
FINAL HEARING

Because of the need for permanency, the Texas Family Code requires resolution of a case within one year, with a possible six-month extension if the court finds there are extraordinary circumstances and finds that the extension is in the best interest of the child. The goal of the final hearing is the entry of a final order that identifies a permanency option or goal for the child and resolves the rights of all involved parties.

**Please see the Checklist Section for the
Final Order and Grounds for Termination Checklists.**

A. Case Must Be Dismissed Within One Year

If DFPS has temporary managing conservatorship of a child, the case must be resolved within one year. Unless the court has commenced the trial on the merits or has granted an extension under [Tex. Fam. Code § 263.401\(b\) or \(b-1\)](#), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing DFPS as temporary managing conservator, the case will be automatically dismissed without a court order. [Tex. Fam. Code § 263.401\(a\)](#).

B. Court May Extend Dismissal Date if Extraordinary Circumstances

Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the 12-month period unless the court finds that extraordinary circumstances necessitate the child remaining in temporary managing conservatorship of DFPS and that continuing the appointment of DFPS as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the one-year period. [Tex. Fam. Code § 263.401\(b\)](#). The court shall consider a parent's good faith effort to successfully complete a substance abuse treatment program when granting an extension of the deadline. [Tex. Fam. Code § 263.401\(b-2\)](#). The court must make a finding of extraordinary circumstances to extend the dismissal date of a suit if a parent has made a good faith effort to complete a service plan but needs more time and the court intends to return the child once the plan is completed. [Tex. Fam. Code § 263.401\(b-3\)](#).

If the court retains the suit on the court's docket, the court shall render an order in which the court:

- Schedules the new date on which the suit will be automatically dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by [Tex. Fam. Code § 263.401\(a\)](#);
- Makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
- Sets the trial on the merits on a date not later than the new dismissal period. [Tex. Fam. Code § 263.401\(b\)](#).

If, after commencement of the initial trial on the merits within the time required by [Tex. Fam. Code § 263.401\(a\) or \(b\)](#), the court grants a motion for a new trial or mistrial, or the case is remanded to the court by an appellate court following an appeal of the court's final order, the court shall retain the suit

on the court's docket and render an order in which the court schedules a new date on which the suit will be automatically dismissed, makes further temporary orders, and sets a new trial date pursuant to [Tex. Fam. Code § 263.401\(b-1\)](#).

If the court grants an extension under [Tex. Fam. Code § 263.401\(b\) or \(b-1\)](#) but does not commence the trial on the merits before the dismissal date, the court's jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under [Tex. Fam. Code § 263.401\(b\) or \(b-1\)](#), as applicable. [Tex. Fam. Code § 263.401\(c\)](#).

1. Limits on the Extensions

The parties to a suit under this chapter may not extend the deadlines set by the court by agreement or otherwise. [Tex. Fam. Code § 263.402\(a\)](#). In addition to the limitation imposed by [Tex. Fam. Code § 263.401\(c\)](#), the following cases address limits on extension of time:

In re J.L.C., [194 S.W.3d 667](#) (Tex. App.—Fort Worth 2006) (mother's request for extension of one year deadline binds her to 18 months maximum for decision);

In re J.H.G., [302 S.W.3d 304](#) (Tex. 2010) (mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal);

In re J.E.P., No. 04-18-00241-CV (Tex. App.—San Antonio 2018) (By rejecting the trial court's proposed trial date, which was the only date left available within the one-year deadline, father effectively agreed to the extension).

In re J.-R.A.M., No. 10-20-00221-CV (Tex. App.—Waco 2020, pet. denied) (mem. op.) (Failure to enter a written order or to specifically set a dismissal date does not affect the validity of an order granting an extension pursuant to emergency orders issued by the Texas Supreme Court regarding the COVID-19 State of Disaster. The emergency orders do not expressly require compliance with an extension granted after the initial extension).

In re A.R., [No 11-20-00152-CV](#) (Tex. App.—Eastland 2020) (mem. op.) (It is well within the trial court's discretion to deny a request for a continuance despite any assertion that a party needs more time to complete services due to the COVID-19 pandemic disrupting services).

In re A.W. a/k/a A.R.W., [623 S.W.3d 519](#) (Tex. App.—Waco 2021, no pet.) (The Twenty-Ninth Emergency Order requires that an extension order entered under COVID-19 provisions where a case has not yet entered an extension order pursuant to [Tex. Fam. Code § 263.401\(b\)](#) must still adhere to its requirements).

2. Failure to Resolve Case Before Dismissal Date

If the court does not commence the trial on the merits before the required date for dismissal, the court's jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order, unless the court has granted an extension. [Tex. Fam. Code § 263.401\(c\)](#).

3. Failure to Make a Timely Motion to Dismiss

There is no duty to file a motion to dismiss. The court automatically loses jurisdiction of the case without a court order unless the trial court has commenced the trial on the merits or granted an extension under [Tex. Fam. Code § 263.401\(b\) or \(b-1\)](#).

4. Effect of Dismissal

Typically, the dismissal of a SAPCR leaves the parties and the children in the status they had before the suit was filed. This is not always the case when DFPS files suit. For example, if a child is placed with a relative after DFPS files suit, the relative may gain standing to file an original suit seeking custody if the child remains with that relative for six months or more during the pendency of the DFPS lawsuit. The relative may not have had this standing at the time the DFPS lawsuit was filed, but now does with the passage of time. [Tex. Fam. Code § 102.003\(a\)\(9\)](#).

Dismissal of the suit filed by DFPS also does not bar another party with standing from proceeding to trial on the suit against the parents. An attorney ad litem appointed to represent the child is entitled to request a hearing or a trial on the merits. [Tex. Fam. Code § 107.003\(a\)\(3\)\(B\)](#). See also *In re Bishop*, [8 S.W.3d 412, 420](#) (Tex. App.—Waco 1999, orig. pet.) (dismissal is without prejudice and does not affect pleadings of intervenor relative and guardian ad litem); *In re J.C.*, [250 S.W.3d 486](#) (Tex. App.—Ft. Worth 2008, no pet. hist.) (foster parents sought and obtained termination of parent’s rights after DFPS suit was dismissed).

DFPS may file a new petition after dismissal, but must look to the current situation in the home in order to find evidence sufficient to establish a continuing danger exists for the child if returned home. A parent must be appointed managing conservator of the child unless the appointment would significantly impair the child’s physical health or emotional development. [Tex. Fam. Code § 153.131\(a\)](#). See also *In re Cochran*, [151 S.W.3d 275](#) (Tex. App.—Texarkana 2004, orig. proceeding) (past terminations alone not sufficient to deny placement with parents absent evidence of current danger to the health or safety of the child).

C. Monitored Return

At any stage of the case, the court may order a monitored return of the child to a parent with DFPS remaining as temporary managing conservator. The monitored return cannot be for more than 180 days unless court grants a request for an additional six months under [Tex. Fam. Code § 263.403\(a-1\)](#). However, the monitored return may be ordered without regard to the other deadlines.

1. Findings and Orders Required for a Monitored Return

The court may retain jurisdiction and not dismiss the suit if the court renders a temporary order that:

- Finds that retaining jurisdiction is in the best interest of the child;
- Orders DFPS to:
 - return the child to the child’s parent; or
 - transition the child, according to a schedule determined by DFPS or the court from substitute care to the parent while the parent completes the remaining requirements imposed under a service plan and specified in the temporary order that are necessary for the child’s return;

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- Orders DFPS to continue to serve as temporary managing conservator of the child; and
 - Orders DFPS to monitor the child's placement to ensure that the child is in a safe environment. [Tex. Fam. Code § 263.403\(a\)](#).

Unless the court has already granted an extension under [Tex. Fam. Code § 263.401\(b\)](#), DFPS or the parent may request an additional six months to complete the remaining requirements in a service plan and specified in the temporary order that are mandatory for the child's return. [Tex. Fam. Code § 263.403\(a-1\)](#). If the court has already granted a six-month extension based on extraordinary circumstances under [Tex. Fam. Code § 263.403\(b\)](#), the extension offered under [Tex. Fam. Code § 263.403\(a-1\)](#) is not available.

If the court renders an order under [Tex. Fam. Code § 263.403](#), the court shall:

- Include in the order specific findings regarding the grounds for the order; and
- Schedule a new date, not later than the 180th day after the date the temporary order is rendered, for dismissal of the suit unless a trial on the merits has commenced. [Tex. Fam. Code § 263.403\(b\)](#).

2. Failed Monitored Return

If before the dismissal of the suit or the commencement of the trial on the merits a child placed with a parent under [Tex. Fam. Code § 263.403](#) must be moved from that home or the court renders a temporary order terminating the transition order issued under [Tex. Fam. Code §263.403\(a\)\(2\)\(B\)](#), the court shall, at the time of the move or order, schedule a new date for dismissal of the suit. The new dismissal date may not be later than the original dismissal date established under [Tex. Fam. Code § 263.401](#) or the 180th day after the date the child is moved or the order is rendered under [Tex. Fam. Code § 263.403\(c\)](#), whichever date is later. [Tex. Fam. Code § 263.403\(c\)](#).

An order terminating a parent's rights after a failed monitored return was upheld as the clear and unambiguous language of [Tex. Fam. Code § 263.403\(c\)](#) allowed for the order to be entered after the 18 months authorized by [Tex. Fam. Code § 263.401](#). *In re J.W.M.*, 153 S.W.3d 541, 545 (Tex. App.—Amarillo 2004, pet. denied). See also *In re Neal*, 4 S.W.3d 443 (Tex. App.—Houston [1 Dist.] 1999, orig. proceeding). If the court renders an order, the court must include in the order specific findings regarding the grounds for the order. [Tex. Fam. Code § 263.403\(d\)](#).

D. Final Hearing

At the final hearing, the court may either:

- Enter a final decree of conservatorship that returns the child to the parent or caregiver and dismisses DFPS;
- Enter a final decree of conservatorship that gives a relative permanent managing conservatorship, with or without termination of parental rights, and dismisses DFPS; or
- Enter a final decree of conservatorship that names DFPS as the permanent managing conservator, with or without termination of parental rights.

1. Parties

At the final hearing, the court must confirm that all parties entitled to service under [Tex. Fam. Code § 102.009](#) have been served.

2. Required Notice of Trial

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than 45 days to the parties of the first setting for trial, or by agreement of the parties. [Tex. R. Civ. P. 245](#).

3. Burden of Proof at Final Hearing

DFPS has the burden to show that parental rights should be terminated or that DFPS or another non-parent should be appointed the permanent managing conservator of the child.

a. Termination

In a termination suit, DFPS has the burden to present clear and convincing evidence of at least one ground for termination and that termination is in the best interest of the child pursuant to [Tex. Fam. Code § 161.001](#). Clear and convincing evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. [Tex. Fam. Code § 101.007](#).

The Due Process Clause of the 14th Amendment requires the State to support the parental unfitness finding in a termination case by clear and convincing evidence. *Santosky v. Kramer*, [455 U.S. 745, 760](#) (1982); *In re G.M.*, [596 S.W.2d 846](#) (Tex. 1980).

Evidence that the parent did one or more of the following does not constitute clear and convincing evidence sufficient to make a finding under [Tex. Fam. Code § 161.001\(b\)](#):

- The parent homeschooled the child;
- The parent is economically disadvantaged;
- The parent has been charged with a nonviolent misdemeanor (other than one listed in [Tex. Penal Code Title 5 or 6](#), or one that involves family violence as defined by [Tex. Fam. Code § 71.004](#));
- The parent administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed;
- The parent declined immunization for a child for reasons of conscience, including religious belief;
- The parent allowed a child to engage in age-appropriate independent activities; or
- The parent sought a second opinion for a child's medical care or transferred a child's medical care to a new provider. [Tex. Fam. Code § 161.001\(c\)](#).

However, the Department may offer evidence of the actions described in [Tex. Fam. Code § 161.001\(c\)](#) as part of an action to terminate the parent-child relationship. [Tex. Fam. Code § 161.001\(e\)](#).

Also, [Tex. Fam. Code § 161.206\(a-1\)](#) restricts courts from terminating the parental rights of a parent unless the court finds by clear and convincing evidence grounds for termination for that parent.

b. Conservatorship

When DFPS asks a court to grant conservatorship to DFPS or to an individual other than the parent, the burden of proof is a preponderance of the evidence, not clear and convincing. A parent may also seek to have conservatorship awarded to an individual of his or her choice, and the burden of proof for the parent would also be a preponderance of the evidence that conservatorship to that individual is in the best interest of the child. [Tex. Fam. Code § 105.005](#).

c. Indian Child Welfare Act (ICWA)

If ICWA applies, the burden of proof and standards for a final order seeking permanent managing conservatorship or termination of parental rights are different than under the Texas Family Code. Under ICWA, the evidence required to terminate parental rights is beyond a reasonable doubt, supported by qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful. [25 U.S.C. § 1912\(d\) and \(f\)](#).

4. Grounds for Termination of Parental Rights

a. Personal Service Required Unless Prongs Met Under [Tex. Fam. Code § 161.208](#)

If a parent of the child has not been personally served in a suit in which DFPS seeks termination, the court that terminates a parent-child relationship may not appoint DFPS as permanent managing conservator of the child unless the court determines that:

- DFPS has made a diligent effort to locate a missing person who has not been personally served and a relative of that parent; and
- A relative located by DFPS has had a reasonable opportunity to request appointment as a managing conservator of the child or DFPS has not been able to locate the missing parent or a relative of the missing parent. [Tex. Fam. Code § 161.208](#).

b. Involuntary Termination of Parent-Child Relationship

Pursuant to [Tex. Fam. Code § 161.001\(a\)](#), “born addicted to alcohol or a controlled substance” means a child:

- Who is born to a mother who during the pregnancy used a controlled substance, as defined by [Tex. Health & Safety Code Chapter 481](#), other than a controlled substance legally obtained by prescription, or alcohol; and
- Who, after birth as a result of the mother’s use of the controlled substance or alcohol:

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- experiences observable withdrawal from the alcohol or controlled substance;
 - exhibits observable or harmful effects in the child's physical appearance or functioning;
or
 - exhibits the demonstrable presence of alcohol or a controlled substance in the child's bodily fluids. [Tex. Fam. Code § 161.001\(a\)](#).

[Tex. Fam. Code § 161.001\(b\)](#) provides the list of grounds for involuntary termination of parental rights. The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that:

- The parent has:
 - voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return. [Tex. Fam. Code § 161.001\(b\)\(1\)\(A\)](#);
 - voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months. [Tex. Fam. Code § 161.001\(b\)\(1\)\(B\)](#);
 - voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months. [Tex. Fam. Code § 161.001\(b\)\(1\)\(C\)](#);
 - knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child. [Tex. Fam. Code § 161.001\(b\)\(1\)\(D\)](#);
 - engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. [Tex. Fam. Code § 161.001\(b\)\(1\)\(E\)](#);
 - failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition. [Tex. Fam. Code § 161.001\(b\)\(1\)\(F\)](#);
 - abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence. [Tex. Fam. Code § 161.001\(b\)\(1\)\(G\)](#);
 - voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth. [Tex. Fam. Code § 161.001\(b\)\(1\)\(H\)](#);
 - contumaciously refused to submit to a reasonable and lawful order of a court under [Tex. Fam. Code Chapter 261, Subchapter D](#). [Tex. Fam. Code § 161.001\(b\)\(1\)\(I\)](#);

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- been the major cause of:
 - the failure of the child to be enrolled in school as required by the [Tex. Educ. Code](#); or
 - the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return; [Tex. Fam. Code § 161.001\(b\)\(1\)\(J\)](#);
 - executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by [Tex. Fam. Code Chapter 161](#). [Tex. Fam. Code § 161.001\(b\)\(1\)\(K\)](#);
 - been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under [Tex. Fam. Code Title 3](#) for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
 - [Tex. Penal Code § 19.02](#) (murder);
 - [Tex. Penal Code § 19.03](#) (capital murder);
 - [Tex. Penal Code § 19.04](#) (manslaughter);
 - [Tex. Penal Code § 21.11](#) (indecent with a child);
 - [Tex. Penal Code § 22.01](#) (assault);
 - [Tex. Penal Code § 22.011](#) (sexual assault);
 - [Tex. Penal Code § 22.02](#) (aggravated assault);
 - [Tex. Penal Code § 22.021](#) (aggravated sexual assault);
 - [Tex. Penal Code § 22.04](#) (injury to a child, elderly individual, or disabled individual);
 - [Tex. Penal Code § 22.041](#) (abandoning or endangering child);
 - [Tex. Penal Code § 25.02](#) (prohibited sexual conduct);
 - [Tex. Penal Code § 43.25](#) (sexual performance by a child);
 - [Tex. Penal Code § 43.26](#) (possession or promotion of child pornography);
 - [Tex. Penal Code § 21.02](#) (continuous sexual abuse of young child or disabled person);
 - [Tex. Penal Code § 20A.02\(a\)\(7\) or \(8\)](#) (trafficking of persons); and

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- [Tex. Penal Code § 43.05\(a\)\(2\)](#) (compelling prostitution). [Tex. Fam. Code § 161.001\(b\)\(1\)\(L\)](#);
 - had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of [Tex. Fam. Code § 161.001\(b\)\(1\)\(D\)](#) or [\(E\)](#) or substantially equivalent provisions of the law of another state; [Tex. Fam. Code § 161.001\(b\)\(1\)\(M\)](#). The petition for termination must be filed before the first anniversary of the date DFPS was granted managing conservatorship in a case where the parent's rights were terminated based on a (D) or (E) finding. [Tex. Fam. Code § 161.001\(d-1\)](#);
 - constructively abandoned the child who has been in the permanent or temporary managing conservatorship of DFPS for not less than six months, and:
 - DFPS has made reasonable efforts to return the child to the parent;
 - the parent has not regularly visited or maintained significant contact with the child; and
 - the parent has demonstrated an inability to provide the child with a safe environment. [Tex. Fam. Code § 161.001\(b\)\(1\)\(N\)](#);
 - failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of DFPS for not less than nine months as a result of the child's removal from the parent under [Tex. Fam. Code Chapter 262](#) for the abuse or neglect of the child. [Tex. Fam. Code § 161.001\(b\)\(1\)\(O\)](#);

Special Issue: *Courts are prohibited from ordering termination on “O” grounds if a parent proves by a preponderance of the evidence that the parent was unable to comply with specific provisions of the court order, that the parent made a good faith effort to comply with the order, and that failure to comply is not attributable to any fault of the parent.*

- used a controlled substance, as defined by [Tex. Health & Safety Code Chapter 481](#), in a manner that endangered the health or safety of the child, and:
 - failed to complete a court-ordered substance abuse treatment program; or
 - after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance. [Tex. Fam. Code § 161.001\(b\)\(1\)\(P\)](#);
- knowingly engaged in criminal conduct that has resulted in the parent's:
 - conviction of an offense; and
 - confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition. [Tex. Fam. Code § 161.001\(b\)\(1\)\(Q\)](#);

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- been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription. [Tex. Fam. Code § 161.001\(b\)\(1\)\(R\)](#);
 - voluntarily delivered the child to a designated emergency infant care provider under [Tex. Fam. Code § 262.302](#) without expressing an intent to return for the child. [Tex. Fam. Code § 161.001\(b\)\(1\)\(S\)](#);
 - been convicted of:
 - the murder of the other parent of the child under [Tex. Penal Code § 19.02](#) or [Tex. Penal Code § 19.03](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 19.02](#) or [Tex. Penal Code § 19.03](#);
 - criminal attempt under [Tex. Penal Code § 15.01](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 15.01](#), to commit the offense described by [Tex. Fam. Code § 161.001\(b\)\(1\)\(T\)\(i\)](#);
 - criminal solicitation under [Tex. Penal Code § 15.03](#), or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 15.03](#), of the offense described by [Tex. Fam. Code § 161.001\(b\)\(1\)\(T\)\(i\)](#); or
 - the sexual assault of the other parent of the children under [Tex. Penal Code § 22.011](#) or [Tex. Penal Code § 22.021](#) or other under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under [Tex. Penal Code § 22.011](#) or [Tex. Penal Code § 22.021](#). [Tex. Fam. Code § 161.001\(b\)\(1\)\(T\)](#); or
 - been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under [Tex. Penal Code § 22.011](#) or [Tex. Penal Code § 22.021](#), or other under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense [Tex. Penal Code § 22.011](#) or [Tex. Penal Code § 22.021](#). [Tex. Fam. Code § 161.001\(b\)\(1\)\(U\)](#); and
 - That termination is in the best interest of the child. [Tex. Fam. Code § 161.001\(b\)\(2\)](#).

Special Issue: For termination of parental rights to be granted, a court must find by clear and convincing evidence that at least one of the grounds for involuntary termination listed above exists AND that it is in the best interest of a child for parental rights to be terminated. Considerations for best interest include, but are not limited to, those listed in [Tex. Fam. Code § 263.307](#) and *Holley v. Adams*, 544 S.W.2d 367

(Tex. 1976). While at least one of the grounds for involuntary termination of parental rights may exist, it may not always be in the best interest of a child for parental rights to be terminated. If it is also not in the best interest of a child to name a parent as the managing conservator of the child, alternatives such as naming DFPS or a non-parent as the managing conservator of the child while awarding possessory conservatorship to a parent should be considered.

Evidence of one or more of the following does not constitute clear and convincing evidence sufficient for a court to make a finding under [Tex. Fam. Code § 161.001\(b\)](#) and order termination of the parent-child relationship. Evidence that the parent:

- Homeschooled the child;
- Is economically disadvantaged;
- Has been charged with a nonviolent misdemeanor offense other than:
 - an offense under [Tex. Penal Code Title 5](#);
 - an offense under [Tex. Penal Code Title 6](#); or
 - an offense that involves family violence, as defined by [Tex. Fam. Code § 71.004](#);
- Provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under [Tex. Occ. Code Chapter 169](#); or
- Declined immunization for the child for reasons of conscience, including a religious belief.
- Allowed a child to engage in independent activities.
- Sought a second opinion for a child's medical care or transferred a child's medical care to a new provider or facility [Tex. Fam. Code § 161.001\(c\)](#).

c. Involuntary Termination: Inability to Care for Child

The Texas Family Code authorizes the termination of the parental rights of a parent who is unable to meet the child's needs due to the parent's mental disability. The court may order termination of the parent-child relationship in a suit filed by DFPS if the court finds that:

- The parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child;
- The illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child;
- DFPS has been the temporary or sole managing conservator of the child of the parent for at least six months preceding the date of the hearing on termination held in accordance with [Tex. Fam. Code § 161.003\(c\)](#);
- DFPS made reasonable efforts to return the child to the parent; and

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- Termination is in the best interest of the child. [Tex. Fam. Code § 161.003\(a\)](#).

Immediately after filing a suit under [Tex. Fam. Code § 161.003](#), the court shall appoint an attorney ad litem to represent the interests of the parent against whom the suit is brought. [Tex. Fam. Code § 161.003\(b\)](#). An attorney appointed under [Tex. Fam. Code § 161.003\(b\)](#) shall represent the parent for the duration of the suit unless the parent, with the permission of the court, retains another attorney. [Tex. Fam. Code § 161.003\(d\)](#).

A hearing on the termination may not be held earlier than 180 days after the date on which the suit is filed. [Tex. Fam. Code § 161.003\(c\)](#).

d. Termination of the Rights of an Alleged Biological Father

Except as otherwise provided by [Tex. Fam. Code § 161.002](#), the procedural and substantive standards for termination of parental rights apply to the termination of the rights of an alleged father. [Tex. Fam. Code § 161.002\(a\)](#).

The rights of an alleged biological father may be terminated if:

- After being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under [Tex. Fam. Code Chapter 160](#);
- The child is over one year of age at the time the petition for termination of the parent-child relationship or for adoption is filed, he has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#), and after the exercise of due diligence by the petitioner:
 - his identity and location are unknown; or
 - his identity is known but he cannot be located;
- The child is under one year of age at the time the petition for termination of the parent-child relationship or for adoption is filed and he has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#); or
- He has registered with the paternity registry under [Tex. Fam. Code Chapter 160](#), but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful, despite the due diligence of the petitioner. [Tex. Fam. Code § 161.002\(b\)](#).

The termination of the rights of an alleged father under [Tex. Fam. Code § 161.002\(b\)\(2\) or \(b\)\(3\)](#) does not require personal service of citation or citation by publication on the alleged father, and there is no requirement to identify or locate an alleged father who has not registered with the paternity registry under [Tex. Fam. Code Chapter 160](#). [Tex. Fam. Code § 161.002\(c-1\)](#).

The termination of rights of an alleged father under [Tex. Fam. Code § 161.002\(b\)\(4\)](#) does not require service of citation by publication on the alleged father. [Tex. Fam. Code § 161.002\(d\)](#).

The court shall not render an order terminating parental rights under [Tex. Fam. Code § 161.002\(b\)\(2\) or \(b\)\(3\)](#) unless the court receives evidence of a certificate of the results of a search of the paternity

registry under [Tex. Fam. Code Chapter 160](#) from the vital statistics unit indicating that no man has registered the intent to claim paternity. [Tex. Fam. Code § 161.002\(e\)](#).

The court shall not render an ordering terminating parental rights under [Tex. Fam. Code § 161.002\(b\)\(4\)](#) unless the court, after reviewing the petitioner's sworn affidavit describing the petitioner's effort to obtain personal service of citation on the alleged father and considering any evidence submitted by the attorney ad litem for the alleged father, has found that the petitioner exercised due diligence in attempting to obtain service on the alleged father. The order shall contain specific findings regarding the exercise of due diligence of the petitioner. [Tex. Fam. Code § 161.002\(f\)](#).

5. Best Interest *Holley* Factors

The case *Holley v. Adams*, [544 S.W.2d 367, 373](#) (Tex. 1976) sets forth factors used to evaluate the evidence relating to best interest, which include but are not limited to:

- The desires of the child;
- The emotional and physical needs of the child now and in the future;
- The emotional and physical danger to the child now and in the future;
- The parenting abilities of the parties seeking custody;
- The programs available to assist these persons;
- The plans for the child by the parties seeking custody;
- The acts or omissions of the parent and any excuse for the same; and
- The stability of the home or proposed placement.

The *Holley* factors appear frequently in case law. Here are some examples that might be informative:

"The absence of evidence about some of these *Holley* considerations would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child. Other cases, however, will present more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice to uphold the jury's finding that termination is required." *In re C.H.*, [89 S.W.3d 17, 28](#) (Tex. 2002).

"Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a fact finder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's future home environment." *In re C.H.*, [89 S.W.3d 17, 32](#) (Tex. 2002).

"The Department is required to prove by clear and convincing evidence that termination of a parent's right to his children is in the children's best interest [...] In determining whether the evidence is legally

sufficient to support a best-interest finding, we ‘consider the evidence that supports a deemed finding regarding best interest and the undisputed evidence,’ and ignore evidence a fact-finder could reasonably disbelieve. *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (citing *In re J.F.C.* 96 S.W. 3d 256 at 268 (Tex. 2002).

“A trial court’s best-interest finding must be supported by clear and convincing evidence in the record [...] [It is error to rely] on a lack of evidence to contradict a finding as if it were evidence supporting the finding [...] A lack of evidence does not constitute clear and convincing evidence.” *In re E.N.C.*, 384 S.W.3d 796, 808 (Tex. 2012).

6. Presumptions Involved in Conservatorship

a. Parent Should Be Appointed as Managing Conservator

Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child’s physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child. It is a rebuttable presumption that the appointment of the parents as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption. [Tex. Fam. Code § 153.131\(b\)](#).

b. Parent with History of Domestic Violence or Sexual Abuse

In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party’s spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit. [Tex. Fam. Code § 153.004\(a\)](#).

Under [Tex. Fam. Code § 153.004\(e\)](#), it is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present neglect, abuse or family violence by that parent, or any person who resides in that parent’s household or who is permitted by that parent to have unsupervised access to the child during that parent’s periods of possession of or access to the child. [Tex. Fam. Code § 153.004\(e\)](#). The statute further provides that courts may consider evidence of a history or pattern of past or present child neglect, abuse or family violence by a parent or other person, as applicable. [Tex. Fam. Code § 153.004\(f\)](#). For more information about dynamics of family violence in a child welfare case, please see the [Domestic Violence](#) chapter in this Bench Book.

c. Parent Should Be Appointed as Possessory Conservator

The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the child. [Tex. Fam. Code § 153.191](#).

The court shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator. [Tex. Fam. Code § 153.004\(c\)](#).

The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that:

- There is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit; or
- The parent engaged in conduct that constitutes an offense under [Tex. Penal Code § 21.02](#), [Tex. Penal Code § 22.011](#), [Tex. Penal Code § 22.021](#), or [Tex. Penal Code § 25.02](#), and that as a direct result of the conduct, the victim of the conduct became pregnant with the parent's child. [Tex. Fam. Code § 153.004\(d\)\(2\)](#).

Notwithstanding [Tex. Fam. Code § 153.004\(d\)](#), a court may allow a parent to have access to a child if the court makes one of several findings pursuant to [Tex. Fam. Code § 153.004\(d-1\)](#), but see [Tex. Fam. Code § 153.004\(e\) and \(f\)](#) regarding visitation and access to a child by any person who will have unsupervised access to a child who also has a history or pattern of past or present child neglect, abuse or family violence.

If the court enters an order appointing DFPS as the permanent managing conservator of the child without terminating the rights of the parent of the child, the court must find that:

- Appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; and
- It would not be in the child's best interest to appoint a relative of the child or another person as the managing conservator. [Tex. Fam. Code § 263.404\(a\)](#).

Special Issue: *Although not required by law, judges should enter final orders regarding conservatorship of the child, child support, and access to the child. If DFPS requests dismissal of its lawsuit after reunification with a parent, the court may want to consider whether:*

- *The dismissal or nonsuit is in the best interest of each child affected by the suit; and*
- *Any orders for the conservatorship, possession of or access to, or support of each child affected by the suit should continue in effect after the dismissal or nonsuit.*

7. Considerations in Naming DFPS as Permanent Managing Conservator

If the court determines that DFPS should be named as permanent managing conservator of the child without terminating the rights of a parent of the child, the court shall take the following factors into consideration:

- The child will reach 18 years of age in not less than three years;
- The child is 12 years or older and has expressed a strong desire against termination or has continuously expressed a strong desire against being adopted; and
- The needs and desires of the child. [Tex. Fam. Code § 263.404\(b\)](#).

Special Issue: *The court is required to continue the appointment of the AAL, or the GAL, or an attorney serving in the dual role as long as child is in DFPS conservatorship but as a best practice, courts should continue the appointment of both the child’s AAL and GAL as long as the child is in the managing conservatorship of DFPS.*

8. Final Order Appointing DFPS as Managing Conservator of Certain Abandoned Children (“Baby Moses” Law)

There is a rebuttable presumption that a parent who delivers a child to a designated emergency infant care provider in accordance with [Tex. Fam. Code Subchapter D, Chapter 262](#):

- Is the child’s biological parent;
- Intends to relinquish parental rights and consents to the termination of parental rights with regard to the child; and
- Intends to waive the right to notice of the suit terminating the parent-child relationship. [Tex. Fam. Code § 263.407\(a\)](#).

A party that seeks to rebut a presumption in [Tex. Fam. Code § 263.407\(a\)](#) may do so at any time before the parent-child relationship is terminated with regard to the child. [Tex. Fam. Code § 263.407\(a-1\)](#).

If a person claims to be the parent of a child taken into possession under [Tex. Fam. Code Chapter 262, Subchapter D](#) [Emergency Possession of Certain Abandoned Children], before the court renders a final order terminating the parental rights of the child’s parents, the court shall order genetic testing for parentage determination unless parentage has previously been established. The court shall hold the petition for termination of the parent-child relationship in abeyance for a period not to exceed 60 days pending the results of the genetic testing. [Tex. Fam. Code § 263.407\(b\)](#).

Before the court may render an order terminating parental rights with regard to a child taken into DFPS custody under [Tex. Fam. Code § 262.303](#), DFPS must:

- Verify with the National Crime Information Center and state and local law enforcement agencies that the child is not a missing child; and
- Obtain a certificate of the search of the paternity registry under [Tex. Fam. Code Chapter 160, Subchapter E](#) not earlier than the date DFPS estimates to be the 30th day after the child’s date of birth. [Tex. Fam. Code § 263.407\(c\)](#).

9. Requirements for Appointment of Nonparent as Managing Conservator

[Tex. Fam. Code § 263.408](#) imposes additional duties on DFPS when a nonparent is appointed as managing conservator of a child in the legal custody of DFPS.

In a suit in which the court appoints a nonparent as managing conservator of a child, DFPS must provide the nonparent with an explanation of the difference between appointment as a managing conservator of a child and adoption of a child, including specific statements informing the nonparent that:

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- The nonparent’s appointment conveys only the rights specified by the court order or applicable laws instead of the complete rights of a parent conveyed by adoption;
 - A parent may be entitled to request visitation with the child or petition the court to appoint the parent as the child’s managing conservator, notwithstanding the nonparent’s appointment as managing conservator; and
 - The nonparent’s appointment as the child’s managing conservator will not result in the eligibility of the nonparent and child for post-adoption benefits. [Tex. Fam. Code § 263.408\(a\)\(1\)](#).

In addition to the rights and duties provided under [Tex. Fam. Code § 153.371](#), the court order appointing the nonparent as managing conservator must include provisions that address the authority of the nonparent to:

- Authorize immunization of the child or any other medical treatment that requires parental consent;
- Obtain and maintain health insurance coverage for the child and automobile insurance for the child, if appropriate;
- Enroll the child in a day-care program or school, including kindergarten;
- Authorize the child to participate in school-related or extracurricular or social activities, including athletic activities;
- Authorize the child to obtain a learner’s permit, driver’s license, or state-issued identification card;
- Authorize employment of the child;
- Apply for and receive public benefits for or on behalf of the child; and
- Obtain legal services for the child and execute contracts or other legal documents for the child. [Tex. Fam. Code § 263.408\(a\)\(2\)](#).

The court must require evidence that the nonparent was informed of the rights and duties of a nonparent appointed as managing conservator of a child before the court renders an order appointing the nonparent as managing conservator of a child. [Tex. Fam. Code § 263.408\(b\)](#). Before entering a final order that awards permanent custody of a child in DFPS conservatorship to a nonparent relative the court must verify that the relative was offered the opportunity to become a licensed foster placement to qualify for a Permanency Care Assistance program and that the relative declined and the Child Placing Agency has been notified of the declination. [Tex. Fam. Code § 263.409](#).

10. Rendering a Final Order after Commencing a Trial on the Merits

The court must render a final order after commencement of trial on the merits in a case brought by DFPS within 90 days, with no tolling for recesses. A party may file a mandamus proceeding to compel compliance. The court may grant a good cause extension that specifies the good cause and the length of the extension. [Tex. Fam. Code § 263.4011](#).

