



Tool Kit

for

Attorneys Representing
the Texas Department of
Family & Protective Services
in Child Protection Cases



DISCLAIMER

The creation and production of this Tool Kit for Attorneys Representing Texas Department of Family Protective Services in Child Protection Cases is funded by the Children's Commission through the federal Court Improvement Program. The materials in this series should not be construed as an advisory or ruling by or from the Supreme Court of Texas on specific cases or legal issues. These materials are solely intended to address the improvement of the law, the legal system, and the administration of justice. The information included in this Tool Kit was published in April 2018.



Justice Eva Guzman, Chair

Tina Amberboy, Executive Director

April 2, 2018

Dear Practitioner,

The Supreme Court of Texas Permanent Judicial Commission on Children, Youth and Families (“Children’s Commission”) is charged with improving the child welfare system by providing education, resources, and support to judges and attorneys who work on child protection cases across the state. One of the goals of the Children’s Commission is to promote high-quality court proceedings that safeguard due process, child and family involvement, and effective legal representation of parties.

As part of its ongoing commitment to elevate the practice of law in child protection cases, the Children’s Commission is pleased to share this Tool Kit for Attorneys Representing the Texas Department of Family and Protective Services. This Tool Kit is designed to benefit prosecutors of all levels of experience by providing concise compilations of hearing checklists, relevant state and federal statutes, and Practice Tips. The Commission hopes this Tool Kit will help promote best practices for prosecutors representing the Department of Family and Protective Services across the state.

Please note that while this Tool Kit is designed for those representing the Department, it is among the many resources which the Children’s Commission has developed and provided to attorneys for parents, attorneys for children, and judges, such as the Texas Child Protection Law Bench Book; the hands-on Trial Skills Trainings; the Family Helpline; the Parent Resource Guide; high quality continuing legal education specific to child protection; and scholarships to state and national programs on child protection. As with these and all other Commission resources, this Tool Kit is available at no cost to any interested user.

The Commission welcomes feedback on this Tool Kit. Please contact us at children@txcourts.gov with any thoughts that you might have on this product.

Thank you for your dedication to the children and families with whom you interact as you represent the Texas Department of Family and Protective Services.

Sincerely,

Tina Amberboy, Executive Director
Supreme Court Children’s Commission



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April 2, 2018

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 working group who put together the *Tool Kit for Attorneys Representing DFPS in Child Protection Cases*. Prosecutors in Texas have been honored to partner with the Texas Department of Family & Protective Services (“DFPS”) in working on child protection 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 a member of the judiciary. Many thanks for their dedication to this important project.

Robert Kepple
TDCAA Executive Director

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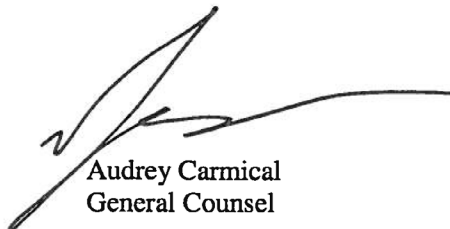
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April 2, 2018

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

Members of the Commission,

On behalf of the Texas Department of Family & Protective Services (“DFPS”), I am pleased to recommend the *Tool Kit for Attorneys Representing DFPS in Child Protection Cases*. The recent recognition by the Texas Board of Legal Specialization of child welfare as a specialization entitled to certification reflects the increasing complexity of this area of the law. Practitioners who do this most important legal work deserve the best tools and support we can offer. This final product reflects the joint efforts, expertise and experience of the Commission, the Texas District and County Attorney’s Association and DFPS. Thanks to the extraordinary vision and commitment of the Commission, this project means we have made one more tangible step to improve outcomes for children, youth and families in Texas.



Audrey Carmical
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Acknowledgements

Acknowledgements

The Legal Representation Committee's Subcommittee on Legal Representation of the Department of Family and Protective Services (DFPS) and the Children's Commission staff would like to recognize the leadership and support of Justice Eva Guzman, Chair of the Children's Commission, and Judge Dean Rucker, Jurist in Residence, and Chair of the Children's Commission's Legal Representation Committee. Under their guidance, the Tool Kit for Attorneys Representing DFPS in Child Protection Cases has grown from a concept to a reality which will serve to improve the quality of legal services to Texas' children and families. We are grateful for their leadership.

The Children's Commission would also like to thank the following contributing authors and editors who collaborated to produce this Tool Kit.

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The Children's Commission would also like to express its gratitude to Rob Kepple and Brian Klas of Texas District and County Attorneys' Association for their support of this resource and for the opportunity to debut this Tool Kit at the TDCAA Crimes Against Children Conference in April 2018, as well as to the Harris County Attorney's Office and the Williamson County Attorney's Office for their helpful review and input.

Additionally, the Children's Commission would like to express its gratitude to the members of the Commission's Legal Representation Committee, and especially the Legal Representation Committee's Subcommittee on Representation of DFPS. The Children's Commission would particularly like to thank member Elizabeth Watkins who drafted the foundational documents for the Tool Kit.

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Children's Commission



Honorable Eva Guzman, Chair, Children's Commission

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



Honorable Dean Rucker, Children's Commission Jurist in Residence and Chair, Legal Representation Committee

Judge Rucker serves as the Presiding Judge of the Seventh Administrative Judicial Region of Texas. He is also the Senior Judge of the 318th Family District Court, sitting by assignment, and serves as the Supreme Court Children's Commission Jurist in Residence (JIR) and the Chair of the Legal Representation Committee. Judge Rucker is board certified in family law by the Texas Board of Legal Specialization. He is a member of the Family Law Section and serves on the Family Law Council, the Formbook Committee, and the Legislative Committee. He is a member of the Texas Family Law Foundation and serves as the Judicial Advisor on its Board of Directors. Judge Rucker is the Vice-Chair of the State Bar Pattern Jury Charge Oversight Committee.

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Table of Contents

Section I: Legal Essentials for Child Protection Cases

Overview: Child Protection Case Flow	11
Burden of Proof	13
Best Interest of the Child	15
Potential Grounds Included in SAPCR	19
Discovery	25
Evidentiary Issues	
Predicates	29
Objections	33
Preservation of Error	35
Expert Witnesses	37
Drug Testing	41
Investigations and Alternatives to Removal of a Child	43

Section II: Hearings

Hearings at a Glance	47
Ex Parte Order	
Before Removal Hearing	49
After Removal Hearing	51
Full Adversary Hearing (For Emergency and Non-Emergency Removal Requests)	53
Status Hearing	59
Permanency Hearing Before Final Order	65
Dismissal Date Strategies	71
Final Hearing	73
Permanency Hearing After Final Order	79

Section III: Concurrent Issues

Establishing Paternity	83
Child & Kinship Support	
Child Support	87
Relative & Kinship Placement Support	89
Older Youth in Foster Care	91
Visitation for Children in Foster Care	93

Section IV: Federal Law Issues

Indian Child Welfare Act (ICWA)	95
Interstate Placements (ICPC)	99
State Court Orders for Special Immigrant Juvenile Status (SIJS)	101
School Stability Under Federal and State Law	103
Missing Parent in the Military Servicemembers Civil Relief Act (SCRA)	105

Section V: Special Issues

Foster Care & Education Checklist	107
Human Trafficking Checklist	109
Medical & Mental Health Checklist	111

Section VI: Additional Resources 113

Overview: Child Protection Case Flow

Texas Family Code Title 5, Ch. 161; 261-266

Removal / Start of Case

Emergency



Ex Parte Hearing

- Before Removal
- After Removal

Within 14 Days

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

*Subject to extension for good cause.

Non-Emergency



Non-Emergency Hearing

Within 30 Days

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

Adversary Hearing

Status Hearing

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

1st Permanency Hearing Before Final Order

Within 180 Days

No later than 180 days after CPS granted TMC, court conducts comprehensive review of child's status and permanency plan. Subsequent Permanency Hearings to be held within 120 days of the initial Permanency Hearing.

Subsequent Permanency Hearing Before Final Order

Within 120 Days

Transition Monitored Return

The deadline can be extended as part of a monitored return. Please see the expanded chart in the Dismissal Date section (page 72).

Final Order

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

New Trial / Mistrial or Remand

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

Extension of Time

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

Automatic Dismissal

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

After Final Order

Permanency Hearing After Final Order

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

Appeals

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

Burden of Proof

Sufficient Evidence to Satisfy a Person of Ordinary Prudence and Caution

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

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

Preponderance of the Evidence

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

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

Clear and Convincing

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

- Termination of Parental Rights. [Tex. Fam. Code § 161.001](#);
- An Order placing a child in foster care under the Indian Child Welfare Act, [25 U.S.C. § 1912\(e\)](#).

Beyond a Reasonable Doubt

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

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

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](#).

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

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

HEARINGS THAT CAN REQUIRE A BEST INTEREST DETERMINATION:

The Adversary Hearing:

When considering placement with relative or non-custodial parent.

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

Permanency Hearings before a Final Order:

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

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

When determining whether to meet a child.

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

COURT DECISIONS THAT REQUIRE A DETERMINATION OF BEST INTEREST:

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

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

Denying a parent visitation:

- If the court finds that visitation between a child and a parent is not in the child's best interest, the court shall render an order that:
 - states the reasons for finding that visitation is not in the child's best interest; and
 - outlines specific steps the parent must take to be allowed to have visitation with the child. [Tex. Fam. Code § 263.209\(b\)](#).

When considering unsupervised visitation in the context of family violence:

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

Extending the dismissal date:

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

Ordering a monitored return:

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

DFPS DECISIONS THAT MUST CONSIDER BEST INTEREST:

When considering placement:

- In selecting a placement for a child, the Department shall consider whether the placement is in the child's best interest. In determining whether a placement is in a child's best interest, the Department shall consider whether the placement:
 - 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\(b\)](#).

CASE LAW ON BEST INTEREST WHEN SEEKING TERMINATION:

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

DESIRES OF CHILD;

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

EMOTIONAL & PHYSICAL DANGER TO CHILD NOW & IN FUTURE;

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

PARENTAL ABILITIES;

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

PROGRAMS AVAILABLE TO ASSIST PARENTS;

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

PLANS FOR THE CHILD BY INDIVIDUALS SEEKING CUSTODY OR AGENCY;

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

STABILITY OF HOME OR PROPOSED PLACEMENT;

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

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

Practice Tip: Suggested sources and topics for proving best interest at termination trial:

Foster Parent Testimony:

- Typical day with the child (meetings/appointments they attend with or for the child).
- Training/classes they have attended.
- Special needs of child and how those needs have been met.
- How child was before and now (if child wants to stay with them vs. go home).
- Future plans for child: considering adoption?

Psychologist, Therapist, or Adoption Specialist's Testimony:

- Permanency-what it means for this child. Low success rate of non-adoptive homes vs. permanent placement.
 - Effects of changes in placement to this child.
 - "Attachment Disorder" and behaviors now & future behavioral problems child may have if not addressed.
 - Detrimental effect on child of continued contact with parent.
 - Psychological effect of "closure" on the healing process.
-

Potential Grounds Included in SAPCR

Involuntary Termination of Parent-Child Relationship. [Tex. Fam. Code § 161.001\(b\)\(1\)](#).

ABANDONMENT GROUNDS

Has the parent voluntarily left the child ([Tex. Fam. Code § 161.001\(b\)\(1\)\(A\)](#))

- alone or in the possession of another (not the parent), *and*
- expressed an intent not to return.

Has the parent voluntarily left the child ([Tex. Fam. Code § 161.001\(b\)\(1\)\(B\)](#))

- alone or in the possession of another (not the parent),
- without expressing an intent to return,
- without providing adequate support of the child, *and*
- remained away for a period of at least *three months*.

Has the parent voluntarily left the child ([Tex. Fam. Code § 161.001\(b\)\(1\)\(C\)](#))

- alone or in the possession of another,
- without providing adequate support of the child, *and*
- remained away for a period of at least *six months*.

Has the parent abandoned the child ([Tex. Fam. Code § 161.001\(b\)\(1\)\(G\)](#))

- without identifying the child or furnishing means of identification, *and*
- the child's identity cannot be ascertained by the exercise of reasonable diligence.

Has the **father** ([Tex. Fam. Code § 161.001\(b\)\(1\)\(H\)](#))

- voluntarily, and with knowledge of the pregnancy,
- abandoned the mother of the child,
- beginning at a time during her pregnancy with the child and continuing through the birth,
- failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, *and*
- remained apart from the child or failed to support the child since the birth.

Has the parent ([Tex. Fam. Code § 161.001\(b\)\(1\)\(N\)](#))

- constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department for not less than *six months*, *and*
- the Department made reasonable efforts to return the child to the parent,
- the parent has not regularly visited or maintained significant contact with the child, *and*
- the parent has demonstrated an inability to provide the child with a safe environment.

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

Has the parent:

- knowingly placed (the child) *or* knowingly allowed (the child),
- to remain in conditions *or* surroundings,
- which endangers the physical *or* emotional well-being of the child.

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.

FAILURE TO SUPPORT ([Tex. Fam. Code § 161.001\(b\)\(1\)\(F\)](#))

Has the parent:

- failed to support the child
- in accordance with the parent's ability
- during a period of *one year* ending *within six months* of the date of the filing of the petition.

FAILURE TO COMPLY WITH COURT ORDERS ([Tex. Fam. Code § 161.001\(b\)\(1\)\(I\)](#))

Has the parent:

- contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261.

See [Tex. Fam. Code § 261.301](#)

TRUANCY AND/OR RUNAWAY ATTRIBUTABLE TO THE PARENT ([Tex. Fam. Code § 161.001\(b\)\(1\)\(J\)](#))

Has the parent been the major cause of:

- the failure of the child to be enrolled in school as required by the Education Code, *or*
- the child's absence from the child's home (without the consent of the parents or guardian),
- for a substantial length of time *or* without the intent to return.

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

Has the parent:

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

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

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

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

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 Paragraph (D) or (E) or substantially equivalent provisions of the law of another state.

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

Has the parent failed to comply with:

- provisions of court order that specifically established the actions necessary for the parent to obtain the return of the child,
- who has been in the Permanent Managing Conservatorship (PMC) or Temporary Managing Conservatorship (TMC) of the Department for not less than *nine months*,
- as a result of the child's removal for the abuse or neglect of the child.

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

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

Has the parent:

- used a controlled substance, as defined by Chapter 481, Health and Safety Code, 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.

See 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).

“BABY MOSES” (Tex. Fam. Code § 161.001(b)(1)(S))

Has the parent:

- voluntarily delivered the child to a designated emergency infant care provider without expressing an intent to return for the child.

CRIMINAL CONVICTION: MURDER, SEXUAL ASSAULT (Tex. Fam. Code § 161.001(b)(1)(T))

Has the parent been convicted of:

- the murder of other parent of child, *or*
- criminal attempt to commit murder of other parent of child, *or*
- criminal solicitation to commit murder of other parent of child, *or*
- sexual assault of the other parent of the child.

PROBATION/DEFERRED FOR SEXUAL ASSAULT OF OTHER PARENT OF THE CHILD (Tex. Fam. Code § 161.001(b)(1)(U))

Has the parent:

- been placed on community supervision, including deferred adjudication community supervision, *or* another functionally equivalent form of community supervision or probation,
- for being criminally responsible for the sexual assault of the other parent of the child.

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

- Service of Citation Required or Due Diligence:
 - After being served with citation, he does not timely file an admission of paternity or a counterclaim for paternity.
 - He has registered with the Paternity Registry and DFPS has exercised due diligence to locate alleged father, but service of process has been unsuccessful.
- Termination does not require personal service of citation or citation by publication if:
 - child is over one year of age,
 - he has failed to register with the Paternity Registry and his identity and location are unknown, *or*
 - his identity is known, but he cannot be located, *or*
 - child is under one year old at the time petition was filed, and he has not registered with the paternity registry.

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,
- that the illness or deficiency will probably continue to render parent unable to provide for child's needs until child's 18th birthday,
- that the Department has been Temporary Managing Conservator or Sole Managing Conservator for at least six months prior to termination hearing,
- that the Department made reasonable efforts to return the child to the parent, *and*
- that termination is in the child's best interest.

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 or that are likely to be proved at trial. Suits filed by a governmental entity are subject to [Texas Rule of Civil Procedure 13](#) which prohibits groundless pleadings brought in bad faith or to harass, as well as [Civil Practice and Remedies Code Section 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.

OVERVIEW

Discovery rules in CPS cases are the same as in other civil cases and are governed by the Texas Rules of Civil Procedure. SAPCRs are usually subject to Level 2 Discovery. Please note that certain jurisdictions have Level 3 Discovery Control Plans and orders in place for CPS cases as part of their local rules.

DFPS may be required *prior* to the Adversary Hearing to turn over, *upon request*, the names of witnesses 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 when requested by the parent, party or ad litem. [Tex. Fam. Code § 262.014](#).

Confidentiality provisions require redacting of DFPS documents in response to a discovery request to edit material that is not subject to release. *The identity of the reporter of abuse or neglect must always be redacted prior to any release.* [Tex. Fam. Code § 261.201](#). Redaction of the record by DFPS's record management group can take up to 20 days but will be completed within the time frame for discovery deadlines. Items produced prior to an Adversary Hearing may need to be redacted by the attorney.

It is important to respond to all discovery requests within thirty days after the discovery was sent. **Failure to timely answer discovery may limit the evidence and testimony which can be presented at trial.** [Tex. R. Civ. P. 193.6\(a\)](#).

TYPES OF DISCOVERY IN TEXAS RULES OF CIVIL PROCEDURE:

- Requests for Disclosure: Rule 194
- Interrogatories: Rule 197
- Requests for Production of Documents: Rule 196
 - Must be served at least 30 days before the end of the discovery period.
- Requests for Admission: Rule 198
 - Failure to respond timely will result in admissions being deemed admitted.
- Depositions: Rules 199-200
 - Any objection to the time and place of the deposition must be made by filing a motion for protective order or a motion to quash.
- Requests for Physical and Mental Examinations: Rule 204
 - In a DFPS suit (among others), on motion by a party or the court's own initiative, the court may appoint:
 - One or more psychologists or psychiatrists to examine a child or another other party to the suit; and/or
 - A qualified expert to test and determine paternity.

NOTABLE DISCOVERY ISSUES IN CPS CASES:

Experts: Rule 195

Special rules govern the exchange of information about expert witnesses in the discovery process. Note that the scope of discovery involving testifying experts or consulting experts, whose work has been reviewed by a testifying expert, is different.

Privileges

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

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

Subpoenas: Rule 176

A person served with a subpoena can request a protective order if the subpoena seeks information that is privileged or otherwise objectionable. DFPS has adopted detailed policy governing procedures for handling subpoenas served on individual staff or the agency; contact your regional attorney for more information regarding the “subpoena mailbox,” and its uses.

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, point out that 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). They 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)). But 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, so to avoid any hearings on the motions, the attorney representing DFPS can simply turn over the requested materials, if not protected. Generally the parent’s attorney, the court, or both, will be appeased and the motions dropped. If material is protected, i.e. the reporter name, a hearing may be necessary for a Court order on the release of such material.

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

- Parties are allowed to testify even if they were not disclosed 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 excludes parties. *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 the Department’s petition, a Status Hearing order, and service plan put the parent on notice that the Department would seek termination if reunification could not be achieved.)
- Because the best interest of a child is of primary importance, the Austin Court of Appeals has held that witnesses in a termination should be allowed to testify even if they were not disclosed in discovery. *Spurck v. Tex. Dep’t of Family and Protective Servs.*, 396 S.W.3d 205, 215 (Tex. App.—Austin 2013, no pet.)

Practice Tip: 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. A reminder about a week before the due date will prompt the attorney representing DFPS to gather the answers from caseworker and insure the records department has gathered and sent all the records. Although others 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 you did not timely make, amend, or supplement a discovery response, and this may result in your evidence being excluded, you can try the following arguments under *Tex. R. Civ. P. 193.6*:

- 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.
-

BUSINESS / MEDICAL RECORDS

- Are you a custodian of the records or are you otherwise familiar with the records contained in the Exhibit? How are you familiar with them?
- Records made in the ordinary course of business?
- Made by persons with personal knowledge (or from information transmitted by them)?
- Made at or near the time of the occurrence?

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? The sender of the text message?
- Do the contents refer to any previous communication you had with this person?
- Is there information in these contents known to this person?

FACEBOOK OR SOCIAL MEDIA

- Do you use Facebook/Twitter/Myspace/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 “like,” “loves,” or “dislikes” might fall into a hearsay exception, such as admission against interest.

HEARSAY STATEMENT OF CHILD ABUSE VICTIM (Tex. Fam. Code § 104.006)

In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible 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.

Objections

General Objections

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

Prior Inconsistent Statements	TRE 801(e)(1)
Admission by Party Opponent	TRE 801(e)(2)
Deposition	TRE 801(3)

Exceptions to Hearsay: Availability of Declarant Immaterial

Present Sense Impression	TRE 803(1)
Existing Men/Emo/Phys Condition	TRE 803(3)
Recorded Recollection	TRE 803(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 in 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 803(4)
Business/Medical Records	TRE 803(6)
Public Records/Reports	TRE 803(8)
Absence of Public Record/Entry	TRE 803(10)
Marriages/Baptisms & Similar	TRE 803(12)
Property Records	TRE 803(14)
Statements in Ancient Docs	TRE 803(16)
Learned Treatises	TRE 803(18)
Reputation - Boundaries/History	TRE 803(20)
Previous Conviction	TRE 803(22)
Statement Against Interest	TRE 803(24)

Exceptions to Hearsay: Declarant Unavailable

Former Testimony	TRE 804(b)(1)
Personal Testimony	TRE 804(b)(3)
Dying Declaration	TRE 804(b)(2)

Objections to the Form of the Question

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

Objections to the Form of the Answer

Narrative	TRE 611(a)
Nonresponsive	TRE 611
Lack of Personal Knowledge	TRE 602
Volunteered	TRE 403; 611(a)

At Trial or in a Hearing

Timely Objections (Tex. R. App P. 33.1)

To preserve error, the party objecting to the admission of evidence must make a timely objection or motion to strike 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: Be aware that you might need to clearly but respectfully reiterate your request to get a ruling on the record, especially if the Court does not respond directly to your request and instead says something like, “move along, Counsel,” etc. If you do not get a ruling, you risk waiving error on appeal.

Practice Tip: When arguing on the record, always avoid using terms of art and acronyms (FBSS, OV, “dad was positive” without saying for what or when, “ruled out,” “unable to determine,” etc. One should always strive to make the record very clear on appeal.

Practice Tip: Make opposing counsel get the information in through the witness, and listen for possible leading, narrative, and relevance.

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

This preserves an argument regarding evidence by informing the appellate court what evidence was excluded by the trial court.

- Request that the judge to allow you to make an offer of proof outside the presence of the jury. On the record, state what the evidence is, and why you think it should be admitted; ask the court to admit for the limited purpose of appeal. Can be physical evidence or testimony that was objected to and sustained.

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

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

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

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

Accelerated Appeals

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

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 fact-finder in deciding the case.

AND

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

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

The Court must determine that:

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

Robinson Reliability Factors:

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

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

Proper Forms of Expert Testimony: Opinion, Conclusion, Ultimate Issue.

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?

Questions on Need for Expert Opinion:

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

Questions on Basis for Opinion:

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

Cross-Examination Questions of the Opposing Expert:

- Has your theory been tested or can it be tested?
- Does your technique rely on the subjective interpretation of the expert?
- 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 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 is typically 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 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). The person who administered the test is not enough to prove it up without the expert.

Drug testing results admitted without proper foundation are not necessarily reversible error if the drug testing results come into evidence through other means (i.e., the parents testify to the use / admit to the probable results).

Common Objections:

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

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

Safety Plans

A Safety Plan is a voluntary written agreement between DFPS and adult family members, which can serve as a short-term safety measure. No court orders are filed in this situation. Safety Plans can be used across many different non-removal interventions. A Safety Plan is not legally binding, but a parent's failure to comply with a Safety Plan can be used as evidence. In a Safety Plan, a parent may agree to:

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

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, or DFPS has reason to anticipate interference during an investigation, a court can 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 caretaker 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.](#)

The Investigation Has Revealed a Need for Services but the Family is Compliant:

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

FBSS offers protective services to a family whose children are not in the managing conservatorship of DFPS to prevent the need to remove a child from the home. Participation in FBSS by a family is voluntary and is accompanied by a Safety Plan. If parents do not comply with the voluntary services, DFPS has the option of initiating a removal.

The Investigation Has Revealed a Need for an Alternative Placement for the Child:

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

A Parental Child Safety Placement is a 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. With an authorization agreement, a parent can give an adult caregiver of a child placed under a PCSP the authority to take action, including but not limited to medical consent, school enrollment, consent for participation in school and sport events, applying for public benefits, and related authority. [Tex. Fam. Code § 34.0021](#).

The Investigation Has Revealed a Need for Services but the Family is not Compliant:

- **Court Order for Participation in Services**

If a family has refused services or is not cooperating with DFPS provided or funded services, the court may order 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.

The caseworker must be able to set out the facts that meet this standard. A parent's failure to comply with court-ordered services is relevant evidence at trial. The court may impose sanctions, which include the removal of the child. If the court denies the request, it must provide its reasons in writing to DFPS. [Tex. Fam. Code § 264.203](#). Please note that neither non-compliance nor refusal to cooperate is a requirement to seek a court order to participate in services.

Practice Tip: A child may be in the parent's home or may be in a PCSP. Consider whether requests for further temporary orders under [Tex. Fam. Code § 105.001](#) are necessary to stabilize the situation.

The Investigation Has Revealed That a Protective Parent is the Victim of Family Violence:

- **Order for Removal of an Alleged Perpetrator (“Kick-Out Order”)**

If possible, it is better that an alleged perpetrator be forced to leave the home, instead of a victim. This allows the child to stay in the home. A temporary restraining order can be used to remove the perpetrator, 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. It is a Class A Misdemeanor to violate this TRO. This order lasts for **14 days**. [Tex. Fam. Code § 262.1015](#). This allows a protective parent time to initiate a custody suit or a Protective Order.

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

Practice Tip: If you are unsure if you will be seeking a permanent Protective Order, file both the Temporary and the permanent Orders at the same time in order to only serve once. The permanent Protective Order can always be passed if it is not necessary, and the Temporary Protective Order expires in 14 days.

Permanent Protective Orders:

A permanent Protective Order requires a finding that family violence has occurred and is likely to occur again in the future. [Tex. Fam. Code §§ 71.004; 82.00; 85.001; 261.501-261.505](#).

- Obtaining such an 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; 84.006](#).
- While awaiting a permanent Protective Order, Temporary ex Parte Orders can keep a respondent from doing certain acts (such as emotional and physical abuse of the child), or going near the child or residence. DFPS can file alone or jointly with another protective person.
- The Temporary Ex Parte Protective Order is good for 14 days, and after notice and hearing, a court can order a permanent Protective Order.
- Additionally, a permanent Protective Order can be obtained for any victim of sexual abuse from their perpetrator.
- A permanent Protective Order can be good for any duration, including the duration of the victim's life.
- A violation of a permanent Protective Order is a criminal offense. [Tex. Fam. Code § 262.1015](#).

AT A GLANCE

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

AT A GLANCE

	Adversary	Status	Perm Hearing Before Final Order	Perm Hearing After Final Order
AAL met with client, form submitted if not	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	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
If APPLA, Dept has conducted Independent Living Skills Assmt	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

Ex Parte Order Before Removal Hearing

GOAL:

To have a court authorize in advance the removal of a child and grant DFPS the temporary managing conservatorship of the child until an Adversary Hearing can be held.

BURDEN OF PROOF:

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

BEST INTEREST:

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

ICWA:

A court can order emergency removal of an “Indian child” only if necessary “to prevent imminent physical damage or harm to the child.” [25 C.F.R. § 23.113 \(d\)](#). This must be followed by a noticed hearing where DFPS must prove by clear and convincing evidence, including qualified expert testimony, that a “foster care placement” is warranted. This hearing cannot be held until 10 days after notice of ICWA rights is given, subject to a 20 day extension on request by a parent or tribe. To avoid the need to continue the hearing, the best practice is to set this hearing out at least 30 days. Please see ICWA information in the Federal Law Issues Section.

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 petition with affidavit; and
- Request that the clerk issue citation and notice of the Adversary Hearing.

REQUIRED SHOWING:

The prosecutor must submit sufficient evidence to prove:

- Either an immediate danger to the physical health or safety of the child, or that the child has been a victim of neglect or sexual abuse;
- That continuation in the home would be contrary to the child’s welfare; and
- That there is not sufficient time, consistent with the child’s physical health or safety and the nature of the emergency, to hold an Adversary Hearing; and
- That reasonable efforts were made to prevent or eliminate the need for removal. [Tex. Fam. Code § 262.102](#).

NOTE ON THE DEFINITION OF “HOME”:

The federal Administration of Children and Families defines “home” as the adult from whom the child is legally removed. In other words, home means parental custody, not physical location. The definition of “home” does not change regardless of where the child is living. Thus, when the department files a petition under [Tex. Fam. Code § 262.113](#), Filing Suit Without Taking Possession of a Child, the court must make the findings regarding reasonable efforts, contrary to the welfare, and continuing danger as they relate to the parent or adult who is entitled to legal custody of the child, not the person who has physical custody. Reasonable efforts to prevent removal from the parent’s custody are not required if the parent has subjected the child to aggravated circumstances as defined by [Tex. Fam. Code § 262.2015](#).

COURT ACTION:

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

- Issue an ex parte order for protection of the child;
- Appoint an attorney ad litem, a guardian ad litem, and authorized medical 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 your caseworker ahead of time to be able to testify on his/her personal knowledge of the reasonable efforts which the DFPS made before requesting removal of the child. Also be prepared to rebut any objections to hearsay within the Affidavit of Removal.

Ex Parte Order After Removal Hearing

GOAL:

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

BURDEN OF PROOF:

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

BEST INTEREST:

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

ICWA:

A court can order emergency removal of an “Indian child” only if necessary “to prevent imminent physical damage or harm to the child.” [25 C.F.R. § 23.113 \(d\)](#). This must be followed by a noticed hearing where DFPS must prove by clear and convincing evidence, including qualified expert testimony, that a “foster care placement” is warranted. This hearing cannot be held until 10 days after notice of ICWA rights is given, subject to a 20 day extension on request by a parent or tribe. To avoid the need to continue the hearing, the best practice is to set this hearing out at least 30 days. Please see ICWA information in the Federal Law Issues Section.

PROSECUTOR PREPARATION:

Before the hearing that must occur within one business day of the removal, the prosecutor must:

- Review caseworker’s affidavit to assess the sufficiency of the evidence;
- Prepare and file the petition with affidavit; and
- Request that the clerk issue citation and notice of the Adversary Hearing.

REQUIRED SHOWING:

The prosecutor must submit sufficient evidence to prove:

- *Either* a continuing danger to the physical health or safety of the child if returned to the home, *or* evidence that the child is a victim of sexual abuse or labor or sex trafficking and is at substantial risk of future sexual abuse or trafficking, or a parent or person with possession of child is currently using a controlled substance which use constitutes an immediate danger to physical health or safety, or permitted the child to remain on the premises where methamphetamines are manufactured;
- That continuation in the home would be contrary to the child’s welfare; and
- That continuation in the home would be contrary to the child’s welfare; and
- That reasonable efforts consistent with child safety 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 on his/her personal knowledge of the reasonable efforts which the DFPS made before requesting removal of the child.

Adversary Hearing Checklist

(From Children's Commission Bench Book)

Prior to Hearing:

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

At Hearing:

- Identify parties present and served
- Inform parents of right to attorney
- Determine indigence
- DFPS provided notice to relatives
- Need for language interpretation
- Child Placement Resources Form/efforts to identify/locate parties not present
- CPS and criminal background checks conducted and home studies initiated
- Indian/Native American Heritage
- Temporary Family Visitation Plan
- AAL form provided if client not seen

At the End of the Hearing:

- Determine sufficient evidence to grant DFPS TMC of child; if not, return child
- Document danger to child to return to home or remain in home and remaining 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 child with noncustodial parent or relative unless not in best interest
- Determine whether DFPS is able to place child with relative or other designated caregiver; note evidence supporting finding either way

COURT ORDER

- Service
- Notice of removal
- Parentage or DNA testing
- Dismissal date
- Transfer CCEJ, if applicable

Best Practices:

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

Well-being Issues at Adversary Hearing:

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

Adversary Hearing

For Emergency and Non-Emergency Removal Requests

GOAL:

To have a court grant DFPS Temporary Managing Conservatorship of a child or authorize DFPS' continued Temporary Managing Conservatorship of a child.

Timing:

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

BURDEN OF PROOF:

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

BEST INTEREST:

Best Interest of the child is always the **primary consideration** in determining conservatorship, possession, and access. [Tex. Fam. Code § 153.002](#); and at the Adversary Hearing, [Tex. Fam. Code § 262.201\(n\)](#) states that the court shall place a child with the child’s noncustodial parent or with a relative unless placement is not in the best interest of the child.

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.

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 qualified expert testimony, that a “foster care placement” is warranted. This hearing cannot be held until 10 days after notice of ICWA rights is given, subject to a 20 day extension on request by a parent or tribe. To avoid the need to continue the hearing, the best practice is to set this hearing out at least 30 days. Please see ICWA information in the Federal Law Issues Section.

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;
- Check status of service of citation (if citation by publication is necessary, the court may render a temporary order without waiting for publication), subpoenas for witnesses and records;
- Verify status of placement with a person named on the Child Placement Resource form;
- Confirm CPS has asked about possible Native American heritage and the identity of any tribe; and
- Verify CPS’ recommendation regarding visitation, medical consent or any other issue that may warrant court intervention.

Practice Tip: If possible at this stage it would be helpful to 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.

REQUIRED SHOWING AFTER EMERGENCY REMOVAL:

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

- There was a danger to the physical health or safety of the child. That danger could include a danger that the child would be a victim of trafficking under [Tex. Fam. Code § 20A.02](#) or [20A.03](#), Penal Code, caused by an act or failure to act of the person entitled to possession;
- That continuation in the home would be contrary to the child’s welfare;
- The urgent need for protection required immediate removal; and
- That despite reasonable efforts to prevent or eliminate the need for removal and to return the child home, there is a substantial risk of continuing danger to the child in the home. [Tex. Fam. Code § 262.201\(g\)](#).

REQUIRED SHOWING FOR NON-EMERGENCY REMOVAL REQUEST:

The prosecutor must submit sufficient evidence to prove:

- There is a continuing danger to the physical health or safety of the child cause by an act or failure to act of the person entitled to possession of the child;
- That continuation in the home would be contrary to the child’s welfare; and
- Reasonable efforts consistent with the circumstances and safety of the child, were made to prevent or eliminate the need for removal. [Tex. Fam. Code §§ 262.113; 262.201\(j\)](#).

COURT ACTION:

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

- Order placement of child with a noncustodial parent, or relative unless that is not in the child's best interest;
- Ask all parties about Native American heritage and the identity of any tribe(s);
- Give parents warning about parental rights and responsibility for Child Placement Resources form and require all relatives to provide information to locate any absent parent or relative; and
- Set a Status Hearing within 60 days.

Renewing and Extending the 14 Days: A Full Adversary Hearing after emergency removal must be held within 14 days because the temporary order authorizing emergency removal expires after 14 days according to [Tex. Fam. Code § 262.103](#). However, those orders can be, and often are, extended before a Full Adversary Hearing is held. The temporary orders can be renewed and extended under the following circumstances:

- Upon a showing of good cause (defects in service, allowing time for the attorney for the child to visit with their client, court closure or docketing issues, etc.), 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*. [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*. [Tex. Fam. Code § 262.201 \(e-1\)](#).

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).

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

- How did CPS become involved with this child?
- What was the condition of the child when CPS 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? If so, 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? If so, how?
- Did the urgent need for protection require the child's immediate removal and did you make efforts to eliminate or prevent the removal unreasonable? *What efforts were made to prevent or eliminate the need for removal?*
- Is there a substantial risk of *continuing danger* to the child if he or she is allowed to return home? If so, 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? Relatives, fictive kin, family caregivers?
- Is it in the best interest of the child to name DFPS as the temporary managing conservator of the child? If so, how is it in the child's best interest?

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

- What type of visitation orders are appropriate?
 - Who pays child support?
 - Is paternity testing needed?
 - Before the service plan can be fully developed and signed by a parent, there may be an identified need for psychological testing, drug assessment or testing, physical examinations; determine what orders might be appropriate and proceed accordingly.
 - Discovery: is there a discovery control plan in place and/or is there a need for formal discovery?
 - What are placement options and is there a need for home studies?
 - Consider 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 Checklist ***(From Children's Commission Bench Book)***

Prior to Hearing:

- Hearing 60 days after DFPS appointed TMC, unless aggravated circumstances
- Persons given 10 days' notice of hearing
- Visitation Plan filed least 10 days before
- Family Plan of Service filed no later than 45th day after DFPS appointed TMC
- Education decision-maker form filed
- Medical consent form filed
- Parent attorneys appointed
- Dismissal date set
- Child assessment by no later than 45th day after child entered TMC of DFPS
- Texas Health Steps administered by no later than 30th day after child entered TMC of DFPS

At Hearing:

Due Process and General Matters

- Identify parties present and served
- DFPS due diligence to locate parties
- DFPS provided notice to relatives
- Need for language interpretation
- Inform parents of right to attorney
- If AAL hasn't seen client, form filed
- Child Placement Resources Form filed
- 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

At the End of the Hearing:

- Determine whether SP reasonably tailored for specific issues identified by DFPS
- Determine whether any SP with goal of reunification adequately ensures that reasonable efforts made to enable parents to provide safe environment for child
- Advise/warn parents & parties:
 - Custodial rights and duties subject to restriction or termination or child not returned unless parent demonstrates willingness and ability to provide child with safe environment

- Progress under SP reviewed at all hearings, including review of newly acquired knowledge or skills
- ☐ Incorporate SP into court order and render additional, appropriate orders to require compliance with or implement SP
- ☐ **ISSUE COURT ORDER:**
 - Dismissal date
 - May transfer to court of continuing, exclusive jurisdiction, if CCEJ exists

Best Practices:

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

Well-being Issues at Status Hearing:

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

Status Hearing

GOAL:

To have a court review contents of 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," DFPS must show by clear and convincing evidence, including qualified expert testimony, that the parent's continued custody "is likely to result in serious emotional or physical damage to the child." [25 U.S.C. § 1912\(e\)](#). This finding cannot be made until 10 days after notice of ICWA rights is given, subject to a 20-day extension on request by a parent or tribe. The best practice is to set this hearing out at least 30 days to avoid the necessity of resetting the hearing. ICWA also requires that DFPS make "active efforts" to reunify among other legal requirements. Please see ICWA information in the Federal Law Issues Section.

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 any and all Courts of Continuing, Exclusive Jurisdiction (CCEJ) inquiry and determine if transfer is required;
- Request that the caseworker complete an Affidavit Regarding Military Service for any missing parent;
- Confirm DFPS has asked all persons about possible Native American heritage and the identity of any tribe;
- Calculate automatic dismissal date;
- 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 locate, and notify relatives and others regarding the removal;
 - Information on the child’s medical care; and visitation plan
 - Child Placement Resources form and any placement related documents;
- Review proposed service plan for compliance with [Tex. Fam. Code § 263.102](#).

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: While the mention of CCEJ is only mentioned in the statutes immediately after the Adversary Hearing, it is a matter that should continue to be reviewed by the prosecutor. The consequences of not having 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 Temporary Managing Conservatorship is granted; and
- Allow the parents the opportunity to comment on the service plan.

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?
- Are there any issues with Indian heritage?
- What are the identifiable services in the plan? Have the parents reviewed the plan? Have the parents signed the plan? Why or why not?
- Where are the children and how are they doing? What activities are they involved in?
- What reasonable efforts have been made to get them out of State care and either returned home or to a relative/kinship placement?
- Should the Department 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 under [Tex. Fam. Code § 264.754](#).
- Have home studies been started? If the home study will be outside of Texas, it will involve ICPC unless it will be on a biological parent. Out of state home studies take significantly longer and must be started as soon as possible. Please see ICPC information in the Federal Law Issues Section.
- 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 Court accepts the service plan and adopts as its court ordered services and it is filed with the Court. At a termination proceeding where it is alleged that parents did not complete services, the plan itself can be evidence.

Practice Tip: Be aware of a defense against the “O” Ground for parents. [Tex. Fam. Code § 161.001\(d\)](#) was added by the 85th Texas legislature and provides a defense against “O” if a parent can prove by a preponderance of the evidence that she or he was unable to comply with the service plan, made a good faith effort, and that failure to comply was not attributable to any fault of the parent.

Permanency Hearing Before Final Order Checklist

(From Children's Commission Bench Book)

Prior to Permanency Hearing (PH):

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

At Hearing:

- Identify those present
- Child in attendance
- DFPS due diligence to locate and serve parties not present
- Parent, alleged father or relative provided locating information for absent parents, alleged fathers, or relatives
- Paternity issues/Paternity Registry
- Need for language interpretation
- Advise parents of right to counsel
- Determine indigence
- Indian/Native American Heritage
- Citizenship issues, consulate notified
- Compliance with orders/Service Plan and progress made
- Parties and those present heard and provided opportunity to present evidence
- If caregiver is present, must be given opportunity to provide information about the child.
- If AAL has not seen child, form filed

Review Permanency Progress Report:

- Safety and well-being of child
- Child's needs (medical/special)
- Child's placement
- Evidence as to whether DFPS is able to place with relative
- Child's primary and alternative permanency goals
- DFPS reasonable efforts to finalize permanency plan
- Child provided opportunity to express opinion about medical care
- For child receiving psychotropic medication, whether child has:
 - been provided non-pharmacological interventions.
 - seen prescribing physician every 90 days for review
- Child's education decision-maker identified, education needs and goals identified and addressed, and major changes in school performance or disciplinary events
- If 14 or older, transition services to assist from care to independent living
- For child with goal of APPLA:
 - child's desired permanency outcome; and
 - whether APPLA best permanency plan; if so, provide compelling reasons why not in child's best interest to:
 - return home,
 - adoption,
 - placed with legal guardian, or
 - placed with a fit and willing relative
 - whether DFPS has conducted an Independent Living Skills (ILSA) assessment
 - whether DFPS has addressed the goals identified in the youth's permanency plan.
 - For youth 16 years of age or older, whether DFPS has provided documents required by Section 264.121(e)
 - For youth 18 years or older, or has had disabilities of minority removed, whether DFPS has provided youth with

documents and information listed in Section 264.121(e-1)

- Child receiving appropriate medical care
- Child has regular, ongoing opportunities for age-appropriate normalcy activities, including those not in child's service plan

At End of Hearing:

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

Best Practices:

- If lack of notice, consider resetting hearing to secure attendance
- Engage parties with direct questions
- Engage youth
- Ask DFPS direct, child-specific questions about primary and concurrent goal
- If not moving to positive permanency, set timelines and tasks to be completed prior to next hearing
- AAL knowledgeable about child's needs and legal objectives
- Set next PH 90 instead of 120 days
- For Older Youth:
 - Family group decision-making
 - Preparation for Adult Living Program (PAL)
 - If will turn 18 while in foster care:
 - Discuss extended foster care and trial independence
 - Ensure referrals to Texas Workforce Commission

- Endure 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:

Medical Care and Mental Health:

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

Education and Educational Decisions:

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

Permanency Hearing Before Final Order

GOAL:

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

BURDEN OF PROOF:

Preponderance of the evidence.

BEST INTEREST:

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

- At each permanency hearing before a final hearing, the court shall make a finding on whether returning the child to the child's home is safe and appropriate, whether the return is in the *best interests* of the child, and whether it is contrary to the welfare of the child for the child to return home. [Tex. Fam. Code § 263.002 \(c\)](#). *See also* [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#).
- The court shall consult with the child if the child is four years of age or older and if the court determines it is in the child's *best interest*. [Tex. Fam. Code § 263.302](#).

ICWA:

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

If a tribe confirms (or a court finds) that a child is an "Indian child," DFPS must show by clear and convincing evidence, including qualified expert testimony, 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 rights is given, subject to a 20 day extension on request by a parent or tribe. The best practice is to set this hearing out at least 30 days to avoid the necessity of resetting the hearing. ICWA also requires that DFPS make "active efforts" to reunify among other legal requirements. Please see ICWA information in the Federal Law Issues Section.

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 Court of Continuing, Exclusive Jurisdiction (CCEJ) inquiry and determine if transfer is required;
- Request that the caseworker complete an Affidavit Regarding Military Service for any missing parent;
- Confirm DFPS has asked all persons about possible Native American heritage and the identity of any tribe;

- Calculate automatic dismissal date;
- 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 locate, and notify relatives and others regarding the removal;
 - Information on the child’s medical care; and visitation plan
 - Child Placement Resources form and any placement related documents
- Review proposed service plan for compliance with [Tex. Fam. Code § 263.102](#);
- 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); 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).

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:

- 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, and 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; transitional care issues; and

- For a child with Another Planned Permanent Living Arrangement (APPLA):
 - *a compelling reason why another plan is not in child's best interest,*
 - *whether DFPS has conducted an Independent Living Skills Assessment (ILSA),*
 - *whether DFPS has addressed the goals of the permanency plan, including a housing plan and the results of the ILSA;*
 - *For youth 16 or above, whether DFPS has provided required documents, [Tex. Fam. Code §§ 264.121\(e\)\(1\); 263.306\(a-1\)\(5\)\(H\)\(v\); and](#)*
 - *For youth 18 or above, or 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 state whether the child is placed with a relative or designated caregiver. [Tex. Fam. Code § 263.002 \(b\);](#)*
- Determine whether to return the child to the parents if it is safe and appropriate, in the child's best interest, or contrary to the welfare of the child. [Tex. Fam. Code § 263.002 \(c\);](#)
- Estimate a likely date for the child to be returned, adoption, or placed in permanent managing conservatorship;
- Retain jurisdiction and permit the child to transition home while the parents complete services or make a monitored return to parents.
- Set a subsequent permanency hearing date no later than 120 days later until a final order is rendered; and
- Announce in open court the automatic dismissal date and the date of any subsequent hearings. [Tex. Fam. Code § 263.306\(a-1\).](#)

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?
- 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?
- Are there any other plans or services needed to meet the child's special needs or circumstances?
- What are the parents' compliance with temporary orders and the service plan and the extent of their progress?
- How are the child/ren? 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?
- 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 made reasonable efforts to finalize the permanency plan, including the concurrent permanency goals (ex: what has CPS offered, rides, appointments, payment for services; 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?

Subsequent Permanency Hearing:

Before a final order, a subsequent hearing must be held within 120 days of the last permanency hearing (although it can be held sooner than 120 days). At such a hearing, the court reviews progress of the parents, the status of the child, and the goal of the Department. When requesting such a hearing, it is advisable to determine what progress is achievable within the time frame allowed.

Dismissal Date Strategies

Calculating the Automatic Dismissal Date

The dismissal clock begins to run on the date when the court first grants DFPS temporary managing conservatorship. Unless the court has commenced the trial on the merits on that dismissal date, with few exceptions a child protection suit filed by DFPS is *automatically dismissed* on the first Monday after the first anniversary of the date the court rendered an order appointing DFPS as temporary managing conservator. [Tex. Fam. Code § 263.401\(a\)](#). A calendar is the best resource to calculate the dismissal date.

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.

Know the Options

From the date DFPS is awarded temporary conservatorship, the viability of obtaining a final order in the allotted time should be assessed on an ongoing basis. Exceptions to the one-year limit are extremely limited, but important:

- **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\(b\)](#).
- **Monitored Return or Transition Monitored Return:** Alternatively, if the court finds retaining jurisdiction is in the child's best interest, the court may render a temporary order to:
 - Return the child to the parent or
 - Transition the child to the home while the parent completes necessary services specified in the temporary order; and
 - Order DFPS to remain as temporary managing conservator and to monitor the child's placement.

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

During this period, if a child must be removed from the parent's home or the court terminates a transition order, 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 new Section 263.403(a-1), the Court can order an additional six months for the parent to complete the service requirements specified in the temporary order during a Transition Monitored Return granted pursuant to Section 263.403(a)(2)(B), but only if no extension under Section 263.401 was already granted.

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

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

OR

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

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

Practice Tip: 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 Checklist

(For non-jury trial; from Children's Commission Bench Book)

Prior to Final Hearing:

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

At Hearing:

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

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

Best Practices:

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

Final Hearing

IMPORTANT: 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 and the suit will be automatically dismissed without a court order. [Tex. Fam. Code § 263.401](#).

GOAL:

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

BURDEN OF PROOF:

If termination of parental rights is requested, the burden of proof is “clear and convincing” evidence. If permanent managing conservatorship is requested, the standard is “preponderance of the evidence, unless ICWA applies, in which case the burden shifts beyond a reasonable doubt” and then the Qualified Expert Witness is required.

BEST INTEREST:

Please see Best Interest Tab, “Best Interest When Seeking Termination.” The focus at a termination trial is on [Tex. Fam. Code § 263.307: Factors in Determining Best Interest of Children](#) (including, but not limited to: child’s age and physical and mental vulnerabilities, frequency and nature of out-of-home placements, history of abusive or assaultive conduct by the child’s family or 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 (*Holley v. Adams*, 544 S. W. 2d 367 (Tex. 1976)). The attorney representing DFPS must prove at least one ground for termination plus best interest on a parent in order to meet the legal requirements for the court to find in favor of termination against that parent.

ICWA:

If ICWA applies, termination of parental rights requires proof beyond a reasonable doubt, including qualified expert testimony, 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 “active efforts” were made to reunify, as well as other requirements. Please see ICWA information in the Federal Law Issues Section.

PROSECUTOR PREPARATION:

This varies greatly depending on the relief requested, the evidence, and whether or not 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.

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 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 (1) that the child will be 18 years old in less than three years; (2) the child is 12 or older and has expressed a strong desire against termination and continuously expressed a strong desire against being adopted and (3) the needs and desires of the child.

[Tex. Fam. Code § 263.404.](#)

Transition Plan Requirements for Certain Youth

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

If the child is 14 or older: that DFPS has conducted an independent living skills assessment (ILSA) for the child as provided under Section 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 Section 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 Section 264.121 (e-1).

[Tex. Fam. Code § 263.4041.](#)

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

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. Before filing an amended petition, requesting an interlocutory default as to a missing parent may avoid notice or service problems. 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;
- 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") (see Federal Issues Section); and
- For an alleged father, evidence that the alleged father has not registered his paternity, or filed a paternity action or admission of paternity.

Answer Defaults vs. No-Answer Defaults

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

Entering Agreed Orders

Agreed Final Orders can be entered by a court when all parties agree on their own, or when agreement has been reached during settlement conference or in mediation. The order must provide for the permanent placement of the children, whether this be to return home, to be placed permanently with a relative as managing conservator, or by voluntary relinquishment of parental rights which allow the children to be adopted. All agreed orders must be dictated into the record and reflected by a final order. A subsequent order may be necessary to transfer PMC to relative.

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.

COURT ACTION:

The court may terminate parental rights on one or more grounds and/or name a Permanent Managing Conservator for the child.

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

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

AFTER THE COURT RENDERS A FINAL ORDER:

The prosecutor must:

- Prepare the judgment making sure: (1) to track the statutory language for the applicable termination grounds, which should be listed in the conjunctive; (2) to include the parental presumption language of [Tex. Fam. Code § 153.131](#), if applicable; and (3) 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** (if an associate judge heard the case) 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*; and
- **An accelerated appeal** must be filed within 20 days after the judgment or *order is signed*, subject to a possible 15 day extension.

For Assistance with Appeals:

A County or District Attorney may refer an appeal to the DFPS Appellate Unit by contacting Martha Garcia, at martha.garcia2@dfps.state.tx.us 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.state.tx.us.

Permanency Hearing After Final Order Checklist ***(From Children's Commission Bench Book)***

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 Hearing:

- Identify those present
- Child in attendance
- Review Dept 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 (ILSA) assessment
- 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:
 - in best interest of child; and

- likely to result in child's safe return to parent
- DFPS identified family or other caring adult with permanent commitment to child
- Address citizenship issues, consulate notified, SIJS
- Ensure those present given opportunity to be heard and if caregiver is present, must be allowed to provide information
- Confer with child about permanency plan
- Regular, ongoing opportunities to engage in age-appropriate normalcy activities

At End of Hearing:

- Issue court order
- Set next PH within 180 days

Best Practices:

- If inadequate notice, consider resetting hearing to secure attendance
- Engage parties with direct questions
- Engage youth
- Ask DFPS direct, child-specific questions about both primary and concurrent goal
- Next PH by 90 or 120 instead of 180 days
- For youth who will turn 18 while in care:
 - Discuss extended foster care and trial independence
 - Ensure referrals to Texas Workforce Commission
 - Ensure delivery of documents *before* leave care
- Youth advised of eligibility for Family Group Decision-Making or Circles of Support to discuss future plans
- Youth enrolled in Preparation for Adult Living Program (PAL) and provided transitional services after 14th birthday

Ask the following questions:

- *What is preventing this child from returning home today?*
- *How is my decision specific to this child and this family?*
- *Are there cultural issues we need to understand?*

Well-being issues at Permanency Hearing:

Medical Care and Mental Health:

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

Education and Educational Decisions:

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

Permanency Hearing After Final Order

GOAL:

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

BURDEN OF PROOF:

Preponderance of the evidence.

PROSECUTOR PREPARATION:

Before the hearing, the prosecutor must:

- 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;
 - court report was filed and provided to all parties;
- Verify DFPS arranged for child to attend the hearing unless specifically excused by the court or, for a child in TJJD custody, appearance in person, telephonic, or by video;
- Verify current information regarding educational decision-maker and any surrogate parent has been filed with the court; and
- Review the permanency progress report in preparation for the Court's review pursuant to [Tex. Fam. Code § 263.5031\(3\)](#) (below).

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;
- 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);
 - If a child is placed in institutional care, is this 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:
 - To place a child for adoption if parental rights are terminated, or
 - 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 photo copies) 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 photo copies) 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\(3\)\(E\)\(v\)](#);
 - Whether transition services are needed for a child age 14 and above;
 - 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;
 - Whether an education decision-maker has been appointed and school issues 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; and
 - Set another hearing in 6 months.

Practice Tip: Here are the documents and information 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).
-

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 Office of the Attorney General.

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

Paternity Registry

The Vital Statistics Unit (VSU) maintains a paternity registry. A man who wants to be notified of a proceeding for the adoption or the termination of parental rights regarding a child he may have fathered must register before the birth of the child or 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.

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.

Adjudicated Father

A man is an **Adjudicated Father** if:

- He has been adjudicated by a court to be the father of a child. Adjudication can be accomplished by an admission of paternity under penalty of perjury during a hearing. Also, a signed Acknowledgment of Paternity that has been filed with the Department 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.

Practice Tip: The Texas Legislature has recognized that in certain circumstances it may be in the best interest of the child not to have their paternity disrupted. The value of maintaining the child's relationship with the man identified to them as their father may prevent interested parties from litigating the issue, including denying a motion for genetic testing. See [Tex. Fam. Code §§ 160.607; 160.608; 160.609](#).

Child & 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 the Department 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.

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

		Multiple Family Adjusted Guidelines (% of Net Resources)						
		Number of Children Before the Court						
		1	2	3	4	5	6	7
Number of other children for whom the obligor has a duty to support	0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
	1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
	2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
	3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
	4	13.60	18.33	23.14	28.00	32.59	33.60	34.18
	5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
	6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
	7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

- 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](#).

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

Please refer to charts and tables in [Texas Family Code Chapter 154, Subchapter B](#) for computing net resources available for payment of child support; child support tax charts; definition of net resources, additional factors for the Court to consider; application of guidelines to net resources, computing support for children in more than one household, etc. This information will cover most child support matters as they arise in CPS cases.

Practice Tip: When child support is ordered, the court shall order that child support be payable through the state disbursement unit (SDU). *See* [Tex. Fam. Code § 154.004\(a\)](#). The Office of the Attorney General (OAG) monitors payment of child support through the SDU and if a delinquency occurs, the OAG has a right to seek enforcement of child support and may at some point initiate proceedings to enforce the payment of child support. Texas law requires the court to order that income be withheld from the disposable earnings of the obligor for the payment of child support. *See* [Tex. Fam. Code § 158.001](#). The OAG prescribes forms as authorized by federal law in a standard format entitled “Income Withholding for Support.” *See* [Tex. Fam. Code § 158.106\(a\)](#). The form is published in the [Texas Administrative Code, title 1, section 55.118](#). A copy of the form is available online at <http://www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-form>.

Relative and Kinship Placement Support

Financial Support for Kinship Caregivers Eligibility Requirements

RELATIVE OR OTHER DESIGNATED CAREGIVER ASSISTANCE PROGRAM (RODC)

Without PMC of the child - Monthly Reimbursement Payment and Medicaid

1. The child must be:

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

2. The caregiver must:

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

3. The caregiver's household income does not exceed

- 300% of poverty, as determined by federal poverty guidelines. (Caregivers with a family income greater than 300% are not eligible.)

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

1. The child must have been:

- previously in the managing conservatorship of DFPS; and
- placed in the home by DFPS.

2. The caregiver must:

- meet ALL of the requirements for caregivers without PMC (e.g., NOT be a licensed or verified foster caregiver);
- have obtained PMC of the child after September 1, 2017; and
- continue to comply with the signed caregiver assistance agreement.

3. The caregiver's household income does not exceed

- 300% of poverty, as determined by federal poverty guidelines. (Caregivers with a family income greater than 300% are not eligible.)

Permanency Care Assistance Program (PCA)

Requires caregiver to become a licensed/verified foster parent and obtain PMC of the child and includes one-time reimbursement of nonrecurring expenses, monthly payment, and Medicaid.

1. 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.

2. 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.

3. 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.

Older Youth in Foster Care

Please see [Tex. Fam. Code § 263.601 - 263.608](#).

How Extended Court Jurisdiction Works:

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).

Path 1 – Extended Foster Care

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 exits to Trial Independence (TI) which automatically extends up to 6 months. A court order is required to extend the TI up to 12 months. The young adult can choose to return to EFC during the TI period or at any time before age 21. During TI, he may or may not use TLS.

Path 2 – Trial Independence without Transitional Living Services

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

Path 2 – 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.

Child Turns 18 While in PMC or TMC

EFC
Agrees to Remain in Care
(Paid Placement)



Extended Foster Care Review Hearing
(every 6 months until age 21 or child leaves placement*)

* The court may extend its jurisdiction past the age of 21 for a child who is incapacitated and for whom the agency is seeking a guardian under the DADS program.



Child Returns to Paid Placement

TI
Leaves Paid Placement



Extended Foster Care Review Hearing
Only if Child Requests



Trial Independence Terminates
At end of 6 months unless extended by the court to 12 months or age 21 (whichever occurs first)

Young Adult may ask for Jurisdiction to continue and may ask for **Extended Foster Care Review Hearing**

Visitation for Children in Foster Care

Temporary Visitation Schedule

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

The Department 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 the Department is named temporary managing conservator of the child unless:

- the Department determines that visitation is not in the child’s best interest; or
- visitation with the parent would conflict with a court order relating to possession of or access to the child.” [Tex. Fam. Code § 262.115](#).

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

A schedule is not required for a child if:

- the court has made or will make a finding of aggravated circumstances; or
- the child has been abandoned without identification. [Tex. Fam. Code § 262.115](#).

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

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

Court Implementation of Visitation Plan

- After reviewing an original or amended visitation plan, the court shall render an order regarding a parent’s visitation with a child that the court determines appropriate.
- If the court finds that visitation between a child and a parent is not in the child’s best interest, the court shall render an order that:
 - states the reasons for finding that visitation is not in the child’s best interest; and
 - outlines specific steps the parent must take to be allowed to have visitation with the child.
- If the order regarding visitation between a child and a parent requires supervised visitation to protect the health and safety of the child, the order must outline specific steps the parent must take to have the level of supervision reduced. [Tex. Fam. Code § 263.109](#).

Indian Child Welfare Act (ICWA)

Authority:

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

State:

[Tex. Fam. Code §§ 262.201\(f\); 263.201\(f-1\); 263.306\(a-1\)\(3\)](#).

How are ICWA cases identified?

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

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

- Any party, tribe or agency informs the agency or court that the child is an Indian child;
- Any participant, officer of the court or agency involved in the proceedings informs the court it has discovered such information;
- The child gives the court reason to know he or she is an Indian child;
- The domicile or residence of the child, parent or Indian custodian is on a reservation;
- The court is informed the child is or has been a ward of a Tribal court; or

The court is informed either parent or the child has a Tribal membership card. [25 C.F.R. § 23.107\(c\)](#).

When Does ICWA Apply?

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

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

- An unmarried person under age 18 who is either a member of an Indian tribe *or*
- Eligible for membership and the biological child of a member. [25 U.S.C. § 1903\(4\)](#).

There are more than 500 federally recognized tribes and children from any of these tribes can be found in Texas. There are also three federally recognized tribes with reservations in Texas:

- Ysleta del Sur Pueblo, also known as the Tigua, in El Paso;
- Kickapoo Tribe of Texas, in Eagle Pass; and
- Alabama Coushatta Tribe of Texas near Livingston.

DFPS enjoys a good working relationship with each of these tribes. A child residing on a reservation has specific legal protections [25 U.S.C. § 1911\(a\)](#), and, in some cases, DFPS and the Tribe have a written protocol for handling these cases.

In every case, 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 history. The Court must also instruct the parties to inform the court of any such information that arises later. [25 C.F.R. § 23.107\(a\)](#).

If there is any indication of possible tribal family history, 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 case law summaries are available in the *Texas Practice Guide for CPS Attorneys*, Sections 4 and 13. Please see: http://www.dfps.state.tx.us/Child_Protection/CPS_Attorneys/default.asp.

Pleadings, Burden of Proof & Required Findings:

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

The burden of proof and standards for an order placing a child in foster care (in effect a removal) or a final order seeking permanent managing conservatorship or termination of parental rights are different than under the Texas Family Code. In summary, if ICWA applies the requirements are:

Foster Care Placement – Clear and Convincing Evidence

Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made by DFPS and proved unsuccessful. [25 U.S.C. § 1912\(d\)](#).

Termination of Parental Rights – Evidence Beyond a Reasonable Doubt

Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful. [25 U.S.C. § 1912\(f\)](#).

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

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

Who is a Qualified Expert Witness?

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. 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 protection case. If the record is silent, a party may raise the issue on appeal, and an appellate court may remand the case for purpose of making this finding. By far the most significant impact of failing to identify an ICWA case is that if key ICWA provisions are violated, *a final order can be invalidated*. The remedy for violation of key ICWA provisions is a petition to invalidate. [25 U.S.C. § 1914](#). Similarly, if there is not sufficient information in the record to assess whether ICWA applies, an appeal can be abated. Either way, permanency is delayed.

Interstate Placements (ICPC)

What is the ICPC?

If a child may be placed in another state, the Interstate Compact on the Placement of Children (“ICPC”) may require approval from that state. (See Chapter 162, Subchapter B of the Texas Family Code). 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.

When does the ICPC Apply?

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

When does the ICPC NOT Apply?

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

Practice Tip: The ICPC is not a fast process. The prosecutor can request a court order for an expedited ICPC in certain circumstances.

Placement with a Relative- Expedited Requests (Regulation 7)

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

- The proposed placement is with a parent (subject to non-custodial parent policy below), stepparent, grandparent, adult uncle or aunt, adult sibling, or legal guardian, *and one of the following criteria apply:*
 - The child was unexpectedly placed in foster care because the parent/guardian was recently incarcerated; is unable to care for the child due to a medical, mental, or physical condition; or is recently deceased;
 - The child or sibling being placed with the child is four years of age or younger;
 - The court finds that the child or sibling has a substantial relationship with the proposed placement; or
 - The child is currently in an emergency placement.

Placement with a Non-Custodial Parent

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

To address child safety in this circumstance, CPS policy requires the caseworker to assess an out-of-state parent without using the ICPC. 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.

Authority

8 U.S.C. § 1101(a)(27)(J)

8 C.F.R. § 204.11

United States Customs and Immigration Service Policy Manual, www.uscis.gov/policymanual

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 a foster child’s immigration status?

Federal law requires a predicate order from a family court (or other court with jurisdiction over the custody and care of juveniles such as a CPS proceeding) before a child can apply for SIJ. 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 SIJ orders should reference the facts underlying each finding.

In addition, USCIS construes “lack of viable reunification” to mean “that the court intends its finding that the child cannot reunify with 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. See *Texas Practice Guide for CPS Attorneys*, Section 13, Citizenship & Immigration Issues, DFPS Staff List.

School Stability Under Federal & State Law

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](#).

How are the court and other parties involved in education stability?

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

Servicemembers Civil Relief Act (SCRA)

Authority

50 U.S.C. §3901 et seq.

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

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

Missing Parent

If a parent has not appeared in a child custody suit, whether or not this is due to military service, DFPS must file An Affidavit of Military Service (available in the *Practice Guide for CPS Attorneys*, Section 13, Military). 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 at <https://scra.dmdc.ost.mil>. Note that a search requires a parent's date of birth, last name and first name or initial, and ideally, social security number.

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

Default Judgment

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

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

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

After Notice

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

Child Custody Protection

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

Foster Care & Education Checklist

School Readiness

- Children ages 0-3 assessed for Early Childhood Intervention (ECI) services.
- Children ages 0-5 enrolled in Early Head Start, Head Start, or Pre-Kindergarten.

School Stability

- Child enrolled in and has transportation to current school.
- Child remains in current school, regardless of additional placement changes.
- School changes occur at the end of grading periods.
- School changes do not conflict with standardized testing or final exams.

Education Decision-Making

- DFPS has conservatorship and designated an Education Decision-Maker (EDM).
- Parent retains or other person given specific education-related rights as appropriate.
- DFPS provided EDM Form 2085-E to child's school and information regarding the EDM given to others.
- Surrogate parent appointed to make decisions regarding special education if a foster parent is unwilling or unable to fulfill that role.

School Enrollment

- Child immediately enrolled in a new school if a change was required.
- Education record or credit transfer issues addressed by court as necessary.

School Placement and School Success

- What does the child say about school and where wants to attend?
- Child in an appropriate school.
- Child progressing academically and on grade level.
- Additional school supports addressed as needed.
- Child involved in extracurricular activities.
- Discipline issues addressed (truancy, suspension, expulsion, restraints).
- Caregiver signed annual form to prohibit corporal punishment at school.

Post-Secondary Education

- If the youth is at least grade 9, personal graduation plan created and graduation endorsement chosen (this is in addition to the Foundation High School Program in STEM, Business & Industry, Public Services, Arts & Humanities, or Multi-Disciplinary Studies).
- Child has a college or career plan.
- Child and his caregivers know about high school graduation requirements and how to prepare and apply for post-secondary education.

Special Education

- If needed, child evaluated for special education services.
- If eligible:
 - Date of child's last Admission, Review, and Dismissal (ARD) committee meeting.
 - Child has Individualized Education Program (IEP) that is current, appropriate, and in force.
 - Transition planning coordinated, beginning no later than age 14.

Human Trafficking Checklist

Has child been victim of sex trafficking?

- A person knowingly transported, enticed, recruited, harbored, provided, or otherwise obtained the child by any means:
 - Caused the child to engage in, or become the victim of, an enumerated sex offense;
 - Received a benefit from participating in a venture that involves an enumerated sex offense;
OR
 - Engaged in sexual conduct with a trafficked child
- Child under 18 years of age, regardless of trafficker's knowledge

What is child labor trafficking?

- A person knowingly:
 - Trafficked child with intent that the child engage in forced labor or services; OR
 - Received a benefit from participating in a venture that involves forced child labor or services including knowingly receiving forced child labor or services
- Child under 18 years of age, regardless of trafficker's knowledge

Under what circumstances will DFPS investigate trafficking?

- If a person traditionally responsible for child's care, custody, or welfare:
 - Compelled or encouraged the child to engage in sexual conduct including child sex trafficking, prostitution, or compelling prostitution;
 - Knowingly caused, permitted, encouraged, engaged in, or allowed a child to be trafficked for sex or labor; OR
 - Failed to make a reasonable effort to prevent the child from being trafficked for sex or labor

If child has been missing from foster care, were the following steps taken?

- DFPS made report:
 - To law enforcement and the National Center for Missing and Exploited Children (NCMEC) no later than 24 hours after learning a child is missing or abducted
- Within 24 hours of learning child missing or returned to care after missing, DFPS notified law enforcement, court, child's AAL and GAL, and parents (unless no known location, TPR, or relinquishment)
- While a child is missing, DFPS makes continuing efforts to locate the child including monthly contacts with law enforcement and former caregivers and supervisory-level review
- After a missing child returns to care, DFPS interviewed the child about why the child was missing, where the child stayed while missing, and whether the child was a victim of sex trafficking while missing

Are there any red flags to help identify child trafficking victims?

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

Medical & Mental Health Checklist

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

Eligibility

- All children in DFPS conservatorship and young adults in extended foster care or those young adults who have returned to foster care, up to age 22
- All youth who turned 18 in foster care and received healthcare through Medicaid (STAR Health or other), but who did not return to extended foster care, are covered under STAR Health or STAR Medicaid under the Affordable Care Act up to age 26

Information Required in DFPS Permanency Review Hearing Court Reports:

- Nature of any emergency medical care provided to child and circumstances necessitating care, include injury or acute illness of child
- All medical and mental health treatment child is receiving and child's progress with treatment (this includes ANY physical, dental, eye, immunization, and mental health issues)
- Any medication prescribed for child, condition, diagnosis, and symptoms for which medication was prescribed, and child's progress with medication
- For child receiving psychotropic medication:
 - Any psychosocial therapies, behavior strategies, or other non-pharmacological interventions provided to child
 - The child has seen or is seeing his/her prescribing physician, physician assistant or advanced practice nurse every 90 days
 - Degree to which child or foster care provider complied or failed to comply with any plan of medical treatment for child
 - Any adverse reaction to, or side effects of, any medical treatment provided to child
 - Any specific medical condition of child diagnosed or for which tests are being conducted to make diagnosis
 - Any activity child should avoid or engage in that might impact effectiveness of treatment, including physical activities, other medications, and diet
 - Other info required by DFPS or rule of court

Additional Requirements that Courts Should Monitor:

- Child has been provided the opportunity to comment on the medical care being provided
- DFPS has provided any parent who retains rights notice of initial prescriptions or changes in dosage
- Each AAL and GAL has reviewed the medical care
- Each AAL has elicited from client his/her view on the medical care being provided
- AAL has advised youth 16 and older of the right to request medical consent designation from the court
- Child received comprehensive, preventive health care checkup within 30 days of entering conservatorship
- If removed for sexual abuse, physical abuse, chronic medical condition, medically fragile or has a diagnosed mental illness, child must receive medical examination by the end of the third business day after the child is removed from the child's home

Additional Resources

All websites in this section were last visited in March 2018.

Texas Department of Family and Protective Services

For general information: www.dfps.state.tx.us

For the Texas Practice Guide for CPS Attorneys: http://www.dfps.state.tx.us/Child_Protection/CPS_Attorneys/default.asp

For general information about HOT DOCS document preparation software, please contact DFPS' Office of General Counsel at (512) 438-5606.

For assistance in the following subject matters, please see the DFPS Attorneys' expertise list linked here: http://www.dfps.state.tx.us/Child_Protection/CPS_Attorneys/documents/Section_14_Resources.pdf found on page 7 of the Resources Page in the DFPS Practice Guide.

Adoption Assistance (AA) and Permanency Care Assistance (PCA) agreed orders and administrative appeals

Adult Protective Services (APS) Issues

Alternative Response

CASA (Including IMPACT "Case Connection" access issues, MOU)

Child-care licensing issues and standards

Children's money issues: Social security benefits including SAPCR court order re: use of children's money);

Confidentiality--APS

Confidentiality--CPS

Criminal and abuse/neglect background checks

Education (including special education / IDEA, ECI, FERPA, Fostering Connections, provisions, McKinney –Vento Act regarding homeless)

Extended Foster Care

ICPC (Interstate Compact on the Placement of Children)

ICWA (Indian Child Welfare Act)

Immigration (children and in general)

International issues

Juvenile Justice Issues

Kinship/relative designated caregiver and associated programs or benefits, including Permanency Care assistance Agreements

Lawsuits and settlements for personal injury and wrongful death for children in conservatorship

Liaison with District and County Attorneys, Judiciary

Medicaid, including eligibility and services for children and adults

Medical issues, including Medicaid STAR Health, Health Passport, psychotropic meds, medical consent, substance abuse

Mental health (including involuntary commitment) and services for people with Intellectual and Developmental Disabilities

Prevention and Early Intervention (PEI)

Permanency Care Assistance

Records release

Subpoena-related issues

Trafficking

Trial and Appellate Practice and Procedure

Uniform Child Custody Jurisdiction and Enforcement Act

Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (Children’s Commission)

<http://texaschildrenscommission.gov/>

Email: children@txcourts.gov

The Texas Child Protection Law Bench Book is available at <http://texaschildrenscommission.gov/for-judges/bench-book/> in the following formats:

- Printable Version
- Online and Interactive
- Available by downloading the mobile application, LawBox:
 - Open the LawBox app
 - Select “The Texas Children’s Commission”
 - Enter “children” for both username and password; additional instructions are available.

Texas District and County Attorney’s Association

<http://www.tdcaa.com>

Appeals

Texas Department of Family & Protective Services: (512) 929-6819

Texas Courts of Appeal <http://www.txcourts.gov/cca/>

The Supreme Court of Texas <http://www.txcourts.gov/supreme/>

Adoption:

Texas Adoption Resource Exchange (TARE) www.dfps.state.tx.us/Adoption_and_Foster_Care/

http://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_TARE/Adoption/icpc.asp

Child Abuse Prevention & Advocacy:

American Bar Association Center on Children and the Law <http://www.abanet.org/child/>

American Bar Association Child Law Practice <http://www.abanet.org/child/clp/>

American Professional Society on the Abuse of Children <http://www.apsac.org/>

National Sexual Violence Resource Center <http://www.nsvrc.org>

Children's Defense Fund <http://www.childrensdefense.org>

Crimes Against Children Research Center <http://www.unh.edu/ccrc/>

National Association of Counsel for Children www.naccchildlaw.org

National Center for Missing and Exploited Children <http://www.missingkids.com>

National Clearinghouse on Child Abuse and Neglect Information <http://ndacan.cornell.edu>

Prevent Child Abuse Texas www.preventchildabusetexas.org

State Bar of Texas Committee on Child Abuse and Neglect www.texasbar.com

Texas Council of Child Welfare Boards www.tccwb.org

Texas District and County Attorneys Association www.tdcaa.com

Texas Lawyers for Children <http://www.texaslawyersforchildren.org>

Interstate Compact on Placement of Children (ICPC):

Association of Administrators of the ICPC <https://www.aphsa.org>: (202) 682-0100

Texas Dept. of Family & Protective Services: (512) 929-6819

Child Support:

Office of Attorney General www.oag.state.tx.us

Court Appointed Special Advocates:

National CASA <http://www.casaforchildren.org>

Texas CASA <http://www.texascasa.org>

Disability - Advocates & Information:

Disability Rights Advocates (formerly Advocacy Inc.) www.disabilityrightstx.org

Domestic Violence:

Texas Council on Family Violence www.tcfv.org

Education:

Texas Education Agency www.tea.state.tx.us/

Texas Homeless Education Office <http://www.utdanacenter.org/theo>

Hotlines:

National Domestic Violence Hotline <http://www.thehotline.org>

Texas Dept. of Family & Protective Services Abuse & Neglect www.txabusehotline.org

Texas Runaway Hotline: (888) 580-HELP (888) 580-4357

Texas Youth & Runaway Hotline www.dfps.state.tx.us/youth hotline: (800) 989-6884

Human Trafficking

Office of the Attorney General <https://www.texasattorneygeneral.gov/human-trafficking>

Office of the Governor <https://gov.texas.gov/organization/cjd/childsextrafficking>

Immigration & Citizenship:

Department of Homeland Security - *All immigration and border related issues formerly the responsibility of the INS are now under the authority of the Department of Homeland Security (DHS). The following divisions now handle:*

U.S. Citizenship & Immigration Services (CIS) - *immigrant services and benefits*

<http://www.uscis.gov/portal/site/uscis>

U.S. Immigration and Custom Enforcement (ICE) - *domestic investigative and enforcement*

<http://www.ice.gov>

U.S. Customs and Border Protection (CBP) - *border enforcement* <http://www.cbp.gov>

Human Rights Initiative <http://www.hrionline.org>

Immigration Legal Resource Center (*Special Immigrant Juvenile Status and general immigration resources*) www.ilrc.org

Indian Child Welfare Act:

Bureau of Indian Affairs <http://www.bia.gov>

National Congress of American Indians www.ncai.org

National Indian Child Welfare Association (NICWA) www.nicwa.org

[Texas Child Protection Law Bench Book: Indian Child Welfare Act \(ICWA\)](#)

International:

Hague Convention on Civil Aspects of International Child Abduction <https://www.hcch.net>

Hague Conference on Private International Law www.hcch.net

Hague Adoption Convention <http://adoption.state.gov>

Desarrollo Integral de la Familia (“DIF”) *Social services counterpart to DFPS in Mexico* <http://www.dif.cdmx.gob.mx/>

International Social Service *Resource for international home studies* www.iss-usa.org

U.S. Department of State

International Judicial Assistance (country specific information regarding service of process and related issues)

www.travel.state.gov/ (Select Law & Policy, then Information for Americans Abroad, then Judicial Assistance, then choose Country Specific information)

U.S. Department of State

Consular Notification and Access-guidance and contact information for foreign consuls <http://travel.state.gov/law>

(See International Travel; select A-Z Index, select Consular Notification & Access).

Judicial:

National Association of Drug Court Professionals <https://www.nadcp.org/>

National CASA Judge's Page http://www.casaforchildren.org/site/Judges_Page

National Center for State Courts <http://www.ncsc.org>

National Council of Juvenile & Family Court Judges www.ncjfcj.org

Texas Center for the Judiciary <http://www.yourhonor.com>

Legal Research:

National Conference of State Legislatures' Child Welfare Research <http://www.ncsl.org>

Texas Legislature Online <http://www.legis.state.tx.us>

Medical Research:

American Academy of Pediatrics <http://www.aap.org>

PubMed Central *A free digital archive provided by the U.S. National Institute of Health.*

www.pubmedcentral.nih.gov

Mental Health:

Nation Alliance on Mental Illness (NAMI): <http://www.nami.org>

Older Youth:

Texas Foster Youth Justice Project <http://texasfosteryouth.org/>

Texas Youth Connection <https://www.dfps.state.tx.us/txyouth/>

Paternity:

Texas Dept. of State Health Services Vital Statistics Unit <https://www.dshs.texas.gov/vs/>

Frequently asked questions about paternity and parentage:

<http://www.dshs.texas.gov/vs/reqproc/faq/paternity.shtm>

Office of Attorney General of Texas FAQ's on establishing paternity:

<https://texasattorneygeneral.gov/cs/establishing-paternity>

State and Federal Child Welfare Policy:

Administration for Children and Families Children's Bureau <http://www.acf.hhs.gov/programs/cb>

Texas Department of Family & Protective Services www.DFPS.state.tx.us

Substance Abuse:

National Alliance for Drug Endangered Children www.nationaldec.org

National Center for Substance Abuse and Child Welfare <https://ncsacw.samhsa.gov>

Substance Abuse and Mental Health Services Administration (SAMHSA) <http://www.samhsa.gov>

Trial Preparation:

Abusive Head Trauma (Shaken Baby Syndrome) National Institute of Neurological Disorders & Strokes <http://www.ninds.nih.gov>

The Shaken Baby Alliance www.shakenbaby.org: (877) 636-3727



