

**REPORT OF THE JUDICIAL COUNCIL
APPEALS FROM TERMINATION OF
PARENTAL RIGHTS ADVISORY COMMITTEE**

November 26, 2007

BACKGROUND

In May 2007, the Kansas Supreme Court requested that the Judicial Council study appeals dealing with the termination of parental rights, with the goal being to expedite those appeals while preserving the due process rights of all involved. Those appeals, which may involve a child in need of care, adoption, or termination of parental rights, will be collectively referred to as TPR appeals in this report. Justice Marla J. Luckert, rules liaison for the Kansas Supreme Court, noted in the request that the Kansas Court of Appeals and the Clerk of the Appellate Courts had taken steps internally to expedite TPR appeals to the extent possible within the current framework of Kansas statutes and Supreme Court Rules of Appellate Procedure. Because there are many views to consider when contemplating changes to appellate procedures, it was determined that a Judicial Council study would be an ideal forum to unite professionals from various parts of Kansas' juvenile legal system to consider procedures for further reducing appeal time in TPR cases.

At its meeting on June 1, 2007, the Judicial Council agreed to undertake this study and created the Judicial Council Appeals From Termination of Parental Rights Advisory Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Appeals From Termination of Parental Rights Advisory Committee are:

Hon. Marla J. Luckert, Chair, Topeka, member of the Kansas Supreme Court.

Roger Batt, practicing attorney in Wichita.

John Cassidy, Topeka, Assistant Attorney General.

Mary Gaffey, Eureka, Past President of Kansas Court Reporters Association.

Carol G. Green, Topeka, Clerk of the Appellate Courts.

Hon. Henry W. Green, Jr., Topeka, member of the Kansas Court of Appeals.

Janice Norlin, practicing attorney in Salina.

Steve Obermeier, Olathe, Assistant District Attorney for Johnson County.

Hon. Jean F. Shepherd, Lawrence, District Judge in the 7th Judicial District.

INTRODUCTION

Over the past three decades, Congress has passed several major pieces of legislation in an attempt to improve child welfare in the United States. The most recently enacted was the Adoption and Safe Families Act of 1997 (ASFA), which sought primarily to speed the process to permanency for foster children journeying through the system, including the court system. Among other changes, the law set new time lines for permanency hearings and established new time lines and conditions for filing a petition for termination of parental rights. Underlying the shorter time lines required by ASFA is the notion of child time. A year is a much longer time to a preschooler than it is to an adult, or even to an older child. If a child is removed from the home at age three, and is not legally free for adoption or permanent placement until age seven, that is more than half the child's life. ASFA mandated permanency planning hearings and concurrent plans, concepts based on acknowledgment of a child's perception of time.

The number of TPR cases that have been considered by the Kansas appellate courts in the last few years are as follows:

<u>Year</u>	<u># of Cases</u>
2004	60
2005	61
2006	78
2007	55 (as of October 30, 2007)

Although ASFA does not contain any provisions mandating a time line for appeals of TPR cases, an appeal can add significantly to a child's wait for permanence. The National Council of Juvenile and Family Court Judges recommends an appellate time line of 150 days from the trial court's order of parental rights termination to the appellate court's decision in the case. See Ann L. Keith and Carol R. Flango, *Expediting Dependency Appeals: Strategies to Reduce Delay*, 9, National Center for State Courts (2002). The ABA's proposed time line is 175 days. *Id.* at 8. Many states, including Kansas, have taken the initiative to try to reduce delays inherent in the appellate process.

In Kansas, all appeals that are received by the Clerk of the Appellate Courts are checked for jurisdiction within one week. Any TPR appeals go straight to the Court of Appeals' Motions Office where an order is issued expediting the case. Although in ordinary cases the Clerk's Office can grant as a matter of course a first motion for an extension to file a brief or to complete a transcript, this is not true in TPR cases. Motions for extensions go to the court for a decision. Also, in 2005 the Court of Appeals began assigning TPR cases to the summary calendar under Supreme Court Rule 7.02(f) in any case where a review of the briefs led the court to believe that oral argument would not materially assist in determining the appeal.

Despite these efforts, in 2006 the average number of days from docketing an appeal to the appellate court's mandate in TPR cases in Kansas was 322 days (this figure is broken down and discussed in more depth in the "Method and Study" section of this report below). This Committee was formed to study the current rules and procedures that govern appeals in TPR cases. The study's objective was to determine whether the process could be expedited while preserving the rights of the parties and, if so, to make recommendations regarding how to implement the revised procedures.

METHOD AND STUDY

The Committee met on September 26, October 30, and November 26, 2007. Included in the Committee's review were Kansas court statistics prepared by the Office of Judicial Administration and statutes and court rules enacted in other states to expedite appeals in TPR cases.

The Committee began by carefully reviewing in detail the current appellate process for TPR cases. The appellate time line was broken down into sequential segments or stages, and statistical reports were requested from the Office of Judicial Administration. The Committee then reviewed the reports, noting the number of days spent on average in each stage. The Committee considered each time period individually and discussed whether that time frame could or should be shortened. According to the statistics reviewed, the average total number of days for TPR appeals in 2006 was 322 days, broken down further below. The Committee concluded that the time periods with the most potential for reduction were the briefing period and the time between when the case became ready and when it was actually heard.

Stage of the Appeal	Average # of Days
Request for Transcript to Transcript Completed	36
Transcript Completed to Completion of Briefing	79
Case Ready to Actual Hearing Date	127
Hearing to Disposition	26
Disposition to Mandate*	<u>54</u>
Total	322

*The median in this category was 34, which includes the statutory period for filing a petition for review. The average is higher because it included two cases in which a petition for review was granted and the cases then went through the Supreme Court before a final mandate was issued.

As noted above, the Kansas Court of Appeals and the Clerk of the Appellate Courts have worked in recent years to expedite the appellate process in TPR cases and have accomplished all that could be done within the current statutes and Rules of Appellate Procedure. On September 26, 2007, Judge Gary Rulon, Chief Judge of the Court of Appeals, and Terri Bezek, Director of Court of Appeals Central Research Staff, presented to the Committee the Court of Appeals' proposed plan for decreasing the time between docketing and disposition by limiting the briefing process, foregoing oral argument in appropriate cases, and designating special panels to hear nonargued TPR cases. Because the Court of Appeals normally sets its dockets approximately four months in advance, establishing new procedures for TPR cases is essential to shortening the appellate time line. The Committee ultimately determined that the Court of Appeals' well thought out proposal should be adopted. The details of the plan are more fully set forth below in Part I of this report.

The Committee also considered other parts of the court system and made recommendations that could be implemented to further reduce unnecessary delays for children. Those recommendations are set forth in Part II of this report, beginning on page 16.

I. COMMITTEE’S RECOMMENDATIONS - APPELLATE PROCEDURE

The Committee recommends revising the appellate procedure for TPR cases. The proposed revisions encompass changes and additions to Supreme Court Rules and the appellate courts’ internal operating procedures as well as the creation of an additional research attorney position.

A. Proposed Amendment to Supreme Court Rule 2.02 - The Committee’s recommendations in this report center on expediting TPR appeals, which requires that these cases be identified as soon as possible and afforded special handling. The Committee recommends a minor amendment to Supreme Court Rule 2.02 so that cases entitled to the new expedited process are identified at the outset on the notice of appeal itself.

Rule 2.02
Form of Notice of Appeal, Court of Appeals

In all cases in which a direct appeal to the Supreme Court is not permitted, the notice of appeal shall be filed in the district court, shall be under the caption of the case in the district court and in substantially the following form:

NOTICE OF APPEAL

Notice is hereby given that (specify the party or parties taking the appeal) appeal(s) from (designate the judgment or part thereof appealed from) to the Court of Appeals of the State of Kansas.

Appellant or Attorney for Appellant(s)
Address
Telephone Number

(Add certificate of service on all parties in accordance with K.S.A. 60-205.)

In all cases filed under the Kansas Code for Care of Children, K.S.A. 38-2201 et seq., or the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 et seq., or both, the notice of appeal shall contain on the top margin the notation **EXPEDITED APPEAL INVOLVING CHILDREN.**

B. Proposed New Docketing Statement - The Committee recommends the use of a new docketing statement for TPR appeals. The docketing statement is organized a bit differently from the standard civil docketing statement and is closely tailored to TPR cases. Most importantly, it contains sections for material facts and legal issues that will be binding on the party submitting the docketing statement. The proposed new docketing statement rule is as follows:

Proposed Rule 2.041a

**DOCKETING STATEMENTS IN ADOPTION, CHILD IN NEED
OF CARE, AND TERMINATION OF PARENTAL RIGHTS CASES**

(a) In all appeals from actions filed under the Kansas Code for Care of Children, K.S.A. 38-2201 *et seq.*, or the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 *et seq.*, or both, the appellant or cross-appellant shall file with the Clerk of the Appellate Courts an original and one copy of a docketing statement within 21 days after the filing of the notice of appeal or cross-appeal in the district court. A copy of the docketing statement shall be served on all other parties to the appeal. Within 15 days after service of the docketing statement, the appellee or cross-appellee may file an original and one copy of an answer to the docketing statement but only if the statement of facts or issues in the docketing statement is insufficient to provide the court a fair summary of the facts and issues on appeal.

The factual statements and issues asserted in the docketing statement **shall be binding** on the party submitting the docketing statement unless the party promptly files a motion to amend the docketing statement as provided in Rule 5.01. A motion to amend the docketing statement may be granted in the discretion of the court only upon the showing of good cause for the amendment.

(b) The docketing statement shall be in the form set forth below.

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

(Case Caption)

County Appealed From: _____

District Court Case No.: _____

Proceeding Under Chapter: _____

Party Filing Appeal: _____

**Docketing Statement - Appeals in Adoption, Child in Need of Care,
and Termination of Parental Rights Cases**

The names of the parties involved in this appeal are shown below in column A. Their respective attorneys' names, law firms, addresses, and telephone numbers are shown below in column B.

Column A
Parties

Column B
Attorneys

1. This docketing statement is filed on behalf of _____, t h e
mother/father/child/State/Intervenor/other _____, in the
following action:

(CHECK ONE OR MORE)

- adoption or relinquishment action
- temporary custody order
- child in need of care adjudication
- any disposition hearing before or after termination
- termination of parental rights

With respect to child(ren):

Child(ren)'s Initials

Date(s) of Birth

_____	_____
_____	_____
_____	_____
_____	_____

2. Proceedings in the District Court:

a. Trial judge from whose decision this appeal is taken:

b. List any other judge who has signed orders or conducted hearings in this matter:

c. This case was disposed of in the district court by:

_____ Bench trial

_____ Dismissal

d. Length of trial, measured in days (if applicable): _____

e. State the name of each court reporter and/or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist under Supreme Court Rule 3.03.)

3. (If applicable) Mother's parental rights were terminated by the district court under the Kansas Code for Care of Children statute(s) _____ [specify statutory provisions, example: K.S.A. 38-2269(a), (b)(1), (b)(7) or K.S.A. 38-2271(a)(1), (3), etc.].

(If applicable) Father's parental rights were terminated by the district court under the Kansas Code for Care of Children statute(s) _____ [specify statutory provisions, example: K.S.A. 38-2269(a), (b)(1), (7) and (8) or K.S.A. 38-2271(a)(7), (8), (10), etc.]

(If applicable) The district court terminated the parental rights of _____ or granted the adoption without the consent of _____ pursuant to the Kansas Adoption and Relinquishment Act statutes _____ [specify statutory provisions, example: K.S.A. 59-2136(d); K.S.A 59-2136(h)(1), (h)(2)].

4. Did appellant's attorney represent the appellant at trial? _____

5. Nature of case and relief sought: The appellant seeks a reversal of the district court order:

a. terminating the parental rights of _____ with respect to the child(ren) _____; OR
[Insert initials]

b. dismissing a petition to terminate the parental rights of _____ with respect to the child(ren), _____ OR
[Insert initials]

c. OTHER (specify)

6. State the material facts as they relate to the issues presented for appeal:
(These facts **shall be binding** pursuant to Supreme Court Rule 2.041a).

7. State the legal issues presented for appeal, including a statement of how the issues arose and how they were preserved for appeal:

*The issue statement should be concise in nature setting forth specific legal questions. General conclusions such as "the trial court's ruling is not supported by law or the facts" are not acceptable. Include supporting legal authority for each issue raised, including authority contrary to appellant's case, if known. (The issues presented **shall be binding** pursuant to Supreme Court Rule 2.041a).*

a. Issue I:

Was issue raised and ruled upon? Yes No. If "yes," state how:

Supporting legal authority for Issue I:

b. Issue II:

Was issue raised and ruled upon? Yes No. If "yes," state how:

Supporting legal authority for Issue II:

(Additional issues may be added.)

8. Constitutional challenges to statutes:

Does this appeal challenge the constitutionality of a statute? Yes No.

If "yes," what statute? _____

Was the statute found to be unconstitutional by the trial court? Yes No.

9. Related cases or prior appeals:

a. Is there any case now pending or about to be filed in the Kansas appellate courts which:

(1) arises from substantially the same case or controversy as this appeal? Yes No.

If "yes," give case caption and docket number:

(2) involves an issue that is substantially the same, similar, or related to an issue in this appeal? Yes No.

If "yes," give case caption and docket number:

b. Has there been any prior appeal involving this case or controversy?

Yes No.

If "yes," give case caption and docket number:

Attorney's Signature

Attorney's Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
FAX Number
Name of the Party Represented
Date: _____

PROOF OF SERVICE

(List all parties served, including name, address, and who they represent).

VERIFICATION

(if required by K.S.A. 38-2273[e])

I, _____ [name of appellant] _____, hereby verify I have reviewed the Docketing Statement above and approve of the filing of the appeal on my behalf.

[Signature of Appellant]

Signed and subscribed before me on this _____ day of _____, _____, at _____, Kansas.

[Notary public]

C. Proposed Revisions to Briefing Procedure - A research attorney assigned exclusively to TPR appeals will carefully review each docketing statement received. Unless the docketing statement indicates that a case presents a need for full briefing, an order will be sent to the parties imposing limited briefing procedures as set forth below in proposed new rule 6.**. Unless the parties can show good cause why full briefing is necessary, the order will direct parties to limit their briefs as required by Rule 6.**.

Proposed Rule 6.**

**BRIEFS IN APPEALS INVOLVING ADOPTION,
TERMINATION OF PARENTAL RIGHTS
AND THE CODE FOR CARE OF CHILDREN**

(a) Upon the docketing of an appeal in a case brought under the Kansas Code for Care of Children, K.S.A. 38-2201 *et seq.*, or the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 *et seq.*, or both, the appeal shall be expedited by order of the court. The following briefing rules will apply unless a motion is filed and granted under subsection (g) of this rule.

(b) The appellant's brief will consist of the following:

(1) A concise summary of the core facts of the case, including references to the record on appeal citing volume and page number where the facts can be found;

(2) A summary of the issues appellant asserts on appeal, including references to the record on appeal citing volume and page number where each issue was raised and ruled upon;

(3) A list of pertinent legal authorities and concise statement of how those authorities support the appellant's position.

(4) The factual summary and list of authorities shall not exceed five (5) double-spaced pages in length.

(5) Appellant shall attach a copy of the district court's order(s) being challenged on appeal.

(c) The appellee's brief will consist of the following:

(1) Appellee's response to the summary of facts, issues and arguments asserted by appellant, including references to the record on appeal citing volume and page number indicating where each new issue raised by appellee was raised and ruled upon;

(2) A list of pertinent legal authorities and concise statement of how those authorities support the appellee's position.

(3) Appellee's response shall not exceed three (3) double-spaced pages in length.

(d) If a cross-appeal is docketed under Supreme Court Rule 2.04, the appellee/cross-appellant's brief shall comply with the requirements set forth above, and shall contain both the appellee's response (3 pages maximum), and cross-appellant's summary of cross-appeal issues (3 pages maximum). Appellant/cross-appellee may then file a cross-appellee's brief in the form set forth for an appellee's brief.

(e) Upon leave of the court and for good cause shown, a reply brief may be filed, not exceeding three (3) double-spaced pages. A reply brief shall not be submitted unless made necessary by new material contained in the appellee's or cross-appellee's brief. A reply brief shall make specific reference to the new material being rebutted and under no circumstances shall it duplicate or include, except by reference, any statements, arguments, or authorities already made in preceding briefs.

(f) No extension of time for filing briefs shall be granted absent a compelling reason shown by the requesting party.

(g) Any party wishing to proceed on appeal under the full briefing provisions set forth in Rule 6.02 through 6.05 must file a motion within 15 days of the final transcript being completed or, if no transcripts are ordered, within 15 days of the appeal being docketed. Such motion should show good cause why more extensive briefing is required.

(h) The provisions of Supreme Court Rule 6.07 governing the formatting of briefs, except for the provisions pertaining to the length of briefs, shall apply to briefs filed under these procedures. The provisions of Rule 7.043 pertaining to the references to certain parties also apply. Once all briefs are filed, the case will proceed as any other appeal.

(i) The record on appeal shall be prepared by the district court as provided in Supreme Court Rule 3.02. It remains the responsibility of the appellant and cross-appellant to ensure the record on appeal includes all pertinent pleadings and transcripts.

D. Court of Appeals Internal Procedure - As soon as the summary briefs are filed, the record will be ordered, and a determination will be made as to whether oral argument is necessary. TPR cases determined appropriate for a nonargued calendar will be immediately assigned to a docket for disposition.

The Chief Judge of the Court of Appeals will designate special panels to decide nonargued TPR cases. Once a panel has conferenced a case and a majority of the panel members have agreed on how the case should be decided, the judge assigned to author the opinion will complete and circulate the opinion within 21 days of the time the case was submitted to the panel, unless a majority of the panel determines that the case requires additional time to complete and circulate the opinion. If a case has not been circulated within 30 days of the time the case was submitted to a panel, the judge assigned to author the opinion will call a conference of the panel members to discuss the case status and explore ways of deciding the case.

If a case has been pending more than 45 days after submission to a panel, the Chief Judge will call a conference of the panel members to discuss the status of the case. If no opinion is circulated within 5 days of this status conference, the Chief Judge will reassign the case to a different panel.

A list of the TPR cases that are not deemed appropriate for the expedited briefing procedure will be submitted by the Court of Appeals to the Supreme Court for transfer consideration.

E. Supreme Court Internal Procedure - The Committee recommends that the Supreme Court consider procedures for expediting the handling of petitions for review in TPR cases.

F. New Research Attorney Position - The Committee agreed that the implementation of these new expedited procedures creates a great deal of additional work for a research attorney, including the initial screening of docketing statements and continuing through complete case preparation. The current Court of Appeals Central Research Staff cannot absorb this additional work, and the Committee recommends that a new position be created and an attorney hired to deal exclusively with TPR appeals.

II. COMMITTEE'S RECOMMENDATIONS - OTHER PARTS OF COURT SYSTEM

A. Court Reporters and Transcripts - In the course of reviewing the various stages of an appeal, the Committee also considered the time frame that precedes the filing of the notice of appeal and the time it takes to get a transcript of the district court hearing. Although there were isolated instances where an excessive amount of time was taken, the Committee concluded that there were not pervasive problems in these areas that required a statutory or rule amendment. However, the Committee did pinpoint some areas where improvements could be made.

The Committee noted that all requests for extension of time to complete a transcript in a TPR case are reviewed by the court. Transcript issues are not a significant cause for delays in these kinds of appeals. The only cases in which transcripts still take a long time are in counties that are using recording equipment and where the transcripts are then created by an hourly employee transcriptionist. Being limited to a 40 hour work week, the transcriptionist may be in a position where multiple transcript requests have come in at the same time, and it is not possible to complete all of them within the deadline.

The Committee made two recommendations in this area.

1. The Committee is aware that resources are not always available, but whenever possible, district judges and/or court administrators should manage personnel resources in a manner that allows expedited transcripts in TPR cases.
2. If a transcriptionist or court reporter is dealing with multiple transcript requests, he or she should prioritize the tasks. Rather than fulfilling the requests in the order they are received, the Committee recommends that the reporter or transcriptionist prioritize the cases by considering the ages of the children involved. The cases involving the youngest children should be completed first.

B. District Court Clerks - The first step of an appeal involves filing a notice of appeal in the district court, but the district judge is often not made aware of these filings. The Committee recommends that district court clerks implement a system whereby judges receive a copy of any notice of appeal filed in a TPR case in order to determine the sufficiency of the notice of appeal pursuant to K.S.A. 38-2273(e) and to consider dismissal under Rule 5.051 if docketing with the appellate court does not timely occur.

C. District Court Judges - The Committee focused on two ways in which district court judges can help reduce the time line of a TPR case: 1) using memorandum decisions as journal entries; and 2) ensuring that appeals are dismissed when appropriate.

1. The statistics reviewed by the Committee showed that there have been some cases with a long time lag between the termination hearing and the filing of a journal entry. Although it is not a widespread problem, it is an area where improvement could be made. The Committee recommends the use of memorandum decisions, which can also serve as the journal entries, in TPR cases. A well written memorandum decision setting forth findings of fact and conclusions of law can save a great deal of time for the appellate courts. If the court does not issue a memorandum decision that is also a journal entry, the Committee recommends that district court judges order that all journal entries in TPR cases be submitted under Supreme Court Rule 170.
2. Pursuant to Supreme Court Rule 5.051, district court judges have jurisdiction to dismiss appeals when the appellant fails to docket the appeal with the clerk of the appellate courts within 21 days after filing the notice of appeal. The Committee recommends that Rule 5.051 be amended to make clear that district court judges also have jurisdiction to dismiss an appeal if the notice of appeal does not bear the verified signature of the appellant if required under K.S.A. 38-2273(e).

Rule 5.051

Dismissal of Appeals by District Court

The district court shall have jurisdiction to dismiss an appeal:

(a) where the appellant has filed the notice of appeal in the district court but has failed to docket the appeal with the clerk of the appellate courts. Failure to docket the appeal in compliance with Rule 2.04 shall be presumed to be an abandonment of the appeal and the district court may enter an order dismissing the appeal.

(b) where the notice of appeal does not comply with K.S.A. 38-2273(e). Failure to comply with K.S.A. 38-2273(e) shall render the notice of appeal invalid and the district court may enter an order dismissing the appeal.

The An order of dismissal entered pursuant to this rule shall be final unless the appeal is reinstated by the appellate court having jurisdiction of the appeal for good cause shown on application of the appellant made within thirty (30) days after the order of dismissal was entered by the district court. An application for reinstatement of an appeal shall be made in accordance with Rule 5.01 and Rule 2.04 and shall be accompanied by a docket fee unless excused under Rule 2.04.

D. Office of Judicial Administration - The Committee recommends that OJA consider reviewing the FullCourt® system to determine the feasibility of implementing a system to assist district courts with tracking notices of appeal filed in TPR cases. Specifically, the Committee recommends looking at the feasibility of a system that would be able to generate reports containing the following information:

1. Name, case number and judge's name of TPR cases in which notices of appeal have been filed;
2. Whether the notice of appeal has been checked for sufficiency pursuant to K.S.A. 38-2273(e); and
3. Date that the notice of appeal was filed and date that the appeal was docketed.

Regardless of whether FullCourt® has these capabilities, the Committee recommends that OJA consider assisting the court clerks, judges, and/or court administrators with implementing a system to monitor TPR cases to ensure that appropriate cases are promptly dismissed pursuant to Rule 5.051.

E. Training - The Committee suggests that training be developed and offered by the Court of Appeals. Such training could cover all aspects of best practices regarding TPR appeals and could be offered free to judges, attorneys, clerks, court administrators, court reporters and any other persons involved in TPR cases.