

Richard Orsinger

From: Hachem, Sandra (CAO) [Sandra.Hachem@cao.hctx.net]
Sent: Thursday, October 13, 2011 11:36 AM
To: 'Caspain2'; 'ruckerd@co.midland.tx.us'; 'Eva.Guzman@txcourts.gov'; 'Debra.Lehrmann@txcourts.gov'; 'acmcclure@8thcoa.courts.state.tx.us'; 'Tina.Amberboy@txcourts.gov'; 'jlopez@langleybanack.com'; 'jwmarr@mmbllp.com'; Richard Orsinger; 'Marisa.Secco@txcourts.gov'; 'georganna@simpsonmartin.com'
Cc: 'Katie.Fillmore@txcourts.gov'
Subject: RE: Draft of Final Report--Arroyo modification
Importance: Low

I AGREE with Kin and would like the problem he has identified addressed in the draft we present.

In that connection, I would like to make a suggestion – so long as it does not have the effect of prolonging this matter to the point that it is not addressed in our draft. I spoke with Kin and told him my concern is that litigants, not so effective in these matters, might file a motion in the appellate court to challenge the court's decision without ever filing a timely notice of appeal. Kin told me that the courts of appeals would likely not do anything with it until the notice of appeal is filed. In my experience, that means – DELAY – sometimes followed by an order of abatement to determine if an attorney provided ineffective assistance of counsel. Since we are trying to address DELAY – I would like it to be absolutely clear that a party MUST file a timely notice of appeal in order to challenge the order sustaining a contest. It might not prevent ineffectiveness entirely but it could help prevent some unnecessary delays.

Kin looked at the language I suggested and agreed it would be better, but stated he did not want the perfect to prevent us from getting this issue at least partially addressed. Therefore, I make this suggestion but do not want it to prevent the issue Kin has identified from being addressed. If it does, please disregard and we'll visit this problem another day.

The alternative:

5) *Review of Order Sustaining Contest.* If the court sustains a contest, the unsuccessful party may seek review of the court's order if such party files a timely notice of appeal by filing and files a motion with the appellate court for review of the order sustaining the contest without advance payment of costs no later than ten (10) days after the notice of appeal is filed. ~~The motion shall be filed within 10 days after the order sustaining the contest is signed.~~ No fee shall be required for the filing of the motion and ~~t~~ The trial court clerk and court reporter shall prepare, certify and file the clerk's record and reporter's record of the indigence hearing, if any, and the hearing on the contest, ~~which shall be provided without advance payment of costs.~~

From: Caspain2 [mailto:caspain2@aol.com]
Sent: Thursday, October 13, 2011 7:35 AM
To: ruckerd@co.midland.tx.us; Eva.Guzman@txcourts.gov; Debra.Lehrmann@txcourts.gov; acmcclure@8thcoa.courts.state.tx.us; Tina.Amberboy@txcourts.gov; Hachem, Sandra (CAO); jlopez@langleybanack.com; jwmarr@mmbllp.com; richard@momnd.com; Marisa.Secco@txcourts.gov; georganna@simpsonmartin.com
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Anders

failed to pay or make satisfactory arrangements to pay for the record, the appellate court shall decide the appeal on the clerk's record alone.

(3) *Supplementation*: Supplementation of the record shall be permitted as allowed in the rules for general civil cases.

(4) *Restriction on Preparation Inapplicable*: Section 13.003 of the Civil Practice & Remedies Code shall not apply to an appeal from a parental termination or child protection case.

(c) Briefs:

(1) All briefs must be filed within the time required for accelerated appeals generally under the Rules of Appellate Procedure, except that a court may not grant more than one request per party for additional time to file a brief unless good cause is shown.

(2) *Anders Brief*: If an appointed attorney for an appealing party concludes the appeal is frivolous and without merit, a brief that meets the requirements of *Anders v. California*, 386 U.S. 738 (1967) may be filed presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. The attorney must accompany the brief with a motion to withdraw from representation. The attorney must also certify that a copy of the brief was delivered to the appellant's last known address. The Appellee may file a responsive brief no later than twenty (20) days after the Appellant's brief is filed. If no timely Appellee's brief is filed, it will be presumed that the Appellee has waived the right to file a response. No later than thirty (30) days after the Appellant's Brief is filed, the appellate court will send notice to the appellant of his or her right to examine the appellate record and file a pro se response within twenty days of the appellate court's notice. If no response is filed within the requisite twenty days, the appellate court must immediately submit the matter to determine if the appeal is frivolous and without merit.

(d) *Precedence and Acceleration*: Appellate courts must give precedence to Child Protection Cases over other civil cases and review and dispose of them on an accelerated basis.

(1) *Motions for Rehearing*: A motion for extension of time may not be granted for the late filing of a motion for rehearing. If a timely motion for rehearing is filed, the appellate court must render a decision on such motion within sixty (60) days after it is filed. If an appellate court fails to render a decision on a motion for rehearing within sixty (60) days after it is filed, it will be considered overruled by operation of law on the sixty-first (61st) day after the motion is filed.

(2) *Petitions for Review*: A motion for extension of time may not be granted for the late filing of a petition for review. If a petition for review is filed, the Supreme Court must grant, deny or dismiss such petition within one-hundred twenty (120) days after it is filed, or it will be

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Dear All:

I'm going to make one last pitch to slightly modify TRAP 20.1(i)(5) in our final report to read as follows (the modification is underlined):

(5) *Review of Order Sustaining Contest.* If the court sustains a contest, the unsuccessful party may seek review of the court's order by filing a motion with the appellate court without advance payment of costs. The motion shall be filed within 10 days after the order sustaining the contest is signed, or ten days after the notice of appeal is filed, whichever is later. The trial court clerk and court reporter shall prepare, certify and file the clerk's record and reporter's record of the indigence hearing, if any, and the hearing on the contest, which shall be provided without advance payment of costs.

In *Arroyo*, the supreme court changed the method of reviewing the trial court's order sustaining a contest to an affidavit of indigence from an original proceeding to a motion in the appeal of the underlying judgment or appealable order. Richard Orsinger and I are concerned about the existing proposed rule, because it can force a motion to be filed before the deadline to file the notice of appeal (especially if postjudgment motions are pending). I believe the modification eliminates this problem, and will not materially slow down the appellate process. It will actually help prevent the confusing situation of an *Arroyo* motion being docketed as a separate appeal, which happens. And there's also the peculiar problem of the First and Fourteenth Courts of Appeals jurisdictional overlay, which although "local," affects roughly a third of the cases in the intermediate appellate courts.

At the last Supreme Court Advisory Committee meeting that Sandra and I attended for the Task Force, *Arroyo* was discussed. Justice Bland emphasized that codification of this process is important as *Arroyo* challenges consume tremendous amounts of the appellate court's time. Eliminating unnecessary *Arroyo* problems will free up judges and court staff to do other court work.

Judge Rucker sees no harm in this modification, and Georganna, Richard, and I support it. I know we have all put in a lot of work on this project, and I ask for your support on this here at the end.

And it's been a pleasure to serve with all of you!

Kin