

**2017 TEXAS LEGISLATIVE UPDATE IN CHILD WELFARE LAW**

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## **2017 TEXAS LEGISLATIVE UPDATE OF CHILD WELFARE LAWS**

*Abstract: This paper highlights new laws passed during the 85th State legislative session that impact legal processes for protecting the welfare of children.*

### **1. INTRODUCTION**

The purpose of this paper is to highlight legislation passed during the 85<sup>th</sup> legislative session that impacts the State's legal system for protecting the welfare of children through its various statutorily assigned agents, including the Department of Family & Protective Services [hereinafter "Department"]. This paper categorizes the bills by subject under four categories: 1) participants in the legal process, 2) legal actions, 3) legal decision issues, and 4) legal procedures. Most of the bills will become effective on September 1, 2017, however, the reader should note there are some bills that became effective immediately. Finally, the reader is advised that this summary has gone through a selective process and does not purport to fully summarize everything passed this last session in relation to child welfare law.

### **2. PARTICIPANTS IN THE LEGAL SYSTEM**

#### **I. APPOINTED ATTORNEY FOR CHILD**

##### **A. Continued Appointment**

**Act of May 26, 2017, HB 7 §9**

**Amends TFC<sup>1</sup> 107.016(2)**

**Effective 9/1/17**

House Bill 7 amends Section 107.016 of the Family Code to permit a court to continue the appointment of an attorney ad litem for the child for as long as the child remains in the Department's conservatorship when the court signs its order appointing the Department as the child's conservator. HB7 §9 (TFC 107.016(2)).

##### **Duty to ensure ID papers**

**Act of May 28, 2017, SB 11 §3**

**Amends TFC 107.003(b)**

**Effective 9/1/17**

Senate Bill 11 amends Section 107.003(b) of the Family Code to require an attorney ad litem for a child in a proceeding under Chapters 262 or 263 of the Family Code to make sure certain documents have been received by the subject child if the child is at least 16 years of age. Those documents include (1) a certified copy of the child's birth certificate, (2) a social security card or a replacement social security card, (3) driver's license or personal identification certificate under Chapter 521, Transportation Code,

and (4) any other personal document that the Department deems appropriate.

##### **B. Duty to review & bring concerns**

**Act of May 26, 2017, HB 7 §8.**

**Amends TFC 107.004**

**Effective 9/1/17**

House Bill 7 adds a duty under Section 107.004 requiring an attorney ad litem for a child in Department conservatorship to "periodically continue to review the child's safety and well-being, including any effects of trauma to the child." HB 7 §8 (TFC 107.004(c-1)). It adds, "when necessary to address an issue of concern," the attorney shall take appropriate action, including requesting a review hearing. *Id.*

#### **II. ASSOCIATE JUDGES**

##### **Final Order Authority Added**

**Act of May 19, 2017, HB 2927**

**Amends TFC 201.007**

**Effective Immediately (May 29, 2017)**

House Bill 2927 amends Subchapter A of Chapter 201 of the Family Code to specify that an Associate Judge may sign a final order without signature by the referring court when there is a waiver of the de novo hearing under Section 201.015 of the Family Code. HB 2927 §1 (TFC 201.007(a)(16)). To be effective, however, it adds that the parties must waive the right to a de novo hearing before the referring court in writing, and it must be before the start of the hearing conducted by the associated judge. *Id.* Section 201.007(c) of the Family Code is amended to clarify that the order signed by the associate judge pursuant to this authority is a final order for purposes of appeal. *Id.* (TFC 201.016(c)).<sup>2</sup>

One important aspect of this Bill concerns its application date. Section 6 of the Act instructs that these amendments are effective immediately. Because the Governor signed this bill on May 29, 2017, that means this bill has been in effect since that date. *See* TEX. CONST. Art. IV §14. Moreover, Section 5 of the Bill provides these changes apply to final orders signed on or after the effective date. Subpart (b) of that section further instructs, notwithstanding that, Section 201.007(e) of the Family Code, as added, applies to any order signed under Section 201.007(a)(16) **before May 1, 2017**. *Id.* HB 2927 §5 (emphasis added). Considering this instruction could result in the redesignation of the date of a final order already signed and calculated under the prior law based on the signature of the referring judge, this may result in some unforeseen issues.

<sup>1</sup> In this paper "TFC" refers to the Texas Family Code.

<sup>2</sup> Please note, there was a Senate Bill 1444 that amended the subchapter concerning associate judges for child protection cases, but the Governor vetoed that bill on June 15, 2017.

### **III. CHILDREN'S COMMISSION**

#### **A. Jury Charge Review**

**Act of May 26, 2017, HB 7 §6**

**Amends TFC 105.002**

**Effective 9/1/17**

House Bill 7 adds Subsection (d) to Section 105.002 of the Family Code to require the Department to collaborate with the Permanent Judicial Commission for Children, Youth and Families (“Children’s Commission”) and interested parties concerning whether broad form jury questions should be used in Department-filed suits affecting the parent-child relationship. HB 7 §6 (TFC 105.002(d)). The recommendations are to be made to the legislature no later than December 31, 2017. *Id.*

#### **B. Attorney Ad Litem Study**

**Act of May 26, 2017, HB 7 §72**

**Effective 9/1/17**

Section 78 of House Bill 7 imposes specific duty upon the Commission that requires the Commission to study the appointment and use of attorneys ad litem in cases involving the Department of Family & Protective Services. HB7 §72. One of the primary purposes is to develop policy recommendations to improve the attorney-ad-litem appointment process and the study is to be reported to each member of the Legislature by September 1, 2018. *Id.* The Commission is also to investigate several issues and perform statistical data collection and analysis of that data for inclusion in its report. *Id.* Some of the issues the commission must look at include: the methods of appointments, accountability across the state to monitor the appointed attorneys, qualifications and training requirements, duration of appointments, rates of compensation, quality of representation, client satisfaction, organization studies and national standards, best practices for attorneys ad litem, average costs for representation, conduct survey of attorneys ad litem, etc. *Id.*

### **IV. COUNTY COMMISSIONERS COURT**

#### **Inquest Regulations**

**Act of May 28, 2017, HB1549 §10**

**Adds TFC 264.509(a)**

**Effective 9/1/17**

House Bill 1549 adds a subsection (a-1) to Section 264.524 of the Family Code to require the County Commissioners Courts throughout this State to adopt regulations regarding timeliness of inquests into the death of a child. HB 1549 §10. The standards must be

as stringent as the standards by the National Association of Medical Examiners unless the county finds it is cost prohibitive. *Id.*

### **V. DEPARTMENT OF FAM. & PROT. SERVS.**

#### **A. Powers and Duties**

**HB 5, HB 1549, HB 7**

**Effective 9/1/17**

House Bill 5 amends Chapters 261, 264, 265 and 266 of the Family Code to change the references in those chapters from the executive commissioner of the Health and Human Services Commission to the commissioner of the Department and references to the Health and Services Commission to mean the Department. HB5 §11 (TFC 264.009(a)); HB5 §10 (TFC 261.004); HB5 §17 (TFC 266.001). Similar changes are made in Chapter 40 of the Human Resources Code. HB5 §28 (HRC 40.0026-0027). Section 34 of House Bill 5 requires the Department and the Commission to contract for shared administrative services and to collaborate for efficient provision of administrative support services. HB5 §34 (HRC 40.048).

Consistent with these changes, the rule-making authority previously given to the Executive Commissioner of Health and Human Services is given to the Commissioner of the Department of Family & Protective Services. HB5 §3 (TFC 107.152(c) (pre and post placement evaluation rules); HB5 §8 (TFC 162.304(b-2)(g) (eligibility for adoption subsidy); HB5 §9 (TFC 162.3041(a-1)) (adoption assistance agreements); HB5 §14 (TFC 266.105) (rules to implement subchapter). It also designates the Department as a juvenile service provider under Section 58.0051 of the Family Code. HB5 §1 (TFC 58.0051(a)(2)). Moreover, the Department is given authority to access juvenile justice information for research and statistical purposes. HB5 §3 (TFC 58.0072(c)). Notwithstanding these shifts, the legislature made clear services provided by the commission for children in Department conservatorship before the effective date of these acts shall continue. HB5 §21 (TFC 266.013).

This paper does not purport to state every duty that the legislature added to the Department’s responsibilities; however, it is worth mentioning there are a lot of new duties. House Bill 1549 requires new duties of collaboration, data collection, development of programs and quicker delivery. *See* HB 7 §33 (adds TFC 264.018(d-1)) (give notice of child placement changes to managed care organization to provide

health care under STAR); HB1549 §1 (TFC 261.204(a)) (publish report of fatalities when the Department finds abuse/neglect); HB 1549 §2 (TFC 261.301) (designate after hours investigators in areas of need); HB 1549 §3 (TFC 264.1075) (if child has intellectual disabilities, Department to refer as soon as possible to provider and make sure determination is conducted before the child turns 16); HB 1549 §4 (TFC 264.1261) (collaborate with foster care providers, faith based groups and child advocates to create plan to address substitute care capacity needs short and long term); HB 1549 §7 (TFC 264.5031) (collect in database “near fatality” situations when child abuse involved); HB 1549 §12 (TFC 264.903(a-1)) (expedite caregiver evaluations to ensure caregiver can protect child from alleged perpetrator of abuse/neglect); HB 1549 §13 (TFC 265.005(b)) (make goals to increase families receiving prevention and early intervention services); HB 1549 §14 (TFC 265.007-008) (states how department is to improve early intervention services); HB 1549 §15 (TFC 40.038) (provide program to help caseworkers who experience secondary trauma in employment); HB 1549 §16 (HRC 40.0516) (collect specified data on county and state level of reports of abuse and neglect in child care facilities); HB 1549 §18 (HRC 40.078) (commissioner to establish Prevention task force to recommend changes for prevention of child abuse and neglect).

There are also new reporting duties as well as collaboration requirements. HB4 §§3-4 (report on designated caregiver placement program with first report due 9/1/18); HB5 §7 (TFC 162.086) (information to prospective adoptive parents on sibling access); HB5 §18 (TFC 266.003) (Department to collaborate with commission and health care and child professionals to develop cost effective medical service model for children served by Department). For example, one new collaboration duty is the requirement that the Department and the Texas Juvenile Justice Department coordinate and develop protocols for sharing information that relates to services provided that would enhance rehabilitation and improve community safety. HB 7 §3 (amends TFC 58.0052).

#### **B. Ombudsman’s Office SB 213, 698**

**Act of May 19, 2017, SB 213**

**Amends TGC<sup>3</sup> 531.991(2)**

**Effective 9/1/17 but only if funds appropriated**

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<sup>3</sup> In this paper, “TGC” refers to the Texas Government Code.

Senate Bill 213 amends subchapter Y of Chapter 531 of the Government Code to require the Governor to appoint an Ombudsman whose duties shall include receiving complaints against the Department, monitoring Department’s responses to corrections recommended and to report wrongdoing or negligence by the Department. SB 213 § 6 (amends TGC 531.993). There is no specific authority allowing the Ombudsman to file legal proceedings against the Department, but this bill specifically grants the Ombudsman authority to “attend” judicial proceedings that may be related to a complaint filed with its office. *Id.* This subchapter also provides for a specific division of the Ombudsman’s office for children and youth in foster care. *Id.* §7. That division shall have procedures for complaints related to those interests and any court with jurisdiction over the child’s case must be made aware of the complaint filed. *Id.* §8.

Section 12 of this bill provides that this Act only takes effect if a specific appropriation for its implementation is provided in a general appropriation by the 85<sup>th</sup> Legislature. SB 213 §12. If the appropriation is made, the Act takes effect September 1, 2017. SB 213 §13.

## **VI. DESIGNATED CAREGIVERS**

### **A. Income-Based Assistance for Designated Caregivers**

**Act of May 25, 2017, HB 4, 85th Leg., R.S.**

**Amends TFC 264.755 and Adds TFC 264.7551**

**Effective date 9/1/17 contingent on appropriations**

House Bill 4 amends Section 264.755 of the Family Code to require the Department to provide monetary assistance to designated caregivers depending on family income. HB 4 §1 (amends TFC 264.755). The level can be as much as 50 percent of the Department’s daily basic foster care rate depending on family income. *Id.* The bill also adds a Section 264.7551 of the Family Code creating a criminal offense for fraudulent information given to obtain caregiver assistance as well as the possibility of a civil penalty up to \$1000. HB4 §2 (TFC 264.7551).

This Act has an effective date of 9/1/17, but it only takes effect if a specific appropriation is made for implementation of this act, and, if not, the Act has no effect. HB §6. There is an instruction in Section 5 of the Bill clarifying if it goes in effect, it will apply to caregiver assistance agreements before, on or after its effective date. *Id.* §5. There is also a provision for assistance to pending agreements on or after June 1,

2017 but before the effective date depending on income. *Id.*

**B. Appeal Process if Disqualified**

**Act of May 21, 2017, SB 879**

**Adds TFC 264.754(c)**

**Effective Immediately**

Senate Bill 879 amends Section 264.754 of the Family Code to permit a relative or other designated caregiver for a child to appeal a disqualification for placement by the Department based on a low-risk criminal offense. SB 879 §1 (TFC 264.754) (TFC 264.754(c)). A “low-risk criminal offense” is defined to mean a nonviolent criminal offense, including a fraud-based offense, the Department determines has a low risk of impacting: (1) a child’s safety or well-being; or (2) the stability of a child’s placement with a relative or other designated caregiver. SB 879 §1 (TFC 264.754(a)). This Act requires the Department to promulgate a procedure for appropriate regional review of a disqualification decision and prospective relative/designated caregivers will be provided that information. *Id.* (TFC 264.754(d)(e)).

**VII. FOSTER CHILDREN**

**Summer Internship Program**

**Act of May 24, 2017, HB 1608**

**Adds TFC 264.1251**

**Effective Immediately w/1/1/18 pilot program**

House Bill 1608 adds a Section 264.1251 to the Family Code to require the Department to establish a summer internship pilot program that permits foster children to develop marketable job skills and professional experience with businesses, governments and nonprofits. HB 1608 §1 (TFC 264.1251). The Department can enter into agreements for this and by April of each year the Department will select children (15 and older) to participate. *Id.* The Department will report to the governor and state representatives concerning its evaluation of the program. The Department is to establish the program by January 1, 2018 and the program expires September 1, 2021. *Id.* and HB §2. This Act had immediate effect. HB 4 §3.

**VIII. FOSTER PARENT**

**A. Education Decision-Making**

**Act of May 25, 2017, HB 1556 §4**

**Amends TFC 263.0025**

**Effective 9/1/17**

House Bill 1556 amends 263.0025 of the Family Code to permit a foster parent to act as a parent (per 20 USC §1215(b)) in making special education decisions

if the Department’s rights are not limited, and the foster parent agrees to act under the requirements of Section 29.015(a)(3) and (b) of the Education Code. HB 1556 §4 (amends TFC 263.0025). This act takes effect September 1, 2017. HB1556 §5.

**B. Employee Leave Policy**

**Act of May 12, 2017, HB 88**

**Adds TLC<sup>4</sup> 21.0595**

**Effective 9/1/17**

House Bill 88 adds Section 21.059 of the Labor Code to create a new unlawful employment practice related to personal leave. Namely, if an employer has a policy permitting personal leave for employees who are biological/adoptive parents in order to care for or assist a sick child, this new law makes that an unlawful employment practice if the policy does not extend to an employee to care for a foster child under Department conservatorship residing in the employee’s home. HB 88 §1 (adds TLC 21.0595). This Act takes effect September 1, 2017 and applies only to claims based on conduct after that date. HB 88 §§2-3.

**C. Intervention Authority Revised**

**Act of May 19, 2017, HB 1410**

**Amends TFC 102.004**

**Effective for suits filed on or after 9/1/17**

House Bill 1410 changes the current intervention authority available to foster parents under Section 102.004(b) of the Family Code. Under current law, Section 102.004(b) of the Family Code provides standing for a “grandparent or other person” to intervene in a suit when the court finds the person has substantial past contact with the child and there is satisfactory proof that appointment of either or both parents would significantly impair the child’s physical health or emotional development. Tex. Fam. Code Ann. §102.004(b) (West 2014). This law has been characterized as a “relaxed standing rule” that allows parties who do not have general standing under Section 102.003 to nonetheless intervene in an ongoing suit. *See Spurck v. Tex. Dept. of Fam. & Prot. Servs.*, 396 S.W.3d 205, 217 (Tex. App. – Austin 2013, no pet.). Because it extends to any “other person”, this provision has been used as a basis for standing by foster parents to intervene. *See Id.* House Bill 1410 changes that.

Namely, House Bill 1410 adds a subpart (b-1) to Section 102.004 of the Family Code that provides: “A foster parent may only be granted leave to intervene

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<sup>4</sup>“TLC” refers to the Texas Labor Code.



under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12). HB 1410 §1. This new law only applies to suits filed on or after September 1, 2017. HB 1410 §2-3.

This amended section obviously treats foster parents differently from other significant people in the child's life for purposes of intervention authority under Section 102.004. Namely, any other person who has substantial past contact with the child could potentially intervene in a suit without establishing an independent basis for standing under Section 102.003. 396 S.W.3d at p. 217. Under this amended section a foster parent cannot.

It is important to note, however, that this bill only precludes a foster parent from intervening under Subsection (b) of Section 102.004 of the Family Code, because that is what the new subsection (b-1) says. Accordingly, if a foster parent has independent standing based on a relinquishment that designated the foster parent managing conservator, this new provision would not prevent the foster parent from intervening per Tex. R. Civ. P. 60 based on that independent standing. *See* Tex. Fam. Code Ann. § 102.003(1)(10) (West 2014).

## **IX. GUARDIAN AD LITEM**

### **A. Additional Authority**

**Act of May 26, 2017, HB 7 §7**

**Amends TFC 107.002(c)**

**Effective 9/1/17**

House Bill 7 amends Section 107.002(c) to grant additional authorities to a Guardian Ad Litem for a child. Namely, it provides that the guardian is entitled to:

- .. have access to the child in the child's placement;
- ...be consulted and provide comments on decisions regarding placement, including kinship, foster care and adoptive placements,
- ...evaluate whether the child welfare service providers are protecting the child's best interests regarding appropriate care, treatment, services, and all other foster children's rights listed in Section 263.008;
- ...receive notification regarding and an invitation to attend meetings related to the child's service plan and a copy of the plan; and
- ...attend court-ordered mediation regarding the child's case.

HB 7 §7 (TFC 107.002(c)). This change takes effect September 1, 2017. HB 7 § 79.

### **B. Additional Duties**

**Act of May 26, 2017, HB 7 §7**

**Amends TFC 107.002(b)**

**Act of May 28, 2017, SB 11 §2**

**Amends TFC 107.002(b-1)**

**Effective 9/1/17**

House Bill 7 amends Section 107.002(b) of the Family Code to require a Guardian Ad Litem for a Child to interview a child's educators and child welfare service providers. HB 7 §7 (TFC 107.002(b)). Senate Bill 11 amends Section 107.002(b-1) of the Family Code to require a guardian ad litem appointed for a child in a proceeding under chapter 262 and 263 of the Family Code to ascertain whether a child who is at least 16 years of age has obtained certain documents. Those documents include: (1) a certified copy of the child's birth certificate, (2) a social security card or replacement social security card, (3) a driver's license or personal identification certificate under Chapter 521, Transportation Code, and (4) any other personal document the Department deems appropriate. *Id.*

### **C. Continued Appointment**

**Act of May 26, 2017, HB 7 §9.**

**Amends TFC 107.016(1)**

**Effective 9/1/17**

House Bill 7 amends Section 107.016 of the Family Code to permit a court to continue the appointment of a guardian ad litem for the child for any period during the time the child remains in the conservatorship of the department. HB7 §9 (TFC 107.016).

## **X. LAW ENFORCEMENT**

### **A. Child Abduction Reporting**

**Act of May 24, 2017, HB 1503**

**Amends 63.0041 CCP**

**Effective 9/1/17**

House Bill 1503 amends Article 63.0041 of Code of Criminal Procedure to require quicker law enforcement communication regarding an attempted child abduction. HB 1503 (CCP 63.0041). It provides a local law enforcement agency, on receiving a report of an attempted child abduction, shall as soon as practicable, but not later than eight hours after receiving the report, provide any relevant information regarding that attempted child abduction to a clearing house. Supplemental information not immediately available shall be entered as soon as possible. *Id.*

**B. Release to Non-governmental**

**Act of May 26, 2017, SB 1571**

**Adds CCP art. 2.273**

**Effective 9/1/17**

Senate Bill 1571 adds Article 2.273 to the Code of Criminal Procedure to address law enforcement placement decisions after taking a child in possession. §SB1571§1 (Adds CCP art. 2.273). Importantly, it specifies certain requirements that the officer must meet when placing the child with someone other than an authorized governmental entity. *Id.* In particular, it provides the officer must:

(1) verify with National Crime Information Center that the child is not a missing child;

(2) search the relevant databases of the National Crime Information Center system, including those pertaining to protection orders, historical protection orders, warrants, sex offender registries, and persons on supervised release to:

A) verify that the person to whom the child is being released:

(i) does not have a protective order issued against the person; and

(ii) is not a registered sex offender unless the person is the child's parent or guardian and there are no restrictions regarding the person's contact with the child; and

(B) obtain any other information the Department of Family and Protective Services considers:

(i) relevant to protect the welfare of the child; or

ii) reflective of the responsibility of the person to whom the child is being released;

(3) call the Department of Family and Protective Services Abuse Hotline to determine whether the person to whom the child is being released is listed in the registry as a person who abused or neglected a child;

(4) verify that the person to whom the child is being released is at least 18 years of age; and

(5) maintain a record regarding the child's placement, including:

(A) Identifying information about the child, including the child's name or pseudonyms; and

(B) the name and address of the person to whom the child is being released.

*Id.*

**XI. PARENTS**

**A. Right to View Deceased Child**

**Act of May 24, 2017, HB 298 §1, SB 239 §1**

**Adds Subchapter D to Ch. 49 CCP<sup>5</sup>**

**Effective 9/1/17**

House Bill 298 and Senate Bill 239 add a Subchapter D to Chapter 49 of the Code of Criminal Procedure to give a parent the right to view a deceased child whose death occurred at a hospital or other institution. HB 298 §1 (CCP art. 49.52). However, if the child is not at a hospital or institution, the medical examiner or justice of peace must approve. *Id.* Act takes effect September 1, 2017. HB 298 §2, SB 239 §2.

**B. Authorization Agreement**

**Act of May 19, 2017, HB 871 §1**

**Amends TFC 34.002**

**Effective 9/1/17**

House Bill 871 amends Section 34.002(a) and 34.0021 of the Family Code to authorize a parent to enter into an authorization agreement under these sections with an adult caregiver. HB 871 §3 (TFC 34.002(a)). This changes the requirement in Section 34.002(a) that currently only authorizes these agreements with a relative. *Id.*

**C. Support Obligations After Termination**

**Act of May 8, 2017, SB 77 §1**

**Amends TFC 154.001**

**Suits filed after 9/1/17**

Senate Bill 77 amends Section 154.001(a-1) of the Family Code to authorize a court to require a parent to continue to pay child support after parental rights are terminated in specified circumstances. SB77 §1 (TFC 154.001). Those circumstances involve a termination involving Section 161.001(b)(1)(T)(iv) or (b)(1)(U) of the Family Code or a situation in which the child was conceived as a result of certain Penal Code offenses. *Id.*

**XII. PROSECUTORS**

**Act of May 28, 2017, HB 1278**

**Amends TGC 552.117(a)**

**Effective immediately**

House Bill 1278 amends the Public Information Act at Section 552.117(a) of the Government Code to exempt from disclosure personal information that relates to a current or former county or district attorney or criminal district attorney whose jurisdiction includes child protective matters. HB 1278 §1 (TGC 552.117(a)(12)). It also adds language to extend this exemption to current or former employees of these prosecutors. HB 1278 §2 (TGC

<sup>55</sup> In this paper, "CCP" refers to the Code of Criminal Procedure.

552.117(a)(13)). It further clarifies this information remains protected from disclosure regardless of whether these persons comply with sections 552.024 or 552.1175 of the Public Information Act. HB 1278 §1 (TGC 552.117(a)(12-13)).

### **XIII. PROSPECTIVE ADOPTIVE PARENT**

**Act of May 28, 2017, SB11 §5**  
**Amends TFC 162.0062 & 162.007**  
**Effective 9/1/17**

Senate Bill 11 adds subsections (a-1) and (c-1) to Section 162.0062 of the Family Code to provide a right to a prospective adoptive parent prior to adoption to examine certain records relating to the child's health history. SB 11 §5 (TFC 162.0062). The Department, licensed child-placing agency, single source continuum contractor or other person placing a child for adoption shall inform the prospective adoptive parent of that right and will edit records as needed to protect the identity of the biological parents or other confidential information. Also, if the parents indicate they wish to proceed with the adoption under Subsection (c) of this Section, they are to be provided with access to research regarding health or trauma conditions that could impact child development and permanency.

It is significant to note that Section 162.007 of the Family Code also specifically requires a child's health history to include whether the birth mother consumed alcohol during pregnancy and whether the child was diagnosed with fetal alcohol spectrum disorder. This change solidifies the Legislature's acknowledgement of the problem of fetal alcohol syndrome that can be a particularly important health issue for adopting parents wishing to adopt children in the State child welfare system.

### **XIV. RELATIVES/KINSHIP**

**Promotion of relative/kinship placements**  
**Act of May 28, 2017, SB 11 §18**  
**Amends TFC 264.151(12)**  
**Effective 9/1/17**

Senate Bill 11 adds Section 264.521 of the Family Code to specify the goals that the legislature intends to be implemented with community based-care for children through nonprofits and local governmental entities. Among the listed goals is "the promotion of placement of children with relative or kinship caregivers if reunification is not possible." SB 11 §18 (TFC 264.151(12)).

### **XV. SINGLE SOURCE CONTINUUM CONTRACTORS**

**A. Eligibility**  
**Act of May 28, 2017, SB 11 §18**  
**Adds TFC 264.154**  
**Effective 9/1/17**

Senate Bill 11 adds Section 264.154 of the Family Code to specify the entities who can be single source continuum contractors and can qualify to contract with the Department to provide foster care. Namely, it provides such entity:

must be a nonprofit entity that has an organizational mission focused on child welfare or a governmental entity.

SB11 §18 (TFC 264.154). The legislative intent statement appearing at the beginning of this subchapter, Section 264.151, also indicates the legislature intends the Department to contract with community based nonprofits and local governmental entities "that have the ability to provide child welfare services." *Id.* (TFC 164.151).

**B. Limited Outsourcing**  
**Act of May 28, 2017, HB 5**  
**Amends TGC 531.02013**  
**Effective 9/1/17**

Section 531.02013 of the Government Code is amended by House Bill 5 to provide an additional limit on outsourced functions. Namely, the Department cannot contract to outsource: investigations of alleged abuse, neglect or exploitation occurring at a child-care facility, including a residential child-care facility, as those terms are defined by Section 42.002, Human Resources Code. HB5 §24 (TGC 531.02013).

**C. Limited Liability**  
**Act of May 28, 2017, HB 5 §13**  
**Amends TFC ch 264; adds TFC 264.170**  
**Effective 9/1/17**

House Bill 5 adds a subchapter in chapter 264 of the Family Code to explain that a single source continuum contractor who provides contract services for the Department is a "charitable organization for purposes of Chapter 84, Civil Practice and Remedies Code for those services. HB5 §13 (TFC 264.170).

## **XVI. TEXAS SUPREME COURT**

### **A. Jurisdiction**

**Act of May 19, 2017, HB 1761**

**Amends TGC 22.001(a), (b), and (c)**

**Effective 9/1/17**

House Bill 1761 amends the general section concerning the Supreme Court's jurisdiction over regular appeals at Section 22.001 of the Government Code. Under its current wording this section lists six situations when the supreme court may exercise jurisdiction over an appeal: (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision; (2) a case in which one of the court of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case; (3) a case involving the construction or validity of a statute necessary to a determination of the case; (4) a case involving state revenue; (5) a case in which the railroad commission is a party; and (6) any other case in which it appears that an error has been committed by the court of appeals and that is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute." Tex. Gov't Code Ann. §22.001(a)(1-6) (West 2014).

House Bill 1761 eliminates these six conditions for its jurisdiction under Section 22.001 and provides the following instead:

- (a) The supreme court has appellate jurisdiction, except in criminal matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.

HB 1761 §1 (TGC §22.001(a)). As indicated, the Supreme Court's review power over appeals is now limited to situations when it can determine the judgment on appeal presents a question that is important to the jurisprudence of the state. Subsection (b) then provides that the appeal may be taken to the Supreme Court by petition for review; and subsection (c) provides that the appeal must first be brought to the court of appeals. *Id.* (TGC §22.001(b)-(c)).

One important aspect of this change is the omission of any focus on error correction. The law prior to this change has allowed review when "it appears that an error of law has been committed ... and that error is of such importance to the jurisprudence of the state that ... it requires correction." Tex. Gov't Code Ann. §22.001(a)(6) (West 2014). This shift in focus may result in the Supreme Court being more restrictive in granting review.

### **B. Rules for Post-judgment Process**

**Act of May 26, 2017, HB 7**

**Adds TFC 263.4055**

**Effective 9/1/17**

House Bill 7 requires the Supreme Court to adopt rules to address conflicts between the filing of a motion for new trial and the filing of an appeal of a final order rendered under Chapter 263. HB7 §30 (TFC 263.4055). It adds that the Supreme Court is to adopt rules to address the period for a court reporter to submit the appellate record. *Id.*

### **C. Rules for Foreign Law/Judgments**

**Act of May 22, 2017, HB 45 §2**

**Adds Sections TGC 22.0041 and 22.022**

**Effective 9/1/17**

House Bill 45 adds Section 22.041 of the Government Code to require the Supreme Court to adopt rules of evidence and procedure to implement the limitations on granting comity for a foreign judgment or an arbitration involving marriage or the parent-child relationship to protect against violations of constitutional rights and public policy. HB 45 §2 (TGC 22.041(b)). This bill also requires the Supreme Court to "provide for a course of instruction" that relates to these issues and adopt rules to accomplish that. HB 45 §2 (TGC 22.022). The bill instructs that the rules are to be adopted not later than January 1, 2018. HB 45 §3.

## **3) LEGAL ACTIONS:**

### **I. MANDAMUS**

**Act of May 24, 2017, HB 1480 §1**

**Amends TGC 22.221(b)**

**Effective 9/1/17**

House Bill 1480 amends Section 22.221 of the Government Code to permit mandamus against an associate judge under Chapter 201 of the Family Code. HB 1480 §1. This Act only applies to suits filed under the Family Code on or after the effective date on September 1, 2017. HB 1480 §§2 and 3.

## **II. PROTECTIVE ORDER - CHAPTER 261**

### **Act of May 26, 2017, HB 7 §14 Amends Chapter 261 of the Family Code Effective 9/1/17**

House Bill 7 adds a Subchapter F to Chapter 261 of the Family Code to authorize a specific type protective order that can be filed by the Department. Namely, it permits the Department to file a request for a protective order on its own initiative or jointly with a parent, relative or caregiver who requests it if certain conditions are met and the court can make certain findings. Importantly, this Act instructs it is not available if the department can apply for a protective order under Chapter 82. HB7 §14 (TFC 261.501(3)).

The condition when this order may be sought is when (1) the department has temporary managing conservatorship of the child and (2) the department determines the child is a victim of abuse or neglect or has a history of being abused or neglected. HB7 §14 (TFC 261.501(1)&(2)). The Department must also determine there is a threat of one of the following: (i) immediate or continued abuse or neglect to the child; (ii) someone illegally taking the child from the home in which the child is placed; (iii) behavior that poses a threat to the caregiver with whom the child is placed; or (iv) someone committing an act of violence against the child or the child's caregiver. HB7 §14 (TFC 261.501(2)(b)).

The bill adds a Section 261.502 to the Family Code to require certain facts to be certified by the Department in its application for this order. Those certified facts must include that the Department diligently searched for and either was unable to locate the child's parent, legal guardian, or custodian, other than the respondent to the application or located and provided notice of the proposed application to the child's parent, legal guardian or custodian, other than the respondent to the application. HB7 §14 (TFC 261.502(a)). If applicable, the Department must also certify that the relative or caregiver who is jointly filing the petition, or with whom the child would reside following entry of the protective order, has not abused or neglected the child and does not have a history of abuse or neglect. HB 7 §14 (TFC 261.503(a)) .

Section 261.504(b) of the Family Code, as added by this bill, states the court *shall issue* a protective order if the court makes an affirmative finding under Subsection (a) of Section 261.504. HB 7 §14 (TFC 261.504(b)) (emphasis added). The affirmative

findings under Subsection (a) include whether there are reasonable grounds to believe: (1) the child is a victim of abuse or neglect; or has a history of being abused or neglected and (2) there is a threat of immediate or continued abuse or neglect to the child; someone illegally taking the child from the home in which the child is placed; behavior that poses a threat to the caregiver with whom the child is placed; or someone committing an act of violence against the child or the child's caregiver. HB 7 §14 (TFC 261.504). Section 261.503, as added by this Bill, states the court may grant this protective order *ex parte* without further notice to the respondent and without a hearing, if the court finds from information in the application that there is "*an immediate danger* of abuse or neglect to the child." HB7 §14 (TFC 261.502(b)) (emphasis added).

Later in House Bill 7, at section 69, it amends Section 25.07 of the Penal Code to make a violation of an order under Chapter 261 an act subject to prosecution. HB7 §69 (amends TPC<sup>6</sup> 25.07(a)).

## **III. REMOVAL LIMITATION**

### **Act of May 26, 2017, HB 7 §19 Adds TFC 262.116 Effective 9/1/17**

House Bill 7 adds Section 262.116 of the Family Code to state specific evidence that cannot be the basis for the Department taking possession of a child. It states as follows:

#### **Sec.262.116. LIMITS ON REMOVAL.**

(a) The Department of Family and Protective Services may not take possession of a child under this subchapter based on evidence that the parent:

- (1) homeschooled the child;
- (2) is economically disadvantaged;
- (3) had been charged with a nonviolent misdemeanor offense other than:
  - (A) an offense under Title 5, Penal Code;
  - (B) an offense under Title 6, Penal Code; or
  - (C) an offense that involves family violence, as defined by Section 71.004 of this code;
- (4) provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or

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<sup>6</sup> In this paper, "TPC" refers to the Texas Penal Code.

- (5) declined immunization for the child for reasons of conscience, including a religious belief.

HB7 §19 (TFC §262.116). A subsection (d) is added to this section to clarify, however, that this section “does not prohibit the department from gathering or offering evidence described by Subsection (a) as part of an action to take possession of a child under this subchapter.” HB7 §19 (TFC 262.116(d)).

#### **IV. SUIT TO MODIFY WITHOUT POSSESSION**

##### **A. Requirements: Suit without Possession**

**Act of May 26, 2017, HB 7, SB 999**

**Amends TFC 262.101, 262.113**

**Effective 9/1/17**

Senate Bill 999 amends Section 262.101 of the Family Code to separate the elements of proof that the affidavit must show into four rather than three separate elements. SB 999 §4 (amends TFC 262.101). The requirements stated in this section were not changed, but the reformatting emphasizes that the current first element of proof actually has two separate elements of proof. *Id.*

Senate Bill 999 also amends Section 262.105 of the Family Code with a new Subsection (b) that states:

- (b) An original suit filed by a governmental entity after taking possession of a child under Section 262.104 must be supported by an affidavit stating facts sufficient to satisfy a person of ordinary prudence and caution that:
  - (1) based on the affiant’s personal knowledge or on information furnished by another person corroborated by the affiant’s personal knowledge, one of the following circumstances existed at the time the child was taken into possession:
    - (A) there was an immediate danger to the physical health or safety of the child;
    - (B) the child was the victim of sexual abuse or of trafficking under Section 20A.02 or 20A.03, Penal Code;
    - (C) the parent or person who had possession of the child was using a controlled substance as defined by Chapter 481, Health and Safety Code, and the use constituted an immediate danger to the physical health or safety of the child; or
    - (D) the parent or person who had possession of the child permitted the

child to remain on premises used for the manufacture of methamphetamine; and

- (2) based on the affiant’s personal knowledge:
  - (A) continuation of the child in the home would have been contrary to the child’s welfare;
  - (B) there was no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
  - (C) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.

SB 999 §8 (adds TFC 262.105(b))

House Bill 7 amends Section 262.113 of the Family Code to add requirements to the affidavit filed with Department’s suit that requests to take possession of a child when the Department does not take possession in advance of filing suit. As amended, it states:

Sec. 262.113. **FILING SUIT WITHOUT TAKING POSSESSION OF CHILD.** An original suit filed by a governmental entity that requests to take possession of a child after notice and a hearing must be supported by an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence and caution that:

- (1) there is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child and that allowing the child to remain in the home would be contrary to the child’s welfare; and
- (2) reasonable efforts, consistent with the circumstances and providing for the safety of the child, have been made to prevent or eliminate the need to remove the child from the child’s home [~~and~~ ~~(2) allowing the child to remain in the home would be contrary to the child’s welfare.~~

HB7 §18 (amends TFC 262.113).

As indicated, the affidavit must still state facts that indicate allowing the child to remain in the home would be contrary to the child’s welfare. However, it adds that there must be facts of *continuing danger* to

the physical health or safety of the child. *Id.* Also, the continuing danger must be caused by a person entitled to possession of the child. *Id.* Additionally, the reasonable efforts to eliminate the need for removal of the child must be shown to be “consistent with the circumstances and providing for the safety of the child.” *Id.*

### **B. Standards: Temporary Order**

#### **Act of May 28, 2017; SB 999**

#### **Repeals 262.205 and 262.201(i)**

#### **Effective 9/1/17**

Senate Bill 999 repeals the current section that authorizes a hearing for temporary removal of a child when the child is not in the Government’s possession. SB 999 §15 (repeals TFC 262.205).

Senate Bill 999 also adds a subsection (j) to Section 262.201 to specify when a court may issue a temporary order for a suit filed under Section 262.113. SB999 §13 (TFC 262.201(j)). It provides:

(j) In a suit filed under Section 262.113, at the conclusion of the full adversary hearing, the court shall issue an appropriate temporary order under Chapter 105 if the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

- (1) there is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child and continuation of the child in the home would be contrary to the child’s welfare; and
- (2) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.

*Id.*

### **V. TEMPORARY CARE OF MINOR**

#### **Act of May 19, 2017, HB 1043**

#### **Adds Chapter 35 of TFC**

#### **Effective immediately**

House Bill 1043 provides for a procedure to permit a temporary order for a specified applicant to perform certain acts necessary for a child’s welfare in lieu of an authorization agreement. HB 1043 §2. This procedure is adopted in a new Chapter 35 of the Family Code, and, is effective immediately. HB 1043 §1 & §2.

The first two sections of the new Chapter 35 specify who may petition for this order:

1. Petitioner must be eligible to consent to treatment under Section 32.001 or to enter an authorization agreement under Section 34.001.
2. Subject child must have resided with the Petitioner at least 30 days prior to filing petition.
3. Petitioner does not have an authorization agreement for the subject child.

*Id.* (TFC §§35.001-35.002).

The new Section 35.005 provides the court “shall” award the temporary authorization if:

1. The court finds it is necessary to the child’s welfare;
2. No objection is made by the child’s parent, conservator or guardian.
3. The court finds by a preponderance of the evidence that the child does not have a parent, conservator, or other legal representative available to give the necessary consent.

HB 1043 §1 (TFC §35.005(b)&(c)).

The order may grant the petitioner authority or consent for any care essential to the child’s welfare. *Id.* (TFC §35.005(d)(6)). Moreover, the Act clarifies that the order may include consent for medical treatment, public benefits, and school enrollment. *Id.* (TFC §35.005(d)). The order may be in effect for up to a year and may be rendered for not more than one more year on a showing by the petitioner of continuing need. *Id.* (TFC §35.005-006). However, at any time, the child’s parent, conservator or guardian can request that the order be terminated. *Id.* (TFC 35.006(b)).

Section 35.007, as added by this Bill, clarifies that the temporary order does not confer or affect standing or a right of intervention in a proceeding under Title 5. Moreover, it adds that it does not establish legal custody or affect the rights of the parent or other person with legal rights of custody and control of the child. *Id.* (TFC §35.007). Finally, this Act clarifies that “it is not a child custody determination and does not create a court of continuing, exclusive jurisdiction under Title 5.” *Id.* (TFC §35.007(d)).

## **VI. TERMINATION OF PARENTAL RIGHTS**

### **Act of May 26, 2017, HB 7 §12 Amends TFC 161.001 and 161.206 Effective 9/1/17**

Section 161.001(b) of the Family Code is one of the primary provisions that authorizes the remedy of parental termination. Tex. Fam. Code Ann. §161.001(b) (West 2014). It authorizes parental termination when the court finds the facts provide proof of one of the specific predicate acts or omissions of a parent from a statutory list in subpart (1) of this Section, as well as a finding that termination of the parent-child relationship is in the child's best interest. *Id.* Section 12 of House Bill 7 makes qualifications and amendments to this provision.

#### **A. Limits and Defenses under Section 161.001**

First, House Bill 7 adds a Subsection (c) after the parental termination subdivision in Section 161.001 to prohibit a court from making a finding under Subsection (b) "based on evidence" of five different scenarios. Those five scenarios include situations when the parent:

- (1) homeschooled the child;
- (2) is economically disadvantaged;
- (3) has been charged with a nonviolent misdemeanor offense other than:
  - (A) an offense under Title 5, Penal Code;
  - (B) an offense under Title 6, Penal Code;
  - (C) an offense that involves family violence, as defined by Section 71.004 of this code;
- (4) provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or
- (5) declined immunization for the child for reasons of conscience, including a religious belief.

HB7 § 12 (adds TFC 161.001(c)). A subsection (e) is added to Section 161.001 in this same section to clarify, however, the following:

(e) This section does not prohibit the Department of Family and Protective Services from offering evidence described by Subsection (c) as part of an action to terminate the parent-child relationship under this subchapter.

HB7 §12 (TFC 161.001(e)).

House Bill 7 also adds a Subsection (d) in Section 161.001 to prohibit an order for parental termination

under the predicate act (b)(1)(O) of this section if the parent provides specified evidence in defense. Namely, it provides:

(d) A court may not order termination under Subsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of the evidence that:

- (1) the parent was unable to comply with specific provisions of the court order; and
- (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

It is important to note that while proof of parental termination requires "clear and convincing evidence," this parental defense only requires proof by a preponderance of the evidence. *See* Tex. Fam. Code Ann. §161.001(b)(1) (West 2014). House Bill 7 also emphasizes the different standard with the addition of Section 161.206(a-1). HB7 §13. In that section, it states: "In a suit filed by the Department of Family & Protective Services seeking termination of the parent-child relationship for more than one parent of the child, the court may order termination of the parent-child relationship for the parent only if the court finds by clear and convincing evidence grounds for the termination of the parent-child relationship for that parent." *Id.*

#### **B New Grounds TFC 161.001**

### **Act of May 8, 2017, SB 77 §2 Adds TFC 161.001(b)(1)(T)(iv) & (b)(1)(U) Effective for suits filed after 9/1/17**

Senate Bill 77 adds a new U ground and a new conviction basis under ground T. SB 77 §2 (TFC 161.001). Both of these changes relate to sexual assault of the other parent of the child under Section 22.011 or 22.021 of the Family Code. *Id.* The new subsection U extends to deferred adjudication or its equivalency for that crime. *Id.*

This change is effective for suits filed after September 1, 2017. SB77 §§3-4.

## **VII. TRANSFER OF ADOPTED-CHILD'S CARE**

### **Act of May 20, 2017, HB 834 §1 and §3. Adds TFC 162.026 and TPC 25.081 Effective 9/1/17**

House Bill 834 adds a Subchapter A to Chapter 162 of the Family Code to require court approval for certain transfers of custody of an adopted child, and also



amends the Penal Code to make transfers in violation of that subject to criminal prosecution. HB 834.

The new section 162.026 of the Family Code added by this bill provides:

Sec. 162.026. REGULATED CUSTODY TRANSFER OF ADOPTED CHILD. A parent, managing conservator, or guardian of an adopted child may not transfer permanent physical custody of the child to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child unless:

- (1) the parent, managing conservator, or guardian files a petition with a court of competent jurisdiction requesting a transfer of custody; and
- (2) the court approves the petition.

HB834 §1 (TFC 162.026).

Section 3 of this bill also adds Section 25.081 of the Penal Code and defines “unregulated transfer” as a transfer without approval required by Section 162.026 of the Family Code. HB 834 §3. It then provides that a person commits an offense if the person knowingly conducts an unregulated custody transfer of an adopted child or facilitates or participates in an unregulated transfer. *Id.* It adds that this offense is a felony of the third degree, but is of the second degree if it is done with intent to commit other specified offenses. *Id.* This section clarifies this offense does not apply to placement of an adopted child with the Department or for short term. *Id.* The Act takes effect September 1, 2017. HB 834 §6.

#### **4) LEGAL DECISIONS**

##### **I. ENDANGERMENT DECISION**

###### **A. Voluntary Placement Not Admission**

**Act of May 26, 2017, HB 7 §17**

**Adds TFC 262.013**

**Effective 9/1/17**

House Bill 7 adds a Section 262.013 to the Family Code to clarify that “the existence of a parent’s voluntary agreement to temporarily place the parent’s child in the managing conservatorship of the department is not an admission by the parent that the parent engaged in conduct that endangered the child.” HB7 §17 (TFC 262.013). This appears to have been added to ensure a parent’s agreement to place a child in the Department’s care will not be construed as

evidence that the parent admitted he or she endangered the child.

###### **B. Continuing Danger Decision: Adv. Hrg.**

**Act of May 28, 2017, SB 999 §13**

**Adds TFC 262.201(i)**

**Effective for suits filed on or after 9/1/17**

Senate Bill 999 adds a new subsection (i) to Section 262.201 of the Family Code to state what a court may consider in deciding whether there is a continuing danger to a child’s health or safety for purposes of deciding whether to continue removal of the child at the adversary hearing. That new subsection states:

(i) In determining whether there is a continuing danger to the physical health or safety of the child under Subsection (g), the court may consider whether the household to which the child would be returned includes a person who:

- (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or
- (2) has sexually abused another child.

SB 999 §13 (adds (i) to TFC 262.201).

##### **II. HEALTH CARE DECISIONS**

**Act of May 26, 2017, HB 7 §38**

**Adds TFC 266.005**

**Effective 9/1/17**

Section 38 of House Bill 7 adds Section 266.005 of the Family Code to require a court to state its reasons for making a health care decision that goes against a health care consultation. HB7 §38 (TFC 266.005). This applies when it is shown a health care professional was consulted for some service, procedure or treatment for the child, and the child is in the conservatorship of the Department. *Id.*

##### **III. EVALUATION OF LEAST RESTRICTIVE ENVIRONMENT FOR PLACEMENT**

**Act of May 23, 2017, HB 1542**

**Amends TFC 263.001 and 264.107**

**Effective 9/1/17**

House Bill 1542 adds a definition at Section 263.001 of the Family Code for “least restrictive environment.” HB 1542 §1 (TFC 263.001(3-a)). It is defined to mean “a placement for a child that, in comparison to all other available placements, is the most family-like setting.” *Id.* A Subsection (c) is added to Section 264.107 of the Family Code directing the department to consider whether the placement is the least

restrictive setting for the child among other factors in deciding the best interest of the child in the placement decision. HB 154 §4 (TFC 264.107(c)).

#### **IV. UNSUPERVISED VISITS PRESUMPTION**

**Act of May 16, 2017, SB 495**  
**Amends TFC 153.004**  
**Effective September 1, 2017**

Senate Bill 495 amends Section 153.004 to add that family violence may provide a basis for a rebuttable presumption that it is not in the child's best interest to have unsupervised visitation with the parent. SB495 §1 (TFC 153.004(e)). It also adds that the history of family violence and other matters listed can provide that presumption if the proof relates to any person in the household or who is permitted by that parent to have unsupervised access to the child during periods of possession. *Id.* (TFC 153.004(e)(2)). It clarifies that "family violence" has the meaning assigned by Section 71.004. *Id.* (TFC 153.004(g)).

#### **V. MEDIATED SETTLEMENT AGREEMENTS**

**Act of May 16, 2017, SB 495 §2**  
**Amends TFC 153.0071(e-1)**  
**Effective September 1, 2017**

Senate Bill 495 amends Section 153.0071(e-1) to provide an additional ground for declining a mediated settlement agreement when a person is a registered sex offender. In particular, it designates the current basis as Subpart (A) and adds the new basis as Subpart (B) as follows:

- (B) the agreement would permit a person who is subject to registration under Chapter 62, Code of Criminal Procedure, on the basis of an offense committed by the person when the person was 17 years of age or older or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to:
- (i) reside in the same household as the child; or
  - (ii) otherwise have unsupervised access to the child; and

SB495 §2 (TFC 153.007(e-1)).

#### **5) LEGAL PROCEDURES**

##### **I. ADVERSARY HEARING DISCLOSURES**

**Act of May 26, 2017, HB 7 §13**

##### **Adds TFC 262.014** **Effective September 1, 2017**

House Bill 7 adds a procedure in Section 262.014 of the Family Code that requires the Department to provide certain information before the full adversary hearing when requested by an attorney for a parent. It states:

Sec. 262.014. DISCLOSURE OF CERTAIN EVIDENCE. On the request of the attorney for a parent who is a party in a suit affecting the parent-child relationship filed under this chapter, or the attorney ad litem for the parent's child, the Department of Family and Protective Services shall, before the full adversary hearing, provide:

- (1) The name of any person, excluding a department employee whom the department will call as a witness to any of the allegations contained in the petition filed by the department;
- (2) a copy of any offense report relating to the allegations contained in the petition filed by the department that will be used in court to refresh a witness's memory; and
- (3) a copy of any photograph, video, or recording that will be presented as evidence.

HB7 §17 (TFC 161.014).

There are three important points that can be derived from the plain wording of this section. First, the disclosure required under this section is only required if there is a request by the parent's attorney and the parent is a party. Second, the items subject to disclosure are only items that will actually be used at the hearing: i.e. a person whom the Department will call as a witness, an offense report that will be used to refresh a witness's memory and a photo, video or recording that will be presented as evidence. Third, the duty is only required of the Department. It is not required of the attorney ad litem for the child or any parent in the suit.

Additionally, an important point that can be made about this duty concerns the lack of enforcement. This section does not provide any penalty if the Department fails to disclose under this Section and does not provide that this duty is subject to the same sanctions available for discovery abuses under the Rules of Civil Procedure. Consequently, it appears a party's sole remedy to address noncompliance would be a motion to compel or possibly mandamus.

## **II. ADVERSARY HEARING TIMING**

### **A. Continuance for Lawyer**

**Act of May 26, 2017, HB 7 §20;**

**Act of May 28, 2017, SB 999 §13**

**Adds TFC 262.201(a-5) aka (e-1)**

**Effective September 1, 2017**

Both Senate Bill 999 and House Bill 7 amend Section 262.201 of the Family Code to provide authority for a court to continue the full adversary hearing for up to 7 days when a parent who is “not indigent” needs an attorney to prepare. HB7 §20 (TFC 262.201(a-5)); SB999 §13 TFC 262.201(e-1). The new section provides the continuance must be based on “good cause” and that the hearing may only be postponed for not more than seven days from the date of the parent’s appearance. *Id.* The new authority indicates the court is granting the continuance to allow the parent to hire an attorney or to provide the parent’s attorney time to respond to the petition and prepare for the hearing. *Id.*

Notably, the alphabetic and numbered sections referred to in these bills are different. House Bill 7 adds this section as a new subsection (a-5) while Senate Bill 999 eliminates the current subpart numbering under subsection (a) and designates this as a new subsection (e-1). *Id.* This may cause a little confusion at first but are reconcilable since they create identical changes. *See* TEX. GOV’T CODE ANN. 311.025 (West 1998).

Also, the last sentence added to this new authority has some numbering issues, but that also appears reconcilable. Namely, Senate Bill 999 requires this new authority to be subject to limits and requirements under Subsection (e) of Section 262.201, while House Bill 7 refers to the limits and requirements of subsection (a-3). *Id.* However, examination of both bills reveals that Subsection (a-5) and Subsection (e) of Section 262.201 are the same Subsection numbered differently in these bills. Notably, House Bill 7 adds reference to Section 155.207 as a requirement that the continuance would be subject to; however, that does not appear in conflict with Senate Bill 999 since this relates to the timing required for a transfer under Section 155.207 of the Family Code. *See* Tex. Fam. Code Ann. §155.207 (West 2014).

### **B. 30 Day Restriction under 262.113**

**Act of May 28, 2017, SB 999 §13**

**Adds TFC 262.201(b)**

**Effective September 1, 2017**

Senate Bill 999 adds a subsection (b) to Section 262.201 of the Family Code to provide a full adversary hearing in a suit filed under Section 262.113 shall be held not later than the 30<sup>th</sup> day after the suit is filed. SB 999 §13 (adds TFC 262.201(b)). The bill does not include any penalty or remedy if the hearing is not held within that time, therefore, it appears its enforcement would likely require mandamus. *See e.g. In re E.D.L.*, 105 S.W.3d 679, 688 (Tex. App. – Fort Worth 2003, pet. denied) (though Section 262.201 of the Family Code requires adversary hearing within 14 days, this requirement is procedural and mandamus would be proper remedy to compel its timeliness).

## **III. CCJ TRANSFERS**

### **A. Automatic Process: TFC 262.203(a)(2)**

**Act of May 26, 2017, HB 7; SB 738 and 999**

**Amends TFC 155.201(d)**

**Effective 9/1/17**

House Bill 7 and Senate Bills 738 and 999 attempt to invoke an automatic transfer procedure from the court of continuing exclusive jurisdiction to a court exercising jurisdiction under Chapter 262. That is, these bills add a subsection (d) to Section 155.201 of the Family Code to require the court of continuing, exclusive jurisdiction to transfer its proceedings, pursuant to the requirements of section 155.204(i), to the court where the suit is pending when it receives a transfer order under 262.203(a)(2) of the Family Code. HB7 §10 and SB738 §1 and SB999 §1-2 (TFC 155.201(d)). Importantly, this only involves situations when the court of continuing exclusive jurisdiction receives a transfer order involving Section 262.203 (a)(2) of the Family Code and that involves the mandatory transfer situations under Section 155.201 of the Family Code. Tex. Fam. Code Ann. §262.203(a)(2) and §155.201 (West 2014).

This new section directs that the transfer be done pursuant to the requirements of Section 155.204(i). Section 155.204(i) is amended by these bills to read as follows:

“If a transfer order has been signed by a court of exercising jurisdiction under Chapter 262, the Department of Family and Protective Services shall file the transfer order with the clerk of the court of continuing exclusive jurisdiction. On receipt and without a hearing or further order from the court of continuing, exclusive jurisdiction, the clerk of the court of continuing exclusive jurisdiction shall transfer the files as provided by this subchapter

within the time required by Section 155.207.” Tex. Fam. Code Ann. §155.204(i) (West 2014).

*Id.* (TFC 155.204(i)).

### **B. Transfer Findings: TFC 262.203**

Act of May 26, 2017, HB 7 §21

Amends TFC 262.203(a)

**Effective 9/1/17**

House Bill 7, Senate Bill 738 and 999 also amends Section 262.203(a) of the Family Code as follows:

- (a) On the motion of a party or the court’s own motion, if applicable, the court that rendered the temporary order shall in accordance with procedures provided by Chapter 155:
  - (1) Transfer the suit to the court of continuing, exclusive jurisdiction, if any, within the time required by Section 155.207(a), if the court finds that the transfer is:
    - (a) Necessary for the convenience of the parties; and
    - (b) In the best interest of the child
  - (2) Order transfer of the suit from the court of continuing jurisdiction; or
  - (3) If grounds exist for transfer based on improper venue, order transfer of the suit to the court having venue of the suit under Chapter 103.

HB 7 §21 (TFC 262.203(a)(1) (emphasis added). As revised, it makes a difference whether the decision is to transfer to or from the court of continuing, exclusive jurisdiction. If the court is deciding to transfer to the court of continuing, exclusive jurisdiction, this section requires the court to make two findings: 1. the transfer is necessary for the convenience of the parties and (2) is in the best interest of the child. *Id.* Nevertheless, for the court to order transfer from the court of continuing, exclusive jurisdiction, subpart(a)(2) does not include such findings. HB 7 §21 (TFC 262.203(a)(1)). HB7 §21; SB738 §3; SB999 §14 (TFC 262.203(a)).

### **IIIB. COMBINING SUITS**

Act of \_\_\_\_, SB 999

Adds TFC 262.013

**Effective 9/1/17**

**Senate Bill 999 adds Section 262.013 of the Family Code requiring the Department to file suit in the same court a petition based on allegations arising**

**from the same incident or occurrence and involving children living in the same home.**

### **IV. DISMISSAL DEADLINE TFC 263.401**

#### **A. Automatic and Jurisdictional**

Act of May 26, 2017 HB7 §§27-28

Act of May 28, 2017, SB11 §12 & 13

Amends TFC §§263.401-402.

**Effective 9/1/17**

Both Senate Bill 11 and House Bill 7 make almost identical amendments to Sections 263.401 & 263.402 of the Family Code. SB11 §12; HB7 §§27-28. Section 263.401 of the Family Code is a provision that imposes a restricted time period for a Department-filed suit to remain pending after a child is taken into State care. Tex. Fam. Code Ann. §263.401 (West Supp. 2015). In 2009, considering a waiver provision in Section 263.402 of the Family Code, the Supreme Court held this time restriction in section 263.401 was not a jurisdictional requirement. *See In re Dept. of Fam. & Prot. Servs.*, 273 S.W.3d 637, 642 (Tex. 2009). Both Senate Bill 11 and House Bill 7 change that.

Both Senate Bill 11 and House Bill 7 amend Section 263.401(a) identically as follows:

- (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court’s jurisdiction over court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child is terminated and the suit is automatically dismissed without a court order.

SB 11 §12; HB 7 §27. Both bills also eliminate subpart (b) of Section 263.402 eliminating the waiver provision. SB 11 §13; HB 7 §28.

Nevertheless, House Bill 7 differs from Senate Bill 11 by adding a sentence at the end of Section 263.401(a) that states:

Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify

all parties to the suit of the automatic dismissal date.

HB7 §27. Because this provides something different from Senate Bill 11 in an amendment to Section 263.401, one must turn to the Code Construction Act for guidance. *Compare* SB11 §12.

According to the Code Construction Act, when bills enacted at the same sessions of the legislature amend the same statutes without reference to each other, they are to “be harmonized, if possible, so that effect may be given to each.” Tex. Gov’t Code Ann. §311.025(b) (West 1998). If the amendments are irreconcilable, the latest date in enactment prevails. *Id.*

Senate Bill 11 is latest enacted bill to amend Section 263.401 so it would control in the event of conflict. Nevertheless, they do not appear to conflict since the last sentence added to Section 263.401(a) in House Bill 7 does not directly conflict with any of the changes made in Senate Bill 11. Consequently, it appears both bills can be read together as effective.

With the changes to Sections 263.401 and 263.402 in these two bills, there are four primary changes. First, both bills expressly make the limited time period after a Department files suit a matter that relates to the court’s jurisdiction. Second, they make the expiration of the stated time period subject to automatic dismissal “without court order.” Third, in conformity with that change, it eliminates waiver of the right to object to a dismissal under Section 263.401. And fourth, Senate Bill 11 places a duty of notification concerning the dismissal on the court. There are numerous issues related to these four changes.

Issues related to the Bill’s Jurisdictional Designation and Elimination of Waiver.

First, the characterization of the dismissal dates as a matter that relates to the court’s jurisdiction and the elimination of the waiver provision are important changes that expose judgments in these cases to invalidation for years. As noted by the Supreme Court, “[i]f the dismissal dates set by the Family Code are jurisdictional, then ... its orders beyond those dates are void.” *In re Dept. of Fam. & Prot. Servs.*, 273 S.W.3d at p. 641. The potential that a judgment could be characterized as void raises the possibility of “collateral attack upon ... termination orders well after the completion of the termination proceedings and even after adoption of the children by other parties.” *Id.* at p. 642. This concern seems well-founded since the Supreme Court has made clear the

jurisdictional authority of a court to grant an adoption depends on the validity of the underlying parental termination judgment. *See Schiesser v. State*, 544 S.W.2d 373, 377 (Tex. 1977) (adoption order rendered while termination order on appeal declared “void.”).

It may be argued that the concern about collateral attacks should be limited since Section 161.211 and Section 162.012 of the Family limit collateral attacks on parental termination and adoption judgments to six months after the judgments are signed. Tex. Fam. Code Ann. §161.211 and §162.012 (West 2014). However, a prior opinion from the Texas Supreme Court indicates those sections will not have effect against a collateral attack based on jurisdiction.

Namely, in *In re E.R.*, the Texas Supreme Court held Section 161.211 of the Family Code could not prevent a collateral attack on a parental termination judgment by someone deprived of appropriate service by publication. *In re E.R.*, 385 S.W.3d 552 (Tex. 2012). Notably, the Supreme Court has recognized by prior opinion that “personal jurisdiction may be waived.” *In re Fisher*, 433 S.W.3d 523, 532 (Tex. 2014). However, in *In re E.R.*, it noted that result is different when there is a complete failure of service, because that deprives a trial court of personal jurisdiction making the resulting judgment “void” and subject to challenge at any time. *Id.* 566.

While the Supreme Court held the six month limit could not be mechanically applied against someone effectively deprived of service, that same opinion acknowledged an equitable defense might be available. *Id.* at p. 568. Namely, the court concluded that: “If, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party’s substantial reliance interest, the trial court has discretion to deny relief. *Id.* at p. 569. Recognizing that the record was silent on possible substantial reliance interests secured during the challenging parent’s delay, the court in *In re E.R.* remanded the case for consideration of that equitable defense to the collateral challenge. *Id.*

It may seem this same analysis should apply if a challenge is raised based on lack of subject matter jurisdiction under the amended language of Section 263.401. Nevertheless, that probably is not the case. Under the current wording of Section 263.401, the restricted deadline imposed relates to the court’s jurisdiction. Consequently, a collateral challenge to a court’s judgment signed beyond the stated deadline

does not just relate to a single party's rights. It relates to the court's authority to make any decision in the case after the expiration of the deadline. Consequently, the analysis would be more like the situation when plenary jurisdiction expires. In that situation, a judgment entered after plenary jurisdiction expires may be declared a nullity at any time. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995).

#### Issues with Respect to Automatic Dismissal without Court Order.

With respect to the amendment that causes the dismissal to occur "automatically" and "without court order," that amendment appears to trigger two issues: (1) is the automatic dismissal with prejudice? (2) and is there enough certainty for its automatic operation to apply?

The issue concerning the effect of the automatic dismissal is important, because a dismissal "with prejudice" is an adjudication of the parties' rights, while a dismissal without prejudice is not. *In re Dept. of Fam. & Prot. Servs.*, 273 S.W.3d at p. 651 (Dissent). What that means is a dismissal with prejudice can preclude the Department from refiling a suit on the same legal grounds. Notably, this issue was not addressed in the law before this amendment and nothing in the amendments seen by the author provides any further illumination on that issue. Therefore, it appears this question remains unanswered.

Nonetheless, it should be noted there is case law on the prior law that is instructive. In particular, there is a dissenting opinion authored by Justices Hecht and Brister from a 2009 mandamus proceeding involving Section 263.401 that provides a good discussion of that issue. In their opinion, the dissenting justices note that at least four appellate courts had considered that issue and held the dismissal under Section 263.401 was without prejudice. *In re Dept. of Fam. & Prot. Servs.*, 273 S.W.3d at p. 651. The dissenters also noted the dismissal in no way appeared to be an adjudication of rights or a sanction and was more like a want of prosecution provision, therefore, a dismissal without prejudice would appear to be appropriate. *Id.* at p. 651-53.

The other issue that this bill raises concerns the certainty of the automatic dismissal deadline. The drafter of this change obviously concluded there was certainty in the deadline in this section because

otherwise it would be problematic to make the deadline a jurisdictional mechanism. That may have been determined appropriate since Section 263.401 clearly defines a year period following the date that the court orders a child in State care. *See* Tex. Fam. Code Ann. §263.401 (West 2015). As such, the drafter must have concluded an automatic dismissal of the case without court order would be appropriate much like the automatic denial of a motion for new trial that occurs on 75<sup>th</sup> day after a judgment is signed. *See* Tex. R. Civ. P. 329b(c). However, that assessment is not correct.

The timeframe in Rule 329b(c) that invokes an automatic ruling goes from two certain dates: i.e. (1) the date the judgment is signed until (2) the 75<sup>th</sup> day expires. Section 263.401 also has two similar certain dates that go from the date the order of custody is signed that places a child in Department's care and the calculation of the one-year period specified. However, that is not the only time period involved. The initial phrase in Section 263.401 modifies the timeframe from the date of custody until the anniversary date with two conditions. Those two conditions are: "Unless" [(1)] the court has commenced the trial on the merits or [(2)] granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator." Tex. Fam. Code Ann. 263.401(a); HB 7 §27. The first condition – commencement of trial – stops the deadline and the second condition –allows limited delay. The problem these modifications provide for this new scheme is the lack of clarity in the operation of an automatic dismissal.

Namely, the first condition that stops the deadline states: "the court has commenced the trial on the merits." Neither Section 263.401 nor any other provision in the Family Code defines this phrase. Also, the Texas Supreme Court has not decided its meaning. While there is an opinion from 1876 that indicated the court found trial commencement occurred when the plaintiffs were called upon and announced ready, the context of that construction was very different as was the statutory phrase involved. *See Watt v. White, Smith & Baldwin*, 46 Tex. 338, 340, 1876 WL 9309 \*2 (Tex. 1876). (deciding propriety of removal action, construction involved phrase "before or at the term at which said cause could be first tried, and before the trial thereof.""). Also, while criminal case law may provide some guidance, the Texas Supreme Court is

not bound by criminal jurisprudence and it is difficult to apply the same meaning when those cases consider the intent of specific laws and constitutional interests unique to the criminal context. *See BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 19 (Tex. 2015) (case refused for consideration by Court of Criminal Appeals does not carry precedential weight or dispose of issue for Texas Supreme Court); *Also see Garner v. State*, No. 05-16-00707-CR, \_\_\_S.W.3d \_\_\_, 2017 WL 1908633 \*7 (Tex. App. – Dallas 2017, no pet. h.) (held trial begins when jury impaneled and sworn for purposes of Article 36.29 of the Code of Criminal Procedure); *Sanchez v. State*, 138 S.W.3d 324 (Tex. Crim. App. 2004) (acknowledging there was no definition of the phrase “trial on the merits commences,” but concluded it did not mean the date the case was set for trial); *Crist v. Bretz*, 437 U.S. 28, 38 (1978) (held double jeopardy attaches when the jury is empaneled and sworn).

Moreover, the uncertainty of this phrase is not a secret. The Tyler Court of Appeals expressly acknowledged the law was unsettled concerning the meaning of this phrase in an opinion issued in 2016. *See In re D.I.*, No. 12-16-00159-CV, 2016 WL 6876503 (Tex. App. – Tyler 2016, no pet.). In that case, the issue concerned whether an appointed attorney provided ineffective assistance of counsel in failing to challenge the court’s failure to dismiss a case under Section 263.401. In deciding that issue the court had to decide whether it would have been clear to the attorney that trial did not commence when the judge timely called the case for trial, but ordered a continuance not long after the announcement. 2016 WL 6876503 at \*1. The court noted there were only a few appellate decisions addressing the meaning of when trial commences for purposes of Section 263.401 and none of those decisions were by the Texas Supreme Court. *Id.* at \*2. Consequently, since the law was so unsettled, the court concluded it could not find the parent’s attorney’s failure to raise a dismissal issue was ineffective assistance of counsel. *Id.*

As mentioned earlier, there is a Texas Supreme Court opinion from 1876 that characterizes commencement as the moment plaintiffs are called upon and announce ready, however, appellate opinions deciding Section 263.401 have not found that meaning applicable. *See Watt v. White, Smith & Baldwin*, 46 Tex. 338, 340, 1876 WL 9309 \*\*2

(Tex. 1876). For example, in 2015, while the Amarillo Court of Appeals did not state precisely what commencement meant under Section 263.401, it found calling the parties to the bench, making inquiry on how long the trial would take and then immediately recessing the case for trial would not be enough. *See In re D.S.*, 455 S.W.3d 750, 751 (Tex. App. – Amarillo 2015, no pet.). The court’s opinion suggested “at a minimum the parties should be called upon to make their respective announcements and the trial court should ascertain whether there are any preliminary matters to be taken up.” *Id.* at 753 (emphasis added). Later, considering the holding of the Amarillo Court, the Houston Court of Appeals (First District) found the announcement of the parties coupled with the court’s determination of a number of preliminary evidentiary matters could be construed sufficient, even though the trial was ordered to resume later to permit the father’s attorney to contact his client in prison. *In re D.W.*, 498 S.W.3d 100, 114 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2016, no pet.).

**B. Court’s Duty of Notification**  
**Act of May 26, 2017 HB7 §§27**  
**Amends TFC §§263.401(a)**  
**Effective 9/1/17**

Another issue with respect to the change in Section 263.401 concerns the trial judge’s duty after a suit is automatically dismissed.HB7 §27 (TFC 263.401(a)). It adds:

Not later than the 60<sup>th</sup> day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date.

HB7 §27 (TFC 263.401(a)). Importantly, unlike the notice provision in Rule 306a, this provision places the duty of notification of a judgment on the judge. Nonetheless, a judge can trigger this notification under the procedures of Rule 306a so long as the court ensures a written judgment is signed that reflects the automatic dismissal date.

Namely, Rule 306a(2) instructs “Judges, attorneys and clerks” to use their best efforts to cause all judgments to be reduced to writing and signed. Since an automatic dismissal of a suit would be a judgment subject to the best efforts requirement, a signed judgment should be signed that triggers notice by the clerk under Rule 306a. Namely, under Rule 306(a)(3), when the judgment is signed, the

duty is upon the clerk to “immediately” send out notices to all parties.

**C. Extension for Service Plan**  
**Act of May 26, 2017, HB 7 §29**  
**Adds (a-1) to TFC 263.403**  
**Effective 9/1/17**

Section 29 of House Bill 7 adds a subsection (a-2) to Section 263.403 of the Family Code to provide authority for an extension of six months as necessary for a parent to complete the remaining requirements in a service plan and specified in the temporary order as mandatory for the child’s return. HB7 §29 (adds TFC 263.403(a-3)). Subsection (a) of Section 263.403(a) is also amended to clarify this six months extension is in addition to the current monitor and return extension in that section. HB7 §29 (amends TFC 263.403(a)). Subsection (c) is amended to clarify if a court renders a temporary order for this extension, the court shall at the time of the order, schedule a new dismissal date and it may not be later than 180 days after the “order is rendered.” HB7 §29 (amends TFC 263.403(c)).

**D. Reconciliation of Application Dates**  
**Act of May 26, 2017 HB7 §73**  
**Act of May 28, 2017, SB11 §33, 34**  
**TFC 263.401 date differs from 263.402-03**  
**Suits filed on or after 9/1/17**

The instructions on application of the changes in House Bill 7 and Senate Bill 11 have a general effective date of September 1, 2017. Nonetheless, it should be noted that there are different instructions concerning Sections 263.401 of the Family Code that need to be reconciled. *See* HB7 §79; SB11 34.

Namely, House Bill 7 instructs:

- (b) The changes made by this Act to Section 263.401, Family Code, apply only to a suit affecting the parent-child relationship pending in a trial court on the effective date of this Act or filed on or after the effective date of this Act. A suit affecting the parent-child relationship in which a final order is rendered before the effective date of this Act is governed by the law in effect on the date the order was rendered, and the former law is continued in effect for that purpose.

HB7 §73 (emphasis added).

Senate Bill 11, on the other hand, instructs differently:

The changes in law made by this Act to Section 263.401, Family Code, apply only to a suit affecting the parent-child relationship filed on or after the effective date of this Act. A suit affecting the parent-child relationship filed before the effective date of this Act is governed by the law in effect on the date the suit was filed and the former law is continued in effect for that purpose.

SB11 §33 (emphasis added).

As indicated, the effective application dates for the changes made in Section 263.401 by House Bill 7 and Senate Bill 11 are different. House Bill 7 makes the changes in Section 263.401 applicable to any suit affecting the parent-child relationship that is *pending* on September 1, 2017; while Senate Bill 11 only makes the changes applicable to suits *filed on or after* September 1, 2017. These instructions are inconsistent when applied to the primary identical changes that both of these bills made to Section 263.401. Consequently, it appears necessary to look to the Code Construction Act to determine how these conflicts are reconciled. *See* Tex. Gov’t Code Ann. §311.002 (West 1998).

Section 311.025(b) of the Code Construction Act instructs “if amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each.” Tex. Gov’t Code Ann. §311.025(b) (West 1998). However, “If the amendments are irreconcilable, the latest in date of enactment prevails.” *Id. The date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.* Tex. Gov’t Code Ann. §311.025 (West 1998). The legislative records indicate Senate Bill 11 was the latest. S.J. of Tex., 85<sup>th</sup> Leg., R.S. 3567 (2017) (House concurred in senate Amendments to HB7 on May 26, 2017); S.J. of Tex., 85<sup>th</sup> Leg., R.S. 4150-51 (House adopted conference committee reports on SB 11 on May 28, 2017). Consequently, to the extent there are any irreconcilable differences in the amendments as promulgated in these two bills, the application date provided by Senate Bill 11 prevails.

The application period for Section 263.401 under Senate Bill 11 is for suits filed on or after September 1, 2017 while House Bill 7’s application is for suits *pending* on or after September 1, 2017. These periods are in conflict. Consequently, the application date



provided in Senate Bill 11 should apply, and the changes to Section 263.401 should only apply to suits filed on or after September 1, 2017.

With respect to the amendments to Sections 263.402 to 263.403 of the Family Code, that appears to be the same. Neither House Bill 7 nor Senate Bill 11 provide specific application instructions for those sections. Consequently, the instruction already discussed above in Senate Bill 11 applies and the following instruction in House Bill 7 applies:

- (c) Except as otherwise provided by this section, the changes in law made by this Act apply only to a suit affecting the parent-child relationship on or after the effective date of this Act. A suit affecting the parent-child relationship filed before the effective date of this Act is subject to the law in effect at the time the suit was filed, and the former law is continued in effect for that purpose.

HB7 §73(c). As indicated, this instruction provides the changes of this bill only apply to suits filed on or after the effective date. Because that is the effective date in Senate Bill 11, that appears to be effective date for Sections 263.402-03 as well. *See* SB11 §33.

## **V. ELECTRONIC NOTARY**

**Act of May 22, 2017, HB 1217 §1**  
**Amends CPR<sup>7</sup> 121.006**  
**Effective 9/1/17**

House Bill 1217 amends Section 121.006 of the Civil Practice and Remedies Code to permit a process by which a person can appear before a notary either in person or by an interactive two-way audio and video communication. HB 1217 §1 (adds CPR 121.006(c)). This section is further amended to require an online notarization to state how the person appeared before the notary. *Id.*

A subchapter C is added to Chapter 406 of the Government Code to define the significant terms related to an electronic notarization and explain the standards. HB 1217 §3 (TGC 406.101-104). It provides the secretary of state may adopt rules to facilitate and implement this subchapter and develop the standards for online notarization. *Id.* (TGC 406.103-104).

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<sup>7</sup> In this paper, “CPR” refers to the Civil Practice and Remedies Code.

## **VI. EX PARTE HEARINGS UNDER CH. 262**

**Act of May 26, 2017 HB7 §22**  
**Adds TFC 262.206**  
**Effective 9/1/17**

House Bill 7 adds a Section 262.206 to the Family Code which provides:

Unless otherwise authorized by this chapter or other law, a hearing held by a court in a suit under this chapter may not be ex parte.

HB7 §22 (TFC 262.206). As indicated, this section prohibits ex parte hearings not authorized by Chapter 262 or other law for suits under Chapter 262, but does not specify what other law might authorize an ex parte hearing.

## **VII. FILING REQUIREMENTS**

**Act of May 28, 2017 SB999 §3**  
**Adds TFC 262.013**  
**Suits filed on or after September 1, 2017**

Senate Bill 999 adds Section 262.013 of the Family Code to impose the following filing requirement when a suit is based on allegations from the same incident abuse or neglect and involving children in the same home:

Sec. 262.013. FILING REQUIREMENT REGARDING MORE THAN ONE CHILD. Each suit under this chapter based on allegations of abuse or neglect arising from the same incident or occurrence and involving children that live in the same home must be filed in the same court.

SB999 §3 (adds TFC 262.013). This requirement applies to suits filed on or after September 1, 2017. SB §16-17.

## **VII. PERMANENCY HEARINGS**

**A. Required Court Findings**  
**Act of May 26, 2017 HB7 §23 & §31**  
**Amends TFC 263.003 and 263.5031**  
**Effective 9/1/17**

House Bill 7 amends Section 263.002 of the Family Code to require a court to include a statement in its findings at each permanency hearing before final order under Chapter 263 concerning whether the department placed the child with a relative or designated caregiver. HB7 §23 (adds TFC

263.003(b)). Section 263.5031 of the Family Code similarly requires that finding at each permanency hearing following final order. HB7 §31 (amends TC 263.5031).<sup>8</sup>

It also adds a section that requires a court at each permanency hearing before a final order to make a finding on whether returning a child to the child's home is safe and appropriate, whether the return is in the best interest of the child and whether it is contrary to the welfare of the child for the child to return home. HB7 §23 (TFC 23.003(c)).

**B. Notice and Right to Testify**

**Act of May 26, 2017 HB7 §24**

**Amends TFC 263.0021**

**Effective 9/1/17**

House Bill 7 amends Section 263.0021 of the Family Code to require the notice of hearing sent to the persons entitled to come to the permanency hearing to state that such individual may, but is not required to, attend and be heard at the hearing. HB7 §24 (adds TFC 263.0021(e)). House Bill 7 also amends Section 263.0021 to clarify that the court is to determine if a caregiver is present and allow them to testify if the caregiver wishes to provide information about t **L**

**APPOINTED ATTORNEY FOR CHILD**

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<sup>8</sup>Section 15 of House Bill 7 also requires findings at each hearing under Chapter 262 concerning whether the department has the option of placing the child with a relative or other designated caregiver. HB7 §15 (adds TFC 262.0022). However, Chapter 262 of the Family Code is the chapter that involves hearings when the Department seeks orders to protect a child, including for emergency removal of a child. *See* Tex. Fam. Code Ann. §261.001-309 (West 2014). Permanency hearings are not part of that chapter but it looks like the legislature wants the Court to make a finding concerning the option of a relative or designated caregiver early in the proceedings.