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# LEGAL ESSENTIALS

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SERVICE OF CITATION

PATERNITY

BEST INTEREST

BURDEN OF PROOF

EVIDENCE

EXTENDED FOSTER CARE

CONTEMPT



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# SERVICE OF CITATION

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## A. Service of Citation

In lawsuits filed by DFPS, the agency is responsible for obtaining service of citation containing the original petition and providing notice of trial settings and other events during the pendency of the legal case. Citation on the filing of an original petition in a SAPCR shall be issued and served “as in other civil cases.” [Tex. Fam. Code § 102.009\(c\)](#). However, most courts do not require service on all those entitled to service before proceeding with the Adversary Hearing. The court may proceed with temporary orders prior to any required service by publication. [Tex. Fam. Code § 262.201\(o\)](#).

### 1. Parties to be Served

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

- Each parent (including an alleged father), unless the parent’s rights are terminated, or a parent signs a waiver of service;
- A managing or possessory conservator, guardian, or other person with court-ordered access to the child;
- A prospective adoptive parent with standing or a conservator designated in an affidavit of relinquishment; and
- The Texas Attorney General’s Office or any other child-support agency (if child-support payments may be affected). See [Tex. Fam. Code § 102.009\(a\)](#); [CPS Policy Handbook § 5230](#) Service by Citation.<sup>14</sup>

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

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

### 2. DFPS Must Make a Diligent Effort to Locate Parent and Relatives

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

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

If a missing parent is believed to be living in a foreign country, DFPS must ask family members in the United States for contact information, contact the consulate of that country, and request assistance in locating the parent. If a missing parent is believed to be living in Mexico, DFPS must follow policies outlined in § 5233.61 of the CPS Policy Handbook. [See CPS Policy Handbook § 5233.33](#) Searching for Residents of a Foreign Country.<sup>15</sup>

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### 3. Relative Defined for Diligent Search Purposes

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

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

### 4. Citation by Publication and Diligent Search

Once DFPS has made the effort and has been unsuccessful, DFPS can file a Motion to Cite by Publication under [Tex. R. Civ. P. 109](#).

[Tex. R. Civ. P. 109](#) requires that before citation by publication can be issued by the clerk, the petitioner must file an affidavit of due diligence. That rule also requires the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the known parent who cannot be located, before granting any judgment on such service.

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

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## B. Notice

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

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**Special Issue:** *Service of citation is required upon the filing of an original petition to give named parties notice of the suit. DFPS should include notice of any upcoming scheduled hearings, such as the adversary hearing, with the citation to comply with the requirement that all persons entitled be given 10 days’ notice of a hearing. [Tex. Fam. Code § 263.0021\(b\)](#). In addition to giving notice of a hearing along with service of citation, notice may be given in a temporary order following a full adversary hearing, in an order following a hearing under [Tex. Fam. Code Chapter 263](#), in open court, or in any manner that would provide actual notice to a person entitled to notice. [Tex. Fam. Code § 263.0021\(c\)](#).*

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## 1. The Right to Notice

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

## 2. Methods of Providing Notice of Hearing

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

Once citation is complete and a return of service is on file, notice may be served by delivering a copy to the party to be served, or the party’s duly authorized agent or attorney of record, as the case may be, electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager or in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

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

## 3. Information Provided to Relatives and Certain Individuals; Investigation

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

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

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

The written notice must include:

- A statement that the child is in the state’s custody;
- Options available for participation in the care and placement and support of the family;
- Options that may be lost if the individual fails to timely respond; and

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- The date, time, and location of the Status Hearing, if known. [Tex. Fam. Code § 262.1095\(b\)](#).

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

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

#### **4. Report Regarding Notification of Relatives**

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

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

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

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

[Tex. Fam. Code § 107.0141](#) allows the court to appoint an attorney for a parent whenever the SAPCR is filed, but if a parent's first appearance is at the Adversary Hearing and the parent requests the appointment of an attorney, then the court shall require the parent to complete and file with the court an affidavit of indigence. The court may consider additional evidence to determine whether the parent is indigent, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the appointment of an attorney for the parent is requested, the court shall make a determination of indigence before commencement of the full Adversary Hearing. If the court determines the parent is indigent, the court shall appoint an attorney to represent the parent. [Tex. Fam. Code § 262.201\(c\)](#).

#### **6. Foreign Consulates**

When DFPS takes possession of a child who was born in another country who is not a U.S. citizen, DFPS must notice the foreign consul of the country of which the child is a citizen. See [CPS Policy Handbook § 6715](#) Working with the Foreign Consulate.<sup>16</sup>

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

- Complete [Form 2650](#), Letter to Foreign Consulates;

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- Send the completed form to the designated consulate by mail, return receipt requested, or by fax and include the confirmation notice when filing it with the court; and
  - Send a copy of the notice to the attorney representing DFPS.

Caseworkers should contact the DFPS Immigration Specialist for consular office contact information. [CPS Policy Handbook § 6715.1](#) Giving Notice to a Foreign Consulate.<sup>17</sup>





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# PATERNITY

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## A. The Establishment of the Parent-Child Relationship

### 1. The Mother-Child Relationship

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. [Tex. Fam. Code § 160.201\(a\)](#).

### 2. The Father-Child Relationship

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 under [Tex. Fam. Code § 160.204](#);
- An effective acknowledgment of paternity under [Tex. Fam. Code 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 [Tex. Fam. Code Subchapter H](#), which has resulted in the birth of the child. [Tex. Fam. Code § 160.201\(b\)](#).

### 3. Types of Fathers

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

## B. Presumed Father

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;

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- 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\(a\)](#).

A presumption of paternity may be rebutted only by:

- An adjudication under [Tex. Fam. Code Subchapter G](#); or
- The filing of a valid denial of paternity by a presumed father, pursuant to [Tex. Fam. Code § 160.303](#), in conjunction with the filing by another person of a valid acknowledgement of paternity as provided by [Tex. Fam. Code § 160.305](#). [Tex. Fam. Code § 160.204\(b\)](#).

## C. Alleged Father

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. [Tex. Fam. Code § 160.402\(a\)](#).

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 alleged father can testify in open court and ask the court to establish paternity.

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- 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.

## D. Acknowledged Father

A man is an Acknowledged Father if:

- He has executed an Acknowledgement of Paternity (AOP) pursuant to [Tex. Fam. Code § 160.302](#). A valid AOP filed with the Vital Statistics Unit (VSU) is the equivalent of an adjudication of paternity.

## E. 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 of a child by filing a pleading to that effect or by admitting paternity under penalty of perjury during a hearing. [Tex. Fam. Code § 160.623](#).
- Also, a valid Acknowledgment of Paternity that has been filed with the vital statistics unit is the equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent. [Tex. Fam. Code § 160.305\(a\)](#).

## F. Paternity Registry

The 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. [Tex. Fam. Code § 160.402\(a\)](#). The registrant has the responsibility of keeping his information current with the bureau. [Tex. Fam. Code § 160.402\(c\)](#). 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. [Tex. Fam. Code § 160.403](#). Registering with the paternity registry also establishes a basis for personal jurisdiction of a person who is not a Texas resident. [Tex. Fam. Code § 159.201\(a\)\(7\)](#) and [Tex. Fam. Code § 160.604](#).

If no father-child relationship can be established or if a father-child relationship has been established, but the father has not been served with citation and has not signed a relinquishment of parental rights with regard to the child, and DFPS seeks termination of parental rights or adoption, DFPS must obtain a certificate of the results of a search of the paternity registry. [Tex. Fam. Code § 160.421](#) and [Tex. Fam. Code § 160.422\(d\)](#). If DFPS has reason to believe that conception or birth of the child have may occurred in another state, DFPS must obtain a certificate from paternity or putative father registry of that state. [Tex. Fam. Code § 160.421\(b\)](#). DFPS must file the certificate of the results of a search of the registry with the court before a proceeding for the adoption of or termination of parental rights regarding a child may be concluded. [Tex. Fam. Code § 160.422\(c\)](#).

The VSU shall furnish a certificate of the results of a search of the registry on request by an individual, a court, or an agency listed in [Tex. Fam. Code § 160.412\(b\)](#). [Tex. Fam. Code § 160.422\(a\)](#). The

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certificate of results of the search must be signed on behalf of the unit and state that a search has been made of the registry and the registration containing the information required to identify the registrant has been found and attached to the certificate or has not been found. [Tex. Fam. Code § 160.422\(b\)](#).

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# BEST INTEREST

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The best interest of the child shall always be the **primary consideration** of the court in determining the issues of conservatorship and possession of and access to the child (emphasis added). [Tex. Fam. Code § 153.002](#).

## A. Factors in Determining Best Interest of Children

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

- Desires of the child;
- Emotional and physical danger to child now and in future;
- Parental abilities;
- Programs available to assist parents;
- Plans for the child by individuals or agency seeking custody;
- Stability of home or proposed placement;
- Any acts or omissions of a parent indicating the relationship is not proper; and
- Any excuse for the acts or omissions of a parent. *Holley v. Adams*, 544 S. W. 2d 367 (Tex. 1976)

Factors in determining the best interest of the child include, but are not limited to:

- Child's age and physical and mental vulnerabilities;
- Frequency and nature of out-of-home placements;
- History of abusive or assaultive conduct by the child's family or others with access to home;
- History of substance abuse by child's family or others with access to home;
- Whether the perpetrator of the harm to child has been identified; and
- For children 16 years of age or older, whether the permanency plan includes services to help the child transition from foster care to independent living. See [Tex. Fam. Code § 263.307](#).

In considering the factors established by [Tex. Fam. Code § 263.307](#), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

## B. Hearings Requiring a Best Interest Determination

### 1. The Adversary Hearing

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**a. When considering placement with relative:**

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

**2. Permanency Hearing Before a Final Order**

**a. When determining whether to meet with 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](#).

**b. When determining whether to send a child home:**

- At each Permanency Hearing before a final order is rendered, the court shall make a finding on whether the child's parents are willing and able to provide the child with a safe environment and whether the return of the child is in the child's best interest. [Tex. Fam. Code § 263.306\(a-1\)\(6\)](#). See also [Tex. Fam. Code § 263.002\(c\)](#).

## **C. Court Decisions Requiring a Best Interest Determination**

**1. 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](#).

**2. Denying a parent visitation:**

- If the court finds that visitation between a child and a parent is not in the child's best interest, the court shall render an order that:
  - states the reasons for finding that visitation is not in the child's best interest; and
  - outlines specific steps the parent must take to be allowed to have visitation with the child. [Tex. Fam. Code § 263.109\(b\)](#).

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

**4. Extending the dismissal date considerations:**

- Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after one year unless the court finds that extraordinary circumstances necessitate the child remaining in the Temporary Managing Conservatorship (TMC) of the

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department and that continuing TMC is in the best interest of the child. [Tex. Fam. Code § 263.401\(b\)](#).

**5. Ordering a monitored return:**

- The court may find 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**

**1. When considering placement:**

- In selecting a placement for a child, DFPS shall consider whether the placement is in the child's best interest. In determining whether a placement is in a child's best interest, DFPS shall consider whether the placement:
  - is the least restrictive setting for the child;
  - is the closest in geographic proximity to the child's home;
  - is the most able to meet the identified needs of the child; and
  - satisfies any expressed interests of the child relating to placement, when developmentally appropriate. [Tex. Fam. Code § 264.107\(c\)](#).

**2. When assessing a relative or designated placement:**

- Before placing a child with a proposed relative or other designated caregiver, DFPS 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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# BURDEN OF PROOF

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

The standard “ordinary prudence and caution” requires a minimal showing of evidence, less than a preponderance but enough to persuade a reasonable person, similar to the “probable cause” required for a search warrant. This burden of proof applies to:

- Hearing on a request for court ordered participation. [Tex. Fam. Code § 264.203](#).
- Ex Parte Removal Hearing. [Tex. Fam. Code § 262.101](#);
- Taking Possession of a Child in Emergency Without a Court Order. [Tex. Fam. Code § 262.104](#); and
- Full Adversary Hearing. [Tex. Fam. Code § 262.201](#).

## B. Preponderance of the Evidence

To show a “preponderance of evidence” is to have evidence that is of greater weight or is more convincing than the evidence that is offered in opposition to it. A metaphor to illustrate the concept of preponderance is the scales of justice rising slightly higher on one side; that is enough to meet the standard of “preponderance of the evidence.” It is the standard of proof which is generally used in civil cases. This burden applies to:

- 60 Day Status Review. [Tex. Fam. Code § 105.005](#);
- Permanency Hearing before Final Order. [Tex. Fam. Code § 105.005](#);
- Final Order Awarding Permanent Managing Conservatorship (PMC) (without termination). [Tex. Fam. Code § 105.005](#);
- Permanency Hearing after Final Order. [Tex. Fam. Code § 105.005](#);
- Adoption Hearing. [Tex. Fam. Code § 105.005](#); and
- Hearing on reinstatement of parental rights. [Tex. Fam. Code § 161.303](#).

## C. Clear and Convincing

To meet a “clear and convincing” burden of proof is to show 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. It is greater than a “Preponderance of the Evidence” but not as much as “Beyond a Reasonable Doubt.” The burden applies to:

- Termination of parental rights when the Indian Child Welfare Act (ICWA) does not apply. [Tex. Fam. Code § 161.001](#); and

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- An order placing a child in foster care under (ICWA). [25 U.S.C. § 1912\(e\)](#).

## **D. Beyond a Reasonable Doubt**

The standard “beyond a reasonable doubt” is met when the trier of fact is fully satisfied, or entirely convinced that something occurred. The burden applies to:

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

The “beyond a reasonable doubt” standard which applies in ICWA cases is the highest standard of proof in a termination of parental rights case under Texas law, signaling the weight of this decision on the trier of fact.

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# EVIDENCE

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Cases involving child abuse and neglect present evidentiary issues and procedures unique to this area of the law. This chapter will provide an overview of statutory provisions related to child welfare cases.

## A. Applicability of Rules of Evidence

Unless otherwise provided, the Texas Rules of Evidence apply as in other civil cases. [Tex. Fam. Code § 104.001](#).

## B. Facilitating Child Testimony at Trial

### 1. Prerecorded Statement of Child

If a child 12 years of age or younger is alleged in a suit under [Tex. Fam. Code Title 5](#) to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:

- No attorney for a party was present when the statement was made;
- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- The statement was not made in response to questioning calculated to lead the child to make a particular statement;
- Each voice on the recording is identified;
- The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
- Each party is afforded the opportunity to view the recording before it is offered into evidence. [Tex. Fam. Code § 104.002](#).

### 2. Prerecorded Videotaped Testimony of the Child

On the motion of a party to the proceeding, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding. [Tex. Fam. Code § 104.003\(a\)](#).

Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony. [Tex. Fam. Code § 104.003\(b\)](#).

Only the attorneys for the parties may question the child. [Tex. Fam. Code § 104.003\(c\)](#).

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The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them. [Tex. Fam. Code § 104.003\(d\)](#).

The court shall ensure that:

- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and not altered;
- Each voice on the recording is identified; and
- Each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom. [Tex. Fam. Code § 104.003\(e\)](#).

### **3. Remote Televised Broadcast of Testimony of Child**

If in a suit a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties. [Tex. Fam. Code § 104.004\(a\)](#).

The procedures that apply to prerecorded videotaped testimony of a child pursuant to [Tex. Fam. Code § 104.003](#) apply to the remote broadcast testimony of a child. [Tex. Fam. Code § 104.004\(b\)](#).

### **4. Substitution for In-Court Testimony of Child**

If the testimony of a child is taken as provided by [Tex. Fam. Code Chapter 104](#), the child may not be compelled to testify in court during the proceeding. [Tex. Fam. Code § 104.005\(a\)](#).

The court may allow the testimony of a child of any age to be taken in any manner provided by [Tex. Fam. Code Chapter 104](#) if the child, because of a medical condition, is incapable of testifying in open court. [Tex. Fam. Code § 104.005\(b\)](#).

### **5. Hearsay Statement of Child Abuse Victim Can Be Allowable**

In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

- The child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
- The court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child. [Tex. Fam. Code § 104.006](#).

### **6. Case Law**

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**a. Admissibility of videotaped statement of a child**

“To determine whether it is necessary to use [a] videotape in lieu of [a] child’s testimony in order to protect [their] welfare, the trial court should hear evidence regarding the specific child witness, the child’s welfare at the time of trial, and the circumstances making it necessary to use the statement rather than the child’s testimony in court or by alternative means such as closed-circuit television.” *In re S.P.*, 168 S.W.3d 197, 208 (Tex.App.–Dallas 2005, no pet.).

“Regardless of admissibility of [a] videotaped statement under [Tex. Fam. Code § 104.002](#), that section does not authorize the trial court to admit [child’s] videotaped statement in lieu of [their] testimony at trial without requiring the Texas Department of Family and Protective Services to make the child available to testify.” *In re S.P.*, 168 S.W.3d 197, 209-210, (Tex.App.–Dallas 2005, no pet.).

**b. Age of child when statement is made**

[Tex. Fam. Code § 104.006](#), which applies to statements made by a child 12 years of age or younger, conditions the age of the child on when the statements were made, not on when the trial court later determines the admissibility of the child’s statements at trial. *In re K.L.*, 91 S.W.3d 1, 15 (Tex.App.—Fort Worth 2002).

**c. Child testimony by alternative means is a case-by-case determination**

An exception “to the right of face-to-face confrontation exists when the State shows that a special procedure is necessary to protect child witnesses from the trauma of testifying in court...The determination of whether such alternative forms of testimony are necessary should be made on a case-by-case basis. In making such a determination, courts should consider whether: (1) use of a video is necessary to protect the welfare of the child; (2) the trauma to the child comes from exposure to the abuser, rather than from the courtroom generally; and (3) the emotional distress to the child would be more than minimal.” *In re R.V.*, 977 S.W.2d 777, 781 (Tex.App.—Fort Worth 1998, no pet.).

**d. Nonverbal communication during a child interview**

“[...] questions directed to a child must be open-ended and not suggestive of a response.” Additionally, an interviewer’s nonverbal communication may not contribute to the making of a particular statement. *James v. Texas DHS*, 836 S.W.2d 236, 239-241, (Tex.App.—Texarkana 1992, no writ.).

**e. Confrontation Clause**

“[A] statement cannot fall within the Confrontation Clause unless the primary purpose [of the statement] was testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. [Additionally,] statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. *Ohio v. Clark*, 576 U.S. 237, 238, 248-249 (2015).

**f. Statement of Abuse**

“The determination that a child had suffered significant emotional difficulty due to her parents’ continuous fighting, drug use, lack of food and care, and spanking or slapping of the child was sufficient for the trial court as the factfinder to have determined that the incidents together rose to the

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level of abuse.” *In re E.M.*, 494 S.W.3d 209, 218 (Tex.App.—Waco 2015, pet. denied) (allowing therapist testimony about statements child made to her).

A child’s testimony about parent’s drug use, how the child was placed in charge of a younger sibling, how the family found their food in dumpsters, how the family drove around at night to try to find a place to sleep, and how the children were spanked with belts, fell within the definition of abuse under [Tex. Fam. Code § 261.001\(1\)](#) for the purposes of [Tex. Fam. Code § 104.006](#). *In re M.R.*, 243 S.W.3d 807, 812 (Tex. App.—Fort Worth 2007, no pet.).

#### **g. Reliability of Statement**

“The analysis provided in case law relating to [Tex. Crim. Proc. Code Art. 38.072](#) is an appropriate guide for courts to follow in determining reliability [of a statement] pursuant to [Tex. Fam. Code § 104.006](#)...In making its determination of reliability pursuant to [Tex. Fam. Code § 104.006](#), just like in [Tex. Crim. Proc. Code Art. 38.072](#),[...] the focus of the inquiry must remain upon the outcry statement, not the abuse itself. A child’s outcry statement may be held reliable pursuant to [Tex. Crim. Proc. Code Art. 38.072](#) even when it contains vague or inconsistent statements about the actual details of the sexual abuse...[T]he same [is] true as it relates to [Tex. Fam. Code § 104.006](#).” *In re E.M.*, 494 S.W.3d 209, 218 (Tex.App.—Waco 2015, pet. denied).

A child's statements introduced in a caseworker's report were not reliable because the report did not describe the circumstances of the interview, including who was present. Additionally, there was no evidence of whether the child was asked leading questions or allowed to tell what happened to her, and there was no evidence that the child understood the difference between truth and lies. *In re E.A.K.*, 192 S.W.3d 133, 146-147 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[Tex. Fam. Code § 104.006](#) “is the civil analogue of [Tex. Crim. Proc. Code Art. 38.072](#) ..., [and courts can use] the same type of analysis [when applying [Tex. Fam. Code § 104.006](#)]...The reliability referred to in [Tex. Crim. Proc. Code Art. 38.072](#) is the reliability of the child’s declaration, not the witness relaying the child’s declaration.” *In re M.R.*, 243 S.W.3d. 807, 813-814, (Tex.App.—Fort Worth 2007, no pet.).

#### **h. Admissibility of videotaped statement of a child**

“[Tex. Fam. Code § 104.006](#) does not require the trial court to make a finding that the witness’ statement in lieu of the child’s testimony is necessary to protect the child’s welfare if the child does not testify...Only if a child is *unavailable* to testify is the trial court required to make a finding that admission of the witness’ statement in lieu of the child’s testimony is necessary to protect the child’s welfare.” *In re K.L.*, 91 S.W.3d 1, 16 (Tex.App.—Fort Worth 2002).

### **C. Video Testimony of Certain Professionals**

In a proceeding brought by DFPS concerning a child who is alleged in a suit to have been abused or neglected, the court may order that the testimony of a professional be taken outside the courtroom by videoconference:

- On the agreement of the department’s counsel and the respondent’s counsel; or
- If good cause exists, on the court’s own motion. [Tex. Fam. Code § 104.007\(b\)](#).

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In ordering testimony to be taken as provided by [Tex. Fam. Code § 104.007\(b\)](#), the court shall ensure that the videoconference testimony allows:

- The parties and attorneys involved in the proceeding to be able to see and hear the professional as the professional testifies; and
- The professional is able to see and hear the parties and attorneys examining the professional while the professional is testifying. [Tex. Fam. Code § 104.007\(c\)](#).

Professional means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. [Tex. Fam. Code § 104.007\(a\)](#); [Tex. Fam. Code § 261.101\(b\)](#).

If the court permits the testimony of a professional by videoconference as provided by [Tex. Fam. Code § 104.007](#) to be admitted during the proceeding, the professional may not be compelled to be physically present in the court during the same proceeding to provide the same testimony unless ordered by the court. [Tex. Fam. Code § 104.007\(d\)](#).

## **D. Testimony from Forensic Assessment Center Network (FACN)**

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

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

The FACN requires consultations with physicians who are board certified in a relevant field or specialty, including radiologists, geneticists, orthopedists, and endocrinologists. Physicians must also have experience in diagnosing treating certain specific conditions such as rickets, Ehlers-Danlos Syndrome, and other medical conditions that mimic child maltreatment or increase the risk of misdiagnosis of child maltreatment. [Tex. Fam. Code § 261.3017\(b\)](#). More information about referrals to the FACN is available in [CPS Policy Handbook §2232](#) and the [DFPS Forensic Assessment Center Network \(FACN\) Resource Guide](#).<sup>18</sup>

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

An exigent removal of a child may not be based solely on the opinion of a medical professional under contract with DFPS who did not conduct a physical examination of the child. However, if the physician

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who conducted the physical examination and the FACN physician both agree that abuse or neglect occurred, both opinions may be used for an emergency removal. [CPS Policy Handbook § 2232.5](#).<sup>19</sup>

## **E. Allegations of Abuse and Neglect and Attorney-Client Privilege**

### **1. General Duty to Report**

A person having reasonable 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\(a\)](#).

### **2. Mandatory Reporters**

If a professional with reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under [Tex. Penal Code § 21.11](#), and the professional has reasonable cause to believe that the child has been abused as defined by [Tex. Fam. Code § 261.001](#), the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under [Tex. Penal Code § 21.11](#). [Tex. Fam. Code § 261.101\(b\)](#).

The requirement to report child abuse and neglect 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\(c\)](#).

### **3. Privileged Communication**

In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of a privileged communication except in the case of communications between an attorney and client. [Tex. Fam. Code § 261.202](#).

## **F. Testimony of Children's Ad Litem**

### **1. Attorney ad Litem**

An attorney ad litem or an attorney serving in the dual role of attorney and guardian ad litem for a child may not:

- Be compelled to produce attorney work product developed during the appointment as an attorney;
- Be required to disclose the source of any information;
- Submit a report into evidence; or
- Testify in court except as authorized by [Tex. Disciplinary Rules Prof'l Conduct R. 3.08](#). [Tex. Fam. Code § 107.007\(a\)](#).

[Tex. Fam. Code § 107.007\(a\)](#) does not apply to the duty of an attorney to report child abuse or neglect under [Tex. Fam. Code § 261.101](#). [Tex. Fam. Code § 107.007\(b\)](#).



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## 2. Guardian ad Litem

Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem's recommendations relating to:

- The best interests of the child; and
- The bases for the guardian ad litem's recommendations. [Tex. Fam. Code § 107.002\(e\)](#).

In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative. [Tex. Fam. Code § 107.002\(f\)](#).

In a contested case, the guardian ad litem shall provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

- The date required by the scheduling order; or
- The 10th day before the date of the commencement of the trial. [Tex. Fam. Code § 107.002\(g\)](#).

Disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to the Texas Rules of Evidence. [Tex. Fam. Code § 107.002\(h\)](#).

## G. Prohibition of Certain Testimony Not Applicable in DFPS Cases

[Tex. Fam. Code § 104.008](#) requiring an expert to conduct a child custody evaluation prior to testifying about conservatorship or possession of or access to a child does not apply to a suit in which DFPS is a party. [Tex. Fam. Code § 104.008\(c\)](#).

## H. Business Records Exception to Hearsay

[Tex. R. Evid. 902](#) provides that an original or copy of a record is self-authenticating and meets the business records hearsay exception requirements of [Tex. R. Evid. 803\(6\)](#), if the record is filed fourteen days before trial and is accompanied by an affidavit that complies with [Tex. R. Evid. 902\(B\)](#).

### 1. Drug Test Results

Admission of drug test results using a business records affidavit are subject to a hearsay objection. 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. Laying the proper foundation typically requires the testimony of three different people: a chain of custody witness, an expert to establish the reliability and proper techniques and testing protocol, and an expert to testify to the results. See *in re K.C.P.*, [142 S.W.3d 574, 580](#) (Tex. App.—Texarkana 2004, no pet.).

The results of drug tests that generally track the language of [Tex. R. Evid. 803\(6\)](#) and [Tex. R. Evid. 902\(10\)](#) are an exception to the hearsay rule. *In re E.B.*, [No. 11-19-00001-CV](#), 2019 WL 3955974

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(Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.). Records of drug test results must also show sufficient indicia of trustworthiness or reliability to bring them within the business records exception to the hearsay rule. *In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.) *citing In re K.C.P.*, [142 S.W. 3d 574](#) (Tex. App.—Texarkana 2004, no pet.).

## **2. Case Law**

The following case law was provided by the Texas Department of Family & Protective Services.

### **a. Indicia of trustworthiness or reliability**

*In re E.B.*, [No. 11-19-00001-CV](#), 2019 WL 3955974 (Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.)

*In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.)

*In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.)

### **b. Live testimony not required for drug test records admitted under the business-records exception**

*In re C.M.-L.G.*, [No. 14-16-00921-CV](#), 2017 WL 1719133 (Tex. App.—Houston [14th Dist.] May 2, 2017, pet. denied) (mem. op.)

*In re L.G.R.*, 498 S.W.3d 195 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)

*In re M.R.D.W.*, [No. 14-17-00506-CV](#), 2017 WL 6045575 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, no pet.) (mem. op.)

*In re C.W.*, [No. 02-14-00274-CV](#), 2014 WL 7139645, (Tex. App.—Fort Worth, December 12, 2014, no pet.) (mem. op.)

*In re Z.N.M.*, [No. 14-17-00650-CV](#), 2018 WL 358480 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.) (mem. op.)

### **c. Admission of drug test results through other testimony**

*In re D.J.H.*, [No. 04-11-00815-CV](#), 2012 WL 1654953, at \*3 (Tex. App.—San Antonio May 9, 2012, no pet.) (mem. op.); see also *In re A.D.H.—G.*, [No. 12-16-00001-CV](#), 2016 WL 3182610 (Tex. App.—Tyler June 8, 2016, no pet.) (mem. op.)

*In K.C.P.*, [142 S.W.3d 574](#) (Tex. App.—Texarkana—2004, no pet.)

*In re A.G.*, [No. 13-17-00318-CV](#), 2017 WL 4546984 (Tex. App.—Corpus Christi Oct. 12, 2017, no pet.) (mem. op.)

### **d. Inferences drawn from behavior and testimony**

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*In re C.R.*, [263 S.W.3d 368, 374](#) (Tex. App.—Dallas 2008, no pet.); *In re C.A.B.*, [289 S.W.3d 874, 885](#) (Tex. App.—Houston [14th Dist.] 2009, no pet.).

*In re M.L.C.*, [No. 04-17-00459-CV](#), 2017 WL 6597828, at \*4 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied) (mem. op.)

*In re K.P.*, [498 S.W.3d 157, 172 n.4](#) (Tex. App.—Houston [1st Dist.] May 26, 2016, pet. denied)

*In re D.M.*, [58 S.W.3d 801](#) (Tex. App.—Fort Worth 2001, no pet.).



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# EXTENDING FOSTER CARE FOR TRANSITIONING YOUTH

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## A. Extended Jurisdiction

Under the Fostering Connections Act, a youth can voluntarily remain in foster care after their 18th birthday (referred to as "Extended Foster Care") if they meet certain requirements. Extended Foster Care is eligible for Title IV-E funding from the federal government until the youth's 21st birthday. [42 U.S.C. § 675](#).

In Texas, the eligibility requirements for extended foster care are that the youth over age of 18 is:

- Regularly attending high school or enrolled in a program leading toward a high school diploma or high school equivalency certificate;
- Regularly attending an institution of higher education or a postsecondary vocational or technical program;
- Participating in a program or activity that promotes or removes barriers to employment;
- Employed for at least 80 hours a month; or
- Incapable of performing the activities described above due to a documented medical condition. [Tex. Fam. Code § 264.101\(a-1\)](#).

Any court with jurisdiction over a young adult on the day before their 18th birthday will automatically continue to have jurisdiction of the youth beyond the 18th birthday for at least six months and must retain the case on their docket while the young adult is in extended foster care and during trial independence. [Tex. Fam. Code § 263.602](#). Per [Tex. Fam. Code § 263.601 et seq.](#), the court must conduct periodic hearings every six months, and must make specific findings. The court must also maintain jurisdiction over a youth age 18 or older who temporarily leaves foster care for a "trial independence" period. This is so that if/when the youth returns to foster care, the youth (and DFPS) will not lose eligibility for federal funding. This statutory structure assists the child welfare agency in ensuring federal funding to assist with extended foster care services. Without it, DFPS would not be able to serve many of the youth who leave foster care after turning 18 and later find they need to return to care for additional supports and services while they transition to independence. Extended care also offers support and stable placement for youth pursuing higher education.

## B. Trial Independence

"Trial Independence," found in [Tex. Fam. Code § 263.6015](#), allows young adults who exit foster care on their 18th birthday or any time prior to their 21<sup>st</sup> birthday, if in extended foster care, to then decide to voluntarily return to foster care within six months (or within a 12-month period if authorized by a court order) for additional support. The court retaining jurisdiction allows DFPS to draw down federal dollars to help provide services to young adults who exit and later return to care. A young adult who enters or reenters extended foster care after a period of trial independence must complete a new trial independence period upon exiting extended foster care. Each trial independence period may last no more than one year. [Tex. Fam. Code § 263.6015](#). The court's extended jurisdiction over the young adult terminates on the last day of the month in which the trial independence ends or upon the young

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adult's 21<sup>st</sup> birthday, whichever comes first. [Tex. Fam. Code § 263.602\(f\)](#). The court may, at the request of the young adult, conduct a review hearing and make specific findings, but may not compel the young adult to attend a court hearing. [Tex. Fam. Code § 263.602\(g\)](#).

## **C. Supervised Independent Living**

The Supervised Independent Living (SIL) program is a type of placement in Extended Foster Care which allows a youth to live in a more independent setting, including apartments, dorms, and shared housing.<sup>20</sup> Young adults receive casework and support services to help them become independent and self-sufficient.

If a youth is placed in a SIL program, the youth receive case management and support services to help them become independent and self-sufficient through a DFPS contracted provider. The youth is not supervised 24 hours a day by an adult and has increased responsibilities.

### **1. Benefits of SIL Program**

Through SIL, a young adult has increased responsibilities and support to transition to independent living with help such as:

- Meeting their own needs with limited guidance
- Experiencing age-appropriate mistakes and consequences and learn responsible behaviors
- Managing finances
- Managing their own time including schedule appointments
- Developing connections with family, caring adults and supportive networks
- Leaving the SIL setting for employment, education, social and other activities
- Achieving identified education and employment goals
- Accessing community resources
- Experiencing life skills
- Establishing important relationships

### **2. Eligibility requirements for SIL**

SIL is available for a young adult who is able to:

- Demonstrate a reasonable level of maturity and ability to manage the expectations required in a SIL setting with no supervision and case management; and
- Meet eligibility requirements for Extended Foster Care.

SIL with Enhanced Case Management (ECM) services, which are additional support or services to help youth be able to adjust to and maintain independence, is available to a young adult who:

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- Demonstrate a reasonable level of maturity and ability to manage the expectations required in a SIL setting with no supervision and case management;
  - Has a history of complex needs that require additional case management to be able to successfully adjust to a (SIL) placement; and
  - Meet eligibility requirements for enhanced case management services<sup>21</sup>
  - Meet [eligibility requirements](#) for Extended Foster Care.

Through SIL with ECM, a young adult receives assistance with:

- Scheduling and managing their own medical, educational, and employment services - through community-based providers, governmental agencies, and other organizations
- Arranging transportation to necessary appointments
- Developing and monitoring a medication management plan
- Improving their daily life skills

The young adult in a SIL placement must meet the Extended Foster Care eligibility requirements within 30 days of placement.

A 17-year-old youth in DFPS conservatorship may apply for a SIL placement but is not eligible for placement until their 18th birthday. Youth may apply for a SIL program 45 days prior to their 18<sup>th</sup> birthday, but there may be situations that allow application submission earlier, such as a SIL which is college-based or SIL apartment waitlists.

### **3. SIL settings**

SIL settings can include:

- Apartments
- Non-College Dorms
- College Dorms – Note that (ECM) is not permitted in college dorm settings)
- Shared Housing
- Host Homes

For more information about SIL settings, see DFPS' [Types of SIL Settings](#) webpage.<sup>22</sup>

### **4. Requesting a SIL Placement:**

**Step 1:** The young adult discusses SIL with the DFPS caseworker. The young adult completes the DFPS SIL Application and gives it to the DFPS caseworker.

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**Step 2:** The DFPS caseworker will then include their comments and complete their required sections of the SIL application. Youth and DFPS caseworker comments are required in all applicable sections in order for the application to be considered complete.

**Step 3:** The DFPS caseworker sends the completed and approved SIL Application and other required forms to the SIL Coordinator through a mailbox established by DFPS. After review, the SIL Coordinator in the DFPS State Office sends an email approving or denying the application.

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**Special Issue:** *If the youth is applying for SIL ECM, additional required documents will need to be sent along with application and other forms.*

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**Step 4:** If approved, the state office SIL Coordinator will send the DFPS caseworker an email with necessary forms and next steps.

**Step 5:** The DFPS caseworker discusses the available SIL placement options with the young adult and submits the application packet to the agreed providers.

**Step 6:** Upon initial acceptance by a SIL provider, the young adult and DFPS caseworker hold discussions with the SIL provider. If the young adult, DFPS caseworker, and SIL provider agree on the placement, then a placement date is identified and the placement is completed.

## D. Resources

DFPS website:

- [CPS Policy Handbook § 10400](#) - Extended Foster Care for Youth Who are Age 18 or Older<sup>23</sup>
- [Extended Court Jurisdiction Flowchart](#)<sup>24</sup>
- [Extended Foster Care Resource Guide](#)<sup>25</sup>
- [Extended Foster Care](#) webpage<sup>26</sup>
- [Supervised Independent Living](#) webpage<sup>27</sup>
- [Transitional Living Services](#) handout<sup>28</sup>

Texas RioGrande Legal Aid website:

- Texas Foster Youth Justice Project [Legal Resources for Youth Aging out of Foster Care](#)<sup>29</sup>



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# CONTEMPT

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Information in this chapter is taken from the Texas Center for the Judiciary Bench Book chapter on Contempt. This version does not include information on a judges' actions in court when witnessing contempt, drafting orders, enforcing orders, and appellate remedies. Please contact the [Texas Center for the Judiciary](#) for access to its bench book, additional and detailed guidance, and associated forms.<sup>30</sup>

## A. Introduction

Texas law recognizes two kinds of contempt and two different types of remedies:

- Direct contempt occurs in the presence of the court during court proceedings and is immediately punishable by the court; and
- Indirect or constructive contempt which occurs outside the court's presence, and dictates stricter procedural standards.

The remedies for contempt are similarly divided into two categories:

- Civil or coercive; and
- Criminal or punitive.

The remedy used by the court, not the conduct of the contemnor, defines the contempt remedies as civil or criminal. Although the term "contempt of court" conjures images of unchecked authority, in reality, the power is limited. A high percentage of contempt judgments are set aside by appellate courts. Exacting standards apply.

## B. Direct Contempt

The essence of direct contempt is that the offending conduct obstructs or tends to obstruct the proper administration of justice.<sup>31</sup> Direct contempt is characterized by an unwarranted interruption of orderly court proceedings and for the most part is unrelated to the issues on trial. The interruption diverts attention from the trial and delays the proceedings until the interruption is addressed by the court. Direct contempt can be addressed by the court immediately unless the contempt involves an officer of the court.<sup>32</sup> However, the power to punish immediately for direct contempt flows from observing the conduct and the exigency of the situation. Once the immediate need to maintain decorum or address the interruption has passed, the power to punish summarily also ends.<sup>33</sup> Examples of Direct Contempt include:

- Refusal to obey a specific court order during trial proceedings;
- Expressing improper remarks or indifference to the court's actions; or
- Disobeying the judge's instruction to cease a disturbance in court.

## C. Indirect Contempt

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Indirect or constructive contempt occurs outside the court's presence and does not involve a disruption of orderly court proceedings. Unlike direct contempt, in constructive contempt the issue generally does relate to the case on trial and is most often characterized by a dispute between the parties to the litigation regarding enforcement of a court order. Constructive contempt does not interfere with or interrupt court proceedings since it is the very focus of court proceedings scheduled to address it. Although time is important, it does not have the urgency of direct contempt and, consequently, the law imposes much more stringent procedural standards on constructive contempt hearings. Examples of Indirect or Constructive Contempt include:

- Having a conversation with a juror after trial begins;
- Secreting assets from a court-appointed receiver; and
- Failure to obey a court order.

## D. Remedies for Contempt

[Texas Gov't Code § 21.001\(a\)](#) gives courts the inherent power to maintain control of court proceedings and enforce lawful orders through the power of contempt. Although all contempt proceedings are quasi-criminal, it is the character of the relief which the proceeding will afford that defines the proceeding as civil or criminal.<sup>34</sup> On a finding of contempt, the court may respond to the contempt by applying the civil/coercive remedy sanction, or the criminal/punitive sanction, or a combination of both.

## E. Civil / Coercive

Civil contempt, more accurately known as coercive contempt, has the purpose of securing compliance with a court order. To be enforceable by coercive contempt the order must be clear and unambiguous.<sup>35</sup> Due process standards apply in indirect contempt proceedings to assure that the contemnor is offered adequate safeguards. Due process for civil or coercive contempt requires:

- Full and complete notice of the conduct with which the contemnor is charged;<sup>36</sup>
- Adequate notice of the court order alleged to have been violated;<sup>37</sup>
- Ample time to prepare and respond to the allegation;<sup>38</sup>
- Reasonable notice of the time and date of the contempt hearing;<sup>39</sup>
- The right to appointed counsel if the alleged contemnor is indigent;<sup>40</sup>
- The right to a jury trial if the potential punishment exceeds 6 months in jail;<sup>41</sup>
- The right to be advised by the court of the right to a jury if punishment could exceed 6 months in jail;<sup>42</sup> and
- The ability to comply with the court order.<sup>43</sup>

## F. Criminal / Punitive

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The nature of criminal contempt is punitive, to punish past errant behavior, and is most commonly assessed in direct contempt cases. It is an unconditional sentence for punishment or deterrence.<sup>44</sup> Criminal contempt proceedings for contumacious and disruptive conduct during court proceedings may be dealt with immediately by the judge, unless committed by a court officer.

## G. Burden of Proof

The burden of proof for a punitive contempt order must be based on proof beyond a reasonable doubt.<sup>45</sup> There is a division of authority on the burden of proof required in cases addressing civil or coercive contempt. [Tex. Fam. Code § 105.005](#) provides for a preponderance of the evidence standard, cited in *In re Smith*, 981 S.W.2d, 909, 911 (Tex. App-- Houston [1st Dist.] 1988, no writ). However, the 5th Circuit has said that the movant bears the burden of establishing the elements of contempt by clear and convincing evidence in a civil contempt proceeding<sup>46</sup> and the Southern District of Texas has held the standard to be clear and convincing for civil contempt as well.<sup>47</sup>

## H. Jury

Case law has held that there is no general right to a jury trial in cases of contempt.<sup>48</sup> However, offenses considered ‘serious’ entitle the person charged to the 6th Amendment right to a jury.<sup>49</sup> Under Texas law, punishment of six months incarceration or less and a fine of \$500 or less is considered a petty offense, insufficient to trigger the right to trial by jury.<sup>50</sup> Punishment exceeding six months’ incarceration entitles the contemnor to a jury, and the judge must advise the contemnor of the right to jury.<sup>51</sup> At what point in the contempt proceeding the case is determined to be serious or petty is subject to conflicting authority. One Court of Appeals has held that “if confinement may exceed six months,” then the contempt offense is serious and constitutional safeguards (i.e., the right to a jury) should be given.<sup>52</sup> However, another Court of Appeals has held that the actual punishment imposed determines whether the character of the contempt is serious or petty.<sup>53</sup>

## I. Authority

References to contempt in the Texas Family Code:

- [Tex. Fam. Code § 157.001\(b\)](#) – Motion for Enforcement
- [Tex. Fam. Code § 157.424](#) – Relation to Motion for Contempt
- [Tex. Fam. Code § 105.001\(f\)](#) – Temporary Orders Before Final Order
- [Tex. Fam. Code § 81.004\(a\)](#) – Contempt for Nonpayment of Fee

Statutory Limitations on Contempt – [Texas Gov’t Code 21.002](#)

- Punishment is limited to six months in county jail and/or fine of up to \$500;
- Cumulative punishment cannot exceed 18 months; and
- Court officers held in contempt are entitled to a personal recognizance bond and another judge to determine the validity of the contempt.

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**Court Officers** – [Texas Gov't Code 21.002\(d\)](#) requires that an officer of the court held in contempt by a trial court shall, upon request, be released on personal recognizance until a *de novo* determination of guilt or innocence by another judge assigned by the regional administrative judge. Court officers include attorneys, court reporters, attorneys ad litem, and receivers.

## J. Orders of Contempt

Orders of contempt must:

- Be in writing, definite, and certain;<sup>54</sup>
- Clearly state in what respect the court's earlier order was violated;<sup>55</sup>
- Notify the contemnor of how they violated the previous order;<sup>56</sup>
- Be signed by the judge within a short, reasonable time after finding of contempt;<sup>57</sup>
- If it is punitive, it must specify the exact punishment imposed;<sup>58</sup> and
- If it is coercive, it must clearly state what the contemnor must do to purge himself of contempt.<sup>59</sup>

If the contemnor is to be incarcerated, the orders of contempt must be accompanied by an order of commitment, and no person may be held for contempt without a written order of commitment. Orders of commitment must provide the precise punishment assessed or, in the case of coercive contempt, the things contemnor must do to be purged of contempt.<sup>60</sup>