OFFICE OF RESPONDENT
PARENTS' COUNSEL
Protecting the Fundamental Right to Parent

March 23, 2018

Judge Ashby, Justice Gabriel, and Rules Committee Colleagues:

I am requesting the Juvenile Rules Committee to consider writing a rule regarding the procedure used to litigate ineffective assistance of counsel claims raised on direct appeal in dependency and neglect proceedings.

The problem that needs to be addressed is the increased time it takes to resolve ineffective assistance claims in child welfare cases under current Colorado case law.

In *People ex. rel. C.H.*, 166 P.3d 288 (Colo. App. 2007), a division of the Court of Appeals recognized that, although a parent's right to counsel in a child welfare proceeding is secured by statute, a parent may still challenge an order of termination on the ground that the parent did not receive effective assistance of counsel. *C.H.*, 166 P.3d at 290-91. The division went on to state that, when evaluating a claim of ineffective assistance, the courts should employ the same test that governs ineffective assistance of counsel claims in criminal cases. *Id.*

In criminal cases, however, ineffective assistance claims are litigated in collateral proceedings according to special rules of procedure. *See* Crim. P. 35(c). In termination cases, there is no specific mechanism for challenging the effectiveness of counsel and therefore such claims must be presented for the first time on appeal.

As the *C.H.* court noted, this procedural mechanism is problematic for the appellate court because the record may not contain sufficient information to enable the appellate court to resolve the parent's contentions on direct appeal. *C.H.*, 166 P.3d at 291. When the record is insufficient, appellate courts generally remand the case to the trial court for further findings and conclusions.

Although the appellate courts will only remand where a parent's allegations are sufficiently specific and compelling to constitute a prima facie showing of ineffective assistance of counsel, the possibility of a remand where this threshold test is met remains problematic in child welfare proceedings by causing delay while the case is sent back down to the trial court for resolution of the ineffective assistance claim. This delay can add months to the case—time that would otherwise be spent moving the family toward permanency.

Most of the other states in the country have recognized the right for parents to have counsel in child welfare proceedings.[1] The majority of these states routinely appoint counsel for indigent parents in termination of parental rights cases and have concluded that the right to counsel includes

[1] As of this writing, the following states have granted parents counsel either through statute or case law: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Washington

a right to effective counsel because of the potential loss of a significant and constitutionally protected liberty interest.

When and how to evaluate ineffective counsel claims in dependency proceedings is a more nuanced question, addressed differently in each state.

Some states, like Colorado, only allow for ineffective assistance claims in dependency proceedings to be raised for the first time on appeal. In New Jersey, for example, the state recognized some of the concerns with this procedure and addressed it through a rule. In asserting a claim of ineffective assistance for the first time on appeal, the New Jersey rule requires appellate counsel to set forth the factual basis for asserting that trial counsel's performance was deficient by proffering certifications or other documentary evidence to support the claim.[2] The rule also allows for the appellate court to remand the case to the trial judge if the appellate court determines that a genuine issue of material disputed fact must be determined.

This procedure strikes a middle approach by preventing the appellate courts from acting as a fact finder but still allowing appellate counsel to present factual evidence (that would ordinarily be outside of the record on appeal) to back up a claim. It also allows for parents to effectively raise these concerns with documented evidence, which is currently prohibited by the Colorado Appellate Rules. Finally, it allows for an expeditious consideration of the factual issues being disputed because it allows the appellate court to evaluate whether appellate counsel has made a true prima facie case for an allegation of ineffective assistance prior to a remand for resolution to the trial court.

Other states' procedures allow for the filing of a post-judgment motion in the trial court, prior to the filing of the notice of appeal. In Maine, for example, the Supreme Court has allowed for trial counsel to file motions for relief from judgment pursuant to Civ. P. 60(b) in order to assert claims of ineffective assistance.[3] *In re M.P.*, 126 A.3d 718, 725 (Me. 2015). The motion must be filed within 21 days of issuance of the order terminating parental rights, or prior to the expiry of the notice of appeal deadline. *Id.*

This procedure also strikes a nice balance between the competing needs for expeditious resolution of the proceeding and the constitutional rights at stake, although it is only created through case law and not memorialized in formal rule.

Finally, the third approach taken by many states is to only permit a parent to challenge the effectiveness of counsel is by filing a writ of habeas corpus.[4] The benefit of this approach is to give full consideration to parents' fundamental rights by allowing a full examination of the relevant facts before termination of rights is final, and by allowing for the presentation of new evidence.

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[2] N.J. R. 2:10-6

[3] Incidentally, Me. R. Civ. P. 60 is almost identical to Colo. R. Civ. P. 60

[4] Many of the procedures adopted by these states, notably California, are involved and therefore will not be detailed here—especially since the Colorado Supreme Court has abolished the writ system with the adoption of the procedure in C.A.R. 21.

As this committee has previously noted, appeals in dependency and neglect cases are on the rise. In fiscal year 16-17 alone, there was a documented 42% increase in the number of appeals filed in child welfare cases. Although the ORPC does not anticipate an increase in this number, it has been a notable upward shift.

The increase in the number of appeals in this area of the law will likely increase the number of cases with clients requesting litigation or investigation of a claim of ineffective assistance of counsel. With the current lack of procedural guidance for respondent parent counsel about how to litigate these claims, I am concerned that there will be an increase in the amount of time spent on the appellate phase of the case and consequently a delay in permanency for the family.

I am therefore requesting this committee to investigate and promulgate a rule regarding ineffective assistance of counsel claims in dependency and neglect cases.

Sincerely,

Ruchi Kapoor
Juvenile Rules Committee Member
Appellate Director, ORPC