Contents

SECTION 10 DE NOVO HEARINGS AND POSTTRIAL STRATEGIES

February 2016

Permanency for a child often depends on whether a court's decision is subject to further review, and if so, whether the decision stands after review. When an associate judge hears a case, there is a right to a *de novo* hearing. Similarly, when a court renders a final order, the issue becomes whether the order can withstand scrutiny on appeal. An increasing number of appeals, coupled with the complexity of procedural and substantive issues, make it essential that every litigator creates a record during trial and post-trial proceedings that supports the trial court's judgment.

The DFPS Appellate Unit

With a statewide perspective and insight as to developing trends and issues in CPS litigation, the appellate unit of the DFPS Office of General Counsel is an excellent resource for busy litigators seeking trial strategies that reflect the latest appellate developments.

The appellate unit has primary responsibility for representing DFPS:

- In response to an appeal arising from a final order in a suit brought under Chapter 263 of the Texas Family Code;
- In appealing a final order under Chapter 263 on behalf of the Department;
- In response to an interlocutory appeal filed by a party;
- In seeking an interlocutory appeal of trial court action on behalf of the Department;
- In response to a mandamus action filed by a party; and
- In seeking mandamus review of trial court action on behalf of the Department.

Setting the Stage for an Appeal

A solid trial record is the best insurance when a final judgment in a CPS case is the subject of an appeal. Whether the issue is due process, sufficiency or admissibility of evidence, the accuracy of the pleadings, or clarity of the trial court's findings, trial counsel's diligent effort to create a clear and complete record can make the difference between permanency and upheaval in a child's life. The appellate attorneys recommend the following strategies to minimize the chance that a case will be reversed on appeal.

1. Well in advance of trial, verify that all necessary parties have been properly served. Before seeking an order for publication[1], assess whether CPS used due diligence to locate missing parents and/or required parties. Personal service is always the best method to serve a party.[2] If necessary, ask CPS to expand search efforts and prepare a new affidavit documenting these efforts.

2. Use careful judgment in deciding what evidence to introduce at trial. Do not introduce uncertified criminal convictions, irrelevant or highly prejudicial photographs, or polygraph test results. If the admissibility of other evidence is questionable, only use it if it is essential to the case and be sure to supplement the record with as much competent evidence as possible so that the judgment will not be reversed if the questionable evidence is thrown out on appeal.[3] Note that the admission of questionable evidence can be challenged on appeal by either a claim that the trial court abused its discretion in admitting the evidence and/or a claim that trial counsel was ineffective for failing to object to the evidence.

3. Always make a complete record. Do not let your or the court's familiarity with the case lull you into failing to get all the essential facts into the record. The content of the record properly admitted into evidence is the only evidence on which the appellate court may rely.[4] Make certain the ages of the children, the identity of the actors, the facts underlying the removal, a chronology of a parent's subsequent acts and failures to act, and a chronology of all efforts DFPS took to reunify the family are in the record.

4. If the trial court is impatient with the process, remind the judge that every judgment, including a default, requires a record in the event of an appeal. Also, remember that there must be a timely and specific objection, proper bill of exceptions, and/or offer of proof to preserve an issue in the event that DFPS seeks to appeal and/or requests a new trial.

5. Check to make sure all orders and filings are proper and complete. When DFPS seeks termination of parental rights, there should also be a request for the specific findings necessary to give DFPS managing conservatorship under Family Code section 153.131

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[1] *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012) ("One thing is clear: service by publication should be a last resort, not an expedient replacement for personal service.").

[2] *In re E.R., J.B., E.G., and C.L.*, 385 S.W.3d 552 (Tex. 2012) ("When the State seeks to sever permanently the relationship between a parent and a child, it must first observe fundamentally fair procedures. The most basic of these is notice. If the State cannot deliver notice in person, it may try other means that will likely reach the parent.").

[3] TEX. R. APP. P. 44.1; *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867 (Tex. 2008) (to obtain reversal based on erroneous admission of evidence, appellant should show three elements: (1) trial court erroneously admitted evidence; (2) no other similar evidence was admitted; and (3) error probably caused rendition of improper judgment).

[4] "A trial judge is presumed to consider only the testimony and exhibits properly in evidence. When reviewing the merits of the trial court's decision, we are limited to considering the material that was before the trial court at the time that it ruled." *Barnard v. Barnard*, 133 S.W.3d 782 (Tex. App.—Fort Worth 2004, pet. denied). Even if a trial court takes judicial notice of its file, third-party statements contained in documents in the clerk's record are not considered evidence if the documents were not admitted at trial. *Rios v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00565-CV, 2012 WL 2989237 (Tex. App.—Austin July 11, 2012, no pet.) (mem. op.). Further, a trial court cannot take judicial notice of prior testimony if the prior testimony has not been admitted into evidence at trial. *In re C.L. and I.L.*, 304 S.W.3d 512 (Tex. App.—Waco 2009, no pet.).

to ensure DFPS will maintain conservatorship if the termination is reversed. If an appointment of DFPS as conservator rests solely on Family Code section 161.207, the conservatorship appointment may be subject to reversal if the termination order is reversed on appeal.[5]

6. Play by the rules. Don't ask for relief on a motion not filed with the court, or fail to give proper notice. Make sure cases are properly set and heard within the statutory timelines and rules of civil procedure.[6] Failing to follow the rules simply lays the ground- work for a potential reversal on appeal.

7. Counsel for DFPS should consistently advocate that the trial court appoint counsel if a parent is statutorily eligible.[7] Who is entitled to counsel is discussed below further.

8. Similarly, if a parent is entitled to a jury trial, do not attempt to deny them one. Conversely, if there is a legitimate basis to argue against a jury request, make sure the record contains the case law and rules in support of your position.

9. As with a jury trial, if you argue against a bench warrant, make sure you know the applicable law and articulate the proper test and standards in your argument. An inmate does not have an automatic right to personally appear in court, but he should be allowed to proceed by affidavit, deposition, telephone, or other means if he cannot appear personally.[8]

10.Try to review the court's file before every hearing. It is possible that an appellate court will treat a motion not brought to the trial court's attention as though the trial court had expressly denied the motion.[9]

11. When you encounter a problem or need to discuss strategy, contact the DFPS Appellate Unit. They monitor and report on appellate court decisions and welcome the opportunity to aid litigators in shaping the record to best withstand appellate scrutiny.

De Novo Hearings

A traditional associate judge must make a written report to the referring court that may contain the associate judge's findings, conclusions, or recommendations and may be in

[5] *In re J.A.J.*, 243 S.W.3d 611 (Tex. 2007) (trial court's award of managing conservatorship to the Department not reversed, even though the termination was reversed, because the trial court made separate findings regarding conservatorship under Family Code section 153.131 and those findings were not specifically challenged on appeal); *In re B.W.*, No. 13-13-00033-CV, 2013 WL 1092215 (Tex. App.—Corpus Christi-Edinburg March 12, 2013, no pet.) (mem. op.) (reversal of termination requires reversal of conservatorship order based solely on TEX. FAM. CODE §161.207).

[6] TEX. FAM. CODE § 263.301 requires notice of a permanency hearing to be given "as provided by Rule 21a, Texas Rules of Civil Procedure".

[7] TEX. FAM. CODE §107.013(a).

[8] *In re R.C.R.*, 230 S.W.3d 423, 426 (Tex. App.—Fort Worth 2007, no pet.).

[9] *In re J.M.L.P.*, No. 06-15-00043-CV, 2015 Tex. App. LEXIS 12052, at *6 (Tex. App.—Texarkana Nov. 25, 2015, no pet.).

the form of a proposed order.[10] After a hearing conducted by an associate judge, the associate judge shall send his or her signed and dated report, including any proposed order, and all other papers relating to the case to the referring court.[11] Unless a party files a written request for a *de novo* hearing before the referring court, the referring court may: (1) adopt, modify, or reject the associate judge's proposed order or judgment; (2) hear further evidence; or (3) recommit the matter to the associate judge for further proceedings.[12]

An associate judge for child protection cases is subject to de novo review, just as a traditional associate judge.[13] However, adoption by the referring court of the proposed order of an Associate Judge for Child Protection Cases is not always necessary. If a request for a *de novo* hearing before the referring court is not timely filed or the right to a *de novo* hearing is waived, the proposed order or judgment of the Associate Judge for Child Protection Cases becomes the order or judgment of the referring court by operation of law without ratification by the referring court.[14]

A party seeking to challenge an associate judge's proposed order or judgment must file a request for a *de novo* hearing before the referring court with the clerk of the referring court no later than the 3rd working day after receiving notice of the substance of the associate judge's report.[15] The referring court shall give notice[16] to the parties and hold a *de novo* hearing no later than the 30th day after the filing of the initial request.[17]

Denial of relief after a *de novo* hearing or waiver of the right to a *de novo* hearing does not affect the right to file a motion for new trial, motion for judgment notwithstanding the verdict, or other post-trial motion.[18]

Post-Trial Wrap Up

Obtaining termination of parental rights or a final order appointing a managing conservator does not end trial counsel's involvement in the case. Counsel for DFPS must:

- Prepare the judgment[19] making sure to: (1) track the statutory language for the applicable predicate termination grounds contained in the jury charge or in the Department's pleadings; (2) list the termination grounds in the conjunctive, and (3) include the parental presumption language of Family Code section 153.131, if

[10] TEX. FAM. CODE § 201.011(a).
[11] TEX. FAM. CODE § 201.011(e).
[12] TEX. FAM. CODE § 201.014(a).
[13] TEX. FAM. CODE § 201.2042(a).
[14] TEX. FAM. CODE § 201.2041(a).
[15] TEX. FAM. CODE §§ 201.011(c) and 201.015(a).
[16] TEX. FAM. CODE § 201.011(c)
[17] TEX. FAM. CODE § 201.015(f).
[18] TEX. FAM. CODE § 201.015(h).
[19] *In re B.W.*, No. 13-13-00033-CV, 2013 WL 1092215 (Tex. App.—Corpus Christi-Edinburg March 12, 2013, no pet.) (mem. op.) (trial court's finding that parent "showed conscious disregard of parental responsibilities" and "voluntarily abandoned his child" touches upon at least six statutory grounds for termination and is impermissibly vague)

applicable;

- Make sure the statutory warning to parents is prominently displayed (boldface type, underlined or capital letters) in the final order[20];

- Circulate the judgment for signatures from opposing counsel, CASA, and any other parties or participants, or request the trial court to specify a date by which the final judgment must be entered;
- File a Motion to Enter Judgment if a party fails or refuses to sign the judgment;
- Be aware of the timeframes for perfecting an appeal;
- If you want to refer the case to the Appellate Unit, promptly send referrals to the unit upon receipt of a notice of appeal or knowledge that a notice of appeal is filed; and
- Schedule a Permanency Hearing after Final Order.

Timeframes

In an effort to expedite permanency for children, all appeals of final orders for placement of children in CPS care in which the agency seeks termination of parental rights or an order for managing conservatorship, are subject to the accelerated appeals process detailed below. Note that frivolous determinations as prescribed in Civil Practice and Remedies Code 13.003 are inapplicable to an appeal from a parental termination or child protection case as defined in Rule of Appellate Procedure 28.4(a)(2).[21]

The Texas Supreme Court has adopted rules that have been described as the "ultra-accelerated" disposition of appeals arising from a suit filed by DFPS (or another governmental entity) seeking termination of parental rights or managing conservatorship.[22] So far as "reasonably possible," the Court of Appeals and the Texas Supreme Court are charged with ensuring that an appeal is brought to final disposition within 180 days from the day of the notice of appeal and 180 days from the day the petition for review is filed.[23]

If a new trial is ordered on remand by the appellate court, a new trial must be commenced no later than 180 days after the mandate is issued by the appellate court.[24]

What triggers the deadline for filing an appeal?

A judgment generally proceeds through three stages: rendition, reduction to writing/signing, and entry. The trial court's signing of a judgment triggers the time for filing an accelerated appeal, a regular appeal, an interlocutory appeal, and an original proceeding.[25]

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[20] TEX. FAM. CODE § 263.405
[21] TEX. R. APP. P. 28.4(b)(3)
[22] *In re S.L.-E.A.*, No. 02-12-00482-CV, 2013 WL 1149512 (Tex. App—Fort Worth March 21, 2013, no pet) (mem.op).
[23] TEX. R. JUD. ADMIN. 6.2(a).
[24] TEX. R. APP. P. 28.4(c).
[25] TEX. R. APP. P. 26.1(a) and (b).

What is the timeline for an accelerated appeal under Chapter 263?[26]

In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed.[27] However, the appellate court may grant a 15-day extension for filing a notice of appeal.[28]

What is the effect of filing a motion for new trial?

After a jury or bench trial, a motion for new trial can be used to preserve post-trial complaints that require evidence to be heard, such as newly discovered evidence, or a challenge based on the court's failure to set aside a default judgment. Note that the granting of a motion for new trial vacates the prior trial and judgment as it relates to the party/parties whose motion was granted.[29] Note that Rule of Appellate Procedure 28.1(b) provides that a motion for new trial does not extend the timeframe for filing a notice of appeal in accelerated cases.

If a new trial or a mistrial is granted after commencement of the initial trial on the merits, then the trial court shall schedule a new date on which the suit will be dismissed, which will be not later than the 180th day after the motion for new trial or mistrial is granted.[30]

When is a motion for new trial appropriate?

A motion for new trial is a prerequisite to certain complaints on appeal, including complaints:

- Which require evidence to be heard, such as newly discovered evidence, or the failure to set aside a default judgment;
- That the evidence was factually insufficient to support a jury finding; or
- Regarding an incurable jury argument, if not otherwise ruled upon by the trial court.[31]

The best strategy in response to a motion for new trial will depend on the nature of the new evidence proffered (if any) and the validity of any arguments made as to why the arguments or evidence were not offered at the time of trial. If a motion for new trial arises from a default judgment, review of the procedural requirements for a default judgment is essential to assess the likelihood of a default being set aside. *See* Practice Guide, Section 5 Litigation Essentials, Default Judgments.

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[26] The time periods for filing interlocutory appeals permitted by statute and mandamus actions are governed by different criteria.
[27] TEX. R. APP. P. 26.1(b); *See also In re K.A.F.*, 160 S.W.3d 923 (Tex. 2005).
[28] *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997).
[29] TEX. R. CIV. P. 320; *State Dept of Hwys and Pub. Transp. v. Cotner*, 845 S.W.2d 818 (Tex. 1993) ("A partial new trial may be ordered notwithstanding the prohibition in [TRCP] 41 against post-submission severences. [TRCP] 320 is thus an exception to Rule 41.").
[30] Tex. Fam. Code § 263.402(b-1).
[31] TEX. R. CIV. P. 324(b).

Can the trial court correct an error after entry of a final judgment?

The trial court retains plenary power to change any part of the order, without a motion, for 30 days from the date a final order is signed.[32] In a child protection suit, the trial court is expressly authorized to make any order necessary to protect the safety and welfare of the child during the pendency of an appeal, so long as the order is made within 30 days of the date the appeal is perfected.[33] This may include appointment of a temporary conservator, issuance of a restraining order, child support order, an order restricting removal of the child from a specific geographic area, or similar temporary relief.[34] Unless the appellate court supersedes such orders, the trial court retains authority to enforce any order made under subsection 109.001.[35]

Who is entitled to appointment of counsel on appeal?

In a CPS suit in which termination of parental rights or the appointment of a conservator for the child is requested, the court shall appoint an attorney to represent the interests of: (1) an indigent parent of the child who responds in opposition to the termination or appointment; (2) a parent served by citation by publication; (3) an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; and (4) an alleged father who registered with the paternity registry under Chapter 160, but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful.[36]

A parent who has been determined indigent by the court is presumed to remain indigent for the duration of the suit and any appeal, unless the court finds a material and substantial change in the parent's financial circumstances.[37] A parent, attorney ad litem for the parent, or attorney for the Department may raise the issue by motion.[38] Otherwise, an attorney appointed for a parent or an alleged father continues to serve in that capacity until the suit is dismissed, all appeals are exhausted or waived, or the attorney is relieved or replaced after a finding of good cause by the court, whichever event occurs first.[39]

[32] TEX. R. CIV. P. 329b(d).
[33] TEX. FAM. CODE § 109.001(a)
[34] TEX. FAM. CODE § 109.001(a).
[35] TEX. FAM. CODE § 109.001(b)
[36] TEX. FAM. CODE 107.013(a).
[37] TEX. FAM. CODE § 107.013(e)
[38] TEX. FAM. CODE § 107.013(e).
[39] TEX. FAM. CODE § 107.016.

How can a County or District Attorney refer a case to the DFPS Appellate Unit?

The Department's Appellate Unit handles termination appeals across the entire state. An attorney representing the Department may refer an appeal to the DFPS Appellate Unit by completing a referral form and forwarding it to the unit for consideration. Appellate referral forms can be obtained by e-mailing Martha Garcia, legal assistant for the DFPS Appellate Unit, at martha.garcia2@dfps.state.tx.us or calling the appellate unit at (512) 929-6819. Once completed, the referral form and any post-trial documents should be e- mailed to Eric Tai, DFPS Managing Attorney for the Appellate Unit, at eric.tai@dfps.state.tx.us.