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# BEST INTEREST

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

## A. Factors in Determining Best Interest of Children

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

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

## B. Hearings Requiring a Best Interest Determination

### The Adversary Hearing

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

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

### Permanency Hearings before a Final Order

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

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

*When determining whether to meet a child:*

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

## C. Court Decisions Requiring a Best Interest Determination

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

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

*Denying a parent visitation:*

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

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

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

*Extending the dismissal date:*

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

*Ordering a monitored return:*

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

## **D. DFPS Decisions That Must Consider Best Interest**

*When considering placement:*

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

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

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

### DESIRES OF CHILD;

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

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

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

### PARENTAL ABILITIES;

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

### PROGRAMS AVAILABLE TO ASSIST PARENTS;

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

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

**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)

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**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.**