LICENSING RELATIVES AS FOSTER PARENTS

The foster care licensing process is meant to ensure that foster parents who get a financial subsidy to care for a child in state custody can meet the child’s needs and provide a safe and appropriate home. For a myriad of reasons, historically, few relative caregivers in Texas have become foster parents. But with the enactment of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008, that will likely change.

Fostering Connections requires states to provide notice to relatives within 30 days after the child has been removed. Among other things, the notice must tell the relative about how to become a foster parent and the benefits and services available with this option. In addition to providing this notice, Child Protective Services (CPS) has increased its outreach efforts to inform relatives of the foster care option.

Fostering Connections also expanded the federal financial support available to relatives by creating an optional subsidy for relatives who take permanent custody of children as a permanent managing conservator. Before Fostering Connections, the federal government only subsidized payments to relatives who took permanent custody of a child through an adoption. In 2009, the Texas legislature enacted the new federal option which in Texas is called the Permanency Care Assistance (PCA) program. Texas adopted all the eligibility requirements of outlined in federal law, including the requirement that the relative be a foster parent for at least 6 months before having conservatorship transferred.

As a result of the new notice requirement, increased outreach efforts, and Permanency Care Assistance, it is likely that more relatives will be applying to become foster parents. To help courts, attorneys, and others assist relative caregivers in navigating through the foster care evaluation process, we provide a summary of how it works and the available options should foster care status be denied.

How the Evaluation Process for Potential Foster Parents Works

Who Evaluates Potential Foster Parents

The foster care licensing process is governed by federal and state law as well as state agency policies. In Texas, foster homes are regulated by the Child Care Licensing (CCL) division of the Department of Family and Protective Services (DFPS). Generally, child care licensing does not evaluate or directly license potential foster parents. Instead, it licenses child placing agencies who then work with potential foster parents and “verify” that they meet the necessary requirements. Commonly, everyone speaks about “licensing” a foster parent, but the correct term is actually “verifying.” The license is held by the child placing agency. The importance of this distinction is explained below.

There is a public child placing agency that CPS operates through its Foster and Adoption Division (FAD), as well as many private child placing agencies around state. Currently, about 15 percent of children are in homes verified through the CPS foster care unit and 85 percent are in homes verified through private child placing agencies. Relatives seeking to become a foster parent can work through either the CPS foster care unit or a
private child placing agency. But, generally, the CPS foster care unit verifies foster parents only for children at a basic level of care.7 Private child placing agencies verify almost all the homes that take children needing higher levels of care, although they verify basic homes as well.

**Criminal and Child Maltreatment Background Check**

Federal law requires states receiving federal foster care funding to conduct a criminal and child abuse and neglect background check on all prospective foster parents.8 The federal government will not subsidize foster care costs for children placed in the home if the prospective foster parent has a felony conviction for child abuse or neglect, spousal abuse, a crime against children, or a crime involving violence (including rape, sexual assault and homicide but not other types of physical assault or battery). The federal government also will not provide a subsidy if someone has a felony conviction for physical assault, battery or a drug related offense within the past five years.9

Texas law requires a criminal and child abuse and neglect background check on all prospective foster parents and anyone 14 years or older living or regularly staying in the home.10 Licensing is prohibited for the following felony convictions under Texas law or similar laws in another state or federal law:11

- **Texas Penal Code**
  - Inchoate Offenses (Title 4, §15.031)
  - Offenses Against the Person (Title 5, Chapters 19, 20, 20A, 21, 22)
  - Offenses Against Property (Title 7, Chapter 29)
  - Offense Against Public Administration (Title 8, §38.17)
  - Offenses Against Public Order and Decency (Title 9, Chapter 43 and §42.072)
- Drug-related offenses within the last five years (Texas Controlled Substance Act, Penal Code §§39.04, 42.08, 42.09, 42.091, 42.092, 42.10, 42.12 and Chapter 49, Texas Alcoholic Beverage Code §106.06)

For other criminal convictions, Texas has a risk evaluation process. The process is available if it has been more than 20 years since the conviction or the prospective foster parent is related to or has a significant longstanding relationship with the child.12

Under Texas law, licensing is also prohibited if CPS or child care licensing has found that someone 14 or older in the house has perpetrated physical or sexual abuse.13 But for findings of emotional abuse or neglect, a risk evaluation process is available.

The entity that is assessing the relative makes the decision about whether to request a risk evaluation.14 The Centralized Background Check Unit within child care licensing considers any risk evaluation requests that are submitted.15

**Evaluation of the Caregiver and Home**

Federal law requires states to develop standards on admission policies, safety, sanitation, and protection of civil rights and will only provide subsidies for those foster parents who meet the requirements.16 In Texas, the foster care standards on admission, sanitation, safety, and protection of civil rights are referred to as minimum standards.17 There are hundreds of minimum standards ranging from general provisions that would be expected in any home (e.g., provide sufficient food and water) to detailed, specific requirements that the average home may or may not meet (e.g., a fire extinguisher in the kitchen and on each level of the home).
Following federal law, Texas allows a variance from the minimum standards for “good and just cause.” A variance requires compliance with the standard but allows flexibility in how compliance is achieved. For example, a standard may require safe drinking water with a variance allowing a foster parent who does not have potable water to fulfill that requirement by using bottled water.

Texas law also provides for a waiver of standards that are not statutorily required if “the economic impact of compliance is sufficiently great to make compliance impractical.” A waiver excuses compliance with the minimum standard altogether. For example, a waiver may be used to allow a home to be licensed even though the bedrooms do not meet the specific square footage requirements set forth in the standards. In contrast, the number of children who can live in a foster family or group home is defined by statute and, therefore, cannot be waived.

Fostering Connections added another layer to the waiver process, allowing states to waive for relative caregivers “non-safety” foster care licensing standards on a case-by-case basis for specific children in care. The federal government left it to the states to define who is a relative and what “non-safety” means, providing no specific policy or rules. In Texas, a relative includes those related by consanguinity as well as fictive kin who have a longstanding and significant relationship with the child. But Texas has no specific definition or policy about which minimum standards are considered “non-safety.”

The entity verifying the relative decides whether to submit a request for a variance or waiver. All requests are submitted to child care licensing and then assigned to an individual child care licensing inspector who evaluates the request and makes a recommendation to a supervisor about whether it should be granted. In evaluating the request, state policy requires the inspector to consider, among other things, whether granting the request will “negatively impact child safety.” Any variance or waiver may have conditions on it, and no variance or waiver may be granted for more than three years.

**Options When a Relative Is Not Verified as a Foster Parent**

**Administrative Options**

A relative’s options depend on who did what.

If the relative is denied verification because someone in the home has a criminal or child maltreatment history that is an absolute bar and the information is correct, no exception can be made. If the relative believes the background information is incorrect, the entity verifying the relative may contact the local child care licensing staff to discuss the matter or conduct their own fingerprint criminal history check through the Department of Public Safety.

If a relative is denied verification because someone in the home has a criminal or child maltreatment history that was subject to a risk evaluation, and child care licensing concludes that the individual is a threat to children’s health or safety, nothing more can be done. Risk evaluations are not subject to any review or appeal.

If a relative is denied verification because child care licensing denied a request for a waiver or variance, the entity verifying relative (and not the relative) can request a child care licensing administrative review. A request for an administrative review must be in writing and submitted within 15 days after receiving notice of the right to an administrative review.

If the relative is denied verification because the CPS foster care unit assessed the relative, found that she did not meet the applicable standards and refused to submit a risk evaluation, or a variance, or waiver request, the relative is entitled to an administrative review by the CPS foster care unit. The worker who is assessing the relative informs the relative of this right orally and in a follow up letter which includes a form to request an
administrative review. The request for a review must be submitted within 15 days after the follow up letter is sent. The review is conducted by the program director or another designee of the program administrator and the relative must be informed of the results of the review in writing.

If the relative is denied verification because a private child placing agency assessed the relative, found that she did not meet the applicable standards and refused to submit a risk evaluation, or a variance or waiver request, the relative's options will depend on the child placing agency's internal policies regarding reviews and appeals.

Judicial Options

A judge in a CPS case cannot simply order a private child placing agency, the CPS foster care unit, or child care licensing to do anything in particular with respect to a relative caregiver. For example, a judge cannot order a private child placing agency or the CPS foster care unit to submit a waiver request for a relative's home, and a judge cannot order child care licensing to grant the request if it is submitted. A private child placing agency is not a party to the CPS case and, in any event, has no legal obligation to take a particular relative into its program. This brings us back to the important distinction between “licensing” and “verifying” discussed in the beginning. Every time a child placing agency “verifies” a home under its license, its license is at risk if the home turns out to violate standards or hurt a child. Forcing a child placing agency to verify a home that it does not think appropriate would be like forcing a lawyer to take an associate into the lawyer's practice that the lawyer did not think appropriate, putting the lawyer's own license or liability at risk.

The CPS foster care unit and child care licensing are a part of DFPS, which is a party to the CPS case. But when verifying a relative or deciding on whether to grant a variance or waiver, these divisions are making authorized executive branch decisions. As a result, the relative must sue and establish a legal right to become a foster parent before any order involving the CPS foster care unit or the child care licensing division can be made.

There are steps a judge can take to encourage a second look or to move the decision about a variance or waiver up the chain of command. If a judge thinks that verifying a relative as a foster parent is in a child's best interest but that the process has gone off track, a judge might order the caseworker to assist the relative with pursuing their administrative remedies. Perhaps in the appropriate case, a judge could even enlist the child's attorney or guardian ad-litem or an attorney for a parent to help if the child's or parent's interest includes securing the relative placement. Alternatively, if a judge believes that the entity assessing the relative is wrongly denying verification by refusing to submit a request for a risk evaluation, variance, or waiver, the judge could order a search for another child placing agency that may be willing to do so. In the end, however, there will be some relatives that would be acceptable to the judge that won't be acceptable to the public or private child placing agency. In those cases, the judge must decide between giving the relative PMC without any subsidy or some other placement.
Endnotes

2 42 U.S.C. §673(d).
3 Texas Family Code §264.851 et. seq.
4 Texas Family Code §264.852(b); 40 Texas Administrative Code §700.1029.
5 Child care licensing can license an individual if they apply to child care licensing directly, but very few do. And starting in state fiscal year 2011, CPS will only be placing with foster homes that have been verified through the CPSfoster care unit or a private child placing agency.
7 Based on information provided by the CPS foster care unit.
10 Texas Human Resources Code §42.056.
11 40 Texas Administrative Code §745.693(a).
12 40 Texas Administrative Code §745.693(b).
13 40 Texas Administrative Code §745.695.
14 40 Texas Administrative Code §745.683(b).
15 Child Care Licensing Handbook 5377.
18 Texas Human Resources Code §42.048(c).
20 40 Texas Administrative Code §745.8307.
21 Texas Human Resources Code §42.042(j).
22 Texas Human Resources Code §42.002(10) & (11).
23 42 U.S.C. §671(a) (10).
24 Texas Family Code §264.751.
25 Based on information provided by child care licensing.
26 40 Texas Administrative Code §745.8309. There is a section in the Administrative Code providing that variances for relatives being assessed by the CPS foster care unit are submitted to the director of CPS. (40 Texas Administrative Code §700.1501(b)). But, in practice, the CPS foster care unit submits all variances and waivers to child care licensing, even for relatives.
27 Child Care Licensing Handbook 5110.
28 40 Texas Administrative Code §745.8313.
29 40 Texas Administrative Code §745.8311.
30 40 Texas Administrative Code §745.663.
31 40 Texas Administrative Code §745.711.
32 40 Texas Administrative Code §745.8805 & §745.8807.
33 40 Texas Administrative Code §745.8809.
34 40 Texas Administrative Code §745.8806.
35 CPS Handbook §7800.
36 40 Texas Administrative Code §745.1505.
37 As set forth in the letter the CPS foster care unit sends to a potential foster care applicant who is denied licensing.
38 CPS Handbook §7800.
39 Minimum standards require private child placing agencies to develop criteria and procedures for screening and accepting potential foster parents. (Child Care Licensing Minimum Standard 749.345). But there is no requirement that they develop an administrative review process for those who are denied licensing.