

Handling Your First Child Welfare Appeal

**SUPREME COURT OF TEXAS CHILDREN'S
COMMISSION**

JUNE 26, 2024



Handling Your First Child Welfare Appeal

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Appeal: Whose Job is it, Anyway?

Tex. Fam. Code § 107.016(2)

In suit brought by the government seeking termination or appointment as conservator, the attorney appointed to serve as AAL continues to serve in that capacity until the earliest of:

- Date suit is dismissed;
- Date all appeals in relation to any final order terminating parental rights are exhausted or waived; or
- Date attorney is relieved of duties or replaced after a finding of good cause is rendered by the court on the record.

Parent found indigent in trial court remains indigent, generally, in court of appeals. [Tex. Fam. Code § 107.013\(e\)](#).



In re P.M., 520 S.W.3d 24 (Tex. 2016)

- Tex. Fam. Code §§ 107.013(a)(1), (e), and 107.016(2) establish the right of an indigent parent to appointed counsel in the trial court and the court of appeals.
- A Petitioner's right to counsel includes a petition for review in the Texas Supreme Court.
- Withdrawal is permissible only on a **showing of good cause** and on appropriate terms and conditions.
- Neither mere dissatisfaction with counsel or client with each other nor counsel's belief that client has no grounds to appeal constitutes good cause for withdrawal.

Who is Responsible for Filing an Appeal?

- Trial counsel is responsible for filing until appellate counsel appointed. [Tex. R. Disc. P. 1.15\(d\)](#); *In re J.O.A.*, [283 S.W.3d 336](#) (Tex. 2016); *Ex parte Axel*, [757 S.W.2d 369, 374](#) (Tex. Crim. App. 1988).
- AAL (or Dual-Role AL) for child may file appeal on behalf of the child.
- Retained counsel may limit scope of their representation. [Tex. R. Disc. P. 1.02\(b\)](#).

Tex. R. Disc. P. 1.02(a)

- Generally, an attorney must abide by their client's decisions regarding objectives, whether to settle or appeal, etc.
 - Notify your client of their right to appeal
 - Determine whether appeal is desired as soon as possible (preferably at end of trial/rendition of the final order)

When and What to Appeal

What to Appeal

Generally, you cannot appeal interlocutory orders

- *But* see [Tex. Civ. Prac. & Rem. Code § 51.014](#).

Mandamus:

- Some interlocutory orders (e.g., some orders following statutory hearings)
- Must show that there is *clear abuse of discretion* **and** *no adequate remedy by appeal*.

May appeal from final judgment:

- *Lehmann v. Har-Con Corp.*, [39 S.W.3d 191](#) (Tex. 2001).



When to Appeal

Lehmann:

- Judgment is final if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.
- Order after trial on the merits is presumed final.

If in doubt, file notice of appeal:

- [Tex. R. App. P. 27.1](#): Premature notice effective after event that begins notice of appeal period



Critical Deadlines

20 Days after Judgment

- Notice of appeal must be filed with the trial court. [Tex. R. App. P. 26.1\(b\)](#)
- A request for Findings of Fact and Conclusions of Law due (but unnecessary in most cases). [Tex. R. Civ. P. 296](#)

30 Days after Judgment

- Post-judgment motions must be filed. [Tex. R. Civ. P. 329b\(a\) & \(g\)](#)

35 Days after Judgment

- The deadline for filing an extension to file a notice of appeal (fifteen days after the deadline for filing the original notice of appeal.) [Tex. R. Civ. P. 26.3](#)
- *But*, if no notice of final judgment, may move to file up to 90 days late. [Tex. R. App. P. 4.2](#)



Perfecting the Appeal

Perfecting the Appeal

Who appeals?

- The party who wants to alter the judgment or other appealable order should file a notice of appeal.
- The non-appealing party gets no more relief in the court of appeals than given by trial court.
 - Other parties have to original deadline or 14 additional days, whichever is later, to file cross-appeal, if desired. [Tex. R. App. P. 26.1\(d\)](#)



Perfecting the Appeal, cont.

- This is Jurisdictional! [Tex. R. App. P. 25.1\(b\)](#)
- Child welfare appeal is accelerated. [Tex. Fam. Code § 263.405\(a\)](#).
- [Tex. R. App. P. 26.1\(b\)](#): Notice of appeal “must be filed within 20 days after the judgment or order is signed.”
- [Tex. R. App. P. 26.1\(a\)](#) does not apply in child welfare cases: *Notice of appeal deadline not extended by post-judgment filings!*

Perfecting the Appeal, cont.

Notice of appeal is filed with the trial court. [Tex. R. App. P. 25.1\(a\)](#)

- Mistakenly filing notice with court of appeals is treated as if the appeal was filed in trial court on same day.

[Tex. R. App. P. 26.3](#): Extensions of time to file notice of appeal:

- Request within 15 days after deadline
- File notice of appeal in trial court
- File motion to extend in court of appeals compliant with [Tex. R. App. P. 10.5\(b\)](#).

Perfecting the Appeal, cont.

Appellant must serve notice on:

- All parties (including child's ad litem)
- Court reporter(s), if reporter's record needed on appeal. [Tex. R. App. P. 25.1\(e\)](#).
- May amend notice any time before appellant's brief filed; after that, only with leave of court. [Tex. R. App. P. 25.1\(g\)](#).
- Again, if in doubt, file notice of appeal; premature notices are treated as timely filed. [Tex. R. App. P. 27.1\(a\)](#).

Trial court clerk's responsibility to forward notice of appeal to court of appeals. [Tex. R. App. P. 25.1\(f\)](#).



Perfecting the Appeal

Contents of notice: [Tex. R. App. P. 25.1\(d\)](#)

1. Court, number, style
2. Date of order/judgment appealed
3. State that party wants to appeal
4. Court(s) to which appeal taken
5. Name(s) of party filing notice
6. State whether the appeal accelerated and whether it is a parental termination or child welfare case

Substance over form! *In re J.M.*, [396 S.W.3d 528, 531](#) (Tex. 2013)

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

IN THE INTEREST OF	§	IN THE DISTRICT COURT
PUGSLEY ADDAMS & WEDNESDAY ADDAMS	§	HARRIS COUNTY, TEXAS
CHILDREN	§	315th JUDICIAL DISTRICT (JUV.)

NOTICE OF APPEAL OF MORTICIA ADDAMS

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

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

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

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

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



Post-Judgment Preservation

Post-Judgment Preservation

Generally, if error/complaint not preserved pre-judgment, it's lost. [Tex. R. App. P. 33.1\(a\)](#).

Exceptions:

- Personal/subject matter jurisdiction
- [Tex. R. Civ. P. 324\(a\)](#)
 - Motion not required to preserve error—usually—
with exceptions on following page

Post-Judgment Preservation, cont.

Motion for new trial needed for:

- Jury misconduct
- Newly discovered evidence
- Incurable jury argument
- To complain of factual insufficiency or against the overwhelming weight of evidence *after a jury trial*. [Tex. R. App. P. 324\(b\)](#)

Note: If you ask for relief in a Motion for new trial, you're only entitled to a new trial (rather than a rendition of judgment)



Other Post Judgment Motions

- Motion for judgment notwithstanding the verdict (JNOV)
- Motion to modify (MTM) the judgment
- Preservation of legally insufficient evidence or matter of law issues following a jury trial:
 - Motion for directed verdict
 - Objection to submission of jury question
 - Motion for JNOV
 - Motion for new trial (MNT)- Caution! If meritorious, you get a new trial instead of a rendition



Oral Motions

Oral motions are acceptable for some post-judgment relief sought, but written motions are preferred.

- Intro: Tell court what you want
- Relevant procedural history/facts
- Tell court why you deserve relief (argument and authorities)
- Conclude: Summarize argument and tell court what you want *again*

Courts should look to substance over form when considering motion, so do not panic if you do not have a form!



Timing

Tex. R. Civ. P. 329b:

- File post-judgment motions within 30 days after judgment signed
- Overruled by operation of law 75 days after judgment signed (if not denied expressly by court)
- Plenary power ends upon the later of:
 - 30 days after judgment; or
 - 30 days after timely-filed post-judgment motions denied



Timing, cont.

- Time to appeal restarts from time trial court modifies/reforms judgment
 - But don't wait for modification—file your notice of appeal! You can always dismiss your appeal if you get the post-judgment relief requested
- Post-judgment motions and requests for findings of fact/conclusions of law do not extend time to file notice of appeal in child welfare cases! [Tex. R. App. P. 28.1\(b\)](#)
- Original notice of appeal will cover any subsequent changes to judgment by trial court. [Tex. R. App. P. 27.3](#)



Findings of Fact and Conclusions of Law

- Generally, a request for Findings of Fact and Conclusions of Law is not needed.
 - [Tex. R. Civ. P. 306](#) requires that a judgment in a suit for termination of the parent-child relationship filed by a governmental entity for managing conservatorship must include the specific grounds for termination or for appointment of the managing conservator.
- If Findings of Fact and Conclusions of Law omitted without preservation, court of appeals presumes trial court made findings/conclusions in support of its judgment.



Findings of Fact and Conclusions of Law, cont.

- If you need original, additional, or amended findings, follow scheme in [Tex. R. Civ. P. 296-299a](#) precisely or risk waiving.
- Because child welfare appeals are accelerated, a request for Findings of Fact and Conclusions of Law extends plenary jurisdiction *but does not extend the notice of appeal deadline.*

Readying the Appeal

Docketing Statement

Tex. R. App. P. 32

- **Tex. R. App. P. 32.1:** Upon filing notice of appeal, must “promptly” file docketing statement
 - May supplement or amend.
Tex. R. App. P. 32.3
 - Not jurisdictional. **Tex. R. App. P. 32.4**
- Forms:
 - www.texascourts.gov

Docketing Statement Contents:

- Party names, contact info.
- Dates of judgment, orders, notice of appeal, record requests, post-judgment motions
- Nature of case
- Priority/accelerated?
- Indigence information
- Mediation information

Clerk's Record

Tex. R. App. P. 34.5

Record must include:

- Pleadings (first and live)
- Charge/verdict or FF/CL
- Judgment or order being appealed
- Requests for FF/CL, post-judgment motions, rulings thereon
- Notice of appeal
- Request for clerk's and reporter's records
- Bill of costs



Clerk's Record, cont.

- Include other documents, video, etc., that you think court of appeals will need, such as the temp orders following the adversary, status, and permanency hearings.
- Request these any time before the clerk prepares the record.
- Your request cannot be refused if timely.
- Your request must be specific; generalities and requests for “all papers” will be ignored.
- Any party may request a supplement to the record.
- [Tex. R. App. P. 34.5](#) address what to do about inaccuracies, lost or destroyed documents, originals not easily copied, etc.



Sample Request for Clerk's Record



OFFICE OF THE
HARRIS COUNTY ATTORNEY
CHRISTIAN D. MENEFFEE

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, a true and correct copy of the foregoing instrument designating the items to include in a first supplemental clerk's record was sent electronically, via facsimile, via e-mail or via first-class mail, return-receipt requested to the following:

Counsel for Appellee Joshua Mireles:

Amy L. Mitchell
Law Office of Amy L. Mitchell
One East Greenway Plaza, Ste. 1005
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houscaln@nationwide.com

Counsel for Appellee Co-Claimant Joshua Mireles:

Everett Day
Everett Day & Associates
1811 Bering Dr., Ste. 300
Houston, TX 77057
eday@edayawfirm.com

Counsel for Intervenor Cristin Mireles:

Allen A. King Jr.
Crim & Villalpando, P.C.
2122 E. Governors Cir.
Houston, TX 77092
Allen@cviniurvlawyers.com

Counsel for Intervenor Colonial Co. Mut. Ins. Co.:

Jasmine F. Robinson
Law Office of Driskell & Lawrence
105 Decker Dr., Ste 150
Irving, TX 75062-2211
Robij14@nationwide.com

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

1015 CONGRESS, 15TH FLOOR, HOUSTON, TX 77002-1700 | 713-274-5101 |



Reporter's Record

Tex. R. App. P. 34.6

- Request for stenographic or electronic recording
- Designate all or part of proceedings and exhibits you are requesting
- Must request in writing at or before time for perfecting appeal (notice of appeal deadline):
 - Which portions of proceedings to include
 - Which exhibits to include
- File the request with the trial court clerk (with copy to reporter)
- You may still request the reporter's record if untimely



Reporter's Record, cont.

Important process for requests for partial records:

- Must include list of points or issues you will raise
- Limited to those points/issues
- Others may designate additional items
- Presumption that partial record is complete record for points/issues

Note: For jury trials, you may want to omit opening, closing, voir dire, etc., unless needed. Statutory hearings are usually unnecessary.



Sample Request for Reporter's Record



Vince Ryan
Harris County Attorney

January 14, 2015

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

Re: Request for Preparation of a Reporter's Record in the Appeal from *Harris County v. Gerald Knapp & Narciso Auriolos*, Cause No. 2012-20003 in the 333rd District Court of Harris County; Court of Appeals Cause No. 01-15-00052-CV

Dear Ms. Masera:

Harris County, Texas (the "County") is appealing the final judgment and associated orders rendered in this case by the 333rd District Court. Please note that the appeal has been assigned to the First Court of Appeals under Cause No. 01-15-00052-CV. As noted above, the style of the appeal should be *Harris County v. Gerald Knapp & Narciso Auriolos*.

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

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

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

1019 Congress, 15th Floor • Houston, TX 77002 • Phone: 713-274-5168 • Fax: 713-755-8848



Deadlines

Accelerated deadlines for filing record in the courts of appeals:

- Due 10 days after notice of appeal filed. [Tex. R. App. P. 35.1\(b\)](#)
- Court may extend up to 30 days in total. [Tex. R. App. P. 28.4\(b\)\(2\)](#)

If appellant takes care of her responsibilities, trial and appellate court responsible for ensuring record filed. [Tex. R. App. P. 35.3\(c\)](#); [37.3\(a\)\(1\)](#)

[Tex. R. App. P. 35.3\(a\)](#): Clerk's duty to ensure clerk's record timely filed if:

- Notice of appeal filed; and
- Payment made, arranged, or indigent

Deadlines, cont.

[Tex. R. App. P. 35.3\(a\)](#): Clerk's duty to ensure clerk's record timely filed if:

- Notice of appeal filed; and
- Payment made, arranged, or indigent

[Tex. R. App. P. 35.3\(b\)](#): Reporter's duty to ensure reporter's record timely filed if:

- Notice of appeal filed
- Record requested; and
- Payment made, arranged, or indigent

[Tex. R. App. P. 37.3\(b\) & \(c\)](#): If appellant fails to satisfy [Tex. R. App. P. 35.3](#)



Notice of Designation of New Counsel

- Trial counsel listed on e-file will continue to receive notice of filings.
- Appellate counsel should file a Notice of Designation of New Counsel to receive e-file notices.
- Once filed, appellate counsel will be able to access the record through the “Attorney Portal” on appellate court’s website

Of Counsel:
CHRISTIAN D. MENEFFEE
Harris County Attorney

Respectfully submitted,

/s/ Michael R. Hull
MICHAEL R. HULL
Senior Assistant County Attorney
TBN: 24003733
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(713) 437-4700 (facsimile)
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ATTORNEY FOR APPELLEE
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES



Common Standards of Review

Common Standards of Review

Abuse of Discretion

- Evidence; *See In re J.P.B.*, [180 S.W.3d 570, 575](#) (Tex. 2005).
- Discretionary Rulings; *See e.g., Joe v. Two Thirty-Nine Joint Venture*, [145 S.W.3d 150, 161](#) (Tex. 2004).

De novo

- Legal Issues; *See In re D.S.*, [602 S.W.3d 504, 514](#) (Tex. 2020)

Mixed Standard

- Ineffective Assistance of Counsel; deference on facts and de novo legal. *See In re M.P.A.*, [364 S.W.3d 277, 290](#) (Tex. 2012)



Common Standards of Review, cont.

Clear and Convincing Burden of Proof (BOP)

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



Drafting the Brief

Drafting the Brief: Timelines and Filing

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

Drafting the Brief: Technical Requirements

Tex. R. App. P. 9

- Electronic signatures okay. [Tex. R. App. P. 9.1\(c\)](#)
- Paper or page: 8.5 x 11. [Tex. R. App. P. 9.4\(b\)](#)
- One-inch margins. [Tex. R. App. P. 9.4\(c\)](#)
- Text=double-spaced. [Tex. R. App. P. 9.4\(d\)](#)
 - Footnotes, block quotes, lists, and issues/points of error may be single spaced. [Tex. R. App. P. 9.4\(d\)](#)
- Appendix: If electronic, should be attached to brief and must contain bookmarks to documents. [Tex. R. App. P. 9.4\(h\)](#)

Drafting the Brief: Technical Requirements, cont.

- Typeface, minimum: [Tex. R. App. P. 9.4\(e\)](#)
 - 14-point text
 - 12-point footnotes (13-pt recommended)
- Max. length of briefs: [Tex. R. App. P. 9.4\(i\)\(2\)\(B\),\(C\)](#)
 - Principal briefs: 15,000 words or 50 pages
 - Reply briefs: 7,500 words or 25 pages
 - Aggregate for all briefing: 27,000 words or 90 pages
- Some parts of brief not included in word or page count. [Tex. R. App. P. 9.4\(i\)\(1\)](#)
- ❖ Suggestion: Get a PDF editing program/app

Drafting the Brief: Technical Requirements, cont.

Tex. R. App. P. 9

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

Appellant's Brief

Tex. R. App. P. 38.1:

- Cover Page [Tex. R. App. P. 9.4\(g\)](#)
 - Case style and number
 - Title of filed document
 - Name of party filing document
 - Signature block: Name, mailing address, telephone, fax, email and State Bar number for lead counsel
 - Oral argument requested (or not)

NO. 14-22-00384-CV

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

IN THE INTEREST OF R.C., A CHILD

A.E.M.,
Appellant,

v.

H.K. and D.K.,
Intervenors/Appellees

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

BRIEF OF THE TEXAS DEPARTMENT OF
FAMILY AND PROTECTIVE SERVICES

Of Counsel:
CHRISTIAN D. MENESEE
Harris County Attorney

MICHAEL R. HULL
Senior Assistant County Attorney
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(713) 437-4700 (facsimile)
michael.hull@cao.hctx.net (e-mail)

ORAL ARGUMENT
NOT REQUESTED

ATTORNEY FOR APPELLEE
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES

Identities of Parties and Counsel

Tex. R. App. P. 38.1(a)

- List of all parties to judgment or order appealed from
 - Names and addresses of all trial counsel
 - Include children's ad litem(s) and attorneys who withdrew from the case
- Include bar and phone numbers and e-mail address

IDENTITY OF PARTIES AND COUNSEL

Petitioner – Appellant	Trial Counsel
Texas Department of Family and Protective Services (“TDFPS”)	Tiffany Garcia State Bar No. 24048478 Assistant County Attorney Office of the Harris County Attorney 1019 Congress, 15th Floor Houston, TX 77002 (713) 274-5318 (telephone) (713) 437-4700 (facsimile) Tiffany.Garcia@harriscountytexas.gov
Petitioner – Appellant	Appellate Counsel
Texas Department of Family and Protective Services (“TDFPS”)	Michael R. Hull Senior Assistant County Attorney State Bar No. 24003733 1019 Congress, 15th Floor Houston, TX 77002 (713) 274-5138 (telephone) (713) 437-4700 (facsimile) Michael.Hull@harriscountytexas.gov
Respondent – Appellant (Mother)	Trial Counsel
A.E.M. (Mother of R.C., a Child)	Alexandra B. George Tex. Bar No. 24101801 441 Louisiana St., Ste. 1225 Houston, TX 77002 ageorge.esq@gmail.com
Respondent – Appellant (Mother)	Appellate Counsel
A.E.M. (Mother of R.C., a Child)	Michael F. Craig Tex. Bar No. 24038842 1533 W. Alabama St. Houston, TX 77006 (713) 526-2226 (telephone) (713) 526-3787 (facsimile) mikecraiglaw@yahoo.com

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Respondent (Father) (Not Appealing)	Trial Counsel
J.C. (Non-Appealing Father of R.C., a Child)	James Mark Cooper Tex. Bar No. 00783872 300 Fannin St., Ste. 205 Houston, TX 77002 cooperlaw@gmail.com
Intervenor – Appellees	Trial Counsel
H.K. and D.K. (Foster Parents)	Michael Schneider Tex. Bar No. 24006221 Berg Plummer Johnson & Ravel, LLP 3700 Buffalo Speedway St., Ste. 1150 Houston, TX 77098 (713) 526-0200 (telephone) (832) 615-2665 (facsimile) mnschneider@bergplummer.com Thao Tran Tex. Bar No. 24075177 440 Louisiana St., Ste. 900 Houston, TX 77002 (713) 223-0754 (telephone) thaotranlawoffice@gmail.com
Intervenor – Appellees	Appellate Counsel
H.K. and D.K. (Foster Parents)	Heather Daniels Tex. Bar No. 24065115 411 Fannin St., Ste. 250 Houston, TX 77002 heather.c.daniels@gmail.com

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Tex. R. App. P. 38.1(b)

Table of Contents (T/C)

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

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- Must be alphabetical within each section
- Include pages of brief on which authorities cited/appear
- **TIP:** Sort by type of authority

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Statement of Case

Tex. R. App. P. 38.1(d)

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

STATEMENT OF THE CASE

This case began with the Department's filing of its Original Petition seeking termination or conservatorship of a child, R.C. ("Ryan"), on October 6, 2020. *CR6-18*. The Department's live pleading was its First Amended Petition, filed on January 6, 2021. *CR95-106*.

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

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

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

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

xiv

STATEMENT OF THE CASE

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

Name of the Judge: Judge John Phillips

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

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

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

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

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

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

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

viii



Statement Regarding Oral Argument

Tex. R. App. P. 38.1(e)

- Note whether you want oral argument and why it should be given (why it would aid decisional process)
- Also reference to request on cover page
- Reasons for oral argument?
 - Novel legal issue
 - Conflicts among appellate courts
 - Novel factual situation (why distinguishable from precedent)
 - Desire oral argument for board certification

STATEMENT REGARDING ORAL ARGUMENT

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

iv



Issues Presented

Tex. R. App. P. 38.1(f)

- List of all issues or points presented
- Issues vs. points
- Issues cover every subsidiary question that is fairly included
 - Maybe include subsidiary issue/point to draw attention to bigger issue?

TIPS:

- Use issues to explain/advocate (within reason)
- More issues/points does not usually increase your chances of success

Note: Parts of the brief to this point are not counted in the word or page limits! ([Tex. R. App. P. 9.4\(i\)\(1\)](#))

ISSUE PRESENTED

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

xvii



Statement of Facts

Tex. R. App. P. 38.1(g)

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

STATEMENT OF FACTS

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

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

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

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

A. The Department's Case Begins

This case began with the Department's filing of its Original Petition seeking termination or conservatorship of a child, R.C. ("Ryan"), on October 6, 2020. *CR6-18*. The Department's live pleading was its First Amended Petition, filed on January 6, 2021. *CR95-106*. The Department sought temporary managing conservatorship of Ryan, *CR97*, permanent managing conservatorship of Ryan, *CR99-100*, and termination of Mother and Father's parental rights to Ryan, *CR100-102*.

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

Sample Statement of Facts

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

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

B. The Foster Parents Intervene

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

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

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

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

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

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

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

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

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

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

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



Summary of the Argument

Tex. R. App. P. 38.1(h)

- “Succinct, clear and accurate statement of the arguments”
- Must not simply repeat issues or points
- Read first by some justices
- Usually one or two pages—but that’s your choice

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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



Argument & Authorities

Tex. R. App. P. 38.1(i)

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

ARGUMENT & AUTHORITIES

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

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

Example of a Standard of Review and Argument Section

I. Standard of Review

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

II. Argument

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

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

acts or omissions in subsections (D), (E), and (O) of § 161.001(b)(1). *CR534-535*. The court also awarded joint managing conservatorship of Ryan to the Foster Parents rather than Ryan's maternal aunt or the Department. *CR535-536*. Mother challenges these findings, but the Department does not.

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

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

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



Prayer and Signature

Tex. R. App. P. 38.1(j)

- Clearly state nature of relief sought
- May request alternative relief
- Standard signature block

PRAYER

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

Respectfully submitted,

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ATTORNEY FOR APPELLANT
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES

Certificate of Compliance

Tex. R. App. P. 9.4(i)(3)

- Needed if done on computer
 - May rely on word count generated by word processor
 - Include footnotes
 - Exclude cover page through and including Statement of Issues; include nothing after Prayer
- Signature block (abbreviated)

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

ATTORNEY FOR APPELLEE
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES

Appendix

Tex. R. App. P. 38.1(k)

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

APPENDIX TABLE OF CONTENTS

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Tab 8:	Intervenors' and Ad Litem for Child's Objection to Court-Appointed Appellate Attorney for Mother

Appellee's Brief

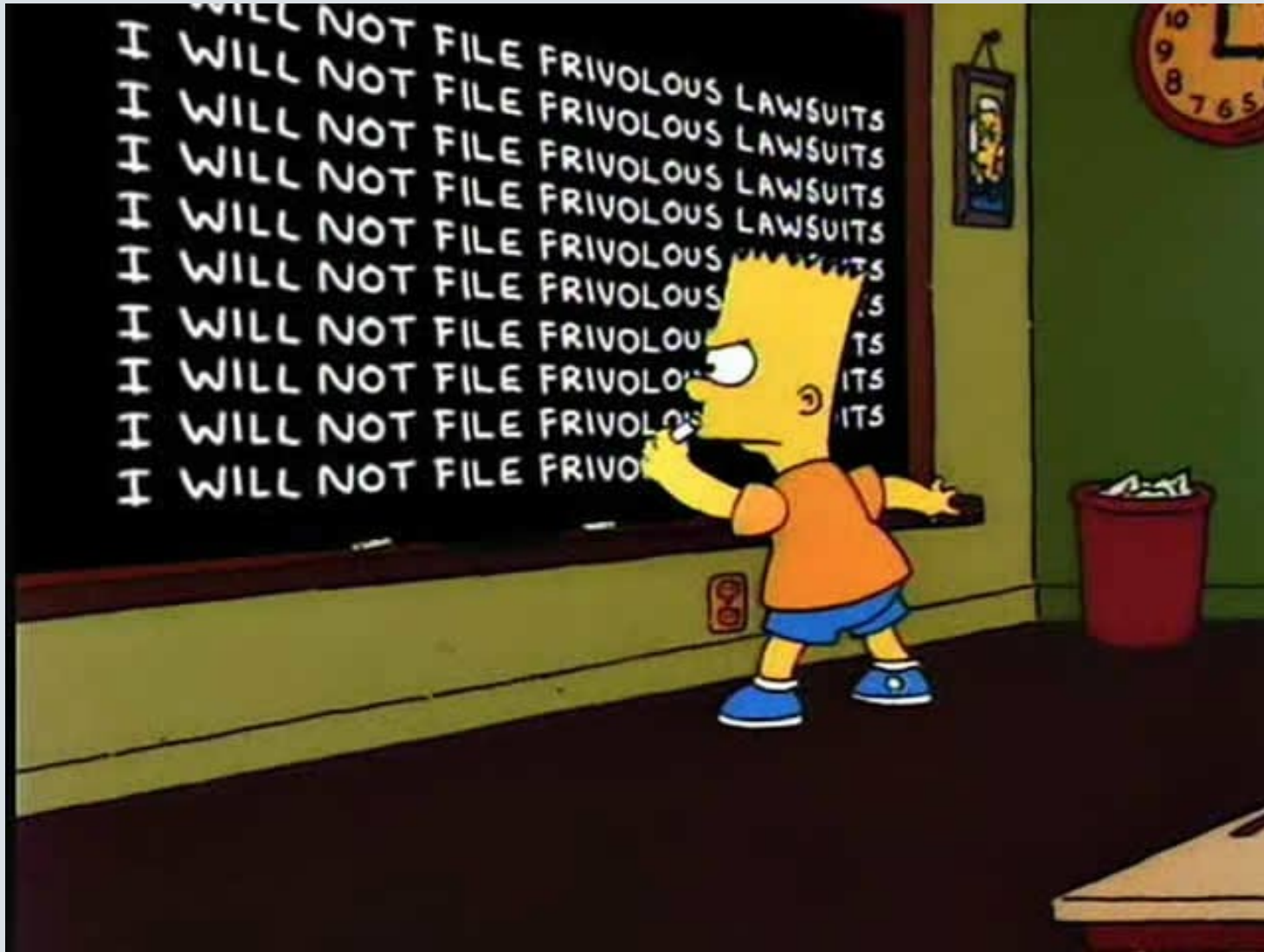
Tex. R. App. P. 38.2

Same as appellant's brief, except:

- List of parties and counsel unless incorrect
- Statements of the case, of the issues, or of the facts unless dissatisfied with appellant's
- Appendix unless adding something additional
- Adoption by reference. [Tex. R. App. P. 9.7](#)
 - “Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case.”
- Reply briefs permitted, but court may decide before filed. [Tex. R. App. P. 38.3](#)
- Briefing rules construed liberally, but court may require amendment or re-briefing. [Tex. R. App. P. 38.9](#)

Advocacy Tips

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



Frivolous Appeals

Frivolous Appeals

[Tex. R. App. P. 45](#): Damages potentially awarded for frivolous appeals; *but see In re P.M.*, [520 S.W.3d 24, 27-28](#) (Tex. 2016) (counsel may file *Anders* brief if appellate issues potentially frivolous; see Slide 5).

- *Anders* guidelines, checklist and forms on courts of appeals sites (under “Practice Before the Court”)
- Counsel must:
 - Thoroughly review record and law
 - File brief detailing review and explaining why appeal frivolous
 - Move to withdraw
 - Provide brief and motion to client
 - Inform parent she can respond *pro se*
 - Assist client in acquiring record and answer client’s questions



Submission to Court of Appeals

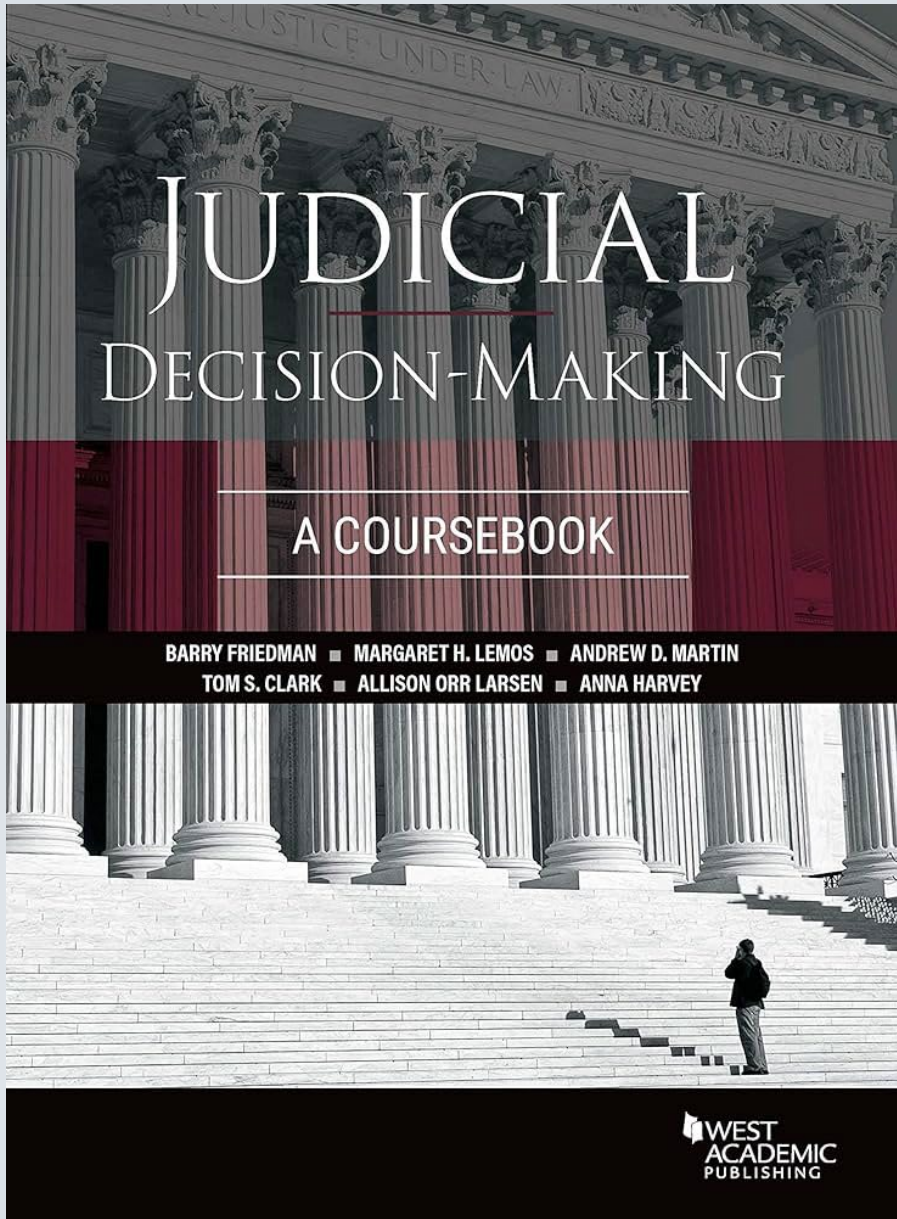
Submission

Tex. R. App. P. 39

- Submission: “The state or quality of an impending decision’s being under active consideration by a court” BLACK’S LAW DICTIONARY (11th ed.)
- May be with or without oral argument. [Tex. R. App. P. 39.1](#)
- Oral argument waived if not requested on front of brief, but court may still order. [Tex. R. App. P. 39.7](#)
- Notice of submission from clerk at least 21 days prior. [Tex. R. App. P. 39.8](#)

Oral argument suggestions:

- Nothing to fear—Texas appellate courts are gentle
- Be prepared!
- Have an opening, outline of arguments (including important factual or legal references), and closing (including specific relief requested)
- Do not read from outline or brief
- When a justice speaks, you zip it
- Answer questions as asked. It was asked for a reason!



Decisions

Decisions

Tex. R. Jud. Admin. 6.2:

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





Rehearing &
Reconsideration

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

Motion for Rehearing

Tex. R. App. P. 49.1 - 49.4

- Due within 15 days of appellate judgment
- May request extension
- Limit of 4,500 words or 15 pages. [Tex R. App. P. 9.4\(i\)\(2\)\(D\)](#)
- No response necessary unless court requests
- May file additional motion within 15 days only if court alters judgment or opinion

Motion for *En Banc* Reconsideration

Tex. R. App. P. 49.5 and 49.6

- May file as separate motion, with or without motion for rehearing
- Same deadlines and word limits as motion for rehearing
- Must address *en banc* standards in [Tex. R. App. P. 41.2\(c\)](#)
- May file additional motion within 15 days only if court alters judgment or opinion
- Because accelerated, court may deny right to file or shorten time to file these motions
- Not necessary for Supreme Court review



Petitions for Review (Very Briefly)

Petitions for Review

Tex. R. App. P. 53-65

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

Resources

McDonald & Carlson, Texas Civil Practice (2d ed.) (Vol. 6 devoted exclusively to Texas civil appeals)

- Most thorough treatment

O'Connor's Texas Civil Appeals (new edition yearly)

- Handy; treatment is broad but not as deep as McDonald/Carlson

Texas Jurisprudence (www.txcourts.gov)

- Basic, but a good place to start
- Opinions, briefs, rules, etc. for each Texas appellate court

Conclusion

- Texas Rules of Appellate Procedure are not complicated
- They are forgiving; other than missing the notice of appeal deadline, mistakes are not fatal.
- Getting an appeal ready and briefed is not difficult, but it is time consuming and requires organization.
- Set aside the necessary time and be organized.
- Don't worry! Follow these guidelines, and then...



Questions?

Michael Hull

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