



Resource Paper on Department of Family and Protective Services (DFPS) Transformation Report To Sunset Advisory Commission

Appendix A of the Transformation Report is a 100-plus page list of roughly 180 Texas Family Code and other statutory provisions that DFPS has identified as posing barriers that complicate or prevent implementation of its transformation changes. We generally agree with DFPS that there is a need to address the many factors that impact the Department’s workload and ultimately how children are served in the child protection system. Moreover, we agree that those factors may be best addressed with legislation primarily aimed at strengthening through amendment or repeal certain provisions of the Texas Family Code, but would encourage and support a collaborative effort not only involving the judiciary, but the many other interested Texas child welfare stakeholders and advocates.

The Children’s Commission has identified a number of substantive concerns with approximately 30 of the proposals for statutory reform:<sup>1</sup> I) Notice to Parties and Interested Persons and Court Reports; II) Limits on Court Discretion and Information to Courts; III) Changes to Judicial Determinations; IV) Case Transfers; V) Impact on Attorneys Ad Litem; VI) Children in Court; VII) Other Changes to Family and Education Codes.

Substantive Matter	Section Affected	Issue
Repeal of State Statutes as Duplicative of Federal Law	Transformation Report, Appendix A	Deleting Texas statutes because they overlap with federal statutes potentially impacts how state courts interpret state law, especially as federal law does not necessarily control how a state court interprets state law.
<b>I. Notice to Parties and Interested Persons</b>		
Notice to Parties and Interested Persons	New notice provision in Chapter 263 or 264 (Transformation Report, hereinafter “TR”, p. 65)	Agree that a single, comprehensive notice provision may be warranted, but it is critical that the statute articulate certain protections to ensure persons entitled to notice of hearings and case events in fact receive timely notice of hearings.
Notice to Parties and Interested Persons	Sections 263.301, 263.303, 263.501 and 263.502 (TR, pp. 37-39, 60, 121, 125)	Suggested amendments may be warranted, but may also work to deprive certain parties and case stakeholders of notice and the opportunity to participate in case-related events. Rework of these statutes should also consider the impact of mandatory e-filing, which will be effective statewide in July 2016.

<sup>1</sup> All references in this paper are to provisions in the Texas Family Code unless stated otherwise.

Court Reports	Sections 263.303, 263.306 and 263.502 (TR, pp. 37-40, 121, 126)	If enacted, this proposal would restrict a judge's ability to request a separate type of report. Prohibiting a court from requesting a detailed court report would infringe on judicial discretion and may also result in the loss of vital information currently provided in court reports. Discontinuing use of a uniform and detailed court report could also result in longer hearings, more witness testimony and proffers of evidence and subpoenas to DFPS to gather important information otherwise lacking in the court reports.
<b>II. Limits on Court Discretion and Information to Courts</b>		
Status Hearings	Section 263.201 (TR, p. 53)	The TR proposes limiting Status Hearings to a narrow 15-day window between the 45th and 60th day, allowing little leeway for courts to schedule the hearings as deemed necessary. This would infringe on a court's discretion to set hearings as the case demands and the court's docket permits.
Orders and Services for At-Risk Children	Sections 264.303 - 264.306 (TR, pp. 82-83)	The TR proposes repeal of these provisions. Without determining how judges use these statutes, repeal may prohibit a judge from issuing orders requiring families to participate in court-ordered services when risks are identified to child safety without needing to remove the child from the home.
Evaluation of Identified Relatives and other Designated Individuals; Placement	Sections 262.114(a) and (b) (TR, p. 117 and p. 52)	The TR proposes limiting the number of relative home studies DFPS must undertake. DFPS understandably cannot study an indeterminate number of relatives after children enter care, but it is important that judges retain discretion to order that home studies be completed based on the circumstances of the cases and the best interests of the subject children. The report also suggests repeal of Section 262.114(b), which currently allows DFPS to place a child without first conducting a CPS and criminal background check. If repealed, courts would also be prohibited from placing children without DFPS first conducting a CPS and criminal background check. This may have unintended consequences of children being placed with non-relative caregivers in urgent circumstances even if/when the relative placement is appropriate and all parties agree that placement is in the child's best interest.
The Involvement of Surrogate Parents, Foster Parents, and Volunteer Advocates in Special Education Issues	Texas Family Code Sections 107.031 (Volunteer Advocates), 263.0025 (Surrogate Parent), and Texas Education Code Section 29.015 (Foster Parents) (TR, pp. 97, 100-01)	The TR proposes repeal of these statutes. All of these provisions affect special education services for children in foster care. Special education law is very complex and much care must be used when repealing, amending, or consolidating Family Code and Education Code provisions in order to avoid compromising federal law, and to ensure the special education needs of students in foster care are met. The changes suggested could add to existing confusion about the court's authority to appoint a Surrogate Parent and may restrict court and school district discretion to determine an appropriate surrogate parent.
Placement of Children in DFPS offices (overnight stays in CPS offices)	Section 263.107(g) (TR, p. 68)	The TR proposes to modify the statute to require the agency to notify the court only if the child lacks placement for "one or more nights," meaning that placement in a caseworker's office for only a segment of a night would not trigger notice to the court. Judges have expressed a preference to receive notice of this situation even when the temporary placement only lasts for part of the night. Courts want to assist, when possible, with finding an appropriate placement for the child, and may only do so if notified of the situation.
Court Approval Required for Travel Outside of United States by Child in Foster Care	Section 264.122 (TR, p. 80)	The TR proposes repeal because the statute is onerous and serves no purpose related to the child's safety. Courts should be consulted prior to the child leaving the United States to ensure travel is in the child's best interest and that certain rights of parties (such as parental rights to visitation with the child) are protected.

Consent for Medical Care – notice of Medical Consenter filed with court within five days of designation	Section 266.004(c) (TR, p. 69)	The TR proposes eliminating the five day filing requirement. This provision was enacted only one year ago. Based on input from courts at that time, there was a preference for receiving this information when the designation occurs and more time is needed to ascertain whether courts believe there is a more appropriate timeframe within which to learn of the medical consenter’s identity.
Permanency Plan for Child and Limitations on Permanency Goals	Sections 263.3025 and 263.3026 (TR, p. 121)	The TR proposes these two statutes are redundant and suggests repeal because DFPS duties related to the child’s permanency plan are covered by current Section 263.303. However, the report also proposes that Section 263.303 be amended with new, more streamlined requirements so it is unclear whether the related duties would be covered by the new proposed version of 263.303. The report also proposes amendment of Section 263.3026, which may also leave unclear the scope of DFPS’ duty to develop a permanency plan and to provide that plan to interested stakeholders and the court. Repeal or amendment should be accomplished in a manner that balances the caseworker’s time to provide sufficient information to the court.
Information Regarding Child’s Education Decision-maker – eliminate notice filed within five days of designation	Section 263.004 (TR, p. 63)	The TR suggests amendment to require notice only to schools and to eliminate the mandatory statutory timeframe for providing such notice to the court and other interested parties because the court and other interested parties do not need the information within five days. However, the proposed amendment terminates the notice altogether.
Parental Child Safety Placements (PCSP)	Sections 264.902 and 263.906 (TR, pp. 85-86)	The TR proposes operating under a general directive to “limit the use and duration of PCSPs to the greatest extent possible.” PCSPs are often used to allow parents to place their children in the care of a relative, in lieu of the Department filing a formal suit affecting the parent-child relationship that seeks conservatorship and removal of the children. Limiting the use of PCSPs may result in an increase in the number of children being removed from their families and placed in non-relative foster care. The report also suggests repealing Section 264.906, which currently requires DFPS to give priority to placing the child with the PCSP when the Department determines it is necessary to formally seek conservatorship from the court. If this section is repealed, children may be placed in non-relative foster care more frequently.
<b>III. Changes to Judicial Determination</b>		
Permanency Hearings and Court Determinations	Section 263.306 (TR, p. 121)	The TR proposes streamlining certain provisions of the Family Code and cleaning up certain other provisions to address numbering issues and duplication and outdated terminology is appropriate. However, proposals to eliminate certain court findings may make the hearing process more indeterminate and unpredictable, leading to lengthier hearings as courts tackle a multitude of issues without statutory guidance. The suggested changes also fail to address foster youth who are also committed to the Texas Juvenile Justice Department.
Placement Review Hearings for children and youth in permanent managing conservatorship (PMC) of the state	Section 263.503 (TR, pp. 125-28)	As with the Permanency Hearings under Section 263.306, some consolidation and revision may be appropriate, but the articulated proposal is problematic because the statute would no longer address in a meaningful way, child placement in institutional care, educational needs and progress, and medical or psychiatric needs and services – all typically problematic for foster youth in long-term foster care.

Judicial Review of Medical Care	Section 266.007 (TR, p. 70)	The TR proposes eliminating certain subsections because the benefit of compiling the information does not outweigh the burden on the caseworker. The list of information required by Section 266.007 is lengthy, but critically important not only to the court but also to the child's advocates as it enables the court and advocates to be informed about the decisions being made for children, and in turn to make appropriate decisions regarding the child's medical care.
Final Order Appointing DFPS as Managing Conservator without Terminating Parental Rights	Section 263.404(b) (TR, p. 124)	The TR proposes repeal because age should not be a factor in determining whether DFPS should be appointed as the managing conservator of a child without termination of parental rights. Courts should also be allowed to consider not only the age, but the needs and desires of the child, as required by current Section 263.404(b). Rather than repealing the entire subsection, an additional factor that encompasses positive permanency should be added to the factors the court must consider.
Factors in Determining Best Interest of the Child	Section 263.307(c) (TR, p. 124)	The TR suggests repeal because it includes archaic and redundant language. Youth aging in the foster care system are particularly vulnerable and guidance for addressing their needs is assisted by this subsection. However, this provision may fit better in Section 263.3026, which deals with youth permanency goals.
<b>IV. Case Transfers</b>		
Case Transfers	Section 262.203 (TR, p. 52)	The TR suggests amendment to allow an associate judge to order a transfer of a case from another court's docket to the court in which the child protection suit is pending. The solution is to amend the section to allow DFPS to file a motion to prompt a mandatory transfer of a suit affecting the parent-child relationship from the court of continuing, exclusive jurisdiction to the court in which the child protection suit is pending, analogous to a mandatory transfer of a suit as now provided in Section 155.201(a).
<b>V. Impact on Attorneys Ad Litem</b>		
Limits on Notice to Attorneys Ad Litem of Changes in Child Placement	Sections 264.107(e) and 263.117(b) (TR, pp. 67-68)	The TR proposes changes that may compromise placement stability because the Department would no longer be required to consult with the child's attorney or guardian ad litem before changing a child's placement meaning that it would be impossible to take action to prevent the placement change from occurring, such as requesting a hearing on the matter. At the same time, the report proposes that attorneys and guardians ad litem assume an ongoing duty to identify possible placements for clients (See TR regarding changes to Sections 107.002 and 107.003). This additional duty would be made more difficult if DFPS is relieved of any duty to notify attorneys and guardians ad litem that a placement change is imminent.
Changes to Attorney ad Litem Duties and Responsibilities	Sections 107.003 and 107.0131 (TR, pp. 48-49)	The TR proposes amendments to clarify that attorneys ad litem are not entitled to attend or participate in every case-related meeting, but language suggested by the Department may be unworkable. The report also suggests amendments to require the attorney ad litem to explain to the child the foster children's bill of rights as identified in Section 263.008 and the possible consequences if those rights are violated. The proposed changes should be discussed with attorneys who represent children before being added to the statute. It also proposes to modify the duties and responsibilities of parents' attorneys by amending Section 107.0131 and adding duties related to service planning and discussing potential placements for children. The first new duty is problematic in those circumstances when the parent is not represented by counsel. The second duty may be appropriate for an attorney, but if the parent does not have an attorney at the time the child placement resources form must be filed with the court, DFPS is the most likely party to assist the parent in completing the form.

VI. Children in Court		
Children in Court	Sections 263.302 and 263.501(f) (TR, p. 54)	The TR suggests statutory amendments to allow children to attend court if they want to, but also argues for a presumption that it is not in the best interest of a child under the age of 10 to attend each review hearing – presumably even if they want to. Also, that before ordering a child younger than 10 to attend a hearing, the court must consider a number of factors relevant to the child’s best interest. Under the current framework, the decision to excuse a child from attending a court hearing currently lies within the court’s discretion. This discretion should remain with the courts and should not be eliminated solely on the basis of the age of the child as suggested by DFPS. Vesting this decision in the judge, however, does not mean that input from the caseworker, the child, and the child’s attorney and guardian ad litem is not critical to the judge’s decision.
VII. Other Changes to Family and Education Codes		
Unnecessary Changes to State Law	Family Code Sections 263.404 (Monitored Return of Child to Parent, TR p.57-58); 161.1031 (Child’s Family Medical History, TR, p.71); Texas Education Code Section 25.001(g)(Educational Stability While in Foster Care, TR, pp. 44, 102)	Section 263.404 – suggested change does not appear to have any relationship to this statute; Section 161.1031 – suggested change may impair child well-being if no family medical history is collected or made available to child’s caregiver or adoptive family; Texas Education Code Section 25.001(g) – may contravene federal Fostering Connections to Success and Adoptions Act of 2008.

Any endeavor to reform the Texas Family Code should be thoughtfully considered by the many stakeholders directly and indirectly affected by the state’s statutory framework in place to protect children in our state’s foster care system. The Children’s Commission is appreciative of the request to provide a response to the Transformation Report.

Under Texas Judicial Canon 4.B, a judge may speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, and the administration of justice and non-legal subjects, subject to the requirements of the Texas Code of Judicial Conduct. Tex. Code Judicial Conduct canon 4.B.I, *available at* <http://www.scjc.state.tx.us/pdf/txcodofjudicialconduct.pdf> (last visited Nov. 7, 2014).

The purpose of Resource Papers issued by the Children’s Commission is to assess the impact of proposed legislation on judicial administration, practices and procedures in child protection cases. They are developed based on the contributions of state child welfare judges and Children’s Commission staff. Resources papers are not advisory opinions issued by the Supreme Court of Texas or any other court. Resources papers are not rulings on specific cases or legal issues, but are solely intended to address the improvement of the law, the legal system, and the administration of justice.