Termination of Parental Rights

How to Perfect the Appeal

Dean M. Swanda

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DEAN M. SWANDA
SWANDA & SWANDA, P.C.
Attorneys at Law
901 West Bardin Road, Suite 306
Arlington, Texas 76017

EXPERIENCE:

Appellate Practitioner - January 3, 1998 to Present

Attorney - Dallas Court of Appeals
September 1986 to August 1987; November 1988 to January 2, 1998

Attorney - Law, Snakard & Gambill
September 1987 to October 1988

EDUCATION:

Member - College of the State Bar of Texas

Southern Methodist University School of Law - Dallas, Texas
Degree: J.D. 1986
Member of Phi Delta Phi Fraternity

La Sorbonne - Paris, France (one semester 1981)

L'Institut Catholique - Paris, France (two semesters 1981-82)

Creighton University - Omaha, Nebraska
Degree: B.A. 1981 *Cum Laude*

PUBLICATIONS:

Dean M. Swanda, *Mandamus: The Discretionary Interlocutory Appeal*, APPELLATE ADVOCATE, August 1998, at 9.

Dean M. Swanda, *Summary Judgment, Mother Hubbard Clauses, and Mafrige v. Ross*, APPELLATE ADVOCATE, May 1997, at 3.

Dean M. Swanda, *Trends in Appellate Procedure*, TEX. LAWYER, Feb. 24, 1997, at 29.

Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721 (1994).

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Appendices

PERFECTING THE APPEAL IN A TERMINATION OF PARENTAL RIGHTS CASE

Scope of Article

This article addresses the steps necessary to perfect an appeal in a termination of parental rights case. The timetable deadlines are different in this kind of case from any other.

Transition from Trial Counsel to Appellate Counsel

If you are trial counsel who wants off the case, here are some suggestions:

1. On the last day of trial, have the parent fill out, sign, and have notarized an affidavit of indigence. CPS parents can be incredibly difficult to locate after they leave the courthouse. You don't necessarily have to file it, but if you can hand it off to appellate counsel, that would simplify the process.

2. Regarding the notice of appeal, if trial counsel puts his or her name on the notice of appeal, the court of appeals will conclude trial counsel is appellate counsel, so, if you don't want to be appellate counsel, don't put your name on the notice of appeal. Have the parent sign the notice of appeal, and if you file the parent's notice of appeal, make sure you file the parent's affidavit of indigence at the same time. Alternatively, make certain the trial court has appointed appellate counsel and inform appellate counsel that no notice of appeal has been filed, so appellate counsel can put his or her name on the notice of appeal.

3. Check with the court coordinator and find out the names of attorneys the trial judge would consider appointing as appellate counsel. Present the judge with (1) a "Motion to Withdraw and a Motion to Appoint Appellate Counsel" and (2) an order specifically removing trial counsel as counsel of record and specifically appointing different counsel as appellate counsel. There are specific requirements for a motion to withdraw and substitute counsel. TEX. R. CIV. P. 10. Failure to follow the requirements might result in an abuse of discretion if the trial judge grants the motion. *Gillie v. Boulus*, 65 S.W.3d 219, 221 (Tex. App.--Dallas 2001, pet. denied). The abuse of discretion might, however, be harmless. *Gillie*, 65 S.W.3d at 221. If you tell the judge you've spoken to the court coordinator, and the court coordinator suggested attorney X, Y, or Z, the trial judge will have less reason to balk at signing the order. Don't leave until the trial judge has signed the order. Sometimes motions to withdraw will float in the court's jacket or on the coordinator's desk for weeks without a signed order, which means trial counsel is

still on the case even as the deadlines are ticking, but trial counsel may not be aware of it.

4. Notify appellate counsel of his or her appointment promptly. Don't rely on the court to notify appellate counsel. If possible, provide the new appellate counsel with a copy of the order appointing him or her as appellate counsel. Without a copy of the signed order, the new appellate counsel may have difficulty getting access to the court's jacket.

The Date on which the Timetables Start

1. Determine the date judgment is signed. The date the judgment is signed starts the appellate timetables. TEX. R. APP. P. 26.1.

> NOTE: If you've been appointed after the trial but before the judgment has been signed, don't assume you'll get notice of the judgment. The clerk may continue to send everything to trial counsel, and trial counsel may assume the clerk is sending everything to appellate counsel.

Fifteen Days after Judgment Signed

2. Within fifteen (15) days of the date of the judgment is signed, file in the trial court:

> a. A "statement of the points or points on which the party intends to appeal." TEX. FAM. CODE § 263.405(b).
>
> > NOTE: The failure to file a statement of points on appeal may result in waiver of all your points. *In re T.C.*, No. 07-03-00077-CV, 2003 Tex. App. LEXIS 6012, at * 5-6 (Tex. App.--Amarillo July 15, 2003, no pet.) (waived complaint because complaint not in statement of points) (memorandum opinion); *but see In re S.J.G.*, 124 S.W.3d 237, 242 (Tex. App.--Fort Worth 2003, pet. denied) (statement of points on appeal is designed to assist trial court determine if appeal is frivolous under section 263.405(d)(3); failure to file statement of points on appeal does not waive complaints).
>
> b. "This statement may be combined with a motion for a new trial." TEX. FAM. CODE § 263.405(b).
>
> > NOTE: Normally a party has thirty days after the judgment is signed to file a motion for new trial. TEX. R. CIV. P. 329b(a). However, in a CPS appeal, the hearing on any motion for new trial

has to be no later than the thirtieth day after the judgment is signed. TEX. FAM. CODE § 263.405(b)(1).

NOTE: After a jury trial, if you plan on attacking the factual sufficiency of the evidence, you must file a motion for new trial. TEX. R. CIV. P. 324(b)(2). Rule 324(b)(2) of the Texas Rules of Civil Procedure requires a motion for new trial to complain about the "factual insufficiency of the evidence *to support a jury finding.*" TEX. R. CIV. P. 324(b)(2) (emphasis added); *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). CPS will argue rule 324(b)(2) applies to bench trials as well. A motion for new trial is not required to attack the factual sufficiency of the evidence after a bench trial. *In re Braddock*, 64 S.W.3d 581, 584-85 (Tex. App.--Texarkana 2001, no pet.).

NOTE: A legal sufficiency challenge in a civil proceeding may be preserved through a motion for instructed verdict, an objection to the submission of a jury question, a motion for judgment notwithstanding the verdict, a motion to disregard the jury's answer to a vital fact issue, or a motion for new trial. *Cecil v. Smith*, 803 S.W.2d 509, 510-11 (Tex. 1991). To be on the safe side, it is usually a good idea to include legal sufficiency challenges in the motion for new trial.

Twenty Days after Judgment Signed

3. Within twenty (20) days of the date of the judgment, file in the trial court:

a. The notice of appeal. TEX. R. APP. P. 26.1(b). For the contents of the notice of appeal, see TEX. R. APP. P. 25.1(d). File the notice of appeal at the same time as or after filing the affidavit of indigence / pauper's oath. TEX. R. APP. P. 20.1(c)(1);

NOTE: Motions for new trial, requests for findings of fact and conclusions of law, or any other post-trial motion do not extend this deadline. TEX. FAM. CODE § 263.405(c); *cf.* TEX. R. APP. P. 26.1(a) (normally various post-trial motions or a request for findings of fact and conclusions of law will extend the deadline).

NOTE: If you miss this deadline, there is a fifteen-day window during which you can still save the appeal. Within fifteen days of the date the notice of appeal was due, you must (1) file the notice of appeal in the trial court and (2) file a motion to extend time to file

the notice of appeal in compliance with rule 10.5(b) of the Texas Rules of Appellate Procedure in the court of appeals. TEX. R. APP. P. 26.3.

NOTE: If you miss the extension deadline, there may yet be hope. The Supreme Court of Texas has set *In re K.A.F.*, No. 09-04-00028-CV, 2004 Tex. App. LEXIS 2447 (Tex. App.--Beaumont March 18, 2004, pet. granted), for oral argument on 2-16-05. The parent in *K.A.F.* missed the accelerated deadline for filing the notice of appeal, and the court of appeals dismissed her appeal. She raises various arguments to (1) authorize extending the deadline, (2) use her motion for new trial / motion to modify judgment as the notice of appeal, and (3) using ineffective assistance of counsel as a means of getting an out-of-time appeal. Historically, the Texas Supreme Court has been extraordinarily forgiving when it comes to perfecting an appeal. *See, e.g., Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (party filed notice of appeal within fifteen-day extension period but neglected to file motion to extend time; appeal perfected notwithstanding failure to file motion to extend time; supreme court deemed a motion to extend time was implied).

NOTE: If any party wants temporary orders pending the appeal, the trial court has to makes such an order "[n]ot later than the 30th day after the date an appeal is perfected." TEX. FAM. CODE § 109.001(a). Filing the notice of appeal begins this timetable.

b. The affidavit of indigence / pauper's oath. TEX. R. APP. P. 20.1(c)(1) (the affidavit of indigence / pauper's oath must be filed at the same time as or before filing the notice of appeal). For the contents of the affidavit, see TEX. R. APP. P. 20.1(b).

NOTE: If you miss this deadline, there is a fifteen-day window during which you can still save the appeal. Within fifteen days of the "deadline for filing the affidavit," you must file a motion to extend time to file the affidavit in compliance with rule 10.5(b) of the Texas Rules of Appellate Procedure in the court of appeals. TEX. R. APP. P. 20.1(c)(3).

NOTE: If your client is in a county jail or in the state penitentiary, you won't need a notary, provided you comply with TEX. CIV. PRAC. & REM. CODE § 132.001-.003.

NOTE: Motions for new trial, requests for findings of fact and conclusions of law, or any other post-trial motion do not extend this deadline. TEX. FAM. CODE § 263.405(c).

NOTE: The filing of the affidavit of indigence sets off a whole subset of deadlines pertaining to any contest of the affidavit.

> The clerk, the court reporter, or any party may file a contest within ten days of the date the affidavit was filed if the affidavit was filed in the trial court. TEX. R. APP. P. 20.1(e). (The following assumes the affidavit of indigence is filed in the trial court; if the affidavit of indigence is filed in the court of appeals, different timetables apply.)
>
> A hearing on the contest must be within ten days after the contest was filed. TEX. R. APP. P. 20.1(i)(2)(A).
>
> The time for conducting the hearing can be extended but not for more than twenty days from the date the extension order is signed. TEX. R. APP. P. 20.1(i)(3).
>
> If there is a hearing, the burden of proof is on the party filing the affidavit. TEX. R. APP. P. 20.1(g). If the party is incarcerated, the affidavit will be considered as evidence. TEX. R. APP. P. 20.1(g).
>
> The rule requires a signed order within the time period set for the hearing. TEX. R. APP. P. 20.1(i)(4). Otherwise, the allegations in the affidavit will be deemed true. TEX. R. APP. P. 20.1(i)(4).
>
> ON THE OTHER HAND, all of these deadlines may be supplanted by section 263.405(e) of the Texas Family Code, which requires a hearing not later than the thirtieth day after the final order was signed. TEX. FAM. CODE § 263.405(d), (e). The court "shall" hear evidence to determine the issue of indigence. TEX. FAM. CODE § 263.405(e). If the court does not "render a written order" denying the claim of indigence or requiring the person to pay partial costs before the thirty-sixth day after the final judgment was signed, the person shall be considered indigent, and the court shall appoint counsel. TEX. FAM. CODE § 263.405(e).

NOTE: Four expenses are at issue when a party files an affidavit of indigence: (1) the filing fees in the court of appeals, (2) the cost of the clerk's record, (3) the cost of the reporter's record, and (4) attorney's fees. If the trial court, in its written order, simply sustains a contest, (1) the appellate court will insist upon the $125 filing fee before proceeding with the appeal and upon a $10 filing fee for any motion you need to file, (2) the district clerk will require payment before filing the clerk's record, (3) the court reporter will require payment before filing the reporter's record, and (4) you may have just lost your status as appointed counsel, because the appointment of counsel presupposes the parent was indigent. *See In re A.M.R.*, No. 04-02-00333-CV, 2002 Tex. App. LEXIS 9346, at *9 (Tex. App.--San Antonio Dec. 18, 2002, no pet.) (not designated for publication) (court of appeals grants appointed counsel's motion to withdraw because trial court found appellant was not indigent). If at all possible, try to get the trial judge to specify in writing whether the contest is being sustained only in part and, if so, as to which parts.

c. "Request for Findings of Fact and Conclusions of Law" if the case was tried before the court without a jury. TEX. R. CIV. P. 296.

NOTE: The rules of civil procedure specifically provide that the findings of fact shall not be recited in the judgment. TEX. R. CIV. P. 299a. At least in other civil appeals, courts of appeals will not consider findings of fact found within a judgment. *Sutherland v. Cobern*, 843 S.W.2d 127, 131 n.7 (Tex. App.--Texarkana 1992, writ denied). Findings of fact routinely appear in termination decrees, but counsel's reliance upon them may be misplaced.

NOTE: If there are no findings of fact and conclusions of law, courts of appeals presume all questions of fact implicitly found in support of the judgment. *Oak v. Oak*, 814 S.W.2d 834, 838 (Tex. App.--Houston [14th Dist.] 1991, writ denied). Because grounds and best interest are statutorily defined, and because CPS is allowed to plead grounds and best interest, without any amplification, in conformity with the statutes, this may not be a concern. TEX. FAM. CODE § 161.101 (petition sufficient if it follows language of statutory ground and alleges best interest). However, if there are no findings of fact and conclusions of law, courts of appeals will affirm the judgment on any legal theory that finds support in the evidence. *Oak*, 814 S.W.2d at 838. The concern here is the court of appeals may affirm the judgment on a legal theory CPS never pled but which

finds support in the evidence. The court of appeals may deem this unpled legal theory as having been tried by consent. Because this legal theory was never pled, more than likely your brief won't address it, and the court of appeals will affirm the termination decree on a basis never anticipated by counsel. For example, CPS rarely pleads for termination under section 161.003 of the Texas Family Code (involuntary termination based upon inability to care for a child due to a mental or emotional illness or a mental deficiency), but the evidence will frequently support a termination on that basis. TEX. FAM. CODE § 161.003. On the other hand, because courts of appeals rarely have any difficulty finding the evidence sufficient on the pled grounds, they have not had any reason to resort to any unpled grounds.

This request sets off another subset of timetables.

Within 20 days of the request: Within twenty days after a timely request is filed, the trial court is supposed file its findings of fact and conclusions of law. TEX. R. CIV. P. 296. Frequently, however, that won't happen.

Within 30 days of the request: If the trial court fails to comply with the original request, the party making the request must file with the clerk within thirty days of filing the original request a "Notice of Past Due Findings of Fact and Conclusions of Law." TEX. R. CIV. P. 296. If you fail to file this notice of past due findings, you will waive your right to complain about the trial court's failure to file findings of fact and conclusions of law. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.-- Houston [14th Dist.] 2000, no pet.).

Within 40 days of the request: If the party files a timely "Notice of Past Due Findings of Fact and Conclusions of Law," then the trial court has forty days from the date the original request was filed to file its findings of fact and conclusions of law. TEX. R. CIV. P. 297.

> NOTE: If the trial court still fails to file any findings of fact and conclusions of law, try filing a motion in the court of appeals to abate the appeal until such time as the trial court makes its findings and conclusions.

Within 10 days after the trial court files its original findings and conclusions: If you're not happy with the trial court's findings and

conclusions, within ten days after the original findings and conclusions were filed, you can file a "Request for Additional or Amended Findings of Fact and Conclusions of Law." TEX. R. CIV. P. 298. You must submit, along with your request, the proposed specific additional and amended findings and conclusions you want; a bare request is insufficient. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.--San Antonio 1992, writ dism'd w.o.j.).

Within 10 days of the request for additional or amended findings and conclusions: If you make a request for additional or amended findings and conclusions, the trial court then has ten days from that request to make any additional or amended findings and conclusions. TEX. R. CIV. P. 298.

d. The request for the reporter's record. TEX. R. APP. P. 34.6(b)(1) (make request at or before the time for perfecting the appeal). Be sure and serve the court reporter and file a copy of the request with the trial court clerk. TEX. R. APP. P. 34.6(b)(2).

e. The request for the clerk's record. TEX. R. APP. P. 34.5.

Thirty Days after Judgment Signed

4. Within thirty (30) days of the date of the judgment, the trial court "shall" hold a hearing to determine whether:

a. a new trial should be granted;

b. a party's claim of indigence, if any, should be sustained; and

c. the appeal is frivolous.

TEX. FAM. CODE § 263.405(d). This hearing is, apparently, not optionable but mandatory. TEX. FAM. CODE § 263.405(d) ("The trial court shall hold a hearing . . . ."). Then again, if there is no hearing, nothing bad may happen to the parent. The motion for new trial will get overruled by operation of law. TEX. R. CIV. P. 329b(c). Depending upon what you are alleging in the motion for new trial, generally getting the motion overruled by operation of law suffices. The affidavit of indigence will be taken as true if there is no timely written order to the contrary. TEX. R. APP. P. 20.1(i)(2)(A), (i)(4) (need written order within deadline for having hearing on contest); TEX. FAM. CODE § 263.405(e) (need written order within 36 days of signed judgment). If the appeal is frivolous, the court of appeals has its own rules dealing with that. TEX. R. APP. P. 45. If the trial court does not set the

hearing sua sponte, and if none of the other attorneys request the hearing, then the parent may want to let this hearing slide as well. If the other parties are content to have the motion for new trial overruled by operation of law, are not contesting the parent's indigence, and are not contesting whether the appeal is frivolous, more than likely, nothing will come of the trial court's failure to have this hearing.

If you lose on the claim of indigence, you can appeal that ruling. TEX. FAM. CODE § 263.405(g). Courts of appeal will review the trial court's ruling on indigence for an abuse of discretion. *In re A.M.R.*, 04-02-00333-CV, 2002 Tex. App. LEXIS 9346, at *2-3 (Tex. App.--San Antonio Dec. 18, 2002, no writ) (not designated for publication) (citing *White v. Bayless*, 40 S.W.3d 574, 576 (Tex. App.--San Antonio 2001, pet. denied).

If you lose on whether the appeal is frivolous, you can appeal that ruling as well. TEX. FAM. CODE § 263.405(g). "In determining whether an appeal is frivolous, a judge may consider whether the appellant has presented a substantial question for appellate review." TEX. CIV. PRAC. & REM. CODE § 13.003(b). A proceeding is frivolous when it lacks an arguable basis either in law or in fact. *In re H.D.H.*, 127 S.W.3d 921, 923 (Tex. App.--Beaumont 2004, no pet.) (later affirmed on its merits, *In re. H.D.H.*, No. 09-03-00388-CV, 2004 Tex. App. LEXIS 11838 (Tex. App.--Beaumont Dec. 30, 2004, no pet. h.) (memorandum opinion); *A.M.R.*, 2002 Tex. App. LEXIS 9346, at *4; *but cf. A.M.R.*, 2002 Tex. App. LEXIS 9346, at *4-9 (when determining whether appeal was frivolous, court appears to focus more on whether her arguments were winnable than on whether they were arguable). The standard is whether the trial court abused its discretion. *H.D.H.*, 127 S.W.3d at 923.

> COMMENT: Requiring a parent to persuade the trial court that an appeal would not be frivolous seems somewhat odd. A frequent concern expressed by appellants is whether the trial judge will be one of the appellate judges. The strength of the appellate process is in the fact that a panel of three new judges reviews what the trial judge did. Appellants find this very reassuring. Because the trial judge effectively decides whether the parent will even get a meaningful appeal, this undermines the parent's confidence in the system. Getting an appellate court to reverse the trial judge's ruling is not very likely when the appellate standard is whether the trial court abused its discretion.
>
> Additionally, the termination of parental rights has been described as the capital punishment of civil law. *See In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App.--Houston [14th Dist.] 2002, pet. denied) (citing other authorities). In Texas criminal law, the appeal of a death sentence is automatic. TEX. CODE CRIM. PROC. art. 37.071, § 2(h). Far from getting an

automatic appeal, the person whose parental rights have been terminated effectively has to make an initial showing that an appeal would not be frivolous. In contrast, in criminal appeals, it is only when a defendant agrees to the judgment and then attempts to appeal the very judgment he agreed to that the appellate process places barriers in his way. TEX. R. APP. P. 25.2(a)(2) (when trial court enters judgment in accordance with defendant's plea bargain agreement, to thereafter appeal, defendant must show he is either appealing a pretrial motion (usually a motion to suppress) that the trial court ruled on (that is, denied and thereby preserved defendant's error -- if the trial court did not deny the pretrial motion, the error would not be preserved and an appeal would be pointless) or that he has the trial judge's permission to appeal).

Finally, the playing field on which the determination is made favors CPS. Having appellate counsel argue why the appeal is not frivolous before appellate counsel has had an opportunity to review the record puts appellate counsel at a disadvantage. Generally the parent is not much help with this matter. Trial counsel can be very helpful, but appellate counsel, who was not at the trial, may find it difficult responding to the arguments of CPS counsel, who was at the trial and who will, therefore, have a far firmer command of the facts. Trial counsel may even be willing to appear at the hearing and argue why an appeal would not be frivolous. Still, one of the benefits of getting different counsel on the appeal -- getting a different perspective -- is lost by this approach. Often appellate counsel, after reviewing the record, will frame the appeal in a manner trial counsel never contemplated. Having appellate counsel articulate how the appeal is not frivolous before counsel has had a chance to review the record appears to put the cart before the horse.

Another problem with having to argue whether the appeal is frivolous before counsel has had a chance to review the record is that some issues may not surface until after the record has been filed. For example, if part of the record is lost or destroyed through no fault of the appellant, that becomes an arguable and potentially winnable point on appeal. TEX. R. APP. P. 34.6(f).

If the concern is speed, the appeal is already accelerated. If the concern is whether the appeal is frivolous, there are other more even-handed means of addressing that concern. For example, after reviewing the record, appellate counsel can file an *Anders* brief, or, after reviewing the appellant's brief, the appellate court can assess sanctions if it determines the appeal is frivolous.

Under the current method, if the trial court finds an appeal would be frivolous, and if the court of appeals affirms that ruling, neither appellate counsel nor the court of appeals will ever have an opportunity to review the record of the actual trial. When a court of appeals reviews the trial court's ruling on whether the appeal was frivolous, the court of appeals reviews only the reporter's record of the section 263.405 hearing. TEX. FAM. CODE § 263.405(g); *see H.D.H.*, 127 S.W.3d at 923 (court of appeals cognizant trial court's ruling precluded appellant from presenting complete reporter's record and clerk's record on appeal); *see In re A.M.R.*, No. 04-03-00335-CV, 2003 Tex. App. LEXIS 5275, at *3 (Tex. App.--San Antonio June 25, 2003, no pet.) (not designated for publication) (court of appeals focused on counsel's failure, at the hearing on the motion for new trial, to articulate how the evidence was insufficient).

Requiring counsel to show how the appeal is not frivolous before having an opportunity to review the record goes a long way toward obtaining a prompt and final result. This requirement has less to recommend it when it comes to ensuring a correct result. *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003) (two competing interests: (1) the need for an expeditious and final decision on whether to terminate the parent-child relationship and (2) the risk of terminating the parent-child relationship erroneously); *M.S.*, 115 S.W.2d at 546 ("[P]art of the process of ensuring the accuracy of judgments necessarily involves appellate review."). Appellate counsel and the court of appeals can hardly vouch for the accuracy of the result when neither has had an opportunity to review the record of the trial itself.

Thirty Days after Notice of Appeal Filed

5. Within thirty (30) days of the date an appeal is perfected, the trial court can conduct a hearing and issue temporary orders pending the appeal. TEX. FAM. CODE § 109.001(a).

NOTE: Try to coordinate this hearing with the hearing required by section 263.405(d).

NOTE: The parent or parents may want continued visitation pending the appeal. If the trial court takes the position that visitation would operate to suspend the termination decree, it may conclude it is statutorily prohibited from ordering continued visitation pending the appeal. TEX. FAM. CODE § 109.001(d).

NOTE: Review of any temporary order is apparently by mandamus. *In re Gonzalez*, 993 S.W.2d 147, 162 (Tex. App.--San Antonio 1999, no pet.),

and *Johnson v. Johnson*, 948 S.W.2d 835, 838 (Tex. App.--San Antonio 1997, writ denied).

Sixty Days after Judgment Signed

6. Within sixty (60) days of the date of the judgment, the record is supposed to be filed in the court of appeals. TEX. FAM. CODE § 263.405(f) (record not due until sixty days after the judgment)

NOTE: The appellate clerk who determines the deadlines may be familiar with accelerated appeals but not with CPS accelerated appeals. That clerk may determine the record is due ten days after the notice of appeal was filed, which is the deadline for other accelerated appeals. TEX. R. APP. P. 35.1(b). If you start getting notices from the court of appeals that the record is overdue very early in the appeal, that is probably what happened. At least one court of appeals has been known to abate an appeal to determine, among other things, whether appellate counsel is rendering ineffective assistance based upon the absence of a timely-filed record.

NOTE: Except for a showing of good cause, courts of appeal may not extend the time to file the record. TEX. FAM. CODE § 263.405(h).

NOTE: The sixty-day deadline is very difficult for the court reporter to meet. By comparison, court reporters for criminal jury trials often have difficulty meeting a one-hundred-twenty-day deadline. Criminal jury trials tend to be much shorter than termination jury trials. Termination trials will have an attorney ad litem for the child or children and may have multiple parents, multiple children, multiple grounds of termination, and intervenors, such as foster parents. Additionally, in criminal appeals, the indigence issue is generally resolved shortly after sentencing; therefore, the request for the reporter's record generally occurs after indigence has been determined. This means the court reporter can begin work immediately. By comparison, in termination appeals, the indigence issue may not be resolved until thirty days after the judgment is signed, which means the request for the reporter's record is generally made before the indigence issue has been resolved. A court reporter may be reluctant to start the reporter's record while the indigence issue remains unresolved. Courts of appeals tend to be aware that a sixty-day deadline for a termination jury trial is not realistic and, to one degree or another, permit extensions of time.

Twenty Days after Both the Clerk's Record and the Reporter's Record have been Filed

7. Briefing Timetables

In an accelerated appeal, an appellant must file its brief within twenty days after the later of: (1) the date the clerk's record was filed or (2) the date the reporter's record was filed. TEX. R. APP. P. 38.6(a).

In an accelerated appeal, the appellee's brief is due within twenty days of the date the appellant's brief was filed. TEX. R. APP. P. 38.6(b).

Appellant's reply brief, if any, is due within twenty days after the date the appellee's brief is filed. TEX. R. APP. P. 38.6(c).

NOTE: To prepare a brief, you will need the record. If the appeal involves more than one appellant or more than one appellee, and in CPS appeals, that can happen (father and mother appeal independently, or foster parents and CPS may find themselves both as appellees), you may discover your briefing timetables are running but someone else has checked out the record. Be prepared to share the record and to coordinate your efforts with other counsel. Some court reporters provide a duplicate copy of the reporter's record or a diskette off which you can print a duplicate copy.

NOTE: Except for a showing of good cause, courts of appeal may not extend the time to file an appellate brief. TEX. FAM. CODE § 263.405(h). It is possible to get extensions, but telling the court of appeals you can't file the brief because you've been busy working on other matters is not the best approach, because termination appeals are supposed to take precedence.

Briefing Considerations

8. The Brief Itself

a. *Anders* briefs. Various courts of appeals have ruled an attorney can file an *Anders* brief, that is, a brief stating the appeal is frivolous and explaining why it is frivolous. *In re D.E.S.*, 135 S.W.3d 326, 330 (Tex. App.--Houston [14th Dist.] 2004, no pet.); *In re K.D.*, 127 S.W.3d 66, 67 (Tex. App.--Houston [1st Dist.] 2003, no pet.); *In re K.S.M.*, 61 S.W.3d 632, 634 (Tex. App.--Tyler 2001, no pet.); *In re A.W.T.*, 61 S.W.3d 87, 88 (Tex. App.--Amarillo 2001, no pet.). Before filing an *Anders* brief, remember the standard is not whether the appeal is winnable but whether there is anything arguable. If you've got something arguable, you should not be filing an

Anders brief. A proceeding is frivolous when it lacks an arguable basis either in law or in fact. *A.M.R.*, 2002 Tex. App. LEXIS at *4 (citing *De La Vega v. Taco Cabana, Inc.*, 974 S.W.2d 152, 154 (Tex. App.--San Antonio 1998, no pet.). Factual sufficiency arguments are rarely winnable. On the other hand, it is a rare case where you cannot argue the factual sufficiency of the evidence. In criminal appeals, if the appellate judges determine appointed counsel improperly filed an *Anders* brief because there were arguable issues counsel could have advanced, they have been known to order the attorney who filed the *Anders* brief off the appeal, abate the appeal, and order the trial judge to appoint new counsel. Filing an *Anders* brief can be risky.

b. A trap for the unwary. If there was more than one ground of termination under section 161.001(1), you must attack all of them or, alternatively, none of them. If you attack only selected grounds and not others, the court of appeals will affirm on those grounds you did not attack. *In re K.N.R.*, 137 S.W.3d 675, 676 (Tex. App.--Waco 2004, no pet.) (broad-form submission on five grounds; appellant attacked only four of five grounds on appeal; court of appeals affirmed on basis of fifth ground appellant did not attack).

c. Ineffective assistance of counsel. Regarding ineffective assistance of counsel, on July 3, 2003, the Texas Supreme Court recognized ineffective assistance of counsel applied to termination proceedings. *In re M.S.*, 115 S.W.3d 534, 544, 550 (Tex. 2003). Counsel in *M.S.* failed to file a motion for new trial and, necessarily, failed to alleged ineffective assistance in a motion for new trial, but the Texas Supreme Court addressed the claim of ineffective assistance anyway. *M.S.*, 115 S.W.3d at 544-50. This is consistent with criminal appeals, where claims of ineffective assistance may be raised for the first time on direct appeal. *Robinson v. State*, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000).

As a practical matter, without trial counsel's explanations in the record, winning a claim of ineffective assistance of counsel will be extraordinarily unlikely. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) ("Consistently with *Strickland*, we must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he 'made all significant decisions in the exercise of reasonable professional judgment.'"); *Jones v. State*, 950 S.W.2d 386, 389 (Tex. App.--Fort Worth 1997, pet. ref'd, untimely filed) (defendant fails to sustain burden of showing ineffectiveness where record is silent as to why counsel took certain actions). An appellant must show the lack of a valid

stratagem. *Delrio*, 840 S.W.2d at 447 n.7. Trial counsel's explanations would appear in the record only if trial counsel testified at a hearing on the motion for new trial.

Given the extraordinarily short time for having a hearing on a motion for new trial (thirty days after the judgment; TEX. FAM. CODE § 263.405(d)), given the fact appellate counsel is generally not appointed promptly after the judgment is signed, and given the fact the record, with rare exceptions, won't be ready within thirty days of the date of the judgment for appellate counsel to review, it is not likely appellate counsel will insert a claim of ineffective assistance of counsel in a motion for new trial. Even if appellate inserts a claim of ineffective assistance into a motion for new trial, it is unlikely appellate counsel will be able to know which questions to ask trial counsel at a hearing on the motion for new trial. Assuming there is an evidentiary hearing, appellate counsel would be working at an extreme disadvantage. The trial judge, CPS's attorney, the attorney ad litem for the child, and the trial attorney whom you've accused of ineffective assistance were all present for the trial and would be intimately familiar with what occurred. Appellate counsel would be the only attorney in the courtroom who wasn't present for the trial.

Similarly, even assuming an appellant can show trial counsel's "conduct was so outrageous that no competent attorney would have engaged in it," *M.S.*, 115 S.W.3d at 545, (which is extraordinarily difficult to show) an appellant must also show harm. Without an evidentiary hearing developing harm, meeting that burden will be very difficult. For example, in *M.S.*, multiple allegations of ineffective assistance lost because the appellate record did not show what impact, if any, trial counsel's alleged failures had on the case. *M.S.*, 115 S.W.3d at 546.

Even if winning a claim of ineffective assistance of counsel would be extraordinarily rare in an appeal, the presence of an appellate claim of ineffective assistance of counsel still serves a valuable function -- fostering public confidence in the legal system. *See M.S.*, 115 S.W.3d at 546 ("[P]art of the process of ensuring the accuracy of judgments necessarily involves appellate review."); *cf. M.S.*, 115 S.W.3d at 547 ("Both the parent and the child have a substantial interest in the accuracy and justice of a decision."); *cf. M.S.*, 115 S.W.3d at 549 (ultimate goal served by procedures promoting an accurate determination of whether the biological parents can provide a normal home); *cf. M.S.*, 115 S.W.3d at 548 (two competing interests: (1) the need for an expeditious and final decision on whether to terminate the parent-child relationship and (2) the risk of terminating the parent-child relationship erroneously); *cf. M.S.*, 115 S.W.3d at 549 ("Termination of

parental rights is traumatic, permanent, and irrevocable."); *cf. M.S.*, 115 S.W.3d at 549 ("[A]ny significant risk of erroneous deprivation is unacceptable."). It is one thing to affirm a termination decree based upon trial counsel's failure to preserve error. *See In re M.S.*, 73 S.W.3d 537 (Tex. App.--Beaumont 2002), *aff'd in part and rev'd in part, In re M.S.*, 115 S.W.3d 534 (Tex. 2003). It is another thing to affirm a termination decree based upon an analysis showing counsel's failure to preserve error made no difference. *In re M.S.*, 140 S.W.3d 430 (Tex. App.--Beaumont 2004, no pet.).

The focus of a claim of ineffective assistance of counsel appears to be to get the court of appeals to address a claim on its merits that was not otherwise preserved and, in the process, getting the judgment affirmed on its merits as distinguished from getting the termination decree affirmed for no other reason than trial counsel's failure to preserve error. *See M.S.*, 115 S.W.3d at 550 ("The appellate court will conduct such a review to determine harm as if factual sufficiency had been preserved, under our established factual sufficiency standard in parental-rights termination cases, understanding that the evidentiary burden in such cases is 'clear and convincing.'"). Even if you show you could have gotten the case reversed on the basis of unpreserved error, you still may not be able to show trial counsel rendered ineffective assistance. *See M.S.*, 115 S.W.3d at 549 ("More to the point, if the court finds that the evidence to support termination was factually insufficient, *and* that counsel's failure to preserve a factual sufficiency complaint was unjustified and fell below being objectively reasonable, then it must hold that counsel's failure to preserve the factual sufficiency complaint by a motion for new trial constituted ineffective assistance of counsel." (emphasis added)); *see M.S.*, 115 S.W.3d at 549 ("[T]he appellate court must indulge in the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' including the possibility that counsel's decision not to challenge factual sufficiency was based on strategy, or even because counsel, in his professional opinion, believed the evidence factually sufficient such that a motion for new trial was not warranted.") The failure to show trial counsel's explanations for his or her conduct is usually fatal. *Jones*, 950 S.W.2d at 389 (defendant fails to sustain burden of showing ineffectiveness where record is silent as to why counsel took certain actions).

In short, don't expect to win on a claim of ineffective assistance of counsel. On the other hand, asserting a claim of ineffective assistance of counsel on an argument that counsel did not properly preserve might get the court of appeals to address the argument on its merits. In the vast majority of the cases, this should get counsel off the hook for not preserving error, and this

should also preclude the client and the public generally from arguing that, but for counsel's failure to preserve error, the termination of the parent-child relations would not have occurred.

Motions for Rehearing

A motion for rehearing may be filed within fifteen days after the court of appeals renders its judgment or order. TEX. R. APP. P. 49.1. If you missed that deadline, you have fifteen days after the deadline during which to file a motion to extend time to file the motion for rehearing. TEX. R. APP. P. 49.8.

A motion for rehearing is not a prerequisite to filing a petition for review in the Supreme Court of Texas and is not required to preserve error. TEX. R. APP. P. 49.9.

Petitions for Review in the Supreme Court of Texas

A petition for review must be filed with the clerk of the Supreme Court of Texas within forty-five days after (1) the date the court of appeals rendered judgment, if no motion for rehearing was timely filed, or (2) the date the court of appeals last ruled on a timely-filed motion for rehearing. TEX. R. APP. P. 53.7(a). There are an additional fifteen days during which you can file a motion to extend time to file your petition for review. TEX. R. APP. P. 53.7(f).

> **A potential trap for the unwary:** If you file a motion to extend time to file your motion for rehearing in the court of appeals, you won't know if you have a timely-filed motion for rehearing until after the court of appeals rules on your motion to extend time. If the court of appeals waits until sixty-one days after the judgment to overrule your motion to extend time, you won't have a timely-filed motion for rehearing, and your time for filing the petition for review as well as your time for filing a motion to extend time to file a petition for review will have expired. If you find yourself getting pushed into this corner, you may want to consider filing a motion to extend time to file the petition for review in the Supreme Court of Texas before the most restrictive timetables have lapsed and base your motion upon your inability to determine what your timetables are due to the failure of the court of appeals to rule on your motion to extend time to file your motion for rehearing. Send a courtesy copy of your motion to extend time to file your petition for review to the court of appeals.

If the client intends on continuing as an indigent, you will have to get the client to sign and have notarized a new affidavit of indigence specifically for the Supreme Court of Texas. You won't be able to rely on the one the client filed to get into the court of appeals.

Appendix "A"

Affidavit of Indigence / Pauper's Oath

CAUSE NO. _____

IN THE INTEREST OF	**§**	**IN THE _____TH DISTRICT COURT**
	§	
	§	
_____, ET AL, CHILDREN	**§**	**OF _____ COUNTY, TEXAS**

AFFIDAVIT OF INDIGENCE / PAUPER'S OATH OF [parent]

BEFORE ME, the undersigned Notary Public, on this date personally appeared _____, who, after being by me duly sworn, did testify as follows:

1. "My name is _____. I am over twenty-one years of age, of sound mind, and have never been convicted of a felony. I have personal knowledge of the facts stated in this affidavit, and all such matters are true and correct.

2. "I am a party in cause number _____, styled *In the Interest of* _____, *et al, Children*, pending in the _____th District Court of _____ County, Texas, and in the _____ Court of Appeals of Texas at _____, *In the Interest of* _____, *et al, Children.*

3. "I am not able to pay the full costs of an appeal.

4. "I am able to pay $_____ toward the costs of an appeal. [TEX. R. APP. P. 20.1(b)]

5. "I receive the following income:

Nature of employment: _____.

The amount of my current employment income is about $_____ per month.

The nature of my government-entitlement income, if any, is _____.

The amount of my government-entitlement income, if any, is $_____ per month.

I also have the following sources of income (Please describe amount and its source): _____

_____. [TEX. R. APP. P. 20.1(b)(1)]

6. "I am married to _____. (Please describe amount of spouse's income and whether that income is available to you):

_____. [TEX. R. APP. P. 20.1(b)(2)]

7. "I own the following real and personal property:

House: _____ Value: $_____.

Car(s): _____ Number of cars: _____. Value of cars: _____.

Other (Please describe and estimate value): _____. [TEX. R. APP. P. 20.1(b)(3)]

8. "The amount of cash I hold: $_____. The money on deposit that I may withdraw is: $_____. [TEX. R. APP. P. 20.1(b)(4)]

9. "The value of my other assets not specified above is: $_____. [TEX. R. APP. P. 20.1(b)(5)]

10. "The following persons are my dependents (Please identify and indicate their relationship to you): _____. [TEX. R. APP. P. 20.1(b)(6)]

11. "I have the following debts in the following amounts:

_____. [TEX. R. APP. P. 20.1(b)(7)]

12. "I have the following monthly expenses for the following items:

Rent: _____.

Electricity: _____.

Groceries: _____.

Other: _____. [TEX. R. APP. P. 20.1(b)(8)]

13. “I have the following assets that I can use as collateral for a loan for court costs: _____. [TEX. R. APP. P.

Appendix "B"

Declaration in Lieu of Affidavit

TEX. CIV. PRAC. & REM. CODE § 132.001.
Use by Inmates in Lieu of Sworn Declaration

(a) Except as provided by Subsection (b), an unsworn declaration made as provided by this chapter by an inmate in the Texas Department of Corrections or in a county jail may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.

(b) This chapter does not apply to an oath of office or an oath required to be taken before a specified officer other than a notary public.

TEX. CIV. PRAC. & REM. CODE § 132.002.
Requirements of Declaration

An unsworn declaration, made under this chapter must be:

(1) in writing; and

(2) subscribed by the person making the declaration as true under penalty of perjury.

TEX. CIV. PRAC. & REM. CODE § 132.003.
Form of Declaration

The form of a declaration under this chapter must be substantially as follows:

"I, (insert name and inmate identifying number from Texas Department of Corrections or county jail), being presently incarcerated in (insert Texas Department of Corrections unit name or county jail name) in _____ County, Texas, declare under penalty of perjury that the foregoing is true and correct.

Executed on (date). (Signature)"

Appendix "C"

Notice of Appeal

CAUSE NO._____

IN THE INTEREST	**§**	**_____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent, _____, in the above cause and by her attorney and files this notice of appeal.

The trial court is the ____th District Court of _____ County, Texas, and the style and cause number of Respondent's case are *In the Interest of_____, et al., Children*, No. _____. TEX. R. APP. P. 25.1(d)(1).

Respondent is appealing the trial court's [date] "Judgment on the Verdict of Jury." TEX. R. APP. P. 25.1(d)(2).

Respondent desires to appeal. TEX. R. APP. P. 25.1(d)(3).

The appeal is taken to the _____ Court of Appeals of Texas at _____. TEX. R. APP. P. 25.1(d)(4).

Respondent _____ is the party filing the notice of appeal. TEX. R. APP. P. 25.1(d)(5).

The appeal involves the termination of the parent-child relationship, which entitles Respondent to an accelerated appeal. TEX. R. APP. P. 25.1(d)(6); TEX. FAM. CODE § 263.405(a).

Respectfully submitted,

_____
Dean M. Swanda
Swanda & Swanda, P.C.
Attorneys at Law
901 W. Bardin Rd., Suite 306
Arlington, TX 76018

Metro (817) 467-4668
Fax (817) 465-3779
State Bar No. 19550620

Appellate Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the ____th day of _____, 200__, a true and correct copy of the foregoing document was sent by First Class U.S. Mail, postage prepaid to:

Criminal District Attorney

Attorney at Litem for children

Counsel for other parent

_____
Dean M. Swanda

Appendix "D"

Motion for New Trial & Statement of Points on Appeal

CAUSE NO. _____

IN THE INTEREST	**§**	**____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

RESPONDENT MOTHER _____'S
MOTION FOR NEW TRIAL AND
STATEMENT OF POINTS ON APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent Mother, _____, in the above cause and by her attorney and file this motion for new trial pursuant to rule 329b(b) of the Texas Rules of Civil Procedure and Statement of Points on Appeal pursuant to section 263.405(b) of the Texas Family Code. In support thereof, Respondent Mother would show the following:

Legal Insufficiency

[Child Number 1]

There is no evidence to support jury finding number 1 that Respondent Mother knowingly placed or knowingly allowed [Child Number 1] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 1] and that Respondent Mother engaged in conduct or knowingly placed [Child Number

1] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 1].

There is no evidence to support jury finding number 2 that the termination of the parent-child relationship between Respondent Mother and [Child Number 1] is in the best interest of [Child Number 1].

[Child Number 2]

There is no evidence to support jury finding number 3 that Respondent Mother knowingly placed or knowingly allowed [Child Number 2] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 2] and that Respondent Mother engaged in conduct or knowingly placed [Child Number 2] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 2].

There is no evidence to support jury finding number 4 that the termination of the parent-child relationship between Respondent Mother and [Child Number 2] is in the best interest of [Child Number 2].

[Child Number 3]

There is no evidence to support jury finding number 5 that Respondent Mother knowingly placed or knowingly allowed [Child Number 3] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 3] and that Respondent Mother engaged in conduct or knowingly placed [Child Number 3] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 3].

There is no evidence to support jury finding number 6 that the termination of the parent-child relationship between Respondent Mother and [Child Number 3] is in the best interest of [Child Number 3].

[Child Number 4]

There is no evidence to support jury finding number 7 that Respondent Mother knowingly placed or knowingly allowed [Child Number 4] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 4] and that Respondent Mother engaged in conduct or knowingly placed [Child Number 4] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 4].

There is no evidence to support jury finding number 8 that the termination of the parent-child relationship between Respondent Mother and [Child Number 4] is in the best interest of [Child Number 4].

[Child Number 5]

There is no evidence to support jury finding number 9 that Respondent Mother knowingly placed or knowingly allowed [Child Number 5] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 5] and that Respondent Mother engaged in conduct or knowingly placed [Child Number 5] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 5].

There is no evidence to support jury finding number 10 that the termination of the parent-child relationship between Respondent Mother and [Child Number 5] is in the best interest of [Child Number 5].

Factual Insufficiency

[Child Number 1]

The evidence is factually insufficient to support jury finding number 1 that Respondent Mother knowingly placed or knowingly allowed [Child Number 1] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 1]; and that Respondent Mother engaged in conduct or knowingly placed [Child Number 1] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 1].

The evidence is factually insufficient to support jury finding number 2 that the termination of the parent-child relationship between Respondent Mother and [Child Number 1] is in the best interest of [Child Number 1].

[Child Number 2]

The evidence is factually insufficient to support jury finding number 3 that Respondent Mother knowingly placed or knowingly allowed [Child Number 2] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 2]; and that Respondent Mother engaged in conduct or knowingly placed [Child Number 2] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 2].

The evidence is factually insufficient to support jury finding number 4 that the termination of the parent-child relationship between Respondent Mother and [Child Number 2] is in the best interest of [Child Number 2].

[Child Number 3]

The evidence is factually insufficient to support jury finding number 5 that Respondent Mother knowingly placed or knowingly allowed [Child Number 3] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 3]; and that Respondent Mother engaged in conduct or knowingly placed [Child Number 3] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 3].

The evidence is factually insufficient to support jury finding number 6 that the termination of the parent-child relationship between Respondent Mother and [Child Number 3] is in the best interest of [Child Number 3].

[Child Number 4]

The evidence is factually insufficient to support jury finding number 7 that Respondent Mother knowingly placed or knowingly allowed [Child Number 4] to remain in conditions or surroundings which endangered the emotional or physical well-being of [Child Number 4]; and that Respondent Mother engaged in conduct or knowingly placed [Child Number 4] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 4].

The evidence is factually insufficient to support jury finding number 8 that the termination of the parent-child relationship between Respondent Mother and [Child Number 4] is in the best interest of [Child Number 4].

[Child Number 5]

The evidence is factually insufficient to support jury finding number 9 that Respondent Mother knowingly placed or knowingly allowed [Child Number 5] to remain in conditions or surroundings which endangered the emotional or physical well-being of

[Child Number 5]; and that Respondent Mother engaged in conduct or knowingly placed [Child Number 5] with persons who engaged in conduct which endangered the physical or emotional well-being of [Child Number 5].

The evidence is factually insufficient to support jury finding number 10 that the termination of the parent-child relationship between Respondent Mother and [Child Number 5] is in the best interest of [Child Number 5].

Failure to Exclude Juror

The trial court erred because it failed to exclude a juror who did not reveal before the taking of testimony in this cause that he worked for the father of the Assistant District Attorney who tried the case. The failure to exclude the juror over Respondent Mother's objection was reversible error.

Erroneous Admission of Hearsay in Violation of Section 104.006 of the Texas Family Code

The trial court erred by allowing hearsay statements of a child to be admitted into evidence without requiring the child to testify or without requiring a showing that the child was available to testify at the proceeding or in any other manner provided by law in violation of section 104.006 of the Texas Family Code. The admission of this hearsay over Respondent Mother's objection was reversible error. TEX. FAM. CODE § 104.006.

Erroneous Admission of Hearsay in Violation of Section 104.002 of the Texas Family Code

The trial court erred by allowing prerecorded hearsay statements of a child without showing each of the prerequisites of section 104.002 of the Texas Family Code. The admission of the prerecorded hearsay statements over Respondent Mother's objection was reversible error. TEX. FAM. CODE § 104.002.

Jury Charge Error - Questions 1, 3, 5, 7, and 9

The trial court erred in submitting jury charge questions asking whether Respondent Mother's parent/child relationship should be terminated as to each of the five children based strictly on grounds without regard to best interest. Termination is proper only when the jury finds both grounds and best interest. TEX. FAM. CODE § 161.001(1); TEX. FAM. CODE § 161.001(2).

Jury Charge Error - Questions 2, 4, 6, 8, and 10

The trial court erred in submitting jury charge questions asking whether Respondent Mother's parent/child relationship should be terminated as to each of the five children based strictly on best interest. Termination is proper only when the jury finds both grounds and best interest. TEX. FAM. CODE § 161.001(1); TEX. FAM. CODE § 161.001(2).

Jury Charge Error

The trial court erred by not adding Respondent Mother's requested definitions and instructions.

WHEREFORE, PREMISES CONSIDERED, Respondent Mother prays that the Court rule that her appeal is not frivolous. Respondent Mother prays that the Court grant this motion and order a new trial. Respondent Mother further asks for such other and additional relief to which she may show herself justly entitled either at law or in equity.

Respectfully submitted,

_____

Dean M. Swanda
Swanda & Swanda, P.C.
Attorneys at Law
901 W. Bardin Road, Suite 306

Arlington, TX 76017

State Bar No. 19550620
Telephone: (817) 467-4668
Fax: (817) 465-3779
Attorney for Respondent Mother / Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Respondent's motion for new trial and statement of points on appeal was sent by First Class U.S. Mail, postage prepaid, on _____, 200__ to:

_____, Criminal District Attorney
Attn: Appellate Section
Frank Crowley Courts Bldg.
133 N. Industrial Blvd.-LB 19
Dallas, TX 75207-4399

Attorney ad Litem for the Children

Attorney for other parent

_____
Dean M. Swanda

Appendix “E”

Section 263.405 Order

CAUSE NO. _____

IN THE INTEREST	**§**	**____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

SECTION 263.405 ORDER

On _____, 200__, came on to be heard the hearing required by section 263.405(d) of the Texas Family Code.

Petitioner, the Texas Department of Protective and Regulatory Services appeared through its attorney, _____.

Respondent Mother, _____, did / did not appear. Her appellate attorney of record, _____, appeared.

Respondent Father, _____, did / did not appeal. His counsel of record, _____, appeared.

_____, appointed by the Court as attorney/guardian ad litem, appeared on behalf of the children the subject of this suit.

The Court DENIES Respondent Mother _____'s Motion for New Trial.

The Court FINDS Respondent Mother _____ indigent and is, therefore, entitled to a court appointed attorney and, also, a clerk's record and reporter's record at no

charge to her. Dallas County shall pay her attorney's fees and for her costs of court, including filing fees and the fees incurred for the clerk's record and the reporter's record.

The Court FINDS that Respondent Mother _____'s appeal is not frivolous as provided by section 13.003(b) of the Texas Civil Practice and Remedies Code.

SIGNED THIS _____ day of _____, 200__.

_____
JUDGE PRESIDING

Appendix "F"

Request for the Reporter's Record

_____, 200__

_____, Official Court Reporter
_____th District Court
2600 Lone Star Drive
_____, TX _____

Re: *In the Interest of* _____, *et al., Children*
Trial court cause no. _____

Reporter's Record due _____, 200___

Dear [Court Reporter]:

Please consider this respondent _____'s written request for preparation of the reporter's record pursuant to rule 34.6(b)(1) of the Texas Rules of Appellate Procedure. Judge _____ appointed me on _____, 200__, to represent respondent _____ in his (her) appeal.

Please transcribe all your notes from: (1) the trial (including any pretrial hearings, hearings outside the jury's presence, voir dire, opening statements, closing arguments, bench conferences, and bills of exceptions or offers of proof), which occurred on [dates of trial] and (2) the section 263.405(d) hearing, which has not yet been set but which will occur later this month. Please include all exhibits admitted in all of the above.

On _____, 200__, respondent _____ filed an affidavit of indigence. If there is a contest, you'll be notified.

The trial court signed the "Judgment on Jury Verdict" on May 27, 2003. The reporter's record is due 60 days after the trial court signs the judgment. TEX. FAM. CODE § 263.405(f). The reporter's record appears to be due Saturday, July 26, 2003, or, effectively, Monday, July 28, 2003.

If you have any questions or if I can be of any assistance, please feel free to contact me at the above telephone number.

Sincerely,

Dean M. Swanda

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 2nd day of June, 2003, the original of the foregoing document was sent by First Class U.S. Mail, postage prepaid, to:

_____, Official Court Reporter
_____th District Court
Henry Wade Juvenile Justice Center
2600 Lone Star Drive
Dallas, TX 75212

I HEREBY CERTIFY, that on the 2nd day of June, 2003, true and correct copies of the foregoing document were sent by First Class U.S. Mail, postage prepaid, to:

Deputy District Clerk
_____th District Court
Henry Wade Juvenile Justice Center
2600 Lone Star Drive
Dallas, TX 75212

The _____, Criminal District Attorney
Attn: The Appellate Section
Frank Crowley Courts Bldg.
133 N. Industrial Blvd. -- LB 19
Dallas, TX 75207

Attorney ad Litem for the children

Attorney for other parent

_____
Dean M. Swanda

Appendix “G”

Written Designation of Material to Include in the Clerk’s Record

CAUSE NO. _____

IN THE INTEREST	**§**	**____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

WRITTEN DESIGNATION OF MATERIAL FOR INCLUSION IN THE CLERK’S RECORD

Clerk’s Record Due _____, 200__ per § 263.405(f) of the Texas Family Code

TO THE HONORABLE CLERK OF SAID COURT:

COMES NOW _____, the respondent, in the above cause, and files this her written designation of material for inclusion in the clerk’s record and respectfully requests the Clerk of this Honorable Court make and prepare as part of the appellate record of this cause copies of the following:

1. The 12-10-01 "Suit Affecting the Parent-Child Relationship, Petition for Emergency Care and Temporary Managing Conservatorship";

2. The 12-10-01 Affidavit in Any Fact by Patty Booth and any other affidavits of fact attached to the 12-10-01 petition;

3. The 12-11-01 "Ex parte Order for Emergency Care and Temporary Custody";

4. The 12-11-01 order appointing _____ as attorney ad litem for the children;

5. The 12-17-01 order appointing _____ as attorney for the respondent mother;

6. The 12-13-01 "Initial Report to the Court";

7. The 12-18-01 "Order Extending Ex Parte Order"'

8. The 1-2-02 "Temporary Order";

9. The 1-23-02 "First Amended Suit Affecting the Parent-Child Relationship, Petition for Emergency Care and Temporary Managing Conservatorship";

10. The 1-23-02 "Affidavit of Any Fact" by _____;

11. The 1-24-02 "Affidavit of Any Fact" by _____;

12. The 1-24-02 "Affidavit of Any Fact" by _____;

13. The 1-24-02 "Affidavit of Any Fact" by _____;

14. The 1-24-02 "Ex parte Order for Emergency Care and Temporary Custody" for _____;

15. The 1-24-02 "Order Appointing Guardian Ad Litem";

16. The 1-29-02 "Status Report to the Court";

17. The 1-30-02 "Initial Report to the Court";

18. The 2-6-02 "Temporary Order"

19. The 2-6-02 Status Hearing Order";

20. The 3-20-02 "Status Report to the Court";

21. The 3-21-02 "Status Report to the Court";

22. The 3-21-02 "Status Hearing Order";

23. The 3-21-02 "Order for Home Study";

24. The 4-8-02 "Petition for Termination";

25. The 5-31-02 "Chapter 263 Order";

26. The 6-18-02 "Chapter 263 Order";

27. The 6-18-02 "Order Appointing Attorney ad Litem";

28. The 7-1-02 "Motion for Further Orders" by Respondent Father;

29. The 7-1-02 "Original Answer to Petition for Termination and Request for Affirmative Relief" by Respondent Father;

30. The 7-19-02 "Rule 11 Discovery Extension Agreement";

31. The 10-17-02 "Notice of Filing of Business Records and Affidavits";

32. The 10-25-02 "Notice of Filing Business Records and Affidavits";

33. The 11-1-02 "Notice of Filing Business Records and Affdavits";

34. The 11-4-02 "Supplemental Answer to Petition for Termination and First Amended Request for Affirmative Relief" by Respondent Father;

35. The 11-6-02 "Motion for Continuance" by _____;

36. The 11-12-02 "Order on Motion for Continuance";

37. The 11-19-02 "Objection to Business Records" by Respondent Father;

38. The 12-4-02 "Order Extending Dismissal Date";

39. The 1-16-03 "Motion for Further Orders" by Respondent Father;

40. The 1-30-03 "Respondent's Exhibit 1";

41. The 1-30-03 "RM-1";

42. The 1-30-03 "RM-2";

43. All the 4-28-03 Affidavits of Relinquishment of Permanent Managing Conservatorship, including, but not limited to: (a) the 4-28-03 "Affidavit of Relinquishment of Permanent Managing Conservatorship" (Mother / Child 1); (b) the 4-28-03 "Affidavit of Relinquishment of Permanent Managing Conservatorship" (Mother / Child 2); (c) the 4-28-03 "Affidavit of Relinquishment of Permanent Managing Conservatorship" (Father / Child 1); (d) the 4-28-03 "Affidavit of Relinquishment of Permanent Managing Conservatorship" (Father / Child 2); (e) the 4-28-03 "Affidavit of Relinquishment of Permanent Managing Conservatorship" (Father / Child 3);

44. The 4-30-03 Jury Note and the court's response, if any;

45. The 4-30-03 "Charge of the Court";

46. The 5-15-03 "Motion to Withdraw and Motion to Appoint Appellate Counsel" by _____;

47. The 5-12-03 "Order";

48. The 5-22-03 "Order of Appointment";

49. The 5-27-03 "Judgment on the Verdict of Jury";

50. Respondent Mother's Notice of Appeal;

51. Respondent Father's Notice of Appeal;

52. Respondent Mother's Affidavit of Indigence/Pauper's Oath;

53. Respondent Father's Affidavit of Indigence/Pauper's Oath;

54. The Order finding Respondent Father indigent;

55. The Contests, if any, to the Affidavits of Indigence/Pauper's Oath;

56. Respondent Mother's statement of points on appeal and motion for new trial;

57. Respondent Father's statement of points on appeal and motion for new trial;

58. The trial court's section 263.405 order on Respondent Mother's Appeal;

59. The trial court's section 263.405 order on Respondent Father's Appeal;

60. Respondent Mother's request for the reporter's record;

61. Respondent Father's request for the reporter's record;

62. Respondent Mother's written designation of material to include in the clerk's record;

63. Respondent Father's written designation of material to include in the clerk's record;

64. Because there was a jury trial, (A) (i) all written documents in the record, including the juror information cards, reflecting the use of the peremptory challenges by all the parties, (ii) all written documents in the record showing the challenges for cause by all the parties parties, and (iii) all written documents showing the manner whereby the jurors were either accepted or rejected; and (B) the trial court’s rulings on (i) any

objections to the parties' use of peremptory challenges, (ii) challenges for cause, and (iii) any objections the parties had on the manner whereby the jurors were either accepted or rejected;

65. Any written waivers;

66. Any written stipulations; and

67. The trial court's docket sheet.

WHEREFORE, PREMISES CONSIDERED, respondent respectfully moves that the Clerk of this Honorable Court make and prepare as part of this cause's appellate record all the matters designated above and transmit the clerk's record to the Court of Appeals for the _____ District of Texas at _____.

Respectfully submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the __th day of _____, 200__, a true and correct copy of the foregoing document was sent by First Class U.S. Mail, postage prepaid to:

CPS

Attorney ad Litem for Children

Counsel for other parent

_____
Dean M. Swanda

Appendix "H"

Motion to Withdraw and Substitute Counsel

CAUSE NO. _____

IN THE INTEREST	**§**	**____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

MOTION TO WITHDRAW AND MOTION TO SUBSTITUTE COUNSEL

COMES NOW, Respondent, _____, and moves this Court to permit his attorney to withdraw as counsel of record and to substitute another attorney as his counsel of record for his appeal.

On _____, 200__, this Court appointed counsel to represent Respondent at trial. On _____, 200__, the trial of this cause was concluded. Respondent has indicated he wanted to appeal. Counsel has spoken to Respondent about the benefits of having different counsel handle an appeal, Respondent approves of the substitution, and the substitution of counsel is not for the purposes of delay.

Respondent's substitute counsel is: [Leave a space where the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute counsel can be written in.]

WHEREFORE, premises considered, Respondent moves this Court to permit his counsel, _____, to withdraw as counsel of record and to substitute _____as his counsel of record in this appeal.

_____
Current counsel

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's motion has been mailed by First Class U.S. Mail, postage prepaid, to:

Client

CPS

Attorney ad Litem

on _____, 200__.

_____
Current counsel

CAUSE NO. _____

IN THE INTEREST	**§**	**____TH DISTRICT COURT**
	§	
OF _____, ET AL.,	**§**	**OF**
	§	
CHILDREN	**§**	**_____ COUNTY, TEXAS**

ORDER ON MOTION TO WITHDRAW
AND MOTION TO SUBSTITUTE COUNSEL

Respondent _____'s "Motion to Withdraw and Motion to Substitute Counsel" is GRANTED, and _____ is ORDERED withdrawn as counsel of record for Respondent, and _____ is ORDERED substituted as appellate counsel of record for Respondent.

_____
JUDGE PRESIDING

_____
DATE

Appendix “I”

Affidavit of Indigence / Pauper’s Oath for Supreme Court

SUPREME COURT CAUSE NO. _____

_____

IN THE
SUPREME COURT
OF TEXAS

_____

IN THE INTEREST OF _____, A CHILD

_____

On Appeal from the _____ District Court of Appeals at _____
Court of Appeals Cause No. _____
Before Justices _____, _____, and _____
and
On Appeal from the ___rd District Court of _____ County, Texas
Trial Court Cause No. _____
Before the Honorable _____

_____

AFFIDAVIT OF INDIGENCE / PAUPER'S OATH

BEFORE ME, the undersigned Notary Public, on this date personally appeared _____ who, after being by me duly sworn, did testify as follows:

1. "My name is _____. I am over twenty-one years of age and of sound mind. I have personal knowledge of the facts stated in this affidavit, and all such matters are true and correct.

2. "I am a party in the above-entitled and numbered cause pending in the ____rd District Court of _____ County, Texas (*In the Interest of* _____, *a Child*, cause number _____), and the _____ Court of Appeals of Texas at _____ (*In the Interest of* _____, *a Child*, cause number _____).

3. "I am not able to pay the full costs of an appeal.

4. "I am able to pay $0 toward the costs of an appeal.

5. "I receive the following income:

Nature of employment: _____.

The amount of my current employment income is about $_____ per month.

The amount of my government-entitlement income, if any, is: None.

The nature of my government-entitlement income, if any, is: Not Applicable.

I also have the following sources of income (Please describe amount and its source): My fiancé, _____, provides me with a place to live. He receives disability benefits of _____ per month.

6. “I have a spouse, but I have not seen him in over a decade and have no idea where to find him.

7. “I own the following real and personal property:

House: No Value: $0.

Car(s): Yes Number of cars: 0. Value of cars: N/A.

Other (Please describe and estimate value): Household furniture.

8. “The amount of cash and money on deposit that I may withdraw is: $0.

9. “The value of my other assets not specified above is: $0.

10. “The following persons are my dependents (Please identify and indicate their relationship to you): One child - _____.

11. “I have the following debts in the following amounts: _____ ____.

12. “I have the following monthly expenses for the following items:

Rent: $_____

Electricity: $_____

Groceries: $_____

Clothing: $_____

Transportation: $_____

Other: $_____

13. “I have the following assets that I can use as collateral for a loan for court costs: None.

14. “No attorney is providing me free legal service without a contingent fee.

15. “No attorney has agreed to pay or advance court costs.

16. “Further the affiant sayeth not.”

_____
(Client)

SUBSCRIBED AND SWORN TO before me, a Notary Public, on the _____ day of _____, 2004.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

MY COMMISSION EXPIRES: