

# Contents

SECTION 1 PROFILE OF A CHILD PROTECTION SUIT .....	2
Strict Time Limits.....	2
Removal Hearings .....	3
Ex Parte Order <i>Before</i> Removal.....	3
Emergency - Ex Parte Order <i>After</i> Removal.....	3
Non-Emergency Hearing.....	4
Adversary Hearing.....	5
Status Hearing.....	6
Permanency Planning Meetings .....	8
Permanency Hearing <i>BEFORE</i> Final Hearing .....	8
Monitored Return Option .....	10
Final Hearings.....	10
Permanency Hearing <i>AFTER</i> Final Hearing.....	11
Extended Opportunities for Young Adults.....	12

# SECTION 1 PROFILE OF A CHILD PROTECTION SUIT

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The Texas Family Code mandates court oversight 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, supervision continues 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.

## Strict Time Limits

The driving force behind the statutory scheme is the requirement that no later than one year after DFPS is named conservator, the court must either commence trial on the merits or dismiss the lawsuit.<sup>1</sup> This deadline requires that counsel for the agency carefully track the date DFPS is first named temporary managing conservator, calculate the mandatory dismissal date and calendar interim dates.

In extremely limited circumstances, a court can retain the suit beyond the one year time limit. This deadline can be extended no more than 180 days, if the court finds 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.<sup>2</sup> Similarly, if the court grants a new trial or mistrial or the case is remanded following an appeal of a final order the court must schedule a new dismissal date no more than 180 days later and set a new trial on the merits within this timeframe.<sup>3</sup> If an extension is granted in either circumstance, the court must make further temporary orders for the safety and welfare of the child and if the court fails to commence the trial on the merits before the new dismissal date, the court must dismiss the suit.<sup>4</sup>

These tightly drawn time frames recognize that successful outcomes for children and youth depend on permanency. It is widely acknowledged every child needs the stability and connection of a permanent home and that DFPS (or any other organization) makes a poor substitute for a parent. To that end, DFPS continues to work to identify and eliminate barriers to permanency, both systemic and on a case-by-case basis. With ongoing support from the Legislature, the courts, community partners and stakeholders, the urgent need for permanency permeates decision-making throughout the child protection system in Texas.

Attorneys for the agency can best serve DFPS by being prepared, focused and knowledgeable about what must be accomplished at every stage along the way. For a quick reference guide for each hearing, consult the Hearing Guides in SECTION 3.

### **TIP: ALWAYS Think about ICWA**

The Texas Family Code now requires that the court inquire about Native American heritage and identify tribal associations at the Adversary, Status and Permanency Hearings.<sup>5</sup> This underscores the importance of considering at *every* stage of *every* case, whether an Indian child may be involved. If the Indian Child Welfare Act (ICWA) may apply, give notice as required, and if a child’s status is confirmed, review requirements for pleading, placements and judicial findings. See Practice Guide, SECTION 4, Indian Child Welfare Act and SECTION 13, TOOLS, ICWA for forms and notices.

<sup>1</sup> TEX. FAM. CODE §263.401(a), mandatory dismissal on the first Monday after the first anniversary of the date DFPS is appointed as temporary managing conservator.

<sup>2</sup> TEX. FAM. CODE §263.401(b).

<sup>3</sup> TEX. FAM. CODE §263.401(b-1), as amended by S.B. 206 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>4</sup> TEX. FAM. CODE §263.401(c).

<sup>5</sup> TEX. FAM. CODE §262.201(a-4); 263.201(f-1); 263.306(a)(9), as amended by H.B. 825 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

## Removal Hearings

What DFPS must prove at a removal hearing depends on the circumstances when a child must be removed. 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.<sup>6</sup> The role of the agency's attorney is to review the affidavit carefully and advise the caseworker of any deficiencies or ambiguities.

### **TIP: Contrary to the Welfare Finding**

In all removal cases, the court must make a finding that it is contrary to the child's welfare to remain with the adult(s) from whom the child is legally removed, i.e. the parents. Even if a child is physically removed from a non-parent, this finding must be made as to the parent(s) (unless parental rights have been terminated) and any managing conservator of a child.<sup>7</sup>

## 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 of the adult(s) who the child is legally being removed from;
- 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.<sup>8</sup>

### **TIP: Child with Sexually Transmitted Disease**

If DFPS discovers a child under age 11 with a sexually transmitted disease, a petition for emergency removal is mandated, unless specific conditions apply.<sup>9</sup>

## 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:

- *Either* a continuing danger to the physical health or safety of the child if returned to the home, *or* evidence that the child is a victim of sexual abuse or labor or sex trafficking and is at substantial risk of future sexual abuse or trafficking;
- That it is contrary to the child's welfare to remain in the home of the adult(s) who the child is being legally removed from; and
- That reasonable efforts were made to prevent or eliminate the need for removal.<sup>10</sup>

If a child is removed pursuant to an *ex parte* hearing, an Adversary Hearing must be set within 14 days, unless the court finds good cause to postpone the Adversary Hearing for no more than seven days from the date of

<sup>6</sup> See Practice Guide, SECTION 13 TOOLS, Affidavits.

<sup>7</sup> 42 U.S.C. §672(a)(2)(A)(ii).

<sup>8</sup> TEX. FAM. CODE §262.102.

<sup>9</sup> TEX. FAM. CODE §262.010(a)(2).

<sup>10</sup> TEX. FAM. CODE §262.107.

the attorney's appointment, to allow the attorney to respond to the petition or prepare for the hearing, or such time that both the parent and appointed attorney agree upon in writing.<sup>11</sup> In that case, the court shall extend a temporary order, temporary restraining order, or attachment for the protection of the child until the date of the postponed hearing. All removal orders must include a warning to parents about the right to be represented by an attorney and to have an attorney appointed if the parent appears in opposition, claims indigence and requests appointment of an attorney.<sup>12</sup>

In cases where DFPS is filing for conservatorship of a child with a severe emotional disturbance<sup>13</sup> solely because the parent is unable to obtain mental health services necessary to protect the safety and well-being of the child, DFPS must take some additional actions. If the child has a mental, behavioral or emotional disorder of sufficient duration to result in functional impairment that substantially interferes with or limits the child's role or ability to function in family, school or community activities, DFPS must, unless it is not in the child's best interest, discuss with the parent or caregiver the option of seeking a court order for joint managing conservatorship of the child with DFPS prior to filing the suit.<sup>14</sup>

In addition, if the investigation determines that the caregiver's refusal to allow the child to remain in the home (or return, if the child was already in an out-of-home placement or setting) was based on the caregiver's inability to obtain the needed mental health services after exhausting all reasonable means available to obtain the services, DFPS must not make a finding of abuse or neglect against that person or enter their name in the Central Registry of abuse and neglect.<sup>15</sup>

***TIP: Visits to Begin Quickly***

To promote and protect the parent-child bond, DFPS must ensure a parent for whom reunification is planned has an opportunity to visit a child within 5 days after the agency is named managing conservator, unless visitation is not in the child's best interest or would conflict with a court order.<sup>16</sup>

## **Non-Emergency Hearing**

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, medical attention and supervision that results in DFPS 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 there is not an urgent need for removal, DFPS can seek a court order authorizing removal following a noticed hearing. 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 of the adult(s) the child is legally being removed from;
- Reasonable efforts were made to prevent or eliminate the need for removal;
- 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.<sup>17</sup>

The hearing should be set as soon as possible and the parent(s) must receive notice of the hearing (unless citation by publication is necessary)<sup>18</sup> and be served with the petition and affidavit. There is no time frame

<sup>11</sup> TEX. FAM. CODE §262.201.

<sup>12</sup> TEX. FAM. CODE §262.102(d).

<sup>13</sup> TEX. FAM. CODE §261.001(9)

<sup>14</sup> TEX. FAM. CODE §262.352(a), as amended by S.B. 1889, §3 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>15</sup> TEX. FAM. CODE §261.001(4)(B); §261.002(b) as amended by S.B. 1889, §1 (84<sup>th</sup> Sess., effective Sept. 1, 2015); 40 TEX. ADMINISTRATIVE CODE § 700.473.

<sup>16</sup> TEX. FAM. CODE §262.115, as amended by S.B. 206, § 25 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>17</sup> TEX. FAM. CODE §262.205(b).

<sup>18</sup> TEX. FAM. CODE §262.205(d).

provided by statute, but best practice is to set the hearing within 14 days of the filing of the petition. If a setting cannot be obtained within 14 days, DFPS should consider whether the delay will pose a risk to the safety of the child and a more immediate removal is needed.

As with any removal, a child must be placed with a noncustodial parent or another relative unless it is not in the best interest of the child.<sup>19</sup>

**TIP: What's a Hague case?**

The name refers to the Hague Convention on the Civil Aspects of International Child Abduction. Since 2011, a Texas court hearing an action for enforcement of a foreign child custody determination or a petition for return of an abducted child, is authorized to place a child with DFPS, if a parent or family member does not have significant ties to the jurisdiction of the court.<sup>20</sup> Although few children enter care in this manner, agency staff and the courts alike should be aware of this possibility.

## Adversary Hearing

If 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 an Adversary Hearing conducted within 14 days of the *ex parte* hearing, subject to an extension of time as referenced above. Before the Adversary Hearing begins, the court must inform unrepresented parents of the right to retain counsel or, for indigent parents who respond in opposition, to have counsel appointed.<sup>21</sup> The court must also ask all parties present whether the child or the child's family has Native American heritage and identify any tribe with which the child may be associated.<sup>22</sup>

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.<sup>23</sup>

DFPS must be prepared to show the alternatives to removal DFPS considered, pursued or rejected to meet the reasonable efforts requirement.<sup>24</sup> Services offered to a parent in the past (including services provided incident to a prior removal) may be relevant, but reasonable efforts must be shown as to each removal. If the court finds the parent subjected the child to *aggravated circumstances*, no service plan and no reasonable efforts are required. The basis for this finding has been expanded to include certain parental conduct involving a child other than the child who is the subject of the suit, as well a parent's status as a registered sex offender, in addition to a long list of egregious conduct, Penal Code offenses, and prior termination of a parent's rights on certain grounds.<sup>25</sup>

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. Before the hearing, DFPS 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, if any. If background, criminal

<sup>19</sup> TEX. FAM. CODE §262.205(e).

<sup>20</sup> TEX. FAM. CODE §152.311(c-1).

<sup>21</sup> TEX. FAM. CODE §§262.201(a-1);107.013, as amended by S.B. 1931, §1, (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>22</sup> TEX. FAM. CODE §§262.201(a-4) , as amended by H.B. 825, §1, (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>23</sup> TEX. FAM. CODE §262.201(A), (B).

<sup>24</sup> *In re Pate*, 407 S.W. 3d 416 (Tex. App.—Houston [14<sup>th</sup> Dist.] July 15, 2013 (orig.proceeding)).

<sup>25</sup> TEX. FAM. CODE §262.2015, as amended by S.B. 219, §1.164 (84<sup>th</sup> Sess., effective Sept. 1,2015).

history checks and a preliminary evaluation are completed, DFPS may place a child with a relative or designated caretaker before a home study is done, but a study must be initiated within 48 hours.<sup>26</sup> If placement with a relative or other designated caretaker has not been made, DFPS must file a statement with the court explaining why and what actions the agency is taking, if any, to make such a placement.

The court must inform any parent appearing that their parental rights may be restricted or terminated if the parent cannot meet a child's need for safety, and set a Status Hearing within 60 days of the appointment of Temporary Managing Conservatorship.

Unless DFPS' right to make educational decisions has been limited by court order, within 5 days of being named Managing Conservator of the child at an Adversary or Non-Emergency hearing, DFPS must file with the court the name and contact information for each person DFPS has named as an "education decision-maker" for the child and provide a copy to the child's school.<sup>27</sup> If the child is or may be eligible for special education services and a "surrogate parent" was appointed by the court or the school to make special education decisions, the name and contact information of that individual must also be included on the form. Any changes are to be reported to the child's school within 5 days and updated information included in the permanency progress report.<sup>[1]</sup>

#### **TIP: Placement Selection**

Except with an emergency placement, DFPS must consult with the child's caseworker, the attorney ad litem, the guardian ad litem and any CASA appointed for the child and use clinical protocols to best match a child's needs with placement resources.<sup>28</sup> The Child and Adolescent Needs and Strengths (CANS) Assessment, designed to provide a uniform, developmentally appropriate and comprehensive assessment of children and youth, will be available June 1, 2016.

## **Status Hearing**

No later than 60 days after a temporary order is entered naming DFPS temporary managing conservator, a Status Hearing must be held.<sup>29</sup> In preparation, 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").<sup>30</sup>

Ten days before the Status Hearing DFPS must submit to the court:

- Any proposed child placement resources form;
- Any completed home study;
- 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 DFPS is taking toward this goal);<sup>31</sup>
- A report on notification to relatives of the child's removal; and<sup>32</sup>
- A copy of the visitation plan developed in collaboration with each parent.<sup>33</sup>

<sup>26</sup> TEX. FAM. CODE §262.114, as amended by S.B. 206, §24 (84<sup>th</sup> Sess, effective Sept. 1, 2015).

<sup>27</sup> DFPS uses Form 2085-E, Designation of Education Decision-Maker for this purpose.

<sup>[1]</sup> TEX. FAM. CODE §263.004, as amended by S.B. 206, §29 (84<sup>th</sup> Sess, effective Sept. 1, 2015).

<sup>28</sup> TEX. FAM. CODE §264.107, as amended by S.B. 219, §§ 1.189, 1.203 (84<sup>th</sup> Sess, effective April 2, 2015) and by S.B. 206, §§50, 86(25) effective Sept. 1, 2015).

<sup>29</sup> TEX. FAM. CODE §263.201(a).

<sup>30</sup> 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 13, TOOLS, Court of Continuing & Exclusive Jurisdiction, Inquiry On Court Of Continuing Jurisdiction For A Child (VS-168).

<sup>31</sup> TEX. FAM. CODE §263.003 (this information is not required if child is in an adoptive or other permanent placement, unlikely at this early stage of the litigation, or if it has already been filed).

<sup>32</sup> TEX. FAM. CODE §263.007(1).

<sup>33</sup> TEX. FAM. CODE §263.107(d).

DFPS must give notice of a child's removal and the options persons may have to participate in the case to:

- All adults related to the child within the third degree of consanguinity;<sup>34</sup>
- Any adult relative of an alleged father (if DFPS has a reasonable basis to believe he is the child's biological father);or
- Anyone identified as a potential relative or designated caregiver on the child placement resources form.<sup>35</sup>

DFPS may also provide such notice to a relative or other person with a significant and longstanding relationship to the child. Notice is not required for any person who is served with citation in the suit, or to anyone with a history of family or domestic violence that would make the person unsuitable to serve as a placement or support for the child.<sup>36</sup> DFPS' report to the court should detail agency efforts to identify, locate and provide information to the listed persons and explain why, if these efforts failed.

At the Status Hearing the court must:

- Advise each parent not represented by an attorney of the right to representation and to appointed counsel for an indigent parent who responds in opposition to the suit (whether DFPS seeks termination or appointment of a conservator)<sup>37</sup>;
- Assess diligent search efforts for any missing parents and whether parents and other persons before the court have supplied information needed to identify and locate additional relatives and completed the child placement resources form, as appropriate;
- Assess DFPS' efforts to identify, locate and notify relatives and others regarding the removal of the child as required by §262.1095;
- Ask all parties whether the child or family has Native American heritage and identify any tribe with whom the child may be associated.
- Review the service plan and make findings as to whether the plan ensures that reasonable efforts are made to enable the parents to provide a safe environment for the child, whether it is reasonably tailored to address any specific issues, whether the parents understand the plan, and whether the parents and CPS have signed the plan;
- Approve the plan with or without modification and incorporate the plan into a court order;
- Review the visitation plan required by §263.107 and render any orders relating to visitation, as provided by §§263.108 and 263.109;
- Review the child's medical care as required by §266.007 and make a finding as to whether the court has identified the individual who has the right to provide medical consent for the child under §266.003;
- Advise parents that their progress on the service plan, including gaining the skills or knowledge as stated in the plan, will be reviewed at all future hearings; and
- Warn parents that unless they can offer the child a safe environment, termination of parental rights is an option.<sup>38</sup>

The Status Hearing is limited to the contents and execution of the service plan, except as otherwise provided by Subchapter B, Chapter 263.<sup>39</sup>

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<sup>34</sup> Relatives within the 3<sup>rd</sup> degree of consanguinity, as defined in § 573.023, GOV'T CODE, means the child's grandparents, great-grandparents, adult aunts and uncles, adult siblings, and adult nieces and nephews.

<sup>35</sup> TEX. FAM. CODE §262.1095, as amended by S.B. 206, §23 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>36</sup> TEX. FAM. CODE §262.1095(c).

<sup>37</sup> TEX. FAM. CODE §263.0061.

<sup>38</sup> TEX. FAM. CODE §§263.006; 263.202.

<sup>39</sup> TEX. FAM. CODE §§263.202(b).

**TIP: Plan Ahead for Permanency Care Assistance**

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 ("PCA") offers monthly cash assistance and eligibility for Medicaid.<sup>40</sup> To qualify a child must reside with the caretaker *for at least six consecutive months after the person becomes licensed or verified to provide foster care* and this must occur *before the relative/fictive kin is named managing conservator*. Moreover, if the court grants either parent or DFPS joint managing conservatorship, the caretaker will not be eligible for the PCA program.<sup>41</sup>

- 1st - Relative/fictive kin licensed/verified +**
- 2nd - 6 months residence with child +**
- 3rd Appointment as Managing Conservator**

## Permanency Planning Meetings

Finding permanency for every child in the agency's temporary conservatorship as quickly as possible is a daunting task. By using family group decision-making to tailor solutions for individual families and drawing on the expertise of multi-disciplinary teams, DFPS continually strives to shorten the time a child must wait to find a permanent placement. Time frames for permanency planning meetings are no longer in statute, but the subject of rules to be adopted by the Health and Human Services Commission.<sup>42</sup>

## Permanency Hearing *BEFORE* Final Hearing

Texas law codifies a comprehensive list of issues the court and DFPS must address in order to highlight and eliminate barriers to permanency at the earliest possible time. A permanency hearing must be held no later than 180 days after DFPS is named as temporary managing conservator,<sup>43</sup> or 120 days from the status hearing. Another permanency hearing, which must be held within 120 days of the first one, buttresses efforts of the court and the parties to tackle specific issues that might delay permanency for a child.<sup>44</sup>

Notice is required and all parties must be given a copy of the permanency plan and the permanency progress report at least 10 days before the hearing.<sup>45</sup> Unless a child is in an adoptive placement or another permanent placement or it has already been filed, 10 days before the hearing DFPS must file 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, DFPS is taking to place the child with the relative.

A child's permanency plan must include concurrent goals, both a primary and at least one alternate goal. 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.<sup>46</sup>

<sup>40</sup> TEX. FAM. CODE , Ch. 264, Permanency Care Assistance Program.

<sup>41</sup> 40 TEX. ADMINISTRATIVE CODE §700.1029(d)(2).

<sup>42</sup> TEX. FAM. CODE §263.009, as amended by S.B. 206, §§30, 86(15) (84<sup>th</sup> Sess., effective Sept. 1, 2015); 40 TEX. ADMINISTRATIVE CODE , Chapter 700, Subchapter L (effective March 1, 2016).

<sup>43</sup> TEX. FAM. CODE §263.304(a).

<sup>44</sup> TEX. FAM. CODE §263.305.

<sup>45</sup> TEX. FAM. CODE §263.0021, as amended by S.B. 219 and redesignated and amended by S.B. 206 (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>46</sup> TEX. FAM. CODE §§263.3026; 263.306(a-1)(4)(C).



If the goal for a child is another planned, permanent living arrangement ("APPLA"), DFPS must also document the desired permanency outcome for the child and a compelling reason the other permanent goals are not in the child's best interest.<sup>47</sup>

The primary duty of a court presiding over a Permanency Hearing is to return the child home if it safe to do so, enter any orders necessary to effectuate permanency and set a dismissal date. To promote better outcomes and ensure compliance with federal law, the Legislature has crafted a long list of issues to be addressed and findings that must be made. Rigorous requirements relating to diligent search efforts, inquiries about Native American heritage, assessments of a child's needs, and related issues provide a solid framework to support permanency. Specifically, the court is directed to:

- Identify persons present in court, and those noticed but failing to appear;<sup>48</sup>
- Advise each parent not represented by an attorney of the right to representation and to appointed counsel for an indigent parent who responds in opposition to the suit (whether DFPS seeks termination or appointment of a conservator) and appoint counsel as required;<sup>49</sup>
- Ask all parties present whether the child or the child's family has Native American heritage and identify any tribe with which the child may be associated;<sup>50</sup>
- *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;<sup>51</sup>
- Review the efforts of DFPS to:
  - ✓ Locate necessary persons;<sup>52</sup>
  - ✓ Request service of citation, including service by publication;<sup>53</sup>
  - ✓ Obtain assistance of parents to locate missing parent, alleged father, or relative;<sup>54</sup>
  - ✓ Locate relatives for placement purposes;<sup>55</sup>
  - ✓ Ensure the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities;<sup>56</sup> and
  - ✓ Finalize the child's permanency plan;<sup>57</sup>
- Review efforts of parents and family to provide location information regarding any missing parent, alleged father, or relative;<sup>58</sup>
- Review the visitation plan and render any appropriate order;<sup>59</sup>
- Evaluate parties' compliance with temporary orders and the service plan and the extent to which progress has been made toward alleviating or mitigating the causes for the child's placement in foster care;<sup>60</sup>
- Review the child's permanency progress report to:
  - ✓ Determine the safety and well-being of the child and whether the child's needs are being adequately addressed;<sup>61</sup>
  - ✓ Determine necessity of continued substitute care, appropriateness of placement, whether the placement is in the best interest of the child, and whether other plans or services are needed;<sup>62</sup>
  - ✓ Determine the appropriateness of the primary and alternate permanency goals for the child;<sup>63</sup>
  - ✓ Review child's medical care, whether child was given an opportunity to give an

<sup>47</sup> TEX. FAM. CODE §263.306(a-1)(4)(H).

<sup>48</sup> TEX. FAM. CODE § 263.306(a)(1).

<sup>49</sup> TEX. FAM. CODE §§ 107.013; 263.0061; 263.203.

<sup>50</sup> TEX. FAM. CODE § 263.306(a)(9).

<sup>51</sup> TEX. FAM. CODE § 263.302.

<sup>52</sup> TEX. FAM. CODE § 263.306(a-1)(2)(A).

<sup>53</sup> TEX. FAM. CODE §§ 263.0021, as amended by S.B. 219 and redesignated and amended by S.B. 206 (84<sup>th</sup> Reg. Sess., effective Sept. 1, 2015); 263.306(a-1)(2)(A).

<sup>54</sup> TEX. FAM. CODE § 263.306(a-1)(2)(B).

<sup>55</sup> TEX. FAM. CODE § 263.306(a-1)(2).

<sup>56</sup> TEX. FAM. CODE § 263.306(c).

<sup>57</sup> TEX. FAM. CODE § 263.306(a-1)(4)(C).

<sup>58</sup> TEX. FAM. CODE § 263.306(a)(3).

<sup>59</sup> TEX. FAM. CODE § 263.306(a)(4).

<sup>60</sup> TEX. FAM. CODE § 263.306(a-1)(3).

<sup>61</sup> TEX. FAM. CODE § 263.306(a-1)(4)(A).

<sup>62</sup> TEX. FAM. CODE § 263.306(a-1)(4)(B).

<sup>63</sup> TEX. FAM. CODE § 263.306(a-1)(4)(C).

opinion on this care, and, if psychotropic drugs are prescribed, make specific required findings as to whether appropriate psychosocial therapies, behavior strategies and other non-pharmacological interventions have been provided and whether the child has been seen by the prescribing physician at least once every 90 days for medication review;<sup>64</sup>

- ✓ Determine whether the child's education needs and goals have been identified and addressed and identify an education decision-maker if not previously identified;<sup>65</sup>
- ✓ *If a child is 14 or older*, order transitional living services;<sup>66</sup> and
- ✓ *For a child whose permanency goal is APPLA*, identify the child's desired permanency outcome, and whether APPLA is currently the best permanency plan for the child, and if so, provide compelling reasons why other permanency plans are not in the best interest of the child;<sup>67</sup>

From DFPS' perspective, a permanency hearing requires thorough preparation to show exactly why the child cannot be returned home safely (if the agency is not recommending return), to identify what remains to be accomplished and when that can be expected to be done. In addition, DFPS must lay the groundwork for a wide array of issues the court must consider. A proactive approach to this process by attorneys for the agency will best serve the child, will facilitate a court's review and, if the case ultimately goes to trial, will help to focus the litigation.

## Monitored Return Option

A court may also 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.<sup>68</sup>

## 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. If a nonparent is appointed as a managing conservator, DFPS must explain the differences between conservatorship and adoption to the proposed conservator and any such court order must address specific authorizations listed in the statute, related to medical, education and related needs of the child.<sup>69</sup>

Without question, this stage of the litigation requires 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, the extent of a parent's compliance with the service plan and the child's current status and needs 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.<sup>70</sup> Attorneys representing DFPS must

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<sup>64</sup> TEX. FAM. CODE § 263.306(a-1)(4)(D)-(E).

<sup>65</sup> TEX. FAM. CODE §§ 263.306(a-1)(4)(F); 264.1072; 42 U.S.C. §675.

<sup>66</sup> TEX. FAM. CODE § 263.306(a-1)(4)(G).

<sup>67</sup> TEX. FAM. CODE § 263.306(a-1)(4)(H).

<sup>68</sup> TEX. FAM. CODE §263.403.

<sup>69</sup> TEX. FAM. CODE §263.408, added by S.B. 314, §1 (84<sup>TH</sup> Sess., effective Sept. 1, 2015).

<sup>70</sup> TEX. FAM. CODE §161.001; *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), non-exclusive list of best interest factors

be prepared to assess all procedural and substantive aspects of a case before proceeding to trial.<sup>71</sup> Fortunately, many experienced litigators are available to mentor, share resources and discuss strategies. Contact a local Regional Attorney, the Appellate Unit or the Office of General Counsel for assistance.

## Permanency Hearing *AFTER* Final Hearing

Recent changes to the Family Code highlight the need for ongoing permanency efforts if the court names DFPS as a child's permanent managing conservator. In this circumstance, the court must review the child's placement at least every six months until the DFPS is no longer the child's managing conservator.<sup>72</sup> If a final order names DFPS as managing conservator *and* terminates parental rights, the court must conduct the initial permanency hearing no later than the 90th day after the final order is rendered and every six months thereafter until the DFPS is no longer the managing conservator.<sup>73</sup>

A permanency progress report must be filed no later than the 10<sup>th</sup> day before the permanency hearing. The contents of this report is specific and designed to enable the court to conduct a comprehensive review. This hearing requires that the court:

- Identify all persons and parties present;<sup>74</sup>
- *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;<sup>75</sup>
- Review the efforts of DFPS to:
  - ✓ Notify all persons entitled to notice;<sup>76</sup> and
  - ✓ Ensure the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities, including activities not listed in the child's service plan;<sup>77</sup>
- Review the child's permanency progress report to determine:
  - ✓ The safety and well-being of the child and whether the child's needs, including any medical or special needs, are being adequately addressed;<sup>78</sup>
  - ✓ The continuing necessity and appropriateness of the child's placement and whether the placement continues to be in the best interest of the child;<sup>79</sup>
  - ✓ *For a child placed in institutional care*, whether efforts have been made to ensure the placement is the least restrictive alternative consistent with child's best interest and needs;<sup>80</sup>
  - ✓ The appropriateness of the primary and alternative permanency goals for the child and whether DFPS has made reasonable efforts to finalize the permanency plan;<sup>81</sup>
  - ✓ Whether DFPS has exercised due diligence to place the child for adoption *if parental rights are terminated*;<sup>82</sup>
  - ✓ *For a child whose permanency goal is APPLA*, the identification of the child's desired permanency outcome, and whether APPLA is currently the best

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<sup>71</sup> See Practice Guide, SECTION 5 LITIGATION ESSENTIALS; SECTION 8 TERMINATION; SECTION 7 EVIDENCE; SECTION 9 JURY TRIALS; SECTION 10 DE NOVO HEARINGS AND POST TRIAL STRATEGIES; and SECTION 10 TRIAL NOTEBOOK.

<sup>72</sup> TEX. FAM. CODE §263.501(b),

<sup>73</sup> TEX. FAM. CODE §263.501(a),

<sup>74</sup> TEX. FAM. CODE § 263.5031(1).

<sup>75</sup> TEX. FAM. CODE § 263.302.

<sup>76</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(2).

<sup>77</sup> TEX. FAM. CODE § 263.503(c), as amended by S.B. 219, S.B. 206, and S.B. 1407 (84<sup>th</sup> Reg. Sess., effective Sept. 1, 2015); NOTE: S.B. 206 repealed section 263.503 in its entirety, but S.B. 1407 added a subsection (c) without reference to the repeal. The Family Code reconciled these amendments by deleting subsections (a)-(b), and adding in (c), so the requirement from (c) is included here, until further reconciliation.

<sup>78</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(A).

<sup>79</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(B).

<sup>80</sup> TEX. FAM. CODE §§263.0021; 263.5031(3)(C).

<sup>81</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(D).

<sup>82</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(D)(i).

permanency plan for the child, and if so, provide compelling reasons why it continues to not be in the best interest of the child to return home, be placed for adoption, be placed with a legal guardian, or be placed with a fit and willing relative;<sup>83</sup>

- ✓ *For a child age 14 and older*, whether services that are needed to assist the child's transition to adult independent living are available in the child's community;<sup>84</sup>
  - ✓ Whether the child is receiving appropriate medical care, including whether the child has been provided the opportunity to express the child's opinion on this care, as well as whether the child has been provided the required specifics about any psychotropic medications, including whether the child is being provided with appropriate services and is being seen by the prescribing practitioner at least once every 90 days;<sup>85</sup>
  - ✓ Whether an education decision-maker for the child has been identified, whether the child's education needs and goals have been identified and addressed, and whether there have been any major changes in the child's school performance or any serious disciplinary events;<sup>86</sup>
  - ✓ *For a child in DFPS permanent managing conservatorship whose parental rights are not terminated*, whether to order DFPS to provide services to a parent for not more than six months if the child has not been placed with a relative or other individual seeking permanent managing conservatorship of the child and it is determined that further efforts at reunification with the parent are in the best interest of the child and likely to result in the child's safe return to the parent;<sup>87</sup>
  - ✓ Whether DFPS has identified a family member or other caring adult who has made a permanent commitment to the child;<sup>88</sup> and
- Set the next permanency hearing within six months, and continue to set these hearings within six months until DFPS is no longer the child's managing conservator.<sup>89</sup>

Without question permanency efforts incorporating all facets of each child's circumstances must continue in full force until DFPS is replaced by a permanent caretaker or a young adult leaves care sometime between age 18 and 22. The special protections available for youth aging out of foster care are discussed in the next section below.

## Extended Opportunities for Young Adults

Young adults who leave foster care without a supportive family or other support system face increased risk of homelessness, poverty, lack of health care, involvement in the criminal justice system, unplanned pregnancies and substance abuse. Fortunately, additional options for support and services have been put in place in recent years to support youth making the transition from foster care until their 21st birthday (or 22<sup>nd</sup> birthday for young adults pursuing a high school diploma or GED).<sup>90</sup>

Delivery of services to support a youth's successful transition to adulthood begin as early as age 14, but at 17 ½ years old, the court and attorneys must be aware of the options and how to best effectuate the choices a youth makes. Key concepts in this arena include *trial independence*, *extended foster care*, *transitional living services* and *extended jurisdiction*.

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<sup>83</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(E).

<sup>84</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(F).

<sup>85</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(G)-(H).

<sup>86</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(I).

<sup>87</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(J).

<sup>88</sup> TEX. FAM. CODE §§ 263.0021; 263.5031(3)(K).

<sup>89</sup> TEX. FAM. CODE §263.501(a).

<sup>90</sup> TEX. FAM. CODE Ch. 263, Subchapter G; 40 TEX. ADMINISTRATIVE CODE §700.346(C).

*Trial independence* ("TI") is a mechanism that allows a young adult to return to care after leaving, in the same way a person often returns to the family home as needed for extra support. If a young adult does not enter extended foster care or exits extended foster care before his or her 21st birthday, a mandatory six month period of trial independence begins on either the young adult's 18th birthday or the date of exit from extended foster care. Whatever a youth's circumstance, the best practice is to request that the court order the maximum trial independence period of 12 months. This will give a young adult the best opportunity to access services in the future.

A young adult who exits and reenters foster care can have more than one TI period. A new period of TI begins each time a young adult exits extended foster care until the young adult's 21<sup>st</sup> birthday. No court hearings are required during a TI period; however, the court must resume review hearings if a young adult returns to foster care. If a young adult was originally eligible for Title IV-E federal foster care, this eligibility continues when the young adult re-enters care after the TI period.

*Extended foster care* allows a "young adult" (a youth in foster care on the day before his or her 18th birthday) to remain in care beyond age 18 by voluntarily delegating responsibility for placement and care to DFPS. This allows a young adult to reside with a foster parent or other residential services provider licensed or approved by DFPS or verified by a licensed or certified child placing agency and paid for by DFPS.

A young adult who does not remain in extended foster care, may elect to receive *transitional living services*. These services include life skills training, as well as planning financial and medical support services.

*Extended jurisdiction* refers to a court's exercise authority over a case after a youth turns 18 years old. All young adults in extended foster care are subject to extended jurisdiction during which the court must conduct review hearings.<sup>91</sup> A young adult who receives transitional living services can request voluntary extended jurisdiction of the court beyond the expiration of the TI period.<sup>92</sup> If the court grants extended jurisdiction, hearings are not required, but may be conducted at the request of the young adult. The court's extended jurisdiction ends on the young adult's 21<sup>st</sup> birthday or when the young adult withdraws consent in writing or in court. If the young adult returns to extended foster care, the court's jurisdiction continues until the young adult leaves foster care and a new period of TI expires or the young adult turns 21 years old.<sup>93</sup> A court is not authorized to appoint DFPS or the Department of Aging and Disability Services as managing conservator or guardian of a young adult and cannot order DFPS to provide services other than those authorized under state law for which sufficient funds are appropriated.<sup>94</sup>

The court is also authorized to extend jurisdiction on its' own motion to allow DFPS to make a referral for guardianship services at the Department of Aging and Disability Services (DADS). In this circumstance, the court's jurisdiction over a young adult ends on the date the guardian is appointed and qualifies, unless the guardian requests extension of jurisdiction. If a guardian is appointed for the young adult and requests continued jurisdiction of the family court, the family court may not issue an order that conflicts with an order of the Probate Court with jurisdiction over the young adult.

If a court exercises extended jurisdiction in any of the above circumstances, the court may continue or renew the appointment of an attorney ad litem and guardian ad litem for the young adult.<sup>95</sup>

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<sup>91</sup> TEX. FAM. CODE §263.602.

<sup>92</sup> TEX. FAM. CODE §263.6021.

<sup>93</sup> TEX. FAM. CODE §263.602(f).

<sup>94</sup> TEX. FAM. CODE §263.607 (appropriations must be sufficient to comply with the court order and the department's obligations to other young adults entitled to similar services).

<sup>95</sup> TEX. FAM. CODE §263.605.