

Memorandum

To: SCAC Members
From: William V. Dorsaneo, III
Re: Proposed Amendments to Appellate Rule 28
Date: March 2, 2005

For the last several months the Advisory Committee and the Appellate Rules Subcommittee have been working on accelerated appeals. During this process, the committee has tentatively approved a draft of a permissive appeal provision and directed the subcommittee to incorporate the draft into a revised Appellate Rule 28. During this process the subcommittee has attempted to deal with other problems in the appellate rules concerning accelerated appeals, particularly problems caused by Texas statutes that must be read together with Rule 28. This memorandum primarily addresses other problems and concludes with a draft proposal for revision of Appellate Rule 28.

Based on my review of various statutory lists and of the statutes themselves, accelerated or expedited review is provided for in a number of different statutes. Many of the statutes, like the general interlocutory appeal statute contained in Section 51.014 of the Civil Practice and Remedies Code,

provide for an interlocutory appeal of an interlocutory order, leaving the appellate procedural details to the Appellate Rules. See C.P.R.C. § 15.003(b) (interlocutory appeal may be taken” of certain venue orders “under the procedures established for interlocutory appeals”) Fam. C. § 6.507 (“An order under this subchapter, except an order appointing a receiver, is not subject to interlocutory appeal”); R.C.S. Art. 4447 cc (allowing “interlocutory appeal to an appropriate appellate court” of order requiring disclosure of environmental, health and safety audit); Nat. Res.C. § 85.253 (allowing appeal of “order granting or refusing” injunctive relief including “temporary restraining order” or “granting or overruling” “motion to dissolve temporary restraining order” “or other form of injunctive relief”); C.P.R.C. § 26.051 (allowing appeal of order denying plea to jurisdiction asserting that an agency of the state has exclusive or primary jurisdiction, as part of an appeal of a class certification order) Gov. C. § 1205.068 (making certain orders and “the judgment” appealable under “the rules of the supreme court for accelerated appeals in civil cases”).

Other statutes, which deal with accelerated appeals of final orders, specifically embrace the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure with or without embellishment. See Fam. C. § 109.002 (“The procedures for an accelerated appeal under the

Texas Rules of Appellate Procedure apply to an appeal in which termination of the parent-child relationship is in issue”); Fam. C. § 263.405 (“An appeal of a final order rendered under this subchapter is governed by the rules of the Supreme Court for accelerated appeals in civil cases and the procedures provided by this section.”) At least one statute provides more vaguely that a party is “entitled to an expedited appeal,” without explaining what that means. See Fam. C. § 262.112 (allowing “expedited appeal” of order that child may not be removed from child’s home by Department of Protective and Regulatory Services).

Several statutes provide their own fast track timetables. See Health & Safety Code § Safety Code 574.070(a) (“[a]n appeal from an order requiring court ordered mental health services” must be filed “not later than the 10th day after the date on which the order is signed”); Health & Safety Code § 81.191(a) (“[a]n appeal from an order for the management of a person with a communicable disease . . .” must be filed “not later that the 10th day after the date on which the order is signed”); Elec. C. § 232.015 (acceleration of appeal in contests of general or special elections may be accelerated by the “trial or appellate court” “in a manner consistent with the procedures prescribed by Section 232.014”).

Appellate Rule 28 does not adequately deal with many of these statutes or other ones, which suggest or direct the appellate courts to give “precedence” or “priority” to certain classes of cases. For example the only final order mentioned in Appellate Rule 28 is an order in a quo warranto proceeding (see T.R.A.P. 28.2).

The last several conference calls held by the Appellate Rules Subcommittee have yielded the conclusion, if not the consensus, that Appellate Rule 28.1 should comprehensively apply to all types of accelerated, expedited or fast track appeals, without listing all of the statutes in the rule. Based on these conference calls, I proposed the following language for inclusion in Rule 28’s first sentence.

Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and all appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are accelerated appeals.

Appeals that are merely given “priority” or “precedence” are not mentioned in the proposed revision because this kind of general statutory language seems to be precatory, at least in the view of many courts, at least when it is not accompanied by stronger statutory language. Also, these statutes do not seem to be causing any trouble, although at last some appellate judges seem troubled by them.

Another alternative would be to list some of the more troublesome statutes in the rule, such as Family Code provisions accelerating appeals from final judgments in termination cases. For example, specific reference could be made in the sentence to “appeals in a suit in which termination of the parent-child relationship is in issue as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in subchapter E of Chapter 203 of the Texas Family Code. . .”

After defining what appeals are covered by Appellate Rule 28, I believe that a majority of the subcommittee concluded that Appellate Rule 28 should be drafted to eliminate as many of the statutory difficulties as possible. I drafted the following language to accomplish this goal.

Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines.

This language can be softened by moving the language “regardless of any statutory deadlines” to a comment or eliminating it entirely, although that will make the sentence less clear to some readers. The other and opposite alternative would be something like the following.

Unless otherwise provided by statute, accelerated appeals are perfected by the filing of a notice of appeal in compliance with Rule 25, within the time allowed by Rule 26.1(b) or as extended as provided in Rule 26.3.

If this second alternative is ultimately adopted, I believe that the first sentence of proposed Appellate Rule 28.1 contained in this memorandum should be revised to expressly include termination cases as suggested above. I also believe that a detailed comment should be written to accompany the rule because this alternative merely advises parties that the statutes take a variety of approaches to acceleration.

Finally, the last sentence of Proposed 28.1(a) (or perhaps the first sentence of 28.1(b)) should state:

Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases - Appeal As of Right

Alternative One

- (a) Perfection of Appeal.** Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and all appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed, are accelerated appeals. Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

Alternative Two

- (a) **Perfection of Appeal.** Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, including appeals in a suit in which termination of the parent-child relationship is in issue as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in subchapter E of Chapter 203 of the Texas Family Code, are accelerated appeals. Unless otherwise provided by statute, accelerated appeals are perfected by the filing of a notice of appeal in compliance with Rule 25, within the time allowed by Rule 26.1(b) or as extended as provided in Rule 26.3. Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.
- (b) **Further Trial Court Proceedings.** In nonjury proceedings, the trial court need not, but may – within 30 days after the order is signed – file findings of fact and conclusions of law. In a quo warranto proceeding, the trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329(a)-(b) until 50 days after the judgment is signed. If not determined by signed written order within that period, the motion for new trial will be deemed overruled by operation of law on expiration of that period.
- (c) **Record and Briefs.** In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35 and 38.

28.2 Civil Cases – Appeal By Permission

(a) **Petition for permission to appeal.**

- (1) To request permission to appeal an interlocutory order pursuant to Section 51.014(d)-(f) of the Civil Practice and Remedies Code, a

party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

(2) The petition must be filed not later than the 10th day after the date a trial court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if, within 15 days after the deadline for filing the petition, the petitioner:

(A) files the petition in the appellate court, and

(B) files in the appellate court a motion complying with Rule 10.5(b)

(b) Contents of petition; service; response or cross-petition

(1) The petition must:

(A) identify the trial court, and trial judge, and state the case's trial court number and style;

(B) list the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of all trial and appellate counsel;

(C) identify the district court's order granting permission to appeal by stating the title and date of the order and attaching a copy of the order to the petition;

(D) state that all parties agree to the district court's order granting permission to appeal;

(E) identify the written order sought to be appealed by stating the title and date of the order and attaching a copy of the order to the petition;

(F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the

order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

(c) Form of papers; number of copies:

All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must be filed unless the appellate court requires a different number by local rule or by order in a particular case.

(d) Submission of petition; appellate court's order. Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion for rehearing may be filed.

(e) Grant of petition; prosecution of appeal

(1) Within 10 days after the signing of the appellate court's

order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding may file a notice of accelerated appeal with the district clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as any other accelerated appeal.

[Alternative (e)]

(e) Grant of petition; prosecution of appeal

(1) Within 10 days after the signing of the order granting permission to appeal, any party to the trial court proceeding must:

(A) file a notice of accelerated appeal with the district clerk to perfect the appeal,

(B) file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as my other accelerated appeal.