



Your First CPS Appeal

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State Bar of Texas
Appellate Section &
Child Protection Law Section
October 26, 2022 Webinar



Introduction

- Whose job is it anyway?
- Appealability
- Preservation (briefly)
- Perfecting the appeal
- Readyng the appeal
- Drafting the brief
- *Anders* briefs
- Submission
- Decision
- Post-judgment motions in the appellate court
- Petition for review (very briefly)
- Resources
- Little time ... lots of stuff
- Feel free to email me with questions:
Michael.Hull@harriscountytexas.gov
- ❖ All PDF pages in the PowerPoint slides will open in your PDF viewer if you double-click on them

1. Little time and lots of stuff:

- Probably won't get through all slides
- Trying to get through the *Anders* brief section
- But goal was to provide a checklist with citations
- Glad to provide a couple of sample briefs, notices of appeal or motions if requested
- But you can find these freely online in PDF at www.txcourts.gov



Whose Job is it Anyway?

Whose job ... ?

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- If retained, probably you
 - TDRPC 1.02(b): May limit scope of representation
- Trial counsel may be responsible regardless:
 - Until appellate counsel appointed
 - TDRPC 1.15(d)
 - *In re J.O.A.*, 283 S.W.3d 336 (Tex. 2016)
 - *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988)
- AAL (or Dual-Role) for Child may appeal
- TDRPC 1.02(a): Generally, must abide by client's decisions re objectives, whether to settle or appeal, etc.
 - What if you cannot find your client?
 - Two quick examples
 - If it were me ...
- Frivolous grounds? *Anders*
 - *See below*

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TDRPC 1.15(d):

- Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned.

In re J.O.A., 283 S.W.3d 336 (Tex. 2008)

- Ineffective assistance of counsel claim; legal and factual insufficiency
- No timely appellate points (within 15 days)—neither strategic nor a concession to any lack of perceived merit
- Trial counsel filed notice of appeal with motion to w/d
- Trial court appointed appellate counsel after 15-day deadline; trial counsel still appointed as deadline passed
- “Trial counsel’s failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding: (p.343)
- Counsel was “seriously deficient” for not filing points
- Part of the problem here may be resolved by better communication between trial court and counsel. Often in these cases, there is a transition from trial to appellate counsel after rendition. Because of the accelerated appellate timetable

and the critical fifteen-day deadline for the statement of points, and because trial and appellate counsel are often different people, there can be misunderstandings as to which attorney is responsible for filing a motion for new trial, a statement of points on appeal, and a notice of appeal. (p.343)

- Given the accelerated timetable, the burden should logically fall on trial counsel, and in this case necessarily so because Timothy's appellate counsel was not appointed until after the fifteen-day period had run. See, e.g., [*In re H.R.*, 87 S.W.3d 691, 703 \(Tex.App.-San Antonio 2002, no pet.\)](#) (concluding that practical effect of accelerated appellate timetable is to burden trial counsel with responsibility of preserving client's appellate rights). As one court of appeals has noted, the fifteen-day deadline is a trap for the unwary. [*In re R.J.S.*, 219 S.W.3d 623, 627 \(Tex.App.-Dallas 2007, pet. denied\)](#). That court of appeals has further suggested that trial courts should alert parents to the requirements of [section 263.405](#) at the end of the final order terminating parental rights. *Id.* We agree and suggest further that the best way to avoid ineffective assistance of counsel claims in the future is for the trial courts to take a proactive approach, assuring that indigent parents do not inadvertently waive their appellate rights under the Family Code. Because of the accelerated nature of these cases, trial courts must act expeditiously when appointing new counsel for the appeal. (p.344)
- Justice Willett, concurring in *J.O.A.*: Courts must:
 - Be more proactive in the post-judgment process
 - Specifically remind trial counsel that while the trial may have ended, their duties have not
 - Referring these types of cases to appropriate disciplinary authorities

Ex parte Axel, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988):

- “[T]rial counsel, retained or appointed, has the duty, obligation, and responsibility to consult with and fully to advise his client concerning meaning and effect of the judgment rendered by the court, his right to appeal from that judgment, and the necessity of giving notice of appeal and taking other steps to pursue an appeal, as well as expressing his professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal.”

Examples:

- Green case (oral argument)
- Refusal to file



Appealability

Appealability



- Generally, can't appeal interlocutory orders
 - *But see* CPRC § 51.014
- Mandamus
 - Sometimes, but not discussing
- May appeal from final judgment
 - *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001)
- *Lehmann*:
 - Judgment is final "if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree"
 - Presumed that order is final after trial on the merits
- If in doubt, file it
 - TRAP 27.1: Premature not/app effective after event that begins notice of appeal period



Perfecting the Appeal

Perfecting the Appeal

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- JURISDICTIONAL!!! TRAP 25.1(b)
 - Only jurisdictional requisite
- CPS appeal = Accelerated
 - TEX. FAM. CODE § 263.405(a)
 - TRAP 26.1(b): Notice of appeal “must be filed within 20 days after the judgment or order is signed
 - TRAP 26.1(a) does not apply in CPS cases: *Notice of appeal deadline not extended by post-judgment filings*
- File notice of appeal with trial court. TRAP 25.1(a)
 - Mistakenly filing with court of appeals treated as filed in trial court on same day
- TRAP 26.3: Extensions of time to file notice of appeal:
 - Within 15 days after deadline
 - File notice of appeal in trial court
 - File motion to extend in court of appeals compliant with TRAP 10.5(b)

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0. TRAP 25.1(b):

- Notice of appeal invokes appellate court’s jurisdiction
- “Any party’s failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately including dismissing the appeal.”

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- Who appeals? TRAP 25.1(c):
 - Party who wants to alter the judgment or other appealable order
 - No more relief than given by trial court without notice of appeal
- Service. TRAP 25.1(e):
 - All parties (incl. child's ad litem)
 - Court reporter(s) if reporter's record needed
- Trial court clerk's responsibility to forward notice to court of appeals. TRAP 25.1(f)
- May amend notice any time before appellant's brief filed; after that, only with leave. TRAP 25.1(g)
- Again, if in doubt, file notice of appeal; premature appeals treated as timely filed. TRAP 27.1(a)
- More accelerated appeal rules, *below*

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- Contents of notice. TRAP 25.1(d)
 1. Court, number and style
 2. Date of order/judgment appealed from
 3. State party wants to appeal
 4. Court(s) to which appeal taken
 5. Name(s) of party filing notice
 6. Whether appeal accelerated and whether from parental termination or CPS case
- Substance over form!!! *In re J.M.*, 396 S.W.3d 528, 531 (Tex. 2013)

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA
CAUSE NO. 2023-04586J

IN THE INTEREST OF	§	IN THE DISTRICT COURT
PUGLEY ADDAMS &	§	
WEDNESDAY ADDAMS	§	HARRIS COUNTY, TEXAS
	§	
CHILDREN	§	3156a JUDICIAL DISTRICT (JUV.)

NOTICE OF APPEAL OF MORTICIA ADDAMS

1. Morticia Addams, Respondent herein, desires to appeal from the district court's decree and final judgment of September 13, 2023 terminating Addams' parental rights to Pugsley and Wednesday Addams. This appeal may include any orders or rulings rendered by the district court prior to or subsequent to its rendition and signing of the September 13, 2023 final judgment.

2. Morticia Addams appeals to either the First or Fourteenth Court of Appeals.

3. This is an accelerated appeal. TEX. R. APP. P. 28.1(a). This is a case involving parental termination or child protection under TEX. R. APP. P. 28.4.

4. This notice of appeal is timely since it was filed with twenty (20) days of the date on which the district court signed the order being appealed, TEX. R. APP. P. 26.1(b); TEX. R. APP. P. 28.1(b), the final judgment decreeing the termination of Addams' parental rights signed on September 13, 2023.

5. Morticia Addams is exempt from paying fees on appeal. Addams was found indigent by the trial court and retains that status on appeal pursuant to TEX. FAM. CODE § 107.013(c).

Morticia Addams' Notice of Appeal
Page 1

3156a Court
October 1, 2023

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1. *In re J.M.*, 396 S.W.3d 528, 531 (Tex. 2013):

“In sum, Rule of Appellate Procedure 25.1 provides that an appeal is perfected and the appellate court's **jurisdiction** is **invoked** when a written **notice of appeal** is filed with the trial court clerk. TEX.R.APP. P. 25.1. We have held that a party complies with Rule 25.1 by making a bona fide attempt to invoke appellate jurisdiction. ”

Doc: Add signature block and certificate of service



Preservation, Briefly

Preservation, Briefly

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- Generally, if not preserved pre-judgment, it's lost
- TEX. R. APP. P. 33.1(a):
 1. On record
 2. Timely
 3. A Request, Motion or Objection
 4. Specificity . . . unless apparent from context
 5. Compliant with rules or statutes
 6. Get Ruling
 7. Objection to refusal to rule
- Exceptions:
 - Personal or subject matter jurisdiction
 - TRCP 324:
 - Motion for new trial not req'd to preserve error—usually
 - MNT needed for:
 - Jury misconduct
 - Newly discovered evidence
 - Incurable jury argument

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Pretrial and trial preservations:

- Many courses and papers on preservation
- Too late by the time you're readying the brief
- Paraphrasing Donald Rumsfeld, "You go to appeal with the record you have, not with the record you want."

Preservation, Briefly

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Motion for New Trial

- MNT necessary following a jury trial:
 - To complain of factual insufficiency or against the overwhelming weight of evidence. TRCP 324(b)
 - If you ask for relief in MNT, you're only entitled to a new trial (rather than a rendition)

Other Post-Judgment Motions

- Motion for JNOV
- Motion to modify judgment: Swiss Army knife of post-judgment motions
- Preservation of legally insufficient evidence or matter of law issues in jury trial:
 - Motion for directed verdict
 - Objection to submission of jury question
 - Motion for JNOV
 - MNT

0. Factual sufficiency: Remand point

5. Legal sufficiency: Rendition point (because it's a legal question)

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- No forms necessary:
 - Intro: Tell court what you want
 - Relevant facts
 - Tell court why you deserve it (authorities)
 - Conclude: Tell court what you want
- Courts should look to substance over form when considering motion
- TRCP 329b:
 - File post-judgment motions within 30 days
 - Overruled by law 75 days after judgment signed
 - Plenary power:
 - 30 days after judgment
 - 30 days after timely-filed post-judgment motions denied
 - Time to appeal runs anew from time judgment modified or reformed
 - But you don't want to hope for modification—file that notice of appeal! You can always dismiss your appeal if you get the post-judgment relief requested
 - Post-judgment motions and FF/CL do not extend time to file notice of appeal in CPS cases!!! TRAP 28.1(b)
 - Original notice of appeal will cover any subsequent changes to judgment by trial court. TRAP 27.3

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Black's Law Dictionary:

- Plenary: "Full, complete, entire"
- Plenary power: "Power that is broadly construed; esp., a court's power to dispose of any matter properly before it"

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Findings of Fact & Conclusions of Law

- Generally, see TRCP 296-299a
- *But see* TRCP 306:
 - “In a suit for termination of the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.”
- Generally needed only after bench trial
- If FF/CL omitted without objection, court of appeals presumes trial court made finding or conclusion in support of judgment
 - E.g., defense
- If needed, must follow scheme in TRCP 296-299a or risk waiving

*** Not something you typically have to worry about in CPS appeals!



Readying the Appeal

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Docketing Statement

- TRAP32.1: Upon filing notice of appeal, must “promptly” file docketing statement
 - May supplement or amend. TRAP 32.3
 - Not jurisdictional. TRAP 32.4
- Forms:
 - www.texascourts.gov, then “Forms,” and then your court

Contents:

- Names, contact info.
- Dates of judgment, orders, notice of appeal, record requests, post-judg. motions
- Nature of case
- Priority/accelerated?
- Indigence info.
- Mediation info.
- Etc.

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Lots more information on your court page.

Probably won't take more than an hour to complete if you have access to trial court docket

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Clerk's Record: TRAP 34.5

- Record must include:
 - Pleadings (first and live)
 - Court's docket sheet
 - Charge/verdict or FF/CL
 - Judgment or order being appealed
 - Requests for FF/CL, post-judgment motions, rulings thereon
 - Notice of appeal
 - Request for clerk's and reporter's records
 - Bill of costs
- Other misc. stuff: E.g., status, adversary, permanency orders, etc.
- Request any time before clerk prepares record
 - Cannot be refused if untimely
- Must be specific; generalities and 'all papers' will be ignored
- Any party may supplement
- Rules also deal with inaccuracies, lost or destroyed documents, originals not easily copied, etc.

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- 0. Record on appeal includes the clerk's record and the reporter's record, if necessary
- 5. Appeal will be dismissed without clerk's record

Readying the Appeal



May 23, 2022

Honorable Marilyn Burgess
Harris County District Clerk
201 Caroline, Suite 420
Houston, Texas 77002

ATTN: Post Judgment

Re: Designation of Items Comprising the Clerk's Record in the Appeal in *Harris County v. Joshua Miralles*, Cause No. 2019-61633 in the 116th District Court of Harris County, Court of Appeals Cause No. 14-22-00367-CV

Dear Ms. Burgess:

I am writing this letter to request that you prepare a Clerk's Record in the appeal of the above-referenced case. The contents of the Clerk's Record should include the following items from the Court's file:

No.	Description	Date Filed	Image No.
1.	Plaintiff Harris County's Original Petition and Req. for Disclosure	8/30/2019	86897422
2.	Crutin Morales' Original Petition in Intervention and Written Discovery Requests	8/6/2020	91626993
3.	Defendant Joshua Miralles' Original Counterclaim and Req. for Disclosure	8/19/2020	91809688
4.	Defendant Joshua Jacob Morales' First Amended Answer	8/31/2020	91957549
5.	Plaintiff Harris County, Texas's Original Answer to Colonel County Mutual Insurance Company's Petition in Intervention	9/16/2020	92196513
6.	Plaintiff Harris County, Texas's Original Answer to Intervenor Crutin Morales's Petition in Intervention	9/23/2020	92286309

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7.	Plaintiff Harris County, Texas's Original Answer to Intervenor Plaintiff Joshua Miralles's Counter Claim	9/23/2020	92286184
8.	Colonel County Mutual Insurance Company's Third Amended Petition in Intervention	2/24/2022	100562299
9.	Harris County's Plea to the Jurisdiction (and appended exhibits A-G, listed below)	4/1/2022	101222071
10.	Plea/Jur Sub Doc: Exhibit A	4/1/2022	101222073
11.	Plea/Jur Sub Doc: Exhibit B	4/1/2022	101222075
12.	Plea/Jur Sub Doc: Exhibit C	4/1/2022	101222077
13.	Plea/Jur Sub Doc: Exhibit D	4/1/2022	101222079
14.	Plea/Jur Sub Doc: Exhibit E	4/1/2022	101222080
15.	Plea/Jur Sub Doc: Exhibit F	4/1/2022	101222082
16.	Plea/Jur Sub Doc: Exhibit G	4/1/2022	101222083
17.	Intervenor Colonel County Mutual Insurance Company's Response to Harris County's Plea to the Jurisdiction	4/19/2022	101480732
18.	Intervenor Crutin Morales's Response to Harris County's Plea to the Jurisdiction	4/21/2022	101553829
19.	Defendant Counter-Plaintiff Joshua Jacob Morales's Joinder in Response to Plaintiff/Counter-Defendant Harris County's Plea to the Jurisdiction	4/22/2022	101558399
20.	Harris County's Bench Brief/Objections in Reply to Responses to Harris County's Plea to the Jurisdiction	4/25/2022	101589768
21.	Harris County's Reply to All Parties' Responses to its Plea to the Jurisdiction (and appended exhibits and documents, listed below)	4/25/2022	101581994
22.	HC Reply Sub Doc: Affidavit of Nicole Allen	4/25/2022	101581995
23.	HC Reply Sub Doc: Exhibit H	4/25/2022	101581997
24.	HC Reply Sub Doc: Exhibit I	4/25/2022	101581999
25.	HC Reply Sub Doc: Exhibit J	4/25/2022	101582001
26.	HC Reply Sub Doc: Harris County's Reply (Notice of Filing of Dual-Cam Videos with Court)	4/25/2022	101582004

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27.	Intervenor Colonial County Mutual Insurance Company's Objections to Harris County's Reply to the Plea to the Jurisdiction	4/25/2022	10151823
28.	Intervenor Cristian Morales's First Supplemental Response to Harris County's Plea to the Jurisdiction	4/26/2022	101632169
29.	Order Signed Denying Plea to the Jurisdiction	4/27/2022	101667553
30.	Harris County's Notice of Appeal	5/17/2022	101999948
31.	This Request for Preparation of a Clerk's Record	5/25/2022	
32.	A Certified Bill of Costs		

Please forward the items listed above, in the form of a Clerk's Record, to the Fourteenth Court of Appeals under cause no. 14-22-00367-CV.

If any additional items are requested for inclusion by any other party, please do not include the requested items in this Clerk's Record; instead, put those items in a First Supplemental Clerk's Record and charge that party for the expenses incurred unless Appellant Harris County expressly assents in writing to the requested supplement.

Thank you for your assistance in this matter. If you have any questions or need clarification in this matter, please feel free to call anytime at 713-274-5138. You may also request assistance from the appellate paralegal, Ms. Sally Alvarado, at 346-354-7506.

Very truly yours,

/s/ Michael R. Hull
MICHAEL R. HULL
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August 30, 2022

Honorable Marilyn Burgess
Harris County District Clerk
201 Caroline, Suite 420
Houston, Texas 77002

ATTN: Civil Post Judgment

Re: Request for Expedited Supplemental Clerk's Record in the Appeal in *Harris County v. Joshua Mireles*, Cause No. 2019-81633 in the 11th District Court of Harris County, Court of Appeals No. 14-22-00367-CV

Dear Ms. Burgess:

I am requesting that you prepare an **expedited First Supplemental Clerk's Record** in the above-referenced case. The contents of the expedited **First Supplemental Clerk's Record** should include the following items from the court's file:

No.	Description	Date Filed	Image No.
1	Sub Doc: Exhibits A-E	04-19-2022	101480733

Please forward the items listed above, in the form of a **First Supplemental Clerk's Record**, to the Fourteenth Court of Appeals under cause no. 14-22-00367-CV.

If any additional items are requested for inclusion by any other party, please do not include the requested items in this Clerk's Record; instead, put those items in a separate supplemental clerk's record and charge that party for the expenses incurred unless Appellant Harris County expressly assents in writing to the requested supplement.

Thank you for your assistance in this matter. If you have any questions or need clarification in this matter, please feel free to call anytime at 713-274-5138. You may also request assistance from the appellate paralegal, Mrs. Sally Alvarado, at 346-354-7506.

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Reporter's Record: TRAP 34.6

- Stenographic or electronic recording
- Designate all or part of proceedings and exhibits
- At or time for perfecting appeal (notice of appeal deadline), must request in writing:
 - Portions of proceedings to include
 - Exhibits to include
- File request with trial court clerk (and give copy to reporter)
- May still request if untimely
- Important process for requests for partial records:
 - Must include list of points or issues she will raise
 - Limited to those points/issues
 - Others may designate add'l items
 - Presumption that partial record is complete record for points/issues
- Jury trials: May want to omit opening, closing, voir dire, etc.
- No reason to omit in bench trials, IMO
- Statutory hearings usually unnecessary

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- Also provisions in TRAP 34.6(e) for inaccurate, missing, destroyed record
- Orders from statutory hearing are usually rendered moot by final judgment, so usually no need for testimony from the statutory hearings
- Good to explicitly exclude as some court reporters will prepare them automatically

Readying the Appeal

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Vince Ryan
Harris County Attorney

January 14, 2015

Josh Masera By Hand Delivery
Official Court Reporter
333rd District Court
201 Caroline, Room 1434
Houston, Texas 77002

Re: Request for Preparation of a Reporter's Record in the Appeal from Harris County v. Gerald Knopp & Narciso Arzola, Cause No. 2012-20003 in the 333rd District Court of Harris County, Court of Appeals Cause No. 01-13-00052-CV

Dear Ms. Masera:

Harris County, Texas (the "County") is appealing the final judgment and associated orders rendered in this case by the 333rd District Court. Please note that the appeal has been assigned to the First Court of Appeals under Cause No. 01-13-00052-CV. As noted above, the style of the appeal should be *Harris County v. Gerald Knopp & Narciso Arzola*.

Please prepare, file, and certify a copy of the reporter's record containing all testimony from all of the witnesses, all discussions during the trial between the judge and the lawyers, and all exhibits. Specifically, please include the following from the trial of this matter on December 5, 2014:

1. The lawyers' opening statements.
2. All of the testimony of all of the witnesses.
3. All conferees between the judge and the lawyers.
4. The lawyers' closing arguments.
5. All admitted exhibits.

As we discussed earlier, there at least two other oral hearings held in this case, one on or about February 1, 2013, and the other on or about September 1, 2013. You indicated to me that there was no record taken at these hearings. I have no reason to disagree. Include these hearings simply to make the point that the reporter's record you are compiling will consist of the hearing or trial on December 5, 2014.

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The County intends for this to be the complete and entire reporter's record of the trial of this matter before the trial court. If the Appellates are aware of any portions that have been unintentionally omitted, the County requests that they inform the County and you, Ms. Masera, of the omission so that these portions may be prepared by you and included in the record before the First Court of Appeals.

We have discussed the issue of payment for the reporter's record over the phone. I requested that you prepare and file and record, after which you send an invoice to me at the address below. I will then request and send a check to you for payment. I noted that litigation expenses have already been budgeted for this case and while the wheels of County machinery move slow at times, you will be paid by Harris County. I understood that this assurance was satisfactory to you. If these arrangements are not satisfactory, prompt notice would be greatly appreciated.

Finally, the County has filed no post-judgment motions in this case.

Thank you for your assistance in this matter. If you have any questions or need clarification in this matter, please feel free to call anytime at 713-274-5138. You may also request assistance from my colleague, Ms. Susan Seacra, at 713-274-5193.

Very truly yours,

OF COUNSEL:
VINCE RYAN
County Attorney
Harris County, Texas

/s/ Michael R. Hull
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- Deadlines for filing records in the courts of appeals if accelerated:
 - Due 10 days after notice of appeal filed. TRAP 35.1(b)
 - Court may extend up to 30 days in total. TRAP 28.4(b)(2)
- Trial and appellate court responsible for ensuring record filed if appellant takes care of her responsibilities. TRAP 35.3(c); 37.3(a)(1)
- TRAP 35.3(a): Clerk's duty to ensure clerk's record timely filed if:
 - Notice of appeal filed and
 - If payment made, arrange or indigent
- TRAP 35.3(b): Reporter's duty to ensure reporter's record timely filed if:
 - Notice of appeal filed
 - Appellant requests record and
 - If payment made, arranged or indigent
- TRAP 37.3(b) & (c): If appellant fails to satisfy TRAP 35.3 ...
- Counsel accesses record through "Attorney Portal" on appellate court's website

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Your duty:

- File notice of appeal
- Request record (clerk will do so automatically if not specific request made) and
- Make payment, make arrangements to pay with clerk or reporter or if Appellant is indigent (point out order or something showing indigence)

TRAP 37.3(b) & (c):

(b) Clerk's Record: If appellant fails to pay fees, make arrangements to pay fee or is not indigent, appeal can be dismissed after "reasonable opportunity to cure"

(c) Reporter's Record: If reporter's record not requested, or no payment, payment arrangements or IFP, "after giving reasonable opportunity to cure," court can decide issues not needing reporter's record.

Without reporter's record, court assumes that record has sufficient facts to support trial court's findings



Drafting the Brief

Drafting the Brief

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Timelines; Filing

- Appellant's brief due 20 days after the last-filed of clerk's or reporter's record. TRAP 38.6(a)
- Appellee's brief due 20 days after Appellant's brief filed (or was due if Appellant failed to file brief). TRAP 38.6(b)
- If desire, reply brief due 20 days after Appellee files brief. TRAP 38.6(c)
- May move to extend time to file. TRAP 38.6(d)
- All briefs and motions filed with appellate clerk (or willing justice). TRAP 9.2(a)
- Must file electronic briefs in civil cases. TRAP 9.2(c)(1) (some exceptions noted in rule)
 - *See generally* TRAP 9 if filing paper copies
- Must serve all parties. TRAP 9.5

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Technical Requirements: TRAP 9

- Electronic Sigs okay. TRAP 9.1(c)
- Paper or page: 8.5 x 11. TRAP 9.4(b)
- One-inch margins. TRAP 9.4(c)
- Text=double-spaced. TRAP 9.4(d)
 - Footnotes, block quotes, lists, and issues or points of error may be single spaced. TRAP 9.4(d)
- Appendix: If electronic, should be attached to brief and must contain bookmarks to documents. TRAP 9.4(h)
- Typeface, minimum: TRAP 9.4(e)
 - 14-point text
 - 12-point footnotes
- Max. length of briefs: TRAP 9.4(i)(2)(B),(C)
 - Principal briefs: 15,000 words or 50 pages
 - Reply briefs: 7,500 words or 25 pages
 - Aggregate for all briefing: 27,000 words or 90 pages
- Some parts of brief not included in word or page count. TRAP 9.4(i)(1)
 - ❖ You need a PDF editing program!

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Lots more information on your court page.

Parts of brief not included in word count:

- Caption
- Identity of parties and counsel
- Statement regarding oral argument
- Table of contents
- Index of authorities
- Statement of the case
- Statement of issues presented
- Statement of jurisdiction (Tex. S. Ct. only)
- Statement of procedural history (never used—it's all in statement of the case)
- Signature
- Proof of service
- Certification (???)
- Certificate of compliance
- Appendix

Items that count in word count:

- Statement of Facts
- Summary of the Argument

- Argument (and Std. Of Rev.)
- Prayer

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Technical Requirements: TRAP 9

- Use of aliases or pseudonyms in parental termination cases. TRAP 9.8
 - In all documents submitted to court, including appendix items
 - Minor must be identified by alias
 - Court may order parents identified by aliases
 - All documents filed must be redacted in same way
 - Docketing statement excepted
- ❖ Try to use “Mother” and “Father” or other descriptive family name; too many first names is confusing
 - ❖ Use alias for parents even without court order
- ❖ For children, I usually use a name that begins with the same letter as child’s real first name
 - ❖ Difficult when parent has several children with the same first initial
- ❖ Include a legend of pseudonyms (see below)

Drafting the Brief

Appellant's Brief: TRAP 38.1

- Cover Page: (TRAP 9.4(g))
 - Case style and number
 - Title of filed document
 - Name of party filing document
 - Signature block: Name, mailing address, telephone, fax, email and State Bar number for lead counsel
 - Oral argument requested (or not)

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NO. 14-22-00384-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

IN THE INTEREST OF R.C., A CHILD

A.E.M.,
Appellant,

v.

H.K. and D.K.,
Intervenor-Appellees

Appealed from the 313th District Court
of Harris County, Texas
Trial Court Cause No. 2020-01940J

BRIEF OF THE TEXAS DEPARTMENT OF
FAMILY AND PROTECTIVE SERVICES

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ORAL ARGUMENT
NOT REQUESTED

ATTORNEY FOR APPELLEE
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES

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Appellant's Brief: TRAP 38.1

- (a) Identity of Parties and Counsel
- List of all parties to judgment or order appealed from
- Names and addresses of all trial and appellate counsel

IDENTITY OF PARTIES AND COUNSEL

Petitioner – Appellant	Trial Counsel
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Petitioner – Appellant	Appellate Counsel
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Respondent – Appellant (Mother)	Trial Counsel
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Respondent – Appellant (Mother)	Appellate Counsel
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Respondent (Father) (Not Appealing)	Trial Counsel
J.C. (Non-Appealing Father of R.C., a Child)	James Mark Cooper Tex. Bar No. 00783872 300 Fannin St., Ste. 205 Houston, TX 77002 jcooperlaw@gmail.com
Interveners – Appellates	Trial Counsel
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Interveners – Appellates	Appellate Counsel
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I forgot the children's ad litem in this—oops.

This is how court checks for recusal/disqualification

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Appellant's Brief: TRAP 38.1

- (b) Table of Contents
 - Reference to page number of each section
 - T/C “must indicate the subject matter of each issue or point, or group of issues or points”
 - In other words, put your descriptive headings in the T/C
 - Detail is a good thing in headings in the brief and in the T/C

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Appellant's Brief: TRAP 38.1

- (c) Index/Table of Authorities
 - Must be alphabetical
 - Pages of brief on which authorities cited
 - Tip: Sort by type of authority

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**Separate section for secondary sources

Drafting the Brief

Appellant's Brief: TRAP 38.1

- (d) Statement of the Case
 - Nature of the case
 - Course of proceedings
 - Trial court's disposition
 - Include record references
 - Seldom exceed half-page
 - No factual discussion
- Narrative or bullet-point?

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STATEMENT OF THE CASE

This case began with the Department's filing of its Original Petition seeking termination or conservatorship of a child, R.C. ("Ryan"), on October 6, 2020. *CR6-13*. The Department's live pleading was its First Amended Petition, filed on January 6, 2021. *CR35-106*.

On October 6, 2020, the court signed an emergency order awarding the Department temporary managing conservatorship of Ryan. *CR19-26*. On November 9, 2020, the court signed a temporary managing conservatorship following an adversary hearing. *CR31-41*. On March 21, 2021, the court signed an order non-suiting the unknown father. *CR132*.

The court signed an order retaining the suit on its docket and extending the statutory dismissal date on October 14, 2021. *2CRSupp3*. This order set the new dismissal date for April 9, 2022. *2CRSupp3*.

The Intervenor or "Foster Parents" filed their Original Petition in Intervention on November 9, 2021. *CR479-484*. The Foster Parents sought appointment as managing conservators of Ryan, and alternatively possessory conservatorship. *CR481*.

On November 18, 2021, the Foster Parents filed a jury demand. *1CRSupp3-4*. The demand, signed by attorney Mike Schneider, the Foster Parents' counsel,

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STATEMENT OF THE CASE

Nature of the Case: This is a case involving the termination of the parents' parental rights to one child, C.M.J. or Colin.

Name of the Judge: Judge John Phillips

Trial Court: 314th Judicial District Court, Harris County, Texas

Disposition by Trial Court: In response to the Department's motion for summary judgment, the trial court signed a final decree terminating the parental rights of J.L.C. and R.C.J., Colin's parents, and naming the Department as Colin's sole managing conservator.

Parties in the Court of Appeals: The Appellant was J.L.C., the child's mother. R.C.J., the child's father, did not appeal the adverse judgment. The Appellee was the Texas Department of Family and Protective Services.

District of Court of Appeals: First District of Texas, at Houston, Texas

Names of Justices: Justice Richard Hightower wrote the opinion for the Court, and Justices Russell Lloyd and Peter Kelly joined.

Citation: *In the Interest of C.M.J.*, No. 01-18-00885-CV, 573 S.W.3d 404 (Tex. App.—Houston [1st Dist.] Mar. 5, 2019, pet. filed).

Disposition by Court of Appeals: The First Court of Appeals affirmed the trial court's judgment in part and reversed it in part. The court of appeals adopted *sub sponte* an elevated or enhanced summary judgment standard in parental termination cases, and it held that the Department failed to meet the elevated standard in part. The court affirmed the predicate termination ground under TEX. FAM. CODE § 161.001(b)(1)(M), but reversed and remanded the best interest finding under § 161.001(b)(2) for a new trial.

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- Never done one in a half-page
- Narrative usually 1 to 2 pages
- Bullet-point is almost always one page

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Appellant's Brief: TRAP 38.1

- (e) Statement Regarding Oral Argument
 - Why argument should or should not be granted
 - Why decisional process would be aided, if requested
 - Also reference to request on cover page
 - Arguments in favor of oral argument?
 - Novel legal issue
 - Conflicts among appellate courts
 - Novel factual situation (why distinguishable from precedent)
 - Desire oral arguments for certification

STATEMENT REGARDING ORAL ARGUMENT

Appellant, the Texas Department of Family and Protective Services, believes that the facts and legal arguments in this case are well-presented in this brief and the record of this appeal, and it believes that the decisional process would not be significantly aided by oral argument. However, the Department would welcome the opportunity to present oral argument if the Court determines that oral argument would be helpful.

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Appellant's Brief: TRAP 38.1

- (f) Issue(s) Presented
 - List of all issues or points presented
 - Issues vs. points?
 - Issues cover every subsidiary question that is fairly included
 - Maybe separate subsidiary issue to draw attention to it?
- Tips:
 - Use issues to explain/advocate (within reason)
 - More issues/points does not usually increase your chances of success
- ❖ NOTE: Parts of the brief to this point are not counted in the word or page limits!!! TRAP 9.4(i)(1)

ISSUE PRESENTED

Issue One: The district court's removal of the case from the jury docket was error since the Intervenor's filed a timely jury demand and paid the jury fee, since Mother relied on the Intervenor's jury demand, and since Mother timely objected to the district court's removal.

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--Number of issues/points:

- Don't want to waive issues that can get you rendition or remand
- But you can minimize good issues/points in a mass of not good issues/points
- Plus you take valuable space away from good points that you may otherwise develop deeper, more compelling arguments
- The fact that you're raising bad issues/points could lead to a justice thinking you're not too confident about your better issues—otherwise why would you bring up meritless issues/points?

Drafting the Brief

Appellant's Brief: TRAP 38.1

- (g) Statement of Facts
 - Concise
 - No argument!
 - Must be supported by record references
 - In civil cases, appellant's statement of facts accepted as accurate/true unless appellee contests

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STATEMENT OF FACTS

This appeal involves one child, R.C. ("Ryan").

Ryan's mother is A.E.M. ("Mother"). Mother was represented in this case by Alexandra George. Mother appealed the final judgment. Ryan's father is J.C. ("Father"). Father did not appeal.

H.K. and D.K. ("Foster Parents" or "Intervenor") were Ryan's foster parents and Intervenor in this case. The Foster Parents' counsel was Mike Schneider and Thao Tran.

Because the Department's only issue on appeal was the denial of a jury trial, its statement of facts is limited to the case history and discussions related to the jury issue only.

A. The Department's Case Begins

This case began with the Department's filing of its Original Petition seeking termination or conservatorship of a child, R.C. ("Ryan"), on October 6, 2020. *CR5-18*. The Department's live pleading was its First Amended Petition, filed on January 6, 2021. *CR5-106*. The Department sought temporary managing conservatorship of Ryan, *CR97*, permanent managing conservatorship of Ryan, *CR99-100*, and termination of Mother and Father's parental rights to Ryan, *CR100-102*.

On October 6, 2020, the court signed an emergency order awarding the Department temporary managing conservatorship of Ryan. *CR19-26*. On

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November 9, 2020, the court signed a temporary managing conservatorship following an adversary hearing. *CR31-41*.

The court signed an order retaining the suit on its docket and extending the statutory dismissal date on October 14, 2021. *3CRSupp3*. This order set the new dismissal date for April 9, 2022. *3CRSupp3*.

B. The Foster Parents Intervene

The Intervenor or "Foster Parents" filed their Original Petition in Intervention on November 9, 2021. *CR479-484*. The Foster Parents sought appointment as managing conservators of Ryan, and alternatively possessory conservatorship. *CR481*.

C. November 18, 2021: Timely-Filed Jury Demand and Jury Fee Paid

On November 18, 2021, the Foster Parents filed a jury demand. *1CRSupp3-4*. The demand, signed by attorney Mike Schneider, the Foster Parents' counsel, stated that the Foster Parents "by and through their attorneys Mike Schneider and Thao Tran request a jury trial and pay the jury fee." *1CRSupp3-4*.

Included in the court's electronic docketing system, DEEDS, are the receipts showing proof of payment of the jury fee on November 18, 2021.¹ *Doc. No.*

¹ These documents are not included in the clerk's record. The Department is requesting the clerk to file a supplemental clerk's record that will include these receipts. The Department is also attaching the two receipt documents to the appendix to this brief and requests the Court to take judicial notice of these documents.

59295292 (Nov. 18, 2021). These records show that Intervenor paid the required \$40 fee on November 18, 2021. *Id.*

D. March 11, 2022: Notice of Jury Trial Filed and Served

Notice of Jury Trial: On March 11, 2022, the Department filed a "Notice of Jury Trial." *3CRSupp67*. This notice states, "Please take notice that the trial on the merits by jury in the above referenced cause of action will be conducted on the March 29, 2022 at 9:00 a.m. in the 313th Judicial District Court of Harris County." *3CRSupp67*.

The certificate of service for the Notice of Jury Trial included both counsel for the Foster Parents, the child's ad litem, Child Advocates and counsel for Father. *3CRSupp67*. The record does not include any sort of written objection to the Department's Notice of Jury Trial.

First Amended Petition in Intervention: Also on March 11, 2022, the Foster Parents filed their First Amended Petition in Intervention. *3CRSupp69-77*. The Foster Parents added claims to terminate the Parents' rights to Ryan and for adoption. *3CRSupp71-74*.

This Court must presume that the trial court took judicial notice of these two documents in its records and was aware of their existence. *In re A.H.B.*, No. 14-11-00926-CV, 2012 WL 1048640 at *3 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012; no pet.) (Court of Appeals "may presume that the trial court took such judicial notice of the record without any request being made and without any announcement that it has done so" (citing cases)).

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Appellant's Brief: TRAP 38.1

- (h) Summary of the Argument
 - "Succinct, clear and accurate statement of the arguments"
 - Must not simply repeat issues or points
 - Read first by some justices
- Usually one or two pages—but that's your choice

SUMMARY OF THE ARGUMENT

The district court found that Mother's parental rights should be terminated under TFC §§ 161.001(b)(1)(D), (E), and (F) and that the Intervenor in this case, the Foster Parents, would share joint managing conservatorship of Ryan. The court made this finding after a bench trial. However, the case should have been tried to a jury. The court's refusal to empanel a jury was an abuse of discretion, and it was harmful error requiring reversal and remand for a new trial before a jury.

The Intervenor filed a jury demand and paid the jury fee on November 18, 2021, about four and a half months before the trial setting on March 29, 2022. The evidence clearly shows that the parties relied on this demand in their trial preparation. The parties all filed motions in limine. Requirements for a jury were discussed at a pretrial conference on March 15, 2022. A notice of jury trial was sent out in early March 2022 to all the parties, and none raised an objection. The court (through its coordinator) admitted that the case had been set on the jury docket before the March 15 hearing, but the court impliedly decided that the Intervenor's waiver of their right to a jury trial on March 15 effected a waiver of the other parties' rights to a jury trial. That was error under TEX. R. CIV. P. 220 as parties who did not file a demand may rely on a demand filed by another party.

Mother challenged the denial with two timely and written documents, an objection on March 18 and a motion for reconsideration on March 25. The trial court

denied the relief sought in both documents. Moreover, Mother attended the start of the jury trial, but her counsel was present throughout. Therefore, Mother did not waive her constitutional and statutory right to a jury trial.

Parties opposed to the jury trial can show that the denial of a jury trial is warranted if they provide record evidence showing prejudice to the opposing parties or that the jury trial disrupt the jury's docket or its functioning. There is no record evidence that would support any of the required findings. Instead, Intervenor announced to the trial court at a subsequent pretrial hearing on March 21 that they were prepared to try the case before the bench or a jury. As noted, the parties had prepared all along for a jury trial. The court had scheduled a jury trial. The court's refusal to provide a jury trial following the Intervenor's waiver was an abuse of discretion under clearly established law.

Moreover, the error was harmful. The issues in this case included parental termination and conservatorship, both jury issues under the Family Code, § 105.002. Both include a best interest element that is a fact intensive inquiry. Because there were genuine issues of material fact for the factfinder to sort through, the court's refusal to provide Mother a jury and its eleventh hour removal of the case from the jury docket was harmful error that requires reversal of the trial court's final decree and remand for a new trial before a jury.

Drafting the Brief

Appellant's Brief: TRAP 38.1

- (i) Argument
 - Clear and concise argument for contentions made
 - Citations to authority and record
 - Standard(s) of review
 - At top of Argument section, or
 - In each issue or point
- ❖ Remember introduction (opposing party argues ..., your client contends ...) and conclusion
- ❖ Use headings (online reading easier with headings)

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ARGUMENT & AUTHORITIES

The district court terminated the Parents' parental rights to Ryan following a bench trial. Mother appealed. Mother complained that the district court erred when it denied her right to a jury trial, and she complained that the court's factual findings were not supported by legally or factually sufficient evidence.

The Department agrees with Mother that she had a right to a trial before a jury and that the district court's denial of that right was reversible error. The Intervenor's filed a jury demand and paid the jury fee more than four months before the trial date. No party objected to the demand. In fact, the parties and the court acted with the understanding that the case would be tried before a jury. On March 15, two weeks before the scheduled trial, the court held a pretrial conference at which the Intervenor's waived their right to a jury. The court appeared to believe that the Intervenor's waiver was a waiver for all the parties since it was the Intervenor's who filed the demand. Mother filed several oral and written objections to the denial of her right to a jury trial. In the end, the court held a bench trial. The district court erred. Since the facts were contested, the court's error was harmful and should result in a reversal of the judgment and a remand for a new trial.

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I. Standard of Review

A trial court's denial of a jury demand is reviewed under an abuse of discretion standard. *In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019). "A trial court abuses its discretion when its ruling is 'arbitrary, unreasonable, and without reference to building principles.'" *Id.* (citation omitted). A court must examine the entire record when conducting an abuse of discretion review. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996). "Restrictions placed on the right to a jury trial will be subjected to the utmost scrutiny." *G.W. v. Tex. Dep't of Fam. & Prot. Servs.*, No. 03-14-00580-CV, 2015 WL 658466 at *2 (Tex. App.—Austin Feb. 11, 2015, no pet.) (citation omitted).

II. Argument

Section 161.001(b), Family Code, was the statutory basis by which the district court granted the termination of Mother's parental rights. Section 161.001(b) empowers a court to order the termination of parental rights based on findings by clear and convincing evidence that (1) the parent committed at least one of several predicate acts or omissions enumerated in § 161.001(b)(1), and (2) that termination is in the child's best interest, § 161.001(b)(2). See *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

The district court found in its May 3, 2022 decree that termination of Mother's parental rights was in Ryan's best interest, and that the facts satisfied the predicate

acts or omissions in subsections (D), (E), and (F) of § 161.001(b)(1). *CR534-535*.

The court also awarded joint managing conservatorship of Ryan to the Foster Parents rather than Ryan's maternal aunt or the Department. *CR535-536*. Mother challenges these findings, but the Department does not.

Mother and the Department also challenge the district court's refusal to have a jury hear the facts in this case despite a properly filed, timely and paid jury demand. The court appeared to decide that the Intervenor's waiver of their right to a jury trial waived the other parties' right to a jury trial, as well. This was error. This was harmful error because the termination and conservatorship issues involved genuine issues of material fact. This Court must reverse the court's final judgment and remand this case for a new trial with a jury.

Issue One: The district court's removal of the case from the jury docket was error since the Intervenor filed a timely jury demand and paid the jury fee, since Mother relied on the Intervenor's jury demand, and since Mother timely objected to the district court's removal.

The Intervenor filed a timely jury demand and paid the jury fee on November 18, 2021, more than four months before the trial setting in this case. *1CRSupp3-4*; *Doc. No. 59295292 (Nov. 18, 2021)*. On March 11, 2022, the Department filed a "Notice of Jury Trial," which let all the parties know that the case was set for a jury trial beginning March 29, 2022. *3CRSupp67*.

Drafting the Brief

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Appellant's Brief: Stnds. of Review

- Evidence: Abuse of discretion. *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005)
- Discretionary Rulings: Abuse of discretion. *See e.g., Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004)
- Legal Issues: *De novo*. *See In re D.S.*, 602 S.W.3d 504, 514 (Tex. 2020)
- Ineffective Assistance: Mixed; deference on facts and *de novo* legal. *See In re M.P.A.*, 364 S.W.3d 277, 290 (Tex. 2012)

Clear and convincing Burden of Proof

- Legal sufficiency (rendition point):
 - Appellee's BOP: Legally insufficient evidence
 - Appellant's BOP: As a matter of law
- Factual sufficiency (remand point):
 - Appellee's BOP: Factually insufficient evidence
 - Appellant's BOP: Against the great or overwhelming weight of the evidence
- *See In re C.H.*, 89 S.W.3d 17, 25-28 (Tex. 2002); *In re J.F.C.*, 96 S.W.3d 256, 265-66 (Tex. 2002)

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--Discretionary rulings:

- Motions to continue
- Motions to amend
- Striking intervention
- Denial of jury trial

Legal Issues:

- Statutory construction
- Summary judgment
- No evidence/matter of law
- Jurisdiction

Drafting the Brief

Appellant's Brief: TRAP 38.1

- (j) Prayer and Signature
 - Clearly state nature of relief sought
 - May use alternative requests for relief
- Standard signature block

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PRAYER

For the reasons set forth above, the Department respectfully requests this Court to reverse the final judgment of the district court and remand this case for a new trial before a jury. If the Court determines that the district court's denial of a jury trial was not reversible error, then the Department requests the Court to affirm the judgment in all other respects.

Respectfully submitted,

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TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES

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--Many justices have expressed frustration at party's failure to specifically say what they want the court to do—in the brief and at argument. Say it or you might not get it.

Drafting the Brief

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Appellant's Brief: TRAP 38.1

- Certificate of Compliance (TRAP 9.4(i)(3):
 - Needed if done on computer
 - May rely on word count generated by word processor
 - Include footnotes
 - Exclude Cover Page through and including Statement of Issues
- Signature block (abbreviated)

CERTIFICATE OF COMPLIANCE

1. This brief/response/reply/motion complies with the type-volume limitation of TEX. R. APP. P. 9.4(e)(2)(B) because:

- ☒ this brief/response/reply/motion contains 12,012 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(e)(1), or
- ☐ this brief/response/reply/motion was not computer-generated, and includes _____ pages, less than or equal to the 50-page limit imposed by TEX. R. APP. P. 9.4(e)(2)(B).

2. This brief/response/reply/motion complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because:

- ☒ this brief/response/reply/motion has been prepared on a computer using Microsoft Word 2010, using a 14-point font throughout the brief except for footnotes, which are in a 12-point font, and using a conventional typeface, Times New Roman; or
- ☐ this brief/response/reply/motion has been prepared in a monospaced typeface using a typewriter, in a font no smaller than 10-characters-per-inch.

/s/ Michael R. Hull
MICHAEL R. HULL
Senior Assistant County Attorney

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AND PROTECTIVE SERVICES

Drafting the Brief

Appellant's Brief: TRAP 38.1

- (k) Appendix
 - Necessary contents:
 - Judgment or other appealable order
 - Jury charge and verdict or FF/CL
 - Text of any rule, regulation, ordinance, statute, etc., on which argument based
 - Any other document central to argument (e.g., contract)
 - Optional contents:
 - Any other relevant document (case, statute, pleadings, excerpts, etc.)
 - Cannot use to avoid page limits
- If electronic, attach to brief; bookmark if more than one item. TRAP 9.4(h)

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APPENDIX TABLE OF CONTENTS

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Tab 2:	Official Receipt for Jury Request Fee Paid
Tab 3:	Department's Motion in Limine
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Tab 5:	Mother's Motion in Limine
Tab 6:	Mother's Objection to Removal from Jury Docket
Tab 7:	Intervenors' Motion in Limine
Tab 8:	Intervenors' and Ad Litem for Child's Objection to Court-Appointed Appellate Attorney for Mother

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--Don't use stuff outside the record unless

- It's something that can be added to the record; or
- It's something court can take judicial notice of

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Appellee's Brief: TRAP 38.2

- Same as appellant's brief, except:
 - List of parties and counsel unless incorrect
 - Statements of the case, of the issues or of the facts unless dissatisfied with appellant's
 - Appendix unless adding something additional
- Adoption by reference. TRAP 9.7
 - "Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case."
- Reply briefs permitted, but court may decide before filed. TRAP 38.3
- Briefing rules construed liberally, but court may require amendment or re-briefing. TRAP 38.9

Drafting the Brief—Advocacy Tips

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- Justices do not always read briefs seriatim:
 - Use introductions and conclusions
 - Use descriptive headings
 - Use persuasive headings
- Stay within the record
- Pretty much all factual statements should be followed by a record citation
- Do not copy other briefs/opinions verbatim
- Much easier to follow if organized
- Write clear, direct sentences
- Use the active voice as much as possible
- Do not denigrate opposing counsel, trial counsel or court
- Do not ignore precedent; better to try to distinguish than avoid
- Arguments without record cites and authority can result in waiver



Frivolous Appeals



Frivolous Appeals

- TRAP 45: If court determines that appeal is frivolous, “it may ... award each prevailing party just damages”
- *But see In re P.M.*, 520 S.W.3d 24, 27-28 (Tex. 2016):
 - Right to counsel under TFC §§ 107.013 & 107.016 continues through petition for review
 - Trial counsel may only withdraw for good cause
 - No valid grounds for appeal is not good cause to withdraw
 - Counsel must file *Anders* brief, instead
- *Anders* guidelines, checklist and forms on courts of appeals sites (under “Practice Before the Court”)
- Counsel must:
 - Thoroughly review record and law
 - File brief detailing review and explaining why appeal frivolous
 - Move to withdraw
 - Provide brief and motion to client
 - Inform parent she can respond *pro se*
 - Assist client acquiring record and answer any questions

--Just because the chance of prevailing is small does not mean an appeal is frivolous

--Doing the work required by *Anders* should probably take as much time as doing brief on the merits



Submission

Submission: TRAP 39

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- Submission: “The state or quality of an impending decision’s being under active consideration by a court, usually occurring after a hearing or after completion of the filing of all briefs.” BLACK’S LAW DICTIONARY (11th ed.)
 - May be with or without oral argument. TRAP 39.1
 - Oral argument waived if not requested on front of brief, but court may still order. TRAP 39.7
 - Notice of submission from clerk at least 21 days prior. TRAP 39.8
- ❖ Mike’s oral argument views:
 - ❖ Nothing to fear—Texas appellate courts are gentle
 - ❖ Be prepared!
 - ❖ Create opening, outline of arguments (including important factual or legal references), and closing (including specific relief requested)
 - ❖ Do not read from outline or brief
 - ❖ When a justice speaks, you zip it
 - ❖ Answer questions as asked. It was asked for a reason!

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Sometimes courts ask bad/tough questions

- Know record well enough to give answer, or tell court that it’s wrong on the facts
- Know top cases well enough to explain why they apply or don’t apply
- If you can’t answer a question, you can ask the court for leave to address the issue in a post-submission brief



Decision

Decision

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TEX. R. JUD. ADMIN. 6.2:

- In an appeal of a suit for termination of the parent-child relationship or a [SAPCR] filed by a governmental entity for managing conservatorship, appellate courts should, so far as reasonably possible, ensure that the appeal is brought to final disposition ...”
 - Courts of Appeals: Within 180 days of filing of notice of appeal
 - Supreme Court: Within 180 days of filing of petition for review
- These appeals fast—be aware!



Motion(s) for Rehearing and/or *En Banc* Reconsideration

Post-Judgment Motions: TRAP 49

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- Motion for Rehearing (TRAP 49.1 - .4)
 - Due within 15 days
 - May request extension
 - Limit of 4,500 words or 15 pages (TRAP 9.4(i)(2)(D))
 - No response necessary unless court requests
 - May file additional motion within 15 days only if court alters judgment or opinion
- Motion for *En Banc* Reconsideration (TRAP 49.5 - .6)
 - May file as separate motion with or without motion for rehearing
 - Same deadlines and word limits as motion for rehearing
 - Must address *en banc* standards in TRAP 41.2(c)
 - May file add'l motion within 15 days only if court alters judgment or opinion
- Because accelerated, court may deny right to file or shorten time to file these motions
- Not necessary for Supreme Court review

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TRAP 49.11: You can't file a post-judgment motion if you've already filed a petition for review, unless court of appeals alters opinion or judgment after petition for filed. But other parties may file post-judgment motion if they have not filed petitions for review and you have



Petition for Review (Very Briefly)

Petition for Review

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- Means to get Tex. Sup. Ct. review
- TRAPs 53-65
- Petition for Review:
 - Due 45 days from judgment or last ruling on motions in court of appeals
 - 4,500 words/15 pages (TRAP 9.4(i)(2)(D))
 - Not a full brief—it is a sales job
 - Include all issues/points to preserve
 - You can brief some issues and reserve briefing on others until full briefing requested by Court
 - Full briefing requested if granted or sometimes before ...
- If indigent, right to petition for review. *In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016)
 - Includes *Anders* briefs. *Id.*
- TRAP 55: Requirements for briefing on the merits



Resources



Resources

- McDonald & Carlson, Texas Civil Practice (2d ed.) (Vol. 6 devoted exclusively to Texas civil appeals)
 - Most thorough treatment
- O'Connor's Texas Civil Appeals (new edition yearly)
 - Handy; treatment is broad but not as deep as McDonald/Carlson
- Texas Jurisprudence
 - Basic, but a good place to start
- www.txcourts.gov
 - Opinions, briefs, rules, etc. for each Texas appellate court

Conclusion

- TRAPs are easy to follow
- Getting an appeal ready and briefed is not difficult ...
- ... but it is time consuming
- Other than notice of appeal, mistakes are not fatal
- Set aside the necessary time and be organized
- Don't worry! Follow these guidelines, and ...

