

Certification and Determinate Sentencing

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Biographical Information

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juvenile offender. One of the ways that states have addressed this issue is by enacting legislation which allows for the removal of juveniles from the juvenile system to adult criminal courts. Generally there are three basic processes for removing juveniles to adult criminal court utilized throughout the country.

Judicial waiver is the process which a juvenile court judge makes the determination to transfer a child to adult court after a hearing. By far judicial waiver is the most common type of transfer or certification.

Automatic waiver, legislative waiver or sometimes referred to as statutory exclusion is the transfer process where certain offenses alleged to have been committed by juveniles are statutorily excluded from juvenile court and original jurisdiction rests with the criminal court. A large number of states have this process. Commonly referred to as automatic waiver because these statutes remove juvenile court jurisdiction "automatically" and no motion or request from the State or even a decision by the juvenile court judge is required.⁵

The direct file, is the transfer process which gives the prosecution the discretion to determine whether to proceed in juvenile court or criminal court against the juvenile. Direct files places sole discretion with the prosecutor to determine if proceedings will be initiated in juvenile court or criminal court.

In Texas the judicial waiver process is used in removing juveniles to adult criminal court and is referred to as discretionary transfer, waiver of jurisdiction or most commonly certification. Discretionary transfer to criminal court or certifications allows a juvenile judge to make the determination whether a juvenile respondent is

⁵ See for example Florida, New York, Colorado Statutes

transferred from the juvenile system to the adult criminal system. Although certifications account for a relatively small percentage of proceedings in juvenile court they are extremely important hearings in that the juvenile court is making a decision to transfer a respondent to adult criminal court⁶.

Proceedings in juvenile court are considered civil in nature and have been designed to remove the "taint of criminality from children" and to focus on treatment, training and rehabilitation of the child⁷. Once a juvenile is certified to stand trial as an adult all of the protections available in the juvenile system are lost and the adult system takes over.

Texas law establishes three types of transfer or waiver of jurisdiction proceedings: hearings where the juvenile respondent is under the age of eighteen at the time of the hearing; hearings where the respondent is an adult or over the age of eighteen at the time of the commencement of the hearing; and the mandatory certification where a person has previously been certified and commits a new eligible offense.

Certification Eligibility

The certification proceedings are initiated by the State filing a Motion or Petition for Discretionary Transfer and the issuance of a summons. The minimal requirements necessary for certification bestow on State prosecutors a wide range of discretion in determining which cases to seek certification. However,

⁶ The number of certification proceedings has dropped dramatically over the years; Texas Juvenile Probation Commission statistics show 596 actual certifications occurred in 1994 compared to 142 certifications in 2001. See "Who Gets Certified? An Empirical Study of Discretionary Transfers from Juvenile to Criminal Court" Robert O. Dawson, Juvenile Law Section Report December 2002.

⁷ TEX. FAM. CODE § 51.01.

certifications are usually limited to the most serious offenses, juveniles with chronic delinquent history, or older juveniles who are alleged to have committed the more serious offenses.

The juvenile court has exclusive jurisdiction over nearly all criminal offenses committed by juveniles.⁸

Under Age Eighteen

Section 54.02 of the Family Code establishes when a child under eighteen may be transferred to adult court. Section 54.02 sets forth three requirements:

1. the child is alleged to have violated a penal law of the grade of felony;
2. the child was:
 - a. fourteen or older at the time he is alleged to have committed the offense, if the offense is
 - a capital felony,
 - an aggravated controlled substance felony⁹, or
 - a first degree felony;
 - or
 - and no adjudication hearing has been conducted concerning that offense;

⁸ See generally, TEX. PEN. CODE 8.07(a)(1)-(5). TEX. PEN. CODE § 8.07(a)(7) was enacted in 2001 to eliminate a potential defense to prosecution under TEX. FAM. CODE § 54.02(j)(2)(A), and now permits prosecution in criminal court of a person eighteen or older charged with murder or capital murder allegedly committed between the ages of ten and fourteen. TEX. FAM. CODE § 51.03(c) (providing exception for perjury). TEX. FAM. CODE § 51.04(a); *In the Matter of N.J.A.*, 997 S.W.2d 554 (Tex. 1999).

⁹ A felony that carries a higher minimum term or higher possible fine than a first degree felony such as possession of large amounts of narcotics.

- b. fifteen or older at the time he or she allegedly committed
 - a second degree felony,
 - a third degree felony,
 - or
 - a state jail felony;
- and no adjudication hearing has been conducted concerning that offense;
3. after a full investigation and a hearing, the juvenile court finds that:
 - a. there is probable cause to believe that the child committed the offense, and
 - b. because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings¹⁰.

Eighteen Or Older

The Texas Family Code establishes when a respondent age eighteen or over may be certified or transferred to adult criminal court as follows:

1. the person is eighteen or older;
2. the person was:
 - a. ten or older and under seventeen at the time he or she allegedly committed a capital felony or murder;

¹⁰ TEX. FAM. CODE § 54.02(a).

- b. fourteen or older and under 17 at the time he or she allegedly committed an aggravated controlled substance felony or a first degree felony other than murder, or
 - c. fifteen or older and under seventeen at the time he or she allegedly committed a second or third degree felony or a state jail felony;
3. no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
 4. the juvenile court finds from a preponderance of the evidence that:
 - a. for a reason beyond the control of the State, it was not practicable to proceed before the person's eighteenth birthday, or
 - b. after due diligence of the State, it was not practicable to proceed before the person's eighteenth birthday because:
 - the State did not have probable cause to proceed and new evidence has been found since the person's eighteenth birthday;
 - the person could not be found; or
 - a previous transfer order was reversed on appeal or set aside by a district court; and
 5. the juvenile court determines that there is probable cause to

believe that the person before the court committed the offense alleged¹¹.

In certification hearings involving respondents over the age of eighteen the court only has authority to either waive its jurisdiction or if jurisdiction is not waived to dismiss the State's petition, or motion to transfer, and any petition seeking to adjudicate the respondent delinquent.¹²

One of the primary elements of the State's burden in these hearings is providing justification for the delay beyond the respondent's eighteenth birthday.¹³ In these types of transfer hearings where the State is initially proceeding after the eighteenth birthday of the respondent demonstrating due diligence is mandatory for the State to meet its burden of transfer. If the State cannot justify the delay in proceeding prior to the juvenile turning eighteen the juvenile court has no jurisdiction to transfer.¹⁴ Establishing due diligence is a

¹¹ TEX. FAM. CODE § 54.02(j).

¹² Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6th ed. 2004).

¹³ In justifying a delay the court in *In the Matter of N.M.P.*, stated [w]e find no authority ... holding that the State must search out and use new, unproven scientific theories or test to meet the due diligence requirement. To the contrary, the law requires the State to show that novel scientific evidence is reliable, and thus probative and relevant.... The State would be in an untenable position if it were required to prove that a cutting edge scientific test was reliable when the experts were still developing and refining the technology. *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998).

¹⁴ See generally, *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998)(new DNA testing became available after the respondent turned eighteen); *In the Matter of J.C.C.*, 952 S.W.2d 47 (Tex. App.—San Antonio 1997)(State unable to provide justification for not proceeding against respondent before turning eighteen when it proceeding against his twin brother for the same offense prior to the twin brother turning eighteen).

jurisdictional matter and no harm analysis is necessary.¹⁵

The court in *Webb*, held it is incumbent upon the State to file and conclude the certification hearing before the respondent's eighteenth birthday.¹⁶ In *Webb*, the court opined that the meaning of "proceeding" in juvenile court, meant concluding the hearing before the respondent's eighteenth birthday, agreeing with the trial court.¹⁷

The certification provisions establish four justifications for the delay as follows:

1. not practicable to proceed before age eighteen;
2. new evidence discovered;
3. respondent could not be found;
4. appellate reversal of certification order

Certifications For Capital Murder And Murder

Only individuals eighteen or over who are alleged to have committed either Capital Murder or Murder while between the ages of ten and fourteen can be considered for waiver of jurisdiction or certification to adult court.¹⁸ This provision of the family code was

¹⁵ See, *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-45 (Tex. App.—El Paso 10/25/01). In *Webb*, the State did not establish that the delay in proceeding in juvenile court before the defendant's eighteenth birthday was not beyond its control. In reviewing the decision the court vacated the murder conviction following certification and dismissed the juvenile proceedings for want of jurisdiction. The defect was held to be jurisdictional and no harm analysis was necessary.

¹⁶ *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-45 (Tex. App.—El Paso 10/25/01).

¹⁷ *Id.*

¹⁸ TEX. FAM. CODE § 54.02(j)(2)(A).

promulgated by the legislature with the 1999 amendments to the Texas Family Code. The rationale for this provision is that Capital Murder and Murder have no statute of limitations and the juvenile court would have been able to impose a sentence of commitment to the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice for up to a forty year term.¹⁹ Before this legislative change, these offenses would not have been eligible for certification if the person was under fourteen at the time the offense allegedly was committed.

If the State, however, was unable to proceed before the eighteenth birthday of the juvenile the juvenile system could not handle the case because the person was over eighteen, and the adult criminal system would also have no jurisdiction since the offense has original jurisdiction with juvenile court.²⁰

Due Process And Constitutional Safeguards

The Supreme Court articulated minimum levels of constitutional protections and due process necessary in juvenile certification proceedings in a landmark series of cases beginning in 1966 with *Kent v. United States*.²¹ In *Kent* the Court stated "the waiver hearing must measure up to the essentials of due process and fair treatment." Prior to *Kent*, the states enacted various legislation to set procedures for juvenile proceedings. However, since juvenile courts were operating under the doctrine of "parens patriae" and hearings were deemed civil and not criminal procedural safeguards

¹⁹ Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6th ed. 2004).

²⁰ See TEX. PEN. CODE § 8.07.

²¹ *Kent v. United States*, 383 U.S. 541 (1966).

afforded adults were vastly lacking in juvenile courts. Beginning in *Kent* and following immediately with *Gault* the Supreme Court for the first time promulgated constitutional protections applicable to juvenile proceedings. In *Gault* the Court stated “[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”²²

Title III of the Texas Family Code has adopted the constitutional mandates of *Kent*, and its progeny in affording procedural protections to respondents in certification hearings.²³ Respondents are entitled to due process in that notice of the charges or allegations or required; an unwaivable right to counsel; right of confrontation; privilege against self-incrimination as spelled out in *Kent*.²⁴

Notice Of Petition Or Motion For Discretionary Transfer

Section 54.02(b) states: “[t]he petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court.”²⁵

The requirements of Section 53.04, mandate that the motion for transfer or petition must state:

1. with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts;
2. the name, age, and residence address, if known, of the child who is the subject of the petition;
3. the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the child’s spouse, if any; and
4. if the child’s parent, guardian, or custodian does not reside or cannot be found in the state, or if their places of residence are unknown, the name and residence address of any known adult relative residing in the county, or, if there is none, the name and residence address of the known adult relative residing nearest to the location of the court.

Additionally, the motion must state “that the hearing is for the purpose of considering discretionary transfer to criminal court.”²⁶

Multiple felony offenses pending against the Respondent for which there is probable cause can and should be alleged in the petition. If the State files a petition which alleges multiple offenses that constitute more than one criminal transaction, the juvenile court may either retain or transfer all offenses relating to a each transaction. It is important to note that the juvenile court waives jurisdiction over a transaction, not a specific statutory offense, so the court may transfer or

²² *In Re Gault*, 387 U.S. at 541.

²³ *See generally*, TEX. FAM. CODE § 54.02.

²⁴ *Id.*

²⁵ TEX. FAM. CODE § 54.02(b); *See also* Texas Fam. Code § 54.02 (k)(addressing certifications when respondent over eighteen); *See also McBride v. State*, 655 S.W.2d 280 (Tex.App.—Houston [14th Dist.] 1983, no writ).

²⁶ TEX. FAM. CODE § 54.02(b).

retain different criminal transactions²⁷. Section 54.02(g) states

“[i]f the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.”

Accordingly, if the court retains jurisdiction over any criminal transaction the respondent is not subject to prosecution for any offense for which the court retains jurisdiction.²⁸ The State upon receiving the transferred case in criminal court may charge any offense or offenses supported by probable cause as long as the offense arose out of a criminal transaction that was transferred by the juvenile court.²⁹ However, the offense charged by the State must have been an offense for which the respondent was eligible for certification. For example if a respondent is certified for a criminal transaction which occurred at the age of fourteen only the first degree felony may be prosecuted. These situations would prevent the State from charging any lesser included offenses.³⁰

Diagnostic Study, Social Evaluation And Investigation

Prior to the actual certification hearing the juvenile court is required to order and have completed various evaluations and reports.³¹ Section 54.02(d) provides:

“[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.³²”

Diagnostic Study

The legislature has not established or expressly stated what must be included in a diagnostic study.³³ However the purpose of this diagnostic study is to assist the court in determining whether to exercise its discretion to either retain or waive its jurisdiction.

Opinions may vary regarding the contents of the diagnostic but generally the report is a forensic examination by a clinical psychologist or psychiatrist and social investigation by the juvenile probation department. The report generally addresses such issues as the child’s sophistication, maturity, background and family history.³⁴

The provisions of Section 54.02(d) are mandatory and apply to transfer hearings regardless of the age of the respondent. The only exception are mandatory certification proceedings conducted pursuant to the Texas Family Code.³⁵ If the court fails to order the diagnostic study, evaluation or investigation or to consider the reports in the discretionary transfer hearing the certification hearing is subject to being

²⁷ TEX. FAM. CODE § 54.02(g).

²⁸ *Id.*

²⁹ *Ex parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

³⁰ TEX. CRIM. PROC. CODE § 4.18.

³¹ TEX. FAM. CODE § 54.02(d).

³² *Id.*

³³ *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

³⁴ For a discussion of what information should be included in the report, see Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Hous. L. Rev. 709 (1972).

³⁵ TEX. FAM. CODE § 54.02(n).

reversed by a reviewing court.³⁶ In *R.E.M. v. State*, the court stated:

Section 54.02(d) is mandatory.... It is impossible to read Title 3 of the Family Code...without reaching the conclusion that its effect is to give to a juvenile offender the right not to be treated as an adult offender unless he is divested of that right by judicial order entered after complying with the requirements set forth in Section 54.02. The necessary conclusion is that, in the absence of an effective waiver by the child, he can be subjected to treatment as an adult only if there has been compliance with the mandatory provisions of Section 54.02.³⁷

Investigation

Also not defined in certification statutes is the term “full investigation of the child, his circumstances, and the circumstances of the alleged offense.”³⁸ In looking at this provision one Texas court opined

“[t]he phrase ‘full investigation of the circumstances of the offense’ is not defined in section 54.02. We believe that for good reasons the legislature did not attempt to define the phrase. Of necessity, any inquiry into the circumstances of an offense must be one of degree. It is a matter of common knowledge that the course and scope of an investigation will vary

³⁶ *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

³⁷ Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6th ed. 2004)(citing *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975)).

³⁸ See e.g., *In re I.B.*, 619 S.W.2d 584 (Tex.Civ.App.—Amarillo 1981).

according to the circumstances surrounding the event.”³⁹

The mandatory procedures enunciated in Section 54.02(d) are established with the purpose of providing the court information sufficient enough to make an informed decision regarding waiving jurisdiction. Although mandatory these procedures must be balanced against the constitutional protections afforded respondents facing transfer to criminal court.. Accordingly, an attorney for a child facing transfer or certification must make appropriate and informed decisions regarding when to invoke such rights as privilege against self-incrimination.⁴⁰ What various courts do seem to suggest is that counsel for defense can assert constitutional protections but cannot then complain on appeal that the required studies or evaluations are incomplete because of his or her own actions.⁴¹

³⁹ *In re I.B.*, 619 S.W.2d 584 (Tex. Civ. App.—Amarillo 1981, no writ). See also *Price v. State*, unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex. App. Lexis 2852 (Tex.App.—Dallas 4/24/02)(appellant argued that a “full investigation” required the probation department to personally interview the victims or include the respondent’s version of the circumstances of the offense in the report. The appellate court rejected this argument, finding that the court did not abuse its discretion in concluding that a full investigation was performed.)

⁴⁰ See e.g., *In K.W.M. v. State*, 598 S.W.2d 660 (Tex. Civ. App.—Houston[14th Dist.] 1980, no writ) (the court stated that section 54.02(d) does not require a court to order that the child discuss his involvement in the offense, no self-incriminatory statements are required, and if any custodial statement will be used in a later criminal trial, then the Family Code protections must be provided.

⁴¹ In *R.E.M. v. State*, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.), the respondent refused to cooperate with the professionals who tried to interview him, then claimed on appeal that the report was incomplete. The court stated: “[w]e are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant’s

The Hearing

Certification hearings in Texas are conducted by the court without a jury.⁴² Specifically, §54.02(c) provides: “[t]he juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.”⁴³ The absence of a jury trial is consistent with the dictates of both state and federal law, since it has been held that juveniles are not constitutionally entitled to jury trials in juvenile proceedings.⁴⁴ No deprivation of any constitutional right should be construed in the absence of juries in the certification hearing. Although a right to jury is not available in certification hearings, a waiver hearing before the court is mandatory prior to a court exercising its jurisdiction and transferring a respondent to adult criminal court.⁴⁵

Further it has been well settled that certification proceedings are not trials on the merits, but hearings to determine whether the juvenile court will waive its original jurisdiction and transfer the case

attitude.” *R.E.M.*, 541 S.W.2d at 845. The court in *R.E.M.* held that Texas Family Code 51.09 precluded a waiver of the diagnostic study where the child asserted his right to remain silent, but did not waive his right to the study. Later cases hold that the respondent’s failure to cooperate does not waive the right to the study, but will prevent the child from arguing on appeal that the study was incomplete. See *Ortega v. State*, unpublished, No. 05-00-00086-CR, 2002 WL 14163 (Tex. App.—Dallas 2002); *In the Matter of J.S.C.*, 875 S.W.2d 325 (Tex.App.—Corpus Christi 1994, writ dismissed); and *In the Matter of C.C.*, 930 S.W.2d 929 (Tex. App.—Austin 1996, no writ).

⁴² TEX. FAM. CODE § 54.02(c)

⁴³ *Id.*

⁴⁴ See, generally, *McKeiver v. Pennsylvania*, 403 U.S. 528, 533, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Strange v. State*, 616 S.W.2d 951 ; *In the Matter of P.B.C.*, 538 S.W.2d 448 (Tex. Civ. App.—El Paso 1976, no writ).

⁴⁵ *Id.*

to adult criminal court for trial or retain its jurisdiction and keep the proceedings in juvenile court.⁴⁶

Evidence

The certification statutes do not expressly promulgate the evidentiary procedures which must be adhered to in waiver hearings, however, the Texas Rules of Evidence provides in pertinent part “[e]xcept as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.”⁴⁷

Many courts have opined that the Texas Rules of Evidence are not applicable in certification proceedings; the primary rationale for this position was that the court needed to make a determination as to whether a grand jury would indict. However with the amendments to the statute effective in 1996 the grand jury provision was repealed.⁴⁸

Factors To Be Considered By The Court

In the seminal case, *Kent v. United States*, the Supreme Court articulated factors which were determinative in addressing whether a judge should waive its jurisdiction and transfer a case to adult criminal court.⁴⁹ The factors articulated by the Court were

1. The seriousness of the alleged offense to the community

⁴⁶ *M.A.V., Jr. v. Webb County Court at Law*, 842 S.W.2d 739 (Tex. App.—San Antonio 1992, writ denied).

⁴⁷ TEX. RULES EVID. 101(b). See also TEX. FAM. CODE § 51.17(c) which apply the Texas Rules of Evidence applicable to criminal cases in juvenile proceedings.

⁴⁸ TEX. FAM. CODE § 54.02(f)(3) repealed.

⁴⁹ *U.S. v. Kent* 383 U.S. at 566-567.

and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the

likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.⁵⁰

The Texas provision of the certification statute §54.02(f) adopts and incorporates the *Kent*, factors which were promulgated to provide constitutional safeguards to juvenile respondents in transfer hearings.⁵¹ Section 54.02(f) requires the juvenile court to consider the following factors in making the decision to waive jurisdiction:

1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

2. the sophistication and maturity of the child;

3. the record and previous history of the child; and

4. the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.⁵²

This list is not exhaustive, in that the court may consider other factors which it deems appropriate in determining whether to transfer a case to criminal court. However the court must

⁵⁰ *Id.*

⁵¹ *Kent v. United States*, 383 U.S. 541, 561-62 (1966)

⁵² TEX. FAM. CODE § 54.02(a). The legislative changes which took effect in January 1, 1996, eliminated two factors: whether the offense was committed in an aggressive and premeditated manner and whether there was evidence on which a grand jury could be expected to return an indictment.

“consider” the statutory factors in making its determination.⁵³

Required Findings

There are five basic requirements that must be established before the juvenile court may waive its jurisdiction. Prior to transfer the court must make the following findings:

1. the child is alleged to have committed a felony;
2. the child was:
 - a. fourteen or older at the time he or she allegedly committed a capital felony, an aggravated controlled substance felony, or a first degree felony, or
 - b. fifteen or older at the time he or she allegedly committed any other felony;
3. no adjudication hearing has been conducted concerning the offense;
4. there is probable cause to believe that the child before the court committed the alleged offense; and
5. because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings.⁵⁴

If the court is proceeding under a hearing where the respondent is over eighteen the court must make the additional findings regarding due

⁵³ *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, writ ref'd n.r.e.)

⁵⁴ TEX. FAM. CODE § 54.02(f).

diligence.⁵⁵ The burden is on the State to prove the allegations in the petition or motion for discretionary transfer by a preponderance of the evidence.

Order

Although courts are required to give its reasons for transfer in its order it is well settled that juvenile courts have wide latitude in determining whether to retain or waive jurisdiction in a certification proceeding.

Community Welfare Provision

Of most important in a court's consideration to transfer a juvenile to adult court is whether the evidence dictates that the welfare of the community requires transfer to adult criminal court.⁵⁶ This finding will be reviewed by an appellate court on legal and factual sufficiency grounds.⁵⁷ If the evidence is deemed legally insufficient on appellate review the respondent may not be transferred to adult court since judgment should be rendered for the respondent and the waiver petition dismissed with prejudice.⁵⁸

Right Of Counsel

An attorney can not be waived in a certification proceeding.⁵⁹ It has been held that proceeding with the transfer hearing without the presence of counsel for the juvenile is reversible error.⁶⁰ It is well established that a juvenile is entitled

⁵⁵ TEX. FAM. CODE § 54.02(j)(4).

⁵⁶ TEX. FAM. CODE § 54.02(a)(3).

⁵⁷ *Green v. State*, unpublished, No. 05-97-01176-CR, 1999 WL 783734, 1999 Tex. App. Lexis 7328, Juvenile Law Newsletter 99-4-14 (Tex.App.—Dallas 10/4/99).

⁵⁸ *Id.*

⁵⁹ TEXAS FAM. CODE § 51.10(b)(1).

⁶⁰ *In the Matter of D.L.J.*, 981 S.W.2d 815 (Tex.App.—Houston [1st Dist.] 1998, no writ).

to the effective assistance of counsel at a certification hearing.⁶¹ In *Kent*, the court stated “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”⁶² The ineffectiveness of counsel in juvenile cases is measured by the *Strickland v. Washington*,⁶³ standard just as in adult criminal cases.

Mandatory Certification

Once Certified Always Certified

The third type of certification in Texas is mandatory certification.⁶⁴ The mandatory provisions were enacted with the advent of the legislative changes in 1995. The provisions of the code establishing the mandatory transfer proceedings basically codifies the doctrine or practice of “once certified always certified.” Although the statute is commonly referred to as mandatory certification the process is not automatic and not all inclusive. The prosecutor has discretion whether to seek a mandatory transfer or not. However, if the State does seek transfer under this provision and the requirements of the statute are complied with, the juvenile court must transfer the case. Mandatory transfer requires:

1. the child was previously transferred to criminal court for criminal proceedings; and

⁶¹ See *Kent v. United States*, 383 U.S. 541, 561-62 (1966); *In re K.J.O.*, 27 S.W.3d 340, 342 (Tex. App.—Dallas 2000, pet. denied).

⁶² *Kent v. United States*, 383 U.S. at 561.

⁶³ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(whether counsel’s performance fell below an objective standard of reasonableness and, if so, whether a reasonable probability exists that, but for counsel’s unprofessional errors, a different outcome would have resulted.); .See also, *In re K.J.O.*, 27 S.W.3d at 343.

⁶⁴ TEX. FAM. CODE §54.02(m).

2. the child has allegedly committed a new felony offense before becoming seventeen years old.

The mandatory transfer provision do not apply if at the time of the transfer hearing:

1. the child was not indicted by the grand jury in the matter transferred;
2. the child was found not guilty in the matter transferred;
3. the matter transferred was dismissed with prejudice; or
4. the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final.⁶⁵

Of major importance to this provision is the requirement that the respondent was previously certified to adult court and a valid transfer order exists and a new felony offense is alleged.⁶⁶ Additionally, the case which the respondent was previously certified to adult court must be final and not have resulted in an acquittal, dismissal prior to indictment, no billed or reversed on appeal.⁶⁷

Once the statutory provisions are met transfer to adult court is mandatory; hence the term “mandatory certification.” These procedures were designed to expedite the transfer process and increase judicial economy.⁶⁸ This streamlined process does away with the requirements of obtaining a complete diagnostic study, social investigation and investigation of the child and the circumstances of the alleged offense. Although the statute calls

⁶⁵ TEX. FAM. CODE § 54.02(m).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See generally, TEX. FAM. CODE § 54.02(n).

for an extremely streamlined process and does not address additional proof requirements it should be concluded that probable cause demonstrating the respondent committed a felony offense would still be necessary to be shown by the State.⁶⁹

Appeals

A juvenile respondent has a right to appeal the decision of a juvenile court transferring jurisdiction to adult court; however, this right has been severely curtailed. Prior to the 1995 legislative changes to the Family Code direct appeals to the Court of Appeals, then possible review by the Texas Supreme Court were available.⁷⁰ Effective with offenses occurring after January 1, 1996, the right to take a direct appeal from a certification order was eliminated.⁷¹ Presently, Texas law provides that an appeal from a transfer order may be taken only after a conviction and direct appeal in adult criminal court.⁷² This joint appeal may include claims of error which occurred in the transfer hearing along with any errors from the adult criminal conviction.⁷³ Additionally, the criminal rules are applicable in the appellate process which result in ultimate state review by the Court of Criminal Appeals instead of the Texas Supreme Court.

⁶⁹ TEX. FAM. CODE § 54.02(a)(3); *Kent v. United States* 557; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6th ed. 2004).

⁷⁰ TEX. FAM. CODE § 56.01(c)(1).

⁷¹ TEX. FAM. CODE § 56.01(c)(1)(A), which had authorized a direct appeal from an order of transfer, was repealed.

⁷² CCP Art. 44.47; See e.g., *Small v. State*, 23 S.W.3d 549 (Tex.App.—Houston [1st Dist.] 2000, writ ref'd).

⁷³ CCP Art. 44.47; *Vasquez v. State*, unpublished, No. 09-99-00664-CR, 2000 WL 795328, Juvenile Law Newsletter 00-3-08 (Tex.App. – Austin 6/22/00).

Perjury

Generally the age limits for juvenile court to have original jurisdiction of a child exists between the ages of ten and seventeen.⁷⁴ However a general exception to this provision deals with perjury offenses.⁷⁵ The Family Code §51.03 states “[n]othing in this title prevents criminal proceedings against a child for perjury.”⁷⁶ Texas Penal Code §8.07 provides that perjury and aggravated perjury may be prosecuted in adult court under the age of fifteen.⁷⁷

Backdoor Certification

Two essentially identical provisions of the juvenile mental health statutes allow for “automatic” transfer of certain cases to adult criminal court.⁷⁸ These statutes states

1. The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the eighteenth birthday of a child for whom the juvenile court or a court to which the child’s case is referred under Section 55.12(2) has ordered inpatient mental health services if:

a. The child is not discharged or furloughed from the inpatient mental health facility before reaching eighteen years of age; an

b. The child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication

⁷⁴ See, TEX. FAM. CODE § 51.03

⁷⁵ TEX. PEN. CODE § 8.07

⁷⁶ TEX. FAM. CODE § 51.03

⁷⁷ TEX. PEN. CODE § 8.07.

⁷⁸ Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6th ed. 2004).

concerning the alleged conduct
has been made.⁷⁹

These provisions require transfer
to adult court juveniles charged with
offenses under the Determinate Sentence
Act who remain confined under a
commitment order at the age of eighteen.
Section 55.44 permits adult criminal

- Attempted murder
- Capital murder
- Attempted capital murder
- Manslaughter
- Intoxication manslaughter
- Aggravated kidnapping
- Attempted aggravated kidnapping
- Aggravated sexual assault
- Sexual assault
- Attempted sexual assault
- Aggravated assault
- Aggravated robbery
- Attempted aggravated robbery
- Felony injury to a child, elderly, or disabled person
- Felony deadly conduct
- Aggravated or first-degree controlled substance felony
- Criminal solicitation of a capital or first-degree felony
- Second-degree felony indecency with a child
- Criminal solicitation of a minor
- First degree felony arson
- Habitual felony conduct (three consecutive felony adjudications).⁸⁸

Second, the range of punishments was changed to account for the various levels of offenses. For third degree felonies the maximum punishment is ten years; second degree felonies twenty years and a maximum of forty years for first degree felonies and capital offenses.⁸⁹

Grand Jury

When seeking to proceed under the Determinate Sentence Act a state prosecutor has essentially unfettered

discretion.⁹⁰ However the petition seeking a determinate sentence must be approved by the grand jury.⁹¹ In considering a case for approval nine members of the grand jury must vote approval.⁹² If nine members do not vote approval the State can not proceed under the act. If the grand jury does reject approval the State can still proceed with the prosecution of the proceeding either with an Original Petition without a determinate sentence or seek certification if appropriate.

Upon approval section 53.045(d) states the “fact of approval shall be certified to the juvenile court and the certification shall be entered in the record of the case”⁹³

Parole and Minimum Lengths of Stay

Another major revision of the determinate sentence statute allows TYC the ability to parole juveniles without permission from the court once a minimum length of stay is served. For Capital Murder the minimum length of stay is ten years, for first degree felonies the minimum length of stay is three years; two years for a second degree and one year for a third degree felony.⁹⁴ If a child is released on parole prior to reaching his or her nineteenth birthday the TYC will supervise him or her until the age of twenty-one at which time supervision will be transferred to adult parole.⁹⁵ If the youth is paroled after the age of nineteen, the youth is immediately placed on adult parole to serve the remainder of the sentence.

⁹⁰ *In the Matter of S.B.C.*, 805 S.W.2d 1 (Tex.App.—Tyler 1991, writ denied).

⁹¹ TEX. FAM. CODE § 53.045(a); §54.04(3).

⁹² TEX. FAM. CODE § 53.045(b).

⁹³ TEX. FAM. CODE § 53.045(d).

⁹⁴ TEX. HUM. RES. CODE § 61.081(f).

⁹⁵ TEX. HUM. RES. CODE § 61.084(g).

⁸⁸ TEX. FAM. CODE § 53.045(a).

⁸⁹ TEX. FAM. CODE § 54.04(3)

Transfer and Hearings

Under current law the Texas Youth Commission may request the committing juvenile court to conduct a hearing to determine whether to transfer a juvenile sentenced under the Act to prison.⁹⁶ Section 61.079 states in part:

1. [a]fter a child sentenced to commitment under Section 54.04(d)(3), 54.04(m), or 54.05(f), Family Code, becomes sixteen years of age but before the child becomes 21 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 institutional division of the Texas Department of Criminal Justice if:

a. the child has not completed the sentence; and

b. the child's conduct, regardless of whether the child was released under supervision under Section 61.081, indicates that the welfare of the community requires the transfer.⁹⁷

This provision allows TYC to request transfer to adult prison those youth who are not working the programs or progressing satisfactorily towards rehabilitation. Once a youth turns sixteen years old and has been at TYC for at least six months transfer can be requested.⁹⁸

The decision regarding transfer to prison will be made by the committing court without a jury.⁹⁹ In making a decision regarding transfer the court has

wide discretion;¹⁰⁰ the court may consider various factors such as the child's history before and after being committed to TYC, the nature of the original offense, and the recommendation of TYC.¹⁰¹ When the purpose of the hearing is to consider transfer the court may either transfer the respondent to adult prison or return the child to TYC.¹⁰²

The procedures and guidelines to be adhered to in a transfer hearing are addressed in §54.11.

Probation

Juveniles sentenced under a determinate sentence are eligible for probation if the sentence received is less than ten years.¹⁰³ This provision was adopted in 1999 with the legislative amendments to the Act. Before this provision change probation and juvenile court jurisdiction of determinate sentence terminated upon a juvenile respondent reaching eighteen years old.¹⁰⁴ Determinate sentence probation was a major revision of the Act; the ten year probation period mirrors probation options available in adult cases.¹⁰⁵ A ten year probation period gives the juvenile court and juries a wider sentencing option and provides for a better handling of case dispositions. Prior to the changes enacted regarding probation courts were limited in granting probation since probation terminated at the juvenile's eighteenth birthday; accordingly, it was more probable that a term of years was imposed without probation in those circumstances. Further juries did not impose any of the terms or conditions of probation and both

¹⁰⁰ See, generally, *Matter of C.L., Jr.*, 874 S.W.2d 880 (Tex.App.—Austin 1974); *K.L.M. v. State*, 881 S.W.2d 80 (1994).

¹⁰¹ TEX. FAM. CODE § 54.11(K).

¹⁰² TEX. FAM. CODE § 54.11(i).

¹⁰³ TEX. FAM. CODE § 54.04(q).

¹⁰⁴ TEX. FAM. CODE § 54.04(d)(1).

¹⁰⁵ Tex. Crim. Proc. Code Art. 42.12 § 3, 4(a).

⁹⁶ TEX. HUM. RES. CODE § 61.079(a)(2).

⁹⁷ TEX. HUM. RES. CODE § 61.079.

⁹⁸ TEX. HUM. RES. CODE § 61.079(a)(2).

⁹⁹ TEX. FAM. CODE § 54.11.

the court and jury merely granted or denied probation.

transfer to adult court.

Presently, as in adult cases, once a respondent is assessed a sentence of ten years or less and probation is awarded, the judge makes the determination of the length of probation.¹⁰⁶

If probation is granted juvenile probation will provide supervision. Probation will expire at the juvenile's eighteenth birthday unless the prosecuting attorney requests a hearing prior to the child's eighteenth birthday and the court orders probation transferred to adult probation. Once transferred adult probation will provide supervision.

Summary

Determinate sentencing was enacted in response to an increase in violent crimes being committed by juveniles. Although many offenses are eligible for determinate sentencing few cases are actually filed as determinate sentenced.¹⁰⁷ A juvenile receiving a determinate sentence has the potential of serving his or her sentence in a juvenile prison where rehabilitation and education are not the primary purpose of the adult system. A juvenile who receives a determinate sentence can never have his record sealed and even if not transferred to the Institutional Division of the Texas Department of Corrections can be under the supervision of adult parole for up to forty years. However, determinate sentence can be a very beneficial option when facing the most serious of juvenile cases—the waiver of jurisdiction and

¹⁰⁶ See Tex. Fam. Code § 54.04 (q); compare Tex. Crim. Proc. Code Art. 42.12 § 4(b).

¹⁰⁷ For a detailed empirical analysis see, Dawson, Texas Blended Sentencing: An Empirical Study of the Uses of Determinate Sentencing, 17 State Bar of Texas Section Report Juvenile Law 5-17 (No. 2, June 2003).