

# **NUTS AND BOLTS OF JUVENILE LAW**

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## **Petition, Summons and Service in the Juvenile Court**

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### **Biographical Information**

Kris Moore is currently Assistant District Attorney in Harris County, Houston, Texas and has been with the District Attorney's office for twenty-four years. Her assignments have included Misdemeanor and Felony Courts and the Appellate Division. Assigned to the Juvenile Division as Chief since 1980, her caseload has included prosecuting juveniles as well as representing Children's Protective Services. She graduated from South Texas College of Law in 1977. Ms. Moore served on legislative committees for both the Juvenile Law Section of the State Bar of Texas and the Texas District and County Attorneys Association. In addition, she served as Chairman for both the Juvenile Section of the State Bar of Texas and Houston Bar Association.



## Part I: The Petition

Source of the Law: Family Code Sections:

- 51.19: Limitation Periods (Statutes of Limitation)
- 53.01: Preliminary Investigation and Determination
- 53.012: Review by Prosecutor
- 53.035: Grand Jury Referral
- 53.04: Court Petition and Answer
- 53.045: Violent and Habitual Offenders

**THE PETITION** is the charging instrument in the Juvenile Court that serves the purpose of a “complaint” or “indictment” in bringing the parties into court and giving them notice of what particular wrongdoing is alleged to have been committed. The petition charges a child with delinquency or being a child in need of supervision and identifies the child and his parent, guardian, custodian and/or spouse, all of whom are parties to the juvenile proceeding (see Section 51.02(9) in the Family Code).

The Family Code recognizes **TWO KINDS OF PETITIONS**: a petition for an Adjudication hearing (for delinquency or CINS conduct) and a petition to transfer (also known as a Certification or Waiver of Jurisdiction). Often in the Certification situation the state has originally filed a charging petition for delinquency and then, when the later decision is made to seek Certification, files a Motion to Transfer or Certify. Filing the original petition might be a better practice, because if and when the court denies the request to Waiver, there is a charging instrument – the delinquency petition – in place and a new petition would not have to be filed.

Prior to the filing of the petition, Section 53.01(a) of the Family Code requires a **“PRELIMINARY INVESTIGATION”** to determine the following:

1. Whether the person referred is a juvenile within the meaning in the Juvenile Justice Code (see definition in Sec. 51.02(2)) over which the juvenile court has jurisdiction; and
2. Whether there is “probable cause” to believe the person referred has engaged in delinquent conduct or conduct indicating a need for supervision.
3. If the person is not a “child” or there is no “probable cause” then the person shall immediately released.

Unless there is a prior written procedure providing otherwise, all **REFERRALS INVOLVING FELONIES, VIOLENCE TO A PERSON OR THE USE OF POSSESSION OF WEAPONS** as defined in Penal Code Sections 46.01 (Illegal Weapons – firearm, illegal knife or club) and 46.05 (Prohibited Weapons – explosive weapon, machine gun, short-barrel firearm, firearm silencer, switchblade knife, knuckles, armor-piercing ammunition, a chemical dispensing device or a zip gun) **MUST BE FORWARDED TO THE OFFICE OF THE PROSECUTING ATTORNEY FOR REVIEW** accompanied by all documents with the referral and a summary of all prior referrals of the child. This is **REGARDLESS OF A FINDING OF PROBABLE CAUSE OR LACK THEREOF**. (Sec. 53.01(d))

Any **ALTERNATIVE REFERRAL PLANS** adopted by a juvenile board must be registered with the Texas Juvenile Probation Commission. A Juvenile Board may not adopt an alternative referral plan that does not require the forwarding of a child’s case to the prosecuting attorney if probable cause exists to believe that the child engaged in delinquent conduct for an offense under Penal Code Sec. 19.03 (**CAPITAL MURDER**) or Penal Code Sec. 19.02 (**MURDER**). (Sec. 53.01(f))

Unless there is an alternative plan, the Prosecuting Attorney must promptly review the circumstances and allegations in the referral for legal sufficiency and desirability of prosecution and may file a petition without regard to whether probable cause was found by the intake officer under Sec. 53.01(d).

Under provisions in Sec. 53.035, a Prosecuting Attorney may seek **ADVICE FROM A GRAND JURY PRIOR TO FILING A PETITION** and if the Grand Jury votes for approval of the prosecution, the prosecutor may file a delinquency petition under Sec. 53.04 of the Family Code. This type of approval by the Grand Jury is NOT THE SAME AND DOES NOT CONSTITUTE approval for the purposes of filing a petition under Sec. 53.045 (Violent and Habitual Offenders – this section contains the list of offenses that can be approved by the Grand Jury for an offense carrying a Determinate Sentence). If the prosecutor carries the case to the Grand Jury for advice and the Grand Jury votes to take no action on an offense, the prosecutor may not file a petition under 53.04 concerning the same offense unless the same or a successive Grand Jury approved filing the petition.

**STATUTES OF LIMITATION** that provide for the amount of time allowed to elapse between the commission of the offense and the filing of the petition are provided in Sec. 51.19. This section makes the same limitation periods and procedures for applying the limitation periods as set out in Chapter 12 of the Code of Criminal Procedure applicable to cases filed in the Juvenile Court. Under Chapter 12 there is no statute of limitation for Murder or Manslaughter, there is a 10 year limitation period for sexual assault and certain types of theft, and there are seven and five year periods for other types of felonies. The residual felony limitation period is 3 years and the misdemeanor limitation period is 2 years. In addition, Sec. 51.19 provides a TWO YEAR limitation period for offenses or conduct not given a specific limitation period under Chapter 12 CCP.

**TIME REQUIREMENTS FOR FILING A PETITION:** A petition must be filed “as promptly as practicable” by a prosecutor (Sec 53.04(a)) and there are certain cases that have specific time requirements. If the juvenile is in DETENTION, Sec. 54.01(p) requires a petition be filed:

1. Within 30 working days after the initial detention hearing if the allegation is a capital felony, a first degree felony or an aggravated controlled substance felony;
2. Within 15 working days after the initial detention hearing if the allegation is any other delinquency offense or a violation of probation;
3. The court “shall” release the child from detention if the petition is not filed within the required time,
4. Thereafter the state could still file the charge, but the child would not be in detention.
5. **NEW LAW:** (Effective 9-1-05) New section added to 54.01 is (q-1): Authorizes a juvenile board to impose shorter filing deadlines than the ones provided elsewhere in Sec. 54.01 and to impose consequences for not filing by the deadline established by the juvenile board. It may authorize, but not require, a juvenile court to release a child from detention if the prosecutor fails to file the petition by the deadline set.

**WHO FILES THE COURT PETITION FOR ADJUDICATION OR TRANSFER HEARING FOR A CHILD?** A prosecuting attorney as defined in Sec. 51.02(11) and who can be the district attorney, the county attorney, or any other attorney who regularly serves in a prosecutory capacity in a juvenile court.

1. Sec. 53.04(a) provides that the petition must be filed by a prosecuting attorney who has knowledge of the facts alleged or is informed and believes they are true.
2. The prosecutor is not required to have personal knowledge.
3. Sec. 53.04(c) provides that the petition may be on information and belief

**REQUIREMENTS FOR THE COURT PETITION.** Four different kinds of requirements: (1) Requirements related to form; (2) Requirements related charging the acts alleged; (3) Requirements related to the pleadings for relief; and (4) Requirements related to identifying the child and the parties.

1. **REQUIREMENTS AS TO FORM**
  - a. The pleading shall be styled “In the Matter of \_\_\_\_\_” Sec 53.04(b)
  - b. The petition may be on information and belief

- c. The petition must state:
    - i. The time, place and manner of the acts alleged and the penal law or standard of conduct allegedly violated
    - ii. The child's name, age, and residence address, if known
    - iii. Names and residence addressed of the parent, guardian, custodian and/or spouse
    - iv. If parent, guardian, or custodian does not reside or cannot be found in the state, or if residence unknown, the name and residence of the closest known adult relative
    - v. For habitual felony conduct, the previous adjudications
  - d. **AN ANSWER (oral or written)** may be made at or before the commencement of the hearing, but is not required. If there is no answer, a general denial is assumed.
2. **REQUIREMENTS RELATED TO CHARGING ACTS ALLEGED** – Sec. 54.03(d)(1) requires the petition to state “with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard or conduct allegedly violated by the acts.”
- a. **Pleading the Place:** Pleading must state the Place of the Acts – As in Criminal Pleadings, the pleadings must state the county and state wherein the acts are alleged to have occurred. Pleadings are fatally defective for failure to allege a place of the acts. Matter of H.S., Jr. 564 S.W. 2d 446 (Tex.Civ.App. Amarillo 1978).
  - b. For a Motion to Modify the state is not required to plead the county in which the conduct occurred. J.J.H. v. State, 557 S.W. 2d 838 (Tex.Civ.App.- Waco 1977). A violation of probation is an offense wherever it occurs!
  - c. **Pleading the Time:** Pleading “on or about” is sufficient as in criminal cases. This is the same as in adult court where the pleadings must allege a date not so remote as to be barred by the statute of limitations. Alleging specific time of day is unnecessary unless particular statutes involved.
  - d. **Pleading Venue:** Sec. 51.06(a) Allows Juvenile proceedings to commence in the county in which the alleged conduct occurred or the county in which the child resides, provided that the child was under probation supervision at the time of the offense; it cannot be determined in which county the conduct took place; or the county in which the child resides if that county agrees, in writing, to accept the case.
    - i. **OFFENSE VENUE** - Venue in the county where the offense took place is alleged by pleading the county and state
    - ii. **RESIDENCE VENUE** - Venue where the child resides is pled by alleging the child's address by county and state.
  - e. **Pleading More Than One Offense:**
    - i. The Family Code allows liberal joinder of offenses in the petition without the restrictions that would apply in an adult court pleading. It has been common practice for juvenile petitions to allege several unrelated offenses. Sec. 51.17(a) of the Family Code requires that Rule 51(a) of the Rules of Civil Procedure be consulted in determining permissible joinder of offenses in a juvenile petition. If applied literally in juvenile cases that would permit the state to join in a single petition all offenses believed to be committed by a juvenile.
    - ii. The judge has discretion to require separate hearings for each offense or to separate the offenses in to logically related groups. Moore v. State, 713 S. W. 2d 766 (Tex.App.- Houston [14<sup>th</sup> Dist.] 1986). Also see Civil Rule 174(a) regarding consolidation for trial of offenses or allowing the court to order a separate trial.
    - iii. In a Certification (Transfer) hearing – Sec. 54.02(g) provides that if the petition alleges multiple offenses, the juvenile court must either retain or transfer all offenses relating to a single transaction.

- iv. **THE REALITY** is that it is probably a better pleading practice to separate the offenses. There is always a risk of violation of the Due Process Clause and there is also the risk of prejudice created by multiple allegations.
- f. **Pleading the Elements of the Offense with Particularity:**
  - i. Sec. 53.04(d)(1) requires the state to allege "with reasonable particularity the... acts alleged and the penal law or standard violated.
  - ii. The same general requirements and standards apply to the juvenile petition as are necessary in adult criminal pleadings.
  - iii. Some pleadings that would have been insufficient in adult court have been allowed in juvenile cases. It appears to depend on the nature and extent of the departure from the requirements of criminal pleadings.
    - 1. In the Matter of Edwards, 664 S.W. 2d 815 (Tex.App. - Corpus Christi 1982) the court upheld a Certification pleading that would have been insufficient in adult court. The court held that due process did not require that the language in a certification petition be as certain as the language in an indictment. See K.M.P.v. State, 701 S.W.2d 939(Tex.App. - Ft. Worth 1986) also a case involving a certification petition.
    - 2. Lesser standards of pleading were also upheld in regular delinquency petitions. See T.R.S. v. State, 663 S.W. 2d 920 (Tex.App. - Ft. Worth 1984) which was a delinquency alleging a theft of a purse. The court rejected the respondents argument that the property description was insufficient. There is also an unpublished opinion regarding an allegation of assault on a public servant which did not allege how the victim was a public servant. In re F.C., No. 03-02000463-CV,2003,WL21282766,,2003 ex.App.Lexis 4709, Juvenile Law Newsletter 03-3-06 (Tex.App. - Austin 2003).
    - 3. In another delinquency case, In the Matter of W.H.C.,III, 580 S.W.2d 606 (Tex.Civ.App - Amarillo 1979), the petition was found to be fatally defective because it failed to allege all of the elements of the offense.
    - 4. In a case that failed to allege all the elements, the court upheld the pleading in the petition because it set out the specific section of the Texas Penal Code allegedly violated. The court said that while express allegations are required in Criminal pleadings, there is a lesser standard of pleading in juvenile cases, and the state specifically pleading the exact statute *impliedly* alleged the necessary elements. See C.F. v. State, 897 S.W. 2d 464 (Tex. App. - El Paso 1995)
  - iv. **Pleading the Law of Parties Not Required.** The state is not required to allege the law of parties in an adult criminal indictment, information or complaint and the same rule applies in juvenile cases. In the Matter of S.D.W., 811 S.W. 2d 739 (Tex.App.-Houston[1<sup>st</sup> Dist]1991) and In the Matter of O.C., 945 S.W.2d 241 (Tex.App.-San Antonio 1997).
  - v. **Pleading the Penal Law Violated.** Sec 53.04(d)(1) requires the petition to state "the penal law or standard of conduct allegedly violated by the acts".
    - 1. What is required is that the pleading state all the elements of the offense so that the defense can locate and research the correct penal statute.
    - 2. Citing the specific Penal Code section is not required but appears to be a good practice (see C.F. case above).
    - 3. If the state cites a Penal Code section and makes a mistake in doing so, it is not fatal as long as all the correct elements are present. The error is disregarded and the respondent stands charged with the offense for which the elements were pled. In the Matter of P.B.C.,538 S.W. 2d 448(Tex.Civ.App.-El Paso 1976); In the Matter of J.R.C., 551 S.W.2d 748

(Tex.Civ.App. - Texarkana 1977); In the Matter of H.R.A., 790 S.W. 2d 102 (Tex.App. – Beaumont 1990).

- vi. **Pleading Prior Adjudications.** Sec. 53.04(d) provides that the petition must state ... “if the child is alleged to have engaged in habitual felony conduct, the previous adjudications in which the child was found to have engaged in delinquent conduct violating penal laws of the grade of felony”. This provisions requires pleading prior felony adjudications when the state is seeking a determinate sentence for habitual felony conduct. This is required to place the respondent on notice which prior adjudications the state will seek to prove.

### 3. REQUIREMENTS RELATED TO THE PRAYER FOR RELIEF

- a. **Removal from home findings:** Usually the petition will pray that the juvenile court find that the respondent engaged in delinquent conduct or conduct indicating a need for supervision and that the court find that the child is in need of rehabilitation or that the protection of the public or the child requires that disposition be made. Sec. 54.04(c). The delinquency or CINS finding along with finding that disposition is necessary must be made before the court can put a child on probation or place him in custody of TYC.
- b. Additional findings are necessary to allow the court to remove the child from his home and the petition should include these in the prayer for relief.
  - i. It is in the child’s best interest to be placed outside his home
  - ii. Reasonable efforts were made to prevent or eliminate the need for such removal
  - iii. The child, in his him, cannot be provided the quality of care and the level of support necessary to meet conditions of probation.
- c. **Restitution Requests:** Under Rule 301 of the Civil Rules a judgment cannot include matters that were not requested in the pleadings. Sec. 54.041(b) allows the juvenile court to order the child or the parent to make full or partial restitution to the victim. Because of conflicting opinions from appellate courts regarding the necessity of pleading specifically for restitution, the legislature in 2001 enacted Sec. 54.048 which permits a juvenile court to order restitution without regard to whether the petition specifically includes a request for such restitution.

### 4. REQUIREMENTS RELATED TO IDENTIFYING THE CHILD AND OTHER PERSONS:

- a. Sec. 53.04(d)(2) requires that the petition state “the name, age, and residence address, if known, of the child who is the subject of the petition”.
  - i. Enables the court to direct service
  - ii. Age allegation necessary to show juvenile jurisdiction
- b. Sec. 53.04(d)(3) and (4) requires information identifying the adults who should be notified of the proceedings.
  - i. Parent – parent is defined in 51.02(9) as the mother or father, but does not include a parent whose rights have been terminated.
  - ii. Guardian – is defined in 51.02(4) as the person who, under court order is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court. A child may have a guardian as well as a parent and it may be necessary to name both in the petition.
  - iii. Custodian – Sec. 51.02(3) defines custodian as “the adult with whom the child resides”. The category of custodian is intended to cover the situation where the identities or whereabouts of the other adults in a child’s life cannot be ascertained, but it is known that the child resides with an adult in a family circumstance and, for the purposes of juvenile court, that adult becomes the “custodian”.
  - iv. Under 51.02(10) the child’s parent, spouse, or guardian is a “party” to the proceedings, however the custodian does not have the status as a party.
  - v. When a child appears before the court without a parent or guardian the court is required to appoint a “guardian ad litem”. The court can appoint the custodian, the child’s attorney or some other adult.

- vi. Other adult relatives – If notice cannot be provided to a parent, guardian or custodian, it is important to provide notice to other adult family members of the proceedings affecting the child. Sec. 53.04(d)(4).

## **Part II: Service and Summons of Parties in Juvenile Court**

Source of the Law: Family Code Sections:

53.06: Summons

53.07: Service of Summons

The purpose of the summons is to give notice of the date, time, and place of the court hearing and, through the attached petition, notice of the charging allegations.

1. **A Juvenile Can NOT waive Personal Service:** There must be personal service of the petition and summons on the child to give the juvenile court jurisdiction over the case. You can't serve the attorney or the parent in place of the child. You can't serve a child by certified mail – it must be **IN PERSON**.
2. **Petition Must Accompany Summons:** Sec. 53.06(b) requires that a "copy of the petition must accompany the summons". A return reciting that the summons was served and that a copy of the petition accompanied the summons suffices in the absence of proof to the contrary that the petition was served with the summons. It is not necessary that a copy of the petition be attached to the return.
3. **Oral Summons Permissible.** In the Matter of K.P.S., 840 S.W. 2d 706 (Tex.App. – Corpus Christi 1992) was a case where the juvenile court personally served the juvenile and his guardian with copies of the petition on the record in open court and orally advised them of the time and place of the court hearing. The court of Appeals held that procedure was sufficient to satisfy the Family Code requirements.
4. **Mandatory Language in a Transfer Proceeding (Certification):** Sec 54.02(b) requires that when the summons is for a transfer hearing "the summons must state that the hearing is for the purpose of considering discretionary transfer to the criminal court". Best practice: Always make sure to track the statutory language. (See further below in II).
5. **A Party – Other Than the Child – May Waive Service by Voluntary Appearance:** Sec. 53.06(e) says that " a party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.
6. **Reasonable Effort Must be Made to Find the Parties:** Sec 53.07(b) provides that the "juvenile court has jurisdiction of the case if after a reasonable effort a person other than the child cannot be found nor his post-office address ascertained, whether he is in or outside this state."
7. **The Burden is on the State to Show Service:** the Supreme Court of the State of Texas held that "absent an affirmative showing of service in the record, the juvenile court is without jurisdiction..." in In the Matter of W.L.C., 562 S.W. 2d 454(Tex.1978). Proper service cannot be presumed.
8. **New Service is Not Required Each Time the Hearing is Reset or Continued and When the Petition is Amended**
9. **Service of the Summons may be made by any suitable person under the direction of the court.** No person who is a party to or is interested in the outcome of the hearing shall serve any process. A probation officer may serve the summons.

Failure to have proper service of summons on the juvenile and his family is one of the "KILLER" mistakes in juvenile court. It is also automatic reversible error in some situations because, without it, the juvenile court lacks jurisdiction to hear the case.



The following is a list of possible points of reversible error, either because the summons was not issued or served, or because the summons served was somehow defective:

1. **NO SERVICE ON THE JUVENILE:** No summons was issued to or served on the child. Without it, even if the juvenile appears voluntarily in court, the court lacks jurisdiction to hear the case. D.W.M., 562 S.W. 2d 851(Tex. 1978); W.L.C., 562 S.W. 2d 454 (Tex. 1978); I.T.W., 532 S.W. 2d 418 (Tex.Civ.App.1976); Alaniz, 2 S.W. 3<sup>rd</sup> 451 (Tex.App.1999).
2. **IF THE CASE IS A CERTIFICATION, THE "MAGIC WORDS" MUST BE IN THE SUMMONS:** If a discretionary transfer petition asking the court to "certify" the juvenile as an adult is filed, the summons must include "magic wording" that the hearing is "for the purpose of considering discretionary transfer" to the district court (or criminal district court) for criminal proceedings. Especially the words "criminal" and "criminal court" must be included. Johnson, 594 S.W. 2d 83 (Tex.Cr.App.1980), rehearing denied; K.W.S., 521 S.W. 2d 890 (Tex.Civ.App.1975); H.G.V., 646 S.W. 2d 623 (Tex.App.1983); Grayless, 567 S.W. 2d 216 (Tex.Cr.App.1978); R.K.M., 520 S.W. 2d 878 (Tex.Civ.App.1975), appeal after remand 535 S.W. 2d 676(1976).
3. **HEARING HELD IN LESS THAN 2 DAYS WITHOUT WAIVER:** The child has the right to have the summons served on him **PERSONALLY**, at least **TWO (2)** days prior to any adjudication or certification hearing. The 2 days can be waived, but as with all waivers of juvenile's rights, it must be waived by BOTH the juvenile and his attorney (make sure both are on the record). Family Code Sec. 53.07(a) and Sec. 51.09(1).
4. **THE JUVENILE MUST BE PERSONALLY SERVED:** He cannot waive personal service, and his attorney cannot accept service for him, nor can his parents, guardian, or custodian accept service for the juvenile. Family Code Sec. 53.06; I.T.W., 532 S.W. 2d 418 (Tex.Civ.App.1976); M.W., 523 S.W. 2d 513 (Tex.CivApp.1975); H.R.A., 790 S.W. 2d 102(Tex.App.1990) **NOTE:** 53.06(e) says "**a party other than the child**, may waive service of summons by written stipulation or by voluntary appearance at the hearing. This is why, if the parents show up in court, it is not fatal if they have not been served. It **IS ALWAYS** fatal if the child (juvenile) has not been served! Allen, 657 S.W. 2d 815 (Tex.App.1982).
5. **CONTINUANCES:** Once the child has been properly served, the juvenile court has acquired jurisdiction and can grant continuances (resets) and additional service is not required. Turner, 796 S.W. 2d 492 (Tex.App.1990).
6. **IF THE PETITION IS AMENDED:** new service is not necessarily required unless the amended petition charges a different offense or asks for transfer (certification) to adult court. It is preferred to get new service of summons on ALL amended petitions. B.R.D., 575 S.W. 2d 126 (Tex.Civ.App.1978); McBride, 655 S.W. 2d 280 (Tex.App.1983); S.D.W., 811 S.W. 2d 739 (Tex.App.1991).
7. **ATTORNEY HAS A RIGHT TO 10 DAYS NOTICE** to prepare for an adjudication or certification hearing. Family Code 51.10(h). If the child is served in court that day, and you want to go ahead and proceed, make sure that not only is the 2 days the child is entitled to waived by the child and the attorney, but make sure the attorney waives his 10 days as well and **MAKE SURE** it is all on the record.
8. **MAKE SURE IT'S IN THE RECORD:** Absent an affirmative showing in the record of service of summons on the juvenile, the juvenile court does not have jurisdiction to proceed, and if the summons contains a defect which the juvenile does not properly waive, a waiver cannot be presumed. Johnson, 594 S.W. 2d 83 (Tex.Cr.App.1980); K.W.S., 521 S.W. 2d 890 (Tex.Civ.App.1975).
9. **MAKE SURE THE RETURN IS PROPER:** The "officer's return" must properly be "filled in" to prove the child and others were served at least 2 days before the hearing. Johnson (above cite);
10. **IF NO PARENT, GUARDIAN, OR CUSTODIAN IS PRESENT:** if no parent or appropriate adult was served and did not voluntarily appear at the hearing, nor waived service of summons by written stipulation, and the whereabouts of these persons is unknown, then the state must offer some evidence to show reasonable diligence has been exercised to try to locate the parents or other appropriate adults to appear in court with the child. Sec. 53.07(b) and see D.W.L., 828 S.W.2d 520 (Tex.App.1992) for a discussion of what constitutes "reasonable effort".