

## MEMORANDUM

To: Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Date: August 11, 2004

Re: Appellate Rule Changes

At our last meeting, the Appellate Rules Subcommittee was requested to consider the following matters:

1. *Adoption of an Appellate Rule to implement the interim appeal provisions of Civil Practice and Remedies Code Section 51.014 (d)-(f).* In 2001, the 77<sup>th</sup> Texas Legislature adopted for Section 51.014 authorizing courts of appeals to “permit” an immediate interlocutory appeals of non-final orders (not otherwise immediately appealable) if a “district court” issues a written order for such an interlocutory appeal and the parties agree to the order. C.P.R.C. § 51.014 (d)-(f); *see Watson v. Moray*, 133 S.W.3d 877 (Tex.App.–Dallas 2004, no pet. n.) (dismissing appeal for want of jurisdiction because subsection (d)’s requirements not met); *See also Stolte v. County of Guadalupe*, \_\_\_\_ S.W.3d \_\_\_\_, 2004 Tex.App. LEXIS 4685 (Tex. App. - San Antonio 2004, no pet. h.); *In re D.B.*, 80 S.W.3d 698, 701 (Tex.App.–Dallas 2002, no pet.).

Section 51.014 (d)-(f) has no counterpart in the Texas Rules of Appellate Procedure showing how the court of appeals’ permission should be requested.

A federal statute has long provided for a somewhat similar appeal of an interlocutory decision. *See* 28 U.S.C. § 1292 (b). In addition, Federal Appellate

Rule 5 prescribes a general rule for seeking permission to appeal from a federal court of appeals. When federal appellate review is discretionary. The Committee Note to the 1998 Amendment of Rule 5 provides that “[t]his new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees.” A copy of Federal Appellate Rule 5 is attached for your consideration.

The Appellate Rules Subcommittee recommends adoption of a new Rule 26.2 implementing Civil Practice and Remedies Code Section 51.014 (d)-(f). A draft proposal of the proposed rule is attached as Attachment A.

2. *Revision of Appellate Rules dealing with accelerated and expedited appeals provided for by statute, particularly in cases involving termination of parental rights.* Appellate Rules 26 (Time to Perfect Appeal) 28 (Accelerated Appeals in Civil Cases) and 29 (Orders Pending Interlocutory Appeal in Civil Cases) all deal with so-called “accelerated” appeals, which are intended to proceed through the appellate process on a faster track than ordinary appeals, particularly ordinary appeals that operate under the extended-90 day perfection timetable that applies to most ordinary appeals.

At present, because of legislative enactments not referenced in the appellate rules which also provide for expedited appellate activity, the foregoing appellate rules create a trap for appellate counsel that requires attention. For example, Family Code Section 109.002(a) provides that:

“An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The procedures for an accelerated appeal under the Texas Rules of Civil Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.”

In addition, Family Code Section 263.405 provides that “[a]n appeal of a final order rendered under [subchapter E (Final Order for Child Under Department Care) of Chapter 263 (Review of Placement of Children Under Care of Department of Protective and Regulatory Services)] is governed by the rules of the supreme court for accelerated appeals in civil cases and the procedures provided by this

section.” Fam. C. § 263.405. Family Code Chapter 263 applies to cases in which termination of the parent-child relationship is sought by the Department of Protective and Regulatory Services. *See In re J.A.G.*, 92 S.W.3d 537, 539-540 (Tex.App.–Amarillo 2002, no pet) – appeal dismissed because notice of appeal was not filed within 20 days after termination order was signed; *In re T.W.*, 89 S.W.3d 641, 641-642 (Tex.App.–Amarillo 2002, no pet.) – same; *see also In re A.J.K.*, 116 S.W. 3d 165, 167-173 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2003, no pet. h.) – accelerated appeal rules apply to cases brought by DPRS even if DPRS abandons request for termination. It also applies to cases in which the Department of Protective and Regulatory Services is appointed as a managing conservator without termination of parental rights Fam. C. § 263.404.

The subcommittee recommends that Appellate Rule 28 should be amended to reflect that in such cases, accelerated appeal procedures and other special statutory requirements must be satisfied. A copy of the proposed amendment is attached and included in Attachment B.

3. *Additional Amendment to Appellate Rule 29.* The original version of Appellate Rule 29.5 provided that during the pendency of “an appeal from an interlocutory order” a “trial court retains jurisdiction” and “may proceed with a trial on the merits.” *See* former App. R. 29.5. As amended in 2002 to conform to the 2001 version of Civil Practice and Remedies Code § 51.014 (b), the words “if permitted by law” were added because the 2001 statute provided: “An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), shall have the effect of staying commencement of a trial in the trial court pending resolution of the appeal.” *Id.* But in 2003, Section 51.014 (b) was amended further to provide that accelerated appeals of interlocutory orders under (a)(3), (a)(5) and (a)(8) stay “all other proceeding in the trial court pending resolution of that appeal.” As a result, the subcommittee recommends that Appellate Rule 29 be amended again to conform to the 2003 amendments to Section 51.014 (b). A copy of the proposed amendment is attached and included in Attachment B.

4. Consideration of Chief Justice Radack’s suggestions for certificates of service and certificates of conference on rehearing motions.

## Attachment A

### MEMORANDUM

To: Appellate Rules Subcommittee, Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Date: August 9, 2004 (Revised August 10, 2004)

Re: Appellate Rules Changes

As promised here is a draft of an Appellate Rule designed to implement the interim appeal provisions of Civil Practice and Remedies Code Section 51.014 (d)-(f). Additional draft rule changes will be sent by separate emails.

1. *Proposed Changes to Rule 25.* Change 25.1 (Civil Cases) to (Civil Cases-Appeal As of Right) and add the following language at the end of the first sentence “within the time allowed by Rule 26”. *See* Fed. R. App. P. 3 (Appeal As of Right-How Taken) and Former Tex. R. App.P. 40 (Ordinary Appeal-How Perfected).
2. Add a new 25.2 (Civil Cases-Appeal By Permission).
3. Change 25.2 (Criminal Cases) to 25.3
4. Rule 25. Perfecting Appeal

#### 25.1 Civil Cases – Appeal as of Right

- a. *Notice of Appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk *within the time allowed by Rule 26*. If a notice of appeal *etc.*

- b. *Petition for Permission to Appeal.* To request permission to appeal an interlocutory order that is not otherwise appealable as of right, a party must file a petition for permission to appeal not later than the 10<sup>th</sup> day after the date a district court signs a written order granting permission to appeal.
- c. *Contents of Petition.* The petition must:
- (1) identify the trial court and state the case's trial court number and style;
  - (2) give a complete list of all parties to the order complained of and the names and addresses of all trial and appellate counsel;
  - (3) identify the order granting permission to appeal by stating the date of the order and attaching to the petition a copy of the order stating the district court's permission to appeal or stating that the statutory conditions are met;
  - (4) identify the interlocutory order complained of by the appellant by stating the date of the order and attaching a copy of the order to the petition;
  - (5) state that all parties agree to the order granting permission to appeal;
  - (6) state the court of appeals to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the petition must state that the petition is addressed to either of those courts; and
  - (7) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the appeal is authorized and should be allowed and the relief sought.
- d. *Other papers.* If any party timely files a petition, another party may file a response or another petition not later than 7 days after the initial petition is served.

- e. *Length of Petitions.* Except by the court's permission, a petition must not exceed 5 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.
- f. *Grant of Petition; Fees; Filing the Record.*
  - (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:
    - (a) request in writing that the official reporter prepare the reporter's record;
    - (b) notify the trial court clerk that permission to appeal has been granted and file any written designation specifying items to be included in the clerk's record; and
    - (c) pay any required fees.
  - (2) *A notice of appeal need not be filed.* The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.
  - (3) The appellate record must be filed within 10 days after entry of the order granting permission to appeal.

COMMENT: This new Rule 25.2 is intended to govern discretionary appeals from trial court orders pursuant to Civil Practice and Remedies Code Section 51.014 (d)-(f).

## MEMORANDUM

To: Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Date: August 11, 2004

Re: Additional Alternatives

### Alternative (7)

State concisely the issues of points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a controlling questions 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.

Consider adding

- (c) Extension of Time. The appellate court may extend the time to file the petition for permission to appeal if, within 15 days after the deadline for filing the petition, the party:
  - (a) files in the trial court the petition for permission to appeal; and
  - (b) files in the appellate court a motion complying with Rule 10.5(b).

Change (c) to (d) etc.

## Attachment B

### MEMORANDUM

To: Appellate Rules Subcommittee, Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Date: August 9, 2004 (Revised August 10, 2004)

Re: Appellate Rules Changes

Here are my suggested revisions for Rules 12, 26, 28, and 29.

#### Rule 12. *Duties of Appellate Clerk*

##### Rule 12.1 *Docketing the Case.*

On receiving a copy of the notice of appeal, *the petition for permission to appeal*, the petition for review, the petition for discretionary proceeding, or a certified question, the appellate clerk must:

- (a) . . .
- (b) . . .
- (c) docket for case

Etc.

#### Rule 26. *Time to Perfect Appeal.*

26.1 *Civil Cases.* The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

- (a)  
↓



(d) *in appeals with procedural requirements prescribed by specific statutes, within the time provided by statute.*

COMMENT to the 2004 Change: The Texas Legislature has enacted specific statutes providing expedited appellate timetables in certain cases. *See e.g.* Health & Safety C. § 81.191 – appeals from orders for management of persons with communicable diseases, notice of appeal must be filed within 10 days; Health & Safety C. § 574.070 – appeals from orders requiring mental health services, notice of appeal must be filed within 10 days. This change is to advise parties and their counsel to consult pertinent statutes which provide specific procedural requirements.

Rule 28. *Accelerated Appeals in Civil Cases.*

28.1 *Interlocutory Orders. . .*

28.2 *Quo Warranto.*

28.3 *Termination of Parental Rights.*

An appeal in a suit in which termination of parent-child relationship is in issue must be given precedence over other civil cases and the procedures for an accelerated appeal apply to any appeal in which termination of the parent-child relationship is in issue. An appeal from a final order appointing the Department of Protective and Regulatory Services as managing conservator without terminating parental rights is also governed by the rules for accelerated appeals in civil cases.

COMMENTS to 2004 change: New Rule 28.3 has been added to advise parties and their counsel that appeals from final judgments granting or denying termination of parental rights are accelerated appeals governed by the rules for accelerated appeals and by additional procedures provided by statute. *See* Fam. C. § 109.002; *see also* Fam. C. §§ 263.404; 263.405.

Rule 29.5 *Further Proceedings in Trial Court.* While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and *unless prohibited by statute* may make further orders, including one dissolving the order *complained of on appeal*. *If permitted by law, the trial court may proceed with a trial on the merits. But the court . . .*

COMMENT to 2004 change: Rule 29.5 is amended to conform to Sections 51.014 (b) and (c) of the Civil Practice and Remedies Code which provide complex procedures for staying proceedings in cases governed by Section 51.014 (a).