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SECTION 5 LITIGATION ESSENTIALS

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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. Now enacted in 49 states (plus the Virgin Islands, Guam, and the District of Columbia),¹ the UCCJEA determines whether a state court has jurisdiction to make an initial child custody determination or to modify an existing child custody decree.² 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.³

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.⁴ 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, exclusive jurisdiction.⁵ When this occurs, no other court has jurisdiction over a suit involving the child except in an emergency action brought by DFPS to protect the health and safety of the child or a suit in which adoption is requested.⁶ A subsequent suit must be initiated as an original proceeding unless the CCEJ has rendered a final order.⁷ 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.⁸

¹ Enactment legislation was introduced in 2015 in Massachusetts. For updated information on the status of a state's enactment, check the Uniform Law Commission website at <http://uniformlaws.org>.

² TEX. FAM. CODE §§152.201; 152.203.

³ See TEX. FAM. CODE §§ 152.102(4); 152.103.

⁴ TEX. FAM. CODE CHAPTER 155.

⁵ TEX. FAM. CODE §155.001.

⁶ TEX. FAM. CODE §155.001(c).

⁷ TEX. FAM. CODE §155.001(d).

⁸ TEX. FAM. CODE §155.001(b).

Temporary Emergency Jurisdiction

DFPS is authorized to file for emergency relief to protect a child in the county where the child is found.⁹ "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.¹⁰

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 (as defined by the Indian Child Welfare Act) is involved, there are special limits on a state court's emergency jurisdiction.¹¹

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?
- What court issued any prior order?

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

- 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.¹²

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 becomes a final child custody determination if the court so indicates and Texas becomes the child's home state.¹³

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

⁹ TEX. FAM. CODE §262.002.

¹⁰TEX. FAM. CODE §152.204(a); *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).

¹¹ See Practice Guide, SECTION 4, INDIAN CHILD WELFARE ACT

¹² *In re N.C.* 294 P.3d 866 (Wyo. 2013) (Texas has continuing exclusive jurisdiction, unless it declines jurisdiction, where mother and alleged father live in Texas, custody proceeding pending in Texas, and children lived in Texas until they went to Wyoming for a visit; neglect petitions were filed within two months of visit to Wyoming).

¹³ TEX. FAM. CODE §152.204(b).

an opportunity to obtain a court order from that court.¹⁴ 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). 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.¹⁵

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)¹⁶ identify any Texas court that has continuing, exclusive jurisdiction.¹⁷ 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.¹⁸ A final order entered without this information is voidable upon a showing that another court had continuing, exclusive jurisdiction.¹⁹

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.²⁰ 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 262.²¹

On motion of the court or a party, the court that rendered the temporary order must:

¹⁴ TEX. FAM. CODE §152.204(c).

¹⁵ TEX. FAM. CODE §152.201(a)(2).

¹⁶ 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.

¹⁷ 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.

¹⁸ TEX. FAM. CODE §155.101(d).

¹⁹ TEX. FAM. CODE §155.104(b).

²⁰ See TEX. FAM. CODE §§155.201; 155.202.

²¹ TEX. FAM. CODE §262.203(b).

- 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.²²

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 requesting a transfer to that 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.²³

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 Subchapter E, CHAPTER 263.²⁴ 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.²⁵ Transfer based on inconvenient forum is discretionary and may be denied if the child has resided in the county less than six months.²⁶

Prior Custody Order from Another State

A prior out of state court order has no impact on a Texas court's right to exercise emergency jurisdiction.

If the agency becomes aware of a prior custody order from another state involving a child who is in DFPS custody, this information should be submitted to the Texas court, with a copy of the prior decree if available. At that point, the UCCJEA directs the court to communicate with the other court in the other state.²⁷ If another state has made a prior child custody determination involving a child, that state has continuing exclusive jurisdiction until a Texas court has jurisdiction to make an initial child custody jurisdiction and:

- The court in the first state determines it no longer has jurisdiction or that another state would be a more convenient forum; or
- A court in that state or in Texas determines that the child, the child’s parents and

²² TEX. FAM. CODE §262.203(a).

²³ TEX. FAM. CODE §155.201; *In re Cooper*, 320 S.W. 3d 905 (Tex. App. — Texarkana 2010, orig. proceeding); *In re Nabors*, 276 S.W. 3d 190 (Tex. App. Houston [14th 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*, No.07-07-0290-CV, 2007 WL 2403366 (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).

²⁴ TEX. FAM. CODE § 262.203(c).

²⁵ *Proffer v. Yates*, 734 S.W. 2d 671 (Tex. 1987, orig. proceeding).

²⁶ TEX. FAM. CODE §155.202.

²⁷ TEX. FAM. CODE §152.204(d).

any person acting as a parent no longer live in the original state.²⁸

If Texas has jurisdiction to modify another state's court order, a Texas court *may* decline jurisdiction if Texas is an inconvenient forum²⁹ and *must* decline jurisdiction (with limited exceptions) if the person attempting to invoke jurisdiction has engaged in "unjustifiable conduct."³⁰

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;³¹
- A tribe;³² or
- Another country.³³

In litigation involving an Indian child, the state court's jurisdiction turns on whether the child lives on the reservation. A tribe generally has exclusive jurisdiction over the case of an Indian child who resides on a reservation, except in the case of an emergency removal, subject to limitations under the Indian Child Welfare Act ("ICWA").³⁴ If an Indian child lives off the reservation, a state court has concurrent jurisdiction, subject to the tribe's right to move to transfer a case to the tribal court.³⁵ If a case involving an Indian child 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).³⁶

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.³⁷

²⁸ TEX. FAM. CODE §152.203.

²⁹ TEX. FAM. CODE §152.207.

³⁰ 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").

³¹ TEX. FAM. CODE §152.303; *In re N.C.* 294 P.3d 866 (Wyo. 2013) (after making initial child custody jurisdiction, Texas has continuing exclusive jurisdiction, unless it declines jurisdiction or the child is present in another state and the exercise of emergency jurisdiction is necessary for the child's protection).

³² TEX. FAM. CODE §152.104(c).

³³ TEX. FAM. CODE §152.105(b).

³⁴ 25 U.S.C. § 1911(a).

³⁵ 25 U.S.C. § 1911(b).

³⁶ 25 U.S.C. §1911(b); See Practice Guide, SECTION 4, INDIAN CHILD WELFARE ACT

³⁷ 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).

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).³⁸

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.³⁹ Expedited enforcement is also available in a statutory procedure akin to a habeas corpus proceeding.⁴⁰

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

Similarly, the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") is an international treaty⁴² that Congress implemented by enacting the International Child Abduction Remedies Act (ICARA).⁴³ Significantly, this body of law does not provide for adjudication of the merits of an international child custody dispute, but is focused primarily on determining the proper legal forum for litigating a case.⁴⁴

³⁸ TEX. FAM. CODE §§152.105;152.305(a).

³⁹ TEX. FAM. CODE §152.305 (b), (c).

⁴⁰ See TEX. FAM. CODE §152.308.

⁴¹ 28 U.S.C. §1738A.

⁴² Established at The Hague October 25, 1980.

⁴³ 22 U.S.C. §9001 et seq.

⁴⁴ See Practice Guide, SECTION 14, RESOURCES, Child Welfare Contacts, International, Hague Convention on Civil Aspects of International Child Abduction.

TIP: International child custody cases

A Texas court hearing an action for enforcement of a child custody determination made in a foreign country or a petition for return of an internationally abducted child under the Hague "abduction convention," is authorized to place a child with DFPS in conjunction with issuance of a warrant to take physical custody of a child, if a parent or family member does not have significant ties to the jurisdiction of the court. TEX. FAM. CODE §152.311 (c-1).

PARTIES

DFPS is authorized to file a SAPCR as a means of protecting a child from abuse and neglect.⁴⁵ A number of other persons and entities are authorized to file an initial SAPCR, including a child's alleged father, sibling over age 18, relative, caretaker or foster parent, subject to specific statutory requirements in each case.⁴⁶ If a petition requests appointment of DFPS as managing conservator, DFPS must be served with citation in the case.⁴⁷

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.⁴⁸ 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.⁴⁹

Who Can Intervene in a SAPCR?

A more relaxed standard for authority to intervene in a child protection suit compared with standing to file an original SAPCR reflects the fact that once a SAPCR has been filed, any disruption to the family has already occurred and adding a new party may aid the court in adjudicating the child's best interest.⁵⁰ 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, in addition to the parties who can file an original SAPCR:

- Grandparents; or
- Others persons deemed to have had substantial past contact with the child.⁵¹

⁴⁵ TEX. FAM. CODE §§102.003(a)(5); 262.001.

⁴⁶ TEX. FAM. CODE §§ 102.003; 102.004(a); 102.0045.

⁴⁷ TEX. FAM. CODE §102.009(a)(10).

⁴⁸ TEX. FAM. CODE §102.003(c).

⁴⁹ 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).

⁵⁰ *In re A.B.*, 412 S.W. 3d 588 ((Tex. App.—Fort Worth 2013,) *aff'd*, 437 S.W. 3d 498 (Tex. 2014).

⁵¹ TEX. FAM. CODE §102.004(b); (noting that there is "[s]ound policy support[ing] the relaxed standing requirements" because allowing persons with "substantial past contact" to intervene may "enhance the trial court's ability to adjudicate the cause in the best interest of the child") *In re M.A.M.*, 35 S.W.3d 788 (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); *Spurck v. DFPS*, 396 S.W. 3d 205 (Tex App. — Austin 2013, no pet.) (relaxed standard for foster parent intervention applies in suit brought by

If CPS removes a child, the agency must search for and attempt to give information about the suit to anyone related to the child within the third degree of consanguinity,⁵² an adult relative of the alleged father CPS determines is most likely the child's biological father and any other relative or designated caretaker proposed as a potential placement on the Proposed Child Placement Resources form.⁵³ Any such person must still meet the criteria for intervention in order to become a party in the suit.

A grandparent's right of access to a child is controlled by TEX. FAM. CODE §153.433, 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*.⁵⁴ If circumstances warrant CPS involvement, however, the same evidence CPS would use to support an action to remove a child or take other protective measures would also likely serve to rebut this presumption if grandparents were to act on their own.

90 Day Window After Parental Rights Terminated

Generally once parental rights are terminated, former parents and relatives by blood, adoption or marriage can no longer file suit.⁵⁵ However, the following relatives have 90 days after termination of parental rights by DFPS to seek managing conservatorship of a child:

- Adult sibling;
- Grandparent; or
- Aunt or uncle.⁵⁶

While the apparent goal is to prompt relatives to take action to care for a child if rights are terminated, 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.

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.

DFPS); *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).

⁵² As defined in TEX. GOV'T CODE §573.023, the third degree of consanguinity means the child's grandparents, great-grandparents, adult aunts and uncles, adult siblings, and adult nieces and nephews.

⁵³ TEX. FAM. CODE §262.1095(a).

⁵⁴ 530 U.S. 57 (2000).

⁵⁵ TEX. FAM. CODE §102.006(a).

⁵⁶ TEX. FAM. CODE §102.006(c).

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.⁵⁷

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.⁵⁸

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.⁵⁹

In most instances when CPS has filed a child protection suit, the same court will adjudicate the child's parentage.⁶⁰ Necessary parties are:

- The mother of the child; and
- A man whose paternity is to be adjudicated.⁶¹

The court must have personal jurisdiction to adjudicate a person as a parent.⁶² The court may exercise jurisdiction over a nonresident individual for purposes of adjudicating parentage if conditions for long-arm jurisdiction are met.⁶³ If there are multiple respondent fathers, lack of jurisdiction over one party does not prohibit the court from making an adjudication of parentage binding on an individual over whom the court has jurisdiction.⁶⁴ The issue of parentage is not subject to jury determination.⁶⁵

Who is the Father?

The best source of information about a child's father is usually the mother. The Affidavit

⁵⁷ TEX. FAM. CODE §160.103.

⁵⁸ TEX. FAM. CODE §160.201(a).

⁵⁹ TEX. FAM. CODE §160.201(b).

⁶⁰ See TEX. FAM. CODE §160.104(1).

⁶¹ TEX. FAM. CODE §160.603.

⁶² TEX. FAM. CODE §160.604(a).

⁶³ See TEX. FAM. CODE §159.201(a).

⁶⁴ See TEX. FAM. CODE §160.604(c).

⁶⁵ TEX. FAM. CODE §160.632.

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.⁶⁶ Careful questioning of the mother (or relatives, in mother's absence) and documentation of the operative facts remain essential for ascertaining paternity. The Paternity Questionnaire is designed to help a caseworker collect essential information regarding paternity.⁶⁷

TIP: Paternity Status

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;⁶⁸
- 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.⁶⁹

What Kind of Father Is He?

There are five possible types of fathers:

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

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.⁷⁰

⁶⁶ TEX. FAM. CODE §161.105.

⁶⁷ See Practice Guide, SECTION 13, TOOLS, Paternity, Paternity Questionnaire.

⁶⁸ See Practice Guide, SECTION 13, TOOLS, Paternity, Mother's Affidavit Regarding Child's Father.

⁶⁹ TEX. CIV. PRAC. & REM. CODE §132.001(a),(e).

⁷⁰ TEX. FAM. CODE §160.102(13).

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.⁷¹

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;⁷²
- 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.⁷³

Both an AOP and a denial of paternity may be signed before the birth of the child and can be signed by a minor.⁷⁴

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.⁷⁵ A proceeding to adjudicate paternity of a child with a

⁷¹ TEX. FAM. CODE §160.204(a).

⁷² For more detailed discussion of the AOP process, See Acknowledged Father, below.

⁷³ TEX. FAM. CODE §160.303.

⁷⁴ TEX. FAM. CODE §160.304.

⁷⁵ TEX. FAM. CODE §160.631(b).

presumed father may be brought at any time 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; or
- The presumed father was precluded from making a request within four years of the child's birth because a misrepresentation led him to the mistaken belief that he was the child's biological father.⁷⁶

If neither of these circumstances applies, 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.⁷⁷

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.⁷⁸

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.⁷⁹

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

The Legislature has acknowledged the significance of alleged fathers in CPS cases in two specific provisions. CPS' duty to exercise due diligence to locate parents for the Status Hearing specifically includes an alleged father, whether or not he is registered with the paternity registry.⁸⁰ Moreover, DFPS is obligated to identify, locate and give information regarding a pending DFPS suit to specified relatives of a child, including an adult relative of the alleged father DFPS determines is most likely to be the child's biological father.⁸¹

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

⁷⁶ 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).

⁷⁷ TEX. FAM. CODE §160.607(a).

⁷⁸ TEX. FAM. CODE §101.0015(a).

⁷⁹ TEX. FAM. CODE §101.0015(b). An unmarried 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 legal father of the resulting child. TEX. FAM. CODE §160.703.

⁸⁰ TEX. FAM. CODE §163.202(a)(1).

⁸¹ TEX. FAM. CODE §262.1095(a)(1).

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,⁸² 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.⁸³

Paternity Registry

The Vital Statistics Unit (VSU) maintains a paternity registry.⁸⁴ A man who wants to be notified of a proceeding for the adoption or the termination of parental rights regarding a child he may have fathered must register before the birth of the child or not later than the 31st day after the child's birth. The registrant has the responsibility of keeping his information current with the bureau.⁸⁵ 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.⁸⁶ Registering with the paternity registry also establishes a basis for personal jurisdiction of a person who is not a Texas resident.⁸⁷

If a father-child relationship is not established, a petitioner seeking termination of parental rights or adoption must obtain a certificate of the results of a search of the paternity registry.⁸⁸ 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.⁸⁹ 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.⁹⁰

⁸² *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).

⁸³ TEX. FAM. CODE §160.606.

⁸⁴ 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).

⁸⁵ TEX. FAM. CODE §160.402.

⁸⁶ TEX. FAM. CODE §160.403.

⁸⁷ TEX. FAM. CODE §102.011(b)(7)(A).

⁸⁸ TEX. FAM. CODE §160.421(a); See Practice Guide, SECTION 13, TOOLS, Paternity, Paternity Registry Inquiry Request (VS-134).

⁸⁹ TEX. FAM. CODE §160.422 (c),(d).

⁹⁰ TEX. FAM. CODE §160.421(b).

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.

Although there is authority for termination of an alleged father's rights *without an effort to identify or locate an alleged father*,⁹¹ this alternative is *not* available to DFPS. DFPS' commitment to engage families whenever possible and independent statutory authority mandate that the agency make an ongoing attempt to identify and locate missing parents, including alleged fathers.⁹² An attorney appointed to represent an alleged father is also specifically charged with investigating whether DFPS exercised due diligence in an effort to locate an alleged father.⁹³

If an alleged father is identified and located, he should be served with the lawsuit if possible. He may elect to assert or deny paternity, may offer family information and resources that benefit a child or may fail to take any action. By affording an alleged father the opportunity to participate in the litigation, DFPS promotes permanency, whether by expanding a child's family connections or setting the stage for a default judgment if an alleged father fails to respond. See DEFAULT JUDGMENT, below.

The paternity registry *does* eliminate the need to invest the time and expense of service by publication for an alleged father.⁹⁴ If the court finds that an alleged father failed to register with the paternity registry and cannot be located despite the exercise of due diligence, the court shall discharge the attorney ad litem appointed for the alleged father, and DFPS can proceed to a final hearing.⁹⁵

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.⁹⁶ With an Affidavit of Waiver of Interest, the Court can terminate the parental rights of an alleged father as long as there is proof that termination is in the child's best interest.⁹⁷ A presumed father cannot sign an Affidavit of Waiver of Interest, because by statute a presumed father remains the legal father unless he

⁹¹ TEX. FAM. CODE §§161.002 (b),(c-1); 161.107 ("parent" excludes man without a parent-child relationship under Ch. 160); *In the Interest of J.M.*, 387 S.W.3d 865 (Tex. App.—San Antonio 2012). (Texas Department of Family and Protective Services knew the father's identity and location and was in contact with him more than four months before the final hearing, and because the child was over one year old when the petition was filed, the father's rights could not be terminated without valid service or a waiver of service).

⁹² TEX. FAM. CODE §§262.1095(a)(1)(A); 263.202(a)(1) (due diligence to locate all necessary persons, including an alleged father, whether or not he has registered with the paternity registry).

⁹³ TEX. FAM. CODE §107.0132(a)(1),(d).

⁹⁴ TEX. FAM. CODE §102.009(a)(8)(alleged father to be served unless waiver of interest or petitioner complied with §161.002(b)(2),(3), or (4)).

⁹⁵ TEX. FAM. CODE §107.014(e).

⁹⁶ See TEX. FAM. CODE §161.106.

⁹⁷ TEX. FAM. CODE §161.204.

rebutts the presumption, or his rights are terminated.⁹⁸

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 an Affidavit of 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).

An Affidavit of Waiver of Interest can be signed by an adult or a minor either before or after a child's birth.⁹⁹ Once it is properly prepared and signed, the Affidavit of Waiver of Interest is irrevocable.¹⁰⁰ 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.¹⁰¹

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.¹⁰² A valid AOP must be on the designated Vital Statistics Unit (VSU) form which is only available to "certified entities."¹⁰³ An AOP is effective when filed with the VSU or on the date of birth of the child, whichever occurs later.¹⁰⁴ A valid AOP filed with the VSU is the equivalent of an adjudication of the paternity and confers all rights and duties of a parent on the acknowledged father.¹⁰⁵ Consequently, no judicial action to establish parentage is necessary with a properly executed AOP or an AOP 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.¹⁰⁶

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

⁹⁸ See TEX. FAM. CODE §§160.203; 160.204(c).

⁹⁹ TEX. FAM. CODE §161.106(a),(b).

¹⁰⁰ TEX. FAM. CODE §161.106(f).

¹⁰¹ TEX. FAM. CODE §161.106(c).

¹⁰² TEX. FAM. CODE §160.304.

¹⁰³ For more information about the acknowledgement of paternity procedure, See Practice Guide, SECTION 14, RESOURCES, Child Welfare Contacts, Paternity.

¹⁰⁴ TEX. FAM. CODE §160.304(c).

¹⁰⁵ TEX. FAM. CODE §160.305(a).

¹⁰⁶ TEX. FAM. CODE §102.011(b)(7)(B).

- 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.¹⁰⁷

Finding out whether or not an AOP is on file for a child is possible by asking the DFPS Diligent Search Unit to check the Hospital Based Paternity Screen (HBPP) portal from the Office of the Attorney General. Should an AOP be located on the HBPP, a request by the caseworker to the VSU with the Department of State Health Services should be made to obtain a copy of the AOP and to verify whether any rescissions or contests of paternity are on file.

Void Acknowledgment of Paternity

An AOP 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 VSU;
- 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.¹⁰⁸

Identifying the biological father in a CPS case can be difficult. Recent statutory changes give a man who signs an AOP without genetic testing somewhat more latitude to challenge paternity. While an AOP can be an efficient and cost-effective means to resolve paternity, if there is any doubt, genetic testing may be a better solution when feasible.

Rescinding an Acknowledgment of Paternity or Denial of Paternity

Rescinding an Acknowledgment of Paternity (AOP) or Denial of Paternity (DOP) can be accomplished by filing proper documents with the VSU. This must be done before the earlier of:

- The 60th day after the effective date of the acknowledgment, or
- The date a proceeding to which the signatory is a party is initiated to adjudicate an issue concerning the child, including a proceeding that establishes child support.¹⁰⁹

A person who signed an AOP or DOP must file a completed rescission with the VSU, acknowledging that to date no proceeding has been held affecting the child in question, and that a copy of the rescission was mailed by certified or registered mail, return receipt requested, to all necessary parties, including the IV-D agency if child support services are

¹⁰⁷ TEX. FAM. CODE §160.302(a).

¹⁰⁸ TEX. FAM. CODE §160.302(b).

¹⁰⁹ TEX. FAM. CODE §160.307(a).

being provided to a party.¹¹⁰ Any party, including the IV-D agency, may contest the rescission by bringing an action to adjudicate paternity under Subchapter G of Chapter 160.

Challenging or Rescission of AOP/DOP

Challenging an AOP or DOP, or rescission of an AOP or DOP, requires a court hearing and must follow the rules for an adjudication of paternity.¹¹¹ If fraud, duress, or material mistake of fact is alleged an action to challenge an AOP or DOP is permitted at any time before an order affecting the child in question (including a child support order) is issued.¹¹² (NOTE, however, the additional option by which a man who is not the genetic father of a child may seek to terminate his parental rights, discussed below.) A genetic test that does not rebuttably identify the acknowledged father as the father of the child constitutes a material mistake of fact.¹¹³

Adjudicated Father

An "adjudicated father" is a man who has been adjudicated by a court to be the father of a child.¹¹⁴ An adjudication of the parentage of a child who has no presumed, acknowledged or adjudicated father may be commenced at any time.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

Termination of Parental Rights When Parent is the Petitioner.

Although a parent may petition the court to terminate the parent's own parental rights to a child, a court can only grant such termination upon finding that termination is in the best interest of the child except in limited circumstances.¹¹⁸ A man who previously signed an AOP or was adjudicated to be the father without obtaining genetic testing may, under certain circumstances, obtain termination of his parental rights without a showing of best interest of the child. This requires a verified petition alleging the petitioner is not the genetic father and that he signed the AOP, or failed to contest parentage in a previous

¹¹⁰ TEX. FAM. CODE §160.307(b).

¹¹¹ TEX. FAM. CODE §§ 160.307(d); 160.309(d).

¹¹² TEX. FAM. CODE §§160.308(a); 160.609(a).

¹¹³ TEX. FAM. CODE §160.308(d).

¹¹⁴ TEX. FAM. CODE §160.102(1).

¹¹⁵ TEX. FAM. CODE §160.606.

¹¹⁶ TEX. FAM. CODE §160.623(a).

¹¹⁷ TEX. FAM. CODE §160.623(b).

¹¹⁸ TEX. FAM. CODE §161.005(a).

proceeding adjudicating parentage, because of the mistaken belief that he was the genetic father, based on misrepresentations by another that led him to that conclusion.¹¹⁹ A man must file a petition for termination within two years of the date he becomes aware of the facts indicating he is not the genetic father. This relief is not available to an adoptive father, a man who consents to assisted reproduction, or a party to a gestational agreement.¹²⁰

Once the petition is filed, a hearing is held to determine if the petitioner can make a prima facie case for termination of the parent-child relationship. If the court determines that a prima facie case has been made, the court must order genetic testing.¹²¹ If that testing excludes the petitioner as the genetic father, the court shall render an order terminating parental rights.¹²² This order will preclude any future child support order and interest accruing from that day forward, but does not affect any order for past support ordered.¹²³

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.¹²⁴ It is also possible to have two or more men court-ordered for paternity testing concurrently or sequentially.¹²⁵ Genetic testing can be voluntary or pursuant to a court order or an order of a support enforcement agency.¹²⁶ 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.¹²⁷

Consequences of Party Declining Genetic Testing

The court may enforce a genetic testing order by contempt.¹²⁸ If a party refuses testing the court may adjudicate parentage contrary to the position of the party refusing testing.¹²⁹

Mother Unavailable or Refuses Genetic Testing

Genetic testing of the mother is not a prerequisite to genetic testing of a child and man whose paternity is being determined. If the mother is not

¹¹⁹ TEX. FAM. CODE §161.005(c).

¹²⁰ TEX. FAM. CODE §161.005(e).

¹²¹ TEX. FAM. CODE §161.005(f).

¹²² TEX. FAM. CODE §161.005(h).

¹²³ TEX. FAM. CODE §161.005(i).

¹²⁴ TEX. FAM. CODE §160.502(a).

¹²⁵ TEX. FAM. CODE §160.502(c).

¹²⁶ TEX. FAM. CODE §160.501.

¹²⁷ TEX. FAM. CODE §160.502.

¹²⁸ TEX. FAM. CODE §160.622(a).

¹²⁹ TEX. FAM. CODE §160.622(b).

available or refuses testing, the court may order the testing of the child and each man whose paternity is being adjudicated.¹³⁰

Falsifying Specimen

Any action to alter or falsify genetic evidence in an action to adjudicate paternity is a 3rd degree felony and any resulting order excluding a man as the father is void and unenforceable.¹³¹

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.¹³² The court shall consider the best interest of the child.¹³³

A denial of a motion for genetic testing must be based on clear and convincing evidence.¹³⁴ If the court has denied genetic testing, the court shall enter an order adjudicating the presumed father as the father of the child.¹³⁵

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.¹³⁶ 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 1.¹³⁷

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.¹³⁸

Unknown Father

¹³⁰ TEX. FAM. CODE §160.622(c).

¹³¹ TEX. FAM. CODE §160.512.

¹³² TEX. FAM. CODE §160.608(a).

¹³³ TEX. FAM. CODE §160.608(b).

¹³⁴ TEX. FAM. CODE §160.608(d).

¹³⁵ TEX. FAM. CODE §160.608(e).

¹³⁶ TEX. FAM. CODE §160.504(a).

¹³⁷ TEX. FAM. CODE §160.505(a).

¹³⁸ TEX. FAM. CODE §160.505(b).

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 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.¹³⁹ 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 CASA¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³

Before conducting the Adversary Hearing, the court must inform any parent present of the right to be represented by an attorney and the right to appointed counsel for an indigent parent who appears in opposition to the suit.¹⁴⁴ Counsel must *also* be appointed for:

- 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; and¹⁴⁵

¹³⁹ TEX. FAM. CODE §§107.011(a); 107.012.

¹⁴⁰ Court Appointed Special Advocates (CASA) is national organization with local affiliates in many Texas communities. See Practice Guide, SECTION 14, RESOURCES, Child Welfare Contacts.

¹⁴¹ TEX. FAM. CODE §§107.002(b)(3).

¹⁴² TEX. FAM. CODE §107.004(a)(2).

¹⁴³ TEX. FAM. CODE §107.008.

¹⁴⁴ TEX. FAM. CODE §262.201(a-1).

¹⁴⁵ TEX. FAM. CODE §107.013.

- 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.¹⁴⁶

The court-appointed attorney's primary responsibility is to identify and locate the person, and if these efforts are unsuccessful, the court must discharge the attorney.¹⁴⁷

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).

A parent claiming indigence must file an affidavit of indigence before the court can conduct a hearing to determine indigency.¹⁴⁸ Once an attorney is appointed on the basis of indigency, however, a parent is presumed to remain indigent for the suit and any appeal, unless a party brings a motion contesting the indigence finding and the court finds a material and substantial change in the parent's financial circumstances.¹⁴⁹

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 if petitioner has complied with TEX. FAM. CODE §161.002 (b)(2), (3) or (4);
- 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.¹⁵⁰

¹⁴⁶ TEX. FAM. CODE §161.003(b).

¹⁴⁷ TEX. FAM. CODE §107.014(a).

¹⁴⁸ TEX. FAM. CODE §107.013(d); TEX. R. CIV. P. 145(b).

¹⁴⁹ TEX. FAM. CODE §107.013(e).

¹⁵⁰ TEX. FAM. CODE §102.009.

From Personal Service to Posting

The rules authorize service by the following means:

- Personal delivery;
- Delivery by certified or registered mail, return receipt requested;¹⁵¹
- Substitute service;¹⁵²
- Citation by publication;¹⁵³ or
- Posting on the court house door.¹⁵⁴

Substitute service, citation by publication and service by posting all require prior court approval, based on proof that a more effective form of service is not viable. This requires that DFPS demonstrate that the person's whereabouts are unknown despite the exercise of due diligence to locate the person. Ongoing contact with a parent is inconsistent with an order for substituted service by publication.¹⁵⁵

Due diligence requires a concerted effort by the caseworker to glean information from available family members, friends or other logical sources and by the agency's diligent search unit, FINDRS, which combines well-honed strategies and access to multiple databases to find people.¹⁵⁶ Once the diligent search is completed, it is incumbent on the caseworker to follow up on leads and information produced by the diligent search unit. By reviewing diligent search efforts and requesting additional steps be taken in appropriate circumstances, attorneys representing DFPS can eliminate a potential ground for reversal of a final judgment.

A citation by publication must be published one time and should be worded according to TEX. FAM. CODE §102.010(b). A statement of the evidence in support of an order for service by publication must be filed and signed by the judge.¹⁵⁷ A verified return of the citation by publication must be on file with the court 10 days before a default judgment can be granted.¹⁵⁸

A party may waive service of citation in writing after suit is filed, but there are specific restrictions applicable to a waiver under the Texas Family Code which apply notwithstanding Section 132.001 of the Civil Practice and Remedies Code. For suits under Title 5 (any Suit Affecting the Parent-Child Relationship), a waiver of service cannot be signed with a digitized signature, and must be sworn before a notary who is not an attorney

¹⁵¹ TEX. R. CIV. P. 106.

¹⁵² TEX. R. CIV. P. 109A.

¹⁵³ TEX. FAM. CODE §102.010(a); TEX. R. CIV. P. 109.

¹⁵⁴ TEX. FAM. CODE §102.010(e); *In re J.M.*, 387 S.W. 3d 865 (Tex. App.—2012, no pet.) (service of process invalid where posting on courthouse door contained the wrong name, and no return of service or statement of evidence filed).

¹⁵⁵ *In re E.R.*, 385 S.W. 3d 552 (Tex. 2012) (where agency in regular contact with mother after filing suit, service by publication was "poor, hopeless and unjustifiable," a diligent search includes efforts one who really wants to find the missing person would make).

¹⁵⁶ CPS HB Appendix 5223.4 and CPS Form 2277 to request a diligent search.

¹⁵⁷ TEX. FAM. CODE §102.010(d). TEX. R. CIV. P. 244.

¹⁵⁸ TEX. R. CIV. P. 107(h).

in the suit (unless the party is incarcerated).¹⁵⁹

Paternity Registry

For information about how the paternity registry can simplify service on an alleged father in some circumstances, See Paternity Registry, above. p. 15.

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.¹⁶⁰ If a parent has not been served or located by diligent search by the time of the Status Hearing, the caseworker must obtain a Certificate of Service or Non-service from the U.S. military. A caseworker can make the request directly to the military or request that FINDRS do so, whether as part of a diligent search or not.¹⁶¹ If the search produces a Certificate of Service, the DFPS attorney should inform the court, all parties and attorneys of record.¹⁶² An initial 90-day stay of the proceedings is commonly granted¹⁶³, but any additional stay is discretionary and depends on whether the person's ability to appear is adversely impacted by military duties.¹⁶⁴ Specific protections also apply under the SCRA if a default judgment is contemplated. See Default Judgment, below.

Out of State Parties

If a 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;

¹⁵⁹ TEX. FAM. CODE §102.0091, added by S.B. 814 (84th Sess. eff. Sept. 1, 2015).

¹⁶⁰ 50 U.S.C. App. §§501-596; (although child custody action is clearly a "civil action or proceeding," a 2008 amendment specifies that the SCRA covers child custody proceedings (P.L. No. 110-181, Jan. 28, 2008, 122 Stat. 128).

¹⁶¹ See Practice Guide, SECTION 13, TOOLS, Servicemembers Civil Relief Act, How to Search for Certificate of Service/Non-Service and Affidavit Regarding Military Service.

¹⁶² See 50 U.S.C. App. §521(b) (2).

¹⁶³ 50 U.S.C. App. §522(b).

¹⁶⁴ 50 U.S.C. App. §522(d)(1); *In re K.B.*, 298 S.W. 3d 691 (Tex. App. —San Antonio 2009, no pet.) (no relief from default judgment for service member served with suit who failed to answer or take action and failed to show how military service affected his ability to defend suit affecting parent child relationship); *In re A.R.*, 88 Cal. Rptr. 3d 448 (2009)(error to deny mandatory stay of dispositional hearing in child protection case where father on active duty in the Middle East, as SCRA preempts Adoption and Safe Families Act in this circumstance); *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).

- 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 the paternity registry or signed an acknowledgment of paternity; or
- There is any basis for exercising personal jurisdiction consistent with the state and federal constitutions.¹⁶⁵

If a parent or other necessary party is in another state, service can be accomplished in the same manner as if a person were in Texas.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ For service of process on a person outside the U.S., see SPECIAL ISSUES, Section 9, International Issues.

DEFAULT JUDGMENTS

When used properly a default judgment can be an efficient tool for streamlining a termination suit. The Texas Supreme Court has made clear that expediting termination proceedings cannot be at the expense of due process. In the context of a default judgment, this requires careful adherence to procedural prerequisites.¹⁶⁹

¹⁶⁵ TEX. FAM. CODE §102.011(b).

¹⁶⁶ TEX. R. CIV. P. 108.

¹⁶⁷ TEX. FAM. CODE §102.012.

¹⁶⁸ *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 R.W.*, 191 Vt. 109(2011) (court may exercise status-based jurisdiction over a termination of parental rights even if the parents resides in Sri Lanka and lacks minimum contacts with the forum); *In re Thomas J.R.*, 663 N.W.2d 734 (Wisconsin 2003) (UCCJEA affords sufficient due process protections to allow exercise of jurisdiction over an out-of-state parent in action to terminate parental rights).

¹⁶⁹ *In re E.R.* 385 S.W. 3d 552 (Tex. 2012) (default judgment terminating parental rights reversed where mother's location known and she was in contact with agency while suit pending).

What the Record Must Show

Although a party can waive a record, a defaulting party cannot do so.¹⁷⁰ The record must show:

- Service of citation, no answer and the return on file at least 10 days;¹⁷¹
- An order appointing an attorney ad litem for the absent parent, if appointment of counsel is mandatory;¹⁷²
- Testimony or evidence to support at least one of the termination grounds plead 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;¹⁷³
- Proof of compliance with the Servicemembers Relief Act ("SCRA");¹⁷⁴ and
- For an alleged father, testimony or evidence that the alleged father has not registered his paternity, or filed a paternity action or admission of paternity.

The burden is on the party seeking a default judgment to show strict compliance with the rules governing service of process.¹⁷⁵ 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.¹⁷⁶

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 amended petition before a default judgment is taken.¹⁷⁷ 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.¹⁷⁸

¹⁷⁰ *G.S.K. v. T.K.N.*, 940 S.W.2d 797 (Tex.App. — El Paso 1997, no writ).

¹⁷¹ TEX. R. CIV. P. 107.

¹⁷² TEX. FAM. CODE §107.013(a).

¹⁷³ TEX. FAM. CODE §102.010(d); TEX. R. CIV. P. 109.

¹⁷⁴ 50 U.S.C. App. Sec. 501 et seq.; See Servicemembers Compliance Required, below.

¹⁷⁵ *Heggen v. Graybar Elec.*, No. 14-06-00058-CV, 2007 WL 43830 (Tex. App.—Houston [14th Dist.] 2007, no pet) (mem.op.).

¹⁷⁶ *Arrington Oil & Gas v. Coalson*, No. 2-07-268-CV, 2008 WL 706508 (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.*, No. 05-04-00219-CV, 2004 WL 2955513 (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).

¹⁷⁷ *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).

¹⁷⁸ TEX. FAM. CODE §161.002.

TIP: After Interlocutory

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.¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹

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.¹⁸² Every party filing a pleading is required to provide an address, telephone number and fax number for himself or his attorney if he is represented by counsel.¹⁸³ If the attorney withdraws, he must provide the court with the last known address of his client.¹⁸⁴ Subsequent pleadings or notices, including amended petitions or counter claims may then be served relatively easily. 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.¹⁸⁵

¹⁷⁹ TEX. R. CIV. P. 306a(3); 329b.

¹⁸⁰ TEX. R. CIV. P.. 107(h).

¹⁸¹ *In re E.A.W.S.*, No., No. 2-06-00031-CV, 2006 WL 3525367(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).

¹⁸² *Salinas v. Texas Dep't Protective & Regulatory Servs.*, No. 03-0400065-CV, 2004 WL1896890 (Tex. App.—Austin 2004, no pet.) (mem.op.)(appearance or filing of answer waives any defect in service).

¹⁸³ TEX. R. CIV. PROC. 57.

¹⁸⁴ TEX. R. CIV. PROC. 10.

¹⁸⁵ *In re C.M.D.*, No. 02-12-00237-CV, 2012 WL 5949506 (Tex. App.—Fort Worth Nov. 29, 2012, no pet.)(mem. op.) (termination of parental rights based on post answer default reversed where failure to appear was due to parents' belief attorney obtained continuance; expediting termination proceedings must yield to due process); *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.

Servicemember's 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.¹⁸⁶ If a parent is in the military, the court must appoint an attorney prior to entry of a default.¹⁸⁷ The Servicemember's Civil Relief Act ("SCRA") permits reopening of the default if: (1) the service member's ability to defend against the action was materially affected due to military services; and (2) the service member has a meritorious legal defense to the action or some part of it. 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.¹⁸⁸

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.¹⁸⁹

DFPS' placement of a child in substitute care effects an assignment of any existing child support rights to the state.¹⁹⁰ If a child in DFPS care is entitled to federal child support enforcement services without making an application, DFPS must immediately refer the 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.¹⁹¹

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).

¹⁸⁶ 50 U.S.C. App. §521(b)(1). See Practice Guide, SECTION 13, TOOLS, Servicemembers Civil Relief Act, How to Search for Certificate of Service/Non-Service, and Affidavit Regarding Military Service.

¹⁸⁷ 50 U.S.C. App. §521(b)(2).

¹⁸⁸ 50 U.S.C. App. §521(g).

¹⁸⁹ TEX. FAM. CODE §154.001(a-1); (b).

¹⁹⁰ TEX. FAM. CODE §264.109.

¹⁹¹ TEX. FAM. CODE §264.109(b).

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.¹⁹² 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.¹⁹³ However, this presumption does not apply if the court finds that the party is subject to an order of confinement that exceeds 90 days and is incarcerated in a local, state or federal jail or prison at the time the court makes the determination regarding the party's income.¹⁹⁴ If a parent is intentionally unemployed or underemployed, the court has discretion to calculate support based on a higher net income.

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.¹⁹⁵ Consult tax charts prepared by the Office of Attorney General to determine a person's net income from a gross monthly wage.¹⁹⁶

**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
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.¹⁹⁷

¹⁹² TEX. FAM. CODE §154.062.

¹⁹³ TEX. FAM. CODE §154.068.

¹⁹⁴ TEX. FAM. CODE §154.068(b), as amended by H.B.943 (84th Reg. Sess., effective Sept. 1, 2015).

¹⁹⁵ TEX. FAM. CODE §154.125.

¹⁹⁶ Published in Sampson and Tindall's Texas Family Code (2015), p.701-706.

¹⁹⁷ TEX. FAM. CODE §§154.128;154.129.

MULTIPLE FAMILY ADJUSTED
GUIDELINES (% OF NET RESOURCES)

		Number of children before the court						
		1	2	3	4	5	6	7
	0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
Number of other children for whom the obligor has a duty of support	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.¹⁹⁸ 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.¹⁹⁹ 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 purpose²⁰⁰ or to provide coverage through the government medical assistance program.²⁰¹

¹⁹⁸ TEX. FAM. CODE §154.123.

¹⁹⁹ TEX. FAM. CODE §154.181.

²⁰⁰ TEX. FAM. CODE §154.182(b)(3).

²⁰¹ TEX. FAM. CODE §154.182(b-2).

Resolving Child Support Payments when the DFPS Conservatorship Case is Being Dismissed

When DFPS is being dismissed from a conservatorship case for which child support was ordered, it is important that the dismissal order specify how to handle the child support after the court dismisses the DFPS case. If the court dismisses the case without referencing the support, the parent is not obligated to pay any past due child support to DFPS or any future child support to the person who becomes the child's permanent managing conservator.

Before the DFPS conservatorship case is dismissed, contact Office of Attorney General, Child Support Division (OAG) and confirm how much support is due (arrears) to DFPS and any interest. The dismissal order must include the amount of arrears and interest (?) and state that the obligor is to make payments to DFPS until the arrears and interest is paid in full, or that the arrears is waived if it is in the child's best interest. However, if the child was in a Title IV-E funded foster care placement, DFPS *cannot waive* the portion of the child support that corresponds to the federally funded portion of the child's foster care payments. See CPS Handbook section 5354, Dismissal of a DFPS Case and Closing a Child Support Case. The caseworker can confirm whether the child received Title IV-E funding.