Children's Commission®
SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Justice Eva Guzman, *Chair*

Jamie Bernstein, *Executive Director*

August 26, 2020

Dear Justice Boyce.

Thank you for the opportunity to review the August 24, 2020 memorandum to the appellate rules subcommittee prior to the Supreme Court Advisory Committee meeting on August 28, 2020. It is evident that the SCAC contributed a tremendous amount of work to examine the recommendations found in the HB 7 Task Force Phase II Report regarding appeals in parental termination cases. In my capacity as Jurist in Residence of the Children's Commission, and in consultation with the Commission staff, there are several issues laid out below for your consideration.

After reviewing the memo, the Children's Commission has some concerns regarding discussion item **B. Showing Authority to Appeal**. As you may recall, HB 7 Task Force developed the Proposed Rules of Appellate Procedure 28.4(c) and 53.2(1) after examining the increase of parental termination appeals in both Texas Appellate Courts and the Supreme Court of Texas. The "phantom appellant" scenario refers to instances where an attorney for a parent appeals the termination of parental rights without having contact with the client, or direction from the client to pursue the appeal, after the termination order is entered. A "phantom appellant" may be a parent who was served and made one appearance at the 14-day adversary hearing without ever contacting their attorney again. Alternatively, a parent who appears at every hearing but disappears on the eve of trial, or a parent who attends the entire trial but is unreachable thereafter could also present as a "phantom appellant." In these scenarios, the threshold issue is whether the attorney who is unable to contact the client and ascertain direction about whether to appeal the termination, between the time the final order is signed and the expiration of subsequent 20 day deadline to file a notice of appeal under Rule 26.1(b), files notice and pursues the appeal despite the lack of contact or direction.

The SCAC subcommittee's outreach to practitioners handling CPS cases identified two concerns. Unfortunately, those concerns do not conform with the concept of the "phantom appellant" laid out above. The first concern was that "[i]t 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." Though this statement is accurate, the crux of the "phantom appellant" issue is the lack of direction on the decision to appeal termination, not the parent's level of participation throughout the case or even at trial. It is also important to note that absent direction from a client, it would be equally problematic to infer a desire to pursue an appeal of termination. A termination appeal is not without substantial emotional cost, both to the parent and the child, as it significantly extends the time they must live with a monumental uncertainty.

Another noted concern was that "[i]t 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." The Children's Commission is unaware of any study on legal representation in CPS cases either in Texas or nationally that would support this assertion. This assertion also does not fit squarely in the concept of a "phantom appellant" and fails to reflect the intended consequences of classifying CPS termination cases as accelerated appeals.

Classifying CPS cases as accelerated appeals deliberately forecloses the rights of parents who will later express a desire to appeal because the calculation has been made that providing timely permanency for children necessitates a compressed period of time for a parent to decide to appeal. Consider the example of a parent who attends every hearing in their case, attends trial, loses at trial, consults with their attorney post-trial, makes the decision not to appeal, the 20-day notice period of Rule 26.1(b) expires, and the attorney is dismissed. If that parent has a change of heart and later expresses a desire to appeal, that opportunity is foreclosed by design, even if the change of heart occurs a day or two after the deadline to file a notice of appeal. It is unclear why the late desire to appeal of a parent who is absent at a critical juncture deserves more protection that a parent who appears at every stage of the case.

Additionally, under the proposed rule, "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." This language confounds the legal standing of presumed and alleged fathers. A presumed father is a legally adjudicated father, equivalent to a father whose paternity is adjudicated by a DNA test, unless the presumption is overturned. A presumed father's rights would have to be terminated under Family Code Section 161.001. Someone named by the mother to be the father of the child, who was identified and located, should be adjudicated either through a DNA test or legal acknowledgement as the father before the case goes to trial. If that person cannot be found and adjudicated, they only have the quasi-status of an "alleged father' and there is a separate termination procedure under Family Code Section 161.002. The procedures are based on whether the father's identity is known or unknown, whether he has registered with the paternity registry, and whether the department exercised due diligence in attempting to serve him. Termination under Section 161.002 requires neither an examination of the acts of the parent nor a best interest determination and was not contemplated by HB 7 Task Force when considering the issue of "phantom appellants."

A separate concern was also noted that a parent present for trial may be difficult to reach afterward and therefore the hearing and determination of intent to appeal should be made at the close of trial. One possible solution is developing a post-trial procedure to determine the intent to appeal. This approach avoids any presumptions of an absent parent's intent to appeal or not appeal the termination. The narrow focus of the post-trial procedure would be to determine whether the parent provided direction to appeal rather than the parent's previous level of participation in the case or their status as a father. The timing of any hearing and/or order dismissing counsel for good cause must take into account the 20 day time period between the signing of the final order and the deadline to file notice under Rule 26.1(b) where the parent is entitled to counsel and may reconnect with their attorney and

timely express a desire to appeal. Finally, the procedure should account for possible unintended consequences of conducting a hearing regarding the decision to appeal at the conclusion of trial when the emotions of parties may be at a high point.

Thank you for taking these considerations into account and please call on me and the staff at the Children's Commission if we can be of further assistance.

Respectfully,

Judge Dean Rucker
Jurist in Residence
Children's Commission

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