

No. 08-0379

**In the Supreme Court of Texas**

---

IN THE INTEREST OF J.O.A., T.J.A.M., T.J.M., AND C.T.M., CHILDREN

---

On Petition for Review from the  
Seventh Court of Appeals in Amarillo

---

**BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE***

---

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

JAMES C. HO  
Solicitor General  
State Bar No. 24052766

DANICA L. MILIOS  
Deputy Solicitor General  
State Bar No. 00791261

Office of the Attorney General  
P.O. Box 12548 (MC-059)  
Austin, Texas 78711-2548  
[Tel.] (512) 936-1700  
[Fax] (512) 474-2697

COUNSEL FOR THE STATE OF TEXAS

## TABLE OF CONTENTS

Introduction .....	1
Argument .....	3
I.    The Court Held in <i>In re M.S.</i> That Parents Are Entitled to the Same Right of Effective Assistance of Counsel as Persons Accused of a Crime—including the Right to Appeal Notwithstanding Objectively Unreasonable Failure of Counsel to Preserve Appellate Rights. ....	3
II. <i>In re M.S.</i> Applies With Equal Force to Error Preservation Requirements in Court Rules and Legislative Acts Alike .....	5
III.  The Court Should Address the Department’s Understandable Practical Concerns by Making Clear That Deliberate Acts by Counsel To Evade Appellate Requirements Will Not Be Rewarded or Tolerated .....	7
Prayer .....	10
Certificate of Service .....	11

**INDEX OF AUTHORITIES**

**Cases**

*Evitts v. Lucey*,  
469 U.S. 387 (1985) ..... 4

*Ex Parte Axel*,  
757 S.W.2d 369 (Tex. Crim. App. 1988) ..... 5

*In re M.S.*,  
115 S.W.3d 534 (Tex. 2003) ..... 2, 3, 4, 5, 7, 8

*M.L.B.v. S.L.J.*,  
519 U.S. 102 (1996) ..... 6

*Mathews v. Eldridge*,  
424 U.S. 319 (1976) ..... 5

*Santosky v. Kramer*,  
455 U.S. 752 (1982) ..... 1

*Strickland v. Washington*,  
466 U.S. 668 (1984) ..... 3

*Ward v. State*,  
740 S.W.2d 794 (Tex. Crim. App. 1987) ..... 4, 5

**Statutes, Rules, and Constitutional Provisions**

TEX. FAM. CODE § 107.013(a) ..... 6

TEX. FAM. CODE § 107.013(a)(1) ..... 3

TEX. FAM. CODE § 263.405 ..... 6

TEX. FAM. CODE § 263.405(b) ..... 7

TEX. GOV'T CODE § 311.021(2) ..... 6

TEX. GOV'T CODE § 311.021(3) ..... 6  
TEX. R. CIV. PROC. 324(b)(2) ..... 3

**Other Authorities**

Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*,  
57 AM. U. L. REV. 1645 (2008) ..... 7, 8

No. 08-0379

## **In the Supreme Court of Texas**

---

IN THE INTEREST OF J.O.A., T.J.A.M., T.J.M., AND C.T.M., CHILDREN

---

On Petition for Review from the  
Seventh Court of Appeals in Amarillo

---

### **BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE***

---

TO THE HONORABLE SUPREME COURT OF TEXAS:

This brief is submitted in response to the Court's March 27, 2009 order inviting the Solicitor General to file a brief that expresses the views of the State of Texas. In the view of the State, the Court should affirm the judgment of the court of appeals that Respondents may pursue their factual sufficiency claims on appeal because the failure to preserve their claims was due solely to the ineffective assistance of counsel. The State takes no position on the merits of the factual sufficiency claims themselves.

#### **INTRODUCTION**

Few rights are as profound and central to human existence as the rights of mothers and fathers to care for and retain custody of their children. As the U.S. Supreme Court has long recognized, a parent's interest in the care and custody of his or her children is a fundamental liberty interest, protected by the Due Process Clause of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 752-53 (1982). When the State seeks to terminate that interest, it must first provide fundamentally fair procedures that satisfy due process. *Id.* at 753-54.

These concerns were at the core of this Court's unanimous decision in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003). That ruling sent a clear signal: Just as individuals accused of a crime are entitled to the effective assistance of counsel before the State may deprive them of their liberty, so too are parents entitled to effective counsel before the State may deprive them of custody of their children.

Courts will not lightly conclude that counsel has been ineffective. As this Court has made clear, counsel's conduct must be "so outrageous that no competent attorney would have engaged in it." *Id.* at 545. But that standard can be met where counsel inexcusably fails to preserve the client's right to appeal. Individuals may be entitled to pursue appeal despite the objectively unreasonable conduct of counsel. Both the U.S. Supreme Court and the Texas Court of Criminal Appeals have so held in the criminal context. Likewise, in *In re M.S.* this Court held that a parent is entitled to proceed on a factual sufficiency claim on appeal when counsel inexcusably fails to file a timely motion for new trial. *Id.* at 549-50.

To be sure, this case differs from *In re M.S.* in one respect—the error preservation requirement at issue arises out of statute, rather than court rule. But we are aware of no principle suggesting that *In re M.S.* would not apply just as readily to statutory requirements of error preservation—just as they do in the criminal law context.

The Department of Family and Protective Services presents understandable practical concerns that counsel may deliberately avoid error preservation requirements to gain tactical advantages for their clients. But such tactics are highly risky for both the client and counsel. The Court can also take steps to ensure that such tactics will not be rewarded or tolerated.

## ARGUMENT

### I. THE COURT HELD IN *IN RE M.S.* THAT PARENTS ARE ENTITLED TO THE SAME RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL AS PERSONS ACCUSED OF A CRIME—INCLUDING THE RIGHT TO APPEAL NOTWITHSTANDING OBJECTIVELY UNREASONABLE FAILURE OF COUNSEL TO PRESERVE APPELLATE RIGHTS.

In *In re M.S.*, counsel failed to file a timely motion for new trial under Texas Rule of Civil Procedure 324(b)(2) to contest the factual sufficiency of the trial court's judgment terminating the mother's parental rights. *In re M.S.*, 115 S.W.3d at 535-36. The Court nevertheless unanimously concluded that the mother retained the right to appeal, because Texas law guarantees effective assistance of counsel to indigent parents in a parental rights termination proceeding—akin to the rights of the accused to effective counsel in a criminal proceeding. *Id.* at 549-50. The logic of *In re M.S.* applies with equal force to this case.

Section 107.013(a)(1) of the Texas Family Code establishes a right to court-appointed counsel for indigent parents in parental rights termination cases. In *In re M.S.*, the Court construed that provision to include the right to *effective* counsel, and expressly incorporated the standard adopted by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine the effectiveness of counsel in criminal proceedings. 115 S.W.3d at 544-545. To establish a claim of ineffective counsel under *Strickland*, defendants must satisfy a two-prong test: They must demonstrate that counsel's performance was deficient, and that the deficiency actually prejudiced the defense. *Strickland*, 466 U.S. at 687.

The *Strickland* standard is a rigorous one for persons accused of a crime to satisfy—and it is likewise so for parents under *In re M.S.* Courts will not question judgment

calls that fall within a “wide range of reasonable professional assistance.” *In re M.S.*, 115 S.W.3d at 545. Counsel will not be deemed ineffective unless his or her conduct is “so outrageous that no competent attorney would have engaged in it.” *Id.* Moreover, all actions of counsel are presumed to reflect the wishes of the client. *See id.* at 549 (“when a motion for new trial is not filed in a case, the rebuttable presumption is that it was considered by the appellant and rejected”) (quotations omitted). Accordingly, it is “the parent’s burden to show that counsel’s performance fell below an objective standard of reasonableness.” *Id.* (quotations omitted).

But where the *Strickland* standard is met, the consequences are clear: A client retains the right to appeal where counsel has behaved in an objectively unreasonable manner in failing to preserve that right. For example, in *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), counsel failed to file a timely “statement of appeal” on behalf of a defendant in a criminal proceeding. Accordingly, the defendant argued that this failure constituted ineffective assistance of counsel. The federal district court granted habeas relief on that basis and ordered release or a new appeal, and both the Sixth Circuit and the U.S. Supreme Court affirmed. *Id.* at 391. Similarly, the Texas Court of Criminal Appeals has set aside nonjurisdictional deadlines for pursuing appeal when failure to comply with them resulted from ineffective assistance of counsel. In *Ward v. State*, the Court granted an out-of-time appeal to a defendant whose appeal was dismissed because his lawyer unjustifiably failed to include the statement of facts in the appellate record. 740 S.W.2d 794, 800 (Tex. Crim. App. 1987). Relying on *Evitts*, the Court found that this failure denied the defendant effective

counsel, granted him a new appeal, and restarted all of the appellate deadlines. *Id.* at 799-800. Likewise, in *Ex Parte Axel*, 757 S.W.2d 369, 374-75 (Tex. Crim. App. 1988), the Court granted an out-of-time appeal on habeas to a defendant whose lawyer unjustifiably failed to file a timely notice of appeal.

*In re M.S.* extended these same principles to parental rights termination proceedings in clear, unequivocal terms: “[I]f the court of appeals finds that the evidence to support termination was factually insufficient, and that counsel’s failure to preserve a factual sufficiency complaint was unjustified and fell below being objectively reasonable, then it must hold that counsel’s failure to preserve the factual sufficiency complaint by a motion for new trial constituted ineffective assistance of counsel.” 115 S.W.3d at 550. “In that case, the court of appeals should reverse the trial court’s judgment, and remand the case for a new trial.” *Id.*

## **II. IN RE M.S. APPLIES WITH EQUAL FORCE TO ERROR PRESERVATION REQUIREMENTS IN COURT RULES AND LEGISLATIVE ACTS ALIKE.**

The Department of Family and Protective Services points out that *In re M.S.* involved a court-made rule, whereas this case involves a statutory error preservation requirement. But the State is unaware of any viable principle that would distinguish *In re M.S.* on this ground.

To the contrary, the Court’s analysis in *In re M.S.* expressly relied not only on the statutory requirement of counsel for indigent parents under the Texas Family Code, but also the due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Invoking *Mathews*, the Court concluded that “the State’s interests in economy and efficiency

pale in comparison to the private interests at stake, and to the risk that a parent may be erroneously deprived of his or her parental rights and the child may be erroneously deprived of the parent's companionship if counsel unjustifiably fails to preserve error." *In re M.S.*, 115 S.W.3d at 548.

The force of this logic is not diminished where the rule in question arises out of statute rather than court rule. Both are equally subject to the federal constitutional requirements of due process. *See also M.L.B.v. S.L.J.*, 519 U.S. 102, 128 (1996) (holding that due process and equal protection requirements prohibit a State from dismissing an indigent parent's appeal in a termination case for failure to comply with a statutory requirement to prepay appellate costs).

The Department also argues that, as a textual matter, the Court must apply § 263.405 of the Family Code as written (and without exception) to deny appellate review to any parent who fails to file a statement of points—even when the failure is caused by ineffective counsel under the strict *Strickland* framework. To do so, however, would effectively nullify another statute—namely, Texas Family Code § 107.013(a), which the Court has construed to entitle indigent parents to effective counsel. *In re M.S.*, 115 S.W.3d at 544-45; *cf.* TEX. GOV'T CODE § 311.021(2), (3) (requiring statutes to be construed in accord with the U.S. and Texas Constitutions and so that the entire statute is effective). Faithful application of *In re M.S.* would not nullify § 263.405 of the Family Code. That provision would continue to operate in full force in all cases in the absence of ineffective counsel—no different from statutes governing procedure in criminal procedures that apply in the absence of ineffective counsel.

**III. THE COURT SHOULD ADDRESS THE DEPARTMENT'S UNDERSTANDABLE PRACTICAL CONCERNS BY MAKING CLEAR THAT DELIBERATE ACTS BY COUNSEL TO EVADE APPELLATE REQUIREMENTS WILL NOT BE REWARDED OR TOLERATED.**

The State is aware of, and sensitive to, the Department's concern that, by affirming the judgment below, the Court could effectively encourage counsel to sandbag their own cases and ignore error preservation requirements in order to strengthen their clients' positions on appeal. *Cf. Kyle Graham, Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645 (2008). For example, the Department may fear that counsel might deliberately refrain from filing the timely statement of points required under § 263.405(b) of the Texas Family Code—perhaps to avoid missing a viable point on appeal inadvertently, or to buy more time to develop additional theories for appeal not yet discovered by counsel—secure in the knowledge that counsel's untimeliness will not be imputed to the parent.

One can debate whether the Department's practical concerns are more theoretical than real—and whether, if the judgment below is affirmed, counsel who fail to follow error preservation requirements in the future are doing so out of ingeniousness or ignorance. But assuming that counsel do indeed gain substantial tactical advantages for the client by engaging in such tactics, and assuming the existence of sophisticated counsel who are willing and able to take advantage of such tactics, the State certainly shares the Department's concern and supports efforts to combat such stratagems.

The State recognizes that, even without further remedial action by this Court, such tactics already carry great risk to both the parent and counsel. For the parent, the risk is waiver of all appellate rights—because there is no guarantee that a court will ultimately

blame the untimeliness on counsel and not the parent. To the contrary, the presumption runs precisely in the opposite direction. See *In re M.S.*, 115 S.W.3d at 549 (“when a motion for new trial is not filed in a case, the rebuttable presumption is that it was considered by the appellant and rejected”) (quotations omitted). Cf. *Graham*, 57 AM. U.L. REV. at 1691 (“An attorney who sandbags in a capital case is betting the client’s life . . .”). And for counsel, the risk is substantial harm to his or her livelihood as an attorney—dangers that include the denial of future court appointments and compensation from public funds in parental rights termination and other proceedings; malpractice claims by parents who have been deprived of their children due to objectively unreasonable conduct by counsel; and disciplinary action by courts or other appropriate authorities, as well as diminution of the attorney’s reputation among the bench, bar, and the community at large. In short, objectively unreasonable failures by counsel to preserve a client’s appellate rights warrant opprobrium when the failures are inadvertent—and even more so when the failures are deliberate.

The Court could take additional steps to help further mitigate the Department’s understandable concerns by clearly identifying these and other risks of opportunistic conduct. In particular, the Court could make clear in its decision that any effort by counsel to game the system will be met with adverse consequences to the attorney, *see Graham*, 57 AM. U.L. REV. at 1691 (“To combat these tactics, courts that encounter inexplicable failures by counsel . . . should strongly consider referring the culpable attorney to the appropriate disciplinary authorities”)—and denial of appeal to the parent. In addition, the Court could direct trial courts to develop and implement procedures that will effectively combat both deliberate and

ignorant failures by counsel to comply with error preservation requirements. For example, trial courts could be tasked to deliver clear, unambiguous instructions immediately following the issuance of any parental rights termination order—instructions that put both parents and trial counsel on clear notice of their right to appeal; the procedures that they must follow in order to preserve that right; and the risks that they face in the event that counsel fails to do so. Trial courts could also specifically instruct trial counsel that failure to adequately preserve appellate rights may constitute an actionable breach of duty to the client that may render counsel vulnerable to both malpractice and disciplinary actions.

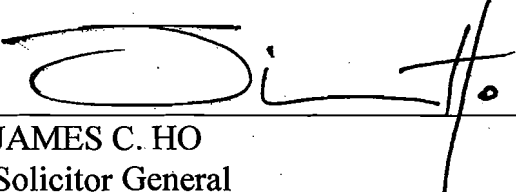
**PRAYER**

The Court should affirm the judgment of the court of appeals that Respondents may pursue their factual sufficiency claims on appeal because the failure to preserve their claims was due solely to the ineffective assistance of counsel. The State takes no position on the merits of the factual sufficiency claims themselves.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

  
A handwritten signature in black ink, appearing to read 'J. Ho', is written over a horizontal line. The signature is stylized with a large 'J' and a distinct 'H'.

JAMES C. HO  
Solicitor General  
State Bar No. 24052766

DANICA L. MILIOS  
Deputy Solicitor General  
State Bar No. 00791261

Office of the Attorney General  
P.O. Box 12548 (MC-059)  
Austin, Texas 78711-2548  
[Tel.] (512) 936-1700  
[Fax] (512) 474-2697

COUNSEL FOR THE STATE OF TEXAS

**CERTIFICATE OF SERVICE**

I certify that on April 23, 2009, a true and correct copy of this document was sent to the following counsel via certified U.S. mail, return receipt requested:

Trevor A. Woodruff  
Duke Hooten  
Michael Shulman  
Texas Department of Family and Protective Services  
P.O. Box 149030  
MC: Y-934  
Austin, Texas 78714

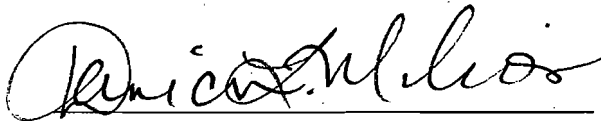
COUNSEL FOR PETITIONER TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

John Franklin McDonough, III  
Assistant District Attorney  
P.O. Box 3431  
Stinnett, Texas 79083

COUNSEL FOR RESPONDENTS TIMOTHY AND TRENA MURPHY

Dale Rabe  
Attorney at Law  
P.O. Box 1257  
Childress, Texas 79201

ATTORNEY AD LITEM FOR THE CHILDREN



Danica L. Milios  
Deputy Solicitor General