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Supreme Court of Texas.
In the Interest of K.A.F., a child.
No. 04-0493.

February 16, 2005

Appearances:
Bruce K. Thomas, (argued), Law Office of Bruce K. Thomas, Dallas, TX, for petitioner Susan Carroll Capps.
Richard J. Clarkson, (argued), Beaumont, TX, for respondent Louis Faucheaux.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 04-0493 in the Interest of K.A.F., a child.
SPEAKER: May it please the Court. Mr. Bruce Thomas will present argument for the petitioner [inaudible].

ORAL ARGUMENT OF BRUCE THOMAS ON BEHALF OF THE PETITIONER

MR. THOMAS: Mr. Chief Justice, members of the Court, I would like to first discuss this morning whether a motion to modify a judgment will extend the appellate timetable for an extraordinary appeal. And then, in any time remaining, I would like to spend for a brief review that very serious constitutional issues are raised in the event that the answer to that question is no. We have here a civil case. We have the luxury of just talking about money whether it be the tip of the rule yesterday or falling off a horse today but sometimes the stakes are much more serious and even though we have a technical construction of the rules here, of what we are arguing about, the ultimate import of what we're talking about is much more fundamental. I can't say it any better than this Court said in in re M.S. where it said that, termination of parental rights is traumatic, irreparable, and permanent. And if there's any arguable construction of the appellate rules that will void the result that just hits you wrong in the gut that you have an irreparable, permanent deprivation of parental rights

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that you don't have a chance to have appellate review.

JUSTICE: How does it affect the assistance of counsel claim to your argument?

MR. THOMAS: I was gonna get to that, but I'll jump right to it --

JUSTICE: But if that's the principle then no deadline for labor will apply.

MR. THOMAS: I don't think so.

JUSTICE: That same argument can be made about notice of appeal filed 100 days instead of 90 days after.

MR. THOMAS: Well, you know, if there's an arguable construction, if there's an arguable construction. If there's no arguable construction, as this Court has said. And this Court has said that our construction is at least bald, then the deadline tolls. I don't' think there's any party that argues that 90 days plus 15 grace period [inaudible] isn't a hard deadline. Once you get out to 105 days, that's a hard deadline. As far as ineffective assistance of the counsel, we believe that that plays into it because there are a number instances where, in analogous circumstances Courts have found that when you had such a due process deprivation that the rules must give way. In fact, this Court's found that in re M.S. where it said factual sufficiency -- preservation of factual sufficiency review must give way to the due process concerns when there has been ineffective assistance of counsel. And we think this is such a case analogous to a criminal case where a court of criminal appeals lost for [inaudible] time of appeals due to an ineffective assistance counsel, analogous to immigration appeals in federal courts and the federal courts have said, "We toll -- we have an equitable tolling offering in ineffective assistance of counsel." We think those same policies play into this case.

JUSTICE: Do you argue that a motion to modify should have a different effect in this kind of a case than in other kinds of civil cases?

MR. THOMAS: No, your Honor, we think that the rule should apply to a motion to modify judgment across the board, but we find no specialist in this case as far as that's concerned until we get to the constitutional issue that it runs you into.

JUSTICE: Right.

MR. THOMAS: As far as our argument is concerned on the construction of the rules, it's straightforward. Rule 26.1 sets up the general rule that you have 30 days to file an appeal. And then there are series of exceptions. Subsection A says, you file one of four posttrial motions. The deadline for filing an appeal is 90 days. Subsection B says, if you have an accelerated appeal, the deadline for filing is 20 days. Rule 26 doesn't address what happens when you have both. When you have both an accelerated appeal and you have one of the four posttrial motions that has been filed. So, if that were standing alone, there wouldn't be a real guidance as to whether A trumps B, because it comes first so B trumps A because B has a shorter time period than A. But we can't find some guidance in Rule 28 because Rule 28.1 and 28.2 referring to accelerated appeals, interlocutory appeals and for quo warranto proceedings, both have the same sentence and that the filing of a motion for new trial should not extend the time to perfect the appeal. Now, that's sentence -- and both of those sections as to have any meaning, then subsection B of 26 can't answer the question. That would just make those sentences surpluses. And there's some reason to think or in fact there's substantial reason to think from the redrafting of the rules in 1997 that those sentences were still meant to have meaning.

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JUSTICE: I don't -- I'm not sure I understand a bit.

MR. THOMAS: Yes.

JUSTICE: Isn't 26 -- do you think that just because there are no exceptions in B that there might be?

MR. THOMAS: Well, I'm saying there are two exceptions.

JUSTICE: Why wouldn't you repeat the exceptions of A in B if you thought they apply?

MR. THOMAS: Well, because there are two separate exceptions. I mean, that's what leads to the ambiguity. We have 30 days and then there are two separate exceptions to the 30 days. One says, if these four things happen, it's 90 days. Then we get a separate exception and they don't refer to each other and says if this other thing happens, it's 20 days. What happens when they both happen? And it just doesn't address what happens when you have both. But if rule B trumps, then these are dead letters on Rule 28.1 to 28.2. Were they intend to be dead letters is that how we interpret this, just, just erroneous surplusage? I don't think so because in the 1997 redraft of the rules, these sentences were specifically left in. Take a look at Rule 28.2 referring to quo warranto proceedings. That rule comes from a prior Rule, 48 -- 42A2 in substantially the same language said -- or exactly the same language says that "the filing of a motion for new trial should not extend the time for -- to perfect the appeal." And a former rule went on to say "for the time for filing appellant's briefs" and the redraft of the rules. Obviously, the second clause was considered -- decided that should be dropped because we now pegged the filing of the appellant's brief from the time of filing the record not from the time of filing the appeal. But the decision was made to keep the rest of the sentence in there, and that doesn't make any sense to preserve the rest of the senates if it's not to have any meaning. This would've been the time to drop it as surplusage if it wasn't to change it to have any meaning but somebody thought it would still have meaning and they kept it in, and the same for 28.1. In fact, there was a more substantial revision to 28.1. 28 --

JUSTICE: The quicker way we can get these appeals decided the better.

MR. THOMAS: True.

JUSTICE: And so why your interpretation will almost guarantee that they will be slower? Maybe not in every case but in lots of them. So, isn't that, I mean, the legislature in the one year deadline, in a separate legislature, gave us a pretty strong indication in line with social science that the quicker to -- who the parents are is determined the better for the child. So, why should we just have a firm rule that says, "Look, with 20 days it is, 20 days we mean."

MR. THOMAS: Because as with so many issues that hit your desk, there are competing policies and here we have a competing policy that we do have to a legislative policy to speed up, accelerate your appeals and we also have a policy to preserve the appeal if there's any arguable argument to do so. And here, we don't destroy the first policy by our interpretation. It does work against it and I have to admit that. It does work against it, but it certainly doesn't destroy it. There are other appellant tools available to speed up and accelerate your appeals and one of them is in Rule 28.3 which presumably is one of the accelerated provisions that's incorporated into the Family Code by Section 109.002A which is a statute applicable here that incorporates generally the accelerated provisions of the Rules of Appellate Procedure into the Family Code, and 28.3 two tools that provides to the appellate courts is you can accelerate the disposition on sworn

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pleadings without waiting for a clerk's record. You can set the disposition without briefs apparently just on argument and there, of course, a number of informal tools or internal tools that you can use by -- appellate court can use by accelerating on its docket. I know as a former staff attorney, when my judge told me to put the draft at the top of my list of things to do, that significantly accelerated the disposition of their appeal. And, I mean, in this case, I know the Fifth Circuit is very reluctant to allow extensions of time on reply briefs. That's another place where it can be extended. In this case, the other side got an extension time on their appellee's brief pushing our reply brief to do a write up for Thanksgiving weekend and I was very tempted to ask for an extension of time but I didn't because it's an accelerated appeal. I don't think you should've given it to me for a reply brief. So, there are a number of tools and arsenal to further that policy of accelerating appeals.

Conversely, the competing policy. If you say that B is the final word and it's only 20 days then that policy is fundamentally destroyed if we lose the appeal, and despite any arguable interpretation to the contrary. And that not only does violence to that policy, it does violence to the plain language of the Appellate Rules in 28.1 and 28.2 --

JUSTICE O'NEILL: It seems to me --

MR. THOMAS: By making those dead letters.

JUSTICE O'NEILL: Well, it seems to me that 28 just -- is totally inapplicable. If you start with 109002A, the first words say the procedures for the accelerated appeal under the rules. See, you have to decide what are the procedures, where are they set up and then really 28 doesn't say anything about procedures as much as it does -- as much as it says what makes it accelerate. It says interlocutory appeals shall be accelerated, quo warranto proceedings shall be accelerated. So, it seems to me 28 says what will be accelerated but it doesn't really set forth any procedures except as it displays specific avenues which would then get us back to 26. So, do you agree that 28 really has no application here?

MR. THOMAS: No, your Honor. I don't agree and this Court didn't agree in Hahn . I mean, this Court made that same analogy in Hahn and said, "Here, take a look at 28.1. This doesn't make sense." If 28.1 says this and 26 subsection 2 --

JUSTICE O'NEILL: That's a different -- well, that's a different argument and we even say that in other areas of the code, they've indicated that they never had to shorten these times and say this won't do it. They know how to do it and they didn't do it here but that doesn't mean it applies here. That means that you consulted to see if the legislature knew how to do it.

MR. THOMAS: Right.

JUSTICE O'NEILL: But I can't, in the language of 28, see that it has any application here other than to indicate that legislature knew how to do it, which just puts you to 26.

MR. THOMAS: Well, I -- I agree with that to the extent I'm using 28 to inform how we interpret 26. I would disagree to the extent that 28.3 only applies to quo warranto and interlocutory and I would say 28.3 was incorporated generally into the Family Code and it's difficult to tell but since the Family Code simply incorporated all the accelerated provisions, you know, en masse, if you will, without making any distinction. It seems to me a perfectly reasonable construction that they were saying that the quo warranto and the interlocutory appealed provisions in 28 apply to this proceeding, as well.

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JUSTICE O'NEILL: Well, if you look at the comment to Rule 28, it says that a motion for a new trial is now permitted in appeal from interlocutory order but it does not extend the time to perfect appeal. That indicates to me that previously you weren't even allowed to file these post judgment motions but we amended Rule 28 to allow, at least, a motion for a new trial but to clarify that that would not -- and you now have that right the trial court can grant it and move the appeal, but it will not extend the timetable.

MR. THOMAS: Yes, and as a matter of fact, I was just about to get to 28.1. It formerly was a language taken from former Rule 42A1 where it said, "In appeals from interlocutory orders, no motion for new trial shall be filed," and there was some conscious decision to change that language to make it consistent with 28.2, the quo warranto rule.

JUSTICE O'NEILL: I think the reason for that, historically, was if the judge had a change of heart, the trial court, there's no need to get to interlocutory appeal if the trial court's gonna reverse himself or herself. So, it seemed jurisprudentially prudent to put that in there to give the trial court another chance to reconsider, but not to slow down the appeal process which doesn't -- it's a signal to me that anybody thought you had the right to file these other post judgment motions.

MR. THOMAS: Well, if you didn't have the right to file the other post --

JUSTICE O'NEILL: To extend -- to extend the deadline.

MR. THOMAS: Well, I see the point but the quo warranto provision was still there and left in only referring to motions for new trial. That still doesn't make any sense and it really doesn't make any sense to make the two parallel to refer to just motions for a new trial. It would make more sense, I believe, if that was the case, just to drop it out. If you dropped out the provision, the prohibition against filing motions for new trial, there would no longer be any prohibition and it would be by putting again specifically referring the motions for a new trial that would not be necessary unless subsection B of Rule 26 doesn't -- would otherwise allow it.

JUSTICE O'NEILL: Well, if the, the phrase of being in there is you get the motion for new trial. It can be acted on within a certain timeframe, but it does not extend the timetable whereas if you totally prohibit it, you didn't get the motion at all and the timetable wouldn't be extended.

MR. THOMAS: But the third option's you drop it all together and you get your motion for a new trial. You just drop the prohibition all together and you get your motion for a new trial.

JUSTICE O'NEILL: But then it would extend the appellate timetable. So, what this was -- and this indicates to me that no one thought that any of these motions were available to extend the appellate timetable up to 26.

MR. THOMAS: Because they only choose motions for a new trial.

JUSTICE O'NEILL: You didn't get one before. You didn't get anything before. Then they come back, okay. At least you get a motion for a new trial but let the trial court pull it back and pull down their erroneous order but that does not extend the timetable, the appeal timetable.

MR. THOMAS: Again, I'll just say there's no reason to say that Rule 26 -- subsection 26-1B already answers that question. You just refill the prohibition and you've breached the policy that you're saying that the [inaudible].

JUSTICE O'NEILL: Well, [inaudible] to the Court.

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CHIEF JUSTICE JEFFERSON: Thank you. If there are no further questions, I will have some on constitutional position and you were explaining that you would take if the Court were to say it didn't extend the deadline and perhaps you can address that on rebuttal. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Richard Clarkson will present argument for the respondent.

ORAL ARGUMENT OF RICHARD CLARKSON ON BEHALF OF THE RESPONDENT

MR. CLARKSON: May it please the Court. As a caveat, let me say that I've been a long-time member of the State Bar Committee on Legal Services to the Poor in civil cases and nothing I say today would detract from my position that the poor are entitled to legal services. Of course, the question and what I think is the threshold question here is a fact question, that is, what was the intent? If you take the document as written, it says, "And less probable to provide the basis to a subsequent appeal." Well, less probable is less than possible. And certainly, what he even admitted under Texas Rule of Evidence 401 as relevant evidence. So, the threshold question is a jurisdictional question that is, that this Court have the right or jurisdiction to reach constitutional issues or statutory interpretation issues if it is -- it must first have before a factual finding on the intent. You know, this is not like 1984 where a war is peace, and love is hate and so forth. We're talking about words and phrases that have hundred of years of jurisprudence behind them. A notice of appeal is not a difficult phrase. It doesn't mean it's possible that we wanna appeal sometime in the future versus we are giving a present notice of appeal.

JUSTICE O'NEILL: But we don't reach that question until we answer the first, correct?

MR. CLARKSON: Yes, that's right. And the case that I just filed to brief in recently in the Easton Court, you know, was a question of whether or not a client was indigent but the court get his abate that trial -- excuse me -- that appeal sent for the record and now has before it the question of indigence saying whether or not a record would be produced and then to go forward with the appeal. We have none of that here. There's no record before this Court. It's all speculative. We don't know even if a motion for new trial of hearing, the client conceded that she had no intention at that time to appeal.

JUSTICE O'NEILL: Well, can you address the first point as to the extension of the deadlines, I mean, how do you address the argument that in other areas legislature -- and the rules indicate that it's clear when posttrial motions will not extend appellate deadlines and by silence in 26-1B, there is no intent to extend. I mean, there has been an intent to allow extension of deadlines.

MR. CLARKSON: Well, not being a scholar on statutory construction, I went to the Sutherlands, 6 volumes set on statutory construction and looked it up and I saw that par immateria as a doctrine, for instance, is important. That goes back to what is the public policy of Texas. The legislative history is available. There is a wonderful office they have here in Austin that will give that to you; legislative intent research, one that has been done in this case. So they were speculating on legislative intent. In another case that I had involving a mandamus was the fact that when the children are taken away from one or both

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parents, the legislature passed a new statute saying that there were six months only to challenge this. Not the bill of review time or any other time that it be mandatory -- that it be done within six months and as Judge Brister, I believe, said the public policy is, this must be done quickly.

JUSTICE O'NEILL: That's when the Texas Department of Protective Services is involved, right?

MR. CLARKSON: No. No, that involves private parties. That case involved private parties but I'm glad you mentioned that because [inaudible] has slept with the distinction which is part of this par immateria, this old statutory instruction rule, and that is the counsel wants you to look at this role, and that role, or this statute and that statute. The role is that it has to be of the same kind or degree -- and just -- the same focus, I should say. And there is case law in Texas that says the Department of Regulatory Services is different than merely two parents having a dispute about who is gonna be named the managing conservatory?

JUSTICE O'NEILL: If you can't file post judgment motions in accelerated appeals, how do you preserve factual sufficiency questions if you can't file a motion for new trial, how do you preserve those?

MR. CLARKSON: Well, of course, that's an issue that has not been, to my knowledge, has not been resolved. One has to balance the right to get these matters taken care of quickly versus the traditional less -- less hurried appellate process. In a regular case, one would file their bills, or file their motions for new trial and so forth which would allow regular appeal to go on. And I think the courts are saying that in expedited appeal, some of these traditional common law rights do not exist. But the court has made the public policy decision or the legislature has that speed is more important in these particular cases.

JUSTICE O'NEILL: Isn't that a due process problem if you lose your right to a factual sufficiency review, and it [inaudible] termination count?

MR. CLARKSON: I recognize that -- well, the Texas Supreme Court and the United States Supreme Court have said the parental right in their children is a primary right that is protected by the Constitution, but the question here is whether or not there was a notice of appeal filed. The counsel has pointed to the document they based that on. One needs a little more evidence unless you abate the case and send it back to the trial court or the court of appeals for additional findings. This Court and the court of appeals have the power to affidavit or remand for hearings to determine crucial factual questions that would bear upon the jurisdiction. I am certain that is a possible thing to do it but the question here is not that did she fail to prove that she was a good mother. The question is, did she fail to file a notice of appeal, and we have that document in front of us. And that document is syntactically ambiguous, to speak charitably. And this lady was passed, had we all learned that she testified that she and the family spent over $200,000 on the trial. So this is not a mere tyro or a mere neophyte. I would be typically paid $200,000 for a child custody dispute. So, it might be that a person wandering blindly out in the desert not knowing north from south, you would help more a person that's still in need of legal assistance and the law is that before this Court can reach a constitutional issue, it must adopt any set of facts which support the constitutionality of the statute under review. In the face of no record, the interpretation is that less probable means just that: that it's less probable there is even gonna be an appeal, so --

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JUSTICE O'NEILL: If you're just looking at 26 (1) and that's all, the language itself. It doesn't say that posttrial motions will not extend the appellate deadline. From what do we imply that?

MR. CLARKSON: I think you have to examine that this is a case where you must examine the public policy of the state of Texas.

JUSTICE O'NEILL: So, we would be adding public policy to the plain language of the statute.

MR. CLARKSON: Yes. And you do this not in a vacuum, but you do it by looking at how the legislature in the last decade or so it has been dealing with all these problems. Time and time again, we read in the legislative history that the legislature is very concerned about how these cases are dragging on and on and on.

JUSTICE O'NEILL: And indicated in the Family Code that there would be no posttrial motions when the situation is severe enough to where the Texas Department of Protective and Regulatory services has had to step in but they did not indicate that in the Family Code, Section 109.002. And they easily could have.

MR. CLARKSON: Yes, yes they could have.

JUSTICE O'NEILL: But you want us to engraft it even though the legislature didn't.

MR. CLARKSON: Yes, I do. But that is not my only argument to the Court. My argument to the Court also is, and I point the Court to McDonalds which is a source that I always keep on my desk. McDonalds says that a motion to modify is, in fact, a motion for new trial. It has also said in the Daytona decision book --

JUSTICE O'NEILL: But regardless, we are just looking at 26. A motion for new trial would extend the deadline, as well.

MR. CLARKSON: Well, it's -- what it says is that that is under A for 90 days. It's not under section B for 20 days. The legislature --

JUSTICE O'NEILL: But that's what we're -- that's what we're trying to determine. There is nothing in 26 itself that says these posttrial motions will not be allowed under B.

MR. CLARKSON: Well there is this. Expressio unius est exclusio alterius. That is --

JUSTICE O'NEILL: Well, that can work against you, as well. I mean, the expression that posttrial motions will not be allowed, and the fact that that statement is not in 26 --

MR. CLARKSON: Yes but -- but as I see it, if they in A you have all these rights and then they go to the trouble of making Section B and don't give you those rights. That is not a stylistic decision but is, under statutory construction, is a decision with a purpose. And that is, if you got 90 days, we will let you do all of this stuff. If it's a fast appeal that must be brought with quickly, we're not gonna give you all of these traditional things. Now --

JUSTICE: If petitioner's appeal was not timely perfected -- if it is not --

MR. CLARKSON: Yes.

JUSTICE: -- why did petitioner not receive an effective assistance of counsel and should he be entitled to an amount of time to appeal?

MR. CLARKSON: Of course, that is a threshold factual question. For instance, if she said then, when she had the attorney, that, you know, that the family spent this money. I don't' know if we're gonna be able to handle an appeal or have an appeal and that's why they talked about less probable and then, months later changes her mind.

JUSTICE: So you think there might be fact questions about the effectiveness of counsel that would have to be, if she's entitled to raise that issue, they would have to be examined by the trial court?

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MR. CLARKSON: Yes. Now, here's one other point -- and this case is in the breaks and that is, for instance, the attorney who filed a motion findings of fact with conclusions of law in a summary judgment proceeding, and the court held that that didn't extend time to file an appeal because such a thing is inapposite for a summary judgment proceeding. But first he had to give findings of fact and conclusions of law. It would be like filing a motion to have a six months vacation. What does that have to do with anything?

JUSTICE: What would she have to prove, do you think, to show ineffective assistance of counsel?

MR. CLARKSON: To show ineffective assistance of counsel, and I have argued these cases before, she would have to show that she did want an appeal and she instructed her attorney to file a notice of appeal, of course, being a lay person she'd probably use imprecise language but that she wanted an appeal and she was not going to likely lose her children. She'd already lost three children. This is number four. Karen is number four.

JUSTICE: But that's pretty clear here. She didn't want to, you know, and this wasn't a pro forma motion for a new trial and motion for --

MR. CLARKSON: It was. It was, in this sense, Judge. And this is my point about the analogy of a summary judgment. She, in effect, threw herself on the mercy of the court. Here is a jury trial and she says, "Oh please," and I'm not at all belittling what she said, but she said in effect, "Please, judge, I want to have custody of my child. Won't you change this verdict and give the child to me?" That was her -- her argument on the motion to modify and they are saying that the notice of appeal was part of this motion to modify. Well, the judge cannot modify the judgment on the basis of just feeling sorry for her.

JUSTICE: Well, there's more -- there's more than that. There is no evidence as to the best interest of the child. That's one of the analogous positions you made. I mean, there is nothing here to believe, I think a reasonable lawyer to conclude if you see this kind of motion, then the next thing that you're going to see is an appeal. She is attempting to preserve error and she -- yes, she is trying to get to trial, trying to get the judge his or her mind but this sets out an appeal.

MR. CLARKSON: Judge, I don't see. First of all, the case is called a Motion to Modify, which is, in effect, a form of motion for new trial.

JUSTICE O'NEILL: Well, it also has modifications as well, and then it says keep my parental rights intact, you know. I could never stand visitations. So, it is a modification. It's not just do it all over again.

MR. CLARKSON: And Judge, I see it clearly as a throwing herself upon the mercy of the court. And as the Court knows, every time there is a jury trial, the judge tells the jurors before they go out to deliberate, "Do not let sympathy play a role in your decision." The same rule applies to this Court. You don't rule on one side or another based upon sympathy, and that's all that this woman really had to ask the court. "I am a mother --

JUSTICE O'NEILL: Well, I mean, you're saying that, that, she wasn't really asking to modify. She was asking to do it all over again.

MR. CLARKSON: Yes.

JUSTICE O'NEILL: She really was asking to modify as well by saying, "Keep my parental rights intact". That's a modification.

MR. CLARKSON: Well, Judge, my position is that no experienced

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judge grants a motion for a new trial based upon pro forma recitation of the real facts that support this. There is no law that supports this.

JUSTICE O'NEILL: So, you agree then? She was moving on the modification and to modify the judgment?

MR. CLARKSON: What she was asking the judge in doing that but she did not really have the power to do and that is to throw out that jury verdict because he felt sorry for her. That he has felt sympathetic to her. That's what she was asking for. Now, I think the case on this question of public policy, what's important is the case out of Wisconsin and that addresses this issue of expediting appeals in the interest of M.T. and M.T. in 1981. It says here Mr. [inaudible] gave up, I believe, pointed out that there was some further appellate decision on the matter. But the point here is, the court held that history considered, statutory history considered, case law considered, it is against public policy in this state to prolong these spaces and there are cut out including separately on an expedited hearing. And could I have the Court's attention to that case. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you very much.

REBUTTAL ARGUMENT OF BRUCE THOMAS ON BEHALF OF THE PETITIONER

MR. THOMAS: I will point out that under Family Code, Section 161.205; the court did have the power to make any other orders short of termination if the court felt the facts warranted it. So, that was a relief that the court could grant in appropriate circumstances to modify the judgment. I would like to turn to that -- to the Constitutional implications, if I may. I think it's appropriate backup to say, why do we have appellate review, to begin with. Why do we put so much stock in appellate review? Why was ---

JUSTICE: Let me ask you.

MR. THOMAS: Certainly.

JUSTICE: Is there any threshold showing that must be made before you would be entitled to an amount of time appeal or just every perspective appellant in these circumstances [inaudible].

MR. THOMAS: The -- the threshold showing would be to show ineffective assistance of counsel and also under the --

JUSTICE: Well, if you've missed the deadline and you wanted to appeal, isn't that ineffective?

MR. THOMAS: Yes.

JUSTICE: So, would ever not get it?

MR. THOMAS: Not -- not in the circumstance such as this.

JUSTICE: And then, is there any limit, any -- any time limits six months or a year?

MR. THOMAS: Yes, your Honor. There is a time limit but there is not a bright line. There is a due process. It has to get as far, in my view, as due process requires and due process just doesn't have very many bright lines in it. I think you would have presumptions. I would think that, at some point, you would have a presumption that this, that this fellow was not really pursuing an appeal. And that after that certain amount of time, it would be very difficult to overcome that presumption. But I don't think you will have a brighter line --

JUSTICE: Would you say -- would you say that inquiry would be distracted by time, day, time, 105 days, however much of this as you

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get to some cases?

MR. THOMAS: I -- I think -- I think all of those plus the -- the six-month statute that Counsel mentioned, the general time it takes to dispose of an appeal.

JUSTICE: This seems -- this seems to -- to hearken back to an earlier inquiry, this seems to cut against the whole idea that these things should speed up.

MR. THOMAS: It cuts against it but, as I said, I don't think it -- it destroys it. And if it cuts against it, it cuts against it because of a greater policy issue of due process. In -- in the Arjiv case that we cited to the Court, the New Jersey Court of Appeals decisions. In that case, over a year had gone by. I mean, they were way outside their appellate deadlines and -- and the Court said, "Due process simply requires us to relax our rules, to allow this even after a year."

JUSTICE: In re B.L.D., we even looked at the Matthews v. Eldridge factors and due process thought that our preservation rules are not required to be aggravated under due process. Which way does that [inaudible] for your position in this case?

MR. THOMAS: Well that -- that would cut against me. But I believe that -- that the Court dealt with that in in re M.S., and felt that a different balance came into effect when ineffective assistance deprived an appellant in that case, the factual sufficiency review. And a factual sufficiency review, I mean, there is probably not one case in a thousand that gets reversed on factual insufficiency. But this Court nonetheless thought it was important that -- that it be reviewed because of due process. I think it was correct because it's not that we find so much error in the trial courts on appellate review. In fact, we find very little error, variably speaking. What is important is we have the safety valve that adds so much legitimacy to the system to have the second set of judicial eyes taking a look when such fundamental rights are at stake.

JUSTICE: Were these arguments on ineffective assistance brought to the court of appeals?

MR. THOMAS: No, they weren't. And -- and I don't know when you are supposed to bring up ineffective assistance -- when you are required bring up ineffective assistance of counsel on appeal, where it affects an appeal. But no, to answer your question that the arguments were brought up for the first time in this Court and -- and I point to certain cases where fundamental rights were at stake, this Court has gone ahead and rested. Thank you.

CHIEF JUSTICE JEFFERSON: Counsel. Thank you. That concludes the argument and all the cases post [inaudible]. The Court will take. The marshall will now adjourn.

SPEAKER: All rise. O yes, o yes, o yes, the Honorable, the Supreme Court of Texas, is now standing therein. Thank you.

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