

Mental Illness  
Or  
Retardation Proceedings  
AKA  
Chapter 55

Presented July 29, 2010  
Nuts and Bolts of Juvenile Law  
Texas Juvenile Probation Commission  
&  
Juvenile Section of the State Bar of Texas  
Austin, Texas

Bill Cox  
Deputy Public Defender

# Chapter 55

Mental illness/mental retardation proceedings are one of the most infrequent and least understood in Juvenile Court. Before beginning mental health proceedings, counsel must be familiar with the terminology and issues of Chapter 55.

Caveats:

- The proceedings for juveniles with mental illness and mental retardation are similar (and in some cases identical), however there are differences, and the two are governed by different sections of Chapter 55 of the Family Code.
- Practitioners who handle by criminal law and juvenile law need to review chapter 55 prior to handling juvenile mental health matters as there are some significant differences in criminal (adult) and juvenile procedures.

## **Mental Illness**

An illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (a) substantially impairs a person's thought, perception of reality, emotional process, or judgement; or (b) grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Health & Safety Code § 571.003(14)(West).

## **Mental Retardation**

Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Health & Safety Code § 591.003(7)(West).

NOTE: Remember that by definition all juvenile clients are “in their developmental period” (under age 18), and as such, client who is diagnosed as having a pervasive developmental disorder in psychological/psychiatric reports probably qualifies as mentally retarded.

While the terms mental illness and mental retardation provide general parameters for the basic issues addressed by Chapter 55, there are a number of other terms with which counsel needs to be familiar. The most helpful reference when dealing with mental health is the DSM IV; (the full name is the Diagnostic and Statistical Manual of Mental Disorders, 4th Revision), published by the American Psychiatric Association. While the DSM IV provides descriptions, characteristics, and diagnostic information for the recognized mental disorders, its structure into five different axis is also used as the basis for many mental health diagnoses.

The general descriptions for each axis are:

Axis I

Adjustment Disorders; Anxiety Disorders; Childhood Disorders; Cognitive Disorders; Dissociative Disorders; Eating Disorders; Factitious Disorders; Impulse Control Disorders; Mood Disorders; Psychotic Disorders; Sexual and Gender Identity Disorders; Sleep Disorders; Somatoform Disorders; Substance-Related Disorders

Axis II

Personality Disorders | Mental Retardation

Axis III

General Medical Conditions

Axis IV

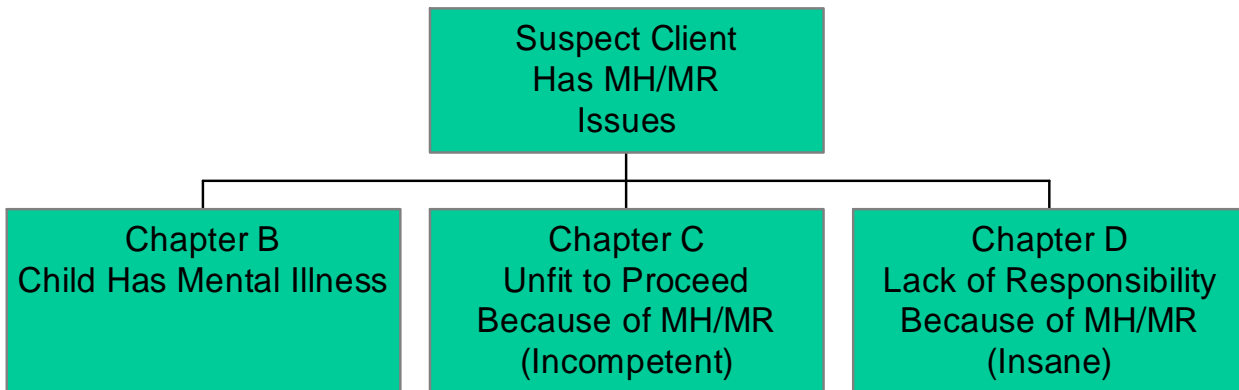
Psychosocial and Environmental Stressors

Axis V

Global Assessment of Functioning

In addition to the authority contained in Chapter 55 of the Family Code, Title 7 of the Texas Health and Safety Code (Subtitles C and D) also governs juvenile mental illness/mental retardation proceedings.

Once counsel has determined that a Chapter 55 issue or issues is present, there are three options:



While proceedings under Chapter B and C are similar, both focused on the present mental state of the juvenile, Chapter D examines the mental state of the juvenile at the time of the alleged offense. The remainder of this paper is divided into three sections, one for each of the three above chapters to provide a step-by-step guide for practitioners.

**Child with Mental Illness**  
**Chapter 55 - Chapter B**  
**(§ 55.11 through § 55.19)**

Proceedings under Chapter 55 Chapter B are relatively unique. While proceedings under Chapters C and D have similar versions in criminal law (competency and insanity respectively), there is not a similar provision for Chapter B. All that is required to proceed under Chapter B is that the child has a mental illness and meet the commitment criteria of the Texas Health and Safety Code, Title 7, Subchapter C. There is no requirement that the child be unfit to proceed or lack responsibility because of mental illness/mental retardation.

When the issue of mental illness is raised by a party (either prosecution or defense), the juvenile court determines if there is probable cause to believe the child has mental illness.<sup>1</sup> The probable cause determination may be based on the motion raising the issue, any supporting documents, counsel's statements, witness testimony, and the Court's observations of the child.<sup>2</sup> If probable cause is found, then proceedings are stayed and an examination is ordered under § 51.20 which must include the expert's opinion on whether the child has a mental illness and if the child meets Title 7, Subchapter C commitment criteria.<sup>3</sup> Note that examination is controlled by a section of Chapter 51 of the family code dealing with Physical or Mental Examinations. In addition to the required elements of the examination, the court can also order the report include an opinion on the child's fitness to proceed.<sup>4</sup>

Examinations require a disinterested expert to perform the examination. Note than an expert can include:

- Physician;
- Psychiatrist; or
- Psychologist

However the expert must also be qualified by education and clinical training in mental health or mental retardation and experienced in forensic evaluation to determine whether the child has a mental illness. Further if fitness to proceed is part of the ordered examination the requirements of Chapter 46B of the Code of Criminal Procedure must also be met.<sup>5</sup> If, after the examination, there is reason to believe that child has a mental illness, then the probation department is required to refer the child to the local MH/MR authority for evaluation and services, unless the petition has already been filed.<sup>6</sup>

After the evaluation report is received, if the juvenile court determines there is evidence of mental illness and the child meets commitment criteria, commitment proceedings are begun,<sup>7</sup> otherwise the stay is dissolved, and the case proceeds normally.<sup>8</sup>

---

<sup>1</sup> Tex. Family Code Chapter 55, § 55.11 (a).

<sup>2</sup> Tex. Family Code Chapter 55, § 55.11 (a) (1)-(2).

<sup>3</sup> Tex. Family Code Chapter 55, § 55.11 (b).

<sup>4</sup> Tex. Family Code Chapter 55, § 55.11 (b)

<sup>5</sup> Tex. Family Code Chapter 51, § 51.20 (a)

<sup>6</sup> Tex. Family Code Chapter 51, § 51.20 (b)

<sup>7</sup> Tex. Family Code § 55.11 (c) (1)

With commitment proceedings the juvenile court may either hear the case itself pursuant to § 55.13 or refer the case to an appropriate court under § 55.14.<sup>9</sup>

Proceeding in front of the juvenile court either party may file an application for court-ordered mental health services AKA commitment.

- Hearing is governed by the Health and Safety Code;
- Burden of proof is on the moving party
- Court appoints physicians to complete certificates of medical examination for mental illness.<sup>10</sup>

Again, the Health and Safety Code determines how the case proceeds, § 574.034 defines the requirements for temporary mental health services, and § 574.035 lists those for extended mental health services.<sup>11</sup>

If the juvenile court refers the commitment proceedings, then the filings on the child's mental illness are sent to the clerk of the receiving office (these documents constitute an application for mental health services) as well as to the receiving prosecuting office. If the child is detained, then the child must be released from detention, transferred to an appropriate place, or kept in detention if no appropriate place is available.<sup>12</sup> If the case is referred to another court, that court is required to notify the juvenile court in writing if temporary or extended mental health services are ordered.<sup>13</sup> Similarly, the court receiving the referral is required to notify the juvenile court if services are not ordered.<sup>14</sup>

After commitment, the Health and Safety Code governs care, treatment, and release, except for the following:<sup>15</sup>

- Orders for services expire 120 days after child's 18th Birthday<sup>16</sup>
- At least 10 days before discharge, facility administrator must notify committing court by certified mail of intent to discharge.<sup>17</sup>

The juvenile court is required to stay the proceedings if a child is ordered to receive either temporary or extended mental health services.<sup>18</sup> If the child not ordered to receive either type of mental health services, then the stay is listed, and the juvenile case proceeds.<sup>19</sup>

---

<sup>8</sup> Tex. Family Code § 55.11 (c) (2)

<sup>9</sup> Tex. Family Code § 55.12

<sup>10</sup> Tex. Family Code § 55.13 (a) - (c)

<sup>11</sup> Tex. Family Code § 55.13 (d)

<sup>12</sup> Tex. Family Code § 55.14

<sup>13</sup> Tex. Family Code § 55.16 (a)

<sup>14</sup> Tex. Family Code § 55.17(a)

<sup>15</sup> Tex. Family Code § 55.15

<sup>16</sup> Tex. Family Code § 55.15 (1)

<sup>17</sup> Tex. Family Code § 55.15 (2)

<sup>18</sup> Tex. Family Code § 55.16 (b)

<sup>19</sup> Tex. Family Code § 55.17 (b)

If a child is released from treatment before turning 18, the court can dismiss the case, or lift the stay and proceed with the case.<sup>20</sup>

If the child:

- Has not been adjudicated;
- Has a determinate sentencing charge
- Is still committed on 18th birthday
- Case is transferred to adult court, for proceedings under Chapter 46B of the Code of Criminal Procedure
- If competency is regained as an adult, punishment is limited to maximum possible as a juvenile

---

<sup>20</sup> Tex. Family Code § 55.18

**Child Unfit To Proceed**  
**Chapter 55 - Chapter C**  
**(§ 55.31 through § 55.45)**

Note:

- This chapter deals with unfitness (incompetence) because of both mental illness and mental retardation.
- Raising fitness issues does not bar legal objections to juvenile court proceedings if they do not require the child's personal participation.<sup>21</sup>
- Like the issues in Chapter B, Unfitness to proceed is raised and ruled upon pre-adjudication.

A child who cannot assist in his/her own defense and/or who doesn't understand the proceedings against him/her shall not be tried, certified, or modified. Either party may raise the issue of fitness to proceed, triggering a probable cause evaluation by the court. In evaluating whether there is probable cause the court may consider the motion, supporting documents, statements of counsel, witness testimony, and its observations of the juvenile. If probable cause is found, the proceedings are stayed, and an examination ordered pursuant to § 51.20. The examination must include expert opinion on unfitness to proceed as the result of mental illness/mental retardation.<sup>22</sup>

Examinations require a disinterested expert to perform the examination. Note that an expert can include:

- Physician;
- Psychiatrist; or
- Psychologist

However the expert must also be qualified by education and clinical training in mental health or mental retardation and experienced in forensic evaluation to determine whether the child has a mental illness. Further if fitness to proceed is part of the ordered examination the requirements of Chapter 46B of the Code of Criminal Procedure must also be met.<sup>23</sup> If, after the examination, there is reason to believe that child has a mental illness, then the probation department is required to refer the child to the local MH/MR authority for evaluation and services, unless the petition has already been filed.<sup>24</sup>

After the examination reports are received and juvenile court determines evidence exists to support unfitness, a hearing is held under § 55.32, otherwise the stay is lifted and juvenile proceedings continue.<sup>25</sup>

The Fitness Hearing:

---

<sup>21</sup> Tex. Family Code § 55.32 (g)

<sup>22</sup> Tex. Family Code § 55.31 (a) - (c)

<sup>23</sup> Tex. Family Code Chapter 51, § 51.20 (a)

<sup>24</sup> Tex. Family Code Chapter 51, § 51.20 (b)

<sup>25</sup> Tex. Family Code Chapter 55, § 55.31



- Issue of unfitness to proceed because of mental illness or mental retardation is decided at a separate hearing;<sup>26</sup>
- Issue decided at bench hearing unless juvenile request jury at least 10 days before hearing;<sup>27</sup>
- Standard is preponderance of the evidence.<sup>28</sup>

If the child is found to be fit to proceed, the stay is lifted;<sup>29</sup> if found unfit, proceedings continue to be stayed and proceedings are held pursuant to § 55.33.<sup>30</sup>

Regardless of whether the unfitness is due to mental illness or mental retardation, a commitment for up to 90 days is required.<sup>31</sup> If the unfitness stems from mental illness there are three placement options:

- Placement with the Texas Department of Mental Health and Mental Retardation<sup>32</sup>
- In a private psychiatric inpatient facility<sup>33</sup>
  - On application of parent or guardian
  - Facility administrator must agree in writing
- An outpatient setting if the court finds it suitable<sup>34</sup>

If the unfitness stems from mental retardation, then only placement with Texas Department of MH/MR or a private inpatient facility is available.<sup>35</sup>

Note: If funds are specifically budgeted for it, the government can be ordered to pay the costs of placement in a private psychiatric facility.<sup>36</sup>

Orders from the court are required to transport the juvenile to and from inpatient treatment facilities. The default is for the probation department or sheriff to provide transportation, however if the child is not picked up by either by the 11th day after court's order for the child's return, then the facility is required to transport the child at the County's expense.<sup>37</sup>

As part of the commitment ordered under § 55.34, the court is required to order the probation department to send copies of all relevant information in its possession to the treatment provider.<sup>38</sup>

The facility's report is due to the court by the 75th day after the commitment order, and must describe the treatment provided, and the facility director's opinion of the child's competency.<sup>39</sup>

---

<sup>26</sup> Tex. Family Code Chapter 55, § 55.32 (b)

<sup>27</sup> Tex. Family Code Chapter 55, § 55.32 (c)

<sup>28</sup> Tex. Family Code, § 55.32 (d)

<sup>29</sup> Tex. Family Code, § 55.32 (e)

<sup>30</sup> Tex. Family Code § 55.32 (f)

<sup>31</sup> Tex. Family Code § 55.33

<sup>32</sup> Tex. Family Code § 55.33 (a) (1) (A)

<sup>33</sup> Tex. Family Code § 55.33 (a) (1) (B)

<sup>34</sup> Tex. Family Code § 55.33 (a) (2)

<sup>35</sup> Tex. Family Code § 55.33 (a) (1) - (2)

<sup>36</sup> Tex. Family Code § 55.33(b)

<sup>37</sup> Tex. Family Code § 55.34

<sup>38</sup> Tex. Family Code § 55.35 (a)

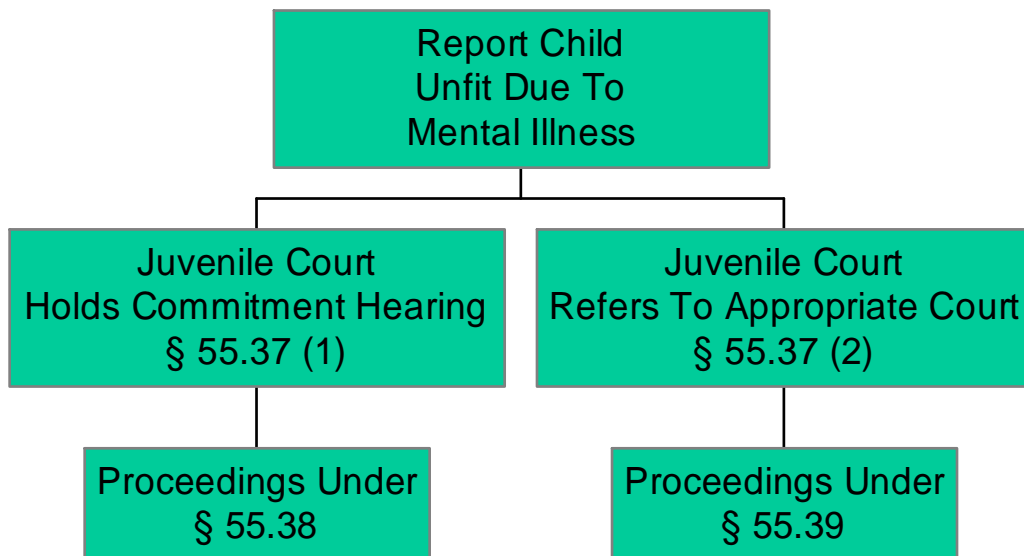
The court then provides a copy of the report to prosecution and defense counsel.<sup>40</sup> **If the report indicates the child to be fit to proceed, the court is required to find the child fit, unless defense counsel objects in open court or files a written objection by the 2nd day after receiving a copy of the report.**<sup>41</sup> If a written objection is made, a fitness hearing must be held, again this is a bench hearing unless a jury is requested.<sup>42</sup> If the child is found fit to proceed, the stay is lifted and proceedings continue normally;<sup>43</sup> if the child is found unfit a commitment hearing must be held.<sup>44</sup>

**Commitment Proceedings:**

Note:

At this point the procedures for commitment because of mental illness and mental retardation become separate: §§55.37 through 55.39 govern mental illness while §§ 55.40 through 55.42 apply to mental retardation.

**Mental Illness Commitments**



If the child is unfit to proceed because of mental illness, and meets the commitment requirements of Chapter 574 of the Health and Safety Code, the court may either hold a commitment hearing or refer the matter to an appropriate court.<sup>45</sup>

---

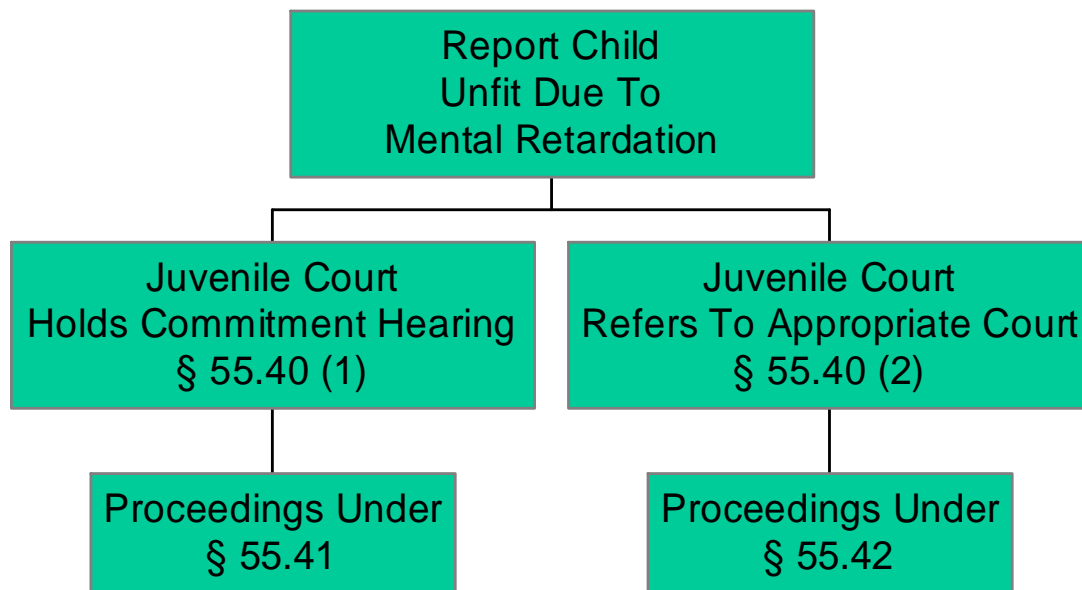
<sup>39</sup> Tex. Family Code § 55.35 (b)  
<sup>40</sup> Tex. Family Code § 55.35 (c)  
<sup>41</sup> Tex. Family Code § 55.36 (a)  
<sup>42</sup> Tex. Family Code § 55.36 (b)  
<sup>43</sup> Tex. Family Code § 55.36 (c)  
<sup>44</sup> Tex. Family Code § 55.36 (d)  
<sup>45</sup> Tex. Family Code § 55.37

For proceedings in juvenile court, the prosecutor files the application for mental health services under the Health and Safety Code (Chapter 574.001). Based on the evidence presented, the court orders either temporary or extended mental health services.<sup>46</sup>

If the case is being referred, then the documentation is forwarded to the receiving court and prosecuting office. The child may be released to home detention, transferred to an appropriate placement, or kept in detention.<sup>47</sup>

The standard of care and treatment is defined by Subtitle C, Title 7 of the Health and Safety Code, with the exception of requiring notice by certified mail from the facility administrator to the committing court 10 days before the juvenile is released.<sup>48</sup>

## Mental Retardation Commitments



The procedures for mental retardation are very similar to mental illness, however they are controlled by a different chapter of the Health and Safety Code. If the child is unfit to proceed because of mental retardation, and meets the commitment requirements of Chapter 593 of the Health and Safety Code, the court may either hold a commitment hearing or refer the matter to an appropriate court.<sup>49</sup>

For proceedings in juvenile court, the prosecutor files the application for mental health services under the Health and Safety Code (Chapter 593.041). Based on the evidence presented the court orders commitment to a residential care facility if 593.052 of the Health and Safety Code is met.<sup>50</sup>

<sup>46</sup> Tex. Family Code § 55.38

<sup>47</sup> Tex. Family Code § 55.39

<sup>48</sup> Tex. Family Code § 55.45 (a)

<sup>49</sup> Tex. Family Code § 55.40

<sup>50</sup> Tex. Family Code § 55.41

The Texas Department of Mental Health and Mental Retardation or other community center is required to accept the juvenile if placement is ordered.<sup>51</sup>

If the case is being referred, then the documentation is forwarded to the receiving court and prosecuting office. The child may be released to home detention, transferred to an appropriate placement, or kept in detention.<sup>52</sup>

The standard of care and treatment is defined by Subtitle C, Title 7 of the Health and Safety Code, with the exception of requiring notice by certified mail from the facility administrator to the committing court 10 days before the juvenile is released.<sup>53</sup>

### **Restoration of Fitness:**

The prosecutor may move for a restoration hearing if:<sup>54</sup>

- The child is found unfit and
  - The child is not ordered to receive inpatient services
  - The child is not committed to residential treatment
  - The child is not ordered into outpatient services
- The child is released from the above before his/her 18th birthday

The hearing is a to the court (no jury);<sup>55</sup> the burden is on the movant (usually the State) by a preponderance of the evidence.<sup>56</sup> If the motion is successful, the stay is dissolved, otherwise the motion is dismissed.<sup>57</sup>

If the child is charged with a determinate sentencing offense and is still committed on his/her 18th birthday, the juvenile court is required to transfer the case to district court for proceedings under Chapter 46B of the Code of Criminal Procedure.<sup>58</sup>

---

<sup>51</sup> Tex. Family Code § 55.41 (c)

<sup>52</sup> Tex. Family Code § 55.42

<sup>53</sup> Tex. Family Code § 55.45 (b) note that a new section was added to 55.45 by the 2007 Legislature which reads as follows:

(c) If the referred child, as described in Subsection (b), is alleged to have committed an offense listed in Section 3g, Article 42.12, Code of Criminal Procedure, the administrator of the residential care facility shall apply, in writing by certified mail, return receipt requested, to the juvenile court that ordered commitment of the child and show good cause for any release of the child from the facility for more than 48 hours. Notice of this request must be provided to the prosecuting attorney responsible for the case. The prosecuting attorney, the juvenile, or the administrator may apply for a hearing on the application. If no one applies for a hearing, the trial court shall resolve the application on the written submission. The rules of evidence do not apply to this hearing. An appeal of the trial court's ruling on the application is not allowed. The release of a child described in this section without the express approval of the trial court is punishable by contempt.

<sup>54</sup> Tex. Family Code § 55.43 note this section was amended in the 2007 legislative session to read as follows:

(B) is discharged or currently on furlough [~~furloughed~~] from a mental health facility or outpatient center before the child reaches 18 years of age.

<sup>55</sup> Tex. Family Code § 55.43 (c)

<sup>56</sup> Tex. Family Code § 55.43 (d)

<sup>57</sup> Tex. Family Code § 55.43 (e) - (f)

<sup>58</sup> Tex. Family Code § 55.44 Note: this section was amended during the 2007 legislative session to read:

**Child Lacks Responsibility For Conduct**  
**Chapter 55 - Chapter D**  
**(§ 55.51 through § 55.61)**

Note:

- This chapter deals with both lack of responsibility (insanity) because of both mental illness and mental retardation.
- Unlike child with mental illness and unfitness to proceed, lack of responsibility is a defensive issue presented to the judge or jury at the adjudication hearing.<sup>59</sup>

\*\*\*\*\*

If the child lacks substantial capacity to either appreciate the wrongfulness of his/her conduct or to confirm his/her conduct to the requirements of the law, he/she is no legally responsible for his/her conduct.<sup>60</sup>

Either party may raise the issue of lack of insanity before the Court; once the issue is raised an examination is ordered under 51.20 which must include the expert's opinion as to whether the child lacks responsibility because of mental illness or mental retardation.<sup>61</sup>

Examinations require a disinterested expert to perform the examination. Note than an expert can include:

- Physician;
- Psychiatrist; or
- Psychologist

However the expert must also be qualified by education and clinical training in mental health or mental retardation and experienced in forensic evaluation to determine whether the child has a mental illness.<sup>62</sup>

At the adjudication hearing, lack of responsibility must be proven by a preponderance of the evidence,<sup>63</sup> and a special issue must be submitted in the charge regarding whether the child lacks

---

(1) the child is not discharged or currently on furlough [~~furloughed~~] from the facility before reaching 18 years of age; and

<sup>59</sup> Tex. Family Code § 55.51 (c)

<sup>60</sup> Tex. Family Code § 55.51 (a); Note according to W.D.A. v. State 835 S.W.2d 277 (Tex. App. – Waco, 1992, no writ), the Family Code definition of insanity is used; not the Penal Code definition.

<sup>61</sup> Tex. Family Code, § 55.51 (b)

<sup>62</sup> Tex. Family Code Chapter 51, § 51.20 (a)

<sup>63</sup> Tex. Family Code , § 55.51 (d)

responsibility and indicate whether it is due to mental illness or mental retardation.<sup>64</sup> A finding of lack of responsibility bars any further proceedings against the child for the charges, other than the commitment process.<sup>65</sup>

After a finding of lack of responsibility, the court is required to order the child be evaluated, regardless of whether the unfitness is due to mental illness or mental retardation.<sup>66</sup> If the unfitness stems from mental illness there are three placement options:

- Placement with the Texas Department of Mental Health and Mental Retardation<sup>67</sup>
- In a private psychiatric inpatient facility<sup>68</sup>
  - On application of parent or guardian
  - Facility administrator must agree in writing
- An outpatient setting if the court finds it suitable<sup>69</sup>

If the unfitness stems from mental retardation, then only placement with Texas Department of MH/MR or a private inpatient facility is available.<sup>70</sup>

Note: If funds are specifically budgeted for it, the government can be ordered to pay the costs of placement in a private psychiatric facility.<sup>71</sup>

Orders from the court are required to transport the juvenile to and from inpatient treatment facilities. The default is for the probation department or sheriff to provide transportation, however if the child is not picked up by either by the 11th day after court's order for the child's return, then the facility is required to transport the child at the County's expense.<sup>72</sup> As part of the commitment ordered under § 55.34, the court is required to order the probation department to send copies of all relevant information in its possession to the treatment provider.<sup>73</sup>

The facility's report is due to the court by the 75th day after the commitment order, and must describe the treatment provided, and the facility director's opinion of the child is mentally ill or mentally retarded.<sup>74</sup> The court then provides a copy of the report to prosecution and defense counsel.<sup>75</sup> If the child does not have a mental illness or mental retardation, the juvenile is released, unless the case involved a determinate sentencing charge and an objection is made by the State within two days of receiving the report.<sup>76</sup> Should the report indicate the child meets the

---

<sup>64</sup> Tex. Family Code, § 55.51 (e)

<sup>65</sup> Tex. Family Code, § 55.51 (g)

<sup>66</sup> Tex. Family Code § 55.52

<sup>67</sup> Tex. Family Code § 55.52 (a) (1) (A)

<sup>68</sup> Tex. Family Code § 55.52 (a) (1) (B)

<sup>69</sup> Tex. Family Code § 55.52 (a) (2)

<sup>70</sup> Tex. Family Code § 55.52 (a) (1) - (2)

<sup>71</sup> Tex. Family Code § 55.52(b)

<sup>72</sup> Tex. Family Code § 55.53

<sup>73</sup> Tex. Family Code § 55.54 (a)

<sup>74</sup> Tex. Family Code § 55.54 (b)

<sup>75</sup> Tex. Family Code § 55.54 (c)

<sup>76</sup> Tex. Family Code 55.55 (a)

commitment requirements of the Health and Safety Code, two certificates of medical examination for mental illness (if applicable), must also be forwarded.<sup>77</sup>

If an objection is filed, the state has the burden to prove the juvenile meets the requirements for a civil commitment under Subtitle C or D of the Health and Safety Code Title 7 by clear and convincing evidence and also suffers from mental illness or mental retardation.<sup>78</sup>

---

<sup>77</sup> Tex. Family Code § 55.56

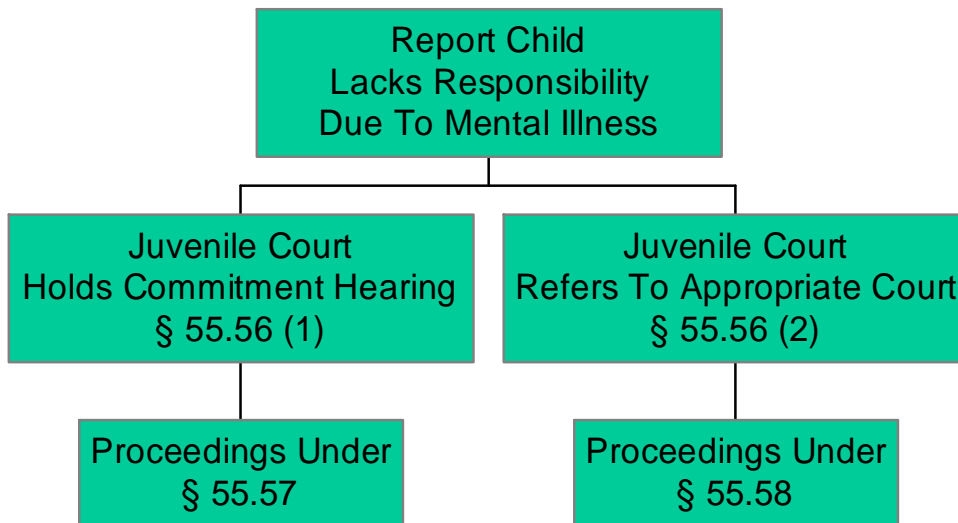
<sup>78</sup> Tex. Family Code § 55.55 (a) – (d).

2007 Legislative Changes:

There were only three changes made to Chapter 55 during the 2007 legislative session. Two are clarifications of the meaning of “furlough” in § 55.43 and §55.44; the other in § 55.45 defined the standards of care and notice of release or furlough. Adding a new section which reads as follows:

(c) If the referred child, as described in Subsection (b), is alleged to have committed an offense listed in Section 3g, Article 42.12, Code of Criminal Procedure, the administrator of the residential care facility shall apply, in writing by certified mail, return receipt requested, to the juvenile court that ordered commitment of the child and show good cause for any release of the child from the facility for more than 48 hours. Notice of this request must be provided to the prosecuting attorney responsible for the case. The prosecuting attorney, the juvenile, or the administrator may apply for a hearing on the application. If no one applies for a hearings, the trial court shall resolve the application on the written submission. The rules of evidence do not apply to this hearing. An appeal of the trial court’s ruling on the application is not allowed. The release of a child described in this section without the express approval of the trial court is punishable by contempt.

Insanity Commitments  
Mental Illness



The commitment procedure is very similar to that for unfitness and mental illness. If the child is unfit to proceed because of mental illness, and meets the commitment requirements of Chapter 574 of the Health and Safety Code, the court may either hold a commitment hearing or refer the matter to an appropriate court.<sup>79</sup>

<sup>79</sup> Tex. Family Code § 55.56



For proceedings in juvenile court, the prosecutor may file an application for mental health services under the Health and Safety Code (Chapter 574.001). Based on the evidence presented, the court orders either temporary or extended mental health services.<sup>80</sup>

If the case is being referred, then the documentation is forwarded to the receiving court and prosecuting office. The child may be released to home detention, transferred to an appropriate placement, or kept in detention.<sup>81</sup>

If the child is unfit to proceed because of mental illness, and meets the commitment requirements of Chapter 574 of the Health and Safety Code, the court may either hold a commitment hearing or refer the matter to an appropriate court.<sup>82</sup>

For proceedings in juvenile court, the prosecutor files the application for mental health services under the Health and Safety Code (Chapter 574.001). Based on the evidence presented, the court orders either temporary or extended mental health services.<sup>83</sup>

If the case is being referred, then the documentation is forwarded to the receiving court and prosecuting office. The child may be released to home detention, transferred to an appropriate placement, or kept in detention.<sup>84</sup>

The standard of care and treatment is defined by Subtitle C, Title 7 of the Health and Safety Code, with the exception of requiring notice by certified mail from the facility administrator to the committing court 10 days before the juvenile is released.<sup>85</sup>

---

<sup>80</sup> Tex. Family Code § 55.57

<sup>81</sup> Tex. Family Code § 55.58

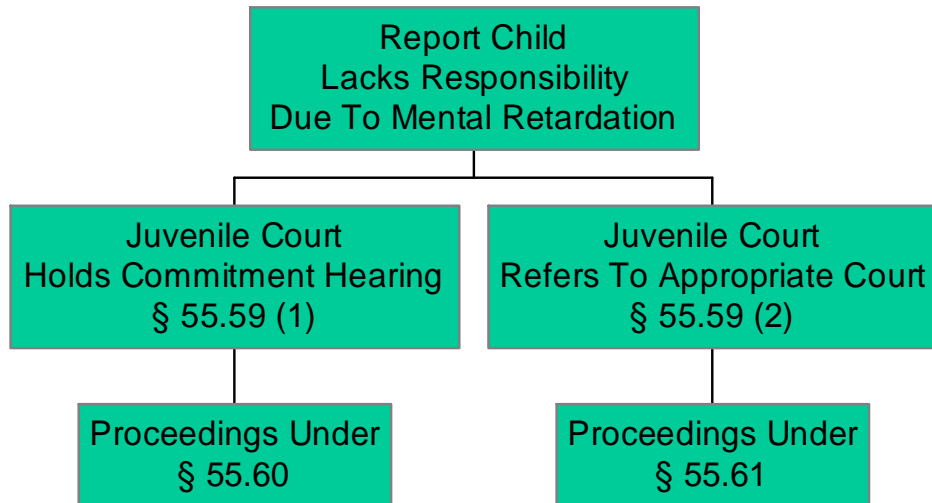
<sup>82</sup> Tex. Family Code § 55.37

<sup>83</sup> Tex. Family Code § 55.38

<sup>84</sup> Tex. Family Code § 55.39

<sup>85</sup> Tex. Family Code § 55.45 (a)

## Insanity Commitments Mental Retardation



The procedures for mental retardation are very similar to mental illness, however they are controlled by a different chapter of the Health and Safety Code. If the child is unfit to proceed because of mental retardation, and meets the commitment requirements of Chapter 593 of the Health and Safety Code, the court may either hold a commitment hearing or refer the matter to an appropriate court.<sup>86</sup>

For proceedings in juvenile court, the prosecutor files the application for placement under the Health and Safety Code (Chapter 593.041). Based on the evidence presented the court orders commitment to a residential care facility if 593.052 of the Health and Safety Code is met.<sup>87</sup> The Texas Department of Mental Health and Mental Retardation or other community center is required to accept the juvenile if placement is ordered.<sup>88</sup>

If the case is being referred, then the documentation is forwarded to the receiving court and prosecuting office. The child may be released to home detention, transferred to an appropriate placement, or kept in detention.<sup>89</sup>

---

<sup>86</sup> Tex. Family Code § 55.60

<sup>87</sup> Tex. Family Code § 55.60 (b)

<sup>88</sup> Tex. Family Code § 55.60 (c)

<sup>89</sup> Tex. Family Code § 55.61

## Chapter 55 Issues Checklist

Is there a Chapter 55 Issue?

(AKA Can you talk to the client and does he/she understand what is going on?)

### Part I -- (Short screening test)

Can you have a coherent conversation with your client? Yes / No

Does the Client understand the charges? Yes / No

Does the Client understand the role of the prosecutor? Yes / No

Does the Client understand the role of the judge? Yes/ No

Does the Client understand your role (Defense Attorney)?

If the answer to any of the above is "No", you may need to go through the full screening questions.

### Part II -- (Full screening)

Is there a history of mental health/mental retardation issues?

If so, is it a mental health history, mental retardation history or both.

What if any treatment(s) has the client received?

(i.e. who were the treating physicians, social workers, threapists, etc; what medications have been prescribed, has the client been hospitalized for treatment or sent to a residential treatment center (RTC))

### School questions:

Has the client had an ARDs (Admission, Review, and Dismissal hearings)

Is he/she in special ed classes, if so which subjects.

Be sure to get all of the client's school records-- this will probably require 2 or 3

subpoenas, one for academic records including achievement tests, one for counseling records, and a third for disciplinary records.

Questions for parents:

How well does the client understand concepts/assignments

If the answer is that he/she gets it, you just have to tell him or her 3-4 times, this may indicate an issue of fitness to proceed

If there a history of inhalant abuse?

Is there anything of concern in client's developmental history, any accidents with head trauma, any illnesses with high fever, loss of consciousness, etc.

Talking to client, be sure to test not only how client responds to individual questions and legal concepts, but also client's short term memory.

---

# Unfitness To Proceed Due to Mental Illness or Mental Retardation

# What Are The Issues

- Mental Illness
- Mental Retardation
  
- Other Reasons?

# Caveats:

- The procedures for mental illness and mental retardation are similar, however they have slight differences and are governed by different sections of chapter 55 of the Family Code
- If you practice both criminal and juvenile law, be sure to review chapter 55-- there are some significant differences in adult and juvenile procedures

# Jurisdiction

- Mental Health/Mental Retardation Services or Commitment jurisdiction rests with the Juvenile Court (Tex. Fam. Code § 55.02)



# Authority

- 2 Sources
  - ◆ Texas Family Code Chapter 55
    - ✦ Section A Definitions/General Issues
    - ✦ Section B Child with Mental Illness
    - ✦ Section C Child unfit to proceed because of MH/MR
    - ✦ Section D Lack of Responsibility because of MH/MR
  
  - ◆ Texas Health and Safety Code Title 7
    - ✦ Subtitles C and D

# Mental Illness

- An illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (a) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (b) grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Health & Safety Code § 571.003(14) (West).

# Mental Retardation

- Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Health & Safety Code § 591.003(7) (West).

# Unfit to Proceed (Incompetence To Stand Trial)

- A child in juvenile court who, as a result of mental illness or mental retardation, lacks capacity to understand the proceedings in a juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such capacity endures. Tex. Fam. Code § 55.31(a).

# Raising The Issue of Mental Illness/Mental Retardation

- The Court is required to determine whether there is probable cause to believe a child has a mental illness on the motion of any party
  - ◆ In making its determination the Court may consider:
    - ◆ the motion raising the issue, any supporting documents, “professional statements” of counsel, and witness testimony
    - ◆ the Court may also make its own observations of the child.

# Probable Cause Determination

- The Court finds that there is no probable cause:
  - ◆ Case continues as usual
- The Court finds that there is probable cause, the Court shall:
  - ◆ Proceedings in the juvenile case are stayed
  - ◆ Order the child examined under §51.20
    - ✦ Report from the examination must include
      - Expert opinion on whether the child
        - Has a mental illness
        - Meets commitment criteria
        - And, *if ordered*, whether child is unfit to proceed

# After The Examination

- After reviewing all information, including info from examination, the Court determines
  - ◆ If there is evidence the Child has a mental illness/mental retardation and meets commitment criteria
  - ◆ If there is no evidence of a mental illness/mental retardation, or child does not meet commitment criteria, the stay is dissolved

# Commitment Proceedings

- Court may either
  - ◆ Initiate proceedings
  - ◆ Refer the case to an “appropriate” court



# Case Referred to “Appropriate” Court

- Juvenile Court is required to:
  - ◆ Forwards papers regarding child’s mental illness to clerk of the court receiving the case with copies to County Attorney or District Attorney
  - ◆ These papers constitute an application for mental health services under the Health and Safety Code
  - ◆ If the child is detained, release the child, order the child transferred to an appropriate place, or find that there is no appropriate place to place the child

# Juvenile Committed By Court To Which Case Is Referred

- Court receiving case must notify juvenile court if child is committed
- Juvenile proceedings are automatically stayed once notice of commitment is received
- If child is not committed, juvenile court must be notified immediately in writing, and juvenile court dissolves stay

# Commitment in Juvenile Court

- Prosecutor or attorney for child may file application for court-ordered mental health services
- The burden of proof is on the party who filed the application for services
- The Court appoints “the number of physicians necessary” to evaluate the child and complete certificates of medical examination for mental illness

# Commitment in Juvenile Court -- Hearing

- After hearing the evidence at a hearing:
  - ◆ Order temporary mental health services if the requirements of Health and Safety Code §574.034 are met
  - ◆ Order extended mental health services if the requirements of Health and Safety Code §574.0345 are met

# Commitment under Chapter 55 § C

- If child is found unfit to proceed because of a mental illness/mental retardation, the child shall be ordered to be placed for not more than 90 days (the statute also bars specifying a shorter time):
  - ◆ With Texas Department of Mental Health and Mental Retardation
  - ◆ In a private psychiatric facility on petition of child's parent/guardian/guardian ad litem, with written approval of facility administrator
    - ✦ The state or subdivision can be ordered to pay these costs
  - ◆ If for mental illness and Court may order treatment in an alternative setting.

# Transportation To and From Facility

- Juvenile Court orders either
  - ◆ Juvenile Probation Department
  - ◆ Sheriff
- To transport child to and from treatment facility
- If JPD or Sheriff does not transport child back to court before 11th day after court signs order to return child to court:
  - ◆ Facility required to transport
  - ◆ County required to reimburse facility's transportation expenses

# Information Provided To Treatment Facility

- Following commitment, Juvenile Court is required to order probation department to send copies of **any information** in the department's possession relevant to child's mental illness/mental retardation to treatment provider

# Report From Treatment Provider

- By 75th day after placement order is issued, treatment providers must submit a report to the court which
  - ◆ describes the treatment provided
  - ◆ includes opinion of facility director regarding child's fitness to proceed
- The Court forwards the report to prosecutor and child's attorney



# Report From Treatment Provider-- Fit To Proceed (Mental Illness)

- If report states that child is fit to proceed
  - ◆ Juvenile court required to find child fit to proceed
    - ✦ Unless child's attorneys files objection by 2nd day after receiving copy of the report
  - ◆ If objection filed
    - ✦ Court hold fitness hearing
    - ✦ Child's attorney may request jury trial
  - ◆ If child ultimately found fit to proceed stay dissolved
  - ◆ If child found unfit to proceed commitment proceedings under §55.38 instituted

# Report from Treatment Provider

## Potential Red Flags

- “He appears to be at least marginally fit to proceed at this time:
- Client’s cognitive functioning appears to fall within the Borderline range, but his adaptive behavioral functioning, estimated to within the moderately to severely impaired ranged, is noticeably below expectation, compared to his level of cognitive functioning.

# Report from Treatment Provider

## Potential Red Flags

- Client was partially oriented to time. (knew year, season, and day of the week, did not know month or day)
- Client did not know the name of home where he was living (at State Hospital)
- In the Communication domain, Client was rated to be functioning within the severely impaired range

# Report from Treatment Provider

## Potential Red Flags

- Does the “language” attributed to client match your observations
- If Client is stable and cooperative, and with the cautions noted above, Client appears at least marginally capable of proceeding to trial at this time.

# Report From Treatment Provider-- Unfit To Proceed (Mental Illness)

- If the report indicates child is unfit to proceed, and meets commitment criteria it must include
  - ◆ 2 certificates of mental examination for mental illness
- The Court initiates commitment proceedings or refers case to “appropriate” court

# Commitment Procedures

- These parallel those in §55.13 and §55.14 of the Family Code
  - ◆ Note: §55.38 does not list which party has the burden of proof
  - ◆ Note: §55.38 required the prosecutor to file the application for services

# Report From Treatment Provider -- Unfit To Proceed (Mental Retardation)

- If the report states that the child meets commitment criteria and is unfit to proceed because of mental retardation it must
  - ◆ Include an affidavit stating the conclusions reached from the diagnosis
- Juvenile Court is required to set a hearing or refer the case to an “appropriate court”

# Commitment Proceedings (Mental Retardation)

- Juvenile Court
  - ◆ Sets hearing and provides notice per § §593.047 and 593.048 Health and Safety Code
  - ◆ Holds hearing pursuant to § § 593-049-593.046 Health and Safety Code
  - ◆ Orders commitment if § 593.052 Health and Safety Code is met
- Texas Department of Mental Health and Mental Retardation is required to admit child to a residential facility on receipt of Court's order



# Restoration Of Fitness

- Prosecutor may request restoration hearing if the child
  - ◆ was previously found unfit because of Mental Illness/Mental Retardation
  - ◆ child is not ordered to receive inpatient, residential, or outpatient services
  - ◆ child was discharged or furloughed from treatment before reaching age 18

# Restoration of Fitness

- Restoration hearing to the judge
- Fitness proven by preponderance of the evidence
- At end of hearing either:
  - ◆ Fitness restored
  - ◆ Motion to restore dismissed

# After Commitment

- Title 7 Health and Safety Code governs except:
  - ◆ Court order for mental health services expires 120th day before child's 18th birthday
  - ◆ Court must be notified by facility administrator in writing (certified mail) at least 10 days before child is released

# Standard Of Care Notice of Release/Furlough

- The standard of care is the same listed in §55.15. There is additional language imposing similar notification requirements on the administrator of a residential care facility

# Release From Mental Health Facility

- If a child is discharged before turning 18
  - ◆ The juvenile case can be dismissed with prejudice
  - ◆ The case can proceed as though no order for MH services was entered

# Child Turns 18

- If child:
  - ◆ Has not been discharged from treatment before age 18
  - ◆ Is charged with a determinate sentencing offense
- Case is referred to criminal court for competency proceedings
- Maximum sentence is limited to punishment range if prosecuted while still in juvenile court

**Lack of Responsibility  
Due To  
Mental Illness  
Or  
Mental Retardation**

# Definition

- A child is not responsible for delinquent conduct or conduct indicating a need for supervision if, at the time of the conduct, because of mental illness or mental retardation, the child lacks substantial capacity to appreciate the wrongfulness of the child's conduct or to conform that conduct to the requirements of the law.



# The Process

- Either party may file a motion raising the issue
- When the issue is raised the court is required to order an examination under §51.20
  - ◆ Exam must include expert opinion on whether the child is not responsible because of mental illness/mental retardation

- Insanity issue is determined by either court or jury at adjudication phase of the case
- Burden of proof is a preponderance of the evidence
- Special issue on lack of responsibility must be included in court/jury's findings
- §55.52 governs proceedings if child found not responsible

# If Found Not To Be Responsible

- If because of mental illness or mental retardation
  - ◆ if child meets commitment criteria, child is placed with
    - ✦ TxMHMR for period not to exceed 90 days
    - ✦ Parent/Guardian/Guardian *ad litem* may request private psychiatric facility
- If because of mental illness and Court finds child can be treated in alternative setting
  - ◆ treatment in that setting may be ordered not to exceed 90 days.

# Transportation To and From Treatment Facility

- The procedure is the same listed in §55.34

# Report from treatment facility

- The procedure is the same listed in §55.35

# Report Child Does Not Have Mental Illness or Mental Retardation

- Note this procedure is reversed from competency cases
- Prosecutor must file an objection within 2 days of receiving report, or child is discharged
- If objection filed,
  - ◆ Court holds a hearing
    - ✦ Child committed if found to have mental illness/mental retardation
    - ✦ Discharged if no finding

# Commitment Procedures

- There are separate procedures for mental illness and mental retardation
  - ◆ The “insanity” procedures track their “competency” counterparts
  - ◆ Juvenile court may refer case to “appropriate” court for commitment proceedings

# Juvenile Recommitted After 90 Day Initial Evaluation

- No deadlines
- Usually no status hearings
- May no longer be pending in the Juvenile Court (Transfer to Probate Court)