INEFFECTIVE ASSISTANCE OF COUNSEL IN THE CPS CASE

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30TH ANNUAL ADVANCED FAMILY LAW COURSE
August 9–12, 2004
San Antonio

CHAPTER 54
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INEFFECTIVE ASSISTANCE OF COUNSEL IN THE CPS CASE

I. INTRODUCTION:
For many years in this State, ineffective assistance of counsel claims have largely been limited to criminal cases, deriving their source from the constitutional right to assistance of counsel available in criminal prosecutions under the Sixth Amendment of the Federal Constitution.\(^1\) Until this century began, ineffective assistance of counsel claims were not generally entertained in civil proceedings and were routinely rejected in civil proceedings involving parental termination.\(^2\) After this century began, however, this changed when three different appellate courts decided the right to such claims should be available in parental termination cases.\(^3\) In 2003, the Texas Supreme Court in In re M.S., 115 S.W.3d 534, 544 (Tex. 2003) followed this lead and held that ineffective assistance claims were available for parents statutorily appointed counsel in parental termination suits. This paper is written to provide discussion of the Supreme Court’s decision, sample evaluation of ineffective assistance claims and the new ethical challenges this new claim brings to child protection litigation in this State.

II. IN RE: M.S.: WHAT DOES IT SAY?
A. What the court did and did not say about the right to ineffectiveness claims
1. Statutory Right Supports Claim
In In re M.S., 115 S.W.3d 340 (Tex. 2003), the Texas Supreme Court considered the complaint of a parent, Shana Strickland, whose parental rights were terminated in a suit in which Ms. Strickland had court appointed counsel as required under a provision in the Family Code which requires the appointment of counsel for indigent parents who respond in opposition to a parental termination suit.\(^4\) Ms. Strickland complained that her constitutional due process rights were violated, because her statutorily appointed counsel was ineffective.\(^5\) Specifically, Ms. Strickland complained that her appointed counsel failed to ensure the reporter recorded voir dire, the charge conference, and closing arguments, failed to preserve her factual sufficiency complaint, and failed to file alternative pleadings allowing for the possibility of a less drastic outcome than outright termination. The Supreme Court agreed that she should have a right to bring ineffectiveness of counsel claims.

The reason the Supreme Court gave in support of Ms. Strickland’s right to bring ineffective assistance of counsel claims was based on the statute that granted her free legal counsel. As the court explains:

In Texas, there is a statutory right to counsel for indigent persons in parental-rights termination cases.\(^6\) The courts of appeals, however, disagree over whether that statutory right carries an implicit requirement that counsel’s assistance be competent and

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4 Specifically, Ms. Strickland was appointed counsel under TEX. FAM. CODE ANN. §107.013 (Vernon 2002) which required the court to appoint counsel for any parent who is indigent and responds in opposition to a suit for termination of their parental rights.

5 As the opinion indicates she based her challenge on “due process” which indicates her claim was under the federal constitution right, U.S. Const. Art. XIV, which provides, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . “ It does not appear she relied on a construction under the Texas Constitution, TEX. CONST. art. I, § 19, which is phrased in terms of due course of law, providing: “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

6 115 S.W.3d at p. 543.
effective. n27 And this Court has only tangentially discussed whether a parent has a right to competent legal assistance in a parental-rights termination proceeding. n28 But we believe that "it would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively." n29 We hold that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel. We thus align Texas with most of the other states that provide a similar right. n30

115 S.W.3d at p. 544. As indicated, the court essentially found ineffective assistance of counsel claims were cognizable, at least with respect to parents who are statutorily appointed counsel, because the statutory right to counsel implicitly carries a right to complain on appeal about the appointed counsel’s effectiveness.

2. Did not say constitutional due process provided right to claim

What is important in examining the Supreme Court’s support for ineffective assistance of counsel claims is not just what it said, but what it did not say. As seen in the excerpt above, the Supreme Court’s simple explanation for the right to an ineffectiveness claim leaves out express reliance on any constitutional basis, such as the due process clause of the Fourteenth Amendment or the Sixth Amendment right to counsel. Nevertheless, as indicated in the court’s opinion, Ms. Strickland’s argument was that her due process rights had been violated by the ineffectiveness of her counsel.7 Ms. Strickland’s argument seemed appropriate since the few cases where ineffective assistance claims have been recognized in Texas in the civil context have, at least suggested they are cognizable as violations of either the Fourteenth Amendment or the Sixth Amendment, because of the potential loss of physical liberty: such as in juvenile delinquency proceedings,8 which have criminal loss of liberty implications, and mental health commitments, which result in loss of liberty much like incarceration.9

The Supreme Court did not cite to these cases in M.S., nor did it expressly state the claim was based on due process concern. Instead, the court commented that its reliance on the statutory right to counsel as the basis for an ineffectiveness claim aligned with the reasoning given by other states in this Nation.10

Later in the court’s evaluation of the alleged deficiencies of Ms. Strickland’s lawyer, the court performed evaluation under the due process clause of the Fourteenth Amendment. Nevertheless, it is apparent that the court’s reference at that point was only to determine whether the attorney’s decision not to file a motion for new trial with a factual sufficiency complaint could amount to a deficiency for purposes of an ineffective assistance claim.11

Had the Texas Supreme Court relied on the Fourteenth Amendment of the federal constitution as the basis for the right to bring an ineffectiveness complaint, the court may have found difficulty in applying the analysis from the United States Supreme Court. The United States Supreme Court never considered whether a parent has a right to an

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7 115 S.W.3d at p. 543 (“Strickland alleges that her attorney failed to provide competent representation . . . in violation of her right to due process of law.”).

8 See In re K.J.O., 27 S.W.3d 340, 342 (Tex. App. --Dallas, 2000 pet. denied) (court acknowledged Texas Supreme Court has not addressed issue, but held ineffective assistance claims could be brought in juvenile delinquency proceeding even though they were civil proceedings, because the United States Supreme Court held a juvenile is entitled to counsel in a juvenile delinquency proceeding and such right necessarily included the right to effective assistance); See also In re

9 See Ex parte Ullmann, 616 S.W.2d 278 (Tex. Civ. App. – San Antonio 1981, writ dism’d); See also Lanett v. State, 750 S.W.2d 302, 306 (Tex. App. Dallas 1988, writ denied) (while not considering an ineffective assistance of counsel claim directly, court noted ineffective assistance of counsel claims were proper based on Ex parte Ullmann, 616 S.W.2d 278 when it considered the admissibility of a psychiatrist’s testimony).

10 115 S.W.3d at p. 544.

11 115 S.W.3d at 547.
ineffectiveness claim in a parental termination suit, but in *Lassiter v. Dep’t of Social Services*, 452 U.S. 18 (1981) the Supreme Court did consider an issue about an indigent parent’s right to counsel in a parental termination case when the state did not statutorily provide for it. Specifically, in *Lassiter*, the high court acknowledged that parental termination cases were civil in nature, not subject to the Sixth Amendment right to counsel available to criminal defendants, and that the court would have to draw its due process analysis from a historical presumption that an indigent litigant only has a right to appointed counsel when, if he loses, he may be deprived of physical liberty. Id. at pp. 26-27.

The court determined that a case-by-case analysis would need to be applied to decide whether the Fourteenth Amendment’s requirement of due process required appointment of counsel and cited *Matthews v. Eldridge*, 424 U.S. 319, 335 which contains the traditional factors applied to civil proceedings. Such test propounds three elements to be evaluated in deciding what due process requires: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. The court noted it would have to balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom. On that evaluation in the case before it, the court found the right was not compelled with respect to Ms. Lassiter.

Because the United States Supreme Court did not find that the constitution compelled the necessity for lawyers for parents in all parental termination cases, it is difficult to imagine that this precedent would have made it easy for the Texas Supreme Court to formulate an analysis that would have allowed ineffectiveness claims for parents in all parental termination cases, even if statutory appointment was involved. By using the due process analysis in the evaluation of the claim, rather than in the support for the claim in the first instance, the Texas Supreme Court avoided this problem.

3. Did not comment whether its decision about ineffectiveness claims were limited to statutorily appointed attorneys for parents in termination suits.

Relying on a statutory right as a basis for this claim; however, may have some consequences in civil litigation in this State. Absent from the court’s decision is any statement indicating whether the court’s holding that ineffectiveness claims derive from the statutory right to counsel extends beyond indigent parents who are statutorily appointed counsel in parental termination suits. This, therefore, leaves open the question whether ineffectiveness claims may be available with respect to other statutorily appointed attorneys.

In a parental termination case, an indigent parent is not the only party who may have statutorily appointed counsel. The attorney for the Department of Family & Protective Services [hereinafter “Department”] which brings the suit is statutorily provided counsel pursuant to TEX. FAM. CODE ANN. §264.009 (Vernon 2002). Also, both the child’s attorney ad litem and guardian ad litem are mandatorily appointed under TEX. FAM. CODE ANN. §107.011 and §107.012 (Vernon Supp. 2004). In addition, an attorney may be appointed for a person entitled to service of citation if the court finds the person is incapacitated under TEX. FAM. CODE ANN. §107.010 (Vernon Supp. 2004).

While challenges have not yet been brought as to all the potential attorneys who could be appointed in a parental termination case since M.S., two opinions have issued in which the parents brought ineffectiveness complaints based on the ineffectiveness of the attorney ad litem for the child. One of those opinions, by the Amarillo Court of Appeals, held that the parent lacked standing to assert error on the performance of the child’s attorney; but the other, by the Beaumont Court of Appeals did not.

Besides expansion of the ineffectiveness claim to other appointed attorneys in a child protection case, the potential is there for reading M.S. to apply whenever a statutory right is present. Child protection cases, of course, are not the only cases that have statutorily appointed counsel. In suits involving children, other than suits filed by a government entity, Chapter 107 of the Family Code authorizes statutory appointments of attorneys to serve as an amicus attorney for a child, an attorney ad litem for a child or a guardian ad litem under TEX. FAM. CODE ANN. §107.021 (Vernon Supp. 2004). In addition, in any civil suit where service is made by publication and no appearance is made, TEX. R. CIV. P. 244 requires the appointment of an attorney in that instance.

Despite the possibility of expansion to attorneys in contexts not involving parental termination, at least one court has indicated it will not go in that direction. The First Court of Appeals in *In the Interest of*

12 In re S.G.S., 130 S.W.3d 223 (Tex. App. – Beaumont, no pet.) (considered parents’ complaint that children's attorney ad litem provided ineffective assistance of counsel); *In the Interest of Z.J.*, No. 07-03-0401-CV, 2004 Tex. App. 2770 (Tex. App. –Amarillo 2004, no pet.) (held parent did not have standing to allege error on the basis of the inadequate performance of the attorney ad litem).


14 In re S.G.S., 130 S.W.3d 223.
W.M.H., 15 considered a claim of ineffectiveness brought by a father where the Department initially sought termination but dropped that claim for relief before trial. The First Court recognized that the Supreme Court “held that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel.” 16 Nevertheless, the court held, because the Department did not seek termination against the complaining parent at trial, and the jury was only asked about conservatorship, the right to bring such claim was not invoked. 17 Interestingly, the court acknowledged that Williams was appointed separate counsel on abatement by the appellate court; 18 therefore, even though parental termination was not at issue, the appellate court apparently acknowledged that the parent had some statutory right to court appointed counsel even after termination was abandoned. 19

4. Did not comment on whether ineffectiveness claim gave rise to other procedural rights traditionally extended under construction of the Sixth Amendment right to counsel for criminal defendants

As already discussed, the Texas Supreme Court framed the ineffectiveness claim as a violation of a statutory right, rather than a claim deriving from a violation of the federal constitution’s Fourteenth Amendment or Sixth Amendment. Nevertheless, since ineffectiveness claims have traditionally been a creature of constitutional protection under the Sixth Amendment, it leaves open the question whether other process might be available that traditionally have been construed under the Sixth Amendment right to counsel. For example, in In re D.E.S., No. 14-03-00724-CV, 2004 Tex. App. 3731 (Tex. App. – Houston [14th Dist.] October 2, 2003, no pet.) (memorandum opinion).

Last year, the Texas Supreme Court held that a Sixth Amendment right to effective assistance of counsel exists in parental-rights termination cases. See In re M.S., E.S., D.S., 115 S.W.3d 534 , 544, 46 Tex. Sup. Ct. J. 999 (Tex. 2003). In doing so, our high court extended the Strickland test n9 used in the criminal context to civil parental-rights termination proceedings. Id. at 545. The procedure prescribed by the United States Supreme Court in Anders derives from the Sixth Amendment right to counsel. See Anders, 386 U.S. at 742, 87 S.Ct. at 1399. Therefore, it seems logical to conclude that the Texas Supreme Court would allow the filing of an Anders brief derived from this right in the parental-rights termination context. 20

As indicated, the Fourteenth Court suggests the high court’s reasoning supports the extension of additional processes traditionally afforded to criminal defendants under the Sixth Amendment. The court then went on to further support this conclusion by noting that Anders procedures had been extended by the Texas Supreme Court in the context of juvenile-delinquency proceedings, because of their quasi-criminal nature; and that the Texas Supreme Court had considered whether additional process may be due parents with respect to unpreserved error under a Fourteenth Amendment due process analysis. 21

The fact that the Fourteenth Court suggested parental termination cases may require additional processes available as quasi-criminal type cases, leaves open the question as to whether other processes typically available in the criminal context may become an issue. One obvious matter that comes to mind, in this context, is whether the Supreme Court would expand M.S. to allow ineffective assistance claims when a parent has a retained lawyer, because that would be a right afforded under the Sixth Amendment to criminal defendants. 22

In this regard, it should be considered that past decisions of the Texas Supreme Court indicate the court has not been open to characterizing parental

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16 Id. (citing In re M.S., 46 Tex. Sup. Ct. J. 999, 1006 (July 3, 2003)).

17 Id. In part, the court relied on a 1997 unpublished opinion from San Antonio, a divorce proceeding, where the appellate court refused to recognize an ineffectiveness claims by the parent who was not statutorily entitled to counsel. See Liva v. Liva, NO. 04-96-00143-CV (Tex. App. – Dallas , 1997 no pet.) [not designated for publication].


19 TEX. FAM. CODE ANN. §107.013 (Vernon 2002) requires appointment of attorneys for indigent parents who respond in opposition to a suit for parental termination. There is not a statute which requires appointment for indigent parents in suits that do not involve parental termination.


21 Id.

22 Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”).
termination cases as straight quasi-criminal cases. In In re A.V., the court explained that the focus of parental-termination cases is not punitive in nature, like criminal cases.23 Also, in In re J.F.C.,24 the Supreme Court effectively declined the invitation to treat parental termination cases as quasi-criminal to afford, as the appellate court had, review of unpreserved errors in a jury charge that relate to "core" issues. Nevertheless, this is not to say other process may become an issue under some other provision of the constitution.

5. Did not comment on the effect of changes in the law effective with respect to suits filed after September 1, 2003.

Since M.S., in Brice v. Denton,25 Justice Tom Gray of the Waco Court of Appeals commented that the Supreme Court’s opinion in M.S. evaluated the right to an ineffectiveness claim without regard to at least one significant change made by the Legislature in this statutory scheme for suits filed after September 1, 2003. Specifically, Justice Gray referred to TEX. FAM. CODE ANN. §107.001(2) (Vernon Supp. 2004), not applicable to the suit before the Supreme Court in M.S., which defined the term “attorney ad litem” in suits affecting the parent-child relationship to mean “an attorney who provides services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality and competent representation.”

Justice Gray explained in his dissenting opinion why he believed this was significant:

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23 In In re A.V., 113 S.W.3d 355 (Tex. 2003) the court commented:

[II]n securing what is in the best interests of the child, the State is not pursuing a retributive or punitive aim, but a "purely remedial function: the protection of minors." n32 We recognize that parental-rights termination proceedings also affect a parent's constitutionally-protected relationship with his or her children, a right that presumably cannot be altered through retroactive application of law. n33 But this Court has stated that "the rights of natural parents are not absolute; protection of the child is paramount. . . . The rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." n34 Therefore in parental-rights termination proceedings, though parents face losing this highly-protected legal relationship, courts cannot ignore the statute's remedial purpose of protecting abused and neglected children.


competence in civil cases. The Texas Disciplinary Rules of Professional Conduct define "competent" as "denoting possession [of] or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client." See TEX. DISCIPLINARY R. PROF'L CONDUCT terminology; see also id R.101 & cmts.; e.g., Liebbe v. Floyd, No. 05-97-01727-CV, 1999 Tex. App. LEXIS 8178, at *12 & n. 4 (Tex. App. – Dallas Nov. 2, 1999, pet denied) (not designated for publication). In amending the Family Code, the Legislature may have had the Disciplinary Rules' understanding of competence, as qualification, in mind as well.27

B. Holds the criminal Strickland standard applies in evaluating claims

In evaluating Ms. Strickland’s claim in M.S., the court coincidently considered another Strickland, Strickland v. Washington, 466 U.S. 668 (1984), and indicated that the standard in that criminal case should be applicable in deciding claims of ineffective counsel in the parental termination context. Strickland involved an appellate challenge based on ineffectiveness of counsel brought by a criminal defendant sentenced to death. In deciding the claim, the United States Supreme Court set forth what is now a very familiar criminal standard for evaluating effective assistance of counsel claims:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. 466 U.S. at 687.

Acknowledging the two components of Strickland, in M.S., the Supreme Court indicated this standard should apply in the termination context. The Texas Supreme Court further acknowledged as follows:

With respect to whether counsel's performance in a particular case is deficient, we must take into account all of the circumstances surrounding the case, and must primarily focus on whether counsel performed in a "reasonably effective" manner. n36 The Court of Criminal Appeals explained that counsel's performance falls below acceptable levels of performance when the "representation is so grossly deficient as to render proceedings fundamentally unfair . . . ." n37 In this process, we must give great deference to counsel's performance, indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," including the possibility that counsel's actions are strategic. n38 It is only when "the conduct was so outrageous that no competent attorney would have engaged in it," that the challenged conduct will constitute ineffective assistance. n39


1. Parent bears burden to establish harmful conduct

a) If error relates to the absence of a particular appellate record, parent bears burden to show what errors would have shown had it been recorded.

In specifically applying the Strickland Standard in M.S., the Texas Supreme Court considered the parent's complaint that her attorney provided ineffective assistance, because he failed to have certain portions of the record transcribed. Basically, Ms. Strickland argued that if she had those portions she might have found that her attorney did something wrong.28 The Supreme Court stated that was not good enough to show her attorney's performance was deficient or that such deficiency prejudiced her defense. The court stated she must at least show what errors would have been recorded if a record had been made.29 In applying the Strickland standard in this way, the appellate court clarified that the party bringing an ineffectiveness claim bears the burden to establish that a particular alleged omission in legal representation actually caused harm.

28 115 S.W.3d at p. 546.
29 Id.
b) Parent has the burden to explain how an act or omission is error.

Moreover, the court’s opinion indicated that a parent’s failure to carry this burden by providing adequate explanation in their appellate brief could result in it not being considered at all. The court noted that Ms. Strickland complained in her briefing that her counsel failed to file alternative pleadings that would allow the jury to consider less drastic alternatives than outright termination. But she did not argue anything further about that point. Accordingly, the court stated it would not address it.

2. Deciding deficiency with respect to error preservation must be reviewed through due process prism.

With respect to Ms. Strickland’s complaints about her attorney’s failure to bring a factual sufficiency complaint, the Texas Supreme Court did not simply conclude that the failure to bring a factual sufficiency complaint was deficient conduct for purposes of the Strickland test. Instead, the court began with acknowledging that it previously held due process did not relieve a parent in a parental termination case from the effect of waiver of appellate review of an appellate point on jury charge error if the parent’s attorney failed to preserve that error as required by the appellate rules. In other words, the court acknowledged that it had already determined that an attorney’s failure to do what is necessary to preserve a jury charge complaint could not be a deficiency that could circumvent application of an express rules of procedure that would preclude appellate review of that error, even considering due process concerns for parents in parental termination cases.

Nevertheless, the court noted that it questioned in In re J.F.C., whether due process may compel a different result with respect to preservation of factual sufficiency complaints. The court went on to explain that a due process analysis, as had been done in J.F.C., must be considered in deciding whether the preservation omission of the attorney could be a potential deficiency under the Strickland test. As such, the court suggested that it would not construe the statutory right to counsel, through an ineffective assistance of counsel claim, to provide a mechanism to avoid application of the procedural rules on preservation of error for an attorney’s failure if the right to constitutional due process would not.

In further explanation, the court stated that Texas gives a right to an appeal and the United States Supreme Court had held that unreasonable restraints should not be placed on allowable appeals in parental termination cases where such restraints would impede free and equal access to the courts. In this connection, the court considered M.L.B., a United States Supreme Court case that determined free and equal access to the court for an indigent parent was impeded when the indigent parent lost her right to appellate review for failure to pay for a record. Accordingly, the court indicated a deficiency in failing to preserve a factual sufficiency complaint would have to be evaluated to see whether it constituted a prevailing right through a “due process prism.”

In turning to its due process prism, the court noted that it applied the standard used by the United States Supreme Court in Matthews v. Eldridge, 424 U.S. 319 (1976) which weights three factors: the private interests at stake, the government’s interest in the proceeding, and the risk of erroneous deprivation of parental rights – and balanced that net result against the presumption that our procedural rules comport with constitutional due process requirements. Concerning the private interests, the court commented that the United States Supreme Court has described the right of a parent to maintain custody of and raise his or her child as an interest far more precious than any property right, and the Texas Supreme court recognizes the right to be paramount, and a commanding one. Moreover, the court noted that the private interest factor included consideration of the child’s interest in the proceeding, sometimes aligned with the parent and sometimes aligned with the State, which the Family Code scheme indicated involved protection of the child’s welfare and focus on the child’s best interest.

The court goes on to comment that both the “parent and the child have a substantial interest in the accuracy and justice of a decision.” The court describes the State’s fundamental interest as one to protect the best interest of the child, economically and with efficient resolution. The court indicated that the State holds an interest in a speedy resolution, because of the psychological effects prolonged litigation have on children, and the need for speed built into the Family Code procedural scheme for prosecution of these type cases. The court also commented that Justice Schneider commented that the State favors preservation rules to avoid delay in termination proceedings.

33 M.L.B., 519 U.S. 102.
34 115 S.W.3d at p. 547.
35 115 S.W.3d at p. 547.
36 115 S.W.3d at p. 548.
37 Id. cit.
Nevertheless, the court commented, based on Santosky v. Kramer, that the state’s interest in speedy resolution must work toward preserving familial bonds rather than severing. Therefore, notwithstanding the State’s interest, its interests should be served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Calling it “pivotal” that termination is a drastic, permanent, and irrevocable relief, the Supreme Court then concluded that failure to raise a factual sufficiency complaint could violate a parent’s due process rights. In explanation the court stated as follows:

[A]ny significant risk of erroneous deprivation is unacceptable. That a motion for new trial is required for appellate review of a factual sufficiency issue is something that competent trial counsel in Texas should know. And filing such a motion is not a difficult task. But though a just and accurate result cannot ever be absolutely guaranteed, we cannot think of a more serious risk of erroneous deprivation of parental rights than when the evidence, though minimally existing, fails to clearly and convincingly establish in favor of jury findings that parental rights should be terminated. Thus, if counsel's failure to preserve a factual sufficiency complaint is unjustified, then counsel's incompetency in failing to preserve the complaint raises the risk of erroneous deprivation too high, and our procedural rule governing factual sufficiency preservation must give way to constitutional due process considerations.

3. Objective standard of reasonableness must apply in deciding whether conduct deficient.

While the Supreme Court found an attorney’s incompetence in failing to raise a factual sufficiency complaint could rise to the level of a due process violation, the court did not automatically find such omission was a deficiency under Strickland and reverse the case on this point. The Supreme Court remanded this matter to the appellate court which is the only body with authority to review factual sufficiency complaints. In doing so, the court attempted to explain that it was not holding, as a matter of law, that factual sufficiency complaints rise to the level of reversible error in all cases, or even in the case before it.

Instead, the Court reaffirmed that the parent retained the burden on remand to show that the failure to preserve the factual sufficiency complaint rose to the level of ineffective assistance under Strickland. The court instructed that the appellate court to indulge a strong presumption that the counsel’s conduct fell within the wide range of reasonable professional assistance, including the presumption that the omission was trial strategy, or because in the lawyer’s professional opinion, he believed the evidence factually sufficient such that a motion for new trial was not warranted. In short, the court stated that the appellate court must hold the parent to its burden to show that "counsel's performance fell below an objective standard of reasonableness” to characterize it as a deficiency.

4. Harm considered under a “but for” test determine whether deficiency warrants reversal.

In addition, the Supreme Court explained that finding the deficiency amounts to incompetence under an objective reasonableness standard would not be enough to justify reversal. The appellate court must also determine whether counsel's defective performance caused harm. In this connection, the court specifically explained as follows:

[I]n other words, whether "there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different." Since 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." More to the point, if the court of appeals 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. In that case, the court of appeals should reverse the trial court's judgment, and remand the case for a new trial.

\[39\] Id.
\[40\] Id. at p. 549.
\[41\] Id. at p. 549.
\[42\] Id. at p. 550.
III. SAMPLE EVALUATION OF INEFFECTIVE ASSISTANCE OF COUNSEL REVIEW

A. Situations decided by Texas Supreme Court before M.S.

Even before the Supreme Court decided an indigent parent could properly bring a claim concerning the ineffectiveness of her counsel, the court commented on situations where ineffectiveness claims would not prevail:

1. A parent’s attorney’s failure to challenge the charge’s omission of the material best interest element would not warrant reversal for ineffectiveness.

   In In re J.F.C., 43 before the Supreme Court decided that ineffectiveness claims could properly be brought by parents, the Supreme Court considered numerous claims regarding the ineffectiveness of counsel in a parental termination case. While the court considered these claims, the court opined it was imprudent to decide in that case whether ineffectiveness claims were viable in parental termination cases since in the case before it those claims could not warrant relief by the court.

   In one of the first challenges in J.F.C., the court considered the parents’ complaint about their appointed attorney’s failure to object to a charge’s omission of a material element (that is: best interest). The court held it could not warrant reversal for ineffectiveness even if the criminal standard applied. In its analysis, the court noted that the parent’s complaint was that the omission of the best interest element meant the parent was deprived of a jury finding on a material element, leaving it to be deemed found by the court. The Supreme Court did not find this to be a material deficiency, because the parent still had the right to challenge this evidentiary finding notwithstanding its omission. Moreover, the court did not seem to have a problem about this error depriving the parent of a jury finding on this particular issue, because it could have been sound trial strategy and the parent failed to show how it could not have been reasonable trial strategy.

2. Failure to seek jury instruction on parent’s religious beliefs not ineffective assistance of counsel when sound trial strategy.

   In J.F.C., the supreme court also considered the parent’s complaint that their counsel was ineffective for failing to request an instruction not to consider the parents’ religious beliefs. The court noted there was considerable testimony during the trial about the parents’ religious beliefs, including one statement where the father testified that it was God who made cocaine available to the parents. Instead of requesting a jury instruction, however, the parents’ attorney asked the Department’s witnesses about the relevancy of the parents' religious beliefs and made arguments to the jury that the parents' religious beliefs were irrelevant to the termination inquiry. On this record, the supreme court stated, “[e]ven were it assumed that the trial court should have given an instruction to the jury had counsel so requested, it cannot be said that counsel’s decision to address the parents’ religious beliefs through argument was anything other than a reasonable exercise of trial strategy.”

3. Failure to object to questions about parent’s sexual deviations every time is not ineffective assistance.

   In J.F.C., the parents further argued that their counsel should have objected every time they were asked during trial about their sexual conduct with third parties and alleged "sexual deviations." The Supreme Court noted that the parents’ counsel objected many times, but not every time. The court opined that just because their counsel did not object to each and every question was not enough to constitute ineffectiveness, because it would presume that was an action "within the realm of reasonable trial strategy in light of the record."

4. Failure to challenge reliability of testimony did not constitute ineffectiveness.

   In J.F.C., the parents further urged that their counsel was ineffective for failing to challenge DPRS’s expert witnesses with backgrounds in psychology and social work. The parents contended that they should have been challenged for reliability of their psychological expert testimony on the ground that there is no scientific basis for predicting future behavior or evaluating individuals. The court noted that psychological experts routinely testify in parental termination cases, and there was nothing in the record to indicate that if such objection had been made that the court would have agreed it was unreliable. Id.

5. Mistaken references to family service plans as orders not ineffectiveness.

   In J.F.C., the parents also argued that their counsel treated the Family Service Plans developed by CPS as a court order even though the record confirmed only one Family Service Plan was referenced by a court order. The court noted, however, that there were three other orders in evidence which contained directives to the parents in the orders themselves, wholly apart from any Family Service Plan. Id. Apparently, because of

   43 96 S.W.3d 256 (Tex. 2003)

   44 In re J.F.C., 96 S.W.3d at p. 283.

   45 Id. at p. 284.
these orders, the court found there was no actual mistake, or, if there was a mistake it did not harm the parents.

6. **No ineffectiveness claim due to attorney’s alleged conflict of interest in representing both parents where actual conflict not shown.**

   In *In the Interest of B.L.D.*, the Supreme Court avoided review of a parent’s complaint of ineffectiveness where the deficiency involved her attorney’s alleged conflict of interest in representing her and another parent. The court avoided this claim, because after reviewing the claim, the court found no actual conflict existed.

**B. Situations decided by Civil Appellate Courts since M.S.**

1. Attorney’s failure to raise constitutional challenges not ineffectiveness without objective proof that failure unreasonable and that but for failure result would be different.

   In *In re W.Y.O.*, the Tyler Court considered a parent’s ineffectiveness claim based on his counsel’s failure to object to the constitutionality of applicable statutes. The parent argued this resulted in subjecting him to application of unconstitutional statutes upon him at trial and the loss of relief due to waiver on appeal.

   After setting forth the Strickland test, the court concentrated mostly on the parent’s failure to meet the burden of proving objective unreasonableness as well as prejudice. The court noted that the record was silent as to counsel’s trial strategy, and the court saw no evidence from counsel’s perspective concerning whether he considered challenging the constitutionality of section 574.034 and, if so, the reasons he decided not to. As a result, the court stated it was unable to determine whether the parent’s attorney’s failure to raise those issues in the trial court constituted unreasonable representation under an objective standard.

2. **No ineffectiveness shown by attorney’s failure to (1) to object to the admission of parents’ criminal backgrounds; (2) failure to object to certain aspects of the jury charge; (3) failure to object to the admission of numerous CPS referrals; and (4) failure to show that the injuries of one of the children could have resulted from juvenile cerebral palsy.**

   In *In re J.W.*, the Dallas Court of Appeals considered a number of complaints raised by parents regarding the ineffectiveness of their counsel, and dealt with them briefly with little discussion. Specifically, the parents challenged their counsel’s effectiveness for failing to object to the admission of criminal background information and CPS referrals, failure to challenge the charge and for failing to show that the children’s injuries could have resulted from other factors, including cerebral palsy. In light of the fact that the appellate court already decided that the evidence factually and legally supported the decision to terminate the parents’ rights, the court stated they did not see in the record how they were harmed by these failures. Moreover, the court stated that the record was silent as to why counsel may have taken the actions that he did.

3. **Ineffectiveness present when attorney not appointed until date of final hearing.**

   In *Brice v. Denton*, the Waco Court of Appeals considered a complaint of ineffectiveness raised with respect to a parent’s attorney who the court stated was not represented until the day of the final hearing. In its explanation, the court found important that the record did not show that the appointed counsel asked for a continuance, the appointed attorney did not have an opportunity to consult his client who was in prison, the counsel’s preparation appeared limited to reviewing the parent’s criminal history, the evidence only filled one and half pages of the reporter’s record and during cross examination, the appointed attorney actually adduced testimony about the parent’s convictions for numerous things including harassment, stalking, several charges for indecency with a child and indecent exposure, as well as DWI. Considering that record, the court held the representation fell below reasonableness. Turning to the prong concerning whether it prejudiced the parent’s defense, it appeared the court focused again on the deficiency of the parent’s attorney whether than proof of prejudice. As justification, the court prefaced its evaluation with language from the Strickland case that indicated that a defendant need not show the deficient conduct more likely than not altered the outcome of the case.

   A strong dissent was written by Justice Gray which disagreed with the opinion’s conclusion that the conduct of the appointed attorney justified reversal under Strickland, especially with respect to the prejudice prong. The dissenting justice noted that most of the deficiencies which the majority opinion relied on for the prejudice prong were not even supported by the

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46 113 S.W.3d 340 (Tex. 2003).

47 No. 12-02-00321-CV (Tex. App. – Tyler August 29, 2003) (memorandum opinion)


Ineffective Assistance of Counsel in the CPS Case

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record, and some were not even alleged as deficient conduct by the parent. The dissenting opinion’s main complaint, however, appeared to be the majority’s decision to find prejudice without proof that the deficiencies alleged actually would have made a difference in the trial. The dissent noted that the majority’s suggestion that testimony from a parent or sister at trial might have helped was no proof in the dissent’s view, since there was no evidence what their evidence would have been.

The dissenting opinion also emphasized that any idea of prejudice under the record before it would have been unlikely considering the evidence which it outlined as follows:

The evidence introduced at trial was that Brice had been convicted of “molesting” his children and sentenced to thirty years’ imprisonment, of which he had served about four years at the time of trial. Brice does not suggest that this is false. A defendant imprisoned on a thirty-year sentence for aggravated sexual assault of a child will not become eligible for parole for at least fifteen calendar years. See TEX. GOV’T CODE ANN. §508.145(d) (Vernon Supp. 2004). Even after such a defendant becomes eligible for parole, it is doubtful that the parole board would recommend parole for a child abuser. n. 9. The children, were nearly ten year old at the time of the termination trial in 2001. It is, therefore, very unlikely that the children would ever even see Brice during the remainder of their childhood.950

C. Claims warranting reversal in the criminal context.

For analogous consideration, the following section provides a sample of situations in the criminal context where ineffectiveness claims were considered.


Facing charges of assault and manufacture of methamphetamines, the defendant was represented by different counsel on each of the charges at his plea hearing51. Counsel for the assault charge withdrew two days after the entering of the plea; the court did not appoint new counsel until 34 days later.52 The Third Court of Appeals in Austin held that since the appellant lacked counsel during the time in which it was necessary to file a motion for new trial, he was "harmed by the deprivation of counsel during this critical stage."53 The court remanded the case to the trial court, directing it to appoint new counsel for the appellant.54

2. Ineffectiveness due to incomplete or faulty investigations.

The following involve three cases finding ineffective assistance due to incomplete or faulty investigations by counsel:


Applicant was granted relief on his petition for writ of habeas corpus after he showed that his counsel improperly relied on the prosecutor's representations concerning his prior convictions. Id. at 286. Relying on these faulty representations, counsel recommended Applicant accept a plea bargain; Applicant did so, fearing that doing otherwise would result in a much larger minimum sentence. Id. The Court of Criminal Appeals found that Applicant satisfied the two-prong test laid out in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): "counsel's representation clearly fell below an objective standard of reasonableness and as a result the plea bargain arrangement agreed to by the applicant was entered into unknowingly and involuntarily." Pool, 738 S.W.2d at 286.


Having been convicted by a jury for aggravated kidnapping and denied relief by the appellate court, Applicant filed for writ of habeas corpus, alleging ineffective assistance of counsel. Specifically, applicant alleged that his counsel's failure to properly investigate his prior convictions lead to an improper enhancement of his sentence. One of Applicant's prior convictions had resulted in "shock" probation; due to this, the conviction was not final and therefore not includable for enhancement purposes. Despite counsel's assessment that his client had obtained the best possible sentence, the Court of Criminal Appeals held that "[r]egardless of the degree of skill demonstrated in securing the minimum sentence in such a case, failing to appropriately challenge the enhancement allegation so as to insure that the correct minimum punishment was available was not effective assistance." Id. at 144.

50 Id. at 2004 Tex. App LEXIS 2329 *65-66.
52 Id.
53 Id. at *4.
54 Id. at *5.
3. **Shortcomings in an attorney’s closing argument cannot constitute a deficiency just because the attorney could have done better.** Yarborough v. Gentry, 124 S.Ct. 1 (2003)(per curiam)

In Yarborough, the United States Supreme Court again clarified that there must be proof that the attorney’s performance was deficient, not that it could have been better. Specifically, in the facts of that case, the defense counsel in closing argument acknowledged certain statements made by the prosecutor about the defendant, and, in fact, referred to her as a “lying, bad person, lousy drug addict, stinking thief, jail, bird,” but stated that neither he nor the district attorney were present during the stabbing and only the jury could decide what really happened. The Ninth Circuit held that the defendant’s counsel should have highlighted exculpatory evidence during closing to try to sway the jury for the defense. Nevertheless, the United States Supreme Court reversed this holding and held that counsel could have been taking a calculated risk in acknowledging his client’s shortcomings to build credibility with the jury. Moreover, the court held that the Ninth Circuit’s holding gave too little deference to the state court’s supervision of the defense counsel in that situation.

### III. ETHICAL IMPLICATIONS.

All lawyers have a duty to represent the interests of their clients zealously within the bounds of the law, because the public has a clear interest in loyal, faithful, and aggressive representation by the legal profession. The public’s interest in loyal, faithful, and aggressive representation takes on an even stronger dimension, however, when the lawyer involved is charged by law with a statutory duty of representing a legal interest that directly impacts public interests of child protection. Now, in light of M.S., the dynamic is even more challenging, because a lawyer’s personal commitment to be zealous and effective in representation in a child protection case will not be enough to prevent the potential for needless delay in a child’s disposition caused by another party’s attorney’s ineffectiveness.

What this means for attorneys appointed in a child protection case is that they must not only make sure their own representation is effective but may need to consider ways to ensure everyone appointed in the case is effective. Because just making sure your own job is effective is hard enough, M.S. brings a new ethical challenge to child-protection cases. The purpose of this section is to discuss different considerations or strategies in this regard.

#### A. Department and Attorney ad Litem for Child should help ensure timely appointment for parents, when appropriate.

As mentioned above in discussing the different evaluations of ineffectiveness since M.S., the timing of the appointment of an attorney could set up a situation where ineffectiveness could be an issue. In this regard, it is important to note that the timing for the different appointments in a child protection case are not the same. When the State files a child protection suit, the Family Code requires that an attorney ad litem for the child be appointed “immediately after the filing, but before the full adversary hearing, to ensure adequate representation of the child.” Whereas the mandatory appointment of an indigent parent does not occur until the indigent parent “responds in opposition to the termination.” Therefore, the trigger for an indigent parent’s counsel’s appointment may not be immediately after the filing of a suit, and a child

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57 **TEX. FAM. CODE ANN. §107.012 (Vernon 2002).**

58 **TEX. FAM. CODE ANN. §107.013 (Vernon 2002) and (Vernon Supp. 2004).**
protection suit may go for some time before an indigent parent affirmatively expresses opposition to the suit and allows the court to consider the facts about the parent’s indigence so as to trigger the court’s duty to appoint an attorney for such party.

The attorney representing the Department that files the suit for child protection obviously should know the statutory requirements on appointments and take the steps necessary to ensure mandatory appointments are made. Nevertheless, it may not always be obvious when an appointment is warranted, especially if the parent does not make appearances in court. Nevertheless, the attorney ad litem for the child may be the most helpful in this regard, and, in fact, it would seem to be appropriate since the attorney ad litem for the child has a duty to interview “all parties” in the case within a reasonable time after appointment. That attorney also has a duty to ensure the proceedings are expedited; and, therefore, has an interest in ensuring ineffectiveness claims are not set up in a case so as to cause a delay in disposition for the child. Of course, whoever communicates with the parent, whether it is the attorney for the child or the Department will have to consider Rule 4.03 of the Disciplinary Rules which would require the lawyer to make ensure that the unrepresented parent understands that the lawyer is not disinterested and prevent misunderstandings about the attorney’s role.

B. The experience of criminal prosecutors may help in formulating ways to avoid ineffectiveness claims.

Once all the attorneys are appointed in the case, the more difficult challenge is how to guard against lawyer incompetence that could result in an ineffective assistance claim? There is no simple answer on how to address this problem. Nevertheless, it might be that litigants in child protection cases can find at least one source for learning strategies to deal with this issue from criminal prosecutors who have been dealing with ineffectiveness claims for a long period of time.

One suggestion the author of this article gleaned from an article for criminal prosecutors was the suggestion of finding ways to make the trial judge involved in ensuring the defendant’s representation is being fairly advanced. For example, to circumvent concerns that a defendant’s attorney failed to order retesting of critical evidence that could conceivably form the basis of an ineffectiveness claim in a criminal case, one prosecutor suggested filing a letter or pleading with the court specifically inviting the defendant’s attorney to retest the evidence; and then, if no response appeared, to file a request with the court to ask the defendant personally (not the lawyer) in court whether the defendant wanted retesting. Of course, the dynamics of a child protection case are a little different than a criminal case and that should make strategy for protecting against ineffectiveness of counsel a little different. Nevertheless, a greater involvement of the trial judge, as has been done in criminal cases, could be one way to ensure the record reflects a party received fair representation.

C. Potential ineffectiveness during post-judgment raise special concerns

In M.S., the big issue that made the court consider ineffectiveness of counsel had to do with the failure of a parent’s attorney to perform the simple task of filing a motion for new trial asserting factual insufficiency. Another important post-judgment document that a parent’s attorney could neglect to file that could impact on a parent’s appeal rights is a parent’s attorney’s failure to simply file a notice of appeal. These type errors can become particularly difficult because these time-sensitive filings occur during a limited plenary time frame and can be compounded by the attitudes of appointed lawyers who do not wish to perform appellate representation.

In this connection, one problem that the author of this article has noticed with some trial attorneys is the reluctance to sign a notice of appeal when the attorney feels incompetent to handle the appeal. According to TEX. R. APP. P. 6.1, the attorney’s signature on the notice of appeal confers their status in the appellate court as lead counsel, unless another attorney is designated. A trial lawyer may not want to sign a notice of appeal that designates him or her as appellate counsel, because the attorney determines that it would be beyond their competence and violate Disciplinary Rule 1.01.

Nevertheless, an appointed lawyer’s evaluation of competence must take into account a little different evaluation than regular lawyers. There is a specific rule of professional conduct that addresses appointed attorneys, Rule 6.01, which indicates competency is not the only issue that an appointed lawyer must consider. Rule 6.01 states that: “A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for “good cause.” Examples of what constitute “good cause” are listed; and representation of a client that likely would result in violation of law or

60 Id. at §107.003(a)(E).
61 Disciplinary Rule 4.04.
63 115 S.W.3d at p. 549.
rules of professional conduct is listed.\textsuperscript{64} Importantly, however, Rule 6.01 does not authorize an attorney ad litem simply to refuse representation when he feels he is incompetent without the court’s permission.\textsuperscript{65} Moreover, a lawyer’s feeling of incompetence in handling a matter does not necessarily amount to incompetence if the lawyer could remedy that defect through reasonable efforts.\textsuperscript{66} Also, when ordered to continue representation by a court, Disciplinary Rule 1.15 states the attorney must continue representation “notwithstanding good cause for terminating the representation.”

Accordingly, even if a trial lawyer feels incompetent to handle post-trial and appellate matters, the court could continue the lawyer as appellate counsel in the case. This is certainly a strong possibility in counties where the resources of appointed lawyers is limited. A motion to withdraw for substitution by more competent counsel, therefore, would not be an automatic remedy for an appointed lawyer who does not want to continue on the appeal.

Because an appointed trial lawyer who does not want to be in the position of appellate work can be called upon to continue representation on appeal, the other parties who wish to protect the judgment of the court against ineffectiveness claims can be placed in a difficult situation. One strategy may be to make the trial judge aware of time sensitive issues as soon as possible. This could be done at the date of entry of judgment or at the hearing which the court is required to hold within 30 days after the final order is signed.\textsuperscript{67} Importantly, the court would need to be advised about post-judgment matters that have, or have not, been handled for the parent in plenty of time for a written motion for new trial and notice of appeal to be filed.\textsuperscript{68}

IV. CONCLUSION

In conclusion, although the court’s reasoning may require further clarification, the Texas Supreme Court now holds that ineffectiveness claims can be brought as viable appellate challenges in civil appeals, at least with respect to indigent parents who are statutorily appointed counsel in parental termination suits. What remains unclear is whether this will apply to retained counsel for parents in parental termination suits, and other appointed counsel in these suits. Also, there is some question whether this holding could extend to statutorily appointed counsel in non-parental termination situations.

While these questions remain unanswered, how courts will decide ineffective issues in individual fact scenarios remains to be seen. Based on the decisions already decided by the Texas Supreme Court and a few appellate courts since M.S., the situations when ineffectiveness claims can prevail on appeal appear limited. Also, because the Supreme Court found deficiencies in preservation deficiencies must be reviewed through a due process prism before they can even be considered a deficiency, criminal jurisprudence may not always be the best predictor of how these claims are resolved.

With the possibility of ineffectiveness claims in parental termination cases, all parties in the case now have an ethical obligation to be cognizant of competency issues with respect to appointed lawyers. Otherwise, judgments may be subject to ineffectiveness claims that could delay a child’s disposition with a needless retrial because of a lawyer’s incompetence. Strategies need to be employed to ensure the process of appointment is done at the appropriate time and that appointed lawyers are advancing the interests of their clients competently. Learning from the experience in criminal prosecution, it may be that the best strategy is to find ways to involve the trial judge in monitoring representation and at a point early enough to allow correction.

\textsuperscript{64} Specifically the Rule states:

\begin{quote}
A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
\begin{enumerate}
\item representing the client is likely to result in violation of law or rules of professional conduct;
\item representing the client is likely to result in an unreasonable financial burden on the lawyer; or
\item the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.
\end{enumerate}
\end{quote}


\textsuperscript{67} TEX. FAM. CODE ANN. §263.405(d) (Vernon Supp. 2004) (requires trial judge to hold hearing within 30 days of judgment to decide if new trial should be granted, whether appeal would be frivolous and whether parent indigent).

\textsuperscript{68} A motion for new trial must be filed within 30 days after the judgment is signed. TEX. R. CIV. P. 329b. Parental termination judgments are accelerated, requiring the notice of appeal to be filed within 20 days of the judgment, however, the notice could be filed late 15 days of the deadline if an appropriate explanation is given requesting the additional time. See TEX. FAM. CODE ANN. §263.405 & §109.002 (Vernon 2002); TEX. R. APP. P. 26.1(b) and 26.3.