A PRIMER TO HANDLING YOUR FIRST (OR NEXT) PARENTAL-RIGHTS TERMINATION CASE ON APPEAL

BY JUSTICE GINA M. BENAVIDES & JOSHUA J. CALDWELL
THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI - EDINBURG

"Parental rights are far more precious than any property right, and when the State initiates a termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."

-In re E.R., 385 S.W.3d 552, 563 (Tex. 2012)

I. INTRODUCTION

As in the trial courts, parental-rights termination cases have a special place on the appellate courts' dockets. These cases are subject to stringent deadlines and procedures and receive special considerations by the appellate courts because of their time-sensitive nature and constitutional implications.

This paper is intended to serve as a primer for any practitioner who is preparing to handle his or her first (or next) parental-rights termination case on appeal. This paper will begin with a discussion regarding the appellate jurisdiction over parental-rights termination cases, then discuss the procedural and substantive pitfalls to avoid when briefing these cases on appeal, oral argument procedures, and finally, the procedures for seeking a petition for discretionary review at the Texas Supreme Court.

II. APPELLATE JURISDICTION

An appeal from a final order rendered in a parental-rights termination suit is considered the same as civil cases generally under the Texas Rules of Appellate Procedure.[1] These cases are given precedence over other civil cases and are accelerated by the appellate courts.[2] Thus, because parental-rights termination cases are accelerated appeals, the notice of appeal must be filed within 20 days after the judgment or order is signed.[3] The appellate court may extend the time to file the

> ➢**PRACTICE TIP**
> Make a bona fide attempt to invoke appellate jurisdiction.

[1] TEX. FAM. CODE ANN. § 109.002(a).
[2] *Id.*
[3] TEX. R. APP. P. 26.1(b).

notice of appeal if, within 15 days after the deadline to file the notice of appeal, a party files a notice of appeal with the trial court and complies with Texas Rule of Appellate Procedure 10.5(b)(2).[4] Filing a written notice of appeal with the trial court clerk invokes the court of appeal's jurisdiction over the parties to the trial court's judgment or order.[5] Keep in mind, however, that any party's failure to take any other step as required by these rules, including the failure of another party to perfect an appeal, does not deprive the appellate court of jurisdiction but is a ground only for the appellate court to act appropriately, including dismissing the appeal.[6] A timely filed document, even if defective, invokes the court of appeals' jurisdiction.[7]

III. RECORD AND BRIEFING

This section will discuss the various deadlines involved in filing a record in these cases, as well as procedural and substantive pointers to consider while briefing a parental-rights termination appeal.

A. Appellate Record

The appellate record is due within ten days after the notice of appeal is filed.[8] Any request for extension of time to file the record may not exceed 10 days.[9] Any extensions granted to file the record may not exceed 30 days cumulatively absent "extraordinary circumstances."[10]

B. Briefing: Procedural Tips

[4] *Id.* R. 26.3 (Extension of Time to File a Notice of Appeal)
[5] *Id.* R. 25.1(b).
[6] *Id.* R. 25.
[7] *Sweed v. Nye*, 323 S.W.3d 873, 875 (Tex. 2010).
[8] TEX. R. APP. P. 35.1(b).
[9] *Id.* R. 35.3(c).
[10] *Id*. R. 28.4(b)(2).

The appellant's brief is due within 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, and appellee's brief is due 20 days after the date the appellant's brief was filed.[11] Some appellate courts have developed special briefing policies. For example, the Thirteenth Court of Appeals developed a policy to allow counsel only one ten-day extension of time to file the brief. Additional motions for extension of time will not be favorably entertained by this Court, absent truly extraordinary circumstances alleged and supported by appropriate argument, authority, and evidence. If the brief is still not timely filed after the sole extension has been granted, and the case does not show truly extraordinary circumstances, the Court will abate and remand the case to the trial court with instructions to appoint new counsel.

The procedural briefing rules regarding parental-termination cases are taken very seriously by the courts of appeal because the Texas Rules of Judicial Administration encourage the intermediate appellate courts to, so far as reasonably possible, bring parental-rights termination cases to final disposition within 180 days of the date the notice of appeal is filed.[12]

C. Briefing: Substantive Tips

Ensuring that a brief is procedural sound is merely half the battle. The next step is to also submit a quality brief that clearly and concisely explains your position. This paper will not focus on the nuts and bolts of brief writing, but will instead emphasize what is important to include in your brief for this type of case.

First, a detailed procedural history of parental-rights termination cases is important to give the readers a clear outline of how the case came to the court of appeals.

[11] *Id.* R. 28.4(a), R. 38.6(a), (b).
[12] TEX. R. JUD. ADMIN. 6.2(a).

Additionally, these procedural details will better enable the reader to understand any potential jurisdictional issues that may come into play with that particular appeal.

Second, because a substantial majority of parental-rights termination cases involve challenges to the factual and legal sufficiency of the evidence supporting termination of parental rights, a detailed recitation of *relevant* factual information supporting your position is helpful to the reader, in order to focus on such facts while reading the appellate record.

Third, oftentimes practitioners do not explain where the child has been placed following termination. Not only is this information relevant to the reader, it may also be relevant to the determination of whether termination was in the child's best interests.

Fourth, use your authorities effectively and be prepared to highlight and distinguish contrary authority. While parental-rights termination cases are usually very fact-specific, there are many cases that lend support or are contrary to the brief's position. Utilize such authorities in an effective manner and do not hide from distinguishing adverse authority.

Fifth, keep in mind that there is a two-pronged approach when conducting a factual/legal sufficiency analysis in a parental-rights termination case. In an involuntary termination of a parent-child relationship, the Department of Family and Protective Services must prove by clear and convincing evidence that: (1) the parent has violated one of the enumerated statutory violations under section 161.001(b)(1); and (2) termination is in the child's best interest. If the trial court has found more than one statutory violation under section 161.001(b)(1), it is imperative for an appellant to analyze and argue why each statutory ground is factually and legally insufficient because only one

predicate finding under section 161.001(b)(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest.[13]'

Finally, an effective appellant's brief understands the appropriate standards of review with which an appellate court reviews the factual and legal sufficiency of the evidence. The standards for challenging the sufficiency of the evidence in a parental-rights termination case is unlike that of a criminal case or a standard civil case. Instead, in a legal sufficiency challenge, an appellate court examines all of the evidence to determine whether the evidence viewed in the light most favorable to the finding is such that the factfinder reasonably could have formed a firm belief or conviction about the truth of the matters as to which the Department bore the burden of proof.[14] When making such a determination, the appellate court considers all of the evidence, not just that which favors the verdict.[15] Furthermore, the court assumes that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so and should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.[16] Thus, if the court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient.[17] In a factual sufficiency review, if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a fact finder could not

> ➢**PRACTICE TIP**
> Know and argue the appropriate standards of review for sufficiency challenges.

[13] *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).
[14] *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005)
[15] *Id.*
[16] *Id.*
[17] *In re J.F.C.*, 96 S.W.3d at 266.

have reasonably formed a firm belief or conviction in the truth of its finding, then the evidence is factually insufficient.[18]

D. *Anders* Briefs

Several courts of appeal, including the Thirteenth Court, allow for *Anders*-type procedures in parental-rights termination cases.[19] Courts treat *Anders* briefs in parental-rights termination cases the same as in the criminal context. If appellant's counsel believes that an *Anders* brief is warranted, counsel shall examine the record and assert that he or she has found no arguable grounds to advance on appeal. Additionally, counsel shall serve appellant with a copy of the brief and his or her request to withdraw. Furthermore, counsel shall inform the appellant of his or her rights to file a pro se response, review the record prior to filing that response, and seek review if the court of appeals concludes that the appeal is frivolous. Lastly, counsel shall provide the appellant with a form motion for pro se access to the appellate record, with instructions to file the motion within ten days.

> ➢**PRACTICE TIP**
> If filing an *Anders* brief, ensure that there are no arguable issues.

When the court of appeals receives an *Anders* brief, it conducts a full examination of all proceedings to determine whether the case is wholly frivolous. If the court agrees that nothing would arguably support an appeal for the appellant, it will affirm the trial court's order terminating parental rights. However, if the court determines after full examination of all of the proceedings that arguable appellate issues exist, the court will abate and remand the case to the trial court to appoint new appellate counsel.

IV. ORAL ARGUMENT

[18] *See In re M.C.T.*, 250 S.W.3d 161, 168 (Tex. App.-Fort Worth 2008, no pet.) (*citing* In re H.R.M., 209 S.W.3d 105, 108 (Tex. 2006) (per curiam)).

[19] *See Porter v. Tex. Dep't of Protective & Reg. Svcs.*, 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, no pet.); *see also Anders v. California*, 386 U.S. 738 (1967) (permitting court-appointed counsel in criminal cases to file a brief concluding that an appeal is wholly frivolous and without merit).

A party desiring oral argument must include that request on the front cover of the party's brief.[20] The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument.[21] If a request for oral argument is denied and the requesting party strongly believes that oral argument will significantly aid the decisional process, the party should file a motion for reconsideration with the Court.

V. PETITION FOR REVIEW AT THE TEXAS SUPREME COURT

If an appellant loses his or her case at the court of appeals, the appellant may seek a petition for review with the Texas Supreme Court. The petition for review must be filed with the Texas Supreme Court clerk within forty-five days after the date of either the court of appeals' opinion, or the last ruling on all timely filed motions for rehearing or en banc reconsideration.[22] Any petition for review must comply with the requirements of rule 53.2 of the Texas Rules of Appellate Procedure.[23] Finally, the Texas Supreme Court must issue an opinion within 180 days of the date the petition for review is filed.[24]

VI. CONCLUSION

Texas laws and rules of court give parental-termination cases special treatment and preference. When handling your first or next parental-rights termination case, it is

[20] *See* TEX. R. APP. P. 39.7.
[21] *Id.* R. 38.1(e).
[22] *See id.* R. 53.7(a).
[23] *See id.* R. 53.2.
[24] TEX. R. JUD. ADMIN. 6.2(b).

important to keep the rules and tips provided in this paper in mind to make the journey smooth and easy.