GEORGIA ASSOCIATION OF JUVENILE COURT CLERKS

SPRING CONFERENCE

APRIL 9, 2008

PINE MOUNTAIN, GEORGIA

APPEALS OF TERMINATION OF PARENTAL RIGHTS CASES AND CHILD CUSTODY CASES

Presented by
William L. Martin, III
Clerk/Court Administrator
Court of Appeals of Georgia
47 Trinity Avenue, Suite 501
Atlanta, Georgia 30334

I would like to thank Angela Norris and all of you for inviting me to speak to you today on the discretionary appeals process as it relates to termination of parental rights cases.

TERMINATION OF PARENTAL RIGHTS CASES

As most of you know, in 2007, the Georgia Assembly passed House Bill 369 amending, among other things, OCGA § 5-6-35 (a) by adding a new subsection 12 to make "rights" cases appealable by discretionary application. Prior to the enactment of that legislation, parties appealing termination of parental rights cases had the right to file a direct appeal under OCGA § 5-6-34 (a).

Before I get into the practical aspects of discretionary applications, I would

first like to give you a little bit of the history of how the Bill came about, some problems I see with the legislation, and how it will effect how you go about doing your jobs and carrying out your duties.

For several years, there have been concerns about the length of time it takes to process a "rights" case through the trial courts and through the appellate level. Of course, over the years, there have been several steps built into the process such as reunification and the like. Not infrequently, I receive calls or emails from prospective adopting parents who have a sense of frustration that the adoption is taking so long because of an appeal of a "rights" case.

Judge Jim Morris, a Senior Juvenile Court Judge from Cobb County, was appointed to a committee by the Chief Justice of the Supreme Court to study these issues. Over the last few years I have had several conversations with Judge Morris and his concern was that the Court of Appeals was not expediting these cases. In

fact, he suggested that the Court might do some summary review of these types of cases, which is really not possible. The Court of Appeals has to give a thorough review of every application or direct appeal that comes before the Court. It must be review by at least three judges and while we do expedite these cases, by statute or court policy, the Court of Appeals expedites 15 different types of cases. If you expedite everything, you expedite nothing.

During the 2007 Legislative Session, Judge Morris met with Chief Judge Anne Barnes of our Court and me to discuss this matter. I suggested if the Chief Justice and the Commission were really serious about expediting these types of appeals, that they go to the legislature and have them be appealed by discretionary application and appealed directly to the Supreme Court. If the cases appealed by discretionary application, a resolution will be had in about 95% of the cases within 60 days, maximum.

The application must be filed within 30 days of the date of the entry of the order of the judgment that is being appealed. The Court of Appeals will then have to issue an order granting, denying, or dismissing the application within 30 days of its docketing in the Court of Appeals. If the appeal were made directly to the Supreme Court, then the parties would not have to worry about an application for certiorari to the Supreme Court. The Supreme Court's ruling would be final in approximately 95% of the cases after 60 days.

The legislation was introduced and did pass, however, "rights" cases were made appealable to the Court of Appeals by discretionary application, so there is still the possibility of certiorari to the Supreme Court.

The legislation had a constituency of the Chief Justice's committee addressing the issues, parents or foster parents and others who wish to adopt. They were organized and were effective in having the legislation passed. The parents

whose rights are being terminated obviously are not organized and do not have the wherewithal to lobby for the defeat of the legislation so it did pass with an effective date of January 1, 2008.

I would now like to address some of the problems that I see with the Bill. The first is the constitutional requirement that all Bills must be germane. That means no Bill can contain more than one subject, unless it is related, or germane, to other subject matter in the Bill. The Bill that did pass was a very comprehensive bill but termination of parental rights and child custody are not germane. And I believe it violates Art. III, Sec. V, Para. III of the Georgia Constitution which says "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof."

Will the issue of the unconstitutionality of the act ever arise? I do not know. Again, the parents whose rights are being terminated are often of such social and

economic status that their counsel are appointed. Even if the issue were properly raised in the trial court and appealed to the Supreme Court, I am not sure how closely the Supreme Court would scrutinize the matter since the Supreme Court really was the driving force behind the passage of the Bill.

Another problem with the Bill is the effective date. The passage of time will cure this problem but for those cases that are coming before the Court now, the Court must decide what the language in the act which says, "this act shall become effective on January 1, 2008, and shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008" means. That is, does it apply to all custody cases filed in the trial court or in the appellate court by that date? Also, the act makes no mention the effective date of "rights" cases, but only custody cases. Although termination of parental rights is not specifically stated, I believe that it was the intent of the Legislature for the effective date to be

applicable to both custody cases and "rights" cases as both were changed in the same amendment.

The Court of Appeals has taken the position that the effective date will be for petitions filed in the trial court. I have passed out a copy of the Court's order in A08D0298. In the Interest of: R. P. T. and W. L. T., children which addresses this issue.

However, as I say, the passage of time will take care of this so that eventually all the termination cases will be initiated in the trial court after January 1, 2008. And, assuming the Supreme Court upholds the constitutionality of the act, or until such time as the constitutionality of the act is challenged, those petitions initiated after January 1, 2008, will then come to the Court of Appeals by discretionary application.

There are 13 types of cases which must be appealed by discretionary

application. Twelve of those are enumerated in OCGA § 5-6-35. Number 12 on that list is termination of parental rights cases. The 13th type of case which must be initiated by discretionary application is found in OCGA § 42-12-1 et seq. the Prisoner Litigation Reform Act of 1996. That Act states if a prisoner in the State of Georgia initiates a civil matter, other than a petition for habeas corpus, it must be initiated as a discretionary application, even though a person not incarcerated would have the right of a direct appeal.

Applications are filed directly with the Court of Appeals, and not the trial court. So in that regard, the application process should make your life easier in terms of dealing with appeals of "rights" cases. The application which is filed with the Court of Appeals must contain a stamped filed copy of the order that is being appealed. Without a stamped filed copy, the Court of Appeals doesn't know if the application was filed timely. The time for filing is within 30 days of the date of the

entry of the order of the judgment that is being appealed. The application must also contain so much of the record as the applicant thinks the Court of Appeals would need to review in order to determine that the trial court had committed a reversible error. Those portions of the record will be exhibits to the application. An example of an exhibit would be the court's order, the petition bringing the termination action, any responses thereto and portions, or all, of a transcripts which may also be available.

The application must be filed as an original and two copies since the Court of Appeals operates in panels of three judges. Of course, the application must contain a Certificate of Service and show service to opposing counsel. The Certificate of Service must have the complete name and mailing address of opposing counsel. Without this, I do not know to whom to send the docketing notices. If I cannot send out docketing notices to all parties, I cannot docket the

application. For instance, a Certificate of Service which says, "this is to certify that I have of this date served opposing counsel by sending copy of same to him at his address my first-class mail, postage prepaid" is not sufficient. Pursuant to OCGA § 5-6-4, the Clerk is prohibited from receiving the application without the $80.00 filing fee or sufficient pauper's affidavit.

Once the application is received in the Court of Appeals and we are able to docket same, it will be docketed and a docketing notice will go out to all parties. The docketing notice will give the case number and also notify the respondent that he/she has 10 days to file a response. This is not a very long time period which to prepare and file a response, but that is what the Code calls for since the Court of Appeals must issue an order within 30 days after docketing the application. If the response comes in after 10 days, the Court will still consider it, but the Court will not wait on a response before acting if it comes in after the 10 day period.

The Court has three options in dealing with the docketed application, assuming that it is properly before the Court of Appeals and does not need to be transferred. The Court can grant the application, deny the application or dismiss the application.

If the application is dismissed, it means that there was some procedural defect depriving the Court of jurisdiction. A dismissal order will state the reasons for the dismissal and means the Court never reached the merits. Should the Court's order deny the application, it means the Court has reviewed the application on the merits but was not persuaded by the merits. If the application is granted, the order will state that it is granted and that the applicant has 10 days from the date of the order granting the application to file the Notice of Appeal in the trial court.

A Notice of Appeal that is filed more than 10 days after the date of the order granting the application will deprive the Court of jurisdiction to hear the direct

appeal. It only takes the vote of one judge on the panel of three to grant the application. After the application is granted and the Notice of Appeal is filed pursuant to the order granting the application, then that appeal is treated as is any other direct appeal.

When you prepare a record for appeal after the grant of the application for discretionary appeal, please include a copy of the order of the Court of Appeals granting the application in the record.

CUSTODY CASES

House Bill 369 attempted to remove child custody cases from those types of cases which must be filed or initiated by discretionary application and to make child custody cases directly appealable. However, again, there are some problems with the act.

The Legislature in the act said that child custody cases would be directly

appealable, however, the Legislature did not go back in OCGA § 5-6-35 and except child custody cases from the domestic relations cases which must be appealed by discretionary application. Also, I believe we have the same problems with the effective date of the act for child custody cases as with rights cases. Again, a problem which will be cured with the passage of time.

The appeal of a child custody case by direct appeal will be like any other direct appeal. The Notice of Appeal will identify for the Clerk which portions of the record, if any, will be omitted from the record on appeal. Also, the Notice of Appeal will indicate whether a transcript of evidence and proceedings will be filed for inclusion of the record on appeal.

The anomaly between child custody appeals and termination of parental rights appeals is that the standard of review is much higher in "rights" cases than in custody cases. The standards of review in a custody case is "abuse of discretion"

which means if there is any evidence in the record to the support the trial court's decision, it must be upheld on appeal.

And the reason for that, I think, is obvious. Who better to make the termination on custody issues than the trial judge who was present at trial and able to observe the demeanor of the witnesses and the parties? Also, the trial judge may have had an opportunity to conduct an in-camera conference with the child or children.

The standard of review in a termination of parental rights case is "clear and convincing evidence." This means that the court must go through the entire record and make sure that there is clear and convincing evidence to support the trial judge's decision to terminate or not to terminate parental rights. And I believe this is how it should be. The decision to take someone's children away and legally terminate one's rights as parents is a very grave and important decision and one not

to be taken lightly.

The problem is that by making "rights" cases appealable by discretionary application, the appellate court does not have the entire record, unless, the appellate court grants the application.

Finally, sometimes after the Court has granted an application, the Court will issue an order that will say the appeal having been improperly granted, the appeal is dismissed. What this means is when the Court reviewed the application, it appeared from the application there was a possibility that the trial court may have committed reversible error. However, after the grant of the application, the entire record came to the Court on appeal, and the appellate court was able to determine from the entire record that the trial court had acted properly and that the application should not have been granted initially.

HOW TO PREPARE THE RECORD FOR APPEAL

I would like to talk to you now about how to prepare a record for submission to the Court of Appeals.