# MEMORANDUM

**TO:** **Supreme Court Advisory Committee**

**FROM:** **Appellate Rules Subcommittee**

**RE:** **Appeals in Parental Termination Cases**

**DATE:** **February 3, 2022**

## 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:
>
> - 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. Issues Presented by Referral

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 addressed recommendations regarding form of citation to provide notice of the right to appeal and representation, showing authority to appeal. These votes are summarized in the subcommittee's October 5, 2021 memo.

## III. Current Issue: Ineffective Assistance of Counsel

The Texas case law addressing the right to effective assistance to counsel is set out in the subcommittee's memo dated October 5, 2021.

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 any counsel rendered deficient performance on behalf of appellant and 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, with modifications discussed below.

## IV. The Subcommittee's Proposed Rule and Recommendation Regarding IAC

The subcommittee proposes the following addition of Texas Rule of Appellate Procedure 28.4(d):

> (d) *Referral for Evidentiary Hearing*. Upon a showing of a **[plausible] [colorable] [prima facie]** claim for ineffective assistance of counsel by written motion filed no later than __ 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 refer an allegation of ineffective assistance of counsel to the trial court with instructions to make findings of fact and conclusions of law and report them to the appellate court. The appellate court must **[rule on]** the motion within **___** days; **[otherwise, it will be denied by operation of law]**. The trial court must begin the evidentiary hearing no later than the **[___]** day after the referral order is signed. The hearing must be recorded by a court reporter. The trial court must make findings of fact and conclusions of law as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result **[within ___ days after the hearing is concluded]**. No later than ___ days from the date of the trial court's order, the court reporter must file a supplemental court reporter's record of the hearing and the district clerk must file a supplemental clerk's record, including the trial court's findings of fact and conclusions of law. [**The deadline in Rule 6.2(a) of the Rules of Judicial Administration is tolled for no more than 20 days pending a referral ordered under this rule**.]

Under this approach, the merits appeal would proceed; the trial court would make findings and conclusions as to IAC; and then the appellate court would address both the merits and, if necessary, the IAC claim at one time. The merits appeal would not be abated. The rule could provide for abatement if the court of appeals deemed it necessary after receiving the trial court's input on ineffective counsel.

The options shown in the first sentence reflect Chief Justice Christopher's comments at the October 8, 2021 meeting regarding concern that a "good cause" standard is too ill-defined. Options for alternative standards that already are referenced in case law are provided for the full committee's consideration. Similarly, concern was voiced at the October 8, 2021 meeting that using the word "recommendations" could cause confusion with regard to (1) the standard of review, and (2) whether the court of appeals is being authorized to make fact findings in the first

instance as opposed to reviewing a trial court's findings of fact. The use of familiar "findings of fact and conclusions of law" language is aimed at avoiding those issues. The following question also was raised in subcommittee discussions: What is the appellant's remedy, if any, if the court of appeals denies a motion seeking referral for a trial court hearing on IAC?

***Recommendation: The subcommittee recommends approval of proposed Texas Rule of Appellate Procedure 28.4(d) in the form set forth above, once the full committee has voted on the alternative choices identified in bold and time limits. The subcommittee makes this recommendation on grounds that the proposed rule appropriately balances the competing considerations involved in this inquiry while avoiding (insofar as possible) additional delays and procedural quagmires.***