

Parental Substance Use in Texas CPS Cases and Opportunities to Keep Families Safely Together



KATE MURPHY
Senior Child Welfare Policy Associate
kmurphy@txchildren.org

April 2019

Table of Contents

- 1 Acknowledgements**
- 1 About this Report**
- 1 Summary of Key Findings**
- 2 Background on Parental Substance Use in Abuse and Neglect Cases**
- 4 Findings from Data Analysis**
- 8 Findings from Interviews**
- 9 Opportunities for Improvement in State Policy**
- 10 Opportunities for Improvement in Legal Settings**
- 11 Appendix: Key Steps in a CPS Case**
- 13 References**

Acknowledgements

Texans Care for Children team members Kate Murphy, Stephanie Rubin, Katie Mitten, Peter Clark, and John Jacob Moreno collaborated to research, write, and design this report.

We appreciate the effort by staff at the Texas Department of Family and Protective Services (DFPS) to respond to our requests for data and other information. We also appreciate their ongoing efforts to support and protect Texas children.

We gratefully acknowledge the Texas Bar Foundation's support for this report.

Texans Care for Children would like to thank the many attorneys, judges, parents, and other Texans who have shared their expertise and experiences with us.

The opinions expressed in this document are those of Texans Care for Children and do not necessarily reflect the views of other organizations and individuals with whom we have collaborated on this issue. 📄

About this Report

This report focuses on preventing entries into foster care by improving how the state interacts with families when a parent is using alcohol or drugs. In researching this subject, our goal was to understand how often children are entering foster care for reasons related to parental substance use, identify policy opportunities to safely reduce entries into care, and highlight areas where judges and attorneys can better support parents with substance use treatment needs in the early stages of a Child Protective Services (CPS) case.

To accomplish this goal, Texans Care for Children reviewed publicly available data, legislative reports, and public testimony; researched current programs and practices; and gathered information through interviews with attorneys and judges around the

state who are leaders in child protection cases as well as parents who have had past CPS involvement.

Specifically, Texans Care for Children analyzed Texas Department of Family and Protective Services (DFPS) data on reasons children were removed from their parents as well as data on referrals to substance use treatment from the Texas Health and Human Services Commission (HHSC). In 2018, we interviewed a dozen judges and attorneys across the state who are leaders in the new Child Protection Section of the Texas State Bar or are members of the National Association of Counsel for Children. We also interviewed six parents with prior CPS involvement. Additionally, we asked for input and feedback from DFPS's Parent Collaboration Group and received nine email responses from parents. 📄

Summary of Key Findings

Key findings from our research, which are explained in greater detail in the following pages, include:

- Texas is a "low-removal state," removing a smaller percentage of children from their families compared to the national average.
- The rate of removals in Texas is increasing.
- Parental substance use is a contributing factor in most removals.
- Nearly all removals that involved parental substance use as a contributing factor are related to neglectful supervision rather than abuse.

- Most removals that involve parental substance use are for children under age six.
- Limited access to substance use treatment for parents makes it difficult to keep families together.
- Parental substance use alone is rarely the sole reason children enter foster care.
- In some communities, stakeholders report that parents' use of illegal substances appears to be treated as abuse or neglect even though it may not endanger a child.
- Appointing an attorney to parents earlier in CPS cases may help keep more families safely together. 📄

Background on Parental Substance Use in Abuse and Neglect Cases

Three Main Types of Cases of Child Abuse and Neglect that Involve Parental Substance Use

If a person uses a controlled substance and that use results in physical, mental, or emotional injury to a child, Texas law clearly defines that as “abuse.”¹ “Neglect” occurs when the parent is not adequately meeting the child’s physical, medical, or emotional needs. Although substance use is not part of the definition of neglect in Texas, neglect may occur when a parent using drugs or alcohol is not paying enough attention to a child’s needs or when their lack of supervision endangers the child’s safety or well-being.²

According to DFPS policy,³ the following types of cases that involve substance use constitute abuse or neglect:

- Physical Abuse, including:
 - Physical injury to a child resulting from a person using a controlled substance
 - A newborn exhibiting signs of harm due to prenatal drug or alcohol exposure, such as a diagnosis of Fetal Alcohol Spectrum Disorder (FASD) or Neonatal Abstinence Syndrome (NAS) or a written medical opinion that the newborn was harmed in utero
- Emotional Abuse: Emotional or mental injury to a child resulting from a person using a controlled substance
- Neglectful Supervision, including:
 - A caregiver driving under the influence of drugs or alcohol
 - A mother or child testing positive for drugs or alcohol at birth, but the child is not showing any effects
- A mother or child testing negative for drugs or alcohol with no evidence that the newborn experienced any harm as a result of the use, but there is concern about the mother’s ability to provide a safe environment for the newborn

Prenatal Substance Exposure

Prenatal substance exposure refers to instances in which a pregnant woman uses legal or illegal substances during pregnancy that could increase the risk for intellectual or developmental disabilities.⁴ Common diagnoses resulting from prenatal substance exposure are Fetal Alcohol Spectrum Disorders (FASD) and Neonatal Abstinence Syndrome (NAS). FASDs are generally a combination of physical and behavioral challenges that can occur in a person whose mother drank alcohol during pregnancy.⁵ NAS is a group of conditions caused when a baby withdraws from certain drugs she is exposed to in the womb before birth, most often caused by opioids.⁶

Texas defines “infant born-addicted” in statute. This definition is problematic for two reasons. First, infants cannot be “born addicted.”⁷ Addiction is a clinical term that means compulsive substance use in spite of harmful consequences.⁸ Physical dependence, on the other hand, is very different. Physical dependence means that stopping the substance use could lead to withdrawal symptoms.⁹ Infants exposed to substances in utero may be born with a physical dependence. Second, the current definition of “born-addicted” in Texas statute includes infants who test positive for a substance even if the child does not exhibit any observable harmful effects. 🚫

COMPARING PARENTAL SUBSTANCE USE, ABUSE, AND DEPENDENCE

According to the National Center on Substance Abuse & Child Welfare

Alcohol and drug use occurs along a continuum. Types of use are identified as **use**, **abuse**, and **dependence**.¹⁰

Alcohol and Drug Use Continuum Implications for Child Welfare	Examples of Risks to Children
<p>Use of alcohol or other drugs to socialize and feel effects. Use may not appear abusive and may not lead to dependence, however the circumstances under which a parent uses can put children at risk of harm.</p>	<ul style="list-style-type: none"> • Driving with children in the car while under the influence. • Use during pregnancy can harm the fetus
<p>Abuse of alcohol or drugs includes at least one of these factors in the last 12 months:</p> <ul style="list-style-type: none"> • Recurrent substance use resulting in failure to fulfill obligations at work, home or school. • Recurrent substance use in situations that are physically hazardous. • Recurrent substance-related legal problems. • Continued substance use despite having persistent or recurrent social or interpersonal problems caused by or exacerbated by the substance. 	<ul style="list-style-type: none"> • Children may be left in unsafe care — with an inappropriate caretaker or unattended — while parent is partying. • Parent may neglect or sporadically address the children’s needs for regular meals, clothing, and cleanliness. • Even when the parent is in the home, the parent’s use may leave children unsupervised. • Behavior toward children may be inconsistent, such as a pattern of violence then remorse.
<p>Dependence, also known as addiction, is a pattern of use that results in three or more of the following symptoms in a 12 month period:</p> <ul style="list-style-type: none"> • Tolerance — needing more of the drug or alcohol to get “high”. • Withdrawal — physical symptoms when alcohol or other drugs are not used, such as tremors, nausea, sweating, and shakiness. • Substance is taken in larger amounts and over a longer period than intended. • Persistent desire or unsuccessful efforts to cut down or control substance use. • A great deal of time is spent in activities related to obtaining the substance, use of the substance or recovering from its effects. • Important social, occupational, or recreational activities are given up or reduced because of substance use. • Substance use is continued despite knowledge of persistent or recurrent physical or psychological problems caused or exacerbated by the substance. 	<ul style="list-style-type: none"> • Despite a clear danger to children, the parent may engage in addiction-related behaviors, such as leaving children unattended while seeking drugs. • Funds are used to buy alcohol or other drugs, while other necessities, such as buying food, are neglected. • A parent may not be able to think logically or make rational decisions regarding children’s needs or care.

Findings from Data Analysis

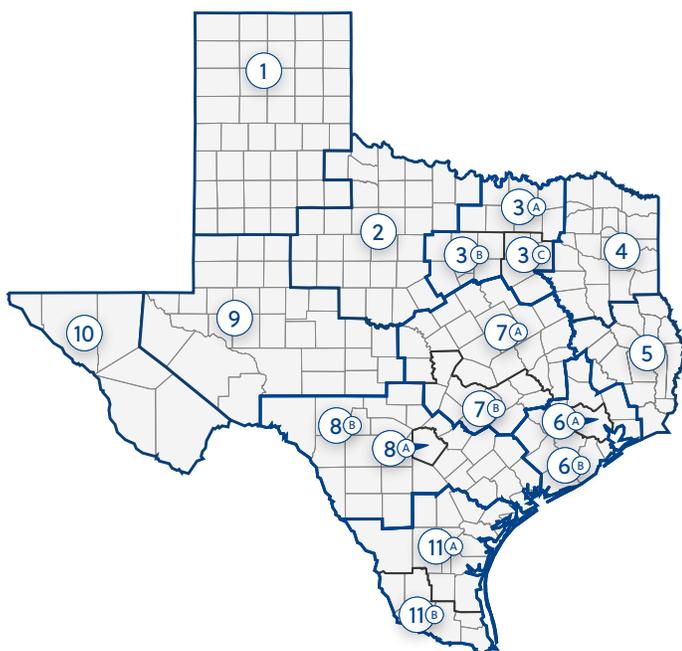
Texas is a Low-Removal State

DFPS works hard to keep families together and generally only removes children when necessary. In fiscal year 2018, CPS only removed 2.73 children per 1000 children in Texas,¹¹ far less than 1 percent of all children in Texas. Historically the national rate has been more than twice that of Texas. For example, the national removal rate in 2016 was 6 children per 1000 and Texas' was 2.58.¹²

Removals are Increasing

Although Texas remains a low-removal state, new entries into foster care have increased nearly 20 percent since fiscal year 2015.¹³ This increase in removals is naturally reflected in the court system. Data indicate that child protection cases in Texas have increased 29 percent over the last five years.¹⁴

DFPS REGIONS AND COMMUNITY-BASED CARE CATCHMENT AREAS



Source: https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/CBC_Catchment_Areas.png

Substance Use is a Contributing Factor in Most Removals

DFPS data from 2017 indicate that parental substance use is a contributing factor in 68 percent of removals in Texas.¹⁵ DFPS most commonly refers parents to substance use treatment for marijuana (31 percent of referrals) and methamphetamine (28 percent) followed by alcohol (12 percent).

In most DFPS regions of the state, marijuana is the primary substance (rather than category of substances, such as stimulants) for which DFPS refers parents to treatment.¹⁶ Region 4 (Tyler) has the highest referral rate for marijuana of any region at 37 percent. By contrast, marijuana represents a smaller share of referrals in Regions 2 (Abilene), 5 (Beaumont), and 9 (Midland). In these three regions, as well as Region 1 (Lubbock), referrals for stimulants (including methamphetamine, cocaine, amphetamine, and crack) tend to be higher, accounting for more than half of the referrals in each of those four regions. Referrals for depressants (mostly alcohol but also Xanax) are highest in Region 10 (El Paso) followed by Region 9 (Midland) and Region 11 (Edinburg). Opioids generally make up the lowest percentage of DFPS referrals to treatment but account for over 10 percent of referrals in Region 8 (San Antonio) and Region 11 (Edinburg).

In general, regions with higher overall removal rates have a higher percentage of removals related to parental substance use. Region 2 (Abilene) has the highest percentage of removals that involve parental substance use (77 percent), as well as the highest overall removal rate in the state. Compared to the state averages, Regions 1 (Lubbock), 4 (Tyler), 5 (Beaumont), and 9 (Midland) have higher percentages of removals related to parental substance use and higher removal rates overall. Regions 3B (Fort Worth), 6 (Houston), 10 (El Paso), and 11 (Edinburg) have lower than average removals related to substance use and also relatively low overall removal rates. Regions 7 (Austin) and 8 (San Antonio) are anomalies, with lower than average removals related to substance use, but slightly higher overall removal rates compared to the state average.

REMOVALS AND REFERRALS FOR PARENTAL SUBSTANCE USE BY REGION

Region	Overall Removal Rate (per 1,000 children) ¹⁷	Percentage of removals in which substance use is a reason for removal* ¹⁸	Substance for which DFPS refers parents to treatment ¹⁹
Statewide	2.73	68%	Stimulants: 45% <ul style="list-style-type: none"> • Methamphetamine: 28% • Cocaine: 8% • Amphetamine: 7% • Crack: 2% Cannabis: 31% Depressants: 13% <ul style="list-style-type: none"> • Alcohol: 12% • Xanax: 1% Opioids: 6% <ul style="list-style-type: none"> • Heroin: 4% • Vicodin: 1% • Opiates & Other Synthetics: 1% Other drugs: 5%
Region 1 (Lubbock)	4.86	74%	Stimulants: 55% Cannabis: 33% Depressants: 11% Opioids: 3%
Region 2 (Abilene)	7.58	77%	Stimulants: 67% Cannabis: 16% Depressants: 10% Opioids: 5%
Region 3 (Arlington)	2.17	A: 72% B: 61% C: 70%	Stimulants: 43% Cannabis: 33% Depressants: 14% Opioids: 5%
Region 4 (Tyler)	5.41	69%	Stimulants: 49% Cannabis: 37% Depressants: 7% Opioids: 3%
Region 5 (Beaumont)	4.64	76%	Stimulants: 53% Cannabis: 24% Depressants: 9% Opioids: 4%
Region 6 (Houston)	1.44	A: 63% B: 67%	Stimulants: 38% Cannabis: 32% Depressants: 14% Opioids: 7%
Region 7 (Austin)	4.06	A: 69% B: 62%	Stimulants: 45% Cannabis: 32% Depressants: 12% Opioids: 4%
Region 8 (San Antonio)	3.54	A: 63% B: 69%	Stimulants: 41% Cannabis: 32% Depressants: 13% Opioids: 11%
Region 9 (Midland)	4.11	68%	Stimulants: 61% Cannabis: 15% Depressants: 16% Opioids: 1%
Region 10 (El Paso)	1.01	64%	Stimulants: 33% Cannabis: 29% Depressants: 22% Opioids: 4%
Region 11 (Edinburg)	2.36	A: 63% B: 58%	Stimulants: 44% Cannabis: 30% Depressants: 16% Opioids: 12%

* The letters refer to "catchment areas," which are subdivisions of existing DFPS regions that were created to serve as existing or prospective Community-Based Care Regions.

Nearly All Parental Substance Use Removals are Related to Neglectful Supervision

CPS cited neglectful supervision in 94 percent of removal cases in which parental substance use was a factor.²³ (By comparison, 80 percent of all removal cases include neglectful supervision as a reason.²⁴) Among removals that include parental substance use, the percentage of removals for neglectful supervision has increased while the percentages of removals for physical abuse, physical neglect, and sexual abuse have remained the same or decreased.²⁵

While neglectful supervision was by far the most common removal reason cited in cases involving parental substance use, physical abuse was the second most cited reason, accounting for 14 percent. Some cases involved both physical abuse and neglectful supervision. The percentage of cases involving physical abuse is lower than expected given the state's definition of abuse specifically includes abuse during parent substance use. Among removals related to parental substance use, there are very few cases of medical neglect (two percent) or emotional abuse (less than one percent).²⁶

Most Substance Use Removals are for Children Under Six

Among removals in which parental substance use was involved, nearly two-thirds (63 percent) involved children under the age of six.²⁷ There is a growing recognition of the benefits to a mother and her young child if they are able to stay together during substance use treatment, including in the case of prenatal substance exposure. Because of this growing body of knowledge, the Texas Attorney General has made it clear that physicians are not required to report to CPS all pregnant patients who have used controlled substances during pregnancy.²⁸ HHSC has also released guidance to ensure physicians know they are not required to report individuals taking medications as prescribed, including methadone.²⁹

Texas HHSC has two programs that aim to reduce the risks of parental substance use on families with children under the age of six. One is Pregnant and Postpartum Intervention (PPI)³⁰ for women referred by DFPS and the other is Parenting Awareness and Drug Risk Education (PADRE)³¹ for men referred by DFPS.

REASON FOR REMOVAL IN SUBSTANCE USE-RELATED CASES

Removal Reason	Percentage of Substance Use-Related Removals That Included Each Removal Reason
Neglectful supervision	94%
Physical abuse	14%
Medical neglect	2%
Emotional abuse	<1%

* The percentages do not add up to 100 percent because there can be more than one removal reason listed.

Limited Access to Treatment Makes it Difficult to Keep Families Together

There is a significant unmet need for substance use intervention, treatment, and recovery services among all Texas children and adults, not just families involved in the CPS system, as demonstrated by the following state data from 2017:³²

- Only 5.8 percent of low-income Texas adults with a substance use disorder are able to receive treatment services through a community-based treatment provider.
- In 2017, there were 13,177 low-income Texas adults and 163 Texas youth on a waitlist for a spot at a community-based substance use treatment provider.
- Texas adults waited more than two weeks (on average) for intensive residential treatment, four weeks for outpatient treatment, and four weeks for Medication Assisted Therapy (MAT). In 2017 alone, there were over 6,600 Texas adults on a waitlist for intensive residential treatment.
- There are only ten residential treatment providers in Texas that contract with HHSC and allow

pregnant women/mothers and their children to stay together during the course of recovery. In 2017 there were over 100 mothers on a waitlist for a spot at a Women and Children residential treatment center, waiting an average of 18 days before a spot became available.

Having access to community services is critical to family preservation. Parents referred to treatment by DFPS are considered a priority population to guarantee earlier access to treatment, but pregnant women and injecting drug users are given higher priority. When DFPS determines whether a child is in danger, the agency weighs possible safety interventions that could alleviate the danger, including community services. However, DFPS is not allowed to consider long-term therapy, treatment, or placement on a waiting list for services as a “safety intervention.”³³ A safety intervention has to immediately address the safety concern. Treatment and therapy sometimes will not address immediate safety concerns, but DFPS will consider a parent’s willingness to access treatment in making decisions about how to proceed with a case because entering long-term treatment may mitigate risks of future child maltreatment. 

Outreach, Screening, Assessment, and Referral Centers (OSARs)

At any stage in a CPS case, a parent may visit or be referred to an Outreach, Screening, Assessment, and Referral Center (OSAR), although parents in CPS cases often do not interact with OSARs until after an adversary hearing.

OSARs often serve as the entry point into substance use treatment and a person’s path towards recovery, determining whether a person needs treatment and what kind of treatment is most appropriate. Regardless of a client’s insurance status, OSAR counseling staff conduct screenings and assessments to determine the level of care needed — such as detoxification, intensive residential, or outpatient care — and refer the person to appropriate treatment options.

There is at least one OSAR in each of the 11 Health and Human Service Regions within the state. Fourteen are co-located within local mental health authorities. 

Findings from Interviews

Substance Use Alone is Rarely the Sole Reason Children Enter Foster Care

During our interviews, several attorneys across the state noted that substance use alone rarely leads to a removal. There are usually other risk factors, co-occurring problems, or socioeconomic factors that increase the likelihood of removal. Some of the commonly cited reasons included housing instability, poverty, lack of social networks, mental illness, and structural racism that may affect investigative and judicial decision-making.

Reinforcing conclusions drawn from our data analysis, interviewees suggested that difficulty accessing treatment could lead to higher removal rates. Attorneys in Ellis County, for example noted that most parents with substance use disorders should be served through Family Based Safety Services (FBSS) rather than removing the child; however, getting parents into treatment locally can be very challenging. This remains true even though families involved with CPS are a priority population, meaning they are among the first to be connected to treatment. Attorneys in Region 6 (Houston) noted that available treatment services in that region contribute to parents entering FBSS.

A lack of social support was also repeatedly noted as a reason that alternatives to removal failed. Attorneys in Region 3 suggested that not having family nearby or lacking stable and supportive family members greatly increases the likelihood of removal. In Region 6, one judge noted that in his community a lack of family support is the main reason that children enter DFPS conservatorship rather than being served through FBSS or court-ordered services.

In Some Communities, Stakeholders Report that Illegal Substance Use Appears to Be Treated as Abuse or Neglect Though it May Not Endanger a Child

Although not consistent with DFPS written policies, several attorneys in Houston and El Paso reported to us that they experienced many cases in which DFPS

treated parental substance use as child abuse or neglect even if the substance use had not led to the child being harmed. For example, attorneys in both areas noted that they see many cases in which a new mother tests positive for marijuana at birth and the child is removed with no other apparent threats to child safety. They also noted they rarely see removals at birth related to alcohol use during pregnancy, although drinking during pregnancy is known to have much more serious effects on the infant than marijuana. One El Paso attorney stated that CPS has a zero tolerance policy for illegal drug use and suggested it is the driving force behind child removals. One attorney in Travis County explained that, in her experience, historically, whether a substance was legal was a factor in whether to remove a child, but that the approach seems to be shifting. Two Travis County lawyers went on to explain that, although the legality of the substance is becoming less of an issue, there is still some misunderstanding at DFPS about the difference between substance use, misuse, an actual substance use disorder, and the appropriate response to each.

Investigating and verifying these reports is beyond the scope of this report. However, these comments from stakeholders suggest areas for potential further inquiry and reveal the impressions held by some community members.

Appointing an Attorney Earlier in a Case May Keep More Families Safely Together

In 2018, the Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families (Children's Commission) conducted a study of legal representation in CPS cases and concluded that counsel should be appointed earlier. Currently, parents in Texas are not entitled to an attorney until their child has been removed. The Children's Commission highlighted that the U.S. Department of Justice has recognized that early appointment of effective legal representation is critical for protecting both the parent and the child in a CPS case. Every interviewee in our research indicated that appointing attorneys for parents earlier in CPS cases could help safely reduce removals and keep more families safely together. If parents do not have access to an attorney prior to the adversary hearing in Texas, it is more likely

that children will be removed from the care of their parents, causing trauma to parents and children, when access to needed treatment may have helped families stay safely together.³⁴

In El Paso County, for example, judges appoint attorneys earlier than the adversary hearing,³⁵ giving attorneys more time to prepare for the adversary hearing following the removal. Local counsel we spoke with noted that when El Paso shifted to this practice in 2000, there was a noticeable reduction in removals. Since at least 2008, Region 10 (El Paso) has consistently had the lowest removal rate in the state.³⁶

Appointing attorneys earlier may also help parents take advantage of court-ordered services and achieve the successful outcomes associated with family drug courts in Texas, ultimately preventing entries into foster care or increasing family reunification after a child has been removed. Judges in Travis County, for example, appoint attorneys for court-ordered services cases. In the Travis County Family Drug Court, about 89 percent of parents who completed their court-ordered services kept their children safe within the following fiscal year and 92 percent of parents who completed the program had no new CPS lawsuit within 12 months.³⁷ 

Opportunities for Improvement in State Policy

Consider Removing Reference to Substance Use from Definition of Abuse

As explained earlier, substance use is not in and of itself abuse or neglect although it is a risk factor. Moreover, the vast majority of child removals related to substance use are in the context of neglect, not abuse. However, state law incorporates substance use into its definition of abuse.³⁸ Given that substance use may not be associated with child abuse, and conflating the two could be stigmatizing, the state should consider removing the use of controlled substances from the definition of abuse.

Recommendation: Texas should study whether to remove Texas Family Code Sec. 261.001(1)(I) from statute. This section specifies that injuries resulting from substance use are abuse.

Seek a “Plan of Safe Care” Grant

In 2016, the federal government passed the Comprehensive Addiction and Recovery Act (CARA), which amended the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA requires states to have policies and procedures to address the needs of infants who experience prenatal substance exposure.

Under CARA, states must develop a “Plan of Safe Care” for infants who were exposed to substances in utero to ensure their safety and well-being and

address the health and substance use disorder treatment needs of the affected family or caregiver. The federal government saw that many states were struggling to implement Plans of Safe Care, so in September 2018 as part of the federal package of opioid bills, Congress authorized the U.S. Health and Human Services Department to provide grants to assist states in better protecting young children through family-centered responses.

Recommendation: Texas should pursue a Plan of Safe Care grant to better meet the safety needs of all infants with prenatal substance exposure and the health and treatment needs of their caregivers.

Remove “Born Addicted” From Texas Statute

The federal requirements outlined in the CARA amendments to CAPTA neither establish a federal definition of abuse or neglect nor require states to investigate all prenatal exposure as abuse or neglect.³⁹ However, the Texas Family Code and the Texas Administrative Code still refer to children “born addicted to alcohol or a controlled substance,” although clinically children cannot be born addicted. Similarly, Texas should not treat every case of prenatal substance exposure as abuse or neglect. Rather, Texas can comply with federal law by focusing on “identifying infants at risk due to prenatal substance exposure and on developing a plan to keep the infant safe and address the needs of the child and

caretakers.”⁴⁰ This public health approach is positive for children and parents.

Recommendation: Remove “born addicted to alcohol or a controlled substance” from statute (Texas Family Code sec. 161.001(a)) and, in consultation with experts, maintain compliance with federal law by replacing the term with “infants born and identified as being affected by substance abuse” and “infants born and identified as being affected by withdrawal symptoms resulting from prenatal drug exposure” with a focus on identifying affected infants and addressing the treatment needs of their caregivers.

Use Funding Under the Family First Prevention Services Act to Provide Substance Use Treatment to Parents Involved with CPS

Untreated parental substance use is one of the main reasons children enter foster care instead of staying with their family. Under the Family First Prevention Services Act (FFPSA), states will be able to use federal Title IV-E funding for substance use treatment services for up to 12 months for parents at risk of losing their children to CPS custody. Specifically, the funding may be used to reimburse 50 percent of the amount states spend on substance use services for parents or caregivers when the services are directly related to the safety, permanency, or well-being of a child. The reimbursement is contingent on the state having a well-designed, rigorously evaluated prevention plan for each child. In Texas, according to DFPS, new prevention funding under the FFPSA would most

likely be used to enhance services provided to some families through FBSS.

Recommendation: Although Texas does not have immediate access to the new funding due to its decision to delay implementation of the FFPSA until 2021, Texas should begin planning for opportunities to leverage this funding to increase access to substance use treatment and prevent more children from coming into foster care.

Ensure Parents Have Access to Effective Legal Representation Earlier, Leveraging New Funding Opportunities

As noted earlier, experts have recognized the benefits of appointing counsel earlier in the CPS process for parents and also children. One barrier to appointing counsel earlier in CPS cases in many counties has been cost. In Texas, counties are responsible for paying for counsel for parents. However, an update to the Child Welfare Policy Manual allows federal funding to cover administrative costs associated with providing legal representation to children and their parents.⁴¹ Under this new federal policy, more counties could appoint counsel during court-ordered services, which could be paid for using federal funds.

Recommendation: Texas should consider requiring judges to appoint attorneys earlier in CPS cases and leverage new federal funding to support the appointments. 📌

Opportunities for Improvement in Legal Settings

Appoint Counsel Earlier in Child Protection Cases

Parents are entitled to legal representation once their child has been removed, but there is no specific time that courts are required to appoint counsel following removal. The earlier counsel is appointed following removal, the more time attorneys will have to prepare for the adversary hearing and protect parent’s rights and preserve families at this stage of the case. If a lawyer hasn’t been appointed by the adversary

hearing, courts could consider appointing one and delaying the hearing for seven days to allow the lawyer to prepare for the case.

If courts want to more actively improve family preservation, the law does not preclude the court from appointing counsel before removal occurs in CPS cases. If courts appoint attorneys for court-ordered services, for example, attorneys could ensure the state is truly making reasonable efforts to prevent removal and preserve more families.

Recommendation: Judges should consider appointing counsel immediately upon ordering removal or earlier if funding is available.

Focus Advocacy at the Adversary Hearing on Reasonable Efforts

Before the state removes a child from their parents, DFPS has to make “reasonable efforts” to prevent the removal from happening and keep children safely at home with their families. If the state has not made reasonable efforts to prevent removals, then a parents’ attorney can argue that the removal was inappropriate. In substance use cases, reasonable efforts will likely depend, to some degree, on what services and treatment options are available locally. If attorneys understand the early process of DFPS cases and services available throughout and after an investigation, they can better advocate for their clients and explore opportunities to connect parents with the substance use treatment they need.

The reasonable efforts findings are powerful tools given to the courts to prevent children from entering foster care. In a recent article by retired judge Leonard Edward, “these findings enable the court to determine whether the agency has done its job to prevent removal, assist in reunifying families, and achieve timely permanency for the child.”⁴²

Recommendation: Attorneys should consider the following:

- Has your client been to an OSAR (licensed chemical dependency counselors who screen people for substance use disorders and refer them to appropriate treatment)? What were their recommendations?
- Is your client willing to enter treatment?
- What community-based services are locally available? Are there family-specialized or female-specialized residential substance use treatment programs?
- Do treatment providers in your community have long waitlists?
- If your client is on a waitlist for treatment, is there a person who could serve as a PCSP (relatives or friends voluntarily caring for the child while the parent works to resolve outstanding safety issues when the state does not have custody of the child)?
- If the child is an infant, did DFPS develop a plan of safe care for the child and mother?
- If the child is under age six, is PPI (a service for moms with substance use prevention or treatment needs) or PADRE (a service for dads with substance use prevention or treatment needs) available nearby?
- Did DFPS develop a safety plan? If not, why?
- Was your client’s case referred to FBSS (state-monitored family preservation)? If not, why?
- Why are court ordered services not being offered to your client? Is there anything that your client could change that would allow the family to work toward safety through court-ordered services instead? 📌

Appendix: Key Steps in a CPS Case

When DFPS receives a call that a child may be in an unsafe situation, the best outcome is to find a way to keep that child safely with her family. Removing a child from her family is a traumatic experience, so safely preserving the family — which includes ensuring that there is no longer risk of the trauma of abuse and neglect in the home — can prevent the child from experiencing additional trauma. Under Texas law DFPS may only proceed with a removal if the child is actually in danger and no reasonable efforts will keep the child safely at home with her family. Nonetheless, it is sometimes necessary to remove children for their safety.

Report of Abuse or Neglect

Families become involved with CPS when a person calls the child abuse and neglect hotline or makes a report of suspected maltreatment online. Statewide Intake (SWI) at DFPS processes the reports and determines whether to refer the case to Child Protective Investigations (CPI) based on the state’s definition of abuse and neglect.

Investigation

Child Protective Investigations (CPI) assess reports of child abuse or neglect to determine whether a child is safe in her home. If a child is unsafe, investigators

also determine whether the parents are willing and able to make changes necessary to keep the child safe. If the investigator decides a child is not safe and cannot be made safe at home, the investigator moves forward with removing the child and the state continues working with the family through CPS. In most CPS cases, the initial goal is to ensure parents get the supports they need to reunify their family.

DFPS Responses Before Removal

Investigators will only remove a child from her parents if the child is in danger and no reasonable efforts will keep the child safely at home. Investigators have a range of tools at their disposal to help ensure children are safe in their homes or make it possible for the children to return home. These include safety plans, Family Based Safety Services (FBSS), Parental Child Safety Placements (PCSP), and court-ordered services. Each of these options rarely involve attorneys because parents do not have a right to publicly funded, appointed counsel in a CPS case until after their child is removed (parents can hire a private attorney at any stage).

Safety plans: Safety plans are agreed-upon plans between the parent and DFPS to ensure child safety. Safety plans are often created at voluntary “Family Team Meetings” that allow parents to tell DFPS what kind of support they need to keep their children safe. The meeting may include friends, families, or lawyers (if the family is able to pay for one themselves).

Family Based Safety Services: These are essentially safety plans that require extra support from CPS to ensure child safety, such as family counseling, substance use treatment, in-home parent coaching or other interventions. During an FBSS case, caseworkers regularly assess child safety and help connect the family to necessary services.

Parental Child Safety Placements: If children cannot safely remain in their own home, extended family members or close friends are asked by the parents to temporarily care for their children through PCSPs while they work to create a safe home environment. The child then will be able to return home after parents make the required changes to ensure child safety.

Court-Ordered Services: Finally, if the safety threats in the household can be addressed through providing services to the family, but the parents refuse to voluntarily participate in those services,

DFPS may request a court order to require a parent to participate.

Removal

According to DFPS policy, removal is a last resort. If a child is in danger and no reasonable efforts will keep a child safely at home, removal may be necessary.⁴³

If removal is necessary, parents can agree to let CPS remove their child. If a parent does not provide consent for removal, there are two types of removals: non-emergency and emergency (requiring a court order or exigent circumstances).

In the following circumstances, the DFPS process requires investigators to take the following steps:

Non-emergency removal:

- Child Protective Investigations (CPI) will go to court to schedule a hearing in which they must present sufficient proof that there is continuing danger to the child’s physical health or safety caused by an act or omission of the caregiver.
- Parents must receive notice of the removal hearing where they will have an opportunity to present evidence of why their children should not be removed.

Emergency removal with a court order:

- CPI will go to court and present sufficient proof that (1) the child is in immediate danger or the child has been the victim of neglect, sexual abuse, or trafficking, and (2) waiting to hold a removal hearing would jeopardize the child’s health or safety.

Emergency removal under exigent circumstances:

- CPS can remove a child without a court order if an investigator has actual knowledge that a child is in immediate danger due to:
 - sexual abuse or trafficking,
 - a person using a controlled substance posing an immediate danger to the health or safety of the child, or
 - the child is in a house where methamphetamine is being manufactured.
- A court will order an emergency hearing on the first working day after the removal to approve the action.

Once a court orders removal, the court may appoint a lawyer to indigent parents or parents under 18. Some judges appoint a lawyer immediately, assuming that parents are indigent and opposed to CPS removing their child. Others wait until the adversary hearing. There is no requirement for when the judge must appoint a lawyer.

Adversary Hearing

An adversary hearing must take place no more than 14 days after removal. The court will presume that children staying with their biological family is in the children's best interest and require DFPS to show otherwise by proving that a "person of ordinary prudence and caution" would find the removal was

justified and no "reasonable efforts" could have prevented it.

At this point if CPS does not present enough evidence that a child would be unsafe at home, the judge will dismiss the case and the child will return home. If CPS proves that returning the child home would be unsafe, the judge will give CPS temporary custody of the child, called Temporary Managing Conservatorship (TMC). When a child is in TMC the state is the temporary parent of the child while pursuing a "Suit Affecting the Parent Child Relationship" where the state is seeking to reunify the family or terminate parental rights. The TMC case will typically last one year, although a six-month extension may be granted for extraordinary circumstances. 📄

References

- 1 Tex. Fam. Code § 261.001(1)(i).
- 2 Accord Tex. Fam. Code § 261.001(4) with Tex. Dep't of Family & Protective Servs., House Select Committee on Opioids and Substance Abuse Charge 6: Impact of Substance Abuse (Aug. 7, 2018) available at <https://capitol.texas.gov/tlodocs/85R/handouts/C3942018080710001/0edd82cc-c8ac-4148-9672-fc97565bfa71.PDF>.
- 3 Tex. Dep't of Family & Protective Services, Statewide Intake Policy & Procedure (Jul. 2015) available at http://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp?zoom_highlight=controlled+substance.
- 4 U.S. Legal, Prenatal Exposure Law and Legal Definition, <https://definitions.uslegal.com/p/prenatal-substance-exposure/> (last visited Mar. 18, 2019).
- 5 Ctr. for Disease Control, Basics about FASDs, <https://www.cdc.gov/ncbddd/fasd/facts.html> (last reviewed May 10, 2018).
- 6 March of Dimes, Neonatal Abstinence Syndrome, [https://www.marchofdimes.org/complications/neonatal-abstinence-syndrome-\(nas\).aspx](https://www.marchofdimes.org/complications/neonatal-abstinence-syndrome-(nas).aspx) (last reviewed Jun. 2017).
- 7 Virgie Townsend, There's No Such Thing as a Baby Opioid Addict, https://tonic.vice.com/en_us/article/bj75n5/baby-opioid-addicts-dont-exist (Nov 8 2017, 11:00am).
- 8 Am. Soc'y of Addiction Med., Definition of Addiction, <https://www.asam.org/resources/definition-of-addiction> (Apr. 12, 2011).
- 9 Nat'l Inst. on Drug Abuse, Definition of Dependence, <https://www.drugabuse.gov/publications/teaching-packets/neurobiology-drug-addiction/section-iii-action-heroin-morphine/8-definition-dependence> (Jan. 2007).
- 10 Nat'l Ctr. on Substance Abuse & Child Welfare, Appendix E Substance Use, Abuse, Dependence Continuum, and Principles of Effective Treatment, https://ncsacw.samhsa.gov/files/SAFERR_AppendixE.pdf (last visited Mar. 18, 2019).
- 11 Tex. Dep't of Family & Protective Servs., Data Book, CPS Conservatorship: Removals, https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Removals.asp (last visited Mar. 18, 2019).
- 12 See Child Trends, Foster Care, <https://www.childtrends.org/indicators/foster-care> (2018).
- 13 Tex. Alliance of Child & Family Servs., Presentation to the House Select Committee on Opioids and Substance Abuse (Aug. 7, 2018) available at <https://capitol.texas.gov/tlodocs/85R/handouts/C3942018080710001/75895fc8-4451-47bb-974d-b6c51642b649.PDF>.
- 14 Tex. Judicial Council, House Select Committee on Opioids and Substance Abuse (Aug. 7, 2018) available at <https://capitol.texas.gov/tlodocs/85R/handouts/C3942018080710001/a7a00419-3873-4e14-8d4d-15f37a46a8f0.PDF>.
- 15 Four Price, House Select Committee on Opioids and Substance Abuse House of Representatives Interim Report, 11 (Nov. 2018) available at https://house.texas.gov/_media/pdf/committees/reports/85interim/Interim-Report-Select-Committee-on-Opioids-Substance-Abuse-2018.pdf.
- 16 Tex. Health & Human Servs. Comm'n, Open Records Request Reasons for Substance Use Treatment (received 2018) (on file with author).
- 17 Tex. Dep't of Family & Protective Servs., Data Book, CPS Conservatorship: Removals, https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Removals.asp (last visited Mar. 18, 2019).
- 18 Tex. Dep't of Family & Protective Servs., Data on Rates By Catchment, Age, Gender, Removal Reasons, and Incarceration (received 2018) (on file with author).
- 19 Tex. Health & Human Servs. Comm'n, Open Records Request Reasons for Substance Use Treatment (received 2018) (on file with author).
- 20 Tex. Dep't of Family & Protective Servs., Data Book, CPS Conservatorship: Removals, https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Removals.asp (last visited Mar. 18, 2019).
- 21 Tex. Dep't of Family & Protective Servs., Data on Rates By Catchment, Age, Gender, Removal Reasons, and Incarceration (received 2018) (on file with author).
- 22 Tex. Health & Human Servs. Comm'n, Open Records Request Reasons for Substance Use Treatment (received 2018) (on file with author).
- 23 Tex. Dep't of Family & Protective Servs., Data on Rates By Catchment, Age, Gender, Removal Reasons, and Incarceration (received 2018) (on file with author).
- 24 Tex. Alliance of Child & Family Servs., Presentation to the House Select Committee on Opioids and Substance Abuse (Aug. 7, 2018) available at <https://capitol.texas.gov/tlodocs/85R/handouts/C3942018080710001/75895fc8-4451-47bb-974d-b6c51642b649.PDF>.
- 25 Tex. Alliance of Child & Family Servs., Presentation to the House Select Committee on Opioids and Substance Abuse (Aug. 7, 2018) available at <https://capitol.texas.gov/tlodocs/85R/handouts/C3942018080710001/75895fc8-4451-47bb-974d-b6c51642b649.PDF>.
- 26 Tex. Dep't of Family & Protective Servs., Data on Rates By Catchment, Age, Gender, Removal Reasons, and Incarceration (received 2018) (on file with author).
- 27 Tex. Dep't of Family & Protective Servs., Data on Rates By Catchment, Age, Gender, Removal Reasons, and Incarceration (received 2018) (on file with author).
- 28 Op. No. GA-0291 (Tex. Att'y Gen. Jan. 5, 2005) available at <https://www2.texasattorneygeneral.gov/opinions/opinions/50abbott/op/2005/pdf/ga0291.pdf>.
- 29 Guidance on Reporting to DFPS Relating to Prenatal Substance Exposure (Tex. Health & Human Servs. Comm'n) (received 2018) (on file with author).
- 30 Tex. Health & Human Servs. Comm'n, Pregnant and Postpartum Intervention, <https://hhs.texas.gov/services/mental-health-substance-use/adult-substance-use/pregnant-postpartum-intervention> (last visited Mar. 18, 2019).
- 31 Tex. Health & Human Servs. Comm'n, Parenting Awareness and Drug Risk Education, <https://hhs.texas.gov/services/mental-health-substance-use/adult-substance-use/parenting-awareness-drug-risk-education> (last visited Mar. 18, 2019).
- 32 Includes adults and youth with income under 200% of the federal poverty level (\$24,280/year for an individual). Includes services funded through Texas' substance abuse and prevention block grant, which helps fund treatment services for individuals who do not have insurance and make income of less than 200% FPL. Texas Health and Human Services, Behavioral Health Services, Office of Decision Support, Jan. 2018.
- 33 NCCD Children's Research Ctr., Structured Decision Making System Procedure and Reference Manual Safety and Risk Assessment, 30 (Apr. 2016) available at https://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/SDM_Safety_Assessment_Manual.pdf.
- 34 See generally Children's Commission, 2018 Study of Legal Representation in Child Protective Services Cases (2018) available at <http://texaschildrenscommission.gov/media/83923/2018-legal-representation-report-final-online.pdf>.
- 35 Nat'l Council of Juvenile & Family Court Judges, The El Paso, Texas 65TH Judicial District Children's Court: Evaluation of Model Court Activities [1999-2001], 33 (2002) available at <http://www.ncjfcj.org/sites/default/files/UpdatedElPaso.pdf>.
- 36 Tex. Dep't of Family & Protective Servs., Data Book, CPS Conservatorship: Removals, https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Removals.asp (last visited Mar. 18, 2019).
- 37 Tex. Dep't of Family & Protective Servs., House Committee on County Affairs Charge 5: Effects of Substance Abuse on DFPS Populations (Sept. 25, 2018) available at https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/CPS/documents/2018/2018-09-25_Substance_Abuse.pdf.
- 38 Tex. Fam. Code § 261.001(1)(i).
- 39 Admin. for Children & Families, Guidance on amendments made to the Child Abuse Prevention and Treatment Act (CAPTA) by Public Law 11-198, the Comprehensive Addiction and Recovery Act of 2016. (2017) available at <https://www.acf.hhs.gov/sites/default/files/cb/pi1702.pdf>.
- 40 Admin. for Children & Families, Guidance on amendments made to the Child Abuse Prevention and Treatment Act (CAPTA) by Public Law 11-198, the Comprehensive Addiction and Recovery Act of 2016. (2017) available at <https://www.acf.hhs.gov/sites/default/files/cb/pi1702.pdf>.
- 41 Nat'l Assoc. Of Council for Children, Children's Bureau Permits Funding for Child and Parent Legal Representation, <https://www.naccchildlaw.org/news/431392/Childrens-Bureau-Permits-Funding-for-Child-and-Parent-Legal-Representation.htm> (Dec. 20, 2018).
- 42 Judge Leonard Edwards, Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention, <https://chronicleofsocialchange.org/top-stories/ignoring-reasonable-efforts-why-court-system-fail-promote-prevention/32974> (Dec. 5, 2018).
- 43 Tex. Dep't of Family & Protective Servs., Child Protective Services Handbook (Mar. 2018) available at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5400.asp#CPS_5400.



1106 Clayton Lane, Ste. 111w, Austin, TX 78723
512-473-2274
txchildren.org
@putkids1st