MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **September 1, 2021**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3, 2019 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

The full committee already has voted on recommendations regarding form of citation to provide notice of the right to appeal, and showing authority to appeal.

This memo moves on to Stage One, topic 1(b) with respect to proposals for addressing untimely appeals and ineffective assistance claims. The subcommittee will address 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, 27 (Tex. 2016) (per curiam).[1]

The full committee has voted in favor of the following citation language to provide notice of the right to appeal and the right to representation by counsel.

> "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."

B. Showing Authority to Appeal

To clarify (1) whether there is a desire on the terminated parent's part to appeal, and (2) who is responsible for prosecuting the appeal, the full committee voted in favor of a recommendation to amend TRCP 306 to read as follows.

<u>[Current] Rule 306 Recitation of Judgment</u>

> 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

[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.

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.

[Proposed] 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. The attorney ad litem will continue the representation for appellate proceedings unless the judgment contains one of the following express statements:

a. The attorney ad litem is replaced by another attorney who will continue the representation for appellate proceedings; or

b. The attorney ad litem is discharged without continuing the representation for appellate proceedings based upon a finding of good cause. For purposes of this subpart, "good cause" means the following:

i. The parent or alleged father failed to appear after service under Texas Rule of Civil Procedure 106(a); or

ii. The attorney ad litem appointed for the parent or alleged father was unable despite diligent efforts to locate the parent or alleged father; or

iii. After being located by the attorney ad litem, the parent or alleged father failed to appear at the trial on the merits; or

iv. After being located by the attorney ad litem, the parent or alleged father never expressed to the attorney ad litem a desire to exercise the right to appeal the judgment to the court of appeals or to the Supreme Court of Texas.

Explanation of changes:

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

2. 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;
    iii. An alleged father who failed to register his parenthood under Chap. 160 and whose location is unknown; and,
    iv. A registered alleged 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 alleged 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 alleged father appears, he is entitled to continued representation only upon proof of indigency.

3. 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 is 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; if 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/alleged father never appeared after personal service or service by publication.

Section 107.0132(d) mandates discharging counsel if the alleged father cannot be located. Section 107.0132(c) suggests the alleged 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 alleged father cannot be located;
ii. The alleged father is served, responds, but fails to prove he is indigent;
iii. The parent is served, responds, but fails to prove indigency.

4. This rule text 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 an appointment prior to a final judgment.

5. The text in paragraph 2 makes clear what the default outcome is and seeks to avoid difficulty in determining finality or other consequences if the judgment does not contain one of the express statements.

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

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.

D. Ineffective Assistance of Counsel

"[T]he statutory right to counsel in parental-rights termination cases embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). The standard for determining whether counsel is effective in this context is the same as the standard applied in the criminal context pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *See In re M.S.*, 115 S.W.3d at 545.

Under *Strickland*, a defendant seeking to establish ineffective assistance must establish both prongs of a two-prong inquiry by showing that (1) "counsel's performance was deficient" by showing "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment; and (2) "the deficient performance prejudiced the defense" by showing that "counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable." *Strickland*, 466 U.S at 687; *see also In re M.S.*, 115 S.W.3d at 545.

"With respect to whether counsel's performance in a particular case is deficient, we must take into account all of the circumstances surrounding the case, and must primarily focus on whether counsel performed in a 'reasonably effective' manner." *In re M.S.*, 115 S.W.3d at 545 (quoting *Strickland*, 466 U.S. at 687). "In this process, we must give great deference to counsel's performance, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' including the possibility that counsel's actions are strategic." *Id.* (quoting *Strickland*, 466 U.S. at 689). Ineffective assistance claims generally must be supported by evidence beyond the bare record of the underlying proceeding.

The HB7 Task Force noted an important distinction between the operation of ineffective assistance claims in the criminal context versus the parental termination context. In the criminal context, it is difficult for a defendant to effectively assert an ineffective assistance claim on direct appeal; the preferred avenue for raising this claim is a post-conviction habeas corpus proceeding. *See, e.g., Mata v State*, 226 S.W.3d 425, 430 n.1 (Tex. Crim. App. 2007). The HB7 Task Force observed: "By contrast, the exhaustion of a direct appeal in a parental-termination case is essentially the end of the procedural road, at least to the extent a parent has no other procedural opportunity to collaterally attack a final order of termination."

The HB7 Task Force recommended a proposed rule to provide an opportunity for the limited abatement of an appeal to hold an evidentiary hearing in support of an ineffective assistance claim. The proposed rule would be part of Texas Rule of Appellate Procedure 28.4 and provide as follows:

> (d) *Remand for Evidentiary Hearing*. For good cause shown by written motion filed no later than 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel. The appellate court must rule on the motion for remand within three days; otherwise, it will be denied by operation of law. The trial court shall begin the evidentiary hearing no later than the seventh day after the abatement order. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether appellant was prejudiced as a result. No later than 20 days from the date of the abatement order the court reporter shall file a supplemental court reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact, and the appeal shall be reinstated. The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule.

The subcommittee is in general agreement with the Task Force's proposed approach via rule to address ineffective assistance claims in the parental termination context. The subcommittee raises the following points for consideration in connection with the operation of such a rule in practical terms.

- The subcommittee discussed whether any further effort to define the parameters of "good cause" is warranted, and concluded that the better course is to leave the phrase undefined given the difficulty of formulating a fair and reasonable written standard that will capture the many possible scenarios that could lead to invocation of this rule.

- The proposed rule contemplates that, if a remand is ordered, the appeal will be abated while trial proceedings are undertaken to address the ineffective assistance claim. Consideration should be given to requiring the party seeking remand/abatement to establish a prima facie case of ineffective assistance before a remand and abatement is authorized. This requirement would act as a brake on this mechanism so that the interests of the affected children in obtaining a prompt resolution of the issues are not unduly compromised.

- The proposed rule contemplates that a direct appeal will be the vehicle for asserting an ineffective assistance of counsel claim in the parental termination context. This is a feasible approach when new appellate counsel enters the case. However, if trial counsel remains on the case through the appeal, then this approach potentially puts trial counsel in the untenable position of asserting counsel's own ineffectiveness at the same time the direct appeal is underway on the merits. For this reason, consideration should be given to recognizing a vehicle with a short time limit for collaterally attacking a termination determination, through an equitable bill of review procedure or similar means, in circumstances in which the same attorney represents the terminated parent in the trial court and on appeal. A vehicle allowing collateral attack also would address situations involving allegations of ineffective assistance on appeal by newly appointed appellate counsel.