

# Certifications

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Defined in Section 54.02 in the Texas Family Code as Waiver of Jurisdiction and Discretionary Transfer to Criminal Court

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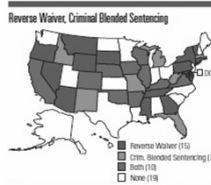
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Judicial Waiver

Automatic Waiver

Prosecutorial  
Discretion




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#### Section 51.02 - Child

10 years of age or older and under 17 years of age

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17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17



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### Who can be certified

- Individual currently under age 18
  - Capital Murder, 1st Degree felonies, Aggravated Control Substances Felony
    - At least 14 years of age and under 17 at time of commission of the offense
  - Second Degree felony, Third Degree Felony, State Jail Felony
    - At least 15 years of age and under 17 at time of commission of the offense
- Individual currently over age of 18
  - Capital Felony or Murder
    - At least 10 years of age and under 17 at time of commission of the offense
  - Aggravated Control Substances felony or first degree other than Murder
    - At least 14 years of age and under 17 at time of commission of the offense
  - Second degree, third degree, or state jail
    - At least 15 years of age and under 17 at time of commission of the offense

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### Notice and Hearing



- 54.02(b)
  - Must state that hearing is for the purpose of considering discretionary transfer
  - Section 53.04, 53.05, 53.06 and 53.07 must be complied with
- 53.04
  - Form of service
- 53.05
  - Hearing held within 10 working days after service if child is in detention
- 53.06
  - Child and child's parent, guardian, guardian ad litem or custodian must be served
  - Must attach petition and state time to answer petition
- 53.07
  - Personal service 2 days prior to hearing if in state and location is known otherwise 5 days

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54.02(a) and 54.02(j)  
require the hearing  
to take place before  
the Juvenile Court

Judge not Jury

District Court may  
not remand



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What must  
happen before  
the hearing

- 54.04(d) requires:
  - Full diagnostic study
    - Not defined
  - Social Evaluation
  - Full investigation of the child, his circumstances and the circumstances of the offense
    - Not defined



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- Currently Under Age 18
- 54.02(a)
  - Must be a full investigation and hearing
  - Probable cause has been established that the child committed the offense
  - The welfare of the community warrants transfer because of
    - Seriousness of the offense, or
    - Background of child
- Currently Over Age of 18
- 54.02(j)
  - Must be a hearing
  - Probable cause
  - Preponderance of the evidence that
    - Reason beyond control of the state not practicable to proceed
  - After due diligence
    - No probable cause before 18 and new evidence found
    - Person could not be found
    - Appellate reasons

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Sec. 51.01. PURPOSE AND INTERPRETATION. This title shall be construed to effectuate the following public purposes:

- (1) to provide for the protection of the public and public safety;
- (2) consistent with the protection of the public and public safety:
  - (A) to promote the concept of punishment for criminal acts;
  - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
  - (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
- (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
- (4) to protect the welfare of the community and to control the commission of unlawful acts children;
- (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
- (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

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#### 54.02(f)

Not exhaustive but **must** consider these

- 1) Whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person
- 2) Sophistication and maturity of the child
- 3) The record and previous history of the child
- 4) The prospects of adequate protection of the public and likelihood of the rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court

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#### Kent v. United States

- Seriousness of the alleged offense to the community and whether the protection of the community requires waiver
- Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner
- Whether the alleged offense was against persons or against property
- The prosecutive merit of the complaint
- Desirability of trial and disposition of the entire offense
- Sophistication and maturity of the juvenile
  - Considering home, environment, emotional attitude and pattern of living
- Record and previous history of the juvenile
- Prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services, and facilities currently available to the juvenile court

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## Hidalgo v. State 983 S.W.2d 746

- Transfer to criminal district court for adult prosecution is the single most serious act the juvenile court can perform because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available
- Transfer was intended to be used only in exceptional cases
- The philosophy was that, whenever possible, children should be protected and rehabilitated rather than subjected to the harshness of the criminal system because children, all children are worth redeeming

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## IN RE CAMERON MOON

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VS



### ***Moon v. State*, 451 S.W.3d 28 (2014)**

The trial court must set forth the basis for the order to transfer with **sufficient specificity to permit meaningful review**

The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule

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In a footnote, the Moon court explains what should happen to the adult criminal case:

At least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another transfer order, assuming that the State can satisfy the criteria under Section 54.02(j) of the Juvenile Justice Code

The juvenile court has either validly waived its exclusive jurisdiction, thereby conferring jurisdiction on the criminal courts, or it has not.

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A BILL TO BE ENTITLED  
AN ACT  
relating to the appeal of waiver of jurisdiction and transfer to criminal court in juvenile cases.  
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:  
SECTION 1. Article 4.19(g), Code of Criminal Procedure, is amended to read as follows:  
(g) This article does not apply to a claim of a defect or error in a discretionary transfer proceeding in juvenile court. A defendant may appeal a defect or error only as provided by [Chapter 54, Family Code](#) [Article 44.49].  
SECTION 2. Section 51.041(a), Family Code, is amended to read as follows:  
(a) The court retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person or the state under Chapter 56 [re-by-the-person-under Article 44.49, Code of Criminal Procedure] of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court.  
SECTION 3. Sections 56.01(c) and (h), Family Code, are amended to read as follows:  
(c) An appeal may be taken:  
(1) except as provided by Subsection (n), by or on behalf of a child from an order entered under:  
(A) [Section 54.02 respecting transfer of the child for prosecution as an adult](#);

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## Important Case Law in the field of Certifications

- Kent vs U.S.
  - 383 U.S. 541
- In Re Gault
  - 387 U.S. 1
- Moon v. State
  - 410 S.W.3d 466
- Hidalgo v. State
  - 983 S.W.2d 746
- Carlson v. State
  - 151 S.W.3d 643
- Cantu v. State
  - 994 S.W.2d 721

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# Thank You

## Certifications

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## DETERMINE SENTENCING

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## HISTORY



You have to know the past to understand  
the present – Carl Sagan

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## Created in 1987

### Determinate Sentencing Statute

Created as an alternative to lowering the age for  
certification eligibility

Maximum Sentence set at 30 years (reserved for Capital  
and first degree felonies)

Six eligible offense (Capital Murder, Murder, attempted  
Capital Murder, Aggravated Kidnapping, Aggravated  
Sexual Assault or Deadly Assault on a Law Enforcement  
Officer

Maximum age of jurisdiction was 21 in juvenile court  
system

Transferred to adult prison by age 18

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## Legislative Changes in 1991

Forty years for most serious offenses (Murder, Capital Murder, aggravated controlled substances felony)

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## 1995 Legislative Changes

Eleven new offenses which brought the total to thirty (including attempt level offenses)

Eliminated transfer hearings regarding transfer before the minimum length of incarceration was reached

Minimum length of incarceration was ten years for a capital felony, three years for a first degree felon, two years for a second degree felony and one year for a third degree felony

Maximum ranges of punishment were also set at a maximum of ten years for third degree felonies, twenty years for second degree felonies, and forty years for first degree felonies and capital murder

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## Legislative Changes in 2001

Two new offenses were added

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Latest Legislative Changes

In response to widespread abuse within the Texas Juvenile Justice Department (Formerly Texas Youth Commission)  
Maximum age of jurisdiction was reduced from age twenty-one to age nineteen.  
If a juvenile had not successfully served the sentence imposed and had not been transferred to the adult system the juvenile was transferred to adult parole supervision on 19<sup>th</sup> birthday

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Where to Find it

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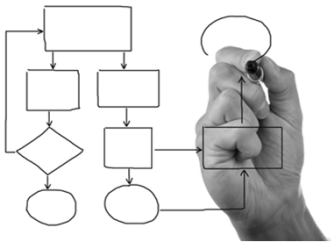
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PROCEDURE



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## PROCEDURE OUTLINE

FILE THE CASE  
HEARING  
POST-ADJUDICATION



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## HOW TO FILE THE CASE

The State has essentially  
unfettered discretion

Bleys v. State  
In the Matter of S.B.C

Must present the case to  
Grand Jury



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## ELIGIBILITY

Capital Murder  
Attempted Capital Murder  
Murder  
Attempted Murder  
Manslaughter  
Intox Manslaughter  
Aggravated Kidnapping  
Attempted Aggravated  
Kidnapping  
Aggravated Sexual Assault  
Sexual Assault  
Attempted Sexual Assault  
Habitual Felony Conduct

Aggravated Assault  
Aggravated Robbery  
Attempted Aggravated  
Robbery  
Felony Injury Cases  
Felony Deadly Conduct  
Aggravated Control  
Substances Felonies  
Second Degree felony  
indecentcy with a child  
Criminal Solicitation  
First Degree Felony Arson  
Criminal Conspiracy

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## Restriction



Prosecuting attorney may not refer a petition that alleges the child engaged in conduct that violated Section 22.011(a)(2), Penal Code, or Sections 22.021(a)(1)(B) and (2)(B), Penal Code, unless the child is more than three years older than the victim of the conduct

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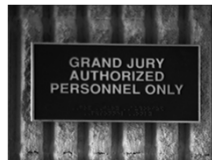
## Grand Jury

At least 9 out of the 12 members must approve the petition

Approval must be sent to the juvenile court and entered into the record

State may waive determinate petition

Juvenile and attorney can waive grand jury presentment



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## HEARING



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# RULES

Must be 12 jurors on the jury  
Juvenile has a right to have the jury determine sentence  
Request for jury sentencing must be in writing  
Written request must be filed before the start of voir dire  
Juvenile court referees, associate judges, or constitutional county judges are prohibited from hearing a determinate petition

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## Disposition

PROBATION  
TEXAS JUVENILE JUSTICE  
DEPARTMENT



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## PROBATION

Sentence must be 10 years or less  
Probation must be awarded  
Judge assess the length of the probation and conditions  
Begin at home or in the care of the Chief Juvenile Probation Officer  
Judge shall make a finding that it is in the child's best interests to be placed outside the child's home; reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; and the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.



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## SUPERVISION and DISCHARGE

Supervised by Juvenile Probation  
Jurisdiction terminates at either 18 or 19 (2011)  
State may petition to transfer supervision if probation is not finished  
Hearing must be requested and completed before aging out  
If discharged, discharge date is entered  
Juvenile released on discharge date

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## SUPERVISION and TRANSFER

At hearing the judge may transfer the supervision of the juvenile to an appropriate adult district court  
Transfer happens on 19<sup>th</sup> Birthday (18 if before 2011)  
Only the petition, the grand jury approval, the judgment concerning the conduct for which the person was placed on determinate sentence probation, and the transfer order are a part of the district clerk's public record  
Minimum requirements for adults are not required for transferred juveniles  
Conditions of adult court must be consistent with the juvenile court conditions  
Violations are handled as adults with no minimum restrictions

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## TEXAS JUVENILE JUSTICE DEPARTMENT OUTLINE

RESTRICTIONS  
PAROLE  
TRANSFER TO ADULT  
SYSTEM



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## RESTRICTIONS

### MINIMUM STAYS

- 10 years – Capital Felony
- 3 years – First Degree Felony
- 2 years – Second Degree Felony
- 1 year – Third Degree Felony

### MAXIMUM SENTENCE

- 40 years – Capital Felony, First Degree, Aggravated Controlled Substances Felony
- 20 years – Second Degree Felony
- 10 years – Third Degree Felony

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## PAROLE

Prior to reaching age 19 the Texas Juvenile Justice Department may elect to parole the juvenile

Juvenile must serve the minimum sentence

If paroled prior to 19, supervised by the Texas Juvenile Justice Department

Automatically transferred to adult parole system at 19<sup>th</sup> birthday



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## TRANSFER TO ADULT PRISON

After juvenile turns 16 but before juvenile turns 19

Court of original jurisdiction

Juvenile entitled to an attorney

Attorney entitled to access to all evidence

Must be recorded and recording retained for 2 years

Notice of the time and place of the hearing must be given to the guardian, the juvenile, prosecuting attorney, victim and any other person who has filed a written request

Court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas Youth Commission, in addition to witnesses

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## TRANSFER BURDEN

In order to satisfy the transfer of the juvenile into the adult system the commission must show that the child has not completed the sentence and the child's conduct indicates that the welfare of the community requires the transfer

Texas Human Resource Code 61.079

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ETHICS IS IMPORTANT IN ALL  
ASPECTS OF REPRESENTATION

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# CERTIFICATIONS IN TEXAS A GENERAL OVERVIEW

31<sup>st</sup> ANNUAL JUVENILE LAW CONFERENCE

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SPECIAL THANKS TO  
KAMERON JOHNSON  
FOR ALLOWING ME TO USE HIS PAPER

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## Certifications in Texas a General Overview

### I. Introduction

On September 2, an intruder entered a woman's apartment took her wallet and raped her.<sup>1</sup> During a search of the apartment the police found latent fingerprints which were developed and processed. After comparison it was discovered that the latent prints matched the fingerprints of Morris Kent, taken when he was 14 years old. At about 3 p.m. on September 5, Morris Kent who was then 16 was taken into custody by the police. Upon being apprehended, Morris was taken to police headquarters where he was interrogated by police officers. It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening. On September 25, Morris was indicted by a grand jury. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. Morris' case was taken to trial and a jury found Morris "not guilty by reason of insanity" as to the rape charges and guilty on the burglary and robbery charges. Morris was sentenced to serve five to fifteen years on each count or a total of 30 to 90 years in prison. Morris appealed his case which eventually was litigated all the way to the United States Supreme Court.

In reversing Morris' conviction the Supreme Court in a landmark decision opined "It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the

juvenile."<sup>2</sup> The Court's decision in Kent was landmark in that for essentially for the first time the Supreme Court applied principles of fundamental fairness and due process to juvenile proceedings.

### II. History of Juvenile Courts

Beginning in the late nineteenth century juvenile justice reform took place nationwide which established separate criminal justice systems for children and adults. In Texas the first schools for juvenile offenders was established beginning in 1889. The genesis of the Texas juvenile schools was based on the principal that "[c]hildren who are in danger of maturing into adult criminals should be rescued – not by imposing on them the disabilities that result from criminal conviction, but by placing them in protective environments and teaching them about discipline, morality, values and productive work."<sup>3</sup> Prior to 1889 most states treated children over the age of seven the same as they treated adults in criminal prosecution. During this period children were sentenced to lengthy periods of incarceration in prisons along with adults. Beginning in the late nineteenth century juvenile justice reform was enacted that established separate juvenile courts. The country's first distinct juvenile court was established in Chicago in 1899 with the statutory purpose that the court would handle children under the age of sixteen and would serve a rehabilitative, rather than punitive purpose. Separate juvenile courts have operated in the United States for

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<sup>1</sup> Kent v. United States, 383 U.S. 541, 543-44, 86 S. Ct. 1045, 1048 (1966).

<sup>2</sup> Kent v. United States, 383 U.S. at 556.

<sup>3</sup> See generally, Michele Deitch, Rebecca Breeden & Ross Weingarten, *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 Am. Crim. L. Rev. 1 (2012).

well over 100 years however every state has a procedure for trying juveniles as adults or transferring their cases to adult court. Here in Texas, in 1918, the legislature raised the age of juvenile court jurisdiction from thirteen to seventeen years old. Essentially, meaning that beginning at the age of seventeen individuals are treated as adults for all purposes in the criminal justice system.

The process of trying juveniles as adults is available in every state in the country. States vary on the requirements of trying juveniles as adults however there exist three basic types of procedures or hearings to transfer juveniles to adult court. The most prevalent type of statute to transfer juveniles to adult court is judicial waiver. Judicial waiver is the process which a juvenile court judge makes the determination to transfer a child to adult court after a hearing. By far judicial waiver is the most common type of transfer or certification.<sup>4</sup>

Automatic waiver, legislative waiver or sometimes referred to as statutory exclusion is the transfer process where certain offenses alleged to have

been committed by juveniles are statutorily excluded from juvenile court and original jurisdiction rests with the criminal court. Over half of the states in the country have this process. Commonly referred to as automatic waiver because these statutes remove juvenile court jurisdiction "automatically" and no motion or request from the State or even a decision by the juvenile court judge is required.<sup>5</sup> This is the general practice in Texas for youth who commit criminal offenses beginning at the age of seventeen. year old youth who are automatically charged in the adult system for offenses.<sup>6</sup>

Direct file, is the transfer process which gives the prosecution the discretion to determine whether to proceed in juvenile court or criminal court against the juvenile. Direct files places sole discretion with the prosecutor to determine if proceedings will be initiated in juvenile court or criminal court.<sup>7</sup>

In 1973 the Texas legislature promulgated Title III of the Family Code. The enactment of Title III was in response in part to U.S. Supreme Court decisions, increases in juvenile crime and an overall desire for Texas officials to be progressive.<sup>8</sup> The initial goals of Title III were to provide for the care, the protection, and the wholesome moral, mental and physical development of

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<sup>4</sup> Currently, forty-six states have a judicial waiver provisions, in which juvenile court judges clear the way for criminal court prosecutions by waiving jurisdiction over individual juveniles. Under a waiver law, a case against an offender of juvenile age must at least originate in juvenile court; it cannot be channeled elsewhere without a juvenile court judge's formal approval. While all states prescribe standards that must be consulted in waiver decision-making, most leave the decision largely to the judge's discretion (45 states). However, some set up presumptions in favor of waiver in certain classes of cases (15 states), and some even specify circumstances under which waiver is mandatory (15 states). See, Patrick Griffin, National Center for Juvenile Justice "National Overviews," State Juvenile Justice Profiles, [http://www.ncjj.org/stateprofiles/overviews/transfer\\_\\_state\\_overview.asp](http://www.ncjj.org/stateprofiles/overviews/transfer__state_overview.asp) (current through 2004 legislative session) (last visited June 25, 2006).

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<sup>5</sup> Twenty-nine states have statutory exclusion provisions that grant criminal courts original jurisdiction over certain classes of cases involving juveniles. Legislatures in these states have essentially predetermined the question of the appropriate forum for prosecution-taking the decision out of both prosecutors' and judges' hands. *Id.*

<sup>6</sup> Tex. Penal Code §8.07.

<sup>7</sup> Fifteen states have direct file laws, which leave it up to prosecutors to decide, at least in specified classes of cases, whether to initiate cases in juvenile or criminal courts. *Id.*

<sup>8</sup> 29 THOMAS S. MORGAN, TEXAS PRACTICE, JUVENILE LAW AND PRACTICE §1 (1985).

children coming within its provisions; to protect the welfare of the community and to control the commission of unlawful acts of children; consistent with the protection of the public interest, to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation; to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and when a child is removed from his family, to give him the care that should be provided by parents; to provide a simple judicial procedure through which the provisions of Title Three are executed enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.<sup>9</sup>

In Texas the judicial waiver process is used in removing juveniles to adult criminal court and is referred to as discretionary transfer, waiver of jurisdiction or most commonly certification. Discretionary transfer to criminal court or certification allows a juvenile judge to make the determination whether a juvenilerespondent is transferred from the juvenile system to the adult criminal system. Although certifications account for a relatively small percentage of proceedings in juvenile court they are extremely important hearings in that the juvenile court is making a decision to transfer a respondent to adult criminal court.<sup>10</sup>

Proceedings in juvenile court are considered civil in nature and have been designed to remove the “taint of criminality from children” and to focus on treatment, training and rehabilitation of the child<sup>11</sup>. Once a juvenile is certified to stand trial as an adult all of the protections available in the juvenile system are lost and the adult system takes over.

Texas law establishes basically three types of transfer or waiver of jurisdiction proceedings: hearings where the juvenile respondent is under the age of eighteen at the time of the hearing; hearings where the respondent is an adult or over the age of eighteen at the time of the commencement of the hearing; and the mandatory certification where a person has previously been certified and commits a new eligible offense.

### III. Certification Eligibility

The certification proceedings are initiated by the State filing a motion or petition for discretionary transfer and the issuance of a summons. The minimal requirements necessary for certification bestow on State prosecutors a wide range of discretion in determining which cases to seek certification. However, certifications are usually limited to, the more serious offenses, juveniles with chronic delinquent history, or individuals over eighteen who are accused of committing offenses when they were younger than seventeen.

The juvenile court has exclusive jurisdiction over nearly all criminal offenses committed by juveniles.<sup>12</sup> Texas

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<sup>9</sup> See original TEX. FAM. CODE §§51.02 (1-5). Amended.

<sup>10</sup> The number of certification proceedings has shown an overall decrease over the last decade; Texas Juvenile Justice Department data show 589 actual certifications occurred in 1996 compared to 212 certifications in 2012. See generally, Robert O. Dawson, Texas Juvenile Law § 10 (8<sup>th</sup> ed.

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2012). See also, “Who Gets Certified? An Empirical Study of Discretionary Transfers from Juvenile to Criminal Court” Robert O. Dawson, Juvenile Law Section Report December 2002.

<sup>11</sup> TEX. FAM. CODE § 51.01.

<sup>12</sup> See generally, TEX. PEN. CODE 8.07(a)(1)-(5). TEX. PEN. CODE § 8.07(a)(7) was enacted in 2001 to eliminate a potential defense to prosecution

Penal Code §8.07(b) states:

[u]nless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age except an offense described by Subsections (a)(1)-(5).<sup>13</sup>

It is important to note that the age limitation is considered jurisdictional.<sup>14</sup> Article 4.18 requires that a defendant or underage child raise the issue of being underage by written motion and the issue must also be presented to the district court judge.<sup>15</sup> If the issue of underage is not raised by written motion in district court then the issue will be considered waived.

#### IV. Perjury

Generally the age limits for juvenile court to have original jurisdiction of a child exists between the ages of ten and seventeen.<sup>16</sup> However a general exception to this provision deals with perjury offenses.<sup>17</sup> The Family Code

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under TEX. FAM. CODE § 54.02(j)(2)(A), and now permits prosecution in criminal court of a person eighteen or older charged with murder or capital murder allegedly committed between the ages of ten and fourteen. TEX. FAM. CODE § 51.03(c) (providing exception for perjury). TEX. FAM. CODE § 51.04(a); In the Matter of N.J.A., 997 S.W.2d 554 (Tex. 1999).

<sup>13</sup> TEX. PEN. CODE 8.07(b).

<sup>14</sup> See generally, TEX. CODE CRIM. PROC. Art. 4.18.

<sup>15</sup> Id.; Rushing v. State, 85 S.W.3d 283,286 (Tex. Crim. App. 2002); Adams v. State, 161 S.W.3d 113 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004); Mays v. State, No. 01-03-01345-CR, 2005 Tex. App. Lexis 3842 (Tex. App.—Houston [1<sup>st</sup> Dist] 5/19/05 unpublished).

<sup>16</sup> See, TEX. FAM. CODE § 51.03.

<sup>17</sup> TEX. PEN. CODE § 8.07(a)(1); See also., Ponce v.

§51.03 states “[n]othing in this title prevents criminal proceedings against a child for perjury.”<sup>18</sup> Texas Penal Code §8.07 provides that perjury and aggravated perjury cases may be prosecuted in adult court even against defendants under the age of fifteen.<sup>19</sup>

#### V. Under Eighteen

Section 54.02 of the Family Code establishes when a child under eighteen may be transferred to adult court Section 54.02 generally sets forth three requirements for transfer to adult court:

1. the child is alleged to have violated a penal law of the grade of felony and meets the minimum age for the charged offense;
2. no adjudication hearing has been conducted concerning that offense;
3. after a full investigation and a hearing, the juvenile court finds that: there is probable cause to believe that the child committed the offense, and because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings.<sup>20</sup>

#### VI. Eighteen Or Older

The Texas Family Code establishes when a respondent age eighteen or over may be certified or transferred to adult criminal court as

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State, 985 S.W.2D 594 (Tex. App.—Houston [1<sup>st</sup> Dist.], no pet.) (affirming a criminal conviction for aggravated perjury committed by 13 year old without court having conducting a certification hearing).

<sup>18</sup> TEX. FAM. CODE § 51.03

<sup>19</sup> TEX. PEN. CODE § 8.07.

<sup>20</sup> TEX. FAM. CODE § 54.02(a).

follows:

1. the person is eighteen or older;
2. the person was ten or older and under seventeen at the time he or she allegedly committed a capital felony or murder; fourteen or older and under 17 at the time he or she allegedly committed an aggravated controlled substance felony or a first degree felony other than murder, or fifteen or older and under seventeen at the time he or she allegedly committed a second or third degree felony or a state jail felony;
3. no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
4. the juvenile court finds from a preponderance of the evidence that: for a reason beyond the control of the State, it was not practicable to proceed before the person's eighteenth birthday, or after due diligence of the State, it was not practicable to proceed before the person's eighteenth birthday because the State did not have probable cause to proceed and new evidence has been found since the person's eighteenth birthday; the person could not be found; or a previous transfer order was reversed on appeal or set aside by a district court; and the juvenile court determines that there is probable cause to believe that the person before the court committed the offense alleged.<sup>21</sup>

In certification hearings involving respondents over the age of eighteen the court only has authority to either waive its

jurisdiction or if jurisdiction is not waived to dismiss the State's petition, or motion to transfer, and any petition seeking to adjudicate the respondent delinquent.<sup>22</sup>

One of the primary elements of the State's burden in these hearings is providing justification for the delay beyond the respondent's eighteenth birthday.<sup>23</sup> In these types of transfer hearings where the State is initially proceeding after the eighteenth birthday of the respondent demonstrating due diligence is mandatory for the State to meet its burden of transfer. If the State cannot justify the delay in proceeding prior to the juvenile turning eighteen the juvenile court has no jurisdiction to transfer.<sup>24</sup> Establishing due diligence is a jurisdictional matter and no harm analysis is necessary.<sup>25</sup>

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<sup>22</sup> Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8<sup>th</sup> ed. 2012).

<sup>23</sup> In justifying a delay the court in *In the Matter of N.M.P.*, stated [w]e find no authority ... holding that the State must search out and use new, unproven scientific theories or test to meet the due diligence requirement. To the contrary, the law requires the State to show that novel scientific evidence is reliable, and thus probative and relevant.... The State would be in an untenable position if it were required to prove that a cutting edge scientific test was reliable when the experts were still developing and refining the technology. In the Matter of N.M.P., 969 S.W.2d 95 (Tex. App.—Amarillo 1998).

<sup>24</sup> See generally, *Moore v. State*, 2014 Tex. App. LEXIS 8098 (Tex. App. Houston 1st Dist. July 24, 2014) *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998)(new DNA testing became available after the respondent turned eighteen); *In the Matter of J.C.C.*, 952 S.W.2d 47 (Tex. App.—San Antonio 1997)(State unable to provide justification for not proceeding against respondent before turning eighteen when it proceeding against his twin brother for the same offense prior to the twin brother turning eighteen).

<sup>25</sup> See, *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, *Juvenile Law Newsletter* 01-4-45 (Tex. App.—El Paso 10/25/01). In *Webb*, the State did not establish that the delay in proceeding in juvenile court before the defendant's eighteenth birthday was not

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<sup>21</sup> TEX. FAM. CODE § 54.02(j).

The court in *Webb*, held it is incumbent upon the State to file and conclude the certification hearing before the respondent's eighteenth birthday.<sup>26</sup> In *Webb*, the court opined that the meaning of "proceeding" in juvenile court, meant concluding the hearing before the respondent's eighteenth birthday, agreeing with the trial court.<sup>27</sup>

The certification provisions establish four justifications for the delay as follows:

not practicable to proceed before age eighteen;

new evidence discovered; respondent could not be found; appellate reversal of certification order

#### VII. Certifications For Capital Murder And Murder

Only individuals eighteen or over who are alleged to have committed either Capital Murder or Murder while between the ages of ten and fourteen can be considered for waiver of jurisdiction or certification to adult court.<sup>28</sup> This provision of the family code was promulgated by the legislature with the 1999 amendments to the Texas Family Code. The rationale for this provision is that Capital Murder and Murder have no statute of limitations and the juvenile court would have been able to impose a sentence of commitment to the Texas Juvenile Justice Department with a possible transfer to the Texas Department

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beyond its control. In reviewing the decision the court vacated the murder conviction following certification and dismissed the juvenile proceedings for want of jurisdiction. The defect was held to be jurisdictional and no harm analysis was necessary.

<sup>26</sup> *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-45 (Tex. App.—El Paso 10/25/01).

<sup>27</sup> *Id.*

<sup>28</sup> TEX. FAM. CODE § 54.02(j)(2)(A).

of Criminal Justice for up to a forty year term.<sup>29</sup> Before this legislative change, these offenses would not have been eligible for certification if the person was under fourteen at the time the offense allegedly was committed.

If the State, however, was unable to proceed before the eighteenth birthday of the juvenile the juvenile system could not handle the case because the person was over eighteen, and the adult criminal system would also have no jurisdiction since the offense has original jurisdiction with juvenile court.<sup>30</sup>

#### VIII. Due Process and Constitutional Safeguards

The Supreme Court articulated minimum levels of constitutional protections and due process necessary in juvenile certification proceedings in a landmark series of cases beginning in 1966 with *Kent v. United States*.<sup>31</sup> In *Kent* the Court stated "the waiver hearing must measure up to the essentials of due process and fair treatment." Prior to *Kent*, the states enacted various legislation to set procedures for juvenile proceedings. However, since juvenile courts were operating under the doctrine of "parens patriae" and hearings were deemed civil and not criminal procedural safeguards afforded adults were vastly lacking in juvenile courts. Beginning in *Kent* and following immediately with *Gault* the Supreme Court for the first time promulgated constitutional protections applicable to juvenile proceedings. In *Gault* the Court stated "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a

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<sup>29</sup> Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012).

<sup>30</sup> See TEX. PEN. CODE § 8.07.

<sup>31</sup> *Kent v. United States*, 383 U.S. 541 (1966).



poor substitute for principle and procedure.”<sup>32</sup>

Title III of the Texas Family Code has adopted the constitutional mandates of Kent, and its progeny in affording procedural protections to respondents in certification hearings.<sup>33</sup> Respondents are entitled to due process in that notice of the charges or allegations are required; the right to counsel is not waivable; the right of confrontation is guaranteed; and the privilege against self-incrimination as spelled out in Kent.<sup>34</sup>

#### IX. Notice Of Petition Or Motion For Discretionary Transfer

Section 54.02(b) states: “[t]he petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court.”<sup>35</sup>

The requirements of Section 53.04, mandate that the motion for transfer or petition must state:

with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts;  
the name, age, and residence address, if known, of the child who is the subject of the petition; the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the

child’s spouse, if any; and if the child’s parent, guardian, or custodian does not reside or cannot be found in the state, or if their places of residence are unknown, the name and residence address of any known adult relative residing in the county, or, if there is none, the name and residence address of the known adult relative residing nearest to the location of the court.

Notice to the juveniles parents has been considered mandatory.<sup>36</sup> In *Carlson v. State*, the court reversed a conviction for Aggravated Assault were the juvenile plead guilty; the court opined that “although service upon a parent is a ‘waivable right’ pursuant to the waiver provisions in Section 53.06(e), no such waiver occurred in this case. Neither of appellant’s parents attended the hearing or waived service of the summons in writing. Since the right to service of the summons was not waived, service upon a parent was mandatory.”<sup>37</sup> However in 2012 legislative amendments were enacted which excluded parents as a necessary party in cases where the respondent is over eighteen<sup>38</sup>. Additionally, the motion must state “that the hearing is for the purpose of considering discretionary transfer to criminal court.”<sup>39</sup>

#### X. Criminal Transaction

Multiple felony offenses pending against the Respondent for which there is probable cause can and should be alleged

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<sup>32</sup> In *Re Gault*, 387 U.S. at 541.

<sup>33</sup> See generally, TEX. FAM. CODE § 54.02.

<sup>34</sup> *Id.*

<sup>35</sup> TEX. FAM. CODE § 54.02(b); See also Texas Fam. Code § 54.02 (k)(addressing certifications when respondent over eighteen); See also *McBride v. State*, 655 S.W.2d 280 (Tex.App.—Houston [14th Dist.] 1983, no writ).

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<sup>36</sup> *Carlson v. State*, 151 S.W.3d 643 (Tex. App.—Eastland 2004).

<sup>37</sup> *Id.*

<sup>38</sup> Tex. Fam. Code § 54.02(k)([t]he person’s parent, custodian, guardian, or guardian ad litem is not considered a party to a proceeding under Subsection (j) and it is not necessary to provide the parent, custodian, guardian, or guardian ad litem with notice.

<sup>39</sup> TEX. FAM. CODE § 54.02(b).

in the same petition to transfer. If the State files a petition which alleges multiple offenses that constitute more than one criminal transaction, the juvenile court may either retain or transfer all offenses relating to a each transaction. It is important to note that the juvenile court waives jurisdiction over a transaction, not a specific statutory offense, so the court may transfer or retain different criminal transactions.<sup>40</sup> Section 54.02(g) states “[i]f the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.”

Accordingly, if the court retains jurisdiction over any criminal transaction the respondent is not subject to prosecution for any offense for which the court retains jurisdiction.<sup>41</sup> The State upon receiving the transferred case in criminal court may charge any offense or offenses supported by probable cause as long as the offense arose out of a criminal transaction that was transferred by the juvenile court.<sup>42</sup> In *Allen*, the Court established the principal that the juvenile court in deciding to waive or transfer its jurisdiction assesses the underlying conduct in the waiver hearing. Accordingly, if a respondent is transferred the adult court not only has jurisdiction over the offense transferred and any lesser included offenses but any conduct that resulted from the same criminal transaction.<sup>43</sup> As a result of the *Allen*

principal a defendant transferred to adult court can be prosecuted for any offense the State can prove as long as the offense charged is based on conduct from the criminal transaction from which the juvenile court waived jurisdiction.

However, the offense charged by the State must have been an offense for which the respondent was eligible for certification. For example if a respondent is certified for a criminal transaction which occurred at the age of fourteen only the first degree felony may be prosecuted. These situations would prevent the State from charging any lesser included offenses.<sup>44</sup>

## XI. Diagnostic Study

Prior to the actual certification hearing the juvenile court is required to order and have completed various evaluations and reports.<sup>45</sup> Section 54.02(d) provides:

“[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.”<sup>46</sup>

The legislature has not established or expressly stated what must be included in a diagnostic study.<sup>47</sup> However the purpose of this diagnostic study is to assist the court in determining whether to exercise its discretion to either retain or waive its jurisdiction.

Opinions vary regarding the

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<sup>40</sup> TEX. FAM. CODE § 54.02(g).

<sup>41</sup> *Id.*

<sup>42</sup> *Ex parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

<sup>43</sup> See, e.g., *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981); *Livar v. State*, 929 S.W. 2d 573

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(Tex. App.—Fort Worth 1996, pet. ref’d); *Brosky v. State*, 915 S.W.2d 120 (Tex. App.—Fort Worth, pet. ref’d)

<sup>44</sup> TEX. CRIM. PROC. CODE § 4.18.

<sup>45</sup> TEX. FAM. CODE § 54.02(d).

<sup>46</sup> *Id.*

<sup>47</sup> *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

contents of the diagnostic examination but generally the report is a forensic examination by a clinical psychologist or psychiatrist and social investigation by the juvenile probation department. The report generally addresses such issues as the child's sophistication, maturity, background and family history.<sup>48</sup>

The provisions of Section 54.02(d) are mandatory and apply to transfer hearings regardless of the age of the respondent. The only exceptions are certifications where the Respondent is over eighteen or the state is seeking automatic or "mandatory" transfer proceedings conducted pursuant to the Texas Family Code.<sup>49</sup> Effective since 2013 the Court may conduct a certification hearing without a diagnostic study if the State is seeking a transfer pursuant to Texas Family Code 54.02(j) or when the transfer hearing occurs after the Respondent's eighteenth birthday. However if the Respondent requests a diagnostic study then the court is required to order an evaluation.<sup>50</sup> If the court fails to order the diagnostic study, evaluation or investigation or to consider the reports in the discretionary transfer hearing the certification hearing is subject to being reversed by a reviewing court.<sup>51</sup> In *R.E.M. v. State*, the court stated:

Section 54.02(d) is mandatory.... It is impossible to read Title 3 of the Family Code...without reaching the conclusion that its effect is to give to a juvenile offender the right not to be treated as an adult offender unless he is divested of that

right by judicial order entered after complying with the requirements set forth in Section 54.02. The necessary conclusion is that, in the absence of an effective waiver by the child, he can be subjected to treatment as an adult only if there has been compliance with the mandatory provisions of Section 54.02.<sup>52</sup>

Although it is mandatory for the court to order a diagnostic evaluation, the respondent may choose to exercise his Fifth Amendment right and not answer questions. Further, the use of the examination results have limited results in a adult criminal proceeding if a juvenile is certified to stand trial as an adult. When the psychological examination is used both as the basis of the examiner's determination that the juvenile should be transferred and as a source of incriminating evidence introduced at trial, it requires additional constitutional safeguards.<sup>53</sup> When used only for its intended purpose, the examination has been held not to be considered a custodial interrogation; however, when the State seeks to use the examination in a subsequent criminal proceeding then the examination serves a dual purpose. In *Cantu v. State*, the court held that notwithstanding the neutral nature of the psychological examination, the statements a juvenile utters during the examination are not automatically removed from the reach of the Fifth Amendment, if a juvenile is not adequately informed of his Fifth Amendment rights with respect to the diagnostic examination or that his testimony during that examination would be used against him in an adjudicatory proceeding, a waiver of his rights is

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<sup>48</sup> For a discussion of what information should be included in the report, see Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Hous. L. Rev. 709 (1972).

<sup>49</sup> TEX. FAM. CODE §§ 54.02(l)(n).

<sup>50</sup> TEX. FAM. CODE §54.02.(l).

<sup>51</sup> *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

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<sup>52</sup> Robert O. Dawson, *TEXAS JUVENILE LAW* § 10 (8<sup>th</sup> ed. 2012)(citing *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975)).

<sup>53</sup> *Cantu v. State*, 994 S.W.2d 721 (Tex. App.—Austin 1999).

ineffective.<sup>54</sup>

## XII. Investigation

Also not defined in certification statutes is the term “full investigation of the child, his circumstances, and the circumstances of the alleged offense.”<sup>55</sup> In looking at this provision one Texas court opined

“[t]he phrase ‘full investigation of the circumstances of the offense’ is not defined in section 54.02. We believe that for good reasons the legislature did not attempt to define the phrase. Of necessity, any inquiry into the circumstances of an offense must be one of degree. It is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the event.”<sup>56</sup>

The certification statutes allow the juvenile court judge to consider and admit written reports from probation officers and other professionals.<sup>57</sup> The mandatory procedures enunciated in Section 54.02(d) are established with the purpose of providing the court information sufficient enough to make an informed decision regarding waiving jurisdiction. Although mandatory these procedures must be

balanced against the constitutional protections afforded respondents facing transfer to criminal court.. Section 54.02(e) seeks to strike a balance by requiring disclosure to counsel for the Respondent prior to the certification hearing<sup>58</sup>. Accordingly, an attorney for a child facing transfer or certification must make appropriate and informed decisions regarding when to invoke such rights as privilege against self-incrimination.<sup>59</sup> What various courts do seem to suggest is that counsel for defense can assert constitutional protections but cannot then complain on appeal that the required studies or evaluations are incomplete because of his or her own actions.<sup>60</sup>

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<sup>58</sup> TEX. FAM. CODE § 54.02(e) requires one day notice to the attorney representing the child to written reports that will be considered by the court. Act of June 19, 2009, 81<sup>st</sup> Leg., S.B. 518 (to be codified at TEX. FAM. CODE § 54.02(e) will provide for five (5) days notice effective September 1, 2009.

<sup>59</sup> See e.g., In K.W.M. v. State, 598 S.W.2d 660 (Tex. Civ. App.—Houston[14<sup>th</sup> Dist.] 1980, no writ) (the court stated that section 54.02(d) does not require a court to order that the child discuss his involvement in the offense, no self-incriminatory statements are required, and if any custodial statement will be used in a later criminal trial, then the Family Code protections must be provided.

<sup>60</sup> In R.E.M. v. State, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.), the respondent refused to cooperate with the professionals who tried to interview him, then claimed on appeal that the report was incomplete. The court stated: “[w]e are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant’s attitude.” R.E.M., 541 S.W.2d at 845. The court in R.E.M. held that Texas Family Code 51.09 precluded a waiver of the diagnostic study where the child asserted his right to remain silent, but did not waive his right to the study. Later cases hold that the respondent’s failure to cooperate does not waive the right to the study, but will prevent the child from arguing on appeal that the study was incomplete. See Ortega v. State, unpublished, No. 05-00-00086-CR, 2002 WL 14163 (Tex. App.—Dallas 2002); In the Matter of J.S.C., 875 S.W.2d 325 (Tex.App.—Corpus Christi 1994, writ dismissed); and In the Matter of C.C., 930 S.W.2d 929 (Tex.

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<sup>54</sup> Id. at 735; See also, Estelle v. Smith, 451 U.S. 454, 465, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359 (1981).

<sup>55</sup> See e.g., In re I.B., 619 S.W.2d 584 (Tex.Civ.App.—Amarillo 1981).

<sup>56</sup> In re I.B., 619 S.W.2d 584 (Tex. Civ. App.—Amarillo 1981, no writ). See also Price v. State, unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex. App. Lexis 2852 (Tex.App.—Dallas 4/24/02)(appellant argued that a “full investigation” required the probation department to personally interview the victims or include the respondent’s version of the circumstances of the offense in the report. The appellate court rejected this argument, finding that the court did not abuse its discretion in concluding that a full investigation was performed.)

<sup>57</sup> TEX. FAM. CODE § 54.02(d).

### XIII. The Hearing

Certification hearings in Texas are conducted by the court without a jury.<sup>61</sup> Specifically, §54.02(c) provides: “[t]he juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.”<sup>62</sup> The absence of a jury trial is consistent with the dictates of both state and federal law, since it has been held that juveniles are not constitutionally entitled to jury trials in juvenile proceedings.<sup>63</sup> No deprivation of any constitutional right should be construed in the absence of juries in the certification hearing. Although a right to jury is not available in certification hearings, a waiver hearing before the court is mandatory prior to a court exercising its jurisdiction and transferring a respondent to adult criminal court.<sup>64</sup>

Further it has been well settled that certification proceedings are not trials on the merits, but hearings to determine whether the juvenile court will waive its original jurisdiction and transfer the case to adult criminal court for trial or retain its jurisdiction and keep the proceedings in juvenile court.<sup>65</sup>

#### Right Of Counsel

An attorney can not be waived in a certification proceeding.<sup>66</sup> It has been held that proceeding with the transfer hearing without the presence of counsel

for the juvenile is reversible error.<sup>67</sup> It is well established that a juvenile is entitled to the effective assistance of counsel at a certification hearing.<sup>68</sup> In *Kent*, the court stated “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”<sup>69</sup> The ineffectiveness of counsel in juvenile cases is measured by the *Strickland v. Washington*,<sup>70</sup> standard just as in adult criminal cases.

### XIV. Evidence

The certification statutes do not expressly promulgate the evidentiary procedures which must be adhered to in waiver hearings, however, the Texas Rules of Evidence provides in pertinent part “[e]xcept as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.”<sup>71</sup>

Many courts have opined that the Texas Rules of Evidence are not applicable in certification proceedings; the primary rationale for this position was that the court needed to make a determination as to whether a grand jury would indict. However with the amendments to the

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App.—Austin 1996, no writ).

<sup>61</sup> TEX. FAM. CODE § 54.02(c)

<sup>62</sup> *Id.*

<sup>63</sup> See, generally, *McKeiver v. Pennsylvania*, 403 U.S. 528, 533, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Strange v. State*, 616 S.W.2d 951 ; In the Matter of P.B.C., 538 S.W.2d 448 (Tex. Civ. App.—El Paso 1976, no writ).

<sup>64</sup> *Id.*

<sup>65</sup> *M.A.V., Jr. v. Webb County Court at Law*, 842 S.W.2d 739 (Tex. App.—San Antonio 1992, writ denied).

<sup>66</sup> TEXAS FAM. CODE § 51.10(b)(1).

<sup>67</sup> In the Matter of D.L.J., 981 S.W.2d 815 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1998, no writ).

<sup>68</sup> See *Kent v. United States*, 383 U.S. 541, 561-62 (1966); In re K.J.O., 27 S.W.3d 340, 342 (Tex. App.—Dallas 2000, pet. denied).

<sup>69</sup> *Kent v. United States*, 383 U.S. at 561.

<sup>70</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(whether counsel's performance fell below an objective standard of reasonableness and, if so, whether a reasonable probability exists that, but for counsel's unprofessional errors, a different outcome would have resulted.); See also, In re K.J.O., 27 S.W.3d at 343.

<sup>71</sup> TEX. RULES EVID. 101(b). See also TEX. FAM. CODE § 51.17(c) which apply the Texas Rules of Evidence applicable to criminal cases in juvenile proceedings.

statute effective in 1996 the grand jury provision was repealed.<sup>72</sup> The issue of hearsay as well as the application of the Sixth Amendment Confrontation clause in certification hearings have been addressed by some appellate courts.<sup>73</sup> However neither of the state's highest courts, the Texas Supreme Court or Court of Criminal Appeals, have yet to address this issue. It is settled that Texas Rules of Evidence applicable to criminal cases are to be used in certification proceedings.<sup>74</sup>

#### XV. Factors To Be Considered By The Court

In the seminal case, *Kent v. United States*, the Supreme Court articulated factors which were determinative in addressing whether a judge should waive its jurisdiction and transfer a case to adult criminal court.<sup>75</sup> The factors articulated by the Court were

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.<sup>76</sup>

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<sup>72</sup> TEX. FAM. CODE § 54.02(f)(3) repealed.

<sup>73</sup> See generally, *Milligan v. State*, No. 03-04-00531-CR, 2006 Tex. App. Lexis 1356, (Tex. App.—Austin 2/16/06) (Neither Sixth Amendment or Crawford confrontation rights apply at the juvenile certification hearing); *In the Matter of S.M.*, No. 2-05-262-CV, 2006 Tex. App. Lexis 9056 (Tex. App.—Fort Worth, 10/19/06) (*Crawford v. Washington* does not apply to determinate sentence transfer hearings since they are not a critical stage of a criminal prosecution) c.f. *In the Matter of M.P.*, No. 10-06-00008-CV, 2007 Tex. App. Lexis—Waco, 2/7/07) (Court held that a juvenile has no Sixth Amendment or Article I, Section 10 of the Texas Constitution right of confrontation during a disposition hearing however, he does have a limited right of confrontation under the Due Process Clause of the Fourteenth Amendment, which requires a balancing test).

<sup>74</sup> TEX. FAM. CODE § 51.17 (c).

<sup>75</sup> *U.S. v. Kent* 383 U.S. at 566-567.

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<sup>76</sup> *Id.*

The Texas provision of the certification statute §54.02(f) adopts and incorporates the Kent factors which were promulgated to provide constitutional safeguards to juvenile respondents in transfer hearings.<sup>77</sup> Section 54.02(f) requires the juvenile court to consider the following factors in making the decision to waive jurisdiction:

1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
2. the sophistication and maturity of the child;
3. the record and previous history of the child; and
4. the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.<sup>78</sup>

This list is not exhaustive, in that the court may consider other factors which it deems appropriate in determining whether to transfer a case to criminal court. However the court must “consider” the statutory factors in making its determination.<sup>79</sup>

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<sup>77</sup> Kent v. United States, 383 U.S. 541, 561-62 (1966)

<sup>78</sup> TEX. FAM. CODE § 54.02(a). The legislative changes which took effect in January 1, 1996, eliminated two factors: whether the offense was committed in an aggressive and premeditated manner and whether there was evidence on which a grand jury could be expected to return an indictment.

<sup>79</sup> See e.g.; Moon v. State, 410 S.W.3d 466 (Tex. App.—Houston [1st Dist.] (2013) (holding “In sum, we find the evidence legally insufficient to support the juvenile court’s finding related to Moon’s sophistication and maturity. We also find the evidence factually insufficient to support the court’s finding regarding the prospect of adequate protection of the public and the likelihood of Moon’s rehabilitation. Thus, the first factor—whether the offense was against person or

## XVI. Moon v. State

Cameron Moon was sixteen years old when he was detained and charged with murder. The prosecuting attorney sought certification and transfer to adult court. In a contested transfer hearing the State called one witness at the hearing: the detective who investigated the case. The detective’s testimony outlined his investigation of the murder and his interrogation of Cameron. Additionally the State introduced an offense report for a referral for a criminal mischief offense and a report from the juvenile probation department which detailed a physical exam of Cameron.<sup>80</sup> Cameron was certified and transferred to adult court where he was tried and convicted of murder and sentenced to thirty years in the Texas Department of Corrections (TDCJ). Cameron appealed his conviction and in 2013 the First District Court of Appeals in Houston reversed his conviction and held that the juvenile court’s finding that there was little, if any, prospect of rehabilitation of Cameron or adequate protection of the public was so against the evidence introduced at the transfer hearing as to be manifestly unjust and an abuse of the juvenile court’s discretion. In 2014 the Court of Criminal Appeals affirmed the appellate court decision and issued its opinion in Moon v. State.<sup>81</sup> In Moon the Court of Criminal Appeals opined that in deciding the ultimate issue of determining whether the seriousness of the offense alleged or the background of the juvenile requires criminal proceedings a juvenile court must

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property—is the only factor weighing in favor of Moon’s transfer. In the Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, writ ref’d n.r.e.)

<sup>80</sup> Moon v. State, 451 S.W.3d 28, 31 (Tex. Crim. App. 2014)

<sup>81</sup> Moon v. State, 451 S.W.3d (Tex. Crim. App. 2014).

have some evidence to support its findings regarding transfer.<sup>82</sup> The Court of Criminal Appeals revisited the United Supreme Court's decision in *Kent v. United States* where the Court opined "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children...permitted this procedure. We hold that it does not."<sup>83</sup>

#### XVII. Required Findings

There are five basic requirements that must be established before the juvenile court may waive its jurisdiction. Prior to transfer the court must make the following findings:

the child is alleged to have committed a felony;

the child was:

fourteen or older at the time he or she allegedly committed a capital felony, an aggravated controlled substance felony, or a first degree felony, or fifteen or older at the time he or she allegedly committed any other felony; no adjudication hearing has been conducted concerning the offense;

there is probable cause to believe that the child before the court committed the alleged offense; and because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings.<sup>84</sup>

If the court is proceeding under a

hearing where the respondent is over eighteen the court must make the additional findings regarding due diligence.<sup>85</sup> The burden is on the State to prove the allegations in the petition or motion for discretionary transfer by a preponderance of the evidence.

#### XVIII. Community Welfare Provision

Of most important in a court's consideration to transfer a juvenile to adult court is whether the evidence dictates that the welfare of the community requires transfer to adult criminal court.<sup>86</sup> This finding will be reviewed by an appellate court on legal and factual sufficiency grounds.<sup>87</sup> If the evidence is deemed legally insufficient on appellate review the respondent may not be transferred to adult court since judgment should be rendered for the respondent and the waiver petition dismissed with prejudice.<sup>88</sup>

#### XIX. Criminal Transaction

When a juvenile court waives its jurisdiction and transfers a juvenile respondent to adult criminal court it is not actually transferring the respondent for all purposes. In essence what the juvenile court is waiving jurisdiction for a particular criminal conduct or transaction.<sup>89</sup> Section 54.02(g) of the Family Code states [i]f the petition alleges

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<sup>85</sup> TEX. FAM. CODE § 54.02(j)(4).

<sup>86</sup> TEX. FAM. CODE § 54.02(a)(3).

<sup>87</sup> *Green v. State*, unpublished, No. 05-97-01176-CR, 1999 WL 783734, 1999 Tex. App. Lexis 7328, *Juvenile Law Newsletter* 99-4-14 (Tex.App.—Dallas 10/4/99).

<sup>88</sup> See generally, *In the Matter of A.T.S.*, 694 S.W.2d 252 (Tex. App.—Fort Worth 1985) (Appellate Court held evidence did not support transfer hearing since offense committed was crime of "juvenile nature").

<sup>89</sup> See, *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

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<sup>82</sup> *Id.* At 57.

<sup>83</sup> *Kent v. United States*, 383 U.S. 541, 554 (1966).

<sup>84</sup> TEX. FAM. CODE § 54.02(f).



multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction<sup>90</sup>.

## XX. Mandatory Certification

The third basic type of certification in Texas is often referred to as "mandatory certification."<sup>91</sup> The mandatory provisions were enacted with the advent of the legislative changes in 1995. The provisions of the code establishing the mandatory transfer proceedings basically codifies the doctrine or practice of "once certified always certified." Although the statute is commonly referred to as mandatory certification the process is not automatic and not all inclusive. The prosecutor has discretion whether to seek a mandatory transfer or not. However, if the State does seek transfer under this provision and the requirements of the statute are complied with, the juvenile court must transfer the case. Mandatory transfer requires:

1. the child was previously transferred to criminal court for criminal proceedings; and
2. the child has allegedly committed a new felony offense before becoming seventeen years old.

The mandatory transfer provision do not apply if at the time of the transfer hearing:

1. the child was not indicted by the grand jury in the matter transferred;

2. the child was found not guilty in the matter transferred;
3. the matter transferred was dismissed with prejudice; or
4. the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final.<sup>92</sup>

Of major importance to this provision is the requirement that the respondent was previously certified to adult court and a valid transfer order exists and a new felony offense is alleged.<sup>93</sup> Additionally, the case which the respondent was previously certified to adult court must be final and not have resulted in an acquittal, dismissal prior to indictment, no billed or reversed on appeal.<sup>94</sup>

Once the statutory provisions are met transfer to adult court is mandatory; hence the term "mandatory certification." These procedures were designed to expedite the transfer process and increase judicial economy.<sup>95</sup> This streamlined process does away with the requirements of obtaining a complete diagnostic study, social investigation and investigation of the child and the circumstances of the alleged offense. Although the statute calls for an extremely streamlined process and does not address additional proof requirements it should be concluded that probable cause demonstrating the respondent committed a felony offense would still be necessary to be shown by the State.<sup>96</sup>

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<sup>92</sup> TEX. FAM. CODE § 54.02(m).

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> See generally, TEX. FAM. CODE § 54.02(n).

<sup>96</sup> TEX. FAM. CODE § 54.02(a)(3); Kent v. United States 557; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8<sup>th</sup> ed. 2012).

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<sup>90</sup> TEX. FAM. CODE §54.02(g).

<sup>91</sup> TEX. FAM. CODE §54.02(m).

## XXI. Order

Although courts are required to give its reasons for transfer in its order it is well settled that juvenile courts have wide latitude in determining whether to retain or waive jurisdiction in a certification proceeding<sup>97</sup>. In reviewing a court's order to transfer a reviewing court will defer to the trial court's findings.

## XXII. Miscellaneous Transfers

Two essentially identical provisions of the juvenile mental health statutes allow for "automatic" transfer of certain cases to adult criminal court.<sup>98</sup> These statutes state that the juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the eighteenth birthday of a child for whom the juvenile court or a court to which the child's case is referred under Section 55.12(2) has ordered inpatient mental health services if:

- a. The child is not discharged or furloughed from the inpatient mental health facility before reaching eighteen years of age; and
- b. The child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.<sup>99</sup>

These provisions require transfer to adult court juveniles charged with offenses under the Determinate Sentence Act who remain confined under a commitment order at the age of eighteen. Section 55.44 permits adult criminal

proceedings when the respondent is competent to stand trial after age eighteen and is charged with an offense under the Determinate Sentence Act. There has been minimal use or litigation of these provisions however the juvenile court has no discretion in its application<sup>100</sup>.

## XXIII. Appeals

A juvenile respondent has a right to appeal the decision of a juvenile court transferring jurisdiction to adult court. Prior to the 1995 legislative changes to the Family Code direct appeals to the Court of Appeals, then possible review by the Texas Supreme Court were available.<sup>101</sup> Effective with offenses occurring after January 1, 1996, the right to take a direct appeal from a certification order was eliminated.<sup>102</sup> Beginning in September 1, 2015, Texas law will again allow direct appeal of juvenile certifications.<sup>103</sup> The Texas Supreme Court is currently adopting rules to accelerate the appeals.<sup>104</sup>

## XXIV. Conclusion

Juvenile courts in Texas have original jurisdiction of offenses committed by juveniles over the age of ten and younger than seventeen. Texas does however for procedures to have certain cases removed or transferred from juvenile court to a criminal district court. Certifications or discretionary transfer of juveniles in Texas account for roughly one

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<sup>100</sup> TEX. FAM. CODE §55.44.

<sup>101</sup> TEX. FAM. CODE § 56.01(c)(1).

<sup>102</sup> TEX. FAM. CODE § 56.01(c)(1)(A), which had authorized a direct appeal from an order of transfer, was repealed. See e.g., *Silva v. State*, \_\_ S.W.3d \_\_, No. 01-06-00031-CR, 2007 Tex. App. Lexis 3698 (Tex. App.—Houston [1<sup>st</sup> Dist.] 5/10/07), *Rodriguez v. State*, 191 S.W.3d 909 (Tex. App.—Dallas 2006).

<sup>103</sup> See TEX. FAM. CODE §56.01.

<sup>104</sup> TEX. FAM. CODE §56.01 (h-1).

<sup>97</sup> See generally, TEX. FAM. CODE §54.02(h).

<sup>98</sup> See, TEX. FAM. CODE §§ 55.19, 55.44; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8<sup>th</sup> ed.

2012).

<sup>99</sup> *Id.*

percent of all juvenile referrals; although this total comprises a relatively small number of juvenile proceedings, these hearings are of utmost importance. Upon transfer to adult court the juvenile protections and safeguards which have been mandated in Texas law since the Gault decision are lost and adult provisions and statutes become applicable.



# DETERMINE SENTENCING

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## Introduction

Determinate sentencing is a hybrid system that allows a juvenile court to maintain control of a juvenile charged with a serious crime, while at the same time fulfilling the purpose of the Juvenile Justice Code. The purpose of the Juvenile Justice Code is to remove, where appropriate, the taint of criminality from children committing certain unlawful acts and to provide treatment, training and rehabilitation that emphasizes the responsibility of both the parent and the child for the child's conduct.<sup>1</sup>

When the courts proceed under an Indeterminate Petition, the juvenile can only utilize the rehabilitation programs available to the Juvenile Justice System until the juvenile ages out of the system. The certification process moves the juvenile immediately into the adult system, bypassing the programs within the Juvenile Justice System structure. By contrast, Determinate sentencing is the hybrid solution that offers the Juvenile Courts an attempt to rehabilitate the Juvenile and transfer the Juvenile to the adult system only if it becomes necessary.

## History

Prior to 1987, the State of Texas was given jurisdiction over a juvenile until the juvenile turned twenty-one.<sup>2</sup> A juvenile could not be certified if the child had not reached the age of 15.<sup>3</sup> This created a void for juveniles charged with serious crimes, that could not be certified or certification was unwarranted. It

also forced the courts to certify juveniles about to age out of the system because there was no alternative. This began to conflict with the rehabilitation purpose of the Juvenile Justice Code.<sup>4</sup>

In response to this dilemma, Determinate Sentencing was created by the Texas Legislature in 1987 with the passing of the Texas Determinate Sentencing Act.<sup>5</sup> Under the Texas Determinate Sentencing Act juveniles, between ages ten through sixteen, who had committed Capital Murder, Murder, attempted Capital Murder, Aggravated Kidnapping, Aggravated Sexual Assault or Deadly Assault on a Law Enforcement Officer were eligible for Determinate Sentencing.<sup>6</sup> The maximum sentence was thirty years.<sup>7</sup> The Texas Youth Commission would house the juvenile but could petition the court at any time to parole the juvenile.<sup>8</sup> If the juvenile was not paroled, a mandatory hearing in the Juvenile Court was required upon the juvenile reaching seventeen and one-half years old.<sup>9</sup> The court would make the decision to either transfer the juvenile to the Texas Department of Criminal Justice to be treated as an adult, or parole the juvenile from the Texas Youth Commission.<sup>10</sup> If the juvenile was paroled from the Texas Youth Commission, the juvenile was to remain on parole until the full sentence was served, the court discharged the juvenile or the juvenile reached the age of twenty-one.<sup>11</sup>

The next change enacted by the legislature happened in 1991.<sup>12</sup> The legislature increased the maximum sentence to forty years if the juvenile was sentenced under

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<sup>1</sup> Tex. Fam. Code Sec. 51.01

<sup>2</sup> Dawson, Texas Blended Sentencing: An Empirical Study of the Uses of Determinate Sentencing, 17 State Bar of Texas Section Report Juvenile Law 5-17 (No. 2, June 2003).

<sup>3</sup> Tex. Fam. Code 54.02

<sup>4</sup> Tex. Fam. Code Sec. 51.01

<sup>5</sup> Dawson, Texas Blended Sentencing: An Empirical Study of the Uses of Determinate Sentencing, 17 State Bar of Texas Section Report Juvenile Law 5-17 (No. 2, June 2003).

<sup>6</sup> Advances in Criminological Theory, Volume 8: The Criminology of Criminal Law edited by William S. Laufer and Freda Adler

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Lost Causes: Blended Sentencing. Second Chances, and the Texas Youth Commission by Chad R. Trulson, Darin R. Haerle, Jonathan W. Caudill, Matt DeLisi and James W. Marquart

Determinate Sentencing for committing Capital Murder, Murder or an aggravated controlled substances felony.<sup>13</sup>

Four years later in 1995 the legislature acted again. The legislature added eleven new offenses which (including attempting to commit the crime) brought the total of criminal offenses eligible for determinate sentencing to thirty.<sup>14</sup> In addition to adding to the list of eligible offenses, the legislature also eliminated transfer hearings unless the Texas Youth Commission requested the transfer of a youth to the Texas Department of Criminal Justice or the Texas Youth Commission wanted to parole a juvenile before the minimum length of incarceration was reached. The minimum length of incarceration was ten years for a capital felony, three years for a first degree felony, two years for a second degree felony and one year for a third degree felony.<sup>15</sup> Maximum ranges of punishment were also set at a maximum of ten years for third degree felonies, maximum punishment of twenty years for second degree felonies, and a maximum punishment of forty years for first degree felonies and capital murder.<sup>16</sup>

In 2001 two new offenses were added to bring the total list of offenses to include:

- Murder
- Attempted Murder
- Capital Murder
- Attempted Capital Murder
- Manslaughter
- Intoxication Manslaughter
- Aggravated Kidnapping
- Attempted Aggravated Kidnapping
- Aggravated Sexual Assault
- Sexual Assault
- Attempted Sexual Assault
- Aggravated Assault
- Aggravated Robbery
- Attempted Aggravated Robbery

- Felony Injury (Child, Elderly, or Disabled)
- Felony Deadly Conduct
- Aggravated First-Degree Controlled Substance Felony
- Criminal Solicitation of a Capital or First Degree Felony
- Second Degree Felony Indecency with a Child
- Attempted Indecency with a Child by Contact
- Criminal Solicitation of a Minor
  - To commit Indecency with a Child
  - To commit Sexual Assault
  - To commit Aggravated Sexual Assault
  - To commit Sexual Performance by a Child
- First Degree Arson
- Habitual Felony Conduct (3 consecutive Felonies)
- First Degree Arson
- Felony Deadly Assault – Discharge of a Firearm; and
- Aggravated Controlled Substance Felony<sup>17</sup>

Another change with regards to determinate sentencing came in 2007. The legislature changed the maximum age of jurisdiction from age twenty-one to age nineteen. The legislature also provided that if a juvenile had not successfully served the sentence imposed and had not been transferred to the adult system, the juvenile was transferred to adult parole supervision upon reaching the age on nineteen.<sup>18</sup>

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> [www.tjcd.texas.gov/about/sentenced\\_offenders](http://www.tjcd.texas.gov/about/sentenced_offenders)

<sup>16</sup> Tex. Fam. Code 54.04

<sup>17</sup> Lost Causes: Blended Sentencing. Second Chances, and the Texas Youth Commission by Chad R. Trulson, Darin R. Haerle, Jonathan W. Caudill, Matt DeLisi and James W. Marquart

<sup>18</sup> Id.



## Procedure under Determinate Sentencing

In certification hearings, after the prosecutor selects to file the Certification Petition, discretion is left to the Juvenile Judge to determine if certification is warranted. This is accomplished by presenting evidence at a hearing.<sup>19</sup> Determinate sentencing places a vast majority of the discretion in the hands of the prosecutor at the initial stages of the procedure.<sup>20</sup> The judge and state organizations are not granted discretion until post-adjudication.<sup>21</sup>

### Grand Jury

If the prosecution elects to proceed under the Determinate Sentencing statute, the case must be presented to the grand jury.<sup>22</sup> At least nine members of the grand jury must approve the Determinate Petition.<sup>23</sup> This is the only check and balance against total prosecutorial discretion.

If at least nine members approve the Determinate Petition, the approval of the petition shall be certified to the juvenile court and the approval shall be entered in the record of the case.<sup>24</sup> The certification of the approval by the grand jury gives the juvenile court the jurisdiction to proceed under the Determinate Sentencing statute. However, the respondent and the attorney do have the right to waive grand jury approval.

If nine members fail to approve the determinate petition, the state cannot proceed under the determinate sentencing statute.<sup>25</sup> The state may proceed with an indeterminate petition or certify the juvenile if appropriate.

## Hearing

As with all juvenile cases, the hearing consists of an adjudication hearing (determining if it is true or not true that the juvenile engaged in delinquent conduct and is in need of rehabilitation or supervision) and a disposition hearing (determining the sentence).

Any judge granted jurisdiction over juvenile cases may preside over an indeterminate petition. The amount of jurors hearing the evidence under an indeterminate petition is dependent on if the County Court or District Court is granted jurisdiction over the juvenile cases. The juvenile has no right to have a jury handle the disposition hearing under an indeterminate petition.<sup>26</sup>

These rules change if the state is proceeding under a properly approved Determinate Petition. First, the amount of jurors hearing the case must be twelve regardless of what court has jurisdiction.<sup>27</sup> Second, the juvenile has a right to have the jury determine the sentence.<sup>28</sup> The attorney for the juvenile must file a written request in order to elect the jury to determine sentencing.<sup>29</sup> The written request must be filed before the start of voir dire.<sup>30</sup> Third, there is a restriction on what type of judge may preside over the determinate case. Only the elected official may preside over the hearings.<sup>31</sup> Juvenile court referees, associate judges, or constitutional county judges are prohibited from hearing a determinate petition.<sup>32</sup> Other than these key differences, the indeterminate petition proceedings and determinate petition proceedings, remain virtually the same.

## Probation

After the juvenile is found to have engaged in delinquent conduct and is in need of

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<sup>19</sup> Tex. Fam. Code 54.02

<sup>20</sup> Tex. Fam. Code 53.045

<sup>21</sup> Tex. Hum. Res. Code 61.079; Tex. Hum. Res. Code 61.084

<sup>22</sup> Tex. Fam. Code 53.045; Tex. Fam. Code 54.04

<sup>23</sup> Tex. Fam. Code 53.045

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Tex. Fam. Code 54.03

<sup>28</sup> Tex. Fam. Code 54.04

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Tex. Fam. Code 54.10; Tex. Fam. Code 51.04

<sup>32</sup> Id.

rehabilitation or supervision the juvenile is sentenced. The juvenile may either be sentenced to a term of years in the Texas Juvenile Justice Department or may be placed on probation.

During the disposition hearing, the judge or jury may elect to place the juvenile on probation.<sup>33</sup> First, the juvenile must be sentenced to ten years or less.<sup>34</sup> Second, the judge or jury must award probation to the juvenile.<sup>35</sup> If the juvenile is placed on probation by the judge or jury, the juvenile can begin probation either at home or in the care of the Chief Juvenile Probation Officer.<sup>36</sup> If the judge places the juvenile outside of the home, the judge shall make a finding that it is in the child's best interests to be placed outside the child's home; reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; and the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.<sup>37</sup>

Just as with adult cases, if the juvenile is placed on probation the terms and conditions of probation are assessed by the judge.<sup>38</sup> The judge assess the length of the probation and what services the juvenile will be ordered to attend.<sup>39</sup>

Juvenile probation will begin the supervision of a juvenile that is awarded probation. Currently, juvenile probation has jurisdiction over to the juvenile until the juvenile's nineteenth birthday.<sup>40</sup> If the offense was committed prior the September 1, 2011, juvenile probation has jurisdiction over the

juvenile until the juvenile's eighteenth birthday.<sup>41</sup>

Prior to the juvenile reaching age nineteen, if the juvenile has not completed probation, the state may petition the court to transfer the juvenile's supervision to an adult district court. The juvenile will be discharged from probation if the request is not made and the hearing is not completed before the juvenile's nineteenth birthday.

If the court determines to discharge the juvenile from probation, the court enters the discharge date into the record.<sup>42</sup> The discharge date must be on or before the juvenile's nineteenth birthday.<sup>43</sup> Once this date occurs, the juvenile is discharged from probation.<sup>44</sup>

The judge may also elect to transfer the supervision of the juvenile to an appropriate adult district court. If this occurs, the juvenile is transferred to adult supervision on the juvenile's nineteenth birthday. Upon transfer to an adult court only the petition, the grand jury approval, the judgment concerning the conduct for which the person was placed on determinate sentence probation, and the transfer order are a part of the district clerk's public record.<sup>45</sup> The minimum requirements for adults are not required for juveniles that are transferred into the adult court.<sup>46</sup> Also the adult court may only order conditions of probations that are consistent with the juvenile court conditions.<sup>47</sup>

If a juvenile violates the conditions of probation after transfer to an adult court, the district court shall dispose of the violation in the same manner as if the court had originally exercised jurisdiction over the case.<sup>48</sup> However, the judge is not bound by the minimum requirements set out for adults.<sup>49</sup>

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<sup>33</sup> Tex. Fam. Code 54.04

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Tex. Fam. Code 54.05(m)

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Tex. Fam. Code 54.051

<sup>41</sup> Id.

<sup>42</sup> Tex. Fam. Code 54.051(c)

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Tex. Fam. Code 54.051(d-1)

<sup>46</sup> Tex. Fam. Code 54.051(e-1)

<sup>47</sup> Tex. Fam. Code 54.051(e-2)

<sup>48</sup>

<sup>49</sup> Tex. Fam. Code 54.051(e-2)

## Texas Juvenile Justice Department

If the judge or the jury do not award probation, the juvenile is transferred to the Texas Juvenile Justice Department for a certain number of years. As discussed earlier in this paper, the minimum stay for a Capital Murder is ten years.<sup>50</sup> The minimum stay for first degree felonies is three years.<sup>51</sup> The minimum stay for second degree felonies is two years.<sup>52</sup> For third degree felonies the minimum stay is one year.<sup>53</sup>

As discussed earlier in this paper maximum sentences also apply. The maximum penalty for a capital degree felony, felony in the first degree, or an aggravated controlled substance felony is not more than forty years.<sup>54</sup> For a second degree felony the maximum punishment is not more than twenty years.<sup>55</sup> For a third degree felony the maximum penalty is not more than ten years.<sup>56</sup>

### Parole

Prior to the juvenile reaching the age of nineteen, the Texas Juvenile Justice Department may elect to parole the juvenile. The only restriction is that the juvenile cannot be paroled until the juvenile has served the minimum sentence with respect to the adjudicated offense.<sup>57</sup> If the juvenile is paroled prior to reaching the age of nineteen, the Texas Juvenile Justice Department will supervise the juvenile.<sup>58</sup> Upon reaching the age of nineteen the juvenile will be automatically transferred to adult parole system to serve the rest of the sentence.<sup>59</sup>

### Transfer to Adult Prison

If the juvenile is not discharged or paroled, the juvenile may be transferred to the adult prison system. When the juvenile becomes sixteen years of age but before the

child becomes nineteen years of age, the commission may refer the child to the juvenile court that entered the order of commitment for approval of the child's transfer to the Texas Department of Criminal Justice for confinement.<sup>60</sup> In order to satisfy the transfer of the juvenile into the adult system the commission must show that the child has not completed the sentence and the child's conduct indicates that the welfare of the community requires the transfer.<sup>61</sup>

Before the transfer hearing takes place proper notice of the time and place of the hearing must be given to the person to be transferred or released under supervision, the parents of the person, any legal custodian of the person, including the Texas Youth Commission, the office of the prosecuting attorney that represented the state in the juvenile delinquency proceedings, the victim of the offense that was included in the delinquent conduct that was a ground for the disposition, or a member of the victim's family, and any other person who has filed a written request with the court to be notified of a release hearing with respect to the person to be transferred or released under supervision.<sup>62</sup> The hearing is not invalid if it is shown on the record that a person requiring notice is unable to be located and reasonable efforts were used to attempt to locate the party.<sup>63</sup>

At the transfer hearing the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas Youth Commission, in addition to the testimony of witnesses.<sup>64</sup> The court shall provide the attorney for juvenile with access to

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<sup>50</sup> Tex. Hum. Res. Code 61.081

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Tex. Fam. Code 54.04(d)(3)(a)

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Tex. Hum. Res. Code 61.081

<sup>58</sup> Tex. Hum. Res. Code 61.084

<sup>59</sup> Id.

<sup>60</sup> Tex. Hum. Res. Code 61.079

<sup>61</sup> Id.

<sup>62</sup> Tex. Fam. Code 54.11

<sup>63</sup> Id.

<sup>64</sup>

all written matter to be considered by the court.<sup>65</sup>

At the hearing, the juvenile is entitled to an attorney.<sup>66</sup> The hearing must be recorded by a court reporter or by audio or video tape recording, and the record of the hearing must be retained by the court for at least two years after the date of the final determination on the transfer or release of the juvenile.<sup>67</sup> At the hearing the court may consider the experiences and character of the juvenile before and after commitment to the youth commission, the nature of the penal offense that the juvenile was found to have committed, the manner in which the offense was committed, the abilities of the juvenile to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the juvenile, and any other factor relevant to the issue to be decided.<sup>68</sup>

## Conclusion

Determinate sentencing was created in 1987 to address the void between indeterminate sentencing and certification proceedings. The main purpose was to maintain jurisdiction over juveniles convicted of serious cases without transferring the juvenile immediately to the adult system. This allowed the Texas Juvenile Justice Department the opportunity to allow the juvenile access to rehabilitation programs that are not available to adult offenders.

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<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.