



10-1-2002

Texas Family Code Section 263.401: Improving the Mandatory Dismissal Deadline to Be Truly in the Best Interest of the Child

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Available at: <https://doi.org/10.37419/TWLR.V9.I1.3>

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**TEXAS FAMILY CODE SECTION 263.401:
IMPROVING THE MANDATORY
DISMISSAL DEADLINE TO BE TRULY
IN THE BEST INTEREST
OF THE CHILD[†]**

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[†] The Author has gained knowledge and experience about the workings of the criminal justice system from her studies and employment. A Criminal Justice major, the Author completed numerous undergraduate courses focusing on various aspects of the criminal justice system. After graduation, her employment enabled her to work closely with law enforcement agencies and prosecutors. In addition, the Author has one year of experience working in the criminal justice system, for both a prosecutor’s office and a criminal defense attorney.

I. INTRODUCTION

For decades, the child welfare system in the United States has been criticized for its shortcomings in the protection of children.¹ Critics have attacked the system for failing to intervene and protect children from abuse and neglect at home,² for placing children in abusive foster homes,³ and for leaving children in foster care indefinitely.⁴ Today, with over 500,000 children in foster care nationally,⁵ most of the criticism focuses on long-term foster care placements.⁶ Critics blame numerous factors for such lengthy placements, including an increase in the number of children entering foster care,⁷ high caseworker caseloads,⁸ and a shortage of adequately trained caseworkers.⁹ Regardless of the cause, lengthy foster care placements are harmful to

1. See Karen Dorros & Patricia Dorsey, *Whose Rights Are We Protecting, Anyway?*, CHILDREN TODAY, May–June 1989, at 6, 7 (discussing the delay in termination suits due to the numerous opportunities given to parents to reform), reprinted in PROTECTING ABUSED CHILDREN 446, 447 (Child Abuse: A Multidisciplinary Survey No. 7, Byrgen Finkelman ed., 1995); Edith Fein & Anthony N. Maluccio, *Permanency Planning: Another Remedy in Jeopardy?*, 66 SOC. SERV. REV. 335, 337 (1992) (critiquing the Adoption Assistance and Child Welfare Act of 1980 and its failures), reprinted in PROTECTING ABUSED CHILDREN, *supra*, at 231, 233; Robert L. Geiser, *The Shuffled Child and Foster Care*, TRIAL, May–June 1974, at 27, 29, 35 (criticizing the system for failing to rehabilitate families, delaying the adoption of children, and mistreating foster parents), reprinted in PROTECTING ABUSED CHILDREN, *supra*, at 37, 39, 41; Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 199–201, 204–11 (1988) (discussing the abuse and neglect of children while in foster care), reprinted in PROTECTING ABUSED CHILDREN, *supra*, at 115, 115–17, 120–27.

2. See Dorros & Dorsey, *supra* note 1, at 447–48.

3. See, e.g., Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option for Dependent Children*, 23 J. FAM. L. 391, 396 (1984–1985), reprinted in PROTECTING ABUSED CHILDREN, *supra* note 1, at 95, 100; Mushlin, *supra* note 1, at 115–16, 120–23.

4. See, e.g., Andre P. Derdeyn et al., *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care*, 31 VAND. L. REV. 1165, 1168–69 (1978), reprinted in PROTECTING ABUSED CHILDREN, *supra* note 1, at 49, 52–53; Geiser, *supra* note 1, at 39.

5. *Youth Across the Nation Team Up for Kids in Foster Care During National Kids Care Week 2001: An Initiative of the Points of Light Foundation*, PR NEWswire, Oct. 9, 2001, at <http://media.prnewswire.com/en/jsp/search.jsp> (on file with the Texas Wesleyan Law Review).

6. See, e.g., Derdeyn et al., *supra* note 4, at 49, 53; Geiser, *supra* note 1, at 37, 39, 41.

7. See, e.g., Fein & Maluccio, *supra* note 1, at 232–33, 235–37; Arlene E. Fried, *The Foster Child's Avenues of Redress: Questions Left Unanswered*, 26 COLUM. J.L. & SOC. PROBS. 465, 465 (1993) (attributing the increase partly to drug addiction, alcoholism, and homelessness) (citing Celia W. Dugger, *Troubled Children Flood Ill-Prepared Care System*, N.Y. TIMES, Sept. 8, 1992, at A1), reprinted in PROTECTING ABUSED CHILDREN, *supra* note 1, at 245, 245.

8. See, e.g., Fein & Maluccio, *supra* note 1, at 239 (citing SHEILA B. KAMERMAN & ALFRED J. KAHN, SOCIAL SERVICES FOR CHILDREN, YOUTH, AND FAMILIES IN THE UNITED STATES (Annie E. Casey Foundation, 1989)). The Child Welfare League of America recommends a caseload of twelve cases. TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., DESCRIPTION OF CHILD PROTECTIVE SERVICES PROGRAM, at http://www.tdprs.state.tx.us/about_prs/state_plan/01descriptionCPS4c.asp (June 30,

children: foster care, due to its temporary nature, does not provide children with the emotional attachments needed for emotional and physical development.¹⁰

A child's emotional and intellectual abilities are nurtured by family relationships.¹¹ Thus, a parent's prolonged absence impedes a child's developmental processes.¹² Foster care typically cannot replace the emotional nurturing given by a psychological parent¹³ because foster parents are discouraged from forming emotional attachments to foster children.¹⁴ Neglecting a child's need for emotional bonding leaves a child without a sense of belonging.¹⁵ While testifying before the Texas Legislature, one child stated that "the longer you are in [foster] care, the more you get moved . . . the more rejected you feel. It makes you feel that you are not wanted and as if nobody loves you."¹⁶ Understandably, children in foster care develop a lack of trust for others, form shallow attachments, and regress in their emotional growth.¹⁷

In 1997, with over seven thousand Texas children in substitute care¹⁸ for more than twenty-four months,¹⁹ changes were needed in

2001) [hereinafter DESCRIPTION] (on file with the Texas Wesleyan Law Review). In Texas, a caseworker's caseload average is 23.9 cases. *Id.*

9. *See, e.g.*, Fein & Maluccio, *supra* note 1, at 239 (citing SHEILA B. KAMERMAN & ALFRED J. KAHN, SOCIAL SERVICES FOR CHILDREN, YOUTH, AND FAMILIES IN THE UNITED STATES (Annie E. Casey Foundation, 1989)); DESCRIPTION, *supra* note 8; DOITROS & Dorsey, *supra* note 1, at 447.

10. MARK HARDIN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 7 (1996). Children need a "psychological parent" and an uncertain future prevents them from making the emotional attachments needed for such a relationship. *Id.*; *see also* JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 90 (1996).

11. GOLDSTEIN ET AL., *supra* note 10, at 8.

12. *Id.* at 11.

13. *See, e.g.*, Sanford N. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 300-01 (1971), reprinted in PROTECTING ABUSED CHILDREN, *supra* note 1, at 17, 34-35. A psychological parent is one who provides for both the child's physical and emotional growth. HARDIN & LANCOUR, *supra* note 10, at 7.

14. *See* Katz, *supra* note 13, at 35. Foster parents are discouraged from bonding with foster children because such "placements [are] intended to be temporary." *See id.*

15. GOLDSTEIN ET AL., *supra* note 10, at 15.

16. *Hearings on Tex. H.B. 2249 Before the Senate Comm. on Jurisprudence*, 77th Leg., R.S. Tape 1, Side A (May 7, 2001) (testimony of Savannah Matlock, Student) (tapes on file with the Texas Wesleyan Law Review).

17. *See id.*

18. Substitute care refers to "[c]hildren under PRS' legal responsibility who are placed outside their home. This includes foster homes, institutions, foster group homes, [and] adoptive homes . . ." TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., 2000 DATA BOOK 162 at http://www.tdprs.state.tx.us/About_PRS/PRS_Data_Books_and_Annual_Reports/2000toc.asp (on file with the Texas Wesleyan Law Review).

19. TEX. SUNSET ADVISORY COMM'N, DEP'T OF PROTECTIVE AND REGULATORY SERVS., STAFF REPORT 37 (1996) [hereinafter SUNSET]. These statistics were compiled at the end of fiscal year 1995. *Id.*

the system to prevent "foster care limbo."²⁰ Foster care limbo refers to the existence of children who live in foster care for lengthy periods of time.²¹ Limbo results when a foster care child cannot be safely returned home; yet he or she is not free for adoption because the state has not terminated the parent-child relationship.²²

In hopes of eliminating foster care limbo, the Seventy-Fifth Legislature passed a law²³ limiting the time in which the Texas Department of Protective and Regulatory Services (DPRS)²⁴ can achieve permanency for a child in its care.²⁵ Texas Family Code section 263.401 limits the time a child can stay in substitute care to twelve months prior to the court entering a final order.²⁶ While this statute and its companion statute²⁷ have been successful in decreasing both the number of children living in foster care and the length of a child's stay,²⁸ further improvements in the system are needed. The twelve-month deadline may not allow sufficient time for parents with drug or alcohol addictions to comply with their service plans.²⁹ In addition, a provision is needed to ensure that cases overturned on appeal and remanded for new trials are resolved in a timely manner.³⁰

20. See *Act of May 28, 1997: Hearings on Tex. S.B. 181 Before the Senate Jurisprudence Comm.*, 75th Leg., R.S. Tape 1, Side B (Mar. 3, 1997) [hereinafter *Senate Hearings*] (statement of Sen. Florence Shapiro) (tapes on file with the Texas Wesleyan Law Review).

21. See Byrgen Finkelman, *Volume Introduction to PROTECTING ABUSED CHILDREN*, *supra* note 1, at xiv.

22. *Id.*

23. This law was recommended by the Texas Sunset Advisory Commission and the Governor's Committee to Promote Adoption. See *SUNSET*, *supra* note 19, at 2, 44; *REPORT OF THE GOVERNOR'S COMMITTEE TO PROMOTE ADOPTION 13-14 (1996)* [hereinafter *GOVERNOR'S COMMITTEE*]. The Supreme Court Task Force on Foster Care also made similar recommendations. See *Act of May 28, 1997: Hearings on Tex. H.B. 2249 Before the Senate Jurisprudence Comm.*, 77th Leg., R.S. Tape 2, Side B (Mar. 13, 2001) (statement of Cynthia Bryant, Member, Texas Supreme Court Task Force on Foster Care) (tapes on file with the Texas Wesleyan Law Review).

24. DPRS is the agency responsible for intervening in familial relationships when abuse or neglect is alleged. *SUNSET*, *supra* note 19, at 167. DPRS is commonly known in Texas as CPS: child protective services.

25. See *Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, sec. 263.401, 1997 Tex. Gen. Laws 3733, 3764-69, amended by Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, sec. 263.401, 2001 Tex. Gen. Laws 2395, 2396 (current version at TEX. FAM. CODE ANN. § 263.401 (Vernon 2002))*.

26. See *TEX. FAM. CODE ANN. § 263.401*. The judge is allowed to extend this deadline up to 180 days for a total of eighteen months. Hereinafter, "section" refers to "Texas Family Code Section" unless otherwise noted.

27. See *id.* § 263.403.

28. Press Release, Texas Department of Protective and Regulatory Services, Governor Bush Highlights Early Success of Texas Adoption Reforms: Adoptions Up, Waiting Time Down (Dec. 7, 1998), at http://www.tdprs.state.tx.us/About_PRS/PRS_Releases_and_Newsletter/1998_releaseAdoptiondec.asp (Dec. 7, 1998) (on file with the Texas Wesleyan Law Review).

29. See *infra* text accompanying notes 250-60.

30. See *infra* text accompanying notes 262-79.

The Texas Legislature should make further amendments to Chapter 263³¹ to allow an additional extension when parents receive inpatient treatment for substance abuse and implement a deadline for overturned cases remanded on appeal. Part II provides background information helpful in understanding the significance of the mandatory dismissal deadline. Part III reviews the development of the twelve-month deadline and discusses the original enactment of section 263.401 and the issues surrounding its interpretation. In Part IV, this Comment explains and analyzes the recent amendments affecting section 263.401. In conclusion, this Comment acknowledges the success of the mandatory dismissal date and recommends that more changes be made for the benefit of Texas foster care children, proposing additional provisions to Chapter 263 of the Texas Family Code.

II. PROTECTING OUR CHILDREN

The protection of children falls on the shoulders of each individual state.³² However, like many other areas of state government, the federal government regulates the child welfare system through its spending power: receipt of federal funding is contingent upon a state's compliance with federal regulations.³³ This Part outlines two federal acts that have had a significant impact on the DPRS's procedures. To illustrate the importance of the mandatory dismissal deadline, this Part also outlines the procedural requirements of a DPRS suit from removal to termination.

A. *The Adoption Assistance and Child Welfare Act of 1980*³⁴

Before the passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA), child welfare agencies operated under a philosophy of child rescue.³⁵ Recognizing the severe psychological effect

31. TEX. FAM. CODE ANN. ch. 263, Review of Placement of Children Under Care of DPRS (Vernon 2002). Hereinafter, "chapter" refers to "Texas Family Code Chapter" unless noted otherwise.

32. States have authority under the doctrine of *parens patriae* to intervene in the parent-child relationship when child abuse and neglect occurs. *E.g.*, *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627-28 & n.13 (1986); *see also* BLACK'S LAW DICTIONARY 911 (7th ed. 1999) (defining *parens patriae* as "parent of his country," and referring to the role of the state as guardian of persons with legal disabilities); Stacy Robinson, Comment, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 395 (1993).

33. *See* Cynthia Bryant & Charles G. Childress, *Introductory Comment* to JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED ch. 262 (12th ed. 2002) [hereinafter SAMPSON & TINDALL'S]. Federal sources fund over fifty percent of DPRS's budget. Federal funding includes Title V-B Child Welfare and Family Preservation, Title IV-E Foster Care, and Adoption Assistance and Independent Living. SUNSET, *supra* note 19, at 170.

34. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

35. *See* Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 254-55 (discussing the AACWA).

that termination of the parent-child relationship has on a child, the AACWA changed this philosophy to family preservation.³⁶ The AACWA's objectives included preventing the unnecessary destruction of families and providing foster children with permanency sooner.³⁷ Another AACWA objective was providing families with services aimed at resolving their problems, with the goal of returning children home or preventing removal altogether.³⁸ To meet this goal, the AACWA mandated that case workers use reasonable efforts to maintain the child in the home when the child's welfare was not at risk,³⁹ or lose federal funding for failure to do so.⁴⁰ If removal was necessary, caseworkers were required to use reasonable efforts to enable the safe return of the child.⁴¹ Only when these services failed to enable the safe return of the child were the parental rights terminated.⁴²

Despite the potential success of the AACWA, much confusion surrounded the "reasonable efforts" requirement.⁴³ The AACWA failed to define reasonable efforts, which resulted in courts throughout the nation interpreting the requirement differently.⁴⁴ Additionally, confusion existed over the ramifications of a judge's finding that a caseworker failed to make reasonable efforts prior to the removal of a child.⁴⁵ The AACWA's only intended consequence for failing to make reasonable efforts was that the state would not receive matching federal funds for the child's foster care placement.⁴⁶ However, many interpreted the AACWA as requiring the return of the child to the parents when "reasonable efforts" were not made prior to removal.⁴⁷ Because of the concern over children being returned to dangerous environments at home, many states enacted "reasonable efforts" provi-

36. See *id.* at 255.

37. Robinson, *supra* note 32, at 399 (citing Barbara Atwell, "A Lost Generation": *The Battle for Private Enforcement of the Adoption Assistance & Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593, 596 (1992)). Another objective of the AACWA was to provide proper care for children when in the system. *Id.*

38. *Id.*

39. See Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 BRANDEIS L.J. 895, 911-12 (1994) (citing 42 U.S.C. § 671(a)(15) (1994)).

40. See Shotton, *supra* note 35, at 227.

41. See Harding, *supra* note 39, at 912.

42. See *id.* at 913 (stating that "if a state fails to comply . . . the State agency may decline to initiate . . . termination of parental rights").

43. See Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1892-93 (2001); see also Shotton, *supra* note 35, at 225-29.

44. Hort, *supra* note 43, at 1892-93 (citing Shawn L. Raymond, Note, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1240 (1999)); see Shotton, *supra* note 35, at 225.

45. See Shotton, *supra* note 35, at 227.

46. *Id.*

47. *Id.*

sions in their removal *and* termination statutes.⁴⁸ Some of these provisions required caseworkers to make reasonable efforts before removing a child from his home.⁴⁹ Because of these problems and other external factors, the AACWA failed to reduce the number of children in foster care.⁵⁰

B. *The Adoption and Safe Families Act of 1997*⁵¹

With the hope of solving problems left unresolved by AACWA,⁵² Congress passed the Adoption and Safe Families Act of 1997 (ASFA).⁵³ The ASFA contains three important provisions aimed at reducing the length of a child's stay in foster care.⁵⁴ First, states must terminate parental rights if the child has spent fifteen of the last twenty-two months in foster care.⁵⁵ States can avoid termination under this requirement if the child is in the care of relatives or if termination is not in the child's best interest.⁵⁶ In addition, the "15/22 provision"⁵⁷ does not prevent states from terminating before fifteen months have elapsed if it is in the best interest of the child.⁵⁸ The ASFA also establishes a timeframe for states to come into compliance with its provisions, in regard to children already in foster care at the time of its enactment.⁵⁹

Second, under the ASFA, child-welfare agencies are not required to use reasonable efforts when a "parent has subjected the child to aggravating circumstances,"⁶⁰ a parent has committed certain crimes

48. See *id.* at 227, 234–35. Some of these states require that a finding of "reasonable efforts" be made at every hearing. *Id.* at 234; see, e.g., MD. CODE ANN., FAM. LAW § 5-525(d)(1) (1999) (requiring the agency to make reasonable efforts to reunify the family before removal); NEV. REV. STAT. 432B.393(1) (2000) (requiring the agency to make reasonable efforts to maintain the child's family prior to removal); R.I. GEN. LAWS § 15-7-7(b)(1) (2000) (requiring the agency to make reasonable efforts to encourage the parent-child relationship).

49. See Shotton, *supra* note 35, at 227; see also, e.g., TEX. FAM. CODE ANN. §§ 262.101–.102 (Vernon 2002).

50. See Hort, *supra* note 43, at 1891–94. External factors include drug use, teenage pregnancy, AIDS, and homelessness. *Id.* at 1892 (citing Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 244 (1999)).

51. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

52. Hort, *supra* note 43, at 1893.

53. 42 U.S.C. § 675(5)(E)(i) (Supp. V 1999).

54. See Hort, *supra* note 43, at 1894–95.

55. 42 U.S.C. § 675(5)(E) (Supp. V 1999).

56. *Id.* § 675(5)(E)(i)–(ii).

57. See Hort, *supra* note 43, at 1881 (referring to 42 U.S.C. § 675(5)(E)).

58. 42 U.S.C. § 675 cmt. (Construction).

59. *Id.* § 675 cmt. (Transition Rules; New and Current Foster Children).

60. *Id.* § 671(a)(15)(D)(i) (Supp. 2002). Aggravated circumstances include abandonment, torture, sexual abuse, and chronic abuse. *Id.*

against another child,⁶¹ or the state has involuntarily terminated parental rights to a sibling of the child.⁶² Thus, in these circumstances, states can move immediately for termination, decreasing the time a child will spend in foster care.⁶³ Concurrent planning for reunification of the family and termination of the parent-child relationship may also be undertaken.⁶⁴ Finally, the Act clarifies that “in determining reasonable efforts to be made . . . the child’s health and safety shall be the paramount concern.”⁶⁵

The provisions of the ASFA have led to many procedural changes in Texas’s child welfare system.⁶⁶ These changes work toward eliminating foster care limbo by decreasing the lengthy time periods between child removal, parental rights termination, and adoption placements.⁶⁷ By decreasing the time a child is without a permanent family, the negative psychological effects of foster care are lessened.⁶⁸

C. *Procedural Requirements from Removal to Termination*

DPRS may take possession of a child in three different manners: pursuant to a court order after a full adversary hearing,⁶⁹ pursuant to an ex-parte order,⁷⁰ or in an emergency without a court order.⁷¹ At a full adversary hearing,⁷² the court may grant DPRS’s removal request if it finds that two factors exist: (1) DPRS made reasonable efforts to prevent the need for removal; and (2) it is contrary to the child’s welfare to remain in the home.⁷³ If the request is granted, the court must enter a temporary order to provide for the care of the child.⁷⁴ Generally, this order will appoint DPRS as the temporary managing conservator of the child,⁷⁵ and the child will be placed in substitute care.⁷⁶ However, the court must place the child with a non-custodial parent, relative, or family friend when it is safe to do so.⁷⁷

61. *Id.* § 671(a)(15)(D)(ii). These crimes are limited to murder, voluntary manslaughter, and felony assault that results in serious bodily injury. *Id.*

62. *Id.* § 671(a)(15)(D)(iii).

63. See Hort, *supra* note 43, at 1895.

64. 42 U.S.C. § 671(a)(15)(F).

65. *Id.* § 671(a)(15)(A).

66. See Bryant & Childress, *Introductory Comment to SAMPSON & TINDALL’S*, *supra* note 33, ch. 262.

67. See Press Release, *supra* note 28.

68. See Geiser, *supra* note 1, at 41.

69. TEX. FAM. CODE ANN. § 262.201 (Vernon 2002).

70. See *id.* § 262.101.

71. See *id.* §§ 262.102, .104.

72. If the child has been removed with an ex-parte order or without an order, a full adversary hearing must be held within fourteen days of the temporary order. See *id.* § 262.201.

73. *Id.* § 262.205.

74. *Id.*

75. See SUNSET, *supra* note 19, at 183.

76. DESCRIPTION, *supra* note 8.

77. *Id.*

After DPRS has been appointed temporary managing conservator, permanency planning begins.⁷⁸ First, DPRS must file a service plan with the court. This plan identifies whether the permanency goal is reunification of the child with the parents or termination of parental rights.⁷⁹ Among other things, the service plan lists the necessary actions that the parents must take for the child to be returned to them.⁸⁰

The next procedural step is the status hearing,⁸¹ at which the court reviews the service plan⁸² and ensures that the parents understand both the plan and the ramifications of failing to comply with it.⁸³ Before a child has been in DPRS's custody for six months, a permanency hearing must be held.⁸⁴ The court evaluates the appropriateness of the child's placement, the parent's compliance with the service plan,⁸⁵ and the progress made toward eliminating those factors that made it necessary to place the child in foster care.⁸⁶ The court must allow the child to return home if it would be both a safe environment for the child and the best interest of the child.⁸⁷

Courts also consider the best interest of the child during a termination hearing.⁸⁸ An order terminating the parent-child relationship may only be entered if the fact finder determines that termination is in the best interest of the child.⁸⁹ When termination is not in the child's

78. See Bryant & Childress, *Introductory Comment* to SAMPSON & TINDALL's, *supra* note 33, ch. 263. Permanency planning refers to the process of DPRS assisting the parents in addressing the problems that led to removal and providing the appropriate services to attain permanency for the child. These separate hearings are intended to help DPRS and the court meet the final order deadline of twelve months. *Id.*

79. See TEX. FAM. CODE ANN. § 263.101.

80. *Id.* § 263.102.

81. *Id.* § 263.201. This hearing must be held not later than sixty days after the court has been appointed temporary managing conservator of the child. *Id.*

82. *Id.* § 263.202(b). The court must make findings on whether the plan adequately ensures that DPRS makes reasonable efforts to enable the parents to provide a safe environment for the return of the child. *Id.*

83. *Id.* Specifically, the court must determine if the parents have been advised that if they are not able to provide a safe home within the time specified in the plan, they are at risk of losing "parental and custodial duties and rights" to the child. *Id.*

84. *Id.* § 263.304. At least ten days prior to the permanency hearing, DPRS "shall prepare a permanency plan" and "shall file with the court . . . a permanency progress report." *Id.* § 263.3025. The plan and report must state whether DPRS recommends to dismiss the suit or to continue it. *Id.* §§ 263.3025, .303. Subsequent permanency hearings will be held within 120 days of the last hearing until a final order is rendered. See *id.* § 263.305.

85. See *id.* § 263.306.

86. *Id.* § 263.306 cmt.

87. *Id.* § 263.306.

88. GOLDSTEIN ET AL., *supra* note 10, at 5; see also Vanessa L. Warzynski, Comment, *Termination of Parental Rights: The "Psychological Parent" Standard*, 39 VILL. L. REV. 737, 759 (1994).

89. See TEX. FAM. CODE ANN. §§ 161.001(2), .003(5). The evidence must prove by a clear and convincing standard that one of the enumerated grounds for termination exists. See *id.* § 161.003.

best interest and it is not safe for the child to return home, DPRS may be appointed as permanent managing conservator,⁹⁰ which places the child in foster care limbo.⁹¹

III. EFFORTS TO ELIMINATE FOSTER CARE LIMBO

In 1996, the Texas Sunset Advisory Commission⁹² released its report describing its review of DPRS.⁹³ The report included numerous recommendations to improve service delivery, “move children into permanent settings” quickly, and “correct management problems.”⁹⁴ In May 1996, Governor George W. Bush signed executive order GWB 96-7 creating the Governor’s Committee to Promote Adoption to “determine which [part of the adoption system] . . . impede[s] the goal of timely adoptions.”⁹⁵ This Part will discuss the recommendations made by the Sunset Commission and Governor’s Committee, the statutes enacted based on them, and the court’s analysis of the statutes.

A. *Texas Sunset Advisory Commission Staff Report*

At the time of the 1995 study, over 4000 Texas children had been living in foster care for more than one year.⁹⁶ Over half of these children had been in foster care for more than two years.⁹⁷ Additionally, the 1995 statistics reflected that children in foster care experienced an average of three foster care placements.⁹⁸ The Commission found that the permanency process lacked deadlines to limit the amount of time a child could spend under DPRS’s conservatorship.⁹⁹ Finding that lengthy stays in foster care harm children,¹⁰⁰ the Commission recommended either that the parent-child relationship be terminated or that the child be reunited with his or her parents within twelve months.¹⁰¹ Requiring that either the deadline be met or the case be

90. See SAMPSON & TINDALL’s, *supra* note 33, § 161.205 cmt.

91. Because parental rights have not been terminated, the child cannot be adopted. See TEX. FAM. CODE ANN. § 162.001(b). Unless circumstances change that allow the child to be returned to a safe home environment, the child will remain in foster care.

92. The Sunset Advisory Commission is the governmental body responsible for reviewing state agencies with the purpose of determining whether the state agency is still needed and what problems need to be addressed. The Commission usually conducts agency reviews every twelve years. However, the review of DPRS was conducted early due to administrative problems that were interfering in service delivery. See SUNSET, *supra* note 19, at 7.

93. *Id.*

94. *Id.* at 1.

95. GOVERNOR’S COMMITTEE, *supra* note 23, at 27–28.

96. SUNSET, *supra* note 19, at 39.

97. *Id.*

98. *Id.* at 37.

99. *Id.* at 39.

100. See *id.* at 38 (finding that lengthy stays increase the possibility of “long-term psychological problems”).

101. See *id.* at 44.

dismissed would prevent children from being in “legal limbo” for years.¹⁰² DPRS also recommended that “[u]nder exceptional circumstances,” the court could be empowered to grant an extension if it was in the best interest of the child.¹⁰³

The Commission supported its recommendation of a twelve-month deadline by examining similar requirements in other states.¹⁰⁴ Almost half of all states had time limits shorter than the federal guideline of eighteen months.¹⁰⁵ In addition to the benefits children would receive from implementing the deadline, the Commission noted that the state could also save significant amounts of money in foster care payments.¹⁰⁶

B. Governor’s Committee to Promote Adoption

Consistent with the Commission’s findings, the Governor’s Committee found that children were spending years in foster care before their adoptions were finalized.¹⁰⁷ It attributed these delays to inefficiency in the process—from removal of the child, to termination, to adoption.¹⁰⁸ Accordingly, the Governor’s Committee adopted the Sunset Commission’s recommendation of a twelve-month deadline.¹⁰⁹

C. Seventy-Fifth Legislative Session

In 1997, the Texas Legislature enacted several changes based upon the recommendations of the Sunset Commission and the Governor’s Committee.¹¹⁰ Intending to reduce the length of time children stay in foster care,¹¹¹ the legislature enacted the twelve-month deadline in Texas Family Code section 263.401.¹¹² At that time, the legislature enacted additional statutes that gave the courts flexibility in meeting

102. *See id.* at 40.

103. *Id.* at 44.

104. *See id.* at 40.

105. *See id.*

106. *See* SUNSET, *supra* note 19, at 45.

107. GOVERNOR’S COMMITTEE, *supra* note 23, at 5–6 (reporting that in fiscal years 1991 through 1995, children spent an average of forty months in foster care before their adoptions were finalized and that in 1996, over 2300 children were awaiting adoptions because the parent-child relationship had not yet been terminated).

108. *See id.* at 13–14.

109. *Id.* at 19.

110. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, secs. 263.401–403, 1997 Tex. Gen. Laws 3733, 3768–70 (amended 2001) (current version at TEX. FAM. CODE ANN. §§ 263.401–403 (Vernon 2002)).

111. *See Senate Hearings, supra* note 20, at Tape 1, Side A (statement of Sen. Florence Shapiro).

112. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, sec. 263.401, 1997 Tex. Gen. Laws 3733, 3768 (amended 2001) (current version at TEX. FAM. CODE ANN. § 263.401).

the deadline of section 263.401.¹¹³ The legislature then streamlined the entire process, as described in Part IV, to ensure that the twelve-month deadline could be met.¹¹⁴

1. Original Enactment of Texas Family Code Section 263.401 and Companion Statutes

Under section 263.401, the court must enter a final order¹¹⁵ by “the first Monday after the first anniversary” of the appointment of DPRS as temporary managing conservator.¹¹⁶ If the court has not entered a final order by the “first Monday,” the suit filed by DPRS must be dismissed.¹¹⁷

However, the twelve-month deadline is not absolute.¹¹⁸ The legislature granted the authority to the court to allow an extension of not longer than 180 days.¹¹⁹ The court must grant the extension prior to the twelve-month deadline and only if it is in the best interest of the child to remain under the DPRS’s conservatorship.¹²⁰ Additionally, the court must state the new dismissal date in the extension order and enter additional temporary orders to ensure the child’s safety.¹²¹ If an extension order is granted, “[t]he court may not grant an additional extension,” and it must either dismiss the suit or render a final order by the new dismissal date.¹²²

The Seventy-Fifth Legislature enacted a statute along with the twelve-month deadline that enables the court to “test” the parent’s ability to provide a safe environment for the child.¹²³ Under this stat-

113. See Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, secs. 263.402–.404, 1997 Tex. Gen. Laws 3733, 3769 (amended 2001) (current version at TEX. FAM. CODE ANN. §§ 263.402–.404).

114. See Act of May 28, 1997, 75th Leg., R.S., ch. 603, §§ 5–12, 1997 Tex. Gen. Laws 2119, 2120–23 (codified as amended at TEX. FAM. CODE ANN. §§ 263.301–.503).

115. The statute defines a “final order” in subsection (d):

- (d) For purposes of this section, a final order is an order that:
 - (1) requires that a child be returned to the child’s parent;
 - (2) names a relative of the child or another person as the child’s managing conservator;
 - (3) without terminating the parent-child relationship, appoints the department as the managing conservator of the child; or
 - (4) terminates the parent-child relationship and appoints a relative of the child, another suitable person, or the department as managing conservator of the child.

TEX. FAM. CODE ANN. § 263.401(d).

116. *Id.* § 263.401(a).

117. *Id.*

118. See *id.* § 263.401(b).

119. *Id.*

120. *Id.*

121. *Id.* § 263.401(b)(1)–(2).

122. *Id.* § 263.401(c).

123. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, sec. 263.402, 1997 Tex. Gen. Laws 3733, 3769 (amended 2001) (current version at TEX. FAM. CODE ANN. § 263.403).

ute, the court can place the child back in the home without dismissing the suit.¹²⁴ In order to return the child home under the authority of this section, the court must find that retaining jurisdiction is in the best interest of the child, order that DPRS continue its conservatorship over the child, and order that DPRS monitor the child's placement.¹²⁵ Furthermore, the court must schedule a new dismissal date not later than 180 days from the date of the order.¹²⁶

If DPRS removes the child from the home again prior to the dismissal of the suit or the rendering of a final order, the court must schedule yet another dismissal date.¹²⁷ "The new dismissal date may not be later than the original dismissal date established under section 263.401 or the 180th day after [the child was removed from the monitored return], whichever date is later."¹²⁸

In entering a final order, the court has alternatives to terminating the parent-child relationship or returning the child to his or her parent.¹²⁹ The court may name a relative of the child or DPRS as the managing conservator of the child without terminating parental rights to the child.¹³⁰ To name DPRS as conservator, the court must find that it is not in the best interest of the child to have a parent, relative, or other individual appointed as managing conservator.¹³¹ This finding must be based on a belief that appointing the parent as managing conservator would "significantly impair" the child's physical and emotional well-being.¹³² Furthermore, additional considerations make such orders more likely for those children who are turning eighteen in the next three years, are "twelve years of age or older" and have "expressed a strong desire against termination" or adoption, or have "special medical and behavioral needs that make adoption" unlikely.¹³³ These provisions were enacted to ensure that children under the permanent conservatorship of DPRS are not lost in the system.¹³⁴

2. Problems in Enforcing the Mandatory Dismissal Deadline

Shortly after the new statutes were enacted, specifically section 263.401, several cases were appealed on mandamus for the court's fail-

124. TEX. FAM. CODE ANN. § 263.403. This section allows DPRS to place the child back in the parents' custody without having to dismiss the petition. DPRS can observe whether the parents have improved and if not, the child can be removed again without the delay of starting a new petition. *See id.*

125. *Id.* § 263.403(a)(3)-(4).

126. *Id.* § 263.403(b)(2).

127. *Id.* § 263.403(c).

128. *Id.*

129. *Id.* § 263.404.

130. *Id.* § 263.401.

131. *Id.* § 263.404.

132. *Id.*

133. *Id.*

134. *See* SAMPSON & TINDALL'S, *supra* note 33, § 263.501 cmt.

ure to comply with the twelve-month deadline.¹³⁵ This subsection discusses the appellate court holdings that led to legislative amendments in 2001.¹³⁶

On petition for a writ of mandamus, *In re Neal*¹³⁷ was the first appellate case to address the twelve-month deadline.¹³⁸ The issue before the court was “whether constructive compliance with section 263.402(a)¹³⁹ allowed the court to retain jurisdiction and not dismiss the suit as mandated under section 263.401.”¹⁴⁰ The trial court complied with section 263.401(a) and entered an extension order prior to the “first Monday” deadline; the new dismissal date was set for 180 days later.¹⁴¹ However, the trial judge disregarded subsection (b) and entered another extension order with a dismissal date beyond the previous dismissal date.¹⁴²

DPRS argued that *de facto* compliance with section 263.402(a) allowed the court’s second extension.¹⁴³ According to DPRS, court approval of the children’s return to their mother under section 263.004(a)¹⁴⁴ constituted a temporary order under section 263.402.¹⁴⁵ “Under their argument, the new dismissal date would have been the later of the original dismissal date or the 180th day after the date the children were removed from their home a second time.”¹⁴⁶ The appellate court was not convinced,¹⁴⁷ holding that section 263.004 was not intended to serve as a third basis for an extension under section 263.401.¹⁴⁸ The court explained that sections 263.401 and 263.402 were enacted in 1997. Had the legislature intended that section 263.004, which was enacted in 1995, serve as an extension to the mandatory dismissal, the legislature would have amended it in 1997.¹⁴⁹ Furthermore, the court reasoned that interpreting section 263.004 as such an extension would “render meaningless the deadlines of sections 263.401(a) and (b) and 263.402(b)(2) and the findings require-

135. See *infra* text accompanying notes 137–85.

136. See *infra* text accompanying notes 187–245.

137. 4 S.W.3d 443 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

138. *Id.*; see TEX. FAM. CODE ANN. § 263.401 (Vernon 2002).

139. TEX. FAM. CODE ANN. § 263.402(a).

140. *Neal*, 4 S.W.3d at 444.

141. *Id.* at 446.

142. *Id.*

143. *Id.*

144. Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 263.004, 1995 Tex. Gen. Laws 113, 270, *repealed by* Act of May 26, 1999, 76th Leg., R.S., ch. 1150, § 31, 1999 Tex. Gen. Laws 4043, 4049.

145. See *Neal*, 4 S.W.3d at 446.

146. *Id.* at 446 n.7.

147. See *id.* at 446–47.

148. *Id.* at 447.

149. *Id.*

ments of section 263.402(b)(1).”¹⁵⁰ Thus, the court conditionally granted the writ of mandamus.¹⁵¹

The Waco Court of Appeals decided several issues regarding the mandatory dismissal date in *In re Bishop*.¹⁵² The court held that a temporary order under section 263.402 could only be rendered on or before the dismissal date mandated by section 263.401.¹⁵³ Otherwise, the court opined, the mandatory dismissal provision is meaningless.¹⁵⁴ Moreover, the court held that when several children are removed from a home, the dismissal date mandated under section 263.401 must be based on the separate orders appointing temporary conservatorship to DPRS despite consolidation of the suits.¹⁵⁵ Furthermore, a trial court may not dismiss the suit in less than twelve months because, under section 263.401, the legislature intended to give DPRS twelve months to achieve permanency.¹⁵⁶

*In re Ruiz*¹⁵⁷ addressed whether a signed docket notation constituted a final order.¹⁵⁸ At the termination hearing, the judge made a docket notation stating: “[d]ecree of termination to be entered as to both parents per jury’s verdict.”¹⁵⁹ Although the termination hearing was held prior to the twelve-month deadline, the judge failed to enter a final order until one month past the deadline.¹⁶⁰

Under section 101.026,¹⁶¹ pronouncement of a court’s ruling may be done “in writing, including on the court’s docket sheet or by a separate written instrument.”¹⁶² However, section 263.401(d) specifically defines a final order¹⁶³ for purposes of section 263.401, and the court held that it controlled over section 101.026.¹⁶⁴ The docket notation was not sufficient to terminate parental rights, and it failed to appoint a managing conservator for the child as mandated under section 263.401(d).¹⁶⁵ Therefore, the court held that the docket notation was not a final order.¹⁶⁶

Next, the court defended its ruling against DPRS’s claim that it produced an absurd result.¹⁶⁷ The court reasoned that such a result was

150. *Id.*

151. *Id.*

152. 8 S.W.3d 412, 418–21 (Tex. App.—Waco 1999, no pet.).

153. *Id.* at 419.

154. *Id.*

155. *Id.* at 420–21.

156. *Id.* at 420.

157. 16 S.W.3d 921 (Tex. App.—Waco 2000, no pet.).

158. *Id.* at 923.

159. *Id.* at 924.

160. *See id.* at 923.

161. TEX. FAM. CODE ANN. § 101.026 (Vernon 2002).

162. *Id.*

163. *Id.* § 263.401.

164. *Ruiz*, 16 S.W.3d at 924.

165. *Id.*

166. *Id.*

167. *See id.* at 927.

not absurd because the dismissal did not have *res judicata* effect.¹⁶⁸ DPRS could refile the suit based on the same grounds, but it could not keep the child “in foster care absent new facts supporting” the need for removal.¹⁶⁹ In the court’s opinion, allowing the child to stay in DPRS’s care absent new facts would circumvent the intent of section 263.401.¹⁷⁰ The court explained that such a ruling would allow DPRS to avoid the sanctions of the deadline and to “maintain custody of a child in its care indefinitely merely by annually refile suit.”¹⁷¹

The next issue considered by an appellate court was whether the parties to a suit brought by DPRS to terminate the parent-child relationship could execute a Rule 11 agreement¹⁷² and avoid the effects of section 263.401.¹⁷³ The Amarillo Court of Appeals held that section 263.401 requires dismissal “once the time lapses,” regardless of what the parties desire.¹⁷⁴ Holding that a “Rule 11 agreement [was] nothing more than a contract,” the court declared it unenforceable as it attempted to bypass the time restrictions of section 263.401(a).¹⁷⁵

*In re M.C.M.*¹⁷⁶ resolved the conflict between the mandatory dismissal date in section 263.401 and the indefinite continuance under section 161.2011.¹⁷⁷ At the time of the appeal, section 161.2011¹⁷⁸ required that a termination suit be continued when pending criminal charges exist relating to the grounds on which termination is based.¹⁷⁹ Such a continuance lasts until the criminal charges are resolved, with the court having discretion to proceed to final trial if it is in the best interest of the child.¹⁸⁰

Relying on the intent of the statutes, the court held that section 161.2011 should stay section 263.401.¹⁸¹ The court opined that section 161.2011 should act to stay the eighteen-month deadline of section

168. *See id.*

169. *Id.* (citing *In re Bishop*, 8 S.W.3d 412, 420 (Tex. App.—Waco 1999, no pet.); *Slatton v. Brazoria County Protective Servs. Unit*, 804 S.W.2d 550, 552–53 (Tex. App.—Texarkana 1991, no writ)).

170. *See id.* These new facts warranting removal must have occurred after the adversary hearing in which DPRS was appointed temporary managing conservator. *Id.*

171. *Id.*

172. A Rule 11 agreement is simply an agreement made between attorneys or parties concerning a pending suit. The agreement must be in writing, signed, and filed in the record to be enforceable. *See* TEX. R. CIV. P. 11.

173. *See In re T.M.*, 33 S.W.3d 341, 347 (Tex. App.—Amarillo 2000, no pet.).

174. *Id.* at 346.

175. *Id.* at 347.

176. 57 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

177. *See id.* at 35–37.

178. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 61, 1997 Tex. Gen. Laws 3733, 3759, amended by Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 3, 2001 Tex. Gen. Laws 2395, 2395 (current version at TEX. FAM. CODE ANN. § 161.2011 (Vernon 2002)).

179. *Id.*

180. *Id.*

181. *M.C.M.*, 57 S.W.3d at 36.

263.401.¹⁸² According to the court, the termination suit would automatically be stayed and the time limits tolled until the criminal trial is resolved.¹⁸³ Upon resolution of the criminal charges, the deadline under section 263.401 would continue to run.¹⁸⁴ If the trial judge did not find it in the child's best interest to await resolution, the stay could be lifted.¹⁸⁵

The mandatory dismissal deadline was an impressive attempt to eliminate foster care limbo. However, the interpretation and compliance problems discussed in this Part revealed the need for further improvements to section 263.401 and the permanency process.¹⁸⁶

IV. ANALYSIS OF THE CURRENT VERSION OF SECTION 263.401

In 2001, the Seventy-Seventh Legislature passed several amendments to the Texas Family Code clarifying the requirements of section 263.401 and eliminating the contradictory language in other statutes.¹⁸⁷ Most of these changes address the issues addressed by the appellate courts in Part III.¹⁸⁸ This Part discusses and analyzes these amendments.

A. *Dismissal Deadline of Twelve Months*

The amendments to section 263.401¹⁸⁹ clarified the extension provisions in its subsections (b) and (c).¹⁹⁰ Now, if the court wants to retain a suit on its docket beyond the mandatory dismissal date, the court

182. *Id.* at 37.

183. *Id.*

184. *Id.*

185. *Id.*

186. *See supra* text accompanying notes 137–85.

187. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395.

188. *Compare id.*, with *supra* text accompanying notes 135–85.

189. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2395, 2396.

190. TEX. FAM. CODE ANN. § 263.401 (Vernon 2002). This section provides in relevant part:

- (b) The court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a), if the court finds that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court retains the suit on the court's docket, the court shall render an order in which the court:
 - (1) schedules the new date for dismissal of the suit not later than the 180th day after the time described by Subsection (a);
 - (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
 - (3) sets a final hearing on a date that allows the court to render a final order before the required date for dismissal of the suit under this subsection.
- (c) If the court grants an extension but does not render a final order or dismiss the suit on or before the required date for dismissal under Subsection (b), the court shall dismiss the suit. The court may not grant an

must find that the continued appointment of DPRS “as temporary managing conservator is in the best interest of the child.”¹⁹¹ Then, the court must render an order that schedules the new dismissal date “not later than the 180th day after the time described by subsection (a),” and “sets a final hearing on a date that allows the court to render a final order before the required date for dismissal.”¹⁹² Additionally, “[t]he court may not grant an additional extension” beyond the 180-day extension permitted by subsection (b).¹⁹³ Various word replacements make it clear that an extension may not exceed 180 days from the original dismissal date under subsection (a);¹⁹⁴ if an extension is granted, the court must enter an order meeting the requirements of subsection (b).¹⁹⁵

The legislature enacted a new provision in section 263.304¹⁹⁶ to ensure compliance with section 263.401.¹⁹⁷ Under subsection (b), the court must schedule the final hearing at the initial permanency hearing,¹⁹⁸ and the final hearing date must comply with the dismissal date under section 263.401(a).¹⁹⁹ Before this subsection’s addition, no provision required the court to take such actions.²⁰⁰ Furthermore, if the court does not comply with subsection (b), any party to the suit may seek mandamus.²⁰¹

These amendments reduce the chance of a dismissal under section 263.401.²⁰² Six months after DPRS is named temporary managing conservator, the court is required to set a final hearing date that complies with section 263.401.²⁰³ If the court fails to do so, the parties

additional extension that extends the suit beyond the required date for dismissal under Subsection (b).

Id.

191. *Id.*

192. *Id.* In addition, this order should also make any temporary orders necessary for the safety and welfare of the child. *Id.*

193. *Id.* § 263.401(c).

194. *Id.* § 263.401(b)(1).

195. *Id.* § 263.401(b)(1)–(3).

196. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 263.304).

197. *See id.*

198. TEX. FAM. CODE ANN. § 263.304(b).

199. *Id.*

200. SAMPSON & TINDALL’S, *supra* note 33, § 263.304 cmt.

201. *See* TEX. FAM. CODE ANN. § 263.304(b).

202. Because the final hearing must be scheduled to comply with section 263.401, a final order will be rendered within twelve months of DPRS’s appointment as temporary managing conservator. *See id.* If the court reschedules a hearing date that does not comply with section 263.401(a), “[a]ny party to the suit” may seek mandamus. *Id.* § 263.304. Only if the court grants an extension under section 263.401(b) will there be an opportunity for the final order not to be rendered in compliance with section 263.401(a). *See id.* § 263.401(a), (b).

203. *See id.* § 263.304. Under section 263.304(a), the initial permanency hearing must be held no later than the 180th day from the date the court renders a temporary order, and section 263.304(b) requires the final hearing date be set. *Id.*

have an immediate recourse of seeking mandamus.²⁰⁴ Under section 263.304(b), the dismissal date provision will be met unless the court later postpones the scheduled hearing date.²⁰⁵

1. Conflict Between Sections 161.2011 and 263.401

The Legislature amended section 161.2011 to eliminate the conflict with section 263.401.²⁰⁶ Under section 161.2011, a continuance is no longer mandatory. In fact, the court may only grant such a continuance at the parent's request and only if it is in the child's best interest.²⁰⁷ Even if the court grants a continuance, status and permanency hearings must be conducted as required under Chapter 263 of the Texas Family Code²⁰⁸ and the time limitation of section 263.401 is not stayed.²⁰⁹ Therefore, unlike a continuance under the previous version of section 161.2011, a continuance may not postpone the final hearing beyond eighteen months from the initiation of the suit.²¹⁰

These changes are consistent with the State's intent of reducing a child's stay in foster care.²¹¹ When the grounds for termination are also the basis for criminal prosecution against the parent, resolution of the criminal case may be helpful in resolving the termination suit;²¹² however, the additional benefit of the resolution is outweighed by the harm caused to a child who lingers in foster care.²¹³ Although a possibility exists that a criminal suit may not be resolved within the dismissal provisions of section 263.401, the possibility is minute.²¹⁴ Despite a

204. *Id.*

205. The hearing date is already set before the twelve-month deadline of section 263.401(a), and the court must schedule the date to allow time for a full trial. *See id.* Therefore, a final order will be rendered before the deadline unless the court postpones the hearing. *Id.*

206. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 3, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 161.2011).

207. *See* TEX. FAM. CODE ANN. § 161.2011(a) (Vernon 2002).

208. *Id.*; *see id.* ch. 263.

209. *See id.* § 161.2011(a).

210. *Compare* Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 61, 1997 Tex. Gen. Laws 3733, 3759, *with* Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 3, 2001 Tex. Gen. Laws 2395. If the court finds it in the best interest of the child, an extension order may be granted to allow more time for resolution of the criminal trial. *See* TEX. FAM. CODE ANN. § 263.401(b). This provision allows for an additional six months. *Id.*

211. *See Senate Hearings, supra* note 20, at Tape 1, Side A (statement of Sen. Florence Shapiro). This amendment will prevent a termination suit from being postponed indefinitely and allow DPRS to achieve permanency quickly.

212. *See In re M.C.M.*, 57 S.W.3d 27, 36–37 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

213. *See supra* text accompanying notes 10–17 (discussing effects of foster care on children).

214. This assertion is based on the Author's experience with the criminal justice system and the assumption that an extension granted to allow more time for resolution of the criminal case is in the child's best interest.

backlogged court system, most criminal cases are resolved within eighteen months.²¹⁵

2. Rule 11 Agreements

With the enactment of Chapter 1090 of the Act of May 22, 2001, the parties may not enter a Rule 11 agreement to avoid the mandatory dismissal under section 263.401.²¹⁶ The statute clearly states that parties to a DPRS suit may not enter into an agreement to extend the deadlines beyond the requirements of Subchapter E.²¹⁷ The prohibition is in the best interest of all foster-care children, because such use of a Rule 11 agreement would render the provision's deadline meaningless.²¹⁸

3. Waiver of the Time Limitation

The legislature included a provision in section 263.402²¹⁹ creating a waiver of the mandatory dismissal under section 263.401.²²⁰ A motion to dismiss the suit for noncompliance with section 263.401 must be timely, or the right to object is waived.²²¹ A timely motion is one made prior to the close of DPRS's evidence at a trial on the merits.²²² Thus, contrary to the *Ruiz* holding,²²³ a party will be unsuccessful in raising the court's failure to comply with the mandatory dismissal date after a final order has been rendered.²²⁴ This amendment was necessary because parents had been using the mandatory dismissal as a "filibustering tactic."²²⁵

B. *Effect of a Dismissal Under Section 263.401*

Due to the confusion that existed over whether a dismissal of a petition under section 263.401 had *res judicata* effect,²²⁶ the legislature

215. This assertion is based on the Author's experience with the criminal justice system.

216. See Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 263.402(a) (Vernon 2002)).

217. *Id.*; TEX. FAM. CODE ANN. § 263.402.

218. Through a Rule 11 agreement, the parties could postpone the case at their whim leaving a child's permanency in limbo. Section 263.401 was enacted to prevent children from lingering in foster care; thus this amendment is in the best interest of the child.

219. TEX. FAM. CODE ANN. § 263.402.

220. See Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 263.402).

221. See *id.*

222. *Id.* This does not include rebuttal evidence. *Id.*

223. See *supra* text accompanying notes 157–71.

224. See Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 263.402).

225. E-mail from Leslie A. Fox, Regional Attorney, Texas Department of Protective and Regulatory Services, to Sherry Hess, Texas Wesleyan University School of Law (Feb. 8, 2002, 15:32:26 CST) (on file with the Texas Wesleyan Law Review).

226. See SAMPSON & TINDALL's, *supra* note 33, § 161.203 cmt., § 161.205 cmt.

amended section 161.203.²²⁷ The amendment clearly states that a dismissal is without prejudice.²²⁸ Thus, a dismissal under the above section would not prevent DPRS from refileing on the same grounds.²²⁹ Only an order *denying* a petition for termination has *res judicata* effect.²³⁰ Such an order must be entered if the court does not terminate the parent-child relationship, unless the court renders another order in the best interest of the child.²³¹

The legislature was correct in not applying *res judicata* to a dismissal under section 263.401. *Res judicata* applies only when there has been a final decision on the merits. When the case has been dismissed under section 263.401, no decision has been made on the merits.²³²

Upon dismissal of a petition under section 263.401, a child in DPRS's custody must be returned to his or her parents.²³³ Although DPRS may refile a petition on the same grounds, a child can only be removed from his or her parents' custody if DPRS presents new facts proving that the child is in danger.²³⁴ "New facts" are those events that have occurred after the adversary hearing in which the court first granted removal.²³⁵ The fact that parents have not alleviated their problems, which were grounds for the first suit, is not enough to constitute a "risk."²³⁶

Although a judge's own subjective values may influence a finding of "risk" to justify removal,²³⁷ the requirement of "new facts" prevents DPRS from simply refileing petitions after dismissal under section 263.401. Unfortunately, foster-care children will not differentiate between the time spent in foster care prior to dismissal and the time allowed under the new petition. They will be aware of the continued intrusion into the parent-child relationship and will likely suffer anxiety over the uncertain future and possible separation from their parents again.²³⁸

227. See Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 4, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 161.203).

228. TEX. FAM. CODE ANN. § 161.203.

229. See *In re Bishop*, 8 S.W.3d 412, 420 (Tex. App.—Waco 1999, no pet.); *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.—Waco 2000, no pet.).

230. *Ruiz*, 16 S.W.3d at 927; see Act of May 28, 1997, 75th Leg., R.S., ch. 603, §§ 5–12, 1997 Tex. Gen. Laws 2119, 2120–23.

231. TEX. FAM. CODE ANN. § 161.205.

232. A dismissal under section 263.401 is based solely on the court's failure to enter a final order by the required dismissal date of this section. The dismissal is not based on any findings against or in support of the petition filed by DPRS.

233. See *Ruiz*, 16 S.W.3d at 927.

234. See *id.*

235. *Id.*

236. See E-mail from Leslie A. Fox, *supra* note 225.

237. *Id.*

238. See WARZYNSKI, *supra* note 88, at 765.

C. Appeals of a Final Order

The legislature addressed the role of appeals in delaying a child's permanency through the enactment of section 263.405.²³⁹ A party who intends to appeal an order terminating the parent-child relationship must file a statement of the points of appeal with the trial court not later than fifteen days after the date the final order was signed.²⁴⁰ This accelerated-appeals process,²⁴¹ in conjunction with section 109.002,²⁴² decreases the uncertainty surrounding the final order.²⁴³ Section 109.002 gives appeals of DPRS's termination suits precedence over other civil appeals cases.²⁴⁴ Additionally, the court is not allowed to suspend an order that terminates the parent-child relationship.²⁴⁵ These provisions prevent an appeal from causing further disruption in a child's life.²⁴⁶

V. PROPOSALS

According to the statistics, the mandatory dismissal under section 263.401 has been successful in decreasing a child's foster care stay prior to termination.²⁴⁷ However, the deadline may not always work in the best interest of the child: the deadline may act to prematurely terminate the parent-child relationship of a parent with a chemical dependency.²⁴⁸ In addition, the legislature has failed to establish a deadline for cases remanded on appeal.²⁴⁹ These problems and the proposed resolutions to these problems will be discussed in the following sections.

A. Amend Section 263.401 to Allow an Extension When the Parent Receives Substance Abuse Treatment

Although the maximum time of eighteen months is sufficient in most cases to determine if the parent can resolve his or her problems,

239. See Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395 (current version at TEX. FAM. CODE ANN. § 263.405 (Vernon 2002)).

240. TEX. FAM. CODE ANN. § 263.405(b).

241. *Id.* § 263.405(a).

242. *Id.* § 109.002.

243. The uncertainty over whether the trial court's judgment will be overturned is decreased because the time period to file an appeal has been shortened, and appellate courts must hear such an appeal quickly. See *id.* §§ 109.002, 263.405.

244. *Id.* §§ 109.002(a), 263.405.

245. *Id.* § 109.002(c).

246. A child's placement under the trial court's final order cannot be disturbed. *Id.* Thus, a child will not be moved between his parents and DPRS while awaiting an appellate decision. *Id.*

247. See DESCRIPTION, *supra* note 8 (stating that DPRS had approximately 8000 children in temporary custody as of January 1, 1998, and all but 220 of those children had their cases dismissed or final orders rendered); see also Press Release, *supra* note 28.

248. See *infra* text accompanying notes 250-61.

249. See *infra* text accompanying notes 262-79.

circumstances exist in which more than eighteen months may be needed.²⁵⁰ These circumstances include when a parent has a substance abuse problem.²⁵¹ This problem very likely inhibits a parent's efforts toward addressing and meeting all of the service plan requirements.²⁵² Consequently, the possibility exists that a parent-child relationship may be terminated prematurely.²⁵³ Because these circumstances "effectively shorten[] their real time to work the [service] plan to the point where it's not possible to meet the deadline,"²⁵⁴ a provision should be enacted to allow an extension to give parents in such a situation more time.

An extension would only be granted based on the court's finding that the parent received inpatient or outpatient treatment under an appropriate treatment facility for chemical addictions. By limiting it to a treatment facility, parents could not attempt to extend the deadline based on self-induced treatment. The party requesting the extension would have the burden of proving the following three elements: (1) that a chemical addiction exists, (2) that this addiction impaired their ability to fulfill the requirements of the service plan, and (3) that treatment was received at an appropriate treatment facility. In addition, a court would be required to find reasonable cause that the child will be reunified with the parent. This would prevent needless delay when the parent receives treatment but the grounds for termination are either serious or the parent has not made a "good faith" effort at reunification.²⁵⁵ The proposed amendment to section 263.401 is as follows:

- (c) An additional extension may be granted under subsection (b)
 - (1) if the court finds that:
 - (a) the parent suffers from a chemical addiction;
 - (b) the parent has received treatment at an appropriate treatment facility for a length of time to impair their ability to meet the goals of the service plan and
 - (c) reasonable cause exists that the child may be reunified with the parent.
 - (2) the burden of proof rests on the party requesting the extension;
 - (3) an extension granted under this subsection may not last longer than 180 days.

250. E-mail from Leslie A. Fox, *supra* note 225.

251. *Id.*

252. *Id.* If a parent has a chemical addiction or a mental health problem, receiving treatment to resolve those illnesses will be required under his or her service plan. See TEX. FAM. CODE ANN. §§ 161.001(1)(P), 263.102(a)(7) (Vernon 2002).

253. See Hort, *supra* note 43, at 1914.

254. E-mail from Leslie A. Fox, *supra* note 225.

255. For example, if the parent has multiple problems that are not likely to be resolved by treatment, there would be no need to extend the dismissal date.

Current subsections (a), (b), (c), and (d) would be reworded and re-numbered accordingly.

Although this amendment may slow the process of moving children through foster care,²⁵⁶ the statistics prove that it is needed. The percentage of child abuse and neglect cases involving parents with chemical addictions has been increasing.²⁵⁷ Addicts seeking treatment may encounter waiting lists.²⁵⁸ In 1998, a mere ten percent of child welfare agencies were able to find treatment programs for needy parents within thirty days.²⁵⁹ Additionally, drug treatment may last up to one year.²⁶⁰ With the potential for successful drug treatment,²⁶¹ this amendment could keep otherwise destroyed Texas families intact.

B. *Create a Time Limit for Disposition of Cases Remanded After Appeal*

Even though the legislature enacted a statute for speedy appeals and temporary orders during an appeal,²⁶² they have failed to regulate the disposition of a case after an appeal.²⁶³ This has resulted in some confusion surrounding the handling of a case after appeal.²⁶⁴ Does the trial court operate under another deadline? If so, how much time does the court have to enter a final order?

Although the disposition of an appealed case would depend on the appellate court's judgment, the trial court's docket, and the particular facts of the case,²⁶⁵ 180 days should be ample time to dispose of any case. On appeal, if the appellate court finds merit in an issue raised, it can either reverse a trial court's holding or reverse and remand the

256. This amendment would grant an additional extension to the one currently allowed, making the maximum time spent in foster care twenty-four months rather than eighteen. The Author admits that this amendment would have the effect of lengthening a child's stay in foster care. However, it is the Author's belief that, in this situation, the harm caused by termination of a parent-child relationship that could have been rehabilitated outweighs the additional harm caused by a lengthier stay.

257. See Hort, *supra* note 43, at 1914 (discussing the prevalence of drug-addicted parents); see also O'Flynn, *supra* note 50, at 243-46.

258. See O'Flynn, *supra* note 50, at 260-61. In 1997, 52,000 people were on waiting lists for substance abuse programs. *Id.*

259. *Id.* at 261.

260. *Id.* at 258.

261. *Id.* at 263. One-third are successful on the first attempt and success is more likely for those who remain in the treatment program for longer periods of time. *Id.*

262. See TEX. FAM. CODE ANN. §§ 109.001-.002, 263.405 (Vernon 2002).

263. See *id.* § 263.405; see also *id.* ch. 263, subch. E.

264. The Author witnessed such confusion personally during the Summer of 2001. A trial court's order terminating a mother's parental rights was reversed by the Fort Worth Court of Appeals. Upon remand, the trial judge was confused as to how much time he had to enter a new order. The attorney *ad litem* argued that the time limit started over but could not support his opinion with case law. The judge finally ordered the child stay in DPRS's custody and circumvented the issue.

265. These factors will affect whether a new trial will be held, a new petition filed, the possibility of a settlement agreement, and so forth.

case for a new trial.²⁶⁶ If the court reverses a final order that terminated a parent-child relationship, the reversal is equal to a denial of the petition.²⁶⁷ Because the petition was in effect denied, DPRS would have to file a new petition based on new facts,²⁶⁸ and the requirements of section 263.401 would apply.²⁶⁹

But if the appellate court reverses and remands the case for a new trial, the trial court must hold a new trial unless the parties reach an agreement on their own.²⁷⁰ Because a final order has been rendered, section 263.401 no longer applies to the remanded case.²⁷¹ The court has no other deadline by which it must abide.²⁷² Considering that trial courts have been resistant in complying with the mandatory provisions of section 263.401,²⁷³ the possibility exists that they will not dispose of these cases in a timely manner on their own initiative.²⁷⁴

Although the parties may normally dispose of the case either through settlement or dismissal, a statute should be enacted to ensure that the permanency of a child is not needlessly delayed. The legislature should enact a statute to allow the trial court and parties 180 days to enter a final order. This timeframe allows the parties ample time to prepare their case for another trial or to reach an agreement.²⁷⁵ The discovery process has already taken place; therefore, the parties are familiar with the case.²⁷⁶ The parties would have ample time to review the appellate court's judgment and identify the strengths and weaknesses of their case.²⁷⁷ This timeframe also allows the trial court flexibility in working the case into its docket.²⁷⁸ The trial court should have few problems meeting the requirements of such a statute because the court already gives preferential court settings to DPRS suits.²⁷⁹

A statute limiting the time allowed for disposition of an appealed case could be structured as follows:

Entering a Final Order After an Appeal

266. TEX. R. APP. P. 43.2.

267. See *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.—Waco 2000, no pet.); see TEX. FAM. CODE ANN. § 161.205.

268. See *Ruiz*, 16 S.W.3d at 927.

269. See *id.*; TEX. FAM. CODE ANN. § 263.401.

270. *Ruiz*, 16 S.W.3d at 927.

271. E-mail from Leslie A. Fox, *supra* note 225.

272. See *id.*; see also E-mail from Sarah R. Guidry, Regional Attorney, Texas Department of Protective and Regulatory Services, to Sherry Hess, Texas Wesleyan University School of Law (Feb. 12, 2002, 13:01:24 CST) (on file with the Texas Wesleyan Law Review).

273. See E-mail from Sarah R. Guidry, *supra* note 272; see also *supra* text accompanying notes 135–86.

274. See E-mail from Sarah R. Guidry, *supra* note 272.

275. E-mail from Leslie A. Fox, *supra* note 225.

276. See *id.*

277. See *id.*

278. See *id.*

279. See *id.*

- (A) If the final order entered by the trial court in a suit affecting the parent-child relationship, filed by the department, was appealed and the appellate court reversed and remanded for a new trial,
 - (1) the trial court shall enter a new final order within 180 days of the date of the appellate court's decision, and
- (B) If the trial court fails to comply with subsection (A)(1) and the suit has not been dismissed, the court shall dismiss the suit.

This proposal would ensure that a case remanded on appeal would not linger indefinitely. Furthermore, it provides a sufficient amount of time for a final order to be rendered.

VI. CONCLUSION

The State of Texas has taken a step in the right direction toward eliminating foster care limbo by enacting Texas Family Code section 263.401 and its companion statutes. However, when a parent has a substance abuse problem, the mandatory dismissal deadline may work against the best interest of the child. Additionally, the legislature has neglected to apply a deadline to remanded cases, leaving a gap in the system. Implementing the proposals in the preceding Part will help ensure that termination is truly in the best interest of the child.

Sherry A. Hess