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PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

JOSEPH E. KRAKORA
Public Defender

ROBYN A. VEASEY
Assistant Public Defender

RICHARD FOSTER
Deputy Public Defender
Managing Attorney

OFFICE OF THE PUBLIC DEFENDER
OFFICE OF PARENTAL REPRESENTATION
APPELLATE SECTION
31 CLINTON STREET, 12TH FLOOR
NEWARK, NEW JERSEY 07102
TEL: 973-877-1265 FAX: 973-273-0132
OPR.APPELLATE@OPD.NJ.GOV

March 30, 2022

Administrative Director Glenn A. Grant
Administrative Office of the Courts
Attn: Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments by the Office of the Public Defender,
Office of Parental Representation,
Regarding the Civil Practice Committee's
Proposed Amendments to Rule 2:6-1 and Rule 2:6-7

Dear Judge Grant:

Thank you for allowing the Office of the Public Defender's Office of Parental Representation, Appellate Section (OPR-Appellate) the opportunity to submit comments on the Report of the Supreme Court Civil Practice Committee.

OPR-Appellate represents indigent parents in the appeals of judgments terminating parental rights (N.J.S.A. 30:4C-15.1a) and findings of Title 9 liability for abuse or neglect (N.J.S.A. 9:6-8.21). OPR-Appellate would be negatively impacted by the proposed amendments to Rule 2:6-1 and Rule 2:6-7, which would adversely affect the ability of our appellate attorneys, staff and pool, to present competent advocacy on behalf of indigent clients in matters of Constitutional dimension. The majority of OPR-Appellate cases involve termination of parental rights, which is the ultimate civil sanction the courts may pronounce and has been referred to as "the equivalent of civil capital punishment." N.J. Div. of Youth & Fam. Servs. v. V.J., 386, 71, 80 (App. Div. 2004). This court in Crist v. D.Y.F.S. stated "[i]t is difficult to consider many consequences of greater magnitude than the loss of one's children." 128 N.J. Super. 402, (Law

Div.1974), aff'd in part, rev'd in part, 135 N.J. Super. 573, 343 (App.Div.1975). In such matters, the record routinely consists of thousands of pages of documents amassed against a parent by the State, through the Division of Child Protection & Permanency.

Opposition to Proposed Amendments to Rule 2:6-1 – Preparation of Appellant's Appendix; Joint Appendix; Contents

The Committee recommends numerous changes to R. 2:6-1, including the encouragement for the parties to "agree on the contents of the appendix," and if such agreement cannot be reached, the requirement, within "14 days after the receipt of any transcripts," for service of a designation of "parts of the record the appellant intends to use," and "a statement of the issues the appellate intends to present for review." The Committee notes that the changes are intended to adhere "more closely to the Federal Rules of Appellate Procedure on joint appendices"; however, OPR-Appellate's child welfare appeals have no federal analogue that would warrant such dramatic changes, and what amounts to a solution to a problem that does not exist. The proposed changes would unnecessarily complicate the preparation and assignment of OPR-Appellate appeals to both staff and pool attorneys, by imposing unduly burdensome requirements, with time constraints on counsel who will be required to identify, within a mere fourteen days of receipt of transcripts, the issues to be raised and the documents necessary to support argument on those issuse.

As alluded to above, there is simply no reason to align our appellate rules of practice and procedure applicable to appendices to the federal rules, as the federal courts do not have jurisdiction over Title 9 and Title 30 appeals which are unique to our state courts. Equally important, the same attorneys do not handle child welfare cases at both the trial level and on appeal, as they would in criminal cases in the federal courts. Thus, the OPR-Appellate staff initially responsible for gathering as much of the record as possible for the appellate counsel who is ultimately assigned have no substantive familiarity with the issues to be raised on appeal, as would be necessary to comply with the new requirements.

The proposed rule changes would require substantive review of all the transcripts, relevant documents and exhibits within "14 days after the receipt of any transcripts," which is a practical impossibility given the administrative resources necessary to assemble the record. In many cases, an appeal will not yet have been assigned to counsel when the transcripts are received. For the current termination-of-parental rights appeals for which OPR-Appellate has prepared an appendix, the average length is 2,267 pages. Even under the best of circumstances, OPR-Appellate is able to assign its cases and provide the trial file to assigned counsel only shortly before transcripts are received. That is attributable to the size of the record involved, as well as to the receipt of disorganized and/or incomplete files from trial attorneys. Even before

transcripts are received, OPR-Appellate staff expend much time and effort in ensuring that the file contains satisfactory copies, either printed or in PDF format, of every document required under Rule 2:6-1(a)(1)(A) through (G). After assignment and receipt of transcripts, it is the responsibility of the assigned appellate attorney to ensure those requirements have been met. Added to that responsibility is the obligation to ensure that the appendix also satisfies Rule 2:6-1(a)(1)(I) by containing "such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised." Requiring completion of that task within fourteen days would be unduly burdensome for OPR-Appellate attorneys, and inhibit their ability to provide the best possible representation for our indigent clients.

The record in OPR-Appellate cases is far more expansive than the record in a typical federal criminal appeal, which makes identification of the potential issues to present for review "14 days after receipt of any transcripts," a practical impossibility. Review of the entire trial record, including the transcripts, is necessary for an appellate attorney to determine what viable appellate arguments must be raised in a particular case. In many instances, additional legal research is required, as is the consultation with other OPR-Appellate attorneys that this office has encouraged since its inception. For most OPR-Appellate cases, it will be highly unlikely that such review can be completed with any competency within fourteen days.

OPR-Appellate fears that compliance with the proposed Rule 2:6-1 amendments, then, will result in overbroad assertions regarding the arguments to be raised, to the point of meaninglessness, as well as appendices that contain many documents that in the end are irrelevant for the appeal, but that were included to protect the client after consideration of Rule 2:6-1(a)(1)(I). These outcomes would benefit neither the court nor the parties in OPR-Appellate appeals.

The Division of Child Protection & Permanency and the Office of Law Guardian rarely file an appendix with their response briefs in OPR-Appellate cases, choosing to rely on the appendix filed by the appellant. Rarer still are respondent motions to strike portions of the appellant's appendix. Thus, the proposed rule changes appear to be intended to rectify a problem of insufficient cooperation that does not in fact exist in appellate practice in child welfare cases. Accordingly, OPR-Appellate respectfully requests that the proposed changes, on which the Committee notes it was "closely divided," be rejected.

Opposition to Proposed Amendments to Rule 2:6-7 – Length of Briefs

The Committee proposes to amend R. 2:6-7 to reduce the page limit of the initial briefs of parties to 50 pages, and reply briefs to 15 pages. The proposed amendments would allow a party to

"seek a relaxation of these page limitations of the party's first brief upon a showing of good cause by motion filed no later than 20 days before expiration of the time for filing the brief." OPR-Appellate respectfully urges that these changes not be adopted, as they have a direct bearing on the effective assistance of counsel to which OPR-Appellate's clients are constitutionally entitled and will result in the unnecessary and unduly burdensome "protective" filing of motions for relaxation of the rule in virtually every case.

Given the size of the record in most OPR-Appellate matters, it will be extremely difficult, if not impossible, for staff and pool attorneys who did not have the matter at trial to discern, within the time allotted, which cases would need additional page length. As a result, most would undoubtedly feel compelled to file a pro forma motion in each case to protect the client's rights and interests. This may have the dual consequence of additional delay in what is intended to be an expedited docket, for the sake of permanency of the children involved, and also an added burden on counsel as well as the court. As our clients are indigent, the State of New Jersey is paying for those billable hours, not in money, but in time-- a kind of time-tax for having the most voluminous case files brought to appeal, which is beyond the parent's or the attorney's control. OPR-Appellate attorneys already submit the most concise briefs possible, in the mutual interest of the court and the party represented and reducing page length would unfairly prejudice the appeals of indigent parents. As nearly every appellate attorney can attest, the length of a brief is often not known until the very moment a brief is filed, after the peer review process has been completed. Current practice is to file a motion with the proposed brief along with a certification that explains the basis for the request rather than a hypothetical future need.

Equally troublesome, although the Committee relies on the good will of the court "in making exceptions to page limits in individual cases where longer briefs are justified," that flexibility will be challenged as corresponding time limits for the filing of briefs in these expedited matters are cast into uncertainty. Each appeal enters a sort of limbo while motions for relaxation of the page-length rule are pending, or perhaps denied, in which case appellate counsel will be faced with substantial and time-consuming revisions to a brief to meet the previously unknown page-length ruling of the court. The unfortunate potential for unnecessary and unwarranted additional confusion and delay in these critical expedited matters is clear.

The length of briefs, particularly in guardianship appeals, are a function of the import and the size of the record, which often encompasses years of litigation. While not every brief in a child welfare matter requires an expansive brief approaching or touching the limits of the rule, in a substantial number of these cases the 65-page limit is essential for full and fair consideration of all the issues bearing on our clients' fundamental parental rights, and constitutionally effective representation.

The proposed rule changes have the clear capacity to adversely affect that full and fair consideration. Accordingly, OPR-Appellate respectfully urges that the proposed changes to Rule 2:6-7 be rejected.

Respectfully submitted,

Robyn A. Veasey

Robyn A. Veasey, Esq.
Assistant Public Defender
Office of Parental Representation

Richard Foster

Richard Foster, Esq.
Deputy Public Defender
Office of Parental Representation
Appellate Section