MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **June 15, 2020**

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:
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> - 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.
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> **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 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 a conservator for the child is requested, an indigent parent is entitled by statute 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 §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the interest of P.M.*, 520 S.W.3d 24 (Tex. 2016) (per curiam).[1]

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:
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> > "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."
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> 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

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[1] The Supreme Court has not addressed whether there is a constitutional or statutory right to appointed counsel in private parental termination suits, or whether such a right extends to a non-indigent parent. The Court also has not addressed whether appointed counsel must be provided for an indigent parent at the petition for review stage in cases in which a governmental entity seeks the appointment of a conservator for a child.

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

The full committee discussed the questions of authority and intent to appeal at length during the November 1, 2019 meeting. Substantial consideration was given to the issue of "phantom" appeals pursued on behalf of absent parents whose intent to pursue an appeal from a termination order may be difficult for trial counsel or the trial court to confirm because they cannot be located. The full committee votes indicated a preference for a rule-based procedure under which the trial court would (1) conduct a hearing at the conclusion of trial, and then (2) sign an order based on the results of that hearing.

The subcommittee considered this procedure based on the vote and recommends a narrow rule to implement it as discussed further below. One possible location for such a rule is as part of current Texas Rule of Civil Procedure 306, which already contains a specific provision addressing the contents of a judgment in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

The subcommittee discussed using Rule 306 as the vehicle for any procedure that may be implemented, and moving the first sentence of Rule 306 to Rule 301.

To obtain practical insights on how such a procedure might work and to identify potential pitfalls, the subcommittee reached out to those who have experience handling these cases. Two key pitfalls were identified.

- It is problematic to infer an intent to relinquish parental rights, or to relinquish the right to appeal from a termination order, solely from a terminated parent's absence at trial or periodic absences as a case progresses. Parents subject to termination may "disappear" from a case for periods of time and become unreachable by counsel because they are homeless, or incarcerated, or experiencing domestic violence, or experiencing untreated mental illness, or experiencing the effects of substance abuse. It is not uncommon for parents in these circumstances to re-establish contact with counsel after trial when their circumstances have stabilized and express a desire to challenge a termination order on appeal. For this reason, a rule permitting the trial court to determine an intent not to appeal based solely on the parent's absence from trial, or trial counsel's inability to communicate with a

parent who previously has been participating in the case but has become unreachable, potentially could operate to foreclose the appellate rights of parents who later will express a desire to appeal.

- Parents who are present for trial may be difficult to reach after trial, which counsels in favor of having any hearing and determination with respect to an intent to appeal occur at the close of trial instead of when the judgment is signed.

Based on this input, the subcommittee has reviewed a proposed revision to Rule 306.

Under this proposal, non-appearance at trial would give rise to a permissible inference that the terminated parent does not wish to appeal when a parent (1) is identified as an "alleged" or "presumed" parent; (2) has never been located or involved in the case; and (3) is represented at trial only because the trial court has appointed an attorney ad litem to represent the "alleged" or "presumed" parent at trial.

[Current] Rule 306 Recitation of Judgment

The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.

[Draft] Rule 306 Judgment in Suit Affecting the Parent-Child Relationship

1. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. **[Same as the current rule.]**

2. The following provisions apply in a suit filed by a governmental entity that seeks the termination of the parent-child relationship or appointment of the entity as a child's conservator.

   a. The judgment may state that an attorney ad litem appointed for a parent or alleged father is relieved or replaced by another attorney after stating a finding of good cause.

   b. The parent's or alleged father's failure to appear in any manner after proper citation may constitute good cause for relieving the attorney ad litem appointed for that parent or alleged father.

c. If the attorney ad litem appointed for the alleged father submits a written summary of the attorney's effort to identify or locate the alleged father with a statement that the attorney was unable to identify or locate the father, the court shall discharge the attorney from the appointment.

Comments on draft:

1. The first sentence of TRCP 306 is moved to TRCP 301.

2. It is assumed that the proposed changes to citation are approved.

3. Under Family Code §107.013 the court must appoint an attorney ad litem for:

    i. An indigent parent who responds to oppose the termination or appointment;
    ii. A parent served by publication; or,
    iii. A putative father who failed to register his parenthood under Chap. 160 and who location is unknown; and,
    iv. A registered putative father who cannot be located for service.

    The attorney ad litem must investigate what the petitioner has done to locate an alleged father and do an independent investigation to find him. Tex. Fam. Code §107.0132(a). If the attorney locates him, he must report the address and locating information to the court and each party. Tex. Fam. Code §107.0132(b). If the attorney ad litem cannot locate him, he shall report his efforts to the court; on receipt of the report, the court must discharge the attorney. Tex. Fam. Code §107.0132(d). If the putative father is adjudicated the parent and is determined to be indigent, the court may continue the appointment on the same basis as an indigent parent. Tex. Fam. Code §107.0132(c). This suggests that after the putative father appears, he is entitled to continued representation only upon proof of indigency.

4. The attorney ad litem serves until the earliest of:

    i. The date the suit is dismissed;
    ii. The date appeals of a final order are exhausted or waived; or
    iii. The date the attorney is relieved of duties or replaced by another attorney after a finding of good caused rendered on the record.

Tex. Fam. Code §107.016(3). The Supreme Court has held that once appointed, counsel may withdraw only for good cause, which did not include client disagreement or belief the appeal was meritless. *In the Interest of P.M.*, 520 S.W.3d at 27. Courts have a duty to see that withdrawal not result in foreseeable prejudice to the client; it the court permits withdrawal, it must provide for new counsel. *Id.* However, this was a case where the parent had appeared and actively pursued an appeal. This leaves unresolved whether the court may relieve the attorney ad litem if the parent/putative father never appeared after personal service or service by publication.

Section 107.0132(d) mandates discharging counsel if the putative father cannot be located. Section 107.0132(c) suggests the putative father who is served is entitled to continued representation on the same basis as a parent who appears. Arguably the *P.M.* decision would permit discharging the attorney ad litem if:

i. The putative cannot be located;
ii. The putative father is served, responds, but fails to prove he is indigent;
iii. The parent is served, responds, but fails to prove indigency.

5. This draft avoids the difficulty of trying to determine whether a party who has never appeared (or has disappeared) wishes to waive the appeal. It focused on determining what is good cause under Texas Family Code section 107.016(3) to relieve the appointed attorney ad litem when the final judgment is signed. It does not address discharging or relieving appointment prior to a final judgment.

   The default position is proposed Rule 306(2)(a): The judgment must find 'good cause' to terminate the appointment or replace the attorney. This creates flexibility to find 'good cause' if the parent has intermittently appeared but now cannot be located. In those cases, 'good cause' will be case-specific and *P.M.* may prohibit discharge without replacing counsel.

   Under proposed Rule 306(2) (b), the court may find "good cause" for terminating the appointment altogether if the parent or alleged father failed to appear in any manner after proper service. However, the court has discretion not to terminate.

   If the parent or putative father was served and never responded at all, that party is not entitled to an attorney ad litem under sections 107.013(a)(1) and 107.0132(c). Due process is not offended because they did not appear and prove indigency.

> Under proposed Rule 306(2)(c), the Court must discharge the attorney ad litem if the attorney filed the report permitted by Texas Family Code section 107.0132(d). The attorney ad litem may be discharged with replacement or filing an appeal.

This proposal generated substantial discussion within the subcommittee. Additional areas for consideration include (1) is Rule 306 the best place to put such a rule; (2) are there other rules that could be more readily adapted for this purpose, such as Rule 308a; (3) should all rules of civil procedure governing the parent-child relationship be assembled in one place as part of "Rules Relating to Special Proceedings" in Part VII of the Texas Rules of Civil Procedure.

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.