The Appellate Process and Unacceptable Delays

by **Judge Leonard Edwards (ret.)**

The length of time necessary to reach a decision in the appellate process is inconsistent with the needs of a child. Simply put, it takes too long. Removal from parental care is traumatic.[1] That trauma is exacerbated by lengthy and cumbersome juvenile court proceedings, and, in particular, the appellate process.[2] The law is clear that children need timely permanency, and the law is also clear that all participants in the child welfare process must take steps to accomplish that goal.[3] But the legal system for processing cases is slow and deliberate, and nowhere is it slower than in the appellate process. The child's sense of time and need for timely permanency is best expressed by the authors of *Beyond the Best Interests of the Child* who write:

> ...we take the view that the law must make the child's needs paramount. This preference reflects more than our professional commitment. It is in society's best interests.
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> Three months may not be a long time for an adult decisionmaker. For a young child it may be forever. The ". . . maximum intervals beyond which it would be unreasonable to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers [are]: (a) 12 months for a child up to the age of 3 years at the time of placement; (b) 24 months for a child from the age of 3 years at the time of placement."[4]
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> As a matter of normal procedure, a child's placement must be treated by legislatures, courts, and administrative agencies as a matter of urgency that comports with a child's sense of time.[5]

1 See Krebs, C., "Trauma Caused by Separation of Children from Parents," American Bar Association, 2019. Available at https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf. On the need for children to have a resolution of their placement in a timely fashion, see Gol Goldstein, J., Freud, A., & Solnit, A. *Beyond the Best Interests of the Child*, The Free Press, N.Y. 1973.

2 On the delays in the juvenile court process see Edwards, L., "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process," Spring 2007, *Juvenile and Family Court Journal*, Vol. 58, No. 2, Available at https://www.supremecourt.ohio.gov/JCS/disputeResolution/resources/publications/Spring07_Edwards.pdf .

3 See the Adoption and Safe Families Act, Public Law 105-80, Sections 101-103.

4 Goldstein, *supra* note 1 at pp. 7-8, 98, 24, 22, 40-43 (cited in *In re Micah S.*, 198 Cal. App. 3d 557, 567, 243 Cal. Reporter 756, 762, 1988 Cal. App. LEXIS 92, 19 (Justice Brauer, concurring)).

5 Goldstein, *supra* note 1 at p. 43.

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Reviewing hundreds of cases arising from the juvenile dependency court reveals that from the date of removal until the resolution of an appeal often takes years, and those years are a substantial period in the life of a child.[6] During that time, a child's life is on hold – waiting for the adults to decide where he or she will live on a permanent basis. A case can be made that such a lengthy appellate process violates not only child development goals, but also the third mandate in the federal law regarding reasonable efforts – promptly finalizing an alternative permanency plan.[7] In appellate proceedings, however, the fault is not with the child welfare agency; it is with the court system and specifically with the appellate court process.

There must be the possibility of an appeal from orders and findings made by a trial court. The termination of parental rights finding made by a juvenile court judge deserves particularly close attention. Terminating the parent-child relationship is the most serious state intrusion into family life, but to put an appeal of that decision into the mix with other types of cases, civil and criminal, guarantees that the child will have a particularly long time to wait for the appellate process to reach a result.

Reaching a final decision by an appellate court involves many people and legal procedures. It takes time in the appellate process to create the clerk's and reporter's transcripts for an appeal. It takes additional time for the attorneys to file briefs in support of their positions. Then there are oral arguments before the appellate court and often the substantial time it takes the appellate court to prepare and issue its decision. There is also the right of the parties to ask for reconsideration of the appellate court's decision. Thereafter, the law permits the parties to ask for a higher appellate court to consider the appellate court opinion. Throughout the appellate process the child must wait, not knowing where his or her permanent home will be.

The appellate caselaw offers many examples of the delays the process can take. In the case of *People in the Interest of A.A.*, 2020 COA 154, the two children, 5 and 7 years of age, were removed from parental care in June 2017. Visitation was suspended because of the mother's substance abuse and the father's behavior during visitation, and the parents' rights were terminated 18 months later. The Colorado Court of Appeals reversed the termination of parental rights finding in November 2020 and sent the case back to the trial court for further proceedings. During the time before the appellate decision, the children (now 9 and 12) had only a few visits with their parents. In another case, *In re Thomas D.*, 2004 ME 104, the four children were removed from parental care in January 2002. Legal proceedings in the juvenile court resulted in a termination of parental rights in September 2003. In August 2004, the Maine Supreme Judicial Court reversed and remanded the termination of parental rights decision because the parents had been denied a case plan to help them to rehabilitate and regain custody. In a third case, *In re Natalya C.*, 946 A.2d 198 (R.I. 2008), the child was removed from her mother's care in September 2004, and the mother's parental rights were terminated in

6 See Edwards, L., "Reasonable Efforts: A Judicial Perspective" Appendix A, for a review of many appellate decisions from termination of parental rights cases. This book can be found and downloaded or reviewed at no cost at judgeleonardedwards.com.

7 42 U.S.C. §§672 (a)(2)(A)(ii), 673(b), & 675; 45 CFR 1356.21(b)(2) (2006).

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May 2006. In April 2008, the Rhode Island Supreme Court reversed the termination and sent the case back to the trial court for further proceedings.

There must be a better way. The California Judicial Council recognized the impact of delay upon children and concluded that they would put juvenile dependency court appeals on a fast track. They now review and decide these cases on an expedited process with written opinions filed in approximately 120 days from receipt of a writ.[8] They attempt to produce their opinion before the next hearing in the trial court.

To accomplish this goal, they have made a number of modifications in the appellate process, starting with the adoption of California Rules of Court, Rule 8.450. The rule is remarkable in its detail, encompassing every member of the court system to complete his or her task within a well-defined time scheme. First, the rule requires that any appellate action be accomplished by extraordinary writ. The reviewing court (the appellate court) will dismiss any appeals in favor of the writ process.[9] Second, the rule instructs the superior court (trial court) not to extend any time period. The reviewing court, however, may extend any time period, "but must require an exceptional showing of good cause."[10] Third, the party seeking writ review must file in the superior court a notice of intent and a request for the record. The notice must include all known dates of the hearing that resulted in the order under review. The notice must be authorized by the party intending to file the petition and must signed by that party or by the attorney of record for that party.[11]

The rule of court outlines how soon the notice of intent must be filed after the court order setting a hearing to finalize the permanent plan for the child. In California, this means that when the juvenile court orders the end of reunification services and sets the date of a hearing pursuant to Welfare and Institutions Code section 366.26, the notice of intent must be filed within seven days unless the party is out of state or out of the country, in which case the time to file is extended.[12]

After the notice of intent is filed, the superior court clerk must send a copy of that notice to the attorneys of record, the parties (including any child 10 years of age or older), and a list of others. When the transcripts are certified as correct, the superior court clerk must send the original transcripts to the reviewing court, the attorneys, and any unrepresented party by any means "as fast as United States Postal Service express mail."[13]

When the notice of intent reaches the reviewing court clerk, that person must lodge the notice. As of that time, the reviewing court has jurisdiction of the writ proceedings. When the

8 California Rules of Court, Rule 8.450 (b).
9 *Id.*
10 *Id.* at subsection (d).
11 *Id.* at subsection (e).
12 *Id.* at subsection (g).
13 *Id.* at subsection (i).

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record is filed in the reviewing court, the clerk must immediately notify the parties, stating the date on which the 10-day period for filing the writ petition will expire.[14]

While this rule of court addresses the important needs of children in juvenile dependency cases, it would make sense to include other court proceedings involving children, including family court custody disputes and probate matters involving young children.

California is not alone in making changes in the appellate process. The Colorado Chief Justice has created a workgroup to address delays in the appellate process for cases involving relinquishment, adoption, and dependency and neglect so that decisions are resolved within six months after being filed. Recommended changes would be to Section 19-1-109(3), C.R.S. (2017) of the Colorado statutes.

It is possible that still further modifications of the appellate process would reduce delays. Perhaps the local trial court could create a special appellate division within the local trial court to promptly hear dependency appeals. Or the state judiciary could create a statewide appellate dependency court with directions to appoint only trial judges with dependency experience supported by clerks and research attorneys that have special training. That appellate court would develop procedures and timelines to reflect the urgency of these cases. Yet the most straightforward approach would be for the appellate court to prioritize the handling of cases involving children so that they are heard ahead of any other type of case.

Other states may have a different approach to delays in the resolution of a child's case in the appellate courts. It is a goal that deserves the attention of appellate courts throughout the country. Changes in appellate procedures would be an acknowledgment that children need a timely resolution of their cases. Delay only increases the trauma they have been experiencing since their removal from parental care. ■

14 *Id.* at subsection (j).