

THE ADJUDICATION HEARING

**NUTS AND BOLTS OF JUVENILE LAW CONFERENCE
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BIOGRAPHY

Stephanie Stevens is a clinical professor of law at St. Mary's University School of Law. She teaches Juvenile Law, Texas Criminal Procedure, and the Criminal Justice Clinic, where she works with students representing indigent people with criminal charges in adult and juvenile court.

Professor Stevens prepares the updates and annotations for Title 3: The Juvenile Code for Sampson and Tindall's Texas Family Code Annotated. Likewise, she prepares the updates for Title 3 in Matthew Bender's Texas Practice Guide.

Additionally, Professor Stevens serves as a member of the Advisory Committee for the Juvenile Law section of the Texas Board of Legal Specialization. In the recent past she served as a member of the committee that writes and grades the Board Certification Examination for the Juvenile Law Specialty.

I. The Scope of the Paper

As this paper is designed to cover juvenile adjudications, there will be little to no mention of pretrial matters, disposition hearings, or appeals. Additionally, as juvenile petitions are covered in another paper, this paper will not discuss the petition, answer, or summons aspect of a juvenile proceeding.

II. The Supreme Court's View of Juvenile Adjudication Hearings and Constitutional Protections

In 1967 the Supreme Court looked at the informality of the juvenile system and began to question the fairness of it. The landmark case of *In re Gault* revamped juvenile courts and held that children have a Fifth Amendment privilege against self-incrimination at an adjudication hearing the same as adults do. Furthermore, children were granted the right to counsel, confrontation, and cross-examination of witnesses, and a Due Process right to notice of the charges pending. All of these rights were limited by the Supreme Court to the adjudication phase of the juvenile proceedings. *In re Gault*, 387 U.S. 1 (1967).

Further review by the Supreme Court required states to prove charges against children beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)), and gave children double jeopardy protections (*Breed v. Jones*, 421 U.S. 519 (1975)). The Court, however, refused to find a right to trial by jury for children. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

III. Texas's View of Juvenile Adjudication Hearings and Constitutional Protections

Texas has not only followed the Supreme Court's mandate for the minimum amount of constitutional protection, but expanded on it.

A. *Self-incrimination*

This protection is codified for juveniles in § 54.03(e).¹ A juvenile is afforded this protection in both delinquent conduct and CINS (child in need of supervision) cases.

An extrajudicial statement taken in violation of any of the provisions of Title 3, the Texas Constitution, or the United States Constitution is not admissible. Perhaps even more importantly, an out of court statement cannot support a finding of delinquent conduct or CINS, unless the statement is corroborated at least in part by other evidence. §54.03(e).

B. *Right to Counsel*

§51.10 states that children have the right to representation by an attorney at all stages of proceedings under Title 3 of the Family Code. In fact, a child cannot waive an attorney in a transfer, adjudication, disposition, probation revocation, or Chapter 55 (mental illness) hearing. Moreover, juveniles are entitled to effective assistance of counsel. *In re K.J.O.*, 27 S.W.3d 340 (Tex. App. F– Dallas, rev. denied).

C. *Proof Beyond a Reasonable Doubt*

¹Unless otherwise specified, all codes provisions cited in this paper reference Title 3 of the Texas Family Code.

Children are presumed innocent. §54.03(f). All delinquent conduct and CINS cases must be proven beyond a reasonable doubt by the state. §54.03(f). And the jury's decision on this must be unanimous. §54.03 (c); *see In re M.P.*, 126 S.W.3d 228 (Tex. App. – San Antonio 2003, no pet.)(error not to require unanimous verdict on at least one of four theories submitted to jury on charges of aggravated sexual assault).

D. Double Jeopardy

Jeopardy is found to have attached in a juvenile proceeding when the jury has been empaneled and sworn. *In re C.J.F.*, 183 S.W.3d 841 (Tex. App. – Houston [1st Dist.] 2005, no pet.).

E. Jury Trial

Although not mandated by the constitution of the United States, Texas requires that juvenile adjudication hearings shall be before a jury, unless waived in accordance with §51.09. If the case is a determinate sentence one, then a 12 person jury is required.

In 2009 the legislature allowed for a six person jury in a misdemeanor trial, even if the case is tried in district court. §54.03(c).

Note that a child is only entitled to a jury at a disposition hearing if the case is a determinate sentence case. To ensure the right to have a jury make the “sentencing” decision, the child must make an election in writing, before the beginning of voir dire. §54.04(a).

Trial shall be by jury unless the jury is waived and the waiver must be in writing or in open court and recorded. *In the Matter of S.G.*, 304 S.W.3d 518 (Tex. App. – Waco 2009, no pet.).

F. Speedy Trial

Various courts have held that juveniles have a constitutional right to a speedy trial. *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. 1978); *In re J.W.G.*, 988 S.W.2d 318 (Tex. App. – Houston [1st Dist.] 1999); *In the Matter of D.M.*, 611 S.W.2d 880 (Tex. App. – Amarillo 1980). The test established in *Barker v. Wingo*, 407 U.S. 514 (1972) is utilized. This test consists of four parts: 1) the length of delay; 2) the reason for the delay; 3) the child's assertion of his right to a speedy trial; and 4) the prejudice to the child from the delay.

IV. Basics of the Adjudication Hearing

A. Conduct Covered

Juvenile court has exclusive jurisdiction over children between 10 and under 17 for the following types of conduct:

1. Delinquent Conduct is the first broad category and it is subdivided into 3 main areas:
 - a. Violations of state or United States law, other than traffic laws, that are punishable by jail. §51.03(a)(1);
 - b. Contempt of court proceedings. §51.03(a)(2);
 - c. DWI (and other similar offenses, such as boating while intoxicated) and third offense driving under the influence of alcohol by a minor. §51.03(a)(3), (4).
2. CINS or children in need of supervision is the second broad category and it is subdivided into 6 types of conduct:

- a. Other fineable only offenses that were transferred from municipal or justice court;
- b. Truancy;
- c. Runaway;
- d. Violation of inhalant abuse statute or ordinance;
- e. An act that violates a school disciplinary code resulting in expulsion;
- f. Violation of a court order under the Services to At Risk Youth Program. §51.03(b).

Juvenile and district courts have concurrent jurisdiction over the offense of perjury. *Ponce v. State*, 985 S.W.2d 594 (Tex. App. – Houston [1st Dist.] 1999, no pet.).

B. Juvenile's Presence

Prior to 2007, no statute existed that conferred on juveniles the right to be present at juvenile proceedings in Texas. It seemed though, that since a juvenile was faced with a loss of liberty, a constitutional right to be present must be available under the Sixth Amendment of the United States Constitution and art. I, § 10 of the Texas Constitution. In 2007, the Texas legislature applied article 33.03 of the Code of Criminal Procedure to juvenile hearings. §51.17(c). This provision mandates the presence of a child at all felony charges and misdemeanor charges where imprisonment is possible. If, however, a child voluntarily absents himself from the adjudication hearing after the jury is selected, the court may proceed without him. *In re C.T.C.*, 2 S.W.3d 407 (Tex. App. – San Antonio 1999, no pet.).

C. Parents' Presence

If a parent is a resident of Texas, has not been exempted by the court, and has not had a managing conservator appointed to his or

her child, then the parent must attend all hearings that affect the child. §51.115. This applies to both parents.

If a child appears before the court without a parent or guardian, the court must appoint a guardian ad litem to protect the interests of the child. §51.11. This section is followed more in spirit than in the black letter of the law. For instance, when a parent was not present in court, but an aunt was, the court's refusal to appoint an ad litem was held harmless. *Flynn v. State*, 707 S.W.2d 87 (Tex. Crim. App. 1986).

D. Admonishments

Prior to the start of the adjudication hearing, the trial court must admonish the child and the parents or guardian of the following rights:

- 1) The allegations against the child;
- 2) The nature and possible consequences of the proceedings;
- 3) The privilege against self-incrimination;
- 4) The right to trial and confrontation of witnesses;
- 5) The right to representation by an attorney;
- 6) The right to trial by jury. §54.03(b)(1-6).

In plea bargained cases, additional admonishments are required. In those instances the court must inform the child that the court does not have to accept the agreement reached between the prosecutor and the child. If the court does not accept the agreement, the court shall inform the child of this and allow the child the opportunity to withdraw the plea. §54.03(j); *see also, In the Matter of M.D.G.*, 180 S.W.3d 747 (Tex. App. – Eastland 2005, no pet.). Additionally, an admonishment regarding the limited right of appeal is mandated. Specifically, the trial

court must inform the child that if the agreement is accepted and followed, the child can only appeal if given permission or if a matter was raised by written pretrial motion before the stipulation was entered. §54.034.

1. Objection necessary – Subsection (I) of 54.03 requires a contemporaneous trial objection to preserve a claim of failure to properly admonish a child. *See also, In the Matter of C.D.H.*, 273 S.W.3d 421 (Tex. App. – Texarkana 2008, no pet.); *In the Matter of M.D.T.*, 153 S.W.3d 285 (Tex. App. – El Paso 2004, no pet.), *but see, In the Matter of T.W.C.*, 258 S.W.3d 218 (Tex. App. – Houston [1st Dist.] 2008, no pet.) (objection required for omitted or incomplete admonishment, but not an erroneous admonishment). Trial counsel should therefore be aware of exactly what admonishments are necessary and make an objection if anything is omitted or stated incorrectly. Below are some of the admonishment issues that arise and the various courts' decisions on these issues.

a. Lesser included offenses - Although the court should admonish on lesser included offenses, *A.E.M. v. State*, 552 S.W.2d 952 (Tex. Civ. App. – San Antonio 1977, no writ), it is not required to admonish on every possible lesser included offense. *In re D.L.K.*, 690 S.W.2d 654 (Tex. App. – Eastland 1985, no writ).

b. Collateral consequences - The trial court usually does not have a duty to admonish on collateral consequences. Specifically, no duty to admonish on sex offender registration exists. *In re B.G.M.*, 929 S.W.2d 604 (Tex. App. – Texarkana 1996, no writ). Likewise, no duty to admonish on immigration consequences exists. *In re E.J.G.P.*, 5 S.W.3d 868 (Tex. App. – El Paso 1999, no pet.).

c. Possible Dispositions - The trial court should inform the child of the possibility of probation until age 18 or commitment to TYC until age 19 (in the proper cases). If the case

involves determinate sentence possibilities, those must be explained as well. The potential for a juvenile record to be admitted in an adult proceeding should be explained to the child also.

E. Which Judges Can Preside Over Adjudication Hearings

An associate judge or referee may preside over adjudication hearings (even jury trials), except in determinate sentencing cases. The referee must, however, inform the child that he has a right to a hearing before the juvenile court judge and provide each party an opportunity to object. §54.10.

As juvenile cases are civil, Texas Government Code §74.053 allows a child to object to a visiting judge assigned to hear the case. The objection is timely if urged “before the first hearing or trial over which the assigned judge is to proceed.” It is error for the visiting judge to fail to remove herself if a timely objection is made. *In re M.A.V.*, 40 S.W.3d 581 (Tex. App. – San Antonio 2001, no pet.).

F. Proof of Age

Age of the child appears to be an element of the State’s case to be proven in a juvenile proceeding. However, §51.042, which requires an objection be made at the adjudication hearing or the complaint is waived, may have eliminated this requirement. *In re E.D.C.*, 88 S.W.3d 789 (Tex. App. – El Paso 2002, no pet.)(state is no longer required to prove age as an element as a result of this statutory provision).

Nonetheless, age can be proved by stipulation, by calling a parent of the child to testify, or through birth certificate records.

G. Special Rules of Evidence

The rules of evidence applicable in criminal cases control in the adjudication proceedings. §54.03(d). Additionally, Chapter 38 of the Code of Criminal Procedure applies. Of importance in Chapter 38 is article 38.23 which prohibits admitting evidence against the accused that is obtained in violation of state or federal laws; or state or federal constitutions. A juvenile should be able to request a jury instruction on the admissibility of evidence if the legality of it being obtained is raised at trial.

Article 38.37 allows for evidence of extraneous bad acts in the prosecution of certain sexual offenses against a child under 17 years of age. The acts must be between the same respondent and alleged child victim and must be relevant, for example to show the state of mind of the respondent and child or to show a previous and subsequent relationship between the respondent and the child.

§54.03(d) states that the social history report shall not be viewed by the court before the adjudication decision and shall never be viewed by the jury.

§54.03(e) requires that accomplice witness testimony be corroborated by other evidence tending to connect the child with the alleged delinquent conduct or CINS. If the testimony is not corroborated an acquittal is mandated. *In re J.R.R.*, 696 S.W.2d 382 (Tex. 1985).

§54.03(e) also requires that out of court statements by children be corroborated in part or the statement is insufficient to sustain a true verdict. *See III (A) of this paper for more detailed information.*

Rule 609(d) of the Texas Rules of Evidence does

allow a juvenile to be impeached with prior juvenile adjudications, if the child is testifying at his own juvenile trial.

H. Jury Instructions

Jury instructions must be requested in the manner proscribed by Texas Rule of Civil Procedure 278. Thus, dictating a request to the court reporter (which would suffice in a criminal case) will not preserve issues in a juvenile case. Jury instruction requests must be made in writing. *In the Matter of F.L.R.*, 293 S.W.3d 278 (Tex. App. – Waco 2009, no pet.).

I. Closing Argument

A prosecutor cannot suggest to a jury that it render a verdict against a child in order to remove a child from a bad or dangerous household and not even consider whether the child committed the charged offense. *In the Matter of C.L.*, 930 S.W.2d 935 (Tex. App. – Houston [14th Dist.] 1996, no pet.).

In Dang v. State, 154 S.W.3d 616 (Tex. Crim. App. 2005), the Court of Criminal Appeals provided a non-exclusive list of factors to evaluate the appropriateness of a time limit set on closing arguments. These include, but are not limited to: 1) the quantity of evidence; 2) the duration of the trial; 3) conflicts in the testimony; 4) the seriousness of the offense; and 5) the complexity of the case.

V. Avoiding an Adjudication Hearing

A. Plea Bargains

Since 1997 juveniles have statutory authority to enter into negotiated pleas. §54.03(j). The adjudication hearing is not waived; rather the child enters a plea of true and stipulates that the evidence in

support of that plea is true. Naturally, a jury is generally waived in this instance. If the court rejects the plea, the child may withdraw and request a jury trial.

B. Deferred Prosecution

Perhaps the best way to avoid an adjudication hearing, for both parties, is to enter an agreement for deferred prosecution. The child agrees to an “informal probation” for a period not to exceed six months. If the child successfully completes the deferred prosecution the petition (if one has been filed) is non-suited.

Deferred prosecution may be given by the probation office, the prosecutor, or the judge. Refer to §53.03 for the guidelines for entering into a deferred contract.

JUVENILE ADJUDICATIONS

LIST OF IMPORTANT DISTINCTIONS BETWEEN JUVENILE AND ADULT CASES IN TEXAS

1. **ADMONISHMENTS:** Must object if incomplete or omitted.
2. **PLEA :** TRUE OR NOT TRUE.
3. **JUDGES:** Associate judges or referees may preside, if no objection, except in determinate cases. May object to visiting judge.
4. **CHILD'S PRESENCE REQUIRED.**
5. **ADULT'S PRESENCE REQUIRED:** An adult who represents the interests of the child must be present or an ad litem will be appointed.
7. **PETITION:** This must accompany summons and child must be served. If multiple offenses are alleged in single petition, severance rules follow civil procedure Rule 41.
6. **JURY TRIAL:** Only for adjudication, not disposition (except in determinate sentence case) and can only waive jury in writing or on the record.
7. **PROOF OF AGE REQUIRED AT TRIAL.**
8. **SPECIAL EVIDENTIARY RULES:**
 - a. § 54.03(d) - social history report not to be viewed by factfinder
 - b. § 54.03(e) - accomplice witness testimony insufficient unless corroborated
 - c. § 54.03(e) - out-of-court statement insufficient unless corroborated
 - d. Rule of Evidence 609(d) - allows impeachment of juvenile in specific circumstances only
9. **JURY INSTRUCTIONS:** Follow civil procedure and must be requested in writing, dictating into record not sufficient.

JUVENILE ADJUDICATION HEARING

NUTS AND BOLTS OF JUVENILE LAW - 2010

IN RE GAULT

- 5th Amendment privilege
- Right to counsel
- Right to confrontation and cross-examination
- Right to notice of charges

OTHER SUPREME COURT CASES

- No constitutional right to trial by jury
- Right to double jeopardy protections
- Must prove beyond reasonable doubt

Texas Codification of Rights

- Self-incrimination – 54.03(e)
- Both CINS and delinquent conduct
- Any out of court statement alone will not support a finding of CINS or delinquent conduct – must be corroborated at least in part by other evidence.

Texas Codification of Rights

- Right to counsel – 51.10
- Falls under Indigent Defense Act
- Cannot waive attorney in adjudication hearings (or transfer, disposition, probation revocation or Chapter 55 hearings)
- Entitled to effective assistance of counsel – follows same standard as adults.

Texas Codification of Rights

- Proof beyond a reasonable doubt – 54.03(f)
- CINS and delinquent conduct
- Error not to require unanimous verdict.

Texas Codification of Rights

Entitled to jury trial – 54.03 – can only waive in writing or in open court and recorded.

- If a determinate sentence case, must be 12 person
- As of 2009, can have 6 person misdemeanor jury in district court
- Only entitled to jury sentencing in determinate cases and must request in writing before voir dire.

Texas's View Of Rights

- Right to double jeopardy attaches when the jury has been sworn.
- Right to speedy trial – follows adult test in *Barker v. Wingo*.

Type of Conduct Tried in Juvenile Court

- 1. Delinquent Conduct – law violations, contempt, DWI, and 3rd alcohol offenses – PI moved to JP court.
- 2. CINS – other fineable offenses, truancy, runaway, inhalant abuse, expulsion acts, violation of At Risk orders.
- 3. Perjury can be tried in adult or juvenile court.

Juvenile's Presence

As of 2007, the child's presence is mandatory.

If child voluntarily absents herself after the jury is selected, then trial may proceed without child.

Parents' Presence

- Must attend all hearings, unless exempted by the court, not a resident of Texas, or a managing conservator has been appointed to child.
- If child has no parent or guardian, court should appoint a guardian ad litem.

Who Presides?

- An associate judge or referee can preside over adjudication hearings, except in determinate sentence cases. Must inform child of right to juvenile judge.
- Can object visiting judge – Tx Gov Code 74.053 – must object before the first hearing or trial over which the assigned judge is to proceed.

Admonishments

- Must object or error is waived.
- Judge might be required to admonish on lesser included offenses.
- No admonishment required for collateral consequences, such as, immigration or sex offender registration.
- Plea bargain cases require additional admonishments.

Special Rules of Evidence

- Rule of Evidence for criminal cases
- Chapter 38 of CCP, which includes 38.22, 38.23, and 38.37
- 54.03(e) – accomplice witness testimony
- Rule 609(d)
- Social history report not to be viewed by fact finder. 54.03(d)

Proof of Age

- Would appear to be an element to be proved by state in order to establish jurisdiction.
- El Paso court, however, found 51.042 which requires objection to failure to prove age, eliminates this requirement.
- Best manner of proof is usually stipulation.

Jury Instructions

- Must be requested as proscribed by Rules of Civil Procedure:
 - In writing –
 - Cannot dictate to court reporter

Closing Argument

- State can't urge jury to adjudicate child just because child's life at home is bad or dangerous.
- Time limit set on closing might be grounds for reversal if too restrictive. *Dang v. State*.
 - ▣ Look to quantity of testimony, duration of trial, conflicts in testimony, seriousness of charge, and complexity.