

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF JUDICIAL ADMINISTRATION,
THE FLORIDA RULES OF JUVENILE
PROCEDURE, AND THE FLORIDA RULES
OF APPELLATE PROCEDURE – IMPLEMENTATION
OF THE COMMISSION ON DISTRICT COURT
OF APPEAL PERFORMANCE AND
ACCOUNTABILITY RECOMMENDATIONS**

CASE NO. SC08-1724

**RESPONSE BY THE COMMISSION ON DISTRICT COURT OF
APPEAL PERFORMANCE AND ACCOUNTABILITY TO COMMENTS**

The Commission on District Court of Appeal Performance and Accountability (Commission), through its chair Judge William A. Van Nortwick, and pursuant to the Publication Notice issued by this Court on September 26, 2008, files this response of the Commission to comments filed in the above-referenced matters.

The Commission’s report, *Study of Delay in Dependency/Parental Termination Appeals Supplemental Report & Recommendations*, submitted to the Court in June 2007, prompted the various rule amendments submitted to the Court. In developing this report, the Commission obtained the viewpoints of a wide variety of stakeholders in dependency/termination proceedings. It:

... conducted five district-wide workshops and one statewide workshop. The purpose of these workshops was to collect the views of participants in the development of a timeline and proposed rules that would reduce delay yet constitute realistic time parameters for attorneys, court reporters, and the courts.”

The Commission stands by the recommendations in its report, most of which have been followed by the proposals. Accordingly, the Commission does not believe it is necessary to comment generally on the proposed rules.

The Commission, however, points out two areas of disagreement with the proposed rules. First, Rule 9.146, which increases the number of orders which

may be appealed as non-final orders, is directly contrary to the recommendation of the report and is opposed by the Commission. Second, Rule 2.535(i), establishing a priority in transcription of dependency and termination proceedings, does not mandate the necessary expedition of these cases to accomplish the time goals set forth in the Commission's report. As to both proposed rules, the Commission sets forth those portions of its report which address those two issues.

RULE 2.535(i). COURT REPORTING

Commission on District Court of Appeal Performance &
Accountability 2007 Report – page 9:

9. The Rules of Judicial Administration should include a provision requiring that transcription of hearings for appeal of dependency and parental termination orders, and any other similar proceedings needing the transcription of hearings, shall be given priority over the transcription of all other proceedings both in the trial and appellate court.

Without a rule providing that transcripts in child case appeals are a priority, transcription of the proceedings will constitute a major source of delay. The Commission further suggests that the rule enabling the chief judge of a circuit to enforce this provision when necessary, including the availability of sanctions. A rule requiring these proceedings to be given priority provides the court reporters with the ability to prioritize these transcripts in the face of demands for other transcripts or court appearances. By placing the priority in the rule, it shows the importance the Supreme Court places on expediting these appeals.

In the Commission's workshops, delay in the transcription of hearings was cited as a frequent cause of delay in dependency and termination appeals. The Commission agrees in concept with the comment of the Department of Children and Families that the proposed rule "...does not require that priority be given to transcripts in child protective cases, only that it 'should' be given." Thus, the proposed rule does not, in reality, mandate priority treatment. Further, the

proposed rule does not have any specific provisions for enabling the chief judge to enforce its provisions. The Commission believes that such enforcement provisions are necessary. Without enforcement by the chief judge, court reporters will not know how to prioritize their work and may give priority to other matters.

RULE 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDERS AND SPECIFIED FINAL ORDERS

Commission on District Court of Appeal Performance & Accountability 2007 Report – pages 13-15:

Non-final Appeals and Petitions for Writ of Certiorari

The Supreme Court requested that the Commission study how other types of orders in dependency and termination cases come to the appellate courts. ...the number and type of orders are listed, as well as types of appeal filed, and how the courts classify the filings. Many orders, other than final orders, were appealed as final or non-final orders and converted to petitions for writ of certiorari.

An examination of these filings indicates that except in the second district, there are few non-final appeals or certiorari petitions filed. It is also apparent that, to date, the courts have been fairly inconsistent in how various appeals are to be handled. Some courts have handled similar proceedings in several different ways. When filed as non-final appeals, not all of the courts accord them the expedited procedures that they deserve, leading to substantial delay in a pending proceeding.

Representatives of the Statewide Guardian ad Litem Program raised the processing of appeals from non-final orders as a significant issue to be addressed. Chief Appellate Counsel Thomas Young prepared a detailed memorandum of law addressing the inconsistent methods by which orders are appealed. ...We thank Mr. Young for his work. He concludes by recommending that the rules be amended to designate the various types of orders which may be appealed by non-final appeal. Any other order should be reviewed by petition for

certiorari. He lists nine orders which may be appealed as non-final, appealable orders.

Rule 9.146(b) provides that “any parent ... affected by an order of the lower tribunal ... may appeal to the appropriate court within the time and in the manner prescribed by these rules.” The Second District has held that this rule “provides no exception or expansion to the appeals permitted under rule 9.130.” *In re R.B.*, 890 So. 2d 1288 (Fla. 2d DCA 2005). The Commission considers this to be the proper understanding of the rule, and the recent amendment of the title of this section is intended to accomplish this. See *In Re Amendments to the Florida Rules of Appellate Procedure*, 941 So. 2d 352 (Fla. 2006). However, in order to assure that practitioners understand the limited non-final orders which can be appealed, Rule 9.146(b) should be amended to state that only non-final orders listed in Rule 9.130 are authorized appeals.

Rule 9.130 provides for the appeal of specific non-final orders, very few of which are the type which would emanate from a dependency or termination case. Even Rule 9.130(a)(3)(C)(iii), permitting appeals from orders determining the right to immediate monetary relief or child custody in family law matters, does not apply to dependency/termination cases, because family law is governed by a separate subset of rules and statutes from dependency and termination cases.

The Commission disfavors an expansion of Rule 9.130 to provide a list of specific orders to be appealed. Generally, the list of non-final orders which may be appealed tends to get longer with time, thus increasing the possibility of delay on appeal as more orders can result in appeal. Chapter 2007-62 may also impact the number of non-final appeals or petitions for certiorari which are filed, as the law requires trial counsel to file any non-final appeals in dependency and termination proceedings and does not allow additional compensation for such appeals. No separate appointment of appellate counsel for such appeals is permitted. (Emphasis added)

If the primary goal is to avoid delay, then review of all non-final proceedings by petition for writ of certiorari, other than those specifically set forth in Rule 9.130, will be more expeditious than any appeal. However, review by certiorari presently carries with it a different standard of review. We believe that this debate as to what types of orders should be appealed by way of non-final appeal, or whether to handle review of non-final orders by way of petition for certiorari, are issues more properly debated in the Juvenile Court Rules and Appellate Court Rules Committees, as those bodies have more experience with the nature of the orders. However, it is the Commission's position that the types of non-final orders which may be appealed should be very limited.

As noted above, the Commission discussed the use of certiorari for non-final proceedings, and it is the opinion of the Commission that the appeal of non-final orders should utilize the certiorari process, due to its broad application and time efficiency. Also, it is the opinion of the Commission that adding more non-final orders to rule 9.130 would increase delay and impact the expedited appeals that already must be heard by the district courts. The Commission stands by its recommendations as to the restriction of orders designated as non-final appealable orders.

Respectfully submitted this 15th day of December, 2008.

William A. Van Nortwick, Chair
Commission on District Court of Appeal
Performance and Accountability

District Court of Appeal Judge
First District

CERTIFICATIONS

CERTIFICATION OF FONT COMPLIANCE

I certify that this Response was prepared in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response was furnished by U.S. Mail to: Scott M. Dimond, Chair, Rules of Judicial Administration Committee, 2665 S. Bayshore Dr., Penthouse 2, Miami, FL 33133; David N. Silverstein, Chair, Juvenile Court Rules Committee, 501 E. Kennedy Blvd., Suite 1100, Tampa, FL 33602-5242; John S. Mills, Chair, Appellate Court Rules Committee, 865 May St., Jacksonville, FL 32204-3310; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300; John Walsh, Legal Aid Society of Palm Beach County, Inc., Foster Children's Project, 423 Fern Street, Suite 220, West Palm Beach, FL 33401; Anthony C. Musto, Special Counsel, Florida Department of Children & Families, P.O. Box 2956, Hallandale Beach, FL 33008-2956; Jeffrey Dana Gillen, Florida Department of Children & Families, 111 S. Sapodilla Ave., Suite 303, West Palm Beach, FL 33401; Thomas Wade Young, Statewide Guardian ad Litem Program, Dempsey & Associates, P.A., 1560 Orange Avenue, Suite 200, Winter Park, FL 32789-5544; Richard C. Komando, Statewide Guardian ad Litem Program, 220 East Bay Street, Second Floor, Jacksonville, FL 32202 this 15th day of December, 2008.

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