The Long and Winding Road:
Improving Outcomes for Children Through CPS Court Reform

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Table of Contents

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Executive Summary

There are more than 50,000 children in the Texas foster care system today. Between 2010 and 2018, approximately 52,500 Texas children experienced the termination of their legal relationship with at least one parent. Removing a child from their family is one of the most devastating actions the state can take against its citizens, and the power to permanently sever the relationship between a parent and child should only be exercised when the state has the most solid and substantial justification.

The liberty interest at stake in child protection cases—the fundamental right of families to be secure in their relationship—requires courts to exercise the utmost caution when making these life-altering decisions. Given the complexity of these cases and the potential life-shattering consequences, courts have the high duty to ensure that children are not needlessly subjected to the trauma of removal into foster care or permanent separation from their families. This paper will track the life cycle of a typical child protection case and propose reforms to enable courts with jurisdiction over child welfare issues to better safeguard the rights of families and achieve optimal outcomes for children.

Key Points

- The number of children in the Texas foster care system rose by nearly 20% between 2010 and 2019.
- Forcibly separating a child from their family, even for a short time, is inherently traumatic and can result in long-term harm.
- As guardians of individual rights, courts have the high duty of safeguarding the liberty of families from abuse at the hands of government and protecting children from abuse at the hands of caregivers.

Introduction

The number of children in the Texas foster care system has steadily increased over the course of the last decade, rising by 19.9% between 2010 and 2019 (Texas Department of Family and Protective Services [DFPS], n.d.-a). Today, more than 50,000 Texas children are in the legal custody of the Department of Family and Protective Services.

Multiple studies have confirmed that forcibly separating a child from his or her family, even if only for a short time, is inherently traumatic and can result in long-term harm (Lawrence et al., 2006, pp. 71-72; Mitchell & Kuczynski, 2010, pp. 437, 442-443). A 2007 study examining the impact of removal on children in Cook County, Illinois, suggested that children who entered foster care experienced higher rates of negative outcomes like juvenile delinquency, teenage motherhood, and economic struggles than their peers who remained with their families (Doyle, 2007, pp. 1598-1602). This study compared children who were "on the margin of placement," meaning that cases of extreme abuse or neglect were screened out and only those cases where there was disagreement among investigators as to whether or not to remove the child were examined (pp. 1584, 1586).

Once a child is removed into foster care, the clock starts on legally mandated timelines that govern the reunification of the child with his or her family or the termination of parental rights (TPR). Under the Adoption and Safe Families Act of 1997 (42 U.S.C. 675(5)(E)), states are required to initiate termination of parental rights proceedings for any child who has been in foster care for "15 of the most recent 22 months." Section 263.401 of the Texas Family Code shortens this timeframe, requiring a final trial on the issue of termination to be commenced no later than 12 months from the date a court placed a child in DFPS conservatorship.

These aggressive timelines, which were originally enacted to expedite permanency for children and avoid long stays in foster care, have resulted in an upward trend in the number of children with terminations of parental rights (Administration for Children and Families, 1998; National Data Archive on Child Abuse and Neglect, personal communication, January 2020*). Between 2010 and 2018, the most recent years federal data are available, Texas ranked second in the total number of terminations of parental rights with 52,543. In 2018 alone, Texas had the second highest rate—behind West Virginia—of termination of parental rights among children served by its foster care system.

Although termination of parental rights may be the best option in many cases, especially where children have been severely abused or abandoned, this high rate of termination along with the trauma caused by the initial separation of children from their families should cause states to take care when making these life-altering decisions. Indeed, the United States Supreme Court has noted that the power of the state to permanently separate children from their families is a "devastatingly adverse action" that is among the most "severe and irreversible" actions that the government can take against a family (*M.L.B. v. S.L.J.*, 1996, p. 125; *Santosky v. Kramer*, 1982, p. 759). For this reason, courts have an important role to play in ensuring that children are not heedlessly removed into foster care and preventing the permanent separation of families unless absolutely necessary. This paper will examine the role of Texas courts in the life cycle of a CPS case and propose reforms at each stage that can help improve outcomes for children and families who have contact with the child welfare system.

The Anatomy of a Texas CPS Case

Intake

Given the complexities of the child welfare system, improving outcomes for children through the courts requires an understanding of the basic life cycle of a CPS case. All cases begin with a report of suspected child maltreatment either directly to DFPS or another state agency. Texas Family Code Sections 261.101 and 261.103 require any "person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect" to immediately report their suspicion to DPFS, a local or state law enforcement agency, or another state agency that oversees a facility in which the alleged maltreatment occurred. In 2019, CPS received more than 300,000 contacts related to child abuse or neglect (DFPS, n.d.-b). Most of these reports came through a phone call to the Texas Abuse Hotline (DFPS, n.d.-c).

Upon receipt of a report, Statewide Intake (SWI) assesses the risk posed by the allegation and assigns a priority level to the investigation (DFPS, 2015a). There are three possible priority levels, each with their own unique requirements. The most severe allegations are designated Priority 1 and involve situations "in which the children appear to face a safety threat of abuse or neglect that could result in death or serious harm" (DFPS, 2015b). An investigation of a Priority 1 report must be initiated within 24 hours of the report. There were 58,877 Priority 1 investigations assigned in 2019 with the total number of these investigations increasing by 7.1% between 2010 and 2019 (DFPS, n.d.-d).

Priority 2 cases are less severe but involve allegations in which "children appear to face a safety threat that could result in substantial harm" (DFPS, 2015c). These investigations must be initiated within 72 hours of the initial report. Between 2010 and 2019, there was an 18.9% decrease in the number of Priority 2 investigations assigned, and 143,266 reports were given this priority in 2019 (DFPS, n.d.-d).

The final assessment level, Priority N, is for cases not assigned for an investigation and applies only in three circumstances: (a) when there was past abuse or neglect, but there are no current safety issues or risk of recurrence; (b) when key information about the alleged abuse or neglect is missing; or (c) when a child dies unexpectedly and there is information indicating that the situation falls under CPS jurisdiction (DFPS, 2015d). During 2019, there were 52,636 reports designated Priority N (DFPS, n.d.-d).

Investigation by CPS

Upon the assignment of an allegation of abuse or neglect, CPS will investigate to determine its validity and whether further action is necessary. After gathering sufficient information, an investigator will assign one of five dispositions

* The data used in this publication (Dataset 235, AFCARS Foster Care File 2018) were obtained from the National Data Archive on Child Abuse and Neglect and have been used in accordance with its Terms of Use Agreement license. The Administration on Children, Youth and Families, the Children's Bureau, the original dataset collection personnel or funding source, NDACAN, Cornell University and their agents or employees bear no responsibility for the analyses or interpretations presented here.

The Anatomy of a Texas CPS Court Case

to the allegation. It is important to note that the disposition assigned by an investigator is an administrative, not a legal, finding. The five possible dispositions that may be assigned during a CPS investigation are administrative closure, ruled out, reason to believe, unable to determine, and unable to complete (DFPS, 2019a).

The two most significant dispositions are "ruled out" and "reason to believe." A "ruled out" disposition is assigned when the CPS investigator determines that the alleged abuse or neglect either did not occur or that it did occur but was not committed by the person who was alleged to be responsible for it. The assignment of "ruled out" effectively ends the abuse or neglect case unless the investigator can identify the correct alleged perpetrator. As opposed to "ruled out," a finding of "reason to believe" is assigned when the investigator gathers sufficient information to support the conclusion that the alleged abuse or neglect occurred and that the alleged perpetrator committed it. While this is an administrative finding rather than a legal conclusion., a "reason to believe" finding triggers additional action by CPS—often the removal of the child—and sets the court process into motion.

Removal

Court Order Required

Generally speaking, CPS cannot immediately remove a child the moment it determines that there is reason to believe an allegation is true. Texas Family Code Section 262, Subchapter B, prohibits CPS from seizing a child from their family absent a court order, parental consent, or imminent danger of physical or sexual abuse. Apart from limited, emergency situations, CPS is required to obtain a court order prior to removing a child into state custody.

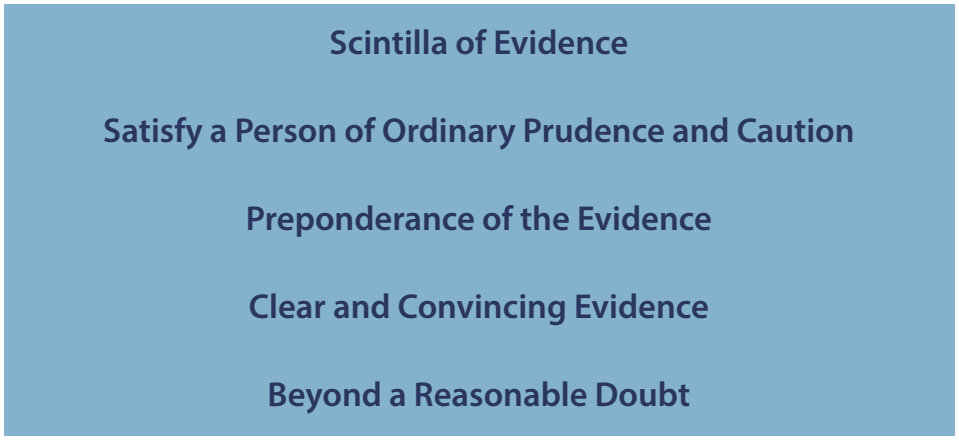
This is a relatively recent shift in practice driven primarily by the Fifth Circuit's ruling in the 2008 case *Gates v. Texas Department of Protective and Regulatory Services* (2008). The decision stemmed from a lawsuit filed by a Houston-area family alleging that the department violated the family's constitutional rights in removing their children during an abuse investigation. Although the Fifth Circuit found that department employees were protected from liability under the doctrine of qualified immunity, it held that the department's actions in the case violated the Fourth Amendment rights of the parents and their children (2008, pp. 429, 438). The court ultimately held that, moving forward, the department "may not seize a child from his or her parents absent a court order, parental consent, or exigent circumstances" in order to ensure that "the least amount of harm will come to the children the government seeks to protect, as well as to their parents." As a direct result of the *Gates* decision, the department shifted its policy from removing a child then going to court the next business day for an ex parte order authorizing the removal to obtaining consent or filing for a court order prior to removal "unless life or limb is in immediate jeopardy or sexual abuse is about to occur" (Cockerell et al., 2008, p. 2).

The Adversary Hearing

Once a child has been removed by the department, Texas Family Code Section 262.201 requires a court hearing, known as a "full adversary hearing" or "show cause hearing," to be held within 14 days of the date of removal. This is the first meaningful opportunity for a judge to review evidence and determine whether the child should remain in foster care or return home to their family. Importantly, it is also the first opportunity parents will have to mount a defense and regain custody of their child. For this reason, the adversary hearing is considered one of the most important hearings in the life of a child protection case (Children's Commission, 2015a, p. 64).

Despite the importance of the adversary hearing, many parents go into it without having the opportunity to consult with legal counsel. According to a 2018 survey by the Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families (hereinafter "Children's Commission"), legal counsel for parents is appointed prior to the adversary hearing in roughly half of all cases (Children's Commission, 2018, p. 22). While this represents an increase from a 2011 study that showed appointment of counsel prior to the adversary hearing occurred in only 21% of cases, a substantial number of Texas families still lack legal representation at the start of this critical hearing.

In recent years, several jurisdictions have undertaken projects aimed at improving the quality of parent representation, ensuring early appointment of counsel, and quantifying the impact these variables have on outcomes for parents and their children. The data from these projects consistently shows statistically significant improvements in three main areas of focus for child welfare practitioners: (a) reduced entries into foster care, (b) less time spent in foster care, and (c) faster and more successful reunifications (Thornton & Gwin, 2012, p. 148). For example, one of the most widely reviewed programs is the parents' representation pilot program launched in 2000 by the Washington State Office of Public Defense (OPD). The goal of the



Note. From *Texas Practice Guide for Child Protective Services Attorneys* by the Department of Family and Protective Services, 2014, p. 4 (https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_7_Evidence.pdf).

program, which was authorized by that state's Legislature, is to find innovative ways of providing better and more effective representation for parents involved with the child welfare system (Oetjen, 2003, p. 3). Multiple studies of the program found that it achieved improved outcomes in several areas of focus, including statistically significant increases in reunification rates as well as decreases in the number of days spent in foster care (Oetjen, 2003, p. 7; Washington State Office of Public Defense, 2010, p. 1).

Another program launched in 2009 by the University of Michigan Law School provides legal and social work advocacy for families at risk of child welfare involvement due to unresolved legal issues related to circumstances like poverty, substance use, or domestic violence (Sankaran, 2014, pp. 1039, 1041). This program, called the Detroit Center for Family Advocacy, accepts referrals from a number of community-based organizations of families whose children are at risk of entering foster care and matches them with an attorney, a social worker, and a parent advocate who help them resolve their issues before CPS becomes involved (p. 1041). An initial evaluation found that of the 55 families served by the program, objectives were met in 98.2% of cases and, most importantly, none of 110 children involved entered foster care (p. 1043).

This preventative representation model is unique in that families are appointed counsel even before CPS files a petition seeking the removal of their children—a concept that has gained recent attention from the federal government. Executive Order No. 13930 signed by President Trump in June 2020 outlined a number of initiatives aimed at improving the child welfare system and directed the Department of Health and Human Services to issue guidance to states "regarding flexibility in the use of Federal funds to support and encourage high-quality legal representation for parents and children, *including pre-petition representation* [emphasis added]" (p. 38,744). Regardless of whether appointment of counsel occurs before a petition seeking the removal of children is filed or sometime prior to the first adversary hearing, the experience of states that have worked to provide parents with early and effective legal representation demonstrates the positive impact something as simple as prioritizing a parent's right to counsel can have for children and families involved with the child welfare system.

At the conclusion of the adversary hearing, Texas Family Code Section 262.201(g) requires the court to order the return of the child unless it finds "sufficient evidence to satisfy a person of ordinary prudence and caution" that (a) there was a danger to the physical health or safety of the child and that remaining in the home would be contrary to the child's welfare, (b) there was an urgent need for protection that required the removal of the child and CPS took reasonable efforts to prevent removal, and (c) reasonable efforts have been made to allow the child to return home, but a substantial risk of continuing danger to the child still exists. The evidentiary standard, "a person of ordinary prudence and caution," is an incredibly low burden unique to CPS cases. According to the *Texas Practice Guide for Child Protective Services Attorneys* published by DFPS, the standard is "the same burden as the 'probable cause'

requirement for a search warrant and is not as stringent as preponderance" (2014, p. 4).

Putting this into perspective, the state has to meet a higher burden of proof (preponderance of the evidence) when forfeiting a drug dealer's ill-gotten gains than when separating children from their families (Texas Code of Criminal Procedure Art. 59.05(b)).

Not only is this burden shockingly low in comparison to the gravity of the removal decision, it is also redundant as Texas Family Code Sections 262.101 and 262.104 apply the same standard to the affidavit CPS files with the court seeking authorization for the initial removal of the child. Thus, under current law, the department is not required to meet a higher evidentiary standard at the adversary hearing to prove that the removal of a child from their family was justified and that the child should remain in foster care. Since it is well-established that separating a child from their family and placing them in foster care results in measurable trauma to the child, increasing the burden of proof at the adversary hearing to at least "preponderance of the evidence" will aid courts in balancing the risks of harm associated with removing the child with those associated with allowing the child to remain in the home. It will also result in parity with the department's own standards for assigning investigatory findings, which requires preponderance when assigning a disposition of "reason to believe" (DFPS, 2019a).

In the event that the court finds sufficient evidence to justify keeping the child in foster care, it will issue temporary orders granting DFPS conservatorship of the child and providing for the child's safety and welfare (Tex. Fam. Code Sec. 262.201(h); Tex. Fam. Code Sec. 105.001).

Service Plan and Status Hearing

Once the court renders temporary orders at the conclusion of the adversary hearing granting the department conservatorship of a child, Texas Family Code Section 263.101 requires the department to prepare and file a service plan with the court within 45 days. Since family reunification is the department's stated top priority in any CPS case, the service plan is intended to detail the steps that parents must take to address safety concerns and enable the return of the child (DFPS, 2017). In the event that the family is unable to achieve reunification, Texas Family Code Section 263.102(a)(5) requires the department to also identify at least one alternative permanency goal in the service plan.

It is difficult to overstate the importance of the service plan as it dictates the actions that parents must take to regain custody of their children. Yet, the service plan takes on even greater importance considering the consequences associated with failing to meet all the requirements the department places in it. Texas Family Code Section 161.001(b)(1) enumerates 21 individual grounds by which the state can terminate the parent-child relationship over the objections of the parent. Among these is the so-called, "O grounds"—aptly named as they are found in Section 161.001(b)(1)(O). Under the O grounds, a parent's rights may be terminated solely because they failed to comply with the provisions of the court order enforcing the service plan. Recognizing that this provision of code could result in unjust terminations of parental rights, the 85th Legislature added Section 161.001(d), which prohibits courts from terminating parental rights under the O grounds if the parent is able to prove that they were unable to comply with specific provisions of the service plan despite making a good faith effort to do so (HB 7, 2017, p. 9).

The gravity of the service plan and devastating consequences if a parent fails to adequately comply with its provisions further underscores the importance of high-quality legal representation for parents in CPS cases. Texas Family Code Section 263.102(a)(3) states that the service plan should be prepared in collaboration with the child's parents. This provides parents with a critical opportunity to influence the contents and deadlines they will be subject to under the plan's provisions. It also allows them to push back against any proposed provisions that may be unrelated to risk factors identified, overly burdensome, or unnecessary for achieving the primary permanency goal. Quality legal representation provides parents with an advocate who can level the playing field between the department and the parents at a stage of the case where there is a dramatic imbalance of power. More importantly, it can help ensure that the service plan is narrowly tailored at addressing risk factors and achieving the timely reunification of the family.

Texas Family Code Sections 263.201 and 263.202 require that the court hold a status hearing no later than the 60th day after the removal of the child for the purpose of reviewing the service plan filed by the department. The court is empowered to modify the service plan during the hearing, providing further support for the important role of a parent's attorney as the attorney can advocate for changes that the parent was unable to obtain during the

service planning conference with the department. At the conclusion of the status hearing, the court will incorporate the service plan into its orders.

Permanency Hearings

Following the approval of the service plan at the status hearing, the family begins working the services required to facilitate the return of their child. The Texas Family Code requires that the court hold a minimum of two permanency hearings to assess the family's progress on completing services. Pursuant to Family Code Section 263.304, an initial permanency hearing is held no later than 180 days after the date the court entered its temporary orders at the conclusion of the adversary hearing. A second permanency hearing, provided for in Family Code Section 263.305, is to be held within 120 days of the initial permanency hearing.

In accordance with Family Code Section 263.306(a-1)(6), the court can order, at each permanency hearing, the return of the child if it finds that the child's parents are willing and able to provide a safe environment for the child and return is in the child's best interests. A provision in Family Code Section 263.403, known as "monitored return," enables the court to facilitate the successful transition of the child home under a limited period of supervision by the department. In 2017, the 85th Legislature added language to this section that permits the use of monitored return while the family is still in the process of completing the remaining requirements of the service plan. If used properly, monitored return is a powerful tool for reducing trauma to children and achieving earlier reunification of families by incentivizing and rewarding families for diligently working services (HB 7, 2017, pp. 22-23). However, the full power of this provision to preserve families and reduce the time a child spends in foster care has yet to be realized as monitored return remains optional. Additional language mandating the use of monitored return throughout the life cycle of a CPS case, except in cases where a child would remain at imminent risk of harm, could be an effective way for the Legislature and courts to further shift the focus of the child welfare system toward strengthening families.

Final Trial on the Merits

In 1997, the U.S. Congress enacted the Adoption and Safe Families Act (ASFA) in response to concerns regarding the length of time children were remaining in the foster care system (Administration for Children and Families, 1998). Among its provisions, ASFA included a mandate that states file for termination of parental rights in cases where a child had been in foster care for 15 of the most recent 22 months (42 U.S.C. 675(5)(E)). Although the so-called "15/22 Rule" is intended to move children out of foster care and into a permanent placement as quickly as possible, it also limits the time that families have to complete services and reunite with their child.

Texas law further shortens this period by establishing a 12-month deadline for the start of the termination hearing. Under Family Code Section 263.401, unless the court commences a final trial on the merits by the first anniversary of the date the court entered its temporary orders, its jurisdiction over the case is terminated and the case is automatically dismissed. However, the code currently does not set a date for when the court is required to enter a final order after it has commenced trial—a loophole that has resulted in children experiencing exceptionally long stays in foster care.

A striking example of how this loophole operates to delay permanency for children is found in the Texas First District Court of Appeals decision in *In re J.D.G.* (2018). In this case, a 2-month-old boy and his older sibling were removed from their family by the department in 2015 due to allegations of abuse resulting from the father's shaking of the infant (2018, pp. 843-844). The children were initially placed with relatives but bounced around to multiple foster homes while the case made its way through the process (p. 857). A final trial on the merits commenced in November 2016, but, due to numerous delays, trial did not conclude until May 24, 2018—nearly two and one-half years since the children were placed in DFPS conservatorship (p. 848). In a scathing concurring opinion, Justice Harvey Brown highlighted the need for legislative action to enable the timely resolution of cases so that children are not harmed by extended stays in foster care and to prevent taxpayers from bearing "the extra costs inevitably incurred as a result of delays" (p. 856). Justice Brown's opinion noted that the current lack of a statutory requirement that "a commenced trial be completed within any specified period of time" creates an environment in which children may linger in foster care for an untold number of years (p. 857).

At the conclusion of the final trial, the court may enter a final order that (a) returns the child to the conservatorship of the parent, (b) appoints a nonparent as permanent managing conservator of the child, or (c) appoints the department as permanent managing conservator

of the child (Tex. Fam. Code Sec. 263.404; Children's Commission, 2015b). With respect to a court's decision to award permanent managing conservatorship of the child to either the department or a nonparent, the court may do so with or without terminating parental rights. In cases where termination of parental rights is sought, Family Code Section 161.001 places the burden on the department to prove, by clear and convincing evidence, at least one of the enumerated grounds for termination and that termination is in the best interest of the child. However, if the department is seeking permanent managing conservatorship of the child with either a nonparent or the department *without* termination of parental rights, the burden is lowered to a preponderance of the evidence (Tex. Fam. Code Sec. 105.005). Although permanent managing conservatorship does not fully sever the legal relationship between parents and children, the practical impact is essentially the same. Raising the standard for awarding permanent managing conservatorship to the department or another nonparent to clear and convincing evidence recognizes this practical impact and achieves parity with the existing constitutionally required standard for termination of parental rights.

Alternatives to Removal

Although foster care commands the majority of the attention from both the public and policymakers, Texas law permits a number of options that provide for the protection of children while allowing families to address issues without the need for removal of the child into foster care. These alternatives to removal provide opportunities to minimize trauma to children by reducing reliance on out-of-home placement as well as several challenges. This section will examine two of the main alternatives provided for in code: Family-Based Safety Services (FBSS) and court-ordered services.

It should be noted, however, that the code provides other alternatives outside FBSS and court-ordered services. For instance, if the department determines that abuse has occurred, but only one member of the child's household was responsible for the abuse, it may request the removal of the alleged perpetrator of the abuse rather than the child. Under Family Code Section 262.1015, a court may issue an order removing an alleged perpetrator from the home if it finds sufficient evidence to show that (a) there is an immediate danger to the child, (b) there is no time to hold an adversary hearing, (c) a parent or other adult who resides with the child is not a danger to the child, (d) that parent or other adult is able to provide a safe environment and protect the child from the alleged perpetrator, and (e) removal of the alleged perpetrator is in the child's best interest. Similarly, the department may seek a protective order under Texas Family Code Section 82.002(d) on behalf of an individual, including a child, alleged to be a victim of family violence to safeguard them from the person alleged to have perpetrated the violence. Such tools can be effective for providing for the protection of children without resorting to the harm of removal, especially in instances where one of the child's parents may also be a victim of domestic violence.

In certain cases, the department may choose to avoid removal in favor of maintaining the child in the home while providing the family with services (Children's Commission, 2015c). One mechanism for this is provided in Texas Family Code Section 264.203, sometimes referred to as "court-ordered services." Under this section of code, courts are empowered to order families to participate in services the department requests for "alleviating the effects of the abuse or neglect" or "reducing the reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future."

Although court-ordered services may be used as an alternative to removal and may be utilized while the child still resides in the home, current Texas law lacks many of the procedural safeguards afforded to families during the adversary hearing. For example, Texas Family Code Section 264.203 lacks a clear burden of proof that the department is required to meet before a court may order services, a set list of narrowly tailored services a court may order, or a limit on the length of time a family may be compelled to participate in services (Sinclair & Davis, 2013, pp. 937-38, 940, 944). A recent decision by the 216th District Court provided clarity on the burden of proof issue affirming that the department must prove its case by a preponderance of the evidence (*Texas Department of Family and Protective Services v. Jordan Eads*, 2020, p. 1).** Although the 216th District Court's decision provides much-needed guidance on the standard of proof issue, the broad language of Texas Family Code Section 264.203(a) and (c) suffers from further problems by essentially granting the department a blank check to compel the family to participate in any "services the department provides or purchases" under threat of sanctions, including the removal of the child. This open-ended discretion combined with the lack of substantive protections for the 14th Amendment due process rights of families has led some to argue that the court-ordered services section of the

** The court rendered its order on September 4, 2020. At the time of this writing, the order may still be appealed by the Department of Family and Protective Services.

Texas Family Code is unconstitutional and in need of serious reform (pp. 937-38, 945).

Another alternative to removal available to the department is a program known as Family-Based Safety Services. This program is intended to provide families who are struggling to give a safe, stable environment to their children with services designed to meet their needs and prevent children from entering foster care (DFPS, 2019b).

In a typical FBSS case, children will remain in the home while the family receives services, but some families may elect to send their children to live with relatives or family friends (DFPS, n.d.-e). According to publicly available data furnished by DFPS, 27,585 families and 74,092 individual children received services through FBSS during fiscal year 2019 (DFPS, n.d.-f; DFPS, n.d.-g). Although the number of families and children in FBSS has trended downward over the last decade, the number of removals has trended upward during this same period (DFPS, n.d.-h).

Since FBSS is intended as a voluntary alternative to removal, authorization and oversight from a court is not required. However, the department may move forward with seeking a court order to either compel participation in FBSS or seek removal of the children—a fact that calls into question whether the program is truly voluntary (DFPS, 2019c; Children's Commission, 2015a, p. 45).

CPS Specialty Courts

Removing children from their home with the potential of forever terminating their relationship with their family is one of the most devastating actions that our judicial system can take. Even in cases where families are successfully reunited, the act of separating a child from their parents is traumatic and carries lifelong consequences. Accordingly, it is incumbent upon the judicial system to take great care when making these decisions to balance the harm caused by removal with the actual danger to the child. Moreover, it is critically important that courts with jurisdiction over child welfare cases take their duty to safeguard the fundamental rights of families and hold the department accountable as seriously as their duty to protect children at imminent danger of abuse.

Article 5, Section 8 of the Texas Constitution establishes district courts as the primary trial courts with original jurisdiction over most matters, including child welfare cases. District court judges are elected by the citizens who reside within a specific judicial district and serve a term of 4 years (Tex. Const. art. V, § 7). In recent years, however, the authority of elected district court judges over child abuse and neglect cases has been transferred to special child protection courts (Texas Judicial Branch, n.d.). These courts, sometimes called "specialty courts" or "cluster courts," are presided over by unelected associate judges appointed by the presiding judge of each administrative judicial region from a list of qualified applicants maintained by the Office of Court Administration (Tex. Fam. Code § 201.201(a)-(b)). As of this writing, 129 of the 254 counties in Texas have a child protection specialty court with new courts scheduled to launch in another 10 counties by the end of 2020 (Texas Judicial Branch, 2019).

Although created with the purpose of assisting district courts, primarily in underserved rural areas, with managing their child protection dockets, specialty courts have spread throughout Texas buoyed by dramatic changes to the traditional role of courts in family law (Sage, 2014). This shift toward the specialty court model in child welfare has generated controversy for its focus on "problem solving" at the expense of the values and procedural protections of the adversarial system (Murphy, 2010, p. 892). Specialty court proceedings are characterized by their informality in comparison to adversarial proceedings as well as their focus on "collaborative" and "holistic" responses to allegations of child maltreatment (pp. 895-96). With this focus comes a diminished role for attorneys, and even judges, in favor of increased reliance on nonlegal participants like social workers and volunteer child advocates in the decision-making process. More concerning, however, is the threat to individual liberty and potential for increased state involvement in the lives of families caused by the erosion of longstanding norms and procedures designed to ensure justice and safeguard the rights of the people. As Murphy points out, this threat is especially acute for low-income families who are disproportionately represented in the child welfare system (p. 910). These families, who often enter the adversary hearing unrepresented, are forced to navigate a more informal process often heavily influenced by nonlegal actors more focused on collaborative "solutions" than determining the truth of the allegations (pp. 911-12). Given that 75% of confirmed maltreatment victims in Texas were victims of neglect only, an allegation with a statistically significant link to poverty, the specialty court model carries a high risk of inappropriately conflating circumstances related to poverty with child maltreatment (Pressley, 2020, pp. 3-4).

Although courts should be creative in deploying resources and services to preserve families by addressing the root causes of confirmed instances of child maltreatment, this can and should be done in the context of the adversarial system. The revitalization of the adversarial system in CPS

cases is an important step for improving outcomes for children and families. At minimum, reforms should include abandoning the collaborative, "problem-solving" approach of child protection courts in favor of procedural and evidentiary protections commonly utilized by elected district court judges as well as creating an absolute right for any party to object to an associate judge conducting a hearing and have their case adjudicated by the district court.

Additionally, associate judges should be elected so that they can be held directly accountable to the citizens affected by their decisions and who are rightfully concerned about the well-being of the children in their communities.

Conclusion

In his speech to Congress on June 8, 1789, James Madison argued that incorporating the Bill of Rights into the Constitution would cause the courts to "consider themselves […] the guardians of those rights" and establish the judiciary as "an impenetrable bulwark against every assumption of power in the legislative or executive" (Madison, 1789). The relationship between children and parents is one of the oldest and most fundamental rights possessed by citizens, and the power of the state to interfere with it must be zealously limited absent a compelling governmental interest (*Troxel v. Granville*, 2000, p. 65). For this reason, it is equally important for courts with jurisdiction over child protection cases to fulfil their Madisonian role as guardians of the rights of children and families against abuse at the hands of government as it is for them to protect children against abuse at the hands of a caregiver. Improving outcomes for children and families who have contact with the child welfare system requires continual attention to the functioning of courts in this role and reforms to procedures governing the complex life cycle of CPS cases to ensure that the child welfare system is able to effectively carry out its important job of protecting children who are in imminent danger in a restrained, constitutional manner.

Recommendations

- Limit removals of children to cases of imminent danger where removal is the least harmful intervention for the child.
- Guarantee the right to counsel in child protection cases by requiring appointment of attorneys for parents at the time a petition seeking the removal of a child is filed.
- Increase the evidentiary standard for separating a child from their family to, at minimum, a "preponderance of the evidence."
- Prioritize the earlier reunification of families by mandating the use of monitored return throughout the life cycle of a CPS case, except in cases where a child would remain at imminent risk of harm.
- Achieve timely permanency for children by setting a clear timeframe for courts to render a final ruling once a final trial on the merits has commenced.
- Change the evidentiary standard for granting permanent conservatorship of a child to the Department of Family and Protective Services or other nonparent to "clear and convincing evidence" to achieve parity with the standard for termination of parental rights.
- Amend Family Code Section 264.203 to apply the same procedural protections in court-ordered services cases as are required in removal hearings.
- Restore the values and safeguards of the adversarial system to child protection courts by requiring courts to employ the same procedural and evidentiary protections utilized by district courts.
- Create an absolute right for any party to object to an unelected associate judge conducting a hearing and to have their case adjudicated by the district court.
- Make decisions to remove children into foster care subject to oversight by elected judges who are directly accountable to the public. ✯

References

Administration for Children and Families. (1998). *Program Instruction: New Legislation — Public Law 105-89, The Adoption and Safe Families Act of 1997*. U.S. Department of Health and Human Services. https://www.acf.hhs.gov/sites/default/files/cb/pi9802.pdf

Cockerell, C., James, J., & Williams, G. (2008, August 22) *Urgent legal advisory for investigations*. Texas Department of Family and Protective Services. https://thsc.org/wp-content/uploads/2012/07/cps-memo-2008-08-22-gates-case.pdf

Doyle, J. (2007). Child protection and child outcomes: Measuring the effects of foster care. *American Economic Review*, *97*(5), 1583-1610. https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.97.5.1583

Exec. Order No. 13930, 85 F.R. 38741 (2020). https://www.federalregister.gov/documents/2020/06/29/2020-14077/strengthening-the-child-welfare-system-for-americas-children

HB 7. Enrolled. 85th Texas Legislature. Regular. (2017). https://capitol.texas.gov/tlodocs/85R/billtext/pdf/HB00007F.pdf

In re J.D.G., 570 S.W.3d 839 (Tex. App. 2018). https://casetext.com/case/in-re-of-2695

Lawrence, C., Carlson, E., & Egeland, B. (2006). The impact of foster care on development. *Development and Psychopathology*, *18*, 57-76. https://cca-ct.org/Study%20Impact%20of%20Foster%20Care%20on%20Child%20Dev.pdf

Madison, J. (1789, June). *Amendments to the Constitution, [8 June] 1789*. Founders Online. National Archives. https://founders.archives.gov/documents/Madison/01-12-02-0126

Mitchell, M., & Kuczynski, L. (2010). Does anyone know what is going on? Examining children's lived experience of the transition into foster care. *Children and youth Services Review*, *32*(3), 437-44. https://www.sciencedirect.com/science/article/abs/pii/S0190740909003089

Murphy, J. (2010). Revitalizing the adversary system in family law. *University of Cincinnati Law Review*, *78*, 891-927. https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1027&context=all_fac

Oetjen, J. (2003). *Improving parents' representation in dependency cases: A Washington State pilot program evaluation*. National Council of Juvenile and Family Court Judges. http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf

Pressley, N. (2020). *Punished for being poor: The relationship between poverty and neglect in Texas*. Texas Public Policy Foundation. https://files.texaspolicy.com/uploads/2020/06/01142226/Pressley-Neglect-Poverty-Perspective1.pdf

Sage, R. (2014, May). *Texas child protection specialty courts* [Memorandum]. Office of Court Administration. http://texaschildrenscommission.gov/media/1372/30-texas-child-protection-specialty-courts.pdf

Sankaran, V. (2014). Using preventative legal advocacy to keep children from entering foster care. *William Mitchell Law Review*, *40*(3). https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1576&context=wmlr

Sinclair, B, & Davis, C. (2013). Services against our will: Texas Family Code § 264.203 is unconstitutional. *Texas Wesleyan Law Review*, *19*(4), 935-46. https://heinonline.org/HOL/LandingPage?handle=hein.journals/twlr19&div=59&id=&page=

The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. (2015a). *Parent resource guide*. http://parentresourceguide.texaschildrenscommission.gov/pdf/Child%20Protective%20Services%20Parent%20Resource%20Guide%202015.pdf

The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. (2015b). *Texas child protection law bench book: Final hearing*. http://benchbook.texaschildrenscommission.gov/library_item/gov.texaschildrenscommission.benchbook_draft/69

The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. (2015c). *Texas child protection law bench book: Order for required participation*. http://benchbook.texaschildrenscommission.gov/library_item/gov.texaschildrenscommission.benchbook_draft/10

The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. (2018). *2018 study of legal representation in child protective services cases*. http://texaschildrenscommission.gov/media/83923/2018-legal-representation-report-final-online.pdf

Texas Department of Family and Protective Services (n.d.-a). *Child Protective Services (CPS): Children in DFPS legal responsibility during the fiscal year*. Retrieved August 17, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Children_in_Conservatorship.asp

Texas Department of Family and Protective Services (n.d.-b). *Statewide Intake: Type of contact & method of receipt*. Retrieved August 17, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Statewide_Intake/Contacts.asp

Texas Department of Family and Protective Services (n.d.-c). *Report abuse, neglect, or exploitation*. Retrieved August 17, 2020, from https://www.dfps.state.tx.us/contact_us/report_abuse.asp

Texas Department of Family and Protective Services (n.d.-d). *CPI intakes: Priority, screening and assignment*. Retrieved August 12, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Investigations/Intakes.asp

Texas Department of Family and Protective Services (n.d.-e). *Family-Based Safety Services (FBSS)*. Retrieved August 24, 2020, from https://www.dfps.state.tx.us/Child_Protection/Family_Support/FBSS.asp

Texas Department of Family and Protective Services. (n.d.-f). *CPS family preservation (FPR): Families served*. Retrieved on September 8, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Family_Preservation/Families_Served.asp

Texas Department of Family and Protective Services. (n.d.-g). *CPS family preservation (FPR): Children served*. Retrieved on September 8, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Family_Preservation/Children_Served.asp

Texas Department of Family and Protective Services. (n.d.-h). *Child Protective Services (CPS): Removals*. Retrieved on August 24, 2020, from https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Removals.asp

Texas Department of Family and Protective Services (2015a, March). *Statewide Intake policy & procedures: 4300 CPS assessment of priority*. https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4300

Texas Department of Family and Protective Services (2015b, March). *Statewide Intake policy & procedures: 4310 assessment of priority 1*. https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4300

Texas Department of Family and Protective Services (2015c, March). *4320 assessment of priority 2.* https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4300

Texas Department of Family and Protective Services (2015d, March). *4330 assessment of priority N.* https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4300

Texas Department of Family and Protective Services. (2017, February). *6234 prioritizing permanency goals.* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_6200.asp

Texas Department of Family and Protective Services (2019a, September). *2281 reaching dispositions for the allegations.* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp

Texas Department of Family and Protective Services. (2019b, June). *12110 philosophy and the role of FBSS staff.* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x12000.asp

Texas Department of Family and Protective Services. (2019c, June). *12651 refusal to participate in a safety plan.* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x12000.asp#CPS_12651

Texas Department of Family and Protective Services. (2020, June). *CPS 1.8 FBSS – Families receiving family preservation services on August 31 FY 2010-2019.* https://data.texas.gov/Social-Services/CPS-1-8-FBSS-Families-Receiving-Family-Preservatio/44ic-7ps3

Texas Department of Family and Protective Services v. Jordan Eads. Cause No. 17-1-28-A. (216th District Court, Kerr County, Sept. 4, 2020). https://files.texaspolicy.com/uploads/2020/09/08151134/2020-9-4-Final-Judgment-and-Order.pdf

Texas Judicial Branch. (n.d.). *About Texas courts: Children's courts*. Accessed August 25, 2020, from https://www.txcourts.gov/about-texas-courts/childrens-courts/

Texas Judicial Branch. (2019, December). *Texas Office of Court Administration Child Protection Courts.* https://www.txcourts.gov/media/1445466/childprotectioncourts_december2019-11x17.pdf

Thornton, E., & Gwin, B. (2012). High-quality legal representation for parents in child welfare cases results in improved outcomes for families and potential cost savings. *Family Law Quarterly*, *46*(1), 139-154. https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting6_031616/Cost_Benefit_Analysis/Parent_Rep_cost_savings.pdf

Washington State Office of Public Defense. (2010, February). *Reunification and case resolution improvements in Office of Public Defense (OPD) parents representation program counties*. http://www.opd.wa.gov/documents/0049-2010_PRP_Evaluation.pdf

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