

CHAPTER 18. REVIEW OF PLACEMENT OF CHILDREN UNDER THE CARE OF THE DEPARTMENT OF HUMAN SERVICES

*Commentary by Suzanne Covington**

Introductory Commentary

Chapter 18 was enacted to prevent children from remaining indefinitely in foster care once placed there under the auspices of the courts. When first enacted in 1979, chapter 18 was a groundbreaking statute.¹ It has remained little changed and little interpreted since that time. Its basic requirements were mirrored and amplified in the federal Adoption Assistance and Child Welfare Act of 1980.² That Act ties case review requirements to receipt of federal funds for foster placements. As a result, all states' foster care systems now have reviews similar to those required by chapter 18.

Since orders under chapter 18 are interlocutory, there is little reported case law. In one of the few cases that has been heard, the court held that the failure to hold a review hearing within the required time period did not divest the court of jurisdiction.³

Chapter 18 itself leaves many questions unanswered. For example, who bears the burden of proof? What exactly does a "review" of placement look or sound like? What standard of proof should be applied if one or more parties want to change the existing temporary orders at a review hearing? Because the statute is broad and general and case law is meager, local practices and procedures for such

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1. See *supra* Editor's Foreword. The previous comprehensive commentary on chapter 18 appears in Smith, *Texas Family Code Symposium — Chapter 18. Parent and Child: Review of Placement of Children Under the Care of the Department of Human Resources*, 13 *TEX. TECH L. REV.* 1021 (1982). There is no commentary that deals with chapter 18 amendments enacted subsequent to the 1982 comprehensive commentary.

2. Adoption Assistance & Child Welfare Act of 1980, §§ 421, 472, 475, 42 U.S.C. §§ 671, 672, 675 (1982 & Supp. V 1987).

3. *Garcia v. Texas Dep't of Human Servs.*, 721 S.W.2d 528, 529-30 (Tex. App. — Corpus Christi 1986, no writ).

review hearings vary greatly. At a minimum, basic due process should be afforded to all participants.⁴

§ 18.01. Review of Placements by Court of Continuing Jurisdiction

(a) In a suit affecting the parent-child relationship in which the Texas Department of Human Services or any authorized agency has been named by the court or in an affidavit of relinquishment of parental rights as the managing conservator of a child, the court shall hold a hearing to review the conservatorship appointment and the placement of the child by the department or authorized agency in foster home care, group home care, or institutional care.

(b) The hearing shall be held not earlier than five and one-half months and not later than twelve months after the date of the last hearing in the suit unless, for good cause shown by any party, an earlier hearing is approved by the court.

(c) Not earlier than five and one-half months and not later than seven months after the date of the last hearing in the suit the department shall:

- (1) petition the court for a hearing; or
- (2) conduct an administrative review of the placement of the child and provide a written report concerning the results of the review to the court and all parties to the suit.

Commentary

This section sets up the requirement of periodic reviews of placement for children in the managing conservatorship of the Texas Department of Human Services (TDHS) and other child placement agencies. In 1987, the section was amended to provide that judicial reviews may occur any time between five and one-half and twelve months from the last hearing in the case. On a showing of good cause, the court may approve an earlier review, but not a later one. If a judicial review has not occurred by seven months, the agency must have an administrative review. A written report of the administrative review must be provided to the court and all parties.

4. For a more extensive discussion, see S. COVINGTON, *JUDGE'S DESKBOOK: PERMANENCY PLANNING FOR CHILDREN* (1987) (available through Texas Task Force on Permanency Planning).

Initially, practices differed across the state as to cases in temporary orders status because the statute was — and is — unclear regarding its applicability to such situations. Shortly after the original enactment, however, subsequent federal funding requirements imposed on the TDHS the necessity of judicial reviews or administrative due process hearings every six months, both before and after a final conservatorship determination for so long as the child is in agency care.⁵ Moreover, given the purpose of preventing children from being “lost in the system,” periodic review makes sense during the time before a final adjudication giving permanent custody of a child to the state agency.

§ 18.02. Voluntary Placements: Suit

(a) If a parent, managing conservator, or guardian of the person of a child who is not subject to the continuing jurisdiction of a court under this title voluntarily agrees to surrender the custody, care, or control of a child to the Texas Department of Human Services, the department, not later than 60 days after taking possession of or exercising control of the child, shall file a suit affecting the parent-child relationship under this title, establishing a court of continuing jurisdiction for the child, and requesting a review of the placement of the child in foster home care, group home care, or institutional care.

(b) The petition shall state that the purpose of the suit is to initiate periodic review of the necessity and propriety of the placement of the child. A copy of the agreement between the department and the parent, managing conservator, or guardian of the child shall be filed with the petition.

(c) In addition to those persons listed in Section 11.09(a) of this code as entitled to service of citation in a suit affecting the parent-child relationship, a person listed in Section 18.03 of this code is entitled to service of citation.

(d) The hearing shall be held not earlier than five and one-half months and not later than twelve months after the date that the department took possession of or exercised control over the child

5. See Adoption Assistance & Child Welfare Act of 1980, § 475(5)(B), 42 U.S.C. § 675(5)(B) (1982).

unless, for good cause shown by any party, an earlier hearing is approved by the court.

(e) Not earlier than five and one-half months and not later than seven months after the date the department took possession of or exercised control over the child the department shall:

- (1) petition the court for a hearing; or
- (2) conduct an administrative review of the placement of the child and provide a written report concerning the results of the review to the court and all parties to the suit.

Commentary

This section is the counterpart of section 18.01. It deals with voluntary placements by families rather than coercive intervention by the TDHS. The review requirements are as discussed above. Voluntary placements of children with the TDHS were fairly commonplace in 1979; there seems to be a distinct reduction of such placements in recent years as fiscal constraints have dampened the agency's receptivity to this practice.

§ 18.03. Persons Entitled to Notice

The following persons are entitled to at least 10 days' notice of a hearing to review a child placement and are entitled to present evidence and be heard at the hearing:

- (1) the Texas Department of Human Services;
- (2) the foster parent or director of the group home or institution where the child is residing;
- (3) each parent of the child;
- (4) the managing conservator or guardian of the person of the child; and
- (5) any other person or agency named by the court to have an interest in the welfare of the child.

Commentary

This section sets out specialized notice requirements for chapter 18 review hearings, which appear to apply only to court proceedings. However, federal statutes and state and federal regulations require that periodic administrative reviews also meet standards of due

process such as those provided in this section.⁶ Foster parents, though not parties to the suit, are specifically given the right to be heard and to present evidence at chapter 18 hearings.

§ 18.04. When Child is at Home

(a) If the Texas Department of Human Services or authorized agency returns a child to a parent for custody, care, or control, the department or authorized agency shall notify the court having continuing jurisdiction of the suit of the department's action and so long as the child remains under the custody, care, or control of the parent, no review of that placement is required under this chapter.

(b) If a child has been returned to a parent and if the department or authorized agency resumes the custody, care, or control of the child or designates any person other than a parent to have the custody, care, or control of the child, the department or authorized agency shall notify the court of its action.

(c) If the department or authorized agency resumes the custody, care, or control of the child or designates a person other than a parent to have the custody, care, or control of the child within three months after returning the child to a parent, the period that that child was under the custody, care, or control of his or her parent shall not be considered in determining the date for the next placement review hearing.

Commentary

This section deals with situations in which the TDHS or an authorized agency returns a child to the home while remaining involved as conservator.

Subsection (a) provides that no chapter 18 reviews are required while the child is with the parent. The agency must inform the court that the child is in the physical custody of the parent. The court can then exercise its discretion whether or not to continue to review the case. In most cases, the child's interest is served by continued review until the case is resolved.

Subsection (b) mandates notification if the child returns to agency care after an in-home placement.

6. *See id.*

Subsection (c) provides that any period of three months or less of in-home care shall not be counted in determining the date for the next chapter 18 review.

§ 18.05. Child's Attendance at Hearing

The court in its discretion may dispense with the attendance of the child at a placement review hearing.

Commentary

This oddly worded section carries a strong negative implication that the child should be in attendance at chapter 18 review hearings, unless the court rules otherwise. The court has discretion to handle this question in any manner consistent with the general mandates of sections 11.11, 14.07, and 18.06.⁷ Most courts probably dispense with the child's attendance. Attendance at court, however, can be a significant opportunity for school-age children to express their needs and desires in a system which tends to discount the child's input in favor of opinions of professionals. If not present, the child tends to remain an abstract concept to the court. The court should at least be asked to make a specific ruling regarding the necessity of the presence of each child.

§ 18.06. Disposition of Child

At the conclusion of a placement review hearing under this chapter, the court, in accordance with the best interest of the child, may order:

- (1) that the foster care, group home care, or institutional care be continued;**
- (2) that the child be returned to his or her parent or guardian;**
- (3) if the child has been placed with the Texas Department of Human Services under a voluntary agreement, that the department institute further proceedings to appoint the department as managing conservator or to terminate parental rights in order to provide**

7. See *supra* commentaries accompanying §§ 11.11, 14.07, and *infra* commentary accompanying § 18.06.

permanent placement for the child or to make the child available for adoption;

(4) if the parental rights of the child have already been terminated or the department or authorized agency has custody, care, and control of the child under an affidavit of relinquishment of parental rights naming the department or authorized agency as managing conservator, that the department or authorized agency attempt to place the child for adoption; or

(5) the Texas Department of Human Services or authorized agency to provide services to ensure that every effort has been made to enable the parents to provide a family for their own children.

Commentary

This section provides a list of possible orders after a review hearing. It is unclear whether the court's power is limited by this list. It is clear that the orders must be in the child's best interest.

Paragraph (1) refers to continuation of foster placement. The statute is nonspecific as to whether the court may order a change from one particular placement to another.

Paragraph (2) allows the court to order in-home placement.

Paragraph (3) allows the court to order the agency to pursue permanent conservatorship or termination and adoption in cases of voluntary placement.

Paragraph (4) allows the court to order the agency to pursue adoptive placement where parental rights have been terminated or voluntarily relinquished.

Paragraph (5) allows the court to order the agency to provide services toward reunification of the family.

No provision is made in this section for ordering the parents to do anything at a chapter 18 hearing. The implication is that the agency must request any such orders by proper motion, unless the parents enter into agreed orders at the review hearing. The agency, by contrast, is on notice through this section that a broad range of possible orders may be entered against it. This is in keeping with the general purpose of chapter 18 to protect the interests of children in state custody. Although many would argue that chapter 18 requires the courts to take on an executive rather than a judicial function, the National Council of Juvenile and Family Court Judges disagrees. A recent publication states: "Juvenile and family courts must have the clear authority, by statute or rule, to review, order and enforce

the delivery of specific services and treatment for deprived children.”⁸

Chapter 18 review hearings are ordinarily brief and informal. However, a mechanism should be available for setting contested, evidentiary hearings when needed.

8. See National Council of Juvenile and Family Court Judges, Metropolitan Court Judges Committee Report. *Deprived Children: A Judicial Response*, 1985-86.