCA benefits continue until the child turns 18 or 21 if the child is 16 years old or older when adopted.*

#### ***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 permanency care assistance;
- Enter into a permanency care assistance agreement with DFPS on behalf of the child prior to becoming the child's permanent kinship conservator; and
- Obtain PMC of the child.

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

## Visitation

### TEMPORARY VISITATION SCHEDULE

A temporary visitation schedule is required early in a case for each child whose goal is reunification. The caseworker develops the schedule with the child's parents to the extent possible.

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

- DFPS determines that visitation is not in the child's best interest; or
- Visitation with the parent would conflict with a court order relating to possession of or access to the child. [Tex. Fam. Code § 262.115](#); or
- DFPS has determined the goal is not reunification.

The temporary schedule remains in effect until the visitation plan is developed under [Tex. Fam. Code § 263.107](#) or modified by court order.

### COURT IMPLEMENTATION OF VISITATION PLAN

Not later than the 30th day after the date DFPS is named TMC of a child for whom the goal of DFPS is reunification with the parent, DFPS must develop a visitation plan in collaboration with each parent. [Tex. Fam. Code § 263.107](#). In determining the frequency and circumstances of visitation, DFPS is to consider the safety and best interest of the child, the child's age, the desires of each parent regarding visitation with the child, the location of each parent and the child, and the resources available to DFPS, including resources to ensure visitation is properly supervised and providing transportation to the visit.

DFPS must file the family's visitation plan no later than 10 days before the Status Hearing. [Tex. Fam. Code § 263.107\(d\)](#). 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](#).

### DFPS BEST PRACTICE GUIDE

DFPS issued a [Child and Family Visitation Best Practice Guide](#) for the field in 2015, which is available online.

This guide provides Department employees with policy, guidance, and tools to assess the appropriateness of visitation, how to develop the visitation plan, how to engage fathers and other family members in the visitation process, the role of the foster parents, and how to move from one level of supervision to another.

## BASIC PRINCIPLES PROMOTED BY THE BEST PRACTICE GUIDE

### *Visitation is essential for a child's well-being*

The primary purpose of visitation is to maintain the parent-child attachment, reduce a child's sense of abandonment, and preserve their sense of belonging as part of a family and community. A child needs to see and have regular contact with their parents and siblings, as these relationships are the foundation of child development. Visitation facilitates permanency planning, promotes timely reunification, and helps in decision making process to establish alternative permanency plans. Additionally, visitation maintains and supports the parent-child relationship necessary for successful reunification.

Maintaining family connections has lifelong significance for the child. Regular visitation maintains their relationships with siblings and others who have significant role in the child's life. When a child loses family connections, they also lose family history, medical history, and cultural history and information. Visitation is considered to be the heart of reunification, but even when reunification is not likely, parents, siblings, and extended family continue to be important in the child's life. The absence of regular and frequent parent-child visitation or contact may have serious consequences for both the child and parents. Without visitation the relationship can deteriorate, and both can become emotionally detached. When the parent-child attachment suffers, reunification becomes more difficult.

### *Benefits of Parent-Child Visitation*

- Supports parent-child attachment
- Eases the pain of separation for all
- Maintains and strengthens family relationships
- Reassures the child that their parents/primary caregivers are all right and helps the child to not blame themselves for placement in foster care
- Supports the family in dealing with changing relationships
- Motivates parent(s) to make positive changes in their life by providing reassurance that the parent-child relationship is important for the child's well-being
- Provides opportunities for parent(s) to learn and try new skills
- Supports a child adjustment to the foster home
- Enables the parent(s) to be active and stay current in their child development, educational and medical needs, and church and community activities
- Provides opportunities for parent(s) to assess how their child is doing, and share information about how to meet their child needs
- Assists in the assessment and decision-making process regarding parenting capacities and permanency goals
- Reduces the time in out-of-home care
- Increases the likelihood of reunification

### *Supervision*

If DFPS recommends to the court that visits be supervised, the visitation plan should include a summary statement of the assessed safety reasons supervision is necessary. In addition, parents should clearly understand the specific safety factors preventing less restrictive contact

with their child and what demonstrated changes will assist a caseworker in being able to make recommendations lifting supervision requirements.

DFPS has adapted a stages of supervision guide which provides descriptions of levels of supervision. Caseworkers can use this tool for assessment and planning to help determine and clearly communicate the structure of a supervised visitation plan. Additional guidance related to this assessment tool can be found in the 2015 [\*DFPS Child and Family Visitation Best Practice Guide\*](#).

***DFPS Review and revision of visitation plan***

Per DFPS, the visitation plan should be reviewed monthly to determine progress, update goals, and determine if it is appropriate to consider changes in supervision, location, and setting. If there has been little or no progress towards developing protective actions and meeting case goals found during two consecutive monthly reviews, the caseworker is directed to initiate a formal or informal family meeting to determine how to modify the visitation plan to include a more intensive level of parent coaching/guidance around visitation.



# Older Youth in Foster Care

An attorney representing DFPS must be aware of several specific duties 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*

Once a child turns 16, the child may request that the court authorize the child to consent to their own medical care. If a child is their own medical consentor, the child's caseworker must consult with the child about their medical care.

### *Identification Issues*

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 provide youth with the following:

- Immunization records
- Health passport
- A Medicaid card or other proof of Medicaid enrollment or insurance card from the health plan that provides health coverage to the youth

Before a youth leaves foster care, if the youth is age 14 or older, DFPS must ensure that the youth has an e-mail address through which the youth may receive encrypted copies of personal documents and records.

## 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 be enrolled 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.

Youth with disabilities should not be excluded from the PAL program. DFPS must make appropriate accommodations that allow for meaningful participation. [Tex. Fam. Code § 264.121\(a\)\(4\)](#).

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. In addition to attending the COS attorneys should help prepare the youth for the COS. A COS may feel intimidating to a youth but going over the structure and purpose of the meeting in advance can help reduce anxiety, this. This is particularly important as the effects of trauma can impede the youth's ability to plan ahead and

see a future for themselves. 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*

[Tex. Fam. Code §§ 263.601- 263.608](#)

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.

Not later than six months before the youth's 18th birthday, DFPS must complete all necessary paperwork to ensure the youth has housing on the date the youth enters extended foster care. DFPS must also review the qualifications and requirements for the youth's housing not later than 90 days before their 18th birthday. [Tex. Fam. Code § 264.1214](#).

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 permitted by the property owner, DFPS should allow the youth to cosign the lease for their 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's address changes 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](http://YourTexasBenefits.com), 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. It 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. Once the benefit is activated, it does not expire. [Tex. Educ. Code § 54.366](#). Adopted youth may also be eligible for the waiver. [Tex. Educ. Code § 54.367](#).
- **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 23 (available to more than only aged out foster youth). [40 Tex. Admin. Code § 700.1613](#).

**Practice Tip:** DFPS is responsible for educating and working with current and former foster youth to access their benefits. Contact information for Regional [Preparation for Adult Living Coordinators](#) as well as [State Office Program Specialists](#) in areas such as Transitional Living Services, PAL, Extended Care/SIL/TJJD, ETV/Youth Program, Youth Employment, Youth Housing, and a Youth Specialist, is available online. The [Texas Foster Youth Justice Project](#) also has helpful resources that can help youth understand the benefits in a way that is accessible to them.

## **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.

### ***Transitional Living Services***

A young adult who stays in EFC may or may not be receiving Transitional Living Services (TLS). TLS are multipurpose 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.

## **PATHS FOR YOUNG ADULTS AGING OUT OF FOSTER CARE**

### ***Path 1 – Extended Foster Care (EFC)***

A young adult who stays in EFC may or may not be receiving Transitional Living Services (TLS). 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.

### ***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 six months. Trial Independence may be extended up to 12 months by court order. 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.

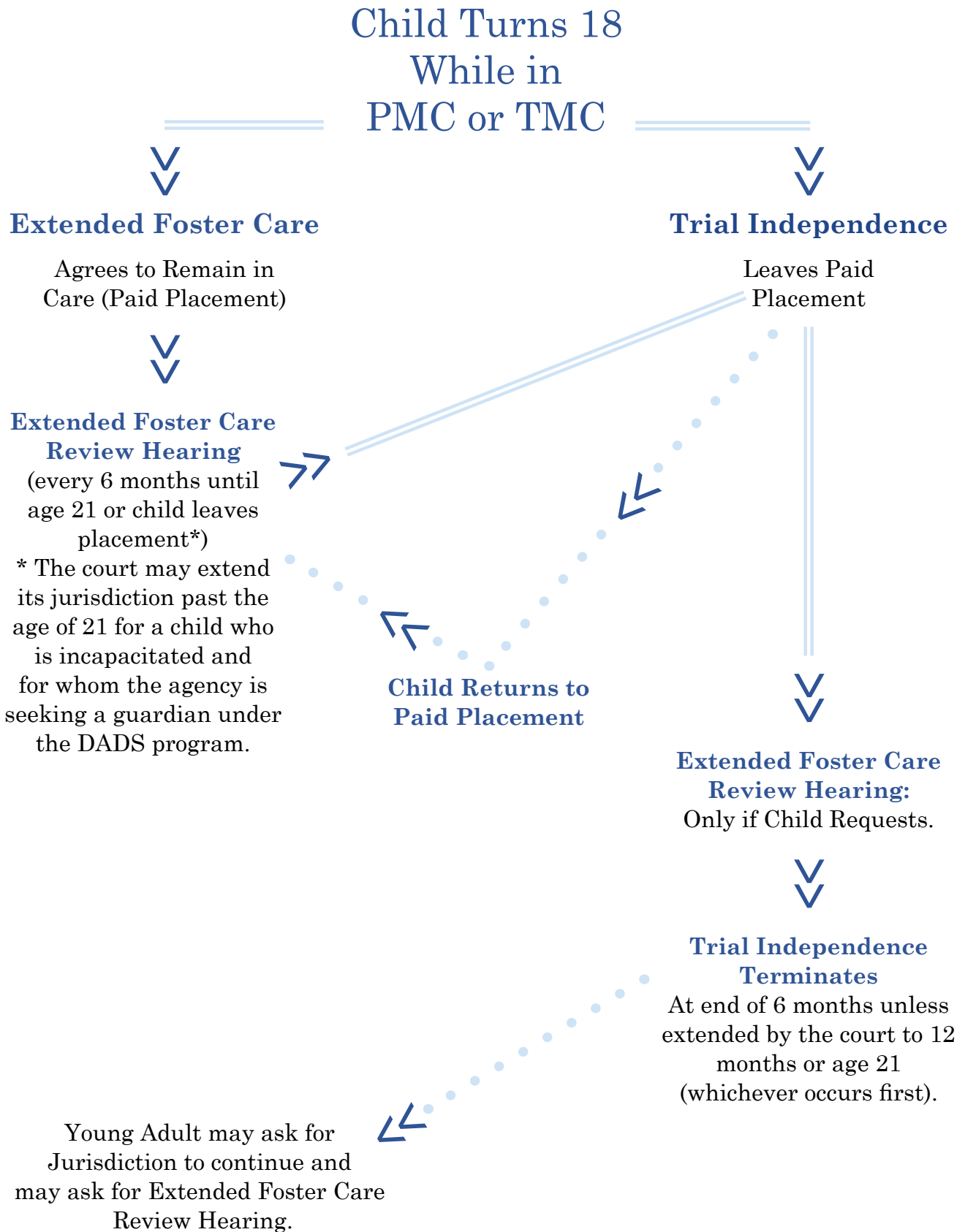
No hearings are required by the court during TI, but the young adult may request a hearing, or the court may set hearings on its own motion. At a hearing, a court may review and make orders regarding the services being provided to youth, identification documents the youth may need, and sibling contact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

### ***Path 2A – Trial Independence without Transitional Living Services***

If the young adult does not receive TLS, the court's jurisdiction ends on the last day of the month in which the young adult's TI period ends or upon the young adult's 21st birthday, whichever is earlier, unless the court has extended jurisdiction until age 21.

### ***Path 2B – Trial Independence with Transitional Living Services***

If the young adult receives TLS during TI, the young adult can request court service review hearings. 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 transitional living services. If the court extends jurisdiction, the young adult can also request court service review hearings during this time period as well. 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.





# Family First Preservation Services Act (FFPSA)

The Family First Prevention Services Act of 2018, also referred to as FFPSA, was signed into law as part of the [Federal Bipartisan Budget Act of 2018](#) (H.R. 1892). FFPSA creates opportunities for Title IV-E federal funding reimbursement of services that are aimed at preventing a child's entry into foster care. Services include support for mental health, substance abuse, and other supports for parents. FFPSA has four central provisions aimed at increasing prevention services, support to kinship caregivers, addressing congregate care, and older youth.

## ***Prevention Services***

FFPSA allows for a 50% matching of federal Title IV-E funds for states who invest in evidence-based prevention services for families with children who are at imminent risk of entering the foster care system. Programs can address mental health, substance abuse, and parenting skills and supports and must meet certain criteria set out in FFPSA for reimbursement eligibility.

## ***Kinship Caregivers***

FFPSA provides support for kinship caregivers and Texas is working to develop, enhance, and evaluate Kinship Navigator programs. Currently, Texas caregivers can receive support through their DFPS kinship caseworker.

## ***Congregate Care***

In an effort to reduce the number of children in congregate care, Title IV-E federal fund reimbursement is available to children in foster homes, qualified residential treatment programs (QRTP), and special settings for pregnant or parenting teens, youth transitioning out of foster care, and youth who are at risk for sex trafficking. QRTPs have a very strict model as defined within FFPSA, including court oversight.

## ***Older Youth***

FFPSA extends the age for independent living services for young adults formerly in foster care up to age 23 and extends eligibility for Education and Training Vouchers (ETV) for qualifying youth to age 26. For more information, see the *Older Youth in Care* section of this tool kit.

## ***Family Preservation Services Pilot Program***

The Family Preservation Services pilot program allows DFPS to dispose of an investigation by allowing the child to return home and providing time-limited family preservation services—subject to Family First Prevention Services Act (FFPSA) qualifications—to children who are candidates for foster care or who are pregnant and parenting foster youth. The pilot program must be implemented in one urban and one rural jurisdiction and at least one jurisdiction where Community Based Care has been implemented. The child's safety must be the primary concern in authorizing services. DFPS must use Title IV-E Funds to pay for legal representation or provide counties with a matching reimbursement for the costs of legal representation and use the Texas Temporary Assistance for Needy Families (TANF) program to provide in-home support services. DFPS must obtain a court order to compel the family of a candidate for foster care to participate in services but need not obtain a court order to provide services to pregnant or parenting foster youth. [Tex. Fam. Code § 262.403](#).

# Indian Child Welfare Act (ICWA)

## STATUTES

Federal statutes governing the Indian Child Welfare Act (ICWA) are [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). Relevant state statutes are [Tex. Fam. Code §§ 262.201\(f\), 263.202\(f-1\), 263.306\(a-1\)\(3\)](#).

## PURPOSE

The Indian Child Welfare Act of 1978 (ICWA) is a federal law that imposes special standards and requirements when a child welfare agency seeks to intervene to protect an “Indian child,” as defined by statute. The law was enacted to protect not only Indian children, but their families and Tribes.

## WHEN DOES ICWA APPLY?

ICWA applies to any “child custody proceeding” involving an “Indian child,” if the court “knows or has reason to know that an Indian child is involved.” [25 U.S.C. § 1912\(a\)](#).

*Note: A case challenging the constitutionality of multiple elements of ICWA, ([Brackeen v. Haaland](#), [994 F.3d 249](#) (5th Cir. 2021), is set for oral arguments before the Supreme Court of the United States in the October Term 2022.*

## DEFINITION OF “INDIAN CHILD”

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.

A Tribe’s determination regarding the child’s status is conclusive and a “state court may not substitute its own determination regarding a child’s membership or eligibility for membership in a Tribe or a parent’s membership in a Tribe.” [25 C.F.R. § 23.108\(b\)](#).

**Practice Tip:** If a Tribe fails to respond after being properly noticed, counsel should verify that the agency has exercised due diligence to communicate with the Tribe by phone, fax, and/or email.

## 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 welfare suit, DFPS must give each parent and identified tribe and any Indian custodian (caretaker) notice of ICWA rights. [25 U.S.C. § 1912\(a\)](#).

### *“Reason to Know” an Indian Child is Involved in the Case*

A court has reason to know a child is an “Indian child” if:

- Any party, Tribe, or agency informs DFPS 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 they are 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\(c\)](#).

### *What Changes if a Case is Identified as an ICWA Case?*

#### **PLEADINGS**

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). HOTDOCS includes both types of ICWA pleadings.

#### **TRIBAL AND STATE JURISDICTION**

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

#### ***Exclusive Jurisdiction on the Reservation***

If the child’s residence or domicile is on the reservation, or if the child has been made a ward of the Tribal court, the Tribal court has exclusive jurisdiction, except when jurisdiction is otherwise vested in the state. [25 U.S.C. § 1911\(a\)](#).

#### ***Emergency Exception***

When an Indian child who resides on a reservation is temporarily off the reservation and emergency removal or placement is necessary “to prevent imminent physical damage or harm to the child,” the state child welfare agency may act despite the fact the Tribal court otherwise has exclusive jurisdiction. [25 U.S.C. § 1922](#). In such circumstances, the state child welfare agency must act promptly to: (1) end the removal or placement as soon as it is no longer necessary to prevent imminent physical damage or harm to the child; and (2) move to transfer the case to the jurisdiction of the Tribe or return the child to the parents, as appropriate.

### ***Concurrent Jurisdiction Off the Reservation***

If the child's residence or domicile is not on the reservation, the Tribal and state court have concurrent jurisdiction. [25 U.S.C. § 1911\(b\)](#). Even in this circumstance, however, there is a presumption of Tribal jurisdiction in cases involving an Indian child. *Mississippi Band of Choctaw Indians v. Holyfield*, [490 U.S. 30](#) (1989).

### **NOTICE**

ICWA imposes many specific requirements governing the timing, the type of notice, and the persons and entities entitled to notice. *In re R.R.*, [249 S.W.3d 213](#) (Tex. App —Fort Worth, Mar. 19, 2009, no pet.). One overarching issue is that without notice, a Tribe cannot confirm or deny Indian child status. Even if a child turns out not to be subject to ICWA, if there is evidence of possible Indian child status, proof of compliance with notice requirements can be essential to counter a challenge based on violation of ICWA.

### ***When is Notice Required?***

Notice is required for each "child custody proceeding." Defined as any action except an emergency hearing that may result in a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement, this means that any Suit Affecting the Parent Child Relationship filed by DFPS requires notice. [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.2](#).

### ***Timing (10 + 20 days)***

No "foster care placement or termination of parental rights" hearing can be held until at least ten (10) days after notice is received (subject to an additional 20 days if the parent/custodian/tribe requests additional time for preparation). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.112 \(a\)](#).

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

### ***When Identity of Parent / Indian Custodian is Known***

Notice of a pending custody proceeding involving an Indian child must be sent to:

- Every known parent;
- Indian custodian;
- Each identified Tribe; and
- Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.11\(a\)](#).

### ***When Identity is Not Known***

If the identity or location of a parent or Indian custodian is not known or the identity of the Tribe cannot be determined, **Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined** must be sent to:

- Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior). [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.11\(b\)](#).

### ***How to Send Notice***

DFPS notices include the required advisements which can be tailored with specific child and

family information. A copy of the petition should be attached as well as any additional family history, including family trees or copies of membership cards. Family history information can be critical to a Tribe’s ability to determine membership status.

If a parent has requested anonymity, the agency and the court should maintain confidentiality and relevant court documents should be under seal. [25 C.F.R. § 23.107\(d\)](#).

The Regulations will allow giving notice by registered or certified mail, with return receipt requested in either case. [25 C.F.R. § 23.11\(a\)](#); [25 C.F.R. § 23.111\(c\)](#). As a practical matter, certified mail is preferred because this allows delivery to someone other than the addressee. If the intended recipient of registered mail is not available, registered mail must be returned to sender, making it necessary to resend notice. Notice may be sent by personal service or electronically in addition, but this does not satisfy the service requirement. [25 C.F.R. § 23.111\(c\)](#). Particularly where an email contact is provided, sending a duplicate notice this way is the best practice to expedite the process of determining a child’s status.

A copy of each notice sent, with the return receipt or other proof of service must be filed with the court and should be admitted into evidence at trial. [25 C.F.R. § 23.111\(a\)\(2\)](#).

### ***Parent/Indian Custodian***

A parent includes the biological or adoptive parent of an Indian child, including a non-Indian parent. [25 U.S.C. § 1903\(9\)](#); [25 C.F.R. § 23.2](#). An alleged father must acknowledge paternity or be legally determined to be the father before being recognized as a parent. *In re V.L.R.* [507 S.W.3d 788](#) (Tex. App.—El Paso, Nov. 18, 2015, no pet.) (unidentified Tribe of a child’s unwed father who fails to establish paternity is not the child’s tribe).

A primary impact of the U.S. Supreme Court’s *Baby Girl* opinion was to limit the rights of a father who was a registered Tribal member but had never had custody of his child. The Court found that an action for termination of parental rights against such a father could proceed without meeting the higher burden of proof or standards in [25 U.S.C. § 1912\(d\)](#) and [\(f\)](#). *Adoptive Couple v. Baby Girl*, [133 S.Ct. 2552](#) (2013). The Court reasoned that ICWA was designed to prevent the breakup of an Indian family. Under these specific facts, because the father had never had custody of the child, the family was not being broken up. The impact of this decision is limited by the following:

- The *Baby Girl* decision does not impact other substantive rights under ICWA, including the right to notice and appointment of counsel for indigent parents; and
- A Texas court declined to extend the *Baby Girl* rationale to a parent who had prior custody of an Indian child, albeit not for the preceding twelve years; *In re V.L.R.* [507 S.W.3d 788](#) (Tex. App.—El Paso, Nov. 18, 2015, no pet.).

[Tex. Fam. Code § 263.202\(a\)\(1\)](#) and [CPS Policy Handbook § 5232](#) require that a diligent search be conducted and notice provided to a parent, including an alleged father. This section of the Family Code also requires certain findings be made by the court in its status order concerning whether the Department has exercised due diligence, among other required findings.

The Regulations now define “continued custody” to include physical and/or legal custody (including under tribal law or custom) that a parent “already has or had at any point in the past,” and specify that a biological mother has had custody of a child. [25 C.F.R. § 23.2](#).

“Indian custodian” is broadly defined as “any Indian person who has legal custody of an Indian child under Tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” [25 U.S.C. § 1903\(6\)](#).

### ***More Than One Tribe***

If a child has ties to more than one Tribe, notice to each Tribe is essential so that each Tribe can make a determination of membership or eligibility. If more than one Tribe responds affirmatively, the Regulations direct the Tribes to designate the child's Tribe and if the Tribes do not agree, the state court must do so, based on specified criteria. [25 C.F.R. § 23.109\(c\)](#).

### ***Contact Information***

The best resource for contact information for individual Tribes is the ICWA notice published in the Federal Register or the Bureau of Indian Affairs' website using the [ICWA Designated Agents Listing](#) available online.

For Tribes without a listing, the Regulations mandate contacting the Tribe directly to find out the proper contact person. If the Tribe fails to respond to written communication, seek assistance from the Bureau of Indian Affairs.

For notice to the Regional Director:

- For child custody proceedings in Texas, except for notice to the Ysleta del Sur Pueblo of El Paso County:  
Southern Plains Regional Director  
Bureau of Indian Affairs  
P.O. Box 368  
Anadarko, Oklahoma 73005  
Phone: (405) 247-6673 Ext. 217; Fax: (405) 247-2895
- For child custody proceedings in El Paso and Hudspeth counties in Texas:  
Southwest Regional Director BIA 1001 Indian School Road NW  
Albuquerque, New Mexico 87104  
Phone: (505) 563-3103; Fax: (505) 563-3101

### ***After Initial ICWA Notice***

Once the initial Notice of Pending Custody Proceeding Involving Indian Child is sent as required, send notice to the same listed persons and Tribes as follows:

- Unless or until a Tribe confirms a child is not a member or eligible for Tribal membership, DFPS will send notice of interim hearings, permanency planning meetings, family group conferencing or similar meetings to all persons and Tribes entitled to notice by regular first-class mail; and
- If the pleadings are amended, or a final hearing is set, DFPS will send a new Notice of Pending Custody Proceeding Involving Indian Child, with the petition and any additional child and family history information attached, by certified or registered mail, return receipt requested. [25 U.S.C. § 1912\(a\)](#); [25 C.F.R. § 23.111](#). As with the original petition, the return receipt should be filed with the court and entered as an exhibit at trial.

### **INITIAL HEARING**

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.

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

## BURDEN OF PROOF

The burden of proof and standards for an order placing a child in foster care (in effect a removal) or a final order seeking permanent managing conservatorship or termination of parental rights are different than under the Texas Family Code. In summary, if ICWA applies the requirements are included below:

### ***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\(f\)](#).

**Practice Tip:** Best Practices for Active Efforts Include (1) early contact and active engagement with the child’s Tribe; (2) higher level of efforts using methods and providing services that are culturally appropriate; and (3) commitment to the spirit of ICWA in the context of the historical trauma. Remember that active efforts must be documented in detail in the record.

## PLACEMENT

ICWA mandates that placements for foster care and adoption be made according to statutory preferences, unless good cause is shown to deviate from the preferences. [25 U.S.C. § 1915](#); [25 C.F.R. § 23.129-131](#).

The statutory preferences give priority as follows:

### ***Foster Care or Pre-Adoptive Placement Preferences***

1. A member of the child’s extended family;
2. A foster home licensed, approved, or specified by child’s Tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. An institution for children approved by the Tribe or operated by an Indian organization which has a program suitable to meet the child’s needs. [25 U.S.C. § 1915\(b\)](#); [25 C.F.R. § 23.131\(b\)](#).

***For an Adoptive Placement***

1. A member of the child's extended family;
2. Other members of the child's Tribe; or
3. Other Indian families. [25 U.S.C. § 1915\(a\)](#); [25 C.F.R. § 23.130](#).

***Departure from ICWA Placement Preference***

The Tribe can by resolution alter the order of preferences. [25 U.S.C. § 1915\(c\)](#). The Tribe's preference should then be followed as long as it is still the least restrictive setting appropriate to the needs of the child.

If a party (including DFPS) seeks to depart from the placement preferences, the party must show by clear and convincing evidence, on the record or in writing, that there is 'good cause' to depart from the placement preferences. The court's determination of good cause must be made on the record or in writing and be based on one or more of the following factors:

- The request of the "Indian child's" parent;
- Request of the child of sufficient age and capacity;
- Ability of placement to maintain sibling attachment;
- The "extraordinary physical, mental, or emotional needs" of the child; and
- The unavailability of a suitable placement (despite a diligent search and active efforts to locate one). [25 C.F.R. § 23.132\(b\)-\(c\)](#).

**MANDATORY TRANSFER TO TRIBAL COURT**

A parent, an Indian custodian, or the child's Tribe may petition the state court to transfer a suit involving an Indian child to the Tribal court. Transfer to the Tribal court is mandatory, unless the court makes a finding of good cause not to transfer, the Tribe declines transfer, or either parent objects. [25 U.S.C. § 1911\(b\)](#); [25 C.F.R. § 23.117](#).

The court cannot consider the following factors in assessing good cause:

- The advanced stage of the proceedings, if notice to the Tribe did not occur until an advanced stage;
- Whether there was no petition to transfer in a prior proceeding involving the child;
- Whether transfer would affect the child's placement; The child's cultural connections with the Tribe or its reservation; or
- The socio-economic conditions of the Tribe, Bureau of Indian Affairs (BIA) social services, or the judicial systems. [25 C.F.R. § 23.118\(c\)](#).

**RIGHT TO INTERVENE**

The Tribe and the Indian custodian have the right to intervene in the state court action at any time in the proceedings. [25 U.S.C. § 1911\(c\)](#). Intervention may be accomplished informally, by oral statement, or formally. Most important, if an Indian child is involved, ICWA applies whether or not the child's Tribe intervenes.

**QUALIFIED EXPERT WITNESS**

The statute does not define what constitutes a qualified expert under ICWA. The Regulations require that an expert be qualified to testify as to whether the child's continued custody by the

parent or custodian is “likely to result in serious emotional or physical damage,” and direct that an expert should be qualified to testify as to the “prevailing social and cultural standards” of the child’s tribe. [25 C.F.R. § 23.122](#). The social worker assigned to the child’s case may not serve as an expert (although a caseworker may testify otherwise, as to the parent’s compliance with the service plan, visitation, and other issues).

Without question, the child’s tribe is the best source for an expert. If the tribe is in agreement with the agency’s legal strategy, and has an expert willing and able to testify, this is ideal. However, if a tribe has a policy against termination of parental rights or is not in agreement with DFPS on a specific case, finding an ICWA expert can be challenging. Understandably, many tribal members do not want to take a position in a court proceeding adverse to a fellow tribal member and with very small tribes, the pool of potential experts is limited.

**Practice Tip:** The DFPS Office of General Counsel may be able to assist in identifying expert witnesses.

Courts with capability should allow participation by phone, video conferencing or other methods. [25 C.F.R. § 23.133](#).

## 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 welfare 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.

## PROSECUTOR PREPARATION

In every case, the prosecutor should confirm that DFPS has asked every parent, extended family member, and any child old enough, whether there is any Native American family heritage. 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 heritage, the prosecutor 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 caselaw summaries are available in the [Texas Practice Guide for CPS Attorneys](#), Sections 4 and 13.

*Note: DFPS is in the process of updating the Texas Practice Guide for CPS Attorneys to ensure that the most current information is available.*





# Interstate Compact on the Placement of Children (ICPC)

## WHAT IS THE ICPC?

The Interstate Compact on the Placement of Children (ICPC) is a statutory agreement between all 50 states, the District of Columbia, and the U.S. Virgin Islands that governs the placement of children in the custody of one state into another state.

If a child in foster care is to be placed in another state, the ICPC may require approval from that state. (See [Tex. Fam Code Ch. 162, Subchapters B-C](#)). When the ICPC applies, child protective services in that 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. The purpose of the ICPC is to ensure that children placed out of their home state receive the same protections and services that would be provided if they remained in their home state.

## 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?

- Birth parents placing with a non-custodial birth parent, or a relative as long as no court has assumed jurisdiction of the child to be placed;
- Relatives placing with birth parents or another relative as long as no court has assumed jurisdiction of the child to be placed;
- If a child is being placed in a hospital or school;
- Tribal Placements;
- Visits, as long as they meet the required criteria.

**Practice Tip:** Generally speaking, the ICPC process moves slowly. The prosecutor can request a court order for an expedited ICPC in certain circumstances. An order for an expedited ICPC only applies to the time frame in which DFPS must complete their portion of the process and send everything out to the receiving state.

## VISITATION OUTSIDE OF TEXAS (REGULATION 9, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, EFFECTIVE JUNE 27, 2002)

A visit is excluded from the ICPC under Regulation 9 if it is for a 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, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, EFFECTIVE OCTOBER 1, 2011)

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 Interstate Compact on the Placement

of Children 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 a 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**

State courts throughout the nation have reached different conclusions on whether ICPC procedures apply when courts place a child with an out-of-state biological parent. Generally, due process prevents delaying placement with an out-of-state parent long enough to complete an ICPC request.

Texas courts had followed the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations that state ICPC procedures do apply to placement with parents in certain circumstances. 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)

## STATUTES

8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11; United States Customs and Immigration Service Policy Manual

## WHAT IS SPECIAL IMMIGRANT JUVENILE STATUS?

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 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 CPS proceeding) before a child can apply for SIJS. The family court or CPS court order must include these 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 SIJS 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 his or her 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 prosecutor should check with the caseworker to find out if:

- Notice been sent to the foreign consul;
- Repatriation or placement in the home country is viable; or
- The child may need assistance to obtain immigration status or U.S. citizenship.

For more information, consult the DFPS Regional Attorney assigned to citizenship and immigration issues. You may also refer to the [Texas Practice Guide for CPS Attorneys](#), Section 13, Citizenship & Immigration Issues, DFPS Citizenship Immigration Contacts list available online.

*Note: DFPS is in the process of updating the Texas Practice Guide for CPS Attorneys to ensure that the most current information is available.*

## School Stability Under Federal & State Law

School is often a source of stability as well as a place for academic and social development of children and youth in foster care. If a child has been removed from their home or is changing placements, consider the potential impact on the child's education and what efforts can be made to keep the child in the same school, if possible.

### FEDERAL 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.](#)

### STATE LAW

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 local schools and 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 interests, 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 TEA to ensure 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\(f\).](#)
- Alternatively, 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. 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 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 they determine 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](#).

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

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

## 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](#).

**Practice Tip:** Consider seeking appointment of a surrogate parent for youth who are placed in a Residential Treatment Center who receive special education services.

# Servicemembers Civil Relief Act (SCRA)

## PURPOSE

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.

## STATUTE

[50 U.S.C. §3901 et seq.](#)

### *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). [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 using the [U.S. military website](#). 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 welfare 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\(c\)](#).





## Common Abbreviations & Acronyms

Acronym	Explanation	Comments
AAL	Attorney ad litem	An attorney who provides services for the purposes of a specific legal action only, including representation of a child, and who owes to their client the duties of undivided loyalty, confidentiality, and competent representation.
AC	Administrative Closure	Administrative Closure occurs when DFPS intervention is unwarranted based on information that comes to light after the case is assigned for investigation.
ADO	Adoption Caseworker	The DFPS caseworker assigned once the case is transferred to the adoption unit.
ADR	Alternative Dispute Resolution	A method of settling conflict outside of litigation, (e.g., mediation).
AOP	Acknowledgment of Paternity	An acknowledgement of paternity is a legal document that allows parents who are not married to establish legal paternity. Both parents must sign an AOP, under penalty of perjury, that the man is the genetic father of the child. When an AOP is filed with Texas Vital Statistics, the genetic father becomes the child's legal father with all the rights and duties of a parent.
AP	Alleged Perpetrator	The person alleged to have committed the abuse or neglect in the case at issue.
APPLA	Another Planned Permanent Living Arrangement	A permanent legal arrangement for a child designed to promote stability and permanency in a child's life; refers to permanent placements other than a reunification with a parent, adoption, or permanent managing conservatorship to a relative.
ASFA	Adoption and Safe Families Act	The Adoption and Safe Families Act of 1997 (Public Law 105-89) was enacted by the United States Congress to improve the safety of children, promote adoption and other permanent homes for children who needed them, and support families. According to the Children's Bureau, ASFA also required child protection agencies to provide more timely assessment and intervention services to children and families involved with child welfare. Additionally, ASFA paved the way for the legal sanction of concurrent planning (simultaneously identifying and working on a secondary goal, such as guardianship, with a relative) by requiring that agencies make reasonable efforts to find permanent families for children in foster care should reunification fail.
AR	Alternative Response	A type of service provided to some families who were the subject of an investigation of child abuse and neglect allegations without including a substantiation of the allegations or an entry of perpetrators into the Central Registry. Includes services and support to help families resolve safety issues and reduce future involvement with DFPS.
ARD	Admission, Review, and Dismissal	The process by which a student's parents and school staff meet at least annually to: 1) decide whether a student has an eligible disability; 2) determine what special education and related services will be provided; and 3) develop an Individualized Education Program (IEP).

Acronym	Explanation	Comments
BIA	Bureau of Indian Affairs	The BIA is a United States federal agency within the Department of the Interior which renders services to indigenous Americans in federally recognized tribes (directly or through contracts, grants, or compacts) to approximately 1.9 million Native Americans and Alaska Natives.
BVS/VSU	Bureau of Vital Statistics/Vital Statistics Unit	The State agency responsible for maintaining legal records for birth, death, marriage, adoption, and paternity.
CAC	Child Advocacy Center	A child advocacy center is a safe, child-friendly, specially equipped facility that completes forensic interviews of children. CACs also provide additional services such as counseling and intervention services during the course of an investigation and prosecution of child abuse cases.
CANS	Child and Adolescent Needs and Strengths	A tool developed by DFPS for children’s services to support decision making, including level of care and service planning, to facilitate quality improvement initiatives, and to allow for the monitoring of outcomes.
CAPTA	Child Abuse Prevention and Treatment Act	CAPTA is a federal law that was originally enacted on January 31, 1974 (P.L. 93-247) and amended several times. According to the Children’s Bureau, CAPTA provides federal funding and guidance to states in support of prevention, assessment, investigation, prosecution, and treatment activities and provides grants to public agencies and nonprofit organizations, including Indian Tribes and Tribal organizations, for demonstration programs and projects.
CASA	Court Appointed Special Advocate; <a href="#">Website</a>	A specially screened and trained volunteer, appointed by the court, who conducts an independent investigation of child abuse, neglect, or other dependency matters, and submits a formal report proffering advisory recommendations as to the best interests of a child. In some jurisdictions, volunteers without formal legal training, such as CASAs, are appointed to represent abused and neglected children and serve in the capacity of a Guardian ad litem (GAL).
CBC	Community Based Care	A newer model of serving children and families through partnerships with private Single Source Continuum Contractors (SSCCs) in designated catchment areas across the State. Often referred to as Privatization.
CCEJ	Court of Continuing, Exclusive Jurisdiction	Upon rendition of a final order in a Suit Affecting the Parent-Child Relationship (SAPCR), a court acquires continuing, exclusive jurisdiction over all subsequent matters regarding the child unless otherwise provided by the Family Code.
CFSR	Child and Family Services Review	A Federal-State collaborative effort designed to help ensure that quality services are provided to children and families through State child welfare systems.
CIP	Court Improvement Program; <a href="#">Website</a>	The highest court of each State and territory participating in the Court Improvement Program (CIP) receives a grant from the Children’s Bureau to complete a detailed self-assessment and develop and implement recommendations to enhance the court’s role in achieving stable, permanent homes for children in foster care. In Texas, the Children’s Commission is the recipient of CIP funds.

Acronym	Explanation	Comments
COS	Circle of Support	A meeting held soon after a youth who has been removed from the home reaches age 16. Its primary purpose is to develop a transition plan for the youth and to connect youth to supportive and caring adults who can help the youth when the youth leaves foster care.
COS	Court Ordered Services	A type of CPS case during which services are ordered by the court for the family, without DFPS having temporary managing conservatorship of the child. Depending on jurisdictional practice, this may also be referred to as a Motion to Participate (MTP), Order to Participate (OTP), or Participation case.
CPA	Child Placing Agency	CPAs are licensed by DFPS and required to conform to minimum standards. They verify and oversee non-agency foster placements.
CPC	Child Protection Court	CPCs are courts that specialize in child welfare cases. As of July 2021, there are 30 CPCs in Texas which cover 147 counties total.
CPI	Child Protective Investigations; <a href="#">Website</a>	A division of Texas DFPS that examines reports of child abuse or neglect and determines if there are any threats to the safety of the children in the home and whether parents are willing and able to adequately manage those threats to keep the children safe.
CPOS	Child Plan of Service	The Child Plan of Service outlines the services to be provided, who is responsible for the completion of that service, and establishes goals for the child.
CPS	Child Protective Services; <a href="#">Website</a>	A division of Texas DFPS that provides services to children and families in their own homes; places children in foster care; provides services to help youth in foster care make the transition to adulthood; and places children in adoptive homes.
CPU	Centralized Placement Unit	The CPU reviews a child's information, tracks placement vacancies, and determines the least restrictive placement option that best meets the needs of a child when a child is in the custody of DFPS.
CSCAL	Child Safety Check Alert List	This is an automated program operated by the Texas Department of Public Safety as part of the Texas Crime Information Center to assist DFPS in locating families that move before CPS begins or finishes an investigation or move during the provision of services by CPS.
CVS	Conservatorship/Conservatorship Unit; <a href="#">Website</a>	"Conservatorship" is defined as the legal care, custody, and control of a child given by court order. CVS also stands for the unit and type of caseworker who is involved with a child when the DFPS has custody of that child.
CWB	Child Welfare Board; <a href="#">Website</a>	Child Welfare Boards are developed and funded in some Texas counties to help meet needs of children and youth in foster care by using county funding to support DFPS' efforts.

Acronym	Explanation	Comments
CWOP	Child Without Placement	CWOP is used to describe a child’s status as not having a licensed placement (for example, residing in a nontraditional location such as a hotel while still being supervised by DFPS or an SSCC).
DFPS/ TDFPS	Texas Department of Family and Protective Services; <a href="#">Website</a>	The state agency charged with protecting children, adults who are elderly or have disabilities living at home or in state facilities, and licensing group day-care homes, day-care centers, and registered family homes.
DPS	Texas Department of Public Safety; <a href="#">Website</a>	The state agency created to provide public safety services by enforcing laws, administering regulatory programs, managing records, educating the public, and managing emergencies, both directly and through interaction with other agencies.
DSHS	Texas Department of State Health Services; <a href="#">Website</a>	The Texas Department of State Health Services promotes optimal health for individuals and communities while providing effective health, mental health, and substance abuse services to Texans.
DSM	Diagnostic and Statistical Manual of Mental Disorders	The Diagnostic and Statistical Manual of Mental Disorders (DSM) is a guidebook widely used by mental health professionals in the diagnosis of many mental health conditions. The DSM is published by the American Psychiatric Association and has been revised multiple times since it was first introduced in 1952. The most recent edition is the fifth, or the DSM-5. It was published in 2013.
ESSA	Every Child Succeeds Act	ESSA is a federal education law passed in December 2015. ESSA contains several educational stability provisions related to the education of children and youth in foster care that mirror the Fostering Connections to Success and Increasing Adoptions Act of 2008. ESSA also requires designated points of contact in education and child welfare systems, assurances that schools will coordinate with child welfare to develop transportation plans for children in foster care, and beginning in December 2018, disaggregated data on children and youth in foster care is included in the reporting requirements.
FFPSA	Family First Prevention Services Act	The Family First Prevention Services Act was signed into law as part of the Bipartisan Budget Act on February 9, 2018. This act reforms the federal child welfare financing streams (Title IV-E and Title IV-B of the Social Security Act) to provide services to families who are at risk of entering the child welfare system. The bill aims to prevent children from entering foster care by allowing federal reimbursement for mental health services, substance use treatment, and in-home parenting skill training. It also seeks to improve the well-being of children already in foster care by incentivizing states to reduce placement of children in congregate care.
FBSS	Family-Based Safety Services; <a href="#">Website</a>	A type of service provided to some families who were the subject of an investigation of child abuse and neglect allegations. Also known as Family Preservation, FBSS includes services to families to prevent removal of the child from the home.

Acronym	Explanation	Comments
FCRB	Foster Care Review Board	FCRBs are panels of screened and trained volunteers, preferably appointed by juvenile or family courts, to regularly review cases of children in substitute placement such as foster care, examine efforts to identify a permanent placement for each child, and proffer advisory recommendations to the court.
FGC	Family Group Conference	FGCs are a type of Family Group Decision Making. During an FGC, the child's family joins with relatives, friends, and community members to develop a plan for the child and family. These are generally held after a child is removed but may also be used before removal when the family receives FBSS.
FGDM	Family Group Decision Making	FGDM is a collaborative approach to service planning and decision-making, which involves the child or youth and their family joining CPS staff to develop a service plan for the child.
FPOS	Family Plan of Service	A plan designed to help parents access assistance from sources other than CPS and to develop the sufficient capacity to protect their children from abuse or neglect.
FSNA	Family Strengths and Needs Assessment	A tool developed to identify and create collaborative agreements about what the Family Plan of Service should address and determines strengths that may help with child safety.
FTM	Family Team Meeting	A type of Family Group Decision Making that is generally held before a child is removed from the home, but also may be held during other stages of services, such as when a family receives FBSS or when a child is in DFPS conservatorship.
GAL	Guardian ad litem	A person appointed by a judge to represent the best interests of an allegedly abused or neglected child. In many counties the GAL is a CASA.
GRO	General Residential Operation	A residential child-care operation that provides childcare for 13 or more children or young adults.
HHSC	Health and Human Services Commission	HHSC is a state agency which oversees operations of the health and human services system.
HSEGH	Health, Social, Educational and Genetic History	The HSEGH report provides the child's information to prospective adoptive families.
ICPC	Interstate Compact on the Placement of Children	The federal ICPC, originally enacted in 1960, provides a legal framework for the timely placement of children across state lines, the suitability of prospective families, and the provision of needed support services. The compact (1) applies to the interstate placement of children in the foster care system and children placed across state lines for adoption; (2) requires the development of time frames for completion of the approval process; (3) establishes clear rulemaking authority, (4) provides enforcement mechanisms; (5) clarifies state responsibility; and (6) ensures states' ability to purchase home studies from licensed agencies to expedite the process.

Acronym	Explanation	Comments
ICWA	Indian Child Welfare Act	The Indian Child Welfare Act, adopted by Congress in 1978, applies to child custody proceedings in state courts involving “Indian” children -- children of Native American ancestry.
ICU staff/ LPS	I See You Staff/ Local Permanency Specialist	DFPS changed the title for <i>I See You</i> staff to Local Permanency in 2017. The <i>I See You</i> worker for a child is officially called the Local Permanency Specialist (LPS); however, references to an <i>I See You</i> caseworker are still common. When a child who is in the conservatorship of DFPS is placed in an out-of-region placement, the region where the child is placed must provide the supervision and a portion of the case management services for the child. The Local Permanency Specialist provides these services, known as courtesy supervision. The CVS caseworker must request services and supervision by a LPS within seven days of the placement.
IDD	Intellectual and Developmental Disability	IDDs are differences that are usually present at birth and that uniquely affect the trajectory of the individual’s physical, intellectual, and/or emotional development. Conditions can affect multiple body parts or systems. Intellectual disability is characterized by differences with both, intellectual functioning or intelligence and adaptive behavior. Developmental disability is a broader category of often lifelong challenges that can be intellectual, physical, or both.
IEP	Individualized Education Program	An IEP is a plan for each child who qualifies for special education and related services that is developed, reviewed, and revised by the ARD committee, of which parents are invited to be active members. It includes the student’s present levels of academic achievement and functional performance, participation in state and district-wide assessments, transition services, annual goals, special factors, special education, related services, supplementary aids and services, extended school year services, and least restrictive educational setting.
IMPACT	Information Management Protecting Adults & Children in Texas	According to DFPS, IMPACT is the main application DFPS uses to record case information about the children and adults the agency protects. DFPS uses IMPACT to document all stages of service of a case, including when someone reports abuse, neglect, or exploitation and when those cases are investigated.
IOP	Intensive Outpatient Treatment	An addiction treatment program that is designated for participants to receive intensive drug treatment while living at home.
IV-E	Title IV-E	Title IV-E of the Social Security Act provides a federal funding stream to states for costs related to the provision of foster care, including costs related to legal representation of DFPS, parents, and children.
JMC	Joint Managing Conservatorship	JMC sets out shared rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions are awarded to one party. <a href="#">Tex. Fam. Code § 101.016</a> . In DFPS cases, it is possible for a parent or a relative to share JMC of a child in the conservatorship of DFPS.

Acronym	Explanation	Comments
JPO	Juvenile Probation Officer	Juvenile Probation Officers provide supervision to youth involved with juvenile probation departments and youth dually in the custody of the Department of Family and Protective Services (DFPS).
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Questioning Youth <a href="#">Webpage</a>	The Child Welfare Information Gateway webpage includes information about serving lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth, including resources for LGBTQ youth in out-of-home care and resources offering support and guidance for LGBTQ youth and their families.
LOC	Level of Care; <a href="#">Website</a>	There are five service levels of care for children in the conservatorship of DFPS. Those service levels are basic, moderate, specialized, intense, and intense plus. <a href="#">40 TAC Section 700.2301-700.2367</a> .
MOU	Memorandum of Understanding	An MOU is an agreement between two parties in the form of a legal document. It is not fully binding in the way that a contract is, but it expresses an interest in performing a service or taking part in an activity.
MSA	Mediated Settlement Agreement	An MSA is a form of alternative dispute resolution (ADR) that settles the case via negotiation under the guidance of a qualified neutral third party. An MSA is binding on the parties if properly executed, and a court may only decline to enter the MSA if a specific exception applies. <a href="#">Tex. Fam. Code § 153.007(c)-(e)</a> ; <a href="#">Tex. Fam. Code § 153.0071(e-1)</a> .
OAG	Texas Office of the Attorney General; <a href="#">Website</a>	The OAG is a Texas state agency that serves as legal counsel to all boards and agencies of state government; issues legal opinions when requested by the Texas Governor, heads of state agencies, and other officials and agencies as provided by Texas statutes; sits as an ex-officio member of state committees and commissions; and defends challenges to state laws and suits against both state agencies and individual employees of the State.
PAL	Preparation for Adult Living (PAL) Program; <a href="#">Website</a>	A program within CPS to provide support and services to help youth prepare for independent adult living upon departure from DFPS care and support. According to DFPS, PAL policy requires that youth 16 and older who are in substitute care and likely to remain in care until at least age 18, and who can qualify for services up to their 21st birthday, receive services to prepare them for adult living. With funding availability, regions may serve any youth age 14 or older on whom Child Protective Services has an open case.
PC	Permanency Conference	A Permanency Conference is held when it is not possible or appropriate to hold a Family Group Conference. A PC is held for a child or youth in DFPS conservatorship for the purposes of developing or reviewing the child's or youth's permanency plan; developing or reviewing the family service plan; resolving barriers to achieving a permanent living arrangement, as appropriate; and developing and reviewing the transition plan for youth age 14 and 15. Family Group Decision Making strategies are used to the extent possible and if appropriate to the situation.

Acronym	Explanation	Comments
PJMC	Permanent Joint Managing Conservatorship	PJMC is a legal term under <a href="#">Tex. Fam. Code § 101.016</a> used in child custody cases to indicate the long-term sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party.
PMC	Permanent Managing Conservatorship	Placement of a child in the permanent conservatorship of an entity or person, by court order, (e.g., Texas DFPS or relative) with no intention of returning the child to the parent’s custody. PMC is a term used solely in the context of child welfare law and is used to designate a managing conservator other than a parent. The designation of a non-parent as sole or joint managing conservator may be used in lieu of the term PMC.
PCSP	Parental Child Safety Placement	A Parental Child Safety Placement (PCSP) is a family-initiated, temporary, out-of-home placement 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 that may occur when the family determines that a PCSP is more workable than having a supervision agreement for parent-child contact.
QRTP	Qualified Residential Treatment Program	A childcare institution that has a treatment model as defined by the Family First Prevention Services Act (FFPSA). Both accreditation of the facility and court review of the placement are required to qualify for federal IV-E matching payments after a child’s placement in a QRTP by the court.
RAPR	Refusal to Accept Parental Responsibility	Refusal to assume parental responsibility is characterized as the failure by the person responsible for a child’s care, custody, or welfare to permit the child to return to the child’s home without arranging for the necessary care for the child after the child has been absent from the home for any reason.
RO	Ruled Out	This is one of the possible dispositions given in a DFPS investigation of child abuse and neglect. For an investigation to be designated as Ruled Out, the information gathered during the investigation supports a reasonable conclusion that: 1) the alleged abuse did not occur; 2) the alleged perpetrator is 9 years old or younger; or 3) the alleged abuse or neglect did occur but there is sufficient evidence to reasonably conclude that the named alleged perpetrator is not responsible.
RTB	Reason to Believe	RTB is one of the possible dispositions given in a DFPS investigation of child abuse and neglect. For an investigation to be designated as Reason to Believe, the information gathered during the investigation supports a reasonable conclusion that the alleged abuse or neglect did occur and that the alleged perpetrator is responsible for it.
RTC	Residential Treatment Center	According to Texas HHSC, an RTC provides therapeutic, residential care for children and adolescents to address needs such as mental illness, substance use, or other behavioral health problems. Children and adolescents live in an RTC for a short period of time as they work to meet their treatment goals.



Acronym	Explanation	Comments
SACWIS	Statewide Automated Child Welfare Information System	The SACWIS is a comprehensive automated case management tool that meets the needs of all staff (including social workers and their supervisors, whether employed by the State, county, or contracted private providers) involved in foster care and adoptions assistance case management. In Texas, the SACWIS system is called IMPACT.
SAPCR	Suit Affecting Parent-Child Relationship	A SAPCR refers to any lawsuit that affects the parent-child relationship, such as conservatorship of a child that has allegedly been abused or neglected by a parent or guardian.
SIJS	Special Immigrant Juvenile Status	SIJS is an immigration classification which allows immigrant children in the state child welfare system who cannot reunify with their parents due to abuse, abandonment, or neglect, and who meet certain other criteria, to obtain lawful permanent immigration status.
SMC	Sole Managing Conservator	An individual named by court order with the exclusive rights and duties of a parent to a child.
SSCC	Single Source Continuum Contractor	An SSCC is a non-profit or governmental entity with child welfare as a primary mission that contracts with DFPS to oversee delivery of services through the state's community-based care foster care program.
TCIC	Texas Crime Identification Center	TCIC provides immediate access 24/7 for law enforcement agencies throughout Texas to data regarding the stolen status of property and the wanted, missing, sex offender, or protective order status of persons.
TEA	Texas Education Agency	TEA is the state agency dedicated to elementary and secondary education.
TFC	Texas Family Code	The laws and statutes that govern Texas family law are contained in the TFC, including laws related to child welfare.
TJMC	Temporary Joint Managing Conservatorship	TJMC occurs when temporary managing conservatorship is granted to DFPS and the parent(s) or other person in a SAPCR where the state agency is a party to the lawsuit.
TMC	Temporary Managing Conservatorship	The awarding of conservatorship of a child to Texas DFPS. This may include children remaining in their home with orders from the court for particular requirements to ensure the safety of the child, or the removal of a child from the family for safety and well-being purposes.
TPM	Transition Plan Meeting	According to DFPS, a Transition Plan Meeting is held soon after a youth who has been removed from the home reaches age 14. A TPM tends to be a shorter and more DFPS-driven conference with fewer participants than a Circle of Support. A TPM is used as an alternative to the Circle of Support when youth do not desire one or a Circle of Support cannot be convened.
TRCP	Texas Rules of Civil Procedure	The TRCP govern all civil lawsuits filed in Texas. They are designed to "obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law" and to provide for efficient disposition of cases.

Acronym	Explanation	Comments
UTC	Unable to Complete	For an investigation to be designated as UTC, the information gathered during the investigation supports a reasonable conclusion that the caseworker could not gather enough information because the caseworker could not locate a principal or a principal was uncooperative.
UTD	Unable to Determine	UTD is one of the possible dispositions given in a DFPS investigation of child abuse and neglect. For an investigation to be designated as UTD, the information gathered during the investigation supports a reasonable conclusion that the allegation does not meet the criteria for unable to complete, but: 1) the information gathered is not enough to determine whether the abuse or neglect occurred, or 2) there is enough information to determine that abuse or neglect occurred, but there is not enough information to determine if the alleged perpetrator is responsible.

*Common DFPS Intake Narrative Abbreviations*

Abbreviation	Definitions
AB	Absent Parent
AP	Alleged Perpetrator
AN	Anonymous
AU	Aunt/Uncle
AV	Attorney Ad Litem
BA	Babysitter
CO	Cousin
DA	Daughter
EC	Emergency Contact
ES	Ex-Spouse
FA	Father (does not differentiate between acknowledged, presumed, or alleged)
FK	Fictive Kin
FM	Other Family Member
FO	Foster Child
FP	Foster Parent
FQ	Foster Sibling
FR	Friend
FV	Family Violence Shelter
GC	Grandchild
GG	Godparent
GU	Guardian
LA	Law Enforcement

Abbreviation	Definitions
MGFA/PGFA	Maternal Grandfather/Paternal Grandfather
MGMO/PGMO	Maternal Grandmother/Paternal Grandmother
MO	Mother
NE	Neighbor
NN	Niece/Nephew
NR	Nurse
OV	Oldest Victim
PA	Parent
PB	Parent (Birth)
PC/PP	Client's Paramour/Parent's Paramour
PO	Probation Officer
PR	Service Provider
SB	Sibling
SC	School Personnel
SL	Self
SO	Son
SP	Spouse
SR	Step-Child
SS	Step-Sibling
ST	Step-Parent
STFA/STMO	Step-Father/Step-Mother
UH	Unrelated Home Member
UK	Unknown
UP	Unpaid Caregiver
XX	Other

*DFPS Case Determination Abbreviations*

Abbreviation	Definitions
ABAN	A case determination of Abandonment
EMAB	A case determination of Mental or Emotional Injury
MDNG	A case determination of Medical Neglect
NSUP	A case determination of Non-Support
NSUP	A case determination of Neglectful Supervision
PHAB	A case determination of Physical Abuse
PHNG	A case determination of Physical Neglect
RAPR	A case determination of Refusal to Assume Parental Responsibility
SXAB	A case determination of Sexual Abuse
SXTR	A case determination of Sex Trafficking

# Additional Resources

## ***Adoption***

- [Texas Adoption Resource Exchange \(TARE\)](#)

## ***Appeals***

- Texas Department of Family & Protective Services: (512) 929-6819
- [Texas Courts of Appeal](#)
- [The Supreme Court of Texas](#)

## ***Child Abuse Prevention & Advocacy***

- [American Bar Association Center on Children and the Law](#)
- [American Professional Society on the Abuse of Children](#)
- [Children's Defense Fund](#)
- [Crimes Against Children Research Center](#)
- [DFPS Prevention and Early Intervention](#)
- [First Three Years](#)
- [National Association of Counsel for Children](#)
- [National Center for Missing and Exploited Children](#)
- [National Clearinghouse on Child Abuse and Neglect Information](#)
- [National Data Archive on Child Abuse and Neglect website](#)
- [National Sexual Violence Resource Center](#)
- [Prevent Child Abuse Texas](#)
- [State Bar of Texas Child Protection Law Section](#)
- [Texas Council of Child Welfare Boards](#)
- [Texas Lawyers for Children](#)

## ***Child Support***

- [Office of Attorney General](#)

## ***Child welfare legal advocacy***

- [American Bar Association Center on Children and the Law](#)
- [American Bar Association Child Law Practice Today](#)
- [National Association of Counsel for Children](#)
- [State Bar of Texas Child Protection Law Section](#)
- [Texas Lawyers for Children](#)

## ***Commercial Sexual Exploitation of Children***

- [National Center for Missing and Exploited Children](#)
- [Texas Office of the Attorney General](#)
- [Office of the Governor](#)
- [Texas Department of Family & Protective Services](#)

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### ***Court Appointed Special Advocates***

- [National CASA](#)
- [Texas CASA](#)

### ***Disability - Advocates & Information***

- [Disability Rights Texas](#)

### ***Domestic Violence***

- [Texas Council on Family Violence](#)

### ***Education***

- [Texas Education Agency Foster Care and Student Success](#)
  - [Resource Guide](#)
- [Texas Education for Homeless Children and Youth](#)

### ***Federal Child Welfare Policy***

- [Administration for Children and Families Children's Bureau](#)

### ***Foster Care Ombudsman***

- [Website](#)
- **Phone:** (844) 286-0769

### ***Hotlines***

- National Domestic Violence Hotline
  - [Website](#)
  - Call: 1-800-799-SAFE (7233)
  - Text "START" to 88788
- Texas Dept. of Family & Protective Services Abuse & Neglect
  - [Website](#)
  - Phone: 1-800-252-5400
- Texas Legal Services Family Helpline
  - [Website](#)
  - Phone: 844-888-6565
- Texas Youth Helpline:
  - [Website](#)
  - Hotline: (800) 989-6884

### ***Immigration & Citizenship***

- [ABA Children's Immigration Law Academy](#) (CILA)
- [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). Please see links to the following three relevant divisions:

- [U.S. Citizenship & Immigration Services \(CIS\)](#) - immigrant services and benefits
- [U.S. Immigration and Custom Enforcement \(ICE\)](#) - domestic investigative and enforcement
- [U.S. Customs and Border Protection \(CBP\)](#) - border enforcement
- [Human Rights Initiative of North Texas](#)
- [Immigration Legal Resource Center](#)- Special Immigrant Juvenile Status and general immigration resources

### ***Indian Child Welfare Act***

- [Bureau of Indian Affairs](#)
- [National Congress of American Indians](#)
- [National Indian Child Welfare Association \(NICWA\)](#)
- [Texas Child Protection Law Bench Book: Indian Child Welfare Act \(ICWA\)](#)
- [2021 Texas ICWA Summit](#)

### ***International***

- [Hague Adoption Convention](#)
- [Hague Convention on Civil Aspects of International Child Abduction](#)
- [Hague Conference on Private International Law](#)
- [Sistema Nacional para El Desarrollo Integral de la Familia](#) (“SNDIF”)- Social services counterpart to DFPS in Mexico
- [International Social Service](#)- Resource for International Home Studies
- U.S. Department of State
  - [Service of Process](#)
  - [Contact Information for Foreign Embassies & Consulates](#)

### ***Interstate Compact on Placement of Children (ICPC)***

- Association of Administrators of the ICPC:
  - [Website](#)
  - Phone: (202) 682-0100
- Texas Dept. of Family & Protective Services:
  - [Website](#)
  - Phone: (512) 438-5646

### ***Legal Research***

- [National Conference of State Legislatures’ Child Welfare Research](#)
- [Texas Legislature Online](#)

**LGBTQA+**

- [Child Welfare Information Gateway Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Webpage](#)

**Medical Research**

- [American Academy of Pediatrics](#)
- [PubMed Central](#) - A free digital archive provided by the U.S. National Institute of Health

**Mental Health**

- [National Alliance on Mental Illness \(NAMI\)](#)
- [Texas Judicial Commission on Mental Health](#)

**National Council of Juvenile and Family Court Judges**

- [National Council of Juvenile and Family Court Judges \(NCJFCJ\) Enhanced Resource Guidelines](#)

**Older Youth**

- [Texas Foster Youth Justice Project](#)
- [Texas Network of Youth Services](#)

**Paternity**

- [Texas Dept. of State Health Services Vital Statistics Unit](#)
- [Frequently asked questions about paternity and parentage](#)
- [Office of Attorney General of Texas FAQ's on establishing paternity](#)

**Substance Abuse**

- [National Alliance for Drug Endangered Children](#)
- [National Center for Substance Abuse and Child Welfare](#)
- [Substance Abuse and Mental Health Services Administration \(SAMHSA\)](#)

**Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (Children's Commission)**

- [Website](#)
- Email: [children@txcourts.gov](mailto:children@txcourts.gov)
- The [Texas Child Protection Law Bench Book](#) is available on the Children's Commission [Bench Book webpage](#) 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.

- The [Attorney Training webpage](#) provides attorneys with a list of training opportunities such as Trial Skills Training, On-Demand MCLE, and other training opportunities.

***Texas Department of Family and Protective Services***

- [Texas DFPS website](#)
- [Texas Practice Guide for DFPS Attorneys](#) - For assistance in subject matter areas, see the DFPS Attorneys' expertise list found in Section 14.

***Texas District and County Attorney's Association***

- [Website](#)
- Fundamentals of Child Welfare Law online training is available on the [TDCAA training webpage](#)

***Trial Preparation***

- [Abusive Head Trauma \(Shaken Baby Syndrome\) National Institute of Neurological Disorders & Strokes](#)
- [The Shaken Baby Alliance](#)



# 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 DFPS 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 the Hearing:

- Hearing within 14 days of removal unless temporary order extended
- Child’s GAL/AAL appointed
- Parties served
- CCEJ identified

#### At the 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
- Determine good cause if AAL has not seen child

### Court Findings

#### At the End of the Hearing:

- Determine sufficient evidence regarding the parent from whom the child was removed to grant DFPS TMC of child; if not, return child to that parent.
- Document danger to child to return to home or remain in home and remaining in 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 the child with a parent not involved in the removal unless there is evidence that the parent cannot be located or is unwilling to take possession of the child or possession of the child by the parent constitutes a continuing danger to the child despite reasonable efforts to enable possession.
- Place child with a 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

Updated March 2022

Adversary Hearing Checklist *continued*

## 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

- 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 the 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
- If parent is unrepresented, inform of right to counsel, determine indigency, and appoint attorney
- Dismissal date set
- Child "3 in 30" exam trio performed no later than 30th day after child entered TMC of DFPS.

#### At the 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, determine good cause
- 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 the End of the Hearing:

- Determine whether SP narrowly 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 narrowly 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 the 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 the 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
- If parent unrepresented, inform of right to counsel, determine indigency, and appoint attorney
- 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, determine good cause
- 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)

*Updated March 2022*

## Permanency Hearing Before Final Order Checklist *continued*

- 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

### Court Findings

#### At the End of the Hearing

- ◻ Return the child to the parent or parents unless, with respect to each parent, there is a continuing danger to the health and safety of the child and returning home is contrary to the welfare of the child.
- ◻ 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

## Permanency Hearing Before Final Order Checklist *continued*

### 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
- Education 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 the 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 the 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 the End of the 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
- Continue appointment of child's attorney ad litem (AAL), or guardian ad litem (GAL), or attorney in the dual role as long as the child is in the conservatorship of DFPS

### Best Practices

- Remind Parent Attorney of appellate duties
- Set initial hearings sooner than statutorily required to ensure progress toward child's permanency goal

Updated March 2022



# 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
- 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

### At the 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)
- 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:

*Updated March 2022*







SUPREME COURT OF TEXAS PERMANENT JUDICIAL  
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