

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Appellate Rules Subcommittee

RE: Appeals in Parental Termination Cases

DATE: February 13, 2023

In response to HB 7, passed by the 85th Legislature, the Texas Supreme 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 HB 7 Phase II Report recommends a rule standardizing procedures for frivolous appeals in this context and opinion templates for use in parental termination cases. The Court’s referral letter asks the Appellate Rules Subcommittee to review these HB 7 Task Force recommendations.

The HB 7 Task Force proposed the addition of new subparts to Rule 28.4. At the May 27, 2022 meeting, the Appellate Rules Subcommittee submitted to the full Committee comments and proposed revisions to the proposed rule. The following votes were taken.

	Question	Result	Vote Count
1.	Do we want a rule on briefs in frivolous appeals?	Yes	17-1
2.	Should it apply to parental termination and child custody cases or should it be limited to suits filed by a governmental entity in which terminate the parent-child relationship or appointment of conservatorship for the child is requested?	Narrow	10-4
3.	Should it apply only to appointed counsel or to all counsel?	Appointed	consensus
4.	Should the term frivolous be further defined?	No	consensus
5.	Do we want a parental termination brief checklist?	No	consensus
6a.	Do we want the CA, if the parent identifies a colorable issue, to have discretion to make existing attorney brief that issue or decide to have new counsel appointed?	Yes	17-1
6b.	Should RJA 6.2 be tolled for any abatement?	No	14-1
7.	Do we want opinion templates?	No	21-1

Based on these votes, the Appellate Rules Subcommittee recommended adoption of a revised version of the rule to address frivolous appeals in this context. The redline changes below reflect comments and votes on the revised rule taken during the October 1, 2022 meeting of the full committee.

28.4 ACCELERATED APPEALS IN PARENTAL TERMINATION AND CHILD PROTECTION CASES

() *Appeal Deemed Frivolous.* In an appeal from a final order 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, an attorney appointed to represent a party appealing from a final order should not move to withdraw based upon a determination that the appeal is frivolous. Instead, the attorney must:

- (1) certify that the attorney has determined the appeal to be frivolous; and
- (2) contemporaneously file a brief that:
 - (A) demonstrates the attorney has adequately reviewed the record and researched the case; and
 - (B) explains the basis for the attorney's determination that the appeal is frivolous; and
 - (C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and
- (3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and
- (4) contemporaneously file a copy of the written notice provided to the client.

() *Pro Se Response to Certification of Appeal Deemed Frivolous.* A party appealing from a final order 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 whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b).

() *Abatement for Additional Briefing.* An appellate court may abate the appeal for either existing counsel or newly appointed counsel to provide additional briefing ~~for appointment of a new lawyer~~ to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(_) *Court of Appeals Disposition of Appeal Deemed Frivolous.* In addition to the requirements of Rule 47, upon determination that an appeal 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 is frivolous, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

- (1) within five days after the opinion is issued, send the client a copy of the opinion and judgment and a notification that:
 - (A) the attorney and the court of appeals both determined the appeal is frivolous;
 - (B) the attorney cannot recommend that further review of a frivolous appeal;
 - (C) the client has the right to file a petition for review under Rule 53; and
- (2) if requested by the client, file a petition for review following the notifications required under subsection (1).

Comment

Comment to 20[] change: Appointed counsel can satisfy the obligation owed to the client by filing a brief meeting the standards set forth in *Anders v. California*, 386 U.S. 738 (1967), and its progeny. *In re P.M.* 520 S.W.3d 24, 27 (Tex. 2016) (per curiam). The reviewing court must conduct an independent evaluation of the record to determine whether appointed counsel is correct in determining that the appeal is frivolous. See *In re P.M.*, 520 S.W.3d at 28 & n.14.

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The HB 7 Task Force also proposed the addition of Rule 53.2(m). To conform Rule 53.2(m) to the revised Rule 28.4, the Subcommittee recommends adoption of the following revised Rule 53.2(m).

53.2. CONTENTS OF PETITION

(_) *Review of Appeal Deemed Frivolous by the Court of Appeals 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.* If counsel filed the certification under Rule 28.4()(1), and the court of appeals determined the appeal was frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.