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## SECTION 3 LITIGATION ESSENTIALS

### JURISDICTION

A court's authority to issue an order in a child protection suit hinges in part on where the child and parents reside, whether another court has issued a prior custody order, and how long any new Texas residents have lived in this state.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is codified in CHAPTER 152 of the TEXAS FAMILY CODE, contains the basic jurisdiction provisions for resolution of a child custody suit.<sup>1</sup> Now enacted in 46 states (plus the Virgin Islands and District of Columbia),<sup>2</sup> the UCCJEA determines whether a state court has jurisdiction to make an initial child custody determination or to modify an existing child custody decree.<sup>3</sup> The UCCJEA governs all proceedings relating to child abuse and termination of parental rights, but does not apply to adoption proceedings or proceedings for emergency medical care of a child.<sup>4</sup>

In addition to the UCCJEA, if there is prior child custody litigation in Texas when DFPS files a Suit Affecting the Parent Child Relationship (SAPCR), state law governing the "court of continuing, exclusive jurisdiction" (CCEJ) dictates which Texas court has jurisdiction.<sup>5</sup> When a Texas court renders a final order in a SAPCR, that court acquires exclusive jurisdiction over child-related issues and is known as the court of continuing,

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<sup>1</sup> A national uniform law, the UCCJEA was formerly known as the Uniform Child Custody Jurisdiction Act (UCCJA).

<sup>2</sup> Enactment legislation has been introduced in Massachusetts, Missouri, New Hampshire and Vermont. For updated information on the status of a state's enactment, check the Uniform Law Commission website at [www.nccusl.org](http://www.nccusl.org).

<sup>3</sup> TEX. FAM. CODE §§152.201; 152.203.

<sup>4</sup> TEX. FAM. CODE §§152.103; 152.102(4).

<sup>5</sup> TEX. FAM. CODE CHAPTER 155; TEX. FAM. CODE § 262.203.

exclusive jurisdiction.<sup>6</sup> When this occurs, no other court has jurisdiction over a suit involving the child except DFPS in an emergency action to protect the health and safety of the child.<sup>7</sup> A subsequent suit must be initiated as an original proceeding unless the CCEJ has rendered a final order.<sup>8</sup> The following final orders do not create continuing, exclusive jurisdiction:

- Voluntary or involuntary dismissal of a SAPCR;
- A final order in a paternity suit that finds that the alleged or presumed father is not the biological father (unless the child was the subject of a prior filed suit); and
- A final order of adoption.<sup>9</sup>

### **Temporary Emergency Jurisdiction**

DFPS is authorized to file for emergency relief to protect a child in the county where the child is found.<sup>10</sup> "Home state" jurisdiction under the UCCJEA requires that a child reside in Texas for six consecutive months prior to DFPS intervention, but a court can assume temporary emergency jurisdiction if the child:

- Is present in Texas; and
- Has been abandoned; or
- The child, a sibling or a parent is subjected to or threatened with mistreatment or abuse.<sup>11</sup>

Neglect is not a basis for emergency jurisdiction under the UCCJEA, but the term "mistreatment" is likely broad enough to encompass all circumstances when emergency intervention is required. If an Indian child is involved, there are special limits on a state court's emergency jurisdiction.<sup>12</sup>

The limitations on emergency jurisdiction make it critical to find out quickly:

- Has the child lived with a parent (or person acting as a parent) in Texas for the past six months?
- Is there a prior child custody order?
- What court issued any prior order?

If there is a prior court order making a child custody determination, it is essential to determine:

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<sup>6</sup> TEX. FAM. CODE §155.001.

<sup>7</sup> TEX. FAM. CODE §155.001(c).

<sup>8</sup> TEX. FAM. CODE §155.001(d).

<sup>9</sup> TEX. FAM. CODE §155.001(b).

<sup>10</sup> TEX. FAM. CODE §262.002.

<sup>11</sup> TEX. FAM. CODE §152.204; *In re J.C.B.*, 209 S.W.3d 821(Tex. App.—Amarillo 2006, no pet.) (Texas court had authority to terminate parental rights of nonresident father, where Texas became child's home state in the intervening 14 months after court assumed emergency jurisdiction following parents' drug arrest in Texas); *In re M.G.M.*, 163 S.W. 3d 191 (Tex. App. —Beaumont 2005, no pet.) (where Texas not home state and litigation pending in Michigan, Texas court only authorized to issue emergency orders for protection).

<sup>12</sup> See Practice Guide, SECTION 9, SPECIAL ISSUES, Indian Child Welfare Act.

- Whether another Texas court has continuing, exclusive jurisdiction; and
- Whether a court in another state has authority that precludes this court from acting beyond issuing the emergency orders.

If there is no prior order and no proceeding begun in another state, an emergency order rendered by a Texas court remains in effect until a state with jurisdiction under the UCCJEA issues an order. If that does not occur, an order issued by the Texas court can become a final child custody determination if the court so indicates and Texas becomes the child's home state.<sup>13</sup>

If there is a prior order entered in another state in conformity with the UCCJEA, a Texas court must specify in the emergency order a period of time sufficient to allow the litigant an opportunity to obtain a court order from that court.<sup>14</sup> The order issued by the Texas court is then valid until the original court issues an order or the stated time period expires.

### **Texas Residents & No Prior Custody Order**

Perhaps the most common scenario DFPS encounters involves parents who both reside in Texas when a SAPCR is filed. If there is no prior child custody order, in Texas or another state, the issue is whether the court has jurisdiction to make an initial child custody determination. Texas has "home state" jurisdiction under the UCCJEA if a child has lived in Texas with a parent (or person acting as a parent) for at least six consecutive months before commencement of the suit (or in the case of a child less than six months old, since birth).<sup>15</sup> Alternatively, if no other state has "home state" jurisdiction (or such state has declined jurisdiction), a Texas court can assume jurisdiction if the child and at least one parent (or person acting as a parent) have a "significant connection" to the state and substantial relevant evidence is in the state.<sup>16</sup>

### **Prior Custody Order in Texas- Court of Continuing Exclusive Jurisdiction**

If there is a prior child custody order from a Texas court when DFPS files suit, the issue is which Texas court has jurisdiction. To find out whether another court has continuing, exclusive jurisdiction (CCEJ), after the adversary hearing DFPS must request that the vital statistics unit (VSU)<sup>17</sup> identify any Texas court that has continuing, exclusive jurisdiction.<sup>18</sup> Within 10 days of a request the VSU must either identify the docket number of the suit or confirm that the child has not been the subject of a prior suit.<sup>19</sup> A

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<sup>13</sup> TEX. FAM. CODE §152.204(b).

<sup>14</sup> TEX. FAM. CODE §152.204(c).

<sup>15</sup> See Practice Guide, SECTION 11, TOOLS, Affidavit for Removal, which requests child's addresses for preceding six months.

<sup>16</sup> TEX. FAM. CODE §152.201(a)(2).

<sup>17</sup> The statute refers to the bureau of vital statistics, but the vital statistics unit within the Texas Department of State Health Services handles these inquiries.

<sup>18</sup> TEX. FAM. CODE §§155.101(a), 262.202; See Practice Guide, SECTION 11, TOOLS, Court of Continuing Exclusive Jurisdiction, Inquiry on Court of Continuing Jurisdiction for a Child (VS-168).

<sup>19</sup> TEX. FAM. CODE §155.101(d).

final order entered without this information is voidable upon a showing that another court had continuing, exclusive jurisdiction.<sup>20</sup>

If the VSU search reveals that a court of continuing, exclusive jurisdiction exists, the issue of which court adjudicates the case is determined by TEXAS FAMILY CODE transfer provisions, not the TEXAS RULES OF CIVIL PROCEDURE and venue statutes that govern other civil cases.<sup>21</sup> While the general rule is that a motion for transfer by the petitioner should be filed with the initial pleadings, a motion for transfer can be filed at any time during the pendency of a DFPS case under CHAPTER 262.<sup>22</sup>

On motion of the court or a party, the court where DFPS filed the SAPCR under Chapter 262 must:

- Transfer the suit to the CCEJ, if any;
- Order transfer from the CCEJ if transfer is mandatory; or
- If transfer based on improper venue is warranted, order transfer of the suit to the court with venue.<sup>23</sup>

Transfer of a SAPCR is generally mandatory:

- From the CCEJ, on motion showing that the child's parents have a dissolution suit pending in another court; and
- To a county where the child has lived for six months or longer, on motion by a party in a suit to modify or a motion to enforce an order filed in the CCEJ.<sup>24</sup>

However, a court hearing a child protection suit under Chapter 262 is not required to transfer a suit to a court where a dissolution suit is pending until a final order is rendered under CHAPTER 262.<sup>25</sup> Transfer of a SAPCR to a county where a child has resided for more than six months is a mandatory, ministerial duty which applies whether or not it would be a proper venue for an original SACPR.<sup>26</sup> Transfer based on inconvenient forum is discretionary and may be denied if the child has resided in the county less than six months.<sup>27</sup>

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<sup>20</sup> TEX. FAM. CODE §155.104(b).

<sup>21</sup> TEX. FAM. CODE §§155.201; 155.202.

<sup>22</sup> TEX. FAM. CODE §262.203(b).

<sup>23</sup> TEX. FAM. CODE § 262.203(a).

<sup>24</sup> TEX. FAM. CODE §155.201; *In re Nabors*, 276 S.W. 3d 190 (Tex. App. Houston [14<sup>th</sup> Dist.] 2009 orig. proceeding) (mandatory transfer to county where children lived with foster parents approximately 17 months); *In re Kerst*, 237 S.W. 3d 441 (Tex. App.—Texarkana 2007, orig. proceeding) (mandatory transfer to county where children lived in foster home for past 16 months); *In re Gore*, 2007 Tex. App. LEXIS 6814 (Tex. App.—Amarillo 2007, orig. proceeding) (county where foster child lived for six years is only county with venue for termination of parental rights action filed by foster parents); *In re Leder*, 2007 Tex. App. LEXIS 5282 (Tex. App. Houston [1st Dist.] 2007, orig. proceeding) (mandatory transfer from county where dissolution granted to county where child lived last six months).

<sup>25</sup> TEX. FAM. CODE § 262.203(c).

<sup>26</sup> *Proffer v. Yates*, 734 S.W. 2d 671 (Tex. 1987, orig. proceeding).

<sup>27</sup> TEX. FAM. CODE §155.202.

**TIP:**

A motion to transfer is only appropriate to address the issue of which Texas court will adjudicate a case. If there is a simultaneous proceeding in another state, follow the UCCJEA procedure set forth at TEX. FAM. CODE §152.110.

**Prior Custody Order from Another State**

When a court becomes aware of either a pending child custody proceeding in another state or a prior child custody determination from another state, the UCCJEA requires the court to communicate with the other court in the other state.<sup>28</sup> If another state has made a prior child custody determination involving a child, a Texas court can only modify a court order from another state (except for temporary emergency orders), if Texas has jurisdiction either as the "home state" or based on a "significant connection," and :

- The court in the first state determines it no longer has jurisdiction or that another state would be a more convenient forum; or
- Either court determines that the child, the child's parents and any person acting as a parent no longer live in the original state.<sup>29</sup>

If Texas has jurisdiction to modify another state's court order, a Texas court *may* decline jurisdiction if Texas is an inconvenient forum<sup>30</sup> and *must* decline jurisdiction (with limited exceptions) if the person attempting to invoke jurisdiction has engaged in "unjustifiable conduct."<sup>31</sup>

The same UCCJEA principles limit the authority of another state's courts to act (except under the emergency provision) once a Texas court has made a child custody determination consistent with the UCCJEA.<sup>32</sup>

**Recognition of Out-of-State, Tribal or Foreign Child Custody Orders**

Unless a Texas court has authority to modify another state's court order, the court must recognize and enforce a child custody determination made by:

- Another state;<sup>33</sup>
- A tribe;<sup>34</sup> or
- Another country.<sup>35</sup>

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<sup>28</sup> TEX. FAM. CODE §152.204(d).

<sup>29</sup> TEX. FAM. CODE §152.203.

<sup>30</sup> TEX. FAM. CODE §152.207.

<sup>31</sup> TEX. FAM. CODE §152.208; *In re S.L.P.*, 123 S.W. 3d 685 (Tex. App.—Fort Worth 2003, no pet.)(where mother established child's Texas residence by violating prior custody orders over two year period mandatory decline of jurisdiction for "unjustifiable conduct").

<sup>32</sup> TEX. FAM. CODE §152.202; *In re K.B.A.*, 145 S.W.3d 685 (Tex. App.—Fort Worth 2004, no pet) (where mother still resides in Texas, court that made the original child custody determination is the only court with jurisdiction).

<sup>33</sup> TEX. FAM. CODE §152.303.

<sup>34</sup> TEX. FAM. CODE §152.104(c).

<sup>35</sup> TEX. FAM. CODE §152.105(b).

In litigation involving an Indian child, the state court's jurisdiction turns on whether the child lives on the reservation and if not, whether a motion to transfer the case to a tribal court is granted. If a case remains in the state court, the court must give full faith and credit to any prior child custody determination made by a tribe (and otherwise comply with the Indian Child Welfare Act).<sup>36</sup>

Similarly, a Texas court shall treat a child custody determination from a court in a foreign country in the same manner as another state's for purposes of recognition and enforcement, as long as the determination was entered under factual circumstances in substantial conformity with the UCCJEA, and the law of the foreign state does not violate fundamental principles of human rights.<sup>37</sup>

### **Registration Procedure**

Registration of an out of state, tribal or foreign court order operates to give an order the same legal effect as a child custody determination issued by a Texas court. A request for registration requires submission of the following documentation to the local court:

- A letter or other document requesting registration;
- Two copies, including one certified copy, of the determination to be registered, with a sworn statement that, to the declarant's knowledge and belief, the determination has not been modified; and
- The name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the order to be registered (unless a court has determined such information to be confidential for the safety of a child or party).<sup>38</sup>

Once these documents are filed, the court must file the determination as a foreign judgment, and notice must be given to the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation that the registered determination is enforceable as of the date of registration and that failure to request a hearing to contest the registration within twenty days will preclude any contest of the child custody determination.<sup>39</sup> Expedited enforcement is also available in a statutory procedure akin to a habeas corpus proceeding.<sup>40</sup>

### **Child Custody Litigation Across State and National Borders**

Federal laws and treaties also provide special protections for children subject to custody disputes and abductions that cross state and international borders. The Parental

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<sup>36</sup> 25 U.S.C. §1911(b); See Practice Guide, SECTION 9, SPECIAL ISSUES, Indian Child Welfare Act.

<sup>37</sup> TEX. FAM. CODE §152.105; *In re Y.M.A.*, 111 S.W.3d 790 (Tex. App. —Fort Worth 2003, no pet.) (where Egyptian court exercised jurisdiction to make an initial child custody order, Texas court properly granted motion to enforce foreign child custody order).

<sup>38</sup> TEX. FAM. CODE §152.305(a).

<sup>39</sup> TEX. FAM. CODE §152.305 (b), (c).

<sup>40</sup> TEX. FAM. CODE §152.308.

Kidnapping Prevention Act of 1980 (PKPA) requires that states give full faith and credit to child custody determinations made in conformity with the PKPA.<sup>41</sup>

Similarly, the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") is an international treaty<sup>42</sup> that Congress implemented by enacting the International Child Abduction Remedies Act (ICARA).<sup>43</sup> Significantly, this body of law does not provide for adjudication of the merits of an international child custody dispute, but is limited to determining the proper legal forum for litigating such a case.<sup>44</sup>

## **PARTIES**

DFPS is authorized to file a SAPCR as a means of protecting a child from abuse and neglect.<sup>45</sup> A number of other persons and entities are authorized to file an initial SAPCR, including a child's alleged father, relative, caretaker or foster parent, subject to specific statutory requirements in each case.<sup>46</sup> If a petition requests appointment of DFPS as managing conservator, DFPS must be served with citation in the case.<sup>47</sup>

DFPS does not petition for adoption for a child in the agency's conservatorship whose parental rights are terminated. A suit requesting only an adoption can be filed by a foster parent who has been approved to adopt a child.<sup>48</sup> Alternatively, a suit for adoption or requesting termination and adoption may be filed by:

- A child's stepparent;
- An adult with actual possession and control of a child as result of an adoptive placement at any time during the 30 days prior to filing of the petition;
- An adult with actual possession and control of a child for not less than two months during the three months prior to filing of the petition;
- An adult who has adopted, or is the foster parent of and has petitioned to adopt a sibling of the child; or
- An adult the court finds has had substantial past contact with the child.<sup>49</sup>

### **Who Can Intervene in a SAPCR?**

A more relaxed standard for intervention as opposed to standing to file an original suit reflects the fact that once a suit has already been filed, any disruption to the family has

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<sup>41</sup> 28 U.S.C. §1738A.

<sup>42</sup> Established at The Hague October 25, 1980.

<sup>43</sup> 42 U.S.C. §11601 et seq.

<sup>44</sup> See Practice Guide, SECTION 12, RESOURCES, Child Welfare Contacts, International, Hague Convention on Civil Aspects of International Child Abduction.

<sup>45</sup> TEX. FAM. CODE §§102.003(a)(5); 262.001.

<sup>46</sup> TEX. FAM. CODE §102.003; 102.004(a).

<sup>47</sup> TEX. FAM. CODE §102.009(a)(10).

<sup>48</sup> TEX. FAM. CODE §102.003(c).

<sup>49</sup> TEX. FAM. CODE §102.005; *In re C.M.C.*, 192 S.W.3d 866 (2006 Tex. App.—Texarkana, no pet.) ("substantial past contact" requires actual contact, not evidence of difficulty in maintaining contact).



already occurred and adding a new party may aid the court in resolving the case.<sup>50</sup> If there is proof that appointment of one or both parents as conservator would significantly impair the child's physical health or emotional development, the court may grant the following parties leave to intervene in a SAPCR filed by DFPS:

- Grandparents; or<sup>51</sup>
- Others persons deemed to have had substantial past contact with the child.<sup>52</sup>

If CPS becomes involved with a family, the agency actively searches for grandparents and other relatives who can serve as caretakers.<sup>53</sup> A grandparent's right of access to a child is controlled by TEX. FAM. CODE §153.433<sup>54</sup>, which requires (among other things) that a grandparent overcome the presumption that a parent acts in the best interest of a child, consistent with the U.S. Supreme Court's decision in *Troxel v. Granville*.<sup>55</sup> If circumstances warrant CPS involvement, however, the same evidence would also likely serve to rebut the presumption if grandparents were to act on their own.

### **90 Day Window After Parental Rights Terminated**

In 2007 the Legislature carved out an exception to the general rule that once parental rights are terminated, former parents and relatives by blood, adoption or marriage no longer have standing to file suit. The new provision gives the following relatives 90 days after termination of parental rights by DFPS to seek managing conservatorship of a child:

- Adult sibling;
- Grandparent; or
- Aunt or uncle.<sup>56</sup>

The possibility of this type of suit extends the time the agency must wait before taking action to finalize a child's permanency plan following a judgment terminating parental rights.

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<sup>50</sup> *Whitworth v. Whitworth*, 222 S.W.3d 616 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2007, no pet.).

<sup>51</sup> TEX. FAM. CODE §102.004(b); *In re M.A.M.*, 35 S.W.3d 788, 790 (Tex. App.—Beaumont 2001, no pet.) (substantial past contact requirement does not apply to grandparents, who may file original suit for managing conservatorship or intervene).

<sup>52</sup> *In re M.T.*, 21 S.W. 3d 925 (Tex. App. — Beaumont, 2000, no pet.) (implied finding of substantial contact warrants intervention where foster parents cared for children over 14 months); *In re N.L.G.*, 238 S.W. 3d 828 (Tex. App. — Fort Worth 2007, no pet.) (foster parents who cared for child all but first seven days of first year of life have substantial past contact to warrant intervention in termination of parental rights action).

<sup>53</sup> TEX. FAM. CODE §262.114(a-2) , as amended by S.B. 2385, 81<sup>st</sup>, Reg. Sess., effective September 1, 2009, requires that DFPS file a written explanation at the adversary hearing regarding failure to place a child with a relative or other designated caregiver named on the proposed child placement resources form.

<sup>54</sup> As amended by H.B. 1012 (Section 12), 81<sup>st</sup> Sess., effective September 1, 2009.

<sup>55</sup> 530 U.S. 57 (2000).

<sup>56</sup> TEX. FAM. CODE §102.006(c); CPS Policy, PSA 07-166 (September 4, 2007) *Certain Relative Challenges of a Termination Order* ("Prior to HB 1481 a termination order was not considered final until 35 days after the signing of the order because of the appellate deadlines. Now the order cannot really be considered final until 90 days after signing the final order.").

## PATERNITY QUESTIONS AND SOLUTIONS

Establishing the parentage of a child is a vital aspect of a child protection suit. The earlier the parentage question is answered, the more efficiently the litigation can be conducted. As soon as a legal father is established, any other potential candidates can be dismissed. Especially if a parent later disappears, having the paternity issue resolved up front simplifies the litigation immensely.

Since 2001, the Uniform Parentage Act (UPA) governs every determination of parentage in this state regardless of the place of birth of the child or the past or present residence of the child.<sup>57</sup> Case law construing prior statutory provisions may be persuasive, but is not controlling as to current statutory provisions.<sup>58</sup>

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.<sup>59</sup>

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 Subchapter D., unless the acknowledgment has been rescinded or successfully challenged;
- An adjudication of the man's paternity;
- The adoption of a child by the man; or
- The man's consenting to assisted reproduction by his wife under Subchapter H which has resulted in the birth of the child.<sup>60</sup>

In most instances when CPS has filed a child protection suit, the same court will adjudicate the child's parentage.<sup>61</sup> Necessary parties are:

- The mother of the child; and
- A man whose paternity is to be adjudicated.<sup>62</sup>

The court must have personal jurisdiction to adjudicate a person as a parent.<sup>63</sup> The court may exercise jurisdiction over a nonresident individual for purposes of adjudicating parentage if conditions for long-arm jurisdiction are met.<sup>64</sup> If there are multiple respondent fathers, lack of jurisdiction over one party does not prohibit the court from

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<sup>57</sup> TEX. FAM. CODE §160.103.

<sup>58</sup> TEXAS FAMILY LAW PRACTICE MANUAL (2d ed. 2006) State Bar of Texas, Chapter 40, "Parentage," p. 865, comment.

<sup>59</sup> TEX. FAM. CODE §160.201(a).

<sup>60</sup> TEX. FAM. CODE §160.201(b).

<sup>61</sup> TEX. FAM. CODE §160.104(1).

<sup>62</sup> TEX. FAM. CODE §160.603.

<sup>63</sup> TEX. FAM. CODE §160.604(a).

<sup>64</sup> TEX. FAM. CODE §§159.201(a); 160.604(b).

making an adjudication of parentage binding on an individual over whom the court has jurisdiction.<sup>65</sup> The issue of parentage is not subject to jury determination.<sup>66</sup>

### **Who is the Father?**

The best source of information about a child's father is usually the mother. The Affidavit of Status used for many years to obtain the relevant information about paternity from a mother who is relinquishing her parental rights is no longer recognized by law.<sup>67</sup> Careful questioning of the mother (or relatives, in mother's absence) and documentation of the operative fact remains essential for ascertaining paternity. The Paternity Questionnaire is designed to help a caseworker collect essential information regarding paternity.<sup>68</sup>

#### ***TIP:***

Do *not* rely on a caseworker's conclusion that a man is a presumed, alleged or other type of father. The caseworker's role is to gather the relevant information. The attorney's job is to analyze the information and to determine what if any additional legal steps are necessary to establish a legal father.

Once information regarding paternity is collected, documenting the mother's statement regarding paternity is essential. If the mother later disappears, or later provides different information regarding paternity, having the mother's formal statement as to paternity may be extremely useful. Documentation can be accomplished in various ways depending on the circumstances:

- If she is at least 18 years old, the information can be documented in an affidavit, which should be notarized;<sup>69</sup>
- A mother can testify in court (if she is under age 18, the court must first make a finding that she is competent to do so); or
- If the mother is incarcerated, an unsworn declaration can be used.<sup>70</sup>

### **What Kind of Father Is He?**

There are five possible types of fathers:

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

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<sup>65</sup> TEX. FAM. CODE §160.604(c).

<sup>66</sup> TEX. FAM. CODE §160.632.

<sup>67</sup> TEX. FAM. CODE §161.105 (repealed by 80th Legis., Reg. Sess (2007), H.B. 3997, effective Sept. 1, 2007.

<sup>68</sup> See Practice Guide, Section 11, TOOLS, Paternity, Paternity Questionnaire.

<sup>69</sup> See Practice Guide, SECTION 11, TOOLS, Paternity, Mother's Affidavit Regarding Child's Father.

<sup>70</sup> TEX. CIV. PRAC. & REM. CODE §§132.001(a).

Being able to sift through the factual allegations and evidence to determine which man is the legal father requires a working knowledge of each alternative basis for establishing paternity.

### **Presumed Father**

A "presumed father" is a man who is recognized as the father of a child by operation of law until that status is rebutted or confirmed in a judicial proceeding.<sup>71</sup>

A man is presumed to be the father of a child if:

- He is married to the mother of the child and the child is born during the marriage;
- He is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- He married the mother of the child before the birth of the child in apparent compliance with 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 is 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:
  - (1) The assertion is in a record filed with the bureau of vital statistics;
  - (2) He is voluntarily named as the child's father on the child's birth certificate; or
  - (3) He promised in a record to support the child as his own; or
- 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.<sup>72</sup>

### **Denial of Paternity by Presumed Father**

A denial of paternity signed by a presumed father is valid only if:

- An Acknowledgment Of Paternity (AOP) is signed or authenticated by another man;<sup>73</sup>
- The denial of paternity is in a court record and authenticated; and
- The presumed father has not previously acknowledged paternity of the child (unless the previous acknowledgement has been rescinded or successfully challenged), or has not been adjudicated as the father of the child.<sup>74</sup>

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<sup>71</sup> TEX. FAM. CODE §160.102(13).

<sup>72</sup> TEX. FAM. CODE §160.204.

<sup>73</sup> For more detailed discussion of the AOP process, See Acknowledged Father, below.

<sup>74</sup> TEX. FAM. CODE §160.303.

Both an AOP and a denial of paternity may be signed before the birth of the child and can be signed by a minor.<sup>75</sup>

### **Rebutting the Presumption**

The paternity of a child with a presumed, acknowledged or adjudicated father can only be disproved with an admissible genetic test excluding the presumed father or identifying another man as the father.<sup>76</sup> In most circumstances, a proceeding to adjudicate the parentage of a child with a presumed father must be commenced not later than the fourth anniversary of the date of the birth of the child.<sup>77</sup> A proceeding to disprove paternity of a presumed father may be brought at any time only if court finds:

- The presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; and
- The presumed father never represented to others that the child was his own.<sup>78</sup>

### **Alleged Father**

An "alleged father" (sometimes called a "putative father") is a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined.<sup>79</sup>

The term alleged father does not include:

- A presumed father;
- A man whose parental rights have been terminated or declared to not exist; or
- A male donor.<sup>80</sup>

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.<sup>81</sup>

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<sup>75</sup> TEX. FAM. CODE §160.304.

<sup>76</sup> TEX. FAM. CODE § 160.603(b).

<sup>77</sup> TEX. FAM. CODE §160.607(a).

<sup>78</sup> TEX. FAM. CODE §160.607(b); *In re Rodriguez*, 248 S.W.3d 444 (Tex. App.—Dallas 2008, orig. proceeding.) (in absence of evidence to justify an exception to the four year statute of limitations, error to order genetic testing to determine parentage of child with a presumed father); *In re K.N.P.*, 179 S.W. 3d 717 (Tex. App.—Fort Worth 2005, pet. denied) (subsequently enacted statute of limitations not applicable but failure to claim paternity within reasonable time bars action if child has presumed father).

<sup>79</sup> TEX. FAM. CODE §101.0015.

<sup>80</sup> TEX. FAM. CODE §101.0015(b). A male donor may become a legal father only if specific affirmative steps are taken. TEX. FAM. CODE §160.7031. In contrast, a husband who provides sperm for or consents to assisted reproduction by his wife is the father of the resulting child. TEX. FAM. CODE §160.703.

<sup>81</sup> TEX. FAM. CODE §160.402(a).

An alleged father may establish paternity by any one of several means, each discussed below:

- Acknowledgement of paternity;
- Paternity adjudication; or
- Genetic testing.

Ideally, the legal status of an alleged father should be established as soon as possible. However, unless a child has a presumed, acknowledged, or adjudicated father, a proceeding to adjudicate parentage can be brought at any time, including after the date:

- The child becomes an adult; or
- An earlier proceeding to adjudicate paternity has been dismissed based on the application of a statute of limitation then in effect.<sup>82</sup>

Unless or until an alleged father is determined to be a legal father, his rights can be terminated summarily after a search of the paternity registry, based on his failure to register, or if, after being served with citation, he fails to file an admission of or counterclaim for paternity.<sup>83</sup>

### **Paternity Registry**

The Vital Statistics Unit (VSU) maintains a paternity registry.<sup>84</sup> 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 31<sup>st</sup> day after the child's birth. The registrant has the responsibility of keeping his information current with the bureau.<sup>85</sup> A man who has filed with the paternity registry within this time frame is entitled to be served with notice of a suit involving the child.<sup>86</sup> Registering with the paternity registry also establishes a basis for personal jurisdiction of a person who is not a Texas resident.<sup>87</sup>

If a father-child relationship is not established, a petitioner seeking termination of parental rights or adoption must obtain a certificate of the

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<sup>82</sup> TEX. FAM. CODE §160.606; *Texas Dep't. of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857 (Tex. 2001) (man barred from bringing action to assert paternity of child with adjudicated father); *In re K.B.S.*, 172 S.W.3d 152 (Tex. App. —Beaumont 2005, pet. denied) (putative father cannot bring paternity action more than four years after child's adoption as the unlimited time for such action applies only if child has no presumed, acknowledge or adjudicated father; adoptive father qualifies as an adjudicated father).

<sup>83</sup> TEX. FAM. CODE §161.002 (b); *In re M.A.*, 2005 Tex. App. LEXIS 9762 (Tex. App.—San Antonio 2005, pet. denied) (man's failure to establish paternity after being served permits DFPS to terminate parental rights summarily without proof of conduct under §161.001(1) or best interests).

<sup>84</sup> TEX. FAM. CODE §160.401 (functions of the bureau of vital statistics referenced in the statute are now performed by the vital statistic unit of the Texas Department of State Health Services).

<sup>85</sup> TEX. FAM. CODE §160.402.

<sup>86</sup> TEX. FAM. CODE §160.403.

<sup>87</sup> TEX. FAM. CODE §102.011(b)(7)(A), as amended by S.B. 865, 81<sup>st</sup>, Reg. Sess., effective June 19, 2009.

results of a search of the paternity registry.<sup>88</sup> Only if a father-child relationship has been established and that man has either been served or has signed a relinquishment of rights can a petitioner seeking termination of parental rights proceed without a certificate showing a search of the paternity registry.<sup>89</sup> If the petitioner has reason to believe the conception or birth of the child may have occurred in another state, the petitioner must obtain a certificate from any paternity registry in that state.<sup>90</sup>

Termination of parental rights based on failure to register with the Paternity Registry is only appropriate in the case of a child born on or after August 1, 1997, when the Texas Paternity Registry first came into effect and a man first had the opportunity to register.

***TIP:***

As of January 1, 2008, Tex. Fam. Code §161.002 (c-1) permits termination of parental rights without personal service, citation by publication *or any proof of efforts to identify or locate an alleged father* who fails to register with the paternity registry. Despite this statutory change, best practice and CPS policy continue to require diligent search for all parents and relatives, including alleged fathers. Consequently, CPS practice will *not* be to seek termination of parental rights of an alleged father without diligent efforts to identify and locate an alleged father.

### **Affidavit of Waiver of Interest**

If an alleged father has no interest in pursuing any rights he may have as a father, and wants to avoid any legal obligations associated with paternity, an Affidavit of Waiver of Interest may be a good option. With an Affidavit of Waiver of Interest, DFPS can terminate the parental rights of an alleged father as long as there is proof that termination is in the child's best interest.<sup>91</sup> A presumed father cannot sign an Affidavit of Waiver of Interest, because by statute a presumed father remains the legal father unless he rebuts the presumption, or his rights are terminated.<sup>92</sup>

While the advent of the paternity registry and readily available genetic testing has made the Affidavit of Waiver of Interest less common than it used to be, it remains a useful tool for eliminating certain alleged fathers from a lawsuit. If a man executes a waiver of interest there is no need to appoint an attorney or to serve him with the lawsuit (assuming a waiver of service is included).

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<sup>88</sup> TEX. FAM. CODE §160.421(a); See Practice Guide, SECTION 11, TOOLS, Paternity, Paternity Registry Inquiry Request (VS-134).

<sup>89</sup> TEX. FAM. CODE §160.422 (c), (d).

<sup>90</sup> TEX. FAM. CODE §160.421(b).

<sup>91</sup> TEX. FAM. CODE §161.204.

<sup>92</sup> TEX. FAM. CODE § 160.203; 160.204(c).

An Affidavit of Waiver of Interest can be signed by an adult or a minor either before or after a child's birth.<sup>93</sup> Once it is properly prepared and signed, the Affidavit of Waiver of Interest is irrevocable.<sup>94</sup> To be valid the document must be:

- Signed by the man waiving interest;
- Witnessed by two credible persons; and
- Verified before a person authorized to take oaths.<sup>95</sup>

### **Acknowledged Father**

A man can become a legal father by signing an Acknowledgement Of Paternity ("AOP"). Both an AOP and a denial of paternity may be signed before the birth of the child and can be signed by a minor.<sup>96</sup> A valid AOP must be on the designated Vital Statistics Unit (VSU) form which is only available to "certified entities."<sup>97</sup> An acknowledgment of paternity is effective when filed with the bureau of vital statistics or on the date of birth of the child, whichever occurs later.<sup>98</sup> A valid acknowledgment of paternity filed with the Vital Statistics Unit (VSU) is the equivalent of an adjudication of the paternity and confers all rights and duties of a parent on the acknowledged father.<sup>99</sup> Consequently, no judicial action to establish parentage is necessary with a properly executed acknowledgment of paternity or acknowledgment of paternity filed in conjunction with a valid denial of paternity. If a man has signed an AOP in Texas, that also serves as the basis to obtain personal jurisdiction over a nonresident.<sup>100</sup>

To be valid an acknowledgement must:

- Be in a record;
- Be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity;
- State that the child whose paternity is being acknowledged:
  - does not have a presumed father or has a presumed father whose full name is stated; and
  - does not have another acknowledged or adjudicated father;
- State whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing; and
- State that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of the paternity of the child and that a challenge to the acknowledgment is permitted only under limited circumstances and is barred after four years.<sup>101</sup>

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<sup>93</sup> TEX. FAM. CODE §161.106(a);(b).

<sup>94</sup> TEX. FAM. CODE §161.106(d).

<sup>95</sup> TEX. FAM. CODE §161.106(f).

<sup>96</sup> TEX. FAM. CODE §160.304.

<sup>97</sup> For more information about the acknowledgement of paternity procedure, See Practice Guide, SECTION 12, RESOURCES, Child Welfare Contacts, Paternity.

<sup>98</sup> TEX. FAM. CODE §160.304(c).

<sup>99</sup> TEX. FAM. CODE §160.305(a).

<sup>100</sup> TEX. FAM. CODE §102.011(b)(7)(B), as amended by S.B. 856, 81<sup>st</sup>, Reg. Sess., effective June 19, 2009, as to AOP's signed or after that date.

<sup>101</sup> TEX. FAM. CODE §160.302(a).



Finding out whether or not an AOP is on file for a child should be possible by filing a Paternity Registry Inquiry Request with the Vital Statistics Unit (VSU).<sup>102</sup> However, the VSU is only authorized to release information to the signatories of an AOP, the courts and to the child support agency.<sup>103</sup> Consequently, while a properly filed acknowledgement of paternity establishes a legal father without further legal action, it may be necessary to take additional steps to ensure the evidence in the record in a SAPCR is sufficient. If either the court or local child support representatives can obtain a record of a filed AOP, that is likely to be the easiest solution. Another option is to ask the court to take judicial notice of the filed acknowledgment of paternity. If these options aren't feasible, it may be necessary to request that the parents, a DFPS representative and the attorney ad litem for the child sign an Order Establishing the Parent-Child Relationship and ask that the court enter the order. While this step should not be necessary if an AOP is filed with the Vital Statistics Unit (VSU), this may be necessary if proof of the filed AOP is not accessible.

### **Void Acknowledgment of Paternity**

An acknowledgement of paternity is void if it:

- States that another man is the child's presumed father, unless a denial of paternity signed or otherwise authenticated by the presumed father is filed with BVS;
- States that another man is an acknowledged or adjudicated father of the child; or
- Falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child.<sup>104</sup>

### **Rescinding or Challenging an Acknowledgment of Paternity**

Rescinding an Acknowledgment of Paternity (AOP) must be done within 60 days after the effective date of the acknowledgment or before the first hearing to adjudicate an issue concerning the child, whichever is earlier.<sup>105</sup> Rescission of an AOP requires a court hearing and must follow the rules for an adjudication of paternity.<sup>106</sup>

If fraud, duress, or material mistake of fact is alleged, an AOP can be challenged within four (4) years of the filing of the acknowledgment, subject to extension if the signatory was a minor.<sup>107</sup> A genetic test that

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<sup>102</sup> See Practice Guide, SECTION 11, TOOLS, Paternity, Paternity Registry Inquiry Request, VS-134.

<sup>103</sup> TEX. FAM. CODE §160.313.

<sup>104</sup> TEX. FAM. CODE §160.302(b).

<sup>105</sup> TEX. FAM. CODE §160.307.

<sup>106</sup> TEX. FAM. CODE §160.309(d).

<sup>107</sup> TEX. FAM. CODE §160.308(a); *In re R.A.H.*, 130 S.W. 3d 68 (Tex. 2004) (putative father not a party in prior suit has 4 years from signing of adjudication of paternity to assert parentage).

does not rebuttably identify the acknowledged father as the father of the child constitutes a material mistake of fact.<sup>108</sup>

### **Adjudicated Father**

An "adjudicated father" is a man who has been adjudicated by a court to be the father of a child.<sup>109</sup> An adjudication of the parentage of a child who has no presumed, acknowledged or adjudicated father may be commenced at any time.<sup>110</sup>

An alleged father may admit to the paternity of a child by filing a pleading to that effect or by admitting paternity under penalty of perjury when making an appearance or during a hearing.<sup>111</sup> If the court finds that the admission of paternity satisfies these requirements and that there is no reason to question the admission, the court shall render an order adjudicating the man admitting paternity as the father.

### **Genetic Testing**

In most cases, the mother's identity is not in question. However, the Uniform Parentage Act does allow for genetic testing for mothers as well as fathers.<sup>112</sup> It is also possible to have two or more men court-ordered for paternity testing concurrently or sequentially.<sup>113</sup> Genetic testing can be voluntary or pursuant to a court order or an order of a support enforcement agency.<sup>114</sup> If a request is made by a party to a parentage proceeding, the court must order a child and other designated individuals to submit to genetic testing, with some exceptions.<sup>115</sup>

### **Consequences of Party Declining Genetic Testing**

The court may enforce a genetic testing order by contempt.<sup>116</sup> If a party refuses testing the court may adjudicate parentage contrary to the position of the party refusing testing.<sup>117</sup>

### **Mother Unavailable or Refuses Genetic Testing**

Genetic testing of the mother is not a prerequisite. If the mother is not available or refuses testing, the court may order the testing of the child and each man whose paternity is being adjudicated.<sup>118</sup>

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<sup>108</sup> TEX. FAM. CODE §160.308(d);

<sup>109</sup> TEX. FAM. CODE §160.102(1).

<sup>110</sup> TEX. FAM. CODE §160.606.

<sup>111</sup> TEX. FAM. CODE §160.623.

<sup>112</sup> TEX. FAM. CODE §160.106.

<sup>113</sup> TEX. FAM. CODE §160.502(c).

<sup>114</sup> TEX. FAM. CODE §160.501.

<sup>115</sup> TEX. FAM. CODE §160.502.

<sup>116</sup> TEX. FAM. CODE §160.622(a).

<sup>117</sup> TEX. FAM. CODE §160.622(b).

<sup>118</sup> TEX. FAM. CODE §160.622(c).

## **Court May Deny Genetic Testing of Presumed Father**

The court may deny testing for a presumed father if the court determines that (1) the conduct of the mother or the presumed father estops that party from denying parentage and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed father. The court shall consider the best interest of the child.<sup>119</sup>

A denial of a motion for genetic testing must be based on clear and convincing evidence.<sup>120</sup> After the court has denied genetic testing, the court shall enter an order adjudicating the presumed father as the father of the child.<sup>121</sup>

A genetic testing report is self-authenticating if it is in a record signed under penalty of perjury by a designee of the testing laboratory.<sup>122</sup> A man is rebuttably identified as the father of the child if the report discloses:

- That the man has at least a 99 percent probability of paternity, using a prior probability of 0.5, as calculated by using the combined paternity index obtained in the testing; and
- A combined paternity index of at least 100 to 1.<sup>123</sup>

A man identified as the genetic father may rebut the results only by producing another genetic test which excludes him as the genetic father or by producing a genetic test which identifies another man as the possible father of the child.<sup>124</sup>

## **Unknown Father**

Many litigators only name and serve an unknown father when there is no other candidate. If there is a presumed, alleged, acknowledged or adjudicated father, the court can make a finding of paternity at the same time it terminates a father's parental rights. Even without an explicit finding of paternity, arguably termination of a man's parental rights is an effective recognition of paternity. Other practitioners prefer to plead for termination of an unknown father initially, at least in those cases where the information as to the father's identity is particularly questionable. This strategy is designed to avoid the difficulty and delay caused by having to serve an amended petition in the event a presumed or alleged father is ruled out by genetic testing, for example. Some courts do not like this approach, preferring to avoid the expense of appointed counsel unless there is no other candidate

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<sup>119</sup> TEX. FAM. CODE §160.608.

<sup>120</sup> TEX. FAM. CODE §160.608(d).

<sup>121</sup> TEX. FAM. CODE §160.608(e).

<sup>122</sup> TEX. FAM. CODE §160.504(a).

<sup>123</sup> TEX. FAM. CODE §160.505(a).

<sup>124</sup> TEX. FAM. CODE §160.505(b).

identified and it is unavoidable. Choosing between these options may depend on the facts, local court practices or other factors.

## APPOINTMENTS

Immediately after DFPS files suit seeking termination of parental rights or appointment of a conservator and before the adversary hearing, the court must appoint a guardian ad litem (GAL) and an attorney ad litem (AAL) for the child.<sup>125</sup> The court may appoint a single person to serve as both GAL and AAL for the child or may appoint a volunteer advocate such as CASA<sup>126</sup> to serve as the GAL, in addition to the AAL. One of the most important distinctions between these roles concerns the nature of the duty to the child. A GAL should elicit the child's expressed objectives, but is not bound by those and should represent the child's best interests.<sup>127</sup> An AAL, however, must represent the child's expressed objectives, as long as the child is competent to understand the nature of the attorney-client relationship.<sup>128</sup> An AAL who determines that a child cannot meaningfully formulate litigation objectives, may substitute the attorney's judgment for the child's on the issue of best interest.<sup>129</sup>

A parent (or alleged father) is entitled to appointed counsel in several circumstances, including:

- An indigent parent who responds in opposition to a DFPS suit requesting temporary managing conservatorship or termination of parental rights;
- A parent served by publication;
- An alleged father whose identity or whereabouts are unknown who failed to register with the paternity registry;
- An alleged father who registered with the paternity registry but cannot be served at the address provided or another known address; and<sup>130</sup>
- A parent who is the subject of a suit for termination of parental rights based on the parent's inability to care for the child because of mental or emotional illness.<sup>131</sup>

A parent who is personally served in a termination case but fails to appear has not "responded in opposition" and does not qualify for appointed counsel on that basis. Similarly, a parent who is served by publication but subsequently appears in person is not entitled to appointed counsel based on service by publication unless he or she qualifies under another basis (e.g. indigency or mental health). Any parent claiming indigence must file an affidavit of indigence before the court can conduct a hearing to determine indigency.<sup>132</sup>

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<sup>125</sup> TEX. FAM. CODE §§107.011(a); 107.012

<sup>126</sup> Court Appointed Special Advocates (CASA) is national organization with local affiliates in many Texas communities. See Practice Guide, SECTION 12, RESOURCES, Child Welfare Contacts.

<sup>127</sup> TEX. FAM. CODE §§107.002(b)(3).

<sup>128</sup> TEX. FAM. CODE §107.004(a)(2).

<sup>129</sup> TEX. FAM. CODE §107.008

<sup>130</sup> TEX. FAM. CODE §107.013.

<sup>131</sup> TEX. FAM. CODE §161.003(b).

<sup>132</sup> TEX. FAM. CODE §107.013(d); TEX. R. CIV. P. 145(b).

## SERVICE OF PROCESS

The following persons and entities must be served with the citation in an original SAPCR:

- A managing or possessory conservator;
- Each parent whose rights are not terminated or who has not waived process under TEX. FAM. CODE CHAPTER 161;
- An alleged father, unless he has executed a waiver of interest or in some instances, failed to comply with applicable paternity registry requirements;<sup>133</sup>
- A person with court-ordered possession or access to the child;
- A person legally required to support the child;
- A guardian of the person or estate of the child;
- A man who filed notice of intent to claim paternity;
- DFPS if the petition seeks to name the agency as managing conservator;
- The child support agency, if rights to support may be impacted;
- A prospective adoptive parent on whom standing is conferred under TEX. FAM. CODE §102.0035; and
- A managing conservator designated in affidavit of relinquishment or to whom written consent to adoption has been given.<sup>134</sup>

At a minimum the parent of a child who is the subject of a SAPCR is entitled to notice of the suit. While it is clear that a person can't be adjudicated as a parent unless the court has personal jurisdiction, whether the Uniform Parentage Act mandates that a court have personal jurisdiction in a child custody or termination of parental rights action is not as clear. The best practice is to establish personal jurisdiction over the parents in a DFPS suit if at all possible. For Texas residents, jurisdiction over the person is accomplished by serving notice of the suit by personal service, or by alternative methods of service if that is not possible. For parties who reside outside Texas, the statutory scheme provides some measure of flexibility, to satisfy due process while affording children protection from abuse and neglect. See Out of State Parties, below.

### **From Personal Service to Posting on the Courthouse Door**

The rules authorize service by the following means:

- Personal delivery;<sup>135</sup>
- Delivery by certified or registered mail, return receipt requested;<sup>136</sup>
- Substitute service;<sup>137</sup>

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<sup>133</sup> As of January 1, 2008, TEX. FAM. CODE §161.002 (c-1) permits termination of parental rights without personal service, citation by publication or any proof of efforts to identify or locate an alleged father who fails to register with the paternity registry. Despite this statutory change, best practice and CPS policy continue to require diligent search for all parents and relatives, including alleged fathers.

<sup>134</sup> TEX. FAM. CODE §102.009.

<sup>135</sup> TEX. R. CIV. PRO. 106(a)(1).

<sup>136</sup> TEX. R. CIV. PRO. 106(a)(2).

<sup>137</sup> TEX. R. CIV. PRO. 106(b).

- Citation by publication;<sup>138</sup> or
- Posting on the court house door.<sup>139</sup>

Substitute service, citation by publication and service by posting all require advance court approval, which requires demonstrating to the court that a more effective form of service is not viable. If persons entitled to service of process cannot be notified by personal service or registered or certified mail or other forms of substituted service, or if the person's identify or whereabouts are unknown, service of process may be accomplished by citation by publication. If a parent's whereabouts are unknown, CPS performs a diligent search, and on that basis requests an order for service by publication.<sup>140</sup> The citation by publication must be published one time and should be worded according to TEX. FAM. CODE §102.010(b). A verified return of the citation by publication must be on file in the court's file for 10 days before a default judgment can be granted.<sup>141</sup>

### **Missing Parent in Military**

The Servicemembers Civil Relief Act (SCRA) protects members of the military from civil judgments and administrative decisions taken while a service member is on active duty and unable to respond with a defense to an action, specifically including any child custody proceeding.<sup>142</sup> If a parent has not been served or located by diligent search by the time of the Status Hearing, the caseworker must access the U.S. military database to determine if the parent is in the military and obtain a Certificate of Service or Non-service.<sup>143</sup> If the search produces a Certificate of Service, the DFPS attorney should inform the court, all parties and attorneys of record.<sup>144</sup> An initial 90-day stay of the proceedings is commonly granted, but any additional stay is discretionary and depends on whether the person's ability to appear is adversely impacted by military duties.<sup>145</sup> Specific protections also apply under the SCRA if a default judgment is contemplated. See Default Judgment, below.

### **Out of State Parties**

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<sup>138</sup> TEX. FAM. CODE §102.010(a); TEX. R. CIV. PRO. 109.

<sup>139</sup> TEX. FAM. CODE §102.010(e).

<sup>140</sup> See CPS HB Appendix 5261 and CPS Form 2777 to request a diligent search.

<sup>141</sup> TEX. R. CIV. PRO. 107.

<sup>142</sup> 50 U.S.C. App. §§501-596; although child custody are within the scope of a "civil action or proceeding," a 2008 amendment specifies that the SCRA covers child custody proceedings are (Pub.L. No. 110-181 (Jan. 28, 2008) 122 Stat. 128).

<sup>143</sup> See Practice Guide, SECTION 11, TOOLS, Servicemembers Civil Relief Act, How to Search for Certificate of Service/Non-Service and Affidavit Regarding Military Service.

<sup>144</sup> 50 U.S.C. App. §521(b) (2).

<sup>145</sup> *In re A.R.*, 88 Cal. Rptr. 3d 448 (2009)(error to deny mandatory stay of dispositional hearing in CPS case where father on active duty in the Middle East, as SCRA preempts Adoption and Safe Families Act in this circumstance); *George P. v. Superior Court*, 24 Cal. Rptr.3d 919 (Ct. App. 2005) (denial of stay beyond initial 90 days affirmed where member of National Guard was able to appear and testify and received services, court noting, "[t]here is nothing in the SCRA that requires the juvenile court to disregard the purpose of the dependency law to expeditiously resolve the custody status of dependent children and place them in permanent homes."); *Slove v. Strohm*, 236 N.E.2d 326 (Ill. App. Ct. 1968)(no stay of paternity proceedings on mere showing of military service without showing ability to defend action is materially affected, especially where child waits for food, clothing and shelter while case is delayed).

If a necessary party is not a Texas resident, the court can exercise personal jurisdiction over that person if the:

- Person is personally served with citation in Texas;
- Person makes a general appearance or files responsive pleading without contesting jurisdiction;
- Child resides in Texas a result of acts or directives of the person;
- Person resided with the child in Texas;
- Person resided in Texas and provided prenatal expenses or support for the child;
- Person engaged in sexual intercourse in Texas which may have resulted in child's conception;
- Person registered with paternity registry or signed an acknowledgment of paternity; or
- There is any basis for exercising personal jurisdiction consistent with the state and federal constitutions.<sup>146</sup>

If a court lacks personal jurisdiction over a nonresident party, the court can exercise jurisdiction over those portions of the suit over which it has authority.<sup>147</sup> In the context of a child protection SAPCR, a court's inability to assert personal jurisdiction over a nonresident party will not preclude the court from making a status determination as to the child, including termination of parental rights.<sup>148</sup>

Service of process on a party in a foreign country can be accomplished by any manner prescribed by the law of the foreign country, any method directed in response to a letter rogatory, any method authorized by TEX. CIV. P. Rule §106, any method provided by treaty or convention, or by any other means authorized by a court that is not prohibited by the country where service is effected.<sup>149</sup>

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<sup>146</sup> TEX. FAM. CODE §102.011(b), as amended by S.B. 865, 81<sup>st</sup>, Reg. Sess., effective June 19, 2009, as to an acknowledgement of paternity signed on or after that date.

<sup>147</sup> TEX. FAM. CODE §102.012.

<sup>148</sup> *In re S.A.V.*, 837 S.W.2d 80 (Tex. 1992) (due process does not require a connection between a nonresident parent and the state for purpose of custody determinations, whereas child support order requires minimum contacts); *In re Thomas J.R.*, 663 N.W.2d 734 (Wisconsin 2003) (UCCJA affords sufficient due process protections to allow exercise of jurisdiction over an out-of-state parent in action to terminate parental rights).

<sup>149</sup> TEX. R. CIV. P. 108(a); For country specific information regarding service of process, See Practice Guide, SECTION 12, RESOURCES, Child Welfare Contacts, International; *In re K.E.Q.*, 2007 Tex. App. LEXIS 2324 (Tex. App. —Dallas 2007, no pet.) (due diligence for citation by publication met where caseworker contacted father's former wife and her mother, Mexican consulate and Immigration & Naturalization Service but could not obtain information beyond report that father died in Mexico).

## DEFAULT JUDGMENTS

When used properly a default judgment can be an efficient tool for streamlining a termination suit. Failure to adhere carefully to the procedural requirements, however, may make a default judgment vulnerable to attack.<sup>150</sup>

### What the Record Must Show

Although a party can waive a record, a defaulting party cannot do so.<sup>151</sup> The record must show:

- Service of citation, no answer and the return on file at least 10 days;<sup>152</sup>
- An order appointing an attorney ad litem for the absent parent, if service is by publication;<sup>153</sup>
- Testimony or evidence to support at least one of the termination grounds alleged in the pleading served on the respondent and that termination is in the child's best interest;
- A "statement of the evidence" approved and signed by the judge which should include information about the diligence used to locate the defendant if citation by publication was requested;<sup>154</sup>
- Proof of compliance with the Servicemembers Relief Act ("SCRA");<sup>155</sup> and
- For an alleged father, testimony or evidence that the alleged father has not filed a paternity action or an admission of paternity.

The burden is on the party seeking a default judgment to show strict compliance with the rules governing service of process.<sup>156</sup> There are no presumptions of valid issuance, service and return of citation in an appeal of a no-answer default judgment, and a default judgment will be reversed absent strict compliance with the rules.<sup>157</sup>

A default judgment must conform to the pleadings served on the defendant. If DFPS amends the original petition and seeks new remedies or restrictions or adds new grounds for termination of parental rights, the parent must be served with a new citation and the

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<sup>150</sup> *In re T.L.B.*, 2007 Tex. App. LEXIS 1991 (Tex. App. — Amarillo 2007, no writ.) (due process requires reversal where father served with citation in termination action, but default entered by court after transfer effected without notice to father).

<sup>151</sup> *G.S.K. v. T.K.N.*, 940 S.W.2d 797 (Tex.App. — El Paso 1997, no writ).

<sup>152</sup> TEX. R. CIV. P. 107.

<sup>153</sup> TEX. FAM. CODE §107.013(a)(2).

<sup>154</sup> TEX. FAM. CODE §102.010(d); Tex. R. Civ. P. 109, 244.

<sup>155</sup> 50 U.S.C. App. Sec. 501 et seq.; See Servicemembers Compliance Required, below.

<sup>156</sup> *Heggen v. Graybar Elec.*, 2007 Tex. App. LEXIS 79 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, no pet) (mem.op.).

<sup>157</sup> *Arrington Oil & Gas v. Coalson*, 2008 Tex. App. LEXIS 1931 (Tex. App.—Fort Worth 2008, no pet.) (default judgment reversed where postal return receipt attached to service of citation in lieu of return) *In re Baby Girl G.*, 2004 Tex. App. LEXIS 11612 (Tex. App.—Dallas 2004 no pet.) (default affirmed where supplemental clerk's record showed citation and return filed over 40 days before entry of termination decree); *Hubicki v. Festina*, 226 S.W. 3d 405 (Tex. 2007) (reversal of default warranted for failure to show that service by registered mail, return receipt requested at home owned by defendant in Mexico constitutes reasonably effective service).



amended petition before a default judgment is taken.<sup>158</sup> Before filing an amended petition, consider requesting an interlocutory default. Taking an interlocutory default based upon the original petition and severing that part of the case effectively closes out that part of the case and avoids notice or service problems. If DFPS seeks to terminate parental rights of an alleged father, it should not be necessary to amend a termination petition to add a new ground for termination because an alleged father's failure to file with the paternity registry is sufficient to support a termination order.<sup>159</sup>

**TIP:**

If an interlocutory decree is entered, when the final judgment is signed, verify that the clerk sends the required notice of final judgment to the last known address of the defaulted party. This gives the defaulted party an opportunity to make a motion for new trial, or to otherwise challenge the judgment within thirty days after the final judgment is signed.<sup>160</sup>

A default judgment can be taken at any time after the time for an answer is to be filed, provided the return has been on file with the clerk for the required 10 days.<sup>161</sup> However, an answer can be filed at any time before judgment is actually taken and in most instances, courts will give a litigant great latitude in construing what constitutes an answer in the face of a request for default.<sup>162</sup>

### **Pre-Answer vs. Post-Answer Defaults**

Once an answer has been filed, notice requirements are less onerous. An answer or participation in the suit generally waives any defects in the previously issued service or notice.<sup>163</sup> Every party filing a pleading is required to provide an address, telephone number and fax number, if available, for himself or his attorney.<sup>164</sup> If the attorney withdraws, he must provide the court with the last known address of his client.<sup>165</sup> Subsequent pleadings or notices, including amended petitions or counter claims may then be served relatively easily.

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<sup>158</sup> *Smith v. Smith*, 241 S.W. 3d 904 (Tex. App.—Beaumont 2007, no pet.) (notice required where amended petition seeks more onerous judgment than earlier pleading).

<sup>159</sup> TEX. FAM. CODE §161.002.

<sup>160</sup> TEX. R. CIV. P. 306a(3); 329b.

<sup>161</sup> TEX. R. CIV. P. 107

<sup>162</sup> *In re E.A.W.S.*, 2006 Tex. App. LEXIS 10515 (Tex. App.—Fort Worth 2006, pet. denied) (father's affidavit setting forth conditions under which he would relinquish his rights sufficient to preclude entry of no answer default); *In re S.K.A.* 236 S.W. 3d 875 (Tex. App.—Texarkana 2007, pet. denied) (letter sent to district attorney but not to court does not constitute a pre-default answer without evidence of mistake); *In re R.R.*, 209 S.W. 3d 112 (Tex. 2006) (incarcerated mother entitled to set aside default where her actions did not show conscious indifference to termination proceeding); *In re J.P.*, 196 S.W.3d 434 (Tex. App.—Dallas 2006, no pet.) (termination by default warranted where letter without address for notice does not serve as answer and father waived notice in affidavit).

<sup>163</sup> *Salinas v. Texas Dep't Protective & Regulatory Servs.*, 2004 Tex. App. LEXIS 7640 (Tex. App.—Austin 2004, no pet.) (mem.op.)(appearance or filing of answer waives any defect in service).

<sup>164</sup> TEX. R. CIV. P. 57.

<sup>165</sup> TEX. R. CIV. P. 10.

**TIP:**

If a parent appears to contest a default prior to the final hearing, and there is any question about compliance with the procedural requirements, the best strategy may be to agree to a new trial, in order to avoid exposing an otherwise solid termination case to reversal.<sup>166</sup>

**Servicemembers Civil Relief Act Compliance Required**

Before a default is taken DFPS must file an affidavit indicating whether or not a parent is in the military.<sup>167</sup> If a parent is in the military, the court must appoint an attorney prior to entry of a default.<sup>168</sup> The Servicemember’s Civil Relief Act ("SCRA") permits reopening of the default if: (1) the servicemember’s ability to defend against the action was materially affected due to military services; and (2) the servicemember has a meritorious legal defense. If a default judgment is rendered against a parent in the military or within 60 days after discharge, the parent may, within 90 days after termination of military service, ask the court to vacate it.<sup>169</sup>

**CHILD SUPPORT**

The Office of Attorney General (OAG) is the Title IV-D agency responsible for enforcement of child support obligations. Attorneys for DFPS need a basic understanding of child support to ensure agency court orders contain proper child support orders where appropriate. When DFPS has filed a SAPCR, child support:

- *May* be ordered when a child is in temporary managing conservatorship of DFPS;
- *May* be ordered after parental rights are terminated; and
- *Must* be ordered (as to a financially able parent) if DFPS is named permanent managing conservator of a child whose rights are not terminated.<sup>170</sup>

DFPS’ placement of a child in substitute care effects an assignment of any existing child support rights to the state.<sup>171</sup> If a child in DFPS care is entitled to federal child support enforcement services without making an application, DFPS must immediately refer the

<sup>166</sup> *In re H.M.J.H.*, 209 S.W. 3d 320 (Tex. App.—Dallas 2006, no writ) (failure to submit evidence of merits warrants denial of motion to set aside default judgment terminating parental rights); *Craddock v. Sunshine Bus. Lines*, 133 S.W. 2d 124 (Tex. 1939) (“Craddock factors” provide that default judgment should be set aside and a new trial granted if : (1) failure to answer was not intentional or the result of conscious indifference but due to mistake or accident; (2) defendant sets up a meritorious defense; and (3) granting a new trial will not result in delay or otherwise injure plaintiff.

<sup>167</sup> 50 U.S.C. Appen. §521(b)(1). See Practice Guide, SECTION 11, TOOLS, Servicemembers Civil Relief Act, How to Search for Certificate of Service/Non-Service, and Affidavit Regarding Military Service.

<sup>168</sup> 50 U.S.C. Appen. §521(b)(2).

<sup>169</sup> 50 U.S.C. Appen. § 521(g) (1); *In re B.T.T.*, 156 S.W. 3d 612 (Tex. App.—San Antonio 2004, no pet.) (Texas court recognizes Hawaii court order applying SCRA to set aside paternity finding and child support order); *Olsen v. Davidson*, 350 P.2d 338 (Colo.1960) (military father who deliberately abandoned his children and had actual notice of dependency action waived rights under SCRA).

<sup>170</sup> TEX. FAM. CODE §154.001(a-1); (b).

<sup>171</sup> TEX. FAM. CODE §264.109.

case to the OAG. If a Title IV-D application is required and DFPS is the managing conservator, DFPS must apply for services on the child's behalf.<sup>172</sup>

### **Pleading and Orders**

To meet DFPS' duty with respect to child support, attorneys for the agency must:

- Plead for child support in the initial petition;
- Request that the court order require parents to bring proof of income to adversary hearing;
- Obtain a temporary child support order at adversary hearing if warranted by the parents' financial circumstances; and
- Include child support provision in any final order naming DFPS as permanent managing conservator (mandatory if parental rights not terminated).

### **Calculating Amount of Child Support Award**

#### Step 1

##### Determine Parent's Net Resources

Income tax returns or pay stubs can be used to determine a parent's net resources, as defined by statute.<sup>173</sup> DFPS form pleadings include a standard request for an order requiring each parent to produce proof of income at the adversary hearing. If there is no evidence produced, the court must presume that the party makes the federal minimum wage for a 40 hour work week.<sup>174</sup> If a parent is intentionally unemployed or underemployed, the court has discretion to calculate support based on a higher net income.<sup>175</sup>

#### Step 2

##### Child Support Guidelines

The following chart can be used to calculate the percentage of a parent's net income, based on the number of children, which is to be ordered for child support.<sup>176</sup> Consult tax charts prepared by the Office of Attorney General to determine a person's net income from a gross monthly wage.<sup>177</sup>

#### CHILD SUPPORT GUIDELINES BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR

1 child	20% of Obligor's Net Resources
2 children	25% of Obligor's Net Resources
3 children	30% of Obligor's Net Resources
4 children	35% of Obligor's Net Resources

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<sup>172</sup> TEX. FAM. CODE §264.109(b).

<sup>173</sup> TEX. FAM. CODE §154.062.

<sup>174</sup> TEX. FAM. CODE §154.068.

<sup>175</sup> TEX. FAM. CODE §154.066.

<sup>176</sup> TEX. FAM. CODE §154.125.

<sup>177</sup> Published in Sampson & Tindall's Texas Family Code (August 2007), p. 685-689.

5 children      40% of Obligor's Net Resources  
 6+ children    Not less than the amount for 5 children

If there are additional children supported by the obligor parent, a different method of calculation applies.<sup>178</sup>

MULTIPLE FAMILY ADJUSTED GUIDELINES  
 (% OF NET RESOURCES)

Number of children before the court

		1	2	3	4	5	6	7
Number of other children for whom the obligor has a duty of support	0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
	1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
	2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
	3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
	4	13.60	18.33	23.14	28.00	32.89	33.60	34.18
	5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
	6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
	7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

Beyond these guidelines, courts have broad discretion to consider many other relevant factors in determining the amount of child support to award.<sup>179</sup> In DFPS litigation, a court may take into account factors such as poverty, incarceration and substance abuse problems that impact a parent's ability to pay child support. In addition, if a parent is ordered to obtain housing, or needs funds to pay for transportation to counseling or to otherwise comply with a service plan for reunification, a court may tailor the child support award accordingly.

Step 3

Mandatory Medical Support

An award for medical support is mandatory in every SAPCR.<sup>180</sup> Standard DFPS pleadings request that health insurance be ordered as "additional child support" in every case. If a parent cannot access health insurance through his or her employment, a parent can be ordered to pay an additional sum for this purpose<sup>181</sup> or to provide coverage through the government medical assistance program.<sup>182</sup>

<sup>178</sup> TEX. FAM. CODE §§154.128;154.129.

<sup>179</sup> TEX. FAM. CODE §154.123.

<sup>180</sup> TEX. FAM. CODE §154.181.

<sup>181</sup> TEX. FAM. CODE §154.182(b)(3).

<sup>182</sup> TEX. FAM. CODE §154.182(b-2).