

Preservation of Error in a Child Protection Case

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General Scope of Paper

- General Preservation Rules in Civil Cases
- Constitutional Concerns in Child Protection Cases
- Special Statutory Schemes

Which Rules?

- TEX. FAM. CODE § 104.001:
 - “Except as otherwise provided, the Texas Rules of Evidence apply as in other civil cases.”
- TEX. R. EVID. 103(a):
 - If the ruling admits evidence, party must
 1. On the record
 2. Timely object or move to strike
 3. State the specific ground unless apparent from the context
 - If the ruling excludes evidence:
 1. Inform court of the substance of the evidence, unless apparent from context

Which Rules?

- TEX. R. APP. P. 33.1(a):
 1. On record
 2. Timely
 3. A Request, Motion or Objection
 4. Specificity . . . unless apparent from context
 5. Compliant with rules or statutes
 6. Get Ruling

 7. Refusal to rule
 8. Objection to refusal
 - Stacy Obenhaus, *Appellate Options a Party has when the Court Refuses to Rule*, STATE BAR OF TEXAS, 31st Annual Advanced Civil Appellate Practice (Sep. 7-8, 2017)

Excluded Evidence

- TEX. R. EVID. 103(a)(2): Offer of Proof
 - Must be preserved first by offer and refusal
 - Pretrial admissibility hearing probably okay (but not motion in limine)
 - Court must allow “as soon as practicable” but before charge read
 - Summary (substance, purpose, relevance and admissibility)
 - By question and answer on party or court’s motion
 - Stipulation?
 - Written form?
 - Put docs in record
- TEX. R. APP. P. 33.2: Bill of Exceptions
 - Unicorn of civil practice?
 - Used to complain about matters not in the record (or maybe about the record, itself)
 - File within 30 days of Not/Appeal
 - Must be part of appellate record

Evidentiary Sufficiency

- Factual
 - Appellee’s Burden of Proof (“BOP”): Factually insufficient evidence
 - Appellant’s BOP: Again the great or overwhelming weight of the evidence
 - Bench trial: No preservation required (TRAP 33.1(d))
 - Jury: Motion for new trial (TRCP 324)
- Legal:
 - Appellee’s BOP: Legally insufficient evidence
 - Appellant’s BOP: As a matter of law
 - Bench Trial: No preservation required (TRAP 33.1(d))
 - Jury:
 - Motion for directed verdict
 - Objection to submission of jury question
 - Motion for JNOV (or to disregard jury finding)
 - Motion for new trial

Jury Charge

- *State v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)
 - “There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.”
- Make objection and get ruling:
 - Definition, question or instruction is defective
 - No pleading or evidence to support submission
- Written request:
 - Charge omits question on which you have burden, or missing instruction or definition
 - Tender substantially correct language in writing and have court sign as refused
- Provide objections and requests *after* charge given to parties by court. 364 S.W.3d 817, 831 (Tex. 2012)

Miscellaneous

- Experts:
 - Object to qualifications, reliability, methodology, foundational data or relevance
- Constitutional claims:
 - Generally waived unless preserved
 - 871 S.W.2d 697, 698 (Tex. 1993)
 - 119 S.W.3d 707, 710-11 (Tex. 2003)
- Complaints about Ct./Apps. must be raised in Ct./Apps. to preserve for Tex. S.Ct.
 - 160 S.W.3d 923, 929 (Tex. 2005)

Mandamus (Interlocutory Relief)

- Available, generally, if:
 - Clear abuse of discretion; and
 - No adequate remedy by appeal
- When available (?):
 - Removal orders (may need if seeking ‘O’ ground)
 - Refusal to rule in some cases (i.e., dispositive motions)
 - Refusal to set for trial before dismissal dates
- Generally, must make request in trial court and court must refuse
- Mandamus is remedy for court’s failure to hold statutory hearings
 - No. 02-10-00188-CV, 2011 WL 251800 at *32-33 (Ft. Worth Jun. 23, 2011)

Recommended Preservation Papers

- Crozier & Fohn, *Preservation of Error at Trial*, STATE BAR OF TEXAS, 7th Annual Advanced Trial Strategies (Feb. 15-16, 2018)
- Hon. David E. Keltner, *Jury Charge Update*, STATE BAR OF TEXAS, 34th Annual Litigation Update (Jan. 11-12, 2018)
- Steve K. Hayes, *Selling your Case at Trial, Selecting Appellate Issues to Pursue, and Other Implications of Error Preservation Rules*, STATE BAR OF TEXAS, 31st Annual Advanced Civil Appellate Practice (Sep. 7-8, 2017)
- Hon. Jane N. Bland, *Preserving Error and Credibility in the Trial Courts: Pretrial and Trial*, STATE BAR OF TEXAS, 101 Civil Appellate Practice (Sep. 6, 2017)

Ineffective Assistance of Counsel

- Generally, due process (standing alone) does not require a court to review unpreserved error
 - 113 S.W.3d 340, 351-55 (Tex. 2003)
 - Tex. S.Ct. would not say “never”
- But TEX. FAM. CODE § 107.013 creates right to attorney if:
 - Suit by gov’t
 - Seeking termination or change in conservator, and
 - Indigent, served by publication or unserved or unidentified alleged father

Ineffective Assistance, cont.

- *In re M.S.*, 115 S.W.3d 534 (Tex. 2003):
 - Right to counsel is statutory
 - Would be “useless gesture” without “right to effective counsel”
 - Follow criminal (*Strickland*) standard, which requires:
 - Counsel’s performance was deficient
 - Deficiency prejudiced defense
 - Strong presumption of competence
 - Representation must be so grossly deficient as to render proceedings fundamentally unfair
 - First, lawyer not having entire record transcribed was not ineffective
 - No showing of what was missing that was needed

Ineffective Assistance, cont.

- *In re M.S.*, 115 S.W.3d 534 (Tex. 2003):
 - If failure to preserve factual sufficiency challenge “unjustified,” then risk of erroneous deprivation too great “and our procedural rule governing factual sufficiency preservation must give way to constitutional due process violations”
 - Won’t hold every failure to preserve factual sufficiency is ineffective
 - Instead, must engage in *Strickland* test
 - Parent must show “counsel’s performance fell below an objective standard of reasonableness”
 - Must also review to determine if defective performance caused harm
 - If evidence was factually insufficient, and failure to preserve was unjustified, then counsel was ineffective and remand appropriate

Ineffective Assistance, cont.

- *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005):
 - Ineffective assistance claim first raised in Supreme Court
 - Could not have complained in trial court; error not apparent until ct/apps ruled
 - Not preserved
- *In re J.P.B.*, 180 S.W.3d 570, 574-75 (Tex. 2005):
 - No evidence point not preserved
 - Ineffective assistance issue not raised in either appellate court
 - Reasonable to presume omission was intentional due to
 - Litigation strategy or
 - Belief evidence was legally sufficient

Ineffective Assistance, cont.

- *In re J.O.A.*, 283 S.W.3d 336 (Tex. 2008):
 - Former § 263.405(b): Must file appellate points within 15 days and waive anything not in points
 - No points filed here
 - Ineffective assistance—yes
 - Right to effective counsel persisted through deadlines
 - Prejudice to parent?
 - Ct/Apps had held evidence was legally and factually insufficient
 - Evaluate by performing legal sufficiency analysis
 - Legally sufficient evidence, so remand for new trial

Ineffective Assistance, cont.

- *In re B.G.*, 317 S.W.3d 250 (Tex. 2009):
 - Denial of appellate record by trial court because appellate points not filed
 - Ineffective assistance not raised
 - But excused because without record, parent deprived of appeal indirectly

Specific Statutory Schemes

- Associate Judge Issues
 - Indian Child Welfare Act
 - Dismissal Deadline
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Associate Judge Issues

- *Peacock v. Humble*
 - Three days to request de novo review of AJ
 - Look to ch. 311, Gov't Code to count days, not TRCP 4
- *Latty v. Owens*
 - Timely appeal of master's recommendations
 - District court adopted report w/o de novo review
- TEX. FAM. CODE § 201.005(c):
 - Must object to associate hearing trial within 10 days
 - Be cautious with local rules

Indian Child Welfare Act

- 25 U.S.C. ch. 21
- *In re J.J.C.*:
 - Burden of determining application of ICWA on Dep't and court
 - ICWA permitted collateral attacks on final state termination judgment if no ICWA notice compliance
 - Preservation not necessary
- *In re Z.C.*:
 - Court noticed notation in CASA report that child might be of Indian descent
 - Court *sua sponte* abated appeal, and ordered trial court to comply with ICWA notice requirements

Dismissal Deadlines

- Tex. Fam. Code § 263.401
 - Courts now lose jurisdiction at deadline (not in paper)
 - No more waiver

- Commencement of the case
 - Requires more than calling the case and immediate dismissal
 - Dealing with preliminary matters prior to dismissal ought to do it