

# REPRESENTING PARENTS IN CPS CASES

*“Other than that, what do you have against them?”*

Prepared By:

Marc D. Isenberg  
Miriam J. Riskind  
ISENBERG & RISKIND

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ISENBERG & RISKIND  
12 Greenway Plaza  
Suite 1100  
Houston, Texas 77046  
(713) 940-0640 Telephone  
(713) 880-0780 Fax  
[IsenbergM@aol.com](mailto:IsenbergM@aol.com)

## Biographical

Marc D. Isenberg

### **Educational Background:**

Bachelor of Arts, University of Texas, 1971

Doctor of Jurisprudence, University of Houston Law Center, 1974

Board Certified, Personal Injury Trial Law, 1991

Board Certified, Juvenile Law 2003

Former Board of Directors, Houston Bar Association Juvenile Law Section

### **Major Accomplishments:**

Eagle Scout

Hiked out of the bottom of the Grand Canyon during a snow storm

Took scuba lessons while my wife was in law school and sky dived after she graduated

Married for twenty-eight years

Only husband and wife team in Texas both certified in Juvenile Law

Miriam J. Riskind

### **Educational Background:**

Bachelor of Arts, History, University of Texas, 1970

Master of Arts, Urban Studies, University of Houston, 1976

Doctor of Jurisprudence, Thurgood Marshall School of Law, 1990

### **Major Accomplishments**

Board Certified in Juvenile Law, 2001

Former Chair, Houston Bar Association Juvenile Law Section

Currently Treasurer, Houston Bar Association Juvenile Law Section

Married to Marc Isenberg for more than 28 years

## REPRESENTING PARENTS IN CPS CASES

*“Other than that, what do you have against them?”*

You may receive a fax or a telephone call from a court advising that you have been appointed in a case involving the Texas Department of Family and Protective Services (also known as “CPS”). In some instances, the only notice you will receive about your appointment will be a printout from the District Clerk. It may be obvious, but always carefully read through any printouts from any court or personnel. The printout will not tell you who you represent so an immediate trip to the courthouse to examine the file is in order. Be aware that in some instances the file may not contain anything indicating you have been appointed; the order appointing you may not yet be available. Clerks of the court can help you to determine your client.

### 1. Who do you represent?

You have been retained or appointed to represent a parent or parents in a case in which the Texas Department of Family and Protective Services (“CPS”) has filed an Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. Your client may be either the mother, father, the presumed father, the alleged father, or the unknown father.

If you have been retained or appointed to represent both parents, you must be exceedingly careful about conflicts which are likely to arise during your representation. You must advise both parents of possible conflicts and disclose all of this prior to beginning your representation. You must also advise them that in the event of a conflict, you may have to withdraw from representing either of them because you have received confidential information from both. There are countless

examples of one parent's actions or inactions which could greatly effect the status of the other parent.

Because time lines are to critical in CPS cases, it is important to advise the Judge as soon as possible of a conflict and set a hearing for your release and substitution of another counsel to represent one or both of the parents. The better rule of representation is to represent only one of the parents.

## 2. Communication with your client

Does your client speak English and even if he or she does, can you effectively communicate with them? It is important to establish a relationship with your client as quickly as possible. Your client's first reaction to the taking of their children by CPS is shock, disbelief, frustration and anger. Even as you identify yourself as their attorney, the client is likely to see you as part of "them" meaning CPS. It is critical that you establish trust with your client. This is easier said than done. How you approach them determines your working relationship throughout the case. As difficult as this can be while working with an English speaking client, the difficulty is increased when there is a language barrier between attorney and client. While the court must provide an interpreter during court proceedings, you will need to find some method to effectively communicate with your client outside of the courtroom. It may be that you have to move the court for an interpreter to be present to interpret when you meet with your client. This may be the only effective way to communicate with your client. This occurred in a case where both parents spoke only Bosnian.

Keeping track of your client during the pendency of the case can be a major problem. In addition to getting your client's address, telephone number, social security number and driver license number, ask for the names, addresses and telephone numbers of your client's relatives and friends so that when your client seems to have vanished, you have some way of attempting to locate him or her.

3. Know the investigative process and explain it to your client.

A. Mandatory Reporting of Child Abuse or Neglect

An individual having “cause to believe” that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person must immediately report the abuse or neglect. TFC §261.101(a). A professional must report if a child has been or may be abused or neglected, or if the child is a victim of the offense of Indecency with a Child under § 21.11 Texas Penal Code, and the professional has cause to believe that the child has been abused as defined by §261.001 or §261.401, the professional must make the report not later than the 48<sup>th</sup> hour after the hour the professional first suspects the abuse or neglect. TFC § 261.101(b). Both failure to report and making a false report carry criminal penalties. TPC §38.17.

B. CPS Investigation Objectives

The primary purpose of the investigation shall be the protection of the child, TFC §261.301(d). The objectives of the investigation are to (1) ensure the safety of the child; (2) determine whether abuse or neglect occurred, and the nature, extent and cause of the abuse or neglect; (3) determine whether the children are at risk of abuse or neglect in the future; (4) provide the family or children needed safety services; and (5) refer the family for services in the community that reduce the risk of abuse or enhance the well being of the family.

C. CPS Investigation Types and Procedures

The Texas Family Code requires a preliminary investigation of any anonymous report before CPS proceeds to a thorough investigation, TFC § 261.304(a). Unless CPS determines that there is some evidence to corroborate the report of abuse, CPS may not conduct a thorough investigation or take any action against the person accused of abuse. TFC § 261.304[c]. In a preliminary investigation

of an anonymous report, the worker must stop the investigation as soon as he or she can reasonably determine that the child is safe and the report cannot be corroborated. A preliminary investigation under this statute may include an interview and examination of the child, visit to the child's home, interviews with the parent, and an interview with any other persons the worker believes may have relevant information. TFC §261.304(b)

#### D. Investigative Tools and Statutory Requirements

Consistent with the child's protection, the department's investigation must determine: (1) the nature, extent, and cause of the abuse or neglect; (2) the identity of the person responsible for the abuse or neglect; (3) the names and conditions of other children in the home; (4) an evaluation of the parents or persons responsible for the care of the child; (5) the adequacy of the home environment; (6) the relationship of the child to persons responsible for the care, custody, or welfare of the child; and (7) all other pertinent data. TFC § 261.301(e).

The investigation may include a visit to the child's home and an interview and an examination of the child, as well as an interview with the parents and other children in the home. An interview by the department of the alleged child victim of physical or sexual abuse must be audiotaped or videotaped. TFC § 261.302. If the department needs to transport the child for purposes of the interview or investigation, the department shall attempt to notify the parent or other person having custody of the child of the transport. TFC §261.302(b-1). A parent who is notified of, and attempts to interfere with the transportation can be charged with a Class B misdemeanor. TFC §261.302(f).

If a parent or another person who is responsible for the child's care refuses to consent to the department's request to interview a child or refuses to consent to a medical, psychological, or psychiatric evaluation of the child, the department may seek a court order to assist its investigation.

Orders in aid of an investigation under Sub-chapter D, Chapter 261 may include an order prohibiting interference with access to the child or the child's records. TFC §262.303. The court may also prohibit removal of the child from the state during an investigation. TFC §261.306.

In addition to orders relating to the child and the child's records, the court may order a parent or caretaker to submit to medical or mental examinations and provide access to related records. TFC §261.305. An indigent parent is entitled to appointed counsel in the hearing relating to examination or release of the parent's medical records. TFC § 261.305[c]. Contumacious refusal to submit to orders in aid of investigation may be grounds for termination of parental rights in a subsequently filed SAPCR. TFC §161.001(1)(I).

#### 4. Reason to believe after investigation

A governmental entity with an interest in the child may file a suit affecting the parent-child relationship requesting an order or take possession of a child without a court order. TFC § 262.001. When a child is taken into possession without a court order, the person taking the child into possession, without unnecessary delay shall: (1) file a suit affecting the parent-child relationship; (2) request the court to appoint an attorney ad litem for the child; (3) request an initial hearing to be held by no later than the first working day after the child is taken into possession. TFC § 262.105. At the initial hearing the judge shall order the return of the child unless the court is satisfied that there is a continuing danger to the physical health or safety of the child if the child is returned to the parent or care giver who is presently entitled to possession of the child. TFC §262.107.

If the child is not returned to the parent or care giver at the initial hearing a full adversary hearing (Show Cause) shall be held within 14 days after the child was taken into possession by the governmental agency. TFC §262.201.

5. Preference of placement

If the child is not returned to the parent at the show cause hearing the court shall place the child with the noncustodial parent or with a relative unless they are deemed to be inappropriate. TFC § 262.201(e). It is therefore very important that you obtain a list of relatives or kinships so that CPS can conduct home studies for possible placement. In some cases, your client may not have good communication with -- or actually be estranged from-- their family. Your client may be ashamed, embarrassed, may feel family members do not understand, and may be unwilling to give CPS and you names. You must communicate very clearly to your client that it is almost always better for the children to be in the home of a relative or kinship than in foster care while the case is pending. Delay in providing this information may effectively keep children from family and in foster care. This is especially critical when the children are babies or infants; foster parents bond quickly with these children, and your client may be facing an intervention in the case by a foster parent in addition to battling with CPS for their children.

TFC §262.114 provides the procedure and time frames for conducting the evaluation of identified relatives and other designated individuals. Before the full adversary hearing, CPS must perform a background and criminal history check of the relatives or other designated individuals identified as potential relatives or designated care givers. CPS **shall** evaluate each person listed on the form to determine the relative or other designated individual who would be the most appropriate substitute care giver for the child and must complete a home study of the most appropriate substitute care giver, if any, before the full adversary hearing. TFC §262.114(a). CPS typically has not done this before the adversary hearing, and it can take more than 30+ days to get this done. Even if the



home study is written, it may be sitting on a supervisor or program director's desk , so you may need to set a hearing to get this done in compliance with the statute.

Also note that CPS rules state the preference for relative placements over other placements. See 40 Tex. Admin. Code §700.1320. The Texas Family code requires at each hearing in the CPS case that the Court place the child with a noncustodial parent, or if not appropriate, with a relative, unless that placement is not in the best interest of the child. TFC §§262.205(e); 263.306(a)(4)(5). If, at the time of the hearing, placement with a relative is not possible or is not in the child's best interests, the Court must require, among other things, that the parent help locate other relatives who may be willing and able to care for the child. This means that CPS must continue to look for appropriate relatives during the case. As the attorney for a parent, you must ask your client to think of other relatives and contact information. You must be insistent about this because CPS often makes no further effort to locate relatives once the child is placed in an appropriate foster home.

6. Service Plan or "*Jumping Through the Hoops*"

Within 45 days of the date the court renders a temporary order appointing the department as managing conservator CPS must file a family service plan. TFC §263.101. The plan must be in a language that the parent understands and must set out in detail the goals of the department and the steps necessary for the parent to demonstrate his or her ability to provide a safe and stable environment for the child. TFC §263.102. The plan has been developed by CPS staff based on the allegations of the removal of the children and the perceived needs of the parent. The plan will set out a series of tasks or courses for the parent to complete.

All of the plans call for your client to take a psychological evaluation, usually a drug and alcohol evaluation, and parenting. Some call for anger management, and a psychiatric evaluation.

The plan will typically state "... and follow all recommendations". All of the plans call for stable employment, and a safe and adequate place to live. Your client must understand that this is a lengthy process, involving therapy, drug counseling, and any other services deemed necessary. Your client will be asked to sign a "release of information" form which will allow the caseworker to receive monthly reports from all the service providers as to the extent of your client's participation. Your client needs to understand that they cannot be late for any appointments, miss any meetings, or miss any visitation with their children.

Be aware that CPS does not have to prepare a family service plan if the court finds that the parent(s) has engaged in an aggravated circumstance as set for in TFC §262.2015. The court must hold a status hearing within the first 60 days after CPS has been named as temporary managing conservator in order to review and approve the family service plan. TFC §263.201(a). The court must conduct a permanency hearing within 180 days of CPS being named as temporary managing conservator to monitor the goals of the agency and the status of the parents compliance with the family service plan. TFC §262.304.

It is critical to explain to your client that the family service plan is the road map that CPS has established which could result in family reunification. It is the parent's duty to make the appointments for the services once CPS has made the referral. Problems typically arise for any number of reasons after a referral has been made. It is important that the lawyer explain to his client that the responsibility is on the client to advise the lawyer of the problem so that corrective steps can be taken before time runs out.

#### 7. Time limits

The court must make a final ruling on the case within one year of the date of the original order

appointing CPS as temporary managing conservator. TFC § 263.401. The court has the discretion to extend for six months its jurisdiction of the case. TFC § 263.401(b)

8. It looks like its going to be a trial

The termination of parental rights involves fundamental constitutional rights. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The natural rights that exist between parents and their children are of constitutional dimension, *Hollick v. Smith*, 685 S.W.2d, 20 (Tex. 1985).

BEWARE: INEFFECTIVENESS OF COUNSEL. The Texas Supreme Court has held that §107.013(a)(1) necessarily includes the right to effective assistance of counsel in termination of parental rights cases in *In Re M.S.* 115 S.W.3d 534 (Tex. 2003), and that it is also extended to the area of appeals. *In Re T.V.* 8 S.W.3d 448 (Tex.App-Waco 1999).

Your client hates the case worker or vice versa. Your client has had a relapse or is in jail. The foster parent has bonded with the child and has filed an intervention for adoption. You get the idea, it looks like a trial – now what do you do?

Request mediation. Sometimes a neutral third party can bridge the gap between the intransigent parties. At one time, mediation was ordered at the beginning of the case. It was very helpful at that time because the parents were able to meet all the caseworkers, supervisors, attorneys and other parties in a neutral setting. As the attorney for the parents, this was very helpful in setting the tone of communications for the case. CPS has largely done away with mediation at the beginning of the case; now there are Permanency Planning Team (PPT) meetings at CPS offices, which are not as beneficial. Nevertheless, any attorney can request mediation at any time. It has proven to be a useful tool in getting the parents to understand the process and verbalize their concerns.

Permanency Planning Team (PPT) meetings are held at least twice during the case. CPS typically schedules these meetings at times which may be inconvenient to attorneys, such as 9:00 a.m. Your client must attend all of these meetings. You should be at all PPT meetings to act as an advocate for your client and keep lines of communication clear. If you find that you cannot attend due to any scheduling conflicts, participate by telephone conferencing. It is critical.

In some cases, if your client has family members who are supportive, you can request that a Family Conference be held instead of a PPT. Although a Family Conference is held at CPS offices, it is lengthier, includes family members, and in some ways, resembles a mediation. Family members are included in the planning; they contribute information and information about placement with relatives. It gives all the parties an opportunity to meet face to face in a less combative environment, and it can be a useful tool in facilitating communication among all the parties. Again, it is important that you make the time to be present at a Family Conference, or at least attend by telephone. It can set the tone for the entire case.

Discovery. At the very least you need to file a request for disclosure, request for production, and interrogatories to CPS and to the attorney ad litem if you feel that the ad litem is adverse to your client. Once you get the case file, read it . . . Be alert if this discovery is not supplemented prior to trial. Object at trial!

You may also want to consider filing Special Exceptions to clarify which grounds CPS is alleging. The petitions filed by CPS have alleged everything in them including the kitchen sink. While many attorneys do not do this, it is an option.

Jury or court trial? Explain to your client that the option is his or hers and explain the advantages and disadvantages in their particular case. CPS typically calls the parent as their first or

second witness. Your client needs to understand and appreciate that. Depending upon the client, it is helpful to meet in the courtroom and have your client sit in the witness chair and react to questions from you. Advise them there will be questions from all of the attorneys on the case.

A parent whose rights are subject to termination in a suit affecting the parent-child relationship and against whom criminal charges are filed that directly relate to the grounds for which termination is sought may file a motion requesting a continuance of the final trial in the suit until the criminal charges are resolved. The court may grant the motion only if the court finds that a continuance is in the best interest of the child. TFC §161.2011(a).

The Texas Supreme Court has upheld the use of broad-form submission in jury questions relating to termination of parental rights cases. *Texas Dept. Of Human Services v. E.B.* 802 S.W.2d 647 (Tex. 1990). Be alert for hearsay statements and uncorroborated information at all court hearings. Carefully listen to testimony from Child Advocates, the caseworker, and any other witnesses and object where appropriate. Make timely and relevant objections and get a ruling on the record. If you do not preserve the error and get a ruling on the record, you have not protected the record for your client should they desire to appeal.

Bench warrant your client? Many times if you are appointed, you do not know where your client is located. Even if your client is incarcerated, it may not be clear where they are within the prison system. In spite of “due diligence” CPS may not know where your client is. You will likely need to call the TDCJ information line, or get the information on your client on-line. You will need name, date of birth, driver’s license number, spin number if possible. Once you have located your client, if your client is incarcerated you should be in written communication with them regarding the status of the case. CPS is supposed to have prepared a family service plan even if he or she is in jail.

Your client needs to inform you whether he or she wants to be present during the trial. In your communication with your client consider the practical aspects of your client being present. Will it be easier for CPS to make its case if your client is present to respond to questions? Your client has an absolute right to be present if possible and participate even if by telephone.

Ongoing law enforcement investigations? It is not unusual for the police to be investigating an offense for injury to a child or the like with your client a prime suspect while the CPS case is pending. Often your client feels that he should talk to the police because they continue to call or because another family member thinks it's a good idea. The simple answer which is sometimes hard for the client to understand is "No, don't talk to the police." It has been our experience that the police are particularly persistent and the client becomes uneasy and panics. In addition, CPS caseworkers and the police take the position "if they didn't do anything, why shouldn't they talk to the police?"

If criminal charges are filed or pending, your client has an absolute right to remain silent. If they can participate in parts of the Family Service Plan without making incriminating statements, they should. The other option is to simply not participate in the Family Service Plan until the criminal charges have been resolved. You may be appointed after the investigation by the police has begun and your client may have already spoken to the police. If your client has, you need to know what they told the police. A thorough interview with your client is a necessity. You need to get the time line and sequence of events from your client, statements, and any witnesses as soon as possible before memories fade. If your client has not been charged, he or she may be at any time. If at the time of your appointment your client has been incarcerated, you must interview your client in jail without delay. You need to obtain the name of your client's criminal attorney and confer with him or her. If your client has made a statement, the criminal attorney should be able to provide you with a copy of

the statement. Advise the criminal attorney of the implication of any plea your client may take. Specifically, if your client enters a plea involving sexual abuse or injury to a child, that conviction will be offered in evidence by CPS to show your client met the grounds alleged in TFC §161.001(E), “engaged in conduct”, one of the most utilized grounds for termination.

Does ICWA apply? Congress in 1978 created the Indian Child Welfare Act 25 USC § 1901 et. seq. The Act regulates placement proceedings involving Native American children. If one of the parents is a member of a Native American Tribe or is eligible to be enrolled in the tribe, the tribe must be notified and given an opportunity to intervene in the case before it can go to trial. This is an issue that many attorneys fail to address until the eleventh hour. ICWA §1912(f) provides that no termination of parental rights may be ordered in the absence of such determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *In Re W.D.H.* 43 S.W.3d 30 (Tex.App-Houston {14<sup>th</sup> Dist}). Clearly ICWA has proven to be a valuable tool for attorneys representing parents.

9. Your client wants to appeal.

The Texas Legislature decided that appeals of cases involving termination of parental rights brought by CPS are to be expedited. The attorney representing a parent whose rights have been terminated must read and understand TFC §262.405 even if that attorney does not plan to handle the appeal.

You must make your client aware of the possibility that even if they were declared indigent for purposes of the CPS case, that not be the case for an appeal. If they are declared not indigent for the appeal, your client will be responsible for the cost of the court record, the reporter’s record and the

attorney fees. Your client needs to be advised that if the case was a court trial, the same judge who terminated their parental rights will, in all likelihood, then make the determination of whether or their appeal is frivolous TFC §263.405(c)(3). If the judge decides that the appeal is frivolous, then the only review by the appellate court is on the issue of whether the case is frivolous, and not on the merits of the case. Finally, you must advise your client that the appellate process may take a year or more before there is a decision by the appellate court.

Within 15 days of the entry of the order terminating the parental rights between your client and his or her child, you must file a statement of appellate points. The statement of appellate points is filed before a motion for new trial, notice of appeal and request for findings of fact and conclusions of law. You can combine a Motion For New Trial and Statement of Appellate Points. The statement of appellate points should be more than “the judicial decision is contrary to the evidence” or that” the evidence is factually or legally insufficient to preserve error” TFC §262.405(I). The only person in a position to prepare the statement of appellate points is the trial attorney. Failure on the part of the trial attorney to do this has the effect of crippling the attorney handling the appeal. By far the best method of assisting your client if they want to appeal is to **immediately** notify the court that your client wishes to appeal, you do not wish to handle the appeal, and that you wish for an attorney to be appointed for the appeal. At the same time, prepare the Motion For New Trial and Statement of Appellate Points, Request For Finding of Facts and Conclusions of Law (if it was a court trial) must be filed (within 20 days of the final order), Motion to Substitute Counsel, and Affidavits of Indigence (within 20 days of the final order). Serve all the proper parties and set the Motions in the trial court for hearings quickly. Be aware that the Notice of Appeal must also be filed with the trial court (the Appellate Division of the District Clerk’s office) and the Appellate Court. In Houston, there are two



Appellate Courts: the 14<sup>th</sup> Court of Appeals and the 1<sup>st</sup> Court of Appeals. The practice is to file a Notice in each court. Although your name may be on the Notice of Appeal, you can file a representation letter once the appellate attorney has been appointed, and the appellate court will remove your name from the list.

#### 10. Conclusion

There are few cases that an attorney may handle in his or her career that require more effort and emotional investment than in representing a parent in a termination of parental rights case brought by CPS. It requires an extraordinary amount of work to keep on top of your client, the CPS case worker, the service provider, and countless others who are involved in a constitutionally protected right. Your client typically will feel outnumbered and overwhelmed. You may find that your role as counselor becomes critical. There are typically few thanks at the end of the case. Perhaps the best thanks is your knowledge that you were prepared and you did the best you could do. While your job is to legally represent your client, part of your job is to advocate for your client. Promote clear communication between the CPS workers and your client. Be alert to personality conflicts and work to minimize that as much as possible. The emotions are high and the case is difficult enough without additional problems. Represent your client to the best of your ability and treat your client with the respect you would expect. The right to a fair trial is fundamental to our society. Your job in providing meaningful representation to your client in such a sensitive area is a cornerstone of those rights.