NUTS & BOLTS OF JUVENILE LAW

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JUVENILE CONFESSIONS

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This paper is designed to be a rough guide to dealing with suppression of statements in juvenile court. It by no means is intended to be exhaustive of every scenario. I tried not to reinvent the wheel, but rather point out the differences between juvenile cases versus adult cases. It has been said that juvenile law is essentially criminal law with a few twists. This paper will focus on the twists.

One of the first twists is that juvenile cases are civil in nature and considered only quasi-criminal. Therefore, appeals of juvenile cases go to the Supreme Court and not the Court of Criminal Appeals following the appropriate Court of Appeals. Although juvenile law is civil, the Code of Criminal Procedure does apply in certain circumstances such as, discovery; rules of evidence; and exclusion of evidence to name a few.[1] As a consequence, when drafting a Motion to Determine Admissibility of Evidence, it may prove helpful to include all relevant statute codes, including those from the Code of Criminal Procedure, the Family Code and both constitutions.

CONFESSIONS

Who Is a Child?

In order for the Family Code to apply to a case, one must determine whether the person making the statement meets the criteria of being a child. The Family Code defines a child as a person aged 10 – 16 inclusive, or aged 17 – 18, who is alleged to have committed an offense while aged 10 to 16.[2] Therefore, if a person who is 17 years old but younger than 18 is being questioned about an offense that allegedly occurred between the ages of 10 and 16, the Family Code applies. On the other hand, any offense alleged to have occurred after the person is 17 is handled by Article 38.22 of the Code of Criminal Procedure. The Family Code provisions do not apply to a person who is 18 or older but being investigated for an offense allegedly occurring between the

[1] §51.17 Texas Family Code. (applying Chapter 38 of the Code of Criminal Procedure to juvenile cases).
[2] §51.02(2) Texas Family Code.

ages of 10 and 16, because §51.02(2) excludes persons aged 18 or older from the definition of a child.[3]

Was the Statement Voluntary?

For a statement to be admissible, whether custodial or not, and whether written or verbal, it must be voluntary.[4] In determining the voluntariness of a statement, the court looks at the totality of the circumstances, which "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[5] Some Texas cases have addressed the voluntariness of statements, using the *Fare v. Michael C.* totality of the circumstances analysis.

One case in particular considered more factors than the *Fare v. Michael C.* court in determining whether a child's statement was voluntary. In *E.A.W. v. State,* an 11-year-old girl was held in a detention center from midnight until 9:00 a.m. without access to a parent or attorney.[6] The child then made a statement and the police complied fully with the requirements of §51.095 of the Family Code in taking her statement. The Court of Appeals held that in the "absence of the presence and guidance of a parent or other friendly adult, or of an attorney," as well as E.A.W.'s immaturity, she could not have knowingly, intelligently or *voluntarily*, waived her rights.[7]

On the other hand, a case involving a 15-year-old who told the officers "I don't want to do this" before actually making a statement, was found to be a voluntary statement.[8] The officer testified he understood the child's indication of not wanting to do it to mean he "did not want to re-live the gruesome details" of the death involved. The Court of Appeals held the child's statement

[3] Robert Dawson, *Texas Juvenile Law*, p. 330 (Texas Juvenile Probation Commission 6th ed., 2004) (hereinafter cited as Dawson).
[4] *Darden v. State*, 629 S.W.2d 46, 51 (Tex. Crim. App. 1982); *Diaz v. State*, 61 S.W.3d 525, 528 (Tex. App.-San Antonio 2001, no pet.).
[5] *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).
[6] *E.A.W. v. State*, 547 S.W.2d 63 (Tex. Civ. App.-Waco 1977, no pet.).
[7] *Id.* at 64.
[8] *Vargas v. State*, No. 01-03-00870-CR, 2005 WL 729460, *3 (Tex. App.-Houston [1st Dist] 2005) (Not designated for publication).

was voluntary based on the totality of the circumstances including the child's 100+ I.Q. and good communication skills. Furthermore, the child's statement "I don't want to do this" was considered an ambiguous request to terminate the interview.[9]

When dealing with a voluntariness issue, consider at least the following 6 factors:

1) The child's age, intelligence, maturity level and experience with the system;
2) The length of time left alone with the police;
3) The absence of showing that the child was asked whether he wished to assert any of his rights;
4) The isolation from his family and friendly adult advice;
5) The failure to warn the appellant in Spanish; [and]
6) The length of time before he was taken before a magistrate and warned.[10]

Was the Child in Custody?

Section 51.095 of the Family Code sets forth the process for taking statements from children and the exclusion thereof. One main focus of section 51.095 is determining if the child is in custody at the time a statement is made.[11] Therefore, in trying to exclude a child's statement, the defense must establish that the child was in custody.

Custody has been defined as a situation in which an objective, reasonable person would believe the restraint is associated with that of a formal arrest.[12] Keeping in mind that we are dealing with juveniles, Texas has established a "reasonable juvenile" standard to use in place of the reasonable person.[13] Factors to consider when determining if a child believes he is in custody

[9] *Id.* at *4.
[10] *Arrests, Searches, Confessions, Juvenile Processing Offices and Waiver of Rights*, Pat Garza, Nuts and Bolts of Juvenile Law, p. 14, 2006.
[11] §51.095(d).
[12] *In the matter of V.M.D.*, 974 S.W.2d 332, 345 (Tex. App.-San Antonio 1998, pet. denied).
[13] *In re L.M.*, 993 S.W.2d 276 (Tex. App.-Austin 1999, pet denied) ("whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted.").

would include: being removed from home against his will; no experience with the juvenile system; not being allowed to call his parents; being told he is not free to leave; etc.[14]

Some situations in and of themselves do not rise to the level of custody. If an officer engages in conversation with a child as a casual encounter, no custody is established because the child is always free to leave during a casual encounter. The most common way for the police to show the court that a child was not in custody is to release him home after the questioning. The case law appears clear that if a child is released back home after questioning, that child was not in custody during the questioning and therefore, §51.095 of the Family Code does not apply.[15]

School interrogations are a little trickier than the usual police interrogation because school officials get involved. In *In the matter of V.P.*, the child was taken to an office by a hall monitor and a police officer to be interrogated regarding a weapon on campus.[16] The officer left the room and the assistant principal interrogated V.P. until he confessed to possessing the weapon. The Court of Appeals held that V.P. was not in custody, and therefore did not have the right to an attorney or the protections of §51.095 of the Family Code.[17] Interestingly, the Court suggested that V.P. might have been in custody while the police officer transported him to the office, but that that custody was over when V.P. was left alone in the office with the assistant principal while the officer waited in the hallway.[18] However, the Court stated V.P. was not in custody until the officer actually arrested him after the interrogation and the weapon was located.[19] Therefore, V.P. was arguably in custody while transported to the office, then no longer in custody because the officer waited outside the office, then in custody again because he was arrested after making an incriminating statement.

In a similar case, a child's statement taken at school was deemed custodial and was determined inadmissible.[20] D.A.R. was originally escorted to the assistant principal's office and patted down

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[14] *Id.* at 289-291.
[15] *V.M.D.*, 974 S.W.2d at 345-46; *In the matter of M.A.T.*, No. 04-97-00918-CV, 1998 WL 784334 (Tex. App.-San Antonio, 1998) (Not designated for publication).
[16] *In the matter of V.P.*, 55 S.W.3d 25, 28-29 (Tex. App.-Austin 2001, pet. denied).
[17] *Id.* at 33 (no custody established because officer was not in the room during interrogation).
[18] *Id.*
[19] *Id.*
[20] *In re D.A.R.*, 73 S.W.3d 505 (Tex. App.-El Paso 2002, no pet.).

before entering the room. He was questioned and released back to class. Subsequently, D.A.R. was escorted to the police officer's office on campus and questioned by the police officer. The child then confessed to bringing a gun to school and took the officer to the location of the gun. The Court of Appeals held that a reasonable 13-year-old would have believed he was in custody. Therefore, the statement was inadmissible because it was custodial and the requirements of §51.095 of the Family Code were ignored.[21] Needless to say, all children at public schools are in some form of custody of the state; the question is whether that custody rises to the level of restraint associated with an arrest. Also keep in mind a child may feel compelled to comply with the student code of conduct requiring them to follow school officials' directives, thereby putting into the question the voluntariness of their statement.

Thus, the factors to consider when determining if a child is in custody include, but are not limited to:

1) Whether the child is free to leave after questioning;
2) Whether a school official, as opposed to a police officer, conducts the questioning;
3) Whether the contact between the officer and child is merely a casual encounter; and
4) The perspective of a reasonable child believing whether or not he is free to leave or is restrained in a manner associated with a formal arrest.

Texas case law provides that a child's 5th Amendment rights extend to probation officers questioning children in detention during pre-disposition interviews.[22] In *J.S.S.*, after the child entered a plea of true and before the disposition hearing, the probation officer questioned J.S.S. (without first warning him of his rights) while he was in custody about his current offense and two previous offenses.[23] The probation officer then testified at the disposition hearing at length about the incriminating statements J.S.S. made, and the judge questioned J.S.S. as well.[24] J.S.S. was sent to TYC specifically because of his incriminating statements. The *J.S.S.* court held the

[21] *Id.* at 513.
[22] *In re J.S.S.*, 20 S.W.3d 837 (Tex. App. – El Paso 2000, r'hrg denied).
[23] *Id.* at 839.
[24] *Id*. at 840.

5th Amendment right to not incriminate oneself extends to sentencing hearings (or dispositions in juvenile court), and that J.S.S. should have been *Mirandized* prior to the pre-disposition interview with his probation officer.[25] Therefore, when in doubt, and especially when the child is in detention, the child should at a minimum be *Mirandized* before questioning.

Custodial Statements That Are Admissible.

Section 51.095 of the Family Code deals with three types of statements that a child may make while in custody that are admissible. Statements that are made while in custody and not the product of interrogation are considered *res gestae* and are admissible.[26] An example of a *res gestae* statement would be when a child blurts out an incriminating statement before the officer questions him. The Court of Criminal Appeals has held that informing a child of his *Miranda* warnings did not amount to interrogation.[27] In *Roquemore*, the child was placed in the police car and given his *Miranda* warnings. The child immediately began to say he wanted to cooperate and made an oral statement.[28] The Court of Criminal Appeals held the statements were freely made and not the product of interrogation, therefore considered *res gestae* and admissible.[29]

The second situation in which a custodial statement is likely admissible is when the child makes an oral statement that tends to establish guilt and leads to secreted evidence.[30] Although the usual requirements for taking statements do not apply to these situations, the officer is still required to, at a minimum, inform the child of his *Miranda* rights and have them waived.[31] One key factor is that the statement must lead to evidence unknown to the officer, hence the term secreted evidence. The El Paso Court of Appeals held an otherwise valid statement inadmissible because there was no showing that it led police to physical evidence about which they did not

[25] *Id*. at 846.
[26] §51.095(a)(3) Texas Family Code.
[27] *Roquemore v. State*, 60 S.W.3d 862, 868 (Tex. Crim. App. 2001).
[28] *Id.*
[29] *Id.* at 868-69.
[30] §51.095(a)(2) Texas Family Code.
[31] *Meza v. State*, 543 S.W.2d 189 (Tex. Civ. App.-Austin 1976, no writ) (statement led to location of rifle shells unknown to officers).

already have knowledge.[32] The key here is that the statement must lead to physical evidence that is unknown to the police and not evidence already being sought.

Lastly, statements made by children in open court hearings or before a grand jury are admissible, except those statements made at a detention hearing under §54.01 of the Family Code.[33] Additionally, §51.095(b)(2) of the Family Code allows for the use of a statement by the child for purposes of impeachment.[34] However, "No statement made by the child at the detention hearing shall be admissible against the child at any other hearing."[35] Therefore, a child could essentially make one statement during his detention hearing and then make an inconsistent statement at a subsequent hearing and may not be impeached with his first statement.

Making a Written Statement.

Although a child cannot waive any right granted to him without his attorney agreeing to such waiver pursuant to §51.09 of the Family Code,[36] the Admissibility of a Statement of a Child statute is an exception to §51.09.[37] In fact, the language of the statute presumes a child's statement is admissible if certain conditions are met. However, the better practice is to begin with the notion in your mind that juvenile statements are not admissible because of the complex manner in which to properly take one. The procedure in §51.095 of the Family Code is quite similar to Article 38.22 of the Code of Criminal Procedure, except that a magistrate must issue the warnings to the child, not a police officer.[38]

Section 51.095(a)(1) governs the taking of a written statement of a child. The following is a chronology of events that must occur in order to make a child's statement admissible:

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[32] *In the matter of R.L.S.*, 575 S.W.2d 665, 667 (Tex. Civ. App.-El Paso 1978, no writ) (statement inadmissible because did not lead to secreted evidence, but rather known evidence.).
[33] §51.095(a)(4) Texas Family Code.
[34] §51.095(b)(2) Texas Family Code.
[35] §54.01(g) Texas Family Code.
[36] §51.09 Texas Family Code (waiver of rights must include attorney concurrence either in writing or during recorded court proceedings.).
[37] §51.095(a) Texas Family Code.
[38] §51.095(a)(1). *Cf.* Article 38.22, Sec. 2(a) Code of Criminal Procedure (allows for but does not require magistrate to give warnings).

1) The child is taken into custody.
2) The child is then taken to a magistrate outside the presence of the police and/or prosecuting attorney. The exception here is that the magistrate may have a bailiff, or a police officer if a bailiff is not available, to ensure the magistrate's safety. However, in either situation, the bailiff or the officer may not carry a weapon in the presence of the child.
3) The child is informed of the following rights by the magistrate:
    a) the right to remain silent and whatever is said may be used against him;
    b) the right to have an attorney present to advise him either prior or during any questioning;
    c) the right to appointed counsel if the child cannot afford one; and
    d) the right to terminate the interview at any time.[39]
4) The child must then waive those rights and the magistrate must believe that he is doing so knowingly, intelligently and voluntarily.
5) The child is then sent back to the police where he makes a written statement.
6) The child is then brought back before the magistrate, outside the presence of law enforcement again, in order to certify the statement. Usually, the magistrate's certification is written at the end of the statement. The magistrate must examine the child and find that he understands the nature and contents of his statement and that he knowingly, intelligently and voluntarily waived his rights.[40]

If any of the above steps are not followed, the statement is inadmissible. For example, if the magistrate had an officer in the room for personal safety and the officer brought his gun into the room, the argument could be made that the statute was violated and therefore, the statement is inadmissible. Additionally, the presence of an officer with a weapon could fuel an argument that the statement was involuntary and in fact coerced.

One last point to be made regarding written statements of children, is the intelligent element. I question whether a child (or an adult for that matter) making a statement to the police is an

[39] §51.095(a)(1)(A) Texas Family Code.
[40] §51.095(a)(1) Texas Family Code (setting forth procedure for the taking of a juvenile's statement).

intelligent thing to do. I am hard pressed to conceive of a situation in which making a statement to the police without the advice of an attorney would be an intelligent maneuver. Nevertheless, the magistrate must make the finding that the child is intelligently waiving his rights. As a consequence, this may make for some interesting cross-examination of the magistrate as to whether it is intelligent for a person to give up his right to silence and incriminate himself, let alone an impressionable juvenile.

Making an Oral Statement.

The taking of an oral statement of a child is quite similar to that of a written statement except that there is the added feature that the statement and the interaction with the magistrate must be recorded electronically.[41] The child still has to be in custody, the magistrate must warn the child of his rights and the child must waive those rights on the recording, all voices must be identified on the recording, and defense counsel for the child must be provided a copy of the recording no later than 20 days before the proceeding.[42] The legislature added a provision to this section allowing for the magistrate to review the recording of the statement with the child to ensure that it was voluntarily given.[43] The magistrate is not required to comply with this subsection, but if he chooses to review the recording, he must make a finding on the recording that the statement was made voluntarily.

The most common mistake I have encountered with oral statements is that the magistrate does not have the child waive his rights on the recording. The statute is clear in that the warning must be "part of the recording, and the child knowingly, intelligently, and voluntarily *waives* each right stated in the warning."[44] Many times a magistrate will simply read the child his rights and asks if he understands them and not ask if he waives each and every one of them.

[41] §51.095(a)(5) Texas Family Code.
[42] *Id.*
[43] §51.095(f) Texas Family Code. (Emphasis added).
[44] §51.095(a)(5)(A) Texas Family Code.

There are times when a statement is held invalid, but the physical evidence produced as a result of the statement is admissible.[45] R.E.A. was under a full custodial arrest pursuant to a warrant. Before patting him down, the officer asked if he "had anything illegal on him," to which R.E.A. replied he had marihuana in his pocket.[46] Although the Court of Appeals agreed with the trial court that the statement was inadmissible, and that the unlawful statement led the officers to the physical evidence, the search was characterized as being incident to arrest and therefore admissible. The Court of Appeals dismissed R.E.A.'s statement as irrelevant because he was going to be searched anyway.[47] Perhaps the result would have been different if R.E.A. was not under a full custodial arrest pursuant to the warrant, but instead in custody as part of an investigatory detention.

There are situations in which a child attempts to invoke a right but does not directly ask for an attorney. In *In re H.V.*, a 16-year-old child was in custody and said "I want to call my mother. I want her to ask for an attorney." The magistrate told the child he was 16 years old and could ask for an attorney himself. The child replied, "I'm only 16."[48] The Court of Appeals held the child's request to have his mother ask for an attorney was a clear invocation of counsel, based on the totality of the circumstances.[49] It appeared to the Court that the child was inexperienced with the juvenile system and did not know that he, a juvenile, could ask for an attorney himself. The driving force in suppressing the statement was probably the fact that H.V. asked that his mother "ask for an attorney" and not the fact that he asked to speak with his mother.

A request to speak with one's mother standing alone is not an invocation of counsel.[50] *In re R.D.* demonstrates a situation in which the request to speak with a parent was not considered an invocation of counsel or a wish to terminate the interview for that matter. R.D. asked to speak with his mother prior to going before the magistrate to make a written statement. As R.D.'s

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[45] *In re R.E.A.*, No. 03-04-00028-CV, 2004 WL 2732163 (Tex. App.-Austin 2004, pet. denied) (Not designated for publication).
[46] *Id.* at *2.
[47] *Id. But see* Article 38.23 Texas Code of Criminal Procedure (no inevitable discovery exception to the Texas exclusionary rule); *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (once the Court determines that evidence was obtained illegally, there should be no further inquiry and the evidence should be ruled inadmissible).
[48] *In re H.V.*, 179 S.W.3d 746, 751 (Tex. App.-Ft. Worth 2005, pet. granted 2006).
[49] *Id.*, at 757.
[50] *In re R.D.*, 627 S.W.2d 803 (Tex. App.-Tyler 1982, no writ).

mom had no phone, a call was made to a neighbor and aunt, and officers drove by the house to retrieve mom, all to no avail.[51] Subsequently, R.D. made a written statement that was in compliance with §51.095(a)(1) of the Family Code. The Court of Appeals held R.D.'s request to speak with his mother was not an invocation of his Fifth Amendment rights or a request for counsel, as there was no evidence that his mother was an attorney.[52] Failing to contact a parent, however, can sometimes lead to the suppression of evidence.

Were the Parents Notified?

The Family Code provides that an individual who takes a child into custody shall promptly notify the child's parent or guardian of the detention.[53] Promptly has been defined to mean up to 90 minutes after a child is taken into custody.[54] The Court of Appeals in *J.B.J.*, found that reasonable efforts were made to contact the child's parents and the officers were only successful after 90 minutes, holding the parents were promptly notified as required by the statute.[55] An important piece of evidence was that the police officers made reasonable attempts to contact the child's parents.

The case in which a parent is not notified at all plays out a little differently. Even though a parent is not notified, clearly in violation of §52.02(b) of the Family Code, the child's statement is not automatically inadmissible absent a showing that the failure caused the child to make a statement.[56] The Court in *Gonzales* discussed the fact that §52.02 of the Family Code is not an exclusionary statute like §51.095, therefore the authority for exclusion of evidence is Article 38.23 of the Code of Criminal Procedure.[57] The Court of Appeals in *Gonzales* held the statement inadmissible because §52.02 of the Family Code was violated, but the Court of Criminal Appeals reversed and remanded for a causal connection analysis.[58] Therefore, it is not enough that a

[51] *Id.* at 804.
[52] *Id.* at 806.
[53] §52.02(b) Texas Family Code.
[54] *In re J.B.J.*, 86 S.W.3d 810 (Tex. App.-Beaumont 2002, no pet.).
[55] *Id.* at 815.
[56] *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).
[57] *Id.* at 912. *See also* §51.17 Texas Family Code (applying Chapter 38 of the Code of Criminal Procedure to juvenile cases).
[58] *Id.* at 914.

parent was not notified, there also needs to be a causal connection to show that if the parent were notified, the child would not have made the statement. Additionally, the burden to show the causal connection is on the respondent child, which then triggers the state's burden of showing attenuation of taint.[59] In addition to notifying a parent when a child is taken into custody, if the child is not going to be released, he needs to be taken to a juvenile processing office[60], a detention facility or a medical facility (if the circumstances warrant it) without unnecessary delay.[61]

Was the Child Taken to a Juvenile Processing Office Without Unnecessary Delay?

While at a juvenile processing office designated by the juvenile board, a child has a right to have a parent or attorney present, may not be left unattended, may not be cuffed or restrained, and may not be held for more than 6 hours there.[62] The major issue in dealing with juvenile processing offices is the transportation of the child to the office. The majority of cases deal with the "without unnecessary delay" language of the statute.

In *Roquemore*, the officer took a detour (at the child's request) while on the way to the juvenile processing office to retrieve stolen property that was hidden.[63] The Court of Criminal Appeals established a clear causal connection when it stated: "Although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time if section 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed."[64] Therefore, as with violations of §52.02(b) (notifying the parents), there also needs to be a causal connection

[59] *Pham v. State*, 125 S.W.3d 622 (Tex. App.-Houston [1st Dist.] 2003, aff'd 2005).
[60] §52.025 Texas Family Code (juvenile processing office designed to be temporary stopping point for completing paperwork not long-term detention).
[61] §52.02(a) Texas Family Code.
[62] §52.025(c) and (d).
[63] *Roquemore*, 60 S.W.3d at 865 (delay between taking child into custody and recovering stolen property took 20-25 minutes).
[64] *Id.* at 871. (footnotes omitted).

between deviating from the juvenile processing center and not just a violation of the statute alone.

One situation in which the courts have held that a delay was necessary was to secure a crime scene. The Court of Criminal Appeals has held that a 50-minute delay in order to secure a murder scene was not unnecessary.[65] The San Antonio Court of Appeals has held that a 2½ hour delay in order to secure a scene was also not unnecessary.[66] The time was needed to search the house for weapons, following a standoff with the child who locked himself in a bathroom and threatened to kill himself.[67] The Court felt it necessary for the police to ensure everyone's safety before proceeding with the child to a juvenile processing office.

Conclusion

In conclusion, this paper is an extremely brief overview of juvenile confessions. The key to dealing with juveniles is to research the various statutes and areas that provide an avenue for getting statements admitted or suppressed. While it may appear that officers complied with particular statutes, there may be another statute with which was not complied. The trick is to thoroughly weed out all the requirements with which police and state officials must comply and incorporate violations into your argument. For example, as was evident from the discussion above, the suppression of evidence can arise from an invalid statement or failure to properly deal with a child who is taken into custody. Always remember that juveniles need much more protections than adults when dealing with police and state officials, in particular due to their immaturity and lack of experience with the justice system.

[65] *Contreras v. State*, 67 S.W.3d 181, 186 (Tex. Crim. App. 2001).
[66] *In re J.D.*, 68 S.W.3d 775 (Tex. App.-San Antonio 2001, rev. denied).
[67] *Id.* at 783.