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Supreme Court of Texas.
In the interest of J.O.A., T.J.A.M., and C.T.M., Children.
No. 08-0379.

October 14, 2008.

Appearances:
Trevor Allen Woodruff, Ward & Freels LLP, Lubbock, Texas, for petitioner.
John Franklin McDonough, III, Pampa, Texas, for appellant.

Before:

Wallace B. Jefferson, Chief Justice; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated. The Court is ready to hear argument now in 08-0379 In The Interest of J.O.A. and others.
COURT MARSHAL: May it please the Court. Mr. Woodruff focus on argument of the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF TREVOR ALLEN WOODRUFF ON BEHALF OF THE PETITIONER

MR. WOODRUFF: May it please the Court. Your Honors, although seemingly complex, the two issues before the Court today boil down to the two relatively simple questions;
Number one, will the Family Code Section 263405, will be applied as written.
And number two, will the long standing case law, establishing that endangered conduct by a parent against the child sibling can be used as endangered conduct against that child will be replaced with new holding, finding that there must be endangered conduct as to each child. As this Court knows, Family Code Section 263405 is the post-trial procedure set forth by the legislature and parental rights termination cases . It requires the appealing party to file a statement of points in which they intend to appeal within 15 days for the trial court signing of its order. It requires the appealing party to hold a hearing before the trial court to present those issues within 30 days. And it requires that the Appellate Court may not consider any issue not

included in a timely filed statement of points. Of course, the problem in this case was that the parents in this case had appeal, excuse me, had a timely appointed counsel but counsel failed to file the statement of points, thus, the Appellate Court was precluded in considering the issues.

JUSTICE HECHT: What if they hadn't?

MR. WOODRUFF: I'm sorry, your Honor.

JUSTICE HECHT: What if there had not been a timely appointed counsel?

MR. WOODRUFF: Well, your Honor, I think, that was going into my next statement which is, I'm not sure that the statute really deals with effectiveness of counsel, where the counsel was appointed. I think, the statute-- I think, the question deals with how the statute handles that issue. And I think, the answer is that those issues are precluded.

JUSTICE HECHT: So even if counsel had not been appointed which we've had cases that in which that was the case, -

MR. WOODRUFF: Yes, Sir.

JUSTICE HECHT: - still you couldn't- and no statement of point was filed, still you couldn't appeal.

MR. WOODRUFF: Well, I want to clarify something, Justice Hecht, as, your Honor, speaking about cases where indigent counsels are appointed?

JUSTICE HECHT: Yes.

MR. WOODRUFF: That may boil down into a different question. That was the question before this Court in S.K.A. That very well may result in a due process violation. Fortunately, we don't have the-- that issue before the Court today.

JUSTICE HECHT: How can you raise it if-- it seem to me your position is pretty absolute, that if it's not in the statement of points just, it's just not an issue on appeal.

MR. WOODRUFF: That's correct, your Honor, because that's what the statute reads. This Court has held that due process concerns comport with this Court's rules of error preservation. The Amarillo court in this very opinion stated, "The 236405 is a prerequisite to the court's authority to consider issues." As this Court knows we're dealing with the statutory right of appeal in this case. As the right of appeal is statutory, this Court's held that the legislature has the right to deny, restrict or limit that right of appeal in whatever manner they see fit. As we're dealing with that statutory right, 263405 is nothing more than a ...

JUSTICE MEDINA: Well, it's not, it's not as they, they seem fit, if there's a violation of someone's constitutional due process rights, I mean, we're not going to let that slide.

MR. WOODRUFF: Well, your Honor, I would like in the issue to-- of situation where you have highly ineffective counsel. Highly ineffective counsel and they failed to file the notice of appeal within the 35-day requirement, being the 20 days notice of appeal and the 15-day rebirth extension. Under that situation, you couldn't appeal that either. This statute is jurisdictional in affect, and then its purpose is to avoid needless appeals, not avoid all appeals but avoid needless appeals. If this Court annunciates, that ineffective assistance of counsel can be use to step around that hurdle. Then the statute is frustrate its purpose is amend, there's no need to follow the statute.

JUSTICE HECHT: There's another statute, and the other statute says you have a right to counsel.

MR. WOODRUFF: Yes, Sir.

JUSTICE HECHT: So it looks to me like if you don't have effective assistance of counsel, you're frustrating that statute.

MR. WOODRUFF: Well, your Honor ...

JUSTICE HECHT: That's what we basically held In re M.S.

MR. WOODRUFF: That's correct, your Honor. There are two things I would answer that, first, In re M.S., the court was dealing with a court made rule requiring error preservation, of fact of its reviews in jury trial cases. Here we're dealing with a specific statute which this Court's held the legislature has the right to promulgate statutes to set forth the the preservation requirements. And number two, your Honor, In M.S., the court was dealing with a situation where it can be beneficial to file that motion for new trial. If you don't file a motion for new trial, you can't get a new trial. In this case, if you don't file your statement of points, the only thing that results is error preclusion. There is no benefit to file on the statute absent a consequence. When you look at ...

JUSTICE: Well, that's quite a-

MR. WOODRUFF: I'm sorry, your Honor.

JUSTICE HECHT: Error preclusion is quite a consequence, isn't it?

MR. WOODRUFF: It is, your Honor, but time and time again in B.L.D., in J.F.C., this Court has held that error preclusion does not necessarily violate due process. When this Court or the legislature promulgates rules, they have to have some bite to them and be followed.

JUSTICE HECHT: But what we said was, however, if it precludes you from having a, a meritorious issue on appeal heard, that raises due process concerns.

MR. WOODRUFF: Well, that's correct, your Honor, but once again, I would return to the fact that we are dealing with a statute here which sets forth the procedural requirements to preserve that issue.

JUSTICE HECHT: Sounds like-- kind of like a Catch 22. You know, you can't-- you can't complain on appeal ineffective assistance of counsel if you don't raise that in the statement of points, but it's not raised in the state of poi-- of points because you got ineffective assistance of counsel.

MR. WOODRUFF: You're exactly correct Justice Hecht. And in the R.N. case out of Corpus Christi, excuse me, out of San Antonio Court of Appeals, that was exactly the issue. The issue before the court there was whether a complaint for an ineffective assistance of counsel could be brought when it wasn't included and timely filed statement of points. The San Antonio court concluded that it could not be brought based on the clear requirements of 263405, this Court denied review. So that issue to some extent has been looked at by this Court before.

JUSTICE JOHNSON: So why did we deny review in that case, do we know?

MR. WOODRUFF: No, your Honor, but since it was the only issue

JUSTICE JOHNSON: (inaudible)

MR. WOODRUFF: I assume the court members know, your Honor.

JUSTICE JOHNSON: That's right. So what, what precedent does it mean-- what, what precedential values that we deny review?

MR. WOODRUFF: Well, your Honor, because it was the ...

JUSTICE JOHNSON: At this particular issue.

MR. WOODRUFF: Yes, Sir. Justice Johnson, the only issue in that case was whether it could be brought. So I'm going to take the step and say that the least a logical inference that as it was the only issue, this Court at least chose not to consider it at that point. That's ...

JUSTICE JOHNSON: But haven't we-- haven't we said in our opinions the denial of a petition for review is not-- there are many reason for

denial of a petition for review.

MR. WOODRUFF: In, in the latest several ca-- rather cases released on 263405, this Court has put that specific language in its opinion. However, there was no opinion issued in R.M. I, I was just trying to draw the parallel for the Court that that's the only-- the only case at this point that's looked at it and followed the plain language of the statute. If the court looks at the legislature's intent in this statute, the legislature specifically put in it's bill analysis that Appellate Courts by allowing these issues to be brought were not included in a timely filed statement of points were it, it-- not only was it ignoring the process of the statute, but the courts were telling appellants-- appealing parties that there are no adverse consequences for failing to file a statement of points.

CHIEF JUSTICE JEFFERSON: Is that-- There's a, there's a right to counsel in these cases. Is that correct?

MR. WOODRUFF: Yes, Sir, yes, Sir.

CHIEF JUSTICE JEFFERSON: And does, does right to counsel mean, right to affective counsel in your view?

MR. WOODRUFF: Yes, it does, your Honor.

CHIEF JUSTICE JEFFERSON: Well, then why wouldn't this be, especially, when you're dealing with constitutional issue of the parent child relationship -

MR. WOODRUFF: Yes, Sir.

CHIEF JUSTICE JEFFERSON: - a denial of counsel be a, a due process violation of the court would be obligated to correct?

MR. WOODRUFF: Well, first, your Honor, if, if the court wishes to step beyond the plain language of the statute and the legislatures clear intent, then if the Court engages in a due process analysis under Matthews and J.F.C and the other cases this Court's engaged in that analysis. I think the decision still falls on the side of the department. Your Honor, we are dealing here not only with the constitutional rights as, as Chief Justice stated of the parent, we're also dealing with the child's right to permanence. That was clearly annunciated as a necessary right by the Supreme Court.

JUSTICE O'NEILL: Does the 15-day deadline really advance permanency, I mean, I understand the goal of the legislature but saying you waived something in 15 days if you don't observe it, how does that truly advance the ball?

MR. WOODRUFF: Well, I, I would point two things out Justice O'Neill, first, this Court has already extended that 15-day deadline in M.N., so my second prong of the Matthews v. Edridge analysis trial is that this Court has already provided additional procedural safeguards by extending that 15-day requirement.

JUSTICE O'NEILL: So we should remand this then in light of?

MR. WOODRUFF: No, your Honor, I, I would like the Court to reverse and render it on the fact that ineffective assistance should never been looked at.

JUSTICE O'NEILL: Well, now I understand that, but I mean if, if you can then move for an extension of the 15 days, there was never an opportunity to do that here.

MR. WOODRUFF: That's correct, your Honor, but it was never requested either, so I would believe that would be a waiver issue.

JUSTICE BRISTER: Help me, help me with the background here, what percentage of appearance in these cases are indigent and have appointed counsel?

MR. WOODRUFF: I can't give the Court an exact percentage but I would say a quite fair amount.

JUSTICE BRISTER: Almost all?

MR. WOODRUFF: That may be a fair assessment, Justice Brister.

JUSTICE BRISTER: And is it true that almost all trial counsel then withdraw immediately after the termination?

MR. WOODRUFF: No, I wouldn't say that's the case, your Honor.

JUSTICE BRISTER: Looks like a lot of them do. Why, why don't, why, why do they do it and why do the trial court grant it?

MR. WOODRUFF: Your Honor, I would say that's a question for the legislature. The legislature, of course, could amend the statute to include language that counsel stay on.

JUSTICE JOHNSON: But doesn't that-- Doesn't it-- if counsel stays on it's a little difficult for counsel to assert ineffective assistance of counsel as a point of error, isn't it?

MR. WOODRUFF: No, Sir, that, that ...

JUSTICE JOHNSON: I mean, doesn't that put counsel in a conflicting position, so to speak.

MR. WOODRUFF: That argument has been raised, your Honor, but it's been held in A.S. out of Beaumont and number of other cases that the 15-day requirement is not unconstitutional. If ...

JUSTICE JOHNSON: No, no, no, I'm just talking about trial counsel and why they're replaced, that happens fairly regularly in criminal cases as I understand, and the reason being, you might want to assert trial counsel was ineffective and how's trial counsel going to stand up in front of an Appellate Court, and argue I was ineffective, -

MR. WOODRUFF: That's happened, your Honor ...

JUSTICE JOHNSON: - that, that puts it in-- doesn't that put trial counsel in a conflicting position and isn't that a good reason to change counsel?

MR. WOODRUFF: Well, excuse me, for interrupting you, your Honor, but that has happened before. The Bermea case that was up before this Court, that's exactly what happened. Counsel failed to file a statement of points and came before the Appellate Court and said, "I was ineffective for not doing it." Your Honor, I-- and, and I would point that this-- our legislature's determined that you have a statutory right to appeal a counsel in our cases, that's true. But as this is a statutory right of appeal, I think, we have to balance those two issues together.

JUSTICE HECHT: So how do we do that? That's-- that really the burden [inaudible]. You can't just say all 405 or all-- how do you balance it?

MR. WOODRUFF: Well, your Honor, since 405 is a strict procedural statute that applies directly to the question at issue, I think, it, it sets forth what's required.

JUSTICE HECHT: So we balance them by giving all the weight to 405?

MR. WOODRUFF: Yes, your Honor. But even if the court engages in that due process analysis, I think, we still prevail there. If I could go back to Justice O'Neill's question, your Honor, you asked why does this 15-day requirement advance children's permanence. It advances children's permanence because if this Court sets forth that you can step aside this requirement, through ineffective assistance of counsel, then the requirement is a-- the requirement, excuse me, the practice is established that you no longer need to follow the statute. The only way the statute works, your Honor, is if each section is applied with equal force. There must be a timely statement of points, so that there is a timely presentation of the issues before the trial court. The purpose of this statute, which I believe goes in the due process analysis, is not to prevent meritorious appeals but to allow the trial court to

correct its mistakes. In an earlier case B.L.E. this Court held that error preservation rules, allowing the trial court to correct its mistake comport with due process because they advance the child's permanence. By allowing parents or appealing parties because this statute applies equally to all parties in these cases, by allowing a party to step aside this statute it's legitimate ...

JUSTICE O'NEILL: But, but not, not all mistakes can be corrected. We got another case up here where the, the statutory deadlines ran out for final disposition, and the trial counsel made no motion to dismiss the case. And how is the trial court gonna correct that, if that's not in the statement of points? I mean, is that a rule we should do, if it's correctable by trial court then it's waived, that if it's not correctable by the trial courts, it's not?

MR. WOODRUFF: No, I wouldn't say that, your Honor, I, I believe by following the statute regardless of whether it's truly correctable by the trial court. By following the statute, you meet the statute's requirements and you're fine for an appeal.

JUSTICE JOHNSON: Counsel, is there anywhere in the-- in this entire scheme that the legislature has created a termination and acceleration expediting appeals other than this one instance where we say a failure to file a-- in a statement of points saying ineffective assistance of counsel that you just don't get to assert it and it doesn't arise until later. Is there anywhere other than strictly construing the statute that you find legislative intent to preclude parents whose parental rights are terminated from having a right to at least have that reviewed by the trial court or by an Appellate Court, that they just don't want any appeals taking place?

MR. WOODRUFF: I don't believe there's any other section that deals with that, your Honor, because 263405 is the post-trial section that deals with that. But again, I would go back to the fact that anytime you have a deadline there must be a consequence for fall-- for failing to follow that deadline. And this Court has held that failing to object at trial, failing to timely file a notice of appeal, those issues preclude a review.

JUSTICE WAINWRIGHT: A consequence to who?

MR. WOODRUFF: I'm sorry, your Honor?

JUSTICE WAINWRIGHT: A consequence to whom, the attorney, the child, the parent, all, -

MR. WOODRUFF: Well ...

JUSTICE WAINWRIGHT: - all for the mistake of the pa-- of the attorney?

MR. WOODRUFF: Well, in those cases, your Honor, it results in a consequence for the parent regardless of whether it's the attorney. And if those cases have been held to be alright by this Court, then 263405 should be dumped into that category as well. When the court's looking at due process, I would ask the Court to not only consider the child's interest in this but also the fact that the state has an interest:

a) in promoting the prominence for the child, and;

b) the state also has an interest in assuring that its procedures are-- you know, used fairly against all or applied fairly to all litigants in the case.

CHIEF JUSTICE JEFFERSON: We thought, we had that technical difficulty corrected. So please ...

UNKNOWN SPEAKER: And we'll give you 20 more minutes.

CHIEF JUSTICE JEFFERSON: Yes.

MR. WOODRUFF: I'll use it, your Honor.

CHIEF JUSTICE JEFFERSON: Continuing and disregard to the extent,

you can. It's not an emergency.

MR. WOODRUFF: Thank you, your Honor. So let me get back to my trade of thought ...

CHIEF JUSTICE JEFFERSON: Uh-hmm. Right, and your time is up. Go ahead, now, go ahead.

JUSTICE HECHT: Let me ask you this, -

MR. WOODRUFF: Yes, Sir.

JUSTICE HECHT: - do you give up on D, with respect to sub-paragraph D, with respect to termination of Terry's interest in the twins?

MR. WOODRUFF: I'm, I'm sorry, your Honor?

JUSTICE HECHT: With respect to Terry-- the termination of Terry's interest in the twins.

MR. WOODRUFF: Yes, Sir?

JUSTICE HECHT: Does the state give up on ground D, I think, the trial court terminated on the grounds of D and E.

MR. WOODRUFF: Yes, Sir.

JUSTICE HECHT: You give up on D?

MR. WOODRUFF: No, Sir, I wouldn't.

JUSTICE HECHT: How could, how could D apply when he never was around after the twins were born?

MR. WOODRUFF: Your Honor, the case law in this area is very specific that endangering conduct towards other children, -

JUSTICE HECHT: Yeah.

MR. WOODRUFF: - siblings, can be used against ...

JUSTICE HECHT: And you make that argument under E?

MR. WOODRUFF: Yes, Sir.

JUSTICE HECHT: But you also make it under D?

MR. WOODRUFF: Yes, Sir. I don't believe there's any case law that precludes that. If the Court wishes to turn to the factual, excuse me, the legal sufficiency review I believe the Amarillo court entirely misread this Court's clear pronouncement of the legal sufficiency review in that case. The evidence before the case, excuse me, before the court of-- trial court in that case, dealt with the father. I believe his name was Timothy, your Honor. He admitted to missing two drug screens, he admitted the use of where the drugs screens are ordered and they are prerequisite to reifications. He admitted to testing positive for marijuana the month before trial and he admitted that the mother was using cocaine during the pregnancy, and he knew it.

CHIEF JUSTICE JEFFERSON: And Counsel, if there are no further questions you can return to that subject in rebuttal.

MR. WOODRUFF: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: And the Court is ready to hear argument now from the Respondents.

COURT MARSHAL: May it please the Court. Mr. McDonough will present argument for the Respondents.

ORAL ARGUMENT OF JOHN FRANKLIN MCDONOUGH, III ON BEHALF OF THE RESPONDENT

MR. MCDONOUGH: May it please the Court, Counsel. When an egregious wrong occurs, however, and we are barred from correcting it due to the application of the statute to situations which most likely no one intended, our legal system has failed in that instance. That was Chief

Justice Quinn in the interest of R.C. out of Amarillo. What we have here is, is an instant that I'm certain legislature didn't intend, no attorneys intended ...

JUSTICE O'NEILL: Well, are, are you sure they didn't intend it, because courts have tried to get around it before, some of the Appellate Courts and legislature seem to make it real clear, courts aren't following this, so we're going to make it air tight.

MR. MCDONOUGH: If that is the case, your Honor ...

JUSTICE O'NEILL: I mean, that is the case.

MR. MCDONOUGH: Yeah, I mean, if the legislature intended to put such an obstacle to the extent that, that even constitutional regards will be thrown out the window, then, then certainly the law has, has failed in this instance.

JUSTICE BRISTER: Well, just the idea of a 15-day deadline there's nothing unconstitutional about that.

MR. MCDONOUGH: In of itself, no, your Honor.

JUSTICE BRISTER: So why aren't people doing it?

MR. MCDONOUGH: Your Honor, I would answer the question in a number of ways, I think, you're dealing with a number of attorneys who in fact don't know that statute exist, I think, that you're dealing with a number of attorneys, and I think, in this case as well you're dealing with attorneys who have done exactly what, what the justices have asked, why are so many people withdrawing? Well, that-- that's the point, a number of people, especially, in, in the district where we are practicing in the pan handle. A number of people are trial attorneys and that's what they're use to, they're use to being in the-- in, in a trial setting, and so they will argue up to the point of trial and once that's over they want out. And I, and I think a lot people don't understand that as trial counsel, you have to go further, that you have to represent them. And I think, in this case, in fact, that's what happened to Timothy Murphy. He was represented by trial-- trial counsel and yet at the point of filing the motion to withdraw and the notice of appeal, it was as if counsel was gone.

JUSTICE HECHT: Is there a financial, financial incentive to get out?

MR. MCDONOUGH: Is there a ...

JUSTICE HECHT: Or is it the lawyer just doesn't want to do it-- handle appellate cases?

MR. MCDONOUGH: Your Honor, I think, that there is-- I would answer this way, I think, that more people are unqualified and are unwilling to put the effort into doing a brief arguing for the Court of Appeals ...

JUSTICE BRISTER: But we really only talking about a list of points.

MR. MCDONOUGH: We are, your Honor ...

JUSTICE BRISTER: I, I don't mind if they don't want to do the brief, but we got 15 days here that switching horses is very difficult in that amount of time. Nobody knows better than trial counsel, the things you objected to and the trial judge overruled you on, and all you have to do is send in a list of points saying the trial judge did these things wrong-- these three things wrong.

MR. MCDONOUGH: I absolutely agree, your Honor.

JUSTICE BRISTER: Isn't the rule you're arguing for though going to discourage, it's going to encourage people to quit. 'Cause if you get your trial attorney to quit and then get a new trial attorney, you're going to get a lot longer period to appeal and, and everything is going to be held up.

MR. MCDONOUGH: No, I don't think, it will, because I think that in the instant case had a notice of-- or a motion to withdraw had been filed on the day of, of the judgment and hearing being-- been-- being held at that time, then I think, the new attorney would've had more time to speak with his counsel, would've had time to speak with appellant ...

JUSTICE BRISTER: Very unlikely, very unlikely would've been able to read the record.

MR. MCDONOUGH: Absolutely. And, and in fact, we ...

JUSTICE BRISTER: Isn't it-- I mean, from this-- forget about the legislature if we're just trying to set this up, and all we-- legislature told us to get it done in 15 days. We'd be best off with a rule that said, "Trial counsel can't quit until after they file their statement of points." That's the person who knows best, who's best able to do that.

MR. MCDONOUGH: Yes, your Honor. And this statute has not provided any of those safeguards. It is ...

JUSTICE O'NEILL: Is there any sort of avenue to file any kind of an Anders brief in this context where someone can just say, "There are no points for appeal in good faith," or, or is that just not done in this area?

MR. MCDONOUGH: Yes, your Honor. In fact an Anders brief is, is an open avenue, it's available. Again, I would say that, that for counsel would be an easy way out. If, if, if all counsel got into the habit of simply saying, "Well, I'm going to file an Anders brief, that's fairly simple brief, I can look for one or two points or I'll just file legal and factual sufficiency," knowing that the statute says that's not allowed.

JUSTICE O'NEILL: Obviously, one of the concerns appears to be that getting around the statute by an ineffective assistance of counsel claim. How would you carve out a rule that would preclude a hole so wide that the rule swallowed up?

MR. MCDONOUGH: Your Honor, I think that the, the 30-day window or make a contingent upon the filing of the record or you can make a contingent on a, a daytime-- a, a day limitation ...

JUSTICE O'NEILL: Filing of the record with?

MR. MCDONOUGH: Or, or completion, of the reporter's record.

JUSTICE BRISTER: But we're al-- we're already in M.N.. The legislature said, "15 days," and Justice Willet says, "Y'all are just ignoring, the legislature's 15 days and tacking on 15 more." Now you're saying we ought to tack on some more. We ought to tack on some more for the record and this and that and the other, I mean, there's-- so far we can go, and then we have to start wondering about our own role in separation of powers.

MR. MCDONOUGH: Yes, your Honor. And in fact, on behalf of my client, I would argue that certainly, we want that window to be as far as we can, give us more time to argue. I think, there are safeguards though that this Court could put in place through this constitutional issue.

CHIEF JUSTICE JEFFERSON: Like what safeguards?

MR. MCDONOUGH: You can make well, one, if you go to the 30-day window which it-- well, the 20-day window is when you have a notice of appeal. Obviously, if this statute had a requirement that, that in fact that was up to trial counsel, that trial counsel before withdraw is permitted.

CHIEF JUSTICE JEFFERSON: What in this, in this process or in the rules requires the trial court or the lawyer to advise the parents that

they have 15 days in which to file these points?

MR. MCDONOUGH: The professional license that they hold, your Honor.

CHIEF JUSTICE JEFFERSON: And that-- and, and, and there's nothing-- for example, in the-- when, when, when the judge finds the order terminating the rights, there's nothing that requires that judge to let counsel know or the parties or anyone that there is a limited time to preserve appellate rights.

MR. MCDONOUGH: There is no requirement.

JUSTICE BRISTER: Well, now, wait a second, they-- if they withdraw they do.

MR. MCDONOUGH: If they withdraw, they do ...

JUSTICE BRISTER: They had-- I mean, if you go to withdraw you have to notify the client in writing of pending deadlines, -

MR. MCDONOUGH: The problem with that -

JUSTICE BRISTER: - right?

MR. MCDONOUGH: - in the present case, that is correct, your Honor, you are require to, to advise them of impending deadlines, however, in the present case, a motion to withdraw was filed on February 21st, the day after judgment, and there was no order on it. So the question is, "At what point was he withdrawn?" The only time that you could say that an order came down in which he was actually withdrawn by the court was the day on which appellate counsel was appointed. So in that respect, who now has to advise the client of the, of the, the deadlines and the rights under those deadlines.

JUSTICE WILLET: But it's true, factually, trial court signed a termination order, at that point the appointed counsels for both parents filed a motion to withdraw which was left for about two and half weeks pending. So during the entire 15-day period they were still counsel, they had filed a motion to withdraw but the motion hadn't been granted. So during this entire 15-day window, to file their statement of points, they were still the appointed counsel of record, weren't they?

MR. MCDONOUGH: That's correct, your Honor. And in that respect, that is the ineffective assistance of counsel. Under this statute the, the statute, if you look only at the plain language, the plain language says that, that, that doesn't matter. That it doesn't matter that, that an individual has a constitutional right to effective assistance of counsel. Obviously, you would have to apply the Strickland Standard there. Should an attorney who has been appointed to represent this client, who has not been withdrawn by order of the court, then, continue to advise or, or is it reasonable to say that, "No, the attorney shouldn't neglect this statute." And in this case, if you overlook the fact that there was no other way that the-- that this appeal could be heard. If you, if you only look at the plain, the plain wording of the statute and the plain meaning of the statute, it precludes it all.

CHIEF JUSTICE JEFFERSON: Would it be appropriate for the court in analyzing this case to look at the merits. What if the court would look at the merits and determined there is no even conceivable legal ground upon which the trial court's decision would be reversed, then we wouldn't get to the ineffective assistance of counsel claim. Is that correct or not?

MR. MCDONOUGH: Your Honor, I would say that the-- it would probably be closer the other way if you didn't have ineffective assistance of counsel, you would never have to get to the merits. I actually, although, I think, if, if, if you found that there was no

merit, yes, there wouldn't be any ineffective assistance of counsel, because they would've had no right to, to appeal.

CHIEF JUSTICE JEFFERSON: Then maybe you ought to spend just a few moments talking about the merits of, of your argument here.

MR. MCDONOUGH: And that would be under the factual legal sufficiency, your Honor. What was created here under the clearing convincing evidence standard was a, a carrot in a stick. Your Honor, for Timothy Murphy, what happened was in the original trial in August of 2007, the testimony was that he had a number of problems. There were some testimony about marijuana use. The record is unclear as to whether when the daily use occurred.

At one time, he was asked the question in that, the statement was, "Yes, I used while I was in California."

His mother later testified that he was using when he was younger, when he had been arrested for robbery. So it's unclear as to where the marijuana use was.

Clearly, the court did not think in August of 2007, it had sufficient grounds to terminate. And therefore, it gave Timothy Murphy and Trena Murphy the opportunity to continue. And in fact, it, it, it gave the order that they would have to continue services, that they would have to submit to drug testing. Timothy Murphy submitted to drug, drug testing and came up clean. The problem in that scenario is that they've put this stick out there with a carrot on it saying, "Look, you follow all of these, you go another six months, we'll extend it and you'll have the right-- you'll, you'll have your children back, there's a good opportunity you'll have your children back."

Well, in the February hearing, that's not what happened. The problem for the factual sufficiency is that there is no more marijuana use, he has shown that he had worked, he had shown that he had provided a housing. Now there was great questions about, well, why are you moving around so much. But then C.P.S. testified that, well, we required you to move to a three bedroom house, and so that's what he did. They said, "Well, you can't be moving from job to job because that's a stability issue," but then they told him you've got to make more money, it's not enough money, you got to support your kids.

The issue of child support, at the first hearing in August of 2007, Timothy Murphy, there was testimony that he had only paid 601. However, he testified that it was all coming out of his checks, and they say, "We don't have any records of that."

Now, when C.P.S. testified in the February 2007 hear-- the February 2008 hearing, the, the final, final hearing. C.P.S. testified that, yes, there were records that money was being taken out of his check but we're not sure what, what those records are. In fact, what they've done is they've said, "Well, you followed everything pretty well, but we're going to hold what Trena did against you Timothy." Because she used cocaine at a time that she had told you that those were probably not your kids, at a time that she have had had you arrested on a false charge and she admitted that on the stand, and what we're going to do is because you permitted her, and knew she was using cocaine at that time, when the testimony was she had only used it that one time during pregnancy. We're going to hold that one fact against Timothy Murphy, and we're going to say that, that in itself is sufficient to show that you endangered your children.

JUSTICE HECHT: Isn't it some evidence, you don't think it's any evidence at all?

MR. MCDONOUGH: Your Honor, in this case I, I think, it would be some evidence but if it was some evidence it would've been some

evidence in August of 2007.

JUSTICE HECHT: Yeah.

MR. MCDONOUGH: But I think, that, that the span from August of 2007 to February of 2008 negated whatever value that evidence was.

JUSTICE HECHT: But if it's-- so you don't-- it's not just that it's factually insufficient even if there was no evidence at all?

MR. MCDONOUGH: I think, there was no evidence.

JUSTICE HECHT: If there was some evidence, then it has to go back to the Court of Appeal, I guess, case does. If you would get pass the senate back to the assistance of counsel issue.

MR. MCDONOUGH: Yes, I believe, yeah.

JUSTICE O'NEILL: Well ...

JUSTICE HECHT: Because obviously, if they thought there was no evidence, they thought their evidence was factually insufficient.

MR. MCDONOUGH: And I don't know that their opinion is clear on that, your Honor, I ...

JUSTICE HECHT: Their opinion is pretty clear there's no evidence.

MR. MCDONOUGH: Right. And I think, in the, in the balancing te-- in the test that they do-- I, I would agree, I would agree with, your Honor, that they have, they have said that there is no evidence.

JUSTICE O'NEILL: No clear and convincing.

MR. MCDONOUGH: No clear and convincing evidence.

JUSTICE HECHT: So his-- so Timothy's rights to the twins can't be terminated according to the Court of Appeals. And now custody is still an issue, they sent it back for custody determination.

MR. MCDONOUGH: That is correct, your Honor.

JUSTICE HECHT: But if they're wrong about no evidence then they would have to reconsider factual sufficiency?

MR. MCDONOUGH: Not necessarily because they, they still have to ri-- the ...

JUSTICE HECHT: Well, then there'd be a new trial, with a rush?

MR. MCDONOUGH: Right.

JUSTICE HECHT: If the evidence is factually insufficient then Timothy would get a new trial?

MR. MCDONOUGH: That is correct. And that to determine if there was very convincing -

JUSTICE HECHT: Not just on -

MR. MCDONOUGH: - evidence.

JUSTICE HECHT: - not just on best interest but on termination.

MR. MCDONOUGH: That is correct, your Honor. And so in this case, as far as the legal and factual sufficiency is, is concerned, I think, that whatever evidence value there was it would've had to be acted on upon the court at the time that it was before the court. But to permit a parent in a relationship where the child to go forward, six months and for him to continue the plan as was ordered of him, and yet to say what you did nine months ago is what we're going to-- is what we're actually going to terminate you on. I, I think, that's insufficient evidence. And in fact, it-- it's basically saying what C.P.S.'s purpose is, is to prove you're a bad parent and not to assist you in regaining that, that relationship with your child. And I think that would be egregious in this case, your Honor.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel.

MR. MCDONOUGH: Thank you, your Honor.

REBUTTAL ARGUMENT OF TREVOR ALLEN WOODRUFF ON BEHALF OF PETITIONER

MR. WOODRUFF: Your Honor, If I may go back to the Chief Justice's question regarding looking at the merits, 263405 is designed to avoid that process. Justice O'Neill, you mentioned creating a hole in the statute. If this Court reviews ineffective assistance and goes to the merits that's exactly what the statute designed against, that's exactly what it would drive counsel to do. It is the better practice to ignore the statute, claim ineffective assistance and bring any issue you want on appeal.

Also, your Honor, I would point out that there is a form of collateral attack in these cases. A bill of review has not been explored yet. I know Amarillo mentioned a writ of coram nobis. I'm not entirely sure that a failure to properly preserve an appeal here, entirely denies a parent or an appealing party from the right to go back to tri-- to the trial court, ask for a new trial and then appeal that bill of review finding.

It was in Amarillo, it was the Amarillo Court of Appeals in R.C.C. and R.C.C. junior, your Honors, that stated that creating a, a-- fabricating a-- an interpretation of the statute that destroys it, is blatant legislating from the bench. Ignoring the statutes clear mandate, I think, is ignoring the stat-- excuse me, the legislature's power to promulgate and enforce those statutes.

JUSTICE HECHT: What is the clear and convincing evidence that you think warrants termination of Timothy's rights of the twins?

MR. WOODRUFF: I would turn to the drug use, the missed drug tests and the admission that he knew of the cocaine used. Also ...

JDUGE HECHT: Of his wife's?

MR. WOODRUFF: Yes, yes, -

JUSTICE HECHT: His wife?

MR. WOODRUFF: - yes, your Honor, of the cocaine-- his wife cocaine used during pregnancy. Also, all the endangering conduct, all the times he kicked the mother out of the home and knew the child was with her. All the times he knew that, that the mother went on cocaine binges and he left the child with her, that's all endangering conduct. Trying to this Court's holding in J.P. ...

JUSTICE HECHT: Really not the Court of Appeals had trouble with that because it was not directed at the twins, 'cause they were taken away from the mother the mo-- the moment they were born.

MR. WOODRUFF: I don't think, that's the status of the law, your Honor. In Robinson-Dupree, it's been held the drug used even before a child's birth can be endangering conduct. In J.P.B. and M.L.I., this Court held that the trial court is the operative of the credibility, the demeanor of the witnesses. There's no precedent to negate endangering conduct existing at an initial trial and then some how after abcontinuance it disappears and is no longer endangering, and there's no precedent for that.

And going back to Justice Johnson's question earlier we don't know why the trial court granted a continuance, we can't assume that it's because the court found the evidence insufficient. At the end of the day after considering the evidence, the trial court judge was in the trial judge's chair, heard the testimony, saw the demeanor of the witnesses and determined that the statutory termination grounds were met. The evidence was clear and convincing. If you look at the evidence in light of the fact finder's judgment, you resolve all disputed evidence in, in favor of the fact finder's judgment. This evidence is

legally sufficient and it should be remanded for a factual sufficiency consideration. If the Court looks at the Amarillo Court's discussion, it looks at best interest. It talks about dad's parenting ability, it talks about dad's employment, talks about dad's support at church, those are Holly versus Adams factors in the best interest. The court-- the Amarillo Court never got passsed the initial question of the statutory termination grounds.

Therefore, I think this case needs to be remanded if the Court moves pass the ineffective assistance. But once again, I would remind the Court that by doing that, I think it would become the practice of appellants, of appealing parties to totally miss filing the statement of points in order to claim ineffective because that actually advances your client's right in a very round about and absurd way, it becomes effective to avoid the statute.

JUSTICE JOHNSON: Your position would be that if the legislature wants to grant the right to assert ineffective assistance of counsel for failing to file a statement of points, then it can do so in the statute, and I presume.

MR. WOODRUFF: That's correct, your Honor.

JUSTICE JOHNSON: And so what would the-- what would, what would that like in your view? Do you have even thought of any structure when the legislature might terminate that to keep the accelerating process going forward here, and yet, afford a right to assert ineffective assistance for failing to file a statement?

MR. WOODRUFF: Well, I think, Justice Johnson, they could've simply added that to the statute. But once again, looking at the language they used, which is-- it's assumed they intended to use, it says, "any." And again, I would remind the Court, that the Court's already provided procedural safeguard, on the fact, that a 15-day extension has already been granted in the M.N. case. So again, I think, if due process is reached, we reach a different calibration than in the M.N., excuse me, in the M.S. case.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and that concludes the argument for this morning. The Marshall will now adjourn the Court.

COURT MARSHAL: All rise. Oyez, oyez, oyez, the Honorable, the Supreme Court of Texas now stands adjourned.

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