

Navigating the Transition from Trial to Appellate Counsel Webinar Q&A

Q: Is there any basis in law for a district clerk to require the filing of a Statement of Inability to Pay Costs before they will accept the filing of a Notice of Appeal?

A: No. Tex. Fam. Code § 107.013(e) provides that a parent who is determined to be indigent “is presumed to remain indigent for the remainder of the suit and any subsequent appeal unless the court, after reconsideration on the motion of the parent, the attorney ad litem for the parent, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent’s financial circumstances.” A district clerk may wish to see a copy of the order to ensure that the trial court found indigent status at some point, but the clerk should have access to the orders in the record. While not required, it is best practice to attach a copy of the indigence order to the notice of appeal.

Q: Can a judge admit the Family Plan of Service except for portions that are considered hearsay?

A: Yes, but the document needs to be redacted before it is entered into evidence. When DFPS offers the Family Plan of Service (FPS) as an exhibit for admission into evidence, opposing counsel should object to the hearsay within the document, and the trial court should sustain the objection if no exceptions apply. The parties may confer to determine what portions of the document should be redacted, and the attorney representing DFPS may offer to redact and re-offer the revised document or an opposing party may wish to submit their own redacted version for consideration. Redactions may also be done by agreement prior to trial. If a judge admits the document without redaction and states that they will not consider the hearsay portions (in a bench trial) or instructs a jury not to do so (in a jury trial), the objecting party must further object and ask the court to direct counsel to redact and re-offer the document so that it accurately reflects what was admitted. It is critical to make an accurate record.

If DFPS attempts to admit more than one FSP, the objections must be made on each FSP. For example, if an attorney represents a mother and objects to portions of her FSP, but father’s FSP contains the same information and gets admitted without objection, then the information becomes part of the record regardless.

Q: How do you deal with judicial questioning of a witness?

A: When a judge asks questions of a witness, it may provide the parties with some insight to the judge’s thoughts on the matter before the court, and counsel may consider tailoring future questions and their witness list based on those insights. Judicial questioning of a witness most often occurs during statutory hearings. A best practice is to request permission from the court to ask some follow-up questions of the witness.

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Q: What's the rationale behind the Texas Rules of Civil Procedure requiring post-trial motions such as a Motion for New Trial (MNT) or Motion for Judgment Notwithstanding the Verdict (MJNOV) following a jury trial but not a bench trial?

A: Post-trial motions give the trial court an opportunity to identify and correct error before asking the appellate court to do the same. In a bench trial, opposing counsel should consider making a motion to dismiss at the close of DFPS' case in chief and again at the end of the bench trial, similar to a jury trial, typically on sufficiency-of-the-evidence grounds. This provides substantially the same result, but trial counsel must stay on top of the potential reversible errors as the trial goes along.

Q: Is there any recourse if you want to stay on for the appeal but the trial court terminates your appointment over your objection?

A: No, but the client may request that their trial attorney stay on as appointed counsel for the appeal. That request, conveyed to the trial court in a verified motion or other written manner, may persuade the court to maintain counsel's appointment through the appeal.

Q: What is the proper action for an attorney representing an absent parent? Is there an obligation to appeal?

A: There is not an obligation to appeal on behalf of an absent parent with one exception: a legal defect in service (notice) under the Texas Rules of Civil Procedure. If DFPS properly served and provided a parent with notice, there is no obligation to appeal. Without speaking to the client, an attorney cannot assume a parent wants a particular outcome in a case; however, an attorney can assume that proper legal notice gave an absent parent enough information to come forward and inquire about the case, if they wanted to do so.

Q: What happens when an appeal is filed within 20 days of the signing of the final judgment and an MNT is timely filed thereafter?

A: The subsequent filing of a motion for new trial after an appeal has been filed does not affect the appeal process. Appellate counsel must still follow the briefing schedule with the Court of Appeals and proceed with the MNT at the trial level. The MNT may extend the trial court's plenary jurisdiction up to 105 days after judgment, and the Court of Appeals aims to resolve child welfare cases within 180 days from the filing of the notice of appeal. This will result in counsel working simultaneously on the appellate brief and brief in support of the MNT. If the trial court grants the MNT, then counsel should request that the appeal be dismissed as long as it is before the appellate court issues an opinion.

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Q: If the Court of Appeals affirms a decision, the mandate is typically not issued for several months. Many individuals want to adopt an eligible child after the mandate has been issued on an appeal. With this in mind, what is the timeline for someone to appeal to the Supreme Court of Texas?

A: The petition for review is due 45 days after the Court of Appeals rendered its judgment if no timely motion for rehearing or motion for en banc reconsideration is filed. If a timely motion for rehearing/reconsideration is filed, the deadline to file a petition for review is generally 45 days after the court of appeals rules on the last motion. You can file a motion for extension to file your petition for review, if you file a compliant motion for extension no later than 15 days after the last day for filing the petition. See Tex. R. of App. Proc. 53.7.

A mandate will issue from the Court of Appeals 10 days after the deadline for further Texas state appellate actions. See Tex. R. of App. Proc. 18.1. Note – a mandate may issue earlier if the parties agree or for good cause on the motion of a party. See Tex. R. of App. Proc. 18.1(c).

Generally, the appellate court clerk handles the issuing of mandates and neither the justices nor the staff attorneys are involved in that process. If you think your mandate should have been issued and it has not, you can file a polite motion with the Court.