

Reform CPS Investigation Procedures and Court Oversight

The Issue

The U.S. Constitution and the Texas Constitution recognize that the parent-child relationship is a fundamental right that may not be interfered with by the state absent a compelling reason. Given that “few forms of state action are so severe and so irreversible” as permanently separating a parent and child, courts play an important role in protecting the rights of families against improper government intervention.

Generally speaking, [Texas Family Code Section 262](#) prohibits Child Protective Services (CPS) from seizing a child from her parents absent a court order, parental consent, or imminent danger of physical or sexual abuse. With the exception of limited, emergency situations, CPS in Texas is required to obtain a court order prior to taking possession of a child in almost all circumstances.

Generally speaking, [Texas Family Code Section 262](#) prohibits Child Protective Services (CPS) from seizing a child from her parents absent a court order, parental consent, or imminent danger of physical or sexual abuse. With the exception of limited, emergency situations, CPS in Texas is required to obtain a court order prior to taking possession of a child in almost all circumstances. [Family Code Section 262.201](#) requires that a court hearing, known as a “full adversary hearing,” be held within 14 days of the date the child was removed by CPS. This hearing is the first meaningful opportunity a judge will have to review the removal and determine whether the child should remain in state custody or be returned home to her family. It is also the first time that the child’s parents will be able to mount a defense and seek the return of their child. According to a 2018 survey conducted by the Supreme Court of Texas Children’s Commission, one third of parents had an [attorney appointed at the adversary hearing](#). This timing means that these parents did not have the benefit of consulting with legal counsel prior to the hearing.

At the conclusion of the full adversary hearing, [Family Code Section 262.201\(g\)](#) requires the court to order the return of the child to her family unless it finds enough 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 removal in order to protect the child from harm and that CPS made reasonable efforts to prevent removal, and (c) reasonable efforts have been made to allow the child to return home, but there is a continuing danger to the child. If the court makes these findings, the child will remain in foster care. The “person of ordinary prudence and caution” evidentiary standard applied when making decisions concerning removing children from their families is lower than the default “preponderance of the evidence” standard found in [Family Code Section 105.005](#) and is roughly equivalent to probable cause.

If the court rules that the child should remain in foster care, a service plan will be prepared according to the requirements of [Family Code Section 263, Subchapter B](#) outlining the steps the child’s parents must take to address factors placing the child at risk of harm and enable the return of the child. Since [Family Code Section 263.401](#) requires that a final trial on the merits be held

no later than the first Monday after the first anniversary of the conclusion of the adversary hearing, the child’s parents effectively have 12 months to complete the service plan and achieve reunification. If they are unable to do so within this 12-month time frame, they face the prospect of having their parental rights terminated. Current DFPS practice is to [request termination](#) as part of the original petition filed with the court at the time of removal. According to federal data, Texas leads the nation in the number of children waiting for adoption whose parents had their parental rights terminated.

It is well established that separating a child from her family and placing her into foster care causes trauma and can result in long-term negative outcomes. One study, which compared outcomes for children in Cook County, Illinois, who were placed in foster care with other children who were investigated for neglect or abuse but did not enter foster care, [found that children placed in foster care tended to fare worse](#) across a number of outcomes, including juvenile delinquency, teen motherhood, employment, and economic prosperity. The study’s result suggests that children at marginal risk fare better in the long term if allowed to remain at home.

Given that removal into foster care presents risks to children that adoption cannot cure, it is important for courts to exercise robust oversight of CPS and balance the risk of harm posed by allowing the child to remain at home with the risks posed by removal. Policymakers and judicial officials should work together to ensure that child protection court procedures protect the fundamental rights of families, minimize the risk of harm posed by family separation, and prioritize keeping children and reunifying families as quickly as possible.

The Facts

- As of the end of FY 2019, there were [51,417 children](#) in the custody of the Department of Family and Protective Services.
- In FY 2019, [CPS removed 18,615 children](#) involuntarily from their home—a removal rate of 2.51 children per 1,000.
- Between FY 2010 and FY 2019, [removals have increased by nearly 14%](#).
- Children removed by the Department of Family and Protective Services spend an average of [19.3 months](#) in state custody. Only [33% of children](#) who enter foster care ever return home to their families.
- Of the 254 counties in Texas, [129 are served by a CPS specialty court](#) overseen by unelected and unaccountable associate judges.

Recommendations

- Limit removals to cases of imminent danger where removal is the least harmful intervention for the child.
- Increase the standard of proof for separating a child from her family to, at minimum, a “preponderance of the evidence.”
- Decisions to remove and place children in foster care should be subject to oversight by elected prosecutors and judges who are accountable to the electorate.
- Prioritize earlier reunification of families subject to court oversight when a continuing danger to the physical health or safety of the child no longer exists in the home.
- Extend procedural due process protections for children and parents to prevent unnecessary removals and prioritize family reunification. Protections should include providing for pre-petition access to counsel, requiring DFPS to plead allegations with specificity, providing parents with adequate notice and opportunity to be heard, and limiting the amount of time CPS can require a family to comply with services.

Resources

[*The Long and Winding Road: Improving Outcomes for Children Through CPS Court Reform*](#) by Andrew C. Brown, Texas Public Policy Foundation (Oct. 2020).

[*Second Chance Parenting: Reinstating Parental Rights*](#) by Nikki Pressley, Texas Public Policy Foundation (Sept. 2020).

[*The Blacklist: How Central Registry Reform Can Protect Kids and Promote Prosperity*](#) by Charissa Huntzinger, Texas Public Policy Foundation (May 2020).

[*Child Protection Courts*](#) by Texas Office of Court Administration (Dec. 2019).

[*Amicus Curiae Brief of State Senator Bob Hall, et al. in Support of Relators’ Petition for Writ of Mandamus, In Re Ashley Pardo*](#)

and Daniel Pardo, Individually and as Next Friend for K.D.P., a Minor, Supreme Court of Texas, No. 19-0760 (Sept. 2019).

[*AFCARS State Data Tables 2009 Through 2018*](#) by the Administration for Children and Families Children’s Bureau (Aug. 2019).

[*Let My People Go Home: Reducing Foster Care Trauma by Prioritizing the Use of Monitored Return*](#) by Andrew C. Brown, and Charissa Huntzinger, Texas Public Policy Foundation (April 2019).

[*Letter to the Office of Texas Attorney General Ken Paxton Regarding Parental Rights*](#) by Andrew Brown, Texas Public Policy Foundation (Jan. 2019).

[*CPS Conservatorship: Children in DFPS Legal Responsibility*](#) by Texas Department of Family and Protective Services, DFPS Data Book (2019).

[*CPS Conservatorship: Removals*](#) by Texas Department of Family and Protective Services, DFPS Data Book (2019).

[*CPS Conservatorship: Children Exiting DFPS Legal Custody*](#) by Texas Department of Family and Protective Services, DFPS Data Book (2019).

[*5560 Involuntary and Voluntary Termination of Parental Rights*](#) by Texas Department of Family and Protective Services, Child Protective Services Handbook (March 2018).

[*2018 Study of Legal Representation in Child Protective Services Cases*](#) by Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (2018).

[*Effects of CPS Involvement on Child Well-being, Testimony before the House Juvenile Justice and Family Issues Committee*](#) by Brandon Logan, Texas Public Policy Foundation (May 3, 2017).

[*Child Protection and Child Outcomes: Measuring the Effects of Foster Care*](#) by Joseph J. Doyle, Jr., *American Economic Review*, 97(5), 1583–1610 (Dec. 2007).