

SECTION 3 HEARING GUIDES

September 2018

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NOTE: *If the Indian Child Welfare Act applies, consult the Practice Guide, SECTION 4.*

EX PARTE ORDER BEFORE REMOVAL HEARING

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

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

DFPS ATTORNEY PREPARATION Before the hearing:

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

REQUIRED SHOWING DFPS must prove:

- *Either* an immediate danger to the physical health or safety of the child, *or* that the child has been a victim of neglect or sexual abuse;
- That it is contrary to the child's welfare to remain in the home;
- That there is not sufficient time, consistent with the child's physical health or safety and the nature of the emergency, to hold an adversary hearing; and
- That reasonable efforts were made to prevent or eliminate the need for removal.¹

COURT ACTION

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

- Issue an *ex parte* order for protection of the child, which must contain a specific statutory warning informing a parent regarding the right to representation and eligibility for appointed counsel;²
- Appoint an attorney and guardian ad litem for the child;³
- Appoint a person authorized to consent to medical care;⁴ and
- Set the adversary hearing within 14 days, unless the court finds good cause to postpone the hearing within the following timeframes⁵:
 - If the parent is indigent, no more than seven days from the date of a parent's attorney's appointment to allow the attorney to respond to the petition or prepare for the hearing; or
 - If the parent is not indigent and appears in opposition to the suit, no more than seven days from the date of the parent's appearance in court to allow the parent to hire an attorney or to provide the parent's attorney time to respond to the petition and prepare for the hearing; or
 - Any such time that both the parent and appointed attorney agree upon in writing. In that case, the court shall extend a temporary restraining order for the protection of the child until the date of the postponed hearing.

NOTE: *Violence Protection*

If family violence is present, consider a protective order to increase safety.⁶

¹ TEX. FAM. CODE § 262.102.

² TEX. FAM. CODE § 262.102(d).

³ TEX. FAM. CODE §§ 107.011; 107.012.

⁴ TEX. FAM. CODE § 266.004.

⁵ TEX. FAM. CODE § 262.201(a)(5),(e).

⁶ TEX. FAM. CODE § 71.004(2); 262.102(c).

EMERGENCY EX PARTE ORDER AFTER REMOVAL HEARING

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

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

DFPS ATTORNEY PREPARATION Before the hearing:

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

REQUIRED SHOWING DFPS must 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, or a parent or person with possession of child is currently using a controlled substance which use constitutes an immediate danger to physical health or safety, or permitted the child to remain on the premises where methamphetamines are manufactured;
- That it is contrary to the child's welfare to remain in the home; and
- That reasonable efforts were made to prevent or eliminate the need for removal.⁷

COURT ACTION

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

- Issue an ex parte order for protection of the child, which must contain a specific statutory warning to parents;⁸
- Appoint an attorney and guardian ad litem for the child and person authorized to consent to medical care;⁹and
- Set the adversary hearing within 14 days, unless the court finds good cause to postpone the hearing within the following timeframes¹⁰:
 - .

NOTE: THE "HOME OF REMOVAL"

Federal policy designates a child's "home of removal" as the home of the adult a child is legally removed from, whether that is a parent or another person with legal custody. Even if a child is found in the physical custody of someone else, all removal findings relate to the home of legal removal including:

- *Reasonable efforts to prevent or eliminate the need for removal; and*
- *It is contrary to the child's welfare to remain in the home.*

⁷ TEX. FAM. CODE §262.107.

⁸ TEX. FAM. CODE § 262.102(d).

⁹ TEX. FAM. CODE §§107.011;107.012;266.004.

¹⁰ TEX. FAM. CODE §262.201

ADVERSARY HEARING/ NON-EMERGENCY REMOVAL

GOAL. To have a court authorize continued temporary managing conservatorship of a child removed in an ex parte hearing *OR* a non-emergency removal.

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

DFPS ATTORNEY PREPARATION

- Assess evidence, including the removal affidavit, witness statements, photos, medical reports and other investigative records;
- On request from a parent or child's attorney, provide names of witnesses DFPS intends to call (other than DFPS employees); a copy of any offense report to be used to refresh a witness's testimony and a copy of any photo, video or recording to be presented as evidence;¹¹
- Subpoena necessary witnesses and records;
- Verify that CPS is prepared to file Child Placement Resource and provide the name of relative or other designated caregiver with whom child is placed or explain why such placement has not been made and what if any actions the agency is taking to make such placement;¹²
- Confirm CPS has asked all appropriate persons about possible Native American heritage and the identity of any tribe and documented responses.¹³
- Check status of service of citation on all required parties; and
- Find out CPS' recommendation regarding visitation, medical consent or any other issue that may warrant court intervention.

REQUIRED SHOWING

I. ADVERSARY HEARING AFTER EX PARTE REMOVAL

This hearing must be set within 14 days of the ex parte proceeding, unless the court finds good cause and postpones the hearing for seven days and extends temporary orders:

- After appointment of counsel for an indigent parent (subject to extension or shortening if parent and attorney agree in writing) or
- After the first appearance of a parent who opposes the suit.

At this hearing, DFPS must prove:

- There was a danger to the physical health or safety of the child, including a danger that the child would be a victim of trafficking under Section 20A.02 or 20A.03, Penal Code, 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 of the adult(s) the child is legally being removed from;
- 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.¹⁴

¹¹ TEX. FAM. CODE §262.014.

¹² TEX. FAM. CODE §262.114 (a-1); (a-2). The Child Placement Resources form is the same as the CPS Child Caregiver Resource form (2625).

¹³ TEX. FAM. CODE §262.201(f).

¹⁴ TEX. FAM. CODE §262.201(g).

II. NON-EMERGENCY REMOVAL

This hearing should be set as soon as possible, no later than 30 days after filing. Confer with DFPS to assess whether a delay poses a risk to the safety of the child.

DFPS must prove:

- There is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child;
- It is contrary to the child’s welfare to remain in the home; and
- Reasonable efforts consistent with the circumstances and safety of the child, were made to prevent or eliminate the need for removal.¹⁵

- **COURT ACTION**

If the court finds sufficient evidence, the court must:

- Issue an order for protection of the child
- Order placement of child with a noncustodial parent, or relative if placement with the noncustodial parent is inappropriate, unless that is not in the child's best interest;¹⁶
- Require parents and relatives to provide information regarding any absent parent, alleged father, or relative of the child; complete Child Placement Resources form and file it with the court if not already on file;;¹⁷
- Inform parents that restriction or termination of parental rights may occur if they cannot offer the child a safe environment;¹⁸
- Ask all parties about Native American heritage and the identity of any tribe(s);¹⁹
- Appoint an attorney and guardian ad litem for the child and a medical consentor; and²⁰
- Set a status hearing within 60 days.

NOTE: If citation by publication is necessary, the court may render a temporary order without waiting for publication.²¹

The court may also:

- Appoint an attorney for any parent entitled to appointed counsel;²²
- Issue temporary protective orders to address domestic violence;²³ and
- Issue necessary orders regarding:
 - ✓ Notice by publication for missing parent;
 - ✓ Additional home assessments or studies;
 - ✓ Paternity testing;
 - ✓ Psychological testing;
 - ✓ Drug assessment or testing;
 - ✓ Medical consent;
 - ✓ Physical examination;
 - ✓ Child Support;
 - ✓ Parent providing information regarding family medical history
 - ✓ parentage, immigration status, or child’s medical history;
 - ✓ Visitation; and

¹⁵ TEX. FAM. CODE § 262.113; 262.201(j)

¹⁶ TEX. FAM. CODE §262.201(n).

¹⁷ TEX. FAM. CODE §262.201(l).

¹⁸ TEX. FAM. CODE §262.201(m).

¹⁹ TEX. FAM. CODE §262.201(f).

²⁰ TEX. FAM. CODE §§107.022; 107.012; §266.004.

²¹ TEX. FAM. CODE §262.201(c).

²² TEX. FAM. CODE §107.013(a).

²³ TEX. FAM. CODE §262.201(k).

- ✓ Discovery or other orders needed to protect a child, facilitate the return of a child, or to find the optimum placement for a child.

Within the first 30 days after a child is removed, DFPS must use due diligence to identify and locate all adult relatives (within 3rd degree of consanguinity), notify them of the removal and provide them with specific information about participation in the proceedings. ²⁴

AFTER HEARING

Report on Education in 5 Days

Unless DFPS' right to make educational decisions is limited by court order, within 5 days of the Non-emergency/ Adversary Hearing DFPS must file information with the court about the child's education decision-maker and any surrogate parent appointed and provide this information to the child's school. Any changes are to be reported to the child's school within 5 days and included in the permanency progress report.²⁵

Request Court of Continuing Jurisdiction

If TMC is granted, DFPS must request identification of the court of continuing jurisdiction.²⁶ Local practice determines who within the agency performs this task, but the attorney must verify this is completed.

NOTE: TMC ORDER STARTS CLOCK

One year after DFPS is appointed as temporary managing conservator, dismissal is automatic, unless trial commences or an extension is granted.

²⁴ TEX. FAM. CODE §262.1095.

²⁵ TEX. FAM. CODE §263.004(b).

²⁶ TEX. FAM. CODE §155.201(d); 262.202; 262.203

STATUS HEARING

GOAL To have a court review due diligence of efforts to serve parties, locate missing parents, notify relatives of a child's removal, review contents of service plan, enter court orders necessary to implement the service plan, and review the child's medical care.

BURDEN OF PROOF Preponderance of the evidence.

DFPS ATTORNEY PREPARATION

- Check status of the Court of Continuing, Exclusive Jurisdiction (CCEJ) inquiry & determine if transfer required;²⁷
- If any parent is missing, confirm that caseworker completed Affidavit Regarding Military Service;²⁸
- Confirm CPS has asked all appropriate persons about possible Native American heritage and the identity of any tribe and documented responses.
- Calculate and document automatic dismissal date²⁹;
- Confirm that 10 days before hearing CPS has filed:
Court Report with Information on CPS efforts to identify, locate, and notify relatives (including relatives of an alleged father, if CPS reasonably believes him to be the biological father) and others of the removal of the child; child's medical care and visitation plan;and³⁰

Child Placement Resources form (if not previously filed) with any completed home study and related required information;³¹ and
- Review proposed served plan for compliance with TEX. FAM. CODE §263.102.

NOTE: "O" TERMINATION GROUND & NEW DEFENSE

If the termination grounds include failure to comply with the service plan, all essential components of the plan must be specified in the court order. If a parents proves his/her inability to comply with the service plan despite a good faith effort and that failure to comply was not the parent's fault, this is a defense to termination on "O" ground.

REQUIRED SHOWING DFPS must prove:

- Due diligence was exercised to locate and serve necessary persons, including an alleged father (whether or not he has registered with the paternity registry);
- Compliance with relative notification under §262.1095; and
- The appropriateness of the service plan.³²

²⁷ TEX. FAM. CODE §155.201(d); §262.202-262.203; local practice will dictate who within the agency performs this task, but the attorney must confirm that the CCEJ check has been done.

²⁸ See Practice Guide, SECTION 5 LITIGATION ESSENTIALS, Service of Process, Missing Parent in Military.

²⁹ TEX. FAM. CODE §263.401(a) (first Monday after one year anniversary of the order granting temporary managing conservatorship).

³⁰ TEX. FAM. CODE §262.1095; §266.007; §263.107.

³¹ TEX. FAM. CODE §263.003. Note: This information is not required if the child is in an adoptive or other permanent placement, but that is unlikely at this early stage of the litigation.

³² TEX. FAM. CODE §263.202.

- **COURT ACTION**

At the status hearing the court must:

- Assess whether all persons entitled to services have been served and whether diligent search efforts were made to locate any missing parents (including alleged fathers);³³
- Advise each parent of the right to representation and to appointed counsel for an indigent parent who responds in opposition to the suit and appoint counsel as required;³⁴
- Determine whether all persons provided information for finding missing parties or relatives;
- Ask all parties about Native American heritage and the identity of any tribe(s);³⁵
- Review the court report filed by CPS summarizing its efforts to identify, locate and notify persons entitled to notification of a child's removal under §262.1095 and make any orders necessary to ensure proper notification;
- Review the visitation plan and render an appropriate order, including specific steps a parent must take to have any supervision requirement for visitation reduced;³⁶
- Make findings regarding the service plan, including whether:
 1. The reunification plan ensures reasonable efforts are made to enable parents to provide a safe home;
 2. Parents have reviewed and understand plan and have been advised regarding potential termination of parental rights or other restriction; and
 3. The service plan is reasonably tailored to address specific issues;
 4. Parents have been allowed to comment on the service plan;
 5. Parents and CPS have signed the plan
- Incorporate the service plan into the court order;
- If no Parent Child Placement Resources form has been filed, require each parent, alleged father or other person to do so;
- Review the child's medical care, make a finding regarding medical consent authority with additional findings if child is prescribed psychotropic medications; and³⁷
- Set an initial permanency hearing no later than 180 days after temporary managing conservatorship is granted.³⁸

At this hearing, the court may also (some of the following are mandatory, but not required *at this hearing*):

- *If a child is eligible for special education services*, appoint a surrogate parent to protect the child's education rights.³⁹
- Make a finding of aggravated circumstances, waive the service plan and reasonable efforts requirements, and set an accelerated trial date;⁴⁰
- Issue temporary protective orders to address domestic violence;⁴¹and
- Issue necessary orders regarding:
 - ✓ Testing for paternity, drug assessment or psychological testing
 - ✓ Additional home assessments or studies;
 - ✓ Child Support;
 - ✓ Parent disclosure of information and documents regarding medical history, parentage, immigration status or child's medical history; or
 - ✓ Visitation.

³³ TEX. FAM. CODE §263.202.

³⁴ TEX. FAM. CODE §107.013; TEX. FAM. CODE §263.0061.

³⁵ TEX. FAM. CODE §263.202(f-1)(f).

³⁶ TEX. FAM. CODE §263.107-109.

³⁷ TEX. FAM. CODE §266.007.

³⁸ TEX. FAM. CODE §263.304.

³⁹ TEX. FAM. CODE §263.0025(b).

⁴⁰ TEX. FAM. CODE §262.2015(b).

⁴¹ TEX. FAM. CODE §§71.004; 83.001.

PERMANENCY HEARING *BEFORE* FINAL ORDER

GOAL Review status of child and permanency plan to ensure final order can be rendered before the automatic dismissal date.⁴²

BURDEN OF PROOF Preponderance of the evidence.

DFPS ATTORNEY PREPARATION

- Verify that all necessary persons received 10 days' notice of the hearing (including any child age 10 or above or whom the court deems appropriate to receive notice) and the permanency progress report (notice of hearing to caregivers and relatives must make clear attendance is optional, not required).⁴³
- Verify DFPS arrangements for child to attend hearing unless specifically excused by court (child in TJJD custody may appear by phone/video);⁴⁴
- Unless the child is in an adoptive or another permanent placement, verify that DFPS has filed the Child Placement Resources form and related information with the court 10 days before the hearing;⁴⁵
- Verify that DFPS has filed information regarding educational decision-maker and the name of any surrogate parent assigned by the school district;⁴⁶
- Verify the Court Report is filed with the court 10 days before the hearing and review permanency plan to ensure it:⁴⁷
 - ✓ Describes the reasonable efforts made by DFPS to finalize a permanency plan;
 - ✓ Identifies concurrent goals, which may include reunification with a parent or other person from whom the child was removed; termination of parental rights and adoption by a relative or other suitable person; the award of permanent managing conservatorship to a relative or other suitable person; or "another planned, permanent living arrangement" (APPLA);⁴⁸
 - ✓ *If the plan is APPLA*, the report must document a compelling reason why another permanency goal is not in the child's best interest;⁴⁹ and
 - ✓ Includes the child's permanency progress report and⁵⁰:
 - Lists parties who have and have not been served, describes service efforts by DFPS and parents' assistance in those efforts;⁵¹
 - Identifies whether the child or the child's family has a Native American heritage;⁵²
 - Evaluates parties' compliance with temporary orders and the service plan and any progress made toward mitigating the causes for the child's placement in foster care;⁵³
 - Evaluates the safety and well-being of the child, the child's placement and whether additional services are needed;⁵⁴
 - Includes a summary of medical care provided, including the child's opinion on this care, as well as 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;⁵⁵
 - Provides information on the child's current education status, goals, and needs, any educational stability issues and any special education services for an eligible child;⁵⁶

⁴² TEX. FAM. CODE § 263.304.

⁴³ TEX. FAM. CODE § 263.0021(e).

⁴⁴ TEX. FAM. CODE § 263.302.

⁴⁵ TEX. FAM. CODE § 263.003.

⁴⁶ TEX. FAM. CODE § 263.004.

⁴⁷ TEX. FAM. CODE §§ 263.0021; 263.3025(a); 263.303(a); Tex. R. Civ. Pro. 21a.

⁴⁸ TEX. FAM. CODE §§ 263.3025(d); 263.3026(a); 263.306 (a-1).

⁴⁹ TEX. FAM. CODE § 263.3026(b).

⁵⁰ TEX. FAM. CODE §§ 263.3025(b); 263.303(b).

⁵¹ TEX. FAM. CODE § 263.306(a-1).

⁵² TEX. FAM. CODE § 263.306(a-1),(3)(9).

⁵³ TEX. FAM. CODE § 263.306(a-1)(4).

⁵⁴ TEX. FAM. CODE § 263.306(a-1)(4)(5).

⁵⁵ TEX. FAM. CODE §§ 263.306(a-1)(D)-(E); 266.007.

⁵⁶ TEX. FAM. CODE §§ 263.0025; 263.306(a-1)(5)(F); 264.1072; 42 U.S.C. §675.

- For a youth age 14 and older, identifies services for transition to adult independent living;⁵⁷
- For any youth age 14 and older in the permanent managing conservatorship of DFPS and all youth age 16 and up, confirms that an independent living skills assessment has been completed;⁵⁸
- For a child whose permanency goal is APPLA, identifies the child's desired permanency outcome, and whether APPLA is currently the best permanency plan for the child, and if so, lists compelling reasons why other permanency plans are not in the best interest of the child;⁵⁹
- Evaluates whether returning the child to the child's parents is in the child's best interest and estimates a likely date for achieving permanency;⁶⁰
- Identifies the dismissal date and the date of any subsequent hearings;⁶¹
- Identifies the efforts by DFPS to ensure the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities, including activities not listed in the child's service plan;⁶²

REQUIRED SHOWING This will vary depending on the circumstances, but may include evidence to show⁶³:

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

NOTE: Extension of Requires EXTRAORDINARY CIRCUMSTANCES

An extension of time beyond the one year dismissal date requires the court to find extraordinary circumstances that necessitate a child remaining in temporary managing conservatorship and that remaining in DFPS care is in the child's best interest and is limited to 180 days.⁶⁴

⁵⁷ TEX. FAM. CODE § 263.306(a-1)(G).

⁵⁸ TEX. FAM. CODE § 264.121(a-3)-(a-4).

⁵⁹ TEX. FAM. CODE § 263.306(a-1)(5)(H).

⁶⁰ TEX. FAM. CODE § 263.306(a-1)(6)-(7).

⁶¹ TEX. FAM. CODE § 263.306(a-1)(8).

⁶² TEX. FAM. CODE § 263.306(c).

⁶³ TEX. FAM. CODE § 263.306.

⁶⁴ TEX. FAM. CODE § 263.401.

- **COURT ACTION**

The court must :

- Ask whether the child or family has Native American heritage and identify any tribe;⁶⁵
- Identify persons and parties present at the hearing and advise unrepresented parents and appoint counsel as required;⁶⁶
- Make findings regarding safety and appropriateness of return of the child to the home, best interest and whether it is contrary to the child's welfare to return home;⁶⁷
- Return the child to the parents if it is safe and in the child's best interest;⁶⁸
- Consider whether to permit the child to transition home or make a monitored return to parent;⁶⁹
- Place the child with a nonparent entitled to service under Tex. Fam. Code §102.003 if it is safe and in the child's best interest;⁷⁰
- Review the placement and make findings whether a child is placed with a relative or other designated caregiver;⁷¹
- *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;⁷²
- Determine whether DFPS has conducted any required independent living skills assessment and addressed the goals of the permanency plan and the skills assessment;⁷³
- *For a child age 16 or older, or who has had the disabilities of minority removed*, whether DFPS has provided the youth with required documents and information;⁷⁴
- Review the efforts of DFPS to:
 - ✓ Locate necessary persons;⁷⁵
 - ✓ Request service of citation, including service by publication;⁷⁶
 - ✓ Obtain assistance of parents to locate missing parents or relatives;⁷⁷
 - ✓ Locate relatives for placement purposes;
 - ✓ Ensure the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities; and
 - ✓ Finalize the child's permanency plan;
 - ✓ Review efforts of parents and family to provide location information regarding any missing parent, alleged father, or relative;
- Evaluate parties' compliance with temporary orders and the service plan and progress;
- 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
 - ✓ 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;⁷⁸
 - ✓ Determine the appropriateness of the primary and alternate permanency goals for the child;⁷⁹
 - ✓ Review child's medical care, whether child was given an opportunity to give an 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

⁶⁵ TEX. FAM. CODE § 263.306(a-1)(3)

⁶⁶ TEX. FAM. CODE §§ 107.013; 263.0061; 263.203,263.306(a-1).

⁶⁷ TEX. FAM. CODE § 263.002(c).

⁶⁸ TEX. FAM. CODE § 263.306(a-1)(6).

⁶⁹ TEX. FAM. CODE § 263.403.

⁷⁰ TEX. FAM. CODE § 263.408

⁷¹ TEX. FAM. CODE § 263.002(b).

⁷² TEX. FAM. CODE § 263.302.

⁷³ TEX. FAM. CODE § 263.306(a-1)(5)(H)(iii)-(iv).

⁷⁴ TEX. FAM. CODE § 263.306(5)(H)(v)-(vi).

⁷⁵ TEX. FAM. CODE § 263.306(a-1)(2)(A).

⁷⁶ TEX. FAM. CODE §§ 263.0021; 263.306(a-1)(2)(A).

⁷⁷ TEX. FAM. CODE § 263.306(a-1)(2)(B).

⁷⁸ TEX. FAM. CODE § 263.306(a-1)(5)(B).

⁷⁹ TEX. FAM. CODE § 263.306(a-1)(5)(C).

- for medication review;⁸⁰
- ✓ Determine whether the child's education needs and goals have been identified and addressed and identify an education decision-maker if not previously identified;⁸¹
- ✓ *If a child is 14 or older*, order transitional living services;⁸² 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;⁸³
- *If a child is eligible for special education services*, appoint a surrogate parent if one has not been appointed by the school district;⁸⁴
- *If a child is the subject of a transitional return*, make findings regarding the grounds for the order, and set a new date not later than 180 days after the temporary order is rendered for dismissal, unless a trial on the merits is commenced;⁸⁵
- Determine whether to return the child to the child's parents if the parents are able and willing to provide the child with a safe environment and it would be in the best interest of the child;⁸⁶
- Estimate a likely date by which the child may be returned to and safely maintained in the child's home, placed for adoption, or placed in permanent managing conservatorship;⁸⁷
- Until a final order is rendered, set a subsequent permanency hearing date no later than 120 days later;⁸⁸ and
- Announce the mandatory dismissal date and the date of any subsequent hearings.⁸⁹

The court may also:

- Enter any necessary pre-trial orders required by local rules or practice to prevent delay of a final hearing and disposition; or
- Make a finding of extraordinary circumstances and set a new dismissal date no more than 180 days beyond the original dismissal date.⁹⁰

⁸⁰ TEX. FAM. CODE § 263.306(a-1)(5)(D)-(E).

⁸¹ TEX. FAM. CODE §§ 263.306(a-1)(5)(F); 264.1072; 42 U.S.C. §675.

⁸² TEX. FAM. CODE § 263.306(a-1)(4)(G).

⁸³ TEX. FAM. CODE § 263.306(a-1)(4)(H).

⁸⁴ TEX. FAM. CODE § 263.0025(c).

⁸⁵ TEX. FAM. CODE § 263.403.

⁸⁶ TEX. FAM. CODE § 263.306(a-1)(6).

⁸⁷ TEX. FAM. CODE § 263.306(a-1)(7).

⁸⁸ TEX. FAM. CODE § 263.305.

⁸⁹ TEX. FAM. CODE § 263.306(a-1)(7).

⁹⁰ TEX. FAM. CODE §263.401(b).

FINAL HEARING

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

BURDEN OF PROOF If termination of parental rights is requested, the burden of proof is "clear and convincing" evidence.⁹¹ If permanent managing conservatorship is requested, the standard is "preponderance of the evidence." If the Indian Child Welfare Act applies, the burden of proof and virtually every other aspect of the case is controlled by this federal law. See Practice Guide, SECTION 4, Indian Child Welfare Act.

DFPS ATTORNEY PREPARATION This will vary depending on the relief requested, the nature of the evidence, the degree of participation by parents or other parties who may be in opposition to DFPS' position and whether or not a jury is requested. In every case, a trial notebook will focus pretrial preparation, reveal issues that require additional research, and ensure easy access to information during trial. See Practice Guide, SECTION 12.

REQUIRED SHOWING

Termination of Parental Rights

Termination of parental rights requires evidence of at least one ground for termination of parental rights *and* that termination is in the best interest of the child.⁹² The best practice is to also plead for permanent managing conservatorship to be awarded to DFPS in the alternative, to avoid a child being returned home if a termination order is reversed.

Appointment of DFPS as Permanent Managing Conservator

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

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

The court shall consider (1) that the child will be 18 years old in less than three years; (2) the child is 12 or older and has expressed a strong desire against termination and continuously expressed a strong desire against being adopted and (3) the needs and desires of the child.⁹³

NOTE: PERMANENCY HEARING AFTER PMC

If parent rights are terminated, the first hearing after DFPS is awarded PMC must be set within 90 days of the final order and hearings held at least every six months until child is adopted or DFPS is no longer the conservator. If rights are not terminated, the first hearing and all others must be set within six months.⁹⁴

⁹¹ TEX. FAM. CODE §161.001(b).

⁹² TEX. FAM. CODE §161.001(b); *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), non-exclusive list of best interest factors.

⁹³ TEX. FAM. CODE §263.404.

⁹⁴ TEX. FAM. CODE §263.501(b).

PERMANENCY HEARING *AFTER* FINAL ORDER GUIDE

GOAL To review the status of every child in DFPS permanent managing conservatorship.

BURDEN OF PROOF Preponderance of the evidence.

DFPS ATTORNEY PREPARATION

- Unless the court finds good cause for a different deadline or waives the report requirement, verify DFPS filed the report with the court 10 days before the hearing, that all necessary persons were given 10 days' notice of the hearing (including any child age 10 or above or whom the court deems appropriate to receive notice) and a copy of the report;⁹⁵
- Verify that DFPS has filed the Child Placement Resources form, any home study and related information 10 days before the hearing, unless the child is in an adoptive or another permanent placement;⁹⁶
- Verify that DFPS has filed current information with the court identifying who DFPS designated as educational decision-maker for the child and the name of any surrogate parent assigned by the school district;⁹⁷
- Verify that DFPS has made arrangements for the child to attend the hearing unless specifically excused by the court or, for a child in TJJD custody, appearance can be by phone or video;⁹⁸
- If a youth will turn 18 in the next 6 months, request that the court enter an order for the maximum 12 month trial independence period;⁹⁹
Review the permanency progress report to verify that the report addresses all essential issues.

COURT ACTION

The court must:

- Identify all persons and parties present;¹⁰⁰
- *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;¹⁰¹
- Review the efforts of DFPS to:
 - ✓ Notify all persons entitled to notice;¹⁰² and
- Review the permanency progress report to determine¹⁰³:
 - ✓ The safety and well-being of the child and whether the child's needs are being adequately addressed;¹⁰⁴
 - ✓ Whether the child is placed with a relative or other designated caregiver and the appropriateness of the child's placement and whether the placement continues to be necessary and in the best interest of the child;¹⁰⁵
 - ✓ If the child is in institutional care, whether efforts have been made to place the child in the least restrictive environment;
 - ✓ The appropriateness of DFPS's primary and alternative permanency goals for the child and whether DFPS has made reasonable efforts to finalize the permanency plan, and whether¹⁰⁶
 - DFPS has exercised due diligence to place the child for adoption, *if parental*

⁹⁵ TEX. FAM. CODE §§ 263.0021; 263.501(c); 263.502(a) and (a-2); Tex. R. Civ. Pro. 21a.

⁹⁶ TEX. FAM. CODE § 263.003.

⁹⁷ TEX. FAM. CODE § 263.004.

⁹⁸ TEX. FAM. CODE §§ 263.302; 263.501(f).

⁹⁹ TEX. FAM. CODE § 263.6015(c).

¹⁰⁰ TEX. FAM. CODE § 263.5031(1).

¹⁰¹ TEX. FAM. CODE § 263.302.

¹⁰² TEX. FAM. CODE §§ 263.0021; 263.5031(2).

¹⁰³ TEX. FAM. CODE § 263.502(a-1).

¹⁰⁴ TEX. FAM. CODE § 263.5031(3)(A).

¹⁰⁵ TEX. FAM. CODE § 263.5031(3)(B).

¹⁰⁶ TEX. FAM. CODE §§ 263.5031(3)(D); 263.3026(a).

EXTENDED JURISDICTION HEARING

If a youth remains in foster care after turning 18 years old, receives transitional living services or returns to foster care following a period of trial independence (TI), court review may be mandatory or only on request of the youth. The mandatory six month TI period can be extended to one year by court order, which protects a youth's access to federal funding in the event of a return to extended foster care. The best practice is to request a court order maximizing the TI period any time a youth is eligible for TI.¹¹¹

GOAL Review status of a young adult who is:

- in extended foster care and therefore under the mandatory extended jurisdiction of the court under TEX. FAM. CODE §263.602(b); or
- receiving transitional living services who has requested voluntary extended jurisdiction under TEX. FAM. CODE §263.6021.

BURDEN OF PROOF Preponderance of the evidence.

I. MANDATORY FOSTER CARE REVIEW HEARING

DFPS ATTORNEY PREPARATION Review the CPS plan of service for young adults in extended foster care and verify that notice was given no later than the 10th day before the hearing to:

- The young adult;
- The foster parent and administrator of any CPA responsible for making the placement;
- The director of a residential child-care facility or other approved provider;
- Each parent whose rights haven't been terminated who is actively involved in the young adult's life;
- Any legal guardian; and
- An attorney ad litem, guardian ad litem, volunteer advocate who has not been dismissed.¹¹²

COURT ACTION:

The court must:

- Assess and make findings as to whether the plan of service and report adequately address:
- Safety and appropriateness of the young adult's living arrangement;
- Whether DFPS has made reasonable efforts to find the least restrictive placement and to finalize the permanency plan in effect for the young adult, including a plan for independent living; and
- For a youth with a permanency plan of independent living, whether: the youth participated in developing the plan of service; the plan reflects the skills and services necessary to achieve independence by the projected date; whether the young adult continues to make reasonable progress toward independence on the projected date; and whether additional services DFPS is authorized to provide are needed.¹¹³
- Order 12 months of trial independence in the event the youth exits extended foster care prior to the next scheduled review hearing, to end on the earlier of:
 - The last day of the month 12 months from the date the child leaves care; or
 - The youth's 21st birthday; andSet the next foster care review hearing within six months, and continue to set these hearings within six months until the youth exits care.

¹¹¹ TEX. FAM. CODE §263.6015.

¹¹² TEX. FAM. CODE §263.602(d).

¹¹³ TEX. FAM. CODE § 263.602(b)(3).

II. OPTIONAL FOSTER CARE REVIEW HEARING

DFPS ATTORNEY PREPARATION

The DFPS attorney should:

- Review the court report summarizing the youth's transitional living services plan, services being provided to the youth under the plan, and the youth's progress in completing the plan; and
- Talk with the PAL coordinator and be prepared to address youth's concerns at the hearing.

COURT ACTION

Should a youth who is receiving transitional living services, request a service review hearing, the court:

- Must assess the services provided and the young adult's progress in achieving independence; and
- May order DFPS to take appropriate action to ensure the youth receives any additional services to which the youth is entitled.

CHECKLIST FOR REMOVING BARRIERS TO PERMANENCY

A proactive approach to these issues will minimize delays.

- Is a diligent search underway for any missing parent, relative or other placement resource?
- Have all parties been served?
- If a parent is missing, check compliance with the Service member's Civil Relief Act (SCRA).
- Is DNA testing, an Admission of Paternity or other paternity issue outstanding?
- Is there a minor parent needing an appointment of attorney and/or guardian ad litem?
- Has *everyone* been asked about the possibility of Indian family heritage and all notices sent if necessary?
- If placement out of state is possible, has any required ICPC approval been requested?
- If parent resides out of the U.S., has the service plan been tailored to reflect available resources?
- Has an application for Special Immigrant Juvenile Status, other immigration relief or U.S. citizenship been filed for an eligible child?
- Could Family Group Conferencing, mediation or other alternative dispute resolution narrow issues or resolve the case?
- If the youth is age 14 or older, what is the plan for transition to adulthood?
- If a youth approaching age 16 may be incapacitated, is a referral to HHSC for guardianship appropriate?
- If the youth is approaching age 18, is a court order for 12 months of trial independence appropriate?
- Or is the youth eligible for extended foster care?