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# INVESTIGATIONS

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## Legal Overview of Investigations

Texas Family Code  
Title 5. The Parent-Child Relationship & the Suit Affecting the Parent-Child Relationship  
Chapter 261. Investigation of Report of Child Abuse or Neglect

The primary purpose of a Child Protective Services (CPS) investigation is to protect the child. CPS investigations are civil in nature and include an evaluation of the child's immediate safety and an assessment of future risk of abuse or neglect.

- A. Initiation of Investigations**
- B. Making a Report**
- C. Fourth Amendment Requirements in an Investigation**
- D. Orders in Aid of Investigation**

### A. Initiation of Investigations

Initiation of an investigation requires:

#### 1. Abuse, Neglect, Exploitation or the Risk of Abuse or Neglect

"Abuse" includes the following acts or omissions by a person:

- Mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- Causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- Physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

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- Failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;
  - Sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of a young child or children under [Tex. Penal Code § 21.02](#), indecency with a child under [Tex. Penal Code § 21.11](#), sexual assault under [Tex. Penal Code § 22.011](#), or aggravated sexual assault under [Tex. Penal Code § 22.021](#);
  - Failure to make a reasonable effort to prevent sexual conduct harmful to a child;
  - Compelling or encouraging the child to engage in sexual conduct as defined by [Tex. Penal Code § 43.01](#), including compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under [Tex. Penal Code § 20A.02\(a\)\(7\)](#) or [Tex. Penal Code § 20A.02\(a\)\(8\)](#), prostitution under [Tex. Penal Code § 43.02\(b\)](#), or compelling prostitution under [Tex. Penal Code § 43.05\(a\)\(2\)](#);
  - Causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by [Tex. Penal Code § 43.21](#) or pornographic;
  - The current use by a person of a controlled substance as defined by [Tex. Health & Safety Code Chapter 481](#), in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;
  - Causing, expressly permitting, or encouraging a child to use a controlled substance as defined by [Tex. Health & Safety Code Chapter 481](#);
  - Causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by [Tex. Penal Code § 43.25](#); or
  - Knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under [Tex. Penal Code § 20A.02\(a\)\(5\)](#), (6), (7) or (8), or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections.
  - Forcing or coercing a child to enter into a marriage. [Tex. Fam. Code § 261.001\(1\)](#).

"Neglect" includes:

- The leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;

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- The following acts or omissions by a person:
    - placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;
    - failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;
    - the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services have been offered and refused;
    - placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or
    - placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under [Tex. Fam. Code § 261.001\(1\)\(E\), \(F\), \(G\), \(H\), or \(K\)](#) committed against another child; or
  - The failure by the person responsible for a child's care, custody, or welfare to permit the child to return to the child's home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away.
  - A negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy. [Tex. Fam. Code § 261.001\(4\)](#).

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

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

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

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

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

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

“Exploitation” includes:

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

## **2. By a Person Responsible for a Child’s Care, Custody, or Welfare**

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

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## B. Making a Report

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

### 1. Call to the Hotline

An investigation of child abuse or neglect usually starts with a call to the hotline. The reporter may identify himself or remain anonymous, but the identity of the reporter is confidential. [Tex. Fam. Code § 261.201\(a\)\(1\)](#). However, a court may order disclosure of the identity of the reporter or the information obtained through the investigation. [Tex. Fam. Code § 261.201\(b\)](#).

### 2. Lay Person's Duty to Report

Any person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report. [Tex. Fam. Code § 261.101\(a\)](#).

In addition to the duty to report pursuant to [Tex. Fam. Code § 261.101\(a\)](#), a person must also report if the person has cause to believe that an adult was a victim of abuse or neglect as a child and the person determines in good faith that the disclosure of the information is necessary to protect the health and safety of another child. [Tex. Fam. Code § 261.101\(b-1\)](#).

### 3. Professional's Duty to Report

If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, the professional shall make a report no later than the 48th hour after the professional first suspects that the child has been abused or neglected. [Tex. Fam. Code § 261.101\(b\)](#).

A professional may not delegate to or rely on another person to make the report. [Tex. Fam. Code § 261.101\(b\)](#).

A professional who has the duty to report under [Tex. Fam. Code § 261.101\(b\)](#) must also report if the professional has cause to believe that an adult was a victim of abuse or neglect as a child and the professional determines in good faith that the disclosure of the information is necessary to protect the health and safety of another child. [Tex. Fam. Code § 261.101\(b-1\)](#).

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

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#### 4. Failure to Report

A person commits an offense if the person is required to make a report under [Tex. Fam. Code § 261.101\(a\)](#) and knowingly fails to make a report. [Tex. Fam. Code § 261.109\(a\)](#).

Failure to report when required is punishable as a Class A misdemeanor, except that the offense is a state jail felony if the child was a person with an intellectual disability who resided in a state supported living center or a facility licensed under [Tex. Health & Safety Code Chapter 252](#) and the actor knew the child suffered serious bodily injury. [Tex. Fam. Code § 261.109\(b\)](#).

A professional as defined by [Tex. Fam. Code § 261.101\(b\)](#) commits an offense if the person is required to make a report under [Tex. Fam. Code § 261.101\(b\)](#) and knowingly fails to make a report. [Tex. Fam. Code § 261.109\(a-1\)](#).

An offense under [Tex. Fam. Code § 261.109\(a-1\)](#) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect. [Tex. Fam. Code § 261.109\(c\)](#).

#### 5. Immunities

A person acting in good faith who reports or assists in an investigation is immune from civil or criminal liability that might otherwise be imposed. [Tex. Fam. Code § 261.106\(a\)](#).

#### 6. False Reports

Knowingly making a false report is punishable as a state jail felony, unless it is shown that the person has previously been convicted under this section, in which case the offense is a third-degree felony and carries a civil penalty of \$1,000. [Tex. Fam. Code § 261.107\(a\)](#) and [Tex. Fam. Code § 261.107\(e\)](#).

### C. Fourth Amendment Requirements in an Investigation

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

#### 1. Consent

An evaluation of consent is based on the totality of the circumstances and under a standard of objective reasonableness. Silence or passivity cannot form the basis of consent to enter. Also, mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent. Once consent is given, the consent may be limited, qualified, or withdrawn. *Gates*, [537 F.3d at 420](#).

#### 2. Court Order

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

### **3. Exigent Circumstances**

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

### **4. Anonymous Tip**

If the Department receives an anonymous report of child abuse or neglect, the Department shall conduct an investigation to determine whether there is any evidence to corroborate the report. [Tex. Fam. Code § 261.304](#). The tip must be corroborated through a preliminary investigation that can include an interview of the child's teachers or peers, an interview of the child at the school, or by looking for injuries on the child without removing any of the child's clothing. An investigation can include a visit to the child's home unless the alleged abuse or neglect can be confirmed or clearly ruled out without a home visit, an interview with and examination of the child, and an interview with the child's parents. [Tex. Fam. Code § 261.304\(b\)](#).

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

### **5. Taking Child Into Separate Room for an Interview**

Like a *Terry* stop [[Terry v. Ohio, 392 U.S. 1, 21-22 \(1968\)](#)], all that is required [to take a child into a separate room for an interview] is a reasonable suspicion of abuse or neglect so long as the interview is no more intrusive than necessary. [Gates, 537 F.3d at 434](#).

### **6. Transporting a Child from School to Another Location for an Interview**

Before transporting a child for an interview, DFPS must first attempt to notify the parent or other person having custody of the child. [Gates, 537 F.3d at 429](#). Absent consent to transport, DFPS may obtain a court order. Although there is currently no express statutory provision authorizing such an order, [Tex. Fam. Code § 261.303](#) may be applicable. According to the holding in [Gates](#), in order to transport a child from a public school for an interview absent a court order or consent, a caseworker must have a reasonable belief that the child has been abused and probably will be abused again upon his return home at the end of the school day. [Gates, 537 F.3d at 439](#).

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

## D. Orders in Aid of Investigation

### 1. Interference

A person may not interfere with a DFPS investigation of a report of child abuse or neglect. [Tex. Fam. Code § 261.303\(a\)](#).

The court may also prohibit the removal of the child from the state during an investigation if the court:

- Finds that DFPS has probable cause to conduct the investigation; and
- Has reason to believe that the person may remove the child from the state. [Tex. Fam. Code § 261.306\(b\)](#).

Contumacious refusal to submit to orders in aid of investigation may be grounds for termination of parental rights in a subsequently filed suit affecting the parent-child relationship. [Tex. Fam. Code § 161.001\(b\)\(1\)\(I\)](#).

### 2. Court Orders

If DFPS requests the information below, but is not allowed access, then the court having family law jurisdiction and for good cause shall order:

- Admission to the home, school, or place where a child may be for the interview, examination, and investigation, [Tex. Fam. Code § 261.303\(b\)](#);
- A child's physical, psychological, or psychiatric examination or the release of related medical records, [Tex. Fam. Code § 261.303\(c\)](#); or
- A parent or caregiver's medical or mental examination and/or access to related records. [Tex. Fam. Code § 261.305\(b\)](#).

If the court determines that the parent or person is indigent, then the court shall appoint an attorney at the hearing relating to the examination or release of medical records under this section. [Tex. Fam. Code § 261.305\(c\)](#).



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Special Issue: Although not required by statute, some courts require an affidavit to support a motion for an order in aid of investigation. Courts might also consider requiring the making of a record, if DFPS requests an order in aid of investigation without an affidavit or a motion for the order.

Courts might consider the following when requested to issue an order in aid of investigation:

- Jurisdiction is proper in the court because the child is located in the jurisdiction of the court or the court has continuing jurisdiction.
- DFPS has filed an application seeking an order in aid of investigation and has shown good cause for a court order because:
  - DFPS cannot access the child;
  - DFPS cannot obtain medical, psychiatric, or psychological records of the child;
  - DFPS cannot obtain consent by the parent or caregiver of the child for a medical, psychological, or psychiatric examination; or
  - the parent or caregiver refuses to cooperate with the investigation and refusal poses a risk to the child's safety.