

STATE BAR OF TEXAS JUVENILE LAW SECTION  
AND THE TEXAS JUVENILE PROBATION COMMISSION'S  
**NUTS AND BOLTS OF JUVENILE LAW**  
AUSTIN AIRPORT MARRIOTT SOUTH ★ JULY 21 – 22, 2008

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## **JUVENILE DETENTION**

A PRESENTATION BY  
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## CHAPTER SIX – JUVENILE DETENTION

**THIS CHAPTER DEALS EXCLUSIVELY WITH THE DENTENTION OF A CHILD IN THE JUVENILE JUSTICE PROCESS.**

The Family Code addresses the subject of juvenile detention in several places:

- 52.01** provides for the issuance by police of a warning notice in lieu of taking the child into custody
- 52.02** authorizes release by police of a child taken into custody on condition the child be brought to the juvenile court by parents or other responsible adults
- 53.02** permits administrative release of a detained child by intake or other court workers
- 54.01** creates a right to a detention hearing before a juvenile court judge, referee/master or detention magistrate

Juvenile-age persons who are charged in criminal court with a traffic offense or other fineable only offenses may not be detained in the juvenile detention facility.

### A. POLICE DETENTION AND RELEASE DECISIONS

#### RELEASE AND REFERRAL

**52.02(a)(1)** – authorizes a police officer or other person who has taken a juvenile into custody to “release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person’s promise to bring the child before the juvenile court as requested by the court.”

**52.02** – provides the police with no criteria by which to decide who should be released and who should not, other than those implicit in the requirement that the release be made to a “responsible adult.”

#### FIREARMS OFFENSES (EXCEPTION TO POLICE RELEASE IN 52.02)

**53.02(f)** (1999) - a child who is “alleged to have engaged in delinquent conduct and to have used, possessed, or exhibited a firearm...in the commission of the offense **SHALL** be detained until the child is released at the direction” of a judge. Police are permitted to contact a judge for authorization to release, which can be done by telephone. Any judicial officer may authorize release of a child taken into custody for an offense involving a firearm.

## **FIREARMS OFFENSES: WHERE A CHILD MAY BE DETAINED**

If a child is taken into custody for a firearms offense and not released by judicial order, the police must transport that child to the county's designated place of juvenile detention.

However, the Legislature did provide for the needs of rural counties that might have difficulties complying with this mandatory detention provision.

**51.12(l)** – authorizes detention of a child under the mandatory firearms provision in the county jail or other facility until the child is released under **53.02(f)** or until a detention hearing is held as required by **54.01(p)**, regardless of whether the facility complies with the requirements of the section, but only in very limited circumstances. The limited circumstances include: there is no juvenile detention facility available in the county or an adjacent county, the facility has been designated by the county juvenile board, the child is separated by sight and sound from adults being detained, the child does not have any contact with staff who has contact with adults being detained.

## **WARNING NOTICES**

**52.019(c)** - authorizes a law enforcement officer to "issue a warning notice to the child in lieu of taking him into custody" under certain circumstances. The warning notice is to be used instead of taking the child to the juvenile processing office or juvenile detention facility. A warning notice may be used instead of taking the child into custody only if the situation falls within guidelines promulgated by the law enforcement agency and approved by the juvenile board. It is the legislature's intent that guidelines be issued by the law enforcement agency and approved by the juvenile court only for relatively minor offenses.

## **RELEASE AND DISPOSITION WITHOUT REFERRAL**

### *INFORMAL DISPOSITIONS AND FIRST OFFENDER PROGRAMS*

**52.03** – authorizes the police to release a child taken into custody and NOT refer the case to the juvenile court.

**52.031** - authorizes a first offender program. Disposition of a case through a first offender program is authorized only if it is permitted by guidelines that have been issued by the juvenile board.

If a case is disposed of under **52.03(b)(1)** or **52.031(e)**, there is immediate release from law enforcement custody and there is no referral of the case to the juvenile court unless the child fails to abide by the terms of the disposition.

**52.032** – provides the juvenile board of each county, in cooperation with each law enforcement agency in the county, **SHALL** adopt guidelines for the disposition of a child under Section **52.03** or **52.032**. The guidelines adopted under this section shall not be considered mandatory. In other words, the juvenile board must have the guidelines, but they do not have to approve of a first offender program.

## **B. INTAKE DETENTION AND RELEASE DECISIONS**

If a case is referred to juvenile court and the child is not released by the police, the child must be physically taken to the detention facility. Responsibility for releasing or detaining the child falls upon the intake or probation officers of the juvenile court. (Discussed in Chapter 5)

### **PRESUMPTION IN FAVOR OF RELEASE**

**53.02(a)** – requires the Intake officer to release a child unless detention is required by one of the six circumstances enumerated in **53.02(b)** which are the following:

- 1) The child is likely to abscond or be removed from the jurisdiction of the court.
- 2) Suitable supervision, care, or protection for the child is not being provided.
- 3) There is no parent, guardian or custodian who can return the child to court.
- 4) The child may be dangerous to himself or others.
- 5) The child has been previously found to be delinquent.
- 6) The child is charged with a firearms offense. This is mandatory and Intake must contact a judge for authorization for any release prior to a detention hearing. Judicial authorization to release may be by phone.

Circumstances 1 through 5 are identical to those that control judicial release in detention hearings. Reasonable conditions of release can be attached to the release of a child.

(Fewer than 50% of referred juveniles are detained - Texas Juvenile Probation Commission – 2003.)

### **INTERROGATION**

The Fifth Amendment to the U. S. Constitution and Texas law give the child the right not to answer questions that call for incriminating information. The child can refuse to answer any questions about the offense for which he or she was referred, or about any other offense. If the child is willing to talk about the offense, **51.095** makes any statements made inadmissible in court. Due to a myriad of potential problems, it is advisable that the Intake officer not question the child about the offense even if the answers are restricted to making the intake detention decision.

### **INFORMATION AS TO IDENTITY**

The child's right to remain silent does not include non-incriminating information such as his name and residence, her parents' names and residences, where the child attends school or may be working and other information that is of an identifying nature.

### **INFORMATION AS TO AGE**

A child's age is a safe area for inquiry by the Intake officer and the officer can safely use the information in the detention/release decision.

## C. DETENTION HEARING: SCHEDULING AND NOTICE

### TIME LIMITS

**54.01** - sets the requirement for detention hearings. If a child is not released administratively, Intake should automatically schedule a hearing.

**54.01(a)** – provides a detention hearing without a jury shall be held promptly, but not later than the second working day after the child is taken into custody. If a child is detained on a Friday or Saturday, then such detention hearing shall be held on the first working day after the child is taken into custody. If a detention hearing can be held sooner, it should be, since the law requires in any event, that it be held “promptly”.

If the child is detained in a county jail under the firearms statute, then a fast-track detention hearing must be scheduled.

**54.01(p)** – requires that a detention hearing **MUST** be held not later than 24 hours excluding weekends and holidays of when the child was taken into custody.

### NOTICE TO PARENTS (Oral Notice)

**54.01(b)** – provides that “reasonable notice of the detention hearing, either oral or written, shall be give, stating the time, place and purpose of the hearing. Notice shall be given to the child and, if they can be found, to his parents, guardian or custodian.” Oral notice is authorized. It is not necessary that either the child or parents be served with a formal citation of a summons for a detention hearing. Notification should be attempted as soon as the hearing time is known.

### FILING PETITION

**53.04(a)** – requires that the petition be filed “as promptly as practicable”, but does not require that a petition be filed before the detention hearing is held.

**54.01(p)**– gives the prosecutor 15 or 30 working days (depending upon the offense) after the initial detention hearing in which to file a petition when the child is detained. (Chapter 9) (Thirty days if offense is capital murder, first-degree felony or aggravated controlled substance felony; 15 days for all other offenses.)

## D. DETENTION HEARING: PROCEDURES

### WAIVER OF INITIAL HEARING

**54.01(h)** – provides that “the initial detention hearing my not be waived but subsequent detention hearings may be waived in accordance with the requirement of **51.09** (waiver provision).

**51.09** – provides that “unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title...may be waived...” In 1995, the legislature decided the waiver of the initial detention hearing is the expression of a “contrary intent” that overrides the general power to waive.

## **RIGHT TO ATTORNEY**

The child has a right to an attorney at the detention hearing.

**54.01(b)** – provides “prior to the commencement of the detention hearing, the court shall inform the parties of the child’s right to counsel and to appointed counsel if they are indigent...”

**54.01(d)** – provides “if no parent or guardian is present at the detention hearing, the court shall appoint counsel or a guardian ad litem for the child.”

**51.10( c )** - provides “if the child was not represented by an attorney at the detention hearing... and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney.”

## **DETENTION HEARINGS WITHOUT COUNSEL**

**51.10( c )** - provides that it is better to hold a prompt hearing without counsel than to postpone the hearing until an attorney can be provided.

**54.01(n)** – allows an attorney appointed to represent a child following a detention hearings without an attorney, to request on behalf of the child, a de novo detention hearing. This request must be made not later than the 10<sup>th</sup> working day after the date the attorney was appointed. The new hearing must be held not later than the second working day after the request.

## **PRIVILEGE AGAINST SELF-INCRIMINATION**

**54.01(b)** – requires the court to inform the parties of the child’s right to remain silent with respect to any allegations of delinquent conduct or conduct indicating a need for supervision.

**54.01(g)** – provides, “No statement made by the child at the detention hearing shall be admissible against the child at any other hearing.” The child has the right not to speak, but if he chooses to speak, what is said can be used only for the purposes of the detention hearing.

## **RECORDING PROCEEDINGS**

**54.01(b)** – provides “All judicial proceedings under this chapter except detention hearing shall be recorded by stenographic notes or by electronic, mechanical, or other appropriate means. Upon request of any party, a detention hearing shall be recorded.” An audio tape recording is sufficient.

## **ADMISSIBLE EVIDENCE**

The Family Code contemplates that the detention hearing will be relatively informal.

**54.01( c )** - provides that the “court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses.” If the report method is used, a copy of the report must be provided to the child’s attorney before the hearing begins. The child is permitted, but not required, to testify or make an unsworn statement at the detention hearing. The judge should permit any reliable and relevant non-privileged information to be presented even if it is technically hearsay or would otherwise be inadmissible in a jury trial. Parents may testify.

## E. DETENTION HEARING; PROBABLE CAUSE

### CONSTITUTIONAL REQUIREMENTS

The Fourth Amendment requires a neutral judicial officer, rather than a prosecutor, determine probable cause. (*Gerstein v. Pugh*, 420 US 103, 95 S.Ct. 854 (1975)- an adult case.) The determination can be based upon any reliable information, such as the representations of the prosecutor or even a police offense report. The determination of probable cause is not required if the person was arrested upon an arrest warrant, since the judge who issued the warrant did so on the basis of a judicial finding of probable cause. A post-custody judicial determination of probable cause is not required when a child is arrested under a directive to apprehend issued by a juvenile court judge under **52.015**.

The US Court of Appeals for the Fifth Circuit held that the *Gerstein* case is applicable to juveniles in *Moss v. Weaver*, 525 F.2d 1258 (5<sup>th</sup> Cir. 1976).

### WHO CAN MAKE THE DECISION

**53.01(a)** – requires a determination of probable cause to be made by the “intake officer, probation officer, or other person authorized by the court” as part of the preliminary investigation of the case. That is not sufficient to comply with *Gerstein* and *Moss* because it is not a judicial determination. A referee/master would qualify because his or her determination of probable cause is really a recommendation to the judge, who has power to accept or reject it.

### THE 48-HOUR REQUIREMENT.

*Gerstein* required a judicial determination of probable cause to be made “promptly” after an arrest without a warrant, but did not define “promptly.” *Riverside v. McLaughlin*, 500 US 44, 111S.Ct. 1661, 114 L.Ed. 2d 49 (1991) defined “promptly” to be “48 hours”. If a child is not released, a judicial determination of probable cause must be made within 48 hours of the time he or she was taken into custody. The 48 hours **INCLUDES** weekends and holidays. The determination can be based on written or oral presentations of information to the judge or referee and need not be made in a hearing.

### METHODS OF DETERMINING PROBABLE CAUSE

There are a number of ways in which the judge can determine probably cause:

- 1) Witnesses with knowledge of the facts can testify.
- 2) A witness can testify based upon what others have told him (hearsay).
- 3) A prosecutor or probation officer can make an unsworn statement or write a report as to the facts he or she has been told or read from an offense report.
- 4) A judge or referee can examine the police offense report in the case and determine probable cause directly from that report.

No particular formality is required so long as the determination is based upon a reasonably reliable factual basis.

## FREQUENCY OF PROBABLE CAUSE DETERMINATIONS

It is not necessary for there to be a new probable cause determination at any of the subsequent detention hearings. It is sufficient that probable cause was found to exist once. The finding of probable cause should be reflected in a written finding that is filed in the papers of the case.

## FAMILY CODE PROBABLE CAUSE REQUIREMENT

**54.01(o)** – codifies the constitutional requirement of a prompt determination of probable cause. It provides that the court or referee shall find whether there is probable cause to believe that a child taken into custody without an arrest warrant or a directive to apprehend has engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court. The court or referee must make the finding within 48 hours, including weekends and holidays, of the time the child was taken into custody. Under this statute, the determination must be made within 48 hours of taking the child into custody, rather than within 48 hours of the child's arrival at the detention facility.

The language of **54.01(o)**, added in 2003, requires a judicial determination of probable cause in cases of children being held for probation violation.

## FAILURE TO MAKE A PROBABLE CAUSE DETERMINATION

*Gerstein* made it clear that failure to find probable cause would not be grounds for setting aside a later conviction or requiring dismissal of charges. An attorney would need to file a writ of habeas corpus contending that the child is being detained in violation of his or her Fourth Amendment rights because of the absence of a probable cause determination.

The District Court hearing the writ petition could order the child's release from detention or could permit the State the opportunity at the hearing to show the existence of probable cause and, if it is shown, deny release. If the probable cause determination is not made when required by federal and Texas law, the child's detention becomes illegal.

## F. DETENTION AND RELEASE CRITERIA

**53.02(b)** – criteria for detention and release by Intake

**54.01(e)** – criteria for detention or release by a judge or referee

These statutes are identical, except that **53.02(b)** prohibits Intake from releasing a firearms offender. The law creates a presumption that the child should be released.

The sections provide that a child should be released unless one or more of five grounds for detention are found to exist:

- 1) he is likely to abscond or be removed from the jurisdiction of the court;
- 2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;
- 3) he has no parent, guardian, custodian, or other person able to return him to the court when required;

- 4) he may be dangerous to himself or may threaten the safety of the public if released; or
- 5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

## **DETENTION CRITERIA IN POST-18 YEAR OLD TRANSFER PROCEEDINGS**

**54.02(p)** – authorizes the juvenile court to detain the person in the certified juvenile detention facility or in the county jail where bond can be set.

## **DETENTION PENDING RELEASE/TRANSFER HEARING**

A juvenile court has the authority to detain a child referred to the court by the Texas Youth Commission for a release/transfer hearing under the determinate sentence act. The child may be placed in a certified place of juvenile secure detention or in the county jail without bond while the hearing is pending.

## **NO RIGHT TO BAIL**

The Juvenile Justice Code does not recognize a right to bail, nor does it assert that such a right does not exist. It is silent on the subject.

## **G. CONDITIONS OF RELEASE**

**54.01(f)** – provides that a release may be conditioned on requirements reasonably necessary to insure the child's appearance at later proceedings, but the conditions of the release must be in writing and a copy furnished to the child. The range of conditions that can be imposed is limited only by the requirement that they be related to likelihood of appearance at trial.

**53.02(a)** - applies to release by Intake and contains an identical provision.

## **VIOLATION OF CONDITION OF RELEASE**

If a child is released from detention on conditions and violates a condition, the release order may be revoked and the child taken back into custody on the original case.

**52.015(a)** – provides for law enforcement or a probation officer to make a request of a juvenile court to issue a directive to apprehend a child if the court finds there is probable cause to take the child into custody under the provisions of **54.01**.

## **ADULT AGREEMENT FOR INTAKE RELEASE**

**53.02(d)** – requires an agreement from an adult to whom Intake has released a child that the adult will be “subject to the jurisdiction of the juvenile court and to an order of contempt by the court if the adult, after notification, is unable to produce the child at later proceedings.”

## **DETENTION HEARING ORDERS REQUIRING PARENTAL COOPERATION**

Under a new chapter in the Family Code on parental rights and responsibilities, the legislature in 2003, authorized a judge, referee, or detention magistrate, upon conditional release of a child from detention, to order “that the child’s parent, guardian, or custodian present in court at the detention hearing, engage in acts or omissions specified by the court, referee, or detention magistrate that will assist the child in complying with the conditions of release.” **54.01( r )** This order can be enforced by contempt.

## **RELEASD OF EXPELLED CHILD IN JJAEP COUNTY**

**53.02(e)** and **54.01(f)** – require conditions of release to include referral to a JJAEP. In a county with a populace greater than 125,000, which is required to operate a Juvenile Justice Alternative Education Program, an Intake or judicial release of a child who was expelled, must include the condition that the child immediately attend the JJAEP program.

## **H. DETENTION ORDERS AND THEIR REVIEW**

**54.01(h)** – provides that a detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more that 10 WORKING days. Further detention orders may be made following subsequent detention hearings. The initial detention hearing cannot be waived, but subsequent detention hearings may be waived as long as the waiver is in accordance with **51.09**. Initial detention orders in all counties have a maximum life of only 10 working days. In counties that do not have a certified juvenile detention facility, the order shall extend for no more than 15 working days.

## **WAIVER OF SUBSEQUENT HEARINGS**

The first subsequent detention hearing is required on or before the 10<sup>th</sup> working day after the initial order. All other subsequent hearings are required within 10 or 15 working days. The purpose of this procedure, rather than permitting a waiver of all subsequent detention hearings at once, is to require everyone to confront the need for continued detention on a regular basis and provide a means to get before the judge or referee, new evidence or changed circumstances which may bear on the detention issue.

## **FAILURE TO HOLD SUBSEQUENT HEARINGS**

If there is a failure to hold a subsequent hearing for a detained child, the child must show some prejudice as a result of the illegal detention. There is no remedy for the illegal detention except seeking release on a writ of habeas corpus or filing a civil lawsuit for money damages.

## **INTERACTIVE VIDEO RECORDING OF SUBSEQUENT DETENTION HEARINGS**

**54.012** – authorizes a subsequent, but not initial, detention hearing to be conducted by two-way television. Use of this technique requires consent of the child and his attorney. The parties, including the State, must be given the opportunity to cross-examine witnesses.

**54.012(b)** – requires the technology to provide for “two-way communication of image and sound among the child, the court and other parties at the hearing.”

**54.012( c )** - requires that the hearing be recorded and that the record be preserved.

# I. RESTRICTIONS ON DETENTION OF STATUS OFFENDERS

## STATUS OFFENDERS

**51.02(15)** – defines a status offender as a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult. This section provides a non-exhaustive list of examples of status offenses:

- 1) truancy under **51.03(b)(2)**
- 2) running away from home under **51.03(b)(3)**
- 3) failure to attend school
- 4) a fineable only offense under **51.03(b)(1)** transferred to the juvenile court
- 5) a violation of standards of student conduct under **51.03(b)(5)**
- 6) a violation of juvenile curfew ordinance
- 7) a violation of provision of the Alcoholic Beverage Code as applied to a minor

Each of these behaviors is prohibited for children, but not for adults.

## DETENTION OF STATUS OFFENDER IN ADULT FACILITY

**4.011(a)** – allows status offenders to be detained in an adult facility. If detained, the status offenders must have a hearing within 24 hours of arrival at the facility, excluding weekends and holidays.

## NONOFFENDERS

**51.02(8)** - defines a nonoffender as a child who is subject to a court's jurisdiction because the child is a victim of abuse, dependency or neglect or is a child who has been taken into custody and is being held solely for deportation out of the United States."

**54.011(a)** - requires the judicial release of all nonoffenders within 24 hours, excluding weekends and holidays, of their arrival at the detention facility or at the 24-hour detention hearing. However, there is no federal or Texas prohibition on the placement of a nonoffender in a shelter or other non-secure facility.

## CHILDREN HELD ON IMMIGRATION VIOLATIONS

**53.01(a)(2)(B)** – authorizes the temporary detention of a person who "is a nonoffender who has been taken into custody and is being held solely for deportation out of the United States".

**54.011(f)** – requires all such nonoffenders be released from secure confinement at the 24-hour detention hearing required of all status offenders and nonoffenders. Civil and criminal penalties are provided for detaining a nonoffender in a secure facility beyond the 24-hour hearing.

Prohibited confinement of a nonoffender in a juvenile detention facility applies only to a secure detention facility as defined by **51.02(4)**.

## THE 24-HOUR DETENTION HEARING

**54.011(a)** – requires a hearing for a status offender or a nonoffender to start “before the 24<sup>th</sup> hour after the time the child arrives at a detention facility, excluding hours of a weekend or a holiday.” Arrival is what triggers running the clock which is later than the event of the child being “taken into custody” for an ordinary detention hearing.

## RETURN OF RUNAWAY

**54.011(e)** – allows for the detention of a status offender for a period not to exceed 5 days to arrange for return of a child to her home jurisdiction under the Interstate Compact Agreement.

**54.01(i) through (k)** - allows placement of a runaway child from another county, state or country to request shelter in the detention facility for up to 10 days.

## J. JUVENILE COURT DESIGNATION OF PLACES OF DETENTION AND POLICE CUSTODY

**52.02(a)(3)** – requires the juvenile board to designate the place or places of detention within its county. The designated places of detention must be certified as suitable for the detention of children.

**52.025** – requires the juvenile board to designate juvenile processing offices, where police may take juveniles in their custody.

## COUNTY OF DETENTION

**51.12(e)** – provides that a designated place of detention may be in another county in a facility that is certified.

**54.01(m)** – a required detention hearing may be held in the county of the designated place of detention where the child is being held even though that place may be outside the county of residence of the child or the county in which the alleged delinquent conduct may have occurred.

## COURT CONDUCTING HEARING

**51.04(F)** – provides that if the judge of the juvenile court or an alternate judge is not in the county or is otherwise unavailable, any magistrate may conduct the detention hearing required by **54.01**.

## TRANSPORTING JUVENILES TO DETENTION FACILITIES

**52.026(a)** - requires the law enforcement officer who takes a child into custody to transport him to the designated juvenile detention facility.

**52.026(b)** – requires that if the designated juvenile detention facility is out of county, then the law enforcement officer taking the child into custody must transport the child to the out of county facility.

**52.026(c)** - includes transportation of the child to and from court as part of the responsibilities of the law enforcement officer taking the child into custody.

Alternatively, if authorized by the commissioners' court, the sheriff may be given this out-of-county transportation responsibility.

## **K. CERTIFYING PLACES OF DETENTION**

**51.12( c )** - The Family Code fixes responsibility upon the juvenile court and the juvenile board to assure that the place designated as the juvenile detention facility is safe and suitable.

**51.12(b)** - The Family Code places ultimate responsibility on the juvenile court for controlling the conditions of detention of juveniles.

### **CONFINEMENT OF YOUTH AGES 18 TO 21**

**AG Opinion** - The Attorney General was asked whether TYC youth between the ages of 18 and 21 could be detained in juvenile detention facilities. The AG concluded that a TYC youth who was arrested for, charged with or convicted of a criminal offense could be detained in a juvenile detention facility but only if not placed in the same compartment with a juvenile and only if not permitted to have regular contact with a juvenile.

If however, a TYC youth is not arrested for, charged with or convicted of a criminal offense, but perhaps is being held on a technical parole violation, then he or she can be detained in a juvenile detention facility the same as any juvenile.

NOTE: Per the passage of Senate Bill 103 during the 80<sup>th</sup> Texas Legislative Session, TYC no longer has jurisdiction for juveniles over 19.