

MEMORANDUM

TO: SCAC Members

October 12, 2007

FROM: Jody Hughes

RE: TRAP Amendments to Require Redaction of Minors' Names

Below is a second revised version of proposed TRAP 9.8 based on the discussion and votes taken at the August SCAC meeting. This version returns to the narrower scope of the original draft, limiting application of the rule to appeals of parental-rights termination cases. *See* Aug. 25, 2007 SCAC Tr. at 16481 (13-12 vote against including Family Code Titles 2-5 in scope of rule). Like the first revised draft, which the SCAC discussed in August, the current draft rule shown below allows use of either initials (single or multiple) or pseudonyms, and applies to parties' briefs and court opinions but not to appellate judgments. Based on the results of two additional polls taken at the August meeting, I deleted the prior provisions contained in the first revised draft specifically granting judicial discretion (1) to order substitution in other cases as appropriate, *see id.* at 16483 (13-11 vote), and (2) to issue sanctions for willful or persistent rule violations, *see id.* (20-3 vote). I also reorganized the rule slightly, edited the heading and subheadings for greater clarity, and substituted "seeking" for "involving" in the phrase "in an appeal of a suit involving the termination of parental rights." The purpose of the latter change was to bring within the scope of the rule those cases where the proceedings did not result in a judgment of termination.

At the August meeting, the Committee also discussed, but did not clearly decide, whether the rule should include a provision giving an appellate court the discretion to redact parents' names in its opinions, or to require parties to redact parents' names, to protect a minor child's identity. A brief summary:

- Judge Yelenosky suggested such a provision is needed to protect the identity of minor children when the last name of a parent is unusual and shared with a minor child; otherwise the goal of protecting the minor child's identity will effectively be defeated by the publication of the parent's unredacted name. Aug. 25, 2007 SCAC Tr. at 16460-62.
- Justice Gaultney agreed that a discretionary provision would be appropriate. *Id.* at 16462.
- Sarah Duncan pointed out that the Fourth Court once redacted the name of a police officer convicted of child abuse, on the defendant's motion, to protect him in prison from retaliation by persons the officer had previously arrested. *Id.* at 16464.
- Frank Gilstrap was concerned that a grant of broad discretion might be subject to abuse, *i.e.*, to shield high-standing members of a community from embarrassment rather than solely to protect the identity of their minor children. *Id.* at 16464-5.

- Chip Babcock agreed about the potential for abuse and cited the public's right to know the outcomes of public judicial proceedings. *Id.* at 16465.
- Judge Christopher noted that requiring redaction in the parties' briefs and motions might hinder the appellate court's ability to identify potential bases for recusal. *Id.* at 16469.
- Judge Christopher and Judge Yelenosky respectively suggested that the recusal problem could be addressed through the "sensitive data" sheet the SCAC has recommended for adoption as part of the Rules of Judicial Administration, or through a similar document separately filed pursuant to a court's local rules or internal operating procedures. *Id.*
- Justice Gaultney suggested that the provision authorizing the court to redact a parent's name should expressly state that its purpose the minor children involved. *Id.* at 16470.
- Frank Gilstrap stated that parents generally are not entitled to anonymity in parental-rights termination cases, and that the public has the right to know what happens in termination cases, such as when the parents have been convicted of child abuse. *Id.* at 16472.

In sum, there appears to be a consensus that children's identities should be protected; that it is appropriate to redact a parent's name whenever necessary to accomplish that goal; and that when the State has sued to terminate the parent-child relationship, the subject parent otherwise may not be entitled to have his or her own identity disguised in legal media publications. However, redacting a parent's name to protect his or her child's identity will also protect the parent's identity as well.

Making redaction of parents' names discretionary creates the potential for redaction for improper purposes, *i.e.*, protecting the identity of parents instead of the children, and could lead to inconsistent policies among appellate courts. But the courts are arguably in the best position to decide when substitution is needed to protect minors' privacy. Presumably for that reason, the Legislature gave appellate courts discretion with respect to minors' names in judicial opinions. *See* Tex. Fam. Code §109.002(d) ("On the motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only.") (applicable to appeals of suits affecting the parent-child relationship).

Pursuant to this statute, most appellate courts in Texas substitute initials or pseudonyms for the names of minor children in termination cases. *See, e.g., In re T.J.R.*, 2007 WL 614085 (Tex. App.—Fort Worth 2007, no pet.) (using initials for child only). Some, but not all, substitute for parents' names as well, often using only a parent's first name or initial. *See, e.g., In re J.R.*, 222 S.W.3d 817 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The Texas Supreme Court follows the latter practice, or at least has done so in recent years. *See In re J.B.P.*, 180 S.W.3d 570 (Tex. 2005); *see also Doe v. Delaware*, 450 U.S. 382, 382 n.1 (1981) (Brennan, J., dissenting to dismissal, for want of federal question, of parents' appeal of state judgment terminating parental rights) (noting that Supreme Court had previously granted motion to seal record and had substituted pseudonyms for parties' names). The Texas Supreme Court also has substituted initials for the names of both a

daughter and her parents in a divorce appeal to protect the daughter's identity, even though she was an adult at the time suit was filed. *See S.V. v. R.V.*, 933 S.W.2d 1, 3 (Tex. 1996) (using initials for all parties where daughter intervened in parents' divorce to claim that father sexually abused her as a minor, and citing the "sensitive nature" of daughter's allegations).

Proposed rule 9.8 would affect only appeals of termination cases. There is some Texas case law addressing the protection of minors' anonymity in cases involving trial records sealed under Tex. R. Civ. P. 76a. *See Fox v. Anonymous*, 869 S.W.2d 499, 507 (Tex. App.—San Antonio 1993, writ denied) (although identities of minor and his parents and terms of settlement were properly sealed in minor's suit to implement settlement of tort claims against health care facility arising from sexual assault by facility's employee, there was no need to seal trustee's name, person signing on trustee's behalf, amount awarded to victim's parents, or amount of attorney fees); *Fox v. Doe*, 869 S.W.2d 507 (Tex. App.—San Antonio 1993, writ denied) (companion case holding that redacting of names of settling defendant corporation or insurance company was unnecessary to protect minor's privacy). However, Rule 76a's definition of "court records" excludes "documents filed in an action originally arising under the Family Code." Tex. R. Civ. P. 76a(2)(a)(3). Accordingly, in such cases, the record can be sealed without following Rule 76a's specific procedures, and Rule 76a's presumption of openness does not apply. *See id.*; *In re Bain*, 144 S.W.3d 236, 241 (Tex. App.—Tyler 2004, orig. proceeding). Appellate courts also may order records (excluding orders and judgments) sealed in termination appeals. *See, e.g., In re R.D.*, 955 S.W.2d 364, 366 (Tex. App.—San Antonio 1997, pet. denied) (ordering record of termination trial sealed except for orders and judgments, and using in opinion only facts voluntarily disclosed in parties' briefs).

The draft below, which requires both parties and appellate courts to shield the identities of minor children in parental-rights termination cases and authorizes courts to redact parents' names if necessary or appropriate to protect a minor child's identity, offers the best approach. Requiring the court or the parties to redact parents' names in cases where redaction is not needed to protect a child's identity gives parents too much anonymity; not giving the court discretion to redact parents' names and require parties to do the same will allow parents' names to appear in briefs and opinions available to the public in print and online, thereby making the parents' minor children easily identifiable and defeating the purpose of camouflaging the minors' identities. This discretionary provision is also consistent with Family Code §109.002(d)'s discretionary approach.

I believe the draft rule also sufficiently addresses the concern about an appellate court's ability to determine the need for recusal. "[U]pon perfecting the appeal in a civil case," the appellant is required to file a docketing statement containing the names of all parties, their lead counsel, and the trial judge. Tex. R. App. P. 32.1. Because the notice of appeal and the docketing statement are filed before any briefs are submitted, the docketing statement should give the appellate court the information it needs to make preliminary recusal determinations even if the court later orders the parties to redact parents' names as well in their briefs. And because the notice of appeal and the docketing statement are not published online through Westlaw or Lexis, the identifying information contained therein can be provided to the court without being broadcast over the Internet.

Rule 9. Papers Generally**9.8 Protection of Minor Child's Identity in Parental-Rights Termination Appeals.**

(a) Redaction of Minors' Names Generally Required in Appellate Briefing and Opinions. In an appeal of a suit seeking the termination of parental rights, a minor child shall be identified only by one or more initial letters of the minor's name or by a pseudonym in any party's brief, petition, motion, or other submission to an appellate court, or in any opinion issued by an appellate court, unless the court orders otherwise.

(b) Redaction of Parents' Names at Court's Discretion. In an appeal of a suit seeking the termination of parental rights, an appellate court may substitute in an opinion, and may order parties to substitute in their briefs, petitions, motions, or other court submissions, one or more initial letters or pseudonyms for the names of parents of minor children if the court determines that such substitution would be necessary or appropriate to protect the identity of a minor child.

(c) Redaction of Children's or Parents' Names In Copies of Appendix Items. In an appeal of a suit seeking the termination of parental rights, for any necessary or optional appendix items to be included with a party's brief, petition, or motion, copies of any appendix items containing the name of a minor child shall be redacted so that the minor is identified only by one or more initial letters of the minor's name or by a pseudonym. An appellate court also may order parties to substitute initials or pseudonyms for the names of parents of minor children in any necessary or optional appendix items to be included with a party's brief, petition, or motion in an appeal of a suit seeking the termination of parental rights, if such substitution is necessary or appropriate to prevent a parent's name from being used to identify a minor child whose parent or parents are the subject of the termination proceedings. Nothing in this rule authorizes alteration of the original appellate record except as specifically authorized by court order.

At the close of the discussion of this rule proposal at the August 2007 SCAC meeting, Justice Gaultney suggested, without opposition, that TRAP 38.1(a) (Identity of Parties and Counsel) be amended to cross-reference new TRAP 9.8. Aug. 25, 2007 SCAC Tr. at 16484. Perhaps like this:

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

- (a) ***Identity of parties and counsel.*** The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel. As required by Rule 9.8, in an appeal of a suit seeking the termination of parental rights a minor child shall be identified only by one or more initial letters of the minor's name or by a pseudonym in any party's brief, petition, motion, or other submission to an appellate court. If an appellate court orders the parties to substitute initials or pseudonyms for the name of a parent of a minor child involved in a termination appeal to protect the identity of a minor child, the parties should identify the parent in a manner consistent with the court's order.