

Pre-Trial Proceedings in Juvenile Court, Rights, Waiver and Appointment of Counsel, Guardian Ad Litem, Texas Fair Defense Act



Speaker Information

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PRE-TRIAL PROCEEDINGS IN JUVENILE COURT

A. Notice of hearings must be given to both the juvenile and other interested parties.

1. The United States Constitution requires that two types of notice be given to the child and the child's parents/guardians:
 - a. notice must be given, in writing, of the alleged misconduct with particularity; and
 - b. notice must be given sufficiently in advance of the hearing to permit preparation.¹
2. The Texas Family Code requires two types of notice as well:
 - a. There must be a petition that sets forth with reasonable particularity the alleged misconduct.²
 - b. There must be a summons that requires the persons served to appear before the court.³
 - c. A copy of the petition must accompany the summons.⁴
 - d. The summons and petition must be served on the juvenile at least two days before the day of the adjudication hearing.⁵
 - (1) Due process may demand more than two days notice.
 - (2) At least one court has stated that service of an amended petition only one day before a hearing was not fundamental error.⁶
 - (3) If petition and summons are not served on a juvenile-respondent at least two days before the day of a hearing, a juvenile court may reset the hearing to a later date to bring the service into compliance with the two-day rule.⁷
3. No notice of the disposition hearing is required by the Texas Family Code.
 - a. The Texas Family Code only requires that the disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing.⁸
 - b. The disposition hearing may immediately follow the adjudication hearing or may be set off to a later date.
4. The Texas Family Code requires notice for hearings to modify disposition.
 - a. The Code requires that there be a petition to modify.⁹
 - b. The Code requires that reasonable notice of a hearing to modify disposition be given to all parties.¹⁰
5. As of September 1, 2003, the Texas Family Code requires the court to provide to parents or other eligible persons sufficient notice in writing or orally in a recorded court hearing of a proposed juvenile court order against the parent or eligible person.¹¹

B. Any Attorney representing a child is entitled to 10 days to prepare for any adjudication or transfer hearing.¹²

1. The right to 10 days to prepare for trial belongs to the attorney, not the child.
2. The right may be waived by the attorney.¹³
3. The right to 10 days to prepare for trial may be impliedly waived.¹⁴
4. Three conditions must exist before the time begins to run:
 - a. The attorney must be representing the juvenile (retained or appointed).
 - b. The petition must have filed with the juvenile court.
 - c. The attorney must receive notice of the contents of the petition and the hearing date.¹⁵
5. There is a split in authority on whether an attorney has 10 days to prepare for a modification hearing.¹⁶

C. Section 53.05 provides time limitations for setting a hearing after a petition is filed.

1. A hearing shall be set no later than 10 working days after a petition is filed if the child is in detention or taken into custody upon service of the summons.¹⁷
2. A petition must be filed within 30 working days if the offense for which the child is detained is a First Degree Felony, an Aggravated Drug Charge, or a Capital Felony.
3. A petition must be filed within 15 working days if the offense for which the child is detained involves offenses other than First Degree Felonies, Aggravated Drug charges, or Capital Felonies.

D. Courts have reasoned around the 10 day limitation period.

1. The juvenile court does not lose jurisdiction of a case by failing to conduct a hearing within 10 days of the filing of the petition unless the juvenile court abused its discretion or deprived the juvenile of due process or the right to a speedy trial.¹⁸
2. The language merely requires that the hearing be *set* within 10 days, not that it actually be completed within that time.¹⁹
3. There may be good cause shown for delays, such as the need for diagnostic studies.²⁰
4. The juvenile may not complain if he caused or participated in the delay of the hearing.²¹

E. The Texas Supreme Court has issued non-mandatory guidelines

1. The Court suggests that a detention hearing be held on the next business day following admission to any detention facility.
2. The guidelines also suggest a transfer or adjudication hearing for a detained juvenile within 10 days, unless good cause for the delay is shown on the record.
3. The Supreme Court also recommends that nothing should prevent a judge from recessing a juvenile hearing where the parties are in agreement or, in the courts discretion, the best interests of the child and society will be served.
4. The Supreme Court also suggests a disposition hearing be held within 15 days after the adjudication hearing.²²

F. The Appellate Courts are likely to use a four part balancing test rather than strictly adhere to the Texas Supreme Court guidelines:

1. the length of delay;
2. the reason for the delay;
3. the defendant's assertion of his right to a speedy trial; and
4. the prejudice to the defendant from the delay.²³

G. For offenses committed after January 1, 1996, discovery in a juvenile case is governed by the Code of Criminal Procedure and by case decisions in criminal law.²⁴

1. Juveniles no longer have the right to take depositions of potential witnesses; they must petition the court and show good cause to the court.²⁵
2. Parties must abide by case law arising under criminal law.

RIGHT TO COUNSEL AND GUARDIAN AD LITEM

A. Juveniles have a constitutional right to counsel.

1. The United States Supreme Court has held that there is a constitutional right to counsel.²⁶
2. Where juveniles are in danger of losing their freedom, the Fourteenth amendment requires notice that the child has a right to be represented by counsel, and if they are unable to afford counsel, that counsel will be appointed to represent the child.²⁷

B. Juveniles have a statutory right to counsel at the following hearings:

1. detention hearings;
2. hearings to consider transfer to criminal court;
3. adjudication hearings;
4. disposition hearings;
5. hearings to modify dispositions;
6. chapter 55 proceedings (mental health);
7. habeas corpus proceedings; and
8. appellate proceedings.²⁸

C. If no parent or guardian is present for present at the initial detention hearing, the court shall appoint counsel for the child.²⁹

D. If an attorney is appointed at the initial detention hearing and the child is detained, the attorney must continue to represent the child until:

1. the case is terminated,
2. the family retains an attorney, or
3. the court appoints a new attorney.³⁰

E. If no attorney represented a detained child at the initial detention hearing, the attorney appointed under §51.10(c) must continue to represent the child until:

1. the case is terminated,
2. the family retains an attorney, or
3. the court appoints a new attorney.³¹

F. If a juvenile is not in detention when a petition is filed, the court shall determine whether the child's family is indigent.

1. If the court finds that the child's family is indigent, the court must appoint an attorney to represent the child on or before the fifth working day after the child is served with the petition for adjudication or discretionary transfer.³²
2. The attorney appointed after the filing of the petition shall represent the child until:
 - a. the case is terminated,
 - b. the family retains a new attorney, or
 - c. the court appoints a new attorney.³³

G. If a motion to modify disposition seeking to modify disposition by committing the child to TYC or to a secure correctional facility is filed, the juvenile court must determine whether the child's family is indigent.

1. If the court determines that the child's family is indigent, the court shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion was filed.

2. The appointed attorney must represent the child until:
 - a. the court rules on the motion or petition,
 - b. the family retains an attorney, or
 - c. a new attorney is appointed.³⁴

H. The Texas Fair Defense Act deals with appointment of attorneys for juveniles.

1. Under the Fair Defense Act, the juvenile board must adopt a plan that:
 - a. specifies qualifications for attorneys who are on appointment lists; and
 - b. establishes procedures for:
 - (1) including or removing attorneys from the list; and
 - (2) appointing attorneys from the list to individual cases.³⁵
2. An adopted plan must comply with article 26.04 of the Texas Code of Criminal Procedure, as much as practical, except that:
 - a. the family's assets are considered in determining indigency; and
 - b. any alternative plan for appointing counsel is established by the juvenile board in the county.³⁶
3. An adopted plan must recognize differences in qualifications necessary for appointments to cases according to the severity of possible punishment.³⁷
4. As of September 1, 2003, an adopted plan must recognize three (3) different levels of possible punishment in order to make appropriate appointments:
 - a. CINS or delinquent conduct where commitment to TYC is not authorized;
 - b. delinquent conduct and commitment to TYC without a determinate sentence is authorized; and
 - c. Determinate sentence proceedings have been initiated or proceedings for discretionary transfer to criminal court have been initiated.³⁸
5. The juvenile board of a county may make available to the public the list from which attorneys are appointed to represent Juvenile-Respondents. If the list is made available to the public, it must include the level of case for which each attorney is eligible for appointment.³⁹

I. The attorney's representation must be effective.

1. The two part *Strickland* test for ineffective assistance of counsel applies to juvenile claims of ineffective assistance in juvenile matters:⁴⁰
 - a. did the counsel's representation fall below an objective standard of reasonableness based on prevailing norms; and
 - b. is there a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different?⁴¹
2. Counsel has been held to be ineffective for not investigating an alibi defense in an adjudication hearing.⁴²

J. Juveniles may not waive the right to counsel in the following hearings:

1. hearings to consider transfer to criminal court;
2. adjudication hearings;
3. disposition hearings;
4. hearings to modify disposition to commit a juvenile to TYC; and
5. Chapter 55 proceedings.⁴³

K. The court has the responsibility to ensure the juvenile is represented by counsel.

1. The court must appoint an attorney if the judge determines that the child's parent is financially unable to employ an attorney to represent the child.⁴⁴
2. The court may order a parent or other responsible adult to hire an attorney if:
 - a. the child is not represented an attorney;
 - b. the court determines that the responsible adult can afford an attorney, and
 - c. the child has not waived his right to representation by an attorney.⁴⁵
3. The juvenile court may appoint an attorney in any case in order to protect the best interests of the child.
4. The juvenile court may order the person responsible for support of the child to reimburse the county for payments made to counsel appointed to represent the child.⁴⁶
5. The court may use contempt proceedings under §54.07 to enforce its orders in regard to retaining an attorney or paying reasonable attorney fees for appointed attorneys.⁴⁷

L. Appointed attorneys are paid from the general fund of the county.⁴⁸

1. Appointed attorneys are reimbursed for:
 - a. with prior approval from the court:
 - (1) expenses incurred for purposes of investigation; and
 - (2) expert testimony; and
 - b. taking into account time spent, labor expended, complexity of the case, and the experience and ability of the appointed counsel,
 - (1) time spent in court;
 - (2) time spent out of court; and
 - (3) any work on appellate matters.
2. Payments to attorneys are made in accordance with a schedule of fees adopted by the county.
 - a. Fee schedules must include:
 - (1) a fixed rate,
 - (2) minimum and maximum hourly rates, and
 - (3) daily rates.
 - b. The county must provide a form to report the services performed.
 - c. No payment will be made until the form is submitted and approved by the court.
 - d. If an attorney is appointed in a case where the parents can afford to retain counsel, the court is not bound by the fee schedule when determining reasonable attorney fees.⁴⁹

M. Some counties may pay for appointed counsel via a public defender office.

1. Some cases may arise when the court may need to appoint an attorney even when a public defender office exists.
2. In those cases, the county must pay the attorney fees unless the court awards unreasonable attorney fees.⁵⁰

N. In juvenile cases, indigency is determined according to the resources of the parents.⁵¹

1. The court may directly question the responsible adult.
2. The court may examine information already gathered by the probation department.

O. In cases when the juvenile court waives jurisdiction and transfers to criminal court, the county may collect appointed attorney fees for the fees spent on the criminal case.⁵²

This may not apply to those cases where the juvenile was transferred pursuant to § 54.02(j)

P. In some proceedings, the child may waive the right to counsel.

1. The waiver of right to counsel must be waived by the child and the child's attorney.
2. Initial detention hearings may be conducted without an attorney.
 - a. An attorney must be immediately appointed.⁵³
 - b. The attorney has a right to a de novo initial detention hearing.⁵⁴
 - c. The attorney should file a formal request with the court for a hearing de novo.

Q. The Family Code requires notification of the right to counsel at several points:

1. before the giving of a statement during the investigation of an offense;⁵⁵
2. before a detention hearing; and,⁵⁶
3. before an adjudication hearing.⁵⁷

R. Parents and other eligible persons also have the right to have an attorney and to have one appointed if the person is indigent.

1. This right to have an attorney appointed attaches in a proceeding on a motion for enforcement where incarceration is a possible punishment.⁵⁸
2. The appointed or retained attorney is entitled to ten days from the day the attorney was retained or appointed.

S. Juveniles sometimes have the right to have a guardian ad litem.

1. When a parent is present, a guardian ad litem is not required.⁵⁹
2. The court may appoint a guardian ad litem even when a parent is present.⁶⁰

T. Law enforcement officers, probation officers, or other employees of the juvenile court may NOT be appointed as guardian ad litem.⁶¹

U. A Juvenile-respondent's attorney may be appointed as guardian ad litem.⁶²

Attorneys should be aware of potential conflicts of interest. A child's best interests may not always coincide with what the child wants in terms of representation.

V. Sometimes an adult may be the *de facto* guardian ad litem.

1. The guiding principle is that every child who appears before a juvenile court must have the assistance of some friendly, competent adult who can supply the child with support and guidance.⁶³
2. If the adult is opposed to the child's desires, or is a victim of the offense, the court should appoint a guardian ad litem.⁶⁴

W. Juveniles have the right to have an interpreter appointed.⁶⁵

1. This right formerly extended to the parents only during the admonishment stage.⁶⁶
2. As of 1991, any person could be sworn in by the court to be the interpreter.⁶⁷
3. However, the 2001 Legislature enacted Texas Government Code Chapter 57, which provides specific qualifications for interpreters in all civil and criminal proceedings and further states that a court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.⁶⁸
4. For offenses committed after September 1, 2003, upon the motion for appointment of an interpreter by a party or on the motion of the juvenile court, if the court determines that the child, the child's parent or guardian, or a witness does not understand and speak English, and interpreter must be sworn to interpret for the person as provided by Article 38.30, Code of Criminal Procedure.⁶⁹
5. For offenses committed after September 1, 2003, if a party notifies the court that the child, the child's parent or guardian, or a witness is deaf, the court shall appoint a qualified interpreter to interpret the proceedings in any language, including sign language, that the deaf person can understand, as provided by Article 38.31, Code of Criminal Procedure.⁷⁰

ENDNOTES

1. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967).
2. TEX. FAM. CODE §53.04(d)(1).
3. TEX. FAM. CODE §53.06(b).
4. TEX. FAM. CODE §53.06(b).
5. TEX. FAM. CODE §53.07(a).
6. *McBride v. State*, 655 S.W.2d 280 (Tex.App.--Houston [14th Dist.] 1983, no writ).
7. *Mosby v. State*, No. 05-99-01355-CR, 2000 WL 1618466, (Tex.App.-- Dallas 2000); *see also Carner v. State*, 592 S.W.2d 618 (Tex.Crim.App.1980, no writ).
8. TEX. FAM. CODE § 54.04(a).
9. TEX. FAM. CODE § 54.05(d).
10. TEX. FAM. CODE § 54.05(d).
11. TEX. FAM. CODE § 61.003.
12. TEX. FAM. CODE § 51.10(h).
13. *R.X.F. v. State*, 921 S.W.2d 888 (Tex.App. El Paso 1996, no writ); *see also Ryan v. State*, No. 01-96-00592-CR, 1997 WL 187306, 1997 Tex. App.Lexis 2050, Juvenile Law Newsletter 97-2-20 (Tex.App.--Houston [1st Dist.] 1997, pet. Ref'd).
14. *Green v. State*, No. 05-97-01176-CR, 1999 WL 1125247 (Tex.App.--Dallas 1999, pet. Ref'd) (essentially holding that failure to object constitutes an implied waiver).
15. *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App.--San Antonio 1979)
16. TEX. FAM. CODE § 54.05(d) provides that reasonable notice of a hearing shall be given.
17. TEX. FAM. CODE § 53.05.
18. *In the Matter of B.V.*, 645 S.W.2d 334 (Tex.App.--Corpus Christi 1982, no writ).
19. *L.L.S. v. State*, 565 S.W.2d 252 (Tex.Civ.App. Dallas 1978, writ ref'd n.r.e.) (holding that due process consideration is the primary object of this statute, and essentially holding that this 10 day limitation may be seen as a time for scheduling, pre-trial motions, et cetera).
20. *D.L.H. v. State*, 649 S.W.2d 826 (Tex.App. Fort Worth 1983, writ ref'd n.r.e.).
21. *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App. Texarkana 1977, writ ref'd n.r.e.).
22. Rules of Judicial Administration Rule 6(d).
23. *Grayless v. State*, 567 S.W.2d 216 (Tex.Crim. App. 1978) (holding that even after two years and nine months of detention before the trial on the merits, the defendant's constitutional right to a speedy trial was not violated); *see Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972) (enunciating the four part test applied to a Texas case by the *Grayless* court).
24. TEX. FAM. CODE § 51.17(b)
25. TEX. CODE CRIM. P. art. 39.02.
26. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967).

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27. *Id.* at 41.
 28. TEX. FAM. CODE § 51.10(a).
 29. TEX. FAM. CODE § 54.01(d).
 30. TEX. FAM. CODE § 51.101(a).
 31. TEX. FAM. CODE § 51.101(b).
 32. TEX. FAM. CODE § 51.101(d).
 33. TEX. FAM. CODE § 51.101(d).
 34. TEX. FAM. CODE § 51.101(e).
 35. TEX. FAM. CODE § 51.101(a).
 36. TEX. FAM. CODE § 51.101(b).
 37. TEX. FAM. CODE § 51.101(b)(2).
 38. TEX. FAM. CODE § 51.102(b)(2)
 39. TEX. FAM. CODE § 51.10(j) (effective September 1, 2003 for offenses occurring after September 1, 2003)
 40. *In the Matter of R.D.B.*, 20 S.W.3d 255 (Tex. App.--Texarkana 2000, no pet.).
 41. *Strickland v. Washington*, 466 U.S. 668, 687 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 693 (1984) (holding that first, the defendant must show that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense).
 42. *In the Matter of K.J.O.*, 27 S.W.3rd 340 (Tex.App.--Dallas 2000, pet. denied).
 43. TEX. FAM. CODE § 51.10(b).
 44. TEX. FAM. CODE §51.10(i).
 45. TEX. FAM. CODE §51.10(d) and (e).
 46. TEX. FAM. CODE §51.10(k)
 47. TEX. FAM. CODE §51.20(e).
 48. TEX. FAM. CODE § 51.10(i)(incorporating the schedule from article 26.05 of the Texas Code of Criminal Procedure).
 49. TEX. FAM. CODE § 51.10(i).
 50. Letter Opinion by Attorney General LO-97-063, 1997 WL 410964, *Juvenile Law Newsletter* 97-3026 (1997).
 51. TEX. FAM. CODE § 51.10(d) and (f).
 52. TEX. CODE CRIM. P. art. 26.057.
 53. TEX. FAM. CODE § 51.10(c)
 54. TEX. FAM. CODE § 54.01(n)
 55. TEX. FAM. CODE § 51.095.
 56. TEX. FAM. CODE § 54.01(b).

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57. TEX. FAM. CODE § 54.03(b)(5).
 58. TEX. FAM. CODE § 61.053(a)
 59. *In the Matter of Edwards*, 644 S.W.2d 913 (Tex.Civ.App.--Amarillo 1978, no writ).
 60. TEX. FAM. CODE § 51.11(b).
 61. TEX. FAM. CODE § 51.11(c).
 62. TEX. FAM. CODE § 51.11(c).
 63. *Flynn v. State*, 707 S.W.2d 87 (Tex.Crim.App. 1986) (holding that it was error to not appoint a guardian ad litem in the absence of parents or legal guardians, but that the error was harmless because the aunt had cared for him and was supportive of him in the *spirit* of the law).
 64. *In the Matter of A.G.C.*, 860 S.W.2d 160 (Tex.App.-Dallas 1993).
 65. TEX. FAM. CODE § 51.17 provides that chapter 38 of the Texas Code of Criminal Procedure applies to juvenile proceedings; the provision for the appointment of interpreters may be found at TEX. CODE CRIM. P. art. 38.30.
 66. TEX. FAM. CODE § 54.03(b) (requiring court to administer admonishments to child and parents).
 67. TEX. CODE CRIM. P. art. 38.30; *see Montoya v. State*, 811 S.W.2d 671, 672-673 (Tex.App.-- Corpus Christi 1991, no pet.) (holding that **A**ny person may appear to act as interpreter**@**
 68. TEX. GOV'T CODE § 57.002
 69. TEX. FAM. CODE §51.17(d)
 70. TEX. FAM. CODE §51.17(f)