PRESERVATION OF ERROR
IN A CHILD PROTECTION CASE

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Introduction:

An appellate court may not consider a complaint on appeal that was not properly preserved.[1] Consequently, to ensure appellate review is available when needed for the proper resolution of a complaint, a lawyer will need to ensure adherence to the procedures required for preservation. In a child protection case[2] filed by the Texas Department of Family & Protective Services (hereinafter "Department") for restriction or termination of parental rights unique preservation issues can apply. To assist in understanding the preservation process in these type cases, this paper provides a short overview of general preservation requirements as well as some unique preservation concepts that can apply.

II. Rules of civil procedure apply to error preservation in child protection cases.

Child protection cases are generally subject to the same procedures for preservation that apply to regular civil cases.[3] In fact, the Supreme has commented it would undermine the State's interest in ensuring finality and expedited resolution for children in these type cases if its preservation of error rules were not followed.[4] In addition, the Family Code provides the rules of evidence applicable to civil cases apply, including Rule of Evidence 103 with its specific preservation requirements for evidentiary challenges.[5] Consequently, a good understanding of the rules for preservation applicable to a regular civil case is necessary to understand the preservation process in a child protection case.

The primary procedural rule for preservation is Texas Rule of Appellate Procedure 33.1(a). The first part of this rule contains the primary requirements for preservation:

> [T]he record must show that:
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent
> from the context; and
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
> (2) the trial court:
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.[6]

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[1] *Federal Deposit Inc. Corp v. Lenk*, 361 S.W.34d 60-2, 604 (Tex. 2012). ("When a party fails to preserve error in the trial court or waives an argument on appeal, an appellate court may not consider the unpreserved or waived issue.") (emphasis added).

[2] In this paper, "child protection case" refers to suits filed by the Department under Title V of the Texas Family Code for permanent managing conservatorship and/or parental termination while the child is under the Department's protection per an order for temporary managing conservatorship under Chapter 262 of the Family Code.

[3] *See i.e. In re K.A.F.*, 160 S.W.3d 923 (Tex. 2005).

[44] *In re B.L.D.*, 113 S.W.3d at p. 353.

[5] Tex. Fam. Code Ann. §104.001 (West 2015); Tex. R. Evid. 103 (specifies what party must do to preserve error in ruling to admit or exclude evidence).

[6] Tex. R. App. P. 33.1.

As indicated, this rule contains six primary elements. The complaint must be (1) on the record (2) at a timely point (3) as a request, objection or motion (4) urged with appropriate and sufficient specificity, (5) in conformity with applicable evidentiary or procedural rules, and (6) expressly or implicitly ruled upon, unless an objection to refusal to rule is appropriate. Case law demonstrates that problems with any one of these six elements can result in waiver on appeal in a child protection case.

1. The Record

A. Some complaints are not easily shown[7]

For example, in *In re L.G.R.*,[8] the mother brought a point for review in a child protection case complaining that the judge demonstrated bias and a prejudicial tone when the court initiated questioning of a particular witness. The appellate court noted no objection appeared on the appellate record to preserve this complaint; but more importantly, the appellate record itself did not show the basis of the party's complaint. In this connection, the court noted an appellate record is by its very nature "inherently limited in its ability to reflect a judge's tone of voice, demeanor or facial expressions." *Id.* Consequently, the court indicated even if the trial judge relied on the objectionable testimony in ruling the record did not show the court's prejudicial tone that formed the basis of the mother's complaint.[9] This case, therefore, illustrates the difficulty associated with ensuring a record shows the basis of a complaint.

B. Exclusion may require offer of proof

Also, if the court excludes evidence, the substance of the evidence is not necessarily going to be apparent from its context in the record. Texas Rule of Evidence 103 provides a procedure to make it part of the record through an offer of proof.[10] Subpart(c) of this Rule indicates the court can take an affirmative role in that process by stating on the record the character or form of the evidence, the objection made and the court's ruling. Alternatively, the court can direct the offer of proof through question and answer format. If the court does not take an affirmative role, the party seeking its admission must take the proper action to ensure the offer is clear on the record. An accurate verbal description on the record may be sufficient. Nonetheless, if the party requests it, the court must allow the party to make the offer through question and answer form.[11]

Importantly, when the case is before a jury, the court must allow the offering party to make an offer of proof outside the jury's presence as soon as practicable-and before the court reads its charge to the jury.[12] When the court correctly permits the offer at the pertinent time in a jury trial, it is the responsibility of the offering party to ensure it is timely to secure its preservation. For example, in *In re A.C.*,[13] the mother was told before the charge was read to make her offer of proof whenever she wished. Nonetheless, the mother waited until after the charge was read to the jury to make her offer. Because

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[7] The appendix includes a paper concerning tips for ensuring a good record.

[8] 498 S.W.3d 195, 207-208 (Tex. App. – Houston [14th Dist.] 2016, pet. denied)

[9] *See also, A.E.A.*, 406 S.W.3d 404, 420 (Tex. App. – Fort Worth 2013, no pet.) (father's complaint that judge was biased was not shown on appellate record based on judge's statement that the father was irritating him or the court's ruling on the admissibility of documents).

[10] Tex. R. App. P. 103(a)(2).

[11] Tex. R. Evid. 103(c).

[12] Tex. R. Civ. Evid. 103(c).

[13] 394 S.W.3d 633, 645 (Tex. App. – Houston [1st Dist.] 2012, no pet.).

the mother made her offer late, the court of appeals held she waived preservation of her complaint concerning its exclusion.[14]

C. Bill of exception has limited usefulness. Another method for having the record show a complaint not otherwise apparent in the record is through a formal bill of exception process described at Tex. R. App. P. 33.2. However, as noted by one commentator that process is "largely on the way of the dinosaur."[15] A bill of exception might have been the only way years ago to create a proper record when a reporter record was inaccurate, lost or missing, but the current Rules of Appellate Procedure address those issues at Rules 34.6(e) and 34.6(f).

In addition, the bill of exception process is not an all-inclusive method for preservation. That is, it will not relieve other general requirements for preserving a complaint on appeal. For example, in *In re K.O.*,[16] a parent utilized the bill of exception process to explain the facts that prevented her from being present at trial and at the post-judgment new trial hearing that she claimed effectively resulted in violating her due process rights. The affidavit included with her bill of exception explained she was transferred to a different jail facility around the time of trial making it difficult for her to communicate with her counsel. She also stated she lacked information at that time about the possibility of a telephonic appearance. The trial court approved the pertinent facts appearing in the bill of exception but noted the court never received a request for a bench warrant at the time of trial and no one ever requested the court to permit the mother to appear telephonically.

On appeal, the appellate court acknowledged the bill of exception process was a process to make a record of matters not otherwise apparent, and the trial court approved facts presented in the bill offered. However, the court explained that still did not excuse the appellant from timely raising the pertinent issues related to that proof. The court then held because the mother did not bring the complaint and supporting facts stated in her bill of exception until after the notice of appeal was filed, her complaint was untimely and waived.[17]

2. Timeliness

With respect to timeliness, it is important to consider that being very early in raising a complaint is not necessarily the appropriate time. For example, a complaint raised in a motion in limine may be the earliest time a party can bring up a specific complaint and obtain a ruling for exclusion of evidence, but that will not be the appropriate time to preserve error if the evidence emerges at trial and is admitted without objection.[18] Also, even when a complaint is made to evidence during trial, the objection can be too late if it does not occur when the evidence is first admitted.[19] In addition, if the timing required for objection is provided by rule or statute,

[14] *Id*.

[15] *See* Justice Jane Bland, Preserving Error and Credibility *in the Trial Court: Pretrial and Trial*, Ch. 12, Civil Appellate Practice 101, (2014). State Bar of Texas (citing Tex. R. App. P. 34.6(e) and (f)).

[16] 488 S.W.3d 829, 833-34 (Tex. App. – Texarkana 2016, pet. denied).

[17] *Id.* at p. 834.

[18] *See Castaneda v. Tex. Dep't of Prot. and Reg. Servs.*, 148 S.W.3d 509, 520 (Tex. App. – El Paso 2004, pet. denied) (found error waived though the party complained about the evidence in pretrial motion in limine, because party failed to object when the evidence emerged during voir dire).

[19] *See In re A.E.A.*, 406 S.W.3d 404, 420 (Tex. App. – Fort Worth 2013, no pet.) (objection to testimony concerning diary not produced before

like in the case of jury charge complaints, a litigant must adhere to the specific requirements applicable to the timing of the complaint at issue.[20]

3. Request, Objection or Motion

Whether a litigant should assert a complaint as a request, objection or motion may be specified by a rule or statute. For example, Rules 272 and 274 provide when and how a party should offer a request or objection in the development of the jury charge. The Supreme Court indicated in 1992 that appellate courts should not promote form over substance in deciding whether a request or objection properly preserves a jury charge complaint.[21] Nevertheless, the Supreme Court did not overrule the requirements of its procedural rules governing jury charges. Consequently, care should be taken to ensure complaints are raised in conformity with specific rules of procedure to avoid waiver.[22]

4. Specificity

Ensuring the complaint made at trial is specific enough requires attention to the exact basis of the party's complaint. For example, in *In re D.W.*,[23] , the mother made a timely request for a bench warrant, but the court denied the request and only permitted her to appear by video conferencing. On appeal, the mother claimed it was prejudicial to her to require her to appear by video conferencing on a large video screen that showed her shackles and prison uniform. The appellate court acknowledged the mother timely requested a bench warrant to urge her complaint, but the record confirmed she never told the trial court the specific complaint she was raising on appeal concerning the prejudicial nature of the video conference method. As such, the court held the mother did not preserve her specific complaint raised on appeal. [24]

5. Conforming to Rules

Even if a complaint made at trial is specific and seemingly timely, there are rules of evidence that can control when and how a party must raise certain complaints. For example, Texas Rule of Civil Procedure 324(b) lists particular points that must be included in a motion for new trial as a perquisite for complaint on appeal and this rule has been applied to the child protection context. For example, in *In re A.H.*,[25] the appellate court found the parent waived her

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trial came too late, because complaint was not lodged until over one hundred pages after the objectionable testimony concerning that evidence occurred).

[20] *See Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 831 (Tex. 2012) (court's failure to request or object at formal charge conference in conformity with procedural jury charge requirements waived error even though the proposed charge with the appropriate subparts was presented pretrial).

[21] *State Dep't of Highways v. Payne*, 838 S.W.2d 235, 241 (1992).

[22] *See also In re N.A.L.*, No. 04-13-00159-CV, 2013 WL 4500633 (Tex. App. – San Antonio 2013, no pet.) (motion for new trial could not cure a party's failure to object to a jury charge in conformity with rule 272); *See also Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451-52 (Tex. 1995) (per curiam) ("While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them.").

[23] 498 S.W.3d 100, 120 (Tex. App. – Houston [1st Dist.] 2016, no pet.).

[24] *Id. (citing, in part, In re D.A.H.*, Nos. 13-07-444-cv, 13-07-450,CV, 2008 WL 3920772, at *4 (Tex. App. – Corpus Christi 2008, no pet.) ("[A] defendant must make a timely objection against being tried in prison clothes or such rights are waived.")).

[25] No. 12-14-00257-CV, 2014 WL 6985915, at *1 (Tex. App.—Tyler Dec. 10, 2014, no pet.).

complaint concerning the factual insufficiency of the jury's finding on the parental termination question, because she did not include it in a motion for new trial as required by this rule.

6. Ruling

The last preservation requirement is for a ruling. While the rule indicates a ruling can be "implicitly" ruled upon, it probably is not a good idea to rely on that. For example in *In re T.D.N.,*[26] a complaint was raised about the court's failure to grant an oral motion for continuance. Because the court proceeded with trial after the party made the oral motion for continuance, it would seem the court "implicitly" overruled the motion. Nevertheless, the appellate found the complaint was waived, because the record did not establish either an implicit or express ruling and considered the fact that the parent did not request the trial court to rule on the oral motion, and did not object to the alleged refusal of the court to rule.[27]

III. Different rules apply for preservation of complaints about the sufficiency of the evidence in child protection cases.

A. Preservation not required for legal & factual sufficiency challenges in nonjury case.

Probably the most common challenges raised in appeals from child protection cases concern the legal and factual sufficiency of the evidence to support the judgment. In a non-jury case, Texas Rule of Appellate Procedure 33.1(d) makes clear an appellant can raise legal and factual sufficiency complaints without first complying with general preservation requirements in the trial court.[28] Consequently, these complaints may be raised for the first time on appeal.[29]

B. Preservation required for legal & factual sufficiency challenges in jury tried case.

Nonetheless, the exception to preservation under Tex. R. App. P. 33.1(d) does not apply to jury tried cases. Consequently, challenges to the legal or factual sufficiency of the evidence in a jury tried case must be preserved. The Supreme Court recognizes five ways to challenge a legal sufficiency challenge in a case tried to a jury: (1) move for an instructed verdict (2) move for a judgment notwithstanding the verdict (3) object to the submission of the jury charge (4) move to disregard the jury finding or (5) move for a new trial. *See Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). However, there is only one way to preserve a factual sufficiency challenge and that is by motion for new trial as provided in Texas Rule of Civil Procedure 324.

C. An ineffectiveness of counsel claim may permit review of sufficiency complaint *as if* preserved.

While preservation is required for both legal and factual sufficiency challenges in jury cases, a claim of ineffectiveness of appointed counsel can provide an exception. Namely, an appellate court may be able to review an unpreserved sufficiency complaint in a jury trial involving parental termination "if the parent's counsel unjustifiably failed to

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[26] No. 14-07-00387-CV, 2008 WL 2574055, at *1 (Tex. App.—Houston [14th Dist.] June 26, 2008, no pet.).

[27] *Id.*

[28] *See* Tex. R. App. P. 33.1(d).

[29] *See Office of Att'y Gen. of Tex. v. Bu3rton*, 369 S.W.3d 173, 175 (Tex. 2012) (Acknowledging based on Tex. R. Civ. P. 324 and Tex. R. App. P. 33.1(d) a complaint about the legal or factual insufficiency of the evidence in a nonjury case may be made for the first time on appeal).

preserve error"[30] when ineffective assistance of counsel warrants it.

The Supreme Court first recognized an ineffective assistance type review for child protection cases in *In re M.S.*.[31] In that case, the Supreme Court considered a parent's challenge to the judgment based on her appointed attorney's ineffective assistance in failing to preserve a factual sufficiency complaint. The Supreme Court concluded because the parent had a mandatory right to counsel by statute, that right embodied the right to effective assistance of counsel. To review that right, the court concluded it would borrow the standard used in the criminal law context articulated in *Strickland v. Washington*.[32] That standard requires a showing that (1) the attorney's performance was deficient and (2) that the deficient performance prejudiced the party's defense.[33]

While the Supreme Court found it helpful to utilize the standard for reviewing effective assistance from the *Strickland* case, it did not borrow its reference to the criminal right to counsel applicable to those cases under the Sixth Amendment in its analysis of deficient performance. That is, under *Strickland* the deficiency is reviewed to determine whether it was so serious that the attorney did not satisfy the function of counsel guaranteed to the defendant under the Sixth Amendment.[34] The Sixth Amendment does not apply to child protection cases. Therefore, the court in *In re M.S.* did not reference it.

Instead, noting it had previously found failure to preserve a factual sufficiency issue could potentially rise to the level of a due process violation, the court indicated it would review whether the attorney's error was serious enough to constitute deficient performance by applying the procedural due process analysis established by *Matthews v. Eldridge.*[35] Applying that standard the court concluded, if an attorney's failure to preserve a factual sufficient complaint is *unjustified*, then his incompetency in failing to preserve the complaint constitutes a risk so serious that the procedural rule governing factual sufficiency must give way to the due process considerations.[36]

That being said, the court's opinion clarified it was not saying any time an attorney fails to preserve a factual sufficiency complaint the attorney commits ineffective assistance of counsel. Instead, it directed appellate courts to utilize the *Strickland* standards that require the appellate court to indulge a strong presumption that counsel's conduct falls within the wide range of reasonable profession assistance. The court went on to explain that could include the possibility the attorney's decision not to challenge the factual sufficiency of the evidence was based on trial strategy or even because counsel, in his professional opinion believed the evidence factually sufficient. In short, the court explained: "courts must hold the parent's burden to show that 'counsel's performance fell below an objective standard of reasonableness." [37]

The court went on to explain that finding the failure to preserve the error is not enough to establish ineffective assistance, because the court must also determine whether that defective performance caused harm. *Id.* The court explained that this evaluation requires a

[30] *See In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (citing *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003)).
[31] 115 S.W.3d 534, 544 (Tex. 2013).
[3232] 466 U.S. 668 (1984).
[33] *Id.* at 687.
[34] *Id.*
[35] 414 U.S. 319 (1976).
[36] *Id.*
[37] *Id. at p. 549.*

court to decide whether there is a reasonable probability that but for the counsel's unprofessional error the result of the proceeding would have been different. The court went on to explain that this would permit the appellate court to review the factual sufficiency of the evidence in the case "as if factual sufficiency" had been preserved.[38] If the court of appeals concluded the evidence to support termination was factually insufficient, and the counsel's failure to preserve that factual sufficiency complaint unjustified and below being objectively reasonable, the court must hold the failure to preserve was ineffective assistance of counsel and should reverse and remand for a new trial.[39] The Supreme Court then remanded the case to the court of appeals to determine whether the failure to preserve the factual sufficiency issue was not objectively reasonable and whether the error deprived the parent of a fair trial.[40]

D. An appointed attorney's failure to preserve a sufficiency complaint does not automatically permit an appellate court to review the unpreserved complaint as if it was preserved.

In *In re J.P.B.*, 180 S.W.3d 570 (Tex. 2005), a party filed a brief challenging the legal sufficiency of the evidence to support parental termination in a jury tried case without addressing the fact that it was unpreserved. The Supreme Court held the court of appeals correctly held the parent failed to preserve that point for appeal.[41] In support of that conclusion, the court first explained it had not permitted review of an unpreserved "legal sufficiency" issue based on ineffective assistance of counsel and did not see a good reason to do so in that case. The court also found it important that the party did not even allege ineffective assistance of counsel with respect to the unpreserved legal sufficiency challenge. Moreover, the court observed it could reasonably presume her attorney did not preserve the challenge because it was litigation strategy or her attorney believed, in his professional opinion, the evidence was legally sufficient. Consequently, even had the mother raised ineffective assistance, the court held the parent failed to demonstrate her counsel unjustifiably failed to preserve the legal sufficiency issue to support an ineffective assistance claim.

IV. A complaint based on the constitution in a child protection case is generally subject to preservation.

The Texas Supreme Court has generally declined to review a constitutional challenge brought to challenge a judgment in a child protection case when it is not preserved.[42] For example, in *In re L.M.I.*,[43] the parent challenged the judgment terminating his parental right based on his affidavit of relinquishment, because he claimed he signed it as a result of fraud, duress and overreaching. When the parent made this challenge in the trial court, the parent brought no constitutional claim with respect to the affidavit. Nonetheless, on appeal, the father argued the appellate court should reverse the judgment for parental termination, because

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[38] *Id.*
[39] *Id.* at p. 550.
[40] *Id*
[41] *Id*. at p. 574.
[42] See *In re B.L.D.*, 113 S.W.d 340, 352 (Tex. 2003) (court observes "we have declined to review unpreserved complaints even when a parent's constitutional interests are implicated); *Dreyer v. Green*, 871 S.W.2d 697, 698 (Tex. 1993) (held constitutional claims of due process and equal protection of the law with respect to statute that barred child from bringing paternity suit after final judgment determined paternity could not be raised for first time on appeal).
[43] 119 S.W.3d 707, 710 (Tex. 2003).

the affidavit of relinquishment was procured in a manner that violated his constitutional rights of due process. The Supreme Court found nothing in the record to indicate the father raised that due process challenge in the trial court. Accordingly, the court held the due process argument was not preserved for review.[44]

V. Due process rights of parents in child protection cases do not generally relieve preservation requirements, but can in special cases.

While constitutional claims generally must be preserved for review, the Supreme Court has acknowledged there may be special circumstances that warrant relief of that requirement. For example, in In *In re B.L.D.,*[45] the Supreme Court considered an appellate court's holding that due process required appellate review of unpreserved complaints in child protection cases so as to permit review of an unpreserved jury charge complaint. The Supreme Court disagreed with the appellate court's assessment. Nevertheless, the opinion included some important discussion on how due process might require it in exceptional circumstance.

Namely, with respect to preservation applying the factors applicable to due process claims in the civil context set forth in *Matthews v. Eldridge*[46] the court found due process did not generally require courts to avoid application of preservation requirements to appellate complaints brought by parents in child protection cases. The court noted while the interests of the parents and State in reviewing unpreserved error may be high, the State's completing interest in protecting the child's best interests through judicial economy, certainty and finality was at least as compelling. Moreover, since the statutory scheme for child protection cases, reinforced with judicial rules, provided heightened procedural protections, the court concluded the risk was low consistent application of preservation rules would result in erroneous deprivations.

Nonetheless, the Supreme Court in *In re B.L.D.* acknowledged the United States Supreme Court in *Lassiter*[47] indicated the result "in a given case" could be different. Thus, the court stated: "we acknowledge that in a given parental rights termination case, a different calibration of the *Eldridge* factors could require a court of appeals to review an unpreserved complaint of error to ensure that our procedures comports with due process."[48] The court then noted as an example the circumstance in *In re M.S.* involving ineffective assistance of counsel in failing to preserve a factual sufficiency complaint. But since the case before it did not involve ineffective assistance of counsel or any other special consideration, the court concluded the court of appeals did not have authority to review the unpreserved jury charge complaint.

After the decision in *In re B.L.D.*, the legislature added a new preservation procedure specifically for child protection cases at Section 263.405(i) of the Family Code that required *all* points on appeal be preserved with a statement of points filed within 15 days after the judgment was signed.[49] This new statute provided special procedures for preservation of the child

[44] *Id*. at p. 711.
[45] 113 S.W.3d 340, 351 (Tex. 2003).
[46] 424 U.S. 319 (1976).
[47] *Lassiter v. Dep't of Soc. Serv. Of Durham County*, 452 U.S. 18 (1981)
[48] 113 S.W.3d at p. 354.
[49] *See Act of May 12, 2005*, 79th Leg., R.S., ch. 176 §1, 2005 Tex. Gen. Laws 332. (superseding history omitted).

protection cases that impacted the Supreme Court's due process evaluation.

Namely, in *In re J.O.A.*[50] the Supreme Court found this new procedure raised due process concerns not present under the general preservation requirements. In the given case before it, the court concluded the procedure unreasonably restricted the parent's due process rights by preventing the parent from having an avenue to complain about her appointed attorney's ineffectiveness, particularly when the ineffectiveness complaint involved the attorney's failure to timely file the statement of points required for preservation of that or any other complaint. Also, the next year, in *In re B.G.*,[51] the court reached a similar decision when the statement of point procedure effectively prevented a parent from having a record for review of appellate complaints.

The year after *In re B.G.*, the legislature repealed the restrictive statement of point procedure at Section 263.405(i) of the Family Code.[52] Nonetheless, the Supreme Court's opinions concerning review of that procedure remains pertinent to illustrate how a preservation requirement, even a statutory one, can be found unfairly restrictive under due process as to relieve its application.

VI. An ineffective assistance of counsel complaint generally will not require preservation, but it can.

Because an effective assistance of counsel claim in a child protection case will typically relate to the deficient performance by a trial attorney, it is unlikely the trial attorney is going to work to preserve a complaint about his inept performance for a complaint on appeal. That is especially true considering its financial effect since unilateral abandonment of legal responsibilities to a client in a case can preclude the attorney's right to any compensation for legal services.[53] Moreover, though the Supreme Court's decision in *In re M.S.*[54] did not directly state an ineffective assistance of counsel claim must be preserved, it is apparent from the fact the attorney did not file post-trial motions that this was not preserved in that case. Moreover, that similarly appeared true in *In re J.P.B.*[55] In that case, the Supreme Court considered a timely appointment issue that was raised in the court of appeals as a basis for ineffective assistance of counsel. The Supreme Court's opinion did not mention whether the complaining party raised the issue of timeliness at trial. However, the facts recited in the opinion from the court of appeals indicated fairly clearly that the parent did not.[56] Also, though the Supreme Court overruled the ineffective assistance of counsel claim in that case, the court obviously considered it for review in reaching that conclusion.

Nevertheless, while waiver of an ineffective assistance of counsel claim is usually not an issue, it can be. For example, in *In re K.A.F.*[57] a party filed a late notice of appeal, but did

[50] 283 S.W.3d 336, 347 (Tex. 2009).
[51] *In re B.G.*, 317 S.W.3d 250 (Tex. 2010).
[52] *See* Act of May 12, 2005, 79th Leg., R.S., ch. 176 §1, 2005 Tex. Gen. Laws 332, 332, repealed by Act of May 5, 2011, 82nd Leg., R.S., ch. 75 §5, 2011 Tex. Gen. Laws 348, 349.
[53] *See Royden v. Ardoin*, 331 S.W.2d 206 (Tex. 1960) (because attorney suspended from practice of law prior to completion of contingency fee contract, he was not entitled to quantum meruit or other compensation for his services up to that point).
[54] 115 S.W.3d 534 (Tex. 2003)
[55] 180 S.W.3d 570 (Tex. 2005).
[56] *See In re J.P.B.*, No. 02-04-026-CV, 2005 WL 327168 (Tex. App. – Fort Worth 2005), *aff'd in part, rev. in part*, 180 S.W.3d 570 (Tex. 2005).
[57] 160 S.W.3d 923 (Tex. 2005),

not challenge the effectiveness of her counsel with respect to that complaint in the court of appeals. After the court of appeals dismissed the mother's appeal for want of jurisdiction, she sought review from the Supreme Court. As an alternative basis for reversal in the event the court agreed with the appellate court that her appeal was untimely, the parent urged she received ineffective assistance of counsel in filing of the out of time appeal and that the acceleration scheme was unconstitutional as applied to her. The Supreme Court held while her complaints related to her appeal, and the ineffectiveness did not relate to issues she would have been able to raise to the trial court, she still was required to raise them in the court of appeals in order to preserve them as a basis for review in the Supreme Court. Because she did not, the court found the point waived.

VII. Preservation of complaints with respect to associate judges require special considerations of the statutory scheme associated with the associate judge's appointment.

It is not unusual for a child protection case to be assigned to an associate judge or master and there are various statutory schemes that authorize courts to make those assignments.[58] Preserving the rights associated with the assignments to assistant judges will usually be satisfied so long as the movant complies with the requirements of the statutory scheme underlying the assignment.[59] Nonetheless, because other processes can apply, including the rules of procedure, this can sometimes be complex and confusing.

For example, in *Peacock v. Humble*[60] a question was raised concerning proper preservation of the right to de novo review from an associate judge's ruling under Section 201.015 of the Family Code when the request was subject to a three day time period. Application of the deadline provision came in question, because of confusion in computing the three-day period over a weekend in light of a seemingly applicable rule of procedure.

In the facts of that case, the parties received notice of the substance of the associate judge's report on Thursday (July 11) and the party seeking de novo review filed his request for de novo review the following Tuesday (July 16). The party seeking de novo review felt his request was timely preserved under Section 201.015, because Tex. R. Civ. P. 4 states "Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time periods of five days or less …." Since the three day requirement was a time-period less than five days, application of Rule 4 seemed applicable to exclude calculation of the weekend - making the Tuesday following the Thursday timely to meet the three-day timeframe to preserve the right to de novo review. Nonetheless, the trial court disagreed.

The moving party challenged the trial court's refusal to hold a de novo hearing by mandamus believing he properly preserved his right to de novo review by filing his

[58] *See e.g.* Tex. Fam. Code Ann. §201.005, §201.201-204 (West 2014); Tex. Gov't Code Ann. §§54.301 -54.820; *See e.g. In re T.S.*, 191 S.W.3d 736 (Tex. App. – Houston [14thDist. 2006, pet. denied).

[59] *See e.g. In re J.A.P.*, No. 04-16-00271-CV, 2016 WL 6407324 at *2-3 (Tex. App. – San Antonio 2016, no pet.) (preserved right to de novo review where record established the request was made per section 201.015 and no action was taken to waive that right).

[60] *Peacock v. Humble*, 933 S.W.2d 341 (Tex. App. – Austin 1996, no writ).

request within the three days provided in the statutory provision. Nonetheless, the appellate court confirmed the movant was incorrect though it acknowledged the movant's confusion.

Namely, the court acknowledged the movant relied on Texas Rule of Civil Procedure 4 in calculating the three-day time-period under the Family Code. However, because Section 201.015 was in the Family Code, the Code Construction Act at Section 311.014 of the Act applied. Section 311.014 provides instructions for time calculations and does not have the five-day exception contained in Rule 4. Instead, it requires Saturdays and Sundays to be included in calculations but if the last day falls on a Saturday or Sunday, the period extends to the next day that is not a Saturday or Sunday. With that application to calculation of the three days under Section 201.015 of the Family Code, the movant was required to file his request for de novo review on the following Monday (July 15) rather than the Tuesday. Consequently, this case illustrates how preservation of the rights associated with assistant judges requires careful attention to the statutory scheme.

Though this case illustrates the danger of improperly applying procedures outside the statutory scheme, proper application of the rules of procedure can still be very important in preserving a right to de novo review. For example, in *Latty v. Owens*[61] a putative father attempted to properly preserve his right to de novo review by appealing the master's recommendations under the then applicable statutory scheme at Section 54.012 of the Government Code. From all respects, it appeared the father preserved his right to *de novo* review by making the request within the time required by the statute. Nevertheless, there was a problem in his preservation of the right, because he failed to consider the application of the rules of procedure on certain action taken by the judge.

Namely, before the de novo hearing was held on the putative father's request for de novo review, the district court actually signed an order adopting the master's report and that order finally disposed of all parties and issues in the case. When a final judgment is signed, Texas Rule of Civil Procedure 329b indicates a trial judge only has 30 days to set aside the judgment unless a timely filed motion for new trial or for modification is filed. After that time frame, the court's jurisdiction over the case is lost. Consequently, even though the putative father properly preserved his right to de novo hearing under the applicable procedures of the statute, he lost his right to de novo review by failing to actively consider and apply the rules of procedure.

Notably, even the referring judge failed to consider proper application of the rules, because the referring judge held its de novo review after the court's plenary jurisdiction expired and entered a subsequent judgment that became the subject of appeal. When appealed, however, the Supreme Court found the appeal was a nullity as was the source judgment since the referring judge signed it outside the time of its plenary jurisdiction. In explaining this situation, the Supreme Court recognized that the father properly invoked his right to contest the master's recommendation by de novo hearing by filing a request within the time required under the statutory scheme. Nonetheless, the father's right was not fully preserved because he lost it when he failed to consider the effect of the application of the rules of procedure once the referring judge went ahead and signed a judgment on the associate judge's report. Once the trial court signed a final judgment, the requestor needed to challenge that in some manner as would be required under the

[61] *Latty v. Owens*, 907 S.W.2d 484 (Tex. 1995).

rules. That is, the Supreme Court stated he should have requested the court to vacate the order, appealed or filed a bill of review.[62]

Another important right in the associate judge scheme that might be difficult to preserve involves the objection process. Section 201.005 of the Family Code provides an objection process in the subchapter that governs associate judges assigned pursuant to Section 201.001 of the Family under Subchapter A.[63] Namely, it gives litigants the right to object to having an associate judge hear the trial on the merits.[64] Importantly, while that section relates to associates judges assigned under Section 201.001 in Subchapter A of Chapter 201 of the Family Code, Subpart (c) of that Section indicates it is much more expansive. Namely, it states it applies: "whenever a judge has authority to refer the trial of a suit under [Title 5], Title 1, Chapter 45 or Title 4 to an associate judge, master, or other assistant judge regardless of whether the assistant judge is appointed under [subchapter A of Chapter 201 of the Family Code]."[65] Consequently, that means, this procedure for objection applies with respect to any associate judge so long as the suit is under Title 1, 4 or 5 or Ch. 45, which encompasses child protection suits. While that subpart (c) makes it possible to object to an associate judge in a child protection case, its requirements may not always be simple to apply.

Namely, to preserve this right, this section indicates the party must file an objection to the associate judge hearing the trial on the merits or presiding at a jury trial "not later than the 10th day after the date the party receives notice that the associate judge will hear the trial."[66] Unfortunately, this section does not explain when and how a party "receives notice" that an associate judge will hear the trial, and associated processes can impact that determination.

For example, one process that could impact that determination could be a local rule that automatically assigns all child protection cases to be tried by associate judges in a particular county. If that process exists, when does a party actually have notice a child protection case is being tried by an associate judge? With that local type local rule, a party essentially obtains notice as soon as he is made a party to the suit subject to that local rule. As such, arguably, any objection would need to be filed within ten (10) days of the date the litigant is made a party. Because, in the case of a defendant, that would be less than the 20-day timeframe available for filing an answer, this makes the procedure likely difficult to meet. No case has yet interpreted this requirement in that context, but this certainly illustrates the complexity of preserving rights under these schemes.

VIII. Preservation of issues related to interlocutory actions or decisions require a different approach than issues typically raised from a final judgment.

Probably the most unique aspect of child protection cases are the many actions and hearings that are statutorily required to occur during the pendency of the case and that impose independent duties on the judge, the Department and the attorneys appointed by the court. For example, the judge is required to give specific warnings to the parents related to the serious nature of the case and give information about the availability of

[62] 907 S.W.2d at p. 486.
[63] Tex. Fam. Code Ann. §§201.001-018 (West 2014).
[64] Tex. Fam. Code Ann. §201.005 (West 2014).
[65] Tex. Fam. Code Ann. §201.005(c) (West 2014).
[66] Tex. Fam. Code Ann. §201.015(c) (West 2014).

counsel at a status hearing that must be held not later than 60 days after the court orders the child in care.[67] The department has a duty to file reports that give specified information to the court and prepare a plan in cooperation with the parents, as possible, to help them provide a safe environment for the child by the status hearing.[68] The appointed attorney has specified duties during the case that relate not only to representation but can also be required to provide specified information to the court.[69] The judge also has a duty to hold permanency hearings within a specified time of the date the temporary order that names the Department as the child's conservator and the judge must make specific determinations at those hearings.[70]

With all these duties and hearings, there obviously is potential that a duty or hearing might not be performed, or will be performed wrongly to the detriment of a party. However, because of the interlocutory nature of these actions, it is unlikely errors involving these duties or hearings will be easily susceptible to preservation for review at the end of the case.

For example, in *In re J.M.C.*[71] a parent challenged a parental termination judgment because the full adversary hearing was not held within the fourteen days as required by law. The parent claimed because it was not held timely, the trial court lost jurisdiction and the child should have been returned to the parent. The appellate court disagreed. The court stated nothing in the provision indicated it was jurisdictional and the appropriate relief to ensure its timely performance was mandamus. Because the parent did not seek a mandamus to preserve her right to a timely hearing, the appellate court concluded she essentially lost her right to this complaint.

Similarly, in a later case by that same court in *In re J.G.K.*[72] a parent challenged a parental termination on due process grounds because during the case the court did not hold the status hearing and permanency hearings within the time required by law. The court acknowledged that Section 263.201 required the court to hold a status hearing not later than sixty days after the temporary order appointed the Department as temporary managing conservator and the record was undisputed that the hearing was not held within that time. The court also acknowledged Section 263.304 and 263.305 required the court to hold an initial permanency hearing within 180 days of the temporary order with subsequent hearings within 120 days of the most recent permanency hearing, and those hearings were not held timely. Nonetheless, the court noted the statutory law to which she based her complaints did not contain any remedy other than mandamus relief to compel the court to comply with that duty. Because the mother did not seek mandamus relief, the court held she could not complain on appeal about a due process violation for the inadequate performance of a duty that she failed to compel through appropriate mandamus relief.

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[67] *See* Tex. Fam. Code Ann. §263.006 & §263.0061 & §263.201 (West 2014).

[68] *See e.g.* Tex. Fam. Code Ann. §263.007 and 263.101 (West 2014).

[69] *See e.g.* Tex. Fam. Code Ann. §107.004(d-1) (d) (2) (West 2014) (statement required to be filed when child not at court hearing); Tex. Fam. Code Ann. 107.0132 (d) (West 2014) (statement required to be filed when attorney unable to locate alleged father appointed to represent).

[70] *See* Tex. Fam. Code Ann. §§263.304, 263.305 and 263.306 (West 2014).

[71] 109 S.W.3d 591, 594 (Tex. App. – Fort Worth 2003, no pet.).

[72] *In re J.G.K.*, No. 02-10-00188-CV, 2011 WL 2518800 (Tex. App. – Fort Worth 2011, no pet.),

What these cases illustrate is that complaints about the specified time certain actions must take place during the case are not likely going to be subject to preservation for review at the conclusion of a case. Instead, securing and preserving complaints about actions that take place during the case will likely require extraordinary relief through mandamus.[73] Preserving complaints about interlocutory actions or decisions lose reviewability at final disposition of the case because they usually become moot with the final decision in the case[74].

For example, in *In re A.K.*[75], the San Antonio Court of Appeals held a father's complaint about the trial judge's decision to make a finding of aggravated circumstances resulting in the father not being offered a service plan could not be subject to review, because such complaint pertained to an interlocutory decision that became moot with the court's final order. Similarly, in *In re M.C.M.*[76] the Houston Court of Appeals held a parent's complaints about the denial of supervised visitation during the case became moot with the final decision for parental termination.

IX. The Indian Child Welfare Act presents unique issues that can circumvent usual preservation of error practice.

The Indian Child Welfare Act (ICWA) is a federal act that was passed by Congress during the mid-1970's over the "consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[77] It applies to all state child custody proceedings involving an Indian child when the court knows or has reason to known an Indian child is involved.[78] Because of its vast coverage, this scheme can present some unique issues in the context of preservation because of the potential for preemption of state processes.

For example, in *In re J.J.C.*[79] a mother complained for the first time on appeal that the trial court failed to properly apply ICWA in entering a judgment for parental termination against her on a jury verdict. The Department argued that she did not preserve this complaint because she never objected to the charge or to the court's failure to apply ICWA in the trial court, and did not raise that complaint in a statement of points, which was a requirement for preservation of error under then-Section 263.405 of the Family Code.[80]

The appellate court acknowledged Congress did not expressly state ICWA preempted the field of state child custody proceedings

[73] *See e.g. Tex. Dept. of Fam. & Prot. Servs.*, 255 S.W.3d 613, 614 (Tex. 2008); *See e.g. E.C.R.*, 402 S.W.3d 239, 248 (Tex. 2013).
[74] *See e.g. In re J.F.G., III*, 500 S.W.3d 554, 558-59 (Tex. App. – Texarkana 2016, no pet.) (complaints about support for initial removal moot, and therefore, unreviewable); *In re J.D.S.*, 494 S.W.3d 387, 389 (Tex. App. – Waco 2015, no pet.) (overruled complaint about findings for maintaining removal under Chapter 262 since it was is superseded with final order); *Coleman v. Tex. State. Dep't of Pub. Welfare*, 562 S.W.2d 554, 5556 (Tex. App. – Tyler 1978, writ ref'd n.r.e.) (alleged error in temporary order became immaterial and moot upon entry of final decree).
[75] *In re A.K.*, 487 S.W.3d 679, 682 (Tex. App. – San Antonio 2016, no pet.).
[76] *In re M.C.M.*, 57 S.W.3d 27, 37 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).
[77] *See Miss Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 1599-1600, 104 L.Ed.2d 29 (1989).
[78] 25 U.S.C.A. §1912(a)
[79] 302 S.W.3d 896 (Tex. App. – Waco 2009, no pet.).
[80] *Id.* at p. 899.

completely; nevertheless, it noted it could. It explained the ICWA could preempt the State's scheme for preservation, in particular, if (1) it is impossible to comply with both the federal and state law and (2) the state law stands as an obstacle to the accomplishment and execution of congressional objectives.[81] The court then indicated that while state law required a party to preserve errors for complaint on appeal, Section 1912 of the ICWA placed the burden of determining application of ICWA on the Department and the trial court and that conflicted with state preservation requirements. Also, Section 1914 of the ICWA provided for post-judgment attacks on involuntary terminations for violations of notice requirements in ICWA and that process was in conflict with the State's process that required preservation of error as a prerequisite to complaint on appeal. Consequently, the court found the mandatory protections for notice in ICWA preempted state preservation requirements and could be raised for the first time on appeal.

Applying the Act, the court acknowledged the record indicated the Department made inquiry regarding whether one of the children was Indian and had filed a copy of its notice pursuant to ICWA with the trial court. Also, a report attached to the notice from the Department's caseworker indicated information that prompted the inquiry. Based on its review of these documents, the appellate court concluded the trial court had reason to believe the children were Indian children because the information indicated the children's maternal grandmother was alleged to be a member of the Chippewa Indian Nation.[82] The court added once that information was present to give the trial court reason to believe the children were Indian children, mandatory notice provisions of ICWA were triggered.

Looking at the notice, the court noted the mother's maiden name and prior addresses were not included and neither was her place of birth. Also, the only ancestral information was that of the grandmother's name, date of birth, reported tribe and membership number. Also, the record was silent as to whether there was any response from the tribe, area director or Secretary of Interior. The court noted it was undisputed that there was no notice as to one of the children, and ICWA was not applied to the proof at trial. The court then held that the proper remedy was to abate the case so that a proper notice could be provided under ICWA and the judgment would be only conditionally affirmed in the event the children were found not to qualify as Indian children. However, if the children were determined to be Indian children, the judgment would be reversed so a new trial could be held applying the requirements of ICWA.[83]

In a later case, the Tyler Court of Appeals, went further, not only disregarding rules of preservation, but considering a complaint under ICWA on its own motion in *In re Z.C.*.[84] After overruling the complaints brought on appeal by both parents from the parental termination judgment, the opinion went on to comment on its observations concerning a CASA report in the record that indicated the parent refused to do a hair follicle test because he was "part Indian and [was not] allowed to cut his hair."[85] The opinion also noted that the permanency reports in the record indicated the child's possible Indian status reported by the father had not yet been determined, and there was nothing in the order of termination making

[81] *Id*.
[82] *Id.*
[83] *Id.* at p. 902.
[84] *See In re Z.C.* , No. 12-15-00279-CV, 2016 WL 1730740 (Tex. App. – Tyler 2016, no pet.)
[85] 2016 WL 1730740 *6.

reference to the issue. Consequently, the court abated the appeal to the trial court to comply with ICWA's notice requirement to determine if the child was an Indian child, and the trial court was ordered to produce a record with appropriate findings determining whether the child was an Indian child. If not an Indian child, the court would affirm the judgment; but if determined to be an Indian child, the case would be reversed and remanded for a new trial to comply with ICWA.[86]

X. Preservation of a challenge to the statutory dismissal deadline requires strict adherence to the statutory scheme and appropriate appellate challenge.

One unique issue in child protection cases that can become a source of appellate complaint involves the proper operation of Section 263.401 of the Family Code. Section 263.401 was originally enacted in 1997 to impose a time limit on how long child protection suits filed by Department can remain pending after the Department has been appointed temporary managing conservator.[87]

The current version of this section provides as follows:

> (a) Unless the court has commenced the trial on the merits or granted an extension under Subchapter (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.

Tex. Fam. Code Ann. §263.401(a) (West 2014).

As indicated, this section requires a court to dismiss a suit filed by the department after a specified period following its appointment as temporary managing conservator of a child unless certain events occur. The triggering events that can avoid a dismissal include (1) the court has commented the trial on the merits or (2) the court granted an extension under Subchapter (b) or (b-1).

Though written in mandatory terms with the directive "shall dismiss," the Supreme Court made clear in *In re Dep't of Fam. & Prot. Serv.*[88] that this provision was not an automatic jurisdictional defect and can be waived. Namely, Section 263.402(b) provides "A party to a suit under this chapter who fails to make a timely motion to dismiss the suit under this subchapter waives the right to object to the court's failure to dismiss the suit."[89] It then provides the following instruction on what constitutes a "timely" motion to dismiss: "A motion to dismiss under this subsection is timely if the motion is made before the trial on the merits commences." [90]

Because of the express directive in Section 263.402(b), a complaint about the court's

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[86] *Id*.

[87] *See* Act of May 28, 1997, 75th Leg., R.S., ch. 600 §17, 1997, Tex. Gen. Laws 2108, 2112-2114; Act of May 28, 1997, 75th Leg., R.S., ch. 603 §12, 1997 Tex. Gen. Laws 2119, 2123-24 and Act of May 31, 1997, 75th Leg., 75th Leg., R.S., ch. 1022 §90, 1997 Tex. Gen. Laws 3733, 3768-3770.

[88] 273 S.W.3d 634 (Tex. 2009).

[89] Tex. Fam. Code Ann. §263.402(b) (West 2014).

[90] *Id.*

failure to dismiss a suit under Section 263.401 is subject to preservation that must satisfy the terms of this section.[91] One problem in meeting those terms, however, is determining when the "trial on the merits commences."

As acknowledged by the Tyler Court of Appeals, interpretation of when trial on the merits commences for purposes of Section 263.401 is not clear.[92] For example, in In re D.I., the Department argued that trial commenced timely to preclude dismissal in that case, because prior to the dismissal date it was called to trial, the parties announced their presence and expressed readiness for trial.[93] The parent argued it was not timely, because there was a transfer order signed and the court did not actually receive evidence for the trial of the case until much later. The Tyler Court concluded it did not have to decide if timely commencement occurred, because the only issue on appeal was whether the failure to file a motion to dismiss was ineffective assistance of counsel. The court stated because determination of whether these facts constituted commencement was unclear in the law, it could not find the trial counsel's failure to seek dismissal under those circumstances fell below an objective level of reasonableness to be ineffective assistance of counsel. In other words, the court essentially found it could not call the trial attorney's evaluation of Section 263.401 deficient because the law was not clear on when trial commences as provided in Section 263.401 and 263.402.

The Amarillo Court of Appeals similarly acknowledged these terms were unclear in *In re D.S.*[94] In that case, the dismissal date was July 12, 2014 and the parties appeared when called for trial two days before that date. When the parties appeared, however, the parties were not asked to make their announcements concerning readiness for trial. Instead, the court called the parties to the bench, asked how long it would take and after they gave their answers, the court immediately "recessed" the hearing and instructed counsel to obtain a subsequent trial date. After the dismissal date passed, the father filed a motion to dismiss that the trial court denied. The father challenge the court's refusal to grant his motion to dismiss on appeal.

On appeal, the appellate court acknowledged when the parties appeared for the trial on July 10 "[n]o substantive action was taken regarding the case" and "[n]o preliminary matters or motions were heard." The Amarillo Court acknowledged no legal authority clearly decided this issue, but concluded Section 263.401 would have to require more than just a putative call of the case and immediate recess. At minimum, the court indicated the record needed to show the parties made their respective announcements, or the court made inquiry into preliminary matters. Since that did not occur, the court held commencement did not occur, and the father's complaint should have been sustained.

In a later case, *In re D.W.*,[95] the Houston Court of Appeals appeared to endorse the Amarillo Court's definition. Namely, the father challenged the judgment on due process grounds because the trial court refused to grant a continuance or request to allow him to attend by teleconference, and the parent claimed this prohibited him from participating in trial in a meaningful manner.

[91] *See e.g. In re D.I.*, No. 12-16-00159-CV, 2016 WL 6876503 (Tex. App. – Tyler 2016).
[92] *Id.*
[93] *Id.*
[94] 455 S.W.3d 750, 751 (Tex. App. – Amarillo 2015, no pet.).
[95] 498 S.W.3d 100, 115 (Tex. App. – Houston [1st Dist.] 2016, no pet.),

In evaluation of that due process claim, the Houston Court acknowledged the Department's suit had been against the dismissal deadline when called for trial. However, the court found that was not an issue applying the Amarillo Court's definition of commencement. In conformity with its reasoning, the Houston court found the trial judge could have effectively commenced trial to avoid the dismissal deadline by merely taking up a few preliminary matters and then recessing the case to allow the father's continuance so he could contact his client in jail.

XI. Conclusion

As this paper illustrates, general rules of preservation apply to child protection cases. However, there are numerous circumstances when special rules apply. While not every special circumstance is illustrated in this paper, it is hoped this paper provides insight into the special preservation processes applicable in child protection cases.

APPENDIX – ATTACHMENT 1

10 TIPS FOR ENSURING A GOOD APPELLATE RECORD

INTRODUCTION

Sometimes the problem in appellate review of a trial judge's decision is not the error of the trial judge's decision, but the way the case was brought to the appellate court. If the record is not good enough to review the decision, then the error in the decision won't be reached. For example, if the appellate record fails to show the decision was ever even posed to the trial judge, the appellate court will have no basis to review the decision. Moreover, if the support or reasons considered in support of the trial judge's decision are not visible in the record, an accurate review of the decision will be impossible. The purpose of this paper is to highlight a few tips to ensure a good appellate record that will permit an appellate court to properly review decisions on appeal.

Tip No. 1: Make sure court reporter takes down testimony.

When a party seeks review on appeal of a trial court decision, it is the burden of the party pursuing the appeal to provide a sufficient record necessary to establish reversible error by the trial court. *See Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex.1990); *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex.1987). In most instances, a party will not be able to establish error in a trial court's decision at a hearing without a full transcription of the subject hearing, because without a complete record the appellate court may be able to presume the absent portions provided sufficient support for the challenged decision. *See e.g. Williams v. Americas Tire Co., Inc.*, 190 S.W.3d 796, 803 (Tex. App.-Dallas 2006, pet. denied); *Sandoval v. Comm'n for Lawyer Discipline*, 25 S.W.3d 720, 722 (Tex. App. - Houston [14th Dist.] 2000, pet. denied). Such presumption is typically applied because an appellate court cannot review the evidence presented to the trier of fact or apply the appropriate sufficiency standards without a complete record. *See e.g. Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex.1968).

The first step in ensuring a complete record on appeal is requesting a reporter to actually take down the proceedings. Rule 13.1 of the Appellate Rules seems to suggest that is not necessary because it provides that the official court reporter must "*unless excused by agreement of the parties*, attend court sessions and make a full record of the proceedings." Tex. R. App. P. 13.1 (emphasis added). As written, it seems this places an automatic duty of a reporter to attend regardless of request unless the parties agree otherwise. Nonetheless, the general statutory provision on a court reporter's obligations is different. It states, "*[o]n request*" a court shall attend all court sessions and transcribe the testimony. Tex. Gov't Code Ann. §52.046(a)(1)(2) (Vernon 2005). Assuming an argument could be made that this statutory provision prevails over the rule, the safest practice is to make a request for the reporter to attend.

Moreover, this is also safest because there are there are other laws written on a reporter's duty which could come into play depending on the circumstances. For example, if the subject hearing is an enforcement hearing under chapter 157 of the Family Code, the Family Code has a specific provision indicating the hearing must be transcribed unless the parties agree to the enforcement order or the motion does not ask for incarceration and the parties waive the record with the court's approval. Tex. Fam. Code Ann. §157.161 (Vernon 2008). However, if

the court has an associate judge under Section 201.009 of the Family Code, the Family Code indicates the court reporter's duty to appear is only discretionary when heard by an associate judge except when it is a jury trial or a contested final termination hearing. *See* Tex. Fam. Code Ann. §201.009 (Vernon 2008. Also, this section further goes on to provide that if a reporter is not provided or on agreement of parties, the record could be preserved in another way approved by the Associate Judge. *Id.*

Appellate courts do not appear to be in agreement whether a reporter's duty to be present for transcription of a hearing is automatic even when special statutes do not come into play. *Compare, e.g., Rittenhouse v. Sabine Valley Ctr. Found., Inc.,* 161 S.W.3d 157, 161–62 (Tex. App.-Texarkana 2005, no pet.) (holding court reporter required to make full record unless excused by agreement of the parties) *with Nabelek v. Dist. Attorney of Harris County*, 290 S.W.3d 222, 231–32 (Tex. App.-Houston [14th Dist.] 2005, pet. denied) (holding party required to request record). Therefore, a litigant should probably not assume it is automatic and always make an affirmative request. That is further true because no complaint can be made to the appellate court about it not being taken down by a reporter unless the record shows the trial judge was plainly made aware of this request. *See, e.g., Nabelek,* 290 S.W.3d at 231–32; *Reyes v. Credit Based Asset Servicing and Securitization,* 190 S.W.3d 736, 740 (Tex. App.-San Antonio 2005, no pet.); *Rittenhouse,* 161 S.W.3d at 162; *Garza,* 212 S.W.3d at 505. That is because the Rules of Appellate Procedure do not permit an appellate court to consider any complaint unless the record shows a timely request, objection, or motion was made to the trial court about such complaint. 190 S.W.3d at 740 (citing TEX.R.APP. P. 33.1(a)). Accordingly, regardless if the law imposes an automatic duty on a reporter to transcribe or not, a litigant should always make sure a specific request is made for a reporter and an objection or motion if the reporter refuses.

However, the question then becomes how can the appellate record show a timely request or objection to a reporter's failure to transcribe was made if no reporter is transcribing anything, including objections? A motion filed with the trial court prior to the hearing and a written order on such request signed on or before the hearing could conceivably preserve this request. However, the formal bill of exception procedure in the Appellate Rules is probably the safest way to make sure the necessary information is provided to the appellate court to secure review. *See* Tex. R. App. P. 33.2. A formal bill of exception must be prepared in writing, state the objection, the court's ruling and the circumstances or evidence presented and be verified by affidavit. *Id.* 33.2(a-c). If the court signs the bill and files it with the case, the bill will be correct and can be presented to the appellate court as a representation of the facts for review. *Id.* 33.2(c)(2)(A). However, if the trial court refuses to sign the bill, it may be necessary to obtain a bystander's bill under this same procedure which requires statements from three disinterested parties. *Id.* 33.2(c)(3). The bill must be filed no later than 30 days after the notice of appeal is filed. *Id.* 33.2(e).

Tip No. 2: Ask the court to accept record descriptions of anything seen or heard that is relevant but not of a nature to be transcribed.

Generally, the official appellate record for review by the appellate court consists of the clerk's record and, if necessary to the appeal, the reporter's record. Tex. R. App. P. 34.1. There may be other materials the court can consider if, for example, there is an agreed

record filed in compliance with the rules or for matters to which judicial notice is authorized on appeal. *See* Tex. R. App. P. 34.2 and Tex. R. Evid. 201. Nonetheless, for the most part, the only information the appellate court is going to be able to consider in its review are the records of the reporter and clerk.

The clerk's record consists of the pleadings, orders and other official documents that are part of the trial court's file in the case, and which are included in the record on appeal either by request or by the district clerk's automatic inclusion of certain basic documents required by the rules. *See* Tex. R. App. P. 34.5. The inclusion of these documents confirms the course of pleadings and orders filed with the trial court, but do not typically constitute evidence for consideration in the appellate court's review unless they were filed pursuant to a proceeding, like summary judgment, that permitted the documents to be considered as evidence by the trial court. *See e.g.* Tex. R. Civ. P. 166a.

The reporter's record is generally the record which will reflect the evidence at issue in the appellate court's review. This record is composed of a transcription of what was stenographically recorded as well as any exhibits the parties to the appeal designate. *See* Tex. R. App. P. 34.6; *but note* Tex. R. App. P. 34.6(a)(2) (if electronically recorded, a different procedure applies).

One problem with stenographic records, however, is that they only take down what is being said. They fail to record gestures, dress, mannerisms, and other matters which could be relevant in a hearing. For example, if a witness is asked about a document and the attorney points to an item asking if it is true, the appellate court is not going to know from the transcript what the witness was asked about. The document would need to be available to the appellate court as an exhibit, clearly identified at the time of questioning and the paragraph in the document that an attorney points to must be clearly identified. Accordingly, it is important to always be sensitive to the fact that the appellate court can only see what is actually being transcribed or placed in evidence.

It, therefore, becomes the duty of the litigant who wishes to protect the record to ensure anything seen or heard which is not transcribed is somehow provided either by document or description. The typical way that an appellate court is made aware of gestures occurring during a trial is by a statement describing the gesture by one of the parties who will ask the trial judge to let the record reflect that description.

Tip No. 3: Review documents that are offered before they are admitted, including your own, and in a format that can be easily referenced in a record.

The trial court clerk is the officer who is required to maintain exhibits and pleadings in the case. *See* Tex. R. Civ. P. 74. Once the exhibits are in the custody of the clerk, the rules require that they remain in the custody of the clerk unless the trial judge permits them to be withdrawn by written order with a copy of the exhibit left in its place, or the court reporter withdraws them with a proper receipt. Tex. R. Civ. P. 75b.

Importantly, once an exhibit is part of the official records of the court, it is an official government document. *See* Tex. Pen. Code Ann. §37.01(2)(A) ("government record" is "anything belonging to, received by, or kept by government for information, including a court record."). This is important, because any tampering or altering of the exhibits after becoming a government document could

result in criminal prosecution. *See* Tex. Pen. Code Ann. §37.01 (Vernon Supp. 2005).

Because a party's ability to control or alter an exhibit after its admission is effectively prohibited, it is critical that any mistakes or changes to the composition of an exhibit be performed before it is admitted into the custody of the court. This is obviously true with respect to the exhibits offered by opponents, but is equally true when one offers his or her own exhibits. In this connection, it is important to anticipate if a document might be admitted as an exhibit which is very lengthy and be prepared to review it to make sure it is in proper order and that papers not belonging to the exhibit are omitted. Also, a lengthy document admitted as an exhibit cannot be easily referenced at trial or on appeal without page numbers, therefore, it would be proper before the exhibit is admitted to ask the court to permit page numbers to be added for proper reference.

Tip No. 4: Avoid using initials, shorthand phrases, or specialized terminology without a clear definition, or explanation of its meaning in the context it is being offered.

Shorthand phrases, initials and industry terminology may be helpful in discussing matters with the parties who understand the terms, but they provide little help to appellate judges reviewing the case unless they are clearly explained. For example, in *In re J.R.*, 171 S.W.3d 558, 570 (Tex. App.–Houston [14 Dist.],2005, no pet.), a parental termination case, a lot of emphasis was placed on the evidence that established the mother continued in a relationship with a man who was a registered sex offender. While the terminology "registered sex offender" was obviously emphasized to show the mother continued to be around someone who committed some offense that required him to register as a sex offender, the appellate court did not see it that way. In fact, the court made clear it could not consider that information controlling when the sex offenses that required him to register were not identified, nor was his age. The information probably was not detailed much at the trial because it had been discussed so much at prior hearings. Nevertheless, such perception is a mistake. It is always important to consider the terminology being used at trial and whether the record clarifies at that time its meaning and/or the underlying facts that make it significant.

Tip No. 5: When an attorney makes statements about facts in the case, make sure to object if you want to ensure those statements are not considered evidence.

One way that evidence can sneak into a record without it being readily obvious is through statements by counsel. In *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997), the Supreme Court found certain unsworn statements made by an attorney regarding an oral contract to be proof a pre-suit agreement even though the attorney was never sworn as a witness. The court held this was proper because the opponent did not object when he should have known that an objection was necessary. The Supreme Court has also applied this reasoning to associated hearings. In *Matthis v. Lockwood*, 166 S.W.3d 743 (Tex. 2006), at a post-judgment hearing challenging a default judgment, counsel testified that notice was sent to the defendant, but the defendant denied receiving it. While statements by neither attorneys were under oath, the Supreme Court found the oath requirement waived when neither raised any objection in circumstances that clearly indicated each was tendering evidence on the record based on personal knowledge on the sole contested issue.

Being aware of the possibility of unsworn testimony being considered is particularly important to remember when your opponent is proceeding pro se. Pro se litigants are governed by the same rules as attorneys, therefore, such litigants would have to object if unsworn statements are made on behalf of your client. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). However, a pro se litigant is also more likely than a non-pro se to speak about facts freely during the trial and raise a greater necessity for objections. Therefore, be on your guard when your opponent is a *pro se* by making every effort to prevent unsworn statements from being considered evidence.

Tip No. 6: Provide a clear chronology of relevant events by offering testimony and documents that establish the timing of relevant actions or events.

In many cases, the chronology of events is well known by the parties and the trial judge before trial, because the facts have already been fully discussed at pre-trial hearings. Nevertheless, this does not translate into proof at the time of trial. The chronology of events should never be taken for granted in protecting the appellate record. Every effort should be made to ensure the relevant dates are clearly admitted at trial in relation to the events that need to be proven, and strategies should be considered to ensure it is done.

For example, the ages of children can be particularly important in a child protection case, because the way a child is cared for at different ages can demonstrate neglect. Leaving a 16 year old child alone for hours is not going to be presumed neglectful, but leaving a newborn infant for hours will be. One strategy to ensure a child's age is clearly established in the record is by getting a copy of the birth certificate admitted early in the trial, and then making sure the dates of events related to neglect are clearly confirmed in the testimony.

Tip No. 7: Do not rely on evidence presented at a prior hearing as support for a decision at a subsequent hearing unless the evidence from the prior hearing is actually admitted at the subsequent hearing.

A wrong assumption sometimes made about the record is that it includes evidence from a prior hearing. While it is true that a trial judge can generally take judicial notice of its own records in a case involving the same parties, testimony from a prior trial or hearing will not be part of the record of a subsequent trial unless it is actually admitted. *See* King, "Comprehensive Guide to Evidence," State Bar of Texas, 37th Annual Adv. Fam. Law Course ch. 4 (August 2011) at p. 9.

For example, in *In re M.C.G.*, the court rejected the appellant's claim that the record showed the caseworker made a mistake in referring the appellant to counseling, because that evidence came from testimony from a prior hearing that was not admitted into evidence at the termination trial. *See In re M.C.G.* 329 S.W.3d 674, 675 (Tex. App.–Houston [14th Dist.], 2010, no pet.). While the parties likely were all present at this prior hearing, as was the judge, the appellate court made clear the record from the trial could not be presumed to include it.

Also, in order for testimony from a prior hearing or trial to be admitted over a hearsay objection under Tex. R. Evid. 804, the declarant of the subject testimony must be unavailable. See *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975). Unavailability in Texas means 'that the witness is dead, or that he had become insane, or is physically unable to testify, or is beyond the jurisdiction of the

court, or that his whereabouts is unknown and that diligent search has been made to ascertain where he is, or that he has been kept away from the trial by the adverse party." *Id.* (citation omitted).

The Supreme Court has noted that some commentators have found it inconsistent that Texas allows the admission of deposition testimony without regard to the availability of the witness (Rule 213, Tex. R. Civ. P.) while excluding former testimony not taken by deposition when the declarant is available. *Id.* (Citing e.g., 5 Wigmore, Evidence s 1401 (Chadbourn rev. 1974)). The Supreme Court suggested this distinction is present, however, because the parties are more likely to have written transcripts of former deposition testimony and the rules require supplementation when a statement made is no longer true when made at a deposition. *Id.* at p. 862.

Tip No. 8: Provide clear descriptions of evidence offered and obtain clarification when a ruling on an offer is unclear.

In order for evidence to be considered part of the record, it must be clear that evidence was actually offered and that the trial ruled on its admissibility. Do not be satisfied if a trial judge merely responds "okay" "move along" "alright" "anything else" in response to a request for admission of an exhibit. Be listening for the word, "admitted," and if it is not said add a request for clarification that lets the record clearly reflect what was offered and the court's ruling.

In this connection, the following are common oversights in the admission process:

1. Failure to mark exhibits
2. Failure to refer to the exhibit number
3. Failure to offer the evidence
4. Failure to have the necessary predicate(s) available and ready
5. Failure to have enough copies
6. Failure to obtain a stipulation or pre-trial ruling, when appropriate
7. Failure to make offers of proof
8. Failure to supplement discovery
9. Failure to obtain a business record affidavit
10. Failure to have necessary exhibits.

King, "Comprehensive Guide to Evidence," at p. 50. The following have also been observed as common oversights in preserving objections to evidence:

1.Premature objections
2. Permitting the witness to testify from an exhibit prior to its admission
3. Failure to request the Witness on Voir Dire
4. Failure to Timely and Properly object
5.Failure to make Discovery objections.

Id. at p. 50-51.

Tip No. 9: Don't presume judicial notice of anything and always secure a ruling that confirms when judicial notice is taken.

Rule of Evidence 201 permits a court to take judicial notice of facts not subject to reasonable dispute that are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources who accuracy cannot reasonably be questioned. Tex. R. Evid. 201(b). Subpart (c) of Evidentiary Rule 201 provides that "[a] court may take judicial notice, whether requested or not." TEX.R. EVID. 201(c). As written this suggests that an appellate court may be able to presume judicial notice when appropriate, whether requested or not.

One situation when it would seem judicial notice is not only appropriate but likely occurring regardless of request is a court's notice of its own file, including prior orders, once it proceeds to trial. Nonetheless, appellate courts have indicated this may not be the case. The First Court of Appeals indicated in *In re R.W. 2011* WL 2436541, 6 -7 (Tex. App.-Houston [1st Dist.] 2011, no pet.), that it could not presume a trial judge took judicial notice of a prior order in its file without a clear ruling by the trial judge because: "when the court takes judicial notice, it must notify the parties and give them an opportunity to challenge that decision." *Id. (citing* TEX. R. EVID. 201(e)). Accordingly, even though the court recognized the rules permitted a court to take judicial notice without a request, the court indicated it would not consider an order to be judicially noticed by the trial judge unless the record reflected that the court took judicial notice.

In reaching that conclusion, the First Court commented that it agreed with the reasoning of the Waco Court of Appeals which concluded there was no evidence of an order signed in the case when the record did not show the court announced it was taking judicial notice of it. 2011 WL 2436541 *7 (referring to *In re C.L.*, 304 S.W.3d 512, 517 (Tex. App. – Waco 2009, no pet.); *See also In re C.L.*, 304 S.W.3d 512, 516 (Tex. App.– Waco 2009) ("The court did not announce in open court that it was taking judicial notice, nor did it recite in the termination decree that it had done so." Accordingly, court held it would not hold the court took judicial notice of its file or prior orders.).

Because Rule of Evidence 201 permits judicial notice to be taken at any stage of a proceeding, including on appeal, the next question one might ask is whether the failure to ask a trial judge to take judicial notice can be fixed with a request on appeal. The Supreme Court's discussion in *In re J.L.* 163 S.W.3d 79, 83 -84 (Tex. 2005), provides some insight on that issue. In that case, the Supreme Court addressed whether an appellate court could take judicial notice of an expert opinion that was issued after the parental termination case was appealed. The appellant had asked the court of appeals to abate the case to the trial court to allow the trial court to receive this new evidence to show the State changed its position on a criminal case at issue in the prior parental termination case. Instead of abating the case, however, the appellate court went ahead and took judicial notice of the new expert opinion as part of of its analysis in the parental termination case. The court's decision to do that was one of the issues for the Texas Supreme Court.

The Supreme Court noted the Respondent argued in support of the court of appeal's decision to take judicial notice based on something the Supreme Court previously stated in *Sparkman v. Maxwell,* 519 S.W.2d 852, 855 (Tex.1975). That particular statement was as follows:

> [A]n appellate court is naturally reluctant to take judicial notice of matters such as municipal charters and regulations promulgated by state agencies when the trial court was not requested to do so and was not given an opportunity to examine the necessary source material. *This does not mean that we would refuse to take judicial notice under similar circumstances where necessary to avoid an unjust judgment.*

Id. (citations omitted) (emphasis added). As

the emphasized language suggested, it appeared the Supreme Court was expressing that it was open to the possibility of allowing judicial notice when "necessary to avoid an unjust judgment." Therefore, it seemed to support the appellant's argument that new evidence that showed a parental termination judgment was based on an incorrect assessment should be an appropriate situation for judicial notice. Nonetheless, the Supreme Court stated it could not have meant that when the evidence at issue is not subject to judicial notice under Tex. R. Evid. 201(b). The court commented a fact that is generally known as required for judicial notice under Rule 201(b) would not need an expert opinion, therefore, an expert opinion obviously is not of the nature for judicial notice. Accordingly, the court held the appellate court's decision to take judicial notice of it was error.

Despite the court's conclusion that judicial notice was not appropriate in that case, the court did not reject the possibility of judicial notice on appeal when necessary to avoid an unjust result. What constitutes the right case for judicial notice of an appropriate fact to avoid an unjust judgment is not clearly defined, but it might be helpful in the right case. That being said, however, since what constitutes an appropriate fact to avoid an unjust judgment has not been clearly defined, it is probably not a good idea to rely on judicial notice on appeal to solidify what was not judicially noticed at trial. Instead, the best approach is to never presume judicial notice is taken of anything necessary for the case at trial, even it seems obvious, such as pleadings and orders in a court's file. When needed as proof in connection with a claim or defense, a clear request and ruling on judicial notice should be made.

Tip No. 10: Always review the exhibits before leaving the hearing or trial, and find out where, how and by whom they are being kept so that the information can be relayed to appellate counsel.

As mentioned before, the exhibits that are filed are kept in the custody of the District Clerk. Nonetheless, attorneys have the right to inspect the records at reasonable times. Tex. R. Civ. P. 76. It is a good idea to always review exhibits before leaving a hearing or trial, because it will be easier to determine if something is missing or accidentally placed out of order at the time of trial than weeks later when the reporter is preparing the record. Moreover, it would be helpful to your appellate counsel to know where the exhibits are kept so he or she will know where to start looking in the event an exhibit fails to get into the record.