

## Review of Recent Juvenile Cases (2009)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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### Juvenile Court continues to have jurisdiction, of those children at TYC, who were over 19 years of age when Senate Bill 103 went into effect, for transfer to TDCJ.[In the Matter of J.J.](09-1-11)

On December 31, 2008, the Austin Court of Appeals concluded that the versions of [sections 61.079\(a\)](#) and [61.084\(g\) of the human resources code](#) in effect at the time this respondent was adjudicated delinquent in 2005 govern TYC's referral of him to the juvenile court for possible transfer.

¶ 09-1-11. In the Matter of J.J., \_\_\_ S.W.3d. \_\_\_, No. 03-08-00023-CV, 2008 WL 5423264 (Tex.App.-Austin, 12/31/08).

**Facts:** J.J. was born on April 8, 1988. In November 2004, the State filed its third amended petition alleging delinquent conduct. In the petition, the State alleged that, on October 10 and 11, 2004, J.J. committed the offenses of aggravated assault with a deadly weapon and aggravated robbery with a deadly weapon, specifically a firearm. J.J. pleaded true to committing the offenses alleged in the petition. The juvenile court found that J.J. had engaged in delinquent conduct, imposed a determinate sentence of twenty years, [\[FN1\]](#) and ordered that J.J. be committed to the care, custody, and control of TYC.

[FN1.](#) A determinate sentence is one in which the term of commitment begins in the custody of TYC with a possible transfer to TDCJ. See [Tex. Fam.Code Ann. § 54.04\(d\)\(3\)](#) (providing for determinate sentencing) (West Supp.2008); *see also* [Tex. Fam.Code Ann. § 53.045\(a\)](#) (listing certain offenses for which determinate sentence may be assessed). A determinate sentence is usually reserved for violent or habitual juvenile offenders. See Robert Dawson, *Texas Juvenile Law* 421-25 (6th ed.2004) (explaining history and scope of determinate-sentencing system).

In September 2007, the Acting Executive Director of TYC recommended to the juvenile court that J.J. be transferred to TDCJ pursuant to [section 61.079\(a\) of the human resources code](#). [\[FN2\]](#) The juvenile court set a transfer hearing for November 8, 2007.

[FN2.](#) We note that this was not the first time that TYC recommended J.J.'s transfer to TDCJ. The record reflects that, on May 11, 2006, when J.J. was eighteen, TYC referred J.J. to the juvenile court for a transfer hearing, but, on June 14, 2006, TYC withdrew its request.

Prior to the hearing, J.J. filed a "plea to the jurisdiction." In the plea, J.J., who had turned nineteen in April 2007, argued that [section 61.079\(a\) of the human resources code](#), as it had been amended effective June 8, 2007, "only authorizes TYC to refer youth to the juvenile court for transfer hearings to TDCJ after the youth

becomes 16 years of age but before the youth's 19th birthday." See [Tex. Hum. Res. Code Ann. § 61.079\(a\)](#) (West Supp.2008). As J.J. observed, "TYC failed to refer him to the Court for approval of a transfer to TDCJ prior to his 19th birthday." J.J. further reasoned that "the juvenile court which committed a youth to TYC no longer has any role in determining whether the youth should be released from TYC and incarcerated in TDCJ after his or her 19th birthday."

In response, the State argued that the juvenile court's jurisdiction over J.J. was governed not by [section 61.079 of the human resources code](#), but by [section 51.0411 of the family code](#). [Section 51.0411 of the family code](#) provides that the juvenile court "retains jurisdiction over a person, without regard to the age of the person, who is referred to the court under Section 54.11 for transfer to the Texas Department of Criminal Justice or release under supervision." [Tex. Fam. Code Ann. § 51.0411](#) (West 2002). The State also argued that the amended version of [section 61.079 of the human resources code](#) did not govern J.J.'s transfer. The version of the statute that should apply, according to the State, was the version in effect at the time J.J. was adjudicated delinquent in 2005. That version of the statute gave TYC authority to refer a child to the juvenile court for transfer to TDCJ before the child becomes 21 years of age. [\[FN3\]](#)

[FN3](#). See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 61, 1995 Tex. Gen. Laws 2517, 2572 (amended 2007) (current version at [Tex. Hum. Res. Code Ann. § 61.079\(a\)](#) (West Supp.2008)).

The juvenile court denied the plea to the jurisdiction. Then, after hearing evidence, the juvenile court transferred J.J. to TDCJ to serve the remainder of his twenty-year sentence. This appeal followed.

**Held:** Affirmed

**Opinion:** We first address J.J.'s second issue, in which he contends that the juvenile court abused its discretion in transferring J.J. to TDCJ because it lacked statutory authority or jurisdiction to transfer him after he turned nineteen. [\[FN4\]](#) In support of this contention, J.J. relies on [sections 61.079\(a\)](#) and [61.084\(g\) of the human resources code](#), as amended in 2007 by Senate Bill 103. [\[FN5\]](#) As amended, [section 61.079\(a\)](#) provides, in relevant part:

[FN4](#). The State attempts to distinguish between J.J.'s arguments below challenging the juvenile court's "jurisdiction" and his arguments on appeal, which are phrased in terms of the juvenile court's "authority" and whether it "abused its discretion" in exceeding that authority. Relying on this purported distinction, the State argues that J.J. has failed to brief his contentions regarding the juvenile court's "jurisdiction" on appeal. We disagree. Whether styled in terms of a lack of "jurisdiction," lack of "authority," or abuse of discretion, J.J.'s central contention both here and below has been that the 2007 amendments to the human resources code precluded his transfer to TDCJ because he was age 19 at the time of the transfer order. J.J. has preserved this contention on appeal.

[FN5](#). See Act of May 25, 2007, 80th Leg., R.S., ch. 263, 2007 Tex. Gen. Laws 421 (effective June 8, 2007).

After a child sentenced to commitment under [Section 54.04\(d\)\(3\)](#), [54.04\(m\)](#), or [54.05\(f\)](#), [Family Code](#), becomes 16 years of age *but before the child becomes 19 years of age*, the commission may refer the child to the juvenile court that entered the order of commitment for approval of the child's transfer to the Texas Department of Criminal Justice for confinement.... [Tex. Hum. Res. Code Ann. § 61.079\(a\)](#) (emphasis added).

The amended version of [section 61.084\(g\)](#) provides:

The commission shall transfer a person who has been sentenced under a determinate sentence to commitment under [Section 54.04\(d\)\(3\), 54.04\(m\)](#), or [54.05\(f\), Family Code](#), or who has been returned to the commission under [Section 54.11\(i\)\(1\), Family Code](#), to the custody of the Texas Department of Criminal Justice *on the person's 19th birthday*, if the person has not already been discharged or transferred, to serve the remainder of the person's sentence on parole as provided by [Section 508.156, Government Code](#). *Id.* [§ 61.084\(g\) \(West Supp.2008\)](#) (emphasis added).

Under the amended versions of these statutes, according to J.J., TYC lost the authority to refer him to the juvenile court for transfer to TDCJ after he turned nineteen, which in turn divested the juvenile court of authority to act on such a referral. J.J. further asserts that once he turned nineteen, the amended version of [section 61.084\(g\)](#) required TYC to transfer him to the custody of TDCJ to serve the remainder of his sentence on parole.

The State maintains that the amended versions of these statutes do not apply to J.J.'s transfer. Instead, the State contends, the versions of the statutes in effect when J.J. was adjudicated delinquent in 2005 govern. Under these versions of the statutes, TYC could refer a person for transfer to TDCJ no later than the person's 21st birthday. [\[FN6\]](#)

[FN6.](#) See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 61, 1995 Tex. Gen. Laws 2517, 2572, 2573-74 (current versions at [Tex. Hum. Res.Code Ann. §§ 61.079\(a\), 61.084\(g\)](#) (West Supp.2008)).

Although we review the juvenile court's decision to transfer a juvenile from TYC to TDCJ for abuse of discretion, [In re F.D., 245 S.W.3d 110, 113 \(Tex.App.-Dallas 2008, no pet.\)](#), our resolution of J.J.'s specific contentions here turn on questions of statutory construction, which present questions of law that we review de novo. [First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 631 \(Tex.2008\)](#). Our primary objective in statutory construction is to give effect to the legislature's intent. [State v. Shumake, 199 S.W.3d 279, 284 \(Tex.2006\)](#). We seek that intent "first and foremost" in the statutory text. [Lexington Ins. Co. v. Strayhorn, 209 S.W.3d 83, 85 \(Tex.2006\)](#). We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results that the legislature could not have intended. [City of Rockwall v. Hughes, 246 S.W.3d 621, 625-26 \(Tex.2008\)](#); see [Tex. Gov't Code Ann. § 311.011](#) (West 2005) ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). We must consider the statute as a whole and in context, and not merely consider provisions in isolation. [Texas Dept. of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 \(Tex.2004\)](#).

We first observe that the legislature has given the juvenile court "exclusive original jurisdiction over proceedings under this title [the juvenile justice code]." [Tex. Fam.Code Ann. § 51.04\(a\)](#) (West 2002). This jurisdiction extends to proceedings "in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct." *Id.* These proceedings include hearings to release a juvenile under the supervision of TYC or to transfer a juvenile to TDCJ. See *id.* [§ 54.11\(a\) \(West Supp.2008\)](#). [\[FN7\]](#) Furthermore, the legislature has provided that "[t]he court retains jurisdiction over a person, *without regard to the age of the person*, who is referred to the court under [Section 54.11](#) for transfer to the Texas Department of Criminal Justice or release under supervision." *Id.* [§ 51.0411](#) (West 2002) (emphasis added).

[FN7.](#) [Section 54.11\(a\)](#) provides,

On receipt of a referral under [Section 61.079\(a\), Human Resources Code](#), for the transfer to the institutional division of the Texas Department of Criminal Justice of a person committed to

the Texas Youth Commission under [Section 54.04\(d\)\(3\)](#), [54.04\(m\)](#), or [54.05\(f\)](#), or on receipt of a request by the commission under [Section 61.081\(g\)](#), [Human Resources Code](#), for approval of the release under supervision of a person committed to the commission under Section 54.04(d)(3), [54.04\(m\)](#), or [54.05\(f\)](#), the court shall set a time and place for a hearing on the release of the person.

[Tex. Fam.Code Ann. § 54.11\(a\)](#) (West Supp.2008).

The legislature did not amend or alter any of these provisions when it amended the human resources code. By the express terms of these provisions, the juvenile court retained jurisdiction to transfer J.J. to TDCJ after he turned nineteen. J.J.'s arguments regarding the 2007 amendments to the human resources code instead potentially implicate whether TYC retained authority, after J.J. turned nineteen, to refer him to the juvenile court for transfer to TDCJ. The answer depends on whether the amended versions of [sections 61.079\(a\)](#) and [61.084\(g\)](#), which took effect after J.J. was adjudicated delinquent but prior to TYC's referral of J.J. to the juvenile court for a transfer hearing, govern his referral. In a memorandum opinion decided earlier this year, this Court concluded that the amended statutes do not apply retrospectively to persons who had been adjudicated delinquent as juveniles under the prior law. *See In re T.G.*, No. 03-07-00543-CV, 2008 Tex.App. LEXIS 4551, at \*21 (Tex.App.-Austin June 19, 2008, pet. denied) (mem.op.) ("We conclude that the legislature intended for the amendments to [human resources code sections 61.079](#) and [61.084](#) to operate only prospectively."). J.J. acknowledges this opinion, but asks that we "review" or reconsider it. We conclude that *T.G.* was correctly decided, and will follow it here.

"A statute is presumed to be prospective in its operation unless expressly made retrospective." [Tex. Gov't Code Ann. § 311.022](#) (West 2005); *see also* [Tex. Const. art. I, § 16](#) ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). "Statutes are only applied retroactively if the statutory language indicates that the Legislature intended that the statute be retroactive." *In re M.C.C.*, 187 S.W.3d 383, 384 (Tex.2006). Senate Bill 103 contained language indicating that the legislature may have intended retrospective application in certain cases involving juveniles who had committed misdemeanors:

A person committed to the Texas Youth Commission on the basis of conduct constituting the commission of an offense of the grade of misdemeanor under Subdivision [\(2\)](#), [Subsection \(d\)](#), [Section 54.04](#), [Family Code](#), as it existed before the effective date of this Act, must be discharged from the custody of the Texas Youth Commission not later than the person's 19th birthday.

Act of May 25, 2007, 80th Leg., R.S., ch. 263, § 65, 2007 Tex. Gen. Laws 421, 455 (emphasis added).

However, there is no language in Senate Bill 103 indicating that the legislature intended the amended versions of [sections 61.079\(a\)](#) and [61.084\(g\)](#) to apply retroactively in cases involving felony offenses. As this Court observed in *T.G.*, the above provision demonstrates "[t]hat the legislature knew how to make a provision retrospective," *In re T.G.*, 2008 Tex.App. LEXIS 4551, at \*20, implying that it did not intend similar retrospective application to juveniles who had committed felonies:

It is equally clear that the legislature sought only to effect an immediate discharge from the TYC for those persons who had committed a misdemeanor. It necessarily follows that the legislature did not intend to discharge or release to parole a person ... who had committed a felony and had received a determinate sentence.

*Id.*

J.J. received a determinate sentence for committing aggravated assault with a deadly weapon and aggravated robbery with a deadly weapon, both felony offenses. J.J. was sentenced prior to the effective date of the 2007 amendments to [sections 61.079\(a\)](#) and [61.084\(g\) of the human resources code](#). Absent express language indicating that the legislature intended retrospective application, we must presume that the amended versions of [sections 61.079\(a\)](#) and [61.084\(g\)](#) do not apply here. See *In re M.C.C.*, 187 S.W.3d at 384.

J.J. attributes significance to the fact that there is no specific savings clause in Senate Bill 103 involving the statutory amendments at issue in this case. Observing that the legislature included a specific savings clause for certain other portions of the 2007 amendments, [FN8] J.J. suggests that by omitting a similar savings clause for [sections 61.079\(a\)](#) and [61.084\(g\)](#), the legislature evidenced its intent to discontinue the former versions of those statutes as soon as the amended versions became effective. We disagree. Instead, the general savings clause of the Code Construction Act governs:

[FN8]. For example, section 67 provides:

The change in law made by [Section 54.052, Family Code](#), as added by this Act, and [Subsection \(c\), Section 61.0841, Human Resources Code](#), as added by this Act, applies only to conduct for which a child is adjudicated on or after the effective date of this Act. *A child who is adjudicated before the effective date of this Act is governed by the law in effect when the child was adjudicated, and the former law is continued in effect for that purpose.*

Act of May 25, 2007, 80th Leg., R.S., ch. 263, § 67, 2007 Tex. Gen. Laws 421, 455 (emphasis added).

(a) Except as provided by Subsection (b), [FN9] the reenactment, revision, amendment, or repeal of a statute does not affect:

[FN9]. Subsection (b) provides, "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." [Tex. Gov't Code Ann. § 311.031\(a\)](#) (West 2005). As there was no reduction in "penalty, forfeiture, or punishment" in this case, this subsection does not apply.

(1) the prior operation of the statute or any prior action taken under it;

(2) any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it;

(3) any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal; or

(4) any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended. \*5 [Tex. Gov't Code Ann. § 311.031\(a\)](#) (West 2005) (emphasis added).

We are "to presume that the general savings clause applies unless a contrary legislative intent is shown by clear expression or necessary implication." [Quick v. City of Austin](#), 7 S.W.3d 109, 130 (Tex.1999). Finding no contrary legislative intent, we conclude that the general savings clause applies in this case. Specifically,

subsection (a)(4) applies, as the hearing to transfer J.J. to TDCJ was a proceeding concerning his punishment for the felony offenses he had previously committed and for which he had been adjudicated delinquent prior to the effective date of Senate Bill 103.

**Conclusion:** We conclude that the versions of [sections 61.079\(a\)](#) and [61.084\(g\) of the human resources code](#) in effect at the time J.J. was adjudicated delinquent in 2005 govern TYC's referral of him to the juvenile court for possible transfer. Consequently, TYC retained the authority to refer J.J. to the juvenile court for transfer to TDCJ after he turned nineteen.