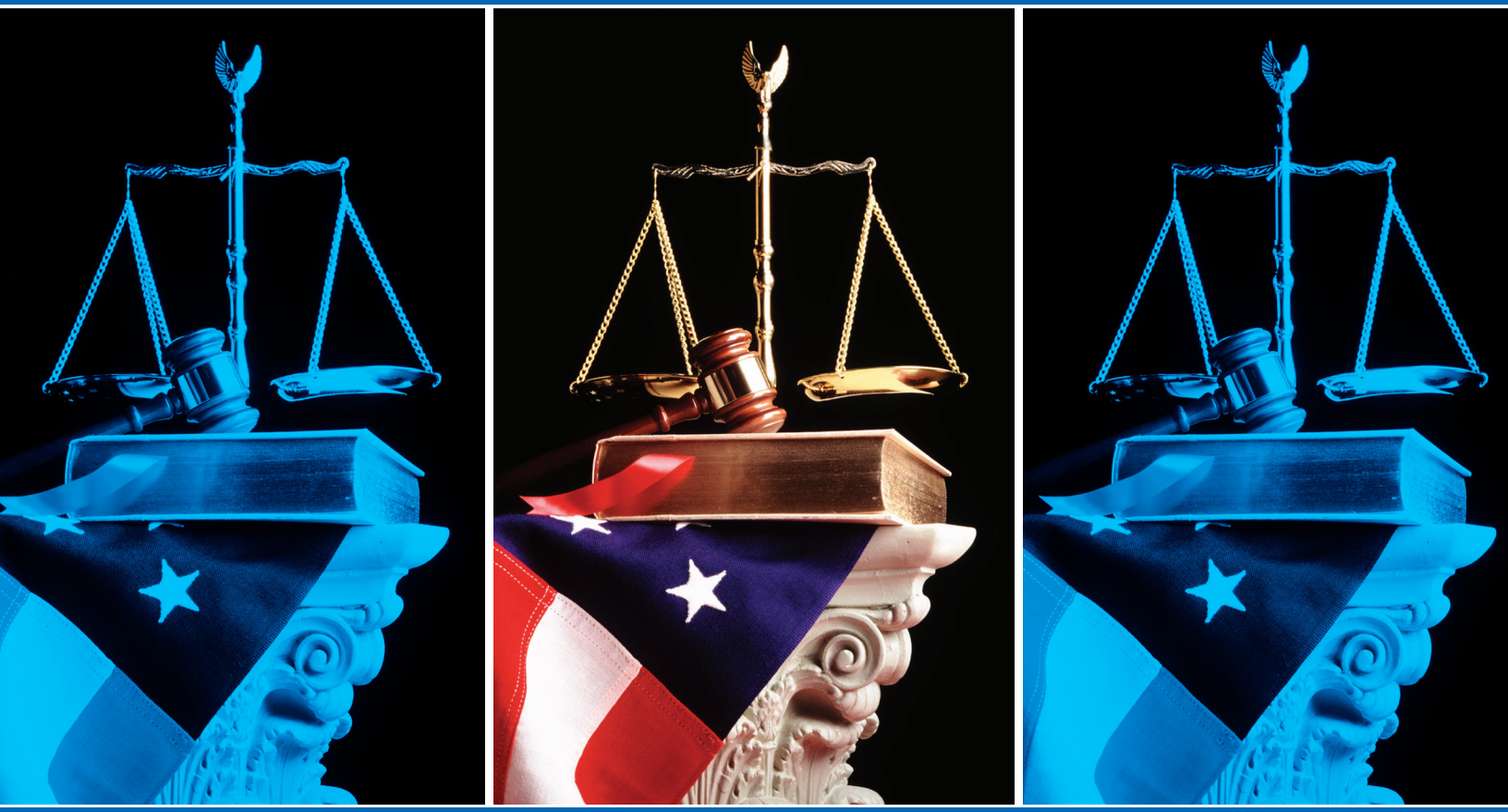
Texas Juvenile Law

9th Edition



Robert Dawson

Texas Juvenile Justice Department

August 2018

TEXAS JUVENILE LAW

NINTH EDITION

An Analysis of Juvenile Statutory and Case Law for
Texas Juvenile Justice Officials
Through the 85nd Texas Legislature

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The Texas Juvenile Justice Department wishes to thank the following individuals for their contributions to the Ninth Edition of *Texas Juvenile Law*.

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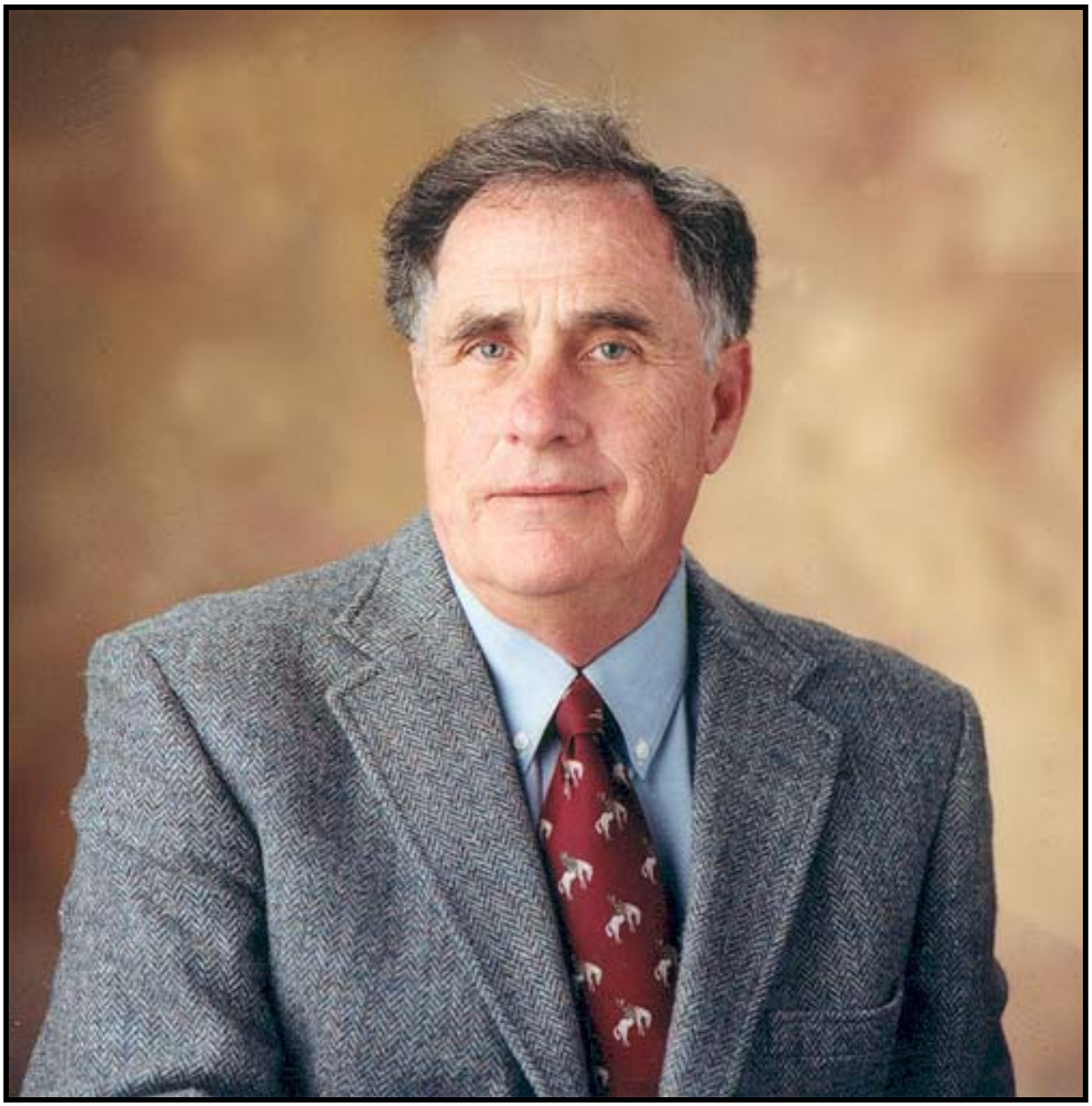
"A teacher affects eternity;
he can never tell where his influence stops."

-Henry Brooks Adams

The Ninth Edition of *Texas Juvenile Law* and all future editions are permanently dedicated to Dr. Robert O. Dawson who will forever be in the hearts and minds of all juvenile justice professionals in Texas.



In Memory of Robert O. Dawson
1939 - 2005

Robert O. Dawson

March 7, 1939 ~ February 26, 2005

"Don't follow the path. Go where there is no path and begin the trail.
When you start a new trail equipped with courage, strength and conviction,
the only thing that can stop you is you!"

- Ruby Bridges, Civil Rights Pioneer

Foreword
by Camille Cain

The Texas Juvenile Justice Department (TJJD) is proud to present the Ninth Edition of *Texas Juvenile Law*. This publication has been carefully updated by a select group of juvenile law experts and is the standard reference work for juvenile court judges, juvenile probation officers, law enforcement personnel, prosecutors, defense attorneys, and academicians. While there are similar publications, we take a great pride in knowing that *Texas Juvenile Law* is often cited as the authoritative source for analysis of juvenile statutes and case decisions.

Since beginning my tenure as the executive director of the Texas Juvenile Justice Department in January 2018, I have become increasingly aware of the importance of balancing innovation with the continuity and tradition that many juvenile justice practitioners have come to expect. The focus of my leadership at TJJD has been to dedicate our agency to providing the highest levels of care for our youth to ensure their safety and well-being. I envision a unified juvenile justice system that employs the Texas Model: a desire to keep youth as shallow in our system as possible, a commitment to providing greater access to family and support systems, and the full implementation of trauma-informed care to meet the real needs of our youth. I have been honored to engage with a cross-section of system stakeholders around the state to understand and incorporate the varied perspectives of practitioners who have invested time and energy toward improving the lives of the children and families of Texas. As we continue our efforts to make Texas juvenile justice a model of excellence for the nation, one important strategy is to provide educational resource materials that will enhance practitioners' working knowledge of the legal procedures, structure, and operations of the system.

In recent years, the restructuring of the juvenile justice system has presented new realities regarding the most efficient way to impart information to the field. We recognize and respect the long-term legacy of the original author, the late Professor Robert O. Dawson, former Bryant Smith Chair in Law at the University of Texas School of Law in Austin, Texas. Professor Dawson was the primary drafter of Title 3 of the Family Code, and his vast body of legal writings has shaped juvenile jurisprudence in Texas. Since publishing the Eighth Edition in 2012 and the Supplement in 2014, we have noted that legislative changes affecting juvenile law have increased in frequency and complexity. From a publication standpoint, we are challenged to keep pace with these changes. To that end, we have explored new and innovative platforms to distribute this important legal reference book. We are confident that the Ninth Edition will honor the substantial work of the original author and exceed the expectations and needs of our established base of users.

For the first time, *Texas Juvenile Law* will be available as a perfect-bound, print-on-demand book that can be ordered through various online commercial book vendors. This greatly reduces our need to produce and maintain a large inventory and eliminates internal processing and shipping responsibilities. As part of our commitment to juvenile probation departments, juvenile courts, and designated system stakeholders, we will distribute a digital copy in Portable Document Format (PDF) for easy reference.

The Office of the General Counsel – Legal Education and Technical Assistance Section assembled a well-respected and experienced legal team—current and former TJJD attorneys Nydia Thomas, Kaci Singer, Jenna Reblin, Jill Mata, Kathryn Gray and John Gonzales and law clerk Alexandra Vargas—who worked diligently to review and document the important legislative changes and case decisions since our last publication. In addition, we have tapped into the specialized expertise of guest contributors Hon. Pat Garza, Regan Metteauer, Darryl Liedecke, Maggie Ellis, and Wesley Shackelford. I also want to acknowledge our amazing production team: Steve Roman, Josh Bauermeister, Reni Johnson, Alba Peña, Kristy Almager, Scott Friedman, Maria Tissing, and others who were involved in the publication process.

We are glad to present this edition to the dedicated cadre of practitioners who are committed to achieving the highest standards of professionalism in the field of juvenile justice and, by extension, delivering the highest possible level of care for our youth to help them lead productive lives.

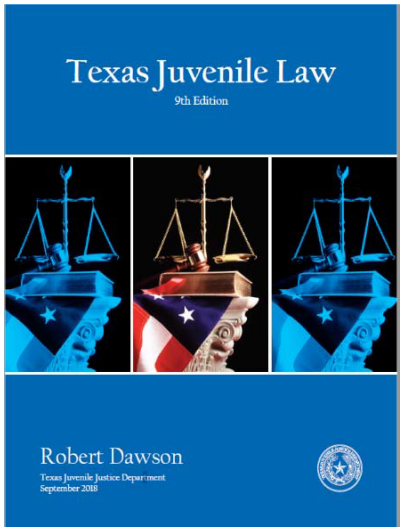
Camille Cain
Executive Director
Texas Juvenile Justice Department

"Justice is truth in action."

-*Benjamin Disraeli*

Managing Editor's Preface
by Nydia D. Thomas, J.D.

Building Capacity and Competence. *Texas Juvenile Law,* Ninth Edition reflects the transformational change that has been characteristic of the juvenile justice system over the past two decades. Since its initial printing in 1984, *Texas Juvenile Law* has guided the work of practitioners in every aspect of the system and underscored the concept that information builds capacity and competence. The original author, Dr. Robert Dawson, often referred to this book as the "operator's manual for the Texas juvenile justice system." For those of us who worked with him over multiple editions, this project is a meaningful way to continue his valuable contribution to juvenile law. In recent years, we have admittedly endured the stresses of sustaining this project through challenging times, tight resources, and shifting priorities. As such, we have had to strategically adapt to maintain this service to the field without compromising quality. The Texas Juvenile Justice Department (TJJD) recognizes that the publication of this book is in keeping with its core legislative mandate to provide training and technical assistance that will *enhance the* delivery of juvenile justice programs and services.



Finding New Efficiencies. *Texas Juvenile Law* is used extensively throughout the state by juvenile court judges, probation officers, prosecutors, defense attorneys, law enforcement officials, universities, and other stakeholders. In the Ninth Edition, we have carefully examined new publication efficiencies and modernized the platform in which the book is offered. Specifically, designated TJJD stakeholders will receive an electronic version of the book and may purchase from select online vendors a print-on-demand bound copy featuring a new cover design and fresh color scheme. TJJD will no longer distribute or process sales of printed copies. We anticipate that by implementing these new platforms, the book will be more cost-effective and widely accessible to key stakeholders, other professionals, and members of the public.

Some readers may remember that we solicited survey feedback from juvenile justice practitioners in attendance at an annual juvenile law conference in 2016. We have taken steps to thoughtfully incorporate many of those suggestions and improvements. Frequent users will immediately notice that much of the content has been streamlined and lengthy restatements of the law have been eliminated, where appropriate. We have also made significant revisions to adjust language to better clarify current law from prior law. Individuals who are researching legislative history and case decision rationale will still find concise passages detailing the chronology of evolving statutory enactments and case law. Keep in mind that this history is also documented in previous editions. To adjust for the ever-increasing size of the book and certain labor-intensive aspects of the updating process, we have removed two of the lengthy appendices. We have revised Chapter 1: Introduction to Juvenile Law, to include information on sources of law. We have also added new Chapter 20: Sex Offender Registration, to fully discuss this complex dispositional option and related court proceedings. The appendix still contains the listing of terms and acronyms as well as the definitions of legal phrases commonly used in the Texas juvenile justice system. We have also opted not to publish the *Statutory Supplement, Volume 2*—which included a compilation of statutes and agency rules—since the relevant laws are readily available through free online sources. The *Supplement* update editions will be discontinued in the future. Going forward, we believe that it will be more efficient to periodically update the book as a whole with the ultimate goal of eventually keeping it current in real-time.

Navigating the Electronic Book. Readers will certainly enjoy taking advantage of the portability of the book in a convenient format which can be uploaded to a computer or converted to be compatible with certain devices. TJJD will distribute the book via a link on the agency website. In addition, information can be located quickly by utilizing the Control-FIND (CTRL-F or its equivalent) search function. The relevant headers, key words and subjects outlined in the Summary of Contents and the internal Table of Contents for each chapter can be used to navigate as key search words in lieu of an index. The Summary of Contents are bookmarked to allow readers to browse directly to specific chapters.

Publishing History. Traditionally, a new edition of *Texas Juvenile Law* has been published after every other legislative session and a *Supplement* edition after each intervening session. After the loss of Dr. Robert Dawson in 2005 and the merger of the state juvenile justice agencies in 2011, there were slight deviations in the schedule. In 2012, the Eighth Edition was published following the 82nd Regular Session of the Texas Legislature in 2011 and first called special session in 2011. The *8th Edition Supplement* (2014) included amendments from the 83rd Regular Session in 2013. This edition—the Ninth Edition—has been updated to include amendments from the 84th (2015) and 85th (2017) Regular Sessions of the Texas Legislature. The publication history is set out below:

Edition	Publication Year	Session
First Edition	1984	68th Regular Session (1983)
1st ed. Supplement	1985	69th Regular Session (1985)
Second Edition	1988	70th Regular Session (1987)
2nd ed. Supplement	1989	71st Regular Session (1989)
Third Edition	1992	72nd Regular Session (1991)
3rd ed. Supplement	1994	73rd Regular Session (1993)
Fourth Edition	1996	74th Regular Session (1995)
4th ed. Supplement	1997	75th Regular Session (1997)
Fifth Edition	2000	76th Regular Session (1999)
Statutory Supplement	2000	76th Regular Session (1999)
5th ed. Supplement	2001	77th Regular Session (2001)
Sixth Edition	2004	78th Regular Session (2003)
Statutory Supplement	2004	78th Regular Session (2003)
Justice and Municipal Courts	2004	78th Regular Session (2003)
6th ed. Supplement	None	79th Regular Session (2005)
Seventh Edition	2008	80th Regular Session (2007)
Statutory Supplement	2008	80th Regular Session (2007)
Justice and Municipal Courts	2008	80th Regular Session (2007)
7th ed. Supplement	2010	81st Regular Session (2009)
Eighth Edition	2012	82nd Regular Session (2011)
Statutory Supplement	2012	82nd Regular Session (2011)
8th ed. Supplement	2014	83rd Regular Session (2013)
Ninth Edition	2018	84th Regular Session (2015)
		85th Regular Session (2017)

Cutoff Dates. In this edition, the references to statutes are current through the 85th Regular Session of the Texas Legislature that concluded in May 2017. The references to case law are current through December 2017. Attorney General opinions are current through December 2017. In rare occasions, a newer case or opinion (e.g., 2018) may be cited if the editors felt its importance merited inclusion in this edition

Acknowledgements. One of the unique missions of *Texas Juvenile Law* has been to chronicle the ever-changing juvenile justice landscape. The information contained in this book provides a level of continuity that is essential to system practitioners who need an easy-to-use reference guide to implement and place in context the laws affecting the juvenile justice system. We are grateful for the continued support of the Texas Juvenile Justice Department (TJJD) under the leadership of Executive Director Camille Cain. In that regard, we'd also like to thank former TJJD General Counsel Jill Mata for emphasizing the importance and sustainability of this invaluable educational resource.

We could not have accomplished this task without the expertise and involvement of a dynamic team of guest contributors, who despite busy schedules, kept their commitment to this project by submitting quality analyses and updates. It has been rewarding to work with the Hon. Pat Garza (Associate Judge, 386th District Court, Bexar County), Regan Metteauer (Program Attorney, Texas Municipal Courts Education Center), Wesley Shackelford (Deputy Director, Texas Indigent Defense Commission) and Maggie Ellis (Defense Attorney, Travis County) who each reviewed or edited specific chapters.

A stand-out note of appreciation goes to Kaci Singer, TJJD Attorney and Policy Supervisor, "our resident scrubber," for her keen eye and for completing the extensive chapter-by-chapter task of concisely synthesizing the chronological history in a way that clarifies the most current and relevant information. We would also like to acknowledge the contributions of Interim General Counsel Karen Kennedy and current and former TJJD Attorneys Jenna Reblin, John Gonzales (employed at the Health and Human Services Commission), Kathryn Gray, and Kyle Dufour (in private practice) as well as Interstate Compact for Juveniles Deputy Administrator, Daryl Liedecke. A special word of thanks to the Office of General Counsel staffers who rolled up their sleeves to help bring this critical project to a close, including TJJD Policy Writers Steve Roman and Josh Bauermeister, Reni Johnson, Paralegal, Scott Friedman, Technical Assistance Specialist, and Alexandra Vargas our former Law Clerk. Thanks also to Kristy Almager, Director of the Juvenile Justice Training Academy, Kenneth Ming, Director of Business Operations and Contracts, William Walk, Senior Contract Specialist, Suzi Rowan, Contract Specialist, and Maria Tissing, Executive Assistant for their guidance and help on the business side of the project. Our final acknowledgement goes out to Alba Peña, Creative Media Designer for conceiving such a fresh, updated cover, as well as Brian Sweany, Communications Director and Meg Askey, Web Administrator. Congratulations to us! Never underestimate the exponential power of "Team Dawson."

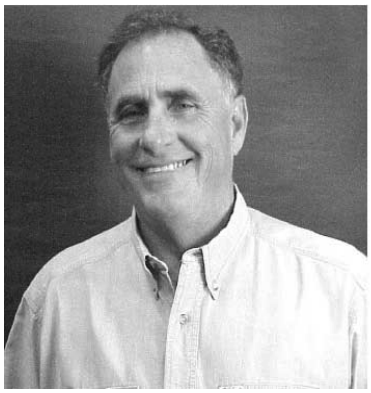
We are proud of the improvements and updates in this edition. As always, we are eager to be of service to you and encourage your continued questions, feedback, and suggestions to advance the capacity and competence of juvenile practitioners in our state. You may contact the TJJD Legal Help Desk via email at LegalHelp@tjjd.texas.gov.

Nydia D. Thomas, J.D.
Special Counsel for Legal Education and Technical Assistance
Office of the General Counsel
Managing Editor of *Texas Juvenile Law*, Ninth Edition
Texas Juvenile Justice Department

"We are each called to take part in a great transformation."

-Desmond Tutu

About the Original Author



Robert O. (Bob) Dawson held the Bryant Smith Chair in Law at the University of Texas at Austin School of Law from 1990 until his death in February of 2005. He received his Bachelor of Arts degree from the University of Missouri in 1960, his Doctor of Jurisprudence degree from Washington University (St. Louis) in 1963 and his Doctor of Juridical Science degree from the University of Wisconsin in 1969. From 1964 to 1967 he was an Assistant Professor of Law at Washington University. He was on the faculty of the University of Texas School of Law from 1967 through 2005. With a seminar in juvenile justice, he taught a course in substantive criminal law and was a creator and co-director of the law school's Actual Innocence Clinic. From 1974 through 1998, he was Director of the law school's Criminal Defense Clinic. In addition to his academic positions, he was both a public defender and a prosecutor.

Bob was the principal draftsman of Title 3 of the Texas Family Code and of the determinate sentence act. He was also involved in much of the drafting of the 1995 re-writing of Title 3 and of biennial amendments made since then. Bob was an advisor to the Juvenile Justice and Family Issues Committee of the Texas House of Representatives from 1995 until his death in 2005. Additionally, throughout his career, he functioned as an advisor to a variety of other legislative committees in both the Texas House and Senate on issues related to juvenile justice.

From 1976 to 1987, Bob was the Juvenile Law Editor of the State Bar of Texas Family Law Section Newsletter. With the creation of the Juvenile Law Section of the State Bar of Texas in 1987, he became the Editor of the State Bar of Texas Juvenile Law Section Report and performed that role till his death in 2005. Throughout his career, he gave lectures on juvenile law to probation officers and attorneys throughout the state.

Bob was co-author of *The Juvenile Justice Process* (Fourth Edition, Foundation Press 2000), a law school course book on juvenile law. He was the author of the *Adjudication* volume of the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project. He was also the author of commentaries on Title 3 of the Family Code that have appeared in 5 Texas Tech Law Review 509 (1974), 8 Texas Tech Law Review 119 (1976), and 21 Texas Tech Law Review 1747 (1990). He was the author of *Prosecution of Juveniles in Texas Criminal Courts: Eliminating the Jurisdictional Requirement of an Examining Trial*, 23 Houston Law Review 1067 (1986); *Responding to Misrepresentations, Nondisclosures and Incorrect Assumptions About the Age of the Accused: The Jurisdictional Boundary Between Juvenile and Criminal Courts in Texas*, 18 St. Mary's Law Journal 1117 (1987); *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 St. Mary's Law Journal 943 (1988); *The Future of Juvenile Justice: Is it Time to Abolish the System?*, 81 Journal of Criminal Law & Criminology 136 (1990); *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 Texas Tech Law Review 1897 (1990); *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 St. Mary's Law Journal 975 (1992); *Judicial Waiver in Theory and Practice*, in J. Fagan and F. Zimring, *The Changing Borders of Juvenile Justice* (U. of Chicago Press 2000); *Who Gets Certified? An Empirical Study of Discretionary Transfers from Juvenile to Criminal Court*, 16 State Bar of Texas Juvenile Law Section Report, No. 4 (December 2002); and *Texas Juvenile Blended Sentencing: An Empirical Study of the Uses of Determinate Sentencing*, 17 State Bar of Texas Juvenile Law Section Report, No. 2 (June 2003). Beginning in 1992 through 2003, he wrote the annual commentaries for Title 3 of *Sampson and Tindall's Texas Family Code Annotated*. Bob also wrote several books and articles on the subject of criminal procedure, which included co-authoring a six-volume treatise *Texas Criminal Practice and Procedure* (Second Edition, West 2001).

Bob was a member of Phi Beta Kappa and Order of the Coif. He was listed in Who's Who in America. He was born in 1939, was married, had one daughter and one step-daughter and lived on a small ranch just outside the greater metropolitan area of Fentress, Texas. He died at home on his beloved horse ranch on February 26, 2005, surrounded by his family and friends.

Principal Contributors

Nydia Thomas has an extensive background in juvenile law and juvenile justice system administration at the state and local levels. She joined the staff of the former Texas Juvenile Probation Commission in 1998 and served as Deputy General Counsel in the areas of juvenile law, administrative law, contracts, and legislative analysis. At the Texas Juvenile Justice Department (TJJD), she serves as Special Counsel for Legal Education and Technical Assistance within the Office of the General Counsel. Ms. Thomas is a professional development trainer and recurring faculty member for the Correctional Management Institute of Texas, the Juvenile Law Section of the State Bar of Texas, and the Texas Department of Public Safety.

A graduate of Howard University School of Law, Ms. Thomas gained valuable experience on Capitol Hill while working for a Member of Congress and a Washington-based congressional research foundation. She is a former councilmember and Mayor-Pro Tem of Cleveland, Texas and has received both gubernatorial and attorney general appointments. She is a past Chair of the State Bar of Texas Juvenile Law Section and the African-American Lawyers Section. Throughout her career, Ms. Thomas has served on a number of community and interagency boards including the Liberty County Child Protective Services Board, Prosperity Bank Business Development Board (Cleveland), Texas Violent Gang Task Force Advisory Board, Statewide Disproportionality Task Force, and the Interstate Compact for Juveniles State Council.

Ms. Thomas has been an editor of the state's foremost juvenile justice treatise, *Texas Juvenile Law* since 2000 and has published legislative reports and topical articles on juvenile law. She was a book reviewer for the inaugural edition of *Juvenile Practice is Not Child's Play: A Handbook for Attorneys Who Represent Juveniles in Texas* by Texas Appleseed/Southwest Juvenile Defender Center and *Indigent Defense in the Texas Juvenile Justice System*, a joint publication of TJJD and the Texas Indigent Defense Commission. During interim legislative cycles, she has been involved as principal facilitator and subject-matter liaison for juvenile justice practitioner workgroups. Ms. Thomas was the recipient of the 2018 Robert O. Dawson Visionary Leadership in Juvenile Justice Award from the Juvenile Law Section of the State Bar of Texas. In her spare time, she enjoys genealogical research, travel, and creative writing.

Kaci Singer began her legal and juvenile justice career in 2001 with the former Texas Youth Commission, where she served as a hearings examiner, appeals attorney, and the Chief Administrative Law Judge. In early 2011, she became a staff attorney for the Texas Juvenile Probation Commission, where she assisted juvenile justice practitioners contacting the legal help desk, analyzed and tracked legislation, provided training, and assisted with policy changes related to the merger of the functions of TYC and TJPC into the Texas Juvenile Justice Department. She left TJJD in 2012 for a brief period, during which time she served as the Director of the Criminal Division of the Travis County District Clerk's Office and then the Director of Court Administration for the Travis County Juvenile Probation Department. She returned to TJJD in 2014, where she currently serves as the Senior Staff Attorney for County Matters and the supervisor of the policy department within the Office of General Counsel.

Ms. Singer has been a member of the Juvenile Law Council of the State Bar of Texas since 2007, serving as chair of the section for the 2018-2019 Bar year. She has also been a member of the Jury Service Committee of the State Bar of Texas since 2013, serving as chair of the committee for the 2017-2018 and 2018-2019 Bar years.

In 2015, Ms. Singer and several other juvenile justice professionals started the Juvenile Law Foundation, a non-profit organization that provides educational and trade school scholarships to individuals who were involved in the juvenile justice system in Texas. Ms. Singer is the president of the Foundation.

Ms. Singer graduated from Baylor University in 1998 and the University of Texas School of Law in 2001. She lives in Austin, Texas, with her husband and two children.

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This book is intended for the use of juvenile court judges, juvenile probation officers, law enforcement officers, prosecutors, defense attorneys, educators, and others to assist in their day-to-day work in the Texas juvenile justice system. It is designed to be a thorough discussion of Texas juvenile law, including a history of that law, with an emphasis on the practical problems that confront the system and the people who work in it.

Foundation for Juvenile Law in Texas. Prior to the United States Supreme Court's monumental 1967 decision *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the law was actually of very little importance to the juvenile justice system. Most juvenile court judges were not lawyers, and it was rare for prosecutors or defense attorneys to appear in juvenile court. The Texas juvenile statute, the now repealed Article 2338-1 of the Civil Statutes, had as its most pronounced characteristic the granting of broad, almost unlimited discretion to local officials to do what they wished with children charged with crimes or misconduct.

All that has now changed. The law, with its emphasis on procedures, rights, restrictions, and lawyers, is an integral part of the juvenile justice system. Juvenile probation officers have at least as great a need to understand the law as they do to possess rehabilitative skills or learn techniques of case management. Knowledge of juvenile law is of major importance to law enforcement officers and school officials and administrators. For prosecutors and defense attorneys, who daily appear in juvenile court, a thorough knowledge of juvenile law is essential.

The legal foundation of the Texas juvenile system is Title 3 of the Family Code. The legal foundations of the criminal process in Texas are the Penal Code and the Code of Criminal Procedure. However, the Penal Code and the Code of Criminal Procedure are documents that "stand alone" legally. They are intended to, and together do, constitute a more or less complete set of legal rules for the criminal system. The same is not true of Title 3. It does not purport to be a complete statement of legal rules for the handling of juvenile cases. Every Title 3 case requires reference to outside sources to complete the set of legal rules that govern that case.

Section 51.17(a) of the Family Code provides, "Except as provided by Section 56.01(b-1)...or otherwise when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title." Unfortunately, the reference to the Texas Rules of Civil Procedure is misleading, for there are some situations that are not governed expressly by either Title 3 or the Rules of Civil Procedure. When that occurs, courts are required to make up rules, and they do so by borrowing from the rules that govern the criminal system. Sometimes they modify those rules when applying them to the juvenile system, and sometimes they apply the criminal rules intact.

A. Texas Family Code and Related Sources of Law

The basis of Texas juvenile law is Title 3 of the Texas Family Code (the Texas Juvenile Justice Code). It was enacted by the Texas Legislature in 1973 and substantially revised in 1995 and has been continually revised since then. In this text, Title 3 is analyzed extensively and quoted when appropriate. It is cited without identifying it each time as the Family Code; for example, a citation to "Section 54.03" means that section of the Family Code. Other Texas statutes are typically identified when cited; for example, the Human Resources Code, the Penal Code, or the Code of Criminal Procedure. Most of the statutes cited in this book can be accessed via the Texas Legislature Online website.

Texas Penal Code. The Texas Penal Code and the case law and opinions of the Attorney General that interpret it are an integral part of Texas juvenile law. To a lesser extent, so are the many penal offenses defined in the various other codes that are part of the statutes. Most juvenile cases involve delinquency, defined in Section 51.03(a)(1) as a violation of "a penal law of this state...punishable by imprisonment or by confinement in jail." Obviously, when a police officer, intake worker, prosecutor, judge, or appellate court must decide whether conduct is covered by a penal law, the person or court must look not only to the statute itself but also to authoritative interpretations of it. Appellate courts apply the same interpretations in juvenile cases as are applied to those involving adults and, when faced with an interpretative issue, will look to criminal cases for authoritative guidance. See Chapter 4.

Texas Code of Criminal Procedure. The primary purpose of the Code of Criminal Procedure is set forth in Article 1.03. The "Code is intended to embrace rules applicable to the prevention and prosecution of offenses against the laws of this State, and to make the rules of procedure in respect to the prevention and punishment of offenses intelligible to the officers who are to act under them, and to all persons whose rights are to be affected by them." Remarkably, many of the provisions in the Texas Code of Criminal Procedure are the same as when they appeared in Texas statutes as long ago as 1856; others were revised in 1965. In 1999 and 2001, the Texas Legislature streamlined and reorganized the Code of Criminal Procedure. Many of the Family Code provisions pertaining to the handling of juvenile-aged youth in justice and municipal courts were transferred. The remaining Family Code statutes should be read in conjunction with the applicable provisions of the Code of Criminal Procedure.

It is well-settled, as a general proposition, that the Code of Criminal Procedure does *not* govern Title 3 proceedings. See, for example, Attorney General Opinion No. H-1252 (1978) (concluding that the Texas Speedy Trial Act, Article 32A.02 of the Code of Criminal Procedure, does not apply to juvenile cases); *Robinson v. State*, 707 S.W.2d 47 (Tex.Crim.App. 1986). Indeed, one of the reasons for declaring that Title 3 cases are civil, and for making reference in Section 51.17 to the Rules of Civil Procedure, was to avoid importing the complexities of the Code of Criminal Procedure into the juvenile system.

That said, there are places in Title 3 which specifically refer to the Code of Criminal Procedure as a source of juvenile law. In those situations, the specific reference to the Code of Criminal Procedure controls over the more general proposition that the Code does not govern juvenile proceedings. For example, Section 52.01(a)(2) of Title 3 authorizes a law enforcement officer to take a child into custody "pursuant to the laws of arrest." One must then examine Chapter 14 and Article 18.16 of the Code of Criminal Procedure to find the statutory basis in Texas for the laws of arrest. Of course, the case law and opinions of the Attorney General interpreting those provisions also accompany those statutory provisions into the juvenile system. Section 52.01(a)(3) authorizes an arrest "by a law-enforcement officer...if there is probable cause to believe that the child has engaged in...delinquent conduct or conduct indicating a need for supervision." The criminal case law discussing what probable cause means in various factual situations must be consulted to give meaning to that phrase as used in that section of Title 3. Finally, "law enforcement officer" is defined in Section 51.02(7) to mean a peace officer as defined in Article 2.12 of the Code of Criminal Procedure.

Section 51.17(b) of Title 3 provides, "Discovery in a proceeding under this title is governed by the Code of Criminal Procedure and by case decisions in criminal cases." Thus, despite the general reference to the Rules of Civil Procedure, discovery is governed by the criminal rules, not the more liberal civil rules. This provision and Section 51.17(c) provide, "Except as otherwise provided in this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title." The same reference to the Rules of Evidence applicable to criminal cases appears in Section 54.03(d). The 1995 amendments changed the governing body of evidentiary law from the Rules of Evidence used in civil cases to the Rules of Evidence used in criminal cases. Most of the time the same rules govern both types of proceedings, but, when they differ, the criminal versions control in

juvenile cases. The 2007 amendments added the references to Articles 33.03 and 37.07, Code of Criminal Procedure.

The 2007 change to Section 51.17(c) superseded *In the Matter of C.J.M.*, 167 S.W.3d 892 (Tex.App.—Fort Worth 2005, pet. denied), which had held that Article 37.07, Code of Criminal Procedure, was not applicable to juvenile proceedings. This change to Section 51.17(c) added Code of Criminal Procedure Articles 33.03 (presence of defendant) and 37.07 (verdicts in criminal cases), making those provisions specifically applicable to juvenile cases. See discussion of *C.J.M.* and Section 51.17(c) in Chapter 21.

If a court is faced with a juvenile procedural issue that is novel, it is likely to look to the Code of Criminal Procedure for a solution. This is illustrated by *C.E.J. v. State*, 788 S.W.2d 849 (Tex.App.—Dallas 1990, writ denied). In that case, the juvenile respondent claimed that the State had used its peremptory challenges to eliminate members of the jury panel on account of their race. That issue had been litigated often in criminal prosecutions, but it was novel in juvenile cases. Indeed, the issue had been litigated so often in criminal cases that the legislature in 1987 had enacted a statute, Article 35.261, Code of Criminal Procedure, to regulate the matter. In *C.E.J.*, the Court of Appeals decided to apply Article 35.261 to the juvenile case before it:

> We recognize that the Texas Court of Criminal Appeals has held that the provisions of the Texas Code of Criminal Procedure do not apply to delinquency proceedings.... Thus, the provisions of article 35.261 are not controlling in this case. However, the Legislature enacted article 35.261 to implement the *Batson* decision.... Consequently, in the absence of legislation implementing the *Batson* decision in delinquency trials, we adopt the relevant provisions of article 35.261, and the case law interpreting it, as our standard of review to determine the timeliness of a *Batson* motion in this juvenile delinquency proceeding.

788 S.W.2d at 853.

Borrowed Language. The legislature frequently plagiarizes itself. When it faces the necessity of enacting a new rule, it will quite often simply lift language from a similar statute already on the books and, perhaps with slight modifications, enact that language to cover the new situation. When that occurs, courts will and should look to the case law interpreting the "parent" statute to determine what meaning should be given to the "offspring" provision. There is a well-founded assumption that the legislature intended that result—that when it borrowed language from another statute, it expected courts to consult the case law under that statute to interpret the new provision.

Over the years, the legislature has borrowed many criminal statutes and placed them in Title 3. Courts have been faithful to the legislature's purpose by consulting the case law under the criminal provisions in interpreting the Title 3 version. For example, what is now Section 51.095, Family Code, enacted in 1975 to govern the taking of statements from juveniles in police custody, was borrowed from Articles 38.22 and 15.17, Code of Criminal Procedure, with some modifications. When the legislature amended the juvenile statute in 1991 to increase the number of exceptions to the prohibition on the admissibility of oral confessions by juveniles in custody, it borrowed language from Article 38.22, Code of Criminal Procedure. See Chapter 16.

The language in Section 54.03(e) that "[e]vidence illegally seized or obtained is inadmissible in an adjudication hearing" was taken from Article 38.23, Code of Criminal Procedure. The language in the same section prohibiting an adjudication on the uncorroborated testimony of an accomplice is lifted directly from Article 38.14, Code of Criminal Procedure. Finally, the language in that same section prohibiting an adjudication on the basis of an uncorroborated out-of-court statement of the respondent is a restatement of the common law requirement in criminal cases called the *corpus delicti* rule. See Chapter 11.

Texas Rules of Evidence. In 1982, the Texas Supreme Court promulgated the Texas Rules of Evidence, which became effective September 1, 1983. In 1985, the Court of Criminal Appeals promulgated the Texas Rules of Criminal Evidence, which became effective September 1, 1986. The Rules were very similar and employed the same organization and numbering system. The overall purpose was, to the extent possible, to have the same rules govern both civil and criminal proceedings, with differences in rules only when absolutely necessary. Both sets of rules were modeled very closely on the Federal Rules of Evidence, promulgated by the United States Supreme Court initially in 1972 and going into effect on July 1, 1975.

In 1998, the Texas Supreme Court and the Court of Criminal Appeals merged the two sets of rules into a single Texas Rules of Evidence. The same rules now apply to both civil and criminal proceedings, except where the rules specifically provide otherwise.

As previously noted, Section 51.17(c) specifies that the Rules of Evidence that apply in criminal cases govern juvenile proceedings. This directive is subject to specific

evidentiary rules in Title 3. See, for example, the evidentiary rules for adjudication hearings set out in Section 54.03(e).

Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure were first promulgated by the Texas Supreme Court in 1940. They have been amended by the Court frequently since then. Rule 2 provides that the "rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated." Section 51.17(a) of the Family Code provides that "[e]xcept as provided by Section 56.01(b-1)...or otherwise when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title."

The Texas Rules of Civil Procedure should be regarded as a residual source of law for juvenile cases. If an issue rises to the level of a constitutional question, then the United States Constitution or Texas Constitution controls. If Title 3 speaks to an issue, it controls. If Title 3 makes reference to a criminal statute or the Code of Criminal Procedure, as in the case of discovery under Section 51.17(b), that reference was intended to be an exception to the general residuary governance of the Rules of Civil Procedure. If Title 3 borrows language from the Code of Criminal Procedure or from criminal case law, the interpretation of that language by the criminal courts was intended to govern. Finally, if a legal issue is an evidentiary one, the Texas Rules of Evidence as applied in criminal cases or Chapter 38 of the Code of Criminal Procedure govern.

Since, over the years, many of the legal problems encountered in handling juvenile cases have been dealt with by amendments to Title 3, there is, in reality, very little role for the Rules of Civil Procedure in contemporary juvenile litigation. Nevertheless, they are available, sitting on the bench, ready to be called into the game by novel arguments of advocates for the child or the State.

Where the Rules of Civil Procedure specifically cover a legal issue in the juvenile system, the courts have been faithful to the command of Section 51.17 and have applied them. For example, in *S.C. v. State*, 715 S.W.2d 379 (Tex.App.—San Antonio 1986, writ ref'd n.r.e.), the respondent's attorney made a timely motion to shuffle the names of the members of the jury panel, which the trial court denied. Rule 223 of the Texas Rules of Civil Procedure provides a right to shuffle upon timely motion in language virtually identical to Article 35.11 of the Code of Criminal Procedure. Indeed, both provisions were copied from the same statute. However, the courts had interpreted Rule 223 to require the person who was denied his or her right to a shuffle to show that he or she was harmed by the trial court's error of law, while on the criminal side no showing of harm was at that time required for a violation of Article 35.11. The appellate court in *S.C.* commented:

> While we may agree with appellant that the Court of Criminal Appeals offers the better reasoning in the construction of its statute than does the Supreme Court of its rule, still the proceeding before us is a civil one with criminal overtones. Unless we are prepared to hold that a refusal to shuffle the jury list has transgressed a fundamental right of appellant secured by statute or by constitution we cannot say that the trial court reversibly erred in its refusal to grant appellant's request.
>
> In the instant case appellant does not urge any harm as a result of the court's refusal to grant the relief prayed for. Since the Supreme Court's interpretation of Rule 223 does not permit us to infer that probable harm arose, the burden remained on appellant to show harm. We hold that under Rule 223 there was substantial compliance by the trial court and that in a juvenile proceeding that is all that is required. Absent some showing that the trial court's failure to shuffle was reasonably calculated to cause and probably did cause the rendition of an improper judgment, reversal is not mandated.

715 S.W.2d at 384.

Of course, had the Code of Criminal Procedure governed, the adjudication would have been reversed without the need for the appellant to show harm of any kind.

When a rule of civil procedure provides that a right is forfeited unless it is asserted in the trial proceedings, that rule must be applied in juvenile cases in light of the requirements of Section 51.09 of the Family Code restricting circumstances in which juveniles can waive rights. For example, in *In the Matter of W.H.C., III,* 580 S.W.2d 606 (Tex.Civ.App.—Amarillo 1979, no writ), the respondent contended on appeal that the petition charging him with arson was defective. The State pointed out that the respondent had not objected to the petition as required by Rule 90 of the Texas Rules of Civil Procedure. The appellate court rejected the State's argument on the ground that a Rule 90 forfeiture of rights must be applied in juvenile cases as modified by Section 51.09, and there was no showing that the requirements of that section had been satisfied. See *R.A.M. v. State,* 599 S.W.2d 841 (Tex.Civ.App.—San Antonio 1980, no writ), discussing the same type of question in the context of failure to object to the juvenile court's charge to the jury, and *In the Matter of*

T.L.K., UNPUBLISHED, No. 02-09-260-CV, 2010 Tex.App.Lexis 4423, Juvenile Law Newsletter ¶ 10-3-6 (Tex.App.—Fort Worth 2010, no pet.), discussing the issue in the context of failure to object to receiving fair notice of the "place" where the alleged conduct occurred. See Chapter 16.

The Texas Rules of Civil Procedure are not designed specifically for juvenile cases. They are designed to govern litigation in a wide variety of civil cases, such as automobile accidents, divorces, disputes on contracts, etc. Therefore, there are times when an issue arises in a juvenile case that is not covered by the Rules of Civil Procedure. When that occurs, the courts borrow concepts from the Code of Criminal Procedure, modifying them to fit more neatly in the juvenile system. *In the Matter of M.A.G.*, 541 S.W.2d 899 (Tex.Civ.App.—Corpus Christi 1976, writ ref'd n.r.e.) is an excellent example. The respondent was adjudicated delinquent and put on probation. The juvenile court required her to live in a local correctional facility as a condition of probation. She appealed the case and, while the appeal was pending, escaped from the correctional facility and could not be located by her attorney or law enforcement authorities by the time her case was scheduled to be submitted to the Court of Civil Appeals. Should the court decide the appeal or dismiss the case on the ground that she had escaped from custody and was still at large?

Not surprisingly, the Rules of Civil Procedure did not address what should happen when the appellant escapes from custody pending the appeal. But, the Code of Criminal Procedure did. Article 44.09 of the Code of Criminal Procedure (now Rules of Appellate Procedure Rule 42.4) provided in part:

> If the defendant, after giving notice of appeal, makes his escape from custody, the jurisdiction of the court of appeals or the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the appropriate court shall, on motion of the attorney representing the state, dismiss the appeal and withdraw any prior opinion; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within 10 days.

Since *M.A.G.* was still at large when the case was decided, the appellate court would have been required to dismiss the case if it were an appeal in a criminal case.

If the appellate court had looked only to the Rules of Civil Procedure, which then governed appeals because the Texas Rules of Appellate Procedure had not yet been promulgated, it would have lacked the power to dismiss the case. Yet, it concluded it did have that power:

> We...believe that it is not only proper but necessary that we order this appeal dismissed. This Court recognizes that trial judges endeavor to place delinquent children on probation and in the custody of a variety of youth facilities other than the Texas Youth Council. Frequently, the security at these other facilities is deliberately kept at a minimum. To allow a juvenile to ignore the orders of the trial court on the one hand, and at the same time expect full relief from this Court on appeal on the other hand, would seriously jeopardize the authority and effectiveness of our juvenile courts who must deal with these problems on a daily basis. This we will not permit.

541 S.W.2d at 901.

The appellate court in *M.A.G.* borrowed the power to dismiss from Article 44.09 but did not take the obligation to dismiss also. It ordered the appeal dismissed, but said that, if the respondent surrendered herself within 15 days, it would consider reinstating the appeal in a motion for rehearing. Thus, the court was creative in fashioning its own rule to cover this situation. However, in 1995 the legislature added Section 56.01(k), modeled on Rule 42.4 of the Rules of Appellate Procedure, to require dismissal of a juvenile's appeal under the same circumstances required in a criminal appeal.

Texas Rules of Appellate Procedure. In 1986, the Texas Supreme Court and the Court of Criminal Appeals jointly adopted the Texas Rules of Appellate Procedure to govern appeals in both civil and criminal cases. The purpose of the Texas Rules of Appellate Procedure is to have the same rules to the extent feasible. That goal was largely met, although there are still some differences between appeals on the civil side and the criminal side. To the extent those rules differ, juvenile appeals (except those challenging a certification to criminal court) are governed by the civil version. However, there are certain circumstances in which the rigidity of a civil rule must bend to constitutional requirements, such as the right of a juvenile to effective assistance of counsel on appeal.

Administrative Law. State agency rules are contained in at least 17 titles of the Texas Administrative Code. The rules are organized and compiled by the Office of the Secretary of State pursuant to the Administrative Procedure Act. Chapters 2001 and 2002, Government Code. Administrative rules, also known as "standards," that relate to juvenile boards and probation departments, are found in Title 37 of the Texas Administrative Code,

Chapters 341 through 359. These rules are promulgated and enforced by the Texas Juvenile Justice Board.

In June 2012, the TJJD's administrative rules that apply to TJJD programs and facilities and to internal TJJD operations were renumbered and transferred, without changes, to Title 37 as Chapters 380 and 385. The agency's administrative rules are available on the TJJD website and on the Texas Secretary of State's website.

Federal Law. Federal law provides the underlying basis for many of the state laws in Title 3 of the Family Code and other applicable statutes. The Juvenile Justice and Delinquency Prevention Act (JJDPA), the Prison Rape Elimination Act of 2003 (PREA), and the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA) affect the handling of juvenile offenders and operations of juvenile justice programs, services, and facilities. See Chapter 6.

B. Types of Appellate Courts

Much of this text is devoted to description and analysis of the opinions of appellate courts. An opinion by the United States Supreme Court is specifically identified as such, as is an opinion by the United States Court of Appeals for the Fifth Circuit, which has jurisdiction over Texas.

Most of the appellate opinions discussed are from Texas state courts. There are three appellate courts in Texas: the Texas Supreme Court, the Texas Court of Criminal Appeals, and the Texas Court of Appeals. There are really 14 Courts of Appeals, each with its own geographic district in the state. Opinions from Courts of Appeals are identified by the city in which they sit, for example, Corpus Christi or Dallas. There are two Courts of Appeals in Houston, one identified as the "1st Dist." and the other as the "14th Dist."

Before September 1, 1981, the Courts of Appeals were called Courts of Civil Appeals because they had jurisdiction only in civil cases. Therefore, opinions from those courts before that date are identified as "Tex.Civ.App." In 1981, the legislature gave the Courts of Civil Appeals criminal jurisdiction and renamed them Courts of Appeals. Opinions from Courts of Appeals after September 1, 1981, are identified as "Tex.App." Opinions from the Texas Court of Criminal Appeals are identified as "Tex.Crim.App." Opinions from the Texas Supreme Court are identified as "Tex."

Thus, a citation to *In the Matter of R.O.D.*, 123 S.W.2d 456 (Tex.Civ.App.—Houston [1st Dist.] 1979), would refer to a case from the Houston First District Court of Civil Appeals, while a citation to the same case as 999 S.W.2d 876 (Tex.App.—Houston [14th Dist.] 1999) would be to a case from the Houston Fourteenth District Court of Appeals. A citation to *In the Matter of R.O.D.*, 999 S.W.2d 543 (Tex. 1999), would be to a case from the Texas Supreme Court, while a citation to *Dawson v. State*, 999 S.W.2d 210 (Tex.Crim. App. 1999), would be to an opinion from the Texas Court of Criminal Appeals. Most cases cited are from the Texas Courts of Appeals.

Texas Civil Appeals. Texas has a dual system for appeals—one civil and one criminal. A juvenile appeal is civil. It goes first to the appropriate Court of Appeals. After that court has decided the case, the losing party may request the Texas Supreme Court to exercise its discretion to review the case. This is done by a petition for review. If the Texas Supreme Court believes the decision below was legally correct, it will deny the petition; if it believes the decision was incorrect and that the error is sufficiently important, it will grant the petition and set the case for a decision on its merits. It will then decide the case itself. It is customary to include the "writ history" of a case as part of its citation. If the citation in an older case concludes with "writ ref'd n.r.e."—writ refused no reversible error—that means that the Texas Supreme Court thought the result by the Court of Appeals was correct but is not necessarily endorsing the reasoning employed to arrive at that result.

Instead of the "n.r.e." notation, the Texas Supreme Court merely notes cases in which it finds no reversible error but does not necessarily approve of the lower court's reasoning with "petition denied." "Petition refused" means the Texas Supreme Court approves of the reasoning of the court below as well as the result. It is used rarely. "Petition granted" means the Texas Supreme Court has granted the petition but has not yet decided the case, while "petition filed" means a petition for review has been filed in the Texas Supreme Court but has not yet been decided by that court.

Texas Criminal Appeals. Before September 1, 1981, appeals in criminal cases went directly from the trial court to the Texas Court of Criminal Appeals. Beginning September 1, 1981, appeals in criminal cases (except death penalty cases) go first to the appropriate Court of Appeals. The losing party may file a petition for discretionary review, asking the Court of Criminal Appeals, in its discretion, to review the case. If the court wishes the decision of the Court of Appeals to stand undisturbed, it will refuse the petition; otherwise, it will grant it and call for briefs from the parties.

Some juvenile issues are decided by a Court of Appeals or by the Court of Criminal Appeals in a criminal appeal because they can determine the outcome of the

criminal case being considered. They are as much a part of the body of juvenile law as are civil decisions.

The Court of Criminal Appeals employs a system of reporting its decisions that is similar to the petition-for-review system of the Texas Supreme Court. A notation in a citation of "pet. ref'd"—Petition for Discretionary Review refused—means that the Court of Criminal Appeals chose not to review the case but neither endorses nor questions any of the legal reasoning employed by the Court of Appeals in its opinion. "Pet. granted" means the petition was granted but the Court of Criminal Appeals has not yet decided the case. "Pet. filed" means the petition has been filed but not yet refused or granted by the court. The Court of Criminal Appeals, like the Texas Supreme Court, grants review in only a small percentage of the cases in which review is sought.

There is no appeal from the Texas Supreme Court to the Court of Criminal Appeals or vice versa. Each is the "supreme court of Texas" in its own field of law—civil or criminal.

C. Court Opinions

Appellate Opinions as Precedent. When an appellate court decides a case, it is both determining the outcome of the case for the parties to the litigation and making law that will affect how similar disputes are resolved in the future. A published opinion from an appellate court is called "precedent." A lower court is bound to follow such an opinion and apply its principles to its own case unless it can distinguish the appellate opinion from its own case. Courts and attorneys cite appellate opinions as law, just as they cite statutes or constitutional provisions as law. If a trial court is asked by an attorney to take some out-of-the-ordinary action in a case, the court will frequently ask for precedent for the action; in other words, it will want to know whether that action or a similar one has previously been approved by an appellate court in a published opinion.

Most appellate opinions depend, to a great extent, on the facts of the case. The legal principles stated in the opinion may be applied only to cases with similar facts. Additionally, almost all appellate opinions state principles that can be read broadly to encompass many future cases or read narrowly to encompass fewer cases. Lawyers spend much time and energy trying to distinguish cases by finding factual differences between the appellate opinion and the case in the trial court and offering reasons why principles expressed in the opinion should be read broadly or narrowly.

Published Opinions. Published opinions of the Courts of Appeals, the Texas Supreme Court, and the Texas Court of Criminal Appeals appear first as slip opinions. Eventually, those opinions are published in the South Western Reporter®. They are then cited by the volume and page numbers of the South Western Reporter®. Thus, a citation to a case as 726 S.W.2d 897 means it appears in volume 726 of the South Western Reporter®, second series, beginning on page 897. There is also a South Western Reporter® that has older cases, which is cited simply as "S.W." And there is a South Western Reporter®, third series, which began in 1999 and is cited as "S.W.3d."

Usually, an opinion has appeared in the South Western Reporter® by the time it is used in this book. However, sometimes an opinion is still in slip opinion form at the time it is used. When that happens, the opinion's citation will include the appellate court cause number (e.g., 03-98-00099-CV) as well as an indication that it has not yet appeared in South Western Reporter® [___ S.W.3d ___]. By using the cause number, the reader can obtain a full copy of the opinion from the clerk of the appellate court even before it appears in the South Western Reporter®. When available, a citation to an opinion that has not yet been published in the South Western Reporter® is also identified by its number on Westlaw (2011 WL 123456) or on Lexis (2011 Tex.App. Lexis 123), which are both proprietary computer databases. Whenever published and unpublished opinions are cited together, the published cases are listed first. In some instances, WL number cites have been added to the cases referenced in the narrative of the book.

Unpublished Opinions. Not all opinions from appellate courts are published. Many are ordered to be unpublished. That means that a copy of the slip opinion is sent to the parties and to the court(s) below but is not released for publication and will never appear in the South Western Reporter®. However, the Texas Rules of Appellate Procedure Rule 47.3 provides that "[a]ll opinions of the courts of appeal are open to the public and must be made available to the public reporting services, print or electronic." Any person may contact the clerk of the court that decided the case and, knowing a cause number, can obtain a copy of any unpublished opinion. In addition, many of these opinions appear in computer-aided research systems, such as Westlaw or Lexis, and can be retrieved and printed by any person with access to those systems. As a consequence of being so readily available, many of these unpublished opinions are circulated informally among the bench and bar.

Texas Rules of Appellate Procedure Rule 47.7 provides that "[o]pinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'" Under Rule 77.3, unpublished opinions from the Court of Criminal Appeals "have no precedential value and must not be cited as authority by counsel or by a court." The fact that these opinions cannot be cited as authority, however, does not mean they cannot be useful or that they may not be used for purposes other than citing them as authority in a brief or oral presentation to a court. Unpublished opinions are sometimes the only occasion upon which an appellate court has spoken on a particular issue. As such, they provide a valuable source of legal reasoning in the analysis of that particular issue.

The practical difference between a published and an unpublished opinion from a Court of Appeals or the Court of Criminal Appeals is that a lower court is bound to follow a published opinion unless the facts of the published opinion can be distinguished from the facts before the lower court. A lower court is not bound to follow an unpublished opinion even if the facts of that opinion cannot be distinguished from the facts of the case before the lower court.

Unpublished opinions have been used in this text whenever relevant to the issue under discussion. Each is identified in its citation as UNPUBLISHED. In this edition, cases that have been released for publication by the Courts of Appeals but have not yet been published are identified as REL. FOR PUBLICATION. Included in the citation is the appellate court cause number, which will enable the reader to obtain a full copy of the opinion from the clerk of the appropriate Court of Appeals. Each unpublished opinion that has appeared in Westlaw or Lexis is identified by a unique number. A full copy of the opinion can be obtained from Westlaw or Lexis using that number. An unpublished opinion that has been reported in the State Bar of Texas Juvenile Law Section Report is identified as, for example, Juvenile Law Newsletter ¶ 18-4-12. That would mean that it is case number 12 of the 4th (December) issue for 2018. There are four issues of the Juvenile Law Section Report in even-numbered years and five issues (including a special legislative issue) in odd-numbered years. Opinions in the Juvenile Law Newsletter are not edited except to exclude issues and discussions that are not relevant to juvenile law.

Many juvenile opinions are uploaded to the State Bar of Texas Juvenile Law Section's website. The Juvenile Law Section's website and online newsletter contain recent case opinions. Some older juvenile opinions that are published and indexed in the Juvenile Law Section Reports are available online using the newsletter link on the website's homepage, www.juvenilelaw.org.

D. Texas Attorney General Opinions

Various public officials are authorized to request opinions from the Texas Attorney General on questions of law. Frequently, an Attorney General opinion is the only authoritative discussion of an issue available. These opinions do not have quite the authority of an opinion from an appellate court, because courts, even trial courts, are free to disregard them. However, opinions from the Attorney General are entitled to and do receive respect in the legal community and, as a practical matter, are frequently accorded the force of an appellate opinion by prosecutors, defense attorneys, and trial courts. Opinions of the Attorney General are cited as "Attorney General Opinion No." followed by the initials of the Attorney General who issued the opinion, a number for the opinion, and the year of issuance; for example, Attorney General Opinion No. GA-860 (2011). These opinions are readily available on the Texas Attorney General's website.

Until 1999, the Attorney General would sometimes issue a letter opinion to address issues that were more local in nature or that affected the interests of particular persons or groups as opposed to being more general or of interest to people throughout the state. Attorney General John Cornyn ended the practice of letter opinions in 1999. A letter opinion should be regarded as carrying the same weight as a full opinion. Occasionally, an Attorney General may issue an opinion under the Public Information Act that is relevant to juvenile law. Those opinions are identified as in this example: Attorney General Open Records Decision No. OR 1999-0978 (1999).

E. Terminology

The terminology used in the juvenile justice system differs from the criminal justice system. The person who is the subject of the juvenile court proceedings is identified in different ways, simply to minimize monotony. Used interchangeably are "juvenile," "respondent," "child," "youth," "defendant," and "appellant." When a juvenile is taken into custody, he or she is "detained" as opposed to "arrested." A juvenile is not "convicted" of delinquent conduct or conduct indicating a need for supervision (CINS) like a defendant is convicted in the criminal justice system; instead, he or she is "adjudicated" for delinquent conduct or CINS. This is an important distinction and can make all the difference when applying for a job or an educational program.

This book contains references to the Texas Juvenile Probation Commission, Texas Youth Council, Texas Youth Commission, and Texas Juvenile Justice Department. Whenever possible, it strives to use the name of the agency as it existed at the time of the event being described.

The Texas Youth Development Council was established by the legislature in 1949 by the Gilmer Aiken act. In 1957, it became the Texas Youth Council, and in 1983, it became the Texas Youth Commission. The Texas Juvenile Probation Commission was established in 1981 to replace the Community Services Administration portion of the Texas Youth Council. In 2011, the Texas Youth Commission and Texas Juvenile Probation Commission were abolished and their functions were combined in the newly created Texas Juvenile Justice Department.

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This chapter deals with the way in which the judiciary in Texas is organized with respect to the juvenile justice system. Which judges can hear juvenile cases? Which judges can conduct detention hearings? What is the authority and role of the juvenile court referee, associate judge, or master? What does the juvenile board do?

A. The Juvenile Board

A juvenile board can be thought of as a committee of judges in each county whose responsibility is to oversee the operations of the juvenile justice system in that county. The juvenile board is the board of directors of "Juvenile Justice, Inc.," while the chief juvenile probation officer is the chief executive officer.

Creation. Juvenile boards are created: (1) by local legislation; (2) by operation of the Family District Court Act; or (3) by a provision of general applicability enacted in 1983.

Many juvenile boards are created by local legislation—each statute having applicability only to one county. Although the statutes are generally the same, there are some minor differences, and the particular statute creating the juvenile board for a particular county must be consulted to determine the membership and powers of any particular juvenile board. Those provisions can be found in Human Resources Code Chapter 152. The counties are arranged alphabetically.

In 1977, the legislature passed the Family District Court Act, which converted domestic relations and statutory juvenile courts into family district courts and provided for the creation of new family district courts. The act also created juvenile boards in counties in which family district courts were created and specified the membership and powers of those boards. Government Code Section 24.606; Human Resources Code Sections 152.0051 through 152.0055. Therefore, the Family District Court Act must be consulted to determine the membership of juvenile boards in those counties. There are over 30 family district courts. In some counties, membership and other provisions as specified by the Family District Court Act have been modified by local legislation. See Government Code Sections 24.601, et. seq.

By 1983, many counties had juvenile boards, but some did not. That year, the legislature created a juvenile board in every county that did not already have one. Human Resources Code Sections 152.0031 through 152.0040. Juvenile boards that had earlier been created by local legislation or the Family District Court Act continue to exist under the terms of the particular statutes creating them. Further, in the future, any county may seek local legislation to design a juvenile board specifically for that county; in that event, the local statute will determine the membership and powers of the board. See Attorney General Opinion No. LO 98-073 (1998), which states that the local statute creating the Henderson County Juvenile Board governs over the more general provisions of Government Code Section 24.306. The local statute determines membership on that juvenile board.

Membership. Juvenile board legislation determines the membership of the juvenile board. Usually all district court judges, the county judge, and judges of statutory courts, such as county courts-at-law, are made members of the juvenile board; with respect to the latter, statutes sometimes include only those judges actually hearing juvenile cases. For example, Human Resources Code Section 152.0032(a), applicable only to counties that do not have juvenile boards created by Subchapters C or D in Chapter 152, provides that district judges, the county judge, and any judge of a statutory court designated as a juvenile court will serve on the board. Some juvenile board statutes authorize public members. If there is a conflict between a membership provision applicable to more than one county and a provision applicable to only one county, the latter controls without regard to which provision was enacted later.

Members of the juvenile board ordinarily receive a salary supplement from the county for service on the board. The amount of the supplement is usually expressed in the local statute creating each juvenile board. When expressed, the amount is sometimes set as a minimum, sometimes as a maximum, and sometimes as a range.

In 2011, the legislature amended Section 24.025(b) of the Government Code to entitle district judges to receive payment of supplemental compensation from the county in an amount equal to that received by other judges who serve on the juvenile board.

The Attorney General examined other juvenile board compensation and concluded that the supplemental income received by a district judge for service on the juvenile board includes medical insurance authorized under Local Government Code Section 157.002. The commissioners court, however, has general discretion to decide

whether to discontinue medical coverage for juvenile board members. The local enabling legislation must be examined to determine whether the commissioners court has other express statutory authority to provide coverage or set compensation. Attorney General Opinion No. GA-0715 (2009).

Advisory Council. Human Resources Code Section 152.0010 originally required each juvenile board to appoint an advisory council, establish the number of citizen members, and set the term of service. In 1995, the legislature provided that four of those members must be a prosecuting attorney, a mental health professional, a medical health professional, and a representative of the education community. Human Resources Code Section 152.0010(a).

In 2001, the legislature amended Section 152.0010 to make the creation and use of an advisory council discretionary. Mandating a citizen advisory body without specific need is counter-productive because of how difficult it makes marshaling the support of the relevant community when that support is actually needed. A juvenile board can now create an advisory council on a permanent basis or only when needed for a particular purpose.

Personnel and Budgeting. Juvenile board legislation usually gives the juvenile board the power to select and employ the chief juvenile probation officer for the county and to approve the chief's selection of all other departmental personnel. In addition, the juvenile board is empowered to approve expenditures from the fund created by state aid and from other sources, such as grants and probation supervision fees. Finally, the juvenile board determines the level of funding for the juvenile probation system from county funds, subject to limited review by the commissioners court.

Human Resources Code Section 152.0007 establishes the basic responsibility of the juvenile board. It succinctly states:

> (a) The juvenile board shall:
>
> (1) establish a juvenile probation department and employ a chief probation officer who meets the standards set by the Texas Juvenile Justice Department; and
>
> (2) adopt a budget and establish policies, including financial policies, for juvenile services within the jurisdiction of the board.

In other words, the board sets the budget and hires the chief. The chief does everything else. If the board is not satisfied with the performance of the chief, it should discharge the chief and hire a new one. The board should not be involved in the day-to-day operation of the probation department nor in the many hiring and other personnel decisions that must be made.

In 2001, the legislature amended Human Resources Code Section 152.0008(a) to define more clearly the sphere of authority of the chief:

> The chief juvenile probation officer may, within the budget adopted by the board, employ:
>
> (1) assistant officers who meet the standards set by the Texas Juvenile Justice Department; and
>
> (2) other necessary personnel.

Approval of hiring decisions by the juvenile board is not required or authorized. If the hiring and firing decisions of the chief do not please the board, it is free to discharge the chief. The county juvenile board also has authority to hire "other necessary personnel," such as a full-time in-house counsel to the juvenile board and juvenile probation department, if it determines that the positions are necessary to fulfill its legislative mandate to provide juvenile services. Attorney General Opinion No. GA-1085 (2014).

Many specific juvenile board statutes in Chapter 152 of the Human Resources Code have exempted the board from Sections 152.0007 and 152.0008. To address these exemptions, a 2001 bill contained a provision in Section 152.0014 that would have provided that the amendments to 152.0007 and 152.0008 apply regardless of any contrary provisions in the chapter relating to specific juvenile boards. Unfortunately, the proposed Section 152.0014 did not pass. So, legally, Sections 152.0007 and 152.0008 do not apply to many juvenile boards. In other words, without the proposed Section 152.0014, the 2001 amendments made to 152.0007 and 152.0008 have no legal effect in those jurisdictions. Despite that fact, it is recommended for efficiency reasons that a juvenile board should operate as envisioned by the language contained in Sections 152.0007 and 152.0008.

Budget Review by Commissioners Court. Human Resources Code Section 142.002(a) provides:

> A juvenile board may, with the advice and consent of the commissioners court, employ probation

officers and administrative, supervisory, stenographic, and other clerical personnel necessary to provide juvenile probation services according to the standards established by the Texas Juvenile Justice Department and the local need as determined by the juvenile board.

Attorney General Opinion No. MW-587 (1982) states that, under this language, the juvenile board has the authority to set the salaries of probation department personnel to be paid from county funds, subject to review by the commissioners court only for abuse of discretion by the juvenile board.

In 1995, the legislature, without repealing or amending Section 142.002(a), enacted Human Resources Code Section 152.0012:

> The juvenile board shall prepare a budget for the juvenile probation department and the other facilities and programs under the jurisdiction of the juvenile board. The commissioners court shall review and consider only the amount of county funds derived from county taxes, fees, and other county sources in the budget. The commissioners court may not review any part of the budget derived from state funds.

The purpose of this provision was to restrict commissioners court review of the juvenile budget to only those items derived from county funds. As to those items, the provision's purpose was not to disturb the previous law under which the juvenile board established the budget and the commissioners court reviewed it only for abuse of discretion, but rather was to continue that tradition. For a statement of this legislative intent, see *Special Legislative Issue,* 12 State Bar of Texas Juvenile Law Section Report 86, No. 3 (August 1995).

In 1997, the legislature, without repealing or amending either of the two previous provisions, enacted Local Government Code Section 111.094 to provide, the "commissioners court in preparing the county budget shall determine the amount of county funds to be spent for the juvenile probation department in the county budget." Regarding that statute, the Attorney General has stated:

> Under this provision...the county may only determine the total dollar amount of county funds allocated to the [juvenile probation] department. It may not determine the particular purposes or amounts of any expenditures from these or any other funds the department receives.

Attorney General Opinion No. DM-460 (1997).

Section 223.002 of the Human Resources Code ties eligibility to receive full state funding through the Texas Juvenile Justice Department to the effort of the county and the local juvenile board to maintain a minimum level of financial support for the local juvenile justice system. As a means of implementing Section 223.002, the state financial assistance contract between TJJD and local juvenile boards also requires the county fiscal officer to certify, on behalf of the local juvenile board, that the county will continue to fund juvenile justice programs and services at a level that is at least equal to the amount funded for services in the fiscal year 1994. The county and juvenile board must also adhere to other contractual provisions that establish financial match requirements and minimum funding levels for juvenile probation salaries. For a fuller discussion of the original 1997 legislation, See *Special Legislative Issue,* 11 State Bar of Texas Juvenile Law Section Report 124-25, No. 3 (August 1997).

In 1997, the Attorney General issued an opinion that reads like a Declaration of Independence for juvenile services. The Attorney General stated that a juvenile probation department is not a unit of county government but is a separate and independent local governmental entity. Indeed, it is a "specialized local entity" under Local Government Code Section 140.003(a)(2). Since the juvenile probation department is not a unit of county government, the Attorney General continued, the county is not liable on any contracts entered into by the juvenile probation department and the department may enter into contracts without obtaining commissioners court approval. The juvenile board is also independent of the county and can contract with a school district for Juvenile Justice Alternative Education Programs (JJAEPs) without obtaining approval from the county commissioners. The juvenile probation department may spend funds from its budget, whether the funds are derived from state sources, county sources, or otherwise, without securing the approval of the commissioners. Finally, the Attorney General characterized the role of the commissioners in the juvenile services budgetary process, even in light of the 1997 Local Government Code enactment, as extremely limited:

> The [juvenile probation] department is funded with both county and state funds.... Although the [juvenile] board is required to submit the department's budget to the commissioners court, the latter's authority over the budget is limited.... A commissioners court has no authority to consider or review the portion of the department budget funded with state funds.... With respect to the items funded by the county, the commissioners court's authority has been limited to approving and funding the budget unless

> the commissioners court can show that the board has abused its discretion.... But under recent [1997] legislation, the county determines the "amount of county funds to be spent for the juvenile department in the county budget."... Under this provision, however, the county may only determine the total dollar amount of county funds allocated to the department.... It may not determine the particular purposes or amounts of any expenditures from these or any other funds the department receives.

Attorney General Opinion No. DM-460 (1997).

In a subsequent opinion, the successor Attorney General reemphasized the limited role of the commissioners in the juvenile services budgetary process:

> Local Government Code Section 111.094 [added in 1997] gives a commissioners court only the authority to set the dollar amount of the county funds which it will expend on the juvenile probation department. The commissioners court does not have general supervisory authority over the juvenile board, an independent entity, and therefore does not have authority over the board's employment decisions or over individual line items in the budgets of programs under the board's jurisdiction, such as the juvenile probation department or juvenile detention department. The commissioners court's power of review over the juvenile probation department is limited to a review of the amount of county funds in that department's budget on an abuse of discretion standard. Consequently the juvenile board, and not the commissioners court, has authority over the employment decisions, travel policies, and general management and financial decisions regarding a juvenile probation department, juvenile detention department, or juvenile detention facility. Further, the commissioners court has no authority to approve the expenses of programs under the jurisdiction of the juvenile board before paying such claims, or to approve amendments of the board's budget.

Attorney General Opinion No. JC-0085 (1999); but cf. Attorney General Opinion No. GA-0799 (2010) (Hood County Commissioners Court has authority under Section 152.0034(b) of the Human Resources Code to establish, increase, decrease, or eliminate the compensation paid to the judges serving on the Hood County Juvenile Board).

Control over the Expenditure of Budgeted Funds. In a dispute between the Potter County Commissioners Court and the Potter County Juvenile Board, the Attorney General was asked whether the commissioners court has any control over the expenditure by the juvenile board of funds that are in the juvenile probation department account in the county treasury. In Attorney General Opinion No. JC-0209 (2000), the Attorney General said the commissioners have no control over juvenile board expenditures from that fund. The juvenile probation department fund in a county treasury consists of county, state, federal, and other funds. The role of a commissioners court is restricted to approving the amount of county money that will be contributed to that fund based on the budget presented by the juvenile board. The Attorney General explained the budgeting and expenditure processes:

> [E]ach juvenile probation department in the state is funded with both state and county funds. The commissioners court determines the amount of county funds that will be budgeted to the juvenile probation department in each budget year. [Section 111.094, Tex. Loc. Gov't Code (1999).] The juvenile board prepares a budget for the juvenile probation department. [Section 140.004(b)(2), Tex. Loc. Gov't Code (1999).] The commissioners court may review only those portions of the juvenile board's budget funded with county funds. [Section 152.0012, Hum. Res. Code (1999).] After the juvenile probation department budget is finalized, a juvenile board must expend funds according to the budget. Any budget amendments must be considered and approved in a public meeting. See Tex. Att'y Gen. Op. No. JC-0085 (1999) at 3-4.
>
> A commissioners court's control over a juvenile probation department's expenditures is confined to this limited budget review before the commencement of the fiscal year. A juvenile board or juvenile probation department is a "specialized local entity" under section 140.003 of the Local Government Code. Pursuant to Section 140.003, once the county funds budgeted for the juvenile probation department are transferred to the department, they are deposited in a special account in the county treasury, along with state funds allocated to the department. At this point, the funds become funds of the juvenile probation department to be disbursed as directed by the juvenile board and lose their character as county funds. [Section 140.003(f) Tex. Loc. Gov't Code (1999) ("Each specialized local entity shall deposit in the county treasury of the county in which the entity has jurisdiction the funds the entity receives. The county shall hold, deposit, disburse, invest, and otherwise care for the funds on behalf of the specialized entity as the entity directs.")]. Although disbursements from the account are subject to review and the approval of the county auditor, see Tex. Loc. Gov't Code Ann. §140.003(g) (Vernon 1999)…the commissioners court

lacks authority to review juvenile probation department expenditures, see Tex. Att'y Gen. Op. Nos. JC-0085 (1999) at 3; DM-460 (1997) at 8.

As we have explained, funds on deposit in the juvenile probation department's account in the county treasury are not county funds. The Juvenile Board may pay its legal fees from available funds in this account. Furthermore, it may do so without the approval of the Commissioners Court. If an amendment to the juvenile probation department budget is required in order for the Juvenile Board to disburse funds to pay its attorney's fees, the Juvenile Board must amend the budget as provided in Section 140.004 of the Local Government Code.

Attorney General Opinion No. JC-0209 at 4-5 (2000).

Other Powers and Duties. In addition to the powers of the juvenile board provided by the various provisions in the statutes creating them, Title 3 of the Family Code grants certain powers and duties to the juvenile board. The most important are listed here:

(1) The juvenile board is required to "report annually to the commissioners court on the suitability of the quarters and facilities of the juvenile court and may make recommendations for their improvement." Section 51.05(b).

(2) The juvenile board designates which court or courts shall be the juvenile court or courts for the county. Section 51.04(b). See Section B of this chapter.

(3) The juvenile board selects and employs the juvenile court referee, if any, for the county. Sections 51.04(g), 54.01(l). See Section D of this chapter.

(4) The juvenile board must "personally inspect all public or private juvenile pre-adjudication secure detention facilities that are located in the county at least annually and...certify in writing...that the facilities are suitable or unsuitable for the detention of children." Section 51.12(c). See Chapter 6.

(5) The juvenile board must "personally inspect all public or private juvenile post-adjudication secure correctional facilities that are not operated by the Texas Juvenile Justice Department and that are located in the county at least annually and...certify in writing...that the facility or facilities are suitable or unsuitable for the confinement of children." Section 51.125(b). See Chapter 6.

(6) The juvenile board in each county must "personally inspect, at least annually, all nonsecure correctional facilities that are located in the county and…certify in writing…that the facilities are suitable or unsuitable for confinement of children." Section 51.126(b).

(7) The juvenile board must, in cooperation with each law enforcement agency in the county, adopt guidelines for the disposition of a child by police agencies under informal disposition and first offender programs. Section 52.032. See Chapter 17.

(8) The juvenile board is responsible for the compilation and maintenance of records under the statewide Juvenile Justice Information System (JJIS) and for the transmittal of local records to the Texas Department of Public Safety (DPS); it is also required to give DPS access to local records for auditing to determine completeness and accuracy of the information reported to the statewide system. Section 58.105. See Chapter 15.

(9) The juvenile board is responsible for approving any agreement between the juvenile probation department and the prosecuting attorney that departs from the statutory default plan allocating power to make intake decisions. Section 53.01. See Chapter 5.

(10) The juvenile board must require the juvenile probation department to report progressive sanction disposition data to TJJD electronically in a format and according to timeframes specified by TJJD. Section 59.011. See Chapter 12.

(11) The juvenile board may, under certain conditions, enter into a contract with a board of county school trustees or a school district board of trustees for all or any part of a district's public school transportation. Section 34.008 of the Education Code.

In addition to these specific responsibilities, the juvenile board is expected to assume a leadership role in the county with regard to identifying needs for services and facilities for juveniles and seeing that those needs are met. In the words of Human Resources Code Section 152.0007(a)(2), "the juvenile board shall...adopt a budget and establish policies, including financial policies, for juvenile services within the jurisdiction of the board."

It should be noted, however, that the county enabling legislation in Chapter 152 of the Human Resources Code ostensibly exempts juvenile boards from the performance

of a variety of duties under the general provisions in Section 152.0007 of Subchapter A. In 2014, the Attorney General opined that Section 152.0001(b) makes clear that "a statement…that a general provision does not apply to a specific juvenile board does not affect the application of laws on the same subject that may affect the board." In fulfillment of its overarching statutory mandate to employ personnel and to provide juvenile services, a juvenile board has authority to adopt written department policy and a personnel policy manual for use by the juvenile probation department. Attorney General Opinion No. GA-1069 (2014).

Re-Allocating Duties from Juvenile Courts to Juvenile Boards. In 2001, the legislature made a number of changes in law regarding what agency or official in the juvenile justice system has the responsibility to make certain designations of essentially an administrative nature. When Title 3 was enacted in 1973, there was a juvenile court in each county but only a few counties had juvenile boards. Thus, in numerous places in Title 3, the legislature gave administrative responsibilities to the juvenile court. In other places, it gave administrative responsibilities to the juvenile board or, if there was none, to the juvenile court or to the district and county judges in the county.

The practice of designating more than one court to be a juvenile court in a county has become almost universal. Now, it is rare for a county not to have at least two courts designated as eligible to hear juvenile cases. Under the current circumstance, then, when legislation gives certain administrative responsibilities to "the juvenile court" it is unclear which court is being referenced. Does that language refer to all the courts designated as eligible to hear juvenile cases? Does it refer only to those courts that hear such cases on a regular basis? To which courts does such language refer in a county in which judges rotate in hearing juvenile cases? Does it include judges who ordinarily do not hear juvenile cases but who may do so occasionally in a relief capacity? There is also a risk that one judge may make one decision and later another judge may inadvertently make a different decision.

The legislature created a juvenile board for each county in 1983. Now, each county has one juvenile board. The membership of each juvenile board is fixed by statute. When the legislature gives a function to a juvenile board, it is clear who has the authority and responsibility to discharge that function.

Furthermore, at times, there may be incompatibilities between a judge hearing a juvenile case and setting policies for the juvenile justice system. Sometimes, the judge is required to pass on the lawfulness of such policy decisions, which can become awkward. For example, a juvenile court judge may designate a certain space as a juvenile processing office under Family Code Section 52.025, but later in a suppression hearing may be asked to decide whether the designation was authorized by statute. Shifting responsibility for making that designation to the juvenile board does not eliminate the conflict—after all, it is likely that the juvenile court judge is a member of the juvenile board—but it does reduce it. There should be, in general, a desire to reduce the areas in which there can arise a direct, substantial conflict between the role of the juvenile court judge as policy maker and his or her role as adjudicator of juvenile litigation.

For these reasons, in 2001, the legislature amended the Juvenile Justice Code in a number of places to shift responsibility for making policy decisions from the juvenile court to the juvenile board. Additional changes were made in 2003. These provisions are collected here:

(1) Section 51.02(12) gives the juvenile board the responsibility for determining which office or official should be the recipient of juvenile referrals.

(2) Section 51.04(g) gives the juvenile board the authority to employ a referee; previously that section gave the authority to "the juvenile board or if there is no juvenile board, the juvenile court."

(3) Section 51.12(b) gives the juvenile board the authority to "control the conditions and terms of detention and detention supervision" in the designated juvenile detention facility.

(4) Section 52.01(c)(2) requires that law enforcement warning notices must be approved by the juvenile board, not the juvenile court.

(5) Section 52.01(c)(6) requires law enforcement to send a copy of a warning notice it has issued to the office or official designated by the juvenile board. Section 52.01(d) provides that a warning notice filed with the office or official designated by the juvenile board may be the subject of further action.

(6) Section 52.02(a)(2) requires a law enforcement officer who has taken a child into custody to bring the child to the office or official designated by the juvenile board. Section 52.02(a)(3) requires such an officer to bring the child to a detention facility designated by the juvenile board. Section 52.02(b)(2) requires that a law enforcement officer taking a child into custody

must notify the office or official designated by the juvenile board.

(7) Section 52.025(a) permits the juvenile board to designate a juvenile processing office and to limit the activities that may occur therein.

(8) Section 52.03(d) requires that a law enforcement agency must report information on dispositions at least annually to the office or official designated by the juvenile board.

(9) Sections 52.04(a) and (d) provide that the office or official to which a juvenile court referral may be made is determined by the juvenile board.

(10) Sections 52.041(c) and (d) require that the office or official designated by the juvenile board must report on the status of a case to the school district that expelled a child and subsequently notified the juvenile system.

(11) Section 53.01(a) provides that the office or official designated by the juvenile board must conduct the preliminary investigation of a referral. Section 53.01(c) requires the office or official designated by the juvenile board to notify parents of a referred child's whereabouts when police have not done so.

(12) Section 53.03(d) authorizes the juvenile board to adopt a fee schedule for deferred prosecution cases.

(13) Section 54.01(l) authorizes the juvenile board to appoint a detention referee. Prior law provided that the juvenile board, "or if there is none, the juvenile court" appoint a referee.

After the enactments in 2001 and 2003, many local juvenile boards adopted a continuing resolution to ratify prior actions or those taken by the juvenile court in order to ensure that the decisions of each entity complied with the law.

Juvenile Board Policy on Pre-Trial Detention of Certified Youth. In 2011, the legislature conferred additional policymaking responsibilities upon the juvenile board regarding the pre-trial detention of certified youth under the age of 17. Human Resources Code Section 152.0015 provides:

> A juvenile board shall establish a policy that specifies whether a person who has been transferred for criminal prosecution under Section 54.02, Family Code, and is younger than 17 years of age may be detained in a juvenile facility pending trial as provided by Section 51.12, Family Code.

Within months of the 2011 amendments to Section 152.0015 of the Human Resources Code, the Attorney General was asked to clarify related amendments in Sections 51.12(f) and (h) and Article 4.19 of the Code of Criminal Procedure. The opinion raised implications for juvenile board policies pertaining to the pre-trial conditions of confinement of youth who have been certified to stand trial as an adult. The Attorney General concluded that Article 4.19 of the Code of Criminal Procedure does not permit the detention of a certified youth under the age of 17 in a facility that does not comply with the requirements for the sight and sound separation of children under Section 51.12(f). Attorney General Opinion GA-0927 (2012). See Chapter 6.

Article 4.19 of the Code of Criminal Procedure was amended in 2013 to codify Attorney General Opinion GA-0927 into law. The legislature deleted the phrase "and treated as an adult as provided by this code" from Article 4.19 to clarify that a person under the age of 17 who is held in a county jail must be sight and sound separated from adults to the extent required under Family Code Section 51.12(f). Subsection (b) specifies that the judge of the criminal court must order a person who turns 17 pending trial to be transferred from the juvenile detention facility to the county jail.

Each juvenile board should systematically address how it wishes to use the powers authorized throughout the Family Code and the Human Resources Code.

Juvenile Board Policies and Programs. In 2013, the legislature added two sections to the Human Resources Code that require local juvenile boards to establish new policies and programs. Section 152.0017 relates to the authority of local juvenile boards to establish a trafficked-persons program in order to provide assistance, treatment, and rehabilitation for children believed to be victims of human trafficking who are alleged to have engaged in or who have been adjudicated for delinquent conduct or conduct indicating a need for supervision. The primary focus of the trafficked persons program is to provide children with prompt access to integrated services and placements as well as to ensure regular court appearances for monitoring and compliance purposes.

Section 152.0016 authorized a five-year pilot program to allow youth to be committed to a community-based post-adjudication secure correctional facility in the same manner as commitment to the Texas Juvenile Justice

Department. As filed, the legislation would have applied to 12 counties comprising nearly one-half of the state's post-adjudication secure correctional facilities. In the final version of the bill, the legislature opted to limit the scope of the applicability of the pilot program to Travis County, the only county that met the population threshold of more than one million and less than 1.5 million.

The basic concept of the Travis County pilot program allows felony offenders to be committed to a community-based post-adjudication secure correctional facility closer to home. Section 152.0016 of the Human Resources Code requires the county juvenile board to establish a policy to authorize use of the local post-adjudication secure correctional facility to commit TJJD-eligible felony offenders and to operate a parole supervision program. Committed felony offenders must be treated "in the same manner" as youth who are committed to TJJD. The local juvenile board is required to take steps to implement the program including the requirement to develop rules that: (1) establish a minimum length of stay; (2) comply with the statutory release requirements for determinate sentence offenders; (3) require home studies to be conducted prior to release of youth on parole supervision; (4) set forth parole revocation requirements; (5) outline proceedings for the release or transfer of determinant sentence offenders; and (6) develop a comprehensive plan to reduce recidivism and ensure successful reentry and reintegration into the community.

Under the original 2013 legislation, the Travis County pilot program was authorized for a five-year period set to end on December 31, 2018. A bill filed during the 2017 legislative session to eliminate the expiration provision did not pass.

Post-Discharge Services Program. Juvenile board enabling statutes must keep pace with the ever-evolving policy and programmatic needs of the juvenile justice system. In 2017, Section 142.007, Human Resources Code, was added to authorize juvenile boards and juvenile probation departments to provide post-discharge (i.e., aftercare services) for six months after the completion of probation. Bexar County proposed this concept in an effort to provide substance abuse, behavioral and mental health services, education mentoring, and job training to youth in the months following discharge. Research suggests that during this transition period, youth are at the highest risk of re-offending. This discretionary program may be established by juvenile boards and probation departments if funds are available and without regard to the child's age at the time of discharge. Juvenile probation departments are prohibited from ordering participation in the program.

Juvenile Board Policies for Juveniles Younger Than 12 Years of Age. In 2017, legislation was enacted to divert juveniles under the age of 12 from the traditional juvenile court path and require referral to a community resources coordination group or other community provider. As part of the bill making that change, Section 152.00145, Human Resources Code was added, requiring the juvenile board to establish policies that prioritize diverting 10- and 11-year-olds from referral to a prosecuting attorney and that limit detention of such children to circumstances of last resort.

Juvenile Board Open Government Training. In 2005, the legislature enacted Government Code Sections 551.005 and 552.012 to promote openness and encourage compliance with open government laws. The statutes establish the requirements for public officials to obtain training in open meetings and public information. The substantially similar provisions require the Attorney General to make training available and to approve any internal training offered by a juvenile board or other alternate providers, with at least one hour of training made widely available on videotape or at no cost. The open government instructional curriculum must include basic topics such as general background, legal and procedural requirements, applicability to governmental bodies, the role of the attorney general, and penalties for non-compliance. Upon completing the training requirement, the juvenile board is required to maintain and make available for public inspection a copy of the certificate of course completion provided by the Attorney General or training provider. Failure to complete the mandatory training does not impose specific penalties nor does it affect the validity of any action taken by the juvenile board. The certificate of course completion is admissible as evidence in a criminal prosecution but is not prima facie evidence that a public official knowingly violated any open government laws. The Attorney General's website provides a link to open government training.

B. The Juvenile Court

The Family Code does not itself create any courts. However, it does provide a means by which existing courts may be designated to exercise juvenile jurisdiction. To exercise juvenile jurisdiction, a court: (1) must be eligible for designation under the Family Code; (2) must not be made ineligible by the statute creating the specific court; and (3) must be specifically designated by the juvenile board to exercise juvenile jurisdiction. According to the Office of Court Administration, there are approximately 843 juvenile court judges in Texas, including associate judges, magistrates, and referees.

Which Courts Are Eligible to Be Designated. The juvenile board may designate any of the following courts as the juvenile court in a county: (1) district court; (2) criminal district court; (3) domestic relations court; (4) statutory juvenile court; (5) constitutional county court; or (6) county court-at-law. Section 51.04(b). In 1977, domestic relations courts and statutory juvenile courts were converted into family district courts. Family district courts have the full jurisdiction of a district court but are directed to give docket preference to family law cases, so those courts, because they are district courts, remain eligible to be designated as a juvenile court. Government Code Section 23.001 (any district court exercising any of the constitutional jurisdiction of a district court has juvenile jurisdiction and may be designated a juvenile court). Justice and municipal courts are not eligible to be designated as juvenile courts.

Under Government Code Section 23.001, added in 1979, any district court, county court, or statutory county court is given juvenile jurisdiction and may be designated by the juvenile board as one of the juvenile courts for the county. The 1979 amendment to the Government Code abrogated *E.S. v. State*, 536 S.W.2d 622 (Tex.Civ.App.—San Antonio 1976, no writ), which held that a statutory county court can have juvenile jurisdiction only if the statute creating that court expressly conferred juvenile jurisdiction upon it.

In 2013, the legislature expanded the courts that are eligible to preside over children referred for juvenile cases who are believed to be victims of human trafficking. Section 51.04(i) authorizes the local juvenile board to designate courts with shared jurisdiction over Title 5 proceedings (i.e., child abuse cases) to also serve as a juvenile court or alternative juvenile court. In a related provision, Section 51.0413 was added to permit a court that does not have jurisdiction over Title 5 matters to transfer any case involving a child believed to be a victim of human trafficking to a designated court with shared jurisdiction under Section 51.04(i).

Eligible Court Must Not Be Excluded Under Organic Statute. Despite the language of Section 23.001 of the Government Code, if a special statute creating a particular court is inconsistent with Section 23.001, the special statute controls. Thus, before an amendment in 1993, the Taylor County Court lacked juvenile jurisdiction and, therefore, could not have been designated by the juvenile board as a juvenile court for that county because Government Code Section 26.321 then stated, "The County Court of Taylor County has the general jurisdiction of a probate court but has no other criminal or civil jurisdiction." Attorney General Opinion No. LO 92-14 (1992). Therefore, the specific statute creating a court must be consulted to ascertain whether that court has not been deprived of juvenile jurisdiction and remains eligible to be designated a juvenile court by the juvenile board. See, for example, Section 24.580, Government Code (creates the 436th Judicial District Court in Bexar County and mandates that it give preference to juvenile matters under Title 3 of the Family Code, effective October 1, 2009 and subsequently amended in 2011).

Designating Juvenile Courts from Among Eligible Courts. Family Code Section 51.04 sets up a local option system on a county-by-county basis for determining what court or courts, of those having juvenile jurisdiction, will be designated the juvenile court or courts for each county.

Each county has a juvenile board. The juvenile board is given the power to designate the juvenile court for its county. The board may change the designation of the juvenile court "from time to time," but "there must be at all times a juvenile court designated for each county." Section 51.04(e). That section further states:

> It is the intent of the legislature that in selecting a court to be the juvenile court of each county, the selection shall be made as far as practicable so that the court designated as the juvenile court will be one which is presided over by a judge who has a sympathetic understanding of the problems of child welfare and that changes in the designation of juvenile courts be made only when the best interest of the public requires it.

Changing Designations. Care must be taken when the designation of the juvenile court is changed because, even if a court has juvenile jurisdiction under the Government Code by its own organic act, it may not exercise that jurisdiction unless it has been designated under the Family Code by the juvenile board as a juvenile court. *G.C.D. v. State*, 577 S.W.2d 302 (Tex.Civ.App.—Beaumont 1978, no writ).

Proof of Designation. Does the State have to prove that the court hearing a juvenile case has been designated by the juvenile board? In *Contreras v. State*, 998 S.W.2d 656 (Tex.App.—Amarillo 1999), *rev'd on other grounds by* 67 S.W.3d 181 (Tex.Crim.App. 2001), an appeal from a conviction of a certified juvenile, the appellant argued that there was no proof in the record that the court that conducted certification proceedings and ordered her to be tried as an adult had been designated by the juvenile board to exercise juvenile jurisdiction. The Court of Appeals held that the burden is on the juvenile to show that the court hearing the case had not been designated as the juvenile

court. The statutory county court that certified the appellant recited in its order that it was "sitting as a juvenile court," which is accepted by the Court of Appeals as proof of designation in the absence of any evidence to the contrary. See also *In the Matter of R.A.B.*, 525 S.W.2d 892 (Tex.Civ.App.—Corpus Christi 1975, no writ), relied upon by the Amarillo court.

Multiple Designations. Although Section 51.04(e) requires that there must be a juvenile court designated for each county, a county may have more than one court designated as the juvenile court. Section 51.04(b). If the constitutional county court is designated as a juvenile court, then Section 51.04(c) requires that at least one alternate court also be designated.

Indeed, there is no reason why each eligible court in a county could not be designated as a juvenile court. If that were done, the juvenile docket could be allocated among the designated courts by agreement among the affected judges. Such an arrangement would promote maximum flexibility and would, for example, permit judges to rotate a juvenile docket. It would also permit courts to substitute for the primary juvenile court when the judge of the primary court is unavailable without the requirement of a specific juvenile board designation. Many urban counties have adopted a multiple-designation practice. If considering this approach, juvenile boards should be cognizant of whether each judge is one "who has a sympathetic understanding of the problems of child welfare," as expressed in Section 51.04(e).

Transfer of Cases and Exchange of Benches. Once a case has been filed in a juvenile court, there are two ways in which flexibility in judicial assignment to handle that case can be effected: (1) transfer of the case from one court to another; or (2) exchange of benches by the judges.

In the first situation, the case is transferred from one court to another and heard by a different judge than the one presiding over the court in which it was filed. In the second situation, the case stays in the court in which it was filed but is heard and decided by a judge of another court sitting as the judge of the court in which the case was filed.

The result is exactly the same; the only difference is whether the case goes to the judge (transfer) or the judge goes to the case (exchange of benches). In an exchange of benches, the judge hearing the case hears it as the judge of the court in which it originally was filed. Of course, there is no requirement that he or she must hear the case in the courtroom assigned to that court, although that may be done.

District court judges in counties with two or more district courts can transfer cases between district courts or exchange benches between district courts under authority of Government Code Section 24.003 and Texas Rules of Civil Procedure 330(e). However, there is no authority for the district court to transfer a case to a county court-at-law. *J.W.B. v. State,* 561 S.W.2d 958 (Tex.Civ.App.—Houston [14th Dist.] 1978, no writ).

In 2013, the legislature changed Government Code Section 24.003 by adding subsection (b-1) to prohibit a district court judge from transferring a civil or criminal case to another district court in the same county without the consent of the judge of the court to which it is transferred. In addition, subsection (b) was revised to exclude the transfer to another district court judge of a suit affecting the parent–child relationship in a court with continuing exclusive jurisdiction.

The judges of constitutional county courts and statutory county courts may also transfer cases to the other court and exchange benches with each other. Government Code Section 74.121(a). Further, the judge of a statutory county court may transfer a case to the district court as long as the district court would have jurisdiction over it, as it would in the instance of a juvenile case. Government Code Section 74.121(b)(1).

The authority to exchange benches does not permit the judge of one level of court to sit in a different level of court. For example, the judge of a county court-at-law could not sit on the district court bench and adjudicate a juvenile case filed in that court. Nor could a district court judge sit on a county-level bench.

In 2011, a number of counties enacted legislation in Chapter 25 of the Government Code to expressly authorize the transfer of cases and exchange benches, notwithstanding certain limitations set forth in Government Code Section 74.121(b)(1).

Exchange of benches is the mechanism available if the judge of the court in which a case is filed dies, becomes disabled, or is otherwise unavailable to handle the case. Government Code Sections 24.003(c) (district judges), 74.121(a) (county judges). Exchange of benches can result in the whole case or only part of it being handled by a new judge. No formal order is required to effect an exchange of benches. *Ryan v. State*, UNPUBLISHED, No. 01-96-00592-CR, 1997 WL 187306, 1997 Tex.App.Lexis 2050, Juvenile Law Newsletter ¶ 97-2-21 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd).

There is no requirement that the judge, who by exchange of benches sits in the juvenile court where the case is filed, must be judge of a court designated by the juvenile board to hear juvenile cases. That judge is hearing the juvenile case in the court in which it originally was filed (which presumably was designated to hear juvenile cases) not in his or her own court. *In re C.G.*, UNPUBLISHED, No. 04-01-00218-CV, 2001 WL 1410519, 2001 Tex.App.Lexis 7666, Juvenile Law Newsletter ¶ 01-4-50 (Tex.App.—San Antonio 2001, no pet.).

It is easy to confuse the exchange of benches, in which the judge of one court sits as the judge of another court, with the fact that in juvenile cases the judge of a district court, constitutional county court, or statutory county court *sits as a juvenile court*. In all juvenile cases, the judge of a court is sitting as a juvenile court. That is because in Texas there are no courts that are created as juvenile courts. Juvenile jurisdiction is attached to courts that already have the jurisdiction of a district court, constitutional county court, or statutory county court. That is why one often sees an order described as having been entered, for example, by the judge of the "123rd District Court, Sitting as the Juvenile Court of Ajax County, Texas."

Visiting Judges. In addition to transfer of cases and exchange of benches, flexibility in the handling of juvenile cases may be achieved by assigning a visiting judge to the case. Cases may be assigned to visiting judges by the presiding judge of an administrative region. Government Code Section 74.054. Visiting judges may be currently active judges or may be former or retired judges who meet certain requirements. Under Government Code Section 74.053(a), the presiding judge is required, if practicable, to give notice of an assignment to the parties' attorneys. Section 74.053(b) permits a party to preclude a visiting judge from hearing certain cases as long as the parties files a timely objection to the assignment. Each party is entitled to only one objection per case.

The objection must be filed "not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier." Government Code Section 74.053(c). Because juvenile cases are civil in nature [Family Code Section 51.17(a)], either the State or the respondent may object to a visiting judge hearing a juvenile case. *In re M.A.V.,* 40 S.W.3d 581 (Tex.App.—San Antonio 2001, no pet.). If a timely objection is made, the judge must remove himself or herself from the case.

In *M.A.V.* an objection was held to be timely even though it was not made by the respondent until just before the beginning of a certification hearing when the respondent's attorney knew of the assignment for several months. The certification hearing was the first hearing in the case; an earlier conference in chambers did not count as a hearing.

Alternate Juvenile Courts. Before 1987, the Family Code required that more than one juvenile court be designated for a county only if the court designated as the juvenile court was presided over by a judge who was not licensed to practice law in Texas. Section 51.04(d) requires that under those circumstances, an alternate juvenile court be designated and the judge of that court be a licensed attorney. Of the six eligible courts, only the judge of the constitutional county court—the county judge—need not be a licensed attorney. Some county judges are attorneys, but many are not. Before 1987, if the county judge happened to be a licensed attorney, then there was no need to designate an alternate juvenile court.

In 1987, however, Section 51.04(c) was changed to require that, if the county court is designated as a juvenile court, at least one other court also be designated as the juvenile court. Therefore, beginning in 1987, a second juvenile court must be designated even if the county judge is a lawyer. This change was made in the bill that created the determinate sentencing procedure for violent offenders. That bill also provided in Section 51.04(c) that a county court, whether presided over by an attorney or not, does not have jurisdiction over proceedings covered by the Determinate Sentence Act. County judges, whether lawyers or not, can still hear juvenile matters except under that statute. See Chapter 21 for a discussion of the determinate sentencing procedures.

Electing the Alternate Court. Prior to 1993, when a non-lawyer juvenile judge issued an order that was appealable under Section 56.01, the law gave the juvenile a choice: he or she could either appeal the case to the Court of Appeals or demand a "trial de novo before the alternate juvenile court." Section 51.18 (since amended).

In 1993, the legislature abolished the option of trial de novo before the alternate juvenile court. It replaced that option with a requirement that the respondent must elect to be tried by the alternate juvenile court before trial rather than after. If the respondent's attorney fails to file a written motion within 10 days in advance of trial, by default, the case may be presided over by a judge who is a non-lawyer. Section 51.18(c). An appeal lies to the Court of Appeals from final orders of either court, as in other juvenile cases. In 2009, the legislature clarified that a motion

for a new trial seeking to vacate an adjudication must be filed no later than the 30th day after the disposition order is signed and is governed by Rule 21 of the Texas Rules of Appellate Procedure. Section 56.01(b-1).

It should be noted that the election system, like the trial de novo system, does not apply to detention hearings; the election system applies only to "any matter that may lead to an order appealable under Section 56.01," and a detention order is not appealable. Sections 51.18(b) and 56.01(c). Therefore, a juvenile has no authority to reject a county judge in a detention hearing and demand an alternate judge.

Where the Juvenile Court May Sit. Article V, Section 7 of the Texas Constitution requires that proceedings in district courts be held in the county seat of the county in which the case is pending. Does this requirement include a district court sitting as a juvenile court? In *In the Matter of G.C., Jr.*, 980 S.W.2d 908 (Tex.App.—Corpus Christi 1998, pet. denied), the petition was filed in the 103rd District Court of Cameron County sitting as a juvenile court but the adjudication and disposition hearings were conducted at the Juvenile Justice Center in San Benito rather than in the county seat of Brownsville. The Court of Appeals held that, while courts have strictly required that district court proceedings be conducted in the county seat, that requirement does not apply to a district court when it is sitting as a juvenile court: "Juvenile courts are specialized courts created by the legislature.... They are separate from the district courts specifically referred to in article V, section 7." 980 S.W.2d at 909. That is true even when the judge of the juvenile court is sitting by virtue of his or her position as judge of a district court.

C. The Detention Magistrate

When a Magistrate May Be Used. Detention hearings must be held quickly, ordinarily within the second working day after the juvenile is taken into custody. Section 54.01(a). On occasion, and for whatever reason (including being ill, holding court in another county, or on vacation), a juvenile court judge is not available to conduct a detention hearing. Under such circumstances, the Family Code permits the detention hearing to be held before any other judge whose court has been designated as a juvenile court. If there is no other juvenile court designated, or if the judge of that court is also out of the county or otherwise unavailable, then (and only then) any magistrate may conduct the detention hearing. Section 51.04(f). A detention magistrate is also called a "substitute judge." Section 54.01(l).

Who May Be a Detention Magistrate. Although the Family Code does not define a magistrate, Code of Criminal Procedure Article 2.09 defines a magistrate as any judge, including a justice of the peace and a municipal court judge. Any judge, including a justice of the peace or municipal court judge, who is available locally, may sit as a detention magistrate when the judge(s) of the designated juvenile court(s) and all alternate juvenile court judges are out of the county or otherwise unavailable to conduct a detention hearing. The Attorney General has concluded that any magistrate named in Article 2.09 of the Code of Criminal Procedure may be a detention magistrate under the Family Code, whether that judge is a lawyer or not. Attorney General Opinion No. H-1301 (1978).

The Family Code considers that a detention magistrate will be used only when necessary as a result of the unavailability of any juvenile court judge. That means that a determination of unavailability must be made for each detention hearing; in other words, a detention magistrate will not necessarily conduct all subsequent hearings in a case simply because he or she conducted the first one. The detention magistrate may conduct a subsequent detention hearing only if none of the juvenile court judges is available to conduct that hearing at the scheduled time and place.

The Rationale for Detention Magistrates. The Family Code's authorization to use detention magistrates is intended to accommodate the need for prompt detention hearings in rural Texas where the only juvenile court judge may be miles away from the location of the detention hearing. In addition, there is unlikely to be a referee or associate judge to conduct the hearing, and the only judges available locally may be the county judge, municipal court judges, and justices of the peace. The policy position of the Family Code is that it is preferable to have a prompt detention hearing before someone other than the juvenile court judge rather than to postpone the detention hearing because the juvenile court judge is unavailable to conduct it in a timely fashion.

For urban areas of the state, the Family Code contemplates that: (1) the designated juvenile court judge will conduct detention hearings unless the county employs a referee or associate judge to do so; (2) where employed, the referee or associate judge will conduct all, or virtually all, detention hearings; and (3) a detention magistrate will rarely be used in urban areas.

Probable Cause Determination. Section 54.01(o) was enacted in 1995 to codify U.S. Supreme Court requirement that there be a judicial determination of probable

cause within 48 hours of taking a person into custody in order to justify further detention. See Chapter 6.

Section 54.01(o) requires that a "court or referee" make that determination. No hearing or other formality is required for making the determination. Because the probable cause determination must be made within 48 hours (including weekends and holidays) of taking the juvenile into custody, a detention magistrate will be used to make probable cause determinations more often than to conduct detention hearings.

Sometimes, the probable cause determination can be made during the detention hearing, in which case there is no doubt it can be made by the judicial officer conducting that hearing, including a detention magistrate. There is no reason why a detention magistrate cannot qualify as a "court" for purposes of making this determination outside the context of a detention hearing as well. A detention magistrate clearly qualifies as a judicial officer under the decisions of the United States Supreme Court. See Chapter 6.

Mandatory Detention for Firearms Offenses. Law enforcement and intake are prohibited from administratively releasing a child who has been taken into custody for delinquent conduct involving the use, exhibition, or possession of a firearm. Section 53.02(f). Release may be ordered only by a judge. Judicial release may be ordered by a juvenile court judge, a substitute judge (detention magistrate) if no designated juvenile court judge is available, [Section 51.04(f)] or a referee. There is no need for a hearing; release may even be ordered by the judge over the telephone. Section 53.02(f). If the child is not released by a judicial officer and is detained in a secure adult facility, then an accelerated detention hearing must be conducted within 24 hours, excluding weekends and holidays, of the child being taken into custody. Section 54.01(p). Of course, that hearing, like ordinary hearings scheduled no later than the second working day of taking the child into custody, may be conducted by a detention magistrate if no juvenile court judge is available.

If a law enforcement officer, probation officer, or intake officer believes a child taken into custody for delinquent conduct involving a firearm should be released before a detention hearing is scheduled to be held, that person should first seek to contact any of the designated juvenile court judges or referees for telephone release. If none is available, then any detention magistrate in the county may order telephone release. See Chapters 5 and 6.

D. The Juvenile Court Referee, Associate Judge, and Family Law Master

What Is a Referee, Master, or Associate Judge. A referee, master, or associate judge is a person appointed to conduct hearings for a judge and, at the conclusion of the hearings, to make findings of fact and recommendations to the judge. The judge, within limits to be discussed later, is free to accept, reject, or modify the findings and recommendations of the referee or master. The judge decides the case, but he or she does so on the basis of the information provided by the referee, master, or associate judge. It is also the juvenile court judge who decides initially which cases filed in the juvenile court will be heard by the referee, master or associate judge and which will be heard by the judge, subject to the power of the parties to reject the referee, master, or associate judge.

Differences Among Referees, Masters, and Associate Judges. Family Code Sections 51.04(g) and 54.01(l) authorize the juvenile board of any county to appoint one or more referees to conduct detention, adjudication, disposition, and modification hearings under Title 3 of the Family Code.

In a 2011 special session, amendments to the Government Code resulted in the reorganization of the laws affecting the court system and changed other aspects of judicial administration. The legislation contained general provisions governing the appointment, qualifications, and powers of associate judges in civil, criminal, and probate courts, including associate judges for juvenile matters. Many of the individual statutes that created masters, referees, and magistrates in certain counties were repealed in 2011. There are still a few remaining county-specific statutes located in Chapter 54 of the Government Code. As such, the references to the term "master" remain part of the narrative of this edition. Government Code Sections 54.801 through 54.820 establish juvenile law masters in Harris County, and Government Code Sections 54.871 through 54.885 establish a magistrate system that includes juvenile cases in Lubbock County. However, in places where "master" was repealed from the Family Code, the term is no longer used as part of this discussion. That does not mean that a master appointed under those two provisions is not permitted to serve the function of referee or associate judge; it is simply an acknowledgment that the term no longer exists in Title 3, Family Code. There are also provisions in Title 3 that apply to a referee but do not include the term "associate judge." In such instances, only "referee" is used in the discussion. That does not reflect any opinion on whether an associate judge may perform the function; it is an attempt to reflect the laws as written.

In counties in which the commissioners court has authorized an associate judge position, Section 201.302 enacted in 2011, permits a judge of a designated juvenile court to appoint an associate judge to hear juvenile cases. Family Code Sections 201.001 through 201.018 authorize the appointment of associate judges to hear family law cases other than juvenile cases. Nevertheless, many lawyers who are associate judges under these provisions may hold a dual appointment as a referee or master under Title 3 of the Family Code or the Government Code.

The provisions in Subchapter D, Chapter 201 of the Family Code do not apply to a juvenile court master appointed under Chapter 54A of the Government Code. As such, a judicial official who served as a referee or master under prior law now serves as associate judge under the 2011 amendments to Chapter 54A of the Government Code. The associate judge designation for many of these judicial officials more accurately reflects their actual independence and responsibilities in the juvenile justice system than connoted by the title referee or master.

In 2009, the legislature amended Code of Criminal Procedure Article 2.09 to include associate judges as magistrates if they have been appointed by the judge of a district court under Chapter 54A, Government Code.

An associate judge appointed under the general provision (Family Code Section 201.001), and thus empowered as associate judge to hear only Titles 1, 4 and 5 cases, may also be appointed to be a Title 3 referee. He or she merely wears two hats: as an associate judge and as a Title 3 referee. See Family Code Section 201.309.

Qualifications of Referees, Associate Judges, and Masters. All Title 3 referees must be attorneys licensed to practice law in the State of Texas. Sections 51.04(g) and 54.01(l). That is also required of family law masters. Beyond that, some statutes require that a family law master must possess the legal qualification to sit as judge of the court that appointed the master or must have been an attorney for a specified number of years. Associate judges must reside in one of the counties to be served and must have been licensed by the State Bar of Texas for at least four years. Section 54A.103, Government Code.

Referees, masters, and associate judges may be full-time or part-time. There may be only one in a county, or there may be several. All are paid entirely from county funds. All serve at the pleasure of the judge or judges who appointed them.

Powers. Originally, the sole function of the referee was to conduct detention hearings. It was contemplated when Title 3 was enacted in 1973 that, in populous areas of Texas, there would be a need for added judicial personnel to conduct detention hearings, which were then new to Texas law. Section 54.01(l). The referee provision was designed to accommodate the needs of the urban areas of Texas, just as the detention magistrate provision was designed to accommodate the needs of rural Texas.

Sections 51.04(g) and 54.10 were added to the Family Code in 1975 to expand the role of the juvenile court referee. In addition to detention hearings, Section 54.10 authorizes the juvenile court referee or associate judge appointed under 54A of the Government Code to conduct adjudication hearings, disposition hearings, and certain hearings under the Interstate Compact for Juveniles. Amendments in 1991 and 1999 expanded the authority of the referee to conduct modification hearings under Section 54.05, to hear cases under Chapter 55 (mental illness or intellectual disability proceedings), and to hear jury trials. The referee or associate judge is not authorized to conduct hearings to consider transfer to criminal court under Section 54.02 [Section 54.10(a)]. Prior to 2017, the referee or associate judge was prohibited from conducting any proceedings, except detention hearings, under the determinate sentencing act. Section 54.10(e). In 2017, the referee or associate judge was given authority to hold a hearing to allow a child to enter a plea or stipulation of evidence in a determinate sentence case. The referee or associate judge must transmit written findings and recommendations regarding the plea or stipulation to the juvenile court judge, who may accept or reject the plea or stipulation. Section 54.10(f).

The prohibitions on hearing certification and determinate sentence cases apply whether the person is solely a Title 3 referee, is a referee appointed under a special statute, or is a family law master or associate judge appointed under a Government Code provision who is also serving as a Title 3 referee or associate judge. The specific restrictions in Title 3 control over any other general provisions in statutes creating masters that authorize, without restriction, the master to hear Title 3 cases.

A referee or master may be authorized by the juvenile board to perform the functions of a magistrate under the custodial interrogation statute. When so authorized, the referee or master may perform those functions without obtaining review and approval by the juvenile court. Section 51.095(e). See also Chapter 16.

Objection to Hearing Before Referee or Master: Detention Hearings. The detention hearing provision states in Section 54.01(l):

> Before commencing the detention hearing, the referee shall inform the parties who have appeared that they are entitled to have the hearing before the juvenile court judge or a substitute judge authorized by Section 51.04(f). If a party objects to the referee conducting the detention hearing, an authorized judge shall conduct the hearing within 24 hours.

The "substitute judge" is the same official as the "detention magistrate." The general referee provision, which is applicable to all hearings including detention hearings, contains a similar requirement of notice in Section 54.10(a)(1). However, the language in Section 54.01(l) is more specific as it requires a hearing before a judge within 24 hours, while the language in Section 54.10(a)(1) does not because it is applicable to adjudication, disposition, and modification hearings (which often could not be conducted within 24 hours) as well as detention hearings. Therefore, the more specific provisions in Section 54.01(l), including notification of the right to a hearing before a judge within 24 hours, control in cases of detention hearings.

Under Section 54.01(l), if a party objects to the referee conducting the detention hearing, the hearing must be held before a judge. Section 51.02(10) defines a party as the State, the child, or the child's parent, spouse, guardian, or guardian ad litem. Thus, if any of those persons objects, the hearing must be held by a judge within 24 hours. Under this provision, the State, for example, could insist that a detention hearing be conducted by a judge rather than a referee.

A referee must take three steps to obtain authority from the parties to conduct a detention hearing: (1) inform the parties of their right to a hearing before a judge within 24 hours; (2) give the parties an opportunity to object to the referee conducting the hearing; and (3) not receive an objection from any party.

It could be argued that a child's right to a detention hearing conducted by a judge can be waived and the referee authorized to conduct the hearing only if a waiver that complies with the general requirements of Section 51.09 has occurred. However, that argument should fail for two reasons. First, the Family Code requires a prompt detention hearing, in most cases within the second working day after the child is taken into custody. There are times when it might not be possible to obtain legal representation for the child in time for the first detention hearing. The detention hearing statute explicitly authorizes a detention hearing to be held without counsel for the child present. Section 51.10(c). A Section 51.09 waiver requires the concurrence of the child's attorney in the child's waiver. If Section 51.09 applied to detention hearings, then every detention hearing in which the child was unrepresented would have to be conducted by a judge. That would defeat the policy of conducting a prompt detention hearing even when counsel is unable to be present. Second, Section 51.09 allows for exceptions by providing that the waiver requirements apply "unless a contrary intent clearly appears elsewhere in this title...." The provision in Section 54.01(l) permitting the referee to conduct the detention hearing unless a party objects is the expression of just such a "contrary intent." Therefore, a Section 51.09 waiver is not required to authorize a referee to conduct a detention hearing.

Objection to Hearing Before Referee, Master or Associate Judge. Until its amendment in 1999, Section 54.10(a) was unclear as to the prerequisites for authorizing a referee or master to conduct an adjudication, disposition, or modification hearing, but probably required a Section 51.09 waiver of the right to a judge hearing. *In the Matter of E.B.S.,* 756 S.W.2d 852 (Tex.App.—Austin 1988, no writ) (record did not show that juvenile was informed of or waived right to have hearing before a judge).

In 2011, Section 54.10(a) was amended to remove the reference to a master and to insert a reference to an associate judge. It currently reads:

> Except as provided by Subsection (e), a hearing under Section 54.03, 54.04, or 54.05, including a jury trial, a hearing under Chapter 55, including a jury trial, or a hearing under the Interstate Compact for Juveniles (Chapter 60) may be held by a referee appointed in accordance with Section 51.04(g) or an associate judge appointed under Chapter 54A, Government Code, provided:
>
> (1) the parties have been informed by the referee or associate judge that they are entitled to have the hearing before the juvenile court judge; and
>
> (2) after each party is given an opportunity to object, no party objects to holding the hearing before the referee or associate judge.

The prerequisites for conducting an adjudication, disposition, or modification hearing before a referee or associate judge are the same as they are for conducting a detention hearing before a referee: (1) inform the parties of their right to a hearing before a judge; (2) give the parties an opportunity to object to the referee or associate judge conducting the hearing; and (3) not receive an objection from any party. As in the case of a detention

hearing, "party" includes the State. Consequently, the State has been unambiguously afforded the right to require that an adjudication, disposition, or modification hearing be conducted by the juvenile court judge.

Adequacy of Warning. In *In re C.S.,* 36 S.W.3d 656 (Tex.App.—Houston [1st Dist.] 2000, no pet.), a juvenile law master informed the respondent at the beginning of an adjudication hearing, "You have a right to have a hearing at this trial before the court, but not before the jury." The Court of Appeals held this statement was not sufficient to convey the information required by Section 54.10(a)(1) that "the parties have been informed by the referee or master that they are entitled to have the hearing before the juvenile court judge." Reference to "the court" in this context was ambiguous because, to the respondent, the master was the court.

The Court of Appeals set the following standard:

> At a minimum, to comply with Section 54.10(a)(1), the master or referee must inform the juvenile that (1) he is entitled to have a hearing before the juvenile court judge, and (2) the referee or master is not a juvenile court judge.

36 S.W.3d at 658.

By contrast, in *In re D.C.*, UNPUBLISHED, No. 01-00-00213-CV, 2000 WL 1473777, 2000 Tex.App.Lexis 6669, Juvenile Law Newsletter ¶ 00-4-10 (Tex.App.—Houston [1st Dist.] 2000, no pet.), the master informed the juvenile, "You have a right to a trial on this matter before a judge or before a jury, but it's my understanding that you had this case set on the court trial docket today and that you're agreeing to have this trial heard by me today." The Court of Appeals held that information plus responsive statements on the record by the respondent and his or her attorney that they wished the master to hear the case complied with Section 54.10(a).

Objection to Hearing Before Harris County Juvenile Law Master. Before the 1999 amendment of Section 54.10, Courts of Appeals gave conflicting interpretations of the provisions in the Government Code creating the Harris County master system and the provision in Section 54.10 respecting the right to a hearing before a judge. The Houston Fourteenth District Court of Appeals said that a master appointed under the Government Code is not required to comply with the notice provisions of Section 54.10. *D.R.H. v. State*, 966 S.W.2d 618 (Tex.App.—Houston [14th Dist.] 1998, no pet.). Later, the Houston First District Court of Appeals held that such a master is required to comply with Section 54.10. *In re D.L.M.,* 982 S.W.2d 146 (Tex.App.—Houston [1st Dist.] 1998, no pet.).

The 1999 changes to Section 54.10 clarified that only an absence of an objection, not a waiver, is required to authorize a hearing before a referee. But, by adding the language "or a master appointed under Chapter 54, Government Code" in subsection (a), the amendment made it clear that the notice and non-objection requirements of Section 54.10 apply to a master hearing juvenile cases by virtue of his or her appointment under the Government Code. That specific language controls in instances when there is an absence of any language concerning notice or objections in the Government Code provisions creating the master position.

It is worth noting that in 2011, the legislature modified the language in Section 54.10(a) to apply to "an associate judge under Chapter 54A of the Government Code." Although the Family Code references to juvenile court masters in Section 54.10 were deleted, the Harris County provisions contained in Chapter 54 of the Government Code were not repealed.

Referee or Associate Judge Release Under the Mandatory Detention for Firearms Provision. Sections 54.10(b) and (c) authorize a referee or associate judge to release a child referred to the juvenile court for a firearms offense before the scheduled detention hearing. The referee or associate judge is authorized to make that special release decision unless the child objects, in which case the decision must be made by a judge. The referee or associate judge is also authorized to make that decision if, under Section 51.09, the child and his or her attorney waive the child's right to have a judge make that decision. Since the child can only benefit from a prompt release decision by a referee or associate judge, it would be a strange turn of events for the child to object to being released by a referee or associate judge or for the child's attorney and the child not to waive the right to a judicial determination.

Jury Trials Before Referees or Associate Judges. Section 54.10 authorizes referees and associate judges to conduct jury trials. Under prior law, several provisions dealing with masters appointed under the individual statutes contained in Chapter 54 of the Government Code, masters were not specifically authorized to conduct jury trials.

Many of these individual county statutes relating to masters were repealed in 2011, including, for example, the Wichita County Juvenile Law Referee statute, which required the referee to send the case back to the referring

court. The Harris County Juvenile Master statute, which is still in law, contains a similar provision. Government Code Section 54.812(a). The Government Code provisions creating the Lubbock County magistrates, which include juvenile as well as criminal cases, do not refer to jury trials.

Of course, any person appointed as a referee under Title 3 or associate judge under Government Code Chapter 54A can hear jury trials should the referring court agree.

Procedure and Time Limits. Since a referee or associate judge is not a judge but does provide information to the judge so that he or she can make a decision, the Family Code sets out procedures and time limits for obtaining the judge's decision in a matter handled by a referee or associate judge. Section 54.01(l) deals with detention hearing reports by a referee and Section 54.10(d) deals with referee recommendations generally. Section 54.10(d) provides:

> At the conclusion of the hearing or immediately after making the determination, the referee shall transmit written findings and recommendations to the juvenile court judge. The juvenile court judge shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law and a recommendation that the child be released operates to secure the child's immediate release subject to the power of the juvenile court judge to modify or reject that recommendation.

Section 54.01(l), dealing with detention hearings before referees, was amended in 1995 to provide that the judge must act on the referee's recommendation "not later than the next working day after the day that the judge receives the recommendations," rather than within 24 hours as previously provided by that section. The same change was made in 1997 in the general referee provisions in Section 54.10(d).

The detention referee provision [Section 54.01(l)] authorizes the referee to report to the juvenile court judge or to a "substitute judge." The substitute judge is a detention magistrate and can be any of the designated juvenile court judges or any other judge—county, justice, or municipal—available. The general referee provision [Section 54.10(d)] requires that the report go to the juvenile court judge only.

Failure of the juvenile court judge to act by the end of the next working day results in the child's release from detention if he or she is detained, but does not prevent the judge from acting later on the non-detention aspects, if any, of the referee's report. If the referee recommends that the child be released from detention or enters a finding, such as not guilty, that requires release from any detention that may exist, that order is effective immediately without waiting for judicial approval. However, upon review, the juvenile court can reject or modify the referee's release recommendation, which may require the issuance of a directive to apprehend if the child has already been released from detention.

Since the next working day deadline is imposed for the benefit of the juvenile, there is no reason why the child and his or her attorney could not waive that benefit under Section 51.09.

Double Jeopardy. The statute contemplates that the referee or associate judge will cause his or her findings and recommendations to be forwarded to the judge without request by either the State or the juvenile. The statute is silent on whether the judge may consider information beyond that contained in the referee's report in making the decision in the matter. Could the State or the juvenile, or both, present written or oral arguments to the judge as to why the referee's or associate judge's recommendations should or should not be followed? There is nothing in the statute to prevent such a practice, although the judge could refuse to consider such material at all, and certainly ought to do so unless the opposing party has knowledge of what is happening.

Suppose a referee is presiding at an adjudication hearing and finds that the child has not engaged in delinquent conduct. Can the judge reject that finding and find instead that the child has engaged in delinquent conduct? The statute seems to consider that the judge may do so. Would such a procedure violate the child's rights against double jeopardy?

The United States Supreme Court was faced with a similar problem in *Swisher v. Brady*, 438 U.S. 204, 98 S.Ct. 2699 (1978). The case presented a challenge to the use of juvenile court masters in Baltimore, Maryland. The masters functioned in much the same fashion as the juvenile court referee in Texas. In several cases, the master had found that the respondents had not engaged in delinquent conduct, and the State filed exceptions to those findings and requested that the juvenile court judge reject them and find that delinquent acts had been proved. The State of Maryland argued that the respondents had not been

placed in jeopardy in proceedings before the master because the master did not make final decisions, only recommendations to the juvenile court judge. But the Supreme Court appears to have rejected that contention and to have concluded that the respondents were placed in jeopardy when the trial began before the master. However, they were not twice placed in jeopardy by the juvenile court judge's review of the master's findings because the entire process was but a single proceeding "which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215, 98 S.Ct. at 2706. Therefore, there was no violation of the double jeopardy principle when the juvenile court rejected the findings of the master and concluded that acts of delinquency had been proved.

However, the United States Supreme Court did, imply one important limitation upon its approval of the Maryland master system. Maryland law prohibited either the State or the respondent from introducing new evidence before the juvenile court without the consent of the other side. The juvenile court was limited to reviewing the record made before the master and deciding on the basis of it. Thus, in effect, the State could not require the respondent, his or her family, and attorney to undergo what amounts to a second trial before the juvenile court judge after a master had found that the respondent had not engaged in delinquent conduct. The Supreme Court strongly implied that requiring such a "second trial" would raise very serious double jeopardy questions.

The Texas referee statute is silent on whether the juvenile court judge may take new evidence when considering whether to accept, reject, or modify the recommendations of the referee. As long as the juvenile court avoids taking new evidence when reviewing a case in which the referee has found in favor of the respondent, the Texas referee system should present no double jeopardy problems.

The Dallas Court of Appeals has held that failure to object on jeopardy grounds to a juvenile court judge's review of a referee's finding waives any double jeopardy claim that may exist. The objection must be made at the time the juvenile court judge reviews the referee's recommendation. *In Matter of D.D.C.*, UNPUBLISHED, No. 05-97-01844-CV, 1998 WL 265178, 1998 Tex.App. Lexis 3146, Juvenile Law Newsletter ¶ 98-3-02 (Tex.App.—Dallas 1998, no pet.).

The juvenile court should exercise care in reviewing the findings of referees or masters so as not to inadvertently invoke double jeopardy issues. In *A.R. v. State*, 678 S.W.2d 177 (Tex.App.—Tyler 1984, no writ), the referee recommended that the child be adjudicated for conduct indicating a need for supervision (CINS) for truancy. The juvenile court reviewed that recommendation, accepted it, and signed the adjudication order. The respondent then filed a motion for a new trial, contending that the evidence before the referee was insufficient to show that the respondent was truant. The juvenile court granted the motion and ordered a new trial. The respondent was again adjudicated for the same truancy offense. On appeal, he successfully argued that because the juvenile court, in granting the new trial, did so on the ground that the evidence was insufficient to show truancy, the double jeopardy protections of the Texas and United States Constitutions prohibit re-trial for the same conduct. However, had the motion for a new trial been granted on any ground except evidence insufficiency, double jeopardy would not have prohibited the State from trying the respondent again.

CHAPTER 3: Age Limits in the Juvenile Justice System

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Definition of Child. The juvenile justice system is defined, in part, by the age of the person who is the subject of the proceedings. A child is defined in Texas Family Code Section 51.02(2) as a person who is:

> (A) ten years of age or older and under 17 years of age; or
>
> (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Over time, the definition of "child" has been amended in other codes to accommodate statutory changes relating to offense and extended court jurisdiction. Between 2011 and 2015, the definition of "child" for purposes of conduct constituting truancy under Section 51.03 varied from the traditional definition. During that time, Section 51.03(e-1) defined a child as a person who was at least 10 years of age and subject to the compulsory attendance laws under Education Code Section 25.085 and who was alleged or found to have engaged in conduct constituting truancy prior to turning 18. Additionally, the court had the ability to retain jurisdiction over the individual even after he or she turned 18. These changes were a departure from the longstanding rule that juvenile courts have jurisdiction only over conduct committed prior to the age of 17 and that probation ended at age 18. In 2015, as part of a reform of school attendance laws in Texas, truancy was removed from the Family Code and the related statutes were repealed, returning the definition of "child" to what it had been for many years. (See Chapter 22 for a discussion of the 2015 changes in truancy laws).

In addition to the three ages mentioned above—10, 17, and 18—there are four more ages that are currently important—7, 14, 15, and 19.

Section 264.302, Family Code allows the Department of Family and Protective Services (DFPS) to provide early intervention services to children as young as seven who are at risk of engaging in delinquent conduct. See Chapter 5.

Under Section 54.02 of the Family Code and Section 8.07 of the Penal Code, 14 is the minimum age for transfer of a juvenile to criminal court for prosecution as an adult for a capital felony, a first degree felony, or an aggravated controlled substance felony. Under these same sections, 15 is the minimum age for transfer of a juvenile to criminal court for prosecution as an adult for any other felony.

In 2007, the Texas Legislature enacted reforms at the former Texas Youth Commission (TYC), which included reducing the maximum age of TYC jurisdiction from 21 to 19. Under then-amended Section 61.084, now Section 245.151, Human Resources Code, 19 is the maximum age at which the Texas Juvenile Justice Department (TJJD) may keep a youth committed to it by a juvenile court. Section 201.001, Human Resources Code, defines "child" consistently with TJJD's jurisdiction as an individual who is at least 10 but not yet 18 and under the jurisdiction of a juvenile court or at least 10 but not yet 19 and committed to TJJD.

The determinate sentencing law for violent or habitual offenses authorizes the sentencing of an adjudicated juvenile to a term measured in years from the date of its imposition—just as a criminal sentence in adult court—rather than measured by the chronological age of the respondent. This reflects an early departure by the legislature from the principle that the age of the respondent determines the powers of the justice system over the individual. The enactment of the determinate sentence law in 1987 constituted an exception to the rule that correctional control over a person adjudicated for delinquent conduct had to terminate no later than age 21 (now age 19) so that longer periods of incarceration for extremely serious offenses were available. See Chapter 21.

Marriage. Marriage is for many purposes a legal emancipation of a minor. However, the jurisdiction of the

juvenile court is not affected by the fact that the respondent is married. The definition of "child" in Section 51.02(2) is not restricted to an unmarried minor. Further, a "party" as defined by Section 51.02(10) includes the "child's...spouse," thereby suggesting that the respondent may be married. *In re M.E.,* 982 S.W.2d 528 (Tex.App.—San Antonio 1998, no pet.); Attorney General Opinion No. MW-298 (1981). While marriage does not preclude juvenile proceedings, it is an exception to the offense of running away from home. See Section 51.03(e) and Chapter 4.

A. Age 18 or 19: The Maximum Age of Court Control

General Principle. The general principle is that the juvenile court loses the power to adjudicate a charge when the respondent becomes 18 years of age. In *In the Matter of N.J.A.,* 997 S.W.2d 554 (Tex. 1999), the respondent was believed to have been a party to a murder committed while she was 16. The State petitioned the juvenile court to certify her to criminal court, but the juvenile court refused. The State then filed a petition for adjudication when the respondent was 17 years old. She turned 18 about three months before the adjudication hearing began. The juvenile court adjudicated her delinquent and committed her to the former TYC. The Texas Supreme Court held that the power of the juvenile court to adjudicate her for delinquent conduct ended when she became 18 years of age because, under Section 51.02(2), she was then no longer a child:

> [T]he juvenile court does not have the authority to adjudicate a juvenile who is eighteen years old or older.... Logically, once a juvenile becomes eighteen, the juvenile court's jurisdiction does not include the authority to adjudicate the juvenile.

997 S.W.2d at 555.

That language implied not only that the petition had to be filed before the respondent's 18th birthday but also that the adjudication hearing had to be completed and the adjudication had to have occurred before that date. The Texas Supreme Court's language contained no exceptions for delays in starting or completing the adjudication hearing, not even those that could have been attributed to the respondent, a criticism leveled against the majority opinion by the four justices who dissented. The Court was careful to note that, under some circumstances, the juvenile court was authorized to certify to criminal court a person who has already become 18 years old.

Legislative Modification of *N.J.A.* The legislature enacted Section 51.0412 in 2001 to modify the rule of *N.J.A.* As enacted, the statute specified that the juvenile court retained jurisdiction over a person, without regard to the age of the person, who was a respondent in an adjudication proceeding, a disposition proceeding, or a proceeding to modify disposition if the petition or motion to modify was filed before the respondent turned 18, the proceeding was not complete before the respondent turned 19, and the court entered a finding that the prosecutor exercised due diligence in attempting to complete the proceeding before the respondent turned 18.

Section 51.0412 changed the rule of *N.J.A.* to the extent that, as long as the petition to adjudicate or motion to modify is filed before the respondent turns 18 and the prosecutor uses due diligence in attempting to complete the proceedings before he respondent's 18th birthday, the jurisdiction of the juvenile court is extended to the conclusion of those court proceedings.

Section 51.0412 also provides the juvenile court with jurisdiction in "a motion for transfer of determinate sentence probation to an appropriate district court" for probationers over the age of 19 if the motion for transfer was timely filed before the juvenile became 19 and the prosecutor exercised due diligence to complete the transfer proceeding before the probationer's 19th birthday. In 2013, Section 51.0412 was amended so that it also applies to timely filed proceedings for waiver of jurisdiction and transfer to criminal court under Section 54.02.

Courts have consistently upheld the juvenile court's continuing jurisdiction under Section 51.0412. *In the Matter of V.A.*, 140 S.W.3d 858 (Tex.App.—Fort Worth 2004, no pet.), (juvenile court retained jurisdiction where motion to modify was filed before V.A. turned 18 and prosecutor used due diligence in attempting to complete proceeding before he turned 18); *In the Matter of A.M.*, UNPUBLISHED, No. 03-03-00703-CV, 2004 WL 2732142, 2004 Tex.App.Lexis 10761, Juvenile Law Newsletter ¶ 05-1-01 (Tex.App.—Austin 2004, no pet.) (juvenile court retained subject matter jurisdiction where motion to modify was filed before A.M. turned 18); *In re B.R.H.*, 426 S.W.3d 163, 2012 Tex. App. LEXIS 7622, 2012 WL 3775759, Juvenile Law Newsletter ¶ 12-4-5, (Tex. App. Houston 1st Dist. 2012), (the juvenile court did not abuse its discretion since the amended determinate sentence petition related back to the filing date of the original delinquency petition, which was filed before the respondent turned 18).

Determinate Sentence Probation and Extended Jurisdiction. In 2011, the age of juvenile court jurisdiction for youth on determinate sentence probation was raised from 18 to 19. Section 54.04. This mirrors TJJD's jurisdiction over juveniles and allows the juvenile court additional

time to provide rehabilitative services to youth on determinate sentence probation. In these cases, the underlying adjudication must occur prior to the respondent's 18th birthday (unless a valid exception applies), but the juvenile court maintains jurisdiction until the respondent's 19th birthday. This change applies to offenses committed on or after September 1, 2011. For offenses before that date, court jurisdiction ends at age 18.

Likewise, Section 51.0412 was amended to specify that the court retains jurisdiction when a motion to transfer determinate sentence probation has been timely filed and the prosecutor has exercised due diligence to complete the proceeding prior to the juvenile's 19th birthday. In 2013, language was inserted in Section 51.0412 to clarify that, for the court to retain jurisdiction over juveniles who committed offenses prior to September 1, 2011, the motion to transfer determinate sentence probation must be filed prior to the juvenile's 18th, not 19th, birthday.

When the legislature extended the juvenile court's jurisdiction over an individual on determinate sentence probation to end at age 19 rather than at age 18, no conforming change was made to the definition of "child" in Section 51.02(2). Although it is clear that the court has jurisdiction over these individuals, the fact that they do not meet the definition of "child" in 51.02(2) has led to practical questions without definitive answers.

Perhaps the most frequently encountered issue relates to the 18-year-old who has allegedly violated his or her determinate sentence probation. There is uncertainty regarding whether such individual may be detained and, if so, where detention should occur. There is concern that placing the individual in the juvenile detention facility might violate the "sight and sound separation" provisions of Section 51.12 since the respondent does not meet the definition of "child." Likewise, there is concern that placing the individual in the adult jail when he has not been charged with a criminal offense committed as an adult might be an issue, particularly since there is no statutory authority to place the respondent in the adult jail.

In a similar vein, though not necessarily tied to a probation violation, is the question of whether the individual can remain in, or be initially placed in, a post-adjudication secure correctional facility as a term of probation once he or she has turned 18. The issue arises again in the context of the "sight and sound separation" provisions in Section 51.12. While there is no guidance on this, it seems unlikely that the legislature intended to give the juvenile court extended jurisdiction over these individuals without also extending the court's ability to use residential placement as long as it has jurisdiction.

Though it does not address this particular group of individuals, some guidance regarding the "sight and sound separation" issue may come from a review of Section 54.02(o)-(r), which allows for an individual who is at least 18 and facing a certification hearing to be held in an adult jail or a certified juvenile detention facility. If held in juvenile detention, the person must be sight-and-sound separated from detained children "to the extent practicable," which is a lesser standard than the "sight and sound separation" provisions in Section 51.12. Relying on either provision to justify the detention of the 18-year-old who has violated his determinate sentence probation requires the use of inference as there is no court guidance on this issue.

What are the outcomes of using a particular disposition option for an 18-year-old who has violated the terms of his determinate sentence probation? One option is commitment to TJJD. If the court chooses this option for someone who cannot complete his or her statutory minimum period of confinement at TJJD prior to turning age 19, TJJD's administrative rules provide that it will set a hearing giving the court the option to order the child transferred to the Texas Department of Criminal Justice Correctional Institutions Division or to have the respondent placed on parole with the Texas Department of Criminal Justice. If using this option, it is important to remember that TJJD does not have the ability to keep the child past the age of 19, and processing a juvenile through commitment and a hearing takes time. While the court maintains jurisdiction over a transfer hearing that is requested before the juvenile turns 19, TJJD does not have the authority to request a transfer hearing after the juvenile turns age 19. Another option is to keep the juvenile on probation until his or her 19th birthday. If the court exercises this option, the court will have the ability to hold a hearing before the individual's 19th birthday and either order the probation transferred to the adult court or discharge the child from the probation. Although the hearing must be held prior to the 19th birthday, the actual transfer to adult probation, by law, cannot occur until the 19th birthday.

Disposition Options After Age 18 or 19. When the respondent turns 18 during the adjudication or disposition proceedings and the requirements of Section 51.0412 have been satisfied, the juvenile court's options for disposition are somewhat limited. The court is not authorized to grant regular probation since that type of probation automatically ends when the child becomes 18. See Section 54.05(b). However, if the juvenile is adjudicated for a felony, the court can order an indeterminate commitment

to TJJD or, if authorized, a determinate sentence commitment to TJJD.

What about determinate sentence probation for up to 10 years? In light of the extended jurisdiction to age 19, the juvenile court may use determinate sentence probation even though the child is 18 at the time of disposition. To deny the respondent the opportunity for determinate sentence probation because the respondent became 18 in a case in which no part of the delay was caused by the respondent would be to invite a substantial constitutional attack on the disposition. Giving the respondent the opportunity for a juvenile court or jury in its discretion to give determinate sentence probation certainly fits well with the purpose of that provision.

There are fewer options, however, when the child has turned 19 years of age before the case is disposed. In such instance, not only is regular probation not an option, commitment to TJJD is not either. This is because TJJD's jurisdictional authority also ends at age 19. However, determinate sentence probation, if authorized by law, is an option.

In 2003, the legislature enacted Section 54.051(i) to address the question of placing a youth who has reached the maximum age of court control on determinate sentence probation. The purpose of the original enactment was to prevent the creation of determinate sentence ineligibility merely because the person has aged out while the case is pending. In 2011, the legislature extended the age of jurisdictional control for youth on determinate sentence probation from 18 to 19. Conforming changes to this provision were enacted in 2013. Section 54.051(i) provides:

> If the juvenile court exercises jurisdiction over a person who is 18 or 19 years of age or older, as applicable, under Section 51.041 or 51.0412, the court or jury may, if the person is otherwise eligible, place the person on probation under Section 54.04(q). The juvenile court shall set the conditions of probation and immediately transfer supervision of the person to the appropriate court exercising criminal jurisdiction under Subsection (e).

There are several other situations in which persons 18 years of age or older may be subject to the power of the juvenile court.

1. Appellate Reversal of Transfer Order

If proceedings have been initiated in juvenile court to transfer a child to criminal court for prosecution as an adult, the power of the juvenile court continues until the transfer decision has been made, even if the child turns 18 years of age in the meantime.

In *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e), a transfer petition was filed against the respondent for an offense committed just before his 17th birthday. Twice he was ordered transferred to criminal court, and twice the juvenile court was reversed on appeal. When respondent was ordered transferred a third time, he was just a few days short of his 20th birthday. He contended on appeal from the third transfer order that the juvenile court had lost jurisdiction over him when he became 18 years of age, but the appellate court rejected that argument:

> [O]nce the jurisdiction of the juvenile court has been timely invoked (as here) by the filing of a petition for waiver of that court's jurisdiction and transfer of the alleged offender to the district court for prosecution as an adult, the jurisdiction of the juvenile court continues until there has been a final disposition of the question of waiver of jurisdiction, whatever be the age of such alleged offender at the time of such final disposition.

569 S.W.2d at 615. See also *R.E.M. v. State*, 532 S.W.2d 645 (Tex.Civ.App.—San Antonio 1975, no writ) (earlier appeal in same case applying same rule).

Such a rule is obviously needed in certification and transfer proceedings in which the appeal of a transfer order may frequently extend the litigation beyond the respondent's 18th birthday. If the rule were otherwise, then the transfer power of the juvenile court could be defeated by obtaining a reversal on appeal and, if the respondent had earlier become 18 years of age, neither the criminal nor the juvenile court would have power to try him or her.

The 1995 Statute. In 1995, the legislature enacted the *R.E.M.* principle into Title 3 and expanded it to include appeals from adjudication orders. Section 51.041, which was clarified in 2001, expanded in 2003 to address appeal by the State, and amended again in 2015 to remove references to the requirement to wait until after conviction to appeal a transfer decision, provides:

> The court retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person or the state under Chapter 56 of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court.

Detention of a Respondent 18 or Older After Appellate Reversal. If a juvenile is certified to criminal court and appeals and the certification is reversed, the matter may end up once again before the juvenile court. If a juvenile is adjudicated delinquent, appeals, and obtains a reversal, that case may also re-appear on the juvenile court's docket. In either situation, if the person is 18 or older, should he or she be detained in the juvenile detention facility? Can such a person be detained in the county jail pending a new certification or adjudication hearing? Subsections 54.02(o)-(r) provide the juvenile court with authority to detain a person who is 18 or older in juvenile detention or county jail pending his or her certification hearing. In 2001, the legislature extended that principle to reach cases in which the person turned 18 before his or her juvenile case was reversed on appeal. Section 51.041(b) provides:

> (b) If the respondent is at least 18 years of age when the order of remand from the appellate court is received by the juvenile court, the juvenile court shall proceed as provided by Sections 54.02(o)-(r) for the detention of a person at least 18 years of age in discretionary transfer proceedings. Pending retrial of the adjudication or transfer proceeding, the juvenile court may:
>
> (1) order the respondent released from custody;
>
> (2) order the respondent detained in a juvenile detention facility; or
>
> (3) set bond and order the respondent detained in a county adult facility if bond is not made.

Section 54.02(q) provides that if the individual who is 18 or older is detained in the juvenile facility, the individual, to the extent practicable, must be kept separate from children detained in the same facility. This requirement is not as onerous as the "sight and sound separation" requirements under Section 51.12. See the discussion in Chapter 6. See also the discussion of the certification detention procedures in Chapter 10. See also Attorney General Opinion GA-0927 (2012).

New Petition After Appellate Reversal in a Transfer Case. *R.E.M.* and Section 51.041 would permit the State, after appellate reversal of a juvenile court certification order, to proceed on the same petition in juvenile court on remand unless the grounds for reversal were defects in the transfer petition, summons, or service of summons. However, Section 54.02(j)(4)(B)(iii), as amended in 1995, authorizes the State to file a new certification petition if "a previous transfer order was reversed by an appellate court or set aside by a district court." That language sets out an alternative course of action for the State to pursue. Such an alternative might be necessary should the State be required to file a new certification petition because the appellate reversal was grounded in a defect in the original petition.

In *In the Matter of M.A.V.*, 954 S.W.2d 117 (Tex.App.—San Antonio 1997, pet. denied), the Court of Appeals held that, when a certification order is reversed on appeal and the respondent becomes 18 years of age before re-hearing on remand, the State must file a new petition for transfer under Section 54.02(j) and cannot simply proceed to hearing on the original petition. The Court of Appeals took that position in a case in which the appellate reversal was not based upon a defect in the original petition. In *M.A.V.*, the 1995 enactment of Section 54.041 did not apply. The position taken by the Court of Appeals in *M.A.V.* would be untenable in a case in which the 1995 enactment applies because it is intended to address precisely that situation and does not require the filing of a new petition.

2. Appellate Reversal of Adjudication Order

Does a rule such as *R.E.M.* exist when the respondent has been adjudicated delinquent rather than ordered transferred to criminal court? Section 56.01(g) provides:

> An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of the person, institution, or agency to whose care the child is committed, unless the juvenile court so orders.

Thus, under Section 56.01(g), unless the juvenile court orders otherwise, the respondent should remain on probation supervision or continue in the custody of TJJD while the appeal is pending. The respondent should be discharged from probation when he or she becomes 18 years of age (or discharged or transferred to adult court at 19 if on determinate sentence probation) and should be discharged from TJJD when he or she becomes 19, whether or not there is an appeal pending at that time.

What happens if a respondent who is adjudicated delinquent and committed to TJJD appeals the case and the appellate court reverses the adjudication of delinquency after the respondent became 18 years of age?

Cases decided under the predecessor to Title 3 of the Family Code held that if the child became 17 years old before reversal of an adjudication of delinquency by an

appellate court, the proceedings must be dismissed upon remand to the juvenile court because the juvenile court lacked jurisdiction to proceed further. *State v. Casanova*, 494 S.W.2d 812 (Tex. 1973); *Carrillo v. State*, 480 S.W.2d 612, 618 (Tex. 1972, reh'g overruled).

This principle has been accepted without analysis and applied to a Title 3 proceeding in a case in which the child became 18 years of age while the appeal was pending. *In the Matter of G.M.P.*, 909 S.W.2d 198, 212 (Tex. App.—Houston [14th Dist.] 1995, no writ).

Such cases, although applicable to adjudication proceedings rather than transfer proceedings, conflict in principle with *R.E.M.*

Section 51.041, discussed in the previous section, abrogates those cases. It states that a juvenile court retains jurisdiction over adjudication proceedings when an appellate court has reversed the adjudication and the respondent has become 18 prior to re-trial. In such an event, the juvenile court's dispositional powers are limited to dismissal, commitment to TJJD, and determinate sentence probation. Regular probation is not an option.

3. Release/Transfer Hearings Under the Determinate Sentence Act

Under the Determinate Sentence Act as revised in 1995, the release/transfer hearing of Section 54.11 applies in two distinct situations: (1) TJJD is requesting juvenile court authority to transfer a sentenced youth to the Texas Department of Criminal Justice (TDCJ) Correctional Institution Division; or (2) TJJD is requesting juvenile court authority to parole a youth before his or her statutory minimum period of confinement has been served.

In either event, the juvenile court may be required to conduct a release hearing or a transfer hearing concerning a person who is at the time of the hearing 18 years of age or older. Section 51.0411 gives the juvenile court jurisdiction to conduct such hearings:

> The court retains jurisdiction over a person, without regard to the age of the person, who is referred to the court under Section 54.11 for transfer to the Texas Department of Criminal Justice or release under supervision.

See *In the Matter of T.G.*, UNPUBLISHED, No. 03-07-00543-CV, 2008 WL 2468697, Juvenile Law Newsletter ¶ 08-3-9 (Tex.App.—Austin 2008, pet. denied) (under Section 51.0411 juvenile court had jurisdiction for purposes of transfer hearing even though youth turned 19 before the referral occurred).

4. Revoking Probation After Child Becomes 18

Suppose a child is on probation and violates it shortly before becoming 18 years of age. Can the juvenile court revoke probation even though the respondent became 18 before the revocation hearing could be conducted? There are no cases that directly answer this question. However, there is case law stating that, as long as the motion to revoke probation is filed before probation expires, the revocation hearing and the revocation itself can occur after probation has expired. See Chapter 13 and *In the Matter of R.G.*, 687 S.W.2d 774 (Tex.App.—Amarillo 1985, no writ).

There is no reason for answering the question any differently just because the respondent's probation expired when he or she became 18 years old rather than because he or she served the term imposed by the court. The principle of *R.E.M.* should apply here to permit the juvenile court to hear the motion filed before age 18 although the respondent was 18 at the time of the hearing. If the probationer were not subject to revocation after becoming 18 for probation violations, then the last several days or even weeks of probation become "free" because a violation during such a period could not possibly result in revocation before the child's 18th birthday. Over the years, the principle questions posed in *R.E.M.* have been, in large measure, addressed in statute.

Section 51.0412, discussed earlier, permits probation to be revoked even though the person became 18 before revocation so long as the motion to revoke or petition to revoke was filed before the respondent became 18 and the State used due diligence in attempting to complete the proceedings before the respondent became 18. The probation term automatically ended when the respondent became 18. Section 51.0412 merely extends the jurisdiction of the juvenile court to revoke on a motion or petition previously filed; it does not extend the period of supervision beyond age 18. This provision makes a juvenile probationer more fully accountable for his or her conduct while under supervision since it permits motions to revoke to be filed for violations that occur near the end of the probation term. This statute abrogates the rule of *In the Matter of N.J.A.*, 997 S.W.2d 554 (Tex. 1999), as applied to probation revocation proceedings.

Section 51.0412 was amended in 2007 to include "a motion for transfer of determinate sentence probation to an appropriate district court" if the motion for transfer was timely filed and the State exercised due diligence in attempting to complete the proceeding before the youth

turned 18. In 2011, the jurisdictional age was extended to age 19, as discussed earlier in this chapter; thus, for offenses occurring on or after September 1, 2011, the motion must be filed before age 19.

5. Inability to File Timely for Transfer

The Jurisdictional Gap. What happens if a person commits an offense before his or her 17th birthday but the State is unable to file charges until after his or her 18th birthday? Since the person is no longer a child under Section 51.02(2), quoted at the beginning of this chapter, the juvenile court would not have jurisdiction to adjudicate the person as a delinquent child. The prosecutor cannot file the case directly in criminal court because Section 8.07 of the Penal Code requires a transfer hearing for an offense committed before the person's 17th birthday. Does this mean that nothing can be done in this situation?

Post-18 Filing. In 1975, subsections 54.02(j) through (l) were added to the Family Code to handle the serious situations that could fall within this gap. At the time, the law provided that, if a person was believed to have committed any felony while 15 or 16 years of age, the juvenile court could transfer him or her to criminal court even though the transfer petition was not filed until after the person became 18 years of age if the juvenile court found from a preponderance of evidence that:

> (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
>
> (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
>
> (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
>
> (ii) the person could not be found; or
>
> (iii) a previous transfer order was reversed by an appellate court or set aside by a district court;

Section 54.02(j)(4).

The age of at least 15 for any felony was consistent with the age for certification before age 18 at the time.

Subdivision (iii) is intended to encompass the situation in which a previous transfer order was reversed by an appellate court or set aside by the criminal court and the respondent became 18 before juvenile proceedings could take place on remand. It was not intended to replace the principle of *R.E.M.* except in those cases in which a new petition must be filed because the appellate court found a deficiency in the original one.

Under any of these provisions, the juvenile court must decide whether to transfer the person to criminal court or to do nothing with the case; there is no option to keep the case in the juvenile system because the person is over 18.

Expansion of Statute. In 1995, the law was changed to allow for certification if a person who was at least 14 was alleged to have committed capital murder, a first degree felony, or an aggravated controlled substance felony or who as at least age 15 as alleged to have committed any other felony. The post-18 certification statute was amended to be consistent with this change.

Special Rule for Murder and Capital Murder. As amended in 1995, the post-18 certification statute applied only when a transferable offense was committed by a person while 14, 15, or 16 years of age. It did not cover the circumstance in which an offense was committed by a person when 10, 11, 12, or 13 years of age but juvenile proceedings were not initiated before the person's 18th birthday. Such a possibility posed a problem only for very serious offenses with long statutes of limitation—primarily murder or capital murder. In those cases, a person who committed a murder while between the ages of 10 and 13 but who was not proceeded against prior to reaching age 18 could not be held legally accountable for his or her conduct in either the juvenile or criminal system.

Thus, the legislature amended Section 54.02(j)(2)(A) in 1999 to authorize certification of a person who was "10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code [murder]." This language authorizes certification only for murder or capital murder and only if the person for whom certification is sought is already 18 years of age and the State justifies the delay in bringing certification proceedings under one of the four grounds set out in Section 54.02(j)(4).

Unfortunately, in 1999, the draftsperson of the provision failed to amend Section 8.07 of the Penal Code to authorize criminal prosecution of a case certified under this provision. Thus, although a juvenile court was authorized to certify a case against an 18-year-old who committed murder when he or she was 13, once the case reached the criminal court, he or she would be expected to claim a defense under Section 8.07. If the defense were recognized, there could be no conviction no matter how compelling the evidence. That, obviously, was not the legislature's

intent. The only purpose of certifying the case is to permit criminal prosecution and, if appropriate, conviction.

In 2001, the legislature corrected the drafting error by enacting Penal Code Section 8.07(a)(7) to authorize a criminal court to process a certified case in which the juvenile allegedly committed a murder or capital murder while between the ages of 10 to 13 but could not be prosecuted until after he or she became 18.

Prior Void Criminal Proceedings. In *In the Matter of D.M.*, 611 S.W.2d 880 (Tex.Civ.App.—Amarillo 1980, no writ), the State filed murder charges in criminal court without prior juvenile proceedings based on the respondent's statement to the police that he was 17 years of age at the time of the offense. After a considerable period of pre-trial delay, the case went to a jury trial and the respondent was convicted of murder. While the jury was deliberating punishment, the respondent revealed to his attorney for the first time that he was only 16 years old at the time of the offense. Upon production of a birth certificate, the criminal charges were dismissed. Respondent then became 18 years of age. A juvenile court transfer petition was filed after age 18 for the same offense.

On appeal from the order transferring him to criminal court, the respondent claimed that the juvenile court was without jurisdiction because he was 18 years of age at the time the transfer petition was filed. The appellate court rejected this argument because the respondent came within the 1975 amendment to Section 54.02 discussed earlier. After the criminal charges were dismissed, the respondent could not be found until the day before the State filed its transfer petition; under the 1975 amendment, the circumstances justified filing the petition after the respondent's 18th birthday.

The Court of Criminal Appeals in *Hoang v. State*, 872 S.W.2d 694 (Tex.Crim.App. 1993) held that the Double Jeopardy Clause does not prohibit transfer proceedings and re-prosecution of offenses when the defendant had been convicted of those offenses although younger than 17 at the time of the conduct and without prior juvenile proceedings. The prior convictions were void and posed no obstacle to post-18-year-old transfer proceedings.

6. Persons Other than the Juvenile

A juvenile court has power over a person 18 years of age or older by virtue of special dispositional provisions dealing with persons other than the juvenile respondent. Examples are: Section 54.06, authorizing the juvenile court to order parents or other financially responsible adults to pay to the court support for a child placed outside the home; Section 54.061, authorizing the court to hold parents or other adults responsible for payment of probation supervision fees; Section 54.041(b), authorizing the juvenile court to order a parent to make restitution payments to the victim of the child's offense until whichever is later between the child's 18th birthday and the date the child is no longer enrolled in school; Section 54.041(a)(1), authorizing the juvenile court to order a person who has contributed to the child's delinquency to refrain from doing any act injurious to the welfare of the child; Section 54.041(a)(2), authorizing the juvenile court to enjoin all contact between a person contributing to the delinquency of a child and the child; Section 54.041(a)(3), authorizing the juvenile court to "order any person living in the same household with the child to participate in social or psychological counseling to assist in the rehabilitation of the child and to strengthen the child's family environment"; and Section 54.044(b) authorizing the juvenile court to order a respondent's parent to "perform community service with the child."

It is important to note that each of these provisions depends upon the juvenile court having before it a respondent who is a child under the Family Code; that is, who is under 18 years of age or who falls into an exception to the age 18 restriction. Care must be taken in imposing orders on parents and other third parties to provide notice and opportunity to be heard to the persons who will be placed under court order. These provisions are discussed fully in Chapter 12 on Dispositions and Chapter 26 on Parental Rights and Responsibilities.

B. Age 19: The Maximum Age of TJJD Control

Indeterminate Commitments. In its earliest statutory form, indeterminate commitments to the former Texas Youth Commission (TYC), like juvenile probation, expired automatically at age 18. In 1985, the legislature changed the uniform rule that age 18 is the maximum age of control over a juvenile. As originally amended, Section 54.05(b) of the Family Code and Sections 61.001(6) and 61.084 [§201.001(6) and 245.151] of the Human Resources Code, allowed a child properly committed to TYC to be retained until that child reached the age of 21.

In 2007, amid massive reforms at the former TYC, the legislature amended Sections 61.084(e) and (g) [§245.151] to make it clear that TYC control over a youth ended at age 19. With the creation of TJJD, the age remained and still remains 19. See the full discussion of all TYC reforms in the Special Legislative Issue, State Bar of Texas, 21 Juvenile Law Section Report 98, No. 3 (August 2007); see also *In the Matter of J.B.L.*, UNPUBLISHED, No. 11-07-00221-CV, 2009 WL 545573 *2, n.4, Juvenile Law Newsletter ¶ 09-2-08

(Tex.App.—Eastland 2009, pet. denied), *cert. denied*, 130 S.Ct. 2064 (2010) (amended Section 61.084 [§245.151] became effective June 8, 2007).

Although the decision to discharge is an administrative decision of the state's juvenile correctional agency, the amendment may have had two important effects on juvenile courts and their staff. First, it means that if a child is on juvenile probation and violates probation before turning 18, juvenile authorities may proceed to modify disposition and commit the child to TJJD, which may keep the person to age 19. Thus, juvenile system control may be extended by only one year. Second, a juvenile court judge in a certification hearing should consider the availability of TJJD control until age 19 as a factor in favor of keeping the child in the juvenile system rather than transferring him or her to the criminal system. Such a consideration is mandated by the requirement of Section 54.02(f)(4) that the juvenile court, in making the transfer decision, must consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of the procedures, services, and facilities currently available to the juvenile court."

Obviously, there will be some circumstances in which the availability of control in the juvenile system until age 19 should tip the balance in favor of retaining juvenile jurisdiction. However, with only one additional year of TJJD jurisdiction, it may be challenging for some youth to complete their required programs before age 19. Because of this, some policymakers were concerned that the 2007 reforms limiting TYC jurisdiction to age 19 would have a potentially negative impact on rehabilitating juveniles committed to the State. Similarly, the availability of determinate sentencing, if the offense charged is covered by that statute, should be considered by the court under Section 54.02(f)(4) when considering certification to criminal court.

Determinate Sentence Commitments. As a result of the reforms in 2007, age 19 is the maximum age of TJJD control under determinate sentencing laws. If a youth with a determinate sentence is on TJJD parole at age 19, he or she is transferred administratively to TDCJ parole supervision. If a youth with a determinate sentence is in a TJJD facility sentence at age 19, he or she is automatically released to TDCJ parole unless the judge has ordered transfer to prison. A youth cannot be transferred to prison without a court order after a 54.11 transfer hearing.

Although TJJD jurisdiction over a youth ends at age 19, the juvenile court may exercise jurisdiction after age 19 for a hearing considering transfer to prison under Section 54.11. Section 51.0411. The key to the court maintaining this jurisdiction is the court timely acquiring the jurisdiction. TJJD's request for transfer hearing under Section 244.014(a), Human Resources Code, submitted before the child turns 19, is what gives the court jurisdiction to hold the hearing. See Chapter 21.

C. Age 17: The Maximum Age for Offenses

The importance of age 17 for the Texas juvenile justice system can be summarized in a few sentences. (1) If delinquent conduct or conduct indicating a need for supervision (CINS) occurred before the respondent's 17th birthday, the juvenile court has exclusive jurisdiction of the case, although under certain circumstances it may transfer the case to criminal court. (2) The juvenile court still has jurisdiction of the case if the respondent became 17 years of age while juvenile proceedings were pending or even before juvenile proceedings were initiated so long as the offense was committed before age 17 and the juvenile court petition was filed before the child turned 18. Under the limited circumstances discussed in Section A of this chapter, the juvenile court still has jurisdiction to consider transfer to criminal court even if the respondent became 18 before juvenile proceedings were initiated. (3) If the offense was committed after the respondent became 17 years of age, the criminal court, not the juvenile court, has exclusive jurisdiction of the case. This is true even if the respondent is still only 17 years of age at the time of the criminal proceedings. (4) If the respondent is within the juvenile system, either as a probationer or as a TJJD resident or parolee and commits an offense while 17 years of age, the criminal court, not the juvenile court, has jurisdiction of the offense. However, the respondent also continues in his or her status as a juvenile probationer or TJJD resident or parolee. Officials in the juvenile system may also seek to revoke probation or parole for commission of the criminal offense or to impose internal discipline on the juvenile if he or she is in TJJD or in probation placement. The 17-year-old may be prosecuted for the criminal offense in criminal court and have probation or parole revoked or TJJD discipline imposed in the juvenile system for the same conduct without violating double jeopardy principles.

1. Offenses Committed Before Age 17

Exclusive Juvenile Jurisdiction. Sections 51.04(a) and 51.02(2), read together, give the juvenile court exclusive jurisdiction over delinquent conduct or CINS occurring before the person's 17th birthday. Section 51.04(a) provides:

> This title [Title 3 of the Family Code] covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct, and, except as provided by Subsection (h), the juvenile court has exclusive original jurisdiction over proceedings under this title.

Section 51.02(2) defines a child as a person:

> (A) ten years of age or older and under 17 years of age; or
>
> (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Section 8.07(b) of the Penal Code provides, with certain exceptions discussed in Chapter 4, that the criminal court does not have jurisdiction over an offense committed before age 17 unless the juvenile court transfers the case for criminal prosecution.

The *Bannister* Rule. Texas courts have stringently enforced Section 8.07 of the Penal Code. They have held that criminal courts have jurisdiction over offenses committed before age 17 only if the juvenile court has transferred the respondent to the criminal court. In *Bannister v. State*, 552 S.W.2d 124 (Tex.Crim.App. 1977), Bannister, 15 years of age and an escapee from TYC, was arrested for burglary of a habitation. Claiming to all to be at least 19 years of age and giving a false name, she entered a plea of guilty to the burglary in criminal court and was placed on five years' probation. Because of her misrepresentation as to age, she was never handled by the juvenile court for the burglary. Later, she was brought before the criminal court for revocation of probation. At that time, she revealed that she had been only 15 years of age at the time of her plea of guilty, which was substantiated by a copy of her birth certificate. The criminal court nevertheless revoked her probation; the Court of Criminal Appeals reversed the revocation on the ground that, because of her age, the trial court never had jurisdiction of the case:

> [T]he district court did not have jurisdiction to try appellant for burglary of a habitation in view of her age despite her deliberate action in misleading the court. Such action...did not constitute waiver [under Section 51.09 of the Family Code of her right to be tried as a juvenile]. The fact that appellant's age was not discovered until the time of revocation of probation proceedings does not change the situation.

552 S.W.2d at 129-30.

The approach of the *Bannister* opinion has been followed in other cases. *Ex parte McCullough*, 598 S.W.2d 272 (Tex.Crim.App. 1980); *Ex parte Pierce*, 621 S.W.2d 634 (Tex.Crim.App. 1981). See also Dawson, *Responding to Misrepresentations, Nondisclosures and Incorrect Assumptions About the Age of the Accused: The Jurisdictional Boundary Between Juvenile and Criminal Courts in Texas*, 18 St. Mary's Law Journal 1117-1164 (1987) for a discussion of the *Bannister* opinion and related cases and a recommendation of a statutory remedy for the problems created by those decisions.

Statutory Abrogation of *Bannister*. The legislature enacted a provision in 1995 that was very similar to the remedy proposed by practitioners in the St. Mary's Law Journal article. Article 4.18 of the Code of Criminal Procedure requires a criminal defendant to raise the claim of underage before jeopardy attaches in the criminal proceedings. If the claim is raised and it is shown to the criminal court that the defendant was under 17 at the time of the offense, the criminal court is required to transfer the case to the juvenile court.

If the claim of underage is not raised by the defendant in a timely manner, then he or she is precluded by Article 4.18 from raising the question in any subsequent proceeding. Article 4.18 does not change the underlying law that the juvenile court has exclusive jurisdiction if the offense was committed before age 17, but it does require a criminal defendant to raise a question of underage in the criminal court. Failure to raise the question in a timely manner forfeits the claim. See *Adams v. State*, 161 S.W.3d 113 (Tex.App.—Houston [14th Dist.] 2004, pet. ref'd) (entering a plea of guilty without contesting jurisdiction by filing a written motion in bar of prosecution under Article 4.18 waived appellant's right to contest court's jurisdiction for the first time on appeal).

Article 4.18 was subsequently amended in Subsection (g) to make it clear that the requirement of a pre-trial objection does not apply to criminal proceedings challenging the lawfulness of transfer proceedings but only to claims that there were no transfer proceedings but should have been. This 1999 change was intended to abrogate the rule of *Miller v. State*, 981 S.W.2d 447 (Tex.App.—Texarkana 1998, pet. ref'd), which had erroneously applied the article to a criminal appeal from a transfer order. The Austin Court of Appeals refused to follow *Miller* and correctly interpreted Article 4.18 in *Light v. State*, 993 S.W.2d

740 (Tex.App.—Austin 1999), *vacated on other grounds by* 15 S.W.3d 104 (Tex.Crim.App. 2000), in which the court recognized that the statute applies only to a claim that there was no transfer hearing, not to a claim of error or defect in a transfer hearing.

Whether the criminal defendant was under 17 at the time of the offense is a question of fact that must be proved. If there is conflicting evidence as to the defendant's date of birth, a criminal court is free to make a finding regarding the date of birth and a Court of Appeals will uphold the trial court's determination under ordinary circumstances. *Mendoza v. State*, UNPUBLISHED, No. 01-97-01017-CR, 1999 WL 460045, 1999 Tex.App.Lexis 5068, Juvenile Law Newsletter ¶ 99-3-16 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (arising before Article 4.18 became applicable). Under Article 4.18(c), it is the burden of the defendant to prove the claim of underage by a preponderance of the evidence.

The Houston Fourteenth District Court of Appeals correctly applied Article 4.18 to bar a claim of underage made in defense of proceedings seeking to revoke adult community supervision in *Pratt v. State*, UNPUBLISHED, No. 14-99-00162-CR, 2000 WL 963530, 2000 Tex.App.Lexis 4616, Juvenile Law Newsletter ¶ 00-3-17 (Tex.App.—Houston [14th Dist.] 2000, no pet.). The criminal defendant had not raised the defense before pleading guilty to charges filed against him in criminal court; therefore, Article 4.18 precluded a subsequent attack on the jurisdiction of the court because of underage.

Constitutionality of Article 4.18. The Waco Court of Appeals in *Rushing v. State*, 50 S.W.3d 715 (Tex.App.—Waco 2001), *aff'd by* 85 S.W.3d 283 (Tex.Crim.App. 2002) held that Article 4.18 is unconstitutional because it was enacted in violation of the separation of powers principle of the Texas Constitution. Rushing was transferred to criminal court for capital murder. On appeal from conviction for that offense, he claimed that the criminal court never acquired jurisdiction over him because the juvenile court's certification order had not been filed in the criminal case. Since Rushing had not objected to this deficiency before trial as required by Article 4.18, the State claimed he forfeited the claim. The Court of Appeals held that Article 4.18 violates separation of powers because "it requires that a jurisdictional complaint be presented to the trial court before it can be presented to an appellate court." 50 S.W.3d at 725.

On petition for discretionary review by the State, the Court of Criminal Appeals held that Article 4.18 does not violate separation of powers principles on the ground that the entire juvenile justice system is a creation of the legislature and, as such, is entitled to enact limitations on that system, including requirements for preservation of error. *Rushing v. State*, 85 S.W.3d 283 (Tex.Crim.App. 2002). See also *Mays v. State*, UNPUBLISHED, No. 01-03-01345-CR, 2005 WL 1189676, 2005 Tex. App. Lexis 3842, Juvenile Law Newsletter ¶ 05-3-01 (Tex.App.—Houston [1st Dist.] 2005, no pet.) (appellant failed to raise jurisdictional objections to the district court before his plea of guilty as required by Article 4.18).

Exception for Perjury. Section 51.03(c) provides, "Nothing in this title [Title 3] prevents criminal proceedings against a child for perjury." The reasons for this exception to the exclusive jurisdiction of the juvenile court for offenses committed before age 17 are explained in Chapter 4. The prosecutor may file a perjury case for an offense committed before age 17 either in juvenile or criminal court and may file the case in criminal court without a juvenile court transfer order. The Attorney General has stated that the adult community supervision and corrections department is obligated to supervise a 16-year-old placed on adult community supervision for perjury even though there were no prior juvenile proceedings. Attorney General Opinion No. DM-461 (1997). See also *Ponce v. State,* 985 S.W.2d 594 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (upholding a criminal conviction for aggravated perjury committed when defendant was only 13 years old; no juvenile certification).

2. Seventeen-Year-Old Who Commits Offense Before 17

The juvenile court does not lose jurisdiction over a case merely because the respondent turns 17 years of age, so long as the offense was committed before he or she turned 17. Section 51.02(2) defines a child to include a person who is "seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age."

Further, Section 54.04(e) provides:

> The Texas Juvenile Justice Department shall accept a person properly committed to it by a juvenile court even though the person may be 17 years of age or older at the time of commitment.

It is the age of the person at the time the offense was committed, not his or her age at the time of commitment, that controls.

3. Age 17 at Time of Offense

General Rule – Criminal Court Has Jurisdiction Over Offense Committed by 17-Year-Old. The adult criminal justice system has exclusive jurisdiction over offenses committed by a person who was 17 years old at the time the offense was committed.

The petitioner in *Ex parte Redmond*, 605 S.W.2d 600 (Tex.Crim.App. 1980) appeared before the criminal court while 17 years of age and, without prior juvenile proceedings, entered pleas of guilty to four charges of aggravated robbery. Three of the offenses were committed before his 17th birthday, but the fourth was committed on his 17th birthday. The Court of Criminal Appeals set aside the convictions in the three offenses that were committed while the petitioner was 16 because the juvenile court had exclusive jurisdiction over them and had not entered a transfer order but affirmed the conviction for the offense that occurred on the petitioner's birthday because that offense was committed while he was 17. See also *Ex Parte Thai Lieu*, UNPUBLISHED, No. 02-08-392-CR, 2009 WL 279808, 2009 Tex.App.Lexis 754 (Tex.App.—Fort Worth 2009, pet. ref'd) (appellant's admission that he was 17 at time of offense put his case outside the juvenile court's jurisdiction).

The Truancy Exception. In 2011, for the purposes of truancy under Section 51.03(b)(2), the legislature vested juvenile court jurisdiction over persons who were 17 years old at the time of the offense. This change created the only instance for which the juvenile court had jurisdiction over an offense committed after the age of 17. However, amid reforms to Texas school attendance laws in 2015, truancy as a CINS was repealed, thereby removing this exception.

When 17-Year-Old Commits Offense While on Juvenile Probation or Committed to TJJD. Suppose a 17-year-old is on juvenile probation or in the custody of TJJD and commits an offense. Which court has jurisdiction over the prosecution of the new offense? In *Ex parte Mercado*, 590 S.W.2d 464 (Tex.Crim.App. 1979), the petitioner was committed to then-TYC when he was 14 years of age. While age 17 and a TYC parolee, he committed aggravated robbery, for which he was convicted in criminal court. He claimed that only the juvenile court had jurisdiction over the robbery case because he was still a child under Section 51.02(2) in that he was at the time 17 but under 18 and had been "found to have engaged in delinquent conduct...as a result of acts committed before becoming 17 years of age." In other words, he contended that his adjudication at age 14 extended the exclusive jurisdiction of the juvenile court until he became 18 years of age, not just 17. After discussing the purpose of Section 51.02(2), the Court rejected the petitioner's contention, explaining that the purpose of the definition of "child" is:

> …to provide juvenile court jurisdiction to that limited category of young persons who commit unlawful acts before becoming age seventeen but who, for one reason or another, have not been brought within the juvenile justice system for those acts prior to reaching seventeen years of age. Thus the juvenile status...is continued for less than one year in order for the system to deal with that person until jurisdiction is terminated by law at age eighteen. The plainly permissible objective is to provide an opportunity for the juvenile authorities to apply corrective measures to one whose chargeable acts are not found out until so near his seventeenth year that the initial jurisdiction of the system cannot be invoked while the person is still sixteen....
>
> [A]fter passing the seventeenth anniversary of one's birth, a person is no longer a "child" with respect to criminal conduct committed after that occasion, and there is not any prohibition known to this Court against such a person being criminally prosecuted as an adult. The fact that at age fourteen he may have been adjudicated and committed to TYC does not, at law, preserve his favored status as a "child" against prosecution for a penal offense committed after reaching seventeen and before becoming eighteen.

590 S.W.2d at 468-469.

4. Probationers, Parolees, and TJJD Residents

Ex parte Mercado establishes that the criminal court has jurisdiction over an offense committed by a TJJD parolee who is 17 years of age. Undoubtedly, the same principle would apply to a juvenile probationer or TJJD resident. However, when that occurs, what happens to the person's status with the juvenile system?

In 1980, the Executive Director of the former TYC sought an Attorney General's opinion on this very question. The specific request was whether the agency could continue custody of three persons committed by juvenile courts who had also been convicted of adult offenses and been placed on adult community supervision. One had been committed to TYC and then transferred to criminal court for a different offense and placed on adult community supervision. A second had been committed to TYC for a juvenile offense and also placed on adult community supervision for an offense committed while age 17. The third had been transferred to criminal court, placed on adult

community supervision, and then committed to TYC for a different offense committed before becoming age 17.

After reviewing various provisions of the Family Code and Human Resources Code, the Attorney General concluded that TYC could keep custody of each of these persons:

> TYC [TJJD] has jurisdiction of and control over any child who has been adjudged "delinquent" within the meaning of the Human Resources Code and the Family Code and has been properly committed to it until such time as the child reaches eighteen [now 19] years of age or is otherwise released from its jurisdiction. We can find nothing that indicates, or even suggests, that TYC [TJJD] forfeits its jurisdiction over a delinquent child who has been properly committed to it, and who would otherwise clearly be under its control and eligible for its services, merely because the child is placed on adult probation following conviction of some other offense.

Attorney General Opinion No. MW-237 (1980).

Therefore, a person on juvenile probation or committed to TJJD who commits an offense after becoming 17 years old is subject to the control of both the criminal and the juvenile systems. Of course, juvenile authorities are empowered to discharge the person from juvenile probation, and TJJD is empowered to discharge the person from TJJD control (a facility or parole) when the person becomes convicted in adult court. Such an action would often be appropriate, but TJJD is not required by law to do so.

D. Ages 14 and 15: The Minimum Ages for Transfer

If any felony is committed by a person while he or she is 15 or 16 years of age, the juvenile court, upon the prosecutor's petition or motion, may consider transfer of the child to criminal court for prosecution as an adult. In cases in which a person is 17, it is the respondent's age at the time of the conduct, not his or her age at the time of the court proceedings, that determines the transferability of the respondent.

Section 8.07(a) of the Penal Code provides that "a person may not be prosecuted for or convicted of any offense that the person committed when younger than 15 years of age" with exceptions not here relevant. Section 8.07(b) of the Penal Code provides that "unless the juvenile court waives jurisdiction...and certifies the individual for criminal prosecution...a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age." Finally, Section 54.02(a)(2) of the Family Code authorizes transfer to criminal court if the child was 14 years of age or older at the time the child was alleged to have committed a capital felony, aggravated controlled substance felony, or a felony of the first degree, or 15 years of age or older at the time the child is alleged to have committed any other felony. Although Section 54.02 could be read to refer to the age of the child at the time the allegations are made in the petition or motion for transfer, Section 8.07(a) makes it clear that it is age at the time of the offense that controls for transfer purposes. See Chapter 10.

E. Age 10: The Minimum Juvenile Court Age

Section 51.02(2) defines a child as "a person who is...ten years of age or older and under 17 years of age." Section 51.04(a) makes it clear that age 10 refers to a person's age at the time of the conduct, not the court proceedings:

> This title [Title 3] covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title *at the time the person engaged in the conduct, and, except as provided by Subsection (h), the juvenile court has exclusive original jurisdiction over proceedings under this title.* [emphasis added]

Setting the minimum age for juvenile court jurisdiction does not reflect a judgment that children under 10 cannot engage in socially harmful conduct, but rather reflects a judgment that they are not sufficiently mature to be held legally responsible for their own conduct in fault-based delinquency or CINS proceedings.

Age 10 is also an important age for criminal prosecution in other courts. In 2013, in an effort to divert low-level misdemeanants from the justice and municipal court dockets, the legislature amended Penal Code Section 8.07 to limit the offenses for which a child may be held criminally responsible. Subsections (d) and (e) were added to eliminate the jurisdictional authority to prosecute children of a certain age who cannot formulate the necessary intent to commit a crime. Subsection (d) prohibits prosecution of a fineable only misdemeanor or a violation of a penal ordinance of a political subdivision committed when a child is younger than 10 years of age. The language in subsection (e) specifies that a child who is at least 10 but not yet 15 is presumed incapable of committing these offenses, with the exception of a juvenile curfew ordinance or order. Procedurally, the statute establishes a rebuttable presumption that may be overcome by a

preponderance of evidence that proves that the child has sufficient capacity to understand the wrongfulness of his or her conduct. Policymakers contend that these procedural requirements may drastically curtail the number of prosecutions for low-level criminal conduct by children.

It bears noting that, although these same offenses may be addressed in juvenile court as CINS, there is no corresponding presumption that individuals of the same age who are prosecuted in juvenile court are incapable of committing the offenses.

Diversion of Children Under Age 12. In 2017, the legislature enacted Section 53.01(b-1) with the goal of diverting the very youngest children away from court involvement in the juvenile justice system. Upon a finding of probable cause, intake staff are required to refer the case of a child under the age of 12 to a community resource coordination group (CRCG), a local-level interagency staffing group, or another community juvenile service provider. A diversion under subsection (b-1) is authorized when a case is eligible for deferred prosecution and does not require referral to the prosecutor under the law, and the child and the child's family are not already receiving services. The statute prohibits referral for coordination of services when the child is alleged to have committed certain serious offenses, including, misdemeanors involving violence to a person or the use or possession of a firearm, location-restricted knife, club, or prohibited weapon or any felony unless the juvenile board has adopted an alternative referral plan. See Chapter 5 for additional discussion of the preliminary investigation and intake process.

F. Age 7: Minimum Age for STAR Program

Setting the minimum juvenile court age at 10 also reflects a judgment that, if the State wishes to intervene in the life of a child younger than 10, it should do so by proceeding against the parents of the child by seeking to terminate parental rights, to obtain managing conservatorship of the child under Title 5 of the Family Code, or to proceed under delinquency prevention programs.

Under Family Code Section 264.302, the Department of Family and Protective Services (DFPS) is authorized to extend services to children at risk of engaging in delinquent conduct. These children may be as old as 16 and as young as seven years of age. They may be referred to the at-risk programs by the juvenile court or probation department, as well as by other agencies. A child who is referred to the juvenile court for conduct engaged in before becoming 10 years of age might appropriately be referred to DFPS for inclusion in its STAR (Services to At-Risk Youth) program. Section 264.301.

Under the STAR program, a person may be given services through local DFPS contractors for any conduct engaged in between the ages of seven and 10 for which a court might find the child to be an "at-risk child." Section 264.302(d). For persons ages 10 through 16, STAR contractors may not provide services to anyone who has been referred to the juvenile court for an offense more serious than a state jail felony or who has ever been adjudicated for delinquent conduct. Section 264.302(c).

G. Proof of Age in Juvenile Proceedings

In juvenile adjudication or transfer proceedings, the State is required to prove that the respondent meets the applicable age requirements of Title 3. In adjudication proceedings, the State must prove that the respondent was 10 years of age or older but under 17 years of age at the time the delinquent conduct or CINS occurred. In a transfer proceeding, the State must prove that the respondent was 15 or 16 years of age at the time the felony offense occurred or at least 14 years of age at the time a capital felony, first degree felony, or aggravated controlled substance felony was committed. *Steed v. State*, 183 S.W.2d 458 (Tex. 1944); *In the Matter of A.S.*, 875 S.W.2d 402 (Tex.App.—Corpus Christi 1994, no writ); *In re J.T.*, 526 S.W.2d 646 (Tex.Civ.App.—El Paso 1975, no writ); *Miguel v. State*, 500 S.W.2d 680 (Tex.Civ.App.—Beaumont 1973, no writ). See also *In the Matter of A.D.D.*, 974 S.W.2d 299 (Tex.App.—San Antonio 1998, no pet.) (stating in dicta that only allegation of age, not proof of age, is required to invoke the jurisdiction of the juvenile court but also finding the State's proof of respondent's age in the dispositional phase of the proceedings was sufficient).

For adjudication or discretionary transfer purposes, the law requires only proof of the date of the offense and the age of the respondent at that time. However, it is important to know the juvenile's date of birth, not merely that he or she was 16 years old at the time the offense was committed. Juvenile dispositions are usually measured by the respondent's date of birth. For example, probation expires no later than the juvenile's 18th birthday, and TJJD control over all persons, including those receiving determinate sentences, expires no later than the person's 19th birthday. Therefore, while age in years may be sufficient for adjudication or discretionary transfer purposes, the more precise date of birth is needed for most dispositional purposes.

Burden of Proof. Is the State required to prove the respondent's age beyond a reasonable doubt? Section

54.03(f) requires the State to prove beyond a reasonable doubt that the child engaged in delinquent conduct or CINS. However, the respondent's age is not an element of the offense. It merely determines whether the charge is properly brought in juvenile court or in criminal court. In that respect, it is analogous to the question of venue in criminal cases, which determines in which county the criminal case can be filed but is not an element of the offense and need only be proved by a preponderance of the evidence. There are no cases that answer the question of how heavy is the burden of proving age. In all likelihood, a court would say that the State is required to prove age only by a preponderance of the evidence, not beyond a reasonable doubt. This is because juvenile proceedings are civil in nature except when a particular criminal requirement is imposed by a statute or constitution. See Section 51.17.

Methods of Proving Age. The State may discharge its burden of proving age in various ways.

1. Birth Certificate. The usual way in which the State would prove age is by a certified copy of the respondent's birth certificate, which would be admissible against a claim of hearsay under Rule 803(9) of the Texas Rules of Evidence. A copy of a birth certificate, if certified as authentic under Rule 902(4) of the Texas Rules of Evidence, would be admissible without proving its authenticity by a witness.

There remains the question of relevancy. How does the State prove that the birth certificate it is seeking to introduce into evidence is the birth certificate of the respondent? Unlike proving prior record in the penalty phase of a criminal trial, there are no fingerprints associated with the birth certificate to enable proof by fingerprint comparison with the respondent. The mere fact that the respondent has the same name as the name on the birth certificate should not be sufficient. Perhaps one of the respondent's parents could be called to prove that the date of birth on the certificate is that of the respondent. Most often, this question is not reached because it is waived by failure of the respondent's attorney to lodge a timely relevancy objection.

2. Proof from a Parent. There is no reason why the State cannot call as a witness either of the respondent's parents who happens to be present in court to prove date of birth. In *In the Matter of L.A.*, UNPUBLISHED, No. 04-97-00434-CV, 1998 WL 904294, 1998 Tex.App.Lexis 8016, Juvenile Law Newsletter ¶ 99-1-11 (Tex.App.—San Antonio 1998, no pet.), a juvenile probation officer testified as to the date of birth she had been given by a respondent's parents. There was no hearsay objection to this testimony. The Court of Appeals held the probation officer's testimony was sufficient proof of age.

3. Respondent's Out-of-Court Statements. Although the privilege against compelled self-incrimination would preclude the State from calling the respondent as a witness to establish date of birth, it is sometimes possible to use his or her own out-of-court statements to others to establish age. Those statements may take the form of formal, written confessions made to the police; of informal admissions made to police, intake, or probation workers; or of statements made by the child that are included in a transfer investigation report that is admitted into evidence at a transfer hearing. For example, in *In the Matter of S.E.C.*, 605 S.W.2d 955 (Tex.Civ.App.—Houston [1st Dist.] 1980, no writ), the State was unable to obtain an out-of-state birth certificate of the respondent. However, evidence was introduced that the respondent gave his date of birth in a signed confession, that he stated to a police officer upon his arrest that he was 16 years of age, and that he gave his date of birth to a doctor who examined him preparatory to the transfer hearing. The appellate court found that sufficient:

> Appellant correctly contends that it was the State's burden to prove by competent evidence that he was a child as defined by the Family Code.... Appellant contends that his statements to the various witnesses as to his birth date was [sic] hearsay, and as such inadmissible. These statements were admissions by the appellant and admissible as substantive evidence on the issues of his age. This is true even though his statements may have been based upon hearsay.

605 S.W.2d at 958.

Section 51.095 may make inadmissible an oral admission of age given by a child while in custody in response to questioning by a police or intake officer. Of course, timely and appropriate objection by defense counsel would be required to preclude admission into evidence of a child's admission of age under those circumstances. In the absence of an objection, the child's custodial admission could be sufficient proof of age. See Chapter 16.

4. Proof by Judicial Admission. Sometimes a respondent or his or her attorney will say something in court that will be taken as an admission against the respondent. Such an admission can be taken as proof of the fact admitted. For example, in *In re D.R.M.*, UNPUBLISHED, No. 01-89-01192-CV, 1990 WL 159335, 1990 Tex.App.Lexis 2539, Juvenile Law Newsletter ¶ 90-4-1 (Tex.App.—Houston [1st Dist.] 1990, no writ), the respondent contended in his

appeal from a transfer to criminal court that the State had not proved age in the transfer hearing. The Court of Appeals rejected this argument, finding that the respondent's attorney had filed a motion seeking determinate sentence proceedings as an alternative to transfer proceedings. In that motion, counsel stated the respondent was a juvenile within the meaning of Title 3. The Court of Appeals also believed that age was proved because a birth certificate was included with the certification investigation report that, without objection, was admitted into evidence at the hearing.

The respondent in *In the Matter of S.C.*, 790 S.W.2d 766 (Tex.App.—Austin 1990, pet. denied) argued in an appeal from a determinate sentence proceeding that the State had failed to prove his age in the adjudication phase of that case. Respondent contended that the juvenile court tricked him into admitting his age in court when the judge asked him to state his name and age at the outset of the adjudication hearing. Respondent argued that since this occurred before the juvenile court judge admonished him of his legal rights as required by Section 54.03(b), the admissions were obtained in violation of the law. The Court of Appeals did not reach the question of whether the respondent's statements made in court could constitute proof of age because it found that age was shown by the respondent's written confession and by stipulation of evidence by defense counsel and the prosecutor.

Age at Time of Conduct. In order to establish juvenile court jurisdiction over adjudication or transfer proceedings, the State must prove that the respondent was a child at the time of the conduct in question. Thus, it must prove the date of the conduct, as well as the age of the child.

However, so long as the proof shows the conduct occurred while the respondent was within the appropriate age brackets, it does not matter if the State erroneously alleges the conduct occurred outside those brackets. In *Ex parte Hunt*, 614 S.W.2d 426 (Tex.Crim.App. 1981)—a criminal prosecution without prior juvenile court handling—the proof was that the defendant became 17 years of age on May 31, 1980. Although the indictment alleged the offense was committed on or about May 19, 1980, the proof at trial was that it occurred on June 19, 1980. The court upheld the conviction with the comment that "[s]ince the proof shows that petitioner was seventeen years old when the offense was committed he was not a juvenile when he committed the offense and he is not entitled to the relief he seeks..." 614 S.W.2d at 427. See also *Belt v. State*, 227 S.W.3d 339 (Tex.App.—Texarkana 2007, reh'g overruled) (evidence showed Belt was an adult when the charged acts occurred).

For a more extended discussion of methods of proving age, see Dawson, *Responding to Misrepresentations, Nondisclosures and Incorrect Assumptions About the Age of the Accused: The Jurisdictional Boundary Between Juvenile and Criminal Courts in Texas*, 18 St. Mary's Law Journal 1117, 1149-55 (1987).

Requirement of a Timely Objection. Prior to 1996, the respondent was not required to raise in the juvenile court the State's failure to prove age as a prerequisite to raising the issue later. Failure to prove age could be raised for the first time on appeal. *Miguel v. State*, 500 S.W.2d 680 (Tex.Civ.App.—Beaumont 1973, no writ) (no proof of age under Article 2338-1, Section 3, Civil Statutes, the predecessor statute to Title 3).

Section 51.042 was added to the Family Code in 1995. It requires the respondent to make an objection to juvenile proceedings based on age at the appropriate juvenile proceeding—adjudication or certification. The juvenile cannot raise the issue for the first time on appeal. Failure to make a timely objection waives the claim and precludes the juvenile from raising the matter on appeal or in subsequent collateral proceedings.

Section 51.042 provides:

> (a) A child who objects to the jurisdiction of the court over the child because of the age of the child must raise the objection at the adjudication hearing or discretionary transfer hearing, if any.
>
> (b) A child who does not object as provided by Subsection (a) waives any right to object to the jurisdiction of the court because of the age of the child at a later hearing or on appeal.

See also *In the Matter of S.C.,* 229 S.W.3d 837 (Tex.App.—Texarkana 2007, pet. denied) (failure to object to court's jurisdiction because of child's age at adjudication or discretionary transfer hearing waives complaint on appeal); *In the Matter of T.A.W.,* 234 S.W.3d 704 (Tex.App.—Houston [14th Dist.] 2007, pet. denied); *In the Matter of D.J.*, UNPUBLISHED, No. 02-07-323-CV, 2008 Tex.App.Lexis 4136 (Tex.App.—Fort Worth 2008, no pet.).

Section 51.042 does not remove the burden of proving age from the State. It does, however, preclude the respondent from raising failure to prove age when challenging a juvenile court judgment on appeal or in collateral proceedings unless an age-related objection was made in juvenile court. The idea is that the objection must be made at a time when the State has the opportunity to supply the omitted proof, if it can. See *In re E.D.C.*,

88 S.W.3d 789 (Tex.App.—El Paso 2002, no pet.) (holding that objecting to admissibility of evidence of age is not same as making an objection to the absence of proof of age under statute); *In the Matter of J.C.M.*, UNPUBLISHED, No. 08-02-00303-CV, 2003 WL 22455287, 2003 Tex.App.Lexis 9184, Juvenile Law Newsletter ¶ 03-4-13 (Tex.App.—El Paso 2003, no pet.) (holding J.C.M. never objected to court's jurisdiction with regard to his age and even filed notice of appeal wherein he admitted being within the jurisdictional age limit of the juvenile court); *In re J.S.*, UNPUBLISHED, No. 05-01-00740CV, 2002 WL 1130136, 2002 Tex.App.Lexis 3911, Juvenile Law Newsletter ¶ 02-3-05 (Tex.App.—Dallas 2002, no pet.) (applying the statute to preclude an appellate claim of lack of proof of age).

CHAPTER 4: Criminal Violations, Delinquent Conduct, and Conduct Indicating a Need for Supervision

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This chapter deals with three main topics: (1) what criminal conduct by children is excluded from the jurisdiction of the juvenile court and placed in the jurisdiction of criminal courts; (2) what is delinquent conduct that will subject a child to the juvenile court's jurisdiction; a (3) what is conduct indicating a need for supervision (CINS).

The procedural requirements for prosecution and adjudication of juveniles for criminal offenses in municipal or justice courts, including restrictions on the secure confinement of juveniles, are discussed in detail in Chapter 23.

A. Criminal Violations by Children

Just because a person is under age 17 while committing a law violation does not necessarily mean the juvenile court has jurisdiction over the case. In addition to instances in which a juvenile has been certified as an adult, there are four situations in which a criminal court has jurisdiction over the case even though the person

was under 17 at the time an offense was committed: (1) perjury, (2) traffic offenses, (3) most offenses punishable by fine only, and (4) certain alcohol violations.

There are special circumstances justifying giving criminal courts jurisdiction in each of these instances. In addition, the legislature amended Penal Code Section 8.07 in 2013 to establish a rebuttable presumption that a child who is at least 10 but younger than 15 years of age is presumed incapable of committing a fine-only misdemeanor or violating a penal ordinance of a political subdivision. In this chapter, the exclusions and the reasons for them are discussed. In Chapter 23, the prosecutorial details of criminal prosecution and adjudications of juveniles in justice and municipal courts are discussed.

1. Perjury

Section 51.03(c) states, "Nothing in this title prevents criminal proceedings against a child for perjury." Section 8.07(a) of the Penal Code prohibits prosecution and conviction for any offense committed when a person is younger than 15 years of age except for the offenses listed in that subsection, the first of which is "perjury and aggravated perjury when it appears by proof that the person had sufficient discretion to understand the nature and obligation of an oath." Section 8.07(b) prohibits criminal proceedings for conduct committed before age 17, unless the juvenile court transfers the case, with the same exception for perjury and aggravated perjury provided in Section 8.07(a), as well as the types of offenses included Section 8.07(a)(2)-(5), discussed later in this chapter.

Perjury under Penal Code Section 37.02 is a jailable misdemeanor. Aggravated perjury under Penal Code Section 37.03 is a felony. Therefore, under Section 51.03(a)(1), each would be delinquent conduct and would subject a child offender to the exclusive jurisdiction of the juvenile court. However, because of the combined effect of Section 51.03(c) and Section 8.07 of the Penal Code, the criminal court also has jurisdiction.

As such, the juvenile and criminal courts have concurrent jurisdiction over a person who is alleged to have committed perjury or aggravated perjury while at least 10 years old and not yet 17. Perjury and aggravated perjury are the only criminal offenses for which either a juvenile court or a criminal court has jurisdiction without a prior transfer order from the other court.

In Attorney General Opinion No. DM-461 (1997), the Attorney General stated that, under these concurrent jurisdiction provisions, a 16-year-old may be criminally convicted of the offense of perjury without prior juvenile court proceedings. *Ponce v. State*, 985 S.W.2d 594 (Tex.App.—Houston [1st Dist.] 1999, no pet.), upholds a criminal conviction for aggravated perjury committed when the defendant was only 13 years old; there had been no juvenile certification, nor could there have been because of the defendant's age.

Why is perjury given this unique status? Article 1, Section 5 of the Texas Constitution provides that the oath required of a witness testifying in any judicial proceeding, civil or criminal, must be taken "subject to the pains and penalties of perjury." There is case law that suggests that since juvenile proceedings are nominally civil, not criminal, a witness who would be subject only to juvenile proceedings for lying under oath might not be a competent witness under that constitutional provision. See *Santillian v. State*, 182 S.W.2d 812 (Tex.Crim.App. 1944). That, in turn, might mean that a juvenile could not testify in any court proceedings. Rather than incur such a catastrophic risk, the Family Code gives the criminal courts concurrent jurisdiction over those offenses in order to leave no doubt that persons of juvenile court age, if otherwise competent as witnesses, may testify under the constitutional qualifying provision.

2. Traffic Offenses

Exclusive Criminal Jurisdiction. Family Code Sections 51.03(a)(1) and (b)(1) exclude traffic offenses from being either delinquent conduct or CINS. Sections 8.07(a)(2) and (3) of the Penal Code exclude traffic offenses from the prohibition on prosecuting an individual for a criminal offense committed before age 15. Section 8.07(b) excludes traffic offenses from the prohibition on prosecuting an individual for a criminal offense committed before age 17 without a transfer from the juvenile court.

In 2005, the legislature repealed Transportation Code Section 729.003(g), which provided that a traffic offense "is within the jurisdiction of the courts regularly empowered to try misdemeanors carrying the penalty provided by this chapter, and is not under the jurisdiction of a juvenile court." Although the legislature repealed that language, Family Code Sections 51.03(a)(1) and (b)(1) still affirm the legislative intent to exclude traffic offenses from the juvenile court's jurisdiction and to give exclusive jurisdiction over them to the criminal courts.

Definition of Traffic Offense. Section 51.02(16) defines a traffic offense as:

> (A) a violation of a penal statute cognizable under Chapter 729, Transportation Code, except for

conduct for which the person convicted may be sentenced to imprisonment or confinement in jail; or

(B) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state.

The legislature redefined "traffic offense" in 2005 by excluding from its definition any offense that is punishable by incarceration, making it clear that juvenile courts have jurisdiction over all traffic offenses that are not fineable only offenses. Penal Code Section 8.07(a)(2) was similarly amended in 2005 to define "traffic offense" in the same manner as Section 51.02(16)(A).

State Violations Covered. Transportation Code Chapter 729 is the statute that regulates the prosecution of state statutory traffic offenses against minors under the age of 17. It covers one who "operates a motor vehicle on a public road or highway, a street or alley in a municipality, or a public beach in violation of any traffic law of this state, including [a list of provisions in the Transportation Code]." Transportation Code Section 729.001(a). Offenses that fall under this chapter are punishable by a fine or other sanction authorized by the applicable statute, other than confinement or imprisonment.

Section 729.001(a) lists the Transportation Code provisions that apply. They are, generally: (1) Chapter 502 (dealing with registration of vehicles); (2) Chapter 521 (dealing with driver's licenses and certificates); (3) Subtitle C (dealing with rules of the road); (4) Chapter 601 (dealing with motor vehicle safety responsibility); (5) Chapter 621 (dealing with vehicle size and weight); (6) Chapter 661 (dealing with protective headgear for motorcycle operators and passengers); and (7) Chapter 681 (dealing with privileged parking).

There are, however, specific statutes within those chapters that are excluded from the list of violations considered to be traffic offenses for this special provision related to minors.

Failure to Stop and Render Aid May Not Be a Traffic Offense. Transportation Code Subtitle C, dealing with rules of the road, includes four offenses of failure to stop and render aid after being involved in a vehicular crash: Sections 550.021, 550.022, 550.024, and 550.025. All four offenses are excluded from the definition of "traffic offense" under some circumstances and therefore are included in the jurisdiction of the juvenile court. The first three exclusions were enacted in 1997. The exclusion of Section 550.025 was added in 2003.

If the operator of a motor vehicle is involved in an accident resulting in injury or death to a person, he or she is required to stop and render aid and provide identifying information to others involved in the accident. Section 550.021, Transportation Code.

Section 550.021(c)(1) was amended in 2007 to make it a third degree felony if the accident results in serious bodily injury or death to a person under these circumstances. In 2013, it was again amended so that it is a third degree felony if the accident results in serious bodily injury and a second degree felony if the accident results in death. Leaving the scene of an accident involving less than serious bodily injury carries a penalty for an adult of up to one year in the county jail or five years in the Texas Department of Criminal Justice, a fine of up to $5,000, or both. Transportation Code Section 550.021(c)(2). Although this offense is part of Subtitle C, it is excluded from the definition of a traffic offense. For a juvenile, that exclusion puts the offense within the jurisdiction of the juvenile court as an offense subject to incarceration or imprisonment under Section 51.03(a)(1).

Transportation Code Section 550.022 defines failure to stop and render aid when there is an automobile accident without personal injury but in which a driven or attended vehicle suffers damage. If the damage to all vehicles involved in the accident is $200 or more, the offense is a Class B misdemeanor and if less than $200, a Class C misdemeanor. For a juvenile, the Class B version of the offense is in the delinquency jurisdiction of the juvenile court as a jailable offense. The Class C version remains a traffic offense, which is excluded from the delinquency jurisdiction of the juvenile court; jurisdiction is exclusively in justice and municipal courts. Since 2005, it is also a Class C misdemeanor to fail to move a vehicle that can be safely driven from the scene of an accident that takes place on a freeway in a metropolitan area. See Section 550.022(c-1).

Transportation Code Section 550.024 makes it an offense not to stop and identify oneself if there is a collision with an unattended vehicle. If the damage to all vehicles involved in the accident is $200 or more, the offense is a Class B misdemeanor; if less, a Class C. For a juvenile, the Class B version of the offense is delinquent conduct. The Class C version remains a traffic offense.

2003 Amendments. In 2003, the legislature added two offenses to the list of those excluded from the definition of traffic offense. Transportation Code Section 550.025(b)(2) makes leaving the scene after colliding with a fixed object in which the damages are $200 or more a Class B misdemeanor. Section 521.457 makes driving

with an invalid license, which is a Class C misdemeanor, a Class B misdemeanor if the person had a prior conviction for driving with an invalid license. By these amendments, each is under the jurisdiction of the juvenile court as delinquent conduct.

2007 Amendment. In 2007, the legislature again amended Transportation Code Section 521.457, driving while license invalid. Under subsection (f-1), the offense is a Class B misdemeanor if it is shown during the course of trial that the person's license was previously suspended as the result of an offense involving driving while intoxicated. Section 521.457(f-1).

2009 Amendment. Transportation Code Section 521.457, driving while license invalid, was amended again in 2009, making it a class B misdemeanor if the person was operating a vehicle with an invalid license and in violation of Transportation Code Section 691.091, related to the requirement to have liability insurance. Section (f-2) was added, making it a Class A misdemeanor if the driver was operating without insurance and caused or was at fault in an accident resulting in serious bodily injury to or death of another person.

Reckless Driving Is Delinquent Conduct. Transportation Code Section 545.401 defines reckless driving and makes the offense punishable by a $200 fine, incarceration for not more than 30 days, or both. Before 2005, reckless driving was not specifically excluded from the legal definition of a traffic offense. It was a juvenile traffic offense when committed by a person while under 17 and exclusive jurisdiction was in the justice or municipal court, not in juvenile court. However, a 2005 amendment to Section 51.02(16)(A) makes it clear that juvenile courts now have jurisdiction over all traffic offenses punishable by imprisonment or confinement in jail, despite the fact that there is no exception for 545.501 in Section 729.001, Transportation Code.

Racing on the Highway Is Delinquent Conduct. In 2004, the Attorney General had to decide whether "racing on the highway" under Transportation Code Section 545.420, when committed by a juvenile, was "delinquent conduct," "conduct indicating a need for supervision," or a "traffic offense," as those terms are defined in the Family Code. Attorney General Opinion No. GA-0157 (2004). Title 3 specifically excludes traffic offenses from the definitions of delinquent conduct and CINS. Sections 51.03(a)(1) and (b)(1). Although the punishment for racing on the highway under Section 545.420 ranges from a Class B misdemeanor to a second degree felony, the Attorney General nevertheless ruled that the plain language of the applicable statutes classified racing on the highway by a person younger than 17 as a traffic offense within the jurisdiction of the justice and municipal courts. The 2005 amendment to Section 51.02(16)(A) remedied this by clarifying that juvenile courts have jurisdiction over all traffic offenses punishable by imprisonment or confinement in jail, despite the fact that there is no exception for it in Section 729.001, Transportation Code.

The Houston First District Court of Appeals upheld a trial court's denial of habeas corpus relief in a case of "drag racing and causing the death of another person." *In the Matter of A.M.M.*, UNPUBLISHED, No. 01-07-01099-CV, 2008 WL 5178969, Juvenile Law Newsletter ¶ 09-1-3 (Tex.App.—Houston [14th Dist.] 2008, no pet.). On appeal, the appellant asked whether racing on the highway comes under the jurisdiction of the juvenile court or of the justice or municipal court. The appellate court emphasized the amended definition of traffic offense, which since 2005 excludes "conduct for which the person convicted may be sentenced to imprisonment or confinement to jail." 2008 WL at 5178969 *1; Section 51.02(16). The Court of Appeals also noted that the alleged offense is a second degree felony punishable by two to 20 years imprisonment. The court stated:

> Because appellant was charged with delinquent conduct that violates a penal law of this state, which is punishable by imprisonment or confinement in jail, the juvenile court has jurisdiction over his case. We hold that the trial court properly denied habeas corpus relief.

2008 WL at 5178969 *1.

Since September 1, 2009, Transportation Code Section 545.420, has required law enforcement to impound a vehicle involved in a racing offense that results in personal injury or property damage. The change is designed to serve as an additional deterrent to the Class B misdemeanor offense of racing on the highway.

Transportation Code Offenses in Juvenile Court. The following is a non-exhaustive list of Transportation Code offenses that are handled in juvenile court and for which a convicted person may be sentenced to imprisonment or confinement in jail:

Section 502.410 (falsification or forgery);

Section 502.411 (bribery of county officer or agent);

Section 502.475 (wrong, fictitious, altered, or obscured insignia);

Section 502.4755 (deceptively similar insignia);

Section 503.067 (unauthorized reproduction, purchase, use, or sale of temporary tags);

Section 504.945 (wrong, fictitious, altered, or obscured license plate);

Section 504.946 (deceptively similar license plate);

Section 504.9465 (license plate flipper);

Section 521.451 (general violations relating to false or altered identification);

Section 521.454 (false application);

Section 521.455 (use of illegal license or certificate);

Section 521.456 (delivery or manufacture of counterfeit instrument);

Section 521.4565 (conspiring to manufacture counterfeit license or certificate);

Section 521.457 (driving while license invalid);

Section 545.157 (passing certain vehicles and causing bodily injury);

Section 545.066 (passing a school bus);

Section 545.4191 (person riding in trailer or semitrailer drawn by truck, road tractor, or truck tractor);

Section 545.420 (racing on highway);

Section 545.421 (fleeing or attempting to elude police officer);

Section 545.4251 (use of portable wireless communication device for electronic messaging and causing death or serious bodily injury);

Section 550.021 (accident involving personal injury or death);

Section 550.022 (accident involving damage to vehicle);

Section 550.024 (duty on striking unattended vehicle);

Section 550.025 (duty on striking fixture or highway landscaping);

Section 601.008 (violation of chapter; offense);

Section 601.371 (operation of motor vehicle in violation of suspension; offense);

Section 621.507 (general offense; penalty); and

Section 681.0111 (manufacture, sale, possession, or use of counterfeit placard).

It is worth examining that there still exists a potential conflict between the definitions of "traffic offense" that appear in 51.02(16)(A) and in 729.001, Transportation Code. The intent of Section 729.001 was to limit the punishment minors face for traffic offenses to only the fine and any non-confinement punishment available for the listed traffic offenses; it specifically excepts out the provisions for which this lesser punishment is not available. The expansive definition in Section 51.02(16)(A), which ostensibly gives the juvenile court jurisdiction over every traffic offense that includes the option of incarceration, seems to effectively nullify the lesser punishment provision created by Section 729.001(c). However, an argument could be made that Section 729.001, Transportation Code, is more specific than Section 51.02(16)(A), Family Code, and thus should control. There are no cases that have examined this specific question.

Driving While Intoxicated Is Not a Traffic Offense. It is important to note that driving while intoxicated (DWI) is not a traffic offense under these provisions. DWI is not among the various traffic statutes referred to in Section 729.001, nor is it a Transportation Code violation. DWI is a Penal Code violation and is punishable by confinement. It is under the exclusive jurisdiction of the juvenile court as delinquent conduct. Section 51.03(a)(3). Driving under the influence of alcohol by a minor, a violation of the Alcoholic Beverage Code, is defined as delinquent conduct under Section 51.03(a)(4).

Reason for Excluding Traffic Offenses from Juvenile Court Jurisdiction. The policy behind the exclusion of traffic offenses from the juvenile court's jurisdiction is to conserve the time and resources of the juvenile system for manifestations of adolescent misconduct that are more serious than traffic violations.

Criminal Courts Cannot Transfer Traffic Offenses to Juvenile Court. Unlike other fineable only offenses within the original jurisdiction of a municipal or justice court, traffic offenses cannot be transferred by those courts to the juvenile court. Traffic cases remain permanently within the jurisdiction of municipal and justice

courts. The mandatory third offense referral provision applicable to other fineable only offenses does not apply to juvenile traffic offenses. Juvenile court involvement in traffic offenses is limited to possible referrals by municipal or justice courts for contempt of court for refusal to obey a dispositional order of the court. See Chapter 23.

Applies Up to Age 17. Until 1997, Section 729.001 included only traffic offenses committed by persons between the ages of 14 and 17. That created uncertainty as to the legal procedures that are required for a traffic offense committed by a person while under 14. In 1997, the legislature eliminated the minimum age of 14; Chapter 729 now applies to all traffic offenses committed by a person while under the age of 17.

City Traffic Ordinances. In addition to traffic violations handled under Transportation Code Chapter 729, Section 51.02(16)(B) of the Family Code includes as a traffic offense "a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state." Under prior law, it was unclear whether the protective procedures established by Chapter 729 applied to the prosecution of a juvenile for a traffic ordinance violation. Section 729.003(a) was amended in 1997 to clarify that those procedures are applicable to prosecution of a juvenile under a traffic ordinance. Section 729.003 was repealed in part in 2003 and then fully in 2005. In a related change, Family Code Section 51.02(16) was amended in 2005 to make it clear that a traffic offense does not include "conduct for which the person convicted may be sentenced to imprisonment or confinement in jail." This change affirms the legislative intent to exclude traffic offenses from juvenile court jurisdiction and to give exclusive jurisdiction over them to the criminal courts.

Procedural Requirements. See Chapter 23 for a discussion of the procedural requirements for the detention, prosecution, adjudication, and punishment of juveniles in municipal or justice courts for traffic offenses.

3. Fineable Only Misdemeanors and Ordinance Violations

Juvenile Jurisdiction—Before 1987. Prior to amendments enacted in 1987, Section 51.03(b)(1) of the Family Code defined conduct indicating a need for supervision (CINS) to include three or more violations of statutes or ordinances punishable by fine only. No court, juvenile or criminal, had jurisdiction over the first or second fineable only misdemeanor or ordinance violation.

Criminal Jurisdiction—1987 to 1989. In 1987, the legislature changed the method by which fineable offenses were handled under the Family and Penal Codes. It gave criminal courts jurisdiction over fineable offenses committed by juveniles, but it authorized the criminal court to transfer to juvenile court a case of a juvenile charged with a fineable misdemeanor who had two prior fineable misdemeanor convictions. After transfer, a CINS petition alleging the transfer and third offense was authorized to be filed in juvenile court. Finally, a special expunction statute was enacted to deal with the criminal records of juveniles convicted in justice or municipal courts under this procedure. The net effect of the 1987 amendments was to give criminal courts exclusive jurisdiction over the first two fineable offenses, while previously no court had jurisdiction over them, and to give the criminal courts discretion to handle the third or subsequent violation or to transfer it to juvenile court.

Juvenile Jurisdiction—1989 to 1991. In 1989, the legislature repealed much of the scheme it had enacted in 1987. However, it defined a single instance of public intoxication as CINS even though it is punishable by a fine only when committed by an adult. Thus, from 1989 to 1991, fineable offenses, except for public intoxication, were within the jurisdiction of the juvenile court only upon proof that three or more had been committed. With the exceptions of traffic offenses and certain alcohol violations, fineable only offenses were not in the jurisdiction of the criminal courts at all. The repeal was enacted at the behest of a group of municipal and justice court judges who believed the new jurisdiction was too burdensome.

Criminal Jurisdiction—1991 to Present. In 1991, the legislature—after two years under the old scheme—enacted a system for handling fineable only offenses in criminal court similar to the scheme it had enacted in 1987 but repealed in 1989.

Conduct Indicating a Need for Supervision Redefined. As part of the 1991 scheme, the legislature redefined CINS to include a single fineable only offense rather than the three or more previously required. Section 51.03(b)(1). However, with certain exceptions, the juvenile court does not have jurisdiction over a fineable only offense unless the case is first filed in criminal court and transferred to the juvenile court by the criminal court. Sections 51.03(b)(1) and (f).

Waiver of Fineable Only "Sexting" Offenses. In 2011, the legislature created the CINS offense of Electronic Transmission of Certain Visual Material Depicting a Minor, known as the "sexting" law, which is discussed fully later in this chapter. Texas Penal Code Section 43.261. The offense applies to individuals up to 18 years of age, which means not all individuals who commit the

offense are juveniles. The offense can be a Class C, Class B, or Class A misdemeanor, depending on the evidence. To ensure that the offense is always handled in juvenile court, it is defined as CINS, which means the municipal and justice courts have no jurisdiction over it. However, because it is sometimes designated a Class C misdemeanor and because of the concern that there may be confusion over where to file this new offense, language was added to Section 51.08(b)(1) to direct any justice or municipal court to transfer to the juvenile court any case in which a charge under 43.261 against a juvenile is filed. It is technically not a transfer or waiver of jurisdiction (since the justice and municipal courts have no jurisdiction); it is probably more accurately described as "forwarding to the appropriate court."

Public Intoxication Prosecutions in Justice and Municipal Court. Prior to September 1, 2009, all public intoxication cases were under the CINS jurisdiction of the juvenile court and not within the jurisdiction of the criminal courts. Penal Code Sections 8.07(a) and (b). This changed with the passage of House Bill 558, which gave justice and municipal courts jurisdiction over juveniles who commit public intoxication under Penal Code Section 49.02. A conforming change was made to Penal Code Section 8.07(a)(4), authorizing the prosecution of minors under the age of 15 in justice or municipal court for public intoxication.

Discretionary Transfer to Juvenile Court. Although transfer to juvenile court becomes mandatory on a third or subsequent offense, as discussed below, the municipal or justice court has discretion to transfer any fineable only case over which it has jurisdiction, other than a traffic offense, to juvenile court, where it will be handled as a CINS case. Transfer could occur on even the first filing in municipal or justice court. Section 51.08(b)(2). This was a major concession to the wishes of some judges of municipal and justice courts.

Mandatory Transfer to Juvenile Court. If a fineable only case (other than a traffic offense) is filed in municipal or justice court and the juvenile has two prior convictions for fineable only offenses (other than traffic offenses), then transfer to juvenile court is mandatory. The only exception is if the court has implemented a juvenile case manager program under Article 45.056, Code of Criminal Procedure; for such courts, the transfer is discretionary, as discussed below. Section 51.08(b) provides:

> A court in which there is pending a complaint against a child alleging a violation of a misdemeanor offense punishable by fine only other than a traffic offense or a violation of a penal ordinance of a political subdivision other than a traffic offense:
>
> (1) except as provided by Subsection (d)[courts that have implemented a juvenile case manager program], shall waive its original jurisdiction and refer the child to juvenile court if:
>
> …
>
> (B) the child has previously been convicted of:
>
> (i) two or more misdemeanors punishable by fine only other than a traffic offense;
>
> (ii) two or more violations of a penal ordinance of a political subdivision other than a traffic offense; or
>
> (iii) one or more of each of the types of misdemeanors described in Subparagraph (i) or (ii).

The statute does not specify whether the two prior convictions must have been obtained in separate proceedings or may have been obtained in the same proceeding. It also does not specify whether a particular sequence of commission and conviction of the offenses must have occurred, i.e., commission and conviction of the first offense, followed by commission and conviction of the second offense, followed by commission of the third offense.

The legislature probably did not intend to require transfer when a juvenile has previously obtained two convictions in the same previous municipal or justice court proceeding. Often, whether one or two fineable offenses are filed from a criminal transaction is an arbitrary decision made by the arresting officer and is not necessarily related to the question of whether the situation requires juvenile court scrutiny.

A situation similar to that which is required under the habitual felony conduct statutes (Penal Code Section 12.42(d) and Family Code Section 51.031) is probably what the legislature had in mind. This would require the following sequence: commission of and conviction for the first fineable offense, followed by commission of and conviction for the second fineable offense, followed by commission of and charge for the third fineable offense. In that circumstance, the criminal justice system will have had two opportunities to deal with the child's behavior

before resorting to the more elaborate and expensive mechanism of the juvenile court. A municipal or justice court does not err in transferring any case to juvenile court, since all cases may be transferred, but can err in not transferring a case. If a conviction is obtained in a case that was subject to the mandatory transfer requirement, that conviction is quite likely void, since the criminal court lacked jurisdiction over the case.

No Mandatory Transfer for Courts with Case Managers. In 2001, the legislature added Section 51.08(d) to exempt from the mandatory transfer requirement those justice or municipal courts that have implemented a case manager program under Article 45.056 of the Code of Criminal Procedure, which was enacted as part of the same bill. This exemption is not applicable to a charge under Penal Code Section 43.261 ("sexting"), discussed below.

A case manager, more fully described in Chapter 23, is a person who performs probation officer-type functions for a justice or municipal court in juvenile cases. Such a person can perform intake duties on complaints filed, operate diversion programs, manage the court's juvenile docket, implement dispositional orders by providing supervision services, and initiate proceedings for enforcing those orders in the event of a violation. If a court has obtained the assistance of a juvenile case manager, that court is as well equipped as a juvenile court to deal with persistent juvenile misconduct at the fineable only offense level. There is, therefore, no need for mandatory transfer. Of course, the justice or municipal court retains the power to transfer any juvenile non-traffic case to the juvenile court. The case manager provision affects only mandatory transfer.

Teen Court and Deferred Disposition Cases. If a prior case was successfully handled under a teen court program, that case cannot be counted as a criminal conviction for mandatory transfer to juvenile court. The teen court statute, Code of Criminal Procedure Article 45.052(d), provides that "a charge dismissed under this article may not be...used for any purpose." See Chapter 23.

If an earlier case was handled successfully under the deferred disposition provision authorized by Code of Criminal Procedure Article 45.051, then it likewise cannot count as a conviction under the mandatory transfer statute. Article 45.051(c) requires the court, upon the defendant's successful completion of the program, to dismiss the complaint and to clearly note "in the docket that the complaint is dismissed and that there is not a final conviction." Article 45.051(e) states, "If a complaint is dismissed under this article, there is not a final conviction and the complaint may not be used against the person for any purpose." It also allows for an expunction of the records under Article 55.01.

Transfer of Failure to Attend School Cases. Section 51.08, pertaining to the transfer of cases from criminal to juvenile court, was amended in 2005 by adding subsection (e). This provision prohibited a juvenile court from refusing to accept the transfer of a case brought under former Education Code Section 25.094 (Failure to Attend School), subject to the juvenile court prosecutor determining under Section 53.012 (Review by Prosecutor) that the case was legally sufficient for adjudication. Subsection (e) was repealed in 2015 as part of the decriminalization of school attendance conduct and the repeal of truancy as a CINS offense over which juvenile courts have jurisdiction.

Convictions in Same Court or County Not Required. The statute does not require that the two prior convictions necessary to make transfer to juvenile court mandatory must have occurred in the same court in which the third case is filed. There is also no requirement that the prior convictions must have occurred in the same county. By requiring in Section 51.08(c) that notice of final dispositions be sent to the juvenile court, the legislature implicitly recognized the fact that some convictions may have been obtained in one court and some in another, because the notice of dispositions is required to facilitate sharing just such information.

Notice of Filing and Final Disposition. When a fineable only case, other than a traffic offense, is filed in justice or municipal court, that court is required to provide notice of the filing to the county's juvenile court. The criminal court is also required to send a copy of any final disposition in the case to the juvenile court. Section 51.08(c).

The statute does not state why notice of filing and final disposition must be given to the juvenile court. However, the obvious purpose of this requirement is to enable the juvenile court to serve as the countywide repository of records concerning fineable only offenses against juveniles. This is necessary to enable the municipal and justice courts to better discharge their duties to transfer the third fineable only case to the juvenile court for handling as a CINS case. It is also necessary to enable those courts to create appropriate dispositions in those cases they retain.

Every county has several municipal and justice courts, each with a separate clerk of court. Without a countywide repository of information, a justice or municipal court in which a fineable only case is filed against a juvenile would have difficulty determining whether transfer to juvenile court is mandatory because of two prior convictions for fineable only offenses.

Therefore, it is implicit in the statutory scheme that the juvenile court maintain records of these filings and dispositions in an accessible manner and respond to inquiries from the municipal and justice courts concerning prior proceedings against a juvenile defendant. Furthermore, it would be appropriate for the juvenile court, upon notice of the filing of a charge against a juvenile defendant who has twice before been convicted, to notify the municipal or justice court of that fact, since transfer to juvenile court is required. Finally, it would be in the spirit of the legislation for the juvenile court to share with a municipal or justice court that provided filing information about a juvenile any information in the possession of the juvenile court concerning that juvenile. Such information could include prior municipal or justice court cases, prior referrals to the juvenile court, and current probation status, if any, of the juvenile who was the subject of the justice or municipal court notice. This sharing of information would enable a coordinated effort to be employed involving a juvenile who is simultaneously in more than one court system.

Transfer Procedure. The statute does not specify any particular procedure that must be employed in order to effect transfer of a case from the jurisdiction of a municipal or justice court to that of the juvenile court. Certainly, none of the elaborate procedural requirements of a juvenile court transfer under Section 54.02 of a felony case to criminal court for prosecution is required or warranted. On the other hand, a transfer from municipal or justice court to juvenile court enables more coercive measures to be taken respecting the case in juvenile court than were possible in criminal court. This suggests that due process of law may require some minimal hearing in the municipal or justice court before transfer is ordered—perhaps only notice that the court is considering transfer and giving the juvenile an opportunity to present arguments against such a decision. Of course, the court has discretion in only some instances, so the arguments in a mandatory transfer situation would be limited to arguing that it is not, in fact, the third offense.

Once the municipal or justice court has decided to transfer the case to juvenile court, it should forward to the intake section of the juvenile court the following: the criminal complaint, any other documents filed in the case, and a written court order transferring the case. At that point, the case becomes a referral to the juvenile court. Sections 51.03(b)(1) and (f).

Proceeding in Juvenile Court After Transfer. The juvenile court may choose to handle a case transferred from municipal or justice court like any other referral to the juvenile court. The juvenile court may refer it to the prosecutor for possible filing of a petition or handle the case non-judicially. If a CINS petition is filed, the prosecutor should allege the elements of the offense that was transferred, the age of the child at the time of the offense, and the fact that the case was originally filed in municipal or justice court but transferred by that court to the juvenile court.

Only one offense plus the fact of transfer need be alleged to confer CINS jurisdiction on the juvenile court. The fact of municipal or justice court transfer must be proved in the adjudication hearing since, like the age of the child at the time of the offense, it is a fact that is necessary to confer jurisdiction on the juvenile court.

New Fineable Offenses After Transfer. Suppose a municipal or justice court transfers a fineable only offense to the juvenile court, and after the transfer, the child commits another fineable only offense. The new offense must be filed in the appropriate municipal or justice court. The juvenile court, however, will not have jurisdiction until the municipal or justice court transfers the case. Sections 51.03(f) and 51.08(b). If the previous transfer was mandatory, the new offense should also summarily be transferred to the juvenile court. If, however, the child does not have two prior convictions, the municipal or justice court may choose to retain jurisdiction over the new offense despite the transfer of the other case to the juvenile court. This type of offense sequence might occur, for example, when the latest charge has been filed in a different court than the court that elected to transfer the previous case to juvenile court.

Criminal Court Procedures. See Chapter 23 for a discussion of the special procedures that are required or available for the handling of criminal cases against juveniles in municipal and justice courts.

4. Alcohol Violations

The Alcoholic Beverage Code regulates the manufacture, distribution, sale, possession, and consumption of alcoholic beverages in Texas. Chapter 106 of that Code creates various offenses specifically dealing with minors, who are defined as persons under the age of 21. Section 106.02 prohibits purchase of alcohol by a minor. Section

106.025 prohibits attempt to purchase alcohol by a minor. Section 106.04 prohibits consumption of alcohol by a minor. Section 106.041 prohibits a minor from operating a motor vehicle or watercraft while under the influence of any detectable amount of alcohol. Section 106.05 prohibits possession of alcohol by a minor. Section 106.06 prohibits purchasing alcohol for or providing alcohol to a minor. Section 106.07 prohibits a minor from falsely representing that he is at least 21 years of age for the purpose of obtaining alcohol. *Florance v. State*, UNPUBLISHED, No. 05-08-00707-CR, 2009 WL 1267350, Juvenile Law Newsletter ¶ 09-3-1 (Tex.App.—Dallas 2009, pet. ref'd), *cert. denied*, 131 S.Ct. 337 (2010) (upholding constitutionality of Section 106.04).

Exceptions, Requests for Emergency Assistance. In 2011, in an attempt to prevent the alcohol-related deaths of minors, the legislature created exceptions to the offenses of consumption of alcohol by a minor and possession of alcohol by a minor (Sections 106.04 and 106.05). The change in law specifies that the first minor to request emergency medical assistance regarding a possible alcohol overdose by another minor is not subject to prosecution. For this exception to apply, the minor that called for help must remain on the scene until medical assistance arrives and must cooperate with both medical assistance and law enforcement personnel.

In 2017, Section 106.04 (minor in consumption) and 106.05 (minor in possession) were again amended, this time to encourage the reporting of sexual assaults that occur even if the victim or the person reporting the offense was a minor consuming or possessing alcohol. The report must be made to a health care provider treating the victim of the sexual assault, an employee of a law enforcement agency, including a campus police department, or the Title IX coordinator or another employee of the institution who is responsible for responding to reports of sexual assault.

While the changes to the law were well-intentioned, the new language unfortunately creates some potential issues. Sections 106.04(f)-(g) read as follows (Sections 106.5(e)-(f) are substantively identical):

> (f) Except as provided by Subsection (g), Subsection (a) *does not apply* [emphasis added] to a minor who reports the sexual assault of the minor or another person, or is the victim of a sexual assault reported by another person, to…
>
> (g) A minor is entitled to *raise the defense* [emphasis added] provided by Subsection (f) in the prosecution of an offense under this section only if the minor is in violation of this section at the time of the commission of a sexual assault that is:
>
> (1) reported by the minor under Subsection (f); or
>
> (2) committed against the minor and reported by another person under Subsection (f).

One issue with the language is that subsection (f) appears to create an inapplicability provision, so that the offense would be inapplicable to a minor who is the victim or sexual assault or who reports the sexual assault of another person whereas subsection (g) appears to create an affirmative defense. These are two different things. If an offense is inapplicable, then the person to whom the offense is inapplicable cannot be prosecuted; it is an exception to prosecution. An affirmative defense does not create an exception to prosecution; it allows for a prosecution while giving the defendant the ability to prove a particular defense.

A second issue is that the exception or defense only applies if the minor, be it the victim or a person later reporting the assault, was consuming or possessing alcohol at the time of the assault. It is unlikely that the person making the report will know exactly when the assault occurred to know if, at that moment, he or she was consuming or possessing alcohol. It is unlikely that the intention was to be so limiting. Instead, it is likely that the intent was to cover a minor possessing or consuming alcohol during the time around when the assault occurred, such as during a party that was happening when the assault occurred.

Driving Under the Influence by a Minor. In 1997, the legislature created the offense of driving under the influence by a minor (DUIM) in Section 106.041, Alcoholic Beverage Code. The offense is committed by a minor who operates a motor vehicle in a public place while having any detectable amount of alcohol in his or her system. In 2009, the legislature expanded DUIM to include operation of a watercraft. Section 106.041(a). The statute was also amended to apply the definition of watercraft codified in Penal Code Section 49.01(4). See Section 106.041(j)(4). Thus, all the elements are identical to DWI except that any detectable amount of alcohol, not necessarily rising to the level of intoxication, suffices to establish guilt. Driving Under the Influence by a Minor is considered a Class C misdemeanor if the minor that committed the offense is still a child as defined by Family Code Section 51.02 (10 years of age but not yet 17). There are different penalties for a repeat offender who is a minor who is at least 17 years of age. Since 2005, a minor

who commits DUIM and who has been previously convicted two or more times of the same offense is not eligible for deferred disposition or deferred adjudication. Section 106.071(f). Third or subsequent offense DUIM is delinquent conduct under Family Code Section 51.03(a)(4) when committed by a minor who is a juvenile.

The Attorney General was asked whether all cases of alcohol-impaired driving by a minor must be prosecuted as driving under the influence by a minor, excluding the possibility of a DWI prosecution. The Attorney General responded that the two offenses are aimed at different situations. DWI covers a person of any age who operates a motor vehicle while intoxicated, while DUIM covers only persons under 21 and does not require intoxication or impairment. Either charge may be filed against a minor, depending upon the facts. Attorney General Opinion No. LO 98-027 (1998).

If DWI, DWI with Child Passenger, or Boating While Intoxicated charges are filed against a person under 21, Section 106.041(g) provides that DUIM cannot be considered as a lesser included offense. That means that a judge or jury cannot acquit the minor of DWI and convict of DUIM as a lesser included offense. That provision was enacted out of concern that juries would be likely to acquit of DWI and convict of DUIM out of a sense of leniency.

Alcohol Violations Under the 1991 Fineable Offense Scheme. Under the scheme enacted in 1991, alcohol violations of a fineable only nature must be filed in the appropriate criminal court no matter what the age of the juvenile charged with the violation. Of course, the municipal or justice court may transfer any such case to the juvenile court and must transfer it if the defendant has two prior convictions, as in fineable only cases generally.

Special Procedures. When minors are prosecuted in criminal court for alcohol violations, the legislature has required that the court must use special procedures and protections for the defendants, much like the procedures required for prosecution of children in criminal court for traffic offenses. There are also special expunction rules applicable only to alcohol offenses. Those special procedures and rules are discussed in Chapter 23.

Punishment Provisions. The punishment provisions for most alcohol violations by minors are in Section 106.071 of the Alcoholic Beverage Code. That section provides that the first offense is a Class C misdemeanor (carrying a fine of up to $500) and provides enhanced penalties for subsequent offenses. It also mandates community service, attendance at an available alcohol awareness course, and driver's license suspension or denial upon conviction or deferred disposition.

See Chapter 23 for a full discussion of the dispositional alternatives available to a municipal and justice court under Chapter 106 of the Alcoholic Beverage Code.

Purchase of Alcohol for a Minor or Furnishing Alcohol to a Minor. There is one age-related alcohol offense that may be committed by either a minor or a person 21 years of age or older. The juvenile court has jurisdiction when a child of juvenile age is charged under Section 106.06 of the Alcoholic Beverage Code for buying alcohol for or otherwise providing alcohol to a minor. Unlike other alcohol-related offenses, this offense is designated as a Class A misdemeanor.

In 2011, the legislature added a new requirement that must be imposed on an adult defendant who has been placed on community supervision under Code of Criminal Procedure Article 42.12 [re-designated as 42A.304, effective January 1, 2017] for purchasing or otherwise providing alcohol to a minor if the defendant committed the offense at a gathering where participants were involved in the abuse of alcohol, including binge drinking or forcing or coercing others to drink alcohol. In addition to community service hours and participation in an alcohol awareness program, the court must order the Department of Public Safety to deny issuance of or suspend the defendant's driver's license or permit for up to 180 days.

There are no similar provisions for a juvenile charged with the same offense under Section 106.06. In addition, the offense is not included among those for which the punishment provisions contained in Section 106.071 or Family Code Section 54.047 apply. Therefore, the juvenile court is not mandated by law to impose the range of dispositional options such as community service, alcohol education, or suspension or denial of a driver's license or permit on a juvenile adjudicated for this offense. However, the juvenile court maintains the dispositional authority to order suspension or denial of the juvenile's license or permit as provided by Section 54.042(f) or as a potential punishment for a probation violation. The period of suspension or denial may not exceed one year.

5. Public Intoxication

Under prior law, a single instance of public intoxication as defined in Penal Code Section 49.02 was a CINS offense under the jurisdiction of the juvenile court (even though for adults it is a fineable only offense). Section 51.03(b)(1). This provision was retained under the 1991

scheme for handling fineable only offenses. Sections 51.03(b)(1), 51.03(f), 51.08, and Penal Code Section 8.07.

In 2009, the legislature conferred jurisdiction of public intoxication cases involving children to municipal and justice courts in Texas. Municipal or justice courts now have jurisdiction over public intoxication cases. See conforming change to Penal Code Section 8.07(a)(4), authorizing minors under the age of 15 to be prosecuted in justice or municipal court for public intoxication. Consequently, there is a requirement that a municipal or justice court transfer the case to juvenile court in order for the juvenile court to accept referral of a public intoxication charge as a CINS case. Absent such a transfer, the case remains in municipal or justice court.

B. Delinquent Conduct

There are two broad categories of conduct subject to the jurisdiction of the juvenile court: delinquent conduct and conduct indicating a need for supervision (CINS), which includes the least serious law violations and certain non-criminal conduct. There are two reasons for making the delinquency/CINS distinction: to avoid the stigma of "delinquency" for the less serious misconduct encompassed in the CINS category and to prevent commitment to TJJD upon an adjudication of a CINS offense. See Section 54.04(d). Probation is the most serious authorized disposition for a CINS case.

Under 1999 and 2007 amendments to Sections 54.04 and 54.05, TJJD commitment is not available in all cases of delinquent conduct. It is available only in felony cases, whereas the law previously authorized it for felonies or upon the third jailable misdemeanor adjudication.

There are four categories of delinquent conduct: (1) class B misdemeanor or greater law violations, (2) contempt of a municipal, justice, county, or truancy court, (3) driving while intoxicated offenses (although these would be delinquent conduct under the first category anyway), and (4) third and subsequent driving under the influence by a minor (DUIM) offenses. Before 2001, violation of probation was a fifth category of delinquent conduct. Because the restrictions on TYC [TJJD] commitments enacted in 1999 made this provision obsolete, it was repealed in 2001.

1. Law Violations

Section 51.03(a)(1) provides that delinquent conduct is "conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail." Thus, delinquent conduct consists of felonies and jailable misdemeanors but does not include misdemeanors punishable by a fine only, most of which initially are within the exclusive jurisdiction of criminal courts. Although this is the general rule, some jailable misdemeanors are considered CINS offenses. See the discussion in this chapter.

Federal Offenses. In 1993, the legislature amended Section 51.03(a)(1) by adding the reference to the penal laws of the United States. The apparent purpose of this change was to permit juvenile conduct that occurs on federal reservations, military bases, installations, and enclaves in Texas to be handled by the Texas juvenile justice system upon referral by federal authorities.

Driving While Intoxicated. Until 1997, first or second offense DWI was conduct indicating a need for supervision (CINS) and third offense DWI was delinquent conduct. In 1997, even first offense DWI was made delinquent conduct. See the discussion later in this chapter.

Proof of Elements of Offense. Section 54.03(f) provides in part:

> The child shall be presumed to be innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt. In all jury cases the jury will be instructed that the burden is on the state to prove that a child has engaged in delinquent conduct or is in need of supervision beyond a reasonable doubt.

When the State alleges a law violation as delinquent conduct or CINS, it must prove each element of the offense alleged, just as in a criminal prosecution. For example, in *In the Matter of M.T.B.*, 567 S.W.2d 46 (Tex.Civ.App.—El Paso 1978, no writ), the respondent was charged with criminal mischief for puncturing automobile tires. The criminal mischief statute requires the State to allege and prove the fair market value of the property damaged or destroyed. Although there was evidence of the purchase price and age of the tires and proof of what it cost to replace them, there was a total failure to prove the fair market value of the tires just before they were damaged. The appellate court reversed the adjudication of delinquency for this failure of proof.

Harmonizing the Penal and Family Codes. There are occasionally problems of determining whether the liability of a person for violating a criminal statute is affected by the juvenile status of that person. In *In the*

Matter of Hartsfield, 531 S.W.2d 149 (Tex.Civ.App.—Tyler 1975, no writ), the respondent was charged with resisting arrest. He contended that he could not be adjudicated delinquent for that penal violation because Section 52.01(b) of the Family Code states that the "taking of a child into custody is not an arrest." The appellate court rejected this contention based on the purpose of that provision of the Family Code:

> The objective of Section 52.01(b) is to avoid the stigmatizing effect of an arrest upon a child.... However, the Legislature did not intend by the enactment of Section 52.01(b), to permit a child to forcefully resist arrest.... We hold that the term "arrest" as used in [the resisting arrest statute] includes the taking into custody of a juvenile.

531 S.W.2d at 152.

By contrast, in *In the Matter of E.A.R.*, 548 S.W.2d 454 (Tex.Civ.App.—Texarkana 1977, no writ), the child was adjudicated for running away (CINS). She was placed on probation in the custody of the Department of Public Welfare and required to live in a group foster home. When she ran away from the foster home, the State filed a petition alleging she committed the criminal offense of escape from custody. The appellate court reversed the adjudication of delinquency on the ground that the escape statute applies only to one arrested for, charged with, or convicted of an offense who escapes from custody; since the child's adjudication of CINS was not a conviction of crime, she could not be found to have committed escape from custody.

In 1985, the legislature amended the escape from custody statute, Section 38.06 of the Penal Code, to provide that the offense is committed if one is "in custody pursuant to a lawful order of a court," in addition to being committed if one is "under arrest for, charged with, or convicted of an offense," the language that gave the court in *E.A.R.* difficulty. Under the amended statute, there would have been no obstacle to adjudicating E.A.R. for escape from custody.

Criminal Age Restrictions. Criminal statutes frequently make the ages of the actor, victim, or both elements of the offense. Questions are sometimes raised as to the applicability of these age elements in the context of juvenile proceedings. In *P.G. v. State*, 616 S.W.2d 635 (Tex.Civ.App.—San Antonio 1981, writ ref'd n.r.e.), the respondent was charged with sexual abuse of a child by having deviate sexual intercourse with a person who was under the age of consent, age 17. The respondent contended that the purpose of the law was to protect children from sexual exploitation by adults, and therefore, he could not commit that offense since he was himself a child under the law. The appellate court rejected this argument:

> The [sexual abuse of a child and rape of a child] statutes evidence an intention to protect a child from anyone who commits a sexual assault on him with or without his consent. It would frustrate the intent of the statutes to hold that a child is protected from sexual abuse by adults, with or without his consent, but is not protected from sexual abuse by minors, with or without his consent. Children are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.

616 S.W.2d at 640-41.

In 2010, the Texas Supreme Court addressed the issue of whether a child under age 14 can be prosecuted for prostitution under Section 43.02 of the Penal Code. *In the Matter of B.W.,* 313 S.W.3d 818 (Tex. 2010). The majority opinion points out that there is no defense to having sex with a child who is under 14 in Texas, regardless of the child's purported willingness. See Penal Code Section 22.021. Since a child under 14 cannot legally consent to sex, the Court found it difficult to reconcile how such a child can "knowingly" offer to engage in sexual conduct for a fee under the prostitution statute. The court says:

> Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition of legal consent for children under fourteen. In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under the age of fourteen may not be charged with that offense.

313 S.W. 3d at 826.

2. Contempt of Court

Section 51.03(a)(2), as amended in 2015, includes as delinquent conduct:

> conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in:
>
> (A) a justice or municipal court;

(B) a county court for conduct punishable only by a fine; or

(C) a truancy court.

The purpose of this provision is to create a mechanism for the enforcement of dispositional orders of municipal, justice, county, and truancy courts in cases involving juveniles. Federal and Texas law prohibit the commitment of a child to an adult jail for failing or refusing to carry out a municipal, justice, county, or truancy court dispositional order. If the judge and the juvenile have reached an impasse, the judge can refer the matter to the juvenile court as a delinquency referral. See Chapter 6.

There is no requirement that the prosecutor file a court petition; these cases can be handled non-judicially under the progressive sanctions model. See Section 59.003(a)(2).

The municipal, justice, county, or truancy court judge can make the delinquency referral with the child either in custody or not in custody. The referring court does not adjudicate the contempt; that is done by the juvenile court. The referring court simply refers the child to the juvenile court for its determination of whether the child engaged in contempt of the court. This court referral is for contempt only and not for the underlying offense. The referring court retains jurisdiction over the underlying offense.

Rather than refer the case to juvenile court, the justice or municipal court may hold the child in contempt and impose a fine of up to $500. Code of Criminal Procedure Article 45.050(c)(2)(A). Under a 2001 amendment, the court may order suspension or denial of the child's driver's license until the child complies with all court dispositional orders. Article 45.050(c)(2)(B). This may be done instead of or in addition to imposing a fine.

Contempt of a truancy court order is handled under Section 65.251, Family Code. If the truancy court chooses to find the contempt, it may order a fine of up to $100, suspension or denial of the driver's license, or both.

In no instance may the justice, municipal, county, or truancy court ever order the confinement of a child for contempt of court. Article 45.050(b)(2), Code of Criminal Procedure and 65.251(e), Family Code. See Chapter 6 for a full discussion of detention of status offenders. Upon transfer to juvenile court, contempt of a county, municipal, justice, or truancy court order can never rise to the level of delinquent conduct for purposes of an indeterminate commitment to TJJD. Section 54.04(u).

These enforcement mechanisms are discussed more fully in Chapter 23.

3. Driving While Intoxicated

In 1997, the legislature added a fourth type of delinquent conduct by enacting Section 51.03(a)(3) to read: "conduct that violates Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code." At the same time, the legislature repealed provisions in Section 51.03(b) that made first or second offense DWI conduct indicating a need for supervision. Repeal of that provision by itself would have made first offense DWI delinquent conduct since as a Class B misdemeanor or higher, it would be a law violation under Section 51.03(a)(1). However, in an abundance of caution, the legislature enacted references to DWI type statutes in the new section as well.

Penal Code Section 49.04 is a reference to DWI, Section 49.05 to flying while intoxicated, Section 49.06 to boating while intoxicated, Section 49.07 to intoxication assault, and Section 49.08 to intoxication manslaughter. The legislature recently created the DWI offenses of Driving While Intoxicated with Child Passenger (Section 49.045) and Assembling or Operating an Amusement Ride While Intoxicated (Section 49.065). It is important to note that these offenses are not specifically enumerated in Section 51.03 nor are they designated as CINS offenses. Instead, they fall under the general definition of delinquent conduct because they are jailable misdemeanors.

In view of the creation of the offense of driving under the influence by a minor (DUIM), the Attorney General was asked whether a juvenile can be charged with DWI. In Attorney General Opinion No. LO 98-027 (1998), the Attorney General responded that the two offenses are separate. If there is evidence the juvenile was intoxicated while operating the vehicle, he or she may be charged with DWI. If there is evidence the juvenile has consumed alcohol but was not intoxicated at the time of the operation, he or she may be charged with DUIM. A judge or jury may not, however, in a prosecution for DWI adjudicate the juvenile for DUIM as a lesser included offense, since the legislature declared in Alcoholic Beverage Code Section 106.041(g) that DUIM is not a lesser included offense of DWI.

4. Third Offense Driving Under the Influence by a Minor

In 1997, the legislature created the criminal offense of driving under the influence by a minor (DUIM), contained in Alcoholic Beverage Code Section 106.041. The offense is committed when a person under age 21 drives a motor vehicle in a public place with any detectable alcohol in his or her system. The first or second violation is a Class C misdemeanor and is handled in justice or municipal court, unless the court chooses to use its discretion to transfer the case to juvenile court.

The legislature enacted Section 51.03(a)(4) to make third or subsequent offense DUIM delinquent conduct when the third offense is committed before the person becomes 17 years old. Without this provision, the third offense would be CINS under Section 51.03(b)(1) upon transfer to a juvenile court by a municipal or justice court in which the complaint was filed. If the person charged with a third DUIM offense is 17 or older at the time of the third offense, then the case becomes a Class B misdemeanor under Alcoholic Beverage Code Section 106.041(c), and the person is prosecuted as an adult in the county court system or its equivalent.

C. Conduct Indicating a Need for Supervision

There are six categories of conduct indicating a need for supervision (CINS). Two of them do not involve law violations, while four do.

1. Runaway

Section 51.03(b) makes running away from home CINS. Running away is defined as:

> the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time or without intent to return.

In 1987, the subsection was narrowed to exclude from its operation a person who is married, divorced, or widowed. This was done from the belief that a married juvenile has the right to determine his or her place of residence and need not reside where parents would wish.

How long must the absence be to become "for a substantial length of time"? There are no appellate cases construing this language in the Family Code. However, the same definition of running away is used in Penal Code Section 25.06 in the definition of the criminal offense of harboring a runaway child. As used in that statute, "substantial length of time" was defined in *Urbanski v. State,* 993 S.W.2d 789 (Tex.App.—Dallas 1999, no pet.) in the following way in response to the defendant's argument that an absence had to be for longer than 24 hours to be substantial:

> Rather than assign a fixed number to the meaning of the term, the legislature left the issue to the fact finder to determine on a case by case basis. Whether a child's period of absence is "substantial" depends upon many factors, including the duration of the child's absence, the time of day, the intent of the child in returning, and the authorization, if any, for the child's absence. See *Barrow v. State*, 973 S.W.2d 764, 768 (Tex. App.—Amarillo 1998, no pet.). To this non-inclusive list, we would also add the child's age, the child's motive for running away, the child's activity during the absence, the child's distance from home, and the number, age, maturity, and experience of the persons, if any, accompanying or assisting the child during the absence. We believe these factors may impact the determination of whether the length of a particular child's absence from home is "substantial." This flexible interpretation of the statute is reasonable…Using the criteria set out above, we conclude Emily was absent from her home for a substantial period of time. The evidence reflects that Emily, a child of sixteen, (1) left home late at night when she was supposed to be sleeping, (2) left home after being denied permission to attend a late night party in another city, (3) was accompanied and transported to that party by appellant, a man ten years older than she, (4) admittedly had a "crush" on appellant and thought he had feelings for her, (5) was taken to three different counties during the course of her absence, (6) remained absent overnight for approximately seventeen hours, and (7) knowingly evaded her parents' efforts to locate her. Considering the circumstances under which Emily left home and remained absent, the evidence sufficiently supports the conclusion that the duration of her absence was "substantial." See *Id.* (holding that five-hour absence was substantial length of time under the circumstances).

993 S.W.2d at 794-95.

Seventeen-Year-Old Runaway. There is a gap between the definition of a runaway under the Juvenile Justice Code, which requires that the act of leaving home must occur before the person becomes 17, and the right and duty of a parent to determine the place of residence of offspring until he or she becomes 18. Because of this gap, a 17-year-old can run away from home without

being subject to the juvenile court's jurisdiction. What, if anything, can be done in such a circumstance?

Chapter 63 of the Code of Criminal Procedure establishes a system for reporting, collecting, and using information about missing children and other persons. Reports of missing children received by a law enforcement agency must be placed in a missing persons information clearinghouse operated by the Department of Public Safety. When a person reported missing is encountered by a law enforcement officer, Article 63.009(g) provides that, on determining the location of a child [reported missing], other than a child under the continuing jurisdiction of a district court:

> [A]n officer shall take possession of the child and shall deliver or arrange for the delivery of the child to a person entitled to possession of the child. If the person entitled to possession of the child is not immediately available, the law enforcement officer shall deliver the child to the Department of Protective and Regulatory Services [renamed the Department of Family and Protective Services (DFPS) under a 2003 legislative change].

For purposes of the missing persons chapter, a child is defined as a person under 18 years of age. Code of Criminal Procedure Article 63.001(1).

The Attorney General has stated that a law enforcement officer has a duty under Article 63.009(g) to take a 17-year-old into custody who has been reported missing for running away from home in order to return that person to his or her parents. In Attorney General Opinion No. JC-0229 (2000), the Attorney General succinctly summarized a lengthy opinion with the following statement:

> Article 63.009(g) of the Code of Criminal Procedure requires a law enforcement officer who locates a seventeen-year-old who has been reported as a missing child to take possession of the child and to deliver the child to the person entitled to his or her possession or to the Department of Protective and Regulatory Services [Department of Family and Protective Services]. The detention of an unemancipated seventeen-year-old against his or her wishes for the purpose of returning the child to his or her parent or guardian does not violate the child's constitutional rights. An officer may use force to take possession of a missing child, but only to the degree the officer reasonably believes is necessary to safeguard or promote the child's welfare consistent with the protective purpose of article 63.009(g).

The officer's alternatives upon taking a 17-year-old runaway into custody do not include taking the child to the juvenile detention facility or referring the "case" to the juvenile justice system. The officer's only options are returning the person to his or her parents or, if that cannot be accomplished, turning the person over to DFPS.

In 2003, the Attorney General addressed a related question: Can a minor be classified as a "missing child" if the minor's legal custodian knows his or her whereabouts? Attorney General Opinion No. GA-0125 (2003). In this case, the police declined to take possession of a 17-year-old who left home and was subsequently located by her family. Since her whereabouts were known, the police reasoned that she could no longer be reported as "missing." The police department argued that it had no authority to act.

The Attorney General ruled that an unemancipated 17-year-old who voluntarily leaves the care and control of her legal custodian without consent and without intent to return is not a "missing child" under Code of Criminal Procedure Article 63.001(1-a) (defining "child" as a person under age 18) if the custodian knows where the child is located. The definition of a "missing child," in part, means a child "whose whereabouts are unknown to the child's legal custodian." Article 63.001(3). Consequently, if the custodian determines the child's location after filing a missing child report and notifies the investigating law enforcement agency, the agency no longer has a duty to continue the investigation or to take possession of the child for return to the custodian.

2. Paint and Glue Inhalation

Section 51.03(b) includes as conduct indicating a need for supervision (CINS):

> conduct prohibited by city ordinance or by state law involving the inhalation of the fumes or vapors of paint or other protective coatings or glue and other adhesives and the volatile chemicals itemized in Section 485.001, Health and Safety Code.

This conduct was made a separate category of CINS in 1977 to permit adjudication even though only one violation is shown of a statute or ordinance that is punishable only by a fine because of the hazardous nature of the activity to the actor. At that time, all other fineable only offenses required three or more violations to give rise to CINS jurisdiction.

Effect of Change in Criminal Penalties. The punishment for paint and glue inhalation was changed in 1998

from a fineable misdemeanor to a jailable misdemeanor. The Attorney General was asked whether this changed paint and glue sniffing from CINS to delinquent conduct. The Attorney General responded that it did not because of the specific language of Section 51.03(b) and the absence of any evidence that, in changing the criminal provision, the legislature intended to convert this conduct into delinquent conduct. Attorney General Opinion No. JM-520 (1986).

Inconsistent Amendments. In 1987, two bills amended what was then Section 51.03(b)(4). One, House Bill 502, repealed the subsection, which would have the effect of making the conduct delinquent conduct because, under the criminal law, it is a misdemeanor punishable by jail. The other, Senate Bill 17, re-enacted the subsection as CINS and added the language, "and the volatile chemicals itemized in...." By itself, this would have kept the conduct as CINS but would have expanded its scope.

Which Controls? The Code Construction Act, Section 311.025(b) of the Government Code, provides:

> [I]f amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.

The date of enactment is the date the bill passed the legislature, not the date the Governor signed the bill or its effective date. See *Ex parte De Jesus De La O*, 227 S.W.2d 212 (Tex.Crim.App. 1950). That rule exists because "the first in time or position must give way to the last, and the latter act will stand as the final expression of the legislative will." 227 S.W.2d at 213. The date of enactment of House Bill 502 was May 22, 1987, when it passed the House; the date of enactment of Senate Bill 17 was May 26, 1987, when it passed the Senate. Therefore, unless the two amendments can be harmonized, Senate Bill 17 controls, and glue and paint sniffing, as expanded by that amendment, remains CINS.

Can the amendments be harmonized? House Bill 502 amended Section 51.03 by repealing the subsection. Four days later, Senate Bill 17 re-enacted that subsection and expanded it to include additional substances. Delinquent conduct and CINS are mutually exclusive categories. The same conduct cannot be both. It is, therefore, impossible to harmonize these enactments. It is clear, therefore, that Senate Bill 17 controls, since it passed the legislature later, and that paint and glue sniffing, as expanded, is still conduct indicating a need for supervision.

Until this question is authoritatively answered by an appellate court, or at least addressed in an opinion of the Attorney General, juvenile courts should treat paint and glue sniffing as CINS. This is because a child adjudicated of CINS cannot complain that he or she should have been adjudicated for delinquent conduct, while the reverse is not true. If it ultimately turns out that paint and glue sniffing is determined to be delinquent conduct, which seems only remotely possible, a juvenile court would have erred but should not be reversed (because the respondent could not have been harmed) if it had required that such cases be handled as CINS cases.

In 2007, inhalant abuse was made a Sanction Level Two offense to encourage a higher level of intervention along with appropriate programs and services for these types of juvenile offenders. Section 59.003(a)(2).

3. Fineable Only Offenses

Before 1987, Section 51.03(b) required three or more fineable only offenses to make one CINS case. From 1987 to 1989, only one fineable only offense was required, provided the child had been twice previously convicted of fineable only offenses and the third case had been transferred to the juvenile court by the municipal or justice court. From 1989 to 1991, the law reverted to its status prior to 1987.

In 1991, the legislature returned to a version of the scheme that was in place from 1987 to 1989. Section 51.03(b) defines CINS to include:

> subject to Subsection (f) [of this section], conduct, other than a traffic offense, that violates:
>
> (A) the penal laws of this state of the grade of misdemeanor that are punishable by fine only; or
>
> (B) the penal ordinances of any political subdivision of this state.

Section 51.03(f) provides:

> [C]onduct described under Subsection (b)(1) [of this section] does not constitute conduct indicating a need for supervision unless the child has been referred to the juvenile court under Section 51.08(b).

The effect of these provisions is to make a single violation of a fineable only offense CINS, but only if the case was first filed in a municipal or justice court and was

transferred by that court to the juvenile court. The municipal or justice court is authorized to transfer any case to the juvenile court and is required to transfer a case against a child who has two previous convictions for similar offenses. See Chapter 23 and subsection A of this chapter. Traffic offenses, even though they are fineable misdemeanors, can never be transferred to juvenile court.

4. Violation of Standards of Student Conduct

In 1995, Section 51.03(b) was amended to classify "an act that violates a school district's previously communicated written standards of student conduct for which the child has been expelled under Section 37.007(c), Education Code" as CINS. Education Code Section 37.007(c) states, "A student may be expelled if the student, while placed in a disciplinary alternative education program, engages in documented serious misbehavior while on the program campus despite documented behavioral interventions." Serious misbehavior is defined by the statute to include deliberate violent behavior that poses a direct threat to the health or safety of others, extortion, coercion, public lewdness, indecent exposure, criminal mischief, personal hazing, or harassment.

Section 52.041, Family Code, requires a school district that expels a student to refer the student to the juvenile court within the second working day after the expulsion hearing. Section 37.010, Education Code contains a similar requirement.

An expulsion can result from either criminal conduct or from a non-criminal violation of a standard of student conduct. If the expulsion was for criminal conduct, it will likely be delinquent conduct under Section 51.03(a)(1). If it is for non-criminal conduct, then Section 51.03(b) would cover it as CINS. In order to prove this violation, the underlying conduct must be proven, not simply the fact of expulsion. An expulsion for the underlying conduct is only one element of the offense. See Chapter 22 for a more detailed discussion of conduct that warrants suspension or expulsion from school.

5. Acts Constituting Prostitution

In 2010, in *In the Matter of B.W.*, 313 S.W. 3d 818 (Tex. 2010), Juvenile Law Newsletter ¶ 10-3-7 (Tex. 2010), the Texas Supreme Court held that juveniles under the age of 14 cannot legally consent to sex and are, therefore, incapable of committing the offense of prostitution under Texas Penal Code Section 43.02. However, many children engaging in conduct consistent with prostitution may actually be victims of human trafficking who are in need of the services that the juvenile justice system is best suited to provide.

In 2011, the Texas Legislature, citing the *B.W.* case, specified that the offense described in Texas Penal Code Section 43.02(a) is considered conduct indicating a need for supervision. Section 51.03(b). Questions remain regarding whether this statutory change was a sufficient response to the *B.W.* case since the state must prove every element of an offense regardless of whether the offense is considered delinquent conduct or CINS. In addition, one of the necessary elements to establish the offense of prostitution under Penal Code 43.02(a) is intent—the very subject of the holding in *B.W.*

Another question raised by the *B.W.* case is the applicability of the holding on children who are at least 14 and not yet 17. Although the court's holding applied only to persons under 14, the age of consent for sexual conduct in Texas is actually 17. The difference between the two ages is the availability, or lack thereof, of an affirmative defense. The concept of the "age of consent" in Texas comes from the sexual assault statutes. Engaging in certain sexual acts with a person who is under the age of 14 is prohibited by law as aggravated sexual assault under Penal Code Section 22.021, because a person under the age of 14 cannot consent; there is no affirmative defense. It is also unlawful under Penal Code Section 22.011 (sexual assault) to engage in those same sexual acts with a person who is at least 14 and not yet 17, again because the person cannot consent. The difference is that there is an affirmative defense available under Section 22.011, which provides that if the alleged victim is at least 14 and not yet 17 and the person charged is no more than three years older than the alleged victim and the alleged victim consented, that person may claim an affirmative defense. The same defense is not available to a person who is more than three years older than the alleged victim.Therefore, a child who is 14 and not yet 17 may not consent to sex with a person who is more than three years older. Although not addressed in the *B.W.* holding, one interpretation that would be consistent with its overall reasoning is that a child who is 14 and not yet 17 cannot form the requisite intent to consent to sex for purposes of the act of prostitution for prosecution under Penal Code Section 43.02. This issue will not arise in court since the treatment of prostitution as CINS applies to all juveniles, not only those under 14. Thus, only the first issue is one that will likely be seen in a challenge to a CINS adjudication for prostitution.

6. Electronic Transmission of Certain Visual Material Depicting a Minor

The advent of the smartphone has created a new phenomenon among teens and adults known as "sexting." "Sexting" is generally defined as the sharing of sexually explicit text messages or photographs via cell phones or other electronic devices, such as computers. The practice of "sexting" images may lead to serious legal consequences, such as prosecution for Possession or Promotion of Child Pornography under Penal Code Section 43.26 when the person depicted engaging in sexual conduct is under 18 years of age. This felony offense may result in a requirement to register as a sex offender. A person whose photographic image has been exchanged and exposed may also suffer serious emotional and psychological consequences as a result of harassment and bullying.

In 2011, the legislature created the CINS offense of Electronic Transmission of Certain Visual Material Depicting a Minor, known as the "sexting" law. Texas Penal Code Section 43.261. Section 51.03(b). This offense was intended to address the harsh consequences of the felony offense of Possession or Promotion of Child Pornography while also addressing the need to educate children about the dangers of sending sexually explicit photographs.

The elements of the offense are outlined in Penal Code Section 43.261. The offending conduct occurs when one minor, defined as a person under 18: (1) sends to another minor, by electronic means (text, email, fax, etc.), visual material that depicts any minor, including the person sending the material, engaging in sexual conduct, as long as the material was produced by the person sending it or the sender knows that another minor produced it; or (2) the minor possesses, in electronic format, visual material that depicts another minor engaging in sexual conduct, if the person possessing the material produced the material or knows that another minor did so. The material can be more than photographs sent via smartphone; it applies to any visual material sent electronically and, therefore, includes images sent over the Internet. However, it does not include print materials, such as actual photographs. The image must depict a minor engaged in sexual conduct as defined in Penal Code Section 43.25.

The law creates tiered offense levels, with enhanced levels for subsequent offenses or when the material is transmitted with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

A juvenile court adjudication for "sexting" is considered a "conviction" for enhancement purposes. The offense level may vary from a Class C misdemeanor to a Class A misdemeanor. The juvenile court, however, has exclusive jurisdiction over all offenses alleged to have been committed by children who are at least 10 and not yet 17 years of age. Section 51.08(1)(A). A 17-year-old charged with this offense will be prosecuted in justice, municipal, or county court, depending upon the offense classification. A parent of a 17-year-old charged with an offense under Penal Code Section 43.261 must be present during the minor's plea and for all other proceedings related to the case.

Education Program. In addition to any appropriate sanctions the court may impose on CINS offenses, Section 54.0404 allows the court to order a child adjudicated for an offense under Penal Code Section 43.261 to attend and successfully complete an education program created to make the child aware of the dangers of "sexting." The course must comply with the requirements in Education Code Section 37.218. Similarly, Code of Criminal Procedure Article 45.061 allows the justice or municipal court to order a 17-year-old convicted of the offense to attend the same type of course. In either court, there is a requirement that the minor or the minor's parent be ordered to pay the cost of attending the educational program if the court determines they are financially able to do so.

Defenses and Affirmative Defenses. The law creates a defense and several affirmative defenses to prosecution. An affirmative defense, as defined by Penal Code Section 2.04, requires that the basis must be established by a preponderance of the evidence. Penal Code Section 2.03 also requires the court to instruct the jury to acquit the defendant upon a finding of reasonable doubt regarding the basis for the defense.

In a juvenile proceeding in which the charge of "sexting" is at issue, the affirmative defenses are: 1) the two minors are less than two years apart in age and are in a "dating relationship," as defined by Family Code Section 71.0021; or 2) the two minors are married to each other. In both instances, the material may only depict the two respondents involved in the relationship or the affirmative defenses are unavailable.

Witnesses who testified in hearings on the "sexting" legislation during the 82nd Legislative Session suggested that the affirmative defenses available to minors in a juvenile proceeding mirror the "dating relationship" defense available in child pornography adult proceedings under Penal Code Section 43.26. Some argued that the

defenses afforded under these provisions are quite different. The defense available under Section 43.26 requires only that the defendant be no more than two years older than the child. There is neither a requirement of a dating relationship, nor is there a restriction regarding which individual(s) must be depicted in a transmission. Therefore, there may be instances in which a minor could establish an affirmative defense to Possession or Promotion of Child Pornography under Penal Code Section 43.26 but could not establish the affirmative defense to a violation under Penal Code Section 43.261.

Age-Related Enforcement Issues. The law creates some challenges related to age. One such issue is that both parties involved in the offense must be under the age of 18. This enforcement dilemma typically arises in a case that involves a student who has turned 18 during his or her senior year of high school. If one student has turned 18 and the other has not, the elements of this offense cannot be proven as to either of them. As a result, the only available charge for both is the felony offense of Possession or Promotion of Child Pornography.

Another such issue involves the elements of the offense. Specifically, the person who is charged with the offense either (1) must be the person who created the image or (2) must know that another minor did so. Since knowledge regarding the age of the producer is an element of the offense, the state bears the burden of proving the actor's knowledge. Proving this element may be difficult in some instances, especially when an image has been circulated among numerous people.

D. Conduct Indicating a Need for Supervision Under Prior Law

Editor's Note: The following sections of this chapter are included to provide historical background on the development of offense jurisdiction affecting Conduct Indicating a Need for Supervision. The discussion covers some provisions that have been repealed or significantly amended but help to place in context the progression and rationale for the relevant changes over time.

1. Violation of Child-At-Risk Court Order

In 1995, Section 51.03(b) was amended to make "conduct that violates a reasonable and lawful order of a court entered under Section 264.305" a CINS offense.

Family Code Section 264.301 creates a child-at-risk program to be operated by the Department of Family and Protective Services (DFPS). This program applies to children ages seven to not yet 17 who are at risk of engaging in delinquent conduct. Under the 1995 scheme, Section 264.305 allowed DFPS to obtain a court order to intervene in the child's life. If a child failed to obey such an order, under Section 264.306, DFPS was required to refer the case to juvenile court, where it was handled as CINS under Section 51.03(b)(6) if the child was at least 10 years of age. Juvenile court referral was the sole enforcement sanction for child-at-risk orders with respect to the child. Under Section 264.306, the court entering the child-at-risk order could hold an adult in contempt of court for refusal to follow the order.

In 2015, Sections 264.305 and 264.306 were repealed. Along with those repeals, violation of a child-at risk court order was removed from the definition of CINS conduct in Section 51.03(b).

2. Truancy (Repealed)

Texas has long had compulsory attendance laws requiring individuals of a certain age to attend school. This section aims to discuss the history of those laws through the repeal of truancy as CINS in 2015.

Prior to 1993, failure to comply with this law was considered CINS under Section 51.03(b)(2) and fell under the exclusive original jurisdiction of the juvenile court, though the juvenile court did have the authority to waive its jurisdiction and transfer the case to an appropriate justice, and later municipal, court. Truancy was defined as "the unexcused voluntary absence of a child on 10 or more days or parts of days within a six-month period or three or more days or parts of days within a four-week period from school without the consent of his parents."

The issue of violating compulsory attendance laws was also addressed at the beginning of 1993 as a criminal matter under what was then Section 4.251, Education Code, which created the Class C misdemeanor of Failure to Attend School. The offense mirrored the elements of CINS in Section 51.03(b)(2).

In 1995, the Education Code was re-enacted and revised. Failure to Attend School was renumbered to Section 25.094, Education Code, and the offense was consistent with truancy under Section 51.03(b)(2), Family Code.

In 2001, the definition of failure to attend school and truancy was changed to require that for 10 absences in a six-month period to count as truancy, the absences must

occur in the same school year. That amendment was intended to prevent tacking end-of-term absences onto the beginning of the next term.

The legislature also streamlined the definition of "truancy." It deleted the element that the absence must have been unexcused and involuntary and must have been without the consent of parents. Absence excuses and involuntariness were made affirmative defenses, which are discussed later.

The legislature also eliminated the provision making it a defense to truancy that the respondent is "married, divorced, or widowed." The legislature determined that marital status no longer justified dropping out of school but instead increased the importance of formal education.

In 2011, the legislature amended Education Code 25.0915 to require all schools to adopt truancy prevention measures. Specifically, the provision required that all truancy referrals to juvenile court or failure-to-attend-school referrals to county, justice, or municipal courts be accompanied by a certified statement from the school confirming that measures were used with the student but efforts to meaningfully address attendance issues had failed.

In 2015, truancy was deleted from the list of CINS and Section 25.094, Education Code, was repealed. Both were replaced with the civil violation of truant conduct under Section 65.003, Family Code, contained in Title 3A. Though civil, truant conduct is prosecuted in truancy courts, which are the JP/municipal courts that previously had jurisdiction over failure to attend school cases. The juvenile court no longer has jurisdiction over these school attendance cases, with the exception of contempt cases and direct appeals of truant conduct cases. In addition, schools are required to take greater measures before filing a charge of truant conduct. See Chapter 22.

Seventeen-Year-Old Truants. In 1997, the legislature increased the compulsory school attendance requirement to age 18. In response to this legislative change, the Attorney General was asked whether the juvenile court had jurisdiction over 17-year-olds who engaged in conduct meeting the definition of truancy under Section 51.03(b)(2). Attorney General Opinion No. JC-0103 (1999). The Attorney General opined that the juvenile court did not have jurisdiction over a 17-year-old offender because the 1997 legislation did not create an exception to the rule that the juvenile court has jurisdiction only over conduct occurring before a person turns 17. A 17-year-old could, however, be charged with the criminal offense of Failure to Attend School under Education Code Section 25.094, and the justice or municipal court would have jurisdiction over the charge. However, that court would be unable to enlist the aid of the juvenile court in the enforcement of its dispositional orders because of the person's age. See Chapter 22.

In 2011, the definition of "child" under Section 51.03(b) was expanded to include 17-year-olds alleged to have committed the offense of truancy. The amendment extended the juvenile court's jurisdictional authority over 17-year-old truants. Section 54.05 was also modified to prevent disposition orders in truancy cases from automatically terminating on the child's 18th birthday in order to ensure that the court retained jurisdiction long enough to work with the child. Section 54.0402 (now repealed) specified that the disposition order could be in effect for 180 days or until the end of the current school year, whichever was longer, and could be modified until the order expired. However, the change in law did not end the jurisdiction of justice and municipal courts over 17-year-old truants. In other words, the truancy charges could have been handled in either court.

Eighteen- to Twenty-Year-Old Truants. Prior to 1999, individuals who were 18, 19, and 20 years old were allowed to voluntarily attend school. These students were not under the school's compulsory attendance requirements and, therefore, were not subject to sanctions for not attending. Education Code Section 25.085(e) requires a person who voluntarily enrolls in or attends school after his or her 18th birthday to attend school each day. School districts were authorized to revoke the enrollment of students for the remainder of the school year with more than five unexcused absences in a semester. As a sanction, the school district could consider a student whose enrollment was revoked to be an unauthorized person on school grounds and file charges of trespassing on school grounds under Education Code Section 37.107. However, the person could not be charged with failure to attend school under Education Code 25.094.

In 2007, the legislature added Education Code Section 25.085(f) in response to concerns regarding the loss of average daily attendance money as a result of the high dropout rates of students 18 years of age and older. As amended, Section 25.085(f) made the offense of failure to attend school under Education Code 25.094 applicable to persons under 21 who voluntarily enrolled in or attended school after the age of 18. Although the new law made this population of students subject to the compulsory attendance law, their parents could not be charged with Parent Contributing to Nonattendance under Education Code 25.093.

The law was changed again in 2011 to specify that students who were at least 12 years of age and not yet 18 could be charged with the criminal offense of failure to attend school. However, the legislature did not remove the provision in Section 25.085(f) that permitted students aged 18 or older who voluntarily enrolled in or attended school to be charged with failure to attend school when warranted.

In 2011, the Attorney General was asked whether a student who was at least 18 years of age or older and younger than 21 was subject to prosecution under Section 25.094 of the Education Code for failure to attend school. The Attorney General identified a statutory conflict regarding age as a necessary element for prosecution. Section 25.085(f) specified that Section 25.094 applied to a person 18 years of age or older and younger than age 21. In particular, the internal reference in Section 25.085(f) could not be reconciled with Section 25.094. As cited, Section 25.094 required that the offender must be at least 12 years old and younger than 18. The Attorney General concluded that a person 18 years of age or older could not commit an offense under Section 25.094 and relied upon the enactment sequence of the 2011 legislation and the language regarding age as a necessary element of the criminal offense set forth Section 25.094 (a). Attorney General Opinion No. GA-0946 (2012).

Amidst truancy reforms in 2015, compulsory attendance laws were again changed so that a person under the age of 19, rather than 18, is required by law to attend school and is subject to the new truant conduct enforcement provisions in Title 3A, Family Code. See Chapter 22.

Ten- and Eleven-Year-Old Truants. The 2011 amendment to Education Code Section 25.094 prohibited the prosecution of a child under the age of 12 for the criminal offense of failure to attend school. Therefore, 10- and 11-year-olds who did not regularly attend school fell under the jurisdiction of the juvenile court for the CINS offense of truancy under Section 51.03(b)(2). Section 54.021 prohibited the juvenile court from waiving its original jurisdiction in these cases.

The 2015 changes to truancy law retained the lower-end age of 12 for the new civil offense of truant conduct under Section 65.003, Family Code. Thus, there is no longer a court mechanism for addressing truant conduct of 10- and 11-year-olds other than through charges against the parents, if warranted.

What Counts as an Absence. The Attorney General was asked whether tardiness to class can be counted as an absence under the "parts of days" portion of the truancy definition. In Attorney General Opinion No. DM-200 (1993), he opined that it cannot, commenting:

> Section 51.03(b)(2) contemplates that a child is not present in the school building for a certain period of time. On the other hand, "tardiness to class"... suggests that the child is present in the school building but, for one reason or another, is late getting to a scheduled class. Generally, therefore, tardiness to class is not an "unexcused voluntary absence" for purposes of section 51.03(b)(2) of the Family Code. Of course, circumstances may arise in which a child's tardiness is so egregious as to constitute an unexcused voluntary absence.

Excused Absences. Under prior law, Section 51.03(d) listed the circumstances that would excuse an absence from school. In 2001, the legislature repealed the statutory examples of excuses for absences that had appeared in Section 51.03(d). Instead, it made excuses an affirmative defense to a charge of truancy and made it clear that a court can excuse an absence that the school failed or even refused to excuse.

The excuses as an affirmative defense remained in the 2015 changes to truancy laws; however, it is now found in Section 65.003, Family Code.

Affirmative Defenses. In 2001, the legislature converted several facts that had previously been elements of truancy (and which, therefore, were required to be proved by the State) into affirmative defenses. It enacted Section 51.03(d) to provide that the respondent had the burden to show by a preponderance of the evidence that one or more of the absences was excused by a school official, should be excused by the court, or was involuntary. It also provided that the court's decision did not affect the school district's ability to determine whether to excuse the absence for another purpose. An example is an administrative determination regarding whether a student should get credit for a course. In 2005, the legislature amended Section 51.03 by adding subsection (d) to clarify that the affirmative defense was effective only when, as a result of that defense, there were an insufficient number of unexcused or voluntary absences remaining to constitute a violation of law (i.e., fewer than 10 unexcused absences in a six-month period or fewer than three in a four-week period). The same language was added to Education Code 25.094(f) concerning the criminal violation of failure to attend school.

Making a matter an affirmative defense does not remove it from litigation but does place the burden of

persuasion as to that matter on the defendant rather than the State. Therefore, it does streamline the judicial enforcement process.

Under the affirmative defense of excused absences, if the juvenile respondent could show that one or more of the absences necessary to constitute truancy were in fact excused by school officials, there would be no truancy. Similarly, if the juvenile respondent could show that one or more of the absences necessary to constitute truancy was involuntary (perhaps because the student was kept out of school by a parent or was ill), there would also be no truancy. Also, if the juvenile respondent could convince the juvenile court that it should excuse an absence required for truancy even when school officials had not or would not do so, there would be no truancy.

Relationship of Truancy to Failure to Attend School Offense (Historical Perspective). After the 2001 and 2005 amendments, the elements and affirmative defenses for truancy as CINS under the Family Code and for failure to attend school as a Class C misdemeanor under the Education Code were identical. Any case filed in justice or municipal court as failure to attend school involving a juvenile could be transferred by that court to the juvenile court, where it would have become CINS under Section 51.03(b)(1)(A). Independently, the same facts could have originally been referred to the juvenile court as truancy (CINS). Whether a case became CINS by the justice/municipal court transfer of a Class C misdemeanor or by direct referral to the juvenile court as truancy made no legal difference in rights, procedures, or dispositional authority. Once the cases arrived at the juvenile court, they were identical.

Unfortunately, the legislature in 2001 added Section 51.03(g), which confused the issue. It provided:

> In a county with a population of less than 100,000, conduct described by Subsection (b)(1)(A) that violates Section 25.094, Education Code, is conduct indicating a need for supervision.

Section 51.03(b)(1)(A) makes a Class C misdemeanor transferred from a municipal or justice court CINS. Education Code Section 25.094 defined failure to attend school as a Class C misdemeanor. Section 51.03(g) added nothing to the previous law. There was, moreover, some risk that persons may have misunderstood it to imply that, in a county of 100,000 or more, a failure to attend school case could not be CINS even when transferred to the juvenile court by a justice or municipal court. That would be an incorrect inference because the intent of this amendment was to expand, not contract, the authority of the juvenile court over school absence cases.

Section 51.04(h) was added in 2001 to implement the "change" enacted by Section 51.03(g):

> In a county with a population of less than 100,000, the juvenile court has concurrent jurisdiction with the justice and municipal courts over conduct engaged in by a child that violates Section 25.094, Education Code.

This provision, like the addition of 51.03(g), made no substantive change in prior law.

Transfer of Truancy Cases to County, Justice, or Municipal Court (Historical Perspective). In 1991, the legislature added Section 54.021 to authorize juvenile courts to transfer truancy cases filed as CINS cases to justice court for adjudication and disposition. In 1995, the legislature amended that section to permit a transfer to be made to either justice or municipal court.

Under a 2001 amendment, a transfer under this section permitted a truancy case to be prosecuted as a criminal case of failure to attend school under Education Code Section 25.094 upon the post-transfer filing in justice or municipal court of a criminal complaint for that offense.

In 2003, constitutional county courts in counties with a population of more than two million were given jurisdiction over failure to attend cases. Truancy cases were also authorized to be transferred to these county courts as provided by Family Code Section 54.021 (now repealed). In 2011, the population requirement for the constitutional county courts was lowered to 1.75 million.

In 1993, the legislature amended Section 54.021 to require that the juvenile court obtain the "permission of the justice court" before waiving jurisdiction over a truancy case. In 1995, that requirement expanded to include transfers to municipal courts. In 2003, transfers to constitutional county courts were also authorized.

In 1993, the legislature also amended Section 54.021(a) to permit two types of waiver:

> A waiver of jurisdiction under this section may be for an individual case or for all cases in which a child is alleged to have engaged in conduct described in Section 51.03(b)(2). The waiver of a juvenile court's exclusive original jurisdiction for all cases

in which a child is alleged to have engaged in conduct described in Section 51.03(b)(2) is effective for a period of one year.

Although the meaning is not clear, it appears that the legislature wished to authorize a juvenile court to waive jurisdiction over all truancy cases that might have arisen during the next year. In that event, the attendance officer was authorized by statute to deal directly with the justice or municipal court in filing cases without involving the juvenile court.

Section 54.021 did not, by its terms, require that the juvenile court conduct a hearing before transferring a truancy case to justice court. The Attorney General suggests that the legislature did not intend to impose a hearing requirement in this process. See Attorney General Opinion No. DM-200 (1993).

The 2015 legislative session made substantive changes to truancy laws. See Chapter 22 for a complete discussion of the changes and the processes employed by the truancy courts to address truant conduct cases referred to them.

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Unlike adult probation officers, juvenile probation officers are ordinarily involved in the handling of cases prior to a court hearing. Frequently, for example, juvenile probation officers make or participate in making pre-hearing detention decisions concerning the child. That is the subject of the next chapter. In this chapter, the focus is upon the intake or screening duties of the juvenile probation officer. These duties exist independently of whether the child is released or detained pending a court hearing and even involve cases in which the child has been released by the police or has never been taken into custody but the case has been referred to juvenile court.

There are two major decisions that must be made at the intake phase of the juvenile process: (1) deciding whether there is a case upon which to proceed further and (2) if there is a case, deciding whether to proceed non-judicially or to seek a court hearing.

A. Deciding Whether to Proceed Further

This is the "gatekeeping" function for the juvenile court. Here, decisions are made as to whether there is sufficient evidence to permit a case to proceed further into the system. If the case passes this "screen," further decisions are made to determine whether it will be handled judicially or non-judicially.

Prior to the Family Code amendments in 1995, the gatekeeping function could be performed exclusively by a juvenile probation or intake officer. Only if that officer determined that probable cause existed could a court petition be filed or a non-judicial disposition be employed.

The 1995 amendments required a sharing of the gatekeeping function between probation and prosecution. The details of the sharing arrangement are subject to local modification by agreement, but some sharing of power will be required in every county.

Preliminary Investigation. Section 53.01 requires a preliminary investigation of every case referred to the juvenile court. A designated intake official must make an initial determination that: (1) the person is a child under Title 3 of the Family Code; and (2) there is probable cause to believe that the person engaged in delinquent conduct or conduct indicating a need for supervision (CINS). Unless it is determined that both of these conditions are met, the law requires that "the person shall immediately be released." Section 53.01(b). A petition for adjudication or transfer hearing may be filed only if these preliminary findings are made. Section 53.04(a). Even informal probation (i.e., deferred prosecution) may occur only upon such affirmative findings. Section 53.03(a).

Prior to 1995, the statute included a third requirement—that further proceedings were in the interest of the child or public. Unless it was determined that all three of the conditions existed, the law required not only that "the [person] be immediately released," which is still required today, but also that the proceedings be terminated. Section 53.01(b).

The 1995 amendments made two major changes in this gatekeeping system: (1) they eliminated the third requirement (i.e., that a determination be made that "further proceedings in the case are in the interest of the child or the public"); and (2) they provided that a finding by intake of no probable cause releases the child from custody but does not necessarily terminate the case, because, in certain circumstances, the prosecutor is empowered to overrule that finding.

Who Conducts the Investigation. Who must conduct the preliminary investigation and make the required determinations? The law gives the juvenile board options to designate who has these responsibilities. Section 53.01(a) provides that these functions are to be performed by "the intake officer, probation officer, or other person authorized by the board." Thus, the juvenile board is empowered to decide that only the prosecutor, for example, can make these determinations.

Section 52.04(c), as added in 1997, provides that even if the prosecutor is the sole intake officer in a county, police and other referrals must first go through the probation department to enable a statistical record of the referrals to be made. Under that circumstance—when the prosecutor is designated solely to perform the intake function—the probation department is required to forward the referral to the prosecutor's office within three business days of receiving it. Since most juvenile statistical information

comes from probation department records, this amendment ensures that the information is collected no matter who performs the intake function in any particular county.

While a juvenile board could designate the prosecutor's office as the sole intake authority for the county, doing so would rarely be wise. Intake is a function that must be performed 24 hours a day, seven days a week. Probation officers often work in detention centers or are otherwise on call during nights and weekends. They are available to do intake of cases referred by police and other sources.

Information Needed. Upon what information are the required determinations to be based? Although Section 53.01(a) uses the words "preliminary investigation," it is not required that the intake officer conduct a field investigation, which would rarely be a feasible course of action.

Can the intake officer conduct the investigation by questioning the child? If the child is in detention, it would be a risky course of action to question the child about the delinquent conduct or conduct indicating a need for supervision (CINS) that underlies the referral. The child's privilege against compelled self-incrimination would give the child the right not to answer any such questions. The intake officer would also be required to inform the child of his or her right to remain silent and to counsel as provided in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), before proceeding with questioning. Although there is no case holding specifically that information obtained in violation of these rights cannot form the basis for the preliminary determinations required by Section 53.01(a) (as opposed to being inadmissible in an adjudication hearing), that is a risk too great to assume.

The privilege against compelled self-incrimination does not preclude questioning a child in detention about his or her background or any aspects of the case except the facts of the delinquent conduct or CINS.

The preferable course of action is to make the determinations on the basis of the information provided by the person or agency making the referral. To facilitate making the required determinations, Section 52.04(a) requires that the following information be provided to the juvenile court when a case is referred:

> (1) all information in the possession of the person or agency making the referral pertaining to the identity of the child and the child's address, the name and address of the child's parent, guardian, or custodian, the names and addresses of any witnesses, and the child's present whereabouts;
>
> (2) a complete statement of the circumstances of the alleged delinquent conduct or conduct indicating a need for supervision;
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> (3) when applicable, a complete statement of the circumstances of taking the child into custody; and
>
> (4) when referral is by an officer of a law-enforcement agency, a complete statement of all prior contacts with the child by officers of that law-enforcement agency.

If this information is provided by the person or agency making the referral, the intake officer should have a sufficient basis to make the required determinations. If the information is not provided or is incomplete, Section 52.04(b) authorizes the intake officer to send the case to a law enforcement agency to obtain the necessary information.

Determining If the Person Is a Child. The first determination required is whether the person referred is a "child" under Title 3 of the Family Code. That means that the person must have been between the ages of 10 and 17 at the time the delinquent conduct or CINS is believed to have occurred.

There are two elements to this determination: (1) the child's age and (2) the date of the offense.

Ordinarily, the information provided by the referring agency will contain a statement as to the child's age or date of birth. Whether that information is provided or not, the intake officer can make the determination of age on the basis of questioning the child. This can be done without warning the child and without violating the child's privilege against compelled self-incrimination. The child's age is a jurisdictional element for proceeding further in the juvenile system but is not an element of the offense, concerning which the child has a privilege against compelled self-incrimination.

If intake determines that the person referred is not a child, then Section 53.01(b) requires that "the person shall immediately be released." Intake has the power to terminate all proceedings in the case upon a finding that the person is not a child because there is no provision mandating prosecutorial review of that decision—only the probable cause decision. Sections 53.01(d) and (f).

However, if the case is one that under statute or local agreement would require prosecutorial review of probable cause, the wisest course of action would be for intake to refer the case to the prosecutor for review of the age finding as well. Sometimes the determination of age can

depend upon evidence of the child's date of birth or the date of the offense that would benefit from prosecutorial review.

In any event, upon an intake determination that the person referred is not a child, the person should immediately be released from custody, whether or not the case is referred to the prosecutor for review.

Diversion of Children Ages 10 and 11. In 2017, the legislature enacted HB 1204 with the goal of diverting the very youngest children away from court involvement in the juvenile justice system. Section 53.01(b-1) requires, upon a finding of probable cause, intake staff to refer certain cases involving a child under the age of 12 to a community resource coordination group (CRCG), a local-level interagency staffing group, or another community juvenile service provider. See Chapter 3 for additional discussion regarding the diversion of children under the age of 12.

Coordination of Services for Young Children. Upon receipt of a referral from juvenile probation department intake as described in Section 53.01(b-1), a CRCG or other community juvenile services provider must evaluate and make recommendations to the juvenile probation department regarding appropriate services for the child. Section 53.011 specifies which groups are responsible for service coordination and staffing. It is worth noting that, as defined in this section, a local-level interagency staffing group and a CRCG established under a memorandum of understanding defined in Section 531.421 and described in Section 531.055, Government Code, are terms that are interchangeable.

Section 53.011 sets out the process that the designated intake official or juvenile probation officer must follow. The juvenile probation officer is required to create and coordinate a service plan or system of care for the child or the child's family that incorporates the recommendations made. The child and the child's parent must consent to the services, but they must be made aware that such consent is voluntary. The probation officer may keep the child's case open for up to three months to monitor the child's compliance and may adjust the service plan or system of care as necessary. The case may be referred to the prosecutor if the child does not successfully participate in the services as required.

A dismissal upon successful completion may have been the likely intent of the legislature, although this is not mentioned in the statute. Section 53.011 provides only that the case may either be kept open for not longer than three months or be referred to the prosecutor if the child is not successful or no longer wishes to participate. The process to divert the youngest children in the juvenile justice system is separate from deferred prosecution, and some differences bear noting. For example, Section 53.03(c) provides that an incriminating statement made a by participant to a person giving advice under deferred prosecution may not be used against the declarant in a court hearing. No similar provision exists in Section 53.011. That said, protections regarding the admissibility of juvenile statements would still apply. For both deferred prosecution and Section 53.011 services, it is advisable that the probation officer not discuss the alleged offense with the juvenile while services are being provided. Another area of distinction is fees. While the deferred prosecution statute sets out the juvenile board's ability to adopt a fee schedule and limitations on those fees, there is no mention of fees for services in Section 53.011. Finally, it is unclear if a person who is unsuccessful under this program would be eligible for deferred prosecution. Given that referral to the prosecutor is the only option mentioned for a child who does not successfully participate, it is arguable that prosecutor-deferred or court-deferred prosecution are available but not probation-department-initiated deferred prosecution.

Probable Cause Determination. After verifying that the person is a child, the second determination is whether there is probable cause to believe that the child engaged in delinquent conduct or CINS. In order to make this determination, the intake officer needs more information than merely an accusation, such as a complaint filed by the police. The intake officer must also be provided with some of the underlying circumstances that led the referring agency to conclude that a violation occurred. Section 52.04(a) requires that certain things accompany the referral or be provided as quickly as possible after the referral, including a complete statement of the circumstances of the alleged delinquent conduct or CINS. These circumstances can and probably should be transmitted to the intake officer in the form of a report from the referring agency. In the case of a police referral, a standard offense, incident, or arrest report would ordinarily provide all the information required to make this determination. In any event, as noted earlier, this determination should not be based upon information obtained by questioning the child about the case.

How certain must the intake officer be that the child has engaged in delinquent conduct or CINS? Section 53.01(a)(2) requires that there be "probable cause." The intake officer is not required to be persuaded beyond a reasonable doubt; that is the standard of proof required at the adjudication hearing, but this is only a preliminary

screening of the case, not a determination of guilt or innocence.

To make a finding of probable cause based on the information provided, the intake officer must have a *reasonable belief* that the child engaged in delinquent conduct or CINS. This is similar to the screening that occurs in the prosecution of felony cases when a judge finds probable cause in an examining trial or when a grand jury finds probable cause upon which to return an indictment.

Texas law requires a determination of probable cause to be made as part of the intake process. There is a separate determination of probable cause required by the Fourth Amendment. That determination, unlike the Texas intake determination, must be made by a judge, referee, or magistrate and may not be made by an intake officer or prosecutor. However, the Fourth Amendment probable cause determination need only be made if the child is not promptly released from detention after being taken into custody without prior judicial order. The Texas intake probable cause determination must be made in every case that is referred to the juvenile court. The Fourth Amendment probable cause determination is discussed in Chapter 6.

Determining If Further Proceedings are Warranted. Prior to the 1995 amendments, there was a third required determination—that "further proceedings in the case are in the interest of the child or the public." This determination was required in order to permit the juvenile court, through its intake staff, to determine whether the case should receive any attention from the juvenile system.

Amendments in 1995 eliminated that determination as part of the intake process. This change evidenced a legislative policy that every case involving probable cause to believe that a child has engaged in delinquent conduct or CINS requires some response from the juvenile justice system, even if only a brief, non-judicial response. The juvenile court is no longer authorized to "close the door" of the system to any category of case in which there is a child and probable cause.

In many local systems, this change did not make much practical difference since the system already provided at least a brief response—supervisory caution—in every case. In other systems, intake policies that totally excluded certain categories of cases had to be eliminated.

School Classroom Removal Cases. Code of Criminal Procedure Article 15.27(g) was amended in 1997 to require that the school district be notified if: (1) a decision has been made not to proceed with a referral from the district for an offense that occasioned the district to remove a student from a classroom and place him or her in a disciplinary alternative education program (DAEP); and (2) if prosecution was refused for lack of prosecutorial merit or insufficient evidence and no formal proceedings, deferred adjudication, or deferred prosecution will be initiated. This notification must be made within two working days of the day the decision not to proceed is made.

Responsibility for providing notification rests with "[t]he office of the prosecuting attorney or the office or official designated by the juvenile board." Presumably, this means that if the decision is made exclusively by intake, that department must provide school notification and, if the decision is made or confirmed by the prosecutor, that official will notify. In some circumstances, the district is required by the Education Code to reevaluate its removal decision when it receives notice that there will be no juvenile proceedings. See Chapter 22.

School Expulsion Cases. A school district that expels a child is required by Section 52.041(b) to notify the juvenile court of that action and provide referral information to it on or before the second working day after the expulsion hearing. Within five working days of receipt of the expulsion referral information, the intake section and/or prosecutor is required by Section 52.041(c) to make the preliminary investigation and determination under Section 53.01. If a decision is made by intake or the prosecutor not to proceed with a juvenile case, the district must be notified within two working days of the making of that decision. See Chapter 22.

Parental Notification. Section 52.02(b) requires an officer taking a child into custody to "promptly give notice of the person's action and a statement of the reason for taking the child into custody" to the child's parent, guardian, or custodian. Section 53.01(c) requires intake to give notice to parents when a child in custody is referred unless the notice given under Section 52.02(b) is adequate. In 2001, the legislature enacted Section 52.04(d) to require intake to provide notice to a parent, guardian, or custodian when a case is referred to the juvenile court involving a child not in custody.

In 2003, the legislature enacted Chapter 61 in Title 3, addressing Rights and Responsibilities of Parents and Other Eligible Persons. Part of that chapter requires intake to notify parents of certain information when a child has been taken into custody. Section 61.102(a) provides:

> The parent of a child referred to a juvenile court is entitled as soon as practicable after the referral to be

informed by staff designated by the juvenile board, based on the information accompanying the referral to the juvenile court, of:

(1) the date and time of the offense;

(2) the date and time the child was taken into custody;

(3) the name of the offense and its penal category;

(4) the type of weapon, if any, that was used;

(5) the type of property taken or damaged and the extent of damage, if any;

(6) the physical injuries, if any, to the victim of the offense;

(7) whether there is reason to believe that the offense was gang-related;

(8) whether there is reason to believe that the offense was related to consumption of alcohol or use of an illegal controlled substance;

(9) if the child was taken into custody with adults or other juveniles, the names of those persons;

(10) the aspects of the juvenile court process that apply to the child;

(11) if the child is in detention, the visitation policy of the detention facility that applies to the child;

(12) the child's right to be represented by an attorney and the local standards and procedures for determining whether the parent qualifies for appointment of counsel to represent the child; and

(13) the methods by which the parent can assist the child with the legal process.

This provision is designed to give parents information about their child's arrest that they should have in order to be effective parents. It creates an exception to the confidentiality provisions of Chapter 58 that have been interpreted to preclude officials in the juvenile justice system from informing parents about any of the details of their child's case.

In 2005, the legislature added Section 261.405(e), which requires that parents of a youth taken into custody or placed in a non-state-operated juvenile justice facility or program be notified "as soon as practicable" about how to report allegations of child abuse. The child's parents must be provided with: (1) information regarding the reporting of suspected abuse, neglect, or exploitation (ANE) in a juvenile justice program or facility to the Texas Juvenile Justice Department (TJJD) and (2) TJJD's toll-free number for this reporting, which is (877) STOP-ANE or (877) 786-7263. A brochure for parents and the public that provides the required information about reporting abuse, neglect, or exploitation of a child may be found on the TJJD website.

This and other provisions in Family Code Chapter 61 are discussed in Chapter 26.

Law Enforcement Duty to Notify Probate Court. Section 52.011 was added in 2017 as a result of an Office of Court Administration initiative to develop a confidential database to track persons with a mental illness or intellectual disability who have had a guardian appointed by the probate court. The provision requires that, after a law enforcement officer takes a child into custody, the law enforcement officer or other person having custody of the child notify the probate court with jurisdiction over the child's guardianship as soon as practical but no later than the first working day after the date of the custody event. The language "or other person having custody of the child" is vague; however, because it is conceivable that the juvenile probation department will be involved prior to referral to juvenile court, the local law enforcement agency and juvenile probation department may wish to develop a protocol regarding the notification process. Only properly trained individuals may have access to the database.

Mental Health Screening and Risk and Needs Assessment. The numbers of youth entering the juvenile justice system that have an ascertainable mental health diagnosis has continued to increase year by year. It became clear that the juvenile justice system needed to put into place an initial screening mechanism for all youth coming into the system to determine whether there were youth with mental health needs who were going undiagnosed and who required professional evaluation and treatment. Since 2001, the legislature has mandated that juvenile probation departments use a mental health screening instrument selected by TJJD. Section 221.003(a), Human Resources Code. Prior to 2001, departments were free to use instruments of their own choosing.

The Massachusetts Youth Screening Instrument (MAYSI) was selected as the statewide screening instrument, and administrative rules governing the screening

process were promulgated to implement the 2001 statutory mandates. Texas Administrative Code Title 37, Chapter 341, requires that every child who is formally referred to the juvenile justice system be screened for mental health needs. The TJJD standard screening tool is required to be administered no later than 14 calendar days from the first face-to-face contact between the juvenile and a juvenile probation officer. If a child is in detention, the screening must be conducted within 48 hours from the time of admission into the facility.

The MAYSI screening instrument contains a series of questions posed to the juvenile, and an overall score is determined that provides the probation department or facility with information to determine if a further professional mental health evaluation is necessary. Because these questions may require the youth to disclose criminal activity (e.g., drug use), it was important to encourage juvenile offenders and their attorneys to agree to participate in the mental health screening. To address this issue, the legislature also enacted Section 221.003(c) to protect the juvenile from misuse of information obtained from the screening instrument:

> Any statement made by a child and any mental health data obtained from the child during the administration of the mental health screening instrument under this section is not admissible against the child at any other hearing. The person administering the mental health screening instrument shall inform the child that any statement made by the child and any mental health data obtained from the child during the administration of the instrument is not admissible against the child at any other hearing.

In 2005, the legislature modified Human Resources Code Section 221.003(a) and enacted Family Code Section 51.21, concerning the mental health screening and referral process of a child entering the juvenile probation system. Under that section, juvenile probation departments have the option to use the mental health screening instrument selected by TJJD (i.e., the MAYSI) or to substitute their own clinical assessment so long as the assessment is done within the time frame prescribed by TJJD.

Section 221.003(f), Human Resources Code, requires the use of a validated risk and needs assessment on every child under the jurisdiction of the local juvenile probation department. The assessment must be administered to every juvenile before disposition of the child's case. The instrument must be a validated assessment instrument provided or approved by TJJD. A validated, web-based Risk and Needs Assessment (RANA) instrument was provided to all local juvenile probation departments free of charge. TJJD approves various vendor-purchased risk and needs assessment instruments on a case-by-case basis. Section 221.002(d) gives TJJD rulemaking authority concerning the mandatory screening instrument or clinical assessment under Section 221.003(c) as well as the risk and needs assessment under Section 221.003(a), Human Resources Code.

Section 51.21(a) requires that if the mental health screening or assessment process indicates that a juvenile needs further mental health assessment and evaluation, the probation department must refer the child to the local mental health authority unless it has a mental health professional on staff to treat the child. Section 51.21(b) mandates that all referrals of youth to the local mental health authority be reported in a specified format to TJJD. TJJD collects the screening instrument data electronically using the Juvenile Case Management System (JCMS) database or, for counties that do not use JCMS, the Electronic Data Interchange (EDI). This data is used to estimate the number of juveniles with mental health needs in the juvenile probation system.

B. Prosecutorial Review of Intake Determinations

In General. Section 53.01 requires prosecutorial review of intake decisions in three different circumstances: (1) there is a review required in murder cases that cannot be altered by local agreement; (2) there is an opportunity for further review through local interagency agreement; and (3) there is a statutory default review required in the absence of a local agreement.

Murder Cases. Section 53.01(f) provides that, in every county, intake must refer to the prosecutor "a child's case…if probable cause exists to believe that the child engaged in delinquent conduct that violates Section 19.03, Penal Code (capital murder), or Section 19.02, Penal Code (murder)." This minimum scope of review cannot be changed by local interagency agreement.

It is important to note that the mandatory murder review as enacted applies only when intake has determined that the person referred is a child and that there is probable cause to believe that murder or capital murder was committed by the child. Therefore, it is theoretically possible for a local agreement to provide that intake would not be required to refer a murder or capital murder case for prosecutorial review in which intake made a finding of no probable cause. However, it would be wise for such an agreement to require referral of such cases for prosecutorial review even when no probable cause was found. It is clearly in the interest of the public to have the

prosecutor review the probable cause determination in all cases of such seriousness.

The Statutory Default Position. Unless and until there is an interagency agreement in place, Section 53.01(d) provides a default provision. That provision mandates review by the prosecutor in three categories of cases whether or not intake has found probable cause to exist:

> (1) all referrals for felonies must be sent to the prosecutor for review;
>
> (2) all referrals for misdemeanors involving "violence to a person" must be sent to the prosecutor for review; and
>
> (3) all referrals for misdemeanors involving the use or possession of a firearm, location-restricted knife, or club (as defined by Section 46.01, Penal Code) or prohibited weapon (as described by Section 46.05, Penal Code) must be sent to the prosecutor for review.

Assault with bodily injury under Penal Code Section 22.01(a)(1) is an example of a misdemeanor involving violence to a person. Unlawfully carrying a weapon under Penal Code Section 46.02 or possession of a prohibited weapon, such as a knuckles, under Penal Code Section 46.05 are examples of misdemeanor weapons offenses.

Local Agreement. Section 53.01(d) permits local officials to modify the default provision by agreement—called by Section 53.01(e) an "alternative referral plan." The plan must be in writing, proposed jointly by the "office of prosecuting attorney and chief juvenile probation officer," and approved by the juvenile board of the county. Until such a plan has been agreed to and approved, the default provision of Section 53.01(d) controls.

The purpose of permitting alternative plans is to enable counties to agree to power-sharing plans that fit the local circumstances of their counties better than the default provision does. In authorizing such plans, the legislature recognized that different counties have different needs and capabilities that should be given recognition if the relevant local officials can agree on the terms upon which intake power will be shared. Even that flexibility, however, is restricted by the provision in Section 53.01(f) that requires prosecutorial review in murder and capital murder cases.

Section 53.01(e) requires that any alternative referral plan must be registered with TJJD. This provision does not require that TJJD approve the plans filed with it—only that they be filed. The purpose of this provision is to create a library of plans that can be consulted by counties for ideas to use in drafting their own plans.

Discretionary Referrals. Section 53.01 speaks only to those circumstances in which it is mandatory for intake to forward the case to the prosecutor for review. Nothing in that section or any other section prohibits intake from voluntarily referring any other cases to the prosecutor for review. If the intake determination seems particularly difficult or the case is, for any reason, particularly sensitive, it would be wise for intake voluntarily to make a referral to the prosecutor for review. It rarely hurts to get a second opinion.

Contents of the Referral. Section 53.01(d) requires, as part of the default provision, that when a referral is required to be made by intake to the prosecutor, it must be made "promptly," without any more definite specification of time. It also requires that the referral to the prosecutor must be accompanied by:

> (1) all documents that accompanied the current referral; and
>
> (2) a summary of all prior referrals of the child to the juvenile court, juvenile probation department, or detention facility.

By inference, "promptly" means as soon as the required information can be assembled and forwarded to the prosecutor. That period will vary from county to county and from time to time within the same county. For example, it will depend in part on the extent to which records of prior referrals are automated in a particular county.

The Prosecutor's Decisions. Section 53.012(a) requires that the prosecutor must review a case sent by intake "promptly." No more specific time requirement is imposed by statute.

Section 53.012(a) requires the prosecutor to review the case for "legal sufficiency and the desirability of prosecution." "Legal sufficiency" means whether, in the opinion of the prosecutor, there is probable cause to believe that the child committed delinquent conduct or CINS. "Desirability of prosecution" means whether, in the opinion of the prosecutor and assuming there is probable cause, the resources of that office and the courts should be devoted to the case and whether prosecution is in the interest of the public, the victim, or the juvenile respondent. In 2010, the Attorney General ruled that a district attorney's determination about whether or not to prosecute a case is squarely within the prosecutor's substantial

discretion. See Attorney General Opinion No. GA-0765 (2010).

Not all cases in which there is probable cause are appropriate for court petitioning. Many can and should be handled non-judicially. Section 53.012(a) simply codifies the prosecutor's historical power to exercise discretion not to prosecute cases in which probable cause exists.

Grand Jury Advice. Prosecutors in criminal cases sometimes refer cases to a grand jury for an advisory opinion as to whether to file charges. This is particularly useful in sensitive cases or cases in which there is publicity. A decision not to prosecute draws less heat when it is made upon grand jury advice. Grand jury approval of juvenile petitions is required to initiate proceedings under the Determinate Sentence Act. See Chapter 21. However, in 1999 the legislature authorized prosecutors to refer any juvenile case to the grand jury for its review and advice. This step is purely discretionary with the prosecutor. The prosecutor is not required to refer a non-determinate sentence case to the grand jury, but if he or she chooses to do so, the grand jury's advice must be followed.

Under Section 53.035(c), if the prosecutor refers a juvenile case to the grand jury and the grand jury votes to take no action on an offense referred, the prosecutor may not file a petition concerning that offense unless the same or a successor grand jury approves the filing of the petition. Under Section 53.035(d), if the grand jury approves prosecution of the offense referred to it, the prosecutor may file a petition charging that offense. The option of obtaining grand jury advice is discussed more fully in Chapter 9.

Filing Petition. Under Section 53.012(a), if the prosecutor determines that there is probable cause and that prosecution is desirable, then he or she "may file a petition without regard to whether probable cause was found under Section 53.01." In other words, the fact that intake has found no probable cause does not preclude the prosecutor from filing a petition. This specific language, added in 1995, overrides the more general, older language in Section 53.04(a) that authorizes a petition to be filed only "[i]f the preliminary investigation, required by Section 53.01 of this code results in a determination that further proceedings are authorized and warranted." The older language reflects the pre-1995 scheme in which intake did not share power with the prosecutor to make the preliminary determinations.

Deadline for Filing Petition. If the juvenile is not being detained, Section 53.04(a) requires the prosecutor to file a petition, if one is to be filed, "as promptly as practicable." If the juvenile is being detained, the prosecutor is required, under legislation enacted in 1999, to file a petition within 30 working days of the initial detention hearing if the charge is a capital felony, an aggravated controlled substance felony, or a first-degree felony. For any other offense, the prosecutor must file the petition within 15 working days if the juvenile is being detained. Failure to meet those deadlines requires release of the juvenile from detention but does not preclude delayed filing of a petition. Section 54.01(q). These requirements are discussed more fully in Chapter 9.

Decision Not to File Petition. A prosecutor might decide not to file a petition for one of two reasons: (1) no probable cause exists or (2) prosecution is not desirable. If the reason for not filing is no probable cause, Section 53.012(b)(1) requires the prosecutor to "terminate all proceedings." Although not required by law to do so, the prosecutor should promptly communicate this decision to intake to enable it to complete its records and to release the child from detention if the child is being detained solely on that charge. This decision is a dismissal of all charges; however, like a dismissal of charges in the criminal system, it does not preclude refiling charges should new evidence surface.

If the reason for not filing a petition is that prosecution of the particular case is not desirable, then the prosecutor is required by Section 53.012(b)(2) to "return the referral to the juvenile probation department for further proceedings." Since the prosecutor has determined not to file a petition, the only "further proceedings" that remain available are non-judicial ones. There are, in general, two non-judicial dispositions available to the juvenile probation department: (1) deferred prosecution and (2) supervisory caution. Upon return of a case from the prosecutor to intake, one of those two non-judicial dispositions could be employed.

C. Deferred Prosecution

A major function performed by intake is implementing the informal probation option authorized by Section 53.03. This disposition was substantially modified in 1995 to reflect power-sharing with the prosecutor's office. Its statutory name was also changed from "intake conference and adjustment" to "deferred prosecution" to reflect the more central role of the prosecutor in the process.

Also in 1995, all references to the child engaging in the program on a "voluntary" basis were eliminated from the statute. That having been done, it is apparent that participation by the child remains voluntary in the sense that

he or she still has the right to refuse to participate and, in doing so, runs only the risk that a court petition will be filed or, if already filed, will be pursued in the case.

Deferred prosecution involves two separate matters: (1) deciding what cases should be handled by deferred prosecution and (2) actually administering the deferred prosecution counseling process.

Definition. Deferred prosecution is an alternative to seeking a formal adjudication of delinquent conduct or CINS. It is essentially a six-month period of probation. Many of the cases referred to the juvenile court are not of sufficient seriousness to the child or the community to justify pursuing the juvenile process through to formal adjudication and disposition hearings. Furthermore, in many counties there are insufficient resources to pursue all cases through to formal court hearings, even if that were regarded as desirable.

Prosecutor's Authority. Prior to the 1995 amendments, each juvenile court judge had the sole power to decide how informal probation was to be employed. This was changed in 1995 to require power to use deferred prosecution be shared with the prosecutor.

Section 53.03(e) authorizes the prosecutor to place any child on deferred prosecution in any case except for certain alcohol-related offenses, as provided in Section 53.03(g). The only restriction is the implicit one that the child must be placed on deferred prosecution before jeopardy has attached at the beginning of the adjudication hearing unless the child and his or her attorney have explicitly consented to a declaration of a mistrial after jeopardy has attached.

In *In the Matter of R.C.*, UNPUBLISHED, No. 13-08-00334-CV, 2010 WL 411873, Juvenile Law Newsletter ¶ 10-1-6 (Tex.App.—Corpus Christi 2010, no pet.), appellant alleged that a deferred prosecution agreement had been reached with a special prosecutor although there was nothing executed in writing by the prosecutor or approved by the court to support enforcement of any agreement. The Court of Appeals, citing Section 51.17 for the proposition that "the Texas Rules of Civil Procedure govern proceedings under this title," held that a settlement agreement under Rule 11 must be: (1) in writing; (2) signed; and (3) filed with the court or entered in open court before a party may seek enforcement.

> The rationale for the rule is straightforward: Agreements of counsel respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.

2010 WL at 411873 *3 (quoting *Padilla v. LaFrance*, 907 S.W.2d 454, 460-61 (Tex.1984)).

While the Court of Appeals agreed that Section 53.03(e) appears to grant prosecutorial discretion to defer prosecution of a juvenile without court approval in certain instances, it did not address this question since the settlement agreement was not enforceable under Rule 11.

Probation Department's Authority. Section 53.03(e) also prohibits the probation department from placing a child on deferred prosecution in a case that Section 53.01(d) requires to be forwarded to the prosecutor. In the absence of an alternative referral plan, a probation officer could not place a child on deferred prosecution whose current referral is for a felony, a misdemeanor involving violence to a person, or a misdemeanor weapons offense. If there is an alternative referral plan in place, the probation officer would be unable to place on deferred prosecution a child whose case is required to be referred to the prosecutor under that plan.

In 2004, the Attorney General was asked whether a juvenile board may designate a juvenile probation department as the office authorized to determine whether to defer prosecution of a child referred to juvenile court for certain non-violent misdemeanor offenses (e.g., theft or criminal mischief). Attorney General Opinion No. GA-0205 (2004). The opinion confirmed that felonies and misdemeanors involving violence or weapons committed by juveniles are exclusively within the province of the prosecuting attorney. However, by enacting Section 53.03(a), "[t]he legislature has merely carved out a narrow class of cases—non-violent misdemeanors—that fall within the jurisdiction of the juvenile probation department." Consequently, a juvenile board may, without violating the Texas Constitution, designate its juvenile probation department as the office with the authority to defer prosecution of a child referred to juvenile court for certain non-violent misdemeanor offenses.

If intake has referred a case to the prosecutor and the prosecutor has determined that probable cause exists but

that the filing of a petition is not desirable, Section 53.012(b)(2) permits the prosecutor to return the case to the probation department for further proceedings. Under those circumstances, probation may place the child on deferred prosecution because the prosecutor returned the case to probation.

In such a circumstance, the deferred prosecution is in effect ordered by the prosecutor as authorized by Section 53.03(e) and probation is functioning as the prosecutor's agent. The agency relationship is reflected by the requirement of Section 53.012(c) that probation must "refer a child who has been returned to the department...and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination of whether to file a petition."

Section 53.03(e)(2) permits probation to place a child on deferred prosecution who has previously been adjudicated for a felony, but only with the prosecutor's written consent. Thus, even if the current referral is for an offense that, under the default provision of Section 53.01(d) or the terms of an alternative referral plan, is not required to be referred to the prosecutor, intake is not authorized to employ deferred prosecution without the prosecutor's written consent if the child has a prior felony adjudication.

Juvenile Court's Authority. May the juvenile court place a child on deferred prosecution? Section 53.03 speaks only to the allocation of authority between the prosecutor and the probation officer. It does not preclude the juvenile court from ordering deferred prosecution in any case that is before the court on a petition for an adjudication.

Section 59.005 defines Progressive Sanction Level Two. Subsection (a) provides that "the juvenile court, the prosecuting attorney, or the probation department may, as provided by Section 53.03" place a child on deferred prosecution for up to six months. The reference to Section 53.03 is certainly a reference to the restrictions imposed by that section on the probation department's authority to place children on deferred prosecution. It cannot be intended to include the juvenile court, since Section 53.03 does not address the authority of the juvenile court to place a child on deferred prosecution. Certainly, if a child before the court on an adjudication petition should be placed on deferred prosecution, the juvenile court should be authorized to do so.

If the juvenile court places a child on deferred prosecution, it should do so before jeopardy attaches in the case. Placing a child on deferred prosecution after jeopardy has attached would be a mistrial under jeopardy law and a new prosecution would be barred unless the mistrial was required by manifest necessity or the juvenile and his or her attorney consented to the mistrial.

Jeopardy attaches when the adjudication hearing has begun—when the jury is sworn in, the first witness begins to testify in a jury-waived trial, or a plea or stipulation is accepted in an uncontested case. See *State v. C.J.F.*, 183 S.W.3d 841 (Tex.App.—Houston [1st Dist.] 2005, pet. denied) (jeopardy attaches in a juvenile proceeding, as in an adult criminal proceeding, when jury is impaneled and sworn).

In 2003, the legislature made it clear that the juvenile court judge has authority to place a child on deferred prosecution without seeking or obtaining prosecutorial approval. Sections 53.03(i) and (j) provide:

> (i) The court may defer prosecution for a child at any time:
>
> (1) for an adjudication that is to be decided by a jury trial, before the jury is sworn;
>
> (2) for an adjudication before the court, before the first witness is sworn; or
>
> (3) for an uncontested adjudication, before the child pleads to the petition or agrees to a stipulation of evidence.
>
> (j) The court may add the period of deferred prosecution under Subsection (i) to a previous order of deferred prosecution, except that the court may not place the child on deferred prosecution for a combined period longer than one year.

While the judge is not bound by the requirements of prosecutorial approval that restrict the probation department, the judge is prohibited by Section 53.03(g) from granting deferred prosecution for one of the enumerated alcohol-related offenses.

In 2005, the legislature added Section 53.03(k), which gives juvenile courts the discretion to consider professional representations by the parties concerning a case and the juvenile's background when deciding whether to grant deferred prosecution. The section also provides that if a child or the attorney makes any representations to the juvenile court in an application for deferred prosecution under Section 53.03(i), such representations may not be admitted against the child at trial if the court does not grant deferred prosecution.

Probable Cause Required. Section 53.03(a) requires that the preliminary determinations discussed earlier in this chapter be made before a child can be placed on deferred prosecution. Thus, deferred prosecution can be used only if there is a finding of probable cause to believe the child engaged in delinquent conduct or CINS. That determination must be made by intake or by the prosecutor if referral to the prosecutor is required by a local alternative plan or by the default statute.

Deferred prosecution cannot be used to deal with those cases that the State is clearly unable to prove in court. Those cases should be dismissed upon a finding of no probable cause by intake or by the prosecutor.

Consent Required. Section 53.03(a)(2) requires that deferred prosecution be based upon the consent of the child and his or her parent, guardian, or custodian "with knowledge that consent is not obligatory." There is no requirement that the child be represented by counsel in order to accept deferred prosecution or that counsel must consent to the acceptance by the child and his or her parent, guardian, or custodian of the offer of deferred prosecution. Consent by counsel is specifically omitted from Section 53.03(a)(2). Section 51.09 requires that defense counsel must concur in any waiver of rights by a child "[u]nless a contrary intent clearly appears elsewhere." The omission of counsel from the list of adults in Section 53.03(a)(2) is an expression of such a contrary intent.

Of course, if the child is represented by retained or appointed counsel, he or she has the right to advice of that attorney regarding the decision whether to accept deferred prosecution; further, many cases of deferred prosecution will be negotiated for the child with the prosecutor by the child's attorney. Even if deferred prosecution is negotiated by counsel for the child, it is not counsel, but the child and his or her parent, guardian, or custodian, who must consent to the disposition.

Since deferred prosecution involves probation without adjudication, it is important to protect the child's right to proceed to court on the case to have a judge or jury decide the question of guilt or innocence. Section 53.03(a)(3) gives the child and his or her parent, guardian, or custodian the right to "terminate the deferred prosecution at any point and petition the court for a court hearing in the case." Further, they must be informed of that right at the time the child is placed on deferred prosecution.

Time Limits. The period for deferred prosecution is set by Section 53.03(a) at "a reasonable period of time not to exceed six months." If deferred prosecution has been successful, the child must be discharged at the end of the set period. The case should be closed and any petition that has been filed dismissed. The child must also be informed of the right to sealing of the records as required by Section 58.262. See Chapter 15 for a discussion of that requirement.

Under a 2003 amendment, the judge can grant deferred prosecution to a child in a case in which the child has already received deferred prosecution, but the combined time on deferred may not exceed one year. Section 53.03(j).

Alcohol Offenses. In 1997, the legislature added Section 53.03(g) to prohibit the use of deferred prosecution for certain alcohol offenses committed by juveniles. The offenses covered are driving while intoxicated, flying while intoxicated, boating while intoxicated, intoxication assault, intoxication manslaughter, third or subsequent offense of consumption of alcohol by a minor, and third or subsequent offense of driving under the influence of alcohol by a minor.

In 2015, Section 53.03(h-2) was added to provide that deferred prosecution for CINS offenses in the Alcoholic Beverage Code (minor in possession and similar offenses) or for public intoxication (Section 49.02, Penal Code) may include a condition that the child attend an alcohol awareness program approved by the Texas Department of Licensing and Regulation, a drug education program approved by the Department of State Health Services, or a drug and alcohol driving awareness program approved by the Texas Education Agency, as described by Section 106.115, Alcoholic Beverage Code.

Drug Offenses. In 2015, Section 53.03(h-1) was added to provide that deferred prosecution for possession of a controlled substance or possession of marijuana offenses may include a condition that the child attend a drug education awareness program approved by the Department of State Health Services in accordance with Section 521.374, Transportation Code.

Graffiti Cases. In 1997, the legislature added Section 53.03(h) to authorize, but not require, as conditions of deferred prosecution in cases of graffiti violations under Penal Code Section 28.08:

> (1) voluntary attendance in a class with instruction in self-responsibility and empathy for a victim of an offense conducted by a local juvenile probation department, if the class is available; and
>
> (2) voluntary restoration of the property damaged by the child by removing or painting over any

markings made by the child, if the owner of the property consents to the restoration.

Family Counseling. The scope of deferred prosecution is broader than counseling only the child who is the subject of the charge. Section 53.03(a) provides that, as part of the process, a probation officer "may advise the parties...concerning deferred prosecution and rehabilitation of a child." Since "party" is defined by Section 51.02(10) to include the child's parent or guardian, participation in counseling by those persons can be made part of an offer of deferred prosecution of the case against the child. Thus, deferred prosecution can be used as an inducement to persuade the relevant persons to participate in family counseling.

While the child's family may be included in the deferred prosecution treatment plan and agreement, it would not be permissible to proceed with the original case because a parent or guardian refused to participate in the program. It is only a violation of the agreement by the child personally that could authorize proceeding to court on the original charge.

Restitution and Community Service. In 1995, the legislature repealed language in the deferred prosecution statute that authorized restitution and community service:

> (d) An informal adjustment authorized by this section may involve:
>
> (1) voluntary restitution by the child or his parent to the victim of an offense; or
>
> (2) voluntary community service restitution by the child.

This language was replaced by the following program description language in Progressive Sanction Level Two: "For a child at sanction level two, the juvenile court, the prosecuting attorney, or the probation department may...require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability." Section 59.005(a)(2).

Requiring a parent to make monetary restitution is not mentioned in the program description for Sanction Level Two. Therefore, it is no longer authorized for deferred prosecution. The reason for this omission was apparently the difficulty of enforcing a deferred prosecution agreement against a child for a parental failure. A parent may be required to make monetary restitution only upon an order under Section 54.041, based on a judicial finding that the child engaged in delinquent conduct or CINS.

Juvenile probation officers and other employees of juvenile probation departments are immune from liability for most acts done by probationers while performing community service under programs of deferred prosecution. See Human Resources Code Section 142.004(a) and Chapter 24.

Fees. Section 53.03(d) authorizes juvenile boards to require the collection of fees for deferred prosecution of not more than $15 per month from the parent, guardian, or custodian of a child (but not the child). It also authorizes the board to adopt "rules for the waiver of a fee for financial hardship in accordance with guidelines that the Texas Juvenile Justice Department shall provide." Money collected must be deposited in the county treasury and "may be used only for juvenile probation or community-based juvenile corrections services or facilities in which a juvenile may be required to live while under court supervision." If the juvenile board does not adopt a fee schedule and rules for waiver, no fee may be imposed.

Violations of Deferred Prosecution. Although the child may terminate the deferred prosecution process at any time in favor of a court hearing, the same is not true of the State. The practice is to impose conditions on deferred prosecution that are similar to those used for formal probation. Thus, by employing those conditions, the State is promising that it will not file a petition or proceed with a petition that has already been filed as long as the child abides by those conditions. As long as the child is not in violation of those conditions, the deferred prosecution process cannot be disturbed by the State.

Section 53.03(f) provides that "[t]he probation officer or other officer designated by the court supervising a program of deferred prosecution for a child under this section shall report to the juvenile court any violation by the child of the program." Section 53.012(c) provides that "[t]he juvenile probation department shall promptly refer a child who has been returned to the department [by the prosecutor] and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination whether to file a petition."

Read literally, those two sections would require probation to report all violations of deferred prosecution to the court but to report to the prosecutor only those violations in the cases that were returned to probation from the prosecutor under Section 53.012(b). However, because the decision whether to file a court petition is

exclusively within the power of the prosecutor to make, violations of all deferred prosecution programs should be reported to the prosecutor as well as to the court.

If the prosecutor thinks it is appropriate, the case may be brought into court by filing a new petition or by setting a court hearing date on a petition that has already been filed. It is important to note that this is in no sense a revocation of the deferred prosecution but rather is a decision to proceed to court with the original case because the effort at informal probation has failed.

A violation must occur within the period of deferred prosecution to authorize proceeding to court on the original offense. In Attorney General Opinion No. LO 98-069 (1998), the Attorney General stated that the prosecutor could not proceed to court on the original charge because of a law violation that occurred several days after the child had successfully completed six months of deferred prosecution. The law violation was not a violation of the deferred prosecution agreement because it did not occur within the deferred prosecution period.

It is implied by the statutory scheme and the Attorney General's letter opinion that if the defense attorney files a request, the child is entitled to a pre-trial hearing before the judge without a jury as to whether he or she violated a condition of deferred prosecution and thereby enabled the prosecutor to go forward with the original case. Without proof of a violation, the prosecutor is bound by the promise the State made when placing the child on deferred prosecution that court proceedings will not be pursued unless a condition is violated. If the juvenile court finds that the child did not violate the deferred prosecution agreement, then the court should dismiss the petition without prejudice.

No Detention. Section 53.03(b) provides, "Except as otherwise permitted by this title, the child may not be detained during or as a result of the deferred prosecution process." This provision was designed to prohibit the use of detention as a "treatment modality" in deferred prosecution but not to prohibit taking a child into custody who is reasonably believed to have committed a new offense while on deferred prosecution.

Furthermore, this language is not intended to prohibit taking a child into custody who is believed to have violated a condition of deferred prosecution. A directive to apprehend may be issued pursuant to Section 52.015 to enable such a child to be taken into custody if there is probable cause to believe that the child violated a term of deferred prosecution and, therefore, the prosecutor has filed a petition in the case or has set a previously filed petition for hearing. In such an event, the child should be detained under the same circumstances, including the right to a detention hearing and periodic review of detention orders, that would apply to a new referral to the juvenile court. See Chapter 6.

Privilege Against Self-Incrimination and Statutory Immunity. Since deferred prosecution contemplates that the child and the probation officer will engage in discussions of the child's behavior that resulted in the juvenile court referral, and, since the case has not yet been adjudicated, there is justifiable concern over the child's right not to incriminate himself or herself should the counseling process fail and the case be brought to court. Section 53.03(c) provides:

> An incriminating statement made by a participant to the person giving advice and in the discussions or conferences incident thereto may not be used against the declarant in any court hearing.

That provision should be explained to the child and his or her parent in order to encourage open discussion by the child with the probation officer during the process of deferred prosecution. The immunity provided by this provision includes statements relating to offenses other than the one for which the child is on deferred prosecution, as well as statements relating to the offense for which he or she has been placed on deferred prosecution.

Duty to Report Child Abuse. The statutory immunity for self-incriminatory statements is complicated by Family Code Section 261.101, which requires that information about child abuse or neglect be reported to law enforcement agencies. What if a child admits to a probation officer that he or she committed child abuse? Is the officer required to report that abuse by Section 261.101 or prohibited from doing so by Section 53.03(c)?

Section 261.101(b) requires juvenile probation, detention, and correctional officers who have cause to believe that child abuse has occurred to, within 48 hours, report the abuse just like any other professional, including "teachers, nurses, doctors, day-care employees" and others. Section 261.101(c) makes it clear that the duty to report overrides the law's usual privileges, including those for private communications to an "attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional." and others. Failure of a professional to report child abuse is generally a Class A misdemeanor; it is a state jail felony if the actor intended to conceal the abuse or neglect. Section 261.109.

Because the duty to report child abuse is so specifically defined and so absolute in its terms (overriding traditional communication legal privileges), it almost certainly would be held by a court to create an exception to the statutory immunity provided by Section 53.03. Therefore, a probation officer who obtains from a child on deferred prosecution information that child abuse has been committed (by the child or anybody else) would be required within 48 hours to report that information to the appropriate law enforcement agency.

The purpose of the Section 53.03 immunity is to encourage the child to be candid with his or her officer. Therefore, at the first meeting between officer and child at the beginning of the deferred prosecution process, the officer should explain to the child that whatever the child says to the officer is confidential and cannot be disclosed. However, the officer should also inform the child that any information provided by the child relating to child abuse (of the child, by the child, or by others of another child) will have to be reported to authorities.

Section 261.001 defines child abuse using a long list of examples. In 2007, the legislature added to the list by including continuous sexual abuse of a young child or children under Penal Code Section 21.02. In deciding whether a communication by a child gives rise to a duty to report child abuse, the probation officer should consult the definitions in Section 261.001.

In 2005, the legislature amended Section 261.101(b) to expand the definitions of child "abuse," "neglect," and "exploitation" located in Section 261.401. Then, in 2007, the legislature expanded Section 261.401(b) to require a state agency that "…provides oversight of a program that serves children" to conduct a swift and thorough investigation of an abuse, neglect, or exploitation report in a facility or program. The statutorily mandated reporting of abuse and neglect references the definitions of these terms in Sections 261.001(1) and (4).

In 2017, Section 261.405 was modified to specifically address investigations of abuse, neglect, or exploitation in juvenile justice programs and facilities. Section 261.405(a) includes the definitions specific to those programs and facilities and gives TJJD the responsibility to investigate the reports.

Duty to Report Child Abuse, Neglect, and Exploitation in a Juvenile Justice Facility or Program. Juvenile probation department and facility staff have additional duties and must adhere to stricter timelines for reporting an outcry, allegation, or suspicion of abuse, neglect, or exploitation (ANE) of a child that occurs in any juvenile probation department, juvenile justice program, or juvenile facility. In contrast with the 48-hour timeframe specified in Family Code Section 261.101(b), juvenile probation and supervision officers, as well as employees, volunteers, or interns, in a non-state-operated juvenile justice facility or program must comply with the stricter 24-hour reporting timeframe contained in TJJD's administrative rules found in Title 37, Texas Administrative Code. TJJD employees and contract employees may be required to report abuse, neglect, or exploitation even earlier, as required by TJJD's internal policies.

Family Code Section 261.405(b) imposes an additional duty on personnel in non-state-operated juvenile justice facilities and programs to submit a report of alleged abuse, neglect, or exploitation in any juvenile justice program or facility to the Texas Juvenile Justice Department and a local law enforcement agency for investigation.

In 2007, the legislature explicitly clarified that "a juvenile probation department" is a juvenile justice program as defined in Section 261.405(a)(4). A dedicated 24-hour, toll-free number (1-877-STOP-ANE or 1-877-786-7263) was established and an official form for reporting incidents and allegations that occur in community-operated juvenile justice programs or facilities was developed by the predecessor agency to TJJD. The TJJD Incident Report Form, A Guide for Juvenile Justice Professionals to Recognizing, Reporting, and Investigating Abuse, Neglect, and Exploitation in the Texas Juvenile Probation System, and other notice forms concerning abuse, neglect, and exploitation are available on the TJJD website.

Duty to Refer for Appropriate Mental Evaluation and Services. Section 51.20(c), which was added in 2005, requires juvenile probation departments to refer certain children to the local intellectual and developmental disability authority for evaluation and services. In 2013, the legislature added chemical dependency to the list of conditions for which an examination may be ordered by the court at its discretion or upon the request of the child's parent or guardian. A child on deferred prosecution supervision or court-ordered probation who has been determined by a qualified professional to have a mental illness or intellectual disability or to suffer from chemical dependency and who is not already receiving treatment services must be referred to the local intellectual and developmental disability authority or to another appropriate and legally authorized agency or provider for evaluation and services. The "qualified professional" may include any qualified mental health professional who has evaluated the child. The evaluation may have occurred at school, at the juvenile probation department, or through a private

evaluator secured by the juvenile's parents. Section 51.20(d) provides that, if a juvenile is referred to the local intellectual and developmental disability authority or other agency or provider, the juvenile probation department must report this referral to the Texas Juvenile Justice Department in a format specified by the agency.

Relationship to Sanction Level Two Program Description. In 1995, the legislature enacted a system of seven progressive sanction levels. Each sanction level consists of a program description for that sanction level and a recommendation as to which offenses should be disposed of using that sanction level. The offense dispositional recommendations are not mandatory; a probation department or court is free to depart from them so long as the departure is explained. There is no requirement that a particular disposition meet the program description of any sanction level, much less the sanction level to which it is presumptively assigned by statute.

The statutorily presumptive assignments to deferred prosecution (sanction level two) are Class A or B misdemeanors (other than those involving firearms), referrals to the juvenile court for contempt of a municipal, county, or justice court under Section 51.03(a)(2), inhalant abuse under Section 51.03(b)(3), and violations of a school's student conduct code resulting in expulsion from a disciplinary alternative education program (DAEP) under Section 51.03(b)(4). Section 59.003(a)(2). The probation department may also assign level two to a child for whom deferred prosecution under Section 53.03 would be authorized. Section 59.002(b). Finally, level two is appropriate for a referral of a subsequent offense that is of the same or greater seriousness than the offense that prompted an assignment to level one. Section 59.003(c).

Sanction levels one and two may be used by the prosecutor, probation department, or juvenile court. Only the court may use sanction levels three through seven.

Program Description. The program description in Section 59.005 for sanction level two includes a program that can be carried out within the legal framework of deferred prosecution. The statutorily stated outline under Section 59.005(a) for a program under level two is for the court or probation department to:

> (1) place the child on deferred prosecution for not less than three months or more than six months;
>
> (2) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability;
>
> (3) require the child's parents or guardians to identify restrictions the parents or guardians will impose on the child's activities and requirements the parents or guardians will set for the child's behavior;
>
> (4) provide the information required under Sections 59.004(a)(2) and (4) ["(2) inform the child of the progressive sanctions that may be imposed on the child if the child continues to engage in delinquent conduct or conduct indicating a need for supervision" and "(4) provide information or other assistance to the child or the child's parents or guardians in securing needed social services"];
>
> (5) require the child or the child's parents or guardians to participate in a program for services under Section 264.302 [operated by the Department of Family and Protective Services for children at risk of becoming delinquent], if a program under Section 264.302 is available to the child or the child's parents or guardians;
>
> (6) refer the child to a community-based citizen intervention program approved by the juvenile court; and
>
> (7) if appropriate, impose additional conditions of probation.

If the requirements of Section 53.03 are met, it is possible to have a child on deferred prosecution who, for one reason or another, does not meet the requirements stated for level two. Such a child would legitimately be on deferred prosecution even if the program he or she is on does not meet the standards of sanction level two or any other sanction level.

D. Supervisory Caution

"Supervisory caution" is a descriptive term for a wide variety of summary, non-judicial dispositions that intake may make in a case. These dispositions may involve, for example, referring the child to a social agency, contacting parents to inform them of the child's activities, or simply warning the child about his or her activities. This collection of dispositions is sometimes referred to as "counsel and release," and has been employed by Texas juvenile probation departments for years.

Eligibility. In 1995, the legislature gave statutory recognition to the legitimacy of summary, non-judicial dispositions in defined circumstances. Sanction level one is a program description of activities that might occur

during a "supervisory caution" disposition of a juvenile referral. Section 59.003(a)(1) provides that sanction level one is appropriate for "conduct indicating a need for supervision, other than [inhalant abuse or a violation of a student code of conduct resulting in expulsion] or a Class A or B misdemeanor."

In 2007, the CINS offense of inhalant abuse was moved to Progressive Sanction Level Two. Thus, sanction level one would be appropriate in cases of referrals for the following categories of CINS: running away, violation of a court order in a program for at-risk children, and Class C misdemeanors referred by municipal or justice courts. In addition, a probation department may assign a sanction level of one to any child referred back to the probation department by the prosecutor under Section 53.012.

Education Program for CINS Prostitution. In 2011, the legislature added the offenses of prostitution under Penal Code Section 43.26 and electronic transmission of certain visual material of a minor ("sexting") under Penal Code Section 43.261 to the list of offenses that are considered CINS. See Chapter 4 for a full discussion. Prostitution, however, is typically designated as a Class B misdemeanor and "sexting" as a Class C, Class B, or Class A misdemeanor.

The legislature did not modify the progressive sanctions guidelines to address the change to prostitution. A plain reading of the sanctions levels suggests that prostitution, though now a CINS offense, must be handled at sanction level two or above. It is not clear if the legislature intended to preclude sanction level one as an dispositional option to address this conduct. In regards to "sexting" conduct, a dispositional option under sanction level one requires the child to attend and successfully complete an education program under Education Code Section 37.218.

Family Code Section 59.004(a)(8) refers to the "sexting" educational program that may be ordered under Family Code 54.0404. The amendment in Section 59.004 makes it possible to order the educational program for a child who has not been adjudicated for the offense. This is helpful because Section 54.0404 applies only to a child adjudicated for the offense. Unfortunately, the legislature did not add this program as an option to the other sanction levels. This was likely an oversight and should not preclude courts or juvenile probation departments from ordering juveniles at higher sanction levels who have not been adjudicated for "sexting" to complete the program. It is important to note that the main rationale for the creation of the offense was to educate children regarding the dangers of sending inappropriate pictures to others.

Program Description. The program description for sanction level one states the least restrictive disposition, except for dismissal of the case, available to the juvenile justice system.

Section 59.004(a) states the program description for sanction level one:

> (1) require counseling for the child regarding the child's conduct;
>
> (2) inform the child of the progressive sanctions that may be imposed on the child if the child continues to engage in delinquent conduct or conduct indicating a need for supervision;
>
> (3) inform the child's parents or guardians of the parents' or guardians' responsibility to impose reasonable restrictions on the child to prevent the conduct from recurring;
>
> (4) provide information or other assistance to the child or the child's parents or guardians in securing needed social services;
>
> (5) require the child or the child's parents or guardians to participate in a program for services under Section 264.302 [program for at-risk children operated under contract with the Department of Family and Protective Services] if a program under Section 264.302 is available to the child or the child's parents or guardians;
>
> (6) refer the child to a community-based citizen intervention program approved by the juvenile court;
>
> (7) release the child to the child's parents or guardians; and
>
> (8) require the child to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

Minimum Involvement. Every child referred to the juvenile court for whom intake or the prosecutor has found probable cause must receive a disposition of his or her case by the juvenile system. No longer is intake able to refuse to take cases by refusing to find, in the language of Section 53.01(a)(3) that was repealed in 1995, that "further proceedings in the case are in the interest of the child or the public."

The minimum possible level of involvement in a case with a finding of probable cause is a supervisory caution disposition that approximates the program described for sanction level one.

CHAPTER 6: Juvenile Detention and Correctional Facilities

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The Family Code addresses the subject of juvenile detention in several places. It provides for the issuance by police of a warning notice in lieu of taking the child into custody [Section 52.01(c)], authorizes release by police of a child taken into custody on the condition that the child be brought to the juvenile court by his or her parents or other responsible adults [Section 52.02(a)(1)], permits administrative release of a detained child by intake or other court workers [Section 53.02(a)], and creates a right to a detention hearing before a juvenile court judge, referee/master, or detention magistrate (Section 54.01). The Family Code also deals with the physical and other circumstances in which a child may lawfully be detained and establishes a system of designating where, for how long, and under what conditions a child may be detained.

Juveniles who are charged in criminal court with a traffic offense or other fineable only offense may not be detained in a juvenile detention facility. Under certain limited circumstances, they may be detained in other facilities. The circumstances under which a juvenile charged in criminal court with a traffic or other fineable only offense may be detained are discussed in Chapter 23. This chapter deals exclusively with the detention of a child in the juvenile justice process. Juvenile processing offices are discussed in Chapter 17.

A. Police Detention and Release Decisions

Release and Referral. Section 52.02(a)(1) authorizes a police officer or other person who has taken a juvenile into custody to "release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court." This section assumes that the police have decided that: (1) the matter warrants juvenile court attention and, therefore, intend to refer the case to the court under Section 52.04; and (2) the child can

be released to be brought before the court when requested by court officials.

This section is intended to break the traditional link between referring a case to the juvenile court and physically taking the child to the court's place of detention. Section 52.02 provides the police with no criteria by which to decide who should and should not be released, other than those criteria that are implicit in the requirement that the release be made to a "responsible adult."

Return to School. In 2007, the legislature added Section 52.02(a)(7) in order to allow a peace officer who takes a child into custody to return the child to his or her school campus (if school is in session and the child is a student) provided that the principal, the principal's designee, or the school's assigned peace officer agrees to assume responsibility for the student for the rest of the school day. Section 52.02(a) references "a person taking a child into custody," which leaves the impression that probation officers have the authority to return students to school as well. However, when read in conjunction with Sections 52.01(a)(3), 52.01(e), and 52.026(a), it is apparent that only law enforcement is authorized to take the child into custody for this conduct, and thus, only law enforcement may release the child to the appropriate school personnel. A 2007 Education Code amendment also makes it clear that a "peace officer" who has probable cause to believe that a child has violated the compulsory attendance law may take him or her into custody for return to the school campus to ensure compliance with compulsory school attendance laws. Education Code Section 25.091(b-1).

Firearms Offenses: Who May Release. In 1999, the legislature provided that a child who is "alleged to have engaged in delinquent conduct and to have used, possessed, or exhibited a firearm...in the commission of the offense shall be detained until the child is released at the direction" of a judge. Section 53.02(f). Thus, police are not authorized under Section 52.02 to release such a child to his or her parents. They are also not authorized to issue a warning notice for a firearms offense because such an action is inconsistent with detaining the child, as required by Section 53.02(f). Police are permitted to contact a judge for authorization to release, which may be done by telephone. Section 53.02(f).

Any judicial officer may authorize the release of a child taken into custody for an offense involving a firearm. Section 53.02(f) empowers each judge designated by the juvenile board to act as a juvenile court judge, a referee or master, or a substitute judge to order release from police custody. Under Section 51.04(f), a substitute judge may act only if no juvenile court judge or alternate court judge is available to authorize release. Under that statute, a substitute judge is any magistrate. Under Code of Criminal Procedure Article 2.09, all judges, including justices of the peace and municipal court judges, are magistrates. In 2009, the legislature amended Code of Criminal Procedure Article 2.09 to include associate judges as magistrates if they have been appointed by the judge of a district court under Chapter 54A of the Government Code.

If police seek a release authorization from a referee, Sections 54.10(b) and (d) impose additional procedural protections. Under Section 54.10(b)(1), the referee must inform the child of his or her right to have the release determination made by a juvenile court judge or substitute judge. If the child objects to having the release decision made by a referee, he or she has a right to have that determination made by a judge. Alternatively, the child may waive the right to a determination by a judge but must have an attorney who agrees in writing with the child to waive that right. If the referee makes a determination about a child's release, that determination must, under Section 54.10(d), be transmitted immediately to the juvenile court judge for review. The juvenile court judge must adopt, modify, or reject the referee's recommendation no later than the next working day; failure to act within that time results in the child's release by operation of a law. These procedural requirements, which apply only to referees and not to substitute judges (who may be non-lawyer justices of the peace or municipal court judges) make the authorization for early release in firearms cases by a referee not useful. Any referee contacted for early release in a firearms case may wish to consider referring the person making the contact to a juvenile court judge or substitute judge for that determination.

Firearms Offenses: Where Child May Be Detained. If a child is taken into custody for a firearms offense and not promptly released by judicial order, police must transport the child to the designated place of juvenile detention in the county unless the case falls within a very narrow exception. The legislature was sensitive to the needs of rural counties that might encounter difficulties complying with the mandatory detention provision because of the scarcity and expense of out-of-county detention space. Therefore, Section 51.12(l) as added to authorize detention in the county jail until the detention hearing can be conducted, but only in very limited circumstances:

> A child who is taken into custody and required to be detained under Section 53.02(f) may be detained in a county jail or other facility until the child is released under Section 53.02(f) or until a detention hearing is held as required by Section 54.01(p),

regardless of whether the facility complies with the requirements of this section, if:

(1) a certified juvenile detention facility or a secure detention facility described by Subsection (j) is not available in the county in which the child is taken into custody or in an adjacent county;

(2) the facility has been designated by the county juvenile board for the county in which the facility is located;

(3) the child is separated by sight and sound from adults detained in the same facility through architecttural design or time-phasing;

(4) the child does not have any contact with management or direct-care staff that has contact with adults detained in the same facility on the same work shift;

(5) the county in which the child is taken into custody is not located in a metropolitan statistical area as designated by the United States Bureau of the Census; and

(6) each judge of the juvenile court and a majority of the members of the juvenile board of the county in which the child is taken into custody have personally inspected the facility at least annually and have certified in writing to the Texas Juvenile Justice Department that the facility complies with the requirements of Subdivisions (3) and (4).

The most important requirements are that: (1) there is no certified juvenile detention facility in the county or in an adjacent county; (2) there is sight and sound separation of juveniles from adult detainees; and (3) the same staff who supervise adult detainees are not used on the same shift to supervise juveniles.

If a child is held in the county jail under those conditions, Section 54.01(p), enacted in 1999, requires an accelerated detention hearing to be held "promptly, but not later than the 24th hour, excluding weekends and holidays, after the time the child is taken into custody." The normal detention hearing deadline under Section 54.01(a) is the second working day after the child was taken into custody.

Warning Notices. Section 52.01(c) authorizes a law enforcement officer to "issue a warning notice to the child in lieu of taking the child into custody" under certain circumstances. The warning notice is to be used instead of taking the child to the juvenile processing office or juvenile detention facility. Section 52.02 (discussed earlier) assumes that the child has already been taken into custody.

One advantage of using a warning notice is the time it saves the police officer in transporting the juvenile to the juvenile processing office or the juvenile detention facility. A warning notice may be used instead of taking a child into custody only if the situation falls within guidelines promulgated by the law enforcement agency and approved by the juvenile board. The warning notice itself must identify the child and describe the conduct. A copy of the notice must be sent to the child's parents and filed with the law enforcement agency and the office or official designated by the juvenile board. Section 52.01(c).

Two different situations can be handled by warning notices. First, the officer issuing the notice may consider that further action will occur later, either at the instigation of juvenile court staff or the law enforcement agency. That action may involve, for example, a conference with the child's parents to further elaborate on the circumstances that gave rise to the warning notice and to alert them to the dangers posed by their child's course of conduct. Second, the officer issuing the notice may consider that no further action on the matter will be taken. In that event, the copies of the warning notice will be filed by juvenile probation and may become useful later in making petition filing decisions and case dispositions should the child subsequently become involved with the law.

Although warning notices may be issued for any offenses within the guidelines, it is the legislature's intent that guidelines issued by the law enforcement agency and approved by the juvenile board be only for relatively minor offenses.

Release and Disposition Without Referral. Section 52.03 authorizes the police to release a child taken into custody and not refer the case to the juvenile court. Section 52.031, enacted in 1995, authorizes a first offender program that is very similar in its outline to the program authorized by Section 52.03. Neither disposition may involve continuing the child in law enforcement custody. Sections 52.03(b)(1) and 52.031(e). Use of either disposition must include immediate release of the child from police custody. These dispositions contrast to Section 52.02 as previously discussed, which contemplates release of the child by law enforcement and referral of the case to the juvenile court.

Related Section 52.032(b) was added in 2013 to prohibit informal handling of cases involving a child believed

to be a victim of human trafficking. Prohibiting the informal disposition of these cases is meant to ensure access to needed programs and services for victims entangled in human trafficking. Other details of informal dispositions and first offender programs by law enforcement agencies are discussed more fully in Chapter 17.

B. Intake Detention and Release Decisions

If a case is referred to juvenile court and the child is not released by the police, the child must be physically taken to the detention facility designated by the juvenile board. At that point, the responsibility for releasing or detaining the child falls upon the intake or probation officers of the juvenile court.

Presumption in Favor of Release. Section 53.02(a) requires the intake officer to release a child unless detention is authorized by one of the six circumstances listed in Section 53.02(b). The statute is clear that release is the preferred decision and must occur unless at least one of those six circumstances is found to exist. Those circumstances are identical to those that control judicial release in a detention hearing under Section 54.01; they are discussed later in this chapter in connection with detention hearings.

The intake officer, like the judicial officer in the detention hearing, is authorized by Section 53.02(a) to attach reasonable conditions to releasing a child. These conditions are also discussed later in this chapter in connection with the detention hearing.

If Section 53.02 and the sections authorizing police release function as intended, most of the children referred to the juvenile court will not be detained. In calendar year 2016, there were 55,174 referrals to Texas juvenile probation departments and 32,236 detentions. Youth were detained for an average of 19 days per detention. Of youth released from detention in 2016, 24.6% were detained for 24 hours or less, 28.5% for 2 to 10 days, and 46.8% for more than 10 days, according to county-specific detention data, which is available on the TJJD website.

Firearms Offenses. A child who is alleged to have engaged in delinquent conduct that involved the use, possession, or exhibition of a firearm in the commission of the offense must be detained until released at the direction of a judge. Section 53.02(f). Intake is prohibited by Section 53.02(b)(6) from releasing such a child. Intake is permitted to contact a judge for authorization to release, which may be done by telephone. Section 53.02(f). As stated earlier, any judicial officer may authorize intake to release a child taken into custody for an offense involving a firearm.

If intake seeks a release authorization from a referee, Sections 54.10(b) and (d) impose additional procedural hurdles. Under Section 54.10(b)(1), the referee must inform the child of his or her right to have the release decision made by a juvenile court judge or substitute judge. If the child objects to the release decision being made by a referee, the determination must be made by a judge. Alternatively, the child and an attorney may agree in writing to waive the child's right to be released by the juvenile court judge or substitute judge. If the referee makes a decision to release or not to release the child, that determination must, under Section 54.10(d), be transmitted immediately to the juvenile court judge for review. The juvenile court judge must adopt, modify, or reject the referee's recommendation no later than the next working day; failure to act within that time results in the child's release by operation of law. These procedural requirements, which apply only to referees and not to substitute judges (who may be non-lawyer justices of the peace or municipal court judges) make the authorization for early release in firearms cases by a referee virtually worthless. Any referee contacted by intake for early release in a firearms case should refer the intake officer to a juvenile court judge or substitute judge for that determination.

Children Younger Than Twelve. In 2017, legislation was added to provide an additional mechanism (other than supervisory caution and deferred prosecution) for diverting children under twelve from juvenile court. Section 152.00145, Human Resources Code, requires juvenile boards to establish policies that prioritize the diversion of children younger than 12 from referral to a prosecutor under Chapter 53, Family Code, and that prioritize the limitation of detention of children younger than 12 to circumstances of last resort. Additionally, the person making the preliminary intake decisions under Section 53.01 is required to refer a child under 12 to a community resource coordination group (CRCG) or another community juvenile service provider if the case is eligible for deferred prosecution, does not require referral to the prosecutor under Section 53.01(d) or (f), and the child and the child's family are not already receiving services from an earlier referral.

Section 53.011, Family Code, requires the CRCG or other community juvenile services provider to evaluate the child's case and make recommendations to the juvenile probation department for appropriate services for the child; the probation officer is required to create and coordinate a service plan or system of care for the child or the child's family that incorporates those recommendations. The probation officer may keep the case open for no more than three months to monitor the child's adherence to the service plan or system of care and may adjust it as

necessary. If the child fails to successfully participate, the probation officer may refer the child to the prosecuting attorney.

This process is different from deferred prosecution. If the child is unsuccessful, deferred prosecution is still an option. However, there is no indication that deferred prosecution may be run concurrently with the service plan or system of care.

Request for Detention Hearing. If the intake officer decides not to release the child administratively or if release is precluded by the firearms prohibition, Section 53.02(c) requires that a request for detention hearing be made and promptly presented to the court. An informal detention hearing must be held promptly and no later than the time required by Section 54.01. Although this section does not explicitly say so, the context makes it clear that it is the intake officer who must request the detention hearing. The child, probably unrepresented at this stage and in detention, is in no position to request one. So making the request falls upon the intake officer by default.

Interrogation. May the intake officer question the child to obtain information to help decide whether to release or detain the child pending a hearing? The answer to that depends on what kinds of questions are asked and how the answers will be used.

Both the Fifth Amendment to the United States Constitution and Texas law give the child the right not to answer questions that call for incriminating information. Thus, the child can refuse to answer any questions about the offense for which he or she was referred or about any other offense. Even if the child is willing to talk about the offense, Section 51.095 makes it unlikely that any statements the child makes will be admissible in court. See Chapter 16. Additionally, questions about the offense must be preceded by Miranda warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The fact that a police officer gave the warnings when the child was taken into custody is probably insufficient, which means that the intake officer should administer new warnings.

While it is not clear that all these restrictions apply to questions whose answers are being used strictly to make the detention/release decision, there is a risk that, if incriminating answers are obtained, the prosecutor may have a difficult time later proving that the evidence he or she is relying upon for an adjudication was not obtained as a result of the child's admissions made at intake. Because of all these potential problems, the intake officer should not question the child about the offense even if the officer intends to use the answers solely to make the intake detention decision. See Chapter 16 for a more complete discussion of statements made by juveniles while in custody.

Information as to Identity. The child's right to remain silent does not encompass non-incriminating information, such as his or her name and address, the names and address (or addresses) of his or her parents, where he or she attends school or works, and other information of essentially an identifying nature. The intake officer has the right to ask those types of questions. To the extent the juvenile's attitude toward authority may be relevant in making the detention/release decision, information about that attitude can be determined from these clearly permissible questions as easily as from questions about the offense itself.

Information as to Age. The child's age presents a special problem because it is not an element of the offense and, therefore, is not covered by the Fifth Amendment privilege against self-incrimination. On the other hand, under Texas law, the State bears the burden of showing in an adjudication or transfer hearing that, at the time of the offense, the child was of an age to bring him or her within the juvenile court's jurisdiction. Because age is not covered by the Fifth Amendment, an intake officer is safe in asking about age and using the answer in making the detention/release decision.

However, the child's answer is very unlikely to be admissible in an adjudication hearing because of the requirements of Section 51.095. The State will be required to prove age independently of any statements about age the child made to the intake officer while in custody.

In short, the intake officer should feel comfortable talking with the child about anything except the offense itself, knowing that, in doing so, he or she is not violating the child's rights.

C. Detention Hearing: Scheduling and Notice

Time Limits. Section 54.01 sets the requirements for detention hearings. If the child is not released administratively, intake should immediately schedule a hearing. Section 54.01(a) provides:

> [I]f the child is not released under Section 53.02, a detention hearing without a jury shall be held promptly, but not later than the second working day after the child is taken into custody; provided, however, that when a child is detained on a Friday or Saturday, then such detention hearing shall be held on

the first working day after the child is taken into custody.

In the typical case, a child detained by intake must receive a detention hearing before the end of the second working day after the child was taken into custody. However, a child arrested on a Thursday, Friday or Saturday is entitled to a detention hearing no later than the following Monday, unless Monday is a holiday. This is the outside limit for the detention hearing. If possible, it should be held sooner in order to adhere to the law's requirement that it be held "promptly."

If the child is detained in a county jail under the special firearms provision, then a fast-track detention hearing must be scheduled, as discussed earlier in this chapter. Section 54.01(p) requires that the detention hearing be held not later than 24 hours, excluding weekends and holidays, after the child was taken into custody.

On December 1, 1984, the Texas Supreme Court adopted Rules of Judicial Administration, which govern, among other things, timelines for disposing of juvenile and other civil cases. The rules state that courts should, so far as reasonably possible, ensure cases are brought to trial or final disposition in conformity with the timelines established in the rules. With respect to detention hearings, the rules state that the initial detention hearing is to be held "on the next business day following admission to any detention facility." However, the rules also acknowledge that conformity may not be possible in especially complex cases or when special circumstances exist. See Chapter 7 for further discussion of the Texas Supreme Court's guidelines.

Notice to Parents. It is obviously important for the child's parents to be present at the detention hearing, if possible. Section 54.01(b) provides, "Reasonable notice of the detention hearing, either oral or written, shall be given, stating the time, place, and purpose of the hearing. Notice shall be given to the child and, if they can be found, to his parents, guardian, or custodian."

Obviously, since oral notice, such as a telephone call, is authorized, it is not necessary that either the child or parents be served with a formal citation or summons for a detention hearing. Since detention hearings must be held quickly, the formal notice requirements imposed elsewhere in Title 3 are dispensed with here.

Although the statute does not say how far in advance of the detention hearing the parents must be notified, notification should be attempted as soon as the time of the hearing is known, in order to effectuate the statutory purpose of having the parents present if possible.

Filing Petition. In *In the Matter of G.B.B.*, 572 S.W.2d 751 (Tex.Civ.App.—El Paso 1978, writ ref'd n.r.e.), the argument was made that it was an error for the child and his parents not to be served with a copy of the State's petition before the detention hearing. The Court of Civil Appeals rejected this argument on the ground that Section 54.01(b) specifically authorizes oral notice, which was provided in that case.

Nor is it required that the State must have filed its petition before the detention hearing is held. Section 53.04(a) requires that the petition be filed "as promptly as practicable" without any more specific time limit unless the child is detained. The 1999 enactment of Section 54.01(p), re-designated as l (q) in 2001, gives the prosecutor 15 or 30 working days (depending upon the offense level) after the initial detention hearing in which to file a petition when the child is detained. See Chapter 9. Since a detention hearing must be held quickly, there would be insufficient time for the prosecutor to review the case and file a petition before the hearing begins.

D. Detention Hearing: Procedures

Waiver of Initial Hearing. Section 54.01(h) provides that "[t]he initial detention hearing may not be waived but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09." Section 51.09 provides that "[u]nless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title...may be waived." The prohibition on waiver of the initial detention hearing added to Section 54.01(h) in 1995 is an expression of a "contrary intent" that overrides the general power to waive recognized by Section 51.09.

Right to Attorney. The child has a right to an attorney at the detention hearing. The right to counsel can be waived under Section 51.09, but under that section, a waiver is not effective unless joined in by the attorney for the child. Further, Section 54.01(b) provides, "Prior to the commencement of the [detention] hearing, the court shall inform the parties of the child's right to counsel and to appointed counsel if they are indigent." Also, Section 54.01(d) provides, "If no parent or guardian is present [at the detention hearing], the court shall appoint counsel or a guardian ad litem for the child." Finally, Section 51.10(c) provides, "If the child was not represented by an attorney at the detention hearing...and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney."

Since detention hearings must be held promptly, real problems of providing representation are presented. In 2013, the legislature added Section 54.01(b-1) to ensure timely representation of counsel and efficiency in juvenile cases. Section 54.01(b-1) specifies that the juvenile court must appoint an attorney within a reasonable time before the first detention hearing unless exigent circumstances make it impossible to do so. The statute does not define exigent circumstances; however, the plain meaning of the phrase suggests an emergency or other unavoidable circumstance that prohibits the court from making an appointment prior to the initial detention hearing.

In a June 2014 Joint Report of Indigent Defense in the Texas Juvenile System, the Texas Indigent Defense Commission recommends the court's finding of exigent circumstances be documented in the court's file. Section 51.101(a) also clarifies that an attorney appointed prior to the initial detention hearing under Section 54.01(b-1) or (d) continues to represent the child until the case is terminated, the family retains other counsel, or the juvenile court appoints a new attorney. Representation continues even if the child has been released from detention. If there are doubts about the ability of the parents to afford counsel, the attorney should be appointed immediately and an inquiry into the financial ability of the parents to retain counsel should be made later.

Detention Hearings Without Counsel. What if the child does not have an attorney and one cannot be provided by the juvenile court in time for the detention hearing? Rather than postponing the hearing, it should be conducted without counsel and counsel should be provided as quickly as possible after the hearing.

Though not the preferred method, holding a detention hearing without counsel is a possibility recognized by Sections 51.10(c) and 54.01(n). Given the choice, it is better to hold a prompt hearing without counsel than to postpone the hearing until an attorney can be provided. It is also important to note that the child cannot jeopardize his or her defense of the case by statements made at the detention hearing because Section 54.01(g) makes those statements inadmissible in evidence.

Appointing Counsel If Child Detained. If a hearing is held without counsel and the judicial officer decides to detain the child, then, under Section 51.10(c), the court must appoint an attorney according to Section 51.10(f) [if financially unable to employ one] or order the parent to retain an attorney under Section 51.10(d).

Under Section 54.01(n), an attorney appointed following a detention hearing in which an attorney was not present is entitled to and may request a de novo detention hearing, as long as the request is made no later than the 10th working day after the date the attorney was appointed. If requested, the new hearing must be held no later than the second working day after the request. The underlying idea is that the newly appointed attorney might have information to present about the case or a release plan to suggest that could cause the judicial officer to release the juvenile. Since the attorney could not present that information or plan at the initial hearing, it is only fair to provide the opportunity for a new hearing promptly.

Privilege Against Self-Incrimination. Section 54.01(b) requires the court to inform the parties "of the child's right to remain silent with respect to any allegations of delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court." Section 54.01(g) provides, "No statement made by the child at the detention hearing shall be admissible against the child at any other hearing." This means that the child has the right not to speak at the detention hearing, but if he or she chooses to speak, what is said can be used only for the purposes of the detention hearing and not in any other proceeding.

Recording Proceedings. Section 54.09 provides, "All judicial proceedings under this chapter except detention hearings shall be recorded by stenographic notes or by electronic, mechanical, or other appropriate means. Upon request of any party, a detention hearing shall be recorded." Given the fact that statements made at detention hearings cannot be used in other hearings, whether or not it is advisable to routinely record all detention hearings is debatable. However, at the very least, the judge or referee should ask at the beginning of the hearing whether anyone wishes for it to be recorded and should do so if a request is made. An audio recording is sufficient.

Admissible Evidence. What kind of evidence may be presented at a detention hearing? The Family Code contemplates that the detention hearing will be relatively informal. Section 54.01(c) provides that "the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." This enables the juvenile probation or intake officer to testify as to circumstances relevant to the detention/release decision or to present this information to the judge or referee in the form of a written report that sets out the relevant information.

If the written report is the chosen option, a copy of the report must be provided to the child's attorney under Section 54.01(c) before the hearing begins. Of course, the

attorney would then be able to call the probation or intake officer who prepared the report as a witness at the detention hearing.

The child is permitted, but not required, to testify or make an unsworn statement at the detention hearing. The child's parents may also testify. The court has the option to order the defense attorney not to reveal information to the child or the child's parents if such disclosures would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future. Section 54.01(c).

Although the Family Code does not specifically speak to the applicability of the Rules of Evidence to detention hearings, the judge or referee should permit any reliable and relevant non-privileged information (for example, not confidential under the attorney–client privilege, not protected under the privilege against compelled self-incrimination) to be presented even if it is technically hearsay or would otherwise be inadmissible in a jury trial.

Section 51.17(c) provides:

> Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.

The closest analogy to a detention hearing in the criminal process would be a judicial proceeding to set bail or to order detention without bail.

Rule 101(e)(3) of the Rules of Evidence provides that, except with respect to privilege, the Rules of Evidence do not apply to certain proceedings, including bail proceedings, other than hearings to deny, revoke, or increase bail, and hearings on justification for pretrial detention not involving bail. Rule 101(c) provides that the rules of privilege apply to all stages of a case or proceeding. A fair reading of Section 51.17(c) in concert with the Texas Rules of Evidence is that the rules of privilege apply to detention hearings in juvenile cases but no other Rules of Evidence do.

E. Detention Hearing: Probable Cause

Constitutional Requirements. A determination of probable cause must be made in certain circumstances under the Fourth Amendment to the United States Constitution. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), the United States Supreme Court held that an adult arrested without a warrant for a criminal offense is entitled to a prompt judicial determination that there is probable cause to believe he or she committed an offense before he or she may be detained. The Court held that a prosecutor's conclusion that there is probable cause and that a charge should be filed is not sufficient; the Fourth Amendment requires that probable cause be determined by a neutral judicial officer, not a prosecutor. The determination must be made if the defendant is detained because bond is denied or because he or she cannot make bond. A probable cause determination is also required if he or she is released but is required to do more than simply appear for trial; for example, he or she is required to live in a halfway house.

The Court, however, rejected the argument that the probable cause determination must be made in an adversarial context, that is, with a right to confront and cross-examine witnesses. Rather, the Court concluded the determination can be based upon any reliable information, such as the representations of the prosecutor or even a police incident report. Finally, the determination of probable cause is not required if the person was arrested upon an arrest warrant, since the judge who issued the warrant did so on the basis of a judicial finding of probable cause. For the same reason, a post-custody judicial determination of probable cause is not required when a child is arrested under a directive to apprehend issued by a juvenile court judge under Section 52.015.

In *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976, no pet.), the United States Court of Appeals for the Fifth Circuit held that the *Gerstein* case is applicable to juveniles. Although *Moss* involved a juvenile proceeding in Florida, there is no reason to believe that the same principle is not applicable in Texas, particularly since the Fifth Circuit has jurisdiction over Texas and would be expected to follow its own decision in *Moss v. Weaver* should the same question be presented to it from Texas.

Who Can Make the Decision. Section 53.01(a) requires a determination of probable cause to be made by "the intake officer, probation officer, or other person authorized by the board" as part of the preliminary investigation of the case. That is not sufficient to comply with *Gerstein* and *Moss* because it is not a judicial determination. The same is true of a determination of probable cause made by a prosecutor in deciding to file a petition in a juvenile case.

On the other hand, a referee would qualify because his or her determination of probable cause is really a recommendation to the judge, who has power to accept or reject it. In addition, a detention magistrate could also

make the probable cause determination because that official is a judicial officer.

The 48-Hour Requirement. In *Gerstein,* the Supreme Court required a judicial determination of probable cause to be made promptly after an arrest without a warrant, but it did not define "promptly." In *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), the Court defined "promptly" to be "48 hours." That means that, unless the child is released from detention, a judicial determination of probable cause must be made within 48 hours of the time he or she was taken into custody. The 48 hours includes weekends and holidays. In some instances, then, the initial detention hearing will not be held within 48 hours of arrest when the probable cause determination must be made. However, because that determination can be based on written or oral presentations of information to the judge or referee and need not be made in a hearing, it can be made before the initial detention hearing by the judge or referee in his or her office, chambers, home, golf course, or elsewhere. It could even be based on information provided by telephone.

Methods of Determining Probable Cause. There are a number of ways in which the judge or referee can discharge his or her responsibility under *Gerstein, Moss,* and *McLaughlin* to make the probable cause determination. First, witnesses with knowledge of the facts could testify and the determination could be based upon their evidence. Second, a witness could testify based upon what others have told him or her (hearsay) and the determination could be based upon that information. Third, a prosecutor or probation officer could simply make an unsworn statement as to the facts he or she has been told about the case (such as from reading an incident report) and the determination could be based upon that statement. Fourth, the judge or referee could examine the police incident report in the case and determine probable cause directly from it. No particular formality is required provided the determination is based upon reasonably reliable information.

Although the *Gerstein*, *Moss,* and *McLaughlin* probable cause determination must be made only if the child is either detained or released on conditions that require more than simply showing up for trial, the better course of action would be to make the determination in every case. It is relatively easy to make because of the informality permitted in showing probable cause. Further, even if the child is released from detention, his or her release is likely to involve more requirements than merely showing up for further court proceedings, so the determination must be made in those cases as well.

Frequency of Probable Cause Determinations. If the child is detained, the Family Code requires that there be further detention hearings at least every 10 or 15 working days unless the child and his or her attorney waive the hearing. Section 54.01(h). It is not necessary for there to be a new probable cause determination at any of the subsequent detention hearings. It is sufficient that probable cause was found to exist once. Of course, the judge's or referee's finding of probable cause should be made on the record, if it is made in a detention hearing that is recorded, or should be reflected in a written finding that is filed with the papers in the case. If the determination is made over phoning the judge should make a record of the conversation to file in the case.

Family Code Probable Cause Requirement. Section 54.01(o) codifies the constitutional requirement of a prompt determination of probable cause:

> The court or referee shall find whether there is probable cause to believe that a child taken into custody without an arrest warrant or a directive to apprehend has engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court. The court or referee must make the finding within 48 hours, including weekends and holidays, of the time the child was taken into custody. The court or referee may make the finding on any reasonably reliable information without regard to admissibility of that information under the Texas Rules of Evidence. A finding of probable cause is required to detain a child after the 48th hour after the time the child was taken into custody. If a court or referee finds probable cause, additional findings of probable cause are not required in the same cause to authorize further detention.

Under the statute, the determination must be made within 48 hours after taking the child into custody, rather than within 48 hours after the child's arrival at the detention facility. If the child is released by intake before the 48 hours expires, then a judicial determination of probable cause is not required because the child is no longer detained. Finally, a judicial determination of probable cause is not required for non-custody, or "paper," referrals to the juvenile court, since the probable cause determination is required only with respect to a respondent who is in custody.

The language in Section 54.01(o) requiring a judicial determination of probable cause in cases of children being held for probation violation was added in 2003.

Failure to Make a Probable Cause Determination. What happens if the child is detained and a probable cause determination has not been made by a judge or referee? In *Gerstein*, the Supreme Court made it clear that this failure would not be grounds for setting aside a later conviction or requiring a dismissal of charges. A remedy is for an attorney to file a petition for a writ of habeas corpus contending that the child is being detained in violation of his or her Fourth Amendment rights because of the absence of a probable cause determination. The district court hearing the writ petition could order the child's release from detention or could permit the State the opportunity at the hearing to show the existence of probable cause and, if it is shown, to deny release.

If the probable cause determination is not made when required by federal and state law, the child's detention becomes illegal. While that illegality is not a defense to the allegations, it would become important in determining civil liability should the child be killed or injured while illegally confined.

F. Detention and Release Criteria

The Family Code sets out criteria for detention and release in Section 53.02(b), which covers release by intake, and in Section 54.01(e), which covers release by the court in a detention hearing. They are identical except that Section 53.02(b) prohibits intake from releasing a firearms offender. The law creates a presumption that the child should be released. It requires the court to release the child unless at least one of following five grounds for detention is found to exist. Section 54.01(e) provides:

> (e) At the conclusion of the hearing, the court shall order the child released from detention unless it finds that:
>
> (1) he is likely to abscond or be removed from the jurisdiction of the court;
>
> (2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;
>
> (3) he has no parent, guardian, custodian, or other person able to return him to the court when required;
>
> (4) he may be dangerous to himself or may threaten the safety of the public if released; or
>
> (5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

Appearance at Trial. Grounds (1) and (3) above deal with the traditional reason for detaining a person in either the criminal or juvenile process: making certain the respondent will appear for trial. Ground (2) relates to the traditional concern of the juvenile process with the welfare of the child and authorizes detention if there is an absence of suitable supervision for the child. While ground (2) is obviously related to the likelihood of appearance at trial, since a child not receiving suitable parental supervision is less likely to appear for trial, it is independent of the concern over future court appearances and authorizes detention simply because the child lacks suitable supervision.

Preventive Detention. Grounds (4) and (5) are a form of preventive detention for juveniles. They relate not to the likelihood of appearance or the present welfare of the child but rather to whether the child is likely to pose a danger if released or is likely to commit a new offense before trial. The subject of preventive detention, which refers to the detention of a person to prevent a predicted criminal offense, is controversial.

Preventive detention in the juvenile process was upheld by the United States Supreme Court in *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403 (1984). The New York statute upheld by the Supreme Court authorized detention of a child if there is a "serious risk" that the child "may before [the trial date] commit an act which if committed by an adult would constitute a crime." Certainly, the New York statute is more generous in per-mitting detention than are grounds (4) and (5) of the Texas statute, so the Texas provision should also pass federal constitutional muster.

However, there is one caution: the Supreme Court was careful to note that the maximum period of time a child could be held under the New York law was 17 days. Texas has no such time limit. See Chapter 7. That being the case, a child detained under grounds (4) or (5) should be given an adjudication or transfer hearing within 17 days in order to avoid any question as to the constitutionality of his or her detention under the Supreme Court case. Detention substantially beyond that arbitrary deadline creates a risk of being declared illegal.

Detention Criteria in Post-18-Year-Old Transfer Proceedings. In 1999, the legislature provided special procedures for the detention of persons 18 years of age or older when proceedings are pending for certification to criminal court. Pending the hearing, the juvenile court

must conduct a detention hearing under Section 54.01 as in any other juvenile case. However, since the person is 18 and no longer subject to parental control, the second and third detention criteria of Section 54.01(e) do not apply. Accordingly, Section 54.02(o) requires the juvenile court judge to release such a defendant unless detention is justified by the first, fourth, or fifth criterion. If the person is not released, Section 54.02(p) authorizes the juvenile court to detain the person in the certified juvenile detention facility or to set bond and order the person detained in the county jail.

Detention Pending Release/Transfer Hearing. In 2003, the legislature authorized a juvenile court to detain a child referred to the court by the Texas Juvenile Justice Department (then-TYC) for a release/transfer hearing under the Determinate Sentence Act pending the completion of the hearing. The detention may be in the certified place of juvenile secure detention or in the county jail without bond. Section 54.11(l)–(n). Detention hearings are not held for such a detention.

No Right to Bail. The Juvenile Justice Code does not recognize a right to bail, nor does it assert that such a right does not exist. It is silent on the subject. The juvenile respondent in *Ex parte D.W.C.*, 1 S.W.3d 896 (Tex.App.—Beaumont 1999, pet. denied) argued that the right to bail in Texas Constitution Art. I, Sections 11 and 29 was violated when the juvenile court ordered him to be detained and refused to set bond. The Court of Appeals rejected that argument. It noted that the great majority of appellate opinions from other states have concluded that juveniles do not have a right to bail and that:

> [t]he general basis for the holding of the majority of these courts is the doctrine of *parens patriae*. Our juvenile law is founded upon the application of this doctrine.... Based upon that doctrine, then, we hold that juveniles do not have an absolute constitutional right to bail, either under the United States or the Texas Constitutions.

1 S.W.3d at 897.

Rather than using the doctrine of parens patriae, which means the state acting on behalf of the minor, the Court of Appeals could have arrived at the same result by observing that the procedural and substantive provisions of the Family Code regarding release by intake and detention hearings provide far more protection to the individual from unwarranted pre-trial detention than the bail system affords in the criminal process. For that reason, there should be no right to bail in juvenile cases.

G. Conditions of Release

Section 54.01(f) provides in part:

> [A] release may be conditioned on requirements reasonably necessary to insure the child's appearance at later proceedings, but the conditions of the release must be in writing and a copy furnished to the child.

Section 53.02(a), relating to release by intake, contains an identical provision but adds the requirement that a copy of the conditions of release must be filed with the office or official designated by the juvenile board. The purpose of these provisions is to encourage the release of detained children in doubtful cases by permitting authorities to attach conditions to the release that will increase the likelihood the child will appear for trial. Examples of such conditions include specifying the child's place of residence, requiring regular attendance at school or work, imposing a curfew, and requiring reporting to a probation officer at designated times. The range of conditions that can be imposed is limited only by the requirement that they be reasonably necessary to ensure the child's appearance at later proceedings.

Violation of Conditions. If a child is released from detention on conditions and violates a condition, the release order may be revoked and the child taken back into custody on the original case. The procedural mechanism for taking this step is the directive to apprehend. Section 52.015 (a) provides, "On the request of a law-enforcement or probation officer, a juvenile court may issue a directive to apprehend a child if the court finds there is probable cause to take the child into custody under the provisions of this title."

When the release order is rescinded and a child is taken into custody, the case should be recycled on the normal schedule for a detention hearing. A violation of a condition of release is not a new offense, so detention after revocation of the order of conditional release is based on the offense originally referred to the court.

In 2005, Section 52.01(a) was amended to add subsection (6), which authorizes a probation officer to take a child into custody for violating a condition of release imposed by the juvenile court or the referee. When a judge or a referee releases a juvenile subject to certain conditions under Section 54.01, a probation officer has the authority to take the child into custody if there is probable cause to believe the child violated a condition of release, without having to

first obtain a directive to apprehend. A detention intake officer will then reassess whether the child should be detained under the detain-or-release criteria.

Adult Agreement for Intake Release. Section 53.02(d) requires an agreement from an adult to whom intake has released a child that the adult will be "subject to the jurisdiction of the juvenile court and to an order of contempt by the court if the adult, after notification, is unable to produce the child at later proceedings." Contempt of court requires that the failure to obey the court order be a willful one and that the inability to comply does not constitute contempt. There is no requirement similar to Section 53.02(d) respecting release by a judicial officer to an adult under Section 54.01.

Detention Hearing Orders Requiring Parental Cooperation. In 2003, as part of the enactment of a new chapter on parental rights and responsibilities, the legislature authorized a judge, referee, or detention magistrate (but not an intake worker), upon releasing a child conditionally from detention, to order "that the child's parent, guardian, or custodian present in court at the detention hearing engage in acts or omissions specified by the court, referee, or detention magistrate that will assist the child in complying with the conditions of release." Section 54.01(r). The order may be enforced by contempt proceedings under Chapter 61, Family Code.

Release of Expelled Child in JJAEP County. Section 53.02(e) and amended Section 54.01(f) deal with conditions of release in cases of expulsion referral. In a county with a population greater than 125,000, which is for that reason required to operate a juvenile justice alternative education program (JJAEP), intake or judicial release of a child who was expelled must include a condition that the child immediately attend the JJAEP program unless the matter is otherwise provided for in the memorandum of understanding between the school district and the juvenile board. The purpose of this provision is to require attendance at the JJAEP as soon as the child is released from detention. See Chapter 8.

H. Detention Orders and Their Review

Section 54.01(h) provides:

> A detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more than 10 working days. Further detention orders may be made following subsequent detention hearings. The initial detention hearing may not be waived but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09. Each subsequent detention order shall extend for no more than 10 working days, except that in a county that does not have a certified juvenile detention facility, as described by Section 51.12(a)(3), each subsequent detention order shall extend for no more than 15 working days.

A 1995 amendment changed the duration of a detention order from 10 days to "10 working days," thus excluding weekend days and holidays from computation of the 10 days. A 1997 amendment enlarged the life of a subsequent detention order to "15 working days" in a county without a certified juvenile detention facility. Initial detention orders in all counties have a maximum life of only 10 working days. In a county without a certified detention facility, any further detention orders have a maximum life of 15 working days. This amendment is intended to ease the administrative and financial burdens of conducting subsequent hearings in those rural counties that use out-of-county detention facilities in cases involving extensive detention.

Waiver of Subsequent Hearings. The first subsequent detention hearing is required on or before the 10th working day after the initial order. Later hearings are required every 10 or 15 working days. While the initial hearing cannot be waived, the child and his or her attorney are permitted to waive a subsequent hearing if the formalities of Section 51.09 are followed. That waiver will legitimate an additional detention order of 10 or 15 working days, but another hearing must be held or waived before the order expires.

The purpose of this procedure, as opposed to permitting a waiver of all subsequent detention hearings at once, is to require everyone to confront the need for continued detention on a regular basis and to provide a means by which new evidence or changed circumstances bearing on detention can be presented to the judge or referee. For example, if there has been a change in circumstances, the child and attorney can refuse waiver of the next hearing and require the judge or referee to receive evidence at the hearing concerning those new circumstances. That would not be possible if the law permitted a single waiver to have applicability to all possible subsequent detention hearings. In addition, such a waiver would, in effect, authorize indefinite detention of the respondent, which is manifestly contrary to the structure of the detention hearing statute.

Failure to Hold Subsequent Hearings. What happens if there is no new detention hearing or new waiver before the expiration of the detention order? In *R.K.M. v. State*, 535 S.W.2d 676 (Tex.Civ.App.—San Antonio 1976,

no writ), the child contended in an appeal from an order transferring him to criminal court that detaining him for more than 10 days without a detention hearing was a violation of due process of law and required reversal of the transfer order. While the Court of Civil Appeals agreed that the 10-day requirement had been violated, it held that violation did not warrant reversing the transfer order without proof that the period of illegal detention adversely affected the child's ability to defend himself in the transfer proceedings. The court also noted that the child was represented by counsel throughout his detention but that counsel had filed no petition for writ of habeas corpus to secure his client's release during the period of illegal detention.

In *D.B. v. State*, 556 S.W.2d 845 (Tex.Civ.App.—Houston [14th Dist.] 1977, no writ), the child contended on appeal from an adjudication of delinquency that the failure to provide appointed counsel and the failure to hold a subsequent detention hearing within the 10-day period deprived him of due process of law. The juvenile court appointed an attorney to represent the child at the detention hearing only. Later, the same attorney was appointed to represent the child at the adjudication and disposition hearings. Thus, the child was without an attorney between the detention hearing and the appointment of counsel two days before the adjudication hearing. Further, more than 10 days expired between these two hearings. Nevertheless, the Court of Civil Appeals held that the adjudication should not be reversed:

> While we do not condone the unlawful detention of the appellant beyond the initial ten-day period, the record does not show and the appellant does not contend that his inability to seek habeas corpus relief [because without counsel] contributed in any way to the finding by the trial court that the appellant was a delinquent child. Neither does it appear from the record that the illegal detention affected in any way the appellant's rights in this appeal. Even if we were to accord the appellant all the rights and privileges that he would have as an adult in a criminal proceeding, we still would conclude that the appellant is not entitled to a reversal and a remand of the case because he was illegally confined. If a conviction is not based upon the fruits of an illegal detention, the mere fact that the illegal detention occurred will not invalidate the subsequent conviction.... We note that the appellant made his confession during the initial ten-day detention period, and not during the period of illegal detention. The failure of the trial court to appoint an attorney for appellant was not harmful error [with regard to the adjudication] just because the appellant was thereby effectively denied the right to seek habeas corpus relief.

556 S.W.2d at 847-48.

Even though the detention is illegal, unless the child can show some prejudice such as an impeded ability to defend in a transfer, adjudication or disposition hearing, or that evidence, such as a confession, was obtained as a result of the illegal detention, there is no remedy for the illegal detention except seeking release on a writ of habeas corpus or filing a civil lawsuit for money damages.

Interactive Video Recording of Detention Hearings. In 1995, the legislature enacted Section 54.012, authorizing subsequent, but not initial, detention hearings to be conducted by two-way television. In 2005, the section was amended to allow interactive video at an initial detention hearing as well. Use of this technique requires consent of the child and the child's attorney. The parties, including the State, must be given the opportunity to cross-examine witnesses. This practice brings juvenile detention hearings in line with criminal court arraignments conducted in many large cities.

I. Restrictions on Detention of Status Offenders and Nonoffenders

Federal law imposes substantial restrictions concerning the secure confinement of juveniles upon states, such as Texas, that obtain federal funds for juvenile justice programs. Several 1995 amendments to the Family Code enact those federal restrictions into Texas law in order to facilitate compliance with the federal requirements. One such provision is Section 54.011 dealing with the detention of status offenders and nonoffenders.

Who Is a Status Offender. Texas law, in conformity with federal law, defines a status offender in Section 51.02(15) as a child who "is accused, adjudicated, or convicted for conduct that would not, under state [Texas] law, be a crime if committed by an adult..." That definition is intended to apply both to children in the juvenile justice system and to children charged with fineable offenses in the criminal system.

As it relates to the juvenile justice system, Section 51.02(15) gives six non-exhaustive examples of status offenses:

> (A) running away from home under Section 51.03(b)(2);
>
> (B) a fineable only offense under Section 51.03(b)(1) transferred to the juvenile court under

Section 51.08(b), but only if the conduct constituting the offense would not have been criminal if engaged in by an adult;

(C) a violation of standards of student conduct as described by Section 51.03(b)(4);

(D) a violation of a juvenile curfew ordinance or order;

(E) a violation of a provision of the Alcoholic Beverage Code applicable to minors only; or

(F) a violation of any other fineable only offense under Section 8.07(a)(4) or (5), Penal Code, but only if the conduct constituting the offense would not have been criminal if engaged in by an adult.

Each of those behaviors is prohibited for children, but not for adults.

Prior to 2015, the statute also included truancy and failure to attend school. When failure to attend school and truancy were changed to civil violations, rather than criminal or juvenile offenses, they were removed from the list of status offense. However, because a violation of a truancy court order that results in a referral to juvenile court for contempt can result in detention, truant conduct should be regarded as a status offense, meaning that the limitations on detaining status offenders should be adhered to in such cases.

Under Texas law, there are circumstances under which a status offender can be lawfully presented to a juvenile detention facility and detained temporarily.

Who Is a Nonoffender. In conformity with federal law, a nonoffender is defined by Section 51.02(8) as a child who is subject to a court's jurisdiction because the child is a victim of abuse, dependency, or neglect or is a child who "has been taken into custody and is being held solely for deportation out of the United States."

Prior to 2003, there were no circumstances under Texas law in which a nonoffender could lawfully be detained even temporarily in a juvenile detention facility. This is because Section 53.01(a)(2) required an intake finding of "probable cause to believe the person [presented to the detention facility] engaged in delinquent conduct or conduct indicating a need for supervision" before a child could be accepted into a juvenile secure detention facility. Section 53.01(b) requires that "[i]f it is determined that...there is no probable cause, the person shall immediately be released." Since a child who is a nonoffender has not engaged in delinquent conduct or CINS, there can never be probable cause. Therefore, in the absence of some specific evidence of misconduct, a person who is a nonoffender cannot be admitted to a juvenile detention facility for any length of time.

Section 54.011(a) requires the judicial release of all nonoffenders within 24 hours, excluding weekends and holidays, of their arrival at the detention facility. If not released before, Section 54.011(a) requires release of a nonoffender at the 24-hour detention hearing. Before 2003, the law did not authorize detention pending the 24-hour hearing and such detention could not be authorized for a nonoffender under Section 53.01(b) because there was no probable cause the child engaged in delinquent conduct. Thus, the 24-hour hearing was merely a way of ensuring, through judicial review, that nonoffenders had not slipped through the intake screen.

Children Held on Immigration Violations. Prior to the law change in 2003, one type of nonoffender—the unaccompanied child being held solely by federal authorities for deportation out of the United States—was unlawfully being held in secure juvenile confinement pending deportation. This was done in a few Texas counties under contract with the Immigration and Naturalization Service (INS), then of the United States Department of Justice. (In 2003, the functions of INS were transferred to the United States Citizenship and Immigration Services under the Department of Homeland Security.)

These contracts for the detention in secure juvenile facilities of children being held without being charged with delinquent conduct or CINS were entered into despite the clear violation of Texas law and despite a requirement by the Office of Juvenile Justice and Delinquency Prevention, also of the United States Department of Justice, that, in order to receive federal juvenile justice grants, Texas must prohibit the detention of all nonoffenders in its secure facilities. In other words, one federal agency was contracting with counties to do exactly what another federal agency prohibited Texas from doing. This presented substantial problems for the Governor's Criminal Justice Division, which is in charge of monitoring compliance with the terms of juvenile justice grants to the state.

In 2003, the legislature made two changes. First, it authorized the temporary detention of a person who "is a nonoffender who has been taken into custody and is being held solely for deportation out of the United States." Section 53.01(a)(2)(B). Second, it required that all nonoffenders be released from secure confinement at the 24-hour detention hearing required of all status offenders

and nonoffenders. For the first time, civil and criminal penalties were provided for detaining a nonoffender in a secure facility beyond the 24-hour hearing. Section 54.011(f) provides, in relevant part:

> A nonoffender who is detained in violation of this subsection is entitled to immediate release from the facility and may bring a civil action for compensation for the illegal detention against any person responsible for the detention. A person commits an offense if the person knowingly detains or assists in detaining a nonoffender in a secure detention facility or secure correctional facility in violation of this subsection. An offense under this subsection is a Class B misdemeanor.

The 24-hour detention authorized for deportation of nonoffenders is intended only to permit federal authorities time in which to find more suitable facilities for holding them pending removal from the country. None of the 2003 changes affect the absolute prohibition on detaining for any length of time in a secure facility of the other type of nonoffender—a child subject to court jurisdiction solely because of abuse, dependency, or neglect. Section 51.02(8).

The prohibition on the confinement of a nonoffender in a juvenile detention facility applies only to a secure detention facility, defined by Section 51.02(14) to be a facility with "construction fixtures designed to physically restrict the movements and activities of juveniles ... held in lawful custody in the facility." In other words, a facility is a secure facility only if it has locked doors. There is no federal or Texas prohibition on the placement of a nonoffender in a shelter or other nonsecure facility. Section 54.011(a) requires release at the 24-hour hearing "from secure detention."

Detention of Status Offender in Adult Facility. In 1997, the legislature, by amending Section 51.12, provided for the detention of juveniles in sight and sound separated portions of adult facilities, but only pending their initial detention hearings and only in a county that does not have its own certified juvenile detention facility. The legislature also amended Section 54.011(a) by deleting the words "the designated" from the phrase "the designated detention facility" to make it clear that status offenders can be detained in adult facilities under the same circumstances that other juvenile offenders can. But, like any status offender, those detained in an adult facility must have a hearing within 24 hours, excluding weekends and holidays, of arriving at the facility. The requirements for detention in an adult facility are discussed later in this chapter.

Conflict Between Federal and State Laws on Detaining Status Offenders. In Texas, a justice or municipal court may not order confinement of a child for violating a lawful court order. However, after providing notice and an opportunity to be heard, the court may refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order. Code of Criminal Procedure Articles 45.050(b)(2) and (c)(1). Section 54.04(n), Family Code, permits a juvenile court to order a disposition of secure confinement of a status offender adjudicated for violating a valid court order only if:

> (1) before the order is issued, the child received the full due process rights guaranteed by the Constitution of the United States or the Texas Constitution; and
>
> (2) the juvenile probation department in a report authorized by Subsection (b):
>
> > (A) reviewed the behavior of the child and the circumstances under which the child was brought before the court;
> >
> > (B) determined the reasons for the behavior that caused the child to be brought before the court; and
> >
> > (C) determined that all dispositions, including treatment, other than placement in a secure detention facility or secure correctional facility, have been exhausted or are clearly inappropriate.

In 2003, the Attorney General was asked whether a juvenile court may detain such a child under Sections 53.02 (Release from Detention) or 54.01 (Detention Hearing) before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order. Attorney General Opinion No. GA-0131 (2003). The Attorney General stated that such a child could be detained, but only if detention is warranted under the detention criteria listed in Sections 53.02(b) or 54.01(e). The opinion concluded that, under Section 54.04(o)(3), a juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility or committed to TYC [TJJD].

According to a federal compliance monitoring report issued in January 2008, the Texas statutory scheme with respect to detaining status offenders who are referred to juvenile court for delinquent conduct contempt of a justice or municipal court order conflicts with the federal Juvenile Justice and Delinquency Prevention Act of 2002 in two respects. First, the act prohibits upgrading a status offender to a delinquent offender for violating a valid

court order imposed for a status offense, unless the violation itself is a delinquent act, as defined by federal law. Second, while the act does allow states to detain adjudicated status offenders for violating a valid court order, such an order must have been issued by a juvenile court judge. Additionally, the juvenile must be afforded certain due process rights, including the right to legal counsel. In Texas, juveniles do not have the right to appointed counsel when charged in justice or municipal court. Unless the child has retained counsel in the justice or municipal court proceeding that preceded the alleged contempt, the State cannot claim the violation of court order exception. It would therefore be advisable for juvenile courts to treat these types of referred cases not as delinquent conduct but rather as status offenses and limit the detention of these children to 24 hours, excluding hours of a weekend or a holiday, as provided by Section 54.011.

The 24-Hour Detention Hearing. A hearing before the juvenile court judge or a referee for a status offender or a nonoffender must be started "before the 24th hour after the time the child arrived at a detention facility, excluding hours of a weekend or a holiday." Section 54.011(a). The event that starts the running of the 24-hour clock is the child's arrival at the detention facility. This occurs later than when the child is "taken into custody," which starts the running of the time during which an ordinary ("second working day") detention hearing must be conducted. Section 54.01(a).

At the 24-hour hearing, the judge or referee is required to release a status offender or nonoffender "from secure detention" unless further confinement is justified for violation of a valid court order. Such a release could be to a parent or to an available nonsecure facility, such as a shelter.

Violation of Valid Court Order. A status offender who is charged with violation of a valid court order is not required to be released from secure detention at the 24-hour hearing. This provision does not apply to a nonoffender.

Section 51.02(17) defines a valid court order as a "court order entered under Section 54.04 concerning a child adjudicated to have engaged in conduct indicating a need for supervision as a status offender." Since Section 54.04 is the dispositional section of the Family Code, only juvenile court dispositional orders qualify as court orders under this section. That excludes from the definition of a valid court order both interim court orders, such as court orders of conditional release from detention and deferred prosecution agreements, and orders entered by a justice or municipal court.

Section 54.04(n) prescribes procedural requirements that must be met in addition to the existence of a valid court order before secure post-adjudication correctional confinement of a status offender for violating a valid court order is permitted.

The judge or referee is authorized to detain a status offender beyond the 24-hour period upon a finding of "probable cause to believe the child violated the valid court order" and that "the detention of the child is justified under Section 54.01(e)(1), (2), or (3)." Section 54.011(b). Each of these three detention criteria relates to detention as necessary to assure the appearance of the child at trial. See the discussion of detention criteria earlier in this chapter.

Those findings authorize detention for up to an additional 72 hours, excluding weekends and holidays. One additional period of 72 hours, excluding weekends and holidays, is permitted upon a finding of "good cause" by the juvenile court. Section 54.011(c). As previously noted, however, this statutory scheme may conflict with the federal Juvenile Justice and Delinquency Prevention Act, which prohibits upgrading a status offender to a delinquent offender for violating a valid court order imposed for a status offense unless the violation itself is a delinquent act, as defined by federal law.

The 24-hour hearing may be held by a "judge or referee." Thus, a juvenile court judge, alternate judge, or detention magistrate may conduct the 24-hour hearing in addition to a referee. The first 72-hour extension for status offenders charged with violation of a valid court order may also be made by any of those judicial officers. However, the second 72-hour extension may be authorized only by the judge of the juvenile court. Section 54.011(c).

The adjudication hearing on a charge of violation of a valid court order must be held within 24 hours, plus 72 hours, plus 72 hours, or seven days, excluding weekends and holidays.

If requested by the child's attorney, a detention order may be extended under Section 54.011(d) "to comply with the requirements of Section 51.10(h), entitling the attorney to 10 days to prepare for an adjudication hearing." For a discussion of that requirement, see Chapter 8.

Return of Runaway. The judge or referee under Section 54.011(e) may detain a status offender for a period not to exceed the time necessary to arrange for a return to the child's home in another state under the Uniform Interstate Compact on Juveniles in Chapter 60 of the Family Code. In 2013, the language specifying a period "not to exceed five

days" was stricken in order to bring Texas law into alignment with the terms of the Compact. This provision is independent of the provisions in Sections 54.01(i) through (k) that permit a runaway child from another county, state, or country to request shelter in the detention facility for up to 10 days. Under Section 54.011(e), the child is being detained without regard to whether that is his or her desire; under Sections 54.01(i) through (k), the child is being detained only because he or she requests it.

J. Juvenile Board Designation of Places of Detention and Police Custody

One responsibility of the juvenile board is to designate the place or places of detention within its county. Sections 51.12 and 52.02(a)(3). The designated place of detention must be one that is currently certified as suitable for the detention of children, in conformity with Section 51.12. Certification requirements are discussed later in this chapter.

A juvenile board also has the responsibility to designate juvenile processing offices, which are places where police may take juveniles in their custody, as defined under Section 52.025.

County of Detention. Ordinarily, the designated place of detention is in the county in which the petition is filed or the offense is believed to have been committed. If there is no certified place of detention in the county in which the petition is filed, Section 51.12(e) provides that the designated place of detention may be in another county in a facility that is certified. In Attorney General Opinion No. LO 92-3 (1992), the Attorney General stated that a child may be detained out of county under this statutory authority.

Section 54.01(m) provides:

> The detention hearing required in this section may be held in the county of the designated place of detention where the child is being held even though the designated place of detention is outside the county of residence of the child or the county in which the alleged delinquent conduct, conduct indicating a need for supervision, or probation violation occurred.

Detention hearings may be held in the county in which the child is being detained or the child may be transported back to the county in which proceedings are pending to have detention hearings conducted there.

Court Conducting Hearing. The Family Code does not say specifically who is to conduct the detention hearing when the designated place of detention is outside the county in which the petition is filed or will be filed. Should it be conducted by a judge or referee of the county in which the court proceedings will occur or by a judge or referee of the county in which the child is detained? As a practical matter, that depends largely upon whether the detention hearing will be held in the county in which the child is detained or in the county in which the petition is or will be filed. Section 51.04(f) provides:

> If the judge of the juvenile court or any alternate judge...is not in the county or is otherwise unavailable, any magistrate may...conduct the detention hearing provided for in Section 54.01.

This suggests that if the judge of the juvenile court in which the petition is filed or will be filed is available in the county where the child is detained, that judge should conduct the detention hearing. But if the juvenile court judge is not within the county, then any other judge may conduct the detention hearing. For example, if a judge of a multi-county district who is the juvenile court judge is sitting in the county in which the child is detained at the time the detention hearing is scheduled, that judge should conduct the hearing. However if that judge is sitting in another county or is otherwise unavailable, then any judge from either the county in which the juvenile court proceedings will occur or the county in which the child is detained may conduct the detention hearing.

The contract that sets out the terms by which juveniles taken into custody in one county may be held in the detention facility of another county on a per diem basis should address the question of what judges should conduct detention hearings and under what circumstances.

Transporting Juveniles to Detention Facilities. In 1993, the legislature enacted Section 52.026, which addresses transportation responsibilities. Section 52.026(a) requires that a law enforcement officer who has taken a child into custody must transport him or her to the designated juvenile detention facility.

In 2007, Section 52.026(a) was amended to include "the school campus to which the child is assigned" as another transportation destination. This option is only available if school is in session, the child is a student, and the appropriate school official agrees to assume responsibility for the student for the rest of the school day. Section 52.02(a)(7).

If the designated place of detention is out of county, Section 52.026(b), as amended in 1999, requires the law enforcement officer who has taken a child into custody to

transport that child to the out-of-county facility. Alternatively, if authorized by the commissioners court, the sheriff may be given this out-of-county transportation responsibility.

Prior to amendment in 1999, the duty of transportation to out-of-county facilities belonged exclusively to the sheriff. As provided by Section 52.026(c), these transportation responsibilities include transporting the child to and from court while he or she is detained, as well as initial transportation to the out-of-county facility.

This legislation was originally enacted in 1993 in response to Attorney General Opinion No. DM-87 (1992), in which the Attorney General stated that the juvenile court lacked authority to order law enforcement officers to transport juveniles in custody. In Attorney General Opinion No. LO 94-065 (1994), the Attorney General reaffirmed the sheriff's obligation to transport juveniles to court hearings and other activities only if ordered to do so by the juvenile court with the approval of the commissioners court.

Detention and Inter-County Transfer of Probation. In 2005, the legislature created a new probation transfer mechanism called inter-county transfer of probation supervision. Section 51.072(i) authorizes the juvenile court of either the sending or receiving county to issue a directive to apprehend or detain a child in a certified detention center if it reasonably believes that the child violated an original condition of probation. If the violation is of a probation condition modified or imposed by the receiving county under subsection (h), the normal procedures for detention and modification/revocation apply, as in any other case of violation of a condition of probation. The provisions contained in Section 52.026 concerning transport also apply to inter-county transfers. For a more extensive discussion of inter-county transfer of probation supervision, see Chapter 27.

Designating Places of Police Custody. When a person takes a child into custody, he or she must, without unnecessary delay and without taking the child anywhere other than a juvenile processing office (unless the child was taken into custody for operating a motor vehicle in public place with a detectable amount of alcohol in the child's system), do one of the actions listed in Section 52.02, Family Code, which include, in part: releasing the child to a parent, taking the child to the office or official designated by the juvenile board, or taking the child to a detention facility designated by the juvenile board.

Under Section 52.025, the juvenile board has the responsibility for designating the juvenile processing office. If the board has not designated a juvenile processing office or an office or official under Section 52.02(a)(2), the police, unless they immediately release the child to parents, must take the child directly to the designated detention facility and may not take him or her to the police station for any purpose.

The juvenile board not only selects which facilities in the county will be designated as juvenile processing offices but also has the responsibility of specifying the conditions of police custody and the length of time a child may be held before release or delivery to the designated place of detention, provided the time does not exceed six hours, which, under Section 52.025(d), is the maximum allowable length of detention in a juvenile processing office.

If a child is taken to a police facility that has not been designated as a juvenile processing office, or if the terms of the designation are not observed, the detention becomes illegal and any statement or confession given by the child while so detained may be excluded from evidence.

Section 52.025 specifies the activities that may occur in a juvenile processing office. Those are discussed in Chapter 16.

The head of a law enforcement agency has the responsibility to designate places of nonsecure custody under Code of Criminal Procedure Article 45.058(b) and juvenile curfew processing offices under Article 45.059(a)(3). Both sections were enacted in 1995. Both are similar to juvenile processing offices in that they are places for temporary and limited-purpose detention of children. They are intended, however, primarily to serve children taken into custody for fineable only offenses; in other words, charges that will be handled by justice and municipal courts, not juvenile courts. They are discussed more fully in Chapter 23.

K. Detention of Juveniles After Disposition Hearing

In 2007, the legislature clarified two specific situations in which a juvenile may be detained in a pre-adjudication secure detention facility after the child's disposition hearing.

Family Code Section 54.04(x) provides:

> (x) A child may be detained in an appropriate detention facility following disposition of the child's case under Subsection (d) or (m) pending:

(1) transportation of the child to the ordered placement; and

(2) the provision of medical or other health care services for the child that may be advisable before transportation, including health care services for children in the late term of pregnancy.

Section 54.04(x) gives express authority to detain a child in a local detention facility after disposition pending transport to placement in a residential facility or commitment to TJJD.

Section 54.04(x) also clarifies that when medical or other healthcare services are advisable prior to transportation, the child may be detained for the period of time required for provision of these services. One of the possible healthcare services expressly included is the provision of healthcare for girls in the late term of pregnancy. Due to the girl's young age and often fragile health, the pregnancy may be high-risk and may be further complicated by the stress of long-distance transportation and the institutional environment of the future placement. During the late stages of pregnancy, a girl's focus is understandably on the impending birth and not on her rehabilitative treatment and assessment. The medical staff at the receiving placement may not know the girl's prenatal history and may not be prepared to provide appropriate care for the mother and baby. In these cases, it may be medically advisable to delay transportation to the new placement until after the baby's birth.

L. Detention of Child Witnesses.

In 2007, Section 52.0151 was added to the Family Code to authorize the issuance of bench warrants to secure the appearance of youth witnesses confined in a TJJD state institution, a juvenile secure correctional facility, or a county pre-adjudication detention facility. This provision also authorizes the transport and detention of a child witness in a local certified detention facility in or near the county where the child is to testify. Since a detention hearing is not required, juvenile justice practitioners have asked for guidance on the appropriate administrative or procedural steps to account for the presence and well-being of a child witness who has been confined for a lengthy period of time in a juvenile detention facility due to court delays in a civil or criminal proceeding.

In 2013, the legislature amended Section 52.0151 to limit the stay of a child witness to a period of no more than 30 days and to permit the court that issued the bench warrant to extend the placement in 30-day increments as necessary. The child witness must be returned if the sending court has not extended the bench warrant and the 30-day period has expired. The same language was added to harmonize Article 24.011, Code of Criminal Procedure.

Despite these provisions, there still exists some question as to whether this scheme violates the Juvenile Justice and Delinquency and Prevention Act, since it allows for individuals who have not been charged with an adult offense to be held in an adult facility based simply on their age.

M. Operating Juvenile Justice Facilities in Texas

In Texas, there are three basic types of facilities that house juvenile offenders: (1) nonsecure correctional facilities; (2) pre-adjudication secure detention facilities; and (3) post-adjudication secure correctional facilities. Family Code Sections 51.02(8-a), (13), and (14) define nonsecure correctional facility, secure correctional facility, and secure detention facility as follows:

(8-a) "Nonsecure correctional facility" means a facility described by Section 51.126.

(13) "Secure correctional facility" means any public or private residential facility, including an alcohol or other drug treatment facility, that:

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility; and

(B) is used for the placement of any juvenile who has been adjudicated as having committed an offense, any nonoffender, or any other individual convicted of a criminal offense.

(14) "Secure detention facility" means any public or private residential facility that:

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility; and

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, any nonoffender, or any other individual accused of having committed a criminal offense.

The Texas Legislature clarified what most practitioners have implicitly understood to be the law regarding which entities can operate secure facilities that incarcerate juvenile offenders. Since this 2007 change in the law,

private individuals or entities cannot operate jails or, in this case, secure facilities to house juveniles, absent government involvement. Private entities, organizations, or individuals must have a contractual relationship with a governmental organization to establish and operate secure detention or correctional facilities where youth can be detained or placed by the juvenile courts. The same rules were applied to nonsecure correctional facilities in 2009. See Section 51.126(a)(2).

Two Family Code sections were created in 2007 to address and explicitly clarify this issue as it relates to pre-adjudication secure detention facilities and post-adjudication secure correctional facilities:

Section 51.12(b-1) provides:

> (b-1) A pre-adjudication secure detention facility may be operated only by:
>
> (1) a governmental unit in this state as defined by Section 101.001, Civil Practice and Remedies Code; or
>
> (2) a private entity under a contract with a governmental unit in this state.

Section 51.125(a) provides:

> (a) A post-adjudication secure correctional facility for juvenile offenders may be operated only by:
>
> (1) a governmental unit in this state as defined by Section 101.001, Civil Practice and Remedies Code; or
>
> (2) a private entity under a contract with a governmental unit in this state.

Under these amendments, pre- and post-adjudication secure juvenile facilities can only be operated by a governmental unit in this state. Private corporations or individuals cannot operate a secure detention or post-adjudication facility where juveniles are incarcerated unless they are affiliated and under contract with a governmental unit. The term "government unit" is defined in Civil Practice and Remedies Code Section 101.001 and includes all Texas state agencies, departments, boards, and commissions, as well as political subdivisions of this state.

Although language with regard to operation simply states that a facility must be operated under contract with a governmental entity, the fact that the juvenile board is required to inspect and certify all public or private facilities in the juvenile board's county suggests that private facilities should be operated under a contract with the juvenile board in that county as opposed to with a juvenile board in another county. It would be difficult for the juvenile board to have any say in the operation of a facility in its county if it is not the entity holding the contract. In 2009, the legislature added Section 51.126, which applies the same rules to the operation of nonsecure correctional facilities in Texas.

In most Texas counties that have a juvenile facility, the facility is operated by the juvenile probation department under the authority of the local juvenile board. In some counties, the juvenile board or the county have a contract with private vendors to operate and manage a facility.

The operation of all secure and nonsecure correctional facilities and secure detention facilities are governed by professional standards promulgated by TJJD in 37 Texas Administrative Code Chapter 343 and 355. Thus, both state and local governments are involved in the operation of secure and nonsecure correctional juvenile facilities in Texas.

N. The Juvenile Board and Juvenile Court Role in Certifying Juvenile Facilities.

The Family Code makes the juvenile court and the juvenile board responsible for assuring that all secure and nonsecure correctional juvenile facilities are safe and suitable for the detention and placement of youth. All secure and nonsecure correctional facilities must be certified as suitable by the juvenile court and juvenile board. This includes pre-adjudication detention, post-adjudication, and nonsecure correctional facilities.

The rules applicable to pre-adjudication secure detention facilities and post-adjudication secure correctional facilities were separated in 2007 and placed in similar but separate statutes: Sections 51.12 and 51.125. Section 51.12 applies only to pre-adjudication secure detention facilities, while Section 51.125 governs post-adjudication secure correctional facilities. In 2009, the legislature added Section 51.126, which is essentially identical to Section 51.125, except that Section 51.126 applies to nonsecure correctional facilities.

1. Pre-Adjudication Secure Detention Facilities

Duties to Inspect and Certify. Under Section 51.12(c), each judge of the juvenile court and a majority of the members of the juvenile board have the responsibility to inspect and certify all public or private juvenile pre-adjudication secure detention facilities annually. In

doing so, a juvenile board must consider seven statutory factors concerning suitability or unsuitability for the detention of children outlined in Section 51.12(c).

> (c) In each county, each judge of the juvenile court and a majority of the members of the juvenile board shall personally inspect all public or private juvenile pre-adjudication secure detention facilities that are located in the county at least annually and shall certify in writing to the authorities responsible for operating and giving financial support to the facilities and to the Texas Juvenile Justice Department that the facilities are suitable or unsuitable for the detention of children. In determining whether a facility is suitable or unsuitable for the detention of children, the juvenile court judges and juvenile board members shall consider:
>
> (1) current monitoring and inspection reports and any noncompliance citation reports issued by the department [TJJD], including the report provided under Subsection (c-1), and the status of any required corrective actions;
>
> (2) current governmental inspector certification regarding the facility's compliance with local fire codes;
>
> (3) current building inspector certification regarding the facility's compliance with local building codes;
>
> (4) for the 12-month period preceding the inspection, the total number of allegations of abuse, neglect, or exploitation reported by the facility and a summary of the findings of any investigations of abuse, neglect, or exploitation conducted by the facility, a local law enforcement agency, and the department [TJJD];
>
> (5) the availability of health and mental health services provided to facility residents;
>
> (6) the availability of educational services provided to facility residents; and
>
> (7) the overall physical appearance of the facility, including the facility's security, maintenance, cleanliness, and environment.

The factors contained in Section 51.12(c) are intended to give guidance to officials as to whether a facility is suitable. Frequently, juvenile boards and judges have expressed hesitation concerning the inspection of these facilities, and liability issues have made such inspections a source of great concern. Clearly, these officials should not be required to conduct a detailed inspection of these facilities in order to determine compliance with applicable standards. TJJD is the designated state agency with the responsibility for determining standards compliance by conducting in-depth monitoring and inspections. In the local official's determination of suitability, however, review of TJJD monitoring reports is critical and, as such, is one of the listed factors.

All of the factors are important. If officials adhere to the statutory checklist, this should demonstrate due diligence in discharging their administrative duties to inspect and determine the suitability of the facility, thus minimizing their liability to the extent possible.

Due to TJJD's special certification responsibility, the Department of Family and Protective Services (DFPS), which has general duties to inspect and license child-care facilities, has no jurisdiction over secure juvenile detention facilities. Attorney General Opinion No. H-1166 (1978).

The juvenile board is required to inspect the detention facility annually and to certify that it is suitable for the detention of children under applicable standards. However, the board's certification need not be unanimous. It is necessary only that a majority of the members of the board must inspect the facility and certify it. *In the Matter of M.C.*, 915 S.W.2d 118 (Tex.App.—San Antonio 1996, no writ) (based on Government Code Section 311.013).

Requirements for Certification. Sections 51.12(f) and (i) set out two types of requirements that must be satisfied for a pre-adjudication secure detention facility to be certified: (1) requirements related to keeping the child separated from adults and (2) minimum child-care standards for the facility.

Currently, all certified places of juvenile detention in Texas are physically separated from adult detention facilities. The separation requirements have current importance only in two circumstances: places of temporary detention prior to a detention hearing in rural counties and places of temporary detention prior to a detention hearing in firearms cases in rural counties.

Separation Requirements. Subsections 51.12(f) and (g) state requirements for the secure detention of children in facilities in which adults are also securely detained. These standards restate minimum federal standards as promulgated by the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice.

When juvenile and adult detention facilities are "co-located" at the same site, Section 51.12(f) requires that children be "separated by sight and sound from adults detained in the same building." This is defined as existing "only if they [children and adults] are unable to see each other and conversation between them is not possible."

Section 51.12(f) provides that the requirement of sight and sound separation extends "to all areas of the facility, including sally ports and passageways, and those areas used for admission, counseling, sleeping, toileting, showering, dining, recreational, educational, or vocational activities, and health care."

Originally, it was proposed in subsection (f) that time-separated sharing of facilities, such as dining rooms, be permitted so that children and adults could use the same space at different times. However, when it became clear that time-separation would violate federal policies, the authority to use time-separation was eliminated. Thus, the separation must be accomplished through architectural design. Subsection (f) requires total separation between children and adults who are securely detained in a common facility.

The requirement of sight and sound separation in subsection (f) exists in any facility that is a "jail, lockup, or other place of secure confinement, including an alcohol or other drug treatment facility." A shelter, group home, or other place without confinement by locked doors is not a "secure" facility and, therefore, is not within the sight and sound separation requirements of subsection (f).

While subsection (f) deals with sight and sound separation of juveniles from adults, subsection (g) establishes separation-of-staff requirements in the operation of co-located facilities. That subsection requires that a child detained in a co-located facility may not have any contact with:

> (1) part-time or full-time security staff, including management, who have contact with adults detained in the same building; or
>
> (2) direct-care staff who have contact with adults detained in the same building.

Subsection (f) applies to a child detained in any building that contains a "jail, lockup, or other place of secure confinement, including an alcohol or other drug treatment facility." By contrast, subsection (g) applies only to "a child detained in a building that contains a jail or lockup" and, as to those buildings, it does not apply to a juvenile processing office or a place of nonsecure confinement.

Thus, while there is a requirement of sight and sound separation for places of secure confinement that house alcohol or other drug treatment facilities, there is no requirement of staff separation in such facilities. This is deliberate to enable alcohol or other drug treatment staff to serve both juveniles and adults confined in such facilities.

Finally, the requirement of staff separation does not apply to a child in a juvenile processing office or a place of nonsecure confinement that is located in a facility with a jail or lockup. Such children may be supervised by staff who have responsibilities that bring them into contact with adult detainees.

Separation Requirements: Temporary Detention. Section 51.12(j), as enacted in 1995, authorizes the temporary detention of a child in an adult detention facility, such as a county jail, under restricted circumstances. There must not be a certified juvenile detention facility in the county in which the child is taken into custody, and the separation requirements of Section 51.12(f) must be met. In addition, the space to be used for temporary juvenile detention must be in compliance with "the short-term detention standards adopted by the Texas Juvenile Justice Department." Section 51.12(j)(2)(A); 37 Texas Administrative Code, Chapter 351. Currently, as required by federal rules, TJJD standards require that staff who serve juveniles must remain separate from staff who serve adults detained in the same facility. Finally, the space must be designated for the temporary detention of children by the juvenile board of the county in which the facility is located.

If the space meets those requirements, a child may be detained in it, but only until he or she is released by intake or is given the initial detention hearing. If the child is detained at the initial hearing, he or she must be moved to a certified juvenile detention facility. Thus, the maximum possible time in the juvenile portion of an adult facility is four nights, assuming a Monday holiday.

Separation Requirements: Firearms Offense Temporary Detention. In 1999, the legislature enacted Section 51.12(l) to impose requirements for the temporary detention of children in adult facilities who are taken into custody for a firearms offense and who are prohibited by law from being released. Those requirements are similar to but slightly different from the requirements that apply in cases of temporary detention in general. They authorize detention only until the detention hearing, which under Section 54.01(p) must be conducted within 24 hours, excluding weekends and holidays, of the child being taken into custody.

Temporary detention in an adult facility in a firearms offense case is available only if there is no certified juvenile detention facility or secure temporary detention facility in the county or in an adjacent county. The space must have been designated by the juvenile board for the county in which the facility is located. Sight and sound separation by architectural design or time-phasing must be in place; this time-phasing separation is not permitted in the general detention rules. The child must have no "contact with management or direct-care staff that has contact with adults detained in the same facility on the same work shift." This is more liberal than the general temporary detention provision in that personnel who supervise adults can also be used for juveniles as long as they do not have contact with adults on the same shift. In addition, the 1999 amendments required that the county in which the child was taken into custody not be located in a metropolitan statistical area, as designated by the United States Bureau of the Census, in order to restrict the availability of firearms offense detention to truly rural counties. Each member of the juvenile court and members of the juvenile board must annually inspect the space and certify that it meets the requirements of subsections 51.12(l)(3) and (4) for sight and sound separation and staff separation.

Permitting time-sharing and use of adult staff but not on the same shift reflect relaxation of federal requirements during the four years that intervened between the 1995 enactment for temporary detention and the 1999 enactment for temporary detention for a firearms offense.

Detention Facility Standards. Section 51.12(c-1)(2) requires that the detention facility must comply with "minimum professional standards for the detention of children in pre-adjudication secure confinement promulgated by the Texas Juvenile Justice Department (i.e., Title 37 of the Texas Administrative Code Chapter 343) or, at the election of the juvenile board of the county in which the facility is located, the current standards promulgated by the American Correctional Association." These standards apply to certified juvenile detention facilities.

Human Resources Code Section 221.002 requires TJJD to establish:

> minimum standards for public and private juvenile pre-adjudication secure detention facilities, public juvenile post-adjudication secure correctional facilities that are operated under the authority of a juvenile board or governmental unit, private juvenile post-adjudication secure correctional facilities operated under a contract with a governmental unit, except those facilities exempt from certification by [Human Resources Code] Section 42.052(g) [a facility operated by or providing services solely to TJJD], and nonsecure correctional facilities operated by or under contract with a governmental unit.

TJJD has standard-setting responsibility for: (1) all public or private secure detention (pre-adjudication) facilities; (2) all local, public secure correctional (post-adjudication) facilities; (3) all private secure correctional facilities except those operated solely for TJJD; and (4) all nonsecure correctional facilities.

Confinement of Youth Ages 17 to 21. In 1991, the Attorney General was asked whether then-TYC [now TJJD] youth between the ages of 18 and 21 could be detained in juvenile detention facilities. The Attorney General concluded that a TYC youth between the ages of 18 and 21 who was arrested for, charged with, or convicted of a criminal offense could be detained in a juvenile detention facility but only if not placed in the same compartment with a juvenile and only if not permitted to have regular contact with a juvenile. That is probably not a practical possibility in many facilities.

The Attorney General also concluded that, if a TJJD youth age 18 to 21 is not arrested for, charged with, or convicted of a criminal offense, but perhaps is being held on a technical parole violation, then he or she could be detained in a juvenile detention facility the same as any juvenile. Attorney General Opinion No. DM-38 (1991). Of course, since 2007, then-TYC and now TJJD jurisdiction ends at age 19.

In 1995, Section 51.12(h) was added. It was amended in 1999 to provide that Section 51.12 did not apply to a person after transfer to criminal court for prosecution as an adult under Section 54.02(o) or to a person who was at least 17 years of age who was taken into custody after having escaped from a TJJD-operated facility or contract facility or who violated a TJJD condition of parole.

Prior to 2011, the language in Section 51.12(h)(1) specified that a person certified for prosecution as an adult for conduct committed prior to age 17 was not subject to the sight and sound separation requirements of Section 51.12. Although under the age of 17 at the time of the conduct, once an individual was certified as an adult, he or she could be removed from juvenile detention and placed in the county jail without the necessity of being sight and sound separated from adults in the jail. From that point forward, he or she was treated as an adult for the purposes of pre-trial detention.

In 2011, the law was changed by amending Sections 51.12(f) and 51.12(h)(1) to specify that a person certified as an adult for criminal prosecution is defined as a child until that person turns 17. The change did not prohibit the certified person from being transferred to the adult jail; it simply made clear that if held in juvenile detention, the person who is under 17 does not have to be sight and sound separated from the other juveniles, but, if the person under 17 is held in county jail, the jail is required to ensure sight and sound separation from persons 17 and over.

Whether the person will be detained in juvenile detention or in the adult jail is discretionary in several ways. First, each juvenile board must adopt a policy specifying whether a person certified as an adult who is under 17 may ever be held in juvenile detention. Section 152.0015, Human Resources Code. If the juvenile board adopts a policy disallowing the certified person from ever being held in juvenile detention, the person is detained in the adult jail, which is required to provide sight and sound separation in compliance with Section 51.12. Second, if the juvenile board has adopted a policy allowing the person to be held in juvenile detention, the person is held in adult jail unless the juvenile court exercises its discretion under Section 51.13(c)(2), as amended in 2011, to order the person detained in a certified juvenile detention facility. If the juvenile court orders the person to be detained in a juvenile detention facility rather than a jail, the person may remain there until whichever occurs first: (1) the day the person turns 17; or (2) the day the court exercising jurisdiction over the criminal case orders the person moved to the jail as provided by Code of Criminal Procedure Article 4.19.

Legislative hearings indicated that the purpose of this provision was to provide a mechanism for the removal of a person initially held in juvenile detention who later exhibited behaviors making it dangerous for the person to remain there. However, no such limitation exists in the law. As written, the law simply gives the judge of the criminal court the power to order the child "to be transferred to another facility and treated as an adult as provided by this code."

In 2013, Article 4.19 was amended to require the adult criminal court judge to order a certified individual to be transferred from juvenile detention to the adult jail on the person's 17th birthday. Requirements of the Prison Rape Elimination Act (PREA) are applicable with regard to the 17-year-old held in an adult jail.

Attorney General Opinion GA-0927 (2012) clarified that Article 4.19 of the Code of Criminal Procedure does not authorize the detention of a certified individual under the age of 17 who has been transferred for prosecution in adult criminal court in a facility that does not comply with the sight and sound separation requirements of Family Code Section 51.12(f). In 2013, Article 4.19 of the Code of Criminal Procedure was amended to delete the phrase "and treated as an adult as provided by this code," to eliminate any confusion.

The 2011 amendments specify that the certified juvenile under the age of 17 is considered a child for the purposes of sight and sound separation. Once transferred to criminal court, the person is considered an adult for all other purposes, including the right to release on bail or bond, if applicable.

In 2013, Section 54.02(h-1) was added to make it clear that if a certified juvenile is held in juvenile detention, the juvenile court judge is responsible for setting or denying bond as required by the Code of Criminal Procedure and other laws applicable to the pretrial detention of adults accused of criminal offenses. Therefore, if the certified individual is held in juvenile detention, detention hearings are not applicable. However, the detention facility should have some manner to keep the court apprised of the status of any cases involving certified juveniles held in juvenile detention. Trial courts are required to give docket preference to the cases transferred to adult court. Government Code Section 23.101.

A frequent question that arose after the passage of Senate Bill 1209 was related to what should happen when a certified individual is convicted in a criminal court before turning 17 years of age. At that point, the person is now convicted as an adult, and Section 51.12(f), which is specific to pre-trial detention in a juvenile facility, no longer applies. Once convicted, the individual should be removed from juvenile detention. It should be noted that a conviction as an adult does not change the impact of PREA regulations regarding the housing of persons under the age of 18 with adult inmates or other federal and state sight and sound separation requirements.

The language in Section 51.12(b)(2) was added in 1995 and amended in 1999. It authorizes placement in a county jail of a youth 17 years of age or older who has escaped from a TJJD facility or has violated TJJD parole. The legislature believed that such a youth is more compatible with the population of the jail than of the juvenile detention facility. Had the youth been arrested for a criminal offense committed while 17 or older, he or she would be placed in the jail, not the juvenile detention facility. In addition, this provision aids TJJD in its efforts to find detention space for youth 17 or older who are escapees or

parole violators. That said, there is still some question as to whether or not this scheme comports with the law, as it may result in an individual who has never been charged with an adult offense being held in an adult facility, which is something prohibited by the Juvenile Justice and Delinquency Prevention Act.

Before its amendment in 1999, Subdivision (2) set a minimum age of 18, included escapees from all juvenile facilities, and applied to probation as well as parole violators. When the age was reduced to 17, it became necessary to exclude 17-year-old juveniles who had escaped from local facilities or who were probation violators since they should still be handled as juveniles.

Failure to Certify or Register. Section 51.12(d) provides:

> [A] child may not be placed in a facility that has not been certified under Subsection (c) as suitable for the detention of children and registered under Subsection (i).... [A] child detained in a facility that has not been certified under Subsection (c) as suitable for the detention of children or that has not been registered under Subsection (i) shall be entitled to immediate release from custody in that facility.

In *In the Matter of G.T.H.,* 541 S.W.2d 527 (Tex.Civ.App.—Eastland 1976, no writ), the Court of Civil Appeals characterized the certification requirement as mandatory and ordered the release of the child from the Eastland County Jail because the jail had not been certified under Section 51.12.

Responsibility of Juvenile Board. The Family Code places ultimate responsibility on the juvenile board for controlling the conditions of detention of juveniles. Section 51.12(b) provides that "the juvenile board shall control the conditions and terms of detention and detention supervision and shall permit visitation with the child at all reasonable times."

In Attorney General Opinion No. DM-439 (1997), the Attorney General stated that the juvenile court's authority over county juvenile detention facilities is separate from the authority of the juvenile board and the commissioners court. A county contract with a private corporation regarding operation of a juvenile detention facility is void to the extent that it conflicts with Section 51.12(b) by attempting to vest in authorities other than the juvenile court the power to "control the conditions and terms of detention and detention supervision." That opinion was abrogated in 2001 by giving such authority to the juvenile board.

In 2013, the legislature re-envisioned the use of post-adjudication secure correctional facilities to commit adjudicated felony offenders closer to home as an alternative to the TJJD state institutions. Senate Bill 511, amended provisions in the Family Code and Human Resources Code to permit the juvenile court or a local juvenile probation department that operates or contracts for the operation of a post-adjudication secure correctional facility to establish a pilot program to commit juveniles who have been adjudicated for conduct constituting a felony or for a determinate sentence offense. This change applies only to Travis County. The commitment has the same legal impact as a commitment to TJJD and all juveniles committed under this provision must be given the same rights as those committed to TJJD, including rights afforded under the *Morales v. Turman* settlement agreement.

Detention of Out-of-State Juveniles. In 1997, the legislature enacted Human Resources Code Section 141.054 to specify where juveniles adjudicated out of state may be confined in Texas. This provision partially codifies an opinion by the Texas Attorney General related to regulating private adult jail facilities housing out-of-state inmates and applies the opinion to juvenile facilities. Attorney General Opinion No. LO 96-151 (1996). The juvenile statute makes it clear that only the state, a county or municipality, or a private vendor operating under a contract with a county or municipality may operate a correctional facility to house out-of-state juvenile offenders. TJJD is mandated to develop rules, procedures, and minimum standards for these types of facilities. A contract made by the state, a county or municipality, or a private vendor for such a facility must require operation of the facility in compliance with TJJD standards. See Title 37 Texas Administrative Code Chapter 342.

Escape from Secure Pre-Adjudication Detention Facility. In 2007, the legislature expanded Penal Code Section 38.06(a) to include escape from a secure juvenile pre-adjudication detention facility as well as escape from the lawful custody of a juvenile probation officer as authorized by Family Code Section 52.01. The latter scenario envisions a juvenile probation officer taking a child into custody for a violation of either a juvenile court order of probation or conditions of release. The prior statutory language was not broad enough to encompass this situation.

2. Post-Adjudication Correctional Facilities

Post-adjudication secure correctional facilities are community-based facilities located throughout Texas that are used by juvenile courts as probation placement options for offenders who need secure confinement as a

condition of probation. These facilities are associated with Level Five of the Progressive Sanctions Model.

In 2007, the legislature added Section 51.125 to address the issue of juvenile secure post-adjudication correctional facilities. The statute reads very similarly to Section 51.12 but is limited to post-adjudication correctional facilities rather than pre-adjudication detention facilities. Section 51.125 contains the same provisions concerning the operation, inspection, and monitoring of these types of facilities as Section 51.12 and places the same responsibility on the juvenile board and juvenile court judges as these individuals have regarding pre-adjudication detention facilities.

Duties to Inspect and Certify. Under Section 51.125(b), each judge of the juvenile court and a majority of the members of the juvenile board have the responsibility to inspect and certify all public or private juvenile post-adjudication secure correctional facilities annually. In doing so, a juvenile board must consider the same statutory factors concerning suitability or unsuitability for the detention of children as they must consider when certifying pre-adjudication juvenile detention facilities.

3. Nonsecure Correctional Facilities

In 2009, Section 51.02(8-a), Family Code was added to define a nonsecure correctional facility as "a "facility, other than a secure correctional facility, that accepts only juveniles who are on probation and that is operated by or under contract with a governmental unit, as defined by Section 101.001, Civil Practice and Remedies Code." That same year, Section 51.126, Family Code was added, to give then-TJPC [now TJJD] explicit authority to regulate the nonsecure correctional facilities after a Sunset Commission review identified a gap in the regulation of such facilities because they were not accounted for in the law and it was unclear if TJPC or DFPS should have been regulating them.

While it is clear that juvenile boards and TJJD have the same responsibilities over these facilities and that the same duties to inspect and certify apply, the definition of "nonsecure correctional facility" was amended in 2013 so that the definition is now merely "a facility described by Section 51.126."

Section 51.126 sets out who may operate a facility and the requirements of inspection, certification, and registration, but does not include definitional language. This is an issue because the distinction made in 2009 to clarify which nonsecure residential facilities for children fell under the juvenile board and TJJD authority, as opposed to the authority of DFPS, was the distinction that the Family Code facilities were meant for only juveniles on probation. In other words, kids who were not under the jurisdiction of the juvenile court could not be placed in these facilities.

The intent in modifying the definition in 2013 was to open the nonsecure correctional facilities to juveniles not on probation but not to juveniles not under the jurisdiction of the juvenile court. Sections 51.12(a) and 51.12(j-1) were amended to allow juveniles to be detained in nonsecure correctional facilities prior to adjudication. In addition, Section 54.04(d)(5) was added to give the court the authority to place a child on probation in a nonsecure correctional facility. These facilities are not meant to house juveniles who have not been referred to juvenile court.

O. The State's Role in Regulating Secure and Nonsecure Juvenile Facilities

1. Promulgating Standards for Secure and Nonsecure Facilities

Human Resources Code Section 221.002 requires TJJD to adopt rules for the operation of juvenile justice programs and facilities. In particular, the agency is required to adopt standards for pre-adjudication secure detention facilities, post-adjudication secure correctional facilities, and nonsecure correctional facilities.

> (a) The board shall adopt reasonable rules that provide:
>
> (1) minimum standards for personnel, staffing, case loads, programs, facilities, record keeping, equipment, and other aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services;
>
> (2) a code of ethics for probation and detention officers and for the enforcement of that code;
>
> (3) appropriate educational, preservice and in-service training, and certification standards for probation and detention officers or court-supervised community-based program personnel;
>
> (4) subject to Subsection (d), minimum standards for public and private juvenile pre-adjudication secure detention facilities, public juvenile post-adjudication secure correctional facilities that are operated under the authority of a juvenile board or governmental unit, private juvenile post-adjudication secure correctional facilities operated under a

contract with a governmental unit, except those facilities exempt from certification by Section 42.052(g), and nonsecure correctional facilities operated by or under contract with a governmental unit; and

(5) minimum standards for juvenile justice alternative education programs created under Section 37.011, Education Code, in collaboration and conjunction with the Texas Education Agency, or its designee.

...

(d) In adopting rules under Subsection (a)(4), the commission shall ensure that the minimum standards for facilities described by Subsection (a)(4) are designed to ensure that juveniles confined in those facilities are provided the rights, benefits, responsibilities, and privileges to which a juvenile is entitled under the United States Constitution, federal law, and the constitution and laws of this state. The minimum standards must include a humane physical and psychological environment, safe conditions of confinement, protection from harm, adequate rehabilitation and education, adequate medical and mental health treatment, and due process of law.

2. Inspection of Secure and Nonsecure Facilities

Before 2003, then-TJPC was required annually to inspect all secure juvenile facilities except those operated by then-TYC [both now TJJD]. In 2003, Human Resources Code Section 141.042(d) [now 221.002] was amended to permit those inspections to be made biennially (i.e., every two years). In 2007, subsection (d) was repealed. That same year the legislature added the requirement that then-TJPC annually inspect all public and private secure pre-adjudication detention and post-adjudication correctional facilities (except those operated by then-TYC). Sections 51.12(c-1) and 51.125(c). In 2009, it was mandated that then-TJPC annually inspect every nonsecure correctional facility in the state. Section 51.126(c).

3. Registration of Secure and Nonsecure Facilities

Facility Registry at TJJD. Sections 51.12(i), 51.125(d), and 51.126(d) require the annual registration of all juvenile secure detention, secure post-adjudication, and nonsecure correctional facilities, respectively, with TJJD. Human Resources Code Section 221.002(c) requires TJJD to operate a statewide registry for the facilities. The registry, which is on the TJJD website, provides juvenile justice practitioners and the public with basic information concerning each juvenile facility in Texas.

Revocation of Facility Registration. TJJD may deny, suspend, or revoke the registration of any facility required to register with the agency if the facility fails to adhere to all applicable minimum standards or if it fails to correct in a timely manner any notice of noncompliance with minimum standards. Sections 51.12(m), 51.125(e), and 51.126(e), Family Code.

Ramifications of Failure to Register or Certify Facilities. If a juvenile facility has not been certified and registered as required by the Family Code, the facility may not legally confine juveniles in the facility.

Section 51.12(d) provides:

(d) Except as provided by Subsections (j) and (l), a child may not be placed in a facility that has not been certified under Subsection (c) as suitable for the detention of children and registered under Subsection (i). Except as provided by Subsections (j) and (l), a child detained in a facility that has not been certified under Subsection (c) as suitable for the detention of children or that has not been registered under Subsection (i) shall be entitled to immediate release from custody in that facility.

While Sections 51.125 and 51.126, which govern post-adjudication correctional facilities and nonsecure correctional facilities, do not have a similar statute expressly stating the above principle, the principle is just as applicable to these facilities as to secure detention facilities.

P. Licensed Residential Treatment Facilities in Texas

Family Code Section 54.04(d) authorizes the court or jury to make a disposition of probation with a placement outside the child's home in a suitable public or private residential treatment facility licensed by a state governmental entity or exempted from licensure by state law.

1. State Oversight

The Department of Family and Protective Services (DFPS) is the state agency authorized to license and regulate nonsecure residential treatment facilities where juvenile offenders may be placed as a condition of probation.

2. Requirement for Licensure

Human Resources Code Section 42.041(a) requires residential child-care facilities to be licensed by DFPS unless an exemption applies as detailed in 42.041(b). Human Resources Code Section 42.001(19) defines "residential child-care facility" as a facility licensed or certified by the

DFPS that operates for all of the 24-hour day. The term includes general residential operations, child-placing agencies, foster group homes, foster homes, agency foster group homes, and agency foster homes.

3. Out-of-State Residential Facilities

Juvenile offenders may be placed in an out-of-state residential treatment facility as a condition of probation, but the facility must be licensed by the appropriate state governmental entity in the state where the facility is located or exempted by law from licensure.

Q. Federal Facilities Housing Juvenile Offenders

The federal Bureau of Prisons (BOP) has the legal authority to keep juvenile offenders in BOP custody. The typical juvenile in BOP custody is between 17 and 20 years of age and must have been under 18 at the time of the offense. Most federal juvenile inmates are from Arizona, Montana, and South Dakota because the most severe crimes committed on Native American Reservations are usually taken to federal court.

The BOP contracts with facilities that house juvenile offenders. Title 18 U.S.C. 5039 specifies that "No juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." The definition includes secure facilities and community-based correctional facilities. Federally sentenced juveniles may be moved into federal adult facilities at certain points. Juveniles who are sentenced as adults are moved into adult facilities when they turn 18. Juveniles who are sentenced as juveniles are moved into adult facilities when they turn 21.

The BOP operates or contracts for the operation of federal detention and corrections facilities. The BOP has developed agreements with state and local governments and contracts with privately operated facilities for the confinement of federally adjudicated juveniles and for the detention or secure confinement of some federal inmates.

1. Federal Detention and Corrections Facilities

According to the BOP website, as of May 2018, there were 13 federal prison facilities, including private facilities and federal prison camps, in Texas.

2. ICE Facilities

In 2003, the U.S. Immigration and Customs Enforcement agency (ICE) was created as a division under the Department of Homeland Security. ICE enforces the United States' immigration and customs laws. The Office of Detention and Removal Operations (DRO), housed within ICE, oversees the detention and deportation of immigrants taken into custody by ICE. As of the publication of the 8th edition of this book in 2012, there were 15 ICE facilities in the state of Texas. As of May 2018, there were 24, according to the ICE website.

R. Federal Law Governing Juvenile Facilities

Juvenile institutions are subject to a substantial body of case law and several key federal statutes that detail the minimum environmental conditions for juvenile facilities. The primary federal laws are discussed below.

1. Prison Rape Elimination Act of 2003 (PREA)

The Prison Rape Elimination Act of 2003 (PREA) is the first United States federal law addressing the sexual assault of incarcerated persons. The bill was signed into law on September 4, 2003. The Act is designed to curb prison rape through a zero-tolerance policy, solid protective and investigative procedures in facilities, and research and information gathering. The Act required the development of national standards to prevent incidents of sexual violence in correctional facilities. After years of development, the final PREA rules were published June 20, 2012, and took effect August 20, 2012.

2. Civil Rights of Institutionalized Persons Act (CRIPA)

The Civil Rights of Institutionalized Persons Act of 1980 (CRIPA) authorizes the Civil Rights Division of the U.S. Department of Justice (DOJ) to investigate conditions of confinement in state and local government-operated adult and juvenile institutions to determine if the conditions jeopardize the health and safety of the residents and to initiate litigation when warranted. CRIPA does not authorize the DOJ to represent individuals but rather to take action to remedy systemic problems. This law is a useful tool in eliminating civil rights abuses in juvenile facilities.

3. Violent Crime Control and Law Enforcement Act of 1994

The Violent Crime Control and Law Enforcement Act of 1994 is a comprehensive law which makes it unlawful for an authority, agent, or person acting on behalf of any governmental entity from engaging in a pattern or

practice that deprives incarcerated juveniles or adults of certain constitutional rights, privileges, or immunities. This law also authorizes federal funding for community policies programs and other law enforcement public safety initiatives.

S. Overview of Constitutional Rights of Incarcerated Youth

Incarcerated youth have a constitutional right to certain conditions of confinement under the United States Constitution, federal case law, and federal statutes. Juveniles have the right to protection from violent offenders, abusive staff, unsanitary living conditions, excessive isolation, and unreasonable restraints. Youth must also receive adequate medical and mental health care, education (including special education for youth with a disability), due process, and access to legal counsel, family communication, recreation, exercise, and other programs that are rehabilitative in nature.

These rights can loosely be classified into four fundamental categories: (1) safety, security, and protection; (2) care, treatment, and rehabilitation; (3) education; and (4) due process of law.

1. Safety, Security, and Protection

Incarcerated youth have a constitutional right to be safe and protected from harm and to feel secure in a juvenile facility at all times. This protection encompasses:

(a) Right to life's necessities (adequate food, shelter, sanitation, clothing, and hygienic materials);

(b) Right to be free from undue restraint (unwarranted or excessive use of restraints);

(c) Right to be free from use of excessive force by staff; and

(d) Right to be reasonably protected from harm, which includes:

(1) self-harm;

(2) staff misconduct and violence (assaults);

(3) youth-on-youth violence (assaults);

(4) harm from third parties (volunteers, visitors, contract providers, etc.);

(5) excessive use of disciplinary isolation;

(6) environmental security hazards; and

(7) abusive institutional practices.

To ensure that a youth receives these protections, there are many factors, policies, procedures, and practices that must be addressed in the implementation of these rights. Critical considerations and recommendations include, but are not limited to, the following:

(a) ensure the use of a functioning and responsive grievance system;

(b) implement an adequate abuse, neglect, and exploitation reporting system and investigation protocols in the facility that include:

(1) reporting all allegations of ANE to external social services or law enforcement agencies;

(2) not filtering allegations based upon perceived credibility of youth or merit of allegations; and

(3) restricting accused staff members from contact with youth pending investigation.

(c) ensure adequate staffing levels (i.e., staff to juvenile supervision ratios) are the policy and practice in the facility;

(d) ensure adequate supervision and monitoring of residents on all shifts;

(e) utilize an effective behavior management/modification system or plan including adequate programming and good behavior incentives (i.e. incentive-based behavior management plan);

(f) provide adequate staff pre-service and in-service training to all employees;

(g) establish adequate suicide prevention protocols in policy and practice;

(h) implement adequate and appropriate suicide watch and seclusion monitoring for youth;

(i) ensure adequately available emergency equipment and communications systems;

(j) implement adequate and appropriate policies and procedures on classification and housing of offenders to ensure safety and security;

(k) provide an adequate environmental and facility structure (no security hazards or suicide hazards);

(l) implement adequate fire safety precautions;

(m) implement adequate risk management practices facility wide;

(n) implement adequate sanitation practices and procedures;

(o) implement adequate general safety practices and procedures; and

(p) ensure adequate record keeping, statistics, and documentation.

2. Care, Treatment, and Rehabilitation

Incarcerated youth have a right to appropriate care, treatment, and rehabilitation, which should include the following:

(a) Right to receive adequate medical care, a concept that embraces both mental health treatment and suicide prevention measures; and

(b) Right to receive minimally acceptable rehabilitative treatment and programming that involves individualized treatment, including:

(1) A minimum of one hour of large muscle activity per weekday;

(2) Two hours of large muscle activity per weekend day;

(3) Educational programming during weekdays;

(4) Effective behavior management systems; and

(5) Other structured developmental and rehabilitative activities.

A review of the Department of Justice court cases and settlement agreements regarding juvenile facilities provides a variety of implementation components designed to ensure these rights. Facilities should strive for the following:

(1) adequate medical and mental health initial screening and assessment at intake of emergency suicide risks, psychiatric disorders, medical and dental disorders, substance abuse disorders, developmental disorders, and learning disorders;

(2) adequate medical and mental health full assessment procedures;

(3) access to medical, dental, and mental health care;

(4) adequate suicide prevention protocols, policies, procedures, and practices;

(5) adequate clinical assessment, treatment planning, and case management;

(6) adequate pharmacological and psychopharmacological services and medication management;

(7) adequate counseling and rehabilitative services;

(8) adequate training of all staff having contact with youth;

(9) proactive (preventative) as well as reactive care;

(10) adequate nutrition management;

(11) adequate measures for preserving communications and recordings;

(12) adequate confidentiality safeguards;

(13) adequate quality assurance programs; and

(14) adequate transition and aftercare programs.

3. Education

Each incarcerated youth has a right to special education instruction and resources if the youth has any disabilities. The Individuals with Disabilities Education Act (IDEA) provides youth with protections and includes the following requirements: adequate implementation of Individualized Education Plans, sufficient access to individualized instruction services in accordance with IDEA, and sufficient access to adequate curriculum.

4. Due Process of Law

Incarcerated youth are entitled to due process protections. Extended isolation for punitive purposes may only be imposed if the youth is afforded notice of the charges and after an informal hearing before a staff member or individual not involved in the incident. Youth should receive due process hearings for disciplinary confinement (i.e., punitive isolation) lasting more than 24 hours and for major rule violations that could lead to loss of privileges or

extension of length of stay. Youth should also have an adequate mechanism for appealing the results of due process hearings.

5. Disciplinary Seclusion

Recent studies have shown that the total prison population in Texas in administrative segregation (i.e., solitary confinement or disciplinary seclusion) is higher than the national average. Research suggests that disciplinary seclusion is harmful to the rehabilitation of children with mental health issues and those who have suffered various forms of trauma. In 2013, the legislature added Section 203.016 of the Human Resources Code to require TJJD to collect data concerning the use of disciplinary seclusion in juvenile secure correctional facilities and to make the data available to the public. The statistical information will help to track the number of children segregated, the reasons for segregation, and the duration of the disciplinary seclusion. TJJD adopted rules in 37 Texas Administrative Code Chapter 343 to address these changes, and juvenile probation departments and facilities are required to comply with the data reporting requirements in these rules. In a provision that expired on February 1, 2015, the Criminal Justice Legislative Oversight Committee was required to conduct a review of the administrative segregation policies of secure detention and correctional facilities throughout the state. The requirement was contingent upon the availability of funds from gifts, grants, and donations, and no review was ever conducted.

T. Department of Justice Resources

The Department of Justice website can be found at www.justice.gov. The Special Litigation section on the Civil Rights Division webpage contains information about DOJ investigations, litigation, and settlement decrees in juvenile facilities nationwide and is a productive reference tool for any juvenile facility administrator.

CHAPTER 7: Pre-Trial Proceedings in Juvenile Court

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The Family Code provides time requirements and limitations for many of the procedural steps needed to process a juvenile case. For example, Section 53.07(a) requires that a summons be served at least two days before the hearing. Section 51.10(h) provides that an attorney shall have at least 10 days to prepare for a hearing. Section 53.05(b) provides that, if the respondent is in custody, the date set for the hearing must not be later than 10 working days after the petition is filed. In this chapter, we will discuss time requirements, a child's constitutional right to a speedy trial in juvenile proceedings, and pre-trial discovery in juvenile cases.

Additional time requirements were added in 1999. Specifically, if the child is in detention, the prosecutor must file a petition within 15 or 30 working days of the initial detention hearing (depending on the offense), or else the child is entitled to be released. Juvenile boards may set an earlier deadline to file a petition when a child has not been released from detention. These provisions, Section 54.01(q) and (q-1), are discussed in Chapter 9.

With regard to determining time requirements, the Code Construction Act provides two rules that should be mentioned here. First, when computing the number of days, the first day is excluded and the last day is included. Second, if the last day falls on a Saturday, Sunday, or legal holiday, the time limit is extended to the next day that is not a Saturday, Sunday, or legal holiday. Government Code Section 311.014. The term "legal holiday" includes only the national and state holidays observed by the state of Texas, as listed in Government Code Section 662.003. Government Code Section 662.021.

A. Notice of Hearings

Constitutional Requirements. In *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967), the United States Supreme Court held that, in juvenile proceedings, the United States Constitution requires that a juvenile be provided with adequate notice of the charges against him or her. Such notice has two elements: (1) a specific allegation of the facts that the State will attempt to prove at the hearing, coupled with information as to the time, place, and purpose of the

hearing; and (2) a requirement that the juvenile is provided with that information sufficiently in advance of the hearing to permit the preparation of a defense. The first of these two elements is discussed in Chapter 9. Here, we are concerned with the second element: namely, giving the child notice early enough to permit preparation.

The United States Supreme Court set these constitutional standards in the *Gault* opinion:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity."...[The Constitution requires] that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described.... It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.

387 U.S. at 33-34, 87 S.Ct. at 1446-47.

Texas Family Code Requirements. The Family Code requires a petition that sets forth with "reasonable particularity" the alleged misconduct. Section 53.04(d)(1). This standard is less stringent than the one applicable to criminal indictments in that it requires only that the juvenile be given notice of the offense charged. See *In the Matter of J.B.M.*, 157 S.W.3d 823 (Tex.App.—Fort Worth 2005, no pet.) (petition alleging attempted sexual assault provided fair notice of the offense charged); *In the Matter of J.G.*, UNPUBLISHED, No. 05-08-00750-CV, 2009 Tex.App.Lexis 3094 (Tex.App.—Dallas 2009, no pet.) [allegation including time, place, manner of acts, and penal law allegedly violated by acts provided adequate notice as required under Section 53.04(d)(1)].

The Family Code also requires that there be a summons. Section 53.06(b) provides that "the summons must require the persons served to appear before the court at the time set to answer the allegations of the petition. A copy of the petition must accompany the summons." Section 53.07(a) requires that the summons be served on the juvenile personally at least two days before the day of the adjudication hearing. The requirements of a petition, summons, and two days' notice also apply to discretionary transfer hearings by virtue of Sections 54.02(b) and (k).

The Two-Day Rule. Two days' notice of an adjudication or transfer hearing is a bare minimum of notice. Every effort should be made to serve the juvenile and others much earlier. A good rule of thumb is to provide service at least 10 days before the hearing date since, as the next section indicates, defense counsel is entitled to at least 10 days to prepare.

It is also important to remember that, although two days' notice may satisfy the Family Code, it does not, in all cases, meet the requirements of due process as expressed in *In re Gault*. Whether the constitutional requirement of notice has been met depends upon the facts of each individual case. Therefore, in cases in which a summons has been served on a child shortly before an adjudication or transfer hearing, the juvenile court judge should be mindful of the requirements of due process when evaluating requests on behalf of the juvenile for continuances of a hearing on the ground that shortness of notice precluded adequate preparation for the hearing.

The certification petition and summons were not served on the juvenile respondent in *Mosby v. State*, UNPUBLISHED, No. 05-99-01355-CR, 2000 WL 1618466, 2000 Tex.App.Lexis 7314, Juvenile Law Newsletter ¶ 00-4-17 (Tex.App.—Dallas 2000, no pet.) until the day the hearing was set. However, the court reset the hearing to a date more than three weeks later, and the respondent appeared at that hearing. The Court of Appeals held on authority of *Carner v. State*, 592 S.W.2d 618 (Tex.Crim.App. 1980) (panel op.), that resetting the hearing brought the service into compliance with the two-day rule.

In *McBride v. State*, 655 S.W.2d 280 (Tex.App.—Houston [14th Dist.] 1983, no writ), the juvenile was served with an amended transfer petition the day before the hearing began. The juvenile was transferred but did not appeal the transfer order. After his conviction in criminal court, he appealed and claimed the violation of the two-day notice provision required that his conviction be set aside. The appellate court held that while "it may have been error for the [juvenile] court to hold the hearing only one day after [the child] was served with the State's amended motion, we do not consider this to be fundamental error which is subject to collateral attack [in an appeal from a criminal conviction]." 655 S.W.2d at 283-84. However, the court left open the possibility that, in an appeal from the transfer order, rather than from the conviction, reversal may have been required in these circumstances.

Notice of Disposition Hearings. The Family Code contemplates that no notice of a disposition hearing separate from the petition is required. It further contemplates that, in the discretion of the juvenile court judge, the disposition hearing may immediately follow the adjudication hearing or be set for a later date. The Family Code requires only that "the disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing." Section 54.04(a).

Notice of Modification Hearings. With regard to modifications of disposition, and probation revocation in particular, Section 54.05(d) requires that there be a petition for a modification hearing but, unlike the requirement for adjudication and transfer hearings, does not provide any particular means of giving notice of the hearing nor of any specific time requirements for notice. It simply requires that reasonable notice be given to all parties. The safest way of providing that notice is, of course, to serve a copy of the petition personally on all required persons and to do so sufficiently in advance of the hearing to permit adequate preparation. There is authority that defense counsel is entitled to 10 days' notice to prepare for a modification of disposition hearing, as discussed in the next section.

B. Time for Counsel to Prepare

The 10-Day Rule and Waiver. Section 51.10(h) provides that an attorney representing a child in Title 3 proceedings is entitled to 10 days to prepare for any adjudication or transfer hearing. Unlike a similar provision in Code of Criminal Procedure Article 1.051(e), which applies only to appointed counsel, the Family Code provision applies to both appointed and retained counsel.

In *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App.—San Antonio 1979, no writ), it was suggested that the 10 days could be waived by complying with Section 51.09. Cases that are more recent hold that the attorney can waive the 10-day preparation period without concurrence by the juvenile or compliance with other Section 51.09 formalities. The Waco Court of Appeals held in *R.X.F. v. State*, 921 S.W.2d 888 (Tex.App.—Waco 1996, no writ) (alternative holding) that the right to 10 days to prepare for trial belongs to the attorney, not the juvenile. Accordingly, that right may be waived by the attorney without requiring concurrence of the juvenile under Section 51.09. The Houston First District Court of Appeals arrived at the same conclusion in *Ryan v. State*, UNPUBLISHED, No. 01-96-00592-CR, 1997 WL 187306, 1997 Tex. App.Lexis 2050, Juvenile Law Newsletter ¶ 97-2-20 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd).

What Constitutes a Waiver. Some courts that have held that counsel can waive the 10 days without concurrence by the juvenile client have also held that a waiver that is less than explicit will suffice. In *In re R.M.M.*, UNPUBLISHED, No. 04-98-00442-CV, 1999 WL 191577, 1999 Tex. App.Lexis 2525, Juvenile Law Newsletter ¶ 99-2-16 (Tex. App.—San Antonio 1999, no pet.), the adjudication petition was served on December 3 and trial began December 10. While defense counsel did not have 10 days to prepare for trial, the attorney, by implication, waived that requirement by agreeing to a December 10 trial date. The fact that the court order appointing the defense counsel to the case was not signed until after trial began is immaterial because counsel was representing the juvenile from some undetermined date before trial began.

The Dallas Court of Appeals in *Green v. State*, UNPUBLISHED, No. 05-97-01176-CR, 1999 WL 1125247, 1999 Tex.App.Lexis 9191, Juvenile Law Newsletter ¶ 99-4-14 (Tex.App.—Dallas 1999, pet. ref'd) held that counsel waived the 10 days to prepare for a discretionary transfer hearing by responding "[a]bout eight days, Your Honor" to the juvenile court's question concerning how long he had been on the case. The Court of Appeals stated, "Appellant's attorney did not object to going forward, request a continuance, or indicate he had not had adequate time to prepare. Under these circumstances, we conclude appellant waived any complaint about not having the full ten days to prepare for the transfer hearing." 1999 Tex.App.Lexis 9191 *32. Following that logic, the failure of counsel to object constitutes an implied waiver of the 10 days to prepare for trial.

When the 10 Days Begin. Three conditions must exist before the time begins to run. First, the attorney must have been either retained by the juvenile's family or appointed by the juvenile court. Second, the petition must have been filed with the juvenile court. Third, notice of the contents of the petition and the hearing date must be communicated to the attorney, which may be effected by either serving the petition on the juvenile or notifying the attorney that the petition has been filed so that he or she may promptly obtain a copy of it. Once those three conditions are met, the attorney is in a position to begin preparing for the hearing, and the 10 days should begin to run.

The facts in *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App.—San Antonio 1979, no writ) are helpful. A petition was filed on May 14. The juvenile court ordered a hearing for May 24. The petition and summons were served on the juvenile on May 18, more than two but fewer than 10 days before the hearing. The juvenile's attorney appeared at the May 24 hearing and demanded 10

days to prepare, which was denied by the juvenile court. The Court of Civil Appeals reversed the juvenile court on the ground that the attorney had not been given 10 days to prepare. The opinion does not state whether the attorney was retained or appointed or when he began his representation of the juvenile. In the absence of evidence that counsel was told of the petition the day it was filed, the appellate court could only assume that he did not learn of its contents until the petition was served on his client, which was only six days before the hearing. Therefore, the 10-day requirement was not satisfied.

Modification Hearings. Should the 10-day requirement be applied to hearings for revocation of probation? There are only two cases dealing with that question, and unfortunately, they are not consistent. In *In the Matter of J.C.*, 556 S.W.2d 119 (Tex.Civ.App.—Waco 1977, no writ), the juvenile probationer was arrested for burglary on February 2. Counsel was appointed on February 3. The petition to revoke probation was filed on February 7, and the revocation hearing was held on February 15. The appellate court rejected the argument that counsel was not given 10 days to prepare for the revocation hearing on the ground that the "reasonable notice" requirement of Section 54.05(d) governs, not the 10-day requirement of Section 51.10(h), and that the notice to counsel (in this case eight days before the hearing) was reasonable.

However, in *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App.—San Antonio 1979, no writ), the Court of Appeals held that the 10-day requirement does apply to revocation proceedings because similar language of the predecessor juvenile statute had been so applied in *Franks v. State*, 498 S.W.2d 516 (Tex.Civ.App.—Texarkana 1973, no writ), and there was no evidence the legislature intended to change that rule when the Family Code was enacted.

Until the conflict between the two cases is settled by the Texas Supreme Court or the Legislature, if it ever is, the only safe course of action is to provide counsel for the juvenile with 10 days to prepare for a revocation hearing, just as for an adjudication or transfer hearing. The court will not be reversed for providing the time but may be for not doing so.

C. Time Requirements for Setting Hearings

In 1999, the legislature enacted Section 54.01(p) [now 54.01(q)] to provide that, if the child is in detention, a petition must be filed within 15 or 30 working days of the initial detention hearing (depending upon the offense), as discussed in Chapter 9.

Section 53.05 requires the juvenile court to set a time for a hearing after a petition has been filed. Before its amendment in 1995, it provided that "the time set for the hearing shall not be later than 10 days after the day the petition was filed if...the child is in detention...." In 1995, this was changed to "10 working days." Sections 54.02(b) and (k) make this requirement applicable to transfer hearings as well as to adjudication hearings.

Conflicting Statutory Provisions. Is there a conflict between this provision and the requirement of Section 51.10(h) that counsel must be given 10 days to prepare for a hearing? Logically there is no conflict since if the hearing is conducted at least 10 days after the petition is filed and counsel is notified but before 10 working days after the petition is filed, both requirements have been satisfied.

As a practical matter, however, there is often a conflict between these provisions. The conflict is particularly likely to arise in transfer proceedings, for two reasons: first, the child is more likely to be in detention pending a transfer hearing than an adjudication hearing, and second, the requirement that the juvenile court obtain a diagnostic study of the child must be satisfied before the transfer hearing can be held.

Resolving the Conflict. The courts have heard several cases involving the requirement that the hearing be set within 10 days of the filing of the petition when the child is in detention. One would expect the same results under the law as amended in 1995, only substituting 10 working days for 10 days. The following can be distilled from those cases.

First, although the language of the statute is mandatory, the juvenile court does not lose jurisdiction of a case by failing to conduct a hearing within 10 days of the filing of the petition. The question is whether, in failing to conduct the hearing within that time limit, the juvenile court abused its discretion or deprived the juvenile of due process or the right to a speedy trial. *In the Matter of B.V.*, 645 S.W.2d 334 (Tex.App.—Corpus Christi 1982, no writ). Since no case has found an abuse of discretion or a deprivation of due process or speedy trial in this situation, it is difficult to predict what circumstance would lead a court to reverse a transfer or adjudication because of a delay when the child was in detention.

Second, the language of Section 53.05 merely requires that the hearing be set within 10 days, not that it actually be completed or even begun within that time. In *L.L.S. v. State*, 565 S.W.2d 251 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e), the court made the following observations:

> The requirement that a hearing be set within ten days after the filing of the petition is mandatory, but there is no jurisdictional requirement that the hearing be completed at that time. The requirement for a setting within ten days provides a time for appearance for both parties. The judge can then determine whether the child is adequately represented and what the future schedule of the case should be. Whether the hearing on the state's petition or on its motion to transfer is completed on that date or postponed is a matter within the court's discretion, subject to the constitutional requirement of a speedy trial. Respondent does not contend that the period of the delay in the present case was so long as to constitute a constitutional denial of due process.... We construe the statute as permitting a postponement in the court's discretion and on the court's own motion, so long as the postponement is not for such a long period as to be a denial of due process.

565 S.W.2d at 255.

Third, when the hearing is set and postponed, there is no requirement that the juvenile and defense counsel must have waived the right to have the hearing go forward on the first setting or even that there be a showing of good cause on the record for postponing the hearing. The juvenile court can postpone the hearing on its own motion without a request by the State or the consent of the juvenile. The standard is whether, under all the circumstances, there was a violation of due process. *L.L.S. v. State*, 565 S.W.2d 251 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e).

Fourth, if the juvenile "participated in or was responsible for" the delays, he or she cannot complain on appeal about them. *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, reh'g overruled); *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e). Similarly, one court has held that, unless the juvenile requests the hearing within 10 days, he or she cannot complain on appeal of the delay absent a showing of abuse of discretion or deprivation of due process. *In the Matter of B.V.*, 645 S.W.2d 334 (Tex.App.—Corpus Christi 1982, no writ.).

Fifth, with respect to transfer hearings, the courts have held that delaying the hearing to allow time for conducting the diagnostic studies required by law is justifiable under Section 53.05. *In the Matter of M.I.L.*, 601 S.W.2d 175 (Tex.Civ.App.—Corpus Christi 1980, no writ).

Sixth, although most of the cases have been ones in which the juvenile court set the hearing within 10 days of the filing of the petition but at that hearing then postponed the hearing on the merits to a later date, it is not necessary to proceed in that fashion. In *D.L.H. v. State*, 649 S.W.2d 826 (Tex.App.—Fort Worth 1983, writ ref'd n.r.e.), a transfer hearing was not held until 19 days after the petition was filed. In the meantime, the juvenile court had ordered and obtained the diagnostic study required as part of the transfer proceedings. The hearing was held five days after the study was completed. The juvenile argued that Section 53.05 was violated and that the juvenile court should have set a hearing within the 10 days of the filing of the petition and then postponed it to a later date if the studies were not then completed. The court rejected that argument:

> Why require such an exercise in a situation such as this? We hold it unnecessary to require the court to set a hearing within the 10 days just so they could turn around and postpone it until diagnostic studies were completed. There was no abuse of discretion in the postponement nor excessive delay.

649 S.W.2d at 827.

Similarly, in *Williams v. State*, 834 S.W.2d 613 (Tex.App.—San Antonio 1992, no writ), the Court of Appeals upheld a delay of 49 days between the filing of the petition and the certification hearing when the respondent was in custody. The court held that the statute was directory rather than mandatory and that the delay in that case did not invalidate the certification order, at least in the absence of evidence that it prejudiced the respondent's case.

Although not setting a hearing within the 10 days when the child is in detention has been judicially approved when there is good reason for not doing so, the safer course of action is to set the hearing within 10 days of the filing of the petition. In effect, that hearing can serve as a pre-trial conference, as suggested by the court in *L.L.S. v. State* and discussed previously. The purpose of Section 53.05 is, of course, to prod the juvenile court into giving calendar preference to cases in which the child is held in detention pending adjudication or a transfer hearing and into moving expeditiously toward deciding them.

Texas Supreme Court Guidelines. On December 1, 1984, the Texas Supreme Court adopted non-mandatory guidelines for the disposition of juvenile and other civil cases. The guidelines have been updated periodically, most recently in March 2018, though there have been no change to the juvenile guidelines, save for renumbering.

The guidelines suggest that a detention hearing be held "on the next business day following admission" to detention. The guidelines also suggest that a transfer or adjudication hearing for a detained juvenile be conducted "not later than 10 days following admission to such facility, except for good cause shown of record." They also recommend that, with respect to a juvenile not in detention, the adjudication or transfer hearing be held "not later than 30 days following the filing of the petition, except for good cause shown of record." Finally, they suggest that the disposition hearing be held no later than 15 days after the adjudication hearing.

There is an exception, however; the guidelines are not to "prevent a judge from recessing a juvenile hearing at any stage of the proceeding where the parties are agreeable or when, in the opinion of the judge presiding in the case, the best interests of the child and of society shall be served."

The guidelines, found in the Rules of Judicial Administration Rule 6 and 6.1(d), are recommendations only and are not intended to be mandatory or to carry any sanctions for noncompliance. In *In the Matter of S.D.W.,* 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ), the Court of Appeals considered a claim that it should reverse an adjudication of delinquency and determinate sentence because of a failure to adhere to the guidelines. The Court of Appeals refused and said, "Rule 6 is a discretionary, nonbinding rule, and we will not disturb a judgment for a court's failure to comply with such a rule." 811 S.W.2d at 746.

D. Right to a Speedy Trial

Speedy Trial Act. The Texas Speedy Trial Act, enacted in 1977, previously appeared as Article 32A.02 of the Code of Criminal Procedure. That act provided time limits for the prosecution of cases. It is apparent from the text of the act that it was intended by the legislature to apply to criminal, but not juvenile, proceedings. In Attorney General Opinion No. H-1252 (1978), the Attorney General concluded that the Speedy Trial Act had no applicability to juvenile proceedings. However, when a juvenile was transferred to criminal court for prosecution as an adult, the time limits in the act then became applicable. The time requirements began with the date the juvenile court made the transfer order, not from the time the juvenile was arrested to be brought before the juvenile court. *Sanders v. State*, 651 S.W.2d 810 (Tex.App.—Houston [1st Dist. 1983, no writ); *Garcia v. State*, 673 S.W.2d 696 (Tex.App.—Corpus Christi 1984, pet. dism'd).

In any event, on July 1, 1987, the Court of Criminal Appeals declared the Texas Speedy Trial Act to be unconstitutional because it violated the separation of powers provisions of the Texas Constitution. *Meshell v. State*, 739 S.W.2d 246 (Tex.Crim.App. 1987). The effect of the *Meshell* opinion was to void the Speedy Trial Act. In 2005, the legislature officially repealed Article 32A.02, and so it no longer has any legal effect on criminal or juvenile proceedings. However, an adult defendant's right to a speedy trial is still mandated by Article 1.05 of the Code of Criminal Procedure.

Constitutional Speedy Trial Right. *Grayless v. State*, 567 S.W.2d 216 (Tex.Crim.App. 1978), is the leading Texas case on the question of the constitutional right to a speedy trial in the context of juvenile proceedings. Two years and nine months elapsed from the time of Grayless' arrest until his trial in criminal court for murder, during which time he was continuously in detention of one sort or another.

In evaluating Grayless' speedy trial claim, the Court of Criminal Appeals applied a flexible balancing test established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). That test consists of four parts: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant from the delay.

The Court of Criminal Appeals in *Grayless* noted that the length of the delay was sufficient to give rise to a speedy trial claim. As to the reasons for the delay, the Court analyzed each step of the proceedings before the juvenile and criminal courts and concluded that all but 11 months of the delay were justified. For example, prior to the transfer hearing, Grayless spent five months in a mental hospital undergoing psychiatric evaluation and treatment; the Court found that to be a reasonable delay. After release from the mental hospital, two months elapsed while the required diagnostic studies preparatory to the transfer hearing were conducted, which the Court also found to be a reasonable delay.

The Court also found that Grayless had not promptly asserted his right to a speedy trial and counted that as a factor against him. Finally, Grayless made the following claims as to prejudice from the delay: he was cut off from his schooling; he lost governmental financial assistance for medical treatment and schooling; he was deprived of parental guidance; and his image before the jury was changed because he was 15 years old at the time the offense was committed and 19 years old at the time of trial. 567 S.W.2d at 222.

The Court concluded that none of these prejudices, nor the fact that Grayless was in custody during the entire two years and nine months, was sufficient, when weighed with the other factors, to constitute a violation of the constitutional right to a speedy trial. Although the delay was lengthy, almost all of it was justified.

The Court of Appeals in *In the Matter of D.M.*, 611 S.W.2d 880 (Tex.Civ.App.—Amarillo 1980, no writ) reached a similar conclusion in a case in which there was a delay of 13 months, most of which was caused because the child falsely claimed to be an adult and failed to reveal his true age until after he had been found guilty by a criminal jury. More recently, a delay of five months was deemed not to be "presumptively prejudicial," especially when combined with respondent's failure to request a speedier trial. *In the Matter of J.M.*, UNPUBLISHED, No. 13-04-226-CV, 2005 WL 1910801, 2005 Tex.App.Lexis 6359, Juvenile Law Newsletter ¶ 05-3-35A (Tex.App.—Corpus Christi 2005, pet. denied). Similarly, in *In the Matter of R.C.*, UNPUBLISHED, No. 13-08-00334-CV, 2010 Tex.App.Lexis 815 (Tex.App.—Corpus Christi 2010, no pet.), a nine-month delay "based upon a joint misapprehension by both the State and appellant," combined with appellant's failure to follow up on an attempted agreement for deferred prosecution, did not result in the denial of a speedy trial.

In *In re J.W.G.*, 988 S.W.2d 318 (Tex.App.—Houston [1st Dist.] 1999, no pet.), in a case involving multiple charges of aggravated sexual assault in which the State dismissed an ordinary delinquency petition to pursue determinate sentencing, the Court of Appeals found that a delay of slightly over one year did not violate the respondent's right to a speedy trial. The respondent was in custody only three days during the pendency of the charges. In *In re C.M.*, UNPUBLISHED, No. 04-98-00481-CV, 1999 WL 125423, 1999 Tex.App.Lexis 1560, Juvenile Law Newsletter ¶ 99-2-04 (Tex.App.—San Antonio 1999, no pet.), the Court of Appeals held that a delay of unrevealed length was justified by the respondent's lack of cooperation. The respondent missed two appointments to submit to court-ordered psychological evaluations and a court setting before he was finally placed on electronic monitoring pending adjudication.

E. Discovery in Juvenile Cases

Prior to its amendment in 1995, Section 51.17 provided, "Except when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title." As applied to discovery, that meant that civil, not criminal, discovery rules applied in juvenile proceedings because there was no other provision in Title 3 that spoke to discovery.

Under Texas Rules of Civil Procedure, a party has a right to take the oral deposition of any potential witness. In *M.B. v. State*, 901 S.W.2d 620 (Tex.App.—San Antonio 1995, no writ), the Court of Appeals held that the right to take a deposition in a civil procedure applied to juvenile proceedings and included the right of the respondent to take the deposition of the child victim of an alleged sexual assault. However, in that case the attorney sought court appointment of a court reporter at public expense to record the deposition. Under civil rules, good cause is not required to take a deposition, but it is required for a court to appoint a court reporter at public expense. The attorney failed to show good cause why such an appointment was necessary, so the juvenile court did not err in refusing to appoint a court reporter. As a result, no deposition was taken.

In *R.H. v. State*, 905 S.W.2d 726 (Tex.App.—San Antonio 1995, no writ), the State failed to list the complainant as a person with knowledge relevant to the litigation in response to the juvenile's interrogatory. The Court of Appeals held it was an error for the juvenile court to permit the complainant to testify and reversed the adjudication. By contrast, in *In the Matter of K.B.H.*, 913 S.W.2d 684 (Tex.App.—Texarkana 1995, no writ), the Court of Appeals held it was not an error to permit the juvenile's probation officer to testify at a certification hearing despite not being listed by the State in response to interrogatory as a person with relevant knowledge. The court noted that the juvenile could not have been surprised that his probation officer was called as a witness and that the rules of admissibility of testimony are relaxed in certification hearings.

The Houston First District Court of Appeals has held, in the context of certification proceedings, that the District Attorney's open file policy was good cause for its failure to respond to the juvenile respondent's interrogatories. *In the Matter of C.W.C.*, 920 S.W.2d 387 (Tex.App.—Houston [1st Dist.] 1996, no writ). The Houston Fourteenth District Court of Appeals held that civil discovery rules are not compatible with juvenile proceedings and, therefore, do not apply, despite the language in Section 51.17 prior to its amendment in 1995. *S.D.G. v. State*, 936 S.W.2d 371 (Tex.App.—Houston [14th Dist.] 1996, writ denied).

In 1995, the legislature added 51.17(b), which provides, "Discovery in a proceeding under this title is governed by the Code of Criminal Procedure and by case decisions in criminal cases."

Thus, with regard to offenses committed on or after January 1, 1996, the more restrictive criminal discovery rights apply in juvenile cases. For example, instead of a

right under the Rules of Civil Procedure to take the deposition of a potential witness, a juvenile respondent will have to petition the juvenile court under Article 39.02 of the Code of Criminal Procedure for permission, in the court's discretion, to depose the witness. It must show good cause for taking a deposition under Article 39.02.

The reference to "case decisions in criminal cases" is intended to encompass the various constitutional and common law discovery rights of a defendant in a criminal case, such as the due process right to disclosure from the State of information that is exculpatory or mitigating in nature.

Juvenile Discovery and the Michael Morton Act. In 2013, SB 1611, also known as the Michael Morton Act, amended Article 39.14 of the Code of Criminal Procedure to require the State to disclose exculpatory evidence and other categories of information to comply with the discovery requirements of Brady *v. Maryland*, 373 U.S. 83 (1963); 10 L.Ed.2d 215. The Michael Morton Act was part of an effort toward greater uniformity in discovery throughout the state and stemmed from a conviction inquiry involving the alleged intentional nondisclosure of exculpatory evidence in a high profile murder case in Williamson County, Texas. *Morton v. State,* 761 S.W.2d 876 (Tex.App.—Austin 1988).

Article 39.14 establishes an "open file" policy regarding information in the prosecutor's possession. Specifically, the statute requires the State to produce and permit inspection and electronic duplication, copying, and photographing, by or on behalf of the defendant, with certain limitations and exceptions. Many contend that the 2013 provisions dramatically change plea and discovery practices in both criminal and juvenile proceedings.

Although Section 51.17(b) makes the discovery provisions of the Michael Morton Act applicable in juvenile proceedings, it should be noted that Chapter 58 of the Family Code already confers similar authority to defense counsel and other entities as specified in Section 58.007. In 2013, Section 58.007 was amended to ensure uniformity of access by permitting a child's defense attorney to inspect and make copies of the information in the prosecutor's case file. This authority was carried forward in the major rewrite of Chapter 58 in 2017. Similarly, the "legitimate interest/permission of juvenile court" provisions in Section 58.007 authorize broad records access to a juvenile's attorney without regard to admissibility or the exculpatory nature of the information sought. To that end, Article 39.14 provides an added framework for discovery in juvenile cases. See Chapter 15 for a discussion of the provisions governing access to juvenile records by defense attorneys and prosecutors.

CHAPTER 8: Right to Counsel, Guardian Ad Litem, and Interpreter

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This chapter deals with the juvenile's right to an attorney and the related question of when the court must appoint a guardian ad litem or interpreter.

A. The Constitutional Requirement of Counsel

In the case *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the United States Supreme Court addressed the question of whether it is constitutional to adjudicate a child delinquent and commit that child to a training school for the duration of his or her minority without representation by an attorney. The Court made these observations about the importance of counsel for the juvenile:

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him" [quoting from *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932)].

387 U.S. at 36, 87 S.Ct. at 1448.

The United States Supreme Court concluded there is a constitutional right to counsel and notice of that right:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. at 41, 87 S.Ct. at 1451.

The Supreme Court also indicated that, while the constitutional right to counsel may be waived under certain circumstances, it had not been waived in *Gault*:

> Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had.... They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an "intentional relinquishment or abandonment" of a fully known right [and, therefore, was not a waiver].

387 U.S. at 41-42, 87 S.Ct. at 1451.

B. Family Code Right to Counsel

Right to Counsel at All Stages. The Family Code goes beyond the requirements of the Constitution in several respects. *First*, it provides that the child has a right to counsel "at every stage of proceedings" under Title 3, not just adjudication proceedings. Section 51.10(a). *Second*, although the constitutional right to counsel can sometimes be waived, the Family Code provides that the right to counsel cannot be waived in the following proceedings: (1) discretionary transfer (certification); (2) adjudication; (3) disposition; (4) Chapter 55 (dealing with mental illness or intellectual disability); and (5) modification of disposition if the prosecutor is seeking commitment to TJJD. Section 51.10(b).

In 2009, the Texas Supreme Court considered whether an indigent person adjudicated under the Determinate Sentence Act has a right, under Section 51.10(a)(7), to appointment of counsel in a habeas corpus proceeding filed after the person becomes an adult. *In re Hall*, 286 S.W.3d 925 (Tex. 2009). The writ was filed in juvenile court several years after Hall's transfer to an adult facility. While Title 3 provides for appointment of counsel in juvenile proceedings, the Texas Supreme Court held that Section 51.10(a)(7) "simply does not provide a juvenile offender, who has been transferred to adult prison, with a general right to appointed counsel in post-adjudication habeas corpus proceedings." 286 S.W.3d at 929. It has been noted that this opinion by the Texas Supreme Court re-emphasizes the civil component of juvenile cases. See *In the Matter of R.C.*, UNPUBLISHED, No. 13-08-00334-CV, 2010 Tex.App.Lexis 815 (Tex.App.—Corpus Christi 2010, no pet.).

Appointment of Counsel and Continuation of Representation. Section 51.101 was added in 2001 as part of the Fair Defense Act to address more fully the question of appointment of counsel and the duties of appointed counsel. In 2013, the legislature amended subsection (a) to clarify that an attorney who is appointed prior to the initial detention hearing or in the absence of a parent or guardian continues to represent the child until the case is terminated, the family retains other counsel, or the juvenile court appoints a new attorney.

The purpose of Section 51.101 is to ensure that a juvenile whose family cannot afford to retain counsel will receive prompt, effective assistance of counsel. Section 51.101 divides juvenile cases into those in which the child is detained at the initial detention hearing and those in which the child is released at the initial detention hearing or is released by police or intake. Children with cases in the former category clearly need the assistance of counsel immediately—to secure release if feasible and to begin investigation and preparation of a defense. Children in the latter category may also need counsel, but whether they do or do not will depend on whether the case is handled judicially or non-judicially.

Most counties routinely provide representation for children at detention hearings, often by a public defender or an attorney-of-the-day program. Section 51.101(a) provides that if the child is detained at the initial hearing, such an attorney becomes the attorney of record for the case in its entirety, or at least until another attorney is retained or appointed. Previously, some children were represented at the initial detention hearing, detained, and then held without representation until their second detention hearing. They were represented

by counsel at the second detention hearing, which may or may not have been the same counsel, but the representation was only for that hearing. If a child is detained at the initial detention hearing, that is a good indication that a court petition will be filed; in such a case it is important that counsel begin work on the merits of the case as soon as possible. Section 51.101(a) attempts to encourage that. In addition, counsel for a detained child can sometimes obtain the child's release from detention by developing a release plan that was not feasible or apparent at the initial detention hearing.

In some counties, representation at the initial detention hearing used to be the exception. As a result of legislative changes in 2013, counsel must be appointed before the initial detention hearing. Nevertheless, Section 51.10(c) provides that if a child is not represented at an initial detention hearing and is detained, the court must immediately appoint counsel or order the parents (if financially able to do so) to retain counsel. Section 51.101(b) makes it clear that such an attorney will remain as the attorney of record for the case in its entirety, not merely to represent the child in a future detention hearing.

Sections 51.101(c) and (d) deal with cases in which a court petition is filed when the child was not detained beyond an initial detention hearing. They require, if the family cannot afford counsel, that counsel be appointed within five working days after an adjudication or certification petition is served on the child. Most cases in which a child is not detained beyond the initial detention hearing will terminate without filing a court petition. Those cases will be disposed of by deferred prosecution or supervisory caution. Under Texas law, a child cannot prejudice his or her defense by agreeing to a deferred prosecution, so the law requires the concurrence of an adult to agree to such a disposition, but not necessarily of an attorney. See Section 53.03(a)(2).

On principle, an indigent child not in detention should as quickly as possible have the assistance of counsel to aid the child and family in dealing with the case. However, since these cases are so numerous and since so many of them are destined for non-judicial handling, such a policy would require a substantial expenditure of county resources for attorney fees in cases in which those resources could be better used elsewhere. For that reason, Section 51.101(d) permits the juvenile court to wait up to five working days after the petition has been served on the not-detained child to appoint counsel.

Section 51.101(e) provides a slightly different rule for modification of disposition hearings. See Chapter 13.

Texas Fair Defense Act Requirements for Juvenile Cases. In 2001, the legislature enacted the Texas Fair Defense Act to improve the quality of defense services for the indigent in criminal and juvenile cases. Although most of the act deals with criminal cases, one provision deals directly with juvenile cases. Family Code Section 51.102 provides:

> (a) The juvenile board in each county shall adopt a plan that:
>
> (1) specifies the qualifications necessary for an attorney to be included on an appointment list from which attorneys are appointed to represent children in proceedings under this title; and
>
> (2) establishes the procedures for:
>
> (A) including attorneys on the appointment list and removing attorneys from the list; and
>
> (B) appointing attorneys from the appointment list to individual cases.
>
> (b) A plan adopted under Subsection (a) must:
>
> (1) to the extent practicable, comply with the requirements of Article 26.04, Code of Criminal Procedure, except that:
>
> (A) the income and assets of the child's parent or other person responsible for the child's support must be used in determining whether the child is indigent; and
>
> (B) any alternative plan for appointing counsel is established by the juvenile board in the county; and
>
> (2) recognize the differences in qualifications and experience necessary for appointments to cases in which:
>
> (A) the allegation is:
>
> (i) conduct indicating a need for supervision or delinquent conduct, and commitment to the Texas Juvenile Justice Department is not an authorized disposition; or
>
> (ii) delinquent conduct, and commitment to the department without a determinate sentence is an authorized disposition; or

(B) determinate sentence proceedings have been initiated or proceedings for discretionary transfer to criminal court have been initiated.

The Fair Defense Act requires each juvenile board to devise and make public a plan specifying qualifications for attorneys to be appointed to juvenile cases when the respondent's family cannot afford to retain counsel. The plan is also required to specify a fair method of selecting attorneys from the public list to be appointed to individual cases.

In 2011, the Texas Legislature established the Texas Indigent Defense Commission (TIDC), administratively attached to the Office of Court Administration, to set statewide standards for indigent defense and to provide grants to counties from a fund to improve the quality of indigent defense services. In Fiscal Year 2018, TIDC budgeted approximately $30.6 million in grant funds for Texas counties, with additional funds available for administration costs, research, and innocence projects. TIDC's website contains detailed information on local indigent defense plans, county spending, and case data; reports and other resources are also available. A joint report by TIDC's predecessor agency, the Task Force on Indigent Defense, and the former Texas Juvenile Probation Commission (TJPC) titled *Indigent Defense in the Texas Juvenile Justice System* may also be accessed on TIDC's website.

For a detailed discussion of the statutory requirements for the juvenile board plans, see Dawson, *Juvenile Board Plans for Appointment of Counse*l, 15 State Bar of Texas Section Report Juvenile Law, No. 10, 4 (September 2001).

Responsibility of Judge or Referee/Master/ Associate Judge. In any of the five types of proceedings in which counsel is mandatory under the Family Code, the ultimate responsibility for seeing to it that counsel is provided rests with the juvenile court judge or referee/master/associate judge. Section 51.10(f)(2) requires the court to appoint an attorney if the judge determines that the child's parent is "financially unable to employ an attorney to represent the child." If the judge determines that the parent is financially able to employ counsel but that the child does not have a lawyer, then Sections 51.10(d) and (e) require the juvenile court either to order the responsible parent to retain counsel or to appoint counsel and order the responsible parent to pay the court a reasonable attorney's fee to reimburse the county for payment to counsel. Either type of order can be enforced by contempt of court proceedings directed at the responsible parent.

Payment of Appointed Counsel. Section 51.10(i) provides for the payment of appointed counsel from the general fund of the county according to the schedule in Article 26.05 of the Code of Criminal Procedure.

Indigent Defense Reporting. As part of the Fair Defense Act, juvenile boards are authorized to make an attorney appointment list available to the public under Section 51.10(j). Article 26.04 of the Code of Criminal Procedure requires attorneys who are eligible for court appointments in Title 3 proceedings to submit, no later than October 15th of each year, information for the preceding fiscal year that describes the percentage of the attorney's practice time dedicated to juvenile appointments accepted in the county. The first report was due on October 15, 2014. The TIDC form to facilitate compliance with this reporting requirement is available on the TIDC website, although the agency also developed an online reporting form to streamline the process. In 2013, the legislature enacted a related provision requiring each county to prepare and provide information on the number of appointments under Title 3 of the Family Code and criminal proceedings made to each attorney accepting appointments in the county. Section 79.036, Government Code. The TIDC website contains information on attorney caseloads, practice time figures, and the amount paid to each attorney. TIDC published its findings on appropriate guidelines in criminal trial representation in a January 2015 report. A supplemental report on caseload guidelines for attorney representation in juvenile cases was published in December 2016.

Providing Counsel by Public Defender. Increasingly, counties are turning to various forms of public defender services to provide legal representation for persons charged with crime or delinquency. Since 2001, as a result of the Texas Fair Defense Act, Code of Criminal Procedure Article 26.044 has authorized any county to establish a public defender's office.

The Texas Attorney General was asked whether the commissioners court of a county that has established a public defender's office to handle cases of indigent defendants charged with crime or delinquency would be required to pay the fees of non-public-defender attorneys appointed by the court, which might occur in cases in which two or more juveniles are charged with the same offense so that one lawyer could not represent all respondents. In Attorney General Opinion No. LO 97-063 (1997), the Attorney General said that the commissioners court is required to pay any appointed attorney's fees awarded by a juvenile court unless the court abused its discretion in setting the amount of the fee.

Public Defender's Office Plans. Under Title 3 of the Family Code, juvenile boards must ensure quality and ease of access to legal representation by indigent juveniles and their families under the Texas Fair Defense Act. TIDC sets standards and administers grants to fund indigent services throughout the state. In 2013, the legislature added indigent defense reporting requirements under Section 79.036, Government Code. Each county must submit information to TIDC in odd-numbered years regarding: (1) any plan or proposal submitted to a commissioners court to establish a public defender's office; (2) any plans for the operation of a managed counsel program; and (3) any contract for indigent defense services. The county entity responsible for compliance with the TIDC requirements must also submit information regarding the efficacy of and any revisions to previously submitted plans, proposals, or contracts.

Determining Financial Ability. The Family Code does not set specific standards to determine when a parent is or is not financially able to retain counsel. This must be done initially by each juvenile court judge or by a referee/master/associate judge, if there is one. Each juvenile court has alternative ways to proceed. The judge or referee/master/associate judge could personally question the parent about financial means to employ counsel and make a decision based on that questioning. The judge could ask the probation or intake officer to obtain financial information from the parent and communicate that information to the judge for decision. No matter how it is done, the Family Code requires that ultimately the judge, referee/master/associate judge, or designee must determine whether the parent can afford counsel and proceed accordingly.

Under the Family Code, indigence is determined according to the resources of the parents. Under the Code of Criminal Procedure, it is determined by the resources of the defendant. The Code of Criminal Procedure has a special rule for determining indigence of a juvenile after he or she has been certified and transferred from juvenile to criminal court. Code of Criminal Procedure Article 26.057 provides:

> If a juvenile has been transferred to a criminal court under Section 54.02, Family Code, and if a court appoints counsel for the juvenile under Article 26.04 of this code, the county that pays for the counsel has a cause of action against a parent or other person who is responsible for the support of the juvenile and is financially able to employ counsel for the juvenile but refuses to do so. The county may recover its cost of payment to the appointed counsel and may recover attorney's fees necessary to prosecute the cause of action against the parent or other person.

This provision appears to assume, without saying so, that at the time of the criminal proceedings for which counsel is appointed, the defendant is still a minor—under 18 years of age. In that event, a cause of action against the parents would be appropriate because of the obligation of the parents to support their minor children. However, if the transferred juvenile is over 18, as he or she would be if transferred to criminal court under Section 54.02(j), then this provision is probably not applicable.

Ordering Parents to Retain Counsel. Since the respondent is a minor child, a parent who is financially able to do so is required by law to retain counsel to represent the child in juvenile proceedings in which counsel is mandatory. This requirement is part of the parent's legal obligation to support his or her minor child. Section 51.10(d) requires the court to order the parent or other person responsible for the support of the child to employ an attorney to represent the child if, after giving the person the opportunity to be heard, the court finds he or she is financially able to do so and the child's right to counsel has not been waived under Section 51.09, if it is a case in which waiver is allowed.

When the juvenile court has ordered the parents to employ counsel and they have refused to do so, the court order may: (1) enforce the order through contempt of court under Section 54.07; or (2) appoint counsel and order the parents to pay a reasonable attorney's fee, which court order is also enforceable by contempt of court under Section 54.07. If the latter alternative is selected, which is probably the more workable alternative in this circumstance, the court can order any reasonable attorney's fees to be paid. Under Section 51.10(i), the court is not bound by the schedule adopted in the county for the payment of counsel appointed to represent a child of indigent parents.

Ordering Parents to Reimburse the County for Appointed Counsel. Just because parents are unable to afford to employ counsel on the private market does not mean they are unable, if given time, to reimburse the county for the costs of appointed counsel. In 2003, the legislature recognized that juvenile courts have authority to order parents to reimburse the county for the fees it has paid to counsel appointed to represent their child. Sections 51.10(k) and (l) provide:

(k) Subject to Chapter 61, the juvenile court may order the parent or other person responsible for support of the child to reimburse the county for payments the county made to counsel appointed to represent the child under Subsection (f) or (g). The court may:

(1) order payment for each attorney who has represented the child at any hearing, including a detention hearing, discretionary transfer hearing, adjudication hearing, disposition hearing, or modification of disposition hearing;

(2) include amounts paid to or on behalf of the attorney by the county for preparation time and investigative and expert witness costs; and

(3) require full or partial reimbursement to the county.

(l) The court may not order payments under Subsection (k) that exceed the financial ability of the parent or other person responsible for support of the child to meet the payment schedule ordered by the court.

The reference to Chapter 61 is to the chapter in Title 3 on parental rights and responsibilities, which contains provisions on placing parents under juvenile court orders and on enforcing those orders by contempt proceedings. See Chapter 26 for a discussion of those provisions.

C. Waiver of Counsel Under the Family Code

In any proceedings under Title 3, other than the five in which counsel is mandatory, the child's right to counsel may be waived. Examples of such proceedings are detention hearings and modification of disposition proceedings not involving commitment to TJJD. The Family Code specifically requires that the waiver of counsel must comply with Section 51.09. Sections 51.10(d)(3) and (f)(3).

Waiver of Counsel Requires Counsel. Section 51.09 requires that any waiver of rights be made "by the child and the attorney for the child." Does this mean that a child must have an attorney in order to waive an attorney? The language of Section 51.09 indicates precisely that. The practical effect is that when there is a proceeding before the juvenile court in which counsel can be waived, the juvenile court might as well provide counsel to represent the child in the proceeding, since counsel will have to be provided to secure a waiver in any event.

When Title 3 was introduced in the legislature in 1973, Section 51.09 permitted a waiver of rights to be made by the child "and one of the following: (a) the child's parent; (b) the child's guardian; (c) the child's guardian ad litem; or (d) the attorney for the child." The legislature eliminated references to parent, guardian, and guardian ad litem, thus requiring concurrence by a child's attorney for rights to be waived. This is how we got to the situation in which the law requires counsel to waive counsel.

Waiver in Detention Hearings. Detention hearings present special problems. If a child taken into custody is not released administratively, a detention hearing before a judge or referee must be held not later than the second working day after the child was taken into custody. Section 54.01(a). The child has a right to representation by counsel at the detention hearing under Section 51.10(a)(1) unless the right to counsel is waived. Does this mean that the child must either be provided with counsel, retained or appointed, at the detention hearing or be provided with counsel to waive counsel? Would it ever make sense to provide counsel only to consult with the child about whether the child will be represented at the detention hearing? If counsel is provided for those purposes, would it not make more sense simply to have that attorney represent the child at the detention hearing itself? Very little additional work for the attorney would be involved, given the nature of detention hearings.

Detention Hearings Without Counsel. What should happen if the child does not have an attorney at the detention hearing and an attorney is not immediately available to the court, but the deadline for conducting the hearing is near? Should the court postpone the hearing to allow time to get an attorney? Or should the court conduct the hearing without counsel and provide counsel as quickly as possible thereafter?

The need for a prompt detention hearing indicates the court should conduct the hearing in the absence of counsel. The juvenile may be released as a result of the hearing. Section 54.01(g) provides that nothing the child may say at the detention hearing can be used against him or her in later hearings, so counsel is not needed to protect the respondent's privilege against compelled self-incrimination.

The legislature anticipated that detention hearings could be conducted without counsel when it provided in Section 51.10(c) that:

> If the child was not represented by an attorney at the detention hearing…and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court shall order the retention of an attorney…or appoint an attorney.

The obligation to immediately order retention of an attorney or appoint an attorney arises only when the child is detained as a result of a hearing conducted without defense counsel.

It should be emphasized that conducting a detention hearing without an attorney is authorized only when it is not possible because of the time requirements for such hearings to provide counsel for the child at the hearing. Then the court is required to provide counsel for the child as quickly after the hearing as possible if the child was ordered detained.

Under Section 54.01(h), an order detaining the child lasts for 10 working days. At that time a new detention hearing, this one with counsel, is required, unless the child and attorney waive it under Section 51.09.

Further, Section 54.01(n) provides a right to a de novo (new) initial detention hearing earlier than the expiration of 10 working days when the initial hearing was conducted without counsel:

> An attorney appointed by the court under Section 51.10(c) because a determination was made under this section to detain a child who was not represented by an attorney may request on behalf of the child and is entitled to a de novo detention hearing under this section. The attorney must make the request not later than the 10th working day after the date the attorney is appointed. The hearing must take place not later than the second working day after the date the attorney filed a formal request with the court for a hearing.

The right to demand a de novo detention hearing exists because counsel may have new information to present to the court or a plan for supervision that will permit the child's release from detention.

D. Notice of Right to Counsel

One of the failures the United States Supreme Court found with the Arizona procedures used in the *Gault* case was that the child and parent were never notified of the child's right to counsel. The Family Code requires that notification at several points in the process. Section 54.01(b) requires the court or referee/master to inform the parties of "the child's right to counsel and to appointed counsel if they are indigent" at the beginning of the detention hearing. Section 54.03(b)(5) requires the court, at the beginning of an adjudication hearing, to explain to the persons before it "the child's right to representation by an attorney if he is not already represented." Since counsel is mandatory in most Title 3 proceedings, the requirements of notice are not of great importance—the court cannot proceed without counsel in any event.

Advice by Probation Officer. Not infrequently, a probation officer may be asked by the parents of a juvenile what action they should take on behalf of their child. Should they hire an attorney? Should they ask for a jury trial? The probation officer should not give the advice sought. In *In re Brown*, 201 S.W.2d 844 (Tex.Civ.App.—Waco 1947, writ ref'd n.r.e.), the parents of a child complained on appeal that the probation officer had advised them not to hire an attorney and not to ask for a jury trial. The probation officer denied he had given such advice. The appellate court concluded the parents had not proven their claim but made the following remarks about what a probation officer should do in such a circumstance:

> It is the duty of the Probation Officer to guard and protect the rights of the child proceeded against, and he should never encourage or advise a child or those interested in its welfare not to employ counsel on a pretense that it might irritate the court, but he should, especially where the charge is a serious one, encourage rather than discourage the employment of counsel to take care of the rights of the child.

201 S.W.2d at 856.

Although the *Brown* case is old and was decided under the statutory predecessor to the Family Code, this point seems as correct today as it was then.

Providing Appointment List to Parents. Parents with means to employ counsel are frequently in the dark as to whom they should hire to represent their child. In 2003, the legislature addressed that problem by authorizing a juvenile board to make its appointment list available to the public. Section 51.10(j) provides:

> The juvenile board of a county may make available to the public the list of attorneys eligible for appointment to represent children in proceedings under this title as provided in the plan adopted un-

der Section 51.102. The list of attorneys must indicate the level of case for which each attorney is eligible for appointment under Section 51.102(b)(2).

E. The Requirement That Counsel Be Effective

It is not enough that defense counsel be retained or appointed to represent a juvenile respondent. The constitutional right to counsel also requires that counsel must be effective in representing the client. The Dallas Court of Appeals in *In re K.J.O.*, 27 S.W.3d 340 (Tex.App.—Dallas 2000, pet. denied) held that the constitutional right to counsel in juvenile cases includes the right to effective representation. The court also held that ineffective representation in juvenile cases is determined by the same standards as in criminal cases; that is, whether counsel's performance fell below an objective standard of reasonableness and, if so, whether a reasonable probability exists that, but for counsel's unprofessional errors, a different outcome would have resulted. In the case before it, the Court of Appeals concluded that retained counsel's performance was ineffective because she failed to investigate the case to follow up on leads provided by her client (particularly regarding alibi witnesses) and, following a failed attempt to get her innocence-declaring client to plead guilty, provided lackluster trial representation.

Failure to investigate exculpatory evidence is a common ineffectiveness claim. The Court of Appeals in *Charles v. State*, UNPUBLISHED, No. 14-01-01248-CR, 2003 WL 21511268, 2003 Tex.App.Lexis 5639, Juvenile Law Newsletter ¶ 03-3-17 (Tex.App.—Houston [14th Dist.] 2003), *aff'd by* 146 S.W.3d 204 (Tex.Crim.App. 2004), stated the standards for determining whether a failure to investigate constitutes ineffective assistance:

> [A]ppellant contends that he was denied effective assistance of counsel when his counsel failed to adequately investigate the…facts and circumstances surrounding his written statement and failed to file a motion to suppress. Counsel has a duty to independently investigate the facts of the case.… A criminal defense lawyer has the responsibility to conduct a legal and factual investigation and to seek out and interview potential witnesses.… Indeed, a defense lawyer must have a firm command of the facts of the case, as well as governing law, before he can render reasonably effective assistance of counsel.… We assess counsel's purported decision not to investigate for "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." McFarland, 928 S.W.2d at 501. We will not reverse a conviction unless the only viable defense available to the accused is not advanced and there is a reasonable probability that but for counsel's failure to advance the defense, the result of the proceeding would have been different.

2003 Tex.App.Lexis 5639 *23-24.

The Court of Appeals concluded that there were no legal grounds to suppress the defendant's written confession so it could not have been ineffective assistance for counsel to fail to investigate the matter.

An opposite result was reached in *In the Matter of I.R.*, 124 S.W.3d 294 (Tex.App.—El Paso 2003, no pet.). This case hinged on an alibi witness named Hayden who was supposed to be notified by appellant's mother to testify at the adjudication hearing but was never subpoenaed. Instead, trial counsel filed a motion for new trial and produced Hayden, who testified that I.R. was with him and his family at Elephant Butte Lake and not in El Paso at the time of the offense. The trial court denied the motion for new trial. At the disposition hearing the court granted defense counsel's motion to withdraw and appointed new appellate counsel.

On appeal, the El Paso Court of Appeals applied the two-prong test for ineffective assistance of counsel claims. See *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999). Under the first prong, the court found that defense counsel's trial performance was deficient in failing to subpoena Hayden to testify at the adjudication hearing. The second prong was also met because the lawyer's failure to interview or call Hayden resulted in his inability to advance a viable defense, namely an alibi. I.R.'s testimony during the adjudication hearing had raised the alibi defense, but there was no evidence to corroborate his testimony. Hayden's testimony would not only have corroborated the alibi but also contradicted the State's witnesses, making it impossible for the fact finder to believe both Hayden and the State's witnesses. Furthermore, Hayden's testimony at the motion for new trial hearing did not cure his absence during the adjudication hearing. "Instead, we conclude that there is a reasonable probability—i.e., a probability sufficient to undermine our confidence in the outcome—that the result of the adjudication proceeding would have been different if counsel had subpoenaed Hayden." 124 S.W.3d at 302. The trial court's judgment was reversed and the case was remanded for a new trial. Cf. *In the Matter of F.L.R.*, 293 S.W.3d 278 (Tex.App.—Waco 2009, no pet.) (first prong of *Strickland* test met; second prong failed since there was not a reasonable probability the outcome would have been different but for counsel's deficient performance).

In *In the Matter of D.C.G.*, UNPUBLISHED, No. 14-05-00164-CV, 2005 WL 3116488, 2005 Tex.App.Lexis 9773, Juvenile Law Newsletter ¶ 06-1-06 (Tex.App.— Houston [14th Dist.] 2005, no pet.), appellant claimed ineffectiveness of counsel for failing to strike a juror who was allegedly biased in favor of one of the State's outcry witnesses. During a hearing on appellant's motion for new trial, the juror testified that he knew the outcry witness and thought he was "very truthful in his business dealings" and "seemed honest." The juror also testified that he was fair in this case and that being acquainted with the outcry witness did not affect his verdict. The Court of Appeals held that allowing the juror to remain on the panel did not undermine confidence in the outcome of this case, especially in light of the victim's testimony.

In *In the Matter of A.C.T.*, UNPUBLISHED, No. 04-09-00068-CV, 2010 WL 374392 *3, 2010 Tex.App.Lexis 726 (Tex.App.—San Antonio 2010, no pet.), appellant alleged ineffectiveness because his trial lawyer did not inform him of the State's plea offer and failed to explain the plea bargaining process to him or his mother. Appellant raised his ineffectiveness claim in a motion for new trial, including affidavits. In his affidavit, the lawyer responded that he had discussed the State's offer of a 10-year determinate sentence with his client and mother "several times," and specifically recalled having a conversation with them on this issue on the Saturday before trial. The Court of Appeals held that the trial court did not abuse its discretion in allowing appellant's motion for new trial to be overruled by operation of law, noting that "[t]he trial court was entitled to resolve the issue on the basis of affidavits alone, and to make a credibility determination between the conflicting affidavits." 2010 Tex.App.Lexis 726 *9. The Court of Appeals further held that, given the conflicting affidavits presented for review, appellant had failed to meet his burden of proving that his trial counsel's performance was deficient.

Claims of ineffectiveness often arise from the failure of counsel to object to the admission of evidence. When that is the claim, the first step is to determine whether an objection, had it been made, would have been well grounded in the law. For example, in *Price v. State*, UNPUBLISHED, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex.App.Lexis 2852, Juvenile Law Newsletter ¶ 02-2-15 (Tex.App.—Dallas 2002, no pet.), the Court of Appeals rejected the argument that counsel was ineffective in failing to object to the completeness of a certification report when the court determined that the report was complete, failing to make a hearsay objection to statements the court determined were not hearsay, and failing to preserve error relating to admission of a confession on the grounds it was obtained in violation of Family Code provisions when there was no evidence in the record that the Family Code had been violated. See *In re R.D.B.*, 102 S.W.3d 798 (Tex.App.—Fort Worth 2003, no pet.) (claim of ineffective assistance at disposition for failure to challenge information in foster home progress report rejected because no showing that any of the information in the reports was not accurate); *Marthiljohni v. State*, UNPUBLISHED, No. 13-03-687-CR, 2005 WL 1832455, 2005 Tex.App.Lexis 6194, Juvenile Law Newsletter ¶ 05-3-30B (Tex.App.—Corpus Christi 2005, no pet.) (counsel not ineffective for failing to object to examining psychiatrist's testimony); *In the Matter of R.N.*, UNPUBLISHED, No. 02-03-179-CV, 2004 WL 362302, 2004 Tex.App.Lexis 1942, Juvenile Law Newsletter ¶ 04-2-04 (Tex.App.—Fort Worth 2004, no pet.) (counsel's performance in not raising a due process notice objection did not fall below objective standards of reasonableness).

However, in *Ex parte Hall*, UNPUBLISHED, Nos. AP-75,868 and AP-75,869, 2008 WL 748648 *1, 2008 Tex.Crim.App.Unpub.Lexis 216 (Tex.Crim.App. 2008), the Court of Criminal Appeals granted habeas corpus relief in a case in which applicant argued "that his trial counsel rendered ineffective assistance because counsel failed to know the law concerning use of a prior juvenile conviction for enhancement and caused a plea of 'true' to be entered to a juvenile conviction that was unavailable for enhancement." 2008 Tex.Crim.App.Unpub.Lexis 216 *1. As a result, applicant's cases were remanded to the trial court for new punishment proceedings.

Defenses to claims of ineffectiveness often involve presenting plausible strategic reasons for counsel's actions or failures to act. When counsel's conduct can be attributed to deliberate strategic choice, rather than to ignorance or other unacceptable reasons, the claim of ineffectiveness will almost certainly fail. For example, in *Montgomery v. State*, UNPUBLISHED, No. 07-00-0574-CR, 2002 WL 31778661, 2002 Tex.App.Lexis 8878, Juvenile Law Newsletter ¶ 03-1-09 (Tex. App.—Amarillo 2002, pet. ref'd), the claim was made that counsel was ineffective in certification proceedings because a complete diagnostic study was not conducted as required by law. The Court of Appeals rejected this claim because the study was not conducted at the request of defense counsel:

> The record shows that the State filed a motion seeking to have psychiatric and psychological examinations performed on appellant including an examination for "competency and fitness to proceed." The court had ordered a diagnostic study, social evaluation, and full investigation of appellant, his circumstances and the circumstances of the alleged offense to be performed which is required

> prior to a waiver of original jurisdiction by the juvenile court. See Tex.Fam.CodeAnn. §54.02 (Vernon 2002). That report indicates that psychiatric and psychological examinations were not performed at the request of appellant's counsel. A letter from appellant's counsel requesting that no such testing be conducted was also attached to the report. Thus, it appears that counsel considered the situation and made an affirmative decision to forego testing. He may well have had a legitimate reason for deciding as he did. Indeed, the decision could have been made to prevent appellant from having an opportunity to make incriminating statements or to add fodder to the State's argument that appellant had the mental faculty of an adult. Yet, we are left to simply guess about those reasons. And, most importantly, counsel was not afforded an opportunity to explain them. So, the record does not show on its face that the decision of counsel was something other than reasonable trial strategy.

2002 Tex.App.Lexis 8878 *19-20. See also *In the Matter of S.C.*, 229 S.W.3d 837 (Tex.App.—Texarkana 2007, pet. denied) (choosing alternate defensive theory not ineffective assistance of counsel); *Ex parte Simpson*, 260 S.W.3d 172, (Tex.App.—Texarkana 2008, pet. ref'd) (defense counsel's failure to contest jurisdiction due to arguably improper transfer from juvenile court was product of a reasonable trial strategy); *Bufford v. State*, UNPUBLISHED, No. 08-02-00478-CR, 2004 WL 1903542, 2004 Tex.App.Lexis 7801, Juvenile Law Newsletter ¶ 04-4-01 (Tex.App.—El Paso 2004, no pet.) (failure to object to questioning about juvenile adjudication was part of sound trial strategy).

The nature of the presumption that counsel had strategic reasons for the conduct claimed to be ineffective was explained in *In re Y.R.C.*, UNPUBLISHED, No. 14-02-00404-CV, 2003 WL 21025817, 2003 Tex.App.Lexis 3946, Juvenile Law Newsletter ¶ 03-2-36 (Tex.App.— Houston [14th Dist.] 2003, no pet.):

> When we review ineffectiveness claims, our scrutiny of counsel's performance must be highly deferential.… A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances.… A fair assessment of attorney performance requires making every effort to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time.
>
> The presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct.… Instead, without evidence of counsel's reasons for the challenged conduct, an appellate court "'commonly will assume a strategic motivation if any can possibly be imagined,' and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it." *Garcia*, 57 S.W.3d at 440 (quoting 3 W. LaFave, et al., Criminal Procedure Section 11.10(c) (2d ed. 1999).

2003 Tex.App.Lexis 3946 *6-7.

In the case before it, the Court of Appeals concluded that counsel may not have objected to evidence of extraneous offenses because the trial court had overruled the initial objections made on that ground and counsel may have believed that to object further would call the attention of the jury to the offenses but not keep evidence of them out of the trial. See also *In the Matter of A.B.*, 133 S.W.3d 869 (Tex.App.—Dallas 2004, no pet.) (without specific explanation for counsel's failure to object to trial judge's statements, appellant could not overcome presumption that challenged action was sound trial strategy); *In the Interest of R.L.R., III*, UNPUBLISHED, No. 14-06-00926-CV, 2008 Tex.App.Lexis 879 (Tex.App.—Houston [14th Dist.] 2008, no pet.) (absent a contrary showing in the record, counsel's lack of objecting was part of valid trial strategy); *Medlin v. State*, UNPUBLISHED, No. 11-03-00111-CR, 2004 WL 743950, 2004 Tex.App.Lexis 3201, Juvenile Law Newsletter ¶ 04-2-15 (Tex.App.—Eastland 2004, no pet.) (referring to client as "stupid" and "hard-headed" could have constituted sound trial strategy).

F. Guardian Ad Litem

Guardian Ad Litem Not Required When Parent Present. A guardian ad litem is an adult appointed by a court to care for the interests of a child who is a party to litigation. Prior to the enactment of Title 3, Texas courts had held that every juvenile must have a guardian ad litem appointed, even when that juvenile was represented by counsel and had one or both parents present in court. Section 51.11 redefines the role of the guardian ad litem. It provides that the juvenile court is not required to appoint a guardian ad litem if either parent or a guardian appears with the child, since the parent or guardian can be assumed, along with counsel, to be actively protecting the interests of the child. In that circumstance, a guardian ad litem is superfluous. Texas courts have

applied Section 51.11 to relieve the juvenile court of the obligation to appoint a guardian ad litem for the child if one of the child's parents is present in court. *In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e and reh'g overruled).

Guardian Ad Litem Authorized When Parent Unable or Unwilling. Section 51.11(b) empowers the juvenile court to appoint a guardian ad litem for the child if "it appears to the juvenile court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings." In *In the Matter of P.A.C.*, 562 S.W.2d 913 (Tex.Civ.App.—Amarillo 1978, no writ), the child contended that the juvenile court should have appointed a guardian ad litem in the transfer proceedings because his father, who was present in court, had given the police an affidavit, which was introduced into evidence, that tended to implicate the juvenile in the offense charged. Without disclosing the contents of the affidavit, the appellate court rejected this claim on the ground that the "affidavit reveals nothing which would require the court to view the father's position as adverse to [the child] or cause the court to believe that he was unwilling to make decisions in the best interest of the child." 562 S.W.2d at 917.

Section 51.11(c) prohibits appointing a "law enforcement officer, probation officer, or other employee of the juvenile court" as guardian ad litem. It does, however, authorize the court to appoint the child's attorney also to be the guardian ad litem. There is sometimes a potential conflict of interest in the role to be served by an attorney as guardian ad litem and as attorney for the child. When the attorney as guardian perceives the best interests of the juvenile in different terms than the client expresses to the attorney as defense counsel, a potential conflict exists that should be brought to the attention of the juvenile court by the attorney in a motion for appointment of another person as guardian ad litem. See *In the Matter of J.E.H.,* 972 S.W.2d 928 (Tex.App.—Beaumont 1998, reh'g overruled), in which the possibility of such a conflict was raised with the juvenile court in the context of a release/transfer hearing under the Determinate Sentence Act but in which an actual conflict, if it materialized, was not brought to the attention of the court.

De Facto Guardian Ad Litem. The juvenile respondent in *Flynn v. State*, 707 S.W.2d 87 (Tex.Crim. App. 1986), appeared for his transfer hearing represented by counsel and accompanied by his aunt, who had cared for him in her home since he was three days old. After transfer, he contended that the juvenile court erred in failing to appoint a guardian ad litem as required by Section 51.11(a) since the aunt was not his parent or guardian.

The Court of Criminal Appeals held that the juvenile court had erred, but that the error was, under these particular circumstances, harmless:

> In the circumstances of this case…we find the error to have been harmless. Commentary to §51.11 of the Family Code reasons that:
>
> > "A basic principle of this code is that every child who appears before a juvenile court must have the assistance of some friendly, competent adult who can supply the child with support and guidance."
>
> 5 Tex.Tech L.R. 529 (1974). In the instant case appellant was accompanied at the certification hearing by the woman who had raised him all his life and whom he thought of as his mother. No one was more likely to render him friendly support and guidance. [Appellant's aunt] should have been appointed appellant's guardian ad litem, but even without court order she served in essentially that capacity. We find that the spirit, if not the letter of the statute was met and the error complained of therefore harmless.

707 S.W.2d at 89.

Neither of the juvenile's parents in *In re J.A.S.*, UNPUBLISHED, No. 03-99-00327-CV, 2000 WL 490717, 2000 Tex.App.Lexis 2712, Juvenile Law Newsletter ¶ 00-2-20 (Tex.App.—Austin 2000, no pet.) appeared at their son's adjudication hearing, but his adult aunt and uncle were present. The juvenile court did not appoint a guardian ad litem. On appeal, the Court of Appeals held that it was error for the court not to appoint a guardian ad litem, but it was not harmful error. The aunt and uncle were supportive of the respondent even to the point of volunteering to have him live with them while on probation. They were de facto guardians ad litem.

In contrast, in *In the Matter of A.G.G.,* 860 S.W.2d 160 (Tex.App.—Dallas 1993, no writ), the Court of Appeals reversed an adjudication accompanied by a 20-year determinate sentence. As an alternative ground for the reversal, the court found that the juvenile court had erred in failing to appoint a guardian ad litem for the child. While the juvenile's grandmother was present during the adjudication hearing, the Court of Appeals found she could not under *Flynn v. State* be a de facto guardian ad litem, because she testified against her grandchild. She

was not, therefore, rendering friendly support and guidance for the child under *Flynn*.

Subsequently, Courts of Appeals have distinguished the *A.G.G.* case. The juvenile respondent in *In the Matter of P.S.G.*, 942 S.W.2d 227 (Tex.App.—Beaumont 1997, no writ) was on trial for the aggravated sexual assault of his sister. Respondent's mother was also the mother of the victim. The mother was in court during the trial and testified as a witness for the respondent during the dispositional phase of the case. Under these circumstances, the juvenile court did not err in failing to take action on its own motion to appoint a guardian ad litem for the respondent. The conflict of interest, if it existed, was not apparent to the juvenile court judge. Cf. *In the Matter of J-M.W.D.*, UNPUBLISHED, No. 04-08-00908-CV, 2009 Tex.App.Lexis 7094, Juvenile Law Newsletter ¶ 09-4-4 (Tex.App.—San Antonio 2009, no pet.) (although appellant's mother may have supported court's decision to commit her son to TYC, nothing in the record suggested that she was unable or unwilling to make decisions in his best interest).

In *M.E.S. v. State*, UNPUBLISHED, No. 05-96-01236-CV, 1997 WL 351240, 1997 Tex.App.Lexis 3358, Juvenile Law Newsletter ¶ 97-3-17 (Tex.App.—Dallas 1997, no writ), the juvenile respondent's mother was also the victim of the attempted murder for which the juvenile was standing trial. She testified for the State in the case. The Court of Appeals distinguished its prior decision in *A.G.G.* on the ground there was no parent or guardian present in that case. In this case, the juvenile's mother was present, albeit in her role as witness for the State. The juvenile court did not abuse its discretion in failing to appoint a guardian ad litem. Further, defense counsel functioned as de facto guardian ad litem in the trial. See also *In the Matter of W.D.M.*, UNPUBLISHED, No. 08-01-00332-CV, 2003 WL 757846, 2003 Tex.App.Lexis 1966, Juvenile Law Newsletter ¶ 03-2-03 (Tex.App.—El Paso 2003, no pet.).

In *In the Matter of L.A.P.*, UNPUBLISHED, No. 04-07-00143-CV, 2008 Tex.App.Lexis 847 (Tex.App.—San Antonio 2008, no pet.), appellant argued that the trial court erred by not appointing a guardian ad litem to represent her interests since her father was the complainant and both parents objected to her placement on probation at home. She further claimed this denied her the assistance and guidance of a friendly adult. The San Antonio Court of Appeals disagreed, noting that when a parent is present, the trial court has the discretion to appoint a guardian ad litem if the parent is not capable or willing to make a decision in the best interest of the child. See Section 51.11(b).

> Here, the trial court was not required to appoint a guardian ad litem because L.A.P.'s father was present during the initial adjudication and disposition hearing and both parents were present at the continuation hearing the next day. Furthermore, there is nothing in the record suggesting that L.A.P.'s parents were not capable or willing to make decisions in L.A.P.'s best interest. In fact, both parents testified they were worried not only for their own safety but also for L.A.P.'s safety. Moreover, the trial court agreed that probation outside of the home was in L.A.P.'s best interest. Thus, the trial court did not abuse its discretion by failing to appoint a guardian ad litem.

2008 Tex.App.Lexis 847 *10-11.

In *In the Matter of J.T.*, UNPUBLISHED, No. 05-97-00823-CV, 1998 WL 351268, 1998 Tex.App.Lexis 3998, Juvenile Law Newsletter ¶ 98-3-15 (Tex.App.—Dallas 1998, no pet.), the juvenile complained of the failure of the juvenile court to appoint a guardian ad litem for him in a hearing in which he was transferred from TYC to the Texas Department of Criminal Justice (TDCJ) under the Determinate Sentence Act. The Court of Appeals rejected the argument that the juvenile's grandmother, who was present at the hearing and testified in his favor, was not a de facto guardian ad litem, thus distinguishing *A.G.G.:*

> [A]ppellant's grandmother, who raised appellant, appeared in court with appellant and testified in his favor. Appellant's grandmother stated that appellant could live with her when released from TYC. She believed appellant had learned his lesson while at TYC and asked that the trial court not transfer appellant to TDCJ. To show his grandmother did not provide him with friendly support and guidance, appellant relies on statements she made on cross-examination in which she denied knowledge that appellant was involved in an aggravated robbery. She also admitted placing appellant in a juvenile facility when he was younger. We do not agree that these statements show that appellant's grandmother did not act as a *"de facto"* guardian ad litem.

1998 Tex.App.Lexis 3998 *5-6.

G. Interpreters for Parents and Others

The respondent in *In the Matter of G.I.*, UNPUBLISHED, No. 05-95-01323-CV, 1997 WL 303754, 1997 Tex.App.Lexis 2938, Juvenile Law Newsletter ¶ 97-3-07 (Tex.App.—Dallas 1997, no pet.), argued that the juvenile court should have appointed an interpreter to assist his

father in understanding the proceedings in juvenile court. He made that claim under Code of Criminal Procedure Article 38.30. The Court of Appeals said that, assuming that provision applies to juvenile proceedings, it applies only to parties and witnesses, and the respondent's father was neither. Of course, that argument misses the definition of party in Section 51.02(10) that includes "the child's parent." However, there was evidence that the father spoke some English and defense counsel had interpreted part of the proceedings for the father. Accordingly, the juvenile court did not abuse its discretion in not appointing an interpreter for the respondent's father. See also *In the Matter of T.V.*, 148 S.W.3d 437 (Tex.App.—El Paso 2004, no pet.) (no due process violation where record showed proceedings were interpreted for mother who understood them).

In 2003, the legislature provided for language interpreters and interpreters for the deaf for parents and others in juvenile proceedings. Section 51.17 provides, in pertinent part:

> (d) When on the motion for appointment of an interpreter by a party or on the motion of the juvenile court, in any proceeding under this title, the court determines that the child, the child's parent or guardian, or a witness does not understand and speak English, an interpreter must be sworn to interpret for the person as provided by Article 38.30, Code of Criminal Procedure.
>
> (e) In any proceeding under this title, if a party notifies the court that the child, the child's parent or guardian, or a witness is deaf, the court shall appoint a qualified interpreter to interpret the proceedings in any language, including sign language, that the deaf person can understand, as provided by Article 38.31, Code of Criminal Procedure.

Any party, which under Section 51.02(10) includes the child, the State, or a parent, spouse, guardian, or guardian ad litem of the child, may request an interpreter. An interpreter may be appointed for the child, the child's parent or guardian, or a witness. Failure to object to an unsworn witness or an interpreter waives any complaint on appeal. See *In the Matter of F.J.R.* UNPUBLISHED, No. 11-07-00342-CV, 2009 Tex.App.Lexis 5117 (Tex.App.—Eastland 2009, no pet.); Texas Rules of Appellate Procedure 33.

In 2009, the Attorney General was asked whether an interpreter must translate foreign language materials for the district attorney in preparation for a criminal proceeding and whether such work is subject to the compensation provisions of Article 38.30(b) and (c). Attorney General Opinion No. GA-0696 (2009). The Attorney General answered the question in the negative, noting that while an interpreter appointed under Article 38.30 must appear before the judge or court to interpret for a witness or the person charged with an offense, an interpreter is not required to translate for the district attorney in preparation for criminal proceedings. "Interpreters appointed under article 38.30 do not perform translation work for the district attorney in preparation for a criminal proceeding, and accordingly compensation under article 38.30 does not cover such work." Presumably, the same would hold true in juvenile proceedings.

CHAPTER 9: The Prosecuting Attorney and the Petition, Summons, and Service

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This chapter deals with the pleadings that must be filed in juvenile cases and with notifying appropriate persons of the issues to be litigated and of the time and place of the hearing. The petition provides notice of the issues that will be litigated. It charges the child with delinquent conduct or conduct indicating a need for supervision (CINS) and identifies the child and those other persons who should be informed of the proceedings. The summons informs those concerned of the time and place of the hearing. The petition and summons must be served to provide the appropriate persons with sufficient notice of the hearing.

The Family Code recognizes two kinds of petitions: petition for an adjudication hearing and petition for a transfer hearing. Section 53.04(a). The case law, however, recognizes a motion for transfer, which can be substituted for a petition for a transfer hearing and which is often used when a petition for adjudication was filed before a decision was made to seek certification to criminal court. Calling the certification pleading a motion rather than a petition has no legal consequences. For example, it does not excuse the State from serving the pleading personally on the juvenile respondent.

A. Making the Filing Decision

The Preliminary Investigation. Section 53.04(a) provides that a petition for adjudication or transfer hearing may be filed only if the preliminary investigation required by Section 53.01(a) was conducted and that investigation resulted in affirmative answers to the two questions presented by Section 53.01(a)—that the person referred to the court is a child and that there is probable cause to believe the person committed delinquent conduct or CINS.

Under 1995 amendments to Section 53.01, intake officers must refer certain types of cases to the prosecutor. In those cases, the prosecutor must, under Section 53.012, determine whether there is probable cause to believe the person referred committed delinquent conduct or CINS. The prosecutor is authorized to file a petition in cases in which he or she finds probable cause even if the intake officer has found that probable cause does not exist.

See Chapter 5 for a discussion of the preliminary investigation and the findings required.

Statute of Limitations. Criminal limitation periods measure the maximum time that can elapse between commission of an offense and filing of formal charges. Civil periods measure the time from the accrual of a cause of action to the filing of a lawsuit based upon it. Prior to amendment in 1997, the Juvenile Justice Code did not address whether civil or criminal statutes of limitations are applicable. Section 51.19, enacted in 1997, provides that the criminal limitation periods established by Chapter 12 of the Code of Criminal Procedure apply to juvenile proceedings. Under Chapter 12, there is no statute of limitations for murder and manslaughter, various sexual assault and sexual abuse offenses committed against young children, indecency with a child, leaving the scene of an accident if it resulted in the death of a person, and certain human trafficking offenses. Code of Criminal Procedure Article 12.01(1).

Prior to 2007, certain offenses in which the victim was a child under the age of 17 had a statute of limitations of 10 years beyond the child victim's 18th birthday. In 2007, the law was changed to increase that statute of limitations to 20 years from the 18th birthday for certain sex-related offenses. The statute of limitations applies to the following offenses: (1) sexual performance by a child; (2) aggravated kidnapping with intent to violate or abuse the victim sexually; and (3) burglary with the intent to commit sexual assault of a child, aggravated sexual assault of a child, or continuous sexual abuse of a child. That same year, the legislature changed the statute of limitations on injury to a child from ten years from the offense date to ten years from the child victim's 18th birthday.

In 2011, trafficking of persons, compelling prostitution, and bigamy offenses involving a child under the age of 18 were added to the statute of limitations under Chapter 12 of the Code of Criminal Procedure. There is a 10-year limitation for certain types of theft, forgery, first degree felony injury to an elderly or disabled individual, sexual assault, and arson. Code of Criminal Procedure Article 12.01(2).

Additionally, there are seven-, five-, and three-year periods for other types of felonies. The residual felony limitation period is three years and the misdemeanor limitation period is two years. Thus, for some offenses, the period of limitations is shorter under criminal rules than it would have been under civil rules. However, for the serious offenses in which limitations are likely to be a problem, the criminal rules permit more delay in instituting proceedings.

The limitation periods in Chapter 12 of the Code of Criminal Procedure govern unless the statute defining the offense provides otherwise. If neither the Code nor a special statute speaks to the limitation issue, as would be the case for non-criminal conduct, such as running away from home, then Family Code Section 51.19(c) provides a default period of two years.

Section 51.19 also provides that the procedures specified in Chapter 12 of the Code of Criminal Procedure apply in juvenile proceedings. Examples would be the rule in Article 12.04 regarding computing time for determining whether the applicable limitation period has been satisfied and excluding from the computation any period when the suspect was out of state, as provided by Code of Criminal Procedure Article 12.05.

Under the Code of Criminal Procedure, it is important to determine when an indictment or information is presented because that determines whether the applicable limitation period has been met. Family Code Section 51.19(b) provides:

> For purposes of computing a limitation period, a petition filed in juvenile court for a transfer or an adjudication hearing is equivalent to an indictment or information and is treated as presented when the petition is filed in the proper court.

Section 51.19 applies only to offenses committed on or after September 1, 1997.

Time Requirements for Filing Petition. If a petition is to be filed, it must be filed "as promptly as practicable." Section 53.04(a). Section 53.012, added in 1995, requires the prosecutor to "promptly review the circumstances and allegations of a referral...for legal sufficiency and the desirability of prosecution."

Except when the child is in custody, there is no specific time requirement for filing a petition and there are no cases interpreting the statutory requirement that it be filed "as promptly as practicable." The child's constitutional right to a speedy trial places some limitations on how long a delay there may be when a child was taken into custody but is no longer being detained before a petition must be filed. That period is quite long. See Chapter 7.

In 1999, the legislature enacted Section 54.01(q). It requires that, if a child is in detention, a petition must be filed within 30 working days of the initial detention hearing for a charge of capital murder, a first degree felony, or an aggravated controlled substance felony and within 15

working days for any other offense. If those requirements are not met, the court "shall order the child released from detention." Failure to comply means the child is released from detention, but it does not preclude the State from later filing a petition. If the child is in detention, there is a requirement that an adjudication hearing be set for a date within 10 working days after the petition has been filed. Section 53.05(b). See Chapter 7.

In 2005, the legislature supplemented Section 54.01(q) with Subsection (q-1). It authorizes juvenile boards to set an earlier filing deadline than the 30- and 15-day deadlines specified in subsection (q) when a youth has not been released after an initial detention hearing and a petition has not yet been filed. The subsection also specifies the consequences of failing to meet those deadlines. As a result, juvenile boards may authorize, but not require, the juvenile court to release a child from detention for a prosecutor's failure to file a petition by the juvenile board's deadline.

Prosecuting Attorney Files the Petition. Section 53.04(a) provides that the petition must be made by "a prosecuting attorney who has knowledge of the facts alleged or is informed and believes that they are true." A petition must be drafted or at least approved by a prosecuting attorney before it may be filed.

Section 51.02(11) defines a prosecuting attorney as "the county attorney, district attorney, or other attorney who regularly serves in a prosecutorial capacity in a juvenile court." Whether, in those counties with dual prosecution offices, the juvenile prosecutor is in the county attorney's office or district attorney's office is totally a matter of local choice and tradition. Occasionally, juvenile prosecuting responsibility is fixed by statute. For example, Human Resources Code Section 152.1131(d) provides that the county attorney is the primary juvenile prosecutor in Henderson County.

In *Roberts v. Lowry*, 742 S.W.2d 747 (Tex.App.—Houston [1st Dist.] 1987, no writ), the authority of the Harris County District Attorney's office to represent the State in juvenile proceedings was unsuccessfully challenged. The argument was made that, because under Government Code Section 43.180 the Harris County D.A. has authority only in criminal and habeas corpus cases, the office lacks authority in juvenile cases. However, the Court of Appeals held that Family Code Section 51.02(11), which defines a juvenile prosecuting attorney to include a district attorney, provided that authority. The same argument was made, with the same result, in *Vitek v. State,* 754 S.W.2d 365 (Tex.App.—Houston [14th Dist.] 1988, no writ).

Disqualification of the Prosecuting Attorney. Under certain circumstances, a prosecuting attorney may become disqualified from representing the State in a juvenile proceeding because he or she previously represented the juvenile now being prosecuted. In *In the Matter of S.C.*, 790 S.W.2d 766 (Tex.App.—Austin 1990, writ denied), the appellant had been tried under the Determinate Sentence Act for murder. One of the assistant district attorneys representing the State in the murder trial had several years earlier represented the respondent in a detention hearing in an unrelated assault case. Respondent contended the prosecutor should have been disqualified from representing the State because of that prior representation of him. The Court of Appeals held the assistant district attorney was not disqualified because there is no evidence that any information he may have obtained by representing the respondent in the prior detention hearing was employed in any fashion in the murder case.

By contrast, in *State ex rel. Sherrod v. Carey*, 790 S.W.2d 705 (Tex.App.—Amarillo 1990, no writ), an attorney was appointed to represent a juvenile in a discretionary transfer proceeding involving two charges of capital murder. Before the transfer hearing, that attorney accepted employment as an assistant district attorney in the office that was representing the State in the transfer proceedings. The juvenile court relieved that attorney of his appointment and appointed new counsel for the juvenile. The elected district attorney instructed the new assistant he was to have nothing to do with the juvenile's case.

The new defense attorney moved that the juvenile court disqualify the entire district attorney's office under Texas Disciplinary Rules of Professional Conduct Rule 1.09, which prohibits an attorney or any member of that attorney's firm from representing an interest adverse to that of a client previously represented by the attorney in "the same or a substantially related matter." The juvenile court disqualified the entire district attorney's office from representing the State and appointed an outside, special prosecutor to represent the State. The Court of Appeals upheld that decision:

> The trial court's duty when ruling on a motion to disqualify is to ensure that the defendant's constitutional rights are not violated by any alleged conflict of interest.… The district attorney, and his entire office under appropriate circumstances, may be disqualified from participation in a particular case on constitutional grounds as well as under the Disciplinary Rules of Professional Conduct. The trial court has a duty to protect a defendant's right to due process of law under both the United States and Texas Constitutions.

790 S.W.2d at 708-09.

Later, the Court of Criminal Appeals held in *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1 (Tex.Crim.App. 1990), a criminal case, that a trial court lacks authority to disqualify an entire district attorney's office unless the grounds and procedures for removal from office are met. In its opinion, the Court discussed *State ex rel. Sherrod v. Carey* and stated the opinion was "unpersuasive."

The effect of these two opinions, one juvenile and one criminal, is to make uncertain whether a juvenile court judge can disqualify an entire district attorney's office for conflict of interest. The Texas Supreme Court has the ultimate authority to decide that issue in juvenile cases. The question is whether, if it ever takes such a case, it will defer to the Court of Criminal Appeals because the subject matter involves prosecutors or whether it will decide the issue on its own as an independent question of juvenile law.

Disqualification of a Juvenile Court Judge Who Was Formerly a Prosecutor. It is common in Texas for prosecutors to become appointed or elected to the trial bench. When that occurs, there is always a question of whether it is lawful for the person to serve as judge over any controversy he or she was involved in as prosecutor.

In *In re K.E.M.*, 89 S.W.3d 814 (Tex.App.—Corpus Christi 2002, no pet.), the juvenile respondent was prosecuted for delinquent conduct by the Nueces County Attorney's Office. Later, the elected county attorney became a juvenile court judge. A petition for writ of habeas corpus was filed in that court seeking release from TYC on the case prosecuted by the county attorney when the judge was the elected county attorney. The judge denied relief, but the Court of Appeals held that the denial was invalid because the judge should have removed himself from the case. The applicable standard is Rule 18b(a)(1) of the Texas Rules of Civil Procedure:

A judge must disqualify in any proceeding in which:

> (1) the judge has served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter.

The Court of Appeals in *K.E.M.* held that the position of elected county attorney automatically required that the juvenile court judge remove himself from this case:

> [W]e hold that rule [18b(a)(1)] imposes an objective standard for judicial disqualification as applied to juvenile adjudications that does not require any showing of actual bias, harm, or prejudice. Further, harmonizing the various approaches discussed above by different courts in Texas as well as interpretations of similar disqualification statutes in other jurisdictions, we hold under rule 18b (a)(1)] as applied to juvenile adjudications that the grounds for constitutional disqualification from hearing a case of a judge who was a former prosecutor are: (1) personal participation by the judge as prosecutor in any way, however slight, in the investigation or prosecution of the same case or of a case arising out of the same set of operative facts; or (2) supervisory authority by the judge as prosecutor at the time the case was investigated, prosecuted, or adjudicated over attorneys who actually investigated or prosecuted the same case or a case arising out of the same set of operative facts.…
>
> The record before us indicates there is no dispute that the juvenile court judge below was the Nueces County Attorney while his office investigated and prosecuted appellant.… [W]e find that the statutory duties of county attorneys and the responsibilities imposed in general on supervisory lawyers in Texas combined to make the former Nueces County Attorney-turned-judge here ultimately responsible for appellant's prosecution.…
>
> We emphasize that the record in this case is entirely free of the slightest suggestion of prejudice or impropriety on the part of the juvenile court judge.…Nonetheless, the duties and responsibilities inherent in the office of Nueces County Attorney adhered to the juvenile court judge when he left the prosecutorial bar and took the bench, and we cannot escape the effect of those duties and responsibilities.…We find that disqualification of the juvenile court judge below is mandated by the statutory duties and supervisory responsibilities imposed by his former office as Nueces County Attorney, irrespective of any direct, personal involvement on his part with the investigation or prosecution of appellant's juvenile adjudication.… "The question is not whether the judge is in fact impartial but whether another person 'might reasonably question the judge's impartiality.'" *Crawford*, 686 So.2d at 202. We can answer that question only in the affirmative. Id. at 203. Thus, to promote public confidence in the integrity and impartiality of the judiciary, we reason that it is desirable to have appellant's application for writ of habeas corpus heard by a judge who has no previous association with either the prosecution or the defense in the challenged adjudication.…
>
> Accordingly, we hold as a matter of law that the juvenile court judge below has no jurisdiction to preside over appellant's application for writ of habeas

> corpus.… The juvenile court's "Findings of Fact and Conclusions of Law and Order" dated September 11, 2001, which denied appellant's fourth application for writ of habeas corpus, are void.

89 S.W.3d at 828-29.

Personal Knowledge Not Required. The prosecutor is not required to have personal knowledge of the facts alleged in the petition. Section 53.04(c) provides, "The petition may be on information and belief." It is sufficient for the prosecutor to have been informed of the relevant facts by a law enforcement officer, probation officer, or other person or to have learned of them from a witness statement or police offense report.

Grand Jury Referral. Grand jury approval of a delinquency petition is necessary to bring a case under the Determinate Sentence Act. Section 53.045. Prosecutors in criminal cases sometimes seek an advisory opinion from a grand jury in cases that are particularly difficult or sensitive. It is a way for a prosecutor to share responsibility for making charging decisions with a group of community representatives.

In 1999, the legislature enacted Section 53.035 to authorize prosecutors in ordinary juvenile proceedings to obtain grand jury advice as to whether a petition should be filed. It provides:

> (a) The prosecuting attorney may, before filing a petition under Section 53.04, refer an offense to a grand jury in the county in which the offense is alleged to have been committed.
>
> (b) The grand jury has the same jurisdiction and powers to investigate the facts and circumstances concerning an offense referred to the grand jury under this section as it has to investigate other criminal activity.
>
> (c) If the grand jury votes to take no action on an offense referred to the grand jury under this section, the prosecuting attorney may not file a petition under Section 53.04 concerning the offense unless the same or a successor grand jury approves the filing of the petition.
>
> (d) If the grand jury votes for approval of the prosecution of an offense referred to the grand jury under this section, the prosecuting attorney may file a petition under Section 53.04.
>
> (e) The approval of the prosecution of an offense by a grand jury under this section does not constitute approval of a petition by a grand jury for purposes of Section 53.045.

While the prosecutor is free to seek or not to seek the advice of the grand jury, if the prosecutor seeks that advice, he or she is precluded from filing a petition without obtaining the approval of that or a successor grand jury. This section is totally independent of the Determinate Sentence Act. Grand jury approval under this section does not convert a delinquency case into a determinate sentence case. There is no authority for a prosecutor to inform a juvenile court petit jury that a grand jury has approved of the filing of a petition under this section.

When the Petition is Filed. In *In the Matter of D.J.*, 909 S.W.2d 621 (Tex.App.—Fort Worth 1995, writ dism'd w.o.j.), the juvenile claimed that the transfer petition had not been filed because it was not in the court's file. The clerk testified that the petition had been received in a timely fashion but had inadvertently been omitted from the court's file. The petition had been served on the juvenile and defense counsel had been given access to it. The Court of Appeals held that the petition was filed when it was received by the clerk.

B. Requirements of the Petition

Section 53.04 sets out the requirements for the petition. It is convenient to think of four different kinds of requirements: (1) requirements related to the form of the petition; (2) requirements related to charging the act of delinquency or conduct indicating a need for supervision (CINS); (3) requirements related to the prayer for relief; and (4) requirements related to identifying the child and other persons.

1. Requirements Related to Form

Section 53.04(b) specifies only one requirement as to form. It provides that "[t]he proceedings shall be styled 'In the Matter of _____." Section 53.04(c) provides that the petition may be "on information and belief," but there is no requirement that the petition state whether the prosecutor who made it did so on personal knowledge or on information and belief. *In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App.—Corpus Christi 1982, writ ref 'd n.r.e.).

There is no invalidity in permitting the petition to be based on information and belief instead of requiring that it be based upon an affidavit or sworn statement. *In the Matter of S.C.B.*, 578 S.W.2d 833 (Tex.Civ.App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). Further, there is no

requirement that the petition be sworn to by the prosecuting attorney. *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e.).

The requirements that govern the forms of indictments, informations, and complaints have been held not to be applicable to juvenile court petitions. *In re V.R.S.*, 512 S.W.2d 350 (Tex.Civ.App.—Amarillo 1974, no writ).

2. Requirements Related to Charging Delinquency or CINS

Section 53.04(d)(1) provides that the petition must state "with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts."

Pleading the Place of the Acts. The requirement that the "petition must state...with reasonable particularity the...place...of the acts alleged" was interpreted in *In the Matter of H.S., Jr.,* 564 S.W.2d 446 (Tex.Civ.App.—Amarillo 1978, no writ). The petition in that case "failed to set forth with reasonable particularity the state and county or any place where the alleged acts of delinquent conduct occurred." There was no indication the respondent challenged the petition by pre-trial motion, but he did move to dismiss the proceedings on this ground after the adjudication hearing had begun. The court held that the word "must" in the statute is mandatory and that the petition was fatally defective for failure to allege the place of the acts. As a minimum requirement, then, the State must allege in its petition that the acts occurred within a particular county. See also *In the Matter of T.L.K.*, 316 S.W.3d 701 (Tex.App.—Fort Worth 2010, no pet.) (State's original and amended petitions failed to set forth with reasonable particularity the "place" where the alleged conduct occurred, thus depriving court of its jurisdiction).

J.J.H. v. State, 557 S.W.2d 838 (Tex.Civ.App.—Waco 1977, no writ) might appear at first blush to be inconsistent with *H.S., Jr.* because it holds the State is not required to plead the county in which the conduct occurred. However, the pleading in *J.J.H.* was a motion to modify disposition, not a petition for adjudication or transfer, and therefore is not subject to the "place" pleading requirement of Section 53.04(d)(1). Indeed, depending upon the exact wording of the conditions of probation, a violation of law may be a probation violation no matter where it occurs, even out of state. See Chapter 13.

There may also be situations in which the State is required to allege where in the county the acts occurred, but there are no juvenile cases on that point. Unless adequate notice to the respondent requires a more specific allegation of place, alleging the county in which the acts occurred should be sufficient.

Pleading Venue. There is the related problem of venue and whether the State must plead venue in its petition. Section 51.06(a), as amended in 1999, specifies venue in juvenile cases. It provides in relevant part:

> (a) A proceeding under this title shall be commenced in:
>
> (1) the county in which the alleged delinquent conduct or conduct indicating a need for supervision occurred; or
>
> (2) the county in which the child resides at the time the petition is filed, but only if:
>
> (A) the child was under probation supervision in that county at the time of the commission of the delinquent conduct or conduct indicating a need for supervision;
>
> (B) it cannot be determined in which county the delinquent conduct or conduct indicating a need for supervision occurred; or
>
> (C) the county in which the child resides agrees to accept the case for prosecution, in writing, prior to the case being sent to the county of residence for prosecution.

The venue provision determines in what county the petition can be filed. The State will be required to prove venue at the adjudication hearing. Almost always, venue is in the county where the delinquent conduct or CINS is believed to have occurred.

Is the State required to allege venue in the petition? There are no juvenile cases on point, but certainly the prudent course of action is to allege venue. Alleging the county in which the acts occurred, already required by Section 53.04(d)(1), would also allege venue if the petition is filed in that county.

The State is required by Section 53.04(d)(2) to allege the residence address of the child. Simply adding the county in which that address is located would also allege venue if the petition is filed in the county with residence venue and if the requirements of Section 51.06(a)(2) are met.

Before the 1999 amendments, Section 51.06 simply permitted any juvenile petition to be filed in the county

where the offense, if it was committed, occurred or the county of the juvenile respondent's residence. The choice was the prosecutor's. The assumption always was that ordinarily the county where the offense was committed is the most appropriate venue because that is where the witnesses and evidence are likely to be located and where the greatest prosecutorial interest is likely to exist.

Since it was believed that some counties where offenses were committed dumped cases on counties of residence for prosecution, the legislature acted in 1999 to restrict county of residence venue to three circumstances. In each there is some special reason for departing from the general proposition that the preferred venue is the county where the offense occurred. First, if the respondent is already on juvenile probation in the county of his or her residence, then it would often be efficient to prosecute a new law violation in that county since there is likely to be a modification proceeding brought there in any event. Second, if it cannot be determined in which county the offense was committed, such as an offense committed near a county line or against a very young child, the petition can be filed in the county of the respondent's residence. Third, if the county of residence for any reason agrees to be the county of prosecution, that is acceptable because its interests are protected.

Pleading Name of Child. In 2005, the legislature amended Section 51.17 by adding subsection (g). The amendment relates to the names alleged in a juvenile pleading and ensures that the failure to disclose a respondent's true name cannot be used as a defense. Section 51.17(g) provides that certain articles contained in the Code of Criminal Procedure also apply in Title 3 proceedings. The specific provisions include Code of Criminal Procedure Articles 21.07 (Allegation of Name), 26.07 (Name as Stated in Indictment), 26.08 (If Defendant Suggests Different Name), 26.09 (If Accused Refuses to Give His Real Name), and 26.10 (Where Name is Unknown).

Pleading Name of Sex Offense Victim. In 2007, the legislature amended Section 51.17 by adding subsection (h). The addition clarifies that Articles 57.01 and 57.02, Code of Criminal Procedure, relating to the use of a pseudonym by a victim in a criminal sex offense, apply to juvenile court proceedings.

The amendment is intended to protect the identity of sex crime victims in cases that could lead to a reportable conviction or adjudication under Chapter 62, Code of Criminal Procedure. It allows the State to use "Jane Doe" or "John Doe" identifiers for the victim in all pleadings and court papers. The accused, however, is still provided with the correct full identity of the victim in order to develop a proper defense.

Pleading Particularity of Time. Section 53.04(d)(1) requires that the petition allege with "reasonable particularity the time...of the acts alleged." It is the custom in criminal pleading for the State to allege that the offense was committed "on or about" a named month, day, and year. The importance of the phrase "on or about" is that it gives the State considerable latitude in proving the date of the offense—it is not bound to prove the precise date alleged.

A 2008 case addresses this issue. In *In the Matter of D.J.*, UNPUBLISHED, No. 02-07-323-CV, 2008 Tex.App.Lexis 4136 (Tex.App.—Fort Worth 2008, no pet.), appellant contended that the State failed to prove the date of the alleged delinquent conduct since none of the witnesses expressly testified that the offense occurred in April 2007. An erroneous date of April 25, 2004, contained in the original judgment, was changed by the trial court to April 25, 2007, in the nunc pro tunc judgment.

Noting that it has long been the law that time is not generally a material element of an offense, the Court of Appeals overruled appellant's complaint on appeal:

> The State does not have to allege a specific date in the indictment. When an indictment alleges that some relevant event transpired "on or about" a certain date, the defendant is put on notice to prepare for proof that the event happened at any time within the statutory period of limitations for the charged offense. D.J. did not raise a limitations defense or otherwise place the timing of the offense at issue below.

2008 Tex.App.Lexis 4136 *4.

Unless the time of day is an element of the offense, e.g., selling alcohol after authorized hours, there is no requirement in criminal pleading that the State allege the time during the day when the offense was committed. Without juvenile cases on point, it is best to assume that the same latitude would be given to the State in juvenile pleading. In juvenile pleading, it would be necessary to allege that a curfew violation occurred during applicable curfew hours, although it probably is not necessary to allege the time of the violation with greater particularity.

Pleading More Than One Offense. Section 53.04(d) requires that the petition must state the "manner of the *acts* alleged." *[emphasis added]* With respect to adjudication hearings, Section 54.03(h) requires the judge or jury

to report which, if any, of the offenses alleged in the petition it finds established by the evidence to enable the court to enter an appropriate judgment with respect to each allegation. With respect to transfer hearings, Section 54.02(g) provides, "If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction."

The Family Code contemplates liberal joinder of offenses in a petition for adjudication or transfer hearing without the restrictions that apply to joinder of offenses in an indictment. Thus, it is common for a juvenile petition to allege several unrelated offenses and for a transfer or adjudication hearing to be conducted for all the offenses at the same time. Of course, the juvenile court judge has discretion to require a separate hearing for each offense or to separate the offenses into logically related groups. *Moore v. State*, 713 S.W.2d 766 (Tex.App.—Houston [14th Dist.] 1986, no writ) (severance of offenses not required in transfer hearing). See also *In the Matter of D.L.*, 160 S.W.3d 155 (Tex.App.—Tyler 2005, no pet.) (no abuse of discretion in denying motion to sever similar counts in the State's petition); *In the Matter of D.L.T.*, UNPUBLISHED, No. 11-06-00192-CV, 2008 WL 2612584, 2008 Tex.App.Lexis 4973, Juvenile Law Newsletter ¶ 08-3-15 (Tex.App.—Eastland 2008, no pet.) (no abuse of discretion in denying motion for separate trials); *In the Matter of M.V., Jr., and C.A.V.*, UNPUBLISHED, Nos. 13-08-00059-CV and 13-08-00104-CV, 2009 Tex.App.Lexis 7693 (Tex.App.—Corpus Christi 2009, no pet.) (no abuse of discretion in joining prosecutions since no hearing was held and no evidence introduced in support of respective motions to sever).

Section 51.17(a) requires that the Rules of Civil Procedure be consulted to determine permissible joinder of offenses in a single juvenile petition or consolidation for trial of separate juvenile petitions. Rule 51(a) permits liberal joinder of claims in a single petition. It provides, in part, that the "plaintiff in his petition...may join either as independent or as alternate claims as many claims...as he may have against an opposing party." If applied literally in juvenile cases, it permits the State to join in a single petition all offenses believed to have been committed by the juvenile.

Rule 174(a) permits the consolidation for trial of separate petitions when the claims involve a "common question of law or fact." Rule 174(b) provides that the court "in furtherance of convenience or to avoid prejudice may order a separate trial of any claim."

Unless there is a factual relationship among the offenses, other than merely the same person being alleged as perpetrator, there is a real risk of a Due Process Clause violation in multiple offense allegations. A juvenile court judge should be sensitive to the increased risk of prejudice created by allegations of multiple offenses and be willing to grant severance of claims into factually related groupings for trial whether the claims are alleged in a single petition or in separate petitions.

In re J.K.R., 986 S.W.2d 278 (Tex.App.—Eastland 1998, pet. denied), is a rare case that discusses consolidation and severance in a juvenile context. Three petitions were filed against the respondent. Each alleged a sexual act against a different child who lived in the same household as the respondent. The juvenile court denied a motion opposing consolidation, which action was upheld by the Court of Appeals. The Court of Appeals rejected the argument that Penal Code Chapter 3 requirements applied. Instead, it applied the Rules of Civil Procedure:

> The trial court consolidated the three petitions on the day of trial. Two of the petitions alleged the delinquent conduct of aggravated sexual assault, and the third alleged delinquent conduct of indecency with a child. Relying upon TEX. PENAL CODE ANN. §§3.02 and 3.04 (Vernon 1994 & Supp.1998), J.K.R. argues that the State failed to give adequate notice that the cases would be consolidated for trial and that the cases should have been severed upon request. These statutes are not controlling.
>
> TEX. FAM. CODE ANN. §51.17 (Vernon 1996) states that the Texas Rules of Civil Procedure govern juvenile proceedings unless otherwise provided. The Juvenile Justice Code contemplates liberal joinder of offenses, but no specific provision addresses joinder and consolidation of actions. Because no specific provision exists, the Texas Rules of Civil Procedure apply as directed by Section 51.17.
>
> Actions that involve common questions of law or fact may be consolidated by the trial court. TEX.R.CIV.P. 174(a). The trial court should exercise sound discretion created by the circumstances of each case. *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677 (Tex. 1956); *Black v. Smith*, 956 S.W.2d 72 (Tex.App–Houston [14th Dist.] 1997, no writ). The legal elements of proof are similar in all three actions. The three complainants were J.K.R.'s sister and his two stepsisters, and they resided in the same home with J.K.R. Each offense was alleged to have occurred in their home. The cases share common witnesses and similar fact patterns. The circumstances surrounding these actions share both common questions of fact

> and law. The trial court did not abuse its discretion by consolidating the three petitions for one trial.

986 S.W.2d at 285.

Pleading Facts with Particularity. Section 53.04(d)(1) requires that the State allege "with reasonable particularity the...manner of the acts alleged." In criminal pleadings, the State must allege in its charging instrument each element of the offense and must particularize those elements to the facts of the specific case. It must, for example, in a theft case not only allege that the property was taken without the effective consent of the owner, but it must also describe the property and name its owner.

What if there is a variance between the owner of property alleged in a petition and the proof adduced at trial? A criminal trespass case, *In the Matter of J.M.R.*, 149 S.W.3d 289 (Tex.App.—Austin 2004, no pet.), involved a petition listing "Janet Belcher" as the owner of the middle school property instead of "Gail Belcher," the school principal, who testified at trial. After the State closed, the defense moved for a directed verdict, alleging that the State failed to prove ownership of the property because Janet Belcher did not testify. The Court of Appeals ruled that the petition sufficiently informed J.M.R. of the offense with which he was charged, allowing him to prepare an adequate defense despite the incorrect first name of the principal who was called to testify. "Only a material variance will render the evidence insufficient in a case involving a claim based upon a variance between the charging instrument and the evidence produced at trial." 149 S.W.3d at 295. The court held that the State's clerical mistake was an immaterial variance.

To some extent, the same requirements apply to the juvenile petition, but the courts have permitted the State more latitude in juvenile pleading than they have in criminal pleading. If the offense as pleaded would be sufficient in a criminal case, it will certainly be upheld in a juvenile case.

Even if a pleading would be insufficient in a criminal case, it may be upheld in a juvenile case, depending on the nature and extent of departure from the requirements of criminal pleading. The pleader in juvenile court should attempt to draft a petition that would pass muster as a criminal pleading, but failure to do so is not always fatal. See *In the Matter of M.T.*, UNPUBLISHED, No. 13-05-434-CV, 2007 WL 2265072, 2007 Tex.App.Lexis 6324 (Tex.App.—Corpus Christi 2007, no pet.) (standards governing juvenile petitions are less stringent than those governing criminal indictments); *In the Matter of T.A.*, UNPUBLISHED, No. 11-06-00342-CV, 2008 Tex.App.Lexis 6692 (Tex.App.—Eastland 2008, pet. denied) (strict prohibition against amendment of pleadings in criminal cases not applicable in juvenile proceedings).

In *In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e.), the respondent was charged in an adjudication petition with capital murder. The State also filed a motion to transfer the case to the criminal court. On appeal from the transfer order, the respondent contended that the petition was insufficient. The petition alleged:

> That on or about the 15 day of February, 1982, the said child violated a penal law of this state punishable by imprisonment or death to-wit: [Section] 19.03 of the Penal Code of Texas, in that he did then and there intentionally cause the death of Natalie Herold, and that the said Darren [sic] K. Edwards was then and there in the course of attempting to commit burglary, in Nueces County, Texas.

644 S.W.2d at 819.

The respondent contended that the petition was insufficient to provide notice of the offense charged and, in particular, that it was insufficient in that it failed to allege the manner and means used to cause the death of the victim, e.g., shooting with a gun, stabbing with a knife. The appellate court rejected this argument:

> A petition to transfer the trial of a juvenile to a district court as an adult need not meet the requirements and particularities of an indictment.…
>
> Due process does not require that the language used in the certification proceedings should be as certain as language required to set out an offense in an indictment or in an information. It is enough in certification proceedings that the conduct be defined as criminal so as to subject the offender either to the process of juvenile proceedings or to trial and punishment as an adult....
>
> Although a proper indictment to serve as the basis for trial in a criminal court for the offense of murder would necessarily allege the manner of death, the same is not required in a juvenile court proceeding by which jurisdiction of a child will be transferred to a criminal court.... The fact that appellant is not apprised by the petition in the exact manner and means to cause of death for which he is charged does not deny him due process. The language of the petition is sufficient to give the appellant fair notice of the criminal

> acts for which he is accused for the certification and transfer hearing.

644 S.W.2d at 821. See also *K.M.P. v. State*, 701 S.W.2d 939 (Tex.App.—Fort Worth 1986, no writ) (also a petition in a case in which the State was seeking transfer to criminal court).

In *T.R.S. v. State*, 663 S.W.2d 920 (Tex.App.—Fort Worth 1984, no writ), the petition for the adjudication hearing alleged the offense of theft. It described the property taken as "a purse." The respondent argued that this description was insufficient, but the court rejected that contention:

> Actions in the juvenile court are initiated by a petition for an adjudication hearing made by a prosecuting attorney.... The Code of Criminal Procedure is not controlling in these cases.... Under the requirements of Tex.Fam.Code Ann. Sec. 53.04 (Vernon 1975), the petition is sufficient to describe the property taken. The kind or brand of purse need not be alleged.

663 S.W.2d at 921.

By contrast, exactly those descriptive averments would probably be required by Article 21.09 of the Code of Criminal Procedure in the face of a motion to quash in a criminal pleading.

The petition in *In re F.C.*, UNPUBLISHED, No. 03-02-00463-CV, 2003 WL 21282766, 2003 Tex.App.Lexis 4709, Juvenile Law Newsletter ¶ 03-3-06 (Tex.App.—Austin 2003, no pet.), charged assault on a teacher as assault on a public servant but did not allege how the victim of the offense was a public servant. The Court of Appeals held that such an allegation was unnecessary even in the face of the special exception filed by the respondent:

> The petition clearly alleged that F.C. committed assault, alleged his victim by name, and identified her as a public servant assaulted while in the course of discharging her official duties. The State was not required to plead further evidentiary facts or to identify her particular category of public servant job. When a term is defined by statute, it need not be further alleged in the charging instrument; the State need not plead evidence it intends to rely upon. *Thomas v. State*, 621 S.W.2d 158, 161 (Tex.Crim.App. 1981) (op. on reh'g). The statutorily defined term is neither vague nor indefinite; moreover, the term "public servant" describes the type of complaining witness and does not go to an act or omission of the accused. Id. at 164. Because the pleadings against F.C. were reasonably particular to place him on notice of the allegations against him, we hold that appellant has not demonstrated that the trial court clearly abused its discretion in denying appellant's motion.

2003 Tex.App.Lexis 4709 *5-6; Cf. *In the Matter of J.C.F.*, UNPUBLISHED, No. 03-09-00298-CV, 2010 WL 3431689, 2010 Tex.App.Lexis 7245 (Tex.App.—Austin 2010) (petition not defective for failing to allege how the act or acts relied on constituted recklessness); *In the Matter of B.L.B.*, UNPUBLISHED, No. 03-09-00264-CV, 2010 WL 2010805, 210 Tex.App.Lexis 3886, Juvenile Law Newsletter ¶ 10-3-2 (Tex.App.—Austin 2010, no pet.) (no material variance in motion to modify in which THC was alleged and marihuana was proved).

Pleading Elements of the Offense. In *Edwards* and *T.R.S.*, all of the elements of the offense as set out in the Penal Code were alleged in the petition but the claim was made that they were not particularized sufficiently in one case by failing to allege the manner and means of death and in the other by failing to fully describe the stolen property. By contrast, in *In the Matter of W.H.C., III*, 580 S.W.2d 606 (Tex.Civ.App.—Amarillo 1979, no writ), the petition failed to allege all of the elements of the offense. The State attempted to allege arson, which at that time was defined in the Penal Code as starting "a fire without the effective consent of the owner and with intent to destroy or damage the owner's building." The petition alleged:

> That on or about the 2nd day of February, 1978, in Potter County, Texas, the said child violated a penal law of this State punishable by imprisonment, to-wit: Sec. 28.02(a) of the Texas Penal Code in that he did then and there start a fire with the intent to damage and destroy a building without the effective consent of GLYNN DOYLE CARVER, principal of River Road High School, Amarillo, Potter County, Texas.

580 S.W.2d at 607.

The court found that under both statutory and constitutional standards this petition was defective:

> The child maintains that the petition fails to state who owned the building and that the owner of the building failed to give consent to the fire. We agree. These matters are essential elements of the offense of arson.
>
> In *Gault*, the United States Supreme Court addressed due process requirements under the Fourteenth Amendment in connection with a state

juvenile court adjudication of delinquency. The Court, specifically addressing notice requirements, stated:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, *and it must 'set forth the alleged misconduct with particularity'* [emphasis added by Court of Appeals]. *In re Gault*, 387 U.S. 1, 33, 18 L.Ed.2d 527, 87 S.Ct. 1428, 1436 (1967).

Gault details minimal due process requirements under the Constitution of the United States. It does not prohibit our State from prescribing statutory requirements calculated to afford the accused in a juvenile proceeding more than minimal constitutional protection.... In this connection, we point out that our Legislature has enacted section 53.04(d)(1) of the Texas Family Code, which is applicable to juvenile adjudication proceedings.... Section 53.04(d)(1) denotes mandatory statutory requirements...which the state must adhere to in juvenile proceedings…

We conclude that the state's petition fails to allege the owner of the building and that the owner failed to give his consent. These matters are essential elements of the offense of arson.... Absent these allegations, the petition fails to comply with the reasonable particularity requirements of *Gault* and section 53.04(d)(1) of the Family Code. For these reasons, the petition is fatally defective.

580 S.W.2d at 608.

C.F. v. State, 897 S.W.2d 464 (Tex.App.—El Paso 1995, no writ), might appear to be inconsistent with *W.H.C.*, but it is not. The adjudication petition in *C.F.* alleged the offense of indecency with a child "in violation of section 21.11 of the Texas Penal Code." Although the petition alleged all the physical elements of the offense, it failed to allege that the sexual contact occurred with the intent to arouse or gratify the sexual desire of any person.

Such an express allegation is required in criminal pleadings by a line of cases from the Court of Criminal Appeals. However, the Court of Appeals rejected the argument that reversal is required in this juvenile case. In part this is because of a lesser standard of pleading in juvenile cases, and in part it is because the State specifically pleaded that the contact violated Section 21.11 of the Penal Code. That section in turn requires proof of intent to arouse or gratify as part of the definition of sexual contact. Therefore, the petition *impliedly* alleged intent to arouse or gratify because of its reference to the Penal Code section violated.

The distinction these cases draw—*W.H.C.* on the one hand and *Edwards* and *T.R.S.* on the other—is between omitting one or more statutory elements of the offense and failing to particularize those elements to the facts of the case at hand. The former will make the petition fatally defective, whereas the latter will not necessarily do so. *C.F.* permits required elements to be impliedly pled under some circumstances. See also *In the Matter of R.R.*, No. 12-07-00041-CV, 2008 WL 2440229, 2008 Tex.App.Lexis 4422, Juvenile Law Newsletter ¶ 08-3-10 (Tex.App.—Tyler 2008, no pet.) [State's petition alleged offense of criminally negligent homicide with "reasonable particularity" as required by Section 53.04(d)(1)].

Pleading Law of Parties Not Required. In criminal or juvenile cases, liability may be based on the defendant's or respondent's personal conduct or upon the conduct of another if the defendant or respondent "solicits, encourages, directs, aids, or attempts to aid" the other to commit the offense. Texas Penal Code Section 7.02(a)(2). This is referred to as the law of parties. If the evidence shows a defendant or respondent aided another in the commission of an offense, the court can instruct the jury that it is permitted to find the defendant or respondent violated the law if he or she aided another in doing so.

In criminal prosecutions, the State is not required to allege the law of parties in the indictment, information, or complaint. Penal Code Section 7.01(c). At the time the petition is written, the prosecutor may know that several persons participated in one aspect or another of the offense but may not know precisely who did what. The Houston First District Court of Appeals held in *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ), that the same rule applies in juvenile cases; i.e., that the State is permitted to allege in a juvenile petition that the respondent committed the offense personally but the court is permitted to instruct the jury under the law of parties if the evidence shows the respondent may have participated in the offense by aiding another to commit it. The San Antonio Court of Appeals in *In the Matter of O.C.*, 945 S.W.2d 241 (Tex.App.—San Antonio 1997, no writ), arrived at the same conclusion.

Pleading Penal Law Violated. Section 53.04(d)(1) requires the petition to state "the penal law or standard of conduct allegedly violated by the acts." In the two petitions set out in *C.F.* and *W.H.C.,* the pleader cited to the section of the Penal Code that was allegedly violated by the

conduct charged. That is undoubtedly the preferred practice, but it is not required by the case law, despite the requirements of Family Code Section 53.04(d).

All that is required is that the petition charge all the elements of an offense. That enables defense counsel to find the penal statute the State is contending was violated. See *In the Matter of B.S.A.*, UNPUBLISHED, No. 03-04-00319-CV, 2006 WL 954095, 2006 Tex.App.Lexis 3048, Juvenile Law Newsletter ¶ 06-2-14 (Tex.App.—Austin 2006, no pet.) (if petition alleges all elements of offense, omission of express reference to Penal Code is not fatal); *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977 reh'g overruled); *In the Matter of P.B.C.*, 538 S.W.2d 448 (Tex.Civ. App.—El Paso 1976, no writ).

If the prosecutor does cite the penal statute in the petition but makes a mistake in doing so, that does not invalidate the petition so long as all the elements of an offense are charged. The error in pleading the penal statute violated is disregarded and the respondent stands charged with the offense identified by the elements that were pleaded. *In the Matter of H.R.A.*, 790 S.W.2d 102 (Tex.App.—Beaumont 1990, no writ).

However, pleading a citation to the penal law violated, although not independently required, may repair a deficiency in pleading all of the elements of the offense if the penal law citation enables the respondent to discern each of the elements of the offense the State is seeking to prove. See *C.F. v. State*, 897 S.W.2d 464 (Tex.App.—El Paso 1995, no writ), discussed above under the heading Pleading Elements of the Offense. That is by itself a sufficient reason for a prosecutor to plead a citation to the penal law allegedly violated.

Pleading Prior Adjudications. In 1995, the legislature added "habitual felony conduct" to the coverage of the determinate sentence provisions. Section 51.031 defines habitual felony conduct, and Section 54.04 establishes the sentence range upon adjudication. Section 53.04(d) provides, "The petition must state...(5) if the child is alleged to have engaged in habitual felony conduct, the previous adjudications in which the child was found to have engaged in conduct violating penal laws of the grade of felony."

This provision is intended to require pleading prior felony adjudications, which may not be state jail felony adjudications, when the prosecutor is seeking a determinate sentence for habitual felony conduct. Such pleading is required to place the respondent on notice as to which prior adjudications the State will seek to prove in order to enable the respondent to determine whether defenses exist to that use of the prior adjudications. The prosecutor should use, as a model pleading, habitual offender indictments under Section 12.42(d), Penal Code. Cf. *In the Matter of J.D.L.Z.*, UNPUBLISHED, No. 02-05-037-CV, 2005 WL 2403427, 2005 Tex.App.Lexis 8139, Juvenile Law Newsletter ¶ 05-4-14 (Tex.App.—Fort Worth 2005, no pet.) (under former law, State was not required to plead habitual misdemeanor conduct to commit juvenile to TYC).

3. Requirements Related to the Prayer for Relief

Although the Family Code does not specifically require that a petition contain a prayer for relief, it is customary to include one. An adjudication petition usually prays that the juvenile court find the respondent has engaged in delinquent conduct or conduct indicating a need for supervision (CINS) and that the court find "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." Section 54.04(c). Both a finding of delinquency or CINS and a finding that a disposition is required must be made before the juvenile court may place the child on probation or commit him or her to TJJD (though CINS cannot result in a TJJD commitment).

Removal from Home Findings. Additional findings are required to empower the court to take the child out of his or her home by probation placement or TJJD commitment. A court order placing a child on probation outside the child's home or committing the child to TJJD must be based upon the following findings contained in Section 54.04(i):

> (1) it is in the child's best interests to be placed outside the child's home;
>
> (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (3) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The third finding is also required by Section 54.04(c). It would be good practice for the prayer for relief to request these three findings as well.

Restitution Orders. Under Rule 301 of the Texas Rules of Civil Procedure, the judgment in a case cannot include matters that are not included in the pleadings. Under Section 54.041(b), the juvenile court may order "the

child or a parent to make full or partial restitution to the victim of the offense." May restitution be ordered if it has not been specifically requested in the petition?

Unfortunately, the two cases that deal with this question arrive at different results. In *In re A.F.D.*, 628 S.W.2d 87 (Tex.App.—Beaumont 1981, no writ), the court held that neither the child nor his parent could be ordered to make restitution unless the State, in its petition, had specifically requested restitution. However, in *In the Matter of M.H.*, 662 S.W.2d 764 (Tex.App.—Corpus Christi 1983, reh'g overruled), the court held that a petition was sufficient even though it did not specifically ask for restitution:

> In the last paragraph of its trial pleading, the State sought to have appellant found to have engaged in delinquent conduct and in need of rehabilitation and disposed of for her own and the public protection. We think that...this pleading is sufficient to support the judgment.... [T]he Family Code allows a juvenile court to order restitution upon a finding that the child is in need of rehabilitation and that protection of the public and the child requires disposition.... The court made the requisite finding and we hold that a disposition requiring restitution is proper where such a finding is made without a specific pleading for restitution by the State.

662 S.W.2d at 766.

In 2001, the legislature enacted Section 54.048 to permit a juvenile court to order restitution by the child or parents without regard to whether the petition specifically includes restitution in the prayer for relief. In other words, the legislature went with the Corpus Christi court rather than the Beaumont court on this issue.

In 2007, the legislature enacted Section 54.0481 (Restitution for Damaging Property with Graffiti). This provision is discussed fully in Chapter 12.

4. Requirements Related to Identifying the Child and Other Persons

Identifying the Child. Section 53.04(d)(2) requires that the petition state "the name, age, and residence address, if known, of the child who is the subject of the petition." The purpose of this requirement is to enable the court to direct service of the petition and summons on the child at the child's place of residence if he or she is not in detention. An allegation of the child's age, or better yet, date of birth, is necessary to show that the court has jurisdiction of the case as a juvenile case under Section 51.04(a).

In 2005, the legislature enacted Section 51.17(g), which applies certain articles of the Code of Criminal Procedure to juvenile proceedings. This subsection relates to names alleged in a juvenile case, ensuring that failure or inability to disclose a true name cannot be used as a defense. For example, a prosecutor may allege either name if a child is known by more than one name or a child or the child's attorney may provide the correct name to the court and it will be noted on the petition. The enumerated articles include Articles 21.07 (Allegation of Name), 26.07 (Name as Stated in Indictment), 26.08 (If Defendant Suggests Different Name), 26.09 (If Accused Refuses to Give His Real Name), and 26.10 (Where Name is Unknown).

Identifying the Victim. In 2007, the legislature added subsection (h) to Section 51.17 so that victims of offenses that require sex offender registration under Code of Criminal Procedure Chapter 62 may use a pseudonym, as in adult criminal cases. See Code of Criminal Procedure Articles 57.01 and 57.02.

Identifying Adults. Sections 53.04(d)(3) and (4) require information as to the adults who should be notified of the proceedings. Subsection (d)(3) requires that the petition state "the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the child's spouse, if any."

Identifying Adults: Parents. Section 51.02(9) defines a parent to mean "the mother or the father of a child" but specifically excludes a parent whose parental rights have been terminated. Thus, the names and addresses of each of the child's parents whose identities can be determined should be included in the petition.

Identifying Adults: Guardian. Section 51.02(4) defines a guardian as "the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court." Since a child may have a guardian as well as a parent, it may be necessary to name both in the petition.

Identifying Adults: Custodian. Section 51.02(3) defines a custodian as "the adult with whom the child resides." Under Section 51.02(10) a child's parent, spouse, or guardian has the status of a party to the proceedings and the juvenile court must, therefore, make an effort to notify those persons of the pendency of the proceedings. However, a custodian does not have the status of a party.

The category of custodian—an informal relationship with the child—is intended to cover the situation in which the identities or whereabouts of the other adults cannot be ascertained but it is known that the child resides with

an adult in a family circumstance. In that event, the adult becomes for the juvenile proceedings a custodian.

Even if the custodian appears with the child before the juvenile court, the court is required to appoint a guardian ad litem, since it is required to do so whenever the child appears without a parent or guardian. See Section 51.11(a). Of course, the court could appoint the custodian as guardian ad litem or, in its discretion, appoint the attorney for the child or some other adult.

Identifying Adults: Other Relatives. It is important to include in the petition the names and addresses of those adults whom there is reason to believe are interested in the proceedings affecting the child. The purpose of Section 53.04(d)(3) is to provide for notice to a broad range of adults. Whether they choose to respond to that notice is another matter. This purpose is reinforced by the requirement of Section 53.04(d)(4) that the name and residence address of an adult relative of the child should be stated in the petition if notice cannot be provided to a parent, guardian, or custodian.

Identifying Adults: Nature of the Requirement. The Family Code uses the word "must" in the language in Section 53.04(d) about identifying parents and others. However, in the only case in which the point was raised, the court excused a failure to comply fully with the requirement. In *M.E. v. State,* 616 S.W.2d 690 (Tex.Civ.App.—Waco 1981, no writ), the petition stated that "the parent of said child and his residence is as follows: Dave Ellison, 300 N. 36th St., Corsicana, Navarro County, Texas." The person referenced was named Dave Wilson, not Ellison, and was the respondent's stepfather, not parent. The court disposed of the contention that this part of the petition was in error and required setting aside the adjudication of delinquency with the following comment:

> M.E. lived with his mother and stepfather Dave Wilson at the address given. The stepfather was served with a copy of the petition, and both Dave Wilson and M.E.'s mother were present at the proceedings in this case.
>
> Appellant made no objection to the State's petition and raises this point asserting fundamental error, for the first time on appeal.
>
> No harm is shown; M.E. was apprised of the delinquent conduct alleged; and we hold the error was not fundamental and does not require a reversal.

616 S.W.2d at 692.

C. Requirements of the Summons

The purpose of the summons is to give notice of the date, time, and place of the court hearing on the allegations of the petition. Section 53.06(b) provides that the "summons must require the persons served to appear before the court at the time set to answer the allegations of the petition."

Petition Must Accompany Summons. Section 53.06(b) also provides, "A copy of the petition must accompany the summons." In *In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e. and reh'g overruled), the court said that, although it was necessary for a copy of the petition to accompany the summons, it was not required that the summons state that it is accompanied by a copy of the petition.

The State can prove that respondent and relevant adults were served with the petition by the return of service of the summons. If the return recites that the summons was served and the summons recites that a copy of the petition accompanies it, that suffices, in the absence of proof to the contrary, as evidence that the petition was served with the summons. *In the Matter of B.A.A.*, UNPUBLISHED, No. 01-94-00513-CV, 1995 WL 258894, 1995 Tex.App.Lexis 918, Juvenile Law Newsletter ¶ 95-2-14 (Tex.App.—Houston [1st Dist.] 1995, no writ); *R.K.D. v. State*, UNPUBLISHED, No. 01-9400527-CV, 1995 WL 2913, 1995 Tex.App. Lexis 11, Juvenile Law Newsletter ¶ 95-1-8 (Tex.App.—Houston [1st Dist.] 1995, no writ).

When the summons recites that a copy of the petition is attached, it creates a presumption that the petition was attached, which can be rebutted only by specific evidence that it was not. It is not necessary that a copy of the petition be attached to the return of service filed with the juvenile court. *In re M.A.*, UNPUBLISHED, No. 03-9800682-CV, 1999 WL 977071, 1999 Tex.App.Lexis 8001, Juvenile Law Newsletter ¶ 99-4-24 (Tex.App.—Austin 1999, no pet.).

Service is not defeated by the petition not being attached to the return of service, contrary to a recitation in the return, because the statute requires that a copy of the petition be attached to the summons, not to the return of service. *In the Matter of R.L.T.*, UNPUBLISHED, No. 01-96-00397-CV, 1997 WL 804196, 1997 Tex.App.Lexis 6677, Juvenile Law Newsletter ¶ 98-1-04 (Tex.App.—Houston [1st Dist.] 1997, no pet.).

The summons in *In re M.D.R.*, 113 S.W.3d 552 (Tex.App.—Texarkana 2003, no pet.) did not recite that it was accompanied by a petition and there was no evidence

in the record that the petition was served with the summons. The Court of Appeals set aside the adjudication of delinquency and TYC commitment:

> In the present case, there is no affirmative showing in the record that M.D.R. was served with a copy of the petition. The summons served on M.D.R. merely informed him that he was to appear in person at the Morris County courthouse at a specific date and time to answer the allegations of the original petition filed on January 17, 2001. While the statute does not require that the summons, or the return, expressly state that a copy of the petition was delivered, there must be some indication in the record that a copy of the petition was served on the juvenile.… After reviewing the record in its entirety, we find no indication M.D.R. was served with a copy of the petition. Because there was no showing of actual service of the petition on M.D.R., the trial court did not have personal jurisdiction.

113 S.W.3d at 553-54.

Oral Summons Permissible. Although the Family Code contemplates that the summons will be in writing, that is not always necessary. In *In the Matter of K.P.S.*, 840 S.W.2d 706 (Tex.App.—Corpus Christi 1992, no writ), the juvenile court personally served respondent and his guardian with copies of the petition in court on the record. The court orally informed the parties of the time and place of the next court hearing in the case. The Court of Appeals held that procedure was sufficient to satisfy the Family Code's notice requirements despite the absence of a written summons.

Transfer Proceedings: Mandatory Language. If the summons is for a discretionary transfer hearing, then an additional requirement exists. Section 54.02(b) provides that in that situation "the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court." This provision has given the courts serious problems.

The first case to deal with this requirement was *R.K.M. v. State*, 520 S.W.2d 878 (Tex.Civ.App.—San Antonio 1975):

> The summons served upon appellant to notify him of the transfer hearing stated: "The purpose of the hearing at the above date and time is to consider waiver of jurisdiction and discretionary transfer." There is no mention of the phrase "to criminal court" anywhere in the summons. The State concedes that the summons does not strictly comply with the wording of the statute, but contends that there was substantial compliance, in that there was attached to the summons a copy of the petition, which specifically sets forth the charges against appellant, and that these documents were sufficient to apprise appellant of the matters to be considered at the hearing and were served in ample time for preparation of his defense....
>
> We see no reason not to adhere to the clear and unambiguous provisions of Section 54.02(b). The statute provides that the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court. The summons here did not do so. We are not inclined to hold that the word "must" as used in the statute means "perhaps," "maybe," "sometime," or "substantially." It is an easy matter to track the language of the statute and to do so would not work a hardship on anyone.

520 S.W.2d at 879-80.

R.K.M. v. State was followed and applied in *In re I.Y.*, 535 S.W.2d 729 (Tex.Civ.App.—Eastland 1976, no writ) and *Deleon v. State*, 728 S.W.2d 935 (Tex.App.—Amarillo 1987, no writ).

Transfer Proceedings: Attorney Alone Cannot Waive. In *In re K.W.S.*, 521 S.W.2d 890 (Tex.Civ.App.—Beaumont 1975, no writ), the transfer summons failed to contain the language required by Section 54.02(b). In this case, however, the attorney for the child acknowledged to the juvenile court that he had in fact received ample notice that the hearing was for transfer, not adjudication, and, as to the failure of the summons to so state, said: "We'll waive that defect." The appellate court followed the reasoning of *R.K.M. v. State* and held the summons to be defective. It then held that the defect was not waived because there was no showing the child joined in the waiver, as required by Section 51.09 of the Family Code.

Transfer Proceedings: Tracking the Language of the Statute. In *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, reh'g overruled), the appellate court refused to apply the seemingly absolute requirement of *R.K.M. v.* State. The summons in this case provided notice of a hearing on the petition of the district attorney "asking for the juvenile court to consider waiving jurisdiction, and certifying J.R.C. as an adult, and transferring the case to District Court for Criminal proceedings." The appellate court responded to the argument that the summons did not comply with Section 54.02(b) with the comment: "The fact that the words used were not in the

exact order of those in the statute does not change the fact that it stated what the statute required."

551 S.W.2d at 754.

Similarly, in *D.L.C. v. State*, 533 S.W.2d 157 (Tex.Civ.App.—Austin 1976, no writ), the summons contained the language that the hearing was for "the purpose of the Court's considering waiver of its exclusive original jurisdiction and transfer of the child to the appropriate criminal court." To the appellant's argument that the summons was defective for failing to include the word "discretionary," the court responded:

> The word "discretionary" following the phrase "for the purpose of considering" is, for all practical purposes, surplusage. For the court to "consider" the transfer contemplates the discretionary character of whatever decision it would eventually make… [*R.K.M. v. State* is distinguishable] as the notice of the transfer proceeding [in that case] wholly failed to apprise the juvenile as to the court of transference.

533 S.W.2d at 160.

More recently, the Court of Appeals in *Polanco v. State*, 914 S.W.2d 269 (Tex.App.—Beaumont 1996, writ ref'd), held that the following language in a transfer summons satisfied the statutory requirement: "to hear the First Amended Petition for Discretionary Transfer to a Criminal Court or District Court for Criminal Proceedings." The summons stated that the purpose of the hearing was "to here [sic] the Petition of the State of Texas."

Transfer Proceedings: Jurisdictional Nature of Defect. The Court of Criminal Appeals dealt with the issue of whether a failure of the summons to contain the mandatory statutory language is a jurisdictional defect for the first time in *Johnson v. State*, 594 S.W.2d 83 (Tex.Crim.App. 1980), *overruled by Hardesty v. State*, 659 S.W.2d 823 (Tex.Crim.App. 1983). Johnson had been transferred by the juvenile court and was convicted of voluntary manslaughter. He appealed from that conviction and contended that the summons to the juvenile court transfer hearing did not comply with Section 54.02(b).

The Court held the failure to comply with that requirement "was not, as the State contends, a mere question of notice, but was a fundamental defect which deprived the juvenile court of jurisdiction to hear the petition." 594 S.W.2d at 86. Since the defect was jurisdictional, the failure of the appellant to appeal from the transfer order to the Court of Appeals (as then permitted by law) did not waive the defect; it could be raised for the first time in an appeal from the criminal conviction.

Although the summons in this case did not contain the language required by Section 54.02(b), it did reference the petition that was attached to it, and that petition contained the language required by Section 54.02(b). The Court rejected the argument that this was compliance with the statute: "The reference in the summons to the attached amended petition requesting transfer of the case to district court for criminal proceedings does not satisfy the requirement of Sec. 54.02(b)...that the summons state the purpose of the hearing." 594 S.W.2d at 86.

In *Hardesty v. State*, 659 S.W.2d 823 (Tex.Crim.App. 1983, reh'g denied), however, the Court retreated from its holding in *Johnson* that the summons cannot be saved by making reference to the petition:

> In the instant case, the summons served upon appellant expressly stated that the purpose of the appearance was for consideration of the Motion for Discretionary Transfer. While the summons itself did not include the phrase "to criminal court,"...it did include an express incorporation of the allegations of the "attached petition." There was in fact an attached petition which contained references to criminal proceedings in criminal district court clearly sufficient to meet the requirements of the Family Code. To the extent that *Johnson*...is inconsistent with this holding, it is overruled.

659 S.W.2d at 825; See also *Forcey v. State*, UNPUBLISHED, No. 10-09-00335-CR, 2010 WL 2010942, 2010 Tex.App.Lexis 3830, Juvenile Law Newsletter ¶ 10-3-3 (Tex.App.—Waco 2010, no pet.) (summons referred to attached petition, which contained references to criminal proceedings in criminal court).

To summarize, if there is a failure to comply with the requirements of Section 54.02(b), that defect deprives the juvenile court of jurisdiction to hear the case. The transfer and any subsequent criminal conviction are void and may be set aside at any time. However, determining whether there is a failure to comply with Section 54.02(b) is more difficult. If the summons contains the necessary information, although not in the exact words of the statute, that is sufficient under *J.R.C.* Even if the summons does not contain the necessary information, if it expressly refers to the petition and the petition contains the necessary information, then, under *Hardesty,* that is sufficient.

Transfer of Persons 18 or Older. Sections 54.02(j) through (l) permit the discretionary transfer of a person to

criminal court who is 18 years of age or older at the time of the certification proceedings. See Chapter 10 for a discussion of the circumstances under which such certifications are possible and the procedural requirements for them.

Section 54.02(k) provides, with respect to such proceedings, that "the summons must state that the hearing is for the purpose of considering waiver of jurisdiction under Subsection (j)." That language, or language that is substantially the same, should be placed in the summons instead of the language required by Section 54.02(b). In 2013, Section 54.02(k) was amended to specify that the petition and notice are not required on the parent, custodian, guardian, or guardian ad litem as they are no longer considered parties to the proceeding if the respondent is 18 years old or older at the time the petition is filed.

Mandatory Transfer Proceedings. Under 1995 amendments, there is one circumstance in which transfer to criminal court is mandatory: when a child has previously been transferred and commits a new felony before becoming 17 years old. See Chapter 10. Section 54.02(n) dispenses with the special notice required in a discretionary transfer summons when the provisions of mandatory transfer are invoked:

> The requirements of Subsection (b) that the summons state that the purpose of the hearing is to consider discretionary transfer to criminal court does not apply to a transfer proceeding under Subsection (m) [mandatory transfer]. In a proceeding under Subsection (m), it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court.

Although "fair notice" of intent to seek mandatory transfer is required in the summons, no particular set of words is required to convey that notice. The legislature desired to avoid a repetition of the "magic words" approach used by the cases in construing Section 54.02(b).

D. Service of the Petition and Summons

The requirement of service of the petition and summons has two purposes: (1) to provide notice of the charges that have been brought and the relief (adjudication or transfer) that will be sought and (2) to provide notice of the time and place of the hearing on those charges. The summons gives notice of the time and place of the hearing, and the petition (or petition and motion to transfer) provides notice of the charges and relief sought. Both the summons and petition must be served.

Section 53.06(a) provides:

> The juvenile court shall direct issuance of a summons to:
>
> (1) the child named in the petition;
>
> (2) the child's parent, guardian, or custodian;
>
> (3) the child's guardian ad litem; and
>
> (4) any other person who appears to the court to be a proper or necessary party to the proceeding.

When the summons is signed by the clerk of the juvenile court, it is presumed that it was issued by direction of the juvenile court. It is not also necessary that there be an order by the juvenile court directing the clerk to issue the summons. *R.A.G. v. State*, 870 S.W.2d 79 (Tex.App.—Dallas 1993), *rev'd on other grounds by* 866 S.W.2d 199 (Tex. 1993).

Section 53.06(b) provides in part that "[a] copy of the petition must accompany the summons." In 2004, the Dallas Court of Appeals addressed this issue in the context of the proper service of a First Amended Petition on a juvenile. *P.L. v. State*, 130 S.W.3d 514 (Tex.App.—Dallas 2004, no pet.). Appellant argued that, while a second Notice of Delinquent Conduct referencing an "attached copy of the petition" had been served on him, it was nevertheless insufficient to prove that he was served with the amended petition. The appellate court disagreed, noting that a review of the record failed to identify any evidence that the amended petition was not served.

> Appellant has not testified that he did not receive the First Amended Petition. There is no evidence that the Original Petition was re-issued and attached to the Second Notice. Nor is there any evidence of a third petition being drafted or filed. We conclude the State has offered significant evidence that the First Amended Petition was the one attached to the second Notice, while appellant has offered no more than mere speculation that it was not.

130 S.W.3d at 515. See also *Fields v. State*, UNPUBLISHED, No. 11-04-00173-CR, 2006 WL 572893, 2006 Tex.App.Lexis 1900 (Tex.App.—Eastland 2006, pet. ref'd) (record reflected that appellant and his mother were served with summons and copy of petition and that purpose of hearing was to determine transfer to criminal court); *In the Matter of C.P.D.*, UNPUBLISHED, No. 02-03-132-CV, 2004 WL 1535218, 2004 Tex.App.Lexis 6130, Juvenile Law Newsletter ¶ 04-3-16 (Tex.App.—Fort Worth 2004, no pet.) (appellate record's failure to include copy of petition

with citation did not establish that trial court lacked jurisdiction).

Finally, Section 53.06(e) provides that "a party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing."

1. Service on the Child

Personal Service. The courts have held that there must be personal service of the petition and summons on the child to give the juvenile court jurisdiction over the case. In *In the Matter of T.T.W.*, 532 S.W.2d 418 (Tex.Civ.App.—Texarkana 1976, no writ), the appellate court reversed the juvenile court order of transfer because, although the child appeared at the transfer hearing, he had not been served with the summons and petition. The court concluded:

> Compliance [with the service requirements] is prerequisite to exercise of juvenile court jurisdiction to conduct hearings and make orders.... In the absence of a summons to the juvenile, the fact here, the juvenile court did not acquire jurisdiction to consider discretionary transfer.

532 S.W.2d at 418.

The Court of Criminal Appeals followed this lead, and in *Johnson v. State*, 551 S.W.2d 379 (Tex.Crim.App. 1977), reversed a conviction for murder because there was no showing that the juvenile had ever been served with the petition for transfer and summons. The fact that the juvenile appeared at the transfer hearing did not cure this defect. Since the juvenile court never acquired jurisdiction to transfer, the criminal court never acquired jurisdiction to try the appellant for the offense transferred.

The respondent in *In re B.R.S.*, UNPUBLISHED, No. 03-00-00076-CV, 2000 WL 1228005, 2000 Tex.App.Lexis 5871, Juvenile Law Newsletter ¶ 00-3-33 (Tex.App.—Austin 2000, no pet.), was adjudicated under the Determinate Sentence Act and given a 40-year sentence. There was no return of service in the file. When the juvenile court judge asked in court whether the respondent had been served with a petition and summons, the juvenile responded he had not received any such documents. The Court of Appeals concluded that the juvenile court had not acquired jurisdiction over the proceedings, so it set aside the adjudication and sentence.

Service on Juvenile's Attorney Not Sufficient. In *In re M.W.*, 523 S.W.2d 513 (Tex.Civ.App.—El Paso 1975, no writ), the State sent a copy of the petition and summons to the juvenile's attorney but did not serve a copy personally on the juvenile. The juvenile and attorney appeared at the transfer hearing. The fact that the juvenile appeared and that his attorney filed an answer in the case did not excuse the State from the requirement of personally serving the juvenile. The appellate court characterized the statutory requirement of personal service as "nothing more than a codification of the long-standing requirement for personal service upon minors" in civil cases because minors are regarded as lacking the legal capacity to waive service. 523 S.W.2d at 515.

Similarly, in *In the Matter of A.B.*, 938 S.W.2d 537 (Tex.App.—Texarkana 1997, writ denied), the Court of Appeals held that service on the juvenile's attorney but not personally on the juvenile did not suffice. The Court of Appeals in *Alaniz v. State*, 2 S.W.3d 451 (Tex.App.—San Antonio 1999, no pet.), held that personal service of the petition and summons for transfer on the secretary of the juvenile's lawyer was insufficient. The Court of Appeals reversed the criminal conviction based on the juvenile court certification.

Service on Parent Not Sufficient. The Court of Appeals, in *Light v. State*, 993 S.W.2d 740 (Tex.App.—Austin 1999), *appeal dism'd by* 2000 Tex.App.Lexis 4299 (Tex.App.—Austin 2000), held that service of the petition and summons for transfer on the juvenile's father did not comply with the requirement of personal service on the child. The Court of Appeals reversed the criminal conviction obtained following certification.

Certified Mail Not Sufficient. The State in *In the Matter of H.R.A.,* 790 S.W.2d 102 (Tex.App.—Beaumont 1990, no writ) sought to serve the petition and summons on respondent by certified mail. Respondent's mother signed the receipt for the petition and summons. She and respondent appeared at the hearing. Although in civil cases generally the plaintiff may request either personal service or service by certified mail, that is not true in Title 3 cases, where personal service on the child is required. Accordingly, the Court of Appeals set aside the adjudication of delinquency.

Waiver of Service. The Texas Supreme Court dealt with the requirement of personal service upon the juvenile. In *In the Matter of D.W.M.*, 562 S.W.2d 851 (Tex. 1978), the juvenile, his parents, and his attorney appeared for a transfer hearing. No one objected to the failure to serve a petition and summons on the juvenile. The juvenile court ordered transfer. On appeal, the Court of Civil Appeals held that the juvenile had waived service by failure to object and that the juvenile had failed to prove that he had not been served. The Texas Supreme Court reversed:

> [Summons] may be waived by all of the parties to the proceedings with the exception of the juvenile. Section 53.06(e) states in clear and unambiguous terms that "[a] party, *other than the child*, may waive service of summons by written stipulation or by voluntary appearance at the hearing." (Emphasis added). This language reflects the common law rule that a minor is without legal capacity under the law to waive service of summons...nor can anyone waive it for him.... We hold that a juvenile must be served with summons and that it must affirmatively appear of record.
>
> …[O]ur interpretation of section 53.06(e) [is] that a juvenile cannot waive service of summons.

562 S.W.2d at 853.

The Court of Criminal Appeals dealt with a similar question in *Grayless v. State*, 567 S.W.2d 216 (Tex.Crim.App. 1978). Appellant was charged in an adjudication petition with murder and was served with that petition and a summons. Later, the State filed a petition with the juvenile court requesting transfer to criminal court for the same conduct. Appellant was never served with the transfer petition or summons. Appellant, his parents, and his attorney appeared at the transfer hearing but made no objection to the failure to serve the transfer petition and summons personally upon the juvenile. The juvenile court transferred the case to criminal court, and no appeal was taken from the transfer order. *Grayless* was convicted of murder and on appeal from that conviction claimed he was not served with the transfer petition or summons. The Court of Criminal Appeals accepted the reasoning of *D.W.M.* and reversed the conviction:

> The proceeding to declare a juvenile a delinquent...and the proceeding to waive jurisdiction and to certify a juvenile as an adult for criminal prosecution...are separate and distinct proceedings....
>
> In juvenile proceedings, summons must issue to the named juvenile, his parents or guardian, his guardian ad litem, and any other party the court deems a necessary party to the proceeding. Sec. 53.06(a).... [Summons] may be waived by all the parties to the proceeding except the juvenile. Sec. 53.06(e).... Therefore, the appearance of appellant at the certification hearing and his failure to object to the lack of a proper summons did not constitute a waiver of the service of summons....
>
> The record shows that the juvenile court did not have jurisdiction over the appellant. Since it did not have jurisdiction, its order waiving jurisdiction and certifying appellant for criminal prosecution was a nullity.... We hold that the district court did not have jurisdiction to try the appellant for a criminal offense in the absence of a valid waiver of jurisdiction by the juvenile court.

567 S.W.2d at 219-20.

The rationales of *D.W.M.* and *Grayless* are that the service requirement is jurisdictional and may not be waived by inaction. In an opinion containing dictum contrary to those propositions, the Austin Court of Appeals in *In re B.J.E.*, UNPUBLISHED, No. 03-00-00438-CV, 2001 WL 838409, 2001 Tex.App.Lexis 4967, Juvenile Law Newsletter ¶ 01-3-22 (Tex.App.—Austin 2001, no pet.), said that a juvenile may not in an appeal from revocation of probation raise failure to serve him or her with the petition and summons for the adjudication hearing that led to the probation in question. The Court of Appeals said that such a challenge must occur in a direct appeal from the adjudication or not at all. The court also said that the appellate record had been supplemented by the State to show that proper service had been made, which also supported affirming the revocation, thus rendering discussion of the first point unnecessary.

A Court of Appeals has held that although Section 53.06 prohibits a juvenile from waiving service of petition and summons, it does not prevent the juvenile from waiving a defect in a return of service by appearing at the hearing. *In the Matter of R.G.S.*, UNPUBLISHED, No. 05-97-01383-CV, 1998 WL 136490, 1998 Tex.App.Lexis 1894, Juvenile Law Newsletter ¶ 98-2-10 (Tex.App.—Dallas 1998, pet. denied). In that case, there were typographical errors in the spelling of the respondent's name in the return of service. There was no evidence that the "waiver" in this case complied with the requirements of Section 51.09 so the use of that concept is questionable. The court could have simply stated instead that a non-material defect in a return of service is not fatal to the court's jurisdiction.

Judicial Admission of Service. The juvenile respondent in *Light v. State*, 15 S.W.3d 104 (Tex.Crim.App. 2000), may have acknowledged in a dialogue with the juvenile court judge that he was personally served with summons, although the return of service recited that the respondent's father had been served with the respondent's summons. The Court of Criminal Appeals remanded the appeal to the Court of Appeals for it to consider whether respondent admitted to personal service, implying that if there is such an admission, it would override the contrary recitation in the return of service. The Court of Criminal Appeals said that an admission of personal service by a

respondent is not a waiver of service by the juvenile, which would have been prohibited by the Family Code.

Proving Service. In *In the Matter of W.L.C.*, 562 S.W.2d 454 (Tex. 1978), the Court of Appeals had affirmed the juvenile court's transfer order. It rejected the juvenile's contention that the juvenile court did not acquire jurisdiction because there was no showing the juvenile had been served. It did so on the ground that the record did not conclusively show that the juvenile had not been served. The Texas Supreme Court reversed the Court of Appeals and held that the burden was upon the State to show that the juvenile had been served rather than the burden being on the juvenile to show that he had not been served: "We hold that a juvenile must be served with summons and that, absent an affirmative showing of service of summons in the record, the juvenile court is without jurisdiction to transfer the juvenile to district court." 562 S.W.2d at 455.

In *Allen v. State*, 657 S.W.2d 815 (Tex.App.—Houston [1st Dist.] 1982, pet. dism'd and reh'g overruled), the appellate court reversed a conviction for murder because there was no showing in the record that the juvenile had been served with petition and summons in the transfer proceedings. The State argued that, in the absence of evidence to the contrary, it should be presumed that the proceedings before the juvenile court were regular and that the juvenile was served as required by law. The appellate court rejected that argument:

> It is true that there is no affirmative showing in the record that the juvenile was not served, but we are of the opinion that we may not presume that all proceedings were regular, including service on the juvenile, because of the holding of our Supreme Court in *In the Matter of W.L.C.*... The juvenile court's docket sheet contains no entry regarding the service or request for service on the juvenile. The court's order of transfer, although thorough in its recitation regarding service on others and the various procedures required by the code as a prerequisite to transfer, was silent regarding service on appellant. There is no summons or return in the file. Under these circumstances, we may not presume the validity of the order or the proceedings.

657 S.W.2d at 817.

Recitation in Return of Service. A recitation in a return of service that the petition and summons were personally served on the juvenile respondent is proof of personal service in the absence of rebutting evidence. *In the Matter of M.E.B.*, UNPUBLISHED, No. 01-95-01534-CV, 1997 WL 103746, 1997 Tex.App.Lexis 1208, Juvenile Law Newsletter ¶ 97-2-03 (Tex.App.—Houston [1st Dist.] 1997, no writ); *In the Matter of S.D.H.*, UNPUBLISHED, No. 01-96-00732-CV, 1997 WL 81173, 1997 Tex.App.Lexis 981, Juvenile Law Newsletter ¶ 97-2-07 (Tex.App.— Houston [1st Dist.] 1997, no writ).

The return of service in *Gibson v. State*, UNPUBLISHED, No. 09-98-260-CR, 1999 WL 1043971, 1999 Tex.App.Lexis 8707, Juvenile Law Newsletter ¶ 99-4-33 (Tex.App.—Beaumont 1999, pet. ref'd), recited that the "citation" had been personally served on the juvenile respondent. Stating that case law defines a citation to be a petition and summons, the Court of Appeals said that the return adequately recited service of both.

Continuances After Service. Once the juvenile has been personally served with a copy of the summons and the adjudication or transfer petition, the juvenile court has acquired jurisdiction over the case; the courts are less stringent in requiring personal service on the juvenile after that. For example, in *Appeal of B.Y.*, 585 S.W.2d 349 (Tex.Civ.App.—El Paso 1979, no writ and reh'g overruled), a motion to transfer was filed. A summons and a copy of the motion were personally served on the juvenile. The transfer hearing did not occur on the date stated in the summons because it was continued twice by agreement of the prosecutor and the juvenile's attorney. No further summons was issued, but the juvenile was present at the transfer hearing when it occurred. The appellate court rejected the argument that a new summons must be served each time a hearing is reset or continued:

> [T]he validly acquired jurisdiction did not cease because the parties agreed to a continuance. Appellant's position would require a second or possibly a third summons because of the continuances. Due process was afforded; the purposes of notice were present; a second or third summons would have afforded Appellant nothing more.

585 S.W.2d at 351.

This case was followed and applied in *In the Matter of R.M.*, 648 S.W.2d 406 (Tex.App.—San Antonio 1983, no writ) and in *In the Matter of C.C.G.*, 805 S.W.2d 10 (Tex.App.—Tyler 1991, writ denied).

The rule that a second service of the same petition is not required following a continuance of the hearing was applied in *Turner v. State*, 796 S.W.2d 492 (Tex.App.—Dallas 1990, no writ). The juvenile court's first order transferring Turner to the criminal court was reversed by the Court of Appeals. Almost 15 months after the first hearing,

a second transfer hearing was held on the same petition without new service of petition and summons. On appeal from the second transfer order, the Court of Appeals held that the continuance rule applied and that a second service of the petition and a new summons were not required.

Amended Petitions. The courts have applied the same reasoning to failures to serve amended petitions upon the child and parents and to defects in summons issued on amended petitions. See *B.R.D. v. State*, 575 S.W.2d 126 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.) (failure to serve amended petition on juvenile's parents did not deprive court of jurisdiction acquired upon service of original petition and summons); *McBride v. State,* 655 S.W.2d 280 (Tex.App.—Houston [14th Dist.] 1983, no writ) (defects in summons served with amended petition do not require reversal on appeal from criminal conviction); *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ) (failure to serve amended petition on respondent does not require reversal in determinate sentence case).

Similarly, serving an amended petition on a juvenile less than two days before the day of the adjudication hearing does not violate Section 53.07(a) if the original petition was served at least two days before the day the adjudication hearing begins. *R.X.F. v. State*, 921 S.W.2d 888 (Tex.App.—Waco 1996, no writ).

The preferred approach is to issue a new summons when amended petitions are filed and serve amended petitions on all the parties. Amending a petition to change the relief requested from adjudication to transfer would be regarded as initiating a different proceeding under *Grayless*, and service of the "amended petition" with new summons would be required to give the court jurisdiction.

Trial Amendments. The State is sometimes permitted to amend its petition even after the hearing has begun, so long as the amendment does not deprive the respondent of the constitutional right to notice of the issues to be heard. In *In the Matter of J.E.,* 800 S.W.2d 958 (Tex.App.—Corpus Christi 1990, no writ), the petition for a transfer hearing alleged an incorrect date of birth for the respondent. The State was permitted to amend the petition at the hearing to allege the correct date of birth. The Court of Appeals held that respondent was not entitled to personal service of the amended petition under these circumstances because the juvenile court had acquired jurisdiction when the original petition was served and the change in date of birth was not a material change in the petition. See *In the Matter of R.C.*, UNPUBLISHED, No. 13-08-00334-CV, 2010 Tex.App.Lexis 815 (Tex.App.—Corpus Christi 2010, no pet.) (no abuse of discretion for trial court to allow amendment to State's petition before appellant's plea since defense counsel did not claim surprise, declined more time to respond, and announced ready to proceed with trial).

2. Service on Parents and Others

Section 53.06(a) provides:

> The juvenile court shall direct issuance of a summons to:
>
> (1) the child named in the petition;
>
> (2) the child's parent, guardian, or custodian;
>
> (3) the child's guardian ad litem; and
>
> (4) any other person who appears to the court to be a proper or necessary party to the proceeding.

Section 53.06(e) provides that "[a] party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing." Section 53.07(b) provides that "[t]he juvenile court has jurisdiction of the case if after reasonable effort a person other than the child cannot be found nor his post-office address ascertained, whether he is in or outside this state." Finally, Section 51.11(a) provides that "[i]f a child appears before the juvenile court without a parent or guardian, the court shall appoint a guardian ad litem to protect the interests of the child."

The purpose of these provisions is to require notice of hearings to those adults who would normally have an interest in the welfare of the child but to ensure that the juvenile court can proceed with the case even if none of those persons can be located. Finally, if none of those persons appear with the child, the juvenile court can proceed with the case by appointing a guardian ad litem for the child. See Chapter 8.

The juvenile court should order service of each person for whom it has a name and address who is the parent, guardian, custodian, non-defense-attorney guardian ad litem, or spouse of the child.

Reasonable Effort. What constitutes a "reasonable effort" to serve a required party so that the juvenile court will have jurisdiction despite lack of service? In *In the Matter of D.W.L.*, 828 S.W.2d 520 (Tex.App.—Houston [14th Dist.] 1992, no writ), the State attempted to locate the respondent's mother, without success. It checked a wide variety of public sources (driver's license record, food stamp

records, criminal history records) for leads, but none proved fruitful. Personal visits were made to several possible places of residence and employment, without success. The juvenile court recessed the hearing three times to allow further efforts to serve the mother. Finally, the juvenile court appointed a guardian ad litem and proceeded with the hearing. The Court of Appeals indicated that the State "expended more than the necessary 'reasonable effort' in its futile attempts to find and serve appellant's parents."

Service on One Parent. The courts have interpreted the language in Section 53.06(a)(2) that the "juvenile court shall direct issuance of a summons to...the child's parent, guardian, or custodian" to require service on only one of those persons, not all of them. In *In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e. and reh'g overruled), appellant complained of the failure of the juvenile court to direct issuance of a summons to his natural father. The court responded:

> The record shows that the appellant's natural mother was present at the certification hearing pursuant to a summons which was properly issued and served on her.... [T]he Family Code requires the issuance of a summons to "the child's parent, guardian, or custodian." This provision does not require the issuance of summons to all such persons. The issuance of a summons to either of the child's parents is sufficient to comply with Section 53.06(a) of the Code.... Since the child's natural mother was properly served with summons, there was no statutory requirement for the service of summons on the child's natural father.

644 S.W.2d at 818. See also *In the Matter of P.C.*, 858 S.W.2d 6 (Tex.App.—Houston [1st Dist.] 1993, no writ); *K.M.P. v. State*, 701 S.W.2d 939 (Tex.App.—Fort Worth 1986, no writ).

In *In the Matter of Honsaker,* 539 S.W.2d 198 (Tex.Civ.App.—Dallas 1976, writ ref'd n.r.e.), the child was served with a summons and his natural mother appeared at the transfer hearing and stated that she had previously signed papers authorizing the child's adoption. There was, however, no proof the child had been adopted. The juvenile court adjourned the hearing to allow time to notify the child's natural father, who lived out of state, of the hearing. When the hearing was reconvened, it was learned that the State could not prove that the natural father had been notified. The juvenile court appointed the natural mother as the child's guardian ad litem and proceeded with the hearing. The appellate court rejected the contention that failure to serve the natural father required reversal of the transfer order:

> Since Honsaker was served with [the summons], his natural mother was appointed his guardian ad litem, and he was effectively represented by competent counsel, we hold that his due process rights were adequately protected. The natural father and adoptive mother are not parties to the lawsuit, and no contention is advanced that they have parental rights which might be affected by the hearing.

539 S.W.2d at 201.

Service on Neither Parent. In *Carlson v. State*, 151 S.W.3d 643 (Tex.App.—Eastland 2004, no pet.), neither of appellant's parents attended the discretionary transfer hearing. The record showed that Carlson's father, who was incarcerated in North Carolina, was not timely served with a summons by certified mail at least five days before the day of the hearing. See Section 53.07(a). Service of the summons on Carlson's mother was not attempted since she was in Big Spring State Hospital at the time of the hearing. The Eastland Court of Appeals held that because neither parent was duly served, the juvenile court lacked jurisdiction to transfer Carlson to criminal district court, thus depriving that court of jurisdiction to try him for the underlying offense. Without discussing if reasonable efforts were made to serve the parents, the court declined to find this jurisdictional error harmless and voided both the transfer order and the subsequent conviction. Cf. *Maldonado v.* State, UNPUBLISHED, No. 07-09-00168-CR, 2010 WL 840814, 2010 Tex.App.Lexis 1796, Juvenile Law Newsletter ¶ 10-2-6 (Tex.App.—Amarillo 2010, no pet.) (service of summons on mother five days after hearing and father nine minutes before hearing violated Sections 54.02(b) and 53.07, thus depriving juvenile court of jurisdiction to transfer case).

Service on Guardian. In *In the Matter of J.S.*, 602 S.W.2d 585 (Tex.Civ.App.—Amarillo 1980, no writ), the State, in its transfer petition, identified the child's parents and stated their out-of-town address. It also identified the child's adult sister as his guardian and gave a local address for her. The juvenile court directed issuance of summons only to the sister. The appellate court held that failure to require service on the child's parents was not error:

> The child must be served with a summons and, absent an affirmative showing in the record of service of summons on the child, the juvenile court has no jurisdiction to transfer the child to district court.... That requirement was met in this case. The extent to which service is required on the other entities named in section 53.06(a) varies, however, depending on the circumstances of each case....

> In this case, the evidence indicates J.S. had not lived with his parents for some time and that he had been living with his sister. Although his parents were never served, his sister was duly served. She appeared at the hearing, was identified in court as his guardian and again identified as his guardian in various post-trial instruments filed by counsel for J.S. In the trial court, there was no objection to, or mention of, the failure to serve the parents.
>
> From these facts, we are satisfied that service on the sister, as the guardian of J.S., was sufficient compliance with section 53.06(a)(2). The purpose of the service provision was met by her notification and appearance at the hearing. Additionally, section 53.06(a)(2) is phrased in the disjunctive, indicating that service on any of the entities named in section 53.06(a)(2) will satisfy that portion of the statute.

602 S.W.2d at 590-91.

There was no evidence that respondent's adult sister had been appointed as his guardian by a court as required by the definition of "guardian" in Section 51.02(4). More likely, she was actually his custodian as defined by Section 51.02(3). The result would be the same.

Service on Custodian. In *In the Matter of V.C.H.*, 605 S.W.2d 643 (Tex.Civ.App.—Houston [1st Dist.] 1980), the child's natural father was deceased and the child's natural mother had given him to a foster father when he was two days old. The juvenile court directed that only the foster father be served. On appeal, the child contended that the failure to order service on his natural mother required reversal of the transfer order. The appellate court disagreed:

> A child's custodian is defined by Section 51.02 of the Family Code as "the adult with whom the child resides." It is undisputed that under this definition the appellant's foster father was his custodian and that the foster father was served and appeared at the first hearing. As [Section 53.06(a)(2)] is clearly worded in the alternative, we consider that service on the custodian and the parent is not required.

605 S.W.2d at 647.

Married Juvenile. If the juvenile is married, is it still necessary for the juvenile court to direct service of summons on a parent, guardian, or custodian of the child under Section 53.06(a)(2)? The Attorney General was asked that question and gave his opinion that it was necessary: "It does not follow from the fact that the parents of a married juvenile have no duties and privileges under [the Family Code because marriage emancipates a minor] that they would necessarily not have an interest in a juvenile proceeding sufficient to justify the statutory requirement that summons to appear at said hearing must issue." Attorney General Opinion No. MW-298 (1981).

If the juvenile is married, must service also be directed to the spouse of the juvenile? Section 51.02(10) states that "'Party' means...the child's...spouse."

In *K.M.P. v. State*, 701 S.W.2d 939 (Tex.App.—Fort Worth 1986, no writ), respondent, who was married, contended on appeal from a transfer to criminal court that her husband should have been summoned to the transfer hearing. Respondent's father was voluntarily present at the hearing. Respondent argued that her husband was a "proper or necessary party" to the proceeding under Section 53.06(a)(4) and should have been served. The court held that, when a parent is served, it is not also necessary to serve a spouse. It should be noted in this case that respondent's husband had been served with a subpoena to testify at the hearing and was present in his capacity as a potential witness for the State. The court concluded:

> Even though the definition of "party" contained in Section 51.02(10)...includes "the child's...spouse," we find that in this case, because [appellant's father] was available to aid appellant during the hearing and because no contention is advanced that [the husband] has rights which might be affected by the hearing, [the husband] was not a proper or necessary party.

701 S.W.2d at 942.

Obviously, most cases of married respondents will not have the unusual feature that the spouse has been subpoenaed as a witness by the State. Therefore, in ordinary cases, the preferred course of action is to attempt service of summons and petition upon the spouse on the theory he or she is a necessary party.

Service on Guardian Ad Litem/Defense Attorney. Section 53.06(a)(3) requires that summons issue to "the child's guardian ad litem." In *In re C.E.H.*, 516 S.W.2d 25 (Tex.Civ.App.—Texarkana 1974, no writ), the child's attorney had been appointed guardian ad litem prior to the adjudication hearing in the case. On appeal, he contended that it was error for the juvenile court not to direct summons to the attorney in his capacity as guardian ad litem. The appellate court rejected this argument:

> Section 53.06...provides that summons shall be served upon certain persons, including the child's

> guardian ad litem, but it also provides in Section (e) thereof, that any party except the child may waive service of summons by a voluntary appearance at the hearing. Section 51.11(c) of that code provides that the attorney for the child may also serve as his guardian ad litem. To hold that a person acting in such a dual role may voluntarily appear at the hearing and participate therein as the child's attorney, and yet not be before the court in his capacity as guardian ad litem, would be to place an unreasonably technical interpretation upon the requirements for summons, and would appear to be contrary to the intent of Section 51.11(c).

516 S.W.2d at 27-28.

Absence at Hearing. Section 53.07(b) authorizes the juvenile court to proceed with a hearing if a person other than the child cannot be served with summons despite reasonable efforts to do so. But what happens when the parent has been served but fails to appear at the hearing? In *Carner v. State*, 592 S.W.2d 618 (Tex.Crim.App. 1980), the Court of Criminal Appeals held the juvenile court could proceed with the hearing: "[W]e know of no requirement that the parent must be present at such hearing, after being duly summoned, before the juvenile court has jurisdiction to proceed upon a motion for discretionary transfer." 592 S.W.2d at 620. Of course, if no parent or guardian is present in court, the juvenile court must, under Section 51.11, appoint a guardian ad litem for the child.

Notice to Parents and Duty to Attend Hearing. Section 51.115, added in 1995, places a legal duty on every parent, managing conservator, possessory conservator, court-appointed custodian, and guardian of a juvenile respondent to attend all juvenile court hearings other than a detention hearing. It also creates a notice requirement in addition to the requirement that summons for an adjudication or transfer hearing must be served on a parent or other adult.

The language of Section 51.115(a) refers to "each parent of a child" and "each managing and possessory conservator of a child." Thus, the legislature's intent was clearly to include both parents within the duty to attend hearings. Under subsection (c), a person required to attend a hearing is entitled to receive notice of the hearing. Therefore, under Section 51.115, both parents have to be notified of juvenile court hearings even though both are not required to be served with summons.

The notice requirement in Section 51.115(a) applies to the following hearings:

(1) Section 54.02 (waiver of jurisdiction and discretionary transfer to criminal court);

(2) Section 54.03 (adjudication hearing);

(3) Section 54.04 (disposition hearing);

(4) Section 54.05 (hearing to modify disposition); and

(5) Section 54.11 (release or transfer hearing).

Although a petition and summons are required only for a transfer or adjudication hearing, Section 51.115 requires notice in disposition, modification, and release/transfer hearings as well.

Section 51.115(c) provides that each of the persons mentioned in Subsection (a) is "entitled to reasonable written or oral notice that includes a statement of the place, date, and time of the hearing and that the attendance of the person is required." This notice may be combined with a summons or other notice required to be given or it may be given independently of the summons notice.

Although subsection (c) could be read to impose a requirement of successful delivery of notice to such persons, that would be an unworkable requirement. Permitting the notice to be combined with the summons suggests that the "reasonable effort" standard for serving summons should be applied here as well.

The requirement of "reasonable written or oral notice" means that personal service of notice is not required. It permits notice to be given by telephone, in person (e.g., at a detention hearing), by ordinary mail, by certified mail, or by other means.

Section 51.115(b)(1) permits the juvenile court to waive notice "for good cause shown." A cautious juvenile court would waive notice in a case in which it appears that authorities were unable to locate a person entitled to notice under subsection (a) despite making a "reasonable effort" to do so.

Section 51.115(c) also provides, "If a person required under this section fails to attend a hearing, the juvenile court may proceed with the hearing." This language authorizes the juvenile court to proceed whether the adult has been given notice and fails to appear or the State was unable to give notice. In the latter event, a cautious judge would waive notice for good cause. If no adult appears for the hearing, Section 51.11(a) requires the court to appoint a guardian ad litem for the respondent.

Section 51.115(d) authorizes the juvenile court to hold in contempt an adult who received notice but failed to appear and to fine such a person $100 to $1,000. In addition to or in lieu of a fine, the court "may order the person to receive counseling or to attend an educational course on the duties and responsibilities of parents and skills and techniques on raising children."

3. Who May Serve the Summons and Petition

Section 53.07(a) requires that the petition and summons be personally served unless the person to be served cannot be found or is out of the state, in which case service by registered or certified mail is sufficient. Of course, the juvenile must always be personally served.

Section 53.07(c) provides that service of the summons "may be made by any suitable person under the direction of the court." Rule 103 of the Texas Rules of Civil Procedure permits service by a sheriff or constable or "by any person authorized...by written order of the court who is not less than eighteen years of age." It further provides, "No person who is a party to or interested in the outcome of a suit shall serve any process."

Service by Probation Officer. In *P.G. v. State*, 616 S.W.2d 635 (Tex.Civ.App.—San Antonio 1981, writ ref'd n.r.e.), the juvenile contended that it was error for the juvenile probation officer to serve the juvenile with the petition and summons because he was not a sheriff or constable, who were then the only persons authorized to serve process under Rule 103, and because the probation officer testified adversely to the juvenile in the transfer proceeding. The appellate court rejected this argument:

> We disagree with appellant's contention that the service of summons in a juvenile proceeding must be made pursuant to the provisions of Rule 103...and this type of service is mandatory.... [T]he Family Code contains a specific provision for the service of such process. It is clear that the legislature intended to give the juvenile court discretion to determine who is a "suitable person" to serve a summons on a juvenile....
>
> We also disagree with appellant's contention that the officer or probation officer here involved is not a suitable person to serve such summons. The fact that a person may be called as a witness by one or the other party to a suit and may thereafter testify favorably or adversely to the person calling him, does not make him an interested party in the ordinary sense of the word or make him a person interested in the outcome of the suit.
>
> A juvenile probation officer who is familiar with the person served or who may have worked with him in an attempt to rehabilitate him would appear to be a very suitable person to serve notice on a juvenile for an appearance at a hearing to determine whether he will be certified to stand trial as an adult for an alleged offense.

616 S.W.2d at 638.

Order for Service by Probation Officer. In *Suave v. State*, 638 S.W.2d 608 (Tex.App.—Dallas 1982, pet. ref'd), the juvenile, appealing from a conviction of murder, contended that the juvenile court never acquired jurisdiction over him because the petition and summons were served by a juvenile probation officer and there was no order of the juvenile court in the record directing service by the probation officer. The court rejected this argument and held that the burden was upon the juvenile to prove that the juvenile probation officer was not directed by the juvenile court to serve summons and was not a suitable person to do so:

> [J]uvenile probation officers work under and for the juvenile judge and are trained to deal with juveniles.... In this case, the record reflects that the juvenile court entered an order directing that the summons be issued and that summons was executed by a probation officer, which fact defendant concedes. Because probation officers are suitable persons to issue summons and likely to be directed so to do by the juvenile judge, we conclude that the officer's return was valid on its face. Thus, defendant had the burden of challenging any alleged defects in the officer's return in the juvenile court.

638 S.W.2d at 611.

In *In the Matter of D.B.C.*, 695 S.W.2d 248 (Tex.App.—Austin 1985, no writ), a summons to a transfer hearing was served by a juvenile probation officer. Respondent contended on appeal that since there was no order entered in this case nor a general order that juvenile probation officers should serve summons, the service was invalid. The appellate court rejected his argument and held that neither a specific nor a general order was needed:

> The manifest purpose of § 53.07(c) is to require that service be made upon a juvenile by one acting in an official capacity. This requirement insures that the juvenile both receives the notice and realizes its import. A juvenile probation officer...is only completing the natural and logical steps prescribed in the Family

> Code. It would be unreasonable to require such a probation officer to secure a recorded express order from the juvenile court each and every time service upon a juvenile is necessary. Similarly, a blanket order covering service of all juveniles would not provide any additional element of supervision by the juvenile court, nor provide any additional direction for juvenile probation officers making such service in a particular case.

695 S.W.2d at 249.

Thus, the requirement of Rule 103 that a person other than a sheriff or constable may serve process "by written order of the court" is inapplicable to service of juvenile process by a probation officer. Of course, the more prudent course of action would be for the juvenile court who wishes persons other than a sheriff or constable to serve summons to enter a written order defining the class of persons permitted to serve, declaring them to be suitable, and directing that they serve summons in all future proceedings.

CHAPTER 10: Discretionary Transfer to Criminal Court

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This chapter deals with discretionary transfer to criminal court, which is sometimes referred to as "certification to criminal court" or "waiver of juvenile court jurisdiction." Only a very small percentage of all juvenile cases result in transfer proceedings. In calendar year 2016, there were 143 youth certified and transferred for trial proceedings in the adult system. Certified youth represented 0.3% of the total referral dispositions to the juvenile justice system. The Texas Juvenile Justice Department (TJJD) reports the following numbers of certifications since 1996:

Calendar Year	Certifications
1996	589
1997	476
1998	433
1999	236
2000	221
2001	142
2002	214
2003	139
2004	164
2005	178
2006	218
2007	212
2008	270
2009	200
2010	216

2011	174
2012	175
2013	199
2014	132
2015	120
2016	143

Although small in number compared with total referrals, certifications remain extremely important cases for the community and for the respondent because they usually involve serious offenses.

Aspects of the transfer process are discussed elsewhere. Chapter 9 discusses the pleading and service of summons requirements in transfer proceedings. Chapter 3 discusses minimum and maximum ages for transfer to criminal court. Chapter 7 discusses statutory time requirements as applied to the transfer process. Chapter 14 discusses the applicability of mental illness and mental retardation proceedings to the transfer process.

A. Eligibility to be Transferred

Section 54.02 sets out two separate types of transfer proceedings: (1) when the respondent is under 18 years of age at the time the proceedings are initiated by the filing of a petition for transfer or a petition for adjudication and a motion for transfer; and (2) when the respondent is 18 years of age or older at the time the proceedings are initiated or at the time of court proceedings.

1. Under Age 18

Section 54.02(a) sets out three requirements for transfer proceedings for a juvenile under the age of 18:

> The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:
>
> (1) the child is alleged to have violated a penal law of the grade of felony;
>
> (2) the child was:
>
> (A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; or
>
> (B) 15 years of age or older at the time the child is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense; and
>
> (3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

Certification for Offense Committed While 14. Prior to the 1995 amendments, the minimum age for certification for any offense was 15. As a result of the 1995 amendments, the minimum certification age for any capital, first degree, or aggravated controlled substance felony was reduced to 14. Aggravated controlled substance felonies are felonies that carry a higher minimum term or a higher possible fine than a first degree felony. Section 51.02(1). A child cannot be certified for a second degree, third degree, or state jail felony committed while age 14.

Age at the Time of the Offense. It is the age of the child at the time the offense is committed that controls. Thus, an offense committed before age 14 cannot be certified under Section 54.02 because Subsection (a)(2) sets a floor of 14 for commission of the offense. Similarly, the child must have been 15 or 16 when committing a second degree, third degree, or state jail felony to be eligible to be certified under this section. See Chapter 3 for a more complete discussion.

The transfer order need not recite that the offense was committed while the respondent was of certifiable age, provided there is evidence in the criminal court record showing he or she to have been of certifiable age. *Leno v. State*, 934 S.W.2d 421 (Tex.App.—Waco 1996, pet. dism'd) (waiver of rights form signed by defendant showed he was 15 or 16 at the time of the offense).

Age at the Time of the Hearing. The age of the juvenile at the time of the discretionary transfer proceedings is also important. Prior to 2013, if the juvenile turned 18 before the certification order was entered, then the proceeding had to begin again and the special procedures applicable to certifications for those who were 18 years of age and older had to be used. Section 54.02(j). In 2013, Section 51.0412 was amended to provide that the juvenile court retains jurisdiction if the juvenile turns 18 after the petition seeking certification is filed but before the order is entered, as long as the court enters a finding that the

prosecutor exercised due diligence in an attempt to complete the proceeding before the 18th birthday; this rule is the same as for any other juvenile proceeding that begins before a youth turns 18. This change was made in order to end the need for proceedings to begin again and to make it clear that Section 54.02(j) was solely applicable to certification proceedings beginning after a person turns 18.

Despite the 2013 statutory change, at least one court has held that the findings in Section 54.02(j)(4) must be made in cases that start before the person turns 18 in order for the court to maintain jurisdiction. The case did not discuss whether the findings required by 51.0412 were made in lieu of the 54.02(j)(4) findings. It is possible to find due diligence under 51.0412 for reasons other than those listed in 54.02(j)(4). *Morrison v. State*, UNPUBLISHED, 2016 WL 6652734 (Tex.App.—Houston [14th District] 2016).

2. 18 Years or Older

Sections 54.02(j) through (l) permit a person who is 18 or older and who committed an eligible felony between the ages of 10 and 17 to be transferred to criminal court. Section 54.02(j) sets out five requirements for this type of transfer:

> The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:
>
> (1) the person is 18 years of age or older;
>
> (2) the person was:
>
> (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code [murder];
>
> (B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code [murder]; or
>
> (C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;
>
> (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
>
> (4) the juvenile court finds from a preponderance of the evidence that:
>
> (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
>
> (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
>
> (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
>
> (ii) the person could not be found; or
>
> (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and
>
> (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

If these five requirements are shown, the juvenile court is permitted, but not required, to transfer the person for prosecution in criminal court. If only a certification petition was filed and the juvenile court declines to transfer, then the case must be dismissed since the juvenile court lacks jurisdiction to take any action other than to consider transfer. However, if an adjudication petition was also filed before the respondent's 18th birthday, then there is a possibility he or she could be adjudicated on that petition after age 18 following denial of certification. See Section 51.0412 and Chapter 3. It is critical that the adjudication petition is filed before the youth is 18 because there is no authority to file one after the youth turns 18.

Due Diligence. Section 54.02(j)(4) requires that the State show it used due diligence in bringing the certification case to court. It sets out four circumstances that constitute justification for delay. The State is required to justify the delay in filing the case by showing it comes under at least one of those four circumstances.

Not Practicable to Proceed Before Age 18. The 1995 amendment adding Section 54.02(j)(4)(A) was intended to encompass those circumstances in which the petition was filed before the respondent's 18th birthday but the State could not get the case to court until after the respondent turned 18 as well as those circumstances in which the State was unable to file its petition before the respondent's 18th birthday. This due diligence ground

might include a case in which the respondent was a fugitive from justice and was apprehended only after he or she turned 18. As discussed earlier, Section 51.0412 regarding incomplete proceedings was amended in 2013 to give the court continuing jurisdiction over certification proceedings in situations in which the petition was filed before the respondent's 18th birthday but the proceeding was not finished despite the prosecutor's use of due diligence in attempting to do so.

Newly Discovered Evidence. Section 54.02(j)(4)(B)(i) specifies that the State lacks probable cause to file a juvenile certification or adjudication petition against the respondent before he or she turns 18 and new evidence is discovered after the person's 18th birthday. The reason for the delay might be that the identity of the offender was not known before he or she turned 18 or that the offense was not reported until after the respondent turned 18.

Respondent Could Not Be Found. Section 54.02 (j)(4)(B)(ii) specifies that proceedings cannot be brought before the respondent turns 18 because he or she cannot be found. It would be necessary for the State to show that it used due diligence in attempting to locate the respondent.

Appellate Reversal of Certification Order. Section (j)(4)(B)(iii) specifies that the juvenile court does not lose jurisdiction over a certification case when a respondent turns 18 before the case is returned to the juvenile court by a district court or an appellate court. Under this delay justification, it is assumed that the case began as an under-age-18 proceeding and that the respondent was certified and appealed and obtained a reversal of the certification order but turned 18 before the re-hearing.

Section 54.02(j)(4)(B)(iii) assumes that a new certification petition is filed following appellate reversal because the original petition is deficient in some way. This subdivision authorizes filing a post-18-year-old petition and defines the appellate reversal as a ground for delay in filing the petition and bringing the case to court.

Section 51.041(a) provides:

> The court retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person or the state under Chapter 56 [Appeal] of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court.

This rule is intended to apply to both certification reversals following criminal conviction and adjudication reversals. As to the former, it merely codifies the rule of *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e.) that the juvenile court retains jurisdiction over the case following appellate reversal even if the respondent has become 18 years of age in the meantime. See Chapter 3.

In *In the Matter of M.A.V.,* 954 S.W.2d 117 (Tex.App.—San Antonio 1997, pet. denied), the Court of Appeals held that when a respondent becomes 18 years of age after the reversal of a certification order but before a new certification hearing can be conducted, the State must file a new petition for a post-18-year-old proceeding under Section 54.02(j) and may not, under *R.E.M.*, proceed on the original petition. Although that position seems incorrect under *R.E.M.* and Section 51.041 when there is no defect in the original petition, it would be the safer course of action for a prosecutor to file a petition under Section 54.02(j) in such cases. In that event, Section 54.02(j)(4)(B)(iii) would provide the justification for the delay in filing the petition and having the hearing.

Proof of Due Diligence. What must be shown to demonstrate that the State used due diligence in attempting to bring the case to court before the respondent's 18th birthday? In *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex.App.—Amarillo 1998, no pet.), the Court of Appeals addressed the meaning of the delay justification in Section 54.02(j)(4)(B)(i) that "after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because: (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person." In the case, a respondent's adoptive father was murdered in 1987, and suspicion centered on the respondent. He was apprehended in the deceased man's automobile, and there was blood on the respondent's shoes. The shoes were sent to an F.B.I. laboratory for testing, but the laboratory responded that the stains were not large enough to permit identifying the blood beyond stating it was human in origin. No charges were filed, and the respondent turned 18 about 13 months after the murder. In 1996, a DNA analysis of the blood stains was conducted, and the blood was identified as being that of the deceased. A certification petition was filed, and the respondent, now 25 years old, was arrested.

The Court of Appeals concluded that DNA testing was not sufficiently well-established by the time the respondent turned 18 to fault the State for not pursuing it before then. The respondent argued that the technology was

available and that the State failed to use due diligence in discovering it. The Court stated that:

> [W]e find no authority...holding that the State must search out and use new, unproven scientific theories or tests to meet the due diligence requirement. To the contrary, the law requires the State to show that novel scientific evidence is reliable, and thus probative and relevant....The State would be in an untenable position if it were required to prove that a cutting edge scientific test was reliable when the experts were still developing and refining the technology.

969 S.W.2d at 99.

In another case, the refusal of a critical witness to cooperate with authorities for a two-year period was sufficient to show due diligence under the same provision. As soon as the witness agreed to testify, the certification petition was filed. In these instances, post-18-year-old certification was authorized. *In the Matter of J.E.V.*, UNPUBLISHED, No. 04-96-00125-CV, 1996 WL 591928, 1996 Tex.App. Lexis 4519, Juvenile Law Newsletter ¶ 96-4-33 (Tex.App.—San Antonio 1996, no writ).

By contrast, in *In the Matter of J.C.C.*, 952 S.W.2d 47 (Tex.App.—San Antonio 1997, no writ), the Court of Appeals reversed a certification for arson on the ground the State had no good explanation for why it did not proceed with an adjudication hearing at the same time that the juvenile's twin brother was proceeded against for the same offense. There was no due diligence shown in the failure to conduct the certification hearing before the juvenile's 18th birthday. See also *Powell v. State,* UNPUBLISHED, No. 05-07-01078-CR, 2009 Tex.App.Lexis 2517, Juvenile Law Newsletter ¶ 09-2-13 (Tex.App.—Dallas 2009, pet. ref'd) (19-month delay in serving and detaining juvenile whose location was known to the State at all times before his 18th birthday did not constitute due diligence).

Similarly, in *Webb v. State,* UNPUBLISHED, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter ¶ 01-4-45 (Tex.App.—El Paso 2001, pet. ref'd), the Court of Appeals held that failure of juvenile court officers to set a certification petition for hearing for a period of six weeks did not excuse the State's delay when there was no evidence the State informed the officials of the respondent's impending 18th birthday.

In *In the Matter of F.A.A.*, UNPUBLISHED, No. 04-97-00091-CV, 1998 WL 11966, 1998 Tex.App.Lexis 134, Juvenile Law Newsletter ¶ 98-1-11 (Tex.App.—San Antonio 1998, no pet.), the Court of Appeals discussed the meaning of the delay justification in Section 54.02(j)(4)(B)(ii) that "the person could not be found." The respondent was on juvenile probation when an attempted capital murder certification petition was filed against him. After that, the probation officer was unable to locate him, and the juvenile failed to make a scheduled court appearance in the probation case. The probation officer testified that he had made approximately 25 attempts to locate the juvenile at his home and made five phone calls to the family in an effort to locate him. The respondent remained a fugitive until he turned himself in to authorities after he turned 19. The Court of Appeals concluded that the juvenile court had not abused its discretion in finding that the State had used due diligence in attempting to locate the respondent before his 18th birthday.

Certifications for Murder. In 1999, the legislature amended Section 54.02(j)(2)(A) in an attempt to authorize the certification of a person 18 years old or older for a murder or capital murder committed after the person became 10 years of age but before he or she turned 14. The theory of this amendment is that, for an offense such as murder for which there is no statute of limitations, the criminal justice system must have the capacity to hold a person accountable by permitting delayed certifications even though the offense would not have been certifiable had the State attempted it before the person's 18th birthday.

If the State had proceeded before the person's 18th birthday for a murder committed while the person was between 10 and 14, the Determinate Sentence Act would have been available and adequate for the case. However, if the State was unable to proceed in juvenile court before the person's 18th birthday, then the juvenile system cannot handle the case because the person is 18 and the criminal system cannot do so because the person was under 14 at the time of the offense. In an effort to fill that gap, the legislature enacted Section 54.02(j)(2)(A) in 1999:

> The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:
>
> …the person was:
>
> (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code [murder];

Penal Code Section 8.07(a)(7) authorizes criminal prosecution in such circumstances.

In 2012, the Attorney General considered a 1998 case that involved a Montgomery County crime victim who died in 2011 of cancer acquired as a result of medical treatments and graphs for burns inflicted by a juvenile offender now in his twenties. Notwithstanding ex post facto or double jeopardy considerations, the AG stated that it was within the prosecutor's discretion to initiate certification transfer proceedings. Attorney General Opinion No. GA-0967 (2012).

The respondent juvenile was 13 at the time of the conduct that the murder charge was based on, and the conduct occurred before the 1999 change that allowed for certification in post-18 cases for murder committed between ages 10 and not yet 14. Despite this, the respondent was certified as an adult, convicted of capital murder, and given a 40-year sentence. The respondent appealed on the basis that the discretionary transfer law, as applied to him, violated the ex post facto clause.

His argument was not based on the fact that 13-year-olds could not be certified at the time of the conduct but instead faced prosecution solely in the juvenile system or through the Determinate Sentence Act, with a chance to avoid prolonged incarceration; instead, it was based on the fact that, after certification, he faced a mandatory life sentence under the law, which 13-year-olds did not face in 1998. The court limited its ex post facto analysis to that argument and found that, because the court sentenced the defendant to 40 years, which was the maximum term he would have been subject to if prosecuted in the juvenile system, there was no ex post facto violation. *Collins v. State*, 516 S.W.3d 504, (Tex.App.—Beaumont 2017, pet. denied).

Detention of a Person Pending Hearing. In 1999, the legislature added Sections 54.02(o) through (r) to authorize a juvenile court to detain a person 18 or older in the juvenile detention facility or in the county jail pending the certification hearing. That provision is discussed in Chapter 6.

The procedure for the detention of a person 18 years of age or older pending a certification hearing requires that the juvenile court hold an initial detention hearing as in the case of any person in custody in a juvenile proceeding. However, the statutory detention criteria are modified to eliminate the two criteria that relate to parental presence and supervision since the subject of the hearing is 18 or older. Thus, the person must be released unless the case falls within one or more of the three remaining detention criteria. See Sections 54.01(e)(1), (4), (5) and Chapter 6.

If the juvenile court decides not to release the person, it may elect to detain him or her in the juvenile detention facility in accordance with ordinary requirements for periodic review but "to the extent practicable, the person shall be kept separate from children detained in the same facility." Section 54.02(q). Alternatively, the juvenile court may elect to set bond in the case and commit the person to the county jail pending his or her release on bond. Section 54.02(r).The juvenile court should use the bond setting criteria of Code of Criminal Procedure Article 17.15 to fix the bond amount.

Whether the court elects to order the person confined in the juvenile detention facility or to set bond and commit him or her to the adult facility is totally a matter for the discretion of the juvenile court. Obviously, a primary consideration in making that decision should be in which population the person will best fit. An 18-year-old small in stature and/or a bit slow mentally might best be confined in a juvenile facility while a larger, more aggressive person might best be placed in the county jail. For a discussion of post-certification detention, see Chapters 2 and 6.

B. The Required Study, Evaluation, and Investigation

Section 54.02(d) provides:

> Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, circumstances, and the circumstances of the alleged offense.

Section 54.02(e) authorizes the juvenile court at the transfer hearing to "consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." This language permits the court to consider the report required to be made by Section 54.02(d).

Report Not Required for Mandatory Certification. In 1995, the legislature provided for mandatory certification in certain circumstances. See the section on Mandatory Transfer later in this chapter. Section 54.02(n) provides, "A mandatory transfer under Subsection (m) may be made without conducting the study required in discretionary transfer proceedings by Subsection (d)." Since the purpose of the study is to provide information to enable the juvenile court judge to exercise discretion whether to certify a case to criminal court, there is no need for the study when certification is mandatory.

Report Not Always Required for Discretionary Certification. Prior to 2013, the provisions of Section 54.02(d) were mandatory for discretionary certification

whether the subject was a child under age 18 or a person 18 or older. Failure of the juvenile court to order the study, evaluation, and investigation or to obtain and consider the report would result in reversal of any discretionary transfer order. In *R.E.M. v. State*, 532 S.W.2d 645 (Tex.Civ.App.—San Antonio 1975, no writ and reh'g denied), the child, on instruction from his attorney, refused to talk with any persons who might seek to interview him for the court-ordered diagnostic study. The attorney then purported to waive the child's right to a diagnostic study and none was conducted. On appeal from the transfer order, the appellate court held that the waiver was ineffective since the child did not join in it as required by Section 51.09 and that the requirement of a diagnostic study was mandatory:

> Section 54.02(d) is mandatory....It is impossible to read Title 3 of the Family Code...without reaching the conclusion that its effect is to give to a juvenile offender the right not to be treated as an adult offender unless he is divested of that right by judicial order entered after complying with the requirements set forth in Section 54.02. The necessary conclusion is that, in the absence of an effective waiver by the child, he can be subjected to treatment as an adult only if there has been compliance with the mandatory provisions of Section 54.02.

532 S.W.2d at 648. But cf. *Pipkin v. State*, UNPUBLISHED, No. 14-09-00018-CR, 2010 WL 4361388, Juvenile Law Newsletter ¶ (Tex.App.—Houston [14th Dist.] 2010, reh'g denied) (Section 51.09 requirements did not apply to defense counsel's unilateral waiver of psychological and psychiatric evaluations since such evaluations are not a "right granted to a child" under Section 51.09).

R.E.M. was a direct appeal from a certification order. In *Rodriguez v. State*, 975 S.W.2d 667 (Tex.App.—Texarkana 1998, pet. ref'd), respondent's attorney informed the court that he waived his client's right to a diagnostic study. On appeal from the ensuing criminal conviction, he argued that the waiver was invalid because it was not tendered in compliance with Section 51.09. The Court of Appeals held that since the appeal was from the criminal conviction, rather than a direct appeal from the certification order, only defects in the certification process of a jurisdictional nature could be considered. It concluded that conducting a diagnostic study, although mandatory, was not jurisdictional and therefore the absence of such a study could not be considered in an appeal from the criminal conviction. The appeal was decided prior to the 1995 abolition of the right to take a direct appeal, which was reinstated in 2015. Under Code of Criminal Procedure Article 44.47, now repealed, all claims, jurisdictional or not, had to be included in an appeal of a transfer order following criminal conviction.

In 2013, Section 54.02(l) was amended to allow, but not require, the juvenile court to waive jurisdiction in a post-18 certification without conducting the diagnostic study or complying with the requirements of subsection (d). The court is still required, however, to make the findings required by subsection (f), including findings regarding the sophistication and maturity of the child and the child's history.

Complete Diagnostic Study. After *R.E.M.* was remanded to the juvenile court, an attempt was made to conduct a diagnostic study of him, but the juvenile refused to cooperate with the psychiatrist and psychologist who sought to interview him. They filed a report, however, based on their observations of him. On appeal from the transfer order, counsel claimed the report was not the "complete diagnostic study" required by Section 54.02(d). *R.E.M. v. State*, 541 S.W.2d 841 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.), The appellate court rejected this argument:

> [A]ttempts were in fact made to effect a diagnostic study, and...the limited nature of the study was due solely to appellant's refusal to cooperate. Under these circumstances, we conclude that the reports of [the psychologist] and [the psychiatrist]...constitute as complete and adequate a "diagnostic study" as was possible under the circumstances, and that a bona fide effort was made to comply with the statute. We are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant's attitude.

541 S.W.2d at 845. See also *In the Matter of J.S.C.*, 875 S.W.2d 325 (Tex.App.—Corpus Christi 1994, writ dism'd) (child refused to be interviewed by psychiatrist or psychologist; court followed *R.E.M.* decision in upholding completeness of report); *Ortega v. State*, UNPUBLISHED, No. 05-00-00086-CR, 2002 WL 14163, 2002 Tex.App.Lexis 41, Juvenile Law Newsletter ¶ 02-1-15 (Tex.App.—Dallas 2002, pet. ref'd); *Montgomery v. State*, UNPUBLISHED, No. 07-00-0574-CR, 2002 WL 31778661, 2002 Tex.App.Lexis 8878, Juvenile Law Newsletter ¶ 03-2-16 (Tex.App.—Amarillo 2002, pet. ref'd).

In *L.M. v. State*, 618 S.W.2d 808 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), a psychological evaluation was conducted as part of the diagnostic study. At the transfer hearing, defense counsel successfully objected to the introduction of the report or the psychologist's testimony. On appeal, the claim was made

that the diagnostic study was incomplete because of this omission. The appellate court rejected this claim on the ground that the report was considered by the juvenile court but was not placed in evidence only because of objection by the child's attorney, accepting the reasoning of the second opinion in *R.E.M. v. State*. Cf. *Pipkin v. State*, UNPUBLISHED, No. 14-09-00018-CR, 2010 WL 4361388, Juvenile Law Newsletter ¶ (Tex.App.—Houston [14th Dist.] 2010, reh'g denied) (appellant's failure to object to the completeness of the diagnostic study at the certification hearing prevented the trial court from taking possible corrective action and waived any complaint on appeal).

In 2010, the Texas Supreme Court conditionally granted a writ of mandamus alleging abuse of discretion by the juvenile court for not obtaining a complete diagnostic study as required by Section 54.02(d). *In re B.T.*, 323 S.W.3d 220 (Tex. 2010). The Court of Appeals had denied mandamus relief because B.T. failed to include the two relevant reports into the appellate record. See *In re B.T.*, S.W.3d 158 (Tex.App.—Tyler 2010). Defense counsel had objected that the reports merely addressed B.T.'s fitness to proceed and did not satisfy the "complete diagnostic study" required by law.

In its per curiam opinion, the Texas Supreme Court stressed that the diagnostic report was incomplete, noting that "no appellate court has upheld a case where the commissioned report itself declares it is insufficient." 2010 Tex.Lexis 692 *8. The report had recommended inpatient psychiatric treatment for B.T. to attain fitness to proceed, followed by a re-evaluation with regard to the State's transfer motion. Ultimately, the Court's decision was not difficult to reach since the State did not oppose mandamus relief and shared B.T.'s concern that a complete assessment had not been completed. In conditionally granting the writ, the Court held that the juvenile court violated Section 54.02(d) by substituting two previous reports for a re-evaluation and completed diagnostic report.

Selection of the Examiner. The San Antonio Court of Appeals in *In the Matter of R.L.M.*, UNPUBLISHED, No. 04-95-00190-CV, 1995 WL 752762, Juvenile Law Newsletter ¶ 96-1-07 (Tex.App.—San Antonio 1995, error denied) held that the diagnostic study was not defective because it was conducted by a person who held an M.S. degree rather than by a person who was a licensed psychologist.

In *In the Matter of L.K.F.*, UNPUBLISHED, No. 01-94-00673-CV, 1995 WL 582244, 1995 Tex.App.Lexis 2398, Juvenile Law Newsletter ¶ 95-4-05 (Tex.App.—Houston [1st Dist.] 1995, no writ), the juvenile, on advice of counsel, refused to be interviewed by a court-appointed psychiatrist. He then moved the court for the appointment of a psychiatrist of the respondent's choosing. The juvenile court refused the motion and this decision was upheld by the Court of Appeals on the ground that the juvenile had no constitutional right to appointment of a psychiatrist of his or her choosing at state expense. Even if the juvenile had not been asking for state payment for the psychiatrist, the court, not the juvenile, has the right to select the psychiatrist to conduct the required interview. Of course, the child could pay for a private psychiatric or psychological examination and offer testimony based on it.

Previous Diagnostic Studies. May the juvenile court rely on diagnostic studies done in connection with prior referrals? How "fresh" must the study be to comply with the statute? In *I.L. v. State*, 577 S.W.2d 375 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.), the child, on appeal from a transfer order, argued that the diagnostic study was incomplete:

> The study was comprised of a psychiatrist's report, a social evaluation and investigation by a court investigator, monthly progress reports on appellant compiled during a one-year stay at the Texas Youth Council, and an intelligence test which was made at least one year prior to the hearing during appellant's stay at Texas Youth Council. There was no physical examination or interview with a clinical psychologist.
>
> The legislature did not clarify what must be included in a "complete diagnostic study." The authors of one article have suggested the elements necessary are examinations by a psychiatrist and clinical psychologist and an evaluation by a probation department caseworker. See Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Hous.L. Rev. 709 (1972). Although no examination was made by a psychologist in the present case, we do not believe the omission merits reversal of the juvenile court's judgment.
>
> Appellant points out that the intelligence test was made at least one year prior to the hearing. There was, however, a psychiatric examination conducted less than a month before the hearing. The examining psychiatrist testified at the hearing that in his opinion no further testing was needed and that a complete diagnostic study had been made. Under the circumstances, the court did not abuse its discretion in the admission of the diagnostic study.

577 S.W.2d at 376.

Full Investigation. In addition to the diagnostic study, Section 54.02(d) requires the juvenile court to order and obtain a "full investigation of the child, his circumstances, and the circumstances of the alleged offense." In *In re I.B.*, 619 S.W.2d 584 (Tex.Civ.App.—Amarillo 1981, no writ), it was argued that the juvenile court ordered but did not obtain a full investigation:

> [B]ecause the person who prepared and presented the report for the Lubbock County Juvenile Probation office admitted that neither she nor anyone in the Juvenile Probation office made such an investigation, and that she relied on the investigations of the Lubbock City Police and Criminal District Attorney's office. [I.B.] further argues that the investigation was incomplete because it failed to resolve alleged conflicts in the statements of two witnesses, showed that several persons other than I.B. had motives to kill the deceased, and, in general, failed to eliminate all of the alleged "possible suspects" in the case....
>
> The phrase "full investigation of the circumstances of the offense" is not defined in section 54.02. We believe that for good reasons the legislature did not attempt to define the phrase. Of necessity, any inquiry into the circumstances of an offense must be one of degree. It is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the event.
>
> The primary function of the investigation is to discover evidence of probative force, whether for or against the juvenile, for presentation at the hearing. The juvenile can, of course, test the fullness of the investigation made. If tested, the matter of the completeness of the investigation is one for initial determination by the trial court which ordered it.

619 S.W.2d at 586. See also *Acevedo v. State*, UNPUBLISHED, No. 05-08-00467-CR, 2009 WL 930347, Tex.App.Lexis 2523, Juvenile Law Newsletter ¶ 09-2-18 (Tex.App.—Dallas 2009, no pet.) (social and psychological evaluations constituted a "full investigation" under Sec. 54.02, not just a "checklist" of included items).

In *Turner v. State*, 796 S.W.2d 492 (Tex.App.—Dallas 1990, no writ), the juvenile's transfer to criminal court was reversed by the Court of Appeals. Fifteen months after the first transfer hearing a second hearing was held and he was again transferred. A fresh diagnostic study was conducted for the second hearing. However, instead of conducting a new investigation, the probation officer submitted a one-page addendum to the original investigation. In an appeal from the second transfer order, the juvenile contended this did not comply with the statutory requirement of a "full investigation of the child, his circumstances, and the circumstances of the alleged offense." The Court of Appeals held that under the circumstances the investigation was sufficient:

> The social evaluation and investigative report submitted in April 1988 [before the first hearing] contained extensive family data and history; appellant's current living arrangements; extensive information on his attitude and behavior at school; his academic performance and capabilities; extensive background information about his employment, religion, hobbies, leisure time activity, and maturity; extensive information about appellant's six previous referrals to the Juvenile Department and seven prior arrests; extensive investigative information about the circumstances surrounding the three offenses which are the subject of the State's petition; and extensive information on appellant's behavior while he had been in juvenile detention. The addendum to the social evaluation and investigative report filed in July 1989 [before the second hearing] was prepared by the same probation officer that prepared the report filed in 1988 and contained updated information on what had happened since the case was transferred to a criminal district court in April 1988. The information contained in the addendum was based upon an interview with appellant and the information found in the district attorney's file.

796 S.W.2d at 497.

In *In the Matter of C.C.*, 930 S.W.2d 929 (Tex.App.—Austin 1996, no writ), the juvenile complained on appeal about the incompleteness of the investigation. However, the Court of Appeals rejected this complaint partly on the ground that it was incomplete because of restrictions the defense attorney placed on access to his client's family by the investigating officer.

Addressing Certification Factors. In making the discretionary transfer decision, the juvenile court will be required to address: (1) whether the offense was against person or property; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the protection of the public and likelihood of rehabilitation of the child within the juvenile system. While it would certainly be appropriate for the officer writing the certification report to address the applicability of those factors to the facts adduced in the report, the failure to do so does not make the report incomplete. *Vasquez v. State*,

UNPUBLISHED, No. 03-99-00664-CR, 2000 WL 795328, 2000 Tex.App.Lexis 4129, Juvenile Law Newsletter ¶ 00-3-08 (Tex.App.—Austin 2000, no pet.).

Admissibility of Report. Section 54.02(e) authorizes the juvenile court to consider the report required by Section 54.02(d): "At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." In *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, reh'g overruled), contentions were made that the report should have been excluded from evidence because it was hearsay, because its author was not called by the State to testify, and because it had not been authenticated. The court rejected all those arguments:

> Although the reports, being ex parte and made out of court, were hearsay, the legislature is free to provide for the reception of hearsay statements into evidence when it is deemed necessary, and it has frequently created exceptions to the hearsay rule for such purposes. Such an exception is particularly appropriate in a proceeding such as this, where the purpose is not to determine guilt but merely to evaluate the background and maturity of the child in order to determine if he may be rehabilitated or if he should be subject to criminal proceedings....It was not necessary that the introduction of the reports be accompanied by the testimony of the authors.... Neither did the failure to identify or authenticate the reports require their exclusion. On joint motion of counsel for the State and appellant, the court ordered that appellant undergo psychiatric and psychological examinations by Dr. Littlejohn and by a representative of the Gregg-Harrison Mental Health and Mental Retardation Center, and that a social study be conducted by a representative of the Welfare Department. Reports of such examinations and social studies were ordered to be submitted directly to the court. The persons designated to make the reports were thus constituted officers or employees of the court to perform the services specified. Their reports were all personally signed and returned to the court as ordered. A court will judicially know the signatures of its own officers and employees, and further identification or authentication of their reports and official papers is not required....The procedure concerning the reports was not a denial of due process. Appellant's attorney participated in the designation of the persons who prepared the reports. He had notice of their identity, and pursuant to the requirements of Section 54.02(e) of the Family Code he received copies of the reports prior to the hearing. If there was doubt as to the genuineness of the reports or a need to cross-examine the authors with reference thereto, he had ample opportunity to raise the issue and call the authors as witnesses or produce other evidence bearing upon the question.

551 S.W.2d at 752. See also *McKaine v. State*, 170 S.W.3d 285 (Tex.App.—Corpus Christi 2005, no pet.) (no error in admitting psychological report over hearsay objection).

The fact that the investigative report contains information from other reports (such as police reports) does not affect its admissibility under Section 54.02(e). *In re D.R.M.*, UNPUBLISHED, No. 89-01-192-CV, 1990 WL 159335, 1990 Tex.App.Lexis 2539, Juvenile Law Newsletter ¶ 90-4-2 (Tex.App.—Houston [1st Dist.] 1990, no writ).

The Houston First District Court of Appeals in *In the Matter of S.S.R.,* UNPUBLISHED, No. 01-95-00622-CV, 1996 WL 350482, 1996 Tex.App.Lexis 2790, Juvenile Law Newsletter ¶ 96-3-08 (Tex.App.—Houston [1st Dist.] 1996, no writ) rejected the argument that the certification report was not admissible in evidence because it contained hearsay within hearsay and violated confrontation rights.

In *In re G.B.B.*, 638 S.W.2d 162 (Tex.App.—Houston [1st Dist.] 1982, no writ), a complaint was made about the introduction of a report into evidence at a transfer hearing. The court had ordered the investigation conducted and the report prepared by the chief juvenile probation officer. That person had filed the report with the clerk of court. The clerk testified that she had received the report from the probation department. The appellate court concluded this was a permissible way to place the report into evidence.

Disclosure of Report. Section 54.02(e) requires disclosure of the report to counsel for the child:

> At least five days prior to the transfer hearing, the court shall provide the attorney for the child and the prosecuting attorney with access to all written matter to be considered by the court in making the transfer decision.

In 2009, Subsection (e) was amended to increase the number of days to receive access to written materials before the transfer hearing from one day to five days. The legislature also added "and the prosecuting attorney" to make it clear that both the child's lawyer and the prosecutor get equal access "to all written matter to be considered by the court in making the transfer decision."

The statute requires disclosure of the certification report, but it also requires disclosure of any written matter that will be considered by the juvenile court in making the transfer decision. In *R.S. v. State*, 575 S.W.2d 641 (Tex.Civ.App.—Austin 1978, no writ), the juvenile court had in its possession a police offense report and two other witness statements concerning a case before the court on a transfer petition. The juvenile court refused to disclose this material to counsel for the child. On appeal, the court reversed the transfer order:

> We hold that appellant's attorney was not provided access to the written material as mandated by the Legislature. The reports were not filed and there was no reason to suspect their existence. We do not hold that appellant's counsel should have been provided with copies.

575 S.W.2d at 642-43.

The Court of Appeals in *Alexander v. State*, UNPUBLISHED, No. 05-97-02022-CR, 1999 WL 225852, 1999 Tex.App.Lexis 2919, Juvenile Law Newsletter ¶ 99-2-21 (Tex.App.—Dallas 1999, no pet.) addressed the harmfulness of the juvenile court's error in providing the certification report to defense counsel only on the morning of the hearing. It held the error was not harmful because "the State did not act in bad faith, the study was filed three days prior to the hearing, [the juvenile's] attorney could reasonably anticipate that the study would occur, and [the juvenile] asked for neither a recess [nor] continuance to allow him time to review the report."

Privilege Against Compelled Self-Incrimination. Can a claim be made that ordering a psychiatric examination is a violation of the child's Fifth Amendment privilege against compelled self-incrimination? In *K.W.M. v. State*, 598 S.W.2d 660 (Tex.Civ.App.—Houston [14th Dist.] 1980, no writ), the court rejected this argument:

> This contention is untenable for two reasons. First, the proceeding provided for in Tex.Fam.Code Ann. §54.02 (Vernon 1975) is to determine whether the juvenile court should waive its exclusive original jurisdiction and transfer the child to the appropriate district court....[T]his proceeding is not an adjudication of the child's guilt or innocence and, therefore, the child's Fifth Amendment rights are not in issue. Second, section 54.02(d) does not require the court to order the child to discuss his or her involvement in the alleged crime with the examiner but merely "the circumstances of the alleged offense." No self-incriminatory statements are required by section 54.02(d), and any given must be preceded by the warnings in section 51.09(b) [referring to custodial statements] to be used against the child in any subsequent trial. Consequently, appellant's Fifth Amendment rights are in no way jeopardized by the requirement of a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense, nor by the use of the information and results from said study, evaluation, and investigation in this discretionary transfer proceeding.

598 S.W.2d at 662.

Similarly, *Mena v. State*, 633 S.W.2d 564 (Tex.App.—Houston [14th Dist.] 1982, no writ) holds that the person conducting the diagnostic study is not required to give the child *Miranda* warnings when the report is used only in a transfer hearing. See *In the Matter of J.C.J.*, 900 S.W.2d 753 (Tex.App.—Tyler 1995, no writ) to the same effect.

The San Antonio Court of Appeals in *In the Matter of R.L.M.,* UNPUBLISHED, No. 04-95-00190-CV, 1995 WL 752762, Juvenile Law Newsletter ¶ 96-1-07 (Tex.App.—San Antonio 1995, writ denied) held that failure to give *Miranda* warnings when interviewing the juvenile did not preclude admissibility of the report at the certification hearing because certification does not involve an adjudication of guilt or innocence.

However, statutory procedures for obtaining statements from a juvenile in custody must be followed in order to make admissible in any subsequent juvenile adjudication hearing or criminal trial any admissions made by the juvenile to the person conducting the diagnostic interview. See Chapter 16.

Right to Counsel. Is there a constitutional right to counsel at the psychiatric or psychological examination that leads to the diagnostic study report? In *Hidalgo v. State,* 983 S.W.2d 746 (Tex.Crim.App. 1999), the claim was made that appellant's Sixth Amendment right to counsel at the psychiatric examination was violated when the examination was conducted without notifying his attorney. The Court of Criminal Appeals held that the psychiatric examination was not a critical stage in the proceedings giving rise to a right to counsel under the Sixth Amendment:

> [W]hether a particular event is a critical stage depends on whether the accused requires aid in coping with legal problems or assistance in meeting his adversary....In the psychological exam itself, the abuses the Sixth Amendment was devised to protect against

> are not present. In the transfer hearing, where determination is actually made, a juvenile is entitled to the assistance of counsel. Also in the transfer hearing, the juvenile has the opportunity to challenge the methods employed in the exam and the conclusions reached in the report. As for appellant's contention that juveniles should be advised as to the nature and purpose of the exam, we agree. However, we cannot say the exam itself is the type of legal confrontation that can be understood only after consulting with counsel. As in the present case, the doctor administering the evaluation typically apprizes [sic] the juvenile of his or her rights with regard to psychological testing and the purpose of the examination. Furthermore, because the exam is mandated by statute, counsel is aware of the need to advise his client when the State files the transfer petition.

983 S.W.2d at 755.

The Court of Criminal Appeals then explored the potential constitutional problems that might be encountered in the examination and reporting process:

> Though this Court recognizes today that counsel serves no functional purpose in the psychological exam conducted for the neutral purpose of determining whether a juvenile should be transferred to criminal court, we are not blind to the potential for injustice. In light of the criteria a juvenile court is required to consider in making its determination on transfer, we recognize that it is all but inevitable, that in the course of any psychiatric or psychological examination, the doctor will inquire into the facts of the alleged offense and the juvenile's prior criminal experiences....Such a query is permissible so long as it is not intended to force juveniles to supply incriminating evidence or investigative leads against themselves. Failure to limit the query to its permissible purpose could lead to a violation of a juvenile's right against self-incrimination or right to counsel.
>
> Though the psychological report in this case contained information concerning appellant's previous delinquency and criminal conduct, as well as a summary of the doctor's conversation with appellant regarding the offense alleged and his prior delinquent conduct, we cannot say the exam exceeded its intended purpose. Because appellant was forced to supply neither incriminating evidence nor investigative leads, we do not agree with appellant's contention that the exam amounted to a custodial interrogation entitling him to Fifth and Sixth Amendment protections. Furthermore, because the State's use of the information elicited from the exam was limited to the transfer determination, we find no constitutional violations consistent with *Estelle* or *Satterwhite*.

983 S.W.2d at 756.

Because there is no Sixth Amendment right to counsel at the examination, there is no violation of the Sixth Amendment in failing to notify counsel of the time, place, and purpose of the examination.

Hidalgo does not address the question of whether there is a state statutory right to counsel that may be more extensive than the Sixth Amendment right. Section 51.10(a) provides, "A child may be represented by an attorney at every stage of proceedings under this title...." That expansive statement would certainly encompass psychological or psychiatric examinations conducted as part of the certification process. The next question is whether the state statutory right to counsel includes the right of counsel already retained or appointed to receive notice of the time and place of the examination to enable counsel to represent his or her client. Undeniably, the child is not required to talk to the psychologist or psychiatrist and could not, for example, be held in contempt of court for refusing to do so. Is there a valid and important function for counsel to perform in being present at the examination to assure that the child's decision whether to talk to the person conducting the examination is knowingly made?

Use of Examination Outside the Certification Process. Part of the rationale of the Court of Criminal Appeals' decision in *Hidalgo* is that constitutional rights are not implicated when the examination report is used only at the certification hearing and not at a juvenile adjudication hearing or a criminal trial. In *Cantu v. State*, 994 S.W.2d 721 (Tex.App.—Austin 1999, pet. dism'd), a psychiatrist examined appellant in preparation for a certification hearing. He testified at the hearing and recommended certification, which was granted. Appellant was then convicted of first degree murder in criminal court. At the penalty phase, the psychiatrist again testified and stated his opinion, based on the juvenile certification examination, that the appellant had an anti-social personality, which he described in rich detail:

> In terms of dealing with the sociopathic, or antisocial disorder, we're talking about an individual who has a pervasive persistent pattern of disregard for and violation of the rights of others. These individuals may engage in repeated criminal behaviors, may have irritable and aggressive temperaments and behavior. May engage in overt, reckless disregard for the safety

> and well-being of others, as well as of themselves. They may put themselves in danger at the risk of their behavior as well. They tend to be dishonest, taunting, manipulative, and deceitful. They lack remorse. You can see these individuals fundamentally lack a conscience. So they have no remorse for their wrongdoing. They tend to be irresponsible as far as following through their commitments. They have unstable patterns of work and child-rearing, and so forth. They don't responsibly carry through with what we understand to be the normal responsibilities of adulthood.
>
> So out of that description a sociopath, or antisocial personality disorder, is going to have at least several of those characteristics. In terms of the sadistic element we're talking about a variety. Sociopath or psychopath that actively enjoys the suffering of others. Individuals who use the suffering and discomfort or pain of others to grandize [sic] themselves. These are individuals like power rapists are the idea that individuals who rape for dominance and power. That's that sadistic kind of element. We can think of the sadistic element as a very driven kind of aggression, that is, an aggression for enjoyment and for control and dominance.

994 S.W.2d at 734, n. 9.

The jury assessed punishment at 40 years in prison. The Court of Appeals reversed the punishment, holding that under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981), the Fifth and Sixth Amendments require that the doctor should have warned appellant that he has a right to remain silent and that any statements he makes can be used against him or her in subsequent criminal proceedings. In the absence of such warnings, the results of the examination are admissible only in certification proceedings. Although *Estelle v. Smith* was a capital case, the Court of Appeals saw no principled basis for not applying it to a non-capital case.

The same conclusion was reached in *Simpson v. State*, 181 S.W.3d 743 (Tex.App.—Tyler 2005, pet. ref'd). A psychological examination was conducted on Simpson in preparation for a discretionary transfer hearing. While the psychologist informed Simpson about the purpose of the examination, she did not warn him that his statements could be used against him at trial nor did she advise him that she could testify against him by using the statements he made during the diagnostic examination. At his adult trial, the psychologist testified about a statement he had made during the court-ordered examination. The Tyler Court of Appeals ruled that the examination of Simpson exceeded the intended purpose of solely providing evidence for the certification hearing and instead became a source of incriminating evidence against him. As such, the diagnostic examination constituted custodial interrogation and violated Simpson's Fifth Amendment privilege against self-incrimination. Admission of the psychologist's testimony also violated Simpson's Sixth Amendment right to counsel because at the time he was not represented by counsel and because the examination was used as the basis for testimony presented during the guilt/innocence phase of trial. Although the Court of Appeals found that admission of the psychologist's testimony constituted constitutional error, it determined beyond a reasonable doubt that the error did not contribute to his conviction. Instead, the evidence presented at trial showed that Simpson's involvement went well beyond what he had admitted to the psychologist. Her testimony was unnecessary to establish Simpson's presence at the murder scene.

The respondent in *Nave v. State*, UNPUBLISHED, No. 05-99-01366-CR, 2000 WL 1711937, 2000 Tex.App.Lexis 7723, Juvenile Law Newsletter ¶ 00-4-25 (Tex.App.—Dallas 2000, no pet.) made statements to a psychiatrist examining him for a certification report admitting to participating in a capital murder. He was certified to stand trial as an adult. Testifying in his defense at the criminal trial, he claimed that the confession he had given to the police, which also admitted his participation, was false. The trial court permitted the State to cross-examine him about the statements he made to the psychiatrist to impeach that testimony. On appeal, Nave did not make a constitutional claim but instead argued that the statements should not have been admitted under the Texas juvenile and adult confession statutes:

> [Nave] argues… that he was never informed of his "*Miranda* rights" before talking with the psychiatrist. In making his argument, Nave relies on section 51.095 of the Texas Family Code and article 38.22 of the Texas Code of Criminal Procedure. … Both statutes require certain warnings to be given for custodial statements to be admissible.… Both statutes also provide, however, that the warning requirements do not apply to voluntary statements bearing on the credibility of the witness. Tex.Fam.Code Ann. § 51.095(b); Tex.Code Crim. Proc.Ann. Art. 38.22 §5. Before the State questioned Nave about his conversation with the psychiatrist, Nave testified about the written confession he gave the police. Nave stated he lied when he told the police he was the one who committed the homicide and his written statement was false. Nave's subsequent confession to the psychiatrist had a direct bearing on the credibility of Nave's testimony about his first confession to the police. The questions, therefore, were proper.

2000 Tex.App.Lexis 7723 *10-11.

Mental Health Privilege Claim. Can a child claim that information given to a psychiatrist or psychologist in a diagnostic study cannot be revealed to the juvenile court in a transfer hearing because it is privileged information? That argument was made in *C.J.P. v. State*, 650 S.W.2d 465 (Tex.App.—Houston [14th Dist.] 1983, no writ). Appellant claimed the information was privileged under the mental health information privilege of Section 5561h of the Civil Statutes. The court rejected this argument:

> We do not believe the legislature would intend for a juvenile court to be bound by article 5561h when it has required that court to order and consider a complete diagnostic study prior to conducting a hearing on whether to waive its jurisdiction. We hold a juvenile court may order a psychiatric examination conducted and receive such report in evidence for the court's consideration in such a hearing without violating article 5561h.

650 S.W.2d at 467. See also *A.D.P. v. State*, 646 S.W.2d 568 (Tex.App.—Houston [1st Dist.] 1982, no writ), which arrives at the same conclusion.

Effective September 1, 1983, Article 5561h was repealed and replaced by the Texas Rules of Evidence. Rule 509(b) provides, "There is no physician-patient privilege in criminal proceedings."

In 2007, Section 51.17(c) was amended to provide that "the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title." As a result, there is no physician-patient privilege in juvenile proceedings. Rule 510 recognizes a mental health information privilege but it is applicable only in civil proceedings, which, under Section 51.17(c), do not include juvenile proceedings.

C. The Transfer Hearing

Section 54.02(c) provides that "[t]he juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings."

Evidence Requirements. Nowhere in Section 54.02 does it state what type of evidence is admissible in a transfer hearing. In general, the courts have permitted any rationally persuasive evidence to be used in a transfer hearing without regard to various rules of evidence that might exclude some evidence in certain circumstances. They have permitted illegally obtained evidence, confessions obtained in violation of Title 3, and hearsay evidence to be used in transfer proceedings. The rationale for such liberality with normal rules for conducting judicial hearings is that the transfer hearing is not a trial but merely a hearing to determine where the trial will be conducted: criminal or juvenile court.

In *B.L.C. v. State*, 543 S.W.2d 151 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.), the juvenile claimed that his confession was improperly admitted into evidence at his transfer hearing because it had been taken in violation of Section 51.095. The appellate court said it did not have to decide whether Section 51.095 had been violated because those restrictions do not apply to transfer hearings, since the purpose of that hearing:

> … is not to determine the innocence or guilt of the juvenile but to establish whether the juvenile's and society's best interest would be served by maintaining juvenile custody of the child or by transferring him to a criminal district court for adult proceedings.

543 S.W.2d at 154.

In a radical break from the course of confession decisions by other Courts of Appeals, the San Antonio Court of Appeals in *In the Matter of S.A.R.*, 931 S.W.2d 585 (Tex.App.—San Antonio 1996, writ denied) held that a juvenile's confession given to police while in custody is not admissible in a certification hearing without a showing that it was taken in compliance with Family Code Section 51.095. But, in *In the Matter of T.L.C.*, 948 S.W.2d 41 (Tex.App.—Houston [14th Dist.] 1997, no writ), the Houston Fourteenth District Court of Appeals refused to follow *S.A.R.* and instead adhered to the traditional view that confession admissibility under Section 51.095 is not an issue at certification.

In *In the Matter of P.A.C.*, 562 S.W.2d 913 (Tex.Civ.App.—Amarillo 1978, no writ), the appellate court used the *B.L.C.* rationale to permit the use of affidavits from absent witnesses at a transfer hearing. There are numerous other cases permitting hearsay evidence (when the person making the statement is not in court available for cross-examination) to be used in transfer proceedings.

The Houston Fourteenth District Court of Appeals in *In the Matter of S.J.M.*, 922 S.W.2d 241 (Tex.App.—Houston [14th Dist.] 1996, no writ) held that the constitutional right of confrontation of witnesses does not apply at a certification hearing. Therefore, there was no error in admitting into evidence the confessions of co-respondents that implicated the juvenile respondent. Presumably, the juvenile

court would be permitted to consider the accusatory statements as evidence against the juvenile respondent. See also *Milligan v. State*, UNPUBLISHED, No. 03-04-00531-CR, 2006 Tex.App.Lexis 1356, Juvenile Law Newsletter ¶ 06-2-01 (Tex.App.—Austin 2006, no pet.) (neither the Sixth Amendment nor the hearsay rule applies to a juvenile certification hearing).

Texas Rules of Evidence. The Texas Rules of Evidence apply in juvenile proceedings, including certification hearings. Rule 101(b) provides that the Texas Rules of Evidence apply to proceedings in Texas courts except as otherwise provided by Rule 101(d)-(f). Exceptions include when statutes address evidence. Section 51.17(c) provides, "Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title." There is no statute that makes the Rules of Evidence inapplicable to certification proceedings.

Grand Jury Criterion. One of the rationales frequently used by appellate courts for not applying rules of evidence to discretionary transfer proceedings was that one of the six factors required to be considered in making the transfer decision was "whether there is evidence on which a grand jury may be expected to return an indictment." Section 54.02(f)(3) (repealed). Many times, courts have held that since a grand jury can consider any information without regard to the rules of evidence, so too can a juvenile court in order to decide whether a grand jury may be expected to return an indictment. See *In the Matter of D.J.*, 909 S.W.2d 621 (Tex.App.—Fort Worth 1995, writ dism'd w.o.j.) (co-defendant's confession admissible against a Confrontation Clause claim because of grand jury criterion); *In the Matter of G.F.O.,* 874 S.W.2d 729 (Tex.App.—Houston [1st Dist.] 1994, no writ) (witness statements admissible over a hearsay claim because of grand jury criterion); *L.M.C. v. State*, 861 S.W.2d 541 (Tex.App.—Houston [14th Dist.] 1993, no writ) (respondent's confession admissible without regard to compliance with Section 51.095 because of grand jury criterion).

The legislature repealed the grand jury criterion effective January 1, 1996. It remains an open question what impact, if any, that change will have on the admissibility of evidence in discretionary transfer hearings.

Joinder of Respondents. When two or more juveniles have acted together in the commission of an offense, the State may seek to transfer all of them in the same hearing. Whether a motion to sever respondents is granted is ordinarily in the discretion of the juvenile court. In the absence of a specific showing of prejudice to one respondent from the joinder, a denial of severance will be upheld on appeal. *In re D.R.M.*, UNPUBLISHED, No. 89-01-1192-CV, 1990 WL 159335, 1990 Tex.App.Lexis 2539, Juvenile Law Newsletter ¶ 90-4-3 (Tex.App.—Houston [1st Dist.] 1990, no writ); *In the Matter of D.L.T.*, UNPUBLISHED, No. 11-06-00192-CV, 2008 WL 2612584, 2008 Tex.App.Lexis 4973, Juvenile Law Newsletter ¶ 08-3-15 (Tex.App.—Eastland 2008, no pet.); *In the Matter of M.V., Jr., and C.A.V.,* UNPUBLISHED, Nos. 13-08-00059-CV and 13-08-00104-CV, 2009 Tex.App.Lexis 7693 (Tex.App.—Corpus Christi 2009, no pet.).

Consular Notification. The Vienna Convention on Consular Relations provides for notification to consular officials when a foreign national has been taken into custody should the person arrested request notification and requires arresting officials to notify the foreign national of his or her rights under the Convention. In *Melendez v. State*, 4 S.W.3d 437 (Tex.App.—Houston [1st Dist.] 1999), *overruled on other grounds, Small v. State*, 23 S.W.3d 549 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd), the argument was presented that the juvenile court lacked jurisdiction to transfer appellant to criminal court because he was a national of El Salvador and was not notified that he had a right under the Convention to have consular officials of El Salvador notified of his arrest. The Court of Appeals rejected that argument on the ground that, even if the Convention had been violated, that condition would not deprive the juvenile court of jurisdiction to transfer the case to criminal court.

Right to Counsel. Section 51.10(b)(1) gives a juvenile a mandatory, unwaivable right to counsel for discretionary transfer proceedings. The certification hearing in *In the Matter of D.L.J.,* 981 S.W.2d 815 (Tex.App.—Houston [1st Dist.] 1998, no pet.) extended over three non-consecutive days. On the middle day, counsel for the juvenile did not appear. Nevertheless, the juvenile court judge permitted the State to conduct re-direct examination of the doctor who had testified the first day and permitted appellant's mother to testify about appellant's mental problems. Counsel re-appeared the third day of the hearing. The Court of Appeals held that the juvenile's right to counsel had been violated by the proceedings on the second day. It also held that the denial of right to counsel was structural error that is per se reversible; no showing of harm is required.

D. Transfer Findings and Order

1. Minimum Requirements

Section 54.02(a) sets out the requirements that must be met before the juvenile court is authorized to exercise its discretion to transfer a child under age 18 to criminal court. Those requirements are:

(1) the child must have been at least 14 years of age at the time of the alleged offense if it is a capital felony, aggravated controlled substance felony, or first degree felony or 15 years of age at the time of the alleged offense if it is any other felony;

(2) no adjudication hearing concerning the offense has been held; and

(3) after a full investigation and hearing, the juvenile court determines there is probable cause to believe the child committed the offense alleged and, because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings.

The first requirement was discussed in the section on eligibility to be transferred for a person under age 18, earlier in this chapter. The second and third requirements are discussed here. Additional requirements relate exclusively to proceedings to transfer a person 18 or older for an offense committed while a juvenile. Those requirements and the due diligence the State is required to show are discussed in the section on Eligibility to be Transferred for a person 18 or older.

a. No Adjudication Hearing

Sections 54.02(a)(2)(A) and (B) require that "no adjudication hearing has been conducted concerning that offense." This condition is required in order to eliminate any double jeopardy claim by a juvenile respondent who has been subjected to a transfer hearing. If an adjudication hearing is held *before* a transfer hearing, then under the interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution made by the United States Supreme Court in *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779 (1975), the respondent cannot later be criminally prosecuted for that same offense.

The mere fact that the juvenile court conducts a full hearing at transfer on the offenses alleged does not convert the transfer hearing into an adjudication hearing that invokes jeopardy protections. *In the Matter of L.R.L.C.*, 693 S.W.2d 552 (Tex.App.—San Antonio 1985, no writ). The claim was made in *Colon v. State*, 696 S.W.2d 267 (Tex.App.—San Antonio 1985, pet. ref'd) that because the State had at the transfer hearing offered proof of each element of the offense alleged and because the juvenile court had found that the allegation had been proved, jeopardy precluded subsequent criminal proceedings. The court rejected this argument:

> The appellant here did not undergo an adjudication hearing in the juvenile court. The issue before the juvenile court was whether or not the cause should be transferred to the adult court, not whether the appellant had committed acts that violate a criminal law. The incidental consideration of the appellant's conduct was not for the purpose of determining guilt but for the purpose of deciding which forum was appropriate to later adjudicate guilt or innocence. The reference in the court's finding to the elements of the offense was not an adjudication that the appellant had committed that offense, but it was rather the way the court chose to identify the cause over which jurisdiction was being waived.

696 S.W.2d at 268.

Thus, neither the fact that the juvenile court permitted full proof of the offense or offenses alleged, nor any findings by the court as to whether those offenses were proved, will preclude subsequent juvenile or criminal proceedings regarding those same offenses.

A void prior adjudication in the case does not preclude certification because the juvenile was never placed in jeopardy in the prior adjudication hearing. *In the Matter of A.C.*, UNPUBLISHED, No. 04-95-00674-CV, 1996 WL 626282, 1996 Tex.App.Lexis 4767, Juvenile Law Newsletter ¶ 96-4-37 (Tex.App.—San Antonio 1996, no writ).

b. Probable Cause Determination

Section 54.02(a)(3) requires the juvenile court to determine "that there is probable cause to believe that the child before the court committed the offense alleged ..."

Lesser Included Offense. Presumably, this language permits a determination of probable cause for a lesser included transferable offense of the offense charged since a lesser included offense is also alleged by charging the greater offense. If the child was 14 at the time of its commission, the lesser included offense must be an aggravated controlled substance felony or a felony of the first degree. The lesser included offense must merely be a felony if the child was at least 15 at the time of its commission. See Code of Criminal Procedure Article 37.09 for the definition of a lesser included offense.

Requirement Is Mandatory. In *In the Matter of R.P.*, 759 S.W.2d 181 (Tex.App.—San Antonio 1988, no writ), the

Court of Appeals held that the requirement that the juvenile court determine probable cause is mandatory. In this case, the respondent had not objected to the absence of that determination in the transfer hearing nor had he complained of it in his brief or argument before the Court of Appeals. The appellate court discovered the mistake on its own. Characterizing the error as "fundamental," it reversed the transfer order and remanded the case to the juvenile court.

In *In the Matter of R.A.G.*, 866 S.W.2d 199 (Tex. 1993), the juvenile court found probable cause to believe that the respondent committed "the offense of capital murder, attempted capital murder, or solicitation of capital murder" and transferred all three cases to criminal court. The Texas Supreme Court held there must be a finding of probable cause for each offense transferred; it is not sufficient that a finding of probable cause might be made with regard to one of the three offenses transferred.

While it is mandatory that the juvenile court make a probable cause finding, it is not required that the finding be recited in the transfer order. An oral finding is sufficient. *Fuentes v. State*, UNPUBLISHED, No. 04-96-00600-CR, 1997 WL 120191, 1997 Tex.App.Lexis 2039, Juvenile Law Newsletter ¶ 97-2-15 (Tex. App.—San Antonio 1997, no pet.).

More recently, in *Hightower v. State*, UNPUBLISHED, No. 06-09-00057-CR, 2009 WL 1974396 *2, 2009 Tex.App.Lexis 5297, Juvenile Law Newsletter ¶ 09-3-9 (Tex.App.—Texarkana 2009, no pet.), the juvenile court signed a discretionary transfer order but failed to include a specific finding of probable cause to believe appellant had committed the alleged offense. After appellant perfected his appeal, the juvenile court signed a nunc pro tunc order waiving its jurisdiction, which included the probable cause finding. However, under Rule 23.1 of the Texas Rules of Appellate Procedure the court lacked the authority to enter such an order after the appellate record had been filed. As a result, the Court of Appeals abated the appeal and allowed the juvenile court to enter a second nunc pro tunc order, including the probable cause finding, thus curing the error. The court stated:

> [I]n this case, we conclude the failure to include a probable cause finding was a clerical error. At the hearing on the discretionary transfer, the juvenile court stated on the record that "[t]he evidence is overwhelming that the State has met its burden…" (footnote omitted) Since the error was clerical, the trial court could modify the transfer order with a nunc pro tunc order to correctly record what actually occurred at the transfer hearing. Since the failure to include a probable cause finding has been cured, the error complained of on appeal is now moot. (footnote omitted)

2009 Tex.App.Lexis 5297 *5-6.

Evidentiary Basis for the Determination. The juvenile court is permitted to base its probable cause determination on hearsay evidence of the commission of the offense and the respondent's involvement in it. *In the Matter of D.W.L.*, 828 S.W.2d 520 (Tex.App.—Houston [14th Dist.] 1992, no writ); *Grant v. State,* 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.); *Edwards v. State*, UNPUBLISHED, No. 05-91-00185-CV, 1991 WL 258726, Juvenile Law Newsletter ¶ 92-1-8 (Tex.App.—Dallas 1991, dism'd w.o.j.) (hearsay testimony by investigating officers sufficient); *In the Matter of K.R.B.*, UNPUBLISHED, No. 04-95-00856-CV, 1996 WL 460027, 1996 Tex.App.Lexis 3596 (Tex.App.—San Antonio 1996, no writ).

Probable cause can be determined by the juvenile court without hearing alibi evidence that the respondent wishes to present. The State is merely required to produce some evidence from which the juvenile court may rationally conclude that the respondent committed the offense alleged. At that point, the juvenile court may terminate the hearing by making a finding of probable cause. *Sutton v. State*, UNPUBLISHED, No. 05-91-01312-CV, 1992 WL 52418, Juvenile Law Newsletter ¶ 92-2-5 (Tex.App.—Dallas 1992); *In the Matter of B.N.E.*, 927 S.W.2d 271 (Tex.App.—Houston [1st Dist.] 1996, no writ).

The Houston Fourteenth District Court of Appeals held in *In the Matter of D.L.N.*, 930 S.W.2d 253 (Tex.App.—Houston [14th Dist.] 1996, no writ) that the juvenile court may make the determination of probable cause based on the law of parties; a showing of personal commission of the offense by the respondent is not required. See *In the Matter of A.A.*, 929 S.W.2d 649 (Tex.App.—San Antonio 1996, no writ); *Grant v. State*, 313 S.W.3d (Tex.App.—Waco 2010, no pet.) (no abuse of discretion in trial court finding "ample evidence" of probable cause that defendant committed murder as a party).

In *In the Matter of D.D.A.*, UNPUBLISHED, No. 02-94-270-CV, Juvenile Law Newsletter ¶ 95-4-07 (Tex.App.—Fort Worth 1995), the respondent contended that the juvenile court could not base a finding of probable cause on the uncorroborated testimony of an accomplice. The Court of Appeals rejected this argument on the ground that a grand jury could indict under such circumstances and that whether there is sufficient corroboration of the accomplice's testimony to convict is a separate question that must be addressed by the criminal court in trial.

c. Community Welfare Requires Criminal Proceedings

To enable the juvenile court to exercise its discretion to certify a case to criminal court, it must find that "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Section 54.02(a)(3). In *In the Matter of A.T.S.*, 694 S.W.2d 252 (Tex.App.—Fort Worth 1985, writ dism'd w.o.j.), the juvenile court transferred a respondent to criminal court for participating with other juveniles in a burglary of a residence in which some items were taken and extensive property damage of a vandalism nature occurred. The appellate court concluded that the evidence did not support the transfer decision, commenting:

> [T]he undisputed testimony established that A.T.S. committed a crime of a juvenile nature with no aggression or harm directed to the person of any individual, that A.T.S. was immature and unsophisticated and had no prior juvenile record except truancy, and that the public would be adequately protected and A.T.S. could be rehabilitated by retaining A.T.S. within the jurisdiction of the juvenile system.

694 S.W.2d at 256. See also *In the Matter of J.P.O.*, 904 S.W.2d 695 (Tex.App.—Corpus Christi 1995, writ denied) (upholding by a four to three vote a transfer to criminal court for burglary).

In *In the Matter of C.C.G.*, 805 S.W.2d 10 (Tex.App.—Tyler 1991, writ denied), an appeal from a transfer in a murder case, the argument was made that the juvenile court cannot transfer based on the seriousness of the offense alone; that transfer must also be based on the background of the juvenile. The Court of Appeals rejected this argument. In this case, the juvenile had shot his stepfather four times with a handgun and then attempted to prevent medical attention from reaching him, commenting, "I want him to die."

The juvenile court's finding of fact that the welfare of the community requires criminal proceedings is subject to appellate review on legal and factual sufficiency bases. A claim of factual insufficiency requires the appellate court to evaluate all the evidence, while a claim of legal insufficiency requires the appellate court to consider only that evidence that supports the juvenile court's finding to determine whether that finding has rational support in the evidence. *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.) (upholding juvenile court's finding on factual sufficiency of the evidence); *Green v. State*, UNPUBLISHED, No. 05-97-01176-CR, 1999 WL 1125247, 1999 Tex.App.Lexis 9191, Juvenile Law Newsletter ¶ 99-4-14 (Tex.App.—Dallas 1999, pet. ref'd) (upholding the juvenile court's finding on both factual and legal sufficiency bases). If the juvenile prevails on a claim of legal insufficiency, he or she is not thereafter subject to being transferred for that offense.

If the juvenile prevails on a claim of factual insufficiency, he or she would be subject to re-certification following a new hearing with new evidence. The standard that an appellate court will apply requires it to examine all the evidence and to uphold the factual finding unless it is "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." *Quinones v. State*, UNPUBLISHED, No. 03-97-00246-CR, 1998 WL 161371, 1998 Tex.App.Lexis 2104, Juvenile Law Newsletter ¶ 98-2-12 (Tex.App.—Austin 1998, no pet.) (upholding the finding under a factual sufficiency standard when juvenile stabbed his mother to death and displayed no remorse).

2. Criteria for Transfer

Section 54.02(f) provides:

> In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
>
> (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (2) the sophistication and maturity of the child;
>
> (3) the record and previous history of the child; and
>
> (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

These are not the only criteria that may be considered by the court in making the transfer decision, but these criteria must be considered.

Finding on Each Criterion Not Required. Although it is customary for juvenile courts to make findings of fact concerning each of these statutory criteria, that is not required by law. All that is required is that the juvenile court has *considered* each of these factors in arriving at a deci-

sion whether to transfer the child. A leading case on transfers, *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, reh'g overruled), established this point:

> We find the evidence sufficient to support the trial court's findings. Although there was ample evidence on all the criteria enumerated in Subsection (f) of the statute, it should be borne in mind that Section 54.02 does not require that, in order for the juvenile court to waive its jurisdiction, all of the matters listed in Subsection (f) must be established. Rather, it provides that the court may waive its jurisdiction if it finds that, because of (1) the seriousness of the offense, or (2) the background of the child, the welfare of the community requires criminal proceedings instead of juvenile proceedings. The statute only directs that the juvenile court *consider* the matters listed under Subsection (f) in making its determination.... They are the criteria by which it may be determined if the juvenile court properly concluded that the seriousness of the offense or the background of the child required a transfer to criminal court. The juvenile court must consider those criteria in order that the appellate court may have a meaningful review of the basis upon which the conclusion was made, and can determine if the evidence *so considered* by the juvenile court does in fact justify the conclusion that a transfer is required.

551 S.W.2d at 753 (emphases in original); see also *Sepulvado v. State*, UNPUBLISHED, No. 12-07-00190-CR, 2008 WL 5339934, 2008 Tex.App.Lexis 9589, Juvenile Law Newsletter ¶ 09-1-10 (Tex.App.—Tyler 2008, no pet.) (sophistication and maturity criteria satisfied by finding that appellant appreciated nature and effect of her actions).

Sufficiency of Evidence to Support Criteria. Even if the juvenile court goes beyond the law's requirements and makes factual findings with respect to the factors enumerated in Section 54.02(f), the transfer order will not be reversed merely because there is insufficient evidence to support one or another of the findings so long as there is sufficient evidence to support the ultimate conclusion that the welfare of the community requires criminal proceedings. *In the Matter of K.D.S.,* 808 S.W.2d 299 (Tex.App.—Houston [1st Dist.] 1991, no writ); *C.W. v. State*, 738 S.W.2d 72 (Tex.App.—Dallas 1987); *In re C.L.Y.*, 570 S.W.2d 238 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ); *Meza v. State*, 543 S.W.2d 189 (Tex.Civ.App.—Austin 1976, no writ); *In re C.L.Y.*, 570 S.W.2d 238 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ).

3. Statement of Reasons

Section 54.02(h) provides that "[i]f the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver...." This is functionally identical to the requirement of Section 54.04(f) pertaining to dispositions and Section 54.05(i) pertaining to modifications of disposition.

In *In the Matter of J.R.C.*, 522 S.W.2d 579 (Tex.Civ.App.—Texarkana 1975, writ ref'd n.r.e.), the court explained the requirement that the juvenile court state specifically its reasons for waiver:

> [T]he Legislative intent of Subdivision (h) is that when the Juvenile Court waives jurisdiction the *reasons* for waiver, as *reasons* are hereafter defined, are to be incorporated in the order. By the words *reasons for waiver* the Legislature meant that the Juvenile Court must set out the rationale of its order, and that is, the rational basis of the court's conclusion or motive that constrains entry of the order waiving jurisdiction.

522 S.W.2d at 583 (emphases in original).

A statement by the juvenile court that it has considered the Subsection (f) factors and relating those factors to the evidence in the hearing is a sufficient statement of reasons for the transfer order. *In the Matter of Honsaker*, 539 S.W.2d 198 (Tex.Civ.App.—Dallas 1976, writ ref'd n.r.e.). See *In the Matter of T.D.,* 817 S.W.2d 771 (Tex.App.—Houston [1st Dist.] 1991, writ denied), in which the juvenile court discussed each of the Subsection (f) factors and related them to the evidence at the hearing. That was found to be a sufficient statement of reasons for transfer. See also *In the Matter of F.A.,* 835 S.W.2d 748 (Tex.App.—San Antonio 1992, no writ); *In the Matter of J.A.A.*, UNPUBLISHED, No. 04-07-00105-CV, 2008 WL 312688, 2008 Tex.App.Lexis 848 (Tex.App.—San Antonio 2008, no pet.) (court's stated reasons under Section 54.04(f) and testimony that youth needed "a structured and therapeutic correctional environment" were supported by the record).

What happens if the juvenile court fails to provide a statement of reasons for its transfer order? That question was definitively answered by the Court of Criminal Appeals in 2014 in *Moon v. State*, 451 S.W.3d 28 (Tex.Crim.App. 2014). The case was overturned because the juvenile court did not specifically state in the transfer order the reasons for transfer, instead simply stating the "seriousness of the offense" mandated transfer and reciting the statutory factors required to be considered in Section 54.02(f). In its ruling, the Court of Criminal Appeals noted the tension between the broad discretion given to

the juvenile court in making transfer decisions and the insistence in *Kent v. U.S*, 86 S.Ct.1045 (1966) that the appellate review assure that discretion is not abused.

> The legislative response to this inherent tension was to mandate, in Section 54.02(h), that the juvenile court "shall state specifically in its order its reasons for waiver and certify its action, including the written order and findings of the court [.]"Although the committee that drafted the Juvenile Justice Code had recommended a version of this provision that would have required no more than a "brief" statement of the reasons justifying transfer, the Legislature deemed this insufficient: "The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true relevation [sic] of reasons for making this discretionary decision." Moreover, Section 54.02(h) obviously contemplates that both the juvenile court's reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order. In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable—in short, that it is a decision demonstrably deserving of appellate imprimatur even if the appellate court might have reached a different result. This legislative purpose is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons.
>
> Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.
>
> Given this legislative regime, we think it only fitting that a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should *not* be made to rummage through the record for facts that the juvenile court *might* have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the Section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).

451 S.W.3d 28, 49-50.

4. Sending Diagnostic Study to Criminal Prosecutor

The juvenile court, when transferring a case to criminal court, is required to "cause the results of the diagnostic study of the person ... including psychological information, to be transferred to the appropriate criminal prosecutor." Section 54.02(h). This is required on the assumption that the criminal prosecutor may find the diagnostic study useful in evaluating the criminal case. If a transferred juvenile is convicted and sentenced to prison, Code of Criminal Procedure Article 42.09, Section 8(c) requires that the diagnostic report in the possession of the criminal prosecutor must accompany the defendant to prison.

E. Transferring Fewer Than All Offenses Alleged

Before a 1995 amendment, Section 54.02(g) provided that "if the juvenile court retains jurisdiction, the child is not subject to criminal prosecution at any time for any offense alleged in the petition." Thus, it was clear that if the juvenile court refused to transfer for any offense alleged in the petition, there could be no criminal prosecution. Were it not for this provision, the State could have simply filed another petition and sought another transfer hearing for the same charges.

Stanley v. State. But what if more than one offense is alleged in the petition or motion and the juvenile court transfers one offense but retains jurisdiction over another? In *Stanley v. State*, 687 S.W.2d 413 (Tex.App.—Houston [14th Dist.] 1985, writ dism'd w.o.j.), the petition for transfer charged respondent with three offenses of aggravated robbery. After a hearing, the juvenile court transferred respondent to criminal court on two of the charges but retained jurisdiction as to the third charge because the State presented no evidence concerning it. On direct appeal from the transfer order, the appellate court concluded

that respondent could not be prosecuted for the two robbery charges for which the juvenile court had transferred him:

> We hold that once the juvenile court retains jurisdiction as to any count alleged in the certification petition, the child's status is fixed as to all offenses alleged in the petition and thus the child is not subject to criminal prosecution as an adult for any offense alleged in the petition.

687 S.W.2d at 414.

***Richardson v. State* – Court of Appeals.** However, the same court in *Richardson v. State,* 728 S.W.2d 128 (Tex.App.—Houston [14th Dist.] 1987), *rev'd by* 770 S.W.2d 797 (Tex.Crim.App. 1989), later backed away from the *Stanley* case. Richardson was charged with four separate offenses, but the juvenile court transferred him for only three, retaining jurisdiction as to the fourth. He appealed from his criminal conviction of one of the three transferred offenses, claiming it was precluded under *Stanley*.

The Court of Appeals decided it needed to "clarify" the *Stanley* case. The court held that it is not enough that the juvenile court refused to transfer one of the offenses alleged in the petition. *Stanley* will preclude prosecution for one of the transferred cases only if the juvenile court exercises jurisdiction over the retained offense:

> We hold that when a motion or petition to waive jurisdiction alleges multiple offenses, section 54.02(g) of the Family Code requires that the child's status be fixed as a juvenile as to all offenses alleged in the petition once the juvenile court retains and exercises jurisdiction over any count alleged in the certification petition....The trial court may still exercise its discretion in waiving jurisdiction as to any alleged offenses and in refusing to waive jurisdiction as to any alleged offenses; it is only the trial court's subsequent exercise of jurisdiction over the retained offense that renders the order waiving jurisdiction invalid....Where the exercise of the trial court's retained jurisdiction does not appear of record, we presume that said jurisdiction was not exercised and that the offense over which jurisdiction was retained, was subsequently dismissed by the trial court.

728 S.W.2d at 130.

***Richardson v. State* – Court of Criminal Appeals**. The Court of Criminal Appeals in *Richardson v. State,* 770 S.W.2d 797 (Tex.Crim.App. 1989), reversed the decision of the Court of Appeals. Agreeing with the dissenting opinion by Chief Justice Brown of the Court of Appeals in *Richardson*, the Court of Criminal Appeals adopted his argument:

> The majority [of the Court of Appeals] attempts to make the distinction that the juvenile court may make a partial transfer as long as the juvenile court exercises no further jurisdiction as to any offense that it retained. Either the juvenile court transfers jurisdiction or it does not. *The majority's holding would reach the anomalous result of the transfer being valid at the time of the transfer and then becoming invalid at a later time if the juvenile court later exercised jurisdiction over any of the retained offenses.* If the juvenile court has transferred jurisdiction, how can it still affect the district court's jurisdiction over the offense?

770 S.W.2d at 799 (emphasis added by Court of Criminal Appeals).

The Court of Criminal Appeals then summarized its position:

> We hold that when a motion or petition to waive jurisdiction alleges multiple offenses, the juvenile court must either waive or retain jurisdiction as to all offenses alleged, at one time. Absent a complete waiver, the juvenile court retains jurisdiction over all offenses alleged in the petition. The district court does not obtain jurisdiction over any offense alleged in the petition.

770 S.W.2d at 799.

The Nonsuit Solution. The Dallas Court of Appeals had earlier refused to follow the Houston Fourteenth District Court of Appeals' *Richardson v. State* decision. *R.T. v. State*, 764 S.W.2d 588 (Tex.App.—Dallas 1989, no writ). It reversed a transfer order because the juvenile court had retained jurisdiction over two arson offenses that were alleged in the transfer petition without any showing that the juvenile court had exercised jurisdiction over them. When the case of *R.T. v. State* was remanded from the Dallas Court of Appeals to the juvenile court, the State dismissed or nonsuited the counts in the petition that the juvenile court had not transferred. The juvenile court then transferred all remaining counts to the criminal court. In an appeal from convictions on those transferred counts, the Court of Appeals held in *Turner v. State*, 796 S.W.2d 492 (Tex.App.—Dallas 1990, no writ) that the juvenile court's procedures complied with the requirements of the Court of Criminal Appeals in *Richardson*:

> In our case, on remand and upon the State's motion, the juvenile court nonsuited the arson counts over which it had originally retained jurisdiction. Thereafter, when the juvenile court transferred all remaining offenses to the criminal district court, it completely waived its jurisdiction because it did not retain jurisdiction of any part of the case.

796 S.W.2d at 494.

The juvenile argued that it was too late to nonsuit the arson counts after the juvenile court had determined not to transfer them to criminal court, but the Court of Appeals rejected that position, making an analogy to granting a State's motion for rehearing in a transfer hearing, a procedure that had been upheld in *Reyes v. State*, 630 S.W.2d 798 (Tex.App.—Houston [1st Dist.] 1982), *aff'd by* 647 S.W.2d 255 (Tex.Crim.App. 1983).

In *In the Matter of R.G., Jr.*, 865 S.W.2d 504 (Tex.App.—Corpus Christi 1993, no writ), the State nonsuited several allegations in a transfer petition after it had rested its case. Appellant argued that this was not a timely nonsuit under Rule 162 of the Texas Rules of Civil Procedure, which requires that a nonsuit be entered "before the plaintiff has introduced all of his evidence other than rebuttal evidence." However, the Court of Appeals rejected that argument on the ground that a transfer hearing is not a trial on the merits but is only a pre-trial hearing and so the nonsuit did not occur after the State had presented its case-in-chief in the trial on the merits. It was, therefore, timely.

The Austin Court of Appeals followed the same reasoning in *In the Matter of D.D.*, UNPUBLISHED, No. 03-94-00729-CV, 1996 Tex.App.Lexis 3270, Juvenile Law Newsletter ¶ 96-3-15 (Tex.App.—Austin 1996, no writ), holding that a motion to dismiss three of the four counts alleged in the certification petition was timely although made after the State rested its case.

In *Ryan v. State*, UNPUBLISHED, No. 01-96-00592-CR, 1997 WL 187306, 1997 Tex.App.Lexis 2050, Juvenile Law Newsletter ¶ 97-2-19 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd), the State alleged capital murder, aggravated robbery, and burglary of a habitation in its transfer petition. During the certification hearing, it orally abandoned the capital murder count. That action effectively removed the capital murder charge from the proceedings so that the juvenile court could later transfer the remaining two offenses without violating *Richardson*.

In *Bailey v. State*, UNPUBLISHED, No. 01-95-00859-CR, 1997 WL 198133, 1997 Tex.App.Lexis 2200, Juvenile Law Newsletter ¶ 97-2-24 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd), the State filed a multi-count certification petition but then filed a first amended certification petition that alleged only one count. Since the amended petition totally superseded the original petition, there was only one count before the juvenile court at the time of the certification decision so certifying only that offense did not violate *Richardson*.

In *Kindle v. State*, UNPUBLISHED, No. 01-90-01102-CR, 1992 WL 23621, Juvenile Law Newsletter ¶ 92-1-1 (Tex.App.—Houston [1st Dist.] 1992, pet. ref'd), the juvenile court transferred the murder count of the petition while the State took a nonsuit on the remaining three counts. The Court of Appeals approved of the transfer under authority of *Turner*. However, in *In the Matter of R.C.*, UNPUBLISHED, No. 13-91-346-CV, Juvenile Law Newsletter ¶ 92-4-4 (Tex.App.—Corpus Christi 1992), the juvenile court transferred some counts, the State nonsuited others, and nothing was done with still others. The Court of Appeals held the transfer was invalid under *Richardson* and was not saved by *Turner* because of the undisposed of (retained) counts.

Legislative Overruling of *Richardson*. By 1995 amendments, the legislature overruled *Richardson v. State.* It amended the statutory foundation for the decision, Section 54.02(g), to read as follows:

> If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.

The amendment places the emphasis upon criminal transactions, rather than upon offenses carved from those transactions. Under the principle of *Ex parte Allen*, 618 S.W.2d 357 (Tex.Crim.App. 1981) the prosecutor is permitted to charge any offense supported by probable cause provided only that the offense arose out of a criminal transaction that was certified by the juvenile court. In other words, the juvenile court certifies a transaction, not a specific statutory offense.

Under the amendment, the juvenile court is required either to retain or to transfer all offenses related to a single transaction, but it may transfer or retain different transactions. The child is not subject to prosecution for any offense arising out of a criminal transaction for which the juvenile court retained jurisdiction.

This amendment permits the juvenile court to hear the evidence as it relates to multi-transaction cases, to determine whether there is probable cause to believe that respondent committed an offense and whether certification is supportable, and, if so, to certify the transaction out of which that offense arose. At the same time, the court can retain jurisdiction over another criminal transaction without the retained transaction precluding criminal prosecution of the certified transaction.

Multiple Transfer Hearings for the Same Transaction. In 2009, three juveniles in Tarrant County assaulted a pizza delivery driver with a baseball bat, severely injuring him. The prosecutor requested certification of one of the juveniles, but the juvenile court chose to retain jurisdiction. The juvenile was committed to the Texas Youth Commission with a 40-year determinate sentence; the other two juveniles also received determinate sentences. Later, the victim died as a result of the injuries suffered in the attack.

In light of the change in circumstance, if the death of the victim had occurred earlier, the prosecutor could have filed the charge of murder. Therefore, the juvenile was not subject to criminal prosecution because the offense arose out of a criminal transaction for which the juvenile court retained jurisdiction in accordance with Section 54.02(g). As a consequence, the prosecution was not able to attempt certification again.

In 2011 in response to the Tarrant County situation, the legislature amended Section 54.02(g) and added Section 54.02(g-1). Together, these provisions allow the prosecution to seek certification and initiate a second transfer of the case for homicide or intoxication manslaughter if the victim later dies.

During the 2011 legislative session, there were policy discussions regarding whether these amendments present double jeopardy and collateral estoppel issues given that they allow for a second prosecution out of a transaction that has already been adjudicated. To date, there have been no cases on point, and it is unclear how the courts will resolve the underlying questions.

F. Mandatory Transfer

Since what the juvenile court certifies is a criminal transaction, the transfer order applies only to that transaction. If, after transfer but prior to becoming 17 years old, the transferred juvenile commits a felony, the new offense is still a juvenile offense. If juvenile officials wish to certify the new offense to criminal court, a new transfer proceeding must be conducted. In the absence of a special rule, this would require a new study and investigation, or at least an updating of the previous study, and a new discretionary transfer hearing.

The legislature favored a principle that became known as "once certified, always certified." This meant that new offenses committed by a certified juvenile prior to becoming 17 would "automatically" be sent to criminal court, thus enabling a more comprehensive disposition to be made because all the charges would be disposed of in the same judicial system. The mandatory certification procedure of Sections 54.02(m) and (n) is intended to implement that principle:

> (m) Notwithstanding any other provision of this section, the juvenile court shall waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal court for criminal proceedings if:
>
> (1) the child has previously been transferred to a district court or criminal district court for criminal proceedings under this section, unless:
>
> (A) the child was not indicted in the matter transferred by the grand jury;
>
> (B) the child was found not guilty in the matter transferred;
>
> (C) the matter transferred was dismissed with prejudice; or
>
> (D) the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final; and
>
> (2) the child is alleged to have violated a penal law of the grade of felony.
>
> (n) A mandatory transfer under Subsection (m) may be made without conducting the study required in discretionary transfer proceedings by Subsection (d). The requirements of Subsection (b) that the summons state that the purpose of the hearing is to consider discretionary transfer to criminal court does not apply to a transfer proceeding under Subsection (m). In a proceeding under Subsection (m), it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court.

Scope of Mandatory Transfer. There are two requirements that must be met: (1) the child was previously

transferred to criminal court; and (2) the child is charged with committing a felony.

Although the statutory language is somewhat unclear, the legislature's intent is that the transfer order must have been made by the juvenile court before the new felony was committed by the child. Of course, the felony must also have been committed prior to the child's 17th birthday; if the person is already 17, then the new offense is a criminal not a juvenile matter.

The previously transferred transaction must either have been disposed of favorably to the State or at least still be a viable criminal case at the time of the mandatory transfer hearing. Otherwise, there would be very little point to requiring transfer to criminal court for the new charge. The mandatory transfer provision does not apply if any of these four conditions contained in Section 54.02(m)(1) exist at the time of the juvenile court hearing:

(A) the child was not indicted in the matter transferred by the grand jury;

(B) the child was found not guilty in the matter transferred;

(C) the matter transferred was dismissed with prejudice; or

(D) the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final.

Although mandatory transfer is not available if any of those four conditions exist at the time of the hearing, if the proper procedures are followed, discretionary transfer would ordinarily be available even in such cases. While it would defeat some of the efficiency purposes of having mandatory transfer, there is no reason why the prosecutor could not in an appropriate case file a certification petition seeking both mandatory and discretionary transfer for the same criminal transaction.

There is one circumstance in which mandatory transfer is available but discretionary transfer is not. If a child is certified for committing a capital, first degree or aggravated controlled substance felony while 14 and later commits a second degree, third degree or a state jail felony before his or her 15th birthday, he or she is not subject to discretionary transfer for the subsequent offense (because not a capital, first degree or aggravated controlled substance felony) but would nevertheless be subject to mandatory transfer because any felony committed after transfer by a 14-year-old is sufficient.

Procedures for Mandatory Transfer. Transfer is mandatory, but not automatic. Until the subsequent offense is transferred by the juvenile court, it is still a juvenile offense. The purpose of the mandatory transfer procedure was to streamline the involvement of the juvenile court, not to eliminate it.

Where is the child to be detained pending entry of the order of mandatory transfer? Until transfer, the offense is still a juvenile offense, which means the child may be detained in a certified juvenile detention facility until the certification order is entered. However, there are also other possibilities. If the offense was committed by the child while incarcerated in the county jail awaiting trial, he or she can continue to be incarcerated on the previous charge while mandatory transfer proceedings are pending in juvenile court. The juvenile court could bench warrant the child from the county jail to the juvenile court hearing. If the child is on adult community supervision at the time of the subsequent juvenile offense, he or she may be detained in the certified juvenile detention facility. If a community supervision revocation warrant has been issued, the child may be detained in the county jail under authority of that warrant. Finally, if the child is free on bond in the criminal case, he or she may be detained in the certified juvenile detention facility for the subsequent juvenile offense or, if bond is revoked or terminated, may be detained in the county jail in the previous criminal case.

Under Section 54.02(n), mandatory transfer requires a petition and a hearing. The petition merely alleges the two essential facts giving rise to the duty to transfer: (1) a prior viable transfer order; and (2) a new felony. The petition should identify by cause number and date the prior transfer order. It should also allege that none of the four conditions excluding mandatory transfer exist. Transfer is mandatory unless: (1) the child was not indicted for the matter transferred; (2) the child was found not guilty of the matter transferred; (3) the matter transferred was dismissed with prejudice; or (4) the child was convicted in the matter transferred and the conviction was reversed on appeal and the appeal is final.

The petition must also allege the new felony offense. General principles regarding pleading all the elements of the offense and the particularity required of factual allegations apply here. See Chapter 9.

The relief prayed for in the petition should clearly indicate that the prosecutor is seeking to invoke the mandatory transfer procedure. If the prayer includes discretionary transfer, then the certification report in Section 54.02(d) will be required.

When the mandatory procedure is used, Section 54.02(n) eliminates the need for the certification report required in discretionary proceedings. That report is addressed primarily to the discretion of the juvenile court, which does not exist when the mandatory procedure is invoked.

When the mandatory procedure is used, Section 54.02(n) excuses the requirement of Section 54.02(b) that the summons must state that the purpose of the hearing is to consider discretionary transfer to criminal court. Instead, Subsection (n) provides that "it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court." The use of the words "fair notice" is intended to convey to the courts the notion that "magic words" are not required to be recited in the summons under the mandatory transfer procedure. This message is necessary because of the expansive manner in which courts have interpreted the notice requirement of Section 54.02(b) for the summons in the discretionary transfer proceeding. See Chapter 9.

Proof Requirements. What must be proved at the hearing on a petition for mandatory transfer? The State must prove the prior transfer order and that none of the four negating conditions defined by Section 54.02(m)(1) exist.

Must the State show probable cause to believe that the new felony was committed by the respondent as alleged in the petition or is it sufficient that it merely proves that the respondent is alleged in the petition to have committed the felony? The statute is ambiguous. However, the context in which the decision must be made suggests that a showing of probable cause to believe that the respondent committed the felony alleged would be required.

Section 54.02(a)(3) requires the State to show probable cause to authorize discretionary transfer. No reason suggests itself for requiring probable cause before the juvenile court may exercise discretion in deciding whether to certify but not to require probable cause in a case in which certification is mandatory. Indeed, to authorize mandatory certification without a finding of probable cause raises significant equal protection issues precisely because probable cause is required for discretionary transfer.

In any event, until the statutory ambiguity is clarified, any juvenile court may require a showing of probable cause as part of the mandatory transfer process, and it would be a prudent course of action to do so.

G. Post-Transfer Proceedings

While it is beyond the scope of this text to discuss in detail the criminal proceedings that follow transfer of a child from juvenile to criminal court, there are some major differences between the prosecution of a transferred juvenile and any other adult that must be noted.

1. Examining Trials

Prior to 1987, Texas courts interpreted the Family Code to create a mandatory right to an examining trial prior to the prosecution in criminal court of a transferred juvenile. There were numerous cases deciding various issues concerning the scope and finality of this special examining trial. See Dawson, *Prosecution of Juveniles in Texas Criminal Courts: Eliminating the Jurisdictional Requirement of an Examining Trial*, 23 Houston Law Review 1067-1112 (1986).

In 1987, the legislature amended Section 54.02(h) to eliminate the mandatory examining trial. It replaced that requirement with a provision for an examining trial if the district court in the criminal case determined there was good cause for conducting an examining trial. It also amended Section 54.02(a)(3) of the Family Code to require for the first time that the juvenile court in the transfer hearing must make a finding that there is probable cause to believe the child committed the offense alleged in order to authorize transfer. Thus, beginning in 1987, the requirement of a showing of probable cause was shifted from the post-transfer examining trial to the transfer hearing itself.

Amendments in 1995 eliminated the remains of the mandatory examining trial system. The provision in Section 54.02(h) referring to the district court finding of good cause for an examining trial was repealed. Also repealed in 1995 was language in Section 54.02(i) about returning a transferred case to juvenile court if the grand jury refuses to indict. This language was replaced in Section 54.02(i) with a statement that "[a] waiver under this section is a waiver of jurisdiction over the child and the criminal court may not remand the child to the jurisdiction of the juvenile court." The Court of Appeals in *George v. State*, UNPUBLISHED, No. 01-97-00973-CR, 1999 WL 351081, 1999 Tex.App.Lexis 4176, Juvenile Law Newsletter ¶ 99-3-04 (Tex.App.—Houston [1st Dist.] 1999, pet. ref'd) held that the 1995 amendment eliminated the last vestiges of the mandatory juvenile examining trial. In that case, the parties had agreed on an examining trial date, but it was never conducted because the prosecutor obtained an indictment before the scheduled date. There was no requirement under the 1995 amendment that the district

court find a lack of good cause for conducting an examining trial. The transferred juvenile's right to an examining trial was extinguished by the return of an indictment just like the right of any other adult charged with a felony.

2. Transfer Order

If the record in a criminal prosecution shows that the accused was under age 17 at the time of the offense, there must also be in the record of the criminal court evidence that there was a juvenile court transfer order. In the absence of such evidence, the resulting criminal conviction will be reversed on direct appeal. *Whytus v. State*, 624 S.W.2d 290 (Tex.App.—Dallas 1981, no pet.); *Ellis v. State,* 543 S.W.2d 135 (Tex.Crim.App. 1976).

Under Article 4.18 of the Code of Criminal Procedure, it is the obligation of the criminal defendant to make a claim of underage as a defense to criminal prosecution—that he or she was under 17 at the time of the offense and no certification proceedings occurred. Failure to raise the claim in a timely fashion will result in its forfeiture. See Chapter 3 for a complete discussion of that provision.

There is no requirement that the State present evidence of the transfer order to the jury in the criminal trial. Transfer is a jurisdictional matter that is for the judge to decide as a matter of law. It is sufficient that the papers in the criminal case show a juvenile court transfer order that is valid on its face. *Darnell v. State*, UNPUBLISHED, No. B14-90-01139-CR, 1991 WL 162902, 1991 Tex.App.Lexis 2121, Juvenile Law Newsletter ¶ 91-4-3 (Tex.App.—Houston [14th Dist.] 1991, no writ).

In *Cornealius v. State*, 870 S.W.2d 169 (Tex.App.—Houston [14th Dist.] 1994), *aff'd by* 900 S.W.2d 731 (Tex.Crim.App. 1995), the juvenile court corrected its certification order by substituting the name of one complainant for another. This change was characterized by the Court of Appeals as the correction of a judicial, rather than clerical, error and could not, therefore, be made by an order nunc pro tunc. However, the correction was made before the grand jury returned an indictment in the transferred case. The Court of Appeals stated:

> Until an indictment is returned by the grand jury, which in this case occurred after the judge corrected the...order, the criminal district court could not acquire jurisdiction over the juvenile. Therefore, at the time [the] juvenile court corrected its order, it still retained plenary power over this cause.

870 S.W.2d at 177.

Similarly, in *Youngs v. State,* UNPUBLISHED, No. 14-97-00874-CR, 1999 WL 394653, 1999 Tex.App.Lexis 4488, Juvenile Law Newsletter ¶ 99-3-07 (Tex.App.—Houston [14th Dist.] 1999, no pet.) the juvenile court certified three separate cases to criminal court. The criminal court clerk placed two of the orders under the file number for the other. The Court of Appeals took judicial notice of all three files and held that the criminal court had acquired jurisdiction by the certification.

Section 54.02(h) states:

> [i]f the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings.…

In *Moss v. State*, 13 S.W.3d 877 (Tex.App.—Fort Worth 2000, pet. ref'd), in a bizarre sequence of events, a juvenile court transfer order was not sent to the district court and was not filed among the papers in the criminal case. In all other respects, however, the parties treated the case as fully certified to the criminal court. The Court of Appeals concluded that all that is necessary is that the juvenile court enter a transfer order. While it is certainly the preferable and virtually unanimous practice for the written order to be sent to the criminal court and filed in the papers in the criminal cause, that is not required by the statute quoted above. See also *Delacerda v. State*, UNPUBLISHED, No. 01-09-00972-CR, 2011 WL 2931189, Juvenile Law Newsletter ¶ 11-3-13 (Tex.App.—Houston [1st Dist.] 2011, no pet) (signed transfer order lacking date and printed name of judge nevertheless transferred jurisdiction to adult district court).

3. Prosecution Only for the Transaction Transferred

Although it is common to speak of waiver of jurisdiction as though the child were being declared an adult for all criminal proceedings, that is not correct. The juvenile court waives jurisdiction only with respect to conduct and a criminal court has jurisdiction to adjudicate only for the *conduct* for which the juvenile court transferred jurisdiction.

This proposition is established by *Ex parte Allen*, 618 S.W.2d 357 (Tex.Crim.App. 1981). Allen was charged in juvenile court with attempted capital murder of one person, which was alleged to have been committed on March 29, 1974. He was concurrently charged with the capital murder of another person, which was alleged to have been committed on April 1, 1974. The State sought trans-

fer. At the transfer hearing, only evidence of the attempted capital murder was introduced. The juvenile court transferred Allen to criminal court based on that evidence. Allen was later convicted of capital murder, but the Court of Criminal Appeals reversed the conviction because he had not been transferred for the conduct underlying the capital murder, only the entirely separate attempted capital murder:

> Since we find no waiver of jurisdiction by the juvenile court relating to conduct upon which the instant capital murder conviction is based we hold that the district court never acquired jurisdiction to proceed with adult trial of petitioner for that offense....
>
> Jurisdiction of the juvenile court with respect to this capital murder offense was properly invoked by a petition filed April 1, 1974. The juvenile court has never conducted a transfer hearing or issued a waiver of jurisdiction relating to conduct resulting in the capital murder prosecution. Consequently, jurisdiction of the capital murder charge remains in the juvenile court.

618 S.W.2d at 361.

The *Allen* principle received an unusual application in *Livar v. State*, 929 S.W.2d 573 (Tex.App.—Fort Worth 1996, pet. ref'd). Livar and others engaged in a criminal transaction that resulted in serious bodily injury to Steven and the death of Ruiz. Livar was certified for the assault on Steven and, in separate proceedings, was not certified for the murder of Ruiz. Livar appealed, asserting that the second proceeding, in which certification was not granted, was tantamount to the juvenile court reasserting jurisdiction over both cases. The Court of Appeals disagreed, holding that the second certification was a void effort because, under *Allen,* the entire transaction, both the assault and murder, were transferred at the first certification hearing whether the juvenile court intended that consequence or not. Prosecution of both offenses was possible as a result of the first certification hearing.

In a similar case, the appellant in *Caldwell v. State*, UNPUBLISHED, No. 05-93-01641-CR, 1998 WL 131245, 1998 Tex.App.Lexis 1804, Juvenile Law Newsletter ¶ 98-2-07 (Tex.App.—Dallas 1998, pet. ref'd) was certified to stand trial for solicitation of the capital murder of her father. Her mother had been murdered by appellant's boyfriend in the same transaction, but she had not been charged with that offense because the State lacked evidence of her direct involvement in it. At the criminal trial of the solicitation of capital murder charge, a witness who had previously lied testified that appellant and her boyfriend had planned and executed the capital murder of appellant's mother. The State then sought and obtained certification of appellant as a party to capital murder of her mother. On appeal from conviction for capital murder, appellant claimed that the *Allen* principle had been violated. The Court of Appeals distinguished *Allen* on the ground that here the State "upon receiving new evidence from a witness in the solicitation to commit capital murder case, commenced a new certification proceeding and the juvenile court certified the appellant to stand trial for the capital murder in the instant case that is the subject of this appeal." The Court of Appeals could have added that here, unlike in *Allen*, both offenses were committed as part of the same criminal transaction. Therefore, it is likely that the State could have, without new juvenile proceedings, charged capital murder of the mother based on certification of the criminal transaction that had been labeled solicitation of capital murder of the father.

The *Allen* principle deals with the underlying conduct (the criminal transaction) for which a child is transferred to criminal court. It does not restrict the criminal court to the particular offense label that the juvenile court may have placed on that conduct. *Wooldridge v. State*, 653 S.W.2d 811 (Tex.Crim.App. 1983); *Tatum v. State*, 534 S.W.2d 678 (Tex.Crim.App. 1976); see also *Jones v. State*, UNPUBLISHED, No. 08-00-00021-CR, 2001 WL 1452206, Juvenile Law Newsletter ¶ 01-452 (Tex.App.—El Paso 2001) (indicting for burglary with intent to commit assault authorized by certification from same transaction of aggravated assault); *Rogers v. State*, UNPUBLISHED, No. 14-95-00871-CR, 1999 WL 93274, 1999 Tex.App.Lexis 1241, Juvenile Law Newsletter ¶ 99-1-30 (Tex.App.—Houston [14th Dist.] 1999) *(cert. denied)*, 528 U.S. 1167, 120 S.Ct. 1189 (2000) (adding capital murder theory of killing during robbery to certification of transaction with theories of killing during burglary and aggravated sexual assault authorized under *Allen* principle); *Hamilton v. State*, UNPUBLISHED, No. 04-93-00174-CR, 1995 WL 612401, Juvenile Law Newsletter ¶ 95-4-01 (Tex.App.—San Antonio 1995, pet. ref'd) (conviction for capital murder affirmed even though juvenile court certified only murder).

In *Brosky v. State*, 915 S.W.2d 120 (Tex.App.—Fort Worth 1996, pet. ref'd), *cert. denied*, 519 U.S. 1020, 117 S.Ct. 537 (1996), the Court of Appeals held under *Allen* that it was permissible after certification to replace an overt act alleged in a certification petition for engaging in organized criminal activity with a different overt act arising out of the same conspiracy.

The certification order in *Jones v. State*, UNPUBLISHED, No. 01-99-00010-CR, 1999 WL 1240928, 1999 Tex.App.Lexis 9456, Juvenile Law Newsletter ¶ 00-1-10

(Tex.App.—Houston [1st Dist.] 1999, pet. ref'd) recited that the certified offenses were committed on December 23, 1997, but the indictments alleged a date for the offenses of December 19, 1997. The Court of Appeals held this was an acceptable variance of indictment from certification order because the same underlying conduct was described in both instruments.

The certification order in *Lopez v. State*, UNPUBLISHED, No. 08-99-00023-CR, 2000 WL 799067, Juvenile Law Newsletter ¶ 00-3-12 (Tex.App.—El Paso 2000) recited aggravated assault by threat with a deadly weapon upon a public servant, while the indictment simply charged the same conduct as aggravated assault by threat with a deadly weapon. The Court of Appeals held under *Tatum* and similar cases that it is the underlying conduct, not the Penal Code offense category, that is transferred. As long as the State does not stray from that conduct, it may charge any Penal Code category the evidence supports. The Court of Appeals could have added that the offense indicted was legally not a different offense than the one certified even at the Penal Code category level since the former was a lesser included offense of the latter.

The prosecutor in criminal court may charge any offense that can be proved, as long as it is based on conduct from the criminal transaction for which the juvenile court has ordered the respondent transferred.

4. Juvenile Detention Credit on Criminal Sentence

In *Ex parte Green*, 688 S.W.2d 555 (Tex.Crim.App. 1985), the Court of Criminal Appeals held that, under Code of Criminal Procedure Article 42.03, Section 2(a), a transferred juvenile is entitled to receive credit on any prison sentence for the time spent in juvenile detention pending certification. In *Ex parte Gomez*, 15 S.W.3d 103 (Tex.Crim.App. 2000), the Court of Criminal Appeals held that a certified juvenile is also entitled under that same provision to receive on any prison sentence credit for good conduct while detained in the juvenile detention facility in the case. See *Ex parte Marsh*, UNPUBLISHED, No. AP-76,138, 2009 WL 1067932, 2009 Tex.Crim.App. Unpub. Lexis 272, Juvenile Law Newsletter ¶ 09-2-14 (Tex.Crim.App. 2009) and *Ex parte Brown*, UNPUBLISHED, No. 74577, 2003 WL 1792683 (Tex.Crim.App. 2003) (both awarding credit for juvenile detention); *Melendez v. State*, UNPUBLISHED, No. 04-99-00502-CR, 2000 WL 1728070, 2000 Tex.App.Lexis 7908, Juvenile Law Newsletter ¶ 00-4-26 (Tex.App.—San Antonio 2000, no pet.); *Delgado v. State*, UNPUBLISHED, No. 14-00-01238-CR, 2002 WL 27297, 2002 Tex.App.Lexis 195, Juvenile Law Newsletter ¶ 02-1-17 (Tex.App.—Houston [14th Dist.] 2002, pet. ref'd).

5. Relationship of Appeal to Criminal Proceedings

When a juvenile is transferred to criminal court, he or she is entitled to appeal the transfer proceedings to the appropriate Court of Appeals. Section 56.01(c)(1). The pendency of the appeal does not prevent the criminal prosecution from proceeding at its normal pace. Section 56.01(g) and (g-1). Nor will an appellate court issue an order requiring the criminal court to await the outcome of the appeal before proceeding with the criminal trial. *L.L.S. v. Wade*, 565 S.W.2d 251 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e.). If the defendant is convicted for a transferred offense and later the appellate court on immediate appeal reverses the transfer order on direct appeal, the conviction will be set aside and the case returned to the juvenile court.

In 1995, the law was changed to eliminate the right to immediately appeal a transfer order, effective for offenses committed on or after January 1, 1996. Instead, the lawfulness of the transfer process could be challenged only in an appeal filed after conviction or deferred adjudication in criminal court for the transferred conduct. See now repealed Article 44.47, Code of Criminal Procedure. However, in 2015, in part due to facts surrounding *Moon v. State*, 451 S.W.3d 28 (Tex.Crim.App. 2014), in which it was reported that juveniles were being routinely certified based on the offense alone without individual consideration of the transfer factors, the legislature restored the right to an immediate appeal of a decision to certify. The right to an immediate appeal applies in cases in which the order transferring was signed on or after September 1, 2015. The scope of the post-conviction appeal has remained unchanged since before the 1996—it is plenary and not restricted to jurisdictional issues. See Family Code Section 56.01(c). Though the appeals do not stay the criminal court proceedings, they are subject to an accelerated process. Under Texas Supreme Court rules, the notice of appeal must be filed within 20 days. Tex R. App. P. 26.1(h).

A transferred juvenile is not required under Code of Criminal Procedure Article 4.18, as clarified by amendment in 1999, to make a timely objection in juvenile court to preserve for appellate review a claim that there was a defect in the juvenile court certification process. Such an objection is required by Article 4.18 only for a claim that there were no certification proceedings at all but there should have been. Appeals in juvenile cases are discussed more fully in Chapter 19.

6. Death Penalty and Life Without Parole

Capital murder committed by an adult who was at least 18 at the time of the offense is punishable by death

or by life imprisonment without parole. Penal Code Section 12.31(a)(1). The death penalty is not available for anyone under the age of 18 at the time of the offense, including a transferred juvenile convicted of capital murder. Penal Code Section 8.07(c). The only punishment available in that circumstance is life imprisonment with the possibility of parole. Penal Code Section 12.31(a)(2); *Allen v. State*, 552 S.W.2d 843 (Tex.Crim.App. 1977). Each of the remaining five offenses is a first degree felony. For an adult (or transferred juvenile), each is punishable by confinement for any term of years of not more than 99 nor less than five or for life. Penal Code Section 12.32(a). In addition, a fine of up to $10,000 may be imposed. Penal Code Section 12.32(b).

Roper v. Simmons. In 1988, the United States Supreme Court ruled the death penalty unconstitutional for juveniles under age 16. *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687 (1988). Almost 20 years later, the Supreme Court expanded its ruling to include anyone under age 18, whether or not the person was tried as an adult. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). Simmons was 17 years old when he planned and committed a particularly heinous capital murder. After turning 18, he was sentenced to death. The issue on appeal was whether the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under age 18 when their crimes were committed. In holding that the death penalty is a disproportionate punishment for capital offenders under age 18, the justices examined the trends of a majority of states rejecting the juvenile death penalty, the immature and irresponsible behavior of many juveniles, and the world's opinion against the juvenile death penalty.

Roper v. Simmons was decided in March 2005. At that time, Texas law allowed for a 17-year-old to be executed for capital murder. In response to the *Roper* decision, the legislature also amended Penal Code Section 8.07(c) to read: "No person may, in any case, be punished by death for an offense committed while the person was younger than 18 years." The previous version had read "…younger than 17 years."

Additionally, within days of the *Roper* decision, the Texas Legislature, during the 79th Legislative Session, strengthened its punishment of capital felonies so that the only possible punishment options were death or life imprisonment without parole. Prior to this change, the options had been death or life imprisonment with the possibility of parole. Thus, individuals who were under 18 at the time they committed capital murder were subject to automatic life in prison without parole, whether they were 17 at the time of the offense or were juveniles who had been transferred to adult court.

In 2009, the legislature did an about face and eliminated the possible sentence of life without parole for juvenile offenders certified to stand trial as adults for the offense of capital murder. Penal Code Section 12.31(a)(1). A conforming change was made in the Government Code to provide that capital offenders serving a life sentence under Section 12.31(a)(1) are not eligible for parole until the actual calendar time served is 40 years, which cannot be reduced for good conduct. Government Code Section 508.145(b). This change, however, did not apply to those who were 17 at the time of the offense. Thus, those individuals were still subject to automatic life in prison without parole.

The legislature did not make the 2009 change retroactive; instead, it was limited to only those juveniles who committed capital murder on or after September 1, 2009. Those juveniles who had committed capital murder between September 1, 2005, and August 31, 2009, were still subject to an automatic sentence of life imprisonment without parole.

Graham v. Florida. In 2010, the United States Supreme Court decided that the Eighth Amendment's Cruel and Unusual Punishment Clause does not permit a juvenile offender (one under age 18) to be sentenced to life without parole for a non-homicide crime. *Graham v. Florida*, 560 U.S.48, 130 S.Ct. 2011 (2010). Sixteen-year-old Graham was placed on adult probation for armed burglary and another offense. When his probation was revoked, the trial court sentenced him to life in prison. Since Florida had abolished its parole system, the life sentence left no possibility for release except by executive clemency.

Noting that the sentencing practice at issue is "exceedingly rare," the Supreme Court cited *Roper v. Simmons* for the proposition that, since juveniles have lessened culpability, they are less deserving of the most severe punishments. Justice Kennedy emphasized that life without parole is especially harsh on juveniles, effectively denying them a meaningful opportunity to seek release based on demonstrated maturity and rehabilitation. "With respect to life without parole for juvenile non-homicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, (citation omitted)—provides an adequate justification." 130 S.Ct. at 2028. *Graham v. Florida* establishes a "clear line" rule that, for offenders under the age of 18 who do not commit homicide, the Eighth Amendment forbids a sentence of life without parole.

Meadoux v. State. Later in 2010, after *Graham v Florida*, the Texas Court of Criminal Appeals considered the appeal of Chris Meadoux, who was certified to be tried as an adult on two capital murder charges and sentenced to life imprisonment without the possibility of parole in August 2008. *Meadoux v. State,* 325 S.W.3d 189 (Tex.Crim.App. 2010), *cert. denied*, 131 S.Ct. 1827 (2011). Because Meadoux's offense was committed between September 1, 2005, and August 31, 2009, the amendment to Penal Code Section 12.31(a)(1) providing for a life sentence [with the possibility of parole] if the defendant was transferred to adult criminal court under Section 54.02, Family Code, was inapplicable. The issue in the case was whether the Court of Appeals had erred in rejecting Meadoux's claim that a sentence of life without parole for a capital crime committed at age 16 violates the Eighth Amendment.

In holding that the punishment of life without parole for a juvenile capital offender is not grossly disproportionate to the offense, the Court of Criminal Appeals considered the four factors enunciated in *Graham v. Florida.*

> We can summarize the preceding discussion as follows: (1) Meadoux has not established that there is presently a national consensus against imposing life without parole on a juvenile for the offense of capital murder. (2) A juvenile capital offender's moral culpability, even if diminished as compared to that of an adult capital offender, is still great. (3) Life without parole is a severe sentence, especially for a juvenile. (4) Life without parole for juvenile capital offenders finds justification in the penological goals of retribution and incapacitation but not in the goals of deterrence or rehabilitation. Considering and balancing these four factors together, we conclude that Meadoux has not carried his burden of showing that, according to contemporary national standards of decency, the punishment of life without parole for juvenile capital offenders is grossly disproportionate to the offense.

325 S.W.3d at 196; see also *Wilson v. State*, 348 S.W.3d 32 (Tex.App.—Houston [14th Dist.] 2011, pet. ref'd) (court could not conclude that appellant proved that an automatic sentence of life without the possibility of parole is unconstitutional); *Forcey v. State*, UNPUBLISHED, No. PD-0963-10, 2011 WL 198992 (Tex.Crim.App. 2011).

In dissent, Judge Meyers pointed out that because Meadoux's offense occurred in 2007, "he is stuck in the period between the commutation of death sentences to life that occurred in 2005 and the Texas Legislature's decision to prohibit life without parole for offenses committed by juveniles on or after September 1, 2009." 325 S.W.3d at 196. He argued that juveniles who were sentenced to life without parole between 2005 and 2009 should be given a new punishment hearing.

Judge Meyers' dissenting opinion concluded:

> The fact that Texas commuted the sentences of juveniles on death row to life, rather than life without parole, and that our Legislature subsequently determined that life without parole is inappropriate for juvenile offenders indicates that the sentence in Appellant's case is unreasonably harsh.

325 S.W.3d at 197.

Miller v. Alabama. In June 2012, in another landmark juvenile case, the U.S. Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile homicide offenders. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Miller v. Alabama addressed two cases in which juveniles were convicted of murder and sentenced to mandatory terms of life in prison without the possibility of parole. One of the cases was in Arkansas. In that case, Kuntrell Jackson, age 14, was an accomplice to a robbery in which one of the other co-conspirators shot and killed a store clerk. The other case arose from Alabama and involved Evan Miller, also age 14. Miller, along with a friend, beat a neighbor and set fire to his trailer, causing his death. The state appeals courts in each case ruled that a sentencing scheme that required the punishment of life in prison without parole did not violate the Eight Amendment.

The Supreme Court disagreed, citing both *Roper v. Simmons* and *Graham v. Florida* to establish that children are different from adults in that they lack maturity and have an underdeveloped sense of responsibility as well as the fact that they are also more amenable to change and rehabilitation, even when they commit terrible crimes.

The Court held that under a mandatory life without parole sentence scheme, the factfinder is unable to consider a juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected

him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a pleas agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller v. Alabama*, at 2468.

The Court did not foreclose the possibility of life without parole as a sentence for a juvenile, but it did require that those determining the sentence of a juvenile must take into account the juvenile's age and the wealth of matters attendant to it; in other words, the age of the offender matters when determining the proper punishment. As such, mandatory life without parole for an offender under the age of 18 at the time of the offense is unconstitutional.

As a result of *Miller v. Alabama*, Penal Code Section 12.31 was amended in 2013 to address the gap in law that existed with 17-year olds, who in Texas were still subject to life in prison without parole. After the change, the mandatory sentence for capital murder for 17-year olds, like for juveniles certified to stand trial as an adult, is life imprisonment with the possibility of parole after 40 years.

The change in law was made applicable to all criminal actions pending, on appeal, or started after July 22, 2013, but was made inapplicable to all final convictions that existed on that date. This left a group of individuals who were under 18 years of age at the time of their offenses still facing the sentence of life in prison without parole.

Ex Parte Maxwell. The question of whether *Miller v. Alabama's* holding applied retroactively was answered differently around the country. The Texas Court of Criminal Appeals addressed the issue in 2014. In December 2005, 17-year-old Terrell Maxwell committed the offense of capital murder. Under the law changes made after *Roper v. Simmons*, Maxwell was sentenced to mandatory life in prison without parole. The Court of Criminal Appeals determined that the *Miller* rule was a new substantive rule and, as such, it applied retroactively, citing the *Teague* doctrine, which Texas follows as a general matter of state habeas practice. Under that doctrine, new substantive rules "apply retroactively because they necessarily carry a significant risk that a defendant…faces a punishment that the law cannot impose upon him because of his stats or offense." *Ex Parte Maxwell*, 424 S.W.3d 66 (Tex.Crim.App.2014), citing *Schriro v. Summerlin*, 542 U.S 348, 352 (2004). *See also Teague v. Lane*, 489 U.S. 288 (1989).

Montgomery v. Louisiana. In 2016, the U.S. Supreme Court answered the question regarding the retroactivity of *Miller v. Alabama* in a case involving an individual who was 17 years of age in 1963 when he killed a deputy sheriff and Louisiana and was given an automatic sentence of life without parole. The petitioner sought relief after *Miller v. Alabama* but was denied because the Louisiana Supreme Court held that *Miller v. Alabama* had no retroactive effect in state collateral review cases.

Citing *Teague*, the Court explained that when a new substantive rule of constitutional law has the effect of controlling the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. A State's enforcement of a penalty that is barred by the Constitution makes the sentence unlawful. *Miller v. Alabama* held that an automatic life without parole sentence is barred by the Constitution; thus, all such sentences are unlawful and *Miller* applies retroactively to them. The Court's holding meant that all individuals serving an automatic sentence of life without parole for offenses committed when they were under age 18 were entitled to new sentencing hearings. *Montgomery v. Alabama*, 136 S. Ct. 718 (2016).

As a result of these cases, 17-year olds in Texas had new sentencing hearings that all resulted in them being sentenced to life in prison with the possibility of parole in 40 years. Appeals were filed challenging this, arguing that the new sentence was unconstitutional because the defendants were not afforded individualized hearings at which to present mitigating evidence. Numerous appeals were filed alleging that the automatic sentence to life was inconsistent with the spirt of *Miller* because the court was not given the opportunity to consider mitigating and other factors related to age. The Court of Criminal Appeals disagreed.

> Appellants argue that they are entitled to individualized sentencing hearings before being assessed sentences of life imprisonment because they were juveniles at the time of their offenses. This is not what *Miller* requires. *Miller* does not entitle all juvenile offenders to individualized sentencing. It requires individualized sentencing only when a juvenile can be sentenced to life without the possibility of parole….[J]uvenile offenders in Texas do not now face life without parole at all. Therefore, appellants' cases do not fall within the scope of the narrow holding in *Miller*.

Lewis v. State, 428 S,W,3d 860, at 863 (2014).

7. Criminal Expunction Proceedings

If a juvenile respondent is certified for prosecution as an adult and the adult proceedings terminate without indictment or in some other fashion that permits records expunction, where does the person bring a proceeding to expunge records and are juvenile records subject to the criminal expunction statute? Currently, Code of Criminal Procedure Article 55.02, Section 2 gives venue for expunction proceedings to a county where the arrest occurred or the county in which the offense was alleged to have occurred. Before 1999, however, venue was restricted to the county in which the person was arrested.

In *Quertermous v. State*, 52 S.W.3d 862 (Tex.App.—Fort Worth 2001, no pet.), which arose before the 1999 amendment, the petitioner was taken into custody in Tarrant County for a juvenile offense but the juvenile case was filed in Dallas County, his county of residence, as then permitted under Section 51.06. The juvenile court in Dallas County certified the case for trial as an adult and the certified case was then transferred back to Tarrant County where venue for the criminal prosecution lay. After charges were dismissed without an indictment, petitioner brought expunction proceedings in Tarrant County. The trial court denied expunction on the ground that venue lay in Dallas County and the Court of Appeals agreed. Taking the petitioner into custody as a juvenile was not an arrest because Section 52.01(b) says it is not. On the other hand, Section 54.02(h) says with regard to certification proceedings that "[t]he transfer of custody is an arrest." Therefore, the arrest in this case occurred in Dallas County where the certification occurred and, because the case arose before the 1999 amendment, exclusive venue to bring expunction proceedings lay in Dallas County.

Assuming expunction is granted by a district court regarding a certified juvenile, does that order reach juvenile records as well as criminal records? Code of Criminal Procedure Article 55.01(a) provides that if a person meets expunction eligibility requirements, he or she "is entitled to have all records and files relating to the arrest expunged." In *Ex parte Jackson*, 132 S.W.3d 713 (Tex.App.—Dallas 2004, no pet.), the appellant sought to expunge his arrest and court records under a former version of Code of Criminal Procedure Article 55.01. Jackson proved that the criminal indictments against him were void because he had not been served with the summons for his transfer hearing, a jurisdictional requirement that cannot be waived. However, Jackson also had the burden under Article 55.01(a)(2)(C) of showing that he had not been convicted of a felony in the five years preceding the date of the arrests. The Dallas Court of Appeals found that he had provided no evidence on this issue and upheld the trial court's denial of his petition for expunction.

If a defendant is arrested on a warrant and records are later expunged, certainly the scope of the expunction order would reach all documents (complaint or affidavit) that form the basis for the warrant as well as the warrant itself. Since the certification of a juvenile is an arrest, expunction of "files relating to the arrest" should be interpreted to include all juvenile court files relating to the case that was certified and therefore resulted in an arrest. Chapter 58, Family Code, provides that juvenile records of a person who has been certified to stand trial as an adult are not eligible for sealing, regardless of what happened in the adult case. Further, Section 58.265, added in 2017, provides that juvenile records are not subject to an order of expunction issued by any court. If a criminal expunction order does not reach underlying juvenile records, then the situation is created that criminal records are expunged but juvenile records are neither expunged nor sealed. This is an anomalous result that that may have been unintentional.

CHAPTER 11: The Adjudication Hearing

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This chapter deals with the adjudication hearing, which is the juvenile equivalent of the criminal trial. The Family Code requires that the adjudication hearing and the disposition hearing be separate. The disposition hearing is discussed in the next chapter.

There are four procedural tracks the juvenile system may employ to deal with a referral: (1) supervisory caution or deferred prosecution at intake (See Chapter 5); (2) a proceeding to consider transfer to criminal court (depending on the child's age and offense—See Chapter 10); (3) Chapter 55, Family Code proceedings (if there is mental illness—See Chapter 14); or (4) an adjudication hearing under Section 54.03 of the Family Code.

Within the fourth track, the prosecutor sometimes has a choice of proceeding with the case as an ordinary delinquency case or prosecuting it as a determinate sentence case. With either choice, an adjudication hearing, as outlined in this chapter, will be a required step in the proceedings. See Chapter 21 for a discussion of the differences that are required in the adjudication hearing when determinate sentence charges are brought.

A. The Requirement for an Adjudication Hearing

Section 54.03(a) provides:

> A child may be found to have engaged in delinquent conduct or conduct indicating a need for supervision only after an adjudication hearing conducted in accordance with the provisions of this section.

What Constitutes a Hearing. To what extent, if at all, can the requirement for a "hearing" be dispensed with under Section 54.03(a)? In *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e.), appellant contended that the transfer order was invalid because he had already been adjudicated delinquent for the same conduct. The State had filed a delinquency petition and then filed a motion to transfer appellant to criminal court. Appellant's attorney filed an answer to the delinquency petition in which he entered a plea of nolo contendere (no contest). He contended on appeal from the transfer order that the plea of nolo contendere constituted an adjudication of delinquency that, under the provisions of Section 54.02 and double jeopardy principles, precluded the juvenile court from transferring him later. The appellate court rejected this argument:

> Section 54.03, Texas Family Code, contains detailed provisions for an adjudication hearing in a juvenile case, and Subsection (a) thereof specifically provides that "a child may be found to have engaged in delinquent conduct only after an adjudication hearing conducted in accordance with the provisions of this section."... In the case at bar, there is no evidence of any such adjudication hearing ever having been held or any such order [of adjudication] entered. Indeed, there is evidence in the record to the effect that no such hearing has ever been conducted. The mere filing of a petition by the State, and answer by Appellant of nolo contendere does not constitute an adjudication of delinquency; rather a holding to such effect would violate the express provisions of Section 54.03(a).

569 S.W.2d at 618.

Certainly, in criminal cases the mere tender of a plea of guilty or nolo contendere by the defendant would not constitute a conviction unless and until the plea is accepted by the trial court.

Summary Judgment Inappropriate. Rule 166a of the Texas Rules of Civil Procedure allows a trial court to decide a civil case based on the pleadings and affidavits. This is called deciding a case by summary judgment. Is such a practice permissible in juvenile cases? In *State v. L.J.B.*, 561 S.W.2d 547 (Tex.Civ.App.—Dallas 1977), *rev'd by C.L.B. and L.J.B. v. State*, 567 S.W.2d 795 (Tex. 1978), the child was charged with shoplifting. He filed a motion for summary judgment supported by his affidavit that he had not passed the check-out counter in the retail store when he was apprehended, nor had he left the store before he was detained. The State failed to respond and the juvenile court granted summary judgment for the juvenile, dismissing the State's petition with prejudice. The State appealed and the Court of Civil Appeals held that the juvenile court should not have used the summary judgment procedure in this or any other juvenile case:

> Whether a juvenile has engaged in delinquent conduct and is in need of supervision or rehabilitation cannot adequately be determined by affidavits. The hearings required by §54.01 (detention hearing), §54.03 (adjudication hearing), §54.04 (disposition hearing), and §54.05 (hearing to modify disposition) all

> necessitate an evidentiary hearing with witnesses present so that all parties, including the court, can ascertain the best interest of the juvenile. To hold that the summary judgment procedure is appropriate under Title 3 would be to frustrate the very purpose of the act.

561 S.W.2d at 549.

The Court of Civil Appeals also held, in that same case, that the State may appeal from a juvenile court order favorable to the juvenile. The juvenile sought review of that holding from the Texas Supreme Court. The Supreme Court held that the State does not have the right to appeal from a juvenile court decision. It reversed the Court of Civil Appeals and affirmed the judgment of the juvenile court in favor of the juvenile. *C.L.B. and L.J.B. v. State*, 567 S.W.2d 795 (Tex. 1978). Unfortunately, it did not comment on whether the Court of Civil Appeals was correct in holding that summary judgments are inappropriate in juvenile proceedings. Until there are additional cases, it is advisable not to attempt to use the summary judgment procedure in juvenile cases.

No Waiver of Hearing. Could the juvenile waive his or her right to an adjudication hearing under Section 51.09? Alternatively, is this a right that cannot be waived? In *In the Matter of N.S.D.*, 555 S.W.2d 807 (Tex.Civ.App.—El Paso 1977, no writ), the juvenile was provided with a document that explained his rights. The document, signed by the juvenile and his attorney, also purported to waive the juvenile's right to an adjudication hearing. The appellate court indicated an adjudication hearing may not be waived:

> [W]e note that the waiver instrument...contains, among other things, a waiver of the right to trial. If such an instrument is being used in the juvenile proceedings, it is suggested that it be changed, as a waiver of the entire adjudication hearing would be something quite beyond the possibility of the waiver provisions.

555 S.W.2d at 809.

Stipulation of Evidence. The *N.S.D.* case does not mean, however, that there must be a full hearing with witnesses even when both the juvenile and the State agree on the facts. When the State and the juvenile agree on the facts and the juvenile does not wish to contest the evidence, the parties can agree to a stipulation of the evidence. The juvenile and his or her attorney, in compliance with the requirements of Section 51.09, may waive the calling of any witnesses and agree that if they were to testify, they would testify as the prosecutor states. The prosecutor then states into the record what the testimony of each of the witnesses would be if they were called to testify, and the juvenile and his or her attorney each agree on the record with that version of the facts. This agreed-to summary of the testimony gives the juvenile court the evidentiary basis needed for an adjudication. It is not a waiver of the adjudication hearing, but rather an expediting of it. See also *In the Matter of M.H.*, UNPUBLISHED, No. 02-03-318-CV, 2005 WL 121726, 2005 Tex.App.Lexis 471, Juvenile Law Newsletter ¶ 05-1-16 (Tex.App.—Fort Worth 2005, no pet.) (stipulation, standing alone, is sufficient to support verdict).

Agreed Statement of Facts. Rule 263 of the Texas Rules of Civil Procedure authorizes submitting the case to the court on an agreed statement of facts, which is similar to the stipulation method just discussed, except the testimony is reduced to writing and filed with the clerk of court.

Judicial Confessions. A variant of the stipulation of evidence method is for the juvenile to waive, in accordance with Section 51.09, his or her privilege against self-incrimination. He or she then takes the witness stand and under oath confesses to the offense charged. This judicial confession gives the juvenile court the evidentiary basis upon which to find that the juvenile has engaged in the conduct charged.

Plea of True. Would a plea of true entered personally by the respondent in court following full admonition by the judge but not accompanied by a stipulation of evidence or judicial confession support an adjudication? That issue was raised but not resolved in *In the Matter of H.L.J.,* UNPUBLISHED, No. 05-97-02138-CV, 1998 WL 656059, 1998 Tex.App.Lexis 6022, Juvenile Law Newsletter ¶ 98-4-11 (Tex.App.—Dallas 1998, no pet.). In that case, the Court of Appeals found that when the juvenile under oath answered "yes" to the question put by the judge whether he had committed the conduct alleged in the petition, that answer supported the adjudication as a judicial confession. Code of Criminal Procedure Article 1.15 requires that a plea of guilty or no contest must be corroborated by evidence to form the basis of a felony conviction. There is no such requirement in juvenile law. There is no reason why stating "yes" under oath (as in *H.L.J.*) should be a sufficient evidentiary basis for an adjudication but entering a plea of true should not. See *In the Matter of J.E.V.*, UNPUBLISHED, No. 05-97-01839-CV, 1998 WL 821628, 1998 Tex.App.Lexis 7393, Juvenile Law Newsletter ¶ 99-1-02 (Tex.App.—Dallas 1998, no pet.) (respondent entered plea of true and

stated he was pleading true because charges were true—if corroboration is required, that was sufficient).

The juvenile court in *In the Matter of L.E.A.*, UNPUBLISHED, No. 05-98-00345-CV, 2000 WL 830698, 2000 Tex.App.Lexis 4293, Juvenile Law Newsletter ¶ 00-3-13 (Tex.App.—Dallas 2000, no pet.) asked the respondent who had just pleaded true, "Now, are you pleading true to this allegation because it is true and for no other reason?" The respondent replied, "It is true." The Court of Appeals held it did not have to decide whether Section 54.03 imposes a plea corroboration requirement in juvenile cases because, even in a felony case in criminal court, that dialogue would be sufficient to corroborate the plea. The respondent's statement, "It is true," is a judicial confession to the offense to which he had just pleaded true. See *In the Matter of R.A.H.*, UNPUBLISHED, No. 05-99-01226-CV, 2000 WL 1598767, 2000 Tex.App.Lexis 7266, Juvenile Law Newsletter ¶ 00-4-15 (Tex.App.—Dallas 2000, no pet.), in which the Court of Appeals arrived at the same conclusion regarding virtually the same dialogue between the judge and the respondent. See also *In the Matter of A.V.*, UNPUBLISHED, No. 04-04-00632-CV, 2005 Tex.App.Lexis 8977, Juvenile Law Newsletter ¶ 05-4-24 (Tex.App.—San Antonio 2005, no pet.) (judicial confession, made in open court and under oath, after being fully informed of the charge, was sufficient evidence for any rational fact finder to conclude beyond a reasonable doubt that respondent committed the alleged offense).

In the Matter of M.D.H., 139 S.W.3d 315 (Tex.App.—Fort Worth 2004, pet. denied) involves a disputed stipulation to a petition alleging resisting arrest. M.D.H. agreed that she resisted arrest by pulling away from a peace officer but denied striking the officer. The trial court, however, admonished M.D.H. that her stipulation would encompass all of the State's evidence:

> I understand you're trying to tell me your side of the story, but if we're going to stipulate to the evidence today, then the only evidence that I can consider is what the District Attorney has just told me. That's what I need to consider is what those witnesses would say is what happened from their perspective and that's the evidence that I can consider in finding whether or not you broke the law. Do you understand that?

139 S.W.3d at 321.

After consulting with her lawyer, M.D.H. indicated that she wanted to proceed with the stipulation of evidence. In denying M.D.H.'s second motion for rehearing, the Court of Appeals ruled that this was a stipulation to all of the evidence, including striking the officer, and that the trial court considered all of the evidence in adjudicating M.D.H. delinquent. See also *In the Matter of M.A.O.*, UNPUBLISHED, No. 02-03-262-CV, 2004 WL 1746890, 2004 Tex.App.Lexis 7082, Juvenile Law Newsletter ¶ 04-3-26 (Tex.App.—Fort Worth 2004, no pet.) (judicial confession constituted competent evidence to satisfy element concerning entry without effective consent in burglary case); *In the Matter of M.C.S., Jr.*, 327 S.W.3d 802 (Tex.App.—Fort Worth 2010, no pet.) (defense cited no authority that appellant must make an "audible utterance" to validate a stipulation).

Each of these methods is different from the one condemned in *L.J.B.* in that both the juvenile and the State agree on the facts and agree that, on those facts, the court should adjudicate the juvenile to have violated the law. There is a hearing before the juvenile court judge or referee/master/associate judge. The stipulation, agreed statement, judicial confession, or plea of true simply avoids the necessity of having witnesses testify when there is no dispute between the parties as to the content of their testimony.

Pleading and Appealing. In criminal practice, a defendant can enter a plea of guilty or no contest pursuant to a plea agreement and preserve his or her right to appeal the correctness of the trial court's denial of a written pretrial motion, such as a motion to suppress evidence. Until 1999, that was not true in juvenile cases. However, if the trial participants—judge, prosecutor and defense attorney—all believed that pleading and appealing under this circumstance was authorized and informed the juvenile of that erroneous belief, that made the plea involuntary. On appeal, the Court of Appeals would set aside the adjudication and remand for new proceedings; it would not reach the merits of the claim of erroneous ruling on the suppression motion. *In the Matter of S.F.*, 2 S.W.3d 389 (Tex.App.—San Antonio 1999, no pet.). In 1999, the legislature enacted Section 56.01(n) to permit pleading and appealing in juvenile cases under approximately the same circumstances as permitted in criminal practice. See Chapter 19 for a discussion of that provision.

Ability to Withdraw a Plea. In adult court, a defendant is authorized by law to withdraw his or her plea if the judge does not accept the recommended disposition agreed to by the prosecutor and defense. Until 1997, juveniles did not have this right. Since the passage of Section 54.03(j) in 1997, juveniles have enjoyed the same right as

adults to withdraw their pleas in such circumstances. This section describes the history that led to this law change.

In *In the Matter of E.Q.*, 839 S.W.2d 144 (Tex.App.—Austin 1992, no writ), the respondent's attorney and the prosecutor agreed that the respondent would enter a plea of "true" to an offense charged under the Determinate Sentence Act and the State would recommend a sentence of five years. Both lawyers assumed that the trial court would permit respondent to withdraw his plea if the court did not accept the terms of the plea bargain. Defense counsel told his client that he and the prosecutor understood that respondent could withdraw his plea if the juvenile court rejected the deal. The juvenile court, upon receipt of the plea of true, imposed a 15-year determinate sentence and refused to allow respondent to withdraw his plea. The Court of Appeals held that the respondent's plea was not entered knowingly, voluntarily, and intelligently because respondent had relied on the erroneous representations of his counsel and the prosecutor that he could withdraw his true pleas if the trial court did not follow the prosecutor's recommendation. Therefore, the Court of Appeals ordered that respondent must be given the opportunity to withdraw his plea of true.

By contrast, in *In the Matter of R.S.*, UNPUBLISHED, No. 01-98-00939-CV, 1999 WL 417347, 1999 Tex.App.Lexis 4619, Juvenile Law Newsletter ¶ 99-3-10 (Tex.App.—Houston [1st Dist.] 1999, no pet.), the respondent testified in a motion for new trial hearing that he had expected to be released from the Texas Youth Commission (TYC) in six to nine months rather than the two years that was actually his minimum length of stay. The Court of Appeals rejected the argument that this belief, which was not shown to have been based on any representations from the court or counsel, made his plea involuntary. It was merely "wishful thinking" on his part.

Negotiated Plea. In *In the Matter of S.L.L.*, 906 S.W.2d 190 (Tex.App.—Austin 1995, no writ), the juvenile respondent was charged with aggravated sexual assault under the Determinate Sentence Act. He agreed to enter a plea of true in exchange for the State's recommendation of a 20-year sentence. Both his attorney and the juvenile court informed him that the court was not bound to follow the State's recommendation or to allow him to withdraw his plea if the recommendation was not followed. The juvenile court imposed a sentence of 40 years, refused to allow the respondent to withdraw his plea, and refused to grant a motion for new trial.

The Court of Appeals distinguished *S.S.L.* from *E.Q.* because in *E.Q.* the juvenile's attorney provided the juvenile with misinformation about the juvenile's right to withdraw his plea, thus rendering the plea involuntary; in *S.S.L.*, the juvenile's plea was not involuntary because he was provided with accurate information about the status of his plea and the worth of the State's recommendation.

A criminal defendant has the right to withdraw his or her plea of guilty if the State's recommendation is not followed by the trial court. However, that is a statutory rule in Article 26.13 of the Code of Criminal Procedure. That provision does not apply in juvenile cases. The Court of Appeals commented on this circumstance:

> While we remain troubled that juveniles do not enjoy the same right as adults to withdraw pleas of guilty and nolo contendere in these circumstances, we are not free to create a new rule of procedure to govern this case. S.L.L.'s argument that juvenile respondents should be protected at least as much as adult defendants charged with the same offense, while compelling, is simply not warranted by present Texas law. Until the legislature extends such a right to juvenile respondents, we cannot grant relief on this basis.

906 S.W.2d at 193.

In 1997, the legislature responded to the invitation by the Austin Court of Appeals in *S.L.L.* by enacting Section 54.03(j):

> When the state and the child agree to the disposition of the case, in whole or in part, the prosecuting attorney shall inform the court of the agreement between the state and the child. The court shall inform the child that the court is not required to accept the agreement. The court may delay a decision on whether to accept the agreement until after reviewing a report filed under Section 54.04(b). If the court decides not to accept the agreement, the court shall inform the child of the court's decision and give the child an opportunity to withdraw the plea or stipulation of evidence. If the court rejects the agreement, no document, testimony, or other evidence placed before the court that relates to the rejected agreement may be considered by the court in a subsequent hearing in the case. A statement made by the child before the court's rejection of the agreement to a person writing a report to be filed under Section 54.04(b) may not be admitted into evidence in a subsequent hearing in the case. If the court accepts the agreement, the court shall make

a disposition in accordance with the terms of the agreement between the state and the child.

The purpose of this provision is to afford the same protection for children in cases of "busted deals" that criminal defendants have had for years under Code of Criminal Procedure Article 26.13. Under the Family Code provision, the juvenile court retains discretion to refuse to accept a plea bargain, but must permit the juvenile to withdraw his or her plea or stipulation in that event. That is only fair.

To obtain the benefits of the 1997 amendment, the juvenile must show that the adjudication was based on a plea agreement with the prosecutor. Merely asserting that by pleading true the juvenile expected to receive probation at home even when the prosecutor also recommends probation does not make the plea involuntary or bring the case within the scope Section 54.03(j). *In the Matter of R.A.R.*, UNPUBLISHED, No. 04-98-00009-CV, 1999 WL 249036, 1999 Tex.App.Lexis 3182, Juvenile Law Newsletter ¶ 99-2-29 (Tex.App.—San Antonio 1999, no pet.).

In one case, the State and the respondent reached an agreement regarding disposition on two separate cases and presented the recommendation to the juvenile court. *In the Matter of M.D.G.*, 180 S.W.3d 747 (Tex.App.—Eastland 2005, no pet.). The agreed upon disposition called for a one-year probation at home and payment of restitution. However, the juvenile court ordered the child placed in the Kerr County juvenile facility for a minimum of six months, explaining that the stipulation actually involved one plea of "true" and one plea of "not true." The Eastland Court of Appeals held that Section 54.03(j) was controlling, stating, "Since the juvenile court elected not to accept this agreed disposition, Section 54.03(j) required the court to permit M.D.G. to withdraw his stipulations. Therefore, we hold that the juvenile court abused its discretion by refusing to allow M.D.G. to withdraw his stipulations." 180 S.W.3d at 749. See also *In re J.H.*, REL. FOR PUBLICATION, No. 04-07-00208-CV, 2007 WL 1481997, 2007 Tex.App.Lexis 3927 (Tex.App.—San Antonio 2007, pet. conditionally granted) (when trial court has duty to follow plea bargain agreement but fails to do so, mandamus is appropriate remedy).

Teen Court. Section 54.032 permits a juvenile court to use a teen court in certain cases instead of a formal adjudication hearing. Under this provision, a teen court may be used only for conduct indicating a need for supervision (CINS) cases based on fineable only violations. See Chapters 4 and 23. The juvenile must waive the privilege against self-incrimination in accordance with Section 51.09 and must admit that the allegations in the petition are true. If he or she has not had the benefit of a teen court program within the past two years, the juvenile court may refer the case to a teen court for disposition. If the juvenile successfully completes the obligations imposed by the teen court, the case gets dismissed. Since September 1, 2009, a child participating in a teen court program must pay a "request fee" of $20 if the court ordering the fee is located in the Texas-Louisiana border region; otherwise, the fee cannot exceed $10. Government Code Section 103.0212(2)(B) and (F).

In 2001, the legislature amended Section 54.032(a) to authorize the juvenile court to defer proceedings for not more than 180 days to allow time for teen court handling of a case. It added subsection (c) to require the juvenile to complete any sentence imposed by a teen court within 90 days of the teen court hearing or by not later than the termination of the original deferral period, whichever occurs first.

Teen Dating Violence Program. In 2011, the legislature created a deferred adjudication option in juvenile court for misdemeanor offenses involving teen dating violence under Section 54.0325. The law authorizes each county to establish a program coordinated by key personnel, including a dedicated teen victim advocate, a court-employed resources coordinator, a judge assigned to all cases that qualify for the program, and one attorney from the district or county attorney's office assigned to the program. Only first offenders, which means a juvenile with no previous referral to juvenile court for dating violence, family violence, or assault, are eligible for the program. Upon the successful completion of the teen dating violence program, the juvenile's charges will be dismissed.

The teen dating violence program differs from teen court in that, unlike teen court, it has no equivalent deferred adjudication option in the municipal or justice courts. Therefore, if a county elects to operate a teen dating violence program, the justice and municipal courts may wish to consider waiving original jurisdiction in appropriate cases to give those children the opportunity to complete the program and have the charges dismissed.

Juvenile's Presence at Hearing. The adjudication hearing may not begin in the absence of the juvenile respondent. However, if the respondent is present when the hearing begins but thereafter voluntarily absents himself or herself, the juvenile court judge is authorized to proceed with the adjudication hearing in the respondent's absence. Once the court determines that the absence is

likely voluntary, it is not required to consider whether the trial might be delayed as an alternative to proceeding in the juvenile's absence. *In the Matter of C.T.C.*, 2 S.W.3d 407 (Tex.App.—San Antonio 1999, no pet.) (juvenile was present for jury selection but failed to appear the next morning for the beginning of the evidentiary phase of the hearing).

Parental Participation in the Adjudication Hearing. The determinate sentence petition in *Adair v. Kupper,* 890 S.W.2d 216 (Tex.App.—Amarillo 1994, no pet.), included provisions asking the juvenile court to order the juvenile respondent's parents "to appear and show cause why they should not be ordered to pay the attorney's fees of any court appointed attorney to represent the child, court costs, restitution if appropriate, and support for the child if necessary." 890 S.W.2d at 217. The parents hired an attorney separate from the attorney appointed by the juvenile court to represent the child. That attorney fully participated in all pretrial proceedings in the case. Prior to the adjudication hearing, however, the juvenile court entered an order prohibiting the parents' attorney from "engaging in voir dire, presenting an opening statement to the jury, presenting, examining, or cross-examining witnesses, presenting trial objections, presenting summation and final argument, and presenting objections to the court's charge." 890 S.W.2d at 217.

The Court of Appeals was asked to issue a writ of mandamus requiring the juvenile court to vacate that order. The appellate court held that the juvenile court's order deprived the parents of their legal right to representation in their child's adjudication hearing. The Court of Appeals did not base its decision on the definition of a "party" in Section 51.02(10), which includes parents, but rather on the fact that the State's petition sought a court order requiring the parents to pay money:

> [W]hen the State summoned the parents to answer the allegations of their monetary liability, the parents were made actual parties to the proceedings who will be bound by the court's judgment....
>
> [B]ecause the State made the parents parties to its action and sought to hold them monetarily liable, the parents cannot be deprived of the right to appear and resist, by the attorney of their choice, the basis for, and the amount of, their alleged liability.

890 S.W.2d at 218.

The opinion is unclear as to whether the parents' right to participate through counsel extends only to those aspects of the adjudication hearing that directly deal with parental monetary liability, such as the extent of property damage or personal injury, or whether it extends to the entire adjudication hearing. The entire hearing is relevant to parental monetary liability in the sense that, if their child is found not guilty of all charges, the parents cannot be held monetarily liable.

B. The Judicial Admonitions Required

There are two categories of admonitions required by the Family Code: (1) those to be given at the beginning of every juvenile adjudication hearing; and (2) those required only when the State and the juvenile have arrived at a plea agreement for disposition of the case.

1. Admonitions Required in Every Case

Section 54.03(b) provides:

> At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:
>
> (1) the allegations made against the child;
>
> (2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;
>
> (3) the child's privilege against self-incrimination;
>
> (4) the child's right to trial and to confrontation of witnesses;
>
> (5) the child's right to representation by an attorney if he is not already represented; and
>
> (6) the child's right to trial by jury.

Admonitions Mandatory. Appellate courts have held from the very beginning that failure to comply with the statutory admonition requirements may result in reversal of an adjudication. In *D.L.E. v. State,* 531 S.W.2d 196 (Tex.Civ.App.—Eastland 1975, no writ), the appellant contended in his brief on appeal that the juvenile court had failed to admonish him as to the allegations and the nature and possible consequences of the proceedings. Since the State filed no brief and presented no oral argument, the appellate court took the facts in appellant's brief as

correct. The appellate court reversed the adjudication with the comment: "[W]e hold that the procedural requirements of 54.03(b)(1) and (2) are mandatory and must be complied with before a child may be found to have engaged in delinquent conduct." 531 S.W.2d at 197. Although the admonishments are mandatory, failure of a court to provide them is subject to a harm analysis on appeal. See *In the Matter of D.I.B.*, 988 S.W.2d 753 (Tex. 1999) and *In the Matter of C.O.S.*, 988 S.W.2d 760 (Tex. 1999).

In 1997, Section 54.03(i) was added, requiring the attorney for the child to comply with Rule 33.1, Texas Rules of Appellate Procedure [requiring a timely objection] to preserve error for appellate or collateral review of the court's failure to provide the child with the required admonitions. No objection is necessary, however, when the admonitions were given but were incorrect. In such instance, the court will examine whether the error renders the plea involuntary. See *In the Matter of T.W.C.*, 258 S.W.3d 218 (Tex.App.—Houston [1st Dist.] 2008, no pet.).

Judge Must Personally Explain to Respondent. In *In the Matter of N.S.D.*, 555 S.W.2d 807 (Tex.Civ.App.—El Paso 1977, no writ), the admonitions of the juvenile court omitted informing the juvenile of his privilege against self-incrimination. The State argued that the statute was complied with because, sometime before the adjudication hearing the appellant, his parent, and his attorney were furnished with a document from the court explaining his rights, including the privilege against self-incrimination. This document suggested that any questions about the juvenile's rights be directed to the bailiff or the juvenile court's secretary. The appellate court found that this was not an adequate substitute for personal explanations by the judge, commenting, "[I]f the trial Court had [in court] directed the juvenile to inquire of the Court bailiff and the secretary as to the answers to any questions concerning his rights, the error would be obvious." 555 S.W.2d at 808.

In *W.J.M.A. v. State*, 602 S.W.2d 397 (Tex.Civ.App.—Beaumont 1980, no writ), the appellant was charged with theft. At the beginning of the adjudication hearing, the juvenile court judge went through each of the six admonitions required by Section 54.03(b) but addressed each of his questions to, and received answers from, defense counsel, not the appellant personally. The appellate court found that this did not comply with the statute:

> It is to be noted that in the lengthy "explanation" the Court did not address any of the statements to the minor defendant; on the contrary, such questions as were propounded were addressed to counsel, the child making no answers. Additionally, and of even more serious nature, the offense was never mentioned nor did the court even hint at the necessary elements of the crime of theft or seek to ascertain if the minor defendant had any knowledge of what constituted theft as defined in the code provisions....

602 S.W.2d at 399.

Section 54.03(b) requires the juvenile court judge to admonish the juvenile personally of his or her rights in the adjudication hearing. Justice Tom Rickhoff, a former juvenile court judge, concurring in reversal of an adjudication for admonition deficiencies in *In the Matter of B.J.*, 960 S.W.2d 216 (Tex.App.—San Antonio 1997, no pet.), commented on the daunting task such a requirement imposes on a juvenile court judge, particularly when the respondent is quite young, and hinted at the tension that may exist between devising an admonition that will withstand appellate challenge and one that has a chance of being understood by the juvenile respondent:

> As a former juvenile judge, I admonished thousands of children and their parents pursuant to Tex. Fam. Code Ann. §54.03(b) (Vernon 1996). I found it impossible to devise an explanation of matters as complex as "the nature and the possible consequences" of proceedings like this one for the cohort of twelve-year-olds who are most prone to error so that they actually understood them. Nevertheless, our stated legislative goal is necessary. The proper admonishments must be delivered in a fashion acceptable if challenged on appeal; hopefully the trial judge will make the additional effort to develop a rapport with the respondent and communicate in language he understands. This trial judge attempted to do just that; ensure that this child actually understood these admonishments—a laudable but most often futile goal.

960 S.W.2d at 221.

Who Must Give the Admonitions. In *In the Matter of J.D.P.*, 691 S.W.2d 106 (Tex.App.—San Antonio 1985, no writ), the respondent was charged with five delinquent acts. At the beginning of the adjudication hearing, the juvenile court asked, "Do you know what you are charged with, young man?" To which the respondent replied, "Yes sir, I read the Petition." The court then asked, "Do you understand the consequences of the hearing we are about to start?" The respondent replied, "Yes sir." The prosecutor then read each of the five charges in the petition. After each charge was read, the court asked whether the

respondent understood the charge; in each case, the respondent replied in the affirmative. A jury found the respondent had engaged in delinquent conduct based on two of the charges. He was placed on probation and appealed, contending the admonitions were inadequate. The appellate court agreed and reversed the adjudication. It concluded, "The [juvenile] court 'explained' nothing to appellant. The 'explanation' is essentially an inquiry as to whether appellant 'understood' the charges against him.... [As it relates to explaining the consequences of the proceedings], the court did not tell appellant that he could be found to have engaged in delinquent conduct if the jury found that he had committed" any one of the five acts alleged. 691 S.W.2d at 107. See also *Penagraph v. State*, UNPUBLISHED, No. 05-94-01397CV, 1995 WL 221951, 1995 Tex. App. Lexis 4023, Juvenile Law Newsletter ¶ 95-2-10 (Tex.App.—Dallas 1995, no writ) (error to have prosecutor admonish as to consequences of proceedings); *P.L.W. v. State*, 851 S.W.2d 383 (Tex.App.—San Antonio 1993, no writ).

The Texas Supreme Court, in *In the Matter of K.L.C.*, 990 S.W.2d 242 (Tex. 1999), held that a reading of the petition by the prosecutor does not comply with Section 54.03(b)(1): "The statute unequivocally directs the trial court to explain to the child the allegations made against him or her. That statutory duty cannot be delegated to the prosecutor." 990 S.W.2d at 243. On the facts of the case, however, the Supreme Court found that the error was harmless. See *In the Matter of C.M.N.,* UNPUBLISHED, No. 04-97-00907-CV, 1999 WL 552823, 1999 Tex.App.Lexis 5677, Juvenile Law Newsletter ¶ 99-3-27 (Tex.App.—San Antonio 1999, no pet.), applying the harmless error ruling of *K.L.C.* to a charge of aggravated robbery in which the petition was read by the prosecutor at the direction of the judge and defense counsel indicated that his client understood the charges.

Since the structure of Section 54.03(b) provides that "the juvenile court judge shall explain to the child" the six rights enumerated, presumably the holding of *K.L.C.* would be applied to an attempt by the prosecutor or anybody else but the judge to explain any of those rights to the juvenile and his or her parents.

When the Admonitions Must Be Given. Section 54.03(b) requires the court to give the admonitions "[a]t the beginning of the adjudication hearing." The State in *W.J.M.A. v. State*, 602 S.W.2d 397 (Tex.Civ.App.—Beaumont 1980, no writ) argued that at a separate court appearance three months before the adjudication hearing began, a different judge had personally given appellant an adequate explanation of his rights and that this should cure the deficiency in the admonition given at the beginning of the adjudication hearing. The appellate court rejected this argument:

> Assuming, arguendo, the adequacy of the original explanation made at the arraignment..., we are unwilling to hold that such an explanation to a child long before the commencement of the adjudication hearing is a compliance with the mandatory statute.

602 S.W.2d at 400.

In *In the Matter of A.D.D.*, 974 S.W.2d 299 (Tex.App.—San Antonio 1998, no pet.), the Court of Appeals held that an admonition given to the juvenile at a suppression hearing four months before the beginning of the adjudication hearing did not cure the deficiencies in the admonitions given at the adjudication hearing:

> We cannot and will not assume a child will understand he has a right not to testify and to have a lawyer present at trial when a trial judge has told him he had those rights four months earlier at a pretrial hearing, especially when the admonishments are immediately followed by an explanation that the pretrial hearing is not a trial, as was the case here.

974 S.W.2d at 305.

By contrast, in *In the Matter of A.M.*, UNPUBLISHED, No. 04-97-01034-CV, 1999 WL 238903, 1999 Tex.App.Lexis 2974, Juvenile Law Newsletter ¶ 99-2-27 (Tex.App.—San Antonio 1999, no pet.), the juvenile court correctly admonished the juvenile when the case was called for the adjudication hearing. At that setting, a suppression motion was heard and the jury was selected but the petition was read to the jury, opening statements were made, and testimony began the following day. The Court of Appeals rejected the argument that admonitions should have been repeated during the court setting the second day: "It is apparent that the admonishments were given in reference to the trial that was about to commence; the court was not required to repeat the admonishments merely because it entertained motions after the admonishments were given and before the jury was selected."

Waiver of Admonitions. The Corpus Christi Court of Appeals held in *In the Matter of J.M., Jr.,* 930 S.W.2d 820 (Tex.App.—Corpus Christi 1996, no writ) that a juvenile

and his or her attorney may, by complying with the requirements of Section 51.09, waive the right to receive the admonitions required by Section 54.03(b). The Amarillo Court of Appeals in *In the Matter of J.D.C.*, UNPUBLISHED, No. 07-97-0400-CV, 1998 WL 764701, 1998 Tex.App. Lexis 6889, Juvenile law Newsletter ¶ 98-4-28 (Tex.App.—Amarillo 1998, no pet.), held that an in-court statement by the juvenile and his attorney waiving the reading of the petition did not constitute a waiver under Section 51.09 of the right to receive an explanation of the allegations in the petition because they were not informed on the record of the right they allegedly waived, which is required by Section 51.09.

By contrast, in *In the Matter of M.M.*, UNPUBLISHED, No. 04-99-00420-CV, 2000 WL 1060392, 2000 Tex.App.Lexis 4743, Juvenile Law Newsletter ¶ 00-3-24 (Tex.App.—San Antonio 2000, no pet.), the respondent, his mother, and attorney all signed a document in which they acknowledged having received a copy of the petition, knowing its contents, and waiving its reading. In court, the respondent's attorney verified that the respondent was voluntarily waiving his rights, that he had a factual understanding of the charge, and that all the admonitions contained in the document, along with the law regarding waiver, were explained to him. Under these circumstances, the Court of Appeals held that, Under Section51.09, the document was a waiver of the child's right to be admonished as to the charges that were filed against him. However, the court also noted that the judge explained the charges on the record and determined that the respondent understood them.

a. Allegations

Section 54.03(b)(1) requires the court to admonish the child as to "the allegations made against the child."

Lesser Included Offenses. In *A.E.M. v. State*, 552 S.W.2d 952 (Tex.Civ.App.—San Antonio 1977, no writ), appellant was charged in a delinquency petition with aggravated rape. When the juvenile court submitted the case to the jury, it submitted the offense of aggravated rape to the jury, which was *explicitly* charged in the petition, but also (properly) submitted as lesser included offenses the crimes of rape and aggravated assault, which were, under the law, *implicitly* charged in the petition. At the beginning of the adjudication hearing, the juvenile court did not attempt to explain the allegations made against the child but instead ascertained that the child had discussed the charge with his attorney and that the attorney had explained the child's rights to him. The appellate court reversed the adjudication of delinquency on the ground that the explanation was inadequate:

> The court, in fact, "explained" nothing to appellant. The explanation is essentially an inquiry as to whether appellant's attorney had "explained" the allegations to appellant. The court made no effort to explain the meaning of the term, "aggravated rape." The court did not explain that, under the allegation of aggravated rape, he could also be found guilty of rape or aggravated assault.
>
> To "explain" is to make something plain. It is difficult to conclude that a statement of an assumption by the court that the required explanation has been given by someone else, followed by a question asking whether appellant had discussed the "contents" of the State's pleading with [his attorney], made anything plain to anyone. The court did not tell appellant that he could be found to have engaged in delinquent conduct if the jury found that he had committed the offense of aggravated rape, or the offense of rape, or the offense of aggravated assault.
>
> Unless we attribute to this 15-year-old boy a knowledge of the constituent elements of aggravated rape, rape, and aggravated assault, and a knowledge of the fact that the language which charges aggravated rape is also necessarily sufficient to charge rape, and the further knowledge that, sometimes, the language which charges aggravated rape also is sufficient to charge aggravated assault, it cannot seriously be argued that the court made anything plain to appellant other than the fact that the court was confident that the necessary explanations had been given by some other person.

552 S.W.2d at 955.

The statement in *A.E.M.* that the juvenile court judge must explain not only the offense charged in the petition, but also any lesser included offenses, was the subject of disagreement in two subsequent cases. In *A.N. v. State,* 683 S.W.2d 118 (Tex.App.—San Antonio 1984, writ dism'd), the respondent was charged with burglary but adjudicated delinquent for the lesser included offense of criminal trespass. The appellate court reversed the adjudication on the ground that the juvenile court had failed to comply with Section 54.03(b)(1) because: (1) it did not explain what criminal trespass is; and (2) it should have because the

respondent could have been adjudicated for criminal trespass out of a burglary petition. In contrast, the Eastland Court of Appeals, in *In the Matter of D.L.K.*, 690 S.W.2d 654 (Tex.App.—Eastland 1985, no writ), rejected the argument that respondent's adjudication for criminal trespass on an attempted burglary petition was invalid because the judge failed to explain the law of criminal trespass. It expressly refused to follow the statement in *A.E.M.* requiring admonishments with respect to lesser included offenses.

Until this conflict in case law is resolved, if it ever is, the only safe course of action is for the juvenile court to take care to admonish the respondent not only of the offense alleged but also of any lesser included offenses that may be implicated by the charge.

Prior Adjudications. In *In the Matter of J.G.*, UNPUBLISHED, No. 03-04-00001-CV, 2005 WL 2464493 (Tex.App.—Austin 2005, no pet.), appellant pleaded true to committing assault on a family member and also stipulated that she had previously been adjudicated for the same offense. During the admonishment portion of her disposition hearing, the trial court took note of the prior adjudication and consequently believed that her subsequent conduct constituted a felony. See Section 51.13(b)(1) (a prior adjudication of a child may be used only in subsequent Title 3 proceedings in which the child is a party). Appellant, however, objected, asserting that the enhancement provisions in Penal Code Section 22.01 cannot apply to juveniles since the statute only references "previously convicted" defendants and therefore describes adult conduct. See Penal Code Section 22.01(b)(2)(A) (family violence enhancement provision if it is shown "that the defendant has been previously convicted of an offense…").

The court of appeals affirmed the case but reformed the court's judgment to reflect appellant's commission of a subsequent misdemeanor assault on a family member:

> We hold that the offense was a misdemeanor, not a felony. Under the Family Code, a juvenile's prior adjudication for assault against a family member may not be used as a prior conviction. See Tex.Fam.Code Ann. §51.13(a). Thus, appellant has no prior conviction that would require her second assault to be enhanced from a misdemeanor to a felony under the penal code. See Tex.Pen.Code Ann. §22.01(b)(2).

2005 WL 2464493 *1.

Law of Parties. The juvenile court judge in *In the Matter of L.A.*, UNPUBLISHED, No. 04-97-00434-CV, 1998 WL 904294, 1998 Tex.App.Lexis 8016, Juvenile Law Newsletter ¶ 99-1-10 (Tex.App.—San Antonio 1998, no pet.) admonished the respondent of the charges by reading the petition charging capital murder. The juvenile was adjudicated on a law of parties theory. The petition charged the juvenile as the perpetrator of the offense and did not plead the law of parties. On appeal, the juvenile contended the court should have explained the law of parties when admonishing him. The Court of Appeals summarily rejected this argument, "The State correctly argues that the trial court, prior to trial, could not possibly know the role which L.A. played in the shooting which would warrant an explanation. A reading of §54.03 does not require the trial court to explain the theory on which the State will prove its case." 1998 Tex.App.Lexis 8016 *11.

Adequacy of Explanation. The respondent in *In the Matter of B.J.*, 960 S.W.2d 216 (Tex.App.—San Antonio 1997, no pet.) was a 12-year-old boy who was charged with eight counts of sexual offenses committed against his younger sisters. After the prosecutor read the petition, the juvenile court determined only that the respondent understood that the charges were felonies, serious crimes, and that they were sexual offenses. The court failed to determine that respondent understood the meaning of aggravated sexual assault and indecency with a child—the offenses he was charged to have committed. The Court of Appeals found that the juvenile court did not comply with Section 54.03(b)(1).

In *In the Matter of A.L.S.*, 915 S.W.2d 114 (Tex.App.—San Antonio 1996, no writ), the Court of Appeals held it was fundamental error (not requiring a trial objection or a showing of harm) for the juvenile court judge to fail to admonish the juvenile respondent as to the charges that were to be tried in a determinate sentence case. The Court of Appeals rejected the argument that the error was harmless because the record reflected that the defense attorney had admonished the juvenile as to the charges.

b. Nature and Consequences of Proceedings Including Record in Criminal Court

Nature and Consequences. Section 54.03(b)(2) requires the juvenile court judge to admonish the respondent as to the nature and possible consequences of the proceedings. In ordinary delinquency cases, the court must inform the child that the possible dispositions include probation until his or her 18th birthday. If the offense is one for which commitment is possible, then the

judge should admonish about the possibility of a commitment to TJJD until age 19.

In a determinate sentence case, the court must inform the respondent of the various options. If the sentence is commitment to TJJD for no more than 10 years, there is a possibility of probation for up to 10 years; depending on its length, that probation may be transferred to the adult system at age 19 or the respondent may be discharged at (or before) that time. Alternatively, the child may be committed to TJJD with a sentence of up to 40 years (capital, aggravated controlled substance, or first degree felony), up to 20 years (second degree felony), or up to 10 years (third degree felony), with the potential for transfer to adult prison. If committed the TJJD, the entire sentence must be served; if not transferred to prison, the respondent will be transferred to adult parole at age 19.

In *In the Matter of T.W.C.*, 258 S.W.3d 218 (Tex.App.—Houston [1st Dist.] 2008, no pet.), the trial judge assessed a six-year determinate sentence probation for the offense of aggravated assault. On appeal, appellant argued that his plea was involuntary because the court had erroneously informed him that the maximum punishment was 40 years imprisonment, rather than 20 years.

The Court of Appeals held that although appellant had not objected to the admonishment, "we can find no cases holding that an objection is required to preserve error regarding an erroneous admonishment." 258 S.W.3d at 221. It also pointed to the express language in Section 54.03(i), which applies to "the failure" of the court to provide the child the required explanation. In this case, the judge provided the explanation but the information conveyed in the admonishment was not a correct statement of the law. Consequently, no objection was required.

What, if any, effect did the erroneous admonishment have on appellant's plea? Although the court's admonishment that appellant faced a possible 40-year sentence was incorrect, the six-year probation term fell within the actual punishment range for aggravated assault. "Thus, the burden shifts to appellant to show that his plea was involuntary." 258 S.W.3d at 223. Appellant satisfied his burden by testifying that he pleaded guilty because he was afraid that if he did not, his attorney would withdraw from his case and he would then get up to 40 years from the judge. The court stated:

> Thus, unlike the defendant in *Grays*, there is affirmative evidence in this record that appellant did not know the true range of punishment for the charged offense. See 888 S.W.2d at 879. This evidence is not contradicted. In fact, at the motion for new trial hearing, appellant's trial counsel testified, "I don't remember telling him a maximum. The only number I ever told him was the 15 years [that the State had indicated it would seek if appellant went to trial]. As a matter of fact, the first time I ever heard of the maximum is when I was conferring with his newly-appointed attorney." Thus, the only evidence in the record shows that appellant believed that he faced 40 years' punishment, and that he was never told, either by the court or his own attorney, that he actually faced only 20 years' punishment.

258 S.W.3d at 223.

As a result, appellant met his burden of showing that he was misled by the erroneous admonishment and that he would not have entered a plea but for the misunderstanding.

In any case in which a felony is charged in the petition, the juvenile court must admonish the respondent regarding the habitual felony conduct provision under Section 51.031; that an adjudication for three separate felonies, where the second was committed after adjudication for the first and the third committed after adjudication for the second, may allow the third felony to be prosecuted under the Determinate Sentence Act as habitual felony conduct.

Admissibility of Juvenile Record. Section 54.03(b)(2) requires the court to admonish the child as to "the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding."

In *In the Matter of F.M.*, 792 S.W.2d 564 (Tex.App.—Amarillo 1990, no writ), the Court of Appeals reversed an adjudication of delinquency because the juvenile court failed to admonish the child as to "the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding" as required by Section 54.03(b)(2). It also held that the juvenile had complied with any requirement of a trial objection by including this claim in his motion for new trial and refused to require a showing that the juvenile was harmed by the juvenile court's omission. Cf. *In the Matter of E.C.D., Jr.,* UNPUBLISHED, No. 04-05-00391-CV, 2007 WL 516137, 2007 Tex.App.Lexis 1270, Juvenile Law Newsletter ¶ 07-2-8 (Tex.App.—San Antonio 2007, no pet.) (error was harmless

absent showing that trial court's failure to give required explanation may have affected adjudication or basis for it).

Article 37.07 of the Code of Criminal Procedure allows evidence of an adjudication for any felony or jailable misdemeanor to be admitted in the penalty phase of a criminal case.

Under Section 51.13(d), a felony adjudication resulting in commitment or sentence to TJJD counts as a prior felony conviction under the repeat offender provisions of Penal Code Sections 12.42(a), (b), and (c)(1), should the juvenile respondent later be charged in criminal court with a first, second, or third degree felony. This provision applies only to repeat offenders under Section 12.42, not to the habitual offender under Section 12.42(d) or mandatory life for a second sex offense under Section 12.42(c)(2). Since a juvenile felony adjudication counts as a prior felony conviction, it would be admissible in evidence in criminal proceedings. See *Thompson v. State*, 267 S.W.3d 514 (Tex.App.—Austin 2008, pet. ref'd) (juvenile felony adjudication counts as a final felony conviction for purposes of sentence enhancement); *Gamble v. State*, UNPUBLISHED, No. 01-06-01028-CR, 2008 WL 2548512, Juvenile Law Newsletter ¶ 08-3-11 (Tex.App.—Houston [1st Dist.] 2008, pet. ref'd) (juvenile judgment for burglary of a habitation was a conviction of a second degree felony for enhancement purposes). Therefore, the juvenile court judge should admonish the respondent as to this provision providing for enhancement of the range of punishment in a criminal case based upon a juvenile felony adjudication and commitment or sentence.

There is more discussion of the admissibility of juvenile records in criminal proceedings in Chapter 15.

Sex Offender Registration. In *In the Matter of S.R., Jr.*, UNPUBLISHED, No. 02-94-097-CV, Juvenile Law Newsletter ¶ 94-4-1 (Tex.App.—Fort Worth 1994), the juvenile respondent argued that the juvenile court judge was required to admonish him concerning his obligations to register under the Sex Offender Registration Act as a possible consequence of the proceedings. The Court of Appeals rejected the argument on the ground that the "consequences" admonition referred only to probation or TYC commitment, not to the "collateral" consequences that might result from an adjudication. In this case, the juvenile court committed the respondent to TYC. The Court of Appeals noted that the obligation to register, under the law as it then existed, would not arise until about three months before his release from TYC.

The Texarkana Court of Appeals in *In the Matter of B.G.M.*, 929 S.W.2d 604 (Tex.App.—Texarkana 1996, no writ) held that the juvenile court was not required to admonish a juvenile as to his or her obligations to register under the Sex Offender Registration Act if the child should be adjudicated for a covered offense. Registration is not one of the "possible consequences of the proceedings" under Section 54.03(b). Cf. Code of Criminal Procedure Article 26.13 (admonishment required on adult proceedings).

Immigration Consequences. In *In the Matter of E.J.G.P.*, 5 S.W.3d 868 (Tex.App.—El Paso 1999, no pet.), it was argued that the juvenile court was required to admonish the respondent as to immigration consequences of a juvenile adjudication because she was a resident alien. The Court of Appeals addressed the question whether immigration consequences are direct or collateral:

> The first question we must decide is whether the possibility of deportation, or other immigration consequence, is a direct or collateral consequence of a plea of true in a juvenile proceeding under Texas state law. A consequence is "direct" if it is definite, immediate, and largely automatic. A consequence is "collateral," on the other hand, if it lies within the discretion of the court whether to impose it, or its imposition is controlled by an agency which operates beyond the direct authority of the trial judge.

5 S.W.3d at 871.

The Court of Appeals concluded that immigration consequences are collateral because they involve "civil proceedings administered by an independent agency over which the trial judge has no control." 5 S.W.3d at 872. Accordingly, judicial admonition concerning immigration consequences is not required.

In criminal prosecutions, the trial court is required by Code of Criminal Procedure Article 26.13(a)(4) in a felony case to admonish a guilty-pleading defendant of possible deportation, exclusion from entry, or denial of naturalization consequences of a conviction. That specific statutory requirement has no applicability in juvenile cases. See *In the Matter of R.F.*, UNPUBLISHED, No. 07-02-0298-CV, 2003 WL 21404126, 2003 Tex.App.Lexis 5170, Juvenile Law Newsletter ¶ 03-3-10 (Tex.App.—Amarillo 2003, no pet.) (holding that the Code of Criminal Procedure admonition does not apply in juvenile cases).

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court looked at the issue of "collateral consequences" not from the perspective of the court giving the admonishment but from the prospective of the attorney doing so. The defendant asserted a claim of ineffective assistance of counsel because the attorney did not advise him of the potential for deportation upon a guilty plea (and the attorney, in fact, told him "not to worry about deportation since he had lived in the country so long"). The Kentucky Supreme Court had denied relief because deportation is a collateral consequence of a conviction. The Supreme Court disagreed:

> Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." [citations omitted] The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court. [citations omitted]. In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." The Kentucky high court is far from alone in this view.
>
> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required…. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.
>
> …
>
> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence…. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.

559 U.S. at 364-365.

The Supreme Court was clear, however, that its holding did not mean every defense attorney must become an expert in immigration law, which can be quite complex. "When the law is not succinct and straightforward…a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear…, the duty to give correct advice is equally clear." Id. at 369.

There have been no Texas juvenile cases since *Padilla* regarding the requirement of counsel in juvenile cases to advise clients regarding the immigration consequences, though it is advisable for attorneys to do so. There has been one case, however, in which the court's failure to give such admonishments was raised. In *In the Matter of J.C.*, UNPUBLISHED, 2013 WL 2145700, No. 04–12–00386–CV, (Tex.App.—San Antonio 2013, no pet.) The court gave the child the admonishments from Section 54.03, Family Code prior to the juvenile's plea of true to delinquent conduct. The child asserted that, although Family Code does not explicitly require admonishments regarding immigration consequences of a plea, "in view of the Juvenile Justice Code's purpose of assuring a juvenile's constitutional rights are enforced," the trial court was required to give such an admonishment under *Padilla*. The appellate court was able to sidestep the issue, however, because the juvenile was born in Bexar County and thus was a non-deportable citizen of the United States. Therefore, the court "assuming, without deciding, that the juvenile court was required" to make the admonishment, its failure to do so was harmless error.

Determinate Sentence Cases. Under the Determinate Sentence Act, a juvenile committed to TJJD may later be transferred to the Texas Department of Criminal Justice (TDCJ) to serve the balance of his or her determinate sentence. A committed juvenile is eligible for release from TJJD on parole only after serving a statutory minimum length of stay of one, two, three, or 10 years unless TJJD seeks and obtains permission from the court to release the juvenile on parole earlier.

The Dallas Court of Appeals in *E.B. v. State*, UNPUBLISHED, No. 05-96-01759-CV, 1997 WL 275567, 1997 Tex.App.Lexis 2760, Juvenile Law Newsletter ¶ 97-3-02 (Tex.App.—Dallas 1997, no writ) and *In the Matter of M.E.S.*, UNPUBLISHED, No. 05-96-01236-CV, 1997 WL 351240, 1997 Tex.App. Lexis 3358, Juvenile Law Newsletter ¶ 97-3-17 (Tex.App.—Dallas 1997, no writ) held that in determinate sentence cases the juvenile court is not required to admonish the juvenile as to the possibility later of transfer to TDCJ and of the statutory minimum period of confinement applicable to the offense charged.

In *In the Matter of J.Y.*, UNPUBLISHED, No. 05-97-00024-CV, 1998 WL 265129, 1998 Tex.App.Lexis 3147, Juvenile Law Newsletter ¶ 98-3-01 (Tex.App.—Dallas 1998, no pet.), the juvenile argued that the judge should have admonished him as to the possibility later of transfer to TDCJ. The Court of Appeals rejected this argument on the ground that transfer to TDCJ is collateral:

> Imposition of the term of years by the trial court is the direct consequence of the disposition after the adjudication proceeding. It is only because the petition was previously approved by the grand jury that it is possible for appellant to be transferred to the Texas Department of Criminal Justice. Thus, we conclude that the physical location where appellant is committed is a collateral, not a direct, consequence of the adjudication proceeding. Therefore, we disagree with appellant that section 54.03(b) requires a specific explanation about the possibility of transfer. Section 54.03(b) does not expressly require such an explanation and, in the absence of any authority requiring us to do so, we decline to expand the list of mandatory admonishments required by the Legislature to include the possibility of transfer to the Texas Department of Criminal Justice.

1998 WL 265129 *3.

But the Court of Appeals then urged juvenile court judges to include the possibility of transfer in their list of admonitions:

> However, this opinion should not be construed to hold that we condone the trial court's failure to explain the possibility of transfer from a juvenile facility to an adult facility. To the contrary, we encourage trial courts to do so. We simply decline to expand the list of mandatory admonishments beyond those provided by the Legislature.

1998 WL 265129 *4.

While the juvenile court is not required to admonish a juvenile charged in a determinate sentence case as to the consequences in the juvenile system of receiving a determinate sentence, if it chooses to do so, it had best make it a correct admonition. The juvenile court in *In the Matter of D.W.R.*, UNPUBLISHED, No. 04-98-00530-CV, 1998 WL 879766, 1998 Tex.App.Lexis 7760, Juvenile Law Newsletter ¶ 99-1-07 (Tex.App.—San Antonio 1998, pet. denied) incorrectly admonished a juvenile charged under the Determinate Sentence Act as amended in 1995 as to his right to a release/transfer hearing when he became 18—a right that did not exist in his case. The Court of Appeals, in a writ of habeas corpus proceeding, held that this mistake caused the plea of true to be involuntary:

> While the trial court was not required by Section 54.03(b) to admonish D.W.R. regarding the procedure followed upon the entry of a determinate sentence, once the trial court proceeded to so advise D.W.R., it was required to do so correctly.... Because the trial court incorrectly advised D.W.R. that he would be eligible for early release pursuant to the terms of the plea agreement, it misled D.W.R. regarding the effect of his guilty plea, and therefore, failed to properly admonish him regarding the consequences of the proceedings against him, in violation of Section 54.03(b)(2)

1998 WL 879766 *8.

Dismissal Without Disposition. Section 54.04(c) provides that unless there is a finding in the disposition hearing that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made," the court "shall dismiss the child and enter a final judgment without any disposition." In *In the Matter of M.A.M.*, UNPUBLISHED, No. 04-97-00795-CV, 1998 WL 412430, 1998 Tex.App.Lexis 4432, Juvenile Law Newsletter ¶ 98-3-22 (Tex.App.—San Antonio 1998, no pet.), the juvenile argued that, as part of the admonition regarding consequences of the proceedings, the juvenile court was required to explain the possibility of dismissal without disposition. The Court of Appeals rejected this argument on the ground that if dismissal without disposition is a consequence, it is only a "general" one and, under the case law dealing with sex offender registration, is not a consequence about which a juvenile must be admonished.

c. Privilege Against Self-Incrimination

Section 54.03(b)(3) requires the court to admonish the child of his or her "privilege against self-incrimination." There are no appellate cases explaining what constitutes compliance with this admonition requirement. The judge should admonish the juvenile that he or she is not required to testify in the hearing and cannot be punished for not testifying. The judge should also inform the juvenile that if he or she elects to testify, anything said may be used against him or her.

d. Trial and Witness Confrontation

Section 54.03(b)(4) requires the court to admonish as to the "child's right to trial and to confrontation of witnesses." The Texas Supreme Court held in *In the Matter of C.O.S.*, 988 S.W.2d 760 (Tex. 1999) that a failure to deliver that admonition can be harmless error if the juvenile pleads not guilty and receives a trial on that plea. There is no harm in not telling the juvenile about a right he or she has fully exercised despite not being informed about it.

Reasonable Doubt. In *In the Matter of K.D.R.*, 864 S.W.2d 581 (Tex.App.—Tyler 1993, no writ), the juvenile court explained reasonable doubt to the 10-year-old respondent in these terms, "That means not that it maybe happened, not that it probably happened, but that it's almost certain that it happened." 864 S.W.2d at 582. On appeal, the Court of Appeals rejected the argument that the juvenile court, if it undertook to explain reasonable doubt, was required to use the language of the jury instruction made mandatory by the Court of Criminal Appeals in *Geesa v. State*, 820 S.W.2d 154, 162 (Tex.Crim.App. 1991). The Court of Appeals commented, "The juvenile judge's definition better served to explain the concept to a ten-year-old of low average intellect than a recitation of the *Geesa* definition." 864 S.W.2d at 582.

e. Representation by Attorney

Section 54.03(b)(5) requires the court to admonish the child of his or her "right to representation by an attorney if he is not already represented." Section 51.10(b) provides that a child's right to representation by an attorney cannot be waived in an adjudication hearing. Thus, every child who appears for admonitions at the beginning of every adjudication hearing should appear with counsel. The court merely has to note for the record that the child is appearing with counsel to avoid the necessity for admonishing as to the right to representation by an attorney.

f. Trial by Jury

Section 54.03(b)(6) requires the court to admonish as to "the child's right to trial by jury." Section 54.03(c) provides, "Trial shall be by jury unless jury is waived in accordance with Section 51.09." Since 2009, if a jury trial is held on a petition alleging a misdemeanor, the jury must consist of six qualified jurors as required by Article 33.01(b) of the Code of Criminal Procedure. A case under the Determinate Sentence Act or a felony case requires a jury of 12.

Not only must the court admonish the child as to his or her right to trial by jury, but trial must be by jury unless the child and his or her attorney have waived the right in writing or in recorded court proceedings as required by Section 51.09. In cases not brought under the Determinate Sentence Act, the juvenile has a right to a jury for adjudication but not for disposition.

In 2009, the Waco Court of Appeals reversed an adjudication because the record contained no affirmative waiver of a jury trial in accordance with Section 54.03(c). *In the Matter of S.G.*, 304 S.W.3d 518 (Tex.App.—Waco 2009, no pet.). The Court of Appeals first had to decide whether failure to object to the lack of a written or oral jury trial waiver must be preserved or whether the issue can first be raised on appeal. Citing *In the Matter of C.O.S.*, 988 S.W.2d 760, 766 (Tex. 2001), the Court of Appeals found that the error may be raised for the first time on appeal: "The Supreme Court held in *C.O.S.* that 'when a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement.'" 304 S.W.3d at 520.

To determine whether reversible error occurred, the appellate court conducted a civil harm analysis: Did the error probably cause the rendition of an improper judgment or probably prevent appellant from properly presenting his case to the appellate court? The court stated:

> The trial court was under a duty to commence a trial by jury unless that right was properly, affirmatively waived by the juvenile and his counsel. The trial court erred in conducting a bench trial with no affirmative waiver as required by Section 51.09. Further, the judgment makes no reference to a waiver of a jury trial. We hold that the trial court's error probably did result in the rendition of an improper judgment.

304 S.W.3d at 521-522.

Right to Jury at Disposition of Determinate Sentence Case. Juveniles have a right to trial by jury at the adjudication and disposition phases of determinate sentence cases. A juvenile is entitled separately to exercise his or her right to a jury at adjudication and disposition. For example, a juvenile may have a jury at adjudication and none at disposition if that choice is made. Therefore, in a determinate sentence case, the judge must specifically admonish the juvenile as to his or her right to a jury at disposition as well as at adjudication. *In the Matter of J.Y.*, UNPUBLISHED, No. 05-97-00024-CV, 1998 WL 265129, 1998 Tex.App.Lexis 3147, Juvenile Law Newsletter ¶ 98-3-01 (Tex.App.—Dallas 1998, no pet.) (although judge orally

admonished only as to right to jury at adjudication, the juvenile's right to jury at disposition was explained in writing on the same form the juvenile and his lawyer signed waiving jury).

Length of Closing Argument. Part and parcel of the right to a jury trial is the right to present an effective closing argument. Historically, trial courts have enjoyed broad discretion to determine the length of closing argument. The issue was recently batted around the Texas appellate court system in the form of a capital murder case that arose from a juvenile's certification to be tried as an adult. On original submission, the Houston Fourteenth District Court of Appeals affirmed appellant's conviction. See *Dang v. State*, 99 S.W.3d 172 (Tex.App.—Houston [14th Dist.] 2002, pet. granted). The Court of Criminal Appeals reversed this decision, holding that the trial court abused its discretion by limiting defense counsel's closing argument to 20 minutes and by denying the lawyer's request for an additional three minutes. *Dang v. State*, 154 S.W.3d 616, 617 (Tex.Crim.App. 2005). On remand, the Court of Appeals was asked to conduct a harm analysis regarding the trial court's restriction on Dang's closing argument. *Dang v. State*, 202 S.W.3d 278 (Tex.App.—Houston [14th Dist.] 2006, no pet.). Since the Court of Criminal Appeals did not reverse the case based on any type of constitutional error, the Court of Appeals applied a non-constitutional harm analysis. It noted that the Court of Criminal Appeals had reviewed a list of seven non-exclusive factors regarding limiting closing argument that weighed in Dang's favor and concluded that the trial court had abused its discretion. Considering the higher court's determination, the Court of Appeals could only conclude that the 20-minute limitation on closing argument had a substantial and injurious effect or influence in determining the jury's verdict. Cf. *J.M.S. v. Florida*, 921 So.2d 813 (Fla.App. 5th Dist. 2006) (absolute violation of Sixth Amendment for court to deny juvenile's right to make closing argument).

2. Plea Agreement Admonitions

If there is a plea agreement, the "prosecuting attorney shall inform the court of the agreement between the state and the child." Then, "[t]he court shall inform the child that the court is not required to accept the agreement." Section 54.03(j). These provisions are part of a statute that gives the child the right to withdraw a plea of true entered pursuant to a plea agreement if the juvenile court does not implement the agreement. Criminal defendants have a similar right under Code of Criminal Procedure Article 26.13.

In *In the Matter of M.D.G.*, 180 S.W.3d 747 (Tex.App.—Eastland 2005, no pet.), the State and M.D.G. reached an agreement in a criminal mischief and interfering with a peace officer case concerning disposition and presented that recommendation to the juvenile court judge. The agreement called for a finding of delinquent conduct, one-year probation in the grandmother's home and payment of restitution, although there was no stipulation as to damages. The court, however, disapproved of the partial stipulation and reasoned that, because M.D.G. did not stipulate to the amount of damages, the court would have to enter a plea of "not true" to criminal mischief while accepting a plea of "true" to the interfering charge. The adjudication hearing proceeded with testimony concerning only the amount of damages caused by the criminal mischief. After adjudicating M.D.G. delinquent, the court immediately held the disposition hearing, at which the court ordered M.D.G. to be detained in the Kerr County juvenile facility for a minimum of six months.

The record shows that the juvenile court understood that its disposition differed from the agreed disposition reached between M.D.G. and the State. Nevertheless, the juvenile court proceeded with its disposition after explaining that it had treated the stipulations as one plea of "true" and one plea of "not true." Trial counsel stated that M.D.G. had proceeded on the assumption that the only issue to be determined was the amount of damages/restitution and that, upon adjudication, the agreed disposition would be followed. After conferring with M.D.G., trial counsel requested that the stipulations be withdrawn. The juvenile court denied M.D.G.'s request. Since the juvenile court elected not to accept the agreed disposition, Section 54.03(j) required the court to permit M.D.G. to withdraw his stipulations. The court abused its discretion by refusing to allow M.D.G. to withdraw his plea of true pursuant to a plea agreement.

The Court of Appeals in *In the Matter of D.O.M.*, UNPUBLISHED, No. 04-98-00841-CV, 1999 WL 268193, 1999 Tex.App.Lexis 3343, Juvenile Law Newsletter ¶ 99-2-31 (Tex.App.—San Antonio 1999, no pet.), held that when the plea agreement is that the State will remain silent on the issue of probation, the juvenile court is not required to admonish the juvenile that the court is not required to accept the agreement:

> The State did not agree to recommend probation pursuant to a plea bargain agreement. The only plea agreement between D.O.M. and the State required the State to remain silent on D.O.M.'s request for probation. Accordingly, the juvenile court was not required

to admonish D.O.M. of the nonbinding nature of a nonexistent recommendation on punishment, and the juvenile court did not reject the plea bargain agreement by ordering D.O.M. committed to the Texas Youth Commission.

1999 WL 268193 *3.

Section 56.01(n) permits a child to plead true pursuant to a plea agreement but to prohibit an appeal except with the court's permission or to challenge the denial of written pretrial motions. Section 54.034 requires the juvenile court to inform the child of that provision.

3. Admonition to Parent, Guardian, or Guardian Ad Litem

Section 54.03(b) requires that the admonitions be given to "the child and his parent, guardian, or guardian ad litem." There are few cases directly addressing what constitutes compliance with the requirement that the admonition must be directed to a parent, guardian, or guardian ad litem in addition to the juvenile respondent or exploring when, if ever, a failure to admonish a parent would be grounds for reversing the child's adjudication. In *In the Matter of O.L.*, 834 S.W.2d 415 (Tex.App.—Corpus Christi 1992, no writ), the claim was made that the juvenile court had not complied with Section 54.03(b) because it had not directed any questions to the respondent's guardian, who was his grandmother. The Court of Appeals held that Section 54.03(b) had been satisfied, noting that the guardian was present throughout the admonitions, that the juvenile court did not prevent the guardian from asking questions and did inquire of the guardian whether her grandson was competent. This approach was followed in *In the Matter of J.M.B.*, 990 S.W.2d 294 (Tex.App.—San Antonio 1998, pet. denied).

In *In the Matter of O.P.*, UNPUBLISHED, No. 07-97-0276-CV, 1998 WL 159555, 1998 Tex.App.Lexis 2084, Juvenile Law Newsletter ¶ 98-2-13 (Tex.App.—Amarillo 1998, no pet.), the juvenile argued that his trial counsel rendered ineffective assistance of counsel because he failed to bring to the court's attention the inability of the juvenile's mother to understand English and, therefore, to comprehend the court's admonitions. The court did not reject the logic of the argument but rejected it on the factual ground that the juvenile had failed to show that the mother's English comprehension was so limited as to require the services of an interpreter to understand the admonitions.

In 2003, the legislature amended Section 51.17 to require the provision of language interpreters and interpreters for the deaf to parents and others in the juvenile process. See Chapter 7 for a discussion.

4. Requirement of a Timely Objection

Split Among Courts of Appeals. Courts of Appeals divided on the question whether a trial objection is necessary to preserve for appellate review a claim that judicial admonitions were deficient. The San Antonio Court of Appeals held that a trial objection is not necessary. *In the Matter of I.G.*, 727 S.W.2d 96 (Tex.App.—San Antonio 1987, no writ); *In the Matter of G.K.G.*, 730 S.W.2d 182 (Tex.App.—San Antonio 1987, no writ); *In the Matter of M.R.R.*, 929 S.W.2d 687 (Tex.App.—San Antonio 1996, no writ). The Houston Fourteenth District Court of Appeals agreed with the San Antonio court. *In the Matter of J.D.C.*, 917 S.W.2d 385 (Tex.App.—Houston [14th Dist.] 1996, no writ) (setting aside 17-year determinate sentence). However, the Austin Court of Appeals, in *In the Matter of R.L.H.*, 771 S.W.2d 697 (Tex.App.—Austin 1989, writ denied), held that a trial objection is necessary. The Dallas Court of Appeals joined the Austin Court of Appeals in holding that a trial objection is required. *In the Matter of J.M.*, UNPUBLISHED, No. 05-95-00107-CV, 1995 WL 731031, 1995 Tex.App. Lexis 3122, Juvenile Law Newsletter ¶ 96-1-06 (Tex.App.—Dallas 1995, writ denied) (alternative basis of decision).

Texas Supreme Court Decisions. The Texas Supreme Court decided three juvenile cases dealing with admonition deficiencies. All three dealt with the requirement of a showing of harm as a predicate to an appellate reversal for an admonition deficiency. One also dealt with whether a trial objection is required to preserve for appellate review a claim of admonition deficiency. In *In the Matter of C.O.S.*, 988 S.W.2d 760 (Tex. 1999), the juvenile respondent was adjudicated in a bench trial of the offense of aggravated sexual assault and received a determinate sentence. He contended on appeal for the first time that the juvenile court had failed to inform him of his right to confrontation of witnesses and had failed to admonish him of the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding. The Texas Supreme Court held that the 1997 amendment to Section 54.03 requiring a trial objection did not apply to C.O.S. because his conduct occurred before the effective date of that amendment. Prior to that amendment, the Supreme Court held there was no requirement of a trial objection to an admonition deficiency. This is because under Court of Criminal Appeals case law, the nature of the right involved

is such that, in the absence of specific statutory requirement, the right must be afforded unless expressly waived by the defendant. The Supreme Court applied that standard to C.O.S. because of the "quasi-criminal" nature of juvenile proceedings, particularly in determinate sentence cases. There was no express waiver in this case.

1997 Statute. In 1997, the legislature resolved the conflict among the Courts of Appeals as to whether a trial objection is required to preserve for appellate review a claim of failure to admonish properly under Section 54.03(b). It added Section 54.03(i):

> In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.

This provision is intended to change case law that regards a failure properly to admonish under Section 54.03(b) as fundamental error not requiring a contemporaneous objection in the trial court for appellate preservation. Prior to this amendment, more juvenile cases were reversed for admonition deficiencies than for any other grounds. Often, the deficiency errors seem not serious enough to warrant automatic reversal and the necessity of a new adjudication hearing.

The reference to Rule 33.1 is to the Texas Rule of Appellate Procedure provision requiring a trial objection to preserve error for appellate review. The Houston First District Court of Appeals held that, under that provision, a timely objection is required to preserve for appellate review an admonition deficiency claim. *In the Matter of L.A.S.,* 981 S.W.2d 691 (Tex.App.—Houston [1st Dist.] 1998, no pet.). The Austin Court of Appeals in *In the Matter of C.C.*, 13 S.W.3d 854 (Tex.App.—Austin 2000, no pet.) applied the 1997 amendment to preclude review of a claim of failure to admonish as to consequences when there was not a timely trial objection. See also *In the Matter of R.J.C.,* UNPUBLISHED, No. 04-01-00686-CV, 2002 WL 31015532, 2002 Tex.App.Lexis 6623, Juvenile Law Newsletter ¶ 02-4-05 (Tex.App.—San Antonio 2002, no pet.); *In the Matter of M.C.S., Jr.*, 327 S.W.3d 802 (Tex.App.—Fort Worth 2010, no pet.); *In the Matter of R.R.F.*, UNPUBLISHED, No. 13-06645-CV, 2008 WL 98721 (Tex.App.—Corpus Christi 2008, no pet.).

In *In the Matter of C.D.H.*, 273 S.W.3d 421 (Tex.App.—Texarkana 2008, no pet.), defense counsel lodged no objection to the erroneous admonition by the trial court that appellant faced commitment to TYC until his "eighteenth birthday." On appeal, appellant argued that he had a right to be sentenced in accordance with the improper admonishment. The Texarkana Court of Appeals disagreed:

> Simply put, we find no authority that would suggest that error associated with a right to be sentenced in accordance with the trial court's admonishment required by Section 54.03(b) of the Texas Family Code is the type of error that can be characterized as a structural or systemic defect such that it would escape harmless error analysis.
>
> ...
>
> We find that, if there is a right to be sentenced to the range of punishment previously announced by the trial court in a juvenile proceeding, it is not a right that is waivable only, but may be forfeited.

273 S.W.3d at 424, 425.

The appellate court concluded that even if the error did not have to be preserved for review, appellant's claim would fail because he could not show harm resulting from the erroneous admonishment.

5. Requirement of a Showing of Harm

Split Among Courts of Appeals. Prior to the 1999 Texas Supreme Court decisions, the Courts of Appeals were split on the question whether a preserved claim of an admonition deficiency should automatically result in reversal of the adjudication or whether an appellate showing of harm is required.

The Corpus Christi Court of Appeals in *In the Matter of O.L.*, 834 S.W.2d 415 (Tex.App.—Corpus Christi 1992, no writ) held that the respondent has the burden of showing how he was harmed by the juvenile court's failure to admonish properly. In this case, because the juvenile court invited questions about the nature of the charge of criminal trespass and because respondent acknowledged he had discussed the charge with his attorney, respondent could not show that he was harmed by the failure *to* admonish. See also *In the Matter of J.M.*, UNPUBLISHED, No. 05-95-00107-CV, 1995 WL 731031, 1995 Tex.App.Lexis 3122, Juvenile Law Newsletter ¶ 96-1-06 (Tex.App.—Dallas 1995, writ denied) (alternative basis of decision) held that the failure of the juvenile respondent to brief the

question whether a failure to admonish was harmful error waived the claim on appeal.

In *In the Matter of T.F.,* 877 S.W.2d 81 (Tex.App.—Houston [1st Dist.] 1994, no writ), the State conceded that the juvenile court had not admonished the juvenile respondent as required by law. However, it urged the Court of Appeals to require the juvenile to show he was harmed by the juvenile court's failure. The Court of Appeals refused to do so:

> We hold that a harm analysis should not be applied to violations of Tex. Fam. Code Ann. §54.03(b). The admonitions set forth in that statute are designed to apprise a juvenile of his most basic, fundamental rights.... A violation of this statute requires reversal without further inquiry.

877 S.W.2d at 82. See also *In the Matter of F.M.*, 792 S.W.2d 564 (Tex.App.—Amarillo 1990, no writ) (refusing to require a showing of harm).

Texas Supreme Court Decisions. In all three 1999 decisions, the Texas Supreme Court required a showing of harm to reverse an adjudication on the basis of a preserved admonition deficiency claim. The Court of Appeals in *In the Matter of C.O.S.*, 961 S.W.2d 360 (Tex.App.—Houston [1st Dist.] 1997, pet. granted), held that, although the juvenile court failed to admonish the respondent as to his right to confront witnesses, that failure was not harmful because he pleaded not guilty and received a bench trial, which resulted in him confronting the witnesses against him. The Court of Appeals also held that the failure of the juvenile court to explain the consequences of having a juvenile record in criminal court was not harmful for the same reason:

> [A]ppellant was not harmed by the judge's failure to admonish him under section 54.03(b)(2) of the "law relating to admissibility of the record of a juvenile court adjudication in a criminal proceeding." Tex. Fam. Code Ann. §54.03(b)(2) (Vernon 1996). We observe appellant did not waive, nor give up any rights based on a belief that a finding of juvenile delinquency could not be used against him later. Rather, appellant contested the charges and strived not to be found guilty of delinquent conduct. If appellant had been told that a finding of delinquency could be used against him in a subsequent criminal proceeding, the only possible way to avoid the consequences of an adverse finding was to plead not guilty and contest the juvenile case. This is exactly what he did. Thus, appellant suffered no harm.

961 S.W.2d at 363.

The *C.O.S.* court distinguished its prior decision in *T.F.*, which had stated that a showing of harm was not required in that case because the trial court totally failed to admonish the respondent of any rights, while in *C.O.S.* there was an admonition, only a deficient one.

When the Texas Supreme Court in *In the Matter of C.O.S.*, 988 S.W.2d 760 (Tex. 1999) decided the case, it held that a showing of harm is required, thus rejecting the approach of some Courts of Appeal that reversal is automatic upon a preserved showing of admonition deficiency. However, it also rejected the approach of the Houston First District Court of Appeals that a trial on a plea of not guilty automatically means there was no harm.

As to the omission to admonish concerning confrontation of witnesses, that approach is sound. There was no harm because there was a trial in which witnesses were confronted. As to the failure to admonish about the consequences of having a juvenile record in criminal court, the Court rejected the blanket holding of the Court of Appeals that a not guilty plea prevented any harm:

> This analysis overlooks the fact that, during the punishment phase of a criminal trial, a judge or jury may consider the range and severity of the defendant's prior criminal conduct. Armed with the knowledge that in a future criminal proceeding, the sentence can take into account the severity of the offense for which he or she is adjudicated delinquent, a juvenile might agree to plead true to a lesser offense.... We conclude that in a juvenile proceeding, harm may be shown by proof that the juvenile could and would have entered into a plea agreement with the State based on a lesser offense if he or she had been properly admonished.
>
> In this case, the record does not reflect any harm to C.O.S. There is no indication that if C.O.S. had been told how the record in this case might be used in the future, he could have avoided an adjudication of delinquency. Nor is there any indication that C.O.S. had the opportunity to plead to a lesser offense as the basis for adjudication.

988 S.W.2d at 767-68.

In the related case of *In the Matter of D.I.B.*, 988 S.W.2d 753 (Tex. 1999), the Texas Supreme Court held that the

juvenile court admonition as to the adult record was deficient but the error was not harmful because there was no "indication that, had D.I.B. known of the potential uses of the record of an adjudication in juvenile court, she would have been able to avoid an adjudication of delinquency. Nor was there any evidence that she was offered and would have accepted an agreement to plead to an offense other than murder as the basis for her adjudication." 988 S.W.2d at 759. However, the juvenile court had erroneously admonished D.I.B. that only a jury could place her on juvenile probation for murder. She elected jury punishment and received a determinate sentence of 20 years. Because counsel had informed the juvenile court that his client would have elected judge disposition if the judge could have given probation, the error in the admonition was harmful and required reversal of the murder adjudication.

In the final case of the Texas Supreme Court trilogy, *In the Matter of K.L.C.*, 990 S.W.2d 242 (Tex. 1999), the Court held that the prosecutor reading the allegations of the petition does not comply with the requirement of Section 54.03(b) that the judge explain the juvenile's rights. However, it held that under the particular circumstances of this case, the error was harmless, and established the standard that this procedure, while erroneous, can be harmless if the "petition is read at the direction of and in the presence of the trial court and is sufficiently clear and direct to explain the allegations against the juvenile." 990 S.W.2d at 244. See Chapter 19 for further discussion of harmless error.

C. Trial by Jury

No Constitutional Right. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), the United States Supreme Court held that the Sixth and Fourteenth Amendments of the United States Constitution require the states to make jury trials available in all criminal prosecutions in which the potential punishment exceeds six months imprisonment. However, in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976 (1971), the Supreme Court held that the United States Constitution does not require states to provide jury trials in any juvenile cases, but that they are free to do so under state law if they wish.

Statutory Right. Grounded in the Texas Constitution, Section 54.03(c) provides for jury trials in Texas juvenile cases:

> Trial shall be by jury unless jury is waived in accordance with Section 51.09. If the hearing is on a petition that has been approved by the grand jury under Section 53.045, the jury must consist of 12 persons and be selected in accordance with the requirements in criminal cases. If the hearing is on a petition that alleges conduct that violates a penal law of this state of the grade of a misdemeanor, the jury must consist of the number of persons required by Article 33.01(b), Code of Criminal Procedure. Jury verdicts under this title must be unanimous.

This language applies only to adjudication hearings. There is no right to a jury at a detention hearing [Section 54.01(a)], at a transfer hearing [Section 54.02(c)], at a disposition hearing {except under the Determinate Sentence Act if the child so elects in writing before commencement of the voir dire examination of the jury panel [Section 54.04(a)]}, at a hearing to modify disposition [Section 54.05(c)], or at a release/transfer hearing under the Determinate Sentence Act [Section 54.11]. Certain other juvenile matters may be tried before a jury. The question of mental illness or intellectual disability excluding fitness to proceed, also called competency to stand trial (Section 55.32), and the question of mental illness or intellectual disability excluding responsibility, also called insanity at the time of the act (Section 55.51), can be tried to a jury. The reference in Section 54.03(c) to Code of Criminal Procedure Article 33.01(b) was added in 2009 to clarify that, in jury trials involving misdemeanors, the jury must consist of six qualified jurors as in adult cases.

Unanimous Verdict Requirement. Section 54.03(c), as originally enacted in 1973, did not contain the last sentence requiring jury unanimity. In *In re V.R.S.*, 512 S.W.2d 350 (Tex.Civ.App.—Amarillo 1974, no writ), the appellate court ruled that a jury was not required to be unanimous in its verdict because in civil cases a verdict of 10 to 2 is permissible. The statute was amended in 1975 to require unanimous jury verdicts.

Size of Jury. The size of the jury—whether 12 or six—depends upon which court has been designated the juvenile court under Section 51.04. If a district or criminal district court has been designated the juvenile court, then the jury will be comprised of 12 persons, as in other cases tried in district level courts, unless the trial involves a misdemeanor, in which case the jury must consist of six qualified jurors. If the constitutional county court or statutory county court has been designated the juvenile court, then the jury will consist of six persons, as in other cases tried before the jury in those courts. *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App.—Dallas 1976, no writ) (upholding an adjudication by a six-person jury in a county level

court for an offense that would have been a felony and would have formerly required a 12-person jury in district court had it been committed by an adult).

However, under the determinate sentencing procedure, the jury must consist of 12 persons, even if the case is being tried in a county level court. Section 54.03(c). See Chapter 21 for a full discussion of that procedure.

Jury Waiver. Civil cases are tried without a jury unless one of the parties files a timely demand for a jury. Criminal cases are tried to a jury unless the defendant waives the right to jury trial. In juvenile cases, Section 54.03(c) adopts the criminal rule and provides that the trial will be to a jury unless the jury is waived in accordance with Section 51.09.

Certain proceedings under Chapter 55 use the civil rule that a jury is not provided unless there is a timely demand for one. See, for example, Section 55.32(c), dealing with fitness to proceed. In those instances, the more specific provisions of Chapter 55 control over Section 54.03(c). See Chapter 14.

The child, as well as the attorney, must waive the right to trial by jury. In *V.C.H. v. State*, 630 S.W.2d 787 (Tex.App.—Houston [1st Dist.] 1982, no writ), the prosecutor and defense attorney both indicated that they did not wish a jury on the question of competency to stand trial, but the juvenile court did not question the juvenile about his wishes in the matter. The appellate court reversed on the ground that the waiver was not effective under Section 51.09 without a showing it was made by the juvenile. See *In the Matter of A.G.P.*, UNPUBLISHED, No. 09-06-396-CV, 2007 WL 1501123, 2007 Tex.App.Lexis 4079 (Tex.App.—Beaumont 2007, no pet.) (jury waiver by child's attorney insufficient without record showing that juvenile also waived jury disposition and understood this right).

The juvenile respondent in *In the Matter of B.R.M.*, UNPUBLISHED, No. 05-95-01417-CV, 1996 WL 80572, 1996 Tex.App.Lexis 751, Juvenile Law Newsletter ¶ 96-2-03 (Tex.App.—Dallas 1996, no writ) signed a form waiving his rights, including his right to trial by jury and entered a plea of true. However, in response to the juvenile court judge's inquiries from the bench, he stated that he did not want to waive his right to jury. The judge ignored this statement, accepted the plea, adjudicated the respondent, and committed him to TYC. On appeal, the Court of Appeals held that the juvenile had not waived his right to trial by jury because of the statement he made to the judge in court proceedings. It rejected the State's argument that the in-court colloquy merely showed the juvenile did not understand the judge's questions. Cf. *In the Matter of J.I.C.*, UNPUBLISHED, No. 08-02-00239-CV, 2004 WL 596217, 2004 Tex.App.Lexis 2758, Juvenile Law Newsletter ¶ 04-2-09 (Tex.App.—El Paso 2004, no pet.) (no abuse of discretion in denying juvenile's request to withdraw jury waiver, citing orderly administration of court's business).

The attorney must concur in any waiver of jury made by the respondent. In *C.D.F. v. State*, 852 S.W.2d 281 (Tex.App.—Dallas 1993, no writ), the juvenile court ascertained that the respondent and the respondent's mother waived a jury but did not ask the respondent's attorney whether he concurred in the waiver. There was a docket sheet entry that read, "set for TBC" (Trial Before the Court). The State argued that was concurrence in the jury waiver by the respondent's attorney, but the Court of Appeals rejected this argument:

> The docket sheet showing "set for TBC" does not indicate what parties were involved in the setting. Even if the attorney participated in the trial setting, we cannot agree that the attorney's acquiescence in placing the case on a nonjury docket or his failure to object constitutes compliance with section 51.09. When the record is silent as to a waiver by appellant's attorney, a waiver may not be presumed.... Thus, section 51.09 was not complied with and appellant's waiver of a jury trial was ineffective absent a showing of joinder by his attorney.

852 S.W.2d at 285.

By comparison, the respondent and his mother in *In the Matter of J.K.D.*, UNPUBLISHED, No. 05-92-02114-CV, 1992 WL 379429, Juvenile Law Newsletter ¶ 93-1-8 (Tex.App.—Dallas 1992, no writ), executed a written waiver of jury trial which was accepted by the juvenile court. The respondent's attorney did not sign the form but did concur with the waiver in recorded court proceedings when the juvenile court was in the process of accepting the child's waiver. The court asked the defense attorney if she knew of any reason that the court should not accept the waiver and proceed with the case. The defense attorney replied that she did not. This was held by the Court of Appeals to be sufficient compliance with Section 51.09. See Chapter 16.

Concurrence by Prosecutor and Court Not Required. Section 54.03(c) provides for trial by jury unless waived by the child and his or her attorney in accordance with Section 51.09. Without more, this would strongly suggest that if the child and defense counsel waive a jury in

accordance with Section 51.09, a bench trial is required. By contrast, in criminal cases, Code of Criminal Procedure Article 1.13(a) provides in relevant part, "The defendant in a criminal prosecution for any offense...shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State." Under the conditions on waiver imposed by the Code of Criminal Procedure, a jury is required unless waived by the defendant with the consent of both the court and the prosecutor. There are no such restrictions imposed by Sections 54.03(c) or 51.09. In juvenile practice, the right to a jury trial belongs exclusively to the juvenile, to be exercised or waived as the juvenile and his or her attorney wish.

In Attorney General Opinion No. JC-0242 (2000), the Attorney General was asked whether the State has a right to a jury trial in juvenile cases by virtue of Rule 216 of the Texas Rules of Civil Procedure. Rule 216 impliedly gives each side in a civil lawsuit the right to demand a jury. The Attorney General concluded that the State does not have a right to a jury trial in juvenile proceedings:

> In our opinion, Rule 216 does not apply to a juvenile proceeding. Subsection 51.17(a) of the Family Code specifically states that the Rules of Civil Procedure are not applicable "when in conflict with a provision" of Title 3 of the Family Code. As one commentator notes, in a treatise on Texas Juvenile Law, "If Title 3 speaks to an issue, it controls." See Robert O. Dawson, Texas Juvenile Probation Commission, Texas Juvenile Law 330 (4th Ed. 1996). Section 54.03 guarantees to the child the right of trial by jury in a juvenile proceeding. Section 51.09 sets forth the specific conditions that must be met in order for waiver to take place. The first of those conditions is that "the waiver is made by the child and the attorney for the child." Nothing in section 51.09 states or implies that the state has any role in this decision, and it does not suggest that the state should have veto power over the decision. Rule 216 conflicts with sections 54.03 and 51.09 by affording to either party the right to demand a jury trial. Because of this conflict, we decline to engraft Rule 216 onto sections 54.03 and 51.09 of the Family Code. The state is entitled neither to demand a jury trial nor to preclude a waiver of a jury trial in a juvenile proceeding.
>
> We conclude that Rule 216 of the Texas Rules of Civil Procedure is not applicable to the determination of whether a jury trial is available in a juvenile proceeding. Accordingly, the state has no right to a jury trial in such a proceeding.

Peremptory Challenges of Jurors. When a jury is selected from a larger panel of potential persons, the State and the respondent may seek to eliminate some members of the panel by showing the judge those persons could not be impartial jurors in the case. Once the attorneys have questioned members of the jury panel, they are then entitled to exercise "strikes" or peremptory challenges on those members of the panel who remain. In an ordinary delinquency or CINS case, each side has six strikes in a case tried in a district level court and three in a case tried in a county level court. Texas Rules of Civil Procedure Rule 233.

Determinate Sentence Cases. Code of Criminal Procedure Article 35.15 allocates each side a larger number of strikes than do the Rules of Civil Procedure. Article 35.15(b) gives the State and defendant each 10 strikes in a felony case in which the death penalty is not an issue. If there are multiple defendants, each defendant has six strikes and the State has six for each defendant. Section 54.03(c) was amended in 2001 to add the language, "and be selected in accordance with the requirements in criminal cases." That amendment requires that the number of strikes specified by the Code of Criminal Procedure must be employed in juvenile determinate sentence cases.

Since one of the principles of the Determinate Sentence Act is to provide a defendant in juvenile court with the same trial rights he or she would have in a felony trial in district court, each side should be allocated strikes in accordance with the Code of Criminal Procedure in such a case. The juvenile court has discretion to allocate more strikes than the law requires, so the number of strikes allocated by the Code of Criminal Procedure can be employed in the discretion of the juvenile court without committing error, even if it is ultimately determined by the appellate courts that the civil rules apply in determinate sentence cases.

***Batson* Strikes.** Ordinarily, peremptory challenges are made without assigning any reason for the strike. Attorneys use strikes to shape the type of jury they wish for the trial by eliminating panel members who could not be eliminated because of partiality but who are still believed to be undesirable jurors. There is one situation, however, in which the use of strikes requires an explanation: when they are employed for the purpose of eliminating a person from a jury panel because of racial, ethnic, or gender reasons.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the State, in a criminal prosecution, from using peremptory challenges to eliminate members of the defendant's race from the jury panel based on race. If the State strikes a member of the defendant's race from the panel and the defendant objects, the State is required to provide a racially neutral reason for the strike.

In *C.E.J. v. State*, 788 S.W.2d 849 (Tex.App.—Dallas 1990, writ denied), the Court of Appeals held that the *Batson* case applies to a Texas juvenile delinquency trial under the Determinate Sentence Act. It also held that the procedure specified for implementing *Batson* in criminal trials in Article 35.261 of the Code of Criminal Procedure applies in determinate sentence cases in the absence of legislation directed specifically at juvenile proceedings.

The Court of Appeals found unpersuasive the State's explanation that its strikes were designed to eliminate females, not blacks, from the panel because there was no explanation of why it was important to the State's case to eliminate females. Finally, the Court of Appeals refused to accept the State's explanation that some blacks were struck because they were not paying attention to the proceedings because there was no evidence in the record to support that claim.

The United States Supreme Court subsequently increased the scope of its *Batson* ruling. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), it held that *Batson* applies to the use of strikes for the purpose of eliminating panel members on account of their race, no matter what the race of the defendant. Thus, it is not required that the defendant must be of the same race as the panel members struck by the State.

In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed. 2d 660 (1991), the Supreme Court held that *Batson* applies to an ordinary civil lawsuit between two private parties. *Edmonson* makes it clear that *Batson* applies not only in a Determinate Sentence Act case but also in any juvenile case. *Edmonson* also means that a juvenile respondent cannot strike members of the jury panel because of race.

In 1994, the United States Supreme Court extended the prohibition against discrimination in jury selection to include gender, regardless of whether the challenge involves a male or female. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419 (1994). As a result, respondent's exercise of peremptory challenges to exclude male jurors in that case violated the Equal Protection Clause of the Fourteenth Amendment.

More recently, in Texas, the appellant in *In the Matter of D.S.C.*, UNPUBLISHED, No. 10-03-00393-CV, 2004 WL 2406763, 2004 Tex.App.Lexis 9563, Juvenile Law Newsletter ¶ 04-4-15 (Tex.App.—Waco 2004, no pet.) argued that the trial court erred in overruling his *Batson/Edmonson* motion regarding the State's use of peremptory strikes against two minority jury panel members. The Court of Appeals, however, held that the trial court did not abuse its discretion in accepting the State's race-neutral reasons for striking both individuals.

Challenges for Cause. Challenges for cause may be made to eliminate from a jury panel persons who, for one reason or another, could not be impartial jurors in the case being tried. In *W.D.A. v. State*, 835 S.W.2d 227 (Tex.App.—Waco 1992, no writ), one member of the jury panel stated that the respondent would not be in court if he had not done something wrong and that he would require the respondent to show that he had done nothing wrong before returning a verdict favorable to him. The respondent's attorney challenged this panel member for cause, but the juvenile court overruled the challenge. The Court of Appeals held that this panel member should have been removed on the challenge because his answers showed he had placed the burden of persuasion on the respondent. This was a bias or prejudice against the respondent prohibited by Section 62.105 of the Government Code. Cf. *In the Matter of M.R.*, UNPUBLISHED, No. 11-08-00155-CV, 2010 WL 1948286 (Tex.App.—Eastland 2010, review denied) (trial court did not err by rehabilitating jurors after defense counsel had challenged them for cause; neither juror was biased against the law or the accused).

D. Proof of Delinquency or CINS

Section 54.03 contains requirements dealing with proof of the delinquency or CINS allegations in the petition.

1. Proof Beyond a Reasonable Doubt

Constitutional Requirement. The plaintiff in a civil case has the burden of proving the allegations of the petition by a preponderance of the evidence. The government in a criminal prosecution must prove its charges beyond a reasonable doubt. In this respect, juvenile cases are treated like criminal cases. In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the United States

Supreme Court held that the United States Constitution requires proof of delinquency beyond a reasonable doubt. In Texas, the legislature also requires proof beyond a reasonable doubt. Section 54.03(f).

Instruction Defining Reasonable Doubt. In *Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App. 1991), the Court of Criminal Appeals held that in criminal trials the jury must be given an instruction defining the meaning of proof beyond a reasonable doubt whether any party requests it or objects to the failure to give it. The court set out in its opinion the exact instruction that must be given. In *Paulson v. State*, 28 S.W.3d 570 (Tex.Crim.App. 2000), the Court of Criminal Appeals overruled *Geesa*; the juvenile courts should follow suit and not give the instruction defining reasonable doubt that was required by that opinion. See also *In the Matter of T.B.*, UNPUBLISHED, No. 13-04-00430-CV, 2005 Tex.App.Lexis 6619 (Tex.App.—Corpus Christi 2005, no pet.) (no error in failing to give jury reasonable doubt definition; citing *Paulson*). In *In the Matter of C.S.,* 79 S.W.3d 619 (Tex.App.—Texarkana 2002, no pet.), the juvenile court gave the *Geesa* instruction over respondent's objection. The Court of Appeals held that while giving the instruction was error under *Paulson,* it was harmless because the respondent benefited from the instruction being given more than it not being given.

Variance Between Charge and Proof. What must the State prove in a juvenile case? First, the petition must set out facts amounting to the law violation or other prohibited conduct it intends to prove at the adjudication hearing. Second, those allegations must be supported with evidence. Thus, even if at State proves a law violation at the adjudication hearing, that is not sufficient; it must prove the very law violation (or a lesser included offense) that it charged in the petition.

This requirement exists to give the respondent and his or her attorney notice of what must be defended against at the hearing. If there is a significant difference between what was charged and what was proved, even if what was proved was also a law violation, then the State has failed to prove its charges and the respondent must be acquitted of the offense charged. In *L.G.R. v. State*, 724 S.W.2d 775 (Tex. 1987), for example, the petition charged that respondent committed arson by intentionally setting fire to a building owned by X, while the proof showed that he intentionally set fire to a nearby railroad box car owned by Y and the fire spread to the building owned by X. The Texas Supreme Court held that the State had failed to prove its charge and set aside the adjudication of delinquency. See *In the Matter of K.H.*, 169 S.W.3d 459 (Tex.App.—Texarkana 2005, no pet.); *In the Matter of D.D.,* 101 S.W.3d 695 (Tex.App.—Austin 2003, no pet.) (cannot adjudicate for terroristic threat on a petition alleging retaliation because former is not a lesser included offense of the latter); but Cf. *In the Matter of A.C.,* UNPUBLISHED, No. 11-09-00164-CV, 2011 WL 3925516 (Tex.App.—Eastland 2011, review denied) [omitting "with a closed fist" from the jury charge did not alter the offense (aggravated assault) for which appellant could be adjudicated].

In 2004, the Austin Court of Appeals decided an unusual case in which appellant escaped from custody while under a furlough order. *In the Matter of B.P.C.,* UNPUBLISHED, No. 03-03-00057, 2004 WL 1171670, 2004 Tex.App.Lexis 4729, Juvenile Law Newsletter ¶ 04-2-07 (Tex.App.—Austin 2004, no pet.). Under Penal Code Section 38.06(a), there are four distinct ways the offense of escape can be committed. "Having alleged that appellant was in custody when under arrest for an offense, the State was required to prove this specific circumstance. We hold that there is a material variance between the allegation that appellant was in custody when under arrest for an offense and the proof that he was in custody pursuant to a court order." 2004 Tex.App.Lexis 4729 *11. Given this material variance, the Court of Appeals found the evidence to be legally insufficient, reversed the judgment of delinquency, and remanded the case to the trial court with instructions to dismiss the case with prejudice.

Reaching a similar result, the Waco Court of Appeals held there was insufficient evidence to prove all the elements in an aggravated assault case. *In the Matter of K.B.,* 143 S.W.3d 194 (Tex.App.—Waco 2004, no pet.). The allegation was that a metal pipe was used as a deadly weapon during the course of committing aggravated assault. However, the evidence was insufficient for a rational trier of fact to find beyond a reasonable doubt that the pipe was in fact a deadly weapon.

> There is testimony that a metal pipe was involved in the fight; however, there is no testimony concerning the physical proximity between the victim and the pipe. Though there is testimony that K.B. cursed at [the victim], there is no evidence that K.B. threatened [the victim]. There is no evidence in the record regarding the pipe's size and shape.
>
> The State may use circumstantial evidence to prove an object is a deadly weapon. [citation omitted] An object's capability to inflict death or serious bodily injury can be inferred from the way it was used in the commission of the offense. Yet, there is no testimony

> as to the manner in which K.B used the pipe, nor is there any evidence from the victim that he was injured by the pipe.…

143 S.W.3d at 200.

The Court of Appeals reversed the aggravated assault adjudication and rendered a judgment of adjudication for the lesser included offense of misdemeanor assault. Cf. *In the Matter of L.F.L.T.B.*, 137 S.W.3d 856 (Tex.App.—Eastland 2004, no pet.) (no material variance between State alleging use of a "large pocket knife" as deadly weapon and proving use of a "knife").

For other cases discussing this issue see: *In the Matter of C.E.S.C.,* UNPUBLISHED, No. 04-07-00490-CV, 2008 WL 1805512 (Tex.App.—San Antonio 2008, no pet.) (material variance between public lewdness allegation of sexual contact in a public place and proof that classroom does not meet statutory definition of a public place); *In the Matter of K.H.*, 169 S.W.3d 459 (Tex.App.—Texarkana 2005 no pet.) (State's petition alleging victim's status as "a witness to a crime" did not conform with retaliation statute requiring threats against a witness or prospective witness at trial); *In the Matter of J.N.S.*, UNPUBLISHED, No. 02-04-178-CV, 2005 WL 77615, 2005 Tex.App.Lexis 273, Juvenile Law Newsletter ¶ 05-1-15 (Tex.App.—Fort Worth 2005, no pet.) (evidence sufficient to adjudicate J.N.S. for unlawful restraint where 13-year-old complainant was statutorily incapable of consenting to the restraint); *In the Matter of D.P.*, UNPUBLISHED, No. 03-02-00713-CV, 2004 WL 962855, 2004 Tex.App.Lexis 4051, Juvenile Law Newsletter ¶ 04-2-26 (Tex.App.—Austin 2004, no pet.) (appellant failed to establish a fatal variance between the State's pleading and proof).

Law of Parties. The San Antonio Court of Appeals held in *In the Matter of A.C.*, 949 S.W.2d 388 (Tex.App.—San Antonio 1997, no writ), that, in a bench trial, the juvenile court judge is authorized to find the respondent engaged in delinquent conduct based upon the law of parties even though that theory was not pleaded in the petition. Doing so is not a variance in the proof from the charge since the law of parties need never be pleaded. Under Texas law, one is responsible under the law of parties for an offense committed by another if he or she intentionally "solicits, encourages, directs, aids, or attempts to aid" the other to commit the offense. Penal Code Section 7.02(a)(2). See *In the Matter of B.P.S.*, UNPUBLISHED, No. 03-07-00284-CV, 2008 WL 3166310 (Tex.App.—Austin 2008, no pet.) (State relied on law of parties to hold B.P.S. responsible for other boy's actions).

In *In the Matter of L.A.S.*, 135 S.W.3d 909 (Tex.App.—Fort Worth 2004, no pet.), appellant was charged as a party with the offenses of coercing, soliciting, or inducing gang membership and engaging in organized criminal activity. L.A.S. challenged the legal and factual sufficiency of the evidence to support his adjudications. The Court of Appeals found that while there was legal sufficiency to uphold the adjudications, the evidence was factually insufficient to support the judgments of delinquency. The appellate court found there was no direct evidence in the record placing L.A.S. at the scene of the assault and that no eyewitness could identify him as one of the assailants. "The record is factually sufficient to establish that L.A.S. was a member of [a gang], but is factually insufficient to establish that L.A.S. threatened or caused bodily injury to [the victim] as a primary actor or a party." 135 S.W.3d at 918, n. 6. The appellate court reversed and remanded the case for a new adjudication hearing. Cf. *In the Matter of I.A.G.*, 297 S.W.3d 505 (Tex.App.—Beaumont 2009, no pet.) (appellant's presence and actions tended to show agreement to commit offense under law of parties).

Lesser Included Offenses. When a criminal offense is charged, the defendant is liable for conviction not only of that offense, but also of any lesser included offenses. Lesser included offenses are not explicitly charged in a petition. They are charged implicitly, however, because every element of the lesser offense is included among the elements of the greater offense that are alleged in the petition. Therefore, a charge of the greater offense logically also includes a charge of the lesser.

If a judge or jury convicts a defendant of a lesser included offense, it is, by that action, also finding him or her not guilty of the greater offense. Therefore, for a judge or jury to have the opportunity to consider a lesser included offense, there must be some evidence that the defendant is not guilty of the greater offense but may be guilty of the lesser offense. When that circumstance is present, the judge or jury is permitted to consider whether the defendant is guilty of the greater offense, guilty of the lesser offense only, or not guilty of any offense.

In 1999, the legislature formalized the procedure for considering lesser included offenses in juvenile proceedings by amending Section 54.03(f) to add, "A child may be adjudicated as having engaged in conduct constituting a lesser included offense as provided by Articles 37.08 and 37.09, Code of Criminal Procedure." Those articles authorize conviction of a lesser included offense in criminal cases and define what a lesser included offense is. The purpose of the 1999 amendment was to clarify the law by codifying

it rather than to authorize a procedure the legislature believed did not already exist.

In *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ), the Court of Appeals applied the law of lesser included offenses as developed in criminal prosecutions to an adjudication hearing under the Determinate Sentence Act. The court found that while voluntary manslaughter, involuntary manslaughter, and criminally negligent homicide were all lesser offenses included in the charge of murder, there was no evidence the respondent was not guilty of murder but guilty of one of the lesser included offenses. Thus, the juvenile court did not err in refusing to give the jury the opportunity to adjudicate respondent of a lesser included offense. See also *In the Matter of L.J., Jr.,* UNPUBLISHED, 2006 Tex.App.Lexis 5974, No. 04-05-00771-CV, (Tex.App.—San Antonio 2006, pet. denied) (evidence did not establish robbery as a valid, rational alternative to aggravated robbery); but Cf. *In the Matter of F.H.*, UNPUBLISHED, No. 03-07-00428-CV, 2008 WL 2220018, Juvenile Law Newsletter ¶ 08-3-5 (Tex.App.—Austin 2008, no pet.) (criminal trespass of a habitation is a lesser included offense of burglary of a habitation).

In *In the Matter of A.E.B.*, 255 S.W.3d 338 (Tex.App.—Dallas 2008, review dism'd), a jury assessed a six-year determinate sentence for the offense of attempted sexual assault. At trial, A.E.B. requested a jury instruction on the lesser included offense of assault, which the trial court denied. Noting that assault is a lesser included offense of attempted sexual assault, the Dallas Court of Appeals held there was some plausible evidence to permit a rational trier of fact to find A.E.B. was guilty only of the lesser offense of assault. The court stated:

> Here, "some evidence directly germane" to the lesser included offense of assault is the evidence concerning the object in A.E.B.'s hand during the attack. As discussed above, the jury was entitled to believe the object was the unopened condom, which supports—and is the only support for—the jury's finding as to A.E.B.'s intent to commit sexual assault. However, the jury was equally entitled to believe the object was the cell phone, which would negate the offense of attempted sexual assault because it would leave the intent element of that offense unsupported by any evidence. We agree with A.E.B. that the trial court erred in denying his request for a jury instruction on the lesser included offense of assault.

255 S.W.3d at 349–350.

Since attempted sexual assault is a third degree felony while assault is a misdemeanor for which a juvenile cannot receive a determinate sentence, the appellate court concluded that A.E.B. had suffered "some harm" from the trial court's denial of his request to instruct the jury on assault.

If, in an adjudication hearing in a determinate sentence case, the judge or jury finds the respondent responsible for a lesser included offense that is not covered by the Determinate Sentence Act, the proceedings continue from that point as an ordinary delinquency case. If the lesser included offense is also covered by the Determinate Sentence Act, then the proceedings continue from that point within any new sentencing limitations that may be imposed by the offense for which the respondent was adjudicated. See Chapter 21.

Sufficiency of the Evidence. The argument is frequently made in juvenile cases that the evidence is legally and factually insufficient to support an adjudication of delinquency. In *In the Matter of E.P.,* 185 S.W.3d 908 (Tex.App.—Austin 2006, no pet.), appellant was observed removing the price tags from merchandise worth less than $22 and placing the items in her pockets. E.P. argued that the evidence was insufficient to prove that she acted with fraudulent intent under Penal Code Section 32.47. E.P. noted that since most of the cases prosecuted under Section 32.47 involve the substitution of price tags or price codes in an attempt to buy a product for a lower price, she should have been charged with Class C theft instead of Class A fraud by deception. The Court of Appeals disagreed and held that the evidence was legally and factually sufficient to support a finding that E.P. removed the tags with fraudulent intent.

In *In the Matter of B.S.S.,* UNPUBLISHED, No. 03-04-00275-CV, 2006 Tex.App.Lexis 1682, Juvenile Law Newsletter ¶ 06-2-04 (Tex.App.—Austin 2006, no pet.), appellant challenged the factual and legal sufficiency of the evidence regarding the value of a stolen cell phone. The victim's father testified that he paid around $100 for the phone but could not remember the exact amount. He agreed that it was more than $50 but less than $500. B.S.S. argued that the State had failed to prove the value of the stolen property. The Court of Appeals held that the fair market value of the phone had been established, especially since appellant presented no evidence to rebut the value. Consequently, a rational trier of fact could have found that the State proved its case beyond a reasonable doubt. See also *In the Matter of M.S.M.*, UNPUBLISHED, No. 03-05-00236-CV, 2008 WL 5100999, Juvenile Law Newsletter ¶ 09-1-2 (Tex.App.—Austin 2008, no pet.) (testimony

that door repair would cost at least $50 was sufficient to support trial court's finding concerning pecuniary loss); *In the Matter of D.L.*, UNPUBLISHED, No. 12-06-00431-CV, 2007 Tex.App.Lexis 6059 (Tex.App.—Tyler 2007, no pet.) (evidence sufficient in that replacement cost was appropriate measure of stolen property's value); *In the Matter of C.D.S.*, UNPUBLISHED, No. 10-07-00226-CV, 2008 WL 257238 (Tex.App.—Waco 2008, no pet.) (body shop estimator's testimony concerning cost to repair automobile was sufficient to prove fair market value of repair cost); but Cf. *In the Matter of O.A.G.*, UNPUBLISHED, No. 03-07-00554-CV, 2009 WL 638192 (Tex.App.—Austin 2009, no pet.) (legal insufficiency upheld since there was no testimony concerning fair market value of stolen tire).

Sufficiency of the evidence to support an adjudication for evading arrest was challenged in *In the Matter of B.J.J.*, UNPUBLISHED, No. 03-07-00633-CV, 2008 WL 2736879 (Tex.App.—Austin 2008, no pet.). B.J.J. was detained by a school resource officer serving a warrant for his arrest. As the officer was detaining B.J.J. and preparing to cuff him, the student turned, pushed the officer, and fled from the scene. On appeal, B.J.J. argued that the evidence showed he was guilty not of evading arrest but rather escaping from custody. The Austin Court of Appeals disagreed:

> In this case, Monroe detained B.J.J. by taking him from his classroom into the hallway and having him stand against the wall. Although B.J.J. submitted to this detention, the detention was not a completed arrest for the purposes of the escape statute, and a reasonable person in B.J.J.'s position would not have understood himself to be restrained to the degree the law associates with a formal arrest. Further, Monroe's statement that he had a warrant for B.J. J.'s arrest did not complete the arrest. Like the defendants in *Medford* [13 S.W.3d 769 (Tex.Crim.App. 2000)] and *Warner* [2008 Tex.App.Lexis 822 (Tex.Crim.App. 2008)], B.J.J. fled before Monroe could complete the arrest by restraining him to the degree required for an escape conviction.

2008 WL 2736879 *3.

The appellate court held that the evidence did not support B.J.J.'s contention that he was guilty of escape rather than evading arrest. Cf. *In the Matter of E.L.L.*, UNPUBLISHED, No. 10-07-00214-CV, 2008 WL 3971765 (Tex.App.—Waco 2008, no pet.) (evidence supported finding that youth intentionally fled from a person he knew was a peace officer attempting to lawfully detain him).

Sufficiency of the evidence is also an issue when the State is required to prove facts and circumstances affirmatively linking the accused to contraband. *In the Matter of J.M.C.D.,* 190 S.W.3d 779 (Tex.App.—El Paso 2006, no pet.) is a drug possession case involving six individuals carrying five backpacks filled with marijuana across the border near El Paso. J.M.C.D. argued that the State failed to affirmatively link him to the drugs since he was not positively identified as one of the individuals carrying a backpack. The appellate court disagreed, holding that he was culpable as a party to the offense since he fled from the scene, attempted to hide, and was one of the six individuals apprehended. "It is unlikely that J.M.C.D. would have attempted to flee if he was not aware of the nature of the contraband. Although none of the evidence is directly conclusive, when taken together it is sufficient for a reasonable trier of fact to determine that J.M.C.D. was either an individual actor or promoted or assisted in the commission of the offense." 190 S.W.3d at 782. See also *In the Matter of H.G.G.D.,* 310 S.W.3d 43 (Tex.App.—El Paso 2010, no pet.) (evidence sufficient to show appellant exercised care, control, and management of more than 50 but less than 2,000 pounds of marijuana); Cf. *In the Matter of J.R.F.,* UNPUBLISHED, No. 14-04-00818-CV, 2006 Tex.App.Lexis 6027, Juvenile Law Newsletter ¶ 06-3-14 (Tex.App.—Houston [14th Dist.] 2006, no pet.) (evidence appellant was in possession of recently stolen property was legally and factually sufficient to support theft adjudication).

In *In the Matter of C.W.L.*, UNPUBLISHED, No. 10-08-00311-CV, 2009 WL 2264336, Juvenile Law Newsletter ¶ 09-3-11 (Tex.App.—Waco 2009, no pet.), appellant argued that the evidence was legally insufficient to prove that he delivered a controlled substance in a drug-free zone due to the State's failure to affirmatively link him to the controlled substance. This argument was based in part on the fact that the alleged incident occurred in a crowded school cafeteria, that another student gave a school official one of the pills, that some of the pills were recovered after falling off the top of appellant's bag, which "was accessible to every student wandering around the cafeteria," and that no pills were found in appellant's possession. 2009 WL 2264336 *4. The Court of Appeals overruled appellant's contention, relying instead on the following evidence:

> [B]oth [student witnesses] testified that the pills that were recovered belonged to C.W.L. and that C.W.L. told them the pills were his ADHD medicine. Thus, a rational trier of fact could have found beyond a reasonable doubt that C.W.L. exercised control, management, or care over the pills.

2009 WL 2264336 *4.

In *In the Matter of T.T.*, UNPUBLISHED, No. 12-06-00034-CV, 2006 Tex.App.Lexis 9927, Juvenile Law Newsletter ¶ 07-1-6 (Tex.App.—Tyler 2006, no pet.), a terroristic threat case, the court upheld the verdict based on the legal and factual sufficiency of the evidence. After a classroom argument, appellant threatened to "throw something" at several young women seated at his table. He stated that it would knock them out and make them "crazy" when they woke up. T.T. then pulled on latex gloves, rummaged in his pockets, and began to count down from "10." When he reached seven, the girls ran from the classroom to the principal's office. On appeal, T.T. argued that the evidence did not show that he acted with specific intent to place the young women in imminent fear of serious bodily injury, that they were not placed in fear, and that no reasonable person would have been placed in fear by his actions. The Court of Appeals held otherwise. "A threat of violence, made with the intent to place the victim in fear of imminent serious bodily injury, is what constitutes this offense." 2006 Tex.App.Lexis 9927 *8 [citing *Dues v. State*, 634 S.W.2d 304, 306 (Tex.Crim.App. 1982)]. Although T.T. did not brandish a weapon, the court noted that preparing his hands with latex gloves and counting down heightened, rather than dispelled, his threat that the promised assault was imminent. In this case, the victims were not required to wait and see whether T.T. had a weapon. The evidence was sufficient to prove that his threat to commit assault was imminent. Cf. *In the Matter of I.A.G.*, 297 S.W.3d 505 (Tex.App.—Beaumont 2009, no pet.) (appellant, who stood silently holding a tire iron while others threatened victim, intended to place victim in imminent fear of serious bodily injury).

By contrast, the Waco Court of Appeals held that the evidence was factually insufficient to show that a juvenile used or exhibited a deadly weapon while hitting the complainant on the head, as charged in the petition. *In the Matter of L.A.*, UNPUBLISHED, No. 10-08-00052-CV, 2009 WL 1623201, Juvenile Law Newsletter ¶ 09-3-4 (Tex.App.—Waco 2009, no pet.). Testimony at trial showed that L.A. punched the complainant in the forehead and a few moments later grabbed a knife and raised it up, pointing in his direction. At the time, L.A. was about five feet away from the victim.

While the evidence was legally sufficient to establish that L.A. used or exhibited a deadly weapon during the commission of the assault, the evidence was factually insufficient to show that L.A. brandished the knife at the same time as she was striking the complainant in the head. The court stated:

> When the deputies' testimony on direct examination is considered with the other testimony…, we must conclude that the conflicting evidence is so strong as to render the jury's verdict clearly wrong and manifestly unjust regarding whether L.A. used or exhibited a deadly weapon 'during the commission' of the assault. (citation omitted) Thus, we hold that the evidence is factually insufficient.

2009 WL 1623201 *3.

As a result, the case was reversed and remanded to the juvenile court.

Sufficiency of the evidence was also contested in a Houston murder case. *Gamboa v. State*, UNPUBLISHED, No. 14-05-00942-CR, 2007 Tex.App.Lexis 405 (Tex.App.—Houston [14th Dist.] 2007, pet. ref'd). The evidence confirmed that Gamboa, who was certified to be tried as an adult, fired a shotgun into a crowd of people at a barbeque but that a co-defendant caused the victim's death. The issue was whether the evidence was legally and factually sufficient to establish Gamboa as a party to the offense. The Court of Appeals held that it was, noting that Gamboa participated in the drive-by shooting, fired a weapon into the crowd, was later found hiding near the abandoned vehicle, and had fresh gunpowder residue on his hands. These facts, at a minimum, supported his guilt as a party to the offense of murder.

In 2008, legal and factual sufficiency was contested in a school-related arson case. *In the Matter of H.A.G.*, UNPUBLISHED, No. 13-07-00677-CV, 2008 WL 2154095, Juvenile Law Newsletter ¶ 08-3-3 (Tex.App.—Corpus Christi 2008, no pet.). The evidence showed that two students had planned to start a fire in the girl's restroom and brought a lighter to school to carry out the crime. The appellate court held that the trial court could infer H.A.G.'s intent to damage or destroy the building based on the following evidence:

> (1) H.A.G. and another student planned to bring a lighter to school; (2) H.A.G. planned to start the fire; (3) H.A.G. started the fire in an empty bathroom; (4) H.A.G. started the fire approximately ten minutes before the school day ended; (5) H.A.G. did not report the fire when it was started or warn anyone that there was a fire when she returned to class; and (6) [the principal] had to conduct an investigation to determine who was in the restroom at the time the fire started.

2008 WL 2154095 *3.

The Court of Appeals also found that factual sufficiency of the evidence had been established. "The trial court could have inferred H.A.G.'s intent to damage the building because H.A.G. and another student planned to bring the lighter for the purpose of starting a fire at school, and H.A.G. failed to report the fire to school officials or warn others of the potential danger." 2008 WL 2154095 *3; see also *In the Matter of E.A.*, UNPUBLISHED, No. 04-09-00520-CV, 2010 WL 4008386 (Tex.App.—San Antonio 2010, no pet.) (reasonable jury could infer that E.A. had intent to damage or destroy vegetation on open land).

A separate 2008 arson prosecution failed, however, when the State's petition alleged that a middle school was located within the incorporated city limits of San Antonio when in fact it was not. *V.V.C. v. State*, UNPUBLISHED, No. 04-07-00166-CV, 2008 WL 1805479 (Tex.App.—San Antonio 2008, no pet.). The Court of Appeals held that the evidence was legally insufficient since no rational trier of fact could have found beyond a reasonable doubt that the school was located within the limits of an incorporated city, as required by the petition, the jury charge, and the arson statute. See Penal Code Section 28.02(a)(2)(A).

Legal and factual sufficiency was also challenged in a failure to identify case. *In the Matter of G.V.*, UNPUBLISHED, No. 03-07-00722-CV, 2008 WL 3896017 (Tex.App.—Austin 2008, no pet.). Police, responding to a second disturbance call at an apartment complex, encountered G.V. sitting at a pool with a baseball bat nearby. G.V. admitted the bat was his, stating "he just got done playing baseball." 2008 WL 3896017 *1. Since the officer saw no baseball or gloves, he decided to ask G.V. for identification. In the process, G.V. gave the officer an incorrect date of birth.

The Austin Court of Appeals concluded that the officer had specific, articulable facts to conclude that G.V. was, had been, or soon would be engaged in criminal activity:

> To summarize, [the officer] had received information about a disturbance at the same location where a prior disturbance had been reported. This prior disturbance involved the same group of individuals who were involved in the current disturbance, a "fight," and "criminal mischief" that resulted in "somebody's car [getting] damaged." A gun was reportedly involved in the current disturbance. Although no gun was found, a rational trier of fact could infer that an aluminum baseball bat could be used to inflict damage to either persons or property. Thus, G.V.'s possession of the bat, although by itself not necessarily a criminal act, could be evidence of criminal activity when considered together with the other circumstances in this particular case. This is especially true when considering the evidence showing that G.V. possessed the bat in a swimming pool area, and that there were no baseballs or gloves found on or around G.V. or anyone else in the pool area. We conclude that the evidence was legally sufficient to support the juvenile court's finding.
>
> 2008 WL 3896017 *4.

Lesser Included Offenses and Double Jeopardy. A greater offense and a lesser included offense are the same offense for purposes of protection from double jeopardy. Thus, it would violate double jeopardy to adjudicate a respondent of both the greater and lesser included offense. That would punish him or her twice for the same offense. The remedy, when that occurs, is to vacate the adjudication for the lesser offense and permit the adjudication of the greater offense to stand. *G.A.O. v. State*, 854 S.W.2d 710 (Tex.App.—San Antonio 1993, no writ) (aggravated sexual assault and sexual assault). See also *In the Matter of L.M.*, 993 S.W.2d 276 (Tex.App.—Austin 1999, pet. denied) (injury to a child and capital murder as charged are the same offense for double jeopardy purposes); *In the Matter of D.S.W.*, UNPUBLISHED, No. 04-09-00592 & 00593-CV, 2010 WL 3443214, Juvenile Law Newsletter ¶ 10-4-5 (Tex.App.—San Antonio 2010, no pet.); *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 WL 364250 (Tex.App.—Amarillo 2010, reh'g overruled) (most serious adjudications affirmed; lesser adjudications vacated); and *In the Matter of E.G.*, UNPUBLISHED, No. 03-05-00853-CV, 2008 WL 5210889 (Tex.App.—Austin 2008, no pet.) (theft and burglary are the same offense for double jeopardy purposes).

The offenses of assault and resisting arrest are not the same offense for double jeopardy purposes because each offense requires proof of a fact not required by the other. Therefore, the juvenile court can adjudicate a respondent for both offenses arising out of the same course of conduct. *In the Matter of M.M.*, UNPUBLISHED, No. 03-96-00483-CV, 1997 WL 304129, 1997 Tex.App.Lexis 3153, Juvenile Law Newsletter ¶ 97-3-09 (Tex.App.—Austin 1997, no writ). Cf. *In the Matter of J.M.,* UNPUBLISHED, No. 13-04-226-CV, 2005 WL 1910801, 2005 Tex.App.Lexis 6359, Juvenile Law Newsletter ¶ 05-3-35B (Tex.App.—Corpus Christi 2005, pet. denied) (no double jeopardy violation for commitment to TYC on escape charge where J.M. had already received TYC administrative sanctions for same offense); *In the Matter of R.A.,* 346 S.W.3d 691 (Tex.App.—El Paso 2009, no pet.) (appellant's removal

from home by CPS not classified as punishment or penalty for double jeopardy purposes).

Affirmative Defenses. Despite the general requirement that the burden of proof is on the State in a criminal or juvenile proceeding, there are certain circumstances in which the criminal defendant or juvenile respondent may constitutionally be required to prove certain claims. These are called affirmative defenses.

One example appears in the Family Code. Section 55.51 defines the defense of mental illness or intellectual disability that excludes responsibility at the time of the act. Section 55.51(d) requires the juvenile to prove lack of responsibility by a preponderance of the evidence. Section 55.51 does not, however, require a juvenile respondent to give notice of intent to assert the defense of lack of responsibility due to mental illness or mental retardation. See *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 WL 364250, Juvenile Law Newsletter ¶ 10-1-8B (Tex.App.—Amarillo 2010, reh'g overruled). There are other examples in the Penal Code. Section 8.05 defines duress and makes it an affirmative defense to a charge of crime, placing the burden on the defendant to prove duress by a preponderance of the evidence. See *In the Matter of P.A.S.*, 566 S.W.2d 14 (Tex.Civ.App.—Amarillo 1978, no writ) for a discussion of applying the affirmative defense of duress in a juvenile proceeding. Cf. *In the Matter of S.S.*, 167 S.W.3d 108 (Tex.App.—Waco 2005, no pet.) (accused bears initial burden of raising mistake of fact defense; once raised, State bears burden of persuasion to disprove it).

Venue. Venue means the place or county where a lawsuit may be brought. Venue in juvenile cases is in the county in which the offense or prohibited conduct occurred or, under limited circumstances, in the county in which the respondent resides. Section 51.06. The State is obligated to allege venue in the petition. See Chapter 9. It is also obligated to prove at the adjudication hearing that the county in which the proceedings were brought has venue over the case.

Venue must be proved by the State, but it is not an element of the offense that must be proved beyond a reasonable doubt. In criminal cases, Code of Criminal Procedure Article 13.17 provides that venue may be proved by a preponderance of the evidence. Doubtless, that same rule would apply in juvenile cases.

While it is necessary for the State to prove that the county in which proceedings were brought has venue, courts are willing to indulge in inferences to supply missing direct evidence. For example, in *In the Matter of S.A.K.*, UNPUBLISHED, No. 01-96-01299-CV, 1997 WL 586184, 1997 Tex.App.Lexis 5055, Juvenile Law Newsletter ¶ 97-4-15 (Tex.App.—Houston [1st Dist.] 1997, no pet.), the Court of Appeals used a map of Harris County to conclude that a named middle school was in Harris County and that venue in Harris County had therefore been proved. Testimony that an offense took place in Post, Texas, allowed the court to take judicial notice that Post is located in Garza County. *In the Matter of E.H.*, UNPUBLISHED, No. 02-05-275-CV, 2006 Tex.App.Lexis 4310, Juvenile Law Newsletter ¶ 06-3-4 (Tex.App.—Fort Worth 2006, no pet.). Similarly, testimony by a peace officer who was called to the crime scene was sufficient to establish that "Big Spring and Wadley" are in Midland County. *In the Matter of K.D.P.*, UNPUBLISHED, No. 11-09-00045-CV, 2010 WL 5257644 (Tex.App.—Amarillo 2010, no pet.). This, undoubtedly, is related to the rule that venue need be proved only by a preponderance of the evidence.

2. Accomplice Corroboration

An accomplice is a person who has been, or who could have been, charged with the same offense charged against the person on trial.

Statutory Requirement. Article 38.14 of the Code of Criminal Procedure requires that the testimony of an accomplice be corroborated in a criminal prosecution to obtain a conviction. The rationale behind this requirement is that the testimony of an accomplice is especially unreliable because of the self-interest of the witness in avoiding his or her own responsibility for the offense and the desire to shift responsibility to another. Almost always, an accomplice witness is testifying under an agreement with the State that results in leniency in the prosecution of his or her own case.

As it was originally enacted, Title 3 did not contain a requirement of accomplice corroboration in juvenile cases. In *In the Matter of S.J.C.*, 533 S.W.2d 746 (Tex. 1976), the Texas Supreme Court rejected the argument that it was a violation of equal protection of the laws not to require accomplice corroboration in juvenile cases but to require it in criminal cases. The Court noted that the United States Constitution does not impose a requirement of accomplice corroboration and that about half of the states and the federal criminal system do not have such a requirement. It also rejected the contention that accomplice corroboration is required by the reasonable doubt burden of proof:

> The juvenile judge invoked the essentials of the due process and fair treatment, including the standard of proof beyond a reasonable doubt. If the admissible evidence establishes delinquent conduct beyond a reasonable doubt, the constitutional evidentiary requirement has been met. Uncorroborated accomplice testimony goes to the weight of the evidence to be considered by the trier of facts. Such testimony does not alter the standard of proof required by due process.

533 S.W.2d at 748-49.

In 1979, the legislature amended Section 54.03(e) to require accomplice corroboration. It used language very similar to Article 38.14 of the Code of Criminal Procedure:

> An adjudication of delinquent conduct or conduct indicating a need for supervision cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the child with the alleged delinquent conduct or conduct indicating a need for supervision; and the corroboration is not sufficient if it merely shows the commission of the alleged conduct.

Who Is an Accomplice. An accomplice is a person who participated in the act being prosecuted to such an extent that he or she could have been charged with the same offense as the person being tried. However, if a juvenile is under the minimum age requirement for committing a crime, then the same child cannot be held criminally responsible as an accomplice. See *In the Matter of D.A.A.*, UNPUBLISHED, No. 13-06-00538-CV, 2009 WL 2397333 (Tex.App.—Corpus Christi 2009, no pet.) (five-year-old witness could not be an accomplice as a matter of law).

The respondent in *In the Matter of J.A.F.R.*, 752 S.W.2d 216 (Tex.App.—El Paso 1988, no writ) was adjudicated delinquent for prostitution. On appeal, he argued the adjudication must be set aside because it was based solely on the testimony of the vice officer, whom respondent claimed was an accomplice to the offense for which he, the respondent, was being tried. The Court of Appeals rejected this argument, commenting, "An undercover agent is not an accomplice so long as he does not bring about the crime but merely obtains evidence to be used against those engaged in crime." 752 S.W.2d at 217. In other words, the vice officer was not acting as an accomplice unless he entrapped the respondent into committing the offense. The same rule exists in criminal cases.

Jury Instructions. If testimony in a jury trial is given by a witness who is an accomplice, the trial court must instruct the jury about the law requiring corroboration of that testimony. If it is clear that the witness is an accomplice, the trial court should instruct the jury that he or she is an accomplice and of what the law requires for corroboration. The jury should be instructed that it may find against the respondent only if it finds the testimony to be corroborated. Failure to give such an instruction is error, even if there is no defense request for it. If there is ample corroboration, however, the error may be harmless. See *In the Matter of M.E.R.*, 995 S.W.2d 287 (Tex.App.—Waco 1999, no pet.). If there is an issue about whether the witness is an accomplice, the trial court should submit that question to the jury with instructions requiring it to find corroboration should it conclude the witness was an accomplice.

The requirement accomplice testimony be corroborated applies only to the in-court testimony of an accomplice. It does not apply to an out-of-court statement of an accomplice that is admitted into evidence through the testimony of a non-accomplice. *In the Matter of A.A.S.*, UNPUBLISHED, No. 04-97-00849-CV, 1999 WL 33088, 1999 Tex. App.Lexis 461 (Tex.App.—San Antonio 1999, no pet.).

Sufficiency of Corroboration. What is required to corroborate the testimony of an accomplice in a juvenile case? Two cases decided under the 1979 amendment provide helpful examples. In each, the appellate court looked to criminal cases decided under Article 38.14, Code of Criminal Procedure, and applied them to the juvenile case before it.

In *In the Interest of A.D.L.C.*, 598 S.W.2d 383 (Tex.Civ.App.—Amarillo 1980, no writ), a lumber yard was burglarized. Two juveniles were apprehended, and they named the respondent as the third person who had participated with them in the burglary. They testified at the adjudication hearing against the respondent. There was also testimony that the three were seen together about one and one-half hours before the burglary and testimony from the father of one of the accomplices that his son had permission to spend the night with the respondent. The appellate court found that the corroboration was not sufficient:

> The sufficiency of the corroboration for accomplice testimony in cases involving adults is determined by eliminating the accomplice testimony from consideration and examining the remaining evidence to ascertain whether there is evidence of an incriminating

> nature that tends to connect the accused with the commission of the crime. If there is such evidence, the corroboration is sufficient; if there is not, it is insufficient.... The corroborative evidence is sufficient if its cumulative weight tends to connect the accused with the crime. It is not necessary that the corroborative testimony link the accused directly to the crime or that it be sufficient in itself to establish guilt.

598 S.W.2d at 385.

The court concluded that the corroboration was insufficient under that standard and reversed the adjudication.

In *In the Matter of M.L.*, 602 S.W.2d 550 (Tex.Civ.App.—Corpus Christi 1980, no writ), there was a residential burglary in which numerous items, including several necklaces, were taken. The accomplice testified and implicated the respondent. A non-accomplice witness then testified that he had seen the accomplice and the respondent at about the time of the burglary and that the respondent had told him that he had burglarized the residence in question. The witness also saw the respondent in possession of necklaces similar to those reported stolen by the owner of the burglarized residence. The court found that the corroboration was sufficient and commented that the statement by the respondent to the non-accomplice witness was itself sufficient corroboration. See also *In the Matter of L.G.*, 728 S.W.2d 939 (Tex.App.—Austin 1987, writ ref'd n.r.e.) (a similar case); *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ) (testimony of accomplices corroborated by respondent's written confession); *In the Matter of C.M.G.*, 905 S.W.2d 56 (Tex.App.—Austin 1995, no writ) (non-positive identification of appellant by police officer sufficient to corroborate accomplice testimony in unauthorized use of motor vehicle trial).

The Austin Court of Appeals found the accomplice testimony corroboration sufficient in a theft case when a non-accomplice witness testified that the juvenile respondent obtained her assistance in pawning some of the stolen items and took the proceeds from the pawning. *In the Matter of N.P.R.*, UNPUBLISHED, No. 03-96-00145-CV, 1996 WL 704255, 1996 Tex. App.Lexis 5396, Juvenile Law Newsletter ¶ 97-1-04 (Tex.App.—Austin 1996, no writ). See also *In the Matter of D.A.B.*, UNPUBLISHED, No. 12-08-00406-CV, 2009 WL 2705882 (Tex.App.—Tyler 2009, review denied) (non-accomplice evidence tended to connect appellant to aggravated robbery); *In the Matter of A.N.V.*, UNPUBLISHED, No. 11-05-00200-CV, 2007 Tex.App.Lexis 307 (Tex.App.—Eastland 2007, no pet.) (non-accomplice evidence tended to connect A.N.V. to crimes and was sufficient to corroborate accomplices' testimony); *In the Matter of A.M.*, UNPUBLISHED, No. 02-02-437-CV, 2004 WL 314942, 2004 Tex.App.Lexis 1688, Juvenile Law Newsletter ¶ 04-1-23 (Tex.App.—Fort Worth 2004, no pet.) (accomplices' testimony sufficiently corroborated with non-accomplice evidence to meet "tends-to-connect" standard).

Acquittal Required if Corroboration Insufficient. In *In the Matter of J.R.R.*, 689 S.W.2d 516 (Tex.App.—Fort Worth 1985), *aff'd by* 696 S.W.2d 382 (Tex. 1985), the adjudication of respondent for theft of bicycles rested upon the testimony of a 15-year-old accomplice to the offense. The appellate court concluded that the Family Code required the testimony of the 15-year-old to be corroborated and that there was insufficient corroboration shown in this case. It reversed the adjudication and remanded for a new trial. However, the Texas Supreme Court reviewed the case and decided that when a court decides there is insufficient evidence to corroborate the testimony of an accomplice, the respondent must be acquitted and not subjected to a new trial for the same offense. *In the Matter of J.R.R.*, 696 S.W.2d 382 (Tex. 1985). Re-prosecution for the same offense following acquittal is prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

3. The Corpus Delicti Rule

In criminal cases, there is a requirement that a conviction cannot rest upon the defendant's out-of-court confession alone. There must be independent evidence that a crime was committed by someone. If that is shown, then, if necessary, the defendant's confession can be the only evidence showing that he or she committed the offense. Section 54.03(e) enacts this requirement for Texas juvenile cases:

> A statement made by the child out of court is insufficient to support a finding of delinquent conduct or conduct indicating a need for supervision unless it is corroborated in whole or in part by other evidence.

In *R.C.S. v. State*, 546 S.W.2d 939 (Tex.Civ.App.—San Antonio 1977, no writ), the juvenile was charged with arson. He made a complete confession to the offense. The other evidence in the case showed that there was a fire, but there was no expert or other evidence that the fire had been deliberately set as opposed to accidentally. The appellate court found that there was insufficient corroboration for the respondent's confession because there was no

evidence independent of the confession that a crime had been committed by anyone. Cf. *In the Matter of H.A.G.*, UNPUBLISHED, No. 13-07-00677-CV, 2008 WL 2154095, Juvenile Law Newsletter ¶ 08-3-3 (Tex.App.—Corpus Christi 2008, no pet.) (corpus delicti of arson established by showing that fire occurred and was purposefully set by someone).

As in the case of insufficient accomplice corroboration, a failure to satisfy the corpus delicti corroboration requirement should result in an acquittal of the charge, not merely a new trial.

4. Evidence Admissibility

Social History Report. Section 54.03(d) provides in part that, "Except in a detention or discretionary transfer hearing, a social history report or social service file shall not be viewed by the court before the adjudication decision and shall not be viewed by the jury at any time." Other sections of the Family Code make such reports admissible in detention, transfer, disposition, and modification of disposition hearings as well as release and transfer hearings under the Determinate Sentence Act.

The idea behind prohibiting the judge from viewing a social history report before making the adjudication decision is to avoid prejudicing the fact-finding process with information about the respondent's background. Exceptions to this principle are necessarily made for detention and discretionary transfer hearings, both of which may have been conducted by the same judge in the same case before the adjudication hearing.

The idea behind prohibiting the jury from viewing a social history report at any time is that a body of laypersons, unfamiliar with the court system, is unlikely to be able to evaluate intelligently the often subjective information contained in such reports so, as in criminal cases, it is best not to provide them with the information at all. Further, except for cases under the Determinate Sentence Act, discussed fully in Chapter 21, the jury has no dispositional role in the juvenile system.

Confrontation of Witnesses. In criminal trials, an out-of-court statement by an accomplice, which would be admissible against the accomplice as an admission by a party, cannot be admitted into evidence if it accuses the defendant on trial of responsibility for the offense. This is because if the person who made the out-of-court statement elects not to testify, the person named in the statement cannot confront and cross-examine that accusation and is therefore deprived of his or her Sixth Amendment right of confrontation. See *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The Sixth Amendment right of confrontation of witnesses applies in juvenile cases. *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428 (1967). In juvenile cases, the same principles apply. Sometimes, efforts are made to permit an out-of-court statement by a co-respondent to be admitted by editing (redacting) the statement to eliminate any references to the respondent on trial. If a jury would nevertheless understand the redacted statement to refer to the respondent, then is it error for a trial court to admit that statement into evidence before a jury. *In the Matter of M.R.R., Jr.*, 2 S.W.3d 319 (Tex.App.—San Antonio 1999, no pet.) (error harmless because of overwhelming other evidence of guilt); *In the Matter of L.A.*, UNPUBLISHED, No. 04-97-00434-CV, 1998 WL 904294, 1998 Tex.App.Lexis 8016, Juvenile Law Newsletter ¶ 99-1-12, (Tex.App.—San Antonio 1998, no pet.) (companion case to *M.R.R.*).

Texas Rules of Evidence in Criminal Cases. Section 54.03(d) provides in part, "only material, relevant, and competent evidence in accordance with the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure may be considered in the adjudication hearing." Most of the rules in the Texas Rules of Evidence are the same for criminal and civil cases. In instances in which different rules exist, the criminal rules govern juvenile proceedings. Chapter 20 discusses the applicability of the Texas Rules of Evidence to Title 3 hearings.

Videotape of Child Victim. Article 38.071 of the Code of Criminal Procedures sets out several ways in which the testimony of a child victim of an offense may be taken to minimize the trauma to the child of testifying in a traditional setting, including a videotaped interview of the child by a Child Protective Services (CPS) worker. There is no comparable provision in Title 3. While Article 38.071 is in the Code of Criminal Procedure, it applies to delinquency proceedings by virtue of the reference to Chapter 38 of the Code of Criminal Procedure in Section 54.03(d), Family Code. See *In the Matter of D.T.C.*, 30 S.W.3d 43 (Tex.App.—Houston [14th Dist.] 2000, no pet.), in which Article 38.071 was used in juvenile proceedings.

That same opinion approved of the practice of allowing an adult to stand next to the child while he or she is testifying. In this case, the adult was a victim-witness

volunteer. Code of Criminal Procedure Article 38.071, Section 10, which requires the court to "take all reasonable steps necessary and available to minimize undue psychological trauma to the child," authorizes this.

The United States Supreme Court has stated that use of a closed circuit television for enabling the testimony of a small child is permissible as long as there is a trial court finding in the case that such a procedure is necessary to protect the child "witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate." *Maryland v. Craig*, 497 U.S. 836, 857, 110 S.Ct. 3157, 3170 (1990).

As applied to videotaped testimony, the Texas statute requires that the trial court must make a similar finding—that the child is unavailable to testify. Code of Criminal Procedure Article 38.071, Section 8(a), provides that, in making the unavailability determination, the court must consider relevant factors, including the relationship of the defendant to the child, the character and duration of the alleged offense, the child's age, maturity, and emotional stability, and how much time as passed since the alleged offense. The court must also consider whether the child is more likely than not to be unavailable to testify because of emotional of physical causes, including the confrontation with the defendant, or because the child would suffer undue psychological or physical harm due to his or her involvement in the hearing or proceeding.

In *In the Matter of C.Y.*, UNPUBLISHED, No. 08-01-00338-CV, 2002 WL 1874855, Juvenile Law Newsletter ¶ 02-3-35 (Tex.App.—El Paso 2002, no pet.), the trial court found the child victim was unavailable to testify in an indecency with a child trial and allowed a video-taped interview of a child by a CPS worker to be shown to the jury. The Court of Appeals found the trial court should not have admitted the videotape (though it was harmless error) because it did not make the Section 8(a) required findings:

> The trial court conducted a pretrial hearing and ruled that L.J. [the child victim] was unavailable only with regard to the first videotape. This finding was based on his belief that the amount of time between the alleged offense in February 1999 and the anticipated trial date of June 2001 was too extensive. The court did not hear testimony on any of the relevant factors set out in Section 8. No evidence was presented on the relationship between the defendant and the child, the maturity and stability of the child, or whether the child would be unavailable to testify because of potential psychological or physical harm. L.J. was not questioned prior to the determination. When defense counsel insisted that the trial court was required to inquire into these factors, the court replied that he was not sure whether, at that point in time, he could make such a determination. However, there was no further discussion either at the pretrial hearing or during the trial itself as to whether unavailability was properly determined.
>
> The trial court was aware of L.J.'s age and had some idea of the nature and duration of the alleged offense, but those factors taken together with the court's determination that there was a long period of time between the alleged offense and the trial date did not provide a sufficient basis upon which to find that L.J. was unavailable under Article 38.071. There was no testimony that the child would suffer harm if she were forced to testify. We thus conclude that the trial court abused its discretion in finding the child unavailable.

2002 WL 1874855 *4.

Both the necessity finding of *Maryland v. Craig* and the unavailability finding of Article 38.071 must be made to authorize admission into evidence of a videotape interview of a child by a CPS worker.

Outcry Testimony. Family Code Section 54.031 deals with a related matter: outcry testimony by an adult to whom a child under 12 has made a statement about being the victim of certain offenses. In 2009, the statute was amended to add "a person with a disability" as an alleged victim. Subsection (d) defines "person with a disability" as a person age 13 or older who due to age or physical or mental disease, disability, or injury is substantially unable to protect himself or herself from harm or to provide food, shelter, or medical care for himself or herself.

Prior to 2011, Section 54.031 applied to sexual offenses in Penal Code Chapter 21, assaultive offenses in Penal Code Chapter 22, prohibited sexual conduct in Penal Code Section 25.02, and sexual performance by a child in Penal Code Section 43.25. In 2011, the list of covered offenses w was amended to add trafficking of persons in Penal Code Section 20A.02(a)(7) or (8) and compelling prostitution in Penal Code Section 43.05(a)(2).

The Court of Appeals in *In the Matter of A.R.S.*, UNPUBLISHED, No. 14-00-00237-CV, 2001 WL 930806, 2001 Tex.App.Lexis 5556, Juvenile Law Newsletter ¶ 01-3-26 (Tex.App.—Houston [14th Dist.] 2001, no pet.) approved

the admission of outcry testimony under this provision despite some uncertainty about whether the strict requirements of the statute were met. Cf. *In the Matter of V.B.*, UNPUBLISHED, Nos. 04-04-00167-CV & 04-04-00168-CV, 2005 WL 418710, 2005 Tex.App.Lexis 1424, Juvenile Law Newsletter ¶ 05-2-02 (Tex.App.—San Antonio 2005, no pet.) (outcry testimony sufficiently reliable as to time, content and circumstances to be admissible under Section 54.031).

Section 54.031(b)(2), like its criminal counterpart, Article 38.072, Code of Criminal Procedure, provides that the outcry witness is the first adult to whom the child or person with a disability made a statement about the offense. See *In the Matter of J.G.*, 195 S.W.3d 161 (Tex.App.—San Antonio 2006, reh'g denied).

In *In the Matter of Z.L.B.*, 102 S.W.3d 120 (Tex. 2003), the Texas Supreme Court addressed the question of who must prove that the witness was the first person to whom the child talked about the offense. The child told his daycare director that his older brother was "touching his privates." The director reported the incident to CPS, which called the police. The State offered the daycare director as an outcry witness over the objection of the respondent, who contended that the child had earlier told his mother about the touching but she had done nothing about it. It was not clear how many details the child told his mother.

Under Courts of Criminal Appeals' interpretations of the almost identical criminal statute, the child's statement to his mother must have contained some details about the offense to qualify as an outcry. The Supreme Court adopted that standard and further followed Court of Criminal Appeals' case law by holding that the burden was upon the respondent to show that the prior statement was a detailed one that qualified as outcry, which he failed to do in this case. Therefore, the daycare director qualified as an outcry witness. See also *In the Matter of J.G.*, 195 S.W.3d 161 (Tex.App.—San Antonio 2006, reh'g denied) (proper outcry witness was the first person told of the incident involving oral sex); *In the Matter of M.A.C.*, 339 S.W.3d 781 (Tex.App.–Eastland 2011, no pet.) (initial statements made to foster parents and case worker too general to amount to outcry statements); *In the Matter of J.R.*, UNPUBLISHED, No. 04-04-00925-CV, 2005 Tex.App.Lexis 10847, Juvenile Law Newsletter ¶ 06-3-5B (Tex.App.—San Antonio 2005, no pet.) (while complainant communicated alleged sexual abuse to his father, details were not described until he was interviewed by CPS); *In the Matter of C.D.G.*, UNPUBLISHED, No. 02-02-304-CV, 2003 WL 22251540, 2003 Tex.App.Lexis 8505, Juvenile Law Newsletter ¶ 03-4-08 (Tex.App.—Fort Worth 2003, no pet.) (no proof that CPS caseworker was not outcry witness where victim's statements to her mother and the police did not "in some discernible manner describe the alleged offense").

Is Section 54.031 the only vehicle for admission of an outcry statement? Not according to the Texarkana Court of Appeals. *In the Matter of M.A.M.*, UNPUBLISHED, No. 06-05-00103-CV, 2006 Tex.App.Lexis 3826, Juvenile Law Newsletter ¶ 06-3-1 (Tex.App.—Texarkana 2006, no pet.). At trial, M.A.M. lodged a general hearsay objection to the mother's outcry testimony. The State argued that the excited utterance exception to the hearsay rule applied. The juvenile court ruled in the State's favor, but neither party invoked Section 54.031. The Court of Appeals noted that an excited utterance is an independent exception to the hearsay rule, "so the outcry statute—whether the juvenile version or the adult version—is not needed for its admission." 2006 Tex.App.Lexis 3826 *5. As a result, the outcry testimony was admissible as an excited utterance even though Section 54.031 was not invoked.

Section 54.031(c)(2) requires the juvenile court to conduct a hearing outside the jury's presence to determine the reliability of the outcry statement. In *In the Matter of C.E.B.*, UNPUBLISHED, No. 09-04-128 CV, 2005 Tex.App.Lexis 5021, Juvenile Law Newsletter ¶ 05-3-20 (Tex.App.—Beaumont 2005, no pet.), the Beaumont Court of Appeals found that the trial court did not conduct the required hearing and therefore erred in admitting the outcry statement over a hearsay objection. However, it held that the same evidence was admitted through videotaped testimony of the victim and on cross-examination of the outcry witness. "Because the jury heard other evidence of sexual contact, we are unable to say the trial court's error probably caused the rendition of an improper judgment." 2005 Tex.App.Lexis 5021 *8. Cf. *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 WL 364250, Juvenile Law Newsletter ¶ 10-1-8A (Tex.App.—Amarillo 2010, reh'g overruled) (mother's hearsay testimony admissible as excited utterance; any failure to meet Section 54.031 requisites for outcry statement was not error).

Impeaching Testimony with Juvenile Adjudication. Under Rule 609(d) of the Texas Rules of Evidence, a juvenile adjudication is not admissible in a criminal trial to impeach the testimony of a witness. Prior to 1998, that same rule probably applied in juvenile proceedings. A 1998 amendment to Rule 609(d) impliedly authorizes the

admission of a juvenile adjudication to impeach a party-witness in a juvenile proceeding. As amended, Rule 609(d) provides, "Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule...." Thus, in a juvenile adjudication hearing, evidence of a prior adjudication is admissible to impeach the testimony of a witness, but only if the witness is the respondent or another party, as defined by Section 51.02(10), such as a parent or guardian.

Pre-Trial Photographic Identification Procedures. The rules regarding photographic identification are the same for juveniles as for adults. There is no right to counsel and the only requirements are that the array of photographs be fair and that no suggestions be made to the identifying witness. Physical pre-trial identifications, such as lineups and one person showups, are also subject to the same rules as in the case of adults. There is no right to counsel if the physical identification procedure is conducted before formal charges are filed. See *In the Matter of D.E.B.,* UNPUBLISHED, No. 03-95-00750-CV, 1996 WL 577866, 1996 Tex.App.Lexis 4439, Juvenile Law Newsletter ¶ 96-4-26 (Tex.App.—Austin 1996, no writ).

In *In the Matter of N.K.M.*, UNPUBLISHED, Nos. 04-09-0017 and 04-09-0018-CV, 2010 WL 3443210, Juvenile Law Newsletter ¶ 10-4-4A and B (Tex.App.—San Antonio 2010, no pet.), a detective investigating an aggravated assault with a deadly weapon case showed the victim an "eyes only" six-person photo lineup that included appellant's photograph. There was conflicting testimony at the suppression hearing about whether the detective told the victim the photo array contained a "person of interest." Appellant argued on appeal that the detective's statement rendered the lineup "impermissibly suggestive," thus tainting the victim's in-court identification. The San Antonio Court of Appeals disagreed:

> [W]e conclude that [the victim's] high degree of attention to his assailant's eyes for the entire encounter, his absolute certainty of his identification of N.K.M. from the photo array, and the short time period between the incident and the pre-trial identification all weigh heavily in favor of his in-court identification being reliable."

2010 WL 3443210 *4.

The Court of Appeals upheld the denial of appellant's motion to suppress.

Photographing juveniles is restricted by Chapter 58 of the Family Code. See Chapter 15 for a full discussion of Chapter 58 and juvenile records.

Special Evidentiary Rules. Section 54.03(e) provides three special evidentiary rules. In the event of a conflict with the Texas Rules of Evidence applicable to criminal cases or Chapter 38 of the Code of Criminal Procedure, the rules in Section 54.03(e) govern.

Privilege Against Self-Incrimination. Section 54.03(e) provides, "A child alleged to have engaged in delinquent conduct or conduct indicating a need for supervision need not be a witness against nor otherwise incriminate himself." Even though a respondent in a Title 3 proceeding is not technically being charged with a criminal offense, he or she still enjoys a constitutional privilege against compelled self-incrimination under the Fifth Amendment to the United States Constitution. This was established by the United States Supreme Court in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967). Section 54.03(e) simply provides statutory implementation of that constitutional privilege.

A prospective witness in a juvenile proceeding—whether a juvenile or an adult—has a Fifth Amendment privilege against self-incrimination. If timely and properly asserted, such a claim prevails over the Sixth Amendment Compulsory Process Clause right of the juvenile to compel testimony in his or her defense. See *McKaine v. State*, 170 S.W.3d 285, 293 (Tex.App.—Corpus Christi 2005, no pet.) (witness' assertion of Fifth Amendment rights and refusal to testify is not evidence and jury is not allowed to draw any inferences from such actions). The juvenile court has no authority to supplant the privilege by granting a prospective witness immunity without concurrence from the State. *F.D.B. v. State*, UNPUBLISHED, No. 14-95-00937-CV, 1997 WL 80610, 1997 Tex.App.Lexis 883, Juvenile Law Newsletter ¶ 97-2-05 (Tex.App.—Houston [14th Dist.] 1997, no writ).

Illegal Confession. Section 54.03(e) provides, "An extrajudicial statement which was obtained without fulfilling the requirements of this title or of the constitution of this state or the United States, may not be used in an adjudication hearing." This is an exclusionary principle dealing with out-of-court statements, admissions, and confessions by juveniles. In addition to requiring that such statements be obtained in compliance with the commands of the Texas and United States Constitutions, it directs that to be admissible such statements must have

been taken in compliance with the Family Code. The principal Family Code provisions that determine admissibility are Sections 51.095 and 52.02. See Chapter 16.

Illegally Seized Evidence. Section 54.03(e) provides, "Evidence illegally seized or obtained is inadmissible in an adjudication hearing." This is a statutory exclusionary rule, similar to Article 38.23 of the Code of Criminal Procedure. It means that if evidence was seized in violation of the United States Constitution, the Texas Constitution, or a statutory provision applicable to juvenile proceedings, that evidence cannot be admitted in an adjudication hearing. Examples are evidence obtained in an illegal stop, arrest, detention, or search of a juvenile respondent. See Chapter 17.

CHAPTER 12: Dispositional Powers and Procedures

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This chapter deals with dispositional powers and procedures in conduct indicating a need for supervision (CINS) cases and ordinary delinquent conduct cases. Dispositions of cases adjudicated under the determinate sentencing act are discussed in Chapter 21. Modifications of disposition, such as revocation of probation, are discussed in Chapter 13.

Timing of the Dispositional Hearing. Section 54.04 sets out the primary requirements for the dispositional hearing and outlines the dispositional powers of the juvenile court. Section 54.04(a) provides: "The disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing." While the disposition hearing must be separate from the adjudication hearing, there is no requirement that the disposition hearing be held on a different day than the adjudication hearing, nor does the child or the State have a right to have the dispositional hearing begin immediately after the adjudication hearing has concluded. The juvenile court, in its discretion, may schedule the disposition hearing for a different day or may begin the hearing as soon as the adjudication hearing is concluded.

Adjudication and disposition issues are distinct. The only question at adjudication is whether the respondent engaged in the conduct alleged in the petition; the only question at disposition is what to do with a respondent who has been adjudicated. It is improper to mix these issues. For example, in *In the Matter of C.L.*, 930 S.W.2d 935 (Tex.App.—Houston [14th Dist.] 1996, no writ), the Court of Appeals held it was reversible error for the juvenile court judge to permit the prosecutor to argue to the jury at adjudication that it should adjudicate the respondent for her own good to remove her from an abusive home.

The respondent in *In the Matter of P.W.*, UNPUBLISHED, No. 03-04-00562-CV, 2005 Tex.App.Lexis 6965 (Tex.App.—Austin 2005, no pet.) argued that his disposition hearing occurred before the adjudication hearing because the

date on the disposition order pre-dated the adjudication order by two days. The State argued the disposition date was incorrect due to a clerical error. A careful review of the record confirmed that the erroneous date was the result of either clerical or typographical error. Both hearings were held on the same date and the disposition hearing was conducted "separate, distinct, and subsequent to the adjudication hearing," as required by Section 54.04(a).

In 1984, the Texas Supreme Court promulgated guidelines for the disposition of juvenile and other civil cases. Those guidelines provide, with respect to a dispositional hearing, that it should be held "not later than 15 days following the adjudicatory hearing; however, the court may grant additional time in exceptional cases that require more complex evaluation." When it promulgated the guidelines, the Supreme Court stressed that they are not mandatory and that no penalties should be imposed if they are not followed in any particular case. For a fuller discussion, see Chapter 7.

Transfer to Different County for Disposition. Section 51.07 authorizes a juvenile court to transfer a case to the county of residence of the child for disposition. The idea of this procedure is that the most convenient county for adjudication is likely to be the county in which the offense occurred, while the best county for disposition is likely to be the county of the child's residence. If those counties are different, Section 51.07 permits the juvenile court, after adjudication, to transfer the case to the county of residence for disposition. Consent of the court of the county where the child resides is not required. In 2013, Subsection 51.07(b) was added to provide that, for children who are involved in both juvenile and child protective proceedings under Title 5 of the Family Code, the county of residence for transfer of disposition purposes is the county in which the court having continuing exclusive jurisdiction over the child is located, regardless of where the child actually lives.

In 1995, the Attorney General was asked whether the consent of the receiving juvenile court is required as a condition of transfer for disposition under former Section 51.07(a). The Attorney General replied that consent by the receiving court is not required, only consent by the child and his or her attorney. Attorney General Opinion No. LO 95-030 (1995). A 2005 amendment to the statute deleted the requirement that the child and the child's attorney consent to the transfer. Also see Chapter 27 for a detailed discussion of inter-county transfer of probation supervision, which is different from disposition transfer.

Evidence at the Disposition Hearing. A disposition hearing under Section 54.04(b) is a court hearing at which the testimony of witnesses may be presented in addition to the social history report. The social history report may not be admitted in a disposition hearing before a jury in a determinate sentence case, so witness testimony is the only evidence that may be presented. A witness properly qualified as an expert under the Rules of Evidence may offer his or her opinion in a disposition hearing as to the future dangerousness of the juvenile respondent. *In the Matter of J.K.R.*, 986 S.W.2d 278 (Tex.App.—Eastland 1998, pet. denied) (witness was Texas Youth Commission direct care employee).

Under proper circumstances, witnesses may be permitted at the disposition hearing to offer opinions as to the proper disposition of the case. For example, in *In the Matter of C.E.M.*, UNPUBLISHED, No. 05-98-01866-CV, 1999 WL 504551, 1999 Tex.App.Lexis 5326, Juvenile Law Newsletter ¶ 99-3-21 (Tex. App.—Dallas 1999, pet. denied), four witnesses—the juvenile probation officer who prepared the social history report, that officer's supervisor, a psychologist employed by the juvenile probation department, and an administrator from a sex offender residential treatment program from which the respondent had absconded—all testified that they recommended commitment to then-TYC. Each witness had a factual basis consisting of knowledge of the offense, the respondent, the prior treatment efforts that had been made, or the treatment that was locally available upon which to base his opinion.

The juvenile court in *In the Matter of A.L.S.*, UNPUBLISHED, No. 05-99-01244-CV, 2000 WL 567091, 2000 Tex.App.Lexis 3008, Juvenile Law Newsletter ¶ 00-2-22 (Tex.App.—Dallas 2000, pet. denied) permitted two probation department employees to testify before a jury in a determinate sentence aggravated robbery case that the respondent should be sentenced to then-TYC. The Court of Appeals upheld the admission of that testimony under Rule 702 of the Rules of Evidence as expert testimony that would assist the jury in deciding the question of whether, under Section 54.04(c), the child was in need of rehabilitation or the protection of the public or the child required that disposition be made.

The juvenile court also permitted the victim to testify that the respondent should not be permitted to live in the community. While the Court of Appeals held that the judge should not have allowed that testimony, it determined that the error was harmless.

In 2009, the legislature added Section 54.04(y) to allow a juvenile court to communicate with the Department of Family and Protective Services (DFPS) before a disposition hearing if the case involves a child for whom DFPS has managing conservatorship. This allows the juvenile court to obtain more information concerning youth who are "dually managed" by DFPS and the juvenile justice system. The provision also allows the parties to the suit affecting the parent-child relationship (SAPCR) in which DFPS is a party to participate in these types of communications.

A. The Social History Report

Section 54.04(b) authorizes the juvenile court to consider social history reports at the disposition hearing, as well as the testimony of witnesses:

> At the disposition hearing, the juvenile court, notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure, may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses.

Section 54.03(d) prohibits the juvenile court from viewing "a social history report or social service file" before making its adjudication decision. Once that decision is made, however, the information in the report or file, which can be assembled before the adjudication hearing has begun, may be considered by the court.

In 2007, the legislature added the words: "notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure," to Section 54.04(b). The amendment was intended to clarify that the juvenile court has wide latitude in considering a full range of evidence at the disposition hearing "notwithstanding" the Rules of Evidence or Chapter 37, permitting the court to hear evidence related to unadjudicated extraneous offenses. This change also clarifies existing law, which allows for a wide open dispositional hearing when disposition is made by the court rather than by a jury. There should be no due process violation even if a person who contributed to the report is not immediately available for the respondent to subpoena to testify, so long as the court permits a continuance of the proceedings to enable the respondent to compel that testimony.

Due Process Challenges. Section 54.04(b) authorizes the use of reports even though persons who have contributed information to them are not called by the State to testify.

In *Tyler v. State*, 512 S.W.2d 46 (Tex.Civ.App.—Beaumont 1974, no writ), the constitutionality of this provision was challenged on due process grounds. A social history report was introduced into evidence at disposition. It contained a report by a psychologist who had examined the juvenile. The psychologist was not called as a witness and did not testify. The court upheld the legality of using social history reports at disposition:

> In the disposition hearing, there is good reason to give the judge the latitude afforded by §54.04(b) to consider all factors in deciding what disposition to make. Any possible danger to the child is removed by the requirement that the court provide the attorney for the child with all written matter to be considered by the court in disposition. We conclude that §54.04 of Title 3 of the Family Code is not unconstitutional as denying due process.

512 S.W.2d at 48.

In *In the Matter of A.A.A.*, 528 S.W.2d 337 (Tex.Civ.App.—Corpus Christi 1975, no writ), the *Tyler* case was followed and the court upheld Section 54.04(b) against a challenge that the information in the report was hearsay. All of the information in a social history report is hearsay, but it is admissible in evidence because the legislature has authorized its use in order to provide a broad informational basis for dispositional decisions.

In *In the Matter of A.F.*, 895 S.W.2d 481 (Tex.App.—Austin 1995, no writ), the argument was made that the social history report should be received by the juvenile court subject to various requirements of the Texas Rules of Evidence. The objection was made that portions of the report were not relevant under Rule 402, that in parts the probative value did not outweigh the prejudicial effect under Rule 403, and that in other parts specific instances of misconduct were shown without meeting the requirements of Rules 404 and 405.

The Court of Appeals held that the legislature did not intend to subject the social history report to these evidentiary restrictions:

> In light of the Family Code's broad objective of addressing the needs of the juvenile while protecting the public in making a disposition, we conclude that the social history report described in section 54.04(b) is not subject to a strict application of the rules of civil evidence. Accordingly, the trial court did not abuse its

> discretion by refusing to exclude portions of the social history report based on the rules of evidence.

895 S.W.2d at 486. See also *In the Matter of D.W.D.*, UNPUBLISHED, No. 02-03-015-CV, 2004 WL 868681, 2004 Tex.App.Lexis 3623, Juvenile Law Newsletter ¶ 04-2-20 (Tex.App.—Fort Worth 2004, no pet.) (no requirement under Section 54.04(b) that social history report be formally introduced to be considered at disposition).

Right to Confront Witnesses. Violation of the right of confrontation was the complaint raised in *In the Matter of M.P.*, 220 S.W.3d 99 (Tex.App.—Waco 2007, no pet.) as to the State's introduction of a Juvenile Court Investigation Report at disposition. The question was whether the Sixth Amendment right of confrontation applies to the disposition phase of a juvenile delinquency proceeding.

> Because there are no findings to be made in the disposition phase which would invoke the Sixth Amendment right to jury trial recognized by *Apprendi* and its progeny and because of the importance of effectively addressing the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent as recognized by the Juvenile Justice Code, we conclude that a juvenile has no Sixth Amendment right of confrontation during the disposition phase (citation omitted). Such a conclusion preserves the flexibility inherent in the design of the juvenile justice system for ensuring that the needs of each child are adequately addressed in the disposition phase.

220 S.W.3d at 109.

The court noted, however, that a juvenile has a limited right of confrontation under the due process clause of the Fourteenth Amendment. As a result, the trial court must balance the accused's interest in confronting and cross-examining an adverse witness with the State's interest in not having to produce that witness. In this case, the trial court erred because it did not conduct this balancing inquiry but the error was harmless since the hearsay evidence was deemed sufficiently reliable and because Section 54.04(b) offers a statutory exception to the hearsay rule. "Thus, the Legislature has determined that such reports have some degree of reliability for purposes of determining the appropriate disposition in a particular case. In fact, such reports have been required for the disposition phase of juvenile delinquency proceedings since at least 1973." 220 S.W.3d at 111-12.

Since Section 54.04(b) requires a juvenile court to provide defense counsel with access to any reports the court will consider before the disposition hearing, a juvenile is afforded an opportunity to subpoena witnesses to challenge the accuracy of any information contained in the reports to be offered by the State.

In *In the Matter of M.H.V.-P.*, 341 S.W.3d 553 (Tex.App.–El Paso 2011, no pet.), appellant argued that the trial court violated his confrontation rights by admitting a witness statement into evidence at the adjudication hearing. The statement was introduced because the witness could not recall what had occurred during an assault. The State countered that the right to confrontation does not apply in an adjudication hearing since *M.P.* only addressed the issue in the context of a disposition hearing. The El Paso Court of Appeals disagreed, noting that juveniles are guaranteed the same constitutional rights as adults in criminal proceedings, including confrontation and cross-examination of witnesses. Nevertheless, the Court of Appeals held that the Confrontation Clause was not implicated since the witness was present and testifying at the time her statement was admitted.

Privilege Against Self-Incrimination. In *In the Matter of J.S.S.*, 20 S.W.3d 837 (Tex.App.—El Paso 2000, pet. denied), the respondent, a Mexican national, stipulated to possession of more than 5 pounds but less than 50 pounds of marijuana. While in detention after being adjudicated delinquent, he was interviewed by a juvenile probation officer for a social history report. The officer did not warn the respondent of his privilege against self-incrimination during the interview. When she talked with him about the facts of the case, he admitted his guilt and confessed to having committed two similar offenses. At disposition, the probation officer testified about the results of the interview. The juvenile court judge committed respondent to then-TYC. In doing so, the judge stated that, because of respondent's admission of the other two offenses, he did not consider him to be a fit candidate for the Mexican National Children's Program, under which respondent would have been placed on probation but supervised in his own home by a Mexican probation officer.

The El Paso Court of Appeals held that under the United States Supreme Court's opinions in *Mitchell v. United States*, 526 U.S. 314, 199 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the respondent had a Fifth Amendment privilege against self-incrimination at the dispositional phase of his juvenile proceedings. That privilege was violated in this case:

> Like the situation in *Estelle v. Smith,* the juvenile probation officer's interview of J.S.S. exceeded any arguably neutral purposes when she questioned him about the facts of the primary offense and the two extraneous offenses and then testified during the disposition hearing about his incriminating statements in support of her recommendation to the juvenile court that J.S.S. be committed to the Texas Youth Commission [now Texas Juvenile Justice Department]. See *Estelle*, 451 U.S. at 467, 101 S.Ct. at 1866. Under these facts, we conclude that the Fifth Amendment applied to the pre-disposition interview with J.S.S., and therefore, he should have been warned of his rights and informed that his statements could be used against him during the disposition hearing. It is undisputed that J.S.S. was not warned prior to the interview and he did not voluntarily waive his right against self-incrimination. Because the trial court considered these incriminating statements in making the decision to commit J.S.S. to T.Y.C. [TJJD] rather than place him in the Mexican National Children's Program, we find that J.S.S.'s Fifth Amendment privilege against self-incrimination was violated by the use of this information against him during the disposition hearing.

20 S.W.3d at 846-47.

It is clear under this opinion that when the respondent is in detention, any pre-dispositional interview must be preceded by *Miranda* warnings and a knowing and intelligent waiver of those rights. However, it is unclear whether the rationale of this opinion would extend to a pre-dispositional interview conducted when the respondent was not in custody. Under the *Miranda* rule (see Chapter 16), the fact of official custody creates an atmosphere of coercion that can be overcome only by the prescribed system of warnings. Because a juvenile not in custody still has a privilege against self-incrimination, a cautious juvenile probation officer will give those warnings even when the respondent is not in custody. Cf. *In the Matter of C.R.R.E.*, UNPUBLISHED, No. 08-02-00476-CV, 2004 WL 231928, 2004 Tex.App.Lexis 1184, Juvenile Law Newsletter ¶ 04-1-21 (Tex.App.—El Paso 2004, no pet.) (distinguishing *J.S.S.,* holding that the trial court reached its decision without taking into account prior instances of smuggling drugs into the U.S.); *In the Matter of T.A.*, UNPUBLISHED, No. 11-06-00342-CV, 2008 WL 4072394 (Tex.App.—Eastland 2008, review denied) (distinguishing *J.S.S.,* holding that the trial court did not consider any extraneous offense in deciding disposition).

Evidence from Adjudication Hearing. In *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App.—Dallas 1976, no writ), it was argued that the language of Section 54.04(b) restricted the juvenile court to considering the testimony of witnesses and the social history report in making a disposition decision. In particular, it was argued that the judge could not consider the evidence that had been introduced in the adjudication hearing in making the disposition decision. The appellate court rejected this argument:

> Section 54.04(b) is intended to broaden, not to contract, the pool of information upon which the court makes its decision.... Part of this information may indeed be evidence presented at the adjudication hearing. To hold that a juvenile court can never consider the record in the adjudication hearing in making its disposition would be unnecessarily burdensome in that witnesses would be forced to reappear and give evidence already heard by the court. Indeed, any evidence presented at the adjudication hearing bearing on a proper disposition of the minor is admissible at the disposition hearing.

542 S.W.2d at 921.

There is no reason in law for either party formally to move for the introduction at the disposition hearing of evidence heard during the adjudication hearing, although in some courts it is customary for the attorneys to do so. The juvenile court can consider adjudication evidence in making the disposition decision even if the adjudication evidence is not formally re-introduced at the disposition hearing.

Detention Center Documents. It is customary to think of Section 54.04(b) as speaking of a social history or pre-dispositional report, that is, a document prepared specifically to assist the juvenile court in disposing of the case. However, the language used in that section is not restricted to reports prepared specifically for disposition but includes all written reports from probation officers, professional court employees, or professional consultants.

In *In the Matter of J.A.W.,* 976 S.W.2d 260 (Tex.App.—San Antonio 1998, no pet.), the court received a file at disposition from the juvenile detention center where the respondent had been detained pending trial. The court granted counsel access to the documents and a recess to permit defense counsel the opportunity to review them.

The Court of Appeals held that the documents could, under those circumstances, be considered by the juvenile court in the disposition of the case:

> [T]he clerk's record contains numerous documents from the detention center. These documents are incident reports from the juvenile detention center documenting J.A.W.'s behavior. Although neither the State nor the defense offered these documents into evidence, the court has the authority under section 54.04(b) to consider reports from probation officers, professional court employees, and professional consultants. This is sufficiently broad to include juvenile detention officers. Clearly, the probation officer's file contained the detention report as the court obtained a copy from the probation officer present in the court room. Based on the latitude the court has to consider all factors, we find that the court could properly consider the detention report when determining the appropriate disposition.

976 S.W.2d at 264.

Reports from detention officers will often be incorporated into the social history or pre-dispositional report by the probation officer preparing that report. *J.A.W.* merely approves of the direct transmittal of that information to the judge. Cf. *In the Matter of J.L.H.*, UNPUBLISHED, No. 10-08-00126-CV, 2009 WL 201354, Juvenile Law Newsletter ¶ 09-2-05 (Tex.App.—Waco 2009, no pet.) (juvenile probation report and separate two-page report amounted to a "social history report" providing a full record available for review on appeal).

Access to Reports by Attorney. One of the safeguards discussed by the court in the *Tyler* case respecting social history reports was the requirement that the child's attorney be given access to them. Prior to 2013, Section 54.04(b) provided, in part:

> Prior to the disposition hearing, the court shall provide the attorney for the child with access to all written matter to be considered in disposition.

In *In the Matter of L.T.F.*, 656 S.W.2d 179 (Tex.App.—San Antonio 1983, no writ), the child's attorney contended that this provision had been violated because, although he had been provided the case history report before the disposition hearing, he had not been provided a psychiatric report that was also considered by the court. In the context of this case, the appellate court rejected this argument because the attorney had been put on notice of the existence of the psychiatric report:

> This provision was designed to allow a juvenile's counsel to examine the documents which the court will use in deciding the appropriate disposition. It was not designed to require the court to notify counsel that it intended to consider material of which counsel was already aware.... The case history, which counsel had already examined, made reference to "Dr. Mernin's evaluation." Consequently, counsel had notice of the Doctor's report.
>
> We do not read the statute as requiring the court to force counsel to examine a particular document. To "provide access" to records is to have the records available for an attorney's review. Counsel had notice of the material being considered by the court and could have examined them upon request. His statement that he had previously only examined part of it did not amount to a denial of access to the other material nor did it require any further affirmative action by the trial judge.

656 S.W.2d at 180-81.

In 2013, the access requirement in Section 54.04(b) was changed to require the court to provide the child's attorney with access to all written matter no less than two working days before the disposition hearing. Additionally, the access requirement was expanded to require the court to give the prosecutor the same access.

The access requirement of Section 54.04(b) contrasts with those for certification hearings in Section 54.02(e) and determinate sentence release/transfer hearings under Section 54.11(d). Since 2009, Section 54.02(e) requires that access be provided "[a]t least five days" before the hearing. In 2013, the legislature made the disclosure requirement for determinate sentence release/transfer hearings under Section 54.11(d) identical to the five-day disclosure time frame for certifications under Section 54.02(e). Although only two working days is required by law, the juvenile court should strive for more generous access than that, bearing in mind also that there will be occasions in which providing the minimum legally permissible access will require postponing the disposition hearing to enable counsel to evaluate the report effectively.

Timely Objection Requirement. In *In the Matter of R.D.P.*, UNPUBLISHED, No. 07-07-0400-CV, 2008 WL

4192705 (Tex.App.—Amarillo 2008, no pet.), appellant argued that the trial court erred by considering the probation officer's social history report before determining whether appellant had violated his conditions of probation. However, no objection was made to the State's offer of the report. "In fact, appellant affirmatively stated that he had 'no objection' to the admission of the evidence and actually thought that there was information in the report that the trial court 'needs to see.'" 2008 WL 4192705 *2. As a result, the Amarillo Court of Appeals held that the failure to object affirmatively waived any complaint concerning the admission of the report into evidence. See also Tex.R.App.P. 33.1(a); *In re R.S.C.*, 940 S.W.2d 750, 752 (Tex.App.—El Paso 1997, no pet.).

B. The Requirement of a Need for Disposition

The Finding That Must be Made in Every Case. Section 54.04(c) provides, in part:

> No disposition may be made under this section unless the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made. If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition.

The reference to the jury was added by the bill creating the determinate sentencing procedure. In a determinate sentence case in which the juvenile has elected jury disposition, the jury must be given the need for disposition question as a special issue and must make an affirmative finding to enable a disposition to be made. See Chapter 21.

In *In the Matter of E.F.*, 535 S.W.2d 213 (Tex.Civ.App.—Corpus Christi 1976, no writ), the juvenile was adjudicated delinquent for burglary and committed to TYC [now TJJD]. On appeal, he contended that there was insufficient evidence for the juvenile court to find under Section 54.04(c) that he was in need of rehabilitation. The appellate court concluded that there was evidence to support the juvenile court's finding:

> [A] deputy sheriff, a city policeman, and a probation officer all testified that the [juvenile's] reputation for being a peaceable and law-abiding citizen was bad. In the record is a document called a "Pre-Dispositional Report" executed by two probation officers. The trial court was entitled to consider this report under §54.04(b) of the Family Code. That report reflects that the appellant's school attendance was irregular and that his grades were poor to failing; that he had no hobbies nor school activities. Further, the report shows the appellant's lack of remorse and his indifference toward his commission of the crime of burglary. We hold that the aforegoing is some evidence of the appellant's need for rehabilitation.

535 S.W.2d at 214-15.

In *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ), the argument was made that Section 54.04(c) violates due process of law because it does not state whether the need for disposition must be shown beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence. The Court of Appeals rejected this argument, with the comment:

> Due process is satisfied in the disposition hearing when the juvenile is represented by counsel, has full opportunity to cross-examine and present witnesses, and is fully aware of the nature of the proceedings.... None of these elements is denied by §54.04(c). Additionally, the findings made under §54.04(c) are subject to review for sufficient evidence to support them. 779 S.W.2d at 957.

Appellant also argued that the requirement of a finding of a need for disposition violates the Equal Protection Clause because such a finding is not required in criminal trials. The Court of Appeals rejected this argument:

> [R]ather than placing juveniles at a disadvantage compared to adult criminal defendants, the statute places an extra burden on the State when seeking disposition of juveniles. In the criminal justice system, a finding of guilt automatically leads to sentencing. However, in the juvenile justice system, an adjudication of delinquency does not lead to disposition unless the court or jury first makes the necessary findings.

779 S.W.2d at 957.

In *In the Matter of A.P.,* 59 S.W.3d 387 (Tex.App.—Fort Worth 2001, no pet.), the juvenile court made written findings that there was a need for disposition but did not make oral findings to the same effect. The Court of Appeals held that oral findings are not required; written findings, presumably incorporated into the court's judgment, suffice.

The Finding Regarding Home Conditions. In 1993, the legislature added a second determination that must be made as part of the need for disposition determination. It amended Section 54.04(c) to add:

> No disposition placing the child on probation outside the child's home may be made under this section unless the court or jury finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

This finding is not required to be made unless the disposition of the case entails placing the child on probation outside his or her home, whether the placement will be a secure or nonsecure location.

C. Findings Required for Probation Placement or TJJD Commitment

In 1993, the legislature amended prior provisions dealing with findings required to remove a child from home and enacted the current version of those requirements. Section 54.04(i)(1) provides, in part:

> If the court places the child on probation outside the child's home or commits the child to the Texas Juvenile Justice Department, the court: ...shall include in its order its determination that:
>
> (A) it is in the child's best interests to be placed outside the child's home;
>
> (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The requirement that the first two findings be made derives from federal law. 42 U.S.C. Sections 672(a) and 671(a)(15) (2009). Under federal law, money is available to the states for certain children who are placed outside their homes, in foster homes or elsewhere, but only upon judicial findings that removal from the home is necessary. See *In the Matter of T.A.W.*, 234 S.W.3d 704 (Tex.App.—Houston [14th Dist.] 2007, pet. denied) (concurring opinion).

All Three Findings Must Be Made. The juvenile court must make each of these three findings in every case in which the child is removed from his or her home by probation placement or TJJD commitment. The statute requires that the finding be recited in the court's probation order or commitment order. In *In the Matter of M.R.L.,* UNPUBLISHED, No. 14-00-00797-CV, 2001 WL 1249302, 2001 Tex.App.Lexis 7008, Juvenile Law Newsletter ¶ 01-4-38 (Tex.App.—Houston [14th Dist.] 2001, no pet.), the juvenile court made all three required findings orally but included only the second one in the order of commitment. The Court of Appeals held it could reform the judgment to conform it to the oral findings and did so without remand or abatement. It affirmed the judgment of the court as reformed.

In *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ), a determinate sentence case, the juvenile court found that it was in the best interest of the child to be sentenced to 20 years, initially to be served in TYC [now TJJD] with possible transfer later to the Texas Department of Criminal Justice (TDCJ). However, the court had not made any finding as to whether reasonable efforts had been employed to keep the child at home. The Court of Appeals remanded the case for a new disposition hearing so that this finding could be made. Cf. *In the Matter of L.L.,* UNPUBLISHED, No. 07-08-0241-CV, 2009 Tex.App.Lexis 904, Juvenile Law Newsletter ¶ 09-2-03 (Tex.App.—Amarillo 2009, no pet.) (distinguishing *J.T.H.* because trial court made oral, not written, findings).

Finding May Be Based on Adjudication Evidence. In order to make the findings required to authorize removing a child from his or her home, the judge may consider evidence that was introduced at the adjudication phase of the case as well as evidence introduced during the disposition phase. *In the Matter of M.S.S.,* UNPUBLISHED, No. 04-95-00593-CV, 1996 WL 81926, 1996 Tex.App.Lexis 762, Juvenile Law Newsletter ¶ 96-2-01 (Tex.App.—San Antonio 1996, no writ) (juvenile court judge commented on violent nature of the sexual assault offense for which the juvenile respondent was adjudicated).

Evidence Required to Support Three Findings. When a juvenile court uses a disposition that removes a child from his or her home, each of the three findings must be made. If there is an appeal from the juvenile court to a Court of Appeals, the appellate court can be asked to review whether there was sufficient evidence before the juvenile court to support the findings that were made. If the appellate court concludes there was not sufficient evidence to support a finding, it will remand the case to the juvenile court for a new disposition hearing. Opinions addressing these issues are important because they set minimum standards for making these findings that are instructive to juvenile courts in future cases.

Cases Finding Insufficient Evidence. The leading case is *In the Matter of A.S.*, 954 S.W.2d 855 (Tex.App.—El Paso 1997, no pet.). A.S. was committed to then-TYC [TJJD] for burglary of a building. A police officer had interrupted a burglary in which A.S. was one of three perpetrators. A.S. fled; shortly thereafter, the officer was attacked by a co-actor, whom the officer shot and killed. A.S. was charged with felony murder, aggravated assault, and burglary of a building, but the jury adjudicated him only of burglary of a building. A.S. had no prior referrals to the juvenile court and had a stable home life. In the social history report, the probation officer recommended probation. There was some evidence A.S. was involved in a street gang in El Paso, which was one reason the family moved back to Midland, where the burglary was committed. The Court of Appeals found the evidence was factually insufficient to support any of the three required findings.

In *In the Matter of K.L.C.*, 972 S.W.2d 203 (Tex.App.—Beaumont 1998, no pet.), the respondent was adjudicated for aggravated assault and committed to then-TYC [TJJD]. She claimed the evidence was insufficient to support the juvenile court's findings that home conditions would not permit probation at home and that reasonable efforts had been made to avoid removal from home. The Court of Appeals found that the home conditions were not adequate but that reasonable efforts to avoid TYC commitment had not been made:

> The record does contain some evidence that K.L.C.'s parent could not provide adequate supervision. K.L.C. was given home detention prior to the disposition hearing but was placed back in detention for failure to comply with the conditions of home detention. No evidence was introduced indicating K.L.C.'s parent would supervise her as needed to meet probation conditions after failing to do so in regards to home detention. Viewing the evidence in the light most favorable to the trial court's ruling, we find the evidence legally sufficient to support the trial court's determination that K.L.C.'s parent could not provide adequate supervision.
>
> As to K.L.C.'s second contention that there was no evidence reasonable efforts had been made to prevent or eliminate the need to remove her from the home, we agree. No evidence was introduced that any effort was made to find an alternative to committing K.L.C. to the custody of TYC. On the contrary, when questioned whether efforts "to see whether or not your agency can rehabilitate her instead of sending her to TYC" were made, [Juvenile Probation Officer] Hall answered, "No." Accordingly, the trial court's finding that "reasonable efforts were made" is wholly unsupported by the record. "While we may not substitute our decision for the trial court's decision, we also may not affirm its decision when there is no evidence in the record to support the conclusions made." *In the Matter of L.G.*, 728 S.W.2d 939, 945 (Tex.App.—Austin 1987, writ ref'd n.r.e.). After all, "[o]ne of the many reasons underlying the Tex.Fam.Code §54.04(f) requirement that the trial court specifically state its reasons for the disposition ordered is that it furnishes a basis for the appellate court to determine whether the reasons recited are supported by the evidence and whether they are sufficient to justify the order of disposition.

972 S.W.2d at 206.

The Court of Appeals in *K.L.C.* interpreted the "reasonable efforts" requirement to mandate that there be evidence in the record that dispositional alternatives to removal of the child from home were explored and were determined not to be available or to be unsuitable.

The respondent in *In the Matter of J.S.,* 993 S.W.2d 370 (Tex.App.—San Antonio 1999, no pet.) admitted guilt of the aggravated sexual assault of a seven-year-old relative. At the time of the offense, he was living with his mother, but then moved to his father's home in New Mexico and started on a program of therapy. The Court of Appeals held that there was insufficient evidence to support the juvenile court's removal from home findings because of the action the family took after the offense was committed:

> A review of the record reflects that appellant was living with his father for over a year in New Mexico prior to the hearings on adjudication and disposition. During that time, at his father's initiative, appellant attended individual, group, and family counseling three times a week. Moreover, appellant's father actively participated in his son's therapy. Appellant's progress was noted by counselors, specifically pointing to his ability to recognize what he did wrong, communicate his offense, and express remorse for his actions. There was no evidence that appellant's father could not provide the quality of care and level of support and supervision which J.S. needed.... Nor was there evidence to suggest that appellant responded negatively to therapy, or that he resisted therapy.... Finally, there was no evidence J.S. had since re-offended or committed another offense since the charged offense of aggravated sexual

> assault. Instead, the record is replete with evidence indicating appellant's good grades, school involvement and general good character while he has been living in New Mexico with his father. And while evidence of a strained relationship existed at the beginning of J.S.'s stay with his father, from the record, it appeared that their relationship had grown closer near the time of the disposition hearing.
>
> We do not ignore the gravity of the offense with which J.S. was charged, and the impact the sexual assault had on the victim. Neither can we ignore appellant's admission of guilt for the offense. However, we also must recognize and acknowledge the steps taken by appellant and his family, specifically his father, in facing the problem at hand and undertaking reasonable efforts to combat it....
>
> Clearly, here we have a juvenile who did more than exhibit temporary remorsefulness because he was caught. He acknowledged and accepted what he did wrong. More importantly, with the help of his family, he was then placed in an environment that provided the necessary supervision and support he needed to address his problem.

993 S.W.2d at 374-75.

The question of whether there was sufficient evidence of reasonable efforts made to prevent or eliminate removal of the juvenile from home arose in a determinate sentence intoxication manslaughter case. *In the Matter of A.D.,* 287 S.W.3d 356 (Tex.App.—Texarkana 2009, reh'g overruled). The State's case during the disposition phase rested primarily on the testimony of a juvenile probation officer who did not think probation at home would succeed due to the family's Mennonite culture. The Court of Appeals held this testimony alone was not enough to support the required findings under Section 54.04(i) and remanded the case for a new disposition hearing.

> We do not believe this perception substitutes for factual evidence of some effort to avoid the need for the removal of the juvenile from the family home. We agree that a serious crime was committed resulting in the death of a young person. But we must apply the statutes as written, and we are not authorized to modify the requirements of the law.
>
> There is no evidence to show that reasonable efforts were made to prevent or eliminate removing A.D. from his home. Indeed, there is no evidence any effort was made to avoid removing A.D. The trial court did not have sufficient evidence upon which to exercise its discretion to find that reasonable efforts were made to prevent or eliminate removal of A.D. from his home. In making that finding, the trial court abused its discretion.

287 S.W.3d at 368.

Cases Finding Sufficient Evidence. In *In the Matter of T.K.E.*, 5 S.W.3d 782 (Tex.App.—San Antonio 1999, no pet.), the respondent was adjudicated for aggravated sexual assault of a child. He was committed to then-TYC [TJJD] on recommendation of the probation officer so that he could receive treatment in TYC's 'sexual offender treatment program. Alternative treatment programs were considered, but the probation officer did not regard them as highly as the TYC program. The Court of Appeals upheld removal from home to enable participation in TYC treatment program:

> The scant evidence that is before us...supports the juvenile court's section 54.04(i) findings. The evidence clearly demonstrates that the incident that formed the basis of A.E.'s complaint was not the first of its kind, thus demonstrating T.K.E.'s need for treatment as a sexual offender. Even T.K.E.'s witnesses acknowledged his need for treatment. The record also reflects that, while there are other treatment centers available, the Texas Youth Commission's 'intensive sexual offender's program is the most highly rated and, therefore, the best able to produce positive results. Given the serious and repeated nature of T.K.E.'s conduct, the best treatment possible is in order.
>
> Further, treatment at the other centers mentioned by the juvenile probation officer would still require T.K.E. to be placed outside of his home as both of the other centers are outside of San Antonio. When asked how she could give T.K.E. support if he were placed on probation, T.K.E.'s mother mentioned a place to live and made a vague reference to counseling. Again, the record reflects that the type of counseling T.K.E. needs is not available as part of the juvenile probation department in San Antonio. Accordingly, if treatment is in T.K.E.'s best interest, and the record certainly supports the fact that it is, there is no alternative but to remove T.K.E. from his home so that he may receive the best treatment possible.

5 S.W.3d at 785-86. See also *In the Matter of M.L.B.*, 184 S.W.3d 784 (Tex.App.—Amarillo 2006, no pet.) (lack of supervision at home and possibility of sex offender treatment supported commitment to TYC); *In the Matter of A.W.*, 147 S.W.3d 632 (Tex.App.—San Antonio 2004, no pet.) (no abuse of discretion in committing youth to TYC to receive sex offender therapy rather than placing him with grandparent).

The fact that the juvenile court did not follow the recommendation of the probation department in committing the respondent to then-TYC [TJJD] does not by itself show a lack of evidentiary support for removal from home. See *In the Matter of D.W.H Jr,* UNPUBLISHED, No. 04-09-00591-CV, 2010 Tex.App.Lexis 7543 (Tex.App.—San Antonio 2010) (no abuse of discretion to commit youth to TYC since available secured placement facilities unsuited to handle youth's behavior); *In the Matter of A.C.,* UNPUBLISHED, No. 02-09-278-CV, 2010 Tex.App.Lexis 3242, Juvenile Law Newsletter ¶ 10-2-12 (Tex.App.—Fort Worth 2010, no pet.) (no abuse of discretion to commit youth to TYC [TJJD] despite support of probation department and extended family); *In the Matter of J.A.*, UNPUBLISHED, No. 04-09-00556-CV, 2010 WL 816198, Juvenile Law Newsletter ¶ 10-2-7 (Tex.App.—San Antonio 2010, no pet.) (TYC commitment supported despite probation staffing committee recommendation for GANG ISP and KAPS program); *In the Matter of D.L.T.*, UNPUBLISHED, No. 03-06-0069-CV, 2008 Tex.App.Lexis 5217 (Tex.App.—Austin 2008, no pet.) (TYC commitment supported despite recommendations for placement in residential treatment center); *In the Matter of C.M.G.*, UNPUBLISHED, No. 04-99-00044CV, 1999 WL 1125423, 1999 Tex.App.Lexis 9084, Juvenile Law Newsletter ¶ 00-1-05 (Tex.App.—San Antonio 1999, no pet.) (commitment supported by violent nature of two robberies committed by respondent); *In the Matter of J.S.,* UNPUBLISHED, No. 04-99-00551-CV, 2000 WL 5252, 2000 Tex.App.Lexis 42, Juvenile Law Newsletter ¶ 00-1-13 (Tex.App.—San Antonio 2000, pet. denied) (aggravated sexual assault conduct requires TYC structure for rehabilitation); *In the Matter of C.R.H.,* UNPUBLISHED, No. 03-02-00238-CV, 2003 WL 192103, 2003 Tex.App.Lexis 869, Juvenile Law Newsletter ¶ 03-1-23 (Tex.App.—Austin 2003, no pet.) (repeated theft adjudications and poor school record justified TYC commitment). See also *In the Matter of K.K.D.*, UNPUBLISHED, No. 03-03-00702-CV, 2004 WL 1792399, 2004 Tex.App.Lexis 7166, Juvenile Law Newsletter ¶ 04-3-29 (Tex.App.—Austin 2004, pet. denied) (no abuse of discretion in committing youth to TYC considering violent nature and gravity of conduct and all the evidence); *In the Matter of M.A.F.*, UNPUBLISHED, No. 14-03-00698-CV, 2004 WL 1661009, 2004 Tex.App.Lexis 6740, Juvenile Law Newsletter ¶ 04-3-23 (Tex.App.—Houston [14th Dist.] 2004, no pet.) (no abuse of discretion in finding TYC commitment for assault on public servant was in youth's best interest to provide highly structured environment with constant supervision and control).

Evidence of mental instability can justify removal from home. See *In the Matter of C.F.*, UNPUBLISHED, No. 03-04-00052-CV, 2005 Tex.App.Lexis 4905, Juvenile Law Newsletter ¶ 05-3-18 (Tex.App.—Austin 2005, no pet.) (no abuse of discretion to commit youth to TYC rather than a residential treatment center for mental health needs); *In the Matter of L.N.,* UNPUBLISHED, No. 01-99-00733-CV, 2000 WL 72536, 2000 Tex.App.Lexis 618, Juvenile Law Newsletter ¶ 00-1-21 (Tex.App.—Houston [1st Dist.] 2000, no pet.) (respondent, who attempted suicide, was diagnosed as bipolar).

The length of time a juvenile may be placed on probation may also be a factor in the court's decision to order commitment to TJJD. In *In the Matter of B.R.*, UNPUBLISHED, No. 04-06-00018-CV, 2006 Tex.App.Lexis 5964, Juvenile Law Newsletter ¶ 07-2-3 (Tex.App.—San Antonio 2006, no pet.), appellant's 18th birthday was just over two months from the disposition hearing, thus allowing only two months of possible probation. Emphasizing that this was not enough time for rehabilitation to occur and that it was too short a probation period for a felony adjudication, the trial court concluded that commitment to TYC was in B.R.'s best interest.

In *In the Matter of M.A.C.*, 999 S.W.2d 442 (Tex.App.—El Paso 1999, no pet.), the juvenile, a Mexican national, was apprehended attempting to smuggle between 50 and 2,000 pounds of marijuana into the United States. He was committed to TYC and claimed that the home removal findings were not supported by evidence, just as in *A.S.* The Court of Appeals disagreed. In this case, the probation officer recommended TYC. Because the juvenile's home situation was inadequate and his mother admitted she could not control him, he did not qualify for supervision in Mexico under the Mexican National Children's Program, an alternative that the probation officer had explored. The lack of parental control distinguished this case from *A.S.* See also *In the Matter of E.F.Z.R.*, 250 S.W.3d 173 (Tex.App.—El Paso 2008, no pet.) (no abuse of discretion in committing Mexican national to TYC since court made the mandatory findings under Section 54.04(i)(1) and youth was ineligible for services through the juvenile probation department); *In the Matter of J.B.D.*, UNPUBLISHED, No. 08-02-00308-CV, 2003 WL 22283154, 2003 Tex.App. Lexis 8570, Juvenile Law Newsletter ¶ 03-4-07 (Tex.App.—

El Paso 2003, no pet.) (no abuse of discretion in committing youth to TYC since there was no out-of-home placement option available because he was a Canadian citizen without legal status in the United States); *In the Matter of J.D.T.C.*, UNPUBLISHED, No. 08-03-00179-CV, 2004 WL 722255, 2004 Tex.App.Lexis 3025, Juvenile Law Newsletter ¶ 04-2-12 (Tex.App.—El Paso 2004, no pet.) (no abuse of discretion in committing Mexican youth to TYC since he was not properly supervised at home and there were no suitable alternative placement programs available).

For additional cases supporting out-of-home placements see *In the Matter of C.G.*, 162 S.W.3d 448 (Tex.App.—Dallas 2005, no pet.) [no abuse of discretion in committing youth to TYC due to aggravated nature of offense and evidence supporting each of the three required findings under Section 54.04(i)]; *In the Matter of A.M.C.,* UNPUBLISHED, No. 04-11-00116-CV, 2011 WL 6090077, Juvenile Law Newsletter ¶ (Tex.App.—San Antonio 2011, no pet.) and *In the Matter of A.C.,* UNPUBLISHED, No. 02-09-278-CV, 2010 Tex.App.Lexis 3242, Juvenile Law Newsletter ¶ 10-2-12 (Tex.App.—Fort Worth 2010, no pet.) (no abuse of discretion to commit youth given violent circumstances of case and youth's turbulent history); *In the Matter of J.W.M.,* UNPUBLISHED, No. 07-07-0397-CV, 2008 WL 2065071, 2008 Tex.App.Lexis 3551, Juvenile Law Newsletter ¶ 08-3-2 (Tex.App.—Amarillo 2008, no pet.) (no abuse of discretion in committing youth since treatment center "home" did not provide juvenile the statutorily specified resources for meeting the conditions of probation); *In the Matter of K.W.*, UNPUBLISHED, No. 05-04-01262-CV, 2005 Tex.App.Lexis 2882, Juvenile Law Newsletter ¶ 05-3-04 (Tex.App.—Dallas 2005, no pet.) (no abuse of discretion in committing youth to TYC due to continuing aggressive behavior, previous placement outside the home, refusal to go to school, associating with negative peers, and history of being a runaway); *In the Matter of J.E.Z.*, UNPUBLISHED, No. 01-05-00116-CV, 2006 Tex.App.Lexis 5200, Juvenile Law Newsletter ¶ 06-3-9 (Tex.App.—Houston [1st Dist.] 2006, no pet.) (record indicating lack of requisite quality of care and supervision in the home supported placement outside the home).

Legal and factual sufficiency of the evidence to support removing a youth from his home for commitment to then-TYC [TJJD] was at issue in *In the Matter of T.E.G.*, 222 S.W.3d 677 (Tex.App.—Eastland 2007, no pet.). A jury found that T.E.G. engaged in delinquent conduct by committing assault and injury to a child. T.E.G.'s probation officer testified that her department's recommendation of TYC was based on the two assaults, numerous disciplinary problems at school, and T.E.G.'s need for specialized treatment. The youth's mother testified that she wanted her son to remain on probation at home but admitted that he exhibited poor impulse control and continued behavioral problems. The juvenile court's order included the three required findings under Section 54.04(i). Additionally, the court noted that the mother, the school district, and the juvenile probation department had made reasonable efforts to prevent T.E.G. from being removed from his home. It also took into account the evidence at the adjudication hearing concerning the severity of the assaults. The Court of Appeals held that the evidence was legally and factually sufficient to support the trial court's finding that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home.

In *In the Matter of J.W.*, UNPUBLISHED, No. 03-96-00687-CV, 1997 WL 619804, 1997 Tex.App.Lexis 5276, Juvenile Law Newsletter ¶ 97-4-22 (Tex.App.—Austin 1997, no pet.), the Court of Appeals held that removal from home findings were supported by evidence of TYC parole violations for curfew, evading detention, and possession of marijuana. Accordingly, recommitment to TYC for credit card abuse was supported by the evidence. Similarly, in *In the Matter of A.P.*, UNPUBLISHED, No. 03-97-00731-CV, 1998 WL 694913, 1998 Tex.App.Lexis 6228, Juvenile Law Newsletter ¶ 98-4-18 (Tex.App.—Austin 1998, no pet.) the fact that the respondent was on intensive supervision probation when he committed the unauthorized use of a motor vehicle offense for which he was adjudicated supported the juvenile court's removal from home findings. See *In the Matter of T.A.F.*, 977 S.W.2d 386 (Tex.App.—San Antonio 1998, no pet.) (prior referrals and prior TYC commitment supported removal from home findings).

Cases Involving Placement Outside the Home. Although most cases in which appellate review of removal from home findings are sought involve commitments to TJJD, any dispositional order that removes the child from his or her home must be supported by the three required findings, which must in turn be based on evidence. *In the Matter of B.M.*, 1 S.W.3d 204 (Tex.App.—Tyler 1999, no pet.) (finding sufficient evidence to support the three findings in a case in which the child was placed on probation at home but with a condition that he spend 90 days in a residential boot camp).

The respondent in *In the Matter of M.F.*, UNPUBLISHED, No. 04-99-00180-CV, 2000 WL 1053909, 2000 Tex.App.Lexis 4876, Juvenile Law Newsletter ¶ 00-3-25 (Tex.App.—San Antonio 2000, no pet.) was adjudicated for

assault on a police officer. She was placed on probation but removed from her home. The Court of Appeals held that testimony about her repeated disruptive conduct in school, involving 20 school infractions, justified removal from home.

The juvenile court in *In the Matter of R.E.A.,* UNPUBLISHED, No. 13-01-129-CV, 2002 WL 992656, 2002 Tex.App.Lexis 3523, Juvenile Law Newsletter ¶ 02-223 (Tex.App.—Corpus Christi 2002, no pet.) placed the respondent on probation in a boot camp. The Court of Appeals upheld the out-of-home placement on the ground that respondent had been referred to the juvenile court seven times, had several disciplinary violations while in detention, and was becoming increasingly more difficult for his parents to control. *In the Matter of J.V.M.,* UNPUBLISHED, No. 08-09-00114-CV, 2010 Tex.App.Lexis 4704 (Tex.App.—El Paso 2010, no pet.) (out-of-home placement supported by near seven-year history of delinquency, probation in and out of the home, and previous TYC commitment).

In an unusual case, a juvenile was placed on probation in the custody of his probation officer for 18 months based on an adjudication for the delinquent conduct offense of contempt of court after violating the court order of a justice of the peace. *In the Matter of E.T.*, UNPUBLISHED, No. 04-03-00796, 2004 WL 2533552, 2004 Tex.App.Lexis 9929, Juvenile Law Newsletter ¶ 04-4-19 (Tex.App.—San Antonio 2004, no pet.). Although the case involved E.T.'s first referral to juvenile court, the court noted that he had been unable to comply with the terms of his probation as ordered by the justice of the peace. Additionally, E.T.'s mother had testified that she was unable to control his behavior and that he should be placed outside the home. Under these facts, it was held that placing E.T. outside the home was not an abuse of discretion. See also *In the Matter of M.J.A.*, 155 S.W.3d 575 (Tex.App.—San Antonio 2004, no pet.) (no abuse of discretion in placing youth on probation outside home where it was shown that protection of the community could not be achieved in his home environment); *In the Matter of J.W.*, UNPUBLISHED, No. 05-06-00959-CV, 2007 Tex.App.Lexis 368 (Tex.App.—Dallas 2007, no pet.) (no abuse of discretion in placing youth on probation at treatment facility since home and family could not provide well-structured environment); *In the Matter of X.E.S.,* UNPUBLISHED, No. 04-09-00715-CV, 2010 Tex.App.Lexis 7549 (Tex.App.—San Antonio 2010) (no abuse of discretion to place youth outside the home given probation officer's recommendation, previous offense history, and need for structured environment); *In the Matter of J.D.B.,* UNPUBLISHED, No. 11-08-00164-CV, 2009 Tex.App.Lexis 6540 (Tex.App.—Eastland 2009, no pet.) (no abuse of discretion in placing youth in lock-down sex offender treatment program outside the home).

The San Antonio Abuse of Discretion Standard. The San Antonio Court of Appeals decided en banc in *In the Matter of K.T.*, 107 S.W.3d 65 (Tex.App.—San Antonio 2003, no pet.), that it would no longer apply legal and factual sufficiency standards to the three required findings. Instead, it would simply ask whether the trial court had abused its discretion in selecting the disposition it did (in this case TYC commitment). The opinion is confusing and unpersuasive. At the end of the day, after refusing to apply sufficiency review standards, the court does exactly that in upholding the commitment. Two justices concurred on the ground that there was sufficient evidence to uphold the three findings. See also *In the Matter of J.G.*, 195 S.W.3d 161 (Tex.App.—San Antonio 2006, reh'g denied) (applying *K.T.* abuse of discretion standard). Cf. *In the Matter of T.G.*, UNPUBLISHED, No. 04-04-00307-CV, 2004 WL 2533632, 2004 Tex.App.Lexis 9923, Juvenile Law Newsletter ¶ 04-4-09 (Tex.App.—San Antonio 2004, no pet.) (no abuse of discretion to place juvenile outside the home in a residential care facility rather than with parents on a monitor); *In the Matter of R.R.*, UNPUBLISHED, No. 04-03-00030-CV, 2003 WL 21467235, 2003 Tex.App.Lexis 5282, Juvenile Law Newsletter ¶ 03-3-14 (Tex.App.—San Antonio 2003, no pet.) (upholding a TYC commitment under the abuse of discretion standard); *In the Matter of J.L.R.*, UNPUBLISHED, No. 04-04-00199-CV, 2006 Tex.App.Lexis 11044 (Tex.App.—San Antonio 2006, no pet.).

D. Dispositional Powers

Once the juvenile court makes the findings required by Sections 54.04(c) and 54.04(i), it may use the dispositional powers offered by the Family Code. It is convenient to group those into seven categories: (1) probation; (2) TJJD commitment; (3) driver's license suspension; (4) orders affecting parents and others, (5) orders for restitution; (6) sex offender registration; and (7) HIV testing.

Under 2007 legislative reforms, under no circumstance may a juvenile be committed to TJJD for a misdemeanor. If the juvenile court determines disposition is warranted for delinquent conduct that is a jailable misdemeanor or CINS, the court may place the child on probation but may not commit the child to TJJD. If the child was adjudicated for felony conduct, the court may choose between probation and TJJD commitment. It can also use the other dispositional powers in conjunction with either probation or

a commitment, subject, of course, to the legal limitations placed upon those powers.

1. Probation

If the child was adjudicated to have engaged in delinquent conduct or CINS, the juvenile court may place him or her on probation.

a. Probation Alternatives

The juvenile court may allow a child on probation to live at home or may place the child anywhere except TJJD. Section 54.04(d)(1) specifies four types of probation placements:

> (A) in the child's own home or in the custody of a relative or other fit person; or
>
> (B) subject to the finding under Subsection (c) [of this section] on the placement of the child outside the child's home, in:
>
> (i) a suitable foster home;
>
> (ii) a suitable public or private residential treatment facility licensed by a state governmental entity or exempted from licensure by state law, except a facility operated by the Texas Juvenile Justice Department; or
>
> (iii) a suitable public or private post-adjudication secure correctional facility that meets the requirements of Section 51.125, except a facility operated by the Texas Juvenile Justice Department.

In 2013, Section 54.04(d)(5) was added to specify that juveniles on probation may be placed in a nonsecure correctional facility registered with TJJD. Although this subsection does not include the language that such placement is subject to the findings in Section 54.04(c) like subsection (d)(1) does, because that section is applicable to all out of home placements, the findings must be made prior to placement of a child on probation in a nonsecure correctional facility. In addition to the findings of Subsection (c), the court is required to make the removal from home findings of Section 54.04(i) to be authorized to place a child on probation outside the child's home. See the discussion earlier in this chapter.

The primary legal difference between placement of a child on probation in a facility and commitment to TJJD is that the juvenile court retains control of the probation placement and may modify it like any other probation condition while a commitment gives jurisdiction of the case exclusively to TJJD.

In 2001, the legislature enacted two restrictions on the use of secure confinement as a condition of probation. Section 54.04(o)(2) prohibits placing a status offender in a post-adjudication secure correctional facility except as authorized for violation of a valid court order under Subsection (n). Status offender is defined by Section 51.02(15) to be "a child accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult." Section 54.04(o)(3) prohibits placing a child adjudicated delinquent for contempt of a justice or municipal court in a secure post-adjudication correctional facility or committing the child to TJJD.

Additionally, in 2001, the legislature enacted Section 54.04(i)(2) to authorize a juvenile court that places a child on probation outside the child's home or that commits a child to TJJD to authorize an administrative body to conduct permanency hearings pursuant to 42 U.S.C. Section 675 if required during placement or commitment. Such a provision should be included in every TJJD commitment. It should also be included in every probation order placing a child outside the home unless the juvenile court wishes to conduct the permanency hearings itself. Including this provision enables Title IV-E federal funds to be used in appropriate cases to pay for foster care and for annual permanency hearings under that program to be conducted by an administrative agency. For TJJD youth, the administrative agency that will conduct the permanency hearings will be the State Office of Administrative Hearings (SOAH). In 2004, the Austin Court of Appeals analyzed Section 54.04(n) and the requirements for placing a status offender in secure confinement.

In *In the Matter of E.D.*, 127 S.W.3d 860 (Tex.App.—Austin 2004, no pet.), E.D. was placed on six months' probation as a status offender for being a runaway. Her behavior while on probation was not exemplary, and, after numerous violations, the State filed a motion to modify. The probation officer's report recommended 12 months' probation and placement at the Travis County Leadership Academy, a secure placement. After a hearing, the court ordered that E.D. be placed at the Leadership Academy, partly because she "cannot be provided the quality of care and level of support and supervision that [she] needs to meet the conditions of probation." 127 S.W.3d at 862. The Court of Appeals held that the court did not abuse its discretion in placing her in secure confinement because the probation officer's report, detailing E.D.'s pattern of

running away and endangering herself, satisfied the requirements of Section 54.04(n) and established that all dispositions other than secure confinement were clearly inappropriate. See also *In the Matter of R.A.N*, UNPUBLISHED, No. 03-06-00462-CV, 2008 WL 2609155, 2008 Tex.App.Lexis 4952, Juvenile Law Newsletter ¶ 08-3-12 (Tex.App.—Austin 2008, no pet.) (no abuse of discretion to place youth on probation in the Leadership Academy for 18 months rather than in a drug treatment program); *In the Matter of J.A.R.*, UNPUBLISHED, No. 03-07-00691-CV, 2008 Tex.App.Lexis 6467 (Tex.App.—Austin 2008, no pet.) (no abuse of discretion to extend probation for one year and place juvenile in a residential treatment program).

b. Probation Term

Until 1993, under Section 54.04(d)(1) the initial period of probation could not exceed one year, but could be extended for one year at a time until the child's 18th birthday. In 1993, the legislature amended Section 54.04 by adding Subsection (l):

> … [A] court or jury may place a child on probation under Subsection (d)(1) for any period, except that probation may not continue on or after the child's 18th birthday.... [T]he court may, before the period of probation ends, extend the probation for any period, except that the probation may not extend to or after the child's 18th birthday.

It also repealed language in Section 54.04(d)(1) that provided probation could be "for a period not to exceed one year, subject to extensions not to exceed one year each." Some juvenile courts place children on probation initially until their 18th birthday, while others place them on probation for a shorter time, usually one year, subject to extensions if needed. While either is arguably lawful, courts should give consideration to whether the length of the probation is fair given the severity, or lack thereof, of the offense and the rehabilitative needs of the child and look to the Progressive Sanctions Model in Chapter 59, Family Code, for guidance on the appropriate length of a probation term.

Additionally, if the term of probation will include placement in a residential facility, consideration should be given to Section 59.008, which provides that placement in a post-adjudication secure correctional facility may be for six to twelve months, as well as at Human Resources Code Chapter 63, which provides the authority for the operation of post-adjudication facilities and defines them to be residential facilities for the "placement of juveniles for periods up to one year in length." Section 63.001, Human Resources Code. Human Resources Code Section 63.027 provides:

> The court will include in its order the length of time that the juvenile will reside in the facility, which will not exceed a period of one year. At the conclusion of the one year period, the court will make a determination as to whether the juvenile will benefit from further residence within the facility. The court may then order the juvenile to be placed in the facility for additional time not to exceed one year.

The provisions of Section 54.05 dealing with modification of disposition govern extensions of the probation period; that is, the probation term may be extended only following a modification of disposition hearing (or its waiver) under Section 54.05. See Chapter 13.

Sex Offender Probation Term. Section 54.04(p) requires a minimum probation term of two years for any child placed on probation for a felony sex offense committed against a victim under the age of 17 that is referenced in Section 54.0405(b) as being covered by the Sex Offender Registration Act. The two-year requirement is subject to the limitation that juvenile probation automatically expires upon the probationer's 18th birthday. When setting the probation term for a sex offense covered by this provision, the juvenile court should simply place the child on probation until his or her 18th birthday if the two-year minimum term would extend probation beyond that date. Placing the child on probation for two years with an understanding probation will automatically expire at age 18 might be confusing to the probation department and the child. See *In the Matter of M.D.T.*, 153 S.W.3d 285 (Tex.App.—El Paso 2004, no pet.) (two-year community supervision sentence upheld despite insufficient evidence claim).

Determinate Sentence Probation Term. In 1999, the legislature enacted Sections 54.04(q), 54.05(j), and 54.051 to create a new type of juvenile probation. In a determinate sentence case, if the judge or jury assesses a sentence to TJJD of 10 years or less, it may place the respondent on probation. The court may then impose a probation term that may be as long as 10 years. For offenses committed prior to September 1, 2011, probation automatically expires at age 18 unless the juvenile court orders it to be transferred to the criminal court for adult community supervision.

In 2011, the legislature changed that age to 19 for all offenses committed on or after September 1, 2011. The change allows juveniles with a determinate sentence to remain in and receive services from the juvenile court longer and makes the age consistent with the maximum age of TJJD jurisdiction. If the juvenile court does order the case transferred to the criminal court, the balance of the probation term is served on adult community supervision. See Chapter 21 for a full discussion.

Determinate sentence probation may be revoked and the child committed to TJJD; there is no mechanism to transfer determinate sentence probation to the adult court prior to age 19 (or 18 for offenses occurring before September 1, 2011).

c. Probation Conditions

Section 54.04(d)(1) authorizes the juvenile court to place the child on probation "on such reasonable and lawful terms as the court may determine." Section 54.04(f) requires that the "terms of probation be written in the court order" and a copy of the order be given to the child.

There are two primary limitations on the juvenile court's discretion to fashion probation conditions: the vagueness doctrine and the prohibition on delegating to others the court's authority to fix the conditions of probation.

Vagueness Doctrine. In *In the Matter of R.A.B.*, 525 S.W.2d 892 (Tex.Civ.App.—Corpus Christi 1975, no writ), the child was placed on delinquency probation "contingent upon the proper and lawful comportment of said child." A motion to modify seeking revocation was filed alleging that the child was in possession of more than four ounces of marijuana, a felony offense, in violation of this condition. The child contended that the probation condition was too vague to be enforceable. The appellate court disagreed:

> The word "lawful," while not particularly definite, refers to matters of substance, rather than to matters of form. It has been defined "as meaning according to law; according to, or provided by, law; that which in its substance is sanctioned or justified by law".... The word "comportment" is just another word for "behavior." Both words "lawful" and "comportment" are words of common usage and easily understood. While it is true that the language used in the...order is colloquial rather than legal, we cannot agree with the juvenile that he did not know that the commission of a felony was not prohibited under the terms of his probation.

525 S.W.2d at 897. Cf. *In the Matter of M.A.H.*, UNPUBLISHED, No. 13-07-426-CV, 2008 Tex.App.Lexis 6864 (Tex.App.—Corpus Christi 2008, no pet.) (failure to object to specific probation condition waived void for vagueness complaint).

Non-Delegation Doctrine. It is well-established that a trial court cannot delegate its duty and responsibility for determining the conditions of probation to the probation officer or anyone else. *DeGay v. State*, 741 S.W. 2d 445 (Tex.Crim.App. 1987). This does not mean that certain things cannot be delegated to the probation officer, such as setting a schedule to facilitate court imposed conditions or determining when random drug tests will occur; however, it does mean that decisions such as how long probation will last and whether the child will be placed outside the home and, if so, where and for how long, cannot be delegated by the court.

A probation condition in *K.K.B. v. State*, 609 S.W.2d 824 (Tex.Civ.App.—Texarkana 1980, no writ), was challenged on both vagueness and delegation grounds. The respondent was adjudicated to be a child in need of supervision and was placed on probation in a foster home. A condition of probation required the child to "reside in the home of the person or persons to whom you are released and obey all of their instructions." Shortly after placement, a delinquency petition was filed alleging a violation of that condition of probation in that "although specifically instructed to do so, [the child] on two occasions refused to do her school homework and had become generally unhappy and uncooperative in the home of [the foster parent] and with her policies and rules of behavior." After an adjudication hearing, the juvenile court found the child to have engaged in delinquent conduct solely on the basis of her refusal to do homework. The court committed the child to TYC.

The appellate court rejected the argument that the juvenile court had unlawfully delegated to the foster parent the authority to set the conditions of probation:

> It is true that the court in a juvenile proceeding cannot delegate its ultimate authority to determine, set and supervise the conditions of probation.... But the probation order is not required to specify every minute detail of the conduct which is mandated or prohibited. Such a requirement would be impractical, if not impossible, and would hinder rather than assist

> the juvenile court in promoting the rehabilitation of juveniles. It is sufficient if the general conduct is spelled out in terms sufficiently clear for the juvenile to understand and be able to obey. This is particularly true where the juvenile is placed on probation in the care of a home or institution. The court can allow the custodian to implement the court prescribed conditions by specifying the detailed method of obedience to those conditions. Although a requirement that the juvenile obey the reasonable rules and regulations of such a custodian vests a certain amount of discretion in the custodian, such discretion is necessary if the home or facility is to be successful in its rehabilitative efforts.

609 S.W.2d at 825-26.

The appellate court also rejected the argument that the condition was invalid because of vagueness:

> [T]he condition of probation...was not fatally vague or ambiguous and...it did give [the child] fair notice of her obligations. The condition is actually quite specific. [The child] was required to obey all of the instructions of the foster parent. Of course, if the evidence revealed that those instructions were ambiguous, conflicting, or unreasonable, we would not affirm a finding of delinquent conduct based on violations of them, but the evidence shows without dispute that the rules and instructions were clear and specific, and that they were fully explained to and understood by the juvenile. The evidence further shows that the violations were knowingly and deliberate. While the actual infractions might be considered to be minor, the trial court obviously gave careful consideration to the ramifications and implications of the child's contumacious attitude, and decided that her welfare in such circumstances required that she receive the protection and rehabilitative services of the Texas Youth Council.

609 S.W.2d at 826.

One of the main principles in whether or not something has been improperly delegated is whether or not a statute allows for such delegation. Though not a juvenile case, in *Lemon v. State*, 861 S.W.2d 249 (Tex.Crim.App. 1993), the court was found to have improperly delegated to the probation department the court's responsibility to name the particular community service site where the probationer was to perform community service. At the time of the offense, Article 42.12, Code of Criminal Procedure, stated that community service site would be designated by the court. See also *Cotton v. State*, 893 S.W.2d 200 (Tex.App.—Fort Worth, 1995, no writ).

Section 54.04(d) provides that the court or jury may place the child on such reasonable and lawful terms as the *court* may determine in the child's own home or with a relative or fit person or in a foster home, residential treatment facility, post-adjudication secure correctional facility, or nonsecure correctional facility. Section 54.04(l) says the *court* or *jury* may place the child "on probation for any period" up to the 18th birthday. Section 63.026, Human Resources Code sets out that a court order is required for admission to a post-adjudication secure correctional facility. Section 63.027, Human Resources Code sets out that the court must include in its order the length of time the child will reside in the facility, which will not exceed one-year; the court may extend that time by up to one year.

Though there is currently no case discussing these provisions, the non-delegation doctrine and cases that do exist suggest that a court must set the terms of probation, determine the child's specific placement, and determine the length of placement in a post-adjudication secure correctional facility; delegating this to a probation officer or to anyone else would likely violate the non-delegation doctrine.

Freedom of Speech. The Attorney General was asked about the constitutionality, under the First Amendment, of probation conditions requiring of juveniles placed on probation who are required to perform community service that they have "no goatees, hair not any further than collar length, no T-shirts with logos and keep shirt tails tucked in." The Attorney General replied that it was not possible to respond categorically that such a probation condition would always be constitutional or would always be unconstitutional. It would depend upon the relationship of such a condition to the rehabilitation of the probationer or the protection of the public. Attorney General Opinion No. LO 93-95 (1993).

School Attendance. In 1993, the legislature added Section 54.043 to the Family Code:

> If the court places a child on probation under Section 54.04(d) and requires as a condition of probation that the child attend school, the probation officer charged with supervising the child shall monitor the child's school attendance and report to the court if the child is voluntarily absent from school.

This language really adds nothing to the duty of a probation officer to monitor all the conditions of probation and report violations to the court.

Monetary Conditions. Special monetary conditions of probation are mentioned in three places in the Family Code. Section 54.041 authorizes the juvenile court to require a child placed on probation to make restitution of loss to the victim of the offense under certain circumstances. Section 54.0411 requires payment of $20 as costs of court. Section 54.061 requires the juvenile court, under certain circumstances, to order the child to pay up to $15 per month in probation supervision fees. Since all of those orders can include adults as well as the child, they are discussed separately in this chapter in connection with the discussion of orders affecting persons other than the child.

Amending Probation Conditions. The juvenile court, under Rule 329b, Texas Rules of Civil Procedure, retains plenary power for 30 days, during which time it may modify the conditions of probation to any condition that could have originally been imposed. The court can act on request of a party or on the court's own initiative; there is no need for a formal petition or motion to modify the original conditions. See *In the Matter of M.A.W.,* 55 S.W.3d 101 (Tex.App.—Amarillo 2001, no pet.), approving of a modification changing the term of probation supervision.

d. Mandatory Community Service

In 1995, the legislature made community service a mandatory condition of probation. Section 54.044(a) mandates the court to "require as a condition of probation that the child work a specified number of hours at a community service project approved by the court and designated by the juvenile probation department."

In 1997, the legislature added Section 54.044(i) to authorize, but not require, the juvenile court to order eight hours of community service for a first offense and twelve hours for a subsequent offense of possession of a fictitious license or certificate under Transportation Code Section 521.453. The offense is a Class C misdemeanor, so it could be in juvenile court as a CINS case only if transferred from a municipal or justice court.

Community service is no longer authorized solely instead of monetary restitution, as it was prior to 1995 under Section 54.041, but can be used in addition to it.

Excuses. Under Section 54.044(a), the court may excuse the community service requirement by entering a finding in the order placing the child on probation that:

(1) the child is physically or mentally incapable of participating in the project;

(2) participating in the project will be a hardship on the child or the family of the child; or

(3) the child has shown good cause that community service should not be required.

Excusing community service is individual to particular juveniles; the absence of a community service program in the county is not a ground for excuse.

Parental Community Service. Section 54.044(b) authorizes, but does not require, the court to order "the child's parent to perform community service with the child." Presumably, when parental community service is ordered, this provision requires the parent to participate in the same community service project as the child. The court may not order the parent and child to perform more than 500 hours of community service together. Section 54.044(c).

Section 54.044(g) prohibits the court from requiring community service from a parent if the court finds that the parent or guardian made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or conduct indicating a need for supervision and, despite their efforts, the child continued to engage in such conduct.

Procedures. Section 54.044(f) gives a child or parent the right "to a hearing on the order before the order is entered by the court." In the case of the child, the disposition hearing would serve that purpose.

In the case of the parent, unless the petition was served on the parent and the prayer for relief requested the court to impose a community service order on the parent, some form of special notice to the parent would be required. That special notice should conform to Section 54.041(a), which deals with other parental orders and requires "notice by any reasonable method to all persons affected." Notice should be given to the parent in time to allow the parent to prepare for any hearing the parent may be entitled to receive under Subsection (f).

The Section 54.044(f) hearing with regard to a parent must permit the parent to establish a ground for excuse under Subsection (g) as well as to argue disability or economic hardship as a reason for not being placed under a community service order.

Selecting Host Agencies and Projects. Section 54.044(a) requires that the community service project be approved by the court and designated by the juvenile probation department. The probation department assembles a list of community service organizations, which is approved by the juvenile court, and then a particular child is assigned to a project that is selected by the juvenile probation department from the court-approved list.

Once the list is assembled, Section 54.044(e) gives the probation department flexibility as to assignment and reassignment of organizations or projects. It permits the department to "designate an organization or project for community service only from the list submitted by the court." It also permits the department to "reassign or transfer a child to a different organization or project on the list submitted by the court under this subsection without court approval."

Limits on Choice of Host Agencies or Projects. The legislature did not limit the types of organizations or projects for which community service could be required of a child or a child and a parent. By contrast, former Section 54.041(b), the previous community service provision, limited community service to "a charitable or educational institution." That now-repealed provision was criticized for not including governmental organizations. Certainly, the provision does include governmental departments, agencies, and organizations as well as charitable or educational organizations.

The provision is broad enough to include private for-profit businesses, but a court would justifiably be criticized for providing a for-profit organization with free labor under court order. The idea of community service is for the offender to return to the community at large some of the value that was taken from it by the offense. The projects should be those that benefit the community at large. Therefore, the projects should be limited to those of governmental or non-profit organizations.

There is a difference between a community service order that would require the child to render service for a private for-profit business unrelated to his or her offending conduct and a probation condition that requires the child to render service restitution to the victim of his or her offense. The latter is permitted even though it benefits a private person on the same grounds that monetary restitution would be permissible. However, a person is not entitled to receive more than actual damages in restitution, so community service for a private individual should be used only when the person is not made whole through restitution.

While religious organizations are non-profit, the court should not order a child or parent to perform service for such an organization, even for their own church, as that might be considered a violation of the Establishment Clause of the First Amendment.

Parental Contempt Enforcement. Under Section 54.044(h), a community service order against a parent is enforceable by contempt of court. For contempt of court to be a feasible remedy, the court order must be specific in its requirements. That means it almost certainly must itself specify the organization or project, rather than attempting to delegate that authority to the probation department. Of course, the probation department may select the organization or project for the parent and then seek amendment of the court order to make it specific and enforceable. See Chapter 26 for a discussion of contempt of court proceedings against parents and others.

Legal Liability. Section 54.044(d) limits the liability of a city or county for injuries inflicted by a child or parent while performing community service under juvenile court order.

e. Mandatory Disclosure of Handgun Source

In 1999, the legislature added Section 54.0406 to require a juvenile court, in any case in which the child was placed on probation for an offense "that includes the possession, carrying, using, or exhibition of a handgun as an element" and in which the court made an affirmative finding that the child personally possessed, carried, or used the handgun, to impose as a condition of probation a requirement that the child notify his or her supervising probation officer of the manner in which the child acquired the handgun, including the date and place of acquisition and the name of any person involved in the acquisition. This notification must be made not later than the 30th day after the date the court places the child on probation. Upon receipt of this information, the juvenile probation officer is required by Section 54.0406(b) to pass it on to the appropriate local law enforcement agency.

Section 54.0406(c) provides that any information provided by the child pursuant to this probation condition, and any information derived from that information, "may not be used as evidence against the child in any juvenile or criminal proceeding." This provision establishes use immunity, which is sufficient to supplant the child's privilege

against self-incrimination and, therefore, enables this probation condition to be enforced by revocation if necessary without violating the Fifth Amendment.

f. DNA Sample Required on Certain Felony Adjudications

In 2009, the legislature enacted Section 54.0409, which requires a juvenile court to order as a condition of probation that a child submit a DNA sample if placed on probation for committing certain felony offenses. The purpose for the mandatory condition of probation is to create a DNA record of the child, unless a required sample has already been submitted. The statute is similar to the requirement that a juvenile "submit a blood sample or other specimen" as a condition of probation if the child is required to register as a sex offender. See Section 54.0405(a)(2).

Section 54.0409 applies to felonies listed in Code of Criminal Procedure Article 42A.054(a) [a.k.a. "3g offenses" because, prior to September 1, 2017, the list was located in Article 42.12, Section 3g(a)(1)] or any felony in which a finding is made that a deadly weapon was used or exhibited during the commission of the felony or during immediate flight from committing the offense. "3g" offenses" to which Section 54.0409 applies include: murder; capital murder; solicitation to commit capital murder; indecency with a child (by contact); aggravated kidnapping; trafficking of persons; sexual assault; aggravated sexual Assault; first degree felony injury to a child; aggravated robbery; offenses under Chapter 481, Health and Safety Code, for which punishment is increased under Section 481.140 (use of a child) ; sexual performance by a child; compelling prostitution; first degree burglary; and burglary with intent to commit sexual assault, aggravated sexual assault, prohibited sexual conduct, or indecency with a child. Section 54.0409 is mandatory, meaning that if a child is adjudicated for a covered felony or the court makes a deadly weapon finding, the juvenile court must require that the child provide a DNA sample.

If a child is placed on probation for a covered felony, the local juvenile probation department is responsible for collecting the DNA sample. If a child is committed to TJJD, then TJJD must collect the sample. "DNA sample" means a blood sample or "other biological sample or specimen." The sample must be submitted to the Department of Public Safety (DPS) for DNA analysis or storage. See Section 411.141(8), Government Code. Juvenile probation departments may collect a saliva sample, also known as a buccal or cheek swab, for submission to DPS. The person collecting the sample must receive training from DPS on how to properly collect the sample and submit the sample using a kit provided by DPS at no cost.

If a child is adjudicated for a felony that requires submission of a DNA sample, the juvenile court must order the child, parent, or other responsible adult to pay an additional court cost of $50 if disposition of the case includes commitment to TJJD or $34 if the child is placed on juvenile probation. Section 54.0462(a). See also Government Code Section 103.0212(2)(G) and (H). The fee is intended to help defray the cost of analysis performed by DPS on the DNA samples provided by the adjudicated child. See discussion on "Orders that may be Entered" in Chapter 26.

The DNA collection requirement applies to juveniles who are placed on probation on or after September 1, 2009. However, the accompanying fee for collecting the sample may only be assessed if the underlying felony conduct occurred on or after September 1, 2009.

g. Treatment Conditions for Sex Offender Probation

In 1997, the legislature enacted Section 54.0405, which set out specific requirements for juveniles placed on probation for sex offenses against children. The court was given authority to require the child, as a condition of probation, to attend psychological counseling with an individual or organization that provides sex offender treatment or counseling. The court was also given authority to order the child to submit to regular polygraph examinations for the purpose of evaluating treatment progress.

Prior to 2001, the offenses covered included: indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; prohibited sexual conduct (formerly incest); aggravated kidnapping with intent to violate or abuse the victim sexually; and burglary of a habitation committed with the intent to commit any felony on this list. However, these offenses were covered only if the victim or intended victim was under the age of 17 at the time of the offense.

In 2001, the legislature amended Section 54.0405 to replace the list of covered offenses with any offense for which a child is required to register as a sex offender. Those offenses are currently listed in Code of Criminal Procedure Article 62.001. The legislature also deleted the requirement that the victim of the offense must be under the age of 17.

In addition to the court's authority to order sex offender treatment and submission to a polygraph as terms of probation, the legislature in 2001 mandated that the court include sex offender register and submission of a blood sample or other specimen to DPS as conditions of probation. Unlike sex offender treatment and polygraph examinations, which a court may or may not order as a condition of probation, registration and submission of a sample must be ordered if the juvenile is required to register as a sex offender. A juvenile court could still require sex offender treatment as a reasonable and lawful condition of probation even if the court has excused sex offender registration—or deferred its decision on whether or not to defer sex offender registration—under Code of Criminal Procedure Article 62.352. The only requirement is that the sex offender treatment be reasonably related to the juvenile or the offense.

There are self-incrimination issues with the use of a polygraph examination in connection with sex offender counseling. The Attorney General addressed some of those issues in Attorney General Opinion No. JC-0070 (1999). Simply requiring the juvenile to submit to polygraph examinations as part of the sex offender treatment program does not violate the self-incrimination clause of the Fifth Amendment. See *In the Matter of A.M.*, 333 S.W.3d 411 (Tex.App.–Eastland 2011, review denied) (since A.M. did not invoke privilege against self-incrimination, statements to polygraph examiner not compelled within meaning of Fifth Amendment). However, according to the Attorney General:

> an examinee has a right to claim the privilege against self-incrimination during the course of a polygraph examination if the answer to the question posed may incriminate the examinee in a future criminal proceeding. The state may not revoke the examinee's community supervision or parole as a consequence of the examinee's invoking the privilege.... If the state wishes to compel the examinee to answer a question after he or she has legitimately invoked the privilege with respect to that question, the state must provide some sort of immunity for the confession.

Section 54.0405(g) authorizes the court to order a parent or guardian to attend special counseling sessions and to participate with the child in some of the child's sessions. Although the statute does not so provide, due process of law requires that the juvenile court must give a parent or guardian notice and hearing opportunity before placing such a person under an enforceable court order. See Chapter 26 for a discussion of contempt of court proceedings against parents and others.

Mandatory Child Abuse Reporting. Family Code Section 261.101(b) requires a professional who "has cause to believe that a child has been abused or neglected or may be abused or neglected or that a child has been a victim of an offense under Section 21.11, Penal Code" (indecency with a child) to report the incident to appropriate authorities within 48 hours. The question was posed to the Attorney General whether the duty to report extends even to circumstances in which a licensed sex offender treatment provider has received information regarded as too incomplete or dated to be useful to the authority to which child abuse information must be reported. The Attorney General responded that the statute does not permit any such exception. Once information is reported, the Attorney General opined, law enforcement and prosecutorial agencies have discretion whether to pursue prosecution but that decision is for them to make, not the person who initially received the information. Attorney General Opinion No. DM-458 (1997).

Similarly, the Attorney General has opined that a licensed polygraph examiner who learns that an examinee may have abused a child is required by Section 261.101 to report that information to law enforcement. That obligation prevails over the conflicting mandate of confidentiality in the polygraph examiners licensing statute. Attorney General Opinion No. JC-0070 (1999).

TJJD is required to adopt guidelines as to which reports from its child care workers of child abuse by TJJD residents must be reported to the Department of Family and Protective Services (DFPS) or law enforcement agencies. Sections 261.103(b) and 261.105(e).

h. Probation Conditions for Graffiti Offenses

In 1997, the legislature added Section 54.046 to authorize the juvenile court, upon adjudication for the offense of graffiti under Penal Code Section 28.08, to order the child, with consent of the owner, to restore the damaged property. The court is also authorized to order the child to attend classes with instructions in self-responsibility and empathy for a victim of an offense. A similar amendment was made to Section 53.03(h) dealing with deferred prosecution.

Ten years later, in 2007, the legislature again amended Section 54.046 to expand the authority of a juvenile court

to order an adjudicated juvenile to reimburse the property owner for the cost of restoring property damaged by graffiti. If the child made markings on public property, a street sign, or an official traffic-control device, the court now could, but was not required to, order the child to make restitution to the affected political subdivision or, with consent, to restore the affected property. If the child, the child's parent, or another responsible person was not financially able to pay restitution, the court could order community service to satisfy the restitution.

In 2009, the legislature revised Section 54.046 by making it mandatory for the juvenile court to order a child, as a condition of probation, to reimburse the property owner or restore the owner's property. Section 54.046(a); it retained the option to order community service in the event of financial inability to pay restitution. Additionally, the judge must order a child placed on probation in a graffiti case to perform at least 15 hours of community service if the pecuniary loss is $50 or more but less than $500 and at least 30 hours if the loss is $500 or more. Section 54.046(d); see also Code of Criminal Procedure Article 42A.509 (contains identical conditions of community supervision for adult offenders who commit graffiti). These mandatory community service hours are in addition to community service ordered in lieu of restitution; they are also in addition to any other conditions of probation the court may order.

Section 54.046(e) states that the child must deliver court-ordered restitution payments in graffiti-related cases to the juvenile probation department for transfer to the owner; the probation department must notify the juvenile court when full restitution has been made.

i. Restitution for Damaging Property with Graffiti

Section 54.0481, which went into effect September 1, 2007, authorizes a juvenile court during the disposition hearing in a graffiti case to order a child, the child's parent, or another responsible person to make restitution by reimbursing the cost of restoring the damaged property or, with consent, to personally restore the damaged property.

It also authorizes a juvenile court to order a child to perform a specific number of community service hours to satisfy restitution if the child, parent, or other responsible person is financially able to pay restitution. The only difference between Section 54.0481 and Section 54.046 with regard to restitution is that the provisions in Section 54.046 are conditions of probation whereas the restitution under 54.0481 is not limited to being a condition of probation, thus it can be ordered even if the child is not placed on probation and can be enforced like every other restitution order and not only as a condition of probation.

j. Probation Conditions for Alcohol or Drug Violations

In 1997, the legislature added Section 54.046 (renumbered to 54.047 in 1999), requiring the juvenile court to order community service and suspension or denial of a license or permit upon adjudication for an enumerated alcohol-related offense. The offenses covered were purchase of alcohol by a minor, attempt to purchase alcohol by a minor, consumption of alcohol by a minor, possession of alcohol by a minor, misrepresentation of age by a minor, and public intoxication.

Each of these offenses committed by a child is a Class C misdemeanor; thus, a case would be filed initially in municipal or justice court. Those courts are permitted to transfer any such case for presentation to the juvenile court as CINS under Section 51.08. If the juvenile has two prior justice or municipal court convictions for any Class C misdemeanors, the municipal or justice court must transfer the third offense to the juvenile court as CINS. Alcoholic Beverage Code Section 106.071(d), as referenced by Section 54.047, requires the juvenile court to impose eight to 12 hours of community service for the first violation of an offense covered by this section and 20 to 40 hours for a subsequent violation. Section 106.071(e) requires that all such community service ordered "must be related to education about or prevention of misuse of alcohol." Picking up trash in the park does not cut it.

Section 106.071(d) also requires the juvenile court to order the Department of Public Safety (DPS) to suspend or deny a license or permit for 30 days for the first violation of an offense covered by this section, 60 days for a second violation, and 180 days for a third or subsequent violation.

For purpose of counting prior offenses, a juvenile adjudication, a criminal conviction, or a criminal deferred adjudication counts. However, a prior juvenile deferred prosecution does not count.

In 2015, this section was amended in several ways. First, driving or operating under the influence of alcohol by a minor was added to the list of covered offenses. Secondly, the court was authorized, though not mandated, to order the child to attend an alcohol awareness program approved by the Department of State Health Services

(DSHS) or the Texas Education Agency. Finally, Section 54.047 was amended to provide that if a child is adjudicated for an offense involving possession of marijuana or other drugs under the Texas Health and Safety Code, the court may require the child to attend a drug education program approved by DSHS.

It appears also that the legislature amended Section 54.047 to require individuals adjudicated for drug offenses to perform community service and have their driver's licenses suspended in the same manner as for the alcohol offenses. Section 54.047(c) read as follows:

> (c) The court shall, in addition to any order described by Subsection (a) or (b) [the orders to attend drug or alcohol education courses, respectively], order that, in the manner provided by Section 106.071(d), Alcoholic Beverage Code:
>
> (1) the child perform community service; and
>
> (2) the child's driver's license or permit be suspended or that the child be denied issuance of a driver's license or permit.

Whether or not this amendment is sufficient to impose the community service and driver's license suspension provisions on the drug offenses, public intoxication, or driving or operating a watercraft under the influence of alcohol by a minor is debatable. An argument can be made that since Section 106.071(a) provides that Section 106.071 is applicable to only certain offenses that do not include these, the provisions regarding community service and driver's license suspension in Section 106.071(d) are not applicable to these offenses. However, another argument can be made that because Section 54.047(c) references only subsection (d) of Section 106.071, the applicability language in Section 106.071(a) is irrelevant and the community service and driver's license suspension provisions in Section 106.0071(d) can be applied.

If the latter argument is accepted, a different issue arises. Prior to this change, there already existed a law addressing driver's license suspension and education classes for the drug and alcohol offenses added to Section 54.047 in 2015. That law is Section 54.042, discussed at length in Section D3 of this chapter, which is applicable to these offenses, which are more serious than the class C misdemeanors to which Section 54.047 applied prior to the 2015 amendments. Section 54.042 requires mandatory driver's license suspension for a much longer period of time; for drug offenses, that period can be indefinitely extended until a drug education course is completed. The amendments to Section 54.047 set up a conflict of laws that will likely need to be rectified by either the courts or in a future legislative session.

k. Mandatory Condition in Animal Cruelty Case

In 2001, the legislature enacted Section 54.0407 to require counseling for juveniles who have committed the offense of cruelty to animals. The statute was amended in 2007 to include cruelty to non-livestock animals. This provision is intended to address the phenomenon that sometimes cruelty to animals is a signal of developing serious psychological problems in a child.

l. Mandatory Condition in Gang-Related Conduct

In 2009, the legislature added Section 54.0491, which requires a juvenile court judge to order a child who has been adjudicated for engaging in gang-related delinquent conduct to participate in a criminal street gang intervention program. The program must be appropriate for the child based on his or her level of involvement in the criminal activities of the gang. Specifically, the intervention program must include at least 12 hours of instruction and may include voluntary tattoo removal. If the child who is required to attend the intervention program is committed to TJJD as a result of the gang-related conduct, the child must complete the program before being discharged from custody or released under TJJD parole supervision.

2. Commitment to the Texas Juvenile Justice Department

Indeterminate Commitment. Although the juvenile court retains control over the disposition when it chooses to place the child on probation, that the same is not true when it elects to commit the child to TJJD. All commitments to TJJD, except under the Determinate Sentence Act, are for an indeterminate term not to extend beyond the child's 19th birthday. If, when, and under what conditions a lawfully committed child is released before his or her 19th birthday is a matter within TJJD's exclusive jurisdiction. In *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App.—Dallas 1976, no writ), the juvenile court committed the child to then-TYC for a one-year period. The appellate court set aside this commitment order, saying:

> Once a court commits a child to TYC, discretion as to the further disposition is vested in TYC and the court cannot invade this discretion by committing the juvenile for a definite period of time. No provision of the Code authorizes the court to make a commitment for a definite period.

542 S.W.2d at 921.

TJJD has exclusive jurisdiction over ordinary delinquent conduct commitments only; for determinate sentence commitments, there are restrictions on the power of TJJD to release. See Chapter 21.

Section 54.04(e) makes it clear that any child can be committed for conduct engaged in after turning 10 but before becoming 17, even if he or she is 17 years of age or older at the time of the commitment. In the case of a reversal of an adjudication and commitment by an appellate court, the person may even be 18 years of age or older at the time of re-trial and commitment to TJJD. See Chapter 3.

Eligibility for Indeterminate Commitment (Before 2007). Before 2007, Section 54.04(d)(2) provided:

> if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony or, if the requirements of Subsection (s) or (t) are met, of the grade of misdemeanor, ...the court may commit the child to the Texas Youth Commission without a determinate sentence.

Section 54.04(s), as enacted in 1999, provided:

> The court may make a disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of misdemeanor on at least two previous occasions;
>
> (2) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication; and
>
> (3) the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications.

Section 54.04(t), as amended in 1999, provided:

> The court may make a disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony on at least one previous occasion; and
>
> (2) the conduct that is the basis of the current adjudication occurred after the date of that previous adjudication.

Under those amendments, for commitment for a misdemeanor, the respondent must have had two prior misdemeanor adjudications or one prior felony adjudication. There has never been such a restriction on commitments in determinate sentence cases, which are all felonies, or in ordinary delinquency felony cases.

Only a misdemeanor that was delinquent conduct could lead to commitment to TYC. This meant a misdemeanor punishable "by confinement in jail," under Section 51.03(a)(1); thus Class C misdemeanors were excluded. Even after transfer to juvenile court, Class C misdemeanors could never qualify for commitment because they were CINS cases, not delinquency cases.

Contempt of a justice or municipal court is delinquent conduct under Section 51.03(a)(2) but it is not a misdemeanor offense for a juvenile. In 2001, the legislature added Section 54.04(u) to provide specifically that contempt of a justice or municipal court did not count as a jailable misdemeanor adjudication for purposes of determining eligibility for TYC commitment.

Prior to 2007, as to delinquency case misdemeanors, the requirement was that a TYC indeterminate commitment was authorized only if there were two previous adjudications for delinquency misdemeanors. There had to have been a particular sequence of prior adjudications. The necessary sequence required the commission of a jailable misdemeanor, followed by adjudication for it, followed by commission of a second jailable misdemeanor, followed by adjudication for it, followed finally by commission of a third jailable misdemeanor. Under those circumstances, and before June 8, 2007, a juvenile court could commit the child to TYC on a misdemeanor adjudication for the third offense. Either of the prior offenses could be a felony or a jailable misdemeanor.

There was also a special provision in Section 54.05(j) that permitted the substitution of a misdemeanor probation violation for one misdemeanor adjudication. Under that provision, indeterminate commitment was authorized if a child committed a misdemeanor and was adjudicated for it, then committed a second misdemeanor and was adjudicated and placed on probation for it, and then violated probation, which was revoked. The violation could be technical; it did not need to be a new offense. See Chapter 13.

Modification of probation, however, was not a substitute for an adjudication. Thus, the following sequence could not support an indeterminate commitment: commission of misdemeanor, followed by adjudication and probation, followed by second commission of misdemeanor for which probation was modified, followed by third commission of misdemeanor. Had the juvenile been adjudicated delinquent for the second commission of a misdemeanor, commitment would have been authorized for the third offense.

The commission-adjudication-commission-adjudication-commission sequence was similar to the sequence required for habitual offender treatment under Section 12.42(d) of the Penal Code. It was established to make sure the system had sufficient opportunity to deal with law violations on a local level before resorting to the more extreme measure of a TYC commitment. Committing a misdemeanor offense after adjudication for a similar offense was considered more serious than committing two misdemeanor offenses during the same transaction. For that reason, the fact that the juvenile was adjudicated for two or more misdemeanors in the same proceeding would count as only one adjudication.

These restrictions applied when the third misdemeanor was committed on or after September 1, 1999. If the misdemeanor offense or the probation violation occurred before that date, these restrictions did not apply. *In the Matter of A.H.*, UNPUBLISHED, No. 03-00-00072-CV, 2000 WL 766267, 2000 Tex.App.Lexis 3999, Juvenile Law Newsletter ¶ 00-3-06 (Tex.App.—Austin 2000, no pet.) holds that these restrictions on TYC commitments did not apply to a probation revocation based on a violation that occurred before September 1, 1999. Therefore, in such a case, revocation of any delinquency probation supported a TYC commitment.

Eligibility for Indeterminate Commitment (2007 – 2017). In 2007, the legislature amended Section 54.04(d)(2) by removing the possibility of a commitment to then-TYC (now TJJD) for any type of misdemeanor offense. In the same year, Sections 54.04(s) and (t), which allowed juvenile courts to commit a child to TYC for multiple misdemeanor violations, were also deleted. The legislature also deleted the reference to "misdemeanor" from Section 54.04(u), making it very clear that contempt of a county, justice, municipal, or juvenile court can never count as a jailable misdemeanor adjudication for purposes of determining eligibility for commitment. The import of these deletions is clear: After June 8, 2007, juvenile misdemeanor offenders could no longer be committed under any circumstances. Instead, a felony adjudication is required to commit a child. If the child is placed on probation for a felony and violates that probation, the probation can be revoked and the child can be committed. If the child is on misdemeanor probation and violates the probation by committing a felony, the felony must be adjudicated as an offense in order for the child to be committed; treating it as a probation violation is not sufficient for commitment.

Eligibility for Indeterminate Commitment (2017). In 2015, the legislature added Section 54.04013, limiting the court's ability to commit a child to TJJD without a determinate sentence to only those instances in which the court makes a special commitment finding that the child has behavioral health or other special needs that cannot be met with the resources available in the community. Though passed in 2015, the provision applies only to conduct occurring on or after September 1, 2017. The legislature did not add a provision requiring this finding in the event of a modification of probation that results in commitment to TJJD; this was likely an oversight and courts may wish to consider including the findings whether it is a direct commitment or a commitment as a result of probation modification.

Community-Based Programs. Since habitual misdemeanor offenders can no longer be committed to TJJD under the 2007 amendments, communities throughout Texas must dedicate more of their local resources to handling these youth. Recognizing the reality of this situation, the legislature added Section 54.0401 to create additional community-based programs designed for these particular offenders. The section applies only to counties with a population of at least 335,000, which include: Harris, Dallas, Tarrant, Bexar, Travis, El Paso, Hidalgo, Collin, Denton, Fort Bend, and Cameron Counties. The statute in its entirety reads:

> (a) This section applies only to a county that has a population of at least 335,000.

(b) A juvenile court of a county to which this section applies may require a child who is found to have engaged in delinquent conduct that violates a penal law of the grade of misdemeanor and for whom the requirements of Subsection (c) are met to participate in a community-based program administered by the county's juvenile board.

(c) A juvenile court of a county to which this section applies may make a disposition under Subsection (b) for delinquent conduct that violates a penal law of the grade of misdemeanor:

(1) if:

(A) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of misdemeanor on at least two previous occasions;

(B) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication; and

(C) the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications; or

(2) if:

(A) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony on at least one previous occasion; and

(B) the conduct that is the basis of the current adjudication occurred after the date of that previous adjudication.

(d) The Texas Juvenile Justice Department shall establish guidelines for the implementation of community-based programs described by this section. The juvenile board of each county to which this section applies shall implement a community-based program that complies with those guidelines.

(e) The Texas Juvenile Justice Department shall provide grants to selected juvenile boards to assist with the implementation of a system of community-based programs under this section.

In 2007, the legislature also provided additional funding to then-TJPC to help county juvenile boards with the creation and implementation of these community-based programs. Juvenile courts in the counties to which this section applies may order youth to participate in these program initiatives. The target population is detailed in Section 54.0401(c) and includes youth who previously could have been committed to TYC under the former misdemeanor commitment rules.

Section 54.0401(f) expired in 2009, at which time the legislature mandated that then-TJPC's 'annual report on the condition of probation services in Texas include an evaluation of the effectiveness of the community-based programs operated under Section 54.0401 as well as information comparing the cost of a child participating in such a program with the cost of committing a child to then-TYC.

In 2011, the legislature continued this reporting requirement in Section 221.012 of the Human Recourses Code by mandating that TJJD submit the report on effectiveness and the comparison of cost between the community-based programs and the cost of commitments to the state.

CINS Violations. If the child is adjudicated only for conduct indicating a need for supervision (CINS), the juvenile court is not authorized to commit him or her to TJJD. Probation is the most serious sanction that may be used, although the child may be placed outside his or her own home, to include being placed in any public institution except TJJD.

Prior to 1999 amendments, if the child had violated a condition of CINS probation, a new petition for delinquency could be filed under Section 51.03(a)(2) for violation of a reasonable and lawful order of probation. If a qualifying CINS probation violation was proved, the child could have been adjudicated as having engaged in delinquent conduct and the court could have committed him or her to TYC for delinquent conduct.

That procedure of filing a delinquency petition under Section 51.03(a)(2) to enforce CINS probation by a TYC commitment was rendered "inoperable" by the 1999 amendments restricting TYC commitments to felony or eligible misdemeanor violations. In 2007, the legislature repealed provisions that allowed commitment to TYC for misdemeanor violations. A CINS adjudication leading to CINS probation would never be a qualifying prior adjudication. One could still obtain a delinquency adjudication for a violation of CINS probation by using the procedures

in Section 51.03(a)(2), but that would not bring the child one step closer to TYC commitment. In 2001, the legislature repealed Section 51.03(a)(2) because the 1999 enactment restricting TYC commitments rendered the provision meaningless and confusing.

Also in 2001, the legislature enacted Section 54.04(o)(3) to prohibit commitment of a child for a delinquency adjudication based on contempt of a justice or municipal court dispositional order. In 2003, the statute was amended to include contempt of a county court. Although contempt of a county, justice, or municipal court is a "jailable misdemeanor" for adults, it is not the kind of jailable misdemeanor that could have ever served as a basis for commitment to TYC. Section 54.04(u).

If the child is on CINS probation for a status offense, as defined by Section 51.02(15), he or she may never be committed to TJJD "for engaging in conduct that would not, under state or local law, be a crime if committed by an adult." Section 54.04(o)(1).

Community-Based Secure Correctional Facility Commitment. Senate Bill 511, enacted in 2013, authorized a five-year pilot program that expanded the dispositional powers of Travis County juvenile courts to commit felony offenders to a community-based post-adjudication secure correctional facility operated by Travis County. A juvenile found to have engaged in delinquent conduct constituting a felony could, after disposition, be committed locally for an indeterminate or determinate sentence stay in the same manner as if the child had been committed to TJJD. The juvenile board was required to implement the necessary policies and programs for the local post-adjudication secure correctional facility and operate a parole supervision program that mirrors those available in TJJD state institutions. Section 152.0016, Human Resources Code. The law specifies that a felony offender who is properly committed to the local post-adjudication security correctional facility must be treated "in the same manner" as a youth committed to TJJD. Conforming provisions in Chapter 59 of the Family Code were amended to authorize the Travis County juvenile board or juvenile probation department to commit youth as recommended under Sections 59.009 and 59.010 of the Progressive Sanctions Model. The pilot program for community-based post-adjudication secure correctional facility commitments expires in December 2018.

Information Provided to Committing Court. The juvenile court that commits a youth to TJJD may request, in the commitment order, that TJJD keep the court informed of the child's progress while committed to TJJD. Human Resources Code Section 243.007(a). TJJD must also provide the committing court with "periodic updates" on the child's progress, although the exact timing of those updates is not defined. This legislation was part of a trend toward opening the lines of communication and information sharing between TJJD and courts and probation departments. TJJD's report may include any information it deems relevant in evaluating the child's progress, including information about the child's treatment, education, and health. Section 243.007(b). The statute does specify that the report may not include information that is protected from disclosure under state or federal law.

TJJD is also required to provide the committing court with certain information no later than 30 days before releasing the youth. The information must include a copy of the youth's reentry and reintegration plan, as developed under Section 245.0535, along with a report concerning the child's progress while at TJJD. TJJD's plan and accompanying report are in addition to the notice of release required under Section 245.051 and do not require a specific request from the committing court. If the child will be released to a county other than the one served by the committing court, then TJJD must provide the information to both the committing court and the juvenile court in the county where the child will be placed after release. Section 245.054(b). If the youth will be placed in another state, TJJD must send the information to both the committing court and the juvenile court in the other state that has jurisdiction over the area where the youth' will reside. Section 245.051(b).

TJJD Commitment Reports on County Internet Websites. Effective January 1, 2008, the juvenile courts in counties with a population of 600,000 or more must post certain information about their TJJD commitments on the county's Internet website. Section 58.352. The counties subject to this requirement include: Bexar, Dallas, El Paso, Harris, Tarrant, and Travis. The report must contain the total number of commitments per court, as well as a description of the offense for each child, the year the child was committed, and the age range, race, and gender of each child. The report must be updated no later than 10 days following the first day of each calendar quarter. The purpose of this amendment is to allow the public to have easy access to information about the use of TJJD commitment as a dispositional option by elected judges. Thus, the data reported should be clearly identified to a specific court and a named judge. Additionally, it appears the information is cumulative and all quarters for a calendar year

should be posted. The legislation does not indicate whether multiple years must be posted, but that would certainly be in line with the intent of the legislation.

Indeterminate Commitment Minimum Length of Stay. Conditional release from TJJD for indeterminate commitments before age 19 depends, in part, upon the youth serving the minimum length of stay assigned by TJJD.

Prior to 2007, the minimum length of stay was based solely on the most serious offense for which the juvenile was committed to then-TYC or for which the child was on probation when committed to TYC. As part of the reforms enacted in 2007, Human Resources Code Section 61.062 required TYC to establish a minimum length of stay for each child based on:

1. the nature of and seriousness of the conduct engaged in by the child; and

2. the danger the child poses to the community.

The requirement remained when TJJD was created in 2011 but is now located in Human Resources Code Section 243.002. In determining the minimum length of stay, TJJD determines the severity of the offense for which the child was committed to TJJD based on the offense level and whether certain aggravating factors were present, such as a weapon. To determine the danger the child poses to the community, TJJD considers certain factors in the child's history, such as age, number of referrals to juvenile court, and whether the child has ever escaped from an out of home placement. Each child may be assigned a minimum length of stay of 9, 12, 15, 18, or 24 months. The factors are objective so that the court, probation department, or attorneys can know the expected minimum length of stay before the decision to commit is made. The minimum length of stay may be determined using TJJD form CCF-040, which is available on TJJD's website.

After a child committed to TJJD with an indeterminate sentence completes the minimum length of stay, TJJD must: (1) discharge the youth from its custody; (2) release the youth under parole supervision; or (3) extend the length of the child's stay in custody. Human Resources Code Section 245.101. In accordance with the law, TJJD has established a review panel to decide which of the three options is appropriate for a child once the minimum length of stay is completed. A child's length of stay may only be extended if, by majority vote and based on clear and convincing evidence, the panel determines that the child is in need of additional rehabilitation and that TJJD is the most suitable place for that rehabilitation. The panel must specify the additional length of stay that is appropriate. If the length of stay is extended, TJJD must provide a report to the parent, guardian, or designated advocate of the child explaining the reasons for the extension. Human Resources Code Sections§245.101(b), §245.102(a), and §245.103(a).

Determinate Sentence Statutory Minimum Period of Confinement. Determinate sentences for adjudicated covered offenses carry their own statutory minimum periods of confinement of 10, three, two, or one years, depending upon the offense for which the youth was sentenced. See Chapter 21.

Children with Mental Illness or Intellectual Disability Disorder. Prior to its amendment in 1995, Human Resources Code Section 61.077 [now §244.011] provided:

> If the commission [TYC] determines that a child committed to it is mentally ill or retarded, the commission, without delay, shall return the child to the court of original jurisdiction for appropriate disposition or shall request that the court in the county where the child is located take any action required by the condition of the child.

In short, TYC was prohibited from housing a child with mental illness or intellectual disability disorder. In 1995, however, Section 61.077 was amended to eliminate the prohibition on accepting children with intellectual disability disorder (i.e. mental retardation). Section 61.077(b) was added to mandate that TYC accept a child with intellectual disability who was committed. The amendments reflected a change in philosophy as to the handling of juvenile offenders with an intellectual disability. Unless the child was found mentally unfit to stand trial because of an intellectual disability or not responsible because of an intellectual disability, he or she is no longer be committed to the Texas Department of Aging and Disability Services (intellectual disability disorder) or the Texas Department of State Health Services (mental illness) from or as a result of handling by a juvenile court. Instead, such a child is handled as part of the juvenile system.

In 1997, the prohibition on TYC accepting a mentally ill child was also repealed. Section 61.077(b) was amended to require TYC to accept a child with mental illness or intellectual disability disorder who was committed. For years prior to this change, TYC had been accepting and

providing services to children who were emotionally disturbed. The 1997 amendment eliminated the need for making the sometimes difficult determination of whether the committed child's condition constituted a mental illness, which required rejection, or an emotional disturbance, which did not.

The provisions in Chapter 55, dealing with children with mental illness, still specify a strong policy preference for handling children with mental illness in the Texas Department of State Health Services (formerly MHMR) programs and facilities rather than in the juvenile correctional process. See Chapter 14.

What of children with mental illness or an intellectual disability who were committed to TJJD but who could not, because of their mental illness or intellectual disability, progress through the mandatory rehabilitation steps to become eligible for parole? If they were denied release because they were unable, due to mental illness or intellectual disability, to progress, that would create serious legal problems. Unless special rules were created, those children would have remained in TYC until the age of mandatory discharge solely because they were unable to progress through the rehabilitation process.

In 1997, the legislature addressed this problem by requiring TYC to discharge a child under an indeterminate commitment who had completed his or her minimum length of stay if TYC determined the child was unable to progress in the agency's rehabilitation programs because of the child's mental illness or intellectual disability. Human Resources Code Section 61.077(b).

Human Resources Code Section 61.0772 was also enacted in 1997, requiring TYC to examine these children and initiate proceedings for mental health or intellectual disability commitments in instances in which the children met statutory standards. This section was amended in 2003 to authorize TYC to refer such children for outpatient treatment in appropriate cases. See Chapter 14.

In 2009, Human Resources Code Section 61.077(g) [now 244.011(g)] was added to ensure that if a child with mental illness or intellectual disability disorder was discharged from TYC due to failure to progress, that child was eligible to receive continuity of care services from the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) under Chapter 614, Health and Safety Code.

This statutory scheme remained in place when TJJD was created in 2011; however, the provisions were moved to Sections 244.011 and 244.012, Human Resources Code.

Children with determinate sentences who have mental illness or intellectual disability disorder were excluded from this scheme because TJJD cannot grant early discharge to a child committed with a determinate sentence. It can only parole such children. There is also a public safety concern over a rule that would require release even on parole of a child with mental illness or intellectual disability disorder who has committed a serious enough offense to receive a determinate sentence.

However, Section 244.0125, Human Resources Code (added in 2009 as Section 61.0773), addresses juveniles with a determinate sentence who are in need of mental health services that TJJD cannot meet. It allows TJJD to petition the committing juvenile court to start mental health commitment proceedings as provided in Chapter 55 of the Family Code. If the child is released from the mental health treatment facility before his or her sentence expires, the juvenile court has the option to return the child to TJJD, transfer the child to TDCJ, or release the child on parole. The child is given credit on his or her sentence for all time spent in the mental health treatment facility. While in the facility, the child may not be released on a pass or furlough.

Committing Foreign Nationals to TJJD. The Texas Juvenile Justice Department must accept all children properly committed to it. The Attorney General has stated that TJJD cannot refuse to accept a properly committed child because the child is a foreign national. Attorney General Opinion No. H-521 (1975).

The juvenile court in *In the Matter of M.A.C.*, 999 S.W.2d 442 (Tex.App.—El Paso 1999, no pet.), committed the respondent, a Mexican national, to TYC [TJJD], a decision that was challenged as an equal protection of the laws violation on the ground that, had respondent been a United States citizen, he would have been given probation. Respondent lived in Ciudad Juarez in an unstable home situation. Because of his home situation, he did not qualify for the Mexican National Children's Program, which would have enabled him to be placed on probation by the American juvenile court while being supervised in his home by Mexican authorities. The Court of Appeals rejected the equal protection argument. It concluded that respondent was committed to TYC because probation alternatives were not available; those alternatives were not available because respondent's home was in Mexico, not

because respondent is a Mexican national. He was treated no differently than a person of any nationality living outside the United States:

> Juvenile probation is not available to M.A.C. because the juvenile probation department lacks jurisdiction to supervise him in Mexico. Other than the Mexican National Children's Program for which M.A.C. did not qualify, there are no alternative programs available. Because the State has a legitimate interest in taking steps to rehabilitate M.A.C. and protect the public, and because M.A.C. did not qualify for the Mexican National Children's Program, commitment to TYC is an appropriate sanction that is rationally related to these interests.

999 S.W.2d at 445-46.

3. Driver's License Suspension

There are two provisions in Section 54.042 for suspending or denying the issuance of a driver's license or permit, one mandatory and one discretionary.

Mandatory Suspension. There are three categories of offenses that lead to mandatory suspensions or denials, each with different lengths and different conditions.

The first is defined in Section 54.042(a)(1)(A) by reference to Section 521.342(a) of the Transportation Code. Included under this provision are: driving while intoxicated by use of alcohol, including since 2009 driving while intoxicated with a child passenger; a jailable violation of the Alcoholic Beverage Code involving manufacture, delivery, possession, transportation, or use of an alcoholic beverage, other than an offense covered under Section 106.071, Transportation Code (alcohol-related offenses by a minor); a jailable misdemeanor violation of the Texas Controlled Substances Act (Chapter 481, Health and Safety Code) other than an offense for which Section 521.372, Transportation Code, requires automatic suspension; a jailable violation of the Dangerous Drugs Act (Chapter 483, Health and Safety Code) involving the manufacture, delivery, possession, transportation, or use of a dangerous drug; and a jailable violation of the Abusable Volatile Chemicals Act (Chapter 485, Health and Safety Code) involving the manufacture, delivery, possession, transportation, or use of an abusable volatile chemical. After adjudication for one of these offenses, the juvenile court is required in disposition to order that DPS suspend or deny the issuance of the child's license or permit for a period of 365 days. Section 54.042(c).

The second class of offenses for which suspension is mandatory is defined in Section 54.042(a)(2) by reference to Section 521.372(a) of the Transportation Code. This class consists of a violation of the federal Controlled Substances Act; any drug offense, which is defined to include "the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance the possession of which is prohibited under the [federal] Controlled Substances Act" as well as driving while intoxicated by use of a controlled substance; and any felony violation of the Texas Controlled Substances Act that does not meet the definition of a "drug offense."

In 2009, a third class of offenses requiring the juvenile court to order DPS to suspend or deny the issuance of a license or permit was added to Section 54.042(a)(1)(B), namely conduct that violates a state or federal law involving severe forms of trafficking in persons, as defined by 22 U.S.C. Section 7102. That federal statute defines "severe forms of trafficking in persons" as sex trafficking involving persons under age 18 for illegal commercial purposes or illegally securing a person's labor or services by subjecting the person to involuntary servitude, debt bondage or slavery. 22 U.S.C. Section 7102(8); see also Government Code Section 531.381(2) (adopting federal definition of "victim of trafficking"). The mandatory period of suspension for such offenses is also for a period of 365 days. Section 54.042(c).

Upon adjudication of an offense in the second class, the juvenile court may not order the license suspended or denied under the provisions applicable to the first and third classes; instead, the court must notify DPS of the adjudication. *In the Matter of C.E.M.*, 981 S.W.2d 771 (Tex.App.—Houston [1st Dist.] 1998, no pet.). DPS then suspends or denies the certification as provided by Section 521.372. The period of mandatory suspension for the second class of offenses is for a minimum of 180 days. If the respondent fails to complete an educational program approved by the Texas Department of State Health Services (formerly the Texas Commission on Alcohol and Drug Abuse), the period of suspension is indefinite. Transportation Code Sections 521.372(c) and 521.374(b).

The question was raised of whether possession of marijuana, a misdemeanor violation under the Texas Controlled Substances Act (Ch. 481, Transportation Code) fell under the first class of offenses requiring a 365-day suspension or the third class of offenses, requiring a minimum 180-day suspension. The court explained that because possession of marijuana meets the definition of a

drug offense under the federal Controlled Substances Act, it falls under the third class of offenses, as does every misdemeanor drug offense meeting that definition. See *In the Matter of R.S.J.*, 999 S.W.2d 871 (Tex.App.—Tyler 1999, no pet.). See also *In the Matter of A.B.C.*, UNPUBLISHED, No. 05-00-00237-CV, 2001 WL 8857, 2001 Tex.App.Lexis 56, Juvenile Law Newsletter ¶ 01-1-07 (Tex.App.—Dallas 2001, no pet.).

The question was also raised of whether municipal courts were required to report convictions of possession of drug paraphernalia of a Class C misdemeanor level to DPS for the purpose of license suspension under Section 521.372, Transportation Code. The Attorney General explained that there is no such responsibility to report because Class C misdemeanor level possession of drug paraphernalia does not meet the definition of "drug offense" under the federal Controlled Substances Act (the sale or transportation of drug paraphernalia is an offense under the Controlled Substances Act). Attorney General Opinion KP-0150 (2017),

If the child has no license, the juvenile court must order that he or she be denied the right to obtain one during the period for which a license could have been suspended.

Section 54.042(e) provides that, if the child qualifies, the juvenile court may grant the child an occupational license.

Discretionary Suspension. Section 54.042(f) authorizes the juvenile court in its discretion to order the suspension or denial of a license of a child adjudicated for any act of delinquency or CINS, except those covered under the mandatory provisions. The period of suspension or denial is set by the court but cannot exceed 12 months.

The juvenile court is also authorized by Section 54.042(g) to state in the conditions of probation that, if probation is violated, the court may order suspension of the probationer's driver's license. If probation is violated, the court may, but is not required to, order suspension for up to 12 months. This can be ordered whether or not probation is revoked and can be ordered even if the court had previously suspended the license when placing the child on probation. The court is empowered to suspend the license upon a probation violation only if notice was given to the child of that possibility at the time he or she was placed on probation.

Section 54.042(e) provides that, if a child qualifies, he or she may be given an occupational driver's license when a license has been suspended under the discretionary provisions.

Suspension for Graffiti Offenses. In 1997, the legislature amended Subsections 54.042(b) and (c) to authorize, but not require, the juvenile court to order the suspension or denial of the driver's license of a child adjudicated for the offense of graffiti under Penal Code Section 28.08. The period of suspension for the first offense is up to 365 days; for a subsequent offense the period of suspension is mandated at 365 days.

Overlapping Suspensions. In 1997, the legislature, as part of the legislation rewriting alcohol offenses by minors, added Section 54.042(h) to provide that periods of license suspension imposed administratively for refusal to take the intoxilyzer or failure of an intoxilyzer test must be credited toward the suspensions imposed upon first adjudication for driving while intoxicated (DWI), intoxication assault or intoxication manslaughter. No credit may be given for subsequent adjudications.

Suspension Beyond Age 18. The suspension of a motor vehicle operator's license under Section 54.042 can extend beyond the respondent's 18th birthday, when juvenile dispositional powers normally cease by operation of law. Because the legislature has specifically provided for suspension beyond the 18th birthday—for 365 days from the date of disposition, for example—that provision controls over the conflicting, general provision of Section 54.05(b) that "all dispositions automatically terminate when the child reaches his 18th birthday."

4. Orders Affecting Persons Other Than the Child

In a number of situations, the juvenile court has powers over persons in addition to the child who was adjudicated. In each situation, the other person has some relationship to the juvenile, such as parentage, that gives the juvenile court powers over that person in order to benefit the child.

This discussion explores child support, injunctive orders, truancy programs, probation supervision fees, and costs of court. There are others. The procedures for imposing and enforcing such court orders are discussed in Chapter 26.

a. Child Support

Section 54.06(a) provides:

> At any stage of the proceeding, when a child has been placed outside the child's home, the juvenile court, after giving the parent or other person responsible for the child's support a reasonable opportunity to be heard, shall order the parent or other person to pay in a manner directed by the court a reasonable sum for the support in whole or in part of the child or the court shall waive the payment by order. The court shall order that the payment for support be made to the local juvenile probation department to be used only for residential care and other support for the child unless the child has been committed to the Texas Juvenile Justice Department, in which case the court shall order that the payment be made to the Texas Juvenile Justice Department for deposit in a special account in the general revenue fund that may be appropriated only for the care of children committed to the Texas Juvenile Justice Department.

Before a 1987 amendment, Section 54.06(a) was limited to children who were placed outside their homes on juvenile probation. This restriction was eliminated and replaced by the language "at any stage of the proceeding." The amended statute covers a child placed outside the home before adjudication or disposition. It would, for example, include a child placed outside the home as part of the six-month deferred prosecution authorized by Section 53.03 or a child placed as part of pre-dispositional release from detention. See *In the Matter of J.S.H.*, UNPUBLISHED, No. 10-08-00563-CV, 2010 Tex.App.Lexis 1942, Juvenile Law Newsletter ¶ 10-2-8 (Tex.App.—Houston [1st Dist.] 2010, no pet.) (Section 54.06 authorizes juvenile court to order parent to pay child support).

Existing Support Orders. Section 54.06(b) provides that if a child is removed from the home and there is in existence a support order that was entered under Title 5 of the Family Code, the juvenile court must order the obligee under that support order to assign his or her right to support to the probation department or TJJD, as the case may be.

Creating Support Orders. Section 54.06(e) requires the juvenile court to use the same child support guidelines required to be used by a divorcing court under Chapter 154, Family Code, and includes provisions for the "medical" support of a child as provided by that chapter.

Section 54.06(f) provides that a child support order entered under this section prevails over any previous child support order to the extent of conflict.

Enforcement. Section 54.06(c) permits a Title 3 support order to be enforced by garnishment of wages. A 1995 amendment also authorized enforcement "by any other means available to enforce a child support order under Title 5." This references the full range of enforcement tools, including criminal contempt of court, income withholding, and confirmation of arrearages. It can be argued under this language that the child support due under a Title 3 order accrues interest as provided in Section 157.265, Family Code. Because the full range of Title 5 child support enforcement is made available, child support is excluded from the enforcement provisions of Chapter 61 of Title 3 dealing with parental rights and responsibilities.

Public Agency Not Liable. In *In the Matter of D.H.*, 556 S.W.2d 628 (Tex.Civ.App.—Waco 1977, writ ref'd n.r.e.), the Department of Human Services (DHS) was the child's managing conservator under the Family Code. The child was adjudicated to be a child in need of supervision. The juvenile court placed the child on probation and ordered that he be placed in the custody of the Devereaux Foundation. The juvenile court ordered that the county pay $180 per month toward the child's support at Devereaux and that DHS pay $1,020 per month. DHS appealed this order. The appellate court reversed the juvenile court and held that both the Texas Constitution and the DHS appropriation bill prohibited the juvenile court from ordering such a payment from DHS to Devereaux.

b. Injunctive Orders

Section 54.041(a) authorizes the juvenile court, once a child has been adjudicated, to issue four different types of injunctive orders requiring persons associated with the juvenile to take certain actions or refrain from taking certain actions. It requires that the juvenile court give "notice by any reasonable method to all persons affected" and authorizes the court to:

> (1) order any person found by the juvenile court to have, by a wilful act or omission, contributed to, caused, or encouraged the child's delinquent conduct or conduct indicating a need for supervision to do any act that the juvenile court determines to be reasonable and necessary for the welfare of the child or to refrain from doing any act that the juvenile court determines to be injurious to the welfare of the child;

> (2) enjoin all contact between the child and a person who is found to be a contributing cause of the child's delinquent conduct or conduct indicating a need for supervision; or
>
> (3) after notice and a hearing of all persons affected order any person living in the same household with the child to participate in social or psychological counseling to assist in the rehabilitation of the child and to strengthen the child's family environment.
>
> (4) after notice and a hearing of all persons affected order the child's parent or other person responsible for the child's support to pay all or part of the reasonable costs of treatment programs in which the child is required to participate during the period of probation if the court finds the child's parent or person responsible for the child's support is able to pay the costs.

Section 54.041(d) provides that any person subject to such a juvenile court order "is entitled to a hearing on the order before the order is entered by the court." Section 54.041(e) provides that these orders of the juvenile court may be enforced by contempt of court proceedings under Section 54.07, which references the enforcement procedures of Chapter 61 of Title 3 on parental rights and responsibilities. See Chapter 26.

In the Matter of S.J.C., UNPUBLISHED, No. 08-08-00284-CV, 304 S.W.3d 563, Juvenile Law Newsletter ¶ 10-1-3 (Tex.App.—El Paso 2010, no pet.) represents a case of first impression in which a parent was found to have contributed to her son's delinquent conduct "by willful act or omission" and was ordered to participate in his rehabilitation. During the disposition hearing, the child's mother refused to sign a copy of the referee's recommendations after having been ordered to do so. As a result, she was held in contempt. The parent's appeal urged that the evidence was insufficient to support the referee's conclusion that she contributed to her son's delinquency.

The El Paso Court of Appeals agreed. Sidestepping the State's argument that the appeal should be dismissed as being moot since the juvenile's probation had been terminated, the appellate court took up the parent's issue under the "collateral consequences" exception to the mootness doctrine:

> Here, the court ordered the mother to attend family counseling, pay numerous fees, pay restitution and provide the probation department with the child's school records. These are clearly legal consequences that would not exist absent the challenged finding.

302 S.W.3d at 569.

Noting that Section 54.04(f) does not require a parent's signature on a referee's recommendation or judgment, the Court of Appeals also found there was nothing in appellant's conduct that would constitute direct contempt.

c. Truancy Classes

Prior to 2015, Section 54.041(f) authorized a juvenile court in a case in which a child has been adjudicated CINS for truancy to order the child's parents or guardians to attend a class offered by a school district on truancy if the school district offers such a class. This section was repealed among reforms to truancy that involved removing truancy from the list of CINS offenses as well as repealing the criminal offense of Failure to Attend School under Section 25.094, Education Code. See Chapter 4.

d. Probation Supervision Fees

Section 54.061(a) requires the juvenile court to order the payment of probation supervision fees if, after giving the child, parent, or other person responsible for the child's support a reasonable opportunity to be heard, the court determines they are financially able to pay the fee. The fee may be no more than $15 per month.

Section 54.061(d) requires the juvenile court to enter a statement in the records of the case if the court finds that the "child, parent or other person responsible for the child's support is financially unable to pay the probation fee." The juvenile court is empowered to waive the probation fee only if it makes that finding and enters a statement that reflects the finding. Enforcement is provided in Chapter 61, Family Code.

The juvenile court may make payment of supervision fees a condition of the juvenile's probation. If the juvenile refuses to pay the fees, a motion to modify seeking revocation of probation can be filed. See Chapter 13.

In 2011, the San Antonio Court of Appeals addressed whether the Department of Family and Protective Services (DFPS) and its employees enjoy sovereign immunity from the imposition of financial obligations against them in connection with a child's delinquency proceeding. *In the Matter of R.L.*, 353 S.W.3d 524 (Tex.App.—San Antonio 2011, no pet.). The petition alleged that R.L., who was under the managing conservatorship of DFPS, committed

burglary and that his DFPS caseworker "had by willful act or omission, contributed to, caused, or encouraged R.L.'s delinquent conduct." 353 S.W.3d at 526. The petition also asked that the court hold DFPS and the caseworker liable for paying any costs, fees, and restitution imposed against R.L. At disposition, the trial court ordered DFPS or the caseworker to perform certain monitoring requirements with respect to R.L. and to pay restitution, court costs, attorney's fees, and probation fees.

The Court of Appeals noted that while no law suit had technically been filed against the State, "the proceeding nonetheless has coercive effects on the State in that it must now bear various obligations mandated by a court order." 353 S.W.3d at 527. Consequently, under the doctrine of sovereign immunity, the trial court lacked jurisdiction to impose such obligations on DFPS or the caseworker. See also *In the Matter of J.L.S.,* UNPUBLISHED, No. 04-11-00030-CV, 2011 WL 4383310 (Tex.App.—San Antonio 2011, no pet.).

e. Costs of Court

Section 54.0411(a) provides:

> If a disposition hearing is held under Section 54.04 of this code, the juvenile court, after giving the child, parent, or other person responsible for the child's support a reasonable opportunity to be heard, shall order the child, parent, or other person, if financially able to do so, to pay a fee as costs of court of $20.

By specifically providing for a $20 fee as costs of court, the legislature intended this fee to be in lieu of normal civil costs of court, not in addition to such costs. Prior to the enactment of this provision in 1987, it was not the custom in juvenile cases to assess any costs of court against the child or parent.

Money collected under this provision is to be transmitted by the counties to the comptroller of public accounts for deposit in the juvenile probation diversion fund. These funds may be appropriated by the legislature to TJJD to provide services to divert juveniles who are "at risk of commitment to TJJD." Section 54.0411 (g) and (h). The court's order may be enforced under Chapter 61 by contempt of court proceedings.

The statute provides that the costs may be assessed in "a disposition hearing." The Attorney General has stated that a modification of disposition in which a hearing has been waived under Section 54.05(h) is not covered by the costs of court statute. The Attorney General asked, but did not answer, the question of whether, even if a Section 54.05 hearing had been held, it would have qualified as a "disposition hearing" under the costs provision. Attorney General Opinion No. LO 97-074 (1997).

The Attorney General stated in Attorney General Opinion No. GA-0017 (2003) that a juvenile court may order any non-prevailing party to reimburse the county for the costs of service of summons under section 53.06 if the juvenile is adjudicated. Additionally, the court may order the parent, guardian, custodian, guardian ad litem, or other necessary party to pay the cost of service of summons if the person is subject to an order under Section 54.041.

Juvenile Delinquency Prevention Fees. Section 54.0461 requires the court to impose a $50 juvenile delinquency prevention fee on the child, parent, or other responsible person when the child is adjudicated for a graffiti violation under Penal Code Section 28.08. This fee was increased from $5 to $50 during the 2007 legislative session. In 2009, a conforming change was made to the Government Code reflecting the increase from $5 to $50. Government Code Section 103.0212(2)(D). As specified in Code of Criminal Procedure Article 102.0171, the fee goes into a pool for juvenile delinquency prevention programs. The fee is a cost of court, which can be imposed with probation or in connection with a TJJD commitment.

5. Orders for Restitution

Types of Orders. There are three types of restitution orders that can be entered in the dispositional phase of juvenile proceedings: (1) ordering the child to pay restitution as a condition of probation, (2) ordering the child to pay restitution independently of probation, and (3) ordering a parent to pay restitution. Section 54.041(b) provides:

> If a child is found to have engaged in delinquent conduct or conduct indicating a need for supervision arising from the commission of an offense in which property damage or loss or personal injury occurred, the juvenile court, on notice to all persons affected and on hearing, may order the child or a parent to make full or partial restitution to the victim of the offense. The program of restitution must promote the rehabilitation of the child, be appropriate to the age and physical, emotional, and mental abilities of the child, and not conflict with the child's schooling. When practicable and subject to court supervision, the court may approve a restitution program based on a settlement between the child and the victim of the offense. An order

> under this subsection may provide for periodic payments by the child or a parent of the child for the period specified in the order but except as provided by subsection (h), that period may not extend past the date of the 18th birthday of the child or past the date the child is no longer enrolled in an accredited secondary school in a program leading toward a high school diploma, whichever date is later.

A restitution order can be made a condition of the child's probation; it could be a reasonable and lawful probation condition under Section 54.04(d)(1). A restitution order can also be entered even when the child has been committed to TJJD since no language in Section 54.041(b) restricts a restitution order against a child to probation cases. In either event, the restitution order must "promote the rehabilitation of the child, be appropriate to the age and physical, emotional, and mental abilities of the child, and not conflict with the child's schooling." See *In the Matter of J.G.*, UNPUBLISHED, No. 05-08-00750-CV, 2009 Tex.App.Lexis 3094 (Tex.App.—Dallas 2009, no pet.), rejecting appellant's argument that restitution order did not promote rehabilitation, was not appropriate to his age and abilities, and would interfere with his schooling.

In *In the Matter of S.G.*, UNPUBLISHED, No. 05-05-00606-CV, 2006 Tex.App.Lexis 2665, Juvenile Law Newsletter ¶ 06-2-12 (Tex.App.—Dallas 2006, no pet.), it was argued that the trial court no longer had plenary power over the issue of restitution since the court had signed an Order of Adjudication and Judgment of Disposition with TYC Commitment before making a final determination regarding restitution. However, the record showed that the disposition hearing was continued by agreement for the sole purpose of considering a restitution claim, which was large and complex. In the meantime, the disposition judgment was signed to avoid undue delay in providing S.G. with necessary services at TYC. "We have found nothing to suggest that the trial court's procedure of bifurcating unresolved restitution issues from the remainder of the disposition was in any way improper under the circumstances." 2006 Tex.App.Lexis 2665 *5.

Factual Basis for Order. The Dallas Court of Appeals in *In the Matter of M.R.D.*, UNPUBLISHED, No. 05-92-01041-CV, 1992 WL 389773, Juvenile Law Newsletter ¶ 93-1-5 (Tex.App.—Dallas 1992, no writ) upheld that portion of the restitution statute that permits a juvenile court's restitution order to be based on "a settlement between the child and the victim of the offense." Such an agreement eliminates the need to take evidence on the amount of restitution that is appropriate. However, the court invalidated on vagueness grounds that portion of the juvenile court's order that simply required the respondent to "reimburse Father for Restitution payments." Because the order did not specify the details of reimbursement, it was unenforceable. Finally, the court noted that if the father failed to pay restitution as ordered by the juvenile court, that failure could not form the basis for revocation of the respondent's probation. Therefore, the sole remedy for parental failure to pay would be contempt proceedings against the parent.

Section 54.041(b) authorizes the court to order "full or partial restitution to the victim of the offense." Section 54.041(c) limits the restitution that may be ordered by the requirement that "a victim of an offense is not entitled to receive more than actual damages under a juvenile court order."

In *In the Matter of J.R.*, 907 S.W.2d 107 (Tex.App.—Austin 1995, no writ), the juvenile court placed J.R. on probation for assault and ordered as a condition of probation that he pay $4,000 in medical bills incurred by the victim for injuries inflicted upon him. On appeal, he contended that the juvenile court erred by merely accepting the medical bills presented without requiring the State to prove that the bills were reasonable, which, it was contended, is required in civil damage award cases. The Court of Appeals rejected this argument:

> Because of the context in which the juvenile court can order restitution, we determine that the rules of restitution in criminal cases should apply. In a criminal proceeding, the amount of restitution is required to be "just," that is, supported by sufficient factual evidence in the record that the expense was incurred.... The amount of expense incurred need not be supported by proof that it was reasonable....
>
> Similarly, we construe the term "actual damages" consistently with the approach to restitution in criminal cases. The trial court therefore correctly admitted the statements of expense actually incurred for [the victim's] medical care without proof that the amounts charged were reasonable.

907 S.W.2d at 109. Cf. *In the Matter of E.A.R., IV*, UNPUBLISHED, No. 03-09-00021-CV, 2009 Tex.App.Lexis 8972, Juvenile Law Newsletter ¶ 10-1-2 (Tex.App.—Austin 2009, no pet.) (victim's testimony supported trial court's restitution order of $3,275 for destruction of vehicle resulting from appellant's delinquent conduct).

The juvenile and/or parent must be given the opportunity in judicial proceedings under criminal procedural rules to dispute the amount of loss claimed by the victim. *J.R.* merely holds there is no additional requirement of showing that a bill is reasonable. Cf. *In the Matter of R.M.*, UNPUBLISHED, No. 05-06-00519-CV, 2007 Tex.App.Lexis 5785 (Tex.App.—Dallas 2007, no pet.) (no abuse of discretion for judge to set restitution amount reasonable to both victim and R.M.'s family).

In a criminal mischief case, appellant claimed that an award of restitution for $9,336.10 violated Section 54.041(b) because the monthly payments would require him to obtain full-time employment and disrupt his schooling. *In the Matter of D.K.*, 247 S.W.3d 802 (Tex.App.—Dallas 2008, no pet.). The Dallas Court of Appeals disagreed, noting that the restitution order was also imposed on D.K.'s brothers and his father and that the amount of restitution was supported by the evidence in the record. As a result, the trial court did not abuse its discretion in setting the restitution award Cf. *In the Matter of D.S.W.*, UNPUBLISHED, No. 04-09-00592 & 00593-CV, 2010 Tex.App.Lexis 7214, Juvenile Law Newsletter ¶ 10-4-5 (Tex.App.—San Antonio 2010, no pet.) (restitution order set aside and case remanded for a new hearing because restitution amount was not adequately supported in the record).

Restitution to Insurance Company. Is an insurance company that has paid a claim for damages to its insured for an offense by a juvenile eligible to be the recipient of a juvenile court restitution order? The juvenile in *In the Matter of M.S.*, 985 S.W.2d 278 (Tex.App.—Corpus Christi 1999, no pet.), stole an automobile and wrecked it. The owner of the automobile was made the recipient of a restitution order for the uninsured loss to the automobile, and the insurance company was included as a separate victim of the offense for the amount it had paid the owner. The Court of Appeals upheld the restitution order to the insurance company:

> We conclude that Farm Bureau Insurance Company is an indirect victim of appellant's delinquent conduct and that it suffered a pecuniary loss. If appellant had not stolen and wrecked Mutchler's car, there would have been no claim made on Mutchler's insurance policy and no need for the insurance company to compensate Mutchler for any loss.
>
> We conclude the juvenile court did not abuse its discretion in determining that Mutchler's actual damages included the amount paid by Farm Bureau Insurance Company for the loss of the automobile.

985 S.W.2d at 280-81.

The Court of Appeals arrived at this conclusion using criminal case precedent, which was based on provisions of Code of Criminal Procedure Article 42.037 dealing specifically with restitution in criminal cases. Code of Criminal Procedure Article 42.037(f)(1) provides:

> The court may not order restitution for a loss for which the victim has received or will receive compensation only from a source other than the compensation to victims of crime fund. The court may, in the interest of justice, order restitution to any person who has compensated the victim for the loss to the extent the person paid compensation. An order of restitution shall require that all restitution to a victim or to the compensation to victims of crime fund be made before any restitution to any other person is made under the order.

It would be appropriate for a juvenile court to be guided by those principles in fashioning orders for restitution to an insurance company and for probation departments to use those statutory priorities in enforcing those orders.

Order Must Relate to Adjudicated Offense. In *In the Matter of D.S.*, 921 S.W.2d 860 (Tex.App.—San Antonio 1996, no writ), the respondent was originally charged with burglary of a habitation with intent to commit theft. The petition was amended to add criminal trespass, and the respondent pleaded true to that charge. The juvenile court placed him on probation and ordered him to make restitution. On appeal, the Court of Appeals struck the restitution order from the conditions of probation. Section 54.041(b) authorizes an order of restitution "[i]f a child is found to have engaged in delinquent conduct...arising from the commission of an offense in which property damage or loss...occurred." There may have been property loss from a burglary with intent to commit theft, but there was no property loss from a criminal trespass (such as damage to doors or windows to secure entry) in this case. Therefore, the restitution order was not authorized.

In the Matter of M.J.L., UNPUBLISHED, No. 04-98-00072-CV, 1999 WL 692635, 1999 Tex.App.Lexis 6784, Juvenile Law Newsletter ¶ 99-4-03 (Tex.App.—San Antonio 1999,

no pet.), the juvenile respondent was ordered to pay restitution for damage to a map display case, a statue box, and a shadow box, all of which were damaged at about the same time on a school field trip; however, he was adjudicated for criminal mischief for damage to the map display case only. The Court of Appeals set aside that portion of the order that required restitution for damages for which the juvenile had not been adjudicated legally responsible. Accordingly, he was required to make restitution only for the damage he inflicted to the map display case.

The respondent in *In the Matter of R.M.Z.*, UNPUBLISHED, No. 04-00-00465-CV, 2001 WL 417302, 2001 Tex.App.Lexis. 2668, Juvenile Law Newsletter ¶ 01-2-19 (Tex.App.—San Antonio 2001, no pet.) was adjudicated for unauthorized use of a motor vehicle. The owner testified that the difference in value of the vehicle as taken and as recovered was $3,200. The vehicle had been damaged by having the steering column broken and the VIN altered. The juvenile court committed respondent to TYC and ordered payment of $3,200 in restitution. The Court of Appeals upheld this order over a claim that, under *In the Matter of D.S.,* the order was unauthorized:

> The unauthorized use of the vehicle would not have occurred but for the alterations and damage to the car. R.M.Z.'s actions caused the alterations and damage to the car that enabled him to operate the vehicle without the owner's consent. There is an essential connection between the two.

2001 WL 417302 *3.

The respondent in *In the Matter of C.T.*, 43 S.W.3d 600 (Tex.App.—Corpus Christi 2001, no pet.), pleaded no contest and was adjudicated for the offense of failure to stop and give information following a motor vehicle accident. The juvenile court ordered payment of $2,000 in restitution for property damage resulting from the accident. Respondent challenged this award under *In the Matter of D.S.*, but the Court of Appeals rejected that argument:

> The involvement of a defendant in an accident and the requirement that there be damages to a vehicle resulting from the accident are essential elements of the offense of failure to stop and give information. Had there been no accident and had there been no damages to a vehicle, there would have been no crime in failing to stop or give information. … Accordingly, we find that the damages for which the trial court ordered restitution were occasioned by, and did arise from, the offense for which appellant was adjudged delinquent. The trial court did not abuse its discretion in ordering appellant to pay restitution as a condition of probation.

43 S.W.3d at 603.

In 2009, the Austin Court of Appeals followed the reasoning and result of *In the Matter of C.T.* to uphold a restitution order for damage to a vehicle and theft of a weed eater arising out of an unauthorized use of a motor vehicle charge. *In the Matter of A.J.V.*, UNPUBLISHED, No. 03-08-00183-CV, 2009 Tex.App.Lexis 2453, Juvenile Law Newsletter ¶ 09-2-17 (Tex.App.—Austin 2009, no pet.). The court writes:

> We conclude that the juvenile court did not abuse its discretion by ordering A.J.V. to pay restitution for the damage to Ovalle's car. The car was stolen on January 29. A.J.V. admitted to the juvenile court that on January 30, he intentionally and knowingly operated Ovalle's car without consent. He also admitted that on January 30, he intentionally fled from a police officer who he knew was attempting to lawfully arrest him. On January 31, Ovalle examined his car and discovered that due to damage to the engine and starter, the car would not start. From this evidence, the juvenile court could reasonably infer that A.J.V. was the last person to operate the car and, as such, was responsible for the damage to the vehicle. The inference that appellant damaged Ovalle's car is strengthened by the short time frame. The damage had to have occurred during a roughly twenty-four hour period beginning with the theft of the car and ending with A.J.V.'s arrest. Given this timetable, the possibility that the damage to the car was inflicted by someone else is considerably reduced. We hold that the evidence supports the juvenile court's finding that the damage to Ovalle's car occurred during or as a result of A.J.V.'s unauthorized use of the vehicle.

2009 Tex.App.Lexis 2453 *8-9. See also *In the Matter of E.A.R., IV,* UNPUBLISHED, No. 03-09-00021-CV, 2009 Tex.App.Lexis 8972, Juvenile Law Newsletter ¶ 10-1-2 (Tex.App.—Austin 2009, no pet.) (finding that damage occurred during and as a result of appellant evading arrest in victim's vehicle).

The Court of Appeals also concluded that, while the restitution order for the stolen weed eater presented a "closer question," the connection between A.J.V.'s unauthorized use of the victim's vehicle and the loss of the weed eater that had been in the vehicle was nevertheless

sufficient to support the trial court's restitution order for the stolen item.

Duration of Restitution Orders. For a juvenile who is not on determinate sentence probation, a restitution order made a condition of probation expires automatically upon the child's 18th birthday under Section 54.05(b), whether fully satisfied or not. Enforcement of such a probation condition would be by modification or revocation of probation. The special problems involved in seeking to revoke probation for failure to comply with monetary probation conditions are discussed in Chapter 13.

Under Section 54.041(b), a restitution order against a child may extend beyond the child's 18th birthday as a court order independent of probation if the child is currently enrolled in a secondary school. That period conforms to the parental liability for support under Title 5 of the Family Code.

The parent of a child may be ordered to make restitution to the victim of the offense. An order directed against a parent may extend beyond the child's 18th birthday until such time as the child is no longer enrolled in a secondary school. This conforms to the period of parental support liability under Title 5, Family Code.

If a juvenile is on determinate sentence probation and that probation is transferred to the adult district court on the juvenile's 19th birthday, the district court is required to make payment of any unpaid restitution a condition of the adult probation. However, the liability of the parent for restitution may not be extended. Section 54.041(h)

Parental Defense of Reasonable Good Faith Effort. Prior to 2015, parents had a defense to an order to make restitution to their child's victim. Section 54.041(g) required the juvenile court to waive any requirement for restitution by the parent if the parent could show that he or she had "made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or engaging in conduct indicating a need for supervision." The statutory language supported the conclusion that the waiver was required upon a showing of reasonable good faith effort whether the showing was made before the restitution order was entered or in defense to enforcement efforts respecting an order already entered. See *In the Matter of D.M.*, 191 S.W.3d 381, 390 (Tex.App.—Austin 2006, pet. denied) ("allowing courts to impose restitution on parents of delinquent children and placing the burden on parents to prove their good faith efforts to prevent delinquent behavior as a defense to liability does not allow for arbitrary and discriminatory application, violate due process, or deprive parents of a reasonable opportunity to prepare a meaningful defense").

However, in 2015, as part of changes made related to truancy reform, Section 54.041(g) was repealed. While Section 54.041(f), also repealed, was related to truancy, Section 54.041(g) was not. Presumably this repeal was a drafting error. Out of a sense of fairness and considering legislative intent, courts may wish to consider operating as though Section 54.041(g) still exists.

Pleadings for Restitution. There is a split of opinion in the appellate cases on whether it is necessary to ask specifically for restitution in the petition for adjudication hearing or whether a general prayer for relief is sufficient. See Chapter 9. In 2001, the legislature resolved the conflict among the Courts of Appeals by enacting Section 54.048, which provides that a prayer for restitution need not specifically be made. See Chapter 9.

Deferred Prosecution. Restitution by the child can be made part of deferred prosecution. See Chapter 5.

Community Service. In 1995, the linkage in Section 54.041(b) between monetary restitution and community service restitution, in which community service was intended to be used only when monetary restitution could not, was broken. They are now independent dispositional powers. If the child is placed on probation, community service is a mandatory condition; the parent can also be ordered to participate in the child's community service activity. See the discussion earlier in this chapter.

Victims and Treatment of Restitution Payments. In 2007, the legislature enacted two versions of Section 54.0481, the second of which relates to victim restitution payments to be collected by local juvenile probation departments. In 2009, the second version of Section 54.0481 was renumbered as Section 54.0482. The statute clarifies the procedure for collecting and processing these payments and ultimately addresses the use of these funds if they are not claimed by the victims.

Section 54.0482(a) requires the juvenile probation department that receives restitution funds under a juvenile court order to deposit the funds in an interest-bearing account in the county treasury and to notify the victim that the funds have been received. If the victim claims the payment, the probation department must promptly send the funds to the victim. The victim has five years from the date the original notice was received to claim the funds.

In 2013, the legislature eliminated the requirement that the notice be sent by certified mail to the victim's last known address each time a payment was received. Instead, the juvenile probation department may provide notice of receipt of payment in any manner (e.g., telephone, email, or regular mail). Notice by certified mail is only required if the victim has not claimed the payment within 30 days of the initial notice.

This change was intended to reduce costs for juvenile probation departments when victims could be located to come get the payments without the need for certified mail. Certified mail is only required to prove notice was given in those instances in which the victim never claims the money. In addition to sending notice by certified mail, the juvenile probation department must also make a good faith effort to locate and notify victims of unclaimed restitution payments. If the victim does not claim a payment on or before the fifth anniversary of the date on which the notice was sent by certified mail, the probation department has no liability to the victim or anyone else related to the funds and the monies must be transferred to a special fund of the county treasury called the unclaimed juvenile restitution fund. The county may spend the money in this fund only for the same purposes for which the county may spend state aid funding received from TJJD, which includes juvenile probation department services, programs, and facilities.

6. HIV Testing

Section 54.033 mandates HIV testing of juveniles who are adjudicated delinquent for the offenses of indecency with a child by sexual contact [Penal Code Section 21.11(a)(1)], sexual assault (Penal Code Section 22.011), or aggravated sexual assault (Penal Code Section 22.021). The juvenile court is empowered to compel a respondent to be tested who does not voluntarily submit to testing. Test results are made available to the local health authority, which is then required to notify the victim of the offense and the respondent of the test result. Section 54.033(c).

7. Order to Protect Victim from Juvenile

Section 57.008 authorizes the juvenile court to enter an order to protect the victim from retaliatory harm from the juvenile:

> (a) A court may issue an order for protection from juveniles directed against a child to protect a victim of the child's conduct who, because of the victim's participation in the juvenile justice system, risks further harm by the child.
>
> (b) In the order, the court may prohibit the child from doing specified acts or require the child to do specified acts necessary or appropriate to prevent or reduce the likelihood of further harm to the victim by the child.

Such an order is similar to the injunctive orders the court may issue against adults to benefit the juvenile. As in those cases, the court must exercise care to provide notice and an opportunity to be heard both at the time the order is made and as part of any enforcement efforts.

This provision does not, by its terms, require that the order be issued only in the dispositional phase of the proceedings. Its tenor, however, does suggest exactly that. Certainly, absent an adjudication that the child is legally responsible for injury to the victim, it is difficult to find that a court order is necessary to prevent further harm to the victim.

E. Specific Statement of Reasons

Section 54.04(f) provides that "[t]he court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child." The requirement of a specific statement of reasons has given the appellate courts some difficulties.

It is important to distinguish between two separate matters: (1) whether the dispositional order recites reasons with sufficient specificity; and (2) whether there was evidence in the record to support the reasons specified. Both are required.

1. Specificity of the Reasons Given

The leading case on this issue is *In the Matter of T.R.W.*, 533 S.W.2d 139 (Tex.Civ.App.—Dallas 1976), *overruled on other grounds, K.K.H. v. State*, 612 S.W.2d 657 (Tex.Civ.App.—Dallas 1981, no writ). The child was adjudicated delinquent and committed to TYC. In the dispositional order, the juvenile court gave as a statement of reasons for the commitment that it was necessary "for the protection of the public and to rehabilitate said child." The State argued that this recitation, coupled with the juvenile court's finding that the child had committed two offenses of theft of property was a sufficient statement of reasons. The appellate court held it was not sufficient. The state-

ment that the child had committed the thefts was required as part of the adjudication hearing by Section 54.03(h). The statement concerning the protection of the public and the rehabilitation of the child was required by Section 54.04(c) in order to authorize the juvenile court to make any disposition of the case at all. See the discussion in Section B of this chapter.

The appellate court discussed the purpose of the requirement of a statement of reasons:

> The present order fails to state why the court decided to commit appellant to the Texas Youth Council rather than to impose some type of probation. Specification of the reasons for the disposition in an order and furnishing a copy to the child, as subdivision (f) requires, provide assurance that the child and his family will be advised of the reasons for commitment and will be in a position to challenge those reasons on appeal. The appellate court may then review the reasons recited and determine whether they are supported by the evidence and whether they are sufficient to justify the particular disposition ordered. Without a specific statement of the reasons for disposition, a reviewing court is left to rely on assumptions in judging the trial court's action.

533 S.W.2d at 141.

The Dallas Court of Appeals adopted the standard that the juvenile court, in its statement of reasons, "must set out the rationale of its order, and that is, the rational basis for the court's conclusion or motive that constrained entry of the order" of disposition. *T.R.W.* was followed in *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App.—Dallas 1976, no writ) and *In the Matter of L.G.*, 728 S.W.2d 939 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

In *J.L.E. v. State*, 571 S.W.2d 556 (Tex.Civ.App.—Houston [14th Dist.] 1978, no writ), the child and four others were adjudicated delinquent for damaging property. The child was committed to TYC and the other four were placed on probation. The dispositional order recited that the reason for the disposition was that the offense had been committed and over $3,000 in damage had resulted. The appellate court found this statement insufficient:

> [S]ection 54.04(f) requires more than a statement of the details of the delinquent conduct that he engaged in.... In this case, the recitation contained in the disposition order does not explain why, of the five youths who caused the property damage...only the appellant was committed to the care, custody, and control of the Texas Youth Council.

571 S.W.2d at 557.

In *F.L.J. v. State*, 577 S.W.2d 532 (Tex.Civ.App.—Waco 1979, no writ), the dispositional order contained four recitations. The first simply recited that the child was adjudicated delinquent for burglary of a habitation. The other three were as follows:

> (2) Said child has a history of attacking others, both verbally and physically.
>
> (3) Said child is in need of a strict environment such as that offered by the Texas Youth Council.
>
> (4) While at the Texas Youth Council, said child will receive individual counseling and will be included in group therapy sessions in which he will be immediately confronted by staff and peers when he exhibits negative behavior.

577 S.W.2d at 533.

The appellate court held that these recitations fully complied with Section 54.04(f).

While simply describing the details of the offense and tracking the findings required by Section 54.04 do not constitute a specific statement of reasons, a statement that the offense is so serious that protection of the public requires commitment does satisfy the specificity requirement. *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ); *In the Matter of D.B., Jr.*, UNPUBLISHED, No. 04-97-00218-CV, 1998 WL 712933, 1998 Tex.App.Lexis 6324, Juvenile Law Newsletter ¶ 98-4-20 (Tex.App.—San Antonio 1998, no pet.). See also *In the Matter of J.P.R.*, 95 S.W.3d 729 (Tex.App.—Amarillo 2003, no pet.) (holding that the 10 findings made by the court meet the specificity requirement).

Remedies When Statement Is Inadequate. If the appellate court finds that the juvenile court did not comply with Section 54.04(f) in stating its dispositional reasons specifically, it should abate the appeal and remand the case to the juvenile court for the entry of a new statement of reasons. See *In the Matter of S.J.F.*, UNPUBLISHED, No. 04-06-00619-CV, 2007 Tex.App.Lexis 4742 (Tex.App.—San Antonio 2007, appeal after remand) (remand with instructions to render proper disposition order was proper remedy where juvenile court failed to include any reasons in

its order). Then the case should be returned to the appellate court for an examination of whether the revised statement complies with the specificity requirement. See *K.K.H. v. State*, 612 S.W.2d 657 (Tex.Civ.App.—Dallas 1981, no writ); *In the Matter of L.G.*, 728 S.W.2d 939 (Tex.App.—Austin 1987, writ ref'd n.r.e.); *In the Matter of M.J.,* UNPUBLISHED, No. 05-96-01763-CV, 1998 WL 842661, 1998 Tex.App.Lexis 7574, Juvenile Law Newsletter ¶ 99-1-04 (Tex.App.—Dallas 1998, no pet.) (approving of a statement of reasons provided by the juvenile court following abatement of appeal).

The juvenile court can correct its dispositional order to comply with the specific statement of reasons requirement by acting within the time during which it retains plenary powers over the case—ordinarily within 30 days after the judgment is signed. See *J.E.S. v. State*, UNPUBLISHED, No. 05-95-00834-CV, 1995 WL 634154, 1995 Tex.App.Lexis 2638, Juvenile Law Newsletter ¶ 95-4-10 (Tex.App.—Dallas 1995, no writ).

Although a failure to state specifically the reasons for disposition is reviewable on direct appeal, failure to comply is not a basis for collateral attack in criminal proceedings. In *Glover v. State*, UNPUBLISHED, No. 05-93-01748-CR, 1994 WL 679774, Juvenile Law Newsletter ¶ 95-1-7 (Tex.App.—Dallas 1994, no writ), the State introduced a juvenile adjudication into evidence during the penalty phase of a criminal trial. In the juvenile case, the court had not complied with the requirement of a specific statement of reasons for disposition, but the Court of Appeals held that, like an irregularity in a judgment of a prior conviction, this defect cannot be challenged collaterally.

Findings of Fact. The Family Code requirement of a specific statement of reasons for disposition replaces any requirement of the Rules of Civil Procedure that the trial court must, upon request, make findings of fact. The statement of reasons serves the same purpose as findings of fact. *In the Matter of J.R.*, 907 S.W.2d 107 (Tex.App.—Austin 1995, no writ).

The juvenile court in *Lewis v. State*, UNPUBLISHED, No. 05-95-00669-CV, 1996 WL 80470, 1996 Tex.App.Lexis 753, Juvenile Law Newsletter ¶ 96-2-02 (Tex.App.—Dallas 1996, no writ) failed to state the reasons for committing the child to TYC. However, pursuant to a defense request, the court had made specific findings of fact. In view of the findings of fact, the Court of Appeals held the failure to state specific reasons for commitment, while error, was harmless. Therefore, it was not even necessary to remand the case for a statement of reasons.

2. Evidence to Support the Statement of Reasons

The leading case on evidence to support dispositional reasons is *In the Matter of N.S.D.*, 555 S.W.2d 807 (Tex.Civ.App.—El Paso 1977, no writ). In that case, the juvenile court gave the following statement of reasons for its commitment of the child to TYC:

> (a) The juvenile is in need of rehabilitation and his rehabilitation can be accomplished through commitment.
>
> (b) There are no services, which have not been used in the past, within the community to effectuate the juvenile's rehabilitation.
>
> (c) The general public of the community needs to be protected.

555 S.W.2d at 809.

The appellate court followed *T.R.W.* and held that reasons (a) and (c) were insufficient statements of reasons. Reason (b) was sufficient, but the appellate court concluded that there was no evidence to support the juvenile court finding in (b):

> It was the testimony of the Juvenile Probation Officer of El Paso County that in his opinion local resources were available which had not been used with the child in the past to effectuate his rehabilitation and that, using those available resources which had previously not been used, the child should have been placed on probation for a period of twelve months. It was his opinion that the child could have been rehabilitated using those previously unused local resources. The trial Court disagreed with the recommendation of the Juvenile Probation Officer. Under the testimony and under the evaluation made of the child, the Court may have been justified in so disagreeing with that conclusion. However, when the only testimony in the record is to the effect that local services were available which had not been used in the past and that the child could have been rehabilitated locally, there then became no basis for the reason given in the order; there was no evidence to support the reason given....

555 S.W.2d at 809.

In *In the Matter of L.G.*, 728 S.W.2d 939 (Tex.App.—Austin 1987, writ ref'd n.r.e.), the respondent was adjudicated delinquent for using cocaine and was committed to

TYC. After the appellate court remanded the case to the juvenile court for a fuller statement of reasons, the juvenile court stated that commitment was justified "because there exists in the community of Lockhart, Texas, where this conduct occurred, a great public awareness and concern about the problem of drug abuse in both the schools and the community at large." 728 S.W.2d at 942. The juvenile court also stated "the best interests of society in [e]nsuring that conduct of the nature involved in this case is not to be tolerated, particularly in the school system, far outweigh any interests to be served by placing the child on probation." 728 S.W.2d at 942.

The appellate court found no evidence in the record to support the commitment to TYC. The probation report recommended probation based on the child's family situation, school performance, and lack of prior referrals. The appellate court affirmed the adjudication of delinquency but set aside the TYC commitment, with the following comments:

> Texas Fam. Code Ann. §51.01(1-2) (1986) provides that Title 3, covering delinquent children, shall be construed to effectuate the purposes of providing care, protection, and the wholesome moral, mental, and physical development of children *along with* the protection of the welfare of the community. Subsection (4) provides that these purposes are to be achieved *whenever possible* in a family environment and that the child is to be separated from his parents only when it is necessary for his welfare or it is in the interest of public safety. There is no evidence in the record to support the trial court's conclusion that commitment to the Texas Youth Commission is warranted under the circumstances, nor is there any evidence that the delinquent conduct alone requires that the public be protected. Furthermore, we find no language in the Family Code indicating a public interest in "deterring" criminal activity which is preeminent over any interest in the rehabilitation of the child in his home environment. Based on the language noted above, we find just the opposite.

728 S.W.2d at 945 (emphases in original).

By contrast, in *F.L.J. v. State*, 577 S.W.2d 532 (Tex.Civ.App.—Waco 1979, no writ), discussed earlier in the section on specificity of the order, the argument was made that there was insufficient evidence to support the reasons recited. The appellate court disagreed:

> The record before us discloses that appellant threatened a worker at the detention center with a knife, has a history of attacking others including staff members at the Mary Lee School, and is in desperate need of a strict environment. Moreover, he has no home to go to, and probation of any sort is conclusively negated by the record. The evidence is sufficient to support the court's judgment.

577 S.W.2d at 533.

In *In the Matter of R.W.*, 694 S.W.2d 578 (Tex.App.—Corpus Christi 1985, no writ), the appellate court rejected appellant's argument that the juvenile court abused its discretion in committing him to the Youth Commission instead of placing him on probation:

> [T]he evidence showed that this was the second time appellant had been referred to the Juvenile Probation Department. The testimony showed that appellant had a deplorable attendance record at school, was failing in many subjects and had some disciplinary problems at school. His mother, according to the testimony of the probation officer, was trying to provide a stable home environment. [T]he juvenile probation officer recommended probation but indicated his recommendation was tenuous and that he was recommending appellant get probation only to give him the benefit of the doubt. There was also testimony that a relative who lived with appellant and his mother and with whom the appellant had frequent contact was involved in drug use and shooting incidents. Under the circumstances, we cannot say the trial court abused its discretion by ordering that appellant be sent to the Texas Youth Commission.

694 S.W.2d at 580. See also *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 WL 364250 (Tex.App.—Amarillo 2010, reh'g overruled) (no abuse of discretion in committing youth to TYC on basis that severity of conduct required commitment for protection of the public despite insufficient evidence to support additional findings that youth had a history of aggressive behavior and persistent delinquent behavior and that there was a lack of local resources to address youth's conduct).

If an appellate court finds insufficient evidence to support the findings made by the court, the remedy is to set aside the disposition order (ordinarily, a TJJD commitment) and remand the case to the court for a disposition that is supported by the evidence (ordinarily, probation).

The juvenile court must make certain findings of fact to remove a child from his or her home and place the child elsewhere on probation or commit the child to TJJD. See Section C of this chapter. Several appellate cases challenging the sufficiency of the evidence to commit a child to TJJD address that claim in terms of the sufficiency of the evidence to support those mandatory findings rather than in terms of an abuse of discretion in committing the child to TJJD or insufficiency of the evidence to support a specific statement of reasons. See Section C of this chapter.

F. Information Provided by Court

In 2007, the legislature added Human Resources Code Section 61.0651 [now 243.005], requiring a juvenile court that commits a child to TJJD to provide TJJD with specific documents related to the child. This statute supplemented then-existing Section 61.065 [now §243.004], which directs the court to forward a certified copy of the commitment order to TJJD and "make available to the department all pertinent information in [its] possession regarding the case." Section 243.004(b). Section 243.005 is much more specific and requires specific documents to accompany the committed child to TJJD.

A court that commits a child to TJJD is required to forward to the court a certified copy of the commitment order. In addition, the court, probation officer, prosecuting and police authorities, school authorities, and other public officials must make available to TJJD all pertinent information in their possession regarding the case. If TJJD requests, the information must be provided on forms furnished by TJJD or according to an outline furnished by TJJD. Human Resources Code Section 243.004.

In addition to the information provided under Section 243.004, the committing court is required to provide the agency a copy of the following documents under Section 243.005:

(1) the petition and the adjudication and disposition orders for the child, including the child's thumbprint;

(2) if the commitment is a result of revocation of probation, a copy of the conditions of probation and the revocation order;

(3) the social history report for the child;

(4) any psychological or psychiatric reports concerning the child;

(5) the contact information sheet for the child's parents or guardian;

(6) any law enforcement incident reports concerning the offense for which the child is committed;

(7) any sex offender registration information concerning the child;

(8) any juvenile probation department progress reports concerning the child;

(9) any assessment documents concerning the child;

(10) the computerized referral and case history for the child, including case disposition;

(11) the child's birth certificate;

(12) the child's social security number or social security card, if available;

(13) the name, address, and telephone number of the court administrator in the committing county;

(14) Title IV-E eligibility screening information for the child, if available;

(15) the address in the committing county for forwarding funds collected to which the committing county is entitled;

(16) any of the child's school or immunization records that the committing county possesses;

(17) any victim information concerning the case for which the child is committed;

(18) any of the child's pertinent medical records that the committing court possesses;

(19) the Texas Juvenile Justice Department standard assessment tool results for the child;

(20) the Department of Public Safety CR-43J form or tracking incident number concerning the child; and

(21) documentation that the committing court has required the child to provide a DNA sample to the Department of Public Safety.

While the Interagency Application for Placement is not among the documents listed in the statute, it should be

included in the commitment packet as it is still required by TJJD. The Interagency Application for Placement is a standard application form that provides a comprehensive profile of a child being placed in residential care or TJJD. It is essential that it be thoroughly and accurately completed.

Section 243.005, Human Resources Code, requires that additional supporting documentation be forwarded to TJJD by the juvenile court when a child has been committed to TJJD. As added in 2013, the committing court is required to provide, as applicable: (1) the child's assessment results on TJJD's standard assessment instrument; (2) the child's tracking incident number and the Department of Public Safety's CR-43J form; and (3) documentation verifying the collection of a DNA sample as required by law.

G. Progressive Sanctions Model

In 1995, the legislature enacted a system of progressive sanctions for the juvenile justice system. There are seven sanction levels, beginning with a supervisory caution and ending with a determinate sentence or certification as an adult. The two major features of the system are the seven program descriptions of sanction levels and the guidelines for assigning cases to sanction levels.

It is important to understand that the system of progressive sanctions does not expand or restrict the dispositional powers of the juvenile court that are specified in other places in Title 3. The lawfulness of any juvenile court disposition must be based on dispositional authorizations and restrictions outside of Chapter 59. The system of progressive sanctions recommends dispositions from among the alternatives authorized under other Family Code provisions.

In 2003, the legislature amended the progressive sanctions system to make it clear that dispositions that depart from the model are not bad and may sometimes be desirable. It did that in a number of ways, one of which was to change the name of the system from progressive sanctions guidelines to progressive sanctions model.

Purpose. Section 59.001 provides:

> The purposes of the progressive sanctions model are to:
>
> (1) ensure that juvenile offenders face uniform and consistent consequences and punishments that correspond to the seriousness of each offender's current offense, prior delinquent history, special treatment or training needs, and effectiveness of prior interventions;
>
> (2) balance public protection and rehabilitation while holding juvenile offenders accountable;
>
> (3) permit flexibility in the decisions made in relation to the juvenile offender to the extent allowed by law;
>
> (4) consider the juvenile offender's circumstances;
>
> (5) recognize that departure of a disposition from this model is not necessarily undesirable and in some cases is highly desirable; and
>
> (6) improve juvenile justice planning and resource allocation by ensuring uniform and consistent reporting of disposition decisions at all levels.

Subsection (5) was added by the legislature in 2003.

The two major purposes of the system are: (1) to encourage uniformity of disposition of juvenile offenders by providing a non-mandatory model for disposition; and (2) to encourage a uniform terminology for all dispositions to enable intelligent planning and resource allocations to be made by public officials. Since the model is not mandatory, it can only encourage uniformity in dispositions, not guarantee it. Because all dispositions must be described in a uniform fashion, a database has been created that will enable legislators and other public officials to make intelligent choices as to how to apply scarce juvenile resources where they will have greatest impact.

Discretionary Nature of Model. The purpose of the model is not to destroy discretion and the exercise of professional decision making in the disposition of juvenile cases. The third and fourth purposes quoted above—to permit flexibility in decisions and to consider the offender's circumstances—acknowledge the necessity for discretion in the application of the model in order to take account of individual needs and circumstances. The addition of Subsection (5) in 2003 underscores the importance of discretion in dispositional decision making.

Discretion exists at three levels in the system: (1) there is juvenile board control over whether to adopt the model at all in the county; (2) there is discretion not to dispose of a case in accordance with the assignment system; and (3) the seven model descriptions are deliberately phrased in

general terms to permit a variety of dispositions to fit within each.

Section 53.013 establishes each juvenile board's power to accept or reject the progressive sanctions system: "Each juvenile board may adopt a progressive sanctions program using the model for progressive sanctions in Chapter 59 [Progressive Sanctions Model]." That language could be construed to permit a juvenile board to adopt a system of progressive sanctions that is different from those set out in Chapter 59. However, that interpretation would be contrary to both major purposes of the system: encouraging uniformity of treatment and describing dispositions using a common language. Therefore, it seems clear the legislature intended for each juvenile board to reject the Chapter 59 system or to accept it but did not intend for it to have the power to accept it with modifications. This interpretation is reinforced when it is remembered that discretion and flexibility are available at two other levels in the system.

The second level of discretion is in the assignment system itself. Section 59.003 establishes assignment guidelines. Section 59.003(a) makes it clear that dispositions in accordance with the model are discretionary with the decision maker by using the word "may" throughout that subsection.

This discretion naturally assumes that a departure may be "up" or "down" from the sanction level of a given offense. In 2004, the Tyler Court of Appeals upheld a deviation from a Sanction Level Five case resulting in commitment to TYC. *In the Matter of C.H.*, UNPUBLISHED, 2004 Tex.App.Lexis 3589 (Tex.App.—Tyler 2004, no pet.). At disposition, the chief probation officer testified that she recommended the deviation and commitment to TYC because she was unsure if there was anything else her department could do for C.H. The juvenile court followed this recommendation, made detailed written findings, and ordered C.H. committed to TYC. Noting that the progressive sanctions guidelines are not mandatory, the Court of Appeals quoted Section 59.003(e): "Nothing in this chapter prohibits the imposition of appropriate sanctions that are different from those provided at any sanction level."

> Because the trial court has broad discretion in determining the disposition of C.H., had sufficient evidence to make such determination, and complied with requirements for committing C.H. to TYC, the trial court properly considered the progressive sanction guidelines and was within its discretion in deviating from those guidelines.

2004 Tex.App.Lexis 3589 *6-7.

The third level of discretion is inherent in the descriptions of programs in the seven sanction levels and the manner in which each sanction level is structured.

For most sanction levels, the language employed to describe the programs and restrictions appropriate to that sanction level is of necessity general in nature. This, in turn, creates flexibility in that a number of specific programs, each different from the others in significant ways, can fit comfortably within the same sanction level program description. This point will become clear in discussion of the sanction level descriptions.

The way in which the program descriptions are structured also provides discretion. Each sanction level description contains one or two primary sanctions. The rest are secondary. For a disposition to qualify as a disposition at a certain sanction level, it must include the primary sanction in that sanction level description. It is not required, nor would it be feasible, for each disposition to require all the secondary sanctions described as appropriate to that sanction level.

Appellate Review of Dispositions under the Model. Section 59.014 prohibits an appellate court from reviewing a disposition to determine whether it was made in conformity with the model:

> A child may not bring an appeal or a post-conviction writ of habeas corpus based on:
>
> (1) the failure or inability of any person to provide a service listed under Sections 59.004-59.010;
>
> (2) the failure of a court or of any person to make a sanction level assignment as provided in Section 59.002 or 59.003; or
>
> (3) a departure from the sanction level assignment model provided by this chapter; or
>
> (4) the failure of a juvenile court or probation department to report a departure from the model.

Section 59.014 prohibits an appellate court from setting aside a disposition on the ground it does not conform to the guidelines in one of the ways listed in that section. See *In the Matter of A.G.*, 292 S.W.3d 755 (Tex.App.—Eastland 2009, no pet.); *In the Matter of C.E.F.*, UNPUBLISHED MEMORANDUM, No. 11-04-00108-CV, 2005

Tex.App.Lexis 1272, Juvenile Law Newsletter ¶ 05-2-09 (Tex.App.—Eastland 2005, no pet.).

The appellate court does, however, retain the power to determine whether there is evidence to support mandatory removal from home findings and to set aside the disposition if there is not or to set aside a disposition on abuse of discretion grounds. *In the Matter of A.S.,* 954 S.W.2d 855 (Tex.App.—El Paso 1997, no pet.) (refusing guidelines review but finding inadequate evidence to support removal from home findings); *In the Matter of Solis*, UNPUBLISHED, No. 05-96-01449-CV, 1997 WL 599146, 1997 Tex.App.Lexis 5157, Juvenile Law Newsletter ¶ 97-4-21 (Tex.App.—Dallas 1997, no pet.) (refusing to set aside a TYC commitment on the argument that the guidelines provided for probation at home for that offense).

Section 59.014(4) was added in 1999 to make it clear that failure to report a departure from the guidelines is not grounds for appeal. There is no requirement that the disposition order specify the reasons for a guidelines departure. *In the Matter of C.W.*, UNPUBLISHED, No. 07-97-0245-CV, 1998 WL 139165, 1998 Tex.App.Lexis 1777, Juvenile Law Newsletter ¶ 98-2-11 (Tex.App.—Amarillo 1998, pet. denied).

Reporting Requirements. When the system was enacted in 1995, it required the preparation of paper reports of departures from the model. Those reports went to the then Texas Juvenile Probation Commission (TJPC) and then to the Criminal Justice Policy Council (since abolished), where they were intended to be used in the preparation of analytical reports about juvenile justice for the legislature and state leaders. From the beginning, the use of paper reports proved not to be feasible. The Criminal Justice Policy Council developed its own database of sample counties from information maintained by those counties in their case management systems. It used that database in the preparation of reports. The specific departure reports required by Chapter 59 were not used by analysts or decision makers. The requirement of reporting departures via paper reports was eliminated in 2003 when the legislature repealed former Sections 59.003(e) and 53.013(b).

Sanction Level Descriptions. Programs appropriate for each of the seven sanction levels are described by Sections 59.004 through 59.010. There is no requirement that all of the programs described at any sanction level must be used in each disposition at that sanction level. However, for a disposition to qualify as a disposition at any given sanction level, at least the primary sanction described in that sanction level must be included in the disposition.

Section 59.003 specifies the sanction level assignment guidelines that link the seven sanction levels to offense severity and prior referrals of the child to the system.

In 1997, the legislature amended Section 59.003(a) to authorize the prosecuting attorney, as well as the court and probation department, to place children in appropriate sanction levels. Of course, this authorization is subject to the principle that only a court can place children on dispositions that correspond to sanction levels three through seven. In addition, Section 59.003(a) was amended to authorize the court to use appropriate sanction levels when modifying disposition as well as when making the original disposition in a case.

Sanction Level One. Sanction level one describes programs—collectively named "supervisory caution" (sometimes referred to as "assess, counsel, and release")—that are the least restrictive responses the juvenile justice system can make to a referral. Section 59.004 provides the descriptions for sanction level one programs:

> (a) For a child at sanction level one, the juvenile court or probation department may:
>
> (1) require counseling for the child regarding the child's conduct;
>
> (2) inform the child of the progressive sanctions that may be imposed on the child if the child continues to engage in delinquent conduct or conduct indicating a need for supervision;
>
> (3) inform the child's parents or guardians of the parents' or guardians' responsibility to impose reasonable restrictions on the child to prevent the conduct from recurring;
>
> (4) provide information or other assistance to the child or the child's parents or guardians in securing needed social services;
>
> (5) require the child or the child's parents or guardians to participate in a program for services under Section 264.302 [DFPS child-at-risk program] if a program under Section 264.302 is available to the child or the child's parents or guardian;

(6) refer the child to a community-based citizen intervention program approved by the juvenile court;

(7) release the child to the child's parents or guardians; and

(8) require the child to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

(b) The probation department shall discharge the child from the custody of the probation department after the provisions of this section are met.

Section 59.003(a)(1) provides that the appropriate sanction level is one if it is the youth's first referral to juvenile court and the referral is for conduct indicating a need for supervision (CINS) that is not a Class A or B misdemeanor, inhalant abuse, or violation of student standards leading to expulsion.

The following conduct would fit within the assignment model for sanction level one: running away from home; fineable only non-traffic misdemeanor transferred to the juvenile court by a justice or municipal court; and Class C misdemeanor electronic transmission of certain visual material depicting minor offenses ("sexting") under Penal Code Section 43.261.

The following CINS would not come within the assignment model for sanction level one: inhalant abuse; conduct in violation of student standards for which a student has been expelled; Class A and B misdemeanor electronic transmission of certain visual material depicting minor offenses ("sexting") under Penal Code Section 43.261; and conduct constituting prostitution under Penal Code Section 43.02. In 2007, the legislature elevated inhalant abuse to a sanction level two offense to reflect its seriousness and to promote stronger prevention and intervention programs to combat this problem.

The offense of electronic transmission of certain visual material depicting a minor under Penal Code Section 43.261 ("sexting") was created in 2011. Although the offense ranges from a Class A to a Class C misdemeanor, the juvenile court has exclusive jurisdiction over it as a CINS offense. In 2013, the legislature clarified that although Class B misdemeanors and higher are defined as delinquent conduct, "sexting" is considered CINS, not delinquent conduct, regardless of the offense level. Since sanction level one is limited to CINS offenses that are not Class A or B misdemeanors, only Class C misdemeanor levels of the "sexting" offense are at sanction level one. However, the fact that the legislature added the education program as a disposition option only at sanction level one should not be interpreted to mean it can only be assigned at that level, as Family Code Section 54.0404 provides that the program may be ordered for any child found to have engaged in CINS. See Chapter 4 for further discussion.

In 2011, conduct constituting prostitution under Penal Code Section 43.02, which ranges from a Class B misdemeanor to a felony, was defined as CINS in response to the case *In the Matter of B.W.,* 313 S.W.3d 818 (Tex. 2010). Because there is no Class C misdemeanor level of this offense, it does not fall under sanction level one.

An eligible case may be placed in sanction level one by the court, the prosecutor, or the probation department. Section 59.003(a) permits the court to assign a child to sanction level one "in a disposition hearing under Section 54.04 or a modification hearing under Section 54.05." Under Section 54.04(a), a disposition hearing must follow an adjudication hearing in which the child was adjudicated to have engaged in prohibited conduct and a modification hearing can occur only with respect to an adjudicated case. Thus, for a court to make a sanction level one assignment, the child must have been adjudicated for CINS.

The prosecutor or probation department may make a sanction level one assignment without there having been a petition and adjudication hearing. Section 59.002(a) provides, "The probation department may assign a sanction level of one to a child referred to the probation department under Section 53.012." Section 53.012(b)(2) requires a prosecutor who finds probable cause but chooses not to file a court petition to "return the referral to the juvenile probation department for further proceedings." Thus, under Section 59.002(a), the probation department may assign to sanction level one a child who has been referred back to it by the prosecutor even though the child's case is not a qualifying CINS case. The prosecutor may directly assign a child's case to sanction level one pursuant to Section 59.003(a).

Sanction Level Two. Sanction level two describes programs that are generally associated with a disposition under Section 53.03. In 1995, the name of that disposition was changed from "intake conference and adjustment" to "deferred prosecution." Section 59.005 provides the descriptions for sanction level two programs:

(a) For a child at sanction level two, the juvenile court, the prosecuting attorney, or the probation department may, as provided by Section 53.03:

(1) place the child on deferred prosecution for not less than three months or more than six months;

(2) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability;

(3) require the child's parents or guardians to identify restrictions the parents or guardians will impose on the child's activities and requirements the parents or guardians will set for the child's behavior;

(4) provide the information required under Sections 59.004(a)(2) [information regarding progressive sanctions] and (4) [providing social service information to the parents];

(5) require the child or the child's parents or guardians to participate in a program for services under Section 264.302 [DFPS child-at-risk program], if a program under Section 264.302 is available to the child or the child's parents or guardians;

(6) refer the child to a community-based citizen intervention program approved by the juvenile court; and

(7) if appropriate, impose additional conditions of probation.

(b) The juvenile court or the probation department shall discharge the child from the custody of the probation department on the date the provisions of this section are met or on the child's 18th birthday, whichever is earlier.

In 2003, the legislature gave the juvenile court explicit authority under Section 53.03 to place a child on deferred prosecution so long as the court acts before jeopardy attaches to the case. See Chapter 5.

Section 59.003(a)(2) provides that if the current referral is for a Class A or B misdemeanor, other than one involving the use or possession of a firearm, inhalant abuse , conduct in violation of student standards for which a student has been expelled, or delinquent conduct under Section 51.03(a)(2) (contempt of a justice, municipal, county, or truancy court) and if there is no evidence the child has previously engaged in delinquent conduct or conduct indicating a need for supervision, the appropriate sanction level is two. Sanction level two is also appropriate under Section 59.003(c) if a child has previously received level one and later is referred for an offense of equal or greater severity.

Section 59.003(a)(2) was amended in 2007 to include inhalant abuse in the sanction level two category, thereby encouraging a higher level of intervention along with programs and services for these types of offenders.

Finally, Section 59.002(b) provides, "The probation department may assign a sanction level of two to a child for whom deferred prosecution is authorized under Section 53.03." Under Section 53.03, the probation department is authorized to use deferred prosecution and, therefore, sanction level two in any case for which referral to the prosecutor is not required by interagency memorandum of understanding. If such an agreement does not exist, then deferred prosecution may be given by the probation department for any offense except a felony, a misdemeanor involving violence to the person, or a misdemeanor weapons offense. See Chapter 5 for a fuller discussion of these provisions.

Firearms offenses are the only Class B or Class A misdemeanors excluded from sanction level two. Examples of offenses excluded under the firearms provision are: unlawfully carrying a handgun (Penal Code Section 46.02), unlawful transfer of a handgun or other firearm (Penal Code Section 46.06), and negligently giving a child access to a readily dischargeable firearm when the child discharges the firearm and causes death or serious bodily injury (Penal Code Section 46.13). Section 46.01(5) defines a handgun as "any firearm that is designed, made, or adapted to be fired with one hand." Section 46.01(3) defines a firearm to mean "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." Certain antique firearms are excluded from this definition. Also excluded by the definition are BB guns and pellet guns because they use compressed air for the propellant rather than an explosion or burning substance.

The activities described at each sanction level are generally cumulative. Activities described in previous sanction levels are included along with new activities that are in-

tended to be progressively more restrictive and demanding, depending on offense severity and chronicity. At sanction level two, a deferred prosecution period of three to six months is substituted for counseling. Victim restitution by the child or community service by the child is authorized. Other activities are similar to those described for sanction level one.

Sanction Level Three. Sanction level three describes programs generally associated with court-ordered probation not involving intensive supervision or confinement in a secure facility. Section 59.006 provides the descriptions for Sanction Level Three programs:

> (a) For a child at sanction level three, the juvenile court may:
>
> (1) place the child on probation for not less than six months;
>
> (2) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability;
>
> (3) impose specific restrictions on the child's activities and requirements for the child's behavior as conditions of probation;
>
> (4) require a probation officer to closely monitor the child's activities and behavior;
>
> (5) require the child or the child's parents or guardians to participate in programs or services designated by the court or probation officer; and
>
> (6) if appropriate, impose additional conditions of probation.
>
> (b) The juvenile court shall discharge the child from the custody of the probation department on the date the provisions of this section are met or on the child's 18th birthday, whichever is earlier.

Sanction level three is not restricted to probation in the probationer's home, but may involve placement in a nonsecure facility as a condition of probation.

A case may be disposed of at level three only by the juvenile court. Section 59.003(a)(3) provides that the appropriate disposition in a case without proof of prior prohibited conduct is level three for a misdemeanor "involving the use or possession of a firearm" or for a state jail felony or a third degree felony. Under Section 59.003(c), if a child is at level two and commits an offense of equal or greater severity, the appropriate disposition would also be level three.

Sanction Level Four. Sanction level four describes programs that generally are associated with intensive supervision probation. Section 59.007 provides the descriptions for sanction level four programs:

> (a) For a child at sanction level four, the juvenile court may:
>
> (1) require the child to participate as a condition of probation for not less than three months or more than 12 months in an intensive services probation program that emphasizes frequent contact and reporting with a probation officer, discipline, intensive supervision services, social responsibility, and productive work;
>
> (2) after release from the program described by Subdivision (1), continue the child on probation supervision;
>
> (3) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability;
>
> (4) impose highly structured restrictions on the child's activities and requirements for behavior of the child as conditions of probation;
>
> (5) require a probation officer to closely monitor the child;
>
> (6) require the child or the child's parents or guardians to participate in programs or services designed to address their particular needs and circumstances; and
>
> (7) if appropriate, impose additional sanctions.
>
> (b) The juvenile court shall discharge the child from the custody of the probation department on the date the provisions of this section are met or on the child's 18th birthday, whichever is earlier.

Sanction level four, like level three, is not restricted to probation in the probationer's home but may involve placement in a nonsecure facility as a condition of probation.

In 2001, the legislature amended Section 59.007(a)(1) to make it clear that level four is intensive supervision probation in which the child resides at home or in a nonsecure placement but not in a secure placement, such as afforded by many boot camp programs. Placement in a secure facility, boot camp or otherwise, is a level five disposition.

At Sanction Level Four, an intensive services program lasting three to 12 months and followed by continued probation supervision is added to the level descriptions. Other activities are the same as those described in Sanction level three.

Section 59.003(a)(4) assigns second degree felonies to sanction level four. Section 59.003(c) provides that if a child at level three commits an offense of equal or greater severity, the new case may be assigned to level four.

Sanction Level Five. Sanction level five describes programs that are generally associated with probation involving placement outside the juvenile's home in a secure correctional facility. Section 59.008 provides the descriptions for sanction level five programs:

> (a) For a child at sanction level five, the juvenile court may:
>
> > (1) as a condition of probation, place the child for not less than six months or more than 12 months in a post-adjudication secure correctional facility;
> >
> > (2) after release from the program described by Subdivision (1), continue the child on probation supervision;
> >
> > (3) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability;
> >
> > (4) impose highly structured restrictions on the child's activities and requirements for behavior of the child as conditions of probation;
> >
> > (5) require a probation officer to closely monitor the child;
> >
> > (6) require the child or the child's parents or guardians to participate in programs or services designed to address their particular needs and circumstances; and
> >
> > (7) if appropriate, impose additional sanctions.
>
> (b) The juvenile court shall discharge the child from the custody of the probation department on the date the provisions of this section are met or on the child's 18th birthday, whichever is earlier.

In 1997, the legislature amended this section to apply level five only to residential placements in secure post-adjudication juvenile correctional facilities (e.g., boot camps, intermediate sanctions units, etc.). Level five does not encompass placement in a nonsecure residential treatment facility. Residential placements primarily for treatment or a lack of parental support in the home may be used at levels two through four.

At sanction level five, a highly structured residential program in a secure facility lasting from six to 12 months is added to the level description. Other activities are the same as those listed in sanction level four.

Section 59.003(a)(5) provides that a first degree felony, other than one involving the use of a deadly weapon or causing serious bodily injury, is appropriate for assignment to sanction level five. A "deadly weapon" is defined by Penal Code Section 1.07(a)(17) to mean:

> (A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
>
> (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

"Serious bodily injury" is defined by Penal Code Section 1.07(a)(46) to mean "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

Section 59.003(d) calls for an increased sanction level when intensive supervision probation (sanction level four) is not adequate to prevent the youth's commission of a felony offense, including a felony offense less serious than

one adjudicated previously. Commission of any subsequent felony by a juvenile at level four increases the sanction level for that offense from four to five.

Sanction Level Six. Sanction level six describes programs that are associated with an indeterminate commitment to TJJD for delinquent conduct. Section 59.009 provides the descriptions for sanction level six programs:

> (a) For a child at sanction level six, the juvenile court may commit the child to the custody of the Texas Juvenile Justice Department or a post-adjudication secure correctional facility under Section 54.04011(c)(1) [Travis County only]. The department, juvenile board, or local juvenile probation department, as applicable, may:
>
> (1) require the child to participate in a highly structured residential program that emphasizes discipline, accountability, fitness, training, and productive work for not less than nine months or more than 24 months unless the department, board, or probation department extends the period and the reason for an extension is documented;
>
> (2) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of the harm caused and according to the child's ability, if there is a victim of the child's conduct;
>
> (3) require the child and the child's parents or guardians to participate in programs and services for their particular needs and circumstances; and
>
> (4) if appropriate, impose additional sanctions.
>
> (b) On release of the child under supervision, the Texas Juvenile Justice Department parole programs or the juvenile board or local juvenile probation department operating parole programs under Section 152.0016(c)(2) [Travis County only], Human Resources Code, may:
>
> (1) impose highly structured restrictions on the child's activities and requirements for behavior of the child as conditions of release under supervision;
>
> (2) require a parole officer to closely monitor the child for not less than six months; and
>
> (3) if appropriate, impose any other conditions of supervision.
>
> (c) The Texas Juvenile Justice Department, juvenile board, or local juvenile probation department may discharge the child from the custody of the department, board, or probation department, as applicable, on the date the provisions of this section are met or on the child's 19th birthday, whichever is earlier.

Under Section 59.003(a)(6), sanction level six is the appropriate disposition for a first degree felony involving the use of a deadly weapon or causing serious bodily injury, for an aggravated controlled substance felony, or for capital murder. "Deadly weapon" and "serious bodily injury" have been defined in the discussion of sanction level five. "Aggravated controlled substance felony" is defined by Section 51.02(1) as a violation of the Controlled Substances Act that is more serious than a first degree felony because it carries a higher minimum term of confinement or authorizes a greater fine. If a child at level five commits any felony, even one less serious than the one for which he or she is on probation, the appropriate disposition is level six. Section 59.003(d).

In 2007, the calculation of the progressive sanctions model was impacted by the repeal of the statutory provisions known as the "misdemeanor commitment rule." In accordance with Section 54.04(d)(2), misdemeanor offenders can no longer be committed to TJJD. A child may be committed to TJJD only if adjudicated for a felony offense or a violation of felony probation. As a result, the progressive sanctions rules may prevent certain adjudication or violation patterns from graduating to Sanction Level Six.

Sanction Level Seven. Sanction level seven describes programs that are associated with a determinate sentence commitment to TJJD or certification to criminal court. Section 59.010 provides the descriptions for sanction level seven programs:

> (a) For a child at sanction level seven, the juvenile court may certify and transfer the child under Section 54.02 or sentence the child to commitment to the Texas Juvenile Justice Department under Section 54.04(d)(3), 54.04(m), or 54.05(f) or to a post-adjudication secure correctional facility under Section 54.04011(c)(2) [Travis County only]. The department, juvenile board, or local juvenile probation department, as applicable, may:

(1) require the child to participate in a highly structured residential program that emphasizes discipline, accountability, fitness, training, and productive work for not less than 12 months or more than 10 years unless the department, board, or probation department extends the period and the reason for the extension is documented;

(2) require the child to make restitution to the victim of the child's conduct or perform community service restitution appropriate to the nature and degree of harm caused and according to the child's ability, if there is a victim of the child's conduct;

(3) require the child and the child's parents or guardians to participate in programs and services for their particular needs and circumstances; and

(4) impose any other appropriate sanction.

(b) On release of the child under supervision, the Texas Juvenile Justice Department parole programs or the juvenile board or local juvenile probation department parole programs under Section 152.0016(c)(2), Human Resources Code, may:

(1) impose highly structured restrictions on the child's activities and requirements for behavior of the child as conditions of release under supervision;

(2) require a parole officer to monitor the child closely for not less than 12 months; and

(3) impose any other appropriate condition of supervision.

Under Section 59.003(a)(7), sanction level seven is the appropriate disposition if "the petition has been approved by a grand jury under Section 53.045" and the offense is a first degree felony involving the use of a deadly weapon or causing serious bodily injury, an aggravated controlled substance felony, or capital murder or if a petition to transfer the child to criminal court has been filed under Section 54.02.

The restriction of sanction level seven to first degree felonies, aggravated controlled substance felonies, and capital murder is not mandatory. Under Section 54.04, the juvenile court may impose a determinate sentence for any first, second, or third degree felony enumerated in Section 53.045 if the procedures required for determinate sentences have been followed. As to certification, any felony committed by a 15 or 16-year-old may be certified and any capital, first degree, or aggravated controlled substance felony committed by a 14-year-old may be certified.

Chronicity. In 1997, the legislature clarified the chronicity provisions of the progressive sanctions system. Previously, Section 59.003(b) contained a provision suggesting that the sanction level could be increased by the court upon complaint of a parent. This, of course, raised substantial due process issues. The legislature repealed that language and substituted the following chronicity language as Section 59.003(b):

Subject to Subsection (e), if the child subsequently is found to have engaged in delinquent conduct in an adjudication hearing under Section 54.03 or a hearing to modify a disposition under Section 54.05 on two separate occasions and each involves a violation of a penal law of a classification that is less than the classification of the child's previous conduct, the juvenile court may assign the child a sanction level that is one level higher than the previously assigned sanction level, unless the child's previously assigned sanction level is six.

In addition, in 1997, Section 59.003(c) was amended. Previously, Section 59.003(c) simply provided that a court could assign a higher sanction level upon subsequent commission of delinquent conduct or CINS. Section 59.003(c) was changed to address two problems related to the rule that authorizes a sanction level increase for the commission of offenses of the same or greater severity.

The first would have occurred when a child repeatedly committed CINS offenses and reached level five. As previously written, a CINS offender at level five who commits another CINS offense is supposed to be elevated to level six. Legally, this cannot be done because a CINS offender cannot be committed to TJJD under any circumstances. The section was changed to provide that a child may not be elevated to level six unless the child has been adjudicated delinquent. The 2007 changes to prevent commitment to TJJD for only misdemeanor adjudications now mean that only felony delinquent conduct can result in this elevation.

Secondly, a child at level six could have been elevated to level seven if a subsequent offense is of greater or equal severity than the previous offense. However, a child cannot legally receive a determinate sentence (level seven) unless the offense committed was one of the authorized offenses listed in Section 53.045. Thus, there may have been situations where the guidelines say to increase the

sanction to level seven when a determinate sentence was not legally possible. The section was changed to disallow a child's level to be increased to level seven unless it is for an offense listed in Section 53.045 and the determinate sentence petition has been approved by the grand jury. However, implicitly, a child at level six may still be elevated to level seven for any subsequent felony offense of equal or greater severity if the child is certified to criminal court.

Finally, the legislature in 1997 added Section 59.003(g) [now (f)] to make it clear that a Section 54.05 hearing is required prior to revocation of probation and commitment of a child to TJJD.

In 2003, the legislature repealed Section 59.003(e), which had required the juvenile probation report departures from the guidelines. In doing so, what had been Section 59.003(f) became Section 59.003(e). Language in subsections (a) and (b) that reads "[s]ubject to Subsection (e)" remained untouched. Currently, subsection (e) reads:

> (e) The probation department may, in accordance with Section 54.05 [hearing to modify probation], request the extension of a period of probation specified under sanction levels one through five if the circumstances of the child warrant the extension.

Because of what was likely an oversight that has not yet been corrected, there may be confusion regarding what that "subject to" language is intended to mean, particularly given that it makes little sense using the current subsection (e).

CHAPTER 13: Modification of Dispositions

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This chapter deals with modification of disposition under Section 54.05, Family Code. Any change in the disposition of the child's case should be made using the procedures of Section 54.05. This includes amending the conditions of probation, extending the probation term, changing the probation placement of the child, and revoking probation to commit the child to the Texas Juvenile Justice Department (TJJD).

Section 54.05 sets out three different procedures for modifying disposition: (1) revoking a felony delinquency probation, which requires a hearing and proof of a violation of a probation condition; (2) modification seeking placement in a secure local facility for more than 30 days, which requires a hearing and an attorney; and (3) any other type of modification, which may be made following a hearing or its waiver. The child cannot waive the hearing when the State is seeking revocation with TJJD commitment or placement in a secure facility longer than 30 days, but the court may make any other type of modification without a hearing if the hearing has been properly waived.

A. Petition and Notice Requirements

Section 54.05(d) provides:

> A hearing to modify disposition shall be held on the petition of the child and his parent, guardian, guardian ad litem, or attorney, or on the petition of the state, a probation officer, or the court itself. Reasonable notice of a hearing to modify disposition shall be given to all parties.

Three separate questions are presented by this language: (1) when must notice of the hearing be given; (2) how must the notice be given; and (3) what must the petition to modify disposition say?

When Notice Must be Given. Section 54.05(d) provides that there must be "reasonable notice" of a modification hearing. Must there be 10 days' notice to enable counsel to prepare, as in adjudication or transfer hearings under Section 51.10(h)? The cases on this question come to opposite conclusions.

In the Matter of J.C., 556 S.W.2d 119 (Tex.Civ.App.—Waco 1977, no writ), holds that 10 days' notice is not required; the court upheld a revocation in a hearing that occurred eight days after the petition to modify was filed. Similarly, the Court of Appeals in *In the Matter of B.W.*, UNPUBLISHED, No. 07-98-0203-CV, 1999 WL 54635, 1999 Tex.App.Lexis 712, Juvenile Law Newsletter ¶ 99-1-27 (Tex.App.—Amarillo 1999, no pet.), held that a hearing held seven days after it was set by the juvenile court was conducted on sufficient notice when defense counsel had been appointed over two weeks before the hearing. While the opinion does not show when the revocation motion was filed, the Court of Appeals suggested that the relevant time period was between appointment of counsel for the modification hearing and the hearing itself:

> [S]ection 51.10(h) contemplates the time provided to the counsel for the accused in order to prepare a defense to the State's motion. It does not regulate the prior notice of a hearing to which appellant is entitled. The latter is controlled by section 54.05(d) of the Family Code. That provision merely requires that the notice be "reasonable." Tex. Fam. Code Ann. §54.05(d). In other words, the two provisions regulate distinct subjects. Furthermore, lacking ten days prior notice of a hearing does not mean that counsel had less than ten days to prepare a defense. Indeed, the time given in which to prepare a defense begins, at the very least, when counsel is retained or receives notification of his appointment. His preparations, however, may begin long before the court schedules any hearing.

1999 WL 54635 *1.

It must be added, however, that counsel cannot prepare a defense until the motion to revoke has been filed since that provides notice of the violations the State will seek to prove at the hearing.

In *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App.—San Antonio 1979, no writ), the court held that the juvenile's attorney must be given at least 10 days to prepare for a revocation hearing. In that case, the hearing held six days after the petition to modify was served on the juvenile was held to be insufficient.

Until this conflict in the decisions of the Courts of Appeal is resolved, the safest course of action is to make certain that the hearing is not conducted until at least 10 days have elapsed from the time the petition has been served on the juvenile and that counsel has had at least 10 days to prepare for the hearing. Counsel can waive the 10-day requirement. See Chapter 7.

If counsel believes he or she has not been given adequate notice of the issues and time to prepare a defense, the remedy is to file a motion for continuance. Such a motion is addressed to the juvenile court's discretion. See *In the Matter of I.P.*, UNPUBLISHED, No. 04-98-00588-CV, 1999

WL 191589, 1999 Tex.App.Lexis 2534, Juvenile Law Newsletter ¶ 99-2-15 (Tex.App.—San Antonio 1999, no pet.) (upholding denial of a motion for continuance under Rules of Civil Procedure 252); Cf. *In the Matter of M.R.*, UNPUBLISHED, No. 11-08-00155-CV, 2010 Tex.App.Lexis 3681 (Tex.App.—Eastland 2010, pet. denied) (oral motions for continuance preserve nothing for review).

How Notice Must be Given. The Family Code does not state how notice must be given. It does provide that notice must be given to "all parties." Section 51.02(10) defines a party as "the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem." The courts have held that a petition and summons for an adjudication or transfer hearing must be personally served on the juvenile and that the juvenile court must make a reasonable effort to give notice to the child's parent, guardian, or custodian. See Chapter 9. Certainly, the safest course of action would be to give notice that would be sufficient for an adjudication or transfer hearing, and that is what is recommended.

In *Franks v. State*, 498 S.W.2d 516 (Tex.Civ.App.—Texarkana 1973, no writ), the juvenile's probation was revoked. On appeal, he contended that the revocation was unlawful because he had not been served personally with the petition to revoke. The court agreed with the juvenile and reversed the revocation on the ground that the juvenile's constitutional rights had been violated. Although this decision occurred before the present Family Code was enacted, it seems equally applicable today. The court said:

> In a revocation of probation case we hold that it is necessary that the notice of the hearing set out the manner or terms of the probation which have been violated in order that the child and his attorney can be apprised of the alleged violations and prepare such defense as may seem necessary. Notice must be personally served upon the minor. *State v. Casanova*, 494 S.W.2d 812 (Tex.Sup. 1973). While the *Casanova* case dealt with service of process to declare Jose Casanova a juvenile delinquent, we hold that similar service of process is required to revoke the probation of one already declared to be a juvenile delinquent. This is so because no person may be deprived of his liberty without due process of law. Due process requires adequate notice, the right to be represented by counsel, and a chance to be heard and to present such defenses as may be available.

498 S.W.2d at 518.

In *In the Matter of T.E.*, UNPUBLISHED, No. 03-04-00590-CV, 2005 WL 1583463, 2005 Tex.App.Lexis 5266, Juvenile Law Newsletter ¶ 05-3-36 (Tex.App.—Austin 2005, no pet.), appellant complained that his mother did not receive "reasonable notice" of the hearing, because she did not receive a summons or a copy of the motion to modify disposition, and that this violated his due process rights as well as Section 54.05(d). The appellate court disagreed, noting that in a modification hearing a respondent is not entitled to service of process but only "reasonable notice."

> When a child's attorney appears, does not file a motion for continuance, and the child and parents are present and fully advised by the court as to the issues before the court, reasonable notice is presumed.

2005 Tex.App.Lexis 5266 at *5.

The court held that the juvenile court had satisfied the notice standard for the hearing on the motion to modify.

To Whom Notice Must Be Given. Section 54.05(d) provides, "Reasonable notice of a hearing to modify disposition shall be given to all parties." Parties include the state, the child, and the child's parent, spouse, guardian, or guardian ad litem. Notice of an adjudication or certification petition must be given to the child and at least one of the adults in his or her life. See Chapter 9.

The Houston First District Court of Appeals applied the same concept to notice of modification petitions in *In the Matter of R.M.R.*, UNPUBLISHED, No. 01-01-00347CV, 2001 WL 1555304, 2001 Tex.App.Lexis 8099, Juvenile Law Newsletter ¶ 02-1-07 (Tex.App.—Houston [1st Dist.] 2001, no pet.). When respondent's mother did not appear at the detention hearing, the juvenile court judge appointed a guardian ad litem. A motion to modify disposition was later served on the child and his mother but not on the guardian ad litem. The child, mother, and attorney appeared at the modification hearing, which resulted in revocation of probation. The Court of Appeals held that failure of the respondent to object while before the juvenile court waived any error in failure to serve the guardian ad litem. However, the court also noted that the purpose of serving adults—to assure that every child has the assistance of a friendly, competent adult able to supply the child support and guidance—was satisfied by the mother's presence.

What the Petition Must Say. The Family Code does not specify the contents of a petition to modify disposition. The safest course of action is to follow the guidelines

of the Family Code for adjudication petitions. See Section 53.04 and Chapter 9. In general, a petition to modify disposition should contain the following information:

(1) the name, age, and residence address of the child;

(2) the names and residence addresses of the parent, guardian, or guardian ad litem of the child and the child's spouse, if any;

(3) the fact that the child was adjudicated delinquent and was placed on probation, including the dates of adjudication and disposition and the court that conducted the adjudication and disposition proceedings;

(4) those conditions of probation the child is believed to have violated should be set out verbatim from the probation order;

(5) with reasonable particularity, the time, place and manner of the child's acts believed to have violated those conditions must be set out; and

(6) a prayer for relief, such as a request that the juvenile court revoke the child's probation and commit him or her to the custody of the Texas Juvenile Justice Department (TJJD).

In *In the Matter of J.P.*, UNPUBLISHED, No. 04-07-00612, 2008 Tex.App.Lexis 7780 (Tex.App.—San Antonio 2008, no pet.), appellant filed a motion to quash, alleging that the State's amended petition to modify disposition did not include the specific manner in which he failed to obey class rules and disrupted class in a residential placement facility. While acknowledging that the pleading requirements for a petition to modify disposition are less stringent than for an adjudication petition, J.P. nevertheless argued that the allegations in the State's amended petition failed to provide sufficient notice under Section 54.05.

The appellate court disagreed, noting that "each allegation paragraph in the State's amended petition specifically identified: (1) the condition of probation violated; (2) the date the violation occurred; (3) the county in which the violation occurred; and (4) the manner in which the violation was committed, *i.e.*, 'disrupted class' or 'discharged from placement as unsuccessful.' These allegations were sufficient to notify J.P. of the grounds on which the State sought to modify his disposition." 2008 Tex.App.Lexis 7780 *9. See also *In the Matter of J.A.S., III*, UNPUBLISHED, No. 13-06-00280-CV, 2008 Tex.App.Lexis 9420, Juvenile Law Newsletter ¶ 09-1-8 (Tex.App.—Corpus Christi 2008, no pet.) (citing *J.P.* and noting that the modification petition informed appellant of probation violation and date of violation).

Amending a Petition for Modification. Sometimes a prosecutor will wish to amend a petition or motion to modify after it has been filed in court. The Family Code does not specify the circumstances under which that can be done or when it can be done. However, the general principle is that the petition or motion can be amended if that can be done without substantial prejudice to the respondent. In *Burns v. State*, UNPUBLISHED, No. B14-89-00746-CV, 1990 WL 51111, 1990 Tex.App.Lexis 946, Juvenile Law Newsletter ¶ 90-2-11 (Tex.App.—Houston [14th Dist.] 1990, no writ), a motion to modify alleged that respondent committed a burglary "on June 24, 1989." Proof at the revocation hearing on respondent's plea of not true was that he committed the burglary on June 22, 1989. The State was then permitted at the hearing to amend the motion to allege the burglary was committed on June 22, 1989, in order to conform the pleading to the proof. The Court of Appeals upheld this procedure on the ground that the amendment did not surprise or prejudice the respondent.

Reconsidering Probation Conditions. The juvenile court in *In the Matter of S.S.*, UNPUBLISHED, No. 04-99-00806-CV, 2001 WL 356963, 2001 Tex.App.Lexis 2315, Juvenile Law Newsletter ¶ 01-2-13 (Tex.App.—San Antonio 2001), *aff'd by* 2001 Tex.App.Lexis 3692 (Tex.App.—San Antonio 2001, no pet.), placed the respondent on probation in his own home. Shortly thereafter, the juvenile court scheduled a hearing to reconsider its earlier decision. At that hearing, held four days after the original disposition, the juvenile court modified the probation conditions to require the respondent to reside in a residential facility while on probation. No motion to modify had been filed.

The Court of Appeals held that the language in Section 54.05(d), "A hearing to modify disposition shall be held on the petition of...the court itself" does not require a written juvenile court's motion to modify in this situation. Rule 329b(d) of the Texas Rules of Civil Procedure gives any court plenary power to reconsider and modify a judgment if it acts within 30 days. The oral notice and opportunity to be heard provided to all parties by the juvenile court complied with any constitutional requirements. What the juvenile court did in this case was to reconsider the conditions of probation it had originally impose rather than to modify those conditions because of subsequent conduct of the

respondent or changes in circumstances. Certainly, Rule 329b(d) could not be used to uphold a revocation and commitment to TJJD without a procedure that follows the requirements of Section 54.05.

Appointment of Counsel Upon Filing Petition. In 2001, the legislature enacted Section 51.101(e) to spell out the obligations of the juvenile court to provide counsel for the indigent when a petition to modify disposition is filed that seeks probation revocation or modification to require confinement in a secure local facility or commitment to TJJD. Section 51.101(e) provides:

> The juvenile court shall determine whether the child's family is indigent if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to the Texas Juvenile Justice Department or placing the child in a secure correctional facility. A court that makes a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion has been filed. An attorney appointed under this subsection shall continue to represent the child until the court rules on the motion or petition, the family retains an attorney, or a new attorney is appointed.

Unlike the requirements pertaining to a petition for adjudication or certification (see Chapter 8), the obligation to determine indigence for modification hinges on the filing of the petition to modify, not upon its service on the child. That is because Section 54.05(d) does not require personal service on the child of a motion or petition to modify but only that "reasonable notice" be given to all parties, including the child. Because the child is already on probation, the court's staff is in a position to advise the judge at the time the modification pleading is filed about the family's indigence. Section 51.101(e) requires appointment of counsel within five working days if the court finds the family to be indigent.

B. Proving a Probation Violation

Proof by Preponderance. Section 54.05(f) provides that a felony or determinate sentence probation may be modified to commit the child to TJJD if the court finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court.

A Court of Appeals is likely to look to adult community supervision revocation cases for assistance in determining whether proof by a preponderance has been shown in a juvenile proceeding. See *In the Matter of T.L.*, UNPUBLISHED, No. 04-97-00002-CV, 1997 WL 657101, 1997 Tex.App.Lexis 5511, Juvenile Law Newsletter ¶ 97-4-27 (Tex.App.—San Antonio 1997, no pet.) (upholding revocation for operation of a motor vehicle without the owner's consent despite absence of proof that car juvenile was driving had same vehicle identification number as one owned by the person alleged to be the owner).

In *In the Matter of J.M.*, UNPUBLISHED, No. 07-08-0215-CV, 2009 Tex.App.Lexis 902, Juvenile Law Newsletter ¶ 09-2-04 (Tex.App.—Amarillo 2009, no pet.), appellant argued that the evidence was insufficient to show that he violated his terms of probation by striking his mother with a closed fist. At the modification hearing, J.M.'s mother testified that her son pushed her instead of striking her. However, J.M.'s sister and a police officer testified that she had reported that J.M. "punched" her in the arm. Evidently choosing to believe the latter testimony, the trial court modified appellant's probation to place him in a boot camp facility. The Court of Appeals affirmed the lower court's ruling, despite the conflicting testimony, since the State is only required to prove a probation violation by a preponderance of the evidence.

Reasonable Probation Conditions. Section 54.05(f) authorizes the juvenile court to revoke probation if it finds that the child violated "a reasonable and lawful order of the court." In *In the Matter of J.L.E.*, UNPUBLISHED, No. 13-04-00058-CV, 2005 Tex.App.Lexis 5452, Juvenile Law Newsletter ¶ 05-3-22 (Tex.App.—Corpus Christi 2005, no pet.), the State filed two motions to modify, the first resulting in placement on Intensive Supervision Probation (ISP) and the second in placement at a facility. In the second motion to modify, the State alleged a violation that occurred before the hearing on the first motion to modify. J.L.E. argued that evidence of the violation that occurred before he was placed on ISP was insufficient to revoke his probation. The Court of Appeals ruled that the only relevant inquiry under Section 54.05(f) is whether a reasonable and lawful order of the court had been violated.

> Therefore, the date of the offense giving rise to the adjudication which the State is seeking to modify is irrelevant to the trial court's determination on a motion to modify a disposition.

2005 Tex.App.Lexis at 5452 *4.

J.L.E.'s plea of true to an alleged violation was sufficient to support the revocation. See also *In the Matter of K.B.*, 106 S.W.3d 913, 915 (Tex.App.—Dallas 2003, no pet.); *In the*

Matter of A.G., UNPUBLISHED, No. 04-05-00398-CV, 2006 WL 118378, 2006 Tex.App.Lexis 375, Juvenile Law Newsletter ¶ 06-1-14 (Tex.App.—San Antonio 2006, no pet.) (no abuse of discretion in finding conditions were reasonable when A.G. committed the infractions).

In *In the Matter of D.E.P.*, 512 S.W.2d 789 (Tex.Civ.App.—Houston [14th Dist.] 1974, no writ), the child was adjudicated delinquent and placed on probation. The State filed a petition to revoke probation, alleging the child violated probation by failing to attend the school in which he was enrolled and by being away from home after 9 p.m. without permission. Although each of those requirements was a reasonable condition of probation when it was imposed by the juvenile court, subsequent events converted them into unreasonable conditions and the child's probation could not be revoked for violating them:

> At the time of the original disposition appellant had been placed in the custody of his uncle on recommendation of the probation officer. He was then enrolled in the school in Angleton. Within one week following the adjudication and disposition hearings the uncle moved to Nacogdoches. His parents resided in the Freeport Intermediate School District. This fifteen year old was placed in a dilemma. If he moved with his uncle to Nacogdoches (there was no evidence that he was invited to do so) he would have been in violation of the court's order to attend the school "in which he is enrolled." On the other hand, if he moved to the home of his parents (as he did) he was not eligible to remain in "the school in which he was enrolled." Insofar as the finding that he was out one evening after 9:00 P.M. without the permission of his parent or guardian, the evidence is insufficient to justify revocation of the probation and the commitment to the Texas Youth Council. The only evidence attempted to be offered by the state on the issue of consent was the alleged statement of the parents to the probation officer that consent had not been given. This was hearsay and could not form the basis of the judgment....
>
> We have reached the conclusion that the move by the court-appointed guardian of the youth, his ineligibility to attend "the school in which he was enrolled" by reason of the residence of his parents that the court should not have modified the disposition to commit appellant to the Texas Youth Council. These circumstances beyond appellant's control have rendered the order of the court unreasonable.

512 S.W.2d at 792; Cf. *In the Matter of B.S.*, UNPUBLISHED, No. 02-10-00368-CV, 2011 WL 3211226 (Tex.App.—Fort Worth 2011, no pet.) (distinguishing *D.E.P.* because appellant's actions were not beyond his control).

In *In the Matter of Rodriguez*, 687 S.W.2d 421 (Tex.App.—Houston [14th Dist.] 1985, no writ), respondent's probation was revoked for violation of a curfew requiring him to be at home between 7 p.m. and 7 a.m. on weekdays. The appellate court upheld the revocation against the claim that the curfew in that case was an unreasonable condition of probation. The court distinguished the *D.E.P.* case on the ground that, while the probation conditions in that case were reasonable when imposed, subsequent events beyond the control of the juvenile caused them to become unreasonable. See also *In the Matter of A.M.*, UNPUBLISHED, No. 04-07-00488-CV, 2008 Tex.App.Lexis 2900 (Tex.App.—San Antonio 2008, no pet.) (revocation for refusing to provide urine sample); *In the Matter of J.A.M.*, UNPUBLISHED, No. 04-07-00489-CV, 2008 Tex.App.Lexis 1962 (Tex.App.—San Antonio 2008, no pet.) (revocation for failing to attend school and assaulting mother); *In the Matter of J.A.K.*, UNPUBLISHED, No. 09-96-332-CV, 1997 WL 228940, 1997 Tex.App.Lexis 2467, Juvenile Law Newsletter ¶ 97-2-28 (Tex.App.—Beaumont 1997, no writ) (revocation for failure to report and violation of a curfew imposed as a condition of probation); *In the Matter of J.L.S.*, UNPUBLISHED, No. 04-01-00363-CV, 2002 WL 873423, 2002 Tex.App.Lexis 3190, Juvenile Law Newsletter ¶ 02-2-19 (Tex.App.—San Antonio 2002, no pet.) (revocation for failure to report and failure to complete community service hours upheld); *In the Interest of B.J.*, 100 S.W.3d 448 (Tex.App.—Texarkana 2003, no pet.) (revocation for associating with persons on probation requires the State to prove that the respondent knew that the persons with whom he was associating were on probation at the time).

Probation can be revoked based on proof of a single Class C misdemeanor offense in violation of a probation condition requiring that the probationer not commit an offense against the laws. *In the Matter of R.B.*, UNPUBLISHED, No. 09-93-322-CV, 1995 WL 723516, Juvenile Law Newsletter ¶ 96-1-05 (Tex.App.—Beaumont 1995, no writ) (threat of bodily harm to mother).

Probation can also be revoked based on hearsay testimony. In *In the Matter of M.W.R.*, UNPUBLISHED, Nos. 04-04-00305-CV and 04-04-00306-CV, 2005 Tex. App. Lexis 2778, Juvenile Law Newsletter ¶ 05-2-30 (Tex. App.—San Antonio 2005, no pet.), a juvenile probation officer testified that appellant's mother informed her that M.W.R. was not at home during his curfew hours. The San Antonio

Court of Appeals ruled that since M.R.W. had already been adjudicated on the underlying offense, there is no violation of his right to confrontation to admit the hearsay testimony during the motion to modify disposition hearing. "Modification of a juvenile probation, like revocation of criminal community supervision, is not a 'criminal prosecution' within the meaning of the Sixth Amendment constitutional guarantee." 2005 Tex. App. Lexis 2778 * 4.

Violation of School, Program, or Placement Rules. In *In the Matter of W.R.C.*, UNPUBLISHED, No. 01-92-01145-CV, 1993 WL 153751, 1993 Tex.App.Lexis 1397, Juvenile Law Newsletter ¶ 93-2-10 (Tex.App.—Houston [1st Dist.] 1993, no writ), respondent was given probation and placed with the Hope Wilderness Center. While on home leave from the Center, he absconded. A motion to modify was filed and probation was revoked. The Court of Appeals held that because home visits were part of the wilderness program, failing to return from a home visit was a violation of the placement condition of probation.

The respondent in *In the Matter of R.L.*, UNPUBLISHED, No. 03-99-00334-CV, 2000 WL 45641, 2000 Tex.App.Lexis 471, Juvenile Law Newsletter ¶ 00-1-19 (Tex.App.—Austin 2000, no pet.), was placed on probation on conditions that included "participate in the Camelot Care Program as directed by the probation officer." In the motion to modify, the State alleged that this condition was violated because R.L. was unsuccessfully discharged from the Camelot Care Program. At the modification hearing, Shana Feldman, a representative of the Camelot Care Program, testified:

> R.L. became involved in the program in mid-October 1998 and was discharged March 15, 1999. Camelot Care ended its work with R.L. because "he had reached his full potential." In Feldman's opinion, the program was unsuccessful in affecting R.L.'s behavior because R.L.'s parents did not follow through at home with consequences for R.L.'s behavior. Additionally, it was Feldman's opinion that R.L.'s problem-solving techniques were not adequate for him to understand his behavior. In her opinion, R.L. needed 24-hour supervision in order to keep him from being impulsive and making bad decisions. Feldman explained that R.L. was discharged from the program because neither he nor his parents were participating and cooperating in the program. Feldman concluded that without participating or cooperating in the program, R.L. and his family would not realize any benefit from the program.

2000 WL 45641 *2.

The juvenile court revoked probation and committed R.L. to TYC. The Court of Appeals held that testimony was sufficient to show a violation of the referenced probation condition. The court did not discuss whether this probation condition violated the rule against delegating authority (see Chapter 12), nor did it discuss the question to what extent due process of law permits probation to be revoked for acts or omissions of the probationer's parents.

The respondent in *In the Matter of R.J.M.*, UNPUBLISHED, No. 05-99-01554-CV, 2000 WL 1207140, 2000 Tex.App.Lexis 5759, Juvenile Law Newsletter ¶ 00-3-31 (Tex.App.—Dallas 2000, pet. denied), was given probation and tried in three different placements. A motion to revoke was filed following his unsuccessful discharge from the third placement. The juvenile court revoked probation and committed respondent to TYC. The Court of Appeals upheld that decision based on this testimony:

> [A] condition of appellant's probation was that he remain at High Frontier "until satisfactorily released or discharged from the placement facility or ordered released by the Court." Appellant argues the word "discharged" is not modified by the word "satisfactorily" and, therefore, appellant did not violate a condition of probation. We disagree. Condition number 2 of appellant's "Terms and Conditions of Probation/Placement Facility" is an unambiguous statement that requires appellant to be satisfactorily released or discharged from High Frontier. During the hearing, several staff members at High Frontier testified appellant remained resistant to change, threatened and attacked other residents, had to be physically restrained on more than one occasion, glorified drug usage by kneeling on the floor and pretending to snort lines of cocaine, and had a total of 270 serious incident reports during his eighteen-month stay at High Frontier. The clinical director at High Frontier and appellant's probation officer recommended removing appellant from High Frontier unsatisfactorily with a recommendation to [commit] him to TYC.

2000 WL 1207140 *3. See also *In the Matter of T.P.*, 251 S.W.3d 212 (Tex.App.—Dallas 2008, no pet.) (upholding probation violation of failing to obey all rules of residential placement facility); *In the Matter of F.J.R.,* UNPUBLISHED, No. 06-99-00174-CV, 2000 WL 1299558, 2000 Tex.App.Lexis 6317, Juvenile Law Newsletter ¶ 00-4-05 (Tex.App.—Texarkana 2000, no pet.) (upholding as a probation violation several instances of violating the rules of the placement facility against a claim of unlawful delegation).

The respondent in *In the Matter of B.D.D., II,* UNPUBLISHED, No. 05-00-01376-CV, 2001 WL 287035, 2001 Tex.App.Lexis 1917, Juvenile Law Newsletter ¶ 01-2-10 (Tex.App.—Dallas 2001, no pet.), was placed on probation on condition that he successfully complete a boot camp program. The motion to revoke alleged he violated rules on numerous occasions and assaulted a staff member. The juvenile court revoked probation based on the testimony of B.D.D.'s case manager:

> At the hearing on the motion to modify, Keith Walker, appellant's case manager at the Cooke, Fannin, and Grayson County Boot Camp, testified that all participants in the boot camp program receive a copy of the boot camp handbook, which sets out the program's rules and regulations. On over twenty occasions from February 2000 to May 2000, Walker was notified that appellant had violated the rules of boot camp. All of these incidents involved violence or disruptive behavior. Walker indicated appellant was a "very angry young man" who had a problem controlling his anger. Walker gave various examples of appellant's actions that were in violation of the program's rules. For example, appellant grabbed a drill instructor's leg during a period of physical exercise, cursed at a staff member and tried to slap his arm away, and pushed another child and became verbally aggressive toward him. On May 21, appellant became angry with a drill instructor and took a swing at the instructor's head. On May 23, appellant was discharged from the boot camp program and taken to a detention center.

2001 WL 287035 *2.

The Court of Appeals upheld the revocation order. See also *In the Matter of T.R.B.*, UNPUBLISHED, No. 06-00-00162-CV, 2001 WL 928775, 2001 Tex.App.Lexis 5515, Juvenile Law Newsletter ¶ 01-3-27 (Tex.App.—Texarkana 2001, no pet.) (upholding revocation of probation for several violations of the rules of an alternative education program).

The appellant in *In the Matter of P.E.C.*, 211 S.W.3d 368 (Tex.App.—San Antonio 2006, no pet.), argued that his commitment to TYC following a modification hearing violated the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C.S. Section 1400, et seq. P.E.C. reasoned that because commitment to TYC would change his educational placement, he should first be afforded the administrative rights provided under the federal statute. The Court of Appeals noted that P.E.C. had presented no evidence that his conduct, which violated his probation, was due to his disability and ruled that IDEA does not limit the juvenile court's authority to modify a juvenile's disposition to commit him to TYC. [citing *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988)].

> Here, the State had the burden to prove by a preponderance of the evidence that P.E.C. violated a condition of his probation before he could be committed to TYC, but had no burden to disprove that P.E.C.'s violations were caused by his disability.

211 S.W.3d at 372. See also *In the Matter of L.A.M.*, UNPUBLISHED, No 04-05-00913-CV, 2006 Tex.App.Lexis 11249, Juvenile Law Newsletter ¶ 07-2-18 (Tex.App.—San Antonio 2006, no pet.) (authority of juvenile court to commit youth to TYC not limited by IDEA).

The prosecutor in *In the Matter of C.C.*, UNPUBLISHED, NO. 05-01-01882-CV, 2002 WL 1340319, 2002 Tex.App.Lexis 4384, Juvenile Law Newsletter ¶ 02-310 (Tex.App.—Dallas 2002, pet. denied), filed a motion to modify alleging that on August 28, 2001, respondent failed to participate in the court-ordered sex offender treatment program. The evidence showed that respondent, his mother and father attended the program, that the father became hostile and threatening, and that the father took respondent and respondent's mother from the room. Program officials then discharged respondent because they felt uncomfortable with the father's behavior. The Court of Appeals concluded that because respondent did not remain for the full session on the date alleged, he violated the condition of his probation requiring him to participate in the program. The court did not discuss the due process implications of revoking respondent's probation because of the conduct of his father and whether respondent voluntarily left the session or was under parental coercion to do so. It is fundamental that violations of probation require voluntary conduct by the probationer personally, a principle that seems not to have been recognized by the court in this case.

In *In the Matter of D.W.P.*, UNPUBLISHED, No. 06-07-00113-CV, 2008 Tex.App.Lexis 56 (Tex.App.—Texarkana 2008, no pet.), the probation violation was based on a "drug screen" administered by a law enforcement officer in a public high school. On appeal, the juvenile complained that the drug test result should not have been admitted without adequate evidence of its reliability. During the modification hearing, the officer could not remember the name of the drug screen he performed and could not explain the underlying scientific principles of the drug test. The Court of Appeals held that the officer's testimony

was insufficient to establish that he properly performed the testing procedure:

> In this case, there is no evidence of the underlying scientific theory or that the technique applying the theory is valid. [footnote omitted] While Officer Estes described what steps he took in performing the test, he was unable to testify that those steps were consistent with a prescribed procedure. When asked what was the first step of the "directions on the administration of the test," Officer Estes stated, "As far as exactly what the directions say, I do not know what's one, two, three, four, no. I can't tell you that." The record contains no evidence, other than Officer Estes's testimony, concerning the drug test introduced. The trial court erred in admitting the test results over D.W.P.'s objection.

2008 Tex.App.Lexis 56 *3-4.

The Amarillo Court of Appeals affirmed a TYC commitment based on a probation violation for failure to attend school. *In re P.Z.*, UNPUBLISHED, No. 07-02-0227-CV, 2003 WL 22389434, 2003 Tex.App.Lexis 8946, Juvenile Law Newsletter ¶ 03-4-11 (Tex.App.—Amarillo 2003, no pet.). In a contested modification hearing, the State alleged that P.Z. violated his probation by failing to attend school every day and failing to get permission to travel outside the county. P.Z. asserted duress, arguing that his mother kept him home for an ear infection and then attempted to put him on a bus to California. The court held that "the evidence is sufficient for the court to have found that a fourteen-year-old who openly defied school and juvenile facility staff was not likely to submit to any authority, including his parents', unless it was of his own free will." 2003 Tex.App.Lexis 8946 *10; see also *In the Matter of A.T.M.*, 281 S.W.3d 67 (Tex.App.—El Paso 2008, no pet.) (upholding revocation for expulsion resulting from a fight at school).

Notice of Conditions. The Austin Court of Appeals held in *In the Matter of J.M.*, UNPUBLISHED, No. 03-96-00376-CV, 1997 WL 230137, 1997 Tex.App.Lexis 2482, Juvenile Law Newsletter ¶ 97-2-29 (Tex.App.—Austin 1997, writ denied), that a claim probation conditions were not incorporated into the juvenile court's order placing the respondent on probation as required by Section 54.04(f) must be made initially in the juvenile court, not on appeal.

Admission and Plea of True. A motion to revoke probation alleged the juvenile's date of birth as August 23, 1979, but proof at the hearing was that his birth date was May 23, 1979. However, at the beginning of the revocation hearing, the juvenile acknowledged to the juvenile court judge that he was the person named in the motion and that his date of birth was August 23, 1979. The Court of Appeals held that admission was sufficient proof of the motion's date of birth allegation. *In the Matter of N.R.,* UNPUBLISHED, No. 04-95-00469-CV, 1996 WL 23369, (Tex.App.—San Antonio 1996, no writ).

A revocation of probation may be based on a violation of probation admitted by the respondent in a plea of true to the petition. *In the Matter of K.M.P.*, UNPUBLISHED, No. 04-07-00694-CV, 2008 Tex.App.Lexis 3260 (Tex.App.—San Antonio 2008, no pet.); *In the Matter of V.D.B.*, UNPUBLISHED, No. 04-97-00093-CV, 1997 WL 330988, 1997 Tex. App.Lexis 3140, Juvenile Law Newsletter ¶ 97-3-13 (Tex.App.—San Antonio 1997, no writ); *In the Matter of R.T.R.*, UNPUBLISHED, No. 04-04-00816-CV, 2005 WL 1629899, 2005 Tex.App.Lexis 5400 (Tex.App.—San Antonio 2005, no pet.); *In the Matter of R.L.,* UNPUBLISHED, No. 04-04-00407-CV, 2005 Tex.App.Lexis 10786 (Tex.App.—San Antonio 2005, no pet.).

Revocation for Failure to Pay. Probation conditions frequently require the probationer to pay money. Examples are restitution, court costs, and probation supervisory fees. Probation can be revoked for failure to pay the required sums, but only if the probationer had the ability to pay and deliberately refused to do so. Who has the burden of proving whether the probationer had the ability to pay? Must the State prove he or she had the ability? Or must the probationer prove he or she did not?

In *In the Matter of M.H.*, 662 S.W.2d 764 (Tex.App.—Corpus Christi 1983, no writ), the juvenile was placed on probation. One condition required her to pay over $800 in restitution to the victim of the offense. A motion to revoke was filed, alleging she failed to pay the restitution. The appellate court, drawing from Code of Criminal Procedure Article 42.12, Sec. 8(c), concerning adult community supervision, held that the burden was on the probationer to prove by a preponderance of the evidence that she did not have the ability to make the payments required. Since there was no evidence in this case of her inability to pay, the court affirmed the order revoking probation.

In 1993, Article 42.037, Code of Criminal Procedure was enacted, providing that, in determining whether to revoke probation, the court must consider the defendant's employment status, earning ability, and financial resources as well as the willfulness in the failure to pay and any other special circumstances that may affect the failure to pay.

In the Matter of J.M., III, 133 S.W.3d 721 (Tex.App.—Corpus Christi 2003, no pet.), addressed the identical issue as *In the Matter of M.H.,* 662 S.W.2d 764 (Tex.App.—Corpus Christi 1983, no writ), but reached a different result. The State filed a motion to modify appellant's disposition alleging, in part, that he failed to make the first two scheduled restitution payments. However, a probation officer testified under cross-examination that J.M. was not old enough to work; that he was confined in either a treatment center or the juvenile detention center during the time the missed payments were due; and that she believed he had no access to financial support from his parents. Without addressing Article 42.037, Code of Criminal Procedure, the court noted that since its decision in *In re M.H.*, the Court of Criminal Appeals had held that, even though the inability to pay was an affirmative defense, the State still had the burden of proving the failure to pay was intentional. *Stanfield v. State*, 718 S.W.2d 734, 737-38 (Tex.Crim.App. 1986). Since the State did not provide any evidence contradicting the probation officer's testimony about appellant's inability to pay or show that his failure to pay was intentional, the juvenile court did not have legally sufficient evidence on which to exercise its discretion to modify the disposition.

In 2007, noting cases calling into question the constitutionality of revoking probation for non-payment, Article 42.12, Sec. 21(c) was amended, providing that if the only issue at a revocation hearing is failure to pay appointed counsel, community service fees, or court costs, the state has the burden to prove by a preponderance of evidence that the defendant was able to pay and did not do so; the affirmative defense was removed. This law change does not apply to restitution or reparation payments, likely because they are addressed in Article 42.037. Article 42.12 21(c) was renumbered to Article 42A.751(i) in 2017.

Revocation Based on Accomplice Witness Testimony. Does the accomplice witness rule apply to motions to modify? In a 2006 case, defense counsel argued that a hearing on a motion to modify disposition is partially an adjudicatory hearing and that Code of Criminal Procedure Art. 38.14 should apply. *In the Matter of L.T., III*, UNPUBLISHED, No. 12-05-00048-CV, 2006 Tex.App.Lexis 826, Juvenile Law Newsletter ¶ 06-1-17 (Tex.App.—Tyler 2006, no pet.). The State countered that Article 38.14, prohibiting uncorroborated accomplice witness testimony in adult criminal trials, does not apply to revocation proceedings. The appellate court held there was no abuse of discretion in allowing the witness to testify without corroboration at the modification hearing.

> Looking to adult revocation cases for guidance and noting the similarity in substance between the adult and juvenile accomplice witness rules, we conclude that neither article 38.14 of the Texas Code of Criminal Procedure nor section 54.03(e) of the Texas Family Code applies to the modification hearing of a juvenile's disposition.

2006 Tex.App.Lexis 826 *6-7. See also *In the Matter of D.G., III*, UNPUBLISHED, No. 09-05-510-CV, 2006 Tex.App.Lexis 10008, Juvenile Law Newsletter ¶ 07-1-5 (Tex.App.—Beaumont 2006, no pet.) (following *L.T., III* in holding that neither Article 38.14 nor Section 54.03(e) apply to modification of a juvenile's disposition).

Modifying Disposition to Require Secure Placement. The evidentiary requirements for modifying a disposition to require secure placement as a condition of probation are most closely akin to revocation of probation. Modifying to require secure placement for an extended period (more than 30 days) should be based on the same evidence that would be required to revoke probation, with the exception that the restrictions on TJJD commitment for violation of misdemeanor probation do not apply. In 2001, the legislature amended Section 54.05(h) to require a juvenile court hearing prior to a modification that results in placement in a post-adjudication secure correctional facility for a period longer than 30 days. That hearing cannot be waived.

In *In the Matter of T.G.*, UNPUBLISHED, No. 05-99-02136-CV, 2000 WL 1598933, 2000 Tex.App.Lexis 7272, Juvenile Law Newsletter ¶ 00-4-14 (Tex.App.—Dallas 2000, no pet.), the juvenile court accepted a plea of true to an allegation of a probation violation and modified probation to require the respondent to reside in a secure facility. Respondent argued that to justify such a radical change on probation supervision, the court was required to find that there was a material change in the circumstances. The Court of Appeals rejected this argument:

> T.G. argues the evidence is factually insufficient to support the trial court's finding that a material and substantial change of circumstances occurred which necessitated a modification of his placement. T.G. cites no authority for his proposition and we find none. The family code does not require a "material and substantial change of circumstances" to modify disposition. See Tex. Fam. Code Ann. §54.05 (Vernon Supp.2000). Rather, the family code requires the trial court find, by a preponderance of the evidence, that the juvenile has violated a reasonable and lawful order of the court.

2000 WL 1598933 *3.

Modifications to Extend the Probation Term. If the term of probation will expire before the juvenile court loses jurisdiction over the matter, there may be occasion for extending it. A petition or motion for modification seeking extension would be the appropriate first step in seeking extension. The hearing may be waived. As added in 2003, Section 54.05(l) provides:

> The court may extend a period of probation under this section at any time during the period of probation or, if a motion for revocation or modification of probation is filed before the period of supervision ends, before the first anniversary of the date on which the period of probation expires.

This provision applies to conduct that occurred on or after September 1, 2003. Extension may be used instead of revocation after a revocation hearing or may occur on agreement by the child and an appropriate adult without a hearing if all that is sought is an extension.

The motion or petition to extend probation must be filed before the probation term expires. If the State waits until probation has expired, then the juvenile court has lost jurisdiction to revoke or modify probation.

In *In the Matter of P.B.B.*, UNPUBLISHED, No. 11-04-00061-CV, 2005 Tex.App.Lexis 7651 (Tex.App.—Eastland 2005, no pet.), appellant's probation was extended for 12 months based on the State's first motion to modify. Thereafter, the State filed a second motion to modify but there was no evidence in the record that any action was taken on the second motion. The Eastland Court of Appeals held that the juvenile court did not have jurisdiction to modify the terms of appellant's probation because his probation had expired before the modification hearing. The record showed that a hearing was held on the State's motion to modify disposition but there was no written order in the record to reflect what happened at this hearing:

> There is no written order in the record extending appellant's probation beyond April 6, 2003. The only evidence in the record of such an extension is a docket sheet entry on July 18, 2002. A docket sheet entry, however, does not suffice as a written order. (citation omitted). Docket sheet entries are inherently unreliable, lacking the formality of orders and judgments. Without a written order extending appellant's probation beyond April 6, 2003, we must conclude that the court's jurisdiction over appellant terminated on that date.

2005 Tex.App.Lexis 7651 *7.

The court held that because P.B.B.'s probation expired on April 6, 2003, the juvenile court did not have jurisdiction to revoke his probation on January 30, 2004.

The juvenile court has the power to extend probation when the term has already expired as long as a motion or petition for modification was filed before the term expired. In such a case, the court is authorized to extend the probation term so long as it acts within a year of the expiration of probation. The new probation term, based on the original adjudication, begins when the extension order is entered. While there may be a gap in supervision, the renewed supervision is a continuation of the original probation. This provision is modeled after Code of Criminal Procedure Article 42A.753 [formerly 42.12, Sec. 22(c)].

In one case in point, appellant argued that because no warrant or capias issued before her probation expired, the State had waited too long to request modification of her disposition to extend her probation. *In the Matter of A.N.A.*, 141 S.W.3d 765 (Tex.App.—Texarkana 2004, no pet.). A.N.A. conceded that the State's motion to modify was filed before her probation term ended but asked the Court of Appeals to apply an adult criminal standard, which also requires that a capias issue in order for the court to have jurisdiction to extend a probationary term beyond its expiration. See *Peacock v. State*, 77 S.W.3d 285, 287 (Tex.Crim.App. 2002). The appellate court rejected this argument, citing Section 54.05(l), which provides that a court may modify and extend probation either during the period of probation or, if the motion to modify is filed before the supervision ends, before the first anniversary of the date on which the period of probation expires. "In this case, the motion to modify was filed before the supervision ended, and the order extending probation was entered before the first anniversary following the date on which the probationary period expired. The trial court's action falls squarely within the ambit of the rule." 141 S.W.3d at 766.

Subsequent Modification for the Same Violation Prohibited. The juvenile court in *In the Matter of J.L.D.*, 74 S.W.3d 166 (Tex.App.—Texarkana 2002, no pet.) extended the respondent's probation for five months upon a stipulation that she had violated probation by committing an assault. Later, the State filed a second motion to modify in which it alleged the same assault and a new violation of probation. After a hearing, the juvenile court found the State had not proven the new violation but revoked pro-

bation based on the assault violation. The Court of Appeals, drawing upon adult community supervision precedent, held this action violated the respondent's rights to due process of law:

> [W]here a trial court holds a hearing on a motion to revoke or modify community supervision and disposes of that motion by allowing a person to remain on supervision with modified conditions, the court is thereafter without authority to change that disposition at a subsequent hearing where no further violation of supervision is shown. *Ex Parte Tarver,* 725 S.W.2d 195, 199-200 (Tex.Crim.App. 1986); *Furrh v. State*, 582 S.W.2d 824, 827 (Tex.Crim.App. 1979). To do so violates a probationer's liberty interest as safeguarded by federal constitutional due process protection and state constitutional due course of law protection.… The cases just cited all concern adult criminal proceedings. Juvenile delinquency procedures are civil in nature.… Nevertheless, there are certain constitutional protections to which a juvenile is entitled as in a criminal trial, because juvenile proceedings may also result in deprivations of liberty. These include due process protections.… There is no reason why the constitutional protections afforded adults against deprivations of liberty at community supervision revocation proceedings should not be available for juveniles. We therefore hold that they apply equally in circumstances such as these, where one act is twice used to modify or revoke community supervision.

74 S.W.3d 166 at 170.

Challenging the Revocation Decision. The juvenile has the right to appeal under Section 56.01 to challenge the revocation decision. However, if the juvenile court has found more than one violation of probation, the juvenile must show that there is insufficient evidence to support each violation in order to prevail on an evidence insufficiency ground. A finding of a single probation violation supported by the evidence is sufficient to uphold a revocation decision. *D.R.C. v. State*, UNPUBLISHED, No. 05-94-00823-CV, 1995 WL 22777, 1995 Tex.App.Lexis 3949, Juvenile Law Newsletter ¶ 95-1-14 (Tex.App.—Dallas 1995, no writ); *In the Matter of T.R.*, UNPUBLISHED, No. 04-97-00965-CV, 1998 WL 315558, 1998 Tex.App.Lexis 3647, Juvenile Law Newsletter ¶ 98-3-11 (Tex.App.—San Antonio 1998, no pet.) (challenging the sufficiency of the evidence to support only one of five violations found by the juvenile court to have occurred). See also *In the Matter of T.R.S.*, 115 S.W.3d 318 (Tex.App.—Texarkana 2003 no pet.) (revocation for failure to faithfully attend school upheld); *In the Matter of J.M.*, 287 S.W.3d 481 (Tex.App.—Texarkana 2009, reh'g overruled); *In the Matter of S.G.V.*, UNPUBLISHED, No. 04-05-00605-CV, 2006 WL 923576, 2006 Tex.App.Lexis 2688, Juvenile Law Newsletter ¶ 06-2-10 (Tex.App.—San Antonio 2006, no pet.).

It is also necessary to object to a sentence, either at the time of the modification hearing or by a post-trial motion, to challenge a revocation decision on appeal. In *In the Matter of J.C.L.,* UNPUBLISHED, No. 13-08-379-CV, 2008 Tex.App.Lexis 8234 (Tex.App.—Corpus Christi 2008, pet. for review filed), appellant's probationary terms were modified on three separate occasions. Appellant entered a plea of "true" on a fourth motion to modify, which resulted in her commitment to TYC. On appeal, J.C.L. complained of the termination and sentence, but she had never objected to the sentence at any previous hearing. The Corpus Christi Court of Appeals held that, "By failing to object, J.C.L. has waived any complaint on appeal." 2008 Tex.App.Lexis 8234* 2 (citing *Trevino v. State*, 174 S.W.3d 925, 927-29 (Tex.App.—Corpus Christi 2005, pet. ref'd).

The mere existence of evidence to support a finding the respondent violated probation does not mean probation must be revoked. Not all violations lead to revocations. The juvenile court has discretion not to revoke probation despite proof of a violation, and it is certainly possible for a juvenile court to abuse that discretion in revoking probation despite proof of a violation. In addition to appellate court challenges on evidence insufficiency grounds, a revocation decision may be challenged on the ground that the juvenile court abused its discretion in committing the respondent to TJJD. For example, in *In the Matter of J.H.*, UNPUBLISHED, No. 12-01-00247-CV, 2002 WL 253873, 2002 Tex.App.Lexis 1387, Juvenile Law Newsletter ¶ 02-2-01 (Tex.App.—Tyler 2002, pet. denied), the Court of Appeals upheld a revocation commitment following a plea of true when there was evidence the respondent had made a suicide attempt and the probation officer testified that TYC could best protect the respondent from himself. See also *In the Matter of E.R.L.*, 109 S.W.3d 123 (Tex.App.—El Paso 2003, no pet.) (TYC commitment upheld despite testimony about appropriate less restrictive alternatives); *In the Matter of B.N.*, UNPUBLISHED, No. 03-00-00546-CV, 2001 WL 987727, 2001 Tex.App.Lexis 5941, Juvenile Law Newsletter ¶ 01-4-03 (Tex.App.—Austin 2001, no pet.) (TYC commitment upheld for violating terms of placement despite testimony that another placement might be preferable to TYC); *In the Matter of E.P.G.*, UNPUBLISHED, No. 10-07-00286-CV, 2008 Tex.App.Lexis

7287 (Tex.App.—Waco 2008, no pet.) (no abuse of discretion to commit youth to TYC rather than order him into intensive supervision probation or require him to wear a monitor).

Interim Supervision Modifications and Revocations. In 2005, the legislature abolished the old system of courtesy supervision and created two new probation transfer procedures: interim supervision and permanent supervision. During the 180-day interim supervision period, some juveniles are likely to commit new offenses or violate the terms and conditions of their probation. In such cases, a modification or revocation proceeding may be appropriate. Under the interim supervision provisions, the receiving county's probation department is authorized to request its juvenile court to modify or supplement the sending county's conditions with perhaps even identical conditions of its own. The judicial mechanism for modifying these conditions is a motion to modify under Section 54.05. The child may be represented by counsel at any hearing under Section 54.05, but counsel is only mandatory if revocation to TJJD or placement in a secure correctional facility is sought. Section 51.101(e).

Section 51.072(h) allocates authority to revoke probation. If the violation was of a condition imposed by the sending county that has not been modified or replaced, then only the court in the sending county has the authority to revoke. If the violation was of a condition modified or imposed by the receiving county, then only the juvenile court of the receiving county may revoke. See Chapters 6 and 27 for additional discussion.

Resuming Supervision. If a child is believed to have violated a probation condition imposed by the juvenile court in the sending county, the juvenile court in either the sending or receiving county may issue a directive to apprehend or detain the child as in other probation violation cases. The receiving county has the option to modify the probation conditions or extend the probation terms, or it may require that the sending county resume direct supervision of the child. Section 51.072(i).

In 2007, Section 51.072(j) was amended to require the receiving county to provide the sending county with supporting written documentation of the circumstances relating to the technical or offense violations of probation upon which a directive to resume is based. This documentation provides the sending county with the probable cause basis upon which to file a modification under Section 54.05 and substantiates the rationale for returning the case back to the sending county. After the juvenile court in the receiving county signs and enters the directive to resume supervision, the sending county must resume direct supervision of the child. The sending county is financially responsible for the prompt transportation of the child back to the sending county.

As originally envisioned by the legislature, once the directive to resume has been issued and finalized, the case permanently returns to the sending county. Juvenile justice practitioners, however, suggested that if the case is required to be permanently transferred back to the sending county (where the child no longer resides) the overarching goal of continuity of supervision and services has been defeated. This issue was addressed by the legislature in 2013, when Sections 51.072(j-1) and (j-2) were added. Under these provisions, the child may be returned to the receiving county during the period of interim supervision, although the return to the receiving county does not restart the 180-day time period; the entire period is still limited to 180 days. See Chapters 6 and 27.

C. TJJD Commitments as Modifications

The Delinquency/CINS Distinction. Only delinquency probation may be revoked. Prior to amendments made in 1999, if a child was on CINS probation and violated it, a petition for an adjudication hearing could be filed under then Section 51.03(a)(2) [defining violation of probation as delinquent conduct]; if the child was adjudicated delinquent for violating CINS probation, he or she could then be committed to TYC. In 1999, Section 54.05(g) was amended to prohibit revoking CINS probation and committing a child to TYC.

Before repeal of the language in 2001, Section 54.05(d) provided additional procedural requirements when seeking to revoke CINS probation. It read, in part:

> When the petition to modify is filed under Section 51.03(a)(2) of this code, the court must hold an adjudication hearing and make an affirmative finding prior to considering any written reports under Subsection (e) of this section.

Therefore, all of the requirements of an adjudication petition concerning the contents of the petition, upon whom it must have been served, and how it must have been served must have been complied with when the State was seeking to "revoke" CINS probation. When a child was on probation for an adjudication of delinquent conduct, a motion to modify disposition that alleged a criminal offense as a violation of "a reasonable and lawful

order of a juvenile court" did not invoke the special procedures of a petition under former Section 51.03(a)(2). Those procedures required an adjudication petition and hearing, with a right to a jury. Unless the petition qualified as an adjudication petition, then it was not invoking Section 51.03(a)(2). *In the Matter of J.K.A.*, 855 S.W.2d 58 (Tex.App.—Houston [14th Dist.] 1993, writ denied).

In 1999, the legislature eliminated the delinquency/CINS distinction for purposes of TYC commitments. It did not repeal any of the provisions that existed to govern the process for "revoking" CINS probation to enable a TYC commitment, but it did render that procedure "inoperable" by requiring that a TYC commitment be based on a felony adjudication or, prior to 2007, on repeated jailable misdemeanor adjudications. Therefore, if a child was on CINS probation and violated that probation, that event could not lead to a TYC commitment even following a new adjudication hearing on a Section 51.03(a)(2) petition. In 2001, the legislature repealed Section 51.03(a)(2) because it no longer was applicable in light of the 1999 restrictions on TYC commitments.

Since 2007 changes limiting TJJD commitment to only felonies, if a child on CINS probation violates that probation by committing a felony, commitment is permissible only if the new felony offense is adjudicated as an offense; finding the felony only as a probation violation is not sufficient for commitment to TJJD.

Restrictions on TJJD Commitments for Misdemeanors (Old Law). In 1999, the legislature restricted the power of the juvenile court to commit a child to TYC for a single misdemeanor offense. It required that the child must have had a prior felony or two misdemeanor adjudications before the current misdemeanor ad-judication to be eligible for commitment. See Chapter 12.

In 1999, the legislature also enacted a special version of that rule for revocation of probation. As enacted in 1999, Section 54.05(k) provided:

> The court may modify a disposition under Subsection (f) that is based on a finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions; and
>
> (2) of the previous adjudications, the conduct that was the basis for the adjudications occurred after the date of another previous adjudication.

Under this rule, a violation of misdemeanor probation could have substituted for the third misdemeanor offense to enable a TYC commitment upon modification. For example, if a juvenile committed a jailable misdemeanor and was adjudicated for it and, after that adjudication, committed a second jailable misdemeanor and was placed on probation for it, a finding in a modification hearing of a violation of that probation used to support a commitment to TYC. The modification substituted for the third misdemeanor adjudication. As in the case of a direct commitment to TYC, a prior felony adjudication also satisfied the requirement of a prior adjudication.

Former Section 54.05(k)(2) required that the prior adjudications must have occurred in a certain sequence. There had to have been an adjudication for the first offense before the second offense was committed. Therefore, adjudications for two jailable misdemeanors in the same adjudication hearing counted as only one prior adjudication under this provision.

Since Section 54.05(k) required that the misdemeanor violation must be delinquent conduct, Class C misdemeanors were excluded from this scheme and could not qualify as a prior adjudication. That was because under Section 51.03(a)(1) only a penal law violation "punishable by imprisonment or by confinement in jail" could be delinquent conduct.

Under Subsection (k), there was no requirement that the probation violation had to be a jailable misdemeanor or even a criminal offense. Any violation of misdemeanor probation with the requisite prior adjudication supported a TYC commitment.

Restrictions on TJJD Commitments for Misdemeanors (Current Law). In 2007, the legislature repealed Section 54.05(k), thus eliminating TYC as a disposition option for revocation of probation in misdemeanor cases. Also deleted was language in Section 54.05(f) that referred to Subsection (k). These deletions were part of the comprehensive TYC reforms enacted during the 80th Legislative Session, which clarified that the only juvenile offenders who may be committed are those adjudicated for felony offenses or who have a current violation of a felony probation. Misdemeanor offenders may not be committed under any circumstances.

It is worth reviewing the history of these now repealed provisions in the event that the legislature elects to revive them in the future. The following sections discuss these now repealed provisions.

Judicial Interpretations of Former Section 54.05(k). Several Courts of Appeals interpreted the language in Section 54.05(k) to require two prior adjudications before the current adjudication upon which probation was based in order to revoke misdemeanor probation for a violation. That interpretation required the same number of adjudications for a revocation of probation as for a direct commitment to TYC and gave no weight to the probation violation. When the bill that enacted Section 54.05(k) was filed in 1999, it required three separate adjudications to authorize commitment for violation of misdemeanor probation. However, the bill was amended in the Senate to change three to two in order to hold the juvenile accountable for his or her violation of probation. The Courts of Appeals appear not to have noticed that amendment or to have disregarded it in interpreting the language that was enacted. See *In the Matter of J.W.*, 118 S.W.3d 927 (Tex.App.—Dallas 2003), *aff'd by* 198 S.W. 3d 327 (Tex.App.—Dallas 2006); *In the Matter of Q.D.M.*, 45 S.W.3d 797 (Tex.App.—Beaumont 2001, pet. denied); *In the Matter of A.N.,* 54 S.W.3d 487 (Tex.App.—Fort Worth 2001, pet. denied); *In the Matter of N.P.,* 69 S.W.3d 300 (Tex.App–Fort Worth 2002, pet. denied); *In the Matter of A.I.*, 82 S.W.3d 377 (Tex.App.—Austin 2002, pet. denied); *In the Matter of S.B.*, 94 S.W.3d 717 (Tex.App.—San Antonio 2002, no pet.); *In the Matter of C.E.T.*, UNPUBLISHED, No. 08-03-00124-CV, 2004 WL 596219, 2004 Tex.App.Lexis 2757, Juvenile Law Newsletter ¶ 04-2-08 (Tex.App. –El Paso 2004, no pet.); *In the Matter of T.B.*, UNPUBLISHED, No. 12-03-00271-CV, 2004 WL 1202975, 2004 Tex.App.Lexis 4926, Juvenile Law Newsletter ¶ 04-3-02 (Tex.App. –Tyler 2004, no pet.); *In the Matter of C.B.J.,* UNPUBLISHED, No. 10-03-00008-CV, 2004 WL 1588274, 2004 Tex.App.Lexis 6378, Juvenile Law Newsletter ¶ 04-3-20 (Tex.App. –Waco 2004, no pet.); *In the Matter of C.S.*, UNPUBLISHED, No. 12-02-00095-CV, 2002 WL 31898885, 2002 Tex.App.Lexis 9285, Juvenile Law Newsletter ¶ 03-1-14 (Tex.App. –Tyler 2002, no pet.).

2001 and 2003 Amendments. In 2001, the legislature amended Section 54.05(k)(2) to further communicate its intent that only one adjudication prior to the misdemeanor adjudication for which a child was on probation was needed to revoke probation and commit the child to TYC. Subdivision (2), as amended, provided, "of the previous adjudications, the conduct that was the basis of one of the adjudications occurred after the date of another previous adjudication."

Then, in 2003, the legislature again re-wrote Section 54.05(k):

> The court may modify a disposition under Subsection (f) that is based on an adjudication that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least one previous occasion before the adjudication that prompted the disposition that is being modified; and
>
> (2) the conduct that was the basis of the adjudication that prompted the disposition that is being modified occurred after the date of the previous adjudication.

This enactment made it clear that when misdemeanor probation revocation was sought, the State was required to prove only one felony or misdemeanor adjudication that occurred prior to the adjudication that was the basis of the probation for which revocation was being sought.

It was this 2003 version of Section 54.05(k) that the legislature repealed in 2007, making it clear that probation based on a misdemeanor adjudication cannot be modified to result in commitment. For additional cases interpreting the 2003 version of Section 54.05(k) see *In the Matter of E.C.*, 216 S.W.3d 424 (Tex.App.—San Antonio 2006, no pet.); *In the Matter of U.G.V.*, 199 S.W.3d 1 (Tex.App.—El Paso 2005, no pet.); *In the Matter of M.A.*, UNPUBLISHED, No. 03-04-00698-CV, 2005 Tex.App.Lexis 5910, (Tex.App.—Austin 2005, no pet.).

Revocation of Determinate Sentence Probation. In 1999, the legislature enacted a new type of probation for use in determinate sentence cases. If the judge or jury sentences the child to commitment to TJJD for 10 years or less, the commitment may be probated for up to ten years.

If the juvenile is still on probation at age 18 for an offense committed before September 1, 2011, or at age 19 for an offense committed on or after September 1, 2011, the juvenile court may transfer the case to criminal court for community supervision as an adult. See Chapter 21.

If the juvenile violates probation before becoming 18 or 19, depending on the offense date, probation may be revoked. Under Section 54.05(j), the juvenile court may commit the child to TJJD for a determinate sentence that "does not exceed the original sentence assessed by the

court or jury." The court can commit for a shorter sentence than originally assessed but not for a longer one. See Chapter 21 for a discussion of Section 54.051 and transfer of determinate sentence probation to district court.

D. The Modification Hearing

Hearing Before Referee/Associate Judge/Master. Section 54.10(a) allows a referee or associate judge to conduct a modification hearing. Even if the referee or associate judge recommends continuing the respondent on probation, the juvenile court on review can reverse that decision and revoke the probation. *In the Matter of D.G.*, UNPUBLISHED, No. 05-01-00208-CV, 2002 WL 338875, 2002 Tex.App.Lexis 1628 (Tex.App.—Dallas 2002, pet. denied). See the discussion of the double jeopardy implications of such a step in Chapter 2.

In *In the Matter of S.G.*, 240 S.W.3d 451 (Tex.App.—Eastland 2007, no pet.), a referee signed an agreed order modifying the terms of S.G.'s probation to release her into the custody of her grandmother until the end of June 2005. The order was signed by the referee on June 9. However, the juvenile court judge did not sign the order until June 24. In the meantime, S.G. violated her probation terms by breaking curfew on June 21, which resulted in the State filing a motion to modify on June 28. The allegation was found to be true and S.G. was committed to TYC.

Was a valid court order in effect when S.G. committed the violation on June 21, 2005? The Eastland Court of Appeals answered in the affirmative, noting that under Section 54.10(d), a referee's recommendation to release a child results in an immediate release subject to the juvenile court's power to modify or reject that recommendation. "In this case, the agreed order operated to release S.G. into the custody of her grandmother. Therefore, we are of the opinion that it took effect upon being signed by the referee." 2007 Tex.App.Lexis at 7807 *4. Since the referee's order was in effect at the time S.G. violated its terms, the trial court did not err in revoking her probation and committing her to TYC.

Waiver of Modification Hearing. Section 54.05(h) requires the juvenile court to hold a hearing before revoking delinquency probation and committing a child to TJJD or ordering confinement in a secure placement for more than 30 days. That hearing cannot be waived. All other types of modification hearings, such as to extend the probationary term, can be waived. Section 54.05(h) states that a child and the child's "parent, guardian, guardian ad litem, or attorney may waive hearing in accordance with Section 51.09." Section 51.09 reads:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
>
> (1) the waiver is made by the child and the attorney for the child;
>
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
>
> (3) the waiver is voluntary; and
>
> (4) the waiver is made in writing or in court proceedings that are recorded.

There are at least two possible interpretations of how a hearing may be waived under Section 54.05(h). One interpretation is that the waiver must comply with Section 51.09, except that there is no requirement that the child's attorney concur in the waiver. Under this interpretation, the provision in Section 54.05(h) that states that the child and the child's "parent, guardian, guardian ad litem, or attorney" may waive the hearing overrides the more general requirement of Section 51.09 that an attorney must concur in a waiver.

The argument under this theory is that the qualifying language of Section 51.09 providing "Unless a contrary intent clearly appears elsewhere in this title..." excuses the need to have the attorney involved in the waiver because the language of Section 54.05(h) regarding the child's parent, guardian, guardian ad litem, or attorney's ability to waive the hearing is an expression of such a contrary intent. Following this interpretation, the only parts of Section 51.09 that must be complied with are that the waiver must be voluntary and made in writing or in recording court proceedings.

The second interpretation is that the reference to Section 51.09 in Section 54.05(h) means that all of Section 51.09 applies and the hearing may only be waived with an attorney if it is a hearing involving a disposition impacting the child. Support for this argument comes from the fact that Section 54.05(h) references all of Section 51.09, not part of it. That reference is intentional and should be given effect. This interpretation is also supported by weaknesses in the arguments supporting the first interpretation. The

first interpretation requires one to determine that Section 54.05(h) clearly provides a contrary intent to the requirements in Section 51.09 that an attorney must be involved when a child is waiving a right under the law. However, Section 54.05(h) is not particularly clear on this. Whereas the argument for the first interpretation rests on a belief that the line in Section 54.05(h) that a child and the child's parent, guardian, guardian ad litem, or attorney may waiver hearing means that the child and any of those people is sufficient to waive a hearing, there is at least as likely a valid interpretation that those individuals are listed not because they are able to assist a child in waiving his or her hearing but rather because they are authorized to waive a modification hearing involving their own dispositions since Section 54.05 is the method for modifying any juvenile court disposition, including one involving a parent, guardian, or other responsible person; thus, the reference to parents and guardians is there to establish they may waive their own modification hearings. However, if the hearing impacts the child, then it can only be waived with an attorney, as provided by Section 51.09.

There are weaknesses in both arguments, to be sure. The question has never been addressed by a court. Until it is or there is a legislative modification for clarity, practitioners will need to decide how this statute should be interpreted. The second interpretation is the safer course of action, though, since requiring an attorney's involvement in the waiver would never be reversible error, even if the first interpretation were to ultimately prevail whereas not requiring the attorney's involvement would be reversible error if the second interpretation prevails.

The requirement that a revocation hearing be held does not mean that it must be a full-blown evidentiary hearing. If the child pleads "true" to the allegations in the petition to modify or stipulates to the testimony of witnesses, that is sufficient to satisfy the hearing requirement. *In the Matter of J.L.*, 664 S.W.2d 119 (Tex.App.—Corpus Christi 1983, no writ).

There is also no requirement that the admonishments provided to a juvenile at the beginning of an adjudication hearing under Section 54.03(b) also be given at a hearing on a motion to modify under Section 54.05. *In the Matter of K.L.S.*, UNPUBLISHED, No. 13-04-397-CV, 2005 Tex.App.Lexis 6656, Juvenile Law Newsletter ¶ 05-4-01 (Tex.App.—Corpus Christi 2005, no pet.); see also *In the Matter of S.J.,* 940 S.W.2d 332, 334 (Tex.App.—San Antonio 1997, reh'g denied) ("S.J. concedes that there is no requirement that the admonishments required for acceptance of guilty pleas be given at a hearing on a motion to modify, because the original admonitions from the adjudication hearing carry over into the disposition.").

No Requirement of a Plea. Does a respondent's failure to enter a plea at the modification hearing render the proceeding a nullity? The answer, according to *In the Matter of T.J.H.-T.*, UNPUBLISHED, No. 04-06-00805-CV, 2007 Tex.App.Lexis 3727, Juvenile Law Newsletter ¶ 07-3-4 (Tex.App.—San Antonio 2007, no pet.), is that it does not. At the motion to modify disposition hearing, the juvenile court did not ask T.J.H.-T. to enter a plea to the charges. He argued on appeal that this failure to require him to enter a plea adversely affects the public interest as defined by the laws of Texas and further urged that the Code of Criminal Procedure should be looked to in deciding this issue. While Article 26.12 of the Code of Criminal Procedure does require a plea to be entered in every criminal case, neither the Rules of Civil Procedure nor the Family Code mandate the same requirement in a juvenile case. As a result, the Court of Appeals ruled that his failure to enter a plea did not render the modification hearing a nullity. See also *In the Matter of C.C.*, UNPUBLISHED, No. 05-01-01882-CV, 2002 WL 1340319, 2002 Tex.App.Lexis 4384, Juvenile Law Newsletter ¶ 02-3-10 (Tex.App.—Dallas 2002, pet. denied).

No Right to a Jury. Section 54.05(c) provides, "There is no right to a jury at a hearing to modify disposition." In *In the Matter of A.M.B.*, 676 S.W.2d 448 (Tex.App.—Houston [1st Dist.] 1984, no writ), respondent contended this language violated Article 5, Section 10 of the Texas Constitution granting the right of trial by jury "in the trial of all causes in the District Courts." The Court of Appeals rejected this argument on the ground that modification of juvenile probation, like the revocation of criminal community supervision, is not a "trial" within the meaning of this constitutional guarantee.

Before amendment in 1999, a probationer had a statutory right to a jury on the question of probation revocation under the Determinate Sentence Act. That right was eliminated in 1999 so that currently there is no circumstance in which a juvenile has a right to a jury trial on the issue of modification. See Chapter 21.

In the Matter of S.H., 846 S.W.2d 103 (Tex.App.—Corpus Christi 1992, no writ) represents the confusion that can sometimes surround modification proceedings. S.H. was placed on delinquency probation for burglary of a vehicle. A petition to modify was filed that alleged as violations of probation a theft, a sexual assault, and a curfew violation. After a hearing, the juvenile court revoked probation and also adjudicated S.H. for the offense of sexual assault. The

Court of Appeals set aside the adjudication because no petition to adjudicate had been filed and because the juvenile court had not granted respondent's demand for a jury trial on those charges. However, the Court of Appeals affirmed the revocation of probation over the objection that a jury trial had not been provided.

While S.H. had a right to a jury trial before being adjudicated of a new offense, he had no such right in the revocation hearing. Had the State wished to adjudicate S.H. for the sexual assault, it should have filed a petition to adjudicate alleging that offense. That would have required a new adjudication and disposition hearing, and respondent would have been entitled to a jury at the adjudication hearing. An alternative would be to use the sexual assault as a violation of probation and to file only a motion to modify. After a modification hearing without a jury, the original probation for burglary of a vehicle could be revoked. That would leave the sexual assault unadjudicated.

Illegally Seized Evidence. In juvenile proceedings, the requirements for admissibility of evidence in revocation proceedings appear not to differ much from those in adjudication proceedings. Thus, evidence that has been obtained as a result of an illegal search or arrest is not admissible in a revocation proceeding. *In the Matter of R.A.B.,* 525 S.W.2d 892 (Tex.Civ.App.—Corpus Christi 1975, no writ). A confession that is involuntary or that was obtained in violation of Section 51.095 is not admissible in a revocation proceeding. See Chapter 16.

Chapter 55 Proceedings. The provisions of Chapter 55, Family Code, dealing with children who are mentally ill or who are unfit to proceed with a judicial hearing, apply to modification of disposition proceedings. See Chapter 14.

If a question of fitness to proceed or insanity at the time of the conduct that is alleged to violate probation is raised in a modification proceeding, the juvenile court is authorized to resolve those issues without a jury because the statement in Section 54.05(c) that "[t]here is no right to a jury at a hearing to modify disposition" controls over statements in Chapter 55 referring to a jury deciding those questions. *In the Matter of E.B.*, 525 S.W.2d 543 (Tex.Civ.App.—Amarillo 1975, writ ref'd n.r.e.).

Revoking Probation After It Has Expired. In *In the Matter of R.G.*, 687 S.W.2d 774 (Tex.App.—Amarillo 1985), a petition for modification of disposition was filed about two weeks before the respondent's probation term expired, but the hearing was conducted after probation expired. The juvenile court revoked probation and committed respondent to TYC. On appeal, the court rejected respondent's contention that probation could not be revoked after it had expired. The court commented:

> When the State filed an application to modify disposition within the probationary period for an alleged violation which occurred within that period, elaborate procedural safeguards such as notice of the charges, notice of hearings, appointment of counsel, if necessary, and other similar acts must be accomplished before the court can make a final determination on the petition to modify disposition. Pragmatically, those matters cannot be accomplished in a matter of a few hours or a few days....
>
> [W]e conclude that when a petition to modify disposition is filed within the probationary term for an alleged violation of the terms and conditions of probation which occurred within the probationary period, and the court proceeds to orderly disposition of that petition within a reasonable time with full regard for the procedural and substantive rights of the child, the court has authority to modify the prior disposition order even though the modification occurs after the termination date specified by the prior order.

687 S.W.2d at 777. See also *In the Matter of P.L.,* 106 S.W.3d 334 (Tex.App.—Dallas 2003, no pet.) (upholding revocation after probation expired when the motion was filed before expiration).

As a result of a confusing set of circumstances, the juvenile court in *In the Matter of J.A.D.*, 31 S.W.3d 668 (Tex.App.—Waco 2000, no pet.) revoked respondent's probation on a motion that was not filed until after the probation term had expired. The Court of Appeals distinguished *R.G.* and, following criminal court precedent, held the juvenile court lacked jurisdiction to revoke probation because of the late filing of the motion.

This same logic would lead to holding that a juvenile court has authority to revoke probation even though the respondent became 18 years old before the revocation hearing, so long as the modification petition was filed during the probation period. See *In the Matter of C.B.*, UNPUBLISHED, No. 02-05-341-CV, 2006 Tex.App.Lexis 5724, Juvenile Law Newsletter ¶ 06-3-11 (Tex.App.—Fort Worth 2006, no pet.) (State exercised due diligence in attempting to complete proceeding before juvenile turned 18). However logical such a position would be, its validity was temporarily cast into doubt by the decision of the

Texas Supreme Court in *In the Matter of N.J.A.,* 997 S.W.2d 554 (Tex. 1999). See Chapter 3.

The San Antonio Court of Appeals in *In the Matter of D.C.*, 49 S.W.3d 26 (Tex.App.—San Antonio 2001, no pet.), followed the Supreme Court's opinion in *N.J.A.* in a probation revocation case. The motion to revoke was filed while the respondent was still on probation but the revocation hearing was held after the expiration of probation at age 18. The Court of Appeals said the juvenile court's jurisdiction over the proceedings ended when the respondent became 18:

> A juvenile court does have authority to commit a child to the Texas Youth Commission for violations of probation that occurred prior to the expiration of the probationary term when the motion to modify is filed before the probationary term expires, and the hearing is conducted without undue delay. See *In re H.G.,* 993 S.W.2d 211, 213 n. 1 (Tex.App.—San Antonio 1999, no pet.); *In the Matter of R.G.*, 687 S.W.2d 774, 776-77 (Tex.App.—Amarillo 1985, no writ). Although both of these cases which are relied upon by the State, permitted modification of juvenile probation after the initial term of probation expired, neither of them involved juveniles who had reached the age of eighteen. The instant case is distinguishable. Although the motion to modify was filed prior to the expiration of the probationary term and D.C.'s eighteenth birthday, the hearing was not conducted until after D.C.'s eighteenth birthday. Under these circumstances, the juvenile court did not have the authority to modify the disposition. See Tex. Fam. Code Ann. §54.05 (Vernon Supp.2000); *In the Matter of N.J.A.*, 997 S.W.2d at 557. We recognize that this interpretation presents a difficult "time crunch" for the State when dealing with a juvenile who is nearing eighteen; however, the statute's wording is clear, as is the supreme court's interpretation of the statute.

49 S.W.3d at 28.

In 2001, the legislature enacted Section 51.0412, which modifies the rule of *N.J.A.* as applied to revocation of probation. It permits probation to be revoked even though the respondent became 18 before the juvenile court could act so long as the motion or petition to revoke was filed before the respondent became 18 and the State proceeded with due diligence.

This rule was expanded in 2007 to include a motion for transfer of determinate sentence probation to an appropriate district court. In 2011, the age for such transfer was changed from 18 to 19. See Chapter 3 for discussion.

Bifurcation of the Hearing and Social History Reports. Section 54.05(e) authorizes the juvenile court to consider social history reports in the hearing to modify disposition, just as it may in the disposition hearing. (See Chapter 12 for a discussion of that provision in the context of a disposition hearing.) However, there is one difference. As originally enacted in 1973, Section 54.05(e) began with this language, "At the hearing to modify disposition, the court may consider written reports from probation officers..." In 1979, the legislature amended this language to read, "After the hearing on the merits or facts, the court may consider written reports from probation officers...." The obvious purpose of that amendment was to require the juvenile court to first decide whether the child violated a probation condition as alleged in the petition and to do so without knowing the possibly prejudicial material in the social history report. Under Section 54.05(e), a bifurcated, or two-step, hearing is required for revocation. The first step is to determine whether the juvenile violated probation. If the juvenile court finds there was a violation, then the second step is to consider what to do about it. The social history report is admissible only in phase two.

In *In the Matter of C.H.*, UNPUBLISHED, No. 04-96-00910-CV, 1997 WL 426979, 1997 Tex.App.Lexis 3989, Juvenile Law Newsletter ¶ 97-3-27 (Tex.App.—San Antonio 1997, no writ), the appellant challenged the constitutionality of authorizing the use of written reports in modification hearings. The Court of Appeals upheld the use of such reports on the ground that, under the amendment, they are permitted only after the first phase (fact finding) of the hearing has been held:

> [T]he division of the disposition modification hearing into two phases provides its own safeguards.... A probation officer's report can only be used by the court after the fact-finding, adjudicative phase of the hearing wherein the reason for modifying the disposition is established. Tex.Fam.Code Ann. §54.05(e) (Vernon 1996).... This division ensures that any "self-incriminating statements" made in such reports will not be available to the court prior to its decision to modify the juvenile's disposition. Furthermore, the court must provide the attorney for the juvenile access to all written matter the court will consider prior to the hearing. Tex. Fam.Code Ann. §54.05(e) (Vernon 1996). This prior access reduces the danger to the juvenile by giving the

> juvenile prior notice of the intended use of such reports.
>
> Finally, section 54.05(e) manifests a legislative intent to permit the court to consider a broad pool of information in formulating an appropriate disposition.... This access assists the trial court in reaching the objective of the disposition modification hearing – that is, ensuring that the child's need for rehabilitation is addressed in the most appropriate setting.

1997 WL 426979 *2. See also *In the Matter of D.S.S.*, 72 S.W.3d 725 (Tex.App.—Waco 2002, no pet.) (holding that the Section 54.05(e) requirement of disclosure of written matter to the defense applies only to writings introduced during the second phase of the bifurcated revocation hearing).

The respondent in *In the Matter of G.B.*, UNPUBLISHED, No. 04-00-00495-CV, 2001 WL 99880, 2001 Tex.App.Lexis 800, Juvenile Law Newsletter ¶ 01-1-17 (Tex.App.—San Antonio 2001, no pet.) claimed that he was coerced into making damaging admissions to the judge at his modification hearing in order to rebut information that was in the social history report. The Court of Appeals rejected this contention:

> G.B. relies on *In Re J.S.S.*, 20 S.W.3d 837, 843-44 (Tex.App.—El Paso 2000, pet. denied) [See the discussion of *J.S.S.* in Chapter 12]. In that case the statements of the juvenile accused were contained in the report and it was found that the trial court considered the incriminating statements in making the decision to place J.S.S. in the Texas Youth Commission. The court found a violation of the Fifth Amendment and reversed the judgment. Id. at 846.
>
> In the instant case, however, G.B.'s statements were not contained in the probation officer's report; rather, they were made directly by G.B. to the trial judge. G.B. admits that the statements were made in an effort to refute the probation officer's report. There is nothing in the record to suggest that G.B.'s statements were anything other than a strategic decision to testify. There is no indication that he was forced to incriminate himself in violation of his Fifth Amendment rights.

2001 WL 99880 *3.

Of course, there is no mandate that a juvenile court has to consider written reports following a modification hearing. In *In the Matter of V.J.*, UNPUBLISHED, No. 12-05-00324-CV, 2006 Tex.App.Lexis 6063, Juvenile Law Newsletter ¶ 07-1-4 (Tex.App.—Tyler 2006, no pet.), appellant argued that the juvenile court erred in requesting but then not using any reports before committing him to TYC. Only one report was tendered by the State and it was received by the court over appellant's objection. As a result, the juvenile court did not refuse to consider any report. "The statutes [Sections 54.04 and 54.05] do not require the court to do anything in particular and certainly do not, as V.J. suggests, require the court to order that reports be generated and then consider them." 2006 Tex.App.Lexis 6063 *4. In this case, the Court of Appeals held that the trial court had considered every report that was presented in the case and upheld V.J.'s commitment to TYC.

Procedural Protections. The right to a revocation hearing must be observed even when the juvenile court uses types of community supervision that it chooses not to call "probation." In *In the Matter of A.B.R.*, 596 S.W.2d 615 (Tex.Civ.App.—Corpus Christi 1980, writ ref'd n.r.e.), the child was adjudicated delinquent and given a suspended commitment, a disposition that was authorized by then Section 61.062 of the Human Resources Code, which was repealed in 1987. (In 2007, Section 61.062 [now §243.002] was re-enacted but addresses an unrelated topic.) The State filed a Motion to Advance Conveyance, alleging that while on suspended commitment the child committed several criminal offenses. The juvenile court conducted a hearing on that motion and committed the child to TYC. On appeal, the child argued that the juvenile court's actions violated his rights under the Family Code. Although the appellate court's opinion is somewhat unclear, the court appears to have concluded that the child was given all of his rights to notice, counsel, and hearing. The only difference is that the juvenile court used different names for these procedures than did the legislature.

Certainly, the mere fact that the juvenile court uses the label of "suspended commitment" rather than "probation" when permitting the child to live under supervision in the community does not justify any departure from the requirements of the Family Code before the child can be committed to TJJD.

This principle was reinforced by *In the Matter of M.A.S.*, 679 S.W.2d 548 (Tex.App.—San Antonio 1984, no writ). Respondent was adjudicated delinquent and placed on "delayed disposition" under conditions identical to those used for formal probation. In effect, the juvenile court postponed the disposition decision in the case and released respondent under probation department supervision in the interim. Later, the juvenile court committed

respondent to TYC without complying with the petition and hearing requirements of Section 54.05. The appellate court reversed the commitment on the ground that the juvenile court was required to comply with Section 54.05 before committing respondent to TYC:

> The procedures employed by the juvenile court...appear to be no more than a thinly veiled specie of...probation.... We hold that appellant was entitled to notice and hearing prior to termination of the modified conditional liberty granted by the trial court.

679 S.W.2d at 552.

The Austin Court of Appeals has held that if the juvenile court follows proper procedures for the revocation of probation, it may then revoke probation, commit the child to TYC [TJJD] but defer transportation to TYC [TJJD] to obtain more information from the probation department. At a reconvening of the hearing, the court heard information that respondent had violated his release conditions several times and had not been truthful with the court concerning school performance. Accordingly, the court ordered transportation on the prior commitment order. Since the juvenile's procedural rights in the revocation process were fully observed, the revocation and commitment were valid. *In the Matter of E.R.*, UNPUBLISHED, No. 03-96-00001-CV, 1996 WL 571515, 1996 Tex.App.Lexis 4372, Juvenile Law Newsletter ¶ 96-4-28 (Tex.App.—Austin 1996, no writ).

The juvenile court in *In the Matter of D.M.W.*, UNPUBLISHED, No. 04-99-00071-CV, 2000 WL 36106, 1999 Tex.App.Lexis 9547, Juvenile Law Newsletter ¶ 00-1-15 (Tex.App.—San Antonio 1999, no pet.) put the respondent on probation pending placement in a secure facility but ordered that he remain in the detention facility pending recommendation and court hearing on the placement selected. Three days later, the State filed a motion to reconsider under Rule 329b of the Rules of Civil Procedure on the ground that respondent had once again violated a detention center disciplinary rule. The juvenile court modified the disposition and ordered respondent committed to TYC. On appeal, respondent contended that there was not a proper motion to modify, nor proof of a probation violation, nor a proper modification hearing. The Court of Appeals rejected the State's argument that the juvenile court had plenary power under Rule 329b to modify its disposition by acting within 30 days. However, the Court of Appeals then approved of the commitment order:

> Section 54.05 also authorizes the State to request a modification of disposition. Tex.Fam.Code Ann. §54.05(d) (Vernon 1996). Here though, the State relied on Rule 329(b) of the Rules of Civil Procedure in its Motion to Reconsider Disposition. Although this rule is used to request a new trial in a civil case, we know of no case where this rule has been applied to a juvenile's disposition hearing. Although the Family Code does not expressly provide for a new disposition hearing, the Code clearly anticipates that a child's conduct may require a modification of the child's disposition. Nothing indicates that the State may rely on the Rules of Civil Procedure to create an opportunity to rehear a case in order to obtain the disposition the State sought in the original hearing. Thus, what occurred here appears to be an irregular procedure. Although an irregular procedure, the substance of the State's motion asks the trial court to act within its jurisdiction. The State's motion asked the trial court "to reconsider its disposition judgment placing [D.M.W.] on probation with long term placement, and to reform the judgment to commit [D.M.W.] to the Texas Youth Commission—in essence, a motion requesting the revocation of probation or a request for modification. Because the facts of this case would have supported D.M.W.'s placement with TYC initially, we do not find that the judge's action in reconsidering her initial decision was improper despite the irregularity.
>
> Our willingness to accommodate this procedural irregularity is greatly due to the trial judge's obvious concern for D.M.W.'s welfare and her considerable deliberation in reaching her decision. The record reflects the trial judge wanted to assure that D.M.W. was placed in a stable, structured environment that could meet the needs reflected in D.M.W.'s psychological evaluation. Although the trial judge initially decided to place D.M.W. on probation at a residential treatment facility, she changed her mind after further considering D.M.W.'s detention conduct and discovering that the designated treatment facility was not a lock-down facility. Clearly, the trial judge wanted to assure D.M.W. was placed in a stable, structured environment that could meet D.M.W.'s needs, but D.M.W.'s conduct indicated to the judge that D.M.W. would not succeed in a non-secured facility. Although we caution the State not to interpret this decision as a mechanism by which it can obtain a second opportunity to obtain TYC placement, we find that the trial court did not abuse its discretion by placing D.M.W. with TYC.

1999 Tex.App.Lexis 9547 *4-6.

Removal from Home Findings Required. Section 54.04(i) requires three findings to remove a child from his or her home for placement or TJJD commitment: (1) the court must find it is in the child's best interest to be removed from the home; (2) that reasonable efforts were made to prevent or eliminate the need for removal and to make it possible for the child to return home; and (3) that the child cannot be provided in the home with the quality of care and level of support and supervision that the child needs to succeed on probation. See Chapter 12.

These findings must be made in a disposition proceeding to enable removing the child from home but, up until 2005, did not have to be made in a modification of disposition proceedings. While the rationale for requiring them applies as strongly to modification as to original disposition, most Courts of Appeal have held that the legislature simply chose to apply them only to original dispositions and that they do not restrict modification proceedings. See *In the Matter of H.G.*, 993 S.W.2d 211 (Tex.App.—San Antonio 1999, no pet.); *In the Matter of M.A.L.,* 995 S.W.2d 322 (Tex.App.—Waco 1999, no pet.); *In the Matter of D.R.A.,* 47 S.W.3d 813 (Tex.App.—Fort Worth 2001, no pet.); *In the Matter of C.L.L.,* UNPUBLISHED, No. 03-99-00294-CV, 2000 WL 235172, 2000 Tex.App.Lexis 1373, Juvenile Law Newsletter ¶ 00-2-02 (Tex.App.—Austin 2000, no pet.); *In the Matter of G.O.*, UNPUBLISHED, No. 13-05-286-CV, 2007 Tex.App.Lexis 1309, Juvenile Law Newsletter ¶ 07-2-7 (Tex.App.—Corpus Christi 2007, no pet.).

The El Paso Court of Appeals in *In the Matter of L.R.,* 67 S.W.3d 332 (Tex.App.—El Paso 2001, no pet.) refused to follow those cases. It held that the three findings required by Section 54.04(i) applied to revocation of probation as well as to direct commitment to TYC. The El Paso Court essentially used the three findings as substitutes for a broader abuse of discretion standard by which to judge the lawfulness of revocation commitments. The El Paso Court also applied the three findings to modifications placing the respondent outside his or her home but not in TYC. *In the Matter of S.R.R.,* UNPUBLISHED, No. 08-01-00365CV, 2002 WL 1874853, Juvenile Law Newsletter ¶ 02-333 (Tex.App.—El Paso 2002).

Based on this conflict between the Courts of Appeals, the Texas Supreme Court granted a juvenile's petition for review and held that the plain words of Section 54.05 do not require the explicit findings mandated by Section 54.04(i). *In the Matter of J.P.*, 136 S.W.3d 629 (Tex. 2004). In disposing of J.P.'s argument, the Supreme Court noted:

> "[I]t must be kept in mind that no original disposition of any kind could have been made unless the best interests of the child indicated protection or rehabilitation was needed. Further, the act of modification itself indicates an in-home alternative has been tried, and undoubtedly most trial courts would find these efforts reasonable because they ordered them. Finally, by finding a violation of probation, a court necessarily finds that in-home supervision was insufficient to ensure there were no such violations. Given the circumstances in which modified orders of commitment arise, the Legislature could have decided separate findings regarding the child's best interests and alternative arrangements were not necessary because they were necessarily included."

136 S.W.3d at 632.

The Texas Supreme Court held that the trial court did not abuse its discretion in modifying the previous disposition orders to commit J.P. to TYC. In a concurring opinion, Justice Schneider raised a legitimate concern that nothing in the statute or in the Court's opinion gives trial courts sufficient guidance about how to handle relatively minor modification cases, as illustrated by *In re H.G.*, 993 S.W.2d 211 (Tex.App.—San Antonio 1999, no pet.), in which the juvenile was initially placed on probation for a misdemeanor offense and later committed to TYC for relatively minor probation violations. Following the legislative changes of 2007, of course, such egregious cases should no longer occur since juveniles cannot be committed to TJJD for misdemeanor offenses or violations. See deletions of misdemeanor provisions formerly contained in Sections 54.04(s)–(t) and 54.05(k).

In response to the *J.P.* case, the legislature in 2005 added Section 54.05(m) to require that the same findings be made as in Section 54.04(i) when modifying a disposition and ordering a child's removal from home.

Even after the changes to Section 54.05(m) in 2005 to require similar findings for out of home placement in modification hearings as those required for out of home placement in the initial disposition hearing, courts continued to uphold out of home placements in modification hearings as long as the hearing was held before the law change, continuing to disagree with arguments that the 54.04(i) findings were applicable to modification hearings. In a case involving a truancy offense, appellant argued that the juvenile court abused its discretion in placing him in secure confinement at a boot camp because it did not

satisfy the requirements of Section 54.04(n). *In the Matter of E.G.*, 212 S.W.3d 536 (Tex.App.—Austin 2006, no pet.).

Section 54.04(n) provides that after a disposition hearing, a juvenile classified as a status offender and adjudicated for violating a court order may be placed in secure confinement only if certain due process requirements are met. However, the Texas Supreme Court has held that Section 54.04 findings are only required when making the initial disposition, not in a modification proceeding. *In the Matter of J.P.*, 136 S.W.3d 629 (Tex. 2004).

> In ordering E.G. to attend boot camp, the trial court did not "order a disposition of secure confinement of a status offender adjudicated for violating a valid court order." Tex.Fam.Code Ann. §54.04(n). Instead, E.G. was adjudicated for truancy and ordered to probation in his home under the original disposition order, and the trial court later modified the original disposition due to probation violations and ordered E.G. to attend boot camp under the modified order.

212 S.W.3d at 540.

Consequently, the juvenile court followed the requirements for modifying disposition orders under Section 54.05 and had sufficient evidence before it to support its decision.

Abuse of Discretion Standard for Removal from Home. The findings required to remove a child from home in a modification proceeding must be supported by evidence supporting the decision to remove the child from home. The abuse of discretion standard applies to review of these decisions. See *In the Matter of M.A.*, 198 S.W.3d 388 (Tex.App.—Texarkana 2006, no pet.); *In the Matter of B.L.B.*, UNPUBLISHED, No. 03-09-00264-CV, 2010 Tex.App.Lexis 3886, Juvenile Law Newsletter ¶ 10-3-2 (Tex.App.—Austin 2010, no pet.) (no abuse of discretion to place youth in an Intermediate Sanctions Center);*In the Matter of J.D.T.*, UNPUBLISHED, No. 02-08-390-CV, 2009 Tex.App.Lexis 2661 (Tex.App.—Fort Worth 2009, no pet.) (no abuse of discretion to commit youth to TYC due to lack of support or supervision at home); *In the Matter of A.R.T.*, UNPUBLISHED, No. 04-08-00301-CV, 2008 Tex.App.Lexis 8679 (Tex.App.—San Antonio 2008, no pet.) (no abuse of discretion in committing youth to TYC where less restrictive rehabilitation alternatives were unsuccessful); *In the Matter of J.L.K.*, UNPUBLISHED, No. 04-07-00588-CV, 2008 WL 2260746, 2008 Tex.App.Lexis 4015, Juvenile Law Newsletter ¶ 08-3-6 (Tex.App.—San Antonio 2008, no pet.) (no abuse of discretion to place juvenile in the care and custody of chief juvenile probation officer for placement on probation outside the home); *In the Matter of J.O.*, 247 S.W.3d 422 (Tex.App.—Dallas 2008, no pet.) and *In the Matter of J.A.B.*, UNPUBLISHED, No. 03-09-00420-CV, 2010 Tex.App.Lexis 6809 (Tex.App.—Austin 2010, no pet.) (no abuse of discretion to commit youth who had abused second probation opportunity to TYC).

An opposite result was reached in a different modification case. *In the Matter of A.G.*, 292 S.W.3d 755 (Tex.App.—Eastland 2009, no pet.). Approximately six weeks after being placed on felony probation at home, appellant was arrested for unlawfully carrying a weapon, namely a machete. He challenged the juvenile court's modification order committing him to TYC, alleging that reasonable efforts were not made to prevent or eliminate the need for his removal from home under Section 54.05(m). The Eastland Court of Appeals agreed with appellant's position:

> As noted previously, only six weeks elapsed between the time that appellant was placed on delinquent court community supervision and his subsequent arrest for unlawfully carrying a weapon. Appellant was continuously detained thereafter in the Jefferson County Juvenile Detention Center after his arrest on the weapon charge. Accordingly, appellant was only on community supervision for a short period of time while in his father's custody. There is no evidence of any efforts to return appellant to his home after he was arrested on the weapon charge. As reflected in the report from the community supervision department, the evidence affirmatively demonstrates that the department did not attempt to return appellant to his home with more stringent community supervision conditions after the subsequent arrest or make any other alternative placement short of TYC. In the absence of evidence of alternative placement efforts, we conclude that the trial court abused its discretion in determining that reasonable efforts were made to return appellant to his home environment.

292 S.W.3d at 762.

Special Commitment Finding. In 2015, the legislature added Section 54.04013, Family Code, providing that a juvenile cannot be committed to TJJD without a determinate sentence unless, after a commitment hearing held in accordance with Section 54.04, the court makes a "special commitment finding that the child has behavioral health or other special needs that cannot be met with the resources available in the community." This special

commitment finding is required for offenses occurring September 1, 2017, or later. The statute does not address disposition after a modification hearing.

There have been no cases challenging indeterminate commitment to TJJD through a modification hearing when no special commitment finding was made. If there are, it will be interesting to see if the court rulings are consistent with the findings made when the out of home findings were not statutorily required for modification hearings. To avoid challenges, courts could make the special commitment finding in modification hearings resulting in commitment to TJJD; even if not required, such an error would not be reversible. If courts determine the finding is required, not including it would likely result in reversal.

E. Statement of Reasons

Section 54.05(i) provides that the "court shall specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child." This is similar to the requirement that the court state its reasons for choosing the disposition it selected. See Chapter 12 for a discussion of that requirement.

In *A.Y. v. State*, 554 S.W.2d 805 (Tex.Civ.App.—San Antonio 1977, no writ), the order modifying disposition gave as the only reason that the child was found to have violated his probation. The appellate court, using cases dealing with similar statutory language in the disposition hearing, held that the statement was insufficient. But in *In the Matter of S.M.*, UNPUBLISHED, NO. 04-02-00683-CV, 2003 WL 1712555, 2003 Tex.App.Lexis 2790, Juvenile Law Newsletter ¶ 03-2-19 (Tex.App.—San Antonio 2000, no pet.), the Court of Appeals held that merely reciting that a probation violation was proved was a sufficient statement of reasons in support of revocation. See also *In the Matter of J.T.B.*, UNPUBLISHED, NO. 06-09-00006-CV, 2009 Tex.App.Lexis 3657, Juvenile Law Newsletter ¶ 09-3-2 (Tex.App.—Texarkana 2009, no pet.) (modification order "more than sufficient" to meet Section 54.05(i) requirements); *In the Matter of D.R.*, 193 S.W.3d 924 (Tex.App.—Dallas 2006, no pet.) (trial court's findings supported by some evidence; no abuse of discretion in committing appellant to TYC); *In the Matter of O.M.*, UNPUBLISHED, No. 03-05-00165-CV, 2006 Tex.App.Lexis 9327, Juvenile Law Newsletter ¶ 06-4-9 (Tex.App.—Austin 2006, no pet.) (statutory language with additional findings sufficient to meet Section 54.05(i) requirements); *In the Matter of J.D.*, UNPUBLISHED, No. 03-03-00511, 2004 WL 1574541, 2004 Tex.App.Lexis 6254, Juvenile Law Newsletter ¶ 04-3-18 (Tex.App.—Austin 2004, no pet.) (not inappropriate for modification order to simply track statutory language).*In the Matter of S.G.*, UNPUBLISHED, No. 04-04-00475-CV, 2005 Tex.App.Lexis 2560, Juvenile Law Newsletter ¶ 05-2-25 (Tex.App.—San Antonio 2005, no pet.), involved a young respondent who was on a felony probation for three and one-half years. The State's fourth motion to modify disposition resulted in a recommendation by the probation officer for commitment to TYC because all local rehabilitative services had been exhausted, including felony ISP. The disposition orders, however, showed that neither felony ISP nor intensive clinical services had ever been ordered. The Court of Appeals also noted that recommending TYC placement because "resources would come from the State rather than the County" is not one of the stated goals of the Juvenile Justice Code and is not a proper reason for committing a child to TYC. The Court held that the evidence was insufficient to support the trial court's conclusion that probation had expended all available resources to rehabilitate the child and there was no showing that she posed a threat to the community. Cf. *In the Matter of J.M.*, 287 S.W.3d 481 (Tex.App.—Texarkana 2009, reh'g overruled) (distinguishing *S.G.*; funding discussion, although inappropriate, was not basis for TYC commitment).

In *In the Matter of I.P.*, UNPUBLISHED, No. 03-05-00242-CV, 2006 Tex.App.Lexis 5108, Juvenile Law Newsletter ¶ 06-3-8 (Tex.App.—Austin 2006, no pet.), the juvenile court initially committed I.P. to TYC but suspended its modification order to give him an opportunity to improve his behavior and remain on probation. During a second hearing three weeks later, the court heard evidence regarding I.P.'s continued probation violations and disciplinary problems at school and committed him to TYC for an indeterminate period of time. On appeal, I.P. complained that the modification order did not "specifically" state the reasons for the modification in violation of Section 54.05(i). The Court of Appeals disagreed, finding that the statutory recitals made by the court were supplemented by the findings from the second hearing. Cf. *In the Matter of L.D.*, UNPUBLISHED, No. 12-06-00193-CV, 2007 Tex.App.Lexis 1714, Juvenile Law Newsletter ¶ 07-2-12 (Tex.App.—Tyler 2007, no pet.) (even when juvenile court gives incorrect reason for its disposition decision, it does not abuse its discretion if right result is reached).

In *K.W.H. v. State*, 596 S.W.2d 248 (Tex.Civ.App.—Texarkana 1980, no writ), the order of modification stated that "the child has clearly shown a need for structural guidance, psychological counseling, and an introduction to a proper standard of moral conduct." The appellate court held that this was an insufficient statement of reasons:

> Section 54.05(i) contemplates more than merely reciting the statutory language or using other general terms. The modifying order must specifically recite the conduct or the offense which prompted the court to make the modification.

596 S.W.2d at 250.

In *In the Matter of J.J.V.*, UNPUBLISHED, No. 04-94-00464-CV, 1995 WL 679680, Juvenile Law Newsletter ¶ 95-4-20 (Tex.App.—San Antonio 1995), the Court of Appeals abated the appeal and remanded the case to the juvenile court with instructions to comply with the requirements of stating reasons for revoking probation. On remand, the juvenile court recited that the "child has previously been on probation on two prior occasions, yet he continues to commit delinquent acts and the conduct before the Court involves a very dangerous act on the part of the said child. The Court further finds it would be inappropriate to place the child back on probation because probation has not been successful in rehabilitating the child and at the same time protect the public." The Court of Appeals found that this statement of reasons satisfied the requirements of Section 54.05(i).

The San Antonio Court of Appeals held in *In the Matter of S.J.*, 940 S.W.2d 332 (Tex.App.—San Antonio 1997, reh'g denied), that it was error for the juvenile court to recite in the order revoking probation and committing the respondent to TYC the criminal offense which was alleged and proved as a violation of probation. Since the respondent was never adjudicated of having committed this offense, it was inappropriate to include it in the commitment order, where it would have an adverse effect on respondent's

minimum length of stay in TYC as well as, possibly, on where the child was placed. Accordingly, the Court of Appeals ordered the recitation struck from the commitment order. The child was on probation for burglary of a vehicle; the court found he violated that probation by committing aggravated robbery.

At the time, the minimum length of stay was determined by the most serious of the relevant offenses documented on the record. Relevant offenses included the committing offense and any offense for which the child was on probation at the time of commitment. The committing offense was the most serious offense found at the child's most recent judicial adjudication. By recording the probation violation as aggravated robbery, that became the most serious relevant offense, subjecting the child to a twelve month-minimum length of stay in a TYC facility as opposed to the six-month minimum length of stay in a medium or high restriction facility that would have been assigned if burglary of a vehicle were considered the most serious offense.

Similarly, in *In the Matter of A.R.D.*, 100 S.W.3d 649 (Tex.App.—Dallas 2003, no pet.), the Court of Appeals held that the statement of reasons given by the juvenile court for revoking probation were simply not applicable to the facts of the case. Therefore, it remanded for additional modification proceedings for statements that were based on the facts of the case.

Although the juvenile court was, prior to the 1995 amendment in Section 54.05, required to find beyond a reasonable doubt that probation was violated before it could revoke probation, the court was not actually required to say in its findings that it had found the violation to be proven beyond a reasonable doubt. The Court of Appeals presumed that the court knew the requirements of the law and had used the correct standard in assessing the evidence. *Finch v. State*, 506 S.W.2d 749 (Tex.Civ.App.—Waco 1974, no writ); *In the Matter of M.H.*, 662 S.W.2d 764 (Tex.App.—Corpus Christi 1983, no writ). Undoubtedly, under the 1995 amendment it is also not required that the juvenile court recite that it finds by a preponderance of the evidence that probation was violated.

CHAPTER 14: Mental Illness or Intellectual Disability Proceedings

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In 2015, the legislature reorganized the Health and Human Services Commission. However, juvenile justice practitioners will be most interested in the effects of that legislation on Chapter 55 of the Family Code. Chapter 55 was renamed "Proceedings Concerning Children with Mental Illness or Intellectual Disability." This legislation updates terminology that is recognized as insensitive or offensive. The term "mental retardation" was replaced with the term "intellectual disability." Additionally, "person first" terminology was employed, such as "child with mental illness" or "child with intellectual disability," acknowledging that the mental illness or intellectual disability is but one characteristic of a person and not the defining essence of that person. Finally, references to the former Department of Mental Health and Mental Retardation have also been deleted and replaced with the Department of State Health Services or Department of Aging and Disability Services, as appropriate. When the passage discusses something in a historical context, the name of the agency at the time of the event is used.

Chapter 55 of the Family Code deals with children with mental illness or an intellectual disability who are also respondents in the juvenile process. There are three types of proceedings under Chapter 55: one in which the child is believed to have a mental illness; one in which the child is believed to be unfit to proceed in the juvenile system because he or she lacks the ability to understand the proceedings or to assist in his or her defense due to a mental illness or intellectual disability; and (3) one in which the child should not be held responsible for his or her conduct because the child could not appreciate its wrongfulness or conform his or her conduct to the law's requirements at the time the offense was committed due to a mental illness or intellectual disability.

There is some overlap among the three categories of proceedings. Thus, virtually all children who are unfit to proceed because of mental illness also meet the requirement for commitment due to mental illness. However, some children who are committable due to a mental illness are fit to stand trial. Many, although not all, children who are found to have been not responsible for their conduct because of mental illness will have current conditions that make them also eligible for commitment due to mental illness. In addition, some children exhibit signs of both mental illness and intellectual disability.

Philosophy Regarding Children With Mental Illness. The philosophy of Chapter 55 is that a child who is in the juvenile process should first be handled in the mental health system if the child meets the criteria for treatment in that system. For example, if a child has been filed on for delinquency or conduct indicating a need for supervision (CINS) but also meets the definition of a person with a mental illness, Chapter 55 directs that the juvenile court must handle that child as a person with a mental illness rather than as a juvenile respondent. If, as a result of the treatment provided in the mental health system, the child recovers, then juvenile proceedings can ordinarily be reinstated at the point where they were interrupted. The rationale underlying this philosophy is that both juveniles and society benefit from prompt treatment in the mental health system.

Philosophy Regarding Children With Intellectual Disability. Until 1995, this same "diversionary" philosophy was directed to juveniles with an intellectual disability. However, unlike mental illness, an intellectual disability tends to be chronic in nature. Juveniles with intellectual disabilities present management and security problems for caregivers. The system of diverting juveniles with intellectual disabilities from the juvenile system to the Department of Mental Health and Mental Retardation (MHMR) had not worked well. Therefore, the legislature decided to restrict greatly the circumstances under which the juvenile court is required to seek commitment of a juvenile with an intellectual disability.

Instead of providing that intellectual disability was a ground for diversion from the juvenile system, the 1995 amendments provided that juveniles with an intellectual disability should be handled in the juvenile system, either on probation or by commitment to TYC. Commitment proceedings to MHMR were authorized only if the juvenile had been found, due to intellectual disability, to be either unfit to stand trial or not responsible.

The 1999 Amendments to Chapter 55. In 1999, the legislature totally rewrote Chapter 55. It did so to accomplish several objectives. *First*, it wished to spell out in more detail than before the procedures and standards that govern proceedings in juvenile court regarding these children. *Second*, it wished to streamline those procedures to bring care and treatment resources closer to those children. *Third*, it wished to give juvenile courts the choice of handling these cases from start to end themselves or, after initial processing, of referring them to the county or probate court that handles commitment of persons with mental illness or an intellectual disability. All of these changes are intended to bring care and treatment resources within easier reach for the juveniles who need them.

2003 Reorganization of Mental Health and Mental Retardation Agency (MHMR). In 2003, the legislature reorganized 12 health and human service agencies to create four departments under the umbrella of the Health and Human Services Commission (HHSC). In the reorganization process, the intellectual disability and the mental health functions of the former Texas Department of Mental Health and Mental Retardation (MHMR) were transferred to two separate HHSC departments. The intellectual disability functions of the former MHMR were reassigned to the Department of Aging and Disability Services (DADS). The mental health services were reassigned to the Department of State Health Services (DSHS). For purposes of this edition, the local mental health service provider will be referred to as the "local mental health authority or center."

A. The Initial Evaluation

Data shows that a much larger percentage of juveniles in the juvenile justice system than in the general population are in need of mental health treatment. Nevertheless, most children who pass through the juvenile justice system do not find themselves the subject of a Chapter 55 fitness to proceed hearing or a proceeding to gauge mental responsibility for their conduct. For children for whom such concerns exist, Chapter 55 provides procedures for assessing them and selecting appropriate legal responses.

Mental Illness. Section 55.11 addresses the initial steps in obtaining an evaluation of a child to determine whether the child has a mental illness. The question of mental illness addresses the child's mental state at the time of the juvenile court proceedings. If a party (the respondent or the State) moves its consideration, the juvenile court must determine whether probable cause exists to believe the child has a mental illness. In making that determination, it may use any available evidence, including its own observations of the behavior of the child in court proceedings. The court may, but is not required, to take evidence on the probable cause question. If the court finds probable cause does not exist, juvenile proceedings continue as before the motion was filed. If the court finds probable cause does exist, it is then required to order an examination of the child under Section 51.20. The court is not required to order an examination of the child merely because a motion requesting one was filed.

The standard of probable cause is deliberately a very low standard. As when it is used to define the evidence needed to take a child into custody (see Section 52.01), it simply means good reason to believe. In this context, it means good reason to believe that the child may have a mental illness and may meet the criteria for inpatient commitment.

Mental illness is defined in Section 55.01 by reference to Section 571.003, Health and Safety Code, a portion of the subtitle governing legal proceedings for the commitment of a person because of mental illness. Section 571.003(14) defines mental illness as:

> an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that
>
> (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
>
> (B) grossly impairs behavior as demonstrated by recent disturbed behavior.

Unfitness to Proceed. Section 55.31 contains a similar provision dealing with the initial claim that a child may be unfit to proceed because of mental illness or intellectual disability.

This section is identical to Section 55.11 regarding mental illness except that it deals with unfitness to proceed, which can result from mental illness or an intellectual disability. Unfitness to proceed, which in the adult criminal justice system is called incompetency to stand trial, is defined by Section 55.31(a). A child is unfit to proceed if the child, "as a result of mental illness or an intellectual disability, "lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense." The initial task of the juvenile court judge is to determine from all the available information whether there is probable cause to believe the child may be unfit to proceed from

mental illness or an intellectual disability. If so, a Section 51.20 examination must be ordered. If not, no such examination is required.

If the moving party believes the child may be unfit to proceed as a result of mental illness, a request for an examination under this section may be combined with a similar request under the mental illness section. Section 55.11(b) contemplates that consolidation by providing, "If ordered by the court, the information [from the Section 51.20 examination] must also include expert opinion as to whether the child is unfit to proceed with the juvenile court proceedings."

When an Examination Was Required Under Prior Law. How much evidence is required to impose upon the juvenile court the duty to "order appropriate examinations?" In *Meza v. State*, 543 S.W.2d 189 (Tex.Civ.App.—Austin 1976, no writ), the child's attorney, in a transfer proceeding, filed a motion suggesting mental illness and requesting appropriate medical and psychiatric inquiry. The juvenile court overruled the motion. On appeal, the appellate court concluded that the juvenile court was incorrect in overruling the motion. However, the juvenile court had before it testimony of a psychologist and a psychiatrist. Neither found any evidence of mental illness in the child. Therefore, although the juvenile court should have granted the motion for further inquiry, its failure to do so did not require reversal in light of the undisputed expert testimony already before the court.

In *In re Q.D.*, 600 S.W.2d 392 (Tex.Civ.App.—Fort Worth 1980, no writ), the juvenile in a transfer proceeding filed a motion requesting appropriate medical and psychiatric inquiry. The juvenile court overruled the motion. The appellate court concluded that, in light of the information contained in the diagnostic study filed with the court, it was not error for the court to refuse to appoint a psychiatrist to examine the juvenile:

> There is no evidence or suggestion in any of the three psychological examinations performed on Q.D. within the preceding six months that he suffered from any mental disease or mental disorder. One of these examinations, conducted by a psychiatrist, was made two days before the certification hearing. The only question raised was about Q.D.'s intelligence, not his mental state. There was evidence that Q.D. was capable of, and did understand, the nature of the charges against him and the functioning of a criminal court. It would follow that if Q.D. were able to understand both the nature of the charges brought against him and the functioning of a criminal court, he should also be able to understand the proceedings brought against him in a juvenile court. Therefore, the trial court did not abuse its discretion when it denied the appointment of a court appointed psychiatrist to examine Q.D. for purposes of the certification hearing.

600 S.W.2d at 393-94.

Therefore, despite the language in *Meza*, it is apparent that it takes more than merely a motion to require the juvenile court to order appropriate examinations. There must be some information in addition to the motion that suggests mental illness or intellectual disability to require the court to take that step.

This point was reinforced by *In the Matter of K.A.H.*, 700 S.W.2d 782 (Tex.App.—Fort Worth 1985, no writ). In that case, before the beginning of the transfer hearing, respondent's attorney stated that his client "does not fully understand the extent of these proceedings" in view of his intellectual disability. On appeal from the transfer order, respondent contended that the juvenile court should, on its own motion, have ordered an inquiry directed toward his fitness to proceed. The appellate court rejected this contention:

> Other than the prehearing assertion by [respondent's counsel], the trial judge was presented with absolutely no evidence which would cause him to believe that a separate fitness hearing was necessary, especially without a request. Both the psychologist and the psychiatrist stated in the prediagnostic report that appellant was capable of assisting in his own defense. No abuse of discretion on the part of the trial court in the respect complained of is shown.

700 S.W.2d at 784. See also *In the Matter of J.D.*, 773 S.W.2d 604 (Tex.App.—Texarkana 1989, writ dism'd) (psychological reports indicated no unfitness to proceed).

When an Examination is Required Under Current Law. Section 55.31 assumes a motion for a mental health examination has been filed by a party. The Corpus Christi Court of Appeals in *In the Matter of E.M.R.*, 55 S.W.3d 712 (Tex.App.—Corpus Christi 2001, no pet.) rejected the argument that a juvenile court judge may be obligated absent extraordinary circumstances to order an examination on his or her own motion:

> We refuse to impose such a duty on the trial court in the absence of such a statutory mandate. The case cited to by appellant, *Matter of B.J.*, may indicate that

> when an issue of mental illness is clearly raised in the record, the trial court has the power to order a mental competency hearing sua sponte. See *Matter of B.J.*, 960 S.W.2d 216, 220-21 (Tex.App.—San Antonio 1997, no pet.). However, in that case, the San Antonio court did not go so far as to hold the trial court erred by failing to hold such a hearing. We likewise refuse to make that holding.

55 S.W.3d at 719.

The Fort Worth Court of Appeals in *In the Matter of J.K.N.*, 115 S.W.3d 166 (Tex.App.—Fort Worth 2003, no pet.) followed the holding of *E.M.R.* that there is no statutory obligation on a juvenile court judge to order a fitness examination in the absence of a motion for one. However, at the request of the respondent, who argued a violation of due process of law, the Court of Appeals examined the trial record to determine whether there was anything that would have placed the judge on notice that a fitness examination might be appropriate even in the absence of a motion. It found nothing.

Non-Responsibility for the Offense. Section 55.51 contains a somewhat different provision dealing with an initial claim that a child may not be responsible for his or her conduct because of mental illness or an intellectual disability:

> (b) On a motion by a party in which it is alleged that a child may not be responsible as a result of mental illness or an intellectual disability for the child's conduct, the court shall order the child to be examined under Section 51.20. The information obtained from the examinations must include expert opinion as to whether the child is not responsible for the child's conduct as a result of mental illness or an intellectual disability.

Section 55.51(a) provides that a child is not responsible for his or her conduct if "at the time of the conduct, as a result of mental illness or an intellectual disability, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law."

Under this provision, if a party (respondent or State) makes a motion asking for a Section 51.20 examination, the court must order one. It does not have the ability to refuse on the ground probable cause is lacking. The question of non-responsibility for the offense because of mental illness or an intellectual disability is a historical question – what was the child's mental condition at the time of the offense? Particularly, in the case of mental illness, it is possible the child may have been suffering from a mental illness at the time of the offense but is not currently. For that reason, there is no requirement that the juvenile court make a finding about probable cause concerning the child's current mental condition.

Section 51.20 Examination. Section 51.20 authorizes the court to order certain examinations of any child who has been referred to the juvenile court. Unlike the predecessor provision (Section 55.01), there is no requirement that a petition for adjudication or certification must have been filed.

Section 51.20(a) was rewritten in 2003 to conform it to a revision of the criminal court competency to stand trial chapter of the Code of Criminal Procedure, which is now Chapter 46B. The primary purpose was to assure that professionals who examine children regarding fitness to proceed meet the qualifications imposed by Chapter 46B and that their reports comply with those provisions.

The section appears in Chapter 51, rather than Chapter 55, because it is not restricted to examinations to determine mental illness or intellectual disability. A court might use this section, for example, to order physical and mental examinations of children entering boot camp programs to determine their ability to handle the physical and mental stress of such programs. The provision is also broad enough to encompass educational achievement testing. In 2013, the section was amended to allow for chemical dependency examinations to be ordered. It was also amended to allow the child's parent to request the court to order the examination, as not all children referred to juvenile court will have an attorney since some cases are handled non-judicially.

Section 51.20(b) had no counterpart in prior law. It provides that if, as a result of the examination under Subsection (a), there is reason to believe the child may have a mental illness or intellectual disability, the probation department must refer the child to the local mental health or intellectual disability authority for evaluation and services unless a petition has already been filed. The important purpose of this provision is to secure evaluation and services as soon as the need for them becomes apparent. Often, care and treatment can be arranged on a voluntary basis without the delay entailed by using the formal procedures of Chapter 55.

Sections 51.20(c) and (d) require the juvenile probation department to refer a child who is under deferred prosecution supervision or court-ordered probation to the local Department of State Health Services (DSHS) or Department of Aging and Disability Services (DADS) authority or to another appropriate and legally authorized agency or provider if it is determined by a mental health professional that the child has a mental illness or an intellectual disability or suffers from chemical dependency. Such referrals must be reported to the Texas Juvenile Justice Department (TJJD) in a format specified by the Department. TJJD collects the data on how many of these referrals are made to the local authority to compare against the mental health agencies' data in an effort to determine what percentage of juvenile justice involved youth with documented treatment needs are being served. The data is collected electronically using JCMS and the Electronic Data Interchange (EDI) specifications for counties that do not use JCMS.

Section 51.20(e), added in 2005, corrects an erroneous deletion of a previous section in the Family Code. When Section 51.20 was amended in 2003 to conform to changes made in the Code of Criminal Procedure dealing with competency to stand trial for adults, the legislature inadvertently repealed language that specifically authorized the juvenile court to order physical examinations of children in the system. By adding Subsection (e), the legislature recodified the inherent authority of juvenile courts to order physical examinations of children who have been referred to juvenile court. Such examinations are necessary prior to admitting children into specific programs, such as correctional boot camps, that require physical endurance.

Mental Health Screening and Referral. Section 51.21, added in 2005, requires a juvenile probation department to refer a youth to the local mental health authority if the youth's scores on the required mental health screening instrument (e.g., MAYSI-2) or clinical assessment indicate the need for further assessment and the probation department or child does not have access to another mental health professional. The probation department must notify TJJD of each referral of a child to a local mental health authority.

After the Examination. If the juvenile court has obtained a Section 51.20 examination under Chapter 55 to determine the child's mental condition, the next step depends on the results of the examination and other relevant information.

If the child was examined for mental illness, the juvenile court must consider "all relevant information, including information obtained from the Section 51.20" examination, to determine whether evidence exists to support a finding that the child is committable as a person with a mental illness. Section 55.11(c). If the court determines that no such evidence exists, then it is required to "dissolve the stay [required by Section 55.11(b)] and continue with the juvenile court proceedings." Section 55.11(c)(2). If the court determines that evidence supporting commitment exists, it then proceeds to the next step in that process.

If the child was examined for unfitness to proceed, the juvenile court must make the same determinations with reference to unfitness. Section 55.31(d). A determination that no evidence exists to support a finding of unfitness requires the court to dissolve the stay required by Section 55.31(c) and proceed with the juvenile case. Section 55.31(d)(2). A determination that evidence exists to support a finding of unfitness requires the juvenile court to proceed with the next step in the process of determining unfitness judicially. Section 55.31(d)(1).

If the child was examined for non-responsibility at the time of the conduct, then the results of that examination will very likely determine whether a claim of non-responsibility will be made in the adjudication hearing. The experts who examined the child and wrote the report can be called as witnesses to testify as to the child's mental condition at the time of the conduct.

B. Proceedings in Mental Illness Cases

Section 55.12 provides that if, after considering all the relevant information, including the report from the Section 51.20 examination, the juvenile court determines that "evidence exists to support" a finding that a child has a mental illness and that the child meets the commitment requirements of law, then the court is required to choose between initiating commitment proceedings or referring those proceedings to the appropriate county or probate court. The choice of whether to proceed with commitment in juvenile court or to refer those proceedings to a county or probate court rests exclusively with the juvenile court. The standard of whether "evidence exists to support" the required finding is intended to state a standard whether it would be irrational for a trier of fact to conclude based on the evidence thus far accumulated that the child has a mental illness and is committable. If it would not be irrational, then evidence exists to support the finding and proceedings are required to be initiated.

Sufficiency of Facts Required for Hearing Under Prior Law. When is a juvenile court required to take steps toward a mental health commitment? In *T.P.S. v. State,* 590 S.W.2d 946 (Tex.Civ.App.—Dallas 1979, writ ref'd n.r.e.), the attorney for the child filed an unsworn motion before the transfer hearing requesting a mental illness hearing under Section 55.02 (prior law). The motion recited testimony previously received by the juvenile court concerning the mental state of the respondent. The Court of Appeals concluded that the motion reciting the previous testimony was sufficient to require the juvenile court to hold a full hearing if the recitations in the motion indicated that the child may have a mental illness. It then concluded:

> The court had before it the testimony of Dr. Green at the earlier hearing and the written reports of Dr. Green, Dr. Mims, Dr. Ateek, and Dr. McLaughlin, all qualified experts, who stated that there was a strong possibility of a serious psychiatric or emotional disorder requiring further observation and treatment. This information was sufficient to show the juvenile court that appellant "may be mentally ill," in the sense of a reasonable possibility that such hospitalization was needed.... We do not hold that the information before the court was sufficient to require such hospitalization, but only that it required a hearing on that issue under section 55.02 and the applicable provisions of the Mental Health Code – the "full blown mental illness hearing," which the juvenile court denied.

590 S.W.2d at 952-53.

By contrast, in *S.D.J. v. State*, 879 S.W.2d 370 (Tex.App.—Eastland 1994, writ denied), reports from a court-appointed psychiatrist and psychologist who had examined the juvenile respondent concluded that did not have a mental illness. In view of those reports, the juvenile court was not required to initiate proceedings under then-existing Section 55.02.

The "evidence exists to support" standard of Section 55.12 is substantially the same as the "may be mentally ill" standard of prior law, so a similar result should be anticipated.

Commitment Standards. The commitment standards are the same whether the proceedings are conducted in the juvenile court or are referred by it to a county or probate court. The committing court must find the required facts by "clear and convincing evidence." Health and Safety Code Section 574.034(a). That subsection sets out the standards for a temporary (no longer than 90-day) commitment for mental health services:

> (1) the proposed patient is a person with mental illness; and
>
> (2) as a result of that mental illness the proposed patient:
>
> (A) is likely to cause serious harm to himself;
>
> (B) is likely to cause serious harm to others; or
>
> (C) is:
>
> (i) suffering severe and abnormal mental, emotional, or physical distress;
>
> (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
>
> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

Health and Safety Code Section 574.035 sets out the same criteria for commitment for extended mental health services (up to one year), but adds these two requirements:

> (3) the proposed patient's condition is expected to continue for more than 90 days; and
>
> (4) the proposed patient has received court-ordered inpatient mental health services...for at least 60 consecutive days during the preceding 12 months.

Procedure When Juvenile Court Conducts Commitment Proceedings. When the juvenile court elects to conduct commitment proceedings itself, Section 55.02 gives the juvenile court the jurisdiction of a county court. During the pendency of the juvenile court commitment proceedings, other juvenile court proceedings remain temporarily stayed under the order entered by the court pursuant to Section 55.11(b). Section 55.13 specifies the procedures to be used:

> (a) If the juvenile court initiates proceedings for temporary or extended mental health services under

Section 55.12(1), the prosecuting attorney or the attorney for the child may file with the juvenile court an application for court-ordered mental health services under Section 574.001, Health and Safety Code. The juvenile court shall:

(1) set a date for a hearing and provide notice as required by Sections 574.005 and 574.006, Health and Safety Code; and

(2) conduct the hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code.

(b) The burden of proof at the hearing is on the party who filed the application.

(c) The juvenile court shall appoint the number of physicians necessary to examine the child and to complete the certificates of medical examination for mental illness required under Section 574.009, Health and Safety Code.

(d) After conducting a hearing on an application under this section, the juvenile court shall:

(1) if the criteria under Section 574.034, Health and Safety Code, are satisfied, order temporary mental health services for the child; or

(2) if the criteria under Section 574.035, Health and Safety Code, are satisfied, order extended mental health services for the child.

Application. If the juvenile court elects to conduct commitment proceedings either the prosecutor or the defense attorney may file an application for mental health services. Section 55.13(a). Whether the application is filed by the prosecutor or the defense often depends on the seriousness of the underlying juvenile charge; defense attorneys would be expected to file applications in cases of more serious charges or when the need for mental health care appears to be central to the welfare of the child. Juvenile proceedings are stayed until the commitment process, which must begin with an application, is completed.

Under Health and Safety Code Section 574.001 the application must be sworn and, if filed by anyone other than the prosecutor, must be accompanied by a certificate of medical examination, which should have been part of the Section 51.20 report. Health and Safety Code Section 574.002 requires that the application be styled using the proposed patient's initials only and state whether the application is for temporary or extended mental health services. The application must state the proposed patient's name and address, county of residence, and an averment that the proposed patient has a mental illness and meets the criteria for temporary or extended mental health services, as the case may be.

The application must also state whether the proposed patient is charged with a criminal offense. Health and Safety Code Section 571.011(a) provides, "A child alleged to have engaged in delinquent conduct or conduct indicating a need for supervision under Title 3, Family Code, is not considered under this subtitle [Subtitle C. Texas Mental Health Code] to be a person charged with a criminal offense." Therefore, it should be alleged in every juvenile case, no matter what the charge is, that the proposed patient is not charged with a criminal offense.

The duties of the attorney for the proposed patient are spelled out in Health and Safety Code Section 574.004. Those same duties apply to the juvenile's attorney in juvenile court commitment proceedings or to an attorney appointed by a county or probate court to represent the proposed patient/juvenile in referred commitment proceedings.

Hearing. Under Health and Safety Code Section 574.005, the juvenile court must set a date for the hearing that is not later than 14 days after the filing of the application; however, the hearing may not be held during the first three days after the application was filed if the juvenile or his or her attorney objects. The juvenile court may grant continuances, but the hearing must be held within 30 days of the filing of the application.

Health and Safety Code Section 574.006 requires that a copy of the application and written notice of the time and place of the hearing be provided to the proposed patient immediately after the court sets the hearing date.

The hearing is conducted under Health and Safety Code provisions. Section 574.031(e) provides that the Rules of Evidence apply unless they are inconsistent with subtitle C. A trial on an application for temporary mental health services is to the court unless the proposed patient or his or her attorney requests a jury trial. Section 574.032(a). A trial on an application for extended mental health services is to a jury, unless jury is waived by the proposed patient or his or her attorney. Section 574.032(b). Section 574.031(g) provides that the burden is upon the

State to prove the commitment criteria by clear and convincing evidence, but Section 55.13(b) places that burden on the party who filed the application when the proceedings are in juvenile court.

Section 55.13(c) requires the juvenile court to appoint physicians to examine the child. Health and Safety Code Section 574.009 requires that two certificates of medical examination for mental illness must be filed before the hearing can begin. The content of the certificates is specified by Health and Safety Code Section 574.011.

Section 55.13(d) requires the juvenile court to enter a commitment order if the child is committable for temporary (no longer than 90 days) or extended (no longer than 12 months) mental health services.

If a commitment for temporary or extended inpatient mental health services is ordered by the juvenile court, the temporary stay that it entered under Section 55.11(b) remains in place for the duration of the treatment. Section 55.16(b). If the juvenile court does not commit the child, then the stay is dissolved and other juvenile proceedings may be resumed. Section 55.17(b).

Procedure When Juvenile Court Refers Proceedings to County Court. If the juvenile court elects under Section 55.12(2) to refer the commitment proceedings to the county court, then Section 55.14 sets out the procedures to be followed:

> (a) If the juvenile court refers the child's case to the appropriate court for the initiation of commitment proceedings under Section 55.12(2), the juvenile court shall:
>
> (1) send all papers relating to the child's mental illness to the clerk of the court to which the case is referred;
>
> (2) send to the office of the appropriate county attorney or, if a county attorney is not available, to the office of the appropriate district attorney, copies of all papers sent to the clerk of the court under Subdivision (1); and
>
> (3) if the child is in detention:
>
> (A) order the child released from detention to the child's home or another appropriate place;
>
> (B) order the child detained in an appropriate place other than a juvenile detention facility; or
>
> (C) if an appropriate place to release or detain the child as described by Paragraph (A) or (B) is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.
>
> (b) The papers sent to the clerk of a court under Subsection (a)(1) constitute an application for mental health services under Section 574.001, Health and Safety Code.

The juvenile court must send all papers relating to mental illness to the clerk of the county court and send copies of those papers to the appropriate prosecutor, which would ordinarily be a county or district attorney if there is one in the county.

Section 55.14(a)(3) authorizes the juvenile court, if the child is in detention, to release the child or place the child elsewhere pending the commitment hearing. If release or placement is not feasible, then the court is authorized to detain the child in the juvenile detention facility. The continuing need for detention must be addressed every 10 or 15 working days under Section 54.01 as in all other cases of extended juvenile pre-adjudication detention.

Section 55.14(b) provides that the papers sent to the county court under this section constitute an application for mental health services, which under Health and Safety Code Section 574.001 may be filed by any adult. The papers should include all the requirements of an application as provided by Health and Safety Code Sections 574.001 and 574.002. Once the papers are filed with the clerk of the county court, the requirements of the Health and Safety Code pertaining to appointment of counsel, notice of hearing, timing of hearing, and conduct of hearing automatically apply.

The county court is required to notify the referring juvenile court if it orders temporary or extended inpatient mental health services of the juvenile. Section 55.16(a). Upon receipt of that notice, all pending juvenile proceedings are stayed by operation of law. Section 55.16(b). If the county court does not order inpatient mental health services, it is required immediately to notify the juvenile court of that decision. Section 55.17(a). Upon receipt of that notice, the juvenile court is directed to dissolve the temporary stay it had entered under Section 55.11(b). Section 55.17(b).

Care, Treatment, and Discharge. Section 55.15 addresses the care a child committed by a juvenile court or a county court on referral of a juvenile court must receive:

> If the juvenile court or a court to which the child's case is referred under Section 55.12(2) orders mental health services for the child, the child shall be cared for, treated, and released in conformity to Subtitle C, Title 7, Health and Safety Code, except:
>
> (1) a court order for mental health services for a child automatically expires on the 120th day after the date the child becomes 18 years of age; and
>
> (2) the administrator of a mental health facility shall notify, in writing, by certified mail, return receipt requested, the juvenile court that ordered mental health services or the juvenile court that referred the case to a court that ordered the mental health services of the intent to discharge the child at least 10 days prior to discharge.

Section 55.15 states the important principle that all juvenile court children committed for mental health services must receive the same care as other persons receive.

All juvenile court-originated mental health commitments expire automatically 120 days after the child's 18th birthday. Section 55.19 sets out requirements for transfer of certain cases to criminal court when a child is still committed upon his or her 18th birthday. Of course, commitments also automatically expire after 90 days or 12 months, depending upon the type of commitment.

If a facility intends to discharge a child, it is required to provide the juvenile court notice of the release 10 days in advance to enable the court to resume juvenile proceedings should it desire to do so. The notice must be by certified mail, return receipt requested.

If a child committed by or on referral of a juvenile court is discharged from the mental health facility before becoming 18 and is no longer committable, then the juvenile court is empowered to dismiss the juvenile charges with prejudice or continue with the proceedings as though no order of mental health services had been made. Section 55.18. Which action the juvenile court takes is totally discretionary but would be expected to depend upon the length of confinement under commitment orders and the seriousness of the juvenile charges.

Transfer to Criminal Court. Section 55.19 sets out requirements for the transfer of a case to criminal court of a person still committed at age 18:

> (a) The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the 18th birthday of a child for whom the juvenile court or a court to which the child's case is referred under Section 55.12(2) has ordered inpatient mental health services if:
>
> (1) the child is not discharged or furloughed from the inpatient mental health facility before reaching 18 years of age; and
>
> (2) the child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.
>
> (b) The juvenile court shall send notification of the transfer of a child under Subsection (a) to the inpatient mental health facility. The criminal court shall, within 90 days of the transfer, institute proceedings under Chapter 46B, Code of Criminal Procedure. If those or any subsequent proceedings result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the delinquent conduct described by Subsection (a)(2) that results in confinement for a period longer than the maximum period of confinement the defendant could have received if the defendant had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court.

Section 55.19 provides that if the child who was not discharged from the mental health commitment before his or her 18th birthday was alleged to have committed an offense that could have been charged under the Determinate Sentence Act and that conduct was never adjudicated, the juvenile court is required to transfer the case to the appropriate criminal court on the person's 18th birthday. The criminal court is required to determine whether the person is competent to stand trial. If not competent, then the juvenile court-originated commitment automatically expires 120 days after the 18th birthday. That would enable criminal court officials to initiate adult civil commitment proceedings. If competent, then the criminal court can proceed with criminal proceedings but the person can be sentenced to no longer a term than he or she could have received from the juvenile court for the same offense. Under Code of Criminal Procedure Article

46B.009, the person, if sentenced to prison, should receive credit on that sentence for all time confined in that case in a mental health facility as a juvenile or as an adult.

Applicability of Mental Illness Provisions to Discretionary Transfer Proceedings. There is a split of opinion among appellate courts as to whether Section 55.02, the predecessor to Sections 55.11 and 55.12, applies to proceedings for discretionary transfer from juvenile to criminal court. In *R.K.A. v. State*, 553 S.W.2d 781 (Tex.Civ.App.—Fort Worth 1977, no writ), the child, on appeal from an order transferring him to criminal court, contended the juvenile court should have conducted a hearing under Section 55.02 to determine whether he should be hospitalized under the Mental Health Code. The court noted that Section 55.02 applies only to a child "alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision." It concluded that when a transfer petition is filed, the child has not been charged with delinquent conduct or conduct indicating a need for supervision and, therefore, Section 55.02 is not applicable. That same language appears in Section 55.11(a).

The second case is *T.P.S. v. State*, 590 S.W.2d 946 (Tex.Civ.App.—Dallas 1979, writ ref'd n.r.e.). In that case, the appellate court refused to follow the interpretation used by the Fort Worth court in *R.K.A.* The Dallas court observed that "[t]he petition [for transfer] alleges that appellant intentionally and knowingly caused the death of an individual by beating him with a club 'in violation of a penal law of this state punishable by imprisonment.' Consequently, it is clear that the petition alleges that appellant has 'engaged in delinquent conduct.' 590 S.W.2d at 948. The court concluded that former Section 55.02 is entirely separate from the provisions of Section 55.04 dealing with fitness to proceed:

> [T]he legislative intent is clear to require proceedings to determine the need for temporary hospitalization whenever it appears to the juvenile court that the child may be mentally ill, even though the child is competent to understand the consequences of his acts and to aid in his defense, and regardless of whether the petition seeks a delinquency adjudication or a discretionary transfer to criminal court.

590 S.W.2d at 950.

M.A.V., Jr. v. Webb County Court at Law, 842 S.W.2d 739 (Tex.App.—San Antonio 1992, writ denied), follows *T.P.S.* in holding that Section 55.02 is applicable in discretionary transfer proceedings.

Since neither the Texas Supreme Court nor the legislature has resolved the conflict among these cases, courts in counties outside the appellate territorial jurisdiction of the Fort Worth, Dallas, and San Antonio Courts of Appeal have authority to apply Sections 55.11 and 55.12 to transfer proceedings or not to do so. In any event, it is clear that requirements of fitness to proceed apply to discretionary transfer proceedings, which would include most cases in which the child may be found to have a mental illness.

C. Proceedings in Fitness to Proceed Cases

Subchapter C deals with children in the juvenile system who may be unfit to proceed in juvenile court because of either mental illness or intellectual disability. A juvenile is unfit to proceed in juvenile court if the child "as a result of mental illness or an intellectual disability lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense." Section 55.31(a). If a child is unfit to proceed, he or she may not be subjected to "discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures." Section 55.31(a). This section states a requirement of the United States Constitution. It is a violation of due process of law to put a person on trial in a criminal or criminal-type proceeding who, as a result of mental illness or an intellectual disability, cannot understand the proceedings or assist in his or her defense. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960).

The Fitness Hearing. If the juvenile court has ordered a Section 51.20 examination and determines from the report of that examination and other information that "evidence exists to support a finding that a child is unfit to proceed as a result of mental illness or an intellectual disability," it is required to schedule a fitness hearing. Sections 55.32(b)–(g) set out the procedures for conducting the hearing:

> (b) The issue of whether the child is unfit to proceed as a result of mental illness or an intellectual disability shall be determined at a hearing separate from any other hearing.
>
> (c) The court shall determine the issue of whether the child is unfit to proceed unless the child or the attorney for the child demands a jury before the 10th day before the date of the hearing.

(d) Unfitness to proceed as a result of mental illness or an intellectual disability must be proved by a preponderance of the evidence.

(e) If the court or jury determines that the child is fit to proceed, the juvenile court shall continue with proceedings under this title as though no question of fitness to proceed had been raised.

(f) If the court or jury determines that the child is unfit to proceed as a result of mental illness or an intellectual disability, the court shall:

(1) stay the juvenile court proceedings for as long as that incapacity endures; and

(2) proceed under Section 55.33.

(g) The fact that the child is unfit to proceed as a result of mental illness or an intellectual disability does not preclude any legal objection to the juvenile court proceedings which is susceptible of fair determination prior to the adjudication hearing and without the personal participation of the child.

Section 55.32(b) provides that the fitness hearing must be held separate from any other hearing, such as an adjudication hearing. It is before the court unless the child or attorney demands a jury. Section 55.32(c). The burden is by a preponderance of the evidence to prove unfitness to proceed; ordinarily, the defense would assume this burden. If relevant to a determination of fitness to proceed, evidence may be introduced at the fitness hearing about the manner in which the offense was committed. *In the Matter of M.A.S.*, UNPUBLISHED, No. 04-01-00386-CV, 2001 WL 432436, 2001 Tex.App.Lexis 8624 (Tex.App.—San Antonio 2001, no pet.) (evidence of the manner in which theft was committed and respondent's contemporaneous explanations for possessing stolen items admissible at fitness hearing).

If the court or jury determines the child is unfit, then the juvenile court orders juvenile proceedings stayed for the duration of the incapacity and proceeds under Section 55.33.

Under Section 55.32(g), the fact that the child is unfit to proceed does not prevent litigating legal objections to the proceedings that do not require personal participation of the child. An example would be the defense of statute of limitations. If the child prevails in such a claim, then he or she is discharged from the juvenile system and is no longer subject to Chapter 55.

In *In the Matter of R.D.B.*, UNPUBLISHED, No. 09-94-207-CV, 1996 WL 260901, 1996 Tex.App.Lexis 2932, Juvenile Law Newsletter ¶ 96-2-20 (Tex.App.—Beaumont 1996, no writ), decided under prior law, a pre-certification psychiatric report found the juvenile did not have an intellectual disability while a pre-certification psychological report found that he did. On appeal, the juvenile contended the psychological report was sufficient to require the court to conduct a full fitness to proceed hearing without request from the parties. The Court of Appeals rejected this argument largely on the ground that the I.Q. number in the psychological report, i.e., 70, was borderline and well within the margin of error for the test employed.

Fitness Inquiry on Court's Own Motion. On appeal from an order modifying disposition and committing him to TYC, the respondent in *In the Matter of A.D.V.*, UNPUBLISHED, No. 03-99-00020-CV, 1999 WL 1243287, 1999 Tex.App.Lexis 9505, Juvenile Law Newsletter ¶ 00-1-09 (Tex.App.—Austin 1999, no pet.), contended that the juvenile court should have, on its own motion, ordered an inquiry to determine his fitness to proceed with the modification hearing. The Court of Appeals rejected that argument:

> In this case, neither party filed a motion alleging that A.D.V.'s medical, psychological, or emotional history affected his capacity. Therefore, the sole issue is whether the juvenile court was under a duty to act on its own motion given the facts of this case.
>
> Although classified as civil proceedings, juvenile cases are quasi-criminal in nature. See *In re M.A.F.*, 966 S.W.2d 448, 450 (Tex.1998). Because of the serious nature of juvenile proceedings and the possibility that a juvenile may be deprived of liberty, this Court looks to criminal cases for guidance on many issues in juvenile cases. See *In re M.S.*, 940 S.W.2d 789, 791 92 (Tex.App.—Austin 1995, no writ). In the adult criminal context, the Court of Criminal Appeals has held that a court is required to make an inquiry regarding an accused's competency sua sponte only if there is evidence before the court that raises a bona fide doubt in the judge's mind as to an accused's competency to stand trial. See *Collier v. State,* 959 S.W.2d 621, 625 (Tex.Crim.App.1997)…. Generally a bona fide doubt is raised "only if the evidence indicates recent severe mental illness, at least moderate mental retardation, or truly bizarre acts by the defendant." Id. [citing *Mata v. State*, 632 S.W.2d 355, 359 (Tex.Crim.App. 1982)]. Because the evidence does not indicate that A.D.V. exhibited any of these

> conditions so as to raise a bona fide doubt of his competency, the court was under no duty to move for an inquiry into A.D.V.'s capacity or need for mental health services.

1999 WL 1243287 *2. Cf. Code of Criminal Procedure Article 46B.004 (court is not required to have a bona fide doubt about the competency of the defendant in order to initiate inquiry).

Placement for Observation Following Finding of Unfitness. If the child is found by a judge or jury to be unfit to proceed in juvenile court, Section 55.33 requires a 90-day evaluative placement:

> (a) If the juvenile court or jury determines under Section 55.32 that a child is unfit to proceed with the juvenile court proceedings for delinquent conduct, the court shall:
>
> (1) if the unfitness to proceed is a result of mental illness or an intellectual disability:
>
> (A) provided that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, order the child placed with the Department of State Health Services or the Department of Aging and Disability Services, as appropriate, for a period of not more than 90 days, which order may not specify a shorter period, for placement in a facility designated by the department; or
>
> (B) on application by the child's parent, guardian, or guardian ad litem, order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days, which order may not specify a shorter period, but only if the placement is agreed to in writing by the administrator of the facility; or
>
> (2) if the unfitness to proceed is a result of mental illness and the court determines that the child may be adequately treated in an alternative setting, order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days, which order may not specify a shorter period.
>
> (b) If the court orders a child placed in a private psychiatric inpatient facility under Subsection (a)(1)(B), the state or a political subdivision of the state may be ordered to pay any costs associated with the child's placement, subject to an express appropriation of funds for the purpose.

Section 55.33 spells out the options when a judge or jury has found the child to be unfit to proceed. A 90-day evaluative period is required. The placement may be in a local mental health facility, in a private psychiatric facility, or, if the cause of unfitness is mental illness, in an outpatient center.

Placement in a local mental health authority or center requires the juvenile court to find that "the child meets the commitment criteria" for a person with mental illness or an intellectual disability. Section 55.33(a)(1)(A). That finding should be made by the juvenile court based on the information already before the court from examinations, reports, and testimony. The purpose of the 90-day placement is to permit the local mental health authority or center to evaluate the child to aid in determining whether he or she is committable. Obviously, the legislature did not intend to require the juvenile court to conduct a commitment hearing to make this finding in order to commit the child for evaluation on whether to conduct a commitment hearing.

Placement in a private facility requires either a private source of payment or, under Section 55.33(b), public payment from an express appropriation of funds for that purpose. In other words, the juvenile court cannot just order the county or a state agency to pay the costs of private psychiatric placement. Placement in an outpatient setting is restricted to children with mental illness since there currently are no such centers for persons with an intellectual disability.

The court order for the evaluative placement must specify that it is for "not more than 90 days." It cannot assign a period of less than 90 days, however. The local mental health authority or center can return the child to the court at any earlier time; there is no minimum period of observation required.

If the juvenile court orders an evaluative commitment to a public or private facility, it must order either the probation department or the sheriff's department to transport the child to the facility. Section 55.34(a). The probation department is required to send to the facility copies of any information in its possession relevant to the question of mental illness or intellectual disability. Section 55.35(a).

Upon receiving notice that the facility has prepared a report, the court must order the probation department or sheriff's department to transport the child back to the

court. If the child is not transported within 10 days, the local mental health authority or center can transport the child. Section 55.34(b). If the child is transported, the county where juvenile proceedings are pending is responsible for the costs of transportation.

Not later than 75 days after the placement order for evaluation was made, the facility is required to issue a report to the juvenile court. Section 55.35(b). The report must describe the treatment of the child provided by the facility or center and state the opinion of the director as to whether the child is fit or unfit to proceed. The court must distribute copies of this report to the prosecutor and defense attorney. Section 55.35(c). Under Sections 55.37 and 55.40, a report that a child is unfit to proceed should also address whether the child meets the criteria for commitment as a child with mental illness or an intellectual disability.

If Child Reported to Now Be Fit to Proceed. Section 55.36 sets out the procedures following a report from the facility or center that the child is now fit to proceed:

> (a) If a report submitted under Section 55.35(b) states that a child is fit to proceed, the juvenile court shall find that the child is fit to proceed unless the child's attorney objects in writing or in open court not later than the second day after the date the attorney receives a copy of the report under Section 55.35(c).
>
> (b) On objection by the child's attorney under Subsection (a), the juvenile court shall promptly hold a hearing to determine whether the child is fit to proceed, except that the hearing may be held after the date that the placement order issued under Section 55.33(a) expires. At the hearing, the court shall determine the issue of the fitness of the child to proceed unless the child or the child's attorney demands in writing a jury before the 10th day before the date of the hearing.
>
> (c) If, after a hearing, the court or jury finds that the child is fit to proceed, the court shall dissolve the stay and continue the juvenile court proceedings as though a question of fitness to proceed had not been raised.
>
> (d) If, after a hearing, the court or jury finds that the child is unfit to proceed, the court shall proceed under Section 55.37.

If the report states the child is fit to proceed, the juvenile court is required to make a finding of current fitness unless the defense objects within two days of receiving the report.

If a finding of current fitness is made, the stay is dissolved and juvenile proceedings resume. If an objection is lodged, a prompt hearing must be held to determine current fitness. The hearing is to the court unless the defense demands a jury trial.

If, following the hearing, the court or jury finds the child is fit to proceed, the juvenile court dissolves the stay and proceeds with the juvenile case. If the court or jury finds the child remains unfit, then the court must proceed in accordance with the provisions for post-unfitness commitment proceedings.

In *Dominguez v. State*, 546 S.W.2d 398 (Tex.Civ.App.—Austin 1977, no writ), decided under prior law, the juvenile court held a hearing on the question of fitness to proceed. On the basis of uncontroverted testimony, it found that the child was unfit to proceed and committed him for a 90-day period of hospitalization. At the conclusion of the commitment, the hospital returned him to the juvenile court with a report that there was no evidence of mental illness. The juvenile court then proceeded to the transfer hearing. The appellate court held this was erroneous:

> The court ordered this transfer notwithstanding the fact that its order declaring that appellant "lacked the capacity to understand the proceedings of the court and further lacked the capacity to assist in his own defense, all as a result of mental illness and is therefore unfit to proceed" was still standing....
>
> Under the state of this record, appellant remains unfit for transfer to criminal court. We hold that...a hearing on this matter should have been held followed by a judicial determination as to whether appellant's unfitness to proceed still exists.

546 S.W.2d at 399.

If Child Now Unfit to Proceed Because of Mental Illness. If the report finds that the child is unfit to proceed and committable due to mental illness, the court is required to choose whether to conduct commitment proceedings itself or to refer those proceedings to the appropriate county court. Section 55.37. The standards and rules for conducting mental illness commitment proceedings are substantially the same as those for a child with mental illness discussed earlier in this chapter. Sections 55.38 (juvenile court commitment proceedings) and 55.39 (referral to county court for commitment proceedings).

If Child Now Unfit to Proceed Because of an Intellectual Disability. If the report finds that the child is unfit to proceed and committable due to an intellectual disability, then the court is required to initiate commitment proceedings or refer those proceedings to the appropriate county court. Section 55.40.

If the juvenile court elects to conduct the proceedings, then the juvenile court has the jurisdiction of a county court for purposes of conducting the hearing. Section 55.02. Section 55.41 sets out the standards and procedures to be used:

> (a) If the juvenile court initiates commitment proceedings under Section 55.40(1), the prosecuting attorney may file with the juvenile court an application for placement under Section 593.041, Health and Safety Code. The juvenile court shall:
>
> (1) set a date for a hearing and provide notice as required by Sections 593.047 and 593.048, Health and Safety Code; and
>
> (2) conduct the hearing in accordance with Sections 593.049-593.056, Health and Safety Code.
>
> (b) After conducting a hearing under Subsection (a)(2), the juvenile court may order commitment of the child to a residential care facility if the commitment criteria under Section 593.052, Health and Safety Code, are satisfied.

Section 55.41 authorizes the prosecutor to file an application for placement. Health and Safety Code Section 593.041(a) permits any "interested person" to file an application for long-term placement in a residential facility. Prior to commitment, a report of an interdisciplinary team recommending placement must have been completed. That will have been done during the 90-day evaluative placement that just concluded. A copy of the team report must accompany the application. The formal requirements for the application are set out in Health and Safety Code Section 593.042. The juvenile court is required to set the hearing on the earliest practicable date and to provide the child with a copy of the application and interdisciplinary team report and with notice of the time and place of the hearing. Sections 593.047-048, Health and Safety Code.

The juvenile court conducts a hearing that, on motion of any party or the court's own motion, is before a jury. The Rules of Evidence apply, and the interdisciplinary team report is admissible in evidence. The hearing is public unless the child requests a closed hearing and the court determines there is good cause to close the hearing. The State has the burden to prove beyond a reasonable doubt that the child meets commitment criteria.

Health and Safety Code Section 593.052 sets out the commitment criteria for long term placement in a residential facility:

> (1) the proposed resident is a person with an intellectual disability;
>
> (2) evidence is presented showing that because of an intellectual disability, the proposed resident:
>
> (A) represents a substantial risk of physical impairment or injury to himself or others; or
>
> (B) is unable to provide for and is not providing for the proposed resident's most basic personal physical needs;
>
> (3) the proposed resident cannot be adequately and appropriately habilitated in an available, less restrictive setting; and
>
> (4) the residential care facility provides habilitative services, care, training, and treatment appropriate to the proposed resident's needs.

If those criteria are met and the court determines that "long-term placement in a residential care facility is appropriate" it commits the child "for care, treatment, and training to a community center or the department when space is available in a residential care facility." Section 593.052(b). There is no expiration date for the commitment.

Section 55.41(c) requires the Department of Aging and Disability Services or the appropriate local mental health authority or center to accept to its care a child committed under these provisions.

Alternatively, the juvenile court may refer commitment proceedings to the appropriate county court. Section 55.42.

Standards of Care and Notice of Release. Section 55.45 establishes the requirement of standards of care and notice of release.

Section 55.45(c) ensures that juveniles in a residential care facility who have committed a Code of Criminal

Procedure Article 42A.054 offense (formerly known as 3g offenses) cannot be released from the facility for longer than 48 hours without first notifying the juvenile court in writing. Notice must also be provided to the prosecutor assigned to the case, who may request a hearing on the matter. If there is no request for a hearing, the trial court will resolve the application based on the written submission. There is no right to appeal from the court's ruling, and the release of a child described in Section 55.45(c) without the court's approval is punishable by contempt.

The purpose of Section 55.45(c) is to ensure that the trial court gets to decide whether incompetent juveniles charged with the most serious offenses should be released. This is similar to the role played by the trial court in adult criminal proceedings. See Code of Criminal Procedure Articles 46B.072 and 46B.073.

Transfer to Criminal Court. As in the case of a mental illness commitment, a commitment because the child was found unfit to proceed due to mental illness or an intellectual disability brings with it the possibility of transfer to criminal court at age 18. Section 55.44 provides:

> (a) The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the 18th birthday of a child for whom the juvenile court or a court to which the child's case is referred has ordered inpatient mental health services or residential care for persons with an intellectual disability if:
>
> (1) the child is not discharged or currently on furlough from the facility before reaching 18 years of age; and
>
> (2) the child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.
>
> (b) The juvenile court shall send notification of the transfer of a child under Subsection (a) to the facility. The criminal court shall, before the 91st day after the date of the transfer, institute proceedings under Chapter 46B, Code of Criminal Procedure. If those or any subsequent proceedings result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the delinquent conduct described by Subsection (a)(2) that results in confinement for a period longer than the maximum period of confinement the defendant could have received if the defendant had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court.

Section 55.44 sets out the procedures for transferring a juvenile case to criminal court when a child has been found unfit to proceed and remains in residential care on his or her 18th birthday. It permits criminal proceedings to be initiated if the person is found competent to stand trial and is charged with an offense that could have been charged under the Determinate Sentence Act. It is in substance identical to Section 55.19 for mental health commitments.

Restoration Hearing. Section 55.43 establishes a right to a restoration hearing under certain limited circumstances:

> (a) The prosecuting attorney may file with the juvenile court a motion for a restoration hearing concerning a child if:
>
> (1) the child is found unfit to proceed as a result of mental illness or an intellectual disability; and
>
> (2) the child:
>
> (A) is not:
>
> (i) ordered by a court to receive inpatient mental health services;
>
> (ii) committed by a court to a residential care facility; or
>
> (iii) ordered by a court to receive treatment on an outpatient basis; or
>
> (B) is discharged or currently on furlough from a mental health facility or outpatient center before the child reaches 18 years of age.
>
> (b) At the restoration hearing, the court shall determine the issue of whether the child is fit to proceed.
>
> (c) The restoration hearing shall be conducted without a jury.
>
> (d) The issue of fitness to proceed must be proved by a preponderance of the evidence.
>
> (e) If, after a hearing, the court finds that the child is fit to proceed, the court shall continue the juvenile court proceedings.

> (f) If, after a hearing, the court finds that the child is unfit to proceed, the court shall dismiss the motion for restoration.

Section 55.43 enables the prosecutor to have a restoration hearing for a child who has been found to be unfit to proceed because of either mental illness or an intellectual disability and who either was not committed for residential care or was committed but discharged before becoming 18 years old. Unless the prosecutor initiates restoration proceedings, the child remains judicially declared unfit to proceed and cannot be proceeded against in the juvenile system but is not receiving care or treatment for his or her mental condition. Fitness must be proved in a trial without a jury by a preponderance of the evidence. If the court concludes the child is fit, then juvenile proceedings can resume.

D. Proceedings in Lack of Responsibility for Conduct Cases

Defining Lack of Responsibility. Section 55.51(a) establishes the defense of lack of responsibility in juvenile cases:

> A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or an intellectual disability, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law.

In criminal cases, this affirmative defense would be labeled the insanity defense.

This provision is more expansive than the insanity defense provided by Texas law in criminal court, which includes only one who, "as a result of severe mental disease or defect, did not know that his conduct was wrong." Section 8.01 of the Texas Penal Code. The Penal Code definition of insanity also differs from that in the Family Code by providing, "The term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." It is error to include that language in a juvenile adjudication proceeding jury charge because it is not part of the Family Code definition of insanity. *W.D.A. v. State*, 835 S.W.2d 227 (Tex.App.—Waco 1992, no writ). See also *Marino v. State*, UNPUBLISHED, No. 03-02-00707-CR, 2004 WL 1468822, 2004 Tex.App.Lexis 5779 *8, Juvenile Law Newsletter ¶ 04-3-14 (Tex.App.—Austin 2004, pet. ref'd) ("The same state interests that justify the creation of a separate and distinct justice system for juvenile offenders also justify the use in juvenile proceedings of a different, broader definition of insanity than is used in the adult criminal system.")

The respondent in *In the Matter of L.J.G.,* UNPUBLISHED, No. 03-99-00412-CV, 2000 WL 963163, 2000 Tex.App.Lexis 4587, Juvenile Law Newsletter ¶ 00-3-20 (Tex.App.—Austin 2000, no pet.) was adjudicated for aggravated assault and two counts of terroristic threat from an incident in which he brought a handgun to school and made threats with it. He claimed he was not responsible for his conduct because of mental illness. In particular, he contended that he "lacked substantial capacity to conform his conduct to the requirements of the law," the standard in then Section 55.05 [now Section 55.51]. The expert testimony was that respondent claimed that God told him to take the handgun to school. The Court of Appeals rejected the argument that the evidence showed lack of capacity as a matter of law or that finding him responsible was against the weight of the evidence. It found that the voices told him to take a handgun to school but there was no evidence the voices told respondent to commit the specific offenses of which he was adjudicated:

> Given the fact that there is no evidence linking the voices to the acts for which appellant was adjudicated delinquent, the conflicting nature of the evidence regarding the voices, and the evidence that appellant's delusional focus could probably have been easily broken, we hold that appellant's lack of capacity for the conduct for which he was adjudged delinquent was not established as a matter of law. Also, evaluating the entire record and the evidence of appellant's condition, we further hold that the court's refusal to find that appellant lacked capacity was not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

2000 WL 963163 *7.

Determining Lack of Responsibility. Under Section 55.51(b), a motion by the defense or the State for a Section 51.20 examination to assist in determining whether a child lacks responsibility under this section must be granted by the juvenile court. The juvenile court has no discretion not to order the examination.

This defense is, under Section 55.51(c), tried to a court or jury in the adjudication hearing. Under Subsection (d), the burden is on the person claiming lack of responsibility

to prove that claim by a preponderance of the evidence. Subsection (c) "clearly and unambiguously" applies only to adjudication hearings and not to modification hearings. *In the Matter of D.B.*, UNPUBLISHED, No. 05-04-01152-CV, 2005 Tex.App.Lexis 8144 *3, Juvenile Law Newsletter ¶ 05-4-12 (Tex.App.—Dallas 2005, no pet.). There is no requirement for a trial court to hold a separate hearing to determine whether a juvenile was responsible for his or her actions. See *In the Matter of E.L.C.*, 656 S.W.2d 149, 150 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.); *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 WL 364250 (Tex.App.—Amarillo 2010, reh'g overruled) (trial court's adjudication of appellant was an implied rejection of his defense that he lacked responsibility due to mental illness or intellectual disability). Even though the burden in juvenile cases is generally on the State beyond a reasonable doubt [Section 54.03(f)], this is an exception to that rule. If, as would ordinarily be the case, the juvenile is raising the defense of insanity, the burden would be on the child to show lack of responsibility by a preponderance of the evidence.

If lack of responsibility is raised and evidence is produced to support the claim, the trial court should instruct the jury as to its definition from Subsection (a). The court or jury is required to state in its finding or verdict whether it finds the child is not responsible for the conduct alleged. Section 55.51(e). If the child is found by the judge or jury to be not responsible because of mental illness or an intellectual disability for the conduct alleged, then the child stands acquitted of those charges and, except for civil commitment proceedings, "shall not be subject to proceedings under this title with respect to such conduct." Section 55.51(g).

Transfer Proceedings. In *T.P.S. v. State*, 620 S.W.2d 728 (Tex.Civ.App.—Dallas 1981, no writ), the child, in an appeal from a transfer order, argued that the juvenile court erred in not holding a hearing to determine whether he was insane at the time of the conduct under Section 55.05, the predecessor of Section 55.51. The appellate court held that Section 55.05, unlike Section 55.02 (mental illness), does not apply to transfer proceedings:

> We conclude that the trial court correctly held that appellant was not entitled to a hearing under section 55.05 in a discretionary transfer proceeding.... Temporary hospitalization under section 55.02 is something a child may need immediately, before transfer to the criminal court, and the report of such hospitalization may bear on the matters to be considered by the court in ordering a transfer.... On the other hand, the child's mental capacity at the time of the alleged delinquent conduct under section 55.05 is a matter of defense that should be considered on the trial of the case. This view is confirmed by the requirement in section 55.05(c) that the issue shall be tried "in the adjudication hearing." If a transfer is ordered, the issue must be determined at the trial in the criminal court. The Code does not contemplate two trials of this issue.

620 S.W.2d at 729.

Other courts have taken the same position. See *R.K.A. v. State*, 553 S.W.2d 781 (Tex.Civ.App.—Fort Worth 1977, no writ); *In the Matter of K.W.E.,* 556 S.W.2d 626 (Tex.Civ.App.—Waco 1977, no writ).

Probation Revocation Hearing. The Family Code contemplates that the question of lack of responsibility at the time of the conduct is to be tried at the adjudication hearing. But, it can also become relevant at a hearing to modify disposition by revoking probation. If one probation violation alleged was delinquent conduct or conduct indicating a need for supervision and the probationer was found to meet the criteria for lack of responsibility at the time of that conduct, then his or her probation should not be revoked.

In *In the Matter of E.B.*, 525 S.W.2d 543 (Tex.Civ.App.—Amarillo 1975, writ ref'd n.r.e.), a motion to revoke was filed alleging the child violated probation by committing the offense of theft. The child argued that he had a right not only to present an insanity defense at the modification hearing but to have a jury determine that question. The appellate court held that the child had no right to a jury at the hearing to modify disposition because Section 54.05(c) specifically provides there is no right to a jury. However, the court then approved of the juvenile court trying the question of lack of responsibility at the modification hearing. It concluded that the juvenile court, based on the evidence presented at the modification hearing concerning lack of responsibility, did not err in concluding that the child had failed to prove insanity by a preponderance of the evidence. The importance of the case is that it holds that the child is entitled to have the question of lack of responsibility tried to the judge in a modification hearing.

Automatic 90-Day Evaluative Placement of Child Found to Lack Responsibility. If the judge or jury finds the child lacks responsibility because of mental illness or an intellectual disability, the juvenile court is required to

have the child evaluated for a period of not more than 90 days. evaluative A prerequisite to placement with the Department of State Health Services (for mental illness) or the Department of Aging and Disability Services (for intellectual disability), is that the court find the child meet commitment criteria under the Mental Health Code (Chapter 574, Health and Safety Code) or the Persons with an Intellectual Disability Act (Chapter 593, Health and Safety Code). This finding is intended to be based upon the evidence already before the juvenile court, including the results of the Section 51.20 examination and the evidence introduced in the adjudication hearing. The purpose of the evaluative placement is to determine whether the child is committable, so it would make no sense to require a full-blown commitment hearing to determine whether to place the child to determine whether the child is committable. However, without such a finding, which is certainly possibly in an instance where the question is whether the child lacked responsibility at some time in the past and not whether the person currently is unfit to proceed, such placement is not authorized. Placement in a private psychiatric hospital would be an alternative in some circumstances [Section 55.52(a)(1)(B)], as would outpatient treatment for mental illness under some circumstances. Section 55.52(a)(2).

As in cases of automatic placement following a finding of unfitness to proceed, the juvenile court is required to arrange transportation to and from the evaluative facility through the probation department or the sheriff's department. Section 55.53. Also, as in cases of unfitness to proceed, the juvenile court must require the probation department to send all relevant information to the evaluative facility. Section 55.54(a).

Within 75 days, the facility must report back to the court on whether the child has a mental illness or intellectual disability. Section 55.54(b). The court must then provide a copy of that report to the prosecutor and defense attorney. Section 55.54(c).

If Report Concludes Child Has No Mental Illness Or Intellectual Disability. If the report concludes that the child has neither a mental illness nor an intellectual disability, then the juvenile court is required to discharge the child from all further proceedings relating to the charges for which a lack of responsibility was found. Section 55.55(a). There is one exception to that requirement. If the adjudication hearing was a determinate sentence act hearing and the prosecutor objects in writing to discharge within two days after receiving a copy of the report, then a special commitment hearing must be conducted. Section 55.55(b). The juvenile court under these circumstances must conduct the commitment hearing itself. If it finds the child has a mental illness and meets commitment criteria, it is required to commit the child to a local mental health authority or center. Likewise, if the juvenile court finds the child has an intellectual disability and meets commitment criteria, it is required to issue an appropriate commitment order. The State is required to prove its case by clear and convincing evidence. Section 55.55(c). In this one instance, because of the seriousness of the initial charge, the juvenile court is authorized to override the recommendation and conclusions of the evaluative report.

If Report Concludes Child Has Mental Illness Or Intellectual Disability. If the evaluative report concludes that the child has either a mental illness or an intellectual disability, the juvenile court must either conduct the appropriate commitment proceedings itself or refer those proceedings to the appropriate county court for it to conduct them. Section 55.56. As in the case of unfitness to proceed, if the juvenile court conducts the commitment proceedings itself, it is required to follow those sections of the Health and Safety Code referenced by the Family Code. Section 55.57(a)(2). Also, as in cases of unfitness to proceed, if the juvenile court chooses to refer the proceedings to a county court, it must take certain steps to make sure the case is effectively referred. Section 55.58. The same choice must be made if the report concludes that the child has an intellectual disability. Sections 55.59-.61.

Section 55.60(c) requires the Department of Aging and Disability Services or the appropriate community center to admit a child who has been committed under the intellectual disability provision.

E. Children With Mental Illness or Intellectual Disability Committed to TJJD

Before its amendment in 1995, Human Resources Code Section 61.077 required TYC [TJJD] to reject commitment of and to return to the committing court a child whom TYC determined to have a mental illness or intellectual disability. In 1995, the prohibition on accepting a child with an intellectual disability repealed and replaced with a requirement that the agency accept children with an intellectual disability. Human Resources Code Section 61.077(a) [renumbered to 244.011(a) in 2011].

This change was made to accommodate children who were previously handled through commitment proceedings under former Section 55.03 of the Family Code.

Instead of attempting to commit children with an intellectual disability who are in the juvenile system to what was then MHMR, the legislature in 1995 decided to keep those children in the juvenile system, including possible commitment to TYC. If a child's intellectual disability results in unfitness to proceed or lack of responsibility for conduct, then proceedings under Chapter 55 are required. However, an intellectual disability without those circumstances no longer authorizes Chapter 55 proceedings.

TJJD Jurisdiction Over Children with Mental Illness. In 1997, Human Resources Code Section 61.077 was amended to delete the requirement that TYC return a child with mental illness to the juvenile court and replace it with a provision requiring TYC to accept a child with mental illness on the same terms that the 1995 amendment had authorized TYC to accept children with an intellectual disability. Section 61.077 was renumbered to Section 244.011 in 2011.

Prior to this amendment, TYC was required to either return youth with mental illness to the committing court or refer the youth to the local county court for appropriate action. The law was changed to require the agency to accept youth with mental illness and intellectual disability because the alternative of returning them to court did not assure in many cases that the youth would be held accountable for their conduct or that they would get the care and treatment they need. Unchanged, however, was the expectation that commitment of these youth to TJJD continue to be based primarily on the severity of their committing offense or offense history and inability to be rehabilitated in the community and not on their need for mental health services.

Any youth may be referred by staff or self-refer to a psychologist and, if necessary, to a psychiatrist at any time during their stay in TJJD or when their behavior indicates the possible presence of a mental health problem.

Youth committed to TJJD are initially assessed at an Orientation and Assessment Unit by a psychologist and, if indicated, by a psychiatrist. A psychiatric assessment is indicated if the youth is referred by a psychologist, will remain in secure confinement for 12 months or longer, or is currently prescribed psychotropic medications. Based on the assessment results and the individual needs of the youth, TJJD may assign youth to any TJJD facility or contract program. Youth who function well with regular psychiatric follow-up and clinical support are assigned to a TJJD facility, while those with more serious mental impairments that adversely impact their daily functioning are assigned to the agency's mental health treatment programs.

Many youth in TJJD over the years have experienced mental health needs that have at some point required specialized treatment or, perhaps, even intensive treatment at the Crisis Stabilization Unit operated within TJJD.

As youth transition from a secure environment to parole, the agency partners with the Texas Council on Offenders with Medical and Mental Impairments (TCOOMMI) to provide continuity of care and appropriate community-based referrals. Psychiatric and support services are provided to eligible youth as long as they remain in the juvenile justice system.

Mandatory Discharge of Children with Mental Illness or Intellectual Disability. TJJD's mission regarding these children is not to treat mental illness specifically, but to stabilize youth sufficiently to enable their participation in the regular correctional and rehabilitation program. The high structure of training school programs and use of psychotropic medication, both under psychological and psychiatric oversight, allow most of these youth to be maintained safely there and to progress to earn parole release. Some youth, however, are unable to progress due to the severity and intractability of their mental disorders. Their confinement time can be disproportionate to the seriousness of their committing offenses relative to other youth simply because they can never earn parole release as other youth can by just applying themselves to the task. Continuing to confine these youth in a correctional facility until their mandatory discharge at age 19 could invite challenges on constitutional grounds if they have completed the minimum confinement period for their offense and are not receiving treatment appropriate to their needs. Human Resources Code Section 244.011(b) requires TJJD to discharge a youth with mental illness or intellectual disability if the youth was not committed under a determinate sentence and:

> (1) the child has completed the minimum length of stay for the child's committing offense; and
>
> (2) the department determines that the child is unable to progress in the department's rehabilitation programs because of the child's mental illness or [intellectual disability].

Human Resources Code Section 244.012 assists TJJD in obtaining appropriate treatment for a child with a mental

illness or intellectual disability who is discharged under Section 244.011(b). Before a child with mental illness is discharged under that section, a TJJD psychiatrist must examine the child. If it is determined the child needs outpatient psychiatric treatment, TJJD must refer the child for appropriate treatment. If it is determined the child needs inpatient psychiatric treatment and the child is not already receiving court-ordered mental health services, TJJD must file a sworn application for court-ordered mental health services as provided in Chapter 574, Health and Safety Code. Likewise, prior to discharge, TJJD must refer a child with intellectual disability for services for the intellectual disability if the child is not already receiving them.

The discharge from TJJD required by Human Resources Code Section 244.011(b) is effective when a court orders mental health or intellectual disability services on referral of TJJD or 30 days after an application for such services is made. Human Resources Code Sections 244.011(c) and (e). If the juvenile is already receiving mental health or intellectual disability services, then the discharge is immediate.

In 2009, Human Resources Code Section 61.077(g) [renumbered to 244.012 in 2011] was added to ensure that if a child with mental illness or intellectual disability is discharged due to failure to progress, that child is eligible to receive continuity of care services from the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) under Chapter 614, Health and Safety Code.

Children with determinate sentences who have a mental illness or intellectual disability were excluded from this scheme because TJJD cannot discharge a child committed with a determinate sentence prior to the expiration of that sentence. It can only parole such children. There is also a public safety concern over a rule that would require release even on parole of a child with a mental illness or intellectual disability who has committed a serious enough offense to receive a determinate sentence.

Human Resources Code Section 244.0125 allows TJJD to petition the juvenile court that committed the child under a determinate sentence to start mental health commitment proceedings as provided in Chapter 55 of the Family Code. If the child is released from the mental health treatment facility before his or her sentence expires, the juvenile court has the option to return the child to TJJD, transfer the child to TDCJ, or release the child on parole. The child is given credit on his or her sentence for all time spent in the mental health treatment facility. While in the facility, the child may not be released on a pass or furlough.

Where Commitment Proceedings May be Initiated. If the child requires mental health services, commitment proceedings may be initiated in the county that committed the child to TJJD or in any county with proper venue over such proceedings under the Mental Health Code. Health and Safety Code Section 574.001(f). If the child is in need of intellectual disability services, an application for commitment should be filed in the county that committed the child to TJJD or in any other county with proper venue. Health and Safety Code Section 593.041(e).

CHAPTER 15: Access to and Confidentiality of Juvenile Records and Proceedings

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With rare exceptions, criminal proceedings are open to the public. Under the United States and Texas Constitutions, criminal trials must generally be open to the public, subject to regulation only to assure security and order. As a general rule, even pre-trial hearings in criminal cases are constitutionally required to be open to the public. Although law enforcement and prosecutor records in criminal cases are not public, the various papers—complaints, informations, indictments, motions, orders, and judgments—filed with clerks of criminal courts are public records. They may be inspected by media reporters and members of the general public.

The tradition in the juvenile system is quite different. With some limited exceptions, the records and hearings that make up the juvenile process are not open to the media or members of the public generally. Due to a concern that public exposure of juvenile proceedings would inhibit rehabilitation of the respondent, juvenile records and hearings throughout the country are ordinarily by law made confidential. That is generally true in Texas, although there are statutory exceptions and juvenile boards and courts have some authority to create additional exceptions to that principle.

Criminal vs. Juvenile Records. Although juvenile records are civil, not criminal in nature, because they address conduct that violates the law, they are more frequently compared to criminal records than they are to other civil records. Clerk of court criminal records are generally public, with some exceptions for records of children, discussed herein. The records of the clerk of the juvenile court are not public. Criminal records of clerks of court are sometimes sold to companies and are available for a fee on the Internet. These databases include records in cases that have resulted in dismissals or verdicts of not guilty as well as those in which a guilty finding was made. Juvenile court clerk records are not available on the Internet. Criminal records of felony or jailable misdemeanor convictions or of deferred adjudications for those offenses on the Texas Department of Public Safety (DPS) computerized criminal history database are public records. Government Code Section 411.135(a)(2). Juvenile adjudications on that same database are not public. Criminal conviction and deferred adjudication records from that database are available on the Internet at DPS and on commercial sites. Government Code Section 411.135(b). Juvenile records from that same database are not on the Internet.

Sex offender registration records of juveniles and adults, including photographs, are public records on the DPS database. Government Code Section 411.135(a)(1). Like criminal conviction and deferred adjudication records, juvenile and criminal sex offender registration records are available on the Internet. Government Code Section 411.135(b).

Criminal records may be expunged only under very limited circumstances set out in Code of Criminal Procedure Article 55.01. Juvenile records are subject to destruction or sealing in a somewhat broader array of cases, including many in which the juvenile was adjudicated but appears to have been rehabilitated.

Justice and Municipal Court Cases Involving Juveniles. When there is a case against a child in justice or municipal court for a traffic offense or other fineable only offense, the court proceedings are open to the public, just as are any other criminal court proceedings. Additionally, prior to 2011, clerk of court records of offenses committed by children were subject to public inspection to the same extent that any other records in criminal proceedings are subject to inspection.

In 2011, the legislature created Code of Criminal Procedure Article 45.0217 in an attempt to make justice and municipal court records confidential to the same extent that juvenile court records are confidential. At that time, Article 45.0217 provided that the criminal records and files related to a child who was convicted of and who satisfied the judgment for a fine-only misdemeanor offense, other than a traffic offense, were confidential and could only be disclosed in limited circumstances. In 2013, changes were made to extend the protections to criminal record and files related to all children charged with a fine-only misdemeanor offense in justice or municipal court, not only those who were convicted and who successfully satisfied the judgment. See discussion later in this chapter and in Chapter 23.

A child convicted of a non-traffic fineable only offense in justice or municipal court is eligible later to seek expunction of the criminal files and records. For a discussion of expunging justice or municipal court records concerning children, see the section on Destruction and Sealing later in this chapter.

A. Use of Juvenile Record in Other Proceedings

Section 51.13 of the Family Code provides general guidance on the use of a juvenile record in other proceedings involving the child:

> (a) ...An order of adjudication or disposition in a proceeding under this title is not a conviction of crime...[and] does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.
>
> (b) The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent:
>
> (1) proceedings under this title in which the child is a party;
>
> (2) sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965; or
>
> (3) civil commitment proceedings [as an adult sexual predator] under Chapter 841, Health and Safety Code.

It is important to distinguish among several different situations in which an attempt is made to use a juvenile record in other proceedings.

1. Use to Impeach the Testimony of a Witness

When a person testifies as a witness in a court of law, whether in a civil or criminal proceeding, a cross-examining party is entitled to show that the witness was previously convicted of a felony or of a misdemeanor involving moral turpitude and that "the probative value of admitting this evidence outweighs its prejudicial effect to a party." Texas Rules of Evidence Rule 609(a). This is permitted because a prior conviction is thought to have a bearing on the credibility or believability of the witness and is, therefore, information the judge or jury should have. However, if at least 10 years has passed since the later of the conviction or release from confinement, the evidence of conviction is admissible only if its probative value substantially outweighs its prejudicial effect. Texas Rules of Evidence Rule 609(b).

In *Ruth v. State*, 522 S.W.2d 517 (Tex.Crim.App. 1975), after the defendant testified in his own defense, the prosecutor asked him a number of questions about his involvement with the law as a juvenile. On appeal, the Court of Criminal Appeals, referring to Sections 51.13(a) and (b), held that a juvenile record is not admissible to impeach the testimony of a witness:

> [A] witness' juvenile delinquency record may not be used to impeach him. Dispositions under proceedings against juveniles are never convictions for crime.... [T]his Court said in *Rivas v. State*, 501 S.W.2d 918, 919 (Tex.Crim.App. 1973) that] "An adjudication of juvenile delinquency may be based upon proof of acts which would constitute felonies or misdemeanors involving moral turpitude if committed by an adult, but such an adjudication does not constitute conviction for a felony or a misdemeanor involving moral turpitude." ...
>
> [The purpose of this rule is to] protect the accused from the odium and stigma attached to any act of youthful indiscretion which had eventuated in a prosecution.

522 S.W.2d at 518-19.

The Court of Appeals in *Hall v. State*, 745 S.W.2d 579 (Tex.App.—Fort Worth 1988, pet. ref'd) reinforced the rule that an adjudication of delinquency is not a conviction of crime and therefore is not admissible to impeach the testimony of a witness in court proceedings. At issue was whether the State should have been permitted on cross-examination of a defense witness to show that the witness had recently been released from TYC. The court held that this was a proper subject for cross-examination by the State because it was relevant to explain the dispute between the defendant and the witness and provided a possible motive for the shooting of a bystander by the defendant. The inquiry, therefore, had relevancy to the proceedings other than merely for impeachment—to show the bias of the witness.

By contrast, in *Gilmore v. State*, 871 S.W.2d 848 (Tex.App.—Houston [14th Dist.] 1994, no pet.), the Court of Appeals upheld the trial court's ruling precluding the defendant from cross-examining the complainant in an assault case by showing he had previously been incarcerated in TYC. The complainant's TYC commitment had no relevance to the trial other than to impeach his testimony, which is not permitted under the Texas Rules of Evidence.

Rule 609(d) of the Texas Rules of Evidence provides a special rule for juvenile adjudications:

> Evidence of a juvenile adjudication is admissible under this rule only if: (1) the witness is a party in a proceeding conducted under title 3 of the Texas Family Code; or (2) the United States or Texas Constitution requires that it be admitted.

The reference to the constitutions does not relate to impeachment but deals with the situation of *Davis v. Alaska*, which is discussed later in this chapter.

Under Rule 609(d), a juvenile adjudication is admissible in a hearing under the Juvenile Justice Code in which the juvenile respondent testifies in order to impeach the credibility of his or her testimony. If that same person were being tried as an adult and testified, the same adjudication would not be admissible to impeach the criminal court testimony. See *Reynosa v. State*, UNPUBLISHED, No. 04-04-00810-CR, 2005 Tex.App.Lexis 10500, Juvenile Law Newsletter ¶ 06-1-10 (Tex.App.—San Antonio 2005, no pet.) (cross-examination concerning prior juvenile adjudications improper but instruction and admonishment in jury charge to disregard the question cured error).

Citing Rule 609(d), the Dallas Court of Appeals held that a criminal defendant was not denied his right of cross-examination when the trial court refused to permit him to ask a witness about a prior juvenile adjudication. Nothing in the facts brought the matter within the purview of *Davis v. Alaska*. See also *Clay v. State*, UNPUBLISHED, No. 05-94-01770-CR, 1996 WL 167930, 1996 Tex.App.Lexis 1370, Juvenile Law Newsletter ¶ 96-2-10 (Tex.App.—Dallas 1996, pet. ref'd). See *Irby v. State*, 327 S.W.3d 138 (Tex.Crim.App. 2010) (defense must show some causal connection or logical relationship between witness's juvenile probationary status and his potential bias to testify favorably for the State before the witness may be cross-examined with that status); *Brookins v. State*, UNPUBLISHED, No. 08-10-00242-CR, 2011 WL 6357786 (Tex.App.—El Paso, 2011, no pet.) (defense prohibited from cross-examining complainant about his juvenile record for "general impeachment of his credibility"). See also *Foster v. State*, 25 S.W.3d 792 (Tex.App.—Waco 2000, pet. ref'd) (cannot impeach criminal trial testimony of accomplice with evidence of a closed juvenile case); *Soto v. State,* UNPUBLISHED, No. 03-99-00522-CR, 2001 WL 42969, 2001 Tex.App.Lexis 375, Juvenile Law Newsletter ¶ 01-1-12 (Tex.App.—Austin 2001, no pet.) (cannot impeach with offense for which witness in criminal trial was sent to TYC [TJJD] even though witness is still on parole for that offense); *Hatter v. State*, UNPUBLISHED, No. 03-04-00359-CR, 2006 WL 1439090, 2006 Tex.App.Lexis 4516 (Tex.App.—Austin 2006, no pet.) (cannot ask witnesses in criminal trial whether they were currently on juvenile probation).

A witness can "open the door" to impeachment by placing his or her character in issue while testifying. However, merely stating that one is a responsible person is not placing one's character for being a law-abiding person in issue and does not open the door to admitting a juvenile adjudication. *Sorelli v. State*, UNPUBLISHED, No. 05-92-02481-CR, 1994 WL 709317, Juvenile Law Newsletter ¶ 95-1-5 (Tex.App.—Dallas 1994, no pet.) (reversed for admitting record of three juvenile felony adjudications into evidence in criminal trial). By contrast, the criminal defendant's testimony in *Powell v. State*, UNPUBLISHED, No. 05-94-01864-CR, 1996 WL 601711, 1996 Tex.App.Lexis 4653, Juvenile Law Newsletter ¶ 96-4-35 (Tex.App.—Dallas 1996, no pet.) that he didn't have "too many run-ins with the police" opened the door for the State to ask him on cross-examination about his five juvenile adjudications. See also *Andrews v. State*, UNPUBLISHED, No. 11-02-00334-CR, 2003 WL 22741663, 2003 Tex.App.Lexis 9955, Juvenile Law Newsletter ¶ 03-4-20 (Tex.App.—Eastland 2003, no pet.) (evidence of defendant's juvenile record admissible to refute the false impression left by defendant's testimony on cross-examination that he "had never been in trouble before"); *Franklin v. State*, UNPUBLISHED, No. 04-02-00726-CR, 2003 WL 22047194, 2003 Tex.App.Lexis 7663, Juvenile Law Newsletter ¶ 03-4-03 (Tex.App.—San Antonio 2003, no pet.) (defendant's prior juvenile adjudication admissible based on his direct testimony that he "[wasn't a] criminal" and "[didn't do] things like that").

However, the false impression must be sufficiently clear to allow for impeachment evidence. In *Carter v. State*, UNPUBLISHED, No. 06-02-00174-CR, 2004 WL 726252, 2004 Tex.App.Lexis 3073, Juvenile Law Newsletter ¶ 04-2-13 (Tex.App.—Texarkana 2004, pet. ref'd), the court found that defendant's testimony did not open the door by leaving a false impression when examined in the context of counsel's specific question and therefore evidence of defendant's juvenile adjudications for reckless injury and assault was inadmissible for impeachment purposes. Nevertheless, the court held that the admission was harmless error and that the same evidence was admissible to refute defendant's theory of self-defense.

2. Use to Cross-Examine Character Witness

When a person accused of a criminal offense puts on the stand a witness to testify about the defendant's good character or reputation, the prosecutor is entitled to ask that witness about any incidents that may be inconsistent with the trait of character the witness has testified about. For example, in *Love v. State*, 533 S.W.2d 6 (Tex.Crim.App. 1976), a witness at the penalty phase of defendant's murder trial testified that defendant had a good reputation. The prosecutor then asked the witness whether she had heard that the defendant while a juvenile had been arrested for the offense of rape and for fondling a juvenile female. The Court of Criminal Appeals held that Section 51.13, Family Code, does not prevent questions of this sort from being asked of character witnesses. In part, this is because only the incident itself is being inquired about in a "have you heard" question and not a juvenile court adjudication or disposition. Also, the question being asked is whether the witness has heard of the incident, not whether the incident in fact occurred. The reason such questions are permitted is to test the witness' true knowledge of the defendant's reputation by inquiring into matters of a public nature about which the witness should know that are inconsistent with the reputation in question.

3. Use as a Basis for Reputation Testimony

Code of Criminal Procedure Article 37.07, Sec. 3(a), permits testimony at the penalty phase of a criminal trial about the defendant's "general reputation." The courts have held that merely because the witness testifying for the State about the defendant's bad reputation for being a peaceable and law-abiding person acquired knowledge of that reputation while the defendant was a juvenile does not preclude that testimony. *Anderson v. State*, 717 S.W.2d 622 (Tex.Crim.App. 1986); *Robles v. State*, 830 S.W.2d 779 (Tex.App.—Houston [1st Dist.] 1992, pet. ref'd).

4. Use at Penalty Phase of Criminal Trial

The law relating to use of a juvenile record in criminal penalty proceedings has undergone substantial changes in recent years. Under current law, an adjudication of a juvenile offense is sometimes admissible and an unadjudicated juvenile offense is also sometimes admissible. The methods of proof for an adjudication and for unadjudicated conduct must of necessity, differ, however.

a. Adjudicated Juvenile Offenses

Section 51.13(b)(2) permits evidence of an adjudication to be admitted in "sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965." In 1987, the legislature explicitly provided for the admissibility of adjudicated juvenile offenses in the penalty phase of a criminal trial by amending Code of Criminal Procedure

Article 37.07, Sec. 3(a) to authorize the admission of a juvenile adjudication of a felony in a criminal penalty phase unless the adjudication was based on conduct that had occurred more than five years before the offense being tried and, during that time, the defendant had not engaged in delinquency, conduct indicating a need for supervision (CINS), or criminal conduct for which he or she had been adjudicated or convicted.

Felonies and Jailable Misdemeanors. In 1995, the legislature added jailable misdemeanors to the list of eligible adjudications and repealed the five-year rule of remoteness. As amended, Code of Criminal Procedure Article 37.07, Sec. 3(a)(1) currently provides in relevant part:

> Additionally, notwithstanding Rule 609(d), Texas Rules of Evidence...evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of:
>
> (1) a felony; or
>
> (2) a misdemeanor punishable by confinement in jail.

A jailable misdemeanor adjudication is admissible, but a fineable-only misdemeanor adjudication is not. In *Castro v. State*, UNPUBLISHED, No. 05-96-01154-CR, 1998 WL 598812, 1998 Tex.App.Lexis 5730, Juvenile Law Newsletter ¶ 98-4-09 (Tex.App.—Dallas 1998, no pet.), the juvenile court judgment simply recited that the defendant was adjudicated for three counts of misdemeanor theft without identifying the penalty category of the offenses. The Court of Appeals rejected the argument that failing to identify the penalty category should preclude the admission of the adjudications because there was a possibility the offenses were not punishable by confinement in jail. The basis of the rejection was the fact that the juvenile was adjudicated for "delinquent conduct," which, by definition under Section 51.03, Family Code, is conduct that is punishable by confinement in jail; a fine-only misdemeanor would not result in an adjudication for delinquent conduct. See also *Parrish v. State*, UNPUBLISHED, No. 10-04-00037-CR, 2005 WL 241193, 2005 Tex.App.Lexis 869, Juvenile Law Newsletter ¶ 05-1-18 (Tex.App.—Waco 2005, pet. ref'd) (no error in overruling defendant's objections to evidence of his juvenile dispositions); *Chappel v. State*, UNPUBLISHED, No. 05-10-00629-CR, 2011 WL 2438520, Juvenile Law Newsletter ¶ 15-3-7 (Tex.App.— Dallas 2011, no pet.).

What is an Adjudication. The question of what constitutes an adjudication of a felony was addressed in *Murphy v. State,* 860 S.W.2d 639 (Tex.App.—Fort Worth 1993, no writ). Appellant was adjudicated delinquent for a misdemeanor and placed on probation. His probation was later revoked for commission of the felony of aggravated assault. Later, in criminal penalty proceedings, the State was permitted to introduce evidence of the juvenile adjudication, probation, and revocation. The Court of Appeals held this was error because proceedings to revoke probation, although for a felony, are not adjudication proceedings. Appellant had been adjudicated only for a misdemeanor, which under the statute as it then existed was not an admissible adjudication. Cf. *Lamb v. State*, UNPUBLISHED, No. 01-03-00587-CR, 2004 WL 1472114, 2004 Tex.App.Lexis 5886, Juvenile Law Newsletter ¶ 04-3-10 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd) (no abuse of discretion to admit appellant's juvenile adjudication for evading arrest and the existence of the probation violation resulting in said adjudication).

Only the juvenile court judgment of adjudication or adjudication and disposition is admissible in the penalty phase. The state may offer a certified copy of the judgment into evidence. *Garcia v. State*, UNPUBLISHED, No. 06-02-00040-CR, 2004 WL 350670, Juvenile Law Newsletter ¶ 04-2-01 (Tex.App.—Texarkana 2004, pet. ref'd) [certified copy of judgment is self-authenticating under Tex.R.Evid. 902(4)]; Cf. *Rangel v. State*, UNPUBLISHED, No. 10-07-00247-CR, 2009 Tex.App.Lexis 1555, Juvenile Law Newsletter ¶ 09-2-6B (Tex.App.—Waco 2009), cert. denied, 130 S.Ct. 407, 175 L.Ed.2d 280 (2009) (uncertified court records not self-authenticating under Tex.R.Evid. 902(4); however, erroneous admission harmless); *Ruiz v. State*, 293 S.W.3d 685 (Tex.App.—San Antonio 2009, pet. ref'd) (erroneous admission of juvenile adjudications had but slight impact on jury with no effect on defendant's substantial rights). If those documents are included in a larger packet of materials from the juvenile court, as will sometimes be the case, it is the responsibility of defense counsel to assure that only the judgments are admitted before the jury. *Garner v. State*, 957 S.W.2d 112 (Tex.App.—Amarillo 1997, no pet.) (culling out from the packet documents relating to the detention hearing and to termination from prior probations). Defense counsel must also make a contemporaneous objection to the admission of a juvenile adjudication at the punishment hearing to preserve error on appeal. *Dorsey v. State*, UNPUBLISHED, No. 12-07-00251-CR, 2009 Tex.App.Lexis 2153, Juvenile Law Newsletter ¶ 09-2-15 (Tex.App.—Tyler 2009, pet. ref'd).

In *Hull v. State*, 172 S.W.3d 186 (Tex.App.—Dallas 2005, pet. ref'd), appellant objected to the admission of two juvenile judgments during the penalty phase of his adult criminal trial because they were not properly certified and did not contain seals. The record showed the documents were from the Hunt County Juvenile Court and maintained by the Hunt County clerk's office. The Court of Appeals held they were correct copies upon which the clerk's office could rely to account for a juvenile's record. "Thus, one means of authenticating a public record under [Rule] 901 is showing that the document is from a public office authorized to keep such a record." 172 S.W.3d at 189. The court also noted there is no requirement under Rule of Evidence 901(b)(7) that a judgment contain a seal and thus concluded that the documents were sufficiently authenticated. Cf. *Benton v. State*, 336 S.W.3d 355, 359 (Tex.App.—Texarkana 2011, pet. ref'd) (appellant linked to prior juvenile court judgments via his name, date of birth, his mother's name, and his signature).

Constitutionality. In *Jackson v. State*, 861 S.W.2d 259 (Tex.App.—Dallas 1993, no writ), the Court of Appeals rejected the argument that the 1987 amendment providing for admission of juvenile felony adjudications was a violation of the separation of powers doctrine of the Texas Constitution because it interfered with the power of the Court of Criminal Appeals to promulgate rules of criminal evidence. Article V, Section 31(c) of the Texas Constitution gives the legislature the power to delegate rulemaking authority to the courts, subject to "such limitations and procedures as may be provided by law." The 1987 amendment is a limitation authorized by that language and, therefore, is not an invasion of the rulemaking powers of the judiciary.

In *Escamilla v. State*, 143 S.W.3d 814 (Tex.Crim.App. 2004), *cert. denied*, 544 U.S. 950, 125 S.Ct. 1697 (2005), the Court of Criminal Appeals affirmed that the State's use of Escamilla's juvenile record during the punishment phase of his adult capital murder trial was not a violation of due process or equal protection principles. See also *Gamble v. State*, UNPUBLISHED, No. 01-06-01028-CR, 2008 WL 2548512, 2008 Tex.App.Lexis 4843, Juvenile Law Newsletter ¶ 08-3-11(Tex.App.—Houston [1st Dist.] 2008, pet. ref'd) (declining to extent the reasoning of *Roper v. Simmons* to the Texas enhancement scheme); *Corwin v. State*, 870 S.W.2d 23, 36-37 (Tex.Crim.App. 1993), *cert. denied*, 513 U.S. 826, 115 S.Ct. 95 (1994) (juvenile misconduct introduced during capital punishment proceeding did not violate due process or Eighth Amendment).

Date of Misdemeanor Offense. In 1997, the legislature added Code of Criminal Procedure Article 37.07, Sec. 3(i) to provide that an adjudication for a jailable misdemeanor is admissible only if the conduct upon which the adjudication is based occurred on or after January 1, 1996, the effective date of the bill that added the jailable misdemeanor adjudication provision to the Code of Criminal Procedure.

Notice of Intent to Introduce Adjudication. Code of Criminal Procedure Article 37.07, Sec. 3(g) provides:

> On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Evidence....The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

Rule 404(b), which deals with other crimes evidence, requires the prosecutor, on request of a defendant to provide reasonable notice before trial that the prosecutor intends to introduce evidence admissible under the rule, other than evidence arising from the same transaction, in its case-in-chief.

In *Ramirez v. State*, 967 S.W.2d 919 (Tex.App.—Beaumont 1998, no pet.), the Court of Appeals held that two weeks' notice of intent to introduce a juvenile adjudication at the penalty phase of a trial was sufficient and that notice given on Friday of intent to introduce felony convictions in the penalty phase of a trial to begin the next Monday was reasonable notice in view of the prosecutor's open file policy.

Proving Identity of Person Previously Adjudicated. The State is required to prove that the person about whom a prior adjudication pertains is the same person who is present as a defendant in the penalty phase of the criminal proceeding. Simply having the same name is not sufficient. The usual way of proving identity is through fingerprint comparison. A person fingerprints the defendant and compares those prints with ones associated with a judgment in a prior case.

As originally enacted, Section 54.04(j) required that a juvenile's thumbprint be affixed or attached to all juvenile orders of adjudication for a felony. That print can be compared with the defendant's thumbprint to establish that he or she is the same person adjudicated in the

juvenile case. In 2001, the legislature amended Section 54.04(j) to require taking the thumbprint of respondents adjudicated for jailable misdemeanors as well as for felonies. That change was made to reflect a 1995 amendment to make juvenile jailable misdemeanor adjudications admissible in criminal penalty proceedings.

In 2007, the legislature added the words "or attached" to Section 54.04(j) to clarify that the requirement that a juvenile's thumbprint be affixed to the disposition order can be met by attaching a document that contains the print. This change facilitates the use of a fingerprint card, which provides the necessary high resolution needed for imaging documents into a paperless system, thus facilitating electronic storage of such information.

There are other ways of proving identity. If the criminal defendant in the course of testifying admits to the details of an adjudication that match the details of an adjudication later introduced into evidence, that constitutes proof by judicial admission. *Morgan v. State*, UNPUBLISHED, No. 05-94-01165-CR, 1996 WL 403994, 1996 Tex.App.Lexis 3118, Juvenile Law Newsletter ¶ 96-3-18 (Tex.App.—Dallas 1996, pet. ref'd). In *Ramirez v. State*, 967 S.W.2d 919 (Tex.App.—Beaumont 1998, no pet.), the juvenile probation officer testified that the person named in a juvenile court judgment is the defendant; that was deemed acceptable proof.

In an unusual turn of events, the prosecutor in *Daniels v. State*, UNPUBLISHED, No. 03-98-00014-CR, 1998 WL 750380, 1998 Tex.App.Lexis 6722, Juvenile Law Newsletter ¶ 98-4-25 (Tex.App.—Austin 1998, no pet.) called defense counsel to testify at the penalty phase before the judge that his client was the same person whom he represented in juvenile court in the case giving rise to the adjudication the State sought to introduce. The trial court forced the attorney to testify, following which the juvenile adjudication was admitted into evidence. The claim was made that this procedure violated Rule 3.08(b) of the Texas Disciplinary Rules of Professional Conduct in that it required Daniels' lawyer to "furnish testimony that [would] be substantially adverse to the lawyer's client." After the testimony, the trial court recessed the proceedings to allow Daniels the opportunity to retain new counsel, but he decided to keep his lawyer. By not obtaining different counsel and by asserting that there was no conflict between him and his attorney, Daniels by his conduct showed that the violation did not affect his substantial rights or deprive him of a fair trial. In addition, a codefendant without a prior juvenile adjudication received the identical sentence, which is some evidence Daniels was not harmed by the juvenile adjudication.

Disposition Evidence. At the penalty phase of a criminal trial, the judge permitted the State to prove prior juvenile dispositions as well as adjudications. Although Article 37.07 speaks only to prior adjudications, the Court of Appeals held that the prior juvenile dispositions could come into evidence as other "relevant conduct" as though they were unadjudicated conduct. *Santoya v. State*, UNPUBLISHED, No. 04-94-00761-CR, 1996 WL 14073, Juvenile Law Newsletter ¶ 96-1-12 (Tex.App.—San Antonio 1996, pet. ref'd) (failing to discuss the effect of Family Code Section 51.13(b) on its analysis). See also *Millican v. State*, UNPUBLISHED, No. 12-03-00230-CR, 2004 WL 2958371, 2004 Tex.App.Lexis 11617, Juvenile Law Newsletter ¶ 05-1-12 (Tex.App.—Tyler 2004, no pet.) (no abuse of discretion in admitting evidence of disposition and order modifying disposition of appellant's prior adjudication).

b. Unadjudicated Juvenile Offenses

In 1989, the legislature amended Code of Criminal Procedure Article 37.07 to authorize unadjudicated criminal conduct to be admitted in the penalty phase of a criminal trial by adding language that provided, "evidence may be presented as to any matter that the court deems relevant to sentencing."

However, the Court of Criminal Appeals in *Grunsfeld v. State*, 843 S.W.2d 521 (Tex.Crim.App. 1992) held that the language added to Article 37.07 in 1989 did not authorize the admission of unadjudicated offenses into evidence at the penalty stage of non-capital cases when the jury was asked to set punishment. That ruling was applied to unadjudicated juvenile offenses. *Williams v. State*, UNPUBLISHED, No. C14-91-00441-CR, 1992 WL 389586, 1992 Tex.App.Lexis 3242, Juvenile Law Newsletter ¶ 93-1-4 (Tex.App.—Houston [14th Dist.] 1992, pet. ref'd).

1993 Legislation. In 1993, the legislature again amended Article 37.07, this time to overrule the *Grunsfeld* decision. As amended in 1993, Article 37.07, Sec. 3(a) [now Sec. 3(a)(1)], permits at the penalty stage:

> … any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or

> for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

See also *Dawson v. State*, UNPUBLISHED, No. 10-01-202-CR, 2003 WL 23120062, 2003 Tex.App.Lexis 10873, Juvenile Law Newsletter ¶ 04-1-13 (Tex.App.— Waco 2003, no pet.) (holding that Texas courts have consistently held that unadjudicated crimes or bad acts committed by the defendant as a juvenile are admissible during the punishment phase of an adult criminal trial).

Pre-Sentence Investigation Report. Even before the 1993 amendment, if the defendant elected punishment by the judge, the trial court was authorized to order an adult supervision officer to conduct a pre-sentence investigation and the officer could include the defendant's juvenile record in his or her report, which could include records of arrests, adjudications, and dispositions. The report may include "the criminal and social history of the defendant." Code of Criminal Procedure Article42A.253. If the defendant elects jury punishment, then there is no pre-sentence report. Code of Criminal Procedure Article 37.07, Sec. 3(d).

Further, even before the 1993 amendment, the trial court could question the defendant at sentencing about his or her juvenile record. In *Walker v. State*, 493 S.W.2d 239 (Tex.Crim.App. 1973), the trial court, in considering the defendant's application for probation at sentencing, questioned the defendant extensively about his juvenile record. This was upheld on appeal:

> [T]he appellant had entrusted his motion for probation solely within the hands of the trial judge. Unquestionably, the judge could have ordered a presentence report before considering appellant's probation motion. That report, by statute, could include the circumstances of the offense, his criminal record, social history and present condition of the defendant
>
> …
>
> It makes a great deal of sense that the judge should have before him a thorough report of the accused's past record and background, [*sic*] when considering his motion for probation. The very purpose of granting probation is to release a convicted defendant who shows himself capable of adhering to certain conditions. The present appellant was 18 years old at the time of trial. The principles just enunciated apply even more so in such a case. It would be ridiculous to conclude that an 18-year-old with a lengthy juvenile record should be granted the same consideration as someone of the same age with a spotless record.

493 S.W.2d at 240.

When the trial judge inquires about a defendant's juvenile record, he or she may consider juvenile arrests that have not resulted in adjudication as well as those that have. *Pitts v. State*, 560 S.W.2d 691 (Tex.Crim.App. 1978).

c. Reconciling Provisions Dealing with Adjudicated and Unadjudicated Offenses

By itself, the 1995 amendment to Article 37.07, Code of Criminal Procedure, would permit juvenile offenses to be admitted in evidence in a jury punishment proceeding only if the offenses resulted in a juvenile felony or jailable misdemeanor adjudication. The 1993 amendment, by itself, would permit any juvenile offense, whether adjudicated or not, to be admitted at the penalty phase before a jury in a non-capital case as a "bad act," provided the defendant were shown beyond a reasonable doubt to have been responsible for the act.

Can these two amendments be reconciled? There is a major distinction between proving prior criminal conduct directly and proving it by conviction or adjudication. The existence of a conviction or adjudication greatly simplifies the proof process. All that is necessary is to prove that the defendant is the same person who was convicted or adjudicated in the prior proceedings. The conviction or adjudication is proof that the defendant in that case committed the conduct in question. The defendant is not permitted to re-open the prior proceedings to offer defenses to the charges because those charges have already been adjudicated. Similarly, the State is not permitted to prove the details of the prior adjudication, but only the name of the offense for which there was an adjudication. See *Lasker v. State*, UNPUBLISHED, No. 01-91-00851-CR, 1993 WL 472873, 1993 Tex.App.Lexis 3107, Juvenile Law Newsletter ¶ 93-4-11 (Tex.App.—Houston [1st Dist.] 1993, no pet.) (error to permit State to introduce photographs of victim of aggravated robbery for which defendant had been adjudicated in juvenile court).

By contrast, when one is attempting to prove criminal conduct directly—without the benefit of a conviction or adjudication—one must prove the elements of the offense and the identity of the offender just as in a criminal prosecution of that offense. Defenses to the charge are permissible, as are claims that the defendant is not the perpetrator of the offense.

One Court of Appeals has held that the State can have the best of both worlds: it can prove a prior juvenile adjudication and prove the details of that offense even to the extent of introducing victim impact testimony from the mother of the person killed in the episode that resulted in the juvenile adjudication. *Barletta v. State*, 994 S.W.2d 708 (Tex.App.—Texarkana 1999, pet. ref'd). On that logic, the criminal defendant should be permitted to introduce mitigating evidence concerning the offense for which he or she was previously adjudicated.

It would make no sense to say that evidence of a "bad act" not previously reduced to criminal conviction is admissible but evidence of the same "bad act" reduced to juvenile adjudication is not admissible. The need for the evidence is identical as are the problems in proving the prior "bad act." Therefore, any juvenile "bad act" that is proved directly by the State should be admissible in evidence under Article 37.07 as amended in 1993. This is consistent with the opinions of the Courts of Appeal under the 1989 amendment approving of the admission of unadjudicated juvenile offenses before the Court of Criminal Appeals acted in *Grunsfeld*. See *Barrera v. State*, UNPUBLISHED, No. C14-90-00528-CR, 1991 WL 242602, 1991 Tex. App. Lexis 2870, Juvenile Law Newsletter ¶ 92-1-3 (Tex.App.—Houston [14th Dist.] 1991, pet. ref'd) (holding that the 1989 amendment permitted evidence of unadjudicated misdemeanor juvenile offense despite other language in Article 37.07 which at that time restricted admissibility to juvenile felony adjudications).

The Eastland Court of Appeals in *McMillan v. State*, 926 S.W.2d 809 (Tex.App.—Eastland 1996, pet. ref'd) held that, under the 1995 amendment to Article 37.07, the State could, at the punishment phase, introduce evidence of unadjudicated juvenile offenses. See *Strasser v. State*, 81 S.W.3d 468 (Tex.App.—Eastland 2002, pet. ref'd); *Dawson v. State*, UNPUBLISHED, No. 10-01-202-CR, 2003 WL 23120062, 2003 Tex.App.Lexis 10873, Juvenile Law Newsletter 04-1-13 (Tex.App.—Waco 2003, no pet.) (same for juvenile offenses resulting in deferred prosecution).

The Texarkana Court of Appeals in *Rodriguez v. State*, 975 S.W.2d 667 (Tex.App.—Texarkana 1998, pet. ref'd) arrived at the same conclusion in rejecting a claim that defense counsel was ineffective in failing to object to proof of a juvenile offense on the ground it was unadjudicated.

On the other hand, should the State seek to prove a juvenile "bad act" by proof of a juvenile adjudication, it is restricted to adjudications for felonies or jailable misdemeanors. This is not a major restriction, since fineable only misdemeanors against juveniles are ordinarily handled in justice or municipal courts, not juvenile courts, and result in criminal convictions, not juvenile adjudications.

There is no inconsistency between the 1987/1995 language concerning juvenile adjudications and the 1993 language concerning extraneous offenses and bad acts. The 1993 language defines what can be proved in the penalty phase, while the 1987/1995 language permits use of juvenile adjudications, as authorized by Section 51.13(b), to show juvenile bad acts when there has been an adjudication.

5. Use to Confront and Cross-Examine State's Witness

The prohibition of Section 51.13 on the use of adjudications, dispositions, or evidence of juvenile proceedings must yield to the criminal defendant's constitutional right to confront the witnesses against him or her under certain circumstances.

In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974), the defendant was on trial for burglary. A key State's witness, Green, testified. Green was himself on juvenile probation for burglary. The trial court prohibited the defendant from showing the jury that Green was on juvenile probation because of a provision in the Alaska juvenile statute very similar to Section 51.13(b). The United States Supreme Court held the defendant was entitled to present this information to the jury:

> The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this [defendant] might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage

> the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.
>
> We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.... Here, however, [defendant] sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of [defendant] or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had [defendant] been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender.

415 U.S. at 319, 94 S.Ct. at 1111-12.

The rationale of *Davis* is that confrontation rights permit the criminal defendant to show the jury that the witness has a motive to seek favor from the prosecutor, who may be influential in the handling of pending juvenile matters, and that such a motive might color the witness's testimony in the present trial.

Davis v. Alaska does not authorize an attorney to engage in a fishing expedition on cross-examination. In *Saenz v. State*, 840 S.W.2d 96 (Tex.App.—El Paso 1992, pet. ref'd), defense counsel sought to cross-examine before the jury a 14-year-old State's witness concerning his contacts with juvenile authorities. Outside the jury's presence, the witness testified that juvenile authorities had only taken him home to his parents and the last contact he had with them was five years ago. Further, he knew of no juvenile charges presently pending against him.

The Court of Appeals distinguished *Davis v. Alaska* on the ground that in *Saenz* there was no "showing that the witness might have had some 'possible biases, prejudices, or ulterior motives' to testify in the State's favor as a result of his previous run-ins with the juvenile authorities." 840 S.W.2d at 100. In *Flores v. State*, UNPUBLISHED, No. 07-97-0229-CR, 1998 WL 487093, 1998 Tex.App.Lexis. 5133, Juvenile Law Newsletter ¶ 98-3-27 (Tex.App.—Amarillo 1998, no pet.), the criminal court judge refused to permit defendant to cross-examine a State's witness to a homicide about proceedings pending against him seeking revocation of his juvenile probation.

The Court of Appeals upheld the trial court's ruling on the highly questionable ground that since the witness had already entered into a plea bargain with the State in which his probation would not be revoked, there was no remaining motive for the witness to seek the prosecutor's favor. Of course, the plea bargain had not been executed at the time the witness testified and the jury should have been informed of the deal to permit it to evaluate its impact, if any, on the witness's testimony.

By contrast, the criminal court in *Henry v. State*, UNPUBLISHED, No. 03-96-00099-CR, 1996 WL 530009, 1996 Tex.App.Lexis 4180, Juvenile Law Newsletter ¶ 96-4-13 (Tex.App.—Austin 1996, no pet.), erred when it refused to permit the criminal defendant's attorney to ask a 13-year-old State's witness who participated in the same offense with which the defendant was charged what disposition his case received in juvenile court. However, the error was held to be harmless under the circumstances. See also *In the Matter of T.A.*, UNPUBLISHED, No. 11-06-00342-CV, 2008 Tex.App.Lexis 6692 (Tex.App.—Eastland 2008, pet. denied) (harmless error for trial court to refuse to allow defense counsel to cross-examine State's witness about being on community supervision).

The criminal trial court in *Ingram v. State*, UNPUBLISHED, No. 05-99-00442-CR, 2000 WL 979719, 2000 Tex.App.Lexis 4715, Juvenile Law Newsletter ¶ 00-3-21 (Tex.App.—Dallas 2000, pet. ref'd) would not permit the defendant to cross-examine the juvenile complainant in a sexual assault trial about her juvenile adjudication for theft. The Court of Appeals concluded that defendant's confrontation rights were not violated since the theft adjudication was not relevant to the trial, particularly because the theft case arose in a different county than the county in which the trial was occurring and was handled by a different prosecutor's office. Finally, the court concluded that, even if it had been error to exclude the evidence, it was harmless.

The criminal trial court in *Carrillo v. State,* UNPUBLISHED, No. 07-99-0185-CR, 2001 WL 1002384, 2001 Tex.App.Lexis 5672, Juvenile Law Newsletter ¶ 01-4-04 (Tex.App.—Amarillo 2001, pet. ref'd) refused to permit the defendant in an aggravated sexual assault trial to question the complaining witness about pending juvenile charges against her. The Court of Appeals upheld this denial on the highly questionable ground that, since the pending juvenile charges had no factual relationship

to the sexual assault accusations, they were not relevant to the trial of those charges, thereby ignoring the defendant's *Davis v. Alaska* argument entirely.

To cross-examine a witness about juvenile proceedings, defense counsel must know about the juvenile involvement of a State's witness. There is authority for the proposition that counsel can obtain pretrial discovery of a juvenile record of a potential State's witness on the same basis that counsel can obtain discovery of a criminal record. Under Code of Criminal Procedure Article 39.14, discovery of a criminal record requires a showing of good cause, materiality, and possession by the State of the record. In perhaps a Catch-22, it is not reversible error for a trial court to deny discovery of a juvenile or criminal record unless the defendant can show that such a record actually exists. *Medina v. State*, 986 S.W.2d 733 (Tex. App.—Amarillo 1999, pet. ref'd); see also *Gallegos v. State*, UNPUBLISHED, No. 08-07-00104-CR, 2009 Tex.App.Lexis 6707 (Tex.App.—El Paso 2009) (no error in denying motion to release juvenile records where appellant made no effort to obtain records from juvenile court, determine whether State possessed such records, or determine whether records even existed).

6. Use of Juvenile Proceedings as a Deposition

Texas Rules of Evidence Rule 804(b)(1) permits former testimony to be offered in evidence if the witness who previously testified is unavailable to testify in person and if the testimony is now offered against a party (or, in a civil case, a predecessor in interest) who had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In *Zepeda v. State*, 797 S.W.2d 258 (Tex.App.—Corpus Christi 1990, pet. ref'd), appellant was arrested for murder. At a juvenile court transfer hearing, a witness testified that he saw the appellant strike the deceased. Appellant was transferred to criminal court and was tried for murder. Late in the trial, the State announced it had been unable to locate the witness who had testified at the juvenile transfer hearing. The trial court permitted the State to read a transcript of that testimony as a deposition in the criminal trial. The Court of Appeals approved of this procedure, commenting:

> [A]lthough appellant complains that the prior hearing is not similar enough to the trial, at issue in both the certification hearing and at trial was whether appellant was the individual who beat [the deceased]. The prior testimony was offered by the State for the purpose of showing that [the witness] "did make a positive identification in front of the [appellant] and his own defense attorney." A review of the testimony shows that [the witness] was questioned by the State regarding his identification of appellant and whether appellant was the individual who hit [the deceased] in the head. The transcript further shows that appellant's attorney thoroughly cross-examined [the witness] with regard to his identification of appellant.

797 S.W.2d at 262.

Similarly, in *Coffin v. State,* 850 S.W.2d 608 (Tex.App.—El Paso 1993), *aff'd by* 885 S.W.2d 140 (Tex.Crim.App. 1994), a psychologist testified for the State at the discretionary transfer hearing about the maturity and sophistication of the defendant and the likelihood of rehabilitation in the juvenile system. After transfer, but before the criminal trial, the psychologist died. Following conviction for murder, the State was permitted to use the psychologist's transfer hearing testimony as a deposition in the penalty phase of the criminal case. The Court of Appeals held the testimony was admissible under Rule 804(b)(1) because defense counsel had had an opportunity and similar motive to develop the testimony by cross examination in the transfer hearing.

The Court of Criminal Appeals affirmed that decision in *Coffin v. State*, 885 S.W.2d 140 (Tex.Crim.App. 1994). It noted that the psychologist's testimony stating that it would take a long time to rehabilitate the appellant was relevant both at the certification hearing and at the penalty phase of the criminal trial. Appellant argued that, given the strength of the State's case at the certification hearing, it would have been futile to have engaged in extensive cross-examination of the psychologist. The Court of Criminal Appeals held that was a tactical choice that did not preclude admissibility of the testimony in the criminal trial:

> Rule 804(b)(1) admits prior testimony over a hearsay objection if there was opportunity and similar motive to cross-examine the witness at the prior proceeding. By its terms, applicability of the exception does not turn on whether the opponent actually availed himself of that opportunity.

885 S.W.2d at 149.

7. Use as Prior Felony Conviction

A 1995 amendment to Section 51.13 created an exception to the declaration in Section 51.13(a) that a juvenile adjudication is not a conviction of crime. Section 51.13(d), as amended in 2013, states:

> An adjudication under Section 54.03 that a child engaged in conduct that occurred on or after January 1, 1996, and that constitutes a felony offense resulting in commitment to the Texas Juvenile Justice Department under Section 54.04(d)(2), (d)(3), or (m) or 54.05(f) or commitment to a post-adjudication secure correctional facility under Section 54.04011 for conduct that occurred on or after December 1, 2013, (i.e. commitment to Travis County's post-adjudication correctional facility under the law that allowed for that through December 31, 2018) is a final felony conviction only for the purposes of Sections 12.42(a), (b), and (c)(1) or Section 12.425, Penal Code.

Penal Code Section 12.42(f) contains similar language. These provisions make reference only to the repeat offender provisions of Penal Code Section 12.42.

The Court of Appeals in *Franklin v. State*, UNPUBLISHED, No. 06-00-00121-CR, 2001 WL 169773, 2001 Tex.App.Lexis 1107, Juvenile Law Newsletter ¶ 01-1-20 (Tex.App.—Texarkana 2001, no pet.) ruled that an adult enhancement allegation of a juvenile felony adjudication and TYC [TJJD] commitment was proved. The evidence consisted of a copy of the Order of Adjudication and Order of Dispositional Commitment to the Texas Youth Commission [Texas Juvenile Justice Department]. These were admissible under the public records exception to the hearsay rule under Texas Rules of Evidence Rule 803(8). See also *Gamble v. State*, UNPUBLISHED, No. 01-06-01028-CR, 2008 WL 2548512, 2008 Tex.App.Lexis 4843, Juvenile Law Newsletter ¶ 08-3-11 (Tex.App.—Houston [1st Dist.] 2008, PDR ref'd) (juvenile judgment for burglary of a habitation was a conviction of a second degree felony for enhancement purposes).

Because the habitual offender provision in Penal Code Section 12.42(d) is not included in Family Code Section 51.13 or Penal Code Section 12.42(f), juvenile adjudications cannot be used for either or both of the prior felony convictions needed to invoke the habitual offender provision with its minimum sentence of 25 years. See *Vaughns v. State*, UNPUBLISHED, No. 04-10-00364-CR, 2011 WL 915700 *4, Juvenile Law Newsletter ¶ 11-2-5 (Tex.App.—San Antonio 2011, pet. ref'd) ("It is clear the Legislature did not intend for juvenile adjudications to be final felony convictions in order to enhance a sentence under subsection (d) as a habitual offender.").

Use of the word "only" in Section 51.13(d) means that a juvenile felony adjudication does not constitute a prior felony conviction for any purposes other than for the repeat offender statute. For example, a juvenile felony adjudication would not be a prior felony conviction that would make a criminal defendant ineligible to receive probation from the jury. See Dix and Dawson, *Texas Criminal Practice and Procedure* §39.23 (2001) for a discussion of that requirement; *Ex Parte Cash*, 178 S.W.3d 816 (Tex.Crim.App. 2005); *Malpica v. State*, 108 S.W.3d 374 (Tex.App.—Tyler 2003, pet. ref'd) (impliedly approving of a jury instruction that a juvenile adjudication for a felony does not disqualify one from receiving community supervision from a jury in a criminal trial); but Cf. *Thompson v. State*, 267 S.W.3d 514 (Tex.App.—Austin, pet. ref'd) (defendant with prior juvenile felony adjudication may apply for probation, and jury may recommend it even after enhancing the sentencing range, depending on sentence imposed).

Section 51.13(d) applies only to offenses committed on or after January 1, 1996. Unfortunately, it was initially unclear whether only the criminal offense to be enhanced must be committed on or after January 1, 1996, or whether, in addition, the previous juvenile adjudications used to enhance must be for offenses committed on or after January 1, 1996.

If the provision is interpreted to permit juvenile adjudications for conduct occurring before January 1, 1996, to be used for enhancement, an additional problem is raised. If the adjudication is based upon a plea of true or a stipulation of evidence, which is often the case in juvenile court, then the issue would be raised whether the plea or stipulation was voluntary when entered. The juvenile would have had no way of knowing at the time of the plea or stipulation that later the legislature would increase the severity of the consequences of the adjudication in this fashion. Further, it can be argued that, unless the juvenile court judge was prescient, he or she would have failed to address "the admissibility of the record of a juvenile court adjudication in a criminal proceeding" by informing the juvenile of this enhancement provision in admonishing the juvenile as required by Section 54.03(b)(2). This, in turn, might make the adjudication invalid and, therefore, preclude its use to enhance the criminal charge.

In 1997, the legislature clarified the uncertainty as to which adjudications qualify for treatment as prior felony convictions by providing in Section 51.13(d) that, to qualify, the juvenile adjudication must have been based upon conduct that occurred on or after January 1, 1996, which was the effective date of the 1995 amendment that added the enhancement provision to the Family Code. This provision was enacted to avoid questions of the validity of pleas and stipulations.

The Austin Court of Appeals held in *Limon v. State*, UNPUBLISHED, No. 03-98-00670-CR, 1999 WL 603452, 1999 Tex.App. Lexis 5918, Juvenile Law Newsletter ¶ 99-3-35 (Tex.App.—Austin 1999, pet. ref'd) that the 1997 enactment did not apply to a case in which the offense being tried was committed before its effective date of September 1, 1997.

The Dallas Court of Appeals in *Sims v. State*, 84 S.W.3d 768 (Tex.App.—Dallas 2002, pet. ref'd) held that it was harmful error for the criminal trial court to permit the State to prove a juvenile felony adjudication for pre-1996 conduct in the face of the 1997 amendment. That amendment applied because the criminal conduct being tried occurred after the amendment's effective date.

The Court of Appeals in *Limon* held that the failure to object before the day trial began, as required by Code of Criminal Procedure Article 1.14, waived any error. The Houston First District Court of Appeals held in *Daniels v. State*, UNPUBLISHED, No. 01-96-01374-CR, 1999 WL 111481, 1999 Tex.App.Lexis 1452, Juvenile Law Newsletter ¶ 99-2-39 (Tex.App.—Houston [1st Dist.] 1999, no pet.), that failure to object before the day trial began to an allegation of a juvenile adjudication for an offense that was committed before 1996, as required by Code of Criminal Procedure Article 1.14, waived any defect in using that prior adjudication to enhance. Cf. *Hall v. State*, 137 S.W.3d 847 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd) (appellant's plea of true precluded complaint about its use for enhancement); *Menson v. State*, UNPUBLISHED, No. 07-09-0221-CR, 1998 WL 534487, Juvenile Law Newsletter ¶ 11-1-8 (Tex.App.—Amarillo 2011, pet. ref'd) (appellant's plea of true precluded complaint that State failed to prove that juvenile offense had not been committed before 1996).

B. Confidentiality of Juvenile Court Proceedings

Texas law gives the juvenile court judge some discretion to decide whether the public may attend a juvenile court hearing. As amended in 1997, Section 54.08 provides:

> (a) Except as provided by this section, the court shall open hearings under this title to the public unless the court, for good cause shown, determines that the public should be excluded.
>
> (b) The court may not prohibit a person who is a victim of the conduct of a child, or the person's family, from personally attending a hearing under this title relating to the conduct by the child unless the victim or member of the victim's family is to testify in the hearing or any subsequent hearing relating to the conduct and the court determines that the victim's or family member's testimony would be materially affected if the victim or member of the victim's family hears other testimony at trial.
>
> (c) If a child is under the age of 14 at the time of the hearing, the court shall close the hearing to the public unless the court finds that the interests of the child or the interests of the public would be better served by opening the hearing to the public.
>
> (d) In this section, "family" has the meaning assigned by Section 71.003.

Prior Restraint. If the juvenile court permits members of the press and public to attend a juvenile court hearing, it may not prohibit the press or other members of the public from further dissemination of information disclosed in the public hearing. To do so would be to impose a prior restraint in violation of the freedom of speech provision of the Texas Constitution—Article I, Section 8, as discussed in *San Antonio Express-News v. Roman*, 861 S.W.2d 265, 268 (Tex.App.—San Antonio 1993, original proceeding), holding that the criminal court judge could not prohibit the press from publishing the names of minor witnesses who testified for the defendant.

> [T]he trial was open to the public and was attended by the general public as well as the media. The testifying minors identified themselves by first and last name and gave public testimony. No request to conceal their identities was made prior to their giving testimony. Once their names were placed in the public record, before a courtroom of spectators, no constitutionally valid reason to limit access to that information existed.

Determinate Sentence Cases. Section 54.08, Family Code was amended in 1995 so that it also applied to include determinate sentence cases. Prior to that change, the juvenile court lacked the power to do exclude the public from such cases.

Section 54.11, establishing procedures and standards for release hearings or transfer hearings under the Determinate Sentence Act, provides in Subsection (f) that "[a] hearing under this section is open to the public unless the person to be transferred or released under supervision waives a public hearing with the consent of his attorney and the court." Thus, for a release hearing or transfer hearing not to be open to the public, the juvenile, his or her lawyer, and the court must all agree it is not to be public. This specific provision, relating only to release hearings and transfer hearings, controls over the more general provision of Section 54.08.

Victims and Members of the Victim's Family. Section 54.08(b) gives the victim and members of the victim's family the right to attend the hearing, even if the hearing is closed to the public, unless the victim or family member is to be a witness in the case or any other case (such as a civil suit) related to the conduct and his or her testimony would be "materially affected if the victim or member of the victim's family hears other testimony." This states exactly the same standard as the Rule on Witnesses in Rule 614 of the Texas Rules of Evidence. Under Section 54.08 and Rule 614, the victim or family member may be excluded whether the hearing is public or not, but only if his or her presence might materially affect his or her own testimony.

In 1997, the legislature made two changes in the confidentiality of proceedings provisions of Section 54.08. First, it expanded the scope of who has a right to be at the hearing from "victim" to include the victim's "family member." "Family" is broadly defined by reference to the Protective Orders Chapter 71 of the Family Code. Section 71.003 defines family to mean (1) consanguinity (one is a descendant of the other or they share a common ancestor), (2) affinity (they are married to each other or the spouse of one is related by consanguinity to the other), (3) former spouses of each other, (4) individuals who are parents of the same child and (5) a foster child and foster parent.

"Victim" is not defined but, drawing on its definition in Section 57.001(3) of the Rights of Victims Chapter of Title 3, should be broadly understood to mean "a person who as a result of the delinquent conduct or conduct indicating a need for supervision of a child suffers pecuniary loss or personal injury or harm." The definition of "victim" in Section 57.001 is restricted to a victim of delinquent conduct because of the administrative burden placed on the system of dealing with victims under Chapter 57. There is no reason for such a restriction in this section since no comparable burden is imposed on the system by providing a victim access to the hearing. Therefore, there should be no artificial restriction to include only delinquent conduct of the natural meaning of the phrase "victim of the conduct of the child." Section 57.002(11) lists as a right of a victim in a juvenile case "the right to be present at all public court proceedings related to the conduct of the child as provided by Section 54.08, subject to that section." Section 54.08 goes further to provide for a victim to be present during closed hearings as well.

Under Age 14 Presumption. The second change made in 1997 was to provide guidance, but not commands, to juvenile courts regarding when the hearing should be closed and when it should be open. If the juvenile respondent is under 14 years of age at the time of the hearing, Section 54.08(c) provides that the hearing must be closed unless the juvenile court makes a finding that "the interests of the child or the interests of the public would be better served by opening the hearing to the public." If the juvenile respondent is 14 or older, the hearing is presumptively open to the public unless the juvenile court in its discretion determines that "good cause" exists for closing the hearing. Section 54.08(a). The juvenile court, therefore, has total discretion in every juvenile case to open or close the hearing by making the statutory findings.

C. Records Not Part of the Juvenile Justice Information System

The 1995 amendments dealing with the creation, maintenance and access to juvenile records were extensive. More importantly, they reflected a radical change in philosophy as to juvenile records. Before the amendments, juvenile records, with few exceptions, were local records to which relatively few persons had access. As a result of the 1995 amendments, most juveniles referred to the court have statewide computerized records in the Juvenile Justice Information System (JJIS) maintained by the Department of Public Safety (DPS) and nationwide records maintained by the Federal Bureau of Investigation (FBI). Access to these records is much more extensive. Significant changes were also made in the creation, maintenance, and access to local juvenile records.

Juvenile records include paper documents but also information about the child from which a physical record could be generated. Section 58.007(a).

Motor Vehicle Operation Records Excluded from Juvenile Restrictions. Section 58.007(a) provides in part, "[t]his section does not apply to a record relating to a child that is: ...required or authorized to be maintained under the laws regulating the operation of motor vehicles in this state." The intent of that language is to permit juvenile motor vehicle records to be handled in the same fashion that adult motor vehicle records are handled. The bill analysis for this provision, originally enacted in 1987, states:

> Section 51.14(c), Family Code, [now Section 58.007(c)] requires law enforcement files and records concerning a child to be kept separate from adult records and maintained locally. Driver's licensing, traffic law enforcement, and the investigation and reporting of motor vehicle accidents are all activities of law enforcement agencies, and therefore are technically law enforcement files. As such, Section 51.14(c) is in direct conflict with other statutory provisions requiring the Department of Public Safety to maintain records on the operation of motor vehicles. This conflict became apparent when law enforcement agencies were advised [by Attorney General Opinion No. H-1034 (1977)] that they should not report information regarding the Blood Alcohol Content (BAC) level of juveniles involved in motor vehicle accidents on the Peace Officer's Accident Report Form.

Bill Analysis to Senate Bill 1069 (1987) by Senator Chris Harris.

Municipal and Justice Court Records. Section 58.007(a)(2) excludes from its confidentiality requirements a "record relating to a child that is: ...maintained by a municipal or justice court." Records in those courts are criminal records even when they pertain to a defendant who is a child. Historically, justice and municipal court records, much like adult criminal records, have been fully open to the public.

Beginning in 2009, however, the legislature recognized the disparity in allowing Class C misdemeanor offenses committed by children to be disclosed to the public when more serious offenses were confidential simply because they were addressed in juvenile court. Therefore, statutory changes were made to create similar protections for juvenile age offenses in both criminal and juvenile courts.

Orders of Nondisclosure in Municipal and Justice Court. In 2009, the legislature mandated that criminal courts immediately issue orders of nondisclosure to prohibit criminal justice agencies from disclosing to the public criminal history information concerning children convicted of committing fine-only misdemeanors after successful completion of the terms of the judgment. Government Code Section 411.081(f-1). Previously, such nondisclosure orders were available only to persons placed on deferred adjudication probation. The 2009 provision marked a major shift from the open and public status of juvenile records in municipal and justice court; however, its scope was limited. For example, the provision applied only upon final conviction and satisfaction of the judgment. Accordingly, it did not apply to charges that had not been through the system, charges that resulted in a finding of not guilty, or charges for which the child received some form of probation under Code of Criminal Procedure Chapter 45, thus avoiding the final conviction that would have triggered the nondisclosure order requirement.

The system for processing nondisclosure orders was not designed to handle the volume of juvenile cases processed through the municipal and justice courts. Amidst reports that the non-disclosure orders were not reaching all necessary entities, there were concerns that children in these courts may not be have been afforded the privacy protections intended by the changes in 2009.

In 2011, the legislature repealed all of the laws enacted in 2009 related to the non-disclosure orders and instead made certain records and files in justice and municipal court confidential and prohibited disclosure to the public.

Article 45.0217, Code of Criminal Procedure, as added in 2011 provided:

> (a) Except as provided by Article 15.27 [Code of Criminal Procedure, relating to school notification of arrests of juveniles who are students] and Subsection (b), all records and files, including those held by law enforcement, and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public.

(b) Information subject to Subsection (a) may be open to inspection only by:

(1) judges or court staff;

(2) a criminal justice agency for a criminal justice purpose, as those terms are defined by Section 411.082, Government Code;

(3) the Department of Public Safety;

(4) an attorney for a party to the proceeding;

(5) the child defendant; or

(6) the defendant's parent, guardian, or managing conservator.

Code of Criminal Procedure Article 44.2811 was added to ensure confidentiality of the records in the event of an appeal. To further alert practitioners to the change, Family Code Section 58.00711 was added, referencing the confidentiality provision in Article 45.0217.

As initially envisioned, these confidentiality provisions applied only to records relating to a child who had been convicted of and had satisfied the judgment for a non-traffic-related, fine-only misdemeanor. This was very similar to the now repealed nondisclosure orders that preceded this change in law. Legislators indicated this was not the intent and requested courts to make all municipal and justice records of juveniles confidential even if there had not yet been, or potentially never would be, a conviction.

In 2013, three different bills modifying the confidentiality of criminal records of a child passed. Two of them, SB 393 and SB 394, made identical changes to Article 45.0217, Code of Criminal Procedure, to expand the confidentiality protections beyond only children who had satisfied judgement so that they also included children whose charges were dismissed after deferred disposition. The other, HB 528, amended the same provision so that records "relating to a child who is charged with, is convicted of, is found not guilty of, had a charged dismissed for, or is granted deferred disposition for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public."

The stated purpose of HB 528 was to close a loophole that allowed the release of records for which there was never a conviction or for which the judgment was not satisfied and to protect the fine-only criminal records of a child to the same degree as the juvenile records of a child. However, because of difference in the law due to the multiple bills, the Office of Court Administration requested an Attorney General Opinion regarding the issue.

Attorney General Opinion GA-1035 examined whether the provisions were in conflict and which should be given effect under the law. Senate Bills 393/394 made identical modifications to the conditional confidentiality established in 2011. In contrast, the amendments to House Bill 528 conferred absolute confidentiality of justice or municipal court records regardless of the procedural status of the case. In its analysis, the AG concluded that there was no irreconcilable conflict and that the court could comply simultaneously with the requirements of each bill. Therefore, municipal and justice courts are required to keep non-traffic, fine-only misdemeanor offense records confidential from the time a child is charged with an offense and throughout all proceedings. The opinion also clarified that justice and municipal court proceedings involving children may be open to the public and court scheduling dockets may be publicly posted.

Juvenile Court, Prosecutor, and Probation Records. Section 58.007, Family Code establishes the confidentiality rules for records of the juvenile court, clerk of court, probation department, and juvenile prosecutor. With limited exceptions, the records of these entities are confidential and may be disclosed only to the judge, probation officers, and professional staff or consultants of the juvenile court; a juvenile justice agency as defined by Section 58.101, Family Code; an attorney representing a party in a Title 3 proceeding; a person or entity the child is referred to for treatment or services, provided there is a written confidentiality agreement with that person or entity; or, with permission of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or work of the court.

Prior to 2017, there was no explicit provision allowing the records to be shared with an entity providing services to the child. Because such an entity is likely to need the information to provide adequate services, this provision was added, with the caveat that the receiving entity must sign a confidentiality agreement before being given the records.

Prior to 2013, the entities listed in 58.007 were allowed to inspect the records. As a result, many prosecutors' offices had open file policies allowing defense attorneys to view and take notes of their records but not to

copy them. In 2013, the law was changed so that the listed entity could inspect and copy the records.

The Attorney General has stated that a victim of property damage by a juvenile respondent may be a "person...having a legitimate interest in the proceeding" under Section 58.007(b)(5). Therefore, the victim may in the discretion of the juvenile court be given access to juvenile records for use in a civil suit against the juvenile respondent. Attorney General Opinion No. DM-334 (1995).

Release of Probation Records Under Juvenile Board Guidelines. In 2001, the legislature added Section 58.007(i) to authorize juvenile probation departments to release information from confidential juvenile records without an individualized juvenile court order if the juvenile board has adopted guidelines for the release.

This provision codifies the practice in some large juvenile probation departments and offers a more efficient alternative to the practice of obtaining individualized juvenile court orders in routine cases. This measure is often used to give standing permission to the military to have access to unsealed juvenile records, with the permission of the juvenile, though it can be used in other instances. Of course, should probation officials feel uncomfortable releasing information under board guidelines in any particular case, they remain free to seek individualized juvenile court authorization.

Access to Court Records by Prosecutors in Criminal Cases. Section 58.007(g) establishes a mechanism to assist a criminal court prosecutor to obtain a juvenile court adjudication record that is admissible in the penalty phase of a criminal trial under Section 3(a), Article 37.07, Code of Criminal Procedure. Upon the request of the prosecutor, the court must provide a certified copy of an admissible adjudication record in the court's possession. Though a sealed record was not shareable under this provision due to the fact that sealed records are to be treated as though they never existed, in 2017 language was added to Section 58.007(g) to make it clear that a sealed record may not be shared with the prosecutor.

Section 58.007(g) applies only to records of felony or jailable misdemeanor adjudications. It does not reach records in juvenile referrals that did not end in adjudication, such as referrals that concluded in dismissals or successful deferred prosecution dispositions. However, it does apply in cases in which probation was given as well as those in which there was a commitment to TJJD.

If the juvenile case resulted in a commitment to TJJD, a criminal court prosecutor may obtain a copy of the adjudication from TJJD under Human Resources Code Section 241.004.

Section 54.04(j) provides a method of facilitating the prosecutor's task in proving in criminal court that the defendant before the court is the same person who some years earlier was adjudicated in juvenile court. It provides:

> If the court or jury found that the child engaged in delinquent conduct that included a violation of a penal law of the grade of felony or jailable misdemeanor, the court:
>
> (1) shall require that the child's thumbprint be affixed or attached to the order; and
>
> (2) may require that a photograph of the child be attached to the order.

In 2007, the legislature added the words "or attached" to Section 54.04(j) to clarify that the requirement that a juvenile's thumbprint be affixed to the disposition order can be met by attaching a document that contains the print. This change facilitated the use of a fingerprint card, which provides the necessary high resolution needed for imaging documents into a paperless system, thus facilitating electronic storage of such information.

Facility Records. Section 58.005 provides for the confidentiality of the records of various agencies that may have custody of a child in a Title 3 proceeding, including TJJD, an entity having custody of the child under a contract with TJJD, or another public or private agency or institution having custody of the child under order of the juvenile court, including a facility operated by or under contract with a juvenile board or juvenile probation department. The records—or information from which a record could be generated—including personally identifiable information, information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral, and any other records or information in the possession of the entity may be disclosed only to:

> (1) the professional staff or consultants of the agency or institution;
>
> (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
>
> (3) an attorney for the child;

(4) a governmental agency if the disclosure is required or authorized by law;

(5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(6) the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Human Resources Code Section 244.003 provides that TJJD records are confidential:

(a) The department shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control.

(b) Except as provided by Section 243.051(c) [relating to a child who has escaped from TJJD], these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section §244.051 [Human Resources Code], and Chapter 61 [Chapter 67 beginning January 1, 2019], Code of Criminal Procedure.

The reference to Code of Criminal Procedure Chapter 61/67 is intended to enable law enforcement agencies compiling information on criminal street gangs to obtain relevant information from TJJD.

Section 244.051(a), Human Resources Code, referred to by Section 244.003, was enacted in 2003 [as Section 61.0731(a), Human Resources Code] to restrict information in the possession of TJJD that may be disclosed to a child or the parents of a child. It reads:

In the interest of achieving the purpose of the department and protecting the public, the department may disclose records and other information concerning a child to the child and the child's parent or guardian only if disclosure would not materially harm the treatment and rehabilitation of the child and would not substantially decrease the likelihood of the department receiving information from the same or similar sources in the future. Information concerning a person who is age 18 or older may not be disclosed to the child's parent or guardian without the person's consent.

In 2007, Subsection (c) was added, which reads:

The department may disclose to a peace officer or law enforcement agency images of children recorded by an electronic recording device and incident reporting and investigation documents containing the names of children if the information is relevant to the investigation of a criminal offense alleged to have occurred in a facility operated by or under contract with the department.

In 2009, the statute was again amended by adding Subsection (d), which states that if the Department of Family and Protective Services (DFPS) has been appointed managing conservator for a child who has been committed to TJJD, then TJJD must disclose records and other information pertaining to the child to DFPS in accordance with DFPS rules. In effect, DFPS stands in the shoes of the parent or guardian for these "dually managed" children. More emphatically, Section 244.052(e) states that TJJD "shall ensure" that DFPS is given the same rights as the child's parent under the parent's bill of rights established under Section 244.052.

The Houston Fourteenth District Court of Appeals upheld the decision of a criminal court judge quashing a subpoena duces tecum seeking to obtain the records concerning the capital murder victim's stay in the Methodist Home in Waco. Those records are confidential under Section 51.14 [now Section 58.005] and no facts were presented showing an overriding constitutional claim. *Degarmo v. State*, 922 S.W.2d 256 (Tex.App.—Houston [14th Dist.] 1996, pet. ref'd).

Law Enforcement Records. Until 2017, Sections 58.007(c)–(f), Family Code, addressed the confidentiality of local law enforcement records. In 2017, amidst a major rewrite of Chapter 58, the law enforcement record provisions were moved to Section 58.008, so they would be easier for practitioner to find. The substantive law was not changed.

Law enforcement records concerning a child and information concerning a child may not be shared with the public. If maintained on paper or microfilm, the records must be kept separate from adult records and, if maintained electronically in the same computer system as adult records, they must be accessible under controls that are separate and distinct from the controls used to access the adult records.

These records must be maintained on a local basis only; they may not be sent to a central state or federal depository except in limited circumstances. For example Section 58.008(c) provides that the law enforcement records of a person with a determinate sentence who is transferred to the Texas Department of Criminal Justice may be transferred to a central state or federal depository after the date of transfer and may be shared in accordance with the laws governing adult records in the same depository.

Section 58.008(d) specifies that a juvenile justice agency or a criminal justice agency may be given access to local law enforcement juvenile records. In 2007, that provision [then 58.007(e)] was amended to add the child and the child's parent or guardian to this list. These individuals are not only permitted to inspect a child's law enforcement records, they may also copy them. However, subsection (e) mandates that before a child or a child's parent or guardian may inspect or copy a record concerning the child, the custodian of the record or file must redact any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child and any information that is excepted from required disclosure under Government Code Chapter 552 or other law.

Local law enforcement records about a child may also be forwarded to and disseminated by the Texas Crime Information Center and the National Crime Information Center when a child has been reported missing by a parent, guardian, or conservator.

Section 58.101(5) defines a juvenile justice agency as "an agency that has custody or control over juvenile offenders," which would include a juvenile probation department, an agency providing treatment for a juvenile offender, an agency with which a juvenile has been placed, and the Texas Juvenile Justice Department. Government Code Section 411.082 deals with which agencies have access to the criminal history information maintained by DPS. Subsection (3) defines a "criminal justice agency" to mean any public agency that is engaged in the administration of criminal justice, which would include police, prosecutorial, judicial, probation, and correctional agencies that deal with juvenile or criminal offenders. Thus, law enforcement information concerning juvenile cases may be accessed by any agency that is involved in the administration of juvenile or criminal justice or any agency involved in the treatment of a juvenile as part of a Title 3 case.

In Attorney General Open Records Decision No. 644 (1996), the Attorney General stated that when Section 51.14 was replaced by Section 58.007 in 1995, and the legislature failed to carry forward the language in 51.14(d) that "law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public," that resulted in law enforcement records not being confidential under the Family Code. They were, however, made confidential by Government Code Section 552.108(a).

In 1997, the legislature amended Section 58.007(c) to provide that law enforcement juvenile files and records are confidential, thereby abrogating the 1996 Open Records Decision. In Attorney General Open Records Decision No. OR1999-0978 (1999), the Attorney General recognized that under the 1997 amendment law enforcement juvenile records were once again not public records.

In Attorney General Open Records Decision No. 680 (2003), the Attorney General ruled that Section 58.007(c) [now 58.008(b)] prohibits a police department from releasing to a local school district the name, address, and date of citation concerning "a child" who is cited for consuming or possessing alcohol in violation of Alcoholic Beverage Code Sections 106.04 or 106.05. The Attorney General also ruled that the interagency transfer doctrine cannot operate to allow the police to transfer confidential juvenile information to a school district because school districts are not among the statute's enumerated entities. See Family Code Sections 58.008, enumerating the governmental entities with which law enforcement records about juveniles may be shared, and Code of Criminal Procedure Article 15.27(h), enumerating the offenses about which law enforcement may inform school districts. Of course, Section 58.008(b) does not apply to the law enforcement records of a person who is not a "child" and who violates Sections 106.04 or 106.05.

Status of Juvenile Records Under the Public Information Act. Chapter 552 of the Government Code

is the Texas Public Information Act. It gives any citizen the right to request information in the possession of a state, county or local public entity. If the record exists and can be found, that entity is required to disclose the record to the requestor, subject to certain exceptions. If the entity believes an exception applies, it is required to request an Attorney General's opinion on the request and to abide by the Attorney General's decision unless it seeks judicial review of it.

Government Code Section 552.101 makes some governmental information confidential and not subject to disclosure under the Public Information Act: "Information is excepted from the requirements of [the Act] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Since Section 58.008(b) makes law enforcement records of juvenile suspects confidential, those records are not subject to disclosure under the Public Information Act. See *Loving v. City of Houston*, 282 S.W.3d 555 (Tex.App.—Houston [14th Dist.] 2009, pet. denied) (summary judgment proper since requested information involved juvenile law enforcement record); Attorney General Open Records Decision No. OR2005-02217 (2005) (Department of Family and Protective Services could not access law enforcement records under Section 58.007 [now 58.008]); and Attorney General Open Records Decision No. OR2001-1373 (2001) (police incident report involving juvenile suspect not subject to disclosure because confidential under Section 58.007(c) [now 58.008(b)]; sending the report to the Attorney General Crime Victims' Compensation Program does not change the confidential status of the report). Since running away from home is conduct indicating a need for supervision under the Juvenile Justice Code, a police runaway report is excepted from disclosure under the Public Information Act. Attorney General Open Records Decision No. OR2001-1704 (2001). A report subject to the juvenile confidentiality provision may not be disclosed even if the name of the juvenile is deleted. Attorney General Open Records Decision No. OR2001-6133 (2001). A law enforcement incident report about a juvenile is confidential even if the juvenile is later certified to criminal court and convicted of an offense. Attorney General Open Records Decision No. OR2001-0779 (2001).

Prior to September 1, 2017, the juvenile confidentiality provision applied only to incidents that occurred before January 1, 1996, or on or after September 1, 1997. Between those two dates, there was no confidentiality provision specifically protecting juvenile law enforcement records. Many of those records were protected under the provision of law that excepts from disclosure records that would impede ongoing investigations. If, however, the juvenile incident report described an incident that occurred during that 20-month period, it was subject to disclosure if the statute of limitations had run so that an ongoing investigation could not be jeopardized. Attorney General Open Records Decision No. OR 2001-1644 (2001). In 2017, when Chapter 58, Family Code was revised via Senate Bill 1304, the bill provided that the changes in law applied to "records created before, on, or after" September 1, 2017.

The confidentiality of a law enforcement incident report involving a juvenile suspect is not eliminated when the requestor is a public housing authority. The report remains not subject to disclosure. See Attorney General Open Records Decision No. OR 2001-1563 (2001).

Prior to changes in the law beginning in 2007, the Attorney General said that the parent of a juvenile taken into custody was not entitled to disclosure of the incident report written about their own child. Attorney General Open Records Decision No. OR 2005-02732 (2005) (parent of minor daughter could not access juvenile law enforcement records under Section 58.007); Attorney General Open Records Decision No. OR 2001-0804 (2001); Attorney General Open Records Decision No. OR 2001-4279 (2001). Similarly, it was determined that a runaway report filed with the police could not be disclosed to the parents of the runaway who made the report. Attorney General Open Records Decision No. OR 2001-4486 (2001). It was also determined that the juvenile was not entitled to disclosure of a law enforcement incident report in which the juvenile was the subject. See Attorney General Open Records Decision No. OR 2001-5316 (2001).

It is important to note that the 2007 amendment to Section 58.007(e) [now Section 58.008(d)], which allows law enforcement records and files concerning a child to be inspected or copied by the child or the child's parent or guardian supersedes the prior open records decisions of the Attorney General. See Attorney General Open Records Decision No. OR 2008-11660 (2008) [parent has right to inspect juvenile law enforcement records concerning her child pursuant to Section 58.007(e)].

If the subject of the report is 17 at the time of the incident, the report is subject to disclosure under adult, not juvenile, rules. Attorney General Open Records Decision

No. OR 2001-0197 (2001). Similarly, if the subject of the report was under the age of 10, the juvenile confidentiality provision does not apply. Attorney General Open Records Decision No. OR 2001-4805 (2001).

The juvenile confidentiality provision applies only when the subject of the arrest or investigation is a juvenile. A law enforcement report that concerns adults but which identifies a juvenile as a victim of or witness to the offense does not enjoy juvenile confidentiality. Attorney General Open Records Decision No. OR2001-1088 (2001).

The juvenile confidentiality provision applies to certain probation department records. Probation department records are in general not subject to disclosure. Attorney General Open Records Decision No. OR2001-0528 (2001). Visitation and other records maintained by a juvenile probation department are not subject to disclosure. Attorney General Open Records Decision No. OR2001-3866 (2001). Information about the death of a resident of a juvenile detention facility is not subject to disclosure. Attorney General Open Records Decision No. OR2001-5795 (2001).

Section 552.101 has been construed by the courts to include a common law right of privacy. See *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Based on that case, the Attorney General has consistently stated, "The doctrine of common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it." Using that analysis, the Attorney General has advised that certain law enforcement information is not subject to disclosure under the common law right of privacy. Attorney General Open Records Decision No. OR 2001-1430 (2001) says that the identity of a sexual assault victim may not be disclosed because it is protected by common law privacy rights.

Disclosure of information cannot be denied to a person who is the subject of that information, or to that person's representative, on the ground that the "information is considered confidential by privacy principles" under the Public Information Act. Government Code Section 552.023(b). However, that does not mean that disclosure to a juvenile or juvenile's representative cannot be denied; rather, it only means that disclosure cannot be denied on the ground that denial is needed to protect the privacy of the requestor. If other confidentiality principles or laws apply, they may be invoked to deny disclosure.

Criminal history information in the National Crime Information Center (NCIC) that originated from DPS is not subject to disclosure under the Public Information Act. Its disclosure is governed by the provisions in Chapter 411 of the Government Code, which limit dissemination of information in the DPS or FBI databases to criminal justice and certain other requestors. Attorney General Open Records Decision No. OR 2001-1859 (2001). In the absence of a provision directing its disclosure, criminal history information is confidential and exempt from Public Information Act disclosure under common law privacy rules. Attorney General Open Records Decision No. OR 2001-1704 (2001). It is unclear how these rulings relate to Government Code Section 411.135, which declares adult conviction and deferred adjudication records in the possession of DPS to be public records. That section does not apply to juvenile records in the DPS Juvenile Justice Information System (JJIS) database. Gang database information concerning a juvenile is not available for public disclosure. Attorney General Open Records Decision No. OR 2001-5349 (2001).

The juvenile confidentiality provision does not apply to incident reports of minor traffic accidents involving juveniles since they are not handled under the Family Code. Attorney General Open Records Decision No. OR 2001-0160 (2001). Similarly, a juvenile is entitled to disclosure of the results of his or her alcohol blood test taken after a motor vehicle accident. Attorney General Open Records Decision No. OR 2001-4438 (2001). While justice or municipal court records are public, those of a prosecutor involved in proceedings in those courts involving juveniles are confidential. Attorney General Open Records Decision No. OR 2001-4231 (2001). Motor vehicle accident reports involving a juvenile are not exempt from disclosure. Attorney General Open Records Decision No. OR 2001-5578 (2001).

Family Code Section 261.201(a) makes reports of investigations into child abuse or neglect confidential under most circumstances. That provision means that law enforcement incident reports about child abuse or neglect investigations are ordinarily not subject to disclosure under the Public Information Act. Attorney General Open Records Decision No. OR 2001-1735 (2001). However, CPS is not entitled to disclosure of a police incident report about a juvenile to aid in its investigation. Attorney General Open Records Decision No. OR 2001-4788 (2001).

TJJD Abuse Reports. In 2007, the legislature amended Family Code Section 261.201 by adding Subsections (i) and (j), both of which govern reports of child abuse and neglect made to TJJD. These provisions make such reports public, but only if the allegation involves a child committed to TJJD and concerns an incident that occurred during the time the child was in TJJD custody. However, TJJD is required to edit any disclosed report to protect the identity of the child victim, the reporter, and any other person whose life or safety may be endangered by the disclosure. These changes were designed to bring greater transparency to abuse and neglect investigations in TJJD. Inspection of these records by the public, advocacy groups, and external oversight agencies is thought to help assure greater protections for youth in TJJD custody.

In 2009, the legislature amended Section 261.201(a) by referencing what was then new Section 261.203, which provides that certain information concerning a child fatality under investigation by the Department of Family and Protective Services (DFPS) is not confidential and must be provided to the requestor by DFPS. The legislature also added two new provisions to Section 261.201 that permit disclosure of confidential information. The first allows such disclosure via an order by an administrative law judge (ALJ) if the information relates to a contested issue involving the license or certification of a professional or educator. Section 261.201(b-1). The second authorizes an investigating agency, other than TJJD or DFPS, to release to a parent, managing conservator, or other legal representative information concerning the reported abuse or neglect of a child that would otherwise be confidential. Section 261.201(k). The information must be withheld if the parent, managing conservator, or legal representative requesting the information is the alleged perpetrator of the abuse or neglect.

Release of Information to Assist in Apprehension. If a juvenile is the subject of an arrest warrant or a directive to apprehend but cannot be located, Section 58.007(h) authorizes the juvenile court to disclose information to the public to aid in apprehension:

> The juvenile court may disseminate to the public the following information relating to a child who is the subject of a directive to apprehend or a warrant of arrest and who cannot be located for the purpose of apprehension:
>
> (1) the child's name, including other names by which the child is known;
>
> (2) the child's physical description, including sex, weight, height, race, ethnicity, eye color, hair color, scars, marks, and tattoos;
>
> (3) a photograph of the child; and
>
> (4) a description of the conduct the child is alleged to have committed, including the level and degree of the alleged offense.

DPS is authorized to release information from JJIS regarding a juvenile who has escaped from a secure detention or correctional facility or who is wanted by a local law enforcement agency. Subsections 58.106(c) and (d) provide:

> (c) The department may, if necessary to protect the welfare of the community, disseminate to the public the following information relating to a juvenile who has escaped from the custody of the Texas Juvenile Justice Department or from another secure detention or correctional facility:
>
> (1) the juvenile's name, including other names by which the juvenile is known;
>
> (2) the juvenile's physical description, including sex, weight, height, race, ethnicity, eye color, hair color, scars, marks, and tattoos;
>
> (3) a photograph of the juvenile; and
>
> (4) a description of the conduct for which the juvenile was committed to the Texas Juvenile Justice Department or detained in the secure detention or correctional facility, including the level and degree of the alleged offense.
>
> (d) The department may, if necessary to protect the welfare of the community, disseminate to the public the information listed under Subsection (c) relating to a juvenile offender when notified by a law enforcement agency of this state that the law enforcement agency has been issued a directive to apprehend the offender or an arrest warrant for the offender or that the law enforcement agency is otherwise authorized to arrest the offender and that the offender is suspected of having:
>
> (1) committed a felony offense under the following provisions of the Penal Code:

(A) Title 5 [offenses against the person, such as murder assault, sexual assault and kidnapping];

(B) Section 29.02 [robbery]; or

(C) Section 29.03 [aggravated robbery]; and

(2) fled from arrest or apprehension for commission of the offense.

TJJD is authorized by Human Resources Code Section 243.051(c) to release information to the public to aid in apprehending a juvenile who has escaped from its custody:

Notwithstanding Section 58.005, Family Code, the department may disseminate to the public the following information relating to a child who has escaped from custody:

(1) the child's name, including other names by which the child is known;

(2) the child's physical description, including sex, weight, height, race, ethnicity, eye color, hair color, scars, marks, and tattoos;

(3) a photograph of the child; and

(4) if necessary to protect the welfare of the community, any other information that reveals dangerous propensities of the child or expedites the apprehension of the child.

D. Fingerprints and Photographs

Prior to its amendment in 1995, Title 3 provided special protections regarding juvenile fingerprints and photographs. The purpose of those protections was to avoid the "booking" process of fingerprinting and photographing that accompanies adult arrests. The 1995 amendments changed that policy to one that requires a booking process in order to obtain the information necessary for the statewide Juvenile Justice Information System (JJIS).

Statutory Authority to Fingerprint or Photograph Children in Custody. Prior to 2017, Section 58.002 provides, in part:

(a) Except as provided by Chapter 63, Code of Criminal Procedure [relating to missing children], a child may not be photographed or fingerprinted without the consent of the juvenile court unless the child is taken into custody or referred to the juvenile court for conduct that constitutes a felony or a misdemeanor punishable by confinement in jail.…

(c) This section does not prohibit a law enforcement officer from photographing or fingerprinting a child who is not in custody if the child's parent or guardian voluntarily consents in writing to the photographing or fingerprinting of the child.

(d) This section does not apply to fingerprints that are required or authorized to be submitted or obtained for an application for a driver's license or personal identification card.

Section 58.002(a) permits fingerprinting and photographing children in custody in four circumstances: (1) with the consent of the juvenile court; (2) for inclusion in the missing children clearinghouse under Code of Criminal Procedure Chapter 63; (3) when a child is taken into custody for a felony or jailable misdemeanor; and (4) when the child is referred to the juvenile court for a felony or jailable misdemeanor but is not in custody. Under the fourth circumstance, the juvenile court staff would be authorized to fingerprint and photograph after the referral even though the referral was a "paper referral" unaccompanied by the child in custody.

The third and fourth circumstances provide the identification foundation for the fingerprint-based computerized statewide JJIS maintained by DPS.

In 2001, the legislature enacted Sections 58.0021 and 58.0022 to add two additional ways in which fingerprints and photographs may be taken of children: to investigate crime and to identify a runaway child. Those provisions are discussed later in this section.

Probable Cause for Fingerprinting. The taking of a fingerprint from a person involves a seizure of the person, however temporary the seizure may be. As a seizure, this investigative technique comes within the scope of the Fourth Amendment of the United States Constitution, prohibiting unreasonable searches and seizures. If a person is taken into custody and fingerprinted in violation of the Fourth Amendment, the fingerprint records and comparisons are inadmissible in evidence. *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643 (1985); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394 (1969).

Unless the child consents to the procedure, a showing of probable cause to believe that the child committed a delinquent act is required by the Constitution to fingerprint a child. In addition, fingerprinting must be authorized under the Family Code. See *Lanes v. State*, 711 S.W.2d 403 (Tex.App.—Beaumont 1986, pet. granted).

The Court of Criminal Appeals addressed this issue when it reviewed the Court of Appeals' decision in *Lanes*. In *Lanes v. State*, 767 S.W.2d 789 (Tex.Crim.App. 1989), it agreed that to fingerprint a child both probable cause and authority under what is now Section 58.002 are required. Consent of the juvenile court by itself is not enough and is not a substitute for probable cause. Since probable cause was not shown by the State, the fingerprinting was unlawful even though the juvenile court had consented. The admission of the fingerprint comparison evidence was error.

Fingerprinting and Photographing Children Not in Custody. In 1997, the legislature addressed the issue of when, if ever, law enforcement may fingerprint or photograph children who are not in custody. It enacted Section 58.002(c) to provide that Section 58.002 "does not prohibit a law enforcement officer from photographing or fingerprinting a child who is not in custody if the child's parent or guardian voluntarily consents in writing to the photographing or fingerprinting of the child." Otherwise, of course, fingerprinting or photographing by law enforcement is prohibited by Section 58.002. In 1999, amidst confusion, the legislature added language to clarify that parental consent was not required to fingerprint and photograph a child referred to juvenile court without being taken into custody. In 2017, after reports that such confusion persisted, language was added to Section 58.002(c) to explicitly provide that consent of the child's parent or guardian is not required to photograph or fingerprint a child in such circumstances.

There may be an exception to the provisions in Section 58.002 related to the collection of information for gang databases. Code of Criminal Procedure Article 61.04(a) [67.102(a), effective January 1, 2019] provides, "Notwithstanding Chapter 58, Family Code, criminal information relating to a child associated with a combination or a criminal street gang may be compiled and released under this chapter regardless of the age of the child." Some law enforcement officials interpret this language to authorize photographing or fingerprinting children for inclusion in gang databases on the child's consent only and without the written parental consent required by Section 58.002(c). There is no claim that Section 58.002(c) is inapplicable outside the context of assembling gang database information.

Fingerprinting and Photographing By Limited Custody. Under Texas law, an officer with probable cause to believe that a juvenile has engaged in delinquent conduct of at least a jailable misdemeanor may take the child into custody and to a juvenile processing office, where law enforcement officers may fingerprint and photograph the child in a normal booking procedure. Section 58.002(a). Fingerprints or photographs obtained in that fashion may be used to investigate a crime.

Under that traditional procedure, if the fingerprints or photographs fail to show that the child was involved in the crime under investigation, law enforcement is expected to release the child. However, it still has possession of the fingerprint record and photographs. In some instances, by the time the child is exonerated and released, the fingerprint record will have already been sent to DPS, where it will be entered in its JJIS and forwarded to the FBI for inclusion in the NCIC database. The law enforcement agency that took the child into custody may or may not attempt to retrieve that information and, if it does, may or may not be successful.

In 2001, the legislature enacted Section 58.0021, which authorizes law enforcement to take temporary custody of a child to obtain fingerprints and/or photographs for comparison in the investigation of a crime. The purpose of Section 58.0021 is to create a less intrusive procedure to obtain fingerprint or photograph information than the process of taking the child into police custody under Section 52.01. Like taking a child into custody for delinquent conduct, it requires probable cause to believe the child engaged in delinquent conduct. It also requires that the officer have probable cause to believe that the child's fingerprints will match fingerprints that have been found at the scene or that the photograph will be of material assistance in the investigation of the delinquent conduct.

The fingerprints and photographs may be taken at the juvenile processing office or at any other place that affords reasonable privacy to the child. If the fingerprints or photograph do not lead to a positive comparison or identification, they must be destroyed. The fingerprints and photographs may be sent to DPS for inclusion in JJIS only if the child is taken into custody or referred to juvenile court for an offense, as provided in Section 58.002.

In 2017, Section 58.0021(b) was amended to allow law enforcement to obtain a photograph from the juvenile probation department, if they have one, in order to eliminate the need to take the child into temporary custody solely for the purpose of obtaining a photograph. Probable cause must be present in the same manner as if the officer were going to take temporary custody of the child to take the picture.

Fingerprinting and Photographing to Identify a Runaway. The fingerprinting and photographing authorized by Section 58.0021 is restricted to delinquent conduct. It does not include CINS, such as running away from home. It is also restricted to situations in which there is reason to believe that the fingerprinting or photographing will aid in crime investigation. There is one situation in which there is a need for fingerprinting and photographing that does not meet those requirements: when a child has been taken into custody for CINS as a runaway and refuses to identify himself or herself. Under prior law, an order of the juvenile court was required to fingerprint or photograph.

Section 58.0022 was enacted in 2001 to authorize law enforcement to fingerprint and photograph for the sole purpose of identifying the child:

> A law enforcement officer who takes a child into custody with probable cause to believe that the child has engaged in conduct indicating a need for supervision as described by Section 51.03(b)(2) [running away from home] and who after reasonable effort is unable to determine the identity of the child, may fingerprint or photograph the child to establish the child's identity. On determination of the child's identity or that the child cannot be identified by the fingerprints or photographs, the law enforcement officer shall immediately destroy all copies of the fingerprint records or photographs of the child.

Fingerprints for Drivers' Licenses. In 1997, the legislature enacted Section 58.002(d) to provide that Section 58.002 does not prohibit taking fingerprints from a juvenile incident to application for a driver's license or personal identification card.

Publication of "Mugshot" Photographs and Information. Over the years, companies have come in to existence that focus on spreading information about who has been arrested and why. With the advent of the internet, these publications live on for years. Some of these companies charge for people to have their mug shot removed, even when the information is in error, the charge is dropped, the case is dismissed, or the records are expunged. To begin to address this issue, Chapter 109, Business and Commerce Code, was added in 2013. The law requires companies that publish criminal record information, including mugshots, to ensure the information published is complete and accurate. It requires the company to clearly and conspicuously publish contact information for a person to dispute the completeness or accuracy of the record and requires the company to investigate the dispute. If the investigation, which must be completed within 45 days, reveals the information is inaccurate or incomplete, the company must remove or correct the inaccurate or incomplete information and may not charge a fee to do so. The law creates a private cause of action against a company that publishes information after receiving notice that the information is the subject of an order of expunction or order of nondisclosure. It also gives the attorney general the authority to sue a company that publishes information in violation of the law and require payment of a civil penalty to the state.

In 2015, amidst concerns that the law did not address the publication of mugshots and confidential information concerning juveniles, the law was amended to address both confidential criminal record information of a child [records concerning a child charged with a Class C misdemeanor under justice or municipal court jurisdiction, excluding traffic offenses] and confidential juvenile record information [information regarding offenses in juvenile court]. The law prohibits business entities from publishing such confidential information and requires the entity, upon receipt of written notice that it is in violation, to immediately remove the information. The entity is authorized to republish the information if it confirms it is not confidential criminal record information of a child or confidential juvenile record information. Both private and state causes of action are available to the child if there is a violation.

The prohibitions in Chapter 109, Business and Commerce Code, do not apply to news publications or radio or televisions stations licensed by the FCC.

Maintenance of the Records. Fingerprint records and photographs of children must be maintained by law enforcement like other juvenile records and are open to inspection only on the same basis as other records. Section 58.008(d). Section 58.008(b) requires that fingerprint

and photograph records, like other law enforcement records concerning juveniles, must be maintained on a local basis only, except for those records included in JJIS.

E. Statewide Juvenile Justice Information System

One of the most significant changes made by the legislature in 1995 was the creation of the Juvenile Justice Information System (JJIS) in Subchapter B of Chapter 58. This is a statewide computer database that has become a comprehensive record of decisions made in all delinquent conduct cases that are referred to the juvenile court.

Purposes of the System. There are three major purposes of this system: (1) to provide a statewide database of information about prior contacts by a juvenile with the law (what in adult parlance is called a "rap sheet") in order to permit more informed decision making respecting subsequent cases involving the same person; (2) to assist in the solution of crimes by enabling the computerized comparison of latent fingerprints with those on file in the database; and (3) to facilitate research concerning the juvenile justice system for operational, legislative, and academic purposes.

Description of the System. The system is part of the larger computerized criminal history system operated by DPS under the authority of Chapter 60 of the Code of Criminal Procedure. Juvenile records in the system are identified to enable special handling regarding access and sealing. The record of each juvenile case should be more comprehensive than that of a comparable criminal case. It should include information about various programs that were used in the disposition of the case—information that is not included in the adult version.

The database contains two elements: textual information and fingerprint analyses. Textual information consists of identifying information about the juvenile, information about the offense, and records of all major decisions made in the processing of the case. Ideally, the system would consist of a complete, current, and accurate step-by-step accounting of each delinquent conduct case that was referred to the juvenile court.

The second major type of information consists of fingerprints. When fingerprint information is sent to the system, it is accompanied by a unique incident number (i.e., TRN) that matches the number on textual information submissions. The fingerprints are scanned or imported into the DPS database, where they are associated with the textual information by the unique incident number. Thereafter, that submission can be retrieved either through identifying textual information, such as name, sex, and date of birth, or through fingerprints alone.

Probable fingerprint matches can be made by a computer using a program called Automated Fingerprint Identification System (AFIS). When a juvenile's fingerprints are loaded into the database, the computer will also automatically check its database to see whether they match: (1) prints submitted from a person taken into custody on a previous occasion under the same or a different name; and (2) latent prints from unsolved crimes. If a match is made to a previous submission, the new information is added to the previous file whether the same name was used by the arrestee or not. If a match is made to a latent print, a crime may be solved that would have otherwise gone unsolved. When a latent print is submitted in the future, it will automatically be compared with all the identified and unidentified prints in the system.

The first time information about a juvenile is sent to the system, that juvenile is assigned a state identification number (i.e., SID number), which will remain exclusively his or hers for the rest of his or her life. If the individual is arrested later as a juvenile or as an adult, he or she will be identified by this same number. That feature facilitates recidivism tracking studies.

Input of Information into the System. Information about a case is placed into the system at three major stages of the case: referral, prosecution, and disposition. The referral information consists of fingerprints and information describing the person and charge. Prosecution information consists of the formal charge that was filed by the prosecutor or the resolution of the case if the prosecutor declined to file charges or the case was resolved nonjudicially by intake. Disposition information consists of the disposition of the case when a formal charge has been filed. In cases of TJJD commitment, disposition information includes major TJJD decisions in the case, such as release or discharge.

Transmittal of Information to the Federal Bureau of Investigation. All information submitted to JJIS by DPS is forwarded to the FBI. Section 58.102(a)(2). That information becomes part of the FBI's nationwide computerized criminal history database. Access to that information is controlled by federal law.

Offenses Included in the System. Only delinquent conduct offenses are included in the system. Section 58.104(a) provides, in part:

> [T]he juvenile justice information system shall consist of information relating to delinquent conduct committed or alleged to have been committed by a juvenile offender that, if the conduct had been committed by an adult, would constitute a criminal offense other than an offense punishable by a fine only.

The delinquent conduct requirement means that inhalant abuse, which is sometimes punishable only by fine and sometimes by jail, is excluded from the statewide system because it is always CINS rather than delinquent conduct under Section 51.03(b). Similarly, the offense of electronic transmission of certain visual material depicting a minor (i.e. "sexting"), which is sometimes a Class C misdemeanor and sometimes a Class A or Class B misdemeanor, is also excluded from the system because it is always CINS under Section 51.03(b), The offense of prostitution, which is always a Class B misdemeanor or higher, is also excluded from the statewide system because it is defined as CINS under Section 51.03(b). Also excluded from the system are running away, a violation of school rules that results in school expulsion, and fineable only offenses transferred by justice and municipal courts to the juvenile court as CINS cases.

The requirement that the delinquent conduct must be a criminal offense if committed by an adult means that delinquent conduct for contempt of a justice or municipal court [Section 51.03(a)(3)] would be included because an adult can receive a three-day jail sentence for that offense.

The third requirement—that the offense be other than one punishable by fine only—currently excludes no offenses not already excluded by the requirement that the offense be delinquent conduct and punishable as a crime. For a criminal offense to become delinquent conduct under Section 51.03(a)(1), it must be punishable by imprisonment or by confinement in jail.

The Requirement of a Referral. Section 58.002(a) permits law enforcement to fingerprint and photograph a child taken into custody or referred to juvenile court for a felony or jailable misdemeanor. However, unlike the adult computerized criminal history system, information included in the juvenile system is based on a referral to the juvenile court, not merely on taking the child into custody. Section 58.001(c) provides:

> A law enforcement agency shall forward information, including fingerprints, relating to a child who has been taken into custody under Section 52.01 by the agency to the Department of Public Safety for inclusion in the juvenile justice information system created under Subchapter B, but only if the child is referred to juvenile court on or before the 10th day after the date the child is taken into custody under Section 52.01. If the child is not referred to juvenile court within that time, the law enforcement agency shall destroy all information, including photographs and fingerprints, relating to the child unless the child is placed in a first offender program under Section 52.031 or on informal disposition under Section 52.03. The law enforcement agency may not forward any information to the Department of Public Safety relating to the child while the child is in a first offender program under Section 52.031, or during the 90 days following successful completion of the program or while the child is on informal disposition under Section 52.03. Except as provided by Subsection (f), after the date the child completes an informal disposition under Section 52.03 or after the 90th day after the date the child successfully completes a first offender program under Section 52.031, the law enforcement agency shall destroy all information, including photographs and fingerprints, relating to the child.

Although a child taken into custody must be fingerprinted for any felony or jailable misdemeanor, that and other information may be submitted to the statewide system only if the arresting agency makes a referral to the juvenile court within 10 days of the arrest. "Referral to juvenile court" is defined by Section 51.02(12) as "the referral of a child or a child's case to the office or official, including an intake officer or probation officer, designated by the juvenile board to process children within the juvenile justice system." In other words, referral to the juvenile court means referring the case to the intake point of the system; it does not also require that the case be filed by the prosecutor.

If the child is not referred to the court within 10 days, all information about the juvenile created by the arrest, including fingerprints and photographs, must be destroyed unless the child is placed in a law enforcement first offender program or on informal disposition. Details regarding the destruction requirement and what constitutes destruction are discussed later in this chapter.

Informal Disposition and First Offender Programs. Section 52.03 authorizes informal disposition of cases

without referral to the juvenile court. Section 52.031 was added in 1995. It creates a first offender program that is very similar to the informal disposition program. A law enforcement agency may operate an informal disposition program, a first offender program, or both. These programs are discussed in detail in Chapter 17.

The law enforcement agency is prohibited by Section 58.001(c) from submitting referral information to the statewide system when a child has been taken into custody and placed in an informal disposition or first offender program.

If the child fails to complete either program, the law enforcement agency may refer the original case to the juvenile court. Under Section 52.04, it must also send to the court all information in its possession concerning the original offense and prior contacts with the juvenile. It should also refer information relating to that case to the statewide system, if the offense is covered by the system, even though that will often occur more than 10 days after the original arrest. The 10-day requirement must yield to the specific circumstance of a child being placed on informal disposition or a first offender program but later being referred to the court for the original offense.

If a child successfully completes an informal disposition program, the law enforcement agency must "destroy all information, including photographs and fingerprints, relating to the child" Section 58.001(c). However, if a child successfully completes a first offender program, that is not necessarily the end of the matter. Section 52.031(j) provides in part:

> The case of a child referred for disposition under the first offender program shall be referred to juvenile court…if: ...
>
> (3) the child completes the program but is taken into custody under Section 52.01 before the 90th day after the date the child completes the program for conduct other than the conduct for which the child was referred to the first offender program.

Thus, if a child successfully completes a first offender program but is arrested for a new offense within 90 days of completion, law enforcement is obligated to refer the original offense to the juvenile court even though the child successfully completed a first offender program for that offense.

Under Section 52.04, law enforcement would be obligated to transmit complete referral information to the juvenile court, which it could not do if it had destroyed that information when the child successfully completed the program. It is also required to submit information to the statewide system if the referral is for an offense covered by the system.

Therefore, there is authorization in Section 58.001(c) for law enforcement to retain records for 91 days following successful completion of a first offender program. If no new arrests have occurred, records relating to the child should be destroyed on the 91st day. This destruction requirement is subject to the provision of Section 58.001(f), which authorizes law enforcement even beyond the 90-day period to maintain a single file for the sole purpose of permitting a subsequent determination whether a child has previously been through a first offender program.

Section 52.031 was amended in 2013 to allow for First Offender Programs to include Class C misdemeanors that are not CINS. If a First Offender Program includes children accused of these offenses, the referral for unsuccessful completion or arrest within 90 days of completion of the program would be to the appropriate justice or municipal court with jurisdiction over the Class C misdemeanor; the records would not be submitted to the statewide juvenile justice information system because they are not records of delinquent conduct.

Referral Information Submitted by the Juvenile Court. Usually, referral information will be sent to JJIS from a law enforcement agency that made the referral to the juvenile court. That agency will have taken the child into custody and obtained the necessary information, including fingerprints.

However, some referrals for offenses covered by the statewide system are not made by law enforcement but rather by schools, social agencies, or other organizations or persons. In addition, law enforcement officials will sometimes take a child into custody but release him or her to parents while making a paper referral of the case to juvenile court intake staff. The duty to gather the information needed for the statewide system is placed jointly on law enforcement and juvenile justice officials. Section 58.001(a) provides, "Law enforcement officers and other juvenile justice personnel shall collect information described by Section 58.104 as a part of the juvenile justice information system...." Section 58.105 requires each juvenile board to assure that necessary information is compiled and transmitted to the statewide system. Section 58.110(b) requires those agencies to use

a uniform incident fingerprint card in reporting information to the statewide system.

In 2007, the legislature amended Section 58.110(e) to delete the requirement that the referral of a child's case without a custody event be reported to DPS within seven days. Instead, non-custody referrals must be reported to DPS within 30 days and must include the fingerprint cards. This amendment relaxes the time frame for local juvenile probation departments to fingerprint non-custodial referrals. Allowing 30 days for non-custodial referrals provides greater flexibility and frequently the trip to be fingerprinted can be combined with another required appearance, thus making it easier on the child and the family.

When a covered case is referred to the juvenile court from a source other than a law enforcement agency, the juvenile court bears the responsibility for collecting the referral information and submitting it to the statewide system. This may necessitate juvenile probation department employees fingerprinting juveniles referred to the court who have not been booked by law enforcement. Alternatively, arrangements with a local law enforcement agency to perform those tasks might be preferable. In 1999, Section 58.002(a) was amended to permit fingerprinting of a child taken into custody or "referred to the juvenile court" in recognition of the duty on the juvenile court to obtain fingerprint information when a covered offense has been the subject of a paper referral.

Case Processing Information. It is important that the information concerning each case reported to the system be as comprehensive as possible and that it include decisions that are made after a juvenile has been referred to the juvenile court. Section 58.104 mandates the information that must be part of the system. Section 58.104(a) specifies the information to be included:

> [T]he juvenile justice information system shall consist of information relating to delinquent conduct committed or alleged to have been committed by a juvenile offender that, if the conduct had been committed by an adult, would constitute a criminal offense other than an offense punishable by a fine only, including information relating to:
>
> (1) the juvenile offender;
>
> (2) the intake or referral of the juvenile offender into the juvenile justice system;
>
> (3) the detention of the juvenile offender;
>
> (4) the prosecution of the juvenile offender;
>
> (5) the disposition of the juvenile offender's case, including the name and description of any program to which the juvenile offender is referred;
>
> (6) the probation or commitment of the juvenile offender; and
>
> (7) the termination of probation supervision or discharge from commitment of the juvenile offender.

Section 58.104(b) identifies the specific information to be included about decisions made in each case:

> [T]he department shall include in the juvenile justice information system the following information for each juvenile offender taken into custody, detained, or referred under this title for delinquent conduct: ...
>
> [(1) through (6) information identifying the juvenile offender.];
>
> (7) the name and identifying number of the agency that took into custody or detained the juvenile offender;
>
> (8) the date of detention or custody;
>
> (9) the conduct for which the juvenile offender was taken into custody, detained, or referred, including level and degree of the alleged offense;
>
> (10) the name and identifying number of the juvenile intake agency or juvenile probation office;
>
> (11) each disposition by the juvenile intake agency or juvenile probation office;
>
> (12) the date of disposition by the juvenile intake agency or juvenile probation office;
>
> (13) the name and identifying number of the prosecutor's office;
>
> (14) each disposition by the prosecutor;
>
> (15) the date of disposition by the prosecutor;
>
> (16) the name and identifying number of the court;

(17) each disposition by the court, including information concerning custody of a juvenile offender by a juvenile justice agency or probation;

(18) the date of disposition by the court;

(19) the date any probation supervision, including deferred probation supervision, was terminated;

(20) any commitment or release under supervision by the Texas Juvenile Justice Department;

(21) the date of any commitment or release under supervision by the Texas Juvenile Justice Department; and

(22) a description of each appellate proceeding.

Access to Information in the Statewide System. The information in the Juvenile Justice Information System (JJIS) is confidential and is not public information. Section 58.106(a) sets out who may have access to information and provides, in part:

[I]nformation contained in the juvenile justice information system is confidential information for the use of the department and may not be disseminated by the department except:

(1) with the permission of the juvenile offender, to military personnel of this state or the United States;

(2) to a criminal justice agency as defined by Section 411.082;

(3) to a noncriminal justice agency authorized by federal statute or federal executive order to receive juvenile justice record information;

(4) to a juvenile justice agency;

(5) to the Texas Juvenile Justice Department;

(6) to the office of independent ombudsman of the Texas Juvenile Justice Department;

(7) to a district, county, justice, or municipal court exercising jurisdiction over a juvenile; and

(8) to the Department of Family and Protective Services as provided by Section 411.114, Government Code.

Who may have access to the JJIS records has changed over time. Prior to 2015, DPS could release juvenile records to any entity to which it may release adult records under Section 411.083 of the Government Code. Under that section, DPS could release juvenile justice information to certain noncriminal justice agencies authorized by statute to "receive criminal history record information."

Under the Chapter 411 of the long list of non-criminal justice agencies is permitted access to criminal history information and, therefore, was permitted access to information in JJIS. Government Code Section 411.090 and following sections authorize over 40 public and private agencies and organizations to have access to information under Government Code Section 411.083. Examples are the State Board for Educator Certification for persons who have applied for a teaching certificate, the Banking Commission for persons who have applied for a license, the Texas Department of Licensing and Regulation, which controls occupational licensing of various kinds, Institutions of Higher Education, school districts, private schools, State Board of Medical Examiners, Board of Law Examiners, and Texas Structural Pest Control Board.

In 2003, the legislature increased the number of agencies and organizations that have access to information in JJIS. Government Code Section 411.122 gives access to over 30 state agencies that grant occupational licenses if the subject of the record applies for an occupational license, holds such a license or requests a determination of eligibility for a license. This list is in addition to the state agencies that already had access to the information. In 2009, the legislature added the Texas Department of Motor Vehicles to this list.

Government Code Section 411.0851(a) requires a private entity that compiles and disseminates criminal history record information for compensation to destroy and not disseminate any information in its possession if the entity has received: 1) an order of expunction under Code of Criminal Procedure Article 55.02; or 2) an order of nondisclosure issued under Government Code Section 411.081(d) or (f-1). Subsection (f-1) was added by the legislature in 2009 and applies to convictions of children on certain non-CINS, fine-only misdemeanors. A conforming change was made to Government Code Section 552.1425(a)(2), which addresses civil penalties for dissemination of certain criminal history information.

In 2003, the legislature also enacted Government Code Section 411.1401 which gives access to information in JJIS to programs providing activities for children in order to screen applicants for volunteer positions and existing volunteers. An eligible organization is a "nonprofit program that includes as participants or recipients persons who are younger than 17 years of age and that regularly provides athletic, civic, or cultural activities." Government Code Section 411.1401(a).

In Attorney General Open Records Decision No. 655 (1997), the Attorney General said that a local public housing authority is entitled to receive juvenile records from DPS for the purpose of screening applicants, lease enforcement and eviction proceedings.

In 2013, the legislature created the Fingerprint Advisory Council, a group of juvenile justice practitioners given the responsibility of reviewing fingerprint practices in the state and making recommendations for legislative changes. The result of that work was a recommendation that the law be changed so that the noncriminal justice agencies' access to JJIS be limited. In 2015, Section 58.106 was amended to provide that if the charge was misdemeanor delinquent conduct, the listed entities could not have access unless the case was adjudicated. Access for felony cases remained unchanged.

In 2015, the legislature also created a Juvenile Records Advisory Committee, which consisted of a group of juvenile justice practitioners given the responsibility of reviewing juvenile records laws and making recommendations for legislative changes. As a result, Section 58.106 was again amended, this time to limit access to all information in JJIS to only the entities listed in Section 58.106(a). Thus, only criminal and juvenile justice agencies, TJJD and the OIO for TJJD, courts exercising jurisdiction over juveniles, DFPS for certain background check purposes, the military (with permission of the juvenile), and noncriminal justice agencies (authorized by federal statute or executive order) may have access to the information in JJIS. This change was applied retroactively, granting over 1 million people greater protection to their juvenile record without them taking any action.

By enacting Section 58.106(c) in 1997, the legislature authorized DPS to release information from JJIS to the public and the press to the extent necessary to protect the public from and assist in the apprehension of a juvenile who has escaped from a TJJD or other secure detention or correctional facility. In 1999, the legislature authorized DPS to release information from the system to facilitate the apprehension of a juvenile for certain offenses. Both of these provisions are discussed earlier in this chapter.

Destruction, sealing, and restricted access of information in JJIS are discussed later in this chapter.

For a more detailed description of the juvenile justice information system as it existed in 1995, see Brian Stettin, *Texas' Computerized Criminal History Record System: A Profile for the Juvenile Bar*, State Bar of Texas, 9 Juvenile Law Section Report 4-13, No. 2 (June 1995).

F. Gang Records

Gang records are compilations of information about criminal street gangs maintained by law enforcement officers or criminal justice agencies as intelligence information. For several years, local law enforcement agencies had been gathering intelligence information about street gangs, often using federal grants in aid but without explicit statutory authorization from the Texas Legislature. In 1995, the legislature authorized local law enforcement agencies to collect gang intelligence information but prohibited sending that information to a statewide database. In 1997, the legislature retained the prohibition on a statewide database but authorized local agencies to pool information into regional databases.

In 1999, the legislature authorized the creation of a statewide gang database to be operated by DPS. That legislation established entry and exit criteria for the information and defined procedures for challenging the appropriateness of including information in the databases. It is codified as Chapter 61 of the Code of Criminal Procedure [to be Chapter 67 effective January 1, 2019] and includes juveniles as well as adults. The 1999 legislation regulates local and regional gang databases and the DPS statewide database.

Entry of Information into Databases. Currently Chapter 61 regulates the entry of criminal information into gang databases. Effective January 1, 2019, the information in Chapter 61 will be in Chapter 69; the new citation will be included in brackets after the current citation for ease of research after the new effective date.

"'Criminal information' means facts, material, photographs, or data reasonably related to the investigation or prosecution of criminal activity." Article 61.01(3) [67.001(5)]. Since gang-related information identifies individuals and implies the commission of criminal conduct by those individuals, it is critically important that the

information be accurate when entered and current when accessed.

In 2009, Article 61.02 [67.051] was significantly altered to require that criminal justice agencies compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs. Article 61.02(a) [67.051(a)]. Previously, collection of such information was optional. Additionally, law enforcement agencies in municipalities with a population of 50,000 or more or in counties with a population of 100,000 or more are now required to compile such information in a local or regional intelligence database. Article 61.02(b) [67.051(b)]. Mandatory entry of such intelligence by larger jurisdictions is expected to improve the efforts of law enforcement officials across Texas to track documented criminal street gang members and to deter their criminal activities.

In the initial stages of the implementation of the 2009 legislation, the obligation to compile, maintain, and disseminate criminal combination and street gang information applied to criminal justice agencies. However, juvenile probation departments around the state sought guidance regarding whether the mandate upon criminal justice agencies in Article 61.02 [67.051], Code of Criminal Procedure also applied to juvenile justice agencies. While the law appeared to include local juvenile justice agencies under the larger criminal justice umbrella, it was not clear whether these "local" entities fell within the definition as a "federal or state agency responsible for the administration of criminal justice." As a result, Article 61.01 [67.001], Subdivision (10), was changed in 2011 to incorporate the meaning of a juvenile justice agency assigned in Chapter 58 of the Family Code as an entity that has custody or control over juvenile offenders. The existing gang data reporting obligations under Chapter 61 [67] of the Code of Criminal Procedure regarding criminal combination and gang activity in state institutions rest with the Texas Juvenile Justice Department.

As amended in 2011, Article 61.02(a) [67.051(a)] requires each criminal justice agency and juvenile justice agency to compile criminal combination or street gang information and make it available to law enforcement. Article 61.02(b-1) [67.051(c)] clarifies that the responsibilities of criminal justice and law enforcement agencies to compile and disseminate information through a range of media including paper, computer, or other manner also apply to juvenile justice agencies. The statute was also amended in Article 61.01 (9) [67.001(11)], Code of Criminal Procedure, to redefine the term law enforcement agency and to clarify that the former Texas Juvenile Probation Commission and local juvenile probation departments were not considered law enforcement agencies. The existing law previously made this exclusion applicable to the former Texas Youth Commission and the Texas Department of Criminal Justice. In 2015, the law was modified to delete references to the Texas Juvenile Probation Commission and Texas Youth Commission and instead refer to the Texas Juvenile Justice Department, to reflect the sunset of TYC and TJPC and creation of TJJD.

Gang Submission Criteria. Article 61.02(b) [67.051(b)] requires that law enforcement agencies compile and maintain the information in the gang databases in accordance with criminal intelligence systems operating policies established under 28 C.F.R. Section 23.1. The reference to 28 C.F.R. (Code of Federal Regulations) relates to federal standards for the entry of data into gang databases that are supported by federal funds, as most databases of any size are. Those standards require reasonable suspicion to believe that a person identified as a gang member in such a database has engaged in criminal activity.

In addition to the federal standards, Texas has established independent criteria in Article 61.02(c)(2) [67.054(b)]. The first two criteria listed in Article 61.02(c)(2)(A)–(B) [67.054(b)(2)(A)–(B)] amount to standalone evidence establishing gang membership.

As amended in 2007, Article 61.02(c)(2)(C) required a combination of any two of the listed criterion, which included extra-judicial self-admission of membership; identification by a reliable informant or corroborated identification by an informant of unknown reliability; frequenting a documented area of a criminal street gang and associating with known gang members; more than incidental use of gang dress, hand signals, tattoos, or symbols associated with a street gang known to operate in areas frequent by the individual; or being arrested or taken into custody with known gang members for conduct consistent with gang activity.

In 2009, Article 61.02(c)(2)(C) [67.054(b)(2)(C)] was amended to allow an out of court self-admission to include a person's use of the Internet or other electronic medium to post photographs or other documentation identifying the person as a criminal street gang member. Additionally, the legislature added two criteria for self-admission, namely visiting a known gang member, who

is not a family member, in a penal institution and evidence of an individual using technology, including the Internet, to recruit new gang members. Article 61.02(c)(2)(C)(vii) and (viii) [67.054(b)(2)(C)(vii) and (viii)].

No one criterion listed under Subdivision (C) is sufficient to justify placing a person's name in the gang database. Two or more are required. This has the primary consequence of precluding entry of a name if the sole basis for believing the person is a member of a gang is self-admission. Self-admission, unless it is made during a judicial proceeding, is unreliable, and thus insufficient, as an entry criterion especially for younger persons and others who may wish to be known as gang members but are not. Under Subdivision (C), self-admission that is not made during a judicial proceeding can be one of the two entry criteria, but it must be corroborated by information meeting the requirements of at least one of the remaining categories. Article 61.02(d) [67.054(c)] clarifies that the requirement that there be two criteria cannot be met if the two criteria are frequenting a documented area of a criminal street gang and visiting a known gang member in a penal institution; in such cases, another criterion must also be present.

"Family member" and "penal institution," are defined. "Family member" means a person related to another person within the third degree by consanguinity or affinity, as described by Subchapter B, Chapter 573, Government Code, except that the term does not include a person who is considered to be related to another person by affinity only, as described by Section 573.024(b), Government Code. "Penal institution" includes a facility operated by or under contract with TJJD and a juvenile secure pre-adjudication or post-adjudication facility operated by or under a local juvenile probation department.

Article 61.02(b) [67.051(b)] requires that law enforcement agencies compile and maintain the information in the gang databases in accordance with criminal intelligence systems operating policies established under 28 C.F.R. Section 23.1.

Article 61.04(a) [67.102(a)] authorizes the collection and maintenance of criminal information concerning children as an exception to the confidentiality provisions of Chapter 58. This means that law enforcement may photograph and fingerprint juveniles who are associated with a combination or criminal street gang. This type of criminal information may be compiled and released under Chapter 61 [67] "regardless of the age of the child."

Under Article 61.03(c) [67.051(d)] a local law enforcement agency described by Article 61.02(b) [67.051(b)] is required to forward information compiled and maintained under Chapter 61 [Chapter 67] to DPS for inclusion in the statewide database.

Parental Notification Local Option. Article 61.04(d) [67.102(d)] authorizes, but does not require, a local government unit to require parental notification about the apparent gang activities of a child:

> The governing body of a county or municipality served by a law enforcement agency described by Article 61.02(b) [67.051(b)] may adopt a policy to notify the parent or guardian of a child of the agency's observations relating to the child's association with a criminal street gang.

Access to Information in a Gang Database. Information in a gang database under Chapter 61 [Chapter 67] is not public information. It can be accessed only by another criminal justice agency, a court, or the defendant in a criminal proceeding who is entitled to discovery under Chapter 39, Code of Criminal Procedure. The criminal justice agency or court receiving the information may use it only for the administration of criminal justice. The defendant receiving the information may use it only for a defense in a criminal proceeding. Article 61.03 [67.101], Code of Criminal Procedure.

Article 61.04(b) [67.102(b)] authorizes the release of information maintained under Chapter 61 [Chapter 67] to the attorney for a child who is a party to Title 3 proceedings if the information is material to the proceedings and not privileged under law.

Review of Information in Databases. Article 61.08(a) [67.202(a)] authorizes an adult named in a gang database or the parents of a child named in a gang database to request review of whether the entry criteria were met. On receipt of such request, the head of the agency or designee must review the information about the person that has been collected by the agency to determine if reasonable suspicion exists to believe the information is accurate and if the information complies with the submission criteria in Article 61.02(c) [67.054(b)].

If the agency determines there is not reasonable suspicion to believe the information is accurate, that is, that it relates to criminal activity by the named person or that the entry criteria of Article 61.02(c) [67.054(b)] were not satisfied, it is required by Article 61.08(b) [67.202(b)] to

destroy its records relating to that person and to notify DPS of its action. Upon receipt of that notice, DPS is required to destroy its records relating to that person. The agency is also required to notify the person who initiated the review of the action it has taken.

If the agency holding the record under review concludes the record is properly in its database, it is required to notify the person initiating the review of that conclusion and that the person is entitled to seek judicial review of the agency's determination under Article 61.09 [67.203].

Because of a concern over abusive review requests, a person confined by TJJD or the Texas Department of Criminal Justice (TDCJ) is not eligible under Article 61.08(d) [67.202(e)] to initiate requests for review of records while they are so confined.

In 2007, the rights granted under Article 61.08 [67.202] were expanded with the addition of Article 61.075 [67.201]. This statute allows a person, including a parent or guardian, to request that a law enforcement agency determine whether it has collected or is maintaining criminal information relating solely to the person or a child. The law enforcement agency must respond not later than the 10th business day after the date the request is received. The agency may, however, require reasonable written verification of the identity of the person making the request and the relationship between the parent or guardian and the child, if applicable. The written verification may include an address, date of birth, driver's license number, state identification card number, or social security number. Article 61.075(b) [67.201(b)].

Judicial Review of Information in Databases. Article 61.09 [67.203] authorizes the filing of a lawsuit seeking review of an agency determination under Article 61.08(b)(2) [67.202(c)] that a record is properly in its gang database.

Venue for the lawsuit is in the county where the person seeking review (adult whose records are in the database or parent/guardian of a child whose records are in the database) resides, no matter where the database is located.

Under Article 61.09(b) [67.203(b)], the district court is required to conduct an in camera review of the disputed information to determine whether, under the standards of Article 61.02 [67.054], the information is properly in the database. An in camera review means that the judge looks at the information in private without the person, his or her lawyer, or the prosecutor being present. Article 61.09(e) [67.203(e)] provides that the information that is the subject of the in camera review is confidential and may not be disclosed. If the court concludes that the information should not be in the database, it orders the law enforcement agency that collected the information to destroy it and notifies DPS of that action so it may destroy its records. If the court concludes that the information is properly included in the database, the person seeking review has a right of appeal.

Automatic Removal of Information from Gang Databases. Article 61.06 [67.151] requires the removal of information from gang databases after five years if: (1) the person was an adult when the information was placed in the databases; and (2) during that time the person was not arrested for an offense that was reported to the DPS criminal history database. In general, only arrests for felonies or jailable misdemeanors are reported to the DPS criminal history database. The removal requirement does not apply to information collected under Chapter 67 by TJJD or TDCJ.

In 2007, the legislature amended Section 61.06(c) [67.151(c)] by enacting three versions of Subsections (c)(1)–(3). Each of the three versions apply to adults and do not impact juveniles. Combined with the 2009 amendments, they make it clear that the five-year period does not include any time spent in a TJJD facility, contract facility, or post-adjudication secure correctional facility, as well as in TDCJ or a county jail or adult contract facility.

If the person was a child when information was placed in the gang database, Article 61.07 [67.152] requires the removal of that information from those databases if two years have elapsed without an arrest being reported to the DPS criminal history database or JJIS. Time spent confined in TJJD or TDCJ does not count toward the two-year period. The removal requirement does not apply to information collected under Chapter 61 [67] by TJJD or TDCJ.

This removal process does not depend upon any application or initiative by the person who is the subject of the records. It is activated by DPS doing a computer check of information in its gang database by cross-checking it against the information it received concerning arrests of adults and juveniles. Once it is determined that information should be removed because of the lack of arrest activity, it should automatically be removed by DPS

from its database. DPS should also notify the local law enforcement agency that submitted the information that the entry should be removed from its database as well.

In 2009, the legislature added Article 61.12 [67.053] to require intelligence database user training every two years for any person in Texas who enters information into or retrieves it from a database under Chapter 61 [Chapter 67]. The law calls for a memorandum of understanding (MOU) between the United States Department of Justice (DOJ) and DPS to provide training concerning the operating principles of such databases and how those principles relate to databases established or maintained under Chapter 61 [Chapter 67]. The operating principles contained in 28 C.F.R. Part 23 provide consistent standards for the operation of criminal intelligence systems between states, fostering accuracy and reliability of information between jurisdictions.

Transitional Provisions. The 1999 legislation required DPS to have its gang database operational by September 1, 2000. On that date, law enforcement agencies that maintained gang databases were required to submit their information to the DPS database. Before September 1, 2000, each local law enforcement agency that had a gang database was required to examine the information in that database and to purge all information that did not conform to the entry criteria established by Article 61.02. The sole exception to this requirement was law enforcement information based on uncorroborated self-admission of gang membership. Since at the time that information was collected, the prevailing entry criterion was uncorroborated self-admission and there was no motive to document such corroboration as might have existed, it would be unfair retroactively to require the purging of that information. As to information collected locally or statewide after the effective date of the legislation on September 1, 1999, an uncorroborated self-admission does not meet entry requirements.

G. Sex Offender Registration Records

The entire system of sex offender registration is explained in detail in Chapter 12. This discussion is a summary of the characteristics of the records created by that registration system, including their status as public records, their permanency, and their eligibility to be sealed.

History of Sex Offender Registration. In 1991, the legislature enacted, as Article 6252-13c.1 of the Civil Statutes, a sex offender registration program that applies to juveniles as well as adults. A juvenile who is adjudicated for various sex offenses has a legal duty to register with the local law enforcement agency in the community in which he or she resides, providing detailed identifying information and information about the offense.

Prior to its amendment in 1995, the registration statute provided that this information was confidential. As the system originally was devised, it was an information system maintained by law enforcement for use only by law enforcement officers in criminal investigations. However, in 1995, that system changed to a system maintained by law enforcement but available to any member of the public, presumably to facilitate crime prevention as well as crime investigation.

No distinction is made between juvenile and adult sex offender registration records. Both are equally public. In Attorney General Open Records Decision No. 645 (1996), the Attorney General stated that information in the sex offender registration files of local law enforcement agencies and DPS is public information whether based upon an adult conviction or a juvenile adjudication and, with the exceptions specified by statute, must be disclosed upon appropriate request.

In 1997, the legislature extensively revised the sex offender registration statute and moved it from the civil statutes to become Chapter 62 of the Code of Criminal Procedure.

Permanency of Juvenile Sex Offender Records. Prior to amendment in 1995, DPS was required by law to identify and destroy sex offender registration records of juveniles when the person became 21 years of age. Civil Statute Article 6252-13c.1, Sec. 6 (repealed). That provision was repealed in 1995. Under 1995 amendments, the duration of the legal duty to register was extended. Previously, it expired when the juvenile became 21, but for juvenile adjudications that occur on or after September 1, 1995, the duty to register extends until 10 years after the person has completed the terms of the disposition (i.e. been discharged from probation, TJJD, or TDCJ if transferred on a determinate sentence).

Until 2003, even when the duty to register expired, the registration records remained in the system. They remained forever, unless they were sealed by juvenile court order, even though as time passed they became less and less accurate as to place of residence of the registrant. In 2003, the legislature enacted Code of Criminal Procedure Article 62.14, which requires removal of infor-

mation from the database when the duty to register expires. In 2005, that article was recodified as Article 62.251, which provides:

> (a) When a person is no longer required to register as a sex offender under this chapter, the department shall remove all information about the person from the sex offender registry.
>
> (b) The duty to remove information under Subsection (a) arises if:
>
> (1) the department has received notice from a local law enforcement authority under Subsection (c) or (d) that the person is no longer required to register or will no longer be required to renew registration and the department verifies the correctness of that information;
>
> (2) the court having jurisdiction over the case for which registration is required requests removal and the department determines that the duty to register has expired; or
>
> (3) the person or the person's representative requests removal and the department determines that the duty to register has expired.
>
> (c) When a person required to register for an adjudication of delinquent conduct appears before a local law enforcement authority to renew or modify registration information, the authority shall determine whether the duty to register has expired. If the authority determines that the duty to register has expired, the authority shall remove all information about the person from the sex offender registry and notify the department that the person's duty to register has expired.
>
> (d) When a person required to register for an adjudication of delinquent conduct appears before a local law enforcement authority to renew registration information, the authority shall determine whether the renewal is the final annual renewal of registration required by law. If the authority determines that the person's duty to register will expire before the next annual renewal is scheduled, the authority shall automatically remove all information about the person from the sex offender registry on expiration of the duty to register and notify the department that the information about the person has been removed from the registry.
>
> (e) When the department has removed information under Subsection (a), the department shall notify all local law enforcement authorities that have provided registration information to the department about the person of the removal. A local law enforcement authority that receives notice from the department under this subsection shall remove all registration information about the person from its registry.
>
> (f) When the department has removed information under Subsection (a), the department shall notify all public and private agencies or organizations to which it has provided registration information about the person of the removal. On receiving notice, the public or private agency or organization shall remove all registration information about the person from any registry the agency or organization maintains that is accessible to the public with or without charge.

The central idea of Article 62.251 is that when DPS receives reliable information that the duty to register has expired, it must delete the information from the sex offender registration database. It must also notify all public and private agencies that have obtained registration information from DPS about the removal. Those agencies are in turn required to remove the information from their databases.

Sealing Sex Offender Registration Records. The sealing provisions of Chapter 58, Family Code, discussed in detail later in this chapter, pose difficult problems when applied to the records maintained under the sex offender registration statute. The sealing statute reaches sex offender registration records because they are "law enforcement" records.

In several situations, Section 58.003 permits records to be sealed as soon as a person exits the juvenile system, within two years after the person exits the system, or when the person becomes 21 years old. However, under the sex offender registration statute the duty to register for one adjudicated of a reportable sex offense continues for 10 years beyond exit from the system.

It would make no sense to permit a juvenile respondent to obtain sealing of sex offender registration records when, under the sex offender registration statute, he or she has a duty, enforceable by a prosecution for a state jail felony, to register each change of address for the next several years. The conflict between these two provisions was resolved in 1997. The legislature enacted Section

58.003(n) to exempt sex offender registration records from the reach of a sealing order but only for so long as there is a continuing obligation to register under the sex offender law. All other juvenile-generated records can be sealed when eligibility accrues, and once the obligation to re-register expires, a new sealing order could be issued to reach sex offender registration records.

Unregistration and Deregistration. In 2001, the legislature enacted Article 62.13 of the Code of Criminal Procedure to authorize juvenile courts to excuse registration in circumstances in which registration would not substantially increase protection to the public and to authorize juvenile courts to order termination of existing registration. That procedure is now codified in Subchapter H of Chapter 62. Juvenile courts are also authorized to order registration or continuation of registration on a non-public status. See Articles 62.351 and 62.352. These provisions are discussed in the section on sex offender registration in Chapter 12.

H. DNA Records

Adults convicted of certain criminal offenses and juveniles adjudicated for those same offenses may be required to provide a biological sample suitable for DNA testing. The purpose of this requirement is to assemble a DNA database, maintained by DPS, to aid in crime investigation. Before 2005, Government Code Section 411.150 governed the authority of then-TYC, now TJJD, to create DNA records of certain juvenile offenders. In 2005, the authority described in Section 411.150 was moved to reenacted and amended Section 411.148, titled Mandatory DNA Record. In 2007, the legislature repealed now redundant Section 411.150.

In 2009, Section 411.148(a)(2)(B) was added to clarify that juveniles adjudicated for certain felonies described in Family Code Section 54.0409 and placed on probation must provide a DNA sample as a condition of probation. See discussion of Section 54.0409 in Chapter 12.

Under Section 411.148(b), juveniles adjudicated of a felony who are confined in a facility operated by or under contract with TJJD must provide one or more DNA samples for the purpose of creating a DNA record. This is a major departure from repealed Section 411.150, which required DNA samples from juveniles adjudicated for particularly serious felonies or felonies requiring sex offender registration. Under Section 411.148(f-1), TJJD must notify the director of DPS that such a juvenile offender is to be released from custody not earlier than 120 days, instead of 10 days as previously required, before the individual's release date.

Section 411.048(d), amended in 2009, mandates that if a juvenile is received into the custody of TJJD, that agency must collect the DNA sample during the initial examination of the child or at another time determined by TJJD. This identical provision was formerly contained in Subsection (e), which was repealed in 2009. If a person who is required to provide a DNA sample is in the custody or under the supervision of another criminal justice agency, such as a community supervision and corrections department, a parole office, or a local juvenile probation department or parole office, then that agency must collect the DNA sample at a time determined by the agency. Section 411.048(d), Government Code.

Section 411.1471(f) clarifies that once a DNA sample is provided, there is no requirement to provide another sample pursuant to Section 411.148 unless a prosecutor establishes that the interests of justice or public safety require the additional sample.

Probation and Parole Condition Requiring DNA Sample. In 2001, the legislature greatly expanded the scope of the requirement to provide a DNA sample to reach juveniles placed on probation. It amended Section 54.0405, Family Code, to require a juvenile court to order a juvenile placed on probation for an offense for which he or she is required to register as a sex offender to submit a blood sample "or other specimen" to DPS. The legislature made this provision retroactive to include juveniles placed on probation before the effective date of the amendment. Since this provision is restricted to juveniles who are required to register as sex offenders, it does not apply to juveniles for whom registration has been excused by the juvenile court under Article 62.352 of the Code of Criminal Procedure or while registration has been deferred by the juvenile court under that article. See Chapter 12 for a discussion of Article 62.352.

Similarly, in 2001 the legislature amended Human Resources Code Section 61.0813 [renumbered as 245.052 in 2011] to require a TJJD parolee to submit a DNA sample if he or she is required to register as a sex offender and has not already provided a sample.

Both the DNA probation condition requirement in Section 54.0405, Family Code, and parole condition requirement in Human Resources Code Section 245.052 apply retroactively to juveniles already on probation or parole. Appropriate authorities are required to modify

probation or parole conditions to impose the DNA sample requirement, if a sample has not already been provided. See Chapter 12 for a discussion of Section 54.0405 and *In the Matter of D.L.C.,* 124 S.W.3d 354.

Access to DNA Information. Access to DNA identifying information in the database is restricted to certain entities for certain purposes. The information may be released to a criminal justice agency for criminal justice or law enforcement identification purposes. It may also be released for a judicial proceeding, but only if otherwise admissible by law. Finally, it may be released to a defendant for criminal defense purposes if it is related to the case in which the defendant is charged or released from custody under Article 17.47, Code of Criminal Procedure (relating to the requirement of the provision of a specimen as a condition of release on bail or bond) or other court order. Government Code Section 411.147. A DNA record is confidential and is not subject to disclosure under the public information law. Government Code Section 411.153. In 2007, the legislature amended Section 411.153(b) to make it an offense to knowingly disclose "to an unauthorized recipient" information in a DNA record or information related to a DNA analysis of a sample collected under the DNA database system. The offense is a state jail felony.

A DNA record must be expunged or removed from a DNA database if it was made the subject of an expunction order issued by a district court under Chapter 55 of the Code of Criminal Procedure. Such an order may be issued if the petitioner is entitled to expunge the record for the offense to which the DNA record is related. Government Code Section 411.151.

In 2003, the legislature amended Government Code Section 411.151 requiring DPS to expunge a DNA record of a juvenile upon presentation of a court order issued under Subchapter C-1, Chapter 58, Family Code sealing the record of adjudication upon which the DNA sample was based.

In 2007, the legislature again amended Government Code Section 411.151 by adding Subsections (c) and (d), which read:

> (c) This section does not require the [DPS] director to expunge a record or destroy a sample if the director determines that the individual is otherwise required to submit a DNA sample under this subchapter.
>
> (d) The [DPS] director by rule may permit administrative removal of a record, sample, or other information erroneously included in a database.

In 2011, the legislature added subsection (e) to provide that a failure on the part of DPS to expunge a DNA record under this Section 411.151, Government Code, may not be the sole ground in a criminal proceeding for excluding evidence based on or derived from the DNA record in the database,

I. Destruction and Sealing of Files and Records

The Family Code distinguishes between the destruction of records and the sealing of records. Destruction involves the irretrievable elimination of records. Sealing involves the collection of records for safekeeping under protections that permit only limited access to them thereafter.

1. Records Destruction

a. Prior to 1995 Amendments

Former Section 51.16 provided a procedure for the destruction of juvenile files and records. The juvenile court was authorized by Section 51.16(i) on its own motion or on request of the juvenile named in the records to order "all files and records" destroyed if: (1) seven years had elapsed since the 16th birthday of the subject; (2) he or she was adjudicated for delinquent conduct or conduct indicating a need for supervision (CINS); and (3) he or she had not been convicted of a felony. In addition, under Section 51.16(j), felony records could not be destroyed.

This provision existed primarily to permit keepers of records to clean out their old records, thereby creating space for new ones. By referring to "all files and records" Section 51.16 was intended to cover law enforcement files and records, as well as those of the clerk of the juvenile court, juvenile probation department, and prosecutor's office.

These "spring cleaning" provisions did not survive 1995 amendments that repealed Section 51.16.

In 2001, the legislature enacted Section 58.0071 to authorize destruction of certain juvenile records along the "spring cleaning" lines authorized before 1995. This provision is discussed later in this section.

b. 1995 Amendments

Under the 1995 amendments, destruction of records was required under two circumstances and authorized under a third: (1) destruction was required by Section 58.001(c) if a child is taken into custody but not referred to the juvenile court within 10 days; (2) destruction was required by Section 58.006 if there was a finding of no probable cause by the prosecutor or intake officer; and (3) destruction of records was authorized by Section 58.003(l), other than those relating to a felony or jailable misdemeanor, that had previously been sealed when the subject became 21 as long as he or she had not adult felony conviction. The current law is discussed later in this chapter.

c. No Referral

Section 58.001(c) provides in part:

> … If the child is not referred to juvenile court within that time [10 days after being taken into custody], the law enforcement agency shall destroy all information, including photographs and fingerprints, relating to the child unless the child is placed in a first offender program under Section 52.031 or on informal disposition under Section 52.03. The law enforcement agency may not forward any information to the Department of Public Safety relating to the child while the child is in a first offender program under Section 52.031, or during the 90 days following successful completion of the program or while the child is on informal disposition under Section 52.03. Except as provided by Subsection (f), after the date the child completes an informal disposition under Section 52.03 or after the 90th day after the date the child successfully completes a first offender program under Section 52.031, the law enforcement agency shall destroy all information, including photographs and fingerprints, relating to the child.

When the obligation to destroy arises under Section 58.001(c), what must be destroyed? It is common for a single incident or offense report to identify multiple suspects. If for some reason one suspect is a juvenile who is not referred or who successfully completes a diversionary or first offender program, must the entire report be destroyed or only those portions that identify the juvenile? It would be unreasonable to require destruction of the entire report because its continued existence is likely to be necessary for the successful prosecution of the remaining suspects. The purpose of the destruction requirement—eliminating that particular juvenile's record—can be accomplished by deleting any information in the report that identifies the juvenile, while leaving the rest of the report intact.

The Attorney General stated in Attorney General Opinion No. DM-435 (1997) that when law enforcement is obligated to destroy juvenile arrest information under Section 58.001, it is sufficient merely to redact documents to delete the information identifying the juvenile. The remaining information may be left intact to facilitate prosecution of adults or other juveniles.

In 1997, the legislature enacted Section 58.001(d) to provide that, if the information related to the child that is obligated to be destroyed is contained in a document that contains information relating to an adult, the obligation to destroy law enforcement information is discharged by editing an entry or document to delete or obscure any identification of the juvenile. By enacting Section 58.001(e), the legislature also provided that deletion of a computer entry constitutes destruction of a record even though a computer expert might under some circumstances be able to reconstruct the file.

In 1997, the legislature enacted Section 58.001(f) to permit law enforcement to keep a copy of records relating to a child who has successfully completed a first offender program that must otherwise be destroyed for the sole purpose of determining the child's eligibility to participate in a first offender program in the future.

Section 58.002(b) is intended to provide an enforcement mechanism for the obligations of law enforcement agencies under Section 58.001 to destroy juvenile fingerprint and photograph records. It requires law enforcement annually to certify to the juvenile board that records required to be destroyed by Section 58.001 have been destroyed. Until 2017, it required the juvenile board to audit law enforcement records to determine whether the annual certification is truthful. The law now allows, but does not require, the juvenile board to conduct such an audit. If an audit shows the certification to be false, the person making the certification is subject to prosecution for perjury.

d. No Probable Cause

The second circumstance under which destruction is required is prescribed by Section 58.263 (renumbered from Section 58.006 in 2017):

> The court shall order the destruction of the records relating to the conduct for which a child is taken into custody, including records contained in the juvenile justice information system, if:
>
> (1) a determination is made under Section 53.01 that no probable cause exists to believe the child engaged in the conduct and the case is not referred to a prosecutor for review under Section 53.012; or
>
> (2) a determination that no probable cause exists to believe the child engaged in the conduct is made by a prosecutor under Section 53.012.

This section requires the juvenile court to order destruction of records if intake has made a finding of no probable cause in a case in which prosecutorial referral is not required or if intake referred the case and the prosecutor made a finding of no probable cause.

Implicitly, there is no requirement that the child must petition the court for this relief. It should be automatically provided by the court. Therefore, when intake or the prosecutor, as the case may be, makes a no probable cause determination, it should also take steps to notify the designated agent of the juvenile court so that a records destruction order will be issued as a matter of course and sent to the appropriate agencies. There should be no need for a hearing of any kind before the destruction order is issued upon official notification of a finding of no probable cause.

e. Certain Sealed Records

Prior to 2017, Section 58.003(l) authorized, but did not require, the destruction of certain previously sealed records:

> On the motion of a person in whose name records are kept or on the court's own motion, the court may order the destruction of records that have been sealed under this section if:
>
> (1) the records relate to conduct that did not violate a penal law of the grade of felony or a misdemeanor punishable by confinement in jail;
>
> (2) five years have elapsed since the person's 16th birthday; and
>
> (3) the person has not been convicted of a felony.

This provision applied only to non-felony and non-jailable misdemeanor records. Therefore, it included records of CINS cases. It required the person to be 21 and required that the records had been previously been ordered sealed, although there was no requirement as to how long they must have been sealed. This provision had very limited utility because of its narrow scope. Because of the limited utility and lack of use, when Section 58.003 was repealed in 2017 with most of its provisions being distributed throughout new Subchapter C-1, this provision was not included.

f. Destruction of Records

In 2001, the legislature authorized prosecutors, law enforcement agencies, and juvenile probation departments to destroy records in closed cases that are unlikely to be of further use but which are expensive to maintain and which sometimes, by pure clutter, make accessing the occasional needed record all the more difficult. Before the substantial 1995 revision of Title 3 there was a provision that permitted a "spring cleaning" of various juvenile records under limited circumstances. That provision, Family Code Section 51.16 (repealed), was inadvertently not carried forward in the revision of the juvenile records provisions that year. The 2001 legislation reintroduced the concept of spring cleaning of juvenile records in a modified and expanded form in Section 58.0071. That legislation applied to the destruction of records on or after September 1, 2001, regardless of when the records were created. In 2017, amidst the revision to juvenile records law, the provision was renumbered to Section 58.264 but the substance was left intact. The 2017 changes also applied to records existing before the effective date.

Neither the juvenile nor his or her family has any right to insist that records be destroyed. Destroying records is not an expungement or sealing and confers no right on the respondent to deny the events that gave rise to the record. This provision exists solely for the convenience of the record keepers. No agency is required to destroy any records. Only the elected prosecutor may order destruction of prosecution records, only the chief of the law enforcement agency may order destruction of law enforcement records, and only the juvenile board may order destruction of juvenile probation records.

There are time requirements, which are based on the most serious conduct for which a person was referred and/or adjudicated. If the most serious conduct for which

a child was referred to juvenile court was conduct indicating a need for supervision, whether or not there was an adjudication, or was conduct for which the court lacked jurisdiction, destruction may occur when the person turns 18. If the most serious conduct referred was misdemeanor delinquent conduct, whether or not adjudicated, or felony delinquent conduct that was not adjudicated, the person must be 21. If the most serious conduct referred was delinquent conduct resulting in a felony adjudication, the person must be 31.

Clerk of court records are specifically excluded from the destruction authorization, as are records maintained by TJJD for statistical and research purposes, including records maintained in JCMS. Sections 58.264(f) and (g). However, any entity may convert physical records to electronic records at any time and then, after the conversion, destroy the physical records because that is not considered destruction. Electronic records are considered destroyed only if the electronic records are deleted. Sections 58.264(d) and (e). Attorney General Opinion No. GA-1017 (2013).

The provisions in the law do not affect the destruction of physical records and files authorized by the Texas State Library Records retention schedule. Section 58.264(h).

2. Records Sealing

Sealing is a benefit offered to juveniles to provide additional protection to records that are already confidential by law. Sealing laws have changed over time and were significantly modified in 2017 as a result of the work of the legislatively-created Juvenile Records Advisory Committee, which made recommendations within the overarching goals of removing the "taint of criminality, whenever possible," ensuring public safety, and improving governmental efficiency while still meeting the rehabilitative needs of the juveniles. Because of the changes in law greatly limiting the entities who may have access to juvenile records, as discussed earlier in this chapter, sealing, though it does provide the greatest protection available under the law, is not as imperative as it once was in protecting juvenile records.

When a record is sealed, it is not physically destroyed but instead is stored locally or with the clerk of the juvenile court in a manner in which only the custodian of records may access the record and then, only if a motion to inspect the sealed record has been granted. Although the physical record is not destroyed, the records are deleted from the court system, case management system, and DPS' juvenile justice system because the impact of sealing is to treat the records and the incident they relate to as though it never occurred, except for limited purposes, described later.

The criteria for sealing juvenile records are based on the juvenile's entire juvenile history, not case by case. In other words, sealing is an all or nothing proposition.

There are two ways in which sealing proceedings may be initiated – by application or without application. Sealing without application means that the juvenile does not have to take any action to get the records sealed; instead, government officials identify that records are eligible for sealing and take the steps to have them sealed. Sealing by application means that the juvenile must actually apply and ask the court to seal the records.

a. Sealing Without Application: Delinquent Conduct

If the most serious offense resulting in referral to juvenile court was misdemeanor delinquent, whether or not adjudicated, or felony delinquent conduct that was not adjudicated, the juvenile may be eligible for sealing without application if other criteria are met, as provided in Section 58.253. The other criteria that must be met are that the person: (1) is at least 19 years of age; (2) has no pending delinquent conduct matters in juvenile court; (3) has no adult felony or jailable misdemeanor conviction; (4) has no adult felony or jailable misdemeanor charge pending; and (5) was never transferred from juvenile to adult criminal court for prosecution (i.e., "certified").

Because it maintains the juvenile justice information system (JJIS), DPS certifies to a juvenile probation department when an individual's records appear to be eligible for sealing. The probation department must, within 60 days of receiving that notification, provide the juvenile court with a list of the referrals and information on how each referral was disposed. If the probation department discovers information that suggests the person's records are not eligible for sealing, the probation department is to notify DPS within 15 days after receiving notice of the certification. If the probation department is correct, DPS will correct its information and no further action is necessary. If the probation department is incorrect and the person is eligible for sealing, the probation department

must provide the court with the information on the referrals and their disposition within 30 days of the determination that the person is eligible. Section 58.254.

A juvenile who is eligible for sealing under Section 58.253 is entitled to have the records sealed. The court has 60 days from receipt of the information from the probation department to issue an order sealing all of the person's juvenile records, including any CINS records, in that county or judicial district. Section 58.254(f).

b. Sealing Without Application: Conduct Indicating a Need for Supervision

Section 58.255 addresses the situation in which the most serious offense for which a juvenile was referred to juvenile court was conduct indicating a need for supervision (CINS), whether or not that conduct was adjudicated. In such cases, the person is eligible for sealing without application if the person: (1) is at least 18 years of age; (2) has no adult felony convictions; and (3) has no adult felony or jailable misdemeanor charges pending.

Because conduct indicating a need for supervision is not recorded in the juvenile justice information system (JJIS), maintained by DPS, juvenile probation departments will not receive notice from DPS that such records are eligible for sealing. Instead, the Texas Juvenile Justice Department (TJJD) will provide them a list each month of juveniles who are at least age 18 who were only referred to juvenile court for CINS. The juvenile probation department is then responsible for running a criminal history check to ensure the person has not adult charges pending and has not, as an adult, been convicted of a felony.

For efficiency purposes, probation departments, prosecutors' offices, and law enforcement agencies may consider destroying these records upon receipt of the sealing order, as such records would be permissible to be destroyed under the permissible destruction (i.e., "spring cleaning") provision in Section 58.264.

c. Sealing By Application

A juvenile who is adjudicated for a felony must submit an application to the court asking to have his or her records sealed. The court may not charge a fee for filing the application. An attorney may represent the child, but there is no requirement for an attorney. The application must include the specific information listed in Section 58.256, including identifying information, information about the conduct referred to the court, and a list of entities the applicant believes to be in possession of the records. The court has discretion to grant the sealing based on the application or to have a hearing to determine whether or not to seal the records. The court cannot deny a request to have the records sealed without holding a hearing.

The court may only seal records on application if the court determines the person: (1) is at least 18 years of age, or is younger than 18 and at least two years have elapsed since the final discharge in each matter for which the person was referred to the juvenile court; (2) does not have any pending delinquent conduct matters with the juvenile court; (3) was never transferred from juvenile court to adult criminal court for prosecution (i.e., "certified"); (4) did not receive a determinate sentence; (5) is not currently required to register as a sex offender; (6) if committed to TJJD or Travis County's local commitment program, has been discharged; (7) has no adult felony convictions; and (8) has no pending felony or jailable misdemeanor adult charges.

Juveniles not adjudicated for a felony may also apply for sealing under this provision, as long as they meet the criteria. Because sealing without application occurs at age 19, those wishing to seal earlier than that may apply. Additionally, a person who is ineligible for sealing without application due to a jailable misdemeanor conviction as an adult could apply to have records sealed under this provision since it grants the court the discretion to seal even with an adult misdemeanor conviction. An adult felony conviction precludes sealing in all circumstances.

d. Notice and Hearing

Because sealing without application is an entitlement, it occurs without a hearing. Sealing by application may occur with or without a hearing; however, a sealing application may not be denied without a hearing. If the court determines a hearing is necessary, it must be held no later than the 60th day after the court receives the person's applicable. The court must give reasonable notice of the hearing to the person who is the subject of the records, that person's attorney, if any, the prosecutor, all entities named in the application as entities the person believes to be in possession of records, and any individual or entity whose presence is requested by the person or the prosecutor. The purpose of the last provision is to allow the person to present testimony supporting his or her request for sealing and to allow the prosecutor to present testimony in support or opposition, as applicable. Section 58.257, Family Code.

e. Order Sealing Records

An order sealing records is the means by which the court communicates to an entity that their records must be sealed. The order must contain the information set out in Section 58.258, which mirrors the information required to be in the application.

In cases involving sealing without application, the order must be issued within 60 days of the court receiving the required information by the court. Section 58.254(f). In cases involving sealing by application, the court is authorized to seal the records "immediately" without a hearing or to hold a hearing no later than 60 days after the court receives the application. Section 58.257. After the hearing, the court will issue an order granting or denying the application to seal. While there is no specific timeline for issuing this order, due process would seem to dictate that it be issued timely.

On entry of an order sealing records, all adjudications relating to the juvenile are vacated and the proceedings are dismissed and treated for all purposes as though they had never occurred. No later than 60 days after entry of the order, the clerk of court must provide a copy to DPS, TJJD (if the person was committed to TJJD), the juvenile probation department, the prosecutor's office, each law enforcement agency having conduct with the juvenile, each agency that had custody of or provided supervision or services to the juvenile, and any other entity the court has reason to believe has records. The clerk also seals all court records relating to the proceedings, including any records created in the clerk's case management system. Section 58.258, Family Code.

f. Actions Taken on Receipt of Order

Prior to 2017, all entities receiving a sealing order were required to gather their records, which could be voluminous, and send them to the clerk. The clerk was required to store the physical records, frequently off site and at a large expense. The only mechanism for having sealed records destroyed was former Section 58.003(l), which applied to CINS records only, required a motion by the person or the court, and could not occur until the person was 21. This is, in part, because there was no was no "spring cleaning" provision for clerks,

Beginning September 1, 2017, not all entities are required to send their records to the clerk upon receipt of the order. Probation departments, prosecutors, law enforcement entities, TJJD, and any public or private agency or institution providing supervision or services to the juvenile must "seal the records in place," which means they must store the records in a manner that allows access to the records only by the custodian of records for the entity. They must also, within 61 days of receiving the order, submit a written verification to the court informing the court they have done so.

Juvenile probation departments, prosecutors, and law enforcement agencies may destroy the sealed records as part of their authority to destroy records under Section 58.264 (i.e. permissible, or "spring cleaning" destruction, discussed earlier in this chapter).

The law is slightly different for DPS. Rather than seal the records from everyone, DPS keep the records in place but limit access to only TJJD and then only for the purpose of conducting research and statistical studies. Prior to September 1, 2017, when records were sealed, they were removed from DPS's juvenile justice information system (JJIS). The majority of individuals whose records are sealed do not have any adult criminal record. However, because recidivism studies involve determining what percentage of individuals with a juvenile record in JJIS also have an adult record with DPS, removing the individuals from JJIS who would make up the percentage that did not recidivate results in an artificially inflated recidivism rate. Allowing DPS to keep the records in its system for TJJD statistical purposes will result in more accurate recidivism rate studies. In addition to limiting access to the records, DPS must destroy any other records it possesses, including DNA records, and send written verification to the court within 61 days.

If an entity that receives an order to seal records has no records related to the juvenile, the entity must provide written notification of the fact to the issuing court within 30 days after receipt of the order. Section 58.259(e), Family Code. If an entity receiving an order is unable to comply because the information is incorrect or insufficient to allow the entity to identify the records that are subject to the order, the entity is to contact the issuing court within 30 days; the court must take any action necessary to provide the necessary information, including contacting the subject of the records or that person's attorney, if any. Section 58.259(d), Family Code.

g. Exempt and Ineligible Records

Section 58.252 provides that certain records are exempt from sealing under the law. These are records relating to a criminal combination or criminal street gang that

are maintained by DPS or a local law enforcement agency, sex offender registration records that are maintained by DPS or a local law enforcement agency, and records collected or maintained by TJJD for statistical and research purposes.

Section 58.256(d) prohibits sealing in three instances. First, the court may not order the sealing of records of a person for whom a determinate sentence was imposed. This section prohibits the sealing not only of the records in the determinate sentence case but also the records of any other juvenile cases the respondent may have had previously. This is consistent with the concept that whether or not a person is eligible for sealing is based on the most serious offense and eligibility criteria is for the entire record, not individual cases.

Second, the court may not order sealing of the records of a person who is currently required to register as a sex offender. Once the duty to register has expired, the person may apply to the court for sealing, if all other sealing criteria are met.

Finally, the court may not order the records of a person committed to TJJD or to the Travis County Juvenile Probation Department's local commitment program until that person has been discharged from the applicable agency.

h. Sealing If Juvenile Found Not Guilty

Prior to 2017, Section 58.003(d) contained a provision that required sealing when the respondent was found not guilty:

> …If the child is referred to the juvenile court for conduct constituting any offense and at the adjudication hearing the child is found to be not guilty of each offense alleged, the court shall immediately and without any additional hearing order the sealing of all files and records relating to the case.

This provision was mandatory and required the juvenile court to act immediately without request or application by the respondent. The language "and without additional hearing" was added to Subsection (d) in 2009 to emphasize that juvenile files and records must be sealed immediately after a child is found not guilty of committing an alleged offense. This sealing order reached only the files and records in the case in which the respondent was found not guilty.

This provision was repealed in 2017 by SB 1304, which was the bill that resulted from the work of the Juvenile Records Advisory Committee. There are two thoughts about why this repeal occurred. One thought is that it was an accidental oversight. The other thought is that it was done intentionally because the information that a juvenile probation department obtains, including psychological exams, if any, and information obtained through a risk and needs assessment, remains useful in the event of a not true finding in case the juvenile is again referred to the probation department. Because so few entities may access juvenile records under the 2017 law change, most of which are law enforcement entities, and because the record clearly indicates the not true finding, it was determined that retaining the information to better meet future needs in the event of a new referral was of greater benefit to the juvenile than immediate sealing.

i. Special Sealing Provisions

Prior to 2017, the court was either mandated or allowed to seal certain records immediately after completion of certain programs. These records included drug court records, records of a person determined to be a trafficking victim, records of a person adjudicated for prostitution, and records of a person adjudicated for sexting. The Juvenile Records Advisory Committee discussed these provisions and determined that the loss of information created by sealing made it difficult to ensure that juveniles' needs were met. While the prosecutor could maintain a record of juveniles who had participated in certain programs, the local nature of these records meant that if a juvenile were referred to a different probation department, that department would not know that the juvenile had a past history with drug use or that the juvenile had been identified as a trafficking victim. Given that the number of entities able to access juvenile records was greatly reduced in 2017, the work group determined that having information necessary to meet the needs of juveniles, regardless of which county they were referred to juvenile court in, was of significant interest that outweighed the now diminished benefit to sealing the records upon completion of a specialty programs. Rather than sealing, it is the in-depth services offered through specialty programs that contribute to the rehabilitation of juveniles.

j. Effects of Sealing

Section 58.258(c) specifies that the effect of a sealing order is that all adjudications related to the person are vacated and the proceedings are dismissed and treated

for all purposes as though they had never occurred. Section 58.261(a) provides that the person whose records have been sealed is not required to state in any proceeding or application for employment, licensing, admission, housing, or other public or private benefit that the person has been the subject of a juvenile matter. Additionally, Section 58.261(b) clarifies that if a person's records are sealed, the information in the records, the fact that they once existed, or the person's denial of the existence of the records or of the person's involvement in a juvenile matter may not be used against the person in any manner, including in a perjury prosecution, civil or administrative proceeding, application for licensing or certification, or an admission, employment, or housing decision. The person who is the subject of the records is not authorized to waive the protected status or the records, meaning they cannot give an entity permission to share sealed records with someone.

Section 58.261 authorizes the person to lie about his or her record. The Attorney General was asked whether a person whose records were not or could not be sealed under Section 51.16 of the former law was required to state in an answer to a question about his or her juvenile record in an application for employment or licensing that he or she had been subject to juvenile proceedings. The Attorney General stated that such a person was obliged to disclose that information in answering such a question unless the records had been sealed. Attorney General Opinion No. DM-9 (1991). If the records were sealed, then the person would be permitted to deny that the proceedings ever occurred. Despite that, it is important to note that very few entities may access juvenile records under any law. Section 58.106(a) sets out the entities with access; they do not include private employers, colleges, or licensing entities.

Section 58.259(c) provides that the lawful response to an inquiry about a juvenile record when the record has been sealed is that no record exists. It is not a lawful response to state that a record exists but has been sealed because that is an acknowledgment that there once was a juvenile record.

k. Inspecting Sealed Records

Section 58.260 authorizes inspection of sealed records in limited circumstances. One such circumstance is upon the request of the subject of the records. Pursuant to that request, the court may allow any person named in the order to inspect the records. After that inspection, and upon request of the subject of the records, the court may order the release of any or all of the records to the person.

This provision exists to allow the subject of the records to re-open sealed records in order to correct any misinformation about his or her juvenile record.

A provision dealing with prosecutorial access to sealed records was enacted in 1995. Then Section 58.003(k), now Section 58.260(a)(2), allows a prosecutor to seek access to a sealed record for the purpose of reviewing the record for the possible use in a capital prosecution or for the enhancement of punishment as permitted under Section 12.42, Penal Code, discussed earlier in this chapter.

This provision implicitly overrides the language in Section 58.258(c) that, upon entry of a sealing order, an adjudication is vacated. If a felony adjudication that may be used under Section 12.42, Penal Code, is vacated, then it cannot be used under the repeat offender provisions of the Penal Code. Section 58.260(a)(2)(B) would, therefore, be totally useless. These provisions can be reconciled by regarding a sealed adjudication as vacated with the single exception of its admissibility under the repeat offender provisions of the Penal Code. For those purposes only, it remains a valid adjudication.

Section 58.260(a) also allows TJJD, TDCJ, and courts to petition to open a sealed record, but only for the purposes of Article 62.007(e), Code of Criminal Procedure, related to using a sex offender screening tool to determine a person's risk level.

l. Child's Right to Explanation

Section 58.262(b) requires that, on the final discharge of a child (or on the last official action if there is no adjudication), a probation officer or TJJD official, as appropriate, must give the child and the child's parent or guardian a written explanation regarding the eligibility for sealing and a copy of Chapter 58, Subchapter C-1.

The juvenile court under Section 54.04(h)(2) is also required to notify the respondent of sealing procedures at the conclusion of the disposition hearing. Although the requirement of notice of sealing rights is important, failure of the juvenile court to comply with it would ordinarily be considered by an appellate court to be harmless error since the omission does not affect the validity of the adjudication or disposition of the case. *In the Matter of K.M.C.*, UNPUBLISHED, No. 10-07-00324-CV, 2008 Tex.App.Lexis 6007 (Tex.App.—Waco 2008, no pet.);

In the Matter of R.L., UNPUBLISHED, No. 04-97-00778-CV, 1998 WL 300565, 1998 Tex.App. Lexis 3586, Juvenile Law Newsletter ¶ 98-3-07 (Tex.App.—San Antonio 1998, no pet.).

m. Expunction of Records of Juveniles

If a juvenile-aged person is convicted in municipal or justice court of a violation of the Alcoholic Beverage Code, a special expunction procedure is available under Section 106.12 of that code. See Chapter 23 for a discussion.

If a juvenile-aged person is convicted in municipal or justice court of any fineable only offense, other than a traffic offense or an alcohol violation, then a special expunction provision in Article 45.0216 of the Code of Criminal Procedure applies. See Chapter 23 for a discussion.

Code of Criminal Procedure Article 45.055 authorizes a justice or municipal court to expunge a record of conviction of the Class C misdemeanor of failure to attend school when the person becomes 18 years of age if there were no subsequent convictions of the offense.

In 2011, as part of significant changes to truancy laws, Article 45.055(e) was added. It requires courts to dismiss criminal failure to attend school cases upon successful completion of conditions imposed by the court under Article 45.054 or upon the defendant's earning of a high school diploma or high school equivalency certificate. See Chapter 23 for a discussion.

Finally, Section 161.255 of the Health and Safety Code, authorizes a justice or municipal court to expunge the record of a person convicted of possession of tobacco products by a minor. See Chapter 23.

There is no provision in law allowing for the expunction of juvenile records. This was an issue after legislation in 2015 revised Texas' truancy and failure to attend school laws. As part of the revision, Article 45.0541, Code of Criminal Procedure, was added, creating an entitlement to expunction for all individuals previously charged with failure to attend school under former Section25.094, Education Code, whether or not there was a conviction. This provision created an issue when justice and municipal courts started sending expunction orders to juvenile courts for contempt of court referrals that had been sent to juvenile court. Although the offense the justice or municipal court had jurisdiction over was the criminal case of failure to attend school, the contempt of court case referred to juvenile court was a delinquent conduct case, which is civil in nature. The question of whether or not the expunction orders applied to the records held by the juvenile court was posed to the Attorney General.

In the request for opinion [RQ-0057-KP (2015)], the Executive Director of TJJD explained that an interpretation that the expunction provision reached failure to attend school criminal records forwarded to the juvenile court as part of a referral for a new and different offense (contempt of court) might impact the court's findings in the contempt of court case since a required portion of the evidence would be expunged. TJJD asked the Attorney General to provide guidance on this, in the event the Attorney General determined the expunction provisions did apply to the juvenile records. This was a main concern and reason for the request.

In KP-0073 (2015), the Attorney General did determine the expunction provision applied to the records sent to the juvenile court with a contempt of court referral, explaining these documents constituted records "relating to the conviction or complaint." The Attorney General did not, however, provide the requested guidance regarding what impact such expunction had on the delinquent conduct cases, which was a main impetus behind the request for opinion.

To address both this issue and the occasional instances in which other courts would order the expunction of juvenile records, which is not provided for in law, Section 58.265, Family Code, was added in 2017. The statute makes it clear that juvenile records are not subject to an order of expunction issued by any court.

J. Restricted Access to Juvenile Records (Repealed)

In 2001, the legislature created a new way of dealing with access to juvenile records. Because studies showed that only a small percentage of eligible juveniles took advantage of the opportunity to seal records, typically due to the cost of hiring an attorney, it was decided that another method of protection was necessary.

The restricted access provision existed in addition to destroying or sealing records and did not replace those procedures. Records were not destroyed or sealed; they remained in place, but access to them was restricted. As originally created, they were available only to criminal justice agencies for a criminal justice purpose. For all other purposes—employment, education, occupational

licensing, etc.—the records ceased to exist and the respondent, like the juvenile whose records were sealed, was authorized to deny that the events that gave rise to the restricted record ever occurred. Over time, additional entities, such as the military, were given access to restricted records.

Although restricted access was designed to operate statutorily with no discretion, the process for actually restricting records was as cumbersome as the process for sealing records. It required certification from DPS that a record was restricted, a court order actually restricting the records, the distribution of the court order to entities in possession of the records, and steps by those entities to flag or otherwise mark the records as restricted. Unlike sealing, though, a person could lose the restricted access protection if that person was convicted as an adult of a felony or jailable misdemeanor. In such instances, the same process occurred in reverse – DPS notified the probation department, who got an order from the court "unrestricting the records," which was then distributed to agencies possessing the records, who then undertook the process of unrestricting the records. A large number of records were both restricted and unrestricted, which meant this was a time-consuming process for all involved.

In 2011, the legislature reduced the age for restricted access from 21 to 17, thereby increasing the number of instances in which records were restricted and later unrestricted, which increased the workload of all entities involved in the process. The age change also created an untenable situation in which records were restricted while the person was still under the jurisdiction of the juvenile court. In 2015, without changing restricted access, the legislature created the concept of "automatic sealing of records." This greatly increased the number of records being sealed, using a process very similar to restricted access, once again increasing the workload of the entities involved in the process.

One of the tasks of the Juvenile Records Advisory Committee was to examine if there were ways to increase the efficiency of processes while still ensuring the confidentiality of juvenile records and the safety of the public. The committee recommended repealing restricted access, streamlining the "automatic sealing process" (the term "automatic sealing" was replaced with "sealing without application" to acknowledge that sealing still requires a process and is not "automatic"), and, perhaps most importantly, restricting access to all juvenile records at all times, not only after age 17 and after certain criteria are met. As a result, restricted access no longer exists. Instead, the pool of entities eligible to receive juvenile records from DPS is limited to those provided in Section 58.106(a), Family Code, and the pool of entities who may have access to prosecutor, probation department, court, and facility records is limited to those provided in Sections 58.007 and 58.005, Family Code, respectively. These provisions are discussed in detail earlier in this chapter.

K. Communicating Information to Schools

In 1993, the legislature created a major exception to the confidentiality provisions of the Texas juvenile justice system. It added Article 15.27 to the Code of Criminal Procedure, which creates a system of notification by juvenile justice officials to schools when a school student is taken into custody, adjudicated, or changes schools while on probation or parole.

The system of notification applies to felonies and to the following misdemeanors: unlawful restraint (Penal Code Section 20.02), indecent exposure (Penal Code Section 21.08), assault (Penal Code Section 22.01), deadly conduct (Penal Code Section 22.05), terroristic threat (Penal Code Section 22.07), engaging in organized criminal activity (Penal Code Section 71.02), the unlawful use, sale, or possession of a controlled substance, drug paraphernalia, or marihuana, as defined by Chapter 481, Health and Safety Code, and the unlawful possession of any of the weapons or devices listed in Sections 46.01(1)-(14) or (16), Penal Code or a weapon listed as a prohibited weapon under Section 46.05, Penal Code. Article 15.27(h), Code of Criminal Procedure.

In 1997, the legislature amended Article 15.27(a) to add a juvenile court paper referral to an arrest as an event that triggers the obligation of a law enforcement agency to notify a school district. It also amended Article 15.27(a) to address the notification obligation of a law enforcement agency when it cannot ascertain in which school district the person arrested or referred is enrolled. In that event, the agency is required to notify the district in which "the student is believed to be enrolled."

The procedures to be used in this notification system and issues raised by the system are discussed in Chapter 22 on Schools and the Juvenile Justice System.

L. Local Juvenile Justice Information System

In 2001, the legislature enacted Subchapter D of Family Code Chapter 58 to give statutory recognition to a sys-

tem for sharing juvenile justice information on a local basis. The system described by Subchapter D was at the time of enactment in existence only in Dallas County and only in the construction stages; it was not yet operational. It is a system that provides for electronic communication of information about juvenile cases among the relevant public entities. The system does not give access to any information not already provided by law; however, it does make that access easier by making it electronic.

Any county or combination of counties could create a system like the Dallas County system. There is no requirement that any county do so and counties that choose to create such systems are free to use models other than the one used in Dallas County. If, however, a county wishes to create a system that has legislative approval, Subchapter D spells out the features of such a system.

In 2005, Bexar County was in the process of establishing a local juvenile justice information system when the county encountered certain mandatory language in Section 58.301(5) that made the system unusable in their jurisdiction. That same year, the legislature specifically amended Subdivision (5) to change the word "required" to "authorized" with regard to a "partner agency" becoming a member of a local juvenile justice information system (JJIS). A series of other amendments to the local JJIS statutes in Chapter 58 made the statutory framework more flexible with regard to partner agencies and components of the system, making it easier for counties to develop their own juvenile justice information systems.

Section 58.303 authorizes a county or combination of counties to create a local JJIS. Membership in the system and the rules for operating it are determined by the county juvenile board or by a multi-county board composed of representatives of the juvenile boards in the participating counties.

In 2005, Section 58.303(b) was amended to eliminate certain mandatory language from the statute. The amendment makes it clear that the list of system components is merely a guiding framework for counties that is discretionary, rather than mandatory. Section 58.305 specifies that the membership of a local JJIS system consists of the juvenile court and court clerk, justices of the peace and municipal courts, juvenile probation department, juvenile prosecutor, law enforcement agencies, public school districts, and governmental placement facilities and service providers approved by the juvenile board or multi-county board. However, amendments to Sections 58.305(a) and (b) made the listing of participating partner agencies discretionary "to the extent possible," instead of mandatory for both single county or multi-county regional systems.

Not every member entity has access to all of the information in the system. Information at access level one is information provided by a school about a child who is believed to have committed a serious offense that must be reported to law enforcement or who has been expelled for an offense.

Information at access level two is information about a fineable only case that has been filed in a justice or municipal court.

Information at access level three is information about cases referred to the juvenile court for delinquent conduct or CINS.

Juvenile justice agencies have access to information at all three levels. Justice and municipal courts have access to information only at levels one and two. Schools have access to information only at level one.

Examples of the practical applications of this system are set out in Section 58.303:

> (b) A local juvenile justice information system may contain the following components:
>
> (1) case management resources for juvenile courts, court clerks, prosecuting attorneys, and county juvenile probation departments;
>
> (2) reporting systems to fulfill statutory requirements for reporting in the juvenile justice system;
>
> (3) service provider directories and indexes of agencies providing services to children;
>
> (4) victim-witness notices required under Chapter 57 [Family Code];
>
> (5) electronic filing of complaints or petitions, court orders, and other documents filed with the court, including documents containing electronic signatures;
>
> (6) electronic offense and intake processing;
>
> (7) case docket management and calendaring;

(8) communications by email or other electronic communications between partner agencies;

(9) reporting of charges filed, adjudications and dispositions of juveniles by municipal and justice courts and the juvenile court, and transfers of cases to the juvenile court as authorized or required by Section 51.08 [Family Code];

(10) reporting to schools under Article 15.27, Code of Criminal Procedure, by law enforcement agencies, prosecuting attorneys, and juvenile courts;

(11) records of adjudications and dispositions, including probation conditions ordered by the juvenile court;

(12) warrant management and confirmation capabilities; and

(13) case management for juveniles in juvenile facilities.

Case management for juveniles in juvenile facilities was added in 2017 to expand the capabilities of the system. There are many other practical applications of the system.

Section 58.307 requires that the information that is part of a local juvenile justice information system be maintained on the same basis of confidentiality that current law requires. It also requires that information in the system, including electronic signature systems, must be encrypted at the level of at least 2048-bit. Section 58.307(e). Information in this system, like information in all juvenile justice information systems, is subject to laws requiring its destruction or sealing.

M. Reports on County Internet Websites

In 2007, the legislature added Subchapter D-1 to Chapter 58 of the Family Code. The subchapter applies only to counties with a population of 600,000 or more, which include Bexar, El Paso, Dallas, Harris, Tarrant, and Travis. It requires juvenile judges to post reports on the respective county's Internet website concerning the number of children committed by each juvenile court to TJJD. The report must contain the total number of commitments per court as well as a description of the offense for each child, the year the child was committed, and the age range, race, and gender of each child. The report must be updated no later than 10 days following the first day of each calendar quarter.

The purpose of Subchapter D-1 is to provide the public with easy access to information about the use of TJJD commitment as a dispositional option by elected judges. Consequently, the data reported should be clearly identified to a specific court and a named judge. It also appears that the information is cumulative and that all quarters for a calendar year should be posted. Section 58.352 does not indicate whether multiple years must be posted, but that would certainly be in line with the intent of this legislation.

N. Statewide Juvenile Information and Case Management System

In 2007, the legislature added Subchapter E to Chapter 58, relating to a state-wide juvenile information and case management system.

As passed in 2007, the statute allowed then-TJPC to participate in partnership with local counties to assist in the creation and maintenance of a statewide system. In 2009, Section 58.403 was amended to provide that, rather than through partnership, TJJD (then-TJPC) was instead authorized to participate, through the adoption of an interlocal contract under Chapter 791, Government Code, with one or more counties in the creation, operation, and maintenance of a statewide data system intended for use to aid in processing juvenile cases, facilitate delivery of services, aid in early identification of at-risk and delinquent youth, and promote information sharing among partner agencies. Section 58.403(a), Family Code. Additionally, TJJD may use funds appropriated by the legislature to pay costs incurred under an interlocal contract, including license fees, maintenance and operations costs, administrative costs, and other costs that may be specified in the interlocal contract. Section 58.403(b). Under Section 58.403(c), TJJD may provide training services to counties on the use and operation of a juvenile case management system created, operated, or maintained by one or more counties under this statute. In this way, the participating counties and TJJD leverage state and local resources to facilitate information sharing by local juvenile probation departments and juvenile justice agencies statewide.

The purposes of the system are described in Section 58.402:

(1) provide accurate information at the statewide level relating to children who come into contact with the juvenile justice system;

(2) facilitate communication and information sharing between authorized entities in criminal and juvenile justice agencies and partner agencies regarding effective and efficient identification of and service delivery to juvenile offenders; and

(3) provide comprehensive juvenile justice information and case management abilities that will meet the common data collection, reporting, and management needs of juvenile probation departments in this state and provide the flexibility to accommodate individualized requirements.

Section 58.404 authorizes TJJD to collect and maintain all information related to juvenile offenders and the offenses they commit, including information contained in the statewide and local Juvenile Justice Information Systems. Nothing in Subchapter E limits the statutory authority of a county, a juvenile justice agency, or TJJD to create an information system or to share information concerning juveniles. Section 58.405.

The current system that exists under this legislation is known as the Juvenile Case Management System (JCMS). The majority of counties are a part of the system, which also allows the counties to report information to TJJD as required by statute and standard. Those counties using a different system are still obligated to report information to TJJD in a manner required by TJJD.

CHAPTER 16: Juvenile Confessions and Waivers of Rights

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This chapter deals with three topics: (1) the general subject of the waiver of legal rights by a juvenile; (2) the more specific subject of juvenile confessions to police or probation proceedings outside the context of confessions; and (3) the application of Sections 51.095 [formerly Section 51.09(b)] and 52.02 to juvenile confessions. The chapter concludes with a brief examination of a special statute regulating the polygraphing of juveniles.

A. The Development of Sections 51.09 and 51.095

Prior to the enactment of the present Family Code, the law in Texas governing waiver of rights by juveniles was developed by the courts on a case-by-case basis. Although lawyers made the argument that a juvenile, in all situations, lacks legal capacity to waive rights, that position was rejected by the courts. Instead, courts decided whether a particular waiver of rights was valid on an individualized basis, taking all the circumstances into account. See *Garza v. State*, 469 S.W.2d 169 (Tex.Crim.App. 1971).

When the bill containing Title 3 of the Family Code was introduced in 1973, it provided in Section 51.09 that a juvenile could waive legal rights if a parent, guardian, guardian ad litem, or attorney of the child concurred with

the waiver. The legislature eliminated references to all but the child's attorney, thus requiring the concurrence of an attorney to waive rights.

There was no provision specifically directed at juvenile confessions, so the general provision dealing with waiver of rights applied to confessions as well as other waivers. In other words, a juvenile's confession was not valid unless his or her attorney concurred in the child's decision to make a statement to the police or other authorities. See *Lovell v. State*, 525 S.W.2d 511 (Tex.Crim.App. 1975); *In re R.E.J.*, 511 S.W.2d 347 (Tex.Civ.App.—Houston [1st Dist.] 1974, no writ); but Cf. *Hernandez v. State*, UNPUBLISHED, No. 08-06-00223-CR, 2008 WL 2402249 (Tex.App.—El Paso 2008, no pet.) (appellant's reliance on *Lovell* holding was misplaced).

In 1975, the legislature re-examined the problem of juvenile waivers as applied in the context of confessions and decided that the position it had enacted in 1973, requiring the concurrence of an attorney, was too stringent. It therefore enacted what became Subsections 51.09(b)–(d), dealing specifically with confessions, permitting a juvenile to waive rights and make a statement without the concurrence of an attorney. What was formerly Section 51.09 became Subsection 51.09(a).

In 1997, the legislature removed Subsections 51.09(b)–(d), dealing with custodial interrogation, and created a new Section 51.095 for them. That left Section 51.09 to deal only with its original subject—waivers of rights outside the context of custodial interrogation.

B. Waivers Under Section 51.09

Section 51.09 provides that, unless a contrary intent clearly appears elsewhere in Title 3, any right granted by Title 3, the US or Texas constitution, or state or federal law may be waived if: (1) the waiver is made by the child and an attorney for the child; (2) they are both informed of and understand the right and possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in recorded court proceedings.

Rights That Cannot be Waived. The introductory language in Section 51.09, "[u]nless a contrary intent clearly appears elsewhere in this title," refers to several different situations. Despite Section 51.09, the child's right to representation by counsel cannot be waived, even if agreed to by the attorney, for certain hearings enumerated in Section 51.10(b): discretionary transfer, adjudication, disposition, probation revocations that results in commitment to TJJD, and Chapter 55 hearings. In addition, it seems clear that a child and his or her attorney cannot waive the adjudication hearing because of the language in Section 54.03(a) requiring one before adjudication. *In the Matter of N.S.D.*, 555 S.W.2d 807 (Tex.Civ.App.—El Paso 1977, no writ). See Chapter 11. Nor can the child and attorney waive a modification of disposition hearing in which commitment to TJJD or confinement in a secure placement for more than 30 days is sought. See Section 54.05(h) and Chapter 13.

Waivers Without Counsel. On the other hand, Title 3 specifically permits waivers in certain situations without the concurrence of an attorney. Under Section 53.03(a), the child and a parent, guardian, or custodian may agree to waive the child's right to a court hearing and accept deferred prosecution of the case without the concurrence of an attorney. Under Sections 54.01(i)–(k), a runaway child may request shelter in a detention facility pending return home without the concurrence of an attorney or any other adult. Under Section 54.05(h), any modification of disposition hearing, other than one in which placement in a post-adjudication secure correctional facility for longer than 30 days or TJJD commitment is sought, may be waived by the child and a parent, guardian, guardian ad litem, or attorney. Section 52.02(d) authorizes, under certain circumstances, a juvenile to consent to or refuse intoxilyzer testing without the concurrence of an attorney if the request and response are videotaped.

Waiver of Rights by Attorney. Ordinarily, in judicial proceedings, an attorney has the power to waive the rights of his or her client without requiring the client to agree expressly to each waiver. For example, if an attorney announces that he or she does not wish to cross-examine a witness or wishes to ask no more questions on cross-examination, the trial court will not halt the proceedings to determine whether the client agrees with that decision. The law places authority for asserting or waiving such procedural rights in the hands of the attorney since decisions must be made promptly in the midst of trial and since the attorney is presumed, in such tactical areas, to be in a better position than the client to know what course of action is in the client's interest.

Furthermore, in many situations, the law requires the attorney to take a step, such as objecting to evidence, and, if the attorney fails to do so, the result is a waiver of the client's ability to complain later—waiver by silence or inaction.

Section 51.09 places limits on the extent to which an attorney may waive the rights of a client in juvenile proceedings and on the concept of waiver by the silence or inaction of the attorney because it requires that waivers be made by the child as well as the attorney. For example, in *In re K.W.S.*, 521 S.W.2d 890 (Tex.Civ.App.—Beaumont 1975, no writ), when the child and his attorney appeared for a juvenile court hearing, the attorney called the court's attention to the fact that the summons was defective because it failed to state that the purpose of the hearing was to consider discretionary transfer to criminal court, as required by Section 54.02(b). However, the attorney also acknowledged that he had already been informed that the hearing would be to consider transfer and was prepared to go forward with the hearing. He then stated, "We'll waive that defect." On appeal from the transfer order, the appellate court reversed the transfer because of the defect in the summons. It refused to recognize the attempt by the attorney to waive that defect because of Section 51.09, stating:

> [I]t is the *child* who, after having been properly informed of and understanding his right and the possible consequences of waiving it, may waive the right. His attorney concurs in the waiver made by the child; the attorney has no authority to make the waiver alone. In this case, counsel's statement of "We'll waive," which indicates concurrence of the child, is insufficient under our record. The record being silent as to a waiver by the child, a waiver may not be presumed.

521 S.W.2d at 894.

The Court of Appeals noted that the juvenile court should have intervened and, by questioning the child, determined whether the child also waived.

An appellate court has also held invalid a waiver of a jury trial by the child's attorney without a showing that the child joined in the waiver. *V.C.H. v. State*, 630 S.W.2d 787 (Tex.App.—Houston [1st Dist.] 1982, no writ). Finally, in *M.E.W. v. State*, UNPUBLISHED, No. 01-93-01152-CV, 1995 WL 96932, 1995 Tex.App. Lexis 458, Juvenile Law Newsletter ¶ 95-2-3 (Tex.App.—Houston [1st Dist.] 1995, no writ), participants in an adjudication hearing noticed that two witnesses had testified without having been sworn in. The prosecutor and defense attorney agreed to have them sworn and to retroactively accept their testimony as sworn testimony. The Court of Appeals held it was a violation of Section 51.09 for the juvenile court to accept the testimony as though it were sworn on the basis of defense counsel's waiver without also requiring a waiver by the juvenile.

Waiver of Defects in Petition. Similarly, Section 51.09 has been applied to prevent waiver of defects in the State's petition in delinquency cases. In *In the Matter of W.H.C., III*, 580 S.W.2d 606 (Tex.Civ.App.—Amarillo 1979, no writ), the delinquency petition for arson was defective in failing to name the owner of the building and in failing to allege that the owner had not consented to the burning. The State argued that this defect was waived because the child's attorney had not brought it to the attention of the juvenile court by special exception as required by Rule 90 of the Texas Rules of Civil Procedure. Rule 90 provides in part, "Every defect...in a pleading...which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court...shall be deemed to have been waived...." The appellate court refused to hold that the defect was waived under Rule 90 because none of the waiver requirements of 51.09 had been met. There was merely a failure to object, not an affirmative waiver by the child and his attorney, under Section 51.09.

When an adjudication petition is amended in a substantial fashion, the juvenile court should offer the respondent an opportunity for time to prepare to meet the amended allegations. That time may be waived under Section 51.09. *In the Matter of L.S.*, UNPUBLISHED, NO. 03-96-00301-CV, 1997 WL 177633, 1997 Tex.App.Lexis 2063, Juvenile Law Newsletter ¶ 97-2-23 (Tex.App.—Austin 1997, no writ) (manner and means of assault amended at beginning of adjudication hearing; time to prepare waived by respondent and counsel).

Waiver of Diagnostic Report. Section 51.09 has been interpreted to prevent waiver of a required procedure even when the child and his or her attorney have attempted to frustrate achieving a major objective of that procedure. A complete diagnostic study is required before transfer to criminal court by Section 54.02(d). In *R.E.M. v. State*, 532 S.W.2d 645 (Tex.Civ.App.—San Antonio 1975, writ ref'd n.r.e.), the child's attorney instructed him not to cooperate in the diagnostic study—to assert his right to remain silent. The child did so and no diagnostic study was made. The juvenile court took the position that the child had waived his right to have a diagnostic study conducted and proceeded with the transfer hearing without the report. The appellate court held Section 51.09 precluded waiver:

> We must, then, consider whether the child's refusal, on the advice of his attorney, to answer questions without the presence of his attorney, constituted an effective waiver. As the court instructed appellant,

> he had an absolute right to remain silent. The state's contention amounts to no more than an assertion that by claiming a constitutional right appellant, despite the clear language embodied in Section 51.09, waived a right [to a diagnostic study] guaranteed by Title 3 of the Family Code. There is no evidence in the record which suggests that a diagnostic study can be made only if the child waives the rights guaranteed him by the constitution of the United States.

532 S.W.2d at 648.

Waiver by Inaction Prohibited. In a case involving a defect in the notice requirement of a transfer summons, the appellate court, in rejecting the State's argument that the child had waived the defect because neither the child nor his attorney objected to it before the juvenile court, commented, "Clearly §51.09 contemplates an affirmative waiver by the child, not merely participation in—or lack of a proper objection to—the proceeding." *D.A.W. v. State*, 535 S.W.2d 21, 23 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

In *R.A.M. v. State*, 599 S.W.2d 841 (Tex.Civ.App.—San Antonio 1980, no writ), the court reversed an adjudication of delinquency because the juvenile court made certain mistakes in its charge to the jury. These mistakes were not called to the attention of the juvenile court and were not argued on appeal. The appellate court responded to the State's argument that the child had waived his right to complain of these mistakes by failing to object:

> It is clearly inappropriate to speak of "waiver" in this case.... [T]he notion of waiver has its roots in our adversary theory of litigation. It is patent that the theory is incompatible with the tenet that one of the most beneficial features of a juvenile proceeding is its "non-adversary nature." The currently accepted belief is that the State, in its role as *parens patriae*, is interested only in the care, needs and protection of the child and his rehabilitation and restoration to useful citizenship. It should not lie in the mouth of such a benevolent substitute parent, after expressing its deep concern for the welfare of the child, to follow its expression of benevolent purpose with the admonition: "But don't forget, if the established procedures, because of the State's overriding concern in your welfare and its eagerness to [e]nsure that you receive prompt and efficacious treatment, overlooks some of your rights, you'd better object or you've had it."

599 S.W.2d at 848.

Statutory Exceptions to Prohibition on Waiver by Inaction. Recent legislation has imposed on the juvenile respondent and defense counsel the obligation to raise certain legal defenses or lodge certain legal objections in a timely fashion before the juvenile court. Failure to act forfeits the underlying right. Section 51.042 requires that an objection to the jurisdiction of the juvenile court because of the age of the respondent should be made before the conclusion of an adjudication or certification hearing. Failure to object waives the jurisdictional claim. *In the Matter of T.A.W.*, 234 S.W.3d 704 (Tex.App.—Houston [14th Dist.] 2007, pet. denied). Section 54.03(i) requires that an objection to a deficiency in the juvenile court's admonitions be made before testimony begins or a plea is entered in an adjudication hearing. Failure to object waives the defect. In each of these situations, the specific statutory requirement of action by defense counsel overrides the general proposition under Section 51.09 that there can be no waiver by inaction.

Implicit Waivers by Action. The Waco Court of Appeals in *R.X.F. v. State*, 921 S.W.2d 888 (Tex.App.—Waco 1996, no writ) held that the juvenile implicitly waived his privilege against self-incrimination when he took the witness stand upon being called by his attorney. This was a "waiver...in court proceedings" by the child and his attorney under Section 51.09 even though it was not an explicit one. Cf. *Crenshaw v. State*, UNPUBLISHED, No. 01-09-00791-CR, 2011 WL 286126 *11 (Tex.App—Houston [1st Dist.] 2011, pet. ref'd) ("An implicit waiver can be inferred from the actions and words of the person being interrogated.").

There is an implicit waiver of child's Fifth Amendment right against self-incrimination when the child decides to take the stand at his or her own trial. In *In the Matter of J.G.M*, MEMORANDUM, No. 13-13-00704-CV, 2015 WL 124177, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-7 (Tex.App.—Corpus Christi, 2015), appellant testified on her own behalf at her disposition hearing. While the State declined to cross-examine appellant, the trial court questioned appellant about whom she stayed with during an earlier period when she ran away. Appellant's counsel objected and urged appellant to "invoke her fifth amendment privilege." The trial court denied the objection and stated that appellant waived her Fifth Amendment privilege by testifying. The Corpus Christi Court of Appeals agreed, holding that appellant's Fifth Amendment privilege was not violated when the trial court questioned her.

Breath and Blood Tests. Under the Family Code, a child may submit to or refuse the taking of a breath specimen without the concurrence of an attorney [notwithstanding section 51.09(a)], but only if the request and response are videotaped and the video is maintained and made available to the child's attorney. Failure to comply with this provision makes the breath test inadmissible. Texas Family Code Section 52.02(d). The submission or refusal without the concurrence of an attorney in this provision only applies to the taking of a breath specimen.

The Family Code, by creating an exception to Section 51.09 for the giving of a breath specimen, infers that a lawyer's acquiescence is necessary for a child's consent to the giving of any other specimen. As a result, it would appear that Section 51.09 requires that, in order for a child to voluntarily consent to the giving of a blood sample, he must do so with the concurrence of an attorney.

Texas' implied consent laws apply to children accused of DWI, BWI, and DUI-Minor. Transportation Code 724.001(2), (4), and (5). Under the mandatory provision of Transportation Code Section 724.012(b), a blood draw can be mandatory when "the person refuses the officer's request to submit to the taking of a specimen voluntarily." Transportation Code 724.012(b). For a child, if the officer's request was of a breath sample, the child refused, and both the request and refusal complied with Section 52.02(c)(1) (videotaped), then the second part of 724.012(b) would kick in and a mandatory blood draw would be legal. However, if the officer's request was of a blood test and the child refused in violation of Section 51.09 (no attorney), then the second part of 723.012(b) would not kick in because the refusal would be considered involuntary.

Reach of Section 51.09. The full reach of Section 51.09 is not clear. It is unknown how far the courts will go in requiring strict compliance with the waiver statute.

Requiring compliance in every situation in which an attorney is free to waive his or her client's rights without contemporaneous, informed consent of the client in judicial proceedings would seem unworkable, yet there is no indication where the courts will draw the line short of that mark.

How would Section 51.09 affect a consent to search? In 1977, the legislature, feeling that the concurrence of an attorney in order for a child to waive his or her Fifth Amendment right and give a confession was just too stringent, carved out an exception for law enforcement to allow for a confession without an attorney. Did the legislature by not writing an exception for searches under Section 51.09, expressly intend to make a consent to a search by a child have to comply with Section 51.09? That would mean that to allow a child to consent or waive his or her Fourth Amendment right against unreasonable search, the waiver would have to be agreed to by an attorney. Does Section 51.09 require a child's consent to be agreed to by an attorney and made with the child and the attorney being informed of and understanding the rights and the possible consequences of waiving that right? If so, must the consent be made in writing or on the record in open court?

C. Statements Must Be Voluntary

All statements which the State attempts to use against a child (whether in custody or not, whether written or not) must be voluntary. If the circumstances indicate that the juvenile defendant was threatened, coerced, or promised something in exchange for his statement, or if he was incapable of understanding his rights and warnings, the trial court must exclude the confession as involuntary. *Diaz v. State*, Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.—San Antonio 2001). A statement is also not voluntary if there was "official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker." *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995). In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances. *Darden v. State*, 629 S.W.2d 46, 51 (Tex.Crim.App.1982).

In *In the Matter of B.S.P*. MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072, Tex.Juv.Rep. Vol.28, No. 4 ¶ 14-4-6 (Tex.App.—San Antonio, 2014), threats by the mother of a sexual assault victim while she held a baseball bat and promised not to call police, then called them, did not make the juvenile's statement regarding the sexual assault involuntary. *In the Matter of B.S.P.,* MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072, Tex.Juv.Rep. Vol.28, No. 4 ¶ 14-4-6 (Tex.App.—San Antonio, 10/29/14). In *Paolilla v. State* No. 14-08-00963-CR, --- S.W.3d ----, 2011 WL 2042761, Tex.Juv.Rep. Vol. 25, No. 3, ¶ 11-3-3 (Tex.App.—Houston [14th Dist.] 5/26/11). Substituted opinion for ¶ 11-2-1, appellant's statements were not considered to be induced, either from the medications she had received or from the effects of her withdrawal symptoms. The Houston Court of Appeals found that, as a result, she had voluntarily waived her rights before giving her statement.

Totality of the Circumstances. The Supreme Court in *Fare v. Michael C.* 442 U.S. at 725, 99 S.Ct. at 2572 (1979), noted that the courts are required to look at the totality of the circumstances to determine whether the government has met its burden regarding the voluntariness of a confession. Many factors may be considered in determining the totality of the circumstances. Some of these include, but are not be limited to, the following:

1. the child's age, intelligence, maturity level, and experience in the system;

2. the length of time left alone with the police;

3. the absence of a showing that the child was asked whether he or she wished to assert any rights;

4. the isolation from family and friendly adult advice;

5. the failure to warn the child in his or her language; and

6. the length of time before the child was taken before a magistrate and warned.

A learning disability or a reading or oral comprehension level below a child's current grade level would also be considered a factor is assessing that child's ability to comprehend the confession process and his rights. Teachers and educators may be useful as witnesses for either the child or the state when a child's understanding and voluntariness regarding their conduct during a confession comes into question.

D. Sections 51.095 and 52.02

From September 1, 1973, until September 1, 1975, the subject of confessions made by juveniles to police or probation officers was governed by what is now Section 51.09. That meant that no confession was admissible in evidence unless the child and his or her attorney each waived the child's right to remain silent. The courts enforced this provision and reversed convictions or adjudications obtained in trials in which confessions made without waivers by counsel were admitted into evidence. See *Lovell v. State*, 525 S.W.2d 511 (Tex.Crim.App. 1975); *In re R.E.J.*, 511 S.W.2d 347 (Tex.Civ.App.—Houston [1st Dist.] 1974, no writ).

In 1975, the legislature created Section 51.09(b) specifically to deal with juvenile statements. The enactment was based roughly on Article 38.22 of the Code of Criminal Procedure, which deals with taking statements from adults who are in custody and suspected of crime. Consequently, courts look to cases decided under Article 38.22 in interpreting the juvenile counterpart. See *In the Matter of R.L.S.*, 575 S.W.2d 665 (Tex.Civ.App.—El Paso 1978, no writ). In 1997, Section 51.09(b) was rewritten and reenacted as Section 51.095.

1. Applicability of Section 51.095

Definition of Child. Section 51.095 applies only to a statement given by a person who is a child under Title 3. Section 51.095(a) premises the entire section on there being a "statement of a child." Section 51.02(2) defines a child to be a person ten years of age or older but not yet 17 years of age or a person who is 17 but not yet 18 who is alleged or found to have engaged in delinquent conduct or conduct indicated a need for supervision for acts committed before age 17. This definition of child determines whether Section 51.095 or Code of Criminal Procedure Article 38.22 applies to custodial interrogation and statements. Although those two provisions are similar, there are major differences that can determine the admissibility of a statement.

Section 51.095 applies to any person who is under 17 years of age while being questioned. If the person being questioned is 17 years old but is being investigated for an offense committed while younger than 17, then Section 51.095 also applies. If the person was 17 years old when questioned and is being questioned about an offense committed while 17, then Section 51.095 does not apply but Article 38.22 does. *Ramos v. State*, 961 S.W.2d 637 (Tex.App.—San Antonio 1998, no pet.).

If the person is 18 years of age or older, Article 38.22 applies even if an offense committed before the person became 17 is being investigated because Section 51.02(2) excludes from the definition of a child, under all circumstances, a person who is 18 years old or older.

Sometimes, the suspect's age cannot accurately be determined before questioning begins. If there is any possibility the suspect is a child, the safer course of action is to conduct interrogation under the protections of Section 51.095. If a statement is taken in compliance with Section 51.095, it will also comply with Article 38.22. However, if the officer questions a person who is a child under adult rules, there is a substantial risk the statement may be inadmissible in evidence under Section 51.095.

Childs v. State, 21 S.W.3d 631 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd), is an unusual case with an even more unusual holding. Childs was taken to the police

station to be questioned about the murder of a taxi cab driver. Police told him he was not in custody and handled him as an adult because he gave a false name and age. He claimed he was 17 because a juvenile warrant was outstanding for probation violation; he actually was only 15. He orally confessed to the murder and was placed under arrest. He then signed two written confessions to the murder. Then his true identity and age were discovered, and he was taken before a magistrate for juvenile warnings. He signed a third written statement before the magistrate. The second and third written statements were admitted into evidence in his post-certification criminal trial for capital murder. The Court of Appeals held that the second statement was properly admitted into evidence because, by claiming to be 17, Childs waived his right to be treated as a juvenile under the special protections of the Family Code:

> [T]he appellant's own action in expressly claiming that he was an adult, in deceiving the police and failing to inform them of his right name and age, affirmatively and expressly waived his rights to be treated as a juvenile during the taking of his second statement.

21 S.W.3d at 639.

This approach is totally inconsistent with the rationale of opinions from the Court of Criminal Appeals dealing with false claims of adulthood in criminal court. See the discussion of *Bannister v. State* and related cases in Chapter 3.

In *Childs v. State*, Justice Sears concurred in the result but dissented from the majority's reasoning. He persuasively argued that, while it was error to admit the second written statement into evidence, that action was harmless in view of the admission of the third statement. The third statement was taken in conformity with juvenile law. There was no claim that the third statement was a fruit of the poisonous tree, namely the second statement.

Class C Misdemeanors. Section 51.095 does not apply to criminal proceedings in justice or municipal courts even when the defendant is under the age of 17. The Code of Criminal Procedures governs them. See Chapter 23.

However, a justice or municipal court is allowed to transfer any non-traffic Class C misdemeanor to the juvenile court, where it becomes a conduct indicating a need for supervision (CINS) case. If the juvenile-age defendant has two prior Class C convictions, transfer is required unless the justice or municipal court has implemented a juvenile case manager program. Section 51.08. A statement taken without complying with Section 51.095 would *probably* not be admissible in juvenile court in a CINS trial for an offense transferred from justice or municipal court. Whether a statement is admissible would depend, therefore, on whether the justice or municipal court chose to transfer the case to juvenile court.

In addition, at the investigatory stage of a case it is sometimes not clear what offense, if any, was committed. For example, if an officer wishes to question a suspect about a theft, the value of the item stolen may not yet be determined. If it turns out that the item has a value of under $100, it is a Class C misdemeanor and will be prosecuted, at least initially, in justice or municipal court. However, if the value is $100 or more, then any prosecution must be in juvenile court. The admissibility of a statement taken without complying with Section 51.095 in such a case may depend upon the fair market value of the item stolen.

The safest course of action when questioning a person under 17 about a Class C misdemeanor, or about what may be a Class C misdemeanor, is to comply with Section 51.095. That course of action will guarantee that any statement will be admissible in evidence no matter what the offense turns out to be and without regard to whether the justice or municipal court later transfers the case to juvenile court.

Custodial Interrogation. Section 51.095(b)(1) provides that neither Section 51.09 or 51.095 precludes the admissibility of a statement made by a child if the statement does not stem from interrogation of the child under a circumstance described by Subsection (d), which includes statements made: (1) while the child is in a detention facility or other place of confinement; (2) is in the custody of an officer; or (3) is interrogated by an officer while the child is in the possession of the CPS and is suspected to have violated a penal law.

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. "A custodial interrogation occurs when a defendant is in custody and is exposed to any words or actions on the part of the police...that [the police] should know are reasonably likely to elicit an incriminating response" *Roquemore v. State*, 60 S.W.3d 862 at 868, (Tex.Crim.App.—2001) [quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980)]. A child is in custody if, under objective circumstances, a reasonable

child of the same age would believe his freedom of movement was significantly restricted. *In the Matter of C.M.,* MEMORANDUM, UNPUBLISHED, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.—Waco 2012).

In McCreary v. State, the unrecorded statement by juvenile, "You got a chrome .45, man, that's nice," to detective after arrest and during processing, without prompting, was considered spontaneous and not the product of custodial interrogation. McCreary v. State, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.—Houston [1st Dist.], 5/17/12).

Interrogation by Probation Officer. In *Rushing v. State*, 50 S.W.3d 715 (Tex.App.—Waco 2001), *aff'd*, 85 S.W.3d 283, 287 (Tex. Crim. App. 2002), a juvenile probation officer was assigned to Rushing at the McLennan County Juvenile Detention Center, where Rushing was being held. Part of the probation officer's regular duties including visiting with the juveniles on his caseload, almost on a daily basis, to inform them of the statuses of their cases, such as upcoming court proceedings, and to deal with any disciplinary or other problems the juveniles might be having. The probation officer testified at trial that during some of his conversations with Rushing, the juvenile volunteered highly incriminating statements describing the crime and Rushing's role in it. The issue under common law or the Texas statutes was whether Rushing was being "interrogated" by the probation officer when he incriminated himself. The court found that the record reflected that the questions the probation may have asked Rushing concerned routine custodial matters, such as how Rushing was getting along in detention or whether Rushing had any questions about the status of his case amounted to questions "normally attendant to arrest and custody" and was not "interrogation."

Interrogation by Psychologist. A defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if the defendant's statements might be used against the defendant at a criminal proceeding. Unless they are preceded by a Miranda warning, the statements to the psychiatrist will be inadmissible when offered against the defendant to prove the defendant's future dangerousness. *Estelle v. Smith*, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

Requiring participation in sex offender treatment as a condition of probation does not necessarily compel participation in a polygraph examination. *In the Matter of A.M.*, 333 S.W.3d 411 (Tex.App.—Eastland 2011, pet. ref'd), No. 11-09-00304-CV, 2011 WL 491018, Juv. Law Rep. Vol. 25 No. 1 ¶ 11-1-7. However, requiring a probationer to submit to a polygraph examination does not in itself subject the person to custodial interrogation. *Ex parte Renfro*, 999 S.W.2d 557, 561 (Tex.App.—Houston [14th Dist.] 1999, pet. ref'd); *Marcum v. State*, 983 S.W.2d 762, 766 (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd). As a result, it would appear that Miranda warnings are not required before administering a polygraph examination of a probationer. Marcum, 983 S.W.2d at 766

Out-of-State or Federal Interrogation. Section 51.095(b) allows for the admission of a statement taken in another state, without regard to whether or not it stems from the interrogation of a child, as long as the statement was recorded by an electronic recording device and was obtained in compliance with the laws of that state or of the Family Code. Likewise, an electronically recorded statement taken by a federal law enforcement officer in Texas or in another state is admissible if obtained in compliance with the laws of the United States.

In *In the Matter of X.J.T.*, MEMORANDUM, UNPUBLISHED, No. 02-13-00176-CV, 2014 WL 787832, Tex.Juv.Rep. Vol.28, No. 2 ¶ 14-2-1A (Tex.App.—Fort Worth, 2014), a juvenile's statement taken in Mississippi in violation of the Family Code was ruled admissible because the juvenile failed to meet his burden to show a causal connection between any violation of Texas or Mississippi law and his statement. While *X.J.T.* is an example of Section 51.095(b) in practice, its holding emphasizes the importance of establishing a causal connection when this type of violation occurs. As will be discussed later in this chapter, when proving a causal connection, the burden is initially on the defendant to raise the issue by producing evidence of a statutory violation. The burden then shifts to the State to prove compliance with the statute. *Pham v. State*, 175 S.W.3d 767, 772 (Tex.Crim.App.—2005). But, even where non-compliance with the statute is established, as was shown here, the burden then shifts back to the defendant to establish a causal connection between the violation of Section 51.095(a) and the statement itself. Because no causal connection was established in *X.J.T.*, the statement was admitted.

In *In the Matter of T.R.S.*, 931 S.W.2d 756 (Tex.App.—Waco 1996, no writ), a juvenile escaped from a Texas juvenile facility and was apprehended in Oklahoma. After learning that Oklahoma law required the presence of a juvenile's parents before police custodial interrogation,

a Texas law enforcement officer conducted the interrogation by long-distance telephone call while the juvenile was in custody in Oklahoma. The Court of Appeals held that, under these circumstances, Texas law governing the interrogation was applicable.

The Requirement of Custody: In General. To determine whether there was a formal arrest or restraint of movement to the degree associated with an arrest, all of the circumstances surrounding the interrogation must be examined. This determination focuses on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. The restriction of freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *McCreary v. State*, MEMORANDUM, UNPUBLISHED, No. 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.—Houston [1st Dist.] 2012).

The Court of Criminal Appeals has recognized four factors relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. *Spencer v. State*, MEMORANDUM, UNPUBLISHED, No. 01-07-00717-CR, 2009 WL 2343212, Juv.Rep., Vol. 23, No. 3, ¶ 09-3-10A. (Tex.App.—Houston [1st Dist.] 2009). The United States Supreme Court has held that a child's age is also a factor to be considered in determining custody. J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

Custody: The Family Code. Section 51.095 is inapplicable to statements made by a child, either written or oral, that occur while the child is not in custody. Section 51.095(b)(1).

Section 51.095(d) defines "custody" for these purposes. It provides that the interrogation rules of Subdivisions 51.095(a)(1) (written statements) and (5) (recorded statements) apply to the statement of a child made:

> (1) while the child is in a detention facility or other place of confinement;
>
> (2) while the child is in the custody of an officer; or
>
> (3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state.

The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States. Texas Family Code 52.01(b). As a result, rules utilized in establishing an adult arrest can and are used in establishing custody of a child. When a person is being questioned by a law enforcement officer, the determination of whether it amounts to a formal arrest or of a restraint of movement to the degree associated with an arrest requires an examination of the totality of the circumstances. This determination focuses on the objective circumstances of the questioning, not on the subjective views of either the interrogating officers or the person being questioned. The restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *McCreary v. State*, MEMORANDUM, UNPUBLISHED, No. 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.—Houston [1st Dist.], 2012).

Being the focus of an investigation does not amount to being in custody. Nor does station house questioning, in and of itself, constitute custody. Words or actions by the police that normally attend to an arrest and custody, such as informing a defendant of his Miranda rights, also, does not constitute a custodial interrogation. When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he or she will be forcibly taken, then that person is not in custody at that time. *In the Matter of C.M.*, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.—Waco, 2012).

In *Gonzales v. State*, 467 S.W.3d 595, (Tex.App.—San Antonio, 2015, pet. ref'd), Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-2-2B, a juvenile was not considered "in custody" when he gave a statement to a detective about his involvement in an aggravated robbery. He and his mother voluntarily went to the police station and had been told by the detective that they were free to leave at any time. The juvenile was not restrained in any manner and left the police station with his mother after giving his statement.

However, the mere fact that an interrogation begins as non-custodial does not prevent custody from arising later. Police conduct during an encounter, such as a suspect being pressed by a questioning officer for a truthful statement, may cause a consensual inquiry to escalate into a custodial interrogation. *In the Matter of C.M.,* MEMORANDUM, UNPUBLISHED, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.—Waco, 2012); *McCulley v. State*, 352

S.W.3d 107, (Tex.App.—Fort Worth, 2011, pet. ref'd), WL 3672062, Tex.Juv.Rep., Vol. 25 No. 4 ¶ 11-4-4.

In *In the Matter of R.A.*, UNPUBLISHED, No. 03-04-00483-CV, 2005 Tex.App.Lexis 4663, Juvenile Law Newsletter ¶ 05-3-13 (Tex.App.—Austin 2005, no pet.), appellant moved to suppress marijuana residue and Xanax pills given to a police officer during a traffic stop. He argued that the officer's questioning amounted to custodial interrogation in violation of *Miranda* and Section 51.095. The trial court ruled that the marijuana was produced while in custody and in response to the officer's offer of leniency but that the Xanax was not handed over in response to questioning and was thus admissible. The Austin Court of Appeals noted that a traffic stop is akin to an investigative detention or "Terry stop" because it is public and "presumptively temporary and brief." The court held that "a reasonable, innocent person in R.A.'s position would not believe that he was restrained to the degree of an actual arrest; accordingly, we find that R.A. was not in custody when he produced the drugs." See also *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S. Ct. 3138, 3149 (1984); *In the Matter of M.V., Jr. and C.A.V.,* UNPUBLISHED, Nos. 13-08-00059-CV and 13-08-00104-CV, 2009 WL 3163522 (Tex.App.—Corpus Christi 2009, no pet.) (reasonable 16-year-old in same situation would not have believed his freedom of movement was significantly restricted and would have felt free to terminate interview and leave); *In the Matter of M.A.O.*, UNPUBLISHED, No. 04-07-00658-CV, 2008 WL 5170297, Juvenile Law Newsletter ¶ 09-1-4A (Tex.App.—San Antonio 2008, no pet.) (reasonable 15-year-old in same situation would have felt free to terminate questioning and leave); *In the Matter of J.W.*, 198 S.W.3d 327 (Tex.App.—Dallas 2006, no pet.) (reasonable 16-year-old would have felt able to terminate questioning since officers did nothing to restrain or restrict his movement).

In *Hernandez v. State*, UNPUBLISHED, No. 04-95-00449-CR, 1996 WL 195414, 1996 Tex.App. Lexis 1591, Juvenile Law Newsletter ¶ 96-2-16 (Tex.App.—San Antonio 1996, pet. ref'd), the juvenile accompanied officers to the station at their request. They told him he was not under arrest and questioned him about a burglary. Then other officers questioned him about a triple homicide after reiterating he was free to leave. He confessed to the homicides. Later he was taken before a magistrate for the Section 51.095 warnings. He signed a written statement and then was released. He was arrested several weeks later. The Court of Appeals held the evidence showed that the certified juvenile was not in police custody at the time of his oral confession. Therefore, the oral confession was admissible in evidence and the written confession would not be made inadmissible because of the previous oral confession. In *In the Matter of J.M.O.,* UNPUBLISHED, No. 04-95-00594-CV, 1997 WL 404270, 1997 Tex.App. Lexis 3692, Juvenile Law Newsletter ¶ 97-3-24 (Tex.App.—San Antonio 1997, no writ), the Court of Appeals upheld the admissibility of a juvenile's oral statement because he was not in custody at the time he gave it. In neither case did the Court of Appeals require adherence to the oral confession requirements of Section 51.095 because the child was not in custody at the time the statement was given. See also *Delacerda v. State*, UNPUBLISHED, No. 01-09-00972-CR, 2011 WL 2931189, Juvenile Law Newsletter ¶ 11-3-13 (Tex.App.—Houston [1st Dist.] 2011, no pet).

The Factors that Determine Custody. The Court of Criminal Appeals has recognized four factors relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. *Spencer v. State*, MEMORANDUM, UN-PUBLISHED, No. 01-07-00717-CR, 2009 WL 2343212, Tex.Juv.Rep., Vol. 23, No. 3, ¶ 09-3-10A. (Tex.App.—Houston [1st Dist.] 2009). In addition, the United States Supreme Court held in *J.D.B v. North Carolina*, that a child's age is also a factor to be considered when determining if the child was in custody. J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

Custody: Age. The standard used for adults regarding custody has always been the reasonable person standard. Some courts had used the same reasonable person standard for children, while other courts took the age of the child into consideration. The issue of whether a juvenile suspect's age properly informs the custody analysis was addressed by the Supreme Court in *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). J.D.B. was a 13-year-old seventh-grade burglary suspect. While at school, a uniformed school resource officer removed J.D.B. from class and escorted him to a closed-door conference room, where he was questioned by two police officers and two school administrators for 30–45 minutes. Before the questioning started, J.D.B. was not given *Miranda* warnings or an opportunity to call his grandmother; he also was not told that he was free to leave until after he had incriminated himself. At the end of the school day, he was allowed to take the bus home.

The majority opinion observed that custodial police interrogations involve "inherently compelling pressures," increasing the possibility of false confession, especially

when the subject of the custodial interrogation is a juvenile. 131 S.Ct. at 2401. Noting "the reality that children are not adults," the Court held "that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." 131 S.Ct. at 2404 and 2406.

The Court left unanswered the question whether J.D.B. was in custody when police interrogated him and remanded the case to address that question, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at that time." 131 S.Ct. at 2408.

The mere fact that police have focused suspicion on a person and have probable cause to take that person into custody does not make interrogation custodial. In *In the Matter of M.A.T.*, UNPUBLISHED, No. 04-97-00918-CV, 1998 WL 784334, 1998 Tex.App. Lexis 7042, Juvenile Law Newsletter ¶ 98-4-29 (Tex.App.—San Antonio 1998, no pet.), the police questioned the juvenile at his home, where he orally confessed to a vehicle arson. Saying they needed him to make a written statement at the station, they transported him there, where he signed the statement. Police then returned him to his home. The Court of Appeals found he was not in custody:

> The fact that the officers initiated contact, questioned M.A.T., and drove him to the police station in a police car does not constitute custody, implied or otherwise.... A reasonable person simply would not have believed that there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest, especially when the officers informed this person and his family that they would bring them right back.

1998 Tex.App.Lexis 7042 *8-9.

See also *Avila v. State*, UNPUBLISHED, No. 04-03-00953-CR, 2004 WL 2803223, 2004 Tex.App.Lexis 11021, Juvenile Law Newsletter ¶ 05-1-03 (Tex.App.—San Antonio 2004, pet. ref'd) (statements were voluntary and did not stem from custodial interrogation since Avila voluntarily accompanied officers to the police station).

Interestingly, twelve years before *J.D.B.* was decided by the Supreme Court, the Austin Court of Appeals in *In the Matter of L.M., 993 S.W.2d 276 (Tex.App.—Austin, 1999, pet. ref'd)* used age as a factor in determining juvenile custody in Texas. In that case, an 11-year-old respondent was taken into the possession of the Department of Protective and Regulatory Services [now the Department of Family and Protective Services] following the death of a young child in her care. DPRS was named temporary managing conservator and placed her in a children's shelter. Police were given access to her to question her about the circumstances of the child's death and did so without taking her before a magistrate. The Court of Appeals held that, under the circumstances of this case, she was in custody at the time of interrogation and ruled the written statement was inadmissible because not taken in compliance with Section 51.095.

Importantly, the Court of Appeals said that the objective standard for determining when a child is in custody must take into account the age of the child:

> We believe it appropriate for Texas courts to consider the age of the juvenile in determining whether the juvenile was in custody. Thus, we adopt a standard similar to that utilized in the cases discussed above; that is, whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted. Our holding does not conflict with the standard applied in earlier Texas cases, but expressly provides for consideration of age under the reasonable-person standard established in *Stansbury*.
>
> ...
>
> Appellant was involuntarily removed from her home by the Department and placed in a children's shelter pursuant to the emergency provisions of section 262 of the Family Code.... She had never been arrested or detained, and she had no experience with the legal system or law enforcement. While we agree with the juvenile court's finding that the shelter was not a jail or detention facility, the record before this Court does not support the juvenile court's finding that, under these circumstances, the shelter was not a place of confinement. Pursuant to the show-cause order, the Department was made managing conservator of appellant and several of her siblings....
>
> The Department then placed appellant in the children's shelter, a provider agency under contract with the Department. Testimonial evidence presented at the hearing on the motion to suppress indicates that by its contract the shelter assumed the powers and duties granted to the Department over appellant by the show-cause order. Testimonial evidence also indicates that while the doors were not locked, appellant would

have to "run away" in order to leave the shelter. Had appellant announced that she was leaving, employees of the shelter most probably would have tried to restrain her. While appellant was not "incarcerated" in the children's facility, she was within the custody of the shelter and under its control, having been placed there by court order. She was not free to leave. Even if appellant were technically "free" to leave, the evidence reflects that while her grandparents' home was in Austin, the children's shelter was in Round Rock, some miles apart. As an 11-year-old, appellant totally lacked the means to voluntarily leave the shelter and return to her family. Finally, she was not returned to her grandparents' home even after law enforcement authorities determined that there was no danger to her there. Therefore, we conclude that the evidence in the record clearly shows that at the time she was questioned appellant was deprived of her freedom in a significant way.

Moreover, appellant's protective shelter became a place of isolation. When law-enforcement officers called the children's shelter and requested that appellant be made available for further questioning, the shelter neither notified appellant's grandparents of the scheduled interview nor provided appellant with a guardian, a parental representative, or even an employee of the shelter for the interview. At the time of her interview, the police had shifted the focus of the homicide investigation from the adults in the grandparents' home and toward appellant; yet she was not taken before a magistrate before she was questioned. At the beginning of the interview, appellant was informed of her right to remain silent, her right to an attorney, and her right to terminate the interview at any time. She was not, however, told that she was free to leave the interview room or the children's shelter, and she was never told she could call her grandparents or any other friendly adult. Appellant was isolated and alone during the police interrogation. This was despite the fact that the shelter, through the Department, had the duty to care for and protect appellant. During the course of the interview, the officers informed appellant that they had "talked to everyone in [her] family already, and...cleared everybody," that "there's nobody left except [appellant]," and that they were "not going to go away." Based on the attendant circumstances outlined above, and taking into consideration the fact that appellant was confined to the shelter at the time of her interview with police, we find that a reasonable eleven-year-old who had never before been through the legal system would believe that her freedom of movement had been significantly restrained. Accordingly, we hold that appellant was in custody at the time she made her statements.

993 S.W.2d at 289-91.

As a result of what happened to L.M., section 51.095(d)(3) was enacted to provide that interrogation is per se custodial if the child is "in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state."

Several cases have held that, unless there is evidence to support the existence of a tandem or consensual relationship between a child protective services (CPS) investigator and the police, a CPS worker need not administer *Miranda* warnings to a juvenile prior to questioning. Tandem or consensual relationships will be determined on a case by case basis. See *In the Matter of K.H.*, UNPUBLISHED, No. 04-04-00924-CV, 2005 Tex.App.Lexis 10810, Juvenile Law Newsletter ¶ 06-1-21B (Tex.App.—San Antonio 2005, no pet.); *In the Matter of J.R.*, UNPUBLISHED, No. 04-04-00925-CV, 2005 Tex.App.Lexis 10847, Juvenile Law Newsletter ¶ 06-3-5A (Tex.App—San Antonio 2005, no pet.).

In *In the Matter of M.G.*, UNPUBLISHED, No. 10-09-00037-CV, 2010 WL 3292711, (Tex.App—Waco 2010, no pet.), the 11-year-old appellant was brought to the police station by his mother after being interviewed at a child advocacy center. It was not until he was at the police department, however, that M.G. was asked whether he wanted to talk to a detective. At the station, M.G. was kept isolated from his mother and led through the detectives' area to an interview room where he sat alone with the detective. M.G. was never informed of his rights under Section 51.095, and the detective could not recall whether she told M.G. that he was free to leave. The court stated:

Instead, Detective Caldwell made it clear that M.G. was the focus of the investigation involving the sexual assault of his brother. Despite M.G.'s denials, Detective Caldwell repeatedly asked M.G. if he had sexually assaulted his brother. At some point, M.G. became teary-eyed. Nevertheless, Detective Caldwell continued to press him for truthful statements, telling him that she knew that he was not being completely honest during the [child advocacy center] interview. She also stressed to him several times that they had found a shirt in his bedroom with potential DNA evidence on it and brought his mother into the interview room, not for M.G.'s benefit, but only to allow Detective Caldwell to take DNA cheek swabs from him. After

all this, M.G. finally gave a statement inculpating himself in the sexual assault.

2010 WL 3292711*5.

Based on the above facts, the Waco Court of Appeals concluded that a reasonable 11-year-old child would have believed his freedom of movement to be significantly restricted after the detective began to press M.G. for a truthful statement. Since the State emphasized M.G.'s videotaped confession during its closing argument, the appellate court could not conclude beyond a reasonable doubt that the error did not contribute to his adjudication and reversed the case. See also *Crenshaw v. State*, UNPUBLISHED, No. 01-09-00791-CR, 2011 WL 286126 (Tex.App—Houston [1st Dist.] 2011, pet. ref'd) (reasonable 15-year-old would have believed himself in custody when he made statement to officers at police station).

Third-Party Statements. What if a juvenile makes a statement to a third party who in turn shares the statement with law enforcement? In *Adams v. State*, 180 S.W.3d 386 (Tex.App.—Corpus Christi 2005, no pet.), an officer placed Adams in custodial detention based on information that she was a runaway. Adams asked to be taken to the home of her uncle, who told the officer that Adams was living with her grandmother. En route to the grandmother's apartment, Adams repeatedly asked to speak to her uncle privately. Adams was allowed to speak to her uncle, who then informed the officer that Adams had told him that an intruder had broken into the apartment and strangled her grandmother. Adams volunteered the same information in the presence of another officer.

On appeal, Adams argued that her uncle had acted as an "agent" of the police and that her oral statements to him should be suppressed. The Corpus Christi Court of Appeals ruled that her statements to the uncle were not the result of custodial interrogation. "While [the officer] acted on the information provided, evidence showed that Adams, unsolicited, repeated the same or similar statements. No right or privilege was violated by the officer's asking [the uncle] what Adams had told him." 180 S.W.3d at 411. The Court of Appeals held that the uncle did not act as a state agent and that Adams' oral statements were admissible.

No Custody Found. *In the Matter of M.V., Jr. and C.A.V.*, UNPUBLISHED, Nos. 13-08-00059-CV and 13-08-00104-CV, 2009 WL 3163522 (Tex.App.—Corpus Christi 2009, no pet.), describes an arson case in which appellant C.A.V. was considered not to be in custody when his statement was given. In determining whether there was a restraint of freedom to the degree associated with a formal arrest, the Court of Appeals made the following findings:

> Here, according to Fire Marshal Stuart Sherman, although arson was suspected at the time C.A.V.'s statement was given, investigators were still looking at the determination factors to make sure it was arson. It was on the evening of the fire that C.A.V.'s mother made the request to speak with someone. Fire Marshal Sherman and County Fire Marshal Kyle Young went to a residence where C.A.V.'s mother explained that her sixteen-year-old son might have been involved in the fire. In front of Fire Marshal Sherman, C.A.V.'s mother asked C.A.V. if he was willing to talk with the marshals voluntarily with her present. C.A.V. nodded his head in agreement. C.A.V. also agreed to transport himself, with his mother, in a private vehicle to an interview room at the district attorney's office to make a statement. The interview room had an office-type environment. It had framed artwork on the walls, a table, chairs, and a couch. The door to the room was closed but not locked. Fire Marshals Sherman and Young interviewed C.A.V. During the interview, the marshals wore no badges and carried no guns, ammunition, or handcuffs. No threats or abusive language were employed. Before C.A.V.'s statement was given, the marshals again commented that it was a voluntary statement and that C.A.V. and his mother did not have to be there. Although the district attorney was in the building, he did not participate in the interview, and no other office staff was present. After the statement was given, C.A.V. and his mother left the office. Based on all the circumstances surrounding the questioning and the taking of the statement, we conclude that C.A.V. was not under formal arrest or under a restraint of freedom of movement to the degree associated with a formal arrest.

2009 WL 3163522 *8.

To determine whether a reasonable 16-year-old in the same situation as C.A.V. would have felt free to terminate the interview and leave, the appellate court evaluated four traditional factors: (1) there was no probable cause to arrest C.A.V. when his statement was given; (2) the investigators did not communicate or otherwise manifest an intention to arrest C.A.V. by their words or actions; (3) C.A.V. was not the focus of the investigation and would not have been taken into custody based on the status of the investigation at the time; and (4) no evidence was presented concerning C.A.V.'s subjective beliefs. "Our evaluation of

the four traditional factors leads us to conclude that a reasonable sixteen-year-old in the same situation as C.A.V. would not have believed his freedom of movement was significantly restricted; rather, he would have felt free to terminate the session and leave." 2009 WL 3163522 *9. See also *Meadoux v. State*, 307 S.W.3d 401(Tex.App.—San Antonio 2009, no pet.) (reasonable 16-year-old in same situation as appellant would have felt free to terminate questioning and leave); *In the Matter of M.A.O.*, UNPUBLISHED, No. 04-07-00658-CV, 2008 WL 5170297, Juvenile Law Newsletter ¶ 09-1-4A (Tex.App.—San Antonio 2008, no pet.) (oral statement in response to officer's question at scene of investigatory stop was not custodial); *In the Matter of R.G.*, UNPUBLISHED, No. 04-01-00317-CV, 2002 WL 872293, 2002 Tex.App.Lexis 3206, Juvenile Law Newsletter ¶ 02-2-18 (Tex.App.—San Antonio 2002, no pet.) (volunteered statement at scene of investigatory stop was not custodial); *In the Matter of R.M.F.*, UNPUBLISHED, No. 04-00-00538-CV, 2002 WL 184336, 2002 Tex.App.Lexis 908, Juvenile Law Newsletter ¶ 02-1-22 (Tex.App.—San Antonio 2002, no pet.) (following *M.R.R.* in an arson case).

The juvenile's written statement in *Martinez v. State*, 131 S.W.3d 22 (Tex.App.—San Antonio 2003, no pet.) was admitted into evidence in his criminal trial for capital murder. The San Antonio Court of Appeals held that Martinez was not in custody when he gave his statement and distinguished the circumstances surrounding his statement from those in *S.A.R.* Martinez and his mother volunteered to accompany plainclothes officers to the police station in an unmarked car. A detective informed Martinez that regardless of what he said, he would not be arrested that day. Martinez was also advised that he was not under arrest before he left home and was never handcuffed. Martinez cooperated with the detective and said he felt relieved after making a statement about his involvement in the murder. He read over his statement and made handwritten corrections before signing it and leaving the interview room. Then, he and his mother were taken home. The next day, a warrant was issued for his arrest.

The Court of Appeals ruled that Martinez's freedom of movement was curtailed less than if he had been formally arrested; that he was not the only suspect at the time of the questioning; and that there was objective evidence that Martinez was not in custody when he gave his statement. The fact that Martinez had been arrested before and was more sophisticated than the average 15-year-old indicated that he understood the value of his rights and the significance of waiving those rights. Under these facts, the court ruled that Martinez voluntarily provided his written statement to the police.

In *Spencer v.* State, UNPUBLISHED, No. 01-07-00717-CR, 2009 WL 2343212, Juvenile Law Newsletter ¶ 09-3-10A (Tex.App.—Houston [1st Dist.] 2009, pet. ref'd), the appellate court upheld the admission of two videotaped statements of a 15-year-old suspect who claimed that he was in custody when the statements were given without being properly advised of his rights. The State responded that appellant was not in custody when he made the statements and thus was not entitled to be informed of his rights. Appellant countered that what may have begun as a non-custodial interview quickly escalated into custodial interrogation based partly on the fact that he was the focus of the police investigation. He claimed this manifestation of probable cause, combined with other circumstances, such as his youth, the detectives' "coercive" conduct, the small size of the interview room where appellant was left "alone" with detectives, and his subjective belief that he would go to jail, would lead a reasonable 15-year-old to believe himself under restraint to the degree associated with arrest.

The Court of Appeals disagreed, citing a long list of factors supporting a non-custodial interrogation that resulted in two voluntary statements:

> Appellant and his mother both agreed that appellant could be interviewed regarding Lorenzo's murder. The detectives told appellant numerous times that he was not under arrest, not in custody, and was free to leave. Appellant indicated that he understood that he was free to leave before he gave the second statement. Despite his asserted mental impairments and his youth, appellant provided answers to the questions posed, formulated a defensive response, and indicated his awareness that confessing could lead to punishment. Evidence was presented that appellant had taken his medication before he made the statements. The interview was not overly long and the record shows that appellant was given a restroom break and something to drink. Both appellant and his mother made the choice that appellant's mother would not be present while appellant was being interviewed. The record also shows that appellant's mother was kept informed of what appellant was telling the detectives. Lastly, the record does not support appellant's contention that the police engaged in a ruse to obtain his confession.

2009 WL 2343212*13.

The San Antonio Court of Appeals reached a similar result in *Mata v. State*, UNPUBLISHED, No. 04-98-00411-CR,

2000 WL 816767, 2000 Tex.App.Lexis 902, Juvenile Law Newsletter ¶ 00-3-09 (Tex.App.—San Antonio 2000, no pet.). In that case the juvenile's written statement was admitted into evidence in his post-certification criminal trial for murder. The Court of Appeals held that under *M.R.R.* the juvenile was not in police custody at the time the statement was given:

> The officers stated that Mata was advised that he was not under arrest. He voluntarily agreed to accompany them to the station and was permitted to ride to the station with his mother. While the officers took Mata's statement, his mother was permitted to be present. Mata and his mother were given the opportunity to review the statement and make changes. Mata left the station with his mother. Under these circumstances, we agree with the trial court's conclusion that Mata was not in custody; therefore, his statement was properly admitted.

2000 Tex.App.Lexis 902 *15-16.

The Court of Appeals said the juvenile court judge was authorized to discredit the testimony of Mata's mother that police never told her that Mata was not required to come to the station. Presumably, the officers' willingness to permit him to ride to the station with her and releasing him in her custody after his confession to murder were thought to be contrary items of evidence. See *Jeffley v. State*, 38 S.W.3d 847 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd) (showing the difficulty of determining when non-custodial questioning ends and custodial questioning begins).

Custody Found. In 2009, the Houston First District Court of Appeals reached an opposite conclusion in a case that began with an invitation to a youth's grandmother to bring him to the Galveston Police Department. *In the Matter of D.J.C.*, 312 S.W.3d 704 (Tex.App.—Houston [1st Dist.] 2009, reh'g overruled). When the grandmother and appellant arrived at the police station, the 16-year-old was taken to an interview room "used routinely to interview all criminal suspects," both adults and juveniles. The investigating officer testified that he was armed during the interview and that the room was locked. Additionally, when appellant's grandmother, who was his legal guardian, asked to join appellant in the interview room, her request was denied. After giving a recorded statement, appellant was immediately arrested.

In holding that appellant was in custody when his statement was made, the Court of Appeals made the following findings:

> We conclude that by excluding appellant's grandmother from the interview room, despite her express request to be present, having the magistrate judge read appellant his rights, then returning to the interview room and locking it, Officer Garcia signaled a change in the nature of the interview. *See Jeffley*, 38 S.W.3d at 856; *Dowthitt*, 931 S.W.2d at 255 (stating that "mere fact that an interrogation begins as non-custodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation"). Under the first step of the custody analysis, we hold that there was restraint of freedom of movement to the degree associated with a formal arrest. *See Stansbury*, 511 U.S. at 322, 114 S. Ct. at 1528-29; See also *In re M.R.R.*, 2 S.W.3d at 323; See also *In re D.A.R.*, 73 S.W.3d at 511.
>
> We also conclude that, in light of the given circumstances, a juvenile of appellant's age could reasonably have felt he was not at liberty to terminate the interview and leave. *See Thompson*, 516 U.S. at 112, 116 S.Ct. 457; *In re M.R.R.*, 2 S.W.3d at 323. Appellant testified that the magistrate told him he could leave the interview room at any time. He also testified that he told Officer Garcia that he was unafraid to leave the interview room at any time. But he also testified that he did "not really" feel that he could leave. Furthermore, because the door was locked, appellant was not objectively "free" to leave. Appellant further testified that he did not understand that he could be charged with a crime as a result of his statement and that his statement could be used "in evidence" against him. *See* TEX. FAM. CODE ANN. §51.095(a)(1)(A) (Vernon 2008) (setting out warnings that must be given for admissibility of custodial statement of child, including statement that "the child may remain silent and not make any statement at all and that any statement that the child may be used in evidence against the child"). In light of all the circumstances, we hold that a reasonable child would not have felt he or she was at liberty to terminate the interrogation and leave. *See Keohane*, 516 U.S. at 112, 116 S. Ct. at 465; *Dowthitt*, 931 S.W.2d at 255; [*19] *Jeffley*, 38 S.W.3d at 855; *In re M.R.R.*, 2 S.W.3d at 323; *Cf Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 2150, 158 L. Ed. 2d 938 (2004) (juvenile defendant's being allowed to leave at end of "non-Mirandized interview" was fact that "weigh[ed] against a finding that [defendant] was in custody").

312 S.W.3d at 713-714.

In *In the Matter of S.A.R.*, 931 S.W.2d 585 (Tex. App.—San Antonio 1996, writ denied), the Court held that a juvenile was in police custody at the time she gave her written statement when she was taken by four police officers in a marked police car to a ten-by-ten office at the police station, informed that she was a suspect for an attempted capital murder and a capital murder, and was photographed and fingerprinted while there. The Court held that a reasonable person would believe his or her freedom of movement had been significantly curtailed.

Custody: Questioning in School. The meaning of custody in a school setting was addressed in *In the Matter of V.P.*, 55 S.W.3d 25 (Tex.App.—Austin 2001, pet. denied). Three girls reported to a campus police officer that the respondent had brought a handgun to school. The officer got respondent out of class and took him to an assistant principal's office. After the officer left that office, respondent, in response to questioning by the assistant principal, revealed to whom he had given the handgun. At the motion to suppress hearing, the officer was unclear about whether respondent was free to leave but implied that he was not free to leave until the handgun was located—that his primary focus was upon the immediate threat to the safety of students that a handgun on campus poses, rather than on possible criminal investigation. The Court of Appeals concluded that, in the school environment, respondent was not in police custody at the time of his statement:

> V.P. was not in police custody during [Assistant Principal] Trevino's questioning. [Officer] Cox and Williams, the school hall monitor, removed V.P. from his class and walked him to Trevino's office. Cox then left the office while Trevino questioned appellant. Even assuming appellant was in custody as he walked with Cox from his classroom to Trevino's office, once Cox left the office, V.P. was no longer in custody as Trevino questioned him about the gun. Trevino questioned V.P. about the gun primarily because he was concerned about the safety of the other students and faculty. Until the gun was located and the matter turned over to Cox, Trevino was conducting a school investigation, not a criminal investigation. If Cox had not gotten the initial report about the gun on campus, Trevino would have been required to tell Cox that V.P. might have a weapon on campus. See Tex.Educ.Code Ann. §37.015(a)(5) (West Supp.2001). That Trevino questioned appellant on the basis of a tip from Cox did not transform the questioning into custodial interrogation, and we have not found any case law indicating that a student has the constitutional right to remain silent or to consult with a lawyer in the face of questioning by a school principal. Because V.P. was not in official custody when questioned, he did not have the legal right to remain silent or to speak to his lawyer.

55 S.W.3d at 33. See also *In the Matter of M.R.*, UNPUBLISHED, No. 11-08-00155-CV, 2010 WL 1948286 (Tex.App.—Eastland 2010, review denied) (school principal did not act as agent of police; voluntary admissions not result of custodial interrogation).

By contrast, the 13-year-old juvenile in *In the Matter of D.A.R.,* 73 S.W.3d 505 (Tex.App.—El Paso 2002, no pet.) was frisked for weapons and his backpack searched when he was taken out of class and brought to an assistant principal's office to investigate a report he had brought a handgun to campus. Questioning by the assistant principal yielded only a denial of weapon possession by D.A.R. He was permitted to return to class; based on further reports he had a handgun on campus, he was later taken out of class and questioned by a uniformed school resource officer. He was not *Mirandized*. Ultimately, D.A.R. told the officer about the weapon and led him to where it was hidden.

The resource officer had probable cause to take D.A.R. into custody by the time of the second interrogation. The officer testified that the door to the room where the questioning occurred was closed but not locked. However, the officer acknowledged that if D.A.R. had proved uncooperative, he would not have permitted him to leave the room without further investigation. The officer did not tell D.A.R. he was free to leave or to contact an adult. The Court of Appeals held that the juvenile court erred in concluding that D.A.R. was not in custody when he confessed to possession of the handgun:

> It was not until appellant was confronted with the statements the other students had made that he confessed to Officer Gonzalez that he had a gun and that he had left it close to the school grounds. Officer Gonzalez testified: "I told him I had information that he had the gun and it was too much of a coincidence that 15 students were telling me about his gun." Officer Gonzalez told appellant that "it would be best for [appellant]" if appellant told him about the gun. Even if appellant was not initially under arrest when he was called into Officer Gonzalez's office, the interrogation escalated into an arrest.…
>
> In light of the circumstances, we believe that appellant was in custody when his statements were

> made. Although the events here occurred in quick succession, there was sufficient time for Officer Gonzalez to realize that appellant came into custody and should have been given proper warnings. Yet, Officer Gonzalez issued no warnings to appellant and instead asked appellant to take him to the gun.

73 S.W.3d at 512-13.

The United States Supreme Court's opinion in *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.Ct. 733 (1985) (See Chapter 17) teaches that public school employees are public officials who must conform their conduct to constitutional requirements. Just because the police are not involved does not end the custody question. Students are in the custody of school administrators, faculty, and staff for much of the day and their freedom of movement is significantly curtailed by compulsory school attendance laws. Courts have repeatedly said that school admin-istrators have a responsibility to protect and keep their students safe. This must be done in an atmosphere where discipline and the need for students to follow instructions creates an inherent custodial relationship for students. As was spelled out in *T.L.O.*, the precarious balance of the rights of the individual verses the safety of all will be determined by the circumstances of each case.

Custody: Summary and Implications. The doctrine of non-custodial questioning of juveniles is now well established. It is undeniable that the requirements of Section 51.095 apply only when the child is in custody. The only remaining questions are how custody should be defined and how to apply that definition to particular facts. *In the Matter of L.M.,* 993 S.W.2d 276 (Tex.App.—Austin 1999, pet. denied), persuasively argues that, while the standard is the objective one of what a reasonable person in the position of the suspect would have believed about whether he or she is free to leave, that standard must take into account the age and experience of the suspect. Thus, an 11-year old with no previous experience in the juvenile justice system might reasonably believe she was not free to leave, while an older, more experienced juvenile might believe otherwise. What the police tell the juvenile about whether the juvenile is in custody is relevant but not determinative. The question is how the circumstances would be viewed by a hypothetical juvenile in the position of the suspect. Cf. *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140 (2004) (adopting an "objective circumstances of the interrogation" test).

It is significant that all of the cases in which Courts of Appeals have determined that confessing juveniles were not in custody are cases in which the police: (1) told the juvenile he or she was not in custody; (2) treated the juvenile in a non-custodial manner during transportation and questioning; and (3) allowed the juvenile to leave police presence after the confession was given. The juvenile was typically taken into custody for the offense to which he or she confessed at least one day later. The willingness of police to permit a juvenile to return home after confessing to what is often a serious offense is taken by the courts to be substantial evidence he or she was not in police custody at the time of the interrogation. It is unknown whether any of these ruling would be different in light of the Supreme Court's ruling in *J.D.B. v. North Carolina,* adding the factor of age as a consideration in determining custody. What is known is that any new discussions regarding the custody of a child should include age because custody is the spark that ignites Section 51.095.

If a juvenile is not in custody, there is no need to take the juvenile before a magistrate for statutory warnings. There is also no need for the peace officer to administer *Miranda* warnings. Restrictions imposed by Section 51.095 on oral statements, such as a requirement of corroboration by physical evidence, do not apply. If the juvenile is not in custody, the requirement of notice to parents also does not apply. *In the Matter of E.M.R.*, 55 S.W.3d 712 (Tex.App.—Corpus Christi 2001, no pet.) (discussed in the section on notice to parents later in this chapter). The requirement to take the juvenile without unnecessary delay to a designated place applies only if the juvenile is in custody. *Dang v. State*, 99 S.W.3d 172 (Tex.App.—Houston [14th Dist.] 2002), *rev'd on other grounds by* 154 S.W.3d 616 (Tex.Crim.App. 2005) (discussed in the section on taking a child in custody to a designated place later in this chapter).

2. Written Statements Under Section 51.095

The Magistrate. The provision on written statements applies only to a child who is in some form of custody. Section 51.095(a)(1). It provides that, prior to questioning a child who is in custody, a magistrate must administer certain warnings to the child. Under Article 2.09 of the Code of Criminal Procedure, a magistrate means any judge, including a justice of the peace and a municipal court judge.

In *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ), because the magistrate had poor eyesight, his secretary read the statutory warnings to the child while in the presence of the magistrate. The Court of Appeals approved of this procedure, noting that it was sufficient that the magistrate was present in the room when the warnings were read.

Referee or Master as Magistrate. In 1999, the legislature added Section 51.095(e) to allow a juvenile law referee or master to perform the duties of a magistrate under the section without approval of a juvenile court as long as the juvenile board in the county where the statement is made has authorized a referee or master to do so.

The purpose of this provision is to increase the number of officials who may administer the warning and signing regime of Section 51.095. Under prior law, it was ironic that any judge but a juvenile court referee could do so, despite frequently being one of the officials in any county most knowledgeable in juvenile law.

Once the juvenile board has authorized the referee or master to perform these duties, there is no need for juvenile court approval each time the referee or master acts. While there are some judgments to be made, such as whether the child is signing a written statement voluntarily, those decisions are not of a character to require individual juvenile court review and approval. Furthermore, the juvenile's attorney can obtain juvenile court judge review of the referee's or master's decisions by refusing to agree to the referee or master hearing the case after a petition is filed and by filing a motion to suppress the written statement with the juvenile court.

The Warnings. Prior to the child giving a statement, the magistrate must give the child the following warnings, which are set out in Section 51.095(a)(1)(A), and the statement must reflect they were given before the statement was made:

> (i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;
>
> (ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;
>
> (iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and
>
> (iv) the child has the right to terminate the interview at any time.

These are the warnings required by the United States Supreme Court, as a matter of constitutional law, in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), to be given to *anyone* questioned while in custody. They are also the warnings required to be given prior to custodial questioning of adults by Article 38.22, Code of Criminal Procedure. The difference is that while either a judge or peace officer may give the warnings under *Miranda* and Article 38.22, only a magistrate may give the warnings under Section 51.095.

The purpose of requiring that a magistrate give the warnings and supervise the signing process is to provide greater protection for juveniles. The magistrate serves as a neutral buffer between the child and the law enforcement officer investigating a criminal offense. In many other states, legislatures have provided that a child in custody may be questioned only in the presence of a "friendly adult," such as a parent, guardian, or attorney. In Texas, the legislature has opted to forego the friendly adult requirement and instead require judicial supervision of the questioning process.

Prior to repeal in 1997, the magistrate was also required to warn the child about the circumstances under which he or she could be certified for trial as an adult in criminal court and the circumstances under which the child could be prosecuted under the Determinate Sentence Act. In 1997, the legislature greatly simplified the magistrate's warning process by eliminating the need to warn the juvenile about certification and determinate sentence possibilities. Those warnings, which are not constitutionally required, had become so lengthy and complicated that they obscured communication of the basic *Miranda v. Arizona* information to the juvenile and were therefore counterproductive.

Non-Statutory Warnings. The Austin Court of Appeals held that a determinate sentence warning is not required as a matter of constitutional law. *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ).

In *Dismuke v. State*, UNPUBLISHED, No. 05-92-02681-CR, 1994 WL 416690, Juvenile Law Newsletter ¶ 94-3-15 (Tex.App.—Dallas 1994), the Court of Appeals summarily rejected the argument that a magistrate is required to supplement the statutory warnings with a statement of the possible punishment the juvenile might face if certified to criminal court for the offense for which he or she was arrested. See also *Rodriguez v. State*, UNPUBLISHED, No. 01-96-00926-CR, 1999 WL 143991, 1999 Tex.App.Lexis 1830, Juvenile Law Newsletter ¶ 99-2-07 (Tex.App.—Houston [1st Dist.] 1999, no pet.).

The respondent in *Hicks v. State,* UNPUBLISHED, No. 04-96-00660-CR, 1997 WL 632797, 1997 Tex.App. Lexis

5390, Juvenile Law Newsletter ¶ 97-4-24 (Tex.App.—San Antonio 1997, no pet.) received a sentence of life imprisonment following his post-certification conviction of capital murder. He contended that his written statement was involuntary because the determinate sentence warnings he received gave him the erroneous impression that the longest sentence he could receive under any circumstances, even following certification, was 40 years. The Court of Appeals rejected this argument on the grounds that the warning was not misleading but, even if it was, "a defendant's misunderstanding of his potential exposure under the law will not render a confession involuntary." 1997 Tex.App.Lexis 5390 *12.

Procedural Requirements. Once the child has been given these warnings by a magistrate, the child may not be questioned unless he or she has "knowingly, intelligently, and voluntarily" waived the rights he or she was informed of by the magistrate's warnings. The waiver must be made "before and during the making of the statement." Section 51.095(a)(1)(C).

While a magistrate is required to provide the warnings contained in Section 51.095, the statute does not require a judge to "test" a juvenile's understanding of the warnings to determine whether the rights are knowingly, intelligently, and voluntarily waived. *Jeffery v. State*, UNPUBLISHED, No. 06-03-00126-CR, 2004 WL 1116331, 2004 Tex.App.Lexis 4544, Juvenile Law Newsletter ¶ 04-2-32 (Tex.App.—Texarkana 2004, no pet.) (magistrate testified that while she did not question Jeffery as to the meaning of specific warnings, she did explain in greater detail those points she thought Jeffery might not have understood).

Nor does the magistrate have to obtain the individual acknowledgment of each right from the child. The record must show only that, before the making of a statement, the magistrate warned the child regarding each right. It is sufficient that the magistrate certify that the statutory rights were read and explained to the juvenile. See *Weir v. State*, UNPUBLISHED, No. 12-06-00408-CR, 2008 WL 2358219, Juvenile Law Newsletter ¶ 08-3-8 (Tex.App.—Tyler 2008, pet. ref'd).

In *In the Matter of A.J.*, UNPUBLISHED, No. 02-04-390-CV, 2005 WL 1475415, 2005 Tex.App.Lexis 4806, Juvenile Law Newsletter ¶ 05-3-16 (Tex.App.—Fort Worth 2005, no pet.), appellant complained that time notations made by the magistrate on the written warnings established that he was not given the statutorily required juvenile warnings until after making his written statement. The magistrate testified that A.J. actually received the statutory warnings twice, that the later time notation was made after the judge had determined that A.J. understood the contents of his statement and that it was made voluntarily after waiving his rights. The record thus showed that A.J. had been properly warned of his rights before making a written statement. See also *Ramos v. State*, UNPUBLISHED, No. 04-04-00824-CR, 2006 Tex.App.Lexis 1385, Juvenile Law Newsletter ¶ 06-2-03 (Tex.App.—San Antonio 2006, no pet.) (no abuse of discretion in court's finding that written statement form merely reflected that magistration process began at 12:26 a.m. and that statement was not made until after Ramos received warnings from the magistrate and waived them at 12:40 a.m.).

The magistrate must certify in writing that the child has "knowingly, intelligently, and voluntarily" waived these rights. Section 51.095(a)(1)(D).

Once the child has been warned by the magistrate, if he or she agrees to being interviewed without an attorney, the police may do so. If the child makes a statement that the peace officer wishes reduced to writing, the officer may write out the statement, have someone else write out the child's statement, or ask the child to do so but must not have the child sign the statement.

Signing Written Statement. Section 51.095(a)(1)(B)(i) requires that, once the statement is reduced to writing, it must be signed by the child in the presence of the magistrate. In *In the Matter of J.M.S.*, UNPUBLISHED, No. 06-04-00008-CV, 2004 WL 1968644, 2004 Tex.App.Lexis 8139, Juvenile Law Newsletter ¶ 04-4-03 (Tex.App.—Texarkana 2004, no pet.), appellant signed his one-page confession in the presence of an investigator but not the magistrate. There is no question that this action violated Section 51.095(a)(1)(B)(i). However, this initial error was cured by the magistrate's subsequent action. "Then, only after she was satisfied that J.M.S. fully understood the nature and contents of his statement and that he knowingly, intelligently, and voluntarily waived his rights, the magistrate asked J.M.S. to sign the statement again." 2004 Tex.App.Lexis 8139 *7. Asking J.M.S. to sign his statement again, despite the earlier error, assured compliance with the statute and made his statement admissible.

With one exception, no peace officer or prosecutor is allowed to be present with the magistrate when the child signs the statement. Under Section 51.095(a)(1)(B)(i), a magistrate may have a bailiff, or a law enforcement officer if a bailiff is not available, be present if the magistrate determines the presence is necessary for the personal safety of the magistrate or other court personnel; however, the

bailiff or law enforcement officer may not carry a weapon in the presence of the child.

Even before that provision was enacted in 1991, a Court of Appeals had held that the momentary presence of a law enforcement officer in the room during the signing of a written statement did not invalidate the statement. *Spears v. State*, 801 S.W.2d 571 (Tex.App.—Fort Worth 1990, pet. ref'd); See also *In the Matter of M.A.C.*, 339 S.W.3d 781 (Tex.App.–Eastland 2011, no pet.) [recorded statement taken in the presence of an armed detective admissible since Section 51.095(f) does not contain the weapon prohibition located in Section 51.095(a)(1)(B)(i)]; Herring *v. State*, 395 S.W.3d 161, 2013 Tex. Crim. App. Lexis 636, 2013 WL 1438249 (Tex. Crim. App. 2013) (law enforcement presence when statutory warnings are given prior to confession will not make the statement inadmissible).

Section 51.095(a)(1)(B)(ii) specifies that the magistrate must be fully convinced that the child understands the nature and content of the statement and is signing it voluntarily. Subparagraph (D) requires the magistrate to sign the statement verifying both this and that the magistrate's examination of the child in making this determination was done outside of the presence of law enforcement or a prosecutor, except to the extent such was required for the safety of the magistrate or court personnel, as discussed above.

Summary of Magistrate's Role. Section 51.095 places a great deal of confidence in the magistrates of Texas to protect the rights of juveniles being interrogated by the police. The child must be brought before the magistrate on two separate occasions: *first*, before questioning, for the warnings and a determination the child's waiver, if given, is voluntary; and *second*, after the written statement has been prepared but before the child signs it, to determine that the child understands the contents of the statement and wishes to sign it voluntarily.

If, when warned, the juvenile tells the magistrate that he or she wishes to remain silent, then there should be no questioning. If the child indicates that he or she wishes to consult with an attorney prior to questioning, then there must be no questioning until the juvenile has consulted with counsel. If the magistrate is unable to provide counsel for a juvenile who requests but cannot afford one, then there should be no questioning of the juvenile at all.

Magistrate's Role in Determining Voluntariness. Section 51.095(a)(1)(A)(ii) gives the magistrate the responsibility of determining whether or not the child is voluntarily signing the statement. Section 51.095(a)(1)(A)(ii). The magistrate is not required to inform a juvenile of the punishment that might be imposed for the offense for which he was taken into custody. However, *Diaz v. State*, 61 S.W.3d 525 (Tex.App.—San Antonio 2001, no pet.) teaches that if the magistrate undertakes to inform a juvenile of the penalty range, he or she had better be accurate. Diaz was taken into custody for aggravated robbery for an incident in which he shot the owner of a motor vehicle in the foot while stealing the car. The magistrate informed Diaz that he would get up to one year in jail for the offense, whereas the law permits a sentence for aggravated robbery of five to 99 years or life imprisonment. Diaz gave a written statement, which was admitted in evidence against him in his post-certification criminal trial. He contended that the statement was rendered involuntary because of the erroneous punishment advice. The Court of Appeals agreed:

> In the present case, the magistrate told Daniel that he "might get up to a year in confinement or up to a $10,000 fine if he were tried as an adult," while the actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Under these facts, Daniel claims his confession was involuntarily obtained. Providing information about the sentence one might receive is not required by section 51.095 of the Texas Family Code. Though well intentioned, the magistrate gave additional incorrect information. Daniel's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary. . . .
>
> Daniel's age at the time of his statement further emphasizes its involuntary nature in viewing the totality of the circumstances. The Supreme Court has emphasized that admissions and confessions of juveniles require special caution. In *Haley v. State of Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302 (1948), the Court reversed the conviction of a 15-year-old boy for murder. In reference to the confession of the teenager, the Court remarked: "what transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."
>
> In the instant case, Daniel was sixteen at the time he gave his statement to police. Daniel testified that he

> was "scared" and that this was "the first time [he had] ever been in a situation like this." Daniel further testified that he admitted he had a knife when he did not have one because the police repeatedly asked him if he had pulled out a knife. Daniel finally agreed that he had a knife because he was scared. Wrongly believing he would receive at most a year of prison time, Daniel made a choice to give what he later testified was an untruthful statement.
>
> The case at hand is analogous to cases in which a defendant is unable to appreciate the actual value of his plea bargain because the maximum punishment he risked without the bargain was overstated in the court's admonition, rendering the plea involuntarily entered.… Here, Daniel was unable to make a voluntary waiver of his rights in making his statement because the maximum amount of punishment he thought he risked was one year. In viewing Daniel's age, the magistrate's misstatement of the maximum sentence that Daniel could receive violated his constitutional rights of due process and rendered his statement involuntary.

61 S.W.3d at 528-29.

When the respondent in *Hill v. State*, 78 S.W.3d 374 (Tex.App.—Tyler 2001, pet. ref'd) was given the statutory warnings by the magistrate, he at first stated he did not wish to waive any of his rights. However, before the videotaped session concluded, he appeared to change his mind. The Court of Appeals concluded that the magistrate violated the juvenile's rights when he continued the interview after the juvenile had asserted his rights to remain silent and to counsel:

> The magistrate's interview can be broken down into three segments. The first occurred when Appellant and the magistrate entered the room and began their conversation. The magistrate read Appellant the statutory warnings and asked if he wished to waive his rights. Appellant clearly and distinctly indicated that he did not wish to waive them. The magistrate asked Appellant to repeat his answer and Appellant reiterated his refusal to waive his rights, whereupon the magistrate indicated a "no" response to the statement on the form: "At this time, I fully understand all my rights as they have been explained to me, and I voluntarily wish to waive them." The magistrate then asked Appellant to sign the waiver form on which the magistrate had indicated a waiver refusal which Appellant did.
>
> According to his testimony at the suppression hearing, the magistrate decided to inquire whether Appellant understood what the term "waive" meant. Appellant answered, "No, sir" and the magistrate proceeded with an explanation of the term "waive." During this explanation, Appellant, while shaking his head in the negative, said, "No," again indicating a desire not to waive his rights. When he was finished, the magistrate asked Appellant if he now understood what the term "waive" meant and Appellant answered, "Yes, sir." The magistrate then asked Appellant if he wished to "waive or give up" his right to remain silent. Appellant again answered, "No, sir." The magistrate then asked affirmatively if Appellant wished to remain silent and was told, "Yes, sir." This response was followed by Appellant being asked if he wished to "waive or give up" his right to have an attorney present to advise him. Again, Appellant responded, "No, sir." By this time, Appellant had unequivocally invoked his rights six times.
>
> The magistrate then stated, "Very well. That concludes the statutory warnings." At this point, the interview should have ended. The magistrate had admirably done his job, and the Appellant had steadfastly declined to waive his constitutional rights. However, for whatever reason, the magistrate asked the proverbial one question too many. The magistrate continued "My understanding from our conversation is, Edward, you are or you are not wanting to give a statement at this time?" This was an improper inquiry. It is not the magistrate's role or responsibility under the Family Code to find out whether an accused wishes to "give a statement." It is a magistrate's responsibility to ascertain if an accused juvenile wishes to waive his constitutional rights. The phrasing of this question, after six unequivocal responses invoking his constitutional rights, unfortunately opened a Pandora's box of further explanation of what Appellant needed to do in order to give a statement: he needed to waive his rights to remain silent and to counsel. Explaining what one needs to do in order to give a statement is not the purpose of the magistrate's warning provisions for juveniles under the Family Code.
>
> Appellant unequivocally invoked his rights under the Fifth and Sixth Amendments at least six times.…
>
> Although Appellant clearly and unequivocally asserted his right to remain silent and his right to counsel, even after the magistrate had taken time to explain the meaning of waiver, the interview did not cease nor was an attorney provided. After the magistrate had

> stated that the warnings were concluded, he continued to interview Appellant regarding the giving of a statement. In this regard, the magistrate's action constituted a re-institution of the interview with Appellant. Appellant did not initiate the contact to reopen the discussion, the magistrate did. The interview should have stopped at the first indication by Appellant that he wished to invoke his rights. Accordingly, his right to remain silent was not scrupulously honored, rendering his subsequent confession inadmissible.

78 S.W.3d at 385-87.

Totality of Circumstances Reviewed. The magistrate is required to determine that the juvenile has voluntarily waived his or her rights and, if he or she signs a written statement, that he or she is doing so voluntarily. However, the magistrate's determinations are not final. They may be challenged in the juvenile court and, if necessary, on appeal.

What standards are used to determine whether a juvenile has voluntarily waived rights or voluntarily signed a written statement? In *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (1979), the United States Supreme Court noted that the government has a heavy burden to prove that the person giving the confession knowingly and intelligently waived the privilege against self-incrimination and the right to counsel and that courts are required to look at the totality of the circumstances to determine whether the government has met its burden. It then applied the same standards to juveniles:

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

442 U.S. at 725, 99 S.Ct. at 2572.

The Supreme Court then examined the circumstances surrounding the interrogation and concluded that the waiver by Michael C. was voluntary.

In *In the Interest of R.D.*, 627 S.W.2d 803 (Tex.App.—Tyler 1982, no writ), the Court of Appeals applied the totality approach of *Fare v. Michael C.* to the case before it and found that the juvenile's waiver of his rights was voluntary:

> Applying the totality-of-the-circumstances test, we find many similarities between Fare and the case at bar. There, the juvenile was 16 1/2 years old; here he was almost 17. There, he was on juvenile probation; here he had been on juvenile probation. There, he had a record of prior offenses; that is true in the instant case. There, the defendant was sufficiently intelligent to understand the rights he was waiving. Here a psychologist's report indicates R.D., though having quit school in the ninth grade, "was functioning within the upper limits of Average or the lower limits of Bright Normal of cognitive functioning." In *Fare*, the juvenile "was not worn down by improper interrogation tactics or lengthy questions or by trickery or deceit"; likewise, the record reflects here that no such tactics, maneuvers, or coercion were employed.

627 S.W.2d at 806-07.

The factors mentioned in this case are not the only factors that can be examined to determine whether a confession by a juvenile is voluntary. The whole point of the totality approach is to ensure that none of the relevant factors are excluded from consideration. The factors mentioned in *Fare* and *R.D.* are, however, useful illustrations of applying the totality approach. See also *In the Interest of J.M.J.*, 726 N.W.2d 621 (S.D. 2007) (South Dakota Supreme Court adopts totality of the circumstances test for voluntariness of juvenile's confession); *Smith v. Delaware*, 918 A.2d 1144 (Del. 2007) (under totality of circumstances inquiry child's waiver or rights was not made knowingly and voluntarily).

Another application of this approach occurred in *E.A.W. v. State*, 547 S.W.2d 63 (Tex.Civ.App.—Waco 1977, no writ). In *E.A.W.*, the Waco Court of Appeals held that an average sixth grader, who was properly advised of her rights, simply could not voluntarily waive her constitutional privilege against self-incrimination without some assistance. The child, age 11, was arrested for burglary and detained from midnight to about 9:00 a.m. the next morning. She had no opportunity while in detention to talk with a parent or attorney. Although police fully complied with

the confession statute, the Court of Appeals held that the waiver of rights was not voluntary:

> We have a fact situation wherein the mechanics and procedure as prescribed by Section 51.09(b) were carefully carried out; however, we are confronted with this problem: Can an eleven year old girl of average intelligence for her age, with a sixth grade education, "knowingly, intelligently, and voluntarily" waive her constitutional privilege against self-incrimination, where she has spent from midnight to 9:00 A.M. in the Juvenile Detention Center, and where she has had no guidance from or the presence of a parent or other adult in loco parentis, or an attorney? We think not. In our opinion, a child of such immaturity and tender age cannot knowingly, intelligently, and voluntarily waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney.

547 S.W.2d at 64. See also *Illinois v. Westmorland*, 866 N.E.2d 608 (Ill.App.Ct. 2007, pet. denied) (absence of adult for immature 17-year old with average intelligence was factor in finding confession involuntary); *Smith v. Delaware*, 918 A.2d 1144 (Del. 2007) (lack of guidance from interested adult is factor in totality of circumstances).

In *In the Matter of B.J.S.*, UNPUBLISHED, No. 03-90-194-CV, Juvenile Law Newsletter ¶ 92-4-1 (Tex.App.—Austin 1992), appellant, 13 years of age, confessed to the murder of his parents. Citing *E.A.W.*, he claimed his waiver of rights was not voluntarily, knowingly, and intelligently made. He signed the written statement at about 4:00 a.m., approximately seven hours after he was taken into custody. Most of that time was consumed by finding a magistrate who could give the required warnings. The Court of Appeals upheld the waiver:

> Although the hour was late and appellant had had little sleep, there is no evidence that he was tired or otherwise suffering from a lack of rest when he was advised of his rights and consented to give the statement. Although appellant had nothing to eat or drink between his arrest and the confession, appellant made no request for nourishment, no request was denied, and the testimony shows that nourishment would have been provided had he asked for it. Appellant was restrained as he was driven from place to place, but there is no evidence that he was physically abused or threatened in any way while in custody. There also is no evidence that appellant was unlawfully questioned before being admonished or that any promises were made to secure his confession.

In *Reyes v. State*, UNPUBLISHED, No. 14-97-009933-CR, 1999 WL 1041477, 1999 Tex.App.Lexis 8651, Juvenile Law Newsletter ¶ 99-4-31 (Tex.App.—Houston [14th Dist.] 1999, pet. ref'd), there was testimony that the respondent had an IQ of 75, had a learning disability that diminished his reading skills to the five-to-seven-year-old range, and had been in special education during his entire schooling. His special education teacher testified that the respondent would not have understood many of the phrases on the statutory warning form he signed. On the other hand, the judge who administered the warnings testified that the respondent appeared to understand the warnings and a different judge who witnessed the signing of the statement testified that he went over the statement with the respondent line by line and that in the judge's opinion he understood what he had signed. The juvenile court held that the respondent had voluntarily waived his rights and voluntarily signed the statement and the Court of Appeals upheld that determination.

A promise of a specific, substantial benefit made by a law enforcement officer that induces a statement might render the statement inadmissible. However, a vague promise that the juvenile "would get less time if he gave a statement" is not sufficiently specific to make a statement involuntary. *In the Matter of R.G.*, UNPUBLISHED, No. 14-95-00584-CV, 1997 WL 379151, 1997 Tex.App.Lexis 3591, Juvenile Law Newsletter ¶ 97-3-20 (Tex.App.—Houston [14th Dist.] 1997, writ denied); See also *Michigan v. Osantowski*, UNPUBLISHED, No. 263211, 2006 Mich.App.Lexis 545, Juvenile Law Newsletter ¶ 06-2-05 (Mich.Ct.App. 2006, appeal denied) (confession made freely and voluntarily and not in response to promises of leniency).

Magistrate's Certification. Section 51.095(a)(1)(D) provides that the magistrate must certify that the signing requirements have been met. That is, the magistrate's signature verifies the magistrate has examined the child independently of any law enforcement officer or prosecuting attorney (except as necessary to ensure personal safety of the magistrate or court personnel) and the magistrate has determined the child understands the nature and contents of the statement and has determined the child knowingly, intelligently, and voluntarily waived his or her rights.

It is not enough that the magistrate certify that the child understands the nature and contents of the statement. In *Reta v. State*, UNPUBLISHED, No. 04-07-00564-CR, 2008 WL 2260726, Juvenile Law Newsletter ¶ 08-3-7 (Tex.App.—San Antonio 2008, no pet.), the video recording of a magistrate warning 16-year-old Reta revealed that

the magistrate did not conduct any examination of Reta to ensure that he understood the nature and contents of the statement, as required by Section 51.095(a)(1)(B)(ii). The San Antonio Court of Appeals noted: "It would be impossible for [a] magistrate to be fully convinced that [a juvenile] understood the nature and contents of the statement if there [was] no examination or inquiry." 2008 WL 2260726 *1 [quoting *Carter v. State*, 650 S.W.2d 843, 850 (Tex.App.—Houston [14th Dist.] 1982), *aff'd by* 650 S.W.2d 793 (Tex.Crim.App. 1983)]. Since the written confession inculpated Reta and should have been suppressed, the appellate court concluded that the denial of Reta's motion to suppress amounted to reversible error.

The magistrate must sign the certification after the child has signed the statement in the magistrate's presence. *Vasquez v. State*, UNPUBLISHED, No. 14-97-0332-CR, 1999 WL 93212, 1999 Tex.App.Lexis 1254, Juvenile Law Newsletter ¶ 99-1-32 (Tex.App.—Houston [14th Dist.] 1999, no pet.).

Request for Counsel Before Giving a Statement. Section 51.09, the Waiver of Rights provision, clearly provides that a child, on his own, cannot waive a constitutional or statutory right without an attorney. However, the provision does allow for exceptions. The beginning of the first line of 51.09 states: *Unless a contrary intent clearly appears elsewhere in this title…*, thus creating an exception to the requirements of section 51.09 if spelled out in other provisions. Section 51.095 begins: *Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if…* specifically removing the lawyer requirement of Section 51.09 for the taking of a child's statement when the requirements of Section 51.095 are met. While a child may waive an attorney under Section 51.095, if he or she requests an attorney at any time during the proceedings, the questioning should cease until an attorney is obtained for the child. *Davis v. State*, 313 S.W.3d 317, 339 (Tex.Crim.App.2010); *State v. Gobert*, 275 S.W.3d, 888, 893 (Tex.Crim.App.2009).

A request for counsel must be unambiguous. It must be sufficiently clear that a reasonable police officer would understand the statement to be a request for an attorney. *Davis v. United States*, 512 U.S. 452, 459 (1994); *Davis v. State*, 313 S.W.3d at 339 (Tex.Crim.App.2010); *Dalton v. State*, 248 S.W.3d 866, 872 (Tex.Crim.App.2008). Whether an accused actually invoked his right to counsel is an objective inquiry. *Davis*, 313 S.W.3d at 339. To determine if an accused invoked his right to counsel, courts look at the totality of the circumstances surrounding the interrogation in combination with the accused's statement. *Dalton*, 248 S.W.3d at 872–73.

In *Stanley v. State*, the San Antonio Court of Appeals found that a defendant did not invoke his right to counsel by his question to the detective regarding calling his mother to see if she got him a lawyer. The court went on to state that, when considering the totality of the circumstances, the defendant's request to speak to his mother with regard to her obtaining an attorney for him was not a clear invocation of his right to counsel. Texas case law holds that an invocation of the right to counsel must be clear and unambiguous. See, e.g., *Davis v. State*, 313 S.W.3d at 341 (holding that defendant's statement of "Should I have an attorney?" was not clear request for counsel); *Dalton v. State,* 248 S.W.3d at 873 (holding that defendant's statement to officer to tell his friends to get lawyer was not direct, unequivocal request for attorney); *Mbugua v. State*, 312 S.W.3d 657, 665 (Tex.App.—Houston [1st Dist.] 2009, pet. ref d) (holding that "Can I wait until my lawyer gets here?" was not clear and unambiguous invocation of right to counsel).

In *Nunez v. State*, UNPUBLISHED, No. 07-08-0475-CR, 2010 WL 2891760, Juvenile Law Newsletter ¶ 10-3-14 (Tex.App.—Amarillo 2010, pet. ref'd), appellant argued, in part, that his juvenile confession to capital murder should have been suppressed because he had previously made a request for counsel when questioned about an earlier robbery. Specifically, appellant had stated to officers investigating the robbery two days earlier that he wanted to "talk with an attorney before giving a statement." 2010 Tex.App.Lexis 5878 *3, fn. 2. Appellant was already represented by counsel on the robbery charge for which he was also in detention. The Court of Appeals ruled that appellant's right to counsel was violated and that the trial court's refusal to suppress the confession was error. 2010 WL 2891760 *2.

Request to Speak to Person Other Than Attorney. If, in response to the warnings, the juvenile does not explicitly invoke the right to remain silent or the right to counsel, but instead requests to speak to someone besides an attorney before questioning, the courts have held that this is not the same as requesting to see an attorney or asking that there be no interrogation.

In *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (1979), the juvenile, already on probation, was arrested and given his *Miranda* warnings. He requested the opportunity to talk with his probation officer before submitting to interrogation. The police denied this request. The juvenile

then agreed to talk to them and confessed to a murder. The juvenile argued that his request to see his probation officer was the equivalent of a request to talk to an attorney and that the police violated his constitutional rights when they questioned him despite that request. Although the California courts agreed with that argument, the United States Supreme Court rejected it on the ground that a probation officer does not play the same role in the juvenile system as an attorney. A probation officer acts in part as protector of the public, not solely as advocate for the juvenile.

A Texas court has applied *Fare v. Michael C.* in a different context. In *In the Interest of R.D.*, 627 S.W.2d 803 (Tex.App.—Tyler 1982, no writ), the juvenile was arrested for burglary. When the arresting officer read the juvenile his *Miranda* warnings, the juvenile asked to see his mother. The officer attempted, but was unable, to contact the juvenile's mother. The juvenile was taken to a magistrate, who administered the warnings required by Section 51.095 and the juvenile later signed a confession. The appellate court held that the juvenile's request to see his mother, like the request of Michael C. to see his probation officer, was not the legal equivalent of a request to consult with an attorney:

> [W]e hold that the request of R.D. to talk to his mother did not per se invoke his Fifth Amendment rights [to remain silent]. There was no evidence that appellant's mother was an attorney, and it is not likely that a mother will possess any legal background surpassing that of a probation officer. Under the reasoning of *Fare*, we find no justification for extending the per se safeguard of *Miranda* to a request for a mother.

627 S.W.2d at 806.

However, a juvenile's request to speak with his mother so that she could "ask for an attorney" was deemed an invocation of the right to counsel when he stated that he wanted his mother to call an attorney for him. *In the Matter of H.V.,* 179 S.W.3d 746 (Tex.App.—Fort Worth 2005, aff'd in part, rev'd in part). The Court of Appeals distinguished the facts of both *Fare v. Michael C.* and *R.D.* and applied a totality-of-the-circumstances test.

> Here, H.V.'s age and lack of experience indicate that his request to call his mother, coupled with his statement that he wanted her to ask for an attorney and his exclamation that he was only sixteen, was in fact an invocation of his right to counsel, and the totality-of-the-circumstances approach allows the juvenile court the necessary flexibility to take this into account in determining whether a juvenile has invoked his Fifth Amendment rights.

179 S.W.3d at 756.

It was held that the trial court did not abuse its discretion in suppressing a second written statement after properly determining that H.V. had requested to speak to his mother so that she could hire an attorney for him.

The Fort Worth Court of Appeals' holding on this issue was upheld by the Texas Supreme Court. *In the Matter of H.V.,* 252 S.W.3d 319 (Tex. 2008, reh'g denied) (H.V.'s statement was an unambiguous request for an attorney).

Parental Presence. Section 52.02(b) requires a person who takes a child into custody to "promptly give notice of the person's action and a statement of the reason for taking the child into custody" to the child's parent, guardian, or custodian. Failure to comply with this requirement may result in exclusion of any statement obtained from custodial interrogation. (See discussion later in this chapter.) Part of the reason for such notice may be to allow the parent to appear and/or pick up the child at a location specified in Section 52.02(a), including a juvenile processing office.

There is no requirement of parental presence when taking a statement from a child under Section 51.095. However, if a child is being questioned or interrogated in a juvenile processing office, which is required if the child has recently been arrested, the juvenile processing office provisions and its requirements would apply to a statement being taken under Section 51.095. Section 52.025(c) provides that the "child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." In *In the Matter of D.J.C.*, 312 S.W.3d 704 (Tex.App.—Houston [1st Dist.] 2009, reh'g overruled), the Court of Appeals held that Section 52.025(c) was violated by police denying a grandmother's request to be present during a police interview and excluding her from the interview room. Cf. *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.) (if parent is denied right of access, the child may not raise that complaint on appeal, citing Section 61.106. The law is silent on what, if any, obligation law enforcement has to facilitate the presence of parents during interrogation).

The Court of Appeals in *Hardy v. State*, UNPUBLISHED, No. 05-94-01636-CR, 1995 WL 634163, 1995 Tex.App.Lexis 2644, Juvenile Law Newsletter ¶ 95-4-9 (Tex.App.—Dallas 1995, pet. ref'd) summarily rejected the argument that the

magistrate was obligated to notify the juvenile's parent of his interrogation even though the juvenile did not request the presence of his parent. There is, however, a requirement of a causal connection in a violation of this provision.

In *Cortez v. State*, the Austin Court of Appeals, allowed the admission of statements because there was no causal connection between the juvenile's statements and the officers' alleged failure to promptly notify the juvenile's parents of the arrest and the alleged denial of the juvenile's right to have parents with him in the juvenile processing office. Cortez v. State, 240 S.w.3d 372 (Tex.App.—Austin 2007, no pet.).

Discretionary Transfer Hearings. For a juvenile's written confession given while in custody to be admissible, there must be compliance with the procedures of Section 51.095 and both the waiver of rights and the confession must be voluntary under the totality of circumstances approach. However, these rules do not restrict the admissibility of confessions in hearings to consider a discretionary transfer to criminal court.

The reasoning is that transfer and certification hearings are considered non-adversarial preliminary hearings in which the juvenile court may rely upon hearsay as well as written and oral testimony. *L.M.C. v. State,* 861 S.W.2d 541, 542 (Tex.App.—Houston [14th Dist.] 1993, no writ). In a discretionary transfer hearing, the juvenile court does not adjudicate guilt or innocence. It is only required to determine if there is "probable cause" that the juvenile committed the offense charged. Since the hearing's only goal is to determine the proper forum in which to adjudicate the defendant's guilt or innocence, the determination of admissibility of a confession is considered premature. *Navarro v. State*, UNPUBLISHED, 2012 WL 3776372, (Tex.App.—Houston [1st Dist.] 2012, pet. ref'd). The reasoning is that appellant's rights will be fully protected when the case reaches trial.

However, one Court of Appeals has held that the confession statute must be complied with before a statement is admissible in a discretionary transfer hearing. *In the Matter of S.A.R.*, 931 S.W.2d 585 (Tex.App.—San Antonio 1996, writ denied). But, in *Dominguez v. State*, UNPUBLISHED, No. 13-10-493-CR, 2012 Tex. App. Lexis 6146, 2012 WL 3043072, Juvenile Law Newsletter ¶12-3-1 (Tex. App.—Corpus Christi 2012, no pet.), the Court of Appeals ruled that once certified as an adult, the Family Code protections for the taking of a confession of a juvenile no longer apply. In that case the juvenile gave his statement to police after turning 17 and being certified and transferred to adult court. As a result, it was the Code of Criminal Procedure that determined the admissibility of the statement, not the Family Code. See Chapter 10 for a discussion of the evidence that may be considered in a discretionary transfer to adult court hearing.

3. Oral Statements Under Section 51.095

Federal constitutional law makes no distinction between written and oral custodial statements. The validity of a confession depends upon answers to the same two questions. First, was the suspect properly warned under *Miranda*? Second, if the suspect was properly warned, did he or she knowingly and voluntarily waive rights to silence and to an attorney? Texas law, however, has long distinguished between the two kinds of statements in criminal cases under Article 38.22, Code of Criminal Procedure. Section 51.095, which is patterned on Article 38.22, makes a similar, but not identical, distinction in juvenile cases.

Oral Custodial Statements. Section 51.095(a) provides with respect to oral statements:

> Notwithstanding [any of the provisions of] Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if: ...
>
> (2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;
>
> (3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;
>
> (4) the statement is made:
>
> (A) in open court at the child's adjudication hearing;
>
> (B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct; or
>
> (C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01.An oral statement, given in response to interrogation, by a juvenile while in custody is not admissible in evidence, subject

to exceptions discussed later. This is true even if the requirements of *Miranda v. Arizona* are fully met. The oral confession rule is an independent requirement of Texas law. See *Marsh v. State*, 140 S.W.3d 901 (Tex.App.—Houston [14th Dist.] 2004, pet, ref'd) (admitting testimony regarding appellant's unrecorded oral statement constituted harmless error); *Jeffley v. State*, 38 S.W.3d 847 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd) (oral statement should have been excluded from evidence but failure to do so in light of other evidence was harmless error).

***Miranda* Requirement.** The juvenile oral confession statute does not explicitly require *Miranda* warnings and a waiver of rights. However, the Court of Criminal Appeals has held that such warnings are required as a matter of constitutional law before an oral statement by a juvenile in custody is admissible. *Meza v. State*, 577 S.W.2d 705 (Tex.Crim.App. 1979).

The Reason for the Written/Oral Statutory Distinction. In *Meza*, the juvenile orally confessed to aggravated robbery and directed officers to the location where he had hidden extra rifle shells he had carried during the robbery. Meza had been given his *Miranda* warnings by a police officer, not by a magistrate as required by the juvenile confession statute for a written confession to be admissible. He contended in his appeal from the robbery conviction that the distinction in the juvenile confession statute between written and oral confessions was irrational and, therefore, in violation of equal protection of the laws. The Court of Criminal Appeals rejected this argument:

> The Legislature's establishment of different requirements as to the admissibility of confessions by juveniles, hinged on whether the oral confession leads to discovery of inculpatory evidence, is a reasonable and rational classification. A confession that does not lead to inculpatory evidence would lack the indicia of truth present when a confession leads to evidence which tends to establish guilt. Requiring greater protection as a prerequisite to admission of a confession that does not lead to such evidence is a rational and reasonable basis to attach that greater protection.

577 S.W.2d at 708-09.

In other words, because an oral confession that leads to inculpatory physical evidence is more trustworthy than a written confession not corroborated by physical evidence, it was reasonable for the legislature to require greater procedural protections for the written confession than for the oral.

Physical Evidence Requirement. An oral statement, to be admissible, must comply with the *Miranda* warnings and waiver requirements and must lead to inculpatory physical evidence. If it meets those requirements, it is admissible even though it was the police officer, rather than the magistrate, who administered the *Miranda* warnings and obtained the waiver from the juvenile. See *S.D.J. v. State,* 879 S.W.2d 370 (Tex.App.—Eastland 1994, writ denied) (holding admissible an oral statement that led to recovery of stolen property connected to a murder); *Littlefield v. State*, 720 S.W.2d 254 (Tex.App.—Beaumont 1986, pet. ref'd) (holding admissible an oral statement that led to the recovery of stolen property and the weapon with which a murder was committed); *Salazar v. State*, 648 S.W.2d 421 (Tex.App.—Austin 1983, no pet.) (holding admissible an oral statement that led to the recovery of stolen property); *In the Matter of R.L.S.*, 575 S.W.2d 665 (Tex.Civ.App.—El Paso 1978, no writ) (holding inadmissible an otherwise valid oral confession because there was no showing that it led the police to physical evidence about which they did not already have knowledge). Cf. *In the Matter of J.A.B.*, UNPUBLISHED, No. 03-09-00510-CV, 2010 WL 3629829 (Tex.App.—Austin 2010, no pet.) (Section 51.095(a)(2) only requires that the statement contain facts or circumstances that are found to be true and tend to establish the child's guilt; statute is satisfied if it contains a single incriminating fact or circumstance unknown to law enforcement but later corroborated).

Beck v. State, 681 S.W.2d 825 (Tex.App.—Houston [14th Dist.] 1984), *rev'd by* 712 S.W.2d 745 (Tex.Crim.App. 1986), underscores the need to fully comply with *Miranda* in obtaining an oral statement from a juvenile. The officer gave the *Miranda* warnings, but the respondent asked the officer "if he should have a lawyer present before he gave a written statement." The officer replied he did not wish a written statement. The respondent then orally confessed and informed the officer where the victim's wallet could be found. Although the finding of the wallet where respondent said it could be found made the oral statement reliable under the juvenile confession statute, the statement was obtained in violation of *Miranda* because the officer continued the questioning despite respondent's inquiry about an attorney. Therefore, neither the oral statement or the wallet should have been admitted into evidence.

Interrogation. The term "interrogation" under Miranda refers not only to express questioning but also to

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

In 1991, the legislature amended the juvenile confession statute to expand the list of circumstances under which an oral statement is admissible in juvenile proceedings. The amendment was essentially copied from Article 38.22, Code of Criminal Procedure. It provided that the juvenile confession statute does not preclude admissibility of a statement given while in custody that "does not stem from interrogation of the child." Section 51.095(b)(1).

The police officer in *In the Matter of K.M.C.*, UNPUBLISHED, No. 04-98-00039-CV, 1999 WL 1020939, 1999 Tex.App.Lexis 8358, Juvenile Law Newsletter ¶ 99-4-28 (Tex.App.—San Antonio 1999, no pet.), read the juvenile aggravated robbery suspect her *Miranda* rights in an interrogation room. When she indicated a willingness to answer questions, he took her in an unsuccessful search for a magistrate. Forty-five minutes later, he returned her to the same interrogation room, where she made an unsolicited oral confession to the robbery. The Court of Appeals held that the officer's actions following the unsuccessful effort to find a magistrate—removing her handcuffs, giving her cigarettes, letting her use the restroom and asking her whether she needed anything to drink—did not constitute interrogation because they were not acts that the officer should have known were likely to elicit incriminating responses.

The juvenile respondent in *Rushing v. State*, 50 S.W.3d 715 (Tex.App.—Waco 2001), *aff'd on other grounds by* 85 S.W.3d 283 (Tex.Crim.App. 2002) was in custody in the juvenile detention facility for capital murder. During the course of awaiting his certification hearing he had numerous conversations with David Salazar, a juvenile probation officer assigned to his case:

> Salazar testified that the conversations usually occurred in the late afternoon in the day room of the juvenile detention center. The day room is an open area, and other detention center personnel are always present. Whenever Rushing began to describe details of the crime, Salazar would tell him: "Jonathan, you have an attorney. You need to tell your attorney this. I can't help you in this matter." Salazar said: "I took it at that point that he really didn't have anybody to talk to and he wanted to get things off his mind...and he just needed somebody to vent to." Salazar also said: "I never make it a point to question anybody. Especially in a high profile case as this, I never solicited any information that would jeopardize the case." Salazar said Rushing was adamant about getting to court as soon as possible; he said he would confess to the crime, and he wanted to "get his time done with." Salazar did not leave when Rushing began talking about the offense because "the whole thing was to get past that conversation so that I could get at the matter at hand which is his behavior in detention and what he needed to do to keep out of trouble and to make his stay in detention easier."

50 S.W.3d at 730-731.

Salazar then testified at Rushing's post-certification criminal trial about several damaging admissions about the offense that Rushing made to him during those conversations. The Court of Appeals held that Salazar had not interrogated Rushing:

> Rushing says that because of his age, the seriousness of the offense, and the daily visits by Salazar, the conversations were reasonably likely to cause Rushing to make an incriminating statement, and therefore the conversations were the functional equivalent of an interrogation. However, questioning which is "normally attendant to arrest and custody" is not interrogation.… The record shows that any questions Salazar may have asked Rushing concerned routine custodial matters such as how Rushing was getting along in detention, or whether Rushing had any questions about the status of his case. These questions, "normally attendant to arrest and custody," are not an "interrogation."

50 S.W.3d at 732.

Impeaching Credibility. In addition, Section 51.095(b)(2)(A) makes a statement admissible if it is "voluntary and has a bearing on the credibility of the child as a witness." This provision applies only if the child testifies in the juvenile proceedings and makes a statement that is inconsistent with a prior statement. That provision allows the prior statement to be admitted into evidence, but only to impeach the child's testimony.

Recorded Custodial Statement. In 1997, the legislature authorized for the first time in juvenile proceedings the admission of an oral statement into evidence because

it was tape recorded. That had been authorized for years in criminal cases by Code of Criminal Procedure Article 38.22 but never before in juvenile cases. There is one big difference between the criminal and the juvenile version. Under the criminal version, either a peace officer or a magistrate may give the warnings on tape, but under the juvenile version only a magistrate may do so. The recording provisions are in Sections 51.095(a)(5), (c) and (f):

> (5) subject to Subsection (f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:
>
> (A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;
>
> (B) the recording device is capable of making an accurate recording, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;
>
> (C) each voice on the recording is identified; and
>
> (D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.
>
> (c) An electronic recording of a child's statement made under Subsection (a)(5) or (b)(2)B) shall be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution.
>
> (f) A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.

In 2009, the Houston First District Court of Appeals addressed the adequacy of judicial warnings given to a juvenile making an electronically recorded custodial statement under Sections 51.095(a)(1)(A) and (a)(5). *In the Matter of D.J.C.*, 312 S.W.3d 704 (Tex.App.—Houston [1st Dist.] 2009, reh'g overruled). While the video recording showed a magistrate warning the 16-year-old about his various statutory rights, it did not show that the juvenile was specifically warned that his statement could be used "in evidence" against him. Section 51.095(a)(1)(A)(i). That warning must be given to a juvenile before making a voluntary written statement, as well as an electronically recorded oral statement. See Section 51.095(a)(5)(A) (incorporating the warnings contained in Section 51.095(a)(1)(A) for recorded statements).

The Court of Appeals held that appellant's electronically recorded statement violated the relevant provisions of Section 51.095:

> Here, the magistrate failed to warn appellant that his video-recorded statement could be used in evidence against him, and nothing else in the warnings alerted appellant that his statement could be used in a hearing to adjudicate juvenile delinquency. Moreover, the record shows that appellant did not understand that he could be charged with a crime as a result of his statement or that his statement could be used in evidence against him at a hearing to adjudicate juvenile delinquency. The State produced no evidence that appellant understood the warnings given him and their implications.

312 S.W.3d at 721.

In light of the complainant's inconsistent and contradictory testimony, the erroneous admission of appellant's statement was found to be harmful since the trial court could not determine beyond a reasonable doubt that appellant's statement did not contribute to his adjudication.

There is a procedural difference between obtaining a written statement and a recorded oral statement. The written statement requires two trips to the magistrate—one for the warnings and waiver and another for the scrutiny and signing of the written statement. A recorded statement requires only one trip to the magistrate—for the warnings and waiver. However, the magistrate who

provides the warnings may request (on the recording) that the officer return the child and the recording after the statement is taken. This gives the magistrate the option to review the recording with the child to determine whether the child's statement was given voluntarily. Section 51.095(f)

In 2007, Section 51.095(f) was amended to change the terms "videotape" and "videotaped" to "recording" and "recorded" respectively, thus authorizing the use of digital media recordings in addition to videotapes. Additionally, the word "tape" was deleted from the statute. The amendment also clarifies that the magistrate's determination of voluntariness must be reduced to writing, signed and dated by the magistrate. The procedures outlined in Subsection (f) are not mandatory, but if a magistrate invokes them, a judicial determination that the statement was given voluntarily must be made or else the statement will be inadmissible.

In 2011, Section 51.095(b) was amended to provide that an electronically recorded statement obtained in another state is admissible against the juvenile if the statement was obtained in compliance with the laws of that state or of Texas. Additionally, an electronically recorded statement obtained by a federal law enforcement officer in Texas or in another state is admissible if obtained in compliance with the laws of the United States. The recordings must be preserved as provided in 51.095(c).

Res Gestae Statements. Article 38.22, Section 5 provides that a "statement that is res gestae of the arrest or of the offense" may be admitted into evidence. Section 51.095(a)(3) provides that a statement of a child is admissible if "the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest."

Res gestae statements are a limited type of oral statement made during or very near in time to the commission of the offense or the arrest. The theory is that the statements should be admitted into evidence because they are particularly reliable since they were made without thought or reflection by the person making the statement but instead were made because of the excitement of the moment. It is the event speaking through the person without mental censoring of what is said. Courts sometimes speak of res gestae statements as excited utterances. It follows that a res gestae statement is not one that is made in response to official interrogation, since the questioning destroys the spontaneity that is an essential ingredient of the statement.

Can a res gestae statement still qualify as an excited utterance if it is made several days after the startling event? In *In the Matter of D.A.A.*, UNPUBLISHED, No. 13-06-00538-CV, 2009 WL 2397333 (Tex.App.—Corpus Christi 2009, no pet.), a 5-year-old witness to a burglary named G.L. tearfully asked a neighbor if a boy his age could go to jail and then confessed his presence at the property that had been entered into and damaged. The neighbor was allowed to testify about G.L.'s statement to her, thus implicating appellant. The Corpus Christi Court of Appeals held that, although several days had passed since the burglary took place, G.L. could still have been dominated by emotion and fear when he made his outcry:

> The record shows that G.L. was present at Perez's property when the startling event of the burglary of the building occurred. While G.L.'s statement to Lopez implicating D.A.A. was made several days after the crime occurred, this statement was made immediately after G.L. saw [Officer] Ponce at Perez's property investigating the crime. It is reasonable to believe that seeing Ponce investigating the damage to Perez's property would have triggered G.L. to be dominated by his emotions stemming from the crime. Therefore, while G.L.'s statement to Lopez was made several days after the startling event, it was still made while G.L. was under the stress of excitement caused by the startling event and dominated by emotion and fear triggered by a subsequent startling event related to the burglary of the building. (citation omitted)

2009 WL 2397333 *5.

4. "Fruit of the Poisonous Tree" Doctrine

If evidence has been illegally obtained, not only is that evidence excluded from judicial proceedings but also so is any evidence obtained as a result of the illegally obtained evidence. This is called the derivative evidence rule or, more poetically, the fruit of the poisonous tree doctrine. If a tree is poisonous, so too will be its fruit.

In 2005, the Fort Worth Court of Appeals held that fruit of the poisonous tree that derives from a voluntary, statement given after a failure to honor a request for counsel is inadmissible. *In the Matter of H.V.*, 179 S.W.3d 746 (Tex.App.—Fort Worth 2005, aff'd in part, rev'd in part). The court further held that a suspect's in-custody invocation of the right to counsel constitutes invocation of a constitutional right, thus making the fruit of the poisonous tree doctrine applicable:

> As we previously discussed, H.V. was detained for approximately three hours—from 4:30 p.m. to 7:30

> p.m.—before he was given *Miranda* warnings. As we have held, and the trial court found, H.V. invoked his right to counsel when he was informed of that right by Judge Bendslev. Nonetheless, Judge Bendslev turned H.V. over to police for interrogation and, from shortly after 7:30 p.m. until 10:35 p.m., police interrogated H.V. in the absence of counsel. After more than two hours of custodial interrogation, Detective Carroll began typing H.V.'s statement. The custodial interrogation of H.V. despite H.V.'s invocation of his right to counsel infringed upon H.V.'s constitutional Fifth Amendment right to counsel. … After H.V. incriminated himself in his second statement and therein disclosed the location of the gun, police concluded their interrogation and H.V.'s Fifth Amendment right to have counsel present during that completed interrogation was forever lost. This constitutional violation of H.V.'s Fifth Amendment right to counsel created a "poisonous tree." The evidence discovered as a result of this constitutional violation—the gun—is the "fruit" of that violation and must be suppressed, at least in the State's case-in-chief.

179 S.W.3d at 763-64.

The Court of Appeals held that the trial court did not abuse its discretion by granting H.V.'s motion to suppress the gun located by police as a result of his second statement.

No Relief for Fifth Amendment Violations. In 2008, the Texas Supreme Court took up the *H.V.* case and held that the gun should not have been suppressed as "fruit of the poisonous tree." *In the Matter of H.V.,* 252 S.W.3d 319 (Tex. 2008, reh'g denied). The Fort Worth Court of Appeals had held that suppression of H.V.'s statement (for violating his request for an attorney) also required suppression of the gun as the "poisonous fruit." The Texas Supreme Court disagreed, however, and noted: "Both the United States Supreme Court and the Court of Criminal Appeals have rejected this doctrine in the Fifth Amendment context of physical evidence obtained after failing to give *Miranda* warnings." 252 S.W.3d at 327. Accordingly, the higher Court affirmed the suppression of the statement but reversed the suppression of the gun.

The Texas Supreme Court explained that the Self-Incrimination Clause concerns compelled testimony, not physical evidence. Consequently, if a statement is taken in violation of the Fifth Amendment and is then excluded, there is no longer a Fifth Amendment violation. Physical evidence that does not compel a defendant to testify against himself or herself cannot be a violation of the Fifth Amendment rights that *Miranda* protects.

> In this case, H.V.'s counsel does not argue that his disclosure of the gun's location was involuntary or coerced for any reason other than violation of his *Miranda* request for counsel. The warnings and invocation of counsel here all occurred in court before a magistrate without police involvement, so there could have been no police coercion. Because violations of *Miranda* do not justify exclusion of physical evidence resulting therefrom, we hold the courts below erred in excluding the gun that brought about [the victim's] death.

252 S.W.3d at 327-28

Oral Amendment of Inadmissible Written Statement. *In the Matter of R.J.H.,* 28 S.W.3d 250 (Tex.App.—Austin 2000), *rev'd by* 79 S.W.3d 1 (Tex. 2002) presents an interesting twist on the usual fruit of the poisonous tree claim. A written statement was inadmissible because respondent had not been taken before a magistrate. After respondent was released from custody, he contacted the interrogating officer on several occasions to change that portion of the statement in which he cast blame on a relative and to assume total responsibility himself. The trial court suppressed the written statement, but permitted the oral statements into evidence because respondent was not in custody at the time he gave them.

The Austin Court of Appeals reversed, but the Texas Supreme Court agreed with the trial court, concluding that the oral statements themselves were not the product of coercion because, as stated by the trial court, R.J.H. was not in custody at the time he made them:

> Nor were R.J.H.'s later statements themselves the product of coercion. R.J.H. initiated contact with Elder on more than one occasion. The two spoke together several times. R.J.H. even offered to lead Elder to unrecovered stolen property. The evidence certainly supports the trial court's determination that R.J.H. was not in custody when he made the oral statements to Elder. Furthermore, there is no indication that R.J.H. felt any pressure to talk to Elder because he had already given Elder a statement that inculpated him in the burglary. For one thing, he and his cousin, Ybarra, had been caught with stolen property in their possession, so that their complicity in the burglary was not wholly dependent on R.J.H.'s confession. And for another, R.J.H.'s efforts to take sole responsibility for the crime appear to have been consistently motivated by his belief that any punishment imposed on him in the juvenile system would be less than the punishment his cousin, Ybarra, faced as an adult for the same crime. Elder did

> nothing to create or foster this belief in R.J.H. If R.J.H. thought he had nothing to lose by making the oral statements to Elder, it was not likely because he had already confessed, but because he had been caught and his previous experience with the juvenile justice system persuaded him that he would suffer no serious consequences.

79 S.W.3d at 8-9.

The Texas Supreme Court did not disclose any principled reason why the fruit of the poisonous tree doctrine should apply only to due process violations and not also to violations of applicable statutes, as was the case in *R.J.H.*

5. Failure to Comply with Section 52.02

Section 52.02(a) requires:

> Except as provided by Subsection (c) [relating to administering intoxilyzer tests in DWI cases], a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:
>
> (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
>
> (2) bring the child before the office or official designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;
>
> (3) bring the child to a detention facility designated by the juvenile board;
>
> (4) bring the child to a secure detention facility as provided by Section 51.12(j);
>
> (5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment;
>
> (6) dispose of the case under Section 52.03.; or
>
> (7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.

There are several Texas cases holding that if police obtain a confession from a juvenile while violating the requirements of Section 52.02(a), the confession is not admissible even though the procedural requirements of Section 51.095 were fully complied with.

Unnecessary Delay. In *In the Matter of D.M.G.H.*, 553 S.W.2d 827 (Tex.Civ.App.—El Paso 1977, no writ), the juvenile was arrested at 12:30 p.m. and held at the police station until taken before a magistrate at 7:25 p.m. She signed a written statement and was finally brought to juvenile detention at 10:20 p.m. She contended on appeal from an adjudication of delinquency that her written statement should not have been admitted into evidence because of the delay in bringing her to the detention facility. The State attempted to justify the delay on the ground that it was necessary to complete the paperwork on the case before taking the child to juvenile detention, but the appellate court rejected that argument and held this was an unnecessary delay in violation of Section 52.02. It then quoted Section 54.03(e) stating, "[a]n extrajudicial statement which was obtained without fulfilling the requirements of this title or of the constitution of this state or the United States, may not be used in an adjudication hearing," and reversed the adjudication of delinquency.

The Court of Appeals in *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935, Juvenile Law Newsletter ¶ 96-3-11 (Tex.App.—Houston [14th Dist.] 1996, no pet.), held that police did not violate Section 52.02 when they transported appellant two blocks for an on-the-scene identification in a fresh aggravated sexual assault case before taking him to the designated place. The same Court of Appeals also held that a delay of three hours at the scene of a homicide investigation was not unnecessary because it was only a temporary detention. The person was not placed into law enforcement custody until police began transporting him to the station. *Dang v. State*, 99 S.W.3d 172 (Tex.App.—Houston [14th Dist.] 2002), *rev'd on other grounds by* 154 S.W.3d 616 (Tex.Crim.App. 2005).

The Court of Appeals in *Contreras v. State*, 998 S.W.2d 656 (Tex.App.—Amarillo 1999), *rev'd by* 67 S.W.3d 181 (Tex.Crim.App. 2001), held that a delay of 50 minutes in bringing respondent to a juvenile processing office, during which time respondent was in a patrol car at the scene

of the offense, was unnecessary under the statute and required excluding a written statement given while in the office. The court refused to accept the argument that the delay was necessary because police were attending to the victim and interviewing witnesses to the offense.

The Court of Criminal Appeals reversed the Court of Appeals' decision in *Contreras v. State* and re-instated the conviction of murder. *Contreras v. State*, 67 S.W.3d 181 (Tex.Crim.App. 2001). The Court of Criminal Appeals concluded that the delay was necessary to secure the crime scene:

> We hold that the de minimis 45 to 50 minute delay in this case attributable to these police efforts is a "necessary" delay. No one should dispute that delay attributable to trying to save the victim's life was a "necessary" delay. The Court of Appeals failed to factor this into its analysis of the "unnecessary delay" issue. See *Contreras*, 998 S.W.2d at 661 (deciding only that police "investigating the stabbing" was inadequate justification for the delay).
>
> Police involvement with the appellant was narrowly circumscribed to "securing the scene" which was necessary and legitimate police activity.… The police did not stray beyond "securing the scene" by interrogating and attempting to obtain a statement from appellant during the 45 to 50 minutes that she was detained in the back of the patrol car. A contrary decision would fail to properly weigh the "competing purposes" in cases like this.

67 S.W.3d at 185.

On remand, the conviction was again affirmed in *Contreras v. State*, 73 S.W.3d 314 (Tex.App.—Amarillo 2001, no pet.).

> The Tyler Court of Appeals in *Hill v. State*, 78 S.W.3d 374 (Tex.App.—Tyler 2001, pet. ref'd), held that a delay of about 25 minutes during which time the police were investigating the scene of a capital murder was necessary under Section 52.02:Determination of what amounts to an "unnecessary delay" must be made on a case-by-case basis. *Contreras v. State*, 998 S.W.2d 656, 660 (Tex.App.—Amarillo 1999, pet. granted)…. '' In this case, Appellant fled the scene of the shooting and was captured after a pursuit. There were multiple suspects who had to be kept separate, and the police were not certain that all of the actors had been apprehended. There were multiple crime scenes in the vicinity where Appellant was apprehended. Appellant was wearing blood-splattered clothing which had to be collected from his person, and, perhaps most importantly, atomic absorption tests had to be performed on Appellant's hands before any gunshot residue was removed inadvertently.
>
> We hold that under the facts in the instant case, Appellant's wait in the patrol car was not an "unnecessary delay" in violation of section 52.02(a) of the Family Code.

78 S.W.3d at 382. See *In the Matter of J.D.,* 68 S.W.3d 775 (Tex.App.—San Antonio 2001, pet. denied) (delay of up to two and one-half hours justified by investigation of conspiracy to kill school students).

The Court of Appeals in *Coffey v. State*, UNPUBLISHED, No. 03-01-00342-CR, 2002 WL 437110, 2002 Tex.App.Lexis 2049, Juvenile Law Newsletter ¶ 02-2-08 (Tex.App.—Austin 2002, pet. ref'd), upheld a delay of about one hour on the grounds, in part, that officers spent a substantial amount of time notifying the juvenile's mother of his arrest for murder and answering her quest-ions about their conduct:

> When appellant and Horton were taken into custody, there were two other young men in the car. The officers had to determine whether or not to release the other passengers. The officers then took time to advise appellant and Horton of their *Miranda* rights. Appellant's mother and a man living with her were in the apartment nearby. The officers were obligated by statute to inform her that appellant was being taken into custody. It was several minutes before she and the man appeared at the door. Sheriff Morris explained to appellant's mother that her son was being taken into custody because they believed he had committed murder. He informed her that appellant was being taken to Lampasas and that she had the right to come to Lampasas. He also told her that appellant would be taken to the juvenile detention facility in Killeen when the investigation was completed. The man with appellant's mother "was getting very verbal." After the officers determined that this man was not appellant's father or stepfather, the man was ordered to go back into the apartment. Appellant's mother became "very emotional" and went back and forth into the apartment. She asked many questions that the officers attempted to answer. Horton had told the officers that there was a handgun in appellant's mother's car. The officers took time to obtain her written consent to

> search the car. There is no evidence that either appellant or Horton were interrogated or made any statements before appellant was released to the chief juvenile probation officer in Lampasas. A review of the record of the officers' conduct at the time appellant was taken into custody, and subsequently, shows they were conscientiously complying with the dictates of the juvenile code.

2002 Tex.App.Lexis 2049 *20-22.

Not Taking the Child Elsewhere. The Houston First District Court of Appeals in *Roquemore v. State*, 11 S.W.3d 395 (Tex.App.—Houston [1st Dist.] 2000), *rev'd by* 60 S.W.3d 862 (Tex.Crim.App. 2001), held that a delay of 20 to 25 minutes, during which time respondent located, for police, property taken in a robbery, was not an unnecessary delay. The Court of Appeals also held that the *Comer* exclusionary rule for a Section 52.02 violation does not apply when there was no police interrogation.

The Court of Criminal Appeals reviewed the *Roquemore* decision. *Roquemore v. State*, 60 S.W.3d 862 (Tex.Crim.App. 2001). The Court agreed that the oral statement was not rendered inadmissible because of any delay in taking Roquemore to a designated place. The statement was volunteered without interrogation shortly after he was taken into custody. However, the police detour to locate the stolen items was a violation of the mandate of Section 52.02(a) that the police must take the child to a designated place "without first taking the child to any place other than a juvenile processing office." This detour, although instigated by the juvenile, meant that the stolen goods and testimony concerning them should have been suppressed:

> [T]he violation occurred when the officers deviated from their route to the juvenile division and instead went to the stolen property's location. Tex.Fam.Code §52.02(a). Although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time if section 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed.

60 S.W.3d at 870-71.

On remand from the Court of Criminal Appeals, the Court of Appeals held that admission of testimony about the recovery of the stolen property was error, but harmless. *Roquemore v. State*, 95 S.W.3d 315 (Tex.App.—Houston [1st Dist.] 2002, pet. ref'd).

Designation of Appropriate Place. Title 3 permits the juvenile board to designate a police station as an appropriate place to take an arrested juvenile. Whether such a designation has been made and, if so, whether the police have remained within the bounds of the designation, can determine the admissibility of any statements obtained. In *Meza v. State*, 577 S.W.2d 705 (Tex.Crim.App. 1979), *cert. denied*, 444 U.S. 947, 100 S.Ct. 417 (1979), the Court of Criminal Appeals concluded that, although the confession was obtained at the police station, the requirements of Section 52.02 had been met because the local juvenile court had designated it as the appropriate place to which to take an arrested juvenile. By contrast, in *In re L.R.S.,* 573 S.W.2d 888 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ), the arrested juvenile was taken to the municipal police station, where he confessed. The designated place for taking arrested juveniles was the county jail. The Court of Civil Appeals concluded that Section 52.02 had been violated and reversed the adjudication of delinquency.

In *Salas v. State*, 756 S.W.2d 832 (Tex.App.—Corpus Christi 1988, no pet.), a police officer arrested the juvenile and took him to the police station, where a confession was obtained. Since the juvenile court had not authorized this procedure under Section 52.02, the confession was illegally obtained:

> By violating article [sic] 52.02, the police officers illegally obtained appellant's written confession, and the trial court erred in admitting it into evidence [in the criminal trial] over appellant's pre-trial objection.... However, the error is not reversible. Appellant took the stand and testified, with very little variance, to the matters found in his statement. He claimed he acted in self-defense in both his written statement and his trial testimony. We find beyond a reasonable doubt that the error made no contribution to his conviction and punishment.

756 S.W.2d at 834-35.

Taking to Juvenile Detention Facility. In *Matthews v. State,* 677 S.W.2d 282 (Tex.App.—Fort Worth 1984, pet. ref'd), the juvenile was arrested and taken to the county juvenile detention facility. Later, police took him from that facility to the police station for questioning. Finding the juvenile division offices locked, they questioned him in the

homicide division offices. The Court of Appeals rejected respondent's contention that his confession should have been excluded from evidence because the homicide division offices had not been designated by the juvenile court pursuant to Section 52.02. The court held that the police complied with Section 52.02 when they took respondent first to the Tarrant County Juvenile Detention Center and, once that had been accomplished, the juvenile confession statute governed subsequent detention and questioning.

In *Blackmon v. State,* 926 S.W.2d 399 (Tex.App.—Waco 1996, pet. ref'd), police took the juvenile directly to juvenile detention but several days later interrogated him at the police station. Here, the Waco Court of Appeals relied on Section 52.04(b) which at the time provided:

> "[t]he office or official designated by the juvenile court [now it is juvenile board] may refer the case to a law-enforcement agency for the purpose of conducting an investigation to obtain necessary information."

While the statute provides for the referral of the "case," the court held that the provision also applies for the referral of the "child." *Blackmon v. State*, 926 S.W.2d 399 (Tex.App.—Waco, 1996). This is the procedure mandated by Comer (discussed below), which allows the officer designated by the juvenile board (detention staff or, in some counties, the prosecutor) the authority to make the decision whether to subject the child to custodial interrogation.

The *Comer* Case. In *Comer v. State*, 776 S.W.2d 191 (Tex.Crim.App. 1989), the Court of Criminal Appeals, for the first time, addressed the question of what effect to give a violation of Section 52.02. Comer was arrested and taken to a magistrate for Section 51.095 warnings. He was then questioned at the police station for almost two hours, where he confessed to murder. Upon return to the magistrate, he signed the written confession. The Court of Appeals upheld the admission of the written confession into evidence in the criminal trial on the ground that compliance with Section 51.095 is all that is required.

However, the Court of Criminal Appeals reversed the decision of the Court of Appeals, rejecting the argument that the enactment of Section 51.09(b) (now Section 51.095) in 1975 should be read as creating an exception to the requirement of Section 52.02. It then outlined the procedures that should be followed:

> Title 3 contemplates that once he has found cause initially to take a child into custody and makes the decision to refer him to the intake officer or other designated authority, a law enforcement officer relinquishes ultimate control over the investigative function of the case.... In our view the Legislature intended that the officer designated by the juvenile court make the initial decision whether to subject a child to custodial interrogation. He can take a statement himself, consistent with §51.09(b)(1)...at the detention facility, or, pursuant to §52.04(b), he can refer the child back to the custody of law enforcement officers to take the statement. This construction gives effect to the Legislature's revised attitude that a juvenile is competent to waive his privilege against self-incrimination without recourse to counsel, while preserving in full its original intention that involvement of law enforcement officers be narrowly circumscribed.

776 S.W.2d at 196.

In the *Comer* case, neither the magistrate's office nor the police station had been designated by the juvenile court as an acceptable place to take arrested juveniles.

In *Beaver v. State*, 824 S.W.2d 701 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd), the juvenile was taken directly to the juvenile detention facility. There, an intake worker filled out certain papers and turned the juvenile over to the investigating police officer for questioning. The Court of Appeals held this was a "referral" of the case to law enforcement under Section 52.04(b). There is no legal requirement that the referral be in writing or that other formalities be observed.

In *State v. Langley*, 852 S.W.2d 708 (Tex.App.—Corpus Christi 1993, pet. ref'd), the arresting officer telephoned the juvenile court intake officer for permission to interrogate the child. The Court of Appeals held that this telephone call did not constitute compliance with the requirement of Section 52.02(a)(3) that the officer "bring the child before the office or official designated by the juvenile court." That requires physically bringing the child to the office or before the official. The *Langley* case arose before the 1991 amendments authorizing the designation of juvenile processing offices.

Juvenile Processing Office. In 1991, the legislature, in response to *Comer v. State*, amended Section 52.02 and enacted Section 52.025 to authorize each juvenile court to designate "juvenile processing offices" for the warning, interrogation and other handling of juveniles. Section 52.02(a) was amended to authorize police to take an arrested juvenile to "a juvenile processing office designated under Section 52.025 of this code." Section 52.025 was

amended in 2001 to shift the authority to designate a juvenile processing office from the juvenile court to the juvenile board. As amended, it provides:

> (a) The juvenile board may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01. The office may not be a cell or holding facility used for detentions other than detentions under this section. The juvenile board by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.
>
> (b) A child may be detained in a juvenile processing office only for:
>
> > (1) the return of the child to the custody of a person under Section 52.02(a)(1);
> >
> > (2) the completion of essential forms and records required by the juvenile court or this title;
> >
> > (3) the photographing and fingerprinting of the child if otherwise authorized at the time of temporary detention by this title;
> >
> > (4) the issuance of warnings to the child as required or permitted by this title; or
> >
> > (5) the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).
>
> (c) A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.
>
> (d) A child may not be detained in a juvenile processing office for longer than six hours.

Remember, under Section 52.02 taking a child to a juvenile processing office is an option for law enforcement officers to perform certain tasks. It is section 52.025 that instructs the officers as to which tasks are to be performed.

It is the responsibility of the juvenile board to designate the juvenile processing offices. Family Code Section 52.025(a). Whether such a designation has been made and, if so, whether the police have remained within the bounds of the designation, can determine the admissibility of any statements obtained. If the juvenile board has not designated a juvenile processing office or an office or official under §52.02(a)(2), the police, unless they immediately release the child to parents, must bring the child directly to the designated detention facility and may not take him or her to the police station for any purpose. Family Code Section 52.02. The juvenile board has the responsibility to specify the conditions of police custody and length of time a child may be held before release or delivery to the designated place of detention. Family Code Section 52.025(a).

In *In the Matter of D.J.C.*, 312 S.W.3d 704, (Tex.App.—Houston [1stDist.] 2009, no pet.) No. 01-07-01092-CV, 2009 WL 3050870, Tex.Juv.Rep. Vol. 23, No. 5, ¶ 09-4-5B, the officer took appellant into custody and interrogated him in an interview room used to interrogate both adult and juvenile subjects. The Court concluded that the evidence showed that the State violated sections 52.02(a) and 52.025(a) by not taking appellant's custodial statement in a designated juvenile processing office.

The respondent in *Nave v. State*, UNPUBLISHED, No. 05-99-01366-CR, 2000 WL 1711937, 2000 Tex.App.Lexis 7723, Juvenile Law Newsletter ¶ 00-4-25 (Tex.App.—Dallas 2000, no pet.) argued that his written confession to capital murder should have been excluded from evidence because the interrogation did not occur in a juvenile processing office. The Court of Appeals rejected that argument:

> Nave concedes he was initially taken to a designated juvenile processing office. He also does not dispute that his statement was written and signed in a designated processing office. His sole complaint is that the interview leading up to his written statement was not conducted in a properly designated office but instead in an office approximately thirty feet away belonging to one of the investigating officers. The office was substantially similar to other offices designated for processing juveniles.
>
> The evidence shows that during his interview, Nave admitted his involvement in the alleged homicide. Following this admission, Nave was asked whether he would be willing to give a statement and he indicated that he would. Nave was then taken to a designated juvenile processing office where he dictated and read the written confession at issue. Nave also signed the confession in a designated office in the presence of a magistrate. Based on this evidence we conclude Nave's statement was "received" in a properly designated juvenile processing office.

2000 Tex.App.Lexis 7723 *6-8. Cf. *Gamboa v. State*, UNPUBLISHED, No. 14-05-00942-CR, 2007, Tex.App.Lexis 405 (Tex.App.—Houston [14th Dist.] 2007, pet. ref'd) (Section 52.02(a) does not require a child to be taken before an official designated by the juvenile board but rather before the office or an official designated by the juvenile board); *In the Matter of J.M.S.*, UNPUBLISHED, No. 06-04-00008-CV, 2004 WL 1968644, 2004 Tex.App.Lexis 8139, Juvenile Law Newsletter ¶ 04-4-03 (Tex.App.—Texarkana 2004, no pet.) (no abuse of discretion in admitting statement based on questioning that may have begun in a room not designated as a juvenile processing office).

Designation of Offices. In *In the Matter of U.G.*, 128 S.W.3d 797 (Tex.App.—Corpus Christi 2004, pet. denied), police escorted the juvenile in handcuffs to the local police station in Alamo, Texas. Once there, he was kept in the general waiting area where adult suspects were also detained and was not taken to the specially designated area for juvenile suspects.

> Because the police officers failed to comply with the requirements of section 52.02, the statement that was obtained from appellant by the investigating officer that night violated his rights as a juvenile under the family code and was inadmissible at trial.

128 S.W.3d at 799.

Although the court ruled that the statement was erroneously admitted at trial, it held that the error was harmless because the State had otherwise met its burden of proof and, therefore, the error did not contribute to appellant's conviction or punishment. Cf. *In the Matter of D.J.C.*, 312 S.W.3d 704 (Tex.App.—Houston [1st Dist.] 2009, reh'g overruled) (statement taken in an interview room "used routinely to interview all criminal subjects" violated Sections 52.02(a) and 52.025(a) requirements that juvenile's custodial statement only be taken in a proper location).

The juvenile court designation order in *Anthony v. State*, 954 S.W.2d 132 (Tex.App.—San Antonio 1997), *abrogated on other grounds, Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App. 2002), pre-dated the enactment of Section 52.025 and designated the entire police station as a place where juveniles could be taken. The San Antonio Court of Appeals held that general designation was not sufficient under Section 52.025 because that section speaks of "an office or room, which may be located in a police facility or sheriff's offices...." For this reason, the Court of Appeals held the statement was unlawfully obtained in the police station and inadmissible in the defendant's criminal proceedings.

The Attorney General was asked whether the juvenile court could designate multiple juvenile processing offices in the county. He replied that multiple designations are authorized by Section 52.025. Attorney General Opinion No. LO 93-38 (1993).

No particular formality is required to prove that a space has been designated by the juvenile court as a juvenile processing office. The conclusory testimony of the interrogating officer that the space was designated as a juvenile processing office, if unchallenged, is sufficient to prove that fact. *Acosta v. State*, UNPUBLISHED, No. 01-95-01260-CR, 1998 WL 188858, 1998 Tex.App.Lexis 2282 (Tex.App.—Houston [1st Dist.] 1998, pet. ref'd).

The Six-Hour Rule. Section 52.025(d) provides, "A child may not be detained in a juvenile processing office for longer than six hours." A time limit was imposed since the purpose of a juvenile processing office is to authorize a temporary detention in a law enforcement facility to accomplish limited objectives. Six hours was selected since, under federal law, a detention of a juvenile in an adult detention facility for less than six hours need not be reported to federal monitoring agencies. What happens if the juvenile is detained in a processing office for longer than six hours? The respondent in *In re C.L.C.,* UNPUBLISHED, No. 14-96-00105-CV, 1997 WL 576409, 1997 Tex.App.Lexis 5011 (Tex.App.—Houston [14th Dist.] 1997, no pet.) was detained for nine hours. However, he signed a written statement after being detained only four hours and much of the subsequent detention was attributable to his actions in leading officers to the place where the murder weapon was hidden and, at respondent's request, to arranging for him to see his parents before being transported to the juvenile detention facility. The Court of Appeals said that the purpose of the six-hour restriction is to preclude the development of a coercive atmosphere:

> [I]t appears the reason the Legislature enacted the six hour limit in §52.025 was to ensure coercion is not used in obtaining a juvenile's confession and that the environment of the interrogation is more nurturing than intimidating. Juveniles detained in excess of the parameters in §52.025 might be unduly taxed and willing to make a confession in order to escape the interrogation and without giving full consideration to the ramifications of their admissions.

1997 Tex.App.Lexis 5011 *5-6.

A violation of the six-hour rule does not necessarily invalidate a confession if the confession was completed

within the required time. *In the Matter of C.L.C.,* UNPUBLISHED, No. 14-96-00105-CV, 1997 Tex.App.Lexis 5011, (Tex. App.–Houston [14th District] 1997).

Relationship Between Juvenile Processing Office and Permanent Dispositions. Section 52.02(a) requires that a person taking a child into custody must, "without unnecessary delay and without first taking the child to any place other than a juvenile processing office," do one of the following: 1) release the child to a parent or other adult; 2) bring the child before the office or official designated by the juvenile board; 3) bring the child to a juvenile detention facility; 4) bring the child to a secure adult facility under very limited circumstances; 5) bring the child to a medical facility; 6) place the child in a first offender program; or 7) return the child to his or her school campus, if an appropriate school official will assume responsibility.

Under Section 52.02, taking a child to a juvenile processing office is not mandatory; it is an option for law enforcement officers to perform certain tasks. It is Section 52.025 that instructs the officers as to which tasks are to be performed. Once those tasks are completed, the officer must, "without unnecessary delay and without first taking the child to any place," release the child under Section 52.02(a). The Court of Criminal Appeals in *Le v. State*, 993 S.W.2d 650 (Tex.Crim.App. 1999) analyzed that provision and concluded that the juvenile processing office was intended to be only a temporary stopping place in police handling of a juvenile case leading to one of the other six dispositions, which for the police are permanent ones.

Police took Le into custody for murder and brought him before a magistrate in an office that had been designated a juvenile processing office. After being warned, he was taken to the homicide office of the Harris County Sheriff's Office, where he was interrogated and gave a statement. Police then took him to the office of a different magistrate, before whom Le signed the statement. There was no evidence the homicide office had been designated as a juvenile processing office. Le was certified to criminal court and convicted of capital murder in a trial in which his written confession was introduced into evidence. The Court of Criminal Appeals held that once Le was removed from the office of the first magistrate, he should have been taken to one of the six places authorized for permanent disposition and, because he was not, the confession was illegally obtained. The Court remanded the case to the Court of Appeals for it to determine whether the error was harmless.

The State argued that the first magistrate's office could be both a juvenile processing office and a permanent place of disposition as an "office or official designated by the juvenile court." If accepted, that argument would have made the confession admissible because Le would have been taken directly to the "office or official" which could then remand him to the police for questioning. However, the Court of Criminal Appeals held that the same space cannot be both. The juvenile processing office is intended to be merely a temporary stop in the handling of a juvenile's case, hence the six-hour restriction, while the other dispositions are for the police permanent ones.

On remand from the Court of Criminal Appeals, the Court of Appeals affirmed Le's conviction of capital murder on the grounds that, while admitting his confession into evidence was error, it was harmless because there was substantial other evidence pointing to Le's guilt by aiding another to commit the capital murder. *Le v. State*, UNPUBLISHED, No. 14-94-01265-CR, 2000 WL 1335290, 2000 Tex.App.Lexis 6311, Juvenile Law Newsletter ¶ 00-4-06 (Tex.App.—Houston [14th Dist.] 2000, no pet.).

Le did not address the critical question of whether a juvenile may be moved from one juvenile processing office to another as part of the interrogation process (because there was no evidence the homicide office was a juvenile processing office) or whether he or she may pass through only one such office. Suppose police had taken Le into custody and to the juvenile processing office in the sheriff's department. If the detective working on the case decided that magistration was required, he or she would most likely have taken Le to the judge rather than seeking to have the judge come to the juvenile processing office. If the magistrate's office had been designated as a juvenile processing office, as it would be in most counties, then, under a restrictive interpretation of *Le*, the police would have had to take him from the juvenile processing office to a place of permanent disposition other than the magistrate's office. On the other hand, if the judge had come to the juvenile in the processing office, then all would be well. That distinction makes little sense and will create enormous investigative problems in some counties burdened with a reluctant judiciary.

So long as the total time does not exceed six hours, police should be permitted to place a child in a juvenile processing office and move him or her to another juvenile processing office for such purposes as magistration, fingerprinting, and photographing. The six-hour limit should define the total time in juvenile processing offices and in

transportation between them. Any more restrictive interpretation of the statutes is unnecessary as a matter of legislative intent, not helpful in protecting the rights of children, and extremely harmful to the administration of juvenile justice.

Right to Have Parent Present. Section 52.025(c) provides that a child may not be left unattended in a juvenile processing office. It also provides that the child is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.

In *In re D.J.C.*, 312 S.W.3d 704, (Tex.App.—Houston [1st Dist.]2009, no pet), the court found that the State violated Section 52.025(c)'s requirement that a child in custody in a juvenile processing center "is entitled to be accompanied by the child's parent, guardian, or the child's attorney," when the record showed that appellant's grandmother, who was his legal guardian, accompanied appellant to the police station and asked to be present with appellant and her request was denied and she was excluded from the interview room.

A child who has been taken into custody and taken to a juvenile processing office for the purpose of obtaining a confession is entitled to have a parent present [under 52.02(c)] if he or she desires. While there is no requirement that the child be advised by the law enforcement officer or the judge of this right, a good practice would be to include it in the judge's admonishments under Section 51.095.

There is at least one question presented by Section 52.025 that has not been addressed by the courts. If the entitlement to have a parent present is interpreted to mean it is a right that belongs to the child, does Section 51.09 require that he be advised of this "right" and does it also restrict him from waiving it without an attorney?

Notice to Parents: In General. Section 52.02(b) requires a person who takes a child into to custody to promptly give notice of that action and a statement of the reason for taking the child into custody to the child's parent, guardian, or custodian. The statute does not state a preference as to whom notice should be given—a parent, guardian, or custodian—only that notice be given to a person within one of those categories. Police in *Vann v. State*, 93 S.W.3d 182 (Tex.App.—Houston [14th Dist.] 2002, pet. ref'd) took the juvenile respondent into custody for capital murder and notified only his adult cousin, Leticia, of their action. The Court of Appeals held that, under the circumstances of this case, the cousin qualified as a custodian to whom notice could properly be given:

> The State argues that Leticia Vann qualified as appellant's "custodian." The Code defines this term as "the adult with whom the child resides." Tex. Fam.Code §51.02(3). It is clear from the record before us that appellant did not have a single, fixed residence. Testimony indicated that officers had contacted appellant's mother on an earlier occasion, at which time she told the police that appellant "stayed where and when he wanted." It is also clear that appellant's cousin Leticia was the principal adult in the home where he often resided. Leticia's mother (appellant's aunt) raised him since he was two weeks old. Appellant had his own bedroom at the house and kept belongings there. Leticia was the adult who was most often at that home, and reported that appellant lived with her and her mother most of the time. At the time police took appellant into custody, he was still "in and out" of Leticia's home, although he was supposed to be living with his mother. Appellant's written statement confirmed that he lived with his mother but sometimes spent the night at his aunt's house.
>
> Viewing the evidence in the light most favorable to the trial court's ruling, we find appellant's cousin Leticia qualifies as his "custodian" within the meaning of the Code, and find under the circumstances of this case that notice to her complied with section 52.02(b).

93 S.W.3d at 184-85.

The requirement of parental notice does not apply unless the child is taken into custody. If the child voluntarily accompanies police to the station for questioning and is free to go at any point in the process, he or she is not in police custody. In that event, the notice requirements of Section 52.02(b) do not apply. *In the Matter of E.M.R.*, 55 S.W.3d 712 (Tex.App.—Corpus Christi 2001, no pet.) (alternative basis for decision).

Notice to Parents: Reason for Taking Into Custody. The Court of Criminal Appeals in *Hampton v. State*, 86 S.W.3d 603 (Tex.Crim.App. 2002) explained the meaning of "reason for taking the child into custody." Police suspected the juvenile respondent of murder. There was a juvenile probation violation warrant that had been issued for him. While in the process of taking the respondent into custody, his mother inquired why he was being arrested. Police told her only about the probation violation, not about their suspicions he had committed a murder. Later, respondent confessed to the murder. The El Paso Court of Appeals held that the police conduct was in violation of Section 52.02(b) because they had not notified the mother of their suspicion that her son had committed a murder.

Hampton v. State, 36 S.W.3d 921 (Tex.App.—El Paso 2001), *appeal after remand* at 106 S.W.3D 846.

The Court of Criminal Appeals held that the police conduct did comply with the parental notice requirements of Section 52.02(b):

> Under the plain language of Section 52.02(b)(1), an officer must inform a child's parent of "the reason" for taking the child into custody. That is, police must provide a parent with the legal justification for the officer's action. Appellant argues that Section 52.02(b) "was adopted for children to have a knowing and intelligent advisor when faced with the intimidating prospect of law enforcement questioning." Section 52.02(b), on its face, does not require police to renotify parents or custodians concerning their suspicions of criminal conduct other than that for which the child has been taken into custody. This statute uses the singular; parents must be told of "the reason" for taking the child into custody. The statute does not say that a parent must be informed of "the legal reason for taking the child into custody, and any other suspicions." Both the plain words and the plain meaning of Section 52.02(b) are directed toward informing the parent of his child's whereabouts and the legal justification for taking him into custody. Interpreting the statutory phrase "a statement of the reason for taking the child into custody" according to its plain meaning does not lead to an absurd result, nor does appellant contend otherwise.…
>
> Clearly, when Det. McCann took appellant into custody on the probation absconder warrant, he wanted to question appellant about Mr. Nance's murder. That fact is not in dispute. But we find no statutory requirement that law enforcement officers must renotify a juvenile's parents before questioning him, whether on the same or a different offense, once they have initially complied with Section 52.02(b)(1). The triggering event for purposes of parental notification is the act of taking a juvenile into custody. It is not the subsequent act of questioning the juvenile. The "reason" for taking the child into custody is the officer's legal justification, not his subjective motives.

86 S.W.3d at 609-10.

Notice to Parents: Promptly. Police in *In the Matter of C.R.,* 995 S.W.2d 778 (Tex.App.—Austin 1999, pet. denied), failed to notify the respondent's mother that her son had been taken into custody and the reason for doing so. A minimum of one hour elapsed from the time the respondent was taken into custody until the initial contact with his mother. In addition, police discouraged her from coming to the police station to see her son and ultimately notified her only when the respondent was taken to the juvenile detention facility. The Court of Appeals held that the requirement of parental notice had been violated and that the written statement given during the period of violation should have been excluded from evidence. The State argued that it is not appropriate to attach such an exclusionary consequence to failure to notify since the Family Code does not require parental presence during interrogation. The Court of Appeals rejected that argument:

> The State next argues that section 52.02(b) was not violated because there is no requirement in the Family Code that a parent must be with the juvenile when he chooses to waive his rights and give a statement. The State again ignores the fact that, by requiring the arresting authorities to give notice of the arrest to a parent, the legislature gave the choice of whether or not to be present to the parent. The legislature may well have concluded that juveniles are more susceptible to pressure from officers and investigators and that, as a result, justice demands they have available to them the advice and counsel of an adult who is on their side and acting in their interest. The fact that the Family Code does not mandate that a parent be present when a child chooses to waive his rights in no way excuses compliance by the police with the notification requirement in section 52.02(b).

995 S.W.2d at 784. Cf. *Cortez v. State*, 240 S.W.3d 372 (Tex.App.—Austin 2007, no pet.) (no evidence police misled youth's parents about his status or attempted to question youth before parents were properly notified).

The court might have added that, under Section 52.025(c), a child is entitled to be accompanied by a "parent, guardian, or other custodian or by the child's attorney" while in a juvenile processing office. See *In the Matter of D.J.C.*, 312 S.W.3d 704 (Tex.App.—Houston [1st Dist.] 2009, reh'g denied) (Section 52.025(c) violated by denying grandmother's request to be present during interview and excluding her from the interview room); but cf. *Grant v. State*, 313 S.W3d 443 (Tex.App.—Waco 2010, no pet.) (if parent is denied right of access the child may not raise that complaint on appeal). Giving parental notice as required by Section 52.02(b) would facilitate the child's right to parental presence in the processing office.

Police in *Gonzales v. State*, 9 S.W.3d 267 (Tex.App.—Houston [1st Dist.] 1999), *rev'd by* 67 S.W.3d 910 (Tex.Crim.App. 2002) acknowledged that they had not attempted to notify defendant's parents that they had taken him into custody. Although the court had held in its original opinion that this violation would not require exclusion of a written statement, on rehearing it followed *C.R.* in holding that violation of the parental notice provision requires exclusion of the statement.

The Houston First District Court of Appeals in *Pham v. State*, 36 S.W.3d 199 (Tex.App.—Houston [1st Dist.] 2000), *vacated by* 72 S.W.3d 346 (Tex.Crim.App. 2002), followed *C.R.* in excluding a murder confession because police had failed to notify the juvenile's parents that they had taken him into custody. The Tyler Court of Appeals in *State v. Simpson*, 51 S.W.3d 633 (Tex.App.—Tyler 2000), *vacated by* 74 S.W.3d 408 (Tex.Crim.App. 2002), arrived at the same conclusion regarding a confession to capital murder.

In all of the previous cases, law enforcement officers had either totally failed to notify parents that they had taken their child into custody or had done so many hours later. However, in *Hill v. State*, 78 S.W.3d 374 (Tex.App.—Tyler 2001, pet. ref'd) the police notified parents, only delayed four hours in doing so, after the juvenile had confessed to capital murder. The Court of Appeals held under the circumstances of this case, which included deep ambivalence by the juvenile as to whether he wished to waive his constitutional rights, a delay of over four hours violated Section 52.02(b):

> Appellant was arrested shortly before 9:25 a.m., but his mother was not contacted until 1:45 p.m., 4 hours and 20 minutes later. Detective Ragland never attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking Appellant's statement. It is unclear from the record whether or not Detective Brewer had attempted to contact Appellant's parents earlier, although Detective Ragland "believed" he had. Appellant's mother was not contacted until she was reached by Sergeant Barrentine at 1:45 p.m. While this four hour and twenty minute delay standing alone might not warrant reversal pursuant to section 52.02(b), the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights. It is also noteworthy that his mother was reached by telephone on the very first attempt immediately after Appellant's confession had been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances we hold this was not prompt notification under section 52.02(b) of the Family Code.

78 S.W.3d at 383-84.

In *Mavoides v. State*, UNPUBLISHED, No. 13-04-00079-CR, 2006 Tex.App.Lexis 6089, Juvenile Law Newsletter ¶ 06-3-15 (Tex.App.—Corpus Christi 2006, no pet.), appellant was arrested in a capital murder case and transported to a designated juvenile processing office. Mavoides told detectives that he was unaware of his parents' specific whereabouts, indicating that his father lived somewhere in Corpus Christi and that his mother resided in New York. Although the information was sketchy, law enforcement did not even try to contact the parents between the time of appellant's arrest and when he provided a written statement. Approximately two days later, authorities located and notified the father regarding the pending charges.

The Court of Appeals found this to be "an unjustifiable delay," deemed "inexcusable" under the facts of this case. 2006 Tex.App.Lexis 6089 *12. As a result, the trial court abused its discretion in allowing the statement to be used against Mavoides at trial. However, the error was harmless in light of the "substantial evidence" that implicated appellant in the homicides. The court concluded that the error did not contribute to the conviction or punishment of appellant despite the admission of the improper statement.

The statute does not require a police officer to do the impossible. It merely requires that he or she make a reasonable attempt to notify the juvenile's parents. See *In the Matter of J.B.J.*, 86 S.W.3d 810 (Tex.App.—Beaumont 2002, no pet.) (parental notification one and one-half hours after taking into custody prompt when prior efforts to notify the parent failed); *Weir v. State*, UNPUBLISHED, No. 12-06-00408-CR, 2008 WL 2358219, Juvenile Law Newsletter ¶ 08-3-8 (Tex.App.—Tyler 2008, pet. ref'd) (notification within one and one-half hours satisfies Section 52.02(b) prompt notice requirement).

Factors to Determine Prompt Notification. In *Ray v. State*, 176 S.W.3d 544 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd), the Court of Appeals applied the four factors set forth in *Vann v. State* to determine whether the notification was promptly given. The four factors include: (1) length of time the child was in custody before notification; (2) whether notification occurred after the police obtained

a statement; (3) ease with which notification was ultimately made; and (4) what police officials did during the period of delay.

In *Ray*, the court found that an eight and one-half hour delay was due in part to the officer's inability to obtain the parent's number from appellant and, once the number had been obtained, the inability to reach the parent until several hours later. "Of particular importance in this case is the evidence presented that demonstrates that the officers made diligent efforts to notify appellant's mother." 176 S.W.3d at 550. Under these facts, the parental notification was deemed to have been given promptly as required by Section 52.02(b). *Ray* contrasts with *C.R.* and *Gonzales,* in which officers made no effort to notify a parent or other adult that the juvenile was in police custody.

In a recent federal case, the issue of parental notification was raised along with multiple violations of the Juvenile Delinquency Act (JDA) under 18 U.S.C.A. Section 5033, which applies to juveniles held in federal custody. *United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007). Section 5033 requires that an arresting officer "immediately" advise a juvenile of his legal rights and "immediately" notify the Attorney General and the child's parents, guardian or custodian that the child is in custody.

In this case, the arresting officers did not even ask about contact information for C.M.'s parents for more than six hours after he was taken into custody and after he had already been questioned. When C.M. told the officers that he was living with his uncles in Los Angeles, no effort was made to contact those relatives. The federal Court of Appeals held that the "failure to make timely contact with C.M.'s uncles in this case violates the JDA's clear requirement that the arresting officer provide immediate notification to an adult responsible for the juvenile—usually to the juvenile's parents, but possibly to a guardian or custodian instead." 485 F.3d at 501.

Noting that the government "violated every requirement of Section 5033," the court held that the violations contributed to C.M. making a confession and that he was prejudiced by the government's misconduct. In dismissing the charges, the court warned "against further erosion of the critical protections due to juveniles under the JDA." 485 F.3d at 505.

Notice to Parents: The Requirement of Causation. The Court of Criminal Appeals in *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App. 2002) held that a failure of police to comply with the notice to parents requirement cannot be the basis for excluding a confession from evidence unless there is shown to be a causal connection between the failure to notify and the giving of the confession:

> In order for a juvenile's written statement to be suppressed because of a violation of §52.02(b), there must be some exclusionary mechanism. Unlike §51.095(a), §52.02(b) is not an independent exclusionary statute. Texas Family Code § 51.17, however, provides that "Chapter 38, Code of Criminal Procedure, applies in a judicial proceeding under this title." Thus, if evidence is to be excluded because of a §52.02(b) violation, it must be excluded through the operation of Article 38.23(a).
>
> Article 38.23(a) provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas...shall be admitted in evidence." Our decisions have established that evidence is not "obtained...in violation" of a provision of law if there is no causal connection between the illegal conduct and the acquisition of the evidence. *Roquemore v. State*, 60 S.W.3d 862 [(Tex.Crim.App. 2001)].
>
> …
>
> In light of Article 38.23(a), the State argues, and we agree, that before a juvenile's written statement can be excluded, there must be a causal connection between the Family Code violation and the making of the statement. Here, the Court of Appeals did not discuss the requirements of Article 38.23(a). Instead, the court held simply that the confession was automatically inadmissible because of the police officers' failure to notify appellant's parents, in violation of Texas Family Code § 52.02(b).

67 S.W.3d at 912. See also *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.)

The Court did not elaborate on the nature of the causal connection requirement, nor did it address such questions as who bears the burden of persuasion as to whether there is a causal connection. The Court vacated *Pham v. State*, 72 S.W.3d 346 (Tex.Crim.App. 2002) and *State v. Simpson*, 74 S.W.3d 408 (Tex.Crim.App. 2002), remanding them to the Courts of Appeals for reconsideration in light of its opinion in *Gonzales*.

In 2003, the Houston First District Court of Appeals, on remand, took up the causal connection analysis as instructed by the Court of Criminal Appeals in the *Gonzales*

case. In a very short opinion, it held that appellant had offered no evidence in the record to show a causal connection between the failure to notify his parents and his decision to give a statement to the police. *Gonzales v. State*, 125 S.W.3d 616 (Tex.App.—Houston [1st Dist.] 2003), *aff'd by* 175 S.W.3d 767 (Tex.Crim.App. 2005). The court's own review of the record also did not uncover any such evidence, so Gonzales' point of error complaining of the failure by police to notify his parents was summarily overruled.

On the same day that the Houston First District Court of Appeals decided *Gonzales*, it also issued an opinion in *Pham v. State*, 125 S.W.3d 622 (Tex.App.—Houston [1st Dist.] 2003), *aff'd by* 175 S.W.3d 767 (Tex.Crim.App. 2005) cert. denied, 546 U.S. 961, 126 S.Ct. 490 (2005), addressing the identical issue regarding the proof required to show a causal connection between the failure of police to notify parents about taking a juvenile into custody and the resulting confession.

The *Pham* case covers three important issues. First, whether the analysis of causal connection and attenuation of the taint is separate. The court held that there are separate analyses for these concepts and that causal connection analysis precedes attenuation of the taint analysis. See also *Roquemore v. State*, 60 S.W.3d 862 (Tex.Crim.App. 2001).

Second, who has the burden of proving the causal connection between a Family Code violation and a juvenile's confession? Initially, the burden is on the accused seeking to suppress a confession to raise the issue by producing evidence of a violation of the statutory requirement.

> [A]s a practical matter, it is reasonable to place the burden on the defendant to produce evidence to which only the defendant has access. The defendant alone has access to his own thought processes, and the defendant has much better access to his own parents, who are likely to be much more cooperative with their accused child and his attorney than with the State.

125 S.W.3d at 627.

If the accused does not establish a causal connection, or if the State shows full compliance with the statutory requirements, the issue is resolved. See Hübner and Pruitt, *Juveniles*, Prosecutor's Note, 27 (Texas District & County Attorneys Association 2005). However, if the accused's burden is met, the burden then shifts to the State to prove compliance with the statute. "Once the defendant meets this burden, the State must then shoulder the burden of either disproving a causal connection or demonstrating attenuation of the taint." 125 S.W.3d at 628, citing Dix & Dawson, 41 Texas Criminal Practice & Procedure Section 13.339 at 29 (2d ed. Supp. 2003).

Third, whether the defendant has made a proper showing that the causal connection exists. Pham's lawyer argued that a causal connection was established by the limitless potentially different outcomes that might have resulted had his parents been promptly notified. The court, however, dismissed this argument as "only speculation," providing the following analysis:

> Regarding what effect the failure to notify appellant's parents promptly had upon his decision to confess, the record does not yield any evidence whatsoever. There is no evidence as to what appellant's parents would have done if they had been notified more promptly. There is no evidence that appellant was aware that his parents were supposed to be notified or that he was aware that they were not more promptly notified. There is no evidence that appellant asked to speak with his parents. To the contrary, there is evidence he did not ask for his parents "or anything like that." It is noteworthy that, upon being notified at 9:50 p.m., appellant's parents did not immediately attempt to contact appellant or an attorney. Instead, they waited until the following day to visit appellant. There is also evidence that appellant did not ask to speak to an attorney when given his rights, including his right to consult with counsel."

125 S.W.3d at 628.

The Court of Appeals ruled that Pham failed to meet his burden of proof since he produced no evidence, but only speculation, about what might have happened. As a result, the court found it unnecessary to conduct an additional attenuation of the taint analysis.

In 2005, the Court of Criminal Appeals consolidated the cases of *Pham/Gonzales* to clarify the causal connection analysis required for suppression of evidence claims. *Pham and Gonzales v. State,* 175 S.W.3d 767 (Tex.Crim.App. 2005), *cert. denied*, 126 S.Ct. 490 (2005). The Court of Criminal Appeals explained:

> In Appellant Pham's case, we granted the following two grounds for review: 1) did the court of appeals err in holding that causal connection and attenuation-of-taint constitute separate analyses, and 2) did the Court of Appeals err by requiring Appellant to prove a causal connection between the violation of section 52.02(b) of the Texas Family Code and Appellant's

> confession? In Appellant Gonzales' case, we granted the following ground for review: did the Court of Appeals adopt the wrong standard by which a causal connection must be established under article 38.23 to justify suppression of evidence seized in violation of the Family Code?

175 S.W.3d at 772.

The Burdens of Proof in Establishing Causal Connection. The burdens in establishing the causal connection shift, in turn. First, the juvenile has the burden to raise the issue and establish non-compliance with the statute. This should be done by a motion averring to the specific Family Code statutes that have been violated as well as the testimony of witnesses. The burden then shifts to the State to establish that it did in fact comply with the statute. This is done through the testimony of witnesses, who are typically law enforcement officers. If the state fails in this burden, then the juvenile has the burden to establish there is a causal connection between the failure to comply and the taking of the confession. In other words, through the testimony of parents or guardians who were not notified timely and the child, the juvenile must establish how the circumstance of the taking of the confession would have been different had the parent or guardian been notified. The State bears the burden of disproving the causal connection or otherwise attenuating the taint. The State may do this by showing that the violation of the statute is so removed from the decision by the child to make a statement that it had no effect.

The Court of Criminal Appeals upheld the Court of Appeals' conclusion that analysis of causal connection and attenuation-of-taint are not necessarily the same:

> An attenuation-of-taint analysis is not always required and therefore need not always be conducted. We have expressly held that a causal connection between a violation of section 52.02(b) and the obtaining of evidence must be shown before the evidence is rendered inadmissible. If there is no causal connection shown in the first place, there is no reason for the State to argue that the taint of the violation is so far removed that the causal connection is broken. Attenuation-of-taint breaks this connection. It does not negate the existence of the causal connection.

175 S.W.3d at 772-73.

Likewise, the Court upheld the Court of Appeals' burden of proof allocation in both cases.

> In this case, it is not enough for the defendant to merely establish a violation. Under Texas case law, it is required that a causal connection be established, and we hold that the defendant, as the moving party wishing to exclude the evidence, is responsible for the burden of proving this connection. Thus, the Court of Appeals correctly held that the burden is on the defendant, as the moving party in a motion to suppress evidence obtained in violation of the law under Art. 38.23, to produce evidence demonstrating the causal connection which this court required in *Gonzales II*. The burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken.

175 S.W.3d at 774.

In the end, both Courts of Appeals decisions in *Pham/Gonzales* were affirmed. See also *Adams v. State*, 180 S.W.3d 386 (Tex.App.—Corpus Christi 2005, no pet.) (no evidence in the record to establish a causal connection between a Section 52.02(a) violation and the complained of statements); *Vega v. State*, 255 S.W.3d 87 (Tex.App.—Corpus Christi 2007, pet. ref'd) (appellant offered no evidence demonstrating causal connection between Family Code violations and decision to give statement to police). Cf. *Pham v. Quarterman*, UNPUBLISHED, No. H-08-3465, 2009 WL 1077441 (S.D.Tex. 2009) (order denying petition for writ of habeas corpus; at time of trial Texas law was unsettled about whether defendant would be required to prove a causal connection to exclude his confession).

When *State v. Simpson* was decided by the Tyler Court of Appeals on remand, it concluded that a causal connection had been shown. *State v. Simpson,* 105 S.W.3d 238 (Tex.App.—Tyler 2003), *aff'd by* 181 S.W.3d 743 (Tex.App—Tyler 2005, pet. ref'd). The juvenile respondent was taken into custody for capital murder. His parents were not notified of his arrest for 48 hours and then only when they were served with a petition for adjudication and notified of a juvenile detention hearing after he had confessed to police to a capital murder and had been taken to the certified place of juvenile detention. Respondent's mother testified at the motion to suppress hearing in criminal court following certification. She testified to a pattern of conduct in which she would promptly go to the police station whenever she was notified that one of her seven children had been taken into custody. Her habitual conduct was sufficient to establish a causal connection:

> Appellee's statement was obtained, without notification to or the involvement of his parents, during the first nine and one-half hours of his detention, which began at 11:00 a.m. on January 28, 2000. After Appellee signed his statement, at approximately 8:30 p.m., Appellee's detention continued, and he remained isolated from his parents until the time of his juvenile hearing at 9:00 a.m. on Monday, January 31. If Appellee's parents had received the notification required by section 52.02(b), we cannot conclude that they would not have proceeded to where Appellee was detained before he gave his statement. Moreover, we do find nothing in the record to indicate that either of Appellee's parents would have advised Appellee to make or sign a statement implicating himself in the commission of capital murder. Therefore, we also cannot say with any degree of certainty, after examining the record before us, that Appellee would have still chosen to confess his crime if his parents had been promptly notified and he had access to them, and possibly to counsel.

105 S.W.3d at 242-43. Cf. *Cortez v. State*, 240 S.W.3d 372 (Tex.App.—Austin 2007, no pet.) (no causal connection between statements and officers' alleged failure to promptly notify parents of youth's arrest and alleged denial of right to have parents with him in juvenile processing office).

In *In the Matter of C.M.* (2012), to establish causal connection, C.M.'s guardians testified that if they had been able to speak with C.M. they would have advised him not to make any statements prior to him speaking with an attorney. One guardian opined that C.M. would have heeded his advice because the guardian had been in trouble with the law previously. However, when later recalled as a witness, the guardian stated that he was unsure whether C.M. would have listened to his advice or not. C.M. never requested the presence of his guardians. The Waco Court of Appeals found that C.M. did not establish a causal connection between the alleged violation and his (third) statement. *In the Matter of C.M.*, UNPUBLISHED, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540, Vol. 26 No. 3 ¶ 12-3-8B (Tex.App.—Waco 2012).

6. Section 51.095 and Juvenile Probation Officers

Most of the cases dealing with statements from juveniles concern police officers. However, there is nothing in the language of Section 51.095 that limits it to interrogation by police officers. There are two cases that have applied Section 51.09 to statements obtained by juvenile probation officers. *In the Matter of S.E.B.*, 514 S.W.2d 948 (Tex.Civ.App.—El Paso 1974, no writ); *In the Matter of F.G.,* 511 S.W.2d 370 (Tex.Civ.App.—Amarillo 1974, no writ). In each case, the statement was ruled inadmissible because it was made without a waiver of rights by an attorney under the pre-1975 version of Section 51.09.

There is no reason why the current version of the juvenile confession statute—Section 51.095—should not apply to juvenile probation officers as well as to police officers. This means that for a written statement by a child in custody or detention to be admissible the system of magistrate supervision of the process must be complied with, and for an oral statement to be admissible the questioning must be preceded by *Miranda* warnings and the confession must lead to inculpatory, physical evidence of the offense or be admissible under another exception to the prohibition on oral confessions.

E. Restrictions on Polygraphing Juveniles

The results of a polygraph examination are never admissible in a criminal trial in Texas. *Romero v. State*, 493 S.W.2d 206 (Tex.Crim.App. 1973). In 1987, the legislature enacted Section 51.151 of the Family Code to restrict the use of polygraph examinations in juvenile cases. If a child is taken into custody, no one may administer a polygraph examination without the consent of the child's attorney or the juvenile court. This provision does not apply if the child is transferred to criminal court for prosecution under Section 54.02. Violation of this provision is made a ground for refusing, revoking, or suspending the license of the examiner. Occupations Code Section 1703.351.

Section 54.03(e) of the Family Code provides in part, "An extrajudicial statement which was obtained without fulfilling the requirements of this title or of the constitution of this state or the United States, may not be used in an adjudication hearing." If a child were subjected to a polygraph examination in violation of Section 51.151, presumably any statements made to the examiner would be inadmissible under Section 54.03(e).

The Attorney General was asked whether Section 51.151 would apply to the polygraphing of a child complainant or witness for the State in a criminal prosecution. The Attorney General concluded that Section 51.151 has no applicability in that circumstance since the child was not in custody under Title 3. Attorney General Opinion No. JM-1141 (1990).

CHAPTER 17: Law Enforcement and Juveniles: Arrests, Searches, First Offender Programs, and Authorized Dispositions

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This chapter deals with four aspects of law enforcement work with juveniles: (1) arrests and temporary detentions; (2) searches and frisks; (3) informal dispositions and first offender programs; and (4) requirements relating to juvenile processing offices, places of nonsecure custody of juveniles, and juvenile curfew processing offices.

Related subjects are discussed elsewhere. Chapter 6, on juvenile detention, examines the law relating to releasing an arrested juvenile by police, the use by police of citations in lieu of arrest, and juvenile board power to control the place and circumstances of police custody of juveniles. Chapter 15, on Confidentiality of Juvenile Records and Proceedings, examines legal standards for police records concerning juveniles, including how they differ from adult records, and provisions for sealing juvenile law enforcement and other records. Chapter 16, on Juvenile Confessions and Waivers of Rights, examines the law relating to interrogating and taking statements from juveniles, including those who are in police custody.

Law Enforcement Officers. Section 51.02(7) defines a law enforcement officer as "a peace officer as defined by Article 2.12, Code of Criminal Procedure," which consists of an extensive list of persons designated as peace officers.

Code of Criminal Procedure Article 2.12 identifies 35 different categories of investigators and security personnel who are peace officers under Texas law and, therefore, law enforcement officers under juvenile law. They include:

(1) sheriffs, their deputies, and those reserve deputies who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;

(2) constables, deputy constables, and those reserve deputy constables who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;

(3) marshals or police officers of an incorporated city, town, or village, and those reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;

(4) rangers, officers, and member of the reserve officer corps commissioned by the Public Safety Commission and the Director of the Department of Public Safety;

(5) investigators of the district attorneys', criminal district attorneys', and county attorneys' offices;

(6) law enforcement agents of the Texas Alcoholic Beverage Commission;

(7) each member of an arson investigating unit commissioned by a city, a county, or the state;

(8) officers commissioned under Section 37.081, Education Code, or Subchapter E, Chapter 51, Education Code;

(9) officers commissioned by the General Services Commission;

(10) law enforcement officers commissioned by the Parks and Wildlife Commission;

(11) airport police officers commissioned by a city with a population of more than 1.18 million located primarily in a county with a population of 2 million or more that operates an airport that serves commercial air carriers;

(12) airport security personnel commissioned as peace officers by the governing body of any political subdivision of this state, other than a city described by Subdivision (11), that operates an airport that serves commercial air carriers;

(13) municipal park and recreational patrolmen and security officers;

(14) security officers and investigators commissioned as peace officers by the comptroller;

(15) officers commissioned by a water control and improvement district under Section 49.216, Water Code;

(16) officers commissioned by a board of trustees under Chapter 54, Transportation Code;

(17) investigators commissioned by the Texas Medical Board;

(18) officers commissioned by:

(A) the board of managers of the Dallas County Hospital District, the Tarrant County Hospital District, the Bexar County Hospital District, or the El Paso County Hospital District under Section 281.057, Health and Safety Code;

(B) the board of directors of the Ector County Hospital District under Section 1024.117, Special District Local Laws Code; and

(C) the board of directors of the Midland County Hospital District of Midland County, Texas, under Section 1061.121, Special District Local Laws Code;

(19) county park rangers commissioned under Subchapter E, Chapter 351, Local Government Code;

(20) investigators employed by the Texas Racing Commission;

(21) officers commissioned under Chapter 554, Occupations Code;

(22) officers commissioned by the governing body of a metropolitan rapid transit authority under Section 451.108, Transportation Code, or by a regional transportation authority under Section 452.110, Transportation Code;

(23) investigators commissioned by the attorney general under Section 402.009, Government Code;

(24) security officers and investigators commissioned as peace officers under Chapter 466, Government Code;

(25) officers appointed by an appellate court under Subchapter F, Chapter 53, Government Code;

(26) officers commissioned by the state fire marshal under Chapter 417, Government Code;

(27) an investigator commissioned by the commissioner of insurance under Section 701.104, Insurance Code;

(28) apprehension specialists and inspectors general commissioned by the Texas Juvenile Justice Department as officers under Sections 242.102 and 243.052, Human Resources Code;

(29) officers appointed by the inspector general of the Texas Department of Criminal Justice under 493.019, Government Code;

(30) investigators commissioned by the Texas Commission on Law Enforcement under Section 1701.160, Occupations Code;

(31) commission investigators commissioned by the Texas Private Security Board under Section 1702.061, Occupations Code;

(32) the fire marshal and any officers, inspectors, or investigators commissioned by an emergency services district under Chapter 775, Health and Safety Code;

(33) officers commissioned by the State Board of Dental Examiners under Section 254.013, Occupations Code, subject to the limitations imposed by that section;

(34) investigators commissioned by the Texas Juvenile Justice Department as officers under Section 221.011, Human Resources Code; and

(35) the fire marshal and any related officers, inspectors, or investigators commissioned by a county under Subchapter B, Chapter 352, Local Government Code.

In 2007, the legislature added Article 2.12(34) above, which defines TJJD abuse, neglect, and exploitation investigators as peace officers and gives them all of the powers of a peace officer, but only if TJJD chooses to commission them. The reference to Human Resources Code Section 221.011 is the companion provision that gives TJJD the explicit authority to commission their investigators as peace officers.

If commissioned by proper authority, any of these officials is a peace officer under Texas law and a law enforcement officer under juvenile law.

Juvenile Probation Officers. The Family Code authorizes three situations where a juvenile probation officer may take a child into custody. Section 52.01(a)(4) permits a child to be taken into custody "by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court." This provision does not require the probation officer to obtain a warrant or directive to apprehend. The authority to take into custody lies with the probation officer. If the probation officer obtains sufficient information to establish probable cause from a credible source that a child has violated a condition of probation, the Family Code gives the probation officer the authority to take the child into custody.

Section 52.01(a)(6) allows a probation officer to take a child into custody "if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under Section 54.01." Once again, there is no warrant or directive to apprehend requirement in the provision. The responsibility in determining probable cause is with the probation officer, and the information used in making that determination may come from any number of sources; however, the probation officer should be able to articulate that the source is a credible source.

Finally, Section 52.015(a) authorizes any law enforcement or probation officer to request a directive to apprehend a child from the juvenile court. The juvenile court may issue a directive to apprehend a child if the court finds there is probable cause to take the child into custody under the provisions of Title 3 of the Family Code. Once the directive to apprehend has been issued, Section 52.015(b) requires the law-enforcement or probation officer take the child into custody. This provision would allow a probation officer who may have probable cause to take a child into custody (as discussed above) but may feel, for whatever reason, ill equipped in taking a particular child into custody, to obtain a directive to apprehend from the judge and ask a law enforcement officer to actually take the child into custody. For the most part, law enforcement officers are armed and better trained in taking citizens into custody than probation officers.

In recognizing this fact, TJJD standards require juvenile boards to establish a policy that specifies whether or not their probation officers may physically take a juvenile into custody as allowed by these provisions. If the policy does allow the probation officer to take a child into custody, the policy must specify whether the probation officer may use force in doing so. If the policy allows force to be used, the policy must address prohibited conduct, the circumstances under which force is authorized, and the training requirements. This standard recognizes the inherent possibility of liability when taking a person into custody and requires the juvenile board, which is the administrative body responsible for the probation department, to address that potential liability through policies and training.

Human Resources Code Section 222.004 prohibits a peace officer from serving as a juvenile probation officer or juvenile supervision officer:

> A peace officer, prosecuting attorney, or other person who is employed by or who reports directly to a law enforcement or prosecution official may not act as a chief administrative, juvenile probation, or detention officer or be made responsible for supervising a juvenile on probation.

222.004(b), Human Resources Code, defines a chief administrative officer (for the purposes of this section) as, regardless of title, the person who is: hired or appointed by or under contract with the juvenile board and who is responsible for the oversight of the operations of the juvenile probation department or any juvenile justice program operated by or under the authority of the juvenile board. This provision attempts to clarify that, regardless of title, a juvenile probation department's chief administrative officer may not be a law enforcement officer.

The Attorney General has stated that, under this prohibition, a peace officer is a person who is elected, employed, or appointed as a peace officer under Article 2.12 of the Code of Criminal Procedure or other law. Attorney General Opinion No. JC-0041 (1999).

School District Peace Officers and Attendance Officers. A school district peace officer has limited territorial jurisdiction, although he or she has the full powers of

a peace officer within that territory. The territorial jurisdiction of a school district peace officer is fixed by the board of trustees and "may include all territory in the boundaries of the school district and all property outside the boundaries of the district that is owned, leased, or rented by or otherwise under the control of the school district and the board of trustees." Education Code Section 37.081(a).

The school district may expand the territorial jurisdiction of school district peace officers beyond school property by contracting with a political subdivision "for the jurisdiction of a school district peace officer to include all territory in the jurisdiction of the political subdivision." Education Code Section 37.081(c). Thus, the territory might be expanded to encompass the entire county if the commissioners agree. A school district police department and law enforcement agencies with overlapping jurisdiction are required to enter into a memorandum of understanding "that outlines reasonable communication and coordination efforts between the department and the agencies." Education Code Section 37.081(g).

Section 52.01(a)(3) provides that a child may be taken into custody upon probable cause by a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code. A warrant or directive to apprehend is not required under this provision. Officers commissioned by a school district under Section 37.081 are listed as peace officers by Code of Criminal Procedure Article 2.12. Therefore, they are also law enforcement officers under Section 51.02(7).

Education Code Section 37.081(b)(3) provides that a school district peace officer "may, in accordance with Chapter 52, Family Code, or Article 45.058, Code of Criminal Procedure, take a juvenile into custody." Also, a peace officer who has probable cause to believe that a child is in violation of the compulsory school attendance law under Education Code Section 25.085 may take the child into custody for the purpose of returning the student to his or her school campus to ensure the child's compliance with the state's school attendance requirements. Education Code Section 25.091(b-1). See similar provisions in Family Code Sections 52.01(e), 52.02(a)(7), and 52.026(a). These enactments are discussed in Chapters 6 and 23. See also Attorney General Opinion No. GA-0860 (2011).

Truant conduct laws are enforced by school district attendance officers as well as by peace officers. Attendance officers are prohibited from taking a truant into custody. However, at the request of a parent, an attendance officer may escort a truant child to campus. Education Code Section 25.091(b). Education Code Section 25.091 was created to distinguish more clearly between the powers of peace officers on campus and attendance officers, who are not peace officers. See also Attorney General Opinion No. GA-0860 (2011).

Taking Into Custody a Seventeen-Year-Old Reported Missing. Chapter 63, Code of Criminal Procedure, establishes a system for reporting and locating missing children and other persons. Article 63.001(1-a) defines a child as a person under the age of 18. Article 63.009(g) requires an officer to take a child reported missing into protective custody. Family Code Section 51.03(b)(2) makes running away from home conduct indicating a need for supervision (CINS), but that provision applies only when the running away occurs before the 17th birthday. The Attorney General was asked what authority a law enforcement officer has to take into custody a 17-year-old who has been reported to be a missing person. The Attorney General summarized his lengthy opinion as follows:

> Article 63.009(g) of the Code of Criminal Procedure requires a law enforcement officer who locates a seventeen-year-old who has been reported as a missing child to take possession of the child and to deliver the child to the person entitled to his or her possession or to the [Department of Family and Protective Services]. The detention of an unemancipated seventeen-year-old against his or her wishes for the purpose of returning the child to his or her parent or guardian does not violate the child's constitutional rights. An officer may use force to take possession of a missing child, but only to the degree the officer reasonably believes is necessary to safeguard or promote the child's welfare consistent with the protective purpose of Article 63.009(g).

Attorney General Opinion No. JC-0229 (2000).

Of course, if the person taken into custody as a reported missing person was 17 at the time he or she ran away from home, then the officer is empowered to act only under Chapter 63 and may not act under the Juvenile Justice Code. In that event, law enforcement authority is limited to returning the child to his or her parents or giving possession of the child to the Texas Department of Family and Protective Services (DFPS).

Transporting Juveniles in Custody. Under Family Code Section 52.026(a), it is the responsibility of the law enforcement officer who has taken a child into custody to transport him or her to the appropriate juvenile detention

facility or to the school campus to which the child is assigned as provided by Section 52.02(a)(7) if the child is not released to the child's parent, guardian, or custodian

Section 52.026(b) provides that the primary responsibility for transporting juveniles to out-of-county facilities lies with the law enforcement officer who took the child into custody. Only if authorized by the commissioners court of the county may responsibility for transportation to an out-of-county facility be placed on the sheriff of that county, if an agency other than the sheriff's department took the child into custody. Finally, upon order of the juvenile board and approval by the commissioners court, it is "the duty of the sheriff of the county where the child was taken into custody to transport the child to and from all scheduled juvenile court proceedings and appearances and other activities ordered by the juvenile court." Section 52.026(c). In Attorney General Opinion No. LO 94-065 (1994), the Attorney General stated that the sheriff is required to transport juveniles under Section 52.026(c) only upon juvenile board order and commissioners court approval.

A. Arrests and Investigatory Stops

Section 52.01(b), Family Code, provides:

> The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

This language makes it clear that juveniles are entitled to constitutional and other protections that apply to the arrests of adults for criminal offenses even though, under the Family Code, the terminology "taking into custody" is used instead of "arrest." It is clear, for example, that evidence obtained as a consequence of an illegal arrest or detention of a juvenile is not admissible in juvenile adjudication proceedings. See Section 54.03(e) and Chapter 11.

1. Constitutional Requirements

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution impose restrictions on when a person may be taken into custody for a criminal offense. Probable cause is required for an arrest or taking into custody; reasonable suspicion suffices for a temporary stop for investigation.

Probable Cause. In *Lanes v. State,* 767 S.W.2d 789 (Tex.Crim.App. 1989), the Court of Criminal Appeals addressed the question of whether those constitutional restrictions apply to juvenile arrests or detentions. It held that they do apply:

> [W]e now extend the probable cause requirement of Article I, Sec. 9 and the Fourth Amendment to juvenile proceedings. Our holding today represents an accommodation between the aspirations of the juvenile court and the grim realities of the system.... Although we are adopting another requisite of the criminal system, we find that requiring probable cause for arrest will not compel abandonment or displacement of the juvenile system's commendable rehabilitative intentions. Such a requisite places minimal fetters on police discretion in making decisions that concern fundamental rights of personal privacy and freedom and have the potential for particularly detrimental effects on a child's life. This holding is also in line with Texas statutory guidelines for a juvenile arrest.

767 S.W.2d at 800-01.

It is important to know that a determination of probable cause must be made in certain circumstances under the Fourth Amendment. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), the United States Supreme Court held that an adult arrested without a warrant for a criminal offense is entitled to a prompt, judicial determination that there is probable cause to believe he or she committed an offense before he or she can be detained. The United States Court of Appeals for the Fifth Circuit held that the *Gerstein* case is applicable to juveniles in *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976, no pet.). This is a judicial probable cause determination and must be made within 48 hours of the time a juvenile is taken into custody. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). See Chapter 6.

Arrest in Suspect's Home. The only time an arrest warrant is constitutionally required to make a routine (non-emergency) arrest is when the arrest is made in the arrestee's dwelling. See *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Cornealius v. State*, 900 S.W.2d 731 (Tex.Crim.App. 1995) (juvenile's warrantless arrest on front porch of home valid).

In *In the Matter of J.D.*, 68 S.W.3d 775 (Tex.App.—San Antonio 2001, pet. denied), a police officer received a report that two juveniles were seen in an alley with a rifle. While at the scene, a citizen reported he saw the juveniles entering a nearby house. Believing that the juveniles might be committing a burglary of the house, the officer and a partner immediately entered the house without an arrest warrant. There the officer was immediately confronted by the respondent pointing a handgun at him. The respondent eventually surrendered, and the other juvenile was found elsewhere in the house with a firearm. The house where these events occurred turned out to be the respondent's home. The juveniles stated they had intended to shoot students at their school and had returned to respondent's house to obtain more ammunition. The Court of Appeals held that the warrantless entry into the house by police was justified by the emergency doctrine, which is an exception to the Fourth Amendment requirement of a warrant to arrest a suspect in the person's own home. The officers' reasonable beliefs that a burglary might be in progress and that an occupant of the home might be in immediate danger justified the entry under the emergency doctrine.

The Texas Court of Criminal Appeals has recognized four factors relevant to determining whether a person is in custody: (1) probable cause to arrest; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant (reasonable person). *Spencer v. State*, MEMORANDUM, No. 01-07-00717-CR, 2009 WL 2343212, Juv.Rep., Vol. 23, No. 3, ¶ 09-3-10A. (Tex.App.—Houston. [1st Dist.] 2009).

In *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L.Ed.2d 310 (2011), police arrived at a school to question a 13-year-old special education student about a string of neighborhood burglaries. The boy was escorted to a school conference room, where he was interrogated in the presence of school officials. The student confessed to several crimes without being given *Miranda* warnings and without his parents having been contacted. In a motion to suppress the confession, he argued that, because he was effectively in police custody when he incriminated himself, he was entitled to Miranda protections. The question for the Supreme Court of the United States was whether the "reasonable person" standard that had always been used to determine custody should include an age consideration.

The Supreme Court of the United States held that as long as the child's age is known to the officer or is objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the *Miranda* test's objective nature. This does not mean that a child's age will be a determinative, or even a significant, factor in every case, but it is a reality that courts cannot ignore. The case was sent back to the lower court to take into consideration the age of the child in the reasonable person analysis.

Being the focus of an investigation does not amount to being in custody. "Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his Miranda rights, do not constitute a custodial interrogation." When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, that person is not in custody at that time. In the Matter of C.M., MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.—Waco, 2/22/12).

Being told one is not free to leave also does not automatically create custody. In *In the Matter of J.W.,* a school security officer, while questioning a child, told the child that he was not free to leave. The Dallas Court of Appeals held that, under the totality of the circumstances, appellant was not in custody during questioning. The child was free to leave and did leave after being questioned by the officer. In the Matter of J.W., MEMORANDUM, No. 05-05-00675-CV, 2006 Tex.App.Lexis 5005 (Tex.App.—Dallas 2006).

Reasonable Suspicion. Short of probable cause to arrest, a brief detention of a person by police is allowed on reasonable suspicion of involvement in criminal activity. To have reasonable suspicion that would justify a stop, police must be able to point to "specific and articulable facts" that would indicate to a reasonable police officer that a crime has been, is being, or is about to be committed. Reasonable suspicion depends on the "totality of the circumstances," and can result from a combination of facts, each of which is by itself innocuous. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Although the Family Code does not address the circumstances under which an investigatory stop of a juvenile may be made, the courts have applied the adult standard, as mentioned above, for permitting brief, investigatory detentions on reasonable suspicion.

The contention in *In the Matter of J.D.B.,* 209 S.W.3d 708 (Tex.App.—Houston [14th Dist.] 2006, no pet.), a Texas case unrelated to the Supreme Court *J.D.B.* case, was that police officers did not have reasonable suspicion to detain nor probable cause to arrest J.D.B. A call about suspicious activity in a trailer park indicated two white males driving

a white pickup truck were removing the license plate from their vehicle and replacing it with a different one. An officer stopped the truck and handcuffed the driver until another officer and the eyewitness could arrive. J.D.B. was positively identified. It was later determined that the plates were from a stolen vehicle and that the truck was also stolen.

The Court of Appeals found that police had reasonable suspicion to detain J.D.B. to maintain the status quo while a more thorough investigation was conducted. Investigative detentions allow an officer to determine quickly whether to hold a suspect for charges or to allow him to go about his business. J.D.B. argued that handcuffing him during his initial detention amounted to an arrest without probable cause. The court disagreed, noting that handcuffing is not always the equivalent of an arrest. "When facts demonstrate reasonable suspicion escalating to probable cause for an arrest, handcuffing a suspect for further investigation can be justified." 209 S.W.3d at 712, citing *Mays v. State*, 726 S.W.2d 937, 944 (Tex.Crim.App. 1986). The Court of Appeals held the investigative detention continued through the identification by the eyewitness and the running of the license plates by the officers and that the formal arrest did not occur when J.D.B. was initially handcuffed.

School Detention. In *In The Matter of V.P.*, the appellant hid a gun in the backpack of a friend going to school and retrieved it upon arrival. The friend told a police officer at the school that the appellant had a weapon. The officer and the hall monitor escorted the appellant to speak to an assistant principal. The officer left the room while the assistant principal interrogated the appellant. The appellant initially denied knowing anything about a weapon and asked to speak to a lawyer but later admitted bringing the weapon to school. The court held that, while the assistant principal was a representative of the State, he was not a law enforcement officer and his questioning of appellant was not a custodial interrogation by such an officer. Because the appellant was not in official custody when questioned by the assistant principal, he did not have the right to remain silent or to speak to a lawyer. The court held that the child's interrogation by the assistant principal did not invoke his Miranda rights and that the statutory procedures for taking a juvenile into custody did not apply until appellant was actually arrested by the law enforcement officer. *In the Matter of V. P.*, 55 S.W.3d. 25, 2001 Tex.App.LEXIS 3578 (Tex.App. – Austin 2001).

Officers in *In the Matter of M.V.*, UNPUBLISHED, No. 04-98-00762-CV, 1999 WL 391856, 1999 Tex.App.Lexis 4442, Juvenile Law Newsletter ¶ 99-3-06 (Tex.App.—San Antonio 1999, no pet.), while passing by a school ground on bicycle patrol, observed three juveniles passing a baggie between them. On approaching them, the juveniles seemed surprised, and one made a movement toward his shoe, stuffing something into it. One of the officers immediately handcuffed that juvenile and asked him what was in his shoe. The juvenile responded by kicking off the shoe, revealing two baggies of marijuana. The Court of Appeals analyzed this fact situation as an investigatory stop on reasonable suspicion. The handling of the baggie and the surprised looks on the boys' faces gave reasonable suspicion to stop them to investigate. The handcuffs were properly used for the officer's protection and did not go beyond the force authorized during an investigatory stop. Only after the marijuana was found did the officer arrest the juvenile and, at that time, he had probable cause to do so. See also *In the Matter of D.P.M.*, UNPUBLISHED, No.13-02-395-CV, 2004 WL 1797576, 2004 Tex.App.Lexis 7223, Juvenile Law Newsletter ¶ 04-3-28 (Tex.App.—Corpus Christi 2004, no pet.) (corroborated information from telephone conversations provided reasonable suspicion to stop and detain juvenile occupants of vehicle).

By contrast, officers in *In the Matter of C.R.*, UNPUBLISHED, No. 03-96-00429-CV, 1997 WL 348532, 1997 Tex.App.Lexis 3307, Juvenile Law Newsletter ¶ 97-3-16 (Tex.App.—Austin 1997, no writ) observed the respondent walking away from a running vehicle stopped in a cul-de-sac near a subsidized housing project. Respondent walked toward two other men standing on the sidewalk, and they huddled together as the vehicle backed out of the cul-de-sac. As the officers approached in an unmarked vehicle, the respondent and two others began walking away. They began running when the officers exited the vehicle and one officer chased and caught respondent. He was adjudicated for evading detention, which is an offense only if the attempted detention is lawful. The Court of Appeals held these circumstances did not give rise to reasonable suspicion:

> Being in a high drug trafficking area, talking to persons in a vehicle near a housing complex, huddling in a group, and walking away from unidentified police officers does not set appellant's conduct apart from otherwise innocent conduct.... Conduct that does not sufficiently set a person apart from innocent persons under the same circumstances does not, alone, create reasonable suspicion; an officer must have facts increasing the likelihood of criminal conduct.... The officers saw nothing exchanged between appellant and

> the person in the vehicle; they saw nothing in appellant's hands or pockets; they saw no money out or anything thrown away; and Officer Micheletti testified that he did not recognize appellant as someone he had arrested before. Indeed, the record failed to reveal any evidence suggesting any illegal activity occurred. Considering the totality of the surrounding circumstances and even taking the facts in the light most favorable to the trial court's ruling, the record does not reflect that Officer Micheletti possessed sufficient articulable facts to warrant appellant's detention; appellant's actions were as consistent with innocent activity as criminal activity and there existed no specific articulable facts indicating appellant's activity was related to a crime. The trial court, therefore, abused its discretion in finding that Officer Micheletti was attempting to lawfully arrest or detain appellant.

1997 WL 348532 *2.

In *In the Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis 9672, Juvenile Law Newsletter ¶ 04-4-16 (Tex.App.—Tyler 2004, no pet.), the driver of a vehicle stopped for a traffic infraction refused to consent to a search of his vehicle after signing a warning citation. The officer had advised R.J. that he had the right to refuse consent to a vehicle search. However, upon hearing R.J.'s refusal, the officer immediately called for a canine unit, at which point R.J. admitted there was marijuana in the vehicle. "We have held that [the officer] did not have reasonable suspicion to continue R.J.'s detention after R.J. refused consent to search. Therefore, [the officer] could not continue R.J.'s detention to conduct a canine sweep." 2004 Tex.App.Lexis 9672 *19-20. The court further held that, on balance, the factors supporting R.J.'s assertion of involuntary consent outweighed those in support of voluntary consent.

2. Statutory Requirements

Section 52.01(a) sets out the circumstances under which a juvenile may be taken into custody:

> A child may be taken into custody:
>
> (1) pursuant to an order of the juvenile court under the provisions of this subtitle;
>
> (2) pursuant to the laws of arrest;
>
> (3) by a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe that the child has engaged in:
>
> (A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state;
>
> (B) delinquent conduct or conduct indicating a need for supervision; or
>
> (C) conduct that violates a condition of probation imposed by the juvenile court;
>
> (4) by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court;
>
> (5) pursuant to a directive to apprehend issued as provided by Section 52.015; or
>
> (6) by a probation officer if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under Section 54.01.

a. Juvenile Court Order

While this provision does not spell out how and when a juvenile court may issue an order to take a child into custody, it does allude to "under the provisions of this subtitle." While the provision remains open-ended, a law enforcement officer may be authorized to arrest a juvenile pursuant to a juvenile court order under several different circumstances. In certain situations, the juvenile court could require that a child be taken into custody when an adjudication or transfer petition and summons is served on him. Section 53.06(d) provides:

> If it appears from an affidavit filed or from sworn testimony before the court that immediate detention of the child is warranted under Section 53.02(b) of this code, the court may endorse on the summons an order that a law-enforcement officer shall serve the summons and shall immediately take the child into custody and bring him before the court.

Also, if the juvenile is released from detention and fails to appear before the juvenile court as required by the conditions of release, or violates any of the conditions of release, the juvenile court may issue an order to take the

juvenile into custody. A failure to appear would be a violation of any condition that required the child's appearance in court, but only if the court date and time were included in the child's conditions of release at the time of release. A law enforcement officer could enforce that juvenile court order by arresting the juvenile.

Section 53.07(e) provides that witnesses may be subpoenaed in accordance with the Code of Criminal Procedure. If a witness who has been subpoenaed fails to appear before the court when required to testify, Article 24.12, the Code of Criminal Procedure, authorizes the issuance by the court of an attachment for the witness. Under Article 24.11, an attachment requires a "peace officer to take the body of a witness and bring him before... [the] court...to testify in behalf of the State or of the defendant...."

Another situation in which a juvenile judge could order the taking of a child into custody would be if the child were on probation and a motion to modify probation has been filed under Section 54.05. In that situation, the juvenile court could issue an order to take the juvenile into custody to answer the motion. A law enforcement officer may be required to arrest a juvenile under such an order.

b. Pursuant to Laws of Arrest

Section 52.01(a)(2) authorizes taking a child into custody pursuant to the laws of arrest. Thus, in any circumstance in which an adult could be arrested by a law enforcement officer or by a private person, a juvenile in the same circumstance could be taken into custody. This authority exists because it is frequently impossible to determine prior to arrest whether the person is a juvenile or an adult. The primary statutory authority for the arrest of adults is Chapter 14 and Article 18.16, Code of Criminal Procedure, and Civil Practices and Remedies Code Section 124.001.

c. By a Law Enforcement Officer or School District Peace Officer

Pursuant to Section 52.01(a)(3), a law enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, may take a child into custody if he or she has probable cause to believe the child engaged in: (1) conduct that violates a penal law or penal ordinance of any political subdivision; (2) delinquent conduct or conduct indicating a need for supervision (CINS); or (3) conduct that violates a condition of probation imposed by the juvenile court. The language of the provision makes it clear that a commissioned school district peace officer has the same arrest powers under Title 3 as any other law enforcement officer. See the discussion of school district peace officers earlier in this chapter. There is no requirement for the officer to obtain a warrant under this provision, only that he or she find probable cause of a violation under the provision. *Cornealius v. State*, 900 S.W.2d 731 (Tex. Crim. App. 1995). Since 2007, a law enforcement officer who has probable cause to believe that a child is in violation of the compulsory school attendance law may also take the child into custody in order to return the child to his or her school campus to ensure compliance with the state's school attendance requirements. Section 52.01(e).

The second part of Section 52.01(a)(3)(A) permits an arrest without a warrant upon probable cause to believe that a juvenile has engaged in "a penal ordinance of any political subdivision of this state." This was intended to authorize warrantless arrests of juveniles for offenses o ver which municipal or justice courts have criminal jurisdiction. See Chapter 23 for a full discussion of those proceedings.

The provisions also authorize a law enforcement officer or school district peace officer to take a child into custody without a warrant upon probable cause to believe the child has violated a condition of judicially imposed probation. The condition violated must be a condition of judicial probation imposed under Section 54.04. The enactment does not authorize a law enforcement officer or school district peace officer to take a child into custody for violation of a deferred prosecution under Section 53.03, Family Code.

In 2005, the legislature added Section 52.01(a)(6) to authorize probation officers to take a child into custody if there is probable cause to believe the child has violated a condition of release imposed by the juvenile court or referee under Section 54.01.

Arrest Warrant. The rule favoring arrest with a warrant is not constitutionally mandated but, rather, is the product of legislative action. The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution merely require that, if an arrest is conducted pursuant to a warrant, the warrant be based upon probable cause. *Vasquez v. State*, 739 S.W.2d 37, (Tex.Crim.App. 1987).

Consequently, there is no requirement under these provisions for an arrest warrant or other court order in order to effect an arrest on probable cause.

In *Vasquez v. State,* 663 S.W.2d 16 (Tex.App.—Houston [1st Dist.] 1983, pet. granted), defendant contended in his appeal from a murder conviction that he had been illegally arrested under Article 14.04 of the Code of Criminal Procedure because the officer lacked an arrest warrant or evidence the suspect was about to escape. The court held that since the defendant was 16 years of age at the time of his arrest, the provisions of Family Code Section 52.01, not Article 14.04, governed and that his arrest was valid under the probable cause provision of Section 52.01.

The Court of Criminal Appeals reviewed this decision in *Vasquez v. State,* 739 S.W.2d 37 (Tex.Crim.App. 1987). It upheld the arrest under Section 52.01 and held that the distinction between the warrant requirement of the Code of Criminal Procedure and the absence of a warrant requirement in the Family Code did not violate the child's rights to equal protection of the laws.

Similarly, the defendant in *Garcia v. State,* 661 S.W.2d 754 (Tex.App.—Beaumont 1983, no pet.), made the claim on appeal from his conviction of murder that he had been unlawfully arrested without a warrant and that a confession was obtained from him as a consequence of that arrest. He contended that Section 52.01(a)(3) deprived him of equal protection of the laws because had he been an adult an arrest warrant would have been required by Article 14.04 of the Code of Criminal Procedure. The court rejected this argument and upheld the Family Code provision, finding that distinguishing between the warrantless arrest of juveniles and adults was "a reasonable and substantial classification." Can information provided by a suspected accomplice form the basis for probable cause to take a child into custody? In a Houston certification case, appellant was implicated in an aggravated robbery by a classmate who denied involvement in the crime but admitted being present at the scene. *Chavez v. State*, UNPUBLISHED, No. 01-07-00563-CR, 2008 WL 5263404, Juvenile Law Newsletter ¶ 09-1-5 (Tex.App.—Houston [1st Dist.] 2008, no pet.). Based on the student's information, an offense report, and the victim's statement, the arresting officer believed he had probable cause to take appellant into custody. The Court of Appeals agreed, holding that the classmate's information was a statement against his self-interest and was therefore inherently credible. "Accordingly, we conclude that [the classmate's] statements were sufficient to give [the officer] probable cause to take appellant into custody." 2008 WL 5263404 *3.

The Court of Criminal Appeals in *Cornealius v. State*, 900 S.W.2d 731 (Tex.Crim. App. 1995), upheld the warrantless arrest of a juvenile on the front steps of his home under Section 52.01(a)(3). Since the defendant was not arrested inside his house, the Fourth Amendment warrant requirement was inapplicable.

Curfew Violations. Many municipalities have enacted juvenile curfew ordinances. Some have enacted nighttime ordinances that prohibit juveniles from being in a public place after a specified hour. Others have enacted daytime curfew ordinances that prohibit juveniles from being in a public place while school is in session. Many municipalities have enacted both types of ordinances. Counties may enact juvenile curfew orders for unincorporated areas. See Local Government Code Sections 341.905, 351.903, and 370.002, for the authority to enact ordinances.

These ordinances and orders usually include numerous defenses to the scope of their operation and are, therefore, very complicated. Whether there was an ordinance violation depends upon more than the age of the person and the time of night because curfew ordinances recognize a variety of legitimate reasons for being in public after curfew. However, when the question is only whether an officer has reasonable suspicion for an investigatory stop to determine whether there is a curfew violation, youthful appearance and time of day by themselves are sufficient. *In the Matter of C.R.*, UNPUBLISHED, No. 04-98-00389-CV, 1999 WL 15963, 1999 Tex.App.Lexis 135, Juvenile Law Newsletter ¶ 99-1-19 (Tex.App.—San Antonio 1999, no pet.) (stop of 14-year-old at 1:00 a.m. lawful).

If an officer stops a juvenile to investigate a curfew violation and determines that a violation has occurred, the officer may take the youth into custody. At that point, a full search incident to a lawful arrest may be conducted of the person of the juvenile. Following that, the officer may release the juvenile to a parent, guardian, or custodian or take the child to a juvenile curfew processing office. Code of Criminal Procedure Article 45.059. The fact that the officer intends to release the juvenile to a parent while giving the juvenile a curfew citation if nothing incriminating is found in the search does not make the arrest a sham or invalidate the search. *In the Matter of J.M.,* UNPUBLISHED, No. 03-98-00206-CV, 1999 WL 372508, 1999 Tex.App. Lexis 4293, Juvenile Law Newsletter ¶ 99-3-05 (Tex.App.—Austin 1999, no pet.) (three juveniles stopped, taken into custody, and searched; two were released to parents while third, on whom marijuana was found, was taken to the juvenile detention facility).

The San Antonio Court of Appeals in *In the Matter of R.P.*, UNPUBLISHED, No. 04-99-00176-CV, 2000 WL 349733, 2000 Tex.App.Lexis 2199, Juvenile Law Newsletter ¶ 00-2-13 (Tex.App.—San Antonio 2000, no pet.), upheld a curfew

stop as a consensual encounter requiring no evidence of violation. An officer saw the youthful-appearing respondent and an adult in a high-crime area of San Antonio at 12:30 a.m., after curfew hours. The officer stopped the pair and asked respondent his age. When respondent replied he was 16, and therefore apparently in violation of the curfew ordinance, the officer frisked him for his own safety. He found a baggie of marijuana in the frisk and then, in a search incident to arrest, found a small quantity of cocaine in a matchbox. The Court of Appeals upheld the stop as consensual:

> Here, Officer Luna was entitled to stop R.P. and to inquire about R.P.'s identity or age. This was a consensual stop and Luna did not have to articulate reasonable suspicion for this stop. Once Luna determined that R.P. was 16 and possibly in violation of the San Antonio curfew for minors, Luna was authorized to conduct a pat down of R.P. Also relevant to the need for the pat down was the time of night and location. Luna stated the section of Brazos Street comprised a "special unit"—a section of the city notorious for high gang activity and burglaries.
>
> R.P. contends Luna's observation of R.P.'s "youthful appearance" failed to justify the detention and the pat down. R.P. refers the court to authority which provides that appearance alone is insufficient to establish reasonable suspicion. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975); *Nieto v. State*, 857 S.W.2d 149, 151 (Tex.App.—Corpus Christi 1993, no pet.). These cases are inapplicable here. Unlike the immigration laws discussed in *Brignoni-Ponce* and *Nieto*, the youth curfew law applies equally to all those of youthful appearance.
>
> R.P. also claims the initial encounter was not consensual and disputes Luna's testimony that he asked R.P. how he was doing prior to asking about his age. Rather, R.P. asserts the initial dialogue with Luna consisted of Luna demanding that R.P. and his companion approach the police car and put their hands on the hood. When faced with conflicting testimony, we defer to the trial court's ruling in believing Luna's account.… The trial court was entitled to believe Luna's account based upon his ten years of service on the special crimes unit, the time of night, and the deserted street surroundings.

2000 WL 349733 *2.

d. By a Probation Officer

A probation officer may take a child into custody under Section 52.01(a)(4) when there is probable cause to believe the child has violated probation. A warrant or other order of the juvenile court is not required. Such an arrest may be made even if the violation occurred after the probationer turned 17, as long as he or she is under age 18 (or age 19 if on determinate sentence probation). Since 2005, a probation officer may also take a child into custody if there is probable cause to believe the child has violated a condition of release imposed by the juvenile court. Section 52.01(a)(6). If the juvenile court has issued a directive to apprehend to take a child into custody for a probation violation, then any law enforcement officer or probation officer may take the child into custody under that order. TJJD standards required each juvenile board to adopt policies specifying whether juvenile probation officers may take juveniles into custody under these provisions.

e. Directive to Apprehend

Section 52.015 creates a juvenile arrest warrant, called a "directive to apprehend." It provides:

> (a) On the request of a law-enforcement or probation officer, a juvenile court may issue a directive to apprehend a child if the court finds there is probable cause to take the child into custody under the provisions of this title.
>
> (b) On the issuance of a directive to apprehend, any law enforcement or probation officer shall take the child into custody.
>
> (c) An order under this section is not subject to appeal.

Section 52.01(a)(5) permits a child to be taken into custody "pursuant to a directive to apprehend issued as provided by Section 52.015."

Section 52.015(a) provides that a directive to apprehend may be issued by a juvenile court if there is "probable cause to take the child into custody under the provisions of this title." Thus, a juvenile court may issue a directive to apprehend if there is probable cause to believe that a child has engaged in delinquent conduct or CINS because a child may be taken into custody pursuant to Section 52.01(a)(3) under those circumstances.

A juvenile court may also issue a directive to apprehend under any of the circumstances in which it may issue

an order of immediate custody. Examples of such circumstances would be a probation violation, a failure to appear for a juvenile court hearing, or a violation of conditions upon which the child was released from detention.

A directive to apprehend is an arrest warrant for purposes of the Fourth Amendment. Although Section 52.015 does not explicitly require that the statement of probable cause upon which a directive to apprehend is based must be a detailed statement under oath, the Fourth Amendment does impose that requirement. The statute should be read as though it incorporated that requirement.

f. TJJD Escapees and Parole Violators

There is special statutory authority to take into custody without an arrest warrant a child who has escaped from the Texas Juvenile Justice Department (TJJD) or who has violated a condition of TJJD parole.

The San Antonio Court of Appeals in *Martinez v. State*, UNPUBLISHED, No. 04-00-00609-CR, 2001 WL 1230485, 2001 Tex.App.Lexis 6564, Juvenile Law Newsletter ¶ 01-4-36 (Tex.App.—San Antonio 2001, pet. ref'd), upheld under authority of the special statute a warrantless arrest by a law enforcement officer of a juvenile who was a TYC [TJJD] escapee. In that case, there was no question that the person taken into custody was a TYC [TJJD] escapee.

Human Resources Code Section 243.051 provides:

> (a) If a child who has been committed to the department and placed by the department in any institution or facility has escaped or has been released under supervision and broken the conditions of release:
>
> (1) a sheriff, deputy sheriff, constable, or police officer may, without a warrant, arrest the child; or
>
> (2) a department employee designated by the executive director may, without a warrant or other order, take the child into the custody of the department.

Subdivision (1) is restricted to only the enumerated law enforcement officers and does not include all persons defined by Code of Criminal Procedure Article 2.12 as peace officers.

3. Notification Requirements when Taking Into Custody a Person under Guardianship.

In 2015, the legislature directed the Office of Court Administration to examine the feasibility of a guardianship database that would help law enforcements officers know if a person they are having contact with is a person who has had a guardian appointed by a probate court.

In 2017, Senate Bill 1096 was passed, implementing the recommendations made by the Texas Judicial Council, including creating a searchable database that is available to law enforcement. Section 52.011, Family Code, was added. It provides that, as soon as practicable but no later than the first working day after the date a law enforcement officer takes a child who is a ward into custody under Section 52.01(a)(2) or (3) (pursuant to laws of arrest or when there is probable cause), the law enforcement officer or other person having custody of the child must notify the probate court with jurisdiction over the child's guardianship. There are similar requirements applicable to arrests of adults under the Code of Criminal Procedure.

B. Searches

The residence, vehicle, or person of a juvenile may be searched by a law enforcement officer pursuant to a search warrant just as in the case of the search of an adult. But cf. *In the Matter of L.J.*, UNPUBLISHED, No. 03-04-00807-CV, 2005 Tex.App.Lexis 10221, Juvenile Law Newsletter ¶ 06-1-08 (Tex.App.—Austin 2005, no pet.) (probable cause and exigent circumstances justified warrantless search of home when appellant opened her door). Statistically, more searches of juveniles, like adults, occur incident to arrest than in any other circumstance. If a law enforcement officer has validly arrested a juvenile under Section 52.01, the officer may search the juvenile for weapons, contraband, and evidence of crime in the same manner as if searching an adult who has been arrested.

In the Matter of R.E.A., UNPUBLISHED, No. 03-04-00028-CV, 2004 WL 2732163, 2004 Tex.App.Lexis 10763, Juvenile Law Newsletter ¶ 05-1-02 (Tex.App.—Austin 2004, pet. denied), represents such a valid search incident to arrest. R.E.A. was detained on an outstanding felony warrant. After taking R.E.A. into custody, the officer asked if he had "anything illegal on him." The juvenile answered that he had a blunt of marijuana in his pocket, which an immediate search confirmed. On appeal, R.E.A. argued that the marijuana was obtained as a result of an unlawful custodial interrogation. The Austin Court of Appeals brushed aside his argument, noting that the custodial question and R.E.A.'s affirmative response were ultimately irrelevant because of the lawful search incident to arrest.

A juvenile also may be searched as part of the process of admitting the juvenile to a juvenile processing office or a juvenile detention facility. Similarly, if a law enforcement

officer has lawfully stopped a juvenile on reasonable suspicion of criminal activity, the officer may frisk him or her for weapons for self-protection during the temporary period of detention in the field, just as in the case of an adult. As in the case of adults, evidence discovered in a search incident to arrest of a juvenile or a frisk during temporary field detention of a juvenile will be admissible only if the arrest or detention was lawful under constitutional and statutory standards.

1. Consent Searches

If an adult consents to a search of his or her residence, vehicle, or person, a law enforcement officer may search without a search warrant and even without probable cause to believe that anything incriminating will be found. The consent is by itself sufficient authority for the search. To establish valid consent, the government must show that the consent was voluntarily given and not the result of duress or coercion, express or implied. In determining whether consent is voluntarily offered the court will utilize the "totality of circumstances" test. *Scneckloth v. Bustamonte*, 93 S.Ct. 2041 (1973).

In *Swink v. State*, 617 S.W.2d 203 (Tex.Crim.App. 1981), the defendant argued that, since he was a juvenile at the time he consented to a search, the consent was invalid because the requirements of Section 51.09, setting out formal requirements for waivers of rights, had not been satisfied. The Court of Criminal Appeals rejected this argument on the ground, in part, that "the section upon which appellant relies speaks only in terms of proceedings under Title 3 of the Family Code. The complained of actions in this cause did not occur under that title." 617 S.W.2d at 211. The Court appeared to be saying that Section 51.09 has no relevance to searches based on a juvenile's consent.

However, in *Griffin v. State*, 765 S.W.2d 422 (Tex.Crim.App. 1989), the Court of Criminal Appeals overruled other language in *Swink* that the Family Code has no relevancy to juvenile cases after they are transferred to criminal court; there may, therefore, be some reason to question the holding in *Swink* that Section 51.09 has no applicability to consent searches of juveniles. In the case of *Schneckloth v. Bustamonte,* the Court concluded that (for an adult) the validity of consent searches should be determined only by looking at the voluntary nature of the consent even though a consent search was the only method whereby an individual could relinquish his fourth amendment protections. The Court found that knowledge of the right waived and appreciation of the consequences of the waiver were important only to the extent that they had a bearing on the voluntariness of the consent, and even then not as prerequisites but only as possible elements to consider in the totality of the circumstances. The court stated:

> When the subject of the search is not in custody and the State attempts to justify the search on the basis of consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances. Scneckloth v. Bustamonte, 93 S.Ct. 2041 (1973).

As stated above, the standard for waiving a person's fourth amendment right against unreasonable search and seizure, as set out by the United States Supreme Court, is only that the waiver be voluntarily made. There are many cases where the voluntariness of a consent is scrutinized by an appellate court in determining whether the consent given was valid. *In The Matter Of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 Tex. App. Lexis 9672, and (Tex.App.—Tyler 2004), *In the Matter of D.G.*, 96 S.W.3d 465 (Tex.App.—Austin 2002, no pet.).

That having been said, could the Texas Legislature, by enacting Section 51.09, have expressly intended to make a consent by a child more difficult, as it did for confessions in Section 51.095? Doesn't Section 51.09, the waiver of rights provision for children, require that a consent not only be voluntary but also be agreed to by an attorney and made with the child and the attorney being informed of and understanding the right and the possible consequences of waiving the right? Further, doesn't it require that the consent be made in writing or in open court?

Consent was not considered voluntary when, after a routine traffic stop, the juvenile, having first refused to consent, later consented to a search of his vehicle after being told by the officer that he would call out the canine to sniff around the vehicle and if the dog "hit" on any scent coming from the vehicle, he would have probable cause to search. *In The Matter Of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 Tex. App. Lexis 9672, and (Tex.App.–Tyler 2004).

A school district police officer in *In the Matter of D.G.*, 96 S.W.3d 465 (Tex.App.—Austin 2002, no pet.), received information from a person whom he knew to be a high school student that respondent, also a student, was selling crack cocaine, which he concealed in the hood of his

sweatshirt. The officer located the respondent after school ended at a gas station next to campus. He approached respondent and asked whether he had anything he was not supposed to have. When respondent answered in the negative, the officer asked whether he could search him. The respondent answered "sure" and "assumed the position." The officer found cocaine in the hood of the sweatshirt.

The Austin Court of Appeals held that the encounter between the officer and the respondent was a voluntary encounter, which requires no evidentiary support and which can be terminated by the citizen at any time, rather than a temporary investigatory detention, which requires reasonable suspicion and involves law enforcement coercion. Further, the search was justified on the respondent's consent:

> Consent to search satisfies the Fourth Amendment if the consent is voluntary.… The consent must not be coerced, by explicit or implicit means, by implied threat or covert force.… The consent must be positive and unequivocal.… Consent is not established by "showing no more than acquiescence to a claim of lawful authority." *Carmouche*, 10 S.W.3d at 331 [citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)]. The State must show by clear and convincing evidence that the consent was freely given.… Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances.
>
> …
>
> Officer Stovall's request to conduct a search came within seconds of his encounter with appellant. He showed no force and did not coerce appellant into complying with the request or persist beyond an appropriate bound. Appellant responded immediately and unequivocally, both orally and physically, agreeing to the request.… The trial court concluded that appellant voluntarily consented to the search and further that there was no evidence that appellant was under arrest or otherwise not free to go. Although Officer Stovall did not advise appellant of his right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that appellant's consent was voluntary. Viewing the totality of the circumstances, we conclude that the State satisfied its burden of showing by clear and convincing evidence that appellant voluntarily consented to the search.

96 S.W.3d at 469.

The Austin Court of Appeals in *In the Matter of L.C.*, UNPUBLISHED, No. 03-02-00070-CV, 2003 WL 21241582, 2003 Tex.App.Lexis 4606, Juvenile Law Newsletter ¶ 03-3-02 (Tex.App.—Austin 2003, no pet.) upheld the validity of a search based on consent under more questionable circumstances. A police officer stopped the respondent because he appeared to be school-aged and was on public streets during school hours, in possible violation of a daytime curfew ordinance. When the officer asked to search the respondent, he answered that he didn't have anything and produced lawful items from his pockets. When asked again, he made the same response. When asked a third time, the response was "something like, 'okay or all right,'" and he held his arms out. A search turned up cocaine in a pocket. The Court of Appeals upheld the search based on consent despite the initial two responses to the officer's request for consent:

> In determining whether consent was voluntary, courts must look to "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. In making these determinations, courts consider factors such as the circumstances leading up to the search; the reaction of the accused to pressure; the youth, education, and intelligence of the accused; the length of the detention; the repetitiveness of the questioning; and any use of physical punishment.…
>
> We hold that, based on the totality of circumstances in this case, the State established by clear and convincing evidence that appellant's consent was voluntary. Viewed in the light most favorable to the court's judgment, the evidence shows that appellant freely agreed to submit to a search. When the officer persisted in obtaining a straight answer to his question, appellant's verbal and non-verbal responses indicated his voluntary agreement with the request for a search. He responded, "okay" or "all right" as he held out his arms to his sides to allow the officer to search him. His words and gestures were consistent with voluntary consent.…
>
> [T]he juvenile appellant was initially evasive about being searched, but then agreed when the officer would not be distracted. Officer Egal testified that he considered appellant's initial responses to be no answers at all, rather than negative ones. We do not believe the officer in this case persisted beyond the bounds that justify a finding of voluntariness. The detention was relatively brief, occurred in broad daylight,

> the boy obviously had more than a passing familiarity with pat-down searches, and he was not alone, but in the company of an adult. There was no use or threat of force. The officer was alone in detaining and searching two suspects.

2003 WL 21242582 *3-4.

The line between an evasive answer to a request to search and a negative answer is a difficult one to draw. Had the juvenile's response been determined by the Court of Appeals to have been a refusal to consent, then it is likely it would have also regarded the officer's persistence as coercion. Cf. *In the Matter of R.S.W.*, UNPUBLISHED, No. 03-04-00570-CV, 2006 Tex.App.Lexis 1925, Juvenile Law Newsletter ¶ 06-2-06 (Tex.App.—Austin 2006, no pet.) (clear and convincing evidence supported conclusion that consent was freely given).

2. Third-Party Consent

Under certain circumstances, a search can be based upon the consent of a person who is not the target of the search. Third-party consent is valid if the person consenting did so voluntarily and had possession and control over the area to be searched either individually or jointly with the target of the search. In *Jacobs v. State*, 681 S.W.2d 119 (Tex.App.—Houston [14th Dist.] 1984, pet. ref'd), law enforcement officers went to defendant's house and asked his mother for permission to search his bedroom for a weapon. The officer explained that defendant's mother did not have to consent to a search without a warrant, but she signed a form consenting to the search. The defendant was present during the search of his room in which marijuana and evidence of a murder were discovered. On appeal, he contended that a parent cannot consent to the search of a child's bedroom. The court rejected this argument:

> There is no question that neither probable cause nor a search warrant is necessary if consent to search is given.... Further, contrary to Appellant's assertion, the Texas Court of Criminal Appeals passed directly on the issue of whether a parent can consent to a search of her child's bedroom in *Sorensen v. State*, 478 S.W.2d 532 (Tex.Crim.App. 1972). The juvenile defendant in *Sorensen* was convicted of possession of marijuana. Like Appellant in our case, he lived at home. The court found that the defendant has no "reasonable expectation of privacy" in his bedroom, that his mother had a right to be in his bedroom, that she could consent to the search of his bedroom and that her consent obviated the need for a search warrant. Further, the court found her consent was binding upon everyone who had rights in the bedroom.

681 S.W.2d at 122; See also *Crenshaw v. State*, UNPUBLISHED, No. 01-09-00791-CR, 2011 WL 286126 *14 (Tex.App.—Houston [1st Dist.] 2011, pet. ref'd) (mother's reference to "his bedroom" reasonably interpreted as bedroom used by appellant).

The United States Supreme Court has held in criminal cases that third party consent may be valid even if the person giving consent did not have sufficient connection to the area to be searched to give consent. So long as the officer reasonably believes the person had control of the premises, the search is valid even if it turns out he or she was merely a casual visitor. See *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). The doctrine of reasonable apparent authority to consent was applied in a Texas juvenile case in *In the Matter of L.D.R.*, UNPUBLISHED, No. 05-92-02756-CV, 1993 WL 378086, (Tex.App.—Dallas 1993).

In *Limon v. State*, 340 S.W.3d 753 (Tex.Crim.App. 2011), a 13- or 14-year-old opened the front door to his residence at 2 a.m. for police officers, who were responding to a "shots fired" call. A detective told the youth what he was investigating and asked permission to enter the residence. The youth admitted the detective and another officer, who both smelled the odor of marijuana coming from the residence, resulting in the arrest of the adult appellant.

The Court of Criminal Appeals noted: "The test set out by the Supreme Court is whether the officer's belief in an individual's authority is reasonable under the facts known to the officer" [citing *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. 2793 (1990)]. The Court held there were several factors supporting the reasonableness of the detective's belief that the youth had apparent authority to give consent to entry.

> Under the facts available to Officer Perez at the moment, a mature teenager, possibly an adult, opened the front door to him at 2:00 a.m. and, after hearing that he was investigating a shooting, gave him consent to enter through the front door. We find that a person of reasonable caution could reasonably believe that A.S. had the authority to consent to mere entry under those circumstances.

340 S.W.3d at 758-759.

3. School Searches

A search situation that is particularly important for juveniles is searches of them and their property on school

premises. If evidence of delinquency is discovered, under what circumstances may it be used in juvenile court? The United States Supreme Court addressed this issue in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

T.L.O. was a high school student. A teacher reported to a principal that T.L.O. and another student had been discovered smoking a cigarette in the ladies' room, a violation of school rules. She was brought to the principal's office and confronted with the accusation. She denied having smoked on school premises and stated she did not smoke at all. The principal then searched her purse. He found a pack of cigarettes and a pack of rolling papers. He also discovered a small quantity of marijuana, a large number of one dollar bills, and a list of students who appeared to owe money to T.L.O.

Believing T.L.O. was dealing marijuana, the principal called her parents and the police. A delinquency petition was filed, and she was adjudicated based on the products of the purse search. The New Jersey Supreme Court reversed the adjudication on the ground that the search was without probable cause under the Fourth Amendment.

The United States Supreme Court upheld the search. It concluded that different Fourth Amendment standards apply to searches on school property of students by public school officials than apply to searches by law enforcement officers:

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the...action was justified at its inception" ...; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."
>
> **Justified at its Inception.** Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when the information received by the teacher or school official establishes reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

105 S.Ct. at 742-43.

The Court held the principal's actions were reasonable under the circumstances.

The defendant in *Russell v. State*, 74 S.W.3d 887 (Tex.App.—Waco 2002, pet. ref'd) was brought to the principal's office when he and two others were discovered smoking cigarettes on the school parking lot. The principal noticed that he was "messing" with one of the pockets of his cargo shorts. Concerned he might be concealing a weapon, she asked him to empty his pockets. When he refused, she called a liaison police officer. The officer frisked the defendant and found a baggie of marijuana in his pocket. The Court of Appeals upheld the action as a valid school search:

> The Richardson Police Department assigned Officer Lee to Russell's high school.… Viewing the evidence in the light most favorable to the court's suppression ruling, Officer Lee possessed the following information when he searched Russell:
>
> > a school security officer had observed Russell and two others smoking in the parking lot;
> >
> > Russell was wearing baggy shorts;
> >
> > Palacios [the principal] had seen him "messing with" a pocket in these shorts; Russell had refused to empty his pocket for Palacios; and
> >
> > according to Officer Lee's experience, students who refuse to empty their pockets for a school administrator are concealing something they don't want to disclose, usually "a weapon, marihuana, or cigarettes."
>
> Based on these facts, we conclude that Officer Lee had "reasonable grounds for suspecting that the search [would] turn up evidence that [Russell] ha[d] violated or [wa]s violating either the law or the rules of the school." See *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743,

> 83 L.Ed.2d at 735; … Specifically, the facts known to Officer Lee gave him reasonable grounds to believe that Russell was in possession of a weapon or other contraband. Thus, the pat-down search of Russell was "justified at its inception." See *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743, 83 L.Ed.2d at 734 (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905).
>
> Officer Lee was concerned that Russell might have a weapon. Although the focus seemed to be on Russell's pocket, we agree with the El Paso Court that it was "more efficacious from a law enforcement standpoint to initially pat [Russell] down" for safety reasons. See *Wilcher*, 876 S.W.2d at 469. Nevertheless, Officer Lee did not have to stop there. Under the facts of this case, we hold that a search of Russell's pocket was "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." See *T.L.O.,* 469 U.S. at 342, 105 S.Ct. at 743, 83 L.Ed.2d at 735; …

74 S.W.3d at 892-93.

Since smoking cigarettes on campus was doubtless a violation of school rules and would have been criminal if Russell were under 18, the search of the pocket would have been justified under *T.L.O.* as a search for cigarettes even without concern over there being a weapon in the pocket.

Reasonableness of Scope of Search. The Court of Criminal Appeals applied *T.L.O.* in *Coronado v. State,* 835 S.W.2d 636 (Tex.Crim.App. 1992). An assistant principal confronted Coronado when the latter was attempting to leave the campus during the school day. Coronado claimed he was leaving to attend his grandfather's funeral, but that claim was refuted by Coronado's relatives when the principal telephoned them. Coronado was evasive in answers to the principal's questions. Since Coronado was 19 years old, skipping school was merely a violation of school rules, not state law. Nevertheless, the principal, in the company of a law enforcement officer, patted down Coronado for his own safety. He then conducted a thorough search of his person, discovering car keys and $197 in currency. Finding nothing more, the principal searched Coronado's locker, where nothing incriminating was found. He then searched the trunk of Coronado's car in the school parking lot. There he found cocaine, a triple beam balance, and marijuana.

The Court of Appeals upheld the search. *Coronado v. State*, 806 S.W.2d 302 (Tex.App.—Texarkana 1991, pet. granted). However, the Court of Criminal Appeals reversed. *Coronado v. State,* 835 S.W.2d 636 (Tex.Crim.App. 1992). Applying *T.L.O.*, it found that the principal:

> had reasonable grounds to investigate why appellant was attempting to leave school and was justified in "patting down" appellant for safety reasons. However, the subsequent searches violated the second prong of *T.L.O.* The searches were not reasonably related in scope to the circumstances which initially justified [the principal's] interference with appellant, i.e. [the principal's] suspicion of appellant's skipping school. Nor were the searches reasonably related to any discovery from the initial "pat down." Rather, the post "pat down" searches of appellant's clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of attempting to skip school. Additionally, nothing observed during the patdown or subsequent search of appellant's clothes and person, or locker, would justify [the principal's] expansion of the search to appellant's vehicle.

835 S.W.2d at 641.

In the course of its opinion, the court distinguished two Courts of Appeals opinions that had upheld school searches under *T.L.O.* In *Irby v. State*, 751 S.W.2d 670 (Tex.App.—Eastland 1988, no pet.), the school official had reason to believe that Irby would be carrying marijuana, which a search turned up. In *Coffman v. State*, 782 S.W.2d 249 (Tex.App.—Houston [14th Dist.] 1989, no pet.), the student's excited behavior and conduct regarding a book bag when confronted in the hallway by the school official led the official reasonably to believe that the bag might contain contraband. Upon searching it, he discovered a handgun. In each of these cases, the searches were justified by the initial suspicion and were necessary in order to substantiate or refute that suspicion. However, in *Coronado,* the searches were not related to the initial suspicion of skipping school. That is what made them illegal.

The Court of Appeals in *Goldberg v. State*, 95 S.W.3d 345 (Tex.App.—Houston [1st Dist.] 2002, pet. ref'd), upheld the search of a student's notebook, which produced entries written by the student about how to rape and kill a woman. Information from those entries was later introduced in defendant's capital murder trial for the killing of a woman. Defendant was taken into custody for possession of alcohol and marijuana on campus. The school police officer testified that she looked through the notebook because students sometimes hide drugs in notebooks.

The Court of Appeals held the search of the notebook was within the scope of the reason for detaining the student:

> Appellant argues that, even if the HISD officers were justified in searching his backpack, they exceeded the necessary scope of the search by reading the notebook. Again, we disagree. In determining that a warrant requirement was unnecessary for school searches, the Supreme Court recognized "[t]he special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself ..." *T.L.O.,* 469 U.S. 325, 353, 105 S.Ct. 733, 749, 83 L.Ed.2d 720. As we have learned from unfortunate events such as the school shootings at Columbine High School in Littleton, Colorado, school officials must take seriously perceived threats to the safety and well-being of their students and faculty.
>
> As we stated earlier, Officer Griest was conducting a reasonable search for drugs in appellant's notebook when she noticed a picture of a demon dripping blood and the title "How to Kill a Woman." We believe that the officer then had the right, if not the responsibility, to read the passage in the notebook to determine whether it constituted an immediate threat to a student or teacher at Bellaire High School.
>
> We do not agree with appellant's assertion that private writings are always beyond the scope of a permissible school search. In fact, in *T.L.O.*, the United States Supreme Court held that it was permissible for a school administrator to read letters found in a student's purse, which implicated her in drug-dealing. 469 U.S. at 347, 105 S.Ct. at 746.
>
> Accordingly, we hold that appellant's notebook was seized and read pursuant to a valid school search. There was no violation of Texas law or the Fourth Amendment.

95 S.W.3d at 370-71.

In *In the Matter of A.H.A.*, UNPUBLISHED, No. 03-07-00296-CV, 2008 WL 5423258, Juvenile Law Newsletter ¶ 09-1-12 (Tex.App.—Austin 2008, no pet.), assistant Principal Soliz observed two freshman enter campus from the bus stop area, which was off limits to students during that time of day. When the students saw Soliz, they quickly turned to join a group of boys playing ball. Soliz called them over. As they approached, Soliz smelled smoke. When the boys denied smoking, Soliz asked to smell their hands. He detected what he knew from experience to be the odor of marihuana.

The boys were taken to a room where another assistant principal and a security guard joined them. The students were asked if they had anything on them that they should not have. One student immediately denied possessing any contraband, but A.H.A. began acting nervously.

> Soliz testified that he could smell marihuana on A.H.A.'s breath and that the odor on his hands was "pungent." Soliz then asked A.H.A. to lift his shirt to expose his waistband. Soliz said that A.H.A. was wearing "real baggy pants" over gym shorts. Soliz put his thumbs in A.H.A.'s waistband between his pants and the gym shorts, in the area of his navel. Soliz testified that his thumbs were "within the belt, width of a belt." Soliz moved his hands outwards and, as he did, Soliz felt "an awkward ball or mass around the waistline." Soliz testified that this mass was about the size of a golf ball. Soliz pulled the mass from A.H.A.'s waistline and saw that it was a clear plastic bag containing what appeared to be marihuana.

2008 WL 5423258 *2.

On appeal, A.H.A. argued that the scope of the search exceeded the initial justification for the search. The Austin Court of Appeals disagreed, holding that the search was reasonable and was neither a strip search nor a "near-strip search."

> The search was conducted in a private room in the presence of two other adults and another student. Looking at the evidence in the light most favorable to the court's ruling, considering that the search was initially justified by Soliz's suspicion that A.H.A. possessed marihuana, and taking into consideration Soliz's testimony that the waistline is a common place for students to hide drugs, we conclude that the scope of the search was reasonably related to the circumstances that justified the original interference.

2008 WL 5423258 *2. Cf. *Safford Unified School District v. Redding*, 557 U.S. 364, 129 S.Ct. 2633, 174 L.Ed.2nd 354 (2009) (search of student's bra and underwear for prescription and over-the-counter pills was unreasonable under *T.L.O.* without suspicion that pills presented a danger).

Anonymous Tips. In *In the Matter of K.C.B.*, Clifford Bowser, the Del Valle Junior High School hall monitor, received a tip from an anonymous student that K.C.B. had a

plastic bag containing marihuana in his underwear. Bowser escorted K.C.B. to the office of Assistant Principal Jackie Garrett, where Bowser asked K.C.B. if he had "anything in his possession which he should not have." After K.C.B. responded that he did not, Bowser had him remove his shoes and socks, in which he found nothing. Bowser then informed Garrett that the tip indicated that the marihuana was in K.C.B.'s underwear. Garrett asked K.C.B. to lift up his shirt, at which time Garrett approached K.C.B. and extended the elastic on K.C.B.'s shorts. Observing a plastic bag in K.C.B.'s waistline, Garrett removed it. K.C.B. was taken to the campus security office where Deputy Salazar, the school resource officer, arrested him for possession of marihuana.

The Court stated that uncorroborated anonymous tips do not ordinarily rise to the requisite level of reasonable suspicion. Here, the presence of drugs on a student did not tip the balance far enough for the search in this case to be deemed justified at its inception. Immediacy of action is not as necessary as could be found with a tip regarding a weapon. The court held that the search of K.C.B., which turned up the marihuana evidence, was not justified at its inception and failed the reasonable test set out in T.L.O.

In *In re A.T.H.,* 106 S.W.3d 338, 344 (Tex.App.—Austin 2003, no pet.), a law enforcement officer working at the school received a tip from an unidentified caller that a group of likely-students were smoking marihuana behind a nearby business. In that case the court held that the officer "lacked justification for his pat-down of A.T.H. even under the T.L.O. standard." A.T.H., 106 S.W.3d at 341-42.

However, if there is an added indicia of reliability to a tip, say the tip was from a known student who simply wanted to remain anonymous, the legality of the search could be different. The reasonableness under all the circumstances allows a teacher or school administrator to balance many factors. Factors in determining whether a search is warranted may include, but are not limited to, the quality of the information received, the nature of the search itself, and the dangers created by the decision not to search.

It is the balancing of a child's diminished rights in school against the level of government interest in the protection of students in the school setting that establishes the legality of a search in school. A search for weapons in a school triggered by an anonymous tip might be found to be justified at its inception despite the fact that under similar circumstances a search for marijuana would not.

In *Wilcher v. State,* 876 S.W.2d 466 (Tex.App.—El Paso 1994, pet. ref'd), a school peace officer brought appellant to a school administrator's office because she had received a report that appellant was carrying a .25 automatic pistol. A search of appellant's person disclosed $1,131 in currency and two small bags of marijuana. The Court of Appeals upheld the search under *T.L.O.* and *Coronado* on the ground that the search here was related to the reason for the detention: the report of carrying a handgun. Similarly, in *M.M. v. State,* UNPUBLISHED, No. A14-93-00988-CV, 1995 WL 115808, 1995 Tex.App.Lexis 574, Juvenile Law Newsletter ¶ 95-2-5 (Tex.App.—Houston [14th Dist.] 1995, no writ), a school teacher on bus duty required appellant to empty his pockets based on reports from other students that he was in possession of marijuana. The Court of Appeals upheld this search under *Wilcher*, distinguishing *Coronado* on the ground that the search in this case was related to the reason for initiating the investigation. Cf. *In the Matter of S.M.C.*, UNPUBLISHED, No. 08-09-00184-CV (Tex.App.—El Paso 2011, no pet.) (student's report that S.M.C. was "high" coupled with previous discussion between student and school official justified initial search).

A Houston Independent School District police officer in *Farias v. State*, UNPUBLISHED, No. 01-94-00-612-CR, 1995 WL 737473, Juvenile Law Newsletter ¶ 96-1-04 (Tex.App.—Houston [1st Dist.] 1995), searched the trunk of appellant's car on the school parking lot and found a sawed off shotgun. The Court of Appeals upheld the search on the ground that, unlike in *Coronado*, the officer in this case had a tip from an informant who had previously given reliable information that appellant possessed a shotgun in his car. This, and not merely the fact that the appellant was truant from class, supported the car search in this case.

The principal in *In the Matter of C.S.*, UNPUBLISHED, No. 14-97-01304-CV, 1998 WL 832121, 1998 Tex.App.Lexis 7436, Juvenile Law Newsletter ¶ 99-1-01 (Tex.App.—Houston [14th Dist.] 1998, no pet.), searched the backpack of a student on an anonymous Crime Stoppers tip that the student would have marijuana. The Court of Appeals upheld this search under *T.L.O.* The tip simply said that an 8th grade Hispanic student with respondent's name would be carrying "three dime baggies of marijuana in her backpack." The court observed that, before searching her, the principal had verified all of the details of the tip except the presence of the marijuana. That verification was sufficient for reasonable suspicion.

Locker Searches. The defendant in *Shoemaker v. State*, 971 S.W.2d 178 (Tex.App.—Beaumont 1998, no pet.), was

in an assistant principal's office when the assistant principal left the office temporarily. She was later informed that her billfold, without cash and credit cards, had been found in a girl's restroom. Suspecting defendant, she used a master key to search her locker, where she found her credit cards. The Court of Appeals upheld this search under the individualized reasonable suspicion standard of *T.L.O.*, concluding that the search was justified from its inception and reasonably related in scope. Having upheld the search, the court went a step further and in dictum stated:

> [T]he defendant did not have a legitimate expectation of privacy in her school locker. A student's locker is school property which remains under the control of school authorities. At Montgomery High School, the lockers have built-in combination locks and the assistant principal has a key that opens all of the lockers. Students at the school are given student handbooks detailing locker policy. The handbook states the following:
>
> > Lockers remain under the jurisdiction of the school even when assigned to an individual student.... Searches of lockers may be conducted at any time there is reasonable cause to do so, regardless of whether the students are present.
> >
> > …
> >
> > Lockers, desks and any other fixture or facility provided for students are the property of Montgomery I.S.D. School officials may conduct searches or use other detection devices at any time that it is felt that illegal substances or items may be found.

971 S.W.2d at 182.

What is interesting is that, while the court in this case based its decision on individualized reasonable suspicion, meaning that the school had gathered enough information regarding this student and this student's locker that warranted a search under T.L.O., in its dictum it stated that, because the lockers at the school were owned by the school and because the school had noticed all students that the lockers where subject to search at any time, the student had no expected right of privacy in her locker. See also *In the Matter of S.M.C.*, UNPUBLISHED, No. 08-09-00184-CV (Tex.App.—El Paso 2011, no pet.) (utilizing individualized reasonable suspicion in upholding a search of a school locker but citing *Shoemaker* (above) with the premise that students have no reasonable expectation of privacy in lockers, which are school property and under control of school authorities).

4. Stop and Frisk

The requirements for an officer conducting a stop and frisk for a juvenile operates in the same manner as it does for an adult and usually occurs when an officer is investigating possible criminal activity. The officer must have a reasonable suspicion that the person detained actually is, has been, or soon will be engaged in criminal activity. *Woods v. State*, 956 S.W.2d 33, 35–38 (Tex.Crim.App.1997). Reasonable suspicion exists when there is "something out of the ordinary occurring and some indication that the unusual activity is related to crime." *Viveros v. State*, 828 S.W.2d 2, 4 (Tex.Crim.App. 1992). In evaluating the requirements of reasonable suspicion, law enforcement officers are permitted to make certain common-sense conclusions about human behavior. *United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

When it comes to the frisk, the Supreme Court of the United States has stated that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

A police officer investigating a homicide in *Freeman v. State*, UNPUBLISHED, No. 03-94-00754-CR, 1997 WL 6302, 1997 Tex.App.Lexis 96, Juvenile Law Newsletter ¶ 97-1-11 (Tex.App.—Austin 1997, no writ), stopped the appellant, whom he knew to be truant from school. The officer frisked appellant for a weapon because he had received information that he would be carrying a gun. After finding a handgun, he took the appellant into custody. The appellant later gave a written statement. The Court of Appeals held that the initial stop was justified to investigate truancy and that the weapons frisk was justified because the officer legitimately feared for his safety during the temporary field detention. Once the weapon was discovered, the arrest was justified.

In *In the Matter of R.S.W.*, UNPUBLISHED, No. 03-04-00570-CV, 2006 Tex.App.Lexis 1925, Juvenile Law Newsletter ¶ 06-2-06 (Tex.App.—Austin 2006, no pet.), a deputy sheriff conducted a brief investigatory stop of a juvenile

walking at 11:30 p.m. in a high crime area, which was subject to a dusk-to-dawn curfew. The youth was wearing an oversized hooded jersey and his hands were tucked underneath his shirt. Additionally, the officer had personal knowledge of R.S.W.'s history of criminal activity. Under the circumstances, the officer conducted a frisk to ensure that he did not have a weapon.

The Court of Appeals upheld the search, noting that the officer's suspicion that R.S.W. had been or soon would be engaged in criminal activity was based on far more than a "mere hunch." The court also ruled that the search did not exceed the legal scope of a weapons frisk since the officer did not search the youth's pocket but merely patted it down externally to feel for weapons. When the officer felt an unknown object (marijuana), he stopped his pat-down and did not look or reach inside the pocket or otherwise manipulate the pocket's contents.

For a search to be justified as a frisk for weapons, the officer must articulate that the motive for the search was self-protection and the search itself must be consistent with that purpose. *In the Matter of A.D.D.*, 974 S.W.2d 299 (Tex.App.—San Antonio 1998, no pet.) (search was for cocaine, not weapons, so invalid on facts).

A police officer stopped a motor vehicle because the driver was not wearing a seat belt in *In the Matter of P.M.*, UNPUBLISHED, No. 04-02-00691-CV, 2003 WL 1964962, 2003 Tex.App.Lexis 3658, Juvenile Law Newsletter ¶ 03-2-33 (Tex.App.—San Antonio 2003, pet. denied). The officer asked the passenger to get out of the car; when he did, he appeared to the officer to be very nervous. The officer then frisked the passenger for weapons and found a handgun in the passenger's pocket. The Court of Appeals stated that the officer had the right to order the passenger out of the car pending completion of the traffic stop without individualized suspicion toward him under *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). The behavior of the passenger gave the officer reasonable suspicion to frisk him for weapons:

> [A] police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity is afoot.… Reasonable suspicion is determined from the totality of the circumstances.… When determining whether reasonable suspicion existed, the facts are reviewed in an objective assessment of whether the officer acted reasonably, and not from the subjective state of mind of the officer at the time of the search. See *Terry*, 392 U.S. at 21- 22; *O'Hara*, 27 S.W.3d at 551. We must also consider the inferences drawn by the officer in light of his experience.…
>
> At the suppression hearing, Officer Favorite described the situation and iterated his reasons for searching P.M. Favorite stated that when he asked P.M. for identification, the appellant raised his hands, which were "shaking uncontrollably." He also described P.M. as "very nervous," stating that it was difficult "for him to get a full and complete sentence out of his mouth." P.M.'s behavior caused Favorite to think something may be wrong, and it was at that point that he asked him to step out of the car. Once P.M. was outside the vehicle, Favorite asked whether he had any weapons on him. P.M. remained silent. In light of Favorite's experience as a San Antonio police officer, P.M.'s silence and extreme nervousness prompted the officer to pat him down.
>
> Favorite also stated that he had no reason to believe P.M. had or was about to violate the law, although he did have a "suspicion that (P.M.) had something on him that he shouldn't have." Favorite based this suspicion on his "training, (his) experience, and the way (P.M.) was acting." Based on his testimony, Officer Favorite had a reasonable suspicion supported by articulable factors making the search constitutional.

2003 WL 1964962 * 3-4.

By contrast, the school resource officer in *In the Matter of A.T.H.,* 106 S.W.3d 338 (Tex.App.—Austin 2003, no pet.), received an anonymous tip that three persons who appeared to be students were smoking marijuana behind a business next to campus and one of the persons was a black male wearing a Dion Sanders football jersey. The officer encountered the respondent wearing the jersey just as he entered the parking lot of the school campus. The officer stopped him and started to frisk him when the respondent removed a baggie of marijuana from his pocket and displayed it to the officer.

The Court of Appeals held that the officer had no right to confront the respondent or to attempt to frisk him because the anonymous tip did not provide reasonable suspicion to believe that respondent had committed or was about to commit a criminal offense. Under United States Supreme Court opinions, merely corroborating easily ascertainable details, such as a subject's clothing, is not sufficient. "Corroborating information that can give rise to reasonable suspicion includes details that accurately predict the subject's future behavior, link the subject to the

alleged criminal activity, or give a particularized and objective reason to suspect the subject." 106 S.W.3d at 345.

5. Strip Searches

T.L.O. established that students have a significant privacy interest in their bodies and under no circumstances is this interest more important than during a school-sanctioned strip search. In *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005, reh'g denied), a school teacher acting as principal authorized the strip searches of approximately 20 male and five female students for "prom money" allegedly stolen during gym class. The boys were required to lower their pants and underwear and remove their shirts while the girls, standing in a circle, pulled up their shirts and pulled down their pants. The boys were searched in the presence of two male school teachers and the girls were searched in the presence of two female teachers. None of the students was touched and the stolen money was never recovered.

The federal District Court followed the analysis of *T.L.O.* to determine the reasonableness of the search. The court found that the strip searches: (1) could have been justified at their inception, even without individualized suspicion, if substantial property had been reported as recently stolen; (2) exceeded what would normally be expected by a high school student in a locker room, proving far more invasive than the urinalyses in *Vernonia School District v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995)*; and (3) did not amount to a sufficient governmental interest to justify such an intrusive search.

> The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable. Accordingly, under *T.L.O.* and *Vernonia*, the searches violated the Fourth Amendment.

402 F.3d at 605. Cf. *Oliver v. McClung*, 919 F.Supp. 1206, 1218 (N.D. Ind. 1995) (strip search for money was not reasonable, but the same search for drugs or weapons might have been justified).

In 2009, the United States Supreme Court held that the search of a student's bra and underwear by school officials was unreasonable under the *T.L.O.* standard because there was no reason to suspect that prescription and over-the-counter pills were concealed in the student's underwear or presented a danger. *Safford Unified School District v. Redding*, 557 U.S. 364, 129 S.Ct. 2633, 174 L.Ed.2nd 354 (2009). While there was reasonable suspicion to justify a search of appellant's backpack and outer clothing based on another student's statement, the ensuing search beneath her clothing was excessively intrusive. The majority opinion emphasized:

> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

129 S.Ct. at 2643.

School districts should proceed with extreme caution when considering strip searches of students under their charge, especially for non-dangerous items such as money or property. The following recent cases illustrate permissible searches for weapons, albeit not in the school setting: *In the Matter of C.A.N.*, UNPUBLISHED, No. 03-04-00519-CV, 2005 Tex.App.Lexis 4664, Juvenile Law Newsletter ¶ 05-3-14 (Tex.App.—Austin 2005, no pet.) (pat-down search of clothing for weapons justified based on totality of circumstances, including officer's experience in patrolling the area); *In the Matter of K.E.*, UNPUBLISHED, No. 04-03-00504-CV, 2004 WL 892112, 2004 Tex.App.Lexis 3697, Juvenile Law Newsletter ¶ 04-2-22 (Tex.App.—San Antonio 2004, no pet.) (pat-down frisk for weapons justified on curfew violation in high crime area where appellant was wearing a heavy jacket on a fairly warm day).

6. Plain View Seizure

As in the "stop and frisk" situations, the "plain view" doctrine for juveniles is as it is for adults. The plain view doctrine should not be looked at as an "exception" to the warrant requirement because the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *Texas v. Brown*, 460 U.S. 730, 738–39, 103 S.Ct. 1535, 1541, 75 L.Ed.2d 502 (1983). If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990).

The "plain view" doctrine requires that: (1) law enforcement officials have a right to be where they are, and (2) it be immediately apparent that the item seized constitutes evidence, that is, there is probable cause to associate the item with criminal activity. In determining whether the officer had a right to be where he was, the Supreme Court requires that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Walter v. State*, 28 S.W.3d 538 (Tex.Crim.App. 2000).

The Court of Appeals in *In the Matter of B.F.,* UNPUBLISHED, No. 01-98-01393-CV, 2000 WL 1641123, 2000 Tex.App.Lexis 7387, Juvenile Law Newsletter ¶ 00-4-18 (Tex.App.—Houston [1st Dist.] 2000, no pet.) upheld a seizure of stolen property as a plain view seizure:

> Officer Harvey of the Fort Bend I.S.D. Police Department stopped the appellant in the hall at Marcario Garcia Middle School around 5:15 p.m. Officer Harvey had stopped B.F., a student at the school, on several occasions for being in the building after hours and for violating other school rules. Officer Harvey noticed that B.F. was holding some jewelry and asked to see it. B.F. handed the jewelry, a ladies' tennis bracelet with 60 diamonds and a ladies' gold class ring (B.F. is male), to the officer. Because the jewelry was not the type that a child of B.F.'s age would normally wear or have at school, Officer Harvey concluded that a teacher had lost the items or that they had been stolen. Based on this conclusion, he confiscated the jewelry and told B.F. to go home. Officer Harvey contacted the Fort Bend County Sheriff's Department the next day and learned there had been a burglary at the LeFiles' home recently. Mrs. LeFiles identified the jewelry, and Officer Harvey then took B.F. into custody.

2000 WL 1641123 *1.

The respondent was adjudicated delinquent for the burglary in a trial in which much of the evidence consisted of the testimony of an accomplice witness. The Court of Appeals upheld the seizure of the jewelry under the plain view doctrine:

> The plain view exception to the warrant requirement applies when: (1) the officer is in a proper position to view the crime or is lawfully on the premises; and (2) the fact that the officer has discovered evidence of a crime is immediately apparent.… The second prong does not require the officer to "know" that certain items are evidence of a crime.…
>
> It is uncontroverted that Officer Harvey was lawfully on the premises of Garcia Middle School when he met B.F. in the hall. Therefore, our only inquiry is whether it was readily apparent to Officer Harvey that he had discovered evidence of a crime.
>
> There must be probable cause to believe the property is associated with some criminal activity.… However, an officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person.…
>
> Officer Harvey formed a reasonable belief that the jewelry was stolen. He had been the Fort Bend I.S.D. officer at Garcia Middle School for two and a half years. He testified he was familiar with the students, and with B.F. specifically. When he stopped B.F., B.F. was in the building after hours, which was a violation of school rules. Officer Harvey saw the jewelry in B.F.'s hand. He knew the jewelry was not the type that middle school students normally had. He also knew it was not the type of jewelry that boys B.F.'s age normally wear. B.F. was not wearing the jewelry; he was holding it. Officer Harvey did not find B.F.'s explanation about the source of the jewelry to be credible, and he knew several burglaries had occurred in the neighborhood around the school. Officer Harvey was entitled to rely on his training and experience as the officer assigned to the school to conclude the jewelry was either lost by or stolen from an adult, and was in all likelihood contraband. Because the items were in his plain view, we hold Officer Harvey did not violate the appellant's rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution or Article One, Section 9 of the Texas Constitution.

2000 WL 1641123 *3.

7. JJAEP and Administrative Searches

School districts are increasingly adopting policies that introduce administrative searches into the educational environment. Instead of targeting individual students, administrative searches are part of a general regulatory scheme designed to prevent crimes before they occur on campus.

Juvenile Justice Alternative Education Programs (JJAEP) are statutory creations developed to provide an education for students who are expelled from school or who were adjudicated by a court order to attend an alternative school. In this context, jurisdictions operate these

schools for youth who have been expelled from school for committing certain criminal offenses.

Student placement in the JJAEP can be either mandatory or discretionary. Mandatory placement is for students who are expelled from their regular schools for committing more serious offenses such as drugs, alcohol, assault, retaliation, and other criminal offenses. Additionally, students who engaged in conduct requiring expulsion, and who are found by a juvenile court to have engaged in delinquent conduct, are adjudicated and ordered, under Title 3 of the Family Code, to attend the JJAEP. Discretionary placement in the JJAEP is for students who are expelled by the school district for committing less serious offenses as described in Section 37.007 (b) or (f), or for engaging in serious or persistent misbehavior covered by Section 37.007(c). A school district could also use its discretion to send a student to the JJAEP if it determined that the student engaged in felonious conduct off campus. Section 37.006 (a) of the Texas Education Code requires a student to be removed from class and placed in an alternative education program if the student engaged in conduct punishable as a felony.

Title 37, Texas Administrative Code, Chapter 348 contains the administrative rules adopted by TJJD that govern the operation of JJAEPs. With respect to searches it provides:

(i) Searches.

(1) All students entering the JJAEP must be subjected to a pat-down search or a metal detector screening on a daily basis.

(2) Searches must be conducted in accordance with written policies and procedures. The policies must:

(A) address:

(i) when a search is appropriate and/or required;

(ii) who is authorized to conduct the search;

(iii) what types of searches are permissible;

(iv) how pat-down searches will be conducted, if applicable; and

(v) what to do when contraband is found;

(B) if pat-down searches are used, require that the staff member conducting a pat-down search is the same gender as the student unless an exception is approved and documented by the JJAEP administrator; and

(C) prohibit strip searches and anal and genital body cavity searches.

In the Matter of O.E., UNPUBLISHED, No. 03-02-00516-CV, 2003 WL 22669014, 2003 Tex.App.Lexis 9586, Juvenile Law Newsletter ¶ 03-4-19 (Tex.App.—Austin 2003, no pet.), involved such a search at the Austin Independent School District's Alternative Learning Center. Only students who had committed school-related disciplinary violations attended the center. The center's security policy required all students to pass through a metal detector, submit to a frisk search, empty their pockets onto a tray, and remove their shoes and place them on a table for inspection. When appellant complied with the search, the center's school resource officer saw a white tissue inside one of his shoes, removed the tissue, and found a marijuana cigarette. The trial court denied appellant's motion to suppress evidence.

In its opinion, the Austin Court of Appeals provided an overview of administrative searches, noting the diminished expectation of students' privacy in the school setting and the State's compelling interest in maintaining a safe learning environment. Significantly, the center was attended by students who had been removed from other campuses for disciplinary reasons, increasing the difficulty of maintaining order and providing a safe place to learn. "The search procedure was justified at its inception as a method of furthering the State's interest in maintaining a safe and disciplined learning environment in a setting at high risk for drugs and violence." 2003 Tex.App.Lexis 9586 *11.

The Court of Appeals next evaluated the level of intrusion on the individual student's privacy, noting that removing one's shoes for inspection has been deemed "minimally intrusive" and thus permissible. See *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 981-83 (8th Cir. 1996). Since the school district had developed a uniform procedure to search each student who entered the center, the administrative search was permissible under the Fourth Amendment.

In the Matter of P.P., III, UNPUBLISHED, No. 04-08-00634-CV, 2009 WL 331887, Juvenile Law Newsletter ¶ 09-2-02 (Tex.App.—San Antonio 2009, no pet.), presents an almost identical fact pattern involving routine administrative

searches of students entering an alternative high school. In *P.P.*, marihuana was discovered in appellant's front pocket during a pat down search. The San Antonio Court of Appeals adopted the "analysis and reasoning" applied in *O.E.*:

> As was the case in *In re O.E.*, the record in this case established that, prior to entering the alternative school, all students and parents are required to complete an orientation session which includes an overview of the school rules and policies and the students are required to sign a contract that includes an agreement to be searched each day before entering the school. P.P. clearly had notice of the routine search requirement, which reduced his expectation of privacy.

2009 WL 331887 *3.

The appellate court held that the administrative search conducted on P.P. and his fellow students was not overly invasive.

8. Random Drug Testing

Mandatory drug testing for all students would constitute a "search" within the meaning of the Fourth Amendment and, as such, would have to be predicated on the "reasonable cause" standard established in *T.L.O.* Courts have declined to permit mandatory drug testing of all students, viewing such an expansive drug testing policy as neither reasonably related to the maintenance of order and security in school nor as preserving the educational environment. See *Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985), *modified by* 663 F.Supp. 149 (W.D. Ark. 1985).

In *Vernonia School District v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995), the United States Supreme Court upheld a school district policy authorizing random urinalysis (UA) drug testing of student-athletes who participate in extracurricular sports. The Supreme Court devised a three-prong test to balance the students' privacy interests and the school's interest in protecting its students. *First*, did the UAs unreasonably infringe upon the student-athletes' expectations of privacy? The Court said that it did not because athletes voluntarily use locker rooms and showers and subject themselves to pre-season physicals, minimum grades, and other rules. *Second*, was the UA procedure used for the search reasonable? The Court said that it was because the privacy intrusion was no greater than using a public restroom. *Third*, did the school district have a legitimate governmental interest to protect? The Court said that the school district had a "compelling" interest in deterring drug use by the student-athletes who were shown to be actively involved in the school's drug culture. The drug testing policy was also justified because of the increased risk of injury associated with the drug use. Under these circumstances, the drug testing policy was deemed a reasonable, constitutional search.

In 2002, the United States Supreme Court addressed the issue of whether suspicionless, random drug testing can be extended to middle and high school students who participate in extracurricular activities. *Board of Education v. Earls*, 536 U.S. 822, 122 S.Ct. 2559 (2002). The students were required to take a drug test before participating in any extracurricular activity (not just athletics), during the activity, and at any time upon reasonable suspicion. The school district's policy did not identify a special need for the drug testing of the students, did not address a known drug problem as in the *Vernonia* case, and did not require a showing of individualized suspicion of drug use.

In a five-to-four decision, the Supreme Court held that the drug testing policy targeting students who participated in extracurricular activities was reasonable. Writing for the majority, Justice Thomas stated:

> [W]e find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding.… *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

536 U.S. at 837-38.

Of course, the United States Supreme Court was not unanimous on Justice Thomas' holding. In dissent, Justice Ruth Bader Ginsburg attacked the majority's holding:

> [This drug testing] policy was not shown to advance the "special needs" [existing] in the public school context [to maintain]…swift and informal disciplinary procedures…[and] order in the schools, *Vernonia*, 515 U.S. at 653.… What is left is the School District's

> undoubted purpose to heighten awareness of its abhorrence of, and strong stand against, drug abuse. But the desire to augment communication of this message does not trump the right of persons—even of children within the schoolhouse gate—to be "secure in their persons…against unreasonable searches and seizures."
>
> ...
>
> It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting "the schools' custodial and tutelary responsibility for children." *Vernonia*, 515 U.S. at 656. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

536 U.S. at 854-55.

If the emphasis, as Justice Thomas writes, is on "protecting the safety and health of its students," then it is not far-fetched to envision the Supreme Court upholding as "reasonable" a school district policy to randomly drug test every student enrolled in a district's school system. Where does the school district's duty to protect its students end? Only time will tell whether random drug testing of students will be expanded in schools across America. For now, policies that allow for random drug testing of students involved in extracurricular activities may be deemed reasonable.

9. Drug-Sniffing Dog Searches

In 2010, the Austin Court of Appeals decided a case involving the search of a student's backpack after a drug-sniffing dog alerted to it in a high school classroom. *In the Matter of D.H.*, 306 S.W.3d 955 (Tex.App.—Austin 2010, no pet.). Students were instructed to leave their property in the classroom and wait in the hallway while police searched each classroom by allowing the dog to sniff the items left in the room. A dog reacted to D.H.'s backpack, resulting in a search that produced a small bag of marijuana.

Noting that students have a lessened expectation of privacy in the school setting, the Court of Appeals first found that restricting D.H.'s ability to take her backpack into the hallway implicated a relatively minor privacy interest since the search of the closed backpack did not occur until after the dog had alerted to it. Secondly, the court reasoned that the invasion of privacy was not significant since the students themselves were not sniffed and were not subjected to embarrassment or scrutiny while the inspection was taking place. Finally, in weighing the invasion of D.H.'s privacy rights against the "governmental concern in preventing drug use by schoolchildren," the court ruled in favor of the State:

> D.H. brought her backpack into a public school, where she was required to temporarily surrender its possession and leave it in the classroom to be sniffed by a dog. Given D.H.'s reduced expectation of privacy, the low level of intrusion involved in the dog's inspection of the airspace surrounding her backpack, the limited information gathered, Reagan High's interest in combating drug abuse, and its tutelary and custodial responsibilities for its students, we hold that the detention of her backpack was reasonable and thus constitutionally permissible.

306 S.W.3d at 960.

C. First Offender Programs and Disposition Without Referral to Court

There are two types of programs operated by law enforcement agencies that permit "diversion" of cases from the juvenile justice system: (1) informal disposition programs and (2) first offender programs. In each, the juvenile is taken into custody but is not referred to the juvenile court. Instead, he or she is handled informally or placed in a program designed to correct the problem without referring the child to the juvenile court.

A law enforcement agency is prohibited from sending information about an arrest to the statewide Juvenile Justice Information System (JJIS) while a child is participating in an informal disposition or first offender program. The implication of these programs for juvenile records is discussed in Chapter 15.

Juvenile Board Guidelines. Section 52.032 was originally enacted in 1999 and amended in 2013 to mandate

that each juvenile board promulgate guidelines for such programs:

(a) The juvenile board of each county, in cooperation with each law enforcement agency in the county, shall adopt guidelines for the disposition of a child under Section 52.03 or 52.031. The guidelines adopted under this section shall not be considered mandatory.

(b) The guidelines adopted under Subsection (a) may not allow for the case of a child to be disposed of under Section 52.03 or 52.031 if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision and cause to believe that the child may be the victim of conduct that constitutes an offense under Section 20A.02, Penal Code.

Subsection (b), added in 2013, prohibits a case involving a child believed to be a victim of human trafficking from being disposed of under informal guidelines without referral to juvenile court in order to ensure appropriate intervention measures. Under juvenile board guidelines, a law enforcement agency may operate an informal disposition program, a first offender program, or both.

1. Disposition Without Referral to Court

Disposition without a referral to court is authorized by Section 52.03, Family Code, first enacted in 1973. Prior to 2013, the law provided:

(a) A law-enforcement officer authorized by this title to take a child into custody may dispose of the case of a child taken into custody without referral to juvenile court, if:

(1) guidelines for such disposition have been adopted by the juvenile board of the county in which the disposition is made as required by Section 52.032;

(2) the disposition is authorized by the guidelines; and

(3) the officer makes a written report of the officer's disposition to the law-enforcement agency, identifying the child and specifying the grounds for believing that the taking into custody was authorized.

(b) No disposition authorized by this section may involve:

(1) keeping the child in law-enforcement custody; or

(2) requiring periodic reporting of the child to a law-enforcement officer, law-enforcement agency, or other agency.

(c) A disposition authorized by this section may involve:

(1) referral of the child to an agency other than the juvenile court;

(2) a brief conference with the child and his parent, guardian, or custodian; or

(3) referral of the child and the child's parent, guardian, or custodian for services under Section 264.302 [Family Code].

(d) Statistics indicating the number and kind of dispositions made by a law-enforcement agency under the authority of this section shall be reported at least annually to the office or official designated by the juvenile board, as ordered by the board.

In contrast to a first offender program, dispositions without a referral to court are available for any offense within the scope of approved guidelines. However the disposition without a referral to court statute contemplates that the disposition will be one that terminates quickly, at least in so far as law enforcement involvement is concerned. A typical disposition under this section would be a conference with parents or referral of the child to a social agency. The statute prohibits the use of detention as part of the disposition. It also prohibits requiring periodic reporting by the child to a law enforcement agency, law enforcement officer, or another agency. The program is created and operated by the law enforcement agency, but it must operate under guidelines approved by the juvenile board. Those guidelines may not allow for disposition without referral to juvenile court if there is cause to believe the child may be the victim of human trafficking. See Section 52.032(b), Family Code.

In 2013, Section 52.03(a) was amended to read (additions underlined):

(a) A law-enforcement officer authorized by this title to take a child into custody may dispose of the case of a child taken into custody <u>or accused of a Class C misdemeanor, other than a traffic offense,</u> without referral to juvenile court <u>or charging the a child in a court of competent criminal jurisdiction</u>, if...

Analyses of the bill indicate this change was designed to allow for the inclusion of Class C misdemeanors (other than traffic offenses) as offenses a law enforcement officer may dispose of without further action. The stated reason behind this is that it was unfair that law enforcement could not informally dispose of a juvenile charged with a Class C misdemeanor as a criminal offense but could do so if the same offense was charged as CINS. The issue with this argument is that a Class C misdemeanor does not become CINS until it is transferred by the criminal court to the juvenile court under Section 51.08(b); thus, law enforcement was treating all Class C misdemeanors the same, whether they were ultimately handled as CINS in juvenile court or not.

It also bears noting that since 1995, Section 52.01, Family Code, has allowed a law enforcement officer to issue a warning notice for Class C misdemeanors in lieu of taking a child into custody as long as the law enforcement agency issued guidelines for doing so and the juvenile board approved those guidelines.

2. First Offender Programs

In 1995, the legislature enacted Section 52.031, Family Code, which authorizes law enforcement first offender programs. The first offender program is very similar to informal disposition programs. However, there are eligibility requirements that apply only to first offender programs. The following are not eligible: (1) children taken into custody for a third degree felony or higher; (2) children taken into custody for a misdemeanor or state jail felony involving violence or weapons; and (3) children taken into custody for delinquent conduct or CINS who are believed to be victims of human trafficking. A previous adjudication (not just arrest or referral) for delinquent conduct also disqualifies a child who would otherwise be eligible for a first offender program. In 2013, Section 52.031 was amended in two different bills to expand the first offender program to also include Class C misdemeanors (other than traffic offenses).

Viewed conversely, a first offender program is for a child without a prior delinquency adjudication taken into custody for conduct indicating a need for supervision (CINS), a Class C misdemeanor (other than a traffic offense), or delinquent conduct not more serious than a state jail felony that does not involve violence or a weapon.

The legislature contemplated that first offender programs may involve continuing contact between the law enforcement agency and the child because it authorized periodic reporting of the child to the law enforcement agency, which the informal disposition program prohibits. The first offender program statute also spells out in more detail than the informal disposition statute the operation of the program, including notice to parents and specific activities allowed as part of the program.

If a law enforcement officer chooses to refer an eligible child to the first offender program, the office would not take the child into custody or issue a citation; instead the officer would report the referral, in writing, to the agency responsible for the program, identifying the child and specifying the grounds for the referral (i.e. the information about the offense). A child referred to the program may not be detained in law enforcement custody.

Prior to beginning the program, the law enforcement agency must give the parent or guardian notice that the child has been referred to the program, a brief description of the program, and information about the grounds for the referral (i.e. the conduct on which referral is based). The parent must also be given notice that the child's failure to complete the program will result in the case being referred to juvenile court (for delinquent conduct or CINS) or to a court of competent criminal jurisdiction (for a Class C misdemeanor). Participation is voluntary and requires the consent of the child and the parent or guardian.

The first offender program may include voluntary restitution to the victim (by the child or parent or guardian); voluntary community service restitution (by the juvenile); educational, vocational training, counseling, or other rehabilitative services; and periodic reporting to the law enforcement officer or agency operating the program.

If a child successfully completes the first offender program, the case is closed and conduct that resulted in the referral to the program cannot be referred to juvenile court (if delinquent conduct or CINS) or to justice or municipal court (if a Class C misdemeanor). If a child successfully completes the first offender program, the child's case is closed and it cannot be referred to court. The only exception is if the juvenile is taken into custody for different conduct during the 90 days after successful completion of the program; in such instances, the case must be referred to juvenile court or to a court of competent criminal jurisdiction, depending on if it was delinquent conduct or CINS or was a Class C misdemeanor. The case will also be referred if the child fails to complete the program, such as for failing to comply with the requirements, or if the child or the child's parent or guardian terminates the program early. A statement made by a the juvenile to a person

giving advice or supervision or participating in the first offender program may not be used against the juvenile in any juvenile or criminal proceeding.

Every December, the law enforcement agency must report to the juvenile board the last known address, including census tract, of each child participating in the first offender program as well as the gender and ethnicity of the child and the offense for which the child was referred to the program.

D. Authorized Permanent Dispositions, Juvenile Processing Offices, Places of Nonsecure Custody, and Juvenile Curfew Processing Offices

1. Authorized Permanent Dispositions

When a child is taken into custody, Section 52.02 restricts what law enforcement may do with that child:

> (a) [A] person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:
>
> (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
>
> (2) bring the child before the office or official designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;
>
> (3) bring the child to a detention facility designated by the juvenile board;
>
> (4) bring the child to a secure detention facility as provided by Section 51.12(j);
>
> (5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment;
>
> (6) dispose of the case under Section 52.03; or
>
> (7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.

Police have seven options for dispositions. The juvenile processing office option is a temporary disposition for the processing of the case and must later be followed by one of the seven permanent dispositions. A child should not be transported to a juvenile processing office *after* one of the seven permanent dispositions has been invoked.

Parent or Other Adult. Section 52.02(a)(1) authorizes the police to release the child to a responsible adult. This is a release without bond—personal, cash, or surety. The release is based totally on the judgment of the police that the adult's promise to bring the child to court is a credible one. This option contemplates that the police will refer the child to the juvenile court (or to a first offender program as a lesser step) and that the adult will be required to present the child to the appropriate official upon request.

Office or Official. Section 52.02(a)(2) gives police the option to bring the child to the "office or official designated by the juvenile board." This permits the juvenile board in each county to create its own intake system. If the county has a juvenile detention facility, that will undoubtedly be designated as the "office" to which the police must take the child. However, if the juvenile detention facility is out of county or within the county but some distance from the law enforcement agency, the "office or official" may be one that is more conveniently located.

Juvenile Detention Facility. Section 52.02(a)(3) authorizes the police to take the child to the designated juvenile detention facility. See Chapter 6.

Adult Detention Facility. Section 52.02(a)(4) authorizes the detention of a child in adult secure detention facilities until the initial detention hearing but only under very restricted circumstances. See Chapter 6.

Medical Facility. Section 52.02(a)(5) authorizes police to take the child to a medical facility for treatment of a "serious physical condition or illness." The medical option does not include facilities for individuals with a mental illness or intellectual disability. Decisions as to when a juvenile may be sent to such a facility are made under Chapter 55 of Title 3. See Chapter 14.

First Offender Program or Disposition Without Referral to Court. Section 52.02(a)(6) authorizes police to dispose of the case with a disposition without a referral to court. In 1995, the legislature enacted Section 52.031 to authorize the creation of law enforcement first offender

programs, which are similar to dispositions without a referral to court authorized by Section 52.03. The authority in Subsection (a)(6) must be read to include first offender programs as well as dispositions without a referral to court. Otherwise, the legislation authorizing first offender programs is of little use because law enforcement would be unable to release arrested children into those programs.

School Campus. Section 52.02(a)(7), added in 2007, authorizes the transportation of a child to the school campus to which the child is assigned, if school is in session, so long as the school principal, a designee or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day. Section 52.02(a) specifies a person taking a child into custody and thus seems to imply that a juvenile probation officer has this authority. However, this is not the case when the statute is read in conjunction with newly amended Sections 52.01(e) and 52.026(a), which place the duty to return a child to school on the law enforcement officer who has taken the child into custody. See also Education Code Section 25.091(b-1).

2. Authorized Disposition in Driving While Intoxicated or Under the Influence Cases

In 1997, the legislature authorized a special disposition option for a juvenile taken into custody because the officer had reasonable grounds to believe the child was operating a motor vehicle while having any detectable amount of alcohol in his or her system. This could be DWI or the offense of driving under the influence of alcohol by a minor (DUIM). See Chapter 23 for a discussion of that offense.

The officer is authorized to take the child to an intoxilyzer or videotaping area in an adult detention facility for immediate processing. It would not be feasible to have separate intoxilyzer and videotaping spaces only for juveniles; since the detention involved in such processing is very short, the legislature, by adding Section 52.02(c), authorized using the adult facilities for these purposes. Once the processing has been completed, the juvenile must be handled in compliance with the requirements of Section 52.02(a), just as any other juvenile.

3. Juvenile Processing Office

The juvenile processing office was created in 1991 in response to *Comer v. State*, 776 S.W.2d 191 (Tex.Crim.App. 1989). Section 52.02(a) authorizes the police to take a child in custody to "a juvenile processing office designated under Section 52.025" of the Family Code. That section permits the juvenile court to designate juvenile processing offices in locations that include law enforcement facilities. The offices are for the initial processing of cases.

It is a temporary location that allows an officer to do certain, specific things. The options in Section 52.02(a) are permanent options, while the juvenile processing office is a temporary option that an officer may use prior to implementing the options of Section 52.02(a). If the officer decides to take the child to a juvenile processing office, he must eventually use one of the options in Section 52.02(a). One office cannot be both a juvenile processing office and one of options listed in Section 52.02(a). *Le*, 993 S.W.2d at 656. A child may be held in a juvenile processing office for a maximum period of six hours. See Chapter 16.

4. Place of Nonsecure Custody

In 1995, the legislature enacted Section 52.027, Family Code, authorizing the designation of places of "nonsecure custody." Unlike juvenile processing offices, which are designated by juvenile boards, a place of nonsecure custody is designated by the "head of the law enforcement agency" for children taken into custody by that agency. In 2001, that section was repealed and moved to the Code of Criminal Procedure, where it became Article 45.058.

Article 45.058(c) reads:

> A place of nonsecure custody for children must be an unlocked, multipurpose area. A lobby, office, or interrogation room is suitable if the area is not designated, set aside, or used as a secure detention area and is not part of a secure detention area. A place of nonsecure custody may be a juvenile processing office designated under Section 52.025, Family Code, if the area is not locked when it is used as a place of nonsecure custody.

What classes of children are places of nonsecure custody intended to serve? They are intended for two categories of children: (1) children in custody for traffic offenses; and (2) children in custody for fineable only offenses. Article 45.058(a). Children in those categories may be taken *only* to a place of nonsecure custody unless they are released to adults or taken before a municipal or justice court. Article 45.058(a).

Article 45.058(d) specifies the procedures to be followed in places of nonsecure custody:

> The following procedures shall be followed in a place of nonsecure custody for children:

(1) a child may not be secured physically to a cuffing rail, chair, desk, or other stationary object;

(2) the child may be held in the nonsecure facility only long enough to accomplish the purpose of identification, investigation, processing, release to parents, or the arranging of transportation to the appropriate juvenile court, juvenile detention facility, secure detention facility, justice court, or municipal court;

(3) residential use of the area is prohibited; and

(4) the child shall be under continuous visual supervision by a law enforcement officer or facility staff person during the time the child is in nonsecure custody.

Article 45.058(e) prohibits holding a child in a place of nonsecure custody for longer than six hours.

Article 45.058(g) allows a law enforcement officer to issue a field release citation instead of taking a child into custody for a traffic offense or fineable-only offense. The exceptions are public intoxication (Section 49.02, Penal Code) and school offenses.

Article 45.058(g-1) provides that a field citation may be issued for a public intoxication charge only if the officer releases the child to the child's parent, guardian, custodian, or other responsible adult.

Section 37.143, Education Code, prohibits the issuance of a citation for a child accused of a school offense, defined as a Class C misdemeanor other than a traffic offense that is committed on school property by a child enrolled in public school. Such conduct is to be addressed through graduated sanctions, if the school district has developed them, or through filing a complaint with the court. Alternatively, the child may be taken into custody as allowed by Section 52.01, Family Code.

However, Article 45.058(j), Code of Criminal Procedure, prohibits filing a complaint against a child younger than 12 for a Class C misdemeanor committed on school property or in a vehicle owned or operated by a school district. Article 45.058(i) provides that if a law enforcement officer files a complaint accusing a child 12 years of age or older of committing a school offense, the office must also give the court the offense report, a statement by a witness to the conduct, and a statement by a victim, if any. If the officer fails to do so, the state's attorney may not proceed in a trial.

Articles 45.058(i) and (j) both reference issuing citations for school offenses. This directly conflicts with the prohibition on issuing citations for school offense found in Section 37.143, Education Code. Section 311.025, Government Code, provides that when statutes are irreconcilable, the statute latest in date of enactment prevails. The date of enactment is the date on which the last legislative vote on the bill enacting the statute is taken. Because the bill enacting the prohibition on citations for all school offenses was the latest in enactment, it should prevail over the provisions in Article 45.058 that allow for the issuance of citations in certain instances.

5. Juvenile Curfew Processing Offices

In 1995, the legislature enacted Section 52.028 to provide for the handling of children taken into custody for violating juvenile curfew ordinances or orders. In 2001, the legislature repealed that provision and moved it to Article 45.059, Code of Criminal Procedure. The same spaces that may be designated as places of nonsecure custody may be designated as juvenile curfew processing offices. The same restrictions on activities apply to both kinds of processing offices. There is a maximum period of six hours applicable to each type of office.

Juvenile curfew processing offices are treated separately from places of nonsecure custody because of their origin in the legislative process. Originally, the juvenile curfew processing office provision was part of a bill dealing comprehensively with juvenile curfews, including authorizing counties and general law municipalities to enact juvenile curfew orders and ordinances. Since at that time it was not known whether the provision in a separate bill on places of nonsecure custody would pass the legislature, the curfew bill contained the provision creating places for processing of children taken into custody for curfew violations. In the middle of the session, a decision was made to place all of the curfew provisions in the principal juvenile bill. After the merger, there was no longer a need for treating juvenile curfew processing offices differently from places of nonsecure confinement. However, for political reasons the juvenile curfew processing provision was kept.

For all practical purposes, the two provisions are the same. It would be wise for the head of a law enforcement agency to designate all places of nonsecure custody to also be juvenile curfew processing offices so there will be no confusion as to where a child may properly be taken. In some communities with daytime curfew ordinances or orders, it may make sense to also designate other places, perhaps on school property, exclusively as juvenile curfew processing offices.

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This chapter deals with those aspects of juvenile proceedings that are interstate in character. It is primarily an explanation of the Interstate Compact for Juveniles (ICJ or Compact) contained in Section 60.010 of the Family Code and how this law works in relation to other Texas laws.

A. Interstate Compact for Juveniles

History. The Interstate Compact for Juveniles replaces the Interstate Compact *on* Juveniles, which was created in 1955 and signed into law in Texas in 1965. However, the title to Chapter 60, Family Code, was not changed and still reads "Uniform Interstate Compact on Juveniles." When the Compact was created in 1955, only a few hundred juveniles were being apprehended or supervised in states other than the state of residence or where the case was adjudicated. Today, that number exceeds 20,000 juveniles annually nationwide.

The effort to rewrite the original Interstate Compact on Juveniles began in 1999 with a survey conducted by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and the National Institute of Corrections (NIC), and published in June 2000. The survey determined that the language of the Compact was antiquated, its rules and procedures were not widely followed or understood, and its administrative structure was inadequate. In December 2000, OJJDP asked The Council of State Governments (CSG), the organization responsible for the drafting and adoption of the original compact, to recommend a detailed course of action regarding the juvenile Compact. CSG convened an advisory group consisting of 24 policy experts representing a broad and diverse group of stakeholder organizations with an interest in juvenile supervision issues. From the two advisory group meetings, it was determined that the outdated Interstate Compact on Juveniles should be rewritten. A drafting committee consisting of 15 other policy experts was formed. The committee drafted a proposed new Compact that largely tracked the language of the new adult interstate Compact, Interstate Compact for Adult Offender Supervision (ICAOS), which was ratified in 2002. The new Compact language was subject to critique and comment from a mailing to 200 individuals, agencies, and associations. The new ICJ significantly updates the 50-year-old mechanism for tracking and supervising juveniles that move across state borders. Providing enhanced accountability, enforcement, visibility and communication, the revised Compact updates a crucial yet outdated tool for ensuring public safety and preserving child welfare.

The primary changes to the 1955 Interstate Compact on Juveniles include:

(1) requiring that all state legislation adopting the ICJ contain substantially the same language in their compact legislation. No amendment shall become effective and binding upon the Interstate Commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states;

(2) establishing an independent compact operating authority to administer ongoing compact activity, including a provision for staff support;

(3) providing for gubernatorial appointments of representatives for all member states on a national governing commission. The commission meets annually to elect the Compact operating authority members and to attend to general business and rulemaking procedures;

(4) rulemaking authority and provisions for sanctions to support essential compact operations;

(5) mandatory funding mechanisms sufficient to support essential compact operations (e.g., staffing, data collection, training and education); and

(6) compelling the collection of standardized information.

The Interstate Compact for Juveniles (ICJ) became active on August 26, 2008, when Illinois became the 35th state to ratify the Compact. In Texas, the Compact legislation, House Bill 706, was passed by the 79th Legislature and signed by the Governor on June 18, 2005. Article IX of the Texas statute provides that the initial effective date of the Compact will be the later of July 1, 2004, or upon enactment into law by the 35th jurisdiction. At the time of this writing, there are 50 states, the Virgin Islands, and the District of Columbia that are signatories to the ICJ.

The Texas legislation contained amendments that do not appear in the CSG ICJ model language. The bill analysis for this legislation advises that Article I entitled "Purpose" was a departure from the model language for the "purpose of restoring certain procedural protections that are present in the current compact and better delineating the rule-making authority that is delegated to the Interstate Commission for Juveniles." However, the amendments to Article I omitted the mandate to establish procedures to resolve pending charges (detainers) against juvenile offenders prior to transfer or release to the community as contained in Article I (I) in the model language.

The model language consists of 13 articles. The Texas legislation in Section 60.010 contains 12 articles. The missing article from the model language is Article IX, titled "The State Council." In addition, all references to the State Council in other articles are deleted in the Texas version. The State Council article requires each state to establish a state-level council to advise the state's participation in compact activities (one representative from the legislative, judicial, and executive branches of government, a victims' group representative, the Compact administrator, and deputy administrator.) The bill analysis for this legislation advises that this requirement was deleted in the interest of cutting costs for non-essential activities.

For a better explanation of the various problems and common practices associated with amending the model language of a compact, see Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, Richard L. Master, *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide* (2006).

Framework. The processes and procedures for the Compact are set out in rule rather than in statute. With this broad framework in place, the drafters of the ICJ expect that this compact will change and adapt with the times.

Each Article of the Texas version of the ICJ addresses a different area, as follows: (1) Article I — the purpose of serving juveniles; (2) Article II—definitions; (3) Article III—establishment of the Interstate Commission for Juveniles; (4) Article IV—powers and duties of the Commission; (5) Article V—organization and operation of the Commission; (6) Article VI—rulemaking functions of the Commission; (7) Article VII—oversight, enforcement, and dispute resolution; (8) Article VIII—financing of the Commission; (9) Article IX—the compacting states, effective date, and amendments; (10) Article X—withdrawal, default, termination, and judicial enforcement; (11) Article XI—severability and construction; and (12) Article XII—binding effect of the Compact and other laws. Unlike the 1955 compact, the ICJ does not prescribe all of the methods by which juveniles are supervised or returned.

Purpose. The Interstate Compact for Juveniles deals primarily with four distinct situations in protecting juveniles and the public, including victims of juvenile offenders. First, cooperative supervision of juveniles who are on probation or parole. Second, the return of juveniles on probation or parole who have absconded to another state or who have escaped to another state from a juvenile correctional facility. Third, return of an accused delinquent to the state where the alleged delinquent act occurred. Fourth, return from another state of an accused status offender or non-offender runaway to the state of residency. In each of these four situations, Texas may be the jurisdiction seeking custody of the juvenile or the juvenile may be located in Texas and another state may be seeking custody. Other situations that are handled through the ICJ include cooperative institutionalization in public facilities for delinquent juveniles who require special services and immediate notice to jurisdictions where defined offenders are authorized to travel or relocate across state lines.

Section 60.010, Article I also requires the compacting states to collaborate to: (1) equitably allocate the costs, benefits, and obligations of the states; (2) establish a uniform data collection system, to monitor compliance with the rules and initiate interventions to address and correct noncompliance; (3) coordinate training and education; and (4) provide an annual report about compact activities to each state's leadership. The purpose is to require better coordination between the compacts where concurrent or overlapping supervision issues arise, such as with the Interstate Compact on the Placement of Children and the Interstate Compact for Adult Supervision. The provisions of the ICJ are to be reasonably and liberally construed in order to accomplish the purposes and policies of the Compact.

Governor Appointments. Section 60.005 empowers the Governor of Texas to appoint an officer as the Compact administrator. Historically, the Executive Director of the state's juvenile corrections oversight agency, the Texas Juvenile Justice Department (TJJD), has been appointed as the Texas compact administrator. The Governor, in consultation with the agency Executive Director, also appoints the Texas commissioner and deputy compact administrator.

Role of the ICJ Office. The deputy compact administrator is responsible for the daily operations of the Office of the Texas Interstate Compact for Juveniles. The primary responsibilities of this office are varied and include: (1) ensuring the statutory mandates of the ICJ are carried out in Texas; (2) representing the state in the Interstate Commission for Juveniles; (3) developing policies and procedures in compliance with statute: (4) establishing a liaison to other ICJ Offices and all local supervising jurisdictions; (5) providing education and training to juvenile justice professionals in Texas; (6) receiving and maintaining records of actions under the ICJ; (7) authorizing or rejecting cases for cooperative supervision for parole or probation; and (8) ensuring all runaways, absconders, escapees, or juveniles who are accused as delinquent are returned to the home or demanding state in accordance with the ICJ. All the paperwork needed to effectuate sending, retaking, or receiving a juvenile probationer or parolee under the Compact flows through the respective ICJ offices. The Office of the Texas Interstate Compact for Juveniles at TJJD should be contacted to obtain the necessary forms and filing procedures.

Section 60.010, Article I allows the compacting states to make contracts for the cooperative institutionalization in public facilities of delinquent juveniles needing special services. This provision of the ICJ was brought forward from the previous compact. It is rarely used, as many states do not have the capacity available to consider this type of placement. Family Code Section 162.102, Article VI, contained in Subchapter B of the Interstate Compact on the Placement of Children (ICPC), deals with the interstate placement of delinquent juveniles in private or public institutions. The ICPC is administered through the Department of Family Protective Services (DFPS).

B. Interstate Commission for Juveniles

Section 60.010, Article III creates the Interstate Commission for Juveniles. The Interstate Commission is a corporate body and joint agency of the compacting states. It is comprised of commissioners from each compacting state who are appointed by their respective appointing authorities in accordance with the rules and requirements of each compacting state. Each state has an appointed commissioner who is entitled to one vote at any meeting of the Interstate Commission. Members are to vote in person and may not delegate a vote to another compacting state. In addition to the commissioners, the Interstate Commission includes individuals who are not commissioners but who are members of interested organizations. These non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general, Interstate Compact for the Placement of Children, Interstate Compact for Adult Offender Supervision, juvenile justice and juvenile corrections officials, and crime victims. These non-commissioner members are ex-officio (non-voting) members.

Section 60.010, Article IV specifies the Interstate Commission's powers and duties. The Commission is authorized to: provide for dispute resolution among the compacting states; promulgate rules to effect the purposes and obligations of the Compact, which have the force and effect of statutory law; oversee, supervise, and coordinate the interstate movement of juveniles, subject to the terms of the Compact; and enforce compliance with the Compact provisions and the rules promulgated by the Interstate Commission.

Section 60.010, Article V describes the requirements of the organization and operation of the Interstate Commission.

Section 60.010, Article VIII authorizes the Interstate Commission to levy and collect an annual assessment from each state to cover the annual approved budget. The annual assessment amount is allocated based on a formula determined by the Interstate Commission that considers the compacting state's population and the volume of interstate movement of juveniles in each compacting state. The formula is based upon the (population of the state / the population of the United States) plus (the number of juveniles sent from and received by a state / the total number of juvenile offenders sent from and received by all states) divided by two. (Interstate Commission Rule 2-101). The Interstate Commission is responsible for annually reporting ICJ activity and any recommendations that have been adopted to the executive, judicial, and legislative branches, as well as the juvenile and criminal justice administrators of the compacting states.

Rules. Section 60.010, Article VI empowers the Interstate Commission to promulgate and publish rules to

effectively and efficiently achieve the purposes of the Compact. The Interstate Commission is to ensure the rulemaking substantially conforms to the principles of the "Model State Administrative Procedures Act," 1981 Act, Uniform Laws Annotated, Vol. 15, p.1 (2000), or such other administrative procedures act as the Interstate Commission deems appropriate, consistent with due process requirements under the United States Constitution as interpreted by the United States Supreme Court. The proposed rules are to be published with the reason(s) for the proposed rules. The Interstate Commission is to allow and invite comments, which are to be added to the record and made publicly available. A public informal hearing is held if petitioned by ten or more persons. The final rules are promulgated with the effective date. There is also provision for any person to file a petition for judicial review of a rule in either the United States District Court for the District of Columbia or in the federal district court where the Interstate Commission's national office is located. If the court finds that the Interstate Commission's action is not supported by substantial evidence in the rulemaking record, the court shall hold the rule unlawful and set it aside. In addition, if a majority of the legislatures of the compacting states reject a rule, those states may, by enactment of a statute or resolution in the same manner used to adopt the Compact, cause that rule to have no further force and effect in any compacting state. Further, the Interstate Commission has an emergency rule provision wherein when it is determined that an emergency exists, an emergency rule may be promulgated; such rule becomes effective immediately upon adoption, with the usual rulemaking procedures applied retroactively as soon as practicable but no later than 90 days after the effective date of the emergency rule. These rules have the force and effect of statutory law. The rules are published on the Interstate Commission for Juveniles website.

Enforcement. Section 60.010, Article VII authorizes the Interstate Commission to provide oversight, enforcement, and dispute resolution in the administration and operations of the interstate movement of juveniles subject to the ICJ. The courts and executive agencies are required to enforce the ICJ and to take actions necessary to effectuate its purpose and intent. All courts are required to take judicial notice of the Compact and the rules. The Interstate Commission has standing to intervene in any proceeding that might affect its powers or responsibilities and is entitled to receive service of process of the proceeding. The Interstate Commission is authorized to enforce the provisions and rules of the Compact using any or all of the means set forth in Article X.

When State Law Conflicts with Compact Law. Section 60.010, Article XII permits the enforcement of other laws that are not inconsistent with the Compact. These provisions take precedence over conflicting laws except for state constitutional provisions or the provisions of other compacts to the extent of the conflict. As stated in the following excerpt from "The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide":

> Once entered, the terms of the compact and any rules and regulations authorized by the compact can, to the extent provided in the agreement, supersede any substantive state laws that may be in conflict, including even state constitutional provisions. Under the Compact Clause, the federal questions are the execution, validity, and meaning of federally approved state compacts. A compact controls over a state's application of its own law through the Supremacy Clause and the Contracts Clause of the Constitution. As observed in [*West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951)]:*
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> It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairments, for otherwise the constitutional guaranty could not properly be enforced.
>
> The contractual nature of the agreement and its federal standing, where applicable, trumps individual state statutory schemes because, through the compact, the member states cede individual state authority in favor of a multilateral resolution to a dispute or in favor of multilateral regulation of an interstate matter. The member states cannot take unilateral steps, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. The standing of compacts, as contracts and instruments of national law applicable to the member states, generally nullifies any state action inconsistent with the terms and conditions of the agreement.

C. Cooperative Supervision

1. Who Is Eligible for Cooperative Supervision

Section 60.010, Article I governs cooperative supervision of juveniles on probation or parole. While Article II of the Compact and Interstate Commission Rule 1-101 provide definitions for the various legal conditions a juvenile may have and corresponding eligibility for ICJ services, ultimately, a juvenile must be under juvenile court jurisdiction to be eligible for cooperative supervision.

Each state that is a party to the ICJ must process all referrals involving juveniles for whom services have been requested, provided those juveniles are under juvenile jurisdiction in the sending state. No state shall permit the transfer of supervision of a juvenile eligible for transfer except as provided by the ICJ and the Compact rules. Interstate Commission Rule 4-101.

Further terms of eligibility for transfer include: (1) a plan that includes a juvenile relocating to another state for more than 90 consecutive days in any 12 month period; (2) a juvenile who has more than 90 days or an indefinite period of supervision remaining at the time the sending state submits the transfer request; and (3) the juvenile will reside with a parent, legal guardian, relative, non-relative, or independently, excluding residential facilities, or is a full time student at a secondary school or accredited university, college, or licensed specialized training program.

All cases transferred to another state must be transferred pursuant to the ICJ except cases involving concurrent jurisdiction under the Interstate Compact on Placement of Children (ICPC). A juvenile who is not eligible for transfer under the ICJ is not subject to these rules.

A request for transfer of supervision for the sole purpose of collecting restitution or court fines is not permitted.

2. Sending and Receiving States

Interstate Commission Rule 1-101 provides the definitions "sending state" to mean the state where the juvenile is on probation or parole and "receiving state" to mean the state where the juvenile proposes to move.

Sending and Receiving Referrals. All communication between states, whether verbal or written, on ICJ issues are transmitted between the respective ICJ Offices. Interstate Commission Rule 2-104.

The sending state must provide the receiving state with the specific referral documents when transferring probation and parole cases prior to juvenile's anticipated arrival date, including proper ICJ forms, court orders, probation/parole rules, petitions, arrest reports, legal and social history, "and any other pertinent information deemed to be of benefit to the receiving state." In parole cases, the information must be sent at least 45 days in advance; probation cases do not have a specific timeframe. If the receiving state requires additional information, the sending state is to respond to the request in a timely manner. Interstate Commission Rule 4-102.

The receiving state's ICJ must forward the home evaluation along with the final approval or disapproval of the request for supervision within forty-five calendar days. Interstate Commission Rule 4-102.

Notification to Juvenile Courts Before Release. Human Resources Code, Section 245.054 requires that TJJD provide the adjudicating court at least 30 days' notice before the juvenile's release as well as providing a copy of the juvenile's reentry and reintegration plan. The notice is required to both the committing court and the juvenile court in the other state that has jurisdiction over the area in which the juvenile is proposing to move.

Expedited Requests. When it appears necessary to request an expedited transfer of supervision for a parole case, the sending state's ICJ Office must verify that a justification for an expedited transfer actually exists. If so, a travel permit (ICJ Form VII) may be issued until the referral information can be provided to the receiving state's ICJ Office along with a written explanation as to why ICJ procedures for submitting the referral could not be followed. Interstate Commission Rule 4-102.

The sending state's ICJ office shall provide the complete ICJ referral to the receiving state's ICJ office within 10 business days of the travel permit being issued. Interstate Commission Rule 4-102.

Sex Offenders. The sending state is not to allow a juvenile sex offender to transfer to the receiving state unless: (1) the sending state's request for transfer of supervision has been approved or reporting instructions have been issued by the receiving state, unless expedited transfer of supervision is necessary; (2) the youth is in the receiving state with a legal guardian; and (3) no legal guardian remains in the sending state. Interstate Commission Rule 4-103.

The sending state's ICJ Office is responsible for verifying that a justification for the request is valid. Upon notification of a request for expedited transfer, a travel permit (ICJ Form VII) shall be issued until the referral information can be provided to the receiving state's ICJ Office within 10 business days of the travel permit being issued. The travel permit rule states that the permit may not exceed 90 calendar days. Interstate Commission Rules 4-103 and 8-101.

Supervision cannot be provided without the written approval from the receiving state's ICJ Office. The sending state is to maintain responsibility until supervision is accepted by the receiving state.

When transferring a juvenile sex offender, documentation should be provided as outlined above for all requests for supervision as well as the safety plan, specific assessments, legal and social history information pertaining to the criminal behavior, victim information (e.g., sex, age, relationship to the offender), the sending state's current or recommended supervision and treatment plan, and all other pertinent materials. Parole conditions are to be forwarded to the receiving state once the juvenile is released from an institution.

Within five business days of receipt of the travel permit, the receiving state shall advise the sending state of applicable registration requirements and/or reporting instructions, if any. The sending state shall be responsible for communicating the registration requirements and/or reporting instructions to the juvenile and his/her family in a timely manner.

Determinate Sentence Probation and ICJ Transfers. The State of Texas is unique in its use of the determinate sentencing option for adjudicated juvenile delinquents. The Texas ICJ Office has typically served only a limited number of determinate sentenced offender cases, and those youth were committed to TJJD. In recent years, however, there has been a growing number of juvenile probationers with determinate sentences allowed to leave their Texas county residences and move across state lines prior to acceptance from the receiving state. ICJ provisions allow and encourage home evaluation and supervision requests prior to placement of the juvenile as an important part of the transfer process of the case to another state.

Compact administrators in Texas have had to clarify, as a result of 2011 legislative changes that extended the jurisdictional age for determinate sentence probation, that the sending county in Texas remains responsible for the supervision of juvenile probation until the receiving state agrees to accept supervision.

In 2011, the legislature amended Section 54.05(a) to extend the juvenile court's jurisdiction to age 19 for juveniles adjudicated and placed on determinate sentence probation. In a conforming provision, Section 54.051 was amended to discharge determinate sentence probation at the age of 19 unless, prior to the expiration of disposition under Section 54.05, the prosecutor elects to file a motion to transfer the case to adult criminal court. If the prosecutor fails to, or exercises the option not to, initiate a timely motion under Section 54.051, the juvenile is discharged from the determinate sentence probation. If the motion is filed timely, the district court may place the person on adult supervision under Chapter 42A, Code of Criminal Procedure. This action of the juvenile court results in a transfer and relinquishment of its jurisdiction at the time of completion of those court proceedings.

Victim Notification. Victim notification is the responsibility of the sending state in accordance with the laws and policies of that state.

A supplemental victim notification form has been developed, along with an instruction page, for use when the sending state will require the assistance of the supervising person in the receiving state to meet victim notification requirements. The sending officer is to clearly document such in the initial referral packet using the supplemental form. The form is to include the specific information regarding what will be required and the timeframes for when it must be received. Throughout the duration of the supervision timeframe, the supervising person, through the receiving state's ICJ Office, is, to the extent possible, to provide the sending state with the requested information so that state can remain compliant with the laws and policies of said state.

It is the responsibility of the sending state to update the receiving state regarding any changes to victim notification requirements. Interstate Commission Rule2-105.

3. Authority to Accept/Deny Supervision

Interstate Commission Rule4-104 provides that only the receiving state's ICJ administrator or designee may authorize or deny supervision of a juvenile by that state after considering a recommendation by the investigating officer.

It should be noted that the home evaluation recommendation is considered along with the ICJ law and promulgated rules. Supervision cannot be denied based solely on the juvenile's age or the offense. The receiving state may deny placement and supervision only when the proposed placement is unsuitable or when the juvenile is not in substantial compliance with the terms and conditions of supervision required by either the sending or receiving state; however, the receiving state may not deny placement and supervision when the juvenile has a custodial parent or legal guardian in the receiving state but does not have one in the sending state. Interstate Commission Rule 4-104.

In conducting home evaluations for sex offenders, the receiving state must ensure compliance with local policies or laws before issuing reporting instructions. If the proposed residence is deemed unsuitable, the receiving state may deny acceptance of the juvenile. Interstate Commission Rule4-103.

All of the rules must be read together as Rule 4-104 provides that supervision must be accepted by a receiving state when a juvenile has no custodial parent or legal guardian remaining in the sending state and when the juvenile has a custodial parent or legal guardian residing in the receiving state.

Further, one of the procedural protections provided in Article I of the Texas statute provides that "ensuring that a receiving state accepts supervision of a juvenile when the juvenile's parent or other person having legal custody resides or is undertaking residence there."

The sending state is to provide reporting instructions to the juvenile within five business days of receipt of the approval by the receiving state, if the juvenile is not already in residence and provide written notification of the juvenile's departure to the receiving state. Interstate Commission Rule4-104.5.

Cooperative supervision is not to be provided without written approval from the receiving state's ICJ Office. The sending state is to maintain responsibility until supervision is accepted by the receiving state. Interstate Commission Rules 4-102 and 4-103.

4. Duty to Supervise

The Texas Attorney General was asked whether a juvenile probationer transferred to Texas under the Interstate Compact could be supervised by a Texas juvenile probation officer if he or she was over 18 years of age or had been adjudicated for conduct for which he or she could not have been adjudicated by a Texas juvenile court. The Attorney General responded that the Texas juvenile probation officer has the authority to supervise and the duty to supervise from the Interstate Compact in such a circumstance. It makes no difference whether the juvenile could have been supervised or adjudicated under Title 3. Under the Interstate Compact, the sending state retains jurisdiction over the case, while the receiving state provides merely "courtesy supervision." Once the state accepts supervision of an out-of-state delinquent juvenile, the Compact requires juvenile probation officers to provide the mandated services. Attorney General Opinion No.DM-147 (1992).

5. Who Supervises and Who Enforces

Under the ICJ, a receiving state is obligated to "assume the duties of supervision over any juvenile" and to "be governed by the same standards of supervision that prevail for its own juveniles released on probation or parole." Interstate Commission Rule 5-101, Chapter 60.010, Article I (A). ICJ Advisory Opinion 1-2010 further clarifies that a supervising state is permitted to impose graduated sanctions upon any juvenile transferred under the Compact if such standards are also applied to its own delinquent juveniles. Both the sending and receiving states may enforce the terms of probation or parole, including the imposition of detention time in the receiving state. The state seeking to impose any sanctions is responsible for any costs incurred from the enforcement of such sanctions. Interstate Commission Rule 5-101.

The receiving state is obligated to furnish written progress reports to the sending state on at least a quarterly basis. Additional reports must be sent whenever there are concerns about the juvenile or if there has been a change in placement. The ICJ prohibits both sending and receiving states from imposing a supervision fee on any juvenile who is being supervised. Interstate Commission Rule 5-101.

The sending state is financially responsible for treatment services ordered by the court or paroling authority in the sending state if they are not available through the supervising agency in the receiving state or cannot be obtained through Medicaid, private insurance, or another payer. The initial referral must clearly state who is responsible for purchasing treatment services. Interstate Commission Rule 5-101.

The sending state determines the juvenile's age of majority and duration of supervision. Whenever circumstances require the receiving court to detain a juvenile under the ICJ, the type of incarceration is determined by the

laws regarding the age of majority in the receiving state. Interstate Commission Rule 5-101.

Juvenile restitution payments or court fines are to be paid directly from the juvenile or juvenile's family to the adjudicating court or agency in the sending state. Supervising officers in the receiving state shall encourage the juvenile to make regular payments in accordance with the court order of the sending state. The sending state is to provide the specific payment schedule and payee information to the receiving state. Interstate Commission Rule 5-101.

Any amendments in the conditions of probation or parole must be made by the court or agency in the sending state that originally set the conditions. Revocation proceedings must take place in the sending state in accordance with its law.

DNA Collection. Government Code 411.148(k) requires the collection of a DNA sample from juveniles with specific felony adjudications accepted to reside in Texas on after September 1, 2009. TJJD's Office of General Counsel determines if out-of-state offenses are the equivalent of the Texas offenses for which such collection is required. The Texas ICJ Office notifies the receiving Texas juvenile probation or parole office as to whether the juvenile must provide DNA samples. The DNA collection process by the Texas Department of Public Safety (DPS) requires that anyone submitting a DNA sample be identified by their unique "state identification number" also known as a SID number. DPS will not process DNA samples without this number. As most, if not all, juveniles coming into Texas do not have this Texas identifier, the process must start with the Texas juvenile probation or parole officer obtaining a complete set of legible fingerprints on the required DPS form and sending it to DPS. Once the SID number is received, the DNA sample is to be taken in accordance with specific DPS instructions and sent to DPS.

Sex Offenders. A juvenile sex offender is to abide by the registration laws in the receiving state, e.g., felony or sex offender registration, notification, or DNA testing. A juvenile sex offender who fails to register when required will be subject to the laws of the receiving state. Interstate Commission Rule 4-103.

Sex Offender Registration Program. Juveniles adjudicated delinquent in Texas for registerable offenses may be required to register in other states regardless of whether their registration has been waived or the decision on registration has been deferred by the adjudicating Texas judge. Concerning juveniles, sex offender registration and other requirements, such as DNA collection, public notification, risk assessment, residential restrictions, and penalties for failure to register, are surprisingly different from state to state. Some states, such as Maryland and Minnesota, have no requirements, whereas other states, such as California and Washington, have requirements similar to adults convicted of the same offenses.

When juvenile probationers and parolees come to Texas adjudicated for offenses containing elements that are substantially similar to the elements of registerable offenses listed in Chapter 62, they are required to register regardless of whether or not the registration requirement was waived or deferred in the sending state. Article 62.354, Code of Criminal Procedure, provides these juveniles with the same recourse as juveniles adjudicated in Texas for registerable offenses—to petition the juvenile court in the county of residence for an order exempting registration.

6. Discharge/Closure of Cases

Interstate Commission Rule 5-104 provides the basis and authority of how cooperative supervision cases are closed. The sending state has sole authority to discharge its juveniles from probation or parole with a few exceptions. The exceptions include when: the juvenile is convicted in adult court and given a sentence that is longer than the juvenile sentence; the case terminates due to expiration of the court order or the maximum period of parole or probation; the juvenile does not relocate within the 90-days after the receiving state has accepted the case; the receiving state has requested early discharge and the sending state has approved; the sending state has issued a warrant for an absconder in the receiving state or the juvenile has been on absconder status for ten business days; the sole purpose of supervision is collecting restitution and/or court fines; or the juvenile has been admitted to a residential facility for a planned stay in excess of 90 calendar days. The rule includes procedures to be followed for such closures. The ICJ Office is to maintain closed cases in their offices for one year after closure before they may be destroyed.

7. Return to Sending State

The Compact authorizes summary procedures for the return of a probationer or parolee whose placement has failed. When the pre-signed ICJ Application for Compact Services and Memorandum of Understanding and Waiver (ICJ Form IA/VI), with appropriate signatures, is completed, no further court procedures are required for

the juvenile's return. If a legal custodian remains in the sending state and the placement in the receiving state fails, the sending state's ICJ Office is to facilitate transportation arrangements for the return of the juvenile within five business days. After the appropriate ICJ authorities in each state have consulted with each other, a duly accredited officer of a sending state may enter a receiving state to apprehend and retake a juvenile on probation or parole. If that is not practical, a warrant may be issued and the supervising state must honor that warrant in full. The officer of the sending state is permitted to transport delinquent juveniles being returned through any and all states without interference. The decision of the sending state to retake a delinquent juvenile on probation or parole whose placement has failed cannot be reviewed by the courts of the receiving state, meaning that the juvenile cannot file a petition for writ of habeas corpus in the receiving state to contest his or her being returned to the sending state. However, if at the time the sending state seeks to retake a juvenile and the juvenile is suspected of having committed a criminal offense or an act of delinquency in the receiving state, then the juvenile may not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision. Interstate Commission Rule 5-103.

These provisions deal only with return of the juvenile whose placement has failed from the receiving to the sending state and do not speak to the question of what procedures must be followed to revoke probation or parole once the juvenile is returned.

The sending state must pay all transportation costs to and (if necessary) from the receiving state. The juvenile is to be returned in a safe manner and within five business days. This time period may be extended with the approval of both ICJ Offices. Interstate Commission Rules 6-104 and 6-105.

8. Travel Permits for Visits

The purpose of travel permits is for the protection of the public. A travel permit is required when a visit will exceed 24 hours. When a visit will exceed 30 calendar days, the sending state is to provide specific reporting instructions for the juvenile to maintain contact with his/her supervising agency. The maximum length of stay under a temporary travel permit is 90 calendar days. The authorized travel permit (ICJ Form VII) is to be provided and received prior to the juvenile's movement. Interstate Commission Rule 8-101.

D. Return of Juveniles

1. Home / Demanding and Holding States

"Home state" is the state where the parent(s), guardian(s), person, or agency having legal custody of the juvenile is located. "Demanding state" is the state having jurisdiction over a juvenile that is seeking the return of the juvenile, either with or without pending delinquency charges. "Holding state" is the state where the juvenile is located. Interstate Commission Rule 1-101.

Section 60.010, Article I (C), states one of the purposes of the ICJ is to "return juveniles who have run away, absconded, or escaped from supervision or control or have been accused of an offense to the state requesting their return through a fair and prompt judicial review process that ensures the requisition is in order and that the transport is properly supervised." This is unique language for Texas; it is not included in the Model Compact.

2. Apprehension Without a Requisition

Interstate Commission Rule 6-102 authorizes taking a juvenile into custody, with or without a requisition from another state, upon reasonable information that a person is a delinquent juvenile, or is accused of being delinquent, and has absconded, escaped, or fled. Presumably, law enforcement information would be a sufficient basis for taking a juvenile into custody. A juvenile taken into custody without a requisition must be taken before a judge of the appropriate court who must determine, after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for a period not to exceed 90 days to enable the juvenile's detention under a detention order issued on a requisition.

Presumably, if a requisition and a detention order have not been issued within 90 days, the juvenile must be released unless other charges are pending in the holding state. Of course, counsel must be appointed under Section 51.10 of the Family Code.

Warrants. All warrants under ICJ jurisdiction are to be entered into the National Crime Information Center (NCIC) by the appropriate law enforcement agency or other authorized agency in the issuing state. Holding states are to honor all lawful warrants as entered by other states and, within the next business, day notify the ICJ office in the home/demanding state that the juvenile has been placed in custody pursuant to the warrant. Within two business days of notification, the home/demanding state is to inform the holding state of whether the home/demanding

state intends to have the juvenile returned. Interstate Commission Rule 7-104.

Release of Runaways to Parent or Legal Guardian. The provisions of the Compact are to be interpreted in addition to other rights, remedies, and procedures and should not be applied as a substitute for other rights or erode the rights and responsibilities of parents. In this regard, a non-delinquent juvenile may be released to his/her parent/legal guardian within the first 24 hours (excluding weekend and holidays) of detainment without applying further due process rights, except in cases where abuse or neglect is suspected by holding authorities.

When the juvenile remains in custody beyond 24 hours, the holding state's ICJ Office is to be contacted. Runaways who are endangering themselves or others who are held beyond 24 hours are to be held in secure facilities until returned by the home/demanding state. Interstate Commission Rule 6-101.

When a holding state has reason to suspect abuse or neglect by a parent/legal guardian or others in the home of a runaway juvenile, the holding state's ICJ Office is to notify the home/demanding state's ICJ Office of the suspected abuse or neglect. The home state's ICJ Office is to work with the appropriate authority and/or court of jurisdiction in the home state to effect the safe return of the juvenile.

In the voluntary return of a runaway who alleges abuse or neglect, the Voluntary Consent to Return Form (ICJ Form III) is to indicate who will assume responsibility for the juvenile if the juvenile will not be returning to a parent or legal guardian. Interstate Commission Rule 6-105.

In the non-voluntary return of a runaway who alleges abuse or neglect, the requisition process is to be initiated by the home state's appropriate authority and/or court of jurisdiction when those authorities determine the juvenile will not be returning to a parent or legal guardian. Procedures to be followed are set forth in Interstate Commission Rule 6-103. More information about the detention of non-delinquents is found under Detention Practices, later in this chapter.

Voluntary Return of Out-of-State Juveniles. Once an out-of-state juvenile is found and detained, the following mandatory procedures apply:

> The holding state's ICJ Office must be advised of the juvenile's detainment. The holding state's ICJ Office then contacts the home or demanding state's ICJ Office advising them of case specifics. Upon notice, the home/demanding state's ICJ Office is to initiate measures to determine the juvenile's residency and jurisdictional facts in that state. At a court hearing (physical or electronic), the judge in the holding state informs the juvenile of his or her rights under the compact using the ICJ Juvenile Rights form or an alternate, comparable procedure. The court may elect to appoint counsel or a guardian ad litem to represent the juvenile in this process. Interstate Commission Rule 6-102.

If the juvenile is in agreement with the return, then he or she must voluntarily sign the approved Consent for Voluntary Return of Out-of-State Juveniles (ICJ Form III). When consent has been duly executed, it is forwarded to and filed with the holding state's compact administrator or designee. The holding state's ICJ Office then forwards a copy of the consent to the home/demanding state's ICJ Office. The home/demanding state's ICJ Office must be responsive to the holding state's court orders in effecting the return of its juveniles.

Each ICJ Office is required to have policies and procedures in place involving the return of its juveniles that ensure the safety of the public and juveniles. Juveniles must be returned by the home/ demanding state in a safe manner and within five business days of receiving the completed ICJ Form III. This time period may be extended up to an additional five business days with approval from both ICJ Offices. Interstate Commission Rule 6-102.

The Compact allows for a court's discretion in appointing counsel for this process. However, if the juvenile is in Texas and the question is whether he or she voluntarily consents to return to another state, Section 51.09 of the Family Code probably requires making an attorney available for the child and the concurrence of that lawyer, in writing or in open court, with any waiver of the right to remain in Texas.

3. Return Under a Requisition

Once the delinquent juvenile, or juvenile accused of being delinquent, has been taken into custody under a requisition and brought before the appropriate court and that court has determined the requisition is in order, that court notifies the ICJ Office in its state, which in turn notifies the ICJ Office in the demanding state. The ICJ Office in the demanding state notifies the appropriate authority in its state, which makes travel arrangements. The demanding state is responsible for travel arrangements and expenses. The demanding state must ensure the safety of the public and of the juvenile being transported. If the

juvenile is considered a risk to harm self or others, the juvenile is to be accompanied on the return to the demanding state. If the juvenile has delinquency or criminal charges pending in the state where he or she is being detained, then he or she cannot be returned to the demanding state without the consent of the holding state.

Non-Voluntary Return of Non-Delinquent Runaways. Interstate Commission Rule 1-101 defines a "non-delinquent juvenile" as any person who has not been adjudged or adjudicated delinquent and a "runaway" as a child under the juvenile jurisdictional age limit established by the state who has run away from his or her place of residence without the consent of the parent, guardian, person, or agency entitled to legal custody.

When the juvenile is a non-delinquent runaway, the parent, legal guardian, or custodial agency must petition the court of jurisdiction in the home or demanding state for a requisition for his or her return. Thus, any child who has left the home of his or her parents or the agency or institution to which custody has been given and has fled to another state is a runaway. Interstate Commission Rule 6-103.

Interstate Commission Rule 6-103 could be applied to a child adjudicated for conduct indicating a need for supervision (CINS) who has fled from his or her placement to another state, to a child who is in the custody of the Department of Family and Protective Services (DFPS), and to a child not currently involved with the juvenile justice system who has simply run away from home. This requisition process is usually facilitated by the juvenile probation department in the county where the parent or legal guardian and child reside. The parent or guardian seeking the requisition may petition their court of jurisdiction using the optional Petition for Requisition of Runaway Juvenile (ICJ Form A), which is signed by the guardian and notarized. This form is not required to complete a requisition for a runaway.

The judge in the state seeking return of the runaway may hold a hearing to determine whether the petitioning parent, guardian, person, or agency is entitled to legal custody of the juvenile, whether it appears the juvenile has in fact run away without consent or is an emancipated minor, and whether it is in the juvenile's best interest to be compelled to return to the home state.

The judge then has discretion to issue a requisition for the runaway's return, which is sent to the Texas ICJ Office. Should the judge agree to issue the requisition, the judge will sign the completed ICJ Form I. This form is addressed to the court of the jurisdiction in the holding state and requests the court to order the youth back to the home or demanding state. If there were juvenile proceedings pending at the time the running away occurred, the judge may issue the requisition without petition or agreement from the parent or other person by using the requisition process for a juvenile accused of being delinquent.

If a proper document seeking return of a runaway is delivered to the juvenile court judge in the Texas county where the juvenile has been found, the duty of the juvenile court judge is to deliver the child to the requesting state. The judge is not permitted to second guess the judge of the requesting state that issued the requisition as to the best interests of the child. *In re The State of Texas, Relator,* 97 S.W.3d 746 (Tex.App.—El Paso 2003, no pet.) (mandamus against the juvenile court judge conditionally granted at the request of the Texas Attorney General).

Non-Voluntary Return of Absconders and Escapees. If a Texas juvenile has absconded or escaped to another state, the responsible authority (juvenile court or TJJD) must prepare a requisition, as defined in Commission Rule 1-101, for his or her return. The Requisition for Absconder Escapee or Accused Delinquent (ICJ Form II) must be completed and signed by the judge in the demanding jurisdiction. This document is sent to the Texas ICJ Office, which forwards it to the authorities in the state where the juvenile is believed to be located. On receipt of the requisition, those authorities are required to issue a detention order to take the juvenile into custody.

Once the juvenile is taken into custody, the child must appear before a judge of an appropriate court within 30 calendar days of receipt by the holding state of the requisition to be informed of the demand made for his or her return. The court in the holding state may appoint counsel or a guardian ad litem to represent the juvenile. If the court determines that the requisition is in order, then the judge must order the juvenile's return to the home or demanding state. If the requisition is denied, the judge must issue written findings detailing the reason(s) for the denial. Regardless of the court's decision, the order concerning the requisition is forwarded immediately from the court to the holding state's ICJ Office, which in turn forwards it to the home/demanding state's ICJ Office. Interstate Commission Rule 6-103A.

Unless both ICJ Offices determine otherwise, requisitioned juveniles must be accompanied to their home/demanding state, where they are delivered to the appropriate person or authority designated to receive the child in

the home state. Juveniles must be returned by the home/demanding state within five business days of receiving the order granting the requisition. This time period may be extended by agreement between the respective ICJ Offices. Interstate Commission Rule 6-103A.

When a juvenile has absconded or escaped to Texas from another state and has been apprehended pursuant to a requisition from the other state, the juvenile court of the county where he or she was apprehended would be the appropriate court for him or her to be taken. Although Rule 6-103A authorizes, but does not require, that court to appoint counsel, Section 51.10 of the Family Code requires the appointment of counsel for such a juvenile.

Non-Voluntary Return of Accused Delinquents. Rule 6-103A provides for the return from another state of a juvenile accused of delinquency. In such cases, any juvenile accused of delinquency for violating a criminal law must be returned to the home/demanding state based on a requisition to the state where the juvenile may be located. A delinquency petition is filed in a court of competent jurisdiction in the requesting state where the criminal law violation is alleged to have been committed. The petition may be filed regardless of whether the juvenile left the state before or after the filing of the petition. The ICJ Form II is used to complete the requisition.

While there must be a juvenile court petition filed before the requisition is sent to the Texas ICJ Office, there is no requirement that there have been an adjudication of that petition. With the use of DNA matches, police department cold case units are able to solve older cases now. Sometimes that involves a person who is no longer considered a juvenile but was when the offense occurred.

The obligation of member states to honor requisitions under the Revised ICJ is recognized in case such as *State v Cook,* 115 Wn.App. 829 (Wash. Ct. App. 2003), in which the Court held that, under Texas law, an adult defendant who was properly charged with a crime while a child was subject to the jurisdiction of the Texas Juvenile Court; thus, the Washington court was required, pursuant to the Compact, to honor Texas' rendition request and return the juvenile to Texas, despite the defendant's claim that he was no longer a juvenile. ICJ Bench Book for Judges and Court Personnel, Version 1.0, 2011, Section 4.5.4, pages 75-76.

Rules for Requisitions. There are specific provisions in that apply to juveniles in custody who refuse to voluntarily return to their home or demanding states and juveniles whose whereabouts are known but who are not in custody. The home/demanding state shall prepare its requisition within 60 calendar days of notification that the juvenile refuses to return voluntary. Juveniles held in detention pending non-voluntary return may be held a maximum of 90 calendar days. All requisitions must include both the appropriate, complete ICJ Forms I and II as well as certified true copies of all court documents demonstrating custody or jurisdiction over the juvenile, including petitions, custody orders, probation/parole orders, warrants, birth certificate, adoption orders. Unless otherwise agreed by both state ICJ offices, a juvenile returned under a requisition must be accompanied during return to the home or demanding state. Interstate Commission Rules 6-103 and 6-103A.

E. Detention Practices and Due Process Hearings

There will be occasions under any of the four circumstances provided for in the Interstate Compact when a child from another state will be detained in Texas. The requirements of Title 3 with respect to holding a detention hearing not later than the second working day after the juvenile is taken into custody apply to juveniles detained in Texas under Interstate Compact provisions. If the juvenile is detained in the initial hearing, counsel should be provided and a new detention hearing held, or one waived by the juvenile and his or her attorney, every 10 or 15 working days, as applicable. See Chapter 6.

The detention and due process hearings may be held by either a referee, associate judge, or master, provided the parties have been informed by the referee, associate judge, or master that they are entitled to have the hearing before the juvenile court judge and, after each party is given an opportunity to object, no party objects to holding the hearing before the referee or master.

If the child is a status offender as defined by Section 51.02(15) of the Family Code, the juvenile court may detain him or her under Section 54.011(e), but only "for a necessary period, not to exceed the period allowed under the Interstate Compact for Juveniles, to enable the child's return to the child's home in another state under Chapter 60." The primary purpose of this provision is to facilitate the return of the interstate runaway child.

Sections 54.01(i) – (k) contain provisions under which a child in custody who has run away from another county, state, or country may voluntarily request shelter in a Texas detention facility for a single 10-day period without a detention hearing. Section 54.01(k) permits the child to waive his or her right to a detention hearing without the concurrence of an attorney to permit shelter for a single

10-day period pending arrangements for his or her return home. Unlike Section 54.011(e), this provision requires that the child voluntarily request shelter in the detention center.

Further, on May 20, 2010, the Office of Juvenile Justice and Delinquency Prevention (OJJDP), U.S. Department of Justice provided a legal opinion to the ICJ National Office clarifying federal law and policy regarding the secure detention of runaways under the ICJ. As cited in this opinion, the relevant provisions of both the reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDPA), 42 U.S.C. 5633 (a) and the excerpt from the OJJDP Guidance Manual for Monitoring Facilities Under the JJDPA of 2002 clearly provide an exemption for secure detention for out-of-state runaway youth held under the ICJ. The opinion does make note of the proposed Valid Court Order ("VCO") exemption "phase out" and the growing trend, evidenced by this proposal, which suggests that alternatives to secure detention and correctional placements need to be identified for status offenders, including runaways, as this aspect of juvenile compact administration is considered going forward.

F. Interstate Agreement on Detainers

Article 51.14 of the Code of Criminal Procedure contains the Interstate Agreement on Detainers in Texas. It regulates the lodging of detainers against prisoners and fixes procedures whereby prisoners can demand a speedy trial on unadjudicated charges underlying detainers. Charges must be dismissed with prejudice if a trial is not provided within 180 days of proper demand.

In *Lara v. State*, 909 S.W.2d 615 (Tex.App.—Fort Worth 1995, pet. ref'd), an adult charge of aggravated robbery was filed against the appellant in Texas. He was then incarcerated by the California Youth Authority on juvenile adjudications. Texas filed a detainer with the California authorities for the robbery charge. Appellant demanded a speedy trial of the charge, but this was not provided. In defense, Texas contended that the Interstate Agreement on Detainers did not apply because appellant was incarcerated in California as a juvenile. The Court of Appeals summarily rejected this contention and found that the Agreement is applicable when a resident of a juvenile facility has a detainer for an adult charge in another state. In this case, however, the demand for a speedy trial was not in the proper form, so the failure to provide a speedy trial did not require terminating the charge.

G. Effect of Texas Laws

In addition to Section 60.010, the legislature in 2005 added Section 60.011, which states that if the laws of Texas conflict with the ICJ, the Compact controls unless the conflict is between the Compact and the Texas Constitution, in which case the Texas Constitution controls, as determined by Texas courts.

H. Liabilities for Certain Commission Agents

In 2005, the legislature also added Section 60.012 to ensure that the Compact Administrator and each member, employee, or agent of the Interstate Commission acting within the scope of the person's employment or duties is entitled to the same protections under the Texas Tort Claims Act as employees, board members, or other officers of a state agency, institution, or department.

This is in addition to the provisions in Section C, Article V of the Compact, which address qualified immunity, defense, and indemnification. That section provides that the Interstate Commission's executive director and employees are immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of, or relating to, any actual or alleged act, error, or omission that occurred, or that the person had a reasonable basis for believing occurred, within the scope of employment, duties, or responsibilities. There is no immunity for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of a covered person.

The liability of any commissioner, or the employee or agent of a commissioner, acting within the scope of such person's employment or duties for acts, errors, or omissions occurring within such person's state may not exceed the limits of liability set forth under the constitution and laws of that state for state officials, employees, and agents.

The Interstate Commission is required to defend the executive director and the employees or representatives of the Interstate Commission. Additionally, subject to the approval of the attorney general of the commissioner's state, the Interstate Commission must defend such commissioner or the commissioner's representatives or employees in any civil action seeking to impose liability arising out of any actual or alleged act, error, or omission that occurred within the scope of Interstate Commission employment, duties, or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of Interstate Commission employment,

duties, or responsibilities. The responsibility to defend does not apply to an actual or alleged act, error, or omission that resulted from intentional or willful and wanton misconduct on the part of such person.

The Interstate Commission must indemnify and hold harmless the commissioner of a compacting state or the commissioner's representatives or employees, or the Interstate Commission's representatives or employees in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error, or omission that occurred within the scope of Interstate Commission employment, duties, or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties, or responsibilities. This does not apply to an actual or alleged act, error, or omission that resulted from intentional or willful and wanton misconduct on the part of such persons.

I. Non-Compacting States

Chapter 60.010, Article II defines "state" to mean a state of the United States, the District of Columbia (or its designee), the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands. There are currently 52 signatories to the ICJ, including all 50 states, the District of Columbia, and the Virgin Islands. While American Samoa, the Northern Marianas Islands, and Puerto Rico are not members of the previous Compact, the Interstate Commission continues to encourage these entities to ratify the Compact.

J. Juvenile Interstate Data System (JIDS)

In November 2012, the ICJ National Office launched the Juvenile Interstate Data System (JIDS) for use by all compacting states to process and track requests for juvenile supervision through the ICJ. The Texas ICJ office uses this system and has integrated it into daily operations. This system has reduced the time needed to process ICJ cases for supervision and has saved agency resources by reducing the amount of mail and fax activity previously required to send information through ICJ.

K. Texas Interstate Compact for Juveniles - Contact Information

The Texas Interstate Compact Parole and Probation Commissioner may be contacted by phone at 512.490.7253 or by email at txicj@tjjd.texas.gov.

CHAPTER 19: Appeals and Collateral Attacks in Juvenile Cases

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This chapter discusses the ways in which appellate courts can review the decisions of the juvenile court to determine whether they conformed with the requirements of law. Texas has a dual system of appellate courts, one for civil cases and one for criminal cases. Juvenile law issues can arise in either system. On the civil side, where most juvenile appellate review occurs, an appeal goes from the juvenile court to one of the 14 Courts of Appeals. After that court has decided the case, the losing party may petition for review by the Texas Supreme Court. If the Supreme Court, in its sole discretion, decides the issues raised in the petition merit its full consideration, it will grant the petition and, after briefs and, perhaps, oral argument, decide the case itself. If the Supreme Court decides the issues do not merit review, it will refuse the petition, thus leaving the Court of Appeals' decision to stand. In the vast majority of cases, the Texas Supreme Court denies review.

Prior to 1981, all criminal case appeals went directly from the trial courts to the Texas Court of Criminal Appeals. That year, the legislature changed the Courts of Civil Appeals into Courts of Appeals and gave them jurisdiction to decide both criminal and civil appeals. Now, appeals in criminal cases go from the trial court to one of the those 14 Courts of Appeals. The losing party has the right to file a petition for discretionary review with the Court of Criminal Appeals. Just like the Supreme Court, the Court of Criminal Appeals has the sole discretion to whether to grant the petition and hear the case. If it grants the petition, it will decide the case; if it does not, the decision of the Court of Appeals stands. Capital murder convictions in which the death penalty has been imposed are automatically appealed directly from the trial court to the Court of Criminal Appeals.

Most juvenile issues arise on the civil side of the appeals process. Juvenile issues arise on the criminal side in two ways: (1) in an appeal from a conviction or order of deferred adjudication after a juvenile has been certified to criminal court for trial when a claim is made that the certification process was defective; and (2) in criminal proceedings when there is an effort to introduce evidence concerning juvenile proceedings, such as evidence of a juvenile adjudication of the defendant or a witness. The admissibility of a confession taken by police from a juvenile while in custody is governed by juvenile law even when the juvenile is later certified and the confession is admitted in a criminal trial. See Chapter 16.

The Texas Supreme Court and the Court of Criminal Appeals are co-equal. Each is the "supreme court of Texas" in its area of law—civil and criminal. Neither has the power to review the decisions of the other. That could create conflicting rules in areas, such as juvenile law, in which cases can be decided by both courts. However, each Court has a strong policy of deferring to any previous decision on the same issue by the other Court, so in practice conflicts are virtually non-existent.

There are two ways in which issues of law may be raised in appellate courts—direct appeal and collateral attack. Each is important in Texas juvenile law.

A. Direct Appeals

All appeals from juvenile courts go to one of the 14 Courts of Appeals. After a Court of Appeals has made a decision in a case, the losing party may seek review by the Texas Supreme Court. Family Code Section 56.01(b) provides that "the requirements governing an appeal are as in civil cases generally." See also *In the Matter of R.G.*, UNPUBLISHED, No. 08-05-00261-CV, 2005 Tex.App.Lexis 7175, Juvenile Law Newsletter ¶ 05-4-08 (Tex.App.—El Paso 2005, no pet.) (appeal from a juvenile court order is to a Court of Appeals and requirements governing appeal are as in civil cases generally).

In 1986, the Texas Supreme Court and the Court of Criminal Appeals jointly adopted the Texas Rules of Appellate Procedure, which govern appeals in both civil and criminal cases. The purpose of the Texas Rules of Appellate Procedure is to have the same rules to the extent feasible; that goal was largely met, although there are still some differences between appeals on the civil side and the criminal side. To the extent those rules differ, juvenile appeals are governed by the civil version. However, there are certain circumstances in which the rigidity of a civil rule must bend to constitutional requirements, such as the right of a juvenile to effective assistance of counsel on appeal.

1. What Decisions May be Appealed

Not every decision made by a juvenile court judge in the handling of a case may be appealed immediately. Generally, an appeal may be taken only from a final decision, although, of course, the appellate court may review any other decision of the juvenile court that contributed to the final decision from which the appeal was taken. Section 56.01(c) provides:

> An appeal may be taken:
>
> (1) except as provided by Subsection (n) [regarding a plea or stipulation of evidence], by or on behalf of a child from an order entered under:

(A) Section 54.02 respecting transfer of the child for prosecution as an adult;

(B) Section 54.03 [adjudication hearing] with regard to delinquent conduct or conduct indicating a need for supervision;

(C) Section 54.04 disposing of the case;

(D) Section 54.05 respecting modification of a previous juvenile court disposition; or

(E) Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or intellectually disabled; or

(2) by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice [under the Determinate Sentence Act].

Only those orders listed in Section 56.01(c) may be appealed. For example, a respondent cannot appeal from the decision of a juvenile court detaining him or her before trial because it is not a final order and is not listed in Section 56.01(c). *In the Matter of J.L.D.*, 704 S.W.2d 395 (Tex.App.—Corpus Christi 1985, no writ). Similarly, a transfer order to another county for disposition under Section 51.07 cannot be appealed. *In the Matter of S.D.S.*, UNPUBLISHED, No. 07-07-0499-CV, 2009 WL 839053, Juvenile Law Newsletter ¶ 09-2-16 (Tex.App.—Amarillo 2009, no pet.); *In the Matter of M.A.O.*, UNPUBLISHED, No. 04-07-00658-CV, 2008 WL 5170297, Juvenile Law Newsletter ¶ 09-1-4B (Tex.App.—San Antonio 2008, no pet.). Of course, the lawfulness of a juvenile's detention, like that of an adult, can be challenged by petition for writ of habeas corpus. In 2001, the legislature added Section 56.01(o) to provide explicitly that nothing in Section 56.01 restricts the child's right to obtain a writ of habeas corpus.

An order transferring a determinate sentence probation to an appropriate district court under Section 54.051 is not appealable under Section 56.01. In *In the Matter of J.H.*, 176 S.W.3d 677 (Tex.App.—Dallas 2005, no pet.), appellant argued that since Section 56.01 precludes such an appeal, the statute is unconstitutional because it allows some juveniles to appeal while denying others the same rights based simply on the type of hearing held by a juvenile court. The United States and Texas Constitutions, however, do not provide for a right of appeal. Instead, the right to appeal is regulated by the legislature, which "may deny the right to appeal entirely, [grant] the right to appeal only some things, or [grant] the right to appeal all things only under some circumstances." 176 S.W.3d at 679, citing *In the Matter of Jenevein*, 158 S.W.3d 116, 119 (Tex.Spec.Ct.Rev. 2003). J.H.'s argument failed because he was treated just like all similarly situated juveniles whose determinate sentence probations were transferred to adult court. See also *In the Matter of W.E.H.*, UNPUBLISHED, No. 02-10-00234-CV, 2011 WL 1901986, Juvenile Law Newsletter ¶ 11-3-1 (Tex.App.—Fort Worth 2011, no pet.); *In the Matter of T.D.S.*, UNPUBLISHED, No. 14-11-00005-CV, 2011 WL 2474056, Juvenile Law Newsletter ¶ 11-3-11 (Tex.App.—Houston [14th Dist.] 2011, review denied).

Similarly, a trial court's refusal to amend the conditions of probation in a determinate sentence case is not appealable. *In the Matter of B.L.C.*, UNPUBLISHED, No. 08-10-00186-CV, 2011 WL 3784972, Juvenile Law Newsletter ¶10-4-3 (Tex.App.—El Paso 2010, no pet.).

In *In the Matter of R.J.M.*, 211 S.W.3d 393 (Tex.App.—San Antonio 2006, no pet.), appellant filed a motion asking the juvenile court to appoint counsel to assist in filing a motion for forensic DNA testing under Code of Criminal Procedure Article 64.01(c). The trial court denied the motion. On appeal, the San Antonio Court of Appeals noted that juvenile appeals are controlled by Section 56.01, which does not authorize the appeal of a motion asking a juvenile court to appoint counsel to assist in filing a post-adjudication motion for forensic DNA testing. Neither, for that matter, does Code of Criminal Procedure Chapter 64, which governs motions for forensic DNA testing and related appeals in criminal cases. As a result, the appeal was dismissed for lack of jurisdiction.

The respondent's attorney in *In the Interest of D.B.*, 80 S.W.3d 698 (Tex.App.—Dallas 2002, no pet.) attempted, prior to adjudication proceedings, to appeal an order denying a motion to suppress. The Court of Appeals dismissed the appeal because the suppression order was not a final order from which an appeal can be taken under Section 56.01(c). Had the attorney waited until adjudication, the appeal might have been allowed under the "plead and appeal" procedure discussed later in this chapter. Cf. *In the Matter of R.J.R.*, UNPUBLISHED, No. 08-03-00392-CV, 2005 Tex.App. Lexis 4416, Juvenile Law Newsletter ¶ 05-3-09 (Tex.App.—El Paso 2005, no pet.) (appellant's testimony about possessing marijuana established facts consistent with those he tried to suppress thus waiving the issue on appeal).

2. Certification Appeals

In 1995, the legislature repealed Section 56.01(c)(1)(A), which had authorized immediate appeal of a juvenile

court order certifying a child to criminal court. The purpose of this action was not to eliminate the right of appeal from a certification order but rather to postpone the appeal until after the conviction, if any, of the transferred offense or offenses transferred. In 2015, when it became apparent that many juveniles were being certified to stand trial as adults without the court finding the required statutory criteria, this right to immediate appeal of the transfer order was restored. This section discusses the history related to these changes.

Unified Criminal Appeal. In 1995, Code of Criminal Procedure Article 44.47 provided for the unified appeal:

> (a) A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code.
>
> (b) A defendant may appeal a transfer under Subsection (a) only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court.
>
> (c) An appeal under this section is a criminal matter and is governed by this code and the Texas Rules of Appellate Procedure that apply to a criminal case.
>
> (d) An appeal under this article may include any claims under the law that existed before January 1, 1996, that could have been raised on direct appeal of a transfer under Section 54.02, Family Code.

The language "an order of deferred adjudication" was added to Article 44.47(b) in 2003 to make it clear that an appeal from post-certification criminal proceedings could be based on an order of deferred adjudication as well as on a criminal conviction.

The reference to January 1, 1996, in Article 44.47(d) was to the effective date of the enactment of this provision. Its purpose was to preserve for appellate review in the unified appeal any legal error that could have been raised in a direct appeal from a certification order under the law in existence before the effective date. In other words, Subsection (d) was intended to preserve the status quo concerning scope of appellate review under the unified appeal.

Article 44.47(d) was needed because, before the abolition of a direct appeal, a juvenile could challenge certain aspects of the certification proceedings in an appeal from a criminal conviction, but only those aspects of the certification process that an appellate court regards as "jurisdictional." See, for example, *Rodriguez v. State*, 975 S.W.2d 667 (Tex.App.—Texarkana 1998, pet. ref'd), in which an appeal from a criminal conviction under pre-1996 law was held not to include errors in the mandatory social study since the study is not a jurisdictional requirement of the certification process. Jurisdictional errors are a limited category of errors that deprive the juvenile court, and therefore the criminal court on transfer, of jurisdiction to act in the case. Article 44.47(d) is intended to make it clear that the jurisdictional error restriction does not apply to the unified criminal appeal. Under the law as amended in 1995, the error rejected in the *Rodriguez* case would have been considered on its merits by an appellate court in the unified criminal appeal. Unfortunately, some Courts of Appeals did not understand this point and continued erroneously to apply the jurisdictional error restriction to criminal appeals governed by the 1996 law and to hold that the juvenile should have raised the error in question in a direct appeal from the certification order that was no longer permitted by law. *Irving v. State*, UNPUBLISHED, No. 14-97-01312-CR, 1999 WL 442036, 1999 Tex.App.Lexis 4873, Juvenile Law Newsletter ¶ 99-3-12 (Tex.App.—Houston [14th Dist.] 1999, no pet.).

The San Antonio Court of Appeals recognized that, if the offense occurred before January 1, 1996, the respondent could not await his criminal conviction to appeal certification errors that were not jurisdictional in nature. See *Wright v. State*, UNPUBLISHED, No. 04-00-00285-CR, 2001 WL 608715, 2001 Tex.App.Lexis 3684, Juvenile Law Newsletter ¶ 01-3-06 (Tex.App.—San Antonio 2001 no pet.) (holding that failure of the State to pursue certification with due diligence when the petition was filed against a respondent 18 or older was not jurisdictional).

The 1995 amendments abolished the juvenile's right to take an immediate appeal from a certification order. An appellate court no longer had jurisdiction over such an attempted appeal and should have dismissed it. See *Rodriguez v. State*, 191 S.W.3d 909 (Tex.App.—Dallas 2006, no pet.); *In the Matter of R.A.*, UNPUBLISHED, No. 08-09-00073-CV, 2009 WL 4146768 (Tex.App.—El Paso 2009, no pet.); *Silva v. State*, UNPUBLISHED, No. 01-06-00031-CR, 2007 Tex.App.Lexis 3698, Juvenile Law Newsletter ¶ 07-3-2 (Tex.App.—Houston [1st Dist.] 2007, no pet.); *In the Matter of G.L.C.*, UNPUBLISHED, No. 04-97-01044-CV, 1998 WL 201520, 1998 Tex.App.Lexis 2443, Juvenile Law Newsletter ¶ 98-2-21 (Tex.App.—San Antonio 1998, no pet.); *In the Matter of D.L.N.*, UNPUBLISHED, No. 05-97-2160CV, 1998

WL 765380, 1998 Tex.App.Lexis 6892, Juvenile Law Newsletter ¶ 98-4-32 (Tex.App.—Dallas 1998, no pet.) (upholding the validity of deferring the right of appeal against a challenge under the Due Process Clause and Equal Protection Clause).

After initially incorrectly deciding that the abolition of direct certification appeals applied to appeals after January 1, 1996, the Fort Worth Court of Appeals then correctly decided that the abolition applied only to offenses committed on or after January 1, 1996. *In the Matter of D.D.*, 938 S.W.2d 172 (Tex.App.—Fort Worth 1996, no writ).

The Houston First District Court of Appeals in *Small v. State*, 23 S.W.3d 549 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd), held that the 1995 amendment abolished a juvenile's right to take an immediate appeal from a certification order. In doing so, it overruled *Melendez v. State*, 4 S.W.3d 437 (Tex.App.—Houston [1st Dist.] 1999, no pet.), which had failed to recognize the effect of that amendment.

There are features of the unified criminal appeal that may not have been obvious to the juvenile law practitioner but which impacted a criminal appeal when an attempt was made to raise juvenile certification issues.

When first enacted, Code of Criminal Procedure Article 44.47(b) permitted a certification appeal only from "a conviction of the offense for which the defendant was transferred to criminal court." If the certification resulted in a deferred adjudication disposition in criminal court, the transferred juvenile could not appeal certification issues because he or she was not yet convicted. *Nguyen v. State*, UNPUBLISHED, No. 05-98-01599, 2000 WL 688563, 2000 Tex.App.Lexis 3356, Juvenile Law Newsletter ¶ 00-225 (Tex.App.—Dallas 2000, pet. ref'd) (dismissing such an appeal without reaching its merits). In 2003, the legislature amended Article 44.47(b) to provide that an appeal may also be taken from an order granting deferred adjudication, thereby abrogating that and similar decisions.

At the time, Rule 25.2(b)(3) of the Texas Rules of Appellate Procedure required that, when a notice of appeal was filed in a criminal case with a plea bargained sentence, the notice had to:

> (A) specify that the appeal was for a jurisdictional defect;
>
> (B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
>
> (C) state that the trial court granted permission to appeal.

The Dallas Court of Appeals in *Mosby v. State*, UNPUBLISHED, No. 05-99-01355-CR, 2000 WL 1618466, 2000 Tex.App.Lexis 7314, Juvenile Law Newsletter ¶ 00-416 (Tex.App.—Dallas 2000, no pet.) held that it would not consider on the merits whether the juvenile court lacked jurisdiction over the certification proceedings because the criminal court notice of appeal did not specify that the appeal was for a jurisdictional defect. In *Christentary v. State*, UNPUBLISHED, No. 07-02-0299-CR, 2002 WL 31557202, 2002 Tex.App.Lexis 8180, Juvenile Law Newsletter ¶ 02-4-21 (Tex.App.—Amarillo 2002, no pet.), the Court of Appeals dismissed an appeal from a plea bargained conviction because, although the defendant had filed a motion to suppress in juvenile court, there was no evidence in the record that it had been ruled upon. Thus, a requirement of the plead and appeal criminal statute was not satisfied. In *Woods v. State*, 68 S.W.3d 667 (Tex.Crim.App. 2002), the Court of Criminal Appeals held that a certified juvenile appealing after a plea bargained disposition in criminal court must comply with the former requirements of Texas Rules of Appellate Procedure Rule 25.2(b)(3) regarding the contents of the notice of appeal.

In 2003, the rule was amended to provide in Rule 25.2(a)(2) that:

> In a plea bargain case—that is, a case in which defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant—a defendant may appeal only:
>
> (A) those matters that were raised by written motion filed and ruled on before trial, or
>
> (B) after getting the trial court's permission to appeal.

The trial court is required by Rule 25.2(d) to certify to the appellate court whether the defendant is entitled to appeal under Subsection (a)(2).

Under those provisions, a claim that the juvenile court or the criminal court lacked jurisdiction had to be raised in a plea bargained case by written pretrial motion and ruled upon in order for the issue to be raised on appeal.

The Court of Criminal Appeals held in *Faisst v. State*, 98 S.W.3d 226 (Tex.Crim.App. 2003), that entering a non-negotiated (open) plea in criminal court did not waive an

appellate claim that the juvenile court erred in the certification proceedings. The Court regarded the claim of certification error as one that addressed the jurisdiction of the criminal court. As such, the plea of guilty or no contest in criminal court could not have been independent of the juvenile court's decision to certify the respondent to criminal court.

The reference in Article 44.47(c) to the appeal being a "criminal matter" meant that, under Article 5, Section 5 of the Texas Constitution, the appeal was a criminal case and it went up the criminal route to the Court of Criminal Appeals rather than up the civil route to the Texas Supreme Court. Unlike other appeals that seek to review decisions of a juvenile court, a certification appeal was a criminal appeal. Since the appeal could be taken only after a criminal conviction, it would include requests for review of claims of errors in the criminal trial as well as in the juvenile transfer proceeding.

Article 44.77 was repealed in 2015 when the right to immediately appeal the certification decision was restored. The immediate appeal is as in civil cases. The Texas Supreme Court was required to make rules to accelerate the disposition of the appeal by the appellate court and the Texas Supreme Court. Section 56.01(h-1). It did so in Misc. Docket No. 15-9156, in which it ordered that an appeal be treated under the rules applicable to accelerated appeals in the Texas Rules of Appellate Procedure.

Article 4.18 Does Not Apply. In 1995, Code of Criminal Procedure Article 4.18 was enacted to abrogate the *Bannister* rule that a claim of underage in criminal proceedings can be made at any time in the criminal litigation and, instead, to require a timely underage objection to be made before disposition of the criminal charge by the trial court. See the extended discussion in Chapter 3.

Article 4.18 provides in part:

> (a) A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

On its face, Article 4.18 did not apply to the unified criminal appeal following conviction in a criminal court of an offense for which the defendant had been transferred from juvenile court. Instead, it applied only when the defendant in criminal court claimed that he or she was entitled to such a certification proceeding and did not receive it or that he or she was too young to be certified to criminal court. Unfortunately, the Texarkana Court of Appeals in *Miller v. State*, 981 S.W.2d 447 (Tex.App.—Texarkana 1998, pet. ref'd) read that article to require that any certification error claimed in the unified criminal appeal must first be presented to the criminal court under Article 4.18 to be preserved for appeal. That view, if widely accepted, would mean that all errors preserved by timely objection and adverse ruling in juvenile court would have to be reurged before trial in criminal court even though the criminal court was without power to grant relief by vacating the certification order.

The legislature in 1999 amended Article 4.18 to abrogate the ruling in *Miller*. It enacted Article 4.18(g) to provide, "This article does not apply to a claim of a defect or error in a discretionary transfer proceeding in juvenile court. A defendant may appeal a defect or error only as provided by Article 44.47." That amendment was intended to make it clear that an objection in the criminal court is not necessary to preserve an error in the certification process that was preserved by objection, if required by law, in the juvenile court. Such an error must be preserved only once, not twice.

In 2015, Article 4.18(g) was amended to specify a defendant may claim a defect or error in the certification process only as provided by Chapter 56, Family Code, making it clear the error may be part of the immediate appeal of the decision to certify.

3. State Appeal of Certain Rulings in Determinate Sentence Cases

In 2003, the legislature enacted Section 56.03 to give the State the right to appeal from certain adverse rulings in Determinate Sentence Act proceedings. Subsection (b) specifies those orders that can be appealed—all of which can be reversed and remanded by an appellate court without violating the constitutional prohibition on double jeopardy. Only those orders can be appealed; there can be no appeal from a judgment or verdict of not guilty. The section is modeled after Article 44.01 of the Code of Criminal Procedure, which authorizes State appeal from similar rulings in criminal proceedings.

If the petition has been approved by the grand jury, the state may appeal a court order that: dismisses the petition or any portion of the petition; arrests or modifies a judgment; grants a new trial; sustains a claim of former

jeopardy; or grants a motion to suppress evidence, a confession, or an admission. An appeal of an order that grants a motion to suppress is allowed only if jeopardy has not attached, the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay, and the evidence, confession, or admission is of substantial importance to the case.

The prosecuting attorney has 15 days from the date the order is entered or ruling is made to file the appeal. The prosecuting attorney is defined as the county, district, or criminal district attorney with the primary responsibility of presenting cases in juvenile court; it does not include an assistant prosecuting attorney.

Before the enactment of Section 56.03, except for rulings granting certain relief to a juvenile under the sex offender registration provisions of Article 26.13 of the Code of Criminal Procedure, in which the State had a limited right of appeal, only the juvenile respondent could appeal from juvenile court rulings. See *In the Matter of S.N.*, 95 S.W.3d 535 (Tex.App.—Houston [1st Dist.] 2002, pet. denied), in which the court held that the State could not appeal from the dismissal of an ordinary delinquency case that resulted from the granting of a motion to suppress evidence; *In the Matter of F.C.,* 108 S.W.3d 384 (Tex.App.—Tyler 2003, no pet.); *In the Matter of F.G.*, UNPUBLISHED, No. 13-06-216-CV, 2007 Tex.App.Lexis 4887 (Tex.App.—Corpus Christi 2007, no pet.).

In the Matter of F.M., 238 S.W.3d 837 (Tex.App.—El Paso 2007, pet. denied), represents an unusual case in which the State appealed the trial court's granting of a motion to reduce the length of the determinate sentence. In 1992, F.M. received a 24-year determinate sentence for aggravated kidnapping and aggravated sexual assault. A year later, he was transferred to the Texas Department of Criminal Justice (TDCJ) following a transfer hearing under Section 54.11. No appeal was taken by F.M. after his transfer to TDCJ. In February 2006, F.M. filed a "Motion to Suspend Further Execution of the Sentence/Motion to Have Sentence Reduced." The motion was heard in July 2006, after which the trial court ordered the sentence reduced to 14 years.

On appeal, the State argued "that the court lacked jurisdiction to reduce F.M.'s sentence and that the plenary power of the court had expired, thereby causing the court's reduction of the sentence to be void, because no law or rule of procedure authorized the reduction." 238 S.W.3d at 838. The El Paso Court of Appeals agreed, noting that once a juvenile is transferred to TDCJ, he or she falls under the authority of the Board of Pardons and Paroles. "However, we are unaware of, and have been unable to find, any indication that the juvenile court remains vested with the ability to reduce the determinate sentence of an inmate incarcerated at the TDCJ." 238 S.W.3d at 839. Since judicial action taken after the expiration of a trial court's plenary power is a nullity, the order reducing F.M.'s sentence was void.

Section 56.03(g) provides for appointment of counsel to defend the interests of the respondent during the appeal. Subsection (h) requires that the child be released from detention on the charges that are the subject of the appeal on the sole condition that he or she appear in court if ordered after termination of the appeal.

The right of the State to appeal is restricted to Determinate Sentence Act proceedings for two reasons: First, those are the most serious juvenile proceedings and therefore the ones in which the State has the strongest interest in obtaining appellate review of adverse juvenile court rulings. Second, the probation disposition in ordinary delinquency cases would often be rendered unavailable if the State could appeal adverse rulings because the juvenile frequently would be 18 years old or older by the time the case returned to the juvenile court following an appellate ruling favorable to the State. In determinate sentence act cases, probation would remain available under Section 54.051(i), enacted in 2003, even if the respondent is 18 or older when the case returns to the juvenile court.

The right of the State to appeal does not reach a decision by a juvenile court refusing certification to criminal court for two reasons: First, the decision is inherently a discretionary one for the juvenile court, which makes appellate reversal extremely unlikely. Second, if the juvenile court refuses certification, the State almost always has the option of Determinate Sentence Act proceedings still available, which are adequate to protect the interests of the public in the case.

In 2007, the legislature added Section 51.17(i) to make it absolutely clear that the State is not required to pay any court costs, in either the trial or appellate courts, except as provided in Section 56.03(f). This brings consistency to the State's general exemption from having to pay filing fees and other court costs in law enforcement-related activities by including juvenile proceedings under such exemption. The State is also exempt from paying fees in criminal cases and parental termination cases.

4. Plea and Appeal

In criminal cases the defendant can enter a negotiated plea of guilty or no contest and still preserve trial court rulings on written pretrial motions for appellate review. The El Paso Court of Appeals held in *In the Matter of R.S.C.*, 940 S.W.2d 750 (Tex.App.—El Paso 1997, reh'g denied) that no such steps can be taken in juvenile cases. But, because all the trial participants in that case erroneously thought the juvenile could stipulate to the evidence and still appeal a pre-trial suppression ruling, the plea was uninformed and involuntary. Accordingly, the Court of Appeals set aside the adjudication. See *In the Matter of S.F.*, 2 S.W.3d 389 (Tex.App.—San Antonio 1999, no pet.).

In 1999, the legislature enacted Section 56.01(n) to permit pleading and appealing in juvenile cases involving a plea or an agreed stipulation of evidence on approximately the same grounds it is permitted in criminal cases, that is the court must give the child permission to appeal or the appeal must be based on a matter raised by written motion filed before the proceeding in which the child entered the plea or agreed to the stipulation of evidence.

As in criminal cases, this provision both restricts and expands a juvenile's right of appeal in plea bargained cases. It restricts the right of appeal when there was a plea-bargained disposition, while under prior law the juvenile could appeal but most grounds of appeal were waived by entry of the plea of true or the stipulation of evidence. It expands the right of appeal to reach matters ruled on that were raised by written pre-trial motion, such as a motion to quash, dismiss, or suppress.

The San Antonio Court of Appeals in *In the Matter of B.N.C.*, UNPUBLISHED, No. 04-02-00788-CV, 2003 WL 1232997, 2003 Tex.App.Lexis 2299, Juvenile Law Newsletter ¶ 03-2-09 (Tex.App.—San Antonio 2003, no pet.), dismissed an appeal in a plea-bargained case because there was no juvenile court permission to appeal and the appeal was not based on a written pre-trial motion in the trial court proceedings. See also *In the Matter of R.T.*, UNPUBLISHED, No. 04-09-00553-CV, 2010 Tex.App.Lexis 2611 (Tex.App.—San Antonio 2010, no pet.) (dismissed for lack of jurisdiction because trial court did not give permission to appeal and there were no written motions filed before plea entered). The court said that a habeas corpus petition filed under a different cause number does not qualify because it was not made in the "proceeding in which the child entered the plea or agreed to stipulation of evidence," which was how the court read the statutory requirement. Cf. *In the Matter of F.C.M.*, UNPUBLISHED, No. 04-07-00827-CV, 2008 Tex.App.Lexis 4459 (Tex.App.—San Antonio 2008, no pet.) (trial judge's statements concerning appeal were ambiguous and arguably constituted a grant of permission to appeal).

The juvenile respondent in *In the Matter of A.E.E.*, 89 S.W.3d 250 (Tex.App.—Texarkana 2002, no pet.) entered a negotiated plea of true to a delinquency charge, was placed on probation, and was ordered to be removed from her father's home and placed with her maternal aunt. Her father appealed, but the Court of Appeals held that the father could not appeal because, under Section 56.01(n), the child could not have appealed. Under Section 56.01(c), the right of the father to appeal in this situation is derived from the right of the child to appeal. That subsection permits an appeal to be taken "by or on behalf of the child." Since the child could not appeal in this situation, the father could not appeal on behalf of the child.

By enactment of Section 54.034, the legislature required the juvenile court to admonish the respondent of the "plead and appeal" provisions. See Chapter 11.

5. Who May Appeal

Section 56.01(c) provides that an appeal from specified juvenile court orders may be taken "by or on behalf of a child." Only the respondent has the right to appeal in ordinary delinquency cases from the juvenile court to the Court of Appeals. The Texas Supreme Court has held that the State does not have that right. *C.L.B. v. State*, 567 S.W.2d 795 (Tex. 1978). However, if the respondent has appealed to the Court of Appeals and received a decision in his or her favor, the State may petition the Texas Supreme Court seeking further review of the appeal initiated by the respondent.

There are two exceptions to the inability of the State to appeal: (1) the State may appeal from certain rulings in determinate sentence proceedings (see the discussion in Section 3 of this chapter); and (2) the State may appeal from certain juvenile court rulings permitting unregistration under sex offender registration provisions in Article 62.357, Code of Criminal Procedure (see Chapter 20).

Under Section 56.01(c), some juvenile appeals are taken "by" the child and some "on behalf of" the child. The power of the appellate court to act on the adjudication and disposition is identical whether the appeal is taken on behalf of the child or by the child.

6. Obligations of the Judge and Lawyer

Judge's Obligation. In juvenile proceedings, the legislature has placed an obligation on the juvenile court judge to make certain that a juvenile's appellate rights are not forfeited through ignorance. Section 56.01(e) provides:

> On entering an order that is appealable under this section, the court shall advise the child and the child's parent, guardian, or guardian ad litem of the child's rights listed under Subsection (d) of this section.

Section 56.01(d) provides:

> A child has the right to:
>
> (1) appeal, as provided by this subchapter;
>
> (2) representation by counsel on appeal; and
>
> (3) appointment of an attorney for the appeal if an attorney cannot be obtained because of indigency.

What happens if the juvenile court fails to deliver the admonitions required by Section 56.01(e)? If the juvenile's attorney appeals the case in a timely fashion despite the absence of admonitions as to the right of appeal then, although the juvenile court judge erred in failing to admonish, the error is harmless and will have no effect on the appeal. The juvenile is not entitled to have the adjudication and disposition set aside because of this error. *C.W. v. State*, 738 S.W.2d 72 (Tex.App.—Dallas 1987, no writ).

If, on the other hand, the juvenile court judge failed to deliver the required admonitions and the juvenile did not appeal the case, he or she may be entitled to an out-of-time appeal later when this deficiency is brought to the attention of an appellate court. For example, in *Coffin v. State*, UNPUBLISHED, No. 08-89-407-CV, Juvenile Law Newsletter ¶ 90-2-5 (Tex.App.—El Paso 1990), the appellant had been transferred to criminal court but the juvenile court judge failed to admonish him of his right to take an immediate appeal from that decision. He was convicted and, in an appeal from that conviction, argued that the juvenile court's failure to admonish deprived the criminal court of its jurisdiction. The Court of Appeals disagreed. It abated the criminal appeal and remanded the case to the juvenile court for proper admonitions. The juvenile was then permitted to take a civil appeal from the transfer order as an out-of-time appeal under the pre-1996 immediate appeal procedure. Cf. *Ex Parte Rodriguez*, UNPUBLISHED, No. 02-07-079-CV, 2008 Tex.App.Lexis 4602 (Tex.App.—Fort Worth 2008, pet. denied) (relief denied based on unavailability of record and conflicting testimony about whether trial court had given proper admonishments).

Lawyer's Obligation. Section 56.01(f) requires the attorney who represented the child in juvenile court to file a notice of appeal with the juvenile court if the child and his parent, guardian, or guardian ad litem express a desire to appeal. The attorney must inform the court whether he or she will handle the appeal. This provision is designed to assure that the "ball is not dropped" during the transition from trial to appeal. If an appeal is desired, the trial attorney is obligated to file a timely, written notice of appeal with the juvenile court.

Appointment of Counsel for Appeal. If the juvenile's attorney informs the court that he or she will not handle the appeal beyond timely filing notice of appeal, then it becomes the responsibility of the juvenile court judge to assure that the child is represented. Section 56.01(f) provides that "[c]ounsel shall be appointed under the standards provided in Section 51.10 of this code unless the right to appeal is waived in accordance with Section 51.09 of this code." Section 51.10(a) provides that "a child may be represented by an attorney at every stage of proceedings under this title, including: ... (8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title."

If the juvenile court determines that the parents can afford to employ counsel but have not done so, it is required either to order them to employ counsel under Section 51.10(d) or to appoint counsel and order the parents to "pay a reasonable attorney's fee set by the court." Section 51.10(e). If the juvenile court determines that the family is "financially unable to employ an attorney" it is required to appoint counsel for the child. Section 51.10(f). Appointed counsel is compensated by the county. Section 51.10(i). Parents may be ordered to reimburse the county for fees it has paid to appointed counsel. Section 51.10(k).

7. Perfecting the Appeal

Unless the appeal is perfected under the Texas Rules of Appellate Procedure, it will be dismissed by the appellate court without reaching the merits of the case. See *In the Matter of C.W.*, UNPUBLISHED, No. 05-04-00674-CV, 2004 WL 2849150, 2004 Tex.App.Lexis 11156, Juvenile Law Newsletter ¶ 05-1-06 (Tex.App.—Dallas 2004, pet. denied) (there is no provision that a party must affirmatively waive the right to appeal pursuant to Section 51.09; an appeal may be waived by inaction).

Notice of Appeal. Notices of appeal in juvenile cases are governed by Rule 26.1, which requires their filing within 30 days of the signing of the disposition order. Notices of appeal in criminal cases are governed by Rule 26.2, which requires filing of notice of appeal within 30 days of the imposition or suspension of imposition of sentence. Of necessity, then, the time limits for juvenile appeals are longer than for criminal appeals—sometimes only seconds longer, but in other cases days or even weeks longer.

An appeal is perfected if a written notice of appeal is filed with the clerk of the juvenile court. Texas Rules of Appellate Procedure Rule 25.1(a). A copy of the notice of appeal must be served on the prosecuting attorney and must be sent to the clerk of the Court of Appeals to which the appeal is being made. Rule 25.1(e); See also *In the Matter of C.G.*, UNPUBLISHED, No. 12-05-00332, 2005 Tex.App.Lexis 9046, Juvenile Law Newsletter ¶ 05-4-21 (Tex.App.—Tyler 2005, no pet.) (since notice of appeal was not timely filed, appellate court without jurisdiction to consider appeal). The notice of appeal must be filed within 30 days of the signing of an appealable order or, if a timely motion for new trial was filed within those same 30 days, within 90 days of signing. Rule 26.1. These deadlines may be extended by an appellate court if a request is made within 15 days after the deadline. Rule 26.3.

In 2009, the legislature clarified that motions for new trial are governed by Rule 21 of the Texas Rules of Appellate Procedure. See Section 56.01(b-1)(2). The clarification was necessary since the rules for motions for new trial contained in Rule 21 more closely reflect the issues frequently raised in juvenile delinquency cases and because adjudication and disposition hearings are more similar to criminal than to civil trials. Accordingly, the legislature made conforming changes to Sections 51.17(a) and 56.01(a).

The 30-day deadline coupled with the 15 additional days for extension are the limits of time for filing a notice of appeal in the absence of a timely motion for new trial. An appellate court will not use Rule 2, authorizing suspension of appellate rules, to extend the time further because Rule 2 by its own terms may not be used to "alter the time for perfecting an appeal in a civil case." If the problem was attorney neglect, a writ of habeas corpus alleging ineffective assistance of counsel and requesting an out-of-time appeal is the appropriate remedy. *In the Matter of T.H.*, UNPUBLISHED, No. 04-98-00482-CV, 1998 WL 412428, 1998 Tex.App.Lexis 4431, Juvenile Law Newsletter ¶ 98-3-21 (Tex.App.—San Antonio 1998).

The written notice of appeal must be filed within the time limits set out in the Texas Rules of Appellate Procedure 26.1. Failure to do so results in dismissal of the appeal without reaching its merits. See *In the Matter of M.R.H.*, UNPUBLISHED, No. 05-09-00725, 2009 Tex.App.Lexis 7748, Juvenile Law Newsletter 09-4-6 (Tex.App.—Dallas 2009, no pet.) (notice of appeal filed in 2009 untimely as to any 2001 judgment); *In the Matter of J.C.H., Jr.*, 12 S.W.3d 561 (Tex.App.—San Antonio 1999, no pet.); *In the Matter of R.H.*, UNPUBLISHED, No. 12-06-00420-CV, 2007 Tex.App.Lexis 672 (Tex.App.—Tyler 2007, no pet.); *In the Matter of R.L.*, UNPUBLISHED, No. 08-04-00082-CV, 2005 WL 82153, 2005 Tex.App.Lexis 296, Juvenile Law Newsletter 05-1-14 (Tex.App.—El Paso 2005, no pet.); *In the Matter of M.N. and H.N.*, UNPUBLISHED, No. 14-0000461-CV, 2001 WL 837105, 2001 Tex.App.Lexis 4952, Juvenile Law Newsletter ¶ 01-3-23 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

Rule 306a(4) of the Texas Rules of Civil Procedure extends the time in which a notice of appeal may be filed to cover the circumstance that the attorney for the party taking the appeal did not receive notice of the signing of the order being appealed for more than 20 days. However, the procedural requirements of the Rule, including filing a sworn motion seeking to prove when actual notice was given, must be observed. *In the Matter of M.M.*, UNPUBLISHED, No. 04-00-00649-CV, 2001 WL 1335414, 2001 Tex.App.Lexis 7309, Juvenile Law Newsletter ¶ 01-04-48 (Tex.App.—San Antonio 2001, no pet.).

Waiving Appeal. The juvenile respondent and his or her attorney may, by complying with the formal requirements of Section 51.09, waive the juvenile's right to appeal after a timely and proper notice of appeal has been given. *In the Matter of B.K.M.*, UNPUBLISHED, No. 01-02-00827-CV, 2003 WL 360935, 2003 Tex.App.Lexis 1585, Juvenile Law Newsletter ¶ 03-1-28 (Tex.App.—Houston [1st Dist.] 2003, no pet.) (waiver made in juvenile court hearing following abatement of appeal by Court of Appeals to determine whether juvenile was represented on appeal); See also *In the Matter of R.R.J.*, UNPUBLISHED, No. 05-03-00676-CV, 2003 WL 22903117, 2003 Tex.App.Lexis 10323, Juvenile Law Newsletter ¶ 04-1-06 (Tex.App.—Dallas 2003, no pet.) (appeal dismissed for want of prosecution after appellant's mother, who originally filed notice of appeal, requested that it be dismissed).

County in Which Notice of Appeal Should Be Filed. *In the Matter of J.S.*, 35 S.W.3d 287 (Tex.App.—Fort Worth 2001, no pet.), presented an unusual question: In which

county should a notice of appeal be filed when the juvenile's probation has been transferred to a different county? Respondent was adjudicated and placed on probation in Tarrant County, but, shortly thereafter, his probation was transferred to Bexar County, where his mother lived. He filed notice of appeal in Tarrant County and the State filed a motion to dismiss the appeal on the ground that the notice should have been filed in Bexar County. The Fort Worth Court of Appeals rejected this argument:

> A juvenile has the right to appeal an order or judgment of a district court with original jurisdiction to the court of appeals authorized to hear appeals for the particular district. See Tex. Const. art. V, §6; Tex.Fam.Code Ann. §56.01 (Vernon Supp.2001); Tex.Gov't Code Ann. §22.201 (Vernon 1988). This court has appellate jurisdiction over all cases over which Tarrant County district and county courts exercise original jurisdiction. Our appellate jurisdiction is thus derivative of the trial court's jurisdiction. The final judgment of delinquency and order of probation in this case were rendered in a cause over which the Tarrant County district court had original jurisdiction. The trial courts of Tarrant County do not fall within the Fourth District [the San Antonio Court of Appeals]. See Tex.Gov't Code Ann. §22.201(c), (e). Furthermore, the case was transferred to Bexar County only for the purpose of supervising appellant's probation after final judgment and disposition of the case. See Tex.Fam.Code Ann. §51.07(b).
>
> …
>
> Because the appeal arises from the final judgment of a trial court within our district, appellant's notice of appeal was properly filed with the Tarrant County District Clerk's Office, and we have appellate jurisdiction over the cause.

35 S.W.3d at 291.

There is a related procedure in which a juvenile can be adjudicated in one county but the case transferred to the juvenile's county of residence for disposition. See Family Code Section 51.07 on Transfer to Another County for Disposition. An appeal would not be appropriate until after the disposition order has been signed, which would occur in the county to which the case was transferred for disposition. In all probability, therefore, the appeal would lie from that county, not from the county of adjudication, even when adjudication issues are included in the appeal. That means that the expenses of providing for counsel and record for the indigent would fall upon the county of disposition, which probably is appropriate since by definition it is the county of residence of the child and of at least one of the child's parents. Presumably, the same logic would apply to a case that has been permanently transferred to another county under inter-county supervision. See Section 51.073.

Costs of Appeal. Costs of an appeal are assessed in conjunction with the filing. A party who wants to proceed without prepaying the costs must comply with Texas Rule of Appellate Procedure 20.1, as revised in 2016. If the party filed a Statement of Inability to Afford Payment of Court Costs in the trial court, no new statement is required for the appellate court unless the court made affirmative findings under Texas Rule of Civil Procedure 145 that the party could afford all court costs and pay them as they were incurred. Thus, a determination of indigence made in the trial court carries forward.

Cases that may be consulted for guidance are listed; given the revision in 2016, care should be used in reviewing the cases for current applicability. *In the Matter of J.C.*, 892 S.W.2d 85 (Tex.App.—El Paso 1994, no writ) (treated indigency affidavits for counsel and for a reporter's record as also declaring indigency to pay cost of appeal and, accordingly, accepted the appeal as perfected); *In the Matter of K.C.A.*, 36 S.W.3d 501 (Tex. 2000) (Section 56.02 Family Code permits an indigency determination based on either a hearing or an affidavit; although this is a technical ruling, it does show that the Family Code provisions governing juvenile appeals control when different from those in the Rules of Appellate Procedure); *In the Matter of D.L.C.*, UNPUBLISHED, No. 07-05-0337-CV, 2005 Tex.App.Lexis 9274, Juvenile Law Newsletter ¶ 05-4-26 (Tex.App.—Amarillo 2005), *aff'd by* 2006 TEX.APP.LEXIS 5013 (Tex.App.—Amarillo 2005, no pet.) (citing *K.C.A.* and holding Rule 20.1 does not apply to appeals under the Juvenile Justice Code).

Appealing Adjudication Issues. The Fort Worth Court of Appeals in *In the Matter of O.S.S.,* 931 S.W.2d 42 (Tex.App.—Fort Worth 1996, writ denied) held that filing a notice of appeal within 30 days of the disposition order does not include adjudication issues if the adjudication order was signed more than 30 days before the notice of appeal was filed. Under those circumstances, only disposition issues may be appealed. The legislature in 1997 amended Section 56.01(b) to provide that a timely appeal from a dispositional order is also an appeal of adjudication issues. *O.S.S.* was effectively overruled by the following provisions in Section 56.01(b) and (b-1):

> (b) …When an appeal is sought by filing a notice of appeal, security for costs of appeal, or an affidavit of inability to pay the costs of appeal, and the filing is made in a timely fashion after the date the disposition order is signed, the appeal must include the juvenile court adjudication and all rulings contributing to that adjudication. An appeal of the adjudication may be sought notwithstanding that the adjudication order was signed more than 30 days before the date the notice of appeal, security for costs of appeal, or affidavit of inability to pay the costs of appeal was filed.
>
> (b-1) A motion for new trial seeking to vacate an adjudication is:
>
> (1) timely if the motion is filed not later than the 30th day after the date on which the disposition order is signed; and
>
> (2) is governed by Rule 21, Texas Rules of Appellate Procedure.

The intent of the 1997 amendment was to abrogate the rule of *O.S.S.* that precluded review of adjudication issues when the adjudication occurred more than 30 days before the post-dispositional notice of appeal was filed. The amendment was not intended to extend indefinitely the time period after adjudication for the filing of a notice of appeal.

While the grounds for appeal may have occurred during the adjudication hearing, it is not until after the disposition of the case that there is a motive to appeal, depending upon what that disposition was. For that reason, if a notice of appeal is given in a timely fashion after disposition, it should reach adjudication issues in juvenile cases, just as it does under Rule 26.2 in criminal cases.

The San Antonio and Fort Worth Courts of Appeals have recognized that the 1997 amendment in Section 56.01 means that a notice of appeal filed in a timely fashion after the signing of the disposition order reaches adjudication issues even if the adjudication order was signed more than 30 days before the disposition order was signed. See *In the Matter of J.C.H., Jr.,* 12 S.W.3d 561 (Tex.App.—San Antonio 1999, no pet.); *In the Matter of G.C.F.*, 42 S.W.3d 194 (Tex.App.—Fort Worth 2001, no pet.).

Motion for New Trial and Evidence Insufficiency. Since September 1, 2009, if a motion for new trial is filed, it must, under Rule 21 of the Texas Rules of Appellate Procedure, be filed within 30 days of the date that the trial court imposes or suspends sentence in open court, as in criminal cases generally. See 56.01(b-1)(2). An order granting a new trial deprives an appellate court of jurisdiction over the appeal. See *In the Matter of K.F.*, UNPUBLISHED, No. 07-08-0102-CV, 2008 Tex.App.Lexis 2068 (Tex.App.—Amarillo 2008, no pet.).

In ordinary civil appeals, a party who wishes on appeal to challenge the factual sufficiency of the evidence to support the trial court's decision must first file a motion for new trial in the trial court. Texas Rules of Civil Procedure 324(b). In *In the Matter of R.J.W.*, 770 S.W.2d 103 (Tex.App.—Houston [1st Dist.] 1989, no writ), the Court of Appeals considered the applicability of that requirement to a juvenile appeal:

> While delinquency proceedings are civil in nature, the protections and due process requirements are similar to those in adult criminal prosecutions. The strict standards applied in criminal law are also applicable to protect the juvenile in this civil, yet quasi-criminal proceeding....
>
> The prerequisite for appeal, in civil cases, to file a motion for new trial to challenge the sufficiency of the evidence to support the jury findings, is necessarily related to the burden of proof in a civil trial. However, in a delinquency proceeding, the State is required to prove the elements of the crime beyond a reasonable doubt, as in an adult prosecution, and not by a preponderance of the evidence.... A motion for new trial is not required as a prerequisite to challenge the sufficiency of the evidence in a criminal appeal. It reasonably follows that, because the burden of proof in a delinquency proceeding is the same as in a criminal prosecution, a motion for new trial should not be required to challenge the sufficiency of the evidence.

770 S.W.2d at 105.

Similarly, in *In the Matter of F.F.G.*, UNPUBLISHED, No. 03-05-00854-CV, 2006 Tex.App.Lexis 10306, Juvenile Law Newsletter ¶ 07-1-8 (Tex.App.—Austin 2006, no pet.), the State argued that appellant was required to file a motion for new trial to properly preserve the issue of factual sufficiency on appeal. The appellate court, however, noted that, since F.F.G. was adjudicated delinquent during a bench trial, such a motion was not necessary. A "motion for new trial is only required to preserve complaints about the factual sufficiency of the evidence supporting jury findings." 2006 Tex.App.Lexis 10306 *4-5.

The Court of Appeals in *In the Matter of M.R.*, 846 S.W.2d 97 (Tex.App.—Fort Worth 1992, writ denied), followed the

lead of *In the Matter of R.J.W.* in holding that a motion for new trial is not necessary to preserve a factual sufficiency claim for appeal. It also held that a motion for new trial is not necessary to preserve a juror misconduct claim if the record already shows the evidentiary basis for the claim. It then found the evidence factually sufficient and denied relief on the juror misconduct claim. See also *In the Matter of C.D.S.*, UNPUBLISHED, No. 10-07-00226-CV, 2008 Tex.App.Lexis 706 (Tex.App.—Waco 2008, no pet.) (noting split by the Courts of Appeals on whether a motion for new trial is required in juvenile cases and finding evidence factually sufficient).

The Texas Supreme Court denied application for writ of error in *In the Matter of M.R.*, 858 S.W.2d 365 (Tex. 1993). However, in doing so, it commented that:

> Before 1973 we held that juvenile proceedings were governed "as far as practicable" by the rules of civil procedure. *Brenan v. Court of Civil Appeals, Fourteenth Dist.*, 444 S.W.2d 290, 292 (Tex. 1968). In 1973, with the enactment of Title 3 of the Texas Family Code, however, the legislature replaced the "as far as practicable" limitation with the provision that "Except when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under [Title 3]." Tex.Fam. Code §51.17. Nothing in Title 3 conflicts with the Rules of Civil Procedure requirement of motions for new trial as a prerequisite to assert evidentiary and procedural errors, including factual sufficiency and juror misconduct challenges. Tex.R.Civ.P. 324(b). We disapprove the court of appeals' holding that juveniles appealing delinquency judgments are exempt from this procedural requirement.

858 S.W.2d at 366.

Under the Supreme Court's statement in *M.R.*, a motion for new trial is necessary to raise a claim of factual insufficiency of the evidence on appeal. See also *In the Matter of D.J.H.*, 186 S.W.3d 163 (Tex.App.—Fort Worth 2006, pet. denied) (not filing motion for new trial waived factual sufficiency complaint on appeal; citing *M.R.*); but Cf. *In the Matter of Q.D.M.T.,* UNPUBLISHED, No. 14-07-00470-CV, 2008 Tex.App.Lexis 8634 (Tex.App.—Houston [14th Dist.] 2008, no pet.) (factual sufficiency issue addressed "in the interest of justice" despite appellant's failure to file motion for new trial). However, a claim of legal insufficiency—that there is no evidence in support of a required element of the verdict—can continue to be made without the necessity of a motion for new trial. *In the Matter of C.F.,* 897 S.W.2d 464, 472-73 (Tex.App.—El Paso 1995, no writ) (addressing a claim of legal insufficiency but refusing to address a claim of factual insufficiency because no motion for new trial had been filed); *In the Matter of R.G.*, UNPUBLISHED, No. 14-95-00584-CV, 1997 WL 379151, 1997 Tex.App.Lexis 3591, Juvenile Law Newsletter ¶ 97-3-20 (Tex.App.—Houston [14th Dist.] 1997, writ denied) (following *C.F.* in refusing to review a claim of factual insufficiency because no motion for new trial had been filed); *In the Matter of E.U.M.*, 108 S.W.3d 368 (Tex.App.—Beaumont 2003, no pet.). Cf. *In the Matter of C.J.*, 285 S.W.3d 53 (Tex.App.—Houston [1st Dist.] 2009, no pet.) (citing quasi-criminal nature of juvenile cases, complaint of factual sufficiency need not be presented in a motion for new trial to preserve it for appeal); *In the Matter of J.L.H.*, 58 S.W.3d 242 (Tex.App.—El Paso 2001, no pet.) (asserting that the punitive nature of the juvenile system justifies using the criminal rule that permits factual sufficiency reviews without requiring a motion for new trial).

The San Antonio Court of Appeals has held under authority of the Supreme Court's opinion in *M.R.* that a motion for new trial is required in juvenile cases to raise a claim of incurable jury argument not ruled upon by the trial court under Tex.R.Civ.P. 324(b)(5). *In the Matter of J.R.H.*, UNPUBLISHED, No. 04-94-00385-CV, 1996 WL 23450, Juvenile Law Newsletter ¶ 96-1-17 (Tex.App.—San Antonio 1996) (also holding that a motion for new trial is not required to raise legal insufficiency claim on appeal).

The Fort Worth Court of Appeals applied *M.R.* to a case in which the juvenile filed a motion for new trial that complained only that the verdict was "contrary to the law and evidence." This was too general to comply with the Supreme Court's motion for new trial requirement in *M.R.* and precluded raising a factual insufficiency claim on appeal. In addition, the failure of the juvenile to move for acquittal, to make a motion for directed verdict of not guilty, or in some other way to challenge the legal sufficiency of evidence at trial precludes raising a legal sufficiency claim on appeal. *In the Matter of K.L.G.*, UNPUBLISHED, No. 02-95-091-CV, Juvenile Law Newsletter ¶ 96-3-06 (Tex.App.—Fort Worth 1996).

In 2010, the Texas Supreme Court addressed the issue of whether a motion for new trial challenging the sufficiency of the evidence to support the jury's verdict preserves error on appeal. *In the Matter of R.D.*, 304 S.W.3d 368 (Tex. 2010). Since appellant's motion did not specifically challenge the evidentiary basis for why the jury rejected his affirmative defense of duress, the El Paso Court of Appeals had ruled that the issue was waived on appeal. See *In the Matter of R.D.*, 304 S.W.3d 424, 429 (Tex. App.—

El Paso 2009, pet. granted). The Supreme Court did not comment on how the 2009 amendment to Section 56.01(b-1) affected the viability of the *M.R.* case by eliminating the requirement of a motion for new trial to preserve a factual sufficiency challenge on appeal in a juvenile case under Rule 21 of the Texas Rules of Appellate Procedure.

> In a civil case, in order to challenge on appeal the factual sufficiency of the evidence to support a jury finding, the point must be raised in a motion for new trial. TEX. R. CIV. P. 324(b)(2). In *In re M.R.*, 858 S.W.2d 365, 366 (Tex. 1993) (per curiam opinion denying application for writ of error), we stated that, unlike the rule in criminal cases, in juvenile proceedings a motion for new trial is necessary to preserve a factual sufficiency challenge. [footnote omitted] Unlike in *In re M.R.*, however, R.D. did file a motion for new trial. The question is whether that motion was sufficient to encompass R.D.'s complaint on appeal that the jury's rejection of his affirmative defense had no evidentiary support. We conclude that it was.

304 S.W.3d at 370.

The high Court held that appellant's general challenge to the legal and factual sufficiency of the evidence followed by a more specific one aimed at the deadly weapon instruction did not constitute a waiver on appeal. It remanded the case to the Court of Appeals for further proceedings. See also *In the Matter of R.D.*, 342 S.W.3d 123 (Tex. App.—El Paso 2011, no pet.) (holding evidence legally sufficient to support jury's rejection of appellant's duress defense).

Effect of Appeal on Juvenile Court Disposition and Appeal Bond. Perfecting an appeal by itself has no effect on the enforceability of the juvenile court's order being appealed. Section 56.01(g) provides:

> An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of the person, institution, or agency to whose care the child is committed, unless the juvenile court so orders. However, the appellate court may provide for a personal bond.

Thus, if the juvenile court committed the child to TJJD, an appeal does not affect the commitment unless the juvenile or appellate court, in its discretion, provides otherwise. If a probation order is appealed, the child remains on probation while the appeal is pending decision by the appellate court.

The reason for this provision is that most juvenile court dispositions are measured by the age of the person who is the subject of them. To suspend implementation of the disposition pending outcome of an appeal would mean in many cases that the respondent would reach the terminal age before the appeal was fully decided and would never be subject to the disposition merely because an appeal had been taken, no matter what the outcome of the appeal. Without this provision, a probation disposition, which automatically ends at age 18, could often be totally avoided merely by taking an appeal and seeking further review by the Texas Supreme Court, no matter what the outcome of the appellate process.

The El Paso Court of Appeals in *In the Matter of J.V.*, 944 S.W.2d 15 (Tex.App.—El Paso 1997, no writ) referred appellant's application for release on bond pending appeal to the juvenile court for an evidentiary hearing and report. It then denied appellant's application for release on bond pending appeal. In doing so, it enumerated some of the factors that legitimately can be considered in making that discretionary decision. It placed great weight on the fact that appellant's behavior had improved dramatically in his present placement with a private provider and did not wish to disrupt that progress. See also *In the Matter of J.G.*, UNPUBLISHED, No. 04-04-00699-CV, 2004 WL 2945705, 2004 Tex.App.Lexis 11477, Juvenile Law Newsletter ¶ 05-1-09 (Tex.App.—San Antonio 2004, reh'g denied) (due deference given to the trial court's findings and recommendation not to release J.G. on personal bond pending resolution of appeal).

The San Antonio Court of Appeals in *In the Matter of D.W.R.,* 990 S.W.2d 446 (Tex.App.—San Antonio 1999, pet. denied) had set aside the juvenile's adjudication and remanded for new proceedings. The State filed a petition for review with the Texas Supreme Court and the juvenile filed with the Court of Appeals an application for release on bond pending resolution of the State's petition. The Court of Appeals referred the matter to the juvenile court for an evidentiary hearing and report. After receiving that report, the Court of Appeals released the juvenile on bond under very strict circumstances, including residing in the home of his ex-stepmother, a curfew, electronic monitoring, weekly reporting to a probation officer and continuation of counseling sessions.

The San Antonio court rejected the State's argument that because the appellant was then 19 years old, he came within the appeal bond provisions of the Code of Criminal Procedure rather than the Family Code. Under Section 51.041 the jurisdiction of the juvenile court is extended to

encompass cases on remand from a Court of Appeals no matter how old the respondent is at the time of the remand. The Court of Appeals held that provision enabled it to use Section 56.01(g) to set bond rather than the more restrictive provisions of the Code of Criminal Procedure.

8. The Appellate Record

Making the Record. On direct appeal, the appellate court can consider only claims of legal errors that appear in the official record of the case. The official record consists of all documents filed with the clerk of the juvenile court in the case (the clerk's record) and a transcription of the notes of the official court reporter or some other reliable report of what occurred in court hearings (the reporter's record). Section 54.09 permits tape recordings, videotape recordings or court reporter's stenographic notes to be used:

> All judicial proceedings under this chapter except detention hearings shall be recorded by stenographic notes or by electronic, mechanical, or other appropriate means. Upon request of any party, a detention hearing shall be recorded.

Failure to include a transcription of the court reporter's notes with the appeal means that any claim of error that may be reflected in that transcription cannot be presented to the appellate court. *In the Matter of A.V.W.*, UNPUBLISHED, No. 01-96-00731-CV, 1997 WL 403124, 1997 Tex.App.Lexis 3763, Juvenile Law Newsletter ¶ 97-3-23 (Tex.App.—Houston [1st Dist.] 1997, no writ) (also refusing to consider a transcription of notes from a case appellant claimed was tried simultaneously with appellant's case).

Gaps in the Record. Failure to record "all judicial proceedings" is error requiring reversal. *S.S. v. State,* 879 S.W.2d 395 (Tex.App.—Eastland 1994, no writ) (failure to record closing arguments in adjudication hearing requires new trial). The Austin Court of Appeals in *In the Matter of M.C.H.*, UNPUBLISHED, No. 03-96-00023-CV, 1996 WL 711471, 1996 Tex.App.Lexis 5531 (Tex.App.—Austin 1996, no writ) held that the failure of the juvenile court to record a pre-trial suppression hearing, by either audiotape or court reporter, required setting aside the adjudication because the absence of that record precluded the juvenile from pursuing appellate claims.

By contrast, in *In the Matter of L.A.,* UNPUBLISHED, No. 04-97-00434-CV, 1998 WL 904294, 1998 Tex.App.Lexis 8016, Juvenile Law Newsletter ¶ 99-1-09 (Tex.App.—San Antonio 1998, no pet.), appellant complained that certain discussions between the juvenile court judge and counsel were not recorded. The Court of Appeals held that omission did not require reversal of the adjudication because there was no claim that anything that occurred at those conferences was related to an issue presented on appeal and the omission appeared to be inadvertent and not a product of juvenile court policy.

The San Antonio Court of Appeals in *In the Matter of S.J.*, 940 S.W.2d 332 (Tex.App.—San Antonio 1997, no writ) held that a juvenile and his or her attorney can waive the making of a record of proceedings by a waiver that complies with the requirements of Section 51.09.

Preserving Notes of Proceedings. A court reporter is required to preserve his or her stenographic notes for three years. Government Code Section 52.046(a)(4). In 1987, a similar requirement was enacted to mandate the recording of release and transfer hearings under the determinate sentencing proceedings. It requires that the record be kept by the juvenile court for at least two years. Family Code Section 54.11(g). The court reporter transcribes them only if needed for an appeal or other proceedings.

Audiotape Records. The El Paso Court of Appeals in *In the Matter of L.B.*, 936 S.W.2d 335 (Tex.App.—El Paso 1996, no writ), established procedures by which audiotape recordings of juvenile proceedings (authorized by Section 54.09) can become the reporter's record for appeal. A certified copy of the cassette tape goes to the Court of Appeals. In the event there is an audio problem with the tapes, the juvenile court should appoint a court reporter to make a typed version of the tape as an aid to understanding the tape. Any disputes as to the content of the audiotapes will be resolved, on motion, by the Court of Appeals.

Flaws in the Record. Rule 34.6(f) sets out the analysis to be used to determine if appellant is entitled to a rehearing when there is a portion of an audiotape or stenographic record that is flawed so that it cannot be deciphered.

An appellant is entitled to a new trial under the following circumstances:

> (1) if the appellant has timely requested a reporter's record;
>
> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or—if the

proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

In *In the Matter of Martinez*, UNPUBLISHED, NO. 0701-0130-CV, 2001 WL 490522, 2001 Tex.App.Lexis 3000, Juvenile Law Newsletter ¶ 01-2-23 (Tex.App.—Amarillo 2001, motion granted), the Court of Appeals abated an appeal from a hearing modifying disposition and committing the respondent to TYC for a determination of whether a new hearing was required as a result of flaws in the audiotape record of the hearing. Later, in the same litigation, the Court of Appeals decided, based on a stipulation by the parties, that the standards of Rule 34.6(f) had been met. Consequently, it set aside the juvenile court's probation revocation order and remanded for new proceedings. See also *In the Matter of K.G.*, UNPUBLISHED, No. 02-10-00057-CV, 2010 WL 5019198 (Tex.App.—Fort Worth 2010) (appellant entitled to new trial since all Rule 34.6(f) requirements established and State conceded error).

Appellate courts also have the authority to reform whatever the trial court could have corrected by a judgment nunc pro tunc when the evidence necessary to correct the judgment appears in the record. See *Asberry v. State*, 813 S.W.2d 526, 529 (Tex.App.—Dallas 1991, pet. ref'd) (appellate court has power to correct and reform judgment when it has the necessary data and information to do so or to make any appropriate order as law and nature of the case may require); *In the Matter of I.R.*, UNPUBLISHED, No. 05-04-01417-CV, 2005 Tex.App.Lexis 4954, Juvenile Law Newsletter ¶ 05-3-32 (Tex.App.—Dallas 2005, no pet.) (citing *Asberry*). Cf. *In the Matter of D.A.O.*, UNPUBLISHED, No. 03-09-00483-CV, 2010 Tex.App.Lexis 6801 (Tex.App.—Austin 2010, no pet.) (clerical error that could have been corrected nunc pro tunc did not render order modifying disposition void or voidable).

Paying for the Record. The responsibility for arranging a transcription of the court reporter's notes and for paying for that transcription rests with the appellant's attorney if the attorney was retained by the family to handle the appeal. Section 56.02(a). Section 56.02(b) provides for a transcript to be provided without charge to the appellant or the attorney if the court, after a hearing or based on affidavit filed by the child's parent (or other person responsible for supporting the child), determines the parent or other responsible party is unable to afford the transcript.

Mitchell v. Baum, 668 S.W.2d 757 (Tex.App.—Houston [14th Dist.] 1984, no writ), presented an occasion for an appellate court to interpret that language. Mitchell was transferred by the juvenile court to criminal court for prosecution as an adult. He had been represented before the juvenile court by a lawyer retained by his mother. After transfer, the criminal court, looking only to Mitchell's resources, appointed the same attorney to represent him in the criminal proceedings on the ground that Mitchell, himself, was indigent. That attorney then sought a county-paid transcript to appeal the transfer order to the Court of Appeals. An affidavit of indigency was filed. The juvenile court, after a hearing, refused to order the court reporter to prepare a transcript at county expense on the ground that Mitchell's mother could afford to pay for it or to give security for its payment. Mitchell then sought a writ of mandamus from the Court of Appeals to order the juvenile court judge to provide a free transcript.

The Court of Appeals rejected Mitchell's argument that, since the juvenile court had transferred the case to adult court, only his resources should be considered in determining whether a free transcript would be provided:

> [R]elator complains of the law's inconsistency in regarding him as a child for purposes of appealing the discretionary transfer order which effectively certified him to be tried, and treated, as an adult for criminal proceedings. In the former, since it is civil in nature, his parent's financial status is properly considered in testing his ability to pay appellate costs. On the other hand, in the criminal proceedings he is regarded as an adult and his indigency status for trial or appeal is determined by his individual financial condition.

668 S.W.2d at 760.

The Court of Appeals stated that the question of resolving the inconsistency is one for the legislature, not the courts. The Court of Appeals then examined the financial resources of Mitchell's family and concluded the family could afford to pay for a transcript:

> Relator's mother receives on his behalf social security payments of $376.00 monthly. There are no other

> children residing at home. His mother owns a three bedroom home with an outstanding mortgage balance of $5,000.00. She earns $10,296.00 yearly as a domestic worker. Relator's stepfather is employed by the City of Houston and has an annual income of $18,000.00. Both mother and stepfather own 1979 automobiles. The mother owes approximately $1,500.00 on installment charge accounts. Each testified that they made unsuccessful attempts to borrow money. There is nothing in the record to indicate the cost of appeal except that it would be in excess of $500. From our review of the record, we find that the court did not abuse its discretion in sustaining the contest to the affidavit in lieu of costs....
>
> [R]elator argues that respondent [juvenile court] improperly considered the stepfather's income for any purpose. While the stepfather did not legally adopt relator, it is clear from the record that respondent only considered the stepfather's income to the extent required by state community property laws.

668 S.W.2d at 761.

In *In the Matter of A.G.*, 195 S.W.3d 886 (Tex.App.—Waco 2006), *aff'd by* 2007 WL 1965588, 2007 Tex.App.Lexis 5310 (Tex.App.—Waco 2007, no pet.), the Waco Court of Appeals withheld a ruling on appellate counsel's motion to withdraw until the issue of indigence was resolved. Citing *K.C.A.,* the appellate court noted that if the trial court finds that A.G. and his family are indigent, it must appoint counsel to represent the child as well as provide the clerk's and reporter's records without charge. The appeal was abated because granting counsel's motion to withdraw would leave A.G. without representation on appeal. In 2007, A.G.'s disposition was affirmed. *In the Matter of A.G.*, UNPUBLISHED, No. 10-06-00107-CV, 2007 WL 1965588, 2007 Tex.App.Lexis 5310 (Tex.App.—Waco 2007, no pet.); see also *In the Matter of M.A.D.*, 167 S.W.3d 938 (Tex.App.—Waco 2005), *appeal dism'd by* 2005 Tex.App.Lexis 7641 (Tex.App.—Waco 2005, no pet.).

If there is a challenge to an affidavit of indigency, as in *Mitchell v. Baum*, the juvenile court must conduct a hearing and rule in writing on the contest within 30 days of its filing. Texas Rules of Appellate Procedure Rule 20.1(i). Failure to do so results in denial of the challenge and upholding the affidavit of indigency automatically. *B.J.M. v. State,* 997 S.W.2d 626 (Tex.App.—Dallas 1998, no pet.).

Sections 56.01(l) and (m) were added in 1995, codifying the rule that the income and assets of the juvenile's family must be taken into account in determining indigence:

> (l) The court may order the child, the child's parent, or other person responsible for support of the child to pay the child's costs of appeal, including the costs of representation by an attorney, unless the court determines the person to be ordered to pay the costs is indigent.
>
> (m) For purposes of determining indigency of the child under this section, the court shall consider the assets and income of the child, the child's parent, and any other person responsible for the support of the child.

Deadlines for Filing the Appellate Record. The appellate record must be filed in the Court of Appeals within 60 days after the judgment is signed or within 120 days after the judgment is signed if there was a motion for new trial. Texas Rules of Appellate Procedure Rule 35.1. The appellate record consists of the clerk's record and the reporter's record. Rule 34.1. The clerk's record consists of all the papers filed in the case. Rule 34.5. The reporter's record consists of a transcription of proceedings in the case. Rule 34.6.

Failure of the attorney for the appellant to secure filing of the reporter's record within these time limits results in the appeal proceeding to decision without the reporter's record, that is, only upon the documents filed in the juvenile court (clerk's record). *E.T.J. v. State*, 766 S.W.2d 871 (Tex.App.—Dallas 1989, no writ).

There is a conflict in decisions concerning the effect of not complying with the deadlines for filing the appellate record. The San Antonio Court of Appeals in *In the Matter of M.R.R.*, 903 S.W.2d 49 (Tex.App.—San Antonio 1995, no writ), held that if the juvenile would be deprived of the effective assistance of counsel by deciding the appeal from a 40-year determinate sentence without an untimely-filed reporter's record, then an untimely motion to file the reporter's record must be granted. The Austin Court of Appeals in *In the Matter of M.S.*, 940 S.W.2d 789 (Tex.App.—Austin 1997, no writ) agreed with the San Antonio Court in *M.R.R.* and held that a juvenile appellant, like a criminal appellant, should be permitted under some circumstances to file a late reporter's record.

By contrast, the Houston Fourteenth District Court of Appeals in *J.W.D. v. State*, 903 S.W.2d 44 (Tex.App.—Houston [14th Dist.] 1995, writ denied), held it had no authority to permit the late filing of a clerk's record in an appeal

from a certification order, even to prevent ineffective assistance of counsel. See also *In the Matter of M.B.*, 894 S.W.2d 82 (Tex.App.—El Paso 1995, no writ) (same in appeal from 25-year determinate sentence); *In the Matter of C.A.C.*, UNPUBLISHED, No. 14-96-00308-CV, 1996 WL 307482, 1996 Tex. App.Lexis 2254, Juvenile Law Newsletter ¶ 96-3-01 (Tex.App.—Houston [14th Dist.] 1996, writ denied).

9. Further Proceedings

Assuring the Child is Represented. Once a timely and proper notice of appeal has been filed, then the clerk's record and the reporter's record should be filed with the Court of Appeals. What if nothing happens in an appeal after the clerk's record has been filed? In *In the Matter of Posadas*, UNPUBLISHED, No. 07-02-0331-CV, 2002 WL 31551374, 2002 Tex.App.Lexis 8141, Juvenile Law Newsletter ¶ 02-4-20 (Tex.App.—Amarillo 2002, appeal dism'd), nothing happened in the appeal after the clerk's record was filed. The attorney of record did not respond to the Court of Appeals' request for information about the status of the appeal. The Court of Appeals abated the appeal with an order that the juvenile court conduct a hearing to determine:

> (1) Whether the juvenile and his attorney have abandoned his appeal.
>
> (2) If the appeal has not been abandoned, the trial court shall determine if the juvenile is indigent and if so, whether the appointment of an attorney is necessary;
>
> (3) If it is determined that an attorney should be appointed, the name, address and State Bar of Texas identification number of the attorney appointed;
>
> (4) If the juvenile is not indigent, whether he has failed to make the necessary arrangements for prosecuting the appeal, and if he has not done so, what orders are necessary to ensure those arrangements are made;
>
> (5) If other orders are necessary to ensure the diligent and proper pursuit of the appeal.

2002 WL 31551374 *1.

The juvenile and his mother appeared at the juvenile court hearing ordered by the Court of Appeals and expressed their desire that the appeal be dismissed. After the appeal was reinstated, the Court of Appeals dismissed it. *In the Matter of Posadas,* UNPUBLISHED, No. 07-02-0331-CV, 2003 WL 21108442, 2003 Tex.App.Lexis 4239 (Tex.App.—Amarillo 2003, no pet.).

Brief. The appellant's brief must be filed no later than 30 days after the record has been filed (20 days in an accelerated appeal, such as an appeal of an order certifying a juvenile to stand trial as an adult under Section 54.02—see Supreme Court Order, Misc. Docket No. 15-9156). Texas Rules of Appellate Procedure Rule 38.6(a). Failure of appellant to file a brief results in a dismissal of the appeal without reaching its merits. *Montemayor v. State,* UNPUBLISHED, No. 01-89-00338-CR, 1990 WL 2997 (Tex.App.—Houston [1st Dist.] 1990, no writ). The State must file its brief within 30 days after the appellant's brief is filed (20 days in accelerated appeals). Rule 38.6(b).

Frivolous Appeals. If court-appointed counsel determines that the appeal is wholly frivolous and without merit, he or she is required to file an "*Anders* brief" advancing any possible arguments for reversal. A copy of that brief is served on the juvenile and parent or guardian and they are advised of their right to present their own brief to the appellate court. This is the procedure set out for criminal cases by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 483 (1967) and *Gainous v. State*, 436 S.W.2d 137 (Tex.Crim.App. 1969).

That procedure was first used in a juvenile appeal in *In the Matter of C.G.*, UNPUBLISHED, No. 01-94-00195-CV, 1995 WL 155556, 1995 Tex.App. Lexis 750, Juvenile Law Newsletter ¶ 95-2-9 (Tex.App.—Houston [1st Dist] 1995, no writ). The San Antonio Court of Appeals in *In the Matter of V.J.B.*, UNPUBLISHED, No. 04-95-00176-CV, 1996 WL 141736, 1996 Tex.App.Lexis 1226, Juvenile Law Newsletter ¶ 96-2-05 (Tex.App.—San Antonio 1996, no writ), held that the standards and procedures established by the Court of Criminal Appeals in *High v. State*, 573 S.W.2d 807 (Tex.Crim.App. 1978), and *Gainous v. State*, 436 S.W.2d 137 (Tex.Crim.App. 1969), also apply to counsel's assessment that the appeal is frivolous in a juvenile case.

The Austin Court of Appeals arrived at the same conclusion in *In the Matter of G.R.*, UNPUBLISHED, No. 03-97-00016-CV, 1997 WL 304122, 1997 Tex. App.Lexis 3155, Juvenile Law Newsletter ¶ 97-3-08 (Tex.App.—Austin 1997, no writ). See also *In the Matter of L.E.H.*, 228 S.W.3d 219 (Tex.App.—San Antonio 2007, no pet.) (*Anders* brief appropriate in appeal of involuntarily commitment order of youth for temporary mental health services); *In the Matter of D.L.*, UNPUBLISHED, No. 02-03-008-CV, 2004 WL 743238, 2004 Tex.App.Lexis 3213, Juvenile Law Newsletter

¶ 04-2-14 (Tex.App.—Fort Worth 2004, no pet.); *In the Matter of A.C.R.*, UNPUBLISHED, No. 02-03-055-CV, 2003 WL 22805092, 2003 Tex.App.Lexis 10019, Juvenile Law Newsletter ¶ 03-4-23 (Tex.App.—Fort Worth 2003, no pet.); *In the Matter of A.G.N.*, UNPUBLISHED, No. 07-07-0312-CV, 2008 Tex.App.Lexis 4615 (Tex.App.—Amarillo 2008), *cert. denied*, 129 S.Ct. 2395, 173 L.Ed.2d 1307 (2009). Cf. *Menson v. State*, UNPUBLISHED, No. 07-09-0221-CR, 2010 Tex.App.Lexis 1164, Juvenile Law Newsletter ¶ 10-2-1 (Tex.App.—Amarillo 2010) (case remanded to trial court for appointment of new counsel since arguable grounds for appeal exist despite filing of *Anders* brief).

The criminal standard and procedure was approved for juvenile cases by the Texas Supreme Court in *D.A.S. v. State*, 973 S.W.2d 296 (Tex. 1998). See also *In the Matter of A.R.B.*, 225 S.W.3d 131 (Tex.App.—El Paso 2005, no pet.) (procedures established in *Anders* apply to juvenile appeals). Unlike in criminal cases, however, a copy of the attorney's frivolous appeal brief must be given to the child's parent as well as to the child. They must be notified of their opportunity to file a brief of their own.

Rule 45, Texas Rules of Appellate Procedure, empowers a court to impose a monetary sanction on an attorney who pursues a frivolous appeal without using the procedures and standards established for appointed counsel to withdraw from the case. See *In the Matter of R.D.W.*, UNPUBLISHED, No. 05-00-01416-CV, 2001 WL 1143313, 2001 Tex.App.Lexis 6585, Juvenile Law Newsletter ¶ 01-4-27 (Tex.App.—Dallas 2001, no pet.), in which the Court of Appeals identified an attorney in an opinion in a juvenile appeal and announced it was considering the imposition of sanctions against him under Rule 45.

Escape by Juvenile. If the juvenile respondent has escaped from TJJD or from a court-ordered placement or is on probation and cannot be found, the appellate court will dismiss the appeal without reaching its merits. *In the Matter of M.A.G.,* 541 S.W.2d 899 (Tex.Civ.App.—Corpus Christi 1976, writ ref'd n.r.e.) (child still a fugitive at the time of appellate court's decision). However, if the child escaped and has been recaptured or has surrendered himself or herself, the appellate court may, in its discretion, consider the appeal on its merits. *In the Matter of L.J.S.*, 613 S.W.2d 14 (Tex.Civ.App.—Texarkana 1981, no writ).

In 1995, the legislature enacted Section 56.01(k) to overrule *L.J.S.* and require dismissal of an appeal when a juvenile has escaped from custody and has not voluntarily returned by the 10th day after the date of the escape. However, the court may not dismiss an appeal, and must reinstate an already dismissed appeal, on an affidavit of an officer or other credible person showing the juvenile voluntarily returned to custody before the 10th day. The provision is based on Rule 42.4 of the Texas Rules of Appellate Procedure, applicable only in criminal cases.

Mootness. If the trial court action being challenged on appeal has already occurred, or if the Court of Appeals cannot correct the error, then the appeal will be dismissed as moot. The respondent in *In the Matter of N.N.D.W.*, UNPUBLISHED, No. 08-01-00244-CV, 2002 WL 1341108, Juvenile Law Newsletter ¶ 02-3-13 (Tex.App.—El Paso 2002), was placed on probation in the Challenge Program. On appeal from the disposition, she argued that her trial attorney rendered ineffective assistance in the disposition proceedings. Before the appeal was decided, she was discharged from probation upon becoming 18 years old. The Court of Appeals held that the case was moot and dismissed the appeal:

> Because of the timing of this appeal, we cannot address the merits. The issues for review are moot since the trial court's order expired on March 12, 2002 [the juvenile respondent's 18th birthday], prior to submission and issuance of this opinion. Appellate courts do not have authority under the Texas Constitution or by statute to render advisory opinions.… The mootness doctrine limits courts to deciding cases in which an actual controversy exists.… When there has ceased to be a controversy between the litigating parties due to events occurring after judgment has been rendered by the trial court, the decision of an appellate court would be a mere academic exercise and the court may not decide the appeal.… If a judgment cannot have a practical effect on an existing controversy, the case is moot.…

2002 WL 1341108 *2.

In this appeal, the juvenile challenged only the probation disposition, not the adjudication. See also *In the Matter of L.S.*, UNPUBLISHED, No. 04-07-00751-CV, 2008 WL 2923855, 2008 Tex.App.Lexis 5660, Juvenile Law Newsletter ¶ 08-3-17 (Tex.App.—San Antonio 2008, no pet.) (appeal became moot as a result of appellant's 18th birthday). Cf. *In re Debrow*, UNPUBLISHED, No. 04-05-00082-CV, 2005 WL 544031, 2005 Tex.App.Lexis 1769 (Tex.App.—San Antonio 2005, writ denied) (petition for writ of mandamus denied as moot because trial court had already ruled on relator's application for writ of habeas corpus).

The juvenile respondent in *In the Matter of J.P.D.,* UNPUBLISHED, No. 03-02-00425-CV, 2003 WL 1922466, 2003 Tex.App.Lexis 3466, Juvenile Law Newsletter ¶ 03-2-26 (Tex.App.—Austin 2003, no pet.) was placed on probation on condition he spend 30 days in a local facility. He appealed, challenging probation condition requiring confinement in the facility.

By the time the appeal reached the Court of Appeals, he had already served his 30 days. The Court of Appeals determined that the appeal was moot. The juvenile respondent argued that his case came within two exceptions to the mootness doctrine, but the Court of Appeals rejected that argument:

> J.P.D. maintains that his issue falls within the two exceptions to the mootness doctrine: (1) capable of repetition yet evading review and (2) collateral consequences.… The "capable of repetition yet evading review" exception applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford***,** 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). In other words, to satisfy the Weinstein test, J.P.D. would have to show that there is a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same parties.… A mere theoretical possibility is not sufficient to satisfy the test.… Although J.P.D. argues that his 30 day confinement was such a short duration that it could not be fully litigated prior to its expiration, on this record, J.P.D. has not demonstrated that there is a reasonable expectation that he would be subjected to the same action again. Indeed, it appears from the record that J.P.D. is now seventeen years old. While it is possible that J.P.D. might have to appear before the juvenile court again before his eighteenth birthday, he has not shown that this possibility rises to the level of a reasonable expectation or a demonstrated probability. He thus has failed to prove that he falls within the "capable of repetition yet evading review" exception to the mootness doctrine.
>
> The collateral consequences exception pertains to severely prejudicial events, the effects of which continue to stigmatize helpless or hated individuals long after the unconstitutional judgment has ceased to operate.… J.P.D. cites *Carrillo v. State*, 480 S.W.2d 612 (Tex.1972), for support in arguing that his appeal falls within the collateral consequences exception to the mootness doctrine. In *Carrillo*, the juvenile had served his sentence and was discharged from probation while his case was on appeal. The supreme court held that Carrillo's case was nevertheless not moot because "a minor should have the right to clear himself by appeal" and this right should not disappear when the sentence given is so short that it expires before the appellate process is completed. *Id.* at 617. The court further noted that adjudications carry "deleterious collateral effects and legal consequences in addition to any stigma attached to being adjudged a juvenile delinquent." *Id*. The court, therefore, concluded that Carrillo's appeal fell within the collateral consequences exception to the mootness doctrine. *Id*.
>
> A significant distinction between *Carrillo* and this case is that J.P.D. has not appealed his adjudication. Indeed, he pleaded true to the allegations against him. Thus, any collateral consequences associated with his adjudication would not be affected were we to conclude that the juvenile court erred in assessing punishment. Moreover, we cannot say that J.P.D.'s sentence carries collateral consequences that are any different or more deleterious than those flowing from his adjudication as a delinquent. Thus, we conclude that J.P.D.'s appeal of the disposition order does not fall within the collateral consequences exception to the mootness doctrine.

2003 WL 1922466 * 1-2.

Had the juvenile respondent challenged the adjudication as well as the disposition, the Court of Appeals could have considered the dispositional challenge moot but could have decided the adjudication challenge under the collateral consequences exception.

In another case, a juvenile appealed a disposition order placing him in a boot camp program. *In the Matter of R.M.*, 234 S.W.3d 103 (Tex.App.—El Paso 2007, no pet.). The State, noting that R.M. had challenged only the modification of probation order, responded that the appeal was moot because his probation had terminated. The Court of Appeals agreed, noting that the two legal exceptions to the mootness doctrine did not apply because R.M.'s probation had ended and because he did not appeal the adjudication order but only the order modifying disposition. As a result, the appeal had become moot. See also *In the Matter of C.G.*, 219 S.W.3d 548 (Tex.App.—Tyler 2007, pet. denied) (appellate court without original jurisdiction to consider youth's application for writ of habeas corpus since she was no longer restrained by juvenile court's

order); *In the Matter of G.E.*, 225 S.W.3d 647 (Tex.App.—El Paso 2006, no pet.) (citing *J.P.D.*); *In the Matter of D.R.Z.*, UNPUBLISHED, No. 08-07-00306-CV, 2009 Tex.App.Lexis 3272 (Tex.App.—El Paso 2009, no pet.) (citing *R.M.* and *G.E.*); *In the Matter of A.M.L.*, UNPUBLISHED, No. 14-06-00874-CV, 2007 WL 1290527, 2007 Tex.App.Lexis 3394, Juvenile Law Newsletter ¶ 07-2-20 (Tex.App.—Houston [14th Dist.] 2007, no pet.) (appeal from disposition order placing appellant on probation rendered moot by termination of youth's probation).

Evidence Sufficiency Standard—Civil or Criminal. Should the appellate court use the civil standard of review of legal sufficiency of the evidence or the criminal standard? Section 56.01(b) states, "The requirements governing an appeal are as in civil cases generally." The civil standard is sometimes called the "no evidence standard":

> When a child challenges the legal sufficiency of the evidence by a "no evidence" point, the appellate court is required to consider only the evidence and inferences tending to support the findings under attack.… If there is any evidence of probative force to support the finding of the jury, the point must be overruled and the finding upheld.
>
> A "no evidence" point of error must and may only be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 288 (Tex.App.—Fort Worth 1984, writ ref'd n.r.e.); Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX.L.REV. 361 (1960).

In the Matter of M.R., 846 S.W.2d 97, 99-100 (Tex.App.—Fort Worth 1992, writ denied) (applying civil standard of legal sufficiency to determinate sentence case in which a 25-year sentence had been given), *abrogated by In the Matter of J.S.*, 35 S.W.3d 287 (Tex.App.—Fort Worth 2001, no pet.). See also *In the Matter of J.K.R.*, 986 S.W.2d 278 (Tex.App.—Eastland 1998, pet. denied) (applying the civil standard of legal sufficiency in case in which respondent was given a three-year determinate sentence).

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court held that, in a criminal case, a no evidence standard, similar to the one used by Texas courts in civil cases, does not provide sufficient protection for the defendant. Due process of law requires the application of a different standard. Under that standard, an appellate court must review all the evidence, both State and defense, in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

All recent appellate cases have applied the *Jackson v. Virginia* standard in juvenile cases on the ground that, since the "beyond a reasonable doubt" standard of proof is constitutionally required in both criminal and juvenile cases, the same standard of review of legal sufficiency should also be applied when appellate courts decide whether proof beyond a reasonable doubt has been shown. See *In the Matter of M.A.L.*, 224 S.W.3d 233 (Tex.App.—El Paso 2005, no pet.); *In the Matter of A.S.*, 954 S.W.2d 855 (Tex.App.—El Paso 1997, pet. denied); *In the Matter of E.P.,* 963 S.W.2d 191 (Tex.App.—Austin 1998, no pet.); *In the Matter of C.P.,* 998 S.W.2d 703 (Tex.App.—Waco 1999, no pet.); *In the Matter of T.K.E.,* 5 S.W.3d 782 (Tex.App.—San Antonio 1999, no pet.) (adopting the criminal standard of review for adjudications but the civil standard for factual findings required as part of the dispositional process); *In the Matter of B.M.*, 1 S.W.3d 204 (Tex.App.—Tyler 1999, no pet.); *In the Matter of J.S.*, 35 S.W.3d 287 (Tex.App.—Fort Worth 2001, no pet.) [abrogating *In the Matter of M.R.*, 846 S.W.2d 97 (Tex.App.—Fort Worth 1992, writ denied)].

It is a fair comment that, despite the differences in wording of the civil and criminal standards, the outcome of the analyses may not be very much different. If there is no evidence on a required element of the offense in question, that is both a civil and a criminal legal insufficiency. If there is some evidence on each of the elements of the offense in question, then that will probably support both the civil and criminal legal sufficiency standards.

It is theoretically possible, but pragmatically difficult, to conjure a situation in which the evidence in support of a required element meets the civil preponderance standard but not the criminal/juvenile beyond a reasonable doubt standard. That is because the issue on appeal is not how the appellate court judge would have decided the question had he or she been a juror, but whether it was irrational for a juror to have found in favor of the State on the evidence presented. It is difficult to imagine a situation in which the evidence was such that it was irrational for the jury to have found guilt beyond a reasonable doubt

but it would not have been irrational for it to have done so by a preponderance of the evidence.

Harmless Error Standard. In a limited set of circumstances, an error by a juvenile court automatically results in reversal of the judgment. However, ordinarily the mere fact that the juvenile court erred does not require reversal of the judgment. The appellate court must make a further inquiry into whether the error harmed the juvenile. Only if harm is found will an appellate court reverse the judgment.

The Texas Rules of Appellate Procedure establish two different harm standards: one for criminal cases and one for civil cases. The criminal standard has two parts, one for constitutional error and one for non-constitutional error. Under Texas Rules of Appellate Procedure Rule 44.2(a), the constitutional error standard provides that the appellate court must reverse a conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. The non-constitutional standard provides: "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Rule 44.2(b).

Under Texas Rules of Appellate Procedure Rule 44.1(a), the civil error standard provides that no judgment may be reversed on appeal unless the error probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the Court of Appeals.

Under the civil rule, reversal is permitted only if the appellate court finds the error probably was harmful. See *In the Matter of A.W.B.*, UNPUBLISHED, No. 07-08-0345-CV, 2010 Tex.App.Lexis 747, Juvenile Law Newsletter ¶ 10-1-8B (Tex.App.—Amarillo 2010, reh'g overruled) (abuse of discretion to exclude psychologist's report during adjudication hearing; however, this did not contribute to rendition of an improper judgment).

In general, Courts of Appeals have applied the civil standard of harm in juvenile appeals. See *In the Matter of G.M.P.,* 909 S.W.2d 198 (Tex.App.—Houston [14th Dist.] 1995, no writ) (reversing adjudication for five evidentiary errors using civil standard of harm).

The Austin Court of Appeals in *In the Matter of C.P.*, 925 S.W.2d 151 (Tex.App.—Austin 1996, writ denied) held that the civil harmless error standard applied in a case in which the juvenile court committed the child to TYC after adjudicating him of aggravated sexual assault and erroneously also adjudicating him for lesser included offenses of indecency with a child. The Court of Appeals struck the indecency adjudications but found they made no difference in the juvenile court's decision to commit the child to TYC.

The Corpus Christi Court of Appeals has held that the criminal standard of harm should be applied in a determinate sentence case and a civil standard should be applied in ordinary juvenile cases. *In the Interest of D.Z.*, 869 S.W.2d 561 (Tex.App.—Corpus Christi 1993, writ denied) (finding harm in the erroneous admission of a custodial statement into evidence). Cf. *In the Matter of J.A.S., III*, UNPUBLISHED, No. 13-06-00280-CV, 2008 Tex.App.Lexis 9420, Juvenile Law Newsletter ¶ 09-1-8 (Tex.App.—Corpus Christi 2008, no pet.) (applying criminal standard of harm to an indeterminate sentence motion to modify disposition).

The San Antonio Court of Appeals followed suit in *In the Matter of D.V.,* 955 S.W.2d 379 (Tex.App.—San Antonio 1997, no pet.). See also *In the Matter of J.H.*, 150 S.W.3d 477, 485 (Tex.App.—Austin 2004, pet. denied) ("because of the quasi-criminal nature of juvenile proceedings and the possibility with a determinate sentence of imprisonment that extends into adulthood, we agree with our sister courts in San Antonio, Corpus Christi, Texarkana, and the First District in Houston that the criminal-harm analysis should govern in juvenile appeals concerning the imposition of a determinate sentence").

The Texas Supreme Court in *In the Matter of D.I.B.*, 988 S.W.2d 753 (Tex. 1999), addressed—but did not resolve—the question of whether the civil or a criminal harmless error standard should be used in assessing harm from errors in the admonition of a juvenile:

> Juvenile proceedings are quasi-criminal in nature. The trial of a juvenile case is governed by the Rules of Criminal Evidence and by Chapter 38 of the Code of Criminal Procedure. However, on appeal our civil rules of appellate procedure govern as far as practicable. Our civil appellate rules generally require that a trial court's judgment cannot be reversed unless there is error and that error probably caused the rendition of an improper judgment. The State relies on the civil rules embodying the harmful error standard rather than its criminal counterpart, and *D.I.B.* does not challenge the application of the civil rules under the United States or Texas Constitutions. Thus, we are not called upon to decide whether the criminal rule should govern a harm analysis in a juvenile case such as this one.

988 S.W.2d at 756.

The differences between the civil standard and the criminal non-constitutional standard may appear not to be substantial. However, the differences between those two standards and the criminal constitutional standard can be quite significant in cases, which are many, in which there is no clear evidence of harm or lack of harm.

Reviewing Propriety of Disposition. The appellate court in a juvenile appeal has broader reviewing authority than it does in a criminal appeal. In a criminal case, an appellate court will not review a sentence that is within statutory boundaries to determine whether the court or jury abused its discretion in selecting it. However, in juvenile cases Section 56.01(i) provides in part:

> [The appellate court] may reverse or modify an order of disposition or modified order of disposition while affirming the juvenile court adjudication that the child engaged in delinquent conduct or conduct indicating a need for supervision.…

Occasionally, appellate courts have concluded that the adjudication was legally correct but that the juvenile court abused its discretion on the evidence in committing the child to TYC. See, for example, *In the Matter of L.G.*, 728 S.W.2d 939 (Tex.App.—Austin 1987, writ ref'd n.r.e.). In that situation, the court should affirm the adjudication but reverse the commitment and remand to the juvenile court with an instruction to enter a new disposition order consistent with the evidence.

In order to have an appellate court review the propriety of a disposition order, it is necessary to include in the appellate record the reporter's record for the adjudication hearing as well as the disposition hearing because evidence at the adjudication hearing can be taken into account by the juvenile court in deciding the disposition. *In the Matter of S.A.M.*, 933 S.W.2d 744 (Tex.App.—San Antonio 1996, no writ).

When the dispositional order under challenge is one that removes the child from his or her home, the special findings of fact required by Section 54.04 to authorize that action will in most Courts of Appeals be the focus of attack, not a general abuse of discretion. See Chapter 12.

Modifying a Judgment. Appellate courts have the authority to modify a judgment of the trial court and to affirm it as modified. See Tex.R.App.P. 43.2(b). In fact, Texas courts have the authority to correct, modify, or reform a judgment to make the record speak the truth when the matter has been called to the court's attention. *In the Matter of J.F.*, UNPUBLISHED, No. 03-08-00012-CV, 2010 Tex.App.Lexis 425 (Tex.App.—Austin 2010, no pet.) (judgment modified to reflect that appellant committed one count of assault by punching and not assault by pushing as well); *In the Matter of S.J.P.*, UNPUBLISHED, No. 04-09-00005-CV, 2010 Tex.App.Lexis 18 (Tex.App.—San Antonio 2010, no pet.) (adjudication order modified to reflect that appellant engaged in criminal trespass of a building); *In the Matter of J.M.*, 287 S.W.3d 481, 491 (Tex.App.—Texarkana 2009, reh'g overruled); *In the Matter of K.B.*, 106 S.W.3d 913, 916 (Tex.App.—Dallas 2003, no pet.); *In the Matter of J.K.N.*, 115 S.W.3d 166, 174 (Tex.App.—Fort Worth 2003, no pet.) (appellate court is authorized to modify juvenile court's judgment).

In *In the Matter of L.L.,* UNPUBLISHED, No. 07-08-0241-CV, 2009 Tex.App.Lexis 904 *2, Juvenile Law Newsletter ¶ 09-2-03 (Tex.App.—Amarillo 2009, no pet.), the juvenile court judge orally announced "that [appellant] cannot be provided the quality of care and level of support and supervision that [he] need[s] to meet the conditions of probation." This pronouncement, however, was not included in the written judgment as required by law. See Section 54.05(m)(1)(C). Citing its authority to correct, modify, or reform a written judgment to include omitted findings, the Amarillo Court of Appeals modified the trial court's order to reflect the oral pronouncement. See also *In the Matter of C.L.W.*, UNPUBLISHED, No. 05-05-00778-CV, 2006 Tex.App.Lexis 1152 (Tex.App.—Dallas 2006, no pet.) (modifying adjudication order which conflicted with oral pronouncement committing youth to TYC); *In the Matter of I.A.G.*, UNPUBLISHED, No. 09-08-00430-CV, 2009 Tex.App.Lexis 7646, Juvenile Law Newsletter ¶ 09-4-7A (Tex.App.—Beaumont 2009, no pet.) (modifying judgment to reflect that child denied charges in open court and that cases were tried before a jury).

B. Collateral Attacks

A direct appeal is part of the same proceedings from which the appeal is taken. It seeks to have an appellate court overturn a decision made by the trial court. A collateral attack is an effort to invalidate a decision made by a trial court, but it arises in a different legal proceeding. For example, anyone held in official custody or detention who believes he or she is being held illegally can file with the appropriate district court a petition for writ of habeas corpus to challenge the detention. Texas Constitution Article V, Section 8. The proceedings on the habeas writ are separate from the juvenile or criminal proceedings that resulted in the detention, but the court conducting the habeas hearing has power to order the petitioner released if he or she is being held illegally.

When a juvenile wishes to attack collaterally an adjudication or other order entered under the Juvenile Justice Code, the correct procedure is to file a petition for writ of habeas corpus invoking the constitutional jurisdiction of district courts in Article V, Section 8 of the Texas Constitution. The special habeas procedure provided by Article 11.07 of the Code of Criminal Procedure applies only to cases in which the applicant has been sentenced to prison for criminal conviction of a felony and does not apply in juvenile cases. *In re Debrow*, UNPUBLISHED, No. 04-01-00095-CV, 2001 WL 121103, 2001 Tex.App.Lexis 946, Juvenile Law Newsletter ¶ 01-1-18 (Tex.App.—San Antonio 2001, writ dism'd).

Relationship of Habeas Corpus to Appeal. Habeas corpus is a remedy that is designed to supplement, not replace, an appeal. Thus, if a direct appeal is available, it must be used instead of filing a petition for writ of habeas corpus. For example, in *Ex parte Powell*, 558 S.W.2d 480 (Tex.Crim.App. 1977), the petitioner was transferred from juvenile to criminal court. He filed a petition for writ of habeas corpus in the district court alleging the juvenile court erred in admitting evidence at the transfer hearing and challenging the sufficiency of the evidence to justify transfer. The district court denied relief, and, on appeal, the Court of Criminal Appeals affirmed that decision on the ground that the petitioner should have appealed on the civil side of the system under Section 56.01 of the Family Code. Cf. *In the Matter of Altschul*, 236 S.W.3d 453 (Tex.App.—Waco 2007), *writ dism'd as moot by* 2007 Tex.App.Lexis 10124 (Tex.App.—Waco 2007) (relator entitled to mandamus relief since he had no other available legal remedy).

Similarly, if the juvenile is currently taking an appeal from juvenile court, he or she may not simultaneously attempt to pursue a petition for writ of habeas corpus raising an issue that could be raised on appeal. *M.B. v. State*, 905 S.W.2d 344, 346 (Tex.App.—El Paso 1995, no writ) (attempting to raise ineffective assistance of counsel in habeas proceedings while appeal is pending).

The juvenile court in *In re K.T.*, UNPUBLISHED, No. 12-03-00094-CV, 2003 WL 1701973, 2003 Tex.App.Lexis 3225, Juvenile Law Newsletter ¶ 03-2-17 (Tex.App.—Tyler 2003, writ denied), revoked the juvenile respondent's probation and committed her to TYC. She filed an original petition for writ of habeas corpus with the Court of Appeals on the ground commitment to TYC was illegal for the misdemeanor for which she was on probation. The Court of Appeals denied the writ because the juvenile should have taken an appeal under Section 56.01 from the revocation order. Habeas corpus cannot be used as a substitute for appeal. Cf. *In the Matter of L.L.*, No. 04-03-00895-CV, 2003 WL 22905193, 2003 Tex.App.Lexis 10272, Juvenile Law Newsletter ¶ 04-1-07 (Tex.App.—San Antonio 2003, no pet.) (no original habeas jurisdiction to consider trial court's detention order); *In re P.L.M.*, UNPUBLISHED, No. 01-11-00157-CV, 2011 WL 1234740 (Tex.App.–Houston [1st Dist.] 2011, no pet.) (no original habeas jurisdiction to consider ineffectiveness of counsel claims; *Ex Parte A.M.*, No. 04-10-00805-CV, 2011 WL 3610128, Juvenile Law Newsletter ¶ 11-4-1 (Tex.App.—San Antonio 2011, no pet.) (affirming denial of habeas corpus relief).

When a double jeopardy claim is made concerning a mistrial, the juvenile may file a pre-trial petition for writ of habeas corpus in the juvenile court to litigate the claim that a second trial would violate double jeopardy. If the juvenile court denies the claim, the juvenile may take an immediate appeal to a Court of Appeals. *In the Matter of S.G.*, 935 S.W.2d 919 (Tex.App.—San Antonio 1996, writ dism'd).

Bill of Review. A bill of review is an equitable proceeding in which the petitioner seeks to establish a prior judgment was based on fraud or other wrongdoing. It is based on newly discovered evidence and may be brought after the time for filing a motion for new trial or an appeal has expired. In *In the Matter of M.P.A.*, UNPUBLISHED, No. 03-02-00068-CV, 2002 WL 31833562, 2002 Tex.App.Lexis 8952, Juvenile Law Newsletter ¶ 03-1-10 (Tex.App.—Austin 2002, pet. denied), petitioner sought to invalidate his adjudication and 20-year determinate sentence for aggravated sexual assault of a child by showing the victim was now recanting her testimony. The Court of Appeals outlined the requirements for a bill of review:

> A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926-27 (Tex.1999). A bill-of-review plaintiff must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he or she was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, which is (3) unmixed with the fault or negligence of the plaintiff. *Hanks v. Rosser*, 378 S.W.2d 31, 34-35 (Tex.1964); *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (Tex.1950). Bill-of-review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies. *Herrera*, 11 S.W.3d at

927. If legal remedies were available but ignored, relief by bill of review is unavailable. *Id.* Although a bill of review is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. *Id.*

The procedure for conducting a bill-of-review proceeding is set out in *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex.1979). First, the bill-of-review plaintiff must file a petition alleging with particularity the facts establishing the three elements of a bill of review. *Id*. at 408. The plaintiff must then present, as a pretrial matter, prima facie proof to support the meritorious defense alleged in the petition. *Id*. 408-09. If the court determines that the plaintiff has presented a prima facie meritorious defense, the court may then conduct a trial, during which the plaintiff must prove, by a preponderance of the evidence: (1) whether the [sic] he was prevented from asserting the meritorious defense due to fraud, accident, or wrongful conduct by the opposing party or by official mistake (2) unmixed with the fault or negligence of the plaintiff. *Id*. If the plaintiff satisfies this burden, the underlying controversy between the parties is retried. *Id*. The district court may try these remaining two elements in conjunction with the retrial of the underlying case or may conduct a separate trial on the elements. *Id*.; *Martin v. Martin*, 840 S.W.2d 586, 591 (Tex.App.—Tyler 1992, writ denied). The plaintiff may demand a jury trial on the two remaining elements. *Martin*, 840 S.W.2d at 592.

2002 Tex.App.Lexis *2-4.

The petitioner raised 12 procedural grounds for relief from the juvenile court's denial of the bill of review. The Court of Appeals affirmed the juvenile court's decision. Its opinion is an excellent, detailed road map for bringing bills of review proceedings in juvenile cases in which there is newly discovered evidence that the juvenile is actually innocent of the offense for which he or she was adjudicated delinquent.

Raising Juvenile Issues in Criminal Appeals. Most collateral attacks on the decisions of juvenile court judges occur as part of criminal proceedings, not by writ of habeas corpus. For example, if a child has been transferred to criminal court he or she may challenge the jurisdiction of the juvenile court to transfer the case to criminal court. If the juvenile court lacked jurisdiction to transfer, the criminal court to which the case was transferred also lacked jurisdiction. See *Johnson v. State*, 551 S.W.2d 379 (Tex.Crim.App. 1977) (conviction reversed because of the failure to personally serve the defendant with a summons to his juvenile court transfer hearing).

On the other hand, only a few fundamental errors in the transfer hearing will result in the setting aside of a criminal conviction because of juvenile proceedings. See *Turner v. State*, UNPUBLISHED, No. 11-07-00139-CR, 2008 Tex.App.Lexis 9415, Juvenile Law Newsletter ¶ 09-1-7 (Tex.App.—Eastland 2008, pet. ref'd) (limiting review to issues raised by pretrial motion; writ of habeas corpus is remedy for plea-bargaining defendant); *McNichols v. State*, UNPUBLISHED, No. 14-08-00125-CR, 2009 Tex.App.Lexis 510, Juvenile Law Newsletter ¶ 09-1-13 (Tex.App.—Houston [14th] 2009, pet. ref'd) (refusing to sustain appellant's claim even if it had been properly preserved for review); *Galloway v. State*, 578 S.W.2d 142 (Tex.Crim.App. 1979) (refusing to reverse a conviction because of inadequacies in the juvenile court's transfer order); *Lowe v. State*, 676 S.W.2d 658 (Tex.App.—Houston [1st Dist.] 1984, pet. ref'd) (refusing to consider the question whether there was sufficient evidence for the juvenile court to order transfer to the criminal court for the offense); *Rivera v. State*, 768 S.W.2d 399 (Tex.App.—Houston [1st Dist.] 1989, no pet.) (refusing to consider whether the juvenile court improperly restricted the juvenile's right of cross-examination in a transfer hearing); *Seelke v. State*, 739 S.W.2d 497 (Tex.App.—Beaumont 1987, no pet.) (refusing to postpone decision in an appeal from a criminal conviction to order a transcription of the notes of a court reporter from a juvenile transfer hearing). In *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935, Juvenile Law Newsletter ¶ 96-3-10 (Tex.App.—Houston [14th Dist.] 1996, no pet.), the Court of Appeals held that a claim of racial discrimination in the certification practices of Galveston County could not be made in the criminal case because it constituted a collateral attack on a non-jurisdictional matter. In each of these cases, the error raised could have properly been raised in a direct appeal from the juvenile court transfer order, but could not at that time be raised in an appeal from the resulting criminal conviction.

In *Ex Parte Cash*, 178 S.W.3d 816 (Tex.Crim.App. 2005), the Court of Criminal Appeals entertained a writ of habeas corpus to decide "whether counsel was ineffective for failing to properly file a motion for probation prior to trial, and whether Applicant was entitled to consideration for probation had the motion been filed." 178 S.W.3d at 818. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to establish prejudice requires that an applicant prove that there is a reasonable probability that, but for counsel's alleged errors, the result of the

proceeding would have been different. Since the jury sentenced applicant to 40 years in prison, considerably more than a probation eligible 10-year sentence, the majority of the Court of Criminal Appeals reasoned that Cash had not met the *Strickland* standard for ineffective assistance of counsel. See also *Rogers v. Quarterman*, 555 F.3d 483 (5th Cir. 2009) (no showing of reasonable likelihood that but for counsel's conduct a state or federal court would have found confession to be involuntary).

Other Collateral Proceedings. The rule prohibiting raising non-jurisdictional errors by collateral proceedings has been applied to efforts to challenge adjudication decisions in the course of an appeal from later transfer of the juvenile respondent from TYC [TJJD] to the Texas Department of Criminal Justice (TDCJ) under the Determinate Sentence Act. *In the Matter of R.V.*, 8 S.W.3d 692 (Tex.App.—Fort Worth 1999, pet. denied); *In the Matter of A.G.,* UNPUBLISHED, No. 05-94-01887-CV, 1996 WL 14082, 1996 Tex.App.Lexis 131, Juvenile Law Newsletter ¶ 96-1-14 (Tex.App.—Dallas 1996, writ denied).

Law of the Case. If a juvenile files a direct appeal, he or she is required to abide by any decision that was made in that appeal. The juvenile is not permitted to attempt to address the issue by a subsequent writ of habeas corpus. Only one bite at the appellate apple is allowed.

CHAPTER 20: Sex Offender Registration

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In 1991, the legislature enacted a sex offender registration requirement that applies to juveniles as well as adults. The statute has been amended and its reach expanded in almost every legislative session since. Although the provisions were originally placed in the civil statutes, in 1997 the legislature moved them to become Chapter 62 of the Code of Criminal Procedure.

In 2005, the legislature re-wrote Chapter 62 by reorganizing and renumbering its provisions. While the juvenile sex offender registration procedures were basically kept intact, the changes resulted in a more user-friendly statutory framework. Only the current Chapter 62 statutory provisions are referenced in this chapter.

Chapter 62 includes juvenile and adult offenders and child and adult victims. It requires registration with a local law enforcement authority, which involves the offender providing information about himself or herself, including his or her place of residence. It also requires frequent re-registration, including whenever the offender moves his or her place of residence. A juvenile's obligation to register extends for 10 years after discharge from the juvenile justice system or expiration of the determinate sentence, if there is one. The statute provides for a public statewide database of registration information, to be maintained by the Texas Department of Public Safety (DPS). Information from that public database, the Texas Sex Offender Registry, including information about public juvenile registrants, may be accessed on DPS' website.

Under some circumstances, local law enforcement authorities must notify school officials of the residence address and residency information of juvenile offenders. Local law enforcement authorities are required to provide community notification by newspaper. Prior to 2005, newspaper notification applied to adults but not to juveniles. However, in re-designated Article 62.056(d), the legislature authorized law enforcement to publish notice in a newspaper or other circular of those offenders, including juveniles, who are assigned a numeric risk level of three. Otherwise, newspaper publication applies only to adults and not to juvenile offenders.

Upon release on probation or parole or from a penal institution at the end of a sentence, the offender must be tested to determine the degree of risk he or she poses to society. If a high score is achieved, DPS is required to use direct mailing to notify neighbors that a registered sex offender is moving into their area. This requirement applies to juveniles as well as adults.

The constitutionality of some of the provisions of the sex offender registration statute applicable to juveniles was upheld in *In the Matter of M.A.H.*, 20 S.W.3d 860 (Tex.App.—Fort Worth 2000, no pet.). The juvenile respondent argued that the statute violates due process because it requires public registration without a requirement of an individualized judicial finding that the juvenile poses a danger to the public. The Court of Appeals rejected this argument on the ground that respondent's reputation is not a legal interest worthy of constitutional protection:

> Although dissemination of the information contemplated by the program to the community may be potentially harmful to appellant's personal reputation, we conclude he has failed to articulate a liberty interest that entitles him to the protection of due process. Therefore, the due process required in juvenile proceedings was all the due process that was necessary. Appellant was found to have engaged in delinquent conduct for indecency, conduct which he admittedly [while 12 years of age] inflicted upon a 7-year-old girl, thus triggering the registration and notification requirements only after a hearing where he had the opportunity to call witnesses and present evidence in his defense.… Any additional requirement that an individualized hearing be conducted for purposes of determining whether appellant presents a continuing threat to society before dissemination of the information is not warranted on the basis of deprivation of reputation.

20 S.W.3d at 865.

He next argued that making the registration public is a violation of due process of law because there was no showing that he constituted a threat to the public. The court rejected that argument:

> This court is cognizant that society has legislatively adopted the view that children who violate the law should be treated differently, i.e., less severely, than adults. For this reason, we assume the legislature prohibited publication to the media in the case where the offender is a juvenile. Notwithstanding this exception, the legislature clearly intended to subject juveniles adjudicated for sexually-related offenses to the mandates of the registration and notification provisions. Providing ready access to information on known sex offenders is a reasonable method of accomplishing the desired objectives of protecting the public and preventing sex offenses, especially, in this context, those perpetrated against children by other children in close

> proximity. A notified public may prevent crimes with greater attention and caution. Accordingly, dissemination of registration information is a rational means toward a legitimate state purpose.

20 S.W.3d at 865.

Finally, respondent argued the registration scheme violates equal protection of the laws because it irrationally singles out sex offenders for harsher treatment than other offenders. The court also rejected that argument:

> We are sensitive to the fact that registration and the attendant notification requirements may have a lasting and painful impact on appellant's life. Nonetheless, given the particular concerns about law enforcement and public safety with respect to sex offenses, we conclude the disparate treatment afforded juvenile and adult sex offenders, alike, is justified. Because the notification provisions are reasonably related to enhancing public awareness that a sex offender may be living in the community, so that appropriate precautions may be taken, we cannot say the notification requirements are irrational.

20 S.W.3d at 866. See also *In the Matter of R.M.,* UNPUBLISHED, No. 04-01-00011-CV, 2001 WL 1131421, 2001 Tex.App.Lexis 6497, Juvenile Law Newsletter ¶ 01-4-26 (Tex.App.—Tyler 2001, no pet.) (rejecting the same constitutional arguments).

It has also been argued that Chapter 62 constitutes cruel and unusual punishment when applied to juveniles because public registration "shames" them and runs contrary to evolving standards of decency. To determine whether a statute operates as punishment for constitutional purposes, courts apply the "intent-effects" test. See *Rodriguez v. State*, 93 S.W.3d 60, 67 (Tex.Crim.App. 2002). In other words, did the legislature intend Chapter 62 to be civil and remedial and not criminal or punitive? With respect to juveniles, the Tyler Court of Appeals has held that Chapter 62 is non-punitive in both intent and effect and, therefore, does not constitute cruel and unusual punishment under the Eighth Amendment. *In the Matter of D.L.*, 160 S.W.3d 155 (Tex.App.—Tyler 2005, no pet.). The court also noted the legislative intent to subject juveniles adjudicated for sexually-related offenses to registration and reporting requirements under Chapter 62.

A. Offenses Covered

Code of Criminal Procedure Article 62.001(5) contains an extensive list of reportable convictions or adjudications of delinquent conduct. In 2007, the legislature placed at the top of the list the offense of continuous sexual abuse of young child or children (Penal Code Section 21.02).

In 1999, the legislature added unlawful restraint, kidnapping, and aggravated kidnapping to the list. Curiously, there is no requirement that any of the three offenses must have been committed for a sexual purpose. What is required, in addition to the offense, which often is unrelated to sexual conduct, is that it be committed against a person under the age of 17. For the first time, then, the legislature required sex offender registration for commission of an offense that may not be sexual in nature. This presents challenges to TJJD and probation for children adjudicated for offenses with no sexual element and for whom the registration decision has been deferred pending the completion of sex offender treatment.

In 2011, the legislature created the offense of trafficking of persons under Penal Code Section 20A.02 and added violations that include a sexual element to the list of offenses that qualify for registration [Penal Code Section 20A.02(a)(3), (4), (7), or (8)].

In 2015, the offense of prostitution that involves soliciting an individual who was under 18 (regardless of whether the actor knew the person's age), represented to be under 18, or believed by the actor to be under 18 (even if not), which is punishable under Penal Code Section 43.02(c-1)(3), was added to the list of registerable offenses.

In 2017, the offense of bestiality was created and was added to the list of registerable offenses.

As of the date of this publication (August 2018), the list of registerable offenses includes:

(1) continuous sexual abuse of young child or children (Penal Code Section 21.02);

(2) bestiality (Penal Code Section 21.09);

(3) indecency with a child (Penal Code Section 21.11);

(4) sexual assault (Penal Code Section 22.011);

(5) aggravated sexual assault (Penal Code Section 22.021);

(6) prohibited sexual conduct [incest] (Penal Code Section 25.02);

(7) compelling prostitution (Penal Code Section 43.05);

(8) sexual performance by a child (Penal Code Section 43.25);

(9) possession or promotion of child pornography (Penal Code Section 43.26);

(10) prostitution involving solicitation of person under 18, believed to be under 18, or represented as being under 18 (Penal Code Section 43.02);

(11) aggravated kidnapping with intent to violate or abuse the victim sexually (Penal Code Section 20.04(a)(4);

(12) burglary of a habitation with intent to commit specified sexual offenses (Penal Code Section 30.02(d);

(13) unlawful restraint (Penal Code Section 20.02), kidnapping (Penal Code Section 20.03), or aggravated kidnapping (Penal Code Section 20.04) if there is an affirmative finding that the victim or intended victim was younger than 17;

(14) the second adjudication for indecent exposure, unless it results in deferred adjudication (Penal Code Section 21.08);

(15) attempt, conspiracy, or solicitation to commit a sexual offense covered by Chapter 62 (Penal Code Chapter 15);

(16) online solicitation of a minor (Penal Code Section 33.021); and

(17) trafficking of persons (Section 20A.02) or continuous trafficking of persons (Section 20A.03), if there is a sexual element (Section 20A.02).

An adjudication of delinquent conduct for a substantially similar offense in another state, in a foreign country, or under federal law is covered if the offender resides in Texas. Code of Criminal Procedure Article 62.001(5)(H) and (I). The 1999 amendment adding out-of-state adjudications abrogated Attorney General Opinion No. LO 98-125 (1998), which stated that, under the law existing then, a juvenile adjudicated out-of-state for an offense that would have required registration had the adjudication occurred in Texas was not required to register in Texas upon moving here.

B. Dispositions Covered

The registration program covers juveniles and adults, but the extent of coverage is different. Registration is required for an adult conviction of or a juvenile adjudication for the same offenses. Article 62.001(5). However, a juvenile disposition that does not involve an adjudication, such as a dismissal following successful completion of deferred prosecution under Section 53.03, is not covered and registration is not required for that disposition.

In 2001, the legislature answered the question of what impact an appeal or pardon has on the obligation to register. Articles 62.002(b) and (c) provide:

> (b) Except as provided by Subsection (c), the duties imposed on a person required to register under this chapter on the basis of a reportable conviction or adjudication, and the corresponding duties and powers of other entities in relation to the person required to register on the basis of that conviction or adjudication, are not affected by:
>
> > (1) an appeal of the conviction or adjudication; or
> >
> > (2) a pardon of the conviction or adjudication.
>
> (c) If a conviction or adjudication that is the basis of a duty to register under this chapter is set aside on appeal by a court or if the person required to register under this chapter on the basis of a conviction or adjudication receives a pardon on the basis of subsequent proof of innocence, the duties imposed on the person by this chapter and the corresponding duties and powers of other entities in relation to the person are terminated.

Taking an appeal does not excuse compliance with registration requirements, but, if the adjudication is set aside on appeal, the duty to register terminates. Of course, if the case is re-prosecuted and a new adjudication for a covered offense obtained, then a new duty to register would arise. Missing is any mention of a juvenile court order setting aside an adjudication after hearing on a motion for new trial. However, since there is no adjudication remaining after that action, there can be no duty to register a sex offender adjudication. While a pardon to restore civil rights (to vote, hold public office, and serve on juries) does not terminate a duty to register, a pardon upon subsequent proof of innocence permanently terminates that duty.

Family Code Section 54.0405 mandates that the juvenile court require, as a condition of probation of a juvenile adjudicated of a covered sex offense, the juvenile to register as required by law. Failing to register as required by law is already a criminal offense and, therefore, a violation of

the probation condition that the probationer commit no offense against the law. Making sex offender registration an explicit condition of probation should focus the attention of both the officer and the probationer on that requirement and perhaps make compliance more likely.

Similarly, Human Resources Code Section 245.053 mandates the imposition of a parole condition requiring sex offender registration by a TJJD parolee who was adjudicated of a covered offense.

C. Registration Requirements

Initial Registration and Verification. The statute requires that appropriate officials notify a juvenile adjudicated for a covered offense of his or her registration obligations and to fill in a registration form before he or she is released from TJJD, released from a secure local facility, or placed on probation. Article 62.053(a) and (c). The statute requires the adjudicated juvenile to verify the information in that registration form with the local law enforcement authority in the municipality or county in which the child resides or intends to reside for more than seven days. Article 62.051(a) and (f). Since 2009, a person for whom sex offender registration is completed must report to the applicable local law enforcement authority to verify the information in the registration form not later than the seventh day after the date on which the person is released. Verification requires that the adjudicated juvenile produce proof of identity and residence. The adjudicated juvenile must verify registration after arriving at the place of residence and has until the later of seven days or the first date the local law enforcement policy allows verification to do so. Article 62.051(a).

DPS is required to determine the person's primary registration authority based on where the person resides, works, or attends school. Article 62.004. This is because a person may be required to register in several different places—where he or she lives, works, goes to school, or frequents regularly. Changes of address and annual verification of registration are made at the person's primary registration authority, as determined by DPS.

In 2009, the legislature mandated that if a person resides, works, or attends school in a county with a centralized registration authority, then that registration authority serves as the person's primary registration authority under Chapter 62, regardless of whether the person resides, works, or attends school in any municipality within the county. Article 62.004(a-1). "Centralized registration authority" is defined as a mandatory countywide registration location designated under Code of Criminal Procedure Article 62.0045. Article 62.001(11).

A county commissioners court is authorized to create a centralized registration authority where all registered sex offenders must register. Article 62.0045, Code of Criminal Procedure. Under prior law, this provision applied only to counties with a population of 100,000 or more. In 2013, the legislature expanded the authority of counties of any size to establish a centralized sex offender registration authority. This may be the sheriff's office of the county or the chief of police's office of a municipality.

If the person intends to reside in another state or reside in Texas but work or attend school in another state, the releasing authority must notify the juvenile of his or her possible obligations to register in the other state. Article 62.053(g).

In 2005, the legislature added Article 62.061, providing that a person required to register under Chapter 62 must comply with a request for a DNA specimen made by a law enforcement agency under Government Code Section 411.1473. Although persons required to register should already have a DNA specimen in the DPS database, some persons required to register have failed to do so. Article 62.061 allows law enforcement agencies to collect a specimen for the database if it is discovered that the person has not been included.

Requiring DNA Sample. In 2001, the legislature amended Section 54.0405 to require courts impose a condition of probation requiring a child who is required to register as a sex offender to submit a blood sample "or other specimen" for DNA analysis unless the child has already done so. Section 54.0405(a)(2)(B).

Section 54.0405(b) reads:

> This section applies to a child placed on probation for conduct constituting an offense for which the child is required to register as a sex offender under Chapter 62, Code of Criminal Procedure.

These mandatory probation conditions apply only when a child is required to register as a sex offender. They do not apply when the juvenile court has, under Article 62.352, excused registration or deferred it to await the outcome of treatment. The provision requiring a DNA sample as a condition of probation is fully retroactive to all children on probation, regardless of when the offense was committed or the adjudication occurred.

Conflicting Court of Appeals Opinion. At least one Court of Appeals has interpreted Section 54.0405 to apply to probationers who have had registration excused by a juvenile court. In 2003, the Fort Worth Court of Appeals entertained an appeal of five consolidated cases involving probation conditions that were amended to require appellants to submit a blood sample or other specimen to create DNA records under Section 54.0405. *In the Matter of D.L.C.*, 124 S.W.3d 354 (Tex.App.—Fort Worth 2003, no pet.). The statute was passed after appellants were placed on probation; however, based on the legislation, the State sought to amend appellants' probation terms to require them all to submit DNA samples. The juvenile court granted the motion. After issuing the order, the court granted the motion of one appellant to excuse further sex offender registration but refused to rescind its DNA order.

In its opinion, the Fort Worth Court of Appeals held that Section 54.0405 did not violate the *ex post facto* or double jeopardy clauses, noting that the legislative intent in creating a DNA record is for identification purposes, not to impose further punishment. It also observed that the DNA statute imposes only a minimal affirmative disability and is non-punitive in both intent and effect. 124 S.W.3d at 366.

The appellate court also held that the double jeopardy clause did not apply since appellants were neither prosecuted a second time for their crimes nor punished again for those crimes. Next, the court held that the DNA statute does not result in a blood draw in violation of the Fourth Amendment's ban on unreasonable searches and seizures. Instead, it ruled that the statute serves a "special need" for the DNA samples beyond the normal needs of law enforcement. Appellants' argument that Section 54.0405 violated their rights against self-incrimination was rejected as unripe for consideration since they had yet to provide blood samples. Finally, it was held that the evidence was sufficient to support the trial court's amendment of appellants' probation terms to add the requirement that they provide a DNA specimen. Unfortunately, the Court of Appeals did not distinguish between the deregistration one of the appellants received and unregistration, which excuses a child from registration at the time of disposition. This legal wrinkle will have to be ironed out in the future.

It should be noted that the legislative intent of the statute was to require a DNA sample "only from a child required to register as a sex offender. It would, therefore, not apply to a child for whom sex offender registration has been excused by the juvenile court pursuant to…Article 62.13 [now Article 62.352] of the Code of Criminal Procedure." Commentary by Robert Dawson, *2001 Special Legislative Issue*, State Bar of Texas, 15 Juvenile Law Section Report 30, No. 3 (July 2001).

Texas Residents with Out-of-State Adjudications. In 2005, the legislature replaced the term "out of state registrant" with "extrajurisdictional registrant." The definition for extrajurisdictional registrant was placed in Article 62.001(10) and the registration requirements in Article 62.052. If a juvenile is adjudicated under federal law, law of a foreign country, or law of another state for an offense that contains elements that are "substantially similar to the elements" of a covered Texas offense, that person is required to register with the appropriate local law enforcement authority in Texas if he or she resides in Texas. Article 62.052(a). Even if the out-of-state offense is not substantially similar to a covered Texas offense, an adjudicated juvenile may be required to register in Texas if the offense is covered by a reciprocal registration agreement between DPS and the other jurisdiction. Article 62.052. If supervision of a juvenile is transferred to Texas under the Interstate Compact on Juveniles for a covered offense, the agency in Texas that assumes supervision is required to notify the juvenile of registration requirements and to fill in the registration form. Article 62.053(d).

Article 62.003 answers the question of who decides whether a conviction or adjudication in another jurisdiction is substantially similar to a covered Texas offense. Initially, the decision is made administratively by DPS, with judicial review on appeal in a district court in Travis County.

Out-of-State Residents Who Work or Attend School in Texas. If a juvenile resides out of Texas but has an adjudication for an offense that is covered by Texas law (which might be a Texas offense or an out-of-state offense) and is working or attending school in Texas, he or she is required to register with the local law enforcement authority in the municipality or county in which the employment or school is located. Article 62.152. Work is defined as full or part-time employment or vocation for more than 14 consecutive days, or for an aggregate period exceeding 30 days in a calendar year, and includes work for compensation or for governmental or educational benefit, such as an unpaid internship. "Work" also includes volunteering on a full or part-time basis. Article 62.151(1). A person is attending school if the person is enrolled in any school—public or private, primary, secondary, or higher education—full or part-time. Article 62.151(3).

Renewing Verification Annually. Once the adjudicated juvenile has registered and verified registration with the appropriate local law enforcement authority, he or she must periodically renew that registration. Adjudicated juveniles must verify registration with the local law enforcement authority annually not earlier than 30 days before or later than 30 days after their birthdays. Article 62.058(a). Some adults are required to verify registration every 90 days, but that requirement does not apply to juveniles. Articles 62.058(a) and 62.001(6).

Expiration of Duty to Register. This process of annual verification continues until the adjudicated juvenile's duty to register expires. A juvenile's duty to register expires 10 years after the juvenile completes the terms of the disposition. Completing the terms of disposition means the person has completed and been discharged from probation or has been discharged from TJJD. In the case of a juvenile committed under the Determinate Sentence Act, the duty to register continues for 10 years following the completion of the sentence, be it in adult prison, on adult parole, or on adult probation. Article 62.101(b).

Some adults must register for life. However, Article 62.101(a) makes it clear that this provision applies to a reportable conviction or adjudication "other than an adjudication of delinquent conduct." That language removes any ambiguity as to the duration of a juvenile's obligation to register and confirms that juveniles are never subject to lifetime registration requirements.

Changes of Address. If a registered juvenile changes address, a procedure for registering the change of address must be followed. This procedure exists for changes of address to places outside Texas, to different counties within the state, to different cities within the county, and to different addresses within the same city. Presumably the requirement also applies to one who moves from one apartment to another in the same complex.

Not later than seven days before the move date, the juvenile must notify the local law enforcement authority where he or she is registered of the intended move date and the new address. If the adjudicated juvenile is on probation or parole, that notice must also be made to the supervising officer. Article 62.055(a). If the change was reported to a probation or parole officer, that officer is required to report it to the local law enforcement authority with which the juvenile is registered and to the appropriate local law enforcement authority at the new address. Article 62.055(b). The probation or parole officer must make the report within three days after receiving notice of the move. The local law enforcement authority is required to forward the new address information to DPS and, if the new address is in the jurisdiction of a different law enforcement authority, to that authority. Article 62.055(d). DPS is also required to notify the local law enforcement authority at the new address. Article 62.055(f).

If the adjudicated juvenile does not move on or before the date anticipated, the juvenile must report to the local law enforcement authority with which he or she is registered with an explanation. Article 62.055(e)(1). If the juvenile is under probation or parole supervision and does not move to an intended residence, then the juvenile must report to his or her supervising officer at least weekly. Article 62.055(e)(2).

In 2009, the legislature added provisions aimed at persons who are subject to sex offender registration and are released from a penal institution but who are not under any type of supervision. Article 62.051(j). Under the definition contained in Article 62.001(3), "penal institution" includes a confinement facility operated by or under contract with TJJD or a juvenile secure pre- or post-adjudication facility operated by or under a local juvenile probation department. If these individuals do not move to the address indicated on the registration form, or if they do not indicate an address on the form, then they must comply with very specific reporting requirements not later than the seventh day after their release. Additionally, a registrant may not refuse or withhold any information required for the accurate completion of the registration form. Article 62.051(k).

Articles 62.051(j) and (k) read as follows:

> (j) If a person subject to registration under this chapter is released from a penal institution without being released to parole or placed on any other form of supervision and the person does not move to the address indicated on the registration form as the person's intended residence or does not indicate an address on the registration form, the person shall, not later than the seventh day after the date on which the person is released:
>
> (1) report in person to the local law enforcement authority for the municipality or county, as applicable, in which the person is residing and provide that authority with the address at which the person is residing or, if the person's residence does not have a physical address, a detailed description of the geographical location of the person's residence; and

(2) until the person indicates the person's current address as the person's intended residence on the registration form or otherwise complies with the requirements of Article 62.055, as appropriate, continue to report, in the manner required by Subdivision (1), to that authority not less than once in each succeeding 30-day period and provide that authority with the address at which the person is residing or, if applicable, a detailed description of the geographical location of the person's residence.

(k) A person required to register under this chapter may not refuse or otherwise fail to provide any information required for the accurate completion of the registration form.

If the adjudicated juvenile moves when anticipated, then, within seven days after moving, he or she is required to verify registration personally with the new local law enforcement authority by providing proof of identity and residence. This process of pre-move notification and post-move verification must be followed each time an adjudicated juvenile moves his or her residence to a place where the person intends to stay for more than seven days for so long as the duty to register exists. Article 62.051(a) and (f).

Since 2009, if a person required to register resides for more than seven days at a location to which a physical address has not been assigned by a governmental entity, the person must confirm his or her location every 30 days by reporting to the local municipal or county law enforcement authority and by providing a detailed description of the applicable location or locations. Article 62.055(i).

Registering at Places Regularly Visited. If a registered juvenile does not change his or her place of residence but does regularly visit another location, he or she may be required also to register at the place visited. Additional registration is required if the person "on at least three occasions during any month spends more than 48 consecutive hours in a municipality or county" other than where the person is registered. Article 62.059(a). Information must be provided to the appropriate local law enforcement authority in the place regularly visited. Article 62.059(b). The local law enforcement authority that receives information under this provision is not required to notify schools or provide public notification of the information it has received. Article 62.059(c).

Obtaining Driver's License or Identification Card. A juvenile required to register as a sex offender is also required to obtain from DPS a special driver's license or identification card within 30 days of release. Annual renewal is required until the person's duty to register expires. Article 62.060. The driver's license or identification card presumably does not contain on its face any indication that the holder is a registered sex offender. However, that information is required to be made automatically available to any law enforcement officer upon inquiry to DPS based on the license or identification card number. DPS must also make automatically available to any law enforcement officer on request information about whether the license plate number of a vehicle is assigned to a vehicle owned or driven by a registered sex offender. Article 62.006.

In 2001, the legislature added commercial drivers' licenses and commercial learners' permits to the list of licenses that contain the special sex offender registration information. Article 62.060(a). The legislature also provided that photographs obtained from the process of applying for drivers' licenses or identification cards by registered sex offenders may be posted on the DPS sex offender Internet site. Article 62.005(c).

Status Changes. Article 62.057(a) requires a juvenile probation or parole officer to notify the local law enforcement authority with whom a probationer or parolee is registered if that person's status has changed "in any manner that affects proper supervision of the person, including a change in the person's name, physical health, job or educational status, including higher education status, incarceration, or terms of release." Within seven days after receiving the relevant information, the supervising officer also is required to notify the registration agency if the probationer or parolee intends to change address.

Article 62.057(b) requires a similar report to the local law enforcement authority from the adjudicated juvenile personally if there is any change in the person's name, online identifiers, physical health, job, or educational status. Article 62.057(c) defines change of status:

For purposes of Subsection (b):

(1) a person's job status changes if the person leaves employment for any reason, remains employed by an employer but changes the location at which the person works, or begins employment with a new employer;

(2) a person's health status changes if the person is hospitalized as a result of an illness;

(3) a change in a person's educational status includes the person's transfer from one educational facility to another; and

(4) regarding a change of name, notice of the proposed name provided to a local law enforcement authority as described by Sections 45.004 and 45.103, Family Code, is sufficient, except that the person shall promptly notify the authority of any denial of the person's petition for a change of name.

Change in Online Identifiers. Effective September 1, 2009, registered sex offenders who have "online identifiers," as defined in Article 62.001(12), must report any changes in their online identifier that was reported on the registration form or any new identifier not included on the form. Article 62.0551(a). The registrant must report the change to or establishment of the person's primary registration authority no later than the later of seven days of the change or establishment or the first date when the applicable authority allows the person to report. The primary registering authority, in turn, must forward this information in the same manner required for a change of address. Article 62.0551(b).

D. DPS Sex Offender Registry

The Department of Public Safety (DPS) is required to maintain a computerized sex offender central database. Article 62.005(a). Article 62.051(c) details the information to be included in the database. Since 2009, the database must include the identification of any online identifier established or used by the registrant. Article 62.051(c)(7). "Online identifier" is defined as electronic mail address information or a name used by a person when sending or receiving an instant message, social networking communication, or similar Internet communication or when participating in an Internet chat. Article 62.001(11).

All information in this database is public information except for the registrant's social security number, driver's license number, any home, work, or cellular telephone number, any online identifier established or used by the person, and any information that would identify the victim of the offense. Article 62.005(b).

In 2009, Article 62.005(j) was added, authorizing DPS, for law enforcement purposes only, to release, upon request, all relevant registration information contained in its computerized central database to a peace officer, an employee of a local law enforcement authority, or the attorney general. Under Article 62.005(b), the information released by DPS may include non-public information.

Before 1999, the registrant's photograph and numeric street address were also excluded from the public portion of the database. However, since 2001 the law has required registrants to provide a recent color photograph, rather than simply a photograph or "if possible, an electronic digital image of the person and a complete set of the person's fingerprints." Article 62.051(c)(2).

Use of Information by Licensing Agencies. Article 62.005(f) requires DPS, upon written request of a licensing authority, to disclose to the licensing authority any sex offender registration information concerning any applicant for or holder of a license.

A licensing authority is a department, commission, board, office, or other agency of the state or a political subdivision of the state that issues a license that is required to practice or engage in a particular business, occupation, or profession. Article 62.005(g).

Article 62.051(c)(5) requires a listing on the registration form of each occupational license that "is held or sought by the person." This requirement was imposed to enable DPS to notify the appropriate licensing agencies of the sex offender registration rather than waiting for a request from an agency. By also enacting Article 62.005(e), the legislature requires DPS to take the initiative to notify licensing agencies when it receives information from a new registrant or a renewing registrant that the person holds or is seeking a license.

Request for Online Identifiers by Social Networking Sites. Since September 1, 2009, DPS is allowed to provide to a commercial social networking website, upon request, the public information contained in its database as well as any online identifiers established or used by a person who uses the website, is seeking to use the website, or is precluded from using the website. Article 62.0061(a). This law assists social networking sites in obtaining additional information that can be used to track sex offenders online. The information received may only be used to pre-screen persons attempting to use the site or to preclude registered sex offenders from using the site. Article 62.0061(c). A social networking site risks a civil penalty of $1,000 for each unauthorized use of information. Article 62.0061(d).

Public Access to the Information on the Internet. Government Code Section 411.135 allows any person to obtain public sex offender registration from DPS.

DPS is required by Section 411.135(b) to respond to electronic requests for public information in its databases. Subsection (c) provides that a person who obtains public information from DPS may use the information for any purpose or release the information to any other person. As a result of these provisions, the public portions of sex offender registration records, including photographs and numeric street addresses, are available to the public on the Internet. Websites are maintained by DPS, by some local police departments, and by private for-profit companies using public information obtained from DPS. Juveniles required to maintain public registration are included on the Internet sites.

E. Local Notification

Local Public Information. Local law enforcement authorities are required to provide public information from the public segment of the DPS database to any member of the public who requests it. Article 62.005(d). Any public official who releases public information is immune from liability for releasing that information. Article 62.009.

In addition, the Attorney General has stated that a local law enforcement authority may broadcast information about registered sex offenders, including juveniles, on a local cable channel. The information that may be broadcast is restricted to information that is public under Article 62.005(b). A juvenile registrant's risk assessment score is not public information and may not be broadcast. Attorney General Opinion No. GA-0056 (2003).

Public Notification by Newspaper. A local law enforcement authority may provide notice to the public in a newspaper of general circulation in the county containing information about adult offenders convicted of a reportable sex offense against a person under the age of 17. Articles 62.056(d) and 62.062. The newspaper publication requirement does not apply to an adjudicated juvenile unless the juvenile has been assigned a numeric risk level of three. Articles 62.062(b) and 62.056.

Notification to Schools. If the victim of a reportable offense was at the time of the offense either under 17 years of age or, regardless of age, a student at a public or private secondary school, the local law enforcement authority must immediately report the registration or change of residence to the superintendent of the school district in which the registrant will reside and to the administrators of any private primary or secondary schools within the district's boundaries. Without regard to the victim, if the registrant is a student in a secondary school, the law enforcement authority also must notify the superintendent and private school administrators. Article 62.053(e) and 62.054. When a juvenile moves to a new district, the local law enforcement agency is required to provide the appropriate school officials in the new district with the same information. Article 62.055(f).

Even if the victim was not under 17 and even if the registrant is not a student, the district where the registrant is living must be notified if the offense adjudicated was sexual performance by a child or possession or promotion of child pornography or a similar federal or out-of-state offense. Article 62.054(a)(3). However, a local law enforcement authority may not provide notice if the offense adjudicated was prohibited sexual conduct (incest) or a similar federal or out-of-state offense, even if the victim was under 17 and the registrant is a student in the school. Article 62.054(b). The reason is that disclosing the identity of the offender in an incest case risks disclosing the identity of the victim.

The law enforcement authority is required to provide to the schools any information the authority determines is necessary to protect the public except the registrant's social security and driver's license number, any home, work, or cellular telephone number, or any information that would identify the victim of the offense. Article 62.053(f). The law enforcement authority must provide the same information if a registrant for whom school notification is required moves to a new school district. 62.055.

Upon receipt of the information, a school district superintendent is required to "release the information contained in the notice to appropriate school district personnel, including peace officers and security personnel, principals, nurses, and counselors." Articles 62.053(e) and 62.055(f). The administrator of a private school is authorized to release public portions of that information to the public. Article 62.009(d). The school official releasing information under those sections is not liable for damages for doing so. Article 62.009(b) and (d).

In 2007, Article 15.27(a-1) was added, authorizing the superintendent or a designee in the school district to send to a school district employee having direct supervisory responsibility over a student the confidential information contained in the Article 15.27(a) notice. However, the superintendent or the designee must first determine that

the employee needs the information for educational purposes or for the protection of the person informed or others.

This expanded notification requirement is in addition to the requirement to inform each educator with responsibility for the instruction of a student who has engaged in misconduct enumerated in the Education Code. Educators must keep the information received confidential from persons who are not entitled to it, except to the extent that it can be shared with the student's parent or guardian as provided by state and federal law. Education Code Sections 37.006(o) and 37.007(g).

Also in 2007, the legislature amended Article 15.27(b) to require prosecutors to notify the superintendent or a designee, both orally and in writing, if a student who has been adjudicated of an offense listed under Article 15.27(h) is required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure.

Notification to Institutions of Higher Education. The registrant is required to state on the registration form whether he or she will be employed, will carry on a vocation, or will be a student at a particular private or public institution of higher education in this or another state. Article 62.051(c)(6). If the person will reside on campus, the local law enforcement authority is required to notify campus security. Article 62.051(e). If the person intends to become employed, to carry on a vocation, or to be a student at an institution of higher education, he or she must register with the campus security authority, or with local law enforcement if there is no campus security authority, within seven days of beginning work or study at the institution. Article 62.053(g)(3).

Special DPS Neighborhood Notification. When an adjudicated juvenile required to register as a sex offender is released on probation or parole, he or she must undergo a risk assessment review. As a result of that assessment of the risk he or she poses to the community, he or she will receive a score of one, two, or three. Article 62.007. A score of one means a low danger to the community, a score of two means moderate danger, and a score of three means serious danger.

Article 62.007(d) permits TJJD or a court to override the score on a risk assessment test only if it determines that the score "is not an accurate prediction of the risk the offender poses to the community" and documents the reasons for that opinion. Presumably, overrides can be up as well as down. Article 62.007(e) requires that juvenile records and files be provided to officials conducting risk assessments to enable them to make those assessments.

If the score is three, then DPS is required to provide special notification to the adjudicated juvenile's new neighbors. DPS must provide written notice in Spanish and English "mailed or delivered to at least each residential address, other than a post office box, within a one-mile radius, in an area that has not been subdivided, or a three-block area, in an area that has been subdivided, of the place where the person intends to reside." This process must be repeated each time the adjudicated juvenile moves to a new place of residence. Article 62.056(a). The notice must contain all of the information from the DPS database that is public information, which includes offense information and the juvenile's street address, full name, photograph, and other identifying information. Article 62.056(b).

Special Local Law Enforcement Authority Neighborhood Notification. When a person who has scored a three on the risk assessment test is required to register or verify registration with a local law enforcement authority, that authority is permitted, but not required, to provide additional community notification. It may provide notice to the public in any manner it deems appropriate including:

> holding a neighborhood meeting, posting notices in the area where the person intends to reside, distributing printed notices to area residents, or establishing a specialized local website. The local law enforcement authority may include in the notice any information that is public information under this chapter.

Article 62.056(d).

F. Penalties for Not Complying with Registration Requirements

Failure of an adjudicated juvenile to comply with any of the numerous registration, verification of registration, and notification requirements of the sex offender registration system is a state jail felony. Article 62.102(b)(1). A repeat offense is a third degree felony. Article 62.102(c). Since September 1, 2009, an offense under Chapter 62 may be prosecuted in:

> (1) any county in which an element of the offense occurs;

(2) the county in which the person subject to Chapter 62 last registered, verified registration, or otherwise complied with a requirement of Chapter 62;

(3) the county in which the person required to register under Chapter 62 has indicated that the person intends to reside, regardless of whether the person establishes or attempts to establish residency in that county;

(4) any county in which the person required to register under Chapter 62 is placed under custodial arrest for an offense subsequent to the person's most recent reportable conviction or adjudication under Chapter 62; or

(5) the county in which the person required to register under Chapter 62 resides or is found by a peace officer, regardless of how long the person has been in the county or intends to stay in the county.

Code of Criminal Procedure Article 13.31.

The obligation of an adjudicated juvenile to register lasts for 10 years after the juvenile court disposition is complete. Article 62.101(c)(1).

G. Official Immunity

Article 62.008 provides official (qualified) immunity for public officials who perform duties under the sex offender registration statute:

The following persons are immune from liability for good faith conduct under this chapter:

(1) an employee or officer of the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, the Department of Public Safety, the Board of Pardons and Paroles, or a local law enforcement authority;

(2) an employee or officer of a community supervision and corrections department or a juvenile probation department;

(3) a member of the judiciary; and

(4) a member of the risk assessment review committee established under Article 62.007.

Subdivision (4) was added by the legislature in 2005.

H. Exemption

In 2011, the legislature modified the age-based exemption from registration for certain offenses. Article 42.017 of the Code of Criminal Procedure authorizes a court to make an affirmative finding based on age to exempt certain offenders from registration requirements. If an affirmative finding is made in a case in which a victim is at least 15 years of age, and the offender is no more than four years older than the victim, the offender can be given an exemption from registration requirements. This exemption can be obtained only in cases of indecency with a child or sexual assault in which the conviction is based solely on the ages of the defendant and the victim or intended victim at the time of the offense.

I. Unregistration and Deregistration of Juvenile Sex Offenders

In 2001, the legislature first authorized juvenile courts to excuse adjudicated sex offenders from registration requirements (unregistration) and to authorize courts to excuse further registration of juveniles who are already registered (deregistration). In 2005, the legislature re-designated and reorganized Articles 62.351 through 62.357 into Subchapter H. These articles apply to all juveniles, regardless of when the underlying conduct occurred or the adjudication was made. The deregistration provisions are fully retroactive.

The premise of Subchapter H is that, in some circumstances, requiring registration of juvenile sex offenders does not protect the public or does so only marginally and also inflicts a greater harm on the juvenile and his or her family. In those circumstances, a juvenile court should have authority to excuse registration or, if the juvenile is already registered, to terminate the registration requirement.

Unregistration. Article 62.351 deals with unregistration:

(a) During or after disposition of a case under Section 54.04, Family Code, for adjudication of an offense for which registration is required under this chapter, the juvenile court on motion of the respondent shall conduct a hearing to determine whether the interests of the public require registration under this chapter. The motion may be filed and the hearing held regardless of whether the respondent is under 18 years of age. Notice of the motion and hearing shall be provided to the prosecuting attorney.

(b) The hearing is without a jury and the burden of persuasion is on the respondent to show by a preponderance of evidence that the criteria of Article

62.352(a) have been met. The court at the hearing may make its determination based on:

(1) the receipt of exhibits;

(2) the testimony of witnesses;

(3) representations of counsel for the parties; or

(4) the contents of a social history report prepared by the juvenile probation department that may include the results of testing and examination of the respondent by a psychologist, psychiatrist, or counselor.

(c) All written matter considered by the court shall be disclosed to all parties as provided by Section 54.04(b), Family Code.

(d) If a respondent, as part of a plea agreement, promises not to file a motion seeking an order exempting the respondent from registration under this chapter, the court may not recognize a motion filed by a respondent under this article.

When the law passed, unregistration applied to any juvenile case in which registration had not occurred by September 1, 2001. Juvenile cases pending adjudication or disposition on that date and children in then-TYC on that date who had not yet been released on parole (and had not been registered as a result of prior probation in the same case) were eligible for unregistration without regard to when the offense occurred.

A juvenile is required to register when he or she is placed on probation. If the juvenile is committed to TJJD, he or she is not registered until released from TJJD on parole. If a juvenile is committed to TJJD on a determinate sentence and is transferred to state prison, he or she does not register until released on adult parole. Any time before that event, the adjudicating juvenile court could be asked to conduct an unregistration hearing.

Article 62.356(a) redefines reportable adjudication to exclude a person whose registration has been excused by a juvenile court order. That means the person is not required to register and is not subject to the criminal penalties that may be imposed for not registering, not reregistering, not reporting changes of address, or providing false registration information. A juvenile court order of unregistration should be made part of the adjudication and disposition orders in the case to ensure its continuing applicability.

Article 62.351(a) requires the juvenile court to conduct a hearing on the person's motion seeking unregistration. The subsection states that the hearing shall be held "during or after disposition of a case under Section 54.04," simply because, until the disposition decision is made, it is not known whether an unregistration decision must be made immediately because the person will be placed on probation or whether it can be postponed because the person will be committed to TJJD. A motion for unregistration could be filed at any time and the hearing could be held during the disposition phase or immediately following disposition and as part of the same court proceeding. The motion should be filed under the original juvenile cause number as a motion, not as an independent petition. There should be no additional court costs for filing it in that fashion.

Article 62.351(b) specifies the details of the hearing. There is no jury and the hearing has the character of a disposition hearing. Often, it will merely be a continuation of that hearing. At the hearing, the court may consider testimony and exhibits but also the representations of counsel and contents of a social history report. The social history report may, but need not, be separate from the social history report that was used in making the disposition decision. It may include expert reports from psychologists, psychiatrists, or counselors about the juvenile, the risk he or she poses to society, and the availability of treatment. Article 62.351(c) provides that this report, like the social history report used in making the disposition decision, must be disclosed to all parties.

Article 62.351(b) provides that the burden of persuasion is on the juvenile respondent to convince the court by a preponderance of the evidence that unregistration is required under the standards expressed in Article 62.352(a). See *In the Matter of T.E.*, UNPUBLISHED, No. 03-09-00148-CV, 2010 WL 4053705, Juvenile Law Newsletter ¶ 10-4-8 (Tex.App.—Austin 2010, no pet.) (juvenile failed to carry his burden when he presented no evidence at the hearing that registration would not protect the public). Under that section, the juvenile court must enter an order of unregistration if the court finds:

(1) that the protection of the public would not be increased by registration of the respondent under this chapter; or

(2) that any potential increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to the respondent

and the respondent's family that would result from registration under this chapter.

Under Subsection (a)(1), the court is required to order unregistration if it finds that registration would not increase the protection of the public. Under Subsection (a)(2), unregistration is required even if some increase in public protection is anticipated but it is clearly outweighed by the anticipated substantial harm to the respondent and respondent's family from registration.

Articles 62.355(a) and (b) integrate unregistration with plea agreements. If the parties make unregistration without a hearing part of the plea agreement that is disclosed to the juvenile court, the court has the option, as in any plea agreement, to accept or reject the terms of the deal. If the deal is accepted by the juvenile court, then it must order unregistration without conducting a hearing under Article 62.351(b). The juvenile court remains free to reject the agreement or to accept it only if it conducts an Article 62.351(b) hearing. In that event, the juvenile must be given the opportunity to withdraw his or her plea or to reaffirm the plea and agreement as modified by the court by imposing the hearing requirement. In addition, the prosecution may, without a plea agreement, waive its right to an Article 62.351(b) hearing. In that event, the court must excuse registration without a hearing. The prosecutor's unnegotiated determination that registration is not in the public interest is sufficient protection for the community. The waiver of hearing by the prosecutor must state whether it is or is not made as part of a plea agreement. Finally, as part of a plea agreement, the respondent may promise not to file a motion for unregistration or deregistration, in which event the juvenile court, if it accepts the agreement, is precluded from accepting such a motion if the juvenile later attempts to file it.

Article 62.357(a) gives the State the right to appeal from a juvenile court decision excusing registration. This right does not include less sweeping decisions postponing registration pending a decision made after the outcome of treatment is known or requiring a nonpublic registration. Notice of appeal must be given under the Rules of Appellate Procedure within 15 days of entry of the order excusing registration. The appeal is limited to the registration issue and does not reach any other issues in the case. The standard of review "is whether the juvenile court committed procedural error or abused its discretion" in excusing compliance with registration.

Article 62.357(b) gives the juvenile the right to appeal the court's decision requiring full public registration. Like the State's right of appeal, this right does not extend to less sweeping decisions refusing to excuse all registration in favor of deferred or non-public registration. This appeal is part of the juvenile's appeal under Chapter 56. The standard of appellate review is identical to what it is for a State's appeal. See *In the Matter of J.D.D.*, UNPUBLISHED, No. 05-07-01252, 2008 Tex.App.Lexis 8657, Juvenile Law Newsletter ¶ 09-1-1 (Tex.App.—Dallas 2009, no pet.) (no abuse of discretion in requiring public registration after unsuccessful sex offender treatment at TYC).

Article 62.356(b) provides that, if the juvenile court excuses registration, the juvenile cannot be required to register in Texas or elsewhere. Article 62.352(b)(1) permits the court to defer its registration decision to await the outcome of treatment efforts. Registration is prohibited during the period of deferral. Deferral is by far the most popular choice made by juvenile court judges. It postpones making a difficult decision until more information becomes available and provides an important incentive for the respondent and his or her parents to cooperate in the treatment programs ordered by the court.

Although the concept of deferred registration is frequently understood to mean the requirement to register has been deferred, this is a misunderstanding of the law. Article 62.352(b)(1) reads, in part:

> (b) After a hearing under Article 62.351 or under a plea agreement described by Article 62.355(b), the juvenile court may enter an order:
>
> (1) *deferring decision* on requiring registration until the respondent has completed treatment for the respondent's sexual offense…

This language makes it clear that the court has deferred its decision on whether or not to excuse registration. The court retains the discretion to make that decision and has no statutory authority to delegate that decision to another entity. Even if a child is unsuccessful in completing treatment, until the court revisits the matter and makes a determination on whether not registration should be excused, the child has no obligation to register.

In *In the Matter of J.D.G.*, 141 S.W.3d 319 (Tex.App.—Corpus Christi 2004, no pet.), the duty to register as a sex offender was deferred by a judge who placed a child on Intensive Supervision Probation (ISP). Less than one month before the probation term was to expire, the State filed a motion requesting that the juvenile court exercise

its discretion and enter a judgment requiring J.D.G. to register as a sex offender. Citing former Article 62.13(j) [now Article 62.352(c)], the Court of Appeals held that, in deferring the decision, the juvenile court retains its jurisdiction and discretion to require a probationer to register at any time during treatment or following its successful or unsuccessful completion. See also *In the Matter of J.M.*, UNPUBLISHED, No. 12-10-00159-CV, 2011 WL 6000778 (Tex.App.—Tyler 2011, no pet.) ("[T]his additional grant of jurisdiction was sufficient to allow the juvenile court to address the State's motion following J.M.'s unsuccessful completion of treatment."); *In the Matter of L.L., Jr.*, UNPUBLISHED, No. 08-10-00073-CV, 2011 WL 2162748, Juvenile Law Newsletter ¶ 11-3-4 (Tex.App.—El Paso 2011, no pet.) (evidence factually sufficient to support implied finding that interests of the public required registration).

Both J.D.G.'s probation officer and a treatment counselor testified that sex offender registration would be appropriate. Under these circumstances, requiring J.D.G. to register immediately prior to the successful completion of his probationary period was not deemed to be an arbitrary or unreasonable action taken by the juvenile court. See also *Adams v. State*, UNPUBLISHED, No. 05-10-01056-CR, 2011 WL 5311099, Juvenile Law Newsletter ¶ 11-4-5A (Tex.App.—Dallas 2011, no pet.) (no abuse of discretion to order appellant to register as a sex offender without holding a separate hearing); *In the Matter of T.E.*, UNPUBLISHED, No. 03-09-00148-CV, 2010 WL 4053705, Juvenile Law Newsletter ¶ 10-4-8 (Tex.App.—Austin 2010, no pet.) (no abuse of discretion to require juvenile to register as a sex offender based on testimony that he posed a high risk to the community and had regressed in the months leading up to his release from TYC); *In the Matter of B.M.*, UNPUBLISHED, No. 02-07-153-CV, 2008 Tex.App.Lexis 751 (Tex.App.—Fort Worth 2008, no pet.) (no abuse of discretion to require juvenile to register as a sex offender based on evidence that he unsuccessfully completed sex offender treatment program and was likely to continue committing sexual offenses). Article 62.352(b)(2) permits the court to require a non-public registration, in which event the registration information cannot be placed on the Internet or released to the public.

The same discretion to require registration of a juvenile who either successfully or unsuccessfully completes sex offender treatment is not vested in TJJD. In Attorney General Opinion No. GA-0772 (2010), the question was asked whether a TYC administrative rule requiring the registration of certain juveniles as sex offenders was inconsistent with Article 62.352, which authorizes a juvenile court to exempt registration or defer making a decision on a request to exempt registration. Under the TYC rule, if a court had deferred its decision regarding whether or not to excuse registration and the youth successfully completed treatment, TYC would not require registration unless additional orders were received from the court. Former 37 Tex. Admin. Code Section 87.85(g)(2). Subsection (g)(3) of the rule, however, required TYC to register a youth who had not successfully completed treatment upon discharge even if the court had deferred its decision on whether or not to excuse registration. The Attorney General stated that former 37 T.A.C. Section 87.85(g)(3) had valid applications when a court had not either excused registration or deferred a decision on registration and, therefore, was not on its face inconsistent with Article 62.352. However, a youth who had unsuccessfully completed treatment could be subject to registration by TYC only if there was not a court order excusing registration or deferring a decision on registration. In other words, if a juvenile court exempted registration or deferred the court's decision regarding whether or not to exempt registration, TYC could not register a person as a sex offender, even if treatment had not successfully been completed.

Deregistration. Article 62.353 deals with deregistration of juveniles who are already registered as sex offenders:

> (a) A person who has registered as a sex offender for an adjudication of delinquent conduct, regardless of when the delinquent conduct or the adjudication for the conduct occurred, may file a motion in the adjudicating juvenile court for a hearing seeking:
>
> (1) exemption from registration under this chapter as provided by Article 62.351; or
>
> (2) an order under Article 62.352(b)(2) that the registration become nonpublic.
>
> (b) The person may file a motion under Subsection (a) in the original juvenile case regardless of whether the person, at the time of filing the motion, is 18 years of age or older. Notice of the motion shall be provided to the prosecuting attorney. A hearing on the motion shall be provided as in other cases under this subchapter.
>
> (c) Only one subsequent motion may be filed under Subsection (a) if a previous motion under this article has been filed concerning the case.
>
> (d) To the extent feasible, the motion under Subsection (a) shall identify those public and private

agencies and organizations, including public or private institutions of higher education, that possess sex offender registration information about the case.

(e) The juvenile court, after a hearing, may:

(1) deny a motion filed under Subsection (a);

(2) grant a motion described by Subsection (a)(1); or

(3) grant a motion described by Subsection (a)(2).

(f) If the court grants a motion filed under Subsection (a), the clerk of the court shall by certified mail, return receipt requested, send a copy of the order to the department, to each local law enforcement authority that the person has proved to the juvenile court has registration information about the person, and to each public or private agency or organization that the person has proved to the juvenile court has information about the person that is currently available to the public with or without payment of a fee. The clerk of the court shall by certified mail, return receipt requested, send a copy of the order to any other agency or organization designated by the person. The person shall identify the agency or organization and its address and pay a fee of $20 to the court for each agency or organization the person designates.

(g) In addition to disseminating the order under Subsection (f), at the request of the person, the clerk of the court shall by certified mail, return receipt requested, send a copy of the order to each public or private agency or organization that at any time following the initial dissemination of the order under Subsection (f) gains possession of sex offender registration information pertaining to that person, if the agency or organization did not otherwise receive a copy of the order under Subsection (f).

(h) An order under Subsection (f) must require the recipient to conform its records to the court's order either by deleting the sex offender registration information or changing its status to nonpublic, as applicable. A public or private institution of higher education may not be required to delete the sex offender registration information under this subsection.

(i) A private agency or organization that possesses sex offender registration information the agency or organization obtained from a state, county, or local governmental entity is required to conform the agency's or organization's records to the court's order on or before the 30th day after the date of the entry of the order. Unless the agency or organization is a public or private institution of higher education, failure to comply in that period automatically bars the agency or organization from obtaining sex offender registration information from any state, county, or local governmental entity in this state in the future.

For several reasons, deregistration is not as desirable for the juvenile respondent as unregistration. Counsel will often be available to assist the respondent in unregistration, since it usually occurs as part of or immediately after the disposition hearing. Counsel must be retained or obtained on a volunteer basis for deregistration, which is a substantial impediment to the availability of that procedure. If the juvenile court orders unregistration, that decision is automatically enforced by the respondent not registering. If the juvenile court orders deregistration, there are further steps involved in enforcing that order, such as: (1) assuring that all of the relevant databases have been identified; and (2) confirming that the information actually is removed. Nevertheless, for the juvenile respondent, deregistration is better than nothing.

Article 62.353(a) authorizes the filing of a motion for deregistration or to convert a public registration into a nonpublic one. This provision is fully retroactive to all cases in which a person is registered because of a juvenile adjudication, regardless of when the offense was committed or the adjudication occurred.

Article 62.353(b) provides that the motion is filed in the original juvenile proceeding leading to the adjudication that was the basis of the registration. Since the motion is filed in an existing lawsuit, there should be no new court costs. The jurisdiction of the juvenile court is extended to include deregistration proceedings even though the registrant is 18 or older at the time of the proceedings.

As enacted in 2001, the law provided that a motion for deregistration could be filed only if a motion for unregistration or a previous motion for deregistration had not been filed. Out of concern for burdens on the caseloads of juvenile courts that these motions might potentially impose, there was only one bite of the apple permitted. In 2003, this position was re-assessed in light of experience. One subsequent deregistration application is permitted even if the respondent filed and was denied unregistration or deregistration. Article 62.353(c). This recognizes

that circumstances can change in a manner that warrants re-examination of this important decision.

Article 62.353(d) requires counsel to identify all agencies with sex offender registration information. That would include the local law enforcement authority where the juvenile first registered, any local law enforcement authority in a community to which the respondent moved and thus re-registered, DPS, and any private websites to which DPS has provided sex offender registration data.

Article 62.353(e) authorizes the juvenile court, on a motion for deregistration, to deny the motion, order deregistration, or change the registration from public to non-public. The fourth option available in unregistration—deferral to await the outcome of treatment programs—is not provided since presumably any treatment that will occur has already taken place by the time of the deregistration proceedings.

Article 62.353(f) requires the respondent to prove the existence of records that are available to the public. The clerk of court is required to send by certified mail a copy of the deregistration order to each law enforcement agency and to each agency or organization proved to have public records. Additional agencies can be served upon payment of a fee. The purpose of this amendment was to reduce the burdens on the clerks, who were sometimes required to send orders to numerous organizations, some of which were believed not to have a record available to the public.

Article 62.353(g) requires the court to send deregistration orders to agencies or organizations after the initial transmittals upon a showing that those agencies have since acquired records about the respondent.

Article 62.353(h) exempts institutions of higher education from the requirement to delete sex offender registration information from its records. It is not known why higher education was given an exemption not even provided to law enforcement agencies. In any event, that specific provision controls and should be recognized as a valid exception.

Article 62.353(i) deals with private databases that obtain sex offender registration information from public entities. It requires them to conform their records to the court's order within 30 days or be barred from obtaining further sex offender registration information from the State of Texas or any local governmental entity in the future. Again, the requirement to remove does not apply to institutions of higher education.

Article 62.354 authorizes a Texas juvenile court in the county of the juvenile's residence to order unregistration or deregistration for an out-of-state adjudication. A court order of unregistration or deregistration affects only Texas registration requirements, not those of the state or other jurisdiction in which the adjudication occurred.

J. The Adam Walsh Act

The federal Sex Offender Registration and Notification Act (SORNA) is Title I of the Adam Walsh Child Protection and Public Safety Act of 2006, Public Law No. 248.109, also known as "the Adam Walsh Act." The Adam Walsh Act is a comprehensive federal act that expands the national sex offender registry, mandates minimum time lengths for registration, and strengthens criminal penalties for crimes against children. The stated purpose of the act is to protect the public, particularly children, from violent sex offenders. Some of the provisions within the act apply only to adult offenders; however, Section 111(8) specifically includes certain juvenile sex offenders. The United States Attorney General is authorized to apply the law retroactively.

John Walsh, father of murdered child Adam Walsh, host of America's Most Wanted television show, and founder of the National Center for Missing and Exploited Children, along with several other families of murdered children, campaigned to get the bill passed into law. The bill was signed by President George W. Bush in 2006. The Act established a penalty for jurisdictions that failed to substantially implement SORNA by July 27, 2011, and for any year thereafter. Texas is among the states that did not substantially implement SORNA by the deadline. A copy of the Act is available on the Library of Congress' website.

General Requirements. The Adam Walsh Act mandates the length of time offenders must register, as determined by a three-tier system: Tier I—15 years; Tier II—25 years; and Tier III—life. The Act creates a national sex offender registry that must be available on the Internet and easily accessible to the public. Each jurisdiction must provide: (1) a physical description of the registrant; (2) the criminal offense; (3) the registrant's criminal history, including date(s) of arrest, conviction(s), and correctional or release status; (4) a current photograph, fingerprints, and palm prints; (5) a DNA sample; (6) a copy of a valid driver's license or identification card; and (7) any other information required by the Attorney General. Offenders must appear in person to update the information at time intervals determined by their tier level. States must set a

maximum criminal penalty for failure to register that includes a maximum term of imprisonment of more than one year.

Impact of the Act on Juveniles. Juveniles are not impacted by the entire Adam Walsh Act, and not all juveniles are included. The Act applies only to juveniles who are 14 years or older at the time of the offense and who commit a sexual offense comparable to or more severe than an aggravated sexual abuse or an attempt or conspiracy to commit such an offense under federal law. See 18 United States Code Section 2241. In Texas, aggravated sexual assault and sexual assault by force, threat, or other means are comparable to the federal law of aggravated sexual abuse, but only if the victim is under the age of 12. Additionally, indecency with a child by contact is comparable if the victim is under the age of 12. Juveniles adjudicated for aggravated sexual assault would be classified as Tier III sex offenders and would be required to publicly register for life. Tier III juveniles may petition the court to excuse required registration if they maintain a clean record for 25 years, successfully complete probation or parole, and successfully complete an appropriate sex offender treatment program. Tier III juveniles are required to appear in person to update their information every three months.

Legislative Efforts in Texas. Conforming legislation in Texas would require comprehensive amendments to Chapter 62 of the Code of Criminal Procedure. Such changes would represent a shift in the current philosophy in Texas regarding juvenile sex offender registration and would likely eliminate the discretion of juvenile court judges to exempt, defer, or allow non-public registration.

Until conforming legislation has been enacted in Texas, juvenile sex offender registration provisions contained in Chapter 62 of the Code of Criminal Procedure remain in place to allow juvenile courts the discretion to make the following decisions:

(a) exempt all registration;

(b) require full registration (including public access on the Internet);

(c) require non-public registration accessible only to criminal justice agencies;

(d) defer the decision to require registration until the juvenile completes court-ordered sex offender treatment; and

(e) grant deregistration and unregistration relief.

See Code of Criminal Procedure Chapter 62, Subchapter G, Article 62.301 and Subchapter H, Articles 62.351 – 62.357.

SORNA Clarification and State Compliance. Texas is among a number of states that opted not to substantially implement the Act by the 2011 deadline. Policymakers expressed concerns that compliant statutory changes in Texas would eliminate the juvenile court's discretion regarding the registration decision and make other extensive amendments to Article 62, Code of Criminal Procedure. Cost was also cited as a significant barrier to full implementation.

Nearly ten years later, some of the uncertainties regarding state compliance were alleviated by clarifications outlined in an August 2016 Federal Register Notice. *Supplemental Guidelines for Juvenile Registration under the Sex Offender Registration and Notification* Act, 81 Fed. Reg. 147 (August 1, 2016) and Federal Register: Notices, August 2016. Specifically, the notice made clear that laws in state jurisdictions that do not meet SORNA guidelines may still be considered to have substantially complied if state policies and practices promote public safety in a manner that does not undermine the overall SORNA objectives.

CHAPTER 21: Determinate Sentencing Proceedings

Determinate Sentencing, Discretionary Transfers, and Ordinary Delinquency Proceedings 547

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As the discussion in Chapter 3 indicates, the juvenile justice system can exercise control over an adjudicated offender for only a limited time. If placed on regular probation, the child must be discharged no later than his or her 18th birthday; if placed on determinate sentence probation or committed to the Texas Juvenile Justice Department (TJJD), no later than his or her 19th birthday. While this reduced period of control may be adequate for many juvenile offenders, for a smaller number, it is not.

For those juveniles for whom a determinate sentence is not appropriate, transfer from juvenile to criminal court is available. If a capital or first degree felony offense was committed while the child was 14 or any other felony offense was committed while the child was 15 or 16, the juvenile court, after a hearing, may transfer the case to criminal court for prosecution under adult law. Although transfer is permitted by law for any felony committed by a 15 or 16-year-old, in practice it tends to be used primarily for very serious, violent offenders and, occasionally, for less serious, but repetitive, felony offenders.

Determinate Sentencing, Discretionary Transfers, and Ordinary Delinquency Proceedings

The Determinate Sentence Act was intended to plug what was perceived as a gap in the coverage of juvenile statutes: serious, violent offenses committed by persons while under the minimum certification age (which was 15 when the Determinate Sentence Act was initially passed). While it does serve that purpose, it is not restricted to children under the minimum certification age. For covered offenses, a prosecutor can decide to invoke the special determinate sentence proceedings rather than seek discretionary transfer to criminal court. He or she may conclude that the Determinate Sentence Act presents a more attractive alternative than discretionary transfer does.

If discretionary transfer is sought, the Family Code requires an investigation, diagnostic study, and full hearing before the juvenile court. The juvenile court judge may or may not decide to transfer the respondent to criminal court for prosecution as an adult. If the judge decides to transfer, then full criminal proceedings, including a possible examining trial, presentation of the case to a grand jury for an indictment, and possible jury trial with jury sentencing in district court may follow. The prosecutor may experience difficulties convincing a jury to award a substantial prison sentence to a 14, 15, or 16-year-old when the jury knows that any sentence it awards must be served from its inception in the Texas Department of Criminal Justice (TDCJ).

If one of the covered offenses is involved, the net effect of the prosecutor's election to invoke determinate sentence proceedings instead of seeking transfer to criminal court is to substitute the rather summary proceedings before the grand jury for the transfer hearing, possible examining trial, and presentation to the grand jury that is required to bring the respondent to trial in adult court. The prosecutor may also be required to participate in a transfer hearing or an early parole release hearing if TJJD

requests either course of action. Of course, the respondent may appeal from the adjudication and sentencing decision as in any juvenile case, just as he or she may appeal from a criminal conviction and sentencing if transferred to criminal court.

Determinate sentence proceedings can also be invoked in cases in which the prosecutor has attempted unsuccessfully to persuade the juvenile court to transfer the juvenile to adult court for criminal prosecution. An unsuccessful transfer attempt does not diminish the right of the prosecutor, in his or her discretion, to refer the petition to the grand jury for its approval. Further, if there has been a transfer but the case has been returned to juvenile court by the district court or the Court of Appeals, the determinate sentence proceedings could be invoked if the respondent is still under 18 years of age. The only timing requirement is that they be invoked by grand jury approval of the petition before the beginning of the adjudication hearing in the juvenile court.

If the prosecutor has filed an ordinary delinquency petition for a non-covered offense and further investigation reveals the presence of a covered offense, he or she may, at any time before the adjudication hearing begins, enter a nonsuit in the ordinary delinquency case and file a new petition charging an offense under the Determinate Sentence Act. Such a move does not constitute double jeopardy because jeopardy has not attached to the charge.

Finally, the availability of determinate sentence proceedings must be a factor weighed by the juvenile court judge in any transfer hearing in which the respondent is charged with one or more of the covered offenses. Family Code Section 54.02(f)(4) requires the juvenile court to consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." If the respondent in a transfer hearing is charged with a covered offense, the juvenile court judge must consider the availability of special proceedings in juvenile court with a possible sentence of up to 40 years, depending on the offense, as an alternative to discretionary transfer to criminal court.

A. Legislative History

In the mid-1980s, there developed a growing perception in Texas, particularly in major metropolitan areas, that serious, violent offenses by juveniles under the then-minimum transfer age of 15 were increasing in number. There was also a growing frustration with the ability of the juvenile justice system to deal with them adequately. For example, before the determinate sentence law was enacted, the juvenile system could respond to a capital murder committed by a child just before his or her 15th birthday with a maximum of only six years of control over the child because commitment to the then-Texas Youth Commission, which had jurisdiction until age 21, was the only option.

For several years, bills were introduced in the Texas Legislature to deal with the problem. A frequent proposal was simply to lower the minimum transfer age from 15 to 13. Various proposals to lower the certification age reached a peak in 1987. One bill would have lowered the transfer age to 13, but only for the offenses of capital murder, murder, aggravated kidnapping, aggravated sexual assault, aggravated robbery, or an aggravated controlled substances violation. Another bill would have lowered the transfer age to 13, but only for capital murder or a first degree felony committed by a juvenile with a prior felony delinquency adjudication.

Yet another bill in 1987 would have lowered the transfer age to 13 but provided that, until the convicted offender became 21 years of age, he or she must be confined in a facility provided by then-TYC but operated by TDCJ. Upon becoming 21, he or she would be transferred to a conventional prison unit. Finally, another bill would have lowered the transfer age to 13 only for capital murder or murder, aggravated kidnapping, aggravated sexual assault, aggravated robbery, or aggravated controlled substances violations and required that, if the juvenile court found probable cause at the transfer hearing, the court was *required* to transfer the child to criminal court. If convicted, he or she would be confined in a facility provided by then-TYC but operated by TDCJ. Once the person turned 21, he or she would be transferred to a conventional prison unit.

Competing with these proposals was the bill containing the Determinate Sentence Act. Its approach was different in one major respect: rather than transferring the child to criminal court for prosecution, it kept the child in juvenile court but provided all the procedural protections that an adult being prosecuted in criminal court would have and provided for an extended term of control—up to 30 years originally, but increased to 40 years in 1991. Confinement was to be first in a juvenile facility; then, at age 18, after a hearing by the juvenile court, the child could be released on juvenile parole or transferred to an adult facility. When the legislature enacted this approach, the other bills died in committee.

The core idea behind determinate sentencing is to give serious juvenile offenders one last opportunity to change the directions of their lives and to account for their offenses. It does so by keeping the offender in the juvenile system with its rehabilitation programs and opportunities to enable the offender to demonstrate change. In the foreground of this effort is the threat of incarceration in an adult penal institution upon failure or inadequate effort toward change. This idea is an extension of the original juvenile court concept to reach even the most serious, most violent offenders while protecting the public. Determinate sentencing states that the juvenile system under these circumstances is capable of handling even the most serious cases and does not need to dump these cases on the criminal justice system by certifying them to adult court.

For a more detailed legislative history of the Determinate Sentence Act, see Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 St. Mary's Law Journal 943-1016 (1988). For an empirical study of the first year of operation under the Determinate Sentence Act, see Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 Texas Tech Law Review 1897-1939 (1990). For an empirical study of the operation of the system from 1999 through 2001, see Dawson, *Texas Juvenile Blended Sentencing: An Empirical Study of the Uses of Determinate Sentencing*, State Bar of Texas, 17 Juvenile Law Section Report 5, No. 3 (June 2003).

Determinate sentence legislation was subjected only to minor amendments from its enactment in 1987 until the 74th session of the Texas legislature in 1995. In that session, two major changes were made: (1) the number of covered offenses was increased from six to about 17; and (2) the method of determining whether and when a sentenced youth would be paroled or transferred to the adult prison was completely altered.

In 2007, the legislature enacted Senate Bill 103 and House Bill 2884, which again changed the landscape for determinate sentencing in Texas. Significantly, the legislature mandated that then-TYC's jurisdiction over youth with a determinate sentence end at age 19 instead of age 21. Human Resources Code Section 244.014. As a result, these offenders must be discharged from TJJD custody on their 19th birthday. That means that, unless the youth has already completed his or her sentence or been ordered transferred to adult prison, the youth will be transferred to TDCJ parole on his or her 19th birthday. Human Resources Code Section245.151. This means that TJJD has less time to rehabilitate offenders committed under Family Code Section 53.045 than it did when jurisdiction lasted to age 21. Unfortunately, one unintended result has been that prosecutors have used the discretionary transfer (certification) process more often since the amount of time TJJD has to work with determinate sentenced youth was significantly reduced.

B. Scope of the Legislation

1. Offenses Originally Covered

Only six of the most serious felony offenses were covered by the original legislation: (1) Penal Code Section 19.02 (murder); (2) Penal Code Section 19.03 (capital murder); (3) Penal Code Section 20.04 (aggravated kidnapping); (4) Penal Code Section 22.021 (aggravated sexual assault); (5) Penal Code Section 22.03 (deadly assault on a law enforcement officer, corrections officer, or court participant); and (6) Penal Code Section 15.01 (criminal attempt, but only if the offense attempted was capital murder).

Sexual Assault and Aggravated Sexual Assault. In 1991, the legislature narrowed the scope of the Determinate Sentence Act by creating an exception for aggravated sexual assault in which the victim was under 14, the actor was not more than two years older than the victim, and the actor did not use force or violence. In 1995, that exclusion was expanded to include sexual assault, which means the victim is under 17 years of age, not just under 14 years of age. Additionally, the age difference was increased to three years. Unlike other offenses covered by the Act, these offenses are not offenses involving violence and often involve sexual relations between dating individuals. This change was made by adding Section 53.045(e), which reads:

> The prosecuting attorney may not refer a petition that alleges the child engaged in conduct that violated Section 22.011(a)(2), Penal Code [sexual assault], or Sections 22.021(a)(1)(B) and (2)(B), Penal Code [aggravated sexual assault], unless the child is more than three years older than the victim of the conduct.

If force or threats were used to induce the sexual acts, then this exclusion does not apply and the case may be handled under the Determinate Sentence Act without regard to the age difference between the participants.

The requirement of a three-year difference between the ages of the respondent and the victim in this manner

is not an element of the offense nor is it an affirmative defense. Instead, it is a prohibition on the authority of the prosecutor to present a juvenile petition to the grand jury for its approval. Consequently, there is no need to allege the required age difference in the petition. *In the Matter of G.I.*, UNPUBLISHED, No. 05-9501323-CV, 1997 WL 303754, 1997 Tex.App.Lexis 2938, Juvenile Law Newsletter ¶ 97-3-07 (Tex.App.—Dallas 1997, no writ). Of course, without grand jury approval, a juvenile petition alleging any offense is only an allegation of ordinary delinquency, not an allegation of a determinate sentence offense.

If the child is not more than three years older than the victim in an aggravated sexual assault not involving violence (victim is under 14 years of age), the case may still be handled as an ordinary delinquency case even though it cannot be handled as a determinate sentence case. In contrast, if the child is not more than three years older than the victim in a case involving the offense of sexual assault under Penal Code Section 22.011(e) (victim is 14, 15, or 16 years old), there is both a prohibition on treating the case as a determinate sentence case as well as an available affirmative defense to prosecution. For the affirmative defense to apply, in addition to the proper age difference, the actor must not, at the time of the offense, be required to register for life as a sex offender (which is never required for a juvenile) and must not have had a previous adjudication for sexual assault that was reportable under the sex offender registration statute. There is no comparable affirmative defense for aggravated sexual assault under Penal Code Section 22.021. See *In the Matter of F.J.S.*, UNPUBLISHED, No. 08-08-00109-CV, 2010 Tex.App.Lexis 3920, Juvenile Law Newsletter ¶ 10-3-5 (Tex.App.—El Paso 2010, no pet.) (Section 22.021 does not include age-related affirmative defense nor does it reference the defense provided in Section 22.011).

Thus, there are very different outcomes in juvenile cases depending upon whether the charge is sexual assault or aggravated sexual assault. In a sexual assault (consensual) case, if the respondent shows he or she falls within the three-year age span, not only can he or she not be adjudicated for a determinate sentence offense, he or she will also be found not guilty under the Penal Code affirmative defense, provided that, at the time of the conduct, he or she had no previous adjudication for sexual assault reportable under the registration statute. Penal Code Section 22.011(e). However, if the respondent prevails on the claim of not being more than three years older than the victim in an aggravated sexual assault (consensual) case, he or she escapes from determinate sentence handling but could still be found delinquent under ordinary delinquency proceedings. That is because the three-year provision applies only to determinate sentence proceedings in juvenile court and is not a defense to aggravated sexual assault under the Penal Code.

In 2009, the legislature made modifications to the offense of sexual assault of a child by removing "not the person's spouse" from the definition of "child," thereby eliminating the need to ask sexual assault victims under the age of 17 whether they are married to the accused. Penal Code Section 22.011(c)(1). The amendment makes being the spouse of a child victim' an affirmative defense, which can be raised when appropriate. Penal Code Section 22.011(e)(1). This affirmative defense is not expected to impact many, if any, juvenile cases and is in addition to the existing affirmative defense that the actor was not more than three years older than the victim at the time of the offense.

Probation. An adult convicted of capital murder is, of course, not eligible to receive probation. Code of Criminal Procedure Article 42A.054(a)(3), formerly Article 42.12, Section 3g(a)(1)(A). In any other case, the jury may grant probation if it assesses a punishment of 10 years or less and the defendant has never before been convicted of a felony. Code of Criminal Procedure Articles 42A.055-056, formerly Article 42.12, Section 4(a). While a judge may grant probation to a defendant who has a prior felony conviction, he or she may not grant probation for murder; aggravated kidnapping; trafficking of persons; indecency with a child; sexual assault;, aggravated sexual assault; injury to a child or elderly or disabled individual; aggravated robbery; certain burglary offenses; compelling prostitution; sexual performance by a child; certain drug offenses involving using a child to commit the offense; or a drug-free zone offense if there was a prior conviction. The judge also may not grant probation if the judge makes a finding that the defendant used or exhibited a deadly weapon during the commission of the offense. Code of Criminal Procedure Article 42A.054, formerly Article 42.12, Section 3g.

In contrast, under determinate sentencing law, if the respondent is adjudicated delinquent for an offense eligible for determinate sentencing and for which determinate sentencing was sought, the juvenile court or jury may sentence the respondent to a term of up to 40 years confinement, depending on the offense level. Family Code Section 54.04(d)(3). Until 1999, the juvenile court or jury could have granted probation for a period not to exceed the respondent's 18th birthday. In 1999, the legislature authorized the judge or jury, if a commitment to TJJD with a

sentence of 10 years or less is assessed, to grant probation. In that event, the judge can place the respondent on probation for any term not to exceed 10 years. See the discussion later in this chapter.

Minimum Age of 10. Most of the proposed changes in the transfer section of the Family Code that did not pass in 1989 would have lowered the minimum transfer age to 13. Under the Determinate Sentence Act, however, no minimum age is specified. Therefore, the Family Code's minimum age of 10 applies. Thus, it is possible for a 10-year old to receive a sentence of 40 years' incarceration for the commission of one of the covered offenses.

Deadly Assault on Law Enforcement Officer. In 1993, the legislature repealed Penal Code Section 22.03, which prohibited deadly assault on law enforcement officers and others. This repeal, effective September 1, 1994, in theory reduced the number of covered from six to five. The reduction was only theoretical, however, because there is no case known to have been brought under the Determinate Sentence Act for a violation of Section 22.03.

2. Offenses Added in 1995 and Thereafter

In 1995, the legislature greatly expanded the number of offenses covered by the Determinate Sentence Act from five offenses to about 17. The additional offenses are eligible only if committed on or after January 1, 1996.

Second and Third Degree Felonies. Some of the offenses added in 1995 are second or third degree felonies. Accordingly, it was necessary to change the dispositional provisions. The punishment range for a capital, aggravated controlled substance, or first degree felony is up to 40 years; for a second degree felony, up to 20 years ; and for a third degree felony, up to 10 years. Section 54.04(d)(3).

Assaultive Offenses. In 1995, the legislature added the following seven offenses to Section 53.045, all of which are of an assaultive nature: sexual assault, aggravated assault, aggravated robbery, injury to child or elderly or disabled individual (other than a state jail felony), felony deadly conduct involving discharging a firearm, indecency with a child by contact, and attempted murder.

Attempted 3g Offenses. In 1995, the legislature also added criminal attempt to commit any so-called "3g" offenses, which are listed in Code of Criminal Procedure Article42A.054 (formerly Article 42.12, Section 3g). The majority of the 3g offenses have possible applicability to the juvenile system. However, there are certain drug offenses that are also 3g offenses only if the person had a prior adult conviction for a drug offense; as such, they are not applicable to juvenile offenders. The proper disposition for an attempted offense is one penalty category lower than the completed offense would have carried. Section 15.01(d), Penal Code.

When criminal attempt to commit a 3g offense was added to the list of determinate sentence offenses, there were only six relevant 3g offenses: murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, and aggravated robbery. Each of these offenses in its completed form was covered under the Determinate Sentence Act by other provisions. Over time, though, as offenses have been added to the 3g offense list, there has not always been a corresponding change to the determinate sentence list. Thus, it is theoretically possible for a juvenile to be eligible for a determinate sentence for an attempted 3g offense but not for a completed one.

In *In the Matter of A.C.,* 2016 WL 4628065 (Tex.App.—Austin 2016), UNPUBLISHED, the court was presented with a situation in which a juvenile was given a determinate sentence for the offense of burglary of a habitation with attempt to commit sexual assault. The juvenile appealed because burglary is not listed an offense for which a determinate sentence may be given. The court held:

> The Juvenile Justice Code authorizes a determinate sentence if, among other requirements not relevant here, "the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that *included* a violation of a penal law listed in Section 53.045(a)." [citing Section 54.04(d)(3), Family Code.] It is undisputed that burglary of a habitation is not among the offenses listed in Section 53.045(a).… However, the offense of criminal attempt is listed in Section 53.045(a), "if the offense attempted was…an offense listed by Section 3g(a)(1), Article 42.12. Code of Criminal Procedure." And sexual assault is among the offenses listed in Section 3(g)(a)(1).… Thus, in this case a determinate sentence was authorized if the juvenile court found at the conclusion of the adjudication hearing that A.C. had engaged in delinquent conduct that included the offense of attempted sexual assault.
>
> The record reflects that such a finding was made.… By finding the…allegation to be true, the juvenile court necessarily found that A.C. had engaged

> in delinquent conduct that included a violation of a penal law listed in Section 53.045(a), specifically the offense of attempted sexual assault. Consequently…a determinate sentence was authorized.

2016 WL 4628065, 2-3.

Criminal Solicitation. In 1995, the legislature also included criminal solicitation as a determinate sentence offense. Criminal solicitation under Penal Code Section 15.03 occurs when one solicits another to commit a capital or first degree felony. The offense is complete when the solicitation occurs, even if the offer is not accepted. The offense of solicitation is punishable one category lower than the offense solicited.

The legislature also made engaging in criminal solicitation of a minor, an offense under Section 15.031, Penal Code, eligible for a determinate sentence. Criminal solicitation of a minor occurs when a person solicits a person under 17 years of age to commit a 3g offense. Criminal solicitation of a minor is punishable one category lower than the 3g offense solicited.

In 2009, the legislature amended Penal Code Section 15.031 to carve out an exception for certain gang-related offenses. The offenses remain the same category as the solicited offense if it is shown at trial that the actor was 17 or older at the time the crime was committed, was a member of a criminal street gang, and committed the offense with the intent to: 1) further the criminal activity of the gang; or 2) avoid detection as a gang member. Section 15.031(e), Penal Code. Because the actor must be 17 years or older, this offense cannot be committed by a juvenile.

Drug Offenses. In 1995, the legislature also included drug offenses within the scope of the Determinate Sentence Act. However, only violations of the Controlled Substance Act that are first degree or aggravated controlled substance felonies are included. An aggravated controlled substance felony is one carrying a higher minimum sentence or a higher fine than carried by a first degree felony [Section 51.02(1)]. Examples of aggravated controlled substance felonies are manufacture or delivery of 200 grams or more of a Penalty Group 1 substance, manufacture or delivery of 400 grams or more of Penalty Group 2 or 3 substances, and possession of 400 grams or more of Penalty Groups 1, 2, 3, or 4 substances.

Habitual Felony Conduct. In 1995, the legislature added habitual felony conduct to the Determinate Sentence Act. As originally enacted, it provided, "Habitual felony conduct is a felony other than a state jail felony engaged in by a child who has at least two previous adjudications for felonies if the second previous adjudication is for conduct that occurred after the date the first previous adjudication became final." Section 51.031. This is similar to the habitual offender provisions in Penal Code Section 12.42(d). The penalty category depends solely on the penalty category for the offense currently being prosecuted. Section 54.04(m).

The legislature amended Section 51.031 in 1997 to clarify some issues raised when it was enacted in 1995. Under the 1997 amendments, a prior adjudication does not count if the case is still pending on appeal at the time the adjudication is offered into evidence under this section. However, a prior adjudication counts whether the juvenile is placed on probation or committed to TJJD as a result of the adjudication. Finally, in order to count, each of the prior adjudications must be based on conduct occurring on or after January 1, 1996, which was the effective date of House Bill 327, which added Section 51.031. The January 1, 1996, restriction was intended to foreclose a claim of attempted retroactive application of this section, which would create significant ex post facto and due process issues.

Arson with Injury. In 1997, the legislature added arson (Penal Code Section 28.02) to the list of offenses covered by the Determinate Sentence Act, but only if the arson resulted in death or bodily injury. For an adult, such arson is a first degree felony, so it would carry a sentence of up to 40 years for a juvenile under Section 54.04.

Manslaughter and Intoxication Manslaughter. The second degree felony offenses of manslaughter (Penal Code Section 19.04) and intoxication manslaughter (Penal Code Section 49.08) were added to the list of covered offenses in 2001.

Criminal Conspiracy. In 2007, the list of offenses was expanded to include criminal conspiracy to commit any of the enumerated determinate sentence offenses. This expansion filled a gap in the law that allowed determinate sentencing of certain enumerated offenses, but only of the person who actually carried out the offense (unless the child was criminally responsible for that person's conduct) and only if the offense was successfully carried out (except for murder, capital murder, and 3(g) offenses for which criminal attempt was already a covered offense).

C. Constitutionality of the Legislation

Texas courts have addressed the constitutionality of the determinate sentence scheme. In each instance, they have upheld its validity.

Equal Protection of the Laws. In *In the Matter of R.L.H.*, 771 S.W.2d 697 (Tex.App.—Austin 1989, writ denied), the appellant received a determinate sentence of 20 years for the offense of attempted capital murder. He claimed that his right to equal protection of the laws was violated because of the differences between the penalty available under the Determinate Sentence Act and those available in an ordinary delinquency case. The Court of Appeals rejected this argument, holding the scheme was a reasonable classification that served a compelling state interest:

> The determinate sentencing statutes were enacted to provide an alternative to the pre-existing criminal and juvenile systems. The criminal system strives to maintain our societal structure and to protect the safety of citizens by punishing persons who violate certain basic rules of conduct. The primary purpose of the juvenile system is "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children...." Tex.Fam.Code Ann. §51.01(1) (1986). It is difficult to imagine more crucial governmental interests than the safety of persons and the well-being of children. These systems encounter a gap with which neither can deal, however, at the point where they intersect, i.e., the violent youthful offender. Which system's goals are more important in such a case? Should the prosecutor strive for the youth's welfare through the juvenile system or should he disregard that and seek to certify the youth as an adult?
>
> Answering such difficult policy questions is within the province of the legislature, and for this particular question, the legislature has provided an answer—namely, determinate sentencing. The determinate sentencing system strikes a balance between these goals. Placing a child in the Youth Commission initially and requiring the committing court to reevaluate the child's situation when he reaches age eighteen are measures tailored to achieve a child's well-being. Prohibiting the Youth Commission from paroling him without court approval and the possibility that he will serve the portion of this sentence beyond age eighteen at the TDCJ are measures designed to protect the public by lengthening the period of confinement.
>
> Because the two state goals involved are vital, we conclude that the state's interest in striking a balance between these goals is compelling. Because the determinate sentencing statutes further a compelling state interest, we conclude that they do not violate appellant's Texas equal rights or his federal right to equal protection.

771 S.W.2d at 701. See also *In the Matter of D.S.*, 833 S.W.2d 250 (Tex.App.—Corpus Christi 1992, writ denied) (rejecting a similar equal protection claim on authority of *R.L.H.*); *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ).

In a related equal protection claim, R.L.H. argued the statute was unconstitutional because, under the law as it then existed, a child sentenced under the Determinate Sentence Act must have been released from TYC or transferred to prison at age 18, while one committed to TYC under ordinary delinquency procedures could remain in TYC until age 21. The Court of Appeals decided that argument was not ripe for consideration until R.L.H. had his transfer/release hearing before the juvenile court at age 17 1/2:

> Because appellant might not serve any time whatsoever in the TDC, an opinion on these arguments at this point would be wholly advisory. This Court has no authority to render advisory opinions.... If the committing court does order appellant to the TDC, then a real controversy will exist, and he may voice his objections in an appeal from that order.

771 S.W.2d at 700; see also *In the Matter of J.B.L.*, UNPUBLISHED, No. 11-07-00221-CV, 2009 Tex.App.Lexis 1600, Juvenile Law Newsletter ¶ 09-2-08 (Tex.App.—Eastland 2009, pet. denied) (opinion would be wholly advisory since due process claims not ripe for review).

Under a 1991 amendment to the Determinate Sentence Act, the juvenile court was given the option, at the release or transfer hearing, to convert the determinate sentence into an indeterminate commitment to TYC until the child became 21 years of age. Under a 1995 amendment, TYC could keep a sentenced juvenile in its custody until age 21 and the youth remained a sentenced offender and still faced transfer to prison. Those amendments effectively eliminated the basis for the argument in *R.L.H.* that the Court of Appeals held was not ripe for decision. However, the provisions relating to the conversion of a determinate sentence to an indeterminate commitment were later repealed. See former version of Section 54.11(i)(1). As a result, a determinate sentence cannot be converted to an indeterminate commitment at any point.

Right to Grand Jury Indictment. R.L.H. also argued that his Texas constitutional right to a grand jury indictment was violated because he was given a sentence that might partially be served in prison without being indicted by a grand jury. The Court of Appeals rejected this challenge:

> Appellant's conclusion incorrectly assumes that a petition cannot function as an indictment. The Constitution provides that "the practice and procedures relating to the use of indictments...including their contents, amendment, sufficiency, and requisites, are as provided by law."... The legislature has exercised this power in the determinate sentencing statutes. A petition is approved by a grand jury "in the same manner that the grand jury votes on the presentment of an indictment."... The grand jury also retains all of its investigative powers while considering a petition submitted to it for approval.... In light of these constitutional and statutory provisions, appellant's position is reduced to a claim that the legislature must term an indictment an "indictment." As if anticipating this argument, the legislature has provided that for the purpose of transferring a juvenile to the Texas Department of Corrections, a "juvenile court petition approved by a grand jury...is an indictment."

771 S.W.2d at 699.

The following opinions have also rejected the grand jury indictment challenge: *In the Matter of J.B.L.*, UNPUBLISHED, No. 11-07-00221-CV, 2009 Tex.App.Lexis 1600, Juvenile Law Newsletter ¶ 09-2-08 (Tex.App.—Eastland 2009, pet. denied); *In the Matter of T.D.H.*, 971 S.W.2d 606 (Tex.App.—Dallas 1998, no pet.); *In the Matter of J.G.*, 905 S.W.2d 676 (Tex.App.—Texarkana 1995, writ denied); *In the Matter of D.S.*, 833 S.W.2d 250 (Tex.App.—Corpus Christi 1992, pet. ref'd); *In the Matter of S.C.,* 790 S.W.2d 766 (Tex.App.—Austin 1990, writ denied); *In the Matter of J.T.H.,* 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ).

The Austin Court of Appeals in *In the Matter of J.T.H.*, 779 S.W.2d 954, 956 (Tex.App.—Austin 1989, no writ), also rejected the related argument that the Determinate Sentence Act violates the United States constitutional requirement of a grand jury indictment on the ground that the requirement applies only in federal proceedings.

Due Process Claim. In *In the Matter of J.B.L.*, UNPUBLISHED, No. 11-07-00221-CV, 2009 Tex.App.Lexis 1600, Juvenile Law Newsletter ¶ 09-2-08 (Tex.App.—Eastland 2009, pet. denied), appellant argued that Section 53.045 violated his due process rights by increasing his punishment without allowing him to present the enhancement to a jury for consideration beyond a reasonable doubt.

> J.B.L. argues that his due process rights were violated because, rather than having a jury determine beyond a reasonable doubt whether his punishment should be increased from an indeterminate sentence to a determinate sentence, the grand jury certified the petition for determinate sentencing based upon probable cause. J.B.L. argues that the jury should have had an opportunity to consider an indeterminate sentence.

2009 Tex.App.Lexis 1600 *7.

The Eastland Court of Appeals disagreed, holding that the determinate sentencing scheme does not act as an unconstitutional enhancement to increase punishment. "Rather, once the State decided to file a petition for determinate sentencing, the range of punishment was set. There was not an enhancement in punishment. The range of punishment did not increase based on any facts that were not presented to the jury. All the facts were presented to the jury when it decided J.B.L's disposition." 2009 Tex.App.Lexis 1600 *12. The appellate court further held that the determinate sentence petition acts as an indictment and that all the necessary facts were presented to the jury and proven beyond a reasonable doubt.

Vagueness. In *J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ), the respondent also argued that a section in the Determinate Sentence Act is unconstitutionally vague:

> [Section 54.04(d)(3)] gives the option, under specified conditions, of sentencing the child "to commitment in the Texas Youth Commission with a transfer to the Texas Department of Corrections for any term of years not to exceed 30 years." Appellant complains that the section could be read to authorize a term of years to be split between commitment to the Youth Commission and the Department of Corrections, or a term of years to be served in the Department of Corrections alone.
>
> We believe the logical way to interpret the section is that the term of years set by the court or jury includes both the time spent in the Commission and the time spent in the penitentiary. This approach is supported by considering other provisions of the determinate sentencing scheme. Under Tex.Hum.Res.Code Ann. §61.084(b)(1) (Supp. 1989) [§245.151], a person

> committed to the Commission under a determinate sentence will be transferred to the Department of Corrections only if he has not completed his sentence before his 18th birthday *(19th)*. Under [Family Code] §54.11 (h)(2) (Supp. 1989), after a release hearing has been held, the court may order a person transferred to the Department of Corrections "for the completion of the person's determinate sentence"; this implies that the determinate sentence does not begin upon transfer to the penitentiary, but that the term served in the penitentiary complements the term served in the Commission. We hold that §54.04(d)(3) is not unconstitutionally vague.

779 S.W.2d at 957.

Involuntary Servitude. In *In the Matter of S.C.*, 790 S.W.2d 766 (Tex.App.—Austin 1990, writ denied), the appellant argued that the Determinate Sentence Act, because it authorizes incarceration in the penitentiary with possible mandatory work assignments therein, violates the Thirteenth Amendment to the United States Constitution, which prohibits involuntary servitude "except as a punishment for crime." The Court of Appeals rejected this argument:

> The Texas determinate sentencing statute... provides the citizens of Texas with a procedure for responding to violent offenses committed by juveniles. In addition, the procedures in the Texas Family Code provide appellant with many of the same due process rights that are afforded to adult criminal defendants in Texas.... [B]ecause we conclude that the work requirement imposed on appellant is an appropriate punishment for a juvenile who committed murder, we hold that the determinate sentencing statute does not impose involuntary servitude or peonage on him in violation of the thirteenth amendment of the United States Constitution.

790 S.W.2d at 775.

Imprisonment Without Conviction. A juvenile adjudicated under the Determinate Sentence Act is not convicted of a crime but, rather, is adjudicated for delinquent conduct. It has been argued that it is unconstitutional to imprison such a person in the penitentiary because he or she has not been convicted. This argument has been rejected on the ground that labeling the court judgment an adjudication of delinquency rather than a conviction of crime benefits, not harms, the juvenile. Under the Determinate Sentence Act, a juvenile is provided the same procedural protections of one prosecuted for a criminal offense. *In the Matter of J.G.*, 905 S.W.2d 676 (Tex.App.—Texarkana 1995, writ denied); *In the Matter of J.L.C.*, UNPUBLISHED, No. 01-97-01077-CV, 1998 WL 304513, 1998 Tex.App.Lexis 3541 (Tex.App.—Houston [1st Dist.] 1998, no pet.).

Double Jeopardy. The respondent in *In the Matter of T.D.H.*, 971 S.W.2d 606 (Tex.App.—Dallas 1998, no pet.), argued that he was punished twice for the same offense when he was transferred from TYC to TDCJ under the Determinate Sentence Act. The court rejected that argument:

> At the time of the release hearing, appellant had already been assessed a forty-year sentence. Although the State was permitted to introduce new evidence at the transfer hearing, the purpose of that hearing was to give appellant another chance to avoid prison.... When appellant was transferred to TDCJ, he was not punished again for his offense, but rather, was required to serve the remainder of the sentence originally assessed. Therefore, the trial court's order transferring appellant to TDCJ to serve the remainder of his sentence does not violate double jeopardy.

971 S.W.2d at 609.

In *In the Matter of P.D.M.*, UNPUBLISHED, No. 09-06-246-CV, 2008 Tex.App.Lexis 897 (Tex.App.—Beaumont 2008, no pet.), appellant was adjudicated under the Determinate Sentence Act for both murder and injury to a child, receiving determinate sentences of 24 years and 20 years, respectively. On appeal, P.D.M. contended he was placed in double jeopardy when the trial court used determinate sentencing through a conviction of a lesser-included offense. He further argued:

> …that the predicate offense of endangering a child is a lesser included offense of injury to a child, so that the two offenses are the same for double jeopardy purposes. Because the State relied on the lesser included offense to elevate a manslaughter to murder, he contends, the State cannot punish him for both murder and injury to a child.

2008 Tex.App.Lexis 897 *6.

The Beaumont Court of Appeals disagreed, noting that the injury to a child statute authorizes multiple punishments for injury to a child and any other Penal Code violation. See Penal Code Section 22.04(h) ("A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either

or both sections."). As a result, the appellate court held that the determinate sentences imposed in this case were not constitutionally prohibited since the legislature has indicated its intent to permit multiple concurrent punishments.

In a case of first impression in Texas, the Houston First District Court of Appeals held that the constitutional guarantee that jeopardy attaches when the jury is empaneled and sworn, as recognized in adult criminal trials, applies equally to juvenile proceedings whose object is to determine whether the juvenile has committed acts that violate a criminal law and whose potential consequences include the deprivation of liberty. *State v. C.J.F.*, 183 S.W.3d 841, 848 (Tex.App.—Houston [1st Dist] 2005, pet. denied). *C.J.F.* involved a jury trial on the State's fourth amended determinate sentence petition. After the jury was empaneled and sworn, C.J.F. and the prosecutor each reported to the trial court that it lacked jurisdiction over the latest petition because it had not been served on the juvenile. The Court of Appeals rejected the State's argument that jeopardy does not attach in a juvenile proceeding until the trier of fact begins to hear evidence or when the first witness is sworn. It also rejected the argument that the Rules of Civil Procedure rather than criminal law principles of double jeopardy should apply.

> We therefore conclude that, even if the State filed its nonsuits timely according to the Rules of Civil Procedure, jeopardy attached to appellee's juvenile proceedings when the jury was empaneled, and we thus hold that the Rules of Civil Procedure must yield to the constitutional protections against double jeopardy.

183 S.W.3d at 848.

Separation of Powers. The respondent in *In the Matter of T.D.H.,* 971 S.W.2d 606 (Tex.App.—Dallas 1998, no pet.), argued that the determinate sentencing law violates the separation of powers doctrine by delegating the executive function of commutation of sentences to the judiciary to be exercised by it in the release/transfer hearing under Section 54.11. The court rejected that argument:

> Appellant asserts that by allowing a trial court to determine whether a juvenile should be discharged following his eighteenth birthday, the statute gives the trial court the power to commute a sentence – a power constitutionally reserved to the executive branch of government. See TEX. CONST. arts. II, §1, IV, § 11.
>
> In *J.G.* [905 S.W.2d 676 (Tex.App.—Texarkana 1996, writ denied)], the Texarkana Court of Appeals refused to consider a similar argument, concluding that a juvenile who is transferred to TDCJ cannot complain that the determinate sentencing law gives the judiciary the power to commute sentences. See *J.G.,* 905 S.W.2d at 682. For the following reasons, we agree with the Texarkana court.
>
> Following the release hearing required by section 54.11 of the Family Code, the trial court has the authority to: (1) recommit the juvenile to TYC without a determinate sentence, (2) transfer the juvenile to TDCJ, or (3) discharge the juvenile.... If the juvenile is transferred to TDCJ, as occurred in this case, he comes under the authority of the Board of Pardons and Paroles.... Only if the trial court orders the juvenile discharged could the trial court arguably be exercising an executive function.... Appellant cannot complain that the trial court might have exercised a power which it had no authority to exercise.

971 S.W.2d at 609-10.

D. Initiating Proceedings Under the Legislation

The first requirement for initiating proceedings under the statute is that a delinquency petition must have been filed in juvenile court. The legal standards for such a petition and the requirement of personal service on the respondent are discussed in Chapter 9. The delinquency petition must allege at least one of the covered offenses. Section 53.045. It may allege non-covered offenses as well. *In the Matter of D.D.S.,* UNPUBLISHED, No. 14-96-00303-CV, 1998 WL 733475, 1998 Tex.App.Lexis 6636, Juvenile Law Newsletter ¶ 98-4-22 (Tex.App.—Houston [14th Dist.] 1998, no pet.) (not fatal to approval process that petition alleged two burglaries in addition to aggravated sexual assault). Of course, the approval affects only the covered offenses and does not convert the non-covered offenses into covered ones. The juvenile may not be given a determinate sentence for the non-covered offenses.

Prosecutor's Decision. The prosecuting attorney in the juvenile court makes a decision whether to pursue the case as an ordinary delinquency case or whether to invoke the special provisions of the Determinate Sentence Act. This decision is totally in the discretion of the office of the prosecutor. See *In the Matter of S.J.*, 977 S.W.2d 147 (Tex.App.—San Antonio 1998, no pet.); *Bleys v. State*, UNPUBLISHED, No. 04-09-00360-CR, 2010 Tex.App.Lexis 3550, Juvenile Law Newsletter ¶ 10-2-17 (Tex.App.—San

Antonio 2010,) (decision to refer petition to grand jury is State's; if petition is never referred, trial court has no jurisdiction to order a determinate sentence).

In *In the Matter of S.B.C.*, 805 S.W.2d 1 (Tex.App.—Tyler 1991, writ denied), the juvenile made the argument that, because the differences in consequences between a charge handled as an ordinary delinquency case and the same charge handled under the Determinate Sentence Act are so large, the prosecutor is required by equal protection of the laws to promulgate guidelines as to when the Determinate Sentence Act will be initiated. The Court of Appeals rejected this claim on the ground that the appellant had not shown he was treated unfairly by the prosecutor's decision to initiate determinate sentence proceedings in his particular case.

The appellant in *S.B.C.* also argued that the prosecutor should be required, when he or she is presenting a juvenile petition to a grand jury, to inform the grand jury of the alternatives available should it disapprove of the petition. The Court of Appeals rejected this argument:

> It is undisputed that the prosecutor had alternatives other than the determinate sentencing statutes under which the appellant could have been adjudicated. However, so long as the prosecutor has probable cause to believe that an accused committed a violation of an offense defined by statute, the decision whether to prosecute, what charges to file or bring before a grand jury, or even what form the prosecution is to take, rests entirely within the prosecutor's discretion.... Furthermore, Tex.Fam.Code Ann. §53.045(b) (Vernon Supp. 1991) authorizes a grand jury merely to determine whether they approve a petition submitted to them under this section. It does not require an investigation of various prosecutorial alternatives.

805 S.W.2d at 6-7.

Presentation to Grand Jury. If the prosecutor decides to invoke the statute, he or she does so by presenting the petition "to the grand jury of the county in which the court in which the petition is filed presides." Section 53.045(a). The respondent has no right to insist upon an examining trial before the prosecutor presents the case to the grand jury. *D.D.H. v. Andell, Judge*, UNPUBLISHED, No. 01-90-00649-CV, 1990 WL 110160, 1990 Tex.App.Lexis 1887, Juvenile Law Newsletter ¶ 90-3-4 (Tex.App.—Houston [1st Dist.] 1990, no writ).

In the ordinary course of events, a prosecutor will charge a covered offense in a delinquency petition, file that petition in juvenile court, and then present it to the grand jury for its approval. Once the grand jury's approval is certified to the juvenile court, determinate sentence proceedings have begun. However, there is nothing in the Juvenile Justice Code that requires that the petition be filed in the juvenile court before it is presented to the grand jury. In criminal practice, an indictment is always presented to the grand jury before it is filed in court. There is no reason why that cannot also be done in juvenile determinate sentence cases. See *In the Matter of J.M.L.*, UNPUBLISHED, No. 03-00-00212-CV, 2000 WL 1636888, 2000 Tex.App.Lexis 7363, Juvenile Law Newsletter ¶ 00-4-19 (Tex.App.—Austin 2000, pet. denied) (holding that grand jury approval of a petition can occur before it is filed in the juvenile court).

Grand Jury Approval. The role of the grand jury is to decide, in its discretion, whether to approve the petition. Section 53.045(b) provides:

> A grand jury may approve a petition submitted to it under this section by a vote of nine members of the grand jury in the same manner that the grand jury votes on the presentment of an indictment.

Code of Criminal Procedure Article 20.19 requires a vote of nine members of a grand jury to authorize the filing of an indictment.

In *In the Matter of J.B.L.*, PUBLISHED, No. 09-09-00217-CV, 2010 Tex.App.Lexis 6269, Juvenile Law Newsletter ¶ 10-3-13A (Tex.App.—Beaumont 2010, no pet.), appellant argued that the grand jury approval process violates the due process requirement that a jury determine any discrete issue of fact that has the effect of increasing the maximum punishment that may be assessed. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court of Appeals disagreed. "The procedure established by Section 53.045 does not violate the due process requirements established by *Apprendi* because the jury determines the maximum punishment allowed under the charging instrument." 2010 Tex.App.Lexis 6269 *3. By assessing a 30-year determinate sentence, the jury set the maximum punishment for the offense under the aggravated robbery petition approved by the grand jury.

Section 53.045(c) provides:

> The grand jury has all the powers to investigate the facts and circumstances relating to a petition submitted under this section as it has to investigate other

criminal activity but may not issue an indictment unless the child is transferred to a criminal court as provided by Section 54.02 of this code.

Under Code of Criminal Procedure Article 20.10, the grand jury may subpoena witnesses to testify before it. If a witness refuses to testify without a privilege to refuse, the witness can be held in contempt of the district court that assembled the grand jury and fined or confined until willing to testify. Code of Criminal Procedure Article 20.15.

While the grand jury can seek to question a suspect or the accused under Code of Criminal Procedure Article 20.17, such a person would have a privilege against compelled self-incrimination that, if asserted in response to questioning, would preclude the person from being held in contempt for refusing to answer the grand jury's questions. A suspect or the accused has no right to be present during the presentation of testimony before a grand jury or even any right to be told that evidence involving him or her is being or will be presented. It is up to the grand jury whether to permit a suspect or accused who wishes to do so to testify before it or to permit the presentation of other witnesses, evidence, or information on behalf of the suspect or accused. Code of Criminal Procedure Article 20.011. All proceedings of the grand jury are secret. Code of Criminal Procedure Article 20.02.

Grand Jury Rejection. If nine members of the grand jury do not vote to approve the petition, then the prosecuting attorney has a choice. He or she can either proceed with the petition as an ordinary delinquency case with the limits on the system's control that apply in such cases or can present the same petition to the same grand jury or to a different or subsequent grand jury to seek its approval. This option is the same the prosecutor has to present a criminal case to another grand jury when it was not approved upon initial presentation.

Finally, if the respondent was 15 or 16 years of age at the time of the commission of a felony, or 14 at the time of commission of a capital, felony first degree felony, or aggravated controlled substance felony, the prosecutor has the third option of filing in the juvenile court a petition or motion for a hearing in which the juvenile court would consider discretionary transfer to criminal court.

The time restrictions on pre-trial proceedings imposed by Title 3 apply in the event a grand jury fails to approve a petition, including the requirement of review by the juvenile court of the need for continued detention every 10 (or 15) working days. See Chapters 6 and 7.

Grand Jury Advice in Non-Determinate Sentence Cases. In 1999, the legislature enacted Section 53.035 to authorize prosecutors to seek the advice of grand juries about whether to proceed in any juvenile case, just as they may do in criminal cases. A prosecutor who seeks advice of the grand jury is, under Section 53.035(c), bound by its decision:

> If the grand jury votes to take no action on an offense referred to the grand jury under this section, the prosecuting attorney may not file a petition under Section 53.04 concerning the offense unless the same or a successor grand jury approves the filing of the petition.

See Chapter 9 for a full discussion of this provision.

By contrast, if the prosecutor seeks but does not obtain the approval of a grand jury under Section 53.045 for Determinate Sentence Act treatment, he or she is still free to pursue the case as an ordinary delinquency case. For that reason, it is important for a prosecutor to specify carefully whether a grand jury presentation is based on Section 53.035 or 53.045.

Probable Cause. A grand jury is authorized to approve the return of an indictment against an adult only if it finds probable cause to believe the accused is guilty of a criminal offense. Section 53.045(b) requires a grand jury to which a juvenile petition has been presented to vote on it "in the same manner that the grand jury votes on the presentment of an indictment." Section 53.045(d) provides that, for purpose of transfer of a juvenile from TJJD to TDCJ, "a juvenile court petition approved by a grand jury...is an indictment presented by the grand jury." The Family Code does not specifically require that the grand jury find probable cause to believe that the respondent is guilty of one of the covered offenses alleged in the petition in order to approve it. But, since the purpose of grand jury review of the petition is to provide the respondent with all the rights he or she would possess as an accused in criminal court, undoubtedly the grand jury should be instructed that it should approve the petition only if it finds probable cause.

Certificate of Approval. If nine members of the grand jury vote to approve the petition, then "the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case." Section 53.045(d). Although no particular form for the certification is required, the grand jury certification is required to be in writing. *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ). The

grand jury should return the approved petition to the appropriate district court, just as an indictment is returned.

The district clerk should certify the grand jury's approval to the juvenile court in which the petition was previously filed or will be filed. Once the certification is received by the juvenile court, the special proceedings have been initiated. So long as the grand jury's written certificate of approval is filed with the juvenile court, there is no requirement that the certificate of approval must be certified as genuine by the clerk of the district court. *In the Matter of S.B.C.*, 805 S.W.2d 1 (Tex.App.—Tyler 1991, writ denied). Undoubtedly, however, such a certification by the district clerk is the better practice.

What the Grand Jury Must Approve. The grand jury must have had presented to it and must have approved the same petition that forms the basis for the Determinate Sentence Act proceedings. In *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ), the State obtained grand jury approval of a petition alleging intentional murder, aggravated robbery, and felony murder. Later, the State abandoned the felony murder count in the mistaken belief it charged capital murder. Still later, the State, having discovered its error, announced its intention to proceed on all three counts of the petition. The respondent was adjudicated delinquent for intentional murder and contended on appeal that the petition should have again been presented to the grand jury to enable the State to proceed on all three original counts. The Court of Appeals agreed with this argument:

> The requirements of section 53.045(a) and (d) and section 54.04(2) and (3) are clear – before a determinate sentence may be imposed, a grand jury must approve the petition made the basis of the judgment. We conclude the amended petition, which included an allegation that previously had been waived [by the State], should have been presented to the grand jury.

811 S.W.2d at 744. See also *In the Matter of A.G.G.*, 860 S.W.2d 160 (Tex.App.—Dallas 1993, no writ) (when State waived right to proceed under Determinate Sentence Act on a grand jury approved petition, the juvenile court could not impose a determinate sentence).

Due Diligence by the Grand Jury. In *In the Matter of A.J.G.*, 131 S.W.3d 687 (Tex.App.—Corpus Christi 2004, pet. denied), the indictment was presented in the disjunctive and charged that appellant caused the death of her infant son with "a razor" or "with a sharp object to the Grand Jurors unknown." The jury eventually convicted appellant based on the latter description of the weapon used. A.J.G. complained that there was legally and factually insufficient evidence presented by the State to demonstrate that the grand jury exercised due diligence in determining for purposes of the indictment that the weapon was "a sharp object to the Grand Jurors unknown." However, the Court of Appeals opted to take another approach, adopting instead the "hypothetically correct jury charge" analysis set forth in *Malik v. State*, 953 S.W.3d 234 (Tex.Crim.App. 1997).

> So long as the essential elements of the crime with which the defendant has been charged have to be found by the jury in order for a guilty verdict to be returned, the State does not have to additionally and separately prove the good faith and due diligence of the grand jury in determining non-essential elements of the charge.

131 S.W.3d at 694.

Doing as appellant suggested would have unnecessarily increased the State's burden of proof, in violation of the standard established in *Malik.* The *A.J.G.* case is significant for applying the *Malik* standard of the hypothetically correct jury charge in sufficiency challenges to juvenile appeals.

Amendments in Approved Petitions. Cases subsequent to *S.D.W.* have recognized that, in certain circumstances, a prosecutor may amend a petition after it has been approved by a grand jury. The prosecutor in *In the Matter of J.A.H.*, UNPUBLISHED, No. 04-96-00207-CV, 1997 WL 471536, 1997 Tex.App.Lexis 4361, Juvenile Law Newsletter ¶ 97-3-32 (Tex.App.—San Antonio 1997, no pet.), amended an approved petition to change the respondent's date of birth, alleging he was 13 at the time of the offense rather than 14. Respondent argued this was a material change that should have been presented to the grand jury because it might have made a difference in the grand jury view of the case had it known he was only 13 at the time of the offense. The Court of Appeals, drawing upon Code of Criminal Procedure Article 28.10 and distinguishing *S.D.W.*, held that the amendment was not material. It stated:

> The State's amendment to the petition in this case did not charge J.A.H. with additional or different offenses and prejudiced none of his substantial rights. Accordingly, we conclude that the trial court properly granted the State's motion to amend and retained jurisdiction to proceed with determinate sentencing.

1997 Tex.App.Lexis 4361 *6. See also *In the Matter of J.G.*, 195 S.W.3d 161 (Tex.App.—San Antonio 2006, reh'g denied) (abandoning indecency by exposure count was not unfair or prejudicial to minor).

Similarly, a post-approval amendment in *In the Matter of K.L.C.*, 981 S.W.2d 1 (Tex.App.—San Antonio 1998), *rev'd on other grounds by* 990 S.W.2d 242 (Tex. 1999), that merely changed the name of the court from a county to district court and made a corresponding change in the cause number to reflect transfer of the adjudication proceedings to a different court did not require grand jury approval since it was not an amendment of substance. The Court of Appeals in *In the Matter of R.H.,* UNPUBLISHED, No. 04-97-00706-CV, 1998 WL 484695, 1998 Tex.App.Lexis 5112, Juvenile Law Newsletter ¶ 98-3-23 (Tex.App.—San Antonio 1998, no pet.) held that changing the spelling of the complainant's surname in a robbery case from "Alvian" to "Alviar" was not a substantial change requiring grand jury approval in view of the continuance granted at the request of the respondent following filing of the amended petition.

Serving an Amended Petition. If the prosecutor obtains grand jury approval of an amended determinate sentence petition, must that petition be personally served on the respondent? It is clear that personal service of an original petition on a respondent is a jurisdictional prerequisite to proceedings. See Chapter 9. But what about service of an amended petition?

In *In the Matter of G.A.T.,* 16 S.W.3d 818 (Tex.App.—Houston [14th Dist.] 2000, pet. denied), the original approved petition alleged aggravated robbery by using a deadly weapon and by inflicting serious bodily injury. It was served personally on the respondent. Later, the prosecutor obtained grand jury approval of a new petition, this time alleging only aggravated robbery by using a deadly weapon. The Court of Appeals held that it was not necessary to serve the amended petition on the respondent. While acknowledging that the situation might be different if the amended petition charged an offense or used a legal theory not in the original petition, the Court of Appeals asserted that the defendant's notice rights were not violated in this case:

> [A]ppellant does not argue that he was in any way surprised when the case proceeded under the determinate sentencing provisions. The State complied with the guidelines of the Texas Family Code by filing the approval of the grand jury with the juvenile court and entering it in the record of the case.… Appellant's grandmother received a copy of the amended petition, including a statement evidencing the grand jury's approval. When the trial judge inquired at the commencement of the trial whether the lawyers were proceeding on the amended petition, defense counsel uttered no objections. Due process was satisfied when appellant was put on fair notice that he was being charged with delinquent conduct, i.e., aggravated robbery, and that his liberty was at stake. The fact that appellant did not receive personal notice that the State sought a determinate sentence does not violate appellant's due process rights.…
>
> Because appellant was properly served with a summons containing the original petition, the trial court acquired jurisdiction over him at that time. The State's failure to serve appellant with the amended petition did not violate his due process rights and did not deprive the trial court of jurisdiction to impose determinate sentencing.

16 S.W.3d at 825. See also *State v. C.J.F.*, 183 S.W.3d 841 (Tex.App.—Houston [1st Dist] 2005, pet. denied) (when juvenile has been served with original petition, trial court does not lose jurisdiction for lack of service of later, amended petition); *In the Matter of K.H.*, UNPUBLISHED, No. 04-04-00924-CV, 2005 Tex.App.Lexis 10810, Juvenile Law Newsletter ¶ 06-1-21A (Tex.App.—San Antonio 2005, no pet.) (service of later petition not required since juvenile was properly served with original determinate sentence petition; citing *G.A.T.*).

Of course, the much preferable course of action is to personally serve any pleadings, even petitions that have been only formally amended, on the respondent.

Waiver of Grand Jury Approval. Is it legally permissible for the child and his or her attorney to waive the child's right to grand jury approval of the petition? In adult criminal proceedings, the right of the suspect or accused to grand jury consideration of whether he or she will be charged by indictment with a non-capital felony can be waived. Code of Criminal Procedure Article 1.141. This waiver of the Texas constitutional right to grand jury indictment for a felony was upheld in *King v. State*, 473 S.W.2d 43 (Tex.Crim.App. 1971).

As the Court of Criminal Appeals noted in the *King* case, in smaller Texas counties, grand juries are not continuously in session. A person arrested for a felony who is unable to be released on bond might be required to spend several months in jail awaiting the impaneling of the next

grand jury. He or she might rationally wish to waive that right and get on with the disposition of his or her case in district court. Of course, the same situation can exist when the person is a juvenile whose case the prosecutor intends to refer to the grand jury for approval of the petition.

The right to grand jury scrutiny of the petition is obviously a right granted to the child for the protection and benefit of the child. Section 51.09 provides, "Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title...may be waived in proceedings under this title" if certain formal requirements, including concurrence in the waiver by the child's attorney, are met. Since the right to grand jury scrutiny of the petition is granted by Section 53.045, which is part of Title 3, and since nothing in Title 3 indicates the legislature intended this to be a non-waivable right, the child and his or her attorney should be permitted to waive grand jury consideration of the case if the formal requirements of Section 51.09 are met.

The Austin Court of Appeals in *In the Matter of A.R.A.*, 898 S.W.2d 14 (Tex.App.—Austin 1995, no writ), held that a juvenile and his attorney, by complying with the procedural requirements of Section 51.09, can effectively waive the juvenile's right to grand jury approval of the petition and authorize determinate sentence proceedings without grand jury approval. See also *In the Matter of L.G.*, UNPUBLISHED, No. 02-07-418-CV, 2008 Tex.App.Lexis 6658 (Tex.App.—Fort Worth 2008, no pet.) (juvenile and his attorney effectively waived grand jury approval of the determinate sentence petition).

In adult criminal proceedings, if the indictment is waived under Code of Criminal Procedure Article 1.141, the prosecutor is authorized to file a felony information. In juvenile proceedings, if a petition has already been filed in juvenile court, the waiver of grand jury consideration, without more, authorizes the juvenile court to proceed to the adjudication hearing without the requirement that the State file any further pleadings. See Chapter 16 for a full discussion of waivers under Section 51.09.

Waiver by Failure to Object. The Austin Court of Appeals held in *In the Matter of A.D.J.*, UNPUBLISHED, No. 03-95-00126-CV, 1996 Tex.App.Lexis 3273, Juvenile Law Newsletter ¶ 96-3-16 (Tex.App.—Austin 1996, writ denied), that, by failing to object in the juvenile court that the grand jury presiding juror signed the certification form but failed to strike "disapproves" in "APPROVES/ DISAPPROVES" on the form, the juvenile respondent waived any claim that the grand jury had not approved the determinate sentence proceedings. Instead, he stipulated to the evidence in exchange for a 15-year sentence. Later in the same case, the Court of Appeals held the juvenile could not challenge the same mistake in an appeal from the order of the juvenile court transferring him from TYC to TDCJ.

Without analysis and by simply relying upon the criminal case of *Lemell v. State*, 915 S.W.2d 486 (Tex.Crim.App. 1995), the Court of Appeals in *In the Matter of S.A.W.*, UNPUBLISHED, No. 14-96-00679-CV, 1998 WL 43303, 1998 Tex.App.Lexis 764, Juvenile Law Newsletter ¶ 98-1-15 (Tex.App.—Houston [14th Dist.] 1998, pet. denied), held that failure to object before trial to pleading deficiencies in a juvenile determinate sentence petition is a waiver of the right to complain about those defects on appeal. See Chapter 16 for a discussion of contrary authority regarding waiver of pleading defects by failure of the juvenile to object.

E. Adjudication Proceedings

All of the requirements that apply to adjudication hearings in ordinary delinquency cases also apply to determinate sentence adjudication hearings. See Chapter 11. Here, the focus is on those requirements that relate only, or primarily, to determinate sentence cases.

County Judges and Referees/Associate Judges/ Masters. Only certain judges can conduct hearings in determinate sentence proceedings. A constitutional county court functioning as a juvenile court does not have jurisdiction to conduct these proceedings because many county judges are not attorneys. The prohibition on a constitutional county court hearing a determinate sentence case applies even if the county judge is a lawyer. Section 51.04(c).

If the grand jury has approved a petition under Section 53.045 that was filed in a juvenile court presided over by a county judge, that judge should accept the district clerk's certification and immediately transfer the case to another court in the county that has also been designated the juvenile court, as required by Section 51.04(c), for the adjudication and, if necessary, disposition hearing.

Of course, a county court that has been designated as a juvenile court can continue to conduct detention hearings after it has received certification of grand jury approval even though the case was transferred for adjudication.

Until 2017, the juvenile court referee/associate judge/master could not hear any part of a determinate sentence case, even if everyone agreed to his or her doing so. In 2017, Section 54.10(f) was added, providing that if there is an agreement to disposition, the associate judge or referee may accept a plea or stipulation of evidence if all parties agree. This is forwarded to the juvenile court judge, who may accept or reject it as in any other plea.

Any district court, criminal district court, family district court, or county court-at-law that has been designated as a juvenile court may conduct adjudication and disposition hearings in cases in which the petition has been approved by the grand jury.

A county court-at-law has jurisdiction over determinate sentence proceedings even if its organic statute gives it jurisdiction only co-extensively with the county court. Section 51.04(c) disqualifies only the constitutional county court, not the county court-at-law. *R.X.F. v. State*, 921 S.W.2d 888 (Tex.App.—Waco 1996, no writ).

Trial by Jury. All juvenile respondents have a right to a trial by jury in adjudication hearings, which may be waived by the respondent and his or her attorney under Section 51.09. All jury verdicts must be unanimous. Section 54.03(c). Those same jury trial rights apply to adjudication hearings on approved petitions.

Size of Jury. In ordinary delinquency adjudication hearings, the size of the jury depends upon whether the court sitting as the juvenile court is a district level or county level court. Twelve-person juries are used by district level courts, unless the trial is on a misdemeanor, in which case the jury must consist of six qualified jurors; six-person juries are used by county level courts. See Chapter 11. However, when a jury is hearing evidence on an approved petition, the jury must consist of 12 persons. Section 54.03(c). Section 51.045 provides, in part:

> If a provision of this title requires a jury of 12 persons, that provision prevails over any other law that limits the number of members of a jury in a particular county court at law.

The reason for the requirement of a 12-person jury is that a first principle of the determinate sentence legislation is to grant a juvenile respondent all the rights to which he or she would have been entitled if charged with a felony in criminal court, and a criminal defendant charged with a felony is entitled to a jury of 12.

Peremptory Challenges. Code of Criminal Procedure Article 35.15(b) provides that, for the trial of a non-capital felony in district court, the State and the defendant have 10 peremptory challenges each and, if more than one defendant is on trial, each side has six strikes for each defendant. For the trial of a misdemeanor in a county level court, Code of Criminal Procedure Article 35.15(c) provides that each party has three strikes. Rules of Civil Procedure Rule 233 provides that each party in a civil lawsuit is entitled to six strikes in district court and three in a county court. Family Code Section 51.045 provides that, in determinate sentence cases, "The state and the defense are entitled to the same number of peremptory challenges allowed in a district court."

If the Code of Criminal Procedure is applied, that means each party has 10 strikes. If the Rules of Civil Procedure are applied, that means each party has only six strikes. Ordinarily, in juvenile cases the civil rules apply. Section 51.17.

In 2001, the legislature amended Section 54.03(c) to provide that a jury in a determinate sentence proceeding is selected "in accordance with the requirements in criminal cases." That means, among other matters, that each party is given 10, not six, strikes.

Proof and Evidence. The same requirement of proof beyond a reasonable doubt applies as in any other adjudication hearing. Section 54.03(f). The same prohibitions on the use of illegally obtained evidence, requirements of corroboration of the testimony of an accomplice, etc., apply to these hearings. Section 54.03(e). See Chapter 11.

Expert Testimony. In a murder prosecution, if the accused raises a justification defense (e.g., self-defense, deadly force in defense of a person, or defense of a third person), he or she must be allowed to offer relevant expert testimony concerning the person's previous relationship with the deceased and the person's state of mind at the time of the offense. This is required to establish the accused's reasonable belief that use of force or deadly force was immediately necessary. If a justification defense is raised, the accused must also be allowed to introduce relevant evidence that the person has been the victim of family violence, as well as relevant expert testimony concerning the accused's mental state at the time of the offense. Article 38.36(b), Code of Criminal Procedure.

In *In the Matter of E.C.L.*, 278 S.W.3d 510 (Tex.App.—Houston [14th Dist.] 2009, pet. denied), appellant tried to

introduce expert testimony from a psychiatrist that he suffered from battered child syndrome and that he believed his conduct was immediately necessary to avoid imminent harm. E.C.L., who alleged that he and his brother had been physically and sexually abused by their father, shot and killed his father when he was told to get in a car to spend the week in the father's custody. The trial court excluded the expert testimony.

In its original opinion, the appellate court reversed, holding that the psychiatrist's testimony should have been admitted to help the jury understand E.C.L.'s fear at the time of the offense. That opinion was later withdrawn and another substituted on rehearing, which reaches the same conclusion. In a well-reasoned decision, the Houston Fourteenth District Court of Appeals explained its holding:

> In this case, E.C.L. sought to introduce evidence that a reasonable person will have a just apprehension of fear of another with whom he has had prior violent conflict. [The psychiatrist's] testimony was relevant to E.C.L.'s state of mind, which had been profoundly affected by the sum of his experiences with his father. Lay people, especially adults, who have not experienced abuse for most of their lives do not have a frame of reference to fully understand why a child in E.C.L.'s position might have felt that deadly force was immediately necessary to protect himself and/or his brother. Therefore, [the psychiatrist's] testimony was admissible under article 38.36(b) to aid the jury in understanding E.C.L.'s fear at the time of the offense. *See Fielder*, 756 S.W.2d at 321; Tex. Code Crim. Proc. Ann. art. 38.36(b).
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> . . .
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> In excluding [the psychiatrist's] testimony that E.C.L. believed force was immediately necessary and that a reasonable person in his circumstances could not retreat, the trial court prevented E.C.L. from presenting the evidence necessary to support a charge on the justification defenses.

2009 Tex.App.Lexis 995 *22, *29-30.

Multiple Counts. More than one allegation can be presented to the jury if there is sufficient evidence to support a verdict for the State on each of them. The juvenile court or jury, as the case may be, must specify in its finding or verdict which allegations in the petition are found to have been proven by the State. Section 54.03(h).

The judge or jury must find for the State on at least one of the covered offenses that has been submitted to it in order to authorize disposition under the Determinate Sentence Act.

If the court or jury finds against the State on all the covered offenses but finds for the State on a lesser included offense or on a non-covered offense alleged in the petition and submitted to it, then the case proceeds from that point forward as an ordinary delinquency case. *In the Matter of S.D.W.*, 811 S.W.2d 739 (Tex.App.—Houston [1st Dist.] 1991, no writ). The jury should be discharged and the court should proceed with the disposition hearing. If the court or jury finds for the State on one or more of the covered offenses, then a special disposition hearing under the Determinate Sentence Act is the next step in the process.

F. Appeals by the Juvenile and the State

The juvenile may appeal an adjudication and disposition in a determinate sentence case on the same terms as in an ordinary delinquency case. Section 56.01, Family Code. Until 2003, the State could not appeal in any juvenile case except for a juvenile court order exempting a juvenile from registering under the sex offender registration statute. In 2003, the legislature enacted Section 56.03 to give the State approximately the same right of appeal in juvenile cases that it has in criminal cases under Article 44.01 of the Code of Criminal Procedure.

Section 56.03(b) specifies the juvenile court decisions in determinate sentence cases that can be the subject of an appeal by the State:

> The state is entitled to appeal an order of a court in a juvenile case in which the grand jury has approved of the petition under Section 53.045 if the order:
>
> (1) dismisses a petition or any portion of a petition;
>
> (2) arrests or modifies a judgment;
>
> (3) grants a new trial;
>
> (4) sustains a claim of former jeopardy; or
>
> (5) grants a motion to suppress evidence, a confession, or an admission and if:
>
> (A) jeopardy has not attached in the case;

(B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and

(C) the evidence, confession, or admission is of substantial importance in the case.

In each of those situations, if the appellate court reverses the decision of the juvenile court, proceedings can resume without violating the prohibition on double jeopardy. Because of jeopardy restrictions, the State is not entitled to appeal from a judgment or verdict of acquittal or from what it perceives to be an inadequate disposition of the case. See Chapter 19.

G. Special Disposition Hearing

Jury Waivers and Jury Election. In an ordinary delinquency proceeding, there is no right to a jury at the disposition hearing. Section 54.04(a). See *In the Matter of F.V.B.*, UNPUBLISHED, No. 11-03-00371-CV, 2005 Tex.App.Lexis 4611, Juvenile Law Newsletter ¶ 05-3-12 (Tex.App.—Eastland 2005, no pet.) (Section 54.04(a) does not violate the Sixth and Fourteenth Amendments by denying the right to a jury trial at the disposition hearing). In a criminal prosecution for a non-capital felony, the defendant has the option of electing to be sentenced by the judge or jury in the event he or she is convicted. Code of Criminal Procedure Article 37.07, Sec. 2(b). In keeping with the principle of providing to juvenile respondents under the Determinate Sentence Act the same rights given to persons prosecuted for felonies, the legislature provided the respondent with a right to jury sentencing in these proceedings. Section 54.04(a).

Prior to September 1, 2007, the juvenile and attorney had the right under Section 51.09 of the Family Code to waive the right to have a jury fix sentence and instead to have the court do it. If the respondent did not waive the right to jury sentencing, the jury was required to fix the sentence. While this is the same rule that still applies in adjudication hearings under Section 54.03(c)—the jury determines true or not true unless the juvenile and attorney affirmatively waive the jury in the adjudication hearing—it no longer applies to disposition.

Under a 2007 amendment to Section 54.04(a), for offenses committed on or after September 1, 2007, the child only has the right to have a jury assess punishment if he or she so elects in writing before the commencement of the voir dire examination of the jury panel. This amendment brings the Family Code in line with Code of Criminal Procedure Article 37.07, Sec. 2(b). However, if a finding of delinquent conduct is returned, the child may, with the consent of the prosecutor, change his or her election of who will assess the disposition. Section 54.04(a).

The respondent, then, has the following choices: to waive jury altogether and go to the court for both the adjudication and disposition phases of the case; to have a jury trial on adjudication but not for disposition; or to have a jury trial on adjudication and disposition only with a timely written election for the jury on disposition prior to voir dire examination of the jury panel.

As in criminal cases, the legislation contemplates that the same jury that sat at the adjudication hearing will fix the sentence, that the jury can at disposition consider evidence it heard at adjudication as well as additional evidence, and that the disposition hearing will begin as quickly as possible after the adjudication hearing has concluded. The jury at disposition is restricted to hearing the testimony of witnesses. It may not, under Section 54.03(d), be given a "social history report or social service file."

Extraneous Offense Jury Instruction. Code of Criminal Procedure Article 37.07, Sec. 3(a)(1), permits the judge or jury to consider in fixing punishment "evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant…regardless of whether he has previously been charged with or finally convicted of the crime or act." In criminal cases, the trial court must instruct the jury that it is required to find the defendant responsible for any such acts beyond a reasonable doubt before it may consider them in fixing punishment. The State in *In the Matter of M.O.M.*, UNPUBLISHED, No. 01-00-00323-CV, 2001 WL 461388, 2001 Tex.App.Lexis 2906, Juvenile Law Newsletter ¶ 01-2-21 (Tex.App.—Houston [1st Dist.] 2001, no pet.), introduced evidence of three unadjudicated offenses at respondent's disposition hearing. Although requested to do so, the juvenile court judge refused to instruct the jury in accordance with the requirements in criminal cases. Without discussion, the Court of Appeals concluded that it was error not to so instruct the jury and then, after extended discussion, found that it was reversible error.

In 2005, the Fort Worth Court of Appeals in *In the Matter of C.J.M.*, 167 S.W. 892 (Tex.App.—Fort Worth 2005, pet. denied) held that Article 37.07 of the Code of Criminal Procedure does not apply in a juvenile proceeding. As a result, the court held that extraneous offense evidence was not admissible during the dispositional phase of a jury trial. In response to *C.J.M.*, the legislature amended Section

51.17(c) in 2007 by specifically adding Article 37.07 to the statute:

> (c) Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.

As a result, extraneous offense evidence is admissible in all jury trials for offenses committed on or after September 1, 2007. Of course, if the case involves a trial before the court, the judge may also consider any written reports, which may contain extraneous offense information. In 2007, the legislature amended Section 54.04(b) to allow such evidence, "notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure."

Unanimous Verdicts and Mistrials. All findings by the jury must be unanimous per Section 54.03(c), Family Code.

Under prior law, for verdicts in non-capital criminal cases received before September 1, 2005, if the jury could not agree on a penalty, a mistrial as to the entire proceedings had to be declared, which included the verdict of true. This was because the same jury that considered guilt/innocence had to also fix the penalty. Re-prosecution, if any, began all over again with the guilt/innocence phase of the proceedings. Code of Criminal Procedure Article 37.07, Section 3(c). The same rule applied in juvenile cases under the Determinate Sentence Act. Re-prosecution would begin from the point when the grand jury certificate of approval of the petition was filed in the juvenile court. However, for verdicts received on or after September 1, 2005, amended Article 37.07, Section 3(c), provides that, if the jury fails to agree as to punishment, a mistrial shall be declared only for the dispositional phase of trial. The jury is then discharged, without jeopardy attaching, and the court must empanel another jury as soon as practicable to decide the issue of punishment.

In the Matter of M.P., 126 S.W.3d 228 (Tex.App.—San Antonio 2003, no pet.), is a determinate sentence case in which appellant alleged that the jury charge contained four separate and distinct offenses in a disjunctive manner instead of one offense (aggravated sexual assault) with various ways to commit that offense. As a result, the erroneous jury instruction potentially allowed a conviction on less than a unanimous verdict.

> [B]y submitting these offenses in the disjunctive it is possible that some jurors chose to find M.P. guilty of one of the offenses and some jurors chose another offense and still others another. Therefore, the trial court erred in submitting the jury charge in the disjunctive.

126 S.W.3d at 231.

Applying a harm analysis, the San Antonio Court of Appeals reversed the trial court's decision, ruling that M.P. suffered at minimum some harm since it was unclear whether the jury was unanimous in finding him guilty of any of the offenses listed in the charge. See also *Francis v. State*, 36 S.W.3d 121, 125 (Tex.Crim.App. 2000); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984); *Clear v. State*, 76 S.W.3d 622 (Tex.App.—Corpus Christi 2002, no pet.); *In the Matter of L.D.C.*, No. 04-10-00855, 2011 WL 5190667 (Tex.App.—San Antonio 2011, no pet.).

Required Findings. The court or jury must make several findings and decisions in the dispositional hearing.

First, the court, or, if there is one, the jury, must find that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." Section 54.04(c). If the court or jury does not so find, then the court is required to "dismiss the child and enter a final judgment without any disposition." Section 54.04(c). The Family Code does not specify whether the finding must be based upon proof beyond a reasonable doubt or by some other standard. The only safe course of action is to require the jury to make the finding based on the reasonable doubt standard. Of course, the jury can consider evidence introduced in the adjudication hearing, as well as additional, competent evidence introduced in the disposition hearing, in making the finding.

Second, probation placement of a child outside the child's home and removal of the child from his or her home by determinate sentence of a child requires a special finding under Section 54.04(c):

> No disposition placing the child on probation outside the child's home may be made under this section unless the court or jury finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation.

Section 54.04(d) provides, in part, that if the court or jury makes the finding specified in subsection (c) allowing the court to make a disposition, the court or jury may

sentence to the child to commitment at TJJD for the statutorily permissible period. Again, the only safe course of action is to make or require the jury to make this finding beyond a reasonable doubt.

Third, Section 54.04(i) requires the juvenile court to make a special finding if the respondent is committed to TJJD or placed on probation outside his or her own home:

> If the court places the child on probation outside the child's home or commits the child to the Texas Juvenile Justice Department, the court:
>
> (1) shall include in its order its determination that:
>
> (A) it is in the child's best interests to be placed outside the child's home;
>
> (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The juvenile court judge, not the jury, must make these findings, even if the jury has selected the sentence. The judge is required to find that placement or commitment is in the child's best interests, that reasonable efforts were made to keep the child at home, and that the home is such that the child cannot be left at home under probation supervision. Failure of the juvenile court judge to make these three findings requires a new disposition hearing, even in a Determinate Sentence Act case. *In the Matter of J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no writ). Once again, the only safe course of action is to make the findings beyond a reasonable doubt.

Probation. Under 1999 legislation, ordinary delinquency probation that expired at age 18 was no longer available in determinate sentence proceedings. Instead, now a special determinate sentence probation, which can extend for as long as 10 years, is authorized in any case in which the judge or jury assesses a punishment of 10 years or less. Section 54.04(q) provides in part:

> If a court or jury sentences a child to commitment in the Texas Juvenile Justice Department…under Subsection (d)(3) for a term of not more than 10 years, the court or jury may place the child on probation under Subsection (d)(1) as an alternative to making the disposition under Subsection (d)(3). The court shall prescribe the period of probation ordered under this subsection for a term of not more than 10 years. The court may, before the sentence of probation expires, extend the probationary period under Section 54.05, except that the sentence of probation and any extension may not exceed 10 years.

The jury should be instructed that if it assesses a determinate sentence of 10 years or less, it must then decide whether to grant probation to the child. The jury should be told that, if probation is granted, the juvenile court will fix the length and conditions of probation and that the jury is not to concern itself with such matters.

Once the child is placed on determinate sentence probation for an offense committed on or after September 1, 2011, he or she may be supervised by a juvenile probation officer until the child's 19th birthday. (If the offense was committed before September 1, 2011, the supervision may continue only until the child's 18th birthday). The jurisdictional age was increased from age 18 to age 19 in 2011 to allow the juvenile court more time to work with this population of offenders and to make it consistent with the maximum age of TJJD jurisdiction.

Sentence Length. Section 54.04(d)(3) provides:

> if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045(a) [the covered offenses] and if the petition was approved by the grand jury under Section 53.045, the court or jury may sentence the child to commitment in the Texas Juvenile Justice Department…with a possible transfer to the Texas Department of Criminal Justice for a term of:
>
> (A) not more than 40 years if the conduct constitutes:
>
> (i) a capital felony;
>
> (ii) a felony of the first degree; or
>
> (iii) an aggravated controlled substance felony;
>
> (B) not more than 20 years if the conduct constitutes a felony of the second degree; or
>
> (C) not more than 10 years if the conduct constitutes a felony of the third degree.

The jury should be told that it must select a determinate sentence of not more than 10, 20, or 40 years, depending on the offense that was adjudicated, and that the child will be committed to TJJD unless the jury has selected a sentence of 10 years or less and recommended probation.

Since a commitment to TJJD under these provisions is a special one that includes a possible transfer to the Texas Department of Criminal Justice, the jury should be instructed that, if it decides on a determinate sentence, the respondent will be committed to TJJD with possible transfer by the juvenile court any time after becoming 16 years of age to TDCJ to serve the balance of any sentence the jury selects. The jury should also be instructed that the respondent will become eligible for release on parole in the discretion of TJJD after he or she has served one, two, three, or 10 years in TJJD custody, depending on the offense adjudicated. Finally, the jury should be instructed that whether and when the respondent will be paroled from TJJD and whether he or she will be transferred to TDCJ will be determined at a later date and that the jury is not to concern itself with such matters. The Dallas Court of Appeals has upheld a similar instruction on the ground it was simply explaining the statutory options to the jury and not applying them to the particular case being tried. *In the Matter of C.E.M.*, UNPUBLISHED, No. 05-98-01866-CV, 1999 WL 504551, 1999 Tex.App.Lexis 5326, Juvenile Law Newsletter ¶ 99-3-21 (Tex.App.—Dallas 1999, pet. denied).

If the respondent is later transferred to TDCJ, then adult good conduct and parole laws govern service of the sentence. Code of Criminal Procedure Article 37.07, Section 4 requires the court, in the penalty phase of criminal proceedings, to instruct the jury as to the possible effects of laws relating to good conduct time and parole on service of the sentence it selects. Those instructions are inappropriate in determinate sentence proceedings because they fail to include the possibility that the juvenile court or TJJD may release the respondent on parole without a transfer to TDCJ. In their current form, the parole law instructions would mislead the jury and should not be given by the court.

In *In the Matter of E.A.P.*, UNPUBLISHED, No. 04-08-00503-CV, 2009 Tex.App.Lexis 1536, Juvenile Law Newsletter ¶ 09-2-10 (Tex.App.—San Antonio 2009, pet. denied), appellant argued that the juvenile court abused its discretion by imposing a 15-year determinate sentence. The facts showed that appellant pleaded true to committing aggravated robbery against three different complainants during a single episode. Despite a juvenile probation officer's recommendation that he be placed on probation, there was also testimony that appellant possessed a knife while at school and was expelled for continuing to smoke and sell marijuana. Lack of parental supervision was also an issue. Given these facts, it was held that the juvenile court did not abuse its discretion in assessing a 15-year determinate sentence.

Deadly Weapon Findings. If the respondent is transferred by the juvenile court from TJJD to TDCJ, the length of the incarceration may be affected by whether a deadly weapon was used during the delinquent conduct, as in the case of adults sentenced to prison. Government Code Section 508.145(d). The Family Code provides for deadly weapon findings in determinate sentence proceedings. Section 54.04(g).

The respondent is entitled to notice, before the adjudication hearing begins, that the State proposes to seek a finding of the use of a deadly weapon. That notice can be provided in three different ways: (1) the petition can expressly charge that the offense was committed with a deadly weapon; (2) if the petition charges that a homicide was committed, it has implicitly charged use of a deadly weapon; or (3) the State may, apart from the petition, provide notice to the respondent of its intent to seek a deadly weapon finding. It is error for the trial court to enter such a finding if the indictment (or petition) does not allege the use or exhibition of a deadly weapon or the jury does not answer a special issue on the matter. See *Jackson v. State*, UNPUBLISHED, No. 10-07-00089-CR, 2008 Tex.App.Lexis 698 (Tex.App.—Waco 2008, pet. ref'd).

If the requirement of notice prior to the adjudication hearing was satisfied by alleging the offense was committed with a deadly weapon and there was no evidence presented at the adjudication hearing that the respondent acted with another in committing the offense, then a finding by the judge or jury at the adjudication phase of the proceedings in favor of the State is a factual finding that a deadly weapon was personally used by the respondent during the offense.

If the evidence at the adjudication hearing was that the respondent acted with another in commission of the offense, then the court or jury should consider a special finding at the disposition hearing. In that event, the jury, if there is jury sentencing, should be given as a special issue at the disposition hearing the question of whether it finds beyond a reasonable doubt that "the defendant used or exhibited a deadly weapon during the commission of the conduct or during immediate flight from commission of

the conduct." Section 54.04(g). If sentencing by the court is elected, the juvenile court would make that finding in the disposition hearing.

The Code of Criminal Procedure includes the situation in which, although the defendant did not personally use a deadly weapon, he or she was a party to the offense and "knew that a deadly weapon would be used or exhibited" during the offense or immediate flight therefrom. Code of Criminal Procedure Article 42A.054(b). However, no similar amendment was made in the Family Code deadly weapon provision. The Austin Court of Appeals in *In the Matter of A.F.*, 895 S.W.2d 481, 486 (Tex.App.—Austin 1995, no writ), held that, under Family Code Section 54.04(g), a finding of personal use by the respondent is still required. In that case, it reformed the juvenile court's judgment to delete the deadly weapon finding because all the evidence showed that the co-respondent, not the appellant, fired the fatal shot.

There must be evidence to support the finding, but it can be evidence admitted at either the adjudication or the dispositional hearing. "Deadly weapon" is defined in Section 1.07(a)(17) of the Penal Code as:

> (A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
>
> (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

If the jury is given as a special issue whether a deadly weapon was used or exhibited by the respondent, the Penal Code definition of that term should be given to the jury. If the court or the jury finds for the State on this issue, then "the court shall enter the finding in the order" of commitment. Section 54.04(g). The effect of such an entry in the commitment order on the length of incarceration is discussed later in this chapter.

Credit for Time in Custody. If the respondent at any time was in custody during the pendency of the case, the date he or she was taken into custody and the date, if any, of his or her release should be entered by the court on the commitment order. This information is essential not only to determine when the sentence ends but also to enable TDCJ and the Board of Pardons and Paroles to determine the inmate's parole eligibility date should he or she later be transferred to TDCJ. Government Code Section 499.053.

Prior to June 8, 2007, credit toward a determinate sentence for any time spent in a secure detention facility before commitment and transfer to TYC was credited at the end of the sentence. On or after June 8, 2007, TYC/TJJD must also grant credit for such time when computing the child's parole and discharge eligibility. Family Code Section 54.052. A corresponding amendment to the Human Resources Code also requires TDCJ to grant credit for time served by a person in TJJD and in a juvenile detention facility in computing parole and discharge eligibility from TDCJ. Human Resources Code Section 245.152(c).

H. Probation

Before 1999 Amendments. Under adult community supervision laws, the judge or jury must assess a penalty of not more than 10 years to place a defendant on community supervision. Articles 42A.053(c) and 42A.056(1), Code of Criminal Procedure. If community supervision is later revoked, the defendant cannot be sentenced to a longer term than the penalty originally assessed unless he or she was placed on deferred adjudication probation. See discussion below.

Under the Determinate Sentence Act, prior to its amendment in 1999, the judge or jury simply granted or denied probation. If it chose to place the respondent on probation, it did not assess a penalty that was then probated. This meant that if probation was later revoked, the respondent could be sentenced to any term that he or she could have received in the first place—up to 40 years for some offenses. In that respect, probation under the Determinate Sentence Act was like deferred adjudication community supervision for adults under Code of Criminal Procedure Chapter 42A, Subchapter C.

1999 Amendments. In 1999, the legislature changed the nature of determinate sentence probation and authorized it to extend into adulthood. The purpose of the amendments was to fill a void in the determinate sentence scheme in which some cases were too serious to be disposed of comfortably by probation that expires at age 18 but not so serious as to require extensive incarceration in TYC [TJJD]. Under the 1999 legislation, the judge or jury in a determinate sentence case must give a sentence and, if that sentence is 10 years or less, can grant probation; the judge can make the length of the probation period as long as 10 years.

In enacting that provision, the legislature changed the nature of the probation to one in which a punishment is assessed but suspended so that, if probation is revoked,

the person can be required to serve a sentence that can be shorter than but not longer than the punishment originally assessed, which in turn can never be longer than 10 years. This is identical to the law respecting the revocation of regular community supervision by a criminal court.

Once a punishment of 10 years or less is assessed by the judge or jury and that authority decides to grant probation, it is the judge who decides the length of the probation term, just as in criminal cases under Code of Criminal Procedure Article 42A.055. Section 54.04(q), Family Code. That term may be for a period of up to 10 years. If a period shorter than 10 years was initially assigned, the judge may extend the term for up to a total of 10 years. The juvenile court may discharge the probationer from further supervision at any time; there is no minimum term of supervision that must be served. See *In the Matter of E.E.*, UNPUBLISHED, No. 08-08-00338-CV, 2010 Tex.App.Lexis 3742, Juvenile Law Newsletter ¶ 10-3-4 (Tex.App.—El Paso 2010, no pet.) (no abuse of discretion for court to terminate probation early based on positive testimony of probation officer and juvenile).

Transfer of Supervision to Criminal Court. If the probation term is scheduled to extend beyond the probationer's 19th birthday (or 18th birthday if offense committed before September 1, 2011), the juvenile court must discharge the child on his or her 18th or 19th birthday, as appropriate, unless the court has acted earlier to order transfer supervision to the appropriate criminal court Community Supervision and Corrections Department. Section 54.051, Family Code, sets out the transfer procedures.

The transfer occurs only on the State's timely motion. Otherwise, the probationer is discharged from supervision by operation of law on his or her 18th or 19th birthday, depending on the date of the offense. Under Section 51.0412, relating to jurisdiction over incomplete proceedings, as amended effective September 1, 2007, the court's jurisdiction over the hearing for transfer can extend beyond the child's 18th or 19th birthday, as appropriate, if the motion to transfer is filed before the child turns 18 or 19 and the court enters a finding that the prosecution exercised due diligence in attempting to timely complete the proceeding. No violation of probation is required to authorize the juvenile court to transfer supervision to the adult Community Supervision and Corrections Department.

Although the hearing to transfer supervision may occur prior to the 18th or 19th birthday (depending on offense date), if the court decides that probation should be transferred to the adult court, the transfer does not actually occur until the 18th or 19th birthday. While transfer of a youth with a determinate sentence from TJJD to adult prison can happen earlier than age 19, as discussed later in this chapter, there is no mechanism for an early transfer to adult probation. Additionally, there is no statute allowing for a juvenile to be detained either before or after the hearing to transfer supervision to adult court. Whether or not such a juvenile may legally be detained is based on whether or not there is an alleged probation violation and whether or not the state is pursuing that alleged violation in juvenile court. If the court holds the hearing to transfer early and decides to transfer, typically the juvenile court will not be pursuing a revocation of that probation to TJJD. In such event, there is no law that allows for the juvenile to be detained pending the actual transfer from juvenile court to adult court.

Whether juvenile procedures and consequences apply to a probation violation or adult procedures and consequences apply depends, under Section 54.051(e-2), on when the violation occurred and when it was discovered. The time under juvenile supervision counts toward minimum time periods required under adult law for eligibility for early discharge from adult supervision under Code of Criminal Procedure Article 42A.701. Section 54.051(e-3), Family Code.

Section 54.051(e-1) was added in 2003. It makes it clear that the restrictions on a criminal court judge placing a defendant on regular community supervision for a 3g offense (Article 42A.054, Code of Criminal Procedure) or for an offense for which a deadly weapon finding has been made do not apply to placing a transferred juvenile on community supervision. Subsection (e-1) also makes it clear that the two-year minimum community supervision term for second and third degree felonies and the five-year minimum term for first degree felonies do not apply to transferred juveniles, who will often have less than two or five years remaining on their probation terms when they are transferred to criminal court.

The final sentence in Section 54.051(e-2), added in 2003, specifies that if the criminal court judge revokes community supervision of a transferred juvenile, the judge may reduce the prison sentence to below the minimum sentence that applies to adult offenders—two years for a second or third degree felony and five years for a first degree felony.

In 2009, the Waco Court of Appeals entertained an issue of first impression, namely whether Section 54.051 authorizes a district court to extend the term of probation imposed by the juvenile court after transfer to adult community supervision. *Krupa v. State*, 286 S.W.3d 74 (Tex.App.—Waco 2009, reh'g denied). Krupa was originally assessed a two-year determinate sentence probation. His probation was transferred to district court, and he was placed on adult community supervision. The district court later extended Krupa's probationary period for an additional three years and ultimately revoked his community supervision, sentencing him to seven years in prison.

On appeal, Krupa complained that the revocation was void because the district court lacked the authority under Section 54.051 to extend the probationary term set by the juvenile court.

The Waco Court of Appeals accepted the State's argument that Section 54.051 authorizes changes to both the probationary period and the conditions set forth by the juvenile court.

> The statute makes clear that the district court exercises jurisdiction over the transferred juvenile. See TEX. FAM. CODE ANN. §54.051(e). Once transferred, the juvenile is subject to the rules enunciated in article 42.12 [42A], which applies for the remainder of the probationary period set by the juvenile court. *Id*. During that period, the district court may impose conditions provided in article 42.12 [42A] as long they are consistent with those ordered by the juvenile court. *Id*. If the juvenile complies, he will be discharged at the end of the probationary period set by the juvenile court. If the juvenile violates the conditions, the district court may handle the violation, "in the same manner as if the court had originally exercised jurisdiction over the case." *Id*. at §54.051(e-2).

286 S.W.3d at 76.

The Court of Appeals declined to find that the district court's extension of Krupa's probation was inconsistent with the juvenile court's probation order, noting that nothing in Section 54.051 suggests that Article 42.12, Section 22 [42A.752], is inapplicable to a transferred juvenile.

> We, therefore, hold that a district court, to which a juvenile is transferred under section 54.051, has authority under article 42.12 section 22(c) to extend the probationary period set by the juvenile court when the juvenile fails to comply with the conditions of community supervision. To hold otherwise would lead to the absurd result that the district court has virtually no authority over the transferred juvenile, a result clearly not contemplated by the Legislature (citations omitted). Because the district court was authorized to extend Krupa's community supervision, its subsequent revocation was not void.

286 S.W.3d at 77.

Section 54.051(g), added in 2003, provides that if the juvenile court deferred the sex offender registration of a juvenile who is later transferred to criminal court, the authority to re-examine the need for registration upon completion of treatment is transferred to the criminal court. Section 54.051(h), added in 2003 and amended in 2005, provides that, after transfer of a juvenile required to register a sex offender to criminal court, the authority to grant a deregistration under Subchapter H, Chapter 62, Code of Criminal Procedure, rests with the criminal court judge. The reason for these provisions is that, after transfer, the current information relevant to the decision is available through the adult Community Supervision and Corrections Department rather than through the juvenile probation department. See Chapter 20.

Section 54.051(i), added in 2003 and amended in 2011, authorizes the juvenile court to grant determinate sentence probation even though the person before the court is already 18 or 19 years of age (depending on the date of the offense) if the juvenile court has jurisdiction of the case under applicable provisions. Upon the granting of probation under this subsection, the person must be immediately transferred to criminal court for supervision in the adult system. The reason for this provision is to keep the probation option open even though there was a delay in processing the case that resulted in the person aging out before disposition. Otherwise probation would be foreclosed by the mere delay in processing the case.

Restitution. In 2001, the legislature added Section 54.041(h) to address the question of restitution obligations when determinate sentence probation is transferred from juvenile to criminal court. That provision now reads:

> If the juvenile court places the child on probation in a determinate sentence proceeding initiated under Section 53.045 and transfers supervision on the child's 19th birthday to a district court for placement on community supervision, the district court shall require the payment of any unpaid restitution as a condition of the

community supervision. The liability of the child's parent for restitution may not be extended by transfer to a district court for supervision.

This law makes it clear that any restitution conditions of determinate sentence probation follow the probationer to adult community supervision after transfer by the juvenile court. Any obligations placed on parents, however, expire when the probationer becomes 18 or is no longer in school, whichever is later; transferring probation to criminal court does not prolong those parental obligations to make restitution. Section 54.041(b). The fact that Section 54.041(b) was not amended in 2011 to conform with extending the court's jurisdiction over determinate sentence probation from age 18 to age 19 makes it clear that parental responsibility still ends at the age of 18 or graduation or withdrawal from school, whichever is later. It is important to note that the parental obligations do not extend to age 19 unless the youth is still in school. It is also important to note that, although the law now reads "19th birthday," the bill that made that change contained a savings clause so that the law relating to jurisdiction to age 18 for offenses committed before September 1, 2011, remains in effect; for those, the restitution still transfers for those cases that result in transfer to adult court at age 18 rather than age 19.

No Right to Jury Trial at Revocation. Prior to the 1999 amendments that changed the nature of determinate sentence probation to one in which the punishment was assessed before the child was placed on probation rather than after any revocation proceedings, a juvenile had the right to a jury determination of the punishment to be assessed upon revocation. That right was abrogated by the 1999 amendments because the juvenile now has a right to a jury assessment of punishment during the original disposition proceedings. For probation dispositions granted for offenses that were committed before September 1, 1999, the right to a jury trial at revocation remains in place.

Revocation Procedures. Revocation of determinate sentence probation by a juvenile court uses the same standards and follows the same procedures as revocation of ordinary juvenile probation. See Chapter 13. Upon revocation, the juvenile court may impose a determinate sentence of any length up to, but no longer than, the sentence originally assessed. The same sentencing authority exists for criminal courts upon revocation of determinate sentence probation after it has been transferred to criminal court. The criminal court may reduce the revocation sentence to any length. Under Section 54.051(e-2), it is not restricted by the minimum sentences specified in the Code of Criminal Procedure.

I. Parole, Discharge, and Transfer for Offenses Committed Before January 1, 1996

In 1995, the legislature completely redesigned the correctional phase of the determinate sentence system. That current system is discussed in the next section. The old system is briefly discussed in this section to provide a background for understanding the current system.

When a child was committed to TYC under a determinate sentence for an offense committed before January 1, 1996, TYC was prohibited from releasing the child on parole without the approval of the committing juvenile court. It was also prohibited from discharging him or her before the full sentence had been served without the approval of the committing juvenile court. Former Human Resources Code Sections 61.081(f) and 61.084(a) (before 1995 amendments).

Any child in a TYC institution under a determinate sentence at age 17 1/2 was required to be referred by TYC to the committing juvenile court for a release or transfer hearing. Human Resources Code Section 61.079(a) [§244.014]. When TYC petitioned the juvenile court for a hearing or notified the juvenile court that a child under a determinate sentence had reached the age of 17 1/2, the juvenile court was required to "set a time and place for a hearing." Family Code Section 54.11(a). If TYC notified the juvenile court that the child was 17 1/2 years of age, the hearing had to be held "before 30 days before the person's 18th birthday." Section 54.11(h) (before 1995 amendments).

The juvenile court at a release or transfer hearing could order: (1) transfer to TDCJ at age 18; (2) absolute discharge; or (3) an indeterminate commitment to TYC. Section 54.11 (before 1995 amendments).

If a child was released on parole with the approval of the juvenile court, he or she remained on parole until whichever of the following occurred first: (1) the total calendar time served in the institution, in local detention, and on parole equaled the determinate sentence; (2) the juvenile turned 21; (3) the juvenile was discharged prior to his or her 21st birthday; or (4) parole was revoked. Human Resources Code Sections 61.084(a) and (c) (before 1995 amendment). If the child was kept in the juvenile system by the juvenile court at the release or transfer hearing, the

child would have completely served his or her sentence at age 21, no matter how many years remained on it.

If the juvenile court ordered the person transferred to TDCJ, the transfer occurred immediately after the decision was made without waiting for the person's 18th birthday.

J. Parole, Discharge, and Transfer for Offenses Committed on or After January 1, 1996

The legislature perceived several problems with the old system. *First*, an "up or out" decision was required in every case shortly before the child's 18th birthday. For some children, the release or transfer hearing came before they had sufficient time in TYC to show results from applying themselves to education and rehabilitation programs. For others, it might be clear long before the hearing date that they should be transferred to prison or released on parole, yet they had to wait until shortly before becoming 18 for the hearing. *Second*, once the decision was made by the juvenile court, it was irrevocable. If the child was retained in the juvenile system, that decision was final and could not be re-examined no matter what the subsequent conduct of the child might show. *Third*, the old system did not provide full accountability with respect to the child retained in the juvenile system. That child discharged his or her full sentence at age 21, no matter how many years remained on it.

The legislative solution was to introduce greater flexibility and accountability into the system. The determinate sentence correctional system enacted in 1995 applies only to offenses committed on or after January 1, 1996.

1. TJJD Parole

Under the 1995 amendments, the legislature granted some authority to TYC to parole, without court approval, children committed to it under determinate sentences. Under the old system, all paroles required court approval at a release or transfer hearing.

Statutory Minimum Period of Confinement. TJJD may, in its sole discretion, parole a child committed to it under a determinate sentence who has served the applicable statutory minimum period of confinement. The statutory minimum periods of confinement are 10 years for capital murder, three years for a first degree felony or an aggravated controlled substance felony, two years for a second degree felony, and one year for a third degree felony. Human Resources Code Section 245.051(c).

The statute provides that the specified number of years must be "served" in order for TJJD to release a child on supervision without court approval. Section 245.051, Human Resources Code. Prior to 2007, the time spent in juvenile detention before commitment was not specified in statute to count toward the minimum period of confinement, although detention time did, by statute, count toward service of the sentence—the child had to be released when the time in TJJD plus time in detention equaled his or her sentence. Human Resources Code Section 245.151(b).

Since 2007, Section 54.052, Family Code, requires a juvenile court judge to give credit for time spent in a secure detention facility before the child is committed and transported to TJJD on a determinate sentence. The same is true for time spent in detention during the pendency of an appeal. In turn, TJJD must give the child credit for time spent in detention pending court and/or pending an appeal when computing the child's parole and discharge eligibility. Section 54.052(d). As a result, the statutory minimum periods of confinement now include time spent in a detention facility as well as in TJJD. Unless the sentence has been completed, TJJD is not required to release when the minimum period of confinement has been completed; it is but one of the criteria for release on parole TJJD uses.

Required Evaluation for Transfer. TJJD is required to evaluate certain children who are committed under the Determinate Sentence Act. When a youth with a determinate sentence turns 18, TJJD must evaluate whether the person is in need of additional services that can be completed in the six-month period after his or her 18th birthday to prepare for release from TJJD custody or transfer to TDCJ. This section does not apply to youth released or transferred before their 18th birthdays. Section 244.014, Human Resources Code.

Early Parole. With one exception, TJJD is not permitted to release a determinate sentence youth who has not completed the minimum period of confinement to TJJD parole without court approval. TJJD is permitted to petition the committing juvenile court for authority to release a child who has not yet served the statutory minimum period of confinement. Human Resources Code Section 245.051. Such release is to TJJD parole. Upon receipt of a request for court approval of parole, the committing juvenile court must "set a time and place for a hearing on the release of the person." Family Code Section 54.11(a). At the conclusion of the hearing, the juvenile court may approve or disapprove release on parole. Family Code Section 54.11(j). It is not authorized to transfer the child to

prison. The exception is that, via a 2005 amendment, TJJD may parole a youth with nine months or less left on his or her sentence without court approval, even if the child has not completed the minimum period of confinement. Human Resources Code Sections 245.051 and 245.151. The notice and hearing provisions of Family Code Section 54.11 apply to release hearings.

Since TJJD is requesting juvenile court authority to grant early parole, it would be expected that some of the time the juvenile prosecutor would oppose that position. In such cases, it would be improper for that prosecutor to purport to represent TJJD at the hearing. TJJD could permit the child's attorney to present the case for release, enabling the juvenile prosecutor to act in opposition to that case. Alternatively, TJJD could, through its own attorneys, present the case for parole release. Presumably the child's attorney would be aligned with TJJD and the juvenile prosecutor might or might not be opposed to that position.

Capital Murder Cases. One would expect and hope that a use of the power of TJJD to petition a juvenile court for early parole would be in cases of capital murder, which have an extremely long 10-year minimum and which, for offenses committed prior to September 1, 2003, had a special rule requiring any child in TYC for capital murder to be automatically transferred to TDCJ at age 21. Human Resources Code Section 61.084(d) (repealed in 2003). Unless TYC routinely presented these cases for consideration by the juvenile court before the child turned 21, he or she had no hope of release or of not being transferred to adult prison and little incentive to take advantage of TYC rehabilitative programs. TYC could routinely present such cases to the committing juvenile court without a recommendation for or against parole but simply to create the possibility of release on parole for those youth. Without such an opportunity, such youth were unlikely to receive much benefit from participating in TYC programs and were, therefore, more likely to become disciplinary management problems for TYC staff.

In 2003, the law changed so that a youth committed to TYC for capital murder who was in a TYC residential facility at age 21 would be administratively transferred to adult parole supervision without the need for a court order, just like any other determinate sentence youth at TYC at the time (discussed later in this chapter).

In 2007, TJJD's jurisdictional age changed from 21 to 19. Thus, for offenses committed on or after June 8, 2007, a youth in TJJD residential care at age 19 for capital murder will automatically be transferred to adult parole supervision, just as in the case of any other TJJD sentenced youth. Human Resources Code Section 245.151. See *In the Matter of J.B.L.*, UNPUBLISHED, No. 11-07-00221-CV, 2009 Tex.App.Lexis 1600 *5, n. 4, Juvenile Law Newsletter ¶ 09-2-08 (Tex.App.—Eastland 2009, pet. denied).

Parole Supervision. TJJD parole officers will supervise a youth with a determinate sentence who is granted parole before age 19. The person will remain on TJJD parole supervision until age 19, unless the parole is revoked earlier. TJJD is not authorized to grant discharge from parole except for service of the entire sentence. Human Resources Code Section 245.151.

Parole Revocation. Youth on TJJD parole supervision for a determinate sentence are subject to ordinary TJJD parole revocation rules and procedures. Human Resources Code Section 245.051. Once TJJD parole is revoked, TJJD may re-parole in its discretion or, if the child is 16 years of age or older, may petition the committing juvenile court to transfer the child to adult prison. Human Resources Code Section 244.014(c).

This option permits TJJD to give a youth an opportunity on parole without giving up for all time the possibility that the youth may be transferred to adult prison should that course of action later seem appropriate.

2. Adult Parole

TJJD Parolee at Age 19. Under the 1995 rewrite, if the youth was on TYC parole supervision at age 21, he or she was no longer regarded as having discharged the full sentence. Instead, the youth was transferred to adult parole supervision administratively and without the necessity for a hearing of any kind under former Human Resources Code Section 61.084(g).

Sections 61.084(g) and (e) were amended in 2007 to reduce from age 21 to age 19 the age at which TYC must either discharge or transfer a person to the custody of TDCJ for parole supervision; this was consistent with changes to TYC's jurisdiction over juveniles committed with an indeterminate sentence.

Sections 61.084(e) and (g) became Sections 245.151(d) and (e) in 2011, but were not substantively changed. Thus, under the law, the adult parole term is the sentence imposed less calendar time actually served at TJJD and in a juvenile detention facility in connection with the conduct

for which the person was adjudicated (including the pendency of an appeal), plus time served on TJJD parole.

TJJD Resident at Age 19. Under the law in effect before 2007, if a person was a TYC resident serving a determinate sentence at age 21, he or she would be administratively transferred to adult parole supervision without a hearing under Human Resources Code Section 61.084(g). That age was changed to 19 in 2007. The law is now found in Human Resources Code Section 245.151(e). Once transferred, the person is subject to adult parole supervision for the balance of the determinate sentence. Government Code Section 508.156.

Under a repeal of Human Resources Code Section 61.084(d) in 2003, the same procedures are applicable in capital murder cases for offenses committed on or after September 1, 2003. For previous capital murder offenses, transfer at age 21 from TYC residential care to incarceration in TDCJ was automatic.

Release by TYC on Parole After Age 19 (Old Law). Prior to 2007, if TYC paroled a youth with a determinate sentence who was 19 years of age or older at the time of parole release, the youth was immediately placed on adult parole supervision under former Human Resources Code Section 61.084(f). That subsection was repealed in 2007 when TYC jurisdiction over youth was modified to end at age 19. TJJD youth who are paroled still serve the balance of their sentence on adult parole supervision; they just are not transferred to adult parole earlier than the end of TJJD's jurisdiction. Government Code Section 508.156(d).

Revocation of Adult Parole. A person serving a determinate sentence on adult parole supervision is subject to ordinary adult parole revocation laws and procedures: "If a parole panel revokes the person's parole, the panel may require the person to serve the portion remaining of the person's sentence in the institutional division." Government Code Section 508.156(e). The person cannot be returned to TJJD even if under the age of 19 at the time of revocation (which can only happen if they are transferred to prison early and then released on parole and found in violation of parole all before turning age 19). Thus, revocation of adult parole creates a "back door" into prison for sentenced youth that is available at any time during their sentence.

3. Transfer to Prison

On TJJD Petition. At any time after a TJJD resident becomes 16 years of age but before the child turns 19, TJJD may petition the committing juvenile court to transfer the youth to prison if "the child's conduct...indicates that the welfare of the community requires the transfer." Human Resources Code Section 244.014(a). The juvenile court must hold the hearing within 60 days of receiving the referral from TJJD. Family Code Section 54.11(h); Cf. *In the Matter of B.T.*, UNPUBLISHED, No. 05-10-00977-CV, 2011 WL 2860107, Juvenile Law Newsletter ¶ 11-3-14 (Tex.App.—Dallas 2011, no pet.) [transfer hearing that began within 60 days but was "reset" at appellant's request satisfied Section 54.11(h)]. The hearing is conducted under the procedures specified by Section 54.11. At the conclusion of the hearing, the juvenile court is limited to either returning the youth to TJJD, which means there is no transfer to prison, or transferring the youth to prison for the balance of the determinate sentence. Family Code Section 54.11(i).

The purpose of this procedure is to enable TJJD to seek transfer to prison of youth who are not benefiting from TJJD institutional programs and who, perhaps, are seeking to prevent others from benefiting.

In 1997, the legislature added Family Code Section 51.0411, which provides that the juvenile court has jurisdiction to conduct a release hearing or transfer hearing without regard to the age of the respondent, thus authorizing such hearings after the respondent becomes 18 years of age. This provision was intended to facilitate the conduct of release hearings and transfer hearings under the 1995 amendments, which could occur as late as the approach of the youth's 21st birthday. It continues to be relevant since the 2007 age change to 19. See discussion of *In the Matter of T.G.* under the "Jurisdiction" section in this chapter.

Although Section 51.0411 gives the juvenile court continuing jurisdiction past the age of 18, it is still important that the court timely acquire jurisdiction of the juvenile for the purpose of transfer. Once the court commits a juvenile to TJJD, it has no continuing jurisdiction over the juvenile. The court does not attain jurisdiction over the juvenile for a transfer hearing until TJJD submits to the court a request for transfer under Section 244.014(a), Human Resources Code. Because TJJD loses jurisdiction at age 19, this request must be made before then. If no request is made, the juvenile transfers to TDCJ parole at age 19, pursuant to Section 245.151, Human Resources Code.

Following Revocation of TJJD Parole. A youth released on TJJD parole may become subject to transfer to

prison by the committing juvenile court on TJJD petition if the youth is 16 or older but not yet 19. Human Resources Code Section 244.014. If the youth has been released on TJJD parole, there must be a revocation of parole, a juvenile court adjudication for felony delinquent conduct for conduct occurring on parole, or a criminal court conviction for a felony offense occurring while on parole before TJJD may petition for transfer to prison. Human Resources Code Section 244.014(c).

The purpose of this provision is to enable TJJD to give a youth an opportunity on parole without foreclosing forever the possibility that the youth may be transferred to prison, if appropriate. The ability of TJJD to petition for transfer to prison is meant to provide added incentives for youth to do well on parole.

Following Revocation of Adult Parole. If a youth under a determinate sentence is supervised on adult parole and that parole is revoked, he or she will be returned to prison to serve the balance of the sentence, which is computed without credit for the time spent on adult parole. Such a youth may not be returned to TJJD. Section 508.156(e), Government Code Section.

Mandatory Transfer for Capital Murder Offenders. A youth under a determinate sentence for a capital murder committed before September 1, 2003, was subject to a special rule regarding transfer to prison. If, at age 21, the youth was a TYC resident who had not been released on TYC or adult parole, he or she had to be administratively transferred to prison to serve the balance of the sentence under adult law. Human Resources Code Section 61.084(d) (repealed in 2003).

Under the old law, if TYC sought and was granted permission by the juvenile court to parole a determinate sentence youth committed for capital murder and that youth was still on parole at age 21, then he or she was transferred administratively to adult parole supervision. Human Resources Code Section 61.084(g) (prior to September 1, 2003). If such a youth had never been released on parole, then he or she was transferred administratively to prison.

For any offense committed on or after September 1, 2003, a youth in TJJD with a determinate sentence for capital murder is treated the same as any other determinate sentence youth in TJJD. Transfer at age 19 (21 for offenses committed before June 8, 2007) is to adult parole supervision, not to incarceration. Transfer to adult prison is only possible by an order of the juvenile court under Section 54.11, Family Code.

4. Release Hearings and Transfer Hearings

Section 54.11 sets out the procedures and standards for conducting the release hearing or transfer hearing under the Determinate Sentence Act. That hearing was originally designed to serve two different purposes: (1) to permit TYC to petition the juvenile court for parole of a child before he or she became 18 years old (a purpose for which it was never used in practice); and (2) to enable the juvenile court to make the "up or out" decision at age 18 (a purpose for which it was typically used).

Purposes of Hearing Under 1995 Amendments. The release or transfer hearing is still available for a modified version of the first purpose—to enable TJJD to petition the juvenile court for release on parole before the youth has served his or her statutory minimum period of confinement for the committing offense.

The second purpose of the revised hearing was to permit TYC to petition the committing juvenile court for an order transferring a youth 16 or older but younger than 21 from TYC to TDCJ. This was changed in 2007 to age 19, consistent with the change to the upper limit of TYC's [TJJD] jurisdiction. On receipt of notice of desire to request a transfer of such a youth to prison, the committing juvenile court is required to set a date for a hearing. Section 54.11(a). Since the hearing is neither a trial nor part of a criminal prosecution, the lack of a formal charging instrument does not constitute fundamental error. *In the Matter of V.M.S.*, UNPUBLISHED, No. 11-10-00357-CV, 2011 WL 2732581, Juvenile Law Newsletter ¶ 11-3-12 (Tex.App.—Eastland 2011, review denied). The hearing must be conducted within 60 days of receipt of a request from TJJD. Section 54.11(h).

In 1997, the legislature added Family Code Section 51.0411 to provide that the juvenile court has jurisdiction to conduct a release hearing or a transfer hearing without regard to the age of the respondent, thus authorizing such hearings after the respondent becomes 18 years of age. This provision is intended primarily to facilitate the conduct of release or transfer hearings under the 1995 amendments, which could occur as late as the approach of the youth's 21st, and now 19th, birthday.

The purposes of the hearing are different under the 1995 amendments, but many of the provisions of Section 54.11 remain unchanged. Therefore, many of the cases decided under Section 54.11 before those amendments are still relevant and helpful to understanding how the hearing operates under current law.

Jurisdiction. Legislative reforms in 2007 lowered the age of youth who are eligible for confinement in TYC [TJJD] from age 21 to 19. In 2008, the issue was raised whether the juvenile court retains jurisdiction to hold a hearing for a juvenile's transfer to TDCJ for confinement if the juvenile: (1) was being held pursuant to a determinate sentence felony adjudication; (2) had not completed his or her minimum length of stay; and (3) had not yet reached age 21 but was 19 when the statute became effective on June 8, 2007. *In the Matter of T.G.*, UNPUBLISHED, No. 03-07-00543-CV, 2008 WL 2468697, 2008 Tex.App.Lexis 4551, Juvenile Law Newsletter ¶ 08-3-9 (Tex.App.—Austin 2008, pet. denied).

T.G. argued that since he was already 19 when the legislative change went into effect, TYC did not have authority to request a transfer and thus the juvenile court lacked jurisdiction to hold a hearing or to order a transfer. Under these circumstances, T.G. argued that he was entitled to mandatory release on TDCJ parole without a hearing. Human Resources Code Section 245.151(e).

The Austin Court of Appeals rejected T.G.'s argument:

> We conclude that the juvenile court retained jurisdiction of juveniles committed to the custody of the TYC under chapter 51 of the family code. The family code squarely addresses the jurisdiction of the juvenile court in sections 51.04 and 51.0411. See Tex.Fam.Code Ann. §§51.04, 51.0411. Section 51.04(a) provides for the juvenile court to exercise jurisdiction over juvenile cases as follows: (a) This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct, and, ...the juvenile court has exclusive original jurisdiction over proceedings under this title. *Id.* §51.04(a). Section 51.0411 then speaks to the court's retention of jurisdiction in transfer proceedings: The court retains jurisdiction over a person, without regard to the age of the person, who is referred to the court under Section 54.11 for transfer to the Texas Department of Criminal Justice or release under supervision. *Id.* §51.0411 (emphasis added). Section 51.0411 makes clear that the court had jurisdiction over T.G. for purposes of the transfer hearing, even though he turned nineteen years of age before the referral occurred.

2008 Tex.App.Lexis 4551 *15-16.

The appellate court concluded that the 2007 reforms did not alter the juvenile court's jurisdiction over transfer proceedings since the legislature did not amend any of these jurisdictional provisions. "Even after the passage of SB 103, the juvenile court's jurisdiction in transfer proceedings remains governed by chapter 51 of the Family Code." 2008 Tex.App.Lexis 4551 *17; see also Section 51.0411.

T.G. also argued that since the provisions of Senate Bill 103 were to go into effect immediately, he must either be discharged from TYC or be transferred to TDCJ to serve the remainder of his sentence on adult parole. Again the appellate court disagreed, ruling that the amendments to Human Resources Code Sections 61.079 [224.014] and 61.084 [245.151] were intended to operate only prospectively. See Government Code Section 311.022 ("A statute is presumed to be prospective in its operation unless expressly made retrospective.").

The decision in *T.G.* was followed in *In the Matter of J.J.*, 276 S.W.3d 171 (Tex.App.—Austin 2008, pet. denied). J.J. was also 19 when the juvenile court ordered that he be transferred to TDCJ to serve the remainder of a 20-year determinate sentence. J.J. argued that the 2007 amendments to Human Resources Code Sections 61.079(a) [244.014] and 61.084(g) [245.151] barred his transfer after he turned 19. The appellate court held that *T.G.* was correctly decided and applied the same reasoning to the *J.J.* case.

As in *T.G.*, the Austin Court of Appeals found that the juvenile court retains jurisdiction "without regard to the age of the person" for transfer to TDCJ or release under TDCJ supervision. Section 51.0411. It also found that, "[a]bsent express language indicating that the legislature intended retrospective application, we must presume that the amended versions of sections 61.079(a) [244.041] and 61.084(g) [245.151] do not apply here." 276 S.W.3d at 176.

> We conclude that the versions of sections 61.079(a) [244.014] and 61.084(g) [245.151] of the human resources code in effect at the time J.J. was adjudicated delinquent in 2005 govern TYC [TJJD]'s referral of him to the juvenile court for possible transfer. Consequently, TYC [TJJD] retained the authority to refer J.J. to the juvenile court for transfer to TDCJ after he turned nineteen.

276 S.W.3d at 177. See also *In the Matter of T.L.S., II*, 294 S.W.3d 397 (Tex.App.—Tyler 2009, no pet.) (following *T.G.* and *J.J.*); *In the Matter of R.D.W.*, UNPUBLISHED, No. 11-09-

00112-CV, 2010 Tex.App.Lexis 5816, Juvenile Law Newsletter ¶ (Tex.App.—Eastland 2010, no pet.) (holding that version of Section 61.079 [244.014] in effect when determinate sentence was assessed controls).

It is important to note that the reason TYC was able to request hearings after the juvenile turned 19 was because the law changing TYC jurisdiction from 21 to 19 applied prospectively only. There must be a timely request by TJJD for the hearing in order to confer jurisdiction to the juvenile court. Once the court commits a juvenile to TJJD, it has no continuing jurisdiction over the juvenile. The court does not attain jurisdiction over the juvenile for a transfer hearing until TJJD submits to the court a request for transfer under Section 244.014(a), Human Resources Code. Because TJJD loses jurisdiction at age 19, this request must be made before then for all youth to whom the 2007 law applies. If no such request is made, at age 19 the juvenile transfers to TDCJ parole pursuant to Section 245.151, Human Resources Code.

Notice of the Hearing. Under Section 54.11(b), the court is required to provide notice of the time and place of the hearing to the juvenile, the juvenile's parents, the juvenile's legal custodian (including TJJD), the prosecutor, the victim, and any other person who has filed a written request with the court to be notified.

The law does not provide how notice is to be given. Written notice is not required. *In the Matter of J.L.P.*, UNPUBLISHED, No. 07-89-222-CV, Juvenile Law Newsletter ¶ 91-3-4 (Tex.App.—Amarillo 1991). It is, however, recommended that the Family Code provisions on summons and service of summons be used as guidelines. See Chapter 9. Section 54.11(c) indicates that failure to give notice to anyone except for the child and the prosecutor does not affect the validity of the hearing as long as the record reflects that the whereabouts of those persons who did not receive notice were unknown to the court and the court made a reasonable effort to locate them.

In *In re G.R.*, UNPUBLISHED, No. 01-98-01142-CV, 1999 WL 351138, 1999 Tex.App.Lexis 4171, Juvenile Law Newsletter ¶ 99-3-03 (Tex.App.—Houston [1st Dist.] 1999, no pet.), the juvenile contended that the record of the release or transfer hearing did not show that he had been given notice of the hearing as required by Section 54.11(b)(1). The Court of Appeals held that the record included a letter from TYC regarding the upcoming hearing and a bench warrant issued by the court for appellant five days before the hearing. Further, appellant, his counsel, and his mother all appeared in court, demonstrating they knew the time and place of the hearing.

Courts of Appeals have rejected arguments that the appellate record must show that the juvenile respondent received formal notice of the hearing. The facts that the juvenile court ordered that proper notice be given and that the juvenile and his or her attorney appeared at the hearing, along with the absence of a motion for continuance on the ground of lack of notice, are, in the aggregate, sufficient evidence that notice was proper. See also *In the Matter of E.V.*, 225 S.W.3d 231 (Tex.App.—El Paso 2006, pet. denied) (record supported court's finding that all parties were notified; notice deemed adequate); *In the Matter of D.W.H.,* UNPUBLISHED, No. 02-06-185-CV, 2007 Tex.App.Lexis 3619 (Tex.App.—Fort Worth 2007, no pet.) (record reflected that appellant's attorney received timely notice of hearing and personally informed appellant of place and time of hearing 10 days prior to proceeding); *In the Matter of J.M.*, UNPUBLISHED, No. 02-05-180-CV, 2005 Tex.App.Lexis 9708, Juvenile Law Newsletter ¶ 06-1-02 (Tex.App.—Fort Worth 2005, no pet.) (record showed appellant received adequate notice of transfer hearing).

Unlike the question of personal service on the respondent of an adjudication or discretionary transfer petition, notice under Section 54.11 does not relate to the jurisdiction of the court over the proceedings. See *In the Matter of B.D.,* 16 S.W.3d 77 (Tex.App.—Houston [1st Dist.] 2000, pet. denied); *In the Matter of R.G.*, 994 S.W.2d 309 (Tex.App.—Houston [1st Dist.] 1999, pet. denied). If the juvenile court grants defense counsel's motion to continue the Section 54.11 hearing on ground of lack of notice, then that issue disappears from the case. The notice of the time and place of the continued hearing announced in court when granting the motion for continuance is itself sufficient notice under the statute. See *In the Matter of J.L.S.*, 47 S.W.3d 128 (Tex.App.—Waco 2001, no pet.).

Scheduling the Hearing. Section 54.11(h) requires that, when a child is referred to a juvenile court by TJJD for transfer to TDCJ, the transfer hearing must be held "not later than the 60th day after the date the court receives the referral." In *In the Matter of K.H.,* UNPUBLISHED, No. 12-01-00342-CV, 2003 WL 744067, 2003 Tex.App.Lexis 4617, Juvenile Law Newsletter ¶ 03-2-02 (Tex.App.—Tyler 2003, no pet.), the juvenile court set a date for the transfer hearing just prior to the expiration of the 60 days. At the beginning of the hearing, counsel for the juvenile requested a postponement because he had been retained only a few minutes earlier. The juvenile court permitted the State to make opening statements and then recessed the hearing

to a later date. On appeal from the transfer order, the youth argued that the juvenile court was without jurisdiction to transfer her because the transfer decision was not made within the 60-day period. The Tyler Court of Appeals rejected this argument:

> Section 54.11 of the Texas Family Code provides that the juvenile court shall hold a release hearing not later than the sixtieth day after the date the court receives a referral for transfer to TDCJ-ID of a person committed to TYC. Tex. Fam. Code Ann. §54.11(h) (Vernon 2002). An earlier version of this provision has been interpreted to mean that the required hearing must begin before the stated statutory deadline but it did not have to conclude before the deadline. *In the Matter of C.L.*, 874 S.W.2d 880, 884 (Tex.App.—Austin 1994, no writ). We agree with that court's reasoning. If the legislature had intended that the hearing be completed before the sixtieth day after the court receives the referral, it could have so specified. See id. Further, even if the court had completely failed to hold the hearing within the time specified, this would constitute error, but it would not deprive the trial court of jurisdiction to order Appellant transferred to TDCJ-ID. The trial court had jurisdiction over Appellant pursuant to Texas Family Code Section 51.0411. Tex. Fam. Code Ann. §51.0411 (Vernon 2002). See also *In the Matter of H.V.R.*, 974 S.W.2d 213, 217 (Tex.App.—San Antonio 1998, no pet.) (The court, interpreting prior version of Section 54.11(h), held that failure to hold release hearing before thirtieth day before a juvenile's eighteenth birthday constitutes error but does not deprive court of jurisdiction.).

2003 Tex.App.Lexis 4617 *5-6.

In *In the Matter of C.E.C.*, UNPUBLISHED, No. 02-06-065-CV, 2006 Tex.App.Lexis 10636, Juvenile Law Newsletter ¶ 07-1-9 (Tex.App.—Fort Worth 2006, no pet.), defense counsel complained that he had been hired only 20 days before the transfer hearing and needed additional time to prepare and to locate potential witnesses. Citing Section 51.09, counsel asked to waive the 60-day deadline for holding the transfer hearing. Without deciding the waiver issue, the Court of Appeals held that the trial court did not abuse its discretion or violate appellant's right to due process by failing to continue the hearing because the court had given C.E.C.'s lawyer more time and opportunity to prepare for the hearing than the law requires.

> Under Section 51.10(h), [defense counsel] was entitled to a minimum of ten days to prepare for the transfer hearing. When appellant's motion for continuance was denied on November 9, [defense counsel] had more than the minimum ten days to prepare for the November 21 transfer hearing. Furthermore, twelve days before the hearing, the trial court allowed [defense counsel] to take all of the TYC documents from the courthouse and copy them so that he could review them prior to the hearing. This allowed [defense counsel] much more than the one day required by the family code to review the documents in preparation for the hearing.

2006 Tex.App.Lexis 10636 *4-5.

Pre-Hearing Detention. Prior to amendments in Section 54.11 enacted in 2003, a TYC youth returned to the juvenile court for a hearing on a request for transfer to TDCJ was required to be detained in a certified place of juvenile detention pending hearing and decision. Sections 54.11(l) through (n) were added in 2003 to give the juvenile court an additional detention option: the county jail. If the youth is 17 years of age or older, the juvenile court may either detain him or her in the juvenile detention facility or in the county jail. If, at the time of the proceedings, the youth is under 17, he or she must be detained in a juvenile facility. Seventeen was chosen because of the fact that if a youth on the streets commits an offense while 17, he or she is treated from the beginning as an adult and may be detained in the county jail pending resolution of the charges in criminal court. Since the youth has already been adjudicated, there is under Subsection (l) no provision for bond should the juvenile court order detention in the county jail. Should the court order detention in the juvenile facility, Subsection (m) requires that he or she, to the extent practicable, be kept separate from children detained in the facility.

Right to Counsel and Guardian Ad Litem. At the hearing, the child is entitled to an attorney. Section 54.11(e). Under Sections 51.10(a) and (f), the child is entitled to appointed counsel if his or her parents are unable to pay for an attorney. The State is represented by the local prosecutor, not by the Attorney General.

Under Section 51.11, the juvenile court must appoint a guardian ad litem at the release or transfer hearing if a parent or guardian is not present. In *In the Matter of T.M.C.*, UNPUBLISHED, No. 05-93-01812-CV, 1994 WL 708291, Juvenile Law Newsletter ¶ 95-1-3 (Tex.App.—Dallas 1994, writ denied), the Court of Appeals held it was error not to appoint a guardian ad litem at the release or transfer hear-

ing under that circumstance. However, in view of the representation provided by defense counsel, the error was harmless. Similarly, the juvenile court in *In the Matter of J.T.*, UNPUBLISHED, No. 05-97-00823-CV, 1998 WL 351268, 1998 Tex.App.Lexis 3998, Juvenile Law Newsletter ¶ 98-3-15 (Tex.App.—Dallas 1998, no pet.), erred in failing to appoint a guardian ad litem when appellant's parents failed to appear at the hearing. However, in view of the appearance and testimony of appellant's grandmother, the error was harmless since she functioned as a "de facto" guardian ad litem for appellant. Under Section 51.11(c), if the court appoints a guardian ad litem at a release hearing or transfer hearing, it may appoint the child's attorney to that role. *In the Matter of J.E.H.*, 972 S.W.2d 928 (Tex.App.—Beaumont 1998, reh'g denied).

Jury Trial and Admonitions. There is no right to a jury at a release or transfer hearing. *In the Matter of P.L.M.*, UNPUBLISHED, No. 01-93-01153-CV, 1994 WL 235527, 1994 Tex.App.Lexis 1293, Juvenile Law Newsletter ¶ 94-3-6 (Tex.App.—Houston [1st Dist.] 1994, no writ) (rejecting the argument that, because the court considered unadjudicated extraneous offenses in making the transfer decision, the juvenile was entitled to a jury trial).

The Dallas Court of Appeals in *In the Matter of E.C.*, UNPUBLISHED, No. 05-95-00477-CV, 1996 WL 547956, 1996 Tex.App.Lexis 4257, Juvenile Law Newsletter ¶ 96-4-22 (Tex.App.—Dallas 1996, no writ), held that the admonitions required by Section 54.03(b) to be given at the adjudication hearing are not required to be given at the release hearing or transfer hearing.

Evidence. Section 54.11(d) provides for using written evidence in the hearing, specifically allowing the court to consider, in addition to witness testimony, the written reports and supporting documents from probation officer, professional court employees, professional consultants, and employees of TJJD.

Section 54.11(e) further provides:

> At the hearing, the person to be transferred or released under supervision is entitled...to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.

The question presented in *C.D.R. v. State*, 827 S.W.2d 589 (Tex.App.—Houston [1st Dist.] 1992, no writ), was whether TYC's written report was admissible in evidence at the hearing as a report from a "professional consultant" or "professional court employee" under Family Code Section 54.11(d). The Court of Appeals held the report was admissible:

> The written report in this case contained vital information for the trial court to examine in deciding whether to parole appellant or send him to TDCJ. The report consisted of psychological and psychiatric evaluations, test scores, a behavior summary, a treatment summary, a recommendation regarding release, and a parole plan in case the court opted for parole. This report was made by trained professionals who interacted with appellant in TYC. It is the type of information necessary for the judge to enter a judgment in the best interests of appellant and society. We hold that the report of TYC's assistant superintendent is a report by a professional consultant and a professional court employee, and thus is expressly allowed by section 54.11(d).

827 S.W.2d at 592. See also *In the Matter of S.C.*, UNPUBLISHED, No. 03-06-00397-CV, 2008 WL 2609233, 2008 Tex.App.Lexis 4954, Juvenile Law Newsletter ¶ 08-3-14 (Tex.App.—Austin 2008, pet. denied) (no abuse of discretion in admitting the TYC psychological evaluation of S.C. during release or transfer hearing).

The Beaumont Court of Appeals has approved of hearsay testimony from a TYC employee at the hearing on the ground hearsay is permitted by Section 54.11(d). *In the Matter of T.C.K., Jr.*, 877 S.W.2d 43 (Tex.App.—Beaumont 1994, no writ).

In 2001, the legislature amended Section 54.11(d) to add TYC employees to the list of persons who may submit written reports to the juvenile court judge at a release hearing or transfer hearing. It now applies to TJJD employees.

The juvenile court in *In the Matter of J.M.O.*, 980 S.W.2d 811 (Tex.App.—San Antonio 1998, pet. denied) permitted the designated TYC witness to testify from TYC records as to efforts by appellant to recruit other TYC youth into his gang. Because the witness had no first-hand knowledge of such efforts, appellant objected on confrontation grounds. The Court of Appeals upheld this procedure in part on the ground that, under Section 54.11(d), appellant was entitled to advance notice of any of the material to be considered in the hearing, including the records from which the TYC official was testifying. Appellant, therefore, had the opportunity to call as witnesses those persons

who had first-hand knowledge of the matters testified to. That opportunity was, in this context, sufficient recognition of his right to confrontation. See also *In the Matter of S.M.*, 207 S.W.3d 421 (Tex.App.—Fort Worth 2006, pet. denied); *In the Matter of D.L.*, 198 S.W.3d 228 (Tex.App.—San Antonio 2006, pet. denied) (transfer hearing not a stage of criminal prosecution for 6th Amendment purposes); *In the Matter of R.M.*, UNPUBLISHED, No. 04-03-00505-CV, 2004 WL 2450882, 2004 Tex.App.Lexis 11908, Juvenile Law Newsletter ¶ 04-4-17 (Tex.App.—San Antonio 2004, post-conviction relief dism'd) (TYC official allowed to testify to hearsay contained in report summarizing youth's behavior while in TYC); *In the Matter of C.G.*, UNPUBLISHED, No. 04-03-00197-CV, 2004 WL 839632, 2004 Tex.App.Lexis 3508, Juvenile Law Newsletter ¶ 04-2-18 (Tex.App.—San Antonio 2004, no pet.) (TYC official may testify to hearsay contained in TYC summary report).

Counsel in *In the Matter of M.R.*, 5 S.W.3d 879 (Tex.App.—San Antonio 1999, pet. denied), made a motion for continuance after receiving material to be considered at the hearing the day before the hearing was scheduled to begin. The juvenile court overruled the motion and proceeded with the hearing. Under these circumstances, the Court of Appeals held that the juvenile's right to confrontation had been violated:

> M.R.'s counsel attempted to protect his client's rights in accordance with our holding in *J.M.O.* Provided with a copy of the report only one day before the hearing, counsel filed a verified motion for a continuance, invoking his client's right to confrontation, citing *J.M.O.*, and stating his obvious need for more time to identify the persons supplying the information in the report and to secure their presence at the hearing. The denial of this motion and the announcement of not ready prevented M.R. from exercising his right of confrontation. As counsel cogently argues in his appellate brief:
>
> [M.R.] was quite literally denied the chance to confront his accusers. It would have made no difference if [M.R.] had been tried in absentia and the judge had simply read [Cucolo's report] to himself. This situation contravenes the spirit of due process.
>
> We do not hold that live testimony from the persons supplying information in a TYC summary report is always required at a release/transfer hearing.... In this case, however, the State relied solely on [TYC official] Cucolo's testimony, which was based on the opinions and reports of others, and M.R. timely asserted his right of confrontation. The denial of the continuance deprived M.R. of any chance of securing witnesses or arranging any other means to enforce his right of confrontation. Considering these circumstances, the trial court's order transferring M.R. to TDCJ-ID must be reversed.

5 S.W.3d at 882. Cf. *In the Matter of F.D.*, 245 S.W.3d 110 (Tex.App.—Dallas 2008, no pet.) (no abuse of discretion to deny second motion for continuance since defense counsel could not estimate how long proceedings would have to be delayed and court noted appellant's approaching 21st birthday; distinguishing *M.R.*); *In the Matter of L.D.M.*, UNPUBLISHED, No. 01-04-00699-CV, 2005 Tex. App. Lexis 3027, Juvenile Law Newsletter ¶ 05-2-29 (Tex.App.—Houston [1st Dist.] 2005, no pet.) (nothing preserved for appeal where trial counsel conceded in open court that she had an opportunity to review all written materials prior to transfer hearing).

In *In the Matter of L.D.T.*, UNPUBLISHED, No. 10-05-00016-CV, 2006 Tex.App.Lexis 1082, Juvenile Law Newsletter ¶ 06-1-20 (Tex.App.—Waco 2006, pet. denied), appellant argued that the trial court erred in admitting TYC exhibits introduced by the State because the records contained in the exhibits violated the Confrontation Clause. The State countered that L.D.T. forfeited his complaint since he did not specify which of the numerous documents within each exhibit allegedly violated his rights. The Court of Appeals agreed, noting that the objection must specifically refer to the challenged material to apprise the trial court of the precise objection. "L.D.T.'s objection was insufficient to make the court aware of which statements in or portions of the documents he believed violated the Confrontation Clause." 2006 Tex.App.Lexis 1082 *2.

The Court of Appeals in *In the Matter of D.L.W.*, UNPUBLISHED, No. 09-97-118-CV, 1998 WL 552659, 1998 Tex.App.Lexis 5509, Juvenile Law Newsletter ¶ 98-404 (Tex.App.—Beaumont 1998, no pet.), held that victim impact testimony is admissible at the release hearing or transfer hearing on the theory that the hearing is an extension of a disposition hearing at which such testimony is admissible. See also *In the Matter of L.C.H.*, UNPUBLISHED, No. 03-03-00687-CV, 2005 Tex.App.Lexis 7784, Juvenile Law Newsletter ¶ 05-4-11 (Tex.App.—Austin 2005, no pet.) (no abuse of discretion in allowing victim impact testimony that did not impermissibly express opinion regarding punishment).

In *In the Matter of D.W.*, 933 S.W.2d 353 (Tex.App.—Beaumont 1996, writ denied), the juvenile respondent's

attorney learned that TYC destroys the working papers that it uses to assemble a release or transfer recommendation after the recommendation is made to the trial court. The Beaumont Court of Appeals held that this procedure does not violate the child's rights to due process of law. TYC [TJJD] has a duty to preserve material only when it is apparent before the time of proposed destruction that the material may be exculpatory.

The TYC representative, after the transfer hearing but before the juvenile court's decision in *In the Matter of C.D.T., III,* 98 S.W.3d 280 (Tex.App.—Houston [1st Dist.] 2003, pet. denied), sent to the juvenile court judge copies of four letters that had been written by the respondent while in jail awaiting the transfer hearing. Because these were filed with the clerk without being disclosed to counsel for the respondent, the claim was made they were considered by the juvenile court without the one day prior disclosure required by Section 54.11(d). The juvenile court judge in a hearing held on abatement of the appeal stated he could not remember whether he considered the letters in making the transfer decision. The Court of Appeals upheld the transfer decision on the ground there was no showing of harm from providing the letters to the court and that, while defense counsel had no prior access to the letters, he did have access to their author, his client.

In 2013, to address the issue regarding the admissibility of the written materials, Section 54.11(d) was amended to explicitly provide that written materials are admissible. In addition, the same subsection was amended to require the court to provide the written material to the child's attorney at least five days before the hearing rather than one day, in an effort to address some of the issues raised in the cases reviewed.

Right to Expert Assistance. Counsel in *In the Matter of J.E.H.,* 972 S.W.2d 928 (Tex.App.—Beaumont 1998, reh'g overruled), moved the juvenile court for funds with which to employ a mental health expert to testify at the release hearing or transfer hearing. The juvenile court denied that motion, which the Court of Appeals held to be error. The Court of Appeals held that the juvenile court's ruling denied the appellant due process of law under the United States Supreme Court's opinion in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). The Court of Appeals held that a sufficient preliminary showing had been made to require the juvenile court to approve of the motion for funds to employ the expert:

> At a hearing on J.E.H.'s request for expert assistance, the State indicated that it planned to offer evidence at the release-transfer hearing from medical experts. The State also conceded that medical evidence would be relevant. J.E.H. presented an affidavit from a psychologist who indicated that expert opinion evidence would be critical to a determination of J.E.H.'s ability to contribute to society, the risk of future dangerousness, the success of treatment to date, whether J.E.H. is amenable to future treatment, the risk to reoffend, and the best interests of "the persons including Respondent child." We hold that J.E.H. made a sufficient showing to require the appointment of a defense expert if the appointment of such an expert is required for such a hearing by the Due Process Clause of the United States Constitution.
>
> Because of the hearing's impact upon a juvenile with respect to his or her punishment and the overall unfairness of the State's presentation of expert testimony when an indigent juvenile would not have the means to counter such evidence in the absence of the appointment of his or her own expert, we hold that the appointment of such an expert in connection with a release-transfer hearing is required by the Due Process Clause when an indigent juvenile makes the required showing to justify such an appointment. As was noted in *Ake*, 470 U.S. at 83, an indigent does not have a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. In this case, while J.E.H.'s motion was styled "Motion To Provide Funds for Expert Assistance from a Psychiatrist," an examination of the motion shows that it was also a request for such expert assistance from the court, not just a request for funds to hire one's own expert.

972 S.W.2d at 930.

In *In the Matter of L.C.*, UNPUBLISHED, No. 04-9700727-CV, 1998 WL 204927, 1998 Tex.App. Lexis 2545, Juvenile Law Newsletter ¶ 98-2-25 (Tex.App.—San Antonio 1998, no pet.), the Court of Appeals held that counsel was not rendered ineffective by the refusal of the juvenile court to appoint a mental health expert to assist counsel in understanding those issues. The Court of Appeals held that mental issues were not central to the juvenile court's transfer decision in this case so a mental health expert was not essential for the defense. See also *In the Matter of A.A.L.*, UNPUBLISHED, No. 14-06-00027-CV, 2007 Tex.App.Lexis 1845, Juvenile Law Newsletter ¶ 07-2-11 (Tex.App.—Houston [14th Dist.] 2007, no pet.) (appellant

failed to show particularized need for an expert to address a significant issue at transfer hearing).

By contrast, there was extensive testimony at the transfer hearing for the respondent in *In the Matter of R.D.B.*, 20 S.W.3d 255 (Tex.App.—Texarkana 2000, no pet.), that respondent suffered from a brain injury and had been receiving medication for mental illness. TYC recommended transfer to TDCJ. Defense counsel did not request the appointment of a mental health expert to examine the respondent and testify at the hearing. The Texarkana Court of Appeals, quoting extensively from *J.E.H.*, held that failure of counsel to request expert assistance was ineffective assistance of counsel, requiring that the transfer order be set aside:

> R.D.B. put on no professional evidence of any kind. The appointment of a psychiatrist or other mental health professional would have accomplished at least two things: (1) it would have required the State to at least have its own mental health professionals to testify in person; and (2) it would have enabled R.D.B.'s counsel to better test the conclusions contained in the report. It is also possible that R.D.B.'s own expert may have reached an opposite conclusion, i.e., that R.D.B.'s behavioral problems were, in fact, a product of his frontal lobe brain injury.
>
> Under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984)…counsel has a duty to investigate such plainly evident background of mental health problems of his client. In the face of such an unfavorable report, counsel was clearly under a duty to seek, in conjunction with his obligation to provide the best defense possible for his client, the court-appointed assistance of a mental health professional, to which he was entitled. His failure to do so clearly prejudiced R.D.B. and undermines this Court's confidence in the outcome of the proceedings.

20 S.W.3d at 261.

After a rehearing in the juvenile court, in which an appointed psychologist testified for the juvenile respondent, the juvenile court again transferred him to TDCJ. In an appeal from that decision, in which the juvenile's attorney filed a frivolous appeal brief, the Beaumont Court of Appeals affirmed the transfer order. *In the Matter of R.D.B.***,** UNPUBLISHED, No. 09-01-178-CV, 2002 WL 31740269, 2002 Tex.App.Lexis 8639, Juvenile Law Newsletter ¶ 03-1-03 (Tex.App.—Beaumont 2002, no pet.).

Chapter 55 Proceedings. The respondent in *In re B.D.*, 16 S.W.3d 77 (Tex.App.—Houston [1st Dist.] 2000, pet. denied), was transferred to prison to serve the balance of his determinate sentence. The transfer hearing was conducted when the respondent was 19 years old. At the hearing, his lawyer argued that his client needed treatment for mental illness and that it should be provided in the juvenile system. On appeal, he argued that the juvenile court should, on its own, have initiated Chapter 55 proceedings. The Court of Appeals said that Chapter 55 did not apply to these proceedings because the respondent was over 18 years of age at the time of the hearing:

> Appellant was 16 years old when he committed the offense, was adjudged delinquent, and was committed to TYC. However, at the time of the release or transfer hearing from which he appeals, appellant was 19 years old. Both sections 55.01 and 55.02 apply only to a "child," and appellant was not a "child" at that time.
>
> The Family Code defines "child" as a person who is over 10 years old or under 17 years old or one who is 17 years old or older and under 18 years old, if alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before turning 17. Tex. Fam. Code Ann. §51.02(2) (Vernon Supp. 2000). Thus, sections 55.01 and 55.02 did not apply to appellant on the date of his hearing, April 8, 1999, because on that date, he was not a "child." Additionally, Family Code section 55.02 expressly provides that any mental health service ordered for a "child" expires automatically 120 days after he turns 18. Tex. Fam. Code Ann. §55.02(c)(1) (repealed 1999). On April 8, 1999, the date of the hearing, appellant was already 19 years and 79 days old. Thus, the court had no power under these sections to order mental health treatment for him.
>
> We hold that because appellant, was not a "child" under Family Code section 51.02(2), the judge had no duty under Family Code sections 55.01 or 55.02 to initiate mental-health examinations or proceedings.

16 S.W.3d at 79-80.

There was no claim in this case that the respondent was unfit or incompetent to participate in the transfer hearing. Had such a claim been made and substantiated by evidence, it would have presented a substantial constitutional question of due process of law for the juvenile court. The question would be whether a hearing to consider transfer from TJJD to TDCJ is of such importance that

due process precludes conducting it if the respondent cannot understand the proceedings or assist in his or her own defense. If the answer to that question is yes, then the juvenile court will have to improvise a procedure to deal with the claim of unfitness to proceed if the respondent is 18 years of age or older. See *In the Matter of J.A.H.*, UNPUBLISHED, No. 04-99-00560-CV, 2000 WL 1283734, 2000 Tex.App.Lexis 6194, Juvenile Law Newsletter ¶ 00-4-03 (TexApp.—San Antonio 2000, writ dism'd) (holding that, by granting the respondent's motion for appointment of a mental health expert to determine his fitness to undergo a release/transfer hearing, the juvenile court met due process standards on the facts; also holding that Family Code Section 55.04 [now Section 55.31] dealing with fitness to proceed in a discretionary transfer, adjudication, disposition, or modification of disposition hearing does not apply to hearings under Section 54.11).

In an unpublished opinion, the Waco Court of Appeals took up the claim that was not specifically raised in *B.D.*; namely, what to do when a juvenile offender during a transfer hearing raises the issue of incompetency. *In the Matter of N.S.*, UNPUBLISHED, No. 10-01-319-CV, 2004 WL 254215, 2004 Tex.App.Lexis 1449, Juvenile Law Newsletter ¶ 04-1-22 (Tex.App.—Waco 2004, pet. denied). This case was also decided under former Section 55.04 (now 55.31). In its majority opinion, the appellate court answered three important questions: *First*, does due process demand that a juvenile offender be competent before submitting to a transfer hearing under Section 54.11? Yes, since a juvenile's ability to fully enjoy the rights afforded under Section 54.11 depends in large part on his or her mental competence. *Second*, is an oral motion sufficient to invoke the court's obligation to order appropriate examinations under what is now Section 51.20? Yes. In enacting former Section 55.04(b) [now 55.31(b)], the legislature could have easily required a written motion but chose not to do so. "The Legislature's failure to expressly require a written motion indicates that it did not so intend." 2004 Tex.App.Lexis 1449 *23. *Third*, was N.S. harmed by the trial court's failure to order an examination as requested by defense counsel? No, since N.S. complained that the court used an erroneous procedure to determine whether he was competent (reviewing written TYC materials), this constituted "nonconstitutional" error.

The Court of Appeals concluded that N.S.'s "substantial rights" were not impacted by the trial court's actions. Several of the psychiatric evaluations considered by the court concluded that N.S. was "malingering," or faking his psychiatric symptoms. Consequently, the court's failure to order an examination did not affect his "substantial rights" and the order transferring N.S. to prison was deemed appropriate.

Chapter 55 Proceedings Initiated by TJJD. In 2009, the legislature authorized TYC [TJJD] to petition the juvenile court that entered the determinate sentence commitment order to initiate mental health commitment proceedings. Human Resources Code Section 61.0773 [now 244.0125]. The petition is treated as a motion under Section 55.11 (Mental Illness Determination; Examination) and requires the juvenile court to proceed under Chapter 55, Subchapter B (Child with Mental Illness). TJJD, in turn, must cooperate with the juvenile court in any proceeding initiated under this section.

If, as a result of the commitment proceeding, a child is committed to an inpatient mental health facility, the juvenile court must give the child credit toward the TJJD commitment term for any time spent in the facility. Youth with a determinate sentence who are committed to an inpatient mental health facility under Section 244.0125 cannot be released from the facility on a pass or furlough. Additionally, if the term of an order committing a child to an inpatient mental health facility is set to expire before the end of the child's sentence and another such order is not scheduled to be entered, the inpatient mental health facility must notify the juvenile court that originally entered the TJJD commitment order. The juvenile court may then transfer the child to the custody of TJJD, transfer the child to the Texas Department of Criminal Justice (TDCJ), or release the child under supervision, as appropriate. Human Resources Code Section 244.0125.

Public Hearing and Hearing Record. Section 54.11(f) provides that the release hearing or transfer hearing is open to the public "unless the person to be transferred or released under supervision waives a public hearing with the consent of his attorney and the court."

Section 54.11(g) provides:

> A hearing under this section must be recorded by a court reporter or by audio or video tape recording, and the record of the hearing must be retained by the court for at least two years after the date of the final determination on the transfer or release of the person by the court.

Minimum Time Requirement. In *In the Matter of J.B.C.*, UNPUBLISHED, No. 02-07-431-CV, 2008 Tex.App.Lexis 7664 (Tex.App.—Fort Worth 2008, no pet.), appellant argued that the trial court abused its discretion by ordering

him transferred to TDCJ when he had only served about half of his three-year minimum period of confinement. The Fort Worth Court of Appeals disagreed:

> The three-year minimum time requirement discussed at the transfer hearing concerns a limitation on TYC's power to release J.B.C. on parole, rather than a statutory minimum time requirement that J.B.C. was to stay at TYC. *See* Tex.Hum.Res.CodeAnn. §61.081 [245.051] (Vernon Supp. 2008) (providing TYC [TJJD] "may not release the child under supervision without approval of the juvenile court…unless…the child has served at least…3 years, if the child was sentenced to commitment for conduct constituting…a felony of the first degree."). In this case, the minimum time before recommending a transfer from TYC to TDCJ was six months. See 37 Tex.Admin.Code §85.65(e)(2)(B) [380.8565] (2006) (providing that TYC [TJJD] may request a juvenile court hearing for transfer to TDCJ for sentenced offenders who have been convicted of a felony offense and have spent at least six months in a high restriction facility).

2008 Tex.App.Lexis 7664 *4-5.

The appellate court overruled J.B.C.'s complaint on appeal since he had spent more than six months in a high restriction facility before TYC requested that he be transferred, which is what TYC administrative rules required.

Statutory Criteria. Section 54.11(k) sets out statutory criteria to guide the discretion of the juvenile court in deciding whether to release, discharge or, where permissible, to transfer a person to TDCJ:

> [T]he court may consider the experiences and character of the person before and after commitment to the Texas Juvenile Justice Department…, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the Texas Juvenile Justice Department… and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

In a 2010 appeal, it was argued that this transfer procedure does not comport with due process because the jury was not given the opportunity to determine whether appellant met the transfer criteria. *In the Matter of J.B.L.*, UNPUBLISHED, No. 09-09-00217-CV, 2010 Tex.App.Lexis 6269, Juvenile Law Newsletter ¶ 10-3-13A (Tex.App.—Beaumont 2010, no pet.). Under *Apprendi*, a trial court may not increase the punishment imposed over the sentence originally authorized in the jury's verdict. Since the transfer procedure allows a trial court to assess a lesser sentence than the one given by the jury, the Court of Appeals held that J.B.L. was not exposed to a punishment greater than the 30-year determinate sentence assessed by the jury.

In *J.S.L. v. State*, UNPUBLISHED, No. 05-96-00690CV, 1997 WL 348537, 1997 Tex.App.Lexis 3289, Juvenile Law Newsletter ¶ 97-3-18 (Tex.App.—Dallas 1997, no writ), when the court transferred the juvenile from TYC to TDCJ, it stated that one reason for the decision was that the juvenile did not testify at the transfer hearing and express remorse for his offense. The Dallas Court of Appeals reversed the transfer order on the ground that the juvenile court, in making it, violated the juvenile's privilege against self-incrimination since it punished him for exercising his constitutional right to remain silent.

TJJD Criteria and Procedures in Seeking Transfer. The Court of Appeals in *In the Matter of M.P.*, UNPUBLISHED, No. 03-99-00477-CV, 2000 WL 301093, 2000 Tex.App.Lexis 1834, Juvenile Law Newsletter ¶ 00-2-8 (Tex.App.—Austin 2000, no pet.), described the procedures employed by TYC at the time in deciding whether to process a case for possible transfer to TDCJ:

> Leonard Cucolo, a TYC program administrator, testified about TYC programs and procedures. He said TYC has jurisdiction to keep juveniles until they are twenty-one years old [now 19]. Cucolo explained that TYC has a "general resocialization program," in which juveniles are rated on a five-phase system. Phase 0 is the lowest rating at which juveniles begin, and Phase 5 is the highest rating, which Cucolo characterized as "a discharge or release type of phase." A juvenile arriving at TYC at Phase 0 generally can achieve Phase 4 within a year or a year and a half. Cucolo said that making an early transfer request involves substantial procedural protections. A juvenile recommended for early transfer must be at least sixteen years old, have spent at least six months in a TYC or another highly-restrictive facility, and have displayed chronic disruptive behavior. The juvenile's record is reviewed by a special committee, and he undergoes a psychological evaluation to determine amenability to further treatment and risk of re-offending. The juvenile is interviewed and allowed

> to give his perception of his progress and an explanation regarding early transfer. The committee sends a report to three levels of executive administrators, and, upon approval by all three administrators, a district court hearing on the early-transfer motion is requested.

2000 Tex.App.Lexis 1834 *3-4.

The Court of Appeals upheld the juvenile court's decision to transfer respondent to the adult prison system. The Court of Appeals recounted the unfavorable testimony:

> Cucolo said appellant's behavior during his time at TYC was marked with a lack of motivation and effort. Appellant refused to complete a chemical dependency program and never progressed beyond Phase 2 in the resocialization program. Appellant was referred to the TYC security program eighty-nine times in thirty-three months for misconduct such as disruptive or assaultive behavior, and had continued gang activity while at TYC, wearing gang colors, getting involved in gang assaults, and marking TYC property with gang lettering. Appellant was referred four times to a special management plan, which is the most restrictive treatment option at appellant's TYC facility and is the result of serious chronic disruption or assaultive behavior. Cucolo said TYC could offer appellant nothing more than what he had already been offered. He testified it was unlikely that appellant would engage in treatment programs if allowed to remain at TYC, given his lack of effort over thirty-three months at TYC. Cucolo said TYC believed that appellant's continued placement at TYC was disruptive for the other juveniles and that the best place for appellant was TDC-ID.

2000 Tex.App.Lexis 1834 *4-5. See also *In the Matter of J.L.C.*, 160 S.W.3d 312 (Tex.App.—Dallas 2005, no pet.) (testimony about numerous incidents of misconduct, high risk of re-offending, and TYC's recommendation supported transfer decision); *In the Matter of J.A.R.*, 343 S.W.3d 504 (Tex.App.—El Paso 2011, no pet.) (nature of offense, lack of impulse control, aggressive behavior, and risk of continued assaultive conduct in an unstructured environment supported transfer decision); *In the Matter of C.G.*, UNPUBLISHED, No. 05-04-01176-CV, 2005 Tex.App.Lexis 2482, Juvenile Law Newsletter ¶ 05-2-22 (Tex.App.—Dallas 2005, pet. denied) (testimony about incidents of misconduct, diagnosis of anti-social behavior, and TYC's recommendation supported transfer decision).

Even when favorable evidence is introduced during a transfer hearing, a juvenile court does not necessarily abuse its discretion by ordering transfer to TDCJ. In *In the Matter of D.T.*, 217 S.W.3d 741 (Tex.App.—Dallas 2007, no pet.), evidence was presented that appellant was well behaved while in TYC, progressed academically, and completed sex offender therapy. Additionally, his TYC case manager and two teachers disagreed with the transfer recommendation. However, there was also testimony about the seriousness of the underlying offense, an extensive criminal history, TYC parole violations, and behavior placing D.T. "at a high risk to re-offend sexually." 217 S.W.3d at 743. Considering all of the relevant factors, the Court of Appeals could not conclude that the trial court abused its discretion by ordering D.T. transferred to TDCJ. See also *In the Matter of R.A.,* UNPUBLISHED, No. 07-09-0386-CV, 2010 Tex.App.Lexis 8844, Juvenile Law Newsletter ¶ 10-4-12 (Tex.App.—Amarillo 2010) (no abuse of discretion in ordering transfer despite completing sex offender treatment program, academic and vocational achievement, "excellent" behavior, and TYC's recommendation to release on parole); *In the Matter of J.B.L.,* UNPUBLISHED, No. 09-09-00217-CV, 2010 Tex.App.Lexis 6269, Juvenile Law Newsletter ¶ 10-3-13A (Tex.App.—Beaumont 2010, no pet.); *In the Matter of W.R. Jr.*, UNPUBLISHED, No. 04-08-00747-CV, 2009 Tex.App.Lexis 4706, Juvenile Law Newsletter ¶ 09-3-8 (Tex.App.—San Antonio 2009, no pet.); *In the Matter of J.D.D.*, UNPUBLISHED, No. 05-07-01252-CV, 2008 Tex.App.Lexis 8657, Juvenile Law Newsletter ¶ 09-1-1 (Tex.App.—Dallas 2009, no pet.) (no abuse of discretion in ordering transfer despite academic achievement); *In the Matter of S.G.V.*, UNPUBLISHED, No. 05-07-00821-CV, 2008 Tex.App.Lexis 5597 (Tex.App.—Dallas 2008, no pet.) (no abuse of discretion in ordering transfer despite completion of TYC sex offender treatment program and family support); *In the Matter of W.S.H.*, UNPUBLISHED, No. 04-08-00578-CV, 2009 Tex.App.Lexis 699 (Tex.App.—San Antonio 2009, no pet.) (no abuse of discretion in ordering transfer despite testimony about youth's leadership qualities).

In *In the Matter of D.W.H.*, UNPUBLISHED, No. 08-99-00187-CV, 2000 WL 1643511, Juvenile Law Newsletter ¶ 00-4-21 (Tex.App.—El Paso 2000), the Court of Appeals upheld a juvenile court transfer of respondent from TYC to TDCJ on the following testimony:

> At the transfer hearing, Cucolo testified that during D.W.H.'s four-year stay at TYC, he did not avail himself to the treatment programs available to him. Instead, he engaged in disruptive, assaultive, threatening behavior. Specifically, he was involved in approximately 155 incidents of misconduct that required him

> to be referred to the security unit. Of those 155 incidents, he was placed in security 100 times, and 128 of those incidents were considered as a "substantial disruption." He was also involved in twelve incidents wherein he was a danger to others: two involved destruction of property, another four involved assaulting students, and one involved an escape risk. His last security referral and placement to security occurred as recently as one month before the transfer hearing was conducted. D.W.H. was committed to TYC for aggravated sexual assault, but his progress in TYC's resocialization program for that type of offender was nonexistent, and his effort in that program was minimal. Based partly on his behavior during his stay at TYC, Cucolo testified that D.W.H. had a high risk of re-offending. His behavior at TYC has also disrupted the treatment program for other juveniles at TYC.

2000 WL 1643511 *2. See also *In the Matter of C.E.F.W.,* UNPUBLISHED, No. 04-08-00854-CV, 2009 Tex.App.Lexis 7005 (Tex.App.—San Antonio 2009, no pet.) (no abuse of discretion in transferring youth to TDCJ based on failure to progress in sex offender therapy, 331 documented incidents, and egregious and violent nature of offense); *In the Matter of C.R.*, UNPUBLISHED, No. 04-06-00494-CV, 2007 Tex.App.Lexis 114, Juvenile Law Newsletter ¶ 07-1-12 (Tex.App.—San Antonio 2007, no pet.) (no abuse of discretion in transferring youth given TYC's recommendation, previous offense, failure to comply with parole requirements, continued drug use, and association with people engaged in criminal activity); *In the Matter of C.F.*, UNPUBLISHED, No. 05-05-00554-CV, 2005 Tex.App.Lexis 8895, Juvenile Law Newsletter ¶ 05-4-17 (Tex.App.—Dallas 2005, no pet.) (TYC's recommendation and evidence about youth's misconduct supported trial court's transfer decision).

The Dallas Court of Appeals upheld transfer of respondent from TYC to TDCJ in *In the Matter of B.J.M.*, UNPUBLISHED, No. 05-00-00179-CV, 2000 WL 1659539, 2000 Tex.App.Lexis 7487, Juvenile Law Newsletter ¶ 0-4-22 (Tex.App.—Dallas 2000, no pet.), on the basis of evidence that focused on respondent's gang activities while at TYC:

> The court liaison, Cucolo, testified B.J.M. was not progressing in the resocialization process at TYC and had assaulted approximately fourteen other juveniles during the previous nineteen months. The court liaison's report shows B.J.M. had sixty-three referrals and thirty-four placements in the security unit in the year and a half he had been in TYC. Cucolo testified that the psychologist who examined B.J.M. believed there was a very high probability that B.J.M. would reoffend. As a representative of TYC, Cucolo asked the court to transfer B.J.M. to TDCJ. All nine members of the TYC special services committee agreed B.J.M. should be transferred to TDCJ.
>
> Although B.J.M. was involved in at least sixty-three incidents in the nineteen months he was in TYC, he contends that he was actually the victim in many of the incidents. Throughout most of B.J.M.'s testimony he attempted to explain how he was not at fault in the assaults alleged by TYC. In those instances in which he did not claim to be the victim, B.J.M. contended the assault was only horseplay, or a misunderstanding. However, he admitted to the psychologist that he had been inducted into the Hoover 107 Crips gang when he was sixteen, and he testified at trial that many of the incidents which occurred at TYC were gang related. B.J.M testified he was not actually part of a gang, he was just "hanging out with them and stuff," and had only said he was a gang member to get a better placement at TYC. At trial he repeatedly denied responsibility for his behavior.
>
> In part because of the unwillingness of B.J.M. to take responsibility for his actions, the psychologist stated in her evaluation that further treatment at TYC would be ineffective. She reported that B.J.M. had made minimal progress and needed greater structure than TYC could provide. B.J.M. had not demonstrated responsiveness to treatment efforts and was unlikely to respond to further efforts at rehabilitation at TYC. The psychologist felt B.J.M. needed a more restrictive setting than was available at TYC and recommended he be transferred to TDCJ.

2000 Tex.App.Lexis 7487 *6-7.

The San Antonio Court of Appeals upheld a transfer order in *In the Matter of D.V.*, UNPUBLISHED, No. 04-00-00729-CV, 2001 WL 1265685, 2001 Tex.App.Lexis 7110, Juvenile Law Newsletter ¶ 01-4-41 (Tex.App.—San Antonio 2001, no pet.). The Court of Appeals relied primarily on the respondent's disciplinary record while in TYC:

> At the transfer hearing, TYC called Court Liaison Leonard Cucolo, who recommended that appellant be transferred to TDCJ. Cucolo based that recommendation on a review of appellant's case file and a clinical interview conducted by a TYC psychologist. Although appellant would not reach the age of 18 until November 2001, TYC decided to request his transfer to TDCJ

> at the age of 16. Cucolo testified that appellant was at a high risk to reoffend, he was not amenable to further treatment, and he was not motivated to change. Finally, Cucolo testified that during the 15 months appellant was in TYC custody, appellant was involved in 77 incidents of misconduct. Those incidents included four assaults on TYC staff and 14 assaults on students or youth within the facility. Based on those facts, and the impediment appellant's disruptions caused to the progress of other youth, TYC recommended that appellant be transferred.
>
> Appellant also testified at the transfer hearing. His testimony included a statement that he had not participated in some of the therapies offered at TYC because he did not feel he needed them. Appellant admitted to causing 40 incidents of misconduct, and agreed that his attitude was a problem. Additionally, appellant's father testified that his son should not be transferred because at TDCJ he would likely not receive the treatment he would at TYC. Appellant's father also testified that his son probably did not understand the importance of participating in therapy at TYC.

2001 Tex.App.Lexis 7110 *5-6. See also *In the Matter of M.M.J.M.*, UNPUBLISHED, No. 08-03-00214-CV, 2004 WL 178611, 2004 Tex.App.Lexis 925, Juvenile Law Newsletter ¶ 04-1-18 (Tex.App.—El Paso 2004, no pet.) [trial court's decision to transfer youth to TDCJ was not arbitrary but based on relevant statutory factors under Section 54.11(k)]; *In the Matter of D.T.*, UNPUBLISHED, No. 10-03-076-CV, 2003 WL 23120203, 2003 Tex.App.Lexis 10914, Juvenile Law Newsletter ¶ 04-1-15 (Tex.App.—Waco 2003, no pet.) (no abuse of discretion in transferring youth to prison since he had not progressed in TYC's general resocialization program and thus was not a candidate for the sex offender treatment program).

Findings of Fact and Conclusions of Law. In *C.D.R. v. State*, 827 S.W.2d 589 (Tex.App.—Houston [1st Dist.] 1992, no writ), the appellant filed a request that the juvenile court make formal findings of fact and conclusions of law to support the decision to transfer appellant to TDCJ. The juvenile court refused, which was upheld on appeal. The juvenile court made certain factual determinations, which were sufficient to permit appellate review for abuse of discretion:

> The court found that the release hearing was being conducted more than 30 days prior to appellant's eighteenth birthday; that appellant had served 13 months of a 15-year sentence; that appellant was still in need of rehabilitation; and that appellant's transfer to TDCJ was in the best interest of appellant and the public.

827 S.W.2d at 591.

Unlike the requirement in Section 54.04(f) relating to dispositions, there is no requirement in Section 54.11 that the juvenile court judge, without a request from a party, must state his or her reasons for transfer. *Charles v. State*, UNPUBLISHED, No. 05-93-01812-CV, 1994 WL 708291, 1994 Tex.App.Lexis 4024, Juvenile Law Newsletter ¶ 95-1-3 (Tex.App.—Dallas 1994, no writ).

Appeals and Habeas Corpus. Family Code Section 56.01(c)(2) gives the child the right to appeal from an order transferring him or her to TDCJ. By implication, the child may not appeal from an order refusing to release him or her under supervision. The State may not appeal from a juvenile court's decision not to transfer a TJJD youth to TDCJ. The child's appeal goes first to the appropriate Court of Appeals as a civil case and then may be reviewed as a discretionary matter by the Texas Supreme Court. Section 56.01(a).

Further, under Section 56.01(g), "[a]n appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of the person, institution, or agency to whose care the child is committed, unless the juvenile court so orders." That means that the child goes to TDCJ on the juvenile court transfer to await the outcome of any appeal of the transfer decision. See Chapter 19 for a discussion of appeals in juvenile cases.

The standard of review by the appellate courts is whether the juvenile court abused its discretion in transferring the juvenile to TDCJ. For examples of the application of that standard, see *In the Matter of J.J.*, 276 S.W.3d 171 (Tex.App.—Austin 2008, pet. denied) (no abuse of discretion in transferring juvenile who engaged in violent, assaultive behavior before and after commitment to TYC); *In the Matter of J.D.P.*, 149 S.W.3d 790 (Tex.App.—Fort Worth 2004, no pet.) (no abuse of discretion in transferring juvenile whose mental illness did not prevent him from completing TYC treatment programs); K.L.M. *v. State*, 881 S.W.2d 80 (Tex.App.—Dallas 1994, no writ) (no abuse of discretion in transferring juvenile who had served one year for murder in face of TYC recommendation against transfer); *J.R.W. v. State*, 879 S.W.2d 254 (Tex.App.—Dallas 1994, no writ) (no abuse of discretion in transferring juvenile who had served 22 months for capital murder in face

of TYC recommendation against transfer); *In the Matter of C.L., Jr.*, 874 S.W.2d 880 (Tex.App.—Austin 1994, no writ) (no abuse of discretion in transferring juvenile in light of statutory criteria); *In the Matter of J.C.D.*, 874 S.W.2d 107 (Tex.App.—Austin 1994, no writ) (no abuse of discretion in transferring juvenile who had served less than one year for murder in face of TYC recommendation against transfer); *Garrett v. State,* 847 S.W.2d 268 (Tex.App.—Texarkana 1992, no writ) (no abuse of discretion in transferring juvenile who had served 10 months for attempted capital murder when TYC witness testified that recent treatment progress may have been contrived to obtain release); *C.D.R. v. State*, 827 S.W.2d 589 (Tex.App.—Houston [1st Dist.] 1992, no writ) (no abuse of discretion in transferring juvenile for aggravated sexual assault in light of recommendations against parole by TYC and juvenile's own mother).

The 1995 changes in the hearing procedure, providing that any juvenile not transferred to TDCJ-CID by age 21 would automatically transfer to adult parole (for capital murder, it began in 2003), meant that a judicially-ordered transfer from TYC to TDCJ would be made only if recommended by TYC because only TYC could initiate the transfer process. However, in 2007, as a result of the age reduction of TYC jurisdiction from 21 to 19, TYC adopted administrative rules providing that it would request a transfer hearing on every youth that could not complete the minimum period of confinement before turning 19, even if TYC was not recommending transfer to prison. This provision is still in TJJD's administrative rules. 37 Texas Administrative Code Section 380.8565.

Petitioner in *Ex parte Valle*, 104 S.W.3d 888 (Tex.Crim.App. 2003), filed a petition for writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure to challenge the lawfulness of his incarceration in TDCJ on a determinate sentence adjudication. Use of Article 11.07 is restricted to persons sentenced to prison for a felony conviction. The petition is filed in the court of conviction, but release from prison can be ordered only by the Court of Criminal Appeals. The Court held that, because an adjudication of delinquency is not a conviction of crime, even in a determinate sentence case, the writ procedure of Article 11.07 is unavailable to petitioner. See also *In re Brooks*, No. 01-11-00658-CV, 2011 WL 5331599 (Tex.App.—Houston [1st Dist.] 2011, no pet.) (while Court of Criminal Appeals lacks jurisdiction over habeas proceeding from an adjudication against a juvenile, district courts have such jurisdiction under the Texas Constitution) and *In re J.C.L.*, No. 10-11-00407-CV, 2011 WL 5221766 (Tex.App.—Waco 2011, no pet.) (J.C.L. had adequate remedies besides mandamus relief to challenge detention, including appeal, if trial court denied his pre-adjudication habeas corpus petition). The Court also suggested that the constitutional writ of habeas corpus is available:

> Because all juvenile adjudications—including appeals—remain on the civil side of our judicial system unless transferred to a criminal court, Article 11.07 should not be used to transport juvenile cases to the criminal side for the single, specific proceeding of an application for writ of habeas corpus.
>
> The appeal procedures in the Juvenile Justice Code do "not limit a child's right to obtain a writ of habeas corpus." We have held that Article V, section 8 of the Texas Constitution gives the district court plenary power to issue the writ of habeas corpus. Although we express no opinion on the matter, we notice that a court of civil appeals held that it had appellate jurisdiction of an appeal from a habeas corpus proceeding in which the validity of an adjudication of delinquency was challenged but upheld, and that several courts of appeals have entertained appeals when writs of habeas corpus were issued by district courts on the application of juveniles accused of delinquent conduct.

104 S.W.3d at 890.

K. After Transfer to the Department of Criminal Justice

Once the sentenced person is in the custody of TDCJ's Correctional Institutional Division, adult rules respecting parole eligibility and mandatory release generally apply. Although transferred juveniles have not been convicted of a criminal offense, they are eligible for release on parole as though they had been. *In the Matter of S.C.*, 790 S.W.2d 766 (Tex.App.—Austin 1990, writ denied). The timing of release from TDCJ is in the hands of the Board of Pardons and Paroles, and neither TJJD nor the juvenile court has any further authority over the case. Government Code Section 499.053(c). Further, the person is entitled to receive good conduct time retroactively and to have counted for parole eligibility any time the person was detained in a detention facility or served in the custody of TJJD. Government Code Section 499.053(c).

Parole Eligibility. For a determinate sentence offense committed on or after September 1, 1993, parole eligibility rules for so-called 3g offenses (except capital murder) and cases in which a deadly weapon finding was made require

the offender to serve one-half of the sentence, without good conduct credit, or 30 years, whichever is less, but in no event less than two calendar years, to become eligible for parole. Government Code Section 508.145(d). Parole eligibility for offenses not on the 3g list and without a deadly weapon finding require the offender to serve one-fourth of the sentence with credit for good conduct or 15 years, whichever is less. With maximum good conduct credit, one-fourth of a sentence can be served in one-twelfth of the sentence.

For a determinate sentence offense committed before September 1, 1993, if the person was adjudicated for a so-called "3g" offense—capital murder, murder, aggravated kidnapping, or aggravated sexual assault—or if the court or jury made a finding that he or she used or exhibited a deadly weapon during the commission of an offense or during immediate flight therefrom, he or she becomes eligible for parole after he or she has actually served one-fourth of his or her sentence or two calendar years, whichever is greater. Good conduct credit does not advance the parole eligibility date.

Capital Murder Presented a Special Case. Prior to the change in law creating life without parole for capital murder, there was a special parole eligibility rule for an adult given a life sentence for capital murder. Under a 1993 amendment, such an inmate was required to serve 40 calendar years to become eligible for parole. Government Code Section 508.145(b). When the 1993 amendments were made, the list of 3g offenses requiring service of one-half of the sentence for parole eligibility omitted capital murder because it was subject to an even longer eligibility delay. However, because a juvenile adjudicated for capital murder cannot receive a life sentence, he or she did not come under the 40-year rule. A juvenile given a determinate sentence for capital murder came under the ordinary parole eligibility rule of one-fourth of the sentence. If a deadly weapon finding was entered in the judgment by the juvenile court judge, however, then the case came under the one-half rule.

In 2001, the legislature enacted Government Code Section 499.053(d) to provide that adult parole eligibility for a juvenile with a determinate sentence for capital murder is achieved in one-half of the sentence, whether or not there is a deadly weapon finding. The enactment applies only to offenses committed on or after September 1, 2001.

Mandatory Release. If an inmate is not released on parole, he or she may be eligible for mandatory conditional supervision when calendar time plus good conduct time equals the sentence. The released individual serves the balance of the sentence under parole-type supervision. Government Code Section 508.148.

In 1987, the legislature provided that inmates convicted of certain offenses were not eligible for mandatory supervision; that is, they must, if not paroled, serve their entire sentences in prison. A juvenile transferred to TDCJ from TJJD who was adjudicated for capital murder, murder (first degree felony only), aggravated kidnapping, or aggravated sexual assault or who was found to have used or exhibited a deadly weapon was not eligible for mandatory release under supervision. Government Code Section 508.149(a).

In 1995, the legislature added to the list of determinate sentence offenses the following offenses for which mandatory release is not available per Section 508.149, Government Code: sexual assault, aggravated assault, aggravated robbery, and injury to child or elderly or disabled individual. Although all but the state jail felony level injury to child or elderly or disabled individual is eligible for a determinate sentence, only the first degree felony level of that offense is ineligible for mandatory release.

In 1997, arson with death or bodily injury was added to the list of determinate sentence offenses under Section 53.045; that offense was already in Government Code Section 508.149(a) as an offense not eligible for mandatory release.

Also in 1997, second degree murder and second or third degree felony level indecency with a child were added to the list of offenses not eligible for mandatory release in Section 508.149, Government Code. Second degree murder had long been eligible for a determinate sentence, so this change meant juveniles given a determinate sentence for second degree murder occurring on or after September 1, 1997, who were later transferred to TDCJ were not eligible for mandatory release. In 1995, second degree felony indecency with a child was added to the list of determinate sentence offenses; a third degree felony indecency with a child offense is not a determinate sentence offense. Thus, the only juveniles ineligible for mandatory release under this change are those adjudicated for a second degree felony level of that offense committed on or after September 1, 1997.

In 2009, first degree felony criminal solicitation under Penal Code Section 15.03 was added to the list of offenses ineligible for mandatory release under Section 508.149(a).

Since both first and second degree felony criminal solicitation have been determinate sentence offenses since 1995, this change means juveniles adjudicated for a first degree felony for offenses committed on or after September 1, 2009, are not eligible for mandatory release.

For offenses committed on or after September 1, 1996, a parole panel has the authority to block mandatory release of an inmate by making a finding that "the inmate's accrued good conduct time is not an accurate reflection of the inmate's potential for rehabilitation" and that "the inmate's release would endanger the public." Government Code Section 508.149(b). This means that, for offenses committed on or after September 1, 1996, the inmate is not entitled to mandatory release, even on an offense for which mandatory release is a possibility.

CHAPTER 22: Schools and the Juvenile Justice System

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In 1995, while the legislature was revising Title 3 of the Family Code by House Bill 327, it was also completely rewriting the Education Code by Senate Bill 1. By engaging in both tasks simultaneously, the legislature for the first time systematically considered questions involving the relationships between these two major public systems devoted to children. As a result, several innovative changes were enacted dealing with the relationship.

This chapter deals with seven aspects of the relationship between schools and the juvenile justice system: (1) the requirement that schools be notified of arrests and adjudications of juveniles for certain offenses; (2) the requirement that schools notify police of certain offenses committed on a school campus or at school functions; (3) suspensions, removals, and expulsions from schools; (4) the requirement that schools that expel students refer them to the juvenile court; (5) the requirements that school districts establish disciplinary alternative education programs (DAEPs) and that certain juvenile boards establish juvenile justice alternative education programs (JJAEPs); (6) the requirements relating to the public education of children in the juvenile justice system; and (7) school procedures and standards in truant conduct cases.

A. Reporting Juvenile Justice Actions to Schools

In 1993, the legislature enacted Article 15.27 of the Code of Criminal Procedure to require, in certain circumstances, that schools be notified of arrests and adjudications of students for specified offenses. The statute applies to all students, whether juveniles or adults.

Exception to Juvenile Records Confidentiality. Article 15.27 is an exception to the confidentiality requirements relating to records of a juvenile court, clerk of court, juvenile probation department, or prosecuting attorney. Section 58.007(b). That exception permits the prosecutor's office and probation department to perform various notification duties imposed by Article 15.27.

Law enforcement records—Section 58.008—do not contain a similar exception to the requirement of confidentiality, but one implicitly exists because the specific notification duties imposed on law enforcement agencies by Article 15.27 could not be discharged without an implied exception to law enforcement confidentiality rules.

Covered Offenses. Not all offenses are covered. Article 15.27(h) specifies the criminal offenses that require school notification. Information must be related to one or more of the covered offenses before school notification is required. In addition, notification is permitted by confidentiality restrictions only in circumstances in which it is required.

Before 1997, the statute included only very serious assaultive offenses, weapons offenses, drug offenses, and organized criminal activity. The statute appeared to be aimed principally at gang activity.

In 1997, the legislature changed the scope of the offenses covered by the mandatory reporting requirements of Article 15.27. Senate Bill 133 struck the list of offenses contained in Article 15.27(h) and substituted "any felony offense." However, House Bill 1150 kept many of the original offenses, including some misdemeanors. In 2001, the legislature amended Article 15.27(h) to include all of the offenses for which reporting was required by either of the bills enacted in 1997. No substantive change was intended.

In its current form, Article 15.27(h) covers all felonies and the following misdemeanors: unlawful restraint; indecent exposure; assault; deadly conduct; terroristic threat; engaging in organized criminal activity; the unlawful use, sale, or possession of a controlled substance, drug paraphernalia, or marijuana; or the unlawful possession of any weapons or devices listed in Penal Code Sections 46.01(1) – (14) or (16) or 46.05.

Reporting Arrests and Referrals. There are two notification requirements relating to arrests: oral notice within 24 hours and written notice within the following seven days.

In 1997, Article 15.27(a) was amended to add a juvenile court paper referral to an arrest as an event that triggers the obligation of a law enforcement agency to notify a school district. The legislature also amended Article 15.27(a) to address the notification obligation of a law enforcement agency when it cannot ascertain in which school district the person arrested or referred is enrolled. In that event, the agency is required to notify the district in which "the student is believed to be enrolled."

Oral Arrest Notice. When a law enforcement agency takes a child "who the agency knows or believes is enrolled as a student in a public primary or secondary school" into custody for a covered offense, it is required to orally notify the appropriate superintendent or superintendent's designee of the arrest. Article 15.27(a). If the agency believes the arrestee is enrolled as a student in a private primary or secondary school, it is required orally to

notify the principal or principal's designee of the arrest. Article 15.27(e)(1).

Prior to 2011, the oral notice was required to be given within 24 hours of arrest, or by the end of the next school day if the 24-hour period would end on a weekend or holiday. After a change to the law in 2011, the oral notice is required to be given within 24 hours or before the next school day, whichever is earlier. Oral notice may be provided in person or by telephone.

In 2005, the legislature added Subsection (i) to Article 15.27, which allows a person to substitute electronic notification for oral notification whenever oral notification is required by law. If notification is made electronically, then the written notification is not also required.

Written Arrest Notice. Article 15.27(a) requires the law enforcement agency to follow the oral notice with written notice no later than seven-days after the oral notice is given. The seven-day period begins running from the date the oral notice is given, not from the date of the arrest. Because of concerns over confidentiality, the legislature contemplated that the written notice will be hand delivered or mailed, not faxed or emailed. The notice must be contained within an envelope. The envelope must be marked "personal and confidential." Under Article 15.27(i), however, electronic notification may be substituted for oral notification, in which case, the secondary written notification is not required.

Content of Arrest Notice. In 1997, the legislature specified the content of the oral or written arrest notification. It provided that the notification must "contain sufficient details of the arrest or referral and the acts allegedly committed by the student to enable the superintendent or the superintendent's designee to determine whether there is a reasonable belief that the student has engaged in conduct defined as a felony offense by the Penal Code. The information contained in the notice may be considered by the superintendent or the superintendent's designee in making such a determination." Article 15.27(a). The purpose of the reference to "a felony offense" appears to be to enable the superintendent to determine whether the offense reported mandates removal to a DAEP placement or even expulsion.

In 2007, the legislature added Article 15.27(a-1) to authorize the superintendent or a designee in the school district to send to a school district employee having direct supervisory responsibility over a student the confidential information contained in the Article 15.27(a) notice. However, the superintendent or the designee was required to determine that the employee needed the information for educational purposes or for the protection of the person informed or others. In 2011, the provision was modified to require the superintendent to send the information to each school district employee having direct supervisory responsibility over the student; there is no longer a requirement to determine whether the employee needs the information. This expanded notification requirement is in addition to the requirement to inform each educator with responsibility for the instruction of a student who has engaged in misconduct enumerated in the Education Code. Educators must keep the information received confidential from persons who are not entitled to it, except to the extent that it can be shared with the student's parent or guardian as provided by state and federal law. Education Code Sections 37.006(o) and 37.007(g).

Adjudication or Deferred Prosecution Notice. Upon adjudication or deferred prosecution for a covered offense, the office of the prosecuting attorney acting in the case is required to orally notify the school within 24 hours or before the next school day, whichever is earlier. This oral notice must also include whether the student is required to register as a sex offender under Code of Criminal Procedure Chapter 62. Article 15.27(b). Within seven days after oral notification is given, the prosecutor's office is required to mail written notice to the school. The written notice must "contain a statement of the offense...on which the adjudication…or deferred prosecution is grounded" and "a statement of whether the student is required to register as a sex offender under Chapter 62." Article 15.27(b). As with law enforcement, if the prosecutor substitutes electronic notice for the oral notice, the written notice is not required.

Probation or Parole Notice of Attending New School. If a child is on probation or parole for a covered offense and enrolls in a new school, the probation, parole, or community supervision officer is required to notify the new school of the child's presence. Notification is also required if a child arrested or adjudicated for a covered offense is later removed from a school and then returned to a different school. This notification must occur within 24 hours of learning of the student's transfer or reenrollment or before the next school day, whichever is earlier. Article 15.27(c). The oral notification must be followed by written notification, except that if electronic notification was used in place of the oral notification, then no further notification is required. Article 15.27(i).

In 2011, the Attorney General clarified the notification obligations of the Texas Juvenile Justice Department under Article 15.27(c) regarding a student who has been paroled from state commitment or who has transferred or reenrolled in school. The AG explained that TJJD is not required to furnish additional information beyond the statement of the offense referenced in Article 15.27(b) and whether the student must register as a sex offender. The opinion also made clear that a statement is sufficient if it describes relevant information about the offense and not merely the conduct charged. Attorney General Opinion No. GA-0860 (2011).

What the School Must Do With the Information. As enacted in 1993, Article 15.27 authorized the school district superintendent or private school principal to send to a school employee "having direct supervisory responsibility over the student the information contained in the confidential notice" if the superintendent or principal "determines that the...employee needs the information for educational purposes or for the protection of the person informed or others." Article 15.27(d) and (e)(3) (relating to private schools).

Section 15.27(d) was repealed in 2007 because the identical language was contained in Subsection (e)(3). However, in 2011, that language was removed; the law now requires the notification to be made to all employees having direct supervisory responsibility over the student, with no requirement to determine if the employee needs the information. See also Education Code Sections 37.006(o) and 37.007(g) requiring notification of each educator who has responsibility for the instruction of a student who has engaged in certain misconduct.

In 2007, the legislature amended Article 15.27(c) to require a superintendent or a principal of a private school to notify instructional and support staff who have regular contact with a student who has transferred into or returned to school.

Article 15.27(a) provides: "All personnel shall keep the information received in this subsection confidential. The State Board for Educator Certification may revoke or suspend the certification of personnel who intentionally violate this subsection." A person who discloses information in violation of Article 15.27 commits a Class C misdemeanor. Article 15.27(f).

Education Code Section 37.017 provides that information received by the schools under Article 15.27 "may not be attached to the permanent academic file of the student who is the subject of the report. The school district shall destroy the information at the end of the school year in which the report was filed."

Sex Offender Registration. In 2007, the legislature added Article 15.27(j), which states that the "notification provisions of this section concerning a person who is required to register as a sex offender under Chapter 62 do not lessen the requirement of a person to provide any additional notification prescribed by that chapter." Sex offender registration procedures are discussed in Chapter 20. The responsibility to notify a school district of an adjudication for which registration is required and the contents of that notification are also discussed in Chapter 20. Since 2007, the written notification required of the prosecuting attorney must also include a statement of whether the student is required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure. Article 15.27(b).

In 2007, the legislature also added Subchapter I on Placement of Registered Sex Offenders to Chapter 37 of the Education Code. Subchapter I applies to students who are required to register as sex offenders under Chapter 62, but it does not apply to students who are no longer required to register or who receive an early termination of the obligation to register. Education Code Section 37.302.

Upon receiving notice that a student is required to register, a school district must remove the student from the regular classroom and determine the student's appropriate placement as provided by Subchapter I. Education Code Section 37.303. All registered sex offender students who are on any form of court supervision, including probation, community supervision or parole, must be removed from the regular classroom setting and placed in the appropriate alternative education program for at least one semester. Education Code Section 37.304(a).

Students who transfer to another school during this mandatory semester may be required to either complete an additional semester in an alternative education program or the new school district may count any time the child has already spent in alternative school toward the mandatory placement requirement. Education Code Section 37.304(b). Under Section 37.308, the school district receiving a transfer student who is a registered sex offender has the authority to make a placement decision for the newly enrolled student.

School districts also have the discretion to place students who are required to register but who are not under

any type of court supervision in alternative school for one semester or in the regular classroom. However, the district may not place such students in the regular classroom if the board of trustees determines that the student's presence there will: (1) threaten the safety of other students or teachers; (2) be detrimental to the educational process; or (3) not be in the best interest of the district's students. Education Code Section 37.305.

At the end of the first semester of a student's placement in an alternative setting, the district's board of trustees must convene a committee to review the student's placement in the alternative education program. The committee, composed of various school and parole or probation personnel, must by majority vote determine and recommend to the board of trustees whether the student should be returned to the regular classroom or remain in the alternative setting. Education Code Section 37.306(b). The child, the child's parents, and a representative for the child are not required to be included in the committee to decide the child's placement. If the student is returned to the classroom, the board of trustees must first determine that such placement will not endanger other students or impair the educational process. If the student is retained in the alternative education program, the committee must be convened before the beginning of each school year to review the student's placement in the alternative setting.

Placements under Subchapter I of students with disabilities who receive special education services must be made in compliance with the federal Individuals with Disabilities Education Act (IDEA). 20 U.S.C. Section 1400, et seq. Only a duly constituted admission, review, and dismissal (ARD) committee can review the placement of such a student. However, the ARD committee may request that the board of trustees convene a committee as described in Section 37.306 to assist in conducting the review. Education Code Section 37.307.

Students who are required to attend an alternative education program under Subchapter I must be placed in a disciplinary alternative education program (DAEP) unless there is agreement in a memorandum of understanding (MOU) between the school district and the juvenile board to place the student in a juvenile justice alternative education program (JJAEP). Education Code Section 37.309. The same result occurs if a court orders the placement of the student in a JJAEP. The JJAEP is entitled to funding for such students in the same manner as for students who are expelled and placed in a JJAEP for conduct for which expulsion is permitted but not required under Section 37.007. Education Code Section 37.310.

A student or the student's parent or guardian may appeal a placement decision, but the issue at the conference is limited to the factual question of whether the student is a registered sex offender. If so, the student may be placed in an alternative education program as provided by law. The decision by the board of trustees is final and may not be appealed. Education Code Section 37.311.

Article 15.27(j), added in 2007, mandates: "The notification provisions of this section concerning a person who is required to register as a sex offender under Chapter 62 do not lessen the requirement of a person to provide any additional notification prescribed by that Chapter."

B. School Reports of Information to Law Enforcement

The 1995 legislation that required law enforcement agencies, prosecutors, and probation or parole officers to notify schools of certain juvenile offenses also required schools to notify law enforcement of offenses believed to have been committed on school property or at a school function.

Covered Conduct. The same offenses that under Article 15.27 triggered an obligation to notify schools before that Article was amended in 1997 impose an obligation on schools to notify law enforcement. Education Code Section 37.015(a)(1) – (7). Unfortunately, Section 37.015 was not amended in 1997 to mirror law enforcement's obligations to notify schools of arrests or referrals of students for all felony offenses.

The following offenses are included in the obligations of the school district to notify law enforcement: any offense for which mandatory release from prison is precluded by Government Code Section 508.149; deadly conduct; terroristic threat; controlled substance, drug paraphernalia or marijuana misdemeanors or felonies; various misdemeanor or felony weapons offenses; engaging in organized criminal activity; and any offense for which a student may be expelled under Education Code Subsections 37.007(a), (d), or (e).

In addition to being a covered offense, the conduct must have been committed "in school, on school property, or at a school-sponsored or school-related activity on or off school property, whether or not the activity is investigated by school security officers." Education Code Section 37.015(a).

Who Must Notify. The duty to notify is placed on the principal—or principal's designee—of any public or private primary or secondary school. The principal merely

needs "reasonable grounds to believe" that a covered offense occurred on school property or at a school-related activity. Education Code Section 37.015(a). "Reasonable grounds" is equivalent to the constitutional requirement of "probable cause" that authorizes a law enforcement officer to take a child into custody. Family Code Section 52.01(a)(3).

Education Code Section 37.015(f) provides, "A person is not liable in civil damages for reporting in good faith as required by this section."

Who Must Be Notified. The principal or principal's designee must notify: (1) the district's police department, if one exists; and (2) the police department of a municipality if the school is located in a municipality or, if not, the sheriff of the county in which the school is located. Education Code Section 37.015(a).

In addition, the principal or designee is required to notify "each instructional or support employee of the school who has regular contact with a student whose conduct is the subject of the notice." Education Code Section 37.015(e).

Content of Notification. The content of the notice is unspecified except for the requirement that the notification must include "the name and address of each student the person believes may have participated in the activity." Education Code Section 37.015(b). Presumably, the notification should include all the information that led the principal or principal's designee to conclude there are reasonable grounds to believe an event requiring reporting has occurred. Factual detail is important to enable law enforcement officers to conduct an investigation.

Reports of Drug or Alcohol Offenses. Education Code Section 37.016 provides that a teacher, school administrator, or school employee is not liable in civil damages for reporting to a school administrator or governmental authority a student whom the reporting person suspects of using, passing, or selling on school property any of the following: marijuana or a controlled substance, a dangerous drug, abusable glue, aerosol paint, a volatile chemical, or an alcoholic beverage. This section, unlike Section 37.015, does not impose a legal duty on a school official to make a report but merely immunizes from liability a person who elects to make a report. To the extent this section overlaps with Section 37.015, the latter controls because it imposes a duty to act.

C. Exchange of Information Between Schools and Juvenile Justice Agencies

Schools and juvenile justice agencies have many occasions to share information about children both serve. The federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Section 1232(g), enacted by Congress in 1974, details under what circumstances certain information from a student's educational record may be shared with local community entities, including juvenile justice agencies. A 1994 amendment to FERPA permits educators to share information with juvenile justice officials about children who are at risk of involvement or who have become involved in the juvenile justice system, prior to adjudication, to the extent state law permits.

Sharing Information About Individual Juveniles. In 1999, the legislature enacted two statutes to facilitate the exchange of information between schools and juvenile justice agencies. One was Family Code Section 58.0051. The other was Section 37.084, Education Code. At the time, working together, these statutes allowed the district school superintendent and juvenile probation department in each county to enter into a written interagency agreement to share information about juvenile offenders and to share such information with one another. All information disclosed was required to relate to the juveniles system's ability to serve the student before adjudication. The juvenile justice agency receiving the information was required to destroy it when the child was no longer under the jurisdiction of the juvenile court. Section 37.084 limited the sharing to information that could be released in conformity with FERPA.

In 2011, Section 58.0051 was substantially revised. It now requires, rather than allows, a school district or charter school to disclose, at the request of a juvenile service provider, confidential information contained in the educational records of a student who has been taken into custody, as provided in Section 52.01, or referred to juvenile court for alleged delinquent conduct or CINS. The school district or charter school disclosing the information must keep a record of the disclosed information for at least seven years. The juvenile service provider receiving the information must certify they have agreed not to disclose it to a third party, other than another juvenile service provider, and that they will use the information only to verify the identity of a student involved in the juvenile justice system and to provide delinquency prevention or treatment services to the student. The law allows juvenile service providers to establish internal protocol and to enter

into memorandums of understanding for sharing information with other juvenile service providers. It also includes a provision requiring the requesting entity to pay a fee to the disclosing entity at the same rates as set forth in Chapter 552 of the Government Code [relating to the permissible charges for information under the Public Information Act] unless the fee is waived in a memorandum of understanding or the disclosure is required by other law.

As defined in Section 58.0051, a juvenile service provider is "a governmental entity that provides juvenile justice or prevention, medical, educational, or other support services to a juvenile." It specifically includes: a state or local juvenile justice agency as defined by Section 58.101; health and human services agencies as defined by Government Code Section 531.001; the Health and Human Services Commission; the Department of Family and Protective Services; the Department of Public Safety; the Texas Education Agency; an independent school district; a juvenile justice alternative education program (JJAEP); a charter school; a local mental health or mental retardation authority; a court with jurisdiction over juveniles; a district attorney's office; a county attorney's office; and a children's advocacy center established under Section 264.402. Family Code Section 58.0051(a)(2).

In 2011, along with the revision to Family Code Section 58.0051, Section 37.084, Education Code, was amended to require, rather than permit, the school district superintendent to disclose the records to a juvenile service provider as required by Section 58.0051.

All of the restrictions of FERPA are eliminated by the parent's voluntary consent to the disclosure, which is a very frequent way by which juvenile justice officials obtain educational information from schools about children in the juvenile justice system. Thus obtained, the information is not restricted to pre-adjudication uses. Nevertheless, the statutes should prove useful in those cases in which parental consent is not obtained.

In a Public Information Act opinion, the Attorney General stated that under FERPA a school district is required to disclose to parents, upon their request, a tape recording of a discussion about their child that occurred in a school board executive session. Attorney General Open Records Decision No. OR2001-1581 (2001).

The Attorney General was asked in Attorney General Opinion No. JC-0538 (2002) whether the parent of a minor child has access to school counseling records concerning the child. The Attorney General responded that a parent has a right of access, subject only to a very narrow exception:

> Generally, all student records are available to parents. Only under very narrow and unusual circumstances may a minor child's school counseling records be withheld from a parent. Under the Federal Family Educational and Privacy Rights Act, a public school may withhold a minor child's counseling records from a parent only if the records are kept in the sole possession of the counselor, are used only as the counselor's personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the counselor. Within this circumscribed category, state law permits the counselor to withhold a minor child's records only if the counselor is a "professional," as defined in section 611.001(2) of the Health and Safety Code, and further, if the counselor "determines that release" of such record "would be harmful to the patient's physical, mental, or emotional health." If the counselor does not fall within the category of licensed professional under section 611.001(2) of the Health and Safety Code, section 26.004 of the Education Code prevails, and the parent "is entitled to access to all written records" of the school district "concerning the parent's child, including...counseling records."

Sharing Information for Research and Statistical Purposes. In addition to the sharing of information with juvenile probation departments discussed earlier, the enactment of Section 37.084, Education Code, in 1999 allowed the TEA commissioner to enter into an interagency agreements to share educational information for research and analytical purposes with both the Texas Juvenile Probation Commission and Texas Youth Commission.

In 2005, Section 58.0072, Family Code, was enacted, providing that information collected and maintain by TJPC for statistical and research purposes was confidential and could not be disseminated except as allowed by that section. TJPC was authorized to grant access to certain entities, including TEA, for research and statistical purposes or for any other purposes approved by TJPC. The information released to TEA could be in identifiable form.

In 2007, Section 58.0051(e) was added to clarify that TJPC could grant TEA access to juvenile justice information for research and statistical purposes in accordance with Section 58.0072 and Education Code Section 37.084. Likewise, Section 58.0072(c)(2) was amended clarify that the access must be in conformity with Section 37.084.

Thus, all three statutes work together to allow sharing in both directions for research and statistical purposes.

In 2017, Section 58.072 was renumbered to Section 58.009. References to TJPC and TYC were updated to TJJD in 2015.

D. School District and Juvenile Board Alternative Education Programs

Alternative education is one way of seeking to educate students who present disciplinary problems that impede learning in regular classrooms or present student issues. Without some form of alternative education, schools would be forced to choose between leaving a disruptive student in a regular classroom or expelling the disruptive student from school with no education. Instead of leaving the disruptive student in the regular classroom where he or she can continue to disrupt the teacher and other students, the student is removed from the classroom and placed in an alternative program. Instead of expelling the disruptive student from school, he or she is placed in an alternative learning center or, if the student must be expelled, placed in an alternative learning center operated under the authority of the county juvenile board. If no such program exists, the student may end up expelled to the streets.

The overall philosophy of the 1995 revision of the Education Code was to continue to educate students who, because of misconduct, must be removed from regular classes rather than simply removing them from school with no further education. Thus, the Code encourages the use of district DAEPs instead of expulsion, restricts the offenses for which expulsion is permissible, and, in most instances, mandates that students who are expelled participate in a JJAEP.

There are two kinds of alternative education programs: those operated by school districts and those operated by juvenile boards.

School District Disciplinary Alternative Education Programs (DAEP). Education Code Section 37.008(a) requires each school district to establish a DAEP that meets certain statutory requirements. The DAEP may be on or off campus but must be provided in a setting other than a student's regular classroom. The students assigned to the DAEP must be separated from students not assigned to the DAEP. The program must focus on English language arts, mathematics, science, history, and self-discipline; provide for students' educational and behavioral needs; and provide supervision and counseling. Only teachers who meet all certification requirements established under Subchapter B, Chapter 21, may be employed.

A school district may operate its own DAEP or may combine with other districts to operate a joint program. Education Code Section 37.008(d).

To earn full average daily attendance, the district must provide at least 43,200 minutes of instructional time each school year to students enrolled in a DAEP. Section 42.005, Education Code.

Section 37.008(l) deals with the course offerings that must be made available in a DAEP:

> A school district is required to provide in the district's disciplinary alternative education program a course necessary to fulfill a student's high school graduation requirements only as provided by this subsection. A school district shall offer a student removed to a disciplinary alternative education program an opportunity to complete coursework before the beginning of the next school year. The school district may provide the student an opportunity to complete coursework through any method available, including a correspondence course, distance learning, or summer school. The district may not charge the student for a course provided under this subsection.

Section 37.008(l-1), added in 2011, requires the district to provide the parents of a student placed in a DAEP with written notice of its obligations under Section 37.008(l).

Section 37.008(m) establishes the mission of the DAEP—to enable students to perform at grade level. The commissioner of education is required annually to evaluate the performance of each DAEP.

Assessment of Academic Growth in DAEP. In 2007, the legislature added Education Code Section 37.0082, which requires school districts to conduct an assessment of a student's academic growth if the student is placed in a DAEP for a period of 90 school days or longer. The assessment must occur upon the student's initial placement and upon the student's departure from the program. The assessment instrument utilized must be designed to assess the student's basic skills in reading and mathematics. TEA is required to adopt administrative rules to implement this section of law.

Juvenile Justice Alternative Education Programs (JJAEP). The Education Code requires a juvenile board in

a county with a population greater than 125,000 to establish and operate a juvenile justice alternative education program (JJAEP). Education Code Section 37.011(a). Under Government Code Section 311.005(3), the population of a county is determined by the latest decennial (2010) federal census. There are 26 counties that meet this criterion. In the aggregate, they account for over two-thirds of the population of the State of Texas.

In 2009, the legislature added Education Code Section 37.011(a-1), anticipating that as many as eight additional counties in Texas would fall under the JJAEP mandate after the 2010 census. The change meant that counties that were not mandatory JJAEP counties in 2000 but that in 2010 had populations greater than 125,000 could opt out of operating a JJAEP. The counties that were expected to fit in this group were Hays, Ector, Ellis, Grayson, Gregg, Midland, Potter, and Randall. To opt out, the juvenile board must enter into a memorandum of understanding (MOU) with each school district in the county. The purpose of the MOU is to minimize the number of students expelled who do not receive alternative education services. The MOU must outline the responsibilities of the juvenile board and the school district and require coordination procedures that include: supervision and rehabilitation services, service by probation officers at the DAEP, recruitment of volunteers, and coordination of social services. Education Code Section 37.013. The MOU must be approved by the Texas Justice Department [TJJD] before a county may opt out of the JJAEP requirements. In 2011, Ellis County got subsection (a-2) added and Gregg County got subsection (a-3) added to clearly make them nonmandatory JJAEP counties. Whether or not they will still be covered in (a-2) and (a-3) will depend on their population after the 2020 census; however, subsection (a-1) would still cover them.

A JJAEP in a county mandated to operate one must be approved by TJJD, and the county must submit its written operating policy to TJJD for review and comment. Education Code Subsections 37.011(a) and (g). There is no statutory mandate for TJJD to approve a JJAEP established by a juvenile board in any other county.

The purpose of requiring a JJAEP is to provide for supervision and education of students expelled from public schools. The educational content of the JJAEP must be the same as the district DAEP. Education Code Section 37.011(d). The juvenile board may provide the facilities and services for the program or may contract with a school district to provide them. Section 37.011(e).

In 1997, the legislature made a fundamental change in the manner in which JJAEPs are funded. Under the prior law, the JJAEP students were funded from school district funds that were paid directly by the schools to the juvenile boards for all students placed in the JJAEP. The 1997 law changed this process in a distinct way. Funding for students expelled under the mandatory expulsion provisions of Sections 37.007, which means the students must be served in a JJAEP, is allocated directly from the state, via TJJD, to the juvenile board. However, the school district is responsible for paying the costs of educating students expelled under the discretionary expulsion provisions of Section 37.007. The students' educational needs may be met through placement in a JJAEP, by a private provider, or by the school district, alone or with one or more other school districts (e.g., a regional program), depending on the school district's choice.

In 1997, the legislature amended Section 37.011 to add both subsections (j) and (o), which are virtually identical, to provide for immunity from liability for members of the juvenile board, the county, and the commissioners court to the same extent as the immunity enjoyed by members of a school district board of trustees under Subchapter B of Chapter 22 of the Education Code.

JJAEP: Relationship to County and School Districts. The JJAEP is operated by the local juvenile board. However, its operation affects the commissioners court of the county and all school districts in the county. The Attorney General was asked to explain the relationship between the JJAEP and those two other units of local government. The Attorney General summarized his opinion in Attorney General Opinion No. JC-0459 (2002):

> Outside of its responsibility to provide some funding to the juvenile board and to review that portion of the juvenile board's budget funded with county monies, a county or a commissioners court is not statutorily responsible for any aspect of the development or operation of a juvenile justice alternative education program (JJAEP). Because the juvenile board receives some county funds, the county may have corresponding obligations or liabilities.
>
> A county has no authority to determine which expulsions that are discretionary under section 37.007 of the Education Code will be subject to placement in the JJAEP. See Tex. Educ. Code Ann. § 37.007(b), (c), (e), (f) (Vernon Supp. 2002). A school district's authority to determine which discretionary expulsions will be subject

to placement in a JJAEP stems from its duty to negotiate with the juvenile board an annual memorandum of understanding. See id. §37.011(k), (l). Conversely, the juvenile board's authority to determine which categories of conduct will be subject to placement in the JJAEP is subject to negotiation with the school district. The eligibility criteria set in the memorandum of understanding may be based upon classifications of conduct only.

A school district is not obligated to fund the construction of JJAEP facilities.

A juvenile board may purchase real estate for JJAEP purposes, but a juvenile board may not accept contributed real estate for JJAEP purposes unless the legislature has expressly authorized it to do so.

JJAEP: Mandatory Admission. The legislature contemplated two types of admission to a JJAEP: mandatory and discretionary. The requirement of mandatory admission is established by Education Code Section 37.011(b) and applies when a student is required by law to be expelled. The juvenile court must order attendance in a JJAEP as a condition of probation if the child is given probation, unless the child is placed in a post-adjudication facility. If a mandatorily-expelled student is placed on deferred prosecution, he or she is required to attend the JJAEP for a period not to exceed six months. The court is required to consider the length of the school district's expulsion order in setting JJAEP attendance as a condition of probation or deferred prosecution.

Under a 2003 amendment, the JJAEP is required by Section 37.011(b)(4) to provide timely educational services, regardless of the student's age or whether the juvenile court has jurisdiction over the student. That provision applies only if the child is a resident of the district or is otherwise entitled to admission to the district schools under Education Code Section 25.001(b).

The board of trustees of a school district may, but is not required to, admit a person who is at least 21 and under age 26 for the purpose of completing the requirements for a high school diploma. However, such individuals are not eligible for placement in a JJAEP and may not be placed with students who are 18 or younger in a classroom setting, a cafeteria, or another district-sanctioned school activity. Education Code Sections 25.001(b-1) and (b-2).

Sections 37.011(b)(1) and (2) require the juvenile court, when mandatory admission applies, to require the JJAEP "in the county in which the student resides" to provide educational services to the student.

JJAEP: Discretionary Admission. There is some conduct for which a district has the discretion to expel a student and admit him or her to a JJAEP. Education Code Section 37.011(g) requires that a JJAEP be subject to "a written operating policy developed by the local juvenile justice board and submitted to TJJD for review and comment." Education Code Section 37.012(a) requires the district, in accordance with its MOU with the juvenile board, to pay the costs of educating children in the JJAEP who have been expelled under the discretionary provisions of Section 37.007. In addition, Section 37.012(d), added in 2003, may be read to implicitly approve of juvenile court orders placing a child in a JJAEP who has not been expelled. It provides that a school district is not required to provide funding to a juvenile board for a student who has not been expelled but who has been assigned by a court to a JJAEP. However, it is unclear that this is actually the intent, given there is no express language allowing a court to order a child to a JJAEP if the school has not first expelled the student. A proper subject for the written operating policy would be to define those students who may be placed in the JJAEP who are outside the scope of the statutory mandatory and discretionary admission rules.

When Students Enter the JJAEP. Family Code Sections 53.02 and 54.01 require that the child expelled in a mandatory JJAEP county begin attendance in the JJAEP as soon as released from detention unless the MOU provides otherwise. The rationale behind this amendment is to ensure that expelled students are immediately placed into an educational setting so that there is no expulsion "to the street." It is important to recall that Education Code Section 37.007, referenced by these two statutes, includes both the mandatory and discretionary expulsion offenses.

Those children expelled for the mandatory offenses will be eligible for state funding through TJJD from the first day of attendance in the JJAEP. If they are not in detention, the should be placed into the JJAEP immediately; if they are in detention, they should be placed into the JJAEP immediately upon release. For those children expelled for the offenses for which the school has discretion to expel, the MOU required under Section 37.011 of the Education Code must address which educational setting is most appropriate for the child (i.e., a school setting, the JJAEP, a private vendor, etc.). If the MOU does not specifically address the placement of the discretionary expulsion children, upon release from detention under Sections

53.02 or 54.01, these children must be placed into the JJAEP.

This policy is reinforced by provisions in Section 37.010(a) that emphasize the key reform concept of Chapter 37, which is "no kids expelled to the street," at least not in the mandatory JJAEP counties. This section provides that an expelled student shall attend an educational program from the date of expulsion. The particular educational placement will vary depending on several factors. If the expulsion was mandatory and the county is a mandatory JJAEP county, the student will attend the JJAEP unless the student is detained or is receiving treatment under an order of the juvenile court. If the expulsion was discretionary, the MOU between the school and the juvenile board will address which educational placement is appropriate for the student. A parent or guardian of a student who is not under the juvenile court's jurisdiction may also exercise the right to withdraw the student from public school and seek education through other means, such as private school, home schooling, charter school, etc.

JJAEP: Special Education Children. In 2001, the legislature provided protections regarding placement in JJAEPs of children with special education needs. During that session, then-TJPC reported that as many as 21 percent of the children in JJAEPs were entitled to special education services under federal law. That percentage was 22 percent for school year 2006–2007. Section 37.004(b) requires a determination by a special education student's admission, review, and dismissal (ARD) committee that placement in a JJAEP or anywhere besides in the classroom is appropriate. Subsection (c) prohibits a student with a disability who receives special education services from being placed in alternative education programs solely for educational purposes. Finally, under Subsection (d), a teacher of special education students in a JJAEP must have the appropriate certificate or permit.

JJAEP: Length of Placement. Placement in a JJAEP cannot extend beyond the probation term. The juvenile court may order placement in a JJAEP that is for a term shorter than the probation term. The school district may agree to readmit the student before the end of the court-ordered probation. Of course, this action would require the juvenile court to modify the dispositional order to release the student from the condition of probation requiring attendance at the JJAEP. Education Code Sections 37.010(f) and 37.011(i).

After a student has successfully completed the probation term set by the juvenile court and is discharged from probation, "if the student meets the requirements for admission into the public schools established by this title, a district may not refuse to admit the student, but the district may place the student in its disciplinary alternative education program." Education Code Section 37.010(f).

E. School Discipline: Suspensions, Removals, and Expulsions

The three major sanctions that schools may use for disciplinary infractions are suspensions, removals, and expulsions. Suspensions are brief separations of the student from normal school activities. Removals are separations potentially much longer in duration and result in placement of the student in a school district disciplinary alternative education program (DAEP). Expulsions are total separations of the student from the district and often will result in placement of the student in an alternative education program operated by a juvenile board (JJAEP).

Student Code of Conduct. Each district is required to adopt a student code of conduct. Education Code Section 37.001. By 2003 enactment, each open enrollment charter school is also required to adopt a student code of conduct. Education Code Section 12.131. The student code of conduct is central to the authority of the school to discipline students. Section 37.001 provides:

> (a) The board of trustees of an independent school district shall, with the advice of its district-level committee established under Subchapter F, Chapter 11, adopt a student code of conduct for the district. The student code of conduct must be posted and prominently displayed at each school campus or made available for review at the office of the campus principal. In addition to establishing standards for student conduct, the student code of conduct must:
>
> (1) specify the circumstances, in accordance with this subchapter, under which a student may be removed from a classroom, campus, disciplinary alternative education program, or vehicle owned or operated by the district;
>
> (2) specify conditions that authorize or require a principal or other appropriate administrator to transfer a student to a disciplinary alternative education program;
>
> (3) outline conditions under which a student may be suspended as provided by Section 37.005 or expelled as provided by Section 37.007;

(4) specify that consideration will be given, as a factor in each decision concerning suspension, removal to a disciplinary alternative education program, expulsion, or placement in a juvenile justice alternative education program, regardless of whether the decision concerns a mandatory or discretionary action, to:

(A) self-defense;

(B) intent or lack of intent at the time the student engaged in the conduct;

(C) a student's disciplinary history; or

(D) a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct;

(5) provide guidelines for setting the length of a term of:

(A) a removal under Section 37.006; and

(B) an expulsion under Section 37.007; and

(6) address the notification of a student's parent or guardian of a violation of the student code of conduct committed by the student that results in suspension, removal to a disciplinary alternative education program, or expulsion.

(7) prohibit bullying, harassment, and making hit lists and ensure that district employees enforce those prohibitions; and

(8) provide, as appropriate for students at each grade level, methods, including options, for:

(A) managing students in the classroom, on school grounds, and on a vehicle owned or operated by the district;

(B) disciplining students; and

(C) preventing and intervening in student discipline problems, including bullying, harassment, and making hit lists.

(b) In this section:

(1) "Bullying" has the meaning assigned by Section 37.082.

(2) "Harassment" means threatening to cause harm or bodily injury to another student, engaging in sexually intimidating conduct, causing physical damage to the property of another student, subjecting another student to physical confinement or restraint, or maliciously taking any action that substantially harms another student's physical or emotional health or safety.

(3) "Hit list" means a list of people targeted to be harmed, using:

(A) a firearm, as defined by Section 46.01(3), Penal Code;

(B) a knife, as defined by Section 46.01(7), Penal Code; or

(C) any other object to be used with intent to cause bodily harm.

(b-1) The methods adopted under Subsection (a)(8) must provide that a student who is enrolled in a special education program under Subchapter A, Chapter 29, may not be disciplined for conduct prohibited in accordance with Subsection (a)(7) until an admission, review, and dismissal committee meeting has been held to review the conduct.

(c) Once the student code of conduct is promulgated, any change or amendment must be approved by the board of trustees.

(d) Each school year, a school district shall provide parents notice of and information regarding the student code of conduct.

(e) Except as provided by Section 37.007(e), this subchapter does not require the student code of conduct to specify a minimum term of a removal under Section 37.006 or an expulsion under Section 37.007.

Provisions dealing with suspensions, removals, and expulsions make reference to the student code of conduct.

In 2005, Section 37.001(a)(4) was amended to allow school districts to consider self-defense, intent or lack of intent, and a student's disciplinary record when evaluating incidents that could result in suspension, removal, or expulsion. The amendment was in response to the fact that, each school year there are a number of students who innocently engage in a prohibited behavior who are sent to an alternative education setting regardless of their lack

of intent. It is important to note, however, that school districts were not mandated to consider these factors but simply required to specify in their student codes of conduct whether consideration of these factors would be given.

In 2009, Section 37.001(a)(4) was again amended, in part because the legislature continued to hear of students engaging in prohibited behavior and being sent to an alternative education setting regardless of their intent or disciplinary history. Effective June 19, 2009, the student code of conduct must specify that self-defense, intent or lack of intent, disciplinary history, and disability must be considered before a student may be placed in a DAEP, placed in a JJAEP, or expelled.

Time-Outs and Similar Measures. Schools sometimes use time-outs and other measures short of suspension, removal, or expulsion as disciplinary measures. Education Code Section 37.0021 includes restrictions on the use of such measures, particularly when the subject is a special education student:

> (a) It is the policy of this state to treat with dignity and respect all students, including students with disabilities who receive special education services under Subchapter A, Chapter 29. A student with a disability who receives special education services under Subchapter A, Chapter 29, may not be confined in a locked box, locked closet, or other specially designed locked space as either a discipline management practice or a behavior management technique.
>
> ...
>
> (c) A school district employee or volunteer or an independent contractor of a district may not place a student in seclusion. This subsection does not apply to the use of seclusion in a court-ordered placement, other than a placement in an educational program of a school district, or in a placement or facility to which the following law, rules, or regulations apply:
>
> (1) the Children's Health Act of 2000, Pub. L. No. 106-310, any subsequent amendments to that Act, any regulations adopted under that Act, or any subsequent amendments to those regulations;
>
> (2) 40 T.A.C. Sections 720.1001-720.1013; or
>
> (3) 25 T.A.C. Section 412.308(e).
>
> (d) The commissioner by rule shall adopt procedures for the use of restraint and time-out by a school district employee or volunteer or an independent contractor of a district in the case of a student with a disability receiving special education services under Subchapter A, Chapter 29. A procedure adopted under this subsection must:
>
> (1) be consistent with:
>
> (A) professionally accepted practices and standards of student discipline and techniques for behavior management; and
>
> (B) relevant health and safety standards; and
>
> (2) identify any discipline management practice or behavior management technique that requires a district employee or volunteer or an independent contractor of a district to be trained before using that practice or technique.
>
> …
>
> (f) For purposes of this subsection, "weapon" includes any weapon described under Section 37.007(a)(1). This section does not prevent a student's locked, unattended confinement in an emergency situation while awaiting the arrival of law enforcement personnel if:
>
> (1) the student possesses a weapon; and
>
> (2) the confinement is necessary to prevent the student from causing bodily harm to the student or another person.
>
> (g) This section and any rules or procedures adopted under this section do not apply to:
>
> (1) a peace officer performing law enforcement duties, except as provided by Subsection (i);
>
> (2) juvenile probation, detention, or corrections personnel; or
>
> (3) an educational services provider with whom a student is placed by a judicial authority, unless the services are provided in an educational program of a school district.

(h) This section and any rules or procedures adopted under the section apply to a peace officer only if the peace officer:

(1) is employed or commissioned by a school district; or

(2) provides, as a school resource officer, a regular police presence on a school district campus under a memorandum of understanding between the district and a local law enforcement agency.

In 2002, the Attorney General was asked about the lawfulness of a school district policy on the use of force against students that provides:

PHYSICAL RESTRAINT. Any District employee may, within the scope of the employee's duties, use and apply physical restraint to a student if the employee reasonably believes restraint is necessary in order to:

(1) Protect a person, including the person using physical restraint, from physical injury.

(2) Obtain possession of a weapon or other dangerous object.

(3) Protect property from serious damage.

(4) Remove a student refusing a lawful command of a school employee from a specific location, including a classroom or other school property, in order to restore order or to impose disciplinary measures.

(5) Restrain an irrational student.

The Attorney General said that the policy is lawful but must be applied with particular care regarding special education students and is subject to the restrictions of Education Code Section 37.0021 and any regulations promulgated by the Commissioner of Education regarding special education students. Attorney General Opinion No. JC-0491 (2002).

The use of restraints by juvenile probation and supervision officers is governed by administrative rules promulgated by TJJD in Title 37 Texas Administrative Code Chapters 341 and 343. The use of restraints in a JJAEP is governed by Title 37 Texas Administrative Code Chapter 348.

Suspensions. A suspension may be used for any conduct specified as grounds for suspension by the student code of conduct. Education Code Section 37.005(a). A suspension may not exceed three school days. Education Code Section 37.005(b). The statute does not specify any particular procedure for imposing a suspension. The suspension may be imposed by "[t]he principal or other appropriate administrator." Education Code Section 37.005(a).

A suspension may be out-of-school or in-school. It simply means the student is prohibited from attending his or her normal classes and from participating in school-sponsored activities for up to three school days. Suspension is a less severe sanction than removal from class and placement in a DAEP. Prior law limited the total number of days of a suspension during a semester to six [Education Code Section 21.301(a) (repealed)], but that limitation no longer exists.

Education Code Section 37.005(a), as amended in 2003, authorizes suspension of a student who "engages in conduct identified in the student code of conduct adopted under Section 37.001 as conduct for which a student may be suspended." Education Code Section 37.001(a) requires each school district to adopt a student code of conduct. The student code of conduct must "outline conditions under which a student may be suspended as provided by Section 37.005 or expelled as provided by Section 37.007." Education Code Section 37.001(a)(3).

The Education Code does not specify any particular procedure that must be used to effect a suspension. However, the United States Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), held that, under a similar procedure in Ohio permitting a suspension of up to 10 days, the student was entitled to notice and hearing prior to suspension or, in an emergency, as soon as possible after suspension. The Court said:

[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

419 U.S. at 581, 95 S.Ct. at 740.

The Court stated that, for suspensions of short duration, it was refraining from requiring schools to permit students the opportunity to secure counsel, to confront and cross-examine witnesses, and to call their own witnesses. The Court cautioned, however, that longer suspensions might require a more elaborate notice and hearing process.

Removals and Expulsions. A removal takes the student from his or her ordinary classes and may result in the placement of the student in a DAEP. Removals are ordinarily of longer duration than suspensions. Removals can occur: (1) because of classroom behavior; or (2) because of criminal offenses committed on or off school property. Expulsion is the separation of the student from the school, including a district disciplinary alternative education program, for a period of time that is longer than three school days. Because expulsion is a total separation from the school, it is regarded as a more serious step than removal from regular classroom and placement in a district disciplinary alternative education program.

1. Children Under Six Cannot Be Removed

Education Code Section 37.006(l) provides that a child who is younger than six years old cannot be removed from class and placed in a DAEP except in instances in which the child has brought a firearm to school as provided by Section 37.007(e)(2).

2. Children Under Ten Cannot Be Expelled

Education Code Section 37.006(f) deals with expulsion of children who are too young to be subject to the jurisdiction of the juvenile court—under the age of ten. It provides that a student who is younger than ten and who has committed an expellable offense under Section 37.007, other than bringing a firearm to school, must be removed from the regular classroom and placed in the DAEP but not expelled. A child younger than ten cannot be expelled, except as provided by Section 37.007(e). Section 37.007(e) simply states that if a child younger than 10 brings a firearm to school, he or she must be expelled under federal law but the school must educate him or her in the DAEP as opposed to expelling to the street. An elementary school student may not be placed in a DAEP with any other student who is not also an elementary school student.

3. Classroom Behavior

The legislature gave the classroom teacher the power to initiate the removal process. Education Code Section 37.002(b) provides:

> A teacher may remove from class a student:
>
> (1) who has been documented by the teacher to repeatedly interfere with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn; or
>
> (2) whose behavior the teacher determines is so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn.

The first standard requires repeated interferences with learning, while the second is satisfied by a single, but more severe, instance of interference or disruption.

The principal may not return a removed student to the same classroom without the consent of the removing teacher unless the school's placement review committee determines that "such placement is the best or only alternative available." Education Code Section 37.002(c). The principal may place the removed student in "another appropriate classroom, into in-school suspension, or into a disciplinary alternative education program." Education Code Section 37.002(c).

If a student commits an offense in the classroom for which removal or expulsion is required by Education Code Sections 37.006 or 37.007, respectively, the teacher is required to remove the student from the class. Education Code Section 37.002(d). Such a removed student cannot be returned to the same class without the teacher's consent unless the placement review committee determines that placement in that classroom is the "best or only alternative available." Education Code Section 37.002(d).

The legislature has specified procedures for removals by a teacher for classroom behavior. They apply both to criminal and non-criminal classroom misbehavior. Within three class days, there is to be a conference or a hearing attended by the campus behavior coordinator or other appropriate administrator, a parent or guardian of the student, the teacher removing the student from class, and the student. The conference or hearing may go forward "whether or not each requested person is in attendance after valid attempts to require the person's attendance." Education Code Section 37.009(a).

Pending the conference, the student is not permitted to be in a regular classroom. Education Code Section

37.009(a). Presumably, that means the student was suspended for three class days shortly after physical removal from the classroom.

The conference is run according to the Supreme Court's short-term suspension guidelines in *Goss v. Lopez:* "At the conference, the student is entitled to written or oral notice of the reasons for the removal, an explanation of the basis for the removal, and an opportunity to respond to the reasons for the removal." Education Code Section 37.009(a).

Education Code Section 37.009(a) also mandates, that after the conference, the campus behavior coordinator, after considering the factors in Section 37.001(a)(4) [self-defense, intent, history, disability]:

> shall order the placement of the student for a period consistent with the student code of conduct. Before ordering the suspension, expulsion, removal to a disciplinary alternative education program, or placement in a juvenile justice alternative education program…the behavior coordinator must consider whether the student acted in self-defense, the intent or lack of intent at the time the student engaged in the conduct, the student's disciplinary history, and whether the student has a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct, regardless of whether the decision of the behavior coordinator concerns a mandatory or discretionary action. If school district policy allows a student to appeal to the board of trustees or the board's designee a decision of the campus behavior coordinator or other appropriate administrator, other than an expulsion under Section 37.007, the decision of the board or the board's designee is final and may not be appealed. If the period of the placement is inconsistent with the guidelines included in the student code of conduct under Section 37.001(a)(5), the order must give notice of the inconsistency. The period of the placement may not exceed one year unless, after a review, the district determines that the student is a threat to the safety of other students or to district employees.

Despite the mandatory language in the law, the removal is not truly mandatory, as the behavior coordinator must consider specified criteria before ordering the removal. This language was added in 2013, thereby creating a concept sometimes referred to as "discretionary mandatory."

4. Criminal Offenses

There is substantial overlap in conduct meeting the elements of certain criminal offenses that can result in removal to a DAEP or expulsion to a JJAEP. The main differences involve where the conduct occurs and, occasionally, whom it involves.

Mandatory Expulsion for Criminal Conduct, Generally. Education Code Section 37.007(a) mandates expulsion for certain criminal offenses committed "on school property or while attending a school-sponsored or school-related activity on or off of school property." As in other "mandatory" removals in the Education Code, the decision of whether or not to expel must take into account self-defense, intent or lack of intent, the student's disciplinary history, and whether the student has a disability that substantially impairs his or her capacity to appreciate the wrongfulness of the conduct. Thus, the expulsion is not truly mandatory, though it will be described as such because that term is used in statute to distinguish between the possible outcomes and the funding mechanisms for them.

Mandatory expulsion applies to conduct containing the elements of the following offenses: (1) unlawfully carrying weapons under Section 46.02, Penal Code; (2) possessing a prohibited weapon under 46.05, Penal Code; (3) aggravated assault; (4) sexual assault; (5) aggravated sexual assault; (6) arson; (7) murder; (8) capital murder; (9) criminal attempt to commit murder or capital murder; (10) indecency with a child; (11) aggravated kidnapping; (12) aggravated robbery; (13) manslaughter; (14) criminally negligent homicide; (15) continuous sexual abuse of young child or children; (16) felony selling, giving away, or delivering marijuana, a controlled substance, or a dangerous drug; and (17) felony selling, giving away, or delivering an alcoholic beverage or feloniously committing "a serious act or offense while under the influence of alcohol." To fit the category of mandatory expulsion, this conduct must have occurred on school property or while attending a school-sponsored or school-related activity, whether on or off property.

Discretionary Expulsion for Criminal Conduct, Generally. The same conduct for which expulsion is considered mandatory under Section 37.007(a) may result in discretionary expulsion under Section 37.007(b)(3) if it occurs within 300 feet of school property, as measured from any point on the school's real property line.

In 2003, the legislature added Education Code Section 37.007(i) to clarify that the district in which a student is enrolled has discretion to expel a student who commits an offense for which expulsion would be mandatory under Subsection (a) while that student is on school property of another district or is attending a school-sponsored or school-related activity of a school in another district.

A student who commits the offense of breach of computer security under Section 33.02, Penal Code, is subject to discretionary expulsion if the conduct involves accessing a school district's computer, network, or system and knowingly altering, damaging, or deleting school property or information or breaching any other computer, network or system. It does not matter where the conduct was committed. Sections 37.007(b)(4) and (5).

Removal and placement in a DAEP is mandatory for some conduct for which expulsion is discretionary. These offenses are discussed below.

Mandatory Removal for Criminal Conduct, Generally. Section 37.006 provides for mandatory removal and placement in a DAEP for certain conduct. There is a general provision that requires placement in a DAEP for any felony conduct committed on or within 300 feet of school property or while attending a school-sponsored activity on or off property. Section 37.006(2)(A). This obviously overlaps with some of the conduct for which expulsion is an option, either mandatory or discretionary. When expulsion is mandated, that will control over mandatory removal. When expulsion is discretionary, the school district has options between removal and expulsion. Section 37.006(m) makes it clear that removal to a DAEP is not required if the student is expelled under Section 37.007 for the same conduct for which removal would be required.

Removal and placement in a DAEP is mandated for public lewdness or indecent exposure occurring on or within 300 feet of school property or at a school-sponsored or school-related activity. Section 37.006(c).

Offenses for which removal to a DAEP is mandated but expulsion is also an option are addressed below.

Assault and Retaliation. Section 37.006(b) provides for mandatory removal and placement in a DAEP if a student engages in conduct on or off school property that contains the elements of the offense of retaliation (Section 36.06, Penal Code) against any school employee. However, if the student engages in assault causing bodily injury or any conduct for which expulsion is mandatory under Section 37.007(a), described earlier, against an employee or volunteer of the school district in retaliation for or as a result of that person's employment or association with a school district, then Section 37.007(d) provides for mandatory expulsion. It does not matter if the conduct occurs on or off school property or while attending a school-sponsored activity.

If a student engages in assault causing bodily injury while on or with 300 feet of school property or while attending a school-sponsored or school-related activity, the student is subject to mandatory removal and placement in a DAEP under Section 37.006(a)(2). However, if the person the student assaults is a school district employee or volunteer, then the student is also subject to discretionary expulsion under Section 37.007(b). The student is also subject to mandatory removal to a DAEP under the general provision relating to a felony committed on or within 300 feet of school property or at a school-sponsored activity. Section 37.006(2)(A), if the student knew the person assaulted was a public servant.

Firearms Offenses. As mandated by federal law, expulsion is required of a student who brings a firearm to school. Education Code Section 37.007(e). The expulsion period must be for "a period of at least one year" except the superintendent may "modify the length of the expulsion in the case of an individual student." Education Code Section 37.007(e)(1). Even though an expulsion, rather than a removal, is addressed, the statute provides that the district must provide DAEP services to a student under age 10 who is expelled under the firearms provision. Education Code Section 37.007(e)(2). The district may provide DAEP services to a student 10 years old or older who is expelled under this provision. Education Code Section 37.007(a)(3).

In 2009, exceptions to this rule were created for students who use, exhibit, or possess a firearm at an approved off-campus target range facility and who prepare for or participate in a school-sponsored shooting sports competition or a shooting sports educational activity sponsored or supported by the Parks and Wildlife Department or an organization working with that department. Education Code Section 37.007(k). These exceptions do not, however, authorize a student to bring a firearm onto school property to prepare for or participate in such school-sanctioned activities. Education Code Section 37.007(l).

Expulsion is discretionary if a student possesses a firearm within 300 feet of school property. Section 37.007(b)(3)(B).

Location-Restricted Knife. Prior to 2017, it was unlawful under Section 46.02, Penal Code, for any person to intentionally, knowingly, or recklessly carry an illegal knife on or about his or her person anywhere other than on his or her own premises or premises under his or her control or inside of or directly en route to a motor vehicle owned by the person or under his or her control. Such an offense was a Class A misdemeanor. Per Section 46.03, Penal Code, it was a third degree felony to carry an illegal knife onto certain locations, including schools, polling places, court offices, and airports.

In 2017, the legislature made changes to laws regarding the carrying of certain knives, in an attempt to provide greater clarity in the law. Section 46.02 was amended so that only persons under the age of 18 are generally prohibited from carrying what is called a "location-restricted knife," defined as a knife with a blade over five and one-half inches. It is not an offense if the person under 18 is on premises he or she owns or that are under his or her control, is inside of or directly en route to a motor vehicle or watercraft owned by or under the control of the person, or is under the direct supervision of his or her parent or legal guardian. The offense is a Class C misdemeanor. Because this is an offense based on age only and is not unlawful for an adult, it meets the definition of a status offense.

The change in 46.02, Penal Code, means that people 18 and over may lawfully carry location-restricted knives on or about their persons anywhere except for a place listed in Section 46.03, Penal Code. Section 46.03 was updated to include locations where it is unlawful to carry a firearm, even with a license to carry. With one exception, carrying a location-restricted knife in to a prohibited location under Section 46.03 is a Class C misdemeanor. It is, however, a third degree felony to take a location-restricted knife on the "premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or a passenger transportation vehicle of a school or educational institution."

The change in law created an issue with regard to expulsions. Section 37.007(a)(1), Education Code, provides for mandatory expulsion for offenses under Section 46.02 or 46.05, Penal Code. There is no reference to Section 46.03. Section 46.05 does not apply to knives. While Section 46.02 does address knives, only those under the age of 18 may commit an offense under that provision. Thus, mandatory expulsion for this offense applies only to students who are under 18. It also represents the only mandatory expulsion for a Class C misdemeanor. For those age 18 and over, the commission of the felony offense of possessing a location-restricted knife on school premises or at a school activity or on a school transportation vehicle is covered under the mandatory removal to a DAEP under Section 37.006(a)(2)(A), Education Code.

In addition to changing how an offense regarding possession of a knife may be committed, the legislature changed the definition of what actually is prohibited. Prior to the 2017 changes, an illegal knife was defined as a knife with a blade over five and one-half inches, a hand instrument designed to cut or stab another by being thrown (e.g. throwing star), a dagger (including but not limited to a dirk, stiletto, or poniard), a bowie knife, a sword, or a spear. In contrast, a "location-restricted" knife is simply a "knife with a blade over five and one-half inches." This definition certainly encompasses some of the terms deleted, such as a bowie knife, which is generally at least 8 inches in length, as well as a sword. However, throwing stars and even small throwing knifes are not encompassed in this definition. This distinction is important for school-related issues because removal and expulsion with regard to location-restricted knives is triggered only by items that are actually prohibited by law.

Drug and Alcohol Offenses. As discussed earlier, expulsion is mandatory if a student sells, gives, or delivers to another person or possesses, uses, or is under the influence of marijuana, a controlled substance, or a dangerous drug while on school property or at a school-sponsored event, if such conduct is a felony. Additionally, the student is subject to mandatory expulsion if he or she sells, gives, or delivers an alcoholic beverage to another person, commits a serious act or offense while under the influence of alcohol, or possesses, uses, or is under the influence of an alcoholic beverage if the conduct committed is a felony. Section 37.007(a)(3).

All of the same conduct, if it does not rise to the level of a felony, subjects the student to mandatory removal and placement in the DAEP if it occurs on school property, within 300 feet of school property, or at a school-related activity. Sections 37.006(a)(2) and 37.007(b)(2)(A).

A student who engages in conduct that meets the elements of an offense relating to an abusable volatile chemical under Sections 485.031-485.034, Health and Safety Code, is subject to mandatory removal to a DAEP if the conduct occurred on or within 300 feet of school property or while attending a school-sponsored activity. Section 37.006(2)(E). The student may also be expelled under Section 37.007(2)(B).

False Alarm and Terroristic Threat. A student who engages in conduct containing the elements of the offenses of false alarm or report under Penal Code Section 42.06 or terroristic threat under Penal Code Section 22.07 is subject to mandatory removal to a DAEP under Section 37.006(a). While there is no requirement that the student be on campus or at a school function when the false alarm or threat is made, the alarm or threat must involve a public school. The student is also subject to discretionary expulsion under Section 37.007(b).

Deadly Conduct. Section 37.007(b)(2)(D) provides that a student who engages in deadly conduct under Section 22.05, Penal Code, committed while on or within 300 feet of school property or while at a school-sponsored or school-related activity, is subject to discretionary expulsion. It bears noting that if the offense involves a firearm and occurs while on school property or at a school-sponsored or school-related event, Section 37.007(a) would make expulsion mandatory for possession of the firearm. Additionally, if the offense involves a firearm and occurs within 300 feet of school property, removal to a DAEP becomes mandatory under the felony catch-all provision in Section 37.006(a)(2).

Criminal Mischief. A school district has discretion to expel a student who engages in felony criminal mischief under Section 28.03, Penal Code, without regard to where the conduct occurred. However, the student must be referred to juvenile court, whether or not the student is expelled. If the offense occurred on or within 300 feet of school property or while at a school-sponsored or school-related activity, placement in a DAEP is mandatory under the Section 37.006(a)(2(A) felony catch-all provision.

Certain Serious Offenses Against Other Students. Section 37.007(b)(4) provides for discretionary expulsion of certain serious offenses committed against other students. These offenses are aggravated assault, sexual assault, aggravated sexual assault, murder, capital murder, attempted murder or capital murder, and aggravated robbery. It does not matter if the offense occurred on or off campus or while attending a school-sponsored or school-related activity. All that matters is that it involve another student. If it did occur at school or at a school-sponsored activity, however, expulsion would be mandatory under Section 37.007(a), as all of these offenses are listed there. Additionally, if it occurred within 300 feet of school property, mandatory removal to a DAEP would be required under Section 37.006(2)(A).

Title 5 Felonies and Aggravated Robbery. Title 5 felonies are those felony offenses found in Chapters 19 through 22 of the Penal Code. They are considered offenses against persons, and include offenses such as murder, sexual assault, kidnapping, and aggravated assault.

Section 37.006(c) requires the school to remove a student to the DAEP for conduct occurring off campus and while not in attendance at a school-sponsored or school-related activity if the student receives deferred prosecution or is adjudicated for a Title 5 felony offense or for felony aggravated robbery under Section 29.03, Penal Code. Removal is also required if the superintendent or the superintendent's designee has a reasonable belief that the student engaged in such conduct, even if there has not been a court action.

Section 37.0081 was amended in 2007 to allow for expulsion for such offenses. The expulsion is discretionary, not mandatory, but the board of trustees or designee must provide an opportunity for hearing and must make certain findings. After an opportunity for hearing, the district may expel a student who is juvenile if the student was referred to juvenile court, charged with, placed on deferred prosecution for, or adjudicated for a Title 5 felony offense or aggravated robbery. After an opportunity for hearing, the district may expel a student who is an adult if the student was arrested for, charged with, given deferred adjudication for, or convicted of such an offense. However, the expulsion may occur only if the board or the board's designee determines the student's presence in the regular classroom threatens the safety of other students or teachers, will be detrimental to the educational process, or is not in the best interests of the district's students.

A student who is expelled under Section 37.0081 must be placed in a JJAEP if the school district is located in a county that operates a JJAEP or contracts with the juvenile board of another county for a JJAEP; if there is no JJAEP for the school district, the student must be placed in a DAEP.

The board or designee may order the placement regardless of when the conduct occurred, where the conduct occurred, whether the student was enrolled in the district when the conduct occurred, or whether the student has successfully completed any court disposition requirements imposed in connection with the conduct.

The decision of the board or the board's designee is final and may not be appealed. The student is subject to the placement until the student graduates from high school,

the charges are dismissed or reduced to a misdemeanor, or the student completes the term of placement or is assigned to another program. These provisions apply even if the student moves to another school district in the state.

The student is entitled to the same reviews as a student removed and placed in a DAEP set out in Section 37.009(e), which means reviews at least every 120 days. If there is any conflict between Section 37.0081, Education Code, and Section 37.007, relating to expulsion for serious offenses, Section 37.007 prevails.

Discretionary Removal for Other Non-School Felony Conduct. In addition to its authority to remove a student for non-school related Title 5 felonies and aggravated robbery, a school district has some discretion to remove a student to a DAEP conduct occurring off-campus and while the student was not a school-sponsored or school-related activity. For such removal, the superintendent or designee must have a reasonable belief that the student engaged in a felony offense other than aggravated robbery or a Title 5 felony and must find that the continued presence of the student in the regular classroom threatens the safety of other students or teachers or will be detrimental to the educational process. Section 37.006(d),

Section 37.006(e) authorizes the superintendent to base the reasonable belief required in Subsection (d) upon all available information, including information received under Article 15.27, Code of Criminal Procedure. Article 15.27 requires law enforcement, prosecutors, and juvenile and adult probation and parole personnel to notify school officials when students are taken into custody, referred, and adjudicated for certain offenses specified in that article. See the discussion earlier in this chapter.

5. Serious or Persistent Misbehavior

If a student has been removed from the classroom and placed in a DAEP, he or she may be expelled from alternative education. As originally written, Education Code Section 37.007(c) authorized discretionary expulsion "if the student, while placed in a disciplinary alternative education program for disciplinary reasons, continued to engage in serious or persistent misbehavior that violated the district's student code of conduct." In 1997, "while placed" was substituted for "after being placed" in order to make it clear that an expulsion for "serious or persistent misbehavior" may occur only when the student was in the district DAEP at the time of the misbehavior. It is not sufficient that the student was at some time in the past in the DAEP but then returned to the regular classroom before engaging in the misbehavior.

In 2011, Section 37.007(c) was amended to allow expulsion only if the student "engages in a documented serious misbehavior while on the program campus despite documented behavioral interventions." This change removed the district's ability to expel a student for "persistent misconduct." The intent was to eliminate expulsion for behaviors such as truancy, talking back to a teacher, sleeping in class, dress code violations, and reading during math class.

Serious misbehavior is defined as: deliberate violent behavior that poses a direct threat to the health or safety of others; extortion; coercion as defined in Penal Code Section 1.07; public lewdness under Penal Code Section 27.07; indecent exposure under Penal Code Section 21.08; criminal mischief under Penal Code Section 28.03; personal hazing under Education Code Section 37.152, and harassment of a student or district employee under Penal Code Section 42.07(a)(1). Expulsion from a DAEP under Section 37.007(c) constitutes conduct indicating a need for supervision. Family Code Section 51.03(b)(4). Referral to the juvenile court is mandatory. Family Code Section 52.041.

6. Notice to Educators Regarding Removal

In 2005, the legislature added Section 37.006(o), which reads:

> In addition to any notice required under Article 15.27, Code of Criminal Procedure, a principal or a principal's designee shall inform each educator who has responsibility for, or is under the direction and supervision of an educator who has responsibility for, the instruction of a student who has engaged in any violation listed in this section of the student's misconduct. Each educator shall keep the information received under this subsection confidential from any person not entitled to the information under this subsection, except that the educator may share the information with the student's parent or guardian as provided for by state or federal law. The State Board for Educator Certification may revoke or suspend the certification of an educator who intentionally violates this subsection.

Subsection (o) was added to ensure that educators responsible for the instruction and/or supervision of a student are made aware of the behavior a student engaged in that resulted in the placement in a DAEP. This was

deemed crucial to student and staff safety. Educators who receive such information must keep it confidential unless they are authorized to release the information to other educators or to the student's parent or guardian under state or federal law. Violation of this confidentiality provision may result in a teacher's certification being suspended or even revoked.

7. Removal: Proof of Criminal Violation and Due Process

When removal to a DAEP is mandatory, the behavior coordinator does not typically have available the less drastic alternatives of return to an appropriate classroom or in-school suspension that are otherwise available under Education Code Section 37.002(c). However, even though the statute says removal is mandatory, Section 37.009(a) has provided since 2015 that the behavior coordinator, before ordering the removal to DAEP, must consider: whether the student acted in self-defense, the student's intent, or lack thereof, in engaging in the conduct; the student's disciplinary history, and whether the student has a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct. Thus, the removal is not as mandatory as it once was.

The Education Code sets out no procedures except for those instances in which the mandatory removal criminal conduct occurs in the classroom. In that circumstance, the same procedures must be followed as for non-mandatory removals from the classroom. Education Code Section 37.009(a).

Two major issues are presented: *First*, what constitutes a reasonable belief that the student engaged in criminal conduct mandating removal and placement in a DAEP? *Second*, what procedures must be employed to effect removal and placement?

Is the school required to await a juvenile court adjudication before initiating removal and placement action? That would present a very difficult circumstance for the schools. There will be a delay of several weeks before it is realistic to expect an adjudication hearing in juvenile court. Further, many juvenile cases terminate in consensual disposition without a formal adjudication of guilt.

The fact that the legislature required a removal hearing before the campus behavior coordinator or other appropriate administrator within three school days for removal from a classroom for criminal behavior [Education Code Section 37.009(a)] is strong evidence that the legislature did not intend to require schools to await juvenile court adjudication. Requiring a hearing within three school days is inconsistent with an expectation that the school will await juvenile court adjudication action in the case.

Because there is no rational basis for distinguishing between criminal offenses occurring in the classroom and those occurring elsewhere on the question of awaiting juvenile court action, there is some reason to believe the legislature did not intend to require schools to await juvenile court action in either situation.

There must be a reasonably reliable basis for believing that the student committed a criminal offense that warrants removal and placement in a DAEP. However, the determination for purposes of removal and placement can be made by school officials and need not await juvenile court action.

The second issue is what procedures must be employed at the school administrative hearing. In 1997, the legislature amended Section 37.009(a) to provide for a prompt post-removal conference in cases of removals by a principal or other appropriate official as well as removals by a teacher. The conference must be held no later than the third class day after removal and will involve the campus behavior coordinator or other appropriate administrator, school official, student, parent or guardian, and teacher, if the removal was made by a teacher. At the conference, the student is entitled to written or oral notice of the reasons for the removal, an explanation of the basis for the removal, and an opportunity to respond to the reasons for the removal.

Before the 1997 amendment, there was no due process protection in statute. However, guidance from *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), suggested that a due process hearing was required at a minimum because the deprivation of removal and placement in a DAEP is at least as serious as the short-term suspensions imposed in *Goss*. The *Goss* case requires: (1) oral or written notice of the charges; (2) if the student denies the charges, an explanation of the evidence the school has; and (3) an opportunity for the student to present his or her side of the story. 419 U.S. at 581, 95 S.Ct. at 740. This process is required as a matter of constitutional law without regard to the wishes of the legislature. Depending upon the circumstances, a more elaborate hearing than that specified in *Goss* may be required. See *Johnson v. Humble I.S.D.,* 799 F.Supp. 43 (S.D.Tex. 1992) (claim of hearing procedure more elaborate than provided in *Goss* requires balancing on a case-by-case basis).

The student in *Nevares v. San Marcos Consolidated Independent School District*, 111 F.3d 25 (5th Cir. 1997) obtained an injunction prohibiting the school district from removing him from his regular classroom and placing him in a DAEP for commission of a felony off campus without providing notice and a hearing. The Fifth Circuit reversed the court-ordered injunction on the ground that there is no federal constitutional right that was infringed by placing Nevares in the DAEP:

> The Supreme Court has held that the suspension from school without some kind of notice and hearing may violate property and liberty interests (citing *Goss v. Lopez*). The state statute to which the Court pointed in *Goss* gave students the entitlement to a public education. Timothy Nevares is not being denied access to public education, not even temporarily. He was only to be transferred from one school program to another program with stricter discipline. This alternative program is maintained by Texas schools for those students whose violations fall short of triggering suspension or expulsion, but who for reasons of safety and order must be removed from the regular classroom.…
>
> We recognize the importance of trust and confidence between students and school administrators. For that reason the student and parents must be treated fairly and given the opportunity to explain why anticipated assignments may not be warranted. But that is for Texas and the local schools to do. We would not aid matters by relegating the dispute to federal litigation.

111 F.3d at 26-27.

Under *Nevares*, school officials have no federal constitutional obligation to provide notice and hearing before removal from the classroom for placement in a DAEP. The legislation shows that, despite this Fifth Circuit opinion, Texas opted to provide the essentials of due process specified in *Goss v. Lopez*.

8. Re-Evaluation of Removal

Education Code Section 37.006(h) provides for re-evaluation of a child's DAEP status upon receipt of information from the juvenile court about the legal case. Code of Criminal Procedure Article 15.27(g) requires the prosecuting attorney or the juvenile court to notify a school that removed a student to the DAEP based on a criminal offense if: (1) the case will not be prosecuted (i.e., lack of jurisdiction, insufficient evidence, etc.) and no formal proceedings, deferred adjudication, or deferred prosecution will be initiated; or (2) a court or jury found the student not guilty or made a finding the child did not engage in delinquent conduct or CINS and the case was dismissed with prejudice.

This notice must be sent within two working days of when the decision not to prosecute occurred or when the case was dismissed. Upon receipt of this notice, the school superintendent or a designee shall review the student's placement in the DAEP. The student cannot be returned to regular classes while the review is pending. By the third class day after the notice is received, the superintendent must schedule a placement review meeting with the student's parent or guardian. After the review meeting, the superintendent may continue the DAEP placement only if there is reason to believe the student's presence in the regular classroom threatens the safety of students or teachers.

Sections 37.006(i) and (j) establish a procedure for review of the school's re-evaluation by the board of trustees and possible appeal to the commissioner of education. In the event of an appeal, a student may not be returned to the regular classroom pending the appeal.

9. Procedures for Long-Term Placement

The legislature did provide for a hearing before the board of trustees or the board's designee "[i]f a student's placement in a disciplinary alternative education program is to extend beyond 60 days or the end of the next grading period, whichever is earlier." Education Code Section 37.009(b). The student's parent or guardian "is entitled to notice of and an opportunity to participate in a proceeding" before the school board. Education Code Section 37.009(b). Unlike an expulsion, the decision of the board regarding long-term placement in a DAEP is not appealable to the courts. Education Code Section 37.009(b).

Placement in a DAEP may extend beyond the end of the school year. Section 37.009(d) provides that, in order to extend the placement, the board of trustees or the board's designee must determine that:

> (1) the student's presence in the regular classroom program or at the student's regular campus presents a danger of physical harm to the student or to another individual; or

(2) the student has engaged in serious or persistent misbehavior that violates the district's student code of conduct.

Placements in a DAEP require review at least every 120 days before the board of trustees or the board's designee: "At the review, the student or the student's parent or guardian must be given the opportunity to present arguments for the student's return to the regular classroom or campus." Education Code Section 37.009(e).

10. Expulsion Procedures

The Education Code addresses expulsion procedures in more detail than removal procedures. Section 37.009(f) requires a hearing before the board of trustees or the board's designee. Written notification of the hearing must be sent to the student's parent or guardian. At the hearing, "the student is entitled to be represented by the student's parent or guardian or another adult who can provide guidance to the student and who is not an employee of the school district." The hearing must be one in which "the student is afforded appropriate due process as required by the federal constitution." Education Code Section 37.009(f). Under *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), a due process clause hearing requires at a minimum: (1) oral or written notice of the charges; (2) if the student denies the charges, an explanation of the evidence the school has; and (3) an opportunity for the student to present his or her side of the story. 419 U.S. at 581, 95 S.Ct. at 740.

The Education Code requires a written invitation to the student's parent or guardian to participate in the hearing, but this notice merely informs the recipient of the time, place, and purpose of the hearing and does not necessarily also disclose the specific charges that will be considered at the hearing. However, *Goss* requires written or oral notice of those charges. Further, *Texarkana Independent School District v. Lewis,* 470 S.W.2d 727, 734-35 (Tex.Civ.App.—Texarkana 1971, no writ) requires, as a matter of due process, that notice of charges be in writing and that the student be given time after receipt of the notice to prepare for the hearing.

Lewis holds that the student has a right to counsel, at his or her own expense, to represent him or her at the expulsion hearing. If the school district intends to be represented by counsel, *Lewis* also holds that the board must notify the student in writing that he or she has a right to be represented by counsel at the hearing. 470 S.W.2d at 735.

Finally, *Lewis* stops short of requiring a right to confrontation and cross-examination at expulsion hearings:

> We hold that the right to cross-examination and confrontation is not mandatory, but may be desirable in those circumstances involving the credibility of witnesses. It is important to note, however, that Boards of Trustees do not have subpoena power, nor do they have power to administer oaths.

470 S.W.2d at 736-37. See also *Johnson v. Humble Independent School District*, 799 F.Supp. 43 (S.D.Tex. 1992) (confrontation and cross-examination rights not required at expulsion hearing).

In lieu of confrontation and cross-examination, the school is required to disclose to the student the evidence it is relying upon to justify expulsion and is required to give the student the opportunity to explain and rebut that evidence.

If the expulsion hearing is conducted by a designee of the board of trustees, the student has the right to appeal the decision to the board itself. Education Code Section 37.009(f). Following that, "[t]he decision of the board may be appealed by trial de novo to a district court of the county in which the school district's central administrative office is located." Section 37.009(f). The Houston First District Court of Appeals has explained the meaning of "trial de novo" in the predecessor to this statute:

> [T]he appropriate standard to be used by the district court when addressing appeals under this statute is one of substantial evidence de novo. Under the substantial evidence standard, the agency's decision has a presumption of legality and validity.... It is the complaining party...who has the burden of showing an absence of substantial evidence to support the school district's decision.

Sanchez v. Huntsville Independent School District, 844 S.W.2d 286, 290 (Tex.App.—Houston [1st Dist.] 1992, no writ).

11. Length of the Expulsion

The length of an expulsion may not exceed one year unless, after review, the school district determines that: (1) the student is a threat to the safety of other students or to district employees; or (2) extended placement is in the best interest of the student. Section 37.009(h). School districts have discretion to re-admit expelled students. Each

school is required to have a placement review committee. One of the functions of the committee is to "make recommendations to the district regarding readmission of expelled students." Education Code Section 37.003(a). Presumably, final decision authority rests with the district.

If an expelled student is on juvenile probation, the district may readmit the student "while the student is completing any court disposition requirements the court imposes." Education Code Section 37.010(f).

The district is required to readmit an expelled student who has "successfully completed any court disposition requirements the court imposes" if the student is otherwise admissible. Section 37.010(f). The district "may not refuse to admit the student, but the district may place the student in the disciplinary alternative education program." Section 37.010(f).

12. Emergency Removal or Expulsion

The Education Code permits emergency removal of a student from a classroom and immediate placement in a DAEP. Under Education Code Section 37.019(a), a principal or principal's designee may order the immediate placement of a student in a disciplinary alternative education program if:

> [T]he principal or the principal's designee reasonably believes the student's behavior is so unruly, disruptive, or abusive that it seriously interferes with a teacher's ability to communicate effectively with the students in a class, with the ability of the student's classmates to learn, or with the operation of school or a school-sponsored activity.

A principal or principal's designee may order "the immediate expulsion of a student if the principal or the principal's designee reasonably believes that action is necessary to protect persons or property from imminent harm." Education Code Section 37.019(b).

At the time of emergency DAEP placement or expulsion, the student must be given oral notice of the reasons for the action. Within a reasonable time thereafter, but not later than the 10th day, the student must be provided "the appropriate due process as required under Section 37.009." Education Code Section 37.019(c). See the removal and expulsion procedures discussed earlier in this chapter. Section 37.019(d) gives the principal immunity from civil liability for an emergency removal and placement under this section.

F. Removal and Expulsion Referrals to the Juvenile Court

The Education Code requires school districts to deliver a copy of the order placing a student into a DAEP or expelling a student to the juvenile court of his or her county of residence. Education Code Section 37.010(a). The law requires the school district to deliver the expulsion or DAEP order for all students, regardless of age. Therefore, considering that some students may have aged beyond the jurisdiction of the juvenile court, it is possible that the court may occasionally receive this notice regarding a person over whom it has no jurisdiction. In such a case, no action may be taken by the juvenile court.

Overlap with Law Enforcement Notification Duties. Education Code Section 37.015(a) requires schools to notify law enforcement agencies of the commission of covered offenses on school property or at a school-related event. Some of the covered offenses also require removal or expulsion of the student. In the case of a removal or expulsion, a separate obligation to send notice of the student to the juvenile court arises.

Almost all of the offenses covered by Section 37.015 are offenses for which removal and placement in a DAEP are mandatory. Some offenses for which removal under Section 37.006 or expulsion under Section 37.007 are mandatory are not covered by the notification provisions of Section 37.015. For some offenses committed on campus or at a school function, notification to law enforcement is required but neither removal nor expulsion is mandated. For others, removal or expulsion is mandated and the school is required to notify the juvenile court of the action. For still others that are covered by each requirement, notification to both law enforcement and to the juvenile court is mandated.

Referral Procedures. Education Code Section 37.010(a) defines the duty to notify the juvenile court of removal or expulsion action:

> Not later than the second business day after the date a hearing is held under Section 37.009, the board of trustees of a school district or the board's designee shall deliver a copy of the order placing a student in a disciplinary alternative education program under Section 37.006 or expelling a student under Section 37.007 and any information required under Section 52.04, Family Code, to the authorized officer of the juvenile court in the county in which the student resides.

The hearing referred to must occur soon after the student is physically taken from the classroom. In the case of classroom misconduct, it must occur within three school days of removal. Section 37.009(a).

If a student is expelled from a DAEP under Section 37.007(c), whether for criminal conduct or for engaging in "serious or persistent misbehavior that violates the district's student code of conduct," the school is obligated to refer the student to the juvenile court. Education Code Section 37.010(b).

Non-criminal conduct engaged in by a student in a DAEP that violates the student code of conduct and for which a student is expelled is conduct indicating a need for supervision (CINS). Family Code Section 51.03(b)(5) includes as CINS "an act that violates a school district's previously communicated written standards of student conduct for which the child has been expelled under Section 37.007(c), Education Code."

The duty of the school to send notice of an expelled child to the juvenile court created by Education Code Section 37.010(a) is reinforced in more general terms by Family Code Section 52.041:

> (a) A school district that expels a child shall refer the child to juvenile court in the county in which the child resides.
>
> (b) The board of the school district or a person designated by the board shall deliver a copy of the order expelling the student and any other information required by Section 52.04 on or before the second working day after the date of the expulsion hearing to the authorized officer of the juvenile court.

Section 52.041 adds nothing to the requirements of Education Code Section 37.010(a). The Education Code section imposes notification duties not only for expulsions but also for removals and DAEP placements.

Duty to Notify Juvenile Justice Alternative Education Program (JJAEP). Section 52.041(e) requires a school district to notify the juvenile court in any county operating a JJAEP (whether required by law to do so or not) of the expulsion of a student. The notification has to be made within two business days. Failure to provide timely notice results in the continuing obligation of the school district to provide education to the child—in other words, failure to notify precludes expulsion from the district until notice is given.

Information to be Provided. Family Code Section 52.04 specifies the information that must accompany referral of a child's case to a juvenile court:

> (a) The following shall accompany referral of a child or a child's case to the office or official designated by the juvenile court or be provided as quickly as possible after referral:
>
> (1) all information in the possession of the person or agency making the referral pertaining to the identity of the child and his address, the name and address of the child's parent, guardian, or custodian, the names and addresses of any witnesses, and the child's present whereabouts;
>
> (2) a complete statement of the circumstances of the alleged delinquent conduct or conduct indicating a need for supervision;
>
> (3) when applicable, a complete statement of the circumstances of taking the child into custody; and
>
> (4) when referral is by an officer of a law enforcement agency, a complete statement of all prior contacts with the child by officers of that law-enforcement agency.
>
> (b) The office or official designated by the juvenile court may refer the case to a law enforcement agency for the purpose of conducting an investigation to obtain necessary information.

Juvenile Justice Feedback to Schools. Section 52.041(c) requires that when an expulsion referral is made to the juvenile court, the court staff must conduct its preliminary investigation within five working days of receipt of notice of the expulsion. Subsection (d) requires the court staff to notify the district when certain dispositions are made in cases of expulsion referral. Notice within two working days of the disposition must be given when the case was rejected by intake, the case was dismissed or refused by the prosecutor, the child was found not guilty, or there was an adjudication but no disposition of any kind under Section 54.04. Subsection (d) is intended to give the school notice so that the school officials may revisit their expulsion decision in light of the actions and outcomes of the juvenile court process. The school is under no obligation to reverse the expulsion decision but may wish to do so in light of the new information received under this subsection.

Code of Criminal Procedure Article 15.27(g) requires feedback to a school district regarding any referral to the juvenile court in a case of removal and placement of a student in a DAEP. The juvenile system is required to notify a school district as to the result of its referral if the case was refused for lack of prosecutorial merit or insufficient evidence and no further proceedings will be initiated or if the child was found not guilty by a judge or jury and the case was dismissed with prejudice. Notice must be given within two working days of the decision not to act or of the court finding. Presumably, the school district would wish to re-evaluate its removal action in light of this new information.

G. Public School Education for Juvenile Justice Children

Education for Expelled Children. Education Code Section 37.010(c) provides:

> Unless the juvenile board for the county in which the district's central administrative office is located has entered into a memorandum of understanding with the district's board of trustees concerning the juvenile probation department's role in supervising and providing other support services for students in disciplinary alternative education programs, a court may not order a student expelled under Section 37.007 to attend a regular classroom, a regular campus, or a school district disciplinary alternative education program as a condition of probation.

This section prohibits a juvenile court from ordering an expelled student to attend school as a condition of probation unless that is permitted as part of the MOU between the juvenile board and the school district.

Between the lines, there appears legislative intent that there be a trade-off or exchange of favors: if the probation department will provide services to the district's DAEP, the district will educate expelled students who have been ordered to attend school as a condition of probation.

In counties covered by the JJAEP provisions, this subsection has applicability only to children outside the scope of the mandatory referral to JJAEP. In other counties, this provision covers the education of all expelled children.

Education for Children on Probation. Education Code Section 37.010(d) permits a juvenile court to order a child on probation to attend a school district DAEP:

> Unless the juvenile board for the county in which the district's central administrative office is located has entered into a memorandum of understanding as described by Subsection (c) (see above), if a court orders a student to attend a disciplinary alternative education program as a condition of probation once during a school year and the student is referred to the juvenile court again during that school year, the juvenile court may not order the student to attend a disciplinary alternative education program in a district without the district's consent until the student has successfully completed any sentencing requirements the court imposes.

With respect to students who have not been expelled, this subsection authorizes the juvenile court to require attendance at a school district disciplinary alternative education program as a condition of probation. If, however, the juvenile is referred to the court again during the same school year, the court cannot require as a condition of probation attendance at a DAEP unless: (1) the district consents; (2) that is permitted under an MOU; or (3) the child has completed the probation term.

Nothing in this subsection prohibits the juvenile court from ordering a juvenile probationer to attend regular classroom classes in his or her home school district. If the district believes that the child is subject to removal to disciplinary alternative education classes, it may initiate action under Education Code Section 37.006 to effect removal.

Education After Completing Court Requirements. Education Code Section 37.010(f) sets out the educational rights of expelled students who have completed court requirements:

> After the student has successfully completed any court disposition requirements the court imposes, including conditions of a deferred prosecution ordered by the court, or such conditions required by the prosecutor or probation department, if the student meets the requirements for admission into the public schools established by this title, a district may not refuse to admit the student, but the district may place the student in the disciplinary alternative education program. Notwithstanding Section 37.002(d), the student may not be returned to the classroom of the teacher under whose supervision the offense occurred without that teacher's consent. The teacher may not be coerced to consent.

This subsection gives an expelled student the right to reenter school when he or she has completed the probation terms set by the juvenile court. The district must readmit the student if otherwise qualified, but it may place him or her in a district DAEP.

Education for Children in Residential Facilities in the District. In 1999, the legislature provided that a child in a residential facility has a right to be admitted to a public school in the district in which the facility is located. Education Code Section 25.001(b)(7). Education Code Section 5.001(8) defines residential facility in a manner that includes both a juvenile pre-adjudication and juvenile post-adjudication facility operated by or under contract with the juvenile board as well as public or licensed private juvenile residential treatment facilities. The district may not charge tuition to such children if placed there by a court in Texas.

However, if a child is placed in a residential facility by another state or by the United States, the district is required to admit the student but must charge tuition for doing so. Education Code Section 25.003(a). Finally, if a child is in a privately-operated residential facility under order from a court in another state, the district is authorized, but not required, to provide education if it is reimbursed for the costs of doing so. Education Code Section 25.0011.

Since September 1, 2007, Education Code Section 37.0062, has required the Texas Education Agency (TEA) to adopt rules for school districts and open-enrollment charter schools that provide educational services in pre-adjudication and post-adjudication secure facilities. The Commissioner of Education must, in coordination with TJJD, adopt rules regarding the instructional requirements for education services in pre-adjudication and post-adjudication facilities. Additionally, the Commissioner must coordinate with TJJD on rules for TJJD's contract facilities. The rules must include instructional requirements, length of the school day, number of instructional days each school year, and the curriculum. The rules in a pre-adjudication facility must ensure that students are able to maintain progress toward graduation; rules in a post-adjudication facility must ensure that students are able to complete graduation requirements.

TJJD is required to coordinate with the Commissioner of Education to establish standards for the safety of the education staff in facilities and to provide access to education services.

H. Criminal Law Enforcement in Schools

For several recent legislative sessions, the adjudication of children for fine-only misdemeanors has been the subject of comprehensive reform, reflecting philosophy that the criminalization of misbehavior by children should be subject to restraints and that outsourcing school discipline from the schoolhouse to the courthouse is not good public policy.

In January 2012, Chief Justice Wallace Jefferson of the Texas Supreme Court formed the Juvenile Justice Committee of the Texas Judicial Council. The judicial members of the committee and 14 advisory committee members were charged to: "assess the impact of school discipline and school-based policing on referrals to the municipal, justice, and juvenile courts and identify judicial policies or initiatives that: work to reduce referrals without having a negative impact on school safety; limit recidivism; and preserve judicial resources for students who are in need of this type of intervention."

After multiple meetings in which members were able to hear presentations and opinions from various stakeholders and diverse views on issues, the Juvenile Justice Committee made four recommendations:

First, the legislature should expressly authorize local governments to implement "deferred prosecution" measures in Class C misdemeanors to decrease the number of local filings from schools.

Second, the legislature should amend applicable criminal laws to ensure that local courts are the last and not the first step in school discipline (i.e., amend Penal Code Section 8.07 to create a rebuttable presumption that a child younger than age 15 is presumed not to have criminal intent to commit Class C misdemeanors, with the exception of traffic offenses).

Third, the legislature should amend offenses relating to disruption of class, disruption of transportation, and disorderly conduct so that age (not grade level) is a prima facie element of the offense.

Fourth, the legislature should amend existing criminal law and procedures to increase parity between "criminal juvenile justice in local trial courts" and "civil juvenile justice in juvenile court and juvenile probation."

The four recommendations were the basis for a 20-page legislative proposal that was adopted by the judicial members of the Juvenile Justice Committee in August

2012. In November 2012, the Texas Judicial Council unanimously adopted the recommendations of the Juvenile Justice Committee. Various parts of the proposal were sponsored by members of the Senate and House (most notably, Senate Bills 393, 394, and 395). All three bills enjoyed bipartisan support and were signed into law by the Governor. Notably, Senate Bill 393 was amended in the House to contain nearly all of the provisions of both Senate Bill 394 and Senate Bill 395. Therefore, references in this chapter to 2013 legislative changes resulting from these bills will be collectively referred to as Senate Bill 393.

Senate Bill 1114 (2013) contained provisions that were included in Senate Bill 393 but also contained provisions that were not vetted by the Texas Judicial Council. Most of Senate Bill 1114 either complements or mirrors provisions in Senate Bill 393. One important exception is discussed below. In certain ways, S.B. 1114 went further to curtail the outsourcing of discipline to local courts than the approach favored by Senate Bill 393.

This chapter focuses on the changes in the relationship between schools, school discipline, and the court and discusses offenses that are detected on campus and prosecuted in municipal, justice, and juvenile courts. The subjects of school searches and the detention and arrest of students on campus are discussed in Chapter 17. Interrogations of students on campus are discussed in Chapter 16.

School Law Enforcement Officers. Senate Bill 1114 (2013), in conjunction with Senate Bill 393 (2013), constituted a major paradigm shift in the relationship between schools, school discipline, and the role of criminal courts. Education Code Section 37.085, added by Senate Bill 1114, provides that an arrest warrant may not be issued for a Class C misdemeanor under the Education Code that was committed when the person was younger than 17. The prohibition is tied to the age of the defendant at the time of the alleged criminal conduct. Thus, even when the child reaches adulthood, an arrest warrant cannot be issued for a Class C misdemeanor defined in the Education Code.

However, by its plain language Section 37.085 does not preclude courts from ordering that children be taken into custody. Code of Criminal Procedure Article 45.014 (Warrant of Arrest) and Article 45.015 (Detention in Jail) generally govern procedures pertaining to arrest and detention in Class C misdemeanor cases. These provisions, however, are inapplicable to cases involving children. Both statutes are trumped by a specific statute prescribing the procedure for securing the presence of a child via an order of non-secured custody: Code of Criminal Procedure Article 45.058 (Children Taken into Custody). It deserves emphasis that authorization for a child to be taken into custody under Article 45.058 is not affected by this bill. Accordingly, municipal and justice courts may continue to procure the custody of children accused of Education Code offenses through an order of non-secured custody but they may not issue an arrest warrant for such offenses regardless of whether the defendant is a child or has reached adulthood.

Senate Bill 393 (2013) amended Education Code Section 37.081 to authorize, but not require, school law enforcement officers to dispose of cases in accordance with Family Code Sections 52.03 or 52.031. Prior to this change, school law enforcement officers were authorized by Education Code 37.081 to take a child into custody but not expressly authorized to dispose of a case without referral to a court or by means of a First Offender Program. This change reflects the legislative intent to divert more cases from municipal and justice courts.

In conjunction with this change, Senate Bill 393 amended Family Code Chapter 52 to give juvenile boards the authority, if they so choose, to include Class C offenses in local law enforcement efforts to dispose of cases without referral to courts and by use of First Offender Programs. As amended, Sections 52.03 and 52.031 of the Family Code are expanded to include non-traffic Class C misdemeanors. This would allow, but not require, juvenile boards to use existing laws governing disposition without referral to court and First Offender Programs to divert cases that otherwise would require formal adjudication by a criminal court and consume limited local criminal court resources.

Education Code, Chapter 37, Subchapter E-1: Criminal Procedure. While Education Code Chapter 37 contains subchapters governing "Law and Order" (Subchapter C allows schools to have their own police departments), "Protection of Buildings and School Grounds" (Subchapter D gives justice and municipal courts jurisdiction for certain school offenses), and "Penal Provisions" (Subchapter E contains certain offenses specific to school settings), before 2013, no subchapter governed criminal procedure. This omission contributed to existing disparities in the legal system and resulted in greater consumption of limited local judicial resources. Subchapter E-1, while limited in scope, balances the interest of the other subchapters with due process and procedural protections

for children accused of criminal violations and helps reduce referrals to court without having a negative impact on school safety.

Section 37.141 provides definitions for "child" and "school offense." In its original form in 2013, this provision defined "child" with the meaning assigned by Code of Criminal Procedure Article 45.058(h), which is a person who is at least 10 and not yet 17 years of age who is also a student. In 2015, the legislature amended the definition in Section 37.141 to mean a person who is a student and at least 10 years of age and younger than 18 years of age. "School offense" is defined as an offense committed by a child enrolled in a public school that is a Class C misdemeanor other than a traffic offense and that is committed on property under the control and jurisdiction of a school district. It aims to preserve judicial resources for students who are most in need of formal adjudication.

Subchapter E-1 has a conflict of laws provision, Section 37.142, providing that, to the extent of any conflict, Subchapter E-1 controls over any other law applied to a school offense alleged to have been committed by a child. This is important because, under prior law, such cases were exclusively controlled by the Code of Criminal Procedure.

Because public schools are authorized and expected by the public to handle misbehavior without immediately resorting to the criminal justice system, the legislature considered special rules governing the use of citations for fine-only offenses on school property warranted. Section 37.143 prohibits the issuance of citations at public schools for school offenses. It is important to note that Section 37.143 does not preclude law enforcement from issuing a citation to a student who is not a child, affect a peace officer's authority to take a child into custody, or preclude school officials or employees from filing charges in court. There is precedent for limiting the use of citations. Texas law does not allow citations to be issued to corporations, associations, or people who are publicly intoxicated. Prior to Senate Bill 393, peace officers routinely instigated criminal cases against children by using citations on school grounds.

Article 45.058 of the Code of Criminal Procedure pertains to taking children into custody for Class C misdemeanors. Senate Bill 1114 (2013) also made changes to provisions governing the issuance of citations to children. The provisions, however, were inconsistent with Section 37.143, a more specific provision. To reconcile this inconsistency, the legislature, in 2015, amended Article 45.058(g) to reference the more specific provision. Article 45.058(i) still contains a reference to issuing a citation to a child 12 years of age or older that is alleged to have committed a Class C misdemeanor on school property, but Section 37.142's conflicts of law provision will prevail.

Prior to Senate Bill 393, nothing prohibited a school district from instigating criminal allegations against a child as a first response to any misconduct that is illegal. Criminal courts with jurisdiction over school grounds in school districts that employ police officers reported that their juvenile dockets were ballooning with cases involving disruptive behaviors and that such cases consumed significant amounts of judicial resources. Under Education Code Section 37.144, school districts that employ law enforcement may, but are not required to, adopt a system of progressive sanctions before filing a complaint for three specific offenses: (1) disruption of class; (2) disruption of transportation; and (3) disorderly conduct.

Section 37.145 authorizes a school, if a child fails to comply with or complete graduated sanctions under Section 37.144, to file a complaint against the child with a criminal court in accordance with Section 37.146. In school-based cases instigated by complaint, prior to Senate Bill 393, the information in the complaint rarely provided ample information to assess the merit of the allegation. Section 37.146 requires that a complaint alleging the commission of a school offense, in addition to the requirements imposed by Code of Criminal Procedure Article 45.019 (Requisites of Complaint): (1) be sworn to by a person who has personal knowledge of the underlying facts giving rise to probable cause to believe that an offense has been committed; and (2) be accompanied by a statement from a school employee stating whether the child is eligible for or receives special services under Subchapter A, Chapter 29 (Special Education Program), and that the graduated sanctions, if required under Section 37.144, were imposed on the child before the complaint was filed.

Enhanced complaints under Section 37.146 provide greater information to prosecutors, defense lawyers, and judges for all non-traffic, school-based offenses because the complaint must be accompanied by additional information that prosecutors and judges need to know in order to ensure fair and proper administration of justice for children.

Section 37.146 authorizes the issuance of a summons under Code of Criminal Procedure Articles 23.04 and 45.057(e). After a complaint has been filed under Subchapter E-1, judges and clerks are reminded that, under Article 23.04, a summons may be issued only upon request

of the attorney representing the state. In other words, unless a prosecutor requests a summons, none shall be issued by a court.

In 2015, the legislature amended Section 37.146 to allow a school employee to recommend in the complaint, if the employee believes that it is in the best interest of the child, that the child attend a teen court program.

Akin to provisions governing prosecutions in juvenile court, Section 37.147 gives local prosecutors the discretion to implement filing guidelines and obtain information from schools. Some prosecutors have experienced opposition from schools when attempting to procure additional information before allowing a school-initiated complaint against a child to proceed. Expressly authorizing such guidelines and allowing prosecutors to obtain such information is necessary to ensure that only morally blameworthy children are required to appear in court and enter a plea to criminal charges. Federal law precludes punishing special education students when the student's misbehavior is a manifestation of a disability. Prosecutors should be able to ascertain if a child is eligible for or is receiving special education services, has a behavioral intervention plan (BIP), or has a disorder or disability relating to culpability prior to the filing of charges. Prosecutors should also be able to easily ascertain from schools what disciplinary measures, if any, have already been taken against a child to ensure proportional and fair punishment.

Section 37.147 authorizes an attorney representing the state in a court with jurisdiction to adopt rules pertaining to the filing of a complaint under this subchapter that the state considers necessary in order to determine whether there is probable cause to believe that the child committed the alleged offense, review the circumstances and allegations in the complaint for legal sufficiency, and see that justice is done.

A series of meetings held during the interim aimed at overseeing the implementation of Senate Bill 393 and Senate Bill 1114 brought to light several issues. Senate Bill 108 was the only bill passed in the subsequent legislative session (2015) that purported to address those issues. However, of the changes made in the bill, only the reconciliation between Code of Criminal Procedure Article 45.058 and Education Code Chapter 37, E-1 was discussed in the meetings. Despite consensus at the interim meetings that certain parts of Senate Bill 393 needed revision, those revisions did not happen in 2015. They also did not happen in 2017.

"Violation of Subchapter" Offense. Prior to September 1, 2007, Education Code Section 37.102 provided, in part:

> (a) The board of trustees of a school district may adopt rules for the safety and welfare of students, employees, and property and other rules it considers necessary to carry out this subchapter and the governance of the district, including rules providing for the operation and parking of vehicles on school property.
>
> …
>
> (c) A person who violates this subchapter or any rule adopted under this subchapter commits an offense. An offense under this section is a Class C misdemeanor.

Under this law, school officials had broad discretion to criminalize student code of conduct violations under Section 37.102. This proved problematic because the provisions referenced were not statutes enacted by the legislature but rather administrative rules promulgated by over 1,000 local school district boards of trustees. As a result, a school official could file a criminal complaint on a gum-chewing student for a Class C misdemeanor violation of Section 37.102. This practice often resulted in a grotesque over-enforcement of the law and would reflect a total lack of judgment and perspective on the part of the school official. "The unbridled authority of school districts to create their own crimes further compounded and complicated the already voluminous number of juvenile cases filed in municipal and justice courts. Critics have claimed for some time that such cases do not belong in the judicial system." The Recorder, *Legislative Update*, vol. 16, no. 4, p. 16 (Texas Municipal Courts Education Center, Aug. 2007).

Since September 1, 2007, only a violation of adopted rules providing for the operation and parking of vehicles on school property is a criminal offense.

Criminal Trespass on School Property. Education Code Section 37.107 makes criminal trespass on school property a Class C misdemeanor. Penal Code Section 30.05 makes criminal trespass on any property a Class B misdemeanor. Government Code Section 311.026 provides that when there is a general statute and a specific statute on the same subject, the specific statute controls in those cases to which it applies. The idea is that the legislature intended the specific statute to take effect as an exception to the general statute. Since the Education Code provision

is specific to school property while the Penal Code provision is not restricted, one might argue that a criminal trespass on school property is governed by the Education Code provision and is a Class C misdemeanor.

This very argument relating to criminal trespass and trespass on school grounds was made in *In the Matter of J.M.R.*, 149 S.W.3d 289 (Tex. App.—Austin 2004, no pet.). J.M.R. argued that the statutes were in *pari materia* to one another, meaning that the two statutes should be construed together. J.M.R. noted that the Education Code provision is a special or local provision that controls over the Penal Code's general trespass statute, thus putting the statutes in irreconcilable conflict. The Austin Court of Appeals disagreed, holding that the two statutes were not written to achieve the same objective.

> The criminal trespass statute is designed to protect against a knowing, intentional, or reckless entry onto the property of another. Protection of property is at the heart of the statute. However, the trespass on school grounds statute is designed to ensure, protect, or provide for the safety of those legitimately on school grounds.

149 S.W.3d at 294.

The court held that the statutes effectively operate independently, do not share a common purpose, and, therefore, cannot be construed together. As a result, the State's election to prosecute J.M.R. for criminal trespass was not in error. See also *In the Matter of M.A.L.*, UNPUBLISHED, No. 03-04-00247-CV, 2005 Tex.App.Lexis 5509 (Tex.App.—Austin 2005, no pet.); *In the Matter of J.B.*, UNPUBLISHED, No. 03-04-00484-CV, 2006 Tex.App. LEXIS 4120 (Tex.App.—Austin 2005, no pet.); *In the Matter of A.J.T.*, UNPUBLISHED, No. 03-04-00410-CV, 2005 Tex.App.Lexis 5498 (Tex.App.—Austin 2005, no pet.); *In the Matter of J.D.W.*, UNPUBLISHED, No. 03-04-00087-CV, 2005 Tex.App.Lexis 5504 (Tex.App.—Austin 2005, no pet.).

Disrupting School Activity. Education Code Section 37.123 provides:

> (a) A person commits an offense if the person, alone or in concert with others, intentionally engages in disruptive activity on the campus or property of any private or public school.
>
> (b) For purposes of this section, disruptive activity is:
>
> (1) obstructing or restraining the passage of persons in an exit, entrance, or hallway of a building without the authorization of the administration of the school;
>
> (2) seizing control of a building or portion of a building to interfere with an administrative, educational, research, or other authorized activity;
>
> (3) preventing or attempting to prevent by force or violence or the threat of force or violence a lawful assembly authorized by the school administration so that a person attempting to participate in the assembly is unable to participate due to the use of force or violence or due to a reasonable fear that force or violence is likely to occur;
>
> (4) disrupting by force or violence or the threat of force or violence a lawful assembly in progress; or
>
> (5) obstructing or restraining the passage of a person at an exit or entrance to the campus or property or preventing or attempting to prevent by force or violence or by threats of force or violence the ingress or egress of a person to or from the property or campus without the authorization of the administration of the school.
>
> (c) An offense under this section is a Class B misdemeanor.
>
> (d) Any person who is convicted the third time of violating this section is ineligible to attend any institution of higher education receiving funds from this state before the second anniversary of the third conviction.
>
> (e) This section may not be construed to infringe on any right of free speech or expression guaranteed by the constitution of the United States or of this state.

To understand this statute, one must consider the Vietnam war protests of the 1960s and 1970s that occurred on many college and school campuses. The activities criminalized in this section are precisely some of those that were used to protest the war. That history also accounts for Subsection (e), which excludes from operation of the statute conduct that the courts have declared to be protected by free speech.

The Attorney General was asked whether a violation of this statute requires proof that the person intended to cause the disruptive activity (prohibited result) or whether the mere fact he or she intended the conduct that caused the disruption result is sufficient. The official requesting

the opinion gave as an example two students fighting in a hallway that attracted such a crowd of on-lookers that the hallway was blocked and a nearby class was disrupted.

The Attorney General first opined that disruption of a classroom would not be prosecuted as a Class B misdemeanor under this statute as disruption of a lawful assembly under Subsection (4) even though a class is a lawful assembly. This is because disrupting the classroom is a separate offense under Section 37.124 of the Education Code punishable only as a Class C misdemeanor. In Attorney General Opinion No. JC-0504 (2002), the Attorney General said:

> Although no portion of the Education Code defines "lawful assembly," we do not believe that the term can be reasonably applied to classroom activities, particularly when a separate statute is applicable to disruption of classes.

The Attorney General concluded that, to prove a violation of any of the five subsections of this statute, the State must prove that the person intended not merely to engage in the conduct that caused the prohibited result but also intended to cause the result itself. In the hallway fight scenario, there was intent to engage in the conduct but no evidence of intent to cause the disruptive result. Under intent, as defined by Section 6.03(a) of the Penal Code, it must be the person's actual desire to cause a prohibited result; it is not sufficient that the person should have known of the likelihood that such a result could be caused by his or her conduct. Cf. *In the Matter of C.M.G.*, 180 S.W.3d 836 (Tex. App.—Texarkana 2005, pet. denied) (evidence legally and factually sufficient to show child's mental culpability under Penal Code Section 6.03).

Disruption of Class, Other School Activity, or Transportation. It is a Class C misdemeanor for a person, other than a primary or secondary grade student, to disrupt a class or other school activity or to disrupt the lawful transportation of children en route to school or a school-sponsored activity while in a county or independent school district-owned or operated vehicle.

As set out in Education Code Section 37.124, "disrupting the conduct of classes or other school activities" includes: 1) emitting noise so loud that it prevents or hinders classroom instruction; 2) enticing or attempting to entice a student to leave a class or activity the student is required to attend; 3) preventing or attempting to prevent a student from attending a required class or school activity; and 4) entering a classroom without permission of the principal or teacher and disrupting the class through acts of misconduct or the use of loud or profane language.

Under Section 37.126, disruption of transportation includes intentionally disrupting, preventing, or interfering with the lawful transportation of students to or from school or a school-sponsored activity if the student is being transported in a vehicle owned or operated by the county or the school district.

In 2011, the legislature amended Sections 37.124 and 37.126 to specify that these provisions do not apply to students in the sixth grade or a lower grade level. These changes were made in response to concerns that too many citations and fines were being issued to elementary age students. In 2013, the legislature amended the same statutes, making it an exception that the person was younger than 12 years of age at the time the person engaged in the prohibited conduct. The reason for the change was that, under the 2011 law, some sixth graders as young as 10 years of age could still be prosecuted. There also appeared to be consensus among law enforcement and prosecutors that it is easier to prove age than grade level. Disorderly conduct under Penal Code Section 42.01 was likewise amended to include the exception based on age. However, the term, "public place" in that statute now includes a public school campus or the school grounds on which a public school is located, broadening the statute in light of prior arguments that the offense could not occur at a school because it was not truly a public place.

Penal Code Section 42.05, titled Disrupting Meeting or Procession, is similar to disruption of classes under Education Code Section 37.124. It provides:

> (a) A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, he obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance.
>
> (b) An offense under this section is a Class B misdemeanor.

In a trial for disruption of a speech given at the University of Texas at Austin during a Middle East Symposium, several of the protesters were convicted of Class B misdemeanors under this statute. They claimed they should have been charged under the Class C misdemeanor offense of what is now Section 37.124 of the Education

Code. *Al-Omari v. State*, 673 S.W.2d 892 (Tex.App.—Austin 1983, pet. ref'd). The Court of Appeals held that the two statutes did not deal with the same subject matter. The predecessor of Section 37.124, which was Education Code Section 4.33 (repealed), dealt only with events that students were required to attend by school officials, while the Penal Code section has no such restriction and, indeed, is not restricted to schools. The symposium disrupted in this case was not one that students were required to attend. Therefore, they could not have been prosecuted under the predecessor of Section 37.124.

The Court of Appeals did note that to prove a violation of the predecessor statute, the State would be required to show that the person intended to obstruct or interfere with the meeting. It is not sufficient that the person intended to engage in conduct that he or she should reasonably know might lead to disruption. Under the current version of the statute, this issue is dealt with explicitly by the specific intent requirement that the person must engage in conduct "with intent to prevent or disrupt a lawful meeting, procession, or gathering."

There is no definition of "school activity" under Section 37.124. That students are required to attend some school activities is recognized by Sections 37.124(c)(1)(B) and (C). However, "school activities" is not defined by the statute and the examples of school activities given are just illustrations of the concept, not a definition or an exhaustive list. Therefore, there could be some school events that would qualify under this statute as "school activities," but which students are not required to attend. There could, for example, be a meeting of the Drama Club or the Chess Club. In those circumstances, a claim can be made that the Class C provisions of Section 37.124 control over the Class B provisions of Penal Code Section 42.05 since the concept of "school activities" has been expanded from its predecessor statute and the Chess Club meets the common definition of a "school activity."

However, if courts follow *Al-Omari v. State* and continue to confine Section 37.124 to school activities at which attendance is required, then the bizarre and perhaps unconstitutional result is created that it is only a Class C misdemeanor under Section 37.124 to disrupt a school activity for which student attendance is required but a Class B misdemeanor under Section 42.05 to disrupt a non-required school activity. One wonders how such a distinction could be defended.

Assault on a Public Servant. Penal Code Section 22.01 defines the criminal offense of assault. Assault under Section 22.01(a)(1) that causes bodily injury is a Class A misdemeanor unless the victim is a public servant, in which case the offense is elevated to a third degree felony. "Bodily injury" is expansively defined by Penal Code Section 1.07(a)(8) to mean: "physical pain, illness, or any impairment of physical condition." It does not take much contact to cause physical pain, which may be only momentary.

The juvenile respondent in *In the Matter of J.L.O.*, UNPUBLISHED, No. 03-01-00632-CV, 2002 WL 18094951, 2002 Tex.App.Lexis 5730, Juvenile Law Newsletter ¶ 92-3-30 (Tex.App.—Austin 2002, no pet.) verbally and physically threatened a classroom teacher and scuffled with an education assistant. He was charged with assault on a public servant, which at that time was a Class A misdemeanor. The Court of Appeals described the event:

> Here, J.L.O. made motions that both Millegan [the teacher] and Blair [the education assistant] interpreted as threatening. He swore at the teachers and threatened to hurt them and to "wale" on them. Millegan testified that he attempted to swing his fist at her before she and Blair tried to place him in the therapeutic hold. When they attempted to restrain him, he began bucking his torso violently, wrenching himself out of Blair's grip. Although J.L.O. attempts to characterize his behavior as a simple attempt to prevent himself "from being thrown to the ground," Blair's and Millegan's testimony characterized it as a more violent reaction. Millegan said he "pulled out of" and "ripped out of" her and Blair's hands. …
>
> Here, J.L.O.…reacted violently, injuring Blair as she attempted to restrain him; assault by recklessly causing injury was authorized by the State's petition. We hold that the evidence is sufficient to support a finding that J.L.O.'s violent attempts to resist restraint after he made threatening movements and verbal threats were reckless at a minimum; they caused Blair [bodily] injury [her thumb and knee were injured, requiring surgery to correct] and constituted assault.

2002 WL 1804951 * 2-3.

The respondent argued that Blair was not a public servant, but the Court of Appeals noted that she was employed by the district as an education assistant, which brought her under the Penal Code Section 1.07 definition of a public servant quoted above.

Finally, the respondent argued that the State was required to prove that he knew that the victims were public servants. The court held it was sufficient that he knew who they were:

> J.L.O. further contends that even if Blair was a public servant, the record contains no evidence that he knew she was a public servant. To elevate simple assault to assault on a public servant, the offender must know that the person he assaults is acting as an agent, officer, or employee of a governmental branch or agency; he need not know the victim's legal status as a public servant. In other words, the offender must realize that he is assaulting a teacher, school district employee, police officer, or firefighter, but does not have to know that teachers, school employees, police officers, or firefighters are defined by the penal code as public servants. See Tex. Pen. Code Ann. §8.03(a) (West 1994) (ignorance of the law is no defense); *Lofton v. State*, 45 S.W.3d 649, 652 (Tex.Crim.App.2001) (evidence showed intent to assault public servant where defendant struck uniformed police officer). Here, J.L.O. concedes that the evidence supports an inference that he knew Blair was an education assistant; he need not have known that her employment gave her special legal standing under the penal code.

2002 WL 1804951 * 4. See also *In the Matter of S.C.*, 229 S.W.3d 837 (Tex.App.—Texarkana 2007, pet. denied) (public servant includes "teacher's aide" of independent school district).

In another case, a substitute teacher was injured while trying to restrain a special education student who was running around the classroom "flailing" his arms and fists and making "verbal outbursts." *In the Matter of P.N.*, UNPUBLISHED, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 *3, Juvenile Law Newsletter ¶ 06-4-1B (Tex.App.—Austin 2006, no pet.). The issue presented was whether P.N. knowingly committed assault of a public servant by attempting to break free with reasonable awareness that it would cause the teacher to fall. The Court of Appeals held that the fact-finder could rationally determine beyond a reasonable doubt that P.N. was aware that the probable result of his actions, namely rearing up his legs and pushing off the wall, would cause the teacher to lose his balance and fall, thereby causing bodily injury. The appellate court also held that the substitute teacher was "lawfully discharging an official duty" when he was assaulted by P.N. See also *Brooks v. State*, 967 S.W.2d 946 (Tex.App.—Austin 1998, no pet.) (despite testimony that appellant accidently hit officer in attempt to flee restraint, rational trier of fact could infer that she swung with knowledge that injury was likely to occur).

In addition to proving that a security officer is a public servant, must the State also prove that a school district is a governmental entity? The Eastland Court of Appeals held that such additional proof was unnecessary even though no witness at trial testified that "MISD" stands for Midland Independent School District. *In the Matter of T.F.*, UNPUBLISHED, No. 11-06-00179-CV, 2008 Tex.App.Lexis 386 (Tex.App.—Eastland 2008, no pet.). The court stated:

> We believe that a rational juror would have known that MISD was the Midland Independent School District and that Midland Freshman was a public high school. Also, a rational juror could have determined that T.F. was involved in a fight while at school, that a school security officer was required to assist T.F.'s teacher break up that fight, and that the officer was struck while doing so. T.F.'s assignment to an AEP classroom is evidence that he was attending a public school. The repeated references to Officer Sanchez as an MISD Police Officer is further evidence that MISD is a governmental entity. The evidence is legally sufficient to establish that Officer Callow was a public servant discharging an official duty at the time of the altercation.

2008 Tex.App.Lexis 386 *5-6.

Retaliation. Penal Code Section 36.06 defines the offense of retaliation. In relevant part it provides:

> (a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act:
>
> (1) in retaliation for or on account of the service or status of another as a:
>
> (A) public servant, witness, prospective witness, or informant; or
>
> (B) person who has reported or who the actor knows intends to report the occurrence of a crime; or
>
> (2) to prevent or delay the service of another as a:
>
> (A) public servant, witness, prospective witness, or informant; or

(B) person who has reported or who the actor knows intends to report the occurrence of a crime.

(b) In this section: …

(2) "Informant" means a person who has communicated information to the government in connection with any governmental function.…

(c) An offense under this section is a felony of the third degree unless the victim of the offense was harmed or threatened because of the victim's service or status as a juror, in which event the offense is a felony of the second degree.

In the Matter of B.P.H., 83 S.W.3d 400 (Tex.App.—Fort Worth 2002, no pet.), involved an adjudication of delinquency for the offense of retaliation against another student. The matter arose out of a "Columbine High School style" plot to kill school officials and to kidnap and rape certain students:

At trial, A.M. testified that sometime after lunch he had to pick up attendance cards from the classrooms as part of his duties as an office aide. As A.M. climbed the stairs to the second floor, he saw Appellant and C.P. together leaning up against a wall. As he approached the two boys, he noticed C.P. was working on the hit list (which had previously been shown to A.M.), and Appellant was working on a map of the school designating who would be killed and who would be taken hostage. A.M. testified that Appellant and C.P. were talking about numerous things, however, they also spoke with each other about the hit list and the map. Noticing that A.M. saw what they were doing, Appellant threatened A.M. with a knife, saying, "if you tell, I'm going to kill you and your mother and your father."

A.M. testified that when Appellant made the threat, he did not take Appellant seriously. A.M. also testified he thought Appellant and C.P.'s plan was all part of a "big joke." However, after hearing T.U. in the vice-principal's office (who reported also seeing a hit list), A.M. went into the office and told the vice-principal about Appellant and C.P.'s plan.…

According to A.M.'s testimony, Appellant pulled out a knife and told A.M. he was going to kill him and both of his parents if A.M. told anyone about Appellant and C.P.'s plan. A reasonable trier of fact could have accepted this testimony as true and inferred from the accused's acts, words, and conduct that he knowingly and intentionally threatened A.M. with death if A.M. acted as a witness against him.… Likewise, after a careful and neutral review of the evidence, we hold the proof of guilt is not so obviously weak as to undermine confidence in the judgment that Appellant intentionally and knowingly retaliated against A.M.

Appellant's third point argues the evidence was legally and factually insufficient to prove A.M. was a witness or prospective witness as contemplated by the retaliation statute. The evidence shows that, after Appellant realized A.M. was looking and listening to what he and C.P. were doing upstairs, Appellant produced a knife and threatened to kill A.M. and his parents if A.M. told anyone. A reasonable trier of fact could infer from A.M.'s testimony that Appellant thought A.M. could report the boys' plan to kill people and take hostages.… Likewise, A.M. became a prospective witness when he gave his statement to the vice-principal.… Based on a careful and neutral review of the record, we also hold the evidence is not so obviously weak as to undermine our confidence in the judgment.… 83 S.W.3d at 408-09. (Cf. *In the Matter of J.S.R.*, UNPUBLISHED, No. 07-11-00009-CV, 2011 WL 6183571 (Tex.App.—Amarillo, no pet.) (evidence was insufficient since State alleged that appellant acted in retaliation for victim's "status" as assistant principal while evidence showed retaliation was for his "service" as assistant principal).

I. Truant Conduct and Parent Contributing to Nonattendance

Justice and municipal courts formerly became involved in adjudicating truancy cases in three ways: (1) upon a complaint being filed against the child for the criminal offense of failure to attend school (Education Code Section 25.094); (2) upon a complaint being filed against the parent of a truant child for the criminal offense of parent contributing to nonattendance (Education Code Section 25.093); or (3) upon transfer from the juvenile court of a truancy CINS case (Family Code Section 54.021).

Though significant changes succeeded in 2013 to reduce the number of children criminally prosecuted for misbehavior at school with Senate Bill 393, efforts to decriminalize truancy in 2011 had failed to gain legislative traction. That changed in 2015 when the legislature impacted the enforcement of that law with House Bill 2398, ending the "criminalization of truancy" and creating a new court and set of procedures to handle school attendance cases involving children.

Failure to attend school is no longer a criminal offense. However, that does not mean that children are no longer held accountable for failing to attend school. The set of procedures for handling school attendance cases are in Title 3A, Chapter 65 of the Family Code (Truancy Court Proceedings). Justice, municipal, and certain county courts (in a county with a population of 1.75 million or more, the constitutional county court) are designated as truancy courts, having original, exclusive jurisdiction over allegations of truant conduct. Subsection 65.004(b).

Truant conduct is not a criminal offense but rather is a civil case. It is defined in Family Code Subsection 65.003(a) as failure to attend school on 10 or more days or parts of days within a six-month period in the same school year, by a child. Child is defined as a person who is at least 12 and not yet 19 years of age and is required to attend school under Education Code Section 25.085. This section is designed to describe the recent history of legislation regarding a school's responsibilities with regard to absences that might lead to a charge of truant conduct (and formerly failure to attend school or CINS truancy). See Chapter 23 for a detailed discussion of how truant conduct cases are handled in court.

Truancy Prevention Measures. In 2011, Education Code Section 25.0915 was added amid concerns of the overuse of the court system to address truancy issues. It required school districts to first attempt adopted truancy prevention measures designed to deal with truancy issues in the school setting before referring a child to juvenile court (truancy) or pursuing criminal charges against the child in county, justice, or municipal court (failure to attend school). To ensure the measures were adopted and used, every referral to court had to include a statement from the school certifying that the truancy prevention measures were applied and failed to meaningfully address the student's school attendance.

In 2013, the legislature clarified legislative intent by further amending Section 25.0915. Specifically, if a complaint or referral was not made in compliance with Section 25.0915, the court was required to dismiss the complaint. This was identical to the former requirement governing an untimely filed school attendance complaint. Because most children accused of not attending school do not have the assistance of counsel, such provisions were necessary to ensure the execution of the legislature's intent. Under current law, a court must dismiss a complaint against a student's parent for an offense under Education Code Section 25.093 (Parent Contributing to Nonattendance) if the complaint: (1) does not comply with Section 25.0951; (2) does not allege the elements required for the offense; (3) is not timely filed, unless the school district delayed the referral of the child for truant conduct under Subsection 25.0951(d); or (4) is otherwise substantively defective. This offense is discussed in more detail below and in Chapter 23. The consequences for an untimely filed referral of a child for truant conduct are also discussed below and in Chapter 23.

In 2015, House Bill 2398 increased the requirements for truancy prevention measures and expanded the range of measures available to schools. School districts must adopt truancy prevention measures for students prior to counting any absences toward truant conduct. A school district must take one or more of the following actions:

> (1) impose:
>
> (A) a behavior improvement plan on the student that must be signed by an employee of the school, that the school district has made a good faith effort to have signed by the student and the student's parent or guardian, and that includes:
>
> (i) a specific description of the behavior that is required or prohibited for the student;
>
> (ii) the period for which the plan will be effective, not to exceed 45 school days after the date the contract becomes effective; or
>
> (iii) the penalties for additional absences, including additional disciplinary action or the referral of the student to a truancy court; or
>
> (B) school-based community service; or
>
> (2) refer the student to counseling, mediation, mentoring, a teen court program, community-based services, or other in school or out-of-school services aimed at addressing the student's truancy.

If a student fails to attend school without excuse on three or more days or parts of days within a four-week period but does not fail to attend school for the time described by Section 25.0951(a), the school district shall initiate truancy prevention measures on the student. Subsection 25.0915(a-4).

Referrals to truancy court must be accompanied by a statement that the school employed truancy prevention measures. Education Code Subsection 25.0915(b). Refer-

rals to truancy court must be dismissed if the court determines that the school did not comply with these requirements, did not timely file the referral, or the referral is otherwise defective. Subsection 25.0915(c).

Initiating Proceedings in Truancy Court. Venue for a truant conduct proceeding, under Family Code Section 65.006, is the county in which the school in which the child is enrolled is located or the county in which the child resides. The process begins with a referral to the truancy court by a school district under Education Code Sections 25.0915 and 25.0951. A school district shall refer a student to a truancy court within 10 school days of the student's 10th absence (10th day or part of day in a six-month period in the same school year). Education Code Section 25.0951. However, a school district may delay referral or choose not to refer if it is applying truancy prevention measures under Section 25.0915, and determines that such measures are succeeding and it is in the best interest of the student that a referral not be made. Subsection 25.0951(d). A school district's referral must:

> (1) be accompanied by a statement from the student's school certifying that:
>
> (A) the school applied the truancy prevention measures required to be adopted under Education Code Subsection 25.0915(a) or (a-4) to the student; and
>
> (B) the truancy prevention measures failed to meaningfully address the student's school attendance; and
>
> (2) specify whether the student is eligible for or receives special education services under Education Code Subchapter A, Chapter 29.

Subsection 25.0915(b).

A referral made under Education Code Subsection 25.0915(a-1)(2) may include participation by the child's parent or guardian if necessary. Subsection 25.0915(a-2).

> A school district shall offer additional counseling to a student and may not refer the student to truancy court if the school determines that the student's truancy is the result of pregnancy, being in the state foster program, homelessness, or being the principal income earner for the student's family.

Subsection 25.0915(a-3).

Upon receiving a referral from a school district, the truancy court must forward the referral to a truant conduct prosecutor. Procedures from that point are discussed in Chapter 23.

Peace Officers. Truant conduct cases can be initiated by a police officer serving as an attendance officer referring a student to a truancy court if the student has unexcused absences for the amount of time specified under Family Code Section 65.003(a). Education Code Section 25.091. However, attendance officers have no authority to take a student into custody to enforce compulsory school attendance requirements. In 2015, the legislature removed such authority, previously listed in Education Code Subsections 25.091(a)(7) and (b)(7), as part of the new truancy reform. Though Family Code Section 52.01(a)(3) authorizes an officer to take a child into custody if there is probable cause to believe that the child has engaged in CINS, *inter alia*, excessive absences no longer constitute CINS.

Attendance officers still have the power to enforce compulsory attendance requirements by filing a complaint in a county, justice, or municipal court against a parent who violates Education Code Section 25.093 (Parent Contributing to Nonattendance) if truancy prevention measures fail to meaningfully address the student's conduct.

Attendance Officers. Truant conduct cases may also be initiated by school district attendance officers who are not commissioned peace officers. If the truancy prevention measures adopted under Section 25.0915 fail to meaningfully address the student's conduct, attendance officers are authorized by Education Code Section 25.091(b)(2) to refer the student to a truancy court or to file a criminal complaint against the parent justice or municipal court.

Prior to 2015 and House Bill 2398, in many counties, juvenile court coordinators filed truancy cases on behalf of a school district and provided assistance to the justice of the peace. In 2011, the Attorney General examined an inter-local agreement provision that authorized a school attendance officer to serve as a juvenile court coordinator in the justice court. While the AG concluded that no statute prohibited the agreement, the opinion suggested that the propriety of the arrangement should be clarified by the State Commission on Judicial Conduct. Attorney General Opinion No. GA-0912 (2012). There is similarly no statute permitting or prohibiting such a practice in truancy court.

Powers and Duties of Peace Officers and Attendance Officers. In 2001, the legislature re-wrote Section 25.091 to more carefully describe the powers and duties of peace officers and attendance officers as they relate to enforcement of the compulsory school attendance laws. Many school districts in Texas now employ peace officers to serve on campus; many more have peace officers from county or municipal forces assigned to campus duty. Rewriting this section was necessary to reflect this growth of peace officers on school campuses in Texas.

In 2007, Section 25.091 was amended by adding Subsection (b-1) which allows a peace officer to return to school any child believed to be in violation of the compulsory attendance law.

Section 25.091 was amended again in 2011 as part of legislation designed to ensure that schools address truancy problems before involving the court system. The statute now requires the attendance officer, or peace officer serving as the attendance officer, to apply the truancy prevention measures discussed earlier in this chapter before referring a child to court (truancy court as of 2015). Additionally, the referral is allowed only in instances in which the truancy measures fail to meaningfully address the issue,

With the removal of Subsections 25.091(a)(7) and (b)(7) relating to taking a child into custody, the powers and duties of school peace officers and attendance officers differ only in that peace officers are authorized to serve court orders and attendance officers are not. Under Section 25.091(b)(6), an attendance officer, at the request of a parent, may "escort a student from any location to a school campus to ensure the student's compliance with compulsory school attendance requirements." Section 25.091 (b-1) allows a peace officer who has probable cause to suspect a child is in violation of the compulsory school attendance law to return that child to his or her school campus to ensure compliance with the mandated school attendance requirements.

The procedures for handling truant conduct or parent contributing to non-attendance cases that have been referred to court are discussed in Chapter 23.

CHAPTER 23: Prosecution and Adjudication of Juveniles in Municipal, Justice, and Truancy Courts

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This chapter discusses the handling of criminal charges against children by municipal and justice courts, and in some cases by constitutional county courts, as well as civil truant conduct cases handled by truancy courts. A criminal violation committed by a person while younger than 17 is not always "a juvenile case." Certain offenses that would with respect to adults be handled in municipal or justice courts can be handled in those courts as criminal cases even though committed by a person while younger than 17. In fact, most cases alleging violations of Texas law by children are filed in justice or municipal courts. These offenses are misdemeanors punishable by fine (and, sometimes, by other non-incarceration sanctions) but not punishable by jail time. See Chapter 4.

However, while the charges are criminal charges and the courts are criminal courts, there are some modifications in the procedures that must be used in those cases when the criminal defendant is of juvenile age. In general, there are added procedural protections afforded to children charged with criminal offenses in these courts. There are, in addition, some significant restrictions on the dispositional powers that may be employed when the criminal defendant is a child.

Because of the modifications in procedure and restrictions on dispositions in these cases, the system for handling these cases resembles a "shadow" juvenile justice system, operating in the justice and municipal courts.

A. What Constitutes the "Shadow" Juvenile Justice System

There are four distinct types of cases within the "juvenile" jurisdiction of municipal and justice courts: (1) traffic offenses; (2) most fineable only offenses; (3) alcohol violations; and (4) truant conduct cases. Each of these is excluded, at least initially, from the jurisdiction of the juvenile court even though the violation occurred before the defendant's 17th birthday.

The reason for the exclusion, in general, is that these cases are not of sufficient seriousness to warrant using the specialized resources of the juvenile justice system. In the absence of some extraordinary circumstances, these cases can be handled more efficiently and just as effectively by the justice and municipal courts.

The municipal and justice courts have authority to transfer any of these cases, except traffic cases and truant conduct cases, to the juvenile court of the county for handling as a conduct indicating a need for supervision (CINS) case. The municipal and justice courts are required to transfer a non-traffic charge against a child with two prior convictions to juvenile court for handling as a CINS case.

As part of the decriminalization of school attendance in Texas in 2015, the legislature removed excessive absences from the list of CINS in Family Code Section 51.03(b). As a result of this legislation (House Bill 2398), outside of the provisions in new Title 3A of the Family Code, juvenile courts no longer have original jurisdiction of school attendance cases. Municipal and justice courts are designated as truancy courts with exclusive original jurisdiction over cases involving allegations of "truant conduct." Truant conduct, the only allegation which the truancy court is authorized to hear, may be prosecuted only as a civil case in truancy court.

The details of each category of cases, including the history and rationale for its exclusion from juvenile court jurisdiction, are discussed in Chapter 4. The details of the transfer authority, obligation, and procedure are also discussed in Chapter 4.

In this chapter, we assume the case could properly be handled in the municipal, justice, or truancy court system. Building on that assumption, we explore the procedural and dispositional implications of handling the case in that system.

B. Taking Into Custody

Arrest Warrant Not Required. Code of Criminal Procedure Article 14.01(b) authorizes a peace officer to arrest an offender without an arrest warrant "for any offense

committed in his presence or within his view." In general, for a misdemeanor of the type handled in municipal or justice court, a peace officer must have an arrest warrant to arrest outside the limited authorization of Article 14.01(b).

A peace officer's power to arrest a juvenile without a warrant for those same offenses is much broader. Under the Family Code, a law enforcement officer may arrest without an arrest warrant if he or she has "probable cause to believe that the child has engaged in...conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state." Section 52.01(a)(3)(A), as amended in 1995.

This is parallel to the power of a law enforcement officer to arrest for delinquent conduct or CINS upon probable cause without a warrant under circumstances in which an adult could not be arrested without a warrant. See Chapter 17. A law enforcement officer under the Family Code is defined to include all peace officers under Article 2.12, Code of Criminal Procedure. Section 51.02(7).

Thus, all a law enforcement officer needs to take a child into custody for a fine-only misdemeanor or ordinance violation is probable cause. A warrant is not required except when the juvenile is being arrested in his or her own home. See Chapter 17. Nor is it required that the offense occur in the officer's presence or view.

Release on Citation to Appear. When a child is detained or taken into custody for delinquent conduct, CINS, or a Class C misdemeanor, the officer is authorized to release him or her with a warning notice. That notice serves the purpose of avoiding the need for taking the child into custody. It must be filed with the juvenile court to enable the court staff to determine whether further proceedings should result. Section 52.01(c).

Code of Criminal Procedure Article 14.06(b) allows a peace officer who is charging a person, including a child, with a Class C misdemeanor (other than public intoxication), to issue a citation rather than take the person before a magistrate.

Article 45.058(g), Code of Criminal Procedures provides that, with limited exceptions, a law enforcement officer may issue a field release citation as provided by Article 14.06 instead of taking a child into custody for a traffic offense or fineable-only offense. The exceptions are public intoxication (Section 49.02, Penal Code) and school offenses.

Article 45.058(g-1) allows a peace officer to issue a field release citation in lieu of taking a child into custody for committing public intoxication but only if the officer releases the child to the child's parent, guardian, custodian or another responsible adult. This amendment to Article 45.058 was part of the legislative mandate that justice and municipal courts have jurisdiction over children who commit public intoxication.

Section 37.143, Education Code, prohibits the issuance of a citation for a child accused of a school offense, defined as a Class C misdemeanor other than a traffic offense that is committed on school property by a child enrolled in public school. Such conduct is to be addressed through graduated sanctions, if developed by the school district, or through the filing of a complaint with the court. Alternatively, the child may be taken into custody as allowed by Section 52.01, Family Code. However, Article 45.058(j), Code of Criminal Procedure, prohibits filing a complaint against a child younger than 12 years of age for a Class C misdemeanor committed on school property or no a vehicle owned or operated by a school district. Article 45.058(i) provides that if a law enforcement officer files a complaint accusing a child 12 years of age or older of committing a school offense, the office must also give the court the offense report, a statement by a witness to the conduct, and a statement by a victim, if any. If the officer fails to do so, the state's attorney may not proceed in a trial.

Articles 45.058(i) and (j) both reference issuing citations for school offenses. This directly conflicts with the prohibition on issuing citations for school offenses found in Section 37.143, Education Code. Section 311.025, Government Code, provides that when statutes are irreconcilable, the statute latest in date of enactment prevails. The date of enactment is the date on which the last legislative vote on the bill enacting the statute is taken. Because the bill enacting the prohibition on citations for all school offenses was the latest in enactment, it should prevail over the provisions in Article 45.058 that allow for the issuance of citations in certain instances.

The Article 14.06 citation is for a child already taken into custody and is in lieu of presenting him or her to a magistrate or detaining him or her further. The Article 45.058 citation is in lieu of taking the child into custody and would ordinarily be given in the field rather than taking the child to the police station.

The Article 45.058 citation, being designed to avoid custody rather than merely to truncate it, serves much the same purpose for the shadow system that the Family Code

warning notice in Section 52.01(c) serves for the juvenile justice system.

C. Law Enforcement Handling and Detention

Article 14.06(a), Code of Criminal Procedure, provides that a person arrested for any criminal offense must be taken "without unnecessary delay" before a magistrate, except in instances in which a citation is given instead. However, Article 45.058 contains more specific and, therefore, controlling directives for the handling of children taken into custody for fineable misdemeanors or ordinance violations.

Definition of Child. The special procedures and protections of Article 45.058 apply only to a person who is a child as defined in that section. Article 45.058(h) sets out the definition of a child for purposes of the shadow system:

> In this article, "child" means a person who:
>
> (1) is at least 10 years of age and younger than 17 years of age; and
>
> (2) charged with or convicted of an offense that a justice or municipal court has jurisdiction of under Article 4.11 or 4.14.

Release to Responsible Adult. In addition to the citation options authorized by Articles 14.06 and 45.058, a law enforcement officer may release the child already in custody to a responsible adult. Article 45.058(a) provides:

> A child may be released to the child's parent, guardian, custodian, or other responsible adult as provided in Section 52.02(a)(1), Family Code, if the child is taken into custody for an offense that a justice or municipal court has jurisdiction of under Article 4.11 or 4.14.

Since 2009, a field release citation may only be issued in lieu of taking a child into custody for committing public intoxication if the officer releases the child to the child's parent, guardian, custodian, or another responsible adult. See Code of Criminal Procedure Article 45.058(g-1).

Family Code Section 52.02(a)(1) authorizes release to a parent, guardian, custodian, or other responsible adult "upon that person's promise to bring the child before the juvenile court as requested by the court." A release under Article 45.058(a) would be conditioned on the adult's promise to bring the child before the appropriate municipal or justice court, not the juvenile court, as requested by that court.

Bail. In addition to release on citation or to a responsible adult, a child taken into custody for a fine-only offense may be released on bail, including personal bond, as authorized by the Code of Criminal Procedure for any other criminal offense. Code of Criminal Procedure Article 17.03.

Place of Nonsecure Custody. Unless the child is released on citation, to an adult, or on bond or is taken to a municipal or justice court, he or she "must be taken only to a place previously designated by the head of the law enforcement agency with custody of the child as an appropriate place of nonsecure custody for children." Article 45.058(b). The specifications for places of nonsecure custody are drawn from federal requirements dealing with the custody of juveniles in adult facilities.

As a practical matter, the child must be taken from the street directly to the designated place of nonsecure custody. From that location, he or she can be released to parents, on bond, or on citation or taken to the municipal or justice court. Paperwork on the arrest should be completed while the child is in the place of nonsecure custody.

Not Taken to Juvenile Detention Center. A child taken into custody for an offense within the jurisdiction of a justice or municipal court cannot be taken to the juvenile detention facility. Article 45.058(f). There are two exceptions to that rule. First, a child may be taken to juvenile detention if his or her non-traffic offense is transferred to the juvenile court by a municipal or justice court judge under Family Code Section 51.08(b). Article 45.058(f)(1). Second, a child may be taken to juvenile detention if the child is referred by a justice or municipal court to the juvenile court for contempt of court. Article 45.058(f)(2). In such instances, the initial investigation and decision to release or detain a juvenile is still made by the juvenile probation department or other authorized officer of the court under Family Code Section 53.02(a) and not by a justice of the peace or municipal court judge.

Places That May Be Designated for Nonsecure Custody. Article 45.058(c) describes the types of places that may be designated as a place of nonsecure custody:

> A place of nonsecure custody for children must be an unlocked, multipurpose area. A lobby, office, or interrogation room is suitable if the area is not designated, set aside, or used as a secure detention area and

is not part of a secure detention area. A place of nonsecure custody may be a juvenile processing office designated under Section 52.025, Family Code, if the area is not locked when it is used as a place of nonsecure custody.

Any place, including a place in a law enforcement facility, that is not used for secure detention can be designated as a place of nonsecure custody.

A place that has been designated as a juvenile processing office under Family Code Section 52.025 may also be used as a place of nonsecure custody. When used as a place of nonsecure custody, however, the room must not be locked. A juvenile processing office requires secure custody through locking because of the sometimes very serious offenses that are being investigated, while a place of nonsecure custody is used only for the least serious offenses and therefore does not require the same security. Instead of locking the room, continuous visual supervision is required. Article 45.058(d)(4).

Designating Places of Nonsecure Custody. The juvenile board under Family Code Section 52.025(a) designates places as juvenile processing offices. Under Article 45.058(b), the head of the law enforcement agency with custody of the child designates places of nonsecure custody. Article 45.058(b) requires that the place must have been previously designated as an appropriate place of nonsecure custody before it may be used as such.

Multiple Designations. There will probably be several places of nonsecure custody in each county—some designated by the sheriff and others by chiefs of municipal police departments. Which one will be used in a particular case will depend primarily on which law enforcement agency has custody of the child.

What Can Occur in a Place of Nonsecure Custody. Article 45.058(d) establishes authorizations and limitations on the activities that may occur in a place of nonsecure custody:

(1) a child may not be secured physically to a cuffing rail, chair, desk, or other stationary object;

(2) the child may be held in the nonsecure facility only long enough to accomplish the purpose of identification, investigation, processing, release to parents, or the arranging of transportation to the appropriate juvenile court, juvenile detention facility, secure detention facility, justice court, or municipal court;

(3) residential use of the area is prohibited; and

(4) the child shall be under continuous visual supervision by a law enforcement officer or facility staff person during the time the child is in nonsecure custody.

A place of nonsecure custody is not a place to take a child just to detain him or her for six hours. It is a place where the child may be held only while work is actively being done on the case to prepare it for court handling.

Preventing Escapes. Although the child is in a place of *nonsecure* custody, he or she is still in law enforcement custody. The word "nonsecure" simply means the door to the area in which the child has been placed cannot be locked. Continuous visual supervision is required both for the protection of the child and to prevent the child from simply walking away from the unlocked room. A peace officer may use reasonable force to prevent the child from leaving the place of nonsecure custody. Penal Code Sections 9.51 and 9.52.

Six–Hour Rule. Article 45.058(e) provides, "Notwithstanding any other provision of this article, a child may not, under any circumstances, be detained in a place of nonsecure custody for more than six hours." The same six-hour rule applies to detaining a child in a juvenile processing office under Family Code Section 52.025(d) and in a juvenile curfew processing office under Code of Criminal Procedure Article 45.059(b)(6).

Alternatives When Six Hours Have Elapsed. The six-hour rule is absolute. There are no exceptions. What alternatives are available when a child has been detained in a place of nonsecure custody for six hours?

The child: (1) may be released by a law enforcement officer to a responsible adult under authority of Article 45.058(a) if such a person can be found; (2) may be released by a law enforcement officer on citation to appear under authority of Code of Criminal Procedure Articles 14.06(b) and 45.058(g), except as provided by Article 45.058(g-1), which authorizes release on citation of a child committing public intoxication only to the child's parent, guardian, or custodian or to another responsible adult; or (3) may be taken by a law enforcement officer before a magistrate for release on personal bond under the authority of Article 17.03 of the Code of Criminal Procedure. If the charge is not a traffic offense, the child may be taken in custody by a law enforcement officer and delivered to the juvenile detention facility, but only if a municipal or justice court has ordered the case transferred to the juvenile

court. Article 45.058(f)(1). An order of transfer under Section 51.08(b) of the Family Code converts the fineable only criminal offense into CINS under the jurisdiction of the juvenile court.

The child and paperwork may be presented to the juvenile detention facility. What the juvenile justice system officials do with the child and the case is solely for them to determine. However, even under the most restrictive circumstances—when the offense is a status offense, such as minor in possession of alcohol or violation of a juvenile curfew ordinance—the child may be detained for up to 24 hours in the juvenile detention facility. Family Code Section 54.011(a). In any other case, the child may be detained by intake until a detention hearing is held, ordinarily by the conclusion of the second working day. Section 54.01(a). See Chapter 6.

The fourth option, which is extreme, should be used only as a last resort. The only formal requirement Family Code Section 51.08(b) establishes for optional transfer to juvenile court is that there must be pending in municipal or justice court a complaint against the child. Under Article 45.019(a)(1) and (d) of the Code of Criminal Procedure, the complaint must be under oath and in writing. However, the complaint could be made personally to the municipal judge or justice of the peace without having to file it first with a clerk of court. Thus, the complaint could be made whenever and wherever a judge or justice can be found.

There is no requirement that the order of transfer to the juvenile court be in writing, but it would undoubtedly be good practice to put it in writing. If it serves no other purpose, a judge's written order may help convince the juvenile court intake person on duty that the case really is a juvenile case and not a criminal case mistakenly brought to the juvenile court.

Juvenile Curfew Processing Office. Article 45.059 addresses the handling of cases in which a child is taken into custody "for violation of a juvenile curfew ordinance of a municipality or order of the commissioners court of a county." It requires that such a child, "without unnecessary delay," be released to a responsible adult, be taken before a judge, or be taken "to a place designated as a juvenile curfew processing office by the head of the law enforcement agency having custody of the person."

Authorizations and Limitations. The places that may be designated as such an office and the activities that may occur in it are identical to those specified for a place of nonsecure custody. Article 45.059(b) provides:

> A juvenile curfew processing office must observe the following procedures:
>
> (1) the office must be an unlocked, multipurpose area that is not designated, set aside, or used as a secure detention area or part of a secure detention area;
>
> (2) the person may not be secured physically to a cuffing rail, chair, desk, or stationary object;
>
> (3) the person may not be held longer than necessary to accomplish the purposes of identification, investigation, processing, release to a parent, guardian, or custodian, or arrangement of transportation to school or court;
>
> (4) a juvenile curfew processing office may not be designated or intended for residential purposes;
>
> (5) the person must be under continuous visual supervision by a peace officer or other person during the time the person is in the juvenile curfew processing office; and
>
> (6) a person may not be held in a juvenile curfew processing office for more than six hours.

Overlap with Places of Nonsecure Custody. There is no reason why every place of nonsecure custody should not also be designated a juvenile curfew processing office in any city or county with a juvenile curfew ordinance or order. Such a dual designation would certainly simplify the issue of where a child in custody for a municipal or justice court offense or ordinance violation can be taken since the answer would always be the same. The only time it might make sense to designate a place as a curfew processing office but not also as a place of nonsecure custody would be designating a place on school property as a place for taking children taken into custody for violation of a school hours' curfew ordinance.

There is really little, if any, need for a place for juvenile curfew processing separate from the place of nonsecure custody. Article 45.059 exists largely by accident. It was originally part of a separate bill in 1995 dealing exclusively with juvenile curfews. That bill authorized counties and general law municipalities to enact curfew ordinances, and what is now Article 45.059 was included to specify procedures for handling children taken into custody for ordinance violations. When, late in the session, the separate curfew bill was made part of the general juvenile bill, the procedural section became Article 45.059 without considering its almost total overlap with Article 45.058.

The substantive sections authorizing general law municipalities and counties to enact juvenile curfew ordinances and orders were enacted as Local Government Code Sections 341.905 and 351.903, respectively.

Fingerprinting and Photographing Children in Custody for Fineable Offenses. Family Code Section 58.002(a) prohibits the fingerprinting or photographing of a child in law enforcement custody for a fine only offense except on juvenile court order: "[A] child may not be photographed or fingerprinted without the consent of the juvenile court unless the child is taken into custody or referred to the juvenile court for conduct that constitutes a felony or a misdemeanor punishable by confinement in jail, regardless of whether the child has been taken into custody."

Even though a child in custody for a municipal or justice court offense is not initially within the jurisdiction of the juvenile court, that court's permission is required to authorize fingerprinting or photographing the child. This prohibition is intended to preclude routine booking fingerprinting and photographing of children in custody for fineable only offenses. Juvenile court permission might be sought and obtained, for example, if there is probable cause to believe that fingerprinting or photographing may implicate or clear the child of responsibility for the offense for which he or she was arrested or for another offense.

D. Prosecution of Children in Municipal and Justice Courts

There are special requirements that apply to the prosecution of children in municipal or justice courts. There is a requirement of parental presence. There are also requirements to notify the juvenile court and, in certain circumstances, the Texas Department of Public Safety (DPS), of pending juvenile cases. With those exceptions, the procedural provisions of Chapter 45, Code of Criminal Procedure, apply to the prosecution of juveniles in justice or municipal courts.

Mental Illness, Disability, or Lack of Capacity. The definition of a child for the purposes of prosecution in justice and municipal court is the same as a juvenile court – a person who commits the offense while at least 10 and not yet 17 years of age. However, there are special rules regarding prosecution of Class C misdemeanor and violations of penal ordinances of political subdivisions. Penal Code Section 8.07(e), added in 2013, provides that a person who is at least 10 years of age but younger than 15 years of age is presumed incapable of committing such an offense, other than an offense under a juvenile curfew ordinance or order. That presumption may be refuted if the prosecutor proves by a preponderance of evidence that the actor had sufficient capacity to understand the conduct engaged in was wrong at the time it was engaged in. The prosecutor is not required to prove the child knew it was a criminal offense or the legal consequences of the offense.

Section 8.08, Penal Code, also added in 2013, requires the court, on the motion of the state, the defendant, the defendant's parent, or the court itself, to determine whether there is probable cause to believe that a child, including a child with mental illness or developmental disability: (1) is unfit to proceed due to a lack of capacity to understand the proceedings or assist in the child's own defense; or (2) lacks substantial capacity to appreciate the wrongfulness of the child's own conduct or to conform the conduct to the requirements of the law. If the court makes such a finding, the court may dismiss the complaint. Once a court has dismissed a complaint under this provision, the court must waive original jurisdiction for any future Class C misdemeanor referrals, other than traffic offenses, and refer the child to juvenile court. Section 51.08(f), Family Code.

Child and Parental Presence in All Fineable Only Cases. In 1997, the legislature began requiring child and parental presence in all justice and municipal court cases involving children under the age of 17. Article 45.0215, Code of Criminal Procedure.

Parental Presence for Electronic Transmission of Certain Visual Material Depicting Minor Cases. In 2011, to address the growing trend of minors sending nude images of themselves to one another, often referred to as "sexting," the legislature created the offense of Electronic Transmission of Certain Visual Material Depicting Minor. The offense may be committed only by persons under 18 years of age and is a Class A, B, or C misdemeanor, depending on the circumstances. For persons under 17, the offense is always a CINS offense and is always under the jurisdiction of the juvenile court. For 17-year-olds, however, it is a criminal offense handled in the county, justice, or municipal court. Although 17-year-olds are considered adults for criminal justice purposes, the legislature chose to amend Code of Criminal Procedure Article 45.0215 and require parents to appear in court with their 17-year-old child charged with this offense.

Child and Parental Presence for Alcohol Violations. Alcoholic Beverage Code Section 106.10 provides, "No minor may plead guilty to an offense under this chapter except in open court before a judge." Prior to 2005, Section 106.11 provided that no person under 18 years of age could be convicted of an offense under Chapter 106 of the Alcoholic Beverage Code unless his or her parent or legal guardian was present in court. That provision was repealed by the legislature in 2005—because it conflicted with the provisions relating to the appearance of parents contained in Code of Criminal Procedure Article 45.0215. The amendment brought the Alcoholic Beverage Code into conformity with the general rule in Chapter 45 of the Code of Criminal Procedure. Section 106.10, which requires minors to plead guilty to Alcoholic Beverage Code violations in open court before a judge, is still in full effect. See The Recorder, *Legislative Update*, vol. 14, no. 6, p. 18 (Texas Municipal Courts Education Center, August 2005).

Parental Presence in Cases in Which Teen Court is Ordered. Code of Criminal Procedure Article 45.052 provides that a justice or municipal court may defer proceedings against a defendant who is under 18 or who, regardless of age, is enrolled full time in an accredited school program leading toward a high school diploma. One of the requirements, however, is that the defendant must plead no contest or guilty in open court with the defendant's parent present. While this provision does not require the parent's presence for a particular type of case, it is important to be aware that, for defendants who are 17 and older, this disposition option is only available if a parent is present.

Enforcing the Requirement of Child's Appearance in Court. When a child is charged with a fine-only misdemeanor offense in justice or municipal court and released from police custody, he or she may be required to appear in court at a specified time and place for trial. Failure to appear subjects the child to possible issuance of an arrest warrant. What sanctions are there for a juvenile who fails to appear when an arrest warrant has been issued but not executed? Some communities have held age 17 "birthday parties" to arrest 17-year-olds for the original offense and failure to appear and to then treat them as adults, including confining them in a secure municipal or county adult detention facility.

The legislature in 2003 addressed the appropriateness of such "parties." It approved of them, but only with safeguards and restrictions. It amended Article 45.057 and enacted Article 45.060. Articles 45.057(h) through (k) provide:

> (h) A child and parent required to appear before the court have an obligation to provide the court in writing with the current address and residence of the child. The obligation does not end when the child reaches age 17. On or before the seventh day after the date the child or parent changes residence, the child or parent shall notify the court of the current address in the manner directed by the court. A violation of this subsection may result in arrest and is a Class C misdemeanor. The obligation to provide notice terminates on discharge and satisfaction of the judgment or final disposition not requiring a finding of guilt.
>
> (i) If an appellate court accepts an appeal for a trial de novo, the child and parent shall provide the notice under Subsection (h) to the appellate court.
>
> (j) The child and parent are entitled to written notice of their obligation under Subsections (h) and (i), which may be satisfied by being given a copy of those subsections by:
>
> (1) the court during their initial appearance before the court;
>
> (2) a peace officer arresting and releasing a child under Article 45.058(a) on release; and
>
> (3) a peace officer that issues a citation under Section 543.003, Transportation Code, or Article 14.06(b) of this code.
>
> (k) It is an affirmative defense to prosecution under Subsection (h) that the child and parent were not informed of their obligation under this article.

These amendments obligate the child and parent to keep the justice or municipal court informed of their current addresses during the pendency of proceedings against the child. Importantly, this obligation continues as long as the case is pending, even after the individual's 17th birthday. Failure to report change of residence to the appropriate court within seven days is a Class C misdemeanor. Article 45.057(h).

Article 45.060 implements the state's policy regarding holding individuals 17 or older accountable for failure to appear either before or after becoming 17:

> (a) Except as provided by Articles 45.058 [taking a child into custody for a fineable only offense] and 45.059 [taking a child into custody for violation of a juvenile curfew ordinance or order], an individual may

not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday.

(b) On or after an individual's 17th birthday, if the court has used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a notice of continuing obligation to appear by personal service or by mail to the last known address and residence of the individual. The notice must order the individual to appear at a designated time, place, and date to answer the allegations detailed in the notice.

(c) Failure to appear as ordered by the notice under Subsection (b) is a Class C misdemeanor independent of Section 38.10, Penal Code, and Section 543.003, Transportation Code.

(d) It is an affirmative defense to prosecution under Subsection (c) that the individual was not informed of the individual's obligation under Articles 45.057(h) and (i) or did not receive notice as required by Subsection (b). (e) A notice of continuing obligation to appear issued under this article must contain the following statement provided in boldfaced type or capital letters: "WARNING: COURT RECORDS REVEAL THAT BEFORE YOUR 17TH BIRTHDAY YOU WERE ACCUSED OF A CRIMINAL OFFENSE AND HAVE FAILED TO MAKE AN APPEARANCE OR ENTER A PLEA IN THIS MATTER. AS AN ADULT, YOU ARE NOTIFIED THAT YOU HAVE A CONTINUING OBLIGATION TO APPEAR IN THIS CASE. FAILURE TO APPEAR AS REQUIRED BY THIS NOTICE MAY BE AN ADDITIONAL CRIMINAL OFFENSE AND RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST."

This article authorizes the justice or municipal court after the individual becomes 17 to set a time and place for hearing the charge filed when the individual was a juvenile and to send notice of that hearing to the last known address of the individual. The purpose of this post-17th birthday notification is to give the individual one last opportunity to appear in court to face the charges.

Failure to appear by the individual while 17 or older is a Class C misdemeanor offense committed by an adult. Prosecution for that offense is governed by adult law respecting issuance and execution of an arrest warrant.

Since 2017, the court may not issue an arrest warrant for failure to appear unless the justice or judge has provided to the defendant, by telephone or regular mail and prior to the failure to appear, notice that includes the court date and time, information about alternatives to the full payment of any fines and costs owed by the defendant (if the defendant is unable to pay the full amount), and an explanation of consequences for failing to appear. 45.014(e). The court must recall the arrest warrant if the defendant voluntarily appears and, before the warrant is executed, either resolves the warrant or makes a good faith effort to do so. If the warrant is executed and the defendant is convicted, the defendant is subject to imposition of a fine of up to $500. Failure to pay that fine subjects the individual to the adult remedy of issuance of a capias pro fine and confinement to lay out the fine and commitment to jail.

The predicate for this procedure is that the justice or municipal court must have "used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday." Article 45.060(b). That requires, at a minimum, issuance of an arrest warrant when the juvenile fails to appear. Whether "all available procedures" also requires that the State use due diligence in the service of such a warrant is a difficult question. Simply issuing the warrant knowing efforts will not be made to serve it probably is not sufficient. Whether issuing the warrant with knowledge it will be entered on law enforcement computers is sufficient is an open question.

Notifying DPS of Failure to Appear. Transportation Code Section 521.3452 requires a court to report to DPS when a minor charged with a traffic offense under chapter 521 does not appear before the court as required by law. DPS may deny the renewal of the person's driver's license, in addition to other actions or remedies provided by law. The court must also report the final disposition of the case to DPS.

Prior to 2017, Transportation Code Section 521.294 required DPS to revoke a driver's license for failure to appear or for defaulting in the payment of a fine in a juvenile traffic case or in any other juvenile justice or municipal court case. These provisions were repealed in 2017. However, under certain circumstances, DPS is authorized by Transportation Code Chapter 706 to deny renewal of a license for failure to appear in court in a traffic-related case.

Notifying Juvenile Court of Filing of Charge and Disposition in Non-Traffic Cases. Family Code Subsection 51.08(c) provides:

A court in which there is pending a complaint against a child alleging a violation of a misdemeanor

offense punishable by fine only other than a traffic offense or a violation of a penal ordinance of a political subdivision other than a traffic offense shall notify the juvenile court of the county in which the court is located of the pending complaint and shall furnish to the juvenile court a copy of the final disposition of any matter for which the court does not waive its original jurisdiction under Subsection (b).

The reason for the notification requirement is to create a county-wide repository of information about non-traffic cases filed against juveniles in municipal or justice courts. That repository permits a municipal or justice court to determine what prior cases have been filed against the same juvenile in any court in the county. If the juvenile has two prior convictions, transfer of the third case to juvenile court may be required by Section 51.08(b)(1).

Since the requirement of notification to juvenile court is linked to the transfer authority and responsibilities in Section 51.08(b), it does not apply to traffic offenses because they can never be transferred to juvenile court. Chapter 4 discusses the details of the transfer process.

Right to Counsel in Justice or Municipal Court. If a juvenile is charged with a Class C misdemeanor or a traffic offense in justice or municipal court, is he or she entitled to counsel to assist in defending against those charges? The San Antonio Court of Appeals in *In the Matter of B.A.M.*, 980 S.W.2d 788 (Tex.App. - San Antonio 1998, pet. denied) held that, because the proceedings are not juvenile proceedings, the right to counsel provision of Family Code Section 51.10 does not apply and, because incarceration is not a possible disposition, there is no constitutional right to counsel. Any defendant in a justice or municipal court criminal proceeding is entitled to retain counsel to defend but, even if indigent, is not entitled to the appointment of counsel.

Interpreters for Parents. Code of Criminal Procedure Article 38.30 requires the appointment of a language interpreter when necessary for a party (including a defendant) or a witness. Article 38.31 requires appointment of an interpreter for a deaf party or witness if one is needed. The Attorney General was asked whether a parent of a juvenile prosecuted in justice or municipal court is entitled to an interpreter under those provisions. In Attorney General Opinion No. JC-0584 (2002), the Attorney General opined that merely summoning a parent to court without more does not require appointment of a language interpreter for the parent who cannot understand English. However, if the parent is to be a witness or if the juvenile court contemplates that it may impose court orders on the parent in the proceedings, that makes the statute applicable since the parent is entitled to an interpreter because he or she is a witness or a party, respectively.

The Attorney General did not address a parent's right to an interpreter for the deaf in juvenile proceedings in justice or municipal court.

In 2003, the legislature added Family Code Sections 51.17(d) and (e) to require appointment of a language interpreter or interpreter for the deaf for a child, parent, guardian or witness in juvenile court delinquency or CINS proceedings. The legislature should consider enacting similar provisions for the benefit of parents of children prosecuted in justice or municipal courts. See Code of Criminal Procedure Article 38.30 pertaining to appointment of an interpreter in criminal proceedings.

Juvenile Case Managers. In 2001, the legislature enacted two Code of Criminal Procedure Articles to authorize the employment of case managers for juvenile cases. In 2003, the legislature consolidated those two provisions into one. In its current form, Article 45.056(a) and (b) provides:

(a) On approval of the commissioners court, city council, school district board of trustees, juvenile board, or other appropriate authority, a county court, justice court, municipal court, school district, juvenile probation department, or other appropriate governmental entity may:

(1) employ a case manager to provide services in cases involving juvenile offenders who are before a court consistent with the court's statutory powers or referred to a court by a school administrator or designee for misconduct that would otherwise be within the court's statutory powers prior to a case being filed, with the consent of the juvenile and the juvenile's parents or guardians;

(2) employ one or more juvenile case managers who:

(A) shall assist the court in administering the court's juvenile docket and in supervising the court's orders in juvenile cases; and

(B) may provide:

(i) prevention services to a child considered at risk of entering the juvenile justice system; and

(ii) intervention services to juveniles engaged in misconduct before cases are filed, excluding traffic offenses; or

(3) agree in accordance with Chapter 791, Government Code, with any appropriate governmental entity to jointly employ a case manager or to jointly contribute to the costs of a case manager employed by one governmental entity to provide services described by Subdivisions (1) and (2).

(b) A local entity may apply or more than one local entity may jointly apply to the criminal justice division of the governor's office for reimbursement of all or part of the costs of employing one or more juvenile case managers from funds appropriated to the governor's office or otherwise available for that purpose. To be eligible for reimbursement, the entity applying must present to the governor's office a comprehensive plan to reduce juvenile crimes in the entity's jurisdiction that addresses the role of the case manager in that effort.

A case manager is much like a juvenile probation officer. He or she assists the court, as directed by the court, in handling the juvenile docket. Many justice or municipal courts employ juvenile case managers. Article 45.056 makes it clear that the legislature approves of the practice. In some courts, case managers receive and docket all complaints filed against juveniles and assist the judge in processing those cases as well as in securing the attendance of juveniles and their parents to court proceedings. If directed by the court, case managers may also operate pre-trial diversion programs and assist in the implementation of dispositional orders, such as by arranging for community service by juveniles and supervising the juvenile during the deferral period.

Article 45.056(a) permits several courts to pool their resources and employ a juvenile case manager to serve each of the courts. A case manager may be employed full-time or part-time and may even, under Article 45.056(a)(3), serve courts that sit in different counties.

Family Code Section 51.08(b) requires a county, justice, or municipal court to refer a charge of a non-traffic offense filed against a juvenile to the juvenile court if the juvenile has two prior convictions for fineable only offenses. However, if the court has employed a juvenile case manager, then the court is permitted, as opposed to required, to refer such cases to the juvenile court. The case manager gives the court an additional tool to use with the habitual juvenile violator so that resorting to the resources of the juvenile court is not as vital.

While Article 45.056(b) authorizes local government entities to apply to the criminal justice division of the Governor's Office for grants to enable employment of juvenile case managers, the legislature, unfortunately, did not appropriate funds for this purpose. However, the Government Code and Code of Criminal Procedure contain provisions that allow courts that employ juvenile case managers to collect a juvenile case manager fee of up to $5 upon a defendant's conviction. Government Code Sections 102.061(7), 102.081(7), 102.101(6), and 102.121(6) and Code of Criminal Procedure Article 102.0174(c).

Legislation enacted in 2011 requires a governmental body whose court employs a juvenile case manager to establish rules on training and standards. The training requirements must include: the role of the juvenile case manager; case planning and management; services for at-risk youth; and detecting and preventing abuse, exploitation, and neglect of juveniles. The juvenile case manager must report to the judge who signed the order or judgment and, upon request, to the assigned or presiding judge, any information or recommendations relevant to assisting the judge in making decisions in the best interest of the child. Further, the judge is required to consult with the juvenile case manager regarding the child's: home environment; development, psychological, and educational status; and previous interaction with the justice system as well as any sanctions available to the court that would be in the best interest of the child. Code of Criminal Procedure Article 45.056.

In 2015, the legislature amended Code of Criminal Procedure Article 102.0174 to expand permissible uses for the juvenile case manager fund fed from court costs on criminal convictions in justice and municipal courts. If there is excess money in the fund after using the fund to finance salary, benefits, training, travel, office supplies, and other necessary expenses, the court may authorize the juvenile case manager to direct the remaining money to be used to implement programs directly related to the duties of the juvenile case manager, including alcohol and substance abuse programs, educational and leadership programs, and other projects designed to prevent or reduce the number of juvenile referrals.

Judicial Instruction. In 2009, legislation was enacted mandating two hours of specialized education for justice and municipal court judges who hear cases involving children accused of committing fine-only offenses. Government Code Section 22.1105. The required training must be a course related to understanding relevant child welfare issues, as well as the Individuals with Disabilities Education Act (IDEA), and must be completed in every judicial academic year ending in zero or five. Judges who took office after September 1, 2009, but before the end of the 2010 judicial academic year (ending August 31, 2010), were required to complete the two-hour training program in 2010. All other judges were required to complete the training during the 2015 academic year. The education requirements will benefit justice and municipal court judges who increasingly hear cases involving children with mental disabilities or who are receiving special education services at school.

E. Dispositional Powers and Procedures

Municipal and justice courts possess a broad range of dispositional powers and alternatives when dealing with children adjudicated for offenses.

1. Fines and Fine Amounts

The basic disposition in municipal and justice court is the monetary fine. Most of the non-traffic offenses filed against juveniles in municipal or justice court are Class C misdemeanors for which a fine of up to $500 is authorized. Penal Code Section 12.23. However, most traffic offenses carry a maximum fine of only $200. Under Transportation Code Section 729.001(c), a juvenile can receive the same fine punishment as an adult for the same traffic offense.

Jail Confinement for Default in Paying Fine. In ordinary criminal proceedings in municipal or justice court, when a fine is imposed and the defendant fails to pay it by the deadline, a *capias pro fine* is issued authorizing the arrest and detention of the defendant until the fine is discharged at the statutory rate. With one exception, discussed later in this section, that procedure is prohibited for juvenile offenders.

Code of Criminal Procedure Article 45.050(b) prohibits incarceration of a juvenile for failure to pay fine and costs. It applies to all justice or municipal court offenses, including traffic offenses:

> A justice or municipal court may not order the confinement of a child for:
>
> (1) the failure to pay all or any part of a fine or costs imposed for the conviction of an offense punishable by fine only;
>
> (2) the failure to appear for an offense committed by the child; or
>
> (3) contempt of another order of a justice or municipal court.

An example of "another order" under Article 45.050(b)(2) would be an order to appear for a hearing or a dispositional order of the justice or municipal court, such as an order to perform community service.

Special procedures for dealing with contempt of a justice or municipal court by a juvenile are discussed later in this chapter. Incarceration of an individual in an adult secure facility is permitted under legislation enacted in 2003 after the juvenile becomes 17 under limited circumstances. Those provisions are also discussed later in this chapter.

Imposing Fine for Contempt of Court. Until its amendment in 1999, Family Code Section 52.027(h) (now repealed) prohibited a municipal or justice court from holding a child in contempt of court for refusing to obey an order of disposition. That action was prohibited because the only punishment available to the municipal or justice court for contempt of court was a "fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail." Government Code Section 21.002(c). Confinement of a child in a city or county jail for up to three days would violate both state and federal law.

In 1999, the legislature enacted what is now Code of Criminal Procedure Article 45.050(c), which authorizes a justice or municipal court to hold a juvenile in contempt for refusal to obey a dispositional order and to fine the juvenile up to $500 for the contempt. The legislature did not address what remedy, if any, is available if the juvenile fails or refuses to pay the contempt fine. In 2001, the legislature authorized justice and municipal courts to order DPS to suspend the driver's license (or deny issuance if one doesn't exist) of a juvenile who has not obeyed a court dispositional order. The suspension or denial lasts until DPS receives notice from the court that the juvenile has fully complied with the order.

These alternatives (fine and license suspension) are instead of, not in addition to, the remedy of referring a child to juvenile court for contempt proceedings in that court.

Article 45.050(c). In addition to the statutory prohibition on doing both, the Double Jeopardy Clause would prohibit a juvenile court from adjudicating a child for contempt of court after that court has already held the juvenile in contempt and issued a punishment order. Contempt of court is discussed more fully later in this chapter.

Capias Pro Fine. Article 45.045(a) authorizes issuance of a *capias pro fine* when "the defendant fails to satisfy the judgment according to its terms." A *capias pro fine* is a special type of arrest warrant. Pursuant to 2017 amendments to Article 45.045, in order for a *capias pro fine* may be issued, the court must first set a hearing on the defendant's failure to satisfy the judgement. The court may issue a *capias pro fine* only if the defendant fails to appear at the hearing or if, after hearing evidence at the hearing, the court determines the *capias pro fine* should be issued. When a person is taken into custody under a *capias pro fine*, he or she can be released upon payment of the fine and costs that are due. If payment is not made, then the judge may order the defendant incarcerated to "lay out" the fine and costs if the judge determines under Article 45.046 that (1) the defendant is not indigent and has failed to make a good faith effort to discharge the fine and costs; or (2) the defendant is indigent and has failed to make a good faith effort to discharge the fines and costs under Article 45.049 (community service) and could have discharged the fines and costs under Article 45.049 without experiencing any undue hardship. The fine is laid out at a rate set by the judge, but not less than $100 per period of time of not less than eight hours nor more than 24 hours. Article 45.048. Article 45.048 also provides that the person shall be discharged on habeas corpus by showing the defendant is too poor to pay the fine and costs.

In 2003, the legislature authorized the use of a *capias pro fine* in juvenile proceedings in very limited situations. The 2003 legislation authorizes a *capias pro fine* only when the individual is at least 17 years of age. Article 45.045(b) provides:

> A capias pro fine may not be issued for an individual convicted for an offense committed before the individual's 17th birthday unless:
>
> (1) the individual is 17 years of age or older;
>
> (2) the court finds that the issuance of the capias pro fine is justified after considering:
>
> (A) the sophistication and maturity of the individual;
>
> (B) the criminal record and history of the individual; and
>
> (C) the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court; and
>
> (3) the court has proceeded under Article 45.050 to compel the individual to discharge the judgment.

Article 45.045(b) applies only to an individual who is now at least 17 years old for an offense committed while he or she was under 17. The judge must have attempted to collect the fine by contempt of court proceedings before resorting to the post-17 *capias pro fine*.

Effective September 1, 2007, a capias or *capias pro fine* may be issued in electronic form. Article 43.021. In 2015, the legislature amended Code of Criminal Procedure Articles 45.045 and 45.056, authorizing alternative procedures in the event the court that issued the *capias pro fine* is unavailable. If a *capias pro fine* is issued for a juvenile who is now at least 17, the procedures for discharging the fine and costs that apply to adults also apply to juveniles.

The use of a *capias pro fine* in juvenile proceedings is intended primarily to apply to juveniles who refuse to pay a fine or otherwise account for their offenses in the belief that, because they are juveniles, they are immune from any real punishment. It permits, as a last resort, the use of adult sanctions against a juvenile once he or she reaches age 17.

2. Lawfulness of Non-Fine Remedies

There are two kinds of non-fine remedies that the legislature has authorized municipal and justice courts to impose: remedies in lieu of a fine and remedies in addition to a fine.

Remedies in Lieu of Fines. Remedies in lieu of a fine have never presented a legal problem since the criminal defendant has the option of rejecting the remedy and paying the fine. Since the choice is the defendant's, the case can still be regarded as one punishable only by a fine.

Remedies in Addition to Fines. Remedies in addition to fines are different. Article V, Section 19 of the Texas Constitution gives justice courts original jurisdiction of all misdemeanors "punishable by fine only ... and such other

jurisdiction as may be provided by law." The Attorney General was asked about the validity of Section 106.115 of the Alcoholic Beverage Code, which permitted a municipal or justice court to require attendance at an alcohol awareness course in addition to a fine.

Such jurisdiction could have been given by the legislature as "other jurisdiction...provided by law." However, the Attorney General determined that an explicit grant of such jurisdiction is necessary; in the absence of such an explicit grant of jurisdiction, municipal and justice courts did not have jurisdiction over the offenses for which the alcohol awareness course was authorized. Attorney General Opinion No. DM-320 (1995).

Legislation Authorizing Additional Remedies. The legislature responded to the Attorney General's Opinion by explicitly giving justice courts non-fine dispositional powers. A non-fine power must be "as authorized by statute, a sanction not consisting of confinement or imprisonment." Article 4.11(a)(1)(B), Code of Criminal Procedure (jurisdiction of justice courts). An identical change was made in the jurisdictional statute for municipal courts. Government Code Section 29.003(c); Code of Criminal Procedure Article 4.14(c).

To be valid under these provisions, a sanction: (1) must be authorized by statute; and (2) must not involve confinement or imprisonment. If it meets each of those criteria, it may be imposed in addition to a fine. Before 1997, there was a third requirement that the sanction must be "rehabilitative or remedial in nature," but that requirement was eliminated in 1997. The 1997 legislation was intended to respond to an Attorney General's opinion that stated that community service does not qualify as a non-incarceration sanction because it is punitive, not rehabilitative or remedial in nature. Attorney General Opinion No. DM-427 (1996).

In 1997, the legislature also amended Code of Criminal Procedure Articles 4.11 and 4.14 and Government Code Section 29.003 to give justice and municipal courts jurisdiction over cases that "arise under Chapter 106, Alcoholic Beverage Code, [offenses by minors] and do not include confinement as an authorized sanction." This is intended to encompass such non-incarceration, non-fine sanctions as community service and driver's license suspension for alcohol violations by minors in the jurisdiction of those courts.

Denial, Suspension, or Revocation of a Privilege. In 1995, the legislature provided that a municipal or justice court has jurisdiction over an offense even though the conviction "has as a consequence the imposition of a penalty or sanction by an agency or entity other than the court, such as a denial, suspension, or revocation of a privilege." Code of Criminal Procedure Article 4.11(b) (justice court jurisdiction); Government Code Section 29.003(d) (municipal court jurisdiction); Code of Criminal Procedure Article 4.14(d) (municipal court jurisdiction). This legislation is intended to cover offenses to which penalties are attached, such as suspension of hunting licenses, that are imposed by non-court entities upon conviction. Without this legislation, such offenses might not have been considered within the "fine only" jurisdiction of those courts because of the then-existing requirement that the non-fine sanction must have been rehabilitative or remedial in nature. That concern was eliminated in 1997 with the repeal of that requirement.

3. Teen Court

The juvenile court has authority under Family Code Section 54.032 to use teen courts. Municipal and justice courts have authority under Article 45.052 of the Code of Criminal Procedure to use teen courts:

> (a) A justice or municipal court may defer proceedings against a defendant who is under the age of 18 or enrolled full time in an accredited secondary school in a program leading toward a high school diploma for not more than 180 days if the defendant:
>
> (1) is charged with an offense that the court has jurisdiction of under Article 4.11 or 4.14 [Code of Criminal Procedure];
>
> (2) pleads nolo contendere or guilty to the offense in open court with the defendant's parent, guardian, or managing conservator present;
>
> (3) presents to the court an oral or written request to attend a teen court program or is recommended to attend the program by a school employee under Section 37.146, Education Code; and
>
> (4) has not successfully completed a teen court program in the year preceding the date that the alleged offense occurred.
>
> (b) The teen court program must be approved by the court.
>
> (c) A defendant for whom proceedings are deferred under Subsection (a) shall complete the teen court program not later than the 90th day after the

date the teen court hearing to determine punishment is held or the last day of the deferral period, whichever date is earlier. The justice or municipal court shall dismiss the charge at the time the defendant presents satisfactory evidence that the defendant has successfully completed the teen court program.

(d) A charge dismissed under this article may not be part of the defendant's criminal record or driving record or used for any purpose. However, if the charge was for a traffic offense, the court shall report to the Department of Public Safety that the defendant successfully completed the teen court program and the date of completion for inclusion in the defendant's driving record.

(e) The justice or municipal court may require a person who requests a teen court program to pay a fee not to exceed $10 that is set by the court to cover the costs of administering this article. Fees collected by a municipal court shall be deposited in the municipal treasury. Fees collected by a justice court shall be deposited in the county treasury of the county in which the court is located. A person who requests a teen court program and fails to complete the program is not entitled to a refund of the fee.

(f) A court may transfer a case in which proceedings have been deferred under this section to a court in another county if the court to which the case is transferred consents. A case may not be transferred unless it is within the jurisdiction of the court to which it is transferred.

(g) In addition to the fee authorized by Subsection (e) of this article, the court may require a child who requests a teen court program to pay a $10 fee to cover the cost to the teen court for performing its duties under this article. The court shall pay the fee to the teen court program, and the teen court program must account to the court for the receipt and disbursal of the fee. A child who pays a fee under this subsection is not entitled to a refund of the fee, regardless of whether the child successfully completes the teen court program.

(h) A justice or municipal court may exempt a defendant for whom proceedings are deferred under this article from the requirement to pay a court cost or fee that is imposed by another statute.

(i) Notwithstanding Subsection (e) or (g), a justice or municipal court that is located in the Texas-Louisiana border region, as defined by Section 2056.002, Government Code, may charge a fee of $20 under those sections.

Teen courts, which are aptly described as "peer sentencing," are available for both traffic offenses and other justice or municipal court offenses. They are dispositional, i.e., probationary, not adjudicatory in nature because, under Article 45.052(a)(2), the defendant must plead guilty or no contest before requesting teen court handling.

The teen court provision covers persons who commit these offenses as long as, at the time of court proceedings, they are either under 18 or are enrolled as a full-time student in a secondary school.

The Attorney General has stated that the combined effect of Subsections (g) and (h) is to authorize a municipal or justice court to order payment of the special $10 teen court fee authorized by Subsection (g) in addition to the $10 teen court fee authorized by Subsection (e). Further, the court may order or waive payment of ordinary costs of court as provided by Subsection (h). Attorney General Opinion No. DM-372 (1996).

In 2007, the legislature added Article 45.052(i), which allows a juvenile court located in the Texas-Louisiana border region to charge a $20 fee to cover the costs of administering the teen court program and performing its duties, rather than the $10 fees provided in Subsections (e) and (g). See also Government Code Section 103.0212(2)(B). While the bill analysis for this new legislation cites inflation and other cost increases as eroding the buying power of the $10 fees, there is no discussion about why the legislation was limited to this region of Texas. Section 54.032(h), Family Code, was amended in an identical manner.

4. Deferred Disposition

Code of Criminal Procedure Article 45.051 establishes a flexible probationary power for a municipal or justice court to use in lieu of imposition of a fine. It is applicable both to juveniles and adults. In 2007, the legislature made these dispositional powers even more flexible by adding Section 45.051(a-1), which gives justice and municipal court judges the discretion to allow defendants to enter into installment agreements to pay court costs or to perform community service or to combine the two dispositional options. In 2011, Article 45.051(a-1) was again amended, this time to allow juveniles to also discharge court costs by attending a tutoring program.

In 2009, the legislature amended Article 45.051(a) to allow a justice or municipal court judge to impose a special expense fee on the defendant in an amount not to exceed the amount of the fine that could be imposed as punishment for the offense. The special expense fee may be collected at any time before the end of the probation period, and the judge may elect not to impose the fee if the defendant shows good cause. If the collection of a special expense fee is ordered, the judge must require that the amount of the fee be credited toward the payment of the amount of the fine imposed by the court.

In a 2009 opinion, the Attorney General stated that a justice of the peace may defer the adjudication of a charge that violates the Parks and Wildlife Code and impose a special expense fee without assessing a fine. Attorney General Opinion No. GA-0745 (2009). As a result, the special expense fee under Article 45.051 is not considered a fine that must be sent to the Parks and Wildlife Department.

Article 45.051(c-2), which became effective September 1, 2007, also grants the court discretion to allow additional time for a defendant to present evidence about why he or she could not comply with the requirements imposed by the judge during the deferral period. While "additional time" is not defined, presumably in light of Article 45.051(a), such an additional period would not exceed 180 days. See The Recorder, *Legislative Update*, vol. 16, no. 4, p. 32 (Texas Municipal Courts Education Center, August 2007). Additionally, if a fine is ultimately assessed, the judge has discretion to impose a lesser fine than was originally assessed. Article 45.051(d). These legislative enactments apply the holding of *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668 (1971), namely that due process requires that indigent citizens be provided alternative means of discharging fines to justice and municipal court cases involving deferred disposition.

Scope of Statute. Article 45.051 applies to any justice or municipal court case, including traffic offenses. There are, however, special requirements for defensive driving, which are covered separately by Code of Criminal Procedure Article 45.0511.

Conditional Disposition. Article 45.051 authorizes the judge or justice, upon a plea of guilty or no contest or a finding of guilt, to "defer further proceedings without entering an adjudication of guilt and place the defendant on probation for a period not to exceed 180 days." The heart of the statute is Subsection (b):

During the deferral period, the judge may, at the judge's discretion, require the defendant to:

(1) post a bond in the amount of the fine assessed to secure payment of the fine;

(2) pay restitution to the victim of the offense in an amount not to exceed the fine assessed;

(3) submit to professional counseling;

(4) submit to diagnostic testing for alcohol or a controlled substance or drug;

(5) submit to a psychosocial assessment;

(6) participate in an alcohol or drug abuse treatment or education program, such as;

(A) a drug education program that is designed to educate persons on the dangers of drug abuse and is approved by the Department of State Health Services in accordance with Section 521.374, Transportation Code; or

(B) an alcohol awareness program described by Section 106.115, Alcoholic Beverage Code;

(7) pay the costs of any diagnostic testing, psychosocial assessment, or participation in a treatment or education program either directly or through the court as court costs;

(8) complete a driving safety course approved under Chapter 1001, Education Code [Driver and Traffic Safety Education Act], or another course as directed by the judge;

(9) present to the court satisfactory evidence that the defendant has complied with each requirement imposed by the judge under this article; and

(10) comply with any other reasonable condition.

In 2009, the Attorney General was asked whether a justice of the peace may defer further proceedings in a failure to attend school case, place an individual on probation, and then order the individual to wear an electronic monitor as a condition of deferred disposition under Code of Criminal Procedure Article 45.051(b)(10). Attorney General Opinion No. GA-0713 (2009). Initially, the Attorney General addressed whether a justice court may exercise the "any other reasonable condition" authority granted in Article 45.051(b)(10) in a failure to attend school case. Noting that

the applicable statute, Education Code Section 25.094(c) (since repealed), did not limit a justice court solely to entering an order under Article 45.054, the Attorney General determined that a justice court could exercise the broad power contained in Article 45.051 in a failure to attend school proceeding. Although Article 45.051 does not specifically list an electronic monitor as a possible condition or requirement of deferred disposition probation, the Attorney General's summary states, "A justice court may use an electronic monitoring device as a condition of deferment of final disposition or probation for an individual found to have committed an offense under section 25.094, Education Code, if the justice court determines that the use of the device in a given proceeding is reasonable." Attorney General Opinion No. GA-0713 (2009) should not be read to authorize using an electronic monitor as a condition of release from juvenile detention.

When Case is Complete. Articles 45.051(c) and (d) set out the consequences of successfully and unsuccessfully complying with the conditions imposed:

> (c) On determining that the defendant has complied with the requirements imposed by the judge under this article, the judge shall dismiss the complaint, and it shall be clearly noted in the docket that the complaint is dismissed and that there is not a final conviction.…
>
> (d) If on the date of a show cause hearing under Subsection (c-1) or, if applicable, by the conclusion of an additional period provided under Subsection (c-2) the defendant does not present satisfactory evidence that the defendant complied with the requirements imposed, the judge may impose the fine assessed or impose a lesser fine. The imposition of the fine or lesser fine constitutes a final conviction of the defendant. This subsection does not apply to a defendant required under Subsection (b-1) to complete a driving safety course approved under Chapter 1001, Education Code, or an examination under Section 521.161(b)(2), Transportation Code.

The issue of whether a judgment was final was raised in *Walden v. Baker, III,* UNPUBLISHED, No. 03-03-00253-CV, 2005 Tex.App.Lexis 10446 (Tex.App.—Austin 2005, no pet.). Walden was a 17-year-old high school student charged with the Class C misdemeanor of failure to attend school. She challenged the jurisdiction of the justice court to amend its deferred disposition order, which imposed additional conditions. Walden argued that the court's previous confinement order was a final judgment of conviction, thus precluding the subsequent amended order. The Court of Appeals disagreed:

> Walden urges us to hold that the January 10 confinement order was a final judgment of conviction in this case and that the order's lack of an explicit final determination of guilt would elevate form over its substance. We disagree. The January 10 order does not reference a violation of any statute or find Ashley guilty of the failure to attend school or any other offense. See [now repealed] Tex. Educ. Code Section 25.094. Instead, it recites that on December 2, the court entered an order whereby Ashley agreed to comply with specific terms of deferred adjudication [sic] and that Ashley failed to satisfy the requirements of her agreement. Although this language imposes conditions in addition to those included in the original deferral order, the order as a whole does not act as a final sentence. Under the facts in this case and the record presented on appeal, we hold that the January 10 order did not act as a final sentence that revoked Ashley's deferred disposition as a matter of law. Accordingly, the May 5 order was not void.

2005 Tex.App.Lexis at 10446 *10-11.

Records Expunction. If the defendant successfully complies with the conditions imposed and the judge or justice dismisses the complaint, "there is not a final conviction and the complaint may not be used against the person for any purpose." Article 45.051(e). Upon successful completion and dismissal of the complaint, all the records created by the arrest and prosecution may be expunged upon proceedings being brought in district court under Article 55.01.

Cost of Attending Certain Programs. In 2015, the legislature added Subsection (g) to Article 45.051, providing that a judge must require a defendant to pay the cost of attending an alcohol awareness program or drug education program (if required to attend as a condition of deferred disposition), unless the judge determines that the defendant is indigent and unable to pay the cost. Installments are permitted.

5. Requiring Attendance at Improvement Programs

Article 45.057(b) authorizes a municipal or justice court to order participation in a wide range of programs intended to assist the child and related adults in a variety of ways:

On a finding by a justice or municipal court that a child committed an offense that the court has jurisdiction of under Article 4.11 or 4.14, the court has jurisdiction to enter an order:

(1) referring the child or the child's parent for services under Section 264.302, Family Code;

(2) requiring that the child attend a special program that the court determines to be in the best interest of the child and, if the program involves the expenditure of municipal or county funds, that is approved by the governing body of the municipality or county commissioners court, as applicable, including a rehabilitation, counseling, self-esteem and leadership, work and job skills training, job interviewing and work preparation, self-improvement, parenting, manners, violence avoidance, tutoring, sensitivity training, parental responsibility, community service, restitution, advocacy, or mentoring program; or

(3) requiring that the child's parent do any act or refrain from doing any act that the court determines will increase the likelihood that the child will comply with the orders of the court and that is reasonable and necessary for the welfare of the child, including:

(A) attend a parenting class or parental responsibility program; and

(B) attend the child's school classes or functions.

This section gives municipal and justice courts broad powers to order participation by the child and a parent, managing conservator, or custodian in a wide variety of community-based programs. Each of those programs appears to be authorized under the jurisdictional statute, discussed earlier, permitting municipal and justice courts to impose "as authorized by statute, a sanction not consisting of confinement or imprisonment."

The reference in Article 45.057(b)(1) to Family Code Section 264.302 is a reference to the child-at-risk programs operated by the Department of Family and Protective Services (DFPS). Section 264.302(e)(3) requires DFPS to provide services for a child referred to it by a justice or municipal court.

6. Community Service

Community service is authorized as a disposition by Article 45.057(b)(2). Additionally, community service would certainly be regarded as being an "other reasonable condition" under the deferred disposition procedure of Code of Criminal Procedure Article 45.051(b)(10). It is also a means for eligible defendants to discharge their fines and court costs under Articles 45.049 and 45.0492, as discussed later in the chapter.

7. Alcohol Awareness Course

Section 106.115 of the Alcoholic Beverage Code establishes an alcohol awareness course as an important dispositional measure in cases of alcohol offenses by minors. It requires the court to order a minor to attend an alcohol awareness, drug education, or drug and alcohol driving awareness program when a minor is placed on deferred disposition for or convicted of any of the following offenses: driving while intoxicated [Section 49.02, Penal Code]; purchase of alcohol by a minor [Section 106.02, Alcoholic Beverage Code]attempt to purchase alcohol by a minor [Section 106.025, Alcoholic Beverage Code], consumption of alcohol by a minor [Section 106.04, Alcoholic Beverage Code, driving or operating a watercraft under the influence of alcohol by a minor [Section 106.041, Alcoholic Beverage Code], possession of alcohol by a minor [Section 106.05, Alcoholic Beverage Code], or misrepresentation of age by a minor [Section 106.07, Alcoholic Beverage Code].

If the defendant is younger than 18 years of age, the court may require the parent or guardian of the defendant to attend the program with the defendant. On a second or subsequent conviction, the court may, but is not required, to order the defendant to attend a program.

The court must order that the defendant present evidence of completion of the program within 90 days but may extend the period by no more than 90 days for good cause. Upon the defendant's timely production of the evidence, the court may reduce the fine by up to one half of the original amount.

If the defendant fails to present the required evidence of completion and the defendant has no prior convictions for one of the covered offenses, the court must order DPS to suspend the defendant's driver's license or permit or, if the defendant does not have a license or permit, to deny the issuance of one. For a deferred disposition or first conviction of a covered offenses, the period of suspension or denial may not exceed six months; for a second or subsequent conviction, the suspension or denial period may be up to one year. DPS is responsible for notifying the defendant of the suspension or denial period.

In addition to license suspension or denial, the court may order the defendant or the parent or guardian to act, or refrain from acting, if the court determines the ordered act, or order to refrain from acting, will increase the likelihood of the defendant presenting the evidence of successful completion of the program.

8. Driver's License Suspension

The Texas Department of Public Safety (DPS) issues motor vehicle operator's licenses; it also suspends and revokes them. Statutory provisions authorize or require municipal or justice courts to notify DPS of the failure of a juvenile defendant to comply with its dispositional orders. In each instance, DPS is required to suspend or revoke an operator's license or deny issuance of a license if the individual applies for one.

Failure to Complete Alcohol Awareness Course. As discussed above, the court is required to order a minor convicted of certain alcohol-related offenses to attend an alcohol or drug awareness program and to submit proof of attendance to the court. If the minor fails to submit proof in a timely manner, the court is required to order DPS to suspend the defendant's driver's license for up to six months or to deny issuance of a license or permit for that period; the period may be up to one year for a second or subsequent conviction. Alcoholic Beverage Code Section 106.115.

Failure to Pay Fine. Prior to 2017, a municipal or justice court could notify DPS that a minor had defaulted in payment of a fine and DPS could revoke that person's license; Transportation Code Section 521.294(6) was repealed, eliminating this possibility. However, Transportation Code Section 521.201(8) still prohibits DPS from issuing a license to a juvenile's license for either failing to appear or for defaulting on payment of a fine if a municipal or justice court reported that fact to DPS. The period of denial ends when the court provides DPS with "an additional report on final disposition of the case." These provisions include traffic offenses as well as other fineable only misdemeanors.

Alcohol Violations. In 1997, the legislature extensively revised the laws relating to suspension or denial of driver's licenses for the commission of alcohol violations by minors.

The legislature, by amending Transportation Code Section 524.011, placed suspension of the license of a child for failing a breath or blood test on the same administrative license revocation track as suspension of an adult's license. Since suspension is required for driving under the influence of alcohol by a minor (DUIM), the legislature added Transportation Code Section 524.011(a)(2) to require an arresting officer to report to DPS any intoxilyzer score by a minor that is greater than .00. Transportation Code Section 524.012 requires DPS to initiate administrative license suspension proceedings if a minor scores above .00 on the intoxilyzer; whether the minor was initially taken into custody for driving while intoxicated (DWI) or DUIM makes no difference. Transportation Code Section 524.015 was amended to add DUIM to DWI, intoxication assault, and intoxication manslaughter as offenses for which a license cannot be suspended if the defendant is found not guilty. In 2009, the offenses of driving while intoxicated with a child passenger and boating while intoxicated were added to the list. Transportation Code Section 524.015(b).

The period of license suspension is set by Transportation Code Section 524.022(b). It is 60 days if the minor has no prior alcohol-related conviction or adjudication, 120 days if the juvenile has one prior, and 180 days if two priors. Under Transportation Code Section 524.022(d), a minor is not eligible to apply for an occupational license for the first 30 days of a 60-day suspension, the first 90 days of a 120-day suspension, and the entire period of a 180-day suspension.

Under Transportation Code Section 724.035, a minor's refusal to submit to the taking of a specimen (breath or blood) carries an administrative suspension of 180 days, which is the same as in the case of a person 21 or older. However, if the person's driving record shows one or more alcohol-related or drug-related law-enforcement contacts during the previous 10 years, the suspension period for denial is two years.

Under Alcoholic Beverage Code Section 106.071, there is a mandatory 30-day license suspension or denial for any child adjudicated or convicted of first offense purchase of alcohol by a minor, attempt to purchase alcohol by a minor, consumption of alcohol by a minor, possession of alcohol by a minor, and misrepresentation of age by a minor. With one prior conviction or adjudication, the mandatory suspension or denial period rises to 60 days; with two priors, to 180 days.

In 2005, the legislature amended Alcoholic Beverage Code Section 106.071(f) to read that a prior adjudication under Title 3 of the Family Code for an alcohol-related offense and a prior order of deferred disposition for a similar offense are both considered final convictions, resulting in

potentially more severe punishment under Section 106.071(c).

Contempt of Court. Under Code of Criminal Procedure Article 45.050(c), a municipal or justice court may hold an individual in contempt of court for failing to comply with a dispositional order entered in a case in which the individual was convicted of an offense committed before he or she became 17. Instead of referring the contempt case to juvenile court for handling as delinquent conduct, the municipal or justice court may adjudicate the contempt and impose a fine and/or driver's license suspension. The suspension is indefinite—until the individual complies with the dispositional order. If the individual does not have a driver's license, denial of the issuance of a license, also of indefinite duration, is substituted. Article 45.050(f) requires the court to notify DPS when the individual fully complies with the dispositional order. DPS must then end the suspension or denial.

The idea behind the suspension/denial of potentially lifetime duration is that, since the individual still has the capacity to comply with the court's dispositional order, he or she has the power to end the suspension/denial by merely complying with the order. Only if that opportunity still exists may the court order the indefinite suspension/denial. The purpose of the suspension/denial is to coerce future compliance with the order rather than to punish for past non-compliance.

9. Dispositional Alternatives for Minor Driving Under Influence

In 1997, the legislature enacted Alcoholic Beverage Code Section 106.041 to create the offense of driving under the influence of alcohol by a minor (DUIM). In 2009, the offense was expanded to include operation of a watercraft. The offense is committed when a person under the age of 21 operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system. The first or second offense is a Class C misdemeanor. The third offense, if committed by a minor age 17 through 20, is punishable by a fine of $500 up to $2000, confinement in jail for up to 180 days, or both. If the third offense is committed while the person is still a child, it is required by Family Code Section 51.08(b) to be transferred to the juvenile court for handling as conduct indicating a need for supervision (CINS). The municipal or justice court that has employed a juvenile case manager is exempt from the mandatory transfer rule. A minor who commits DUIM and who has been previously convicted twice or more of the same offense is not eligible for deferred disposition or deferred adjudication. Section 106.041(f).

In addition to possible fines and other sanctions, the court is required to impose 20 to 40 community service hours for the first offense and 40 to 60 community service hours for subsequent offenses. The community service must be related to education about or prevention of the misuse of alcohol. Sections 106.041(d) and (e).

10. Dispositional Alternatives for Alcohol Violations by Minors

In 1997, by enacting Alcoholic Beverage Code Section 106.071, the legislature consolidated and fortified the dispositional alternatives available for the offenses of purchase of alcohol by a minor, attempt to purchase alcohol by a minor, consumption of alcohol by a minor, possession of alcohol by a minor, and misrepresentation of age by a minor. This consolidated provision does not include the offense of DUIM, which carries its own dispositional provisions.

The first or second offense is a Class C misdemeanor. The third offense, if committed by a person 17 through 20, is punishable by a fine of $250 up to $2000, confinement in jail up to 180 days, or both. If the third offense is committed while the person is still a child, it is required by Family Code Section 51.08(b) to be transferred to the juvenile court for handling as conduct indicating a need for supervision (CINS). The municipal or justice court that has employed a juvenile case manager is exempt from the mandatory transfer rule.

For conviction of the first offense, the court is required to order eight to 12 hours of community service; the court is required to order 20 to 40 hours of community service for a subsequent conviction. Community service must be related to education about or prevention of misuse of alcohol or drugs, as applicable (drugs added in 2015).

The court is required to order DPS to suspend or deny the driver's license for 30 days for the first conviction, 60 days for the second conviction, and 180 days for the third or subsequent conviction. The court is also required to order attendance at an alcohol or drug awareness program under Alcoholic Beverage Code Section 106.115. See the discussion earlier in this chapter.

11. Orders Affecting Parents and Other Adults

Family Code Section 54.041 authorizes a juvenile court at disposition to order parents and other adults to do or

not do certain acts that may affect the rehabilitation of the child. See Chapter 12. In 1999, the legislature enacted a similar provision for juvenile cases before justice and municipal courts. Code of Criminal Procedure Article 45.057 provides, in relevant part:

> (b) On a finding by a justice or municipal court that a child committed an offense that the court has jurisdiction of under Article 4.11 or 4.14, the court has jurisdiction to enter an order:
>
> (1) referring the child or the child's parent for services under Section 264.302, Family Code;
>
> (2) requiring that the child attend a special program that the court determines to be in the best interest of the child and, if the program involves the expenditure of municipal or county funds, that is approved by the governing body of the municipality or county commissioners court, as applicable, including a rehabilitation, counseling, self-esteem and leadership, work and job skills training, job interviewing and work preparation, self-improvement, parenting, manners, violence avoidance, tutoring, sensitivity training, parental responsibility, community service, restitution, advocacy, or mentoring program; or
>
> (3) requiring that the child's parent do any act or refrain from doing any act that the court determines will increase the likelihood that the child will comply with the orders of the court and that is reasonable and necessary for the welfare of the child, including:
>
> (A) attend a parenting class or parental responsibility program; and
>
> (B) attend the child's school classes or functions.
>
> (c) The justice or municipal court may order the parent, managing conservator, or guardian of a child required to attend a program under Subsection (b) to pay an amount not greater than $100 to pay for the costs of the program.
>
> (d) A justice or municipal court may require a child, parent, managing conservator, or guardian required to attend a program, class, or function under this article to submit proof of attendance to the court.
>
> (e) A justice or municipal court shall endorse on the summons issued to a parent an order to appear personally at the hearing with the child. The summons must include a warning that the failure of the parent to appear may result in arrest and is a Class C misdemeanor.
>
> …
>
> (g) A person commits an offense if the person is a parent, managing conservator, or guardian who fails to attend a hearing under this article after receiving an order under Subsection (e). An offense under this subsection is a Class C misdemeanor.
>
> …
>
> (l) Any order under this article is enforceable by the justice or municipal court by contempt.

Also in 1999, the legislature added Alcoholic Beverage Code Section 106.115(d)(2), which permits a justice or municipal court, if the juvenile defendant has failed to complete a court ordered alcohol awareness course in the required time, to order a parent, managing conservator or guardian:

> to do any act or refrain from doing any act if the court determines that doing the act or refraining from doing the act will increase the likelihood that the defendant will present evidence to the court that the defendant has satisfactorily completed an alcohol awareness program or performed the required hours of community service.

An example of an appropriate use of this provision would be to order a parent to provide transportation so that the child can attend the court-ordered course.

Neither parental responsibility provision for justice and municipal courts speaks to the procedural requirements that must be observed to impose a valid court order on a parent. Family Code Section 54.041(a) requires in a similar situation that the juvenile court, before ordering a parent to take or refrain from taking action, give "notice by any reasonable method to all persons affected.…" That statute does not require, but the Due Process Clause does require, that, in addition to notice, the person to be placed under court order must be personally before the court and be given an opportunity in a hearing to participate in the decision. The same requirements of notice and hearing would apply to a justice or municipal court order against a parent or other adult.

12. Contempt of Court

Contempt Punishment. The ultimate enforcement power of any court is contempt. The only punishment available to the municipal or justice court for contempt of

court in an adult case is a "fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail." Government Code Section 21.002(c). In 1999, the legislature authorized the justice or municipal court to hold a juvenile in contempt and impose a fine of up to $500 as punishment. Article 45.050(c)(2)(A). Confinement of a child in a city or county jail for up to three days would violate both state and federal law and is, therefore, not authorized for a juvenile held in contempt of a justice or municipal court. In 2001, the legislature added the alternative contempt punishment of indefinite suspension of a driver's license, to be reinstated only when the individual fully complies with the court's dispositional order. Article 45.050(c)(2)(B). In 2003, the legislature authorized municipal and justice courts to impose both a fine and license suspension as punishment for contempt.

Fine or Referral to Juvenile Court. Article 45.050(c) gives a justice or municipal court the option of dealing with contempt of court by a juvenile by conducting contempt proceedings and imposing a fine of up to $500 and/or indefinite license suspension upon a finding of guilty or of referring the contempt case to the juvenile court, where it can be handled as delinquent conduct under Family Code Section 51.03(a)(2).

Article 45.050(c) makes it clear that the justice or municipal court must choose between holding the juvenile in contempt or referring the contempt proceedings to the juvenile court; the court may not attempt to do both. In addition to violating the statute, it would violate the Double Jeopardy Clause for a juvenile court to try a juvenile for contempt of a justice or municipal court when that court has already adjudicated the juvenile for the same act of contempt.

Information Needed for Referral. When a municipal or justice court makes a contempt of court referral to the juvenile court, it is required to provide certain information to the court. Family Code Section 52.04(a) provides:

> The following shall accompany referral of a child or a child's case to the office or official designated by the juvenile board or be provided as quickly as possible after referral:
>
> (1) all information in the possession of the person or agency making the referral pertaining to the identity of the child and the child's address, the name and address of the child's parent, guardian, or custodian, the names and addresses of any witnesses, and the child's present whereabouts;
>
> (2) a complete statement of the circumstances of the alleged delinquent conduct or conduct indicating a need for supervision;
>
> (3) when applicable, a complete statement of the circumstances of taking the child into custody; and
>
> (4) when referral is by an officer of a law-enforcement agency, a complete statement of all prior contacts with the child by officers of that law-enforcement agency.

Section 52.04(a)(2) requires the judge or justice to describe in writing those facts he or she believes constitute contempt of court. The municipal or justice court should also send a copy of its entire file in the case to the juvenile court to assist it in evaluating the referral.

Referrals with Child in Custody. Contempt referrals by a municipal or justice court can be paper referrals or referrals with the child in custody. Code of Criminal Procedure Article 45.058(f) provides:

> A child taken into custody for an offense that a justice or municipal court has jurisdiction of under Article 4.11 or 4.14, may be presented or detained in a detention facility designated by the juvenile court under Section 52.02(a)(3), Family Code, only if:
>
> (1) the child's non-traffic case is transferred to the juvenile court by a justice or municipal court under Section 51.08(b), Family Code; or
>
> (2) the child is referred to the juvenile court by a justice or municipal court for contempt of court under Article 45.050.

If the municipal or justice court has probable cause to believe that the child is in contempt of court for failure to obey one of its dispositional orders, then it has probable cause to believe the child has engaged in delinquent conduct in violation of Family Code Section 51.03(a)(2), which defines as delinquent conduct, "conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court." The definition applies only in justice or municipal court, a county court for conduct punishable by a fine only, or truancy court. If the judge or justice wishes to make a custody referral to the juvenile court for contempt, it should order a law enforcement officer to take the child into custody and transport him or her to the juvenile detention center. Under Family Code Section 52.01(a)(3), a law enforcement officer has authority to take such a child into custody because, under

these circumstances, he or she would have probable cause to believe that the child has engaged in delinquent conduct.

Juvenile Court Action After Referral. Whether the juvenile detention center admits the child or releases him or her to parents or others is a decision for juvenile intake to make. As to the case itself, under the Progressive Sanction Model, contempt of a municipal or justice court is assigned to level two - deferred prosecution. Family Code Section 59.003(a)(2). The Attorney General was asked whether a justice court could order a juvenile to be detained in a juvenile detention facility for three days for contempt of the justice court. The Attorney General answered that the justice court does not have that authority. Attorney General Opinion No. JC-0454 (2002). If a justice or municipal court refers a child to a juvenile court for contempt proceedings, that court may detain or release the child pending further proceedings just as in the case of any other delinquency referral. That decision, however, is for the juvenile court to make, not the referring court.

In 2003, the Attorney General addressed a related question, namely whether a juvenile court may detain a child under Family Code Sections 53.02 or 54.01 before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order. Attorney General Opinion No. GA-0131 (2003). The Attorney General determined that, regardless of the type of delinquent conduct with which a child is charged, the child may be detained by a juvenile court before an adjudication hearing so long as one of the factors listed in Sections 53.02 or 54.01 is present. Consequently, a child who is charged with contempt of a justice court order may be detained by a juvenile court if detention is warranted under the previously listed Family Code sections. The Attorney General clarified earlier Attorney General Opinion No. JC-0454 by emphasizing that a juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility. See also Family Code Section 54.04(o)(3) (a child adjudicated for contempt of a county, justice or municipal order may not, under any circumstances, be placed in a post-adjudication secure correctional facility or be committed to TJJD for that conduct).

It must be noted, however, that the Texas statutory scheme with respect to detaining status offenders who are referred to juvenile court for delinquent conduct contempt of a justice or municipal court order conflicts with the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 2002 in two respects. *First*, the JJDPA prohibits upgrading a status offender to a delinquent offender for violating a valid court order imposed for a status offense unless the violation itself is a delinquent act, as defined by federal law. *Second*, while the JJDPA does allow states to detain adjudicated status offenders for violating a valid court order, such an order must have been issued by a juvenile court judge. Additionally, the juvenile must be afforded certain due process rights, including the right to legal counsel. In Texas, juveniles do not have the right to appointed counsel when charged in justice or municipal court. Unless the child has retained counsel in the justice or municipal court proceeding that preceded the alleged contempt, the State cannot claim the violation of court order exception. It would therefore be advisable for juvenile courts to treat these types of referred cases not as delinquent conduct but rather as status offenses and limit the detention of these children to 24 hours, excluding hours of a weekend or a holiday, as provided by Section 54.011.

13. Waiver of, or Alternative Methods to Satisfy, Fines and Costs

There are multiple provisions in Article 45, Code of Criminal Procedure, that address a justice or municipal court's ability to waive fines and costs or to allow them to be satisfied through alternative methods.

Article 45.041 requires the judge or justice, during or immediately after imposing a sentence, to inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If not, the justice or judge must determine whether the fine and costs should be: paid at a later date or in designated intervals; discharged by performing community service under Article 45.049 or Article 45.0492; waived in full or in part under Article 45.0491; or satisfied through a combination of methods.

Article 45.041 also provides that the judge may allow a defendant who is a child as defined by Article 45.058(h) to elect at the time of conviction to discharge the fine and costs by either performing community service or receiving tutoring under Article 45.0492 (version added by HB 350 in 2011) or paying the fine and costs. This option is available for any child convicted of a Class C misdemeanor even though the referenced version of Article 45.0492 is applicable only to offenses occurring on school grounds. This option is available regardless of whether the child has the means to pay the fine and costs.

There are two versions of Article 45.0492, both of which were added in 2011 and amended in 2017. The first version, added by HB 350 in 2011 and amended by HB 351 and SB 1913 in 2017, applies to a defendant younger than 17 who is assessed a fine or costs for a Class C misdemeanor occurring on school grounds. The justice or judge may require the defendant to discharge all or part of the fine or costs by performing community service. In this version, the court may order the juvenile to perform community service by: (1) attending a work and job skills training program; a high school equivalency exam prep course; an alcohol or drug abuse program; a rehabilitation program; a counseling program; a mentoring program; a tutoring program; or any similar activity; or (2) by performing service for a governmental entity; a nonprofit organization or other type of organization that provides services to the general public that enhance social welfare and the general well-being of the community; or an educational institution. The entity accepting the individual to perform community service must agree to supervise the performance and report back to the court. While there is no limit on the total amount of community service that may be ordered, the court may not order the defendant to perform more than 16 hours per week unless the judge determines that requiring more does not impose an undue hardship on the juvenile or the juvenile's family. The defendant is considered to have discharged no less than $100 of fines or costs for each eight hours of community service. A local juvenile probation department or a court-related services office may provide the administrative and other services necessary to supervise the juvenile.

The second version of Article 45.0942, created by HB 1964 in 2011 and amended by HB 351 and SB 1913 in 2017, differs from the first in three ways. First, it is applicable to all Class C misdemeanor offenses committed by a child, not just those on school ground. Second, it limits the court to ordering a maximum of 200 community service hours. Third, attending a tutoring program is not considered community service under this version.

When there are duplicate provision in law, the question that arises is, "Which one controls?" The Code Construction Act provides guidance when amendments to the same statute are enacted in the same session without referencing one another. The provisions must be harmonized, if possible, so that effect may be given to each. If they cannot be harmonized, the latest in date of enactment prevails. Government Code Section 311.025(b). In this instance, the two versions of Article 45.0492 can be harmonized. The conflict regarding when tutoring may be ordered is resolved by the fact that Article 45.041 allows the court to order tutoring and specifically states that it may be ordered for any Class C misdemeanor committed by a child, not only those committed on school grounds. This means that the only remaining conflict is the limitation of community service hours to 200. Because that limitation is in the statute that applies to all Class C misdemeanors, it encompasses those that occur on school grounds. Thus, the court should likely follow the 200-hour limitation, no matter where the offense occurred.

Article 45.049 applies to all defendants, not just children. It allows the court to require a defendant to discharge all or part of the fine or costs by performing community service if the court has determined the defendant has insufficient resources or income to pay the fine or costs or if the defendant has failed to pay a previously assessed fine or costs, regardless of ability to pay. Community service may be performed for a governmental entity, a nonprofit organization, another organization that provides services to the general public that enhance social welfare and the general well-being of the community that is not a nonprofit, or an educational institution. It also allows the defendant to perform community service by attending a work and job skills training program, a high-school equivalency exam prep course, an alcohol or drug abuse program, a counseling program, a mentoring program, or any similar activity. Credit is given at a rate of not less than $100 for every eight hours of community service.

Article 45.0491 was added in 2007 to address instances in which indigent defendants defaulted on the payment of a fine or costs. As originally written, the court was authorized to waive the fines and costs of a person who had defaulted if the person was indigent and if the court determined that requiring the defendant to discharge the fine and costs through community service as allowed by Article 45.049 posed an undue hardship on the defendant. Article 45.0491 was amended in 2013 to allow the court to also waive the fine and costs for a child, without the child defaulting, if the court determined discharging the fine and costs via community service or tutoring as allowed by 45.049 or 45.0492 posed an undue hardship on the child. In 2017, Article 45.0491 was amended to remove the requirement that there first be a default before the court could waive the fine or costs for an indigent defendant. It also added a provision allowing the court to waive the fine and costs for a person who is not indigent but whom the court determines does not have sufficient resources or income to pay all or part of the fine or costs.

F. Court Records and Expunction

Court Records Are Confidential. Municipal and justice court records regarding Class C misdemeanors are considered criminal records. Prior to 2011, records relating to juveniles were available to the public just like records relating to adults. In 2011, the legislature added Article 45.0217, Code of Criminal Procedure, to make records relating to a child who is convicted of and who has satisfied a judgment for a fine-only misdemeanor offense (other than a traffic offense) confidential. Such records were open to inspection only by judges or court staff, a criminal justice agency for a criminal justice purposes, DPS, an attorney for a party to a proceeding, the child, of the child's parent, guardian, or managing conservator. This was similar to the confidentiality provisions for juvenile records, except that it applied only to cases in which there had been a conviction and the judgment was satisfied (fine paid and/or other dispositions completed) and there was no provision for the court to allow the release to another entity with an interest in the work of the court. This provision did not alter the rights of juveniles to expunction in the justice and municipal courts.

This new confidentiality provision was dubbed "conditional confidentiality," due to the contingency that the child satisfy the judgment. A conforming provision was added through Article 44.2811, which specified the confidentiality remained intact even after appeal. Section 58.00711, Family Code, including language identical to Article 45.0217 was created; however, that provision was misplaced as none of the records to which it applies are juvenile records, which is what is covered by Chapter 58, Family Code. For this reason, Section 58.00711 was repealed in 2017; though amended between 2011 and its repeal, it will not be discussed in this section.

In 2013, the legislature passed multiple bills relating to the confidentiality of the records of children in justice and municipal courts. While some believed that these bills, House Bill 528 and Senate Bills 393 and 394, were irreconcilable, it was determined by the Attorney General that they were not.

House Bill 528, effective January 1, 2014, amended Article 45.0217, Code of Criminal Procedure, by repealing the concept of conditional confidentiality and instead expanding the confidentiality to all non-traffic-related criminal records of children, giving near-parity to the records in juvenile court. With the change, the records of a child charged, convicted, acquitted, or granted deferred disposition are confidential; in other words, justice and municipal court criminal records concerning a child are always confidential. The list of entities who may inspect the records was not changed. Conforming changes were made in Article 44.2811. The changes apply to offenses committed before, on, or after the effective date of the Act, granting retroactive protection to the criminal records of children in justice or municipal courts.

Senate Bills 393 and 394, which were identical with regard to changes made to Articles 45.0217 and 44.2811, took a different approach, expanding the use of conditional confidentiality to include children whose cases were dismissed after receiving deferred disposition but not expanding confidentiality to all criminal records of children in justice and municipal courts. These amendments also applied to offenses committed before, on, or after the effective date of the Act, which was September 1, 2013.

Attorney General Opinion No. GA-1035 (2014) answered the question of whether House Bill 528 (total confidentiality) and Senate Bills 393 and 394 (expanded conditional confidentiality) irreconcilably conflicted. According to the Attorney General, the conditions in the Senate Bills with regard to Article 45.0217 are encompassed in the House Bill because records confidential under the Senate Bill (those of a child who was convicted and satisfied the judgement and those of a child whose case was dismissed as a result of deferred disposition) are encompassed in the total confidentiality created by the House Bill. While some records are required to be withheld under the House Bill that are not required to be withheld under the Senate Bills, the law is only violated when a court discloses a record that the statute requires be withheld; in other words, compliance with the House Bill results in compliance with the Senate Bills. The Attorney General's conclusion that the bills are not irreconcilable means that, as of January 1, 2014, all criminal court records of a child in justice or municipal courts are confidential and may not be disclosed except as authorized by law.

The Attorney General also examined Article 44.2811, as amended by the bills, and determined that, taken together, the bills establish three separate, independent conditions for confidentiality and, as a result, complying with one bill does not result in violating the other. Confidentiality attaches when: (1) a child is convicted and has satisfied the judgment; (2) the child receives a dismissal after deferral of disposition; or (3) the case is appealed. Attorney General Opinion No. GA-1035 (2014) at 2.

The Attorney General also indicated that the docket is not considered a record and so is not subject to the

confidentiality provisions and explained that the laws do not address and so do not impact the openness of a courtroom.

Statewide Database of Alcohol Violations by Minors. Alcoholic Beverage Code Section 106.116 requires municipal, justice, and juvenile courts to send to the Texas Alcoholic Beverage Commission, at its request, notice of conviction or adjudication for a violation of the Alcoholic Beverage Code by a minor. This mandate overrides any confidentiality and local record maintenance requirements.

In addition, Alcoholic Beverage Code Section 106.117 requires all convictions and deferred dispositions in municipal and justice court for alcohol violations by a minor to be reported to DPS. These offenses are Class C misdemeanors, which are not part of the statewide computerized criminal and juvenile history system maintained by DPS. Alcoholic Beverage Code Section 106.117(d) makes these records confidential and exempts them from the records destruction but not the sealing provisions in Chapter 58 of the Family Code. It also exempts them from any other law limiting collection or reporting of information on a juvenile or other minor or requiring destruction of that information.

An acquittal under Section 106.041, driving or operating a motor vehicle or watercraft under the influence of alcohol by a minor (DUIM), is required to be reported because of the effect it has on driver's license suspension. See Transportation Code Section 524.015.

There is no legislative authorization to take fingerprints and photographs of juveniles who are charged with Class C misdemeanor alcohol violations in municipal, justice, or juvenile courts. The legislature created a presumption that a person who holds a driver's license is the same person identified in court records by a driver's license with the same identification number. That presumption is capable of being rebutted by testimony under oath. By reference to driver's license numbers in Section 106.117(c), the legislature apparently contemplated that this database will be maintained based on names, dates of birth, and drivers' license numbers, if any.

Unlike the Juvenile Justice Information System (JJIS), only convictions (and their equivalent) or, in the case of DUIM, acquittals, are to be reported. An arrest or charge is not to be reported unless and until it results in court action that triggers the reporting requirement.

This is not a public database, and dissemination of information from it is restricted to law enforcement agencies and courts and only to enable them to "carry out their official duties."

Alcoholic Beverage Code Section 106.117(d) provides that the information collecting and destruction provisions of Family Code Chapter 58 and any other law do not apply to the DPS database. Of course, information in this database is still subject to sealing provisions of Family Code Chapter 58 and to various expunction, sealing, and destruction provisions in Chapter 45, Code of Criminal Procedure and Section 106.12, Alcoholic Beverage Code. See Chapter 15 for a discussion of destruction and sealing rights under Chapter 58.

Ordinary Expunction Provisions. Children's case records in municipal or justice court are subject to the same expunction provisions as any other criminal records. Under Code of Criminal Procedure Article 55.01, as applied to fine only offenses, a person is entitled to have criminal records expunged if: (1) the defendant has been acquitted by the trial court, as long as the defendant was not convicted of any offense arising out of the same criminal episode or is not subject to additional prosecution related to the same criminal episode; (2) the defendant has been convicted and subsequently pardoned for a reason other than actual innocence; (3) the defendant has been convicted and subsequently pardoned or otherwise granted relief on the basis of actual innocence; (4) the person has been released and no information or indictment charging the person was presented and the statute of limitations has expired or, regardless of the statute of limitation, it has been 180 days since the date of arrest; (5) the person completed a veterans treatment court program or a pretrial intervention program resulting in the information being dismissed or quashed; (6) the information was presented due to a mistake, false information, or another similar reason indicating absence of probable cause; (7) the information was void; (8) the person was arrested due to identification information that was inaccurate due to a clerical error; or (9) another person, upon that person's arrest, falsely gave the identifying information of the person seeking expunction. A court may expunge the records if the person has been convicted and acquitted by the Court of Criminal Appeals or, if the period for granting a petition for discretionary review has expired, by a court of appeals. An expunction based on acquittal is not available if there are any charges for which the conviction remains in place or there are any charges from the same criminal episode that are still subject to prosecution.

The provision of law stating that a defendant was not eligible to have records expunged no matter how the case terminated if he or she had been convicted of a felony in the five years preceding the date of the arrest was removed in 2011. Former Code of Criminal Procedure Article 55.01(a)(2)(C).

Expunction for Deferred Disposition. If a case in municipal or justice court was dismissed under the deferred disposition provisions of Code of Criminal Procedure Article 45.051, records can be expunged under Code of Criminal Procedure Article 55.01. Code of Criminal Procedure Article 45.051(e). Deferred disposition is available for adults as well as children. It is available in traffic cases as well as other fineable only cases.

In addition, Code of Criminal Procedure Article 45.051(e) provides, "If a complaint is dismissed under this article, there is not a final conviction and the complaint may not be used against the person for any purpose."

Special Expunction Provisions for Children. The Code of Criminal Procedure contains an expunction provision especially for children prosecuted in municipal or justice court. Code of Criminal Procedure Article 45.0216 provides:

(a) In this article, "child" has the meaning assigned by Section 51.02, Family Code.

(b) A person may apply to the court in which the person was convicted to have the conviction expunged as provided by this article on or after the person's 17th birthday if:

(1) the person was convicted of not more than one offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child; or

(2) the person was convicted only once of an offense under Section 43.261, Penal Code.

(c) The person must make a written request to have the records expunged. The request must be under oath.

(d) The request must contain the person's statement that the person was not convicted of any additional offense or found to have engaged in conduct indicating a need for supervision as described by Subsection (f)(1) or (2), as applicable.

(e) The judge shall inform the person and any parent in open court of the person's expunction rights and provide them with a copy of this article.

(f) The court shall order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, expunged from the person's record if the court finds that:

(1) for a person applying for the expunction of a conviction for an offense described by Section 8.07(a)(4) or (5), Penal Code, the person was not convicted of any other offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child; and

(2) for a person applying for the expunction of a conviction for an offense described by Section 43.261, Penal Code, the person was not found to have engaged in conduct indicating a need for supervision described by Section 51.03(b)(6), Family Code, while the person was a child.

(f-1) After entry of an order under Subsection (f), the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose.

(g) This article does not apply to any offense otherwise covered by:

(1) Chapter 106, Alcoholic Beverage Code [alcohol violations by minors]; or

(2) Chapter 161, Health and Safety Code [underage tobacco violation].

(h) Records of a person under 17 years of age relating to a complaint may be expunged under this article if:

(1) the complaint was dismissed under Article 45.051 or 45.052 or other law; or

(2) the person was acquitted of the offense.

(i) The justice or municipal court shall require a person who requests expungement under this article to pay a fee in the amount of $30 to defray the cost of notifying state agencies of orders of expungement under this article.

(j) The procedures for expunction provided under this article are separate and distinct from the expunction procedures under Chapter 55.

Prior to 2015, the Code of Criminal Procedure allowed a municipal or justice court to expunge criminal records of children accused of certain Class C misdemeanors (notably, traffic offenses are excluded) if the complaint is dismissed pursuant to deferred disposition (Article 45.051) or completion of a teen court program (Article 45.052). Senate Bill 108 amended Article 45.0216(h) to allow such records to also be expunged if a complaint is dismissed under "other law" or if the child is acquitted of the offense.

Penal Code Sections 8.07(a)(4) and (5) permit prosecution in criminal court of a child for a misdemeanor offense within the jurisdiction of a justice or municipal court or for an ordinance violation. Penal Code Sections 8.07(a)(2) and (3) refer to traffic offenses only. Subdivisions (4) and (5) were added in 1991 when fineable-only offense jurisdiction was given to municipal and justice courts. It is clear, therefore, that the special juvenile expunction provisions of Article 45.0216 do not apply to traffic offenses. Records of traffic offense cases can be expunged only in Chapter 55 proceedings.

Expunction proceedings under Article 45.0216 are brought in the court in which the criminal cases were filed—municipal or justice court. A motion or petition to expunge could be filed in municipal or justice court under the original criminal cause number. That court enters the expunction orders and collects the records for safekeeping.

If a juvenile has only one conviction for an eligible offense, he or she, upon reaching the age of 17, may apply to the justice or municipal court for expunction of the records. If a case terminated with a dismissal or a deferred disposition, then it did not end in a conviction and does not count toward the one conviction restriction.

The request for expunction must be in writing and under oath, but no particular form is required. If the justice or municipal court finds that the juvenile was convicted of only one such offense, then the court must order expunction of all records, including prosecutorial and law enforcement records, relating to the case or cases for which expunction was sought. Article 45.0126(f) provides that upon entry of an expunction order, "the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose." Unfortunately, the 2005 enactment of Subsection (i), which requires a $30 fee to defray the cost of notifying state agencies of the expungement orders, may have a chilling effect on indigent youth and their families availing themselves of this right.

This expunction procedure is designed to be a residual procedure, applicable only when a more specific procedure does not apply. As provided by Article 45.0216(g), the expunction provisions of the Alcoholic Beverage Code apply to juvenile alcohol violations, and the provisions in Chapter 161, Health and Safety Code, apply to underage tobacco violations.

Special Alcoholic Beverage Code Expunction Provision. The Alcoholic Beverage Code contains a special expunction provision applicable only to convictions of alcohol offenses by minors. Alcoholic Beverage Code Section 106.12 allows a person, upon turning 21, to apply for expunction if the person was convicted or only one age-related alcohol offense while a minor. The application must include a sworn statement to that effect. If the court finds the person had only one conviction, the court must order the expunction. After entry of the order, the applicant is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose. The court is required to charge a $30 filing fee to defray the cost of notifying state agencies of the order of expunction.

This statute addresses only a conviction. If the alcohol violation was disposed of by deferred disposition under Article 45.051 of the Code of Criminal Procedure, by teen court under Article 45.052 of the Code of Criminal Procedure, or by a dismissal of charges or an acquittal, there has not been a criminal conviction. This statute would not apply to such a case, but the special juvenile sealing statute in Article 45.0216 could be applied because it would not conflict with the Alcoholic Beverage Code provision in that circumstance. Article 45.0216 would permit an immediate sealing of the records in the alcoholic beverage case in the discretion of the judge or justice.

Special Failure to Attend School Expunction Provision. As part of the transition of truancy from criminal to civil in nature, Code of Criminal Procedure Article 45.0541 creates a special expunction for failure to attend school cases, providing that an individual who was convicted of the former offense of failure to attend school, or who had such a complaint dismissed, is entitled to an expunction, regardless of whether the person petitions for the expunction. The $30 fee authorized in Government Code Section 103.021(20-b) to defray the cost of notifying state agencies of orders of expunction was repealed in

2015, and no new expunction fee was authorized. Justice and municipal courts issued expunction orders under this provision and sent them to juvenile courts, presumably ordering them to expunge records that accompanied contempt referrals to juvenile court.

The Attorney General was asked whether this new provision applied to failure to attend school records that were forwarded to juvenile courts as part of a referral for the delinquent conduct offense of contempt and that served as evidence in those cases. The Attorney General was further asked what impact the expunction would have on the contempt referral and any disposition of that referral. The Attorney General answered that the expunction orders did apply to the juvenile court records, despite them being records related to a different offense, but declined to give guidance on how the expunction impacted the delinquent conduct contempt cases. Attorney General Opinion KP-0073 (2016). To eliminate this issue in the future, Section 58.265, Family Code, was added in 2017 stating that juvenile records are not subject to an order of expunction issued by any court.

Expunctions for Underage Tobacco Violations. Health and Safety Code Section 161.255 provides for expunction by a justice or municipal court of records in underage tobacco violation cases. In 2015, the legislature amended Health and Safety Code Section 161.252 to include e-cigarettes as a prohibited tobacco product by a minor. Correspondingly, Sections 161.253 and 161.255 were amended to include e-cigarettes in awareness programs and community service. The lack of regulation by the federal government at the time and the potential harmful effects on adolescents prompted this legislation. Section 161.255 allows an individual convicted of an offense under Section 161.252 to apply to the court for expunction. The court must order expunction if the court finds the individual satisfactorily completed the e-cigarette and tobacco awareness program or community service ordered by the court. A $30 fee is required to defray the cost of notifying state agencies of the order of expunction.

G. School Attendance Cases: The Texas Truancy Transition

If the system for handling cases when the criminal defendant is of juvenile age resembles a shadow juvenile justice system operating in the justice and municipal courts, then the system for handling civil truant conduct cases in truancy courts lies somewhere between a shadow and a reflection. Justice and municipal courts formerly became involved in adjudicating school attendance cases in three ways: (1) upon a complaint being filed against the child for the criminal offense of failure to attend school (former Education Code Section 25.094); (2) upon a complaint being filed against the parent of a truant child for the criminal offense of parent contributing to nonattendance (Education Code Section 25.093); or (3) upon transfer from the juvenile court of a truancy CINS case (former Family Code Section 54.021). In 2015, just one year shy of 100 years since the enactment of the compulsory attendance law in Texas, the legislature changed the enforcement of that law with House Bill 2398, ending the "criminalization of truancy" and creating a new court and set of procedures to handle school attendance cases involving children.

Failure to attend school is no longer a criminal offense. However, that does not mean that children are no longer held accountable for failing to attend school. The procedures for handling school attendance cases are in Title 3A, Chapter 65 of the Family Code (Truancy Court Proceedings). Justice, municipal, and certain county courts (in a county with a population of 1.75 million or more, the constitutional county court) are designated as truancy courts, having original, exclusive jurisdiction over allegations of truant conduct. Section 65.004(b). Municipalities may enter into an agreement with a contiguous municipality or one with boundaries that are within one-half mile of the municipality seeking to enter into the agreement to establish concurrent jurisdiction of the municipal courts in the municipalities and provide original jurisdiction to a municipal court in which a truancy case is filed as if the municipal court were located in the municipality in which the case arose. Section 65.004(c). If a person was referred to the truancy court for truant conduct before the person's 19th birthday, the truancy court retains jurisdiction over the person, without regard to the person's age, until final disposition of the case. Section 65.004(d).

Truant conduct is not a criminal offense. The only allegation the truancy court is authorized to hear, truant conduct, is prosecuted as a civil case in truancy court. Section 65.003(b). It is defined in Family Code Section 65.003(a) as failure to attend school on 10 or more days or parts of days within a six-month period in the same school year, by a child, defined as a person who is 12 years of age or older and younger than 19 years of age, who is required to attend school under Education Code Section 25.085. An adjudication of truant conduct is not a criminal conviction. Section 65.009.

In addition to the procedures in Family Code Chapter 65, the legislature authorized the Texas Supreme Court to

promulgate rules of procedure applicable to truant conduct proceedings. Section 65.012.

Initiating Proceedings in Truancy Court. Venue for a truant conduct proceeding under Section 65.006 is the county in which the school in which the child is enrolled is located or the county where the child resides. The process begins with a referral to the truancy court by a school district under Education Code Sections 25.0915 and 25.0951. A school district shall refer a student to a truancy court within 10 school days of the student's 10th absence (10th day or part of day in a six-month period in the same school year). Education Code Section 25.0951. However, a school district may delay referral or choose not to refer if it is applying truancy prevention measures under Section 25.0915 and determines that such measures are succeeding and it is in the best interest of the student that a referral not be made. Section 25.0951(d). A school district's referral must:

> (1) be accompanied by a statement from the student's school certifying that:
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> (A) the school applied the truancy prevention measures required to be adopted under Education Code Section 25.0915(a) or (a-4) to the student; and
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> (B) the truancy prevention measures failed to meaningfully address the student's school attendance; and (2) specify whether the student is eligible for or receives special education services under Education Code Subchapter A, Chapter 29.

Section 25.0915(b).

At this juncture, the truancy court must forward the referral to a truant conduct prosecutor. The truancy court is not authorized to review or screen referrals prior to forwarding. Family Code Section 65.052. However, once the truant conduct prosecutor files a petition requesting an adjudication of the child for truant conduct, the truancy court shall dismiss the petition if the referral is defective under Education Code Section 25.0915(c). A truancy court is authorized by Family Code Section 65.017 to employ a juvenile case manager in accordance with Code of Criminal Procedure Article 45.056 to provide services to children who have been referred to the truancy court or who are in jeopardy of being referred to the truancy court.

In a municipal or justice court, the attorney who represents the State in criminal matters in that court is to serve as the truant conduct prosecutor. Family Code Section 65.052. The truant conduct prosecutor shall promptly review the facts described in the referral, and may, in the prosecutor's discretion, determine whether to file a petition with the truancy court requesting an adjudication of the child for truant conduct. Family Code Section 65.053. As part of his or her review, and prior to filing, the truant conduct prosecutor must determine whether the referral was made in compliance with Education Code Section 25.0915. If the referral does not comply, the petition may not be filed. Family Code Section 65.053(b). The decision to file a petition that complies with Section 25.0915 lies entirely with the prosecutor. Under Family Code Section 65.053, if the prosecutor decides not to file a petition, the prosecutor shall inform the school district of that decision.

A petition for adjudication of a child for truant conduct initiates an action of the State against a child who has allegedly engaged in truant conduct. This petition may be on information and belief. Section 65.054(c). It may not be filed after the 45th day after the date of the last absence giving rise to the act of truant conduct. Section 65.053(c). This is a notably short limitations period. Under Family Code Section 65.054(d), the petition must state:

> (1) with reasonable particularity the time, place, and manner of the acts alleged to constitute truant conduct;
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> (2) the name, age, and residence address, if known, of the child;
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> (3) the names and residence addresses, if known, of at least one parent, guardian, or custodian of the child and of the child's spouse if any; and
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> (4) if the child's parent, guardian, or custodian does not reside or cannot be found in the state, or if their places of residence are unknown, the name and residence of any known adult relative residing in the county or, if there is none, the name and residence address of the known adult relative residing nearest to the location of the court.

Education Code Section 25.0915(c), provides:

> The truancy court shall dismiss the petition if the court determines that the school district's referral:
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> (1) does not comply with Subsection (b) [of Education Code Section 25.0915];
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> (2) does not satisfy the elements required for truant conduct,

(3) is not timely filed, unless the school district delayed the referral under [Education Code] Section 25.0951(d); or

(4) is otherwise substantively defective.

For example, under Education Code Section 25.0915(a-3), a school district may not refer a student to truancy court if it determines the truancy is a result of pregnancy, being in the state foster program, homelessness, or being the principal income earner for the student's family.

After the petition has been filed, the truancy court shall set a date and time for an adjudication hearing; the hearing cannot be held until at least the 10th day after the date the petition is filed. Family Code Section 65.056. After setting the hearing, the truancy court directs that summons be issued to: (1) the child named in the petition; (2) the child's parent, guardian, or custodian; (3) the child's guardian ad litem, if any; and (4) any other person who appears to the court to be a proper or necessary party to the proceeding. Section 65.057(a). The summons must: (1) require the persons served to appear before the court at the place, date, and time of the adjudication hearing to answer the allegations of the petition; (2) be accompanied by a copy of the petition; and (3) be served on the person personally or by registered or certified mail, return receipt requested, at least five days before the date of the adjudication hearing (if the person is in this state and can be found). Section 65.057(b). A witness may be subpoenaed in accordance with the procedures for the subpoena of a witness under the Code of Criminal Procedure. Section 65.064.

The child may answer the petition, orally or in writing, at or before the commencement of the hearing. If the child does not answer, a general denial of the alleged truant conduct is assumed. Section 65.060. There is no set way in which the child must answer. However, a plea of guilty or not guilty would be inappropriate because the case is not criminal. A child may answer "true" or "not true." Another possible answer is to "admit" or "deny" the allegations in the petition. The best practice is likely for the child to answer the petition orally at the adjudication hearing.

An adjudication hearing is required even if the child answers the petition with "true" prior to the hearing. A child may only be found to have engaged in truant conduct after an adjudication hearing. Section 65.101(a). If any person summoned for the hearing, other than the child, fails to appear, the hearing may proceed. The child must be present for the court to hold a hearing. Section 65.057.

Prior to the proceedings, or at any time during the proceedings, a party may make a motion requesting that the petition be dismissed because the child has a mental illness as defined by Health and Safety Code Section 571.003. Family Code Section 65.065 provides that, in response to the motion, the truancy court shall temporarily stay the proceedings to determine whether probable cause exists to believe the child has a mental illness. If the court finds probable cause, it shall dismiss the petition. If the court does not find probable cause, it shall dissolve the stay and continue with the proceedings. In making the determination, the court may consider the motion, supporting documents, professional statements of counsel, and witness testimony in addition to observing the child. Of course, a court may *sua sponte* determine that probable cause exists to believe the child has a mental illness and dismiss the petition. Section 65.065 should not be read as a prohibition on the court in light of Family Code Section 65.001(c), which states that the primary consideration in adjudicating truant conduct is the best interest of the child.

Initiating Proceedings by Attendance or Law Enforcement Officers. Truant conduct cases can be initiated by a police officer or other attendance officer referring a student to a truancy court if the student has unexcused absences for the amount of time specified under Family Code Section 65.003(a). However, attendance officers' authority to take a student into custody when in violation of the compulsory school attendance law is limited to taking into custody for the purpose of returning the child to the child's school campus. Section 25.091(b-1), Education Code.

Attendance officers still have the power to enforce compulsory attendance requirements by filing a complaint in a county, justice, or municipal court against a parent who violates Education Code Section 25.093 (Parent Contributing to Nonattendance), if truancy prevention measures fail to meaningfully address the student's conduct.

For a discussion of the powers of attendance officers and of peace officers enforcing school attendance laws, see Chapter 22. Also see Chapter 22 for criminal procedures related to school offenses.

Truant Conduct. The civil offense of "truant conduct" is defined in Family Code Section 65.003(a) as failure to attend school on 10 or more days or parts of days within a six-month period in the same school year. The offense may be committed only by a child who is required to attend

school under Education Code Section 25.085. This may look familiar, as the same conduct constituted the former criminal offense of failure to attend school as well as "truancy," a form of conduct indicating a need for supervision (CINS). This conduct is now neither a criminal offense nor CINS. Further, failing to attend school on three or more days or parts of days in a four-week period (which also constituted the former criminal offense of failure to attend school and a form of CINS) no longer constitutes truancy. That time period does, however, trigger the requirement that a school district initiate truancy prevention measures in Education Code Section 25.0915(a-4). For a discussion of required truancy prevention measures, see Chapter 22.

Section 65.002(1) defines "child" as a person who is 12 years of age or older and younger than 19 years of age. In 2015, the legislature amended Education Code Section 25.085 in two important ways. First, persons 18 years of age are required to attend school. Prior to the amendment, a person was not required to attend school after his or her 18th birthday. Second, a person voluntarily enrolls or attends school only after his or her 19th birthday. The amendment also created new revocation procedures and requirements relating to voluntary enrollment.

For the purposes of allegations of truant conduct, a person voluntarily attending school under Education Code Section 25.085(e) cannot be found to have engaged in truant conduct. Education Code Section 25.085(f), allows a school district to adopt a policy requiring such a person, if they are under the age of 21, to attend school until the end of the school year; however failure to so attend does not constitute truant conduct.

The definition of truant conduct does not require that the 10 or more absences be unexcused. Instead, under Family Code Section 65.003(c), it is an affirmative defense to an allegation of truant conduct that one or more of the absences required to be proven have been excused by a school official or by the court or that one or more of the absences were involuntary. This affirmative defense is successful only if it results in there being an insufficient number of unexcused or voluntary absences remaining to constitute truant conduct. The child has the burden to show that the absence has been or should be excused or that the absence was involuntary, but that burden is only by a preponderance of the evidence. If a court decides to excuse an absence for the purpose of determining truant conduct, that does not affect a school district's ability to determine whether to excuse the absence for another purpose.

Parental Presence in Truant Conduct Cases. When a petition alleging a student engaged in truant conduct under Family Code Section 65.003 is filed by the truant conduct prosecutor in truancy court, Family Code Section 65.057 requires the court to summons the parent, guardian, or custodian to appear personally at the hearing and to bring the child to court. Under Family Code Section 65.062, a parent or guardian of the child and any court-appointed guardian ad litem of a child is required to attend the hearing unless such person is excused by the court for good cause, is not a resident of this state, or is a parent of a child for whom a managing conservator has been appointed and the parent is not the conservator. This is enforceable by contempt under Family Code Section 65.253. If a child appears without a parent or guardian, or it appears to the court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to truancy court proceedings, the court may, under Family Code Section 65.061, appoint a guardian ad litem. The court may order the child's parent or other responsible person to reimburse the county or municipality for the cost of the guardian ad litem only after it determines such person has sufficient financial resources to offset the cost in part or in whole. Section 65.061(c).

If the child fails to appear at the hearing and the court endorsed on the summons an order directing the person having physical custody or control of the child to bring the child to the hearing as allowed in Section 65.057(c), the court may issue a writ of attachment for the person who failed to bring the child as ordered. The writ of attachment is executed in the same manner as in a criminal proceeding under Chapter 24, Code of Criminal Procedure. Section 65.254.

Adjudication Hearing. A child may only be found to have engaged in truant conduct after an adjudication hearing. Section 65.101(a). Parents and guardians are also required to attend the hearing, but the hearing may occur without their presence. Section 65.057(b). The child, however, must be present, for the hearing to occur. Family Code Section 65.101(b) requires the truancy court to explain to the child and the child's parent, guardian, or guardian ad litem:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if the child is not already represented; and

(6) the child's right to a jury trial.

Despite the use of the word "right" in Section 65.101(b)(5), a child alleged to have engaged in truant conduct is not entitled to have an attorney appointed to represent the child in truancy court; however, the court may, under Family Code Section 65.059, appoint an attorney if the court determines it is in the best interest of the child. Family Code Section 65.059 allows the court to order a child's parent or other responsible person to pay for the cost of an attorney appointed under this section if the court determines that the person has sufficient financial resources.

Elsewhere in the truancy construct, the legislature addresses procedural protections for the child in truant conduct proceedings. For example, the adjudication of a child as having engaged in truant conduct may not be used in any subsequent court proceedings other than for the purposes of determining remedial actions under Chapter 65 or in an appeal. Other procedures in Chapter 65 include appointing an interpreter, discovery, digital signatures, and public access to and recording of court hearings. Family Code Section 65.013 requires the truancy court to appoint a qualified interpreter in a truancy court proceeding on a motion by a party or the court if the court determines the child, parent or guardian, or a witness does not understand and speak English or if a party notifies the court that the child, parent or guardian, or a witness is deaf. For language interpreters, Code of Criminal Procedure Article 38.30, Subsections (a), (b), and (c) apply. A qualified telephone interpreter may be sworn if an interpreter is not available to appear in person. For deaf interpreters, Code of Criminal Procedure Article 38.31, Subsections (d), (e), (f), and (g), apply.

Family Code Section 65.101(e) includes other procedural protections for the child, such as a provision that the child does not have to be a witness against or otherwise incriminate himself or herself. It further provides that an extra-judicial statement of the child obtained in violation of the United States or Texas Constitution may not be used in the hearing. It also provides that a child's statement made out of court is insufficient to support a finding of truant conduct unless it is corroborated wholly or partly by other evidence. In light of the civil nature of truancy proceedings, the applicability of these provisions is unclear.

Rights granted to a child by Family Code Chapter 65, including the right to a trial by jury, or by the constitution or laws of Texas or the United States can only be waived in truancy proceedings if:

(1) the right is one that may be waived;

(2) the child and the child's parent or guardian are informed of the right, understand the right, understand the possible consequences of waiving the right, and understand that waiver of the right is not required;

(3) the child and the child's parent or guardian sign the waiver; and

(4) the child's attorney signs the waiver, if the child is represented by counsel.

Family Code Section 65.008.

At the conclusion of the adjudication hearing, the court or jury must find whether the child has engaged in truant conduct. Section 65.101(f). Such finding must be based on competent evidence admitted at the hearing. The Texas Rules of Evidence, however, do not apply in a truancy proceeding except when the judge hearing the case determines that a particular rule of evidence applicable to criminal cases must be followed to ensure that the proceedings are fair to all parties, or as otherwise provided by Family Code Chapter 65. Section 65.101(d).

There is a presumption that the child did not engage in truant conduct and the State must prove its case beyond a reasonable doubt. The truancy court must explain this burden to the jury, if there is one. Section 65.101(f). If the truancy court or jury finds that the child did not engage in truant conduct, the case is dismissed with prejudice. Section 65.101(g). If the finding is that the child did engage in truant conduct, the truancy court must proceed to judgment and order the remedies it finds appropriate under Family Code Section 65.103, the purpose of which are to keep the child in school. Jury verdicts must be unanimous. The jury is not involved in ordering remedies. Section 65.101(h).

Truancy Court Dispositional Powers and Procedures. Truancy courts possess a limited range of dispositional powers and alternatives when dealing with children adjudicated for truant conduct.

1. Remedial Actions

A truancy court must order appropriate remedial actions (also called remedies) upon issuing a judgment finding a child to have engaged in truant conduct. Section

65.101(h). The court must both orally pronounce the remedial actions and enter them in a written order. Section 65.102(b). The required written order is a remedial order. Family Code Section 65.103 lists possible remedies in a remedial order:

> A truancy court may enter a remedial order requiring a child who has been found to have engaged in truant conduct to:
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> (1) attend school without unexcused absences;
>
> (2) attend a preparatory class for the high school equivalency examination administered under Section 7.111, Education Code, if the court determines that the individual is unlikely to do well in a formal classroom environment due to the individual's age;
>
> (3) if the child is at least 16 years of age, take the high school equivalency examination administered under Section 7.111, Education Code, if that is in the best interest of the child;
>
> (4) attend a nonprofit, community-based special program that the court determines to be in the best interest of the child, including:
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> (A) an alcohol and drug abuse program;
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> (B) a rehabilitation program;
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> (C) a counseling program, including a self-improvement program
>
> (D) a program that provides training in self-esteem and leadership;
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> (E) a work and job skills training program;
>
> (F) a program that provides training in parenting, including parental responsibility;
>
> (G) a program that provides training in manners;
>
> (H) a program that provides training in violence avoidance;
>
> (I) a program that provides sensitivity training; and
>
> (J) a program that provides training in advocacy and mentoring;
>
> (5) complete not more than 50 hours of community service on a project acceptable to the court; and
>
> (6) participate for a specified number of hours in a tutorial program covering the academic subjects in which the child is enrolled that are provided by the school the child attends.

The truancy court may not order a child to attend a juvenile justice alternative education program, a boot camp, or a for-profit truancy class or perform more than 16 hours of community service per week. Section 65.103(b). These remedies and prohibitions are almost identical to those that were available to the courts in prior failure to attend school cases.

Family Code Section 65.104 provides that the remedial order is effective until the later of: (1) the date specified by the court in the order, which may not be later than the 180th day after the date the order is entered; or (2) the last day of the school year in which the order was entered.

A truancy court may modify any remedy imposed by the court, but only at a hearing and only while the remedial order is effective. The order of a truancy court may be challenged by a motion for new trial. Rules 505.3(c) and (e) of the Texas Rules of Civil Procedure apply to the motion.

After pronouncing the remedial actions, the court must advise the child and the child's parent, guardian, or guardian ad litem of the child's right to appeal and the procedures for the sealing of records, discussed below. Section 65.102(c).

2. Driver's License Suspension

In addition to a remedial order, Family Code Section 65.103 authorizes the truancy court to order DPS to suspend the driver's license or permit of a child who has been found to have engaged in truant conduct. If the child does not have a driver's license or permit, the court may order DPS to deny the issuance of a license or permit to the child. The period of the license or permit suspension or the order that the issuance of a license or permit be denied may not extend beyond the maximum time period that a remedial order is effective as provided by Family Code Section 65.104.

3. Other Orders in Truant Conduct Cases

Upon a finding that a child has engaged in truant conduct, the truancy court may enter certain orders affecting

persons other than the child. These orders are provided in Family Code Section 65.105, which authorizes the court to:

(1) order the child and the child's parent to attend a class for students at risk of dropping out of school that is designed for both the child and the child's parent;

(2) order any person found by the court to have, by a wilful act or omission, contributed to, caused, or encouraged the child's truant conduct to do any act that the court determines to be reasonable and necessary for the welfare of the child or to refrain from doing any act that the court determines to be injurious to the child's welfare;

(3) enjoin all contact between the child and a person who is found to be a contributing cause of the child's truant conduct, unless that person is related to the child within the third degree by consanguinity or affinity, in which case the court may contact the Department of Family and Protective Services, if necessary;

(4) after notice to, and a hearing with, all persons affected, order any person living in the same household with the child to participate in social or psychological counseling to assist in the child's rehabilitation;

(5) order the child's parent or other person responsible for the child's support to pay all or part of the reasonable costs of treatment programs in which the child is ordered to participate if the court finds the child's parent or person responsible for the child's support is able to pay the costs;

(6) order the child's parent to attend a program for parents of students with unexcused absences that provides instruction designed to assist those parents in identifying problems that contribute to the child's unexcused absences and in developing strategies for resolving those problems; and

(7) order the child's parent to perform not more than 50 hours of community service with the child.

However, Family Code Section 65.105(c) provides that, on a finding by the court that a child's parents have made a reasonable good faith effort to prevent the child from engaging in truant conduct and that, despite those efforts, the child continues to do so, the court shall waive any requirement for community service that may be imposed on a parent.

Enforcing Court Orders. Court orders in truant conduct cases are enforced by contempt of court proceedings or, in some cases, by referral to the juvenile probation department with a request for truancy intervention.

1. Contempt: Child

If a child fails to obey a remedial order or is in direct contempt of court, the truancy court, after providing notice and an opportunity for a hearing, may hold the child in contempt of court and order the child to pay a fine not to exceed $100 and/or order DPS to suspend the child's driver's license or permit; if the child does not have a license or permit, the court may order DPS to deny the issuance of a license or permit to the child until the child fully complies with the court's orders. Section 65.251(a).

Family Code Section 65.251(e) provides that a truancy court may not order confinement of the child for failure to obey the remedial order.

If a child fails to obey a remedial order or is in direct contempt of court and has failed to obey an order or has been found in direct contempt of court on two or more previous occasions, the court, after providing notice and an opportunity for a hearing, may refer the child to the juvenile probation department as a request for truancy intervention, unless the child failed to obey the truancy court order or was in direct contempt of court while 17 years or age or older. Section 65.251(b). The Attorney General clarified that the referral to juvenile probation for a truancy intervention is on the third contempt, whether that contempt is direct contempt or failure to obey a truancy order, and that the two prior contempt occasions could be two direct contempt violations, two failures to obey a truancy order, or one of each. Attorney General Opinion KP-0064 (2016).

The juvenile probation department may, on review of information provided by the truancy court, offer further remedies related to the local plan for truancy intervention strategies adopted under Education Code Section 25.0916 or refer the child to a juvenile court for a hearing to be conducted under Family Code Section 65.252. Section 65.251(d). If the probation department makes a referral, the juvenile prosecutor must determine if probable cause exists to believe the child engaged in direct contempt or failed to obey an order of a truancy court under circumstances that would constitute contempt. If the prosecutor requests adjudication and the court finds the child engaged in conduct that meets the definition of contempt, the court must enter an order requiring the child to comply with the truancy court's order and forward that order

to the truancy court within five days. The court must also admonish the child, orally and in writing, of the consequences of subsequent referrals to the juvenile court.

If the prosecutor determines there is probable cause, the prosecutor must determine whether to request an adjudication. If it does so, the juvenile court must conduct a hearing not later than the 20th day after receiving the request for adjudication. If the prosecutor does not find probable cause, or if the juvenile probation department finds extenuating circumstances caused the original truancy referral, the juvenile court must enter an order requiring the child's continued compliance with the truancy court order.

Section 65.252 presents multiple implementation and legal issues. First, there is a jurisdiction question. The juvenile court has jurisdiction to adjudicate delinquent conduct and CINS. Contempt by failure to comply with a truancy court order (i.e. "indirect contempt") is by definition delinquent conduct under Section 51.03, which means the juvenile court clearly has jurisdiction over it. However, direct contempt is not defined as either delinquent conduct or CINS. Direct contempt of a juvenile court is addressed specifically in Section 54.07, Family Code; however, there is no mention of the juvenile court having jurisdiction over direct contempt committed in another court. Thus, it is questionable whether the juvenile court has authority to adjudicate a direct contempt referral from another court. Even if Section 65.252 is read to confer jurisdiction over direct contempt of a truancy court on the juvenile court, it is unclear what action the juvenile court could take that would actually address the direct contempt given that the juvenile court actions mandated in Section 65.252(b) focus on requiring the child to obey the truancy court order, which is not likely an issue in a direct contempt referral, as well as warning the child about the possible consequences of future referrals.

The possible consequences of future referrals include "a possible charge of delinquent conduct" and "a possible detention hearing." Given that it is highly likely at least one of these things occurred before the court found the child had engaged in contempt, these admonishments seem to come too late in the process to be meaningful, whether the child was referred for direct or indirect contempt.

Another implementation issue arises with regard to the reference to the juvenile probation department and a finding of extenuating circumstances. The juvenile probation department is not included in the process between referral to the prosecutor and the prosecutor's decision to "request an adjudication." However, there is a reference to the juvenile probation department finding that "extenuating circumstances caused the original truancy referral." In addition to the lack of guidance on when this finding is to be made, this seems to insert the juvenile probation department into a fact-finding role related to a truancy referral that has already been found to be true by the truancy court. Further, if the juvenile probation department makes this finding, the juvenile court is required to enter an order requiring the child to continue complying with the truancy court order. This seems to insert the juvenile probation department into the role of judge, as the statute mandates a court action based on the probation department's finding.

Similarly, the juvenile court is required to enter an order requiring the child to continue complying with the truancy court order if the prosecutor finds there is no probable cause to believe the child engaged in contempt; given that the prosecutor would not request an adjudication if there is no probable cause, it is unclear how this matter would get to the court for an order to be issued.

Given the issues with Section 65.252, it may be best to rely on the provision in Section 65.252(d), which provides that the section "does not limit the discretion of a juvenile prosecutor or juvenile court to prosecute a child for conduct under Section 51.03 [delinquent conduct and CINS]." While this does not address the potential direct contempt jurisdictional issue, proceeding under a normal delinquency petition for indirect contempt does address the procedural issues posed by Section 65.252. When asked, the Attorney General opined that the admonishments regarding consequences for future contempt referrals in Section 65.252(b)(3) do not impact the ability of the prosecutor to proceed under a delinquency petition, even on the first referral to juvenile court for contempt under Section 65.251. Attorney General Opinion KP-0064 (2016).Family Code Section 65.251(e) provides that a truancy court may not order confinement of the child for failure to obey the remedial order.

In 2015, House Bill 2398 amended Family Code Section 51.02 to remove truancy under Family Code Section 51.03(b)(2) and failure to attend school under Education Code Section 25.094 from the list of specifically enumerated status offenses. The legislature did not add truant conduct under Family Code Section 65.003(a) to the list. However, Section 51.02 is not an exhaustive list, and truant conduct meets the definition of a status offense as derived from the federal Juvenile Justice and Delinquency Prevention Act. It is a violation of the law to fail to attend school

because of the person's status as a child. An adult cannot commit this offense. This is important because contempt cases may be referred to juvenile court based on a violation of an underlying truancy court order. These status-offense-based contempt referrals often present detention issues and may impose other restrictions on the permissibility of detention, hearing requirements, and length of detention, as outlined in Family Code Section 54.01. This provision is consistent with federal law and still applies to contempt matters based on truant conduct.

2. Contempt: Parents and Others

A truancy court may find parents and persons other than the child in direct contempt or may enforce the following orders by contempt:

> (1) an order that a parent or guardian of a child or any court-appointed guardian ad litem of a child attend an adjudication hearing under Family Code Section 65.062(b);
>
> (2) an order requiring a person other than a child to take a particular action under Family Code Section 65.105(a);
>
> (3) an order that a child's parent, or other person responsible to support the child, reimburse the municipality or county for the cost of a guardian ad litem appointed for the child under Family Code Section 65.061(c); and
>
> (4) an order that a parent, or person other than the child, pay the $50 court cost under Family Code Section 65.107.

Family Code Section 65.253(a).

The penalty for a finding of either type of contempt for parents and persons other than the child is a fine in an amount not to exceed $100. Section 65.253(c). In addition to this fine, direct contempt is punishable by confinement in jail for a maximum of three days, a maximum of 40 hours of community service, or both confinement and community service. Section 65.253(d). Note that, despite the decriminalization of nonattendance by children in Texas in 2015, the offense of parent contributing to non-attendance is still a misdemeanor, adjudicated in municipal and justice courts (not truancy courts), discussed below.

The state may initiate enforcement of a contempt order under Family Code Section 65.253 against a parent or person other than the child by filing a written motion for enforcement. The truancy court may also initiate enforcement of an order on its own motion. The state's motion must comply with Section 65.257:

> (1) identify the provision of the order allegedly violated and sought to be enforced;
>
> (2) state specifically and factually the manner of the person's alleged noncompliance;
>
> (3) state the relief requested; and
>
> (4) contain the signature of the party filing the motion.

The state must allege the particular violation by the person of the truancy court order that the state had a reasonable basis for believing the person was violating when the motion was filed. Section 65.257(b). The truancy court may also initiate enforcement on its own motion. Section 65.257(c).

Notice and a hearing are required. The notice must be given by personal service or by certified mail, return receipt requested, on or before the 10th day before the date of the hearing on the motion. The notice must include a copy of the motion for enforcement. Personal service must comply with the Code of Criminal Procedure. Section 65.258(b). If a person who has been personally served with notice to appear at the hearing does not appear, the truancy court may not hold the person in contempt but may issue a warrant for the arrest of the person. Section 65.258(d).

Section 65.259 contains procedural requirements for a hearing on a motion for enforcement. At the enforcement hearing, the state must prove beyond a reasonable doubt that the person against whom enforcement is sought engaged in conduct constituting contempt of a reasonable and lawful court order as alleged in the motion for enforcement. The person against whom enforcement is sought has a privilege not to be called as a witness or otherwise to incriminate himself or herself. There is no jury at the hearing. If the person against whom enforcement is sought was not represented by counsel during any previous court proceeding involving a motion for enforcement, the person may, through counsel, raise any defense or affirmative defense to the proceeding that could have been asserted in the previous court proceeding that was not asserted because the person was not represented by counsel. It is an affirmative defense to enforcement of a truancy court order under Section 65.253 that the court did not

provide the parent or other eligible person with due process of law in the proceeding in which the court entered the order.

Appeals from Truancy Court. After pronouncing the court's remedial actions, the court must advise the child and the child's parent, guardian, or guardian ad litem of the right to appeal. Section 65.102(c). The child, the child's parent or guardian, or the state may appeal any order of a truancy court. Section 65.151. A person subject to an order under Family Code Section 65.105 may appeal that order. Appeals from the truancy court are to a juvenile court. Section 65.151(b). The case must be tried de novo and is governed by Family Code Chapter 65 and the Texas Rules of Civil Procedure, except that no appeal bond is required. Section 65.152. On appeal, the judgment of the truancy court is vacated. Section 65.151(b). A child may be represented by counsel on appeal. If the child was represented by counsel before the truancy court, that attorney must file a notice of appeal with the court that will hear the appeal and inform that court whether or not he or she will handle the appeal. Section 65.153.

Presumably the Title 3, Family Code, procedures should be followed by the juvenile court with regard to the appeals, except to the extent there is a conflict with Rule 506, Texas Rules of Civil Procedure, in which case Rule 506 will govern. The exception is that, while there is a right to an attorney in Title 3 proceedings, an attorney is allowed, but not required, in truant conduct appeals. Section 65.153.

Section 65.151(c) provides that the juvenile court judgement in the appeal may be appealed in the same manner as an appeal under Chapter 56, Family Code, which applies to all other juvenile court appeals. Chapter 56 provides that a juvenile is entitled to an attorney for an appeal. It is unclear if the language is Section 65.153, which allows for but does not create a right to an attorney on appeal, is applicable to an appeal from the juvenile court or just from the truancy court.

Records. Three provisions in Chapter 65 address records: Section 65.201 (Sealing of Records); Section 65.202 (Confidentiality of Records); and Section 65.203 (Destruction of Certain Records).

After pronouncing the court's remedial actions, the court must advise the child and the child's parent, guardian, or guardian ad litem of the procedures for the sealing of records in Family Code Section 65.201. Section 65.102(c). The child may apply, on or after his or her 18th birthday, to the truancy court to seal the records relating to the case. This includes records held by the truancy court, the truant conduct prosecutor, and the school district. The application must include the child's name, sex, race or ethnicity, date of birth, driver's license or identification card number, and social security number or an explanation of why one or more of these items is not included.

Prior to sealing the records, the truancy court will make a determination of whether the child complied with the remedies ordered in the case. Inspection of the sealed records may be permitted only by an order of the truancy court upon the request of the child. If the child's records are sealed, the child is not required to state that he or she has been the subject of a truancy proceeding in any subsequent proceeding or in any application for employment, information, or licensing. Further, any statement made by the child that he or she has never been found to have engaged in truant conduct may not be held against the child in any criminal or civil proceeding.

All index references to sealed records must be deleted not later than the 30th day after the date in the sealing order. A truancy court, clerk of the court, truant conduct prosecutor, or school district must, according to Section 65.201(e), reply to a request for information concerning a child's sealed truant conduct case that no record exists with respect to the child.

Records and files created under Chapter 65 may only be disclosed to:

(1) the judge of the truancy court, the truant conduct prosecutor, and the staff of the judge and prosecutor;

(2) the child or an attorney for the child;

(3) a governmental agency if the disclosure is required or authorized by law;

(4) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;

(5) the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification;

(6) the agency; or

(7) with leave of the truancy court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Family Code Section 65.202.

On or after the child's 21st birthday, the child may make a motion to order the destruction of the sealed records as long as the child has not been convicted of a felony. Section 65.203.

Parent Contributing to Nonattendance. The 2015 changes to truancy laws did not change a parent's susceptibility to prosecution for contributing to the child's nonattendance, which remains a criminal offense. However, the penalty was changed. At the beginning of each school year, school districts and open-enrollment charter schools are required to give parents written notice that if they are subject to prosecution if their child is absent for 10 or more days or parts of days in a six-month period in the same school year and the child is subject to referral to truancy court for truant conduct. Education Code Section 25.093 defines the misdemeanor offense of parent contributing to nonattendance. A parent commits an offense if the warning required by Section 25.095(a) is issued and the parent, with criminal negligence, fails to require the child to attend school, and the child fails to attend school for 10 or more days or parts of days in a six-month period in the same school year. As with students, there is an affirmative defense for absences that were excused by the school or that should be excused by the court. The burden is on the parent to prove the absences were or should have been excused; the standard is preponderance of the evidence.

The mere fact that the defendant is the parent of a truant child does not make the parent guilty of this criminal offense. The parent must be criminally negligent in failing to require the child to attend school. Under Article 21.15, Code of Criminal Procedure, the State must allege in the complaint "with reasonable certainty, the act or acts relied upon to constitute...criminal negligence." Liability is based upon proof of criminal negligence on the part of the parent.

An offense is a fine-only misdemeanor; the first is punishable by a fine up to $100, the second by a fine up to $200, the third by a fine up to $300, the fourth by a fine up to $400, and the fifth and subsequent by a fine up to $500. Each day the child remains out of school may constitute a separate offense. Two or more offenses may be consolidated and prosecuted in a single action.

If the court orders deferred disposition under Article 45.051, Code of Criminal Procedure, the court may require the parent to provide personal services to a charitable or educational institution as a condition of the deferral. The court may also order the parent to attend a program for parents of students with unexcused absences that provides instruction designed to help those parents identify problems that contribute to the unexcused absences and develop strategies for resolving those problems. If a parent fails to comply with an order of the court entered under Section 25.093, the court may punish the parent for contempt under Section 21.002, Government Code.

In 2015, the legislature added Code of Criminal Procedure Article 45.0531, a new dismissal, authorizing a county, justice, or municipal court, at the court's discretion, to dismiss a parent contributing to nonattendance charge if the court finds that a dismissal would be in the interest of justice either because there is a low likelihood of recidivism by the defendant or that sufficient justification exists for the failure to attend school.

CHAPTER 24: Civil Liability of Probation Officers for Official Acts or Omissions

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The focus of this chapter is the civil liability of probation officers and other juvenile justice personnel for injuries inflicted upon others as a result of official acts or omissions. Civil liability means a judgment from a court requiring the probation officer or someone on his or her behalf to pay money to compensate the person injured for the harm inflicted. In some instances, the award of money may include punitive damages—that is, money extracted to punish the wrongdoer and to deter future wrongful acts by others.

An award of damages may be made against the probation officer personally, in which case the money comes out of his or her own pocket if there is no insurance or provision for governmental reimbursement, or it may be made against the governmental unit for which the officer works, in which case the money comes from the budget of that unit. Under some circumstances, a person, such as a chief juvenile probation officer or a supervisor in a probation department, may be held personally liable for the acts or omissions of a probation officer acting under his or her control and supervision.

In general, a judge has absolute immunity from civil liability for any act or omission within the jurisdiction of his or her court. Probation officers sometimes share that absolute immunity, but usually do not. For that reason, the major focus of this discussion is upon the civil liability of probation officers and other non-judicial juvenile justice personnel. That said, judicial immunity does not extend to a judge's work in a non-judicial, administrative capacity, such as work as a member of a juvenile board.

Although there is considerable overlap, it is useful to divide the question of civil liability into liability under Texas law and liability under federal law.

A. Liability Under Texas Law

A juvenile probation officer may be sued under Texas law for official acts or omissions that harm another. The suit may be brought by a probationer, a probationer's parent, a former probationer, or a total stranger who was harmed by the manner in which the juvenile probation officer did his or her job. This section discusses the major problem situations likely to be encountered by a juvenile probationer officer. It then discusses the defenses that are available to the officer. Finally, it discusses the question of governmental liability.

1. Situations Giving Rise to Liability

There is no fixed number of situations in which a juvenile probation officer is liable for official acts or omissions. Any conduct or omission that harms another may be the basis for liability. For example, if a juvenile probation officer is driving from the office to make a home visit to a probationer and, through carelessness, injures another with his or her automobile, he or she can be sued and held liable in damages. Because of the nature of juvenile probation work, however, there are certain recurring situations that are of special importance, and those are discussed here.

Improper Sexual Relationship With Person in Custody. Section 39.04, Penal Code, prohibits certain conduct with adult and juvenile offenders in custody or under supervision. Under current law, it is a second degree felony for an employee of or contractor or volunteer for TJJD or another juvenile correctional facility to engage in sexual contact, sexual intercourse, or deviate sexual intercourse with a juvenile in the custody of a facility. It is also a second degree felony for such persons to employ, authorize, or induce a juvenile in custody to engage in sexual conduct or sexual performance. Additionally, it is a state jail felony for an employee of or contractor or volunteer for TJJD, a juvenile facility, or a juvenile probation department to engage in sexual contact, sexual intercourse, or deviate sexual intercourse with a juvenile the person knows is under supervision (parole or probation) but not in custody. The current state of the law encompasses the variety of individuals that may engage in an improper sexual relationship with a juvenile; however, it has taken many years to get to the point that the holes in the law have been eliminated. Below is a history of the changes to this law to demonstrate this process.

In 1997, Section 39.04, Penal Code, was amended to create for the first time an offense involving improper sexual relationships with persons in custody. At that time, the legislature created a state jail felony offense for when an official or employee of a correctional facility or a peace officer engaged in sexual intercourse or deviate sexual intercourse with an individual in custody. However, correctional facility was defined to include only adult facilities.

In 1999, the offense was expanded to include sexual contact in addition to sexual intercourse or deviate sexual intercourse. Additionally, the definition of correctional facility was modified so that the offense applied to juveniles in facilities operated by or under contract with the Texas Youth Commission (TYC). Finally, a new state jail felony offense was created for employees of the Texas Department of Criminal Justice (TDCJ) who engaged in sexual contact, sexual intercourse, or deviate sexual intercourse with individuals on TDCJ parole. This provision did not apply to TYC.

In 2001, the definition of custody was expanded so that it now included facilities operated by or under contract with a juvenile board and, with regard to the offense related to persons in custody, included contract employees and volunteers at each type of correctional facility. The provision related to individuals on supervision but not in custody still did not apply to juveniles.

In 2007, Section 39.04 was modified to make it a second degree felony for an employee of TYC to employ, authorize, or induce an individual in custody to engage in sexual conduct or sexual performance. Additionally, the offense of engaging in sexual contact, sexual intercourse, or deviate sexual intercourse with a juvenile in custody was increased to a second degree felony if the offense involved a TYC employee or an employee of a juvenile correctional facility operated primarily with state funds. Finally, Section 39.04(f) was modified to include employees of TYC and of local juvenile probation departments in the

prohibition on engaging in sexual contact, sexual intercourse, or deviate sexual intercourse with a person under supervision (on probation or parole) but not in custody.

In 2015, the law was modified to expand the offense of employing, authorizing, or inducing an individual in custody to engage in sexual conduct or sexual performance to include all juvenile facilities, not just TJJD facilities. Additionally, the enhanced second degree felony for prohibited conduct in juvenile facilities was expanded to include all juvenile facilities operated by or under contract with a juvenile board and not just those funded primarily with state dollars.

In 2017, the offense of engaging in sexual contact, sexual intercourse, or deviate sexual intercourse with a person under supervision but not in custody was expanded to include contractors and volunteers for TJJD and other juvenile justice facilities.

Having an improper sexual relationship with a juvenile probationer may expose the employee of a juvenile probation department to both criminal and civil liability.

Illegal Detention of Nonoffenders Held for Deportation. In 2003, the legislature authorized the temporary detention of a person who "is a nonoffender who has been taken into custody and is being held solely for deportation out of the United States." Section 53.01(a)(2)(B). It also required that all nonoffenders be released from secure confinement at the 24-hour detention hearing required of all status offenders and nonoffenders. As a result, juvenile probation officers, supervision officers, and intake officers should be aware that civil and criminal penalties may attach for the illegal detention of a nonoffender in a secure facility beyond the 24-hour hearing. Section 54.011(f) provides that it is a Class B misdemeanor to knowingly detain or assist in detaining a nonoffender in a secure detention or correctional facility and that the nonoffender is entitled to immediate release and may bring a civil action for compensation for the illegal detention. See Chapter 6 for a full discussion, along with a discussion of detaining status offenders.

False Arrest. One potential for juvenile probation officer liability is false arrest or detention. If an officer restrains a juvenile without legal authority, he or she is liable in damages for false arrest. Virtually any restraint in freedom of movement is enough to constitute false arrest; it need not be for a long period of time nor result in incarceration in a jail or juvenile detention facility. In addition, the restraint may take the form of an omission, such as an "intentional breach of duty to take active steps to release the plaintiff from a confinement in which the plaintiff has already properly been placed—as, for example, a failure to let the plaintiff out at the end of his sentence to a term in jail, or to produce the plaintiff in court promptly after an arrest." W. Page Keeton, *Prosser and Keeton on Torts* 51 (5th Ed. 1984).

Section 52.01(a)(1) of the Family Code authorizes any person to take a child into custody "pursuant to an order of the juvenile court under the provisions of this subtitle." Sections 52.01(a)(4) and (6) authorize a juvenile probation officer to take a child into custody if there is probable cause to believe the child has violated a condition of probation imposed by the juvenile court or a condition of release imposed by a juvenile court or referee.

Probation officers should also be aware that if the probable cause determination is not made when required by federal and Texas law, the child's detention becomes illegal. While that illegality is not a defense to the allegations, it would become important in determining civil liability should the child die or become injured while being illegally confined.

Section 52.01(a)(2) authorizes any person to take a child into custody "pursuant to the laws of arrest." The laws of arrest are found generally in Chapter 14 of the Code of Criminal Procedure. Article 14.01(b) authorizes a peace officer to arrest "an offender without a warrant for any offense committed in his presence or within his view." In contrast, Article 14.01(a) authorizes any person to arrest an offender without a warrant only "when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace."

Article 14.04 deals with arrests without a warrant for a felony that has not been committed in the presence of a peace officer. It provides:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

A private citizen has no right to arrest without a warrant for a felony not committed in his or her presence or view.

Article 18.16, Code of Criminal Procedure, authorizes all persons to arrest without a warrant one reasonably believed to have stolen property in order to recover the property.

Section 52.015 of the Family Code authorizes a juvenile court to issue a directive to apprehend if there is "probable cause to take the child into custody" under Title 3 of the Family Code. A directive to apprehend may be thought of as a juvenile arrest warrant that can be issued for a criminal violation of law or for non-criminal conduct, such as a violation of probation or commission of a status offense, such as running away from home. Under Section 52.015 any law enforcement or probation officer may execute a directive to apprehend by taking the named child into custody.

A juvenile probation officer is not a peace officer or a law enforcement officer. Except for taking a juvenile into custody for violation of probation or a condition of release under Sections 52.01(a)(4) or (6), or executing a directive to apprehend under Section 52.015(b), a juvenile probation officer has only the arrest powers of a private citizen.

Even in the instances in which the juvenile probation officer is authorized to take a person into custody, the officer must comply with his or her juvenile board policies regarding taking into custody. TJJD standards in Texas Administrative Code Title 37, Chapter 341 require juvenile boards to adopt such policies.

Malicious Prosecution. What liability does a juvenile probation officer incur when he or she causes papers to be filed in court that result in the arrest of a probationer for violation of probation? The officer would not be liable for false arrest because the probationer is being detained under the court's authority, not that of the probation officer. But, depending upon the circumstances, the officer might be liable for malicious prosecution. "Malicious prosecution is the groundless institution of criminal proceedings against the plaintiff." W. Page Keeton, *Prosser and Keeton on Torts* 54 (5th Ed. 1984). To prove malicious prosecution, the probationer would have to show that the proceedings (revocation of probation) terminated in his or her favor and that the probation officer filed the violation report without probable cause to believe that the charges made in the report were true.

"Probable cause" means reasonable grounds to believe; it does not require that the charges in fact be true. Section 54.05 of the Family Code permits revocation of probation only if the allegations are proved by a preponderance of the evidence. There will be situations in which a motion to revoke was filed properly, but, because a witness could not be brought into court or for other reasons, the juvenile court properly found that the allegations were not proved. Therefore, just because the juvenile court found in the probationer's favor in the revocation hearing does not expose the probation officer to civil liability.

Libel or Slander. Juvenile probation officers regularly testify in court proceedings or write reports that are received in evidence. They also discuss information about probationers with others in the course of performing their duties. In many of these instances, the information related about the juvenile or others is not flattering, to say the least. What, then, of the possibility of civil liability for defamation—libel or slander—if any of these statements made by a juvenile probation officer turn out to be untrue? As to testimony in court, the law grants the witness an absolute privilege from suits for defamation, even if it could be shown that the witness deliberately lied. The same absolute privilege would undoubtedly apply to reports prepared by the officer for submission to the court in lieu of testimony.

As to untrue statements of a derogatory nature made out of court, the law accords a qualified privilege with respect to them. Basically, if the statement was appropriate to discharge a duty of the juvenile probation officer, then it is privileged and the person disparaged cannot sue for defamation if the statement turns out to be untrue unless the juvenile probation officer knew it was untrue at the time the statement was made. W. Page Keeton, *Prosser and Keeton on Torts* 824-39 (5th Ed. 1984). It is important to remember, however, that this qualified privilege applies only when the communication is part of the probation officer's job and does not apply to gossip or idle chitchat.

Right of Privacy. Juveniles, like other citizens, are accorded by the law a right of privacy. A juvenile probation officer would be liable in damages for an unauthorized invasion of a juvenile's right of privacy. An example would be an intrusion upon the juvenile's "physical solitude or seclusion, as by invading his home or other quarters, or an illegal search" of his or her home or person. W. Page Keeton, *Prosser and Keeton on Torts* 854 (5th Ed. 1984). The key is that the invasion must be unauthorized. An unannounced home visit to a probationer by a juvenile probation officer is an invasion of the juvenile's privacy, but, if it is authorized by a condition of probation, it is most certainly a lawful invasion.

A juvenile's right of privacy also may be invaded unlawfully by "publicity of a highly objectionable kind given to

private information about the [juvenile] even though it is true [information] and no action would [therefore] lie for defamation." W. Page Keeton, *Prosser and Keeton on Torts* 856 (5th Ed. 1984). Once again, however, if the public disclosure is required as part of the juvenile probation officer's employment, as when personal information about a juvenile is reported to a court in judicial proceedings or discussed with a supervisor or prosecutor as part of the officer's duties, the invasion of privacy is permissible because it is authorized by law.

Failure to Warn Others. Are there circumstances under which a juvenile probation officer might be liable to third persons for failure to protect them from a probationer? A leading case in this area is from the Supreme Court of California. *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976). A patient in therapy confided to his psychologist an intention to kill a particular person. The psychologist caused the patient to be detained briefly because of the threat, but the patient was released when he appeared to be rational again. The psychologist did not take steps to warn the person threatened of the danger posed by the patient. Approximately two months later, the patient murdered the person whom he had mentioned to the psychologist. The parents of the murdered girl sued the psychologist for damages because of his failure to warn her of the danger. The California Supreme Court held that the psychologist under these circumstances had a duty to warn her:

> When a therapist determines, or pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

551 P.2d at 340.

The Texas Supreme Court rejected the rationale of the *Tarasoff* case in *Thapur v. Zezulka*, 994 S.W.2d 635 (Tex. 1999). In that case, a patient told his psychiatrist that he felt like killing his stepfather. The psychiatrist did not disclose that threat either to the stepfather or to the police. Shortly thereafter, the patient killed the stepfather. The Texas Supreme Court held that the mental health confidentiality statute, Health and Safety Code Section 611.002, prohibits the psychiatrist from disclosing the threat to the stepfather. Therefore, there can be no legal liability for honoring the confidentiality statute. Health and Safety Code Section 611.004(a)(2) would have authorized disclosure of this information to a law enforcement agency. That Section authorizes but does not require disclosure, so it cannot form the basis of liability. Although juvenile probation officers are not licensed treatment personnel under Chapter 611, it is likely that a Texas court would hold that a juvenile probation officer also has no duty to warn of such a threat.

Taking Unauthorized Action. A probation officer can get into legal trouble if he or she permits a probationer to depart from the conditions of probation set by the court. In *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (4th Cir. 1976), a probationer on the officer's caseload had been placed on probation on the condition that he be in a daycare status with the Psychiatric Institute and live with his parents. Later, upon the recommendation of the institute but without seeking the approval of the judge, the probation officer agreed to permit the probationer to live and work on his own and to attend two weekly group sessions at the Institute. Shortly thereafter, the probationer murdered the plaintiff's daughter. There was sufficient information in the probationer's background to indicate some danger to others. The court approved an award of $25,000 in damages, half of which was charged personally to the probation officer. It was clear that the probation officer was held liable because he acted without authority of the court in permitting a departure from the treatment plan approved by the court and made a condition of probation. Because the probation officer acted beyond his authority, he was not entitled to official immunity from liability to the parents of the murdered girl.

Release of Dangerous Juvenile from Confinement. What liability, if any, is there if a person given custody of a juvenile under court order fails to prevent the juvenile from harming a member of the public? In *Texas Home Management v. Peavy*, 89 S.W.3d 30 (Tex. 2002), a juvenile was placed with a private mental health residential facility on arrangement from a juvenile court. While a resident at the facility, he engaged in numerous rules infractions and committed several assaults. He was permitted unsupervised home visits periodically, where he frequently violated the law by committing burglaries, auto thefts, and an aggravated assault with a handgun. Although the juvenile's mother asked that the home visits cease, they continued. On the final occasion, the juvenile shot and killed

Elizabeth Peavy and stole her automobile. Her parents sued the residential facility for their daughter's death.

The Texas Supreme Court held that the facility owed a duty to the public not to expose it to an unreasonable risk of harm from the juvenile. The facility had the right to control the juvenile and to restrict his movements. His conduct in the facility and on previous home visits suggested he posed a high risk of violent and other anti-social conduct while on home visits. Although the case was resolved in part on procedural grounds, *Texas Home Management* has received negative treatment in a number of cases that have emerged since 2002. Subsequent appellate rulings suggest, in similar circumstances, that the court will not impose a duty to control the unforeseeable acts of a person with whom a special relationship exists. *Dyess v. Harris*, 321 S.W.3d 9 (Tex. App.—Houston [1st Dist.] 2009).

2. Official Immunity

Even if an injury has been inflicted by an official act or omission, there may be a defense of official immunity. Judges have absolute immunity for all official acts within the jurisdiction of their courts. They cannot be held liable even if they act from totally improper motives and totally contrary to the law. Other public officials, however, generally enjoy at best a qualified immunity. That means that the official is immune from liability so long as he or she acted in a good faith belief that his or her conduct was in accordance with the law.

Whether there is even a qualified immunity may depend, however, on whether the act in question was one that called upon the official to exercise judgment or discretion or whether it was a so-called ministerial act that the official was under a legal duty to perform. Most courts say there is no qualified official immunity in the latter situation. W. Page Keeton, *Prosser and Keeton on Torts* 1062-64 (5th Ed. 1984).

Finally, even though the official in question is not a judge, he or she may have the absolute immunity of a judge if the function being performed by the official is specifically ordered by a judge or is very closely related to judicial functions. There are cases involving probation officers that make such a distinction. They are discussed later in this chapter under defenses to federal suits, since they arose under federal law.

Plaintiff Flores in *Davila v. Flores*, 6 S.W.3d 788 (Tex.App.—Corpus Christi 1999, no pet.), was terminated based on reports detailing his abuse of a TYC resident. The reports were made by Davila and another TYC employee, Steen. When Flores was reinstated in his position, he filed suit for intentional infliction of emotional distress, defamation, and slander. The trial court refused Davila's and Steen's motions for summary judgment and they appealed. The Court of Appeals reversed on the ground that Davila and Steen were protected by official immunity for distributing the statements they made about Flores. In the course of its opinion, the Court of Appeals explained the defense of official immunity based on good faith performance of official duties:

> The employee's good faith is measured against a standard of objective legal reasonableness, without regard to his or her subjective state of mind.… In other words, an employee acts in good faith if a reasonably prudent employee under the same or similar circumstances could have believed that the need to take the complained-of action outweighed the associated risk of harm….
>
> By their affidavits in the present case, Davila and Steen conclusively proved that they did not disseminate the information in bad faith and that their actions in disseminating the information in the course of the investigation were objectively reasonable. In other words, their affidavits show that a reasonably prudent employee under the same or similar circumstances could have taken the same action in the course of the investigation.
>
> Once the public official or employee has met his burden of proof on good faith, the plaintiff may attempt to controvert the existence of the employee's good faith.… But to avoid a summary judgment based on official immunity, the plaintiff carries a much higher burden of proof.… In order to raise a fact issue, a plaintiff is required to prove that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." …
>
> Accordingly, in the present case, the burden shifted to Flores to show no reasonable person in Davila and Steen's position could have thought the circumstances justified disseminating the information in the manner that they did. However, Flores failed to present any controverting evidence to disprove good faith or to show that the dissemination of information was unreasonable under the circumstances.

6 S.W.3d at 793.

Sex Offender Registration. In 2001, the legislature enacted Code of Criminal Procedure Article 62.091 to provide official (qualified) immunity for public officials who perform duties under the sex offender registration statute. That provision was amended in 2005 and renumbered as Article 62.008, which reads:

> The following persons are immune from liability for good faith conduct under this chapter:
>
> (1) an employee or officer of the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, the Department of Public Safety, the Board of Pardons and Paroles, or a local law enforcement authority;
>
> (2) an employee or officer of a community supervision and corrections department or a juvenile probation department;
>
> (3) a member of the judiciary; and
>
> (4) a member of the risk assessment review committee established under Article 62.007.

Administration of Medication. In 2001, the legislature enacted Human Resources Code Section 142.005 to authorize the administration of medication to a child in secure detention or correctional facilities, juvenile justice alternative education programs, and various day programs. The section creates immunity for administering authorized medications. It provides:

> (a) On the adoption of policies concerning the administration of medication to juveniles by authorized employees, the juvenile board and any authorized employee of a program or facility operated by the juvenile board are not liable for damages arising from the administration of medication to a juvenile if:
>
> (1) the program or facility administrator has received a written request to administer the medication from the parent, legal guardian, or other person having legal control over the juvenile; and
>
> (2) when administering prescription medication, the medication appears to be in the original container and to be properly labeled.
>
> (b) This section does not apply to:
>
> (1) damages arising from the administration of medication that is not in accordance with the prescription issued by a medical practitioner; or
>
> (2) an act or omission of a person administering medication if the act or omission is:
>
> (A) reckless or intentional;
>
> (B) done wilfully, wantonly, or with gross negligence; or
>
> (C) done with conscious indifference or reckless disregard for the safety of others.

Authorization to Carry a Firearm. In 2009, the legislature exempted juvenile probation officers who are legally authorized to carry a firearm from the prohibition against carrying firearms. Human Resources Code Section 222.005. As a result, juvenile probation officers who are properly authorized and trained may carry firearms. More specifically, the legislature enacted Human Resources Code Section 142.006, which authorizes the carrying of a firearm by juvenile probation officers during the course and scope of their official duties. This provision does not confer an absolute right, but rather is conditioned on the officer: (1) receiving a certificate of firearms proficiency from the Texas Commission on Law Enforcement (TCOLE); (2) being authorized to carry a firearm by the employing probation department's chief juvenile probation officer; and (3) being employed by the department for at least one year. Juvenile probation officers are disqualified from carrying a firearm if they have been designated as a perpetrator ins a TJJD abuse, neglect, or exploitation investigation.

In addition to the authorization for juvenile probation officers to carry firearms, the legislature also enacted firearms training mandates that required TJJD and TCOLE to, by rule, adopt a memorandum of understanding (MOU) to establish a training program in the use of firearms by juvenile probation officers. The MOU must establish a program that provides instruction in: (1) the legal limitations on the use of firearms; (2) range firing and procedure and firearms safety and maintenance; and (3) other topics deemed necessary for the responsible use of firearms by juvenile probation officers. TCOLE must administer the training program and issue certificates for successful completion of the program and may charge reasonable and necessary fees for administering the program. Occupations Code Section 1701.258; see also 37 Texas Administrative Code Section 359.100 for the MOU, adopted by rule.

Both Sections 142.006(c) and 1701.259(d) specify that the statutes do not affect the sovereign immunity of the state, a state agency, or a political subdivision of the state. This is a clear indication by the legislature that it is not waiving or giving up official immunity for any governmental functions performed by the state, its agencies, or a political subdivision of the state. Liability may still rest with a local juvenile probation department or a juvenile probation officer for official acts or omissions that harm another.

Juvenile Board Immunity. In 2001, the legislature enacted Human Resources Code Section 152.0013 to create official immunity for official acts or omissions by members of a juvenile board:

> (a) A member of a juvenile board is not liable for damages arising from an act or omission committed while performing duties as a board member.
>
> (b) This section does not apply if the act or omission is:
>
> (1) reckless or intentional;
>
> (2) done wilfully, wantonly, or with gross negligence; or
>
> (3) done with conscious indifference or reckless disregard for the safety of others.

As filed, this enactment would have created absolute immunity, but it was amended to restrict it to official (qualified) immunity. This means that juvenile board members will not be liable so long as they acted in good faith, believing their conduct to be in accordance with the law.

3. Governmental Liability

If a probation officer is liable for injury to another as a result of an official act or omission, to what extent, if any, is the government for which he or she works also liable for that same injury? If a lawsuit is filed against a probation officer for official acts or omissions, may the government provide legal counsel to defend the probation officer and may it pay the judgment against the probation officer if one is obtained? Is the government required to provide legal counsel and pay the judgment?

Texas Tort Claims Act. In the absence of a statute waiving immunity, under the doctrine of sovereign immunity, a unit of government would not be liable for injuries caused by the acts or omissions of a juvenile probation officer. The Texas Legislature has enacted the Texas Tort Claims Act, which provides that a governmental unit will be held liable for certain conduct of its employees performed within the scope of their employment. Civil Practice and Remedies Code Section 101.021. Although the employee would still be sued, when the Tort Claims Act applies, for practical purposes, that removes the burdens of defending the suit and paying the judgment from the employee and places it on the governmental unit for which he or she worked.

In 2011, the El Paso Court of Appeals faced the question of whether the El Paso Juvenile Probation Department is a separate entity from El Paso County. *El Paso County v. Solorzano*, 351 S.W.3d 577 (Tex.App.—El Paso 2011, no pet.). The suit alleged negligence on the part of a juvenile probation officer as well as the County in the officer's hiring, supervision and training. In response, the County filed a plea to the jurisdiction arguing that the officer was an employee of the El Paso Juvenile Probation Department, not the County, and that the trial court therefore lacked subject-matter jurisdiction. The trial court denied the County's plea, resulting in an interlocutory appeal by the County challenging that denial.

On appeal, the Court of Appeals held that the El Paso Juvenile Probation Department is a governmental entity separate and apart from the County since the County does not have the legal right to control and supervise the details of juvenile probation personnel. See also Attorney General Opinion No. DM-460 (1997). In fact, the juvenile probation department, as well as the juvenile board, are both defined as a "specialized local entity" under Local Government Code Section 140.003(a)(2).

The opinion was called into question, however, by a federal district court in *Coates v. Brazoria County, Texas,* 894 F.Supp.2d 966 (S.D. Tex. 2012):

> In any event, this Court is not convinced that *Solorzano's* reasoning…is correct. Numerous factors indicated that the Board is not separated from the County. A juvenile board is defined as "a body established by law to provide juvenile probation services *to a county*." Tex. Hum. Res. Code Ann. §201.001(a)(6) (emphasis added). The Board's composition provides further evidence that it is a county entity: its members are the county district judges, the county court-at-law judges, and the county judge, who is also the presiding officer of the…Commissioners Court. Additionally, the Board's funding structure depicts the Board as a dependent county entity. The Commissioners Court, which the County has referred to as its final policy

> maker, pays the Board members compensation at an amount set by that court. Tex. Hum. Res. Code Ann. §152.0261(b)…. [T]he County provides 75% of the Juvenile Board's overall funding. Finally, as detailed in *Flores,* Chapter 142 of the Texas Human Resources Code and various opinions of the Texas Attorney General also suggest that juvenile boards are county entities. 92 F.3d at 265. For example, section 142.002(a) of that Code establishes that juvenile boards may employ probation officers with the approval of the commissioners court, while Tex. Att'y Gen. Op. No. H–1133 (1978) recognizes a duty of the county attorney to represent and provide legal advice to the county juvenile board. *Id.*

894 F.Supp.2d 966, at 970-971.

Thus, there is no clear answer to the question of whether the probation department and county are separate entities for liability purposes.

Although there are no cases directly on point, it seems clear that the Tort Claims Act does not apply to juvenile probation officers but instead addresses immunity only for governmental entities themselves. However, there are three exemptions from the applicability of the act that effectively cover all potential liability of juvenile probation officers. Exempted from the act is any claim "arising out of assault, battery, false imprisonment, or any other intentional tort." Civil Practice and Remedies Code Section 101.057. Also exempted is "a claim based on an act or omission of an employee in the execution of a lawful order of any court." Civil Practice and Remedies Code Section 101.053(b). Finally, and most broadly, there is exempted "a claim based on an act or omission of a court of this state or any member of a court of this state acting in his official capacity, or to the judicial function of a governmental unit." Civil Practice and Remedies Code Section 101.053(a). Cf. *Flores v. Cameron County*, Tex., 92 F.3d 258 (1996). (Flores is a Fifth Circuit civil rights violation case that clarifies that the juvenile board is an arm of the county and not the state).

B. Liability Under Federal Law

A person harmed by an official act or omission of a juvenile probation officer will frequently have a choice of filing a lawsuit against the officer based on state law, federal law or both. This section focuses upon the federal law that determines liability and the defenses that are available to the probation officer when a claim is made under federal law.

1. Liability for Violating Federal Rights

Under the Civil Rights Act of 1871, a state official or an official of a state subdivision may be liable to pay damages for the violation of another's federal constitutional or other federal rights. That statute, popularly known as Section 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 United States Code Section 1983.

Examples of the types of claims that might be brought under this statute are: an unreasonable search of a juvenile by a probation officer in violation of the Fourth Amendment to the United States Constitution; an unreasonable arrest by a probation officer in violation of the Fourth Amendment; questioning of a juvenile by a probation officer in such a way as to elicit self-incriminatory statements in violation of the Fifth Amendment; interference with a juvenile's right to communicate with an attorney in violation of the Sixth Amendment; and engaging in conduct that would be in violation of the "cruel and unusual punishment" prohibition of the Eighth Amendment. See *In the Matter of J.M.*, 287 S.W.3d 481 (Tex.App.—Texarkana 2009, reh'g overruled) (J.M.'s account of his treatment and experience at TYC did not demonstrate evidence of cruel and unusual punishment).

In *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), *cert. denied*, 546 U.S. 1033, 126 S.Ct. 749 (2005), a juvenile who had been adjudicated of the determinate sentence offense of injury to a child filed a federal law suit under 42 U.S.C. Section 1983 seeking damages from the detectives, prosecutors and a child protective services (CPS) supervisor for violating her Fifth Amendment privilege against self-incrimination by obtaining an involuntary confession which was used against her during her trial. The Fifth Circuit Court of Appeals found that while Murray's Fifth Amendment right against self-incrimination had been violated, the officers were not liable because of the intervening actions of the trial judge who admitted her confession into evidence. "In the language of tort law, the officers were relieved of liability because their acts were not the

proximate cause of the constitutional violation—the use of the confession at trial." See Note, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 Mich. L. Rev. 1551 (2007). The Fifth Circuit Court of Appeals reversed the federal district court's denial of qualified immunity for the officials on Murray's Fifth Amendment claim. See also *Murray v. Earle*, UNPUBLISHED, No. 08-50603, 2009 U.S.App.Lexis 11882 (5th Cir. 2009) (invoking "law of the case doctrine" to decline appellant's request to revisit Fifth Amendment issue).

2. Defenses to Suits Under Federal Law

Of course, it is a defense to a lawsuit under Section 1983 that the probation officer's act or omission did not violate the other's federal rights. It is also a defense that, although those rights were violated, the probation officer was not involved to the extent necessary to hold him or her liable. But there is one major defense that is prominent in Section 1983 suits, and that is the defense of official immunity.

There are two kinds of official immunity—absolute and qualified. If the person being sued enjoys absolute immunity, he or she may prevent the lawsuit from even going to trial by asserting the immunity. If the official has only a qualified immunity, then it will frequently be necessary to defend the lawsuit in a trial in order to establish that he or she behaved within the scope of the qualified immunity. This, of course, is a major difference, since the official with qualified immunity may have to undergo the burdens of a trial to establish that he or she is not liable under the immunity provision.

Absolute Immunity. Absolute immunity is provided when it is the public duty of the official to make decisions that are extremely likely to engender hostility from some of the persons affected and when it is particularly important that those decisions be made without fear of retaliatory lawsuits.

A judge enjoys absolute immunity for any decisions, even if contrary to established law, within the jurisdiction of his or her court. As explained by the Supreme Court of the United States:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218 (1967).

Similarly, a public prosecutor enjoys absolute immunity with respect to those duties that involve being an advocate for the government in court, as opposed to administrative functions or investigative activities. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

No Absolute Immunity for Administrative Decisions. In *Alexander v. Tarrant County*, UNPUBLISHED, No. 4:03-CV-1280-Y, 2004 WL 1884579, 2004 U.S.Dist.Lexis 21376, Juvenile Law Newsletter ¶ 04-4-05 (N.D. Tex. 2004, claim dism'd), the liability claim arose because a 17-year-old died while incarcerated at a residential military-style boot camp for adult non-violent offenders. His family sued several judges for actions they took while serving as members of a legislatively established board, informally known as the "Tarrant County Board of Criminal Judges." The plaintiffs alleged that the board failed to properly staff and manage the probation department and the facility where the young man died. The judges countered that they were protected by judicial, legislative, and sovereign immunity; in other words, absolute immunity.

The federal court disagreed, noting that judges are only entitled to absolute immunity against civil actions based on their judicial acts, not administrative acts.

> After reviewing the parties' arguments, the relevant case law, and the policy underlying judicial immunity, the Court concludes that the defendant judges are not entitled to judicial immunity. While the defendant judges would be entitled to judicial immunity for all the decisions they made in furtherance of their legislatively mandated responsibilities as judges in establishing the [probation department] and making personnel decisions pursuant to section 76.002(a) of the Texas Government Code, the plaintiffs allege that the defendant judges acted in excess of these responsibilities. Pursuant to 76.002(b) of the Texas Government Code, the defendant judges "are entitled [but are not required] to participate in the management of the [probation department]." Consequently, if the defendant judges decide to take on such managerial duties, these duties are administrative

> duties, not judicial duties entitling them to judicial immunity.

2005 U.S.Dist.Lexis 21510 *13-14.

The judges' motion for summary judgment and motion to dismiss was later granted based, in part, on Tarrant County's persuasive arguments that the State, rather than the county, is the entity responsible for overseeing the probation facility at issue, and because the plaintiffs elected not to respond to Tarrant County's arguments or evidence regarding that issue. *Alexander v. Tarrant County*, No. 4:03-CV-1280-Y, 2005 U.S.Dist.Lexis 21510 (N.D. Tex. 2005). Although the *Alexander* case dealt with the actions of judges in the adult system, it is important to distinguish that juvenile boards enjoy a grant of immunity from liability under Human Resources Code Section 152.0013. Nevertheless, this case serves as a stern reminder that absolute immunity will not protect judges making administrative, non-judicial decisions.

Qualified Immunity. Most officials in the executive branch of government enjoy only a qualified immunity, meaning that they will not be held personally liable if they reasonably believe their actions to be lawful in light of the given circumstances. This includes police officers [*Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 16 L.Ed.2d 88 (1967)], school board members [*Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)], prison officials and officers [*Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978)], and a superintendent of a state hospital [*O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)].

Immunity for Juvenile Probation Officers. Because a probation officer is a judicial employee, it can be argued that he or she should enjoy the same absolute immunity from federal liability possessed by the judge. That is an expansive application of the doctrine of absolute immunity, however, since a probation officer does not have the decisional responsibilities of a judge and, therefore, is in less need of such an absolute immunity.

If, on the other hand, the specific act of misconduct that forms the basis of a claim under Section 1983 was carried out by the probation officer under orders from the judge, then, with respect to that act, the officer should be able to claim the absolute immunity of the judge since it was really the court's decision that resulted in the deprivation of federal rights, not the probation officer's.

Even if the officer's actions were not undertaken based on specific judicial order, if it was intimately associated with judicial proceedings, there may be absolute immunity. Two cases from the Fifth Circuit illustrate this point.

In *Spaulding v. Nielson,* 599 F.2d 728 (5th Cir. 1979), Spaulding filed a civil rights suit against the federal probation officer who prepared the pre-sentence report in his case. He claimed there were material inaccuracies in, and omissions from, the report. The federal district court dismissed the suit on the ground that the probation officer possessed the same absolute immunity from suit possessed by the trial judge. The Fifth Circuit agreed with the district court and held that a probation officer preparing a pre-sentence report has absolute immunity from suit based on errors in conducting the presentence investigation or preparing the report:

> Judges who act within the scope of their authority enjoy absolute immunity from damage suits.... This immunity has been extended to prosecutors for their decisions to prosecute and their conduct of the government's case on the theory that these activities are "intimately associated with the judicial phase of the criminal process...." We hold that a probation officer is entitled to the same protection when preparing and submitting a presentence report in a criminal case. The report is an integral part of the sentencing process, and in preparing the report the probation officer acts at the direction of the court.... We think it apparent that this narrow function is "intimately associated with the judicial phase of the criminal process" and thus, where, as here, the challenged activities of a federal probation officer are within this function, he or she is absolutely immune from a civil suit for damages.

599 F.2d at 729.

The second Fifth Circuit case is *Galvan v. Garmon*, 710 F.2d 214 (5th Cir. 1983). Michael Galvan was on probation from a Texas state court for theft. His probation officer noticed that a Michael Galvan had been arrested for a criminal offense. Assuming it was the same person, she prepared a motion to revoke probation. A warrant was issued and the probationer was detained for 20 days before he was released when it was discovered that it was not he who had been arrested for the criminal offense. Galvan filed a Section 1983 suit against the officer, the chief probation officer, and the adult probation department for damages. The federal district court dismissed the suit on the ground that all the defendants enjoyed absolute immunity from suit. On appeal, the Fifth Circuit reversed and

held that, in this situation, the probation officer did not have absolute immunity, but only qualified immunity. The court pointed to language in United States Supreme Court opinions that absolute immunity should be the exception and qualified immunity the norm. It then distinguished its earlier decision in the *Spaulding* case:

> Whereas in *Spaulding* the probation officer was acting at the direction of the court during the presentence report process, in the immediate case the probation officer acted at her own initiative and at a different phase of the criminal process less intimately associated with the judiciary.

710 F.2d at 215.

The court specifically refused to speak to the question whether it was proper to sue the adult probation department in federal court because that question was not raised in the appeal.

Meaning of Qualified Immunity. What is the scope and meaning of qualified immunity? In general, an official is liable for violation of a civil right under Section 1983 only if he or she knew or reasonably should have known that the act or omission would violate the constitutional or other federal rights of the person affected. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Frequently, that determination depends upon the status of the case law defining the federal right at the time of the act or omission in question. Was the right in question recognized by the United States Supreme Court at the relevant time? Was it recognized by some or all of the lower courts that had occasion to consider the issue? How many courts had considered the issue? These and other questions are all germane to determining the status of the federal right.

Liability of Supervisor. There is another defense to a Section 1983 suit that applies when a person is being sued not for his or her own acts but because he or she occupies a supervisory position over one who is claimed to have violated the federal rights of another. Generally, an employer is liable for any wrongs committed by employees in the course of their employment; no specific proof of wrongdoing by the employer need be shown. This legal doctrine, called respondeat superior, is not applicable in a Section 1983 suit. For a superior, such as a facility administrator, casework supervisor, head of intake, or chief juvenile probation officer, to be held liable under Section 1983 for the acts or omissions of a subordinate, there must be some proof that the supervisor specifically authorized the act, authorized in general terms acts of that nature, knew of the existence of acts of that general nature and failed to exercise power to prevent them from occurring, or in some way was connected with the acts beyond merely being in a supervisory capacity. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

C. State Defense and Payment of Judgments

1. Juvenile Probation Officers

The legislature in 1989 enacted Section 142.004 of the Human Resources Code, which provides: "Juvenile probation personnel employed by a political subdivision of the state are state employees for the purposes of Chapter 104, Civil Practice and Remedies Code." See also *El Paso County v. Solorzano*, 351 S.W.3d 577 (Tex.App.—El Paso 2011, no pet.) ("Department personnel are considered state employees for purposes of state liability and indemnification for acts of negligence and criminal prosecution.").

Chapter 104 of the Civil Practices and Remedies Code requires the state to pay certain judgments against employees for official acts or omissions and to provide counsel to defend a lawsuit filed against an employee for official conduct. The State's obligation to pay a judgment extends only to payment of "actual damages, court costs, and attorney's fees." Civil Practices and Remedies Code Section 104.001. The statute applies to an act or omission of an employee in the course of employment. Juvenile probation officers are covered by this legislation because of the Human Resources Code provision.

Under Civil Practices and Remedies Code Section 104.002(a), the State is obligated to pay a judgment if:

> (1) the damages arise out of a cause of action for negligence, except a wilful or wrongful act or an act of gross negligence; or
>
> (2) the damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States, except when the court in its judgment or the jury in its verdict finds that the person acted in bad faith, with conscious indifference or reckless disregard; or
>
> (3) indemnification is in the interest of the state as determined by the attorney general or his designee.

The State's obligation may not exceed $100,000 to a single person and $300,000 for a single occurrence in the

case of personal injury, death or deprivation of a right, privilege or immunity or $10,000 for a single occurrence of damage to property. Civil Practice and Remedies Code Section 104.003(a). However, the State is not liable to the extent damages are recoverable under and are in excess of the deductible limits of insurance.

The Texas Attorney General is required to defend a juvenile probation officer in a suit within the scope of Chapter 104. Civil Practice and Remedies Code Section 104.004. In order to require the Attorney General to defend, a juvenile probation officer who is sued for an official act or omission must notify the Attorney General within 10 days of being served with notice of the lawsuit. Civil Practices and Remedies Code Section 104.005.

If a juvenile probation officer is criminally prosecuted for an offense that would also give rise to civil liability covered by Chapter 104 and is found not guilty or the case is dismissed under certain circumstances, then the State is required by Section 104.0035 of the Civil Practice and Remedies Code to reimburse the probation officer for reasonable attorney fees paid to defend the criminal prosecution. There is a $10,000 ceiling on the reimbursement. Civil Practice and Remedies Code Section 104.0035(b).

2. Juvenile Boards

In 2001, the legislature enacted Human Resources Code Section 152.0014 to indemnify juvenile board members for damages as a result of official acts or omissions:

> The state shall indemnify a juvenile board member in the same manner and under the same conditions that it indemnifies an officer of a state agency under Chapter 104, Civil Practice and Remedies Code.

This enactment gives juvenile board members the same right to state indemnification for damages from official acts or omissions as enjoyed by state employees and juvenile probation officers.

D. Insurance

There are certain statutes that allow governmental units to purchase insurance policies to protect against liability claims. For example, Section 54.044(d), Family Code, provides that a county or municipality that establishes a program to help children and parents to perform community service may purchase insurance policies to protect the county or municipality from any cause of action that arises from the act of the child or parent while performing community service. Just like under the Tort Claims Act, the municipality or county is not liable to the extent damages are recoverable by insurance and the limitations of $100,000 per person and $300,000 per occurrence for instance of personal injury or death and $10,000 per occurrence of property damage apply.

The same language is used in Section 65.106, Family Code, regarding community service under a truancy court program.

CHAPTER 25: Victims' Rights

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A. Crime Victims' Bill of Rights

The idea of a crime victims' bill of rights is to establish basic rights for crime victims that are similar to the rights of persons accused of crime that are established by the Bill of Rights to the United States Constitution. It is an effort to strike a more even "balance" between the rights of the accused and the rights of the victim.

In 2004, the United States Congress enacted the Justice for All Act. H.R. 5107, Public Law 108-405. It contains sections related to crime victims and the criminal justice process. The major sections relate to: (1) protecting victims' rights in federal criminal proceedings; (2) eliminating the substantial backlog of DNA samples collected from crime scenes and convicted offenders; and (3) improving and expanding the DNA testing capacity of federal, state and local crime laboratories.

While Congress has debated whether to propose an amendment to the United States Constitution to establish a national bill of rights for crime victims for many years, virtually all states have enacted crime victims' bills of rights of their own. The voters of Texas amended the Texas Constitution in 1989 to enact a bill of rights. That provision is Article 1, Section 30.

Texas Constitutional Provision. The Texas constitutional provision creates two basic rights for crime victims: (1) the right to be treated with fairness and with respect for the victim's dignity and privacy; and (2) the right to be reasonably protected from the accused throughout the criminal justice process. It also creates five rights that crime victims have, but only if they specifically request them. They have the right to: (1) notification of court proceedings; (2) be present at all public court proceedings; (3) confer with the prosecutor; (4) restitution; and (5) information about the conviction, sentence, imprisonment, and release of the accused.

The constitutional provision is designed to be implemented by the legislature. It authorizes the legislature to define "victim," which determines who has these rights, and generally to enforce the rights through legislation. The provision also recognizes three limitations on enforcement of the crime victims' bill of rights: (1) the legislature may provide that a public official or agency cannot be held liable for failure to provide a right; (2) the accused cannot use failure to provide a right in defense of criminal proceedings; and (3) while a victim can enforce the rights, he or she cannot participate as a party to the criminal proceedings (such as by calling or cross-examining witnesses) or challenge the disposition of the case (such as by appealing a dismissal of charges).

Crime Victims' Legislation in Criminal Cases. Even before the 1989 promulgation of the crime victims' bill of rights in the Texas Constitution, the legislature had enacted Chapter 56 of the Code of Criminal Procedure to establish a legislative bill of rights for the criminal justice system. Chapter 56 was enacted in 1985. It served as the model for the enactment in 1989 of the crime victims' bill of rights in the juvenile justice system.

Crime Victims' Legislation in Juvenile Cases. Chapter 57 of the Family Code, Rights of Victims, closely follows Chapter 56 of the Code of Criminal Procedure, Crime Victim's Rights. Section 57.002(a), as amended in 2015, provides:

(a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the juvenile justice system:

> (1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
>
> (2) the right to have the court or person appointed by the court take the safety of the victim or the victim's family into consideration as an element in determining whether the child should be detained before the child's conduct is adjudicated;

(3) the right, if requested, to be informed of relevant court proceedings, including appellate proceedings, and to be informed in a timely manner if those court proceedings have been canceled or rescheduled;

(4) the right to be informed, when requested, by the court or a person appointed by the court concerning the procedures in the juvenile justice system, including general procedures relating to:

(A) the preliminary investigation and deferred prosecution of a case; and

(B) the appeal of the case;

(5) the right to provide pertinent information to a juvenile court conducting a disposition hearing concerning the impact of the offense on the victim and the victim's family by testimony, written statement, or any other manner before the court renders its disposition;

(6) the right to receive information regarding compensation to victims as provided by Subchapter B, Chapter 56, Code of Criminal Procedure, including information related to the costs that may be compensated under that subchapter and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that subchapter, the payment of medical expenses under Section 56.06, Code of Criminal Procedure, for a victim of a sexual assault, and when requested, to referral to available social service agencies that may offer additional assistance;

(7) the right to be informed, upon request, of procedures for release under supervision or transfer of the person to the custody of the Texas Department of Criminal Justice for parole, to participate in the release or transfer for parole process, to be notified, if requested, of the person's release, escape, or transfer for parole proceedings concerning the person, to provide to the Texas Juvenile Justice Department for inclusion in the person's file information to be considered by the department before the release under supervision or transfer for parole of the person, and to be notified, if requested, of the person's release or transfer for parole;

(8) the right to be provided with a waiting area, separate or secure from other witnesses, including the child alleged to have committed the conduct and relatives of the child, before testifying in any proceeding concerning the child, or, if a separate waiting area is not available, other safeguards should be taken to minimize the victim's contact with the child and the child's relatives and witnesses, before and during court proceedings;

(9) the right to prompt return of any property of the victim that is held by a law enforcement agency or the attorney for the state as evidence when the property is no longer required for that purpose;

(10) the right to have the attorney for the state notify the employer of the victim, if requested, of the necessity of the victim's cooperation and testimony in a proceeding that may necessitate the absence of the victim from work for good cause;

(11) the right to be present at all public court proceedings related to the conduct of the child as provided by Section 54.08, subject to that section; and

(12) any other right appropriate to the victim that a victim of criminal conduct has under Article 56.02 or 56.021, Code of Criminal Procedure.

Subdivision (12) means that any right given to the victim of a criminal offense by Article 56.02, Code of Criminal Procedure, is automatically given to the victim of a juvenile offense by Section 57.002. Any future additions to Article 56.02 would automatically apply in juvenile cases as well.

For example, Article 56.02(a)(13), added in 2009 and renumbered in 2013, also applies to juvenile cases. That subsection grants the following right to a victim, victim's guardian or close relative of a deceased victim:

(13) for a victim of an assault or sexual assault who is younger than 17 years of age or whose case involves family violence, as defined by Section 71.004, Family Code, the right to have the court consider the impact on the victim of a continuance requested by the defendant; if requested by the attorney representing the state or by counsel for the defendant, the court shall state on the record the reason for granting or denying the continuance.

In 2013, subsections (a) 11 and 14 were repealed from the provisions of Article 56.02 and moved to newly created Article 56.021, Code of Criminal Procedure, relating to the Rights of Victims of Sexual Assault. Section 57.002 of the Family Code was amended in subsection (a)(12) to confer identical rights to victims of sexual assault involving a juvenile. Subsection (a)(16) of Article 56.02 expands

the rights of a victim of a capital felony or the victim's guardian or relative to be contacted by a victim outreach specialist and to have a victim service provider designated to act as a liaison between the victim and the juvenile's defense attorney.

Section 57.002(b) requires that TJJD, in notifying a victim of the release or escape of a person, use the same procedure established for notification of the release or escape of an adult offender under Article 56.11, Code of Criminal Procedure.

Article 56.11 includes notification to a witness who testified against the defendant at trial, other than a witness who testified during the course and scope of his or her official or professional duties. See Article 56.11(a). It is the responsibility of the victim or witness to provide TJJD with an appropriate e-mail address, mailing address, and telephone number to facilitate notification.

Article 56.11(a-1) requires notification of a victim or witness whenever the inmate or defendant, if subject to electronic monitoring as a condition of release, is no longer monitored electronically. A reasonable attempt must be made to give the notice no later than 30 days before the date the defendant completes the sentence and is released or ceases to be monitored electronically as a condition of release. Code of Criminal Procedure Article 56.11(e)(1)(A).

Article 56.11(g), places additional notification duties upon prosecutors and provides:

> Not later than immediately following the conviction of a defendant [of certain felony offenses], the attorney who represented the state in the prosecution of the case shall notify in writing a victim or witness described by Subsection (a) of the victim's or witness's right to receive notice under this article.

The provisions of Chapter 57 apply only to a victim, a close relative of a deceased victim, or a guardian of a victim. Section 57.002(a). If the victim was killed by the criminal conduct, then a close relative of the deceased victim has the rights of the victim. Close relative is defined as the spouse, parent, or adult brother, sister, or child of the deceased. Section 57.001(1). If, because of age or mental or physical incompetency, the victim has a guardian, then the guardian has the rights of the victim. Section 57.001(2). A parent would be the natural guardian of a victim who is younger than 18.

There is one major difference between the juvenile and criminal statutes: the juvenile statute defines "victim" as "a person who as a result of the delinquent conduct of a child suffers a pecuniary loss or personal injury or harm." Section 57.001(3). By contrast, the criminal statute defines victim in a much narrower fashion as one "who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered bodily injury or death as a result of the criminal conduct of another." Code of Criminal Procedure Article 56.01(3). In other words, only certain assaultive crimes against the person are included in the criminal code bill of rights. It does not include persons who have been the victims of property crimes, such as theft or burglary, and does not include most so-called "victimless" crimes, such as possession of a controlled substance.

Unlike the criminal provision, the juvenile bill of rights includes victims of property offenses, such as theft, burglary, or vandalism. The only offenses excluded are so-called "victimless" offenses—those in which society at large is the victim but no particular person suffers special harm from the offense. Given the frequency of offenses against property, the juvenile definition means that the juvenile bill of rights applies in thousands of cases in which the criminal provision does not apply.

Three Limitations on Bill of Rights. The juvenile provision also recognizes the same three limitations on the bill of rights that appear in the constitutional provision and in the criminal statute.

Section 57.005 gives immunity from civil liability to a public official or agency that fails to provide a victim a right specified in Chapter 57:

> The Texas Juvenile Justice Department, a juvenile board, a court, a person appointed by a court, an attorney for the state, a peace officer, or a law enforcement agency is not liable for a failure or inability to provide a right listed under Section 57.002 of this code.

Section 57.006 prohibits a child from attempting to benefit in the handling of his or her own case from the failure of a governmental official or agency to provide a right to a victim:

> The failure or inability of any person to provide a right or service listed under Section 57.002 of this code may not be used by a child as a ground for appeal or for a post-conviction writ of habeas corpus.

Finally, Section 57.007 precludes a victim from attempting to participate in the proceedings as a party, for example, by attempting to call witnesses, to cross-examine them, or to argue to the jury:

> A victim, guardian of a victim, or close relative of a victim does not have standing to participate as a party in a juvenile proceeding or to contest the disposition of any case.

Regarding Enforcement. Crime victims' bills of rights—whether in the Constitution, the Code of Criminal Procedure, or the Family Code—have one feature in common: they are statements of principle but are not enforceable legally. Unlike most legal rights, bill of rights provisions cannot form the basis for legal proceedings of either a civil or criminal nature seeking redress for violation of the right. Public officials are expected voluntarily to comply with the bills of rights, but if they fail to do so in a particular case, the victim has no legal enforcement procedures available. This immunity from lawsuit was enacted at the request of police and prosecutors, who feared that they would be unable fully to implement the bills of rights because of limitations on their resources.

Just because the bills of rights cannot be enforced legally does not mean that they have no impact on the real world. The articulation of those rights by law means that police and prosecutors risk political punishment should they fail to implement them in a significant fashion. Victims' rights organizations are diligent in monitoring compliance with these rights and in seeking additional legal remedies (such as adverse publicity) for non-compliance. A public official risks his or her career by not taking these rights seriously and not making a reasonable and good faith effort to implement them.

B. Administrative Implementation of Bill of Rights

The legislature placed responsibility for administering the juvenile system bill of rights on the juvenile boards and juvenile probation departments. In the criminal system, that responsibility is placed on elected prosecutors and on law enforcement agencies.

Juvenile Board Responsibility. Each county has a local juvenile board, which is established by legislation and normally consists of the county and district judges in the county. See Chapter 2. The juvenile board selects the chief juvenile probation officer, develops resources and establishes procedures for the handling of juvenile cases, and annually approves of the juvenile budget and presents it to the commissioners court.

Chapter 57 of the Family Code requires each juvenile board to ensure to the extent practicable that a victim of a juvenile crime is accorded the rights in the bill of rights. Section 57.003(a). The board is authorized, but not required, to designate a victim assistance coordinator. This person most likely will be an employee of the juvenile probation department but could be an employee of the public prosecutor. Section 57.003(b).

Section 57.003(g) authorizes the juvenile board, with consent from the county's commissioners court, to approve a program in which the victim assistance coordinator may offer up to 10 hours of post-trial psychological counseling for a person who serves as a juror or alternate juror in an adjudication hearing involving graphic evidence or testimony. Such a program is not mandatory but instead rests within the discretion of the juvenile board. The affected juror or alternate juror must request the counseling not later than the 180th day after the date on which the jury in the adjudication hearing is dismissed. Section 57.003(g).

Victim Assistance Coordinator. The victim assistance coordinator is required to ensure that victims receive the rights granted in the bill of rights and to provide an explanation of those rights. At a minimum, the coordinator is required to provide: (1) written notice of the juvenile crime victims' bill of rights; (2) an application for compensation from the crime victims' compensation fund; and (3) a form for a victim impact statement. If requested, the coordinator is required to assist the victim in completing a compensation or victim impact form.

Juvenile Probation Department. The juvenile probation department is by statute given the major responsibility for implementing the provisions of Chapter 57. Section 57.0031 requires the probation department to provide very specific written notice to a victim of a juvenile crime:

> At the initial contact or at the earliest possible time after the initial contact between the victim of a reported crime and the juvenile probation office having the responsibility for the disposition of the juvenile, the office shall provide the victim a written notice:
>
> (1) containing information about the availability of emergency and medical services, if applicable;
>
> (2) stating that the victim has the right to receive information regarding compensation to victims of

crime as provided by the Crime Victims' Compensation Act (Subchapter B, Chapter 56, Code of Criminal Procedure), including information about:

(A) the costs that may be compensated and the amount of compensation, eligibility for compensation, and procedures for application for compensation;

(B) the payment for a medical examination for a victim of a sexual assault; and

(C) referral to available social service agencies that may offer additional assistance;

(3) stating the name, address, and phone number of the victim assistance coordinator for victims of juveniles;

(4) containing the following statement: "You may call the crime victim assistance coordinator for the status of the case and information about victims' rights.";

(5) stating the rights of victims of crime under Section 57.002;

(6) summarizing each procedural stage in the processing of a juvenile case, including preliminary investigation, detention, informal adjustment of a case, disposition hearings, release proceedings, restitution, and appeals;

(7) suggesting steps the victim may take if the victim is subjected to threats or intimidation;

(8) stating the case number and assigned court for the case; and

(9) stating that the victim has the right to file a victim impact statement and to have it considered in juvenile proceedings.

It is unclear how the role of the victim assistance coordinator is different from the statutory duties imposed on the juvenile probation department since there is a total overlap of duties. The probation department's duties are imposed by statute, while the juvenile court is authorized, but not required, to employ a victim assistance coordinator to perform those more limited statutory duties.

C. Victim Impact Statements

A victim impact statement is a written statement by a victim or close relative of a deceased victim that details the effects of the offense on the victim and the victim's family. The statement is provided to decision makers to assist them in exercising discretion in the case. Family Code Section 57.003(d)(3) suggests that a victim impact statement in a juvenile case can be used "at detention, adjudication, and release proceedings …" That, however, seems incorrect. The statement would not be admissible at adjudication but could be used at disposition. It would normally not be prepared in time for detention decision making, although given the informality of detention hearings, it might be admissible there. See Chapter 6. In practice, the judge does not see a victim impact statement unless and until the respondent is adjudicated. It is used for dispositional decision making. Section 57.003(e) requires the victim assistance coordinator to assist the victim in completing a victim impact statement.

Family Code Section 57.0031(9) merely requires the probation department to notify the victim that he or she has the right "to file a victim impact statement and to have it considered in juvenile proceedings." However, Code of Criminal Procedure Article 56.03(a)(13) gives the victim the right to be informed of the uses of a victim impact statement and the statement's purpose in the criminal justice system; to complete the victim impact statement; and to have the victim impact statement considered by the prosecutor before sentencing or before a plea agreement is accepted. Since victims of juvenile crime are entitled to the victims' rights established in the Code of Criminal Procedure, juvenile probation departments should consider providing notice consistent with the more descriptive, and later enacted, Article 56.03(a)(13) rather than Section 57.0031(9).

D. Plea Bargains

The prosecutor is required, as far as is reasonably practical, to give the victim notice of the existence and terms of any plea bargain agreement that will be presented to the court. Code of Criminal Procedure Article 56.08(b-1). As a measure to ensure this is done, the judge, before accepting a plea bargain, is required under Article 26.13(e) to ask if the attorney representing the state has given the victim the required notice regarding the plea bargain.

E. The Child Witness

The rules of evidence permit very young children—some as young as three years old—to testify in juvenile proceedings. Upon challenge by the party against whom child testimony is offered, the judge will question the child

to determine whether he or she can understand the difference between telling the truth and lying and can tell a rational story of the relevant events.

Evidence law prohibits an attorney from asking leading questions (ones that suggest the answer the questioner hopes to receive) of his or her own witness. There is an exception to this prohibition in the case of child witnesses in which the attorney can seek court permission to ask leading questions to obtain a coherent story from the witness when the child cannot provide such testimony without being asked leading questions.

Judges are sensitive to the fears of young children about testifying in court. For example, they will permit a child witness to bring a favorite stuffed animal with him or her to the witness stand for comfort. They will also permit special persons, such as a parent or victim assistance coordinator, to stand next to the child while the child is testifying in order to reassure the child that he or she is safe.

Article 38.074, Code of Criminal Procedure, includes requirements to ensure that children: (1) understand the proceedings and questions put to them; (2) are required to testify at the time of day they are best able to understand the questions and undergo the proceedings without being traumatized; (3) have a limited duration of testimony and have breaks when necessary; (4) are not subject to intimidation or harassment by any party; (5) are allowed to have a toy, blanket, or similar comfort item; and (6) are allowed to have a support person in close proximity if necessary. A support person is not allowed to obscure a child from the view of the defendant, to provide a child with the answer to any question, or to assist or influence a child's testimony.

Previously Recorded Child Testimony. Chapter 38 of the Code of Criminal Procedure applies to juvenile cases by virtue of Family Code Section 51.17(c). Article 38.071, Code of Criminal Procedure, permits a child's out-of-court recorded statement to be admitted in court in certain circumstances. Prior to 2001, this law applied only to child victims of certain enumerated offenses. In 2001, the law changed to apply to child witnesses, regardless of whether or not the child was the victim of the offense. The law applies only to children younger than 13 and only if the court determines the child is unavailable to testify in the presence of the defendant. The procedure is available only in prosecutions for the following offenses: murder; capital murder; manslaughter; aggravated kidnapping; indecency with a child; sexual assault; aggravated assault; aggravated sexual assault; injury to a child or elderly or disabled individual; prohibited sexual conduct (incest); aggravated robbery; sexual performance by a child; continuous sexual abuse of young child or children; compelling prostitution; and trafficking of persons offenses in which a is child caused to engage in or become a victim of certain sexual offenses. Article 38.071, Section 1.

If a child's oral statement is recorded before the indictment is returned or the complaint has been filed, it is admissible if the court determines the factual issues of identity of the perpetrator or actual occurrence of the incident were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases. An example would be an experienced and trained child care professional, such as a child protective services (CPS) worker. Article 38.071, Section 2(a).

If there is such a recording, once the indictment is returned or the complaint is filed, either the prosecutor or the defense attorney may file a motion with the court to allow both parties to submit written interrogatories. If the court approves, the same neutral individual who initially questioned the child, if possible, shall submit the written questions to the child under the same or similar circumstances of the original recording.

If there is a post-indictment recording, the pre-indictment recording is not admissible unless the post-indictment recording is admitted at the same time, provided the post-indictment recording was requested before the hearing or proceeding.

Article 38.071, Section 3, Code of Criminal Procedure, contains a provision, rarely used, permitting the child to testify live via closed circuit television. The child is located outside the courtroom and outside the presence of the defendant, who remains in the courtroom. The child's testimony is taken by the lawyers in the remote location and is played simultaneously to the defendant and the jury via closed circuit television.

Outcry Testimony. Family Code Section 54.031 permits testimony by a person to whom a child or a person with a disability has made a statement out-of-court about being the victim of an offense. The child must be 12 years of age or younger and the offense being prosecuted must be a violation of: Chapter 21 (sexual offenses) or 22 (assaultive offenses), Penal Code; prohibited sexual conduct (incest); sexual performance by a child; trafficking of persons offenses in which a child is caused to engage in or become

a victim of certain sexual offenses; or compelling prostitution. Section 54.031(a).

To qualify as an outcry statement, the statement of the child or of the person with a disability must describe the offense being prosecuted and must be being offered by the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense. Typically, such statements are made soon after the offense to a parent or other relative, babysitter, teacher, or childcare worker. The judge must find: (1) the statement is reliable based on the time, content, and circumstances of the statement; and (2) the child or person with a disability who made the statement is available to testify in court or in any other manner provided by law. If the statement is determined to be admissible, then the person to whom the child made the statement (the outcry witness) is permitted to tell the jury what the child said as long as the party presenting the testimony provides 14 days' notice of the name of the witness, its intent to call the witness, and a written summary of the statement. For the purposes of this law, a person with a disability is defined as a "person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self."

Other Admissible Hearsay. Article 7A.035 allows consideration of out-of-court statements from child victims younger than 14 years of age in a proceeding seeking a protective order in cases of continuous sexual assault of a child, indecency with a child, sexual assault, or aggravated sexual assault. The hearsay statement is admissible in the same manner as a hearsay statement of a child abuse victim in a suit affecting the parent-child relationship, as provided by Family Code Section 104.006. That means the court must find that the time, content, and circumstances of the statement provide sufficient indications of its reliability, the child is available to testify in court or in any other manner provided for by law, and the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child. Additionally, the hearsay statement must describe the offense committed against the child.

Similarly, Family Code Section 84.006 allows the use of hearsay testimony of a child 12 years of age or younger when a protective order in a family violence case is sought. This statement is also admissible in the same manner as a statement under Section 104.006.

F. Confidentiality of Information

Confidentiality of Information Provided by Victim. Government Code Section 552.132 permits an applicant for compensation from the fund to keep his or her identifying information confidential and not subject to disclosure under the Public Information Act. Identifying information includes name, social security number, address and telephone number of the victim or claimant, or any other information that would identify or tend to identify the victim or claimant. However, once an award is made, the amount of the award and the name of the recipient become public information.

Confidentiality of Minor Victim's Personal Identifiable Information. Section 58.004 was added in 2015 to require that, before a juvenile court record may be released (as allowed by law), all personally identifiable information about victims who are under the age of 18 must be redacted prior to release, with certain exceptions. The requirement to redact does not apply to information that is: (1) necessary for an agency to provide services to the victim; (2) for law enforcement purposes; (3) when shared in the Juvenile Case Management System (JCMS); (4) shared with an attorney representing the child in a Title 3 proceeding; or (5) shared with an attorney representing any other person in a juvenile or criminal court proceeding arising from the same act or conduct for which the child was referred to juvenile court. The fourth and fifth provisions regarding sharing with attorneys were not included in the 2015 legislation. They were added in 2017 to account for the fact that such information is constitutionally required to allow the accused person to prepare a defense and to confront his or her accuser.

Use of Pseudonyms for Victims of Certain Offenses. The Code of Criminal Procedure allows victims of certain offenses to use a pseudonym and makes it illegal to improperly disclose information relating to the case. The offenses include sex offenses (Article 57), stalking (Article 57A), family violence (Article 57B), and trafficking (Article 57D).

The victim is allowed to choose to use a pseudonym instead of his or her name in public files and records concerning the offense. These records include police reports, press releases, and records of judicial proceedings. To elect to use a pseudonym, a victim must complete the Pseudonym Form (available from the Attorney General's Office) and return the form to the law enforcement agency investigating the offense. Victims who return the form

cannot be required to disclose their names, addresses, or phone numbers in connection with the investigation or prosecution of the crimes. The forms are confidential and cannot be disclosed to anyone other than the victim, a defendant in the case, or the defendant's attorney, unless required by a court. The court may order disclosure of the victim's name and other information only if the court finds that the information is essential in the trial for the offense, the identity of the victim is in issue, or the disclosure is in the best interest of the victim.

Each relevant Article creates a criminal penalty if a public servant knowingly discloses information of victims of stalking. It is a Class C misdemeanor for a public servant with access to the name and other information of victims who chose to use a pseudonym to knowingly disclose the name, address, or telephone number of the victim to anyone who is not assisting in the investigation or prosecution other than defendants, their attorneys, or anyone authorized by court order.

G. Public Compensation to Victims of Crime.

Victim assistance coordinators and juvenile probation departments are required by law to notify victims of juvenile crime of their possible right to public compensation from the State of Texas for their losses. Family Code Sections 57.003 and 57.0031. The Crime Victims' Compensation Act is Chapter 56, Subchapter B of the Code of Criminal Procedure. The Act is administered by the Texas Attorney General.

Definition of Victim and Claimant. Article 56.32 (a)(11) of the Code of Criminal Procedure defines a "victim" as an individual who "suffers personal injury or death as a result of criminally injurious conduct…if the conduct…occurred in this state" and is a resident of the United States or its territories or possessions. Personal injury includes mental harm as well as physical injuries. Also defined as a "victim" is a Texas resident who suffers personal injury or death as a result of criminally injurious conduct if the conduct occurred in a state or country without a compensation program and the victim would be entitled to compensation had the conduct occurred in Texas. Finally, "victim" is defined as a Texas resident who suffers personal injury or death as a result of an act of international terrorism.

In addition to a victim, an individual—called a "claimant"—may make a claim from the fund if the individual has paid medical or burial expenses of a victim, is a dependent of a victim who died as a result of the criminal conduct, or is an immediate family member or household member of a victim who requires psychiatric care or counseling as a result of the criminal conduct. Article 56.32(a)(2). An immediate family member or household member of a deceased victim may receive up to $1,000 in lost wages as a result of bereavement leave taken by that individual. Article 56.42(e).

Qualifying Criminal Conduct and Losses. Only criminal conduct that results in death or personal injury is compensable. Articles 56.32(a)(4) and 56.34(a). That is consistent with the definition of "victim" under Crime Victims' Bill of Rights provisions in Chapter 56 of the Code of Criminal Procedure. It is, however, much narrower than the comprehensive definition of "victim" in juvenile proceedings under Chapter 57 of the Family Code, which includes crimes against property in addition to crimes that cause death or personal injury.

Compensation for a victim is restricted to pecuniary losses. Articles 56.32(a)(9) and 56.34(a). It is not permissible to compensate the victim for pain and suffering that has not resulted in pecuniary loss. Pecuniary loss means reasonable and necessary expenses incurred as a result of the criminal conduct, but only: (1) medical care, psychiatric care, counseling, and physical therapy; (2) loss of past earnings and anticipated loss of future earnings; (3) care of a child or dependent; (4) funeral or burial expenses; loss of support of a child or dependent, unless doing so would benefit the offender; (5) reasonable and necessary costs of cleaning the crime scene; (6) reasonable replacement costs for clothing, bedding, or property of the victim; and (7) a one-time only payment for reasonable and necessary costs incurred by a victim of domestic violence for relocation and housing rental assistance payments, subject to a maximum of $2,000 for relocation and $1,800 for housing rental expenses. Articles 56.32(a)(9) and 56.42(d).

In 2013, the legislature added the definition of human trafficking to Section 56.32(14) of the Code of Criminal Procedure. Victims of human trafficking are eligible to receive one-time only assistance payments under the Crime Victims' Compensation Act.

Reduction for Payments from Other Sources. The Texas Crime Victims' Compensation fund is a payor of last resort. Even if the victim suffers pecuniary loss, compensation is not available to the extent the loss has been compensated, or can readily be compensated, from collateral sources. Collateral sources are defined as restitution orders from a criminal or juvenile court; compensation from

the United States or another state; social security, Medicare, or Medicaid; another state's or country's crime victims' compensation program; worker's compensation; employer's wage continuation program, not including vacation and sick leave benefits; proceeds from an insurance policy; health insurance benefits; and proceeds from third party litigation (e.g., victim sued discount store for inadequate security when crime committed on store's property). Articles 56.32(a)(3) and 56.34(b).

Procedures for Making a Claim. A claim must be filed within three years of the occurrence of the criminal conduct. If the victim is a child, a claim must be filed within three years after the child is made aware of the crime but may not be filed after the child turns 21. If the victim was physically or mentally incapacitated as a result of the crime and that incapacity reasonably prevented the victim from filing earlier, the period of incapacity is not included in calculating the three-year period. The Attorney General may extend the deadline for filing for good cause. Article 56.37.

The Attorney General is required to deny a claim if the criminal conduct is not reported to police within a reasonable time; this restriction does not apply if the victim is a child. Article 56.46. The Attorney General is also required to deny a claim if the claimant or victim knowingly and willingly participated in the criminal conduct, the claimant or victim is the offender or an accomplice of the offender, an award of compensation would benefit the offender or an accomplice of the offender, the claimant or victim was incarcerated in a penal institution at the time of the offense, or the claimant or victim knowingly or intentionally submitted false or forged information in the application process. However, a victim or claimant cannot be denied payment merely because the victim or claimant is an immediate family member of the offender or resides in the same household as the offender. Article 56.41.

Payments and Services. There is an aggregate limit of $50,000 for losses resulting to a victim or claimant from a criminal offense. This applies to the victim and to all others claiming regarding the same offense. Article 56.42(a). In addition to the $50,000, the Attorney General may award $75,000 for extraordinary pecuniary losses if the personal injury to a victim is catastrophic and results in a total and permanent disability to the victim, for lost wages and reasonable and necessary costs of making a home or automobile accessible, obtaining job training or vocational rehabilitation, training in the use of special appliances, receiving home health care, durable medical equipment, rehabilitation technology and long-term medical expense. Article 56.42(b). In addition to those amounts, a victim of domestic violence or of a sexual assault in his or her own residence may receive a one-time only payment for reasonable and necessary costs for relocation and housing rental assistance payments, subject to a maximum of $2,000 for relocation and $1,800 for housing rental expenses. Article 56.42(d).

In addition to cash payments, the Attorney General is authorized to refer the person to a state agency for vocational or other rehabilitative services and provide counseling services or contract with a private entity to provide counseling services. Article 56.35.

If the victim or claimant was assisted by an attorney in the application process, the Attorney General may, in addition to compensation awarded, award attorney's fees to the lawyer. The fees cannot exceed 25 percent of the award the attorney assisted in obtaining. If the amount was not in dispute and if no hearing was held, then the attorney fees cannot exceed 25 percent or $300, whichever is less. The attorney cannot contract with the victim or claimant for a larger fee. Article 56.43.

The Attorney General must make a lump sum payment for all pecuniary losses that have accrued at the time the application is approved. As to future losses, the Attorney General must make installment payments, but may make a lump sum payment if the amount of estimated future losses does not exceed $1,000. Article 56.44.

Payments for Forensic Medical Costs. Article 56.06 allows the AG's office to pay reasonable costs for forensic medical examinations to a victim who has reported the assault to law enforcement. Article 56.065 was amended to provide changes to certain requirements for forensic medical examinations of victims of alleged sexual assault so that the attorney general's office may pay the reasonable costs for medical care provided to the victim who has not yet reported the alleged sexual assault to law enforcement.

Victim Uncooperativeness or Responsibility for the Crime. The Attorney General may deny or reduce an award otherwise payable if: (1) the claimant or victim has not substantially cooperated with an appropriate law enforcement agency; (2) the claimant or victim bears a share of responsibility for the act or omission giving rise to the claim because of the claimant's or victim's behavior; or (3) the claimant or victim was engaging in an activity that, at the time of the crime, was prohibited by law. Article

56.45. The Attorney General is required to deny a claim if the claimant or victim knowingly and willingly participated in the criminally injurious conduct, the claimant or victim is an accomplice, an award of compensation would benefit the offender, or the claimant or victim was incarcerated in a penal institution at the time of the offenses. A claim cannot be denied merely because the claimant or victim is an immediate family member of the offender or resides in the same household as the offender. Article 56.41(b).

Judicial Review of Attorney General's Decision. If a claimant or victim is not satisfied with the Attorney General's decision, the person may file a notice of dissatisfaction with the decision. The notice must be filed with the Attorney General within 40 days. Not later than 40 days after that filing, the claimant or victim may bring a lawsuit in the county in which the injury or death occurred or the victim resided at the time of the injury or death; if the victim resided out of state, then the lawsuit is filed in Travis County. During the pendency of such a lawsuit, payments are suspended. The judicial review is de novo, that is, starting all over again. Total attorney's fees of up to 25 percent of the amount awarded may be paid to the attorney who represented the victim or claimant in the lawsuit.

Reimbursement to the State for Payments. The State is entitled to recover for compensation it provided from the fund for any amounts received by a claimant or victim from a collateral source. Article 56.45(3). If the claimant or victim who received compensation from the fund intends to bring a lawsuit to recover damages for the crime, he or she must notify the Attorney General of the lawsuit. The Attorney General may join the lawsuit as a party plaintiff, may require that the lawsuit be brought as trustee on behalf of the State to recover benefits awarded by the State, or may take neither action. The claimant or victim may deduct expenses of the suit, including attorney fees, from any amount it pays the State from the amount received from the lawsuit. The claimant or victim is not authorized to settle a lawsuit for recovery for a crime for which he or she has received compensation from the State without the approval of the Attorney General. Article 56.52.

H. Restitution to Victims of Crime

The Texas Constitution lists the right to restitution as among the rights possessed by a crime victim. Article 1, Section 30(a)(4). The purpose of restitution is to restore the victim to the position he or she was in before the crime was committed—to the extent money can accomplish that objective. Prosecutors and judges make decisions in juvenile prosecutions and trials designed to increase the likelihood that the victim will receive adequate restitution. There are ample legal tools to obtain sufficient restitution in any juvenile case with a pecuniary loss to the victim—primarily, but not exclusively, making payment of restitution a condition of probation. The primary obstacle to adequate restitution is that many juvenile respondents and their families are poor. Even when placed on probation for up to 10 years, many are unable even on installments to make substantial restitution payments—not much money is left after living expenses are paid from take home pay of minimum wage jobs.

Civil Lawsuit Against Offender. Almost all crimes that cause pecuniary loss to a victim also give rise to civil liability by the offender to the victim. The victim could file a lawsuit against the offender to recover damages for all injuries inflicted by the offense, including compensation for pain and suffering and punitive damages. In a serious case, the amount awarded by a jury could easily be millions of dollars. The difficulty is collecting the judgment. The great majority of offenders are poor or at best lower middle income persons with limited means. They are judgment-proof. That means that all of the property they own is exempt from seizure to collect on the judgment. Assets such as land and home, cars, other personal property, income from current wages, and qualified retirement funds are all exempt. If there is anything left after the exemptions are claimed by the offender, he or she could file bankruptcy to discharge the judgment debt and other unsecured debts at a fraction of their values.

Lawyers who bring lawsuits of this type do so on contingent fees, which means they collect a percentage of any award received and collect nothing if nothing is received. Before deciding to take a crime victim's case, the lawyer will investigate the payoff of the lawsuit. Since the typical homeowner's insurance policy excludes intentional crimes from coverage, those policies do not cover the typical crime victim's lawsuit. If the lawyer determines there is no money or property from which to settle a case or collect on a judgment, he or she will refuse to take the case. Realistically, in the great majority of cases, civil lawsuits by crime victims against offenders are not feasible—it is a rare offender who has the resources of an O.J. Simpson.

As a practical matter in the typical case, if the victim is to receive monetary compensation for the offense, it will be the juvenile justice system, not the civil compensation system, that provides the compensation.

Restitution by Juvenile Court Order. The Family Code provides for restitution to the victim of juvenile delinquent conduct or conduct indicating a need for supervision (CINS). The juvenile court may order the juvenile, the juvenile's parent, or both to pay full or partial restitution.

Restitution Ordered from Juvenile. Restitution from a juvenile is most often ordered as a condition of probation and requires installment payments. Section 54.04(d)(1), Family Code, authorizes the juvenile court to place an adjudicated child on probation "on such reasonable and lawful terms as the court may determine." When ordinary probation ends, the obligation of the juvenile to make restitution payments as a condition of probation also ends. Section 54.05(b). See Chapter 12 for a discussion of ordering restitution as a condition of probation.

That said, restitution does not have to be made a condition of probation. Restitution is cumulative of other remedies and can be in an order separate from probation. However, the period for payment may not extend past the later of the child's 18th birthday or the date the child is no longer enrolled in an accredited secondary school in a program leading toward a high school diploma. Section 54.041. A failure to comply with an order of restitution that is not a condition of probation is enforceable under Chapter 61, Family Code.

The juvenile can be placed on extended probation for up to 10 years under the Determinate Sentence Act. Section 54.04(q). When the juvenile becomes 19 (or 18 for an offense occurring before September 1, 2011), the juvenile court decides whether to terminate probation supervision or to transfer supervision to the appropriate criminal court. If supervision is transferred, the criminal court places the defendant on adult community supervision for the balance of the original probation term. Any unpaid restitution obligation follows the juvenile to criminal court and must be made a condition of adult community supervision. Sections 54.041 and 54.051.

Probation can be revoked for violation of a restitution payment order only if the State proves that the failure to pay was intentional, that is, not an oversight. Once that occurs, the respondent is permitted to show that he or she did not pay because he or she was financially unable to pay. Inability to have paid restitution is an affirmative defense to revocation. See Chapter 13.

Any restitution order against a child "must promote the rehabilitation of the child, be appropriate to the age and physical, emotional, and mental abilities of the child, and not conflict with the child's schooling." Section 54.041(b).

If the juvenile is committed to TJJD, no restitution payments would ordinarily be expected while the juvenile is in residential care. However, Human Resources Code 246.003 provides that, if a child earns wages by working in the agency's industries program, the agency has the authority to apportion those wages, in amounts determined by the agency, in the following priority: (1) a person to whom the child has been ordered by a court or has otherwise agreed to pay restitution; (2) a person to whom the child has been ordered by a court to pay child support; (3) the compensation to victims of crime fund or auxiliary fund; and (4) to the child's student account.

Additionally, if a child has been released on parole by TJJD and the child violates parole, the agency is authorized under Human Resources Code Section 245.051(f)(2), to require the child to make full or partial restitution to the victim of the offense that constituted a violation of parole or, if unable to pay, to perform services for a charitable or educational institution. This is an option in addition to or in lieu of parole revocation.

Restitution Orders Against Parents. A juvenile court may order a child's parent to pay restitution to the victim of the offense. Family Code Section 54.041(b) provides:

> If a child is found to have engaged in delinquent conduct or conduct indicating a need for supervision arising from the commission of an offense in which property damage or loss or personal injury occurred, the juvenile court, on notice to all persons affected and on hearing, may order the child or a parent to make full or partial restitution to the victim of the offense. The program of restitution must promote the rehabilitation of the child, be appropriate to the age and physical, emotional, and mental abilities of the child, and not conflict with the child's schooling. When practicable and subject to court supervision, the court may approve a restitution program based on a settlement between the child and the victim of the offense. An order under this subsection may provide for periodic payments by the child or a parent of the child for the period specified in the order but except as provided by Subsection (h), that period may not extend past the date of the 18th birthday of the child or past the date the child is no longer enrolled in an accredited secondary school in a program leading toward a high school diploma, whichever date is later.

The parental order is totally independent of any order that may be entered against the child, except the victim is not entitled to receive restitution for more than the loss suffered. Section 54.041(c). A parent's restitution obligation ends when the child becomes 18 or is no longer enrolled in an accredited secondary school, whichever is later. If the child is placed on determinate sentence probation, and supervision is transferred to a criminal court at age 19 (or 18 for an offense committed before September 1, 2011), the parent's restitution liability is not extended by the transfer and would ordinarily end at age 18. Section 54.041(h).

Until 2015, parents had a defense against a restitution order if they made a reasonable good faith effort to prevent their child from engaging in the conduct that caused the loss. Section 54.041(g) provided:

> On a finding by the court that a child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or engaging in conduct indicating a need for supervision and that, despite the parents' or guardians' efforts, the child continues to engage in such conduct, the court shall waive any requirement for restitution that may be imposed on a parent under this section.

Unfortunately, and inexplicably, Section 54.041(g) was repealed in 2015 by the bill that revised Texas' truancy laws. As this provision is wholly unrelated to truancy, it makes sense for courts to continue providing this defense until the law can be reinstatement. Attempts to reinstate the provision in 2017 failed due to unrelated legislative issues.

Victims and Treatment of Restitution Payments. Section 54.0482clarifies the procedure juvenile probation departments use for collecting and processing restitution payments and also addresses the use of these funds if they are not claimed by the victims.

Section 54.0482 on Treatment of Restitution Payments reads:

> (a) A juvenile probation department that receives a payment to a victim as the result of a juvenile court order for restitution shall immediately:
>
> (1) deposit the payment in an interest-bearing account in the county treasury; and
>
> (2) notify the victim that a payment has been received.
>
> (b) The juvenile probation department shall promptly remit the payment to a victim who has been notified under Subsection (a) and makes a claim for payment.
>
> (b-1) If the victim does not make a claim for payment on or before the 30th day after the date of being notified under Subsection (a), the juvenile probation department shall notify the victim by certified mail, sent to the last known address of the victim, that a payment has been received.
>
> (c) On or before the fifth anniversary of the date the juvenile probation department receives a payment for a victim that is not claimed by the victim, the department shall make and document a good faith effort to locate and notify the victim that an unclaimed payment exists, including:
>
> (1) confirming, if possible, the victim's most recent address with the Department of Public Safety; and
>
> (2) making at least one additional certified mailing to the victim.
>
> (d) A juvenile probation department satisfies the good faith requirement under Subsection (c) by sending by certified mail to the victim, during the period the child is required by the juvenile court order to make payments to the victim, a notice that the victim is entitled to an unclaimed payment.
>
> (e) If a victim claims a payment on or before the fifth anniversary of the date on which the juvenile probation department mailed a notice to the victim under Subsection (b-1), the juvenile probation department shall pay the victim the amount of the original payment, less any interest earned while holding the payment.
>
> (f) If a victim does not claim a payment on or before the fifth anniversary of the date on which the juvenile probation department mailed a notice to the victim under Subsection (b-1), the department:
>
> (1) has no liability to the victim or anyone else in relation to the payment; and
>
> (2) shall transfer the payment from the interest-bearing account to a special fund of the county treasury, the unclaimed juvenile restitution fund.

(g) The county may spend money in the unclaimed juvenile restitution fund only for the same purposes for which the county may spend juvenile state aid.

Section 54.0482 requires the juvenile probation department that receives restitution funds under a juvenile court order to deposit the funds in an interest bearing account in the county treasury and to provide the victim notice that the funds have been received. Prior to 2013, notice had to be by certified mail. To reduce costs in instances in which a phone call notice sufficed for the victim to claim the funds, the law was changed to require certified mail only in instances in which the victim does not claim the money within 30 days of the less formal notice. The victim has five years from the date of the certified mail notice to claim the funds.

The juvenile probation department must make a good faith effort to locate and notify victims about unclaimed restitution payments. In addition to the initial certified mail notice regarding unclaimed funds, the probation department must send at least one additional certified mailing to the victim. If the victim does not claim a payment on or before the fifth anniversary of the date on which the first certified mail notice regarding unclaimed funds was sent, the probation department has no liability to the victim or anyone else related to the funds; the money must be transferred to a special fund of the county treasury called the unclaimed juvenile restitution fund. The county may spend the money in this fund only for the same purposes for which the county may spend state aid funding received from the TJJD, which includes juvenile probation department services, programs, and facilities.

I. Notice of Release or Escape

The crime victims' bill of rights includes the right to notice of release or escape from a correctional facility and of the right to provide information relevant to release on parole. Family Code Section 57.002(a)(7) provides:

[A] victim, guardian of a victim or, close relative of a deceased victim is entitled to "the right to be informed, upon request, of procedures for release under supervision or transfer of the person to the custody of the Texas Department of Criminal Justice for parole, to participate in the release or transfer for parole process, to be notified, if requested, of the person's release, escape, or transfer for parole proceedings concerning the person, to provide to the Texas Juvenile Justice Department for inclusion in the person's file information to be considered by the department before the release under supervision or transfer for parole of the person, and to be notified, if requested, of the person's release or transfer for parole.

Each of these notice rights is predicated upon the victim or other eligible person having requested the information. In addition, Section 57.004 provides:

A court, a person appointed by the court, or the Texas Juvenile Justice Department is responsible for notifying a victim, guardian of a victim, or close relative of a deceased victim of a proceeding under this chapter only if the victim, guardian of a victim, or close relative of a deceased victim requests the notification in writing and provides a current address to which the notification is to be sent.

J. HIV and Related Testing

Family Code Section 54.033 requires testing for HIV and other diseases in certain juvenile cases. It is similar to Article 21.31, Code of Criminal Procedure, and provides, in part:

(a) A child found at the conclusion of an adjudication hearing under Section 54.03 of this code to have engaged in delinquent conduct that included a violation of Sections 21.11(a)(1) [indecency with a child by contact], 22.011 [sexual assault], or 22.021 [aggravated sexual assault], Penal Code, shall undergo a medical procedure or test at the direction of the juvenile court designed to show or help show whether the child has a sexually transmitted disease, acquired immune deficiency syndrome (AIDS), human immunodeficiency virus (HIV) infection, antibodies to HIV, or infection with any other probable causative agent of AIDS. The court may direct the child to undergo the procedure or test on the court's own motion or on the request of the victim of the delinquent conduct.

…

(c) The person performing the procedure or test shall make the test results available to the local health authority. The local health authority shall be required to notify the victim of the delinquent conduct and the person found to have engaged in the delinquent conduct of the test result.

Juvenile Offenders as Victims of Sex Crimes. Juvenile offenders sometimes are the victims of sexual abuse while in juvenile justice programs and facilities. These victims are at risk for sexually transmitted infections, including HIV, and should be provided counseling in a sensitive,

culturally competent, and easily understood manner regarding transmission, testing, and treatment methods.

An HIV test result is confidential and may be released only to the entities listed in Health and Safety Code Section 81.103. A county or district court is included in this list for purposes of complying with Chapter 81 or rules concerning the control or treatment of communicable diseases and health conditions. Section 81.103(b)(10). A person commits a Class A misdemeanor if, with criminal negligence, he or she releases or discloses a test result or other information or allows a test result or other information to become known. Section 81.103(j). A county or district court judge is authorized to issue a protective order or to take other similar action to limit disclosure of a test result obtained under Section 81.103 before that information is entered into evidence or otherwise released in a court proceeding. This is discretionary with the court. Section 81.103(k).

Exposing Juvenile Probation Employees to HIV. Employees of juvenile probation departments are included in the list of individuals who may request involuntary testing of persons suspected of exposing them to certain diseases, including the HIV virus. Health and Safety Code Section 81.050(b)(6). Employees of a juvenile probation department can request a test from the state or a local health department when they believe they have been exposed to the HIV virus or another communicable disease during the performance of their job duties. If the person refuses to comply with the health department's order to be tested, a prosecutor may ask for a court order requiring the test. The employee requesting the test must be informed of the test results when they become available and, if needed, be offered medical follow-up and counseling services.

Section 81.050 should not be confused with Family Code Section 54.033, which requires testing for HIV and other diseases at the conclusion of an adjudication hearing of a juvenile who has engaged in delinquent conduct that includes indecency with a child by contact, sexual assault, or aggravated sexual assault. This type of testing is for the benefit of victims of these specific offenses. Section 81.050, on the other hand, allows an employee of a juvenile probation department to request "involuntary testing" of persons who are suspected of exposing them to certain diseases at any time if they suspect having been exposed to a reportable disease. This right is not dependent on an adjudication and may not even involve a juvenile offender.

K. Victims of Human Trafficking

Sections 54.04(v) and (w) pertain to victims of severe forms of human trafficking. Under the federal Victims of Trafficking and Violence Protection Act of 2000, such victims may apply for legal residency once they have been certified as victims of a severe form of trafficking. Allowing courts in Texas to make such a judicial finding encourages victims to assist in the prosecution of these types of cases.

Family Code Sections 54.04(v) and (w) read:

> (v) If the judge orders a disposition under this section for delinquent conduct based on a violation of an offense, on the motion of the attorney representing the state the judge shall make an affirmative finding of fact and enter the affirmative finding in the papers in the case if the judge determines that, regardless of whether the conduct at issue is the subject of the prosecution or part of the same criminal episode as the conduct that is the subject of the prosecution, a victim in the trial:
>
> (1) is or has been a victim of a severe form of trafficking in persons, as defined by 22 U.S.C. Section 7102(8); or
>
> (2) has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described by 8 U.S.C. Section 1101(a)(15)(U)(iii).
>
> (w) That part of the papers in the case containing an affirmative finding under Subsection (v):
>
> (1) must include specific information identifying the victim, as available;
>
> (2) may not include information identifying the victim's location; and
>
> (3) is confidential, unless written consent for the release of the affirmative finding is obtained from the victim or, if the victim is younger than 18 years of age, the victim's parent or guardian.

See also Code of Criminal Procedure Articles 42.0191 (Finding Regarding Victims of Trafficking or Other Abuse) and Article 42.12, Section 5(i) and 5(j).

In 2009, the legislature defined "domestic victim" to mean a victim of trafficking who is a permanent legal resident or citizen of the United States and assigned the same definition to "victim of trafficking" as contained in 22

U.S.C. Section 71.02(14) (a person subjected to an act or practice involving "severe forms of trafficking in persons" or sex trafficking). See Government Code Section 531.381.

L. Trafficked Persons Program and Deferred Adjudication

In 2013, the legislature added Section 54.0326 to authorize the designation of certain juvenile courts and diversion programs for juveniles who may be the victims of human trafficking. Section 54.0326 authorizes shared human trafficking jurisdiction to defer adjudication proceedings until the child's 18th birthday and requires the child to participate in a trafficked persons program upon oral or written request of the child. Upon evidence of successful completion of the program, the court shall dismiss the child's case with prejudice.

CHAPTER 26: Parental Rights and Responsibilities

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This chapter attempts to define the role of parents in the juvenile justice system. It deals with three aspects of their roles: (1) parents as parties to juvenile proceedings; (2) when juvenile courts can order parents to take action or refrain from taking action affecting their child; and (3) what means are available for enforcing juvenile court orders directed at parents.

A. Parents as Parties to Juvenile Proceedings

There are only two parties in criminal proceedings: the State and the accused. In juvenile proceedings, there are more parties. Family Code Section 51.02(10) provides:

> "Party" means the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem.

It is rare for a juvenile respondent to have a spouse, but parents are involved to some extent in most juvenile proceedings. Section 51.02(9) defines a parent:

> "Parent" means the mother or the father of a child, but does not include a parent whose parental rights have been terminated.

It makes no difference whether the natural parents of a juvenile respondent are married to one another.

Declaring a parent to be a party raises more questions than it answers. Does that mean that a parent of a juvenile respondent has the right to participate in the proceedings to the same extent as the respondent? Can the parent cross-examine witnesses, call witnesses on his or her own behalf, participate in jury selection, make opening state-

ments and closing arguments? As a party whose important rights to custody of the child are at stake, does a parent/party have the right to counsel to represent those interests? If the parent is indigent, must the county provide court-appointed counsel?

The Family Code has declared parents to be parties but has not fleshed out what that declaration means. Neither have the courts. This is a largely undeveloped area of juvenile law. Nevertheless, the Family Code has spelled out parental rights at some stages of the juvenile process.

Right to Notice of Charges and Hearing. Section 53.06(a) requires the juvenile court to direct service of a petition and summons to:

> (1) the child named in the petition;
>
> (2) the child's parent, guardian, or custodian;
>
> (3) the child's guardian ad litem; and
>
> (4) any other person who appears to the court to be a proper or necessary party to the proceeding.

Only one person in the second listed category must be served. See Chapter 9. That means that it is not required to serve both of the respondent's parents and that a guardian or custodian can be served instead of a parent.

Obligation to Appear. Section 53.06(c) permits the court to order a person, most likely a parent, to appear in court with the child:

> The court may endorse on the summons an order directing the person having the physical custody or control of the child to bring the child to the hearing. A person who violates an order entered under this subsection may be proceeded against under Section 53.08 [writ of attachment] or 54.07 [criminal contempt of court] of this code.

In addition, Section 51.115 obligates a parent to appear at a juvenile court hearing and prescribes a penalty for failure to appear:

> (a) Each parent of a child, each managing and possessory conservator of a child, each court-appointed custodian of a child, and a guardian of the person of the child shall attend each hearing affecting the child held under:
>
> (1) Section 54.02 (waiver of jurisdiction and discretionary transfer to criminal court);
>
> (2) Section 54.03 (adjudication hearing);
>
> (3) Section 54.04 (disposition hearing);
>
> (4) Section 54.05 (hearing to modify disposition); and
>
> (5) Section 54.11 (release or transfer hearing).
>
> (b) Subsection (a) does not apply to:
>
> (1) a person for whom, for good cause shown, the court waives attendance;
>
> (2) a person who is not a resident of this state; or
>
> (3) a parent of a child for whom a managing conservator has been appointed and the parent is not a conservator of the child.
>
> (c) A person required under this section to attend a hearing is entitled to reasonable written or oral notice that includes a statement of the place, date, and time of the hearing and that the attendance of the person is required. The notice may be included with or attached to any other notice required by this chapter to be given the person. Separate notice is not required for a disposition hearing that convenes on the adjournment of an adjudication hearing. If a person required under this section fails to attend a hearing, the juvenile court may proceed with the hearing.
>
> (d) A person who is required by Subsection (a) to attend a hearing, who receives the notice of the hearing, and who fails to attend the hearing may be punished by the court for contempt by a fine of not less than $100 and not more than $1,000. In addition to or in lieu of contempt, the court may order the person to receive counseling or to attend an educational course on the duties and responsibilities of parents and skills and techniques in raising children.

The summons required by Section 53.06 would be sufficient notice, provided it states that the attendance of the person served is required.

Section 51.116 seeks to protect the employment of a parent who misses work to attend a juvenile court hearing as required by Section 51.115. It prohibits termination and

provides for reinstatement and compensation in the event of termination.

The Power to Consent to Certain Proceedings. Section 51.09 requires that a waiver of most rights of a juvenile must be made by the child and his or her attorney. The parent is given no role in the decision-making process. However, in a few places the Family Code gives the parent a decisive role—a veto—over a proceeding. Section 53.03(a)(2) permits a child to be placed on deferred prosecution if "the child and his parent, guardian, or custodian consent with knowledge that consent is not obligatory." Because deferred prosecution is intended to function in a lawyer-free environment, an adult besides a lawyer can concur with the wishes of the child to accept it.

Section 54.05 prescribes the characteristics of a modification of disposition hearing. It contemplates that, under certain circumstances, a modification may occur without the need for an attorney for the child. Subsection (h) provides:

> A hearing shall be held prior to placement in a post-adjudication secure correctional facility for a period longer than 30 days or commitment to the Texas Juvenile Justice Department as a modified disposition. In other disposition modifications, the child and the child's parent, guardian, guardian ad litem, or attorney may waive hearing in accordance with Section 51.09.

The child and parent may wish to waive a hearing when the purpose of the modification is to achieve some result they desire, such as early termination of probation. See Chapter 13.

B. Rights of Parents Under Chapter 61

Chapter 61 of the Family Code was enacted in 2003 to define the rights and responsibilities of parents in the juvenile justice system. Subchapter C defines the rights of parents. For purposes of Subchapter C, "parent" includes the guardian or custodian of the child. Section 61.101. Section 51.02(4) defines a guardian as a person appointed by a court as guardian of the person of a child or the public or private agency with whom a child has been placed by a court. Section 51.02(3) defines a "custodian" as the adult with whom the child resides, whether or not the adult is otherwise related to the child legally or biologically.

Subchapter C is modeled after Chapter 57 of the Family Code, which creates a system of victims' rights. See Chapter 25.

Information About Child's Referral. Family Code Section 61.102(a) gives the parents of a child taken into custody or referred to the juvenile court the right to basic information about their child's case:

> The parent of a child referred to a juvenile court is entitled as soon as practicable after the referral to be informed by staff designated by the juvenile board, based on the information accompanying the referral to the juvenile court, of:
>
> (1) the date and time of the offense;
>
> (2) the date and time the child was taken into custody;
>
> (3) the name of the offense and its penal category;
>
> (4) the type of weapon, if any, that was used;
>
> (5) the type of property taken or damaged and the extent of damage, if any;
>
> (6) the physical injuries, if any, to the victim of the offense;
>
> (7) whether there is reason to believe that the offense was gang-related;
>
> (8) whether there is reason to believe that the offense was related to consumption of alcohol or use of an illegal controlled substance;
>
> (9) if the child was taken into custody with adults or other juveniles, the names of those persons;
>
> (10) the aspects of the juvenile court process that apply to the child;
>
> (11) if the child is in detention, the visitation policy of the detention facility that applies to the child;
>
> (12) the child's right to be represented by an attorney and the local standards and procedures for determining whether the parent qualifies for appointment of counsel to represent the child; and
>
> (13) the methods by which the parent can assist the child with the legal process.

The information mandated is expansive but not comprehensive. For example, it does not include information that would ordinarily be included in the narrative portion

of a police incident report. It is intended, however, to include all of the information a parent would wish to receive about the arrest or referral. The information conveyed will often be unknown to the parents but essential for the parents to know if they are to be effective. See section on Access to Records in this chapter.

The information provided by this section is for the benefit of the parent, not the child. Section 61.102(d) provides:

> Information disclosed to a parent under Sub-section (a) is not admissible in a judicial proceeding under this title as substantive evidence or as evidence to impeach the testimony of a witness for the state.

That language effectively precludes any use of information provided to a parent from being used as evidence in the juvenile proceedings involving the child.

Access to Records. In 2007, the legislature amended Family Code Section 58.007(e) (renumbered to Section 58.008(d) in 2017) to permit the child and the child's parent or guardian to inspect or copy law enforcement files and records concerning a child. However, before this can be done, the custodian of the record or file must redact any personally identifiable information about a juvenile suspect, offender, victim or witness who is not the child and any information that is excepted from required disclosure under the Public Information Act. Section 58.008(e).

Access to Child. Section 61.103 establishes a comprehensive right in the parents of access to their child in custody of juvenile officials:

> (a) The parent of a child taken into custody for delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court has the right to communicate in person privately with the child for reasonable periods of time while the child is in:
>
> (1) a juvenile processing office;
>
> (2) a secure detention facility;
>
> (3) a secure correctional facility;
>
> (4) a court-ordered placement facility; or
>
> (5) the custody of the Texas Juvenile Justice Department.
>
> (b) The time, place, and conditions of the private, in-person communication may be regulated to prevent disruption of scheduled activities and to maintain the safety and security of the facility.

This section states a general principle that a parent has a right under reasonable circumstances to access to a child being held in custody by the juvenile system. However, if this right of access is denied to a parent, the child may not raise that complaint on appeal. *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.). Subsection (b) permits the detaining authority to control the time, place, and conditions of the visitation.

Section 61.103 reinforces Section 51.12(b), which requires that the juvenile board "shall permit visitation with the child at all reasonable times" when the child is held in a certified place of juvenile detention.

Parental Written Statement. Section 61.104 establishes a new method by which a parent may communicate in writing his or her view of the child and the case to the juvenile court judge in disposition of the case:

> (a) When a petition for adjudication, a motion or petition to modify disposition, or a motion or petition for discretionary transfer to criminal court is served on a parent of the child, the parent must be provided with a form prescribed by the Texas Juvenile Justice Department on which the parent can make a written statement about the needs of the child or family or any other matter relevant to disposition of the case.
>
> (b) The parent shall return the statement to the juvenile probation department, which shall transmit the statement to the court along with the discretionary transfer report authorized by Section 54.02(e), the disposition report authorized by Section 54.04(b), or the modification of disposition report authorized by Section 54.05(e), as applicable. The statement shall be disclosed to the parties as appropriate and may be considered by the court at the disposition, modification, or discretionary transfer hearing.

This section is modeled after Family Code Section 57.002(a)(5), which authorizes the use of written victim impact statements in juvenile cases. Under Section 61.104(a), the parent should be provided with a form for the statement when served with the summons. The statement may address "the needs of the child or family and or any other matter relevant to disposition." If the parent chooses to make a written statement, it will be provided to the judge

with the probation department report at the disposition, modification, or certification hearing. Like the disposition report, the parental statement must be disclosed to the other parties. As in the case of any other evidence, the juvenile court may give the written statement such weight as it regards appropriate.

Section 61.104 provides that a written parental statement should be used only when the judge, not the jury, disposes of the case. Subsection (b) provides that the statement may be considered by the court but not by the jury. In addition, Subsection (b) requires the probation department to transmit the statement along with the disposition report. Disposition reports are for the use of judges only. Section 54.03(d) provides that the jury may never view a social history report or social service file.

Sample parental written statement forms can be found on the TJJD website.

Parental Oral Statement. Section 61.105 gives the parents the right to address the court personally at disposition:

> (a) After all the evidence has been received but before the arguments of counsel at a hearing for discretionary transfer to criminal court, a disposition hearing without a jury, or a modification of disposition hearing, the court shall give a parent who is present in court a reasonable opportunity to address the court about the needs or strengths of the child or family or any other matter relevant to disposition of the case.
>
> (b) The parent may not be required to make the statement under oath and may not be subject to cross-examination, but the court may seek clarification or expansion of the statement from the person giving the statement.
>
> (c) The court may consider and act on the statement as the court considers appropriate.

This section is modeled after Family Code Section 57.002(a)(5), which gives victims of juvenile crime the right to "provide pertinent information to a juvenile court conducting a disposition hearing concerning the impact of the offense on the victim and the victim's family by testimony…or any other manner before the court renders its disposition." Unlike the victim sentencing comments authorized by Code of Criminal Procedure Article 42.03, Section 1(b), which must be made after sentence is already imposed and is therefore solely for the emotional benefit of the person making the statement, parental oral statements are intended to influence arguments of counsel and the disposition of the case.

Only a parent who is already present in court must be given the opportunity for making an oral parental statement. Proceedings need not be delayed to obtain the presence of a parent. The oral statement may broadly address "the needs or strengths of the child or family or any other matter relevant to disposition of the case." Section 61.105(a).

In some cases, a parent will have made a written statement and also an oral statement, which is permissible; some parents will undoubtedly prefer one communication method over the other, so either may be employed.

There is an underlying assumption that a parent may be reluctant to testify in a formal sense and thereby subject himself or herself to cross-examination by the lawyers. Accordingly, to increase the likelihood that a parent will want to give a statement, the conditions under which it is to be given are informal. No oath is required. That places the parental statement on par with unsworn information provided by persons to the probation officer conducting an investigation for a disposition report and to the unsworn information provided in a written parental statement. Cross-examination by the lawyers is not permitted in order to further encourage a parent to provide a statement. However, the juvenile court judge is permitted to ask clarifying or expanding questions of the parent.

Limitations. Sections 61.106 and 61.107 establish substantial limitations on the rights system established by Subsection C. Section 61.106 on Appeal or Collateral Challenge provides that the failure or inability of a person to perform an act or provide a service listed in Chapter 61, Subchapter C, cannot be used by the child or by any party as a ground for appeal or a writ of habeas corpus or to exclude evidence against the child in any proceeding or forum.

The rights granted by Subchapter C belong to the parents, not to the child. For example, if a parent is denied access to his or her child under Section 61.103, the child may not raise that complaint on appeal. See *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.). Section 61.106 is modeled after Section 57.006. That section precludes a child from taking legal advantage of a failure to afford a victim a right under Chapter 57.

Section 61.107 on liability provides:

> The Texas Juvenile Justice Department, a juvenile board, a court, a person appointed by the court, an employee of a juvenile probation department, an attorney for the state, a peace officer, or a law enforcement agency is not liable for a failure or inability to provide a right listed in this chapter.

This section grants immunity from civil suit to governmental agencies that have failed to honor a right granted to parents. It is modeled after Section 57.005, which grants the same immunity regarding failure to honor victims' rights.

C. Rights of Parents Under Chapter 261

In 2005, the legislature added Section 261.405(e), which requires that parents of a youth taken into custody or placed in a juvenile justice facility or program be notified "as soon as practicable" about how to report allegations of child abuse. The child's parents must be provided with information regarding the reporting of suspected abuse, neglect, or exploitation (ANE) in a program or facility to TJJD, along with the toll-free number for this reporting: (877) STOP-ANE or (877) 786-7263. It is important to note that this section does not apply to law enforcement-type custody events since TJJD has no power to investigate cases related to any abuse, neglect, or exploitation of a child that occurs while in police custody. However, once the child is brought to a juvenile justice program or facility, TJJD does have jurisdiction to investigate. This section would clearly apply to situations in which a juvenile probation officer takes a child into custody and also when a detention officer has custody of a youth from a facility (e.g., transport officer takes youth from a facility to court).

D. Juvenile Court Orders Directed at Parents

Subchapter A applies to a juvenile court order entered against a parent or other eligible person requiring the person to act or refrain from acting. Section 61.001(2) defines an "other eligible person" as "the respondent's guardian, the respondent's custodian, or any other person described in a provision under this title authorizing the court order." Juvenile court authority to enter the order must be found in Title 3 outside of Chapter 61 because that chapter deals only with the entry and enforcement of such orders.

Orders That May be Entered. Section 61.002(a) references those provisions in Title 3 that can give rise to authority to issue an order enforceable under Chapter 61:

> Except as provided by Subsection (b), this chapter applies to a proceeding to enter a juvenile court order:
>
> (1) for payment of probation fees under Section 54.061;
>
> (2) for restitution under Sections 54.041(b) and 54.048;
>
> (3) for payment of graffiti eradication fees under Section 54.0461
>
> (4) for community service under Section 54.044(b);
>
> (5) for payment of costs of court under Section 54.0411 or other provisions of law;
>
> (6) requiring the person to refrain from doing any act injurious to the welfare of the child under Section 54.041(a)(1);
>
> (7) enjoining contact between the person and the child who is the subject of a proceeding under Section 54.041(a)(2);
>
> (8) ordering a person living in the same household with the child to participate in counseling under Section 54.041(a)(3);
>
> (9) requiring a parent or other eligible person to pay reasonable attorney's fees for representing the child under Section 51.10(e);
>
> (10) requiring the parent or other eligible person to reimburse the county for payments the county has made to an attorney appointed to represent the child under Section 51.10(j);
>
> (11) requiring payment of deferred prosecution supervision fees under Section 53.03(d);
>
> (12) requiring a parent or other eligible person to attend a court hearing under Section 51.115;
>
> (13) requiring a parent or other eligible person to act or refrain from acting to aid the child in complying with conditions of release from detention under Section 54.01(r);
>
> (14) requiring a parent or other eligible person to act or refrain from acting under any law imposing an obligation of action or omission on a parent or other eligible person because of the parent's or person's relation to the child who is the subject of a proceeding under this title;

(15) for payment of fees under Section 54.0462; or

(16) for payment of the cost of attending an educational program under Section 54.0404.

Subdivision (14) is a residuary provision that references any omitted provision of Title 3 that fits its criteria or that may later be enacted. For example, Section 54.01(r), enacted in 2003, authorizes a juvenile court, upon releasing a child from detention, to order the child's parent, guardian, or custodian who is present in court to "engage in acts or omissions specified by the court, referee, or detention magistrate that will assist the child in complying with the conditions of release." An order entered under Section 54.01(r) can be enforced under Chapter 61 via Section 61.002(13).

School attendance offenses of failure to attend in the Education Code and truancy in the Family Code were repealed by the legislature in 2015. Under prior law, truancy was considered conduct indicating a need for supervision (CINS). Truant conduct under Title 3A of the Family Code contains similar elements. In a conforming change, the reference to truancy-related juvenile court orders affecting parents and others in Section in 61.002 was removed.

Section 61.002(15) allows the juvenile court to order parents (or other responsible adults) to pay fees for offenses requiring DNA testing under Section 54.0462.

Section 61.002(b) excludes child support orders from the scope of Chapter 61 because their enforcement is dealt with by the comprehensive tools available to the court under Title 5 of the Family Code.

Due Process Requirements. Section 61.003(a) permits the juvenile court to use summary procedures for the imposition of an order against a parent or other eligible person but requires that the basic procedures of due process of law must be followed, which are giving the parent notice and providing the parent with a sufficient opportunity to be heard before the order is imposed.

Although written notice in the form of a motion is not required, the parent must be given sufficient specific and advance notice of the proposed order to be able to participate in the decision to impose the order. The juvenile court should be sensitive to the needs of the parent to understand and participate in this decision. Failure to provide adequate notice and hearing is made a defense of enforcement proceedings by Section 61.055(g). See *In the Matter of J.A.G.*, 172 S.W.3d 155 (Tex.App.—Beaumont 2005, no pet.) (record supported orders against parents, who were served and given proper notice, for court fees and costs).

Once the juvenile court enters an order against a parent, it must be reduced to writing and a copy promptly furnished to the parent. Section 61.003(b).

Transfer of Order Affecting Parent. In 2005, the legislature added Section 61.0031 to coincide with Sections 51.071-51.074, concerning inter-county transfer of probation supervision. Section 61.0031 authorizes, but does not require, a juvenile court that entered an order against a parent or other eligible person to transfer the order to the new county if the parent or eligible person will reside in the same county as the child.

Two specific requirements must be met for the order to be effective in the receiving county: (1) the parent or eligible person must receive written notice of the transfer, including identification of the court to which the order has been transferred; and (2) the court to which the order is transferred must require the parent or eligible person to personally appear to be notified of the order's existence and terms. Failure to do so renders the order unenforceable. Section 61.0031(c) and (d). As long as proper notice has been provided to the parent or eligible person, the juvenile court to which the order has been transferred may modify, extend, or enforce the order as if it had originally entered the order.

In 2013, Section 61.0031(d), which requires notice and appearance of a parent, was harmonized with 2007 changes to the inter-county transfer statutes that authorized the waiver of the permanent supervision transfer hearing under Section 51.073(c). The amended provision eliminates the parental notice and appearance requirement under Subsection (d) when the receiving county adopts the original terms and conditions ordered by the sending county and permanent supervision is finalized by an agreed order. If a hearing is necessary to impose new or different terms of probation, the parent must be provided with the required notice in order to maintain the enforceability of the transfer order. This was an unfortunate change because it deprived the parent of due process by allowing the child and the child's attorney's waiver of a hearing related to the child to also waive a hearing related to the parent. See Chapter 27 for an additional discussion of Inter-County Transfer of Probation Supervision.

Appeal. Section 61.004 authorizes appeal from a denial of a request for an order against a parent and a parent

to appeal from entry of such an order. An appeal does not suspend or delay the underlying juvenile proceeding.

In *In the Matter of D.D.H.*, 143 S.W.3d 905 (Tex.App.—Beaumont 2004, no pet.), the trial court ordered the parents of a juvenile to pay $5,000 in restitution. Neither parent appealed the order for payment of fees. While Section 61.004 gives a parent the right to appeal from an order against the parent, a juvenile may not do so on behalf of the parent. The Court of Appeals held that D.D.H. was not the proper party to challenge the restitution order on appeal.

E. Enforcement of Orders Directed at Parents

Before the enactment of Chapter 61, enforcement procedures were provided by Section 54.07. Various sections of the Family Code authorizing court orders against parents referenced that section. See, for example, Section 54.041(e), dealing with orders against parents in general, and Section 54.044, dealing with community service. With the enactment of Chapter 61, Section 54.07 was amended to become a conduit between the numerous provisions authorizing parental orders and the enforcement procedures set out in Chapter 61 rather than itself providing enforcement procedures.

Motion for Enforcement. Enforcement of a parental order is initiated by the filing of a written motion for enforcement. Section 61.051(a) establishes the requirements of the motion for enforcement:

> A party initiates enforcement of a juvenile court order by filing a written motion. In ordinary and concise language, the motion must:
>
> (1) identify the provision of the order allegedly violated and sought to be enforced;
>
> (2) state specifically and factually the manner of the person's alleged noncompliance;
>
> (3) state the relief requested; and
>
> (4) contain the signature of the party filing the motion.

Any party—the State, the child, the child's spouse, or the child's parent, guardian, or guardian ad litem—may file a motion for enforcement of a juvenile court parental order. The motion is intended to be a concise statement of the violation of the court order. Probably the best model is a motion to revoke probation.

Section 61.051(b) states a rule of mandatory joinder of all allegations of parental order violations that should have been known to the movant at the time the motion is filed:

> The movant must allege in the same motion for enforcement each violation by the person of the juvenile court orders described by Section 61.002(a) that the movant had a reasonable basis for believing the person was violating when the motion was filed.

The reason for mandatory joinder is that, under Section 61.057(b), a court may impose only one punishment for all violations adjudicated from a single motion. Consecutive punishments are prohibited. Failure of the movant to allege a violation precludes later bringing those charges.

There is a six-month grace period for bringing allegations of violations of parental orders. A motion may be filed against the parent under Section 61.051(c) anytime until six months after the child's 18th birthday.

Notice and Appearance. Section 61.052(b) requires that a copy of the motion for enforcement and notice of the time and place of hearing on the motion must be served on the parent, by either personal service or certified mail, on or before the 10th day before the date of the hearing on the motion.

Section 61.052(d) establishes the procedures to follow if the parent fails to appear in response to the notice. The juvenile court is prohibited from entering a default contempt judgment based on a failure to appear. If the non-appearing parent was personally served, he or she may immediately be taken into custody under a capias. However, if service was by certified mail, then personal service for a new court appearance date is required instead of immediate custody. The court may order that personal service be made immediately.

Attorney for the Parent. If a parent appears for an enforcement hearing without an attorney, the juvenile court is required by Section 61.053(a) to inform the parent of his or her right to representation and to appointment of counsel if the parent is indigent:

> In a proceeding on a motion for enforcement where incarceration is a possible punishment against a person who is not represented by an attorney, the court shall inform the person of the right to be represented by an attorney and, if the person is indigent, of the right to the appointment of an attorney.

The language "where incarceration is a possible punishment" was added in the Senate. Since, under Section 61.057(a), incarceration is always a possible punishment, the Senate language added nothing to the subsection.

If the parent claims indigency and requests appointment of counsel, Section 61.053(b) permits the court to require an affidavit of indigency and/or to hear evidence of the parent's financial circumstances. Subsection (b) contemplates that there will be cases in which the parent will wish not to be represented by counsel and respects that desire. That might be particularly likely to occur in proceedings in which it is clear to all participants that jail or a fine is not in the picture but rather simply a further, perhaps clarifying, order by the court to the parent. In that event, it seems prudent to permit the enforcement proceeding to occur without what appears to be the unnecessary expense of participation by counsel. However, Section 61.055(f) preserves for later presentation by counsel any defense or affirmative defense that might have been raised in the earlier enforcement proceeding by counsel had he or she been a participant in the proceedings.

If the parent requests counsel and is indigent, Section 61.053(c) requires that the court appoint counsel.

Section 61.053(d) gives a newly appointed or retained attorney at least 10 days after appointment or retention to prepare for the enforcement hearing. The attorney may waive any or all of the 10 days.

Compensation of Appointed Attorney. Section 61.054(a) requires that an attorney appointed for a parent meet the qualifications required for appointment to Class B misdemeanor cases in juvenile court. The attorney need not be on the juvenile court's appointment list, but must be qualified to be on that list for Class B misdemeanors. A Class B misdemeanor was selected because it is the closest category to the authorized parental contempt punishment of six months incarceration. Subsection (a) requires that the attorney be paid "a reasonable fee for services." That fee is to be paid from the county general fund in accordance with the fee schedule previously adopted by the juvenile board.

Section 61.054(c) provides that a court that appoints counsel to represent a parent in enforcement proceedings may order the parent to "reimburse the county for the fees the county pays to appointed counsel."

Enforcement Hearing. Section 61.055(a) requires that the enforcement hearing be recorded by stenographic or electronic means as required of other juvenile court hearings under Section 54.09. Since the contempt of court proceedings are criminal, Section 61.055(b) requires the movant to prove its allegation of violations beyond a reasonable doubt. For the same reason, Subsection (c) recognizes that the parent has a Fifth Amendment privilege not to be called as a witness or otherwise to incriminate himself or herself.

Section 61.055(d) provides that the court will conduct the enforcement hearing without a jury.

Section 61.055(f) permits a delayed defense when a matter could have been raised in prior enforcement proceedings but was not because the parent was unrepresented.

Finally, Section 61.055(g) makes it an affirmative defense (burden on parent to prove by a preponderance of the evidence) that the juvenile court did not provide the parent due process of law when it imposed the parental order. The due process standards are in Section 61.003(a).

Section 61.056(a) establishes an affirmative defense if the parent's failure to pay was because the parent lacked the ability to pay.

Section 61.056(b) specifies that the burden of proving the affirmative defense is on the parent.

Section 61.056(c) defines inability to pay:

> In order to prevail on the affirmative defense of inability to pay, the person asserting it must show that the person could not have reasonably paid the court-ordered obligation after the person discharged the person's other important financial obligations, including payments for housing, food, utilities, necessary clothing, education, and preexisting debts.

In other words, the juvenile court's payment order must be placed in the context of the parent's already existing financial obligations. The payment order does not supplant any of those pre-existing obligations.

Punishment for Contempt. Section 61.057(a) provides that punishment for contempt is confinement for up to six months and/or a fine of up to $500. This is the same punishment authorized by the Government Code for contempt of any other district or county level court.

Section 61.057(b) prohibits the imposition of consecutive punishments for violations adjudicated as part of the same enforcement proceeding:

> The court may impose only a single jail sentence not to exceed six months or a single fine not to exceed $500, or both, during an enforcement proceeding, without regard to whether the court has entered multiple findings of contempt.

Section 61.051(b) requires joinder in a motion for enforcement of all violations of which the movant had reason to believe had occurred. Failure to allege precludes later enforcement efforts regarding those violations.

Section 61.057 provides for alternatives to imposition of incarceration and a fine. In lieu of those punishments, Subsection (c) provides that the juvenile court may "enter an order requiring the person's future conduct to comply with the court's previous orders." Subsection (d) makes it clear that violation of one of those orders can itself be the subject of further enforcement proceedings. To assist the parent in complying with further orders, under Subsection (e), the court "may assign a juvenile probation officer to assist a person in complying with a court order." Under Subsection (g), the court is authorized to "reduce the burden of complying with a court order issued under Section 61.057(c) at any time before the order is fully satisfied, but may not increase the burden except following a new finding of contempt in a new enforcement proceeding."

Even if the court imposes a jail term or a fine, it can later reduce either of them under Section 61.057(f):

> A juvenile court may reduce a term of incarceration or reduce payment of all or part of a fine at any time before the sentence is fully served or the fine fully paid.

Chapter 27: Inter-County Transfer of Probation Supervision

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This chapter provides an overview of the formal mechanism for the transfer of probation supervision and jurisdiction to another county. The two distinct phases of this method of jurisdictional transfer are interim supervision and permanent supervision. The process of inter-county transfer of probation supervision, often referred to by juvenile justice practitioners as "ICT," involves six basic steps: (1) a child on probation moves to another county; (2) the sending county notifies the receiving county of the child's

move; (3) the receiving county accepts the child's case unless it has a statutory basis to refuse; (4) the sending county provides all required documents to the receiving county; (5) the receiving county supervises the child for 180 days; and (6) jurisdiction and responsibility for the child's supervision permanently transfer to the receiving county after 180 days, unless it was a determinate sentence case, in which case supervision does not transfer until the later of 180 days or one-third of the sentence. Sections 51.071 through 51.075 and Section 61.0031 describe the specific requirements and obligations that are derivative of these basic procedural steps.

A. Courtesy Probation Supervision Abolished

In 2005, the legislature abolished the informal cooperative arrangement commonly known as "courtesy supervision." Historically, a juvenile probation department in the county that placed a child on probation could enter into an agreement with the child's county of residence to provide supervision and services. Over the years, juvenile justice practitioners identified a number of problems with the informality of the courtesy supervision process, such as a lack of continuity in service, accountability, and legal regulation. In some situations, due to the lack of legal regulation, children on probation were residing in counties without probation supervision from either the county where they were placed on probation or the county where they were currently residing. These children were not absconders; they simply fell through the cracks of the system and were not being provided adequate supervision and services.

In 2005, the legislature incorporated into the omnibus juvenile justice bill (House Bill 1575) the recommendations of a juvenile justice workgroup on this issue. As enacted, Section 51.071 prohibits the practice of courtesy supervision for offenses committed or conduct engaged in on or after September 1, 2005. Courtesy supervision and transfer of probation supervision were replaced by a new system known as inter-county transfer of probation supervision, representing a combination of interim supervision and permanent supervision.

Legislative Findings. Although not codified in the Family Code, Section 53 of House Bill 1575 (2005) included six findings in the session laws to reflect the legislative intent of the new statute and to assist in its interpretation. The legislature identified the following:

> The legislature finds in relationship to Section 51.07, Family Code, as amended by this Act, and Sections 51.071, 51.072, 51.073, 51.074, and 51.075, Family Code, as added by this Act, that:
>
> (1) children and families in Texas are becoming increasingly mobile and children on probation frequently move to other counties in the state;
>
> (2) when children on probation move from one county to another, it is in the interests of the child, the child's family, and society that probation supervision continue with as little interruption as possible;
>
> (3) if a child on probation in a county to which probation has been transferred violates a condition of probation, the transfer should not impede appropriate legal consequences for the violation;
>
> (4) numerous issues are raised by transfer of probation between counties that are not currently addressed by law but that should be resolved;
>
> (5) the county to which supervision has been transferred should provide similar supervision and services to transferred children as is provided to children adjudicated in that county; and
>
> (6) the current informal system of courtesy supervision provides neither the assistance to the child nor the protection of the public that should be provided.

Subsequent Technical Changes. In 2007, two years after the implementation of the statutes relating to inter-county transfer of probation supervision, juvenile justice professionals made additional recommendations that were enacted into law. The technical changes clarified some of the practical and procedural aspects of interim and permanent supervision relating to documentation, time frames, and payment of restitution in order to refine the mechanics of the interim and permanent supervision process. Additional changes were made in 2013 to facilitate the continuity of services and offer the best opportunity for effective supervision at the local level.

B. Interim Supervision

When does a child "become" the child of the supervising county due to a change of residence? Even though the delinquent conduct or conduct indicating a need for supervision (CINS) was committed elsewhere, when is it fair

to impose the burden and expense of supervision on the county of residence?

At the recommendation of the courtesy supervision workgroup, the legislature settled on 180 days as the appropriate time period for interim supervision for youth on regular (i.e. non-determinate sentence) probation. Section 51.072(m). If a child on regular probation has moved to a different county and has lived there for 180 days, then it becomes fair and reasonable to regard that child as "belonging" to the county of his or her new residence. It is then fair to require that county to assume the burden and financial responsibility of permanent supervision. Until that time, however, the residence arrangement is regarded as tentative or transient and the child will be supervised under an arrangement for interim supervision.

Length of Interim Supervision Period. It is contemplated that all cases of permanent supervision begin as cases of interim supervision but automatically convert to permanent supervision after 180 days. An exception is made for youth on determinate sentence probation, for whom automatic transfer of permanent supervision does not occur until after satisfactory completion of the greater of 180 days or one-third of the probation term, as set forth in Section 51.072(n).

Section 51.072 contains the mechanics of the probation supervision transfer system and spells out in detail how the procedures work. Subsection (a) defines "sending county" and "receiving county." The sending county can be either the county that originally placed the child on probation or the county that assumes permanent supervision under an inter-county transfer when the child moves.

Initial Request. Section 51.072(b) obligates a juvenile probation department supervising a child to request another probation department to provide interim supervision of a probationer who has moved into the county or intends to move into the county.

In 2007, the legislature eliminated the unintended requirement imposed by Section 51.072(b) that multi-county jurisdictions and judicial districts must request interim supervision from another county if served by the same juvenile probation department. The statute provides an exception for brief stays in another county of fewer than 60 days, to exclude arrangements such as summer visits with a parent or grandparent, time in another county in a camp, etc. During such stays of short duration, the county of original jurisdiction can supervise the child indirectly. Except for stays of fewer than 60 days, it is mandatory that the sending county request that the receiving county provide interim supervision of the child. No child should reside in a county for longer than two months without direct supervision being provided by the local probation department.

Refusal of Request. The receiving county is obligated to provide interim supervision whether the child has moved to the county with his family or not. Under Section 51.072(c), the county is permitted to refuse interim supervision under the two narrow circumstances identified by Subdivisions (1) and (2), which include if the child is in a residential placement facility or a foster care placement through the Department of Family and Protective Services (DFPS). In contrast to Subsection (c), a third basis for refusal was added in 2013. Section 51.072(f-2) allows the receiving county to temporarily refuse interim supervision until the sending county has provided documentation that the child's DNA sample was taken and related fees were paid.

Method of Request. Section 51.072(d) requires that the request for interim supervision be initiated by electronic communication, including telephone, email, or fax. The request should be directed to the probation officer designated by the chief juvenile probation officer as the "inter-county transfer officer" or, in the absence of such a designation, to the chief. TJJD maintains on its website a statewide web-based database of contact information for officers designated as inter-county transfer officers.

Exchange of Documents. Section 51.072(e) specifies the information that must accompany the request by the sending county, while Subsection (f) specifies those documents from the clerk's file and the probation department's files that must be sent to the receiving county once it has agreed to accept interim supervision of the child.

Section 51.072(e) requires the sending county to provide: (1) basic information (name, sex, age, race, birth date) about the child; (2) basic information (name, address, birth date, social security or driver's license number, and phone number) about the person the child will reside with; (3) the offense(s) for which the child is on probation; (4) the length of probation; (5) a brief summary of the child's referral history; (6) a brief statement of any special needs; (7) the name and telephone number of the child's school, if available; and (8) the reason for the move. This information is considered essential for expediting the transfer process and assisting the officer in the receiving county to

quickly identify, locate, and contact the child in the new county of residence.

The minimum statutory timelines associated with the exchange of documents required under Section 51.072(f) were originally intended to accommodate the sending of paper documents via email and regular mail. Since then, technological advancements have improved the methods by which the information and supporting documents required by the statute can be exchanged. Many receiving and sending counties have converted to paperless systems and may exchange information electronically through the use of the statewide case management systems. Document images, court papers and information relating to the child's case can be uploaded and quickly retrieved for viewing by authorized users. Despite these advancements, the established statutory timelines govern compliance.

Return of Acceptance and Transfer Documents. In 2007, Section 51.072(f) was amended to extend the time required to process and return the acceptance of an interim supervision case from five to 10 business days. The documents that must be provided to the juvenile probation department of the receiving county include the following, as stated in 51.072(f):

(1) the petition and the adjudication and disposition orders for the child, including the child's thumbprint;

(2) the child's conditions of probation;

(3) the social history report for the child;

(4) any psychological or psychiatric reports concerning the child;

(5) the Department of Public Safety CR 43J form or tracking incident number concerning the child;

(6) any law enforcement incident reports concerning the offense for which the child is on probation;

(7) any sex offender registration information concerning the child;

(8) any juvenile probation department progress reports concerning the child and any other pertinent documentation for the child's probation officer;

(9) case plans concerning the child;

(10) the Texas Juvenile Justice Department standard assessment tool results for the child;

(11) the computerized referral and case history for the child, including case disposition;

(12) the child's birth certificate;

(13) the child's social security number or social security card, if available;

(14) the name, address, and telephone number of the contact person in the sending county's juvenile probation department;

(15) Title IV-E eligibility screening information for the child, if available;

(16) the address in the sending county for forwarding funds collected to which the sending county is entitled;

(17) any of the child's school or immunization records that the juvenile probation department of the sending county possesses;

(18) any victim information concerning the case for which the child is on probation; and

(19) if applicable, documentation that the sending county has required the child to provide a DNA sample to the Department of Public Safety under Section 54.0405 or 54.0409 or under Subchapter G, Chapter 411,Government Code.

Juveniles who have been adjudicated and placed on probation for certain felonies or sex offenses are required under Sections 54.0405 and 54.0409 of the Family Code to submit a DNA sample in accordance with Chapter 411 of the Government Code. Subsection 51.072(f)(19) was added in 2013, along with Subsection 51.072(f-2), which provides that the sending county's failure to provide the required DNA documentation is grounds for the receiving county to temporarily refuse acceptance of the interim supervision until the sending county provides the documentation.

Official Start Date. The original statutory provisions authorized the inter-county transfer officers to determine the interim supervision start date. This "official start date" was commenced solely upon the agreement of the inter-county transfer officers in the sending and receiving counties. Since the transfer of jurisdiction was linked to the

agreed date, juvenile justice professionals and, ultimately, the legislature decided upon a more precise basis to determine the actual date of the transfer of jurisdiction at the end of interim supervision.

Under current law, Section 51.072(f-1) requires inter-county transfer officers to establish an official start date within three business days of the time that all documents have been received and accepted. As such, the sending county is required to provide all mandatory documents, complete the transfer, and establish an interim supervision start date within a minimum of 14 business days.

Modification and Revocation of Conditions of Probation. Section 51.072(g) provides that the ground rules for interim supervision are the conditions of probation imposed by the juvenile court in the sending county unless and until they are changed by the juvenile court in the receiving county. In the informal practice of courtesy supervision, the supervising department was stuck with the conditions imposed by the sending county, whether or not they fit the child's current needs.

Supplementing, Replacing, and Modifying Conditions. Under interim supervision, the receiving probation department can ask the juvenile court to modify or supplement the sending county's probation conditions with conditions of its own. Under this authorization, the juvenile court in the receiving county could replace all of the sending county's probation conditions with those of its own, many of which might be identical. The judicial mechanism for modifying these conditions is a motion to modify under Section 54.05. While the child is entitled to choose to be represented by counsel at a hearing to modify disposition, counsel is not mandatory in this type of hearing since neither placement in a post-adjudication secure correctional facility or revocation and commitment to TJJD is being sought. Under Section 54.05, it would also be possible for the child and a parent to waive a court hearing on the modification request.

Authority to Revoke Probation. Section 51.072(h) allocates authority to revoke probation and commit to TJJD. If the violation was of a condition imposed by the sending county that has not been modified or replaced, only the court in the sending county has the authority to revoke. If the violation was of a condition modified or imposed by the receiving county, then only the court in the receiving county can revoke.

Directives and Responding to Violations of Probation. Section 51.072(i) provides that if the child violates a sending county's probation condition, either the sending or receiving county may issue a directive to apprehend or detain the child in its certified detention facility, as in other cases of probation violation. The receiving county may respond to the violation by modifying or extending the probation term (but not by revocation) or it may require the sending county to resume direct supervision of the child. In the latter event, the sending county must resume custody of the child and, as provided in Subsection (j), transport the child back to the sending county. If the violation is of a probation condition that has been imposed or modified by the receiving county, then normal procedures for detention and modification/revocation apply, as in any other case of violating a condition of probation.

Section 51.072(j) requires the receiving county to provide the sending county with supporting written documentation of the circumstances relating to the technical or offense violations of probation upon which a directive to resume is based. This documentation provides the sending county with the probable cause basis upon which to file a modification under Section 54.05 and substantiates the rationale for returning the case back to the sending county. For further discussion of modifications and resuming supervision see Chapter 13.

Return of Child to Receiving County After Modification. After the enactment of the inter-county transfer provisions in 2005, juvenile justice practitioners cited a number of issues with continuity of supervision and other concerns regarding the limited options of the sending county after it conducts a modification proceeding of a child who has been returned for a violation or the commission of a new offense. In 2013, the legislature amended Section 51.072 to give the sending county the ability to return the child to the current county of residence (i.e., back to the receiving county). This procedural change was designed to facilitate the continuity of services and offer the best opportunity for effective supervision at the local level.

Sections 51.072 (j-1) and (j-2) permit the return of a child to the receiving county during the period of interim supervision. Policymakers incorporated in the statutory language additional guidance to inter-county transfer officers for making the agreement to return the child to the receiving county. Specifically, inter-county transfer officers may consider the child's circumstances, including whether: (1) the person having legal custody of the child

resides in the receiving county; (2) the child has been ordered by the juvenile court to reside with a parent or other person in the sending county or another county; and (3) the case meets the statutory requirements of collaborative supervision. Subsection (j-2) clarifies that the term of interim supervision under Subsection (j-1) may not exceed the 180-day timeframe in which jurisdiction transfers to the receiving county.

Fees and Financial Responsibility. Section 51.072(k) entitles the receiving county to any probation supervision fees collected from the child or the child's parent while providing interim supervision. Subsection (l) obligates the sending county to pay for any special treatment or placement it has required by its own probation conditions. In an apparent oversight, the original language was silent about which county was the responsible agent for collecting and distributing restitution payments.

This responsibility rests with the receiving county. As amended in 2007, Section 51.072(k) provides that the receiving county is required to collect and distribute monetary restitution payments as specified by the sending county. This streamlines the process and eliminates the necessity of requiring the child to make payments to two different counties. It also obligates the receiving county to distribute any remaining or remitted monetary restitution payments directly to the victim or as required by other law after interim supervision becomes permanent. See Chapter 25 on Victims' Rights for a discussion of Section 54.0482, which sets out the procedure for collecting and processing unclaimed restitution payments.

Moving to Another County During Interim Supervision. After the implementation of the inter-country transfer of probation supervision statute, juvenile justice practitioners expressed concerns about the inability to send a case back to the sending county when a child moved to a third county (other than the sending or receiving county) prior to the expiration of interim supervision.

Section 51.072(m-1) provides the receiving county with a mechanism to notify the sending county, by means of a directive to resume, that the child has moved to a third county *prior to* the expiration of the 180-day period of interim supervision. The statute authorizes the receiving county to close out and return the case back to the sending county. Subsection (m-1) further affirms that, during the period of interim supervision, the sending county actually retains jurisdiction over the child and is required to resume supervision of the case or initiate a request for supervision in the child's new county of residence, if appropriate.

Determinate Sentence Cases. Interim supervision may not exceed 180 days. Section 51.072(m). After the child has resided in the receiving county for 180 days, permanent supervision automatically transfers to the receiving county. An exception is found in Subsection (n) for youth on determinate sentence probation; for these youth, permanent supervision does not transfer until after satisfactory completion of the greater of 180 days or one-third of the probation term, including one-third of the term of any extension ordered under a Section 54.05 modification. The original 2005 statute did not set a lower limit on the duration of interim supervision for determinate sentence probation. In 2007, largely to facilitate the analysis of research data by the former Texas Juvenile Probation Commission, the legislature clarified in Section 51.072(n) that the period of interim supervision for determinate sentence probation cannot be less than 180 days.

Early Transfer Under Determinate Sentence. In Section 51.072(n), the sending court is given the discretion to order an earlier transfer of permanent supervision for a youth on determinate sentence probation in only in one instance. If a juvenile is approaching age 19 (or 18 for offenses occurring before September 1, 2011) and the prosecutor seeks to transfer the juvenile to adult probation under Section 54.051, the juvenile court of the sending county may order transfer of permanent supervision early. In this situation, the receiving county acquires full jurisdiction to discharge or transfer the case to the district court for adult community supervision as permitted under Section 54.051. The sending and receiving counties should follow through in a timely fashion to ensure compliance with the time limits for conducting the hearing under Section 54.051(b). As with other permanent supervision provisions, complete jurisdiction, duties, and responsibilities regarding the child will transfer to the receiving county.

90-Day and 180-Day Probation Reports. Section 51.072(o) requires the receiving county to send a progress report to the sending county at least once every 90 calendar days during the period of interim supervision. The report provides an update to the sending county on the child's compliance with court conditions, school attendance, reporting status, level or supervision and monitoring, subsequent detentions, and payment of restitution and fees during the period of interim supervision. A second report must be sent just before or concurrent with the expiration of the 180 days.

C. Permanent Supervision

Section 51.073 sets out the features of permanent supervision. Compared to interim supervision, the terms of permanent supervision are easy to relate. The responsibility for supervising the probationer is assumed entirely by the receiving county, as in the case of transfer of jurisdiction under other law. Thereafter, the sending county has no further jurisdiction over the child's case. Section 51.073 attempts to streamline the process of transferring permanent supervision.

Section 51.073(a) defines "sending county" and "receiving county." The receiving county is the county where the child probationer moves or intends to move. The sending county is either the county that originally placed the child on probation or the county that assumed permanent supervision of the child under a previous inter-county transfer of probation supervision.

Duties Upon Permanent Supervision. Section 51.073(b) requires the juvenile court to order the probation department of the sending county to provide the receiving county's probation department with the order of transfer. Upon receipt, the receiving county's probation department must file the necessary documents with the clerk of the juvenile court. Subsection (b) is referenced in Section 51.072(m), which was amended in 2007. Subsection (m) requires the sending county juvenile probation department to promptly send the transfer order to the receiving county in accordance with this provision.

Permanent Supervision Proceeding. The requirements of a permanent supervision hearing, which is essentially an "arraignment," are set out in Section 51.073(c). Under the original 2005 statute, this hearing was required for all cases. In 2007, the legislature eliminated the necessity of a permanent supervision hearing when there are no changes to the terms of probation ordered by the sending county or to those ordered by the receiving county during the period of interim supervision.

Agreed Orders. The transfer of permanent supervision can be finalized without a hearing by filing and entering an agreed probation order. Since there are no new terms or conditions of probation, the order can be signed by the child and the parent and entered by submission to the receiving county juvenile court. Dispensing with the requirements of a formal hearing alleviates the necessity and expense of hiring an attorney to represent the child. No right to counsel attaches since the terms and conditions of the court were previously communicated and the child was afforded due process in the original disposition proceeding.

Formal Hearing for New Probation Conditions. In situations in which the receiving county juvenile court elects to impose new or different conditions of probation, the process is transformed into a disposition proceeding very similar to a proceeding under Section 54.04 and a mandatory right to counsel attaches, in accordance with Section 51.10. In both cases, when the juvenile court signs the agreed order or at the conclusion of the court appearance, the child "belongs" to the receiving county and complete jurisdiction and all responsibilities regarding the child's supervision transfer to the receiving county.

Effect of Permanent Supervision. Section 51.073(d) provides that, once permanent supervision is transferred, full authority and responsibility rests with the receiving county. The sending county has no further jurisdiction over the child's case. At that point, the receiving county becomes fully responsible for:

(1) selecting and imposing conditions of probation;

(2) providing supervision;

(3) modifying conditions of probation; and

(4) revoking probation.

If the child moves again, the receiving county becomes the sending county (i.e., the county that assumed permanent supervision of the child under an inter-county transfer of probation supervision). Section 51.073(e) emphasizes that any new offense committed in the sending county remains under the jurisdiction of that county.

Sex Offender Registration Decision. In 2007, the legislature resolved in Section 51.073(d-1) that the receiving county has jurisdiction over the sex offender registration hearing and related decisions made under Article 62 of the Code of Criminal Procedure. This subsection clarifies that the authority to make the dispositional decision passes to the receiving county upon the expiration of interim supervision and related proceedings to finalize permanent supervision. Recognizing that the sending county may still have a residual interest in the case, the legislature added language that allows the receiving county to consider the written recommendations of the sending county juvenile court regarding the sex offender registration decision. See Chapter 20 for further discussion.

D. Deferred Prosecution

Section 51.074 permits transfer of interim supervision when a child on deferred prosecution resides in or moves to a different county. Transfer of permanent supervision, however, is not authorized, since the maximum term of deferred prosecution is 180 days. Section 53.03(j) allows the juvenile court to extend for a six-month period a previous order of deferred prosecution for a combined period not to exceed one year. The 2005 statute did not address whether a child who violates the conditions of deferred prosecution and is placed on an additional period of court-extended deferred remains on interim supervision.

In 2007, the legislature added Section 51.074(b) to clarify that the child continues on interim supervision even when the period of deferred prosecution is extended under Section 53.03(j).

Handling Violations of Deferred Prosecution. The legislature also addressed the issue of deferred prosecution violations committed by children on interim supervision. The primary remedy for a violation of deferred prosecution is to file a petition on the underlying offense. Under the inter-county transfer statute, however, jurisdiction remains with the sending county during the period of interim supervision. As such, only the sending county has authority to prosecute for the violation.

As added in 2007, Section 51.074(c) prohibits the receiving county from modifying the conditions of the deferred prosecution agreement imposed by the sending county. Subsection (c) also establishes the mechanism for the receiving county to direct the sending county to resume supervision when the child violates the conditions of deferred prosecution.

E. Collaborative Supervision

Section 51.075 authorizes a limited form of "courtesy supervision," that addresses a special situation in which a child is on probation in one county but spends substantial time in an adjoining county. The child and the community benefit if the child is supervised in both the county where he or she spends much time as well as in the county that placed the child on probation. Before the prohibition of courtesy supervision, that is how these collaborative arrangements were handled. Once Section 51.071 was added to prohibit courtesy supervision, it became necessary to give statutory recognition to this beneficial practice. Since this involves adjoining counties, there is not typically a need to transfer supervision from one county to another. Instead, effective direct supervision can be provided by the county that placed the child on probation even if a substantial part of the child's time is spent in an adjoining county.

Under a collaborative supervision arrangement, the probation departments in adjoining counties can agree that the county in which a child spends time will provide informal supervision of the child. A probation officer in the adjoining county serves as an agent of the juvenile probation department of the county in which the child was placed on probation. Section 51.075(b). See *Inter-County Transfer of Probation Supervision: Overview and Implementation Recommendations*, State Bar of Texas, 19 Juvenile Law Section Report 8-12, No. 4 (September 2005).

Elements of the Agreement. The key elements of any collaborative supervision agreement should include:

(1) collaboration criteria and process;

(2) required documentation [See 51.072(f)(1)];

(3) required communication and reports between collaborators;

(4) role of probation officer providing supervision under collaborative agreement;

(5) case management and service expectations; and

(6) handling of disputes or problems with collaborative supervision.

The probation officer providing the collaborative supervision must give the home county periodic oral, electronic, or written reports concerning the child. The juvenile court of the county that placed the child on probation retains jurisdiction and has the sole authority to modify, amend, extend, or revoke the child's probation. Section 51.075 (c).

F. Parents and Inter-County Transfer Orders

In 2005, the legislature amended Family Code Chapter 61 on Parental Rights and Responsibilities to coincide with the implementation of the inter-county transfer of probation supervision statutes. Section 61.0031(b) authorizes the juvenile court to transfer any orders affecting parents to the new county in which the parent now resides or to which the parent has moved or intends to move. Section 61.0031(d), amended in 2013, eliminates the parental notice and appearance requirement when the receiving

county adopts the original terms and conditions ordered by the sending county and permanent supervision is finalized by an agreed order. If a hearing is necessary to impose new or different terms of probation, the parent must be provided with the required notice in order to maintain the enforceability of the transfer order. It should be noted that the agreed transfer order applies to the juvenile's probation, thereby providing that if the child and the child's attorney agree to the order, it can be argued that the parent is deprived of his or her opportunity for a hearing. Thus, there is likely a due process issue regarding the parent's rights. See Chapter 26 for additional discussion on Parental Rights and Responsibilities.

G. Inter-County Transfer Implementation Recommendations

TJJD maintains an informational packet that contains practical tips to assist counties with Sections 51.072–51.075 and Section 61.0031, Family Code. *The Inter-County Transfer of Probation Supervision: Overview and Implementation Recommendations* contains sample documents, forms, and pleadings for use by local juvenile probation departments, prosecutors, and judges in establishing local policies and procedures regarding inter-country transfer of probation supervision. Sample documents, forms, and pleadings are available on the TJJD website.

CHAPTER 28: Texas Juvenile Justice Department

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A. Creation of TJJD

The Texas Juvenile Justice Department (TJJD) was created as a new state agency on December 1, 2011, pursuant to Senate Bill 653, which was enacted during the 82nd Texas Legislature. At the same time and via the same legislation, the Texas Juvenile Probation Commission (TJPC) and Texas Youth Commission (TYC), the state's two previous juvenile justice agencies, were abolished. All functions, duties, and responsibilities of the former agencies were transferred to TJJD.

Senate Bill 103 in 2007. Senate Bill 103 was enacted in 2007 as part of the legislative efforts to review and remedy systemic issues regarding the safety and security of juveniles committed to the former Texas Youth Commission. Independent of the extensive legislative reforms enacted in Senate Bill 103, the governor placed the agency into conservatorship as a result of a highly publicized sexual abuse scandal at the West Texas State School in Pyote. A critical component of the state-level reform efforts included additional funding that was provided to

local juvenile probation departments to treat and rehabilitate more youth in the communities as a diversion from commitment. These community-based programs were viewed as vital to downsizing and population reduction at the state institutions.

House Bill 3689 in 2009. Both TYC and TJPC were under Sunset review during the 2009 legislative session. Sunset review is the periodic, formal process the legislature uses to determine if a state agency is still useful and viable or if it is time for the "sun to set" on that agency (i.e., abolishment). Additionally, even if it is determined that an agency should remain, sometimes significant changes to the structure or function of the agency may result from the Sunset review. The Sunset Commission is composed of five Senate members, five House members, and two public members. The staff of the Sunset Commission conducts extensive research into each agency and prepares a report and recommendation that is presented to the formal Sunset Advisory Commission members. In 2009, the Sunset Commission staff recommended that both TJPC and TYC be abolished and that a new agency be created…the Texas Juvenile Justice Department. The Sunset Commission members voted on this recommendation in January 2009 and, in a close 6 to 5 vote, approved the recommended creation of a new juvenile justice agency. The vehicle for this move was ultimately House Bill 3689 by Representative Ruth McClendon.

The concept of a consolidated system faced significant opposition; ultimately, the final legislation kept both agencies separate and distinct and required greater collaboration. House Bill 3689 also contained additional reform measures for TYC, continuing the work that had begun the prior session in Senate Bill 103. Additionally, TJPC received approximately $48 million in additional funding to assist local juvenile probation departments in creating and expanding community-based programs to divert more youth from TYC.

In 2010, TYC and TJPC began implementing the reforms and new responsibilities resulting from the 2009 legislative session. Local juvenile probation departments proved quite successful in diverting additional youth from TYC commitment using the expanded state funding provided to assist them. The timing was also fortunate, given the downward trend in crime that was being seen in Texas and across the nation.

Sunset Review 2011. Both TYC and TJPC were up for Sunset review again in 2011, a rare occurrence indeed to have a second Sunset review in back-to-back legislative sessions. In November 2010, the Sunset Advisory Commission staff released their report, which recommended continuation of TYC and TJPC as separate agencies. Ironically, but expectedly, the Sunset Advisory Commission members opted not to follow this recommendation; at their January 12, 2011 meeting, the Commission tacitly acknowledged their opinions that the reforms had not been successful. Therefore, in a unanimous vote, the Commission recommended that both TYC and TJPC be abolished and a new combined agency be created named the Texas Juvenile Justice Department (TJJD).

Under Representative Jerry Madden and Senator John Whitmire, Senate Bill 653 became the vehicle for the merger and creation of TJJD. The bill received support from a coalition of state and national advocacy groups. Equally as important, if not more important, was the fact that local juvenile probation departments generally supported the merger and expressed their commitment to making a community-based system successful…a commitment that they had already demonstrated, especially since 2007, by successfully diverting hundreds of additional youth from TYC. The passage of Senate Bill 653 marked the beginning of a new era in Texas juvenile justice, and proponents of the new agency believed that the foundation laid by the legislation would ensure the new TJJD would be successful in accomplishing the goals of a probation/community-driven system that would more effectively serve children and families in local communities.

Goals and Purposes of TJJD. Senate Bill 653 provided a roadmap for TJJD and detailed the purposes and goals of the new agency. Human Resources Code Section 201.002 states:

This title shall be construed to have the following public purposes:

> (1) creating a unified state juvenile justice agency that works in partnership with local county governments, the courts, and communities to promote public safety by providing a full continuum of effective supports and services to youth from initial contact through termination of supervision; and
>
> (2) creating a juvenile justice system that produces positive outcomes for youth, families, and communities by:
>
> > (A) assuring accountability, quality, consistency, and transparency through effective monitoring and the use of system wide performance measures;

(B) promoting the use of program and service designs and interventions proven to be most effective in rehabilitating youth;

(C) prioritizing the use of community-based or family-based programs and services for youth over the placement or commitment of youth to a secure facility;

(D) operating the state facilities to effectively house and rehabilitate the youthful offenders that cannot be safely served in another setting; and

(E) protecting and enhancing the cooperative agreements between state and local county governments.

Human Resources Code Section 201.003 details the goals of the new agency:

The goals of the department and all programs, facilities, and services that are operated, regulated, or funded by the department are to:

(1) support the development of a consistent county-based continuum of effective interventions, supports, and services for youth and families that reduce the need for out-of-home placement;

(2) increase reliance on alternatives to placement and commitment to secure state facilities, consistent with adequately addressing a youthful offender's treatment needs and protection of the public;

(3) locate the facilities as geographically close as possible to necessary workforce and other services while supporting the youths' connection to their families;

(4) encourage regional cooperation that enhances county collaboration;

(5) enhance the continuity of care throughout the juvenile justice system; and

(6) use secure facilities of a size that supports effective youth rehabilitation and public safety.

Agency Strategic Plan, Vision, Mission, and Philosophy. TJJD adopted the following vision, mission, and core values in 2015. The full agency strategic plan can be downloaded on the TJJD website.

Mission

Transforming young lives and creating safer communities.

Core Values

Justice. We do the right thing, in all things, with all people.

Safety. We commit to a culture that protects youth, employees, and the public.

Integrity. We build trust through transparency and ethical behavior.

Partnership. We achieve best results through collaboration with counties stakeholders, youth and their families.

Innovation. We proactively create opportunities to improve the juvenile justice system.

Vision

An effective and integrated juvenile justice system that:

1. Advances public safety through rehabilitation.
2. Equitably affords youth access to services matching their needs to enhance opportunities for a satisfying and productive life.
3. Employs a stabilized and engaged workforce fully empowered to be agents of change.
4. Operates safe and therapeutic environments with positive peer cultures emphasizing mutual accountability.
5. Is a model system with innovative, data-driven, and successful programming.

B. Governing Board

TJJD is governed by a 13-member board appointed by the Governor with the advice and consent of the Senate. The board is responsible for establishing the mission of TJJD and setting the agency's overall priorities and goals.

Board Creation and Composition. In 2011, the inaugural governing board of the unified juvenile justice agency played a significant role in charting the course of the Texas Juvenile Justice Department. Human Resources Code Section 202.001 creates the governing board and outlines the membership composition of the agency

board, terms, and appointment of the presiding officer. Section 202.001(a) states:

> (a) the board is composed of the following 13 members appointed by the governor with the advice and consent of the senate:
>
> (1) one member who is a district court judge of a court designated as a juvenile court;
>
> (2) three members who are members of a county commissioners court;
>
> (3) one prosecutor in juvenile court;
>
> (4) one chief juvenile probation officer of a juvenile probation department serving a county with a population that includes fewer than 7,500 persons younger than 18 years of age;
>
> (5) one chief juvenile probation officer of a juvenile probation department serving a county with a population that includes at least 7,500 but fewer than 80,000 persons younger than 18 years of age;
>
> (6) one chief juvenile probation officer of a juvenile probation department serving a county with a population that includes 80,000 or more persons younger than 18 years of age;
>
> (7) one adolescent mental health treatment professional licensed under Subtitle B or I, Title 3, Occupations Code;
>
> (8) one educator, as that term is defined by Section 5.001, Education Code; and
>
> (9) three members of the general public.

Members serve staggered six-year terms pursuant to Subsection (b). The Governor also is charged with designating one member of the board to serve as the presiding officer under Subsection (c).

Subsection (e) prohibits the local members (i.e., judge, commissioners' court members, and prosecutor and chief probation officers) from holding office in the same county or judicial district as another appointed member.

The current board members, their positions, and their term expiration dates are available on the TJJD website.

Duties and Responsibilities. The Texas Juvenile Justice Board is the governing body of TJJD and is responsible for the operations of the department per Section 203.001(a). The Board is responsible for separating the policymaking responsibilities of the board and the management responsibilities of the executive director and staff of the agency. Human Resources Code Section 203.001(b). Senate Bill 653 also added new language to the TJJD enabling legislation that requires the board to perform additional, and very critical, functions. Section 203.001(c) states:

> (c) the board shall establish the mission of the department with the goal of establishing a cost-effective continuum of youth services that emphasizes keeping youth in their home communities while balancing the interests of rehabilitative needs with public safety. The board shall establish funding priorities for services that support this mission and that do not provide incentives to incarcerate youth.

The Board is required to meet periodically (i.e., at least quarterly), adopt rules regarding the board's proceedings, keep a public record of board decisions, and develop a procedure that provides the public with a reasonable opportunity to appear and speak before the board on any issue under the agency's jurisdiction. Human Resources Code Section 202.008. Finally, the Board is responsible for hiring and supervising an executive director to administer TJJD. Human Resources Code Section 203.002.

Board Member Recusal. Section 202.005 lists some specific situations where a board member must recuse himself or herself from participating in board action. A chief juvenile probation officer (CJPO) cannot vote or participate in a decision by the Board that solely benefits or penalizes or otherwise solely impacts the chief's probation department. Additionally, a CJPO cannot vote or render any decisions regarding matters of certified officer discipline before the Board that involve the chief's probation department.

C. Advisory Council

Section 203.0081 of the Human Resources Code creates the Advisory Council on Juvenile Services to advise TJJD. It provides:

> (a) The advisory council on juvenile services consists of:
>
> (1) the executive director of the department or the executive director's designee;
>
> (2) the director of probation services of the department or the director's designee;

(3) the director of state programs and facilities of the department or the director's designee;

(4) the executive commissioner of the Health and Human Services Commission or the commissioner's designee;

(5) one representative of the county commissioners courts appointed by the board;

(6) two juvenile court judges appointed by the board; and

(7) seven chief juvenile probation officers appointed by the board as provided by Subsection (b).

The Board appoints the Advisory Council members in the required categories. Members serve staggered two-year terms. The ex officio members in subsections (a)(1)-(4) are on the council by virtue of their positions and do not have term limits. The Board is required to appoint one chief juvenile probation officer from each of the seven regional chiefs' associations in the state. The associations are responsible for nominating individuals to the Board. To the extent practical, the appointments should represent small, medium, and large juvenile probation departments.

The Advisory Council reports the results of their work to the Board, typically at board meetings. Section 203.0081(e) details the duties and responsibilities of the Advisory Council:

(e) The advisory council shall assist the department in:

(1) determining the needs and problems of county juvenile boards and probation departments;

(2) conducting long-range strategic planning;

(3) reviewing and proposing revisions to existing or newly proposed standards affecting juvenile probation programs, services, or facilities;

(4) analyzing the potential cost impact on juvenile probation departments of new standards proposed by the board; and

(5) advising the board on any other matter on the request of the board.

D. Budget

TJJD receives funding from the Texas Legislature through the biennial legislative appropriations process. The TJJD budget structure establishes funding strategies, performance measures, and goals in specific areas such as community juvenile justice, state services and facilities, parole services, and indirect administration. These funding goals help to ensure public safety, offender accountability, and the rehabilitation of juvenile offenders through the allocation of funds to county juvenile boards and probation departments. In addition, funds are used to provide a safe and secure correctional environment for juveniles committed to TJJD and to promote successful rehabilitation and community reintegration. Agency budget information can be found on the TJJD website and the Legislative Budget Board website.

E. Sunset Provision

The TJJD Board and the agency are subject to Sunset review under Chapter 325 of the Texas Government Code. In 2011, Senate Bill 653 provided that TJJD would undergo a sunset review in 2017. As amended by SB 1630 in 2015, Section 202.010, Human Resources Code, extends the sunset review date for TJJD from 2017 to 2021.

F. Organizational Structure of TJJD

The organizational chart for TJJD can be found on the agency's website.

G. Enabling Legislation

The statutory foundation for TJJD is found in the agency's enabling legislation in Title 12 of the Texas Human Resources Code. This title is organized into four main subtitles that bring together the former enabling legislation of the Texas Juvenile Probation Commission, the Texas Youth Commission, and the Independent Ombudsman, each of which was in a separate chapter of the Human Resources Code. These subtitles include:

Subtitle A. Texas Juvenile Justice Board and Texas Juvenile Justice Department. Subtitle A creates the governing board and agency.

Subtitle B. Probation Services; Probation Facilities. Subtitle B contains the majority of the statutory provisions previously applicable to TJPC that were in former Chapter 141, Human Resources Code.

Subtitle C. Secure Facilities. Subtitle C contains the majority of the statutory provisions previously applicable to TYC that were in former Chapter 61, Human Resources Code.

Subtitle D. Independent Ombudsman. Subtitle D contains the statutory provisions previously applicable to the Independent Ombudsman that were in former Chapter 64, Human Resources Code.

Although not included in this edition, a cross-reference index of current and former Human Resources Code provisions related to TJJD and its predecessor agencies, TJPC and TYC can be found in Appendix A of the *Statutory Supplement*, Volume II of T*exas Juvenile Law* (8th Ed. 2012).

H. Agency Administrative Law

Title 37 of the Texas Administrative Code (Public Safety and Corrections) contains the administrative rules promulgated by TJJD that are applicable to various programmatic and oversight functions of the agency. Prior to the merger in 2011, the administrative rules of the former Texas Youth Commission were contained in Title 37, Part 3. In June 2012, Part 3 was repealed and the TYC rules were transferred to Title 37, Part 11 and re-enumerated in Chapters 380 and 385. Part 11 contains the rules of the former Texas Juvenile Probation Commission that are now the rules of TJJD. Those chapters relate primarily to the oversight responsibilities that TJJD has over local, community-based juvenile justice programs, services, and facilities.

Part 14 contains the rules of the Office of the Independent Ombudsman for the Texas Juvenile Justice Department. The chapters contained in Part 14 relate to the authority and responsibilities of the independent ombudsman regarding TJJD programs and facilities and include:

Chapter 601 contains the rules of the Office of Independent Ombudsman in relation to the Ombudsman's work with facilities operated by or under contract with TJJD. In 2015, the Ombudsman's responsibility was expanded to include facilities at which a juvenile on probation is placed as part of disposition of a juvenile case.

Since the agency merger, TJJD has engaged in an active and collaborative rulemaking process with the TJJD Advisory Council and other juvenile justice stakeholders to systemically review agency administrative rules in Title 37, Part 11. Significant revisions were adopted in Chapters 341, 343, 344, 348, and 355. These rule changes were effective in 2018.

I. Agency Functions

TJJD has responsibilities that cover the continuum of the juvenile justice system in Texas. The agency funds prevention and early intervention services in addition to providing grants to local juvenile probation departments for the provision of programs, services, and facilities across the state that serve juvenile offenders in their communities. TJJD provides oversight of local programs and facilities by setting standards and monitoring compliance with these standards, as well as by providing technical assistance and training to local practitioners. Additionally, TJJD operates secure state institutions for youth committed to the state by juvenile courts, as well as halfway houses that transition youth back into communities.

1. Community-Based Programs, Services, and Facilities

TJJD allocates a significant portion of its overall budget to local juvenile probation departments through grants that help departments provide probation services, including supervision, detention, and placement of juveniles. TJJD promulgates administrative rules, or standards, that apply to the operations of probation departments and secure or non-secure facilities operated by or under contract with probation departments or juvenile boards. TJJD monitors compliance with these standards as required by statute. Technical assistance and training is provided statewide to juvenile justice practitioners on a wide variety of topics, including juvenile law, standards compliance, and developing new programming for youth. TJJD also certifies and disciplines juvenile probation, juvenile supervision, and communities activities officers.

In 2015, the legislature adopted Human Resources Code Section 203.010, which requires TJJD and its governing board to develop and adopt a regionalization plan for keeping juveniles closer to home as an alternative to commitment to the TJJD state secure correctional facilities. Regionalization funding is available through this program.

2. State Programs, Services, and Facilities

TJJD operates secure state institutions for those juvenile offenders who cannot be served in local communities because the youth pose safety concerns for the community or require a higher level of treatment and rehabilitation than can be provided in the community. TJJD contracts with a variety of residential treatment providers to serve appropriate youth that are committed to the state. Additionally, TJJD operates halfway houses around the state to help youthful offenders more successfully transition back into their communities when released from secure confinement.

a. Secure Institutions

TJJD operates high security facilities in which youth are placed according to treatment need, proximity to home, risk of violence, and other factors. There are five state institutions for juvenile offenders located throughout Texas. These facilities include:

(1) Evins Regional Juvenile Center in Edinburg;

(2) Gainesville State School in Gainesville;

(3) Giddings State School in Giddings;

(4) McLennan County State Juvenile Correctional Facility in Mart; and

(5) Ron Jackson State Juvenile Correctional Complex in Brownwood.

b. Contract Care Facilities

Contract care facilities offer a diverse array of services, depending upon the provider, and include residential treatment centers and a young offenders program. TJJD contracts with a variety of residential treatment facilities for the placement of youth throughout Texas.

c. Halfway Houses

TJJD operates medium security facilities, or halfway houses, that serve youth reentering the community. The agency currently operates seven halfway houses, located throughout Texas, which include:

(1) Ayres House in San Antonio;

(2) Brownwood House in Brownwood;

(3) Cottrell House in Dallas;

(4) Tamayo House in Harlingen;

(5) McFadden Ranch in Roanoke;

(6) Schaeffer House in El Paso; and

(7) Willoughby House in Fort Worth.

d. District Parole Offices

Parole services provide a continuum of care as youth are returned to the community. Parole provides an initial intensive level of surveillance and includes regularly scheduled parole office visits and unannounced visits to home, work, and school. Parole provides aftercare treatment to protect educational and treatment gains made in residential settings. TJJD operates 13 district parole offices throughout the state in the following cities: Amarillo, Austin, Dallas, El Paso, Fort Worth, Harlingen, Houston, Lubbock, Midland, New Waverly, San Antonio, Temple, and Tyler.

e. Population Served by TJJD

TJJD serves youth who have been adjudicated delinquent of felony offenses and committed to the agency by a juvenile court. In order for a youth to be committed to TJJD, the delinquent act must occur when the youth is at least 10 and not yet 17 years of age. TJJD may retain jurisdiction over a youth until his or her 19th birthday. The youth sent to TJJD are meant to be the state's most serious or chronically delinquent offenders. Statistical information and other reports describing the population served by TJJD are available on the agency website.

f. Specialized Treatment Programs

Trauma-Informed Training. In recent years, mental health professionals have highlighted the long-term effects of traumatic childhood experiences (i.e., abuse and neglect, violence, disasters, sudden death of a relative or friend) and the implications on the psychological and emotional well-being of children. Studies suggest that the exposure to multiple traumatic events may increase the risk for substance abuse, depression, suicide, and delinquent behavior. In 2013, the legislature required the Texas Juvenile Justice Board to adopt administrative rules that require juvenile probation officers, juvenile supervision officers, and court-supervised community-based program personnel to receive trauma-informed care pre-service training. The legislation requires TJJD to develop a mandatory pre-service training module on trauma-informed care. The training must be based on best practices and provide knowledge of how to interact with juveniles who have experienced traumatic events. The requirements of Section 221.002(c-1) and a related amendment in Section 221.0061, Human Resources Code, are a response by policymakers to ensure that juvenile justice practitioners and child-serving professionals develop skills in recognizing signs of traumatic stress in children and facilitating appropriate intervention services and programs.

Victims of Human Trafficking: Identification and Assessment. In 2013, the legislature enacted statutes

aimed at ensuring earlier identification and assessment of children believed to be victims of human sex trafficking. Section 221.0035, Human Resources Code, requires TJJD to evaluate the practices and screening procedures used by local juvenile probation departments and to develop a recommended set of best practices that may be used to improve the probation department's ability to identify victims of sex trafficking. Sex trafficking of children under Section 20A.02(a)(7), Penal Code, occurs when a person causes a child to engage in, or become the victim of, specific prohibited conduct. The language in the statute also provides guidance on the key components of implementing best practices, including examining the child's history of referrals and adjudications; inquiring about prior history of sexual abuse; assessing the need for rape crisis counseling or other counseling; and asking questions to ascertain whether the juvenile is at high risk of being or becoming a victim of sex trafficking.

For a full description of the specialized treatment programs and services provided by TJJD, visit the agency website and review the most recent Strategic Plan.

Appendix A: Acronyms and Phrases Commonly Used in the Juvenile Justice System

Acronyms

ACA	American Correctional Association
ACE	American Council on Education
ACIS	Automated Certification Information System
AJCA	Association of Juvenile Compact Administrators
ANE	Abuse, Neglect, and Exploitation
APPA	American Probation and Parole Association
ARD	Admission, Review, and Dismissal
BIP	Behavior Intervention Plan
CAO	Community Activities Officer
CASA	Court Appointed Special Advocates
CCH	Computerized Criminal History
CFR	Code of Federal Regulations
CGM	Certification Guidelines Manual
CINS	Conduct Indicating a Need for Supervision
CJIS	Criminal Justice Information System
CJPO	Chief Juvenile Probation Officer
CPS	Child Protective Services
CRCG	Community Resource Coordination Groups
CRIPA	Civil Rights of Institutionalized Persons Act
CRM	Compliance Resource Manual
DADS	Department of Aging and Disability Services
DAEP	Disciplinary Alternative Education Program
DARS	Texas Department of Assistive and Rehabilitative Services
DFPS	Texas Department of Family and Protective Services
DNA	Deoxyribonucleic Acid
DOJ	Department of Justice
DPRS	Texas Department of Protective and Regulatory Services
DPS	Texas Department of Public Safety
DSHS	Texas Department of State Health Services
DTA	Directive to Apprehend
DUIM	Driving Under the Influence by a Minor
DWI	Driving While Intoxicated
EDI	Electronic Data Interchange
FA	Facility Administrator
FBI	Federal Bureau of Investigations
FERPA	Family Educational Rights and Privacy Act
GED	General Education Development Certificate
HHSC	Texas Health and Human Services Commission
HIPAA	Health Insurance Portability and Accountability Act
HRC	Human Resources Code
ICE	Immigration and Customs Enforcement
ICJ	Interstate Compact on Juveniles
ICT	Inter-County Transfer of Probation Supervision
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
ISP	Intensive Services Probation
JCMS	Juvenile Case Management System
JDA	Juvenile Delinquency Act
JCO	Juvenile Correctional Officer
JIS	Justice Information System
JJAEP	Juvenile Justice Alternative Education Program

JJAT	Juvenile Justice Association of Texas
JJDPA	Juvenile Justice and Delinquency Prevention Act
JJIS	Juvenile Justice Information System
JPO	Juvenile Probation Officer
JSO	Juvenile Supervision Officer
LAR	Legislative Appropriations Request
LBB	Legislative Budge Board
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex
MAYSI-2	Massachusetts Youth Screening Instrument (Second Version)
MHMR	Texas Department of Mental Health and Mental Retardation
MHSA	Mental Health and Substance Abuse (DSHS Section)
NCCD	National Council on Crime and Delinquency
NCJFCJ	National Council of Juvenile and Family Court Judges
NCIC	National Crime Information Center
NJDA	National Juvenile Detention Association
OAG	Office of the Attorney General
OCA	Office of Court Administration
OIO	Office of the Independent Ombudsman
OJJPD	Office of Juvenile Justice and Delinquency Prevention
PRC	PREA Resource Center
PREA	Prison Rape Elimination Act
RANA	Risk and Needs Assessment
SOAH	State Office of Administrative Hearings
STAR	Services to At-Risk Youth
TAC	Texas Administrative Code
TCIC	Texas Crime Information Center
TCOLE	Texas Commission on Law Enforcement
TCOOMMI	Texas Correctional Office on Offenders with Medical or Mental Impairments
TDCAA	Texas District & County Attorneys Association
TDCJ	Texas Department of Criminal Justice
TDFPS	Texas Department of Family and Protective Services
TDPRS	Texas Department of Protective and Regulatory Services
TEA	Texas Education Agency
THECB	Texas Higher Education Coordinating Board
TIDC	Texas Indigent Defense Commission
TJDA	Texas Juvenile Detention Association
TJJC	Texas Juvenile Justice Coalition
TJJD	Texas Juvenile Justice Department
TJPC	Texas Juvenile Probation Commission
TMCEC	Texas Municipal Courts Education Center
TPA	Texas Probation Association
TPPF	Texas Public Policy Foundation
TRAP	Texas Rules of Appellate Procedure
TYC	Texas Youth Commission

Phrases

ANDERS BRIEF
A request filed by a court-appointed attorney to withdraw from the appeal of a criminal case because of his/her belief that the grounds for the appeal are frivolous. Named after *Anders v. California* (1967).

CAPIAS PRO FINE
An arrest warrant for unpaid fines and costs.

DE FACTO
Latin for "in fact," it is often used in place of "actual" to show that the court will treat as a fact authority being exercised or an entity acting as if it had authority, even though the legal requirements have not been met.

DE MINIMUS
Latin for "of minimum importance," it refers to something minimal or a difference that is so small or minor that the law does not refer to it and will not consider it.

DICTA (plural for DICTUM)
Latin for "remark," it is a comment by a judge in a decision or ruling that is not required to reach the decision but may state a related legal principle as the judge understands it. While it may be cited in legal argument, it does not have the full force of precedent (previous court decisions or interpretations) since the comment was not part of the legal basis for judgment.

EN BANC
French for "in the bench," it signifies a decision by the full court of all the appeals judges.

ERGO
Latin for "therefore."

ERRATA
The plural form of the Latin word "erratum." The term "errata" refers to minor errors contained in a publication and the list of corresponding corrections. The following is an example of its use in a sentence: You are reading the content of Texas Juvenile Law way too closely if you find errata in this book! However, if you do find errata, please let our editors know so that we may update and improve future editions.

EX POST FACTO
Latin for "after the fact," it refers to laws adopted after an act is committed making it illegal although it was legal when it initially was committed. An ex post facto law may also increase the penalty for a crime after it is committed.

GUARDIAN AD LITEM
Latin for "guardian at law." The person appointed by the court to look out for the best interests of the child during the course of legal proceedings.

HABEAS CORPUS
Latin for "you have the body." A writ of habeas corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A habeas corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment.

MENTAL HEALTH CLINICAL ASSESSMENT
The process of gaining a better understanding of an individual's concerns, needs, and strengths.

NOLO CONTENDERE
Latin for "I will not contest" the charges, it is a plea made by a defendant to a criminal charge allowing the judge to then find him/her guilty. Often called a "plea of no contest."

NOTWITHSTANDING
Despite anything to the contrary.

NUNC PRO TUNC
Latin for "now for then," it refers to changing back to an earlier date of an order, judgment or filing of a document. Such a retroactive re-dating requires a court order, which can be obtained by a showing that the earlier date would have been legal, but there was error, accidental omission, or neglect that has caused a problem or inconvenience that can be cured.

PARENS PATRIAE
Latin for "father of his country." The term for the doctrine that the government is the ultimate guardian of all people under a disability, especially children, whose care is only "entrusted" to their parents.

PARI MATERIA
Latin meaning "of the same matter." Laws pari materia must be construed with reference to each other.

PER SE
Latin for "by itself," meaning inherently.

PRIMA FACIE
A fact presumed to be true unless it is disproved.

RES GESTAE
A Latin phrase for "things done." The res gestae of a crime includes the immediate area and all occurrences and statements immediately after the crime. Statements made within the res gestae of a crime or accident may be admitted in court even though they are hearsay on the basis that spontaneous statements in those circumstances are reliable.

RESPONDEAT SUPERIOR
Latin for "let the master answer," a key doctrine in the law of agency, which provides that a principal (employer) is responsible for the actions of his/her/its agent (employee) in the course of employment.

SIC
A Latin word, originally "***sicut,"*** meaning "thus," "so," or "just as that." In writing, it is placed within square brackets and usually italicized — [***sic***] — to indicate that an incorrect or unusual spelling, phrase, punctuation, and/or other preceding quoted material has been reproduced from the quoted original and is not a transcription error.

SUBPOENA DUCES TECUM
Latin for "under penalty to bring with you," it is used to compel the production of documents that might be admissible before the court. It cannot be used to require oral testimony and ordinarily cannot be used to compel a witness to reiterate, paraphrase, or affirm the truth of the documents produced.

TRIAL DE NOVO
A "new trial" by a different tribunal (***de novo*** is a Latin expression meaning "afresh," "anew," "beginning again," hence the literal meaning "new trial"). A ***trial de novo*** is usually ordered by an appellate court when the original trial failed to make a determination in a manner dictated by law.

VOIR DIRE
French for "to speak the truth," it refers to the questioning of prospective jurors by a judge and attorneys in court. Voir dire is used to determine if any juror is biased and/or cannot treat the issues fairly or if there is cause not to allow a juror to serve (knowledge of the facts, acquaintanceship with parties, witnesses or attorneys, occupation which might lead to bias, prejudice against the death penalty, or previous experiences, such as having been sued in a similar case).

WRIT OF MANDAMUS
Latin for "we command," it is a writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.

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