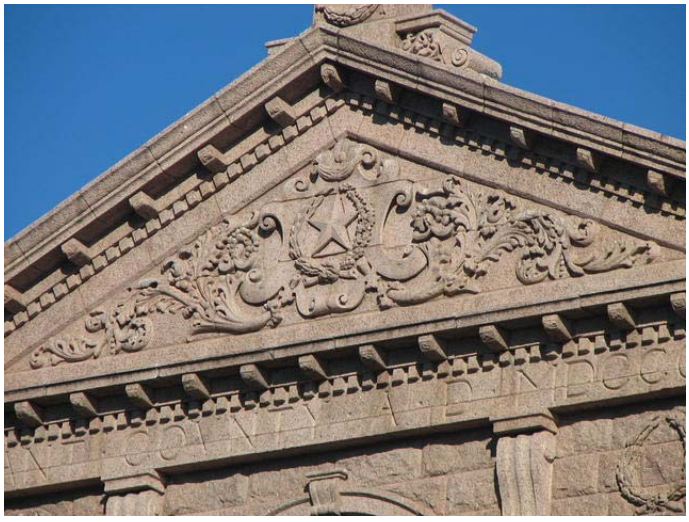

SECTION 8 DE NOVO HEARINGS AND POST TRIAL STRATEGIES

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

The DFPS Appellate Unit

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

The appellate unit has primary responsibility for representing DFPS:

- In response to an appeal arising from a final order in a suit brought under CHAPTER 263 of the TEXAS FAMILY CODE;
- In appealing a final order under CHAPTER 263 on behalf of the Department;
- In response to a mandamus action filed by a party; and
- In seeking mandamus review of trial court action on behalf of the Department.

Setting the Stage for An Appeal

The importance of trial counsel creating a solid record increased exponentially when the Texas Supreme Court issued its' opinion construing TEXAS FAMILY CODE §263.405 *vis-a-vis*' ineffective assistance of counsel claims.[1] In *J.O.A.*, the Texas Supreme Court found §263.405(i) to be unconstitutional to the extent it "precludes a parent from raising a meritorious complaint about insufficiency of the evidence to support a termination order" through counsel's failure to file a statement of points and resulting due process violation.

Applying the *Matthews v. Eldridge*[2] test, the *J.O.A.* Court concluded that while every failure to preserve factual sufficiency issues will not support a claim of ineffective assistance of counsel, where the attorney's performance falls below an objective standard of reasonableness, the risk of erroneous deprivation in a suit to terminate parental rights re-

[1] *In re J.O.A.*, ____ S.W.3d ____2009 Tex. LEXIS 250 (Tex. May 1, 2009).
[2] *Matthews v. Eldridge*, 424 U.S. 319 (1976).

quires that the procedural rule for preservation of an appellate issue under Family Code section 263.405 give way to due process considerations.[3] Finding the trial attorney's failure to file a timely statement of points as "tantamount to abandoning his client at a critical stage of the proceeding", the court cited the fact that **appellate** counsel was not appointed until after the deadline for filing the statement had passed and concluded the father was denied due process as a result of the ineffective assistance of trial counsel in failing to file a statement of points.

The *J.O.A.* opinion suggests that trial courts take a proactive approach to assure indigent parents do not inadvertently waive appellate rights and act expeditiously to appoint appellate counsel. The DFPS Appellate Unit also recommends that counsel for the agency take the following steps to minimize the likelihood of a successful appeal based on the ineffective assistance of counsel:

1. Use careful judgment in deciding what evidence to introduce at trial. Do not attempt to introduce uncertified criminal convictions, irrelevant or highly prejudicial photographs, or polygraph test results. If the admissibility of certain evidence is questionable, only use it if it is essential to the case. If you do so, supplement the record with as much competent evidence as possible so that the judgment will not be reversed if the questionable evidence is thrown out based on a claim of ineffective assistance for failing to object to the evidence.

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

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

4. Check to make sure all orders and filings are proper and complete. When DFPS seeks termination of parental rights, there should also be a request for the specific findings necessary to give DFPS managing conservatorship under Family Code section153.131 to ensure DFPS will maintain conservatorship if the termination is reversed.[4]

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[3] TEX. FAM. CODE §263.405 (post-trial procedure for preservation of issues on appeal in state-sponsored parental-rights termination case).

[4] *In re J.A.J.*, 243 S.W.3d 611, 617 (Tex. 2007) (trial court's award of managing conservatorship to the Department not reversed, even though the termination was reversed, because the trial court made separate findings regarding conservatorship under FAMILY CODE SECTION §153.131 and those findings were not specifically challenged on appeal).

5. Play by the rules. Don't ask for relief on a motion not filed with the court, or fail to give proper notice. Make sure cases are properly set and heard within the statutory timelines. Failing to follow the rules simply lays the groundwork for an appeal.

6. Whether or not the trial court heeds the Supreme Court's advice to be proactive about appointing counsel, counsel for DFPS should advocate that the trial court fulfill this duty. Whether it is the initial appointment of counsel, a new appointment necessary after parent's attorney withdraws, or the appointment of appellate counsel, it is to the agency's benefit that the court's failure to appoint counsel timely does not create the basis for reversal of a judgment.

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

8. Facilitate the appearance of an incarcerated parent at trial by requesting a bench warrant or asking the court to accept a telephonic appearance. As with a jury trial, if you argue against a bench warrant, make sure you know the applicable law and articulate the proper test and standards in your argument.

9. When you encounter a problem or need to discuss strategy, contact the DFPS Appellate Unit. They will be monitoring and reporting on appellate court decisions in the wake of the *J.O.A.* opinion and welcome the opportunity to aid litigators in shaping the record to best withstand appellate scrutiny.

De Novo Hearings

An associate judge may render and sign any order except a final order.[5] After a trial on the merits, an associate judge may recommend an order to the referring court.[6]

A party seeking to challenge an associate judge's proposed order or judgment must file a request for a *de novo* hearing before the referring court with the clerk of the referring court no later than the seventh working day after receipt of the substance of the associate judge's report.[7] The referring court shall give notice to the parties and hold a *de novo* hearing no later than the 30th day after the filing of the initial request.[8]

If there is no timely request for a *de novo* hearing, or the right to request one is waived, the proposed order or judgment of an Associate Judge for Child Protection Cases (CPS associate judge, not a traditional associate judge) becomes the order or judgment of the referring court by operation of law.[9] Denial of relief after a *de novo* hearing or waiver of

[5] TEX. FAM. CODE §201.104(b).
[6] TEX. FAM. CODE §201.104(c).
[7] TEX. FAM. CODE §§201.015; 201.2042.
[8] TEX. FAM. CODE §201.01(e);(f).
[9] TEX. FAM. CODE §201.2041(a).

the right to a *de novo* hearing does not affect the right to file a motion for new trial, motion for judgment notwithstanding the verdict, or other post-trial motion.[10]

Post-Trial Wrap Up

Obtaining termination of parental rights from a jury verdict or a bench trial does not end trial counsel's involvement in the case. Counsel for DFPS must:

- Prepare the judgment, making sure to track the language of the jury charge in a jury trial;
- circulate the judgment for signatures from opposing counsel, CASA, and any other parties;
- file a Motion to Enter Judgment if a party fails or refuses to sign the judgment;
- schedule a section 263.405(d) hearing not later than 30 days after the judgment is signed by the trial judge; and
- schedule a Placement Review.

Procedures designed to streamline and expedite appellate review of CPS cases require active and careful participation by trial counsel to ensure that a case is properly set-up for appeal. Specifically, trial counsel must know:

- Timeframes for accelerated appeals; and
- how to conduct a Family Code section 263.405(d) hearing.

Timeframes

All appeals of final orders for placement of children in CPS care, whether termination is granted or not, are subject to the accelerated appeals process.[11]

What triggers the deadline for filing an appeal?

A judgment generally proceeds through three stages: rendition, reduction to writing, and entry. The trial court's signing of a judgment triggers the time for filing an accelerated appeal.[12] The time periods for filing interlocutory appeals permitted by statute and mandamus actions are governed by different criteria.

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

[10] TEX. FAM. CODE §201.015(h).
[11] TEX. FAM. CODE §§109.002(a), 263.405(a); TEX. R. APP. P. 26.1(b).
[12] TEX. R. APP. P. 26.1.

For a complete schedule of post-trial deadlines, consult the chart below. Pursuant to statute, no later than fifteen (15) days after a final order is signed by the trial court, a party seeking to appeal the order must file a statement of points on which the party intends to appeal.[13] However, the trial court, for good cause, may grant a fifteen-day (15) extension for filing the statement of points.[14] A request for a new trial must also be filed within fifteen (15) days of the trial court signing the judgment.[15] No post-trial motion will extend the time for filing a notice of appeal.[16] In an accelerated appeal, the notice of appeal must be filed within twenty (20) days after signing the judgment or order.[17] However, the appellate court may grant a fifteen-day (15) extension for filing a notice of appeal.[18]

Procedures

A statement of points is a concise summary of each legal point to be raised on appeal. The purpose is to provide the trial court with a mechanism to avoid needless appeals.[19] A general claim that the evidence is not legally or factually sufficient is not sufficiently specific to preserve an issue for appeal.[20] Any issue not specifically identified in the statement of points cannot be considered by the court of appeals.[21]

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

After a jury or bench trial, a motion for new trial can be used to preserve post-trial complaints that require evidence to be heard, such as newly discovered evidence, or a challenge based on the court's failure to set aside a default judgment. A statement of points may be combined with a motion for new trial, but a motion for new trial does not extend the timeframe for filing an appeal in the case of a mandatory accelerated appeal.[22] Note that a motion for new trial effectively vacates the prior trial and judgment. Thus, if a new trial is granted, a trial on the merits must be commenced prior to the dismissal deadline of Family Code section 263.401 or the case will be dismissed.[23]

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[13] TEX. FAM. CODE §263.405(b)(2).
[14] *In re M.N.*, 262 S.W.3d 799, 803 (Tex. 2008).
[15] TEX. FAM. CODE §263.405(b)(1).
[16] TEX. FAM. CODE §263.405(c); *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005).
[17] TEX. R. APP. P. 26.1(b).
[18] TEX. R. APP. P. 10.5(b); *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).
[19] *In re R.J.S. and M.S.*, 219 S.W.3d 623, 626 (Tex. App.–Dallas 2007, pet. denied).
[20] TEX. FAM. CODE §253.405(i).
[21] *Id*.
[22] TEX. FAM. CODE §263.405(b-1), (c); *In re K.A.F.*, 160 S.W.3d at 927.
[23] *In re Dep't of Family and Protective Servs.*, 273 S.W.3d 637, 647-49 (Tex. 2009) (trial court timely rendered order terminating mother's parental rights but then granted her a new trial; mother's motion to dismiss after trial court failed to enter a new termination order prior to the dismissal deadline proper; case was dismissed for failure to comply with the mandatory dismissal deadline of Family Code section 263.401).

When is a motion for new trial appropriate?

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

- Which require evidence to be heard, such as newly discovered evidence, or the failure to set aside a default judgment;
- That the evidence was factually insufficient to support a jury finding; or
- Regarding incurable jury argument if not otherwise ruled upon by the trial court.[24]

The best strategy in response to a motion for new trial will depend on the nature of the new evidence proffered (if any) and the validity of any arguments made as to why the arguments or evidence were not offered at time of trial. If a motion for new trial arises from a default judgment, review of the procedural requirements for a default judgment is essential to assess the likelihood of a default being set aside. *See* Practice Guide, Section 3 Litigation Essentials, Default Judgments.

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

The trial court retains plenary power to change any part of the order, without a motion, for thirty (30) days from the date a final order is signed.[25] In a child protection suit, the trial court is expressly authorized to make any order necessary to protect the safety and welfare of the child during the pendency of an appeal. This may include appointment of a temporary conservator, issuance of a restraining order, child support order, an order restricting removal of the child from a specific geographic area, or similar temporary relief.[26] Unless the appellate court supersedes such orders, the trial court retains authority to enforce such orders.[27]

What is a section 263.405(d) hearing?

No later than thirty (30) days after a final order is signed, the trial court must hold a hearing to determine whether:

- A new trial should be granted;
- A party's claim of indigence should be sustained; and
- An appeal of the case is frivolous.[28]

The courts of appeals are split as to the effect of a failure to hold the required hearing under section 263.405(d). One court has specifically held that the hearing is necessary, and that the failure to hold the hearing results in the court's preclusion from considering any

[24] TEX. R. CIV. P. 324(b).
[25] TEX. R. CIV. P. 329b(d).
[26] TEX. FAM. CODE §109.001(a), (d).
[27] TEX. FAM. CODE §109.001(b).
[28] TEX. FAM. CODE §263.405(d).

issues on appeal.[29] Another court has held the opposite: that a section 263.405(d) hearing is not necessary in order to preserve issues for appeal.[30] A third court has held that failure to conduct the section 263.405(d) hearing does not warrant reversal of the underlying judgment; instead, the appropriate remedy is to abate the appeal and direct the trial court to comply with the statutorily mandated section 263.405(d) hearing.[31]

Because the appellate courts have reached such varying conclusions regarding section 263.405(d) hearings, this Practice Guide cannot set out a standard procedure for how to handle the hearings. The best practice is to determine the appellate court's position in your jurisdiction and proceed accordingly.

How should counsel representing CPS respond to a party's claim of indigence and request for appointed counsel?

If a party claims indigence and requests appointment of counsel, the court must hold an evidentiary hearing. If the court fails to render and sign a written order denying such a request before the thirty-sixth (36) day after the final order is signed, the court *must* appoint counsel.[32]

Counsel for DFPS may contest an indigence claim on the merits, or if the claim is untimely, and by doing so, force the appellant to prove indigence.[33] Equally important, if a party is deemed indigent, counsel for DFPS should make every effort to ensure the trial court adheres to the statutory requirements for making a timely appointment of appellate counsel.

What is DFPS counsel's role in the frivolous finding?

An appeal is frivolous when there is no arguable basis in law or in fact, or no substantial question for appellate review.[34] By responding at the section 263.405(d) hearing to each point raised by the appealing party by specifically recounting the relevant evidence and authority, counsel for DFPS can persuade the trial court to find that an appeal is frivolous and create a record that will support the trial court's frivolous finding on appeal.[35]

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[29] *In re R.J.S.*, 219 S.W.3d at 627.

[30] *In re J.A.B.*, No. 2-06-404-CV, 2007 Tex. App. LEXIS 8294, *7 (Tex. App.–Fort Worth Oct. 18, 2007, no pet.) (mem. op.).

[31] *Wall v. Tex. Dep't of Family and Protective Servs.*, 173 S.W.3d 178, 183 (Tex. App.–Austin 2005, no pet.).

[32] TEX. FAM. CODE §263.405(e); *In re L.F.B.*, No. 06-06-00040-CV, 2006 Tex. App. LEXIS 7379, *1-*2 (Tex. App.–Texarkana Aug. 22, 2006, no pet.) (mem. op.).

[33] TEX. R. APP. P. 20.1(c), (e), (g); *In re S.T. and B.T.*, 239 S.W.3d 452, 456 (Tex. App.–Waco 2007, pet. denied).

[34] TEX. CIV. PRAC. & REM. CODE §13.003(b).

[35] *In re A.S.*, 239 S.W.3d 390, 392-93 (Tex. App–Beaumont 2007, no pet.) (frivolous finding affirmed where evidence supporting the judgment cited at the section 263.405(d) hearing included: father's abuse of illegal drugs with mother during her pregnancy; his failure to help mother get mental health treatment during pregnancy; his continued use of illegal drugs while on parole; positive drug screen during single visit with his child; statement that he would not visit the child because DFPS required a drug screen and his pa-

What happens if the court denies a party's claim of indigence or finds the appeal is frivolous?

The party affected can appeal either or both decisions by filing the reporter's record from the section 263.405(d) hearing and clerk's record no later than the tenth (10) day after the decision.[36] A finding of frivolousness limits the party's appeal to the frivolous finding only.[37] By statute, the appealing party is entitled to the record of the section 263.405(d) hearing only when appealing a frivolous finding.[38]

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

The Department's Appellate Unit handles termination appeals across the entire state. An attorney representing the Department may refer an appeal to the DFPS Appellate Unit by completing a referral form and forwarding it to the unit for consideration. Appellate referral forms can be obtained by e-mailing Janice Goff, legal assistant for the DFPS Appellate Unit, at janice.goff@dfps.state.tx.us or calling the appellate unit at (512) 929-6819. Once completed, the referral form and any post-trial documents should be e-mailed to Trevor Woodruff, DFPS Appellate Attorney, at trevor.woodruff@dfps.state.tx.us.

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role officer would be notified when he failed the drug screen; the fact that father's parole was revoked when the child was five months old, based in part upon his conviction for two more crimes; his failure to establish that he had a suitable residence for the child; and his failure to identify a relative who would care for the child during his incarceration); *In re K.D.*, 202 S.W.3d 860, 868 (Tex. App.–Fort Worth 2006, no pet.) (challenges to the legal and factual sufficiency of the evidence frivolous where evidence showed mother: used up to three grams of methamphetamine daily; was unemployed; failed to maintain safe and suitable housing; lived with a man she knew to be a drug abuser; failed to attend several drug treatment programs; was expelled from a court-ordered drug treatment program; allowed her child to wander around a motel parking lot for over an hour while she was sleeping off a methamphetamine high; failed to attend to child's severe diaper rash and head-lice infestation; attended just thirteen of thirty-four possible visits with her child; and made virtually no progress on her CPS service plan).

[36] TEX. FAM. CODE §263.405(g).

[37] TEX. FAM. CODE §263.405(g); *In re R.A.P. II*, No. 14-06-00109-CV, 2007 Tex. App. LEXIS 471, *5 (Tex. App.–Houston [14th Dist.] Jan. 25, 2007, pet. denied) (mem. op.).

[38] *In re T.G.*, No. 04-08-00882-CV, 2007 Tex. App. LEXIS 4187, *4 (Tex. App.–San Antonio May 30, 2007, no pet.) (mem. op.). (the consideration of the frivolous finding arises from a consideration of the statement of points and the record of the (d) hearing alone); *but see In re M.R.J.M.*, 193 S.W.3d 670, 674 (Tex. App.–Fort Worth 2006, order) (the provision in (g) stating that the "appellate court shall render appropriate orders after reviewing the records and appellate briefs, if any", allows the appellate court to request a full record of the trial to determine frivolousness).

CRITICAL DEADLINES FOLLOWING FINAL JUDGMENT[39]

1	TJS	Termination Judgment Signed
	TJS +10	Request for findings of fact & conclusions of law
2	TJS+15	Request/motion for new trial due – § 263.405(b)(1)
3	TJS+15	Statement of Points due – § 263.405(b)(2)
4	TJS+20	Notice of Appeal due – TEX. R. APP. P. 26.1(b)
5	TJS+20	Affidavit of Indigence due
		TEX. R. APP. P. 20.1(c)(1) ("AD")
6	AD+10	Contest to affidavit of indigence, if necessary, due
		TEX. R. APP. P. 20.1(e)
7	TJS+30	Hearing (30 day hearing) to decide:
		a) whether to grant a motion for new trial;
		b) whether the appealing party is indigent; and
		c) whether the appeal is frivolous - § 263.405(d)
8	TJS+36	Absent written ruling from 30 day hearing,
		indigence is presumed
		and counsel shall be appointed – § 263.405(e)
9	30 Day	Reporter's record and clerk's record from the
		30 day hearing must
		be filed in the appellate court – § 263.405(g)
	Hearing	
	date+10	
10	TJS+60	Appellate record must be filed, unless after the
		30 day hearing:
		a) a new trial was granted; or
		b) the trial court denied a free record (not indigent) - § 263.405(f)

[39] This chart is reprinted from *In re S.T. and B.T.*, 239 S.W.3d 452, 460 (Tex. App.–Waco 2007, pet. denied) (C.J., Gray, dissenting).