

Determinate Sentencing proceedings for the Violent or Habitual Offender

This is an outline of Chapter 21 of Texas Juvenile Law 5th Edition written by Dr. Robert O. Dawson published September 2000. Page numbers listed in the brackets refer to pages in the above referenced book.

I. Determinate Sentencing Act [D/S] [p. 347-348]

- A. 1987 - originally up to 30 years
- B. 1991 - increased up to 40 years
- C. 1995 - Two major changes:
 - 1. Number of covered offenses increased from five to about thirty; and
 - 2. Method of determining whether or when sentenced youth paroled or transferred to adult prison was completely altered.

II. Scope of the Legislation [p. 348]

A. Offenses originally covered:

- 1. 19.02 PC [murder]
- 2. 19.03 PC [capital murder]
- 3. 20.04 PC [aggravated kidnapping]
- 4. 22.021 PC [aggravated sexual assault]
- 5. 22.03 PC [deadly assault on a law enforcement officer, corrections officer, or court participant]
- 6. 15.01 PC [criminal attempt if offense attempted was capital murder]
[Note: PC = Penal Code, FC = Family Code, D/S = Determinate Sentence, CCP = Code of Criminal Procedure, HRC = Human Resource Code, GC = Government Code]

B. Sexual Assault and Aggravated Sexual Assault [p. 348]

- 1. 1991 - Aggravated sexual assaults excluded from D/S when:
 - (i) Purely consensual & victim under 14
 - (ii) Actor not more than 2 years older than victim
- 2. 1995 - Exclusion expanded:
 - (i) To include sexual assault and
 - (ii) Actor not more than 3 years older than victim
- 3. Exclusion does not apply to use of force or threats = D/S without regard to age difference
- 4. 3 years age difference:
 - (i) Dawson believes affirmative defense
 - (ii) Burden of proof on respondent
 - (iii) Jury trial - submit special issue re 3 year requirement
- 5. Sexual Assault - 22.011 (a)(2) PC allegation
 - (i) If respondent falls within 3 year age difference = no D/S and
 - (ii) If respondent also shows not required to register as a sex offender = not guilty by virtue of 22.011(e) Penal Code affirmative defense

6. Aggravated Sexual Assault - 22.021 PC allegation
 - (i) If respondent falls within 3 year age difference = no D/S
 - (ii) Respondent can be found delinquent under ordinary delinquency provisions
NOTE: 22.021 PC does not have a 3-year affirmative defense to prosecution

C. Punishment Authorized [p. 349]

1. Adult Cases

- (i) Capital Murder - death or life imprisonment [12.31(a) PC]
- (ii) 1st Degree Felony - confinement 5 to 99 years [12.32(a) PC] (+) fine up to \$10,000 [12.32(b) PC]
- (iii) Capital Murder Conviction = not eligible for probation [Article 42.12, Section 3 & 3g (a)(A) CCP]
- (iv) Any case other than capital murder = jury may grant probation if punishment 10 years or less and defendant never before convicted of a felony [Article 42.12, Section 4(a) CCP]
- (v) Judge may grant probation to defendant with a prior felony conviction
- (vi) Judge may not grant probation for aggravated kidnapping or aggravated sexual assault or if deadly weapon finding [Article 42.12 Section 3g CCP]

2. Juvenile Cases

- (i) Death penalty not available for a transferred juvenile convicted of capital murder. [8.07(c) PC]
- (ii) Adjudicated for one of six original offenses judge or jury may sentence up to 40 years or until 1999 court or jury could grant probation up to 18th birthday
- (iii) 1999 - if a punishment of 10 years or less - judge or jury may grant probation. Judge can place on probation for any term not to exceed 10 years.

3. Minimum Age of 10 [p. 349] -Applies to Determinate Sentencing cases

4. Deadly Assault on Law Enforcement Officer [p. 349] - repealed effective September 1, 1994

D. Offenses Added in 1995 [p.349] - increased offenses covered by the D/S act from five to 30 - only included offenses committed on or after January 1, 1996.

E. Second and Third Degree Felonies [p. 349] - Changed dispositional provisions

1. Capital, aggravated controlled substance or first degree felony = up to 40 years [54.04(d)(3)(A) FC]
2. Second degree felony = up to 20 years [54.04(d)(3)(B) FC]
3. Third degree felony = up to 10 years [54.04(d)(3)(C) FC]

F. New Assaultive Offenses - Legislature added 7 assaultive offenses to D/S act:

1. Sexual Assault [Section 53.045(a)(4) FC]
2. Aggravated Assault [Section 53.045(a)(5) FC]
3. Aggravated Robbery [Section 53.045(a)(6)]
4. Injury to Child, Elderly Individual or Disabled Person, Other Than a State Jail Felony [Section 53.045(a)(7) FC]
5. Felony Deadly Assault Involving the Discharging a Firearm [Section 53.045(a)(8) FC]
6. Indecency With a Child by Contact [Section 53.045(a)(11) FC]

7. Attempted Murder [Section 53.045(a)(13) FC]
- G. Attempted 3g Offenses [p. 349] - Legislature added criminal attempt to commit any “3g” offense listed in Article 42.12, Section 3g CCP to D/S act:
1. Murder
 2. Capital Murder
 3. Indecency With a Child by Contact
 4. Aggravated Kidnapping
 5. Aggravated Sexual Assault
 6. Aggravated Robbery
 7. Sexual Assault
- [Note: This provision covers any criminal attempt defined by Section 15.01 PC = one penalty lower than completed offense]
- H. Certain drug offenses are also 3g offenses but only if person has a prior adult conviction for a drug offense = no applicability to juvenile offenders. [p.350]
- I. Criminal Solicitation [p.350] - Added as a D/S offense
1. Section 15.03 PC Criminal Solicitation - when one solicits another to commit a capital felony or first degree felony
 2. Offense complete when solicitation occurs even if offer is not accepted
 3. Punishable one category lower than the offense solicited.
- J. Criminal Solicitation of a Minor, Section 15.031 PC added as a D/S offense
1. When a person solicits another under 17 years of age to:
 - (i) Commit a 3g offense
 - (ii) Commit 21.11 PC, Indecency With a Child
 - (iii) Commit 22.011 PC, Sexual Assault
 - (iv) Commit 22.021 PC, Aggravated Sexual Assault
 - (v) Commit 43.25 PC, Sexual Performance by a Child
 2. Punishable one category lower than the offense solicited.
[Note: Dawson says would not apply to 21.11(a)(2) {3rd Felony} or 43.25 (d) {3rd Felony}]
- K. Drug Offenses [p. 350]
1. D/S offenses include violations of the controlled substance act that are felonies of the first degree or aggravated controlled substance felonies. [53.045(a)(9) FC]
 2. Aggravated controlled substance felony = one carrying a higher minimum sentence or a higher fine than carried by a first degree felony. [51.02(1) FC]

L. Habitual Felony Conduct [p. 350]

1. D/S offense = habitual felony conduct [53.045(a) FC] enacted in 1995
2. Habitual felony conduct is a felony other than a state jail felony engaged in by a child who has at least two previous adjudications for felonies if the second previous adjudication is for conduct that occurred after the date the first adjudication became final. [51.031 FC]
3. The second previous final adjudication is for conduct that occurred after the date of the first previous adjudication became final.
4. Penalty category = penalty category for offense currently being prosecuted [54.04(m) FC]
5. Amended in 1997:
 - (i) Prior adjudication counts whether juvenile was placed on probation or committed to TYC
 - (ii) Each of the prior adjudications must be based on conduct that occurred on or after January 1, 1996
 - (iii) Prior adjudication does not count if on appeal at time offered under this section

M. Arson With Injury [p. 350] -Amended in 1997 to add Arson [28.02 PC] if the arson resulted in death or bodily injury to the D/S act - First Degree Felony.

N. NEW LAW - September 1, 2001 AMENDMENT - the following offenses were added to the D/S act:

1. Section 19.04 Penal Code, Manslaughter - Second Degree Felony - added to Section 53.045(a)(3)
2. Section 49.08 Penal Code, Intoxication Manslaughter - Second Degree Felony - added to Section 53.045(a)(16)

III. Constitutionality of the Legislation [p.350] - Constitutionality of the D/S act has been upheld surviving the numerous attacks:

- A. Equal Protection of the Laws [p. 350]
- B. Right to Grand Jury Indictment [p. 350]
- C. Vagueness [p. 352]
- D. Involuntary Servitude [p. 352]
- E. Imprisonment Without a Conviction [p.352]
- F. Double Jeopardy [p. 352]
- G. Separation of Powers [p. 352]

IV. Initiating the Proceedings Under the Legislation [p. 353]

A. Prosecutor's Decision [p. 353]

1. Decision whether to pursue ordinary delinquency case or D/S is totally within discretion of the prosecutor.
2. Delinquency petition must have been filed in juvenile court.
3. Petition must allege at least one of the covered offenses. [53.045 FC]
[Note: Petition may also allege non-covered offenses but that does not convert the non-covered offenses into covered ones]
4. Prosecutor is not required to promulgate guidelines as to when the D/S act will be initiated.
5. Prosecutor is not required to inform the grand jury of the alternatives available in the juvenile system should it disapprove of the petition.

B. Presentation to Grand Jury [p. 354]

1. To invoke the D/S statute the prosecutor presents the petition to the grand jury. Once the grand jury's approval is certified to the juvenile court, determinate sentence proceedings have begun.
2. The prosecutor could get the petition approved by the grand jury prior to filing it in the juvenile court.
3. The respondent does not have a right to an examining trial before the prosecutor presents the case to the grand jury.

C. Grand Jury Approval [p. 354]

1. Grand jury may approve a petition by a vote of nine members. [53.045(b) FC]
2. Grand jury has the same investigative powers as in criminal cases but may not issue an indictment unless juvenile certified to adult court under Section 54.02 [53.045(c) FC]
3. Grand jury may subpoena witnesses to testify. [Article 21.10 CCP]
4. If witness refuses to testify without a privilege to refuse, the witness can be held in contempt of the District Court that assembled the grand jury and fined or confined until testify. [Article 20.15 CCP]
5. Grand jury can seek to question a suspect or the accused, but they would have privilege against compelled self-incrimination which, if asserted, would preclude being held in contempt for refusing to answer questions. [Article 20.17 CCP]
6. A suspect or accused has no right to be present during the presentation of testimony before a grand jury, or even any right to be told that evidence involving him is being or will be presented.
7. It is up to the grand jury whether to permit a suspect/accused who wishes to do so to testify before it or to permit the presentation of other witnesses, evidence or information on behalf of the suspect/accused. [Article 20.011 CCP]
8. All proceedings of the grand jury are secret. [Article 20.02 CCP]

- D. Grand Jury Rejection [p. 354] - if nine members of the grand jury do not vote to approve the petition, then the prosecutor has the following choices:
1. Proceed as an ordinary delinquency.
 2. Present the same petition to the same grand jury or to a different or subsequent grand jury to seek its approval.
 3. If respondent was 15 or 16 at the time of commission of felony or 14 at time of commission of a capital, first degree or aggravated controlled substance felony - prosecutor could file a petition requesting discretionary transfer to criminal court.
- E. Grand Jury Advice in Non-Determinate Sentence Cases [p. 354]
1. 1999 enacted Section 53.035 FC to authorize prosecutors to seek the advice of grand juries about whether to proceed in any juvenile case.
 2. Section 53.035(c) FC - if grand jury votes to take no action - the prosecuting attorney may not file a petition under Section 53.04 unless the same or a successor grand jury approves the filing of the petition.
- F. Probable Cause [p. 355] - Grand Jury should be instructed that it should approve the juvenile petition only if it finds probable cause.
- G. Certificate of Approval [p. 355]
1. The fact of grand jury approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case. [Section 53.045(d) FC]
 2. Grand jury certification is required to be in writing.
 3. Grand jury should return the approved petition to the appropriate district court, just as an indictment is returned
 4. The district clerk should certify the grand jury's approval to the juvenile court in which the petition was previously filed.
- H. What the Grand Jury Must Approve [p.355]
1. Grand jury must have had presented to it and must have approved the same petition that forms the basis for the D/S act proceedings.
 2. Amended petitions [unless amendment is not material] should be presented to the grand jury.
- I. Amendments in Approved Petitions [p. 355]
1. Prosecutor may amend a petition after approval by grand jury only if the amendment is not material.
 2. See: Article 28.10 CCP Amendment of Indictment - Amendment was not material - it did not charge the juvenile with additional or different offenses and prejudiced none of his substantial rights.
 3. Personal service of an original petition on a respondent is a jurisdictional prerequisite to proceedings. Is personal service of an amended determinate sentence petition required? In the Matter of G.A.T., 16 S.W.3d 818 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) the Court of Appeals held that it was not necessary to serve the amended petition on the respondent. Result may be different if the amended petition charged an offense or used a legal theory not in the original petition.

- J. Waiver of Grand Jury Approval [p.356]
 - 1. Article 1.141 CCP - adults can waive grand jury consideration of whether they will be charged by indictment with a felony.
 - 2. Juvenile and attorney by complying with 51.09 FC can waive juvenile's right to grand jury approval of the petition.
- K. Waiver by Failure to Object [p. 356] - Failure to object before trial to pleading deficiencies in a juvenile D/S petition is a waiver of the right to complain about those defects on appeal.
- V. Adjudication Proceedings [p. 356] - All of the requirements that apply to adjudication hearings in ordinary delinquency cases also apply to D/S adjudication hearings.
 - A. County Judges and Referees/Masters [p. 357]
 - 1. Referee/Master cannot hear D/S cases [54.10(c) FC]
 - 2. Constitutional County Court does not have jurisdiction to handle D/S cases 51.04a(c) [even if a county judge is a lawyer - prohibited from hearing a D/S case]
 - 3. Any district court, criminal district court, family district court or county court-at-law that has been designated as a juvenile court may conduct adjudication and disposition hearings in D/S case.
 - B. Trial by Jury [p. 357]
 - 1. All juveniles have a right to trial by jury in the adjudication hearing - may be waived by juvenile and attorney under Section 51.09 FC
 - 2. Jury verdict must be unanimous [Section 54.03(c)]
 - C. Size of Jury [p. 357]
 - 1. Ordinary Delinquency Adjudication:
 - (i) District Court - 12 person jury
 - (ii) County Court - 6 person jury
 - 2. Determinate Sentencing Case
 - (i) Twelve person jury [Section 51.045 FC]
 - (ii) 54.03 (c) AMENDMENT SEPTEMBER 1, 2001 - If the hearing is on a petition that has been approved by the grand jury under Section 53.045 the jury must consist of 12 persons *and be selected in accordance with the requirements in criminal cases.*
 - D. Peremptory Challenges [p. 357]
 - 1. Question of whether to use criminal rules or civil rules [best practice = 10 strikes if D/S cases] resolved by September 1, 2001 amendment.
 - 2. NEW LAW Amendment September 1, 2001 - Section 54.03(c) FC requires jury in D/S cases to be selected in accordance with the requirements in criminal cases so Article 35.15(b) applies to D/S cases. [10 peremptory challenges or if more than one respondent each side has 6 strikes for each respondent]

E. Proof and Evidence [p. 357]

1. Proof beyond a reasonable doubt [Section 54.03(f)]
2. Evidence illegally seized or obtained is inadmissible [Section 54.03(e)]
3. Adjudication cannot be had upon testimony of an accomplice unless corroborated [Section 54.03(e)]
4. Privilege against self-incrimination [Section 54.03(e)]
5. Extra-judicial statement obtained in violation of Title 3 FC or Texas or United States constitutions may not be used in adjudication [Section 54.03(e)]
6. Out of court statement made by child is insufficient to support finding of delinquency or CINS unless corroborated [Section 54.03(e)]

F. Multiple Counts [p.358]

1. Section 54.03(h) - Court or jury shall state which of the allegations in the petition were found to be established by the evidence.
2. Judge or jury must find for the State on at least one of the covered offenses to have a D/S disposition.
3. If court or jury finds against State on covered offenses but finds for State on a lesser included offense or on a non-covered offense - proceed as a conventional delinquency case. Discharge jury and court handles disposition.

VI. Special Disposition Hearing [p. 358]

A. Jury Sentencing [p. 358]

1. Conventional delinquency - no right to jury at disposition [Section 54.04(a)]
2. Right to jury sentencing in D/S cases [Section 54.04(a)]
3. Same jury for adjudication and disposition
4. Jury at disposition may consider evidence from adjudication + additional evidence
5. Jury may not be given social history report or social service file [Section 54.03(d)]

B. Extraneous Offense Jury Instruction [p. 358]

1. Code of Criminal Procedure 37.07, Sec.3(a) permits the judge or jury to consider in fixing punishment "evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant ... regardless of whether he has previously been charged with or finally convicted of the crime or not." In criminal cases, the trial court must instruct the jury that it is required to find the defendant responsible for any such acts beyond a reasonable doubt before it may consider them in fixing punishment."
2. In the Matter of M.O.M., UNPUBLISHED, it was reversible error for the court to refuse to instruct the jury in a juvenile D/S case in accordance with the [CCP 37.07, Sec.3(a)] requirements in criminal cases. NOTE: The requirements in CCP 37.07 do not apply in juvenile cases. However, the respondent in a D/S case must be given all of the important procedural rights that a criminal defendant charged with the same offense would enjoy.

B. Jury Waivers [p. 358]

1. Juvenile and attorney have right to waive jury sentencing and to have the court to do it instead.
2. Juvenile may:
 - (i) Waive jury altogether and go to the court for adjudication and disposition
 - (ii) Have jury for adjudication and waive jury on disposition
 - (iii) Have jury for both adjudication and disposition
 - (iv) Waive jury for adjudication and have a jury for disposition
3. Family Code does not impose a deadline for electing jury punishment. Unless jury sentencing has been waived - qualify panel - members of jury must be able to consider full range of punishment. [Adult cases -Article 37.07, Section 2(b) CCP - requires election of jury punishment prior to voir dire]

C. Unanimous Verdict and Mistrials [p. 358]

1. Jury verdicts must be unanimous [Section 54.03(c)]
2. Same jury that considered guilt/innocence must fix the penalty. Mistrial on punishment = mistrial as to entire case including guilty verdict. [Article 37.07, Section 3(c) CCP]

D. Required Findings [p. 359]

1. Child is in need of rehabilitation or the protection of the public or the child requires that disposition be made. If this finding is not made - the court is required to dismiss the child and enter a final judgment without any disposition. [Section 54.04(c)] Family Code does not state burden of proof - so use beyond a reasonable doubt.
2. 1993 Amendment - Section 54.04(d)(1)(B) - May not place child outside home unless finding that 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. [Note: this finding is required by 54.04(d) to commit to TYC] Family Code does not state burden of proof - so use beyond a reasonable doubt.
3. Required findings by juvenile court [not jury] if the respondent is committed to TYC or placed outside the home [Section 54.04(i)]:
 - (i) It is in the child's best interests to be placed outside the home
 - (ii) 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
 - (iii) 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.
[Note: FC does not state burden of proof - so use beyond a reasonable doubt]

E. Probation [p. 359]

1. If jury grants probation - judge sets conditions
2. 1999 Legislation:
 - (i) If judge or jury assesses punishment of 10 years or less - judge or jury may grant probation.
 - (ii) Judge prescribes period of probation not to exceed 10 years.
 - (iii) Court may - before probation expires - extend probation under 54.05 - probation + extension may not exceed 10 years. [54.04(q)]
 - (iv) D/S probation supervised by juvenile probation until 18th birthday - supervision may be transferred to criminal court.

F. Sentence Length [p.360]

1. D/S Sentences:
 - (i) Not more than 40 years
 - (a) Capital felony
 - (b) First degree felony
 - (c) Aggravated controlled substance felony
 - (ii) Not more than 20 years = second degree felony
 - (iii) Not more than 10 years = third degree felony
2. Jury Instructions - Do not instruct jury concerning possible effects of laws relating to good conduct time or parole [Required in adult cases - Article 37.07, Section 4 CCP]

G. Deadly Weapon Findings [p.360]

1. Respondent is entitled to notice before adjudication that State is seeking a deadly weapon finding.
2. Notice can be provided in 3 ways:
 - (i) Petition alleges offense committed with deadly weapon
 - (ii) Petition alleges a homicide
 - (iii) State sends notice of intent to seek a deadly weapon finding
3. Jury Sentencing
 - (i) Special Issue at dispositional hearing
 - (ii) Whether jury finds beyond reasonable doubt that the respondent used or exhibited a deadly weapon during the commission or immediate flight
 - (iii) 54.04(g) FC applies only to D/S cases
 - (iv) 54.04(g) FC requires personal use by respondent [Adult cases - Article 42.12, Sec. 3g(2) allows deadly weapon finding for party if knew weapon would be used or exhibited]
4. Length of incarceration affected by deadly weapon finding if respondent is transferred from TYC to TDCJ [Government Code Section 508.145(b)]

H. Credit for Time in Custody [p. 361]

1. Include amount of time in custody in commitment orders.
2. Required to determine parole eligibility if juvenile is later transferred to TDCJ. [Government Code Section 499.053]

VII. Probation [p. 361]

A. Before 1999 Amendments [p. 361]

1. If probation was granted by judge or jury a sentence was not assessed - a term of probation up to age 18 was set.
2. If probation was later revoked the respondent may be sentenced to any term that could have originally been assessed.
3. D/S probation like deferred adjudication for adults [Article 42.12, Section 5 CCP]

B. 1999 Amendments [p. 361]

1. If judge or jury assesses punishment of 10 years or less - that authority may grant probation - judge determines length of probation [like criminal cases Article 42.12, Sec. 4(b) CCP][54.04(q) FC]
2. Judge may set probation term up to 10 years.
3. If probation term initially selected is less than 10 years -judge may extend term for up to a total of 10 years. [54.04(q) FC]
4. Judge may discharge from supervision at any time - no minimum term of supervision [Section 54.04(q) FC]
5. If probation is revoked - judge may order shorter sentence but sentence may not be longer than punishment originally assessed which can never be longer than 10 years. [Identical to adult revocation]
6. If probation term extends beyond 18th birthday - court must discharge child on 18th birthday unless earlier transferred supervision to criminal court.
7. Transfer procedures - Section 54.051 FC:
 - (i) Motion of state - juvenile court shall hold hearing to determine whether to transfer or discharge
 - (ii) Hearing must be conducted before child's 18th birthday + same manner as 54.05 hearing
 - (iii) If court discharges child - court shall specify discharge date on or before child's 18th birthday
 - (iv) If court transfers child - shall transfer on 18th birthday.
 - (v) Child transferred shall be placed on community supervision for remainder of probationary period - consistent provisions as ordered by juvenile court.
 - (vi) Child transferred - district court shall dispose of violation of community supervision or probation [if violation not discovered by state before child's 18th birthday] in same manner as if court had originally exercised jurisdiction.
 - (vii) Probation time counted for eligibility for early discharge under Section 20, Article 42.12 CCP.
 - (viii) Probation violation not required for transfer to appropriate district court.

C. Restitution [p. 362]

1. New Law Sept.1, 2001: FC 54.041(h) If the juvenile court places the child on probation in a determinate sentence proceeding initiated under Section 53.045 and transfers supervision on the child's 18th birthday to a district court for placement on community supervision, the district court shall require the payment of any unpaid restitution as a condition of the community supervision. The liability of the child's parent for restitution may not be extended by transfer to a district court for supervision.

D. No Right to a Jury Trial at Revocation [p. 362]

1. Right to jury at revocations for D/S offenses committed prior to September 1, 1999.
2. No right to jury at revocations for D/S offenses on or after September 1, 1999.

E. Revocation Procedures [p. 362]

1. D/S probation revocations = same standards and procedures as ordinary juvenile probation revocations
2. Upon revocation, juvenile court may impose a D/S of any length up to sentence originally assessed
3. Same sentencing authority for criminal courts in revocation of D/S probation transfers

VIII. Parole, Discharge and Transfer for Offenses Committed Before January 1,1996 [p. 363]

- A. D/S offense prior to January 1, 1996 -TYC prohibited from release/discharge of child before full sentence served without court approval. [HRC Sections 61.081(f) & 61/084(a)]
- B. Child in TYC at age 17 ½ must be referred to juvenile court for release/transfer hearing - must be set and hearing held before 30 days before 18th birthday. [54.11(h) before 1995 amendment]
- C. Release/Transfer Hearing - Juvenile court could order:
 1. Transfer to TDCJ
 2. Absolute discharge, or
 3. Indeterminate commitment to TYC
[Note: Transfer occurred immediately - not on 18th birthday]
- D. If child released on parole with the approval of juvenile court:
 1. Child will remain on parole until it is revoked
 2. Until total calendar time served in institution, detention and on parole equals the D/S
 3. Until 21st birthday, or
 4. Until discharged by the juvenile court, whichever occurs first. [HRC 61.084(a) & (c)]
- E. If child is kept in the juvenile system = sentence served at age 21

IX. Parole, Discharge and Transfer for Offenses Committed On or After January 1, 1996 [p. 363]

A. TYC Parole [p.363] - Authority to parole without court approval after completion of minimum length of stay

1. Statutory Minimum Lengths of Stay [p. 363]

- (i) TYC may parole child upon completion of minimum length of stay.
- (ii) Minimum Lengths of Stay:
 - (a) 10 years - capital murder
 - (b) 3 years - 1st Degree Felony, Aggravated control substance felony
 - (c) 2 years - 2nd Degree Felony
 - (d) 1 year - 3rd Degree Felony

2. Early Parole [p. 364]

- (i) TYC may petition juvenile court for authority to release child on parole before completion of minimum length of stay. [54.11(a) FC]
- (ii) Court may approve or disapprove release on parole [54.11(j) FC]
- (iii) Section 54.11 FC notice/hearing provisions apply

3. Capital Murder Cases [p. 364]

- (i) 10 year minimum length of stay + automatic transfer to TDCJ for any child in TYC at age 21
- (ii) Early parole hearings would give incentive for participation in TYC rehabilitative programs

4. Parole Supervision [p. 364]

- (i) If paroled by TYC before 19th birthday - supervised by TYC parole until revoked or until age 21
- (ii) TYC has no power to discharge from parole unless entire sentence served [HRC 61.084(a)]

B. Adult Parole [p. 364]

1. TYC Parolee at Age 21 [p.364]

- (i) TYC parole supervision at age 21 automatically transferred to adult parole [HRC 61.084]
- (ii) Adult parole term = sentence less calendar time served at TYC + juvenile detention facility + time served on TYC parole.

2. TYC Resident at age 21 [p. 365] - TYC resident at age 21 [unless capital murder] administratively transferred to adult parole supervision for balance of D/S. [HRC 61.084(g), Government Code 508.156]

3. Released by TYC on Parole after Age 19 [p. 365] - placed on adult parole for balance of the sentence [HRC 61.084(f), GC 508.156(d)]

4. Revocation of Adult Parole [p. 365]

- (i) Person serving D/S on adult parole supervision is subject to ordinary adult parole revocation

- (ii) If parole panel revokes - may require person to serve portion remaining of sentence in institutional division. [GC Section 508.145(e)]
- (iii) Cannot return person to TYC

C. Transfer to Prison [p. 365]

1. On TYC Petition [p. 365]

- (i) At any time after TYC resident's 16th birthday TYC may petition juvenile court to transfer to prison [HRC 61.079(a)(2)]
- (ii) Juvenile court must hold hearing within 60 days of receiving referral from TYC. [FC 54.11(h)]
- (iii) Hearing = 54.11 procedures
- (iv) Juvenile court may:
 - (a) Return youth to TYC or
 - (b) Transfer youth to prison for balance of D/S [FC 54.11(i)]

D. Juvenile court has jurisdiction to conduct release/transfer hearing without regard to respondent's age. [51.0411 added 1997]

1. Following Revocation of TYC Parole [p. 365]

- (i) Youth released on TYC parole - parole is revoked - TYC may petition juvenile court to transfer youth age 16 or older to prison
- (ii) Must revoke TYC parole before may petition for transfer to prison [HRC 61.079(c)]

2. Following Revocation of Adult Parole [p. 365]

- (i) Youth under D/S on adult parole and that parole is revoked - youth may be committed to prison to serve the balance of the sentence computed without credit for the time spent on parole.
- (ii) Youth may not be returned to TYC. [GC Section 508.156(e)]

3. Mandatory Transfer for Capital Murder Offenders [p. 365] - Youth under D/S for capital murder if at age 21 is a TYC resident -automatic transfer to prison to serve balance of sentence [HRC Section 61.084(d)]

E. Release or Transfer Hearing [p. 366]

1. Purpose of Hearing Under 1995 Amendments [p. 366]

- (i) TYC to petition for release on parole before youth has served minimum length of stay
- (ii) TYC petition for order transferring a youth 16 or older to TDCJ

2. Notice of Hearing [p. 366]

- (i) Court required to give notice of time and place of hearing to:
 - (a) Person to be transferred or released
 - (b) Parents
 - (c) Legal custodian including TYC
 - (d) Prosecuting Attorney
 - (e) Victim/member of victim's family and
 - (f) Any other person who has filed written request to be notified

- (ii) Failure to give notice to anyone except child and prosecutor does not affect validity of hearing if whereabouts unknown and reasonable effort made to locate
 - (iii) Courts of Appeals have rejected arguments that the appellate record must show that the juvenile respondent received formal notice of the release/transfer hearing. The fact that the juvenile court ordered that proper notice be given, that the juvenile and his/her attorney appeared at the hearing, and the absence of a motion for continuance on the ground of lack of notice are in the aggregate sufficient evidence that notice was proper.
3. Right to Counsel and Guardian Ad Litem [p.367]
- (i) Child entitled to attorney at release/transfer hearing. [54.11(e)]
 - (ii) Child entitled to appointed counsel if parents unable to pay for attorney [51.10 (a) & (f)]
 - (iii) State is represented by local prosecutor and not the Attorney General.
 - (iv) Court must appoint a guardian ad litem at the release/transfer hearing if a parent or guardian is not present. [51.11]
 - (v) Child's attorney may be appointed as guardian ad litem.
4. Jury Trial and Admonitions [p. 367]
- (i) No right to jury at release/transfer hearing
 - (ii) 54.03(b) admonitions are not required at release/transfer hearing.
5. Evidence [p. 367]
- (i) Section 54.11(d) court may consider written reports from:
 - (a) Probation officers
 - (b) Professional court employees
 - (c) Professional consultants
 - (d) TYC Employees [September 1, 2001 Amendment]
 - (e) Also - testimony of witnesses
 - (ii) Attorney for person to be transferred/released shall be provided access to all written material at least one day prior to hearing
 - (iii) Person to be transferred/released entitled to:
 - a. Attorney
 - b. To examine all witnesses against him
 - c. To present evidence
 - d. Oral argument
 - e. Previous examination of all reports, evaluations, etc. used in hearing
6. Right to Expert Assistance [p. 369]
- (i) Appointment of mental health expert in release/transfer hearing required by the Due Process Clause when indigent juvenile makes the required showing to justify the appointment.
 - (ii) In the Matter of R.D.B., 20 S.W.3d 255 (Tex.App. – Texarkana 2000) held that failure of counsel to request expert assistance [where background of mental health problems of his client was plainly evident] was ineffective assistance of counsel requiring that the transfer order be set aside.

7. Chapter 55 Proceedings [p. 369]
 - (i) In the Matter of B.D., 16 S.W.3d 77 (Tex. App. – Houston [1st Dist.] 2000, pet. denied) the court of appeals said that Chapter 55 did not apply to these proceedings [release/transfer hearing] because the respondent was over 18 years of age at the time of the hearing. Chapter 55 applies only to a “child” as defined by FC 51.02. NOTE: There was no claim in this case that the respondent was unfit or incompetent to participate in the transfer hearing.
 - (ii) In the Matter of J.A.H., UNPUBLISHED – holding that by granting the respondent’s motion for appointment of a mental health expert to determine his fitness to undergo a release/transfer hearing the juvenile court met due process standards; Section 55.04 [now 55.31] does not apply to 54.11 hearings.

8. Public Hearing and Hearing Record [p. 369]
 - (i) 54.11(f) hearing open to public unless waived by person with consent of his attorney and court
 - (ii) 54.11(g) hearing must be recorded by court reporter or by audio or video tape recording and retained for at least 2 years.

9. Statutory Criteria [p. 369] - 54.11 (k)
 - (i) Character of person before and after TYC commitment
 - (ii) Nature of offense and manner committed
 - (iii) Abilities of person to contribute to society
 - (iv) Protection of victim/members of victim’s family
 - (v) Recommendations of TYC and prosecuting attorney
 - (vi) Best interests of person
 - (vii) Any other factor relevant to issue to be decided

10. TYC Criteria and Procedures in Seeking Transfer [p. 370]
 - (i) Description of procedures employed by TYC in deciding whether to process a case for possible transfer to TDCJ.

11. Findings of Fact and Conclusions of Law [p. 370] - No requirement in Section 54.11 that juvenile court judge must state reasons for transfer.

12. Appeal [p. 370]
 - (i) Section 56.01(c)(2) -child has right to appeal order transferring child to TDCJ
 - (ii) By implication, child may not appeal order refusing release under supervision
 - (iii) Appeal - first to Court of Appeals as a civil case – may be reviewed as discretionary matter by Texas Supreme Court [56.01(a)]
 - (iv) Section 56.01(g) - appeal does not suspend juvenile court order nor does it release child from commitment -unless juvenile court so orders
 - (v) Abuse of discretion is standard of review
 - (vi) Only TYC can initiate process to transfer to TDCJ

- X. After Transfer to the Department of Criminal Justice [p. 370]
 - A. Once transferred person is in custody of TDCJ, adult rules for parole eligibility and mandatory release apply.
 - B. Board of Pardons and Paroles controls timing of release from TDCJ. [GC 499.053(c)]
 - C. Retroactive good conduct time + time detained in TYC or detention counted for parole eligibility. [GC 499.053(c)]
 - D. Parole Eligibility [p.370]
 - 1. D/S offense committed before September 1, 1993:
 - (i) "3g" offense or deadly weapon finding:
 - (a) Eligible for parole if served 1/4th of sentence or
 - (b) 2 calendar years - whichever is greater
 - (ii) All other D/S offenses - eligible for parole when calendar time + good conduct time equals sentence.
[REPEALED]
 - 2. D/S offense committed on or after September 1, 1993:
 - (i) "3g" offense [except capital murder] or deadly weapon finding to be eligible for parole:
 - (a) Must serve 1/2 of sentence or 30 years whichever is less
 - (b) In no event less than 2 calendar years
 - (ii) All other D/S offenses - eligible for parole when serve 1/4th of sentence with credit for good conduct.
 - E. Capital Murder Presents a Special Case [p. 371]
 - 1. Adult given life sentence for capital murder must serve 40 years to become eligible for parole. [1993 amendment -GC 508.145(b)]
 - 2. Juvenile adjudicated for capital murder:
 - (i) Does not come under 40 year rule
 - (ii) Ordinary parole eligibility of 1/4th sentence unless deadly weapon finding = 1/2 sentence or 30 years whichever is less
 - (iii) NEW LAW 2001 – Government Code 499.053(d) – adult parole eligibility for a juvenile with a D/S for capital murder is achieved in one-half of the sentence, whether or not there is a deadly weapon finding.
 - 3. "3g" offenses added to D/S act effective January 1, 1996:
 - (i) Indecency with a child by contact
 - (ii) Aggravated robbery
 - (iii) Sexual assault of child
 - (iv) Parole eligibility = 1/2 of sentence served
 - 4. "3g" offense of sexual assault of child expanded to include adult or child

F. Mandatory Release [p. 371]

1. Eligible for mandatory conditional release when calendar time + good conduct time = sentence
2. Not eligible for mandatory conditional release if transferred from TYC to TDCJ with deadly weapon finding or for one of the following offenses [1987 amendment]:
 - (i) Capital murder
 - (ii) Murder [1st degree only]
 - (iii) Aggravated kidnapping [1st or 2nd degree]

Determinate Sentence Cases

*This outline of cases is taken from the
March 2002 Juvenile Law Section Report, Volume 16, No.1*

RELEASE/TRANSFER HEARINGS

1. In the Matter of R.V., 8 S.W.3d 692 (Tex. App. – Fort Worth 12/2/99)
Cannot challenge adjudication by motion for new trial filed after transfer to TDCJ.
2. In the Matter of J.M.O., 980 S.W. 811 (Tex.App. – San Antonio 9/30/98, review denied)
Confrontation right not violated by hearsay testimony at release/transfer hearing.
3. In the Matter of J.E.H., 972 S.W.2d 928 (Tex.App. – Beaumont 8/27/98)
Error not to appoint mental health expert at release/transfer hearing; no error in appointing counsel as guardian ad litem.
4. In the Matter of M.R., 5 S.W.3d 879 (Tex.App. – San Antonio 11/3/99)
Failure to grant continuance in release/transfer hearing denied juvenile of the right to confront witnesses.
5. In the Matter of J.T., UNPUBLISHED, No. 05-97-00823-CV, 1998 WL 351268, 1998 Tex.App.Lexis 3998(Tex.App. – Dallas 7/2/98)
If error, harmless not to appoint guardian ad litem at TDCJ transfer hearing.
6. No discretion abuse in transfer from TYC to TDCJ.
In the Matter of R.L., UNPUBLISHED, No. 07-97-0019-CV, 1997 WL 243485, 1997 Tex.App.Lexis 2544 (Tex.App. – Amarillo 5/12/97)

In the Matter of P.F., UNPUBLISHED, No. 07-97-0496-CV, 1998 WL 526492, 1998 Tex.App.Lexis 5316 (Tex.App. – Amarillo 8/24/98) [Anders brief accepted]

In the Interest of C.E.P., UNPUBLISHED, No. 05-96-00110-CV, 1997 WL 264096, 1997 Tex.App.Lexis 2657 (Tex.App. – Dallas 5/20/97)

In the Matter of R.G., 994 S.W.2d 309 (Tex.App. – Houston[1st Dist.] 5/27/99, ped.filed 8/11/99) [contrary to expert recommendation]

In the Matter of Duncan, UNPUBLISHED, No. 07-97-0220-CV, 1998 WL 75056, 1998

7. In the Matter of L.C., UNPUBLISHED, No. 04-97-00727-CV, 1998 WL 204927, 1998 Tex.App.Lexis 2545 (Tex.App. – San Antonio 4/29/98)
Not error to refuse to appoint psychologist to assist counsel to understand information at TDCJ transfer hearing.
8. In the Matter of J.L.C., UNPUBLISHED, No. 01-97-01077-CV, 1998 WL 304513, 1998 Tex.App.Lexis 3541 (Tex.App. – Houston [1st Dist.] 6/11/98)
Transfer to TDCJ is lawful although juvenile is not criminally prosecuted or convicted under D/S act.
9. J.S.L. v. State, UNPUBLISHED, No. 05-96-00690-CV, 1997 WL 34537, 1997 Tex.App.Lexis 3289 (Tex.App. – Dallas 6/25/97)
Transfer to TDCJ reversed because court considered juvenile's failure to testify in making decision.
10. In the Matter of D.L.W., UNPUBLISHED, No. 09-97-118-CV, 1998 WL 552659, 1998 Tex.App.Lexis (Tex.App. – Beaumont 8/27/98)
Victim impact testimony admissible at release/transfer hearing.
11. In the Matter of H.V.R., 974 S.W.2d 213 (Tex.App. – San Antonio 1998)
Failure to hold transfer hearing earlier than 30 days before 18th birthday error but not fatal.
12. In the Matter of R.D.B., 20 S.W.3d 255 (Tex.App. – Texarkana 5/18/00)
Ineffective assistance of counsel in failure to seek appointment of mental health expert for release/transfer hearing.
13. In the Matter of M.R., UNPUBLISHED, No. 04-99-00932-CV, 2000 WL 1346466, 2000 Tex.App.Lexis 6349 (Tex.App. – San Antonio 9/20/00) Juvenile court had no jurisdiction to transfer juvenile to TDCJ when case still on appeal from previous order.
14. In the Matter of J.A.H., UNPUBLISHED, No. 04-99-00560-CV, 2000 WL 1283734, 2000 Tex.App.Lexis 6194 (Tex.App. – San Antonio 9/13/00)
No statutory right to fitness hearing at release/transfer hearing; due process satisfied by psychiatric exam and testimony.
15. In the Matter of J.L.S., 47 S.W.3d 128 (Tex.App. – Waco 5/2/01)
Notice in court of time and place of hearing to consider transfer to TDCJ complies with statute.
16. In the Matter of B.D., 16 S.W.3d 77 (Tex.App. – Houston [1st Dist.] 3/9/00)
Record need not show proof of notice to respondent of release/transfer hearing.
17. In the Matter of G.R., UNPUBLISHED, No. 01-98-01142-CV, 1999 WL 351138, 1999 Tex.App.Lexis 4171 (Tex.App. – Houston [1st Dist.] 6/3/99)
State not required to prove it gave notice of release/transfer hearing.
18. In the Interest of B.D., 53 S.W.3d 327 (Tex. 12/7/00)
Texas supremes deny review in case raising applicability of chapter 55 to release/transfer hearings.
19. In the Matter of A.M., UNPUBLISHED, No. 05-99-00432-CV, 2001 WL 832364 (Tex.App. – Dallas 7/25/01)
Transfer hearing under old law that began more than 30 days before 18th birthday was timely.

20. In the Matter of D.W.H., UNPUBLISHED, No. 08-99-00187-CV, 2000 WL 1643511 (Tex.App. – El Paso 11/2/00)
Transfer to TDCJ upheld based on juvenile’s misconduct and lack of rehabilitative progress while in TYC.
21. In the Matter of B.J.M., UNPUBLISHED, No. 05-00-00179-CV, 2000 WL 1659539, 2000 Tex.App.Lexis 7487 (Tex.App. – Dallas 11/6/00)
Transfer to TDCJ upheld based on juvenile’s misconduct and unwillingness to assume responsibility while at TYC.
22. In the Matter of E.T.M., UNPUBLISHED, No. 01-96-00235-CV, 1997 WL 549189, 1997 Tex.App.Lexis 4713 (Tex.App. – Houston [1st Dist.] 8/29/97)
No violation of right to grand jury indictment; return proved juvenile given notice of release/transfer hearing.

GRAND JURY APPROVAL

1. In the Matter of J.M.L., UNPUBLISHED, No. 03-00-00212-CV, 2000 WL 1636888, 2000 Tex.App.Lexis 7363 (Tex.App. – Austin 11/2/00)
Okay for grand jury to approve petition before it is filed in juvenile court; factual basis for removal from home findings.
2. In the Matter of M.R., UNPUBLISHED, No. 04-96-00283-CV, 1998 WL 429626, 1998 Tex.App.Lexis 4693, (Tex.App. – San Antonio 7/31/98)
Failure to present amended petition to grand jury not fatal when notice provided.
3. In the Matter of R.H., UNPUBLISHED, No. 04-97-00706-CV, 1998 WL 484695, 1998 Tex.App.Lexis 5112 (Tex.App. – San Antonio 8/19/98)
Grand jury approval not required for petition amendment of complainant’s last name.
4. In the Matter of J.A.H., UNPUBLISHED, No. 04-96-00207-CV, 1997 WL 471536, 1997 Tex.App.Lexis 4361 (Tex.App. – San Antonio 8/20/97)
Grand jury approval of amendment in petition to correct birth date not required.
5. In the Matter of S.J., 977 S.W.2d 147 (Tex.App. – San Antonio 1998)
(1) Mistakes in grand jury approval certification not fatal; (2) one-on-one show up not fatal to in-court identification.
6. In the Matter of D.D.S., UNPUBLISHED, No. 14-96-00303-CV, 1998 WL 733475, 1998 Tex.App.Lexis 6636 (Tex.App. – Houston [14th Dist.] 10/22/98)
Not error to allege non-covered offense in petition to be presented to grand jury alleging covered offense.

ADJUDICATION/DISPOSITION

1. E.B. v. State, UNPUBLISHED, No. 05-96-01759-CV, 1997 WL 275567, 1997 Tex.App.Lexis 2760 (Tex.App. – Dallas 5/27/97)
Failure of judge to admonish juvenile about transfer to TDCJ and of 3 year minimum length of stay not error.
2. In the Matter of S.A.W., UNPUBLISHED, No. 14-96-00679-CV, 1998 WL 43303, 1998 Tex.App.Lexis 764 (Tex.App. – Houston [14th Dist.] 2/5/98)
Failure to object to petition defect before trial waives claim.

3. In the Matter of G.A.T., 16 SW3d 838 (Tex.App. – Houston [14th Dist.] 3/30/00)
Failure to serve amended petition approved by grand jury on juvenile not jurisdictional defect.
4. In the Matter of M.E.S., UNPUBLISHED, No. 05-96-01236-CV, 1997 WL 351240, 1997
Tex.App.Lexis 3358 (Tex.App. – Dallas 6/26/97)
No error in refusing to appoint guardian ad litem; admonishments both given to and waived by juvenile.
5. In the Matter of K.L.C., 981 S.W.2d 1 (Tex.App. – San Antonio 5/20/98)
(1) Non-substantive amendments in petition not fatal; (2) over dissent, failure to admonish nets reversal.
6. In the Matter of J.Y., UNPUBLISHED, No. 05-97-00024-CV, 1998 WL 265129, 1998
Tex.App.Lexis 3147 (Tex.App. – Dallas 5/27/98)
Not required to admonish about possible later transfer from TYC to TDCJ – not a direct
consequence of proceedings.
7. In the Matter of C.P., UNPUBLISHED, No. 05-00-019790-CV, 2001 WL 1289830, 2001
Tex.App.Lexis 7198 (Tex.App. –Dallas 10/25/01)
Respondent waived disposition jury in writing before adjudication hearing thereby mooting
possibly defective oral admonition.
8. In the Matter of G.I., UNPUBLISHED, No. 05-95-01323-CV, 1997 WL 303754, 1997
Tex.App.Lexis 2938 (Tex.App. – Dallas 6/5/97)
(1) Right to jury at disposition explained and waived; (2) agg. Sexual assault age difference
not offense element; (3) failure to appoint interpreter for parent not error.
9. In the Matter of S.B., UNPUBLISHED, No. 04-98-00535-CV, 1999 WL 239102, 1999
Tex.App.Lexis 2992 (Tex.App. – San Antonio 4/21/99)
Scope of statute not vague.
10. In the Matter of R.J.J., 959 S.W.2d 185 (Tex. 1/16/98)
Voluntary manslaughter (now second-degree murder) a covered offense under 1994
amendment.

REVOCACTION

1. In the Matter of J.R., UNPUBLISHED, No. 05-99-01086-CV, 2000 WL 409676, 2000
Tex.App.Lexis 2552 (Tex.App. – Dallas 4/19/00)
Denial of jury trial on punishment in probation revocation hearing requires reversal.

APPEAL

1. In the Matter of T.H., UNPUBLISHED, No. 04-00-00494-CV, 2001 WL 246816, 2001
Tex.App.Lexis 1665 (Tex.App. – San Antonio 3/14/01)
Court of appeals accepts appellate counsel's brief that the appeal from juvenile court
transfer to TDCJ was frivolous.