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## EXPEDITED APPEALS IN INDIANA: TOO LITTLE, TOO LATE

Joel M. Schumm\*

By court rule, the Indiana Supreme Court requires that Indiana's appellate courts give "expedited consideration" to interlocutory appeals and to appeals involving children on issues such as custody, support, visitation, adoption, and the termination of parental rights. Although these cases are certainly worthy of any court's careful and expeditious consideration, the attempt of the appellate courts in Indiana to address them in an expedited manner has had little, if any, practical effect. Moreover, the same rules that expedite consideration of this somewhat disparate class of cases provide no opportunity for expedited consideration of the hundreds of other cases, including the cases of criminal defendants, even those serving a short sentence that will likely expire before the appellate court issues an opinion.

Part I of this Article reviews and critiques the existing procedures in Indiana, including the length of time and the procedures by which cases make their way to and through the state's appellate courts. The Article explores the systemic problems with the purported expedition of cases through specific examples of recent cases in which reversal did not occur until several months after the trial court's erroneous ruling. Part II offers suggestions for improvement: If Indiana is serious about expediting appeals involving children, the rules could easily be changed to expedite record preparation and briefing. However,

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expediting one category of cases necessarily slows the rendering of decisions in other cases, and thus Indiana should carefully reevaluate whether any cases should be expedited to the exclusion of others, or, at a minimum, consider adopting procedures that more easily allow litigants and the courts to expedite those cases in which an expedited decision is especially important and feasible. As a final alternative, Indiana could easily abandon any notion of expediting appeals and, with a slight change in the rules for transcript preparation, render decisions in most cases in the same amount of time that it currently takes for expedited cases.

#### I. TO EXPEDITE OR NOT TO EXPEDITE, THAT IS THE QUESTION (WHICH MAKES LITTLE DIFFERENCE)

The Indiana Rules of Appellate Procedure provide that the appellate courts “shall give expedited consideration to interlocutory appeals and appeals involving issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute.”<sup>1</sup> Although this rule requires the appellate court to give expedited consideration to a case once it arrives at the court, the appellate rules do very little to get the case to the appellate court expeditiously.

In Indiana, an aggrieved party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty days after the entry of a final judgment.<sup>2</sup> The trial court clerk then has thirty days in which to assemble the clerk’s record,<sup>3</sup> and the

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1. Ind. R. App. P. 21(A) (2002). The focus on expedited appeals in Indiana is largely limited to cases involving children and thus this article does not explore the implications, if any, for the small number of cases falling under the final part of the rule, which purports to expedite “all other appeals entitled to priority by rule or statute.” For example, Indiana Code section 35-50-2-9(j) provides that the review of a “death sentence . . . shall be given priority over all other cases,” but because of the voluminous record of proceedings in such cases and the complex and very significant legal issues presented, record preparation and briefing almost always take considerably longer than in the run-of-the-mill appeal. Moreover, as recent opinions make clear, the court routinely takes several months, if not well over a year, to decide these cases.

2. Ind. R. App. P. 9(A)(1) (2002).

3. Ind. R. App. P. 10(B) (2002).

court reporter has ninety days in which to prepare the transcript and file it with the trial court clerk.<sup>4</sup> The appellant's brief must be filed within thirty days of the completion of the transcript.<sup>5</sup> The appellee's brief is due thirty days after service of the appellant's brief,<sup>6</sup> and the appellant may file a reply brief fifteen days thereafter.<sup>7</sup> Accordingly, if the court reporter and litigants take full advantage of their allotted time, a case will not arrive at the appellate court in less than five and a half months.<sup>8</sup>

These deadlines are the same whether the appeal is from a final judgment or an interlocutory order, or is an expedited appeal.<sup>9</sup> The only notable distinction among them is that "[m]otions for extension of time in appeals involving worker's compensation, issues of child custody, support, visitation, paternity, adoption, determination that a child is in need of services, and termination of parental rights shall be granted only in extraordinary circumstances."<sup>10</sup> Therefore, whereas a typical expedited appeal will likely arrive at the appellate court in five and a half months, a typical non-expedited appeal may arrive in seven to nine months, if the court reporter or one or both parties seek an extension of time.

Pursuant to Indiana Rule of Appellate Procedure 21(A), the court will then give "expedited consideration" to interlocutory appeals and appeals involving children, while other cases will be

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4. Ind. R. App. P. 11(B) (2002).

5. Ind. R. App. P. 45(B)(1) (2002).

6. *Id.* 45(B)(2).

7. *Id.* 45(B)(3).

8. It is possible, but not very likely, that the case could arrive in a shorter period of time. The appellant could encourage (or apply subtle pressure on) the court reporter to prepare the transcript in less than ninety days, and the appellant certainly could file his or her brief in less than thirty days. However, in expedited appeals involving children, there appears to be no mechanism whereby the appellant could ask the appellate court to require the court reporter to prepare the transcript in less than ninety days or reduce the number of days for briefing. *Cf.* Ind. R. App. P. 14(F)(2) (2002) (allowing the court of appeals to "shorten any time period" upon motion of a party in an interlocutory appeal).

9. "Appeals Involving Waiver of Parental Consent to Abortion" are governed by Indiana Rule of Appellate Procedure 62, which allows a minor or her physician to appeal the denial of a waiver by filing a written request with the trial court within ten days. A limited record is then expeditiously prepared, and the supreme court decides the case "without briefs or oral argument, unless the Court otherwise directs." Ind. R. App. P. 62(E) (2002).

10. Ind. R. App. P. 35(D) (2002). Litigants are reminded of this rule and the court's intention to adhere to it through a letter from the court administrator.

decided in due course. Both categories of cases are decided by either a published opinion or a “not-for-publication memorandum decision.”<sup>11</sup> Although the court of appeals does not publish data on the average length of time it takes to issue an opinion in an expedited case, the average is likely about a month.<sup>12</sup> This is not a significant difference from the average disposition time for all cases, which has been in the range of 1.3 to 1.5 months in recent years.<sup>13</sup> In any event, an opinion does not become “final” (nor may it be acted upon by the parties or the trial court) until it is “certified,” i.e., until the time has run for the parties to seek a rehearing in the court of appeals or a transfer to the supreme court.<sup>14</sup> This requirement adds at least thirty additional days.<sup>15</sup>

The net result of these rules is that an expedited appeal is resolved, at the earliest, more than seven months<sup>16</sup> after the filing of a Notice of Appeal, while a non-expedited appeal may take a few months longer. Although well-intentioned, the “expedited” appeals process appears to have little practical effect. Cases involving children are certainly important and worthy of expeditious consideration. Trial court decisions that improperly grant custody, curtail visitation, or terminate a parent-child

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11. Ind. R. App. P. 65 (2002).

12. This estimate is based on this author’s experience as a law clerk at the Indiana Court of Appeals. In most chambers, an expedited case is assigned to a clerk shortly after its arrival. That clerk will likely finish the case on which he or she is currently working and begin work on the expedited case within a few days. Depending on the difficulty of the expedited case, the clerk will likely submit a draft to the judge approximately a week later, and the judge could take as little time as a few hours or as long as several days revising and editing the draft. The draft is then circulated to the other two judges on the panel, who are informed that the case is an expedited case and are asked to vote as early as possible. Assuming neither judge seeks substantial revision of the circulated opinion or desires to write a separate concurring or dissenting opinion, the circulated opinion will likely be ready for hand-down a few days later. The hand-down procedure, however, occurs in two stages: First, the opinion is circulated to the entire court; second, approximately seven days later, it is issued to the parties and the public. The letter from the court administrator states: “For its part, the Court pledges to decide child related cases within two months after they are fully briefed and within three months, if the Court hears oral argument.”

13. *2000 Indiana Judicial Report* vol. 1, at 27 (Div. St. Ct. Admin. 2000). The data is not average disposition time, but rather “average age of cases pending,” which by inference is a close approximation. *Id.*

14. Ind. R. App. P. 65(E) (2002).

15. Ind. R. App. P. 54(B), 57(C) (2002) (allowing thirty days in which to file a petition for rehearing or a petition to transfer).

16. *But see supra* n. 8.

relationship are decisions that have a significant impact on children, who are helpless to do anything about them.<sup>17</sup> If the trial court makes a mistake, it is a very serious one—and one that should be corrected as soon as possible.<sup>18</sup>

A few recent cases highlight the magnitude of what is at stake and why any delay, let alone a delay of seven or more months, should be a serious concern in any scheme purported to expedite appeals involving children. In *Kirk v. Kirk*,<sup>19</sup> the trial court denied, on January 16, 2001, a father's petition for change of custody from the mother and granted him very limited visitation.<sup>20</sup> Ten and a half months later, on December 5, 2001,<sup>21</sup> the Indiana Court of Appeals reversed, explaining, "The voluminous evidence leads unerringly to but one conclusion: that there has been a substantial negative change in [the child's] mental health since the last custody determination and that a change in custody is not only in her best interests but also is imperative and long overdue."<sup>22</sup>

In *Froelich v. Clark*,<sup>23</sup> in early July of 2000, the trial court denied a mother's petition to terminate the paternal grandmother's guardianship of the mother's then eight-year-old son.<sup>24</sup> Almost eight months later, on February 21, 2001, the court

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17. As the letter from the court administrator states, these cases "are disruptive to the parties and especially unsettling to the children involved. The longer a case pends on appeal, the greater the disruption and anxiety for the parties."

18. Considering the highly deferential standard of review in these types of cases, however, reversal is rare. See e.g. *M.H.C. v. Hill*, 750 N.E.2d 872, 875 (Ind. App. 2001) ("We will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous."); *Irvin v. Hood*, 712 N.E.2d 1012, 1013 (Ind. App. 1999) ("We will not disturb the trial court's decision in an adoption proceeding unless the evidence at trial led to but one conclusion and the trial court reached an opposite conclusion.").

19. 759 N.E.2d 265 (Ind. App. 2001).

20. *Id.* at 266.

21. The author's review of the appellate court clerk's docket shows that the delay can be explained by the following timetable: (1) The appellant waited a full thirty days to file his notice of appeal; (2) the court reporter took the full ninety days to prepare the transcript; (3) the appellant then filed his brief twenty-five days later; (4) the appellee was granted an extension and filed her brief two months later; (5) the appellant filed a reply brief eleven days later; and (6) the court took nearly two months to issue its opinion.

22. *Kirk*, 759 N.E.2d at 270.

23. 745 N.E.2d 222 (Ind. App. 2001).

24. The court's opinion does not specify when the trial court ruled. However, the clerk's docket shows that a praecipe, the precursor to the notice of appeal, was filed on July

of appeals reversed and ordered that the guardianship be terminated; it ruled that the trial court had erroneously found that the presumption in favor of parental custody had been rebutted.<sup>25</sup> In so doing, the court acknowledged “the upheaval that a change in custody will undoubtedly cause.”<sup>26</sup>

Finally, in *Harris v. Delaware County Division of Family and Children Services*,<sup>27</sup> the trial court terminated a father’s parental rights on October 20, 1999, after at hearing at which he was not present. Over nine months later, on July 26, 2000, the Indiana Court of Appeals reversed because the Division of Family and Children had failed to give adequate notice to the father.<sup>28</sup>

In cases involving children, as these cases highlight, a delay of over seven months is simply unacceptable. A child whose mental health is being harmed by a custodial parent should not be forced to wait nearly a year for a change of custody. Nor should a biological parent have to wait that long to have her child’s grandparent’s guardianship terminated and her custody restored. A parent who did not receive adequate notice of a termination hearing should not for one day—much less nine months—be deemed not to be a child’s parent.<sup>29</sup> Had each of these cases been decided two or three months later (along with the non-expedited appeals), it is difficult to imagine that the additional period of delay would have had a significantly different impact on the parties involved. Therefore, one must seriously question what, if anything, is being accomplished by Indiana’s expedited appeal rules.

In a similar vein, interlocutory appeals, by their very nature, are cases that involve important issues that must be resolved expeditiously. The Indiana Rules of Appellate Procedure allow interlocutory appeals “as a matter of right” in

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16, and the notice of appeal was filed on July 31. These documents must be filed within thirty days of the entry of judgment.

25. *Froelich*, 745 N.E.2d at 233.

26. *Id.*

27. 732 N.E.2d 248, 249 (Ind. App. 2000).

28. *Id.*

29. Even more troubling is the prospect that a stay is not granted in a wrongly decided termination case, and the child is adopted during the pendency of the appeal. In such cases the disruption to the child’s life (and those of the adoptive and biological parents) would be unimaginable.

the following classes of orders: (1) those involving the payment of money; (2) those compelling execution of a document; (3) those compelling delivery or assignment of securities or similar documents; (4) those involving the sale or delivery of possession of real estate; (5) those involving rulings on preliminary injunctions; (6) those concerning appointments of receivers; (7) those involving most writs of habeas corpus; (8) those concerning transfers of cases; and (9) those involving some rulings of administrative agencies.<sup>30</sup> Other issues may be pursued as discretionary interlocutory appeals if they are certified by the trial court and accepted by the court of appeals.<sup>31</sup>

The criteria for allowing such appeals include: (1) whether the appellant will suffer substantial expense or injury; (2) whether the issue is one that involves a substantial question of law that will provide a more orderly disposition of the case if resolved early; and (3) whether the remedy of appeal is otherwise inadequate.<sup>32</sup> Forcing a litigant to wait seven or more months for the execution of a crucial document or to be given possession of rightfully owned real property, although not as troubling to most as the effect of the delay in cases involving children, is no more palatable for the parties involved. More importantly, as explained in Part II of this Article, the delays in both categories of cases are almost entirely avoidable.

## II. MAKING THE RULES MAKE A DIFFERENCE

In order to more effectively expedite appeals, the Indiana Supreme Court could amend the appellate rules to require an expedited schedule for transcript preparation and briefing, as the state's prior rules required. The appellate rules in place before 2001 required in *interlocutory appeals* that transcripts be prepared in thirty days,<sup>33</sup> that appellant and appellee briefs be filed in ten days,<sup>34</sup> and that reply briefs be filed in five days.<sup>35</sup> Under the old rules, a case reached the appellate court within

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30. Ind. R. App. P. 14(A) (2002).

31. *Id.* 14(B).

32. *Id.* 14(B)(1)(c).

33. Ind. R. App. P. 3(B) (2000).

34. Ind. R. App. P. 8.1(B) (2000).

35. *Id.*



two months, nearly one-third of the time under the current rules. The change appears to be the result of one of the broad goals of the new appellate rules—establishing common deadlines for the benefit of the occasional appellate practitioner<sup>36</sup>—but one must seriously question whether this goal should trump the competing goal of shortening the time for processing an appeal,<sup>37</sup> especially when the important interests of a child are at stake. Returning to these deadlines in interlocutory appeals and requiring that they be followed in all other expedited appeals would be a significant stride toward real expedition of these important cases.

It is difficult to envision major opposition to such a change, save that it would create different deadlines that might confuse the occasional appellate practitioner. Court reporters and litigants alike survived under the former rule, and a reversion to or expansion of it would likely cause little difficulty in most cases.<sup>38</sup>

However, whenever a court expedites some cases, it necessarily delays the resolution of the remaining non-expedited cases. In a simple civil case in which a small sum of money is at stake, the delay is understandable and no reason for concern. However, the concern is heightened in other cases, such as

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36. See generally George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 Ind. L. Rev. 1275, 1276 (2000) (explaining the proposed benefits of the new rules).

37. *Id.*

38. There was considerable opposition by court reporters to the adoption of the new Indiana Rules of Appellate Procedure in 2001, but this opposition was based largely on a perception that more was being required of them and nothing was being given back in return. If the time for preparation of transcripts in some cases is shortened to thirty days, court reporters would seemingly be able to put those cases to the front of the line and, if necessary, request extensions in non-expedited cases. Most transcripts for cases involving children are based on relatively short hearings, and would not require a lot of effort to prepare. Although some cases involving the termination of parental rights have lengthy records of proceedings, most of the record is usually documentary evidence/exhibits and not in-court testimony that must be transcribed by the court reporter.

The expedited briefing deadlines would seemingly cause little difficulty for the cases in which trial counsel also serves as appellate counsel or in many cases in which new appellate counsel is presented with a relatively short record on which to write an appeal of issues on which the law is well-settled and uncomplicated. Counsel in termination of parental rights cases, however, will likely find a ten-day limit unsettling considering the lengthy record that will likely need to be reviewed and the magnitude of the issues at stake. Because there is no chance to later correct errors or omissions by appellate counsel—such as through an ineffective assistance of counsel claim or other post-conviction relief claim in a criminal proceeding—more time should at least be available in these cases.

criminal cases in which defendants are sentenced to relatively short jail terms or are near the completion of their sentences. It is quite possible, if not probable, that they will fully serve their sentences before the court issues an opinion—if not before their cases ever reach the appellate court. An appeal bond in a criminal case is relatively rare,<sup>39</sup> so criminal defendants are seemingly helpless to do anything but serve their sentences while patiently waiting for the court to resolve their non-expedited appeals.<sup>40</sup> As recent reversals make clear, the court of appeals is sometimes left to note that its opinion will likely result in the “immediate release” of a defendant.<sup>41</sup> Because of the certification process discussed above,<sup>42</sup> however, the release in these cases cannot truly be characterized as “immediate.”

If changes are to be made to the appellate rules, the Indiana Supreme Court may well wish to reconsider the categories of cases most worthy of expedited treatment. Cases involving children and interlocutory appeals, both of which are covered under the current rule, are certainly worthy candidates for meaningful expedited treatment. However, some criminal cases, especially those in which a defendant is serving a short sentence or is near the end of his or her sentence, seem equally meritorious. There may well be other categories of cases or individual cases worthy of expedited treatment; therefore, one possible solution would be a flexible approach that allows the appellant in any case to request, as may currently be done in interlocutory appeals, that the court of appeals shorten the allowable time periods for record preparation and the filing of briefs.<sup>43</sup>

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39. See *Tyson v. State*, 593 N.E.2d 175, 178 (Ind. 1992) (“The petitioner bears the burden of demonstrating that there are compelling reasons to allow a guilty defendant to remain free pending appeal of his conviction.”).

40. Indiana Rule of Appellate Procedure 21(B) allows a party to file a “motion for expedited consideration,” but the categories listed do not seem to apply to the run-of-the-mill criminal appeal in which the defendant’s sentence will likely be served before resolution of the appeal.

41. See e.g. *Partlow v. Superintendent*, 756 N.E.2d 978, 983 (Ind. App. 2001); *Biehl v. State*, 738 N.E.2d 337, 341 (Ind. App. 2000).

42. See *supra* nn. 14-15 and accompanying text.

43. Ind. R. App. P. 14(F)(2) (2002).

## CONCLUSION

In the final analysis, any expedition scheme will be somewhat arbitrary, and cases viewed by some as being worthy of expedited treatment will be excluded. Therefore, the most equitable resolution of the problem may be to truly level the playing field, maintaining the same deadlines for record preparation and brief filing in all cases, while making general efforts to hasten the process for all appeals. There is no legitimate reason why it should take ninety days for a court reporter to prepare most transcripts. The exceptionally long transcript presents a good basis for an extension of time, but the run-of-the-mill transcript could easily be prepared in forty-five or even thirty days.<sup>44</sup> Even if the present briefing deadlines were maintained (rather than shortened, which would likely meet opposition from the appellate bar) but extensions were rarely granted, most cases would arrive at the court of appeals within five months. Considering the court's current level of efficiency in rendering opinions,<sup>45</sup> most litigants would likely have their cases resolved within the following two months, thereby resulting in a total length of delay shorter than that currently existing in most expedited appeals.

Nevertheless, there does not appear to be any clamoring among the bar, the public, or the bench to suggest that the current expedition scheme is in need of any change, let alone a major overhaul. As discussed above, however, the current scheme is not particularly effective in meeting its desired goals and some relatively minor changes in the appellate rules could produce a system that truly expedites appeals in perhaps a more equitable and just manner.

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44. The current problem seems to be related to an existing backlog that prohibits court reporters from beginning work on a transcript until well into the ninety-day period. If this backlog were eliminated or reduced, shorter deadlines would be quite feasible.

45. See *supra* n. 13 and accompanying text.