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DETERMINATE SENTENCING

A PRESENTATION BY
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DETERMINATE SENTENCING

Determinate sentencing (sometimes referred to as “blended sentencing”) provides expanded punishment options for certain felony offenses – bridging the gap between normal delinquency proceedings (indeterminate sentencing) and waiver of jurisdiction and transfer to criminal court (certification to stand trial as an adult). The determinate sentencing statute is located in TFC 53.045, entitled Violent or Habitual Offenders.

Applicability

There are no age restrictions specified in the determinate sentencing statutes; therefore, the general age requirements under the TFC apply (in other words, it covers acts committed by children age 10 through 16).

The conduct covered by determinate sentencing includes the “violent” offenses listed in TFC 53.045(a)(1)-(17), as well as “habitual offenders,” as defined in TFC 51.031.

Violent Offenses

The “violent” offenses are as follows:

- ★ murder, capital murder, manslaughter,
- ★ aggravated kidnapping, sexual assault, aggravated sexual assault,
- ★ aggravated assault, aggravated robbery,
- ★ injury to a child, elderly individual, or disabled individual (if the offense is punishable as a felony, other than a state jail felony),
- ★ felony deadly conduct involving discharging a firearm,
- ★ certain offenses involving controlled substances, criminal solicitation, indecency with a child, criminal solicitation of a minor,
- ★ criminal attempt (if the offense attempted was murder, capital murder, or a “3g” offense under Article 42.12 of the Code of Criminal Procedure),
- ★ arson (if bodily injury or death is involved),
- ★ intoxication manslaughter, and
- ★ conspiracy to commit any of the above offenses.

NOTE - There is an EXCEPTION to the above regarding consensual sexual contact between youth. TFC 53.045(e). When the Respondent child and his/her victim are three years or less apart in age, the prosecutor cannot proceed with a determinate sentence for: sexual assault under PC 22.011(a)(2) [consensual sexual contact with a child], nor for aggravated sexual assault under PC 22.021(a)(1)(B) and (2)(B) [consensual sexual contact with a child under 14].

Habitual Offenders

A habitual offender is one who has engaged in “habitual felony conduct” (as defined in TFC 51.031), and essentially means a child who has:

- ★ two final prior felony adjudications (“final” meaning the child was placed on probation or committed to TYC, and all appeals are exhausted),
- ★ that were in sequence, and
- ★ that became final BEFORE the child committed the new non-state jail felony offense.

NOTE – An adjudication based on conduct that occurred before January 1, 1996 cannot be considered (TFC 51.031(c)).

Pretrial Procedure

The decision to seek a determinate sentence is completely within the discretion of the prosecutor (TFC 53.045(a)). Once that decision has been made, the prosecutor must draft and file a petition (in compliance with TFC 53.04 and 53.045) that alleges at least one of the listed violent offenses or habitual felony conduct. Non-covered offenses may also be alleged, but they will remain indeterminate.

The prosecutor must then present the petition to the grand jury for a vote. This is done in the same manner as presenting an indictment to a grand jury, and it requires a finding of probable cause. Additionally, at least nine members of the grand jury must approve the petition in order for the prosecutor to proceed with a determinate sentence. TFC 53.045(b). The grand jury has its normal investigatory powers as in adult matters (ie, it can compel testimony, the proceedings are secret, etc.). NOTE - The grand jury cannot *indict* a child unless the juvenile court has transferred the child to criminal court (ie, “certified” the child). Therefore, under a TFC 53.045 presentation, the grand jury is limited to approval or disapproval of the petition for determinate sentencing. TFC 53.045(c).

If the grand jury fails to approve the petition, then the prosecutor has three options if prosecution is still desired:

- ★ Proceed with an ordinary delinquency petition, or
- ★ Re-present the petition to the same or a successor grand jury to seek approval (new evidence is necessary), or
- ★ If the child was old enough at the time of the offense, seek “certification” of the child (waiver of jurisdiction and transfer to adult court).

NOTE - The disapproval of a petition for determinate sentencing is DIFFERENT from a grand jury rejection after presentation for an Advisory Opinion under TFC 53.035(c). The grand jury’s rejection of an Advisory Opinion **bars** filing a petition unless the same or a successor grand jury approves prosecution. Disapproval for determinate sentencing, however, does NOT bar prosecution, rather it merely limits disposition to the indeterminate limits if the case remains in the juvenile system and if the case is not re-presented and approved.

If the grand jury does approve the petition, the petition will be “returned” to the appropriate district court (like an indictment), and the approval must then be certified by the district clerk (in writing) and forwarded to the juvenile court where it must be entered in the record to take effect. Note – for purposes of transfer of a child to TDCJ, a petition approved by the grand jury is an indictment. TFC 53.045(d).

A child and his/her attorney can waive approval by the grand jury, thereby allowing the case to go forward as a determinate sentence without presenting the petition to the grand jury, but the waiver must be done in compliance with TFC 51.09. *In re A.R.A.*, 898 S.W.2d 14, 15-16 (Tex.App.-Austin 1995, no writ). This is akin to waiver of indictment as set forth in CCP 1.141.

Amending an “Approved” Petition

A petition “approved” by the grand jury for determinate sentencing can be amended without presenting an amended petition to the grand jury if the amendment is not “material” (ie, not charging additional/different offenses, or otherwise prejudicing the child’s substantial rights). Beware, however, that most amendments made will be material, so the State should generally either present an amended petition to the grand jury for approval, or obtain a waiver of grand jury approval (as to the amendment) from the child and his/her attorney in compliance with TFC 51.09.

Determinate Sentence Adjudication Hearings

Determinate sentence adjudication hearings have the same formal requirements as an ordinary adjudication hearing, but CANNOT be heard by a referee or master. TFC 54.10(e). In addition, they cannot be heard by a constitutional county court. Per TFC 51.04(c), in counties where the constitutional county court hears juvenile cases, the county must have another court designated to hear determinate sentence cases (either a district court, criminal district court, family district/domestic relations court, or county court at law).

Determinate Sentence Trials

Adjudication Hearing/Phase – TFC 54.03

The child has a right to a trial by jury, but may waive that right in accordance with TFC 51.09 and thereby elect to have a bench trial. TFC 54.03(c). The jury must consist of 12 persons and be selected in accordance with the requirements in criminal cases. *Id.* Peremptory challenges are the same as in criminal cases – 10 per side unless there are multiple respondents, in which case each respondent gets 6 strikes, and the state gets 6 strikes per respondent. CCP 35.15(b). The verdict must be unanimous by proof beyond a reasonable doubt based on evidence that is material, relevant, and competent. TFC 54.03(c)-(d). The Judge or jury must find for the State on at least one covered offense in order to have a determinate sentence disposition.

Disposition Hearing/Phase – TFC 54.04

The child has a right to a jury at the disposition hearing, but only if the child requests jury disposition in writing prior to the commencement of voir dire. The child can only change his/her jury election thereafter with the consent of the prosecutor. TFC 54.04(a). Exception – for conduct prior to September 1, 2007, the child does not have to elect judge/jury punishment until after adjudication. Former TFC 54.04(a). The right to a jury at disposition can also be affirmatively waived by the child in accordance with TFC 51.09.

There are evidentiary differences between judge disposition and jury disposition. When a judge is assessing punishment, a social history report containing broad information about a child, including criminal history and extraneous offense information, is admissible into evidence and may be considered by the judge in making his/her decision (of course, he/she may not view the report prior to the conclusion of the adjudication hearing). However, when a jury is assessing punishment, the social history report is inadmissible. TFC 54.03(d). In addition, unadjudicated extraneous offenses are NOT admissible (even if proven beyond a reasonable doubt during the disposition hearing) in a jury disposition if the offense was committed prior to September 1, 2007. *In Re C.J.M.*, 167 S.W.3d 892, 894-95 (Tex.App.-Ft. Worth 2005). For offenses committed on or after September 1, 2007, the legislature has made prior criminal history and unadjudicated extraneous offense information, etc., admissible in accordance with CCP 37.07. TFC 51.17(c).

Dispositional Findings

There are a number of required findings during the dispositional phase of the trial. With regard to deadly weapon findings, the state must give notice of intent to seek a deadly weapon finding prior to adjudication. The state can do so either by alleging a deadly weapon offense, by alleging a homicide, or by sending notice of intent to seek a deadly weapon finding to defense counsel. The deadly weapon finding is a special issue that must be proven beyond a reasonable doubt. NOTE – A deadly weapon finding in juvenile court has different requirements from such a finding in adult court. A deadly weapon finding in juvenile court requires personal use of the deadly weapon by the Respondent. *In the Matter of A.F.*, 895 S.W.2d 481, 486 (Tex.App.-Austin, no writ). The court must include the deadly weapon finding in the court's dispositional order, and specify whether the deadly weapon was a firearm. TFC 54.04(g).

In addition to the above findings, the court should include a finding regarding the amount of time already served by the child (for credit towards his/her sentence) in all commitment orders after June 8, 2007, pursuant to TFC 54.052.

As in normal adjudication situations, before a disposition of probation or TYC commitment can be made, there must first be a finding that the child is in need of rehabilitation or that the protection of the public or the child requires that disposition be made. TFC 54.04(c). This finding must be made for both probation and TYC commitments. As a result, there are three basic dispositions a judge or jury can make in a determinate sentence case:

- ★ No disposition is necessary, or
- ★ Probation (with a possible transfer to criminal court for completion of the probation term), or
- ★ Commitment to TYC (with a possible transfer to TDCJ).

Determinate Sentence Punishment Ranges

The determinate sentence punishment ranges are found in TFC 54.04(d)(3)(A)-(C), and are as follows:

- ★ 40 year maximum for a capital felony, 1st degree felony and aggravated controlled substance felony
- ★ 20 year maximum for a 2nd degree felony
- ★ 10 year maximum for a 3rd degree felony

Determinate Sentence Probation

If the judge or jury assesses punishment of 10 years or less, then the judge or jury can recommend probation. TFC 54.04(q). The probation period cannot exceed 10 years and the length is determined by the judge. Prior to expiration, the judge may extend the probation for any period of time not to exceed a total probationary period of 10 years. There is no minimum length of probation (except for certain sex offenses where the minimum is 2 years under TFC 54.04(p)), so the judge can, in most cases, discharge the child at any time. If the probation is later revoked, the judge can lower the sentence, but may not raise it. TFC 54.05(j).

A determinate sentence probation begins in the juvenile system and automatically expires on child's 18th birthday, unless previously transferred to criminal court. TFC 54.04(q).

Transfer of a Determinate Sentence Probation to Criminal Court

A determinate sentence probation can be transferred to adult criminal court for continued supervision past the child's 18th birthday pursuant to TFC 54.051. Such a transfer is initiated on motion of the state which must be filed and heard prior to the child's 18th birthday. TFC 54.051(b). Note, however, that under limited circumstances, the hearing can be concluded AFTER the child has turned 18 years of age pursuant to TFC 51.0412 (requires a timely-filed motion to transfer and finding of due diligence in an attempt to complete the proceeding prior to age 18). No probation violation is needed as a predicate to transfer. TFC 54.051(f). The same procedures apply in a hearing to transfer probation as in a hearing to modify disposition under TFC 54.05. TFC 54.051(b).

If the probation is transferred, the transfer occurs on the child's 18th birthday. TFC 54.051(d). If the court elects not to transfer, then the court specifies a discharge date on or before the child's 18th birthday. TFC 54.051(c). If the probation is transferred to criminal court, the child is placed on community supervision for the balance of his/her sentence under terms consistent with the juvenile court order. TFC 54.051(e). The amount of time completed on probation in the juvenile system counts toward the early discharge minimums under CCP 42.12(20). Once transferred, the criminal court disposes of probation violations, including juvenile violations not discovered prior to the child's 18th birthday. TFC 54.051(e-2). Sex offender registration authority transfers to the criminal court regarding continued deferral of registration and/or excusing further compliance with registration. TFC 54.051(g). There is no right to a jury since the hearing is governed by the procedures in TFC 54.05. The court's decision is not subject to attack on appeal. TFC 56.01(c). The child's obligation to pay restitution transfers with the probation (TFC 54.041(h)); however, the parent's obligation to pay restitution does not transfer (thus expiring on the child's 18th birthday). Finally, the CCP 42.12, Sec. 3g restrictions on probation do NOT apply to a transferred determinate sentence probation, nor do the CCP 42.12 3(b) minimum periods of supervision. TFC 54.051(e-1).

Determinate Sentence Probation Revocation – Hearing to Modify Disposition

The same procedures apply to a determinate sentence probation revocation/ modification as in revocation/modification of an indeterminate probation, and the hearing is governed by TFC 54.05. There is no right to a jury for determinate sentence revocation/modification for offenses committed on or after September 1, 1999. However, there is a right to a jury for offenses committed prior to September 1, 1999. Upon revocation, the court can impose any sentence, up to the original sentence. TFC 54.05(j). For revocation of a probation that has been transferred to criminal court, the criminal court can impose any sentence, up to the original sentence – but the child is NOT subject to the minimum sentences set forth in the CCP. TFC 54.051(e-2). See also “Determinate Sentence TYC Commitments” section, immediately below.

Determinate Sentence TYC Commitments

In addition to the general findings under TFC 54.04(c), the court must make the three additional findings in order to place the child outside of the home or commit him/her to TYC. TFC 54.04(i)(1). The court must find as follows:

- ★ It is in the child's best interests to be placed outside the child's home, and
- ★ Reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home, and
- ★ The child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The judge or jury, as the case may be, determines the length of the sentence – up to 10, 20 or 40 years, depending on the offense. There is no minimum sentence length. The child begins his/her sentence in TYC, with a possibility of transfer to TDCJ for completion of the full sentence. TFC 54.04(d)(3).

Minimum Lengths of Stay

TYC is authorized (per HRC 61.081(f)) to release a child to parole, without Court approval, at any time after the child has completed his/her minimum length of stay, as follows:

- ★ 10 years – for capital murder
- ★ 3 years – for 1st degree felonies and aggravated controlled substance felonies
- ★ 2 years – for 2nd degree felonies
- ★ 1 year – for 3rd degree felonies

NOTE – There is an exception for offenses committed on or after September 1, 2005. In such situations, TYC is authorized to release a child to parole, without Court approval, at any time during the last nine months of the child's sentence. HRC 61.081(i). Also, TYC may petition the juvenile court for early release of the child under supervision prior to expiration of the minimum length of stay. TFC 54.11. See "Early Release to Parole Prior to Satisfying Minimum Length of Stay" section below.

Terminating TYC Control

There are three basic ways that TYC's control over a child can be terminated:

- ★ Completion of the sentence by the child, or
- ★ A request by TYC to the juvenile court requesting transfer of the child to TDCJ, if same is granted by the court (TFC 54.11), or
- ★ Automatic transfer of the child to TDCJ parole at the child's 19th birthday, but only if the sentence has not been completed (HRC 61.084(g)).

TYC to TDCJ Transfers

At any time after the child's 16th birthday (but before the child's 19th birthday), TYC can petition the juvenile court to transfer the child to TDCJ (prison) to serve the balance of his/her sentence, but only if the child has not completed his/her sentence AND the child's conduct warrants such transfer for the welfare of the community. This is governed primarily by TFC 54.11 (Release or Transfer Hearing) and by HRC 61.079(a). The Court retains jurisdiction to do so even if the child is now 18 years old. TFC 51.0411.

The hearing is initiated by a written request to the committing court from TYC, and the decision to seek transfer is in TYC's discretion. A hearing must be held within 60 days of the court's receipt of TYC's request. TFC 54.11(h). The court can either return the child to TYC or transfer him/her to TDCJ for the balance of the sentence. TFC 54.11(i). A transfer hearing can even be held following revocation of parole (but not while the child is actually out on parole). HRC 61.079(c). The court must give notice of the hearing to all persons listed in TFC 54.11(b)(1)-(6). However, failure to give notice to anyone other than the child and the prosecutor will NOT affect the validity of the hearing if those persons whereabouts are unknown and reasonable efforts were made to locate them. TFC 54.11(c).

At the hearing, the child is entitled to an attorney (retained or appointed). TFC 54.11(e). TYC is represented by the local prosecutor. The Court must appoint a guardian ad litem if the child's parent or guardian does not appear. TFC 51.11. There is no right to a jury. The child's attorney can examine witnesses, present evidence, and argue. TFC 54.11(e). The child and his/her attorney are entitled to previous examination of all reports, evaluations, and examinations of the child to be used at the hearing. *Id.* The court can consider written reports from probation officers, professional court employees, professional consultants, and employees of TYC. TFC 54.11(d). The court can also consider witness testimony. *Id.* The child's attorney is entitled to access to all written matter to be considered by the court at least one day prior to the hearing. *Id.* An indigent child is entitled to appointment of a mental health expert under due process if the child makes the required showing to justify such appointment. *In Re J.E.H.*, 972 S.W.2d 928, 929-30 (Tex.App.-Beaumont, 1998). The hearing is open to the public unless waived by the child with consent of his/her attorney and the court (TFC 54.11(f)), and the hearing must be recorded by a court reporter or by audio or video. TFC 54.11(g). The record must be retained for 2 years. *Id.*

The criteria to be considered by the court in making its transfer decision includes:

- ★ the experiences and character of the child, both before and after commitment to TYC
- ★ the nature of the committing offense
- ★ the manner in which the offense was committed
- ★ the ability of the child to contribute to society
- ★ the protection of the victim/victim's family
- ★ the recommendations of TYC and the prosecutor
- ★ the best interest of the child....and anything else relevant. TFC 54.11 (k).

There is no requirement for findings of fact or conclusions of law. The decision is appealable under TFC 56.01(c)(2), but it is an abuse of discretion standard. The appeal does not suspend the order or release the child (unless the juvenile court orders the child's release). TFC 56.01(g). However, the appellate court can provide for personal bond if it chooses. *Id.*

Automatic Transfer to TDCJ Parole

A child who has not completed his/her sentence AND has not either been paroled or transferred prior to his/her 19th birthday shall be transferred by TYC to TDCJ parole on the child's 19th birthday to serve the remainder of his/her sentence. HRC 61.084(g).

Early Release to Parole Prior to Satisfying Minimum Length of Stay

An early release hearing is authorized under TFC 54.11. It allows TYC to petition the court for release of a child on parole prior to completing the statutory minimum length of stay. This is intended to create an incentive/reward for the child to participate and do well in the programs at TYC. The release hearing works the same way as a transfer hearing and the decision is NOT appealable.

Determinate Sentence Parole

If the child is paroled from TYC prior to age 19, parole begins on TYC parole and automatically transfers to TDCJ parole at age 19 if the entire sentence has not been served. HRC 61.084(g). TYC cannot discharge the child from parole unless the entire sentence has been served. HRC 61.084. Adult parole time is computed as the original sentence length, less time the child spent in TYC, in detention, and on TYC parole. If the child is transferred to adult parole, the adult parole revocation procedures apply. If the child is revoked after being transferred to adult parole, the child may be required to serve out the remainder of his/her sentence in TDCJ. In any event, the child cannot be returned to TYC after a transfer.