

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Appellate Rules Subcommittee

RE: Appeals in Parental Termination Cases

DATE: September 5, 2019

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3 letter refer the following matter to the Appellate Rules Subcommittee:

Out-of-Time Appeals in Parental Rights Termination Cases. A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:

- a narrow late-appeal procedure;
- an abate-and-remand procedure like the one proposed in the Phase II Report;
- a habeas- or bill-of-review-style procedure; and
- prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.

Suits Affecting the Parent-Child Relationship. In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
 - a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
 - b. Assessing proposals for addressing untimely appeals and ineffective claims
 - i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
 - ii. "narrow late-appeal procedure"
 - iii. "habeas- or bill-of-review-style procedure" for a collateral attack
 - iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
 - a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
 - b. Opinion templates as created by the HB7 task force

This memo focuses on Stage One, topic 1(a) with respect to the right to counsel on appeal, notice of right to appeal, and showing authority to appeal. The subcommittee will address Stage One, topic 1(b) and Stage Two in later meetings.

IV. Discussion

A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an indigent parent is entitled to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code § 107.016(3).

The HB7 Task Force made the following recommendations regarding an indigent parent's notice of the right to appeal and the right to counsel on appeal.

The HB7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:

“You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you.”

“You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you.”

To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental termination cases. Such a citation could have language customized to address the availability of default judgments in parental-termination cases.

The subcommittee reviewed and discussed these HB7 Task Force recommendations.

The subcommittee recommends the following revision to the HB7 Task Force's proposed citation language.

“You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you.” at no cost to you.”

“You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you.”

The proposed revision clarifies the practical consequence of being “eligible for appointment of an attorney” and conforms the first paragraph to the second paragraph so they both provide the same information in parallel fashion.

The subcommittee also discussed use of the word “indigent” in the HB7 Task Force proposal. A question arose during the subcommittee’s discussions concerning whether “indigent” would be understood by persons receiving this notice, and whether the term should be (1) defined, or (2) replaced with simpler wording such as “poor.” The word “indigent” has a settled meaning for courts and lawyers, but this meaning may not be clear to non-lawyers who receive this notification. There was no consensus among the subcommittee members on whether to change or further define the word “indigent.” The subcommittee notes that a discussion regarding potential use of the word “poor” occurred during the full advisory committee’s June 2019 meeting in conjunction with deliberations regarding the contents of name change forms. Differing views were expressed during the full advisory committee’s June 2019 meeting about whether the word “poor” carries pejorative connotations and whether “poor” is easier to understand than other terms describing lack of financial resources.

The HB7 Task Force proposal comports with an October 2017 report by the Rules 15-165a Subcommittee entitled, “Modernizing TRCP 99, Issuance and Form of Citation.” The full advisory committee discussed this report at its October 2017 meeting, and the proposed revisions to TRCP 99 are pending before the Texas Supreme Court. Among other things, the October 2017 report recommends eliminating from TRCP 99 the description of a citation’s mandatory contents and instead promulgating a form citation in plain language that clerks must follow. The Appellate Rules Subcommittee endorses the application of this approach to parental termination cases. The Appellate Rules Subcommittee solicits input from the full advisory committee about whether additional language addressing default judgments or other topics specific to parental termination cases should be considered for inclusion in a form citation for parental termination cases.

B. Showing Authority to Appeal

The HB7 Task Force made the following recommendations (footnotes omitted) with respect to requiring an attorney to show authority to pursue an appeal from a termination order.

The filing of a notice of appeal starts the process of immediately preparing a record for which a court reporter might not be compensated. To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not actually be seeking to challenge a final order, the HB7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that “the attorney consulted with the appellant and the appellant has directed the attorney to pursue to the appeal.” *See Appendix C, Rule 28.4(c)*. The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l)*. As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney’s authority but eliminating the requirement of a sworn motion.

The HB7 Task Force’s proposed rule revisions read in part as follows.

HB7 Task Force Proposed Texas Rule of Appellate Procedure 28.4(c):

(c) *Certification by Appointed Counsel and Motion to Show Authority.* A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court’s ruling. The court must rule on the motion to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.

HB7 Task Force Proposed Texas Rule of Appellate Procedure 53.2(l):

(l) *Certification by Appointed Counsel.* In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

The subcommittee reviewed and discussed these HB7 Task Force proposals.

The subcommittee endorses the recommendation to require a statement of authority to appeal or file a petition for review as reflected in proposed TRAP 53.2(l) and the first sentence of proposed TRAP 28.4(c) for the reasons spelled out in the HB7 Task Force's recommendation.

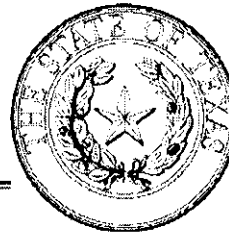
The subcommittee recommends a different approach regarding an enforcement mechanism in proposed TRAP 28.4(c). Questions arose among the subcommittee members regarding the necessity of creating a motion-to-show-authority procedure. If the full advisory committee concludes such a procedure is necessary, then the subcommittee recommends creating a simpler procedure. Grafting the procedure from TRCP 12 onto TRAP 28.4(c) makes for a lengthy and potentially cumbersome or redundant appellate rule. Instead of adding language to proposed TRAP 28.4(c) delineating the procedure for challenging authority to appeal, the subcommittee recommends (1) adding a second sentence to proposed TRAP 28.4(c) stating that a motion challenging an attorney's authority to pursue a parental-termination appeal will be handled in the trial court under TRCP 12, and (2) supplementing TRCP 12 as necessary to accommodate the accelerated timeframes applicable to parental-termination appeals.

C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

Later subcommittee reports will address issues concerning extensions of time by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed counsel fails to timely pursue an appeal. At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court.

As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

Memorandum



To: Texas Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: July 20, 2017

Re: Extension of Time to File Petition for Review in Parental Termination Cases

The referral on this topic is as follows:

Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel.

The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

During the June 2017 meeting of the full advisory committee, potential revisions to TRAP 4 were discussed to address this issue. Two versions of the rule revisions were proposed.

Version 1 allows a motion for extension of time to file a petition for review by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed

counsel fails to file the petition timely. This “no fault” version does not require allegations regarding any failure by appointed counsel to act on the parent’s instructions or to inform the parent regarding the right to file a petition for review. The only required allegation is that appointed counsel failed to file the petition timely.

Version 2 also allows a motion for extension of time; in contrast to Version 1, however, this version requires a statement that appointed counsel failed to file the petition for review timely, and that either (1) the indigent parent instructed counsel to file it; or (2) counsel failed to inform the parent of the right to file a petition for review. Version 2 allows appointed counsel to file a response.

The full advisory committee voted 13 to 6 at the June 2017 meeting in favor of Version 1’s approach, which omits a requirement to show fault on the part of appointed counsel.

With respect to Version 2, the full advisory committee voted 10-to-5 in favor of requiring verification if a showing of fault is required.

Justice Christopher suggested an alternative approach under which appointed counsel would be notified that counsel must file a petition for review unless an indigent parent consents in writing not to file the petition. This mandatory approach, it was suggested, could eliminate disputes over fault and the need to amend TRAP 4 to create a specific mechanism for extensions of time to file a petition for review in these circumstances. The full advisory committee voted 10-to-3 in favor of this alternative approach.

In light of the June 2017 discussion and votes, the appellate subcommittee has made minor changes to Versions 1 and 2 and has drafted new Version 3, all of which are attached to this memo. The three versions thus are: (1) a no-fault motion for extension mechanism (Version 1); (2) a motion for extension mechanism requiring verified allegations of fault on the part of appointed counsel, with an opportunity for counsel to respond (Version 2); and (3) a notice requirement under which the court of appeals’ opinion and judgment must be accompanied by written notice to appointed counsel that a petition for review must be filed unless counsel obtains written consent from the indigent parent not to file the petition (Version 3).

The appellate subcommittee recommends adoption of Version 1 (no-fault motion) together with Version 3 (notice of appointed counsel’s mandatory duty to file a petition for review unless indigent parent consents in writing not to file).

The subcommittee’s view is that confusion and missed deadlines likely will be diminished under Version 3 if the rules require notice of appointed counsel’s mandatory duty to file the petition for review. The subcommittee nonetheless concludes that some number of missed deadlines still are likely to occur even with explicit notice to appointed counsel of a

mandatory duty to file a petition for review on behalf of an indigent parent whose rights have been terminated. For this reason, an extension mechanism in the form of Version 1 should be included as a supplemental measure to allow an avenue for further review. No allegations regarding fault should be necessary to obtain an extension if the rules provide notice of appointed counsel's mandatory duty to file. There is no "fault" to be disputed if the duty to file is mandatory. The only showing necessary to obtain the extension in light of this mandatory duty should be a showing that the required petition for review was not filed timely.

July 18, 2017 CLEAN DRAFT OF VERSIONS 1, 2 AND 3

**PROPOSED TRAP REVISIONS FOR MOTIONS FOR EXTENSION OF TIME
TO FILE PFR IN PARENTAL TERMINATION CASES
(ADDING VERSION 3 WITH NOTICE REQUIREMENT BASED ON TRAP 25.2(D))**

VERSION 1 (ELIMINATE ATTY FAULT REQUIREMENT)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory¹ right to appointed counsel in a parental-termination suit² may move for additional time to file a petition for review by filing a motion stating that the indigent parent's appointed counsel failed to file the petition timely.

(b) *Where and When to File.* A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days³ after the following:

¹ Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

² TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

³ This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

- (1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or
- (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.⁴

(c) *Order of the Court*. The court must grant the motion if the motion for additional time was timely filed, and appointed counsel for the indigent parent did not timely file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

⁴ The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

VERSION 2 (KEEP ATTY FAULT REQUIREMENT; ALLOW ATTY RESPONSE)

4.7. Effect of Appointed Counsel's Failure to Timely File a Petition for Review in a Parental-Termination Case.

(a) *Additional Time to File Petition for Review.* An indigent parent with a statutory⁵ right to appointed counsel in a parental-termination suit⁶ may move for additional time to file a petition for review if the parent's appointed counsel failed to file the petition timely.

(b) *Contents of Motion.* The motion for additional time must **be verified and** state that appointed counsel failed to timely file a petition for review, and that either:

- (1) the indigent parent instructed the appointed counsel to file a petition for review; or
- (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review.

⁵ Texas Supreme Court decisions have recognized a statutory right to appointed Supreme Court counsel in a parental-termination suit under TEX. FAM. CODE § 107.013(a), which restricts the right to suit initiated by a governmental entity. *In the Interest of P.M.*, 2016 WL 1274748 (Tex. Apr. 1, 2016). The Court has not addressed whether there is a constitutional or statutory right in private parental-termination suits or whether such a right is afforded a non-indigent parent.

⁶ TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

(c) *Where and When to File.* A motion for additional time to file a petition for review must be filed in and ruled on by the Supreme Court. The motion must be filed within 90 days⁷ after the following:

- (1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or
- (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing or en banc reconsideration.⁸

(d) *Response.* Appointed counsel may, voluntarily or at the court's request, file a response stating that the indigent parent was notified in writing of the right to file a petition for review and instructed counsel in writing not to file.

(e) *Order of the Court.* The court must grant the motion if the motion for additional time was timely filed, appointed counsel for the indigent parent did not timely file a petition for review, and either

- (1) the indigent parent instructed the appointed counsel to file a petition for review; or
- (2) the appointed counsel failed to inform the indigent parent of the right to file a petition for review. The time for filing the petition for review will begin to run on the date when the court grants the motion.

⁷ This time period is taken from TRAP 4.5 providing for a similar procedure when a litigant receives late notice of judgment.

⁸ The dates are taken verbatim from TRAP 53.7(a)(1) and (2).

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.

VERSION 3 (NOTICE OF RIGHT TO FILE PFR)

48. ___ *Notice of Right to File Petition for Review in the Supreme Court of Texas in Parental-Termination Cases Involving Indigent Parent with Statutory Right to Appointed Counsel.* If the parental rights of an indigent parent with a statutory⁹ right to appointed counsel¹⁰ have been terminated, the appellate clerk will send to appointed counsel a notice of the parent's right to file a petition for review in the Supreme Court of Texas with the opinion and judgment. The notice will include a statement that appointed counsel must file a petition for review in the Supreme Court of Texas unless the parent consents in writing not to have appointed counsel file a petition for review.

Comment.

The Texas Supreme Court held in *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748 (Tex. Apr. 1, 2016) (per curiam), that the statutory right to appointed counsel in parental-termination cases extends to proceedings in the Texas Supreme Court and held in *In the Interest of M.S.*, 115 S.W.3d 534 (Tex. 2003), that the statutory right to appointed counsel embodied the right to effective

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¹⁰ TEX. FAM. CODE § 107.013(a) also provides for appointed counsel for an indigent parent in proceedings where a governmental entity seeks the appointment of a conservator for a child. The Texas Supreme Court has not specifically addressed whether appointed counsel must be made available in such proceedings at the petition for review stage. The draft rule could be broadened to parallel the statute.

assistance of counsel. The Court further recognized in *In the Interest of P.M.* that appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards set forth in *Anders v. California*, 386 U.S. 738 (1967). The rule treats the filing of an *Anders* brief as the filing of a petition for review.