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SECTION 2 STATUTORY HEARINGS

A QUICK LOOK AT THE LIFE OF A CHILD PROTECTION SUIT

The Texas Family Code mandates court supervision of a child protection lawsuit from the time a child is removed until a final order is entered, and if DFPS remains a party to the lawsuit, then even after a final order. At each juncture, the statutory scheme requires measured progress in the form of specific duties and functions that must be performed to ensure timely resolution of a case.

The driving force that dictates timely resolution of a child welfare case is the requirement that no later than one year after DFPS is named conservator, the court must either commence trial or dismiss the lawsuit.¹ This deadline requires that counsel for the agency carefully track the date DFPS is first named temporary managing conservator and calculate the mandatory dismissal date and calendar interim dates.

In extremely limited circumstances, a court can retain the suit for no more than 180 days beyond the one year time limit. To do so, the court must find that “extraordinary circumstances” make it necessary for the child to remain in the temporary conservatorship of DFPS and that continuing the order of temporary conservatorship is in the child’s best interest.² In that case, the court must set a new dismissal date no more than 180 days from the original dismissal date, make further temporary orders for the safety and welfare of the child, and set the trial on the merits. If the court fails to commence the trial on the merits before the new dismissal date, the court must dismiss the suit.³ No further extension is permitted.

By being prepared, focused and knowledgeable about what must be accomplished at every stage along the way, attorneys for the agency can best promote the goals of safety, permanency and family-focused solutions for children. The description that follows is designed to introduce a new child protection practitioner to the progression of hearings mandated by statute. For a more detailed description of each type of hearing See Practice Guide, SECTION 2 STATUTORY HEARINGS, Ex Parte Order *Before* Removal Hearing Guide, Emergency Ex Parte Order *After* Removal Hearing Guide, Non-Emergency Removal Hearing Guide, Adversary Hearing Guide, Status Hearing Guide, Permanency Hearing Guide, Final Hearing Guide, Placement Review Hearing Guide and Every Hearing Checklist.

¹ TEX. FAM. CODE §263.401, mandatory dismissal on the first Monday after the first anniversary of the date DFPS is appointed as temporary managing conservator.

² TEX. FAM. CODE §263.401(b).

³ TEX. FAM. CODE §263.401(c).

Removal Hearing

What DFPS must prove at a removal hearing depends on the circumstances when a child must be removed:

- If an immediate removal is necessary, but there is time to seek a court order, an ex parte order *before* removal is appropriate;
- If a threat to life or limb or sexual abuse is immediate and removal without a court order is warranted, an emergency ex parte order *after* removal is appropriate; and⁴
- If the need for removal is not urgent, a noticed hearing for a non-emergency order is appropriate.

In each type of removal, the caseworker's affidavit must contain a complete, concise and accurate summary of the evidence that satisfies the applicable standard for removal. A sample affidavit format is available to aid caseworkers.⁵ The role of the agency's attorney is to review the affidavit carefully, advise the caseworker of any deficiencies or ambiguities and to the extent possible, aid CPS in improving the written fact presentation of the basis for a removal.

Ex Parte Order *Before* Removal

DFPS may seek an *ex parte* order authorizing the subsequent removal of a child with sufficient evidence to prove:

- *Either* an immediate danger to the physical health or safety of the child, *or* that the child has been a victim of neglect or sexual abuse;
- That it is contrary to the child's welfare to remain in the home;
- That there is not sufficient time, consistent with the child's physical health or safety to hold an adversary hearing; and
- That reasonable efforts were made to prevent or eliminate the need for removal.⁶

Emergency - Ex Parte Order *After* Removal

A child cannot be removed without a prior court order unless the totality of the circumstances supports a reasonable belief that the child is in immediate danger of serious physical harm or sexual abuse. If a child is removed under this authority, the agency must appear in court no later than the next business day with sufficient evidence to prove:

⁴ Removal of a child without a court order constitutes a "seizure" under the 4th Amendment. For detailed guidance on this issue, See Practice Guide, SECTION 1 BEFORE FILING SUIT, The Fourth Amendment & CPS Practice.

⁵ See Practice Guide, SECTION 11 TOOLS, Affidavits.

⁶ TEX. FAM. CODE §262.102.

- *Either* a continuing danger to the physical health or safety of the child if returned to the home, *or* evidence that the child has been sexually abused and is at substantial risk of future sexual abuse;
- That it is contrary to the child's welfare to remain in the home; and
- That reasonable efforts were made to prevent or eliminate the need for removal.⁷

TIP:

A parent or caretaker's use drugs may warrant removal: (A) Use of a controlled substance when the use constitutes an immediate danger to the physical health or safety of a child;⁸ or (B) Allowing a child to remain on the premises where methamphetamines are manufactured.⁹

Evidence that the household includes a person who has caused serious injury or the death of another child as a result of abuse or neglect or sexually abused another child is relevant under either type of ex parte removal.¹⁰

Non-Emergency Hearing

If there is not an urgent need for removal, but the child's safety is at risk if left in the care of the parent, DFPS can seek a court order authorizing removal following a noticed hearing. The hearing should be set as soon as possible and the parent(s) must receive notice of the hearing and be served with the petition and affidavit. There is no time frame provided by statute, but best practice is to set the hearing within 14 days of the filing of the petition. If a setting can not be obtained within 14 days, CPS should consider whether the delay will pose a risk to the safety of the child and a more immediate removal is needed.

A non-emergency order for removal requires sufficient evidence to prove:

- That it would be contrary to the child's welfare to remain in the home; and
- That reasonable efforts were made to prevent or eliminate the need for removal.¹¹
- Appointment of the parent or parents as temporary managing conservator of the child is not in the best interest of the child because appointment of the parent as conservator would significantly impair the child's physical, health, or emotional development;¹² and
- Placement with a noncustodial parent or another relative is not in the best interest of the child.¹³

Often it is the cumulative effect of long term neglect, evidenced by filthy home conditions and a chronic failure to attend to a child's basic needs for food, clothing,

⁷ TEX. FAM. CODE §262.107.

⁸ TEX. FAM. CODE §262.104(a)(5).

⁹ TEX. FAM. CODE §262.104(b).

¹⁰ TEX. FAM. CODE §§262.102(b); 262.107(b).

¹¹ TEX. FAM. CODE §262.205(b).

¹² TEX. FAM. CODE §153.131, the presumption that a parent should be appointed managing conservatory is removed by a history of family violence.

¹³ TEX. FAM. CODE §262.205(e).

medical attention and supervision that results in CPS requesting authority to remove a child on a non-emergency basis. While the timing is not as critical as if a child were threatened with imminent physical harm or sexual assault, the impact on a child of long-term, serious deprivation of basic care can be devastating.

If a child is removed pursuant to an *ex parte* hearing, that order expires within 14 days.¹⁴ Accordingly, an adversary hearing (also called a 14 day hearing) must be conducted within that timeframe to authorize continued managing conservatorship by DFPS. In contrast, if a temporary order is issued after a noticed non-emergency hearing, that temporary order remains in effect and the next hearing will be the status hearing.

TIP:

The 365 day clock for dismissal of a suit begins to run when the court first grants DFPS Temporary Managing Conservatorship, even if the order granted is from an *ex parte* hearing.

Adversary Hearing

Within 14 days after DFPS takes a child into custody in an *ex parte* proceeding, the court must revisit the issue of removal and either enter temporary orders or return the child to the family. At this hearing, in order to appoint DFPS as the temporary managing conservator of the child, the court must find:

- Danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession;
- It is contrary to the child's welfare to remain in the home;
- The urgent need for protection required immediate removal; and
- That despite reasonable efforts to prevent or eliminate the need for removal and to return the child home, there is a substantial risk of continuing danger to the child in the home.¹⁵

A child's placement is a key issue at this hearing. When CPS determines that removal may be warranted, CPS requests that the parents complete a Child Placement Resources form to provide names and contact information for recommended caregivers.¹⁶ Prior to the hearing, CPS must perform a criminal history and background check of the relatives or other persons identified as potential caregivers by the parents and complete a home study of the most appropriate caregiver.¹⁷ CPS must file with the court a copy of the Child Placement Resources form, a copy of any completed home study and the name of the relative or other designated caregiver the child is placed with.¹⁸ If placement with a relative or other designated caretaker has not been made, CPS must file a statement with

¹⁴ TEX. FAM. CODE §262.201.

¹⁵ TEX. FAM. CODE §262.201(a) and (b).

¹⁶ TEX. FAM. CODE §261.307(a)(2); the Child Placement Resources form is the same as the CPS Child Caregiver Resources form (2625).

¹⁷ TEX. FAM. CODE §262.114.

¹⁸ TEX. FAM. CODE §262.114 (a-1), as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

the court explaining why and what actions the agency is taking, if any, to make such a placement.¹⁹

If the court does not return the child home at this hearing, the court must order placement with a noncustodial parent or relative unless it is not in the child's best interest.²⁰ The court shall require any parent, alleged father or relative present to complete and file a proposed child placement resource form with the court if the form has not previously been filed.²¹ The court must appoint counsel for eligible parents,²² inform any parent appearing that their parental rights may be restricted or terminated if the parent cannot meet a child's need for safety,²³ and set a Status Hearing within 60 days of the award of Temporary Managing Conservatorship.

At this juncture the court may make a finding of aggravated circumstances and on that basis waive the necessity for a service plan,²⁴ or issue orders for medical consent, notice by publication for a missing parent, an additional home study or assessment, visitation, child support, paternity testing, psychological testing, drug assessment or testing, physical examinations, parent completion of parent/family medical history form, parent disclosure of information regarding parentage, immigration status, or child's medical history, and discovery or other orders needed to protect the child, facilitate return of the child or to find the optimum placement for a child.

Status Hearing

No later than 60 days after a temporary order is entered, a status hearing must be held.²⁵ Prior to this hearing, DFPS must submit a request to the Bureau of Vital Statistics to determine whether or not there is another Court of Continuing, Exclusive Jurisdiction ("CCEJ").²⁶

The focus of the status hearing is:

- The contents and implementation of the service plan;
- The status of diligent search efforts for any missing parents; and
- A warning to parents that unless the parent can offer the child a safe environment, termination of parental rights is an option.²⁷

¹⁹ TEX. FAM. CODE §262.114 (a-2), as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

²⁰ TEX. FAM. CODE §262.201(e).

²¹ TEX. FAM. CODE §262.201 (c), as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009.

²² TEX. FAM. CODE §107.013(a); See Practice Guide, SECTION 3 LITIGATION ESSENTIALS,

Appointments.

²³ TEX. FAM. CODE §262.201 (c).

²⁴ TEX. FAM. CODE §262.2015.

²⁵ TEX. FAM. CODE §263.201.

²⁶ TEX. FAM. CODE §262.202; Local practice will dictate who within the agency performs this task, but the attorney must confirm that the CCEJ check has been done; See Practice Guide, SECTION 11 TOOLS, Court of Continuing & Exclusive Jurisdiction, Inquiry On Court Of Continuing Jurisdiction For A Child (VS-168).

²⁷ TEX. FAM. CODE §§263.006; 263.202.

The service plan is the blueprint for family reunification and should be scrutinized carefully. Particularly if the agency seeks termination under the “O” ground,²⁸ it is crucial that all essential components of the service plan are specified in the court order and that CPS is prepared to return the children without further condition if the parents perform the plan as ordered by the court.

CPS should also be prepared to demonstrate that due diligence was exercised in locating missing parents. If a parent has not been served or located, the caseworker should also complete an Affidavit of Military Service in preparation for the Status Hearing, in compliance with the Servicemember’s Relief Act.²⁹

DFPS must file with the court 10 days before the hearing any proposed child placement resources form, any completed home study, and the names of any relative or designated caregiver with whom the child has been placed or an explanation why such placement has not occurred and what actions if any CPS is taking to place the child with the relative.³⁰ The duty to provide this information and documentation continues until a child is adopted or placed in another permanent placement.

As with any hearing, any outstanding issues relating to health care, placement, paternity testing, child support or other issues can be addressed at the status hearing. See Practice Guide, SECTION 2 STATUTORY HEARINGS, Every Hearing Checklist.

TIP:

Plan Ahead for Permanency Care Assistance Program

If a child is placed with a relative or kinship placement that may become permanent, careful planning is essential to avoid inadvertently disqualifying a child’s caretaker for financial support. The Permanency Care Assistance Program (as added by H.B. 1151 and SB 2080, 81st Reg. Sess.) is a potential source of financial support for relatives or adults with a longstanding and significant relationship with a foster child. The benefits available under this new program, which begins September 1, 2010, are similar to adoption assistance benefits and include monthly cash assistance and eligibility for Medicaid. However, only caretakers with whom the child resides *for at least six consecutive months after the person becomes licensed or verified to provide foster care* are eligible. In addition, these eligibility criteria must be satisfied *before the relative/fictive kin is named managing conservator*. In the context of the one year or even the maximum 18 month period before a case must be dismissed or a final order rendered, six consecutive month’s residence, which must accrue after the caretaker becomes licensed or verified and *before* the relative/fictive kin is named managing conservator, makes it essential that CPS, the court, and the attorneys all plan accordingly. Failure to do so may result in the caretaker being ineligible for benefits and, if financial support is necessary, could eliminate an otherwise appropriate and stable placement for a child.

²⁸ TEX. FAM. CODE §161.001(1)(O).

²⁹ See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Service of Process, Missing Parent in Military.

³⁰ TEX. FAM. CODE §263.003, as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date. Note: This information is not required if the child is in an adoptive or other permanent placement, but that is unlikely at this early stage of the litigation.

Permanency Hearing

The first permanency hearing must be held no later than 180 days after DFPS is named as temporary managing conservator,³¹ or 120 days from the status hearing. A subsequent permanency hearing must be held within 120 days of the last permanency hearing.³² Notice is required and all parties must be given a copy of the permanency plan (required at the initial permanency hearing) or permanency progress report (required at subsequent permanency hearings) at least 10 days before the hearing.³³ Unless the child is in an adoptive placement or another permanent placement, DFPS must file with the court 10 days before the hearing any proposed child placement resources form, any completed home study, and the names of any relative or designated caregiver with whom the child has been placed or an explanation why such placement has not occurred and what actions if any CPS is taking to place the child with the relative.³⁴

A child's permanency plan must include concurrent goals, both a primary and at least one alternate goal.³⁵ The goals for a child may include:

- Reunification with a parent or other person from whom the child was removed;
- Termination of parental rights and adoption by a relative or other suitable person;
- The award of permanent managing conservatorship to a relative or other suitable person; or
- Another planned permanent living arrangement.³⁶

If the goal for a child is another planned, permanent living arrangement ("APPLA"), CPS must also document a compelling reason the other permanent goals are not in the child's best interest.³⁷

The list of issues the court is mandated to review makes clear that this is intended to be a rigorous, substantive assessment of virtually every aspect of a child and family's status and progress in the child protection system. From DFPS' perspective, this requires thorough preparation and the ability to show, if the agency is not recommending return to the home, exactly why the child cannot be returned, what remains to be accomplished and when that can be expected to be done. DFPS must be prepared to address the status of every aspect of the case, including the agency's efforts to:

- Locate missing parents and relatives;
- Locate relatives for possible placement; and
- Implement the permanency plan.³⁸

³¹ TEX. FAM. CODE §263.304.

³² TEX. FAM. CODE §263.305.

³³ TEX. FAM. CODE §§263.301; 263.3025; Tex. R. Civ. Pro. 21a.

³⁴ TEX. FAM. CODE §§263.003, as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

³⁵ TEX. FAM. CODE §263.3025(d), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

³⁶ TEX. FAM. CODE §263.3026 (a) as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

³⁷ TEX. FAM. CODE §263.3026(b). as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009

³⁸ TEX. FAM. CODE §§263.3025; 263.303.

If a child is in institutional care, committed to the Texas Youth Commission, or is age 16 or older, DFPS should be prepared to advise the court regarding how the needs of these specialized populations are being met.

At the hearing, the court must:

- Thoroughly assess all facets of the case;
- Return the child to the home if it is safe to do so;
- Enter necessary orders to ensure progress toward permanency; and
- Set a dismissal date.³⁹

Monitored Return Option

A court may order a child returned to the parents without dismissing the case, in order to monitor the reunification process. The monitoring period is limited to 180 days, at which point the suit must be dismissed if the parent has performed successfully. If a child must be returned to care following an unsuccessful monitored return, the court then sets a new dismissal date.⁴⁰

Final Hearings

Ultimately if a child cannot be safely returned to a parent, DFPS may seek termination of parental rights so a child can be placed for adoption with a relative or other appropriate person. Although it is sometimes necessary, naming DFPS as a child's permanent managing conservator without termination of the child's parental rights is only appropriate if no other, more permanent option is available

Without question, this stage of the litigation requires the most careful preparation, adherence to procedural requirements and close coordination between DFPS staff and attorneys representing the agency. Evidence of DFPS' efforts to locate a missing parent, a parent's compliance with the service plan and the child's adoptability may all be crucial at this juncture.

If termination of parental rights is requested, there must be clear and convincing evidence of at least one statutory ground for termination of parental rights and that termination is in the best interests of the child.⁴¹ Attorneys representing CPS must be prepared to assess all procedural and substantive aspects of a case before proceeding to trial.⁴² Fortunately, many experienced litigators are available to mentor, share resources and discuss strategies. Contact a local Regional Attorney or the Office of General Counsel for assistance.

³⁹ TEX. FAM. CODE §263.306.

⁴⁰ TEX. FAM. CODE §263.403.

⁴¹ TEX. FAM. CODE §161.001; *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), non-exclusive list of best interest factors.

⁴² See Practice Guide, SECTION 3 LITIGATION ESSENTIALS; SECTION 5 TERMINATION; SECTION 6 EVIDENCE; SECTION 7 JURY TRIALS; SECTION 8 POST TRIAL STRATEGIES; and SECTION 10 TRIAL NOTEBOOK.

Placement Review Hearing

If the final order names DFPS as managing conservator, the court must review the child's placement at least every six months until the child becomes an adult. If a final order names DFPS as managing conservator *and* terminates parental rights, the court must conduct the initial placement review hearing no later than the 90th day after the final order is rendered and every six months thereafter until the child is adopted or becomes an adult.⁴³

A placement review report must identify the child's permanency goal, evaluate the child's placement, evaluate whether an institutional placement is the least restrictive alternative, include a transition plan and describe any Transitional Living Services being provided for a child at least 16 years old, evaluate a child's education placement, other necessary plans and services, efforts to find an adoptive home if parental rights have been terminated,⁴⁴ and for children committed to TYC, evaluate their treatment, education and rehabilitation.⁴⁵

In the case of a child in DFPS permanent managing conservatorship whose parental rights have not been terminated, the placement review report must include description of the agency's efforts to determine the current caregiver's willingness to become a permanent placement for the child, locate a relative or other suitable permanent managing conservator and to describe any change in the parents' circumstances that might warrant return of the child to the parent or termination of parental rights.⁴⁶

If the permanency goal is to find another planned, permanent living arrangement ("APPLA"), DFPS must document a compelling reason why adoption, permanent managing conservatorship with a relative or other suitable individual, and returning the child to a parent are not in the child's best interest.⁴⁷

Unless the child is in an adoptive placement or another permanent placement, DFPS must file with the court 10 days before the hearing any proposed child placement resources form, any completed home study, and the names of any relative or designated caregiver with whom the child has been placed or an explanation why such placement has not occurred and what actions if any CPS is taking to place the child with the relative.⁴⁸

At the placement review hearing, the court must evaluate each of the issues listed above which DFPS reports on.⁴⁹ If the Department has permanent managing conservatorship of a child whose parental rights have not been terminated, the court may order additional

⁴³ TEX. FAM. CODE §263.501, as amended by S.B.939, 81st Reg. Sess., effective June 19, 2009, as to suits filed on or after that date.

⁴⁴ TEX. FAM. CODE §263.502(c), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

⁴⁵ TEX. FAM. CODE §263.502(c)(7), as amended by S.B. 1629, 81st Reg. Sess., effective May 23, 2009, information for progress toward rehabilitation should be obtained from TYC.

⁴⁶ TEX. FAM. CODE §263.502(c)(7), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

⁴⁷ TEX. FAM. CODE §263.502(d), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

⁴⁸ TEX. FAM. CODE §263.003, as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

⁴⁹ TEX. FAM. CODE §263.503 as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

services for a parent for no more than six months if specific findings regarding the placement and possibility of reunification are made.⁵⁰

⁵⁰ TEX. FAM. CODE §263.503(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

EX PARTE ORDER *BEFORE* REMOVAL HEARING GUIDE

GOAL To have a court authorize in advance the removal of a child from a parent's care and grant DFPS the short-term managing conservatorship of the child until an adversary hearing can be held.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- Review caseworker's affidavit to assess the sufficiency of the evidence;
- Prepare and file the petition with affidavit; and
- Request that the Clerk issue citation and notice of hearing to parties.

REQUIRED SHOWING DFPS must submit sufficient evidence to prove:

- *Either* an immediate danger to the physical health or safety of the child, *or* that the child has been a victim of neglect or sexual abuse;
- That it is contrary to the child's welfare to remain in the home;
- That there is not sufficient time, consistent with the child's physical health or safety to hold an adversary hearing; and
- That reasonable efforts were made to prevent or eliminate the need for removal.⁵¹

COURT ACTION

Mandatory

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

- Issue an ex parte order for protection of the child;
- Appoint an attorney and guardian ad litem for the child;⁵² and
- Set the adversary hearing no more than 14 days later.⁵³

Discretionary

At this hearing, the court may also:

- Appoint an attorney to represent eligible parents;⁵⁴
- Appoint a person authorized to consent to medical care;⁵⁵ and
- Issue temporary protective orders to address domestic violence.⁵⁶

⁵¹ TEX. FAM. CODE §262.102.

⁵² TEX. FAM. CODE §§107.011; 107.012; Appointment of an attorney and guardian ad litem for a child shall be done immediately after a petition is filed and before the adversary hearing. See Practice Guide, SECTION 3, LITIGATION ESSENTIALS, Appointments.

⁵³ TEX. FAM. CODE §262.201; A temporary order issued under Ch. 262 expires not later than 14 days after it is issued so this order necessitates further court review at an adversary hearing (also known as the 14 day hearing).

⁵⁴ TEX. FAM. CODE §107.013; See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Appointments.

⁵⁵ TEX. FAM. CODE §266.004; The court generally authorizes DFPS (or another person) to give medical consent at the earliest possible juncture. See Practice Guide, SECTION 9 SPECIAL ISSUES, Health Care.

⁵⁶ TEX. FAM. CODE §262.102(c); Title 4, Protective Orders and Family Violence; See Practice Guide, SECTION 1 BEFORE FILING SUIT, Alternatives to Removal.

EMERGENCY EX PARTE ORDER *AFTER* REMOVAL HEARING GUIDE

When a threat to life or limb or sexual abuse is imminent, removal of a child without a prior court order is warranted. When this type of an emergency removal occurs, DFPS must go to court no later than the next business day to request judicial review of the action.

GOAL To have a court authorize the continuing removal of a child from a parent's care and grant DFPS the short-term managing conservatorship of the child until an adversary hearing can be held.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- Review caseworker's affidavit to assess the sufficiency of the evidence;
- By the next working day after removal, prepare and file the petition with affidavit; and
- Request that the Clerk issue citation and notice of hearing to parties.

REQUIRED SHOWING DFPS must submit sufficient evidence to prove:

- *Either* a continuing danger to the physical health or safety of the child if returned to the home, *or* evidence that the child has been sexually abused and is at substantial risk of future sexual abuse;
- That it is contrary to the child's welfare to remain in the home; and
- That reasonable efforts were made to prevent or eliminate the need for removal.⁵⁷

COURT ACTION

Mandatory

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

- Issue an ex parte order for protection of the child;
- Appoint an attorney and guardian ad litem for the child;⁵⁸ and
- Set the adversary hearing no more than 14 days later.⁵⁹

Discretionary

At this hearing, the court may also:

- Appoint an attorney to represent eligible parents;⁶⁰

⁵⁷ TEX. FAM. CODE §262.107.

⁵⁸ TEX. FAM. CODE §§107.011; 107.012; Appointment of an attorney and guardian ad litem for a child shall be done immediately after a petition is filed and before the adversary hearing. See Practice Guide, SECTION 3, LITIGATION ESSENTIALS, Appointments.

⁵⁹ TEX. FAM. CODE §262.201; A temporary order issued under Ch. 262 expires not later than 14 days after it is issued. So this order necessitates further court review at an adversary hearing (also known as the 14 day hearing).

- Appoint a person authorized to consent to medical care;⁶¹ and
- Issue temporary protective orders to address domestic violence.⁶²

⁶⁰ TEX. FAM. CODE §107.013; See Practice Guide, SECTION 3, LITIGATION ESSENTIALS, Appointments.

⁶¹ TEX. FAM. CODE §266.004; The court generally authorizes DFPS (or another person) to give medical consent at the earliest possible juncture. In the interval between removal and the court's order, the caseworker or a person designated by the caseworker can give consent. See Practice Guide, SECTION 9, SPECIAL ISSUES, Health Care.

⁶² TEX. FAM. CODE §262.102(c); Title 4, Protective Orders and Family Violence; See Practice Guide, SECTION 1, BEFORE FILING SUIT, Alternatives to Removal.

NON-EMERGENCY REMOVAL HEARING GUIDE

GOAL To have a court authorize in advance the removal of a child from a parent's care and grant DFPS temporary managing conservatorship of the child.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION

In preparation for filing the petition with affidavit, the DFPS attorney must:

- Review caseworker's affidavit to assess the sufficiency of the evidence;
- Request that the Clerk issue citation and notice of hearing to parties; and
- Request that a hearing be set as soon as possible. If a setting cannot be obtained within 14 days, the DFPS Attorney should discuss with CPS so they can consider whether the delay will pose a risk to the safety of the child.

Before the hearing, the DFPS attorney must:

- Review and assess evidence, including the removal affidavit, witness statements, photos, medical reports, and other investigative records;
- Subpoena necessary witnesses and records;
- Verify that the Child Placement Resources form has been provided to the parent, CPS has evaluated each person listed on the form, CPS has determined the most appropriate person to be a substitute caregiver, and a home study has been completed on that person;⁶³
- Check status of service of citation and notice of hearing on all required parties;⁶⁴ and
- Find out CPS' recommendation regarding visitation, medical consent or any other issue that may warrant court intervention.

REQUIRED SHOWING DFPS must submit sufficient evidence to prove:

- It is contrary to the child's welfare to remain in the home;
- Reasonable efforts were made to prevent or eliminate the need for removal;⁶⁵
- Appointment of the parent or parents as temporary managing conservator of the child is not in the best interest of the child because appointment of the parent as conservator would significantly impair the child's physical, health, or emotional development;⁶⁶ and
- Placement with a noncustodial parent or another relative is not in the best interest of the child.⁶⁷

⁶³ TEX. FAM. CODE §§261.307; 262.114.

⁶⁴ See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Parties and Service of Process.

⁶⁵ TEX. FAM. CODE §262.205(b).

⁶⁶ TEX. FAM. CODE §153.131, the presumption that a parent should be appointed managing conservatory is removed by a history of family violence.

⁶⁷ TEX. FAM. CODE §262.205(e).

COURT ACTION

Mandatory

The court must either make findings and enter temporary orders for protection of the child or leave the child in the care of the parent or other person entitled to possession.⁶⁸

If the child is not left in the care of the parent, the court must:

- Order placement of the child with a noncustodial parent or relative, unless that is not in the child's best interest;⁶⁹
- Require parents and relatives to complete the Child Placement Resources Form and provide locating information for missing parents or relatives and inform them that failure to do so will not delay court proceedings;⁷⁰
- Inform parents that restriction or termination of parental rights may occur if they cannot offer child safety;⁷¹
- Appoint an attorney and guardian ad litem for the child;⁷² and
- Set a status hearing within 60 days of the award of temporary managing conservatorship.⁷³

Discretionary

At this hearing, the court may also:

- Appoint an attorney to represent eligible parents;⁷⁴
- Appoint a person authorized to consent to medical care;⁷⁵
- Issue temporary protective orders to address domestic violence;⁷⁶ and
- Issue necessary orders regarding:
 - ✓ Notice by publication for missing parent;
 - ✓ Additional home assessments or studies;
 - ✓ Paternity testing;
 - ✓ Psychological testing;
 - ✓ Medical consent or examination;
 - ✓ Child Support;
 - ✓ Parent completion of parent/family medical history form;
 - ✓ Parent disclosure of information regarding parentage, immigration status, or child's medical history; and
 - ✓ Visitation.

⁶⁸ TEX. FAM. CODE §262.201(b); a temporary order rendered under Ch. 262 is valid and enforceable until superseded by a court with jurisdiction to do so. TEX. FAM. CODE §262.204(a).

⁶⁹ TEX. FAM. CODE §262.201(e).

⁷⁰ TEX. FAM. CODE §§262.201(c); 261.307(a)(2) and (b); The Child Placement Resources form is the same as the CPS Caregiver Resource form (2625).

⁷¹ TEX. FAM. CODE §262.201(c).

⁷² TEX. FAM. CODE §§107.011; 107.012; Appointment of an attorney and guardian ad litem for a child shall be done immediately after a petition is filed and before the adversary hearing. See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Appointments.

⁷³ TEX. FAM. CODE §263.201.

⁷⁴ TEX. FAM. CODE §107.013; See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Appointments.

⁷⁵ TEX. FAM. CODE §266.004; The court generally authorizes DFPS (or another person) to give medical consent at the earliest possible juncture. See Practice Guide, SECTION 9 SPECIAL ISSUES, Health Care.

⁷⁶ TEX. FAM. CODE §262.102(c); Title 4, Protective Orders and Family Violence; See Practice Guide, SECTION 1 BEFORE FILING SUIT, Protective Orders.

ADVERSARY HEARING GUIDE

GOAL To have a court authorize DFPS obtaining temporary managing conservatorship of a child.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- Review and assess evidence, including the removal affidavit, witness statements, photos, medical reports and other investigative records;
- Subpoena necessary witnesses and records;
- Verify the Child Placement Resource form has been provided to the parents and that CPS is ready to file it (with social security numbers redacted), that CPS has evaluated each person listed on the form and determined the most appropriate relative to be a substitute caregiver, that CPS has completed a home study on that person and is ready to file it with the court, and that CPS can provide the name of relative or other designated caregiver with whom child is placed or a statement explaining why such placement has not been made and what if any actions the agency is taking to make such placement;⁷⁷
- Check status of service of citation on all required parties; and⁷⁸
- Find out CPS' recommendation regarding visitation, medical consent or any other issue that may warrant court intervention.

REQUIRED SHOWING Within 14 days after DFPS takes a child into custody in an ex parte proceeding, the court must return the child home unless the court finds:

- There was a danger to the physical health or safety of the child, caused by an act or failure to act of the person entitled to possession;
- It is contrary to the child's welfare to remain in the home;
- The urgent need for protection required immediate removal; and
- That despite reasonable efforts to prevent or eliminate the need for removal and to return the child home, there is a substantial risk of continuing danger to the child in the home.⁷⁹

COURT ACTION

Mandatory

The court must either make findings and enter temporary orders for protection of child or return the child to the parent or other person entitled to possession.⁸⁰ If the child is not returned home, the court must:

⁷⁷ TEX. FAM. CODE §262.114; §262.114 (a-1); (a-2), as amended by S.B. 2385, 81st Reg. Sess. effective September 1, 2009, as to suits filed on or after that date. The Child Placement Resources form is the same as the CPS Child Caregiver Resource form (2625), See Practice Guide, SECTION 11, TOOLS, Placements, for a copy.

⁷⁸ See Practice Guide SECTION 3 LITIGATION ESSENTIALS, Parties and Service of Process.

⁷⁹ TEX. FAM. CODE §262.201(b).

- Order placement of child with a noncustodial parent or relative, unless that is not in the child's best interest;⁸¹
- Require parents and relatives to complete Child Placement Resources form and file it with the court if not already on file, and inform them that failure to do so will not delay court proceedings;⁸²
- Inform parents that restriction or termination of parental rights may occur if they cannot offer child safety;⁸³ and
- Set a status hearing within 60 days of the award of temporary managing conservatorship.⁸⁴

NOTE: If citation by publication is necessary, the court may render a temporary order without waiting for publication.⁸⁵

Discretionary

At this hearing the court may also:

- Appoint an attorney for any parent entitled to appointed counsel;⁸⁶
- Make a finding of aggravated circumstances, waive the service plan and reasonable efforts to return requirements, and set an accelerated trial date.⁸⁷
- Issue temporary protective orders to address domestic violence;⁸⁸ and
- Issue necessary orders regarding:
 - ✓ Notice by publication for missing parent;
 - ✓ Additional home assessments or studies;
 - ✓ Paternity testing;
 - ✓ Psychological testing;
 - ✓ Drug assessment or testing;
 - ✓ Medical consent;
 - ✓ Physical examination;
 - ✓ Child Support;
 - ✓ Parent completion of parent/family medical history form;
 - ✓ Parent disclosure of information regarding parentage, immigration status, or child's medical history;
 - ✓ Visitation; and
 - ✓ Discovery or other orders needed to protect a child, facilitate the return of a child, or to find the optimum placement for a child.

⁸⁰ TEX. FAM. CODE §262.201(a).

⁸¹ TEX. FAM. CODE §262.201(e).

⁸² TEX. FAM. CODE §§262.201(c), as amended by S.B. 2385, 81st, Reg. Sess., effective September 1, 2009.

⁸³ TEX. FAM. CODE §262.201(c).

⁸⁴ TEX. FAM. CODE §263.201

⁸⁵ TEX. FAM. CODE §262.201(f).

⁸⁶ TEX. FAM. CODE §107.013(a); See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Appointments.

⁸⁷ TEX. FAM. CODE §262.2015.

⁸⁸ TEX. FAM. CODE §262.201(C); Title 4, Protective Orders and Family Violence; See Practice Guide, SECTION 1 BEFORE FILING SUIT, Protective Orders.

STATUS HEARING GUIDE

GOAL To have a court review due diligence of efforts to locate missing parents, review contents of service plan and enter court orders necessary to implement the service plan.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- Check status of the Court of Continuing, Exclusive Jurisdiction (CCEJ) inquiry;⁸⁹
- Determine whether transfer of the case is required;⁹⁰
- Request that the caseworker complete the Affidavit Regarding Military Service for any missing parent;⁹¹
- Calculate and document mandatory dismissal date;⁹²
- Review status of efforts to locate parents and other necessary persons;
- Verify that CPS has previously filed with the court the Child Placement Resources form, a copy of any home study completed in response to the form, and the name of the relative with whom the child is placed or the reason why such placement was not made and the actions CPS is taking to place the child with the relative. If this information has not been previously filed with the court, then it needs to be filed with the court no later than 10 days prior to the hearing;⁹³ and
- Review proposed service plan for compliance with TEX. FAM. CODE §263.102.

NOTE: "O" GROUND FOR TERMINATION OF PARENTAL RIGHTS

If termination for failure to comply with service plan under TEX. FAM. CODE §161.001(1)(O) is plead as a termination ground, all essential components of the plan must be specified in the court order and CPS must be in agreement that if parents comply, the agency is prepared to return the child to the parent without further condition.

REQUIRED SHOWING DFPS must submit evidence to prove:

- Due diligence was exercised to locate necessary persons;⁹⁴ and
- The appropriateness of the service plan.⁹⁵

⁸⁹ TEX. FAM. CODE §262.202; Local practice will dictate who within the agency performs this task, but the attorney must confirm that the CCEJ check has been done; See Practice Guide, SECTION 11, TOOLS, Court of Continuing & Exclusive Jurisdiction, Inquiry On Court Of Continuing Jurisdiction For A Child (VS-168).

⁹⁰ TEX. FAM. CODE §262.203; See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Jurisdiction, Prior Custody Order in Texas - Court of Continuing Exclusive Jurisdiction.

⁹¹ See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Service of Process, Missing Parent in Military.

⁹² TEX. FAM. CODE §263.401(a) (first Monday after one year anniversary of the order granting temporary managing conservatorship).

⁹³ TEX. FAM. CODE §263.003, as amended by S.B. 2385, 81st, Reg. Sess., effective September 1, 2009, as to suits filed on or after that date. Note: This information is not required if the child is in an adoptive or other permanent placement, but that is unlikely at this early stage of the litigation.

⁹⁴ TEX. FAM. CODE §263.202(a)(1).

⁹⁵ TEX. FAM. CODE §263.202(b).

COURT ACTION

Mandatory

The court must determine whether:

- Due diligence was exercised to locate missing persons;
- All persons in court provided all information for finding missing parties or relatives;
- The service plan provides for reasonable efforts to aid the parents in establishing a safe home; and
- Parents have reviewed and understand the service plan.⁹⁶

The court must also:

- Warn the parents regarding possible restriction or termination of parental rights if they are unable to provide a safe home within a reasonable period of time.⁹⁷
- Advise the parties that their progress under the service plan will be reviewed at future hearings;⁹⁸
- Make a finding regarding the identification of a person with the right to consent for medical treatment;⁹⁹ and
- Set an initial permanency hearing no later than 180 days after temporary managing conservatorship is granted.¹⁰⁰

Discretionary

At this hearing, the court may also:

- Appoint an attorney to represent eligible parents;¹⁰¹
- Require parents to submit Child Placement Resources Form, if not already done;
- Enter orders to implement service plan;
- Make a finding of aggravated circumstances, waive the service plan and reasonable efforts to return requirements, and set an accelerated trial date;¹⁰²
- Issue temporary protective orders to address domestic violence;¹⁰³ and
- Issue necessary orders regarding:
 - ✓ Notice by publication for missing parent;
 - ✓ Additional home assessments or studies;
 - ✓ Paternity testing;
 - ✓ Psychological testing;
 - ✓ Drug assessment or testing;
 - ✓ Medical consent;
 - ✓ Physical examination;

⁹⁶ TEX. FAM. CODE §263.202(a) and (b).

⁹⁷ TEX. FAM. CODE §§263.006; 262.202(b)(2).

⁹⁸ TEX. FAM. CODE §263.202(c).

⁹⁹ TEX. FAM. CODE §263.202(e).

¹⁰⁰ TEX. FAM. CODE §263.304.

¹⁰¹ TEX. FAM. CODE §107.013(a); See Practice Guide, SECTION 3, LITIGATION ESSENTIALS, Appointments.

¹⁰² TEX. FAM. CODE §262.2015.

¹⁰³ TEX. FAM. CODE, Title 4, Protective Orders and Family Violence; See Practice Guide, SECTION 1 BEFORE FILING SUIT, Alternatives to Removal.

- ✓ Child Support;
- ✓ Parent completion of parent/family medical history form;
- ✓ Parent disclosure of information and documents regarding parentage, immigration status or child's medical history;
- ✓ Visitation; and
- ✓ Discovery or other orders needed to protect a child, facilitate the return of a child, or to find the optimum placement for a child.

PERMANENCY HEARING GUIDE

GOAL Review status of child and permanency plan to ensure final order can be rendered before mandatory dismissal date.

BURDEN OF PROOF Evidence sufficient to "satisfy a person of ordinary prudence and caution."

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- Verify that all necessary persons were given 10 days' notice of hearing and a copy of permanency plan or permanency progress report;¹⁰⁴
- Verify CPS arrangements for child to attend hearing unless specifically excused by court or, for child committed to the Texas Youth Commission (TYC), appearance can be in person, telephonic, or by video;¹⁰⁵
- Verify that CPS has previously filed with the court the Child Placement Resources form, a copy of any home study completed in response to the form, and the name of the relative with whom the child is placed or the reason why such placement was not made and the actions CPS is taking to place the child with the relative. If this information has not been previously filed with the court, then 10 days before the hearing it must be filed with the court unless the child is in an adoptive or other permanent placement;¹⁰⁶
- Review permanency plan (1st permanency hearing) or permanency progress report (subsequent permanency hearings) to verify that the report:
 - ✓ Identifies concurrent goals, both a primary and at least one alternate permanency goal which may include reunification with a parent or other person from whom the child was removed; termination of parental rights and adoption by a relative or other suitable person; the award of permanent managing conservatorship to a relative or other suitable person; or "another planned, permanent living arrangement" (APPLA);¹⁰⁷
 - ✓ *If the plan/goal is "another planned, permanent living arrangement" (APPLA), the report must document a compelling reason why another permanency goal is not in the child's best interest;*¹⁰⁸ and
 - ✓ Recommends dismissal or if dismissal is not recommended:
 - On permanency progress reports, identify the dismissal date;
 - Lists parties who have not been served, describes service efforts by DFPS and parents' assistance in that effort;
 - Evaluates parties' compliance with temporary orders and the service plan;

¹⁰⁴ TEX. FAM. CODE §§263.301; 263.3025(a); Tex. R. Civ. Pro. 21a.

¹⁰⁵ TEX. FAM. CODE §§263.302, as amended by H.B. 1629, 81st Reg. Sess., effective May 23, 2009; 263.3025(a); 263.303(a), the permanency progress report must also be filed with the court 10 days before the permanency hearing.

¹⁰⁶ TEX. FAM. CODE §263.003, as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

¹⁰⁷ TEX. FAM. CODE §263.3025(d); 263.3026(a), both as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁰⁸ TEX. FAM. CODE §263.3026(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

- Evaluates the child's placement and whether it is meeting the child's needs, and recommend additional services needed for the child;
- Describes necessary actions to ensure a final order consistent with the concurrent permanency goals is rendered on or before dismissal date; and
- *For a child age 16 and older*, identifies services for transition to adult living;¹⁰⁹
- *If a child is committed to TYC or released under TYC's supervision*, evaluates whether the child's needs for treatment and education are being met, what progress toward rehabilitation the child is making, and what plans or services are needed;¹¹⁰ and
- Identify and prepare to address issues arising since or continuing from the status hearing (or most recent permanency hearing).

REQUIRED SHOWING This will vary depending on the circumstances, but may include evidence to show:

- Why return of a child to a parent is not safe or in the child's best interest;
- The permanency plan and the basis for the plan;
- Which placement is most appropriate and why;
- The progress made toward addressing problems that necessitated placement;
- Whether reasonable efforts have been made to finalize the permanency plan;
- What additional services or requirements may be necessary;
- Whether current visitation or possession orders remain appropriate;
- The results of any relative or kinship home studies; and
- What diligent search efforts have been made for any missing parties.

COURT ACTION

Mandatory

With respect to the child's placement the court can:

- Return the child to the parents if it is safe and in the child's best interest;¹¹¹
- Place the child with a nonparent entitled to service under Tex. Fam. Code §102.003 if it is safe and in the child's best interest; or¹¹²
- Retain jurisdiction and make a monitored return to parents.¹¹³

The court is also directed to:

- Identify persons present in court, and those noticed but failing to appear;¹¹⁴

¹⁰⁹ TEX. FAM. CODE §263.303(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹¹⁰ TEX. FAM. CODE §263.303(b)(2)(G), as amended by H.B. 1629, 81st Reg. Sess., effective May 23, 2009, information for progress toward rehabilitation should be obtained from TYC. See also HUMAN RESOURCES CODE §61.0766 which requires TYC to provide a report to the court and DFPS, including the results of any assessments, placement of the child in particular programs, and progress in those programs.

¹¹¹ TEX. FAM. CODE §263.306(a)(4).

¹¹² TEX. FAM. CODE §263.306(a)(5).

¹¹³ TEX. FAM. CODE §263.403.

- *For a child age 4 and older*, consult with the child in a developmentally appropriate manner about the permanency plan, if it is in child's best interest;¹¹⁵
- Review CPS' efforts to:
 - ✓ Locate necessary persons;
 - ✓ Request service of citation, including service by publication; and
 - ✓ Obtain assistance of parents to locate missing parent, alleged father, or relative;¹¹⁶
- Review efforts of parents and family to locate any missing parent, alleged father, or relative;¹¹⁷
- Evaluate CPS' efforts to find relatives for placement purposes;¹¹⁸
- Evaluate parties' compliance with temporary orders;¹¹⁹
- Determine necessity of continued substitute care, appropriateness of placement and whether other plans or services are needed;¹²⁰
- *If a child is placed with parents on a monitored return*, make specific findings regarding the grounds for the order, and set a new date not later than 180 days after the temporary order is rendered for dismissal, unless a trial on the merits is commenced;¹²¹
- *If a child is in institutional care*, assess whether efforts have been made to find the least restrictive placement consistent with the child's best interest and special needs;¹²²
- *If a child is 16 or older*, order transitional living services;¹²³
- *If a child is committed to TYC or released under TYC's supervision*, determine whether the youth's needs for treatment, rehabilitation and education are being met;¹²⁴
- Assess plans, services and issue further orders to ensure a final order is rendered prior to the dismissal date;¹²⁵
- At permanency hearing, set next permanency hearing date no later than 120 days later;¹²⁶
- Give notice in open court of mandatory dismissal date, next hearing and trial date to all parties;¹²⁷ and
- Review service plan, permanency report and other information to determine:
 - ✓ Safety of child;
 - ✓ Continuing necessity and appropriateness of placement;
 - ✓ Extent of compliance with service plan;
 - ✓ Extent of progress in alleviating causes necessitating foster care placement;

¹¹⁴ TEX. FAM. CODE §263.306(a)(1).

¹¹⁵ TEX. FAM. CODE §263.302.

¹¹⁶ TEX. FAM. CODE §263.306(a)(2).

¹¹⁷ TEX. FAM. CODE §263.306(a)(3).

¹¹⁸ TEX. FAM. CODE §263.306(a)(6).

¹¹⁹ TEX. FAM. CODE §263.306(a)(7).

¹²⁰ TEX. FAM. CODE §263.306(a)(8).

¹²¹ TEX. FAM. CODE §263.403(b)

¹²² TEX. FAM. CODE §263.306(a)(9).

¹²³ TEX. FAM. CODE §263.306(a)(10).

¹²⁴ TEX. FAM. CODE §263.306(a)(12), as amended by H.B. 1629, 81st Reg. Sess., effective May 23, 2009.

¹²⁵ TEX. FAM. CODE §263.306(a)(11).

¹²⁶ TEX. FAM. CODE §263.305.

¹²⁷ TEX. FAM. CODE §263.306(a)(12).

- ✓ Whether DFPS made reasonable efforts to finalize the permanency plan, including the concurrent permanency goals; and
- ✓ A likely date by which child may be returned home, adopted or placed in permanent managing conservatorship.¹²⁸

TIP: Extension of Dismissal Date

The only basis for an extension beyond the mandatory one year dismissal date requires the court to find extraordinary circumstances that necessitate a child remaining in temporary managing conservatorship and that remaining in DFPS care is in the child's best interest. Any such extension is limited to 180 days.¹²⁹

Discretionary

The court may also:

- Enter any necessary pre-trial orders required by local rules or practice to prevent delay of a final hearing and disposition; or
- Make a finding of extraordinary circumstances and set a new dismissal date no more than 180 days beyond the original dismissal date.

¹²⁸ TEX. FAM. CODE §263.306(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹²⁹ TEX. FAM. CODE §263.401.

FINAL HEARING GUIDE

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

BURDEN OF PROOF If termination of parental rights is requested, the burden of proof is "clear and convincing" evidence.¹³⁰ If permanent managing conservatorship is requested, the standard is "preponderance of the evidence."

DFPS ATTORNEY PREPARATION Preparation for a final hearing varies greatly depending on the relief requested, the nature of the evidence, the degree of participation by parents or other parties who may be in opposition to DFPS' position and whether or not a jury is requested. In every case, preparation of a trial notebook will focus pretrial preparation, reveal issues that require additional research, and ensure easy access to information during trial. See Practice Guide, SECTION 10 TRIAL NOTEBOOK.

REQUIRED SHOWING

Termination of Parental Rights

Termination of parental rights requires evidence of at least one ground for termination of parental rights *and* that termination is in the best interest of the child.¹³¹ See Practice Guide, SECTION 5 TERMINATION OF PARENTAL RIGHTS.

Appointment of DFPS as Permanent Managing Conservator

The appointment of DFPS as a child's Permanent Managing Conservator without termination of parental rights is only appropriate if there isn't a more permanent option for a child. If DFPS requests to be appointed as a permanent managing conservator without termination of parental rights, the agency must show:

- Appointment of a parent as managing conservator would not be in child's best interest because it would significantly impair the child's physical health or emotional development; *and*
- It would not be in child's best interest to appoint a relative or another person as managing conservator.¹³²

¹³⁰ TEX. FAM. CODE §161.001.

¹³¹ TEX. FAM. CODE §161.001; *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), non-exclusive list of best interest factors.

¹³² TEX. FAM. CODE §263.404, in making this determination the court shall take into consideration the following factors: (1) that the child will be 18 in less than three years; (2) that the child is 12 or older and has expressed a "strong desire against termination or being adopted"; (3) that the child has special medical or behavioral needs that make adoption unlikely; and (4) the needs and desires of the child.

TIP: Setting the Placement Review Hearing

If Permanent Managing Conservatorship is awarded to DFPS, the court must set a placement review hearing date. The date depends upon whether parental rights were terminated:

(1) If DFPS was named the Permanent Managing Conservator of a child and parental rights *were not* terminated, then the court must conduct a placement review hearing at least once every six months until the child becomes an adult.¹³³

(2) If DFPS was named the Permanent Managing Conservator of a child and parental rights *were* terminated, then the court must conduct the initial placement review hearing within 90 days of the court rendering the final order and subsequent placement review hearings at least once every six months until the child is adopted or becomes an adult.¹³⁴

¹³³ TEX. FAM. CODE §263.501(a).

¹³⁴ TEX. FAM. CODE §263.501(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009, as to suits filed on or after that date.

PLACEMENT REVIEW HEARING GUIDE

GOAL To review the status of every child in DFPS permanent managing conservatorship at least every six months until child reaches adulthood or is able to achieve another permanency goal.

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

DFPS ATTORNEY PREPARATION Before the hearing, the DFPS attorney must:

- ✓ Verify that all necessary persons were given 10 days' notice of the hearing and a copy of the placement review report. In addition, the report must be filed with the court 10 days before the placement hearing;¹³⁵
- ✓ Verify CPS arrangements for child to attend hearing unless specifically excused by the court or, for a child committed to the Texas Youth Commission (TYC), appearance can be in person, telephonic, or by video;¹³⁶
- ✓ Verify that CPS has previously filed with the court the Child Placement Resources form, a copy of any home study completed in response to the form, and the name of the relative with whom the child is placed or the reason why such placement was not made and the actions CPS is taking to place the child with the relative. If this information has not been previously filed with the court, then 10 days before the hearing it must be filed with the court unless the child is in an adoptive or other permanent placement;¹³⁷
- Review the placement review report to verify that the report addresses:
 - ✓ The department's permanency goal for the child;¹³⁸
 - ✓ *For a child whose permanency goal is another planned, permanent living arrangement (APPLA)*, a compelling reason why adoption, permanent managing conservatorship with a relative or other person, or return to a parent is not in the child's best interest; and information regarding a family or other caring adult who has made a permanent commitment to the child;¹³⁹
 - ✓ The appropriateness of the child's current placement for meeting the child's needs;¹⁴⁰
 - ✓ *If the child is placed in institutional care*, whether the placement is the least restrictive alternative consistent with child's best interest and needs;¹⁴¹
 - ✓ *For child 16 and older*, a transition plan that identifies needed tasks and services to transition the child to adult living, and those services being provided by the Transitional Living Services program;¹⁴²

¹³⁵ TEX. FAM. CODE §§263.501(c) and (d); 263.502(a); Tex. R. Civ. Pro. 21a.

¹³⁶ TEX. FAM. CODE §263.501(f), as amended by H.B. 1629, 81st Reg. Sess., effective May 23, 2009.

¹³⁷ TEX. FAM. CODE §263.003, as amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date.

¹³⁸ TEX. FAM. CODE §§263.502(c); 263.3026(a), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹³⁹ TEX. FAM. CODE §§263.502(d); 263.503(a)(7) as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁴⁰ TEX. FAM. CODE §263.502(c)(1).

¹⁴¹ TEX. FAM. CODE §263.502(c)(2).

¹⁴² TEX. FAM. CODE §263.502(c)(3), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

- ✓ The appropriateness of the child’s educational placement;¹⁴³
- ✓ Additional plans or services needed to meet the child’s special circumstances;¹⁴⁴
- ✓ DFPS’ efforts to place child for adoption, if parental rights are terminated;¹⁴⁵
- ✓ *For a child in DFPS permanent managing conservatorship whose parental rights are not terminated*, the efforts made to find a permanent placement with the current caregiver, relatives or other suitable individuals, and to evaluate any change in parent circumstances that may warrant child's return or possible termination of parental rights;¹⁴⁶ and
- ✓ *If a child is committed to TYC or released under TYC's supervision*, whether the child's needs for treatment and education are being met, what progress toward rehabilitation the child is making, and what plans or services are needed.¹⁴⁷

COURT ACTION

The court must:

- *For a child age 4 and older*, consult with the child in a developmentally appropriate manner about the permanency or transition plan, if it is in child's best interest.¹⁴⁸
- Determine :
 - ✓ If the child's placement is necessary, safe and appropriate; and, if applicable, whether the out of state placement is still necessary;
 - ✓ *For a child placed in institutional care*, whether efforts have been made to find the least restrictive placement consistent with the child's best interest and special needs;
 - ✓ *For a child age 16 and older*, whether necessary transition services are available;
 - ✓ If other plans or services are needed to meet the child’s special needs or circumstances;¹⁴⁹
 - ✓ *For a child committed to TYC or released under TYC's supervision*, determine whether the youth's needs for treatment, rehabilitation, and education are being met.¹⁵⁰ In addition, the court must not dismiss the suit unless the child is adopted or in the permanent managing conservatorship of an individual;¹⁵¹
 - ✓ *For a child in DFPS permanent managing conservatorship whose parental rights are not terminated*, whether DFPS has diligently attempted to place the child for adoption;¹⁵²

¹⁴³ TEX. FAM. CODE §263.502(c)(4).

¹⁴⁴ TEX. FAM. CODE §263.502(c)(5).

¹⁴⁵ TEX. FAM. CODE §263.502(c)(6).

¹⁴⁶ TEX. FAM. CODE §263.502(c)(7), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁴⁷ TEX. FAM. CODE §263.502(c)(7), as amended by S.B. 1629, 81st Reg. Sess., effective May 23, 2009, information for progress toward rehabilitation should be obtained from TYC.

¹⁴⁸ TEX. FAM. CODE §263.501(f).

¹⁴⁹ TEX. FAM. CODE §263.503(a)(1) - (4).

¹⁵⁰ TEX. FAM. CODE §263.503(7), as amended by S.B. 1629, 81st Reg. Sess., effective May 23, 2009

¹⁵¹ TEX. FAM. CODE §263.503(g), as amended by S.B. 1629, 81st Reg. Sess., effective May 23, 2009.

¹⁵² TEX. FAM. CODE §263.503(a)(5).

- ✓ *For a child in DFPS permanent managing conservatorship whose parental rights have not been terminated, whether a permanent placement, including appointment of a relative a permanent managing conservator or returning the child to a parent is appropriate for the child;¹⁵³ and whether to order up to six months of services for a parent, if the court makes the necessary findings regarding the child's placement and the possibility of reunification;¹⁵⁴*
- ✓ *For a child whose permanency goal is another planned, permanent living arrangement (APPLA), whether DFPS has documented a compelling reason why adoption, permanent managing conservatorship with a relative or other person, or return to a parent is not in the child's best interest; and identified a family or other caring adult who has made a permanent commitment to the child;¹⁵⁵ and*
- ✓ *Whether DFPS has made reasonable efforts to finalize the permanency plan.¹⁵⁶*
- *Set the next placement review hearing within six months, and continue to set these hearings within six months until the child is adopted or becomes an adult.¹⁵⁷*

¹⁵³ TEX. FAM. CODE §263.503(a)(6), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁵⁴ TEX. FAM. CODE §263.503(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁵⁵ TEX. FAM. CODE §263.503(a)(7), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁵⁶ TEX. FAM. CODE §263.503(a)(8), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁵⁷ TEX. FAM. CODE §263.501(a) and (b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009, as to suits filed on or after that date. Note: If DFPS was named Permanent Managing Conservator and parental rights were terminated at the final hearing, the initial placement review hearing is required to have been set by the court within 90 days of the court rendering the final order.

EVERY HEARING CHECKLIST

- What is the status of diligent search for any missing parent, relative or other placement resource?
- What is the status of service of process on parties?¹⁵⁸
- Has a child placement resources form, any completed home study and other information required pursuant to TEX. FAM. CODE §§262.114(a-1) and (a-2) and 263.003¹⁵⁹ been filed with the court?
- Are there unresolved paternity issues?¹⁶⁰
- Is there a minor parent needing an appointment of attorney and/or guardian ad litem?
- Is there any possibility of Indian heritage?¹⁶¹
- Are there medical consent/treatment issues, including psychotropic medications?¹⁶²
- If a child has special needs related to physical or mental disability, are appropriate services in place?¹⁶³
- Is a referral to Family Group Conferencing, mediation or other alternative dispute resolution appropriate?
- Are there issues relating to the appropriateness of the child's placement?¹⁶⁴
- What is the child's primary and at least one alternate concurrent permanency plan?¹⁶⁵
- If the permanency plan is "another planned, permanent living arrangement" (APPLA), what is the compelling reason why another permanency goal is not in child's best interest?¹⁶⁶
- If the youth is age 16 and above, what is the status of planning for transition to adulthood?
- If the youth is committed to TYC or released under TYC's supervision, what are youth's needs for treatment, education, what progress is being made toward rehabilitation and what plans or services are needed?¹⁶⁷
- Is international travel planned for a foster child?¹⁶⁸

¹⁵⁸ See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Parties and Service of Process.

¹⁵⁹ As amended by S.B. 2385, 81st Reg. Sess., effective September 1, 2009, as to suits filed on or after that date,

¹⁶⁰ See Practice Guide, SECTION 3 LITIGATION ESSENTIALS, Paternity Questions & Solutions.

¹⁶¹ See Practice Guide, SECTION 9 SPECIAL ISSUES, Indian Child Welfare Act.

¹⁶² See Practice Guide, SECTION 9 SPECIAL ISSUES, Health Care, Medical Consent and Psychotropic Medications.

¹⁶³ If a child has special needs this will be noted in the medical summary prepared for judicial review. If there are unresolved issues relating to services, treatment options or resources, the attorney should confer with the caseworker and be prepared to respond to the court regarding these issues. For additional information, See Practice Guide, SECTION 12 RESOURCES, Child Welfare Contacts, Disabilities - Advocates & Information.

¹⁶⁴ See Practice Guide, SECTION 9 SPECIAL ISSUES, Placement.

¹⁶⁵ TEX. FAM. CODE §§263.3025(d); 263.3026(a), both as amended by S.B. 939, 81st Reg. Sess. effective June 19, 2009.

¹⁶⁶ TEX. FAM. CODE §263.3026(b), as amended by S.B. 939, 81st Reg. Sess., effective June 19, 2009.

¹⁶⁷ TEX. FAM. CODE §§263.002(2); 263.303(b)(2)(G); 263.306(a)(12); 263.502(c)(7); 263.503(7), all as amended H.B. 1629, 81st Reg. Sess., effective May 23, 2009.

- Is a child a citizen of a foreign country? ¹⁶⁹
- Is a child undocumented? ¹⁷⁰
- If out of state placement is under consideration, does the ICPC apply and if so, what is the status of the request?¹⁷¹

¹⁶⁸ TEX. FAM. CODE §264.122, international travel requires advance court approval, See CPS HB 6571.62 and CPS Intranet Form No. 2069, Caregiver Declaration for Out-of-Country Travel. Note: For out of state travel within the United States CPS policy requires advance approval by DFPS and advance notice to the court; however, approval by the court is only required if the local court requires it.

¹⁶⁹ See Practice Guide, SECTION 9 SPECIAL ISSUES, Citizenship & Immigration Status, When is notice to the foreign consul necessary?

¹⁷⁰ See Practice Guide, SECTION 9 SPECIAL ISSUES, Citizenship & Immigration Status, Why is getting Special Immigrant Juvenile Status (SIJS) important?

¹⁷¹ See Practice Guide, SECTION 9 SPECIAL ISSUES, Laws Concerning Placements, Out of State.