



The Impact of Child Protection Cases On General Civil Practice

BY CHARLES CHILDRESS & SANDRA HACHEM

Texas statutes intended to address the plight of abused or neglected children have been evolving for more than 100 years.¹ By 1982, the Family Code provided a statutory right to appointed counsel for indigent parents in termination suits, and both the Texas and U.S. Supreme Courts had ruled that due process required the parental unfitness finding in a termination case to be supported by clear and convincing evidence.² As these and other changes made the system more complex, both case resolution time and the number of children in temporary foster care increased. In response, the 1997 Texas Legislature, acting on a report from the Governor's Committee to Promote Adoption,³ established new deadlines requiring that a final order be rendered within one year from the date the state obtained temporary custody of a child.⁴

With more cases being pushed to final orders, the number of appeals also increased. By 2004, the *State Bar Family Law Section Report* noted a "veritable explosion" of appeals, including six Supreme Court opinions since 2000.⁵ It is estimated that about 1,000 appellate opinions involving Child Protective Services (CPS) were issued last year.⁶ The many statutory and constitutional considerations specific to these cases distinguish them from other civil cases. However, CPS cases are subject to the same general rules of procedure and evidence applicable to all civil cases.⁷ As the volume of CPS appeals interpreting those rules has increased, so has their potential to have an impact on general civil practice.

This article will discuss two examples of decisions that may have an impact on civil practice outside the CPS context: (1) the Texas Supreme Court's decision to permit modification of a statutory deadline through application of the Rules of Civil Procedure; and (2) the Texas Supreme Court's extension of the "ineffective assistance of counsel" rules from criminal law to an indigent parent's statutorily provided representation.

Reading Rules of Civil Procedure To Amend Deadlines in Statutes

The 2001 Texas Legislature, recognizing that post-trial delays following the "final order" mandated by the 1997 statute continued to keep children in foster care for additional months or years, added new Family Code Section 263.405,⁸ making all appeals from CPS cases accelerated appeals and providing trial-level procedures intended to speed up the process.⁹ Among other provisions, this section requires that a party seeking to file an appeal must act within 15 days after the final order is signed and provide a statement of points on which the party intends to appeal.¹⁰ The deadline is similar to the statute's requirement that the trial court hold a hearing within 30 days to consider granting a new trial to determine whether an indigent appellant is entitled to an appointed attorney and free record on appeal, and to determine whether the appeal would be frivolous.¹¹

Practitioners accustomed to the dilatory post-trial pace of "standard" appeals were slow to adapt to the new, shorter, leg-

islative deadlines.¹² The statutory 15-day deadline for filing “points” for appeal proved particularly troublesome, and the courts of appeals were generally unsympathetic to this legislative deadline, with one court refusing to allow the absence of a timely filed statement of points to limit the issues to be considered on appeal.¹³ The Legislature, in turn, amended the statute in 2005 by adding Section 263.405(i) to prohibit the appellate court from considering any issue not “specifically presented to the trial court in a timely filed statement” of points.¹⁴ Although some courts of appeals questioned the constitutionality of the legislative scheme, most recognized it as clear and applied it as written.¹⁵

In 2008, the issue arrived at the Texas Supreme Court¹⁶ on the following facts. On Aug. 4, 2006, a final order terminating the parental rights of Mandi D. to her child, M.N., was signed by the trial court.¹⁷ Mandi’s statement of points for appeal was due 15 days after that date. Six days after the statutory deadline, she filed a combined motion for new trial and statement of points for appeal. One day after the trial court should have held the statutory 30-day hearing, Mandi filed a motion to extend the time for filing her statement of points, citing Rule 26.3, Texas Rules of Appellate Procedure (which gives the appellate court authority to extend the time to file a notice of appeal). Without citing other authority, the trial judge granted Mandi’s motion for extension of time and found that her statement of points was timely filed. On appeal, the Eastland Court of Appeals held that the statute did not allow an extension of the 15-day deadline for filing the statement of points for appeal, and affirmed the termination order.¹⁸

The Texas Supreme Court granted review, reversed the court of appeals, affirmed the trial court’s order granting the extension and finding that the statement of points was “timely,” and remanded the case to the court of appeals for review on the merits. The Court held that Rule 5 of the Texas Rules of Civil Procedure gave the trial court the authority it needed to extend the time under the statute,¹⁹ without discussing in detail the language of the rule.²⁰ This is a significant omission, as Rule 5 refers to deadlines established “by these rules or by a notice given thereunder or by order of court,” while other rules, such as Rule 4, relating to computation of time, refer specifically to statutes.²¹ It is not difficult to understand why neither the court of appeals nor the trial court considered using Rule 5 as a basis for the extension.

Justice Don Willett, in dissent, observed: “For better or for worse, the Legislature in Family Code section 263.405(b) set a firm fifteen-day deadline for filing a statement of points for appeal. Reasonable people can dispute the efficacy of this hard-and-fast deadline, but few can dispute its clarity.”²²

Nevertheless, the Court, in Justice Willett’s phrase, imported the “court-made rules of procedure” into its statutory construction in order to “trump” the Family Code’s clear and firm 15-day deadline for filing the statement of points for appeal. Justice Willett’s dissent illuminates that the Court has opened the door to allowing its own rules to modify deadlines enacted

by statute. This raises the question of whether this same idea could be applied to statutes in other civil contexts.

Ineffective Assistance of Counsel

Texas has provided a statutory right to court-appointed and county-paid attorneys for indigent parents in termination suits since before the U.S. Supreme Court’s *Lassiter* decision, which provided a conditional and more limited right to counsel as a matter of federal constitutional law.²³ Currently, the right to appointed counsel for an indigent parent “who responds in opposition” to the CPS suit extends to all cases in which CPS seeks “temporary managing conservatorship of a child.”²⁴ Thus, an indigent parent whose child may be placed in foster care is entitled to court-appointed and county-paid representation, even if termination of parental rights is not being sought. On the other hand, an indigent parent who is facing a termination suit filed by a private party is not entitled to a court-appointed attorney.²⁵

The Family Code also provides for appointed counsel for a parent or alleged father when the parent is served by publication²⁶ or the suit involves alleged fathers who may have their potential rights terminated under the “paternity registry” provisions of the Family Code.²⁷ In addition, the statutory right to counsel under the Family Code includes provisions requiring representation for the child²⁸ and CPS.²⁹

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In 2003 and again in 2009, the Texas Supreme Court was called upon to determine whether the statutory right to counsel included a right to “effective assistance” of counsel, and, if so, what the parameters of that right might be. As background, it should be noted that the concept of “effective assistance” arose and developed in the context of criminal law, where the Sixth Amendment to the U.S. Constitution³⁰ and Article I, Section 10 of the Texas Constitution³¹ specifically require that criminal defendants have the “assistance of counsel,” and “the right of being heard by himself or counsel, or both.” These provisions do not, by their terms, apply to civil cases.

The 2003 case, *In re M.S.*,³² was an appeal from a jury verdict terminating parental rights. On appeal, the parent complained of her counsel’s failure to have a record made of the voir dire, charge conference, and closing arguments,³³ and to file a motion for new trial in order to preserve a factual sufficiency complaint on appeal.³⁴

On petition for review, the Texas Supreme Court observed that:

In re J.F.C., a recent parental rights termination case, we conducted a due process analysis of our rule of civil procedure which permits a deemed finding if an element in the jury charge is omitted. Today, in *In re B.L.D.*, also a parental rights termination case, we determined whether our preservation rules violate due process when counsel fails to object to error in the jury charge. In both of those cases, we held that due process considerations did not require us to set aside our procedural rules.³⁵

In *J.F.C.*,³⁶ the Court held that objections to the jury charge could not be raised for the first time on appeal and that omitted findings could be expressly found by the trial court or deemed on appeal to support the judgment. In *B.L.D.*,³⁷ the Court held that due process does not require appellate review of unpreserved jury charge error.

The Court was not willing, however, to deny review of the “effectiveness” of appointed counsel in a termination case. The Court held that “the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel.”³⁸ The Court then adopted the criminal law standard³⁹ for evaluating the effectiveness of counsel because there was “no reason not to apply it in our civil parental-rights termination proceedings.”⁴⁰ The Court stated the general rule that showing ineffective assistance under criminal law precedents “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and then observed that to determine “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.”⁴¹

Applying the new standard, the Court then found that trial counsel’s failure to ensure that the entire proceedings were recorded did not constitute ineffective assistance of counsel,⁴²

but that “counsel’s failure to preserve the factual sufficiency issue may constitute ineffective assistance of counsel.”⁴³ The case was remanded to the 9th Court of Appeals for a determination of whether the failure to preserve the issues was “not objectively reasonable, and whether this error deprived [the appellant] of a fair trial.”⁴⁴ This determination could only be made by assessing the factual sufficiency of the evidence; on remand, after more than three years in the appellate process while the children remained in foster care, the court of appeals determined that the evidence was factually sufficient.⁴⁵

In 2009, the Texas Supreme Court, in a case, *In re J.O.A.*,⁴⁶ in which the appellant’s trial attorney withdrew without filing a statement of points for appeal and the appellate attorney was appointed too late to do so, held that Family Code subsection 263.405(i) “is unconstitutional as applied when it precludes a parent from raising a meritorious complaint about the insufficiency of the evidence supporting the termination order.”⁴⁷ The Court found that the failure of trial counsel to file a timely statement of points preserving the issues for appeal was “tantamount to abandoning his client at a critical stage,” and the remedy was to review the unpreserved points, which the court of appeals had done.⁴⁸ Justice Willett, in his concurrence, pointed out that this due process ruling might lead counsel to deliberately disregard normal preservation of error requirements “in order to seize tactical advantage.”⁴⁹

Currently, the Supreme Court has only found effectiveness claims applicable to appointed counsel in government-initiated parental termination suits, but there does not appear to be any reason why the court’s same rationale could not be argued applicable to the appointment of counsel for the child in privately initiated parental termination suits.⁵⁰ This issue has not yet been addressed. Moreover, there are other situations, other than parental termination suits, in which a court may be required or authorized to appoint counsel. For example, under Tex. R. Civ. P. 244, when a defendant is served by publication and does not answer or appear, the court must appoint an attorney to defend the suit on behalf of that defendant. Further, there is general authority for discretionary appointments of counsel in any civil suit when a court determines a person is too poor to afford representation per Section 24.016 of the Government Code.⁵¹ Because the Supreme Court has found that the statutory right to counsel embodies the right to effective counsel,⁵² argument for effectiveness of counsel claims involving appointed counsel in other contexts may be seen in future cases.

Also, the Texas Supreme Court has not directly commented on whether an effectiveness claim could extend to retained counsel. This is different than criminal law, which provides no distinction between retained and appointed counsel in effectiveness of counsel claims.⁵³ At least one appellate court has quoted the Court of Criminal Appeals on the duties of “trial counsel, retained or appointed,” in a parental termination case suggesting this criminal case law is applicable to counsel in parental termination cases.⁵⁴ Considering, as discussed in the

first example of this article, that the Texas Supreme Court has indicated civil procedure must be interpreted in line with its commitment to “just, fair, equitable and impartial adjudication of the rights of litigants,”⁵⁵ even if it means, as opined by Justice Willett, expanding a statutory right by judicially made rules, one is left to wonder if the Court’s same rationale in *In re M.S.* could not be argued to extend ineffectiveness claims to privately retained counsel in litigation of not only parental termination cases, but also other important rights in the civil context.

Traditionally, the State Bar has attempted to enforce minimum standards of representation through the grievance process or malpractice suits, and the Legislature has specifically provided that attorneys who fail to perform their duties in representing children are subject to disciplinary action.⁵⁶ The Texas Supreme Court’s “effective assistance of counsel” decisions have created a whole new remedy in civil cases for such failures of representation, and being publicly criticized for actions taken at trial may increase the lawyer’s risk of grievances. Justice Willett, in his *J.O.A.* concurrence, cautioned trial courts to be more proactive in ensuring that the parties know and follow the rules and specifically suggested that trial courts remind trial counsel that “while the trial may have ended, their duties have not,” and that failing to preserve appellate rights “could constitute a breach of fiduciary duty to the client that spawns both malpractice claims and disciplinary actions.”⁵⁷

Conclusion

A common thread in the cases discussed above is the Texas Supreme Court’s determination to seek a just outcome by modifying or overruling statutory requirements if necessary. While the special protections provided to parent-child relationships distinguish these cases, an open question remains whether similar arguments may produce similar results in other civil contexts.

Notes

1. See Act of April 5, 1907, 13th Leg., R.S., ch. 64, 1907 Tex. Gen. Laws 135 (scheme gives court authority to order disposition for child that is best for child’s moral and physical welfare if court determines child is a “dependent child” essentially defined as an abandoned, neglected, or abused child); Act of May 21, 1931, 42nd Leg., R.S., ch. 177 §6, 1931 Tex. Gen. Laws 300, 301 (this adoption act authorized adoption without parental consent “when termination by a Juvenile Court or Court or competent jurisdiction” had been granted); Act of May 25, 1973, 63rd Leg., R.S., ch. 543 §1, 1973 Tex. Gen. Laws 1411 (codified at §15.02 of the Family Code permitted parental termination on proof of specified acts or omissions and best interest finding reflecting the format of the present scheme, and later recodified as §161.001 of the Family Code); See Act of May 24, 1995, 74th Leg., R.S., ch. 20, 1995 Tex. Gen. Laws (codified at §161.001 of the Family Code); Act of May 24, 1995, 74th Leg., R.S., ch. 709 §1, 1995 Tex. Gen. Laws 3745 (added as a statutory requirement that termination of parental rights be based on clear and convincing evidence).
2. On the burden of proof, Texas anticipated the federal requirement. See *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980); Texas also provided a broader right to counsel than was required by federal notions of due process. See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (requiring a case-by-case analysis of the

- need for appointed counsel as a matter of due process, but noting that statutes in many states provided for the appointment of counsel).
3. The committee was established by Executive Order GWB 96-7, May 22, 1996. The Committee found that between 1991 and 1996 children adopted through the Child Protective Services (CPS) system spent an average of 40.8 months in temporary foster care before the adoption was finalized. *Report of the Governor’s Committee to Promote Adoption*. Governor’s Committee to Promote Adoption, Report of the Governor’s Committee to Promote Adoption (September, 1996), at p. 5.
 4. Act of Sept. 1, 1997, 75th Leg., R.S., ch. 603, §14, 1997 Tex. Gen. Laws 603 (added §263.401 of the Family Code). The statute allowed one extension of up to 180 days beyond the original deadline, and established a series of temporary hearings designed to force the cases to a conclusion.
 5. Sampson, John J., *Editor’s Foreword to Articles*, 2003–4 Fam.L.Sect.Rep. (Winter 2003/04), at 7.
 6. This calculation was done on June 15, 2010, by co-author using a legal search system.
 7. See *In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003) (“our Rules of Evidence applicable to civil cases and our Rules of Civil Procedure govern termination proceedings.”) (citing Tex. Fam. Code §104.001 (rules of evidence), *In re J.F.C.*, 96 S.W.3d at 262–63 (burden of proof on appeal) and *E.B.*, 802 S.W.2d at 648 (jury charge)).
 8. Added by Acts 2001, 77th Leg., ch. 1090, Sec. 9, eff. Sept. 1, 2001; Amended by: Acts 2005, 79th Leg., Ch. 176, Sec. 1, eff. Sept. 1, 2005 and Acts 2007, 80th Leg., R.S., Ch. 526, Sec. 2, eff. June 16, 2007.
 9. Tex. Sen. Research Center, Bill Analysis, Tex. H.B. 2249, 77th Leg., R.S. (2001).
 10. Family Code §263.405(b).
 11. Family Code §263.405(d).
 12. Although the Rules of Appellate Procedure specifically permitted extensions of time to file notices of appeal, some were filed so late as to deprive the appellate court of jurisdiction. *In re T.W.*, 89 S.W.3d 641 (Tex. App. — Amarillo 2002, no pet.) (Court of Appeals was *without jurisdiction* to hear mother’s accelerated appeal filed beyond the 15-day deadline for a motion to extend; attorney’s ignorance not “good cause” that would waive jurisdictional deadline); *In re J.A.G.*, 92 S.W.3d 539 (Tex. App. — Amarillo 2002, no pet.) (appellate court *lacked jurisdiction* to review mother’s appeal from an order terminating her parental rights, where notice of appeal was filed by mother more than 20 days after the final order terminating parental rights was signed, and a timely motion to extend time period to appeal was not filed); *but see In re B.G.*, 104 S.W.3d 565 (Tex. App. — Waco 2002, no pet.) (where parent attempting to appeal filed notice of appeal 27 days after the judgment was signed, a motion for extension could be implied; ignorance of the new appellate deadline was “reasonable explanation” for the late filing).
 13. *In re D.R.L.M.*, 84 S.W.3d 281 (Tex. App. — Fort Worth 2002, pet. denied) (failure to file the statement of points within 15 days did not deprive appellate court of authority to consider issues on appeal).
 14. Acts 2005, 79th Leg., Ch. 176, Sec. 1, eff. Sept. 1, 2005.
 15. See, e.g., *Pool v. DFPS*, 227 S.W.3d 212, 215 (Tex. App. — Houston [1st Dist.] 2007, no pet.).
 16. *In re M.N.*, 262 S.W.3d 799 (Tex. 2008).
 17. *Id.* 262 S.W.3d at 800.
 18. *In the interest of M.N.*, 230 S.W.3d 248, 251 (Tex. App. — Eastland 2007) *revid*, 262 S.W.3d 799 (Tex. 2008)
 19. *In re M.N.*, 262 S.W.3d at 804.
 20. Tex.R.Civ.P. 5 provides in relevant part: “When *by these rules or by a notice given thereunder or by order of court* an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion ... (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.” (emphasis added).
 21. Tex.R.Civ.P. 4 provides in relevant part: “In computing any period of time prescribed or allowed by these rules, by order of court, *or by any applicable statute*, the day of the act, event, or default after which the designated period of time begins to run is not to be included.” (emphasis added).
 22. *In re M.N.*, 262 S.W.3d at 805.

23. *Lassiter*, *supra*, fn. 2.
24. Sampson & Tindall's Texas Family Code Annotated, August 2005 Edition §107.013, Comment (2005); Acts 2005, 79th Leg., ch. 268, §1.06, eff. Sept. 1, 2005.
25. *In re J.C.*, 250 S.W.3d 486, 489 (Tex. App. — Fort Worth 2008, pet. denied) (mother's appointed attorney dismissed after CPS non-suit — foster parents filed suit and obtained termination of parental rights); *see also In re V.R.P.*, No. 04-04-00431-CV (Tex. App. — San Antonio 2005, pet. denied) (mem. op.) (no statutory right to AAL; parent failed to preserve constitutional complaint).
26. Tex. Fam. Code §107.013(a)(2).
27. Tex. Fam. Code §107.013(a)(3) & (4).
28. Tex. Fam. Code §107.012.
29. Tex. Fam. Code §264.009.
30. U.S. Const. amend. VI, made applicable to the states by U.S. Const. amend. XIV, Section 1.
31. Tex. Const. art. I, §10.
32. *In re M.S.*, 115 S.W.3d 534 (Tex. 2003).
33. *In re M.S.*, 115 S.W.3d at 545–6.
34. *In re M.S.*, 115 S.W.3d at 546.
35. *In re M.S.*, 115 S.W.3d 534, 546 (Tex. 2003) (footnotes omitted).
36. *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).
37. *In re B.L.D.*, 113 S.W.3d 340 (Tex. 2003).
38. *In re M.S.*, 115 S.W.3d at 544 (the opinion focuses on termination of parental rights and does not mention other circumstances in which the Family Code provides a statutory right to counsel).
39. As set out in *Strickland v. Washington*, 466 U.S. 668 (1984)
40. *In re M.S.*, 115 S.W.3d at 545.
41. *In re M.S.*, 115 S.W.3d at 545 (footnotes omitted).
42. *In re M.S.*, 115 S.W.3d at 546.
43. *In re M.S.*, 115 S.W.3d at 550.
44. *In re M.S.*, 115 S.W.3d at 545.
45. *In re M.S.*, 140 S.W.3d 430 (Tex. App. — Beaumont 2004, no pet.); the court's website shows that the original notice of appeal was filed on Jan. 22, 2001.
46. *In re J.O.A.*, 283 S.W.3d 336 (Tex. 2009).
47. *In re J.O.A.*, 283 S.W.3d at 339.
48. *In re J.O.A.*, 262 S.W.3d 7, 22 (Tex. App. — Amarillo 2008) *rev'd in part and affirmed in part* 283 S.W.3d 336 (Tex. 2009).
49. *In re J.O.A.*, 283 S.W.3d at 347.
50. In non-governmental suits in which the best interests of a child are at issue, a court may appoint an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code Ann. §107.021(a) (Vernon 2008). Also, if a private suit seeks parental termination, the court "shall" appoint an amicus attorney or attorney ad litem unless the court can affirmatively find the interests of the child will be adequately represented by a party whose interests are not in conflict with the child's interests. *Id.* at §107.021(a-1).
51. Tex. Gov't Code Ann. §24.016 (Vernon 2004).
52. *In re M.S.*, 115 S.W.3d at 544.
53. *Ex Parte Axel*, 757 S.W.3d 369 (Tex. Crim. App. 1988) (en banc).
54. *Pool v. D.F.P.S.*, 227 S.W.3d 212, 216 (Tex. App. — Houston [1st Dist.] 2007, no pet.) (quoting *Axel*).
55. *In re M.N.*, 262 S.W.3d at 802 (quoting Tex.R.Civ.P. 1).
56. Tex. Fam. Code §107.0045.
57. *In re J.O.A.*, 283 S.W.3d at 347.



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