

COURT OF APPEALS

MARGRET G. ROBB
JUDGE



OF INDIANA

INDIANAPOLIS 46204-3419

SUITE 1270, SOUTH TOWER
115 W. WASHINGTON STREET
(317) 233-3668

To: Chief Judge John G. Baker

CC: Chief Justice Randall T. Shepard

From: Judge Margret G. Robb *Margret G. Robb*
Judge Terry A. Crone
Judge Charles Pratt
Judge Lynn Murray
Director James W. Payne
Deputy Attorney General Gary Secrest
David J. Remondini
Ms. Leslie Dunn
Mr. Andrew Berger, Association of Indiana Counties
Professor Joel M. Schumm

CC: Jeffrey Bercovitz

RE: H.B. 1001 Expedited Appeal

Date: 8 September 2008

At the request of Chief Judge John Baker, a committee, of all parties interested in the matter, was formed to draft a procedure outlining the requirements of the expedited appeal referenced in the House Bill, now enacted and to become effective 1 January 2009. This review is limited to the statutory procedure set out in H.B. 1001 as to whether the trial court's decision requires the state's payment for placement and/or services. Other issues are subject to a separate appeal.

After several meetings and full discussion, the attached form and Rule were approved by the committee. However several questions were discussed for which no resolution was determined, as they were not necessarily required under the charge given to the committee. They, however, are germane to the procedure and are as follows:

1. Will there be Supreme Court review? The committee believed it would not be inappropriate to limit this review, but in the event transfer remained an option, the Court of Appeal's decision would not be stayed pending transfer unless the Supreme Court specifically did so. Second, only a statement requesting transfer consideration would be filed with no additional memoranda; the record before the Court of Appeals would remain the entire record.
2. Who does the Attorney General represent: DCS, GAL/CASA, the judge and how is the decision made; is it the same for every case once a decision has been made? This will largely depend on the regular protocol of the Attorney General.
3. Is the trial court's finding of an "emergency order" appealable at the same time the placement and/or services issue is appealed? This finding only becomes relevant in the event the appellate decision supports DCS and the result is that the state does not pay for the services or placement. One

suggestion was that it would be left to the discretion of DCS, but like a permissive interlocutory appeal, if the issue were not raised in the initial appeal, DCS could raise it subsequent to the appellate decision.

4. Does the trial court retain jurisdiction during the pendency of the appeal? It was generally thought that the trial court would retain jurisdiction of any matter not directly implicated by the appeal, unless the decision was to sua sponte amend the order to follow the recommendation of DCS.
5. Because plea agreements pose a separate issue, the committee suggests the following procedure. A trial court shall take under advisement any plea agreement that requires payment of state funds by DCS until DCS recommendations are available. The court shall then forward the plea agreement to probation for its recommendation and referral to DCS for its recommendation. If the DCS recommendation varies from the plea agreement, neither the court nor the parties are bound by the plea agreement.
6. The rule as drafted by the committee does not allow a Motion to Correct Error, but the committee believed the trial court retained jurisdiction during an appeal by DCS under this process to amend its order sua sponte to accept the recommendation of DCS.
7. The last issue is, perhaps, the most controversial. It is an interplay between expediting time and efficiency/ between financial concerns, community and personal safety, and possibly liberty interests. The rule as drafted provides for this expedited procedure to be initiated only by DCS, because H.B. 1001 requires this review of the placement, program or services order which is a state DCS financial issue.

One committee member believes the procedure set out in the statute allows not just a determination of financial source, but would allow a change of placement during this expedited appeal from, say the trial court's alternative "a" to, say, DCS's alternative "b". If the expedited review is not restricted to the issue of payment, leaving the issues of placement for a regular appeal the matter is particularly complicated. This house bill does not anticipate expedited appeals by anyone other than DCS. Accordingly, in the event GAL/CASA, the juvenile, the juvenile's parents, the county, the prosecutor would want to appeal either the placement or whether the juvenile is or is not even a delinquent or CHINS and those appeals would follow the regular process, the child's placement could be changed again. A second committee member, who believes the expedited appeal, as now drafted, is limited to payment issues, expressed serious concerns about giving expedited consideration to payment issues while the liberty/safety interests of children and parents in the underlying appeal will not be addressed until months later. That committee member favored consolidating the appeals of all issues under time limits somewhere between those of the proposed rule and existing appellate deadlines. This would require a more sweeping revision to the Appellate Rules than required by H.B. 1001 or the committee's charge, however.

I might personally note that although the time-line of getting these alternative issues to the Court of Appeals takes longer, as you know, the Court of Appeals has always had a commitment to expedite these decisions. It is for these reasons that the Court of Appeals believes that the most expeditious, the most judicially sound procedure is the one proposed.

Please advise if there is any other matter you wish the committee to discuss or if you wish to discuss any of this further.

Rule X. Expedited Appeal for Payment of Placement and/or Services

- A. **Applicability:** This Rule governs review of decisions of the trial court, in any case in which the trial court's order for placement and/or services of a juvenile does not follow the recommendation of the Department of Child Services (DCS) for an ultimate determination of payment source.
- B. **Notice:**
1. DCS shall file a Notice of Expedited Appeal with the trial court clerk within five (5) business days after the court's order of placement and/or services.
 2. Service shall be postmarked the same day as the Notice of Appeal is filed and shall be served on the trial court judge, the court clerk, county commissioners, the guardian ad litem, CASA, any juvenile who is the subject of the order if 14 years of age or older, counsel for the juvenile, the parents of the juvenile, the Attorney General, in the case of a juvenile delinquency matter the Chief Probation Officer and Prosecutor, and any other party of record.
 3. The Notice of Appeal, in a form proscribed by this rule, shall designate the order from which the appeal is taken, any Transcript that is to be provided; and any documents or exhibits to be included in the Record on Appeal in addition to the pre-dispositional report and all attachments thereto which shall be included in all cases.
 4. All parties heretofore set out who receive notice shall be specifically identified with the address to which the Notice was sent.
 5. Any party who has received the Notice shall have five (5) business days from the filing of the Notice of Expedited Appeal to file an Appearance and request any additional other items to be included in the record. Failure to file said Appearance shall remove that party from the Appeal.
 6. The trial court shall be considered a party to the Appeal subject to its failure to file an appearance.
- C. **Transcript and Record.**
1. The completion of the Transcript and the Record on Appeal shall take priority over all other appeal transcripts and records. Within fifteen (15) days after the filing of the Notice, the trial court clerk shall assemble the record. The clerk shall file a notice of completion of the record and serve all parties to the Appeal.
 2. The trial court clerk is not obligated to index or marginally annotate the clerk's record. It shall be the responsibility of DCS.
- D. **Memo**
1. A memorandum may be filed by any party on Appeal which may which may be in narrative form and need not contain a statement of the issue, statement of the case or a legal argument.
 2. All memoranda shall not exceed ten (10) pages and consistent with App. R. 43 A-G, J, and K. Any factual statement shall be supported by a citation to a page where it appears in the record.

3. DCS shall have five (5) business days from the filing of the Clerk's notice of completion of the record in which to file a memo as to why the trial court's decision should be reversed.
 4. Any responding party shall have five (5) business days after DCS has filed its memorandum to file a memo, to respond as to why the decision should be sustained or reversed.
 5. A party shall file five (5) copies plus the original of the Memorandum.
- E. Extensions: No motion for extension of time shall be granted.
 - F. Motion to Correct Error, pursuant to T.R. 59: A party may not file a Motion to Correct Error after the trial court enters its order.
 - G. Appellant's Case Summary pursuant to App. R. 15: No Appellant's Case Summary shall be filed by the petitioning party.
 - H. Rehearing pursuant to App. R. 54: A party may not seek rehearing.
 - I. There shall be no Petitions to Transfer to the Supreme Court pursuant to Title XI of the Rules of Appellate Procedure.
 - J. Certification of Opinion: The Clerk shall certify the opinion or memorandum decision five (5) business days after it is handed down.
 - K. Service to the parties, in addition to mailing, shall be by fax and/or email. Additional days for mailing pursuant to App. R. 25C shall not be applicable once an appearance is filed by a Respondent[s] providing said number and/or e-mail address.

STATE OF INDIANA) IN THE [insert name of trial court]
) SS:
 COUNTY OF _____) CASE NO. [insert trial court number]

In re: _____,)
 (juvenile's names),)

Department of Child Services,)
 Petitioner)

Notice of Expedited Appeal Regarding Juvenile Placement and/or Services

The Department of Child Services, [by counsel], pursuant to Ind. Appellate Rule ____, respectfully gives notice of an expedited appeal from the following judgment(s) or order(s) entered by the [insert the name of the court]: [list title(s) and date(s) of appealed judgment(s) or order(s).]

The clerk of [insert name of trial court] is requested to assemble the Clerk's Record, shall be completed on or before [date]. The record shall include, in addition to the pre-dispositional report, the following:

The court reporter of the [insert name of the court] is requested to transcribe, certify, and file with the clerk of the [insert name of trial court] on or before the date the clerk's record is due to be completed and shall include the following hearings of record, including exhibits: [designate requested portions of the transcript]

Respectfully submitted,

[Insert Name of Attorney or pro se party]

Address

Telephone number

Facsimile Number

E-mail address

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following by [indicate method of service], this ____ day of _____, 20__ : [insert list of parties served, as required by Appellate Rule ____]

[Insert name of Attorney or pro se party]