

Proposed Court Rule to Eliminate Appellate Court
Delay in Termination of Parental Rights Case

June 3, 2003

by the Honorable Elizabeth A. Weaver
Justice of the Michigan Supreme Court

I propose for public comment a court rule that imposes strict time limits on delay in the Michigan Supreme Court and the Court of Appeals for termination-of-parental-rights cases. This proposed court rule provides that an appeal would not be in the Court of Appeals for longer than thirty-five weeks (eight months) and would not be in the Supreme Court for longer than thirteen weeks (three months).

A recent Michigan Supreme Court case, *In re JK*, 468 Mich ___ (2003) illustrates the need for there to be a court rule that limits the time that termination-of-parental-rights case will spend in the Supreme Court. That case, *In re JK*, spent almost two years in the appellate system. The Michigan Court of Appeals had the case for seven months, plus another month considering the motion for rehearing, a reasonable amount of time. However, the Michigan Supreme Court had the case for over a year. If the proposed court rule were adopted, termination of parental rights cases would have to be resolved in the Supreme Court within 3 months - less than one quarter of the time that was spent on the *In re JK* case.

At the appellate level in termination-of-parental-rights cases, the only concern is correcting any significant mistakes of fact or law made by the courts below. The corrective appellate process should not take as long as the process in the family courts, where the actual work of attempting to correct the behaviors and improve the parenting skills of parents, who have been determined sufficiently unfit so as to require the state to assume temporary custody and control over their children, takes place.

There have already been efforts to reduce unnecessary delay at the trial court and the Court of appeals levels. The Legislature has enacted laws designed to eliminate excessive delay in the family division of the circuit court and to prevent children from remaining indefinitely in the temporary custody of the courts. These laws encourage children to be reunited with their families or adopted into a permanent home. 1994 PA 264. There have been efforts made to reduce appellate delay at the Court of Appeals. In September 2002 the Court of Appeals convened a dependency appeals work group, which has been examining ways to reduce the time it takes to receive and resolve appeals involving a termination of parental rights and those involving custody of minor children. The work group's report can be found on the Court of Appeals website, at

These praiseworthy efforts have been directed at the trial courts and the Court of Appeals, not at reducing the delay in the Supreme Court.

The Supreme Court should act to adopt a court rule that will eliminate delays by the Supreme Court in termination of parental rights cases. To date, the only move towards reducing delays in the Supreme Court is an amendment to Michigan Court rule 7.302, increasing the time limit for applications for leave to appeal from orders terminating parental rights from 21 days to 28, and providing that delayed applications for leave to appeal will not be accepted.

Currently, the Michigan Court Rules provide for expedited briefing in matters involving child-custody,¹ and that child custody cases shall be given priority on the session calendar.² This is not adequate. Michigan needs not just a priority of cases, but a court rule providing that the cases will be decided with finality by the Supreme Court within thirteen weeks (three months) from the time that they are filed.

Michigan should join the growing number of other states, such as Colorado,³ Minnesota,⁴ Wisconsin,⁵ and Ohio,⁶ that have created strict guidelines for appellate review in termination-of-parental-rights cases. See Keith & Flango, *Expediting*

Dependency Appeals: Strategies to Reduce Delay, (Williamsburg, VA: The National Center for State Courts, 2002).

Below I have suggested a proposed court rule, designed to eliminate excessive delays by the Michigan Supreme Court in termination-of-parental-rights cases, which I urge the Michigan Supreme Court to publish and offer for public comment. The proposed court rule also suggests strict time limits on appeals in the Michigan Court of Appeals, which the dependency appeals work group and the Michigan Supreme Court may wish to consider. If this court rule were adopted, an appeal would not be in the Court of Appeals for longer than thirty-five weeks (eight months) and would not be in the Supreme Court for longer than thirteen weeks (three months). The goal of this proposed rule is to ensure that there would be at most eleven months from the date a claim of appeal is filed to the date that a final decision is issued by the Supreme Court.

FOOTNOTES:

1. MCR 7.212(A)(1)(a)(i) provides that in child-custody cases an appellant's brief shall be filed with the Court of Appeals within "28 days after the claim of appeal is filed, the order granting leave to appeal is certified, or the transcript is filed with the trial court, whichever is later..." The usual rule is 56 days. MCR 7.212 (A)(1)(a)(iii). In child-custody cases an appellee must file its response brief within 21 days after the appellant's brief is served. MCR 7.212(A)(2)(a)(i). This is reduced from 35 days in most cases. MCR

7.212(A)(2)(a)(iii). In both instances, the time may be extended only by the Court of Appeals on motion.

2. MCR 7.213(C) provides:

The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

- (1) interlocutory criminal appeals;
- (2) child custody cases;
- (3)interlocutory appeals from the grant of a preliminary injunction;
- (4) appeals of decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid; and
- (5) cases that the court orders expedited.

3. Colorado's Children's Code created a workgroup in the state judicial department, whose goal is "to consider necessary changes to practices, rules, and statutes in order to ensure that appeals in cases concerning relinquishment, adoption, and dependency and neglect be resolved within six months after being filed." Colo Rev Stat 19-1-109(3).

4. In Minnesota, any appeal from a termination of parental rights must be taken within thirty days, the transcript must be completed within thirty days, and the appellate court must issue its decision within sixty days of the date that the case is deemed submitted. Minn Stat 82.02(2), 82.05, and 82.06.

5. In Wisconsin there are accelerated procedures for the filing of the court transcript and shortened times for filing of briefs. The Court of Appeals is required to issue a decision within thirty days after the filing of the appellant's reply brief (or a statement that a reply brief will not be filed). Wis Stat 809.107(6)(e). Such a strict time limit is not imposed on the Wisconsin Supreme Court; there the rule is that the

supreme court shall give preference to any petition for review of a termination of parental rights. Wis Stat 809.107(6)(f).

6. Ohio has recently undergone an extensive revision of its Rules of Practice of the Supreme Court and its Rules of Appellate Procedure, designed to expedite adoption and termination-of-parental-rights appeals. See Stratton, *Expediting the adoption process at the appellate level*, 28 Cap U L R 121 (1999) and Wawrose, "Can we go home now?": Expediting adoption and termination of parental rights appeals in Ohio state courts, 4 J App Prac & Process 257 (2002). As a first step, the court reporter is asked to give priority to the preparation of the record. Ohio Rev Code Ann App R 11.2(C)(2). The briefing schedule for the parties is not altered, but Ohio restricts the granting of extensions for filing briefs—they may be granted only "in the most unusual circumstances" and for "the most compelling reasons in the interest of justice." Ohio Rev Code Ann App R 11.2(C)(3). If oral argument is granted, it must be held within thirty days after the briefs are filed. Ohio Rev Code Ann App R 11.2(C)(4). The appellate courts are required to enter judgment within thirty days after the parties have submitted the briefs or presented oral argument, whichever is later, though this can be extended for "compelling reasons in the interest of justice" Ohio Rev Code Ann App R 11.2(C)(5). The restrictions on the supreme court are not so explicit.

PROPOSED MICHIGAN COURT RULE 5.993A

APPEALS IN PROCEEDINGS RELATED TO TERMINATION OF PARENTAL RIGHTS

(A) Applicability. This rule applies to the appeal of an order terminating parental rights under MCL 712A.19b and supersedes all inconsistent provisions of other rules governing appeals.

(B) Appeals to the Court of Appeals

(1) An order terminating parental rights is appealable to the Court of Appeals by right.

(2) An appeal must be taken within

(a) 21 days after entry of the order appealed from; or
(b) 21 days after the entry of an order denying a motion for rehearing if the motion was filed within the initial 21-day appeal period.

(c) The Court of Appeals may not grant a delayed application for leave to appeal an order of the family division of the circuit court terminating parental rights if filed more than 63 days after entry of an order of judgment on the merits, or if filed more than 63 days after entry of an order denying rehearing.

If a party is entitled to the appointment of an attorney and requests the appointment within 21 days after the date of an appellate order under the rule, the 21-day period for the taking of an appeal begins to run from the date of entry of an order appointing, or denying the appointment of, an attorney. The appointment order must direct the court reporter to prepare and file the transcript within the time limit specified in subsection 3 of this rule.

(3) The court reporter or recorder shall file the transcript with the trial court within 28 days after it is ordered in a termination-of-parental-rights case. The Court of Appeals may grant up to two 14-day extensions of the time limit.

(4) Time for Filing and Serving Briefs

(a) The appellant shall file its brief as required under MCR 7.212 within 21 days after the claim of appeal is filed or the transcript is filed with the

trial court, whichever is later. This time may not be extended.

(b) The appellee(s) shall file their briefs as required under MCR 7.212 within 14 days after the appellant's brief is served on the appellee(s). This time may not be extended.

(5) Time for a Decision

(a) If oral argument is heard, the judgment of the Court of Appeals must be entered within 112 days from the filing of appellees' brief(s).

(b) If the case is submitted without oral argument, the judgment of the Court of Appeals must be entered within 77 days from the filing of appellee's brief.

(6) Motion for Rehearing in the Court of Appeals

(a) A motion for rehearing may be filed within 14 days after the date of the order or the date stamped on an opinion.

(b) A party may answer a motion for rehearing within 7 days after the motion is served on the party.

(c) The Court of Appeals must issue a decision on the motion for rehearing within 21 days after the answer is filed, or the time to submit an answer has passed, whichever is sooner.

(C) Appeals to the Supreme Court

(1) An order terminating parental rights is appealable to the Supreme Court by leave.

(2) When to File

(a) The application for leave to appeal must be filed within 7 days after

(i) the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(ii) after the filing of the opinion filed from;
or

(iii) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for reconsideration.

(b) The Supreme Court may not grant a delayed application for leave to appeal.

(3) The Supreme Court must issue a decision whether to grant or deny the application, enter a final decision, or issue a peremptory order within 21 days after the application for leave to appeal is filed.

(4) Calendar Cases

(a) Time for Filing and Serving Briefs

(i) The appellant shall file the brief and appendix required under MCR 7.309 within 21 days after leave to appeal is granted. This time may not be extended.

(ii) The appellee(s) shall file the required brief(s) and appendix within 14 days after the appellant's brief is served on the appellee(s). This time may not be extended.

(b) Scheduling Oral Argument. Preference must be given to these cases to facilitate their scheduling. Argument may be held at times other than at the Court's scheduled oral arguments.

(c) Time for a Decision. The judgment of the Supreme Court must be entered within 28 days from the filing of appellee's brief.

(5) Motion for Rehearing

No motion for rehearing may be filed.